Journal of Contemporary European Research

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Contents

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Research Article

Member States and Audible Communication within the EU Council Working Groups

Petr Kaniok

Abstract

EU Council Working groups still represent a neglected topic in EU research. Where they are analysed, the effect of socialisation is particularly tested, while rationally motivated factors such as Left-Right position, green/alternative/libertarian (GAL) and traditionalism/authority/nationalism (TAN) positions or approaches towards European integration are left aside. This article analyses how such factors shape the Member States' oral communication at the Working Groups level. Based on a dataset gathered by non-participatory observation of interventions, the analysis suggests that none of the rationally constructed variables play a significant role in shaping the audible communication of representatives of the EU Member States. The article's conclusions therefore lend support for the effect of socialisation on oral communication as well as the influence of structural factors such as Member States' power and the character of the document under discussion.

Keywords

EU Council, Working Group, EU Member States, Communication, Cooperation

The Council of the EU is an important EU institution for European Union (EU) Member States (MS). It serves as an arena where they can express and defend their interests. MS do so particularly through bargaining and negotiations. Communication is an important factor enabling this most important function of the Council.

The process of articulating interests starts in the Council's working groups (WGs). In addition to being the lowest level of the Council hierarchy, they are also its least studied element. This is especially true of the bargaining and negotiation processes within the groups, as well as communication used there. Current research tends to focus primarily on tasks exercised by WGs in the Council's decision-making processes (Olsen 2011; Häge 2016, 2013, 2008, 2007a, 2007b). However, little has been revealed when it comes to the internal praxis of the Council's WGs or the factors which shape it. While Kaniok (2016) analyses the general communication patterns within the WGs, there is little scholarship dealing with this phenomenon. Surprisingly, almost no interest has been paid to the MS in this regard. This is striking as they are the most prominent actors in Council activities. Moreover, WGs offer MS the initial opportunity to express their demands and national interests.

The goal of this study is to extend our knowledge about the WGs by analysing MS oral interventions expressed during meetings of the WGs acting mainly in the area of the internal market. Based upon data collected during non-participatory observations of more than 20 meetings, the article uncovers how MS communicate when intervening in the WGs and how they contribute to the general atmosphere within them. More specifically, it focuses on how MS governments' positions on the Left-Right scale, their position on Green–Alternative–Libertarian/Traditionalism–Authority–Nationalism scale (GAL/TAN) and their approach towards European integration factor into the communication in WGs. Hence, this article tests a rationalist assumption that interactions in the WGs reflect the political preferences of MS governments.

The main findings of the analysis are as follows: rationally constructed factors which should reflect the political interests of national governments do not appear to function as influential variables at the WGs level. Neither distance from the political centre, nor GAL/TAN position, nor general approach towards European integration seem to influence the forms of MS communication within WGs. On the contrary, the analysis confirms the impact of the socialisation process that occurs within the WGs, as Brussels-based representatives tend to be significantly more cooperative than their capital-based colleagues. Additionally, structural factors such as a MS power or the character of the document being discussed play an important role. This article therefore argues that the domestic politicisation of EU affairs does not necessarily shape the actual behaviour of MS in the Council.

The article proceeds as follows: the first section introduces the role of WGs in the Council's decision-making system. It also reviews existing research on this issue. The next section presents the theoretical framework and hypotheses. The third part describes the data used, how the data was gathered and how these data were analysed. The article proceeds to the analysis. The last part of the article places the findings in the context of existing knowledge and outlines directions for possible further research.

WORKING GROUPS: WHAT MATTERS THERE?

WGs construct the most basic component of the Council's work. Estimates for the number of WGs very. Usually, there are between 170 to 200 WGs[1]. The key purpose of a WGs may be described as that of a body which allows for the negotiation and deliberation of MS positions. That does not mean that MS are acting alone. Important tasks are expected from the Presidency, as well as from the Commission and from the Council Secretariat.

Legislative work consists of deliberating proposals, whereas the main focus of non-legislative activities is to draft first versions of Council conclusions. This means that each WGs is supposed to prepare a particular file for a Council decision. Therefore, the WGs should formulate a consensus on the text which will allow for its approval at the COREPER level and after that its formal adoption by the ministers.

It is worth mentioning that WGs are far from being uniform. Important structural aspects as to who chairs their meetings (this could be either rotating Presidency, elected chair, a representative of Council Secretariat or a representative of the High Representative of the Union for Foreign Affairs and Security Policy) or what is the main focus of the WG (legislative proposal versus non-legislative files) play an important role and affect their functioning.

From a theoretical point of view, Council WGs are understood from two broad angles. The rationalist perspective recognises them as only formally important bodies serving as nothing more than a channel through which national interests are articulated. The reason for such a straightforward understanding is that MS participants in WGs must follow guidelines in the form of national instructions. These are based upon preferences formulated within their domestic political systems. Such preferences mirror the interests of various actors, be they economic, social or political, within each MS and are the result of bargaining that may need to occur at this level in order to formulate a coherent national stance to be put forward in EU arena negotiations (Moravcsik 1998; Beyers and Diericks 1998). From the neo-institutionalist perspective, WGs represent more active as well as independent players. They are perceived as arenas within which interests are bargained for and against, and where the very rules regulating such negotiations are defined. From the neo-institutionalist point of view, the members of WGs go beyond the task of purely negotiating among pre-defined interests. Instead, they contribute to reshaping European public issues, the rules and norms that construct negotiation, and frequently the very identities and loyalties of those involved (Trondal 2007; Lewis 1998, 2005; Aus 2008).

Regarding the influence of the WGs, there is no agreement in existing formal guidelines. In general, they seem to be rather underestimated, as being part of a too banal and apolitical part of the EU machinery, whereas the focus of EU scholars is on what could be called the authoritative dimension of the EU decision-making process and its effects outside Brussels (Adler-Nissen 2016: 90). Conventional wisdom suggests that WGs are responsible for the majority of Council results (van Schendelen 1996; Hayes-Renshaw and Wallace 1997). However, this conclusion has been based either on mere guesswork or on estimates by insiders. In more rigorous research, Häge (2008, 2007b) revealed that WGs were responsible for less than 40 per cent of Council decisions, while Olsen (2011: 159) claims that an even smaller share of decisions, only 33 per cent, are resolved by WGs as the majority of files raise controversies among MS or have financial impacts. More recently, Howard Grøn and Houlberg Salomonsen (2015) have suggested that the division between the non-political WGs and the political ministerial level is questionable, as representatives other than ministers often participate in the ministerial meetings.

A conflict similar to that between 'conventional wisdom' and more rigorous research can be seen in the role of political factors for the WGs. WGs were long perceived as an arena where the technical aspects of legislation were worked out while leaving the political issues for debate in bodies such as COREPER (Westlake 1999). Foilleux, de Maillard and Smith (2005) challenged this approach, however, arguing that there is no clear distinction between 'political' and 'technical' issues. The principal finding of their study was that WGs do not operate solely at a 'technical level'. Instead, they are vital arenas in which the ambiguous nature of politics in the EU influences the negotiating processes and legislative outcomes.

The most important tools for WGs activities are negotiations among involved participants. Here, both formal and informal communication among participants creates the necessary conditions which enable the WGs to operate smoothly. Beyers and Diericks (1998, 1997) found that discretion is important in the communication between national delegates and that informal communication is excessive in WGs occupied by Brussels-based attendants. Notably, this communication is led by non-state players such as Commission representatives. The more powerful actors were identified to be those coming from large MS, and communication patterns following a South-North line (Beyers and Dierickx, 1998). The presence of this conflict dimension was later confirmed by Naurin (2007). Kaniok's (2016) analysis revealed that WGs tend to be more competitive than consensus-oriented when it comes to the internal communication, also arguing that WG participants differ significantly in their behaviour. MS are the most cooperative, followed by the Commission, while the Presidency focuses on promoting its own interests. Additionally, actor affiliation does not play a role in communication, as Brussels-based delegates do not appear to adopt a more cooperative approach than do participants attending the meetings from their domestic institutions. Naurin (2010) disclosed that there are prevailing patterns of discussion within WGs, arguing that explanations are given more often because of an actor's aim to persuade other participants than to explain one's position in order to promote a compromise. Smeets' (2016, 2015, 2013) work on the EU Council's deliberations on the Western Balkans put a strong emphasis on language as a factor shaping the governing dynamics of the Council negotiations.

Even though there are some differences among researchers, the strongest conclusion from existing research is that socialisation-creating consensus can be identified as a process influencing various levels of the Council (particularly regarding COREPER) and participants act in a way which is far from being motivated solely by self-interest. There are different explanations for what factors create this consensus. Some studies have focused on the costs of norm-violating and the related tendency to practice self-censorship (Heisenberg 2005; Aus 2008). Such explanations could be linked to processes of stigmatisation or shaming (Schimmelfennig 2003; Adler-Nissen 2014) as delegates attending meetings share a 'responsibility to come up with solutions and keep the process going' (Lewis 2005: 949-950). It is thus perceived as inappropriate and costly to persist in obstructionist behaviour. In this way, obstructers can be shamed into norm compliance (Adler-Nissen 2014). Other studies have linked the consensus-reflex to negotiation styles and deliberative processes (Risse and Kleine 2010; Lewis 2005). This perspective received its impetus from the broader debate on socialisation, which focuses on whether prolonged exposure to the Brussels way of doing business can influence national delegates' behaviour in the Council (Juncos and Pomorska 2011; Checkel 2003). Similarly, it can be argued that particularly Brussels-based MS attachés can form epistemic communities (Zito 2001), a network of professionals sharing a common worldview, beliefs about how causal relationships unfold in a given area and also including agreed methods for assessing these relationships as well as normative beliefs about the policy implications (Haas 1992: 3). WGs perfectly fit to this description. They do not consist only of attachés, but also from experts in the field, often attending them in given areas for years.

Therefore, it is often argued that there is a cooperative spirit within the meeting rooms and friendly atmosphere among the delegates. The socialisation argument has been frequently tested (Lewis 2005, 2003, 1998; Juncos and Pomorska, 2011, 2006; Egeberg 1999; Beyers 2005), yet little is known about the rationally motivated factors which may shape communication in the WGs. From a rationalistic approach, it may be said that the governments of the MS use WGs as arenas where they can pursue their political goals. Such objectives can be differentiated into three aspects. First, the Left-Right position of a particular government plays a significant role. Second, the cabinet's placement on the GAL/TAN scale, reflecting its position on democratic freedoms and rights, has come into question more and more in the latest phase of European integration. Third, a government's

approach towards European integration constitutes another important factor as it signals how far and how deep a particular country seeks to move forward the integration process.

There are good reasons to believe that all these components may influence what a particular country does in the EU Council. Starting with Left-Right position, European integration has been traditionally seen as a project of the political centre (Taggart 1998; Aspinwall 2002). As Marks and Hooghe (2006) argue, the EU has been created by mainstream parties (Christian democrats, liberals, social democrats and conservatives) which have dominated national as well as European political institutions. At the same time, many non-centrist parties attack European integration as an extension of their domestic opposition. One can thus expect that governments consisting of such parties would be more concerned with promoting their interests and demands and less interested in fostering a cooperative spirit within the EU institutions. Similar relations can be observed within the GAL/TAN dimension where parties and government closer to the GAL axis tend to be more interested in common goals than their counterparts from the TAN camp. Lastly, when it comes to Euroscepticism, or a party's more general underlying approach towards European integration, this is a phenomenon which has become increasingly important since the 1990s when the process of the politicisation of European integration rapidly sped up. As a result of the persistent multiple crises which the EU has been facing since approximately 2008, both MS party systems as well as the salience of Euroscepticism have become increasingly important factors influencing the day-to-day decision-making process in the EU. Recent research on the EU Council shows that political factors play a role at the ministerial level. Mühlbock and Tosun (2018) found that ministers' voting behaviour was significantly influenced by important national factors such as public opinion, party politics and structural, as well as sectoral, interests. Similarly, Roos (2019) revealed that the number of conflicts in this area has increased in the post-Lisbon EU, arguing that such conflicts have their roots in domestic politics. The question is thus whether a similar process of the increased influence of political factors can also be identified at the WGs level.

THEORY AND HYPOTHESES

This study contributes to the research on the internal processes with the WGs, more specifically the nature of their internal communication. This article operationalises internal communication as set of formal oral expressions presented during meetings by those who attend them, and those who are authorised to speak there, otherwise called interventions. Interventions represent the most straightforward route by which an actor can influence the WG's business. WGs represent the most suitable opportunities to do so as MS are induced to voice their concerns early in the process (Smeets 2015: 291). They know that even a minister will have little chance to change a decision-making process in motion, let alone turn it around as they wish (Puetter and Wiener 2007: 1085). Informal rules and norms dictate not only when it is appropriate to object, but also how to object. As various scholars argue (Smeets 2016; Novak 2013; Cross 2011), the expected way to show opposition in the Council is by means of interventions, rather than through vetoes or votes. Council plenaries have been referred to as long lines of isolated interventions. Such interventions serve not just as a chance to state one's position and look for allies. In this sense, Smeets (2016: 27, 2015: 291) argues that they should primarily be seen as investments since they serve to signal commitment for or against a given position. Plenary interventions indicate how far, or more precisely how high up, MS are willing to take matters.

Interventions should not be overestimated as they are not the sole tool used by MS to communicate. First, it could be argued that even being silent can be understood as a form of communication, particularly indicating a cooperative attitude. Additionally, non-verbal aspects of communication, especially body language, may construct an important part of the message a particular delegate wants to send. WGs actors, particularly MS, may also send written comments. They may also negotiate bilaterally or multilaterally in a completely informal format. A classic case of this type of negotiation is a 'like-minded

group' or networks of countries sharing similar interests or goals (Elgström 2017, 2000: 465). Finally, discourse and context in terms of how certain topics are framed are important as interventions are not expressed in vacuum, but do appear in certain situation which may influence them.

All these aspects of WGs communication were deliberately omitted for several reasons. First, when it comes to remaining silent, as Aus (2008: 115) argues, internal negotiations are driven by the logic of 'if you oppose, you have to speak up'. Moreover, any 'silent' form of communication is undetectable and is therefore not very important from a rationalistic perspective. Non-verbal dimensions of communication as well as context undoubtedly play an important role. Nevertheless, the dataset does not contain them. One could also argue that their measurement is almost impossible, not least because it would require the analysed meetings to be video-recorded, which is not the case for WGs. Apart from questionable operationalisation of what particular gesture means or how to measure contextual factors (the cultural or personal aspects related to particular delegate in the room come to play), it would be very difficult to pair such data with oral interventions because of possible different sequencing of both. Therefore, this study focuses only on audible forms of communication with particular emphasis on interventions.

In intervening, MS are theoretically restricted by the Council's Rules of Procedure. The rules encourage MS to intervene only if they are proposing a modification to the issue under discussion (Council Decision 2009/937/EU, annex 5). In reality, interventions often do not follow this rule. Participants can speak about whatever they wish, expressing for example support for another actor's position or requiring further clarification of a point.

Rationally motivated components which can shape the content of interventions are tested through three hypotheses. The basic logic departs from the assumption that pro-European actors will emphasise cooperative communication and that representatives whose governments are critical or sceptical of the EU will communicate non-cooperatively.

H$_1$: The farther a Member State's government is from the political centre, the less its delegates in the working groups contribute to cooperative communication within the working groups.

The problem of political party attitudes toward the process of European integration has attracted growing attention from party scholars over the past decade. Some of the most significant attempts to understand how European integration works for party systems come from heterogeneous literature claiming that conflict over the EU is shaped by the economic dimension. In particular, several contributions share the view that Left/Right ideology influences party preferences on European integration (e. g. Marks and Steenbergen 2004; Hooghe *et al.* 2004). This approach builds upon the widespread argument that European integration produces neither a new cleavage, nor new normative orientations in conflict with other long-established ones. Instead, it is largely subsumed by historically rooted ideologies. Furthermore, attitudes toward the EU evolve with these ideologies. Thus Europe can be interpreted by the same party in different ways at different times due to ideological change. In the end, the traditional socio-economic dimension of conflict is regarded as an important (though not the only) explanation of party attitudes toward the EU. The Left-Right position argument is relevant for this study because the rationalistic perspective on the WGs treats them as channels through which capitals express their positions, including ideological stances.

H$_2$: The farther a Member State's government is from the cultural/non-economic centre, the less its delegates in the working groups contribute to cooperative communication within the working groups.

The economic dimension and party position on it is not the only explanation for the position political party can take on the EU. As Marks *et al.* (2006) claim, a second, non-economic or cultural, new-politics dimension has gained strength since the 1970s in Western Europe. This dimension summarises several noneconomic issues as ecological, lifestyle, and communal, and is correspondingly more diverse than the Left/Right dimension. In some countries, it is oriented around environmental protection and sustainable growth. In others it captures conflict surrounding traditional values rooted in a secular-religious divide, or is pitched around immigration and defence of the national community. Marks et al. (2006) describe the poles of this dimension with composite terms: green/alternative/libertarian (GAL) and traditionalism/authority/nationalism (TAL). They have also found that hard GAL and hard TAN positions usually lead to opposition to European integration. Similarly, as in the case of the Left-Right dimension, if the rationalistic perspective on the WGs is valid, it should be reflected in a way that delegates from governments closer to the TAN part of GAL/TAN element should be less cooperative than their colleagues linked to the governments which are closer to the GAL side.

H_3: The more Eurosceptic a Member State's government is, the less its delegates in the working groups contribute to cooperative communication within the working groups.

The third component of the rationalistic argument is overall party position towards the EU. If rationalist assumptions are correct, this should also be anchored at the WGs level. As party-based Euroscepticism is traditionally seen as politics of opposition (Sitter 2002, 2001), it is reasonable to expect that governments with critical stances towards the EU in general should instruct their WGs representatives in a similar way. Consequently, one could expect more focus on one's own positions and interests and less on concerns regarding other actors' preferences and common goals.

DATA, VARIABLES AND METHOD

Kaniok's (2016) binary variable *'Communication'* was analysed for the dependent variable. This variable is a result of non-participatory observation of 21 meetings of several Council WGs dealing particularly with Single Market agendas. This observation took place between 9 October 2013 and 26 November 2013. During these meetings, the content of interventions expressed by the various actors was captured (see Kaniok 2016) and two groups were created based on whether there was support for another's action was present or not. Hence, Value 1 ('Cooperative') combines interventions expressing support for another actor, either being the sole content of the intervention, or being accompanied by an expression of the speaker's own position or by a procedural comment. Value 0 ('Uncooperative') includes interventions delivering a speaker's own position, either as the sole content of the intervention or in tandem with the procedural issue mentioned.

