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Argumentative patterns in the European Union's directives

An effective tool to foster compliance by the Member States?

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This paper provides an account of the arguments advanced by the European Union (EU) legislator in the preamble of directives adopted for harmonization in the internal market, and assesses them as to their potential at convincing the Member States to implement the directive at issue. We show what directives should argue for and how they do so in practice, by focussing in particular on Directive 2011/83/EU on consumer rights. Furthermore, this contribution moves beyond a purely academic discussion by linking the theoretical-normative framework advanced to the Court of Justice of the European Union's approach to assessing the preambles of EU directives in the context of the 'check' on the duty to state reasons under Article 296 of the Treaty for the Funcioning of the European Union (TFEU). Our analysis unveils a legislative practice in which the obligation to give reasons is not discharged adequately from an argumentative perspective, and which remains generally unsanctioned due to the rather light and flexible test used by CJEU under Article 296 TFEU.

Keywords: argumentative patterns, compliance, duty to state reasons, EU directive, harmonization

1. Background, motivation and aim

The European Union's directives are important legislative instruments used to attain the Union's objective to adopt a common legal framework in various policy areas. Directives are binding with regard to the end to be achieved, but they leave discretion to the Member States as to how they are to be implemented. Unlike comparable legal instruments, such as EU regulations, which are suitable

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harmonization tools because they are binding in their entirety and directly applicable in all Member States, EU directives represent an acceptable compromise between the needs of EU integration and the diversity characterizing the Member States' legal systems (cf. Craig and de Búrca, 2015: 106).

In the last decades it has become almost self-evident that the measures and policies enacted in the EU directives are not always (fully) applied or are applied incorrectly by the Member States. A reliable indicator in this respect are the numerous infringement proceedings brought by the European Commission against the Member States regarding the non-implementation and incorrect implementation of directives (see for instance Report from the Commission. Monitoring the application of Union law, 2014 Annual Report – COM(2015) 329 final). This has led to numerous hot debates on the implementation of these EU legal acts in which proposals for improvement of the current situation find broad resonance, and alternative claims are often advanced. Compliance issues have become a common research topic both for the legal scholars and the political scientists (see for example, Börzel 2001; Falkner et. al 2005; Mastenbroek 2007; Nicolaides and Oberg 2006; Versluis 2004; Zhelyazkova 2012).

The solutions proposed in order to counter the implementation problems of this important legal instrument, whether legal, political, administrative or economic, are not fully satisfactory, sometimes going as far as suggesting that the EU should abandon directives altogether (Nicolaides and Oberg 2006: 14). The problem is that scholars addressing the implementation issue sought the solution with the Member States and how they can be determined to comply. However, alternative scenarios potentially contributing to solving the compliance problem have not been examined comprehensively. One issue unexplored for the time being is whether and to what extent the content of the directives themselves could be improved to foster or increase compliance by the Member States.

A close look at EU directives, particularly the preamble,[1] immediately reveals their argumentative character.[2] The EU legislator typically advances a standpoint in which a course of action is prescribed by pointing at its desirable consequences (e.g. social impact, added value, effectiveness). In line with Article 296 TFEU (Treaty on the Functioning of the European Union) providing that 'Legal acts shall state the reasons on which they are based […],' the EU legislator points at the legal

1. The term 'preamble' is used to refer to the first part of the directives preceding the main (prescriptive) part of the legal text, ending before '[the European Parliament and the Council of the European Union] have adopted this directive.' The term itself is not used in the wording of EU directives.

2. See Komárek (2015, 29) who underlines that 'in the context of the EU, all institutions issuing legal acts have the duty to give reasons.'

basis of the directive and argues for compliance with the principles of subsidiarity and proportionality for a proper functioning of the EU. This is remarkable if one compares the situation at national level, 'since many national legal systems do not impose an obligation to furnish reasons for legislative acts, or do so in limited circumstances' (Craig and de Búrca 2015: 548).

EU directives undergo a long process of preparation by the Commission, are debated and frequently amended in the European Parliament and are negotiated once or twice in the respective Council of (national) Ministers. Nevertheless, although national representatives at various levels had their say on the contents and arguments of EU directives, the case law of the Court of Justice of the European Union (see Section 4) shows that Member States are not always fully satisfied with the final results and often challenge directives invoking the breach of duty to state reasons.

Because arguments play seemingly such an integral part of this legal instrument and are also relevant for its legality, a robust and precise argumentative analysis seems a precondition for an appropriate understanding and critical assessment of the quality of EU directives. The working assumption behind this analysis is that the argumentation in the preamble of the Union's directives serves to convince the addressees (i.e. Member States) of the legality and desirability of these legal instruments with a view to induce a degree of compliance as high as possible. This assumption is based on the empirical observation that typically EU directives comprise a recommendation to follow a certain course of action by pointing at the necessity and added value of doing so. Such a way of arguing can only be explained as an attempt at convincing a critical opponent (in this case the Member States as the main addresses of the measure) to act in compliance with the legal instrument envisaged.

