Aberdeen Student Law Review

With thanks to our sponsor Stronachs LLP

November 2015
Volume 6

www.abdn.ac.uk/law/student-activities/aberdeen-student-law-review-95

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FOREWORD BY THE HON. LORD WOOLMAN SENATOR OF THE COLLEGE OF JUSTICE

It is cheering to know that legal scholarship thrives in Aberdeen. Each year the ASLR discloses some of the fruits of that scholarship. This year's volume covers a wide range of interesting topics. I commend it to you.

Stephen Woolman

INTRODUCTION TO VOLUME SIX

It is with great honour that we welcome you to the sixth volume of the Aberdeen Student Law Review (ASLR). Only six years have elapsed since the first volume of this Journal was published in 2010 and, yet, the ASLR has already become an integral part of Aberdeen University's vibrant legal research environment. Each year, the Journal records a high volume of submissions across a diverse range of legal topics, reflecting the various areas of law that are taught and researched at the University of Aberdeen. Building on the prestigious legacy of previous editions, this year we are delighted to host five high quality pieces of work on topics and ideas which are innovative, contemporary and practically appealing. They cover fields ranging from energy and climate-change law to European patent law and British constitutional law. We would like to express our utmost gratitude to all the authors who submitted their articles to the ASLR and contributed, through their hard work, to maintaining the high publication standards of the Journal.

This publication could not have taken shape without the meticulous work and dedication of the members of the Editorial Board, Augustinus Mohn, Anna Holzmeister, Euan West, Bukky Lawal and Mukarrum Ahmed, who have each devoted considerable time and energy in reviewing manuscripts submitted for publication, suggesting revisions to the authors and editing this volume. A special merit is due to Demetris Hadjiosif who, in addition to assisting with the management of this volume, has helped in promoting the ASLR in the University of Aberdeen student community and beyond. Thanks must also be extended to the previous managing editors Ilona Cairns, Andrew Merry and Phil Glover for their helpful insights throughout the year.

Additionally, the hard copy version of this volume could not have been produced without the generous sponsorship afforded to us by our long-standing sponsor, Stronachs LLP and the kind support, both financial and administrative, by the School of Law of the University of Aberdeen. Last but certainly not least, warm thanks are due to James Downie from Stronachs LLP, the Head of School Anne-Michelle Slater, Sarah Duncan and Tamas Gyorfi for all their practical support and advice.

We do hope you find this volume to be an informative and enjoyable read.

On behalf of the Editorial Board

Constantinos Yiallourides
Managing Editor
November 2015

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The Patentability of Human Embryonic Stem Cell-Based Inventions in the European Union

Is the current treatment of such inventions under article 6 of Directive 98/44/EC on the legal protection of biotechnological inventions consistent with European human rights laws? Does the interpretation of the morally problematic legal terms therein come under the ambit of patent law?

JAMES FIELD*

Abstract

The Court of Justice of the European Union (CJEU) cases Brüstle v Greenpeace and International Stem Cell Corporation have led to many human embryonic stem cell (hESC)-based inventions becoming unpatentable under Directive 98/44/EC art 6 due to the 'dignity' of the 'human embryo'. This article highlights these cases' failure to consult external authorities when defining 'human embryo' and assessing its enjoyment of 'human dignity', despite the terms' roots in human rights law. It notes that European patent law and human rights instruments closely linked to EU law including the European Convention on Human Rights have long accommodated European moral pluralism, arguing this has led certain EU Member States to accept the commercialisation of hESC-based inventions. This suggests the CJEU's decisions may disproportionately interfere with competing human rights interests including those to health (due to the medical potential of hESC therapies) and to property. Equally it suggests that these decisions attempt to regulate the development of hESC-based inventions, which is problematic because in isolation patent law cannot inhibit their commercialisation. Accordingly, the article concludes that although morality plays an important role in patent law, interpreting morally problematic terms such as 'human embryo' and the 'human dignity' it enjoys falls outside its ambit.

Keywords: Embryonic stem cell, patent, human dignity

1. Introduction

The patentability of inventions based on uses of human embryonic stem cells (hESCs) is a highly controversial area, which in addition to challenges for technical reasons is open to attack on grounds of morality. This is particularly true in Europe, where the European Patent Convention (EPC)[1] art 53(a) and EU Directive 98/44/EC

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[1] Convention on the Grant of European Patents, as amended (5 October 1973, entered into force 7 October 1977) (EPC).

('the Biotechnology Directive')[2] art 6(1) exclude patents if commercially exploiting the underlying invention would violate '*ordre public*'[3] or morality. The Biotechnology Directive art 6(2) goes on to provide a non-exhaustive list of inventions automatically falling foul of this provision, with art 6(2)(c) encompassing 'uses of human embryos for industrial or commercial purposes'.

The Biotechnology Directive was adopted shortly before the first successful isolation of hESCs, and so makes no mention of inventions involving them. This has caused inevitable difficulties, particularly regarding the interpretation of 'human embryo' under art 6(2)(c). The European Patent Office (EPO)[4] has adopted a broad definition of this term in an effort to safeguard the 'human dignity' attaching to embryos,[5] which was confirmed by the Court of Justice of the European Union (CJEU)[6] in *Brüstle v Greenpeace*.[7] Here, the inviolability of 'human dignity' was held to necessitate the refusal of patents over hESC-based inventions involving the destruction or use as a base material of what it defined as a 'human embryo' – regardless of when in the development process this took place or the reason for which it occurred.[8] The *International Stem Cell Corporation* (*ISCC*) judgment then clarified this by excluding inventions requiring uses of cells possessing the 'inherent capacity' to develop into a human being.[9]

However, in deciding these cases the CJEU did not consider the wealth of relevant European human rights authorities on matters including the rights of the unborn child, the needs of competing stakeholders, and the content of 'human dignity'.[10] Instead, it defined the 'human embryo' and its protection 'autonomously' for the purposes of EU law.[11] Yet patents are inherently commercial in nature, and depriving inventors and investors in innovative projects of property rights over their inventions may deter them from commencing that work.[12] If this occurs, the potential medical benefits of hESCs – the early application of which points to a future

[2] Directive 98/44/EC of the European Parliament and of the Council of 6th July 1998 on the legal protection of biotechnological inventions [1998] OJ L213/12 (Biotechnology Directive).
[3] 'Public policy'.
[4] Granting Body created by EPC (n 1) ch III. A successful application to the EPO grants a 'bundle' of individual patents in each EPC Contracting State named by the applicant, rather than a single, unitary patent across EPO territory. This avoids the need to submit multiple applications. See EPC (n 1) art 64(1)-(2).
[5] *WARF/Stem Cells* (G2/06) [2009] EPOR 15.
[6] This article shall use the abbreviations 'CJEU' and 'ECJ' interchangeably depending on whether the Court was sitting in the post-Lisbon era or in its previous guise as the European Court of Justice.
[7] Case C-34/10, *Brüstle v Greenpeace eV* [2011] ECR I-9821.
[8] *Brüstle* (n 7) paras 38, 46, 52.
[9] Case C-364/13, *International Stem Cell Corporation v Comptroller General of Patents, Designs and Trade Marks* [2015] BLR para 38.
[10] Shawn Harmon, Graeme Laurie and Aidan Courtney 'Dignity, Plurality and Patentability: The Unfinished Story of Brüstle v Greenpeace (Case Comment)' (2013) 38(1) EL Rev 92, 97-98.
[11] *Brüstle* (n 7) para 26.
[12] Martina Ines Schuster, 'The Court of Justice of the European Union's Ruling on the Patentability of Human Embryonic Stem-Cell-Related Inventions (Case C-34/10)' (2012) 43(6) IIC 626, 628-641.

revolution in numerous medical treatments[13] – may be slowed within Europe to the detriment of present and future patients.[14]

This suggests that the dignity of the human embryo was not the only relevant consideration at stake in the CJEU decisions. Therefore, this article will firstly outline the interaction of morality with European patent law and how it has influenced the current approach to hESC-based inventions under the Biotechnology Directive art 6.[15] Next it shall be argued that sufficient links exist between these cases and the human rights regime to merit closer consideration of the latter's authorities on human dignity and the status of the human embryo.[16] It will be investigated whether, due to the potential benefits for the right to health of allowing their commercialisation and the scope to claim a disproportionate deprivation of the right to property, the post-*ISCC* treatment of hESC-based inventions under the Biotechnology Directive art 6 presents inconsistencies with European human rights laws.[17] Finally, as the CJEU 'autonomously' defined the 'human embryo' purely to apply the Biotechnology Directive art 6, it shall be asked whether the interpretation of such morally problematic terms falls under the ambit of patent law and what implications this isolated approach may have.[18]

2. Morality in European Patent Law

A. Background

It has long been accepted that to receive a patent, applicants must demonstrate that their inventions are novel, implement an inventive step, are industrially applicable, and fall outside the exceptions to patentability.[19] These criteria have become uniform standards within Europe by means of the EPC, which has been transposed into the national legislation of all signatory states[20] and so influences the grant of both 'bundle' EPO patents and those in individual states.[21] Patentees receive a negative right to prevent others from infringing upon[22] their invention – which, following the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS

[13] Scott Parker and Paul England, 'Where Now for Stems Cell Patents?' (2012) 7(10) JIPLP 738, 738; Charles Brabin, 'Intellectual Property in the Realm of Biology' (2014) 36(11) EIPR 687, 689.
[14] Harmon, Laurie and Courtney (n 10) 97.
[15] Part 2.
[16] Part 3.
[17] Part 4.
[18] Part 5.
[19] EPC (n 1) art 52; Patents Act 1977, s 1.
[20] There are currently 38 signatory states. See EPO, 'Member States of the European Patent Organisation', <www.epo.org/about-us/organisation/member-states.html#invited> accessed 22 February 2015.
[21] Each EPO (and therefore EU) Member State continues to grant national patents in accordance with the EPC alongside the 'bundle' European patents – see Charlotte Waelde and others, *Contemporary Intellectual Property: Law and Policy* (3rd edn, OUP 2014) paras 10.22-10.23.
[22] By virtue of EPC (n 1) art 64 infringement of a European patent is to be dealt with by national law.

Agreement), lasts for at least twenty years[23] – and in this sense gain a limited monopoly over its use in return for releasing its innovative details into the public domain. Thus, as noted in the introduction, refusals of patentability can have adverse commercial consequences.[24]

Such exclusions have always been a part of the patent regime,[25] as have revocations of protection after grant,[26] however EPC art 53(a)'s '*ordre public*' and 'morality' exception received little attention until recent advances in biotechnology.[27] Biotechnological inventions challenge the patent system in general due to the complexity of ascertaining their inventive qualities,[28] but this is especially true where the morality exception is engaged. This was illustrated by the EPO's difficulties in balancing the suffering of genetically-engineered mice with the benefits of advancing mankind's understanding of cancer in *HARVARD/Oncomouse*.[29] Similar difficulties were experienced at a national level which was problematic for the EU[30] as the lack of a common policy towards biotechnological inventions led to an increasingly fragmented legal landscape within its territory.

B. The Biotechnology Directive

Therefore, the European Commission drafted the Biotechnology Directive[31] in an effort to harmonise the treatment of biotechnological inventions by the EU Member States' patent regimes,[32] with corresponding Regulations being incorporated into the EPC.[33] This clarified that biological material isolated from its natural environment constitutes an invention rather than a discovery [34] provided it satisfies the patentability criteria.[35]

However, the ethical controversy surrounding biotechnology caused the Directive's initial rejection[36] and the adoption of a revised version in 1998 which pays

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[23] Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) LT/UR/A-1C (TRIPS) art 33, annexed to the Agreement Establishing the World Trade Organisation arising from the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), and administered by the World Trade Organisation – Waelde and others (n 21) para 10.42.

[24] Biotechnology Directive (n 2) Recital 14; Howard Florey/Relaxin T74/91 [1995] EPOR 541 (Op Div), para 6.3.3.

[25] EPC (n 1) art 53.

[26] ibid art 138.

[27] Waelde and others (n 21) para 11.51.

[28] See, for example, the UK case *Asahi Kasei Kogyo* [1991] RPC 485, where a genetically engineered protein was deemed novel despite a reference to its natural existence in an earlier patent.

[29] *HARVARD/Oncomouse* (T19/90) [1991] EPOR 525.

[30] All EU Member States are also EPC Contracting States.

[31] Originally proposed in 1988.

[32] Gerard Porter, 'The Drafting History of the European Biotechnology Directive' in Aurora Plomer and Paul Torremans (eds), *Embryonic Stem Cell Patents: European Law and Ethics* (OUP 2009) 8.

[33] Implementing Regulations to the Convention on the Grant of European Patents, Part II, Ch V (as amended 2012).

[34] Biotechnology Directive (n 2) art 3(1); Aurora Plomer (Project Coordinator), 'Stem Cell Patents: European Patent Law and Ethics Report' (Nottingham, 2006) 18-20 <www.nottingham.ac.uk/~llzwww/StemCellProject/project.report.pdf> accessed 4 March 2015.

[35] Biotechnology Directive (n 2) art 3(1).

[36] Porter (n 32) 13.

greater attention to moral sensitivities. Principally this includes the aforementioned denial of patentability where commercial exploitation contravenes '*ordre public*' or morality,[37] and art 6(2)'s list of examples of such inventions.[38] Art 5 also precludes the human body from patentability at any stage of development,[39] but under art 3(2) an element isolated from it by means of a technical process is patentable.[40] This is reinforced by Recitals 16 and 38, which state that such inventions must not be contrary to 'human dignity'.[41]

Thus it appears that the protection of this fundamental principle was always envisaged in part through art 6's '*ordre public*' and morality exception,[42] which provides a check on the Biotechnology Directive's conflicting but related aim of promoting patentability and innovation. This is supported by the ECJ decision *Kingdom of the Netherlands v European Parliament*, which stated that in addition to art 5, art 6(2)'s exemplary list of unpatentable inventions[43] helps ensure the safeguarding of human dignity.[44]

It is this complex legislative framework that was applied by the CJEU in the hESC-based inventions cases *Brüstle* and *ISCC*. Yet in so doing, despite basing its definition of 'human embryo' on the somewhat indeterminate principle of 'human dignity', little consideration was given to what this value actually encompasses. As it is rooted in human rights law and theory, it appears that authorities from this area would have provided a useful insight into the assessment of hESC-based inventions.[45] However, this has occurred in neither the main cases on the '*ordre public*' and 'morality' exceptions, nor the hESC-based inventions decisions.

