

CHAPTER 2

CORE VALUES: TENSIONS AND BALANCES IN THE EU SHARED LEGAL ORDER

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1. INTRODUCTION

‘Human dignity, freedom, democracy, equality, the rule of law and the respect for human rights: these are the core values of the European Union which are set out at the beginning of the Treaty of Lisbon,’ says an EU official web-page.² It continues that ‘they are common to all Member States.’³ According to the former president of the European Commission, Barosso, the European Union’s core values are solidarity, sustainability, accountability, security and promoting Europe’s values in the world. This raises questions: which are the core values? Are they indeed common to all Member States? Who has the authority to define and possibly enforce core values in the shared legal order of the EU and its Member States? Are there territorial limits to the application or validity of the core values? Do the core values benefit the citizen?

In this contribution we will focus on the notion of core values. This notion is part of the research question that informs all contributions in this volume:

‘In regulation and enforcement, how do core values influence the relationship between European and national territoriality, between European and national citizenship and between European and national government authority?’⁴

In focusing on the notion of core values, our aim is twofold: to form a theoretical, though possibly still preliminary, understanding of the *concept* of core values, and to give an overview of the core values identified in the case studies, which follow this Chapter. We will also discuss several common threads relating to tensions

¹ We thank Prof. Dr. Marcus Düwell, Prof. Dr. Frans Pennings, Prof. Dr. Tony Prosser, Dr. Michiel Luchtman, and Dr. Ton van den Brink for their comments on the draft versions of this contribution.

² This information is taken from the official web-page of the European Union, available at: <http://europa.eu/lisbon_treaty/glance/rights_values/index_en.htm> accessed 01.06.2015.

³ *Ibid.*

⁴ In turn, this research question is part of the overall research theme of *Renforce*, relating to shared regulation and enforcement in the EU.

between core values that emerge from these case studies. Our contribution is set up as follows. Section 2 provides some musings as to the notion and content of core values and the (possible) differences between core values, values, principles and policy goals. In Section 3 we discuss which core values and tensions between them are identified in the case studies presented in the following seven chapters. Section 4 finalizes this contribution by discussing the mutual influences between core values and the shared legal order in the EU.

2. CORE VALUES: A THEORETICAL PERSPECTIVE

Although the notion of core values is a central tenet of the overall research question of both the research presented in this volume and the general Renforce project, it is not defined. This is not surprising since it is a fuzzy concept. The values mentioned in the introduction, for example, are clearly valuable, but there is no reason not to add several more notions to this list adding such values that are included in the European Charter of Human Rights (Human Dignity, Liberty, Democracy, Equality, Rule of law, Respect for Human Rights), or values that are labelled as ‘European Values’ by European citizens themselves: such as ‘family values’, and ‘work-life balance.’⁵ These, and innumerable other values could, without further delineation, all be labelled as ‘core values.’ The general notion of ‘value’ indicates something that is valued and thus valuable and these issues are all valuable. However, to be a useful guiding point for answering the general research question underlying this volume (and the whole Renforce project), both a more detailed and more delineated understanding of the concept and at the very least a general idea of which ‘somethings’ are thus valued and can be labelled as ‘core values’, is necessary. This is what this section attempts to do. Here, we will delineate the concept and propose a context-specific definition of core values (Subsection 2.1). We will also analyze which values might be labelled as core values and identify several problematic aspects in relation to fitting the actual ‘somethings’ into this definition (Subsection 2.2).

2.1. DELINEATION OF THE CONCEPT OF CORE VALUES

The term ‘value’ connotes something that is valued or valuable. This is easily understood in the economic sense of an exchange value, in the market economy often expressed as monetary value.⁶ In moral philosophy, however, a value is understood as the something that is of importance with the goal of determining

⁵ See European Values Survey 2008, available on <www.europeanvaluesstudy.eu>.

⁶ As in the work of A. SMITH, *Wealth of Nations*, Methuen & Co., Ltd., London 1776, although the exact meaning of Smith’s theory of exchange value is not very clear.

our actions, thus providing a standard of evaluation.⁷ In common usage of the notion of value, values may be based on something outside ourselves, such as a religious system, or on something intrinsic to human beings, such as biological evolution,⁸ or, depending on one's view, humanity itself.⁹ The values that we choose (or adhere to as part of culture/religion) guide our moral behaviour, that is, the choices we make relating to (doing) right or wrong.¹⁰ In both moral philosophy and common usage, the notion of a value is therefore connected with a sense of relationship between *someone* (a person) undertaking action and *something* (a value). For the purposes of this research project, the discussed points are a useful starting point: a value is thus something of importance, which guides actions.

In value theory a general distinction is made between theories of value pluralism and value monism. Value pluralists contend that multiple values are possible; monists contend that ultimately there is a unitary value underlying all.¹¹ There are several reasons why the debate need not overly concern us here and a pluralist point of view will be taken in this contribution. First, because there is a systemic link between (the philosophy of) liberalism and value pluralism. As the EU, as a political and moral system, adheres to the tenets of liberalist philosophy there is no reason to reject value pluralism.¹² Secondly, and more mundane perhaps, because value pluralism fits not only the complexity of everyday decision-making,¹³ but seems also much more apt to describe legal and judicial decision-making. Which brings the third reason into view: we would suggest to let the debate lie because it is assumed that the research question, by speaking of core values in the plural, means adhering to the notion of value pluralism as a fundament for the research project.

⁷ Which is the domain of Deontological Ethics (moral theory guiding and assessing choices of actions). Value theory in general might be referred to as the study of what things are good, and how good they are (axiology), see: M. SCHROEDER, 'Value Theory', in E. ZALTA (ed.), *The Stanford Encyclopedia of Philosophy*, 2012, available on: <<http://plato.stanford.edu/archives/sum2012/entries/value-theory/>>.

⁸ As put forward by C. DARWIN, *Descent of Man*, John Murray, London 1871, who poses that morality is a 'by-product' of evolution (Chapter 4): 'any animal whatever, endowed with well-marked social instincts, the parental and filial affections being here included, would inevitably acquire a moral sense or conscience, as soon as its intellectual powers had become as well, or nearly as well developed, as in man'.