The logic behind the dependent variable ('Communication') and its two values is based upon practitioners' experience (Kaniok, 2016), the Council's internal norms, and literature on the Council and its working bodies. According to reports by practitioners, both what is said during the meetings as well as how it is said are highly important. Dissent from changes proposed by the Presidency, for example, may be expressed in various ways. Requests which are made in the context of the expression of other actors' opinions are perceived as more acceptable and more constructive than the mere expression of the speaker's position. Whilst the former suggests that such interventions are based upon a development within the group, and send a clear message of respect for the other actors, the latter approach leaves such aspects aside. Even the Council's official norms promote certain values such as consensus, efficiency and cooperation among MS[2]. Therefore, these different styles considerably influence both the overall atmosphere of the meeting and the perceptions of the speaker. As the literature on the EU Council argues, informal rules and norms of negotiation substantially shape the way the EU Council and its bodies operate. Moreover, MS should voice their positions at the lowest levels of the Council hierarchy

(Smeets 2015) because in the later stages of policy making, including at the ministerial level, this is not considered appropriate behaviour (Puetter and Wiener 2007: 1085).

When it comes to the independent variables, they were computed based on the Chapel Hill Survey and its longitudinal dataset. The Chapel Hill Survey measures party positions towards various aspects of European integration and it contains party positions on general political issues. Hence it is possible to compute values for MS governments using the following formula:

$$\text{'MS government'} = ((\text{CES variable}_{party1} * \text{seatsnumber}_{party1}) + (\text{CES variable}_{party2} * \text{seatsnumber}_{party2}) + (\text{CES variable}_{partyn} * \text{seatsnumber}_{partyn})) / \text{MS governmentnumber}$$

The *CES variable* denotes a particular CES variable and its value for a particular party. '*Seatsnumber*' represents the number of seats held by the party in government, and the MS '*governmentnumber*' refers to the total number of seats in the MS government for which the value is computed.

Governmental position in relation to the political centre was calculated as its distance of LRGEN variable's value 5, signalling that such a party belongs to the political centre. Negative values were transformed into positive ones, as distance from the centre should have the same impact both in the case of Left-wing and Right-wing cabinets. When it comes to the GALTAN variable, a similar method of recalculation was chosen, in this case keeping the difference between negative and positive results. This reflects, as Hooghe and Marks (2006) argue, a different approach of GAL and TAN parties towards European integration. 'Position towards European integration' was measured by using the variable EU_POSITION. It contains 7 values, where 1 indicates strong opposition to the EU and 7 indicates strong support for the EU.

The analysis controls for various factors. First, the level of individual socialisation of participants makes a difference in their behaviour (Fouilleux, de Maillard and Smith 2007). Delegates working at national Permanent Representations usually share a sense of dual responsibility to both to their MS as well to the EU's institutions. This is important as Brussels-based diplomats tend to follow a different pattern of behaviour than their capital-based counterparts. To summarise, the former emphasise a more cooperative style in negotiating than the latter. Therefore, the records of participant interventions available for every meeting were used to construct the variable '*Representative*'. This makes it possible to distinguish whether a MS was represented only by a national expert coming in from the capital, by a Brussels-based attaché or a combination of the two.

Second, collective socialisation[3] considers the passing of time as an aspect which enables various actors to accept internal rules and norms and follow them. One could thus expect that the longer a collective actor takes part in a WGs, the more it will follow the shared norms of consensus and cooperation which exist there. The transfer of this collective socialisation factor to individual delegates is ensured by the training of officials within MS. Thus, the variable '*Length of EU membership*' is expressed as the number of years a particular MS has been a member of the EU.

Third, salience influences actors' behaviour within the Council and their eagerness to compromise on a particular proposal. Selck (2003) suggests that there are signs that EU institutions involved in legislative work use their procedural powers more vigorously when dealing with important issues. For example, politically salient issues are more likely to be decided already during the first reading stage (Rasmussen 2007). Whether a decision is made at the ministerial or the administrative level in the Council also relies upon on the perceived salience of a document (Häge 2007). Schneider *et al.* (2010: 92) claim that greater importance leads to a greater willingness to make concessions to reach a

consensus. Thus, one may expect that cooperation (also in terms of communication) in the WGs will be higher when dealing with legislative files than when preparing non-legislative documents. Hence, meeting agendas accessible on the Council website prior to each meeting were used to construct the variable '*Item*', which divides the agenda between non-legislative and legislative issues.

Fourth, the language used can also impact the degree of cooperation. English can be regarded as the modern lingua franca in the Council. Egeberg, Schaefer and Trondal (2003: 27-30) and van Els (2005) claim that a considerable majority of both formal negotiations and informal communications among participants is carried out using English. Also, in formal negotiations diplomats seldom speak either French or German which are, in addition to English, considered as another two EU working languages. If they do not use their mother tongue, they are using English. As Egeberg, Schaefer and Trondal (2003: 28) found, 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 can be perceived as an aspect which supports cooperative communication in the WGs, because it saves time and provides a substantial majority of delegates with equal positions in the negotiation process. Therefore, the variable '*Language used*' describes the language used during the meetings. The values recorded here are English and other languages.

Finally, the size of the actor matters in terms of control. Ownership of more resources can influence the willingness of MS to cooperate or act independently (Naurin 2015). '*Size of the Member State*' was calculated as each MS's voting power expressed in terms of per cent share of their votes in the total number of votes available in the Council. The variable '*QMV share*' hence reflects the relative power of each MS.

ANALYSIS

A total of 5,021 interventions were observed, including purely procedural interventions. However, only 2,179 of them were expressed by MS, as reported in Table 1.

Table 1: Interventions in the Working Groups According Actor Type

	Amount	Percentage
Presidency	2,554	50.9
Commission	256	5.1
General Secretariat	32	0.6
Member States	2,179	43.4
Total	5,021	100.0

Figure 1 reports the distribution of interventions across MS. Purely procedural interventions are excluded from the sample. That means that 2,049 interventions expressed by MS bear either a cooperative or uncooperative message. Figure 1 reports three different values: the total number of interventions, the number of cooperative interventions and the number of uncooperative interventions.

Figure 1 sends a couple of interesting messages. First, the size of the MS seems to matter quite a lot when it comes to oral activity in the WGs. All large countries (in terms of their voting power or population share) can be found among the most active speakers. The only exception is Poland, which is placed in the middle of the main group. The second attribute which seems to encourage or discourage representatives of the MS to speak is tradition of EU membership, or to be more accurate, their 'western' character. CEE countries and countries which do not belong to the traditional 'West', appear to be more passive than experienced EU members or countries which have shared the same values with European Community members since before 1989, for example Austria and Sweden. Big states also appear to be more assertive. This means that they prefer to express their position when

intervening. Being involved in the Presidency trio, whether as a country holding the office or as a former or upcoming Presidency, has an impact too. Lithuania, when holding the acting Presidency, was completely silent (even though the country delegate was present at all meetings) and the oral activities of Greece (upcoming Presidency) and Ireland (past Presidency) were very low.

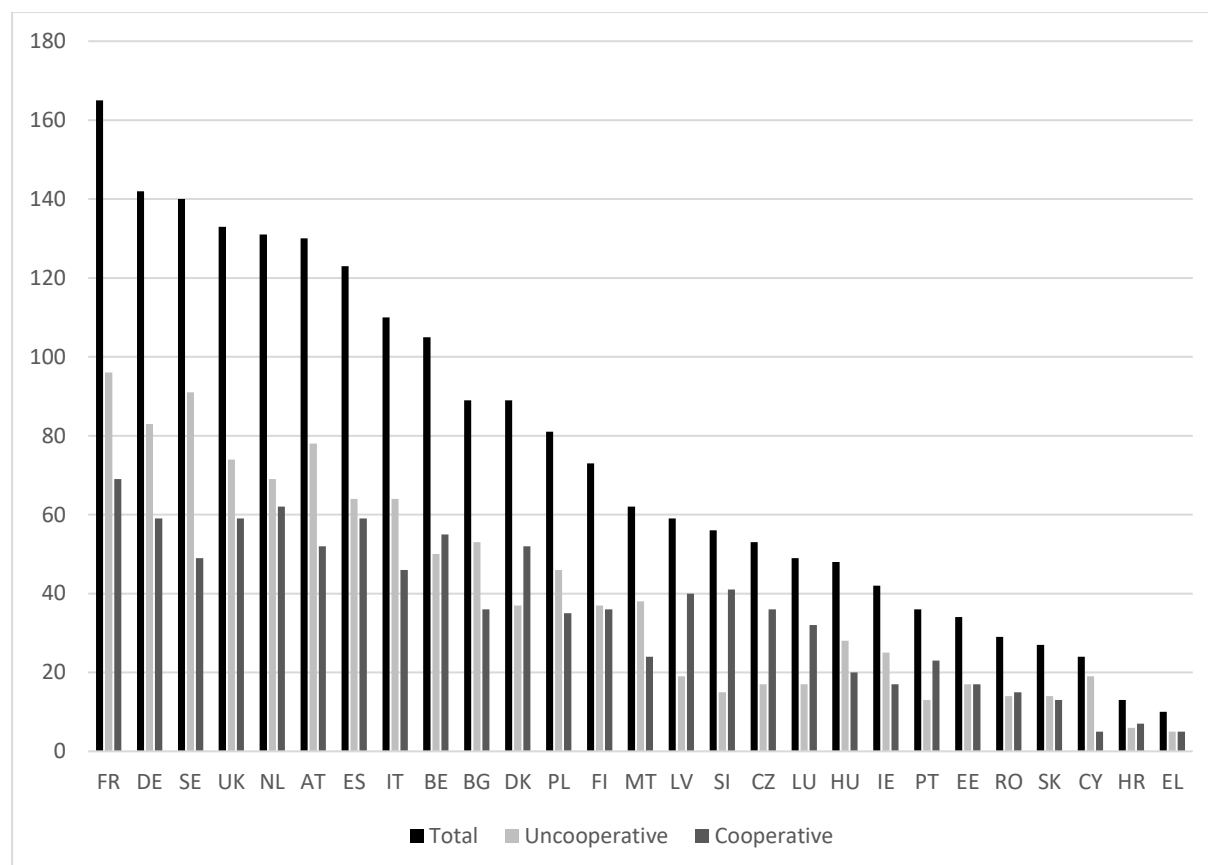**Figure 1: Interventions in the Working Groups According Type**

Figure 2 presents the share of uncooperative and cooperative interventions expressed in relative terms, in other words what percentage of interventions from the total number given by MS were cooperative and uncooperative. This perspective offers further interesting findings. First, the effect of size is slightly downplayed, as the first five most uncooperative countries (from a relative perspective) cannot be counted among the big players. The same applies to membership tradition. 'New' MS can be found in both corners of Figure 2, while traditional countries (particularly the founding 'six') are distributed across it.

Figure 2: Share of Uncooperative and Cooperative Interventions
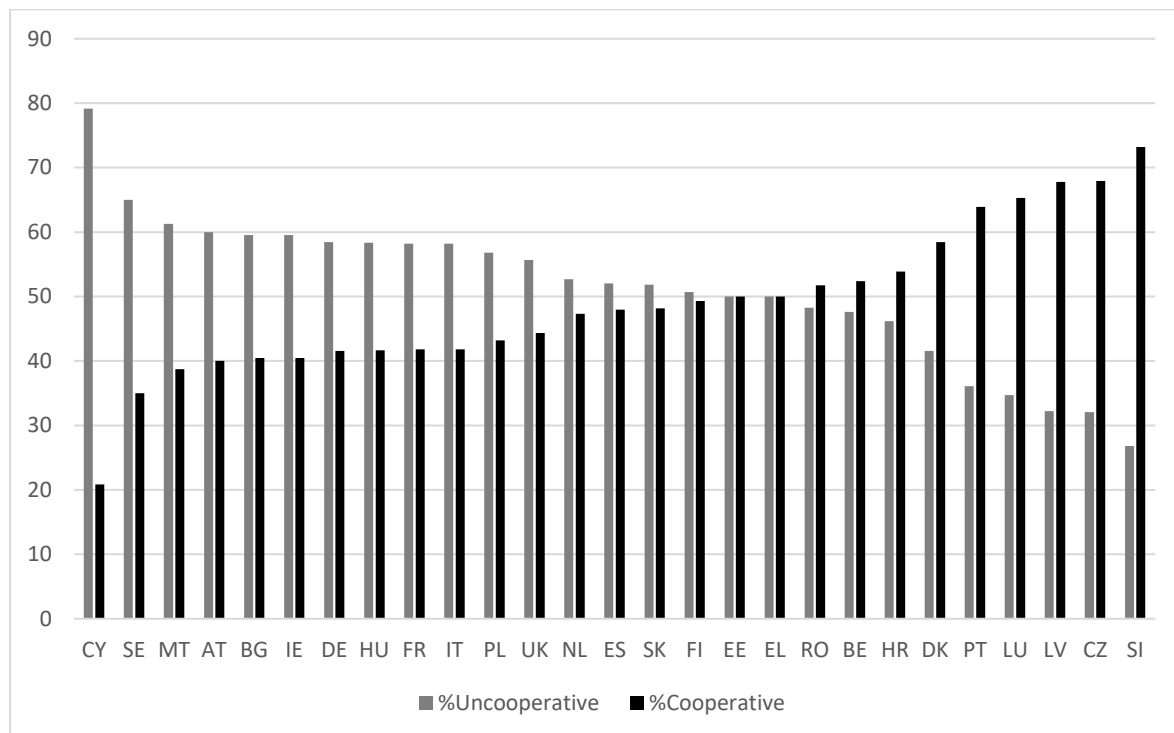
In the second part of the analysis, a binary logistic regression was used to explore which independent/control variables affect the dependent variable and to what extent. The analysis included only 1,852 of the 2,053 interventions. One MS (Czech Republic) had a caretakers' cabinet in the analysed period and three countries (Luxembourg, Malta, and Cyprus) were not included in the Chapel Hill dataset. In these cases, such governments could not be characterised in terms of Left-Right ideology, GAL-TAN position or approach towards European integration. They were therefore excluded from the analysis.

Altogether, four models were constructed. The first three analysed individual hypotheses and the fourth included all the independent variables. All the models encompassed the control variables '*EU membership*', '*Language used*', '*Item*' and '*Representative*'. The results of the analysis are summarised in Table 2, reporting the B value and its SE.

Table 2: Overview of Models

	Model 1	Model 2	Model 3	Model 4
	B (SE)	B (SE)	B (SE)	B (SE)
Independent variables				
Ideology	-.01 (.06)			-.00 (.06)
EU Approach		-.08 (.06)		-.08 (.06)
GAL/TAN			-.04 (.04)	-.42 (.04)
Control variables				
QMV	-5.15 (2.31)**	-6.01 (2.23)***	-4.61 (2.29)**	-5.23 (2.50)**
EU Membership	.00 (.00)	.00 (.00)	.00 (.00)	.00 (.00)
Item (Non-Legislative)	.52 (.15)***	.51 (.15) ***	.54 (.16) ***	.53 (.15)***
Language Used (Non-English)	.09 (.11)	.15 (.13)	.08 (.11)	.15 (.11)
Representative (Brussels)	.23 (.11)**	.24 (.11)***	.23 (.10)**	.25 (.10)**
Constant	-.10 (.13)	.34 (.38)	-.09 (.12)	.39 (.38)

*p ≤0.1, ** p≤0.05, ***p≤0.01

Table 2 shows that in general terms the models do not explain much of the MS communication within the WGs. The values of the Nagelkerke R^2 coefficient are quite low for all models (0.02), and even the differences between values of −LL for the initial models and regression models are quite small in all cases (29.45 for Model 1 (2552.72-2523,27), 31.00 for Model 2 (2552.72-2521.72), 31.19 for Model 3 (2558.00-2519.14) and 32.99 for Model 4 (2558.00-2525.01)). Even though the analysis did not aspire to explain the maximum of variety, this indicates that the independent variables cannot be used to understand WGs communication. Firstly, any rationally motivated variable reflecting domestic interests in terms of ideology, EU approach and the GAL/TAN dimension reaches statistical significance. Even if significance is left aside, the values of the coefficients of all the independent variables across the models are very low. Moreover, they do not follow expected directions in all cases. For example, a more positive approach towards the EU (Models 2 and Models 4) seems to decrease cooperative communication in the WGs. Thus, all three hypotheses are be rejected.

How can the conclusion that rationally motivated factors do not have a substantial impact on communication in the WGs be explained? The first set of answers can be found among the control variables. Their coefficients and statistical significance suggest that both socialisation and structural effects can be regarded as more powerful and decisive when it comes to the communication by MS. Regarding socialisation, the analysis proposes that the affiliation of the representative plays a role. If a MS is represented only by a Brussels-based attaché, the probability of cooperative communication is increased. In the opposite case, when a capital-based delegate is present, they contribute to relatively uncooperative communication.
More powerful than this individual level variable seems to be variables that capture a MS's size, and the character of the document being discussed. First, voting power expressed as QMV share has the biggest impact on communication within the WGs. Delegates from bigger MS often express what their countries want without packaging their demands into any mollifying cover. However, the opposite seems to be case for small countries' communication patterns. A relatively strong influence can be also spotted in case of document character. Here, if the issue under discussion in a WGs is a legislative proposal, and not for example a Council conclusion draft, cooperation in communication decreases.

The remaining two control variables, language and EU membership, did not reach statistical significance in any model. Duration of EU membership seems to be unimportant, as its coefficients across models were close to zero. When it comes to language, when English is not used in interventions, cooperation in communication increases. However, the effect of language is not statistically significant.
Regarding structural effects, one can imagine that the high degree of technicality that characterises the agenda of the Single Market WGs can play a significant role. In many cases, very detailed and specific legislative proposals do not offer the best opportunities for expressing political preferences of particular government, simply because deliberations surrounding such files go into great depth and such micro level discussions disable expression of political beliefs.

DISCUSSION AND CONCLUSION

The WGs of the EU Council are among the least understood actors in the EU decision-making system. Even though research on WGs has increased in recent years, major gaps remain. First, existing studies often merge all administrative levels of the Council into one group and do not distinguish between COREPER and WGs, with data from COREPER representing the major source. Second, existing research is built upon the information provided by insiders and the ex-post evaluation of their activity. Third, regarding the theoretical background, models inspired by social constructivism are the dominant point of departure. There still exists, therefore, an important gap in our knowledge of how WGs

accomplish their tasks and how the parties involved behave. In particular, MS represent neglected actors.