C. '*Ordre public*' and 'Morality'

These terms have long been associated with intellectual property regimes,[46] as illustrated by the EPO case *Plant Genetic Systems* (*PGS*),[47] decided before the adoption of the Biotechnology Directive. Here '*ordre public*' was stated to encompass matters including the protection of the physical integrity of individuals, whilst 'morality' concerned 'the belief that some behaviour is right and acceptable whereas other behaviour is wrong (…) rooted in a particular culture'. For the EPO, the relevant culture was that of European society as a whole.[48] Yet the exact content of such standards remained unclear, meaning that despite consensus on issues such as the

[37] Biotechnology Directive (n 2) art 6(1).
[38] ibid art 6(2).
[39] ibid art 5(1).
[40] ibid art 5(2).
[41] Brabin (n 13) 690.
[42] Ella O'Sullivan, 'International Stem Cell Corp v Comptroller General of Patents: The Debate Regarding the Definition of the Human Embryo Continues' (2014) 36(3) EIPR 155, 156.
[43] Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council* [2001] ECR I-7079 para 39.
[44] *Netherlands* (n 43) paras 76-77.
[45] Harmon, Laurie and Courtney (n 10) 96-97; elaborated upon in Part 3.
[46] Paris Convention for the Protection of Industrial Property, as amended (20 March 1883) art 6 B(3) concerning Trade Marks.
[47] *Plant Genetic Systems* [1995] EPOR 357, 366.
[48] *PGS* (n 47) 366.

immorality of human cloning,[49] the acceptability of hESC research[50] gave rise to a plurality of views between states.[51] This led the EPO to repeatedly to interpret art 53(a)'s provisions narrowly.[52]

European value pluralism was also reflected at EU level by the *Netherlands* decision. In addition to the safeguarding of human dignity mentioned above, it was observed that '*ordre public*' was well-recognised in Community law,[53] and that when applying morality exceptions to movement of goods provisions Member States could refer to their 'own scale of values'.[54] Therefore, a 'wide scope of manoeuvre' for Member States in the application of art 6(1) was acknowledged as a means of respecting cultural sensitivities,[55] though it also noted that art 6(2)'s list of immoral inventions prevented the provision becoming discretionary.[56]

This was supported by *Commission v Italy*,[57] which considered art 6(2) to allow Member States no discretion in transposition as its purpose is 'to give definition to the exclusion laid down in art 6(1)'.[58] The provision was therefore argued to be definitional rather than moral in nature,[59] meaning that under art 6(2)(c) only industrial or commercial uses of human embryos, rather than of hESCs, should be excluded as any wider definition would ignore the moral pluralism surrounding such inventions.[60]

Thus it appeared that art 6 was to be interpreted narrowly, and any extended application to hESC-based inventions seemingly had to be justified with reference to fundamental European values such as 'human dignity'.[61] Once again, therefore, it is clear how regard to the human rights regime could be useful in the application of the '*ordre public*' and morality exception.[62]

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[49] Acknowledged in Biotechnology Directive (n 2) Recital 40 and unpatentable under art 6(2)(a).
[50] See Part 4.
[51] AM Viens, 'Morality Provisions in Law Concerning the Commercialisation of Human Embryos and Stem Cells' in Aurora Plomer and Paul Torremans (eds), *Embryonic Stem Cell Patents: European Law and Ethics* (OUP 2009) 88-89.
[52] *Oncomouse* (n 29) 525, 527; *PGS* (n 47) 367, 372; Estelle Derclaye, 'Patent Law's Role in the Protection of the Environment – Re-assessing Patent Law and its Justifications in the 21st Century' (2009) 40(3) IIC 249, 258-262.
[53] *Netherlands* (n 43) Opinion of A-G Jacobs para 97; Case 41/74 *Van Duyn* [1974] ECR 1337, para 18.
[54] Case 34/79 *Henn and Darby* [1979] ECR 3795, para 15.
[55] *Netherlands* (n 43) para 38.
[56] ibid para 39.
[57] Case C-456/03 *Commission of the European Communities v Italian Republic* ECR 1-5335.
[58] ibid para 78.
[59] Aurora Plomer, 'Towards Systemic Legal Conflict: Article 6(2)(c) of the EU Directive on Biotechnological Inventions' in Aurora Plomer and Paul Torremans (eds), *Embryonic Stem Cell Patents: European Law and Ethics* (OUP 2009) 187-189.
[60] Plomer, 'Stem Cell Patents' (n 34) 71-73; Pierre Triechel, 'Case Comment: G2/06 and the Verdict of Immorality' (2009) 40(4) IIC 450, 465-466.
[61] Aurora Plomer, 'After *Brüstle*: EU Accession to the ECHR and the Future of European Patent Law' (2012) 2(2) QMJIP 110, 123-124; Plomer, 'Towards Systemic Legal Conflict' (n 59) ch 7; Harmon, Laurie and Courtney (n 10) 98-99.
[62] Harmon, Laurie and Courtney (n 10) 95-98.

D. hESC-Based Inventions

As noted above, however, the Directive makes no mention of hESC-related inventions. Thus, the extent to which patents involving methods of extracting hESCs necessitating the destruction of human embryos engaged art 6(2)(c)[63] was uncertain.

The issue was first addressed by the EPO in the *Edinburgh* patent[64] case. Here, the definition of 'morality' enunciated in *PGS* was repeated, but as no 'uniform' European approach to hESCs could be ascertained,[65] a broad construction of EPC Rule 28(c) was adopted where an invention isolating 'animal' transgenic stem cells also encompassed hESCs. This was justified on the basis that a narrow protection of embryos 'as such' was already provided by Rule 23d(e),[66] and that Biotechnology Directive Recital 16's reference to respect for dignity and integrity of the person necessitated the preclusion of hESCs from patentability due to their destructive origins.[67]

This approach was followed in *WARF/Primate ESCs*, which declared an invention enabling the production of hESCs unpatentable.[68] Indeed, its scope was extended to preclude inventions requiring uses of destructive methods even where they were not mentioned in the claims,[69] though it also left open a 'deposit loophole' whereby patents would be granted if performing the invention required no further destruction.[70]

These cases prompted fears in some quarters that future hESC research would be overly restricted,[71] whilst elsewhere the EPO's wider conception of 'human embryo' that considered stakeholders other than the patentee was praised. Yet, Harmon notes that they remained lacking in meaningful engagement with the balancing of these issues, and were decided in isolation of overarching principles from relevant legal regimes such as the European Convention on Human Rights (ECHR).[72]

WARF's approach was then built upon at EU level by the CJEU's preliminary ruling in *Brüstle v Greenpeace*. After the German *Bundesgerichtshof* (Federal Court of Justice, BGH) asked it to define the term 'human embryo' under art 6(2)(c), the court gave a wide, 'autonomous' interpretation to be applied solely for the purposes of EU

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[63] Together with its EPC (n 1) counterpart, Rule 28(c) (former Rule 23d(c)).
[64] Patent Application No 94 913 174.2, July 21, 2002, Opposition Division, as cited in Shawn Harmon, 'The Rules of Re-Engagement: The Use of Patent Proceedings to Influence the Regulation of Science ('What The Salmon Does When it Comes Back Downstream')' (2006) 4 IPQ, 378.
[65] Edinburgh at [2.5.3], as cited by Harmon (n 64) 396.
[66] Biotechnology Directive (n 2) art 5(1) equivalent.
[67] Harmon (n 64) 396-397.
[68] *WARF* (n 5).
[69] Waelde and others (n 21) para 12.60.
[70] Sigrid Sterckz and Julian Cockbain, 'Assessing the Morality of the Commercial Exploitation of Inventions and the Relevance of Moral Complicity: Comments on the EPO's WARF Decision' (2010) 7/1 *SCRIPTed* 83 <www.law.ed.ac.uk/ahrc/script-ed/vol7-1/sterckx.asp> accessed 14 February 2015.
[71] Harmon, Laurie and Courtney (n 10) 100-101.
[72] Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights, as amended) (ECHR); Harmon (n 64) 399-403.

law in order to avoid divergence in the patentability criteria of Member States.[73] This definition encompassed:

> any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis.[74]

As such cells were considered capable of commencing 'the process of development of a human being', respect for 'human dignity' was held to necessitate their unpatentability, although Member States were permitted to determine whether hESCs obtained from human blastocysts also fell under the term.[75]

Yet, this definition was formulated with minimal consideration of both the term 'human dignity' and European moral pluralism on the status of the human embryo. The CJEU claimed it was adjudicating on a purely legal – as opposed to medical or ethical – issue,[76] but neglected to consider the numerous legal authorities in this area – particularly from the European human rights regime.[77] These were dismissed by Advocate-General Bot as irrelevant because they related to subjects outside the EU's competence including abortion.[78] However, the Biotechnology Directive itself specifically recalls the authority of fundamental freedoms enshrined in the ECHR[79] – which, following the Treaty of Lisbon, are even more closely integrated into the EU legal order.[80] This has also raised arguments that the decision is inconsistent with the Directive's Recital 8, as the 'autonomous' definition effectively constitutes a legal term entirely separate from its understanding in national patent laws.[81]

On the basis of this wide definition, the CJEU responded to the BGH's second question by declaring inventions involving uses of embryos for scientific purposes unpatentable due to the commercial and industrial interests inherent to applying for patents over such products.[82] This is again problematic as it causes extended interferences with private property rights.[83] Furthermore, the need to protect the dignity of human embryos as defined in this case was held to necessitate the

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[73] *Brüstle* (n 7) paras 26-28.
[74] ibid para 38.
[75] ibid paras 34-36, 38.
[76] ibid para 30; this contention is also debatable as suggested by the activity in this area by Ethics Committees such as the European Commission's European Group on Ethics in Science and New Technologies; to which Recital 44 of the Biotechnology Directive specifically refers: 'Whereas the Commission's European Group on Ethics in Science and New Technologies evaluates all ethical aspects of biotechnology; whereas it should be pointed out in this connection that that Group may be consulted only where biotechnology is to be evaluated at the level of basic ethical principles'.
[77] Harmon, Laurie and Courtney (n 10) 96.
[78] *Brüstle* (n 7) Opinion of AG Bot para 49.
[79] Biotechnology Directive (n 2) Recital 43; all EU Member States are also High Contracting Parties to the ECHR.
[80] Harmon, Laurie and Courtney (n 10) 95-99; see also Part 3 section C.
[81] Harmon, Laurie and Courtney (n 10) 97; Plomer, 'After *Brüstle*' (n 61) 125; see also Part 5.
[82] *Brüstle* (n 7) para 41.
[83] Plomer, 'After *Brüstle*' (n 61) 130-135.

unpatentability of inventions requiring their destruction or use as a base material at any point in the development process.[84] This closed *WARF*'s 'deposit loophole'.[85]

Brüstle was therefore criticised due to concerns the 'immoral' origins of hESC-based inventions would render them largely unpatentable, despite their moral acceptability in certain Member States.[86] Given the innately commercial nature of patents, concerns also arose that – to the detriment of healthcare patients – investment in European stem cell research would decline.[87] These were compounded when *TECHNION/Culturing Stem Cells* [88] incorporated *Brüstle* into EPO jurisprudence, extending the ruling's scope outside EU territory.[89]

However, the recent CJEU case *ISCC* clarified a limitation to *Brüstle* in the light of clearer scientific evidence. *Brüstle*'s inclusion of human ova stimulated by parthenogenesis under the term 'human embryo' caused confusion as they are unable to form extra-embryonic tissue needed to develop to term.[90] Indeed, this characteristic in similar cells led the BGH to permit the *Brüstle* patent where its claims explicitly excluded uses of destructive methods after the CJEU's ruling – though this has been criticised for equating 'destruction' to 'uses' of the human embryo for industrial or commercial purposes.[91] It was held in *ISCC* that such cells were not human embryos as they lacked the 'inherent capacity' to develop into a human being,[92] subject to Advocate-General Villalón's caveat that later genetic manipulations restoring that capacity would render them again unpatentable.[93] Thus, this case allows patents over hESC-based inventions in certain circumstances. However, Plomer argues the 'inherent capacities' test promotes uncertainty as it leaves *Brüstle*'s extensive definition of 'human embryo' intact and raises questions over how particular types of embryo – such as those left over from *in vitro* fertilisation (IVF) treatment – are capable of developing to term.[94] Furthermore, it still neglects to consider human rights authorities on human dignity and the human embryo, or to balance these concerns with competing interests.

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[84] *Brüstle* (n 7) para 52.
[85] A Mahaalatchimy and others, 'Exclusion of Patentability of Embryonic Stem Cells in Europe: Another Restriction by the European Patent Office' [2015] EIPR 1, 25, 26.
[86] M Varju and J Sándor, 'Patenting Stem Cells in Europe: The Challenge of Multiplicity in EU Law', CMLR (2013) 49(3) 1007, 1018.
[87] Harmon, Laurie and Courtney (n 10) 100-101.
[88] T2221/10 [2014] EPOR. 23.
[89] Mahaalatchimy and others (n 85).
[90] *ISCC* (n 9) para 38.
[91] O'Sullivan (n 42) 162.
[92] *ISCC* (n 9) para 38.
[93] *ISCC* (n 9) paras 34-35; Case C-364/13, *International Stem Cell Corporation v Comptroller General of Patents, Designs and Trade Marks* [2015] Bus LR 98, Opinion of A-G Villalón, paras 75-77.
[94] Aurora Plomer, 'Case C-364/13 – Patentability of Embryonic Stem Cells and Parthenotes: Inherently Uncertain?' (EUtopia Law, 19 December 2014) <http://eutopialaw.com/2014/12/19/case-c-36413-patentability-of-embryonic-stem-cells-and-parthenotes-inherently-uncertain/#more-2554> accessed 24 January 2015.

E. Summation

Part 2 has sought to demonstrate that the EU and EPO patent regimes have always recognised the overarching need to respect fundamental values such as human dignity. However, this principle's grounding in human rights philosophies means it has interacted through its influence on human rights laws with other moral issues seen in the hESC-based inventions cases – including the nature and status of the human embryo. This also encompasses the protection of '*ordre public*' to the extent that it addresses respect for physical integrity.[95] Yet the CJEU made no link between the two in *Brüstle*, which has resulted in the wide, 'autonomous' post-*ISCC* approach seen today. Therefore, Part 3 will expand upon the intersection between the Biotechnology Directive and human rights laws.

3. The Intersection with Human Rights

A. Morality, Human Rights and Biotechnology

The relationship between morality and the law in general has long been a source of legal and philosophical debate. This is no different in the field of human rights law, with commentators arguing that it draws upon and gives legal force to 'moral' values.[96] Indeed, early legal instruments incorporating elements of such rights[97] reflect the teachings of natural law; whereby legal rules were thought to arise from the individual's inherent ability to naturally know right from wrong. In Locke's view this drove human beings to form political orders respecting everybody's fundamental rights; including those to life, liberty and property.[98]

Following World War II, modern forms of human rights philosophies have come to the fore; largely centring on Kant's view of 'personhood', whereby all individuals enjoy a minimum level of protection simply due to their membership of the human race.[99] For example, this concept can be seen underlying Dworkin's argument that human rights are based on affording privileged status to basic values

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[95] *PGS* (n 47) 366.

[96] Abbe EL Brown 'Guarding the Guards: The Practical Impact of Human Rights on Protection of Innovation and Creativity' (20th BILETA Conference, Belfast (Over-Commoditised; Over-Centralised; Over-Observed: the New Digital Legal World?) 2005) <www.bileta.ac.uk/content/files/conference%20papers/2005/Guarding%20the%20Guards%20-%20the%20Practical%20Impact%20of%20Human%20Rights%20on%20Protection%20of%20Innovation%20And%20Creativity.pdf> accessed 03 September 2015.

[97] See, for example, the US Declaration of Independence 1776 and the Déclaration des Droits de l'Homme et du Citoyen de 1789 (French Declaration of Human and Civil Rights) 26 August 1789, translation <www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf> accessed 20 February 2015.

[98] Jerome Shestack, 'The Philosophical Foundations of Human Rights' in Janusz Symonides (ed), '*Human Rights: Concept and Standards*' (Ashgate 2000) 37; see generally J Locke, 'Two Treatises of Government' (original published 1690) <www.efm.bris.ac.uk/het/locke/government.pdf> accessed 04 March 2015.

[99] Shestack (n 98) 42-44.

that ensure the equal treatment of all. This led him to reject an entirely utilitarian consideration of what constitutes a societal benefit.[100]

It is submitted that this core value of respect for the individual, arising purely out of their being, encompasses the concept of 'human dignity'. This is reflected by the Universal Declaration of Human Rights (UDHR),[101] which recalls the 'inherent dignity' and 'equal and inalienable rights of all members of the human family', arising solely from the fact of being born.[102] Furthermore, though the UDHR itself is not legally enforceable, it is expanded upon by the International Covenants on Civil and Political Rights (ICCPR)[103] and Economic, Social and Cultural Rights (ICESCR);[104] both of which are overseen by compliance Committees.[105] The Preambles of these Covenants retain references to the 'dignity' of every 'human person', and state that all rights found therein arise from this principle.[106]

It can therefore be argued that these provisions reflect a conception of 'human dignity as empowerment', where it is the overarching principle giving validity to the other rights recognised by the universal human rights regime.[107] However, those rights inevitably come into conflict with one another – particularly where biotechnology is concerned. Indeed, the acceptance that biotechnological progress requires balancing with fundamental rights[108] has prompted the adoption of non-binding documents including the Universal Declaration on the Human Genome (UDHG).[109] Whilst art 1 of this Declaration reiterates the need to recognise the 'inherent dignity' of the human family, new considerations including the principle of non-commercialisation of the human body and its parts[110] are also present. Many writers suggest this reflects the operation of 'dignity as constraint' on biotechnological development.[111] In this way, the principle encourages innovation on a 'responsible moral basis' whereby such work is not entirely prohibited but acknowledges the rights of others whose dignity may be compromised.[112]

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[100] ibid 55.
[101] Universal Declaration of Human Rights (10 December 1948) UNGA Res 217 A(III) (UDHR).
[102] UDHR (n 101) Preamble, arts 1-2.
[103] International Covenant on Civil and Political Rights (signed 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[104] International Covenant on Economic, Social and Cultural Rights (signed 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
[105] See work of the UN Human Rights Committee, <www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> accessed 03 March 2015; and UN Committee on Economic, Social and Cultural Rights <www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx> accessed 03 March 2015.
[106] ICCPR (n 103) Preamble; ICESCR (n 104) Preamble.
[107] Deryck Beyleveld and Richard Brownsword, '*Human Dignity in Bioethics and Biolaw*' (OUP 2001) 27-28.
[108] Francesco Francioni, 'Genetic Resources, Biotechnology and Human Rights: The International Legal Framework' in Francesco Francioni (ed), *Biotechnologies and International Human Rights* (Hart Pub 2007) 6-7.
[109] Universal Declaration on the Human Genome and Human Rights (11 November 1997) UNGC 29 C/Res 16.
[110] ibid art 4; later seen in Biotechnology Directive (n 2) art 5.
[111] Beyleveld (n 107) 40-43; Francioni (n 108) 20.
[112] Rainer Moufang, 'Patenting of Human Genes, Cells and Parts of the Body? The Ethical Dimensions of Patent Law' (1994) 25(4) ICC 487, 495-498.

