

# *European integration assessed in the light of the 'rules vs. standards debate'*

**Franziska Weber**

**European Journal of Law and Economics**

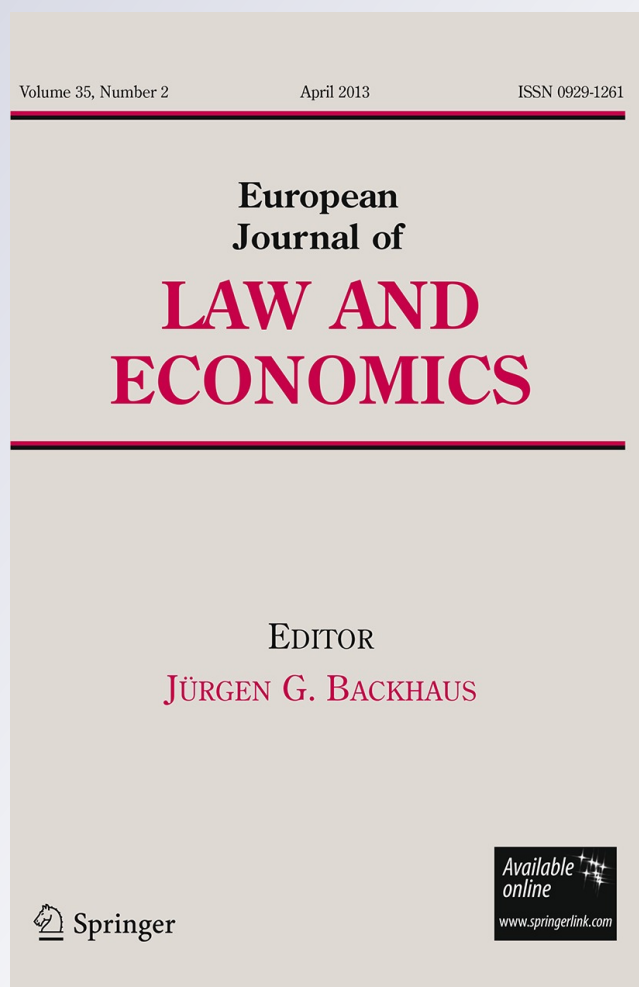
ISSN 0929-1261

Volume 35

Number 2

Eur J Law Econ (2013) 35:187-210

DOI 10.1007/s10657-011-9259-2



**Your article is published under the Creative Commons Attribution license which allows users to read, copy, distribute and make derivative works, as long as the author of the original work is cited. You may self-archive this article on your own website, an institutional repository or funder's repository and make it publicly available immediately.**

## European integration assessed in the light of the ‘rules vs. standards debate’

Franziska Weber

Published online: 9 June 2011

© The Author(s) 2011. This article is published with open access at Springerlink.com

**Abstract** The interplay of various legal systems in the European Union (EU) has long triggered a debate on the tension between uniformity and diversity of Member States’ (MS) laws. This debate takes place among European legal scholars and is also paralleled by economic scholars, e.g. in the ambit of the ‘theory of federalism’. This paper takes an innovative perspective on the discrepancy between ‘centralized’ and ‘decentralized’ law-making in the EU by assessing it with the help of the rules versus standards debate. When should the EU legislator grant the national legislator leeway in the formulation of new laws and when should all be fixed ex ante at European level? The literature on the ‘optimal shape of legal norms’ shall be revisited in the light of law-making in the EU, centrally dealing with the question how much discretion shall be given to the national legislator; and under which circumstances. This paper enhances the established decisive factors for the choice of a rule or a standard in a national setting (complexity, volatility, judges’ specialization and frequency of application) by two new crucial factors (switching costs and the benefit of uniformity in terms of information costs) in order to assess law-making policies at EU level.

**Keywords** Rules vs. standards debate · Law-making · European Union

**JEL classification** K39

---

F. Weber (✉)

European Doctorate on Law and Economics (EDLE) program, Rotterdam Institute of Law and Economics (RILE), Burgemeester Oudlaan 50, P.O. Box 1738, 3000 DR Rotterdam, Netherlands

e-mail: f.weber@law.eur.nl

URL: www.edle-phd.eu

## 1 Introduction

A central debate in European Law when it comes to law-making for the whole Union deals with the tension between uniformity and diversity (De Witte et al. 2001; De Búrca and Scott 2000; Dougan 2004; Tuyschaever 1999; Hunt 2010). One policy is the imposition of European-wide equal norms. In contrast to that stands the desire to promote diversity and flexibility throughout the Member States (MS). The central question becomes how far the European Union (EU) legislator is to have the final say on the laws to be adopted in the MS or how much discretion should be given to national legislators to consider national particularities? How can this form of federalism be organized? Depending on the choice of the legal instrument effective implementation of European law can depend to a large extent on the cooperation of the MS (Rehbinder and Stewart 1985). It is for them to decide on the ‘necessary organisational, legal and institutional arrangements’. They furthermore highly differ as to their administrative tradition which leads to different necessities when integrating EU law (Falkner et al. 2005, p. 319; Siedentopf and Hauschild 1990, p. 451; Knill 1998, p. 7).<sup>1</sup>

Many economic scholars have dealt with harmonization, centralization and decentralization labeled as the theory of federalism and the theory of regulatory competition (Tiebout 1956; Stigler 1957; Arcuri and Dari-Mattiacci 2010),<sup>2</sup> and also particularly as to its shape in the EU (Van den Bergh 2002a; b; Weatherill 2004; Ott and Schäfer 2002; Kieninger 2002). This paper will approach the question on the degree of uniformity in particular settings from an innovative new point of view: the rules versus standards debate.

The rules versus standards debate in Law and Economics and legal literature dates back to a seminal paper by Louis Kaplow from 1992 (also Kaplow 1995, 2000).<sup>3</sup> Since then this line of research has seen various applications, e.g. to the literature on effective laws in developing countries (Cooter and Schäfer 2008; Faure 2008, 2010; Ogus 2008; Schäfer 2006) or the extensions to behavioural effects (e.g. Korobkin 2000) or e.g. applications in the field of anti-trust (Crane 2007).

While the debate is generally used in a national context as to the relationship between legislature and judiciary, in the context of the EU the debate shall be lifted up to the relationship between two legislators: the European legislator and the national legislator: The literature on ‘rules versus standards’ shall be revisited in the light of law-making in the EU, centrally dealing with the question how much discretion shall be given to the national legislator; and under which

---

<sup>1</sup> ‘With respect to state intervention, several dimensions can be distinguished, including hierarchical versus self-regulation, substantive versus procedural regulation, as well as uniform and detailed requirements versus open regulation allowing for administrative flexibility and discretion. In the same way, different patterns of interest intermediation can be identified, such as formal versus informal, legalistic versus pragmatic, and open versus closed relationships between administrative and societal actors’.

<sup>2</sup> Arcuri and Dari-Mattiacci 2010 recently added the point of view that decentralization works as a risk-diversification device.

<sup>3</sup> As Kaplow sets out a number of the points, particularly concerning the effects of rules and standards on legal costs and on behavior, can also be found in the prior economic analyses by Ehrlich and Posner 1974 and Diver 1983.

circumstances; and further by which type of legal norm this can be reflected? When it comes to legal norms the discussion, as will be motivated, shall focus on the differentiation between the European legal instruments regulation and directive. Notwithstanding this application to the EU context, a more general usage of the theory is possible in any setting where differing legal traditions are organized in a somewhat federal way and some discretion as to law-making can be left to a lower level.

The established decisive factors for the choice of a rule or a standard in a national setting (complexity, volatility, judges' specialization and frequency of application) will be enhanced by two new crucial factors (switching costs and the benefit of uniformity in terms of information costs) in order to assess law-making policies on European level. After a summary of the 'rules versus standards' debate (1), the analogy to EU law making will introduced (2), illustrated and the two new factors applied (3) followed by conclusions (4).

## 2 The 'Rules vs. Standards' debate in the national context

In this section first a characterization of rules and standards is carried out, followed by a more detailed assessment of how to adapt shapes of norms to legal environments.

### 2.1 General characteristics

One aspect of the debate is a straightforward point: Norms differ as to their degree of precision, detail or complexity. The spectrum ranges from 'relative simplicity to complexity'.<sup>4</sup> In balancing the degree of complexity the following holds true: 'the lower the information costs (for the individual ex ante and the enforcement authority ex post) and the greater the variation in harm caused by different individuals' actions, the larger will be the net benefit of [high] precision in legal commands'.<sup>5</sup> This characteristic is discussed as to norms generally. In order to distinguish rules from standards, the notions of clarity and flexibility are crucial though. The basic distinction between rules and standards is the time of promulgation of the respective degree of detail (Kaplow 1992, p. 586).<sup>6</sup> It concerns whether the law is given content, specification, ex ante or ex post (Kaplow 1995, p. 508; Kaplow 2000), i.e. done before individuals act (rules) or afterwards (standards) (Kaplow 1992, p. 621). Rules are those legal commands which lead to a

<sup>4</sup> This term refers as set out in Kaplow 1995, p. 150, to number and difficulty of distinctions that a legal norm makes.

