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Special Section on the UK's EU Referendum

Foreword: 'Life Is Going to Be Different in the Future'

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Foreword: 'Life Is Going to Be Different in the Future'

The result of the EU referendum of June 2016 sent a shockwave through Europe as Europeans found that the British voting public had narrowly rejected continued membership of the European Union. As 2016 draws to a close, Theresa's May Government has given few clues as to what life will look like after the European Union becomes a club of 27 rather than 28. Whatever the rightness of the view that 'to provide a running commentary' (May 2016: 3-4) would be to undermine the negotiating position of the UK, a full five months after the referendum the future remains uncertain and the UK's already fractious relationship with Brussels is turbulent. The title of this foreword is taken verbatim from Prime Minister Theresa May's interview with Andrew Marr in early October 2016 (May 2016: 4), an interview conducted just a few months after May's predecessor disavowed any intention of seeing the United Kingdom through the consequences of their vote on the referendum – a referendum he himself had offered.

Well before campaigning for the referendum opened, as Editor-in-Chief of JCER, a journal focused on European research and as Chair of the University Association of Contemporary Europe Studies (UACES), owner and publisher of JCER, we felt a responsibility to ensure that a topical response to the results – whatever they might have been – was heard. In the first of a new initiative by JCER (to publish a special section on an issue of topicality for Europe and those who research it), this final issue of 2016 features a special section dedicated to delivering some understanding of the reasons for the EU referendum, the inherent processes, the politicking and the voting choices. These matters are explained in the commentaries that follow with much authority and certainty. Other aspects, the economic, political and social effects, the resultant relationships between the UK's constituent parts, Brussels and its European neighbours, are, inevitably, treated with some caution.

We will return to the contributions in a moment. First, however, given our wide European readership, it is worth capturing a sense of where the UK is in respect of its debate on the referendum and its impact. We write here in our capacities as both citizens (of the UK and the EU) and professional academics. What follows is food for critical thought above all else. We have not attempted to separate the personal from the political, and we do not engage anyone but ourselves in our reflections[1] Stepping outside our strictly-defined roles as editor, chair and dispassionate academic is as uncomfortable as it is liberating, and we do so explicitly to encourage debate in this journal, in the Association and in the wider academic communities that we all belong to.

'DIFFERENT' IS NOT ALWAYS GOOD

The nature and tone of the debate leading up to the actual casting of votes has rightly received its own share of attention. It has been a debate in which pre-existing divisions have been laid bare and new divisions have emerged. The European Union is not the only union that is in danger of disintegrating as the countries that make up the United Kingdom are faced with the complexity of ensuring their people's democratic choice is represented fairly in what will follow. Regard for either Union figured very little in the debate about the referendum itself and even where the UK's future was raised in the campaign period, fears of the consequences for the integrity of that particular Union were too often dismissed as unjustified scaremongering. In fact, voting patterns did reveal significant differences between the preferences of Wales, Northern Ireland, Scotland and England. The devolved nations and their administrations fell on different sides of the winning ticket, as some of the commentaries that follow detail. All have concerns to be part of what Prime Minister May has

called a 'UK approach' to negotiating Brexit; all have demands – some specific, some shared – for how the post-exit policymaking landscape gets carved up between Brussels, London and the regional capitals of the UK. Difference is not a sign of inevitable insurmountable division, of course. That said, the United Kingdom is currently looking like one of the more inaptly named states in world politics. Former UK Prime Minister David Cameron's granting of the referendum to settle the long-held differences between members of the Conservative Party has spectacularly failed, compromising the ability of this dominant party to heal wider divisions. The Labour Party is in an even more unenviable situation and is thereby compounding political deficiencies by failing to act as a reliable and effective Opposition. Having achieved its primary reason for existence, UKIP is struggling to reinvent itself. The Liberal Democrats are coping with their own negative legacy, although the negotiations over the terms of the British exit may yet afford them an opportunity to recover much of this lost ground. In short, there is visibly more to point to in the form of problems than solutions. More is said elsewhere in this special section of the politics of the countries of the UK as a consequence of the referendum.

For those who voted to Remain and possibly for some of those who voted Leave, it is difficult to avoid the impression that the country is in a more parlous state than it was prior to June 2016. The full impact of leaving the EU will not be felt, of course, until the ties currently binding the UK have been undone in a process as yet to be determined. Even where certain outcomes might be thought to be coming into focus, doubt has been cast. For instance, in its November 2016 report, the Office for Budget Responsibility spoke of its 'judgement … that over the time horizon of our forecast any likely Brexit outcome would lead to lower trade flows, lower investment and lower net inward migration than we would otherwise have seen, and hence lower potential output', saying this was 'consistent with most external studies' (Office for Budget Responsibility 2016). That staunch supporter of the Leave campaign, Iain Duncan Smith MP, was quick out of the blocks to dismiss such fears, adding to the by now familiar tendency to denigrate expertise by pointing out past forecasting failures by the OBR, a stance quickly picked up by sympathetic media outlets (Wallace and Ping Chan 2016).

The social, political and diplomatic signs are that there is much damage to repair. Socially, evidence of worrying divisions was exposed by the cleavages identified by voting patterns in the referendum (Curtice 2016). Again, such divisions do not inevitably lead to social fragmentation but the political and media reporting atmosphere before and after the referendum was sufficiently divisive to make many of these cleavages significant. Further, there are the many recorded instances of acts of prejudice, a sign of a growing casualisation, even normalisation of discriminatory language and behaviour and even hate acts (Lusher 2016). Serving as the most terrible of symbols of just how toxic the atmosphere in England at least had become is the murder of Jo Cox MP. Witnesses at the murder trial spoke of her now convicted killer shouting 'Britain First' and in his home, evidence was found of him keeping records of her support for the EU (Walker 2016). At the same time, no more hopeful symbol of British generosity exists than the 'not in her name' message that her family has championed ever since.

For those who consider that the United Kingdom stands for something positive in the world, the impact on the British reputation must be particularly painful. At the diplomatic level, the nature of the campaign and then the appointment of Boris Johnson to Foreign Secretary has not served the national interest well, as evidenced by the immediate reactions to that appointment (BBC 2016). Four months on and there is little sign of returning respect for Britain's diplomacy (Wesel 2016). Pragmatic considerations may well mean that the EU-27 are not able to give in to what might be understandable desires to punish the British. Such constraints, however, are not the same as a sign of friendly disposition. One has only to contrast the discourse in relation to President-Elect Trump ('the USA is our ally', 'he will be President, we must learn to do business with him')[2] with the

discourse in relation to Europe to understand that little care has been taken in recent months, even years, to build close relations, even if reflecting differences of opinion, with the UK's closest neighbours. Indeed, in the post-referendum environment, few opportunities to emphasise division, rather than heal it, have been lost, as signalled most recently by the response of European Council President, Donald Tusk, to British arguments that the EU was responsible for the uncertainty created by the EU referendum (Robinson 2016). Aside from the rather Dis-United Kingdom then, it is fair to say that political and media debate in the UK has spared little time for consideration of the UK's responsibility vis-à-vis fellow Europeans.

For scholars who have committed much of their professional life to learning and teaching about Europe and the European Union, who have witnessed the benefits EU membership brings to research, student mobility, transnational networks and social movements, to political debate and policy-making, this was more than unfortunate, not least because it was suggestive of our own failure to communicate a rounded picture of the European Union to relevant elites as well as the public more widely; and perhaps of a broader failure to be heard outside our own networks. This will undoubtedly be a source of introspection for all those who seek to connect their research to decision-making and public service.

LEARNING OPPORTUNITIES ABOUND

The outlook is not all doom and gloom. As educators, we the authors can see a learning opportunity when it presents itself. Debates prior to and following the referendum itself have performed the important service of revealing the extent to which little is known about the EU and, arguably, even less understood. As the recent legal challenges (and reactions to them) to Theresa May's insistence on having the power to invoke Article 50 via Royal Prerogative (and therefore Executive power) have shown, there is even an imperfect understanding of the United Kingdom's constitutional set-up. Thus, whether in respect of the European Union or the politics of the United Kingdom, there is much to be taught – and learned. Even the distinctly contentious branding of the Lord Chief Justice and two other judges as 'enemies of the people' (Slack 2016) after they ruled Parliament must be part of the exit process (Perkins 2016) can be turned into a learning moment: when legal process and by extension the legal profession are framed as obstacles to 'getting on with it' - where 'it' is Brexit – it invites us to ask how best, going forward, to safeguard democracy and the values which, until now, most would have argued underpin the UK's societies. In the new political landscape that will eventually emerge, it will be vital that those in a position to do so ensure they have the necessary educational tools.

Aside from pointing us to places where gaps in knowledge must be filled, the referendum has raised the far more complex question of the responsibility of those in the public sector or whose job is to perform a public service to respond to blatant acts of misinformation, even lies and propaganda. Following a report by the Electoral Reform Society into the referendum that spoke of the failure to provide adequate debate and which identified a number of problems (Brett 2016), there have been calls to establish a 'truth commission' (Kildea 2016). Academics, politicians, civil servants and journalists have questions to ask of themselves of their role in this. For instance, is the academic required to be impartial in relation to important political debates and if so, what does impartiality look like in practice? The same question is true for the media. Much has understandably been made of the BBC's so-called 'false balance' as giving equal representation to both the Leave and Remain sides rather than giving appropriate weight to the various arguments.[3] The question should not be divorced from the question of serving society.

Politicians, aside from the work that leaving the EU will entail, must also look to their profession. Learning begins with asking questions and there are numerous questions that should be asked by and of the political elites in the countries of the United Kingdom. Under what circumstances is it responsible to hold a referendum? Should there be consequences for those who are found to have lied, deliberately misled or misinformed the public? More immediately, there are, to be Rumsfeldian about it, some known unknowns that take priority, as our contributing authors make clear.

CONTRIBUTIONS

This section opens with a commentary from Helen Wallace that goes behind the scenes of the referendum itself, and thereby serves as opening contribution to this special section on the EU referendum. Offering insights, first, into how the British got to the point of being offered a second referendum on EU membership 41 years after the first, Wallace goes on to talk about the possible timetable for the British exit as well as the nature of it. In the commentary that follows Helen Wallace's piece, Michael Shackleton confronts the question of where the UK fits in the European Union in this twilight world between a vote for exit and an actual exit from the EU. In this 'neither insider nor outsider' commentary, Shackleton directs us to understand the realities of life for the UK in Brussels as it negotiates its way out of the Brussels village, a question that has occupied surprisingly few.[4]

The starting logic of the JCER Editors in commissioning this special section was to ensure that the perspectives and concerns of the English did not eclipse those of the other parts of the United Kingdom. Thus, this special section comprises articles in which Wales, the island of Ireland, and Scotland are firmly represented. The Northern Ireland and Scotland positions are relatively well known as a result of their respective majority votes to Remain. Both countries have mounted legal challenges in respect of a result that will reflect the majority Leave preferences of England and Wales. More puzzling and far less illuminated is the vote of Wales to Leave. In their piece for this section, Jo Hunt, Rachel Minto and Jayne Woolford of the Wales Governance Centre offer an insight into this and other issues. From Wales, we travel to the island of Ireland, in relation to which the special section offers two separate sets of thoughts. In each of their commentaries, Mary Murphy and Anthony Soares walk readers through the complexities of the island of Ireland's position, offering detailed understandings of precisely why and how this geographical space should and does command political attention in the context of an eventual British exit from the EU. The section then travels north and east to Scotland where Simon Smith considers the options available to Scotland as well as discussing the party political differences there.

The section ends with two works looking at relatively neglected areas, one neglected in scholarship, the other politically. Both constitute clarion calls for scholars of European research. Ben Rosamond identifies an absence of comprehensive theorising on disintegration rather than integration.[5] In this early attempt to set out a meaningful research agenda, there is clear utility not only for scholars of European integration but for those working on regionalism the world over. The message of Brexit after all is that what is made can be unmade. Given the final word in this special section on the EU Referendum, Roberta Guerrina reminds us of the silence in the EU referendum debate in relation to equality issues - and of the consequences of that silence. Focusing on gender, hers is a cautionary tale about the effects of the long-term British political and media failure to acknowledge all that 'the EU ever did for us' and directs us to consider also the consequences of the removal of a layer of representation for under-represented groups and issues of equality.

Finally, as Editor-in-Chief of JCER and Chair of UACES, we would like to thank all those who contributed to this special section. The task of delivering insights relating to a still extremely fluid

and also contentious context should not be under-estimated and we are most grateful to all the authors for making time in their very pressured schedules to contribute. Simona Guerra and Kathryn Simpson, editors of JCER, must also be acknowledged for their work in seeking and securing many of the contributing authors.

ENDNOTES

[1] The views expressed here are those of the two authors and should not be treated as representative of JCER or UACES and its membership.
[2] See, for instance, Theresa May's (Press Association 2016) response to Trump's election.
[3] See the excellent and comprehensive report edited by Jackson, Thorsen and Wring 2016, particularly Gaber's contribution.
[4] Helen Wallace and Michael Shackleton are, respectively, UACES's honorary President and a UACES patron. The views they express here are theirs and should not be treated as representative of UACES and its membership.
[5] Rosamund's piece here therefore makes a valuable contribution to an ongoing academic discussion about the 'dis-integration' of the EU. See for example Webber (2014) and Oliver (2016).

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Commentary

Heading for the Exit: the United Kingdom's Troubled Relationship with the European Union

Helen Wallace

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Abstract

So Brexit means Brexit, or so says Theresa May, the United Kingdom's (UK) new Prime Minister. But what does it actually mean? And how did the UK find itself travelling along this stony road towards withdrawal from the European Union (EU)? This article looks at the back story, gives comments on the referendum held on 23 June 2016, and identifies some of the issues that now lie ahead of the UK and the EU as they address the consequences of the referendum vote for leaving the EU.

TRAPPED INTO A REFERENDUM

British public opinion on the merits of EU membership has from the outset been divided, so no surprise that the arguments of the Eurosceptics should have become so widely shared. Their sentiments have permeated the politics of both the Labour and Conservative parties across the years, with divisive impacts inside both parties as well as across the wider political spectrum. So the more recent controversy is located in a much longer history of contention and ambivalence as regards the place of the UK in the wider European family.

What changed over the last decade or so was the increasing pressure to put the issue of membership 'to the people'. By habit and constitutional practice the UK has generally been characterised as a representative ***and parliamentary*** democracy, rather than as a direct democracy. However, the intra-UK devolution process began to make the resort to referendum on a 'constitutional' issue seem a plausible and appropriate means of settling an argument of country-wide importance. The appeal of the referendum as an instrument gained cogency in the light of the Scottish referendum on the independence of Scotland in 2014. The appeal of the referendum on the question of UK membership of the EU was bolstered by the fact that in 1974/5 the then Labour Government – deeply divided about the EU – had resorted to a referendum on the renegotiated terms of UK membership to deal with an intra-party controversy.

The debate over first the Constitutional Treaty and then the Treaty of Lisbon brought the issue to the fore again. The UK's politics had become complicated by the rising impact of the United Kingdom Independence Party (UKIP) – both populist and Eurosceptic. Moreover, the referendums held in France and The Netherlands in 2005 – both with majorities for rejection of the Constitutional Treaty – added weight to the argument that the UK electorate should also have its say in a referendum. As the Treaty of Lisbon went forwards for ratification in the UK the argument raged as to whether it was sufficiently far-reaching for a referendum to be appropriate, a discussion which increased the pressures for acceptance across the party spectrum: that under some circumstances a referendum was the right democratic response; that this might need to be a referendum on EU membership as such and not only on this or that treaty; and that it was only right for younger generations to have their say.

In the case of the Treaty of Lisbon the then Labour Government succeeded in arguing that it was not sufficiently far-reaching to merit a referendum. But the Conservative Party in opposition remained in favour – and all the mainstream parties found themselves conceding the case for a referendum in some circumstances. The debate had shifted from being 'when?' not 'whether?'. Hence, in 2011, the Coalition Government introduced the European Union Act which made provision for a referendum to be held in the case of a treaty proposal to transfer further significant powers to the EU.

RENEGOTIATION AND REFORM

So under what circumstances was the referendum held? Pro-Europeans slid from being clear in developing a narrative that was unambiguously in favour of continued EU membership to focusing their narrative on an acceptance that the EU was not perfect and their mantra became EU reform. The persistent eurozone problems did not help and the surges of both migrants and refugees did not help either. David Cameron, the Prime Minister, eventually chose in his Bloomberg speech of January 2013 to commit to an exercise in renegotiating some specifics of the relationship between the UK and the EU and then to holding a referendum on the outcome which would be a referendum on membership as such in the light of whatever had been renegotiated. The new Conservative Government in 2015, its stance no longer moderated by pro-European Liberal Democrat partners, came into office thus committed.

There followed in 2015/6 an exercise in renegotiation with the EU around a rather short list of key points: removing a commitment by the UK to 'ever closer union'; a reinforced commitment to completing the single market (including the digital economy) while also reducing the intrusiveness of EU regulation; safeguards for non-eurozone member states in future EU policy-making; and measures to address both the numbers of people moving to the UK from other EU countries and their access to welfare benefits. The character of this list played to sensitive nodes in UK public opinion but its narrowness also was very similar to the renegotiation exercise previously carried out in 1974/5.

In February 2016, the European Council agreed a text that appeared to satisfy the UK demands at least up to a point – the outcome on free movement for other EU citizens being the most vulnerable and least clear part of what was agreed. David Cameron then made his judgment call, namely that enough had been achieved for him to recommend this package to the UK electorate as a basis for the UK to ***remain*** within the reforming EU with a special form of membership.

THE REFERENDUM CAMPAIGN AND OUTCOME

The question on the ballot paper was should the UK ***remain*** or ***leave*** the EU? The two campaign platforms took shape but proved to be very different in character, interestingly drawing their analogies and lessons from very different analyses of other referendum experiences. They hence developed very different campaigning strategies.

The remain camp – Stronger In – was much influenced in its analysis by experiences in 1975 on the EU, the Scottish independence referendum of 2014, and the alternative vote (AV) referendum of 2011. The apparent consensus of the experts was that voters tend to vote in favour of the status quo rather than for change and hence that the chances of a victory for ***remain*** were high. The campaigning coalition brought together pro-Europeans from across the political parties, business leaders and the main trade union movement. The chosen strategy was to focus on 'killer economic facts' and the benefits of the status quo as opposed to the uncertainties of Brexit – very reminiscent of the campaign against Scottish independence. Much was assigned to depend on the supporting evidence provided by largely metropolitan experts and on the credibility of the more prominent political figures, in particular David Cameron himself. The remain camp very specifically chose not to engage with the 'hearts rather than heads' arguments or the identity issues. Their campaign was complicated by two further factors. One was that David Cameron (like Harold Wilson in 1975 and predictably so) decided to allow Eurosceptic members of his government to stay in government but to campaign for 'leave', thus enabling the Conservative Party to be explicitly divided and preventing

the Conservative Party machine from engaging with the campaign. The other was that the Labour Party was undergoing its own existentialist challenge under Jeremy Corbyn's leadership, was distracted and was also disrupted by a surge of support for UKIP in Labour heartlands in the north of England and in Wales. As things turned out, the remain campaign failed to generate a persuasive cross-party and cross-sectoral platform and became locked into a strategy mainly directed from the Prime Minister's office in No 10.

The leave camp looked and behaved very differently. Its strategists drew their analogies from experiences with EU referendums in Denmark, France, Ireland and The Netherlands, in which their 'no' campaigns had drawn on numerous sources of anti-establishment sentiment, and also from the UK AV referendum in which the successful 'no to AV' campaign had been run by some of the same people. It was a bicephalous campaign because UKIP ran its own campaign rather than merging with the cross-party Vote Leave platform. This turned out to be an advantage rather than a weakness in that it enabled the hard-edged UKIP arguments to be circulated while the Vote Leave platform was dominated in the public eye by heavy hitting mostly Conservative Eurosceptics. The Vote Leave campaign achieved two successes. One was the investment made over several previous years in identifying and corralling specific segments of 'no-sayers' from this or that community of shared interest or ideas. The other was an impressive tactical ability to generate short and sharp slogans: take back control from Brussels; control UK borders so as to reduce inward migration; save money from the EU budget contributions and instead use the money to build hospitals and so forth.

Somehow or other the leave campaign also reached much further outside the metropolitan political space than the remain campaign. In England outside London, the leave side predominated, as proved to be the case in Wales, with UKIP also gaining in popularity. The politics were very different in both Scotland and Northern Ireland. In Scotland, the remain camp proved strong and convincing, the politics of being pro-European entangled with the politics of Scottish independence. In Northern Ireland, the Catholic communities were overwhelmingly in favour of remain, while the Protestant communities tended to favour leave. The potential impacts of Brexit for the island of Ireland are huge and worrying given that the peace agreements over Northern Ireland were embedded in the fact that both the UK and the Republic of Ireland were members of both the EU and the European Convention on Human Rights. Moreover, the economic ties between the North and the South, as well as with mainland Britain, are intertwined and there is a long standing Common Travel Area for persons between the UK and Ireland. The Irish government carefully insisted during the referendum campaign that they would much prefer that the UK remain fully within the EU.

One further observation on the campaign: the media, both traditional and new, made a difference to the way the arguments of both camps came across. The BBC went for a form of balance which they interpreted as giving similar weight to the remain and leave protagonists rather than (as a public service broadcaster) as implying a focus on the substantive issues in a more deliberative way. More of the newspapers favoured leave than supported remain. In the social media, the ability of the leave campaign to develop short and sharp slogans translated rather easily into effective messages shared so as to reinforce their credibility.

The outcome was an overall UK result of 52 per cent in favour of Brexit and 48 per cent in favour of the UK remaining within the EU. But the voters were unevenly spread across the UK geographically: broadly speaking London, Scotland and N Ireland on the side of remain, with Wales and the rest of England in favour of Brexit. There were inter-generational cleavages: older voters more for Brexit, younger voters more for remain, but with the latter generating a lower turnout level; and socio-economic cleavages, with the more professional and wealthier voters more for remain and the less well-off and less highly educated more for Brexit. A significant proportion of voters from a non-European migrant background supported Brexit, partly encouraged by the possibility that after

Brexit there would be more opportunities for migrants and family reunification from the rest of the world. Neither the Conservative Party nor the Labour Party was in any state to mobilise its core electorate to support remain. We await full analysis of the electoral data but it is clear both that the electorate was fragmented and that voters on the leave side were casting their votes for a range of reasons that went far beyond the EU issues as such.

A CONSULTATIVE REFERENDUM RESULT BECOMES A GOVERNMENT POLICY

The first impact was the immediate resignation of David Cameron as Prime Minister and as leader of the Conservative Party. For a very brief period it seemed that there would be a leadership contest between the remain and leave camps. Instead Theresa May was elected unopposed – a politician who had been a lukewarm supporter of remain but who also had a history as Home Secretary of taking a tough line against inward migration and ambivalence about EU policies. She made radical changes to the cabinet putting leading Brexiteers into key positions: David Davis as head of a new 'Department for Exiting the EU'; Liam Fox as head of a new Department for International Trade; Boris Johnson as Foreign Secretary; and Andrea Leadsom as responsible for farming as well as the environment. Theresa May insisted that 'Brexit means Brexit'. Much remains to be clarified as to what this really means, but at least in the short term, it means that key positions for the eventual negotiations with the rest of the EU will be in the hands of tough Brexiteers, although her cabinet retains a number of ministers who had canvassed actively for the remain campaign, though not George Osborne who lost his cabinet post. What did become very clear after the referendum is that there was no properly crafted plan either among the Brexiteers or among the pro-Europeans either as to how to define the substance of a proposed new relationship with the EU or as regards the timeline for achieving it.

THE TIMELINE

Two points remain to be determined: the first is when the UK government will trigger Article 50 of the Treaty on European Union which provides for a process of negotiating withdrawal; and the second is the time that would be needed to negotiate a new relationship between the UK and the EU. Views vary on the merits of the cases for an earlier or a later triggering of Article 50, partly dependent on the UK government developing its negotiating objectives and partly a function of judging when the time might be ripe for a productive negotiation with elections pending in France, Germany and other EU member states. Theresa May announced on 5 October 2016 that the trigger would be pressed 'no later than the end of March 2017'. On 3 November the uncertainties were increased when the High Court issued its judgment that the government does not have power under the Royal Prerogative to trigger Article 50 without the authorisation of the British parliament. Moreover, as we shall see below, Article 50 envisages a period of two years for the withdrawal negotiations but also that period could potentially be extended – after all the EU has quite some record of prolonging deadlines in the face of political circumstances. Even harder to determine is how long it would take to negotiate a subsequent agreement on a new relationship – with perhaps an interim transitional period to be established. What has become crystal clear is that a quick break is not on the cards since the complexities of membership cannot be simplified or hurried. Estimates on this vary hugely, with some commentators suggesting that this might take many years. Perhaps the easiest way to conceptualise this is as an accession process in reverse, with the range of the *acquis communautaire* to be addressed, including so as not to create legislative voids or confusion in

the post-Brexit UK once outside the EU legislative system and specific issues to be addressed chapter by chapter.

Soft Brexit versus hard Brexit

It became clear in the aftermath of the referendum that the government had no clearly formulated plans for life outside the EU and that the leave camp had no unified or cogent view of what Brexit actually involved. It was one of the oddities of the campaign period that the leave campaigners had made an array of disparate (and seductively appealing) pledges about the benefits of life outside the EU, including spending the money saved from EU budget contributions several times over. No precedents existed for the withdrawal of a member state or territory, the cases of Algeria and Greenland not being pertinent to the case of the UK.

In essence, the discussion has come to be focused on a spectrum from soft Brexit to hard Brexit, that is to say from arrangements that might be close to the example of Norway inside the European Economic Area (EEA) to the case of any third country firmly outside the EU's trading and legislative regimes. This debate prioritises the following issues: the status of the UK in relation to the single market, ie how much of an insider or outsider; the trading framework for the UK, ie if not inside the single market then whether or not inside the EU customs union (like Turkey) or in a default reversion to membership of the World Trade Organisation (WTO), which is not a simple or rapid status to achieve; how to reconcile the UK's future market and trading relationship with the probable insistence of the EU on the UK maintaining free movement of persons for nationals of other EU (and EEA) member states; and what might be the financial bill for partial UK insider status, including for the 'flanking' policies and programmes such as those for EU-supported research and science. The government ministers from the Brexit camp and currently in key positions are at the hard Brexit end of the spectrum, while those who had been in the remain camp are to one degree or another at the soft Brexit end of the spectrum. As the pros and cons of various options become clearer, the government as a whole will have to decide where to pitch its negotiating objectives.

Of course, it is one thing for the government to determine its negotiating objectives and another to figure out what might be negotiable. This is a double edged question. On the one hand, it depends on how the EU and its other member states respond to the UK. This may well not become discernible until after the forthcoming French and German elections. Even then, there is likely to be quite a range of responses from the EU side, not least from the central Europeans from which so many of the incomers in the UK have arrived and for which the UK's EU budget contributions are so significant in cohesion transfers. Their understandable concerns will have to be weighed against the gaps that UK withdrawal will create in the EU portfolio, including within the common foreign and security policy activities in which the UK currently plays an important part. On the other hand, the UK government will have to take account of the concerns of UK stakeholders whose interests are directly and differentially affected by the potential outcomes as regards market and trading status and consequences.

In addition, there are complications as regards the four nations of the UK, given the varying degrees of devolution to Northern Ireland, Scotland and Wales, and the particularly troublesome implications for the island of Ireland, including the potential prospect of border controls across the island. The issues range from macro constitutional to micro substantive such as those for agriculture – a policy devolved to the four nations – after the UK ceases to belong to the common agricultural policy. Even in the UK with its small farming sector, agricultural policy holds many traps for politicians.

INTERIM CONCLUSIONS

These are still early days. It will take a while longer for both the timeline and the substance to become clearer and longer still for the shape of the negotiations between the UK and the EU to become evident. Given the previous absence of a clear alternative to regular full membership of the EU, it remains to be seen what kind of settlement would command consent within the UK, even supposing that agreement can be found with the EU and its other 27 member states. On the EU side, there will be a push and pull between seeking to retain a close relationship with the UK in the light of its political and economic importance in Europe, on the one hand, and, on the other hand, avoiding a shallower form of arrangement with the UK that might be attractive to other currently full member states of the EU. Meanwhile, within the UK there are questions about where the balance of economic and political interests might lie and what the political constellation might be at the moment when hard decisions will need to be taken as to whether or not to accept the outcome of these negotiations. And how would any such acceptance need to be delivered? By the then government? By Parliament? By another referendum?

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Commentary

Britain in Brussels after the Referendum: Insider or Outsider?

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Abstract

For the first time in its history the European Union (EU) is faced with the prospect of losing one of its member states. Article 50 of the Treaty on European Union lays down the formal provisions that have to be respected to manage such a loss but it is silent on the precise status of the departing member state during that period. In practice, following the 23 June referendum, the United Kingdom has become both an insider and an outsider. It will be negotiating its departure with the 27 other states, seeking to define its future position as a non-member and yet until that departure has been ratified, it will remain legally a full member of all EU institutions, with the corresponding rights and duties. This commentary will consider the impact of this unique intermediate position on the role of Britain and its behaviour in Brussels. It will suggest that it will inevitably find itself in an ever weaker position, no longer enjoying the trust and confidence afforded to other states within the EU. The give and take of bargaining and compromise that marks out the way the EU operates will be rapidly superseded by the less forgiving, more confrontational world of interstate bargaining.

To the disappointment and dismay of the member governments of the other 27 member states, Britain voted in a referendum to leave the EU on 23 June 2016. No state had ever decided to withdraw from the Union before (Greenland, which left in 1985, was and remains a part of Denmark) and many feared that the success of the Brexit campaign might encourage other countries to hold similar referenda, putting the whole structure of EU cooperation at risk. However, the more immediate effect was the transformation of the UK's position in Brussels: it became both an outsider and an insider at the same time. It continues to be represented in all the institutions, to be bound by EU law and to participate in policy discussions. And yet all other member states are aware that this situation will only last for a limited period up until the UK's departure and therefore are inclined to consider it already in important respects as an outsider. This commentary will suggest that the structure of Article 50 of the Treaty on European Union (TEU) and the way the EU institutions function will make this insider/outsider status an uncomfortable place where the UK's influence will necessarily weaken as it ceases to be seen as part of the Brussels world. The consensual politics of the EU will be rapidly exchanged for a role as a third country bargaining with the EU27.

THE STRUCTURE OF ARTICLE 50

After the referendum, attention turned to the mechanism for withdrawal laid down in the so far unused Article 50 TEU. It is an article which combines a degree of clarity that was lacking before the Lisbon Treaty came into force (before 2009 there was no specific provision for leaving the EU) with a substantial number of areas of uncertainty, in part perhaps due to the expectation of many that it would never need to be used. Overall, its impact is to favour the remaining states over the one that is departing in the course of the withdrawal negotiations.

What of the areas of clarity? First, it specifies the timetable that needs to be respected. The two sides have two years to negotiate the withdrawal agreement from the moment that the departing state notifies its intention to withdraw, unless the European Council decides unanimously to extend the period, in agreement with the state concerned (Article 50(3)). The uncertainty as to whether

such a unanimous extension can be obtained provides a strong incentive for the departing state to reach agreement in that time. Second, it explicitly differentiates the role of the departing state from that of those that remain. In particular, it makes plain that the departing state shall not participate in the discussions of the European Council or the Council where the remaining member states are agreeing their position for the negotiations or deciding whether to extend the period for the negotiations (Article 50(4)). Outsider status is thereby given formal recognition. This is in marked contrast with the situation where a member state votes against a Treaty change or an Association Agreement, as with the Netherlands and the rejection by referendum of the agreement with Ukraine. And third, it lays down the conditions for approving the withdrawal agreement. It will require qualified majority support inside the Council and consent from the European Parliament (Article 50(2)). Unlike a Treaty change it does not need to be ratified by all the member states, in accordance with their respective constitutional requirements. Hence the Community institutions are given a privileged position in the process that the departing state needs to be aware of in the course of the negotiations.

However, the degree of clarity provided by Article 50 should not be exaggerated. As so often, much remains unsaid and will be determined in the course of applying the article. First, nothing is prescribed as to when the departing state should notify the European Council of its intention to make use of Article 50. When he presented the deal he had reached with the rest of EU in the House of Commons in February, David Cameron had suggested that in the event of a No vote the article would be invoked 'straight away' (Cameron 2016), effectively starting the two year negotiation period in June 2016. His successor Theresa May took a different position, arguing that her new government needed time to agree on its approach to the negotiations and suggesting that she would not invoke Article 50 before the early part of 2017. This change provoked some dismay from other member states who wanted the issue to be dealt with as soon as possible and could see the temptation of delaying the decision further until after the German and French elections of 2017. However, the apparent advantage for the UK government cannot be separated from its need to satisfy the domestic constituency that wants a quick departure and fears that the issue could be subject to an indeterminate delay. In formal terms, therefore, the decision over the start of formal negotiations is one for the British government alone but it is a right of limited value. Once it has been exercised (and Theresa May confirmed at the Conservative Party Conference that it would be exercised by the end of March 2017), the two year deadline and, in particular, the unanimous decision required to extend it, give a clear negotiating advantage to the other member states.

Second, Article 50 does not specify whether there can be any informal contacts between the UK government and the other member states as well as the European institutions before the formal notification of withdrawal. Immediately after the referendum, the Commission President, Jean-Claude Juncker, issued written instructions to his fellow commissioners, their chiefs of staff and directors-general not to enter into any negotiations with the UK government, not to travel to the UK and not to answer questions on the Brexit process in any EU or other forum (Eder 2016). The 27 other member states made the same basic point when they met on 29 June, stating in the conclusions of an informal meeting of the European Council that 'there can be no negotiations of any kind before notification [of the intention to withdraw] has taken place' (European Council 2016). On the one hand, the 27 expected the UK to reveal what it wanted from the negotiations before discussions could begin, on the other, they needed to be free to negotiate amongst themselves as to how they would respond to British demands. Most obviously, there is the issue of whether the UK wants to remain a full member of the Single Market and if so, whether it is willing to accept the four freedoms, including free movement. The negotiation will be very different if Britain decides it will

seek to go it alone outside the Single Market, a prospect that appears more than likely following Theresa May's speech at the Conservative Party Conference.

Third, Article 50 does not offer an overview of all the elements of British withdrawal. It points to two different agreements, namely the arrangements for withdrawal and the framework for the UK's future relationship with the Union. The latter will be negotiated in detail once Britain has left but the wording of Article 50(2) makes plain that it has to be taken into account during the negotiations on the former. In other words, the character of the withdrawal agreement will be different depending on what UK/EU relations are expected to look like afterwards. Will there, for example, be continuing participation in any EU bodies, such as the European Investment Bank (see Unwin 2016) or Europol (see Paravicini for discussion on the continuing role of the UK in relation to Europol)? The complexity of this process is made clear by Charles Grant in an Insight piece for the Centre for European Reform (Grant 2016). He calculates that there are at least six kinds of agreement that the UK will have to complete as part of redefining its position in the world. The agreement on withdrawal is in this sense a relatively small part of the jigsaw puzzle but one that cannot be easily separated from the rest. The burden of all these negotiations will fall very firmly on British shoulders.

Lastly, there is no indication as to whether a withdrawal notice can be revoked: Article 50(5) only speaks of a state that has withdrawn reapplying. Such a revocation before the process has run its course may seem remote at the present time but there is nothing in the Treaties that specifies what would happen if, for example, the agreement to withdraw was rejected by the UK Parliament. Indeed, there is no indication as to the impact of the European Parliament's rejecting the agreement and there being no unanimity in the European Council to extend the negotiating period. Would Britain find itself outside the EU with no structure to govern its relationship with the other states? Such a theoretical possibility underlines the prospective weakness of the UK position in the negotiations ahead.

INSIDE THE EU INSTITUTIONS

Both by what it says and by what it does not say, Article 50 puts the United Kingdom at a structural disadvantage once it has indicated its formal intention to withdraw. That disadvantage is all the clearer if we look more closely at the way in which the EU institutions operate. The British presence in those institutions has already been compromised and is likely to become more difficult in the months and years ahead.

The sudden announcement by Jonathan Hill two days after the referendum result that he was going to resign as the UK's European Commissioner illustrated very clearly the dilemma faced by anyone of British nationality inside the Brussels structure. His statement that he did not feel it was right for him to carry on with his work as the commissioner in charge of financial services was controversial. As Britain remains a full member of the EU and has yet to indicate its intention to leave, there was no formal need for him to resign. And yet he recognised that whatever the formal situation, he would find it difficult to stay in post without others considering that his nationality made it effectively impossible to adopt a European approach to his work, particularly as the financial sector is one that impinges so specifically on British interests.

The British government could have declined to replace Hill but such a decision could have generated uncertain consequences, not least potential legal challenges to decisions taken by a Commission of fewer than 28 Commissioners. However, the government wished to maintain its position as an

insider and so decided to nominate a career diplomat, Julian King, as the last British Commissioner. He received the 'Security Union' as his portfolio, an area with potentially just as much scope for conflict with the United Kingdom. At his hearing that took place at the European Parliament on 12 September 2016, King's argument that he would support the European rather than the national interest was still sufficiently convincing for his appointment to be supported by a large majority in the Parliament (394 in favour, 161 against, 83 abstentions). However, it remains to be seen how effective he will be and whether it will be possible for him to be both inside the Commission where his room for manoeuvre is limited by the obligation to report to a Vice-President and outside, for example in Council negotiations where the support of the UK is likely to be highly conditional and other states may not entirely trust the positions that he presents, however good his presentational skills.

The question of trust extends much lower in the Commission as Juncker acknowledged by writing an internal memo to all 1,164 officials with UK nationality the day after the referendum. He sought to reassure them that he would do all in his power to protect their positions and to reciprocate the loyalty that they had displayed to the institution. He put it thus: 'You left your national 'hats' at the door when you joined this institution. That door is not closing on you now' (in Simon 2016). How this promise will work out in practice is hard to tell. It will surely be difficult for UK officials to enjoy the same kind of career progression as other nationals, even if they are able to remain in the Commission. And it will be even more difficult to guarantee that they will enjoy their pensions under the same conditions as apply at present if they retire to the UK. Indeed, despite its relatively minor budgetary importance, this was identified very quickly as a potential flashpoint in the withdrawal negotiations (Barker and Brunsden 2016).