It is the goal of this paper to enter this unexplored area and provide a systematic analysis and evaluation of the argumentation patterns employed in the preamble of EU directives.[3] The main aim is to identify, analyze and evaluate the various combinations of arguments used by the EU legislator in the preamble of the directives with a view to secure implementation by the Member States. Our

3. Majone (1989) has emphasized the fundamental role played by arguments in policy-making. He argued that in all stages of the policy process, use is made of arguments for a definition and conceptual framing of the issues, to make such issues understandable to the public and to motivate policy responses. This idea has inspired Fischer and Forester (1993) and Fischer and Gottweis (2012) in their account of the 'argumentative turn' in policymaking, whereby the focus lies on the idea that 'public policy, constructed through language, is the product of argumentation' (Fischer and Gottweis 2012, 7). While acknowledging the undeniable advantage of examining the policymaking *process* for its argumentative value in the way the aforementioned publications do, this paper concentrates on argumentation as the *product* of policymaking.

approach will be to propose an argumantative framework that is both theoretically justified and empirically supported. To this end, legal and political insights, explaining the legal background and the political reality, will be integrated into the pragma-dialectical theory of argumentation in context (van Eemeren 2010, 2016), explaining the role and effectiveness of argumentative moves. This approach will result into (a) a systematic overview of the argumentative patterns at issue, and (b) an assessment of these patterns as persuasive tools for guaranteeing implementation by the Member States. Directive 2011/83/EU on consumer rights will serve as a case in point.

The added value of this paper consists in providing for the first time a mapping of the argumentative patterns used by the EU legislator in EU directives, in particular the directives adopted in the internal market area. Whereas the need to provide reasons in EU directives as legislative instruments has been emphasized in the scholarly literature in particular linked to the application of Article 296 TFEU (Falkner et al. 2005, Prechal 2005, Beck 2012, Komárek 2015), an analytical account of the way arguments are used in the preambles of these instruments is yet to be provided. A cornerstone finding is that it enables preliminary conclusions as to the potential persuasive value of the arguments at issue by accounting at the same time for the legal-political context surrounding the adoption and implementation of these legislative instruments. Moreover, the paper connects theory to practise by explaining the Court of Justice of the European Union (CJEU)'s approach to assessing the arguments used in the preambles of EU directives in the context of the 'check' on the duty to state reasons incumbent upon the EU legislator under Article 296 TFEU.

2. EU directives: What should they argue for?

One of the basic principles for the functioning of the European Union rests on the idea that Members States transfer part of their sovereignty to a common institutional framework that allows for common policies (Thomann 2015: 1386). In exercising the Union's powers, the EU institutions enact, according to their competences defined by the Founding Treaties, various legal instruments such as regulations, directives, decisions, recommendations and opinions (see Article 288 TFEU).

EU directives form an important part of this framework by delegating some decision-making processes to the transposing Member States. One particular characteristic of EU directives is that they define the results to be achieved by the Member States (for instance, the production, distribution and use of medicinal products for public health), but the Member States are free to choose the form and means to achieve this result in view of the peculiarities of their own society, legal

system, economy, and politics (cf. Dimitrova and Rhinard 2005). This is specified concisely in Article 288 TFEU which states that 'A directive shall be binding as to the result to be achieved upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

In principle, EU directives are not directly applicable, but need to be enshrined into national law.[4] In order to achieve the EU's objectives, these legislative acts require timely and proper transposition and implementation. This means that these acts need to be incorporated into national law in order to make the EU's objectives and requirements directly applicable in the Members States, and they need to be applied at national and subnational level. Put simply, these legislative acts need to be complied with by the Member States (cf. Falkner et al. 2005: 12–13).

Arguably, the transposition and implementation of the EU directives implies a 'confrontation' between two political systems. On the one hand, there are the Member States which are not always equally successful in 'uploading' their own preferences at EU level (Börzel 2002). On the other hand, there are various EU-level decision-making institutions (European Parliament, European Council, European Commission) which try to impose their own objectives to ensure policy coherence among the Member States. More often than not, as legal and political scholars point out, incorrect, late or non-compliance with EU directives arises as a result of the confrontation between the national and the EU level. A 'transposition deficit' seems to be often at issue even in the case of Member States whose interests seem not to be neglected in policy formulation (Falkner et al. 2004, Falkner et al. 2005).

Various causal factors have been identified for the problematic transposition of EU directives, generally grouped under three categories: institutional[5] (related to the EU and national institutions involved in the policy-making process),

4. The Court of Justice of the European Union (CJEU) has on occasion accepted that EU directives may have direct effect under certain conditions. See, for instance, the CJEU judgment in the landmark Case 41/74 *van Duyn v Home Office* [1974] ECR 1337.