<sup>5</sup> Cf. Kaplow 1995, pp. 151 who refers to Ehrlich and Posner 1974 and Diver 1983. He furthermore found that if information costs of the enforcement authority are low, more complex rules tend to be efficient even if information costs for individuals are high, as long as they are not prohibitively high. The findings on self-reporting behavior that are set out in his paper shall be neglected as they are not central to the question of this paper.

<sup>6</sup> As Kaplow criticizes not all authors make this distinction so clearly: the degree of detail used in the formulation of laws is a distinct question from that on the time of giving this content.

clear-cut distinction between lawful and unlawful, while standards are general legal criteria which require a more elaborate judicial decision making (Ehrlich and Posner 1974; Diver 1983; Kaplow 1992; Schäfer 2002). The latter requires an application of ‘a background principle or a set of principles to a particularized set of facts in order to reach a legal conclusion’ (Korobkin 2000, p. 23).

As an example with a low degree of detail one can look at a provision setting out a speed limit. A provision stipulated in form of a rule would make the issue clear cut e.g. the speed limit shall be at 60 km/h. In form of a standard, on the other hand, it would simply read that ‘reasonable speed’ should be used. The determination of ‘reasonable’ would take place *ex post*, while ‘60’ was established as the speed limit *ex ante* in the first example.

The degree of the precision of laws is at two extremes with how the two law-making techniques are formulated (Parisi 2007, p. 9). This does, however, not exclude that a general standard is applied with a lot of precision by the judiciary. The end result can be the same and in specific situations this would mean different costs have to be incurred.

Both approaches involve costs at two stages: at the law-making and at the adjudication stage.<sup>7</sup> The size of cost that they lead to, however, varies depending on the moment of measurement. For the decision on the use of rules and standards it has to be considered that in the case of rules the content of the laws has to be determined *ex ante*. Lawmakers have to carry out studies in advance in order to determine the appropriate rule (Kaplow 1992, p. 569). Therefore, rules are more costly for legislators to promulgate than general standards, which require less specificity beforehand.

‘Standards’, however, while leading to lower costs at the law-making stage, impose higher costs at the implementation and (born by judicial bodies) decision-making stage (Kaplow 1992, p. 570). The determination of each law’s content is carried out by the adjudicators *ex post*. Standards are formulated in an open way and allow for judges to make a fact-specific determination. They leave them furthermore with discretion. The adaptation to local, varying circumstances is better possible by open standards (Fon and Parisi 2007, p. 4.). Learning from a rule is considered to be cheaper because the content of the laws is extensively set out in it beforehand (Kaplow 1992, pp. 563).<sup>8</sup> This suggests that rules will tend to produce behaviour that is more in conformity with legal norms than would equivalent standards (Kaplow 2000, p. 510). However, too much detail in setting out the rules will reduce the effect considerably. The language used is furthermore important. Standards are more robust to attempts by subjects of the law to avoid legal consequences (Wegner 1997; Kaplow 2000, p. 514; Fon and Parisi 2007, p. 4).<sup>9</sup>

<sup>7</sup> Besides the relation between the legislature and the judiciary also the relation between various levels of government (legislature and executive) are discussed in the literature. Also note the relation to the *ex ante* versus *ex post* legal intervention discussion in: Shavell 1984.

<sup>8</sup> Otherwise an individual’s accuracy in following the law also depends on whether he has asked for legal advice as to the interpretation (before acting) of the norm.

<sup>9</sup> They argue that ‘given the greater accessibility of detailed rules, more individuals are likely to become informed in a regime dominated by rules than standards’.

To sum up standards generally have a broader scope of application than rules (Fon and Parisi 2007, pp. 16). Situations do not have to be thought of beforehand. To adapt a rule is more difficult and might require legal amendments. Whenever the human capital at the *ex post* stage is better qualified to carry out the detailed interpretation of the law, less complexity beforehand is warranted.

As already mentioned both ways can lead to the same result: Option one are ‘rules’ as laws that are specified up front with a greater level of detail and that thus leave a lesser margin of discretion in the implementation of such norms and option two, a standard, can be applied with a high degree of detail by the judiciary.

There is thus an area of conflict between initial specification costs and enforcement and compliance costs (including specification at this stage) (Posner 1998a, b).<sup>10</sup> In the choice between specificity and generality at the moment of promulgation, the overall goal should be the minimization of total costs. The suitability of a standard or a rule depends on some main factors of a legal environment that are set out under the next aspect. Depending on these factors the optimal moment of specifying the provisions (right at the moment of enactment in case of rules or later on in the adjudication and implementation process in the case of standards) can be identified.<sup>11</sup>

## 2.2 Adaptation to specific circumstances

Next, factors facilitating the decision-making process on a law’s shape in a given area are discussed. In theory, provided that lawmakers and the judiciary are benevolent, the same content and thus result for the penalty that someone has to face and low or high degree of detail can be reached independently of the choice of standards (*ex post*) or rules (*ex ante*). The optimum position is dependant on the circumstances since the costs and benefits of using the various shapes of legal instruments vary. For the choice between rules and standards the following main criteria are decisive for a reduction of total costs (promulgation, adjudication and compliance costs) (Fon and Parisi 2007, pp. 6).<sup>12</sup> More plainly, the allocation of tasks for the law-maker or the judiciary has to be organized efficiently depending on the field of law at hand.

### (1) volatility

Volatility, i.e. changes over time in the regulated environment, lead to legal obsolescence. In an area of law that is subject to a frequent change of economic and social conditions leading to an ever new assessment of the optimal set of legal decisions standards are more efficient than rules (Schäfer 2002, p. 2; Kaplow, 1992). Details and specifications that are set out *ex ante* become obsolete at a faster rate. Therefore the use of more specific rules might be warranted when there is a stable

<sup>10</sup> Difficulties to interpret standards which are not specified emerge for all subjects of law, also the individuals that are addressed by it.

<sup>11</sup> Note that the distinction between rules and standards is not clear-cut and in reality there are mixed forms same as acts consisting of rules and standards, cf. e.g. Kaplow 2000, pp. 510.

<sup>12</sup> They assume that ‘lawmakers act benevolently, without considering the impact of political failures and selfish behavior by legislators, courts, and subjects of the law’ as set out on p. 17.

environment and general standards when there is a fast rate of change (Kaplow 1992, p. 621). Standards are less affected by changes as they indicate only the type of circumstance that is relevant and not the specific circumstance. Detailed rules are more sensitive to exogenous, unforeseen changes. With standards the possibility of a detailed analysis by the judiciary *ex post* is left open.

The range of potential situations to be covered should be formulated in a very open way to possibly cover future situations, too. This can work best if *ex post* the norm is given content. In cases of a discrepancy between the *ex ante* legal norm and the particular circumstances of the case there is a potential for societal losses.

## (2) judges' specialization

Judges' specialization affects the level of guidance that they need.<sup>13</sup> Specialized judges are better in applying complex laws and interpreting them because they are very familiar with the laws in their specialized field. In order to decrease adjudication costs it therefore seems to hold that the optimal level of specificity increases the more specialized the courts are that are to apply and interpret them (Fon and Parisi 2007, p. 8). Therefore a greater use of detailed legal provisions would be expected that cover a wide range of situations and variations (Fon and Parisi 2007, p. 14). Due to their specialization they can, however, also deal with vague norms and do not need clear-cut advice on how to decide a case. A lot of interpretation of the norms could thus take place *ex post*. Judges can create and use case-law.

Fon and Parisi generalize it to 'greater use of rules will be warranted when legislative costs are lower relative to judicial costs. An increase in judicial human capital, on the other hand, would lower judicial costs and thus justify the use of less specific laws in response to an increase in complexity of the regulated environment (2007, p. 15)'.

## (3) frequency of application

A common point is the finding that the more often a norm is applied, the more a rule with a higher degree of specificity (beforehand) is desirable as these costs then only have to be born once (Kaplow 1992, p. 563).<sup>14</sup> Frequency speaks thus in favour of rules, as adjudication costs would otherwise most likely be higher than promulgation costs. Standards work best when behaviour varies a lot and there is little repetition in case scenarios (Kaplow 2000, p. 510). To set out the legal consequences of a frequent behaviour in detail beforehand seems warranted. The case for standards would be clearly that of situations which arise rarely, or varying circumstances, or a low frequency.