This study addressed these gaps by analysing MS formal oral communication within WGs, using a dataset based upon the non-participatory observation of interventions. It has focused on rationally motivated logic assuming that WGs are a channel through which MS transfer their political and ideological goals which should affect their delegates' behaviour. Thus, the study hypothesised that the communication patterns in the WGs would be cooperative in the case of pro-European, centrist and moderate GAL/TAN governments while rather uncooperative in the case of Eurosceptic, non-centrist and significantly GAL or TAN cabinets. However, neither of these assumptions were confirmed. Rationally-based factors do not appear to significantly shape the oral behaviour of MS at the WGs level. This means that what is often said, particularly in a critical tone, towards the EU in domestic contexts is not necessarily reflected in the activities of the Council's lowest arena.

There are various factors which explain why the rationalistic variables that transfer domestic political preferences are unable to explain the oral communication of MS in the WGs. In the first place, the study confirmed the influence of the socialisation argument as found in studies dealing with COREPER (Lewis 2005, 2003, 1998; Egeberg 1999; Beyers, 2005). Contrary to Kaniok (2016), the analysis presented here suggests that being Brussels-based has an impact on participants' audible communication. For MS delegates, Brussels affiliation increases their willingness to communicate in a cooperative way. The distinctive impact of this socialisation variable can be explained by different datasets including different participants. While Kaniok (2016) included all participants in WGs meetings, particularly the Presidency and Commission, this study focused only on MS. While in almost all cases the representatives of both the Commission and Presidency are Brussels based, the variety among MS is substantially bigger. As Kaniok (2016) found that both the Commission and the Presidency defend their interests (both institutions push them forward through Brussels-based representatives) it can be claimed that cooperative communication by WGs members is encouraged particularly by Brussels-based MS representatives.

Another important factor that is more powerful than 'politically' constructed variables is the character of the document that is being discussed. In this sense, if legislation is debated, MS communication decreases. This is hardly surprising because the legislation is generally perceived as more important than non-legislative points. In this respect, the study confirms similar findings to Kaniok (2016).

Apart from the strong influence of structural and sociological variables, the marginal effect of domestic political factors can be also explained by the expert character of discussions at the WGs level. WGs usually examine both legislative and non-legislative proposals using an article-by-article approach. This means that, particularly in case of legislative proposals, the interventions often bear detailed and specific technical demands related to the particular article of the file. Hence, a majority of such interventions are hardly influenced, even at the domestic level, by either Left/Right government placement or the cabinet's general position towards European integration. This suggests that politicisation is not such an important factor in the earliest stage of the Council decision-making process. Considering the number of decisions that are adopted at the WGs level, this means that the influence of the political variables of MS governments can be overestimated and in reality they could play a less significant role in the day-to-day EU political process. This is particularly important in the current phase of the integration process, which recently has been significantly politicised especially within the domestic political arenas of many MS.

In general, the findings of this analysis should be seen as complementary to existing research on Council's internal bodies. There is no agreement among scholars as to which patterns of behaviour dominate in the Council. The analysis of MS interventions confirms

other studies emphasizing the importance of socialization processes for the Council (for example Lewis 2005; Juncos and Pomorska 2011) and expands the investigation by stressing the key role of Brussels-based diplomats for orchestrating the spirit of cooperative communication within the WGs. Being identified as the crucial 'masters of puppets' is not very surprising. The majority of attachés working at the national Permanent Representations are active in more than one WGs. Being responsible for two or more similar agendas inevitably leads to meeting the same people every week and thus creating not only networks, but also feeling of shared responsibility. In this sense, Brussels-based national delegates seem to form similar professional circles as do participants in COREPER and can be characterised with Lewis's (2005) 'Janus face' metaphor.

On the other hand, this study also backs those who depict the Council and its components as an arena where intergovernmental elements play a role. In this respect, the study supports the findings of Naurin (2010), who argues that the WGs are involved more in argument rather than deliberation. This analysis shows that the bigger and long-established MS are active in this regard and that the character of a document under discussion is a significant predictor.

More broadly, this study's findings support the path-breaking empirical research by Smeets (2016, 2015, 2013) on the COWEB working party on Western Balkans enlargement. In this sense, the subtlety of Smeets' work ('all must have prizes') and the actual ambiguity of many negotiations on political and technical distinctions is quite complementary to the analytical conclusions offered here. Particularly the context of social interaction and channels of communication seem to matter as they act to depoliticise many factors that would otherwise lead to bargaining breakdowns. As Smeets' work analysed the political process in a totally different area (the Council negotiations at the working party level on the Western Balkan) such factors appear to play a role across policies and topics.

Several limits to this study should be mentioned. First, this article conceptualised communication within WGs narrowly, focusing only on what can be heard. Even that such choice makes sense for practical as well as analytical reasons, leaving aside factors such as non-verbal communication or context of issues that are deliberated has its price. All these factors are influential and significantly shape oral communication. The big question is how they can be captured and analysed in a systematic way. The EU Council is one of the least open and transparent EU institution and its WGs are perhaps the least accessible level of Council's structure. In this regard, the findings of this article support wider and broader use of what Adler-Nissen (2016) or Bicchi and Bremberg (2016) call the 'practise turn in EU studies'. That is application of participatory or non-participatory observation or other ethnographic methods as perhaps only they can explain how opaque parts of EU's decision-making machinery work. Second, this article focused only on a limited amount data on the WGs operating in one, albeit broad, policy area of the Single Market. It would be valuable for future research to analyse WGs acting in areas that are more intergovernmental, as one could reasonably expect that negotiations on more traditionally salient issues, such as police cooperation or defence, could reflect more intense governmental ideological, or overall EU, preferences. However, existing research suggests that even in such 'high level' areas, there is socialisation of the participants involved in the bargaining (Juncos and Pomorska 2006, 2011). On the other hand, the systematic study of a greater variety of WGs could strengthen the socialisation argument because, if confirmed, WGs acting in different policy areas are attended by different attachés than those negotiating Single Market topics. Second, the inclusion of more policy areas, such as agriculture or social policy, could be beneficial in that sense as well. MS preferences vary across sectors and a more complex dataset could thus produce more a detailed and balanced picture of WGs communication. The Single Market agenda, even if researched across a limited number of topics, touches to some extent every MS and each of them have preferences to express. There are, however, areas or policies where a particular MS, or group of states, does not necessarily have any interest at all. One could, for example,

imagine fishery policy being a case where countries such as the Czech Republic or Slovakia do not have any preferences. Such comprehensive research would require significant effort to collect such data. Third, this study focused only on the formal oral communication of MS, excluding the formal written inputs and informal processes that often precede WGs meetings. Accessing this kind of data, particularly regarding the informal level, is very difficult. Fourth, this study also omitted the issue of the saliency of particular proposals for MS. In this regard, it could be useful to measure the saliency of specific parts of documents debated within the WGs, because the saliency of technical details may vary point by point. Fifth, on the explanatory side, the study did not account for the increased role of populist parties across EU MS, in some states already being part of the government. As this tendency does not seem to be abating, the question of how and whether populism and EU politicisation can influence the functioning of the EU Council represents an interesting challenge for future work. In this sense, one could expect at least two possible directions appearing. First, the politicisation emerging in the capitals can be downplayed by the WGs attachés, particularly those who are Brussels-based, creating conflicts between the ministerial level of the EU Council and its lower layers. Second, politicisation can be gradually transferred to the Council as populist national governments replace their staffs in Brussels with fresh and more loyal personnel. Such a process would be slow, but would affect and challenge the internal norms of the EU Council.

ACKNOWLEDGEMENTS

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ENDNOTES

[1] The Council Secretariat regularly publishes a list of working groups. The January 2019 overview mentions 156 'preparatory bodies' altogether, 123 chaired by the Presidency and 33 chaired by an elected or an appointed chairman or by a representative from Council Secretariat (Council Secretariat, 2019).

[2] For example, the Council's Rules of Procedure (Annex V) considers a full round table as excluded in principle. It encourages MS to express their positions collectively. This applies particularly to the like-minded groups which should hold consultations before the meetings take place and then present their joint positions. The Council's Rules of Procedure also suggest that specific proposals for amendments should be submitted in written form.

[3] This control variable can be perceived as problematic as the interventions are expressed by individual representatives. It would have been more accurate if the length of each individual's membership in the WG had been included. Nevertheless, such data are not included in the dataset. Moreover, even though interventions are voiced by individuals, they should represent the position of a particular MS, not a speaker's personal opinion.

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Research Article

The European Union and the Liberal International Order in the Age of 'America First': Attempted Hedging and the Willingness-Capacity Gap

Brice Didier

Abstract

The crisis of the Liberal International Order (LIO) has resulted in, and been amplified by, the unilateral turn taken by the United States (US) under the Trump presidency. In this sense, 'America First' resulted in revisionism by the system leader vis-à-vis an order the US created and led for decades. This shift away from a historical US liberal hegemony has been even more consequential as it resulted in a leadership crisis and translated into episodes of rupture within the transatlantic community, which constitutes the backbone of the LIO. While the European Union (EU) initially positioned itself as a follower of the US, it has more recently appeared to oppose American 'illiberalism' through its rhetoric of 'principled pragmatism', expressed in an increasing number of issues. Building on the concept of leadership, this article analyses whether and to what extent the EU has the willingness to uphold LIO leadership and to what extent it is strategically equipped to do so. Following an analysis of the 2003 European Security Strategy and 2016 EU Global Strategy in order to comprehend better the EU's relationship with the LIO and its willingness to lead, the article builds on two brief case studies: the America First trade policy and the Iran nuclear agreement. In turn, this facilitates examination of the EU's capacity to lead and determination of the extent to which this leadership is accepted by other actors. The article argues that, while being limited by American preponderance over international issues, the EU is faced with a willingness-capacity gap but still attempts to uphold the LIO through pragmatic leadership by hedging.

Keywords

Historically structured and led by the United States (US) with the support of Europeans, the Liberal International Order (LIO) is undergoing a crisis. This has both resulted in, and been amplified by, the United Kingdom's (UK) vote to leave the European Union (EU), as well as the unilateral turn taken by the US administration on the international stage under President Donald J. Trump (see Ikenberry 2018; Duncombe and Dunne 2018: 41). This crisis is thus an existential one, as Trump's 'America First' policies have resulted in revisionism by the system leader itself, by not only questioning the order and its operation, but also the rules and values that underpin the order. Such an unprecedented shift from US primacy and leadership of the LIO towards 'illiberal hegemony' (Posen 2018) has been even more consequential as it translated into episodes of rupture – symptomatic of a profound deterioration of relations – within the transatlantic community, formed by the US and the main LIO supporters: the EU and its member states. Although the election of Joe Biden heralds a renewal of the transatlantic link, Trump's 'America First' policies are likely to leave a lasting mark.

As the backbone of the LIO, transatlantic relations have been characterised by deep and complex economic, security, institutional, political and cultural interconnectedness (Riddervold and Newsome 2018; Henrikson 2016). The transatlantic community has long embodied a 'powerful constellation of interests, norms and identities […] informing a shared vision of the West as bearing special responsibility for maintaining global peace, stability and prosperity' (Tocci and Alcaro 2014: 366-367). There has always been a paradoxical yet inherent tension between US liberal hegemony and the LIO, resulting in an illiberal practice of hegemony exemplified by American support for autocratic regimes and military coups (Duncombe and Dunne 2018: 26-27; Desch 2007; Bukovansky 2017: 291). Yet, it was the end of the 'bipolar world' and the recognition of the US 'unipolar moment' which fostered tensions between the hegemon and its supporters. These tensions culminated in the transatlantic and intra-EU confrontations surrounding the issue of the US-led invasion of Iraq in 2003, which initiated an era of cold diplomacy but led neither to a transformation of the West nor to a collapse of the LIO (Anderson 2018: 625). The start of the global financial crisis and the Russia-Georgia war led most scholars to identify 2008 as the year marking the end of the unipolar moment (see Duncombe and Dunne 2018: 25; Alcaro 2018: 153-154). It would be the starting point to the disruption of Western hegemony and 'revisionism' by (re)emerging powers – namely an emerging China and a resurgent Russia – as the biggest challenge to the LIO (Kagan 2017; Riddervold and Rosén 2018: 28-29; Duncombe and Dunne 2018: 25). Today, however, the disruption of the existing order by the 'rise of the rest' is no longer at the forefront of discussions, being subject to its own internal predicament (see Patrick 2017a; Ikenberry, Parmar and Stokes 2018; Anderson 2018).

Given its endogenous nature, the form of revisionism that threatens the LIO today constitutes an existential crisis. The US under Trump has not only abandoned liberal principles (most notably free trade, human rights and democracy promotion), it has also led the LIO into a 'crisis of authority' (Ikenberry 2018: 10; Duncombe and Dunne 2018: 27-29) by self-consciously abdicating its leadership role (Patrick 2017b: 52; Ikenberry 2018:7, 2017: 4; Bukovansky 2017: 292). By endorsing the UK's vote to leave the EU, encouraging the Eurosceptic far-right, and going as far as calling the EU a 'foe' (Contiguglia 2018), Trump's leadership abandonment has had an even more significant impact, signalling an unprecedented yet unequivocal shift away from historical – yet sometimes ambivalent – US sponsorship of the EU. Reciprocally, while the EU previously positioned itself as a follower of the US, its position has evolved (Schunz and Didier 2019). Although the change in the EU's discourse predates Trump's election and is to be found in the concept of 'principled pragmatism' introduced in the 2016 EU Global Strategy (EUGS) (High Representative 2016), more recently, the EU has employed a rhetoric that suggests a harder turn away from transatlanticism. Through its unwavering support for multilateralism and international rules and norms, the EU has turned from product to promoter of the LIO, eager to 'lead a liberal pushback' against a situation of illiberalism (Smith 2017: 83).

In her declaration following the election of Trump as US President in November 2016, German Chancellor Angela Merkel made it clear that Europe would not abandon the LIO (Federal Chancellery 2016). However, this promise preceded Trump's announcements on trade tariffs as well as the decision to pull out of the Iran nuclear agreement, which led then-European Council President Donald Tusk to go as far as declaring: 'with friends like that who needs enemies?', in May 2018 (Baczynska 2018). Taking it even further, then-European Commission President Jean-Claude Juncker seized the opportunity to claim that '[t]he geopolitical situation makes it Europe's hour', on that account offering more European leadership in the face of 'strong demand for Europe throughout the world', during his September 2018 State of the Union address (European Commission 2018).

Acknowledging the preponderance of intra-EU struggles regarding European leadership on the international stage at a time of overlapping crises (Riddervold and Newsome 2018: 507-508; Peterson 2018), this article takes an EU-level viewpoint in order to analyse whether and to what extent the EU has the willingness to uphold LIO leadership (RQ1), and to what extent it is strategically equipped to do so (RQ2).

After conceptualising leadership within the Atlantic order, the article first reviews European leadership *willingness*, by studying rhetorical changes regarding LIO leadership through a discourse analysis of the 2003 European Security Strategy (ESS) and the 2016 EUGS. It then examines US-EU interactions and the *capacity* of the EU to lead, as well as the *acceptance* of this leadership by third actors, through two concise illustrative case studies: international trade and the Iran nuclear deal. Finally, by extracting patterns from both the discourse analysis and the two cases, it identifies a *willingness-capacity gap*, unequivocally echoing Christopher Hill's 'capability-expectation gap' (1993). Yet, the article ultimately argues that, despite this *willingness-capacity gap* that limits its leadership, the EU is pragmatically seeking to uphold the LIO by exerting a form of functional stabilising leadership through hedging.

ANALYTICAL FRAMEWORK

In order to answer the research questions, this paper builds on the concepts of crisis and leadership in the Atlantic order.

Crisis in the Atlantic Order

Erected in the aftermath of World War II, the LIO is the culmination of a geopolitical and ideational project built on the combination of US economic, normative and military power. It is highly interconnected and institutionalised, most notably through the UN system, the Bretton Woods institutions, the WTO, NATO, the G7 and the G20. '[M]ultifaceted and sprawling … organised around economic openness, multilateral institutions, security cooperation and democratic solidarity', the LIO was produced by US hegemony, together with European sponsorship (Ikenberry 2018: 7). Hence, although '[a]fter the end of the Cold War, [it] spread outwards' (ibid.), this *International* order is very much *Atlantic* at its core. Exhibiting 'patterns that lie between traditional images of domestic and international politics, thus creating a subsystem in world politics' (Deudney and Ikenberry 1999: 195), Euro-American relations constitute 'a distinct political order' that Ikenberry names the 'Atlantic order' (2008: 8). This Atlantic order has acted as an attraction or gravitation point for the entire LIO as we have come to know it.

It was two institutionalised 'bargains' – yet still requiring a shared vision on both sides of the Atlantic (see the *non-hegemonic leadership* subsection below) – which led Europeans to agree to 'live within the US-led system' in exchange for security and political-economic protection (Ikenberry 2008: 9-10). Although such a degree of interconnectedness under US hegemony has influenced the behaviour of the system's other components (i.e. Europeans), it also implies that a change in the US positioning vis-à-vis the order inherently

affects these other components. While the Atlantic order does not exclude the possibility of fluctuations – '[a]s interests change, as values shift, as new external challenges and opportunities present themselves' (Anderson 2018: 622) – such fluctuations denote the 'adaptive' character of the order *mainly* to *external* challenges. Today, however, the biggest challenge to the Atlantic order is not an exogenous but an endogenous one: revisionism from within.

According to Ikenberry, the Atlantic order experiences crisis when a rupture regarding 'core interests', 'market and social interdependence', institutional 'rules and norms', and/or 'the sense of community' occurs (Ikenberry 2008: 12). In this sense, the crisis of the system can be explained when considering Trump's 'America First' dogma as a disruptive element increasing the non-linearity of the existing order. Through hostility to the order's foundations and the self-conscious abdication of US leadership, 'America First' calls into question its 'existence and viability' (Ikenberry 2008: 3). To avoid the system's breakdown and a potential 'strategic rivalry' between the US and the EU, a solution to the crisis of the LIO then appears to be found somewhere between a 'transformation' or 'restructuration' of the transatlantic relationship and an 'adaptation' of the Atlantic order through 'new arrangements' (Ikenberry 2008: 12-14).[1] Such a solution can be found in a change of leadership.

Non-Hegemonic Leadership

The creation of the Atlantic order and more broadly, the LIO, required the existence of an actor others would gravitate towards or be attracted by: the US. But beyond American hegemony, the setup of an 'order' also required 'a *shared vision* among actors, which, … need[ed] to be *acted upon*' (Schunz 2016: 435, emphases in the original). Hence, 'attraction' or 'gravitation' presumes leadership, which is needed to 'ensure that shared visions are indeed acted upon' (Schunz 2016). Insofar as leadership involves 'a structuring or restructuring of the situation and the perceptions and expectations' of others (Bass and Stogdill 1990: 19-20), a solution to the crisis of the LIO can be found by the upholding of this leadership by an alternative actor within the Atlantic order.