5. Among the most prominent institutional factors are the European Commission and the European Parliament (EP) on the one hand, and the Council of Ministers on the other hand, reflecting different institutional logics. The European Commission and the EP promote expansion of EU competence as well as some specific policy objectives which often go against the Council's aims and interests. The Council of Ministers aims to resolve through the representatives of the Member States common problems while maintaining a relative autonomy. Also, national politico-administrative structures affect transposition because of bureaucracy, different interests, complicated structures (for a detailed account of such institutional factors, see Dimitrakopoulos 2001; 445–449; Falkner et al. 2004, 2–3; Thomann 2015, 1369; Versluis 2004, 2).

political[6] (regarding the interests between competing powers) and substantive[7] (concerning the nature of the objective pursued) (Dimitrakopoulos 2001: 445; Mastenbroek 2005: 1105–1107; Steunenberg and Rhinard 2010: 496). It is outside the scope of this paper to delve closely into the specific factors affecting compliance. What is most relevant for the purpose of this paper is that by now, despite identifying many potential and real causes, it has become clear that the effective implementation of EU directives remains an issue that still requires a solution. It goes without saying that, on the one hand, Member States should try to improve the transposition and implementation of EU directives by attempting to minimize institutional, political and substantive factors possibly affecting the implementation process. Moreover, there are enforcement procedures in place whereby full compliance with EU law is monitored and secured, and non-compliance is systematically sanctioned by national and supranational courts (cf. Prechal 2005). On the other hand, the EU legislator should by now be well aware of the potential transposition issues and consequently should also make efforts to foster compliance on the side of the Member States. In what follows, we will concentrate on the EU legislator's approach in this direction.

A close look at the preamble of EU directives reveals that the EU legislator already at this stage tries to counter potential non- and miscompliance as well as possible litigation by the Member States. Typically, a course of action is proposed (such as rules for the production, distribution and use of medicinal products) by pointing at its desirable consequences (for example, it has an effective impact on public health). By doing so, the EU legislator advances a prescriptive standpoint which is subsequently supported by a number of arguments aimed at demonstrating maximum effectiveness of the proposed course of action.

Three fundamental legal principles govern decision-making at EU level including legislative acts such as directives according to Article 5 TEU. First, the principle of conferral, according to which the EU is a union of Member States and all its competences are voluntarily conferred upon it by its Member States. EU directives can only propose a course of action that has been explicitly agreed upon in the EU Founding Treaties by all Member States. In legal terms, this entails that EU directives may be adopted '(…) only when there is a legal basis for action provided in the Treaties' (Craig and de Burca 2015: 322). Choosing one legal basis or another has

6. One of the important political factors is the choice of national legislative instruments (individual ministerial styles) for transposing the directives (see Dimitrakopoulos 2001, 449–452 Versluis 2004, 3).

7. Substantive factors include the introduction of new concepts alien to the legislation of the Member States, and the density and content of existing national legislation (Dimitrakopoulos 2001, 452).

consequences regarding the scope and limits of the legislative instrument, as well as the decision-making procedure for its adoption. In this context, arguing convincingly that the directive is based on the correct legal basis is essential, as a finding to the contrary by the Court of Justice of the European Union (CJEU) can lead to the annulment of the directive (see for instance Tobacco Advertising case, Case C-376/98 Germany v European Parliament and the Council [2000] ECR I-8419).

Second, the principle of subsidiarity defines the circumstances in which it is preferable for action to be taken by the Union, rather than the Member States. In areas in which the EU does not have exclusive competence, this principle seeks to protect the capacity of the Member States to take decisions and authorizes intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States, but can better be achieved at Union level (Article 5(3)–(4) TEU).[8] Under Article 5(3) TEU there are three preconditions for intervention by Union institutions in accordance with the principle of subsidiarity: (a) non-exclusive competence (the area concerned does not fall within the Union's exclusive competence; (b) necessity (the objectives of the proposed action cannot be sufficiently achieved by the Member States and the proposed action therefore needs to be carried out); (c) added value (the action can by reason of its scale or effects be implemented more successfully by the Union).

Third, the principle of proportionality specifies that the content and form of the proposed action does not exceed what is necessary to achieve the objectives set by the Treaties (Article 5(4) TEU). Craig and de Búrca (2015: 551) explain that normally there are three stages in a proportionality inquiry: the suitability of the measure for achieving the desired act, the necessity to achieve the desired end, and the scope of the burden imposed on the individual in relation to the objective to be achieved (proportionality *stricto sensu*). This principle is most problematic at EU level and its application in the strict sense as a balancing act can rarely if ever be checked in practice (cf. Sauter 2013). It requires EU institutions to consult widely on their legislative proposals, including taking into account the views of the national parliaments of the Member States, and making sure that the proposed act is not manifestly disproportionate in terms of a costs versus benefits balance (cf. Sauter 2013: 9).