The relationship between volatility and frequency can be analysed in the following way: If volatility is a given in the environment and consequently obsolescence is a big issue in the legal order, lower levels of specificity should be chosen, basically opposite to frequency.

<sup>13</sup> The same is true for a bureaucrat at lower levels of the executive branch.

<sup>14</sup> He calls it the 'frequency of individual behavior and adjudication' in contrast to a behaviour that would be rare.



#### (4) the complexity of reality

A last main issue is the complexity of reality in the field in which the norm is to be passed. Generally the more complex an environment is, the more costly it is to develop norms that cover every possible variation. Particularly, promulgation costs increase with the complexity of the environment that is to be regulated as it is difficult to specify these contingencies (Fon and Parisi 2007, p. 7). This situation calls for a general standard that can be filled with the details for many possible contingencies *ex post*. When deciding on the costs of adjudication there is an interrelation with the frequency of application.

### 3 An analogy: legal norms enacted by the European Union

Next, the forms of legal instruments that are available in the EU and the law-making process are illustrated and the potential of the analogy to directives and regulations is explored.

The essence of the supranational nature of European Law is the fact that MS have transferred some legislative competences to the EU and by this limited their own sovereign rights to adopt legislation in the areas in question.<sup>15</sup> A general point to make is that the scope of competences of the EU differs as to various legal fields. While exclusive competences have been granted to the EU according to art. 3 TFEU in some areas, only so-called ‘shared’ or ‘supporting’ competences (arts. 4 and 5 TFEU) are available in others.<sup>16</sup> This is apparently a source of uniformity and diversity among legal orders in the EU.

From an economic perspective this current state of the law can be subject to change—as also various Treaty amendments in the past have shown. From an economic efficiency perspective law has not necessarily struck the right balance yet. This paper shall abstract from the *de facto* allocation of competences and assess along the lines of various criteria when there are reasons to favour uniformity or diversity.<sup>17</sup>

#### 3.1 Law-making in the EU

In the EU there is an inherent tension between uniformity and diversity as to the legal orders of the 27 MS currently and potentially after implementing new European laws (De Witte et al. 2001; Dougan 2004; Tuytschaever 1999; Hunt 2010). The central question is how law-making powers are to be shared. When weighing the balance between the European legislator and the national legislator,

<sup>15</sup> See Van Gend en Loos (Case 26/62); [1963] ECR 1; [1970] CMLR 1.

<sup>16</sup> There are some safeguards for the MS interests. Due to the principle of subsidiarity the Commission when taking action is to show the need of taking action on EU and not MS level in cases that do not fall within the exclusive competence of the EU and under the principle of proportionality, it shall not be exceeded what is necessary to achieve the objectives of the Treaties (art. 5(3),(4) TEU).

<sup>17</sup> It is thus abstracted from a political decision-making process in which not least lobbying plays a decisive role.

a closer look at legal instruments and law-making policies within the EU is essential.

With regard to available legal instruments at European level in 2003 it was noted that the ‘theory of instruments has yet to establish its place within Union constitutional law’ (Bast 2003, p. 13).<sup>18</sup> Now it is generally specified in the Treaties which instrument shall be used for which area of law. The legal base as set out in TEU and TFEU is to establish the scope for EU legislation, the procedure and type of law, but regularly the choice of legal base will not be straightforward (Chalmers et al. 2010, p. 95). Furthermore in cases where it is not specified art. 296 TFEU is applicable that reads:

“Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality...”<sup>19</sup> There is thus still discretion left to the Union institutions (Bast 2003, p. 40)<sup>20</sup> which is why different institutions at times seek to use the legal basis that provides the procedure most advantageous to them (Chalmers et al. 2010, pp. 95).<sup>21</sup> This apparently leads to vigorous litigations (Cullen and Charlesworth 1999). Obviously regulations simplify life for the European Commission and there might thus be a preference for this type of instrument (Bast 2003, p. 13). MS, on the other hand, seem to prefer a two-step procedure that a directive provides for in which they can seem active, even if in substance this might not even be the case (Koopmans 1995, pp. 695; Bast 2003, p. 70).

As to the number of different legal acts, a recent change has occurred. Before the Lisbon Treaty entered into force in 2009 European policy was characterized by the ‘famous’ 3 pillar structure, introduced with the Treaty of Maastricht in 1993.<sup>22</sup> This meant that in some areas the entity was of supranational nature, MS referred parts of their competences to the EU and limited their own sovereignty, and in others, where the MS were not ready to grant the EU wide law-making and scrutinizing powers, namely the second and the third pillar, the nature of EU law was intergovernmental. These two different natures of EU law led to a wide variety of legal instruments,

<sup>18</sup> He suggests as of p. 36 a classification according to the four criteria: binding force, formal addressee, implementation structure and obligatory force. See also his more recent findings on legal instruments in Bast 2010.

<sup>19</sup> Note that before the latest Treaty amendment there was a clarification annexed to the EC Treaty: ‘The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures’, see point 6 of Protocol 30 annexed to EC Treaty. According to information by Europe Direct of 17th November 2010 in this instance both the content of the measure concerned (intended level of harmonisation; level of harmonisation already achieved in the MS’ legislation; expected complementary implementation rules at national level) and its objectives (degree of urgency; degree of flexibility) are taken into consideration.

<sup>20</sup> The situation that he describes in 2003 where it is ‘rather doubtful that the institutions have always been clear as to the specific performance profile when choosing the instrument that appeared appropriate to them’ thus to some extent still is applicable.

<sup>21</sup> Courts struggle when they have to assess if the right legal basis was referred to and apply concepts like the predominant aim and content of the measure and hierarchies mentioned within the Treaties.

<sup>22</sup> The European Communities (EC) were taken together in the first pillar, the second pillar consisted of the Common Foreign and Security Policy (CFSP) and the third pillar of Police and Judicial Co-operation in Criminal Matters (PJCC) which was originally named Justice and Home Affairs (JHA).

binding to different degrees, differing as to addressees etc. Thus with some a high degree of uniformity could be achieved, while by others this was impeded and diversity among the MS was the (desired) result.

With the entering into force of the Lisbon Treaty on 1st December 2009 and the abolishment of the pillar structure the number of legislative instruments has been reduced to five (Piris 2010, pp. 92).<sup>23</sup> The main legislative instruments as to law-making in the EU are directives and regulations (Craig and de Búrca 2008, pp. 82).<sup>24</sup> Besides regulations and directives, there are decisions, recommendations and opinions (the latter two are not legally binding) (Chalmers et al. 2010, p. 101).<sup>25</sup> The legal basis for their enactment is Article 288 of the Treaty on the Functioning of the European Union (TFEU) which reads:

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all MS.

A directive shall be binding, as to the result to be achieved, upon each MS to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.<sup>26</sup>

Recommendations and opinions shall have no binding force.

The new Treaties furthermore introduce a hierarchy of legislative and non-legislative acts (Chalmers et al. 2010, p. 92; Piris 2010, p. 97).<sup>27</sup> While the former are those mentioned above that are adopted by an official law-making procedure, the

<sup>23</sup> Before the Lisbon Treaty entered into force there were the following types of legal instruments: regulations, directive, four types of decisions (EC, CFSP, JHA and sui generis), recommendation and opinion, framework decision (JHA), convention between Ms (EC and JHA), principles and general guidelines (CFSP), the common strategy (CFSP), two types of common positions (CFSP and JHA) and the joint action (CFSP). Note that the pillar structure has not completely been abolished as the institutional settings for ex-pillar 2 have basically not changed and the provisions can be found in the Treaty on European Union (TEU). Notably according to art. 24 (1) TEU the adoption of legislative acts shall be excluded for the CSFP field. This is apparently another set of factors leading to or maintaining possible diversity among the MS. While it is again true that this setting might be subject to change in the future, the findings of this paper, when it comes to focusing on directives and regulations, are currently predominantly applicable to areas in which these two are indeed the main legislative instruments. The Lisbon Treaty furthermore adds a new case of 'permanent structured co-operation in the field of defence' (Art. 42 VI and 46 TEU).

<sup>24</sup> See for an evolution of the various legal instruments over time: Bast 2003.

<sup>25</sup> These are generally to be regarded as soft law.

<sup>26</sup> This has been slightly modified compared to the pre-Lisbon time.

<sup>27</sup> There are three instances in the Treaty where the Commission has the choice as to whether to follow a special legislative procedure or a non-legislative procedure (see arts. 203, 349 and 352 TFEU). The latter article entails the so-called 'flexibility clause' which allows for action by the EU in cases where this proves necessary 'within the framework of the policies defined by the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers'. This provision is regarded as controversial particularly because its predecessor that was formulated in a narrower way was interpreted with latitude.

power to issue non-legislative instruments can be granted to the Commission by Council (according to arts. 290 and 291 TFEU).<sup>28</sup>

The legal instruments lead to different levels of uniformity and diversity of laws among the MS. Another trigger of diversity in the EU is the principle of ‘enhanced co-operation’ that has existed on paper since 1997 and was modified with the Lisbon Treaty (Piris 2010, pp. 89).<sup>29</sup> Where the EU does not have exclusive competences those MS, not all, that wish to ‘enhance cooperation’ between themselves can do this under certain conditions. As a measure of last resort, this will inevitably lead to varying laws among the MS.