Defined in an interactionist perspective, leadership is 'a process in which one individual uses intentional influence to guide, structure and facilitate activities and relationships in a group or organisation' (Avery 2004: 22), an 'asymmetrical relationship of influence, where one actor guides … the behaviour of others towards a certain goal over a certain period of time' (Underdal 1998: 101). Consequently, Nye defines leadership in an international relations perspective as 'a political process with three components: leaders, followers and the contexts in which they interact' (Nye 2008: 55). However, the concept of *leadership* is often mistaken for that of *hegemony*, and even more so when dealing with *American* leadership (Nye 2008; Destradi 2010). According to Rosecrance and Taw (1990), the literature seems to suggest that hegemons lead by offering public goods, making the issue of hegemonic leadership about bearing and sharing the (systemic) costs of this provision of public goods. Yet, although still asymmetrical, the pursuit and exercise of leadership are different from those of hegemony:

> while the hegemon aims to realise its own self-interested goals by presenting them as common with those of subordinate states, the leader guides – 'leads' – a group of states in order to realise or facilitate the realisation of their common objectives (Destradi 2010: 921).

Thus, where hegemony is transactional, leadership is transformational, hence corroborating the assumption that, in the pursuit of mutual benefits, leaders are actors of change. Leadership can, therefore, be exercised either by a hegemonic or a non-hegemonic actor, on the condition that the other actors agree to follow that leadership, as well as share the cost of public goods.

Framing EU Leadership: Willingness, Capacity, Acceptance

Bearing in mind the interactionist dimension of the Atlantic order (Bass and Stogdill 1990: 19-20) but also the dynamic character of leadership, a waning of US leadership does not necessarily imply an irrevocable collapse of the order itself, insofar as order and leadership do not necessarily align (Bukovansky 2017: 293). Moreover, the weakening of the transatlantic bond does not exclude an assertion of European leadership (Riddervold and Newsome 2018: 509-510). As they can keep drawing benefits from the existing order's setting and common goods, followers can attempt to uphold the institutional and normative framework, in spite of the loss of the hegemon's leadership (Keohane 1984). Such considerations therefore open the possibility for upholding the LIO through a change of leadership, from the declining hegemonic leader to an until-then follower, i.e. in our case: towards European leadership.

Under which conditions is this conceivable? With regard to regional powers' leadership, Van Langenhove, Zwartjes and Papaganou identify three determinants which also guide the present analysis: '(i) the willingness to act as a leader; (ii) the leadership capacity; and finally (iii) the acceptance of the leadership claim by other actors – regional and international' (2016: 20, emphases added). From an interactionist perspective, such a framework is indeed helpful to understand better how a (potential) leader uses rhetoric to shape their own identity into a leader's, to influence others, but also how they transform – or do not – this rhetorical leadership into action, including in their relationship with other actors.

Research Design

In order to capture better the EU's leadership *willingness* and answer RQ1, the next section consists of a discourse analysis of the EU's major successive strategies: the 2003 Security Strategy and the 2016 Global Strategy. This analysis allows us to unveil the EU's evolving relationship with the LIO and with leadership. Nevertheless, assuming a position of leadership does not only depend on willingness: '[t]here are also the capacities and capabilities that count' (Van Langenhove, Zwartjes and Papanagnou 2016: 22), as well as the 'positions taken by other actors' vis-à-vis that leadership (Van Langenhove, Zwartjes and Papanagnou 2016: 23). Considering that, 'when assessing willingness and motivation one has to go beyond the verbal – and the promotion of norms and values – and look for corresponding acts or processes …' (Van Langenhove, Zwartjes and Papanagnou 2016: 21), this paper then analyses how this *willingness* is put into practice, through two concise case studies, useful to assess both *capacity* and *acceptance* and to answer RQ2.

The two case studies are chosen from two policy domains which are illustrative of the crisis within the LIO, in which President Trump's 'America First' policies have provoked major upheavals and in which, consequently, the US and the EU have confronted each other. First, the case study on international free trade examines how the EU has been responding to the 'America First' trade policy. It is illustrative of a policy domain in which the EU has considerable leverage and in which there has been a rappro chement with third countries in the context of Trump's policies. Second, the Iran nuclear agreement case study focuses on the role of the E3/EU in the process of solving the nuclear crisis from 2003 onwards. Taking a historical perspective, it is emblematic of the focal role of transatlantic cooperation in a multipolar setting of multiple power poles collaborating and competing in 'overlapping, shifting alliances' (Kausch 2015: 2), and has become a major factor of transatlantic tension with the Trump presidency. These two case studies are based on the examination of strategic documents, official policy papers and press releases, as well as chronological events and announcements (press releases and conferences, press interviews) from relevant leaders and other officials from the EU, the US as well as Russia and China.

Following this study of the EU's leadership determinants through the successive discourse analysis and case studies, patterns are extracted in order to draw the leadership profile of

the EU in the face of Trump's revisionism. Offering an answer to both research questions, this article's argument is two-fold. First, it argues that, faced with a gap between its *willingness* to lead and its *capacity* to do so, the EU can at best simply uphold the LIO through *adaptation* (Ikenberry 2008: 12-14). Second, this article argues that, by partly *balancing* the US without antagonising it, and *attracting* other (US antagonist) great powers, without fully aligning with them, the EU is putting its 'principled pragmatism' dogma into practice by behaving as a hedger (see below for further details on the concept of 'hedging'). It does so through the *acceptance* of its leadership by other actors, hence exerting a form of functional stabilising leadership.

AN EVOLVING EU *WILLINGNESS*: FROM PRINCIPLED FOLLOWERSHIP TO PRAGMATIC LEADERSHIP

Although post-Cold War US Presidents Clinton, Bush Jr and Obama's approaches to international politics fluctuated, they shared fundamentals regarding the consolidation of the LIO and transatlantic relations. In this regard, the Trump presidency marks a shift away from the old post-WWII bipartisan consensus, based on the idea of making the LIO 'the bedrock of US national security strategy' (Mazarr 2017: 5). In contrast, a product of American post-WWII structural foreign policy (Keukeleire and Delreux 2014),[2] which resulted in the emergence of the LIO as we know it today, the EU 'has gained a reputation for being [its] strongest proponent and defender', to the point that it 'defends [it] almost reflexively, as part of its core identity and beyond rationalised cost-benefit calculation' (Smith and Youngs 2018: 45).

Placing the analysis at the 'grand strategy' level, this section consists of an analysis of the 2003 ESS and 2016 EUGS, providing a relevant basis for answering RQ1.

The 2003 Security Strategy: Principled Followership

Only 14 pages long, the ESS is a declaratory document which cannot be dealt with in the same way as a comprehensive policy statement, such as a US president's successive National Security Strategies (NSS). Nonetheless, as the culmination of a long process which consisted of building an overarching, commonly agreed international political identity, it remains a capstone document.

Starting with the assumption that 'Europe has never been so prosperous, so secure nor so free' (European Council 2003: 1), the ESS exposed a triumphalist post-modern reading of the LIO. Against the backdrop of its release at the peak of the US unipolar moment, the EU intended to assert its actorness by building on the existing 'international system', 'at the core of [which] is the transatlantic relationship', which is 'irreplaceable' (European Council 2003: 9, 13). A response to President Bush Jr's 2002 NSS (White House 2002a) and the US invasion of Iraq which divided Europeans, the ESS was an endeavour to bring both sides of the Atlantic back together.

Although willingly subordinating the EU to US leadership, the ESS opposed the 2002 NSS on two main points. First, while aiming to 'promote its [liberal] values' (European Council 2003: 6), the ESS displayed no moral imperative and did not insist on spreading 'freedom' around the world.[3] Second, contrary to the 2002 NSS's emphasis on unilateralism, coercion and the use of force, the ESS insisted on cooperation as a normative goal (European Council 2003: 7-8), and on 'share[d] responsibility' through 'a rule-based international order based on effective multilateralism', which it affirmed not only as a tool but also as an objective of the LIO (European Council 2003: 1, 9-10). Finally, although it vouched to champion the LIO by becoming 'more active' and 'more capable' (European Council 2003: 5, 11-14), the EU claimed no leadership ambition.

The 2016 Global Strategy: Pragmatic Leadership?

A much longer and more comprehensive document than the ESS, the EUGS is the culmination of the development of the EU's international identity. Released at the end of Obama's second term in a background of waning US hegemony, it sketches a less glowing image of the state of the LIO and the role of the EU within it, notably by giving lower priority to the transatlantic bond.

A post-Lisbon strategy, the foundations of the EUGS are 'enshrined in the Treaties' (High Representative 2016: 13). The Lisbon Treaty indeed mentions a clear normative positioning of the EU vis-à-vis the LIO (Articles 2, 3(5) and 21 of the Treaty on the EU (European Union 2010: 17, 28)). Hence, the EUGS repeatedly reiterates the EU's commitment to 'a global order based on international law', 'with multilateralism as its key principle and the United Nations at its core' (High Representative 2016: 10, 13, 16, 18, 39). Therefore, the EU's goal towards the LIO remains ambitious, as it intends to extend 'the reach of international norms, regimes and institutions' (High Representative 2016: 41, 42). Yet, the LIO is introduced as both a goal and a vehicle for the EU and its ('vital') 'interests' (High Representative 2016: 13, 39), insofar as '[a] rules-based global order unlocks the full potential of a prosperous Union' (High Representative 2016: 13, 16).

This change in the EU's approach to the LIO and multilateralism is paired with a more pragmatic perspective regarding EU-US relations. Admittedly, the EU commits to '[a] closer Atlantic': on security issues, with the US as its 'core partner', and NATO as 'the bedrock of Euro-Atlantic security' and 'the strongest and most effective military alliance in the world' (High Representative 2016: 36-37); and on the broader global agenda, with the negotiations for a Transatlantic Trade and Investment Partnership (TTIP) (currently on hold but in progress at the time when the EUGS was released) as 'demonstrat[ing] the transatlantic commitment to shared values and signal[ing] our willingness to pursue an ambitious rules-based trade agenda' (High Representative 2016: 37). However, and contrary to the ESS, the EUGS does not place the EU as a follower of US leadership and does not solely praise its transatlantic partnership: 'we will also connect to new players and explore new formats' (High Representative 2016: 4), 'We will work with core partners, like-minded countries and regional groupings. We will partner selectively with players whose cooperation is necessary to deliver global public goods and address common challenges' (High Representative 2016: 18). Pledging to diversify its partnerships further depending on the issue at stake, and perhaps at the expense of the US, the EUGS arguably presents a new form of international engagement.

The EUGS also witnesses a change in the EU's appreciation of the state of the LIO. Contrary to the ESS, which began by claiming prosperity for the EU, the EUGS starts with the diagnosis that '[t]he purpose, even existence, of our Union is being questioned' (High Representative 2016: 3). On the one hand, this difference helps explain the change from the 2003 post-modern focus to a more 'realistic' one in 2016, characterised by greater attention given to security issues and the dual need to promote multilateralism while reforming the multilateral system. On the other hand, it also helps explain how the EU envisions its own leadership role:

> We will be guided by clear principles. These stem as much from a realistic assessment of the strategic environment as from an idealistic aspiration to advance a better world. In charting the way between the Scylla of isolationism and the Charybdis of rash interventionism, the EU will engage the world manifesting responsibility towards others and sensitivity to contingency. *Principled pragmatism* will guide our external action in the years ahead (High Representative 2016: 16, emphasis added).

With the EU seeing itself as a model, the EUGS exposes a vision of a more influential role on the world stage: 'the EU will strengthen its voice and acquire greater visibility and

cohesion' particularly 'across multilateral fora' (High Representative 2016: 40). Nevertheless, unable to 'deliver alone' (High Representative 2016: 43), the EU does not express an assumed leadership claim. Instead, '[t]he EU will lead by example on global governance … It will act as an agenda-shaper, a connector, coordinator and facilitator within a networked web of players' (High Representative 2016: 43). Therefore, the EUGS advocates a more pragmatic form of leadership, based on 'credibility' (High Representative 2016: 44) and 'co-responsibility', the latter being its 'guiding principle in advancing a rules-based global order' (High Representative 2016: 18). This more nuanced approach also helps explain the willingness of the EU to reach out to other partners than the US in upholding the LIO, as well as its 'aspiration to transform rather than simply preserve the existing system' (High Representative 2016: 39). It also denotes a new sense of prioritisation that helps explain the concept of 'principled pragmatism', notably through 'effective global governance' (High Representative 2016: 36, 43) as a substitute to the ESS's 'effective multilateralism'. Applied to specific issue areas on which the EU looks for new partners (Schunz and Didier 2019), this new dogma is of even more relevance as we observe that the US has not only been abandoning leadership but perhaps transatlanticism.

A Willingness for Pragmatic Leadership

Although the EU is not a unified foreign policy actor, the ESS in 2003 and the EUGS in 2016 each bring forward a single assessment of the challenges confronting the LIO and the EU's positioning in this regard. Considering that '[f]undamental to the EU's engagement with the liberal order has been the nature of its relationship with the United States' (Smith and Youngs 2018: 47), it is noticeable that, paired with more detachment from the US, the EU's rhetoric from one strategy to the other evolved alongside changes in its assessment, both of the state of the LIO and the evolution of transatlanticism. In sum, and to answer RQ1, the EU is increasingly assertive regarding its role within the LIO. While still not claiming leadership as a *primus inter pares* actor, it nevertheless professes its *willingness* to assume pragmatic leadership.

'Principled pragmatism' has been even more relevant at the time of the Trump presidency. Indeed, President Trump's 2017 NSS could be summarised by its introductory statement: 'An America First National Security Strategy is … a strategy of principled realism that is guided by outcomes, not ideology' (White House 2017a: 1). Considered from a transatlantic perspective and compared to the EU's 'principled pragmatism', this 'principled realism' dogma is emblematic of the growing rift within the Atlantic order regarding the upholding of the LIO. How has this rift manifested in major policy domains? And how has the EU been transforming its rhetorical claim to pragmatic leadership into practice? The following section attempts to answer RQ2 through two case studies.

FROM DISCOURSE TO PRACTICE: *CAPACITY* AND *ACCEPTANCE*

The US retreat from the LIO's leadership has been unequivocally brought to centre stage by Trump's decisions to withdraw the US from UNESCO, the Paris Climate Accord, the Intermediate-Range Nuclear Forces Treaty, the Iran nuclear deal, Trans-Pacific Partnership (TPP) negotiations, and to freeze the negotiations for a TTIP – among others. To answer RQ2, this paper analyses EU leadership in two brief yet emblematic and complementary case studies: the America First trade policy and the Iran nuclear deal.

Case Study 1: EU Responses to the America First Trade Policy

Since 1934, trade has been American presidents' leverage to boost US economic prosperity and the country's global political project (Hiscox 1999; Bailey, Goldstein and Weingast 1997). Although temporary protectionist measures in order to preserve national industries from international competition are nothing new in the US, notably regarding aluminium and steel, and even recently under Bush Jr and Obama (Feroci 2018: 1), Trump's

denigration of free trade in the name of sovereignty is unprecedented. On his first full day in office, President Trump withdrew the US from the TPP negotiations (White House 2017b). This was followed by the freezing of the TTIP negotiations and the renegotiation of the North Atlantic Free Trade Agreement (NAFTA). Overall, President Trump distanced himself from President Bush's qualification of 'free trade' as a 'moral imperative' (White House 2002a: 17, 18). Instead, his 'America First' trade policy, released in March 2017, embodied this protectionist and unilateralist view by announcing that the US was ready to promote its national interest without much consideration for existing international trade rules (US Trade Representative 2017).

Granted 'far-reaching authority' with regards to foreign trade (Norrlof 2018: 68), as provided by Section 201 of the US Trade Act of 1974 (US Department of Commerce 2019), the President's policy has not only been waiving the US's global leadership but also threatening US-EU trade relations and the international trade order as a whole. Nonetheless, even though presenting a tangible direct threat, this situation also offered an opportunity for EU leadership.

President Trump's Dual Divide-and-Rule Strategy

Following the freezing of TTIP negotiations, at the heart of transatlantic economic and political relations for a decade, albeit already highly controversial on both sides under Obama, Trump's questioning of the international free trade order built on the rationale of a dual divide-and-rule strategy vis-à-vis the EU.

At the international level, although he has repeatedly presented Europeans – particularly Germany and its car industry – as unfair competitors to the US (Swanson 2017) and although EU-US confrontation has become increasingly direct and virulent, President Trump and his administration took action first and foremost against China. But US trade policy and tariffs imposed on imports from China – and China's response to those – also pose an indirect threat to the EU, insofar as a US-China trade war would concomitantly 'affect trade flows between China and the EU (as a consequence of a diversion of China's exports from the [US] to the EU markets)' (Feroci 2018: 3). Exemplified by the fact that Trump's announcement of EU exemptions from aluminium and steel tariffs was concomitant with the announcement of tariffs against China equal to USD 60bn worth of imports (Wolff 2018: 50), this strategy furthermore pressured the EU to choose between its two main trading partners, even though the EU has condemned both American protectionist measures and Chinese 'unfair' competition.

At the intra-EU level, divergences occur at two levels. On the one hand, contestation of the EU Commission's trade strategy by member states at the domestic level tends to weaken the Commission's position. This distrust among member states towards the Commission was notably visible following the Wallonian veto on the Comprehensive Economic and Trade Agreement (CETA) (voided by the Court of Justice of the EU (CJEU 2019)) and the Dutch 'no' in the referendum on the EU-Ukraine Association agreement (even though a compromise was found afterwards) as well as public debates on TTIP negotiations. On the other hand, by primarily targeting Germany's export sectors, US sanctions instilled defiance among less export-sensitive EU member states, who are relatively unaffected by the sanctions and, as a result, subscribe less extensively to the EU's response. Such a strategy has exacerbated divisions between EU member states.

EU Leadership Capacity and Willingness

In the European project's DNA, the EU's *willingness* within the international trade order rests on its material and constitutional *capacity* to claim leadership.

Even without the UK, the EU is still one of the three biggest markets in the world (Smith 2017: 84). The size of the single market is the EU's first source of global power, making it a global attractor and giving it political leverage (Damro 2012). Moreover, the Common

Commercial Policy being an exclusive competence of the EU (see Article 207 of the Treaty on the Functioning of the EU (European Union 2010: 140)), Europeans can engage with the US as equals on trade and regulatory issues and speak with one voice at the WTO. In a way, in international trade, the EU's leadership *capacity* precedes its leadership *willingness*. As then-Commission's spokesperson Schinas put it: '[t]he EU stands ready to react swiftly and appropriately in case our exports are affected by any restrictive trade measures by the US' (Boffey 2018).