Thus it is clear that morality and human rights laws are inherently inter-related, with the latter attempting in part to provide minimum levels of respect for the moral value of 'human dignity' inherent to all individuals. Part 2 noted that the hESC-based inventions cases refer to the immorality of violating the 'human dignity' of human embryos. This implicitly (under the post-*ISCC* regime) assumes that any cell possessing the 'inherent capacity' to develop into a human being is subjected to the operation of 'human dignity', either 'as constraint' on the actions of others or 'as empowerment' so that other rights attach to it and prevent its use. Therefore it is possible to suggest that human rights authorities on the right to life of the unborn child and other issues concerning dignity and the human embryo should be considered.

These will now be discussed within the European human rights framework.

B. The Council of Europe

The Council of Europe's principal human rights mechanism is the ECHR; which, as noted in Part 2, is specifically referred to as authoritative by the Biotechnology Directive.[113] In contrast to the universal human rights regime, this Convention initially made no mention of the term 'human dignity', though it is now cited to justify abolishing the death penalty.[114] However, the concept's importance as a 'fundamental objective of the Convention' has long been recognised by the European Court of Human Rights (ECtHR).[115]

The ECHR's sole reference to 'human dignity' is recalled alongside the 'basic value' of the right to life.[116] Art 2 guarantees this right to 'everyone', but gives no indication of when it begins. This has prompted litigation on the status of the human embryo. For example, in *Vo v France*[117] it was alleged that by declining criminally prosecute a doctor whose negligence caused a patient to miscarry, France failed to protect the foetus' right to life under art 2. In response, the ECtHR consulted numerous ethical[118] and legal[119] authorities and found that there was no consensus in France or Europe regarding the nature and rights of the unborn child. Accordingly it applied a margin of appreciation, affording France a scope of manoeuvre to decide on such issues at national level.[120]

This was reinforced by *Evans v UK*,[121] in which the margin of appreciation was relied upon when refusing to consider the right to life of human embryos frozen for the purposes of IVF treatment. As the would-be father withdrew his consent to their

[113] Biotechnology Directive (n 2) Recital 43.
[114] ECHR (n 72) Protocol 13 Preamble.
[115] *S.W. v UK* App No 20166/92 (ECtHR, 22 November 1995) para 44.
[116] ECHR (n 72) Protocol 13.
[117] (2005) 40 EHRR 12.
[118] *Vo* (n 117) 277-280.
[119] ibid 274-277.
[120] ibid 296-298.
[121] *Evans v UK* App no 6339/05 (ECtHR, 10 April 2007).

implantation, it was held that his right to choose not to become a father[122] outweighed any right the embryo may have enjoyed.[123]

Thus it appears there is nothing to suggest any European consensus on when 'human dignity' takes hold of the human embryo. This is supported by the rejection of numerous opportunities to protect the unborn child from conception under the universal human rights regime.[124] Indeed, as *Vo* and *Evans* illustrate, whilst it accepted that the embryo belongs to the human race,[125] the ECtHR has recognised that precisely because of the disharmony over the level of protection it requires, High Contracting Parties are entitled to approach the issue individually, each according to the moral views of their people.[126]

With regard to hESC-based inventions, therefore, it may be argued that European human rights laws do not regard 'human dignity' as providing the human embryo with a right to life from conception. Thus, to declare such inventions unpatentable across all Member States, their commercial exploitation would have to run contrary to this principle.

This may be possible under the Oviedo Convention, a Council of Europe mechanism which attempts to incorporate human rights into the growing field of biomedicine[127] and prohibits all uses of the human body, as such, for financial gain.[128] Thus, whilst this seemingly reflects the Biotechnology Directive art 5(2) in allowing commercialisation where isolated elements are used,[129] if read in conjunction with art 18(1)'s requirement that the human embryo *in vitro* enjoy 'adequate protection' when involved in research, it may be argued that commercially exploiting methods that entail the embryo's destruction or use as a base material – as a stage of the body's development – is unacceptable. This is based on the recognition of the 'dignity' of 'everyone',[130] though *Vo* noted that the plurality of European views concerning when life begins[131] led the Convention's framers to leave the term 'everyone' undefined so signatory states could approach it individually.[132] It is therefore clear that 'human

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[122] ECHR art 8 enshrines the right to respect for private and family life.

[123] *Evans* (n 121) paras 83-92.

[124] The framers of both the ICCPR and the Convention on the Rights of the Child declined to do so: M Nowak, 'U.N. Covenant on Civil and Political Rights CCPR Commentary' (2nd edn, NP Engel 2005) 154; MJ Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers 1987) 121; Manfred Nowak, 'Article 6. The Right to Life, Survival and Development', in A Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2005) para 41.

[125] *Vo* (n 117) 295.

[126] Pierre-Marie Dupuy, 'State Responsibility for Violations of Basic Principles of Bioethics' in Francioni (ed), '*Biotechnologies and International Human Rights*' (n 108) 40; Tade Matthias Spranger, 'Case C-34/10, Oliver Brüstle *v* Greenpeace eV' (2012) 49(3) CMLR 1197, 1203-1205.

[127] Susan Millns, 'Consolidating Bio-Rights in Europe' in Francesco Francioni (ed), *Biotechnologies and International Human Rights* (Hart Pub 2007) 75.

[128] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (concluded 4 April 1997, entered into force 1 December 1999) CETS 164 (Oviedo Convention) art 21.

[129] Plomer, 'Stem Cell Patents' (n 34) 60.

[130] Oviedo Convention (n 128) art 1.

[131] Millns (n 108) 77.

[132] *Vo* (n 117) 275-276; Council of Europe, 'Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on

dignity' justifies constrained actions in this area,[133] and that despite the lack of a uniformly accepted stage at which this principle attaches to human embryos[134] they are owed a minimum level of protection of the kind enunciated in human rights philosophies.[135]

Furthermore, although some EU Member States including the UK and Germany are yet to sign Oviedo,[136] the ECtHR has relied on its provisions in cases under the ECHR.[137] This has prompted some to argue that, together with *Brüstle*, a European consensus on the moral abhorrence of commercial activities relating to the human embryo is beginning to emerge,[138] though as noted above the ECtHR also cited the Convention as evidence of moral pluralism in *Vo*.

C. EU Fundamental Rights

Having been incorporated into the EU legal order by the Treaty of Lisbon, the EU Charter of Fundamental Rights[139] (EU Charter) now binds the Union and all Member States.[140] Its first chapter is dedicated to the protection of 'dignity', with art 1 stating that 'human dignity is inviolable. It must be respected and protected'. This is supplemented by rights to life[141] and physical and mental integrity – including a prohibition on uses of the human body and its parts for financial purposes.[142]

In the interpretation of 'human dignity' the CJEU has been receptive to the concurrent right found in the German *Grundgesetz* (Basic Law) art 1,[143] which often constrains actions that disregard the value of human beings as individuals.[144] This was illustrated by *Omega Spielhallen*,[145] where the principle justified a German

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Human Rights and Biomedicine 1997 Explanatory Report' (1997) (Oviedo Convention Explanatory Report) para 18 <http://conventions.coe.int/treaty/en/reports/html/164.htm> accessed 7 March 2015.

[133] Beyleveld (n 107) 40-43.

[134] Aurora Plomer, 'Human Dignity, Human Rights, and Article 6(1) of the EU Directive on Biotechnological Inventions' in Aurora Plomer and Paul Torremans (eds), *Embryonic Stem Cell Patents: European Law and Ethics* (OUP 2009) 214.

[135] See Part 2 section A.

[136] See table of signatures and ratifications at Council of Europe, 'Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine' <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=164&CM=8&DF=26/03/2015&CL=ENG> accessed 7 March 2015.

[137] *Glass v UK* App No 61827/00 (ECtHR, 9 March 2004).

[138] Aidan O'Neill, 'EU Law, Human Dignity and the Human Embryo: The Decision of the CJEU Grand Chamber in Brüstle v Greenpeace eV (C-34/10)' (EUtopia Law, 21 October 2011) <http://eutopialaw.com/2011/10/21/eu-law-human-dignity-and-the-human-embryo-the-decision-of-the-cjeu-grand-chamber-in-brustle-v-greenpeace-ev-c%e2%80%913410/> accessed 05 September 2015.

[139] Charter of Fundamental Rights of the European Union [2012] OJ C326/02 (EU Charter).

[140] Consolidated Version of the Treaty on European Union [2012] OJ C326/01 art 6(1).

[141] EU Charter, art 2.

[142] ibid art 3.

[143] Art 1 I *Grundgesetz* (German Basic Law); O'Neill (n 138).

[144] N Foster and S Satish, *German Legal System and Laws* (3rd edn, OUP 2002) 214-216.

[145] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberb*ürgermeisterin *der Bundesstadt Bonn* [2004] ECR I-9609.

restriction on the import of laser guns from within the EU to the detriment of free movement of goods.[146] However, as this interpretation was particular to Germany, the restriction's application was not required of all Member States. This has prompted claims that pluralism regarding the scope of 'human dignity' necessitates the determination of such limitations at national rather than EU level, with the CJEU assessing only their necessity and proportionality to the protection of this value.[147] It appears that the pre-EU Charter approach,[148] when the common constitutional traditions of Member States were recognised as a source of the fundamental rights[149] 'enshrined in the general principles of Community law and protected by the Court',[150] supports this as the German view of human dignity clearly was not a 'common constitutional tradition'.

Omega also seemingly reflects the *Netherlands* ruling, which in Part 2 was shown to recognise the margin of manoeuvre states enjoy in applying the art 6(1) morality provision whilst at the same time using art 6(2) to avoid creating uncertainty. It seems strange, therefore, that when adopting *Brüstle*'s expansive definition of 'human embryo' when protecting 'human dignity', no attempt was made to find a consensus on this value between Member States. Indeed, if the CJEU had done so it would have observed that moral pluralism surrounding the embryo's legal status has led the ECtHR to apply a margin of appreciation in *Vo* and *Evans*. Thus it is clear that the adoption of an 'autonomous' definition in *Brüstle* with no reference to authorities from human rights law is problematic.[151]

This is further supported by the emphasis in the Biotechnology Directive, the Charter,[152] the Treaty on European Union art 6(3) and CJEU jurisprudence[153] of the authority of fundamental rights guaranteed by the ECHR. Indeed, even in the pre-EU Charter era *Nold v Commission* stated that international human rights treaties to which Member States were signatories supplied 'guidelines' for Community law.[154] In addition, since 2009 the EU Treaties have provided that the Union shall accede to the ECHR.[155] Although recent developments have led to uncertainty concerning the

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[146] *Omega* (n 145) paras 34-35.
[147] Thomas Ackermann, 'Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*' (2005) 42(4) CMLR 1107, 1116-1117.
[148] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 361-371.
[149] Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, para 4; Case 4/73 *Nold v Commission* [1974] ECR 491 para 13.
[150] Case 29/69 *Stauder v City of Ulm* [1969] ECR 419, para 7.
[151] Plomer, 'After *Brüstle*' (n 61) 125; Harmon, Laurie and Courtney (n 10) 100.
[152] EU Charter (n 139) Preamble.
[153] Case C-400/10 PPU *McB v E* [2011] 3 WLR 699 para 53; Anna Poole, Lesley Irvine, 'Legislative Comment: Essential Knowledge for UK Lawyers about the EU Charter of Fundamental Rights' (2012) 3 JR 235, 241-242.
[154] *Nold v Commission* (n 149) para 13.
[155] Treaty on European Union (n 139) art 6(2); Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Protocol (No 8).

terms and timescale of this process,[156] this reinforces the claim that ECtHR case law should be considered when interpreting morally sensitive issues.[157]

D. Summation

This discussion has sought to illustrate that the hESC-based inventions cases under the Biotechnology Directive are based on the inconsistent application of a uniform standard. Although the CJEU recognised moral pluralism between EU Member States in *Brüstle*, it proceeded to define the status of the human embryo according to a conception of human dignity that had no basis in the legal documents from which these principles originate: namely international and European human rights laws. Furthermore it was observed that numerous EU authorities recognise the value of the ECHR – indeed there is an ongoing accession process between the two. This suggests they should be interpreted harmoniously.

4. Is the Current Treatment of hESC-based Inventions Consistent with European Human Rights Laws?

The discussion in Part 3 illustrates that there is reason to question whether the current treatment of hESC-based inventions is consistent with European human rights laws. This will now be considered by assessing the interpretation of art 6(2)(c) under the post-*ISCC* regime, with close reference to the realities of commercialising inventions relating to the human embryo and the conflicts that may arise due to competing human rights interests.

A. 'Human Dignity', the Human Embryo and the post-ISCC Framework

The CJEU held in *ISCC* that the human embryo's 'dignity' is violated where a patent is sought over an invention involving the use of cells possessing the 'inherent capacity' to develop into a human being.[158] This was argued by Advocate-General Villalón to form a 'no-go zone' common to all Member States.[159] Thus, when read together with *Brüstle*, the current position on the treatment of hESC-based inventions is that any work requiring the destruction or use as a base material of such cells, regardless of the stage in the development process at which this occurred or whether they were originally used for scientific purposes, will be unpatentable.

In order to demonstrate the full implications of this, the properties of different types of hESC will now be briefly outlined. Broadly, they are split into two main categories: totipotent and pluripotent cells.[160] It is widely accepted that as totipotent

[156] CJEU Opinion 2/13 of the Court (Full Court) on accession to the ECHR 18 December 2014 (not yet reported); see Brice Dickson, 'The EU Charter of Fundamental Rights in the Case Law of the European Court of Human Rights' (2015) 1 EHRLR 27.
[157] Harmon, Laurie and Courtney (n 10) 95-98.
[158] *ISCC* (n 9) para 38.
[159] *ISCC* A-G Villalón (n 93) para 57.
[160] Parker (n 13) 738.

cells can become fully-formed human beings, they constitute a 'stage of human development' and are therefore unpatentable.[161] This is in keeping with the post-*ISCC* framework and reflects national definitions of the 'human embryo' such as that of the UK Human Fertilisation and Embryology Act (HFEA).[162] On the other hand, as noted in Part 2,[163] pluripotent cells cannot develop to term.[164] This characteristic led the CJEU to accept parthenotes – a form of pluripotent hESC – as morally acceptable under art 6(2)(c) in *ISCC*, though, as these cells arise from unfertilised human ova, they also avoid *Brüstle*'s exclusion of patents using 'human embryos' as defined in that case.

It is therefore clear that the exclusion from patentability of inventions based on pluripotent hESCs takes hold only where they were derived from 'human embryos' as defined in *Brüstle*. Yet, Part 3 illustrates that there is no European consensus on the 'human embryo' and its status with regard to 'human dignity'. Indeed, a brief examination of hESC research regulation in Member States shows a plurality of approaches,[165] ranging from the UK's issue of licences to perform research on leftover human embryos[166] from IVF which would otherwise be destroyed,[167] or even those made purely for research purposes,[168] to Ireland's complete lack of regulation due to its recognition of the unborn child's right to life from conception.[169] Furthermore, Spain adopts a somewhat intermediate approach in allowing research on supernumerary IVF embryos in the 'pre-embryo' stage, which it defines as prior to the 14th day after fertilisation,[170] whilst other states require that only non-viable embryos – for example with chromosomal abnormalities precluding life – be used in research.[171]

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[161] *Brüstle* (n 7) Opinion of AG Bot paras 84-85; Plomer, 'Stem Cell Patents' (n 34) 66-69; Schuster (n 12) 631-633.

[162] Human Fertilisation and Embryology Act 1990 (HFEA) s 1(1)(b) of which states that the human embryo includes 'an egg (…) undergoing any (…) process capable of resulting in an embryo'.

[163] See Part 2 section D.