With varying legal instruments the outcome of the design of the national law can be pre-defined and controlled to varying degrees. It is set out below how the rules versus standards debate can to a large extent be compared to the choice between the two main legislative instruments, directives and regulations, by applying the legal definitions as set out in the second and third sentence of Article 288.

Lastly in this introductory part some main features of the European TFEU law-making process shall be illustrated that is independent of the choice of the legal instrument.<sup>30</sup> At European level the law-making process can take various forms (Loos 2006, p. 4). In general, the European Commission has the right of initiative and the Council and the European Parliament take the final decisions following an ordinary or a special legislative procedure (Chalmers et al. 2010, p. 61; Piris 2010, pp. 95).<sup>31</sup> The law-making process can be complicated because at several stages a political compromise between the various MS and EU institutions has to be found. Also the number of different legislative procedures was reduced with the Treaty of Lisbon (Chalmers et al. 2010, p. 94). The most common form is the ordinary legislative procedure as set out in arts. 289, 294 TFEU which was previously called co-decision procedure according to which Parliament can veto any proposal as it sets out a joint adoption by European Parliament and Council. As ‘special legislative procedures’, mentioned in art. 289.2 TFEU, there is the consultation

---

<sup>28</sup> The Commission furthermore has direct legislative powers in two limited fields, namely when it comes to ensuring that public undertakings comply with the rules contained in the Treaty (art. 106 (3) TFEU) and when determining the conditions under which EU nationals may reside in another MS after having worked there (art. 45 (3)(d) TFEU). The European Parliament may adopt legislative acts in three cases (arts. 223 (2), 226 and 228 (4) TFEU) but the consent of another institution/other institutions will be required, for details see the provisions.

<sup>29</sup> It is set out in Art. 20 TEU and Arts. 326–334 TFEU.

<sup>30</sup> Art. 289 TFEU that will be referred to in the following sets out the law-making procedure for regulations, directives or decisions likewise.

<sup>31</sup> The overall powers of the Commission are stipulated in art. 17 TEU. There is an important exception to its powers in that in the FSJ (Freedom, Security and Justice) area the initiative comes from a group of MS. In some cases initiatives that trigger a legislative procedure are recommendations from the European Central Bank or the request of the Court of Justice. As to the right of initiative to the Commission there are exceptions in the Common Foreign and Security Policy where it only has an ancillary role. In this area initiatives and proposals for decisions may be made by any MS, the High Representative or the High Representative with Commission support according to art. 30(1) TEU to the Council. In fact the Commission takes few proposals on an own initiative but rather is a gate-keeper when different players come to it with legislative suggestions. A new type of petitions that is to be considered by the Commission since the entering into force of the Lisbon Treaty is the citizens’ initiative that requires the support of at least 1 million citizens from a significant number of MS, see art. 11(4) TEU.

procedure and the assent procedure. Legal acts are either adopted by the Council with the participation of the Parliament (through consultation or consent) or by the European Parliament with the consent of the Council.

### 3.2 A promising application: directives versus regulations

In the traditional rules versus standards debate the comparison on costs and benefits takes into consideration two different stages—that of law-making and that of adjudication. When assessing the effectiveness of European law scholars follow the implementation theory, dividing the political process up in policy formulation, implementation and impact (Snyder 1993, p. 26). When making the analogy to European law-making it is striking that the chain of law-making is longer, basically complemented by the law-maker at European level. The upcoming analysis primarily looks at the European decision-maker and the national law-maker as the decisive two interacting phases. Costs (whose minimization is desirable) are incurred at both stages, by the European institutions and by the national legislator. As a further step the interaction with the executive or the judiciary in the MS and the Court of Justice of the European Union (ECJ) shall be commented on.

A Directive lays down certain end results that must be achieved in the MS addressed by it (Craig 2009, p. 6).<sup>32</sup> National authorities have to adapt their laws to meet these goals, but are free to decide how to do so. Each directive generally specifies a deadline by which the national laws must be adapted—giving national authorities the room for manoeuvre within the deadlines necessary to take account of differing national situations. As they are objectives they have to be given content at a lower level of governance (Härtl 2006, pp. 174).

They are a typical example of an instrument that leaves flexibility in the way that final laws are implemented in the country and they leave it open as to how exactly to adapt, e.g. the manner in which way enforcement is delivered. The exact content of the new law that is added to the national legal system is given *ex post*. They are designed to harmonize to some degree rather than to make the laws uniform. Like a standard that gives a framework to the later adjudication, a directive sets out general policies and leaves discretion, however, within the parameters of the directive itself (Hinton 1999, p. 311). In some instances the freedom of the national legislator is very wide: they can go beyond the requirements of the directive. Likewise at times there is room for them to take advantage of the discretionary provisions to minimize a directive's impact (De Smets 2009).<sup>33</sup> It can be called a 'compromise' which unifies law to some extent but also takes account of national particularities (Härtl 2006, p. 173).

From a perspective of legal certainty for the citizens the necessity of the implementation phase has led to some inconsistencies that have consequently been solved by the ECJ. While generally as soon as the implementation phase ends

---

<sup>32</sup> A directive does not have to be addressed to all EU MS while a regulation does.

<sup>33</sup> The degree of scrutiny at the European Commission when making a transposition check determines if a MS can be successful with this. At times these restrictions might be lawful.

citizens rely on the national legislation (Snyder 1993, p. 24),<sup>34</sup> there are some exceptions to this rule (e.g. Hinton 1999, pp. 311):

The court developed the doctrine of ‘direct effect’ to stipulate that unimplemented or badly implemented directives can actually have direct legal force depending on certain conditions.<sup>35</sup> On top of that in *Francovich v. Italy*,<sup>36</sup> the court found that MS may have to compensate individuals and companies that have been adversely affected by the non-implementation of a directive. The rationale for attributing direct effect to directives was to secure the ‘useful effect’ (*effet utile*) of EU legislation. While e.g. primary EU law sources have direct effect,<sup>37</sup> horizontal direct effect of directives is excluded, and individuals can only rely on directives against the state or an emanation of the state and not against other individuals.<sup>38</sup>

Furthermore following the doctrine of ‘indirect effect’, national provisions always have to be interpreted in conformity with European Law, arguably even before the implementation period ends. For directives this can be a fallback option in cases of the missing horizontal direct effect.

Besides if a MS fails to pass the required national legislation on time, if the national legislation does not adequately comply with the requirements of the directive or if the MS fails to systematically implement a directive it can be sued by the European Commission before the ECJ.

While the passing of a directive is basically a two-step process that leads to the refinement of national laws similar to a standard given content by a judge, a typical one-step process is illustrated next<sup>39</sup>: A regulation is the most direct form of EU law. As soon as it is passed, it has binding legal force throughout every MS, on a par with national laws. The exact formulations that will later on be found in every MS are fixed ex ante at European level. National governments do in theory not actually have to take action themselves to transpose and implement these regulations. They are part of the national legal systems without the need for transformation or adoption by separate national legal measures. Regulations are analogous to domestic legislation. This is why they are a good illustration of a legal instrument that can lead to uniformity of laws throughout the EU, like ‘rules’ that set out the precise content. In the adoption there is no flexibility left for the MS. Variations in MS are by definition unwanted. Other than directives, there is thus no two-phase

<sup>34</sup> Individuals rely on the national transposing legislation and not the directive itself in case of correct implementation, see *Felicitas Rickmers-Linie KG & CO v Finanzamt für Verkehrsteuern, Hamburg* (Case 270/81): [1982] ECR 2771, see also case *Emmott v Minister for Social Welfare* (C208/90): [1991] 3 CMLR 894, 915.

<sup>35</sup> *Van Gend en Loos* (Case 26/62); [1963] ECR I; [1970] CMLR 1. The requirements are: the provision must be sufficiently clear and precisely stated; it must be unconditional and not dependent on any other legal provision; it must confer a specific right upon which a citizen can base a claim. If these conditions are met, provisions of the Treaties can be given the same legal effect as Regulations. Note that the concept can apply in relation to EC regulations, directives, Treaty provisions and decisions.

<sup>36</sup> See *Andrea Francovich and Others v. Italian Republic* (C-6/90&C-9/90): [1991], ECR, pp. 5357.

<sup>37</sup> As an example of direct vertical effect, see requiring respect for the principle in Article 141 EC of equal pay for women and men (*Defrenne v. Sabena*, (Case 2/74) [1974] ECR 631.