The existence of these principles imposes on the EU an obligation to justify its legislative instruments, including EU directives, against the aforementioned principles (cf. Mastenbroek 2007: 22). This implies that, as far as the argumentation in the preamble of the directive is concerned, it should pertain at least to these fundamental principles.

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8. The principle of subsidiarity ensures moreover that the exercise of powers is as close to the citizen as possible.

3. EU directives in the internal market area: What do they argue for?

On the basis of the actual wording and contents of EU directives, we will further distinguish the characteristic argumentative features[9] of the preamble of the EU directives. These characteristics, derived by examining numerous directives in the internal market area,[10] concern the standpoint at issue, as well as the arguments advanced in this legislative instrument. For the sake of clarity, these features will be outlined by illustrating them when deemed necessary with concrete examples from Directive 2011/83/EU on consumer rights intended to attain a high level of consumer protection.[11] This directive is a typical instance of a directive adopted for harmonization in the internal market area.

First, in comparison with other legislative instruments, directives always contain a positive prescription (*Action X should be carried out*)[12] and they demand that Member States adopt specified measures in order to comply with EU

9. For more general characteristics of EU directives from a legal and political science perspective, see for instance Mastenbroek 2007, 17–18.

10. Such directives include, for instance, Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L 311/67, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36, Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L 165/63, Directive 2014/90/EU of the European Parliament and of the Council of 23 July 2014 on marine equipment and repealing Council Directive 96/98/EC [2014] OJ L 257/146, Directive 2015/2366/EU of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337/35.

11. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64.

12. This prescriptive standpoint can also be formulated as *Goal G needs to achieved*. Whatever the formulation, the prescriptive standpoint entails the evaluative proposition that 'Directive D is effective.' The rationale of this reconstruction is based on insights from speech act theory according to which a recommendation for a course of action presupposes that the speaker making the recommendation is committed, among others, to the belief that the recommended course of action is the optimal solution to an existing or potential problem and therefore desirable to be carried out (see Searle and Vanderveken [1985] 2009, 181).

requirements.[13] In all cases, domestic change is triggered by prescribing specific institutional requirements with which Member States must comply (cf. Knill and Lehmkuhl 2002: 257).

Second, the actual state of affairs is suggested to be (likely) problematic, which calls for the implementation of the proposed directive. This implies 'replacing existing domestic regulatory arrangements' (Knill and Lehmkuhl 2002: 258), which in turn 're-shape and re-form the existing domestic provisions' (cf. Scharpf 1999). Recitals (5) and (6) of the Preamble of Directive 2011/83/EU point, for example, at the necessity of achieving 'a high level of consumer protection and a better functioning of the business-to-consumer internal market', as well as at 'certain disparities [which] create significant internal market barriers affecting traders and consumers.' By making such remarks, it is implicated that these aspects are problematic and therefore require a solution.

Third, it is suggested that the EU directive in question will remove the problem, or that it is a fundamental step towards solving the problem later. Directives are not just legislative acts which simply weaken the impact and extent of the problem while a solution is still being sought, but they offer the best solution to the existing problem. A good illustration is provided by Recital (2) of the Preamble of Directive 2011/83/EU:

> This Directive should therefore lay down standard rules for the common aspects of distance and off-premises contracts, moving away from the minimum harmonisation approach in the former Directives whilst allowing Member States to maintain or adopt national rules in relation to certain aspects.

Fourth, and quite importantly, the EU directives central to our investigation boil down to creating harmonization at EU level. As often underlined, by their own nature, 'directives are particularly useful when their aim is to harmonize the laws within a certain area' (Craig and de Búrca 2015: 108), implying that Member States are obliged to do justice to a certain Community interest related to the functioning of the internal market (Prechal 2005). In illustrating this point, Recital (7) of the Preamble of Directive 2011/83/EU underlines the envisaged harmonization, proposing a 'full harmonization of some key regulatory aspects.'

Fifth, the EU directive as a legislative instrument needs to concern a substantial change in the actual state of affairs, such as the free movement of goods and services in the internal market, and not mere minor changes for which simpler

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13. Knill and Lehmkuhl (2002, 257) mention that, in addition to the prescriptive approach, it is also possible for European policies to attempt to change domestic opportunity structures and to change domestic beliefs and expectations. The latter are considered by these scholars as the weakest form of European policy-making.

instruments, such as EU implementing acts could be made available. Usually, it is shown that a substantial change is required because there is a lack of proper regulation or even a regulation gap which needs to be removed in order to ensure the appropriate functioning of the EU.

Finally, the precise means and methods to achieve the action prescribed in the directives are always left to the competent national authorities. General suggestions for attaining a certain objective are sometimes made by pointing at what needs to be avoided while trying to attain the envisaged goal. For instance, Recitals (14)–(18) of the Preamble of Directive 2011/83/EU give a detailed account of the areas not to be covered by the directive (such as contract law aspects and language requirements).