⁹ As in the humanist tradition; e.g. F. EDWARDS, 'The Human Basis of Law and Ethics' (1985) *The Humanist*.

¹⁰ In this respect, values are people/group-driven in the sense that they are just for specific peoples, groups of people, etc. For the purposes of this project, we focus on the values of the EU and its member states.

¹¹ For an explanation and an overview: E. MASON, 'Value Pluralism', in E. ZALTA (ed.), *The Stanford Encyclopedia of Philosophy*, 2012, available on: <<http://plato.stanford.edu/archives/fall2011/entries/value-pluralism/>>.

¹² E.g. I. BERLIN, *Two Concepts of Liberty*, Clarendon Press, Oxford 1966; W. GALSTON, *Liberal Pluralism*, Cambridge University Press, Cambridge 2002. Although, of course, the fact that the EU adheres to liberalism does not mean that value monism cannot be true, it does mean that the notion of value pluralism is a better match for this research.

¹³ M. CHERRY, A. SMITH ILLIS, *Pluralistic Casuistry*, Springer Science, Houten 2007; From the perspective of civil servants: M. W. SPICER, 'Value Pluralism and its Implications for American Public Administration' (2001) 23:4 *Administrative Theory & Praxis*, pp. 507-528.

Value pluralism, of course, means that an open set of values (and therefore also: core values) is possible, though it does not decide on whether a conflict between values can be solved by a comparison between them, or whether the values are – ultimately – incommensurable.

This notion of core values is, if anything, still very broad, so a further delineation as to the concept is necessary. We propose the following method in doing so.

First, as the research undertaken here is (predominantly) *legal* in nature, we propose that the values that might be labelled as core values (within the context of this research) are in one way or another *legal* values. That would mean: values as laid down, protected by, or inherent in legal documents. This does not mean that these values are legally enforceable, nor are non-binding documents as source of values excluded (for example: legal policy documents). Also, the values can be explicitly mentioned, but might also be hidden and implicit. And, these values, we propose, can be both ‘utilitarian’ values, such as might be infused by an economic rationale, as well as ‘moral’ values, such as respect for human integrity and freedom. This definition of ‘legal’ value is still very broad, but does exclude many socially constructed values that guide people’s everyday choices, such as the value of respect for one’s parents, the value of undertaking physical exercise, or the value of a healthy work-life balance.

Second, as the research undertaken relates to the (loosely defined) EU integration project, the core values of the central research question must be values that relate to this project. Clearly lawyers often view the EU project as an integration project that is primarily *legal* in nature; thus the core values would encompass the values guiding this integration project. This then provides the relationship between the ‘someone’, the European Union, and the ‘something’, the European project of European integration. This seems to us to be an elegant, but rather narrow view, as the European Union is not only concerned with inward activities relating to its own shape, function and future, but also with interaction with the wider world. Therefore, the core values (again, in the context of this research question) would relate to these outward-looking activities as well. What is more is that the EU integration not only comprises the European Union itself, but also its member states and the relationship between the two. In such a setting, core values might also encompass such values that are inherent in this shared EU national legal order. Limiting the core values to the EU project only does mean that values that lie outside this sphere are excluded in the context of this research project. For example, values specific to an American setting – bearing arms as an exponent of individual freedom – are not core values here. Nor are values that are specific to a region or people within the European Union – for example the Sami value of Reindeer herding – core values in the context of this research (though

the general value of respect for indigenous culture might be). The values are thus territory-bound, though they may have extra-territorial effect.¹⁴

Third, a further fundamental assumption underlying the research question is that a distinction is possible between *core* values and ‘ordinary’ values. Although a general inquiry into the notion of ‘core’ values leads to discovering that it is especially companies which are in apparent need of ascertaining their core values to guide their commercial strategies, this is not – we surmise – how the term is intended, or is it indeed useful here. No method is implied in the research question for how to distinguish between ordinary values and core values, but value theory does make a distinction that can be useful for our purposes. It seems to be generally accepted that some values are *instrumental* values: values that are useful in obtaining or guaranteeing something else, a ‘higher’ value. These are different from *intrinsic* values.¹⁵ Money, for example, is valued, but usually only as instrumental in obtaining something else: for example, coffee, concerts and clothing. Though coffee and clothing are valued for respectively their bringing about a caffeine ‘rush’ and protection against the weather (or both primarily as an expression of style, of course), both are again valued as instrumental in obtaining yet another something: well-being and a good mood, for example. But concerts – or the music played at concerts, or the arts in general – it might be argued has value in and for itself. The arts have *intrinsic* value.¹⁶ The same is true for human life, which need not to be an instrument to be valued: it is of intrinsic importance and value, it has intrinsic worth.¹⁷

Relating this distinction to the legal research question at hand, we might propose that *core* values are those values which are not instrumental but intrinsic, i.e., those that cannot go further up the value chain and are valuable in and for themselves.

¹⁴ And a core value according to Mr. Barosso (see the introduction) is the promotion of European values worldwide (though we might question whether this is a *legal* value).

¹⁵ We are aware, of course, that we are simplifying a very complex body of thought in only a few sentences. However, for the purposes of this research, we use the distinction between instrumental and intrinsic in a pragmatic way (an instrumental way, if you like): to try to better grasp the meaning of the concept of core values within the remit of our research project. The distinction will prove useful to us (as we will show) to inform and guide the debate that comes out of bringing the case studies together.

¹⁶ See for a discussion on the value of arts in general: RAND corporation, ‘Reframing the Debate About the Value of the Arts’, 2005, available on <www.rand.org/content/dam/rand/pubs/research_briefs/RB9106/RAND_RB9106.pdf>.

¹⁷ We realize that in addition to the distinction between intrinsic and instrumental value, one could observe that some values may have more complex relationships with each other, especially if we take into account other notions, such as normative standards. For instance, human dignity could be seen as the basis for human rights, implying equality and freedom. At the same time, it may force us to protect the freedom of human beings. Unlike the earlier mentioned EU source (*supra* footnote 2), human dignity may be seen as a normative standard, rather than a core value; M. DÜWELL, *Cambridge Handbook on Human Dignity*, Cambridge University Press, Cambridge 2014, p. 608. For the purposes of this contribution, we use the concept of core values in a more technical sense.