[164] Parker, 'Where Now?' (n 13) 738; Hubertus Schacht, 'Commencement or Completion – What Constitutes a 'Human Embryo' within the Meaning of the EU Biotechnology Directive?' (2014) 36(1) EIPR 66, 67-68.

[165] Plomer, 'Stem Cell Patents' (n 34) Appendices I-II; also see generally Euro Stem Cell, 'Regulation of Stem Cell Research in Europe' <www.eurostemcell.org/stem-cell-regulations> accessed 12 March 2015.

[166] HFEA (n 162) sch 2, para 3.

[167] ibid sch 3, para 6.

[168] ibid sch 2, para 3(1), this is prohibited under Oviedo Convention (n 128) art 18(2) in EU Member States that have ratified it.

[169] Constitution of Ireland art 40(3).

[170] Ley 14/2007, de 3 de julio, de Investigación biomédica (Spanish Law No 14/2007 of 3 July 2007 on Biomedical Research) art 3(s) art 33 <www.isciii.es/ISCIII/es/contenidos/fd-investigacion/SpanishLawonBiomedicalResearchEnglish.pdf> accessed 02 March 2015; Rosario Isasi and Bartha Knoppers, 'Towards Commonality? Policy Approaches to Human Embryonic Stem Cell Research in Europe' in Aurora Plomer and Paul Torremans (eds), *Embryonic Stem Cell Patents: European Law and Ethics* (OUP 2009) 34.

[171] Isasi and Knoppers (n 170) 48.

This plurality is also recognised within the EU legal order by the Human Tissues and Cells Directive (HTCD),[172] which was adopted to harmonise the approach to 'health threats' within EU territory following increased research on the human body. As the EU's competence in this area does not encompass the integration of moral views[173] however, the HTCD is stated to apply to hESC research in those Member States where it is permitted.[174] Furthermore, 'the legal term "person" or "individual"' was left to be defined by individual states.[175]

This illustrates the necessity of the margin of appreciation applied in *Vo*. Yet, in neglecting to consider this authority, *Brüstle* stated that respect for the dignity and integrity of the person required that 'any human ovum must, *as soon as fertilised*, be regarded as a "human embryo"' under art 6(2)(c), 'since that fertilisation is such as to commence the process of development of a human being'.[176] This ignored certain Member States' acceptance of using non-viable and supernumerary IVF embryos in hESC research, despite the latter's potential to develop into a human being if implanted into a woman's uterus. It is also inconsistent with *Evans*' statement that the right to life of the frozen IVF embryo is to be determined by individual states.

However, it must be remembered that art 6(2)(c) is an example of *commercial exploitation* that would be contrary to '*ordre public*' or morality. Thus far the legitimacy of hESC research itself under human rights laws has been considered, though it is now established that 'human dignity as empowerment' does not recognise a right to life of human embryos from conception. However, this does not equate to issues where dignity acts as a 'constraint', as occurs when commercially exploiting uses of the embryo is prohibited. In this regard it is noteworthy that some Member States that have ratified the Oviedo Convention – which as noted in Part 3 requires an 'adequate level of protection' for the embryo and prohibits uses of the human body as such for financial gain – continue to allow uses of non-viable and supernumerary IVF embryos[177] and allude to upstream commercialisation in hESC research legislation.[178] Moreover, other Member States are yet to sign or ratify this Convention, and prior to *Brüstle* had granted patents over hESC-related inventions.[179] Thus, it is submitted that nothing in the European human rights regime suggests 'human dignity' necessitates the prohibition of commercialising

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[172] Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells [2004] OJ L102 (HTCD).
[173] Plomer 'Towards Systemic Legal Conflict' (n 59) 181-182.
[174] HTCD (n 172) Recital 7.
[175] ibid 12.
[176] *Brüstle* (n 7) para 35 (emphasis added).
[177] Plomer, 'After *Brüstle*' (n 61) 132-134; Plomer, 'Human Dignity, Human Rights, and Article 6(1)' (n 134) 213; Isasi and Knoppers (n 170) 42; Spranger (n 126) 1207.
[178] Ley 14/2007 (Spanish Law No 14/2007) (n 170).
[179] Mainly in the UK and Sweden - Plomer, 'Towards Systemic Legal Conflict' (n 59) 196-198; Clara Sattler de Sousa e Brito, 'Biopatenting: 'Angst' v. European Harmonisation – the ECJ Decision on Stem Cell Patents' (2012) 1 EJRR 130, 131. After *Brüstle* the UK-IPO had to issue a Practice Notice following the judgment clarifying that hESC-related inventions would now receive limited patentability: UK-IPO, '*Inventions Involving Human Embryonic Stem Cells*' (17 May 2012) <www.ipo.gov.uk/pro-types/pro-patent/p-law/p-pn/p-pn-stemcells-20120517.htm> accessed 12 March 2015.

pluripotent hESCs derived from uses of supernumerary IVF and non-viable embryos.

This is lent further credence by the EU Advanced Therapies and Medicinal Products Regulation (ATMPR),[180] which was adopted shortly after the HTCD and aims to facilitate the market entry of products of human origin 'prepared industrially or manufactured by a method involving an industrial process'[181] within EU territory. Like the HTCD, it applies equally to advanced therapies involving uses of hESCs where Member States permit their 'sale, supply or use'.[182] Thus, the ATMPR seemingly recognises the moral pluralism between European states regarding the commercialisation – as well as the acceptability – of hESC-based inventions.[183] Indeed, commentators have observed that by allowing data exclusivity over therapeutic cell lines permitting up to 11 years of uninterrupted use of the experimental data behind the product,[184] the ATMPR itself creates a right facilitating commercialisation[185] that delays the appearance of generic competition on the market.[186] Furthermore, the difficulties and costs involved in creating generic references of large products such as entire cells mean there is little incentive for generics companies to invest in developing rival products – so in fact there may be almost unlimited rights to exploit the advanced therapy.[187]

In all, therefore, the post-*ISCC* treatment of hESC-based inventions is clearly problematic from a human rights perspective. However, it is equally apparent that the CJEU's jurisprudence does not violate human rights laws with regard to the right to life of the human embryo. Rather, it imposes a greater level of protection than the ECHR requires. This is permitted by the EU Fundamental Charter[188] and the ECtHR.[189] However, if such provisions encroach on other rights, the European human rights regime would oblige them to pursue a legitimate aim and be proportionate to that aim[190] – as demonstrated by the CJEU in *Omega* and the

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[180] Regulation (EC) No 1394/2007 of the European Parliament and of the Council of 13 November 2007 on Advanced Therapies for Medicinal Products and amending Directive 2001/83/EC and Regulation (EC) No 726/2004 [2007] OJ L324 (ATMPR).
[181] ATMPR (n 180) Recital 6.
[182] ibid.
[183] Plomer, 'Towards Systemic Legal Conflict' (n 59) 183-186; Enrico Bonadio, 'Stem Cells Industry and Beyond: What is the Aftermath of Brüstle?' (2012) 3(1) EJRR 93, 95.
[184] Daniel Acquah, 'Extending the Limits of Protection of Pharmaceutical Patents and Date outside the EU – Is there a Need to Rebalance?' (2014) 45(3) IIC 256, 265.
[185] Directive 2001/83/EC arts 6, 10; Directive 2004/27/EC art 10(4); Julian Hitchcock and Clara Sattler de Sousa e Brito, 'Case Comment: Should Patents Determine when Life Begins?' (2014) 36(6) EIPR 390, 395.
[186] Anand Grover, 'Report of the Special Rapporteur on The Right of Everyone to the Enjoyment of The Highest Attainable Standard of Physical and Mental Health' (UNCHR, UN Doc A/HRC/11/12, 31 March 2009) para 78.
[187] Hitchcock (n 185) 395-396.
[188] EU Charter (n 139) art 52(3).
[189] *A, B and C v Ireland* [2011] 53 EHRR 13.
[190] Ansgar Ohly, 'European Fundamental Rights and Intellectual Property' in Justine Pila and Ansgar Ohly (eds), *The Europeanisation of Intellectual Property Law: Towards a European Legal Methodology* (OUP 2013) 153-156.

Netherlands case.[191] This points to the necessity of considering competing human rights interests.

B. Competing Human Rights Interests

i. The Right to Health

The post-*ISCC* approach to the patentability of hESC-based inventions is likely to encourage at least some diversion of investment and development away from inventions the CJEU considers to be morally unacceptable.[192] In EPO practice it appears this will result in those patented between the first derivation of hESCs in 1998 and the first recognised derivation of hESCs from non-destructive sources in early 2008[193] being unenforceable. The effect on future research may be minimal, as stem cell lines from such origins have been publicly available since this date and so inventions completed after it did not necessitate the use of destructive methods.[194] It is unclear whether this would be the case if the issue came before the CJEU however, as, whilst supported by the German BGH's grant of the *Brüstle* patent in an amended form that excluded *destructive* uses of human embryos, O'Sullivan argues that this appears to disregard the CJEU's prohibition of uses 'as a base material' under art 6(2)(c).[195]

The issue here is that the development of hESC-based therapies is likely to take decades,[196] and there is a chance that denying patentability to and so reducing the prospects of commercialising inventions created during this initial ten-year period may delay the appearance on the market (at least from within the EU) of such therapies. This would equally delay the unlocking of their potential benefits to health.

This raises the question whether 'human dignity' also requires respect for the right to health.[197] Thus far, this article has illustrated the lack of European consensus on when 'human dignity' attaches to the human embryo.[198] However, the very reason for this principle and related rights including the right to life is that they

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[191] Also before the ECtHR in *A, B and C v Ireland* (n 189).

[192] Harmon, Laurie and Courtney (n 10) 97.

[193] ASTERIAS/Embryonic stem cells, disclaimer (T1441/13) [2015] EPOR 9, para 35; George Schlich and David Eyre, 'Morally Acceptable Sources of Human Embryonic Stem Cells (hESCs): Embryos that Never Were, or Never Could Be' (September 2014) <www.schlich.co.uk/latest_stem_cell_patenting.php> accessed 14 March 2015; Barbara Rigby 'EPO Shies Away from Taking a Stand on Human Embryonic Stem Cells'<www.dehns.com/site/information/industry_news_and_articles/epo_shies_away_from_human_embryonic_stem_cells.html> accessed 14 March 2015.

[194] George Schlich and David Eyre, 'The First Glimmers of Hope After the Doom of the Brüstle Decision' (October 2012) <www.schlich.co.uk/latest_first_glimmers_after_the_doom.php> accessed 24 February 2015.

[195] *Brüstle* (n 7) para 52; O'Sullivan (n 42) 162.

[196] University of Michigan, 'Stem Cell Research: Frequently Asked Questions' <www.stemcellresearch.umich.edu/overview/faq.html#section2> accessed 13 March 2015.

[197] Ohly (n 190) 158-160; Harmon, Laurie and Courtney (n 10) 97.

[198] For example, the EU Charter art 1 (n 139) states that 'Human dignity is inviolable', but it has been shown that there is no way of definitively deeming it to attach to anything capable of developing into a human being from the moment of fertilisation (or stimulation).

'empower' human beings already alive.[199] This may result in certain states regarding the restriction of activities that could lead to cures for patients as morally unacceptable and, by extension, contrary to 'human dignity'.[200] This is supported by Member State legislation on hESC research, which often justifies these activities with reference to their prospective benefits for human beings suffering today.[201] The rationale was also behind the HTCD and ATMPR, whilst the Biotechnology Directive itself recalls the medical progress attributable to biotechnological advances.[202]

Yet, the hESC-based inventions cases argue that restricting patents over such works is necessary to maintain respect for 'human dignity' when harmonising Member State patent laws on biotechnological inventions. As noted above, affording the embryo greater protection than European human rights laws require is permitted, and it is difficult to see any issue with the harmonisation of patent systems to promote biotechnological innovation.[203] Therefore, the cases shall be assumed to pursue a legitimate aim.[204] However, the right to healthcare is specifically recalled by EU Charter art 35,[205] and although not present in the ECHR is outlined in ECtHR jurisprudence.[206] Moreover, following *Nold* from the pre-EU Charter era[207] it may be argued that other Council of Europe instruments including the European Social Charter (EuSC)[208] and the Oviedo Convention[209] incorporate this right into EU law, particularly as those Member States applying the EU Charter's Protocol – which invalidates art 35 insofar as it is not provided by national law[210] – have also signed and ratified the EuSC.[211]

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[199] See, for example, ECHR (n 72) art 2; EU Charter (n 139) arts 1-2; ICCPR (n 103) art 6.

[200] Shane Burke, 'Interpretive Clarification of the Concept of "Human Embryo" in the Context of the Biotechnology Directive and the Implications for Patentability: Brustle v Greenpeace eV (C-34/10)' (2012) 34(5) 346, 349-350; Hitchcock (n 185) 397-398.

[201] Isasi and Knoppers (n 170) 43.

[202] Biotechnology Directive (n 2) Recital 17; Advocate-General Bot also makes reference to those with health problems – see *Brüstle* (n 7) Opinion of AG Bot, para 43.

[203] Indeed, the *Netherlands* case appears to support this notion in recognising the margin of manoeuvre for Member States under art 6(1).

[204] Plomer, 'After *Brüstle*' (n 61) 131; Ciara Staunton, 'Commentary: *Brustle v Greenpeace*, Embryonic Stem Cell Research and the European Court of Justice's New Found Morality' (2013) 21 Med L Rev 310, 316-318.

[205] EU Charter (n 139) art 35.

[206] *Nikky Sentges v the Netherlands (Admissibility)* [2003] Application no 27677/02 (8 July 2003); Danielle Da Costa Leite Borges 'Making Sense of Human Rights in the Context of European Union Healthcare Policy: Individualist and Communitarian Views' (2011) 7(3) IJLC 335, 344-345.

[207] *Nold v Commission* (n 149) para 13.

[208] European Social Charter (concluded 18 October 1961, entered into force 26 February 1965) ETS No 035, as amended 1996 (EuSC) art 11; whilst this Charter is non-binding, all EU Member States have ratified it.

[209] Oviedo Convention (n 128) art 3.

[210] Treaty on the Functioning of the European Union (n 155) Protocol (No 30) art 1(2).

[211] The signatories of Protocol (No 30) are Poland and the UK, as stated by Treaty on the Functioning of the European Union (n 155) Protocol (No 30), both of which have ratified the EuSC: Council of Europe, 'Signatures and Ratifications of the European Social Charter, its Protocols and the European Social Charter (Revised)' (26 March 2013) <www.coe.int/t/dghl/monitoring/socialcharter/Presentation/SignaturesRatificationsMarch2013_en.pdf> accessed 10 September 2015.

The EuSC recognises 'effective access to healthcare for all (…) as a basic human right',[212] whilst Oviedo requires this access to keep pace with scientific developments.[213] Therefore, as the right can be linked to respect for the 'human dignity' of patients requiring medical treatment today, the post-*ISCC* regime's proportionality may be questioned. Furthermore, though it is unclear whether the right to health extends to the development of new, innovative methods of healthcare, as Oviedo specifically addresses biomedicine, it seems that if therapies arising from hESC-related inventions are accepted within a signatory state, the right to health would apply pressure for it to be used. Thus, when read together with the EU Charter's right to freedom of scientific research,[214] there is scope to argue that the European human rights regime favours measures facilitating the development of hESC therapies.[215]

This could be countered with reference to human rights-related claims raised concerning the effects of intellectual property on the right to health. The grant of a limited monopoly in this vital sector is controversial, as evidenced by the work of the UN Special Rapporteur on Health and Intellectual Property[216] and the adoption of the Doha Declaration on TRIPS and Public Health,[217] which highlight the danger of intellectual property rights being used to restrict access to healthcare. Similarly, the limitations imposed (albeit between private entities) upon European patent law by 'Bolar' exemptions allow greater freedom to use patented drugs when seeking regulatory approval for generic or new products.[218] As pharmaceutical companies continue to develop medicines despite the likelihood of future reduced prices due to competition appearing on the market sooner than it would in the absence of such exemptions, and the encouragement of developing countries to enact similar flexibilities,[219] these examples suggest that limiting patent rights does not necessarily deter innovative activity.

Furthermore, patents over parthenotes and inventions not necessitating the use of destructive methods are currently accepted, meaning that if inventors engage in what the CJEU considers morally acceptable activities they can seek protection.[220]

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[212] Borges (n 206) 339-340; Council of Europe, 'Digest of the Case Law of the European Committee of Social Rights' (1st September 2008) <www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf> accessed 15 March 2015.