The main argumentative features just outlined suggest a prototypical argumentative pattern of the directives in the internal market area that can be represented in a structure of standpoints and arguments. In this representation, based on the pragma-dialectical guidelines for the analysis of argumentative structures (van Eemeren 2010), the standpoint is the first proposition (represented with number 1) and all the other propositions stand for arguments (notated with 1.1). In order to show that the arguments are connected to each other in a coordinative structure (i.e. there is a combination of arguments offering support to the standpoint, rather than each argument independently supporting the standpoint), thus strengthening each other, a letter is added to each argument numbered in the same way (1.1a, 1.1b, etc.). The arguments in brackets are implicit arguments making clear the connection between the arguments and the standpoint (such as a causal connection):

1. Action X proposed in this directive should be carried out by the Member States
1.1a There is a problem P at European level that requires a solution
1.1b Carrying out action X helps to solve the existing problem P at European level
(1.1a-b) In principle, if actions of type X lead to solving problem P at European level, then those actions should be carried out
1.1a1a There are disparities between certain national provisions
1.1a1b Such disparities directly affect the functioning of the internal market
1.1b1a It helps ensure legislative coherence and harmonization among Member States
1.1b1b This is absolutely necessary for the proper functioning of the EU
(1.1b1a-b) In principle, if carrying out actions of type X ensures legislative coherence and harmonization among Member States, and this is absolutely necessary for the proper functioning of the EU, then that action needs to be taken

1.1b1a1a Action X is effective
1.1b1a1a1a It removes the problem completely
1.1b1a1a1b Removing the problem is desirable
(1.1b1a1a1a -b) In principle, if actions of type X remove a problem completely, and removing the problem is desirable, then those actions should be carried out

One particular argument in this structure requires further remarks. The main prescriptive standpoint demanding action on the part of the Member States is supported by a proposition which points at the existence of a problem at European level. In all cases, the existing disparities between national provisions are the cause of a substantive problem for the internal market requiring a solution (for instance, related to consumer rights). Remarkably, instead of arguing why the existence of different rules at national level (usually referred to as 'disparities') does not and cannot solve the substantive problem, the EU legislator simply points at the existing disparities as a problem which can only be solved at European level by prescribing common standards. In this sense, the principle of subsidiarity seems to be ignored by the EU legislator: it should show that the directive is necessary because the action cannot be sufficiently achieved by the Member States, but can better be achieved at Union level, but instead it simply mentions that the existence of different rules at national level is inherently problematic. The legislator simply refers to the issue of harmonization between Member States as the only panacea for a proper functioning of the EU. In argumentative terms, this can only be evaluated as the fallacy of evading the burden of proof (van Eemeren and Grootendorst 1992: 117–118): the EU legislator should justify the opinion expressed in the prescriptive standpoint as imposed by the principle of subsidiarity, but it fails short of doing so. The burden of proof, incurred by advancing a standpoint, is not adequately discharged because arguments are not provided for the prescribed action.

3.1 Arguing for harmonization in Directive 2011/83/EU on consumer rights

As explained in Section 2, the EU legislator should argue for the legal basis of the legislative instrument, and the principles of subsidiarity and proportionality. Recital (65) of the Preamble of Directive 2011/83/EU refers to the principles of subsidiarity and proportionality as follows:

> Since the objective of this Directive, namely, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty

> on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

It is noticeable in this case that the EU legislator refers explicitly to the principles of subsidiarity and proportionality, but strikingly enough this amounts to a mere confirmation that the legislator acts as imposed upon him by the Treaty on European Union. The EU legislator does not give further reasons why acting at EU level is most relevant in order to meet the objectives set by the Treaties (principle of subsidiarity) and why the content and form of the directive does not exceed what is necessary to achieve the objectives set by the Treaties (principle of proportionality). This way of acting seems to be at odds with 'the duty to give reasons' as specified in Article 296 TFEU. As Craig and de Búrca (2015: 548) convincingly explain by distilling the CJEU case law referring to the content of this obligation (see Section 4 for a more detailed discussion on this issue), the duty to give reasons must show in a clear and unequivocal manner the reasoning of the author of the act, thereby enabling the persons concerned to ascertain the reasons for it, so that they can defend their rights and ascertain whether or not the measure is well founded, and quite importantly, also enable the Court to exercise its power of review.

This remark is in line with the idea that 'from the perspective of the decision-maker, an obligation to give reasons helps to ensure that the rationale of the action has been thought through' (Craig and de Búrca 2015: 548). While we agree with Shapiro (1992: 180) that 'a decision-maker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision', it remains an open question in the case of Directive 2011/83/EU how one can judge the rationale of the directive in question in the absence of reasons arguing for the principles of subsidiarity and proportionality. Indeed, Member States have participated in the decision-making process, and should be aware of the reasons behind the directive, but even then a formal statement of reasons is hardly sufficient if one makes recourse to the directive. This way of arguing amounts again to an evasion of the burden of proof: potentially critical questions regarding the principles of subsidiarity and proportionality are not answered or are insufficiently answered.