The EU's answer to US protectionism is two-fold. On the one hand, the EU has broadened its set of trading partners and engaged in a number of bilateral and plurilateral trade agreements, most notably with Japan, Mexico, Vietnam and Mercosur countries. On the other hand, the Commission seeks to answer intra-EU concerns by further emphasising reciprocity and norms in the new generation of trade agreements. In line with the 2015 'Trade for All' Strategy (European Commission 2015), the Commission insists on tougher EU standards, notably regarding market access, climate-related and environmental norms, and privacy and intellectual property rights. It does so in import sectors such as aluminium and steel, and in the technology industry. By setting up new trade defence mechanisms, and in order to gain both internal and external acceptance, the EU has gone even further and answered to US illiberalism with a form of liberal restraint, thereby conveying a sense of principled pragmatism.

EU Leadership Acceptance by Others

In the face of Trump's illiberalism, EU trade leadership has been *accepted* by a broader range of actors. Beside the fact that the 'America First' trade policy ended up accelerating the conclusion of a bilateral EU-Japan Economic Partnership Agreement instead of a US-Japan trade agreement (European Commission 2019), the most notable rapprochement concerned another Asian power: China.

For reasons quite similar to those for which Trump was reproaching China regarding unfair competition, the EU and China have been opposed on economic and trade disputes for many years. But the Trump administration's aggressive trade defence measures, concomitant with a more open approach from China to trade agreements, have provided the EU with a window of opportunity for a more comprehensive bilateral trade relationship. This rapprochement was acknowledged at the July 2018 EU-China summit: by agreeing to start negotiating an investment treaty and to set up an EU-China working group within the WTO to reform the institution (EEAS 2018), the summit showcased a common EU-China rhetoric to uphold the international trade order. This rapprochement was reiterated by Beijing in China's EU Policy Paper in December 2018 (Xinhua 2018). Thus, rather than witnessing the EU aligning with the US in confronting China, the EU and China reciprocally welcomed each other's economic prominence. In this sense, China, if not *accepting*, is at least *tolerating* EU leadership attempts. This *tolerance* allows for discussing trade and investment bias together with the possibility of granting China the WTO's Market Economy Status. Insofar as the unexpected opening of US-China bilateral trade talks ended up failing, with the US raising tariffs on Chinese imports again (Swanson and Rappeport 2019), the EU's window of opportunity is still open for pragmatically strengthening its relationship with China and to continue broadening its range of free trade agreements with other countries.

Case Conclusion

To conclude on trade, the EU's potential for leadership rests primarily on its capacity to lead. In encountering American protectionism and trade antagonism, the EU has very clearly expressed its willingness to lead. This context, paired with its leverage as a market power, allows the EU to deploy pragmatic relationships with third actors, which, in return, accept or *tolerate* the EU's leadership.

Case Study 2: the Iran Nuclear Agreement

> Through our combined weight, we can promote agreed rules to contain power politics and contribute to a peaceful, fair and prosperous world. The Iranian nuclear agreement is a clear illustration of this fact (High Representative 2016: 15).

Forty years after the Islamic Revolution in Iran, what was perhaps the most significant success of transatlantic diplomacy in the twenty-first century has become a major generator of transatlantic tension. Although the EU and the US have together been at the frontline of international efforts to deter Iran's nuclearisation, the process that led to the July 2015 Joint Comprehensive Plan of Action (JCPOA) was a long and complicated one. At all stages, the dispute over the fate of the nuclear deal has highlighted important transatlantic divergences, regarding the means rather than the end – hence regarding the value of cooperative security, a fundamental element of the LIO. Following the second Obama administration's period of pragmatic engagement with Iran via EU-led negotiations that resulted in the deal, Trump's administration, in line with his foreign policy speeches both as a candidate and as President, marked a shift back to aggressive containment. In breach of the LIO and cooperative security, the US withdrawal from the deal and the reinforcement of sanctions that quickly followed have highlighted the EU's limitations in upholding the JCPOA.

EU Leadership Willingness and Capacity

One can analyse EU policy vis-à-vis Iran's nuclear programme in the light of two elements. First, at the time when the nuclear issue emerged, the EU and the US had followed opposing tracks: while the US has sought to isolate Iran since the 1979 revolution, the EU attempted to build a pragmatic relationship which culminated in the negotiation of a trade and cooperation agreement, alongside political dialogue. Second, the issue emerged in a context of transatlantic dissonance started by the US-led invasion of Iraq (2003-2011), regarding the legitimacy of the use of force to prevent the proliferation of weapons of mass destruction (WMDs). While the EU considered the threat posed by WMDs to be proliferation *as such* (Council of the EU 2003), the US focused rather on *who* held WMDs (White House 2002a, 2002b). Consequently, whereas the US favoured a unilateral approach unequivocally undermining the role of the United Nations (UN), France and Germany defended the UN's rules-based multilateral approach. Despite some EU members bandwagoning with the US over Iraq, most notably the UK, overall, EU governments championed the second approach. Following a strategy of engagement rather than containment, initial diplomatic efforts were then carried together by France, Germany and the UK in 2003, joined by the EU per se as of 2004, in order to prevent Iran's nuclearisation *and* a wider transatlantic rift.

Nevertheless, and despite such *willingness*, European *capacity* remained limited and dependent on *US willingness*. As of 2005, in the face of US secondary sanctions and Tehran's rejection of the European offer of political dialogue and economic incentives which it considered poor, the EU converged with the US on scaling up its sanctions regime (Lohmann 2016; Alcaro 2011). After extending the EU-built negotiation framework to the US, and although US policy evolved between Bush Jr and Obama from containment to pragmatic engagement, by mid-2012, transatlantic diplomacy towards Iran was US-made, hence 'relegat[ing] [the EU] to the 'subaltern' in a hegemonic power constellation' (Pieper 2017: 106).

EU Leadership Acceptance by Others

Although an EU alignment on US willingness was crucial for reaching an agreement and containing Iran's nuclearisation by peaceful means, the E3/EU (France, Germany, the UK / the EU as such) played a crucial role in the negotiations by setting the agenda and acting as mediator between the different parties. This pivotal role was exemplified by the position

of lead negotiator held by the High Representative as of 2006, on behalf not only of the EU, but of the UN Security Council's 'P5+1' or 'E3/EU+3' (the E3/EU and the US, Russia and China). Through this original positioning and a forefront mobilisation of political capital, EU leadership in the negotiations was thus *accepted*, by the US, but also by China (see Almond 2016) and Russia – as acknowledged by Russian Deputy Foreign Minister Ryabkov:

> The role of the EU and of the European External Action Service is hard to exaggerate; they coordinated the talks, they summarized the outcome of the discussions, and in fact they were the ones essentially drafting the text, together with Iranian representatives (CESS 2015: 11).

This inclusion of the two remaining permanent members of the UN Security Council, Russia and China, proved crucial 'to dispel the reading that 'the West' was aiming to deprive Iran of legitimate rights' (Pieper 2017: 104). Further, it also proved to be a decisive factor in building the E3/EU's lead legitimacy *beyond* the West and upholding multilateralism as well as the non-proliferation regime, a cornerstone of the LIO. Following its signature in Vienna on 14 July 2015, the JCPOA was subsequently approved by the Security Council on 20 July (UN Security Council 2015). After the International Atomic Energy Agency's certification of Iran's compliance with all its commitments, the JCPOA came into full effect on 16 January 2016, which led to a lifting of US and EU sanctions. Hence, the EU not only advanced its strategic (political and economic) interests, but also its normative goals by helping to uphold the non-proliferation regime and, beyond, has shown how to build on the LIO's central pillar – the UN.

America's Aggressive Containment and Europe's Difficult Balancing

In line with the 2017 NSS but in breach of Resolution 2231, the US withdrawal from the agreement on 8 May 2018 directly confronted UN legitimacy and the LIO. The EU, despite its *willingness* to act as a leader, did not have the *capacity* to bring about an appropriate answer to the American shift back to aggressive containment.

Although one could have witnessed an opportunity for E3/EU emancipation, in reality the Europeans had not anticipated the return of US secondary sanctions – aimed at cutting off Iran's oil revenues – and therefore were not adequately prepared to respond to them. This lack of preparedness, combined with the sanctions' effect on Iran's economy, led Tehran to pressure the E3/EU even more to offer concrete guarantees to uphold the deal by threatening to withdraw from it. A solution was found by the E3 with the setup of a 'special purpose vehicle' named INSTEX: a mechanism facilitating Iran's oil exports to Europe by avoiding financial-monetary channels, and therefore US secondary sanctions (France Diplomatie 2019). Nevertheless, its economic impact remained limited (Geranmayeh and Batmanghelidj 2019), which ultimately led Iran to withdraw partially from the deal, one year after Trump's withdrawal announcement (Wintour 2019). In the end, the EU itself is not a sovereign entity: resilience against US unilateralism can only come from member states. An intergovernmental structure, INSTEX is mainly a political gesture on the part of the E3 states, through E3, not EU, sovereign backing.

As in the case of trade, the Trump administration has attempted to implement a 'divide-and-rule' strategy. In this regard, the 'Middle East Security Conference' organised by the US in Warsaw in February 2019 was not only aimed at broadening the US-led anti-Iran coalition but also to make some EU member states tack and align with Washington's hard line, ultimately weakening the pro-Iran deal European bloc. Similarly to trade, this strategy has not paid off yet, insofar as the biggest EU member states have softly boycotted the meeting by not sending high-level officials, while Italy – led (at the time of writing) by a Eurosceptic coalition – has joined the E3/EU in opening dialogue with Iran on regional issues.

Case Conclusion

In many ways, the historical process that led to the 2015 JCPOA is a good example of how the EU adopted a 'principled pragmatic' strategy before naming it as such in the 2016 EUGS. The chronological perspective adopted in this case study allows for understanding how, despite its *willingness* to lead and the *acceptance* of its leadership by Iran, Russia and China, the EU's *capacity* to act remains anchored to American strategic choices. Whereas the EU could exert leadership towards the deal in 2015 when the US was still inclined towards cooperation, it was revealed to be powerless when faced with the Trump administration's aggressive containment.

EXPLAINING PATTERNS: THE *WILLINGNESS-CAPACITY GAP* AND STRATEGIC HEDGING

As shown throughout the discourse analysis and the two cases, the EU expresses its *willingness* and, to a certain extent, actually attempts to lead, and even sometimes to balance against US unilateralism. Nevertheless, with regard to RQ2, if European rhetoric accounts for leadership *willingness*, one cannot underestimate the *willingness-capacity gap* that a fully-fledged EU leadership faces. As Chancellor Merkel put it:

> They [China, Russia, and the US] are forcing us, time and again, to find common positions. That is often difficult given our different interests. … So we keep putting one foot in front of the other. However, our political power is not yet commensurate with our economic strength (Kornelius, Fried and Oltermann 2019).

Such a *willingness-capacity gap* covers two dimensions. First, it has to do with resources. The EU has at its disposal significant economic leverage and global influence in areas such as international trade, as the first case study shows. However, the fact remains that the EU is not equipped with resources equivalent to that of the US to exert the same type of leadership, that is, a dominant, hegemonic one. As the case study on the Iran nuclear deal shows, EU leverage in upholding the LIO is hampered by its limited material power and there is no alternative to the US's fully-fledged hegemonic leadership to shape the LIO. Much of the LIO's fate, even in the eventuality of its upholding by another international power such as the EU, still depends on the US. Second, the issue is also one of coherence among EU member states. Although Trump's divide-and-rule strategy has not proven fully efficient, EU countries have considered 'America First' differently. Although EU member states stood together on the issue, the bloc can show weakness and fragmentation. Notably, while Germany and France have oscillated between patience and the search for further autonomy, other EU member states like Poland, for instance, have been more accommodating vis-à-vis the Trump administration by hosting the Warsaw Conference in February 2019, the purpose of which was to attempt to break the European front on the Iran deal.

Despite the *willingness-capacity gap*, as in the two cases, interaction through *acceptance* might open new opportunities for credible alternative leadership. Confronted with 'America First', the EU and other power poles have been compelled to reconcile and share responsibilities while embracing new forms of cooperation. Precisely because the EU is not a world hegemon, a multipolar world order provides the appropriate context for transforming the EU's 'principled pragmatism' dogma into a more flexible form of LIO leadership.

In the case study on trade, the EU accelerated the development of its free trade network and enhanced bilateral dialogue with China, while pressuring the latter to abide further by

European standards. Nevertheless, although the July 2018 EU-China summit concluded on a rapprochement, it was not followed by immediate progress on key points such as the question of granting China the WTO's Market Economy Status. In the case study on the Iran nuclear deal, European and Russian views were aligned with regards to the upholding of the Iran deal, and Russia and China supported the EU's initiatives such as the setup of INSTEX. Nevertheless, the EU and the US both remain antagonistic towards Russia and Iran when it comes to regional political and security issues. Consequently, in the face of the willingness-capacity gap, the EU places 'parallel bets in the hopes of avoiding both domination and abandonment' (Patrick 2017b: 52), developing what is better known as 'strategic hedging'.

Derived from the field of finance and referred to as an 'insurance policy' for secondary powers (Toje 2010; Lake 1996; Koga 2017; Foot 2006), the concept of hedging helps to explain strategies that insist on 'engagement and integration mechanisms' while simultaneously emphasising 'realist-style balancing' (Medeiros 2005: 145). Although it is not a new concept in international relations and foreign policy analysis, it has been increasingly mobilised in the literature to conceptualise the strategies developed most notably by Japan and Southeast Asian states 'to strike a Middle Path' between the US and China and 'avoid excessive security dependence on a single Great Power' (Tessman 2012: 205; Koga 2017). Distinct from both bandwagoning and balancing, hedging is particularly relevant in the situation of a waning US hegemony and an increasingly multipolar system (Tessman 2012: 205; Koga 2017). Thus, the concept helps to explain how the EU's principled pragmatism can be put into practice. By attempting to uphold the liberal order together with illiberal powers vis-à-vis which it seeks to implement a binary approach based on engagement and pressure, the EU does not seek systematically to oppose the US. In line with the rhetoric outlined throughout the 2016 Global Strategy, the EU is developing a hedging strategy which allows it to avoid immediate confrontation with the US while moulding a more selective form of leadership.

CONCLUSION

This article set out to capture the EU's leadership of the LIO in rhetoric and practice. The findings suggest that there is a gap between the EU's *willingness* and its *capacity* to lead. In order to fill this gap, the EU attempts to translate its foreign policy rhetoric of 'principled pragmatism' into practice through the *acceptance* by a more diverse set of actors of a flexible and functional form of leadership based on a hedging strategy.

While the US has been the main architect and holder of the LIO, it has also been the biggest impediment to it, by constraining its full completion. Such a finding is all the more relevant when witnessing the incompatibility between 'America First' transactional policies and America's leadership of the LIO. Concomitantly, the more coercive and unilateral the US, the more resistance it meets within the Atlantic order. This article cautions, however, against a conflation of issues: the future of the Atlantic order and the future of the LIO are ultimately separate, allowing the EU to develop its potential for leadership and to uphold the LIO outside of the Atlantic order.

Pragmatism on the part of the EU is also partly explained by the fact that the US's structural and material pre-eminence remains a key driver of the EU's international positioning. If the upholding of the LIO calls for its de-westernisation, the EU remains anchored to the US within the Atlantic order. For now, its limited leadership capacity hampers the EU's potential emancipation from the US. Even though it looks for other partners to support its attempt to uphold the LIO, its positioning as a hedger is the strategy that provides the EU with largest room for manoeuvre. However, such a positioning has less to do with a complete shift than a *diversification* of its partnership portfolio, within a context of a moving and unpredictable global power constellation.

ACKNOWLEDGEMENTS

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ENDNOTES

[1] According to Ikenberry, a crisis in the Atlantic order can have three alternative outcomes: 'breakdown', 'transformation', or 'adaptation': 'breakdown' means that the crisis leads to disorder: a collapse of the order's rules and institutions, which 'may actually result in a phase of strategic rivalry and great power counterbalancing'; in contrast, 'transformation' means a restructuration of the transatlantic relationship via a 'renegotiat[ion] of its basic rules and norms' towards 'a new set of arrangements that are mutually satisfactory'; lastly, 'adaptation' sees a continuation of the pre-crisis bargain through the addition of 'new rules and arrangements' to the existing system 'to cope with the new disagreements' (2008: 12-13).

[2] Echoing the academic concept of 'structural power', Keukeleire and Delreux define a structural foreign policy as 'a foreign policy which, conducted over the long-term, aims at sustainably influencing or shaping political, legal, economic, social, security or other structures in a given space', and use US foreign policy towards Western Europe after WWII as a first relevant example (2014: 28).

[3] While 'freedom' is mentioned 46 times (and 'liberty' 11 times) in the 2002 National Security Strategy of the United States, it appears only twice in the 2003 European Security Strategy.

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Research Article

Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective

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Abstract

The increased recourse to soft law by the European Union (EU) as a flexible solution to complex social and policy issues has raised several questions about the democratic legitimacy of decision-making at the EU level. With the aim to provide a normative direction for future empirical assessment of EU soft law, this article explores the democratic credentials that EU soft law measures should fulfil to ensure their legitimacy. Drawing from the intersections of liberal, republican and deliberative conceptions of democracy, this article proposes four democratic legitimacy standards for the evaluation of soft law measures in practice: parliamentary involvement, transparency, participatory quality and reviewability.

Keywords

EU soft law; Democratic legitimacy; Liberal democracy; Republican democracy; Deliberative democracy

European governance has shown a strong tendency towards the substitution of conventional 'hard' forms of public action which are legally binding, with 'softer' forms which are instead grounded in persuasion. Throughout the development of the European Union (EU) into a complex system of decision-making, such complementary governance methods have been progressively used in all areas of EU policymaking (Hartlapp 2019: 193). Though soft governance does not always take the form of law (i.e. more emphasis might be put on coordination rather than strictly legal aspects) soft law has become a staple of soft governance, accounting for over 10 per cent of all Union law (Stefan, Avbelj, Eliantonio, Hartlapp, et al. 2019: 3). Soft law measures (SLMs) have now become a leading form of public action in response to complex social and policy issues. While in their inception SLMs were meant to increase the legitimacy of the Union (European Council 1992), there is little evidence that this has been achieved in practice. Though praised for their flexibility, SLMs become problematic as their emergence has not been met with a dynamic framework of appropriate legitimacy measures, thus furthering the already precarious democratic standing of the Union. While Eurosceptic movements are gaining more and more traction, the EU is increasingly, and rather urgently, confronted with demands of, efficiency and effectiveness on the one hand and democratic legitimacy on the other.

