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The Impact of EU Legislation on National Legal Systems: Towards a New Approach to EU – Member State Relations

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Abstract
How does EU legislation impact the Member States? Arguably, no other issue is more closely connected to national sovereignty. However, existing research has thus far failed to deliver a univocal answer to this question. Instead, quantitative research – from political scientists and public administration scholars – has resulted in very diverging conclusions. By contrast, the legal perspective on the relationship between the EU and its Member States has been dominated by a focus on the principles of conferral and subsidiarity, as well as on the delineation and use of EU powers. Such an approach makes it equally difficult to identify the actual and concrete impact of EU legislation. Yet, it is contended in this contribution that a legal perspective, focusing on the actual content of EU legislation, is needed to come to a better understanding of the EU's legislative impact on the Member States.

The scope of application and the added value of EU legislation as well as national discretion therein are three key elements for determining the impact of EU legislation. The scope of application concerns the situations covered by EU legislation; added value regards the question of how EU legislation relates to other (pre-existing, overarching and adjacent) EU law. Policy choices and other room for manoeuvre for the Member States included in EU legislation makes for national discretion. Examples may be open norms or non-defined terms and concepts and the possibility to apply exceptions at the national level to general rules of EU legislation. Three areas of EU law are compared, each with a focus on a particular legislative act: migration law (the Family Reunification Directive); freedom to provide services (the Services Directive) and criminal law (the Framework decision on the European Arrest Warrant).

Keywords: division of competences, better lawmaking, national discretion, EU federalism, harmonization, EU legislative acts, national sovereignty

I. INTRODUCTION

In times of a growing politicisation of EU membership in various Member States, and concerns over excessive regulatory burdens imposed by the EU, the impact of EU legislation on the Member States is an issue of paramount importance. It defines

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the rights and obligations of citizens and business and the – constitutional – relationship between the EU and national levels. This relationship has often been viewed through the lens of European integration theories and constitutional models. The translation thereof into democratic arrangements and consequences for national sovereignty have equally received much attention. The very concrete effects of EU legislation on national legal orders and individuals is, however, an equally important issue.

In 1988, Commission President Jacques Delors famously predicted that in 10 years' time, 80% of economic – and perhaps also of social and fiscal – policy-making would be of EU origin.[1] This prediction encouraged public administration and political science scholars to assess whether this estimate was correct.[2] More than 25 years after Delors' prediction the issue has, however, still not been settled even though its political and societal significance has only risen since 1988.

The EU's legislative impact has been linked more directly to national sovereignty since then. This has had constitutional implications in various Member States. In its decision on the constitutionality of the Treaty of Lisbon, the German Constitutional Court imposed national guarantees on the exercise of EU legislative authority eg in the form of parliamentary involvement.[3] In the UK, the legislative impact of the EU has equally been one of the major issues in the Brexit campaign. Prior to that, the UK legislature had already adopted the European Union Act 2011 which includes the so-called 'sovereignty clause'. This provision prescribes that the status of EU law in the UK legal order is determined by and dependent on national parliamentary legislation only.[4] Moreover, the exercise of EU legislative powers has been subjected to specific conditions to protect national sovereignty.[5]

In view of the political and societal significance of the issue, this contribution addresses the question of how a legal perspective may contribute to identifying the legislative impact of the EU on the Member States. A legal perspective opens the door to a substantive perspective on the EU's legislative impact. This is important, as legislative impact is not only an issue of quantity. Codification measures will, for instance, have a less marked impact than legislation introducing new policies. Total harmonisation is more intrusive on the Member States than legislation introducing new policies. And the consequences of sector-specific legislation will be limited whereas general legislation, such as the Services Directive, will generate much broader effects.

This contribution is structured as follows. In the first two Parts I will analyse the extent to which existing research has given answers to how EU legislation impacts the Member States. It will first be examined which conclusions may be drawn from

[1] J Delors, Debates of the European Parliament [1988] 6 July No 2-367/140.

[2] See eg A Moravcsik, 'The Myth of Europe's "Democratic Deficit"' (2008) November/December *Intereconomics* 316, pp 331–340.

[3] 33BvE 2/08, DE:BVerfG:2009:es20090630.2bve000208.

[4] Section 18 European Union Act 2011 (the so-called 'Sovereignty Clause').

[5] *Inter alia* prohibiting Ministers of the Crown to vote in favour of or otherwise support a decision at the EU level unless the draft decision is approved by Act of Parliament (see eg section 7(3) European Union Act 2011).

quantitative research, how that has enhanced our understanding of the EU's legislative impact and what its limitations are (Part II). The focus will then shift to how legal approaches addressing the relationship between the EU and its Member States inform an understanding of the impact of EU legislation. In such legal approaches, the dominant issues are the principles of conferral and subsidiarity, and the issue of the delineation and use of EU powers. Also, the distinction between regulations and directives, and the distinction between various methods of integration are factors which are directly relevant in this regard. In Part III I will examine the extent to which this type of research has contributed to an understanding of the EU's legislative impact. Next, the focus will shift to the level of concrete EU legislation (Part IV). The impact of EU legislation in three distinct fields of EU policy will be examined in case studies based on three criteria:

> *Scope of application*: is EU legislation regulating a well-defined, limited set of situations or are its implications manifested in a wide range of social and economic circles?
>
> *Added value*: to what extent are the substantive norms new or are they based on or elaborating existing provisions of EU law (eg internal market freedoms or fundamental rights)?
>
> *National discretion*: does EU legislation provide the Member States with a full and complete regulatory framework or does it rather leave policy choices and the further elaboration of norms to the Member States? Examples are non-defined terms and concepts and the possibility to apply exceptions to general rules of EU legislation, but also minimum harmonisation creating national discretion.

These criteria flow first of all from the particular nature of EU legislation. The scope of application is specifically relevant in the EU context as EU legislation is often limited to regulating eg specific goods or services. The relation between primary law and secondary EU legislation explains the relevance of added value criterion. Secondary legislation may be directly elaborating Treaty provisions or, rather, create self-standing regulatory frameworks. This makes for a significant difference in terms of impact. Lastly, national discretion is a specific feature of most EU legislation which directly affects the impact of EU legislation on the Member States as well.

The criteria will be applied to case studies to examine how concrete and specific EU legislation impacts the Member States. Additionally, it will be analysed whether these criteria are indeed appropriate to increase the understanding of the EU's legislative impact. Three areas of EU law are compared, each with a focus on a particular legislative act: migration law (the Family Reunification Directive); the freedom to provide services (the Services Directive) and criminal law (the Framework decision on the European Arrest Warrant). These three areas represent fields in which the EU's authority to legislate has been contested and in which fundamental tensions exist (eg between security and freedom; and between economic freedom and social concerns). Thus, it may be expected that national discretion may be found here, in order to balance national and European interests.

The focus of this contribution is on EU legislation. Admittedly, legislation is only one way in which the European Union affects the Member States. Executive measures, and also decisions of the Court of Justice, have a substantial impact on the Member States as well. In the field of the EMU for instance, executive decision-making affects the Member States more than legislation. This is particularly true for economic policy coordination, an area in which the – executive – influence of the EU has, moreover, grown substantially over the last years. The result is a perhaps even blurrier relation between Member States' and EU powers. Nevertheless, legislating remains a key responsibility of the EU, especially in light of a higher level of decentralisation of executive and judicial powers in the EU.

II. QUANTITATIVE RESEARCH

A dominant element in the discussion is the estimation that the total volume of European legislation (previously: the *acquis communautaire*) amounts to around 80 000 pages.[6] More in-depth research has been carried out – for some reason especially in the Netherlands – which has led to very diverging outcomes. Some have come to the conclusion that up to 60 percent of Dutch legislation is of European origin, whereas others went even further and claimed the percentage to be as high as 80 percent (thereby confirming the prediction of Delors in the 1980s).[7] Many others have come to much lower percentages, though, of between only 8 and 15 percent.[8] Not only are these huge differences striking, but the estimates generally arrive at considerably higher percentages than studies reveal. Apparently, the perception of the EU's legislative impact is generally overrated.