In addition to arguing for the legal principles just explained, the EU legislator is also expected to offer sufficient support for the idea regarding harmonization. Since directives are particularly suitable legislative instruments aimed at achieving a high degree of harmonization at European level, the issue of harmonization occupies a central place in their argumentation. This is particularly relevant for convincingly supporting the choice of the correct legal basis allowing for harmonization (in the case of Directive 2011/83/EU the standard legal basis for

harmonization – i.e. Article 114 TFEU – had been used) in the absence of which the directive may be annulled. On this point, Recitals (2)–(5) of the Preamble insist on the fact that Article 114 TFEU can be used for adopting common measures in the internal market aiming at ensuring a high level of consumer protection, and that the proposed harmonization measures meet these objectives. An additional argument is that the application of previous legislative instruments (allowing only for minimum harmonization) resulted in gaps and inconsistencies which will be alleviated by the newly introduced harmonization rules (see in particular Recital (2) of the Preamble).

Moreover, questions from the Member States are likely to arise as to the necessity and added value of ensuring harmonization and subsequently, the EU legislator should plead for ensuring compliance with the directive because in this way a proper harmonization among Member States is achieved. Recitals (6) and (7) of the Preamble of Directive 2011/83/EU are particularly relevant here:

(6) Certain disparities create significant internal market barriers affecting traders and consumers. Those disparities increase compliance costs to traders wishing to engage in the cross-border sale of goods or provision of services. Disproportionate fragmentation also undermines consumer confidence in the internal market.
(7) Full harmonisation of some key regulatory aspects should considerably increase legal certainty for both consumers and traders. Both consumers and traders should be able to rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Union. The effect of such harmonisation should be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area. Those barriers can only be eliminated by establishing uniform rules at Union level. Furthermore consumers should enjoy a high common level of protection across the Union.

The EU legislator's argumentation in these recitals can be reconstructed as represented below. The argumentation supports a prescriptive standpoint (1) reconstructed on the basis of Article 28 of the Directive regarding transposition stating that 'Member States shall adopt and publish, by 13 December 2013, the laws, regulations and administrative provisions necessary to comply with this Directive.'

1. Member States should adopt and publish the laws, regulations and administrative provisions necessary to comply with this directive
1.1a At the moment Member States apply different standards as to the relationship consumer-trader
1.1b Adopting uniform rules helps to solve this issue

1.1a1a There are disparities between national provisions affecting traders and consumers
1.1a1b Such disparities create significant internal market barriers
1.1a1b1a The disparities increase compliance costs to traders wishing to engage in the cross-border sale of goods or provision of services
1.1a1b1b Consumer confidence in the internal market is undermined
1.1b1a Full harmonisation of some key regulatory aspects considerably increases legal certainty for both consumers and traders
1.1b11a A single regulatory framework ensures clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Union
1.1b1b Consumers enjoy a high common level of protection across the Union

In this argumentation, the 'duty to give reasons' under Article 296 TFEU seems again to be evaded, this time because insufficient argumentation is at issue. The EU legislator emphasizes in Recital (6) the disparities in the internal market creating significant internal market barriers affecting traders and consumers, as well as compliance costs and consumer confidence. Noticeable is that a choice is made to refer to 'certain' disparities, rather than to 'all', thus reducing the scope of the standpoint which in this way becomes easier to defend. But a question might be raised as to whether compliance with the Directive is indeed a suitable solution to diminish the problems and hence, whether achieving the desired end imposes the directive on consumer rights. This question is the more relevant in this context as earlier directives on consumer rights already lay down a number of contractual rights for consumers (Directive 85/577/EEC[14] and Directive 97/7/EC),[15] and this directive is envisaged as an effective replacement of the earlier legislative acts.

In Recital (7) the tone changes. When it comes to the results to be attained, the legislator refers to 'full' harmonization in order to 'considerably' increase legal 'certainty', as well as to 'clearly defined' legal concepts, the possible 'elimination' the legal barriers, and a 'high' level of protection. A suggestion is made that by complying with this directive, fundamental results can be achieved to the benefit of the consumer, and also that things are evident and crystal clear and do not need to be proved. It is presupposed that evidence of the envisaged results is known to all Member States. Once more, the burden of proof is strategically evaded.

14. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L 372/31.

15. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L 144/19.