Although this distinction between instrumental and intrinsic values seems to be useful in delineating core values from ordinary values, it does bring its own problems. First, a very strict distinction between instrumental and intrinsic might lead us to an extremely short list of values that can be deemed ‘core’ values in the context of this research question: are not many values instrumental in reaching towards the overall value of – for example – ‘Peace’ or ‘Well-Being’? But a reduction in this way definitely defeats the purpose of the research, which is, briefly put: to identify how (and therefore: which) core values influence and are influenced by the shared EU-national legal order. Obviously replacing the term ‘core values’ with ‘peace’ leads, in almost all contexts of a study of a specific set of regulatory measures in a specific policy domain – as the case studies intend – to a nonsensical question. We propose to solve this conundrum by recognizing that just as in general legal theory a legal system may be broken down into as many subsystems as are useful for classification, comparison and research as necessary, within these different legal subsystems (different sets of regulatory measures or policy domains) a different set of core values might be defined. These would be the core values that would function as the specific ‘standard of evaluation’ within the subsystem. The value relationship on that level would be the relationship between the subsystem (or policy domain) and the core values of that subsystem.

However, in a systemic sense, we suggest that the core values of a subsystem should either be the same as the overarching core values, or it should be possible to subsume these sub-system core values under the general core values. For example: peace may well be an overarching core value and a value of the policy domain of the EU’s external relations and is therefore a core value at both levels. But to label (for example) ‘mutual recognition’ as a core value in the policy domain of the internal market it is a necessary (though not sufficient) condition to be able to subsume that value under one of the overarching core values. In this sense, then, there is a hierarchy of core values.

This is represented by figure 1 below.

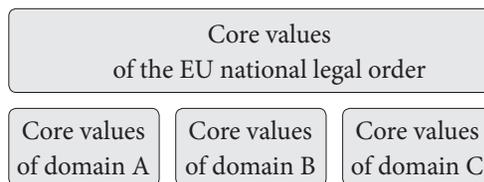


Figure 1. Hierarchy of core values

As a *preliminary definition* and a hypothesis – and in our conclusion we will return to this definition – core values, in the context of this Renforce research project, are those multiple (legal) values which function as a standard of normative evaluation, are not instrumental and which are inherent in the shared European-national legal

order, with the understanding that each (legal) subsystem or policy domain may contain its own core values.

This definition also may help to clarify the differences and possible overlaps between core values, legal principles and policy aims. The concept of a ‘principle’ is as fuzzy as the concept of a core value, and much debated of course. However, it is generally agreed that there is a difference between a *legal principle* and a *legal rule*. The legal rule in turn contains – or is built upon – a *legal norm*.¹⁸ A principle is different from a rule in that the principle may lay down an ‘essential element of a legal order’,¹⁹ and might function as a ‘signpost’, pointing the way, but not detailing the steps in which to reach the goal. In contrast, the legal rule is much more concrete. The legal norm, in turn, is the source of the legal rule and supposes a substantive *aim*. For example, society’s aim may be to have orderly behaviour on the roads – to prevent accidents and the costs these might entail – the legal norm would be to act responsibly, whereas the legal rule would be to drive on the right-hand side of the road (in the Netherlands at least). The norm, however, is informed by (legal) principles: for ‘road driving’ behaviour, for example, the liability principle in case of accidents.

A fairly simple representation, however, would be that legal principles can be seen as a means to achieve core values of society. The value at stake in the example above might thus be the value of (the protection of) human life. This would put the legal values – hierarchically – above the legal principles. But the relationship, on further inspection, is not so straightforward, especially considering that we have noted that core values can be found both on the overarching level and on the level of policy domains. It is equally true that legal principles can be at play on this overarching level, and on the level of the policy domains, which makes a clear hierarchy impossible. Furthermore, it seems equally valid to say that legal values may also be encapsulated in, or given the weight of, a legal principle. Perhaps an important difference between principles and values would then be that (recognized) principles of law are *enforceable*. This means that in procedures of judicial review these principles may be relied upon as touchstones for a review of regulatory acts, as is true both on the national and on the European level (and in this way on the European level quite a long list of principles have been recognized as principles of European law).²⁰

A neat delineation between the different concepts would make it possible to differentiate precisely between them. This seems impossible as practice defeats

¹⁸ See especially R. DWORKIN, *Taking Rights Seriously*, Harvard University Press, Cambridge 1978, pp. 24 and further: ‘Rules are applicable in an all-or-nothing fashion (...). Principles have a dimension that rules do not – the dimension of weight or importance. When principles intersect [...] one who must resolve the conflict has to take into account the relative weight of each.’

¹⁹ A. VON BOGDANDY and J. BAST, *Principles of Constitutional Law*, Oxford University Press, Oxford 2006, p. 8.

²⁰ Compare the comment of PRECHAL on Article 52 of the EU Charter, in S. PEERS, T. HERVEY, J. KENNER, A. WARD, *The EU Charter of Fundamental Rights*, Hart Publishing, Oxford 2014, pp. 1510-1511.

theory: thus, though even on the highest level the legal principles, in the conception represented here, are of a ‘lesser’ order than (core) values, they may function (or be perceived) as (core) values in their respective policy domains. A purely hierarchical relationship between them then becomes more difficult to perceive.

More certain are we in stating that *policy aims* should be conceived as an even further step ‘downwards’. They contain a further concretization, in which general policy aims inform the specific aims of each regulatory measure. Thus, specific aims of a certain regulatory measure are usually instrumental, as contributing to the general policy aims, which would be instrumental as well.

This intricate relationship between core values, principles and policy aims is – in stylized form! – represented by figure 2 (below).