But how may the differences in outcomes of the scientific studies be explained? A crucial factor here is the huge variety in research methods. First, most studies provided no analysis of *all* EU legislation but have instead been based on and limited to specific policy areas. As the intensity of EU legislation varies greatly from one policy area to another, sector-specific research may not easily support general conclusions on the EU's legislative impact. The existence of these substantial differences between policy areas is indeed one of the few general conclusions that may be drawn from quantitative research.

The sector-specific nature of the findings is not the only relevant issue. Quite a number of studies have concentrated on the effects of EU directives as these affect Member States' legal orders directly.[9] A closely related strand of research involves

[6] On the basis of research carried out by Open Europe in 2005, cited in J Steinberg, *Why Switzerland?* (Cambridge University Press, 2015), p 295.

[7] See the references to these estimates made by M Bovens and AK Yesilkagit, 'The EU as Law-maker: The Impact of EU Directives on National Regulation in the Netherlands' (2010) 88(1) *Public Administration* 57. These authors themselves come to a lower percentage.

[8] Eg EC Page, 'The Impact of European Legislation on British Public Policy Making: A Research Note' (1998) 76(4) *Public Administration* 803; WC Müller et al, 'Legal Europeanization: Comparative Perspectives' (2010) 88(1) *Public Administration* 75.

[9] S Hogenbirk and S Princen, 'Het Soortelijk Gewicht van Europese Wetgeving. De Invloed van de EU Nader Bekeken' (2010) 19 (1) *Bestuurskunde* 71.

relating the number of EU transposition measures to the total amount of legislation that is passed within a year in a given Member State; or analysing national legislation for references to EU law.[10] All of these methods are problematic in their own way. A concentration on EU directives ignores other EU legislation; most importantly EU regulations, which greatly outnumber EU directives. An analysis of national implementing measures equally overexposes directives, ignoring directly applicable EU law. Analysing references to EU law in national legislation is problematic as such references may not be explicitly made: Member States are not obliged to refer to underlying EU sources when they adopt implementing legislation. All these studies may, therefore, risk painting too narrow a picture of the actual impact of EU legislation.

A more fundamental issue is that the impact of EU legislation depends not only on its volume but also on its content. Comparing for example the Chocolate Products Directive,[11] to the Services Directive it will be clear that the impact of the latter on the Member States' legal orders is much more substantial.[12] Moreover, these types of legislative measures are not equally spread: the detailed, technical and hardly politically sensitive or controversial type of legislation such as the Chocolate Products Directive represents the much more common type. The Treaty objective of establishing an Internal market has prompted the adoption of numerous product norms and other technical regulation, which usually addresses only a specific and limited number of addressees.

All in all, analysing the impact of EU legislation in Member States by applying quantitative methods has both fundamental and practical drawbacks. This also explains the substantial differences in outcomes. Consequently, public administration and political science research may only partly explain the legislative impact of the EU on the Member States.

III. LEGAL RELATIONSHIPS

The relationship between the EU and its Member States is a key feature in EU legal scholarship. In particular, the changes brought about by the Treaty of Lisbon have encouraged a wide array of contributions focusing on the division of power between the EU and the Member States. The pre-existing treaties already included other elements which are relevant for determining the EU's legislative impact. The distinction between regulations and directives as legislative acts is one such element as the directive is generally seen as a less intrusive instrument than the regulation. Also, the distinction between different types of harmonisation and integration is a relevant factor. These three elements will be considered in more detail in this Part.

[10] In a research paper of the House of Commons, which *inter alia* discusses studies from other Member States, a number of studies have been elaborated which use have applied this method to study the impact of EU legislation: *How much legislation comes from Europe?* (House of Commons Library, 2010) Research Paper 10/62 http://researchbriefings.files.parliament.uk/documents/RP10-62/RP10-62.pdf

[11] European Parliament and Council Directive (EC) 2000/36 [2000] OJ L197/19.

[12] European Parliament and Council Directive (EC) 2006/123 [2006] OJ L376/36.

A. *The catalogue of competences and the principle of conferral*

The EU may only exercise those competences which the Treaties confer upon the institutions (principle of conferral); the catalogue of competences (Arts 2–6 TFEU) distinguishes between types of powers. The latter was included in the Treaty of Lisbon with the objective of creating and increasing clarity with regard to powers of the EU. The catalogue was, nevertheless, hardly a novelty but rather a summary and bringing together of the various competences to be found throughout the TFEU.[13] The catalogue of competences is non-exhaustive and, as a fixed system, was considered by some to be undesirable given the open and flexible nature of European integration.[14] Moreover, given that most EU powers have been classified as shared powers (most notably in the field of the Internal Market and the Area of Freedom, Security and Justice), the actual density and intensity of EU law depends on the extent to which the EU legislature has actually exercised its powers. Another complicating factor is the overlapping (or conflicting) powers for which the Treaties contain no specific arrangements.[15]

Another issue regards the weak monitoring of the conferral principle by the Court. Since its decision on the Tobacco Advertisement Directive,[16] measures based on Article 114 TFEU need not necessarily be aimed primarily at improving the adequate functioning of the internal market. The level of unpredictability of the use of the legal basis is therefore quite high. Apart from the category of exclusive EU competences, both the competence catalogue and the principle of conferral are of limited relevance for assessing the legislative impact of the European Union. In any, case they provide only an abstract picture as they are – in the words of Schütze – merely entitlements for future legislation.[17]

B. *The nature of EU acts*

The choice of legal acts by the EU legislature has been linked to the broader legitimacy of the EU.[18] This suggests that this choice is guided by clear principles. The Treaty definitions of a regulation and a directive (Art 288 TFEU) suggest that regulations are more intrusive instruments than directives. Indeed, directives have been regarded as a more flexible instrument as they allow Member States to choose appropriate implementing forms and methods.[19] Similarly, the old Subsidiarity and

[13] Cf Piris, who considered the competence catalogue 'a codification of ECJ case law and treaty law': J Piris, *The Lisbon Treaty: A Legal and Practical Analysis* (Cambridge University Press, 2010), p 74.

[14] Ibid p 77.

[15] P Craig, 'Competence: Clarity, Containment and Consideration' (2004) 29(3) *European Law Review* 323.

[16] European Parliament and Council Directive (EC) 2003/33 [2003] OJ L152/16.

[17] R Schütze, *From Dual to Cooperative Constitutionalism* (Oxford University Press, 2009), p 190.

[18] *European Governance: A White Paper* COM (2001) 428; KA Armstrong, 'The Character of EU Law and Governance: From 'Community Method' to New Modes of Governance' (2011) 64(1) *Current Legal Problems* 179, p 187.

[19] S Prechal, *Directives in European Community Law* (Clarendon Press, 1995), p 86.