Nonetheless, the EU legislator cannot claim with absolute certainty that these results will be achieved. Therefore, a choice is made to refer cautiously to something which will probably be the case but no guarantee is offered: 'full harmonization *should* considerably increase', 'consumers and traders *should* be able', 'the effect of such harmonization *should* be to eliminate the barriers stemming from the fragmentation of the rules'. But when it comes to the actual elimination things are presented with more certainty, as if only one option exists, namely 'those barriers *can* only be eliminated by establishing uniform rules'. This way of arguing suggests that there is no better alternative than achieving the harmonization proclaimed in this directive when in fact there might be other options available. This might also be seen as a strategic move aimed at persuasively supporting the choice of the legal basis allowing for harmonising measures by this directive (i.e. Article 114 TFEU). A suggestion is made that it is certain that harmonization by means of this directive is the best and only solution to some problem (internal market barriers), whereas other solutions that might also be available are not given any consideration here.

4. Assessment of the reasons in the preamble of the EU Directives by the CJEU

The Court of Justice of the European Union (CJEU) had at times reviewed the reasons included by the EU legislator in the preamble of directives pertaining mainly to the choice of legal basis, subsidiarity and proportionality in particular in the context of assessing whether these legislative instruments comply with the duty to state reasons under Article 296 TFEU[16] (see for instance the seminal Case C-84/94 *UK v Council*,[17] Case C-413/04 *Parliament v Council*,[18] and Case C-460/05 *Poland v Parliament and Council*.[19] In such cases, the Court states generally that under Article 296 TFEU Union's legal acts need to show 'clearly and unequivocally' the reasoning upon which that act is based (Case C-84/94 *UK v Council*, para 74; Case C-413/04 *Parliament v Council*, para. 81). Moreover the Court emphasises that such reasoning fulfils a double function under Article 296 TFEU: (1) to enable the

16. A breach of the duty to state reasons under Article 296 TFEU represents an 'infringement of an essential procedural requirement' according to Article 263 TFEU entailing the annulment of the respective legal act.

17. Case C-84/94 *UK v Council* [1996] ECR I-5755.

18. Case C-413/04 *Parliament v Council* [2006] ECR I-11221.

19. Case C-460/05 *Poland v Parliament and Council* [2007] ECR I-102.

persons concerned (normally the addressees of the legal act) to determine the reasons of the measure and (2) to enable judicial review by the Court. While the previous point suggests quite high standards being applied to the statement of reasons in the preambles of EU acts, the Court takes immediately a few steps back. First, by pointing out that the standards applicable to the statement of reasons may vary depending on the nature of the legal act (Case C-413/04 *Parliament v Council*, para. 81). Second, by indicating that an assessment of the statement of reasons against Article 296 TFEU entails looking at the wording and context of the measure, including the relevant legal framework (Case C-413/04 *Parliament v Council*, para. 81). Third, by stating that the duty to show clearly and unequivocally the reasoning behind the act does not entail going into every relevant point of fact and law (Case C-84/94 *UK v Council*, para 74). Such an approach results in a flexible 'statement of reasons' test in the application of which the Court enjoys a lot of place for manoeuvring based on a case-by-case assessment of each legal act under consideration. Regarding specifically the EU directives as legislative instruments, a relevant factor to consider is the wide discretion that CJEU recognises to the EU legislator when it comes to the adoption of legislative acts (Case C-84/94 *UK v Council*, para 58; see also Case C-176/09 *Luxembourg v Parliament and Council*, para. 62).[20] This translates into limited judicial review by CJEU over EU directives as legislative acts, this being reflected arguably also in the assessment in light of Article 296 TFEU of the reasons included in the preambles of such instruments.

In the application of this test, the Court pointed out that where a contested measure clearly discloses the essential objective pursued by the EU legislator, it is not necessary to provide specific reasons for each of the technical choices made by it (Case C-84/94 *UK v Council*, para 79). In this context it was sufficient that the preamble of the directive clearly showed that the EU legislator considered that harmonisation was necessary, no further demonstration being needed in the Court's view with regard to the EU intervention (Case C-84/94 *UK v Council*, paras. 47 and 81). This suggests rather low standards of review at least as regards legislative acts taking the form of directives. Following this line, in Case C-460/05 *Poland v Parliament and the Council*, the Court ruled that the lack of reasons regarding the application of some derogatory provisions with regard to holders of Polish diplomas was not in breach of Article 296 TFEU. Two reasons were advanced by the CJEU in this regard. First, the directive represented a mere codification of previous legislation which made it unnecessary to introduce specific motivation in the preamble (paras. 18–19). Second, and most importantly, the fact that the contesting Member State had been involved in the adoption of the Directive was considered as a sufficient indication that the Member State was aware in a clear

20. Case C-176/09 *Luxembourg v Parliament and Council*, [2011] ECR I-3727.

and unequivocal manner of the reasons on the basis of which the contested provisions of the directive were adopted (paras. 17 and 20). These examples suggest that more often than not the Court is unwilling to undertake a rigorous examination of the reasons and arguments advanced by the EU legislator in the preambles of directives. In this respect, the Court seems to be ready to accept rather general statements and references to various legal and factual aspects as being sufficient arguments under the 'statement of reasons' test. In this way the EU legislator is dispensed of any thorough demonstration or explanation regarding essential aspects of the legislative instrument pertaining to the chosen legal basis, the need for EU action, the suitability, legality and added value of EU action. The Court showed that it is willing to go even further (as Case C-460/05 *Poland v Parliament and the Council* demonstrates) by 'covering' the lack of reasons in the preamble through factors which are external to the directive such as the involvement of the applicant in the adoption procedure.