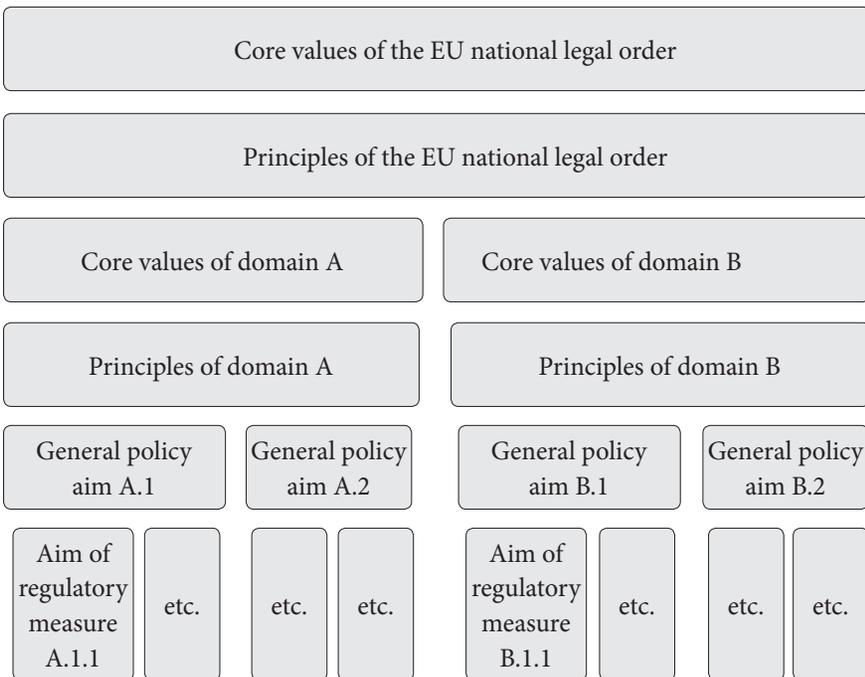


Figure 2. Core values, principles and policy aims

2.2. WHICH ARE THE CORE VALUES OF THE EU?

Having defined the notion of core values, in this subsection we inquire into the *substantive set* of values which might be labelled as core values for the purpose of the research undertaken in this volume. Again, as a *preliminary definition* we have defined core values as those multiple (legal) values which function as a standard of normative evaluation, which are not instrumental in nature and which are inherent

in the shared European-national legal order, with the understanding that each (legal) subsystem or policy domain may contain its own core values.

Starting with a close reading of the Treaties, we propose that a fairly uncontested set of core values can be derived from these texts. However, this list seems to us to be incomplete and too limited for the purposes of answering the research question. We will therefore widen our scope and discuss the constitutional order of the European Union as a source of core values. This top-down approach will leave us, before embarking on an analysis of which core values are identified in the case studies (a bottom-up approach), with no definite set of core values, but a slightly less obfuscated notion nonetheless.

2.2.1. *Seemingly uncontested core values*

Starting from the definition of core values as arrived at above, the obvious starting point for finding these values are the European Treaties. The EU's values are contained in Article 2 of the Treaty on the European Union (hereafter: TEU):

‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’

This very explicit list of values should inform all activities of the EU (though it might be debatable as to how many are listed exactly: is ‘pluralism’ separate from ‘democracy’ or an inherent feature thereof, and is equality between women and men not included in the notion of non-discrimination?). They are, or should be, the evaluation point for policy actions.

Article 3, though using the term ‘aims’, can equally be said to hold core values, as it lists in Section 1:

‘The Union’s aim is to promote peace, its values and the well-being of its peoples.’

It seems that both these lists are non-reducible (and generally also non-commensurate), in the sense that these contain values that are not instrumental in nature. Therefore, these would connote core values.

Another logical legal source of core values would be the Charter of Fundamental Rights of the EU, where – in its preamble – ‘common values’ are listed as:

The ‘indivisible, universal values of human dignity, freedom, equality and solidarity’, which are based on the ‘principles of democracy and the rule of law’.

The Charter contains many provisions detailing the fundamental rights derived from these common values, but it seems that although – for example – one would

intuitively balk against calling the right not to be tortured *instrumental*, it does seem to derive from the general value of human dignity. Therefore, it is at the very least these listed common values that can rightly be called core values, also in the context of this research project.

This would leave us with a set of core values that would look something like this:

- Human dignity
- Freedom
- Democracy
- Equality and non-discrimination
- Rule of law
- Respect for human rights
- Pluralism
- Tolerance
- Justice
- Solidarity
- Peace
- Well-being of the peoples of the Union

List 1. Core values in the Treaty & Charter

Although to us it seems to be well possible to shrink the list, as some values seem at the very least to overlap substantively, such an exercise could only be undertaken after a careful consideration. In such a consideration the content each of the values mentioned would have to be sketched and the specific European interpretation – which might be different from the interpretation of what appears to be the same values that are shared with much of the ‘Western’ world – would have to be provided.²¹ For our purposes such an exercise seems unnecessary.

In using our definition the notions contained further along in Article 3 TEU would, however, not be part of the ‘overarching’ core values, nor would all of the values inherent in the rights contained in the Charter be placed on the level of these

²¹ See for example I. MANNERS, ‘The constitutive nature of values, images and principles in the European Union’, in S. LUCARELLI and I. MANNERS (eds.), *Values and Principles in European Union Foreign Policy*, Routledge Taylor & Francis Group, Oxford 2006. pp. 19-41: who lists ‘sustainable peace, social liberty, consensual democracy, associative human rights, supranational rule of law, inclusive equality, social solidarity, sustainable development and good governance’ as central European values.

overarching core values. They might be labelled as the core values of the different policy domains, albeit it that these are still very general policy domains at this level. This includes, for example, that the ‘internal market’ – as a policy domain – rests on a set of core values that include sustainable development, balanced economic growth and price stability, etc. And that in the policy domain of social policy the values of collective bargaining, or the values of fair and just working conditions might be labelled core values of this policy domain.

This notion of a hierarchical set of values is represented in the figure below.