Proportionality Protocol (attached to the Treaty of Amsterdam) established a preference for directives over regulations as well.[20]

However, the Inter-Institutional Agreement on Better Law-making 2016 does not voice such a clear-cut preference for directives, even though it also seeks to add a normative dimension to the choice of legal acts.[21] It requires the legislature to explain and justify the choice of legislative act and to 'take due account of the difference in nature and effects between regulations and directives'.[22] The previous Interinstitutional agreement (2003) was a bit more elaborate on the issue and prescribed that a 'proper balance should be struck between general principles and detailed provisions, in a manner that avoids excessive use of Community implementing measures'.[23] While this may suggest at least an implicit preference for directives, the Agreement also voices the need for effective and efficient measures, which might be read as an argument in favour of regulations as they are directly applicable.[24]

The Commission has taken the argument of effectiveness a step further and derived a preference for regulations from it. In its Communication 'A Europe of Results' it stated that regulations 'reduce the scope for national divergence and the creation of additional burdens (gold plating) through transposition' and also that 'replacing directives with regulations can, when legally possible and politically acceptable, offer simplification, as they enable: immediate application and can be directly invoked before courts by interested parties'.[25] Even though the Commission arrives at a conclusion opposite to that established in the old Subsidiarity Protocol, the underlying assumption remains that directives are less intrusive from the perspective of a Member State.

The regulation is a much more commonly used legal act than the directive.[26] The legislative practice reveals, however, an ambiguous picture with regard to the use of regulations and directives. The Court has enabled this ambiguity by allowing the

[20] Protocol No 30 (annexed to the Treaty establishing the European Community). This protocol has been replaced with a new protocol which no longer contains the provision.

[21] 'Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making' [2016] OJ L123/1. According to De Witte, proportionality is, in light of Art 297 TFEU, still the normative foundation for the choice between regulations and directives: B De Witte 'Legal Instruments and Law-Making in the Lisbon Treaty' in S Griller and J Ziller (eds), *The Lisbon Treaty – EU Constitutionalism Without a Constitutional Treaty?* (Springer, 2008), p 96.

[22] Protocol No 30, consideration 25.

[23] Ibid, consideration 12.

[24] Ibid, the relevant consideration (number 12) reads: 'It will ensure that the action it proposes is as simple as is compatible with the proper attainment of the objective of the measure and the need for effective implementation.'

[25] COM(2007) 502 final, *A Europe of Results*.

[26] A pre-Lisbon empirical study by Bogdandy et al has demonstrated this, and there is no indication this has significantly changed since then. A von Bogdandy et al, 'Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis' (2004) 23(1) *Oxford Yearbook of European Law* 91.

EU legislature to adopt very detailed directives which leave the Member States virtually no policy discretion. In the *Enka* case it argued that in view of the objective of the Directive it may be necessary to ensure 'the absolute identity of national provisions' across Member States.[27] Consequently, directives may prescribe the Member States' exact obligations to be transposed into national legislation. The Chocolate Directive is still a pre-eminent example.[28] Conversely, regulations have been adopted that have needed substantial fleshing out by national legislatures in order to become fully effective. An example is Article 5(1) of Regulation No 1782/2003/EC on support schemes under the common agricultural policy which provides:

> Member States shall ensure that all agricultural land, especially land which is no longer used for production purposes, is maintained in good agricultural and environmental condition. Member States shall define, at national or regional level, minimum requirements for good agricultural and environmental condition on the basis of the framework set up in Annex IV, taking into account the specific characteristics of the areas concerned, including soil and climatic condition, existing farming systems, land use, crop rotation, farming practices, and farm structures.

The open-textured wording ('good agricultural condition') as well as the Member States' discretion to establish minimum requirements leave the national authorities ample policy discretion, despite the legislative act being a regulation. This example, moreover, highlights that the choice of the legislative act in practice depends primarily on the policy area concerned.[29] Regulations dominate in areas such as agriculture, competition law and transport, whereas environmental policy, immigration law and EU company law are regulated mainly by way of directives. The preference for directives in the field of company law, but also in the field of consumer protection (measures such as the Unfair Commercial Practices Directive)[30] – as well as the prescribed use of directives in the field of criminal law – must be understood from the desire to enable the Member States to integrate all aspects of an area into a single, coherent system of law (eg Civil or Criminal Codes). The adoption of directives in such fields in therefore not necessarily based on the impact or the importance of the EU acts on the national legal systems.

The distinction between directives and regulations is, thus, too ambiguous a factor to help in understanding the impact of EU legislation. The European legislature enjoys substantial discretion to choose between regulations or directives. The effects of the legal acts are therefore more difficult to distinguish than might be expected.

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[27] *Enka BV v Inspecteur der Invoerrechten en Accijnzen Arnhem*, C-38/77, EU:C:1977:190, para 12.

[28] European Parliament and Council Directive (EC) 2000/36 [2000] OJ L197/19.

[29] For some policy areas, such as criminal law, directives have been prescribed (see *inter alia* Art 82, para 2; Art 83 TFEU). This may not explain, however, why the choice of legal acts depends on the policy area, as the TFEU mostly refers to 'measures', thereby leaving it to the discretion of the EU legislature to opt for either regulations or directives.

[30] European Parliament and Council Directive (EC) 2005/29 [2005] OJ L149/22.

C. *Methods of integration*

In legal doctrine, various types of legal integration have been distinguished which are based on the level of discretion they leave to the Member States. Minimum and total harmonisation are the main types. As these forms are defined on the basis of the level of national discretion, the typology directly informs the question on the legislative impact of the EU. Precisely because of the intrusive nature of total harmonisation, minimum harmonisation has been developing, in a gradual fashion, in the EU's legal order to accommodate national differences.[31] EU legal acts based on minimum harmonisation indicate that the Member States are free to maintain or to introduce stricter rules. The national legislature retains its legislative authority to shape these additional policies. By contrast, in case of total harmonisation the Member States lose the power to derogate from the provisions of the EU legal act apart from the exceptions explicitly provided for by the legal act at issue.[32]

The method of harmonisation is therefore *prima facie* a very powerful legal instrument to determine the legislative impact of EU law on the Member States. Several problems arise in this context as well, though. First, EU legislation is usually classified into categories of harmonisation methods only by legal doctrine. Acts that explicitly specify the level of harmonisation are indeed quite scarce. Second, the typology of harmonisation methods is broader and includes forms which are not identified in terms of their impact on national discretion. Barnard has distinguished exhaustive, optional, partial, minimum and reflexive harmonisation.[33] These concepts relate only in part to the level of national discretion they provide. The concept of optional harmonisation, for instance, relates to choices for market participants, not for Member States. Mutual recognition as a method of integration is even more difficult to pin down in terms of legislative impact. On the one hand, mutual recognition instruments allow Member States to maintain national legislation and practices without replacing them with uniform EU standards. On the other hand, laws of other Member States gain equal status to that of domestic law in case of cross border situations. Thus, mutual recognition requires Member States to apply foreign laws to cross border situations.[34] Lastly, the distinction between minimum harmonisation and total harmonisation has been blurred by the obligations to which Member States are subjected in the context of shaping stricter rules. Especially the desire to curb so-called gold-plating has effectively limited the freedom of Member States.

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[31] PJ Slot, 'Harmonization' (1996) 21(5) *European Law Review* 378; M Klamert, 'What We Talk About When We Talk About Harmonisation' (2015) 17(1) *Cambridge Yearbook of European Legal Studies* 360.

[32] See eg *Carlo Tedeschi v Denkavit Commerciale s.r.l.*, C-5/77, EU:C:1977:144.

[33] C Barnard, *The substantive law of the European Union*, 5th ed (Oxford University Press, 2016), p 624 ff.

[34] The effects have therefore been described as a horizontal transfer of sovereignty: KA Nikolaïdis, *Mutual Recognition Among Nations. The European Community and Trade in Services* (1993) PhD thesis, Harvard, p 491.

IV. IMPACT OF EU LEGISLATION IN THREE LEGAL DOMAINS

In this Part, the impact of EU legislation in the areas of EU criminal law, migration law and the provision of services will be examined. After identifying general characteristics in each of the three legal domains, the elements of scope, added value and national discretion will be applied. In the areas of EU criminal law and services national discretion is closely linked to the other two elements. National discretion will therefore not be analysed separately in relation to these domains. In the area of migration law, the individual relevance of national discretion is more obvious, and will thus be examined as a separate element.