<sup>38</sup> The latter was established in *Foster v. British Gas* (Case C-188/89): [1990] ECR I-3313.

<sup>39</sup> Cf. Härtl 2006, pp. 173 as to the two-step nature of directives and the one step nature of regulations.

legislative procedure consisting of enactment and implementation. Regulations simplify matters in that they enable immediate application and can be directly invoked before courts by interested parties (Twigg-Flesner and Metcalfe 2009). They confer rights on individuals that the national courts are bound to protect.<sup>40</sup> Unlike a directive it is vertically and horizontally directly effective (Craig 2009, p. 9).<sup>41</sup> For those who are bound by or benefit from a regulation, they guarantee union-wide equal laws.

In this originally intended form regulations and directives satisfy the characteristics for an analogy to the rules versus standards debate rather well. However, the ‘division of labour’ between the two in practice over recent years has become less clear-cut (Král 2008, pp. 252). This development was triggered with the introduction of the notion of ‘limited direct effect of directives’. In their theoretical original usage directives are an instrument for the harmonization of laws and regulation an instrument to create unitary laws (Härtl 2006, pp. 174). However, regulations can now equally be an instrument for harmonization.

It applies to both forms of instrument that the degree of freedom left to the MS as to EU legislation differs clearly when it comes to the issues of minimum or maximum harmonization (Thomson 2009, p. 5).<sup>42</sup> Minimum harmonization sets out a threshold that MS must meet with their national laws. National laws may, however, exceed the terms of the legislation if desired. In contrast to this maximum harmonization contained in a European norm establishes both a ‘floor and ceiling for domestic regulations’. Here, national laws may not exceed the terms of the EU legislation. A norm can be a mix of maximum and minimum harmonization clauses. Likewise legislation in one legal area can be mixed as to the approaches. Which degree of harmonization is desired is typically expressed within an act.

While it is typical for directives to offer MS a number of options that they can choose when transposing, there are also those that offer few alternatives (Thomson 2009, p. 8). The ECJ has furthermore restricted the discretion with which MS can implement directives by ruling that ‘it is essential that each MS should implement directives in a way which fully meets the requirement of clarity and certainty.’<sup>43</sup> There are likewise regulations that leave alternative choices to the MS and so also account for diversity in legal systems. Regulations have moved away from being 100% clear and thus immediately applicable (Bast 2003, p. 38).<sup>44</sup> They often need

<sup>40</sup> *Munoz* (Case C-253/00): [2002] ECR I-7289 para.27.

<sup>41</sup> It is often argued that the recognition of direct effect of directives, possibly also to horizontal situations, would erode the differences between directives and regulations. This is, however, not the case as the main distinction is: ‘Directives leave Member States choice as to form and methods of implementation, and they only take effect after the period for transposition. Giving direct effect to Directives, whether vertical or horizontal, does not undermine this.’ The doctrine of direct effect would only cover situations of wrong or not timely implementation.

<sup>42</sup> ‘Therefore, other things being equal, European directives that require far-reaching adjustments to national practices are less likely to be complied with than directives that are more congruent with existing national arrangements’.

<sup>43</sup> C-102/79 *Commission v. Belgium* where implementation by way of an administrative act which can later be modified by the MS was not regarded as a proper fulfillment.

<sup>44</sup> ‘Directives can serve not only to stimulate national legislation but also just as well to activate administrative planning’; eg. ‘developing programs to realize qualitatively designed objectives can fully

implementing legislation and can turn out to lead to harmonization rather than unification (Král 2008, pp. 244).<sup>45</sup> The instruments can also be interrelated (Craig 2009, pp. 23). The ‘parent’ provision can be either a directive or a regulation, followed by further legislation as either regulations or directives. If the directive is the ‘parent’, regulations can e.g. serve to specify in more detail aspects of the regulatory scheme. Instances can be found where regulations make reference to directives and vice versa.

As discussed in the first section the distinction between rules and standards is one of degree, although it often is convenient to discuss it as an all-or-nothing choice (Kaplow 2000, p. 508). The same applies to the legal reality in the EU.<sup>46</sup> The rationale of the different legal bite in different policy fields that the two legal instruments were to have was, indeed, undermined by legislative instruments having become substitutable for one another (Chalmers et al. 2010, p. 99). The discussion in this paper will take the original intention as a starting point. The two instruments shall furthermore only be selected as indicators or proxies for the broader picture: the optimal tension between uniformity and diversity.

## 4 Assessment

Once it was established that the tension between diversity and uniformity can be compared to the choice between a rule and a standard and that using the examples of directives and regulations can be illustrative, it is now assessed in how far the criteria that were developed in the literature are applicable and helpful as to the decision on when to formulate laws in which shape.

### 4.1 Applying the existing factors

As was set out, the discussion in the context of the EU is lifted to the relationship between the EU and the national legislator. In a given area one can ask if it is better for the European legislator to decide on the exact laws or for the national legislator in the implementation phase. Based on this, when deciding between regulations (rules) and directives (standards), flexibility for the national legislator can be extensively created or completely excluded. It will become clear rather quickly that the established factors of the rules versus standards debate do not suffice to comprehensively assess EU law-making and that additional factors are needed to capture the particularities of the interaction between European Institutions and

---

Footnote 44 continued

regulate certain sector as well as confine themselves to setting minimum standards, imposing conditions on mutual recognition or obliging MS to make reports.’.

<sup>45</sup> While at some instances this is mentioned within the regulation there are situations in which there is no explicit mentioning but according to him nevertheless justified in EU primary law.

<sup>46</sup> While the formulations used in a regulation are decided at EU level, the directive in a way can leave the choice of whether to formulate the national law in form of a rule or a standard widely to the national law-maker. In that sense the rules versus standards debate can be applied twice.



MS.<sup>47</sup> Still, first a look shall be taken at the established factors and how these can be applied to this particular scenario:

When it comes to volatility it has to be kept in mind that there is a cost to excluding flexibility by formulating rigid legislation that then has to be amended in a long legislative process. The passing of EU legislation is an even more time consuming process than that on national laws. As there is a necessity to implement directives it will take even more time until the (new) provisions will be set in place compared to legislation that is directly applicable.<sup>48</sup> Abolishing outdated legislation creates extra costs, too. However, the decision on how rigidly a norm will be formulated will be taken at different levels according to the different legal instruments. When it comes to regulations the legislator at European level will decide on the final formulation—he can opt for shaping it more like a ‘rule’ or a ‘standard’.<sup>49</sup> With directives it is the national legislator that still has a certain amount of freedom in how to ultimately formulate and implement the directive (Crettez et al. 2009, p. 141).<sup>50</sup> It can possibly still be formulated in terms of rules or standards by the national legislator. In one scenario (regulations) it is thus the European legislator deciding on the formulations and in the other scenario (directives) it is the national legislator that has some leeway—it follows that the European legislator cannot fully control what national legislators in the various MS will do (Chalmers et al. 2010, p. 64).<sup>51</sup>

To some extent the implementation period for directives means that decisions on the ultimate formulations are decided on later than in the case of regulations that take immediate effect and thus an adaptation to changes that have happened between the beginning of the implementation phase and the passing of the law is to some extent possible.

Volatility could also be a reason to reduce harmonizing efforts organized at EU level to a minimum and leave the competence completely to the MS. Obviously this will most likely retain their diversity but it would guarantee a faster legislative process and leave the decision on how to shape the national laws (according to these criteria preferably as a standard) firmly in their hands. MS sovereignty is basically retained, thus diversity favoured over uniformity.

Whilst the relationship between the EU and the national legislator is primary, later in the chain judges also come into the picture as they shape the impact of

---

<sup>47</sup> As said above law-making is complicated as various bodies are involved and external influences are not unusual. This paper looks into factors that should be considered when deciding on legal instrument and disregards the actual process of law-making and difficult questions like where the information of what is actually needed in a MS comes from and who would know this information best.

<sup>48</sup> The implementation phase might leave room for minor adjustments, too.

<sup>49</sup> Please note that the usage of the words ‘rule’ and ‘standard’ here refers to national laws that are ultimately integrated in the national legal system.

<sup>50</sup> Their model illustrates optimality of complexity levels across countries.

<sup>51</sup> A directive gives limited leeway to the MS. As set out before the Commission is empowered to bring MS before the court of justice for breaching EU law (258 TFEU) and it is also responsible for monitoring compliance by MS with judgments of the Court of Justice to have them fined (art. 260 (2)). The limits of control are thus where the MS acted legally in the implementation for which the Court’s case-law can serve as guidance.

legislation. Judges, as stated before, do need lesser guidance the more they are specialized; likewise they can cope with far more complicated details. Having to deal with EU-legislation on top of national legislation is a challenge for domestic judges, particularly with regulations that are formulated in ‘Brussels wording’ or when they are to apply the concept of ‘indirect effect’. With European Law in general, though, it is an advantage that domestic courts can ask the ECJ whose interpretation is then binding for the national court for a preliminary ruling via Art. 267 TFEU when doubts exist concerning the interpretation or validity of EU legislation (Chalmers et al. 2010, pp. 149). Once a directive is implemented, the wording as it is then formulated by the national legislator should be less of an obstacle to the application.