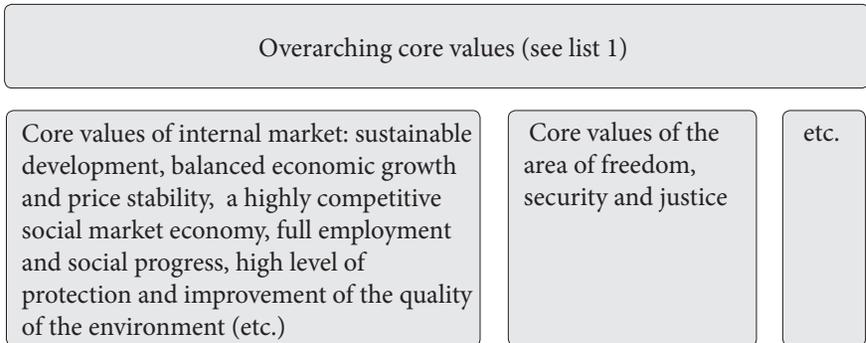


Figure 3. Overarching core values and core values of Policy Domains

2.2.2. *Constitutional values of the shared legal order as core values*

The research question informing this volume of contributions explicitly relates to the relationship between the EU and the national level. As explained above, it is therefore not only the values of the EU itself that can be labelled core values, but also values relating to the interplay within the shared legal order. Although several of the overarching core values, such as democracy and solidarity, mentioned above will – in the EU context – also relate to this relationship, most scholars and practitioners of EU law would intuitively and immediately add such diverse concepts as ‘attribution of competences’, ‘subsidiarity’, ‘direct effect’, ‘primacy’ and maybe the notions of accountability and transparency to the list (to name but a few). Here, the difficult relationship between legal principles, which these notions are, and (core) values becomes apparent: a very principled reasoning and application of the definition of core values above might lead to excluding the just mentioned notions. These could be deemed instrumental values if one agrees with the assessment that the values of subsidiarity, of shared competence, of direct effect and others, are all geared towards – and thus instrumental in – contributing to the overarching values of peace, justice, the rule of law and well-being. They could also be labelled as ‘mere’ principles instead of values. But this not only risks a *reductio ad absurdum* but, as alluded to above, it also defeats the purpose of defining core values as relevant in the context of the research undertaken in this volume.

Therefore, at the very least within the subsystem of the constitutional system of the shared legal order, these values – which may be labelled principles *at the same time* – would need to be labelled core values. Adding these ‘constitutional core values’ as core values would inform the research undertaken in this volume in a sensible way. But, different from the core values of the overall policy domains (such as the internal market), these constitutional core values inform *all* policy domains (and if they do not, and are only applicable to a subset of policies, they – we pose – are not core values) and might thus be placed directly below the EU’s overarching core values.

This is represented in figure 4, below.

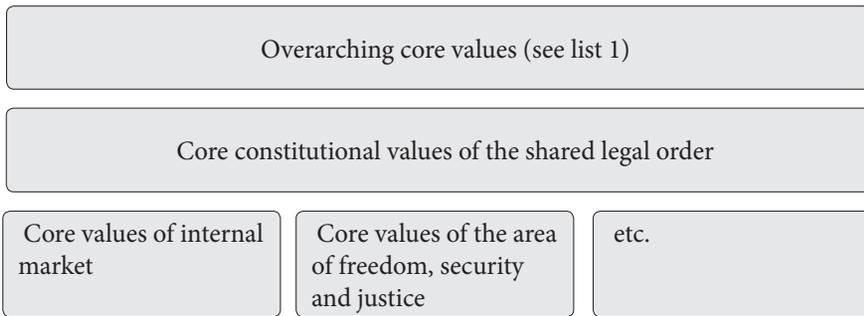


Figure 4. The place of constitutional core values

Though we do not propose a complete set of constitutional core values, the usual suspects would qualify to be placed on this list. It is clear that to EU lawyers these values will also – and at the same time – be known as legal principles, as explained above:

- Subsidiarity
- Attribution
- Direct effect
- Primacy
- Institutional balance
- Proportionality
- Loyal cooperation
- etc.

List 2. List of constitutional core values

To summarize: as a *preliminary definition* we proposed that core values, in the context of the Renforce research project, are those multiple (legal) values which function as the standard of normative evaluation, are not instrumental and which are inherent in the shared European-national legal order, with the understanding that each (legal) subsystem or policy domain may contain its own core values. We might add, though that might make the definition a tad long, that the specific subset of constitutional core values would be part of this set of core values.

In the next sections we will analyze which values have been identified as core values in the different case studies, whether these would also be labelled as core values following the definition above – or as ‘core’ values of a policy domain.

3. CORE VALUES: A REALITY CHECK

So far we have introduced core values and the ways of how to define them from a rather theoretical angle. Our definition is tailored to the research undertaken in this volume as no single definition of a ‘core value’ or a ‘EU core value’ exists. This section supplements this rather abstract picture by providing for a synthesis of the vertical case studies presented further in this book with respect to the questions of:

- (1) which core values of the EU shared legal order are actually identified as core values of their policy domains in the contributions relating to different fields of law,
- (2) why have they been identified as being core values, and
- (3) how do the identified core values interact with each other in the shared legal order?

This section shows that similar to the findings of the previous part, the core values identified in the contributions in this volume differ greatly from each other. No exhaustive list of ‘core values in the EU’ is to be expected by the end of this section either. Furthermore, the distinction between intrinsic and instrumental values faces expected challenges: what could be considered as intrinsic for a certain policy area can at the same time be instrumental with respect to the core values of the shared legal order. The concept of core value thus remains fuzzy. At the same time, what binds nearly all the case studies is the method by which the core values are identified: core values derive from constitutional and treaty texts explicitly or at least implicitly. As for the interaction between core values in the shared legal order, a common feature which is present in nearly every case study is a search for a balance between *economic* and *social* core values deriving from EU and/or national levels. Such a balance and possible conflicts are attempted to be resolved with the help of EU law or at least along the lines of EU law and case law, but this is done mainly at the national level. Here, one can see the impact that the national and EU

legal orders have upon each other and upon each other's core values and the latter's at times evolving meaning. This section analyses the identified questions in three respective parts.

3.1. CORE VALUES IN THE VERTICAL CASE STUDIES

What core values are identified in the different policy fields of the EU integrated legal order? Seven case studies which have been undertaken in a total of 11 policy fields have identified a great variety of notions as core values. Below is a more detailed picture.