Soft governance is based on voluntary and non-sanctioning forms of public action. In the EU context, soft law is best defined *in negativo* to the Community Method as it deviates from the traditional decision-making processes by introducing informal, flexible regulatory instruments (Senden and van den Brink 2012; Eberlein and Kerwer 2004). These measures are not binding but can produce legal practical effects (Trubek, Cotrell and Nance 2006; Snyder 1993; Senden 2004). Thus, one should consider the political weight associated with them. For instance, such measures are often employed instead of legislation in areas where the political sensitivity is high or where legislative action is not possible (Schäfer 2006). This grey-area of EU law merits significant attention as it reveals fundamental deficiencies in the institutional architecture of the Union due to the lack of appropriate and proportionate legitimacy measures (Senden and van den Brink 2012: 11).

SLMs often come at odds with conventional standards of democratic legitimacy, for instance due to the notable lack of a parliamentary dimension. Traditionally, parliaments often confer legitimacy upon the rules and norms that govern a demos (or in the EU's case a *demoi*) by exercising accountability via the deliberation and passing of laws or the checking of the executive (Tsakatika 2007: 549-550). Yet, it is evident that the parliamentary dimension of EU soft law enjoys low salience. Still, parliaments are not the only democratic legitimacy mechanism that one could employ. Competing conceptions of democracy highlight different principles that can be used for the examination of the democratic legitimacy of soft law, for example principles such as deliberation, transparency, or accountability. Such different normative conceptions of democracy can thus be used to deduct a series of legitimacy standards for the adequate assessment of SLMs. This article considers the principles put forth by three competing democratic models: liberal, republican and deliberative. The aim here is to propose a model for the assessment of the legitimacy of EU soft law that appeals to liberal, republican, and deliberative conceptions of legitimacy; in essence focusing on the intersections of the three schools of thought. In short, the objective of this article is to propose a number of normative legitimacy standards against which EU soft law may be evaluated in practice.

Regardless of their non-binding and voluntary nature, SLMs produce considerable effects through, for instance, the authoritative allocation of values or the framing of national policies, among others (Stefan 2013; Senden and van den Brink 2012; Senden 2004). These effects, along with their flexible and efficient adoption procedure, has established them as key players in the field of EU policy. Thus, their evaluation vis-à-vis democratic legitimacy standards is an important step towards

the enhancement of the legitimacy of the Union's public action. While some work in this direction has been done in anticipation to the increase of soft measures in the EU in the 2000s (see Føllesdal 2005; Borrás and Conzelmann 2007), it has focused primarily on specific mechanisms such as the Open Method of Coordination (OMC) (see Radulova 2007; Kröger 2007; Dawson 2009; Büchs 2008; Benz 2007). In essence, it has not acknowledged the empirical reality of how soft law is used in European governance and has left a great deal of developments that have occurred since under-explored. Still, in recent years, soft law has gained new academic traction with a number of studies inquiring into its use within the EU legal order (see Stefan 2020; Stefan, Avbelj, Eliantonio, Hartlapp, et al. 2019; Saurugger and Terpan 2020; Hartlapp 2019; Eliantonio, Korkea-aho and Stefan 2020; Eliantonio and Stefan 2018). As it is clear that soft law is here to stay, both in practice and scholarship, we argue that more attention should be paid to this issue. This article provides an updated view on this matter and focuses on the development of a framework of normative legitimacy standards for EU soft law that reflects liberal, republican and deliberative democratic principles.

This article proceeds as follows. The next section introduces the central concepts of this article by defining what soft law is and justifying why a critical study of its legitimacy credentials is crucial. Section three elaborates on three different normative conceptions of democracy to propose a number of legitimacy standards that are appropriate for SLMs. This section builds on liberal, republican and deliberative approaches to construct a framework against which SLMs may be assessed in practice. Section four elaborates on the democratic standards in terms of their context and relation to different types of SLMs. The final section draws some concluding remarks on the future of the study of soft law in the European legal order.

EU SOFT LAW AND DEMOCRATIC LEGITIMACY

In Negativo: Defining Soft Law

The concept of soft law is not uncontested and, albeit enshrined within the notion of new governance, it is by no means new. While EU SLMs can be traced back to the 1962 'Christmas Notices', soft law has gained traction upon the call of the Commission for the supplementation of hard law with non-binding and informal governance tools in the 2001 White Paper on *European Governance*. At present, soft law measures are prominent in almost all EU policy fields (Hartlapp 2019: 193), to the extent that as of 2004 soft law accounted for more than 10 per cent of all Union law (Stefan, Avbelj, Eliantonio, Hartlapp, et al. 2019: 3).[1]

How, then, can we understand the concept of soft law within the context of EU law? Soft law is rarely defined on its own right, partly due to the notable lack of a comprehensive definition in the Treaties which only provide that recommendations and opinions may not have legally binding effect in Article 288 of the Treaty on the Functioning of the European Union (TFEU). This definition is hardly sufficient. Although a few defining characteristics are observed, the literature consistently defines SLMs *in negativo* to hard law (see Trubek, Cotrell and Nance 2006; Terpan 2015; Senden 2004; Saurugger and Terpan 2020; Eberlein and Kerwer 2004; de Búrca and Scott 2006; Abbot and Sindal 2000). On this premise, several definitions of soft law can be identified (see Wellens and Borchardt 1989; Thürer 1990; Snyder 1993; Senden 2004). This article adopts Senden's (2004: 112) approach which defines soft law as 'rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects'. This definition is appropriate for our purposes as an emphasis is put on the intention of

SLMs to produce legal and practical effects which are independent of a legally binding force.

The empirical reality of SLMs should be taken into account in this discussion. As this article aims to propose a normative assessment framework for the democratic legitimacy of SLMs in practice, further exploration of its function(s) and effects is appropriate. Although the notably vast variety of SLMs can be seen as a hindrance for their systematic analysis, several classification frameworks have been put forth to operationalise their investigation (see Wellens and Borchardt 1989; Senden 2004; Chalmers 2014; Borrás and Conzelmann 2007). Here, we employ Senden's (2004) tripartite classification framework which emphasises the function of soft law. SLMs are classified as: preparatory and informative, interpretative and decisional, and formal and informal steering (Senden 2004: 118-119). The first category includes acts such as Green Papers, White Papers or action programmes which do not establish rules of conduct but are adopted with the objective of proposing a starting point for the legislative process. Interpretative and decisional SLMs fulfil two functions. Interpretative SLMs restate or summarise the interpretation that should be given to Union law provisions, for instance through guidance documents. Decisional SLMs indicate how European institutions should apply Union law provisions in individual cases, for example through Commission communications or Notices. Lastly, formal and informal steering instruments explicitly aim at the establishment of new rules by guiding legal or political action, for instance through Recommendations, and can be adopted prior, concurrent, or subsequent to legislation (Senden 2004: 119). These are summarised in table 1.

Table 1: Summary of Soft Law Functions

	Classification	Function	Example(s)
Category 1	Preparatory	To prepare the ground for policy or legislation or indicate the need for future action.	White papers, Green papers, Action Programmes, Action plans, Declarations
	Informative	To provide information on EU or institutional (public) action.	Inter-institutional communications, Communications, individual communications
Category 2	Interpretative	To aid with the interpretation of EU law provisions.	Guidance Notices, Guidelines, Commission Notices
	Decisional	To aid with the application of EU law by EU institutions in individual cases.	Communications, Commission Notices, Codes, Frameworks

	Classification	Function	Example(s)
Category 3	Formal Steering	To establish or promote EU policy objectives through instruments provided for in Art 288 TFEU	Recommendations, Opinions
	Informal Steering	To establish or promote EU policy objectives through instruments that have arisen through practice	Resolutions, Conclusions, Codes of Practice, Guidelines, Declarations

What effects do SLMs bring about? As with their function, there is an inherent diversity in the area of soft law regarding their potential effects. For instance, soft law can achieve subtle policy changes or shifts in public discourse by producing (authoritative) definitions of values (Jacobsson 2004: 89; Borrás and Conzelmann 2007: 535). Such changes can be observed when soft governance mechanisms such as the OMC are employed. These mechanisms work through a system of peer pressure and peer praise, benchmarking and peer reviewing (Tsakatika 2007: 551; Radulova 2007: 365; Kröger 2007: 566) which may create a common understanding of particular issues or what counts as a 'sound' policy. SLMs also produce (indirect) legal effects as they can be used as interpretation aid for EU law provisions (Senden 2004: 138), which may in turn set alternative interpretations or create obligations other than those intended by the legislator(s). This can happen through the consideration of SLMs in adjudication, an expectation created through the case law of the Court in the 1989 *Grimaldi v. Fonds des maladies professionnelles* case. Further, SLMs have a self-binding effect on the issuing institution which can be bound to comply with published measures or explain why it has chosen to deviate from it (Stefan 2013: 187). Although deviations are permissible on the basis that sufficient and acceptable legal reasons are given, such a 'regulation by publication' should not be dismissed. Institutional practice such as consistent reference to and use of a SLM may also produce similar effects by creating a *de facto* binding obligation (Beckers 2018: 580). This shows that albeit not *legally* binding, SLMs may gradually become socially, politically and morally binding (Jacobsson 2004: 82) through their effects and authority.

The Democratic Legitimacy of EU Soft Law: Why Should We Care?

If governments and states are not bound by the rules of conduct put forth in SLMs, why is there a need for democratic legitimacy? The answer to this question is connected to the potential effects of SLMs as summarised above. While democratic legitimacy is commonly reserved for hard law due to its coercive character (traditionally expressed through sanctions) we argue that SLMs are not alien to coercion. SLMs, for instance, are based on peer pressure and peer praise, fear or exclusionary practices, all of which are effective coercive tactics (Zerilli 2010: 6; Wolterstorff and Cuneo 2012: 15-16). Indeed, while non-binding and voluntary, SLMs are influential due to their effects which can range from long-term policy changes, to subtle shifts in discourse, and setting standards of 'good' policy (Tsakatika 2007: 551; Radulova 2007: 365; Kröger 2007: 566; Jacobsson 2004: 89; Büchs 2008:

767; Borrás and Conzelmann 2007: 534) or to prepare, interpret or even replace law (Senden 2004: 118-119).

By means other than an explicit legal force, SLMs produce important practical and legal effects through the creation of a common discourse or a common symbolism, the fulfilment of a socialisation function, or the creation of peer pressure or praise to achieve policy changes. In this sense, SLMs entail an authoritative allocation of values and do rely on some form of 'coercion', albeit not to the same extent or in the same way as hard law, due to their purposive selection and interpretation of norms and values. Therefore a discussion on their legitimacy is imperative. This discussion is becoming more critical as SLMs have been shown to be increasingly used in EU crisis management (see Wessel 2020; Terpan and Saurugger 2020). In fact, during the 2020 COVID-19 crisis alone, a massive body of substantive SLMs has been adopted to mitigate the effects of the crisis, ranging from coordinating the economic response to managing the safe lifting of lockdowns (Stefan 2020: 664).

What is the state of affairs regarding the democratic legitimacy of EU soft law? Among other things, SLMs have been heavily criticised due to their tendency to circumvent traditionally legitimate decision-making fora such as the European Parliament (EP). While the recourse to soft law may enhance the discretion of the EU institutions, that often happens to the detriment of Member States and EU democracy as competences may not be respected and legitimate decision-making avenues are bypassed (Stefan, Avbelj, Eliantonio, Hartlapp, et al. 2019: 34-35; Dawson 2009: 201-203). In essence, the adoption of soft law lacks institutional, procedural and democratic guarantees. The EP itself has expressed concern regarding the notable absence of a parliamentary dimension of soft law by issuing a number of resolutions in this regard. Indeed, as early as 1968 the EP warned against the neglect of the procedural decision-making formalities by the Council, particuarly around parliamentary consultation and the Commission's right of initiative (European Parliament 1969). An additional two resolutions have been published on the same issue: one in June 2003 in reference to the OMC (European Parliament 2003) and most notably in 2007 on the institutional and legal implications of the use of soft law where the EP critically asserted SLMs escape the appropriate legislative bodies and defies the rule of law, as well as the principles of subsidiarity and proportionality (European Parliament 2007).

As EU SLMs possess considerable normative power, they deserve additional attention regarding their democratic legitimacy. This may be achieved through the further inclusion of the EP in the process. Parliaments, and their innate accountability mechanisms, are traditionally understood to convey legitimacy upon the norms that govern a demos as they have the capacity to authoritatively check the rule-making processes and publicly deliberate values and principles involved in policy choices (Tsakatika 2007: 549). The absence of *ex-post* parliamentary review, then, can have negative repercussions, for instance in regard to interpretative and decisional SLMs as the Commission has the discretion to interpret EU law in an overly flexible or subjective manner which may create confusion, or even additional legal obligations (Senden and van den Brink 2012: 16). In this sense, a lack of parliamentary involvement equals a lack of democratic legitimacy. This situation not only creates an institutional imbalance, but also has severe consequences on the transparency and legal certainty of EU law (Senden and van den Brink 2012: 16).

Further, literature on the legitimacy of EU soft law pays particular attention to its justiciability, or lack thereof. This shortcoming is particularly relevant for the case of interpretative and decisional SLMs which, regardless of their non legally binding nature, may produce several indirect legal effects (for instance, the creation of additional legal obligations as argued in the above paragraphs) on the basis of the principles of equal treatment and legitimate expectations, or through their capacity to fulfil a standard-setting role for judicial interpretation and review (Senden 2004:

239-240). While SLMs may not bring about binding legal effects, some obligations on the actors involved might be imposed without ensuring judicial protection (Senden and van den Brink 2012: 55). A reason for this weakness originates from a rigid understanding of the notion of legal effects, deriving from Art 263 TFEU, which does not incorporate the indirect effects that SLMs may have (Senden and van den Brink 2012: 68-69; Eliantonio 2020; Eliantonio and Stefan 2018: 464-465). Consequently, the justiciability of soft law is very limited, albeit not impossible, essentially making the level of judicial protection against potentially unlawful soft law-making rather low (Senden and van den Brink 2012: 55; Eliantonio and Stefan 2018: 467). The limited justiciability of SLMs, and the subsequent lack of judicial protection, furthers the claims of a legitimacy deficit of EU soft law.

Given the above discussion, we argue that the farther SLMs are removed from conventional legitimacy guarantees while maintaining their current level of impact, the more the necessity for democratic legitimacy increases. Since the presence of SLMs in the EU legal order seems to increase, and as soft law is currently relatively immune to traditional legitimacy guarantees, there is a growing need for the concrete setting of legitimacy standards applicable to soft law. Such a need goes well beyond the bounds of 'output' in terms of how effective and efficient SLMs are, and requires consideration that includes the 'input' and 'throughput' stages as well. Therefore, SLMs need to be brought under democratic control or be otherwise legitimised. As different instruments fulfil several functions, it is vital that this diversity is recognised vis-à-vis the demand for democratic legitimacy. The assessment of SLMs in this regard should be tailored to the function of the measures. In this light, we can identify the SLMs that may be more problematic on account of their need for democratic legitimacy.

In reference to the taxonomy adopted in this article (Table 1), some functions seem to have a greater need for legitimation. Since preparatory and informative instruments only fulfil a pre-law function as potential predecessors to EU legislation, these instruments may only prepare the discussion which will ultimately take place in fora which are inherently endowed with democratic legitimacy. For this reason, this article does not consider preparatory and informative instruments. However, interpretative, decisional, and steering instruments play a significant role in the EU decision-making process. Thus, these instruments require democratic legitimation, and the development of an assessment framework that reflects their functions is in order.

THREATS AND OPPORTUNITIES: COMPETING DEMOCRATIC CONCEPTIONS

Having argued that soft law is an appropriate object of scrutiny against standards of democratic legitimacy: we now ask what might these standards look like? Competing democratic conceptions answer this question differently. While some emphasise participation or deliberation, others highlight accountability or reviewability as principles that ensure democratic legitimacy.

There is little consensus on what legitimacy *is* in the political philosophical or political scientific literature. Thus, the concept in itself remains elusive. Still, we can distinguish between empirical-descriptive and normative conceptions of legitimacy; the former referring to the Weberian understanding of legitimacy as the belief of the ruled in the good faith and validity of the ruler, while the latter referring to a normative 'level' of acceptability and justification of the exercise of political power and authority (Beetham 1991: 17-18). In essence, the divide is between power as justified because people believe in its legitimacy versus justified in terms of the *beliefs* of the people (Beetham 1991: 11). Here we abide to the latter normative

understanding which holds that legitimate public action complies with a set of substantive standards (Sadurski 2006: 377), which may however shift over time as a result of social change. Still, if such standards are absent, legitimacy is not attainable (Beetham 1991: 11). This is the main contribution of this article: to propose a set of standards which are compatible with soft law and can enhance its democratic legitimacy if and when adhered to in practice. For the purposes of this article, we understand legitimacy as a normative property of political institutions that underpins questions about who has the right to create norms and how those should come about (Besson and Marti 2018: 508). As such, legitimacy embodies several aspects of 'good' governance, from procedural integrity, to values and sources of authority (Beetham 2012: 107).

There is a necessary epistemological remark to be made here regarding the translation of legitimacy principles into tangible assessment criteria. While legitimacy principles stem from a more philosophical understanding of legitimacy, for instance revolving around values such as the public good, openness, equity, fairness and so on (see Mansbridge 2015; Besson and Marti 2018; Beetham and Lord 2013), they often speak to problems that can be understood empirically. For instance, the principle of transparency stems from a philosophical premise relating to the openness of government and the right of civil society to 'check' the rulers. However, the same principle can be used to carry out matter-of-fact inquiries into the political state of affairs of a given entity (for example a state, a government, an institution) on the basis of specific relevant indicators. The framework that this article proposes takes into account both normative and empirical considerations, viewing them as mutual drivers in the assessment of legitimacy for soft law.

With this in mind, we recognise that the norms on which legitimacy may rest are not present across the board. Thus, to navigate through the conceptually rich field of democratic theory, this article pays respect to the well-established normative distinction between liberal, republican and deliberative democracies as conceptualised by Habermas (1994). Though not mutually exclusive on all accounts, these conceptions emphasise different principles, thus allowing for a comprehensive assessment of the democratic legitimacy of SLMs from several perspectives. Be that as it may, this analysis comes with two caveats. First, the purpose of the following paragraphs is to extract abstract standards based on the ideal-types of these conceptions which are diverse within themselves. The point here is to highlight their fundamental legitimacy principles. Second, while in this article we focus on the intersections among the three schools of thought (as opposed to their differences), there are trade-offs between different principles that should be considered. These will be addressed in the next section.