[213] Oviedo Convention Explanatory Report (n 132) para 24; Borges (n 206) 340-341.

[214] EU Charter (n 139) art 13.

[215] A similar argument exists with regard to the interface between ICESCR (n 104) arts 12 and 15(1)(b)-(c); see also CESCR, 'General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author' (ICESCR art 15(1)(c)) (12 January 2006) E/C12/GC/17 para 35.

[216] Report of Anand Grover (n 186).

[217] Declaration on the TRIPS Agreement and Public Health (20 November 2001) WT/MIN(01)/DEC/2 <www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf> accessed 10 September 2015.

[218] Directive 2001/83/EC on the Community Code Relating to Medicinal Products for Human Use; Directive 2004/27/EC amending; [2001] OJ L311/67, art 10(6); L Cohen and L Peirson, 'The UK Research and "Bolar" Exemptions: Broadening the Scope for Innovation?' (2013) 8(11) JIPLP 837, 841.

[219] Report of Anand Grover (n 186) para 48, 104 and parts 3-5 generally.

[220] Harmon, Laurie and Courtney (n 10) 103-104; Christopher Hayes, 'Stem Cell Patents: Limiting the Application of *Brüstle*' (2014) 9(12) JIPLP 951, 952; Brabin (n 13) 690-691.

The underlying hESC research equally avoids prohibition. Thus there is a case in favour of the post-*ISCC* regime's proportionality with regard to the right to health.

Nevertheless, this discussion illustrates that the right to health may justify the grant of patents over hESC-based inventions in states considering their commercialisation to be compatible with 'human dignity'. It is also noteworthy that, in the complete absence of patent rights, the alternative methods of commercialising such therapies elaborated in Part 5[221] may be of greater detriment to the right to health.

ii. The Right to Property

Another human rights concern engaged by the post-*Brüstle* and *ISCC* framework is the right to property. *ISCC* retained *Brüstle*'s interpretation of art 6(2)(c) as precluding patentability where the 'embryo' – including cells capable of developing to term – is used or destroyed at any time during the development of or scientific research leading to the invention. This was deemed necessary because where an invention is patented and the limited monopoly takes hold, it cannot be considered in isolation of the research that led to its creation.[222] Yet it clearly interferes with the private property rights of patentees.[223]

Part 3 noted that Locke considered the right to property to be a fundamental right that all individuals possess:[224] a significance reflected by its presence in universal human rights authorities.[225] It is also included in ECHR Protocol 1 art 1 (P1A1), which protects the 'peaceful enjoyment' of property for 'every natural and legal person', whilst the EU Charter art 17(2) explicitly extends this right to include intellectual property.[226] Furthermore, the ECtHR has protected patents under P1A1 in *Smith Kline and French Laboratories v Netherlands*,[227] and although *American Tobacco* notes that no violation occurs where a patent application is validly rejected by the appropriate authority,[228] the right arguably encompasses such applications in limited circumstances.[229]

Together, these provisions suggest that authors of innovative works become endowed with a human right to property of which they should not be arbitrarily dispossessed.[230] Thus although the desirability of granting such rights to legal persons – which allows corporate investors behind inventions to claim interferences

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[221] See Part 5 section B.
[222] *Brüstle* (n 7) para 43.
[223] Harmon, Laurie and Courtney (n 10) 98-99.
[224] Shestack (n 98) 37.
[225] UDHR (n 101) art 17; ICESCR (n 104) art 15(1)(c).
[226] EU Charter (n 139) art 17.
[227] No 12633/87, Commission decision of 4 October 1990, Decisions and Reports 66, 70.
[228] *British American Tobacco Company Ltd v The Netherlands* (1996) 21 EHRR 409.
[229] L Helfer, 'The New Innovation Frontier: Intellectual Property and the European Court of Human Rights; (2008) 49(1) Harv Int'l LJ 2, 24, in the light of the extension of the right to trademark applications holding a 'legitimate expectation of obtaining an asset' *Anheuser-Busch v Portugal*, App No 73049/01, 45 EHHR 36, 830 (Grand Chamber 2007) para 65.
[230] UDHR (n 101) art 17(2).

with their human rights – has been questioned,[231] patentees clearly require at least some level of protection.

However, the right to property may be restricted in certain situations. Under the universal human rights regime ICESCR art 15(1)(c)'s protection of innovative works arises out of the 'inherent dignity' of all human beings,[232] and so only ensures that creators are treated fairly once their work is publicly disclosed rather than providing a basis for the potential accumulation of substantial profits.[233] In this way it is not equal to the rights conferred by patent regimes. The European framework reflects these concerns; with the ECHR[234] and EU Charter[235] allowing states to deprive individuals of their property in the 'public interest' and to control uses of that property in the 'general interest'. Both the ECtHR[236] and CJEU[237] recognise a wide margin of appreciation for states applying such restrictions, provided they pursue a legitimate aim and fulfil the proportionality principle.[238] This suggests a need to balance the right to property with other considerations, particularly other human rights under the European framework.[239]

However, assuming once again that the hESC-based inventions cases pursue a legitimate aim,[240] it remains valid to argue that achieving harmonisation by applying a broad definition of 'human embryo' to protect a conception of 'human dignity' that fails to acknowledge European moral pluralism contravenes the proportionality principle.[241] Furthermore, excluding inventions involving the destruction or use as a base product of an embryo even where this occurred for scientific purposes arguably extends the definition of 'industrial and commercial purposes' in a manner that was never intended. Indeed, Porter notes that the Biotechnology Directive's framers inserted this wording to narrow the previous exclusion's scope from 'methods in which human embryos are used'.[242] When read together with the *Italy* case[243], this suggests that art 6(2)'s non-discretionary nature requires the terms 'industrial' and 'commercial', as well as 'human embryo', to be given their natural meaning.[244] Applying this literal approach, patents over works relating to pluripotent hESCs

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[231] Klaus D Beiter, 'The Right to Property and the Protection of Interests in Intellectual Property – A Human Rights Perspective on the European Court of Human Rights' Decision in Anheuser-Busch v Portugal' (2008) 39(6) IIC 714, 719.
[232] ibid 716.
[233] ibid 716-717.
[234] ECHR (n 72) Protocol 1 art 1.
[235] EU Charter (n 139) art 17(1).
[236] *American Tobacco* (n 228).
[237] Case C-275/06 *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008] ECR I-271, paras 67-71.
[238] EU Charter (n 139) art 51(1); *L.B. v Italy* App No 3254/96 (Judgment of the First Section, 15 November 2002) paras 23-25.
[239] Christophe Geiger, 'Intellectual Property Shall be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope' (2009) 31(3) EIPR 113, 116-117; Helfer, 'The New Innovation Frontier' (n 229) 9-11.
[240] See section B(i).
[241] Plomer, 'After *Brüstle*' (n 61) 131.
[242] Porter (n 32) 20-21; Plomer, 'After *Brüstle*' (n 61) 123, 131-135; Harmon, Laurie and Courtney (n 10) 98-100.
[243] *Commission v Italy* (n 57) para 78; Part 2 section C.
[244] Plomer, 'After *Brüstle*' (n 61) 123.

derived from supernumerary IVF and non-viable embryos in jurisdictions where such actions are morally acceptable would not run contrary to art 6(2)(c).[245]

At the most it could be claimed that declaring such hESC-based inventions unpatentable is proportionate in EU Member States that prohibit hESC research or the commercialisation of products arising from them on grounds of morality and the protection of 'human dignity'.[246] Yet this cannot be said for states that allow such practices.

In return it could be argued that *ISCC* has improved the treatment of hESC-based inventions under the Biotechnology Directive. The case has certainly returned an amount of proportionality to the restriction on the right to property[247] for post-2008 works, but will do little to mitigate the losses of those registered prior to this date. The extension of 'industrial and commercial purposes' to scientific purposes also raises the question of whether an invention involving research performed before this date – when no non-destructive methods of deriving hESCs were available – will also be caught by art 6(2)(c).[248] Such works may still be commercialised for example through the ATMPR or robust trade secrets laws; however, as shall be discussed in Part 5, these may be more harmful to the right to health than the patent regime.[249]

Therefore, it is submitted that the current regime arguably represents a disproportionate denial of the human right to property for patentees whose rights are now unenforceable due to the 'moral impermissibility' of their invention, despite its grant in a Member State that regards it as morally acceptable.[250]

C. Summation

This discussion has sought to dissect the post-*ISCC* interpretation of the art 6(2)(c) provision 'uses of human embryos for industrial or commercial purposes' as an example of a commercial exploitation contrary to '*ordre public*' or 'morality' under art 6(1), with close reference to its consistency with European human rights laws. Having established the pluralism surrounding the term 'human dignity' and the status of the human embryo in Part 3, section A showed that the 'human embryo' is defined differently by EU Member States, and that uses – whether destructive or as a base material – of pluripotent hESCs derived from sources such as supernumerary IVF and non-viable embryos are not universally regarded as morally abhorrent. It was then demonstrated that the same is true of the commercial exploitation of such materials; before the proportionality of this finding's impact on the right to health was considered – though this author notes there are strong cases on both sides of this debate. Finally it was observed that the extension of 'industrial or commercial purposes' to include uses of human embryos for scientific purposes, as a result of European moral pluralism, may constitute a disproportionate interference with the right to property where it renders patents unenforceable in states considering

[245] Harmon, Laurie and Courtney (n 10) 98-99; Plomer, 'After *Brüstle*' (n 61) 130-131.
[246] Plomer, 'After *Brüstle*' (n 61) 130-135.
[247] Hayes (n 220) 952.
[248] O'Sullivan (n 42) 162.
[249] Harmon, Laurie and Courtney (n 10) 104-105; see discussion in Part 5.
[250] Plomer, 'Inherently Uncertain?' (n 94).

inventions involving such activities to be morally acceptable. It may therefore be argued that the current treatment of hESC-based inventions under art 6 is inconsistent with European human rights laws.

5. Does the Interpretation of the Morally Problematic Terms in Article 6 Come Under the Ambit of Patent Law?

Thus far this article has suggested that the CJEU should have taken European human rights authorities into consideration when adjudicating on the patentability of hESC-based inventions. It has demonstrated that there are arguably inconsistencies with these provisions, particularly regarding the rights to health and property. Furthermore the protection of an extended definition of the human embryo – the 'human dignity' of which accords it a status universally recognised by neither Member States nor the European human rights regime – seemingly disregards the Biotechnology Directive Recital 8's rejection of creating a 'separate body of law in place of the rules of national patent law'. Yet, the current approach was also shown to go further than human rights laws require in protecting the status of the human embryo, and this may not violate the right to health because of the post-*ISCC* possibility to gain patents over inventions involving non-destructive methods. Is this an unacceptable legal position? Part 3 recalled that some commentators argue the judgment could be construed as the origin of European consensus on the embryo.[251] This raises the question whether the interpretation of the morally problematic term 'human embryo' and related issues such as the extent to which it enjoys 'human dignity' as seen in Biotechnology Directive art 6 comes under the ambit of patent law. In order to address this issue, the rationales of patent law itself shall be outlined, before the other methods of protecting and exploiting unpatentable inventions are considered. After illustrating that moral pluralism over such works not only prevents their being outlawed but potentially pushes them towards more monopolistic protection, it will be asked whether it is viable for patent law to operate in isolation of external legal regimes.

A. Rationales of Patent Law

Perhaps the most commonly cited justification for the grant of patents and the limited, negative monopoly accompanying them is the incentive-disclosure rationale. This is often likened to a 'social contract',[252] whereby in return for publishing details of the innovative activity behind their invention, inventors are rewarded[253] with a property right allowing them to benefit from it for a period of time. It is claimed that this encourages would-be inventors to invent and contribute to advancing human knowledge[254] and deters engagement in 'free-riding' activities[255]

[251] O'Neill (n 138).
[252] Matthew Fisher, 'Classical Economics and Philosophy of the Patent System' (2005) 1 IPQ 1, 20, 26.
[253] It has also been suggested that the reward itself is a justification of patents; however this is now seen as a weak argument due to the availability of other forms of prize – see Fisher (n 252) 11.
[254] L Bently and B Sherman, *Intellectual Property Law* (3rd edn, OUP 2009) 340.

that will stagnate development. This is equally true of investors in innovation, whose financial contributions are as important as the inventor's actions to innovative projects.[256] Indeed, modern justifications of patent law have centred on the investor due to this reality. For example, it has been noted that inventors who obtain patents over their inventions when looking to commercialise them are more likely to attract the necessary investors because the patent functions as a 'signal' of financial viability.[257] The influence of these justifications can clearly be observed in the hESC-based inventions cases, as illustrated by the post-*Brüstle* claims that the ruling would cause a future lack of investment in European hESC research.[258]

An earlier rationale of relevance to the present discussion is that inventors enjoy a 'natural right'[259] of property over the fruits of their innovative efforts, though the incentive-disclosure rationale has taken precedence over this because it is undermined by the temporally-limited nature of patents.[260] However, Part 4 illustrates that the European human rights framework protects intellectual property, and that any interference with this right must be legitimate and proportionate.

On the other hand, where these limitations are justified, it has been observed that patents may be used to regulate particular activities.[261] This effect can be seen in the hESC-based inventions cases, as it appears that the protection afforded to the human embryo in the name of 'human dignity' – though intended to enable the application of a uniform interpretation of art 6(2)(c)[262] – has a regulatory function by encouraging future investment in hESC-related activities that the CJEU considers morally acceptable.[263] Indeed, the inclusion of morality and '*ordre public*' provisions in European patent laws implies the system has always been capable of playing such a role.[264]

Thus, it is submitted that the discussion regarding patents over hESC-based inventions in this article has reflected all the aforementioned rationales. In particular the CJEU judgments' regulatory effect seems to have influenced the other justifications' operation in a manner that merits further investigation. Therefore, their practical implications – especially the widely claimed assertion that *Brüstle* would inhibit European hESC research, and its continued veracity after *ISCC* – will now be discussed.

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[255] Mark Lemley, 'Ex Ante Versus Ex Post Justifications for Intellectual Property' (2004) 71 (1) U Chi L Rev 129, pt I-B.
[256] Fritz Machlup and Edith Penrose, 'The Patent Controversy in the Nineteenth Century' (1950) 10(1) JEH 10, 25.
[257] Waelde and others (n 21) para 10.18.
[258] Harmon, Laurie and Courtney (n 10) 100-101.
[259] Fisher (n 252) 6.
[260] ibid 7-8.
[261] Waelde and others (n 21) para 10.20; Bently (n 243) 340-341.
[262] Plomer, 'After *Brüstle*' (n 61) 130-135; see also Part 4 section B(ii) on right to property.
[263] Schuster (n 12) 638-639.
[264] Derclaye (n 52) 258-259.

B. Inhibiting Commercialisation?

The post-*ISCC* regime will undoubtedly have some effect as a regulatory measure whereby inventors and investors are encouraged to engage in developing hESC-based inventions that do not involve embryos possessing the 'inherent capacity' to become a human being at any stage. This will be facilitated by the rapid development of non-destructive methods of obtaining hESCs, particularly parthenogenesis following *ISCC*, which was ongoing at the time of the *Brüstle* judgment.[265] On the other hand, Parts 3-4 illustrated that the current treatment of hESC-based patents under the Biotechnology Directive art 6 in fact relies on an interpretation of human dignity that has no basis in human rights law, and that, as a result, inventions involving work on supernumerary IVF and non-viable embryos are now considered unpatentable despite them being morally acceptable in certain Member States.

Yet, the Biotechnology Directive is incapable of preventing the commercialisation of these uses by other means and other bodies. For example, the EPO still allows patents with post-2008 priority dates[266] over 'immoral' hESC-based inventions as the destruction of hESCs was unnecessary after this date – even though this seemingly contradicts the CJEU's reference to uses 'as a base material' in *Brüstle*.[267] This suggests that the 'natural rights' justification is protected, as a right to property still arises out of the inventor's innovative activity.