The British position is still more exposed in the other political institutions where UK interests are more clearly visible: the European Council, the Council of Ministers and the Parliament. In all three, we are witnessing a significant shift in behaviour as the UK assumes the insider/outsider role.

The effect has been most evident in the European Council. Immediately after the referendum on 29 June 2016, a first informal meeting of the heads of state and government was held without Britain. One of its main purposes was to reaffirm the unity of the 27 and to call on the British to notify the others of its intention to withdraw as soon as possible. However, it also explicitly made it clear that the 27 would continue to meet without the UK on occasions separate from normal European Council meetings. A specific conclusion was that they would meet again in Bratislava and a second informal meeting duly took place on 16 September (with further meetings envisaged for 2017). This second meeting went beyond expressions of regret, adopting a Roadmap for the future of the EU. Whatever the difficulties of implementation, it was manifestly more than a collection of pious wishes. It included, for example, a commitment to strengthen EU cooperation on external security and defence, a subject that had always been taboo for successive UK governments. Michael Fallon, the Defence Secretary, made it clear that the British government would veto any attempts to create anything that might look like an EU army (in Rettman 2016). This was not a new position but it means something different now that the UK is proposing to leave the organisation. It no longer has the means to block such a development in the medium term and also has to consider the impact of such a veto in the short term given the need to negotiate withdrawal on the best possible terms. In other words, the sense of a veto changes once you are no longer fully an insider.

It is not difficult to imagine that the number of informal European Councils without the UK present will increase at the expense of those where it is. Even when it is present, it is much less likely to be able to influence the direction of the discussion. The recognition of this change of status has

effectively taken place already in the Council of Ministers, where the day to day bargaining on policy takes place. On assuming office in July 2016, Theresa May made it clear immediately that the UK would no longer wish to assume the Presidency of the Council in the second half of 2017. The response of the Council was swift and brutal. Within a matter of days, on 26 July 2016, it adopted a Decision to modify the order of the Council Presidencies up to the year 2030 (Council of the European Union 2016). As a result, Estonia will now take over the vacant slot created by the British decision and the order has been adapted to allow Croatia to have the six month responsibility of the Presidency in 2020.

The impact of this change is greater than might appear. It is an explicit statement by Britain that it no longer wishes to maximise its ability to shape the Council agenda in the way that chairing the Council enables any state to do. It also means that other states will look at the United Kingdom in a different way when it comes to the search for common positions on legislation. The complexity of the situation is underlined if we consider what will happen whenever there is a vote under Qualified Majority rules. Whatever position the UK takes, it will have an important impact on the outcome: it cannot remain neutral. A positive vote will enhance the possibility of obtaining a qualified majority, just as a negative vote will make it easier to reach a blocking minority of four states, making up 35 per cent of the total EU population. Moreover, abstention is no solution to the neutrality dilemma: it effectively amounts to exactly the same thing as a negative vote, hindering the formation of a qualified majority of 55 per cent of the states voting. Following the behaviour of the UK government in the Council using Votewatch will assume a new significance for researchers in the coming months.

A good example of the difficulties ahead can be gleaned from the Bratislava roadmap which supports the creation of a Travel Information and Authorisation System (ETIAS) for visa-exempt travellers entering the EU. As UK citizens might be required under this system to request in advance permission to enter the EU and even to pay for the privilege, one can imagine that the UK would wish to influence the terms of the proposal in the Council. However, all the other states would be well aware of this fact and might therefore be inclined to resist any proposals made to water down the proposal from a state whose status is about to change. Being a full member of the Council will no longer mean what it did before the referendum.

The same is true for British Members of the European Parliament, particularly for those who are office holders, either as committee chairs or rapporteurs. The immediate response to the referendum vote in the Parliament was a widespread call for such office holders, notably the chairs of the Internal Market and Civil Liberties committees (Vicky Ford and Claude Moraes), to stand down (in De La Baume 2016). The idea that their role was somehow compromised was given backing by the initial decision of Ian Duncan, a Conservative MEP responsible for emissions trading to give up his rapporteurship (a decision since revoked), though others such as Richard Corbett, rapporteur on the revision of the Rules of Procedure, resisted pressure from within their committees to stand aside.

It will be possible to follow the nomination of rapporteurs over the coming months and to verify whether the political groups decide not to nominate new UK rapporteurs and also to see whether there is a change in the allocation of chairmanships as between nationalities when the mid-term review of these positions takes place in January 2017. It seems hard to imagine that the UK will retain the number of posts as office holders that it has held in the past, particularly as individual MEPs quite reasonably start to consider their futures outside the institution. Richard Howitt, the second longest serving British MEP, who announced his departure in early September 2016 to take up a new position promoting global corporate responsibility, will undoubtedly be the first of many

members (and the assistants working with them) who will want to find new work. The impact of such an exodus on the influence that UK MEPs will be able to exercise will be considerable.

At the same time, the work of the Parliament continues and the political groups will want to maximise their chances of winning votes and of influencing Council behaviour. Any thoughts of inviting British MEPs to abstain from voting on legislation dissipated as members realised that, for those procedures where Parliament needs an absolute majority to amend or reject Council's position, it would be tantamount to giving a block of 73 votes to the Council. Moreover, what if some British MEPs agreed to refrain from voting but others did not? Specific political groups would be disadvantaged and so all groups continue to want to ensure that British MEPs vote and respect the group line. This may assume a particular importance in the context of the vote that the Parliament will have to take on the withdrawal agreement between the EU 27 and the UK. The Parliament has nominated Guy Verhofstadt, leader of the Liberal group and former Belgian Prime Minister, as the person responsible for following the negotiations with the UK. He has already made it clear that he expects the deal to be made in time for the 2019 elections to take place without UK involvement. If he failed in this attempt and then expressed strong reservations about the deal, would he find an unlikely ally in the form of UKIP members, reluctant to accept the compromises that are likely to be necessary if a deal is to be reached? As the influence of British MEPs over day to day legislative issues diminishes, so the importance of the Parliament in relation to the final separation is likely to grow significantly.

CONCLUSION

If the analysis of this commentary is correct, then once the formal notification of withdrawal has been submitted, the British government can expect its influence inside the European institutions to diminish quickly. Article 50 will give the advantage to the EU 27 and the workings of the different institutions will marginalise British concerns. It will make something of a mockery of the claim that the UK remains a full member of the EU until it leaves. The UK will find it extraordinarily difficult to exercise the kind of influence that it enjoyed as a full member before the referendum. No-one will wish to listen seriously to its concerns as they will inevitably be tainted by the thought that they are linked to its future role outside the EU. Rather, the UK will enter the world of interstate bargaining where essential outcomes are determined by relative strength. Only a confirmed optimist can imagine that these outcomes will be favourable to the UK.

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Commentary

Winners and Losers: the EU Referendum Vote and its Consequences for Wales

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Abstract

In the June 2016 EU Referendum, Wales voted to leave the EU - in the face of strong political support to remain. Whilst Wales's vote puts it on the 'winning' Leave side, the process of leaving the EU will bring with it some tangible losses that will impact Wales differently from the rest of the UK. In the immediate aftermath of the vote, there was widespread consternation about why Wales, as a net beneficiary due to significant receipts of European Structural and Investment Funds, would see a majority vote Leave. The reasons behind this, and also the potential for a new regional policy are discussed in this article. In addition, it looks at a possible 'win' for Wales with the potential expansion in regulatory competence which may come from the repatriation of competences back to the devolved administrations on Brexit, though recognising that this may not be straightforward and may carry a heavy price tag.

In a referendum on 23 June 2016, the UK voted to leave the European Union (EU). With a turnout of 72.2 per cent, the UK-wide result was 51.9 per cent Leave to 48.1 per cent Remain. The people of the UK had spoken. However, they had not spoken with one voice. Indeed, the territorial differentiation that characterises the UK's relationship with the EU was itself reflected in the outcome of the referendum, with distinct results returned in the four nations of the UK. Rather unsurprisingly, Scotland and Northern Ireland voted Remain (the former more convincingly than the latter) and England voted Leave. Wales, however, proved a rather intriguing case. In defiance of the near universal support for EU membership from the political elite and sectoral bodies across Wales, the final Welsh vote stood at 52.5 per cent Leave to 47.5 per cent Remain, on a turnout of 71.6 per cent. As such, Wales positioned itself apart from the other devolved nations and was on the 'winning side' of the UK's EU Referendum.

The wheels have now been set in motion for the UK's exit from the EU. Formal negotiations, once they commence following the triggering of Article 50 TEU, will reflect the status of the UK as a single entity. However, the process and outcome of these negotiations will play out on multiple levels across the UK. There is, after all, not just one singular relationship at stake in the negotiations. Instead, there will be consequences for the multiple relationships that exist between the EU and the UK's devolved nations, relationships that play out along financial, economic, legal, political and cultural lines. The UK's exit from the EU will also have knock-on implications for the future union of the four nations of the UK, both politically and constitutionally (Minto, Hunt, Keating, McGowan 2016; Douglas-Scott 2015).

Whilst opinions may differ about the prospects for Wales, and the rest of the UK, outside the EU, the referendum campaign saw the Welsh Labour Government support remaining in. On 24 June 2016, the First Minister of Wales announced his 'deep disappointment' with the referendum result, and outlined the six priorities for protecting Welsh interests post Brexit. First is job protection, and the maintenance of economic confidence and stability. Access to the single market is seen as 'vital',[1] along with continued participation until at least 2020 in the EU funding programmes which have seen Wales as a net beneficiary of EU money. Looking ahead, a new financial settlement within the UK is demanded, along with the placing of the Devolved Administrations 'on an entirely different footing' in the constitutional order of the UK. He called too for Wales to be fully involved in the discussions on the terms of withdrawal (Welsh Government 2016a).

Shortly after the Referendum, the newly installed Prime Minister Theresa May stressed that she was seeking a UK approach to negotiations (May, J. 2016) and made early moves to substantiate this commitment, with Prime Ministerial visits to Edinburgh, Belfast and Cardiff during the summer for meetings with the leaders of the devolved nations. Since then, however, hopes of a more inclusive negotiating position have diminished. More recent proclamations of 'one United Kingdom' and the spectre of 'divisive nationalism' (May, T. 2016) raise serious doubts about the level of inclusion of the devolved nations in the negotiating process, as does the exclusion of the Scottish, Welsh and Northern Irish Ministers from a permanent seat on the Government's European Union Exit and Trade Committee. Of course, how this will play out in practice remains to be seen. Notably, unlike Scotland and Northern Ireland, Wales voted to leave the European Union. However uncomfortable a prospect, the broadly pro-European political elite must contend with this result and ensure that it is reflected in the line the Welsh Government and Assembly advance in the negotiations ahead, negotiations which will take place both within and beyond the UK.

Following this introduction, in a first section, the article presents the particular position of Wales, as a small nation within two unions, and highlights the distinctive features of this Wales-UK and Wales-EU relationship, providing an initial take on the reasons behind the vote to leave. Whilst Wales's vote puts it on the 'winning' Leave side, the process of leaving the EU will bring with it some tangible losses that will impact Wales differently from the rest of the UK. In the immediate aftermath of the vote, there was widespread consternation about why Wales, as a net beneficiary due to significant receipts of European Structural and Investment Funds (ESIF), would see a majority vote Leave. This is considered in more detail in the next section, before a final section looks at a possible 'win' for Wales with the expansion in regulatory competence which may come from Brexit, though recognising that this may have a price tag.

WALES IN THE UK AND THE EU AND THE VOTE TO LEAVE

In some ways, the outcome of the EU Referendum in Wales was not surprising, being as it was broadly in line with the polling data for the couple of years preceding the vote (Scully 2016). In other ways, however, Wales's vote to leave was remarkable. This left-leaning, small nation, which benefits financially from EU membership, had long been seen as pro-European (Wyn Jones and Rumbul 2012). Wales had supported the UK's membership of the European Economic Community in the 1975 Referendum[2] and, since this time, the developing EU context had served to bolster Wales financially, economically and also as a distinct international actor. Indeed, the EU has a notable impact on Wales on a number of fronts: legal and political, cultural, financial and economic.

The history of Wales's membership of the EU is now indivisible from the story of devolution in the UK, which entered a new phase following the coming to power of the UK Labour Government in 1997. Following a referendum in that year, narrowly in favour (50.3 per cent), a devolved Welsh Assembly was established. The Assembly and machinery of government has been in a state of constant development since then, with successive expansion of powers. These processes of devolution have unfolded against the background of EU membership (Cole and Palmer 2011) and the Welsh political architecture has been developed within the context of two unions – the UK and the EU. Devolution in the UK is asymmetric, with a different model and a different scope of devolved powers operating across each of the devolved nations. Unlike Scotland and Northern Ireland, Wales has to date had a 'conferred' model of devolution, under which the legislative Assembly may adopt laws in those areas conferred on it under the Government of Wales Act 2006, Schedule 7. This model will be replaced with the reserved powers model seen in Scotland and Northern Ireland, when the

most recent (highly contested) Wales Bill finishes its passage through Parliament and receives Royal Assent (Parliament, UK 2016) (which is likely to be in early 2017). Under this model, the Welsh Assembly will have competence to legislate on all such matters as are not reserved to the Westminster Parliament. The continuing sovereignty of Parliament connects all three models of devolution, though a constitutional convention operates that Westminster will not normally legislate on a devolved matter without consent of the relevant devolved parliament. This Sewel Convention has been incorporated into the Scotland Act and a comparable provision is foreseen in the new Wales Act. Current areas devolved to Wales include agriculture, economic development, health, education, housing and the environment. Structures for policy coordination across the UK are in place (though their effectiveness is open to question), and are centred on Joint Ministerial Committees which operate against the backdrop of a Memorandum of Understanding. Public spending on matters for which the devolved administrations are responsible is underpinned by a block grant made to the devolved nations from the Treasury, the level determined in line with the Barnett formula, as well as from EU funds.

A number of the policy areas which have been devolved to Wales also fall under EU competence. As such, these devolved powers are exercised within a framework provided by EU law, which places both shaping and limiting effects on Welsh law. Of course, the EU also has an impact on Wales beyond areas of devolved competence, and in some cases this impact is quite distinctive. Indeed, EU law and policy (whether in devolved or non-devolved areas) plays out in a particular way in Wales given its size, the nature of its key industries and its socio-economic make-up. Reflecting this distinct 'regional' impact of the EU are the multiple channels through which the particular interests of Wales can be promoted at the EU level. The EU institutions themselves make provision for the representation of Wales. Wales has four Members of the European Parliament, and has representation on the Committee of the Regions and the European Economic and Social Committee. There are also individuals from Wales and seconded experts from the Welsh Government working as officials in the EU institutions. Beyond this, Wales has established its own outpost in Brussels – Wales House – that seeks to protect and promote the interests of Wales in the EU. This is home to the Welsh Government EU Office, the National Assembly for Wales EU Office, the Welsh Local Government Association (WLGA) EU Office, and the Welsh Higher Education Brussels (WHEB) Office. In addition to this, there is an extensive range of networks in which Wales is represented, through the participation of the Welsh Government, the National Assembly, WLGA, WHEB and other organisations, e.g. the Arts Council for Wales and the Welsh Council for Voluntary Action.

As will be seen in more detail in the final section, the prospect of removing the framework provided by EU law raises significant questions around competence, capacity and intra-UK relations. Another feature of this dual framework has been cultural. As highlighted above, the institutional architecture of the EU has provided structures and networks through which Wales has asserted itself as a distinct *European* nation. In addition to its importance to policy formation, this has been significant for the Welsh identity both within and beyond the UK. Indeed, in providing the background against which Wales has profiled its distinctive identity, the EU has accommodated a 'soft' Welsh nationalism.[3] This goes some way to explaining the conventional association of Wales with a pro-Europeanism.

This pro-Europeanism is shared by the majority of the political elite in Wales. Indeed, out of the 60 Assembly Members (AMs), the vast majority supported the UK's continued membership of the EU. There was a vocal minority who supported Leave, notably the seven recently installed UKIP AMs (new additions to the Assembly with the elections on 5 May 2016) and the leader of the Welsh Conservatives, Andrew RT Davies. The broad sweep, however, was firmly pro-EU. Labour has long been the dominant party in Wales, both in the Assembly (currently with 29 AMs) and at Westminster (currently with 25 out of 40 Welsh MPs). In the run up to the EU referendum, the Labour Welsh Government was unwavering in articulating that there are clear benefits to Wales of EU

membership, with the First Minister stating in a BBC interview in June 2015 that a vote to leave the EU would be 'catastrophic' for Wales (BBC News 2015). Plaid Cymru (the Party of Wales) also adopted a clear pro-EU stance. Furthermore, along with the Scottish National Party, Plaid Cymru supported a devolution lock on the final referendum outcome, whereby a vote to leave the EU would only be valid if this result was returned across the four nations.

A particularly striking feature of the EU Referendum in Wales is the clear disconnect between the electorate's vote to leave the EU and the overwhelming support for the UK's continued EU membership from the political elite and sectoral interest groups across Wales. Of the 22 local authority areas in Wales, 17 voted Leave. These included those areas represented by the First Minister Carwyn Jones and Plaid Cymru Leader Leanne Wood. A number of factors have been advanced to explain this contrast between the political classes and the Welsh public in their support for the EU (see O'Hagan 2016; Wyn-Jones 2016). First, there are particular challenges attached to disseminating a distinct Welsh narrative about EU membership. In part, this is due to the dominance of London-based media in Wales. These media outlets are broadly insensitive to territorial differentiation within the UK, therefore providing no room for addressing the specific case of Wales and the EU. Secondly, the EU Referendum came hot on the heels of the Assembly elections; they were held only seven weeks apart. Therefore, there was a certain amount of fatigue amongst the political activists, who had invested heavily in campaigning around the National Assembly elections and who were simply too tired to begin campaigning anew with the same level of vigour. Finally, it is considered that (much like the Leave result across England) many voters in Wales were casting a vote against the status quo. Whilst key arguments of the Leave campaign resonated amongst Welsh voters (such as immigration and budget contributions), to some extent the EU was seen as the embodiment of the distant, unaccountable political elite and this was a key factor in their voting choice.

Central to much of the pro-EU, Wales-specific narrative has been the financial and economic impact of EU membership. Financially, unlike the UK as a whole, Wales is a net recipient of EU funds, predominantly through Common Agricultural Policy (CAP) payments and European Structural and Investment Funds (ESIF). A crucial feature of these funds is that they are ring-fenced, and hence guaranteed, at the level of devolved administrations, for a seven-year period. The issue of EU funding is discussed further below. Finally, looking to economic considerations, the Single Market has a particular significance for Wales. In part, this is because Wales is a small nation and has used its membership of the Single Market as a key selling point to secure Foreign Direct Investment. Furthermore, unlike the UK as a whole, Wales is recorded as a net exporter of goods to the EU (HM Revenue and Customs 2016; Woolford and Hunt 2016a) and the EU is a particularly significant market for certain products, especially food and drink exports.

'TURKEYS VOTING FOR CHRISTMAS': BREXIT AND THE END OF EU FUNDING TO WALES

The decision of voters in some of the poorest areas of Wales to vote Leave immediately led to a flurry of media coverage asking why, in Wales, the 'turkeys had voted for Christmas' (O'Hagan 2016; Wyn-Jones 2016). Wales after all enjoys far higher levels of EU funding than other UK regions and as a result, whilst the UK overall is a net contributor to the EU budget, Wales is a net beneficiary.[4] A large part of this funding comes through the EU's Cohesion Policy. This policy originated from the recognition that the benefits of the Single Market were not distributed evenly across the EU, and a redistributive mechanism to reduce regional disparities was created. Under the current funding programming period, running from 2014-2020, the Welsh Government is set to receive (and manage as a devolved function) more than 300 million EUR per year from the EU from the European Regional Development Fund (ERDF) and the European Social Fund (ESF). When the other two ESI Funds[5] are

incorporated into the figure, the Welsh Government should be in line to receive more than 3 billion EUR by the end of the 2014-2020 programming period (Woolford and Hunt 2016b). Whilst overall this contribution may appear minimal, representing only 0.4 per cent of Welsh GDP, the majority of funding is concentrated in the 'less-developed region' of West Wales and the Valleys. Wales comprises two separate regions for EU funding purposes, and, with a GDP below 75 per cent of the EU average, West Wales and the Valleys qualifies for the highest levels of EU funding.[6] This suggests that a very significant impact could be felt locally in eligible areas. The amounts received by the more impoverished areas look all the more substantial when compared to other forms of UK regional or regeneration funding.

Unsurprisingly, First Minister Carwyn Jones identified, the day after the EU referendum, the 'security of funding budgeted under EU programmes' as one of the six key priorities for Wales in the context of Brexit (Welsh Government 2016a). Despite the fact that the current Conservative Government made it clear in the run up to the referendum, that there would be no guaranteed replacement of any shortfall in EU receipts to Wales in the event of Brexit (BBC News 2016a; Woolford 2016), he has continued to argue for a 'full guarantee' that funding will continue for existing EU programmes to 2023.[7] Some assurance of continuity in the short term has been provided.[8] One of the biggest vulnerabilities in relation to ESIF financial allocations and their potential loss to Wales is, of course, the timing and content of Article 50 withdrawal negotiations. With the triggering of Article 50 expected in March 2017 and a two-year withdrawal process provided for in the Treaties, UK membership of the EU will end in March 2019. It is reasonable to assume that an end to EU budgetary contributions is likely to coincide with the withdrawal of ESIF allocations to the UK which could lose Wales more than 860m EUR of the 2014-2020 allocations. Potential future funding opportunities from the policy post-2020 will also be missed out on[9] as will funding under a number of other related instruments.[10]

But how significant is this loss to Wales? It has been widely recognised that some of the areas of Wales that have received the most significant amounts of funding from the EU voted with the largest margins in favour of Leave. EU funding receipts appeared largely irrelevant to Welsh voters. Was this a case of EU regional policy failing in Wales, or was its communication to voters ineffective against a 'Leave' debate that suggested EU funding was 'our money anyway'? The Welsh Secretary of State, Alun Cairns, was quick to suggest that the results showed that those purported to benefit the most from European aid 'did not want what was being offered to them' and that the policy had not been wholly successful, funding projects with 'questionable strategies and woolly outcomes'. Repeated eligibility for the highest levels of funding suggests mismanagement by the Welsh Government, according to Mr Cairns, and that 'spending according to the same old plans after two decades is not an option any longer' (BBC News 2016b).

These criticisms are not new. Academics have previously commented on the tendency of the region and its devolved government simply to repackage existing development approaches and policy priorities into 'standard EU fare' designed to absorb European funding (Morgan 1997; Pugh 2014). The higher funding levels in Wales have not led to greater performance or results against key economic indicators such as jobs created and new businesses (Hunt, Lavery, Vittery and Berry 2016). In Wales, projects funded under the ERDF are estimated to have created 36,640 new jobs and 11,900 new businesses in the 2007-13 period. The equivalent figures for Scotland, where the Remain vote triumphed in every local authority area, are 44,311 and 17,474 respectively, despite receipts amounting to 36 per cent of those to Wales.[11] Questions can be asked as to whether interventions that resulted in job and business creation would have been more relevant and visible to targeted communities than the larger infrastructure projects that tend to be favoured under the Welsh programmes (BBC One Wales). The choice of intervention is strongly correlated with the impact of the funding, with people-focused interventions tending to have a greater impact than place-based

infrastructure investment (Becker 2012). New models of delivery such as Community-Led Local Development (CLLD) that look to boost the impact of EU funding at the local level through cooperation, engagement and cross-fund integration, welcomed in Scotland, have been ignored in programming approaches in Wales, where conditions would make them particularly relevant (Farnet 2015). EU funding, of course, operates in a broader socio-economic context. External developments, such as the financial crisis and subsequent austerity measures, can have significant impact on their delivery. Economic figures show that many of the local authority areas voting to 'leave' have never recovered from the effects of the economic crisis and have lower GDP levels than in 2000 (StatsWales 2016).

Whilst the effectiveness of the use of the funds to date can be questioned, their loss will see calls for a thorough reassessment of the mechanisms under which public finances are transferred to Wales. Carwyn Jones has called for a major and immediate revision of the Barnett Formula (Welsh Government 2016b). UK and Welsh economic development strategy and funding, highly aligned with the broader EU policy framework, now stands at a junction. Whilst the Welsh Assembly and ministers have a range of devolved powers to promote economic development[12] and could develop a Welsh regional policy, it seems unlikely based on financial resources and geographical scale. The UK Parliament retains the right to legislate in this area and could develop a UK-level territorial policy. Responses from Westminster suggest that serious policy overhaul is likely. This could mean that regions are designated differently and that the focus of the policy, eligible activities, favoured regions and amounts allocated could be significantly different. The potential at least exists for the design of more tailored policies to benefit Wales.

BREXIT - EXPANDING THE POWERS OF WALES?

The story of Welsh devolution has been one of incremental shifts in the responsibilities and powers from Westminster and Whitehall to Cardiff Bay. This has seen an expansion in both the range of policy areas devolved, and also in the tools and techniques available to the Assembly to act. Initially, on the coming into force of the 1998 Government of Wales Act, the powers granted to the Assembly extended only to passing secondary legislation under primary acts of the Westminster Parliament. This was in contrast to the situation in Scotland, which had gained primary law making powers for its Parliament. These powers have been developed such that, by 2011, the Welsh Assembly had the competence to adopt primary laws across twenty devolved areas, supplementing more extensive executive powers held by the Welsh Government. These powers run alongside those retained in London to legislate for Wales, whether as part of UK-wide legislation or through more territorially targeted measures, subject to the Sewel Convention.[13]

Amongst the areas devolved to Wales have been some areas which have been heavily Europeanised, with a decades-long build-up of regulatory measures at EU level. These include, most notably, the areas of agriculture and the environment, as well as economic development, as seen above. To date, EU law has set the parameters for the exercise of Wales's powers in these areas (Morrow 2013) and on the withdrawal from the EU of the UK, such constraints may, depending on the new relationship formed with the EU, no longer apply. This could then see a transfer of significant 'real' powers to Wales (and the other devolved administrations), taking them beyond the de facto powers of implementation defining their position so far – and, in those terms a 'win'. However, the actual scope for the exercise of those powers may be more restricted than first presumed.

To take the example of the environment, much EU environmental law is contained in directives, which require implementation by state authorities. These have been transposed both at UK or Wales level. Differences of approach (in terms of administration, procedure, timing and even substance)

are possible across the devolved administrations within the framework of EU law, and a distinctively Welsh approach has emerged in a number of areas. There is, for example, a statutory duty upon Welsh ministers to promote sustainable development in all their business and ensure a scheme for its implementation (Government of the UK 2008), further enhanced through the Wellbeing Power (ibid), which authorises Welsh ministers to do anything they consider appropriate to promote or improve the 'economic, social and environmental wellbeing of Wales' (see also Government of the UK 2015). More specifically, there has been Welsh implementation of EU measures differing from that undertaken elsewhere in the UK, on such matters as elements of waste legislation and nitrate pollution. At the same time however, the UK Government seeks to achieve consistency of effect. In some cases EU environmental law has been jointly implemented across the UK[14] in order to ensure coherence, so that the UK meets national targets and standards, as well as for political or resource reasons.

In the event of Brexit, as environmental policy is devolved to Wales under the current UK devolution settlement, responsibility for this area would return to Wales. Wales's approach to environmental laws may then see it choose[15] to deregulate, or refine existing laws, or maintain those existing laws and voluntarily incorporate future laws coming from the EU. However, as is currently the case, the Westminster Parliament would still have powers to legislate for Wales, and steps may be envisaged domestically to promote a common approach across policy areas. There are, after all, a number of negative consequences associated with too much diversity or divergence from neighbouring jurisdictions in the area of environmental policy, whether at UK level or between the devolved administrations. For example, energy policy could be problematic in the case of Brexit due to the interconnections across different national markets. Furthermore, a number of requirements within this field of law stem from other international legal obligations to which the UK is party. Wales's freedom of action could thus also be constrained by obligations arising from international law. Finally, there are very real questions around Wales's capacity to absorb swathes of additional policy-making responsibility. This includes not only infrastructure and institutional aspects, but also, as seen most clearly in the regional development example, the financial costs that are attached to certain policies.

CONCLUSION

Wales emerged on the winning side of the EU referendum. Against the backdrop of overwhelming political support for continued EU membership, this small, left-leaning nation – a net beneficiary of EU membership and conventionally understood to be pro-European – voted Leave. At the time of writing, much hangs in the balance. What is certain, however, is that the UK's exit from the European Union will echo down generations. Whatever variant of Brexit finally agreed, the legal, political and economic implications will be considerable – although more significantly pronounced in the case of a 'hard Brexit'. As part of this, Wales will have its own Brexit story to tell. This story will reflect Wales's distinct relationship with the EU as well as its (unsettled) devolution settlement, itself developed in the context of the UK's EU membership. Brexit in Wales will play out along multiple lines (political and legal, cultural, financial and economic) and the Welsh Government will seek to defend the Welsh national interest on these fronts in the Brexit negotiations. This, however, will be set against the background of the Welsh public's rejection of the European status quo.

Under current constitutional arrangements, as EU frameworks are lifted, Wales will claim ownership of vast swathes of law making. On the one hand, this may be seen as another 'win' for Wales as it will be able to develop its own legal, policy and regulatory regimes, free from the constraints and limitations of EU law (although still subject to other international obligations). On the other, this raises huge capacity issues as Welsh political and administrative institutions are loaded with

significant additional burdens. Of course, this will only be the case if Wales can successfully defend its policy territory from the centralising forces of Westminster. The story of Brexit in Wales is far from clear-cut. It is a complex story of disruption and division, and one in which there will be winners and losers.

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ENDNOTES

[1] Initially, on 24 June, this included a commitment to the continuation to the free movement of people. This commitment was later dropped and removed from the English version of the press release.
[2] 64.8 per cent voted Remain in 1975, against a UK wide Remain vote of 67.5 per cent.
[3] On Welsh soft nationalism, see Moon 2013.
[4] Calculated at 79 GBP per person per annum (Ifan, Poole and Wyn Jones 2016)
[5] European Agricultural Fund for Regional Development and European Maritime and Fisheries Fund.
[6] And has done for three programming rounds, from 2000-2006; 2007-2013; and now 2014-2020.
[7] Under EU rules, funds can be spent up to three years following allocation.
[8] A guarantee has been given by the Treasury to fund those projects agreed by devolved administrations which represent good value for money and close alignment with domestic strategic priorities. There is as yet little clarity as to how that would be measured or defined.
[9] Recognising that the level of funding available would likely be reduced from the current programming period.
[10] For example, through access to the Connecting Europe Facility and the European Fund for Strategic Investments and future loan financing from the European Investment Bank.
[11] The combined ERDF and European Structural Fund allocation to Scotland for 2007-2013 was 820 million EUR compared to 2,218 million EUR for Wales (Hunt, Lavery, Vittery and Berry 2016).
[12] See variously Government of Wales Act 2006, Schedule 7; Welsh Development Agency Act 1975.
[13] Disputes do occur – see, for example, the successful challenge to a non-devolved removal of the Agricultural Wages Board, through a robust and expansive reading of Welsh competence by the Supreme Court, [2014] UKSC 43.
[14] Eg Waste Electrical and Electronic Equipment Regulations 2013, implementing Directive 2012/19/EU.
[15] On an assumption that the proposed 'Great Repeal Act' acknowledges the role of the Devolved Nations in the ongoing review of which EU laws to remove.

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Commentary

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Abstract

This article considers the possible consequences of Brexit for Northern Ireland. It begins by analysing the political context leading up to the UK's referendum on EU membership, which was preceded only weeks earlier by the elections to the Northern Ireland Assembly. It then offers an overview of the reaction of a divided Northern Ireland Executive to the UK's decision to leave the EU, before considering some of the potential consequences for Northern Ireland of the UK's departure from the EU. These include the future nature of the Northern Ireland-Ireland border, North-South relations, the possibility of retaining the Common Travel Area, the loss of EU funding for cross-border cooperation, as well as customs controls and trade. It concludes by suggesting how Northern Ireland could retain some degree of continuing relationship with the EU.

NORTHERN IRELAND'S POLITICAL LANDSCAPE BEFORE THE EU REFERENDUM

On 5th of May 2016, the people of Northern Ireland went to the polls – as did those in Scotland and Wales. In Northern Ireland, they were voting for who would represent them in the Northern Ireland Assembly to make decisions on their behalf on those matters that had been devolved to them by the UK Government in London as a result of the 1998 Belfast/Good Friday Agreement. To the annoyance of Northern Ireland politicians, the campaign for the Assembly elections frequently drew the parties into an area over which the institution they were running for had no ultimate power: the United Kingdom's membership of the European Union. What political leaders in Northern Ireland had feared and communicated to the then Prime Minister, David Cameron – as had their counterparts in Scotland and Wales – appeared to have come to pass. Campaigning for elections to the devolved institutions had been side-tracked into addressing an issue that merited a greater amount of political energy than could be devoted to it as the parties fought for supremacy in the Northern Ireland Assembly's next mandate. This bleeding of one campaign into another could at least in part explain why the debate in Northern Ireland on the upcoming referendum on EU membership was characterised by many as belated, ill-informed and lacklustre. Nevertheless, Northern Ireland's political parties (some more forcefully than others) began to outline their positions during the campaign for the Assembly elections, and put them to the people during the official campaign for the EU referendum.

Of the main parties, only the Democratic Unionist Party (DUP) stood on a platform for the UK's withdrawal from the EU, stating that it would be in the best interests of the United Kingdom as a whole and of Northern Ireland itself, and a means of reasserting the UK's sovereignty. Its MPs in Westminster were particularly active, appearing in campaign hustings alongside prominent figures in the 'Leave' campaign such as UKIP's Nigel Farage, both in Great Britain and in Northern Ireland. All the other main Northern Ireland parties were in favour of the UK remaining in the EU, including not only those on the nationalist side (Sinn Féin and the Social Democratic and Labour Party (SDLP)), but also the Alliance Party and, significantly, the Ulster Unionist Party (UUP), the second largest Unionist party. The latter's 'remain' stance not only reinforced its political positioning stance as apparently more progressive than their Unionist rivals in the DUP, which had already been dramatically made when it pulled out of the power-sharing Government – the Executive – towards the end of the

Assembly's mandate, but it also served to undercut fears that the EU referendum would divide parties along sectarian lines.

The UUP's political manoeuvring, which included its positioning on EU membership, did not reap the rewards it had been hoping for in the results of the Northern Ireland Assembly elections. It made no gains, remaining with 16 seats in the Assembly, although the numbers also remained unchanged for the two largest parties, with the DUP keeping its 38 and Sinn Féin 28. The biggest losers were the SDLP, which lost two seats (from 14 to 12), whilst Alliance kept its eight seats. It was away from the largest parties that electoral shifts were seen, with the Green Party, which was pro-remain, adding another seat to its sole representative in the Assembly and People Before Profit, which was pro-leave, gaining two seats in its first venture into Northern Ireland Assembly elections as a party that already had a presence in the legislature of the Republic of Ireland. Two other minor parties with an anti-EU stance that had hoped for electoral success were the Traditional Unionist Voice (TUV), which could not add to its single seat, and UKIP, which lost its only representative in the Assembly, while one independent was elected. This was the largely unchanged make-up of the Northern Ireland Assembly as the political parties moved towards the EU referendum and its aftermath, although the complexion of the Northern Ireland Executive would undergo some major changes when the SDLP refused its allocation of ministerial posts and joined the UUP to form an official opposition. The Alliance Party also decided to turn down the opportunity of a seat in government, leaving the DUP and Sinn Féin as the only two parties in the Executive, with the independent Member of the Legislative Assembly, Claire Sugden, taking up the position of Minister of Justice.

POLITICAL REACTIONS TO THE OUTCOME OF THE REFERENDUM

On June 23rd 2016, 55.8 per cent of the electorate in Northern Ireland voted in favour of the UK remaining in the European Union. In Scotland, that desire was expressed in even stronger terms with 62 per cent voting to remain. In the aftermath of the result of the referendum, in which the weight of England's decision to vote in favour of leaving (as did Wales) determined the overall UK result, the political reaction in Northern Ireland has stood in stark contrast to that of Scotland's and has once again highlighted underlying tensions inside the Northern Ireland Executive. Whereas Nicola Sturgeon, as First Minister of Scotland, was quick to state that her Government would defend the Scottish people's decision to remain in the EU and to appoint a 'Brexit Minister', Northern Ireland's First and Deputy First Ministers were diametrically opposed in their reactions to the outcome of the referendum. Arlene Foster, the First Minister and leader of the DUP, emphasised the need to accept the UK's decision to leave the EU and that Northern Ireland could not have a 'special status' by becoming a UK region retaining a post-Brexit relationship with the EU. The Deputy First Minister, Sinn Féin's Martin McGuinness, on the other hand, stressed that Northern Ireland had clearly voted to remain and therefore its will had to be accommodated. Moreover, just as Nicola Sturgeon announced that she would immediately begin the process in the Scottish Parliament to pass legislation for another independence referendum in order to maintain Scotland's place within the EU, Martin McGuinness and Sinn Féin called for a border poll to determine Northern Ireland's future – as part of a united Ireland or to remain within the United Kingdom. That call was immediately rejected by the then Secretary of State for Northern Ireland, Theresa Villiers, and repeated by her successor, James Brokenshire, as well as being condemned by Northern Ireland's Unionist politicians.

Although the deep divisions in the Northern Ireland Executive can be understood in light of the opposing positions taken in the run-up to the referendum by Northern Ireland's two largest parties, they do not bode well as the Executive faces up to the consequences of the UK's decision to leave the EU. Some of the concerns raised by that decision were, nevertheless, communicated to the Prime Minister, Theresa May, in a joint letter signed by the First and Deputy First Ministers in August 2016. Those concerns were: the nature of the border between Northern Ireland and the Republic of Ireland; access to the Single Market and movement of labour; energy supply; EU funding; safeguarding of the agri-food sector; and involvement in discussions between the Irish and UK Governments relating to the border. However, aside from the fact that all of these concerns had been raised by a number of organisations and bodies from a range of sectors in Northern Ireland before the referendum, it was notable that this correspondence did not include any concrete proposals on how to address them, nor did it refer explicitly to any potential constitutional consequences. Neither were there any specific plans proposed by the leaders of the Irish or Northern Ireland administrations at the July 2016 plenary meeting of the North South Ministerial Council (NSMC), where concerns were raised concerning the economy and trade, Northern Ireland and British-Irish relations, the Common Travel Area and relations with the EU. Ministers did agree, however, that the NSMC would be the privileged vehicle for joint discussions on the UK's withdrawal from the EU.