5. Results and challenges

In this paper, we have provided a detailed account of the arguments advanced by the EU legislator in the preamble of the directives adopted in the internal market area. We made an assessment of the quality of the employed arguments as to their potential at convincing the Member States to implement the directive at issue. For these purposes, we showed what directives should argue for and how they do so in practice, by focussing in particular on Directive 2011/83/EU on consumer rights. Furthermore, this contribution linked the theoretical-normative framework advanced to legal practice. In this respect the emphasis lied on the Court of Justice of the European Union (CJEU)'s approach to assessing the arguments used in the preambles of EU directives in the context of the 'check' on the duty to state reasons incumbent upon the EU legislator under Article 296 TFEU.

First, EU directives should argue in their preamble at least as regards the legal basis on which the decision-making competence rests, the principles of subsidiarity and proportionality. Second, a close examination of the way in which the EU legislator actually argues in practice reveals a pattern in which the burden of proof is evaded: the obligation to give reasons is not discharged adequately either by failing to provide arguments at all or by giving insufficient arguments. In addition, harmonization is claimed to be the best and only solution to an existing problem in the internal market, whereas other solutions that might also be available are given little if any consideration. Third, the CJEU applies a rather light and flexible test when assessing the arguments of the directives as legislative acts under Article 296 TFEU. This is perceived as problematic since the Union legislator's reasoning

pertains to fundamental aspects as to the legal validity and acceptability of these legislative instruments.

Obviously, the conclusions drawn in this paper require additional empirical work in order to make more generalizable claims. We concentrated only on directives in the internal market area, in particular those adopted for the purpose of harmonization, but these legislative acts differ from directives aiming at social protection or at environmental protection, or those adopted for the liberalization of the market (Prechal 2005: 40). Given the importance of safeguarding the quality of directives in the EU legislative landscape, such work is relevant if not imperatively necessary in order to formulate appropriate methods for analysing and evaluating them to make it possible to establish whether the EU legislator acts in a fashion that is conducive to the goal of the directives, and how the legislator can be taught how to avoid counterproductive practices and potential litigation in the future.

It is not possible to know for sure if the proposed solutions are the best, or even good ones, but at least it is possible to know whether the directives are formulated such as to optimally enable compliance and legal review. As also underlined by scholars suggesting similar problems (cf. Dimitrakopoulos 2001: 443–444), the formulation issue is only part of the picture. The choices in policy transposition are so complex in nature, and even if issues of formulation are solved, the wider process of policy implementation will not necessarily improve. This paper has made a step in this direction being aware of the fact that the implementation of EU directives cannot be covered meaningfully by a unilateral approach. The implementation problem requires an integrative approach in which legal and political insights are integrated into a framework for argumentation analysis in mutual complementarity. In-depth legal insights are urgently necessary as they provide knowledge of the legal context, the principles of EU decision-making and the available legal options. Insights from political science are fundamental with a view to explaining lack of action on the part of the Members States due to political reasons and how the EU counters such opposition. Argumentation theory is vital because it provides the tools for identifying the most prominent forms of arguing, for assessing the relationship between the arguments and their potential effectiveness.

The question naturally arises: what next? In the first place, this paper has paved the ground towards a proper evaluation of the quality of EU directives. By outlining the arguments which are characteristic of these legislative acts, it is possible to develop and subsequently apply evaluation criteria for judging the soundness of each argument type distinguished. This is a fundamental issue, because different criteria apply for each case. For instance, arguments from example (illustrating the disparities among Member States) need to be evaluated differently than causal

arguments (in which it is shown that disparities lead to inequalities in the internal market). In the second place, it has been shown that the CJEU applies a rather light and flexible test when assessing the arguments used in Directives as legislative acts under Article 296 TFEU. Whereas such an approach is partly understandable in view of the restraint the Court generally adopts when reviewing EU legislative acts, the defects detected from an argumentative point of view in the reasoning used in the preambles of the EU directives examined here might signal that the test currently applied by the CJEU should perhaps be revised. Thus, while keeping in mind the specific features of the EU directives as legislative acts, the analytical framework devised in this paper for identifying and assessing the argumentative patterns could enrich the 'toolbox' of the Court for the purpose of assessing the coherence, consistency and adequacy of the reasoning used in the preambles of these instruments. After all, essential aspects of the EU directives such as legal basis, subsidiarity and proportionality should in principle be soundly and persuasively argued for in order to secure the validity of the legislative instrument itself and with a view to foster a high level of compliance by the Member States.

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