Moreover, even if in future litigation the CJEU were to reject EPO practice – as it did in closing the 'deposit loophole' after *WARF* – Member States still wishing to encourage the continued development of unpatentable works in the pipeline could provide tax incentives or ensure robust protection from trade secrets laws.[268] For example, they may strictly enforce non-disclosure agreements and restrictive covenants against those dealing with inventors, and more generally may protect confidential information in a manner similar to that offered by the UK's common law doctrine breach of confidence.[269] Indeed, Bently suggests that although not being a full property right, the protection of such information is often considered to be an intellectual property right,[270] as supported by the English Court of Appeal.[271] In addition the ATMPR permits temporary data exclusivity over hESC-based therapies, which, as noted in Part 4, is likely to have a chilling effect on the market, particularly for generic competition.[272]

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[265] George Schlich and David Eyre, 'Parthenotes are an Acceptable Source of Human Embryonic Stem Cells' <www.schlich.co.uk/latest_source_stem_cells.php> accessed 14 March 2015.
[266] ASTERIAS (n 193) para 35.
[267] O'Sullivan (n 42) 162.
[268] Harmon, Laurie and Courtney (n 10) 104-105.
[269] Waelde and others (n 21) paras 18.5-18.10, 18.12-18.13; see also James Pooley, 'Trade Secrets: The Other IP Right' (WIPO Magazine, June 2013) <www.wipo.int/wipo_magazine/en/2013/03/article_0001.html> accessed 7 September 2015.
[270] Lionel Bently, 'Trade Secrets: 'Intellectual Property' but not 'Property'?' in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013) 62.
[271] *Vestergaard Frandsen S/A and Ors v Bestnet Europe Ltd* [2011] EWCA Civ 424 [56].
[272] Part 4 section A.

Accordingly, it is clear that those whose patents are rendered unenforceable or inventions unpatentable by the current regime may rely on other legal mechanisms to develop a monopoly in the absence of a patent. Although there would always be a risk of the disclosure of a trade secret to the public[273] and without further EU clarification the laws protecting them would be likely to vary between Member States,[274] the costs involved in reaching the market and complexity of 'reverse-engineering' cell-based products is likely to deter competition.[275] Thus, even after data exclusivity ends, such products may effectively be subjected to an unlimited monopoly.[276] This suggests that denying patentability does not necessarily remove the commercial incentive to work such inventions; rather, it removes the signal of viability to potential investors. Provided such investors understand the risks of these alternative methods of commercialisation, they may still wish to invest. Moreover, if the 'fixing' of patent claims is indeed contrary to *Brüstle*, creators of such works that have not already been disclosed in newly unenforceable patents may combine data exclusivity and trade secrets to gain market exclusivity without publicly detailing their inventive work. Given the potential medical benefits of hESC-based therapies, this would certainly be less socially desirable than allowing the grant of a patent and could have greater adverse effects on the right to health,[277] as if managed correctly the invention could be kept secret and monopolised.

Therefore, it appears that the post-*ISCC* treatment of hESC-based inventions does not prevent all commercialisation of violations of the human embryo's dignity (as conceived by the CJEU) before the EPO, in Member States and even under the EU legal framework. Thus it is questionable whether the 'autonomous' definition of 'human embryo' is capable of having a truly regulatory effect on hESC-based inventions. Indeed, as non-destructive methods of deriving hESCs were first disclosed in 2008 – perhaps earlier[278] – it can hardly be said that the patent system has been used to regulate innovation towards the development of such methods. Rather, following *ISCC*, the CJEU is encouraging the creation of inventions using what it considers to be the most morally desirable methods available today. Yet, the underlying 'immoral' research activities themselves remain permissible. It was even suggested they could be increased and patents sought outside Europe following *Brüstle*,[279] though it now appears that a combination of EPO practice and the *ISCC* 'inherent capacities' test, which seems much more focused on balancing scientific advances and the attendant medical potential, property rights, and respect for 'human dignity',[280] have reduced this possibility.

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[273] WIPO, 'Patents or Trade Secrets?' <www.wipo.int/sme/en/ip_business/trade_secrets/patent_trade.htm> accessed 07 September 2015.
[274] Concerning the scope for Directive 2004/48/EC on the enforcement of intellectual Property rights to encompass confidential information, see Bently (n 270) 73; WIPO (n 273). This contention is supported by TRIPS (n 23) art 39 and Paris Convention (n 46) art 10*bis*.
[275] Parker (n 13) 746; WIPO (n 273).
[276] Hitchcock (n 185) 395-396.
[277] Editorial, '*Nature Biotechnology: Tilting Toward Secrecy*' (2011) 29(12) Nature Biotechnology Journal, 1055.
[278] Schlich (n 265).
[279] Harmon, Laurie and Courtney (n 10) 105-106.
[280] Hayes (n 220) 952.

This again supports the contention that consultation of relevant human rights law authorities would have highlighted European moral pluralism and competing interests such as the rights to property and health. The patent regime alone is incapable of determining when life begins, and in this respect its isolation from other legal authorities weakens the power of the regulatory function, which, as noted above, appears to be the prominent concern of art 6's morality exclusion.

C. Isolated Patent Law?

This finding seemingly reflects a criticism that has previously been levelled at the patent regime in a different respect. In 1995 Bently and Sherman observed that historically patent law has always been considered separately to 'matters cultural, political and ethical'.[281] This characteristic has also caused difficulties in the USA, where the assessment of moral issues is tied to the doctrine of 'utility': a concept akin to European 'industrial applicability'. [282] Biotechnological advances in this jurisdiction have led to the rejection of patents over 'human organisms'[283] but many such inventions escape scrutiny on moral grounds.[284] Yet, ethics committees such as the European Group on Ethics in Science and New Technologies have suggested that, provided activities proceed on a responsible basis, the patentability of certain hESC-based inventions, due to the medical advances they could help contribute to, is acceptable.[285] Although non-binding, such committees have a strong influence due to their expert composition.[286]

Thus, there is evidently a need to consider morally problematic issues within patent law. However, as shown in the previous section, when considered *only* in the context of the patent regime, their effects are equally isolated, as the grant of a patent does not equate to a right to commercialise. Indeed, as a patent only allows its holder to prevent others from commercially exploiting the invention, that holder is not necessarily able to bring her/his invention to the market in any case, and instead may be subjected to regulatory measures from outside the patent regime.[287]

D. Summation

Patents are primarily intended to incentivise engagement in innovation and the subsequent public disclosure of the advances that such work provides. They are also capable of deploying this incentive to regulate development in certain contexts.

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[281] Burke (n 200) 349, citing L Bently and B Sherman, 'The Ethics of Patenting: Towards a Transgenic Patent System' (1995) 3 Med L Rev 275, 275.
[282] Oliver Mills, *Biotechnological Inventions: Moral Restraints and Patents* (2nd edn, Ashgate 2010) 45-46.
[283] Burke (n 200) 348-349.
[284] Mills (n 282) 49-50.
[285] Opinion of the European Group on Ethics in Science and New Technologies to the European Commission, *Ethical aspects of Human Stem Cell Research and Use* (Opinion No 15, 14 November 2000) para 2.3 <http://ec.europa.eu/archives/bepa/european-group-ethics/docs/avis15_en.pdf> accessed 22 February 2015; Moufang, 'Patenting Human Genes' (n 112) 495-498.
[286] Elodie Petit, 'An Ethics Committee for Patent Offices?' in Aurora Plomer and Paul Torremans (eds), *Embryonic Stem Cell Patents: European Law and Ethics* (OUP 2009) 309.
[287] As illustrated by European states' pluralistic approach to hESC research.

However where this occurs on grounds of morality, at least in the context of a supra-national organisation such as the EU, those moral values must be universal or they will fail in their regulatory objectives. The alternative methods of commercialising 'immoral' inventions remain, and may be more harmful to human rights concerns than the patent system. It is therefore clear that treating the human embryo as it is recognised under the European human rights regime would ensure that patent law is more integrated with other legal policies in its approach to hESC-related inventions, as well as maintaining consistency within the internal EU legal order under the HTCD and ATMPR. [288] Thus it is submitted that whilst moral considerations certainly come under the ambit of patent law, the interpretation of morally problematic terms such as 'human embryo' and its right to 'human dignity' does not – as implied by Biotechnology Directive Recital 8.

6. Conclusion

In closing, it is submitted that the references to 'human dignity' in applying the Biotechnology Directive's art 6 morality exception to hESC-based inventions suggests a clear link between the patent and human rights regimes. The failure to consider this in CJEU cases has resulted in an approach to such inventions that is inconsistent with European human rights laws. Whilst the interpretation of 'human embryo' and the dignity attached to it in fact provides greater protection than the human rights regime requires, it is undermined by its lack of a basis in European moral consensus. This creates potential conflicts with the rights to health and property, and pushes the commercial exploitation of 'immoral' inventions towards other legal regimes – which raises questions regarding the legitimacy of the Court's 'autonomous' definition of 'human embryo'.

Whilst *Brüstle* used 'human dignity' to justify a wide, constraining interpretation of this term, *ISCC* seems to limit it by considering competing concerns to a greater extent. Nevertheless, patent law cannot operate in isolation of outside regimes. Issues of morality and '*ordre public*' are essential to the responsible management of patents over hESC-based inventions, but alone are vulnerable to ineffectiveness in the achievement of their aims. Therefore it appears that the interpretation of the morally problematic term 'human embryo' in art 6(2)(c), together with the attendant issues relating to its status and attachment to 'human dignity', does not come under the ambit of patent law. Rather, a much more harmonious position could be achieved if it were applied as approached under European human rights laws.

[288] Plomer (n 59); Hitchcock (n 185) 395-396.

The EU Legal Liability Framework for Carbon Capture and Storage: Managing the Risk of Leakage While Encouraging Investment

ANDA POP*

Abstract

Ensuring the security of energy supply, while reaching climate change mitigation targets, is a most difficult objective. Yet the European Union (EU) can no longer afford to delay its achievement. In this context, the relatively novel technology of carbon capture and storage (CCS) has gained increasing support at EU level, as it promises to deliver a much needed solution. An enabling legal framework for the geological storage of CO_2, in the form of a 2009 CCS Directive, was rapidly adopted in order to stimulate the environmentally safe deployment of CCS. Nevertheless, deployment remains slow. This article aims to emphasise that in its present form, the Directive fails to encourage investment in CCS. By maintaining a focus on the EU provisions governing liability for leakage of CO_2 from CCS projects, it is argued that the Directive fosters legal uncertainty. Furthermore, it creates an imbalance between the responsibilities of private and public actors for the inevitable risks inherent in a socially useful and arguably necessary technology. A proposal for reform is outlined, which corrects this imbalance and provides more legal certainty.

Keywords: Carbon capture and storage/CCS, Leakage, Climate change, Geologic sequestration, EU Directive, Liability

1. Introduction

With humanity only 35 years away from what is predicted to be dangerous levels of anthropogenic climate change,[1] efforts to deploy a series of greenhouse gas mitigation and clean energy technologies have never been more relevant. The European Union (EU) has long acknowledged this urgency and has taken its place as an international leader in the adoption of policy and legal instruments enabling and encouraging the development of such technologies.[2] Over the past decade, one

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[1] IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2015) <www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf> accessed 3 March 2015.

[2] James Meadowcroft and Oluf Langhelle, *Caching The Carbon: The Politics and Policy of Carbon Capture and Storage* (Edward Elgar 2009) 217.

option which has been gaining increasing support from an EU policy perspective is Carbon Capture and Storage (CCS).

CCS represents a set of technologies which aim to prevent emissions and achieve the capture, transport and storage of CO_2 resulting from energy generation and other industrial processes, within underground geological formations.[3] Such storage is intended for tens of thousands of years.[4] The technology is promising and well understood from a theoretical perspective, yet still lacks widespread application and extensive practical experience.[5] While it promises to provide a significant contribution to climate change mitigation efforts, it simultaneously facilitates the continued use of fossil fuels.[6] This is one of the main reasons why it remains controversial among stakeholders. As Bradshaw notes, CCS has been 'described variously as a "magic bullet", "an uncomfortable but necessary option", "an expensive distraction" and a "false hope"'.[7]

The EU has taken a strong supportive stance on the deployment of CCS. This is particularly evident from its adoption of an enabling legal framework for the geological storage of CO_2, in the form of the 2009 CCS Directive.[8] However, the EU approach to regulating CCS is not without its shortcomings. One area which is arguably in need of improvement is the legal liability regime. This refers to the set of EU provisions which allocate legal responsibility for harm resulting from CCS projects.[9]

This article aims to evaluate some of the provisions of the CCS Directive in terms of their effectiveness in achieving a balance between ensuring environmentally safe deployment and the encouragement of investment in the technology. The focus of the Directive on the storage component of the CCS chain is maintained in this respect. A particular focus is also maintained on the most serious among several environmental risks associated with CO_2 storage, the risk of leakage, which refers to the possibility of CO_2 escaping from the storage site into the atmosphere or water column, thus undermining the objective of climate change mitigation.[10]

This article aims to build upon the public policy reasoning which should inform the development of a rational and coherent EU legal liability regime for CCS. Chapter one emphasises the reasons why the EU seeks to pursue the deployment of

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[3] Stuart Haszeldine, 'Geological Factors in Framing Legislation to Enable and Regulate Storage of Carbon Dioxide Deep in the Ground' in Ian Havercroft, Richard Macrory and Richard B Stewart (eds), *Carbon Capture And Storage: Emerging Legal and Regulatory Issues* (Hart Pub 2009) 8.

[4] ibid.

[5] KA Daniels, HE Huppert, JA Neufeld and D Reiner, 'The Current State of CCS: Ongoing Research at the University of Cambridge With Application to the UK Policy Framework' (2012) EPRG Working Paper 1228 <www.repository.cam.ac.uk/handle/1810/244744 > accessed 3 March 2015.

[6] Meadowcroft and Langhelle (n 2) 217.

[7] Carrie Bradshaw, 'The New Directive on the Geological Storage of Carbon Dioxide' (2009) 11 Env L Rev 196, 196.

[8] European Parliament and Council Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 ('CCS Directive') [2009] OJ L140/114.

[9] Avelien Haan-Kamminga, 'Long-term Liability for Geological Carbon Storage in the European Union' (2011) 29 JENRL 309, 314.

[10] Meadowcroft and Langhelle (n 2) 282.

CCS and why said reasons are of equal relevance to the risks involved with CCS, as well as their implications for the regulatory framework and the goals, which liability should seek to achieve in this context. It highlights two essential parameters of an effective liability regime: a balance between the responsibilities of stakeholders and legal certainty with respect to the obligations of each of the relevant actors. Chapter two provides a short analysis of the types of liability associated with leakage which are governed at EU level and their effectiveness in achieving balance and legal certainty. It emphasises that in its present form, the CCS Directive places unnecessary barriers on investment in CCS due to an, arguably, inappropriate allocation of the burden of uncertainty. Chapter three draws upon existing options for a more balanced management of this uncertainty and proposes a set of amendments to the CCS Directive.

2. Making use of CCS: Importance, Risks and the Need for Balanced Regulation

Throughout their evolution, the coherence of EU energy and climate change mitigation strategies has been threatened by a conflict between two fundamental but seemingly irreconcilable objectives. On the one hand, the EU has long recognised and acted upon the need for urgent action in the fight against climate change and has established itself as a global leader in this context.[11] The collective commitments of its Member States, in line with international efforts and consensus,[12] are illustrative of the level of ambition pursued: the current target of a 20% reduction of greenhouse gas emissions as part of its 2020 climate and energy package,[13] will be supplemented by a 40% reduction target by 2030.[14] Looking ahead to the pivotal year of 2050, the EU aims to reduce its emissions by 'at least 80%'.[15] On the other hand, the only realistic prospect of EU energy security for the next half-century would perpetuate the current 'carbon lock-in', a scenario intimately linked to the use of fossil fuels, the main cause of dangerous levels of CO_2 emissions.[16] It is not an exaggeration to state that 'Europe's energy situation is precarious'.[17]

In theory, CCS presents itself as a promising, albeit controversial solution to this inherent clash between crucial EU policy goals. The geologic sequestration of CO_2 on a sufficiently large scale could not only bring a vital contribution to its

[11] James Meadowcroft and Oluf Langhelle, *Caching the Carbon: the Politics and Policy of Carbon Capture and Storage* (Edward Elgar 2009) 217.
[12] Notably the United Nations Framework Convention on Climate Change (UNFCCC 1992) and the Kyoto Protocol to the Convention.
[13] Compared to 1990 levels. Commission, '20 20 by 2020: Europe's Climate Change Opportunity' (Communication) COM (2008) 30 final, 2.
[14] Compared to 1990 levels. Commission, 'A Policy Framework for Climate and Energy in the Period From 2020 to 2030' (Communication) COM (2014) 15 final, 5.
[15] Compared to 1990 levels. Commission, 'Communication on the Future of Carbon Capture and Storage in Europe' (Communication) COM (2013) 180 final, 11.
[16] Gregory C Unruh, 'Understanding Carbon Lock-in' (2000) 28 Energy Policy 817.
[17] Meadowcroft and Langhelle (n 11) 211.

emission reduction efforts,[18] but it could also act as a 'bridge' that can buy time for Europe's currently slow transition to sustainable energy sources.[19] Its own vast coal reserves could then be utilised in a way that is compatible with environmental objectives which, in turn, would allow the EU to reduce its increasing dependence on energy imports and the associated vulnerability with international political instability.[20] There are also important economic considerations involved. Deploying CCS is said to be a significantly cheaper means of meeting climate change mitigation objectives. In this respect, Professors Adelman and Duncan note that the economics are 'sobering' and refer to the International Energy Agency ('IEA') estimate of a 71% increase in the costs for meeting 2050 targets without CCS.[21] Moreover, it can offer Europe the possibility to develop, improve and export the technology, thus enhancing its economic competitiveness at every stage and contributing to the emergence of a global CCS industry.[22] This uniquely combined potential for climate change mitigation coupled with energy security and economic development opportunities explains the significant interest in CCS shown by nations around the world and the EU's remarkably swift efforts in devising a regulatory framework supporting such projects, namely in the form of the 2009 CCS Directive.[23]

The realisation of this potential engages a number of underlying assumptions and complexities which are beyond the scope of this article.[24] Nevertheless, it involves one occasionally neglected aspect which is worth emphasising, as it arguably has a significant bearing on the design of an appropriate liability regime for CCS. This refers to an assessment of the potential harm resulting from CCS operations when viewed in light of the risks inherent in failing to incentivise deployment of the technology at the necessary scale.