A. *Criminal law*

1. *General characteristics*

Criminal law is closely connected to the nation state and the state monopoly on the use of violence. Providing security has long been the most fundamental task of states and even their *raison d'être*. This central position of the state has influenced the legal framework of EU criminal law and how it affects national criminal law.[35] Therefore, before zooming in on concrete EU legislation in the field, some more general consequences of this state-centered position must be addressed.

First, although the number of legislative acts in the field of criminal law has substantially increased over the years (most notably as a result of the Treaty of Lisbon which eased decision-making procedures) the EU has regulated only bits and pieces of criminal and criminal procedural law. By contrast, at the national level criminal law and criminal procedural law have been developed as comprehensive and coherent systems of law, usually by way of Codes of law. This has led some scholars to argue that the influence of the EU must not only be viewed in light of its concrete, substantive effects on national criminal law and criminal procedure, but also in light of the more structural effects on the system of national criminal law and criminal procedure and the consistency thereof.

Second, the Treaty provisions on criminal law and criminal procedure have a much greater impact on how legislation is shaped compared to other policy areas. The applicable legal bases determine with a high level of specificity the type and content of the measures the EU may adopt. With the entry into force of the Treaty of Lisbon, the scope and conditions for applying the various legal bases have been specified even further.[36] This explains in part the fragmentation of European criminal law: no general power exists for the European legislature to harmonise criminal law. The specific powers that do exist contain limitations and conditions such as: substantive criminal law measures must be limited to minimum rules in areas of particularly serious crime and legislative action is permissible only with regard to cross border crime (Art 83 TFEU). The principle of mutual recognition is

[35] The existence and the scope of the European Union's powers and influence on national criminal law has been the focus of intense academic debate. See V Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing, 2016), ch 2 (in particular 2.IV).

[36] This must be seen as a guarantee for the Member States that lost their veto powers.

the leading principle here as well, and differences between Member States should be 'respected' (Art 82(2) TFEU).

Greater coherence, however, has been brought by Article 83(2) TFEU that connects other EU policy areas to EU criminal law cooperation. Whenever in one of these other EU policy fields criminalisation is deemed necessary, Article 83(2) TFEU serves as an additional legal basis. In the pre-Lisbon era, no institutional link needed to be established with the EU criminal law legal bases, according to the Court.[37]

The principle of mutual recognition, one of the main principles in the field, presupposes that the Member States' criminal law systems remain intact, but that the borders between national systems may not constitute an obstacle for cross border law enforcement.[38] Not all EU legislation in the area may be easily understood in these terms, though. The previous Framework Decision on the Status of the Victim in criminal proceedings and its successor the Directive establishing minimum standards on the rights, support and protection of victims of crime are based on neither mutual recognition, nor the regulation of cross border issues.[39] Instead, uniform (minimum) standards for the protection of victims are set and the status of all victims in criminal proceedings is regulated, and not just of those victims involved in cross-border criminal proceedings. The Framework decision and the Directive have therefore affected national criminal procedure integrally.[40] Moreover, whereas the Framework decision contained several open-textured provisions, the level of specificity and concreteness of the new Directive is much higher. It has further strengthened the position of victims by extending their rights and extending the scope of application of the legislative act (eg to include family members of deceased victims).[41] The legislative freedom of the Member States has therefore effectively been diminished. Thus, although the provisions on criminal law in the Treaties are more specific than they are in other areas, the content of EU legislation in the field may still be quite unexpected.

2. *Scope and national discretion*

Nevertheless, other legislation in the field is indeed based on mutual recognition. This has consequences for both the scope and the level of national discretion. The Framework Decision on the European Arrest Warrant (EAW) illustrates this.[42]

[37] On the basis of the Court decision in *Commission v Council*, C-176/03, EU:C:2005:542, which has received much critique in legal doctrine.

[38] Cf Art 82 TFEU.

[39] Council Framework Decision (EC) 2001/220/JHA [2001] OJ L82/1; European Parliament and Council Directive (EC) 2012/29 OJ L315/57.

[40] APAV/Victim Support Europe, *Victims in Europe: Implementation of the Framework Decision on the Standing of Victims in the Criminal Proceedings in the Member States of the European Union* (2009) Project Victims in Europe Report, http://ec.europa.eu/justice/news/consulting_public/0053/project_victims_europe_final_report_en.pdf.

[41] Art 2 Directive (EC) 2012/29.

[42] Council Framework Decision (EC) 2002/584/JHA [2002] OJ L190/1.

As it is based on mutual recognition, its scope is limited to cross-border situations. It applies only when suspects or convicted persons are in another EU Member State and the requesting state invokes assistance of the host state. The effects on the criminal law systems of the Member States are in this sense limited. The effects on national discretion are different, however. Unlike pre-existing international agreements on extradition, the EAW has substantially reduced national discretion of the executing Member State. Mutual trust in the judicial authorities of the Member States is key, which makes the impact of the Framework decision considerably higher than what could be expected *prima facie*. The impact of the EAW relates, first, to the diminished possibilities of the authorities of the executing state to refuse surrender. Executing authorities are obliged to arrest and/or surrender persons in case of a listed crime (Art 2(2) EAW) or in case the double criminality test has been fulfilled (Art 3(4) EAW). They retain, however, some level of discretion to apply the facultative refusal grounds (Art 4 EAW). As a result of the fixed time limits and the obligatory reduction of formalities contained in the Framework decision, the procedural constraints on the executing authorities are arguably even more compelling. Member States' legislatures have equally seen their discretion diminished. A first indication is Article 2(2) EAW that contains the list of crimes for which the double criminality test has been lifted (the listed crimes). Also, the fact that the refusal grounds have been exhaustively regulated by the Framework decision greatly diminishes national discretion.[43]

3. *Added value and national discretion*

The comparison between surrender under the EAW and extradition, previously governed by conventions under the Council of Europe, also reveals the added value of the European Arrest Warrant. It has been argued that the material act of extraditing persons has remained unaltered, even though the EAW applies the different term of surrender.[44] Nevertheless, there are fundamental differences between the two regimes:[45]

- The political element has been discarded from surrender proceedings
- Surrender on the basis of the EAW in principle includes own nationals
- The double criminality requirement has been softened and partly replaced by mutual trust
- Refusal grounds have been limited.

These elements all impact the Member States, the executing state in particular. Compared to the Council of Europe conventions and other international law instruments, the EAW is more demanding on executing states to cooperate in

[43] Although the Framework decision itself is silent on the issue, the Court nevertheless concluded that Member States could not include refusal grounds that are not mentioned in the Framework decision: *Wolzenburg,* C-123/08, EU:C:2009:616.

[44] A Klip, *European Criminal Law: An Integrative Approach*, 2nd ed (Intersentia, 2012), p 411.

[45] Further elaborated by L Klimek, *European Arrest Warrant* (Springer, 2015), pp 311–320.

executing incoming requests. Conversely, for issuing states the EAW is a more effective instrument for law enforcement purposes than extradition has been.