The very question of where discussions on the consequences of Brexit for the island of Ireland should take place, and who should be involved in them, has itself become a matter of contention. In the immediate aftermath of the referendum, Ireland's Taoiseach, Enda Kenny of the Fine Gael party, called for an All-Island Forum that would bring together political parties from both jurisdictions to discuss the concerns raised by Brexit. While other parties in Northern Ireland reacted positively, the Taoiseach's proposal was promptly rejected by the DUP as unwelcome Irish interference in internal UK matters – a rejection perhaps in part provoked by public statements on the inevitability of a united Ireland by, among others, Enda Kenny and Micheál Martin, the leader of Ireland's second largest party, Fianna Fáil; but it was also rejected as a consequence of the DUP's insistence that ministerial discussions at the NSMC made the creation of an All-Island Forum unnecessary. An additional motivation, however, may have been DUP resistance to allowing any direct input into political considerations of Brexit from parties outside the Northern Ireland Executive, particularly since they had adopted a 'remain' position in the EU referendum. By insisting that such discussions should only take place at the NSMC means the DUP and Sinn Féin – as the parties that make up the Executive – would maintain a degree of control over the direction taken and any resulting policy initiatives. In this scenario, given the general stalemate within the Northern Ireland Executive on how to approach Brexit as a result of the diametrically opposed views of the DUP and Sinn Féin, the likelihood of any radical policies would have been greatly reduced. As an alternative, the Taoiseach announced in October the convening of an All-Island Civic Dialogue, to take place in Dublin in November, which would not only bring together representatives from the main political parties on the island of Ireland, but also civic society groups, trade unions, business groups and non-governmental organisations to discuss the consequences of Brexit. This time, however, like the DUP, the UUP stated that they would not be attending, leaving the other parties to present the concerns of Northern Ireland.

BREXIT AND THE NORTHERN IRELAND-IRELAND BORDER

Indeed, the effects of Brexit will be most keenly felt in Northern Ireland as it becomes the only region in the UK immediately placed at an external land border of the EU. What had become to all

intents and purposes an invisible and open border as a result of its de-securitisation following the cessation of paramilitary violence and the removal of customs posts with the establishment of the EU's Internal Market, now risks regaining some of its 'hardness'. The extent to which the border becomes a significant obstacle will depend on the ultimate nature of the UK's post-Brexit relation to the EU and particularly whether it retains access to the Internal Market and, therefore, accepts the principle of the freedom of movement of EU citizens – a proposition that appears extremely unlikely at the present juncture, where even membership of the Customs Union is doubtful.

The negotiations with the EU that will follow the UK's triggering of Article 50 will test the extent to which the Conservative Government can accommodate Northern Ireland's position within the Union of nations that is the United Kingdom and immediately contiguous to another Union – the European Union – which had become an important framework for the region's external relations and a supporter of its peace and reconciliation process. Full accommodation of Northern Ireland's position would mean, among other things, retention of the Common Travel Area, access to the EU's Internal Market, absence of border controls, replacement of EU funding for the agricultural sector and financial support for the continuation of cooperation between the two jurisdictions on the island of Ireland. However, the Government will be keenly aware that the other devolved nations – and Scotland above all – will be following with close interest the extent to which it addresses Northern Ireland's concerns, and in particular the degree to which it is able to keep the border with the Republic of Ireland – and therefore the European Union – open.

NORTH-SOUTH RELATIONS AFTER BREXIT

Yet it is precisely that border – which was both the site and symbolic cause of the decades-long violent conflict in Northern Ireland – that makes it a unique concern as the UK heads towards Brexit. It is the point of separation between two sovereign states that, as member states of the European Union, became co-guarantors of the 1998 Belfast/Good Friday Agreement that put an end to 'the Troubles'. They did so, as set out in the Agreement: 'Wishing to develop still further the unique relationship between their peoples and the close cooperation between their countries as friendly neighbours and as partners in the European Union' (British-Irish Council n/d). Although the UK's departure from the EU should not be seen as an immediate and fatal blow to that Agreement (and the Agreement has already informed the basis of the arguments for two legal challenges to Brexit in Belfast's High Court), its spirit may be slowly undermined in the aftermath of Brexit if the border becomes an increasingly difficult obstacle to North-South relations.

Those relations are formally embodied within the second of three strands in the 1998 Belfast/Good Friday Agreement, which not only set out the creation of the North South Ministerial Council, but also specific areas for North-South cooperation that led to the creation of six implementation bodies. Whilst the Agreement specifically provided for the NSMC to facilitate North-South cooperation and coordination in EU matters, some of the cross-border implementation bodies are either directly dependent on common EU membership (such as the Special EU Programmes Body, which manages cross-border EU Structural Funds programmes) or have responsibilities that are facilitated by adherence to a common EU regulatory framework. Brexit, therefore, will require not only a reassessment of the NSMC's future role, if any, in North-South considerations of EU matters but also of the functioning of the cross-border implementation bodies. These reassessments need not represent an existential threat to the 1998 Agreement (although greater difficulties may arise as revisions are made to the 1998 Northern Ireland Act), but they are nevertheless an indication of how the UK's departure from the EU has the potential to make the border between Northern Ireland and

the Republic of Ireland if not more physically visible, at least more of a dividing line between jurisdictions moving in different policy directions.

THE COMMON TRAVEL AREA

Both in the run-up to the referendum and since the decision to leave the EU was made, the existence of the Common Travel Area (CTA), which predates Ireland's and the UK's accession to the European Community, has been seen as a means of keeping the border open. In its current incarnation as a line separating two EU member states, the Ireland-Northern Ireland border sees some 30,000 people freely travelling to work in the other jurisdiction (Centre for Cross Border Studies and Cooperation Ireland 2016), and almost 2.5 billion GBP worth of yearly cross-border trade (InterTradeIreland 2016). The possibility of maintaining the CTA post-Brexit may safeguard the free movement of cross-border workers (as long as they are either UK or Irish nationals, since the CTA only applies to citizens of these countries), but it cannot guarantee the same for the free movement of goods, services or capital as these are outside its remit. Survival of the CTA, however, is not solely dependent on the willingness of the Republic of Ireland and the UK to uphold an arrangement that they originated but also on the EU's acceptance that one of its member states should offer privileged rights to citizens of a third country.

The EU's acceptance of the continuation of the CTA, which it had recognised as a legitimate arrangement through the attachment of Protocol 20 to the EU Treaties to which both the Republic of Ireland and the UK were signatories, would be more likely if the UK were to retain access to the Internal Market and its associated principle of the free movement of EU citizens. In such a scenario, with the Republic of Ireland outside the Schengen area, there would be no obvious need to impose passport controls. However, although a post-Brexit UK outside both the EU and its Internal Market would be free to opt to continue with the current arrangements in terms of freedom of entry to Irish citizens as set out in the Immigration Act 1971, as well as the associated rights conferred to them under the British Nationality Act 1981, the same would not be the case for the Republic of Ireland since the EU would have to give its approval. Moreover, in order to guarantee full reciprocity, the EU would also have to allow the Republic of Ireland and UK citizens the current rights they enjoy in terms, for example, of residency and employment.

Even with EU consent, in order to avoid the imposition of passport controls that would seek to deny entry across the Ireland-Northern Ireland border, the UK would have to accept the argument that the absence of such controls would allow free travel across the border from the Republic into Northern Ireland but that any non-Irish EU citizen would be doing so in the knowledge that they would have no right to access employment, welfare assistance or public services in line with any restrictions imposed by the UK. However, in order not to shift the border to the Irish Sea by imposing passport controls at ports of entry in Great Britain for travel from Northern Ireland that would be unacceptable to Unionists, the same principle would have to be applied to the entire United Kingdom. In other words, by accepting a common approach to entry of non-Irish EU citizens, the Government would not be imposing what would be seen as discriminatory measures to citizens of the United Kingdom travelling from Northern Ireland into Great Britain, and would avoid making Northern Ireland live the tension of being placed at the border of two Unions.

CUSTOMS CONTROLS AND TRADE

Whatever the outcome of the UK's negotiations with the EU in terms of its departure, the Ireland-Northern Ireland border will become the subject of some degree of controls related to the crossing of goods. Although the physical nature of those controls may be attenuated by the introduction of electronic mechanisms, this will not entirely relieve businesses involved in cross-border trade from additional administrative burdens and their associated costs, nor the imposition of customs controls such as those in place between Sweden (an EU member state) and Norway (a member of the European Economic Area). Such controls would become even more necessary if the UK (as currently appears to be the case) decides to remain outside both the Internal Market and the Customs Union. Crucially, the possible introduction of either physical passport or customs controls (or both) at the Northern Ireland-Ireland border would become potential targets for violent attacks by elements opposed to the ongoing peace and reconciliation process.

A post-Brexit UK outside the Internal Market or the Customs Union would have serious consequences for the economies of both jurisdictions on the island of Ireland, but potentially affecting Northern Ireland more than its southern neighbour given the greater importance of the Irish market to Northern Ireland businesses. In terms of relative importance, the volume of cross-border trade going from North to South (36.7 per cent according to the Northern Ireland Statistics and Research Agency 2016) on the island of Ireland is much larger as a proportion of total volume than trade going from South to North (1.8 per cent according to the Central Statistics Office 2016). This is especially the case for Northern Ireland's agri-food sector, which is not only involved in all-island supply chains, but was also the sector that in 2014 sold 57.4 per cent of its total sales in the EU to the Republic of Ireland, with only 3 per cent of its export sales going outside the EU (Department of Agriculture and Rural Development 2015). Brexit, therefore, represents a significant challenge to a Northern Ireland economy with underlying structural deficiencies resulting from the dominance of the public sector and a comparatively weak export performance.

Northern Ireland's export performance becomes noticeable when considering that of its total sales (with a total value in 2014 of 65,800 million GBP) the majority are within Northern Ireland itself (65.9 per cent), with the second most important destination being Great Britain (19.3 per cent) (Northern Ireland Statistics and Research Agency 2016). Only 14.8 per cent of Northern Ireland goods were exported in 2014: 59.1 per cent of those exports was to the EU, with the other 40.9 per cent going to the rest of the world. Of Northern Ireland's total sales in 2014 to the EU, 62.3 per cent (worth 3,599 million GBP) were to the Republic of Ireland alone, making it the single most important destination within the EU (Northern Ireland Statistics and Research Agency 2016). Consequently, given its current characteristics, Brexit has the potential to weaken what is already a structurally fragile Northern Ireland economy, especially if the UK departs the EU without guaranteeing access to the Internal Market or membership of the Customs Union. The negative effects would be most keenly felt in the agricultural and wider agri-food sector, which not only has a more prominent role in the Northern Ireland economy than is the case in other parts of the United Kingdom, but also depends on 87 per cent of its income from Single Farm Payments under the EU's Common Agricultural Policy and sees the Republic of Ireland as one of its most important markets (Department of Agriculture, Environment and Rural Affairs 2016). Compounding these difficulties will be restrictions on accessing foreign labour and the imposition of tariffs, with agricultural produce attracting some of the highest tariffs under WTO rules.

CROSS-BORDER COOPERATION AND EU FUNDING

While the potential consequences for the movement of people and goods across the Ireland-Northern Ireland border may be the more immediately visible signs of how Brexit may affect Northern Ireland and its relationship with an EU member state, there are other possible effects that can be easily overlooked if the focus is purely on trade and immigration. Unless alternative solutions are found, the UK's departure from the EU will deny Northern Ireland access to EU programmes that have funded cross-border cooperation projects not only with the border counties of the Republic of Ireland but also, in the case of the INTERREG programme, with western Scotland. With Northern Ireland receiving approximately 13 billion EUR since 1994 in total EU funding (The Executive Office 2016), Brexit represents a real threat to the continuation not only of cross-border cooperation projects but also to a range of organisations throughout Northern Ireland that have depended on such funding to deliver front-line services.

Uniquely, Northern Ireland and the Border Region of Ireland have benefited from a European Territorial Cooperation programme specifically created to reinforce a peaceful and stable society by fostering reconciliation, and to promote social and economic stability in the region. Since its beginning in 1995 as an EU response to the paramilitary ceasefires and the developing peace process in Northern Ireland, the PEACE programme has brought approximately 1.56 billion EUR in EU funds to the region (Special EU Programmes Body 2016).

If the UK post-Brexit and in its negotiations with the EU prior to its departure gives too narrow a focus on trade – important as it is, including for Northern Ireland – there is a serious risk that the 'softer' mechanisms for supporting peace and reconciliation and cross-border cooperation made possible through EU funding programmes will wither due to neglect. Unless Northern Ireland is able to access such EU funding programmes beyond Brexit, or funding is replaced by the UK Government, not only will the types of projects currently delivering services with EU support be reduced or discontinued completely, but with them we will also lose a significant amount of skills and knowledge of cross-border cooperation and peace and reconciliation built up over the years by many organisations and local authorities. Such a situation would, in turn, risk Northern Ireland becoming increasingly insular and peripheral to both the Union of the United Kingdom and the European Union on its doorstep.

CONCLUSION

To conclude, it should be noted that there are possible options that could be taken in order to mitigate the negative consequences of Brexit for Northern Ireland. In general terms, they would allow Northern Ireland to retain a degree of access to EU funding for cross-border cooperation, maintain some aspects of the Common Travel Area and perhaps some access to the Internal Market. Crucially, for these possibilities to become realities, the Republic of Ireland must take the lead. It would have to seek these things in a way that would not be seen by the European Commission and the other member states as rewarding the UK for leaving the EU, but rather as accommodating the specific needs of a member state due to its geographic location and its position as a co-guarantor of the Northern Ireland peace process – a peace process in which the EU has invested politically and financially. However, this returns us to the question of whether the UK Government would be equally willing to accommodate the needs of one of the nations that make up the Union of the United Kingdom, allowing Northern Ireland to retain a relationship with another Union with which Scotland, England and Wales would be cutting all ties.

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Commentary

The EU Referendum in Northern Ireland: Closing Borders, Re-Opening Border Debates

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ABSTRACT

The UK decision to leave the European Union (EU) following a referendum in June 2016 fundamentally alters the country's relationship with the EU, with its European neighbours, with the rest of the world and potentially with its own constituent units. It is clear that different parts of the UK will be impacted differently by this decision and by the unfolding exit terms and process. In this context, Northern Ireland is considered to be particularly vulnerable. This article examines the referendum campaign in Northern Ireland by detailing input from the Northern Ireland administration, political parties, civil society and external figures. The article suggests that the overall referendum campaign in Northern Ireland was hamstrung by the opposing positions taken by key political protagonists, particularly Sinn Féin and the Democratic Unionist Party (DUP). This produced a challenging context for the referendum debate in Northern Ireland. The post-referendum period has also been marked by persistent differences in relation to how best to approach specific Northern Ireland issues and challenges. A continued absence of clear positions and a lack of contingency planning underline a poor level of preparedness for future political developments.

2016 has brought a series of political shocks and surprises across the Western democratic world. Disaffected voters have delivered unexpected referendum and election results which profoundly challenge existing governance arrangements. The UK's decision to leave the European Union (EU) following a referendum in June 2016 fundamentally alters the country's relationship with the EU, with its European neighbours, with the rest of the world and potentially with its own constituent units. The impact of the vote remains difficult to qualify and quantify, but it is clear that different parts of the UK will be impacted differently by this decision and by the unfolding exit terms and process. In this context, Northern Ireland is considered to be particularly vulnerable (see for example ESRI 2015; Morgenrath 2015; and Open University Business School and Northern Ireland Assembly 2015).

The EU has played a subtle role in supporting Northern Ireland since the UK acceded to the then European Community in 1973. EU support for successive domestic peace efforts has been underscored by financial commitments and initiatives (see Hayward and Murphy 2012 for an overview). In turn, support for the EU in Northern Ireland has typically been stronger than in other parts of the UK. This proved to be the case when, in contrast to the UK as a whole, the Northern Ireland electorate returned a vote to Remain following the June 2016 referendum.

This article examines the referendum campaign in Northern Ireland and focuses on the words and actions (or lack thereof) of the Northern Ireland administration, political parties and civil society. It references input from UK political figures and it examines the extent to which the Irish government took an active interest in the referendum question. The article suggests that the overall referendum campaign in Northern Ireland was hamstrung by the opposing positions taken by key political protagonists, particularly Sinn Féin and the Democratic Unionist Party (DUP). This produced a challenging context for the referendum debate in Northern Ireland. The post-referendum period has also been marked by persistent differences in relation to how best to approach specific Northern Ireland issues and challenges. A continued absence of clear positions and a lack of contingency planning underline a poor level of preparedness for future political developments. Arguably, this

diminishes the extent to which the Northern Ireland interest can be protected as the EU and the UK negotiate their future relationship.

THE REFERENDUM CONTEXT IN NORTHERN IRELAND

The smallest of the UK's devolved regions, Northern Ireland is geographically removed from the rest of the UK but shares a land border with the Republic of Ireland. Scarred by an extended period of conflict which, in its most intense form, endured from the late 1960s to 1994, Northern Ireland was experiencing profound political instability during the early years of UK accession to the EU. Support for UK membership of the EU in 1973 was muted in Northern Ireland. Only one political party, the nationalist Social Democratic and Labour Party (SDLP), was vocal in supporting accession. Unionists and Republicans were less enthusiastic. The former feared a potentially negative impact on British national sovereignty and the latter was focused on the drive to secure all-Ireland sovereignty. A lack of domestic support for the EU was not the only factor limiting Northern Ireland's early relationship with the Union. Engagement was also thwarted by the region's own internal political troubles and the operation of direct rule. The conflict dominated political discourse and discussion in Northern Ireland, to the point where other policy priorities were side-lined. And nor did the specific governance arrangements which pertained until the signing of the 1998 Belfast Agreement facilitate a high degree of regional autonomy. The operation of direct rule effectively allowed the Northern Ireland political class to distance themselves from conventional political and policy debates. The introduction of devolution in 1999 altered Northern Ireland's constitutional status within the UK. The region was granted advanced decentralised powers which were to be managed by a directly elected cross-community Assembly and Executive. This move demanded much of Northern Ireland's political parties and personnel. It required the new administration to engage more robustly with a 'normal' policy agenda and less with constitutional and security issues. For the first time in generations, Northern Ireland politicians began to grapple with a range of pressing socio-economic challenges across policy portfolios including health, education, welfare and the environment. Contrasting pro- and anti-EU party positions sometimes impacted on the outputs of the local administration but, for the most part, Northern Ireland enjoyed a harmonious relationship with Europe.

THE REFERENDUM CAMPAIGN IN NORTHERN IRELAND

Northern Ireland's traditionally positive relationship with the EU produced a less hostile referendum campaign than was evident across other parts of the UK. The region's geographic separateness from the rest of the UK and its land border with the Republic of Ireland have created a different context for its relationship with the EU. In addition, Northern Ireland's distinctive political features mean that debate and discussion takes place in an altogether different political and social environment. The region's consociational devolution arrangement and a dual ethnic party system make for a distinctive and unusual political context.

The devolved power-sharing Northern Ireland Executive is composed of political parties from both sides of the political divide and a series of specific arrangements exists to manage and legitimise decision making and the legislative process. This political system was explicitly designed to accommodate and to protect the rights and interests of the two communities in Northern Ireland. The system is subject to some criticism, including the charge that opposing political parties may often face difficulties in reaching agreement on contentious issues. This scenario was apparent for the 2016 EU referendum in Northern Ireland. In contrast to other devolved UK regions – such as

Scotland and Wales – the Northern Ireland Executive did not produce a position paper on the EU referendum. The Northern Ireland *Draft Programme for Government Framework 2016-2021* did not include consideration of a possible Brexit and its implications for Northern Ireland. A lack of clarity and unity on this question extended to the Northern Ireland Assembly where there was minimal discussion of the referendum. Assembly Committees, such as the Committee of the then Office of the First Minister and Deputy First Minister (OFMDFM) did not include reference to the EU in its strategic priorities for 2014/2015. 'European issues' was an indicative committee priority for 2015/2016, but in the immediate run-up to the referendum, the committee (since renamed the Committee of the Executive Office) did not engage to any extensive degree with the question of EU membership. Other sectoral committees did consider the referendum. The Enterprise Committee investigated the economic implications for Northern Ireland of a Brexit. The Briefing Note (produced by the Open University) estimated that economic output in Northern Ireland would be 3 per cent lower in the event of a UK departure from the EU (Open University Business School and Northern Ireland Assembly 2015).[1]

Northern Ireland's regional political parties and unusual party system meant that other UK political forces, such as the Conservative Party, the Labour Party and UKIP, did not dominate the campaign as they did elsewhere. These parties have only a small presence in Northern Ireland and so constitute very minor players. In Northern Ireland, the EU has never stirred the same level or intensity of political debate as in other parts of the UK. The SDLP has long been the most strident in its support for the EU and continued EU membership. The party, and in particular its young leader, were a strong and vocal advocate for Remain. Sinn Féin's support for the EU has altered over time. Opposed to successive EU referendums on EU treaties in the Republic of Ireland, the party opted to support the Remain side in Northern Ireland. The party position was influenced by Sinn Féin's belief that a UK exit from the EU would damage Northern Ireland's relationship with the rest of the island of Ireland. Other smaller parties, including the Alliance Party of Northern Ireland (APNI) and the Green Party also campaigned for the UK to stay in the EU. Of the two unionist parties, the smaller Ulster Unionist Party (UUP) chose to support Remain. This decision was somewhat at odds with the party's traditionally sceptical stance on Europe and it was opposed by some former and serving UUP figures. The largest unionist party, the DUP, and the much smaller Traditional Unionist Voice (TUV) party were the key political advocates for Leave in Northern Ireland. The DUP was also closely allied to the official Vote Leave campaign (see McCann and Hainsworth 2016).

All of the Northern Ireland political parties, bar the SDLP, were late to develop and articulate their positions on the referendum question. In addition, political parties were distracted by the Northern Ireland Assembly election which took place just a few weeks prior to 23 June. During this period, parties were heavily focused on election campaigns and local issues. Electioneering did not tend to include any substantial consideration of the upcoming referendum. Political engagement with referendum issues did get more pronounced in the weeks immediately before the vote, but even then, the overall impression is of a campaign which lacked energy, depth and momentum.

Similarly to the rest of the UK, the voices for Leave and Remain were filtered through two official campaign groups. *Britain Stronger in Europe* and *Vote Leave* established branches in Northern Ireland and both groups focused largely on general topics relevant to the broader UK debate, with some limited discussion of Northern Ireland specific concerns. Sectoral bodies and interest groups were also active. The Confederation of British Industry (CBI) (NI) was among the more vocal contributors to the debate. Trade unions and the voluntary and community sector also engaged. The EU Debate NI initiative (launched by the Centre for Democracy and Peace Building (CDPB)) aimed to provide a forum and space for detached and objective consideration of key issues (see EU Debate NI 2015). The local Northern Ireland media covered the referendum campaign, and that coverage became more frequent and numerous as the referendum date neared. The UK national press also

has substantial penetration in Northern Ireland. The majority of this coverage pushed a Vote Leave perspective (see Levy, Aslan and Bironzo 2016).

Rather unusually, the Irish government contributed to the debate, not just in Northern Ireland, but more broadly across the UK. Much of the wider Irish political establishment harboured deep concerns about the impact of a possible Brexit on the Republic of Ireland. The issue was categorised as a strategic threat to Ireland's national interest (see Department of the Taoiseach 2016).

The major campaign issues in Northern Ireland were somewhat different from those which animated discussion elsewhere. Immigration was discussed but to a lesser extent. Those opposed to Brexit in Northern Ireland were more concerned about the political and economic impact of a UK exit from the EU on the border between Northern Ireland and the Republic of Ireland. The implications for free movement, trade and the peace process were key referendum themes (and these were issues which also exercised the Irish government). The question of EU funding, particularly future access to structural funds, the Peace Programme and the Common Agricultural Policy (CAP), was also much discussed during the Northern Ireland campaign. The DUP and other Leavers disputed the purported negative political and economic impact of Brexit and First Minister Arlene Foster objected strongly to the contention that Brexit might undermine the Northern Ireland peace process. Cries of 'Project Fear' were not unusual. The Leave campaign was aided by leading pro-Brexit figures who visited Northern Ireland during the campaign, most notably Nigel Farage and Boris Johnson. Those supportive of Remain were helped by contributions from senior UK and Irish political figures, including the Prime Minister and the Irish Taoiseach who also spent time in Northern Ireland.

A low-key campaign was more spirited during the final days before the vote (perhaps motivated by poll figures which suggested that the Remain side was losing ground). However, on the whole, the campaign was late to gain traction and it did not substantially engage the political establishment or the public. The claims of both sides were not informed by detailed research or analysis pertinent to Northern Ireland, and nor were they forensically interrogated by the media. The politically sensitive themes which the referendum discussion touched upon in terms of the UK's constitutional future, the status of the border between Northern Ireland and the Republic of Ireland and the impact of the vote on the peace process may also explain why parties shied away from detailed discussion and debate.

THE REFERENDUM OUTCOME IN NORTHERN IRELAND

The pollsters have been making unreliable predictions of late! In Northern Ireland however, the EU referendum result was as expected. 55.8 per cent supported Remain, a figure which is lower than that recorded in other regions which voted the same way, namely Scotland, London and Gibraltar. Turnout in Northern Ireland was down too. Almost ten percentage points lower than for the UK as a whole, and 8 per cent less than the turnout figure for the Northern Ireland Assembly election a few weeks earlier. Turnout was also slightly down in nationalist constituencies. The Sinn Féin stronghold of West Belfast where fewer than 50 per cent of voters cast a vote is particularly notable. Murphy (2016) has suggested that: 'some nationalist voters may have strategically absented themselves from the voting booths in an attempt to contribute to a Leave vote – a result which would provide a basis for calls for a border poll (or referendum on a united Ireland)'. Sinn Féin's call for a border poll in the immediate aftermath of the vote was roundly rejected by all other political parties and by the UK and Irish governments. The suggestion that the Northern Ireland vote to Remain is synonymous with support for a united Ireland is not plausible given that almost two-fifths of Unionists supported

the Remain side. The notion that their constitutional preference for unity with the UK has now diminished or disappeared is imprudent.

The Northern Ireland result, however, does reveal a clear East-West divide in Northern Ireland. 11 of the 18 constituencies there voted Remain, including the Belfast constituencies and all border constituencies. A Leave result was recorded in all Eastern constituencies, whilst those constituencies represented by a nationalist or independent MP returned a vote in favour of continued EU membership. In fact, the Foyle constituency recorded the fourth highest Remain vote (78.3 per cent) of all UK constituencies. Three constituencies with Unionist representation in Westminster also supported Remain. The seven constituencies which voted Leave were all Unionist in orientation.

This referendum outcome is interesting because it does not demonstrate the existence of a stark communal divide. A simplistic nationalist/unionist explanation for the Northern Ireland vote is not convincing (Mills and Colvin 2016). This is also confirmed by an Ipsos-Mori poll which found that 40 per cent of Protestant voters in Northern Ireland wanted the UK to stay in the EU (McBride 2016). Related research by Garry (2016: 2) notes that: 'two thirds of self-described "unionists" voted to leave while almost 90 per cent of self-described "nationalists" voted to remain'. Unionists were less influenced by their party's position than nationalists were. A larger proportion of Unionists than nationalists defied their party position when voting in this referendum – 25 per cent of DUP supporters voted to Remain, while 58 per cent of UUP voters opted to Leave (Garry 2016: 6).

In line with other trends across the UK, educational qualification is linked to vote choice in Northern Ireland. The more educated were more likely to support Remain. 80 per cent of professionals chose for the UK to stay in the EU while fewer than 50 per cent of manual workers did. Attitudes to immigration were also predictors of vote choice with those opposed to immigration more likely to vote Leave. Northern Ireland attitudes mirror some of the deeper socio-economic concerns which motivated voters across the UK as a whole:

> In short there does seem to be evidence supporting the idea that there is a cluster of traits (low education and skill) and beliefs (anti immigrant, socially conservative, alienated from politics) associated with the leave vote in Northern Ireland that is consistent with the 'left behind by liberal globalisation' argument elaborated in the rest of the UK (Garry 2016: 6).

THE REFERENDUM AFTERMATH IN NORTHERN IRELAND

Questions about the status of the Irish border after Brexit have dominated discourse in Northern Ireland since the referendum result. Membership of the EU single market has effectively removed the border between Northern Ireland and the Republic of Ireland, and this has altered not just economic relations on the island but political relations too. In 2014, cross-border trade was worth over 300 million EUR (InterTradeIreland 2016a). Since the Brexit vote, 25 per cent of Northern Ireland companies and 57 per cent of Irish companies think Brexit will have a negative impact on cross-border sales. A majority of Northern Ireland firms (62 per cent) are keen to continue to have access to the single market and free movement of people (InterTradeIreland 2016b). In terms of free movement, the status of the Common Travel Area (CTA) between Ireland and the UK is now also under scrutiny. How, indeed if, the benefits of this arrangement can be protected post-Brexit has been one of the key concerns for Northern Ireland and the Irish government too.

The hard or soft character of the border post-Brexit is, therefore, of substantial significance to both Northern Ireland and the Republic of Ireland. The Prime Minister's intimation that she intends to

prioritise border controls over single market access however, suggests that she favours a hard Brexit. This would likely require the re-imposition of a more visible border between Northern Ireland and the Republic of Ireland including border controls and fortification. The political and psychological impact of such a move threatens to undermine the ongoing (and still fragile) Northern Ireland peace process. Former Northern Ireland Secretary of State, Lord Mandelson, has noted (*Belfast Newsletter* 15 March 2016):

> … the reimposition of a formalised border would be a radical departure from the established strategy of the administrations in Dublin, London and Belfast. Anything in my view that strengthened a sense of separatism between Northern and Southern Ireland – physically, economically, psychologically – has the potential to upset the progress that has been made and serve as a potential source of renewed sectarianism that would always bear the risk of triggering further violence in Ireland, particularly in the North.

Whether a hard or soft border materialises has potentially profound political and economic implications for the region, and for the island of Ireland as a whole. There are various ideas about how new border arrangements might be structured and managed, and in particular how disruption to trade and free movement might be avoided. The Irish government's *Contingency Framework* for Brexit (see its Appendix) notes:

> While ultimately dependent on the outcome of EU-UK trade negotiations, analysis will be deepened on options for possible customs and excise controls, including the role of modern technology, with a view to minimising impediments to trade.

There are ideas too about *where* the border might be. Moving border controls away from the border between North and South, and shifting them to the sea border between Northern Ireland and the UK has been mooted as a means to allow for a soft border to exist on the island of Ireland. The political ramifications of such a move, however, and perhaps more especially its symbolic effect, can be construed as creating a de facto united Ireland, a proposition which is vehemently opposed by Unionists.

The Northern Ireland Executive's response to the referendum outcome has been minimal. A joint letter to the Prime Minister from the First Minister and Deputy First Minister outlines key concerns for Northern Ireland during this new era. It emphasises concerns about the border, and it also references other areas including trade, energy, EU funding and the agri-food and fisheries industry where the Northern Ireland Executive wishes to be involved and engaged in protecting key interests. Beyond this limited show of cross-party unity however, there is no clear contingency plan in Northern Ireland. McGowan (2016) notes how problematic this is:

> many of Northern Ireland's core priorities – such as agriculture and fishing – may be less important issues for the UK negotiating position as a whole. The Executive needs to advance its priorities and it will be imperative for it to develop meaningful dialogue with David Davis' Department for Exiting the European Union.

The inability of the Executive to agree a joint position is echoed in the Northern Ireland Assembly. A recent motion endorsing a proposal that there should be legal recognition of the unique status of Northern Ireland and the circumstances on the island as part of the arrangements to leave the EU was defeated by a single vote on 17 October 2016. The fractious debate which preceded the vote further underlines the absence of an agreed strategy in Northern Ireland and highlights the division between nationalists and unionists about how to deal with the implications of Brexit for Northern

Ireland (see Northern Ireland Assembly 2016). This additional lack of political cohesion and unity limits the strength of Northern Ireland's position during the various negotiations to come.

There are other avenues too, including the Northern Ireland Assembly committees and the institutions created by the 1998 Belfast Agreement, namely the North-South Ministerial Council (NSMC) and the British-Irish Council (BIC). The Northern Ireland Assembly committees have not been vociferous in their examination of the referendum vote. There has been only limited committee discussion of the implications of the result, and there are no plans to convene an inquiry or consultation. This contrasts with the work of other parliaments, in London and Dublin, which have engaged in deeper examination of the impact of Brexit on relations with Ireland.

There has been some tentative engagement with other institutions. The BIC, in particular, may become an interesting forum for the UK's regions and nations to communicate their views. An extraordinary meeting of the Council took place in Cardiff on 22 July 2016 to discuss the implications of Brexit. A new Joint Ministerial Committee on EU Negotiations (JMC(EN)) will be the primary vehicle for agreeing a UK approach to the Article 50 negotiations and for accommodating the interests of all constituent units of the UK. Irish government attempts to harness an all-island cross-party and cross-sectoral approach to Brexit have been thwarted by Unionist non-participation in the *All-Island Civic Dialogue on Brexit* which convened in Dublin on 2 November 2016. The initiative, however, does include some Northern Ireland civil society representation and it envisages future meetings and dialogue.

CONCLUSION

The June 2016 referendum rejection of UK membership of the EU has thrown up a whole series of pronounced challenges for the Union, for the UK, its neighbours and its constituent units. The UK wide referendum has been criticised for the way in which it allowed unchecked commentary on the EU (by both Leavers and Remainers) to inform the narrative. The quality of the debate and the discussion suffered (see Liddle 2016). In Northern Ireland, the bigger issue was not so much the quality of the debate, rather the limited and late amount of debate. The Northern Ireland administration, political parties and civil society were slower to engage with key referendum issues. The quality of debate was also restricted by a lack of information, data and expertise specifically relevant to Northern Ireland.

The referendum result in Northern Ireland produced majority support for Remain and revealed some cross-party and cross-community support for this outcome. It also produced a result which conflicts with that of the UK as a whole and begs questions about how to accommodate Northern Ireland's preference. The possibility of a 'special arrangement' for Northern Ireland has been mooted, but there is little clarity about the detail of such a scenario. The seeming inability of the parties to the Northern Ireland Executive and Assembly to agree and to implement a framework for dealing with Brexit diminishes the strength of Northern Ireland input to the wider process of the UK extracting itself from the EU. In the past, Northern Ireland's failure to agree and communicate a position on various EU policies has been damaging (see Murphy 2014). On this occasion, however, the stakes are arguably very much higher.

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ENDNOTES

[1] The Northern Ireland Assembly Research and Information Service briefing paper, *The EU Referendum and Northern Ireland: Information Resources* (20 May 2016) provides a clear illustration of the lack of consideration of the referendum issue by the Northern Ireland Assembly relative to Westminster, the Irish Parliament and other UK devolved legislatures.

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Commentary

If We Cannot Have Both, Then Which Union Do We Choose? Scotland's Options after 'Brexit'

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Abstract

In the space of two years, the Scottish electorate has been asked on two separate occasions to declare its position with regard the two unions to which it currently belongs – that of the UK and of the EU. This special interest piece aims to take stock of the mood in Scotland towards Brexit and to consider the various options for Scotland going forward. It is starting to look probable that Scotland will have to go to the polls one last time. If the Scots cannot belong to both unions, then ultimately they will probably have to make one final decision as to which union they favour.

Between 2014 and 2016, the Scottish electorate has been to the polling station no fewer than four times: the 2014 independence referendum, 2015 general election, the 2016 Scottish Parliamentary elections and, of course, the recent referendum on the UK's departure from the EU. With regard to the so-called 'Brexit' referendum, the Scottish Government (SG) did not have any yearning to have the referendum at all. In the lead up to the referendum, the SG argued strongly that there was no popular demand in Scotland to have a referendum, and there was certainly no public demand in Scotland to find itself in a position where it was outside the EU. When the referendum did come, Scotland's statement about wanting to stay in the EU was pretty emphatic. Scotland now finds itself in a position of trying to explain to the UK Government (UKG) that Scotland has given its view and they expect some respect to be given to that view.

This special interest piece aims to take stock of the mood in Scotland towards Brexit and to consider the various options for Scotland going forward. The first section will discuss the results and compare some demographics of the two referendums. The piece will then turn to both the SG's preparations for and reactions to the result of the June 23 vote. Finally, a discussion of how 'Brexit' may affect UK constitutional matters as well as some thoughts on existing options and preferences facing the SG, the other Scottish political parties and the UKG are offered.

FROM 2014-2016

Comparing the 55 per cent - 45 per cent who voted to Remain part of the union with the United Kingdom (2014) with the 62 per cent - 38 per cent who voted to remain part of the European Union (2016) is an interesting exercise. Anecdotally, there seems to be some correlation between those who voted NO in the independence referendum and those who voted Leave in the EU referendum. For example, the demographic who was most inclined to vote Leave in Scotland (as well as the UK as a whole) were the elderly. They were also the demographic who were the most likely to vote NO with regard to independence in 2014. Conversely, younger people voted for both the EU and Independence.

Economic indicators are also an interesting comparison. The lower income areas were predominantly places that voted YES to independence but they also had some of the strongest support within Scotland for leaving the EU. This seems to track onto voting patterns across the UK as a whole. So in terms of the 55 per cent - 45 per cent and the 62 per cent - 38 per cent, where it is consistent is age and where it is inconsistent is social status. Those with higher incomes were predominantly pro-Union (UK) and pro-Remain (EU). If a second independence referendum

materialises as a consequence of Brexit, this demographic will be particularly interesting to observe should they be asked once again to choose between the two unions. At the moment, they appear to be preferring the UK union over the European Union but that may change as the Brexit process deepens. Current YouGov data indicates that if a second referendum were to be rerun, the result would be almost identical to the last time with 54 per cent of Scots voting against independence and 46 per cent in favour (Smith 2016).

It is also interesting to note that many of the working class and traditional labour communities that came over to the Yes campaign in 2014 - and subsequently voted for the Scottish National Party (SNP) in 2015 and 2016 - were not a hotbed of support for the EU in the June referendum. Economic security during the independence referendum, especially for the elderly, was absolutely crucial. However, and somewhat counterintuitively, this sense of economic security did not seem to count for as much during the Brexit vote, at least for those in Scotland who voted to leave.