Vertical case-study domains (in the order of their appearance in the book)	Identified core values
EU telecommunication, air transport and gender equality law	efficiency and justice, mitigating power imbalances
EU internal market	solidarity, equality, economic stability (economic freedoms and social rights)
EU competition law and financial regulation	consumer surplus/welfare and financial stability
Economic governance	sovereignty, (economic) stability and solidarity
Administrative and contract law	equal treatment, legal certainty and party autonomy
Public procurement law	transparency, proportionality and non-discrimination
Area of freedom, security and justice	freedom, security and justice

List 3. Core values in vertical studies.

While most of the identified core values have a substantive character (e.g. financial stability), some of them are of a somewhat procedural nature (e.g. legal certainty).²² Furthermore, in some cases a single core value is identified (e.g. stability), whereas in other cases several core values are discussed relating to either a single or to multiple policy domains. Important to note is that singularity does not necessarily correspond to having a somewhat 'simple' or straightforward core value: economic stability, a seemingly single core value in the area of the EU internal market, may comprise multiple and somewhat conflicting elements: at the very least economic freedoms and social rights. We will come back to the issue of a conflict and interrelationship between core values in Section 3.3. The same complexity applies,

²² Although, of course, legal certainty also has a substantive element, we label this value primarily as a procedural value.

for instance, to the core values of freedom and security, which are identified and scrutinized under one policy domain: terrorist activities have made it clear that freedom can be limited for security reasons. The complex structure of core values results in an ever-lasting exercise for balancing their multiple and possible conflicting constituting elements. In this light, another defining element of values could be the absence of finality; core values are never achieved, but must be constantly upheld or protected (see the contribution by van Bockel and Duijkersloot).

In terms of the classification as either intrinsic or instrumental, no conclusive divisions can be made. The policy domain of the area of freedom, security and justice seems to be a good example of a domain where the domain-intrinsic values of freedom, security and justice are also explicitly identified as values in the Treaties, and thus as overarching core values as well (see Section 2.2.1. above). At the same time, some of the identified core values, such as economic and financial stability, may be intrinsic for the policy domain from which they accrue, but can have an instrumental function in relation to the core values of the shared legal order: think, for instance, of the overall stability of the EU system which relies on both economic and financial stability, but also on other types of stability (e.g. social). Similarly, procedural core values, such as legal certainty, can be both intrinsic (e.g. for the area of administrative procedure law) and instrumental (e.g. in ensuring the stability of the shared legal order). The latter example also shows the instrumental character of procedural areas of the law, identified as a 'policy domain' in the case studies: administrative procedure is designed for ensuring the proper operation of various substantive areas. Therefore, administrative procedural law is not a goal in itself, but rather a means for the proper functioning of the substantive policy fields and the area of law.

3.2. LABELLING CORE VALUES: ON WHAT BASIS?

The second question which we will answer in this section is on which basis have the core values in the cases been identified. The most common reasoning in this respect is a *legal* one. The identified core values feature in the EU treaties' texts and case law, derive from national constitutional orders or the European Charter for Human Rights. Since a peculiarity of constitutional/institutional law is reliance on, at times, unwritten conventional, rather than black-letter legal rules, some core values do not directly derive from written texts. Concerning particular provisions in the Treaties, the already mentioned Article 2 TEU is indeed one which is used in the contributions of vertical studies, but also other articles of the EU Treaties have been considered by authors. For instance, Article 3 TEU mentions such values as the social market economy and freedom, security and justice. In the contribution on economic governance, Van den Brink and Van Rossem discuss a specific group of core values in the area of economic governance (sovereignty, stability and

solidarity) which they take from a specific case of the CJEU (hereafter: the CJEU²³) (*Pringle*).

In some contributions, however, it is not only the legal source that is used as a method to uncover core values. Pennings and Manunza argue that in order to realize a fair, non-corrupt and efficient market, a well-drafted public procurement law is an essential requirement. To this end, awarding public procurement contracts must take place in a transparent way and without discrimination between the candidates. Non-discrimination and transparency in this way form the core values identified in the field of public procurement.

3.3. INTERACTION BETWEEN CORE VALUES IN THE EU SHARED LEGAL ORDER

Interaction between elements can occur both vertically (hierarchical) and horizontally (parallel). For the core values in the EU shared legal order both types are present. A hierarchical relationship is seen, for instance, in the relationship between substantive and procedural core values: procedural values can be seen as instrumental to, and hence lower in the hierarchy than, substantive values. For instance, legal certainty is necessary to ensure stability. Hierarchy may also exist in relation to the level of origin of the core values. For example, the core values of the policy domain of EU integration, e.g. solidarity and economic stability in the EU, may subordinate (at least to a certain degree) core values that originate from the national level, such as national sovereignty. Van den Brink and Van Rossem discuss this relationship. For the sake of economic stability in the EU and in the name of solidarity, the EU member states have given up some of their national sovereignty over budgets. Such a ‘partial subordination’ leads at least to two types of interactions between the core values: conflicts and transformation, or the evolution of the meaning of a core value. These two types of interactions are in fact noticeable throughout the vertical case studies and hence are discussed here in a more detail.

3.3.1. *Core values in conflict*

As Van Bockel and Duijkersloot note in this volume: ‘Scholars and policy makers increasingly acknowledge that economic law and regulation does not exist in isolation from different political and social values.’ The relation between economic and social or political values is the major conflict between identified core values in the shared EU legal order. This is a lynchpin for nearly all vertical case studies. In the contribution by Pennings and Manunza, the economic vs. social values

²³ For practical reasons we refer to the Court of Justice of the European Union and the CJEU, also when discussing cases dating from before the Treaty of Lisbon.

conflict exists between the public procurement of goods for the best price vs. the consideration of other, 'secondary goals', such as supporting jobs and industries in less developed areas, or giving preferences to companies contributing to environmental or societal goals (fair trade, the employment of disadvantaged groups). For Veldman and De Vries, the very core of a *social*, yet at the same time a *market*, economy inheres such a contradiction: the internal market is based on the idea of economic freedom of establishment, yet it has to be balanced in relation to ensuring some social rights for workers, e.g., the right to organize trade unions and to strike. Similarly, Buijze, Koning and Senden note a conflict between economic rationales of liberalization (competition would lower the price for a service of good) and social obligations (a minimum standard for an air transport or telecommunication service). They have also discussed the uneasy relationship between corporate freedom and imposition on companies' social values, such as equal opportunities for men and women on company boards. The conflict between economic and political values is discussed by Van den Brink and Van Rossem. It concerns the value of economic stability which is to be ensured at a certain cost: giving up some part of a political/constitutional value of national sovereignty.