Two crucial issues of the European Arrest Warrant regard proportionality (the application of the EAW to minor offences) and the protection of fundamental rights. Both of these exemplify the loss of national discretion. Executing Member States have lost the power to scrutinise incoming requests to surrender requested persons on proportionality grounds. They are obliged to cooperate even if the EAW concerns only minor issues. This runs the risk of hampering mutual trust between the Member States.[46] Also, the issue of fundamental rights protection results from the loss of national discretion. Executing Member States have, especially initially, been limited in protecting the fundamental rights of requested persons. This has led in several Member States to constitutional challenges of the national implementing measures, most notably in Germany.[47] Also the Court has had to decide several times whether the balance that has been struck in the Framework Decision between the principle of mutual recognition an fundamental rights protection is a proper one.[48] The various Court decisions are consistent, however, in determining that EU law itself determines the balance between mutual recognition and fundamental rights. Thus, the discretion of national authorities on the rights of requested persons in the context of EAWs is very limited.[49] Especially in more recent cases, the Court has put more emphasis on issues of fundamental rights protection. This can be seen in joined cases *Aranyosi* and *Căldăraru*, obligating the executing state to consider the 'real risk' of inhuman or degrading treatment in case of surrender to the issuing state.[50] Other Court decisions equally constrain the issuing Member State. In *Bob-Dogi* the Court concluded that the executing state has to consider whether a separate national arrest warrant (triggering national forms of judicial protection) underlies the EAW.[51] The Court has also concluded that the concepts of a sentence handed down in absentia and that of judicial authority concern autonomous EU law concepts.[52] Although these decisions have limited national discretion to interpret and elaborate key concepts of the EAW, the effect thereof is that executing Member States have more discretion to address fundamental rights issues.[53]

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[46] As signaled by the Commission: COM(2011) 175 final, *Report from the Commission to the European Parliament and the Council*. See also P Albers et al that studied *inter alia* whether executing authorities indeed refrain from exercising proportionality scrutiny on incoming EAWs: P Albers et al, *Final report: Towards a Common Evaluation Framework to Assess Mutual Trust in the Field of EU Judicial Cooperation in Criminal Matters* (Ministerie van Justitie, 2013).

[47] 2 *BvR* 2236/04, DE:BVerfG:2005:rs20050718.2bvr223604.

[48] The *Radu* decision is the most notable example: *Radu,* C-396/11,EU:C:2013:39.

[49] The above mentioned decision in *Radu* is a case in point here, as is the *Melloni* decision of the Court: *Melloni,* C-399/11, EU:C:2013:107.

[50] Joined cases *Aranyosi and Căldăraru*, C-404/15, EU:C:2016:198.

[51] *Bob-Dogi*, C-241/15, EU:C:2016:385.

[52] *Dworzecki*, C-108/16 PPU, EU:C:2016:346 and *Poltorak*, C-452/16 PPU, EU:C:2016:858 respectively.

[53] T van den Brink, 'Horizontal Federalism, Mutual recognition and the Balance Between Harmonization, Home State Control and Host State Autonomy' (2016) 1(3) *European Papers* 938.

Arguably, other legislation in the area has had less impact on the Member States. An example is the framework decisions on counter-terrorism measures.[54] The objective of these framework decisions is to oblige the Member States to qualify specific actions as terrorist crimes. However, the framework decisions apply to acts which national legislatures have already qualified as criminal offences. The Framework Decisions further contain a number of conditions to be applied by the Member States, but the latter retain considerable discretion as to the choice of which offences they want to apply the framework decision to. The Netherlands have, for instance, included recruiting for the jihad to the list of terrorist crimes which was not a binding obligation on the basis of the Framework decisions.[55]

The foregoing represents not more than a general 'quick-scan' of the effects of EU criminal law on the Member States. Still, it is possible to derive some conclusions therefrom. First, the legal bases of the TFEU reveal more about the impact of EU criminal law than legal bases in other EU policy areas. However, some legislation that is adopted in the field is not easy to understand from these legal bases and has a wider impact on Member States than may have been expected. Second, all three criteria for determining the impact of EU legislation are relevant in the field of EU criminal law. The key principle of mutual recognition determines that most (albeit not all) legislation is limited to regulating cross-border situations only. This greatly limits the scope, and thus the impact, of EU criminal law. The added value criterion draws attention to pre-existing schemes of cooperation. EU legislation must, in the light of this criterion, be compared to Council of Europe law rather than to primary EU law. This comparison requires cautiousness. It may seem that EU legislation materially results in the same, or at least a highly similar, legal regime. The actual design may, however, differ so much from the earlier international law instruments that the impact on the Member States may indeed be much more substantial. National discretion is a crucial criterion as well. The difference in impact between the old Framework Decision on the Status of the Victim in criminal proceedings and its successor Directive is mainly a difference in terms of the level of national discretion they entail. EU counter-terrorism measures strongly build on national legislation and provide the Member States considerable policy discretion. As was elaborated above, the EAW must be viewed in terms of (loss of) national discretion. In addition to the loss of national discretion of executing Member States, Court case law also increasingly limits national discretion of issuing Member States, for example by prescribing which national authorities may issue European Arrest Warrants. The application of the three criteria to EU criminal law demonstrated considerable overlaps. The level of national discretion informed the added value of the EAW. This is true for the 'scope'-condition as well: the new Victims' Rights Directive extends the scope of application of the victims entitled to the rights laid down therein, thereby equally limiting national discretion to decide which groups qualify as victims.

[54] Council Framework Decision (EC) 2002/475/JHA [2002] OJ L164/3.

[55] Art 205 Dutch Code on Criminal law.

B. *Migration legislation*

1. *General characteristics*

EU migration legislation may as such hardly be qualified as a coherent system of law. Indeed, instead of a single general migration policy, separate subsystems of migration law are in force for visas, asylum and immigration.[56] Moreover, internal migration (ie between EU Member States) is governed by internal market law and EU citizenship law, and therefore constitutes a separate system of law. In this Part, I will focus on external migration, ie the policies on migration from third countries.

Following the transfer of migration policies to the Community pillar after the entry into force of the Treaty of Amsterdam, the EU legislature has adopted a wide range of legislation. Characteristic of EU migration legislation is that it regulates specific types of migrants or situations. Groups such as researchers, EU family members, seasonal workers and asylum seekers are all governed by specific sets of rules.[57] The focus in EU law on the status of migrants stimulates the Member States to arrange their legal systems accordingly, as this will facilitate the implementation of EU law. This may, however, clash with pre-existing national systems of migration law. The Dutch system of migration law provides a case in point. The main distinction made in the Dutch Aliens Act 2000 is between residence permits for an indefinite period and for fixed periods. As a result of having to implement EU law, Dutch migration law has introduced numerous provisions regarding the status of the applicant or migrant. Thus, the main distinction made on the basis of length of stay has been pushed to the background. This change has been qualified as a 'silent revolution' of the national migration law system.[58]

A second characteristic is the balance between the rights of individual applicants and the interests of the Member States to control and to restrict migration.[59] This balance is visible in the simultaneous existence of legal instruments such as the

[56] Even though at the level of policy, initiatives such as European Commission, *Global Approach to Migration and Mobility* (COM (2011) 743 final) and Council of the European Union, *European Pact on Immigration and Asylum* (Council Document 13440/08, 24 September 2008) have been developed and adopted, no such an integrated approach to migration exists at the level of legislation. The latter pact contains a call for concrete measures in relation to a set of common principles labelled as 'basic political commitments' (S Carrera and E Guild, 'The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights?' (2008) September (170) *CEPS Policy Briefs*, p 3.One of the main reasons for the lack of such an overall legal system lies in the range of legal bases that may be applied to regulate migration issues.

[57] Researchers: Council Directive (EC) 2005/71 [2005] OJ L289/15; EU family members: European Parliament and Council Directive (EC) 2004/38 [2004] OJ L158/77; seasonal workers: European Parliament and Council Directive (EU) 2014/36 [2014] OJ L94/375; asylum seekers: European Parliament and Council Directive (EU) 2011/95 [2011] OJ L337/9.

[58] S Prechal and T van den Brink, *Methoden en Technieken van Omzetting van EU-recht* (Research report for the Dutch Council of State), p 18, https://www.raadvanstate.nl/assets/publications/publicaties/rvs_methoden_omzetting-2.pdf.