Legitimacy and Liberal Democracy

There are two main themes that can be identified in the liberal tradition: aversion to arbitrary authority, and belief in the free expression of individual interests (Smith 1968: 276). Along these lines, liberalism is conceptualised in terms of limiting the power of the ruler, of recognising the rights and liberties of individuals in a political system and of establishing constitutional checks on the governing power (Mill 2011: 2). Such a governing power comes into being through free and fair elections in which citizens can express their preference at an equal level and with equal weight (Held 2006: 94). Liberal democracies are usually moderated through legal means, for instance through a (codified) constitution, which are put in place to protect individuals' rights and freedoms and prohibit their infringement by other individuals or by governments (Habermas 1994: 2; Addink 2019: 93). Essentially, in terms of negative liberties of non-interference. In this conception, the government is an apparatus of public administration which follows strict established procedures and serves the aggregated interests of a market-structured society (Habermas 1994: 1).

In its contemporary conception, having been adjusted to the societal pluralism of present day society, liberal democracy is a form of representative democracy which subjects the decision-making power of the elected representatives to the rule of law, emphasises accountability and the role of institutions in ensuring it, and protects the rights and freedoms of individuals (Wolterstorff and Cuneo 2012: 113-114; Habermas 1994: 1; Goldmann 2001: 143; Beetham and Lord 2013: 16; Addink 2019: 93). Since the liberal democratic process occurs in the form of compromises between competing interests represented in institutions such as parliaments, democratic legitimacy may be ensured through, *inter alia*, equal voting rights or a representative parliament that openly debates (Habermas 1994: 6) and through mechanisms that hold authority into account. In this sense, liberal democracy emphasises accountability, transparency, division of powers, the rule of law, and public debate (Held 2006; Frykman and Mörth 2004; Habermas 1994).

SLMs are at odds with most of the principles of liberal legitimacy outlined here. In terms of accountability, SLMs are rarely brought under parliamentary, judicial or administrative review. The inherent aspects of soft law, which are frequently quoted as its most positive characteristics, namely its voluntary nature and lack of binding force, become obstacles to its democratic legitimacy when it comes to liberal democracy. Specifically, the intrinsic vagueness of soft law regarding who is accountable for the practical and legal effects that may occur, and the ambiguity of the political commitments that accompany a SLM act as an innate impediment to their democratic legitimacy (Frykman and Mörth 2004: 159). Further, the lack of a uniform application of soft law and the possible additional legal obligations that interpretative and decisional SLMs may bring about, impair the adherence of SLMs to the rule of law and the principle of legal certainty (Senden 2004: 339-340), thus further weakening their democratic legitimacy in accordance to liberal democratic principles.

Most importantly, the salience that liberal democratic approaches assign to the role of parliaments conflicts with the distinct lack of a parliamentary dimension. This parliamentary dimension, or lack thereof, and the legitimacy that it inherently carries is problematic on two accounts. Firstly, due to the implication of experts or technocrats in soft policy formulation instead of fairly elected politicians, the principles of representation and accountability are often neglected (Frykman and Mörth 2004: 159; Borrás and Conzelmann 2007: 536). Secondly, as parliaments are traditionally understood to define the norms that governs the demos, a lack of a parliamentary dimension for instruments that do ultimately bear significant normative power endangers their legitimacy as SLMs cannot be brought under public scrutiny, nor adapted or revoked *ex-post*. A further implication of this is a critical lack of transparency in interest representation as actors with higher influence in the political process my act 'unchecked'.

Against this background, in order for soft law to be accommodated within liberal democracy it must adhere to certain standards of accountability, transparency, the rule of law, and must have a parliamentary dimension. While SLMs seem to underperform on almost all accounts, compliance with these standards is not impossible if adequate measures are taken.

Legitimacy and Republican Democracy

Republicanism's roots are found in the ideals of equal and active citizenship of Athenian and Roman democracies. Its current form is, in a way, a revival of such self-government (Honohan 2002: 15; Held 2006: 29). The republican conception emphasises citizenship and active participation in the political process and highlights the role of communities and interactions (the demos of democracy) in the formation of values that guide state action (Honohan 2002; Held 2006; Habermas 1994;

Goldmann 2001; Frykman and Mörth 2004). State action, as such, aims at the realisation of common aspirations, shared norms, and collective ideals formed through interactions (Habermas 1994: 3-4). In essence, the participation of individual or community-based actors is crucial for the definition of norms and are the core of the principle of self-government that is central to republican democracy. These shared norms become the basis for the development of policies, which in turn should reflect the norms of the community.

The republican approach deviates from the negative liberties of liberalism and assigns positive liberties to the citizenry. In essence, citizens are not only protected from the interference of the state, but they are active participators in the political process (Habermas 1994: 2). In this sense, the state apparatus is not there to protect the private rights of individuals, but to guarantee an inclusive environment in which citizens are free to define the norms which lay in the interest of all (Habermas 1994: 2). While such a holistic definition of norms may seem unrealistic or unfeasible (especially in a demos such as the EU), it is possible to understand this premise in contrast to the principles of liberalism as outlined above. The relationship here between citizen and state is that of a trustor and a trustee (Pettit 2002: 8). In short, republicanism does not only treat citizens as legally and politically equal, but also seeks to create a community where the value of their identities is recognised and exists in the public sphere (Honohan 2002: 111). The rule of law is significant here. Although liberal approaches assign salience to the rule of law as a means of protection, republicanism views the rule of law as an essential way to introduce and enable rights and freedoms for citizens (Viroli 2002: 149; Pettit 2002: 36). In practice this entails that the decision-making process is transparent and open enough for citizens to be able to take part in it (Pettit 2002: 188). In essence, decisions that apply to the citizenry should be taken in a transparent and open manner.

Based on these principles of republican democracy, we can deduce that the principal legitimation means of republicanism rely on active participation in the political process, the rule of law and transparency. On this basis, the accommodation of soft law in its current form is problematic. Firstly, the uncertainty of a European demos impairs the very premise of this conception as republican legitimacy depends on the expression of the common identity of a society. Then, a requisite aspect for SLMs to be legitimate is to reflect a common understanding of the norms or values that they propagate. While some argue that without a common European demos the development of democratically legitimate policies is impossible (for example Scharpf 1999), others argue that there is a way to accommodate soft law in this legitimacy definition. For instance, a way for soft law to come to terms with republican legitimacy is to increase the involvement of national actors into the articulation process of SLMs (Frykman and Mörth 2004). Essentially, bringing the different *demoi* into one multifaceted demos. Further, as civil society organisations and independent social actors increasingly gain traction in EU policy, we could adjust our understanding of a *demos* to this reality. Apart from the involvement of parliaments or actors in the soft law making process, the republican legitimacy deficit of soft law could be remedied by the increased involvement of societal actors in the decision-making process.

SLMs in their current form can hardly be accommodated within republican legitimacy, which revolves around the openness and transparency of the political process, and the sharing of norms in a community that shares a collective (political) identity. However, through the enhancement of transparency and the strengthening of the participation of societal actors, a community which represents such values and ideas could be created.

Legitimacy and Deliberative Democracy

The schools of thought we have surveyed thus far enjoy a long tradition. Deliberative democracy provides a more recent perspective on the organisation of government and the aims of the political process. Deliberative theory has gained popularity and has been often examined in the context of soft governance (see Usui 2007; Radulova 2007; Jacobsson 2004; de la Porte and Nanz 2004). While liberal and republican approaches respectively conceptualise the political system as a market-structure or a community, deliberative theory conceives it as a forum where public reason and argumentation take place in the pursuit of the common good (Valadez 2001: 31). Deliberative democracy assigns a lesser role to the authority of representatives or the process of elections, but focuses on the authority of the *forum* (Saward 2003: 122; Held 2006: 237-238). In this forum, policy is made through consensus-seeking via free and rational deliberation among citizens (Goldmann 2001: 143).

Thus, we can understand deliberative democracy through conceptualising the political process as a 'give-and-take' or active dialogue of public reasoning between citizens and states (Parkinson 2006: 1). There are certain safeguards that should be in place for deliberation to occur. Deliberative democracy foresees institutional measures that guarantee the equality between citizens and the accessibility of the deliberative forum (Dahl 1989: 1; Beetham 1994: 28). This may be achieved through ensuring that all citizens have an equal voice and access to the process of public deliberation, that the process takes place in a transparent manner, that all institutional barriers that could hinder participation are removed, and that accessible fora of deliberation are developed (Valadez 2001: 31-32).

In deliberative theory, the source of legitimacy is not at all based on the predetermined will of the individuals of a society. Instead it is found in the process of will-formation and the process of deliberation (Manin 1987: 351; Elster 1997: 143). This notion of deliberation is central. Legitimacy rests on the public deliberation of free and equal citizens (Bohman 1998: 401) and requires a constant stream of input (Bohman 1996: 198). At the very core, deliberative theory stipulates that legitimacy derives from the participation of citizens in decision-making via an active dialogue (Bohman 1996: 151). This dialogue should take place in an institutionalised and open manner (Bohman 1996: 239). A lack of this would hinder the legitimation of political power and, by extension, public policies. In this sense, deliberative democracy puts forth deliberation and debate on the forefront of democratic legitimation. In other words deliberative democratic legitimacy is conferred upon decisions through the elaboration on the reasons, explanations and accounts of political decisions (Valadez 2001: 32-33; Saward 2003: 120-124; Held 2006: 237). Thus, public deliberation can act as a catalyst for the democratic legitimacy of such decisions as it enables the public to endorse or reject the laws and policies that affect them (Lafont 2015: 45).

On similar grounds to republican principles of political participation, deliberative theory deems political decisions as legitimate when equal participation of relevant members of the citizenry are involved in the process; and when those subjected to the effects of a law or policy are involved in the deliberation (Parkinson 2006: 4; Lafont 2015: 45; Gutmann and Thompson 1996: 344; Dryzek 2001: 651). Such deliberation should take place in all stages of the decision-making process, spanning from problem definition to agenda-setting and implementation (Parkinson 2006: 3), and should be responsive to and reflect the wishes of the general public (Beetham 1994: 26-30). Here, there is a contrast between deliberative and liberal legitimacy. While the latter rests on the powers of the ballot and on majority rule, the former depends on the deliberation and defence of political decisions (Saward 2003: 120-124).

In theory, SLMs supposedly comply with these requirements. For instance, the OMC was designed to rely on deliberation (Radulova 2007: 376). However, empirical research indicates that such deliberation does not take place. To the contrary, the OMC is seemingly a closed and technocratic process which barely allows for the participation and deliberation at any stage (Radulova 2007: 376-377; de la Porte and Nanz 2004: 283-284). Furthermore, the transparency of soft law *making* is also almost completely opaque (Senden 2013: 65), indicating that the safeguards that need to be put in place for SLMs to gain 'deliberative legitimacy' are barely there. While it is impossible to include the input of everyone at the EU level, this can be done through the establishment of citizens' fora, the introduction of 'mini-publics', or the establishment of 'information-pooling' mechanisms that have the capacity to gather a representative sum of input (Lafont 2015: 48-49; Eberlein and Kerwer 2004: 132-134).

The principles of legitimacy derived from each of the three normative democratic conceptions examined here are summarised in Table 2.

Table 2: Summary of Legitimacy Principles

School of Thought	Central Legitimacy Principle(s)
Liberal Democracy	Accountability, transparency, the rule of law, parliamentary involvement, representation
Republican Democracy	Political participation, transparency, the rule of law, protection from corruption
Deliberative Democracy	Political participation, deliberation, public scrutiny, transparency

A DEMOCRATIC LEGITIMACY FRAMEWORK FOR EU SOFT LAW

This section attempts to translate the democratic legitimacy principles outlined above (Table 2) into concrete and empirically comprehensible legitimacy standards for SLMs. The standards proposed in this section pay particular attention to the intersections of the above conceptions and the relevance of each principle to the legitimacy deficits of SLMs as presented in this article. As previously discussed, SLMs of an interpretative and decisional or steering nature have been shown to play a significant role in the EU decision-making process. The former are used to interpret EU law provision by the courts, while the latter are used as 'soft' guidance for national or EU policy. The proposed standards should be tailored to their specific functions.

Legitimacy Standards

While the legitimacy principles advanced by each normative approach are distinct, some commonalities can be found, especially given the current debates on the legitimacy of soft law which are centred around its weak parliamentary dimension, its lack of transparency and its accountability deficit. Firstly, albeit to different degrees, all three conceptions of legitimacy emphasise the role of parliaments as fora of democratic legitimation. For instance, parliaments can act as accountability

mechanisms and representative fora, and can be a forum of deliberation. Further, given the notable lack of a parliamentary dimension of SLMs in practice, parliaments are significant at both a theoretical and an empirical level. Therefore, the standard of *parliamentary involvement* for SLMs seems necessary.

Secondly, Table 2 reveals that the principle of transparency is central to all three normative approaches. For liberal, republican and deliberative theorists transparency enhances the legitimacy of governance instruments as it enables monitoring and scrutiny by the public and increases accountability. As soft law has been criticised for its 'closed-door' approach when it comes to the articulation or deliberation of SLMs, transparency and openness during such stages is significant. In this sense, a standard of *transparency* should be respected.

Third, from a deliberative and republican perspective, the principles of political participation and deliberation are necessary elements of democratic legitimacy. For republicans, societal input during in decision-making ensures that policies take account of and can be responsive to actual societal demands, thus fulfilling their purpose to serve the people. Deliberative theorists find the equal access to the deliberation process of decisions ensures their democratic legitimacy. At present, citizens are overwhelmingly only the addressees of Union policy action, be it hard or soft, and are seldom the authors (Kies and Nanz 2013: 1). This holds true for SLMs, as they enjoy low levels of political participation and a weak deliberative quality (Radulova 2007; de la Porte and Nanz 2004). Hence, for both approaches it is necessary for the positive assessment of the democratic legitimacy of SLMs that these measures possess certain *participatory qualities*.

Lastly, the principle of accountability is, for the most part, emphasised in the liberal tradition, and the attention that this topic has received indicates that this dimension of soft law deserves further consideration. The importance of review mechanisms when it comes to soft law has been highlighted (see Senden and van den Brink 2012; Eliantonio and Stefan 2018). To cover these concerns, the principle of accountability can be translated into a standard of *reviewability* which may ensure the valid exercise of public power through SLMs. The democratic legitimacy standards that have been deducted are summarised in Table 3.

Table 3: SLMs Democratic Legitimacy Standards

Standard	Democratic Principle(s)	Democratic Conception(s)	Possible Indicators
Parliamentary Involvement	Representation, accountability, public debate, deliberation	Liberal, republican, deliberative	Involvement of parliamentarians in soft law making, ex-post parliamentary control
Transparency	Accountability, monitoring, public scrutiny, accessibility	Liberal, republican, deliberative	Availability of translations, authorship, document accessibility
Participatory Quality	Political participation, public debate, deliberation, discursive interactions	Deliberative, republican	Participatory opportunities, openness and inclusiveness of participation

Standard	Democratic Principle(s)	Democratic Conception(s)	Possible Indicators
Reviewability	Accountability, public scrutiny, protection from arbitrary authority	Liberal, republican	Judicial Review, ex-post parliamentary control

Before moving on to the operationalisation of these standards, there are some limitations that need to be addressed. First and foremost, the proposed framework is not exhaustive and does not address the internal diversity of the three schools of thought in full. Democratic theory constantly evolves, is reshaped in response to social change and is often adjusted to particular societal contexts. Here, we have focused on the central tenets of liberal, republican and deliberative theory. Further, the emphasis here was on the commonalities of the three approaches with the aim to construct a framework that is relevant and endorsed from all three perspectives. Thus, there are some trade-offs that need to be dealt with. Despite differences between the three schools of thought which make them incompatible in some ways, there are compromises to be made on the basis of intersecting principles. Here we focus on those. For instance, an increased political participation of relevant actors in the decision-making process is at odds with the principles of liberal theory which foresee that all actors have equal standing in the process. Still, these do not necessarily negate each other and they can co-exist even when contrasting. Moreover, there are trade-offs between the legitimacy and the efficiency of SLMs. While this may be the case, we argue that such a consideration cannot preclude the scrutiny of SLMs in regards to their democratic legitimacy in the input and throughput stages. The legitimacy concerns for soft law are significant and should be addressed, even to the partial detriment of output. The point here is that legitimacy, both in terms of principles and phases, is not a zero-sum game.

Operationalisation

Parliamentary Involvement

Discontent with the level of parliamentary involvement in the development and monitoring of SLMs has been ardent (see Tsakatika 2007; Senden and van den Brink 2012; Mörth 2004; Borrás and Conzelmann 2007). Certainly, soft and hard law instruments cannot entail equal levels of parliamentary involvement. However, a compromise for the needs of SLMs can be reached. In reference to the criticism in this regard and the legitimacy principles analysed above, parliamentary involvement can occur at two stages: *ex-ante* and *ex-post*.

The *ex-ante* stage of parliamentary involvement for SLMs speaks to the involvement of parliamentarians in the soft law making process. As parliaments enable debates on norms and values, the participation of parliaments in the input process ensures the representation of interests, the reflection of common ideas and values, and the deliberation between political actors. The *ex-post* stage refers to the control that parliaments can exercise over the effects of SLMs. This measure is also related to issues of accountability and may take the form of review and is thus also related to the standard of reviewability. To ensure democratic legitimacy from this perspective, soft instruments should be open to review by the EP which should have the capacity to adapt, amend or revoke SLMs.

In consideration of the function that SLMs can fulfil, a parliamentary dimension is necessary for both categories: interpretational and decisional, and steering. Albeit *ex-ante* and *ex-post* parliamentary involvement are relevant for both types of

instruments, some distinction can be made. For the case of interpretative and decisional instruments, parliamentary input is particularly significant due to the role of the EP as a co-legislator. Such SLMs are used by courts and have the capacity to elucidate EU law and may produce indirect legal effects other than those intended by the legislator (Senden 2004: 16). From this perspective salience of parliamentary input for interpretative and decisional SLMs is high. For steering instruments that aim to guide policy, parliamentary involvement in the form of *ex-post* review may ensure the monitoring of the practical and legal effects of such instruments, thus enhancing accountability.

Transparency

Transparency can be understood as a precondition or a basis for the democratic legitimacy of SLMs (Borrás and Conzelmann 2007: 543). In the context of soft law, and given the current criticism on the opacity of its decision-making process, transparency may refer to the availability and ease of access of information relating to all stages of soft law, from agenda-setting, to the publicity of the decision-making process, and the establishment of monitoring mechanisms available to the general public. Such transparency could relate to the availability of translations, to the clear assignment of authorship, the publicity of decision-making, or the accessibility of relevant documents. This standard is particularly important for SLMs as their emergence does not depend on elected officials, but usually falls in the hands of executives, private actors and experts (Tsakatika 2007: 551; Borrás and Conzelmann 2007: 543). By ensuring that the processes are transparent and all relevant information is widely available, each instrument or decision becomes susceptible to public and institutional scrutiny, thus accommodating principles of liberal, republican and deliberative legitimacy. This requirement is also in line with the approach of the EU institutions as stipulated in the *Better Regulation Guidelines* (European Commission 2017: 46) which instruct that all evidence and processes of decision-making in the Union should be made available to the general public.