The more national judges are to apply laws of other MS according to private international law in various scenarios, the more a uniform approach as to union-wide laws can be preferred. Having said that, except for cases where there was no previous law in the country as to the particular area in which a European norm is passed, a judge confronted with a European norm that would adapt his legal system’s laws would first have to learn how to apply new concepts. This could be made dependant on sectors that regularly involve cross-border disputes and others that do not.

As to the frequency of application there might be a benefit of having a wording that is familiar to the national judge (i.e. an implemented directive) in case of frequent use of a provision. The decision on how complex these national laws would be rests to some degree, actually to the extent set out within the directive, with the national legislator. In contrast where there is a high degree of cross-boarder interaction a benefit can be found in a norm that unifies the corps of law (this can easily be achieved via a regulation).

A high frequency could, in contrast to the volatility scenario, speak in favour of increasing the European influence, as here learning (by citizens, judges, and executive) of new laws will be fast due to a regular application.

The complexity of reality: If many provisions in a directive, (i.e. numerous and possibly complex) have to be considered by the national legislator in the implementation process these are likely to cause delay or even mistakes in the implementation phase (Thomson 2009, p. 9; Loos 2006, p. 3).<sup>52</sup> Also the transposition checks that are carried out by the European Commission are cumbersome. It can be interpreted as an advantage for regulations since these can be implemented faster when there are many details. Also as to complexity of reality one can again wonder if this speaks in favour of increasing or decreasing EU law-making efforts in general and there might be arguments to favour national approaches, giving less or no competences to the EU in the Treaties in the first place.

This is the last of the established criteria for the national context. As the institutional setting, when it comes to coordinating law-making between the EU and

---

<sup>52</sup> ‘This is true for any drafting of laws: Inconsistencies cannot be prevented completely. Law is the work of man, and consequentially errors are made when legal rules are drafted.’ Thus also regulations are not free from this. The application leaves further room for mistakes.

the national legislator, is obviously different, it has become clear that the comparison is currently too weak and the existing criteria have to be refined. In the EU law context it seems initially more appropriate to refer to reality differently, i.e. to basically refer to the complexity of the national legal order that the EU legislation is to affect.<sup>53</sup> This leads to the first of the new factors.

#### 4.2 Introducing two new factors

##### (1) Switching costs

The starting point is the degree of interference between the new EU-made legislation and the previous national legislations. It is typical for European law that generally, in an area where a European norm is passed, law is already in existence in the MS. The European law basically comes on top, which is different from the case in a national setting where the rules versus standards issue is usually discussed. Alternatively the EU norm will enhance or amend the national law. In cases where there has not previously been any national law in a field, it will fill this gap. All MS in these situations are required to change the laws (Legrand 1997; Legrand and Munday 2003; Ogus 2002). The law that has to be integrated is ‘made in Brussels’. Even though MS will put forward their interests e.g. in Council meetings the result will render amendments of the national laws necessary that vary throughout the MS.<sup>54</sup> When laws have to be coordinated with the pre-existing legal norms ‘switching costs’ have to be born by the national legislator for adapting the national law to the new EU law. These will vary throughout the MS. Switching costs are the higher the more the shape of the national law differs from that of the new EU norm and the more discrepancies there are between what is set out in the law and what already exists in the national legal system. The diversity of national laws in the area at stake (e.g. huge discrepancies in the common law and the civil law approach) and how conscious the EU act is of this determine overall switching costs in the EU. Single MS might benefit from similarities that their laws already have to the European norm,<sup>55</sup> likewise they might benefit where they had no previous laws in a particular area. Where there is no previously existing law, at first glance there are no switching costs to be incurred. However, as soon as one realizes how different fields of law are connected to each other and that it is difficult to change traditions, one has to acknowledge that even in this situation adaptation is required and thus switching costs will have to be born.<sup>56</sup>

<sup>53</sup> This is an extension of what Fon and Parisi (2007) express when they talk about the ‘cost of coordination and harmonization of new rules within existing legal systems’ as to codifications like civil codes, 13.

<sup>54</sup> Furthermore if thinking of Union-wide laws MS might not necessarily put forward the request to have a law that fits well within the own legal system. There might be other more pressuring (possibly captured) interests.

<sup>55</sup> It is noteworthy that the two-step nature of the procedure to implement a directive gets lost if in a MS what is set out in the directive already exists. A MS can in this instance not be forced to adopt additional laws.

<sup>56</sup> This is a familiar argument from the literature dealing with ‘path dependence’ of legal systems according to which legal transplants can only be successful if adapted to the previously existing legal

In this instance freedom in how exactly to make these changes can thus reduce switching costs. If the national legal orders are heterogeneous there will always be MS incurring high and low switching costs and the overall costs thus have to be assessed. This will result in the optimal flexibility that has to be granted to national legislators. It determines in which instances uniformity can be achieved and in which instances it would be very costly.

Expressing the choices of the legislator in terms of the European main legal instruments, the following might hold: Rules, i.e. regulations, add the same law to all MS. In areas of law where there already is a lot of harmony among the MS or no pre-existing laws, regulations can work well as switching costs are minor for all. However, the more national legal systems' styles diverge from that of the new law, the more will switching costs increase due to the directly effective regulation. The use of 'standards' is thus advisable when switching costs are relevant. Impeding switching costs calls for diversity among MS which can be achieved with directives leaving the MS flexibility as to how to achieve certain end results. Where there is a high degree of harmony already among the MS regulations can work well, unless they go against what is considered to be the established harmony. The term 'gradual' can be used as to directives since national legislators can introduce a new concept to a legal system in such a way that it is successfully integrated, e.g. make necessary changes to various previous acts instead of just add. Likewise freedom might be given to the MS partly to introduce a new concept at first and at a later stage move to completion. A directive seems to be appropriate to set out such a stepwise integration.

One form that the costs of switching can take,—integrating a law that stands in contrast to the general national law,—is that of 'fragmentation costs' (e.g. Cuijpers and Koops 2008). This is a potential consequence of implementing regulations which are rigidly the same in all the MS but might lead to a high degree of fragmentation of national laws. The original harmonious legal order becomes fragmented by the European 'intruder'. Strict objectives within a directive can also lead to a similar problem, though.

As set out the distinction between directives and regulations is to some extent blurred but it shall be pointed out that some difference will always remain: With a directive a transposition of its content into national law is required (Král 2008, pp. 252). With a regulation by its nature the content is pre-defined, except for cases where national implementing measures are necessary. The task here is rather to concretize etc. Therefore with directives one gets a more national character in the implementation phase while with regulations the community character is retained. On top of this regulations may or may not require transposition measures, whereas a directive, by its nature, must require such measures.<sup>57</sup>

With very complex norms there will always be higher costs involved with both instruments, directives or regulations. The question is how high the costs of

---

Footnote 56 continued

setting in a country. Path dependency can explain inefficiencies of institutions (e.g. Heine and Kerber 2002).

<sup>57</sup> Unless that what they stipulate already exists in a MS.

legislative coordination are and how they can be reduced. The degree of harmonization set out in a norm is another crucial factor to establish how much has to be added to pre-existing laws and how drastically this has to be carried out.

The next point that particularly concerns laws spread across different, but interacting, legal systems is the question of the effects of differing degrees of uniformity on information costs.

## (2) Benefit of uniformity in terms of information costs<sup>58</sup>

When contrasting uniformity and diversity, there is a clear advantage to uniformity: aligning laws in various MS reduces information costs. It reduces the costs of finding out how laws are implemented and applied in the other MS, and this can be very beneficial for citizens, companies or judges. Again the distinction between regulations and directives shall be used as an indicator of this divide. Generally the two instruments lead to varying degrees of uniformity. A regulation in general automatically leads to the exact same law in all the MS (the aim: unification). There is thus no additional information requirement to find out how a norm is implemented at domestic level. This is true for the citizens or companies of a MS of the EU. When such a regulation is interpreted in national courts the judgments should furthermore not differ.<sup>59</sup> In order for this to work the regulation should be a rather pure type and leave no or few necessities for coordination with national legal provisions as otherwise the law in the area to be regulated would not be unified.