[59] The term 'balance' is used here in a neutral way. This implies that no normative judgement is made whether the balance that has been struck is 'optimal', but simply that these interests have played a role

Returns Directive and the Directive on mutual recognition of expulsion decisions on the one hand and the Family Reunification Directive and the Directive on minimum standards for the reception of asylum seekers on the other.[60] The first two primarily protect Member States' interests to control migration flows, whereas the latter – at least at first sight – primarily protects the rights of individual third country nationals. Yet, a closer look at these latter legislative acts reveals that the balance between Member States' and individuals' interests has in fact been incorporated within this legislation as they equally contain provisions to serve the interests of the Member States' interests to control migration. The Family Reunification Directive contains a number of conditions for individuals to comply with, some of which are facultative for the Member States. Conversely, the Returns Directive contains provisions to protect the principle of non-refoulement, the best interests of the child, the right to family life and a duty to take into account the state of health of the third country national concerned.[61] This Directive may, thus, equally been seen as a balance between the interests of individuals and controlling migration.

A third characteristic of EU migration law concerns the strong influence of international law, especially international refugee law. Substantial parts of EU asylum law may indeed be seen as an elaboration of international treaties and agreements.[62] The effects of such legislation must be assessed in light of the fact that Member States party to such international agreements are already subject to the obligations laid down therein.

In the remainder of this Part, the impact of the Family Reunification Directive, will be examined in closer detail. It is one of the most important legislative instruments in the field and the analysis can build on existing research in which its nature, its effects in the Member States and its relation to other legislation in the field has already been assessed.[63]

2. *Scope*

The Directive applies to third country nationals who seek family reunification or formation with other third country nationals (sponsors) in the EU. EU citizens who seek family reunification benefit from a more liberal regime.[64] EU citizens who

(F'note continued)
in the policy choices that have led to the eventual acts. Obviously, there has been a lot of debate on the rightness of these choices.

[60] Council Directive (EC) 2008/115 [2008] OJ L348/98; Council Directive (EC) 2001/40 [2001] OJ L149/34; Council Directive (EC) 2003/86 [2003] OJ L251/12; Council Directive (EC) 2003/9 [2003] OJ L31/18.

[61] Council Directive (EC) 2008/115 [2008] OJ L348/98, Art 5.

[62] See for a comparison C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2016), ch 4.

[63] Of particular relevance here is the report by Groenendijk on the implementation in a number of Member States, K Groenendijk et al, 'The Family Reunification Directive in EU Member States. The First Year of Implementation' (2007) 1 *Nijmegen Migration Law Working Papers Series*.

[64] This regime is laid down in European Parliament and Council Directive (EC) 2004/38 [2004] OJ L158/77.

reside in their own country and seek reunification with third country nationals are excluded from the scope of application of the Directive as well. Their situation is governed by national legislation. This may lead to the unsatisfactory situation that Member States may treat national sponsors less favourably than EU citizens or third country nationals.[65] Articles 7 and 8 of the Directive list a number of conditions that Member States may impose on sponsors (*inter alia* accommodation, insurance and means of subsistence) as well as on their family members (most notably integration requirements). With regard to the latter, the Court specified that such conditions may not make family reunification excessively difficult, which may be the case if the costs of an integration exam are excessive or if special circumstances in individual cases are not considered.[66]

3. *Added value*

The right to family reunification, the Directive's central element, is not created by this Directive itself, but is based on pre-existing international provisions (most notably Arts 8 and 14 of the European Convention on Human Rights).[67] This has, however, been contested by the Court: '[t]hese various instruments [meaning international law instruments] … do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation.' Peers has however argued that the right to family life may indeed include entry and residency rights for family members.[68] Following this reasoning, the Directive merely regulates the implementation of that right. The purpose of the Directive would then be to merely determine the conditions for the exercise of that right (as is stated in Art 1). In the above mentioned case, initiated by the European Parliament, the Court tested the legality of the Directive in the light of these and other international provisions.[69] The Court concluded that the Directive itself is in line with these provisions and that its application by the Member States should be governed by these provisions.[70] On the other hand, the Directive adds much more value than simply being a codification of existing norms. In paragraph 60 of the judgment, the Court argues:

> Going beyond those provisions [ie the provisions of the various international legal instruments], Article 4(1) of the Directive imposes precise positive obligations, with

[65] COM(2008) 610 final, *Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification*, p 4.

[66] *K and A*, C-153/14, EU:C:2015:453. See also S Peers, 'Integration Requirements for Family Reunion: The CJEU Limits Member States' Discretion' (*Euanalysis*, 9 July 2015) http://eulawanalysis.blogspot.nl.

[67] *European Parliament v Council*, C-540/03, EU:C:2006:429, consideration 59. For a more detailed and elaborate analysis of the relation between the Directive and international legal provisions, most notably Art 8 EConHR, see: P Boeles et al, *European Migration Law* (Intersentia, 2009), pp 183–187.

[68] S Peers, *EU Justice and Home Affairs Law*, 3rd ed (Oxford University Press, 2011), pp 463–464.

[69] See note 67 above.

[70] Ibid, para 105.

> corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorize family reunification of certain members of the sponsor's family, without being left a margin of appreciation.

Thus, the added value of the Directive is, first, to define concrete rights for sponsors and their family members and second, to impose a binding legal framework on the Member States of conditions and requirements that may be applied. Although international legal instruments in the field contain more than just general principles, the Family Reunification Directive effectively creates a comprehensive legal framework of conditions, requirements and rights. One of the consequences thereof is that the Member States may not impose additional requirements.[71]

4. *National discretion*

The Directive contains various elements of national discretion to treat individuals more favourably. It contains various minimum provisions, allowing the Member States to pursue more liberal immigration policies. They may extend the group of relatives eligible for family reunification to include dependent parents, unmarried adult children and unmarried partners.[72] The Directive, furthermore, contains a general provision enabling the Member States to adopt or maintain more favourable provisions.[73] More discretion for national authorities is found in Article 15 that concerns the right of residence for family members. The Member States may grant an autonomous right of residence (ie independent of the sponsor) before five years of residence and decide upon the status of that right; they may limit the right of residence in case of breakdown of the family relationship (para 1); they may issue and autonomous residence permit in case of widowhood, divorce, separation, or death of first-degree relatives (para 3) and although the granting of such autonomous residence permits is obligatory in case of 'particularly difficult circumstances', it is for the Member States to define what circumstances qualify as such.[74]

The three factors of legislative impact are all relevant in the field of EU migration law. National discretion, especially in the form of minimum harmonisation provisions and facultative provisions, has a self-standing relevance here and allows the Member States to balance migration control and individual protection. The scope of application is a relevant factor as well, especially as EU migration legislation is usually limited to specific types of migrants. The added value element highlighted that not only the broader context of EU law, but also international law instruments may affect the impact of EU legislation. Unfortunately, the application of these criteria does not come without problems. This has particularly been the case with regard to the added value criterion.

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[71] See Boeles et al, note 67 above, p 193.

[72] Council Directive (EC) 2003/86 [2003] OJ L251/12, Art 4(2).

[73] Ibid, Art 3(5).

[74] Boeles et al, see note 67 above, p 202.

C. *The Services Directive*

The Services Directive has been a controversial piece of EU legislation.[75] Its perceived neo-liberal bias (concerns about social dumping *inter alia* have been raised); its potential to affect a wide array of national legal domains and the significance of services to national (and thereby the European) economies are important factors.[76] The most important elements of national discretion derive from the scope of application and the added value of the Directive. National discretion will therefore not be examined separately, but in relation to the scope of application of the Directive (the horizontal nature of the Directive; exceptions and its effect on internal situations) first, and its added value in relation to the applicable Treaty provisions second.