Although Scotland returned an overwhelming Remain vote (62 per cent), one could also argue that the leave vote (38 per cent) was actually relatively high given the fact that the Leave campaign did not have any substantial political party representation in Scotland. Although the people of Scotland were as exposed to Boris Johnson and the Leave campaign as anywhere else in the UK, there was no significant voice in Scotland channelling that campaign. The 38 per cent can be partially explained by exposure to the UK-wide campaign but given this lack of party support, it is surprising that the Leave return was so high. In any case, it is not an insignificant number and it could very well be significant if another independence referendum were to be held at some stage in the near future. In this regard, it is also likely that some tactical voting took place as some independence-minded voters may have believed that the UK leaving the EU is good grounds to fight another independence referendum.

CONTINGENCY PLANNING

In the lead up to the referendum, the SG actively argued that the UK should remain in the EU. The SG made some general preparations for both a Leave and a Remain vote - it would have been irresponsible of them otherwise – and to some extent the SG was braced for either outcome. However, in the ten to fourteen-day period prior to the vote, a realisation had begun to set in that a Leave vote was possible, if not probable. In reality, the outcome came as much of a surprise to the SG as it did to the UKG. Given that every voting district in Scotland returned a vote for Remain, this only enhanced the sense of shock. What has become clear since the referendum, and somewhat ironically since it was the UKG that actually proposed the referendum, is that only the SG seems to have thought through the ramifications in any detail. In short, and as one interlocutor indicated, there was a plan but the leading figures in Scotland were not really emotionally prepared for the result.

Yet, Nicola Sturgeon reacted swiftly and directly on the morning after the UK voted 52 per cent to 48 per cent to leave the European Union. The First Minister drafted her speech in the early hours with the absolutely fundamental aim of conveying that there was a distinctive and differentiated position in Scotland. Her primary goal was to make it absolutely clear that Scotland had voted differently from the UK-wide vote. The priority was to make it known to both the UKG and to those listening in other European capitals that the SG had very different priorities from the British electorate as a whole.

Discussions with interlocutors in Edinburgh have also revealed that the First Minister's response was deliberately pressing for quite specific reasons.[i] First, she felt it was very important to convey to those nationals from other EU countries living in Scotland, that they were still welcome. From their point of view, this was not the message getting through, neither in the course of the referendum, nor subsequently. Second, there was a pressing requirement to respond to some of the immediate questions thrown up by the vote itself, most notably uncertainties concerning the constitutional and legal implications of leaving the EU.

In essence, although the First Minister was quick off the mark, she spoke more in terms of her perceived mandate than any real strategy. There can be no doubt that the question of independence is never far from the hearts of those in the SNP, but it does not appear to be the case that the SG or the SNP went into the EU referendum thinking that this was an opportunity to exploit. The SG was (and is) genuinely anxious about what leaving the EU will mean in terms of Scotland's own interests. Of course, that does not necessarily carry over to the post-EU referendum landscape. Indeed, the First Minister made clear that, 'as things stand, Scotland faces the prospect of being taken out of the EU against our will' (BBC News Website 2016a).

Since the vote, the First Minister has been very definite about the need for Scotland to retain some kind of connection to the EU, most notably the European Single Market. Officials with the SG have grave concerns regarding the impact that leaving the Single Market would have on the Scottish economy. According to a document released by HM Treasury in 2014, 'almost 270,000 jobs in Scotland, over 10% of total Scottish employment, are linked to the UK's single integrated market' (HM Treasury 2014). A report produced by the Fraser of Allander Institute for the Scottish Parliament concluded that,

> over the long-term a reduced level of trade is expected to result in Scottish GDP being between 2% and 5% lower than would otherwise be the case. The range of impacts is driven by the nature of any post-Brexit relationship between the UK and the EU – the stronger the economic integration with the EU, the smaller the negative impact (Fraser of Allander Institute 2016).

Therefore, the position of the SG, which is not an unreasonable one given both the Scottish vote to Remain and the potential economic impact, is a clear desire to remain a member of the EU. And if this is not possible, then access to the Single Market at the very least. In a speech at the Institute for Public Policy Research, the First Minister offered 'five key interests' that she would prioritise in terms of negotiations with the UKG before Article 50 (Article 50 TEU 2008) is triggered. These are: 'democratic interests, economic interests, social protection, solidarity, and having influence' (Sturgeon 2016).

Although this may be a reasonable position to take, it does mask some real complexities. For example, David Mundell, the Secretary of State for Scotland, has also expressed the UK Government's position. Also speaking at the Institute for Public Policy Research, Mundell noted that 'we should remember that almost four in ten of Scottish voters backed Leave, not an insignificant number'. He also outlined three assumptions informing the UKG position. First,

> the EU referendum result provides a democratic mandate for the United Kingdom to leave the European Union … For the United Kingdom Government, part of making a success of Brexit means leaving the EU in one piece and remaining in one piece after that process is complete.

Second, 'that the referendum result applies just as much to those parts of the UK that voted to remain as voted leave'. Third, 'under the devolution settlement, foreign affairs are a reserved matter for the UK Parliament and the responsibility of the UK Government' (Mundell 2016a).

So where does Scotland stand and what are the options going forward? Before turning to the various possibilities and preferences currently being proposed, let us first turn to the constitutional and legal circumstances underpinning this process.

CONSTITUTIONAL MATTERS

In October, the Prime Minister finally announced that Article 50 would be triggered before the end of March 2017 (Elgot 2016). Once Article 50 is formally invoked, the two-year process of leaving the European Union commences. One would expect the SG and the UKG (plus the other devolved administrations) to negotiate a UK position that accounts for all interests before article 50 is triggered. As Professor Jo Shaw notes, the UK Parliament is the sovereign body within the British system and legally, 'the UK Government holds most of the cards'. However, when it comes to legitimacy, Shaw suggests that the SG has 'a pretty good hand to play' (BBC News Website 2016b).

During a trip to Scotland, Theresa May, the UK Prime Minister, suggested to the Scottish First Minister that she was 'willing to listen to options' on Scotland's future relationship with the European Union (BBC News Website 2016c). In testimony before the Scottish Parliament's European and External Relations Committee, Fiona Hyslop (MSP and Cabinet Secretary for Culture, Tourism and External Affairs) confirmed that 'the legal competence for the negotiation is with the UK government'. However, she also intimated that

> UK ministers have not told me what their plans are because I do not think that they have plans yet … but I have made it clear that they should think carefully about when and how they trigger article 50 and that it is important that we be involved in the negotiations or discussions and the process prior to article 50 being triggered (The Scottish Government 2016).

Ms Sturgeon has since declared that she does 'accept that the Prime Minister has a mandate in England and Wales to leave the EU, but [she does] not accept that she has a mandate to take any part of the UK out of the single market'. She went on to say

> the Scottish Government will not be window dressing in a talking shop to allow the UK Government to simply tick a box. We expect to have, along with the other devolved nations, a role in decision-making, we expect our engagement to be meaningful (Gourtsoyannis 2016).

OPTIONS AND PREFERENCES

The Scottish Government's position

After discussions with interlocutors in Edinburgh, some understanding of the SG's position can be identified. Not unlike arguments put forward during the independence campaign in 2014, Edinburgh

continues to suppose that the EU can be quite a pragmatic body when it wants to be. As already mentioned above, the First Minister has set out certain interests that she is seeking to protect. These interests are being presented to the UKG as well as to other governments in Europe in order to discern if there is any appetite for differentiated arrangements should it come to that. When Theresa May came to Scotland, she talked about wanting to establish a UK approach and UK priorities. Nevertheless, the SG is still trying to ascertain what exactly she meant by that.

The SG is clear that its least bad option is for the UK to remain in the Single Market, which it believes is not only what is best for Scotland but also what is best for the UK. The SG is quick to point out that it is not content to be taken out of the EU just because it may retain access to the Single Market. Again, it only sees this as the least bad option. Essentially, the SG's position is that it is trying to retain its place within the EU. However, it knows full well that this would require a great deal of creativity and imagination on the part of both the UK and the EU if Scotland were to retain its position in the EU while being part of the UK. To paraphrase one interlocutor, Scottish interests are best served within the European Union by some distance, if this can be done pragmatically within the UK, then that option is viable as much as anything else.

Other Options

There now seems very little doubt that the UK will leave the EU, most likely by April 2019. The exact outcome of the negotiation process (or processes) is still in question, but the SNP seems to have come to the conclusion that the UKG prefers to pursue the 'hard' Brexit option. Therefore, Scotland's future is very much in doubt, in terms of its relationship with both the EU and the UK. This can be understood in two separate but not unrelated classifications. First, in terms of the UK's final negotiated settlement in relation to the EU. Second, Scotland's constitutional position in relation to the UK. In the first category, the central dividing line is between the so-called 'hard' and 'soft' Brexit options. The options under the second category range from the status quo, to increased devolved competencies for Scotland, to full independence for Scotland. The table below gives an idea of the range of options and complexities with regard to the various models that have thus far been proposed.

Table 1 (BBC News Website 2016d)

	EU Membership	Norway	Switzerland	Canada	Turkey	World Trade Organisation
Single Market Member?	Full	Full	Partial	No	No	No
Tariffs?	None	None	None	Reduced Tariffs through free trade deal	None on industrial goods	Yes
Accept free movement?	Yes	Yes	Yes	No	No	No
In the customs union	Yes	No	No	No	Yes	No
Makes EU budget contributions	Yes	Yes	Yes (but smaller than Norway)	No	No	No

One additional option that has been proposed is the so-called 'reverse Greenland' possibility. This proposal fits into the category whereby some of the constituent parts of the UK, namely those that voted to Remain (Scotland, Northern Ireland and potentially Gibraltar) would retain some variation of EU membership. The rest of the UK (rUK) would, however, leave the EU under the terms of a separate negotiated agreement. This option would leave Scotland with access to the Single Market while abiding by the Four Freedoms of the Union. Furthermore, Scotland would be a contributor to the EU budget and assume some form of shared (with Northern Ireland) decision making powers, replacing those formally held by the UK. This option would require a tremendous amount of creative thinking and most experts dismiss it as highly unlikely. The proposal is problematic for two significant reasons. First, this would create a new type of membership classification for the EU. Second, if the rUK were to remain outside the Single Market, presumably accompanied by a rejection of the Four Freedoms, then this may necessitate a hard border between Scotland and England. That is not likely to be something desired by either Scotland or the rUK. The range of possibilities open to Scotland would, therefore, seem generally to correspond to the following: (1) a 'hard' Brexit for the UK and by extension for a Scotland remaining a part of the UK; (2) the UK stays in the Single Market (so-called 'soft' Brexit) and by extension so does Scotland; (3) some form of differentiated solution for Scotland relating to either a 'soft' or 'hard' Brexit for rUK; (4) independence for Scotland potentially in the EU but a 'soft' UK Brexit; (5) independence with Scotland potentially in the EU but a 'hard' UK Brexit.

The Parties

The primary interests of the SNP, as things stand, are outlined above. However, a few further comments are warranted. The First Minister visited Brussels this summer where she met with the President of the European Commission, Jean-Claude Juncker, the President of the European Parliament, Martin Schulz, as well as some leaders of the political groupings within the European Parliament. According to the Scottish Government, the First Minister 'stressed that Scotland chose to remain part of the European Union, and her determination to ensure all options are considered to enable Scotland to remain in the EU'. The Scottish First Minister also declared that she had

> deep concerns about the impact of the referendum not just on Scotland, the UK and the European institutions, but on people in all our countries and on the EU itself. If there is a way for Scotland to stay, I am determined to find it (Scottish Parliament Information Centre 2016).

The First Minister has also organised a council of experts to advise on protecting Scotland's relationship with Europe. 'The Council draws on a breadth and wealth of knowledge and experience, comprising specialists with backgrounds in business, finance, economics, European and diplomatic matters, and it will encompass a range of political and constitutional opinions' (The Scottish Government 2016). There are three SNP ministers who are directly involved with the negotiations on behalf of the SG, all of whom answer to the First Minister: Alasdair Allan (Minister for International Development & Europe), Michael Russell (Minister for UK Negotiations on Scotland's Place in Europe), and Fiona Hyslop (Cabinet Secretary for Culture, Tourism and External Affairs). Finally, the cross-party European and External Relations Committee within the Scottish Parliament has been taking evidence on the EU referendum result and its implications for Scotland (The Scottish Government 2016).

The Scottish Labour Party maintain that the impact of leaving the EU will have a tremendous detrimental impact on Scotland and the Scottish economy. They see no real plan or strategy emanating from the UKG and the Party believe that, at this point, it is unclear exactly what the UKG aspires to on the back of leaving the EU. There is also a feeling that we are where we are to a large extent by accident. From their point of view, Theresa May lacks a formulated strategy, much less one that is agreed at the Cabinet level. The bottom line is that without knowing if the UKG is ultimately seeking to retain the UK's position within the Single Market, then it is very difficult for any party to influence any consequences for Scotland. The Scottish Labour Party support the SG's endeavour to explore the various options available to Scotland and they too are anxious to know what weight the SG will have in terms of the wider Brexit negotiations.

The Scottish Conservatives essentially believe that the result was one taken by the UK as a whole. Although most Conservatives in Scotland did not campaign for Leave, they see no option other than carrying out the will of the UK electorate expressed last June. They believe that the UK (and Scotland) will simply adjust pragmatically to this new reality and that they will, ultimately, make a success of Brexit. Assuming a rational approach, they believe that the people of the UK have no real interest in torpedoing their own national interest. Once the disappointment felt by 'Remainers' has passed, level heads will prevail. Of course, the other component that motivates them is keeping Scotland in the UK. In this regard, they believe the arguments for Scotland retaining its position in the UK are even stronger now than they were in 2014. As Mundell puts it,

> [t]he arguments in support of Scotland's place in the UK have got stronger, not weaker, since September 2014. And I do not think that the UK's vote to leave the European Union does anything substantial to weaken the argument for the UK (Mundell 2016b).

So their position is this, when the UK leaves the EU, no matter the form that Brexit takes, Scotland will leave the EU as part of the UK. They are much more concerned with the deal the UK can negotiate with the EU than any 'differentiated' arrangements for the devolved administrations. However, they do claim that Scotland will have and should have a central role in those negotiations.

Like the SNP, the Scottish Green Party are open to 'differentiated' options. Nevertheless, their primary position is that an independent Scotland with membership in the EU is the best overall result. As such, they believe this process will come down to a choice between two unions for the Scottish people. The Scottish Liberal Democrats have also made it clear that they think the UKG is without a strategy and are gambling with the UK's national interest as a consequence. They share in the belief that Brexit - and especially a 'hard' Brexit - will be detrimental to the Scottish economy but they are not inclined towards Scottish independence.

CONCLUSION

With the UKG seemingly pursuing a 'hard' Brexit and the SNP positioning itself towards linking this attitude to a second Scottish independence referendum, the Prime Minister and the First Minister are both engaging in a hefty gamble. If Theresa May is determined to leave the EU and the Single Market, her strategy will be underpinned by an assumption that the Scottish electorate will be resigned to choosing the UK union over the EU. She will put faith in the economic centre of gravity being in the UK and not the EU. However, she would do well to remember that the UK electorate very recently ignored what appeared to be an overwhelming economic argument against leaving the EU. If the Scottish public feel aggrieved enough by the Brexit negotiation process, they too may

choose some nebulous desire for self-governance over arguments around economic security. In other words, taking back control could trump fears of economic detriment just as it did in June. The UKG should be nervous that any future independence referendum could be unaffected by the economic argument if the UKG is not perceived to represent the Scottish voice in the Brexit negotiations with the other 27 EU member states.

As for Nicola Sturgeon and the SNP, calling a second independence referendum is the gamble. On October 13, she indeed confirmed that a new draft independence bill would be published for consultation. Currently, there are two unknowns for the First Minister. The first is comprehending exactly what post-EU membership status the UKG will seek to attain as part of the Brexit negotiations; not to mention the final negotiated settlement. In this regard, and after a meeting of the Joint Ministerial Committee on October 24, the SG remain 'frustrated' and feel they do not have 'any greater insight into the thinking of the UK government' (BBC News Website 2016e). The second big unknown for the First Minister is to what extent Brexit negotiations move the needle in terms of YES voters for independence. The First Minister has no desire to have another referendum on independence unless she is very confident that the SNP would win. Currently, the polls suggest this would not be the case. If you add the potential of a hard border between England and Scotland into the debate, a preference for the UK over the EU is highly likely.

ENDNOTES

[1] In preparation for writing this article, a series of interviews were conducted between August and September 2016. These interviews involved discussions with a small set of sources in or connected to the Scottish Government as well as academics.

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Commentary

Brexit and the Problem of European Disintegration

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Abstract

The Brexit referendum provokes speculation about the likelihood of European disintegration. This article discusses how scholarship might deal with the issue of disintegration and argues that it should be thought of as an indeterminate process rather than an identifiable outcome. Within the EU system, Brexit is likely to unleash disintegrative dynamics, which could see the EU stagnate into a suboptimal institutional equilibrium. At the same time, EU studies needs to lift its gaze beyond the internal dynamics of the EU system to consider the disintegration of the democratic capitalist compact within which European integration has been embedded historically.

This article uses Brexit as a platform for thinking through some key issues associated with what might be called 'European disintegration'. The result of the referendum in the UK held on 23 June 2016 certainly poses many more questions than it answers, but at the very least it raises the very real prospect of a member state leaving the European Union. This has never happened before. What Brexit might mean for both the UK and the EU has very quickly become *the* defining question of contemporary European politics. At the same time, scholars working on the EU have been accused of being very poorly prepared to grasp analytically the mechanics of disintegration that Brexit has unleashed (or of which it is a symptom). As Jan Zielonka puts it: '[t]he problem is that EU experts have written a lot about the rise of the EU, but virtually nothing about its possible downfall' (Zielonka 2014: 22).

The argument here is that we should not be too harsh on EU studies for failing to develop a theory of disintegration. Indeed, within the field there is plenty of work capable of positing with relative ease the conditions under which integration could be put into reverse, while simultaneously theorising institutional brakes to full-scale disintegration. In terms of the political science of the EU, this is probably a reasonable place to be: that is (a) cognisance that Brexit might be, along with other internal crises playing out more or less simultaneously (the Euro crisis, the refugee crisis), the harbinger of deep existential troubles for the project of European unification; balanced with (b) recognition that there are strong sources of institutional resistance to the full-scale collapse of the EU. At the same time, there is a risk that interpretations of Brexit and its consequences become too fixated on intra-EU dynamics (both in terms of causes and effects). Shifting attention to the broader political economy context gives us a powerful frame for reading Brexit in terms of a set of key conjunctural dynamics associated with a broader crisis of democratic capitalism.

DISINTEGRATION AND EU STUDIES

So why is there no theory of disintegration? And should there be? The answer to the first question lies in part in the motivations that brought scholars to the European case of regional institution-building in the 1950s and 1960s: they were drawn into the field by the puzzle of how 'political unification' takes place. As Ernst Haas explained: '[t]he units and actions studied provide a living laboratory for observing the peaceful creation of possible new types of human communities at a very high level of organization and of the processes which may lead to such conditions' (Haas 1971: 4). Haas's point was that there were sound analytical (as well as strong normative) reasons for exploring processes of post-national community *formation*. These reasons were deeply anchored in antecedent and contemporary literatures (see, for example, Deutsch et al. 1957; Jacob and Toscano

1964; Etzioni 1965; de Vree 1972) and were not purely associated with a narrow interest in the spillover dynamics that may (or may not) have been shaping the nascent European Communities of the time. The associations between European integration and the historical sociology of nation/state/community formation has re-emerged more recently as a topic in EU studies (see especially Bartolini 2005), even if the field continues to narrate (somewhat misleadingly) its past story almost exclusively in terms of a great debate about the dynamics of integration between neofunctionalists and intergovernmentalists (Rosamond 2016).

Another reason for the absence of a literature on disintegration is what might be called the institutionalist bias of mainstream integration theory. In their separate ways, both neofunctionalism and (liberal) intergovernmentalism imagine the EU as institutionally resilient. For the former, integration is made possible by a series of prior background conditions and is driven by a mixture of functional integrative pressures and the reorientation of producer group activities to the new supranational institutional centre. Equally, supranational institutions are depicted in neofunctionalist thought as purposefully committed to the inherently expansive logic of integration – a process they actively sponsor. The much discussed concept of 'spillover' was developed in a way that – not inaccurately – foresaw deeper integration as a solution to apparently intractable difficulties in securing existing integrative aims (Lindberg 1963). By the early 1970s, neofunctionalists had begun to think seriously about how spillover logics might be reversed (see especially Schmitter 1971).

Intergovernmentalists argue that divergent preferences can stall integrative momentum, but bargaining takes place in an institutional context that is configured for the delivery of absolute gains across participating member states (Moravcsik 1998). Even Hoffmann's version of intergovernmentalism, first articulated when the EU was going through its first great crisis (Hoffmann 1966, 1982) and well before Moravcsik's later liberal institutionalist elaboration, posited that integration would stall because governments would not concede to the encroachment of integration into areas of 'high politics'. The suggestion was that integration would have limits rather than that it would unravel. Along similar lines, principal-agent accounts of integration (Pollack 2003) frequently focus on how the delegation of authority from principal (member-state) to agent (supranational institutions) can entail, in the longer run, a loss of the principal's ability to repatriate that decision-making competence.

Finally, historical institutionalists tend to argue for the 'stickiness' of institutional equilibria. Put simply, institutional designs tend to outlive the imperatives that gave rise to them. Institutional survival is the norm in the absence of a 'critical juncture' (an intensive period of fluidity and crisis that brings forth a revised institutional equilibrium). The EU is often taken to be a benchmark case of this path-dependence. Its basic institutional template owed much to the security and policy imperatives of the immediate post-World War II context. Yet this institutional template, while embellished through successive rounds of treaty reform, remains intact to all intents and purposes (Pierson 1996).

If the standard literature on the EU has an antonym for 'integration', then it tends to be 'differentiation', 'differentiated integration' or 'flexible integration' (see Stubb 2002; Warleigh 2002; Leuffen, Rittberger and Schimmelfennig 2012; Adler-Nissen 2014). This describes the actually existing patchwork quality of integration, characterised as it is by multiple national derogations and opt-outs from core treaty goals or common policy areas. It captures, for example, the very particular membership status of both Denmark and the UK (prior to Brexit) – the nuances of which have been well documented (Adler-Nissen 2009; Naurin and Lindahl 2010). Of course, 'differentiation' – as both procedural solution and normative principle – is a key technique to prevent disintegration from

happening. Tendencies toward differentiation can be explained, but such explanations are dealing with a very different dependent variable.

If there is a theoretical school with strong credentials to offer an account of disintegration, then it could be realism/neorealism in International Relations (Waltz 1979). In such accounts, cooperation (including intensive examples such as the EU) is always likely to break down because of the inevitable logic of relative gains. It may be rational for two or more states to cooperate at a given point in time, but even if all states in the arrangement gain from collaboration, those gains are likely to be asymmetric. Given that states take their cues from an assessment of their relative position within an anarchic security structure, those on the losing side of the relative gains game will exit the cooperative arrangement. Clusters of states may hang together when the structuring principles of geopolitics (such as the Cold War) make it rational for them to do so (Mearsheimer 1990) or when they have a clear common adversary (Rosato 2011), but structural change and the removal/dissolution of the enemy should bring about the demise of cooperation. Yet the issue for realists, as one of their number admits, is that theory 'gives a poor account of one of the most important processes of contemporary world politics in a historically volatile region' (Collard-Wexler 2006: 399). Moreover, realists rely heavily on the interplay between geopolitical structures and the security calculus of states to account for changes to patterns of cooperation and conflict. The UK's prospective departure from the EU could, of course, be attributed to widespread perceptions of the onset of unacceptable relative gains. There might be some empirical traction in this approach (notwithstanding some rather substantial issues of operationalisation), but realism's insistence that exit decisions would be driven by *raison d'état* in light of external security calculus does rather make it a hard sell as a theory capable of explaining the nuances of Brexit.

DISINTEGRATION AS PROCESS

As Hans Vollard (2014: 1123) points out: 'history is full of currency areas, federations, empires and states that disintegrated'. As such, it should be possible to fashion a set of testable propositions about the dynamics and logics of integration without falling into the trap of EU-centrism. At the same time, like 'integration' before it, 'disintegration' suffers from a 'dependent variable problem' (Haas 1971). Put another way, 'disintegration' can be seen as either a definable *outcome* or as a *process* leading to an unspecified outcome. In the case of the former, this would presumably entail the de jure and/or de facto end of the EU as a meaningful entity, the reversion of European international politics to a pre-integration state and perhaps the replacement of the EU with some alternative ordering principle (that may or may not be institutionalised) for pan-European politics.

It is certainly interesting to speculate on what a fully disintegrated Europe might look like and there is obvious analytical value in working with ideal typical future scenarios, not only as a means of prediction but also as a way of shedding light on dynamics in the present. Such work has been done with great effect on future integrative scenarios (see Morgan 2007) and there is no reason why similar reasoning could not be applied to scenarios for European disintegration. This is where thinking about the EU in terms of the rise and decline of pluri-territorial imperial orders might have some traction (Gravier 2009, 2011; Marks 2012; Zielonka 2007). The downside is that the fall of specific 'empires' is best undertaken with the benefit of historical hindsight. Plus, any attempt to insert the EU experience as another data point in a theory of imperial decline runs the risk of assuming that sampling from the past *must* help us to understand present and future trends (Blyth 2006). There is also the risk that EU scholars will come to be cast as latter day versions of the generation of Sovietologists who were taken by surprise when the USSR collapsed rapidly in the early 1990s (Cox 1998). This would be unfair.

If there is a key insight of relevance from the *acquis* of EU studies, then it would be this: even if Brexit has contributed to the release of disintegrative dynamics within the EU system, there are strong reasons to expect that these will be intercepted, shaped and modified within the complex multi-level institutional architecture of the EU. In short, the best guess must be that Brexit-induced disintegration will be messy, drawn out and unpredictable. In the wake of the referendum, commentators have rightly pointed to the unknowability of how Brexit will play out in the UK context. Aside from deep questions about the economy and the sustainability of post-Brexit growth models (Wren-Lewis 2016), the legal (Armstrong 2016) and territorial (Barnett 2016) implications of the referendum result are taking British politics into uncharted territory, where deep uncertainty is the norm and where 'wicked problems' define the political context for years to come. The UK is obviously the most important site for the politics of Brexit. But, of course, the implications of Brexit for the EU will be subject to the complex interplay between what happens in the UK and the multi-level, multi-institutional game across the EU. The upshot may be that the UK does not leave the EU at all (Moravcsik 2016) or that ingenious solutions to particular aspects of the UK's dilemmas will be engineered (Gad 2016). Alternatively, we might speculate, following a remark made by Philippe Schmitter 45 years ago, that integration could stall and settle into a prolonged period of 'low risk entropy' (Schmitter 1971: 257).

In other words, it is more politically urgent and analytically plausible to think about disintegration as an indeterminate process and thus how disintegrative forces and dynamics might transform significantly the EU institutional equilibrium, whilst simultaneously being constrained and shaped by it. One of the most likely outcomes of the Brexit vote is a further contagion of 'Eurosceptic dissatisfaction' (Vollaard 2014) as actors elsewhere in the EU draw inspiration from the Brexit experience and seek to replicate it in their national contexts. EU studies as a field is already well-equipped to make sense of these internal process of politicisation, contestation and cleavage formation around the emergence of anti-EU sentiment (Hooghe and Marks 2008), especially within the work of scholars who claim an affinity to 'classical' integration theory (Niemann 2006).

EUROPEAN DISINTEGRATION IN CONTEXT

The argument posed so far is that any attempt to think about the disintegrative effects of Brexit should be couched in terms of disintegration as an open-ended process rather than as a pre-defined outcome. If Brexit does inspire similar challenges to EU membership in other member states and has the effect of planting intractable problems into the EU system, then the worst case for European integration is most likely an institutional equilibrium of diminishing returns.

It is tempting to think of Brexit as the kind of critical juncture that historical institutionalists regard as likely to induce radical institutional change. Perhaps, but the suggestion here, by way of conclusion, is to suggest that the EU's crises (of which Brexit may be the most acute) should be understood within a much broader set of transformations, themselves disintegrative in character, that challenge the democratic capitalist compact which gave rise to the EU and within which it has been embedded (see Rosamond 2017 for a more detailed argument).

In his recent work, Wolfgang Streeck (2014) uses the experience of recent crises to show that the respective allocative logics of the market and representative democracy are not natural bedfellows. Indeed, historically these logics pull in very different directions, meaning that governments are forced to engineer some kind of compromise between them – usually by subordinating one principle to the other. The three decades after World War II were remarkable for being able to deliver a democratic capitalist compact, particularly in Western Europe where varieties of the Keynesian welfare state allowed degrees of domestic policy autonomy within a managed modest expansion of

economic openness. The latter part was accomplished in part by and through European integration. This democratic capitalist compact was always fragile and was arguably dependent on the unusually high growth rates enjoyed by the rich democracies during the post-war boom.

As the logics of capitalism and democracy de-coupled in light of a variety of factors – low growth rates, globalisation, post-industrial transition, increasing fiscal burdens on the state, the rise of market liberal ideas, the decline of political parties, growing inequality and so on – so supranational integration came to be posited as a viable institutional solution to these emerging collective problems (Jacoby and Meunier 2010). In the context of the global financial crisis and the subsequent sovereign debt crisis in Europe, the EU (particularly through the operating logic of the Eurozone) came to be widely seen less as a solution and much more as part of the problem. Contestation of the EU within the EU was amplified by the prior breakdown of the so-called 'permissive consensus' on integration (Hooghe and Marks 2008), which had been an essential if underappreciated component of the post-war democratic capitalist compact.

The point to make here is that, as has always been the case – but especially now, the EU should not be studied in isolation from the broader dynamics of political economy within which it is situated. The risk of begging for a theory of 'European disintegration' to help us make sense of what Brexit might do to the EU is that we end up treating the EU as a self-contained system. Those internal systemic properties are important to understand, but if we are looking for potent disintegrative forces, then perhaps we are more likely to find them shaping the broader context of the stalled and possibly declining project of European unification.

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Commentary

Strategic Silences in the Brexit Debate: Gender, Marginality and Governance

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Abstract

This article explores some of the medium term implications of the EU Referendum on the position and future of women's rights in the UK. Using process tracing, the article explores the complex relationship between EU and UK legislation in the area of maternity rights. Specifically, it argues that considering the UK government's opposition to the original Pregnant Worker Directive (1992) and later to the abandoned Amendment Directive, we can expect these regulations to become watered down. The economic and political environment that shaped the EU Referendum campaigns will frame the UK's negotiations to leave the EU in favour of de-regulation. The UK's withdrawal from European institutions increases the vulnerability of marginal groups and interests as layers of representation are taken away. Moreover, the invisibility of gender issues and the largely strategic deployment of women in the actual campaigns is likely to compound the impact of the well-established position of the UK on equality matters, as highlighted by negotiations on the pregnant worker directives.

If the contentious lead-up to the EU Referendum in the UK has revealed anything, it is the degree of misinformation regarding the relationship between European and national legislation and decision-making processes. 'Brussels' has long been used to shift blame for unpopular decisions, e.g. austerity, from the national sphere to the European level (Schäfer 2004). This is particularly important in relation to widespread perceptions about Europe's imposition of red tape and 'unnecessary' regulations on British employers (Heath 2016). As women's employment rights fall in this category, it is imperative to take stock of the impact of this highly charged campaign on social cohesion, both in the UK and Europe more widely. One of the main omissions in current discussions about post-Brexit Britain is the impact of the UK withdrawal from the EU on the position of women's rights as a policy agenda. When thinking about silences there is no better lens than gender to provide a detailed analysis of the long-term impact of European disintegration on less powerful demographic groups.

Discussions around the Referendum, and now the UK's exit from the EU, highlight the marginality of equality as a political issue. Considering the historical role played by European legislation in promoting gender equality in the member states, it is more than a little surprising that the 'Remain' campaign did not actively adopt this discourse, so widely deployed by European institutions themselves, as a hook for a wider discussion about social Europe, social justice and fundamental rights.

This article will present the case for a feminist analysis of Brexit, calling for both policy makers and organised civil society to ensure that equality is not pushed off the agenda, for its absence provides an opening for economic and political actors seeking to re-negotiate the scope of equal rights policies in the UK (Elgot and Walker 2016). The EU Referendum has thrown both British and European politics into a whole new level of crisis. As Walby explains in relation to the 2008 financial crisis, 'a crisis is a moment when there is the possibility of large-scale change consequent upon a small event in a narrow window of time. The lack of proportionality between cause and consequences is inherent to the definition of crisis' (Walby 2015: 34). What we have learnt from the 2008 financial crisis is that policy measures enacted to deal with 'crisis' often have unintended gender consequences. The asymmetrical impact of the financial crisis on women is blind to women's sustained contribution to the formal and informal economy. Couple this with ideologically loaded prescriptions, the discourse of 'crisis' legitimises the implementation of exceptional measures that

are disproportionate in relation to the impact they have on social cohesion and vulnerable groups (Guerrina 2015; European Women's Lobby 2012).

THE IMPORTANCE OF CONTEXT: EUROPEANISATION OF GENDER EQUALITY POLICES

The role of the EU as a gender actor is largely undisputed. From a very humble beginning with the inclusion of Article 119 setting out the principle of equal pay for men and women in the Treaty of Rome, equality policies are now one of the most widely developed areas of European social policy (Kantola 2010; Abels and Mushaben 2014; Woodward and van der Vleuten 2014). This is an interesting story about the way equality norms were originally instrumentalised for pursuit of higher economic priorities, but were then adopted by feminist activists within the institutions (femocrats) and civil society organisations in order to advance the position of working women across Europe. European legislation has therefore provided the overarching framework for the development of women's employment rights across Europe since 1957 (Hoskyns 1996; Kantola 2010; Lombardo and Forest 2012).

The focus of these developments revolves largely around women's relationship to the market, either in the context of employment rights or in terms of access to services. Beyond the opportunities and constraints of the European gender *acquis*, this analysis is important insofar as it provides useful insights into patterns of influence. The literature on Europeanisation, when applied to the analysis of gender equality policies, highlights the impact of national gender regimes on the member states' negotiating positions at the European level. Whereas supranational institutions have acted to expand the reach of the gender *acquis*, member states often act as a break arguing that an enhanced legislative/regulatory framework inhibits employers' freedom. In so doing, member states have sought to limit the scope of EU equality policies (MacRae 2010). This is especially the case for the UK that has long favoured negative integration and deregulation over establishing a comprehensive regulatory system for promoting equality at the European level (Masselot, Caracciolo di Torrella and Burri 2012). Although this cannot serve as a predictor of the future policy behaviour of member states, it highlights the importance of European legislation and opportunities for judicial recourse, to provide a safety net for traditionally marginal groups, e.g. women, that struggle to influence policy at the national level.

The European gender *acquis* is highly commodified, as it revolves largely around women's relationship with the employment market. Actors operating both within the Commission and the Parliament have consistently worked to ensure that gender is part of the policy agenda, thus expanding the reach of key policies and principles. Working together with the European Women's Lobby, European institutions have provided enhanced opportunities for feminist advocacy (Helfferich and Kolb 2001). From a humble beginning in the Treaty of Rome, the European Equality Agenda now includes a range of legally binding provisions and soft policy measures aimed at encouraging sharing of best practice. But perhaps above all, the development of the gender *acquis* is a tale about the competition between national and European interests. Whereas European institutions have pushed to expand the scope of women's rights, member states, especially the UK, value competitiveness above social justice and cohesion (Eurofund 2015).

The outcome of the UK Referendum on EU membership is thus a critical juncture. Feminist institutionalists have long argued about the importance of understanding the impact of critical junctures on promoting, or conversely impairing, the development of women's rights (Waylen 2009). As such, it is imperative that we develop a detailed, and gender sensitive, assessment of the impact of Brexit on women's position in the UK as workers and as citizens.

MATERNITY RIGHTS – A TALE OF CONTRADICTIONS AND EU POLICY ENTREPRENEURESHIP

The development of maternity rights at the European level is a useful example of competition between the Commission and member states discussed previously. In order to understand this complex relationship, it is necessary to unpack the negotiations that led to the ratification of the 1992 Pregnant Worker Directive 92/85/EEC (Council of the European Union 1992) and the now defunct proposal for an Amendment Pregnant Worker Directive (European Commission 2008). The 1992 Pregnant Worker Directive is one of the EU provisions that had a marked impact on the development of UK legislation in matters of maternity rights. When looking at the expansion of national provisions in the 1990s and 2000s, it is clear the Pregnant Worker Directive was a catalyst for these developments (Guerrina 2005; Masselot, Caracciolo di Torrella and Burri 2012).

Member states', and specifically the UK's, 'troubled' relationship with European equality legislation is highlighted by the government's position during the negotiations of the Pregnant Worker Directive and the now shelved 2008 Proposal for an Amendment Directive. The negotiations that surrounded both policy proposals highlight the tension between establishing a minimum threshold of rights for working mothers, and the 'national' interest, as defined by the governments of the time (Guerrina 2005; Eurofund 2015; PA 2011).

The way the Directive came into being, however, is illustrative of both the role of the EU as a gender actor and the way substantive equality is often relegated to an issue of second order importance when in conflict with 'national', perhaps more specifically business, interests. The negotiations surrounding the introduction of this Directive highlights both the role of the European Commission as policy entrepreneur in order to advance a key policy agenda and the member states' pushback against the expansion of an area of employment legislation that needs to be highly regulated in order to achieve its stated objectives (Guerrina 2005; Mazey 2012: 134-5).

The European Commission originally intended to put forward a very ambitious proposal, however, in order to forestall opposition in the Council, the Commission revised and watered down the proposal. The UK was particularly vocal in its opposition to these provisions, as they were seen as too costly on employers. Although originally conceived to be under the auspices of Article 119 (Equality), the Directive was ultimately ratified under Article 118a (Health and Safety). The reason for switching Treaty foundation was to bypass the requirement for unanimity in the Council; unlike equality, health and safety provisions were decided by Qualified Majority Voting. The UK government's opposition to the directive was one of the main reasons for changing the focus and watering down the scope of the provision. The work of the Commission and the European Parliament (EP) in trying to ensure a minimum standard of protection for pregnant workers and workers who have recently given birth, is an excellent example of how the equality *acquis*, albeit important, really only provides a mere safety-net (Bego 2015; van der Vlueten 2007; Guerrina 2005).