A. Technical Aspects of CCS and the Risk of Leakage

Among the various types of CCS, the application to large point sources of emissions is considered to be the most promising for the purposes climate change mitigation.[25]

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[18] International Energy Agency (IEA), 'Technology Roadmap: Carbon Capture and Storage' (OECD/IEA 2013) 5 <www.iea.org/publications/freepublications/publication/technology-roadmap-carbon-capture-and-storage-2013.html> accessed 3 March 2015.

[19] European Parliament and Council Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 ('CCS Directive') [2009] OJ L140/114, Preamble para (4).

[20] John Bowman and Juliette Addison, 'Carbon Capture and Storage -"The Only Hope for Mankind?" An Update' (2008) 2 LFMR 516, 516.

[21] David E Adelman and Ian J Duncan, 'The Limits of Liability in Promoting Safe Geologic Sequestration of CO_2' (2011) 22 DELPF 1, 1.

[22] Bowman and Addison (n 20) 517; Meadowcroft and Langhelle (n 11) 222.

[23] As Bowman and Addison note, 'Politically, the EU Commission, Council and Parliament, together with the USA, Australia, the UK, Norway and Canada have been competing with each other to demonstrate their leadership in the field of CCS for some time.' Bowman and Addison (n 20) 517.

[24] The large scale deployment of CCS will ultimately depend on a number of factors, in addition to the liability regime, such as the creation of sufficient financial incentives for investment, political backing and public opinion. Meadowcroft and Langhelle (n 11) 232.

[25] ibid 10.

In essence, the technological processes involved aim to prevent the CO_2 resulting from energy generation and other industrial activities from being vented into the atmosphere. Instead it ensures that it is stored underground, within suitable geological formations, for many thousands of years.[26] The CCS chain can be broadly divided into three operations: the capture of the CO_2, its transportation to the storage site and its sequestration within the underground formation.[27] Additionally, the storage phase is comprised of three stages itself, namely CO_2 injection, closure and post-closure of the site.[28] At the capture stage, the gaseous mixture emitted by point sources (either centralised power generation or other large industrial facilities such as those producing steel, cement, paper, etc.) is separated in order to obtain an almost pure stream of CO_2.[29] This is then transported to the storage site, which may be located either onshore or offshore, by pipeline or ship.[30] Among the types of subsurface formations which may be deemed suitable for the ultimate sequestration of the CO_2 are depleted oil and gas reservoirs, saline aquifers, un-mineable coal seams, and shale and basalt formations.[31]

Many of the technologies forming part of the CCS chain are well-established and their practical application is well understood. CCS operators benefit from a wealth of knowledge and practical experience gained in the context of various industries that similarly deal with subsurface geology.[32] These include hydrocarbon exploration and production, mining, underground disposal of industrial and nuclear waste, as well as underground storage of natural gas.[33] Nevertheless, there is still limited commercial-scale operational experience of the CCS chain in its entirety, which inevitably leads to a degree of uncertainty surrounding its environmental integrity.[34] Several risks associated with CCS have been identified, at a local level (potentially affecting the natural environment, human health and property) and in relation to the global climate.[35] Understandably, the concern that features most prominently in the minds of policy makers and the general public relates to the risk of CO_2 escaping from the storage formation into the surrounding environment

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[26] Stuart Haszeldine, 'Geological Factors in Framing Legislation to Enable and Regulate Storage of Carbon Dioxide Deep in the Ground' in Ian Havercroft, Richard Macrory and Richard B Stewart (eds), *Carbon Capture and Storage: Emerging Legal and Regulatory Issues* (Hart Pub 2009) 8.

[27] Elizabeth Lokey Aldrich and Cassandra Koerner, 'Assessment of Carbon Capture and Sequestration Liability Regimes' (2011) 24 Electricity Journal 35, 36.

[28] ibid.

[29] Intergovernmental Panel on Climate Change (IPCC), *Special Report on Carbon Dioxide Capture and Storage* (Cambridge University Press 2005) 25.

[30] Sven Bode and Martina Jung, 'Carbon Dioxide Capture and Storage—Liability for Non-Permanence Under the UNFCCC' (2006) 6 IEA 173, 175.

[31] Sasha Russell, *Carbon Capture and Storage Projects within Emissions Trading Systems: The Treatment of Carbon Credits Arising from Carbon Capture and Storage Projects* (Lambert Academic Pub 2011) 6.

[32] Haszeldine in Havercroft, Macrory and Stewart (n 26) 8.

[33] Kay Damen, André Faaij and Wim Turkenburg, 'Health, Safety and Environmental Risks of Underground CO_2 Storage – Overview of Mechanisms and Current Knowledge' (2006) 74 Climatic Change 289.

[34] KA Daniels, HE Huppert, JA Neufeld and D Reiner, 'The Current State of CCS: Ongoing Research at the University of Cambridge with Application to the UK Policy Framework' (2012) EPRG Working Paper 1228, 3 <www.repository.cam.ac.uk/handle/1810/244744> accessed 23 March 2015.

[35] Meadowcroft and Langhelle (n 11) 4. These risks include leakage of CO_2, leakage of CH_4 (methane), induced seismicity, ground movement and displacement of brine: Damen and others (n 33) 292.

(either the atmosphere or the water column) with the associated potential to undermine the very purpose of climate change mitigation.[36] It is therefore important briefly to explore the probability, magnitude and effects of such leakage.

i. Likelihood and Severity of Leakage

Numerous commentators emphasise that both the likelihood and magnitude of potential leakage can be considered minor and should not be overstated.[37] A frequently quoted Intergovernmental Panel on Climate Change ('IPCC') estimate states that the quantity of CO_2 escaping from rigorously selected storage sites will remain below 1%. This is 'very likely' for the first hundred years and 'likely' over the first thousand years.[38] A properly selected and competently managed storage site could experience a level of leakage that is 'much less than 0.1 per cent in even 1 million years'.[39] This is because, in spite of its novelty, CCS technology mimics analogous geological processes using 'the same natural trapping mechanisms which have already kept huge volumes of oil, gas and CO_2 underground for millions of years'.[40] Only stable geological formations are chosen, so as to provide a primary, secondary or even tertiary seal as well as side and under seals, which serve to contain the CO_2 within the porous subsurface.[41] Once injected, the natural processes referred to as 'trapping' begin to occur, further contributing to the permanent sequestration of the CO_2.[42] As a consequence of these phenomena, even an intentional effort to re-extract the entire quantity of injected CO_2 would be largely fruitless.[43] While this means that the likelihood of catastrophic accidents leading to extensive and uncontrollable leakage is extremely low, a degree of uncertainty remains as to the possibility of CO_2 escaping from transport pipelines, through operational or abandoned wells on the site, as well as through fault lines, depending on the characteristics of the geological formation in question.[44] Importantly, this risk is dictated to a significant extent by the level of maintenance of both active and abandoned infrastructure and the standard of quality applied in well design and construction.[45] Additional factors contributing to this uncertainty relate to the

[36] Meadowcroft and Langhelle (n 11) 282.
[37] Haszeldine in Havercroft, Macrory and Stewart (n 26) 14; Meadowcroft and Langhelle (n 11) 282; Adelman and Duncan (n 21) 5.
[38] IPCC 2005 (n 29) 34.
[39] Haszeldine in Havercroft, Macrory and Stewart (n 26) 14.
[40] Meadowcroft and Langhelle (n 11) 228.
[41] Haszeldine in Havercroft, Macrory and Stewart (n 26) 10.
[42] Mark Anthony de Figueiredo, 'The Liability of Carbon Dioxide Storage' (DPhil thesis, Massachusetts Institute of Technology 2007) 34-35.
[43] Haszeldine in Havercroft, Macrory and Stewart (n 26) 19.
[44] Damen and others (n 33) 296; CATO 2, 'Support to the Implementation of the CCS Directive'- Overview and Analysis of Issues Concerning the Implementation of the CCS Directive in the Netherlands' (2010) CATO2-WP4.1-D01, 68 <www.co2-cato.org/publications/library1/-support-to-the-implementation-of-the-ccs-directive-overview-and-analysis-of-issues-concerning-the-implementation-of-the-ccs-directive-in-the-netherlands> accessed 23 March 2015; de Figueiredo (n 42) section 2.2.3.
[45] Damen and others (n 33) 295.

unprecedented time scales for which CO_2 storage is sought, incomplete knowledge of the dynamics of leakage and the possibility of a scientific knowledge failure.[46]

ii. Effects of Leakage

Should the risk materialize, the consequences of leakage similarly depend on the location of the storage site and the way in which incidents are managed. For instance, leakage from onshore storage sites is likely to affect a much more significant number of people than in the case of offshore sites, particularly if they are situated in valleys.[47] The effects of heightened levels of CO_2 on human health and local fauna are well understood. Depending on the concentration, effects range from the more benign 'rapid breathing, headaches and tiredness' to the most serious dangers of 'brain malfunction, loss of consciousness' and death by asphyxiation.[48] In this context, lethal incidents involving natural releases of CO_2 are often invoked in order to illustrate the dangers of potential leakage from storage sites, notably the 1986 Lake Nyos incident in Cameroon, with 1700 human fatalities.[49] Many commentators, however, warn against such analogies for three main reasons. Firstly, if a release of CO_2 does occur from a CCS site, it is more likely to take the form of gradual seepage rather than sudden and rapid leakage, which means that the quantity of escaped CO_2 would be, at least initially, much lower than in the case of natural events.[50] Secondly, in contrast to the unpredictable nature of such events, CO_2 storage sites are subjected to close monitoring by parties who are under a legal duty to remediate the leakage immediately.[51] Unlike in the case of a natural CO_2 release, there would therefore be an opportunity to restrict public access to the location in question until it dissipates.[52]

The effects of CO_2 leakage on the local natural environment, however, are less certain.[53] The main concern relates to the contamination of drinking water and surface water, leading to adverse effects on the health of marine ecosystems.[54] With respect to the impact on the global climate, the danger is that extensive leakage would render the whole CCS exercise futile as a climate change mitigation option. Consequently, one aspect to be established from the start is the level at which CO_2 releases would start to undermine, rather than help achieve emission reduction targets. All these considerations, however, need to be balanced against the scenario in which CCS is not deployed at the necessary scale.

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[46] Meadowcroft and Langhelle (n 11) 284.

[47] Damen and others (n 33) 298.

[48] Jennifer J Roberts, Rachel A Wood and R Stuart Haszeldine, 'Assessing the Health Risks of Natural CO_2 Seeps in Italy' (2011) 108 PNAS 16545, 16545.

[49] Damen and others (n 33) 297.

[50] Roberts and others (n 48) 16547.

[51] CCS Directive (n 19) art 16.

[52] Roberts and others (n 48) 16547.

[53] Damen and others (n 33) 298. There may be 'damage to the global climate system, (…) direct damage to the flora and fauna due to the exposure to CO_2, and (…) damage due to changes in the quality of groundwater and surface water': CATO 2 (n 44) 64.

[54] Ian Havercroft and Richard Macrory, *Legal Liability and Carbon Capture and Storage: A Comparative Perspective* (Global CCS Institute 2014) <www.globalccsinstitute.com/publications/legal-liability-and-carbon-capture-and-storage-comparative-perspective> accessed 23 March 2015; Damen and others (n 33) 298.

B. Consequences of Failing to Deploy CCS

While CCS is only one example within a diverse portfolio of greenhouse gas abatement strategies, numerous commentators emphasise that it is the only option that can help achieve the necessary scale of emission reductions within the relevant time frame.[55] Other measures, particularly increased energy efficiency and renewable energy generation are preferable from a sustainability perspective, yet still face significant obstacles and cannot deliver the required results within the few short decades left to avoid dangerous anthropogenic climate change. Moreover, while these alternative strategies can only address emissions from power plants, CCS can be applied to many other large industrial processes that emit CO_2 and thus contribute significantly to climate change.[56] CCS' contribution can be important precisely in relation to the sources that are most problematic and most likely to see an increase in emissions.[57] In addition, CCS is among the very few technologies that can achieve negative CO_2 emissions when coupled with biomass energy.[58] It is therefore often argued that reaching current emission reduction targets is simply not possible unless CCS technology is installed for almost all large CO_2 emitters.[59]

In this context, the potential severity of the effects of CO_2 leakage from CCS activities should arguably be put into a broader perspective, as many of them are already occurring without CCS, precisely due to the regular accumulation of yearly emissions. For instance, the main feared consequence of CO_2 leakage from offshore storage sites relates to ocean acidification and its adverse effects on marine ecosystems and the livelihood of populations depending on them.[60] However, the IPCC estimates that 'the ocean has [already] absorbed about 30% of the emitted anthropogenic CO_2' and will continue to do so in the context of ever increasing emissions, leading to the very same types of adverse effects.[61] A similar reasoning can be applied to the fear of CO_2 leakage into the atmosphere. As Roberts et al note, 'Anthropogenic CO_2 release is contributing to a process which will have catastrophic effects on human lives across the globe'.[62] Therefore, it can be argued that insofar as the risk of leakage from CCS activities is affected, it is relatively small and manageable and it is preferable to the much greater and unmanageable risks associated with climate change, the effects of which can already be observed in the natural world.

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[55] Daniels and others (n 34); Adelman and Duncan (n 21) 1; Commission, 'Proposal for a Directive of the European Parliament and of the Council on the geological storage of carbon dioxide and amending Council Directives 85/337/EEC, 96/61/EC, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC and Regulation (EC) No 1013/2006' COM (2008) 18 final, 2.

[56] Bowman and Addison (n 20) 516.

[57] Meadowcroft and Langhelle (n 11) 253.

[58] See Christian Azar, Kristian Lindgren, Eric Larson and Kenneth Möllersten, 'Carbon Capture and Storage from Fossil Fuels and Biomass – Costs and Potential Role in Stabilising the Atmosphere' (2006) 74 Climatic Change 47.

[59] Meadowcroft and Langhelle (n 11) 8.

[60] IPCC 2005 (n 29) 38.

[61] IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2015) 4 <www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf> accessed 23 March 2015.

[62] Roberts and others (n 48) 16547.

Finally, a related aspect which should arguably carry some weight in the risk assessment refers to the idea that the likely consequences of failing to develop CCS at a large enough scale would not be confined to the European context, as climate change affects the whole of humanity. It can be said that the EU, as a union of developed United Nations Member States, should act as a leader in the urgent improvement and deployment of climate change mitigation technologies, accepting the associated costs and local risks in accordance with the principle of 'common but differentiated responsibility'.[63] Indeed, this is a role that the EU is aiming to fulfil, as it has repeatedly stated, but which requires a more holistic approach than that which is currently being adopted through legislation.[64]

C. Implications for the Regulatory Framework and the Role of Liability

Two central facets of the discussion on appropriate regulation therefore emerge. Firstly, the risk of leakage as outlined above shows that the likelihood of its occurrence depends to a significant extent on human action and is associated primarily with elements which are under the operator's full control. Crucially, careful site selection both in terms of the location of the storage site relative to densely populated areas, and in terms of the geological formation itself, will minimise the likelihood and effects of leakage to a level at which it can be considered as nearly insignificant. The potential magnitude of the leak, if it does occur, can be further reduced through appropriate monitoring and remediation measures. The residual risk that inevitably remains, due to the incompleteness of scientific knowledge and the lack of extensive practical experience with CCS, is potentially less acute than many of the risks that are routinely accepted in relation to other industries.[65] Secondly, many of the fears relating to the effects of CO_2 leakage on the global environment as a consequence of CCS activities are arguably unwarranted as they are already in the process of materialising precisely due to the absence of CCS. Adding this aspect into the equation could lead to the conclusion that a relatively permissive approach should be taken to the regulation of CCS projects, in light of the urgency of climate change mitigation efforts.