1. *Scope of application and national discretion*

As a horizontal legislative act, the Services Directive covers more than 80 sectors.[77] From an extensive study of the implementation of the Directive in the Member States it may be learned that that Member States have adopted three types of implementing measures.[78] The adoption of general laws on the provision of services has been the most common way of implementing the Directive. Second, in some Member States the Directive has incited amendments to general administrative laws. A notable example is Germany, where the Directive has led general administrative legislation to be changed in order to accommodate 'simplification, modernization and acceleration of administration, or better administrative proceedings, at the legislative level.'[79] Admittedly, such a profound impact on national law was only found in Germany, but in a number of other Member States some specific changes to general administrative laws have also been reported.[80] Third, the Directive has resulted in new sectoral legislation in a wide range of fields. The UK has witnessed the adoption of new laws and the amendment of existing laws ranging from the Administration of Justice Act 1987, the Care Standards Act 2000, the Education Act 2002 and the Companies Act 2006, to the Employment Agencies

[75] European Parliament and Council Directive (EC) 2006/123 [2006] OJ L376/36.

[76] V Hatzopoulos, 'The Court's approach to services (2006–2012): From Case Law to Case Load?' (2013) 50(2) *Common Market Law Review* 459.

[77] C Barnard, *The Substantive Law of the European Union*, 4th ed (Oxford University Press, 2013), p 426. For a non-exhaustive list of services to which the Directive applies, see: GT Davies, 'The Services Directive: Extending the Country of Origin Principle and Reforming Public Administration' (2007) 32(2) *European Law Review* 232, p 234.

[78] U Stelkens et al, 'General Comparative Report on the Research Project 'The Implementation of the Services Directive in the EU Member States' of the German Research Institute for Public Administration Speyer' in U Steklens et al, *The Implementation of the EU Services Directive: Transposition, Problems and Strategies* (T.M.C. Asser Press, 2012).

[79] M Mirschberger 'The Implementation of the Services Directive in Germany' in U Steklens et al, *The Implementation of the EU Services Directive: Transposition, Problems and Strategies* (T.M.C. Asser Press, 2012), p 230.

[80] Stelkens et al, see note 78 above.

Act 1973.[81] However, in other Member States the implementation of the Directive required less legislative work. This has depended mostly on how intensively they had regulated the provision of services.[82]

Although the scope of application of the Directive is wide, a number of key sectors have been excluded. In some areas, including financial services and transport services, sector-specific EU legislation applies. The reason to exclude the application of the Directive in other areas, however, has been the desire to protect national autonomy. This concerns policies such as health care; social services in the areas of housing, childcare and support to families and persons in need and audiovisual services and taxation. Moreover, services of general interest have been excluded in a more general sense.[83]

The Court has the competence to review whether national measures fall under one or more of the exempted areas. It has, however, interpreted these exceptions broadly, taking into consideration that the EU legislature balanced free movement of services with 'the need to safeguard the specific characteristics of certain sensitive activities, in particular those linked to the protection of human health.'[84] Member States thus enjoy a considerable measure of discretion to decide whether services qualify as health care and/or social services.[85] The Court does establish a binding framework of assessment for that decision however, for example by determining that the principal activities of the service provider concerned must fall within the scope of the exceptions.[86] Moreover, procedural conditions apply, such as the condition with regard to social services that the service provider concerned must be 'mandated' by the State.

Another limitation is that the Directive in principle only regulates cross border activities. Chapter IV of the Directive, and in particular Article 16(1) thereof, explicitly lays down the right of service providers to provide services in another Member State. Internal situations thus remain within the realm of the Member States, although they have frequently opted to extend the scope of the Directive to include domestic situations as well. They have done so in particular with regard to the parts of the Directive on the national public administration.[87] This is an obvious choice, as

[81] M Trybus and A Berger 'The implementation of the Services Directive in the United Kingdom' in U Steklens et al, *The Implementation of the EU Services Directive: Transposition, Problems and Strategies* (T.M.C. Asser Press, 2012), pp 636–644.

[82] See eg S Prechal et al, 'The Implementation of the Services Directive in the Netherlands' in U Steklens et al, *The Implementation of the EU Services Directive: Transposition, Problems and Strategies* (T.M.C. Asser Press, 2012), pp 435–474. They note (at p 446) that prior legislative operations in the Netherlands to reduce administrative burdens, to simplify legislation and to 'de-regulate' caused much of domestic law to be already in line with the Directive.

[83] These exceptions may be found in Art 2-2a of the Directive.

[84] *Femarbel*, C-57/12, EU:C:2013:517.

[85] Zahn has criticized this wide measure of national discretion for leading to a lack of legal certainty: R Zahn, 'The regulation of healthcare in the European Union: Member States' discretion or a widening of EU law? *Femarbel* and *Ottica New Line*' (2014) 51(5) *Common Market Law Review* 1521.

[86] Consideration 40 of the Decision.

[87] See eg Prechal et al, note 82 above, p 447.

it would make no sense not to allow internal providers of services to benefit from administrative simplification and the single point of contact in the same way as foreign providers of services.

There is another reason why the cross-border element makes it difficult to assess the Directive's impact. More than ten years after its entry into force, it has still not been definitely resolved whether, apart from Chapter IV, purely internal situations fall completely outside the scope of application of the Directive. As early as 2007, Davies argued that while a limitation to cross border activities of the Establishment and Administrative simplification chapters would suffice to achieve free movement objectives, the literal texts of the provisions in these chapters and the underlying legal bases to harmonise national laws suggest that they are applicable in purely internal situations as well.[88] More recently, in an Opinion on joined cases *Trijber* and *Harmsen*, Advocate General Szpunar came to the same conclusion and added that the Commission's Handbook on Services and the legislative history of the Directive provided additional arguments.[89] Since the Court has not given a definite answer yet, Member States are faced with legal uncertainty as to whether they actually enjoy national discretion on this point.[90] It may provide them with an extra argument to apply the provisions of the Directive to internal situations as well.

2. *Added value and national discretion*

The Services Directive regulates issues that are covered by the Treaty provisions on free movement as well. This mitigates the impact of the Directive: its added value is limited to the extent to which it alters the preexisting legal framework based on primary law. Indeed, significant parts of the Directive concern codification of – mostly – Court case law. By contrast, the original proposal by the Commission included a more far-reaching country of origin principle, requiring the Member States to accept supervision of the provider and services by the state of origin.[91] This would have meant a significant divergence from the system based on primary law and would have implied that Member States would have had to accept national standards of other Member States without a level of minimum harmonisation and without the possibility of host state control.[92] Fierce criticism has led the EU legislature to base the eventual Directive more firmly on the existing legal framework.

[88] Davies, see note 77 above, p 236.

[89] Opinion of Advocate General Szpunar in *Trijber* and *Harmsen*, joined cases C-340/14 and C-341/14, EU:C:2015:505. The Court referred in these cases to the existence of a possible cross-border dimension, thus leaving the answer open to the fundamental question on the application of the Directive in purely internal situations.

[90] The Court avoided the issue in the *Trijber* and *Harmsen* cases but it is currently at stake again in pending cases *Visser Vastgoed,* joined cases C-360/15, X and C-31/16, EU:C:2017:397.

[91] COM(2004) 2 final, *Proposal for a Directive of the European Parliament and of the Council*, Art 16.

[92] S Griller 'The New Services Directive of the European Union Hopes and Expectations from the Angle of a (Further) Competition of the Internal Market' in HF Köck and MM Karollus (eds), *The New Services Directive of the European Union*, (2008) III *FIDE proceedings*, p 391.