The discussed conflicts are mostly of a horizontal nature: it is challenging to subordinate economic values to social values or the other way around. Rather, society is thought to benefit from a proper balance between them. At the same time, a subordinate relationship may be possible if the core values are taken in a perspective from the end and means of the EU integration project, which has been largely economic in nature. This may, we propose, in fact explain the existing state of play of the existing conflicts in legal rules.

As is well known, it is *market integration*, starting from a free trade area, which has guided the EU integration from the outset. Corresponding to this goal, the EU-level institutions have logically been given powers to regulate and integrate predominantly economic policy domains. Thus the economic rationale trumped the social rationale (and the social domain was left to the Member States).²⁴ But along the way of developing economic integration, it has become questioned whether, for instance, consumer welfare which is the core value behind competition policy, should only be measured in economic terms (Van Bockel and Duijkersloot).

²⁴ Although it is interesting to point to the fact that the field of economics does not really provide a single answer to what the guiding values are in their discipline. In contrast to the free market values of the predominantly neo-classical economists, as are currently much in vogue in European competition law for example, stand economists adhere to a social theory of value, in which the economic and social values seem to be more balanced; see A. CORRELJÉ, J. GROENEWEGEN, R. KÜNNEKE and D. SCHOLTEN, 'Design for Values in Economics' In J. VAN DEN HOVEN, I. VAN DE POEL, and P. VERMAAS (eds.), *Handbook of Ethics, Values and Technological Design*, Springer, Dordrecht 2014.

Making the economic integration also a *social integration* has become part of the EU integration project, but it is a recent development in the history of the EU.²⁵

In addition, such a transformation to a more balanced approach between economic and social values in the EU integration project has not always necessarily been supported in legal and political terms. Legally speaking, the EU-level institutions may still lack powers to promote some social values. Think, for instance, of the discussion on promoting legal certainty in the area of administrative procedure law discussed by Kruisinga, Buijze and Keirse. Here, a great part of the discussion on the future European Administrative Procedures Act is about lacking a legal basis for introducing such an act. Whereas in the area of social rights, the Lisbon Treaty has made some progress (see Title X in the Treaty on the functioning of the European Union (hereafter: TFEU)) the political will seems to be lacking to integrate in the area of social policy; secondary legislation on social policy is not that extensive. Interestingly in this respect, the contribution by Buijze, Koning and Senden notes that the EU institutions seem to rely rather on economic arguments and legal bases, which are connected with the value of efficiency and the internal market, even in those areas and legal acts which are in fact not that economic (e.g. legislation aiming to protect the interests of disabled clients in communications law).

The gradual evolution from a predominantly economic logic to a social-economic integration logic in fact explains the current state of play, developments and legal conflicts identified in individual contributions. For instance, in the area of public procurement, Directive 71/305 did not provide for social considerations to be taken into account in selecting candidates. The Court in its *Max Havelaar* and *Beentjes* judgments, however, interpreted the existing rules as not being exhaustive and uniform. The member states could thus maintain or adopt necessary conditions to take environmental and social objectives as long as this did not adversely affect transparency and non-discrimination. Such a transformation from the economic to a socio-economic rationale of the public procurement procedure has recently led to the adoption of new directives in which social and sustainability criteria were included (see the contribution by Pennings and Manunza in this volume).

Interestingly, there are also examples where social rights have been more advanced in the EU legislation and further legislative actions were taken for the sake of economic considerations. In the area of air transport, Buijze, Koning and Senden note that the relevant existing legislation placed a considerable financial burden on airlines and the economic rationale served as a justification for curbing the rights of passengers (e.g. by increasing the time thresholds after which the passenger has a right to compensation from 3 hours to 5, 9 to 12 hours depending on the length of the journey).

²⁵ ‘The Maastricht Treaty was the end of the “economic constitution”’, cf. C. JOERGES, ‘What is Left of the European Economic Constitution? A Melancholic Eulogy’ (2005) 30 *European Law Review*, pp. 461-89, p. 474.

All in all, ensuring and/or balancing core values is an ongoing process which has been more advanced in some policy domains in terms of having a legal cloth than in other areas. As Krusinga, Buijze and Keirse observe, the reality of having a general EU administrative and contract law still remains a question. The contribution by Marguery and Oude Breuil is a good illustration of the legal gaps and problems which exist in the area of freedom, security and justice. Here, the core value of freedom of movement for prostitutes clashes with the core value of public security in France, where prostitution is not considered to be a legal form of employment, as it is considered to be in the Netherlands, for example. Furthermore, the inter-member states' prosecution of illegal trafficking falls short in the protection of Bulgarian prostitution migrants if they are to be witnesses in a French prostitution trafficking case. The problematic instances exist because ensuring core values in the EU is tightly interconnected with the questions of legal forms, levels and institutional designs for regulation and enforcement, which function in turn within another set of core values' conflicts, such as national sovereignty vs. stability in the EU.

3.3.2. Core values in transformation/evolution

The dynamism of EU integration and its core values can also impact the meaning of some core values. The primary example deriving from nearly all case studies is the evolution of primarily economic values of the EU, such as consumer surplus (best price), into socially economic values, such as stability in the field of the internal market, which necessitates balancing economic and social rights and freedoms. The evolution implies creating more complex values comprising somewhat contradictory sub-elements; ensuring them is likely to be more challenging. Next to this horizontal complexity (e.g. economic vs. social values), the shared legal order adds a vertical dimension. Van den Brink and van Rossem show, for instance, that the value of national sovereignty may have different meanings horizontally (among different member states) and that it is affected vertically by the EU integration, which shrinks its scope when more sovereign powers of the member states are given to the EU level.

All in all, in light of the theoretical considerations introduced in the previous part, this section has analyzed the case studies presented in the following chapters along the three lines: what scholars have identified as core values and upon what basis and how the core values interact with each other in the shared legal order. Now, the question becomes how the themes identified thus far relate to the concepts that are subject of the horizontal contributions: authority, territory and citizenship. We will consider this in the following and concluding section of this chapter.