Directives give MS discretion to achieve the aims set out in it. The uniformity depends on how strictly these objectives are formulated and also varies with the degree of harmonization (e.g. minimum or maximum harmonization). In some cases flexibility is given to implement provisions that deviate from the original text, in others deviations are forbidden. In extreme cases a norm leaves no opportunity for MS to consider cultural, historical, commercial and legal differences (Tesauro and Russo 2008, p. 198).<sup>60</sup> MS, however, still have some freedom to decide on the form and methods to achieve the directive's objectives. The uniformity of national laws that implement directives is lower than that resulting from regulations. How much lower depends on how strict the objectives to be achieved are set out in the directive.

Thus a desired high level of uniformity requires the use of regulations if this is beneficial from the point of view of information costs. With directives the effect is less and often less clear. The stricter a directive is about the aims to be achieved the closer it would get to being likewise effective. One might for example wonder if it can be beneficial for a consumer to know what the substantive law (cooling off or prescription periods) and the procedural law (who can address which court?) for buying a certain product are like in a MS. Information costs could be reduced if this was aligned.<sup>61</sup> The case of the entrepreneur might be even more obvious: in order to

<sup>58</sup> Information costs can be defined as the costs incurred by anyone (citizens, judges, enforcement authorities, law-makers etc.) to find out what the law is like in another MS.

<sup>59</sup> Use can be made as usual of Art. 267 TFEU.

<sup>60</sup> Note: at the time of the formulation of the act these are considered, though. The same is true for directives.

<sup>61</sup> This does not preclude that other costs will render this impracticable.

establish a business in various MS unified law would simplify his life considerably. In other instances reducing information costs might be much less crucial. The freedom that is left to the MS increases the number of mistakes in the implementation phase. Variations, wanted and unwanted, increase information costs. In extreme cases only clarifications in ECJ case law, e.g. when the European Commission sues a MS for failure to fulfill an obligation, could lead to a high degree of uniformity. Due to the limited direct effect of directives, full reliance on the provisions is possible only at a far later stage than with regulations.

When giving the national law-maker freedom in how to implement a directive, there can at times be only little prior assessment of how many extra details, variations etc., a national legislator might add or which pre-existing legal documents the new law will connect to in order to integrate it.

Besides the issues mentioned in the first part (like volatility, complexity of the environment etc.) these two aspects are the new and most decisive factors for the decision as to which instrument to use. They set out the main criteria as to when uniformity or diversity can be appropriate in the EU as regards the costs incurred with both strategies. The factors established in the previous literature leave crucial distinctions unexplained. To some considerable degree the examples of directives and regulations could be used as a convincing illustrative proxy for the policy decision on uniformity versus diversity among European legal orders.

The analysis was carried out as if the decision of which legal instrument to use was purely dependent on the assessment of these costs and abstracted from the reality according to which the EU has differently wide competences in various legal fields. The established factors give guidance to the legislator as to which instrument to choose looking at EU-wide welfare considerations. The results of this paper do, even though some discretion is left to the European law-makers as to the legal instrument to choose, actually concern the moment of formulating the Treaties and granting different instruments in the ambit of different concepts of competence (exclusive, shared, supporting, none).

The assessment comes down to the trade-off between the legal reality in the EU—and in how far which type of instrument would be an intruder to a legal system—balanced with the benefits, possible long-term benefits, of unification in terms of information costs. The evaluation depends on the power that one awards to the concept of ‘path dependence’.

While this is one reasoned set of advice that is given to the legislator, in reality different motivations might rest with law-makers.

## 5 Conclusion

The central question for this research was how to coordinate law-making between the EU and the national legislator—federalism—in the ambit of uniformity and diversity of legal orders. How much leeway shall be given to the national legislator when it comes to law-making in the EU? This paper approached this topic differently to previous literature from the point of view of the rules versus standards debate. It was set out that in order to assess the procedures in the EU one

has to go beyond the established criteria in the rules versus standards debate, particularly because it deals with the interrelation of the European and the national legislator and not just a pure national context. The current set of criteria was refined and two new factors added: switching costs and the benefit of uniformity in terms of information costs. These are the decisive cost indicators for advocating uniformity or diversity.

While they are not a complete match, the instruments regulation and directive were chosen as convincing proxies to illustrate this decision on the law-making level. From the completed set of factors of the rules versus standards debate one can deduce in general in which context a legal instrument should aim at uniformity and in which a flexible approach can be warranted. This can be applied in any context where differing legal traditions are organized in a somewhat federal way and some discretion as to law-making can be left to a lower level.

The indicators that were set out can inspire considerable future research: Firstly the theory can be positively tested with a real example drawn from existing European law. There are reasons why the field enforcement of consumer laws can be a fruitful starting point. Various directives in the field of consumer law in the past were very conscious of the different enforcement traditions in the MS, that can be dominated by a strong focus on public or private law enforcement, by leaving the choice of the enforcement mechanisms to the MS.<sup>62</sup> More recently the regulation on consumer protection cooperation created a EU-wide network of national enforcement authorities with similar investigative and enforcement powers.<sup>63</sup> This meant that MS where such an authority did not exist were induced to establish one (Stuyck 2009, p. 79). This e.g. led to the Netherlands that were originally purely relying on private law enforcement setting up a Consumer Authority. There has been both, a change in the legal instrument and the approach as regards favouring uniformity and diversity in terms of enforcement traditions. By thoroughly assessing this field and others it could be illustrated in how far the reality complies with the theory and in which aspects it does not. From this one could try to come to normative conclusions and set out more clearly when which instrument should be used. A third paper could integrate this approach with the established literature on the economics of federalism and regulatory competition.

---

<sup>62</sup> See e.g. art. 11 on Enforcement in the Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149/22 of 11th June 2005. It leaves it as a choice to the MS whether to guarantee the enforcement by 'courts or administrative authorities' paying tribute to their respective public or private law enforcement traditions. Other directives leave the design of enforcement options open like: Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours or Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>63</sup> Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 364/1, 9.12.2004. See for the Dutch Consumer Authority, <http://www.consumerauthority.nl/>, as of 3rd May 2011.

**Acknowledgments** I am grateful to Michael Faure, Francesco Parisi, Willem van Boom Klaus Heine, Patrick Leyens, Morag Goodwin and an anonymous referee for very valuable comments on earlier versions of the paper. Likewise I owe thanks to the participants of the EDLE Conference “The future of Law and Economics”, Maastricht, 3–4 March 2011. I wish to thank Fred Farrant for his great help in editing my paper.

**Open Access** This article is distributed under the terms of the Creative Commons Attribution Non-commercial License which permits any noncommercial use, distribution, and reproduction in any medium, provided the original author(s) and source are credited.

## References

- Arcuri, A., & Dari-Mattiacci, G. (2010). Centralization versus decentralization as a risk-return trade-off. *Journal of Law and Economics*, 53, 359–378.
- Bast, J. (2003). On the grammar of EU law: Legal instruments, *Jean Monnet Working Paper 9/03*. Max Planck Institute for Comparative Public Law and International Law.
- Bast, J. (2010). Legal instruments and judicial protection. In A. von Bogdandy & J. Bast (Eds.), *Principles of European constitutional law* (2nd ed., pp. 345–397). Oxford, Portland: Hart Publishing and Muenchen: CH Beck oHG.
- Chalmers, D., Davies, G., & Monti, G. (2010). *European Union Law cases and materials* (2nd ed.). Cambridge: Cambridge University Press.
- Cooter, R., & Schäfer, H.-B. (2008). *The poverty of nations*. Fair fax: Mercatus Center George Mason University.
- Craig, P. (2009). The legal effect of directives: Policy, rules and exceptions, 34 *European Law Review*, 349 and University of Oxford—Legal Research Paper Series, Paper No 24/2009.
- Craig, P., & de Búrca, G. (2008). *EU law, text, cases and materials* (4th ed.). Oxford: Oxford University Press.
- Crane, D. A. (2007). Rules versus standards in antitrust adjudication, *Washington and Lee Law Review*, 64, 49–110; Cardozo Legal Studies Research Paper No. 162. Available at SSRN: <http://ssrn.com/abstract=927293>. Accessed 13 January 2011.
- Crettez, B., Deffains, B., & Deloche, R. (2009). On the optimal complexity of law and legal rules harmonization. *European Journal of Law and Economics*, 27, 129–142.
- Cuijpers, C., & Koops, B.-J. (2008). How fragmentation in European law undermines consumer protection: The case of location-based services, *European Law Review*, 33, 880–897, available at SSRN: <http://ssrn.com/abstract=1645524>. Accessed 13 January 2011.
- Cullen, H., & Charlesworth, H. (1999). Diplomacy by other means: The use of legal basis litigation as a political strategy by the European Parliament and the Member States. *Common Market Law Review*, 36, 1243–1270.
- De Búrca, G., & Scott, J. (2000). *Constitutional change in the EU: from uniformity to flexibility?*. Oxford: Hart Publishing.
- De Smets, K. (2009). Is harmonisation always effective? The implementation of the environmental liability directive. *European Energy & Environmental Law Review*, 18(1), 2–18.
- De Witte, B., Hanf, D., & Vos, E. (2001). *The many faces of differentiation in EU law*. Antwerp, Oxford, New York: Intersentia.
- Diver, C. S. (1983). The optimal precision of administrative rules. *Yale Law Journal*, 93, 65–109.
- Dougan, M. (2004). *National remedies before the european court of justice: Issues of harmonization and differentiation*. Oxford: Hart Publishing.
- Ehrlich, I., & Posner, R. A. (1974). An economic analysis of legal rulemaking. *Journal of Legal Studies*, 3, 257–286.
- Falkner, G., Trieb, O., Hartlapp, M., & Leiber, S. (2005). *Complying with Europe: EU harmonisation and soft law in the member states*. Cambridge: Cambridge University Press.
- Faure, M. G. (2008). Environmental rules versus standards for developing countries; learning from Schäfer. In T. Eger, J. Bigus, C. Ott, & G. Von Wangenheim (Eds.), *Internationalisierung des Rechts und seine ökonomische Analyse/Internationalization of the law and its Economic Analysis, Festschrift für Hans-Bernd Schäfer zum 65. Geburtstag* (pp. 735–746). Wiesbaden: Gabler.