The Chapter on Establishment is indeed a reflection of well-established case law of the Court.[93] It is true that the Chapter on Services has limited the list of mandatory requirements for Member States to justify restrictions to the Treaty exceptions and environmental concerns. Although such an exhaustive list did not exist before, it does mirror the more restrictive approach in the Court's case law to free movement of services.[94] It has been argued, however, that the Court may still allow the Member States to rely on other public interests.[95] The level of legal certainty on the impact of the Directive – in terms of both its added value over the preexisting legal framework and in terms of the degree of discretion left to the Member States – thus leaves something to be desired.

The added value of Chapters II (Administrative Simplification) and VI (Administrative Cooperation) and their effect on national policy discretion is more straightforward. The obligations contained in these chapters do not flow directly from primary law. The chapters contain a wide range of obligations, including the establishment of Points of Single Contact; simplification of procedures; the so-called *lex silencio positivo* (Art 13(4) of the Directive); concrete obligations to ensure the effective cooperation between Member States and the obligation to screen national measures that restrict the free movement and to simplify these if possible. It has been observed that these obligations 'cause major needs for adaptation'[96] in the Member States and that these 'intrusive' rules 'take away national autonomy significantly'.[97] The effect of the Services Directive on national administrative organisation may indeed not be underestimated. In particular the screening requirements and the establishment of Points of Single Contact have had a profound effect on national administrations and legislatures.[98] At the same time, the chapters on Administrative Simplification and Cooperation leave quite some policy discretion to the Member States. The screening obligations still leave the decision on the compatibility of national rules with the Directive to the Member States.[99] Also the decision whether and how such national rules and procedures may be simplified leave a considerable measure of discretion to the Member States.

The Services Directive illustrates that it may be difficult to distinguish between the three elements of legislative impact. The scope of application and the added value are crucial elements to understand the impact of the Directive, but both are directly

[93] If this Chapter would apply to purely internal situations, this would make for a significant difference with primary law, as was discussed above.

[94] Cf GT Davies, note 77 above.

[95] In the absence of case law on the matter, it is however still a point of discussion whether the Court will still allow Member States to rely on other grounds derived from the public interest, see eg C Barnard, 'Unraveling the Services Directive' (2008) 45(2) *Common Market Law Review* 323, pp 366–368.

[96] Griller, note 92 above, p 415.

[97] Davies, note 77 above, p 245.

[98] Stelkens et al, note 78 above, p 18.

[99] This does imply however, that the burden of proof on the legality of such national rules has shifted which does impact national discretion: Griller, note 92 above, p 415.

linked to and result in national discretion. The examination of the Services Directive also indicates how the three elements help to uncover uncertainties in the impact of EU legislation resulting from ambiguities in EU legislation and/or Court case law. This creates not only problems for Member States but may also cause legal uncertainty for citizens and business. Lastly, the analysis highlighted the differences in impact. The Administrative Cooperation and Simplification chapters impact the Member States fundamentally differently than the limitation of justification grounds (to diverge from the general provision on free movement.

VI. CONCLUSIONS

The question how EU law impacts the national legal order is crucial in the current times of challenged EU legitimacy. The legal perspective has much to offer in this regard. Public administration and political science based analyses have the disadvantage that they lack a generally accepted methodology that leads to unequivocal results. They are also insensitive to the actual content of EU legislation. Consequently, such analyses do not consider the complexities of EU legislation adequately and thus result in conclusions which suggest a degree of clarity that does not correspond to reality.

EU legal doctrine includes several elements which appear to be immediately relevant for this question. The principles of conferral and subsidiarity, the distinction between regulations and directives and classifying legislation as specific forms of harmonisation determine the relation between the EU and the Member States. They are, however, too far removed from actual and concrete legislation to clarify the EU's impact on the Member States. EU legislative practice reveals, for instance, that the choice between regulations and directives is less determining for the EU's legislative impact on the Member States than may be expected. The legal basis reveals in some cases more on the impact of EU law (eg in the areas of environmental policy and criminal cooperation) but other legal bases, especially the harmonisation of the internal market, may be applied to a broad array of legislative acts. The type of harmonisation is not a very helpful factor either, mainly because it is often difficult to identify what the exact type of harmonisation is.

General legal principles are, therefore, of limited use only. Assessing the impact of EU legislation requires concrete legislation to be considered. In all three legal domains, a crucial factor has been the scope of application of EU legislation. EU legislation is regularly sector-specific, addressing only a very specific issue or subject. Migration law is characteristic of this approach. Whereas Member States have adopted general migration laws, EU legislation addresses specific groups of migrants. The impact of such legislation is arguably smaller than that of horizontal legislation impacting larger numbers of individuals. Horizontal legislation in general (such as the Services Directive) has a large impact on Member States' legal orders for its ability to affect a wide variety of policy fields. But the scope of application is not merely a factor explaining the impact of EU legislation. The EU legislature actively deploys it to manage the division of authority between the EU and its Member States and to accommodate political desires for national discretion.

The Services Directive is again illustrative: specific, politically sensitive, issues have by way of exceptions been excluded from its scope of application.

A second factor is the added value of EU legislation. This element requires an assessment of how EU legislation relates to the broader legal framework of which it is part. This is particularly an issue if EU legislation concerns the elaboration of fundamental rights (the Family Reunification Directive). But also more in general the broader regulatory context matters. The content of the Services Directive has been to a considerable degree a codification of Court case law and the European Arrest Warrant replaced extradition procedures based on the 1957 European Convention on Extradition (ECE). In such situations, a comparison of EU legislation and the legal situation applicable before may be necessary to assess the impact of EU legislation on the Member States.

A third factor is national discretion. In all three areas, EU legislation leaves policy discretion to the Member States. This limits the impact of EU legislation. The Family Reunification Directive allows Member States – within certain parameters – to balance integration demands and the right to family reunion. In the case of the Services Directive, national discretion is related to institutional autonomy. The Member States may decide how they achieve administrative simplification and single points of contact. The framework decisions on counter-terrorism measures demonstrated national discretion in the form of freedom to decide on the scope of application. By contrast, the impact of the European Arrest Warrant on national legal orders has been particularly significant as it has limited national discretion of executing states. National discretion, implicit or explicit, is thus a key factor for determining the impact of EU legislation.

The application of the criteria has also revealed several problems and methodological issues. The first is that it may be difficult to clearly separate the three criteria; especially national discretion overlaps with the other two. If an EU legislative act limits its scope of application by granting an exception or excluding areas, this may equally result in national discretion. A further delineation of these elements may, therefore, be called for. Furthermore, it can still be difficult to assess the actual impact of EU legislation even if the elements are clearly defined. The added value of EU legislation may be especially difficult to assess, but the existence of national discretion is also sometimes far from obvious. The role of the Court contributes to legal uncertainties in specific areas. Lastly, the analysis is not conclusive on whether the number of elements here should be extended. Together they indeed enhance the understanding of the impact of concrete EU legislation.

At the same time, it seems difficult to relate certain aspects to one of these elements. Political sensitivity of EU legislation seems crucial for the impact of EU legislation, especially the perception thereof. Yet, it is difficult to relate that to one of the three elements as it essentially concerns a non-legal aspect. The result of the political sensitivity of EU legislation may indeed be that the EU legislature leaves more policy discretion to the Member States, but it is as such not an indicator of impact. The same is true for situations in which EU legislation fits badly within national systems of law. The case of the Services Directive highlighted, furthermore,

the difference between EU legislation containing substantive norms and provisions requiring institutional changes.

This has, therefore, been only a first – exploratory – analysis of the EU's legislative impact, based on a legal perspective and focusing on concrete legislation. A more refined methodology and the application thereof to a wider array of legislative policies, and possibly over time, is indeed needed. Legal assessment of the EU's legislative impact is the missing link for understanding the relationship between the EU and its Member States. Indeed, it is indispensable to understand the EU's true impact on our daily lives. It is a research approach which has much to offer to discourses on the legitimacy of the EU.