As this standard is a rather basic condition for legitimacy, little distinction between interpretative and decisional or steering SLMs can be made. Since interpretative and decisional SLMs are used to give meaning or clarifications to Union law, it is imperative that transparency regarding actor participation in the drafting process is ensured. Steering instruments are intended to influence domestic and EU policy and so it is important that information on the decision-making processes (such as who is involved) affiliated with each instrument are made publicly available. Thus, instruments of both types require openness in regards of their articulation, with interpretative and decisional instruments emphasising the transparency of the value allocation and the participation of actors in their articulation, and steering instruments highlighting the transparency of the decision-making processes.

Participatory Quality

As an inherent aspect of democracy, the possibility for the public to participate in the political process freely and equally is an essential legitimacy criterion for republican and deliberative theories, and a central requirement for the legitimacy of SLMs. However, we must note that a 'participatory deficit' can be identified across the Union and is not particular to SLMs. To remedy this, there have been considerable efforts to engineer participatory avenues (Abels 2009: 3) which can be extended to the case of SLMs. Certainly, some restrictions should be made as the participation of actors in all stages of the development of soft law measures is not possible. However, some measures can be put in place. The participatory quality of SLMs may be remedied through two interconnected steps: establishing participatory opportunities and ensuring access to the deliberation process for the general public.

Participatory opportunities can be realised in the form of 'mini-publics' like citizens' assemblies, or through the establishment of participation opportunities throughout the decision-making process. One can identify a variety of innovative 'experiments' in the Union that aim to increase the involvement of citizens in such processes at different geographical levels (Kies and Nanz 2013: 1). For instance, these can take the form of virtual communications, consultations or polling (Kies and Nanz 2013: 1). In line with the *Better Regulation Guidelines* (European Commission 2017: 69-70), participation may be enhanced through consultations of citizens, stakeholders and target groups which should take place at all instances of preparing legislative or policy action, and can occur throughout the policy cycle (European Commission 2017: 70). However, as consultations have been shown to be under-utilised (Radulova, Nastase and Juntson 2019), it is necessary that the participatory quality of SLMs is not limited to this particular mechanism. For instance, through communications at multiple levels and including different stakeholders at the national, regional or pan-European levels, and including citizens, civil society organisations (CSOs) or relevant actors.

An important aspect of this process, which brings us to the second step, is ensuring that all relevant actors have free and full access to the debate. This step is tied with the standard of *transparency* as outlined above, and, in particular, with the transparency of the entire soft law making processes (agenda-setting, initial deliberations, and so on). Another aspect of this is for such processes to take place in different formats. For instance, by including direct interactions between policymakers and societal stakeholders. This is to ensure that participation in consultations goes beyond the passive involvement of stakeholders, and is based on the discursive interactions so that debates can be interactive, reflexive and allow for argument.

Arguably, this standard is more relevant for steering instruments than interpretative or decisional ones. As political participation to this extent is seldom a component of law-making, hard or soft, public consultation for instruments that are meant to interpret existing Union law does not bear too much significance in terms of democratic legitimacy. On the other hand, the access to the deliberation process of steering instruments may play an important role in the early stages of the decision-making process where input from citizens and CSOs is crucial for the expression of societal needs. In this way, societal stakeholders gain the opportunity to become, at least in part, authors of the policies that govern them.

Reviewability

Deriving from the principles of accountability, the rule of law and the need for critical scrutiny, the standard of the reviewability of soft law is key for the assessment of its democratic legitimacy. In this context, reviewability may take the form of justiciability. Though other forms of review are possible, for instance through the involvement of the European Ombudsman (Senden and van den Brink 2012: 58-59), the possibility for judicial review of SLMs is more in line with the legitimacy criteria put forth by liberal democracy as it includes both principles of accountability and the rule of law. However, it is also relevant to republican principles as reviewability of SLMs can protect societal stakeholders from being subjected to arbitrary and 'unchecked' power. In practice, the standard of reviewability could be fulfilled by facilitating the admissibility of soft law measures for judicial review.

This standard is consistent with the capacity of soft law measures to be employed as interpretation aids by courts and national authorities. Justiciability is particularly relevant for soft law as it can become politically, morally and socially binding through its effects (Jacobsson 2004: 82), or through institutional practice (Beckers 2018: 580). Currently, the justiciability of soft law measures is hindered due to a rigid

understanding of the concept of legal effects that does not include the indirect legal effects that soft law produces (Senden and van den Brink 2012: 49; Eliantonio 2020; Eliantonio and Stefan 2018: 459). Thus, a more comprehensive definition of legal effects or the recognition of practical and indirect legal effects is in order for the purposes of the judicial reviewability of SLMs. While this view has been held by Advocate General Bobek (2017) in Belgium v. Commission who has called for a relaxation of these admissibility requirements, such a re-definition seems to be ongoing at the Member State level in reference to domestic SLMs (Eliantonio 2020), an EU-level discussion along these lines is appropriate and timely.

The standard of reviewability is applicable to interpretative and decisional and steering instruments on comparable levels. However, some distinction can be made. As interpretative and decisional instruments primarily produce legal effects and obligations, whereas steering instruments produce primarily practical effects, the justiciability of interpretative soft law measures appears to be more urgent. Due to their function, SLMs produce significant legal and practical effects that should be subjected to accountability mechanisms. While SLMs themselves come without legal sanction, it is imperative that shortcomings in the decision-making stages is properly sanctioned to ensure the dependency of the political power to the approval of the public and the protection of the latter from the former.

CONCLUSIONS

The EU suffers from a democratic legitimacy crisis. While SLMs have become a staple of EU governance across the board, such measures are rarely brought under democratic control, thus endangering the Union's already problematic legitimacy standing. Is soft law an asset or a threat to the EU legal order? Is there a way for EU SLMs to be democratically legitimate given their elusive nature? While, thus far, the non-binding, voluntary and sanction-free nature of SLMs has been an obstacle for their democratic legitimation, this article has argued that SLMs are not only an appropriate subject of democratic scrutiny, but that their assessment against standards of democratic legitimacy is a necessary and urgent step.

How can one identify such standards? Drawing from liberal, republican and deliberative schools of democratic thought, and with a basis in the current debates on the legitimacy of soft law measures in the EU, this article highlighted several democratic legitimacy principles that provide some normative direction for the study of SLMs. In particular, for SLMs to be democratically legitimate according to the three democratic conceptions, they should comply with standards of *parliamentary involvement*, *transparency*, *participatory quality* and *reviewability*. SLMs are currently underperforming on most accounts and there is room for improvement. Particularly, we have argued that the democratic legitimacy of SLMs will be enhanced when adhering to the standards proposed here. In essence, the more SLMs contain a strong parliamentary involvement in the *ex-ante* and *ex-post* phases, are open to judicial review (and potentially other types of review), set out sufficient avenues for public participation and deliberation, and are transparent in their articulation, adoption and implementation, the higher degree of democratic legitimacy.

Against this background, our contribution here is twofold. First, the framework proposed here can be utilised in further empirical research to assess the democratic legitimacy of SLMs in practice. Second, it informs future governance debates on the legitimacy aspects of soft legal action. Both these contributions become more relevant in the current context. As some preliminary studies have shown (for example Stefan 2020), SLMs have been employed on a large scale to 'bridge' the crisis-management competences of the Union during the COVID-19 crisis. Such an

extensive adoption of SLMs has brought to attention the potential legitimacy deficiencies of soft law as a form of public action. The point here is that as recourse to soft law increases, a critical study of its democratic legitimacy is crucial.

It is more than clear that EU soft law is here to stay. This article proposed a framework for the empirical analysis of SLMs that may clear the road for a new angle of studying the democratic legitimacy of soft law. The work conducted here is hardly exhaustive and should not be regarded as a panacea for the democratic assessment of soft law. Thus, the issue of the legitimacy of SLMs remains open. Given the inherent variation of the pragmatic reality of soft law, our article endeavours to provide some normative direction for the empirical study of SLMs in the pursuit of establishing soft law as a legitimate and acceptable form of public action in the EU legal order.

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ENDNOTES

[1] Unfortunately, an updated statistic on the volume of soft law in the EU legal order does not exist. Therefore, this number should be read as indicative of the increasing soft law dimension in European governance.

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Book Review

Citizenship in the European Union: Constitutionalism, Rights and Norms

Author: Anne Wesemann

Nuno Ferreira

Abstract

Wesemann offers a refreshingly insightful and theoretically sophisticated analysis of the jurisprudence of the Court of Justice of the European Union (CJEU) on EU citizenship by framing her analysis within the theory of constitutional rights developed by German theorist Robert Alexy.

Keywords

Citizenship, Alexy, pluralism, constitutionalism, constitutional rights, Court of Justice of the EU, judicial activism

Published in 2020, Anne Wesemann's book *Citizenship in the European Union: constitutionalism, rights and norms* is a refreshingly insightful and theoretically sophisticated analysis of the jurisprudence of the Court of Justice of the European Union (CJEU) on EU citizenship. Building on her doctoral thesis submitted at the University of Sussex,[1] Wesemann offers a much welcome addition to the fields of legal theory, constitutionalism, and EU (and) citizenship studies. Despite the never-ending body of literature on the topic of EU citizenship,[2] Wesemann successfully offers something new to the field.

In Chapter 1, Wesemann introduces and contextualises the topic, namely an exploration of the CJEU's jurisprudence on citizenship from the prism of the theory of constitutional rights developed by German theorist Robert Alexy.[3] Wesemann identifies a clear gap in research, namely the application of Alexy's legal theory to the field of EU citizenship. While Alexy's work has already been explored in relation to the Charter of Fundamental Rights, Wesemann addresses for the first time the relevance of Alexy's work in the context of the CJEU's jurisprudence on EU citizenship. Moreover, Wesemann wishes to make a contribution to the debate on 'judicial activism', something of which the CJEU is often accused. Finally, Wesemann rightly points to the topicality of EU citizenship, especially in light of the UK leaving the EU and UK nationals without any other EU nationality losing their EU citizenship (p. 12).

Alexy's theory of constitutional rights is presented and analysed in detail in Chapter 2, offering a clear picture of Alexy's work of relevance for the book's topic. Despite having been developed in reference to the case law of the German Federal Constitutional Court (*Bundesverfassungsgericht*), Wesemann highlights the broader relevance of Alexy's theory to positivism, morality, argumentation and constitutional rights (p. 21). Wesemann focusses on the distinction between rules and principles, how the optimization requirement (i.e. the need to be fulfilled to the optimum extent legally and practically possible) applies to principles, what is to be done in cases of conflicts between norms, and the role that the principle of proportionality plays in this legal theory. Wesemann also usefully addresses several critiques to Alexy's work (including by Jakab, Yaz and Klement),[4] and cogently defends that these critiques do not undermine in any significant way Alexy's work, in particular his functionality argument.

To facilitate the use of Alexy's (imminently domestic) legal theory in the context of EU law, Wesemann frames her view of EU law as a form of legal (constitutional) pluralism. She thus uses Chapter 3 – especially by drawing on the work of Patrignani, Bianchi, Tamanaha, Menéndez and Walker –[5] to analyse different forms of pluralism and to what extent they suit the EU, the activity of the CJEU, the notion of citizenship and the work of Alexy. Wesemann shows awareness of the complexities in this field and addresses them promptly. The chapter thus draws from broader debates on EU constitutionalism to effectively contextualise the nature and characteristics of EU law, which proves useful for subsequent analysis. Indeed, the analysis in this chapter ultimately justifies applying to the EU law context a legal theory that was developed in reference the (German) domestic legal context and applying Alexy's legal theory to EU citizenship in particular.

Similarly, Chapter 4 provides further useful contextualisation by exploring the origins, evolution and notion of EU citizenship, always remaining clear that the focus of the book is placed on *how* the EU citizenship treaty norms work (i.e. their structure) rather than what content they entail (i.e. their substance). Building on the scholarship of Barbalet, Bellamy Habermas and Eleftheriadis (among others), Wesemann discusses EU citizenship as a form of post- and trans-national form of citizenship. Wesemann concludes that Articles 20 and 21 of the Treaty on the Functioning of the European Union (TFEU) are constitutional rights norms, as well as part of the EU's constitutional legal framework.

By the same token, Chapter 5 provides an important discussion of the activities of the CJEU, how it is seen by commentators, and how it decides on cases. Through the prism of

the Court's reasoning and methods of interpretation, Wesemann focusses in particular on the (un)fairness of accusations of 'activism' frequently addressed to the Court. By tackling the critique produced by scholars such as Rasmussen, Kmiec, Schmidt, Beck, Sarmiento, Sakari and Conway, Wesemann argues that what is often perceived as 'political' or 'activist' is indeed in most cases the result of the structure of the norms being used. Accusations of 'activism' are thus over-simplistic and fail to grasp the structural nature of the norms in question.

Having laid down such solid foundations for the book's main focus, Wesemann then deals with its core analysis in Chapter 6: how the CJEU uses EU citizenship norms – namely Articles 20 and 21 TFEU – as constitutional, open-textured principles (as understood by Alexy) in its legal reasoning. For these purposes, Wesemann draws from both judgments and opinions by Advocates General, and selects the *Grzelczyck*, *Rottman* and *Zambrano* cases as key examples of EU citizenship working as a constitutional norm in the Court's decision-making. This is particularly visible in the way the Court deals with Articles 20 and 21 TFEU as open-textured principles and optimization requirements, how it carries out the balancing of rights and interests (namely individuals' rights and interests, on the one hand, and States' sovereignty over immigration matters, on the other hand) and how it applies the principle of proportionality. The 'genuine enjoyment' test, for example, can be seen as an example of a legal mechanism devised by the Court to operate the balance of interests required by the constitutional nature of Articles 20 and 21 TFEU. This is not, contrary to what is claimed by some, a means to use Articles 20 and 21 TFEU to always favour the individual, as decisions in cases such as *McCarthy*, *Dano*, *Petruhhin* and *Tjebbes* show that the Court may find it more appropriate to decide the case on the basis of more specific rules rather than the Treaty norms, or simply decide that the balance of interests in question cannot favour the individual. Decisions in cases such as *Chavez-Vilchez* and *Lounes*, instead, confirm the way the Court works with Articles 20 and 21 as constitutional norms, as understood by Alexy.

Wesemann does not aim to replace other perspectives on the Court's jurisprudence on EU citizenship (which generally focus on the content of this legal status), but rather complement those perspectives with a methodological, similarly valuable view. She thus adds 'an objective and structural argument to the list of substantive and subjective reasons why cases are decided in a particular way' (p.139). She does so admirably, while also engaging with and deconstructing the 'judicial activism' criticism addressed to the CJEU. Wesemann presents a sound and much neglected view that the CJEU's jurisprudence on EU citizenship is the result (to a significant extent, at least) of the structure, function and characteristics of the Treaty norms in question rather than the product of a (more or less) hidden agenda. This, Wesemann hopes (p. 11) and I would agree with her, can help us produce more objective analyses of the Court's decisions relating to citizenship.

Much of what Wesemann says in her book will probably resonate with CJEU judges and legal scholars educated in the German legal system or who draw inspiration from Germanic legal literature. Yet, more generally, it will also resonate with all those who see the 'constitutional depth and potential of EU law' (p. 3) and has the potential to enhance our understanding of the workings and dynamics of the CJEU and its decision-making.

Although I was familiar with the work of Alexy, having used it in my own doctoral thesis,[6] I found Wesemann's exploration of Alexy's legal theory (especially through Chapter 2) not only clear but also enlightening for both expert and uninitiated audiences. This book thus has the potential to help raise further awareness of the work of Alexy outside Germany. Furthermore, this book opens the way to the exploration of Alexy's work in relation to other legal fields and topics, including other policy fields in EU law, as Wesemann points out (p. 144).

In short, Wesemann presented us with a concise, elegantly written and nuanced monograph, which can be of great interest to academics, judges and policy-makers across

disciplines and jurisdictions. It will certainly appeal to legal, constitutional and European theorists as well as to scholars interested in citizenship and CJEU debates. It is overall an authoritative, solid and convincing application of Alexy's theory of constitutional rights to the CJEU's jurisprudence on EU citizenship and, as Wesemann says, 'we may not agree on the detail, but we agree to debate' (p. 147).

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Citizenship in the European Union: constitutionalism, rights and norms.

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Edward Elgar Publishing, 2020

ISBN: 978 1 83910 316 2, 192pp. https://www.e-elgar.com/shop/gbp/citizenship-in-the-european-union-9781839103162.html

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ENDNOTES

[1] For the sake of transparency, I want to acknowledge that I have acted as main supervisor of Anne Wesemann's doctoral studies towards the end of her time at the University of Sussex, more precisely between March 2017 and September 2018.

[2] For a recent example, see Dora Kostakopoulou (2020) *EU Citizenship Law and Policy: Beyond Brexit*, Edward Elgar.

[3] Wesemann draws from both the original German language version and the English language translation of Alexy's main works, including Robert Alexy (1994) *Theorie der Grundrechte*, Suhrkamp, and Robert Alexy (2002) *A Theory of Constitutional Rights*, Oxford University Press.

[4] András Jakab (2016) *European Constitutional Language*, Cambridge University Press; Joseph Raz (2007) 'The argument from Justice, or How Not to Reply to Legal Positivism', in George Pavlakos (2007) *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy*, Hart; Jan Henrik Klement (2008) 'Vom Nutzen einer Theorie, die alles erklärt: Robert Alexys Prinzipientheorie aus der Sicht der Grundrechtsdogmatik', *JuristenZeitung*, Vol. 63, 15/16. pp. 756-763.

[5] Emma Patrignani (2016) 'Legal Pluralism as a Theoretical Programme', *Oñati Social-Legal Series*. Vol. 6, 3. pp. 707-725; Andrea Bianchi (2016) *International Law Theories*, Oxford University Press; Brian Z. Tamanaha (2011) 'The Rule of Law and Legal Pluralism in Development', *Hague Journal on the Rule of Law*. Vol. 3, 1. pp. 1-17; Augustín José Menéndez (2011) 'From Constitutional Pluralism to a Pluralistic Constitution? Constitutional Synthesis as a MacCormickian Constitutional Theory of European Integration' in Augustín José Menéndez and John Erik Fossum (eds) *Law and Democracy*

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[6] Subsequently re-worked and published as Nuno Ferreira (2011) Fundamental rights and private law in Europe: The case of tort law and children, Routledge.