- Faure, M., Goodwin, M., & Weber, F. (2010). Bucking the Kuznets curve: Designing effective environmental regulation in developing countries. *Virginia Journal of International Law*, 51(1), 95–156.
- Fon, V., & Parisi, F. (2007). On the optimal specificity of legal rules. *Journal of Institutional Economics*; George Mason Law & Economics Research Paper No. 04-32; *Minnesota Legal Studies Research Paper No. 07-17*. Available at SSRN: <http://ssrn.com/abstract=569401> or doi:10.2139/ssrn.569401. Accessed 13 January 2011.
- Härtl, I. (2006). *Handbuch Europäische Rechtssetzung*. Berlin: Springer.
- Heine, K., & Kerber, W. (2002). European corporate laws, regulatory competition and path dependence. *European Journal of Law and Economics*, 13, 47–71.
- Hinton, E. F. (1999). Strengthening the effectiveness of community law: direct effect, Article 5 EC, and the European Court of Justice. *International Law and Politics*, 31, 307–348.
- Hunt, J. (2010). Devolution and differentiation: regional variation in EU law. *Legal Studies*, 30, 421–441.
- Kaplow, L. (1992). Rules versus Standards: An economic analysis. *Duke Law Journal*, 42(3), 557–629.
- Kaplow, L. (1995). A model of the optimal complexity of legal rules. *Journal of Law, Economics and Organization*, 11, 150–163.
- Kaplow, L. (2000). Characteristics of rules. In: B. DeGeest, (Eds.), *Encyclopedia of law and economics*, vol. V, 502–28. Edward Elgar (also electronically published at <http://encyclo.findlaw.com>).
- Kieninger, E.-M. (2002). *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt*. Tübingen: Mohr Siebeck.
- Knill, C. (1998). Implementing European policies: The impact of national administrative traditions. *Journal of Public Policy*, 18(1), 1–28.
- Koopmans, Th. (1995) Regulations, directives, measures. In: O Due, M. Lutter, & J. Schwarze (Eds.), *Festschrift für Ulrich Everling zum 70. Geburtstag* (p. 695).
- Korobkin, R. B. (2000). Behavioral analysis and legal form: Rules vs. standards revisited. *Oregon Law Review*, 79, 23–60.
- Král, R. (2008). National normative implementation of EC Regulations: An exceptional or rather common matter? *European Law Review*, 33, 243–256.
- Legrand, P. (1997). The impossibility of 'legal transplants'. *Maastricht Journal of European and Comparative Law*, 4, 111–124.
- Legrand, P., & Munday, R. (2003). *Comparative legal studies: Traditions and transition*. Cambridge: Cambridge University Press.
- Loos, M.B.M. (2006). The influence of European consumer law on general contract law and the need for spontaneous harmonisation—On the disturbance and reconstruction of the coherence of national contract law and consumer law under the influence of European law, Centre for the Study of European Contract Law, *Working Paper Series No. 2006/02*.
- Ogus, A. (2002). The economic basis of legal culture: Networks and monopolization. *Oxford journal of legal studies*, 22(3), 419–434.
- Ogus, A. (2008). Regulatory arrangements in developing countries. In T. Eger, J. Bigus, C. Ott, & G. Von Wangenheim (Eds.), *Internationalisierung des Rechts und seine ökonomische Analyse/Internationalization of the law and its Economic Analysis, Festschrift für Hans-Bernd Schäfer zum 65. Geburtstag* (pp. 721–734). Gabler: Wiesbaden.
- Ott, C., & Schäfer, H.-B. (2002). Die Vereinheitlichung des europäischen Vertragsrechts. Ökonomische Notwendigkeit oder akademisches Interesse? In C. Ott & H.-B. Schäfer (Eds.), *Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen* (pp. 203–236). Tübingen: Mohr Siebeck.
- Parisi, F. (2007). Harmonization of EU private law: An economic analysis, *University of Minnesota Law School, Legal Studies Research Paper Series*, Paper No. 07–41.
- Piris, J.-C. (2010). *The Lisbon treaty: A legal and political analysis*. Cambridge: Cambridge University Press.
- Posner, R. A. (1998a). *Economic analysis of law* (5th ed.). New York: Aspen Law and Business.
- Posner, R. A. (1998b). Creating a legal framework for economic development. *World Bank Research Observer*, 13(1), 1–13.
- Rehbinder, E., & Stewart, R. (1985). *Environmental protection policy. Integration through law*. Berlin: De Gruyter.
- Schäfer, H.-B. (2002). Legal rules and standards, *German Law and Economics Working Paper Series 2/2002*, available at SSRN.

- Schäfer, H.-B. (2006). Rules versus standards in rich and poor countries: Precise legal norms as substitutes for human capital in low-income countries. *The University of Chicago Supreme Court Economic Review*, pp. 113–134.
- Shavell, S. (1984). Liability for harm versus regulation of safety. *Journal of Legal Studies*, 13, 357–374.
- Siedentopf, H., & Hauschild, C. (1990). Europäische Integration und die öffentlichen Verwaltungen der Mitgliedstaaten. *Die öffentliche Verwaltung*, 43(11), 445–455.
- Snyder, F. (1993). The effectiveness of European Community Law: Institutions, processes, tools and techniques. *The Modern Law Review Limited*, 56(1), 19–54.
- Stigler, G. J. (1957). The Tenable Range of Functions of Local Government in Joint Economic Committee, U.S. Congress, federal expenditure policy for economic growth and stability. Washington, D.C.: U.S. Government Printing Office, pp. 213–219.
- Stuyck, J. (2009). Public and private enforcement in consumer protection: general comparison EU-USA. In F. Cafaggi & H.-W. Micklitz (Eds.), *New frontiers of consumer protection the interplay between private and public enforcement* (pp. 63–90). Antwerp, Oxford, Portland: Intersentia.
- Tesaro, C., & Russo, F. (2008). Unfair commercial practices and misleading and comparative advertising: an analysis of the harmonization of EU legislation in view of the Italian implementation of the Rules. *Competition Policy International*, 4(1), 192–222.
- Thomson, R. (2009). Same effects in different worlds: the transposition of EU directives. *Journal of European Public Policy*, 16(1), 1–18.
- Tiebout, C. M. (1956). A pure theory of local expenditures. *Journal of Political Economy*, 64, 416–433.
- Tuyschaever, F. (1999). *Differentiation in European Union Law*. Oxford: Hart Publishing.
- Twigg-Flesner, C. & Metcalfe, D. (2009). The proposed consumer rights directive—less haste, more thought?, *European Review of Contract Law*, available at SSRN: <http://ssrn.com/abstract=134578>. Accessed 13 January 2011.
- Van den Bergh, R. (2002a). Regulatory competition or harmonization of laws—guidelines for the European regulator. In A. Marciano & J.-M. Josselin (Eds.), *The economics of harmonizing law* (pp. 27–49). Cheltenham/UK: Edward Elgar.
- Van den Bergh, R. (2002b). Forced harmonisation of contract law in Europe, communication from the commission on European contract law. In S. Grundmann & J. Stuyck (Eds.), *An academic greenpaper on European contract law* (pp. 249–268). The Hague, London, New York: Kluwer.
- Weatherill, S. (2004). Why object to the harmonization of private law by the EC? *European Review of Private Law*, 12, 633–660.
- Wegner, G. (1997). Economic policy from an evolutionary perspective: A new approach. *Journal of Institutional and Theoretical Economics*, 153(3), 485–509.