4. CONCLUSION

We started our contribution by delineating the concept of core values. While core values can be looked at from different perspectives and hence may be materialized in different ways, their common feature is that a value is something important that guides our actions. The core values identified in this volume are indeed such important things that guide the EU integration process. In this conclusion we address two remaining issues. First, it is about the question of whether we can now find a definite answer to the question as to which are the core values of the EU. Second, we focus on the interrelationship between the concept of core values and the three pillars of sovereignty: authority, territory and citizenship.

As to the first issue: can we come to a definite answer as to the question of which are the core values of the EU's shared legal order? The answer must be in the negative: neither the theoretical, nor the case-study perspective discussed in this chapter have offered a definite list of the core values of the EU shared legal order. Rather, the case studies support the idea, offered in the theoretical exploration, that the list is open-ended. We learn from the case studies, as expected, that the values are influenced by values that are coming from the EU level, but also by national-based values: these seem to be increasingly mixed. This is not surprising, of course, in a joint enterprise of 28 nation states together with EU entities (and including other public and private actors). Furthermore, no single or preferred method of how to determine the core values in the EU shared legal order has been proposed, nor is there a single method used in the case studies; it is doubtful that such method exists – it all depends on the perspective one takes (legal, philosophical, economic) and the level of the study at issue (the specific policy area, overarching or constitutional). It must be said, though we have declined to propose a definite list of core values in our theoretical exploration and we would agree with the qualification as a core value of the values identified in the individual case studies, there are some values where it may be questioned if the values at issue are not really instrumental in reaching a higher value. But this does depend, as the case studies show, on the type and size of the policy area (the umbrella, as we label it in our theoretical exposé) which one takes into consideration.

Second, as to linking the notion of core values to the concepts of authority, territory and citizenship, it is a matter of authority (see Van den Brink) who, of all the actors involved, would actually determine what the core values in the EU shared legal order are, and who is called upon to balance and mitigate conflicts between them. This question is entwined with the source of the specific core values at stake. From a *legal* perspective, which is adopted by most of the contributors to this volume, the EU Treaties (Articles 2 and 3 TEU), and their authors, i.e., the member states, have been the main *source* to determine the core values in the shared legal order. These are politically legitimized actors. Further, it seems that the power to balance conflicting values in specific policy areas primarily belongs

to the EU institutions, representing all EU citizens and the member states, i.e., the EU legislator. This power is governed by a number of safeguards (the principles of conferral, subsidiarity, and proportionality, all constitutional core values) and is delineated in the ‘competence catalogue’ (Articles 2-6 TFEU). Although not formally the legislator, the Commission (as the initiator of legislation) and the Court of Justice of the European Union play an important and at times decisive role in defining and addressing the conflicts between core values, too. From a legal point of view it might equally be valid to hold that it is the Court of Justice that has the power to decide upon balancing conflicting core values, and this volume offers plenty of relevant examples (e.g., that of *Pennings and Manunza*, of *Van den Brink and Van Rossem* or of *Buijze, Koning and Senden*) of the judgments of the Court which have had a ‘balancing’ effect in relation to conflicting (and at times not necessarily existing in EU legislation) core values.

As to the territorial application of the core values in the EU shared legal order, the analysis by Ryngaert and Vervaele in this volume shows that the geographical contours of the EU do not need to limit the application of the EU core values to the inner territory. In fact, the EU exports its core values in order to make these core values effective internally. But this extra-territorial application does play out differently for (on the one hand) regulation and (on the other) enforcement possibilities. Clearly, the EU sets legal rules to apply to anything and anyone coming into the EU. Also, in its international interactions, the EU is in the position to negotiate and thus impose its values upon the third party. However, enforcement abroad is another story, where the EU lack the authority to enforce its values directly. At the same time effective enforcement within the EU is not without reservations either. What Ryngaert and Vervaele call an ‘artificial construction’ of states’ borders poses various challenges to the transnational enforcement where the nation state is the key sovereign player. While there are more possibilities for horizontal and vertical cooperation, integration and harmonization within the EU, the monopoly of sovereign states to enforce law on its territory and to punish remains the case in and outside the EU. This monopoly to enforce law has been much less subject to sharing than the regulatory power (in the EU). The transnational, multiple, inadequate enforcement are the challenges to be addressed in the future in order to ensure that core values are upheld.

Finally, and perhaps it is somewhat late to pose this question, but why would we concern ourselves with core values, other than a purely academic interest, in the first place? The answer must surely be that identifying and upholding core values – in the sense of guiding the EU’s integration project – should be beneficial for the EU citizen. Core values do not exist *in abstracto*. Core values form an understanding as to what society, the shared European society, finds important, how the interaction within society should be functioning and against what standard actions and behaviour in the legal realm (as this is predominantly legal research) would be evaluated. This concerns both horizontal and vertical relationships: among the

citizens and between the citizens and those who exercise authority within a certain territory. But having a multi-layered legal order means possibly conflicting core values (especially within and between policy domains). The EU developing from a more single-motivated economic integration project to a much further-reaching socio-economic integration project makes this relationship even more complex. In order to uphold the core values, existing conflicts need to be resolved.

The starting point of departure of this contribution as well as the whole research project has been the question about the relationship between the core values and the shared regulatory and enforcement order in the EU. In light of 11 policy areas discussed in seven policy case studies and three horizontal perspectives on authority, territory and citizenship, this volume shows that this relationship is quite complex. The snapshots taken in the case studies show that the discussed mutual influence between the core values and the EU shared legal order results in having different degrees and modes of sharing in regulating and enforcing different policies in the EU and different balances between economic vs. social and substantive vs. procedural values throughout the policy domains. This balancing is not unique for the European Union, it is present also at a national level. For example, the question of making public procurement procedures non-discriminatory is an issue that came to the EU level from the national level. In competition law, the issues of whether – and if so how – the consideration of animal welfare should be included in its assessment are something which national authorities deal with as well. The core values may therefore evolve on a national level, which will affect the balancing of the core values of the shared legal order. It is an important challenge to find a balance, within this complexity, tensions, and development.