Over a decade after the implementation of this Directive, the Commission proposed to re-open the question in an attempt to improve working standards for pregnant workers across Europe. The history of this second iteration of the Directive is possibly even more complex and demonstrates even more clearly the impact of enduring tensions between the way member states pursue national interest at the European level and the role of supranational institutions as advocates for women's rights.

The Parliament adopted its position at the first reading stage, and expanded the proposal of the Commission in several areas; two will be discussed here. First, MEPs proposed that workers be entitled to a continuous period of maternity leave of at least 20 weeks allocated before and/or after confinement, extending the Commission's proposal of 18 weeks and the 14 weeks set out in the 1992 Directive. Additionally, they proposed that maternity leave shall include a compulsory period of

six weeks after birth on full pay, without infringing upon existing national laws which provide for a period of compulsory maternity leave before childbirth. The six-weeks period of compulsory maternity leave was to apply to all working women, regardless of the number of days worked prior to their pregnancy (European Parliament 2010).

These two issues soon became the battleground for discussions between representatives of these two institutions in the Conciliation Committee. The EP and Council clashed over which set of interests should have priority. In this instance the EP sought to prioritise workers' rights against a narrow framing of national interest put forward by member states. Between the tabling of the Commission proposal in 2008 and the final shelving of the proposal in 2015, the Parliament and Council were not able to arrive at a compromise position. Representatives of the member states voiced concern over prospective financial costs and considered the proposal to place undue economic burdens on national economies. In addition, some states argued that their existing policies functioned better than the amended proposal of the Parliament. For example, the UK released a series of impact assessments stating these two issues quite clearly (HM Government 2012; HM Government 2012a, 2012b, 2012c). The Commission issued an ultimatum: it would withdraw the proposal if the EP and the Council remained deadlocked (European Commission 2014). The disagreement between the Parliament and Council was polarising and led to the stalemate that ultimately led to the formal withdrawal of the Directive on 1 July 2015. The Council's entrenched position on this issue brings into question how the very principle of national interest is constructed and which groups, and interests, are represented by the member states.

The analysis presented here is a clear example of the complex network of interests at play in the European policy-making process. Trying to balance the common interest with those of member states can lead to stagnation and the watering down of legislative measures. The 1992 Pregnant Worker Directive and the (now shelved) proposal for an Amended Pregnant Worker Directive provide important insights into the nature of the relationship between European institutions and national governments, or, to put it more explicitly, the juxtaposition of the common good and national interests. It is also clear that there is ample opportunity for member states and the EP to contribute to this process. This balancing act, however, makes the process much longer and less effective.

Exiting from the European Union will have a negative impact on British women's representation in two ways. First, they will lose access to transnational networks of organised civil society, femocrats and representatives operating in the EP to promote and safeguard women's interests and ensure member states are accountable to less powerful groups in society. Second, they will lose representation in the EP itself, as UK citizens will no longer be able to vote for MEPs to represent their interests at the European level.

CONCLUSIONS

In a post-Referendum Britain, the track-record of different UK governments in negotiating the gender *acquis* becomes all the more important. The EU has, in many ways, been a progressive force in the area of gender and equality for men and women, despite the challenge from its member states in the Council. European institutions have provided an additional layer of representation for groups (e.g. women) and interests that are largely marginal at the national level. Support for this agenda was partly the result of critical actors operating within the institutions (e.g. femocrats) and partly the result of self-interest as the institutions themselves sought to expand their own power and reach. The result, however, was a number of policy developments that have benefited women in Europe.

Many of the debates during and, especially after, the EU referendum have concentrated on issues of 'high politics'. The issue of equality was relegated to a footnote at the end of the campaign when both camps sought to capture women's votes. The assumption at the end of the campaign when women became more visible was that symbolically presenting women in the debates might help to engage this part of the electorate. Ultimately, an analysis of the impact of the UK's referendum on gender issues extends beyond women's equality policies. For instance, little or no consideration has been given to the impact of 'mainstream' policies on gender issues. There is clear evidence that traditionally 'gender-neutral' policies, such as economic and monetary policy as well as security and defence, have unintended gender consequences. (Allwood, Guerrina and MacRae 2013) The invisibility of gender in the discussion is all the more remarkable, considering the impact of austerity and the 2008 crisis on equality in the UK (Annesley & Scheele 2012).

The real question for UK policymakers now is how to ensure that this same body of law is not watered down, to the point that the European safety-net is removed. The Leave campaign's slogan, 'take back control', is not just about Westminster's ability to re-assert its authority over legislative matters, controls on people movement and the UK's territorial boundaries. Couple this trend with the loss of citizens' representation at the European level as the UK will withdraw from the Commission and the EP, it is easy to see how much more vulnerable the interests of marginal groups are going to be to the ideological preferences of the government of the day. In this context, the European regulatory framework on workers' rights becomes synonymous with red tape and an increased burden for business.

Andrea Leadsom's position on maternity rights and pay in 2012 is an example of the level of debate and potential impact of Brexit on the gender equality framework in the UK. 'Taking back control' therefore becomes less about parliamentary sovereignty and more about privileging certain sets of interests in the policy-making process. Consciously or unconsciously, this is a rejection of the EU's inclusion of traditionally marginal groups that has resulted in a more enabling environment for particular policy agendas, including women's rights.

The inclusion of a detailed analysis of gender equality policies and the role of the EU in the development of UK provisions could have helped to develop a more nuanced understanding of the relationship between national and European governance from the standpoint of 'traditionally marginal groups': an understanding that pooling of sovereignty in key areas of social policy, such as gender equality policies, allowed for the emergence of a wider set of initiatives that helped to promote the interest of marginal groups in the national context. An historical overview of the development of the gender *acquis* indicates that femocrats have more opportunities for manoeuvre within a European context than a national one. The emergence of a feminist constellation within European institutions provides institutional actors and civil society organisations a platform for more effective lobbying on issues relating to gender and equality (Woodward 2003).

The long-term impact of the EU referendum campaign and likely Brexit negotiations will be to side-line social policy and equality issues and thus marginalise the interests of women as a core constituency. The emerging crisis will further legitimise the contraction of support structures and activation policies directly aimed at increasing women's engagement with the public sphere and the labour market. We can therefore expect this new 'crisis' to compound the impact of austerity and in so doing to reproduce dominant gender ideologies. The silencing of women and gender, so pervasive during and after the Referendum, ultimately highlights how women, and equality, remain, in the mainstream political imagination, the object of policy rather than subjects of change.

The real question for policymakers in a post-Brexit environment is how to deal with the issue of intersectionality. This article explored the impact of European disintegration on one demographic group, women, whose interests are often relegated to the bottom of the policy agenda. It has

demonstrated the role of supranational organisations in providing organised transnational civil society with a platform for advancing the interests of groups that are silenced and marginalised at the national level. The Commission's entrepreneurial skills and the institutional structure of the EU allowed critical actors operating at the supranational level to circumnavigate the ideological tensions within and between governments. In so doing, they were able to ensure the rights of women in Europe were protected, at least in terms of formal discrimination. It remains to be seen if Westminster, as a site of power and legislative authority will be able to fill this gap. The complexity of disentangling the British legal framework from the EU is likely to crystallise the high-low politics binary at the expense of social inclusion and marginal interests. This is not only damaging for women's rights, but it is a significant step back in the development of a more inclusive policy framework focused on promoting the value and benefits of diversity to society and the economy at large.

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Research Article

In the Shadow of Consensus: Communication within Council Working Groups

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Abstract

There are two competing perceptions of the EU Council and its working groups. The first of them argues that the Council works as a battleground for expressing the interests of Member States and other participating actors. A competing view emphasizes the effects of socialization and informal norm shaping behaviour of the actors involved. It thus considers the Council as a forum where consensus prevails. This article analyses how different actors acting in the Council working groups communicate in a formal way. Based upon analysis of non-participatory observation of interventions, it finds that working groups tend to be arenas for real bargaining where the actors enforce their interests. It also finds that even the Council Presidency focuses on interests' promotion and that socialization – which can be found at the COREPER level – does not take place in the working groups.

Keywords

EU Council, Working Group, Presidency, EU Member States

INTRODUCTION

In light of the fact that the Council of the EU is one of the most important EU institutions, it is striking that working groups have been quite neglected as a topic of interest in European Studies. This gap concerns not only the total number of studies and articles primarily devoted to these internal Council bodies, but also the methods and approaches employed in the studies. It is true that the total number of articles, books or chapters has increased substantially in recent years. Existing studies focus primarily on the role played by working groups in the Council political process (Olsen 2011; Häge 2008, 2013), but little is known about the internal life of the Council's working groups. The existing research places particular reliance on data gathered from insiders in the form of interviews (Naurin 2007, 2015) or questionnaires (Naurin 2010). There is, however, no study which attempts to describe working groups using data independent of the actors' own assessments.

This study attempts to fill this gap by analysing interventions within the working groups operating mainly in the area of the internal market. Based upon data gathered during non-participatory observations of more than 20 meetings, the paper aims to uncover whether working groups should be viewed as a battleground for national interests or rather as a forum of consensus where common interests prevail. In doing so, the study focuses on three different factors: the role of key players, the characteristics of these actors, and their affiliations. Moreover, the paper analyses how different players contribute to the overall atmosphere of the working groups.

The main findings of the analysis may be summarized as follows: First, working groups tend to be more competitive than consensus-oriented. Second, actors differ significantly in their behaviour. Member states are the most cooperative actor followed by the European Commission while the Presidency focuses on promoting its own interests. Third, actor affiliation does not play a role, as Brussels-based delegates does not tend to adopt a more cooperative stance than do delegates from the capitals. Also the length of the EU membership does influence actors´ behaviour.

The article proceeds as follows: the first section introduces the position of the Council working groups and their role in the Council's decision-making system. The second part provides an overview

on existing research, followed by theoretical framework and hypotheses. The third section is devoted to a description of the data used, as well as the process of gathering data. It also offers an explanation of the methods used in the analysis. Then the paper focuses on the analysis and results in the context of possible further research.

THE WORLD OF COUNCIL: MINISTERS, COREPER AND WORKING GROUPS

The Council itself consists of three basic levels: working groups, preparatory bodies such as the Committee of Permanent Representatives (COREPER) and the ministerial level. While the ministerial level is ordinarily treated separately from the technical and semi-political dimensions, current research sometimes treats working groups and preparatory bodies as a single entity or similar entities[1]. In this analysis, however, I take into account only the working groups, leaving out consideration of bodies such as COREPER, the Antici Group or the Mertens Group. Also omitted are ad hoc and consultative committees.

Working groups represent the most basic element of the Council's work. Different authors give different estimates of their numbers – usually, there are between 170 – 200 working groups[2]. Fouilleux et al. (2007: 98) maintain that working groups should be embedded in the institutional structure of the Council, consist of attachés from the Member States' permanent representation and national experts, deal with several pieces of legislation at a time, exist for a number of years and prepare COREPER and ministerial level meetings[3]. The function of a working group may be described as that of a body which enables the negotiation of Member States' positions. Nevertheless, the Member States are not the only parties involved. Important roles are assigned to the Presidency, to the Commission, and to the Council Secretariat. Legislative work consists of the deliberating proposals for the EU legislature, non-legislative activities include preparing Council conclusions. Essentially, each working group is assigned with preparing a particular file for the Council decision. This means the working party should reach a consensus on the text which will enable its adoption at the COREPER level and subsequently its formal approval by the ministers at the Council level.

Although working groups vary in many respects (see Fouilleux et al. 2007), their usual activity may be characterized in terms of several shared features. Each group is composed of one or more representatives from each Member State, members of the Council General Secretariat, members of the Commission staff and the chair. The group is tasked with going through the legislative or non-legislative documents in order to find a compromise which maximally suits the parties involved. This is usually done article by article. While Member States and the Commission primarily express their interests, the Presidency is supposed to listen and try to find a compromise solution. The Council Secretariat is present specifically in order to explain legal difficulties and possibilities. However, the Council Secretariat may go beyond its traditional technocratic role and play an important political role (Beach 2007). Different types of delegates attend. Member States are represented by the staff of their permanent representations in Brussels. These attachés cover one or more working groups simultaneously. They may be accompanied by national experts from the capitals. Sometimes a meeting may be attended only by the expert or only by the attaché. The Commission is represented by the head of the unit responsible for particular legislation, along with one or two other officials. The team from the Presidency consists of the chair and one or two assisting persons.

This article examines formal oral communication within the working groups. As communication are understood oral formal expressions that are presented during meetings by those who attend them – so called interventions. Interventions, generally speaking, represent the most direct route by which a working group´s actor can influence its business. In intervening, Member States are theoretically restricted by the Council's Rules of Procedure, which say that Member States should not intervene unless they are proposing a change to the item under discussion (Council Decision 2009/937/EU,

annex 5). In practice, however, the content of interventions does not always follow this rule. Participants are allowed to speak about whatever they wish. Interventions are not the only manner by which a particular issue can be influenced or communicated. Actors may, for example, also send written comments and may negotiate bilaterally or multilaterally on a purely informal basis[4]. Such forms of communication are however omitted as data for their research can be hardly approached.

LITERATURE REVIEW

Little previous research has been directed at Council working groups. This may be seen as surprising, since research into the overall role of committees in the EU decision-making process is quite broad and well-developed (see Pedler and Schafer 1996; Christiansen and Larsson 2007; Blom-Hansen 2011; Héritier et al. 2013). All these committees exercise varied roles within the EU, since they are part of institutions emphasizing different interests. Thus it is very difficult to treat committees as a compact entity, even though such approaches exist (Quaglia et al. 2008).

Council working groups are seen from two broad perspectives. The rationalist perspective considers them as formally important, because they serve as communication channels for expressing national interests. Members of working groups are bound by national instructions based upon preferences formulated in their home capitals. These preferences reflect the interests of economic, social and political actors from each member state and the outcome of bargaining that may need to take place at this level in order to establish a single national stance to be maintained in European-level negotiations (Beyers and Dierickx 1998; Moravcsik 1998). By contrast, for the neo-institutionalists, working groups play a more active role. They are seen as arenas within which preferences are bargained for and where the very rules governing such negotiations are defined. In short, the members of Council working groups go beyond the function of merely negotiating among pre-existing interests. Instead they contribute to redefining European public issues, the rules and norms that structure negotiation and sometimes even the very identities of the actors involved (Lewis 1998; Lewis 2005; Aus 2008).

Existing research may be divided into three basic groups. The first consists of work focusing on the role of working groups in the decision-making process, as well as their influence and capacity. Common wisdom indicates that working groups prepare and decide the majority of Council outcomes (Hayes-Renshaw and Wallace 1997; van Schendelen 1996). Most of these conclusions have been based either upon pure estimation or upon information which comes from insiders. Current research repeatedly challenges such figures. Häge (2008) found that working groups were responsible for less than 40 per cent of decisions, Olsen (2011: 159) notes that an even smaller amount of decisions, only 33 per cent, are made by working groups.

The second line of research targets the issue of communication. Two works of Beyers and Dierickx (1997, 1998) may be seen as pioneering in creating systematic in-depth analyses. The first piece aimed at exploring links between communication involving national delegates and several discretionary factors, revealing that discretion matters (Beyers and Dierickx 1997). The second study analysed the form of communication which takes place within working groups. It showed that informal communication is intense in working groups populated by Brussels-based attendants. Surprisingly, this communication is led by non-state actors. The more influential actors were revealed to be those coming from large member states, and communication patterns followed a North-South division (Beyers and Dierickx 1998). The presence of this conflict line was later confirmed by Naurin (2007).

The third branch of research consists of studies looking into the loyalty of delegates. Especially for research using data gathered at the COREPER level, the findings suggest that delegates acting in

these groups have shared loyalties, both to the group and to their respective states (see Egeberg 1999; Beyers, 2005). This is supported by several studies conducted by Lewis (1998, 2003, 2005) which state that members of COREPER develop process and relationship interests, as well as a sense of collective responsibility. Lewis claims that COREPER is driven not only by the logic of consequences, but also by the logic of appropriateness (Lewis 2005: 942). Trondal and Veggeland (2003) confirm the shared loyalty thesis even with the delegates of Member States' in European Commission committees. Moving to the level of working groups, Naurin (2010) discovered that there are prevailing patterns of discussion within working groups. Naurin (2010: 50) claims that the main intention behind giving explanations is to try to convince others more often than it is to clarify one's position in order to facilitate a compromise in working groups. In his most recent study, Naurin (2015) challenges the prevailing conceptualization of the Council as an arena where intergovernmental negotiations can be characterized as consensual, claiming that particularly the 'Big 3' (France, Germany and the United Kingdom) are unwilling to make generous concessions.

The prevailing message from existing research seems to be that socialization takes place in lower levels of the Council (particularly at the COREPER level) and actors behave in a manner which is far from being driven only by their self-interests. However, all research relies on data gathered from insiders[5] or on the detailed study of the negotiation of one or more pieces of legislation. This approach is quite understandable, since the Council is not one of the most transparent institutions in the EU. By relying on information from insiders, however, there is a risk that the data may be biased. Firstly, insiders may overestimate their own roles, mix the formal versus informal levels of negotiation, or may simply provide only that information which they find comfortable to discuss. Also problematic is the fact that insiders are often asked to evaluate not just themselves, but other delegates and their positions as well, or to adopt a general stance resulting in a 'mean stance' for the particular Member State. Moreover, the majority of research dealing with the internal behaviour in preparatory bodies relies upon data from COREPER. However, COREPER is a very specific entity which differs in terms of attendance, substantial knowledge of files received from working groups. It is therefore problematic to merge these two discrepant levels and automatically assume that working groups share the same features as does COREPER. This paper thus contributes to our knowledge of working groups by exploring relevant data acquired directly at the working group level in a manner which is independent of the actors involved.

This study seeks to make a contribution to the research on the communication within working groups. It focuses on two key issues – firstly, it studies what kind of communication – in form of interventions – takes place in working group meetings. Is this communication more cooperative in nature? Or does it rather incline to a pattern in which the fulfilment of one's own interests is paramount? Following existing research on COREPER and other Council preparatory bodies, I expect that communication within working groups tends to be cooperative rather than uncooperative. I am also interested in whether there are differences in building this consensual communication according to the type of actor involved. Secondly, how do various actors influence the internal communication of working group meetings? Do the interventions which construct this communication show significant differences depending upon the types of actors involved?

Motivated by these two main questions, the following four hypotheses are tested in this paper:

H_1: The general pattern of communication within the working groups will be cooperative rather than competitive.

H_2: At the individual level, Brussels-based delegates will be significantly more cooperative in communication than delegates coming in from the capitals or than those in mixed delegations.

H_3: Of the collective actors involved, the Presidency and the Council Secretariat will be significantly more cooperative in communication than delegates representing the Member States and the European Commission.

H_4: The longer a particular collective actor is part of a working group's structure, the more cooperative in communication it tends to be.

Generally speaking, all hypotheses are rooted in the socialization argument. This concept is very broad as it may be applied both to social constructivism as well as to rational choice theory (Quaglia et al. 2008: 157). While for the former it deals particularly with the internationalization of norms, for the later it means especially strategic role play. Such conceptualized socialization means that actors adjust their strategies to the legal, informational, and organizational opportunities and constraints provided by committees and multiple principals, and their behaviour varies accordingly. In both cases – for the social constructivist as well as the rationalist – socialization has an effect on behaviour although the mechanisms differ (Checkel 2005; Trondal 2007).

When developing these expectations into more specific assumptions, it can be argued that the Council is far from being a purely intergovernmental arena which serves for the expression and defence of national interests (Aus 2008) and as such there is a strong preference for mutual cooperation among parties rather than for contestation (H_1). Proceeding to the individual level, the affiliations of delegates make a difference in their behaviour (Fouilleux et al. 2007). Delegates who are permanently deployed in Brussels share a sense of responsibility and thus act in more a cooperative way than their fellows from the capitals. This differentiation is important because Brussels-based diplomats tend to behave and negotiate in different ways than do national experts[6]. Succinctly put, the former are set to adopt a more cooperative style in negotiating than the latter. (H_2).

The socialization argument is also valid from the collective actors´ perspective. There is a broadly accepted assumption that the Council Presidency (H_3) acts as an impartial, neutral actor which gives up the pursuit of its own interests (Tallberg 2006; Tallberg, 2008: 187; Bunse 2008: 39). Such claims are also connected with social constructivism or sociological institutionalism as they deal with the logic of appropriateness. Following this concept, the Presidency is constrained by expectations from other Member States or by shared norms of impartiality. Last but not least, socialization takes into account time as a factor which enables various actors to accept internal norms and rules. One could thus expect that the longer a collective actor takes part in working groups, the more it accepts and follows their internal norms of consensus and cooperation (H_4).

When evaluating the hypotheses, I control for three factors which may also influence actors´ communication behaviour. Firstly, the size of the actor matters. Possession of more resources can affect willingness of such states and institutions to cooperate or act independently (Naurin 2015). Secondly, salience plays a role in actors´ behaviour and their willingness to adopt a compromise on a particular issue. There is evidence that legislative bodies in the EU use their procedural powers more forcefully when facing important issues (Selck 2003). For example, politically salient proposals are more likely to be decided in the first reading stage (Rasmussen 2007). Whether a decision is made at the administrative or the ministerial level in the Council also depends on the political salience of an issue (Häge 2007). Schneider et al. (2010: 92) claims that higher salience leads to a higher willingness to make concessions to reach an agreement at all. Thus one may expect that cooperation in the working groups will be higher when dealing with legislative proposals than when preparing non-legislative documents. Thirdly, the language used when intervening can also importantly influence the degree of cooperation. English is the modern lingua franca in the Council, with a substantial majority of both formal negotiations and informal communications among delegates carried out using it (Egeberg et al. 2003: 27-30; van Els 2005). Also, in formal negotiations delegates rarely use either French or German. If they do not use their mother tongue, they are using English. As Egeberg

et al. claim (2003: 28), in the late 1990s, 90 per cent of non-native English speakers representing their countries in the Council were able to communicate to some extent in English, and more than 80 per cent spoke English well or very well. Therefore, using English may be seen as a factor which supports cooperation in the working group as it saves time and gives a substantial majority of delegates' equal conditions in the negotiation process.

DATA AND METHOD

The data employed in this study comes from the non-participatory observation of more than 20 meetings of various Council working groups dealing with policies related particularly to the Single Market. An overview of meetings is presented in Table 1. Working groups were selected for observation based upon the willingness of relevant attachés to enable non-participatory attendance. The working groups presented in this paper thus do not comprise a comprehensive picture of all working groups across all policy sectors. Nevertheless, this sample offers a unique perspective on the internal life of Council working groups. The observation took place from the beginning of October 2013 to the end of November 2013. Council working groups usually work all-day, with a 90-minute lunch break. Sometimes groups may meet for a half-day only, either in the morning or in the afternoon.

Table 1. Overview of working groups

Day	Working group name	Character	Agenda
9. 10.	G1 – Competitiveness and Growth	Half day	Legislative
10. 10.	I01 – Social Questions	Half day	Legislative
15. 10.	G1 – Competitiveness and Growth	Full day	Non-legislative
17.10.	H5 – Telecommunications and Information Society	Full day	Legislative
18.10.	I01 – Social Questions	Full day	Legislative
22.10.	G1 - Competitiveness and Growth	Half day	Non-legislative
23.10.	G7 – Technical Harmonisation	Full day	Legislative
24.10.	G7 – Technical Harmonisation	Full day	Non-legislative
28.10.	G23 – Consumer Protection and Information	Full day	Legislative
29.10.	G1 – Competitiveness and Growth	Full day	Legislative
31.10.	G12 – Competition	Full day	Legislative
5. 11.	H5 – Telecommunications and Information Society	Full day	Legislative
6. 11.	G1 – Competitiveness and Growth (High level group)	Full day	Non-legislative
7. 11.	G1 - Competitiveness and Growth	Full day	Non-legislative
11. 11.	G1 - Competitiveness and Growth	Full day	Legislative
12.11	H5 – Telecommunications and Information Society	Full day	Legislative
18.11.	G1 - Competitiveness and Growth	Full day	Legislative
19.11.	H5 – Telecommunications and Information Society	Full day	Legislative
21.11.	H5 – Telecommunications and Information Society	Half day	Non-legislative Legislative
25.11.	A16 – Friends of the Presidency Group (Integrated Maritime Policy)	Full day	Legislative
26.11.	H03 - Aviation Working Party	Full day	Legislative

Data gathering was carried out in two phases. The first consisted of two weeks of observation of the working groups[7] to identify which kinds of interventions are present and how they might be defined. Then a coding scheme describing all variables was constructed. There were five basic variables that were followed during the subsequent observation process - the actor, intervention, language used, type of delegate and the character of the agenda.

The first variable, 'actor', consists of four values which are used to identify each type of actor who attended in order to express their views during the working group meetings. The first of these is the Presidency; the second actor type is the Member State; the third is the European Commission; and the fourth is the Council Secretariat. The second variable captures the content of interventions expressed by the various actors during the meetings. Each type of rhetorical act was defined in terms of its content and assigned coding values. This variable contains six values; these are described in Table 2.

Table 2. Coding of interventions

Label	Description
Position	The actor explicitly communicates only her/his own substantial position/opinion/request without referring to the other parties.
Procedure	The speaker's intervention concerns a procedural, insubstantial matter.
Support	The intervention communicates support for another party's position without explicitly expressing the actor's own position.
Position and procedure	The actor's own substantial position is mixed with procedural requests/remarks or issues. The intervention clearly contains both these parts.
Position and support	The actor explicitly communicates its own position but frames it in the context of other actors, expressing its support for their position and opinion. The intervention clearly contains both these parts.
Support and procedure	The speaker's intervention concerns a procedural, insubstantial matter but at the same time, the actor also explicitly praises another party's position or approach. The intervention clearly contains both these parts.

This division of interventions into six categories is based upon the three basic messages that delegates communicate when taking the floor. The first of these is a clear expression of their own position or interest ('*Position'*). In doing so, the delegate simply states what he or she wants – e.g., how the particular Member State wishes to rewrite a specific sentence or document, or which changes it finds acceptable. Such intervention contains only a demand and is not accompanied by any complimentary remark or statement supporting another actor. In the context of cooperation within the working party, a simple expression of a state's position is thus considered to be a factor which decreases the level of cooperation. It neither explicitly contributes to the existing coalition, nor does it show appreciation for the activity of any other actor. As it usually expresses new demands, it rather complicates the process of negotiation.

The second common type of message is a procedural intervention *('Procedure'*). In making a procedural intervention, a delegate may wish to clarify further proceedings, for example. Interventions made by the Presidency in yielding the floor to other delegates are also classified as procedural interventions. As such, procedural interventions are treated as neutral in their contribution towards the atmosphere in the working groups. Procedural interventions were included into the dataset even though they do not necessarily bear any message directly related to the content of negotiation. On the other hand, they shape the internal communication atmosphere within a working group. For example, referring to a particular procedural rule has an effect on how smoothly a working party goes through its agenda.

The third basic message is an expression of support for another party's opinion or stance, or praise for the work of another actor *('Support').* The former does not exclude an actor´s own preference from the statement but it always indicates his/her willingness to cooperate or his/her awareness of existing positions. An actor's position is, in such a case, present only implicitly. Support for another actor's position is thus treated as factor which increases cooperation within the group. The remaining three categories are based upon combining the abovementioned three kinds of simple interventions. First, an actor may combine its own preference with an emphasis on a procedural issue (*'Position and Procedure'*) – the latter part of such an intervention may serve as an argument supporting the actor´s demand or it may merely explain the procedural motivation underlying it. Secondly, an explicit expression of one´s own position may go hand in hand with an expression of support for another Member state *('Position and Support'*). Finally, support for another´s point can be combined with a procedural remark *('Support and Procedure'*).

As a result, binary dependent variable 'Communication' was created. Value 1 ('Cooperative') merges all interventions which contain support for another actor – either being the only message of intervention or being accompanied by procedural remark or by speaker´s own position. Value 0 ('Uncooperative') on the contrary unites interventions bearing speaker´s own position, either as the only content of the intervention or being accompanied by commenting on procedural issues. Purely procedural interventions were not included into the exploratory analysis as the can be classified as neutral. However, they are presented and commented in the descriptive part of analysis in order to illustrate which kind of actors express them and how important they are in the overall communication within the working groups.

The logic behind the dependent variable ('Communication) is based upon experience expressed by practitioners[8] and the Council´s internal norms. For the first, practitioners say that not only what is said during the meetings but how it is expressed is highly significant. Disagreement or dissatisfaction with, for example, changes made by the Presidency may be expressed in various ways which substantially affect both the overall atmosphere of the meeting and the perception of the speaker. Demands which are articulated in the context of other actors´ positions are considered as more acceptable and more 'user friendly' than the mere expression of the speaker´s interests. Even the Council´s internal norms prefer certain values such as efficiency, consensus or cooperation among Member States. For example, the Council´s Rules of Procedure considers a full round table as proscribed in principle and encourages delegations to express their demands collectively. This concerns particularly like-minded delegations which should hold consultations prior the meetings and then present their common positions. The Council´s Rules of Procedure also expect that concrete proposals for amendments should be sent in written form[9].

Regarding the independent variables, the first of them captures actor intervening *('Actor'*). There are two distinctions. The first of them differentiates between collective actors as a whole, dividing them into Presidency, Commission, Member State, and Council Secretariat. If a Member State intervened, the particular Member State was coded. Lists of participants were used to construct a variable labelled *'Representative'*. This captures whether a Member State is represented strictly by a Brussels-based diplomat, or by a national expert coming in from the capital, or a combination of the two.

Variable *'Length of EU membership'* is expressed as the number of years an actor had been a member of the European Union. When it comes to non-state actors, they are treated as having existed since the beginning of the European integration process. As the Presidency combines an institution and a member state holding the office, the value for the Presidency is computed as a sum of the length of member state membership and the length of the Presidency divided by two[10].

Concerning the control variables, the first of them (variable *'Size')* is based upon the Panke's catalogue of small EU Member States, which is in turn based upon voting power in the Council (Panke 2010: 15-18). In this variable, the Commission is treated as a large actor. Even though it does

not vote in the Council, its overall power in negotiations and communication is enormous. The Commission sets the agenda, has its own interests in negotiations and thus has the power to influence the negotiation process even at the working group level. The Council Secretariat is treated as a small actor because it assists the working groups´ work and can hardly enforce its own interest. When it comes to the Presidency, it is in line with literature classified as a small actor as well as it should follow the norms of neutrality and impartiality. The second control variable *'Language used'* captures the language used during the meetings. The basic distinction is between English and other languages. Thirdly, meeting agendas accessible in the room or on the Council website prior to the meeting were used to construct the variable *'Item'*, which divides the agenda between legislative and non-legislative issues.

The second phase of data gathering consisted of collecting interventions during the meetings. The predefined intervention categories given in Table 2 were used to note each intervention by an actor in terms of its content, language and – if applicable – the Member State speaking. This was possible due to the fact that interventions articulated during meetings are usually quite brief in terms of time, visibility and audibility. The researcher was present throughout 21 meetings from beginning to end, noting the interventions with the help of the prepared table. All in all, during the meetings, the research gathered 5021 interventions (including procedural ones). In the analysis that follows, a binary logistic regression is used in order to evaluate how independent variables contribute to the communication patterns within the working groups. Prior this explanatory part, detailed descriptive insight into dataset is provided in order to demonstrate differences in formal communication among various actors.

ANALYSIS

The first step of the analysis introduces a descriptive overview of the data, as summarized in Figure 1, Figure 2 and Table 3. While Figure 1 presents all interventions including the procedural ones, Figure 2 excludes them and offers an overview of substantive communication within the groups. Then, Table 3 summarizes the data used for the exploratory analysis in terms of distribution of the dependent variable ('Communication').

As Figure 1 indicates, if all interventions are taken into account, the dominant speaker taking the floor during the working groups´ meetings is the Presidency. However, its role is mainly procedural as the obvious majority of its interventions are of a purely organizational nature. Thus, the Presidency can be described as a 'dealer' distributing the floor among other actors and ensuring that the process goes smoothly. This finding perfectly fits with the role of the Presidency as described in the literature. According to it, the Presidency should focus on the role of the chair who wants to find a common interest, leaving their own goals behind. On the contrary, the Member States and the European Commission intervene in rather substantive terms. Both actors focus on expressing their positions, but at the same time they also express support for the other parties´ interests. Even this picture corresponds with what we know about the Council in general. The Council´s General Secretariat presence is, in terms of interventions, almost invisible which is not surprising as well.

However, if purely procedural interventions are removed from the sample, a completely different picture emerges. As Figures 2 shows, if procedural comments are deleted from the dataset, Member States become dominant actors. Their focus on interest promotion and coalition building is not changed, which is the case for the Commission as well. This is not surprising – the Council and its components are designed exactly for interest articulation and aggregation. However, what changes compared to the complete dataset is the role of the Presidency. As Figure 2 illustrates, even the Presidency has its own interests which it tries to promote. Without being hidden in the 'procedural fog', this dimension of the Presidency becomes quite clear. Figure 2 also reveals that the Presidency

prefers combining its interest promotion with procedural interventions. It seems that the Presidency uses this approach in order to soften its demands, make them more acceptable and to be in line with its expected role of neutral chair and honest broker.

Figure 1. Interventions in the working groups

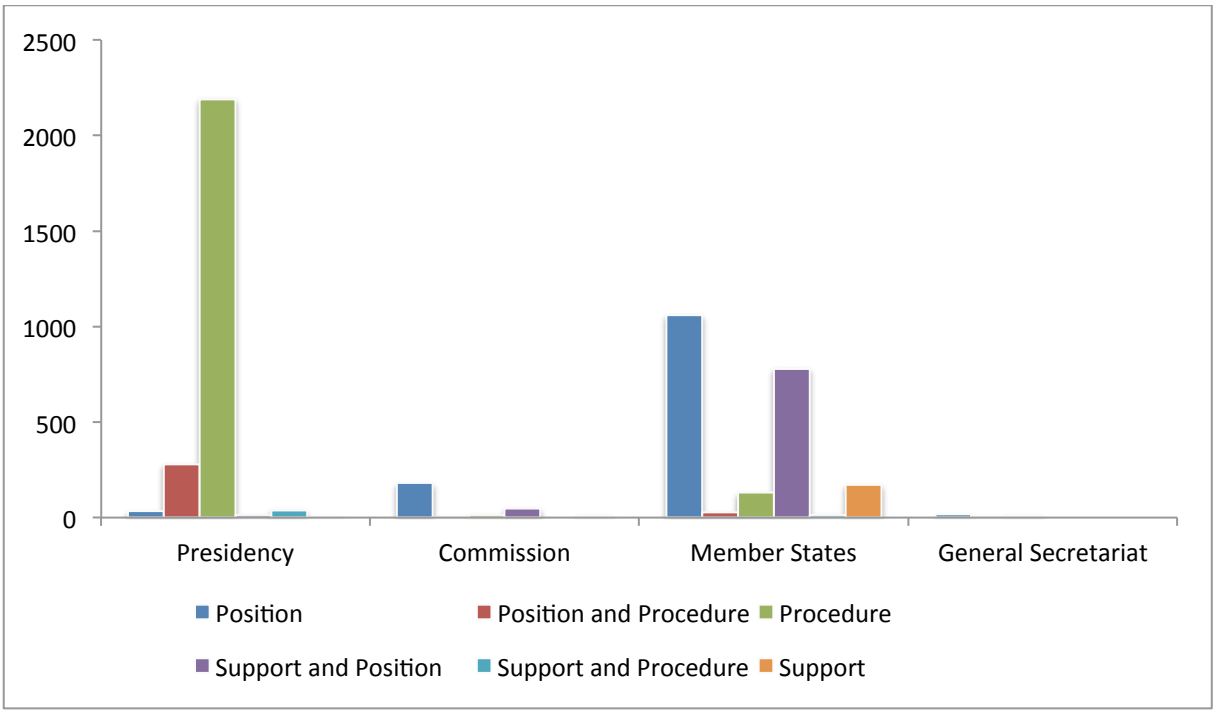
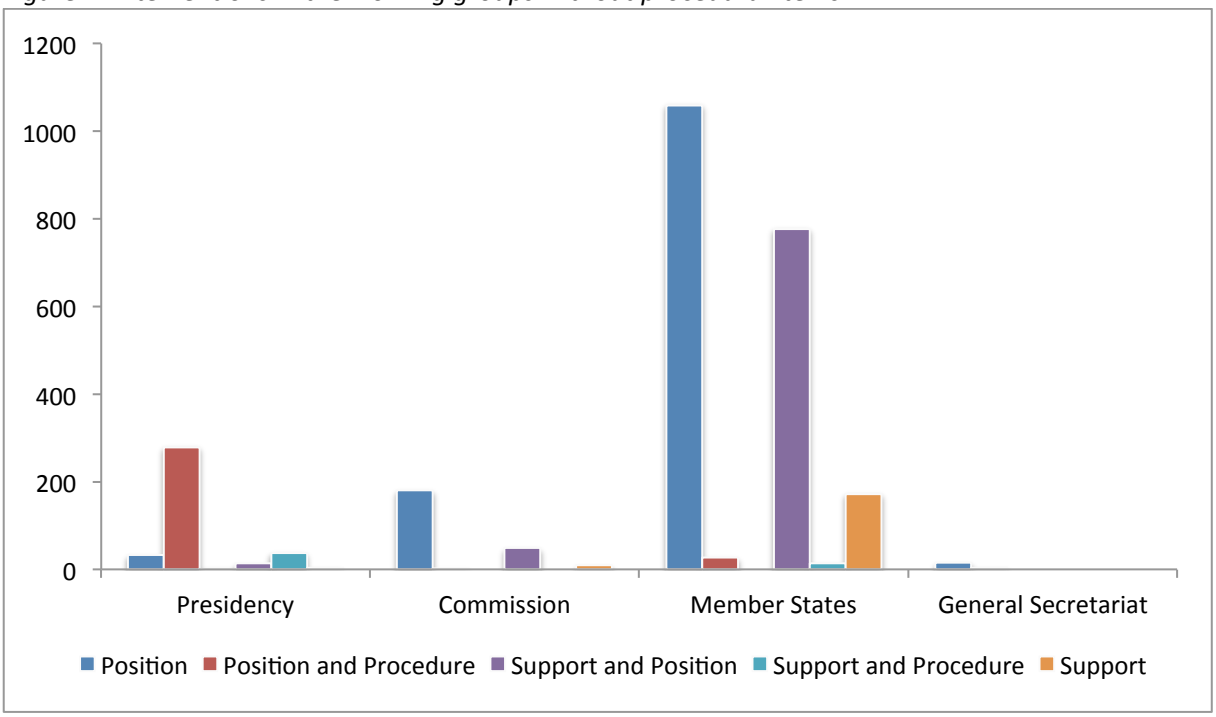


Figure 2. Interventions in the working groups without procedural items



Finally, Table 3 reports the distribution of the dependent variable according to the actors. The very simple analysis summarized in Table 4 does not support H_1, which anticipates cooperative, rather than competitive, communication in the working groups. This means that participants tend to push their own interests by intervening, rather than taking into account the positions of other actors. The

working groups are thus slightly closer to functioning as arenas of intergovernmental negotiation than to socialized forums where common interests prevail. This means that real negotiations take place there and this formal level bargaining is important. It can hardly be claimed that negotiations can be found only behind the scenes and that meetings of working groups merely present the outcomes of these unseen processes.

Table 3 .An overview of communication within working groups according actors

	Cooperative	Uncooperative	Total
Actor			
Presidency	54	311	365
Member States	963	1086	2049
Commission	58	183	241
General Secretariat	0	20	20
Total	1075	1600	2675

In the second part of the analysis, a binary logistic regression was used to investigate what types of independent variables influence the dependent variable and to what extent. In this analysis, all interventions expressed by the Council Secretariat were removed from the dataset. As Table 3 suggests, there is no variation in the Council Secretariat´s interventions which makes it problematic for statistical analysis. The reduced dataset for exploratory analysis thus contains 2655 interventions. Its results are summarized in Table 5 reporting B (and its SE) and Exp(B) coefficients as well as Wald coefficients.

Table 5. Results of binary regression on communication

	B (SE)	Wald	Exp(B)
Independent variables			
Actor: Commission	.75 (.24)***	10.10	2.12
Actor: Member State	1.78 (.16)***	117.95	5.95
Representative: Brussels based	.11 (.01)	1.46	1.12
Length of EU Membership	.00 (.00)	.45	1.00
Control variable			
Item: Non legislative	.58 (.13)***	20.22	1.79
Size: Big actor	-.20 (.11)*	3.33	.82
Language: Non-English	.02 (.01)	.06	1.02
Constant	-1.97		

Nagelkerke R^2 .10 . *** p < 0.01, ** p < 0.05, * p < 0.01 . Standard errors in parentheses.

Table 5 shows fairly well that in general terms the model does not explain many of the communication patterns within the working groups. The value of Nagelkerke R^2 coefficient is quite low, even the difference between values of –LL for initial model (3583.98) and model for the regression (3375.22) is quite small. However, the goal of the analysis was not to explain amount of variation in the formal communication, but to test theoretically developed hypotheses.

When it comes to their evaluation, the analysis addresses a few interesting findings – in terms of existing research. Regarding the actors involved, the Presidency – if 'stripped from procedural clothes' – is not as cooperative as might be expected. Quite on the contrary. Both the Commission and the Member States tend, in their substantive interventions, to be more cooperative than the country in the helm. These findings are statistically highly significant and contribute the most to the model´s explanatory power. This can be interpreted as that the actor characteristic is the most decisive regarding the communication atmosphere within the working groups. Even though the General Secretariat´s interventions had to be omitted from the analysis – which weakens the conclusion – H_2 cannot be supported.

Also the third hypothesis, expecting that the Brussels-based delegates would be more cooperative than their capital-based fellows, cannot be confirmed. Although the analysis shows that the Brussels-based delegates increase the degree of cooperation in working group formal communication, this contribution to the cooperative atmosphere within the groups is not statistically significant.

Last but not least, the data does not support hypothesis H_4 either. That means that regarding the degree of cooperation in the formal communication, there is no difference in the length of EU membership. Socialization at the collective level thus does not play that much of a role. One cannot thus expect that the longer a particular actor is involved in the process of the European integration, the more cooperative it is.

When it comes to the control variables, type of item and size of actor play a statistically significant role. Legislative items substantially decrease the degree of cooperation in the formal communication. The same can be said regarding the size. Big actors in the working groups such as influential Member States or the Commission tend to be less cooperative than the smaller ones. Both these findings are not surprising – the legislation is generally seen as more important than non-legislative points and also big actors tend to pursue their interests more actively than their smaller counterparts. On the other hand, language does not play a role. There is no significant difference between English and non-English speakers. When English is used, the level of cooperation in communication increases. However, this contribution is not statistically significant.

CONCLUSION

The working groups of the EU Council are not among the most-described players in the EU decision-making system. Due to their role and position within the Council, access to data which describes their functioning is limited. The existing research suffers from two major shortcomings. First, it places particular reliance on the information provided by insiders and the ex-post evaluation of their activity. Second, the majority of studies use COREPER data. There is, therefore, a remarkable deficit in our understanding of how working groups fulfil their roles and how the parties involved behave. This study fills this gap by analysing formal oral communication within working groups using the non-participatory observation of interventions. Based upon existing research and particularly on the socialization argument, the study expected that the communication pattern in the groups would be cooperative rather than competitive. With regards to particular actors and their contribution to the degree of cooperation, the study anticipated that the role of the Presidency would be important, as well as the affiliations of delegates, and that length of EU membership would play a role.

The findings of this analysis should be – in general – seen as challenging existing research. There is no shared consensus among scholars as to which pattern of behaviour prevails in the Council. The analysis of interventions supports those who depict the Council and its components as an intergovernmental arena. In this respect, for example, the study supports the findings of Naurin (2010), who sees the working groups involved more in argument rather than deliberation. This

finding is hardly surprising. Working groups do form the basic level at which Member States may express their interests and enforce them. The analysis however shows that even the Presidency is quite active in this regard. It is also shown that as its comparative advantage, huge amount of procedural interventions can be seen, which enable the Presidency to hide its demands and goals.

Additionally, the variety of working groups seems to limit the possibility of creating any 'spirit of common interest'. In this sense, working groups differ substantially from COREPER where a limited group of people meets twice a week.

To sum up, this study suggests that working groups seem to form a quite unique level of the Council structure where actors behave in a substantially different way than in structures which aggregate interests. As they construct the first possibility for expressing substantive demands, actors involved in them use working groups particularly for interest articulation and for coalition building. In terms of substantive interventions, actors differ in their behaviour substantially, particularly if the Presidency is compared with Member states or the Commission.

Why does the behaviour of the Member states and the Presidency differ? There may be several explanations for this. For the first, Member states know that if they want to succeed in interest promotion, they have to find partners and form suitable coalitions. As a Member state is always a Member state, it has to do so constantly. The same applies to the Commission. On the other hand, the Presidency is in a different role. For the first, it is a unique opportunity to promote something that is, for a country in the helm, important. As the Presidency has substantive procedural power, it may hide such promotion in the 'procedural fog' – who would notice that the Presidency wants something if such a demand is wrapped in the typhoon of procedural interventions? Additionally, each Presidency has some substantive agenda. Even though it should be neutral and impartial, it has to promote its priorities unless it should be considered as a failure. One can hardly imagine a Presidency which would totally resign on the promotion of policy goals and focus its power only on consensus building and Council administrative management. And if any Presidency wants to promote anything, it has to start to do so already at the working groups´ level.

Regarding the effect of socialization where existing research suggests that Brussels-based participants should be more cooperative than their fellows coming from the capitals; the study does not confirm this expectation. It seems that working groups attendants differ from those attending the COREPER – and here it should be noted that the "socialization hypothesis" is based upon research analysing COREPER activities. In comparison to the COREPER meetings which take place regularly twice a week and usually last for almost half of a day, working groups meet less frequently. As they are the first opportunity for expressing what Member states want, their participants use them in this way. The same perhaps applies for the importance of the length of EU membership where one could expect that socialization takes place as well.

There are of course limitations of this analysis. First, this study took into account only a limited number of working groups, particularly those related to the Single Market. It would therefore be valuable for future research to include working groups acting in areas that are more intergovernmental. However, with the increased level of intergovernmentalism, hardly any different results could be obtained. Second, the study focused only on formal oral communication, leaving aside for example written inputs or informal processes. Additionally, the study builds upon research that dealt particularly with the COREPER level of the Council. Such a point of departure obviously biases initial expectations as COREPER is in many aspects very different from the working groups. This study highlighted the need for such differentiation and can therefore be seen as an important contribution to our understanding of how the EU Council and its components work.

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ENDNOTES

[1] For instance, Fouilleux et al. (2005) begin their paper on the role of working groups by referring to Lewis (1998) focusing on research on COREPER.
[2] The Council Secretariat regularly publishes a list of working groups. In the last such overview from July 2013, there were 158 'preparatory bodies' altogether, 125 of which were chaired by the Presidency and 33 of which were chaired by a permanent chairman (Council Secretariat 2013). In the period between July 2000 and December 2005, the number of groups varied from 254 to 289 (Häge 2013: 22).
[3] Fouilleux et al. additionally say a working group should 'have a change of presidency every 6 months' (2007: 98). However, especially after the Lisbon Treaty created a permanent chair of the Council of External Relations, a substantial number of groups have a fixed chair. Moreover, some working groups are chaired by an elected chair and some are chaired by the Council Secretariat (Council Secretariat 2013: 16).
[4] A typical example of this kind of negotiation is a 'like-minded group' (Elgström 2000: 465).
[5] There are some exceptions, one being a study by Cross (2011), which analyzed the conditions and circumstances under which Member States in the Council are ready to intervene. Relying on footnotes noted in official records kept by the Council Secretariat, Cross identified significant differences among Member States in the number of interventions.
[6] This difference is precisely captured by quote "When national experts are present, I never let them have the microphone. If I let the experts take the microphone, they would just say what we want from the negotiation and the meeting would be over. Instead our job is to persuade (Fouilleux et al. 2007: 104).
[7] These meetings are not counted into the number of attended working groups.
[8] Interview with attaché 9. 10. 2013, Interview with attaché 17. 10. 2013, Interview with attaché 18. 10. 2013, Interview with attaché 23. 10. 2013.
[9] See, in particular, Annex V of Council Rules of Procedure.
[10] In this case it means a value of 35=61 (the Presidency)+9(Lithuania)/2.

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Research Article

The Structure of Diversity among Migrant Rights Organisations in Europe: Implications for Supranational Political Participation

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Abstract

European umbrella organisations that promote migrant and refugee rights seek to influence EU policy-making in the context of Europe's 'migration and refugee crisis'. From a functional representation perspective, their legitimacy rests on being representative of large constituencies that actively participate in their work. Yet past research on national migrant rights organisations underscores that, due to their diversity, priorities within the movement are not uniform. Different scholars come to different conclusions regarding the cleavages that define the movement. Moreover, it remains unclear how these cleavages impact participation in European umbrella organisations. This paper investigates these questions by empirically examining the cleavages among the membership base of two EU umbrella organisations: the European Council on Refugees and Exiles and the European Network Against Racism. Data come from a content analysis of member organisations' websites and interviews with directors of European umbrella organisations. Factor analysis techniques are used to assess empirically the different dimensions that structure diversity, examining several fault lines: identity/ideology, target population and worldview. The results point to cleavages that can differentially affect participation in the umbrella and present strategies used by leaders of umbrella organisations to encourage more active participation by certain types of under-represented member organisations.

Keywords

EU policy-making; non-governmental organisations; immigration; asylum; migrant rights; umbrella organisations; political participation

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A growing body of literature focuses on functional representation by civil society organisations (CSOs). In broad terms, the literature addresses the potential role of CSOs in making European Union (EU) policy processes more democratic, helping to overcome the widely-noted democratic deficit. European umbrella organisations which work to promote migrant and refugee rights are specific CSOs that have gained access to EU policy-making and seek influence in the context of Europe's 'migration and refugee crisis'. They are tasked with aggregating preferences and representing the interests of their constituency. Their legitimacy rests on being representative of large constituencies that actively participate in their work (Kröger 2013). Yet past research on national migrant rights organisations underscores that priorities within the movement are not uniform. Moreover, certain members may be more willing to get involved in policy work and, structurally, some may be better able than others to participate in the work of the umbrella. These factors have implications for how well umbrella organisations are able to 'mediate between the national and the supranational' (Rumford 2003: 32) in combatting the democratic deficit.

The contribution of this analysis is to produce a better understanding of the specific cleavages that exist among the constituencies of European migrant and refugee rights umbrella organisations, which is an important first step in determining where the umbrella organisations might focus their efforts to increase their own legitimacy. The analysis focuses on the membership base of two separate EU umbrellas: the European Council on Refugees and Exiles, and the European Network Against Racism. It asks two questions: (1) how do the different issue priorities, target populations and ways of framing issues serve as the basis of defining different cleavages?; and (2) how can EU umbrella organisations draw on these divisions to promote more active participation, thereby more

effectively representing their constituencies and increasing their own legitimacy? Data are drawn from a content analysis of each national member organisation's website (spanning a total of 157 groups), supplemented by data from interviews conducted in July 2015 with the directors of several European umbrella organisations.[1] Factor analysis techniques are used to assess empirically the different dimensions along which diversity is structured among these populations. In doing so, several possible cleavages are examined, including identity/ideology, target audience and ways of framing work within a broader worldview. It is argued that a better understanding of the cleavages within the membership can potentially be used to know where more active participation is needed.

Why are these important questions to address? First, determining the main cleavages can, at a minimum, produce a better understanding of the roles and priorities of different members, particularly as these umbrellas seek to influence the development of a Common European Asylum System. It can, for instance, help shed light on who is most (and least) likely to engage with specific policy debates or issues at the EU level via the umbrella. The fact that the European Commission regularly consults and funds European umbrella organisations highlights their importance in supranational policy processes. From a theoretical standpoint, active involvement from the constituency, as opposed to just the umbrella organisation, is necessary for input to be considered legitimate (Kröger 2013) and to strengthen 'the democratic quality of policy-making' (Brummer 2008: 2).

Relatedly, such knowledge can be used to strengthen both the quality of representation by European umbrella organisations and their legitimacy as non-electoral actors by helping to promote more active involvement and participation by specific segments of the membership. Addressing these questions can help address the problem of 'façade representativeness' identified by Kröger (2014), whereby 'weak interest groups' and 'cause' organisations tend to be minimally, if at all, involved in EU policy-making processes by way of their membership in umbrella organisations. Ultimately, knowledge of the main divisions among the national organisations can be used as the basis for enhancing the quality of their participation in and representation by European umbrella organisations. In turn, these aspects are key factors in the push by the umbrellas to foster the creation of a supranational polity by Europeanising the political activities of their constituencies (Warleigh 2001) and the European Commission's expectation that civil society organisations can help overcome the EU's democratic deficit.

This analysis proceeds as follows. The next section examines the literature on migrant rights organisations in Europe to analyse the various divisions which define contestation as identified by previous research. It also discusses implications for participation in the work of the umbrellas. Next, the data and methods used for assessing the cleavages within the movement are presented, followed by the results of the statistical analyses. Following this, the interview data is used to develop and discuss strategies that directors of EU umbrella organisations can employ to make better use of the diversity in their constituencies, which can ultimately promote more active involvement. Finally, the conclusion orientates the findings of the study in the context of the relevant literature and discusses possibilities for future work.

PRO-MIGRANT ORGANISATIONS, DIVERSITY AND POLICY PARTICIPATION

Issues of migration and border control are at the core of many political debates in Europe, including the recent 'Brexit' vote. In this context, the diversity that characterises the local and national organisations working as part of the migrant rights movement has been documented to some extent in the literature examining the political activities of these groups. Numerous studies have dubbed the migrant rights movement in general as 'fragmented' (Guiraudon 2001; Berclaz and Giugni 2005).

Past research has provided (often anecdotal) observations concerning some of its defining cleavages and different scholars come to different conclusions regarding the most important divisions. Some scholars, for example, note specific cleavages according to ethnicity or identity (Guiraudon 2001), whereas others highlight the geographical nature of diversity and how it leads to the promotion of different agendas depending upon the nature of integration and citizenship policies of groups' respective countries (Kastoryano 1996; Favell 1998; Koopmans and Statham 2000). Still other research stresses divisions in the modes of organisation, pointing out ethnic-based interest groups and contentious coalitions and further studies distinguish between pro-migrant versus anti-racist lobbying organisations (Fella and Ruzza 2012; Koopmans, Statham, Giugni and Passy 2005).

There are at least two implications of this work: first, that migrant rights actors in Europe experience difficulty in finding common ground, identifying the most pressing issue priorities, establishing a meaningful dialogue and defining a common agenda for action, all of which contribute to the overall political weakness of the movement (Kastoryano 1994; Geddes 1998). Second, when it comes to their membership in European umbrella organisations, this great diversity results in 'façade representativeness', which limits substantive involvement in the development of supranational policy positions in that it makes the coordination of common policy positions much more difficult (Kröger 2014).

Much of the research that identifies and discusses such divisions is based on case studies or observational accounts of cleavages in specific organisations or sets of organisations. There have been no studies to date which empirically examine how diversity is structured across a wide range of migrant rights organisations throughout Europe as a whole. As a result, the specific cleavages that define the movement writ large remain unclear or unknown. Understanding these dimensions of contestation is important because, for one, they help define the focus of political action and impact the ways in which organisations carry out their operations and political activities. Dalton (1994: 12-13), for instance, argues that the identity of a social movement organisation influences its methods of attracting supporters, selecting issues to focus on, presenting viable solutions, forming alliances and choosing political tactics.

Prior research underscores cleavages based on ethnicity and, potentially, religion. Koopmans et al. (2005: ch. 6), for instance, highlight organisational divisions among different ethnic groups and Guiraudon (2001) discusses how those divisions prevented the articulation of a common agenda for organisations active at the European level. Analysing the involvement of national groups in one European umbrella, she explains how organisations representing different ethnic groups expressed antagonism publicly towards one another and sought to gain control within the umbrella. The main divisions in this particular case were between the Turks and the Moroccans (Guiraudon 2001: 170). Generally speaking, ethnic-specific organisations represent migrants of similar origin but studies have also identified similarly defined divisions among organisations representing specific religious groups of migrants. For instance, past case study research has centred on Muslim and Turkish migrant social movement organisations in Europe and their links with fellow migrants across borders (Amiraux 1998; Ogelman 1998). In sum, *ethnicity and religion* are characteristics that, according to past studies, serve as the basis of defining cleavages among migrant rights organisations, as different groups advocate for the interests of specific ethnically- and religiously-defined constituencies.

Perhaps more prominent divisions are structured according to *issue agendas and policy priorities*. In terms of how we can expect groups' issue priorities to be structured, several cleavages can be observed by analysing past research on anti-racist and pro-migrant organisations. First, Koopmans et al. have observed a counter-mobilisation by anti-racist organisations against the far-right. As they explain:

> [o]ne important dimension of this over the last two decades has been their intense campaigning to combat the rise of the extreme right in Europe, for which they have mobilised a counter-discourse against the extreme right's propaganda depicting migrants as a major threat to national identities (2005: 206).

As a dimension of contestation, one might expect, then, that evidence of such a public campaign should emerge in the empirical analysis of how issues are structured. Further dimensions which have been identified in the literature (and also by practitioners) centre on the promotion of political rights for migrants and ethnic minorities, as well as the extension of social rights to migrants (Koopmans et al. 2005; Fella and Ruzza 2012; Schnyder 2015). Based on these observations, a cleavage is expected among service provision organisations versus those that are more political and policy-focused.

Prior work has also argued that the content of claims-making should vary a great deal from one country context to another. For instance, referring to national institutions, Koopmans et al. argue that '[p]olitical resources, legitimacy, and resonance derived from these institutions help to make sense of the formation of specific group identities and the elaboration of particular political aims by actors mobilizing for migrants' (2005: 210). Echoing this argument, Guiraudon (2001: 170-171) observes that:

> 'national groups' tend to reproduce the incorporation and citizenship models of their host countries, thereby making dialogue difficult. Migrants from Scandinavia and the Netherlands favor multicultural policies, while those from France have internalized the assimilationist Republican model of integration. In some countries, such as Germany, legal discrimination is still very much an agenda that unites migrant groups…This is not the case in other northern European countries or in Britain, where the emphasis is on nonlegal [sic] discrimination (in housing or hiring).

Furthermore, Koopmans and Statham (2000: 217) have found that minority actors make claims which involve different types of rights, including citizenship rights, other civil and political rights, social and economic rights, cultural rights and anti-discrimination rights. One might expect some of these rights-based cleavages to emerge in the empirical analysis. In summary, the cleavages that define organisations' *issue priorities* should include public campaigns against the far-right, political rights and service provision to ensure social rights.

In addition to the above, a final area in which cleavages are expected concerns the *broader worldviews* of the organisations and how they frame the significance of their work. One possible dimension concerns anti-racist versus pro-migrant worldviews, with the former placing migrant and refugee issues into a broader anti-discrimination context involving human rights and the latter framing their work more specifically around the advancement of their target populations in the societies in which they live (Fella and Ruzza 2012). Whereas anti-racist organisations tend to advocate for inclusion on the basis of broader human rights principles of equal treatment, pro-migrant organisations tend to frame their work around the need to support more specific categories of migrants (Koopmans et al. 2005: ch. 6). In addition, past research suggests that organisations in East Central Europe (ECE), where the migrant rights movement is newer and domestic elites are not as supportive of citizen activism, may be more likely to frame their work around the importance of civic engagement and participation and its significance to democratisation. For example, in discussing ECE countries, Cisar and Vrablikova (2012: 143). note that '[a]lthough they democratized rather quickly in terms of their main formal institutions, these countries are behind old Western democracies in their level of political and civic activism ...'. This has implications for creating a

differential context for their political activities (Tarrow and Petrova 2007). In sum, the cleavages that define *broader worldviews* should include broad human rights principles (such as equal treatment), the need to support specific categories of migrants and principles of democracy (such as civic engagement).

The above observations highlight the difficulty of overcoming the various national priorities and contexts that have traditionally shaped organisations' work in the field of migration and refugee politics. Ultimately, this can create an obstacle to the potential Europeanisation of their political activities and to the EU umbrella organisations which represent their interests in EU policy-making. If representation is not just about outputs but also about process and inputs (Schmidt 2013) whereby a two-way relationship functions between the represented and the representative, the active involvement of these organisations in the development of EU policy positions is needed in order to confer legitimacy upon the umbrella organisations that operate on their behalf (Kröger 2013).

Depending upon the nature of their work, the national groups comprising the membership base of the umbrellas tend to fall into the category of either 'weak interest groups' or 'cause' organisations identified by Kröger (2013). More specifically, the former refers to 'constituencies such as the poor and socially excluded … who generally do not enjoy the various sorts of capital necessary to organise themselves' (Kröger 2013: 592), while the latter refers to groups representing a cause, such as the environment, whereby 'those supporting the organisation are not those for whom the organisation acts as an advocate …' (Kröger 2013: 591). Both types have been found to take part minimally, if at all, in the process of EU policy-making, such that EU umbrellas act on behalf of constituencies that lack active involvement in the organisation.

The need for active participation is made more acute in view of past research, which underscores that migrant and refugee rights organisations have indeed gained access to the EU and have done so relatively quickly, despite the divisions that characterise the movement. However, unlike some advocacy CSOs which receive institutional support, migrant and refugee rights organisations have worked proactively to fashion ties with specific EU institutions. They seek to influence outcomes mainly through lobbying strategies, which afford only limited opportunities to influence policy (Thiel and Uçarer 2014).

Indeed, the divisions among stakeholders and conflicting agendas in the development of a common immigration and asylum policy has some calling for the 'knocking into shape' of this policy field (Niessen 2001), with a legitimate and important role to play by non-elite actors. The dual norms of border security on the one hand, which portrays migrants and refugees as security threats, and humanitarianism on the other, which stresses the need for human security and international protection, underscore the conflicting agendas involved (Vaughan-Williams 2015). These conflicting normative frameworks highlight the difficult role of CSOs in the formulation of EU migration policy and provide context for the fragmented policy responses that have followed. Furthermore, although these CSOs are consulted by the European Commission, their expertise may be used as a strategic means of lending credibility to the Commission's proposals as opposed to improving policy (Boswell 2009). Do these factors imply that CSOs do not have a legitimate role to play in this area of supranational policy-making? Not necessarily, as they bring issues to the table that otherwise might be overlooked or simply ignored by elites; yet their democratic legitimacy depends, at least in part, on the substantive involvement of their constituency. Ascertaining the cleavages of the membership can serve as a first step in understanding where more targeted efforts are needed to promote involvement.

IDENTIFYING CLEAVAGES IN THE MEMBERSHIP OF TWO EU UMBRELLA ORGANISATIONS

To obtain data on migrant and refugee rights organisations, the national membership population of two large European umbrella organisations – the European Council on Refugees and Exiles and the European Network Against Racism – were examined. Each of these umbrella organisations has a broad and diverse constituency spanning each of the current EU member states and beyond. Altogether, the websites of 157 national organisations spanning a total of thirty-nine countries were analysed.[2] These groups comprise the entire membership population of the two umbrellas.

A content analysis of the website of each national organisation was conducted to code their issue priorities, target populations and broader worldviews (i.e., the language and discourse surrounding their work and purpose).[3] Each instance was coded in which a specific issue (e.g., health care, discrimination, asylum policy, psychological care etc.) and target group (e.g., illegal migrants, asylum-seekers, women migrants, youth etc.) was mentioned. Groups' broader worldviews were also coded, with a specific eye toward the language used to frame their mission and purpose (e.g., human rights, international responsibilities, advancing democracy etc.). To reduce the data and empirically identify the cleavages, the next step was to perform a factor analysis. Three separate factor analyses were conducted to identify the different dimensions of issue priorities, target populations and worldviews.[4] The final results of the factor analyses and the varimax-rotated solutions are presented in the following section.

DOCUMENTING DIVERSITY: HOW ARE ISSUE PRIORITIES, TARGET POPULATIONS AND WORLDVIEWS STRUCTURED?

Tables 1 through 3 that follow display the results of the factor analyses that identified the different dimensions of organisations' issue priorities, target populations and worldviews (or discourses that frame their work). The figure in parentheses next to each variable indicates the total percentage of organisations which mentioned each factor on their website. The following discussion examines and elaborates on the different factors that define the cleavages among the membership.

In Table 1, the analysis identified five dimensions of issue priorities with eigenvalues greater than 1.0. The first dimension – *legal and educational issues* – is composed of the following individual issue priorities: legal issues, intercultural information, education, and the general provision of information. The second dimension – *integration support and services* – comprises employment support, psychological care, general integration support and health care. Third, there is *political participation and activism*, which captures minority empowerment, civic participation, public awareness, the representation of migrants' views and general participation in political life. The fourth dimension reflects *rights and citizenship issues*, including social rights, citizenship and housing rights. The final dimension concerns issues relating to the availability of *public information and debate* over migration-related issues and includes access to information and the promotion of public debate.

Hypothesis 1 predicted that these dimensions should reflect (1) public campaigns against the far right, (2) political rights for migrants and (3) the provision of services to help secure social rights. Although there is no variable in Table 1 that explicitly mentions the far right, there is a dimension that reflects public information and public debate about migration and asylum issues. These public information campaigns typically focus on educating citizens about diversity and the benefits of living in a multicultural society. Such discourses effectively serve the function of counter-mobilising against far-right political rhetoric. In looking at the percentage frequencies, only a small proportion

of groups actually focuses on the promotion of public debate as a key issue priority (1 per cent), but 46 per cent focus on the related variable of raising public awareness (although this variable does load on a different factor). Furthermore, the *political participation and activism* dimension reflects a strong focus on political rights and political inclusion, as expected, raising key issues such as empowerment of minority groups and civic participation, among others. Lastly, as expected, organisations do provide services and focus on social rights, but these are reflected in two separate dimensions (*integration support and services* and *rights and citizenship*). Only a small percentage of groups explicitly incorporates social rights as part of their issue focus (2 per cent); integration support and practical services reflect a much stronger focus of their work, as might be expected.

Table 1. Factor analysis dimensions: issue priorities of national migrant and refugee rights organisations

Variable (% of organisations)	Legal and educational issues	Integration support and services	Political participation and activism	Rights and citizenship	Public information and debate
Legal issues (43%)	-.62				
Intercultural information (15%)	.62				
Education (30%)	.56				
General information (19%)	.47				
Employment support (13%)		.63			
Psychological care (15%)		.55			
Integration support (36%)		.54			
Health care (8%)		.51			
Empowerment of minority group (3%)			.69		
Civic participation (6%)			.58		
Public awareness (46%)			.50		
Representation of viewpoints (2%)			.47		
Political life (5%)			.40		
Social rights (2%)				.69	
Citizenship (1%)				.63	
Housing (9%)				.50	
Access to information (5%)					.68
Public debate (1%)					.51

Note: Principal component analyses identified five dimensions of issue priorities with eigenvalues greater than 1.0. Entries are factor loadings of each issue priority. The varimax-rotated solutions are presented here.

Overall, one of the main cleavages that emerges in Table 1 is between service providers and politically-focused groups, which has implications for who is most and least likely to participate in the umbrella. Although much of the service providers' work concerns issues of migrant integration (which also concerns the umbrellas), these groups are perhaps least likely to be actively engaged in the work of the umbrellas due to their heavy caseloads. Moreover, interviews with the umbrella leaders confirmed they tend to lack the policy expertise that promotes participation in the umbrellas' topic-based working groups, which draft position papers on behalf of the membership on policy issues. Past work has shown that such organisations authorise the umbrella to work on their

behalf, even if they are not actively involved (Kröger 2013), but the extent to which the position papers and policy recommendations are representative of their interests remains an empirical question.

A separate factor analysis examined the target populations that organisations serve, representing those groups of central focus in their work. Table 2 presents the results of how these target population groups are structured. Factor analysis identified six salient dimensions of target groups with eigenvalues greater than 1.0, as follows: (1) *refugees, asylum-seekers and ethnic minorities*; (2) d*isplaced and stateless persons*; (3) *Muslim and women migrants*; (4) *unaccompanied minors and detainees*; (5) *youth and illegal migrants*; and (6) *African migrants and general vulnerable groups of migrants*.

Table 2. Factor analysis dimensions: target populations of national migrant and refugee rights organisations

Variable (% of organisations)	Refugees, asylum-seekers and minorities	Displaced and stateless persons	Muslim and women	Unaccompanied minors and detainees	Youth and illegal migrants	African and vulnerable populations
Refugees (47%)	0.82					
Asylum-seekers (38%)	0.80					
Ethnic minorities (24%)	-0.64					
Rejected asylum-seekers (1%)		0.74				
Stateless persons (4%)		0.68				
Displaced persons (10%)		0.68				
Muslim migrants (3%)			0.85			
Women migrants (7%)			0.77			
Unaccompanied minors (4%)				0.76		
Detainees (1%)				0.76		
Illegal migrants (5%)					0.71	
Youth (13%)					-0.61	
African migrants (6%)						0.67
Vulnerable groups (5%)						-0.65

Note: Principal component analyses identified six dimensions of target populations with eigenvalues greater than 1.0. Entries are factor loadings of each target population. The varimax-rotated solutions are presented here.

Hypothesis 2 expected these dimensions to include a strong orientation toward ethnicity and religion. Although both variables are present and help define two of these six dimensions, a greater proportion of organisations focus their work on ethnic minorities as opposed to a specific religious group. More specifically, 24 per cent of organisations focus on serving ethnic minorities, which loads on the same factor as refugees and asylum-seekers. Ethnic minorities represent a sizable target population, with most organisations identifying this population in general terms, as opposed to focusing on a specific ethnic minority group. By contrast, only 3 per cent of organisations have an

explicit focus on Muslim migrants, which loads on the same factor as women migrants. Comparatively, slightly more organisations target their work on women migrants and refugees (7 per cent). Although some organisations do target ethnic and religious minorities (as predicted), it is refugees and asylum-seekers which comprise the dominant focus (47 per cent and 38 per cent respectively).

In general, these dimensions appear to reflect a cleavage among organisations that focus on specific categories of migrants versus those that aim at a more general target group. These specific categories, such as women, Muslim or African migrants and refugees, may or may not be reflected in the umbrellas' political positions, depending (at least in part) on whether the most active members reach a consensus on the need to include them. Moreover, the national organisations concerned with these more specific target groups tend to be smaller and operate with fewer staff, which could potentially preclude their active participation in the umbrella.

The final hypothesis considered how the broader worldviews of the various organisations are structured, reflected in the discourses that frame their missions and priorities. Hypothesis 3 predicted that organisations will use framing which reflects human rights principles (such as equal treatment and fairness) and the need to support specific categories of migrants and principles of democracy (including civic engagement). Table 3 displays the results of the final factor analysis. The results support two of the three predicted dimensions specified in hypothesis 3. More specifically, organisations do tend to invoke human rights principles and values in the discourses that frame their missions. For example, the dimension of *obligations and compassion* (which comprises dignity, respect, compassion and international obligations) reflects both an emphasis on states' human rights obligations, as well as the values that make those obligations important. In addition, the dimensions of *equality and cooperation*; *social justice and citizenship*; and *empowerment and legal justice* embody the universal human rights principles of non-discrimination, participation and inclusion, and accountability and the rule of law. Furthermore, the human rights principles of universality and inalienability are reflected in the dimension of *unconditionality*. In addition to human rights principles, the dimensions that structure organisations' broader frames and discourses also reflect certain core values, as seen in the dimension of *fairness and understanding*, as well as a sense of international interdependence, as reflected in the *harmony and globalisation* dimension.

In addition, hypothesis 3 expected groups to frame their missions in terms of democratic principles. The dimension of *democracy and participation* reflects the use of democratic principles in the discourses organisations use to frame their work. This dimension includes important elements fundamental to democratic societies, including human peace, freedom, democracy, civil society participation, pluralism and the rule of law. In addition to these expected ways of framing their work, Table 3 shows that organisations also use discourses that involve societal problems, as seen in the *racism and xenophobia* dimension. Organisations, therefore, ground their work in contexts which invoke universal human rights principles and obligations, democratic principles and societal problems that may be viewed as a counter-mobilisation against the rhetoric of the far right. The framing of their work in terms of support for specific categories of migrants, as hypothesis 3 also expected, is not borne out by the factor dimensions. Rather, groups tend to use broader and more universal framing strategies as opposed to appealing to the plight of specific group types or categories.

Organisations which employ broader framing strategies that resonate with established EU policy areas, including anti-discrimination, may have a greater incentive to participate in the umbrella. In contrast, groups whose frames are more specific, or simply less defined by an existing EU policy space (such as harmony and globalisation or fairness and understanding), may face more hurdles in establishing issue linkages that resonate at the supranational level. Linking migrant and refugee

issues to an anti-discrimination policy frame has proven quite successful in the past, for instance, it resulted in the adoption of the 'Race Directive' in June of 2000 (Guiraudon 2003).

MORE PARTICIPATION, MORE REPRESENTATION

Thus far, the goal of the analysis has been to document empirically and analyse the different dimensions that underlie the issue priorities, target populations and broader worldviews of national organisations that work on behalf of migrants and refugees in Europe. In this section, the findings will be used as the basis for developing strategies that leaders of European umbrella organisations can use to involve the national constituencies more actively in their work.

The interviews with leaders of umbrella organisations highlighted the problem of active participation from a diverse national constituency. For instance, one leader of a prominent umbrella explained that its most active members tend to be policy-focused groups as opposed to service providers, even though the former comprise a much smaller percentage of the membership compared to the latter. Moreover, the cleavages of the membership can serve to hinder participation; as one umbrella leader put it: 'It's impossible to put together a pan-European campaign' involving the entire network due to its diversity (interview, director of umbrella organisation, 21 July 2015). Given that certain segments tend to be more active while others lack any substantive involvement whatsoever, a relevant question to ask is how leaders of umbrella organisations can make better use of the specific cleavages of the national groups to help promote more active involvement. From a perspective of legitimacy that underscores process, fostering greater participation from the constituency would increase the legitimacy of the umbrella organisation and the quality of its representation.

The literature on EU legitimacy argues that the constituencies of EU umbrella organisations need to take an active part in the development of EU-level policy positions; umbrella organisations must actively involve their members in EU affairs to be seen as legitimate (Kröger 2014: 157). Otherwise, the umbrella risks the loss of legitimacy that comes from 'façade representation', whereby members do not actively participate in the organisation's work (Kröger 2014: 157). This argument assumes legitimacy rests on virtually only one form of participation – constituency involvement in the development of supranational policy positions.

However, interviews with leaders of several European umbrella organisations suggest that, given a diverse constituency, not all members are functionally able to participate in this way. Directors noted, for example, that some national organisations enter the membership already possessing the political knowledge and general wherewithal to play an active role in policy-making, whereas others may be less well positioned to do so without some capacity-building in certain areas. In speaking with directors of EU umbrella organisations, it was noted that some member organisations 'provide direct services, but don't do policy work', (interview, director of umbrella organisation, 8 July 2015). In addition, interests may diverge based on the target populations (constituencies) that the national organisations serve. Leaders of umbrella organisations expressed a general desire to promote more active participation by the constituency, even in view of divergent interests and priorities.

Some directors prefer to handle this diversity by organising working groups on various topics, assuming members will opt in based on interest. From here, policy positions are often compiled through a formalised process involving input from the members of the different working groups. Although the benefit of this approach is that it allows members to participate based on issue interests, the drawback is that less politically savvy groups (such as the service providers), or smaller organisations with fewer resources at their disposal, are often unable or unwilling to participate. In addition, organisations that focus on a certain target population, such as women migrants, may find

working groups that address issues of importance, but which lack a strong focus on their target group. In such cases, organisations may opt not to participate in issue-based working groups (interview, director of umbrella organisation, 8 July 2015).

Moreover, even the politically-savvy organisations may face barriers that prevent active participation in working groups. For example, because national groups tend to specialise in issues or target constituencies specific to their locality, they may lack information or expertise on the broader range of issue areas important to a supranational audience, which the working groups are organised to address. Because their work is contextualised by the situation in their own country, they may lack knowledge of EU-level issues and this may discourage their active participation. Beyond this, groups which wish to be politically active may simply be too burdened with their daily workload to manage to participate in a working group. The current structure within many large umbrella organisations reflects the assumption that national members already possess the necessary expertise and resources to participate in the development of the umbrella's policy positions.

An alternative approach that came to light during one interview highlights a different strategy, which some of the smaller umbrellas tend to employ. In essence, it involves promoting participation by strategically using the umbrella as a platform for targeted capacity-building and communication activities. As expressed by the organisation's director, this is seen as a prerequisite for meaningful participation in the formulation of policy positions given such a diverse membership base. The idea is that if certain groups lack knowledge or capabilities that would be needed to participate meaningfully in the formulation of policy positions, the umbrella serves as a vehicle for strengthening the national organisations in specific areas. As one director stated in speaking about her goals for the umbrella organisation: 'We make sure the members are aligned, active, and capacities are utilised. If there is a member with a weakness, we put them in contact with another member with that strength to help' (interview, director of umbrella organisation, 8 July 2015).

Thus, one of the main priorities prior to involving members in policy work is to create structures that facilitate communication among the membership through the organisation of communication and capacity-building working groups. One of the stated goals of the umbrellas that employ this approach is to 'strengthen migrant organisations at the country level' (interview, director of umbrella organisation, 21 July 2015). In one organisation, prospective members complete an extensive questionnaire prior to joining to help leaders systematically identify the issues of greatest importance, target audiences and weaknesses. Members of the capacity-building working groups subsequently attempt to identify projects that different national organisations can undertake jointly in an effort to expand awareness, develop skills and increase their overall participation in the umbrella. Moreover, the process of strategically connecting member organisations based on differences in knowledge or skill encourages socialisation, defined as 'the process by which actors acquire different identities, leading to new interests through regular and sustained interactions within broader social contexts and structures' (Bearce and Bondanella 2007: 706). This is one way to take advantage of diversity to help expand knowledge, encourage participation and ultimately to increase the legitimacy of the umbrella organisation. A worthwhile avenue for future research is to examine how these structures work in more detail and to assess their impact on participation within the umbrella.

CONCLUSION

This research focused on two European umbrella organisations – the European Council on Refugees and Exiles and the European Network Against Racism – to identify empirically where cleavages exist among the national organisations that comprise their membership base. The need for more active

participation by the members was identified as a priority by leaders of umbrella organisations working in the field of migrant and refugee rights. Therefore, these cleavages were used as a starting point for proposing ways to involve certain segments of the membership more actively in the umbrellas' work and reduce barriers to participation that some members may experience. Empirically, there are many more cleavages that exist among the national constituencies (and they exist across multiple areas) than directors acknowledged in the interviews. This diversity was sometimes spoken of as an obstacle to promoting participation and therefore legitimacy, but a handful of EU umbrella organisations have been able to use it to their advantage.

Despite their internal cleavages, these European umbrellas have gained access to the EU political system rather quickly, as the European Commission seeks to legitimate its proposals in this policy field by consulting with these and other CSOs. The Commission's goal in doing so is to combat the democratic deficit that typifies the complex, opaque and technocratic style of supranational policy-making. The argument is that CSOs can act as a bridge between the national constituencies and the EU (Nanz and Steffek 2004), building the trust needed to legitimate supranational policy decisions. Yet, for the umbrellas' input to be legitimate, democratic-participatory arguments underscore the need for active involvement by the constituency in the development of policy positions. Without it, we are left with the problem of 'façade representativeness' that entails no substantive involvement in EU policy-making (Kröger 2013). In general, active participation across the membership strengthens the legitimacy of the European umbrellas in the context of functional representation and strengthens 'the democratic quality of policy-making' (Brummer 2008: 2) at the supranational level.

Identifying where internal cleavages exist can lay the foundation for future research which examines whose interests are represented well by the umbrellas and whose are not. Past research has not examined whether the issues of most importance to the national constituencies are actually represented in the policy positions of umbrella organisations. In addition, the divisions identified here can be used as the basis for further research that assesses conflict and cooperation within the umbrella organisations and how umbrellas arrive at their political positions given the potentially divergent priorities of the membership. Given the increasing attention paid in the literature to non-electoral modes of representation, these are important questions to address. Moreover, the findings can help add nuance to the research on the Europeanisation of organisations' political activities by examining the cleavages that make it more or less likely to occur. Finally, this study examined two of the large umbrella organisations as case studies, but future contributions can help develop a more nuanced body of knowledge by examining smaller umbrellas or those more focused on a specific subset of issues, such as the European Network of Migrant Women.

Past research has found that certain CSOs ultimately fail to Europeanise their members' activities in such a way as to foster the development of a supranational polity and address the EU's democratic deficit (Warleigh 2001; Kröger 2013). However, once leaders of umbrella organisations know the specific cleavages that structure the constituency, it becomes easier to foster participation in a way that actively encourages capacity-building. Diversity can therefore be strategically harnessed to strengthen the membership, foster greater levels of participation and potentially increase the legitimacy of the umbrella organisation.

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ENDNOTES

[1] In all cases, interviews were conducted with the organisation's director. The terms of participation and consent require anonymity of the organisations be observed.

[2] The complete list of countries and national organisations is available as supplemental material.

[3] Several key sections of the websites were analysed, including the home page, 'About Us', 'History', 'Campaigns', 'Issues' and 'Current Projects' which included information about the issues of highest concern to the organisation.

[4] The initial dimensions were determined based on eigenvalues greater than 1.0 but were subsequently reduced to minimise the incidence of some single variables loading on their own factor. More specifically, the initial factor analysis for issue priorities yielded an initial solution comprising 14 factors. However, due to several variables loading on their own factor and in light of theoretical considerations from previous analyses of the dimensions of organisations' issue priorities (Dalton, Recchia and Rohrschneider 2003; Schnyder 2015), the final number of factors was reduced to five. The same process was employed for the other two factor analyses.

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Research Article

The Limits to the CJEU's Interpretation of Locus Standi, a Theoretical Framework

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Abstract

The Court of Justice of the European Union (CJEU) has refused to allow direct actions as a possible solution for the protection of rights that are not individualisable through public interest litigation. For 53 years it has held on to its interpretation of the standing criteria in (now) Article 263 TFEU, severely limiting access to justice for all but the most specific of cases. The criticism of this interpretation has been copious and strong, newly invigorated in recent years by arguments on the rule of law. This article aims not to add to the criticism but to offer a compelling explanation of the 'why' behind the Court's reasoning. By making use of a framework that addresses a supreme court's interpretative limits regarding *locus standi,* this article will not only shed light on the past but equally explain why the Court has chosen to reject public interest litigation, in a manner that might otherwise seem counter-intuitive.

Keywords

CJEU; Public Interest Litigation; Judicial Relations; Standing; Access to Justice

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In recent years, there has been a change of focus in criticism of the Court of Justice of the European Union regarding its standing criteria. Where the *Plaumann* criteria have always been criticised by both academics and Advocates General, this criticism focused on the effect of the doctrine on the individual.[1] The new line of criticism focuses on the fact that the Court's interpretation of 'individually concerned' has an even more adverse effect on the public interest, by making public interest litigation (PIL) by way of direct actions an impossibility.

This article aims to offer a theory on the reason behind the Court's severely restrictive interpretation. Although it has been contested for 53 years,[2] the focus has largely been on the effects of this interpretation and why, sometimes how, it should be changed.[3] The main premise of these arguments has always been that the Court is able to do so, if it would just set its mind to it.[4] In their critique of the Court, most authors underestimate the nature of standing requirements. These

1 To give a full overview of the academic analysis would severely impact both the readability and the style requirements for this contribution, a good timeline can be found along these lines: Gerhard Bebr, *Judicial Control of the European Communities* (Stevens 1962); Ami Barav, 'Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court' (1974) 11 *CMLRev* 191; H Rasmussen, 'Why Is Article 173 Interpreted against Private Plaintiffs?' (1980) 5 *ELRev* 112; Anthony Arnull, 'Private Applicants and The Action For Annulment Under Article 173 Of The EC Treaty' (1995) 32 *CMLRev* 7; Albertina Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?' (2003) 62 *Cambridge Law Journal* 77; Laurence W Gormley, 'Judicial Review – a New Dawn after Lisbon?', *Europe. The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (2010); For an extensive overview of the discussion, please see the highly recommended: Roland Schwensfeier, 'Individual's Access to Justice under Community Law' (Diss, University of Groningen 2009).

2 Note 1 aims to give a decade by decade impression.

3 Exemplary of this discussion is the back and forth between Stein and Vinnig and Hjalte Rasmussen in: Eric Stein and G Joseph Vining, 'Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context' (1976) 70 *Am. J. Int'l L.* 219; Rasmussen (n 1).

4 And, as argued by Rasmussen (n 1), that not doing so is a result of its own internal desire to have everything remain as it is.

rules and traditions are the focal point of the culture and traditions of every legal order. As such, every apex constitutional court is not only limited by the literal requirements set out by the law, but sees its interpretative space as limited by a number of elements. This article aims to explain the CJEU's long-standing refusal regarding *locus standi* for the individual through the application of a theoretical framework that describes these limiting elements. The framework will equally make it clear why the current call for access for public interest cases will be even more difficult to answer than access for the individual.[5]

To that end, this article is structured in the following manner. Given the nature of the problem regarding public interest litigation, the first step will be to define what falls under this heading. It will be shown that part of the problem on debating this issue is the confusion of tongues on the term. Secondly, the origins of the CJEU's *Plaumann* doctrine will be discussed, as it is the root cause for the problems surrounding public interest litigation. It is then possible to describe the theoretical framework that can give an explanation for the Court's restrictive interpretation and apply it to the factual situation at the time of the *Plaumann* judgment. The subsequent section will explain how the specific characteristics of the public interest in a European context exacerbates the problem, making public interest litigation impossible. This will be followed by a discussion of how the realisation of this problem has led to a qualitative change in the criticism of the Court's case law. Finally, the last segment will be devoted to the moment in which a significant change has occurred in all four of the elements restricting the Court's interpretational possibilities and the reasons behind the limited judicial response. The conclusion will offer a compelling argument for the Court's current line of case law, which might seem counterproductive to the creation of a European approach to solve unindividualisable problems such as environmental issues.

PUBLIC INTEREST IN EUROPEAN CONTEXT

For a term that is used so frequently, in both every day and academic usage, the concepts of 'public interest' and 'public interest litigation' are ill-defined. Not unlike Justice Potter Stewart in his attempt to distinguish free speech from smut, we know it when we see it.[6] This has led to a plethora of possibilities for what can be grouped under the heading. The results of a seminal conference on the topic are a prime example.[7] Although the resultant book offers diverse study into the nature of 'public interest', it equally shows how each scholar perceives something of public interest within his or her own field. As one of the editors notes, the definition is drafted so as to encompass '[...] diffuse interests of a large number of people, such as in environmental protection, consumer protection, safety at work and anti-discrimination policies'.[8]

The idea is that by asserting the possibility of a public interest in all areas of European law, the Court can more easily grant standing by making use of the doctrines it has developed for each of these specific areas. As such, Arnull regarded the Court's approach in *Codorníu* as an opportunity.[9] In *Codorníu* the Court of Justice and the Advocate General applied the standing criteria under what was

5 For the purposes of clarity, this article will often focus on the area of environmental protection, as it is arguably the area in which the formation of a pan-European polity has gone the furthest, leading to the creation of a number of highly organised NGOs that interact with the Union's institutions.

6 *Nico Jacobellis v. Ohio* 378 U.S. 184 (1964).

7 Hans-W Micklitz and Norbert Reich (eds), *Public Interest Litigation before European Courts* (Nomos 1996).

8 Norbert Reich, 'Public Interest Litigation Before European Jurisdictions' in Hans-W Micklitz and Norbert Reich (eds), *Public Interest Litigation before European Courts*, vol 2 (Nomos 1996) 6.

9 Case C-309/89 Codorníu v Council [1994] ECR I-1853.

then Article 173 EEC in relation to dumping cases and applied it to a case concerning a trademark.[10] Gormley opined on the importance of the *AITEC* case[11] for the possibility for associations to be awarded standing, in this case in the field of state aid.[12] These are only two examples from a body of work that comprises discussions of almost every field of European law imaginable. This lack of a clear definition interferes with a coherent analysis of the actual problem. It is therefore necessary briefly to define PIL in a European context to understand how the nature of this concept causes difficulties in the judicial system of the EU.

The above mentioned authors make use of an interpretation of 'the public interest' that is functionally equivalent to 'the common good'.[13] Under that interpretation, all areas of law can benefit from PIL, where it can be a remedy for malfeasance regardless of the complainant. It is equally in line with the American origins of the term. The term 'public interest litigation' was coined by Justice Louis Brandeis, and referred to the nature of the *lawyer* who would advocate a cause not related to the corporate, lucrative interest.[14] Within his meaning, this could be any area of the law, from anti-trust to taxation - all could benefit from lawyers pursuing the common good. It was through the rise of the civil rights movement that public interest lawyers and that cause became synonymous. Yet, even when the successes of PIL are famous and numerous, standing in the United States still requires a personal scope. Litigation often starts with an engineered trigger,[15] be it Rosa Parks refusing to give up her seat on a bus,[16] the owners of property near national parks that are in danger of urban development[17] or the search for a same-sex couple with tax issues.[18]

Public interest litigation as associated with its American origin is therefore better exemplified by the *Defrenne* case than by the above mentioned examples;[19] a case where a lawyer sacrificed time and knowledge for the public good, combined with a case of rights infringement that can be limited to the scale of the individual.[20] In the US context, the public interest is, in effect, still the defence of a personal right or injury, the result of which may have an effect on the greater good. In principle, the standing requirements of the Union do not differ in this regard. The problem in European law is that of the true public interest, an interest that cannot be distilled to a single point of conflict in the form of an applicant. Therefore, it is proposed that for the current discussion, public interest should be defined as those rights that are not individualisable. Rights that are individualisable can when bundled be seen as a collective interest, which merits other considerations.[21] The effect of this

10 Anthony Arnull, 'Challenging Community Acts - An Introduction' in Hans-W Micklitz and Norbert Reich (eds), *Public Interest Litigation Before European Courts* (Nomos 1996) 46. It must be noted that, at least here, Arnull draws conclusions based on the phrasing of the A-G and Court of certain terms that could equally, or perhaps even more so, be interpreted as stating that this case dealt with a specific set of circumstances.

11 Cases T-447-449/03 AITEC et al. v. Commission [1995] ECR II-1971.

12 Laurence W Gormley, 'Public Interest Litigation and State Subsidies' in Hans-W Micklitz and Norbert Reich (eds), *Public Interest Litigation Before European Courts*, vol 2 (Nomos 1996).

13 R v Inland Revenue Commissioners, ex p National Federation of Self Employed and Small Businesses Ltd [1981] UKHL 2 (UKHL (1981)).

14 Louis D Brandeis, 'Opportunity in the Law, The' (1905) 3 *Commw. L. Rev.* 22, 28.

15 Alec Stone Sweet and Thomas L Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92 *AmPolSciRev* 63.

16 Browder v. Gayle, 142 F. Supp. 707 (1956).

17 Sierra Club v. Morton 405 U.S. 727 (1972).

18 United States v. Windsor 133 S.Ct. 2675 (2013).

19 Case 43/75 Defrenne v Sabena [1976] ECR 455.

20 In the case of Defrenne, Eliane Vogel Polsky actively sought out a 'victim' of gender discrimination because she believed it would be possible to rely on European Law directly before the Belgian Tribunal de Travaux and Conseil d'Etat. It is a prime example of strategic litigation where the federal law of higher order is used directly to circumvent or dismiss the lower laws of the federation's members. For a full account, see: Catherine Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996).

21 Mark Dawson and Elise Muir, 'One for All and All for One? The Collective Enforcement of EU Law' (2014) 41 *LIEI* 215.

definition is that the traditionally purely economic interests in the cases mentioned by Micklitz fall outside the scope of this treatise. The reason that they cannot be individualised lies in the nature of the act and poses a question not unknown in other legal orders. Consider the plight of unindividualisable rights, such as certain environmental rights, for which, by the nature of the right, neither the applicant nor the contested act, will ever be granted standing.

INDIVIDUALISATION AS A PILLAR OF STANDING

The problem in European law lies with the interpretation of Article 263 TFEU and its earlier incarnations, in which individualisation takes pride of place.[22] Although the power of the Court to review acts is sweeping in scope, the precise extent of this power depends on the class of applicants. It is clear from the wording of the Article that there are three categories of applicants:[23] the privileged in the form of Council, Commission, Parliament and Member States that can ask for the review of every measure, no matter whether it affects them or not;[24] semi-privileged applicants are the European Central Bank Committee of the Regions and Court of Auditors, these are only enabled to request the review of acts that affect their prerogatives; finally, natural and legal persons as addressees of an act or when directly and individually concerned by said act.[25]

The focus of criticism of the Court for its interpretation of the standing criteria relates almost exclusively to this last category of applicants. It is this category of applicants, encompassing citizens, companies and NGOs, that has the most limited capabilities both regarding the acts they can have reviewed and the hurdles they need to cross actually to be granted standing before the Court. Both Advocates General[26] and legal scholars agree that the problem originates with the Court's interpretation of the term 'individual concern' that stems from the now infamous *Plaumann* ruling, dating from 1963.[27]

In that case, a clementine importer from Germany requested the review of a Commission decision that denied the German state the possibility of applying a more advantageous tariff for citrus fruit. The Court ruled that Plaumann & Co was not individually concerned by the decision addressed to the

22 Article 173 EEC and Article 230 EC.

23 Four if one were to make a divide in the category based on whether dealing with a regulatory act or not.

24 This includes legislative acts.

25 It goes beyond the scope of this article to go into the nature of the acts that can be requested to be reviewed by natural and legal persons, although the Article specifically mentions '[...] an act addressed to that person or which is of direct and individual concern to them', thereby no longer making use of the earlier specifications of decisions or decisions in the form of a regulation. Technically, this means that all acts, including legislative acts, can be demanded to be reviewed by the Court by natural or legal persons, however, clearly, this would be difficult to reconcile with the direct and individual concern requirements. The Article in its current incarnation is in line with the case law, which clearly did not put too much stake on the nature of an act once the aforementioned requirements were met.

26 For instance, the Opinion of A-G Lagrange in one of the first cases: Joined Cases 16 and 17/62 Producteurs de Fruits v Council [1962] ECR 471: 'Such is the system that the jurist, for his part, might find unsatisfactory, but which the Court is bound to apply. This is not the place to justify the system. One might observe only that it is coherent and that serious arguments can be put forward to justify it'.

27 See for a more historical overview: Mariolina Eliantonio and Nelly Stratieva, 'From *Plaumann*, through *UPA* and *Jégo-Quéré*, to the Lisbon Treaty: The Locus Standi of Private Applicants under Article 230(4) EC through a Political Lens' [2009] *Maastricht Faculty of Law Working Paper* 1.

State.[28] For an applicant to be individually concerned, so the Court concluded, a party must show that he or she was affected:

> […] by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[29]

The Court has seen fit to elaborate on what could differentiate an applicant to such an extent that he or she could be found to be individually concerned. Most of these clarifications have focused on the rights of specific economic actors who are affected by those areas of European law that have had the greatest impact. Problematic situations regarding dumping,[30] state-aid,[31] and competition cases[32] have been resolved by individualising the applicants in a number of ways. It has been through these cases that the CJEU injected basic tenets of good governance and the rule of law in the European legal order. The creation of the concept of 'general principles';[33] the use of procedural rights and safeguards;[34] the insertion of basic rights protection;[35] all these concepts are now either seen as a logical part of the *acquis* or have been constitutionalised in the Treaty proper.[36] Yet these innovations also demonstrated the crux of the matter in relation to true public interest cases. The Court can only use these to establish the nature of an applicant as approaching that of an addressee of a measure, through distinguishing him or her from any other applicant.[37] Applicants who defend the interests of us all can never stand out. The concept of *locus standi* in European law is based on remedying the most personal of connections between Union and the individual. Where that connection is deemed to be even slightly more nebulous, the act in question is in effect deemed to be of such a nature that it is incontestable.[38]

THE CONCEPT OF INTERPRETATIVE SPACE

The concept of 'individual concern', as interpreted by the Court, has given rise to criticism in broadly four categories. Two of these are formal in nature: (1) the fact that (then) Article 173 EEC was

28 It did not go into the question of the importer being directly concerned because, the Court reasoned, if the applicant was not individually concerned a further investigation would not be necessary as the demands of direct and individual concern are cumulative.

29 Case 25/62 Plaumann *et al* v Commission [1963] ECR 95.

30 Case C-358/89 Extramet Industries SA v Council [1991] ECR I-2501.

31 Case 169/84 COFAZ v Commission [1986] ECR 391.

32 Case C-198/91 William Cook plc v Commission [1993] ECR I-2487.

33 Joined Cases 7/56 and 3/57 to 7/57 Dineke Algera v Common Assembly of the ECSC [1961] ECR 53.

34 Famously in *Extramet* (n 30) but see the similar reasoning in Case 264/82 Timex Corporation v Council & Commission [1985] ECR 849 (paras. 14-15).

35 Developed from the general principles (see n 33 at p. 55) in Case 29/69 Erich Stauder v Stadt Ulm [1969] ECR 419, often cited in one breath with Case 4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission [1974] ECR 491.

36 Art. 6 para 3 TEU 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

37 Notably *Codorníu* (n 9) demonstrates the coming together of individualisation and creative reasoning through most of the means mentioned above.

38 This is in part due to the fact that the clause 'direct and individual concern' is not only used to define the position of the applicant but also the nature of the contested act. Schwensfeier (n 1) 47; apart from this point, it is clear that the standing criteria are not exotic, as can be seen from the comprehensive study: Mariolina Eliantonio and others, 'Standing up for Your Right(s) in Europe' (Directorate General for Internal Policies - Policy Department C: Citizens' Rights and Constitutional Affairs 2012) Study PE 462.478.

interpreted so differently from its ECSC predecessor, Article 33; (2) the assumption that the Court is merely exercising docket control. The other two are of a more substantive nature: (3) the argument that the approach to 'individual' is illogical;[39] (4) the lack of adherence to fundamental human rights in the current interpretation. In all of these categories, the premise is that the defect is due to the Court's case law rather than the actual wording of (now) Article 263 TFEU. Do these criticisms succeed in elucidating and thus remedying the role of the Court in this problem?

The statement that any court is applying docket control is in itself not remarkable. Almost all legal orders make use of a form of docket control as a means of judicial management. When applied to the European situation, the complaint is meant to illustrate a seemingly random or even biased element that is introduced.[40] This observation clashes with the fact that the Court has, over the years, taken a progressive approach to the aforementioned rights and principles in the European legal order[41] and used them when possible to individualise parties. Similarly, arguments to the effect that the Court does not take sufficient account of certain human rights seem to forget that it was that same Court that introduced them into an economically focused Treaty system. The 'lack of logic' argument equally lacks convincing weight. When looking at the examples of the early sugar cases,[42] it may seem at first glance to be indeed remarkable that one producer will be deemed to have met the standing requirements, where a producer in a similar situation has not. Yet this is easy criticism to make from the national perspective, where acts are categorised and administrative law as a field has taken flight. This argument neglects the fact that in these 'illogical' situations, the Court is trying to remain within the boundaries not unlike those in, for instance, France, where the possibility of review of an act draped in democracy is severely limited.[43] The Court, however, has to do so without the benefit of carefully categorised and qualified acts. The impetus for this contribution is therefore the fact that the scholarship on access to justice and the CJEU's approach to standing does not engage with the place that standing requirements have in a constitutional order. One can conclude that the criticism has therefore not been particularly helpful in defining if and how the Court could remedy the issue of standing. This contribution therefore aims to offer a theoretical underpinning that offers a more constructive manner in which to critique the problem of, for instance, the public interest in EU law.

The onus is ever placed on the Court, which indeed is rarely willing to engage with these criticisms,[44] even when levelled by its own Advocate General.[45] Yet it should be remarked that in a few instances it has done so with the notable caveat that:

> While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding

39 Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (4th edition, OUP Oxford 2007) 512.
40 Arnull (n 10) 51; See also: Laurence W Gormley, 'Judicial Review in EC and EU Law—Some Architectural Malfunctions and Design Improvements?' (2001) 4 *Camb. YBELS* 167 in which the author infers a managerial approach.
41 See the remarkable reasoning in *Chernobyl* that laid the groundwork for *Les Verts,* Case 70/88 European Parliament v. Council [1990] ECR I–2041.
42 Cases 10 & 18/68 Società 'Eridania' Zuccherifici Nazionali and others v Commission [1969] ECR 459.
43 L Neville Brown and John S Bell, *French Administrative Law* (5th edition, Oxford University Press 1998) 157; Catherine Elliott, Catherine Vernon and Eric Jeanpierre, *French Legal System* (Pearson Education 2006) 226.
44 Ludwig Krämer, 'Environmental Justice in the European Court of Justice', *Environmental Law and Justice in Context* (1st edn, Cambridge University Press 2009) 209.
45 *Ad.* n 25 Case C-50/00P UPA [2002] ECR I-06677.

> Treaty and never amended as to its principles, it is for the Member States [...] to reform the system currently in force.[46]

Furthermore, the Court keeps reiterating its opinion that there exists a 'complete system of legal remedies'.[47] Apparently the Court itself is aware of the critique, is clearly not afraid to bring about change, and yet it does not move. Rather than giving reasons focusing on what the Court is doing wrong, research should focus on the 'why?' behind this immovable object, thereby facilitating the imagining of a possible fulcrum and lever.

Four Elements that Shape the Interpretative Space

It is submitted that in fact the Court does not see the interpretative freedom to widen the scope of its standing criteria. In all legal orders, the most important element that defines the standing criteria is in essence the relationships that exist between the formative institutions and the state. This is why the role of standing in judicial review is of such interest. More than any other single point of law, it can tell the story of a state's DNA. See, for example, the long history of the French limitations to judicial review out of fear of the return of judge-made law, a trauma from the days of the *ancien regime.*[48] Or the German system of administrative law, based on the protection of the rights of the individual, a reaction to the dark days in the middle of the twentieth century.[49] Each system outlines the relationship between the legislature, the executive and the citizen. In each system, the role of the judiciary describes the relative weight of each of these actors in relation to each other.

These relations are governed by more than merely the written law. They evolve over time and indeed in France,[50] Germany[51] and England,[52] the standing regime has changed significantly with the passing of years. This has often happened without any formal changes to codified principles, but rather through the case law of the courts themselves. Yet what compels these courts to change a rule of such a fundamental nature? What makes them decide that they have the authority to do so at that point of change? Lastly, what restrains that authority?

It is proposed that we can describe the relationship that governs a (supreme) court's freedom of interpretation of the rules of standing on the basis of four elements.[53] These four elements describe the field of tension that is a court's interpretative space. These elements equally indicate the relative weight of the actors within the *res publica.* These elements can be summarised as:

- **The constitutional relationship**; the constitutional possibilities for legal challenges in a formal sense
- **Federalism**; the existence and extent of a federal system within the state

46 Case C-50/00P Unión de Pequeños Agricultores v Council of the European Union [2002] ECR I-6677 para 45.
47 Case 294/83 Parti écologiste 'Les Verts' v European Parliament [1986] ECR 1139.
48 Edwin Borchard, 'French Administrative Law' 133, 135; C Sumner Lobingier, 'Administrative Law and Droit Administratif: A Comparative Study with an Instructive Model' (1942) 91 *University of Pennsylvania Law Review and American Law Register* 36, 39.
49 Peter Bucher, *Der Verfassungskonvent auf Herrenchiemsee*, vol 2 (Harald Boldt Verlag 1981).
50 Philippe Manin, 'The Nicolo Case of the Conseil D'Etat: French Constitutional Law and the Supreme Administrative Court's Acceptance of the Primacy of Community Law Over, Subsequent National Statute Law' (1991) 28 *CMLRev* 499.
51 B Muller, 'Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law: Judgment of the Court of 12 May 2011 -- Case C-115/09 Trianel and Judgment of 8 March 2011 -- Case C-240/09 Lesoochranarske Zoskupenie' (2011) 23 *JEL* 505.
52 Richard A Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 *MLR* 859.
53 David Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) 55 *MLR* 44.

- **Guiding principles;** ideals set out in constitution or other documents of equal status
- **Fundamental Rights;** the existence of fundamental rights in the constitutional order, possibly through treaties or other international obligations.

These elements were first found in David Feldman's work on the comparison of diverging developments in the judiciaries of the Commonwealth countries. Yet they can be put to an even more illustrative use. By developing these four elements and using them as a theoretical framework on the interpretative space for (supreme) courts, it is possible to give shape to that space.

The constitutional relationship is largely found in the written requirements for applicants laid down in the law and the meaning assigned to them by the legislator.[54] The constitutional relationship defines the basic conditions that an applicant will need to fulfil in order be eligible to have her or his complaint heard. In general, there are three approaches to these requirements: an interest based approach, a personal rights approach and the *actio popularis*. In general, the interest based approach, where only an interest in the act under review needs to be demonstrated is seen as more permissive than the personal rights approach, where the infringement of a right needs to be demonstrated. The *actio popularis*, where any party can ask for the review of an act, is very rare. The federalist or centralist tendencies of a state define the balance between central and decentralised government and the relationship that these institutions have to the applicant. In a federal system, an applicant can ask for the protection of his or her federal rights, whereas a centralist state will not have this added layer of protection. The guiding principles of a state can often be found in the preamble or formative articles of a constitution and set out the aspirations of the state. They aim to define the state's nature. In this sense, Germany aims to foster friendly relations with its neighbours[55] and Canada adheres to the concept of 'Peace, Order and Good Governance'.[56] This cannot only help as an important teleological tool, but in some cases a court will be able to award standing on the basis of a government acting against its constitutional nature and limits.[57] Finally, fundamental rights not only logically shape the interpretative space because they create rights and obligations but they are of interest as they can enter into the constitutional order through international treaties, creating radical shifts.

Through the application of this framework, the following section will paint the picture of the interpretative space as it existed for the CJEU at the inception of the EEC and how it has developed. For the purposes of this contribution, the four elements that shape the interpretative space will be briefly described for the period during the *Plaumann* case, to shed light on the reasoning behind this seminal case. The section following this explanation will explain how the interpretative space limits PIL. The last period described will deal with the period after 2009, in which all of these elements have undergone change.

54 Or, of course, the constitutive body, which need not be a formal legislator. See the US Constitution of 1787, the French Constitution of 1791, or the Paulskirche Constitution of 1849, none of which were drafted by the formal legislative body at the time.

55 '[…] *von dem Willen beseelt, als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen.*' - preamble *Grundgesetz für die Bundesrepublik Deutschland* (1949).

56 As per section 91 of the Constitution Act, 1867.

57 Famously in Germany the BVfG had to rule on peacekeeping operations, see: Markus Zockler, 'Germany in Collective Security Systems-Anything Goes?' (1995) 6 *EJIL*. 274.

THE INTERPRETATIVE SPACE SINCE *PLAUMANN*

Although authors have hailed the success of the constitutional development of the European legal order,[58] the earliest days of the project were fraught with ideological difficulties. At the time of the drafting of the Treaty of Rome, the original ideal of a federal Europe was increasingly becoming a lost dream rather than a vision for the future. The result was a bare-bones framework that was of a decidedly economic nature. Even though the German delegation present at the negotiations pushed for a more federal approach, including a strong federal court, the institutional arrangements ended mostly in a system after the French system of administrative law, with only minor concessions.[59] Where in a federal context a supreme court has far reaching powers to preserve the boundaries and rights laid down by the agreements in the constitution, the system of the Treaty of Rome was distinctly silent.[60] Indeed, it was the Court itself that would cut through this Gordian knot in the famous *Van Gend en Loos* and *Costa v ENEL* cases.[61]

Given the nature of the fledgling EEC, it is not surprising that no mention was made of any grand overarching ideal in relation to human rights or the furtherance of peace in the world. Where the German preamble to its Constitution speaks of Germany's obligation to maintain friendship with other people and secure the peace,[62] the preamble to the Treaty of Rome only hopes that the sharing of resources will lead to peace. Human rights were deemed to be covered by the newly created European Convention on Human Rights and were deliberately left out of the Treaty text. The only rights that did find their place were such rights as the right to equal pay.[63] It should be noted that these rights were mostly constructed to prevent any unfair competition between Member States, such as the use of women as low cost labour.

In this context, the role of the Court was extensively discussed. France, which had opposed the creation of a court since the days of the ECSC treaty, did not agree with the liberal interpretation the Court had given to standing under Article 33 ECSC.[64] The fact that industry had such relatively easy access to the Court had never fitted well with the French concept of the European project. Article 173 EEC was explicitly given a limited meaning as opposed to its ECSC counterpart.[65] The negotiating delegations were of the opinion that the opening of the standing requirements by the Court of Justice had gone too far.[66] A more limited approach was explicitly and carefully drafted to disallow overly wide access to the Court of Justice. This is perhaps best reflected in the Spaak Report, which followed the Messina Conference as a further concretisation of the plans towards the EEC. In the

58 Probably most famously Weiler: 'Transformation of Europe, The' (1990) 100 *Yale L.J.* 2403.
59 Dokumente Zum Europäischen Recht - Band 2: Justiz (Bis 1957). Available online: http://www.springer.com/law/international/book/978-3-540-63498-0 [accessed 8 October 2014].
60 For an overview of the struggles of early American comparative scholars in defining a federal jurisdiction, see: Peter Hay, 'Federal Jurisdiction of the Common Market Court' (1963) 12 *AmJCompL* 21; Jerry L Mashaw, 'Federal Issues in and about the Jurisdiction of the Court of Justice of the European Communities' (1965) 40 *TulLRev.* 21.
61 Morten Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65' (2012) 21 *Contemporary European History* 375.
62 'By the will to fulfill to guarantee the liberty and the rights of humans, to arrange the community and economic life in social justice and to serve social progress, to promote the friendship with other people and to secure the peace, the German people gave themselves this condition.' - Preamble German Basic Law 1949
63 Article 119 EEC: 'Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers'.
64 Gerhard Bebr, *Rule of Law Within the European Communities* (Institut d'Etudes Européennes de l'Université Libre de Bruxelles, 1965).
65 Barav (n 1) 191.
66 Anne Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome' (2012) 21 *Contemporary European History* 339, 246.

report, whose focus was on the ways in which market integration could take place, the paragraph on the Court read:

> La Cour, qui sera celle de la C.E.C.A., sera chargée de statuer sur les plaintes concernant des violations du traité par les Etats ou les entreprises et sur les recours en annulation contre les décisions de la Commission européenne, sans avoir le pouvoir d'y substituer une décision nouvelle.[67]

There is explicitly no mention of judicial recourse for individuals and the powers of the Court are further limited by the fact that it cannot substitute a decision by the Commission through a ruling. The Court of Justice was, for all intents and purposes, increasingly an administrative court in the French tradition, with an instruction not to travel the road it had gone down before. As such, the constitutional relationship between the Court, the institutions and the citizens was explicitly limited.

When *Plaumann* came before the Court, it found its interpretative space severely limited. It could not interpret federal safeguards to such an extent that the clementine importer could be granted standing, nor could it invoke overarching policy principles or human rights that could be used to give a more encompassing reading of the text. Perhaps most importantly, the Court knew that the drafters had given a very specific meaning to the text of Article 173 EEC, all the key people working in the sphere of the Court, be that on the bench or behind the scenes, had played an active part in the drafting of the Treaty and the creation of the institutions. The individual supplicant will only make it to the top of the Kirchberg when the case affects him or her in the most direct of manners.

THE IMPOSSIBILITY OF PUBLIC INTEREST

The real fact that the dogma of 'individual concern' poses difficulties for those interests that face the impossibility of individualisation became clear from a series of cases beginning with the famous *Greenpeace* case. In this first case in which an Environmental NGO (ENGO) contested an act of the Commission, two things became clear. For one, the Community had matured to the point that measures were taken outside of the field of market regulation that were clearly of an administrative law nature. Second, these measures were not easily qualifiable through the traditional approach of the Court as they did not produce an effect that could be brought down to a single applicant. In this case, which dealt with funding for the construction of a coal-fired power plant, the Court relied on earlier case law: associations will be granted standing if their procedural interests have been affected or when their members are each individually concerned.

Greenpeace illustrates how EU standing requirements are ill-suited for the pursuance of public interest litigation.[68] Although the facts of the case are problematic, it is clear that the Commission's act under the European Structural Fund has no personal scope in relation to specific inhabitants or economic operators, it is equally clear that the nature of the act is not within the domain of the legislative measures traditionally cordoned off from judicial interference. The *Greenpeace* case was a

67 'The Court, which will be that of the ECSC, will be responsible for ruling on complaints of violations of the treaty by states or businesses and on appeals against decisions of the European Commission, without the power to substitute a new decision', thereby following the French notion of an administrative court with limited judicial discretion. *Rapport des Chefs de Delegation aux Ministres des Affaires Etrangeres*, 2 B p. 25 (Spaak Report).

68 See for further cases: T-117/94 Associazione Agricoltori della Provincia die Rovigo a.o. v Commission [1995] ECR II-455, on appeal C-142/95 P Associazione Agricoltori della Provincia die Rovigo a.o. v Commission [1996] ECR I-6669; T-219/95 R Danielsson *et al.* v Commission [1995] ECR II-3051.

clarion call that awakened the different actors to the fact that the European project had evolved to such an extent that public interest litigation had a possible place in it.

The debate initiated by *Greenpeace* came to a head by the circumstances of the *UPA* and *Jégo-Quéré* cases.[69] In these cases, issues of problems with individualisation and the role of rights, especially the right to an effective remedy, were laid bare by the opinion of Advocate General Jacobs.[70] Triggered by his extensive analysis of the problems,[71] the Court of First Instance proposed a different reading of the term 'individual concern' than traditionally used by the ECJ.[72] Although the particulars of the cases and the intra-institutional fight that ensued are not particularly relevant for the thesis put forward in this contribution, the episode did contribute a valuable element to the discussion. Jacobs opened the floor to a wider discussion on justice and the role of the rule of law and fundamental rights within the scope of European law as, in his opinion, the Court did not adhere to these principles.[73]

The Opinion was remarkable, not least due to the role that the Court has played in the development of rights and the rule of law. Even before there was any discussion of Europe's accession to the ECHR, it was the Court of Justice that found and enforced human rights within the European legal order through the concept of 'general principles'.[74] The Court subsequently made use of these rights where it could to individualise certain applicants when possible, without crossing the line towards a rights-based standing criterion; an option that exists in, for instance, Germany and was explicitly dismissed when the Court was created. It should also be kept in mind that although the CJEU has made use of the case law from the Strasbourg court in its discovery and interpretation of human rights, the right to fair trial and an effective remedy as set out in the ECHR have always been interpreted in such a way as to allow a wide diversity of standing regimes.[75]

Similarly, the introduction of the concept of the Rule of Law came through the Court's ruling in *Les Verts.* The Advocate General's opinion makes it clear that he considers this term to have a far-ranging effect, as would be expected from a scholar in the Common Law tradition. However, the continent does not have such an extensive legal tradition in relation to the Rule of Law, which is reflected in the subtle differences in the wording of the different language versions of the case. The differences in meaning between Rule of Law, *rechtsgemeinschaft, communita di diritto* and *rechtsgemeenschap,* combined with the explanation given by the Court leads to the conclusion that the Court gives an expansive reading of the principle of legality, not intending to insert a new theoretical standard.[76] Jacobs, however, was of the opinion that the system did not ensure the right

69 T-173/98 Union de Pequenos Agricultores v Council [1999] ECR II-3357, C-50/00 P Union de Pequenos Agricultores v Council [2002] ECR I-6677; T-177/01 Jégo-Quéré et Cie SA v Commission [2002] ECR II-2365, C 263/02 P Commission v Jégo-Quéré et Cie SA [2004] ECR I-3425 *UPA* dealt with the effects of a Regulation that aimed to reorganise the market for olive oil products. *Jégo-Quéré* dealt with a Commission Regulation that laid down the mesh sizes of fish netting.

70 C-50/00 P Union de Pequenos Agricultores v Council [2002] ECR I-6681.

71 An opinion that is still widely cited and perhaps is his most famous contribution to EU law, see in his Festschrift: Takis Tridimas and Sara Poli, 'Locus Standi of Individuals under Article 230(4): The Return of Euridice?', *Making European Community Law: The Legacy of Advocate General Jacobs at the European Court of Justice* (Edward Elgar Publishing Ltd 2008).

72 *Ad* n 70. To quote Jacobs: 'In my opinion, it should therefore be accepted that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests'.

73 For a very thorough overview of the affair, see: Christopher Brown and John Morijn, 'Case C-263/02 Commission Jego-Quere & Cie SA' (2004) 41 CMLRev 1639.

74 Case 4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission (1974) ECR 491 para. 13.

75 As would become clear in the *Bosphorus* ruling. Bosphorus Hava Yollari Turizm v Ireland (2006) 42 EHRR 1.

76 Laurent Pech, '"A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 *EuConst* 359, 365.

to an effective remedy, nor did it ensure the existence of the Court's oft asserted '[...] complete system of remedies'.[77]

The Opinion has been the rallying call for authors on public interest litigation, especially in the field of environmental law, which has undergone the greatest developments within the European project. Authors have taken the argument to heart and published extensively, pushing for a change in the Court's interpretation.[78] However, these arguments come from the wish of the authors to bring about the level of environmental protection that they feel is needed. The mere wish for wider interpretation of standing to protect the environment[79] does not take into account the nature of the acts undertaken by the EU and the limits that nature imposes on the Court. In most cases, no further reasoning is given except the aforementioned general principles and rights that need protection by the Court. But as demonstrated earlier in relation to individual rights, the fact that certain constitutional elements exist does not automatically ensure a relationship between those rights and the applicant in a manner that ensures *locus standi.* Reductive reasoning like the aforementioned is, as Waldron warns us,[80] 'outcome-related reasoning' and the value thereof, no matter how noble the aspiration, is negligible and not conducive for change.

In reality, there were only small shifts in the EU's legal order through the introduction of the wish for a high level of environmental protection[81] and the acceptance of the Court's case law on human rights by way of the Council Conclusions.[82] These changes are hardly enough to cause a significant shift in the four elements to allow for an interpretative shift by the Court.

2009, DIE VERWANDLUNG?

In 2009, significant changes to the four elements that create the interpretative space of the CJEU came into effect. First and foremost, the entry into force of the Treaty of Lisbon brought the most significant change to the wording of Article 263 TFEU to date. Second, the Aarhus Convention formally entered into force in the European legal order.[83] Last, the Charter of Fundamental Rights, incorporating a right to effective judicial protection has gained the status of primary law.[84] Although these changes superficially seem to address the criticism of the interpretation of the Court, the extent to which they actually shape the interpretative space will be of the essence.

77 As first mentioned in *Les Verts* para 23.

78 See, for instance: Nicolas de Sadeleer, Gerhard Roller and Miriam Dross, *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal* (Europa Law Publishing 2005); Ludwig Krämer, 'The Environmental Complaint in EU Law' (2009) 6 *Journal for European Environmental & Planning Law* 13; C Poncelet, 'Access to Justice in Environmental Matters--Does the European Union Comply with Its Obligations?' (2012) 24 *JEL* 287.

79 Krämer (n 43) 209.

80 Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) *Yale L.J.* 1346.

81 As can be seen from the additions made by the Treaty of Amsterdam to (then) Article 100 (a) ensuring that all measures undertaken by the Commission will take as a base a high level of environmental protection. An enactment of the statement under the new preamble.

82 OJ 1977 C 103/1 Council Declaration on Democracy, EC Bulletin 3 1978 p.5.

83 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* 38 ILM 517 (1999), as approved by the Union by way of Decision 2005/370/EEC OJ L-124

84 Arguably, the Lisbon Treaty has equally caused for a change in the federal nature of the Union through, for instance, the defining of exclusive and shared competences in relation to subsidiarity. Though of interest, these changes have not yet seen use in the field of public interest litigation. This will be discussed in the author's forthcoming doctoral thesis on this subject. See until that time: R Schütze, 'Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism?' (2009) 68 *CLJ* 525.

The most obvious element to have changed is the manner in which the Treaty of Lisbon has added a new category of applicants. Although the article largely remains the same, the paragraph on the possibilities for natural and legal persons now reads:

> Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.[85]

This innovation was a result of the discussion circle at the Intergovernmental Conference for the Constitution for Europe. During the negotiations on a constitutional document for the European Union, a broad discussion took place on all elements of European law. Within the discussion circle on the future of the Court, the issue of standing was naturally discussed, but the solutions proffered differed widely.[86] The main problem seems to have been an agreement on what the actual problem was that needed to be resolved. On the one hand, there was a camp that, in the line of Jacobs's comments, wanted to see far-reaching change of the fundamental underpinnings of the Article, some suggesting the need for a rights-based approach to judicial review.[87] On the other, the narrow view of the problem dealt with the situation in *Jégo-Quéré,*[88] the one situation in which this camp was of the opinion that an actual denial of justice may have taken place. The result was the creation of a clause that is difficult to see out of the context of the original idea behind the Constitution. Under the Constitution, the number and nature of European acts was supposed to be reduced and simplified.[89] The concept of the 'regulatory act' would have created a category that was brought to light by *Jégo-Quéré,* an act by an Institution that created an immediate real world effect without the intercession of another body. Setting the mesh size of netting, placing chemical agents on lists, these are types of administrative acts that have a direct relationship with those affected by them. Although this seems a clear concept, the clear categorisation of acts did not transfer from the Constitution into the Treaty of Lisbon,[90] resulting in the necessity of interpretation by the Court on what a 'regulatory act' comprised post-Lisbon.

Lisbon also changed the status of the Charter of Fundamental Rights of the EU. Where the status of the document had been vague since its inception in 2000, the Treaty of Lisbon elevated the Charter to the status of primary law, reaching equivalence in legal status to the Treaties themselves. The Charter formally implements a number of human, social and economic rights into the EU legal order, amongst which is Article 47 guaranteeing the right to an effective remedy and a fair trial. Article 47 aims to consolidate Article 6 and 13 of the Convention into one article and as such, the Article needs to be interpreted in line with the case law by the Strasbourg Court on fair trial.[91] One of Jacobs's main points in the *UPA* opinion was the fact that even though the Charter did not have a formal status, the rights stated therein should at least be indicative of the Union's intentions. The Court answered the Advocate General's argument by referring to the Articles in the Convention and to its case law with regard to the Member States, but the effect seemed limit to these mere remarks. The fact that the Charter now has the same status as the Treaties makes it an enforceable right rather than a guiding light.

85 Article 263 (4) TFEU, emphasis added.

86 See the final report for the Intergovernmental Conference by Circle I: CONV 636/03.

87 See the Draft Articles for Part Two on the Court of Justice: CONV 734/03 p.21

88 See *supra* n 35. Against the *UPA* formula, it is impossible for a member state to create an implementing act in situations where the Commission prescribes a certain (technical) norm or standard.

89 Article I-33, Treaty Establishing a Constitution for Europe OJ C 310, 16.12.2004 p.26.

90 Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010).

91 See: Explanation on article 52 Explanations Relating To The Charter Of Fundamental Rights OJ 2007 C-303/02

While Lisbon was dawning on the horizon, the Union had committed itself to the obligations laid down by the Aarhus Convention, a ground-breaking international agreement that seeks to help citizens in the enforcement of their environmental rights. As such, it is built on three 'pillars' that aim to facilitate this, the rights of: access to information; access to decision making procedures; and access to justice. Whilst the first two pillars have been implemented with, arguably, relative ease, the third pillar has caused a lot of problems within the European system of judicial protection.[92] The premise of the rights of access to justice within the meaning of the Convention is the idea that every person should be able to have acts that affect his or her direct environment reviewed by an independent body. Not only that, but the Aarhus Convention explicitly creates a role for NGOs in this process, obliging signatory states to make it possible for them to have access to justice when the protection of the environment is their statutory goal.[93]

CHANGES IN ELEMENTS ≠ CHANGES IN INTERPRETATIVE SPACE

Given the changes discussed above, one would be forgiven for assuming that the Court's interpretative space has changed to such an extent as to create a possibility for the Court to be more lenient regarding PIL, at least when involving the environment. However, the opposite seems to have happened. In recent case law, the Court has held on to its classical interpretation, gainsaying the claims of environmental organisations to their rights. Where NGOs have tried to rely on the Aarhus Convention directly, it has stated that it is not possible to do so due to the nature of the Convention as it is not sufficiently clear to rely on.[94] It has made use of the unclear situation of the term ‘regulatory act’ to limit its interpretation to the most literal meaning possible.[95] Even the term 'direct concern', which was underdeveloped before Lisbon, has now been given a new lease on life.[96] Where in earlier cases the Court would not place too great an emphasis on the term, accepting a party to be directly concerned when the member state giving actual effect to the contested measure did not have any discretion in its application, now even the collection of fines or tariffs will mean that the applicant is not directly affected by the underlying EU act.

This may seem remarkable, yet closer inspection through the lens of the theoretical model may offer an explanation. The shift in the elements that form the Court's interpretative space may have been far less great than assumed on first inspection. The changes to the text of the Treaty have explicitly considered the problems faced by both the individual applicant and public interest litigants. And while the regulatory act was deemed to offer solace for the individual, the plight of, for instance, NGOs was deemed to fall outside the scope of the Treaty.[97] The Explanations to the Charter make clear that it is not the intent of Article 47 to change the system of judicial protection within the EU.[98] The Aarhus Convention states that it allows for the rights it aims to grant to be achieved within the legal framework already in place in the signatory states. In proceedings brought by ENGOs against

92 Regulation 1367/2006/EC OJ L-264.
93 Art.2 paragraph 5 Aarhus Convention.
94 Case C-401/12 P Council v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht and Case [2015] C-404/12 P Council v Stichting Natuur en Milieu and Pesticide Action Network Europe [2015].
95 Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council [2013].
96 Case T-312/14 Federcoopesca v Commission the term has had such a negligible role that it did not warrant discussion in the preceding sections.
97 Final Report of the Discussion Circle on the Court of Justice, CONV 636/03 (2003). However, it should be noted that they can form part of the proceedings before the CJEU when part of the proceedings in the preliminary reference proceedings as a third party intervention. *Cf.* Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources et al. [2014] not yet reported.
98 Art. 52 para 2 Charter and the corresponding text in the Explanations: ‘[…] such rights remain subject to the conditions and limits applicable to the Union law on which they are based, and for which provision is made in the Treaties’.

the Union before the body that was instituted by the Convention to ensure compliance of its signatories, the ACCC, the Institutions have remained firm in their insistence that it makes correct use of this clause.[99] Furthermore, the Institutions have made their opinion clear that almost all environmental measures fall into the category of 'legislative act', a category exempt from the 'Access to Justice' provisions in Aarhus. Last, but certainly not least, the declaration upon approving the Aarhus Convention by the EU explicitly refers to the fact that it does so on the understanding that the system of judicial protection will not be affected.[100] Again, the Court finds its interpretative space severely restricted.

It has, however, found a solution to its dilemma. Within the four elements of the theoretical framework, the Court has had the most space regarding the federal nature of the Union. Although at its inception, it was explicitly not federal in nature, certain elements have given the Union at least a federal character. The preliminary reference procedure, and the manner in which the Court has developed it is one of those elements. In recent years, the Court has proactively enforced the Aarhus Convention when the possibility arose through the references of Member States' courts. This is especially astonishing as these rulings go against the grain of the principle of procedural autonomy,[101] perhaps one of the last areas free from European interference.[102] Some have called this judicial subsidiarity,[103] but it is submitted that in fact the Court is making use of its freedom in the interpretation of the federal nature of the Union to bring to fruition finally the complete system of remedies it has always envisioned. By securing the rights of public interest organisations to bring a case before the national courts[104] and by strengthening the obligations under the preliminary reference procedure,[105] the CJEU is able to create a judicial structure through which it can effectuate rights and enforce EU and member state obligations, without stepping over the boundaries in place regarding direct action.

CONCLUSION

The use of the theoretical framework of four elements that shape the interpretative space to illustrate the Court of Justice's limits when interpreting the standing requirements offers a compelling argument regarding the Court's well documented reticence in relation to access for public interest litigants. It has been demonstrated that the Court's power as the final arbiter of the

99 'Submissions of the European Commission, on behalf of the European Community, to the Aarhus Convention Compliance Committee concerning communication ACCC/C/2008/32' p.10.

100 '[…] the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9 (3) of the Convention' Declaration upon approval of the Convention. Available online: http://www.wipo.int/wipolex/en/other_treaties/details_notes.jsp?treaty_id=261[accessed 14 October 2016]

101 JH Jans, S Prechal and RJGM Widdershoven (eds), *Europeanisation of Public Law: Second Edition* (2nd edition, Europa Law Publishing 2015).

102 Michal Bobek, 'Why There Is No Principle of "Procedural Autonomy" of the Member States', *The European Court of Justice and the Autonomy of Member States* (Intersentia 2012).

103 George A Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 *ColumLRev* 331; Sanja Bogojević, 'Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity' (2015) 34 *YEL* 5.

104 As illustrated in, for instance, Case C-263/08 Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommungenom dess marknämnd [2009] ECR I-9967 and Case C-240/09 Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky [2011] ECR I-1255 in which the Court of Justice ordered far reaching changes to respectively Swedish and Slovak procedural law on standing requirements in order to conform with the relevant European regulation implementing the Aarhus Convention. In both cases the Court of Justice interprets the Regulation in the light of the purposes of the Convention, achieving a more judicial result than the Aarhus Convention Compliance Committee would be able to achieve.

105 Case C-160/14 João Filipe Ferreira da Silva e Brito and Others v Estado Português [2015] (not yet reported)

Treaty has, from the inception of the European project, been limited when it comes to all applicants. The framework reveals how the Court has been creative in finding ways to individualise applicants whilst remaining within the limits these elements set. In doing so, it has proven to give a better explanation for the Court's behaviour and a useful tool for analysis. The rise of public interest litigation as a response to the growth of the European Union into a legal order that goes beyond its merely economic origins has offered a challenge. Although changes have taken place as a response to this development, these changes are mostly superficial in nature and have in fact done nothing for the interpretative space of the Court. The Court's seemingly unflinching approach to 'individual concern' is therefore logical when seen through the lens of the framework.

The logical extension of this conclusion is that the Court will only see the possibility for change when the Treaty is redrafted with the explicit will of the drafters to allow for unindividualisable rights to be defended. This is in part a particularity that exists within the European constitutional order, in which primary law cannot be directly changed through other legislation, be it international treaties or secondary law. However, this assumption underestimates the role of the other elements. The fact that the Court is now building on the role of the preliminary reference procedure is more remarkable that one might assume at first glance. For the longest time, the Court has stated that the procedure as it exists in Article 267 TFEU was not a remedy.[106] However, in the face of changing circumstances, the Court has developed the one element in which it has had the least limitations: the federal nature of the judicial system.

The effects of this development are difficult to predict. On the one hand, the possibilities of defending these interests both regarding national rules and Union measures have increased due to the Court's case law. This effect has been reached whilst still complying with the wishes of Member States and Institutions to keep the balance as it has always stood. On the other hand, the more formal criticisms already mentioned by Jacobs remain valid. The cost, both monetary and in time, to an ENGO before it can actually have an act by the Union and its Institutions reviewed, is substantial. The application of the Court's intervention is also limited to the field of environmental law; when social rights increase in importance this process will have to take place again. Equally, this approach hinders the formation of a pan-European NGO movement. This not only hinders the pooling of knowledge and resources but has been argued to be less efficient.[107] Although the final conclusion of this contribution has to be that the Court is making the best use of its severely limited interpretative space, this conclusion also has to come with the *obiter dictum* that this would not be necessary if the constitutive parties in the European legal order would realise that the nature of the Union has changed, and PIL has a place in it.

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106 Case C-283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 3415 para. 9
107 Carol Harlow, 'Public Law and Popular Justice' (2002) 65 MLR 1.

Book Review

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THE EUROPEAN PUBLIC SERVANT – A SHARED ADMINISTRATIVE IDENTITY?

Author: Patrick Overeem & Fritz Sager Kyris

The growing complexity of public administration at the European Union (EU) level is well documented in academic literature, and multiple authors make references to a European administrative space, see for example Trondal and Peters (2013); Olsen (2003); Hoffmann (2008). Research on member state compliance with EU regulation often emphasises the importance of well-functioning national public administrations. Yet, questions related to the existence or the emergence of shared European administrative principles and values remain under-researched. *The European Public Servant – a shared administrative identity?* — edited by Fritz Sager and Patrick Overeem — aims to fill this gap in the literature by analysing contemporary and historical ideas on the role of the public servant in Europe. In doing so, the book makes a welcome contribution to the scholarly debate on the history of administrative ideas, and I would recommend it to any reader interested in public administration and Europeanisation.

This edited volume is divided into six parts, each part consisting of two or three chapters. The first part includes an introductory chapter written by the editors, and a theoretical and methodological chapter written by Raadschelders. Part two and three focus on historical developments and how the public servant has been conceptualised across countries and time. In the second part, "Older Notions of Public Service", Paul first analyses the role played by the king's counsellor as a sixteenth century predecessor to the European public servant. She concludes that counsellors of the past and public servants of the present share the responsibility to provide advice, and the advice given by them can be regarded as a way to increase the appearance of governments ruling *for* the people rather than *over* them. In the second historical chapter Rutgers gives an account of the oath of office in the Netherlands. This contribution shows that whilst the swearing of oaths is a symbolic act it carries important weight particularly in legal contexts throughout Europe.

The third part of the book is dedicated to what the authors refer to as the "formative nineteenth century". In the first chapter of three Hegewisch addresses the heavily debated question of to what extent public servants should enjoy political influence. An analysis of early nineteenth century German ideas serves to illustrate two opposing normative stands: the public servant as someone whose influence has to be restrained to protect citizens' freedom and the public servant as someone whose influence instead protects the freedom of citizens. It is argued that an important point of a shared administrative identity would be to mediate between these conflicting views. This is followed by Stapelbroek's exploration of the link between moves to depoliticise government activities by turning them into administrative tasks and the opening up for the emergence of a European space. In the final chapter of the third part, van den Berg, van der Meer and Dijkstra investigate how and why public servants have acquired a protected status throughout Europe. Public service bargain

perspectives are used to analyse the similarities and differences in the historical development of countries belonging to different administrative traditions.

The contributions to the fourth part of the book assess the transfer of administrative ideas between Europe and America. In the first chapter Rosser shows how Hegelian ideas of the administration as a fundamental part of the government of modern states influenced American public administration. Mavrot then examines how American ideas have inspired post-World War II changes to the composition and study of public administration in France. She concludes that the French tradition of emphasising the juridical skills of public servants came under increased criticism from politicians, academics, and administrators calling for a more technocratic civil service similar to that of the United States. In the following chapter, Hurni similarly shows how American ideas that public servants are not mere tools of political power but hold discretionary power took hold in Germany.

The Europeanised public servant in the EU is the theme of the fifth part of the book, which includes a chapter penned by Connaughton and a chapter co-authored by Hilmer Pedersen and Johannsen. In her chapter, Connaughton analyses Irish public servants' interaction with policy-making at the EU-level, and concludes that, whilst EU-membership has affected the administration, tradition is still an important factor. Hilmer Pedersen and Johannsen instead look to the Eastern part of the EU and investigate how the public administrations of the Baltic states are moving away from the Soviet legacy and adopting European values. They find that the most significant differences are not to be found between states but between different levels of administration. Whereas public servants at the level of state administrations place more emphasis on integrity than what sub-national public servants do, those employed at the sub-national level tend to be more open to citizens' participation.

The sixth and final part seeks to address the question of whether or not a shared European administrative identity exists. Using multivariate analysis of the World Values Survey 2005/6, Brachem and Tepe find that public servants in France, Germany, Great Britain and Sweden rate *Self-transcendence* values (i.e. values associated with the protection and enhancement of welfare for people and nature) more highly than what public servants in the United States do. The training programmes of public servants and the implications that follow from them are then explored by Talshir, who argues that political culture has a significant impact on public service training. Finally, in the last chapter, the editors attempt to pull the strings of the various contributions together in order to shed light on the book's research questions.

As this overview of the various chapters show, the volume has an ambitious scope in terms of the time period and range of countries covered. Rather than imposing the same framework for all contributors, the editors have allowed the various authors to explore different aspects of the volume's themes from their various perspectives. The contributors come from different sub-disciplines of political science and public administration, and utilise different methodological approaches. This is simultaneously refreshing and somewhat frustrating. It is refreshing because it sheds light on European administrative values from a range of different perspectives, thus inviting the readers to open their mind to different avenues of research and critical thinking. It must also be stated that all contributions are highly informative and intellectually rigorous, as they are carefully situated in the wider literature, and include ample references to sources as well as succinct clarifications of methods and approaches used. Where appropriate, authors have also provided additional information and clarifications in foot notes. There is no doubt that this volume is an important contribution to the study of the European administrative space and the emergence of shared administrative values. The frustration comes from the sense that you have merely scratched the surface of one area before moving on to the next. For instance, given the undoubtedly significant influence of the European Union on national public administrations, readers looking for an in depth systematic exploration of the effect of the European Union upon the emergence of a shared

administrative identity in Europe may be somewhat disappointed. Readers approaching the topic from a different background may instead wish for more analysis pertaining to their particular interests. It would not be fair to the volume's contributors to label this a weakness. One must see this book for what it is: an attempt to explore and start to make sense of an under-researched area. It is apparent that the authors are reluctant to draw too far-reaching conclusions on what in some cases is a rather explorative research approach. This said I still believe that the concluding chapter could have been just that little bit bolder by elaborating further on results already discernible from the various contributions. For instance, what is the wider significance of tensions between Europeanisation pressures and national traditions, or between different perceptions on the role of the public servant? To conclude, its ability to stimulate curiosity is a key strength of this volume. Readers coming from different backgrounds but sharing an interest in European public administration can all benefit from reading this book, which ends by stating a number of clear future research agendas. Readers may, for instance, be inspired to follow the editors' suggestions to widen the comparative perspective to include more countries and regions, or to impose a more developed analytical framework on all contributions in order to more systematically develop a body of theory that helps us make sense of the wealth of historical and contemporary material.

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SHORT DESCRIPTION:

This edited volume explores the emerging European administrative space. With contributions from several sub-disciplines to political science and public administration the book investigates to what extent a shared administrative identity amongst public servants exists in Europe using a range of methodological approaches.

KEY WORDS Administration; Europe; public servant; administrative space; identity

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Book Review

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HANDBOOK ON TEACHING AND LEARNING IN POLITICAL SCIENCE AND INTERNATIONAL RELATIONS

Editors: John Ishiyama, William J. Miller and Eszter Simon

Abstract

An essential guide for Political Science educators at all stages in their career. This solid compendium offers a state of the discipline overview of teaching practices and challenges, providing a sound base for designing engaging active learning activities.

Key Words

Politics; International Relations; Teaching and learning; Active learning

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In an academic environment where research often seems to be more valued than teaching, this volume seeks to bring back the balance by shifting the focus towards pedagogical practices in Political Science and International Relations (IR). Designed as a practical tool aimed at educators at all stages in their career, the *Handbook on Teaching and Learning in Political Science and International Relations* represents a useful addition to the existing literature and an essential guide to curriculum building and pedagogical methods in this discipline. The Handbook is a solid compendium of best practices and ideas for teaching innovation and it constitutes a valuable contribution to the scholarship of teaching and learning from a discipline that is often under-represented in terms of research on pedagogical aspects.

This comprehensive volume brings together 37 contributions grouped in three parts: curriculum and course design; teaching subject areas; and in-class teaching techniques. The chapters in the first section focus on overarching aspects of learning design, such as curriculum building, outlining the evolution of curricular models in the USA (chapter 1), distance and online learning (chapter 5), assessment - both at programme and at course level - as an integral part of the course design cycle (chapters 7, 8 and 9), building cross-disciplinary learning communities (chapter 10), as well as

promoting skills development and civic engagement as goals of Political Science education (chapters 6, 11 and 13). A recurrent theme in this part, revisited in the rest of the volume, is 'constructive alignment', the idea that all the pieces of the learning design puzzle, starting with building the curriculum, on to choosing the teaching methods and eventually the assessment types have to be carefully planned and executed to match, ultimately, the learning goals. Students' engagement with their own learning is seen as potentially leading to an active involvement in political and civic life and is thus a skill that needs to be nurtured by political science courses. Similarly, information literacy (chapter 11) is a vital component of Higher Education in general, with specific relevance for the disciplines under discussion due to the large amount of information available, requiring the students to develop advanced search and processing skills.

Moving towards a more practical dimension, the second part of the Handbook offers valuable teaching strategies for specific topics or subject areas. Active learning methods such as simulations, debates and the use of multimedia material as a starting point for discussion are recommended by Watson, Hamner, Oldmixon and King for engaging students in Introduction to Politics classes (chapter 14), by Agnieszka Paczynska for teaching conflict and conflict resolution (chapter 15) and by Fiona Buckley in the context of teaching gender politics (chapter 17). Mitchell Brown (chapter 18) and Christina Leston-Bandeira (chapter 19) focus on teaching research methods at graduate and undergraduate level respectively, emphasising the need for methods courses to be thoroughly integrated into the curriculum and for students to reflect on the research process and understand the direct link with their future careers. While experimenting with new pedagogical methods is very important in the endeavour to provide students with a positive learning experience, Rebecca Glazier (chapter 23) reminds educators that, in order to be effective, innovation should take place within the framework of their own teaching style.

The third part brings a series of in-class teaching techniques to the fore. The overall focus, similarly to the volume as a whole, is on active, student-centered learning. This can take various forms, such as: simulations, as illustrated by Asal, Raymond and Usherwood (chapter 26) and Boyer and Smith (chapter 27), group work (chapter 28), team-based learning as discussed by Andreas Broscheid (chapter 29), experiential learning (chapter 30) and Problem-Based Learning as Heidi Maurer explains in chapter 31. From their respective perspectives, the authors address the most important aspects of active learning: students playing an active role in their learning helps them better understand complex issues; the classroom seen as a collaborative rather than a competitive environment; and, finally, a constant reminder of key elements to be carefully tackled: debriefing, feedback and encouraging student self-reflection. Kas and Sheppard offer interesting tips on making the most of large class teaching (chapter 35), from how to make lecturing more appealing, to introducing interactive elements and the vital aspect of communication and classroom management; while Gabriela Pleschova assesses the use of three technology tools in the Political Science classroom (chapter 25). Ishiyama and Rodriguez make a very relevant point by bringing the reader 'back to the basics' of syllabus design (chapter 24). The syllabus, in their view, plays the role of a roadmap, outlining the most important aspects of the learning process; it serves as a guide to both students and educators and thus needs to be written in very clear language in order to manage course expectations.

While the book covers a wide range of topics touching upon the different levels of the teaching and learning process, in geographical terms the contributions are mainly written by scholars from the United States and the United Kingdom, with fewer than a quarter of all authors representing other countries. Considering the fact that some of the chapters are intrinsically linked to the respective national context regarding education policies and university organisation, the volume could have benefitted from a more geographically diverse pool of contributors, in order to offer a more comprehensive yet more nuanced account of teaching Politics and IR.

Each of the three parts constitutes a valuable source of reflections on various pedagogical practices in Political Science and IR, thus making the Handbook a very useful reference tool for every stage of the teaching and learning cycle, from curriculum design, to methods and approaches to specific topics. In order to showcase the rich content in a user-friendlier manner, the chapters could have been grouped in clearly divided sub-sections (i.e. sub-sections on assessment and skills acquisition in the first part, a sub-section on active learning in the third part), thus reinforcing the overall coherence of the volume. Moreover, as most of the contributions, especially in parts two and three, outline teaching strategies or methods in a specific area, the use of an in-chapter template, whereby all authors observe a certain structure and address similar issues, would have added to the clarity and consistency of the Handbook.

The overarching theme of active learning is addressed in detail in the third part of the Handbook, through seven different contributions, ranging from group work and team learning to simulations and Problem-Based Learning. Each chapter, reflecting the experience of the author(s), represents an insightful set of practical recommendations aimed to inspire and support Political Science educators. Grouping these parts into a specific sub-section and connecting them in order to avoid overlaps and enhance their message would have allowed the reader to place specific methods into a broader context and grasp potential synergies.

While the size and richness of content are commendable, a meticulously designed structure was required in order to strengthen the Handbook's potential for becoming a helpful reference tool in the process of course design. Although the general organisation in the three parts does offer a certain amount of guidance, the diversity of topics tackled within each part requires a reinforced narrative structure, with mini-summaries at the end of each part, outlining the core themes and connecting the chapters while steering the reader through the content of the volume. Jeffrey Bernstein's chapter on the Scholarship of Teaching could have served as an opening to the Handbook, framing the issues to be addressed. Moreover, a final conclusion, linking the substance of the book with general educational concepts, would have allowed the readers to look at their teaching practice from a broader, non-discipline related perspective.

Teaching excellence is increasingly becoming relevant in this ever-changing academic landscape. Continuous professional development, not least through networks providing a framework for best practice exchange, is an essential factor in designing a rewarding learning experience. In this context, the *Handbook on Teaching and Learning in Political Science and International Relations* offers a valuable overview of the pedagogical practices and challenges in this discipline while aiming to equip educators with a useful set of practical tools for and ideas on innovating their teaching and designing engaging courses and programmes.

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Handbook on Teaching and Learning in Political Science and International Relations

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Book Review

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TEACHING AND LEARNING THE EUROPEAN UNION. TRADITIONAL AND INNOVATIVE METHODS

Editors: Baroncelli, S., Farneti, R., Horga, I., Vanhoonacker, S.

Abstract

The topic of the book is teaching and learning in European Studies. In its holistic approach, this volume combines chapters addressing the general features and particularities of the academic discipline as such, delivering empirical findings on the nature and type of relevant pedagogies and examples of best practice examples in this field.

Keywords

European Studies; Teaching and Learning; Active Learning; Innovative Teaching.

The book's focus, as the title already gives away, is the rapidly evolving field of European Studies. Although it mainly emphasises pedagogical aspects, the volume also manages to sketch a more general picture of European Studies' programmes, their origins, purpose and current features. It portrays innovative teaching experiences and various active learning methods relevant for the field.

In a commendable format, the book addresses those involved or about to engage in the instructional design and teaching of European Studies. When looking for a piece to grasp the discipline better, to understand dimensions of employability, to get insights into existing pedagogical approaches as well as examples of best practice or to be inspired for one's own teaching, this volume is one of the very few available options. The lengths of chapters were ideal for reading, well-structured with regards to the information they provided.

Divided into three parts, the first section of the book establishes the context in which the field of European Studies emerged, continues to develop and evolve. Those interested in the history and evolution of European Studies programmes should consider reading the introduction by Baroncelli, Farneti and Vanhoonacker. It provides the reader with background information about the discipline and addresses its particularity: the parallel development of the discipline alongside the actual European integration process as a sui generis phenomenon.

Those audiences looking for input on professional education might find the chapter of Gijselaers, Dailey-Hebert and Niculescu valuable. It analyses the potential of European Studies programmes to prepare future employees for new labour market demands, which require them to work in dynamic, complex and ever changing environments. In this context, the authors consider European Studies as a perfect laboratory for the relevant teaching and learning goals, such as understanding and functioning in an applied fashion and focusing on problem-solving skills.

That the demands from the labour market in this area of expertise shift away from content to competencies is reflected also in the next chapter written by Bearfield, which will appeal to those audiences interested in the human resources policy of the European Union. The article concisely summarises the review and reform process of the human resources selection strategy of the European Personnel Selection Office (EPSO), to outline the current outlook. Being aware of the competences required helps potential course designers of EU Studies to adapt the content and support potential applicants in their preparation for the exams.

Those readers concerned with practical application, this time in relation to European active citizenship, will also be interested in the chapter contributed by Van Dyke. She explores ways in which (higher) education programmes can support active citizen education. She argues that for a strong citizenry it is necessary that political science instructors foster an understanding of practical political decision making and democratic deliberation. She considers active learning, such as through simulations, as central in order to foster European consciousness and to develop civic skills, as a prerequisite to becoming a lifelong engaged European citizen.

Audiences interested in questions of multilingualism in Europe and the necessity for it to be reflected in European Studies will find stimulating insights in the second part of the book which opens with a chapter by Franceschini and Veronesi. Although states still tend to prefer to adhere to one nation, one language ideologies, the authors argue that multilingualism as a major cultural characteristic of Europe should be reflected in its higher education landscape. For them, higher education cannot be limited to transmitting knowledge *about* Europe, but should be devoted to offering a space for communicating *as* Europeans.

Readers looking for insights into the added value of visits to the EU institutions and internships will find Chapter 6 by Lavalle and Berlin of interest. It depicts the experiences of an intense study tour and internship programme for Canadian students. This programme is depicted as having been highly successful in helping non-EU students understand the EU.

Chapter 7 by Baroncelli, Fonti and Stevancevic and Chapter 8 by Fonti and Stevancevic are concerned with innovative teaching methods in European Studies. The authors present and assess the findings of an empirical study which clearly shows that the use of innovative methods and tools is still limited. Fonti and Stevanceivic write about an international research project in which 300 professors and researchers were asked about their use of teaching methods, such as internships, distance learning and exchange programmes. Their finding is that the majority of lecturers have yet to incorporate innovative teaching methods and tools habitually into their teaching. However, further research is needed to identify more concretely the factors leading to this outcome.

In Chapter 9, Baroncelli addresses a readership looking for information on linguistic pluralism in European Studies and the Jean Monnet Programme. Her results reflect education policy as a field where the EU's role is primarily to support and supplement member states' action. Two-thirds of the programmes, in all their diversity, are taught in the domestic language, only one-third is taught in English. Interestingly, English is definitely the lingua franca: there are no cases where there was another foreign language than English used.

The third part of the book is relevant for those interested in actual teaching practices. Chapter 10 by Jones and Bursens focuses on the impact of simulation games. The authors positively assess the transatlantic EuroSim simulation using data from 2007-2010 with regards to its affective and cognitive learning dimensions. It provides important insights into these aspects of teaching with simulation games and gives excellent insights into a best-practice example. Chapter 11 by Natalia Timus is directed at those audiences interested in the opportunities and challenges of distance learning in European Studies. According to Timus, distance learning is a suitable tool for teaching European Studies because it is able to incorporate a variety of theoretical frameworks, practical experiences, models of teaching and makes mobility more accessible. Timus directs us to consider, however, that distance learning leads to more responsibility for all parties involved.

Chapter 12 is a helpful source for Problem-Based Learning. Maurer and Neuhold provide a very detailed and informative account not only of their long-standing experiences with this method, but give substantial background information and detailed descriptions of practical steps. For them the approach is just as process-dependent, needing regular reviews and adaptations, as the discipline of European Studies and the integration process itself. The chapters that follow assess Web 2.0 technologies for teaching European Studies. Chapter 13 by Mihai looks at blended learning, thus combining different modes of delivery, both traditional and online forms of teaching. For the author, blended learning is particularly suitable for the complexity of the subject and the diversity of the audience in European Studies. Those considering blended learning methods should, however, be aware of the fact that learners need to be particularly flexible to adapt to this approach and that such techniques require intense planning and organisation.

The final chapter, 14, written by Farneti, Bianchi, Maygründter and Niederhauser, addresses the potential of social networks for teaching European Studies. Those readers interested in the participatory and hence democratic quality of Web 2.0 technology might find stimulating insights here. For the authors, social networks give opportunities to enhance democratic dialogues and to build and ensure lasting active citizenship. The key for a successful integration of Web 2.0 technologies into the classroom is the appropriate literacy to handle these tools appropriately. Acknowledging Web 2.0's potential to contribute to the emergence of a European public sphere underlines that it might be worth investing in this kind of literacy.

As becomes clear, the book assembles a variety of topics, perspectives and approaches within the realm of European Studies' pedagogy. In this combination, a variety of specialised interests are addressed. Therefore, it is not necessarily a book to be read from beginning to end, rather it resembles a handbook or compendium, from which readers select chapters depending on the specific information sought. Considering the limited number of publications in the field of teaching and learning European Studies, this book makes an important contribution. In its very broad approach to the field, this volume is also a clear signal that more detailed research is needed. Almost every chapter in the book touches upon a different topic, each of which could be dealt with individually in a separate book publication. This also explains the only very loose connectedness of the different chapters in the book. Hence, the book at hand highlights the diversity of the field, strongly suggesting more detailed research in this area. Contributors discuss the ways of teaching and learning within and about a sui generis entity. They seem in large parts to agree that grasping such a complex and dynamic entity needs a matching pedagogy which facilitates students in being able to understand, engage, react and communicate effectively within, about and across the EU.

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