Such an approach, however, would be dangerous. As Anderson et al note, 'because geological sites *can* be found and managed safely in such a way as to all but rule out leakage, does not mean they *will* be found and managed in that way if the proper guidelines, incentives and oversight are not in place'.[66] Similarly, Meadowcroft and Langhelle point out that 'the fact that risks can be managed successfully (and have been […] in similar types of industrial setting in the past)

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[63] United Nations Framework Convention on Climate Change (UNFCCC, 1992) art 4.

[64] As argued in Chapter Three.

[65] Chris Clarke, 'Long-term Liability for CCS: Some Thoughts about Specific Risks, Multiple Regimes and the EU Directive' in Ian Havercroft, Richard Macrory and Richard B Stewart (eds), *Carbon Capture and Storage: Emerging Legal and Regulatory Issues* (Hart Pub 2009) 179; 'With appropriate site selection the local health, safety and environment risks of geological storage would be comparable to the risks of current activities such as natural gas storage, enhanced oil recovery and deep underground disposal of acid gas': Russell (n 31) 40.

[66] Jason Anderson and others, 'Results from the Project "Acceptance of CO_2 Capture and Storage: Economics, Policy and Technology (ACCSEPT)"' (2009) 1 Energy Procedia 4649, 4650.

does not automatically guarantee that they will be managed successfully in the case of CCS projects'.[67] Once the decision has been made to proceed with the deployment of CCS projects, the supporting regulatory framework should be devised in such a way as to ensure that leakage risks are indeed minimised to the greatest extent possible by the parties who are in the best position to do so at any given stage. Yet, it should also allocate the burden of uncertainty in a manner that reflects the social utility of the technology. This is where a balanced legal liability regime can bring a vital contribution. However, it can only do so if it is carefully tailored to the characteristics of CCS projects and if it takes a broad (perhaps global) perspective in creating a balance between various stakeholders' interests. It can therefore be said that the liability regime in the context of CCS projects should seek to achieve two aims:

- It should represent a clear legal expression of what is considered to be an appropriate division of responsibilities between CCS operators (along with their insurers) and Member States. This needs to be constructed on the basis of a realistic assessment of the risk of leakage[68] and the allocation of a party (or parties) which is in the best position to accept this risk at various stages of the CCS operation. An excessive level of liability on either private or public entities would effectively inhibit the deployment of CCS projects at the necessary scale. This is due to two possible reasons: either investment cannot be secured (if operators cannot shoulder the financial burden or cannot find appropriate insurance) or it would be politically and publically unacceptable (if the Member States were to be solely liable for leakage, there would be little incentive for operators to exercise the necessary degree of care throughout CCS operations – the issue of 'moral hazard').[69] A balance must be struck between the interests of operators, the concerns of individual Member States and the collective interest in addressing climate change. Particularly in the EU context, creative solutions may need to be devised in order to ensure their political acceptability.

- It should be formulated based on an awareness of the extent to which these rules play a role in encouraging or discouraging investment in CCS projects. In this context, what must be achieved is much-needed legal certainty with respect to the nature, extent and duration of liabilities, as this element carries considerable weight in investment decisions.

The third chapter will proceed to analyse the current EU approach to liability for leakage within the framework of the 2009 CCS Directive, in terms of the achievement of two aims: balance and legal certainty.

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[67] Meadowcroft and Langhelle (n 11) 281.

[68] As Roberts and others note, 'uncertainty does not mean inevitable leakage' (Roberts and others (n 48) 16545).

[69] Avelien Haan-Kamminga, 'Long-term Liability for Geological Carbon Storage in the European Union' (2011) 29 JENRL 309, 326; Meadowcroft and Langhelle (n 11) 12.

3. Legal Liability for Leakage: The EU Regulatory Framework

The 2009 CCS Directive is the final result of an accelerated effort on the part of EU institutions to translate a strongly supported policy into a regulatory framework.[70] The proposal for a Directive that would govern the environmentally safe deployment of CCS projects formed part of the 2008 Climate and Energy Package. It represents an ambitious set of legislative measures that would not only ensure the attainment of the EU's own greenhouse gas reduction targets but also strengthen its position of international leadership in the matter of climate change mitigation at a strategically important moment.[71] The speed with which the Directive was adopted, coupled with the political context which required an especially strong emphasis on ensuring the environmental integrity of CCS projects, may, however, also explain some of its shortcomings.[72]

In respecting the fundamental principles of subsidiarity and proportionality,[73] the CCS Directive represents an instrument of minimum harmonization which leaves a significant amount of discretion to Member States, an aspect which in itself may generate a degree of regulatory uncertainty.[74] The CCS Directive only provides for what is necessary to create a general legal framework for site selection,[75] permitting of exploration and storage,[76] monitoring[77] reporting[78] and management[79]

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[70] The idea of CCS as a climate change mitigation strategy had only recently been gaining increasing support, since a 2005 Commission Communication, 'Winning the Battle against Global Climate Change' COM (2005) 35 final; James Meadowcroft and Oluf Langhelle, *Caching the Carbon: The Politics and Policy of Carbon Capture and Storage* (Edward Elgar 2009) 217.

[71] It was important that the EU implement a set of concrete climate measures ahead of the 2009 Copenhagen summit in order to convince key States to reach an agreement on greenhouse gas reduction targets. Meadowcroft and Langhelle (n 70) 221.

[72] The Commission services worked at 'incredible speed' (Meadowcroft and Langhelle (n 70) 225) voting on the Directive on 'Super Tuesday' (John Bowman and Juliette Addison, 'Carbon Capture and Storage -"The Only Hope for Mankind?" An Update' (2008) 2 LFMR 516, 518). Furthermore, 'the Directive (…) was agreed at a time when many Member States were (and remain) sceptical of the possibility of permanent CO_2 storage' (Ian Havercroft and Richard Macrory, *Legal Liability and Carbon Capture and Storage: A Comparative Perspective* (Global CCS Institute 2014) 38 <www.globalccsinstitute.com/publications/legal-liability-and-carbon-capture-and-storage-comparative-perspective> accessed 23 March 2015.

[73] Consolidated Version of the Treaty on European Union [2012] OJ C326/13 art 5.

[74] Avelien Haan-Kamminga, Martha M Roggenkamp and Edwin Woerdman, 'Legal Uncertainties of Carbon Capture and Storage in the EU: The Netherlands as an Example' (2010) 3 CCLR 240, 241-242.

[75] Under art 4 of the CCS Directive (n 19). Member States decide which parts of their territory may be used for the selection of storage sites. The suitability of geological formations for this purpose must be determined on the basis of the Annex 1 criteria (these refer to data collection, geological modelling, characterisation of the storage dynamic behaviour, sensitivity and risk assessment). Such formations may only be selected for storage if no significant risk of leakage or environmental or health risks are identified.

[76] Under art 5 (exploration permits) and arts 6-11 (storage permits) of the CCS Directive (n 19).

[77] Art 13 of the CCS Directive (n 19).

[78] Art 14 of the CCS Directive (n 19).

[79] Most importantly, measures for addressing leakages (art 16) and closure and post-closure obligations (art 17). In order to ensure that the operator is able to meet its obligations under the Directive, financial security is required under art 19 and a financial contribution must be made under art 20 towards post-transfer costs borne by the competent authority for ensuring the permanent storage of the CO_2 (CCS Directive) (n 19).

of CO_2 storage sites, as well as a division of responsibilities between the operator and the competent national authority.[80] Leakage of CO_2 from the storage site may generate four types of legal consequences.

- Firstly, administrative liability arising under the provisions of the CCS Directive itself (as transposed within national law);
- Secondly, liability in relation to environmental harm;[81]
- Thirdly, an obligation to purchase emission allowances;[82] and
- Fourthly, liability under delict/tort and other laws at national level.

The first three categories are addressed through EU instruments and constitute the focus of this analysis, which is built upon the two essential criteria proposed above in Chapter One.

A. Liability under the CCS Directive

i. Balance

It can be said that the provisions of the CCS Directive reflect an awareness of the extremely long timescales which are envisaged for the management of CO_2 storage sites and of the idea that storage is intended to be permanent. The timescales involved far exceed the usual lifespan of the private entities managing CCS storage sites.[83] The necessity for a degree of 'intergenerational transfer of risk'[84] is reflected in the Article 18(1) requirement that most liabilities[85] arising in connection with the storage site are to be transferred to the competent authority after a sufficient period of time has passed, indicating post-closure stability.[86] Nevertheless, until the point of such transfer,[87] there is a significant imbalance in the distribution of risks between the operator and the Member State, which does not adequately reflect the nature and purpose of CCS as a climate change mitigation technology. In essence, the competent authority does not contribute at all to shouldering the burden of pre-transfer risks of leakage, while the operator is exposed to potentially unquantifiable and uncapped liability. The two most important obligations in this respect relate to the requirement

[80] Through the transfer of post-closure responsibilities to the competent authority at national level: CCS Directive (n 19) art 18.
[81] Governed by the ELD: Consolidated Version of the European Parliament and Council Directive 2004/35/CE of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage ('ELD') [2013] OJ L143/56, Annex III.
[82] Under European Parliament and Council Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC ('ETS Directive') [2003] OJ L275/32.
[83] Avelien Haan-Kamminga, 'Long-term Liability for Geological Carbon Storage in the European Union' (2011) 29 JENRL 309, 310.
[84] Meadowcroft and Langhelle (n 70) 285.
[85] Only those relating to monitoring and corrective measures under the CCS Directive, purchase of allowances under the ETS Directive and preventive and remedial action under the ELD, the transfer of other liabilities being left to the discretion of the Member States.
[86] The minimum is 20 years, unless the competent authority is satisfied that the CO_2 will be 'completely' and 'permanently' stored at an earlier date. CCS Directive (n 19) art 18(1)(b).
[87] Which may be uncertain or may not occur at all, as argued below.

for financial security [88] and contribution under the financial mechanism, [89] as cumulatively they encompass financial cover for all of the operator's leakage liabilities under the CCS and ETS Directives. Particularly in respect of the amount of financial security, there are concerns that these obligations may prove to be prohibitively expensive for operators.[90]

As a matter of principle, it is unclear why the Member State should not bear part of this liability, at least until sufficient practical experience with CCS is gained in order better to estimate the financial amounts involved in the risk of leakage and, importantly, to encourage the development of appropriate insurance products.[91] The difficulty with this imbalance can also be framed in terms of a lack of legal certainty.

ii. Legal certainty

Both the criteria for determining the amount of the financial security and the contribution under the financial mechanism are surrounded by uncertainty. This is, on the one hand, due to the difficulty in calculating the amounts of the separate components within the financial security and, on the other hand, due to the uncertainty surrounding the precise components of the financial contribution.

Firstly, among the pre-transfer obligations covered by the financial security, there is at least one which is arguably unquantifiable: the obligation to surrender allowances under the ETS Directive.[92] The main difficulty is that neither the CCS Directive nor the published Guidance allows the simple estimation of this obligation based on the likelihood of leakage[93]. Theoretically this leaves open the possibility for the operator to be required to insure against the loss of the whole quantity of stored CO_2, which is both 'physically impossible' and 'an unacceptable position for

[88] CCS Directive (n 19) art 19, covering all of the operator's pre-transfer obligations under the CCS and ETS Directives.

[89] ibid art 20, covering at a minimum the costs of monitoring for a period of 30 years post-transfer but potentially including 'costs borne by the competent authority after the transfer of responsibility to ensure that the CO_2 is completely and permanently contained'.

[90] Chiara Armeni, 'Case Studies on the Implementation of Directive 2009/31/EC on the Geological Storage of Carbon Dioxide: United Kingdom' (University College London, Centre for Law and the Environment, Carbon Capture Legal Programme 2011) 32 <http://decarboni.se/sites/default/files/publications/49456/cclpeucasestudiesprojectunitedkingdom.pdf> accessed 23 March 2015.

[91] ClimateWise, 'Managing Liabilities of European Carbon Capture and Storage' (2012) 5 <www.climatewise.org.uk/storage/_website-2012/collaborations/ccs/ClimateWise%20CCS%20Report%20Nov%202012%20-%20Full%20Report.pdf> accessed 23 March 2015.

[92] Havercroft and Macrory (n 72) at 46 summarise the obligations which fall under the financial security.

[93] ibid 47; Commission, 'Implementation of Directive 2009/31/EC on the Geological Storage of Carbon Dioxide Guidance Document 4: Article 19 Financial Security and Article 20 Financial Mechanism' (European Communities 2011) (Commission Guidance Document 4) 12 <http://ec.europa.eu/clima/policies/lowcarbon/ccs/implementation/docs/gd4_en.pdf.> accessed 23 March 2015.

commercial businesses'.[94] Conversely, it is unrealistic to expect that no leakage will occur at all.[95]

Secondly, the criteria for assessing the post-transfer financial contribution under Article 20 of the CCS Directive, which opens the possibility to include any costs 'borne by the competent authority […] to ensure that the CO_2 is completely and permanently contained'[96] may be so broad as to 'not represent an actual transfer of responsibility' at all.[97] In the absence of a cap or of an understanding with the competent authority, practical experience with demonstration projects shows that this may significantly hinder investment decisions.[98]

Another important source of legal uncertainty relates to the precise conditions under which transfer of responsibilities to the competent authority is to take place and the period of time post-closure that must elapse for this purpose. It is noteworthy that the Directive leaves both aspects at the discretion of the Member States.[99] This means that such transfer may never take place at all, as the competent authority is not satisfied that 'all available evidence indicates that the stored CO_2 will be completely and permanently contained' [100], even if the set minimum period has elapsed. Furthermore, the requirement of Article 18(1)(b) does not make the decision as to the appropriate minimum period exclusively dependent on the characteristics and behaviour of the particular storage site. As the Commission itself notes, 'the [competent authority] is always at liberty to determine a longer period than 20 years if it considers this appropriate'.[101] Even if a storage site shows strong signs of stability throughout its active existence, as well as for 20 years post-closure with only a very minor risk of leakage, the competent authority may never declare itself

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[94] Stuart Haszeldine, 'Geological Factors in Framing Legislation to Enable and Regulate Storage of Carbon Dioxide Deep in the Ground' in Ian Havercroft, Richard Macrory and Richard B Stewart (eds), *Carbon Capture and Storage: Emerging Legal and Regulatory Issues* (Hart Pub 2009) 19.

[95] CATO 2, '"Support to the Implementation of the CCS Directive"- Overview and Analysis of Issues Concerning the Implementation of the CCS Directive in the Netherlands' (2010) CATO2-WP4.1-D01, 6 <www.co2-cato.org/publications/library1/-support-to-the-implementation-of-the-ccs-directive-overview-and-analysis-of-issues-concerning-the-implementation-of-the-ccs-directive-in-the-netherlands> accessed 23 March 2015.

[96] Which, according to Guidance Document 4 (n 93) at 42 may include any obligations under the CCS Directive, namely monitoring, corrective measures, surrender of allowances and preventive and remedial actions under the ELD.

[97] Dentons, 'The Experience of CCS Demonstration Projects in the European Union with the Transposition of the CCS Directive' (Global CCS Institute 2013) 4 <www.globalccsinstitute.com/publications/experience-ccs-demonstration-projects-eu-transposition-ccs-directive> accessed 23 March 2015.

[98] ibid 29.

[99] CCS Directive (n 19) art 18(1) where four conditions are imposed (complete and permanent containment, a minimum period of time, a financial contribution and the sealing of the storage site with removal of the injection facilities), yet the first two are arguably surrounded by uncertainty.

[100] ibid art 18(1)(a). It has been argued that this test may be 'extremely difficult or impossible to fulfil in practice', and suggested that 'a single dissenting view of an expert would mean the test is not fulfilled' (Havercroft and Macrory (n 72) 38).

[101] Commission, *Implementation of Directive 2009/31/EC on the Geological Storage of Carbon Dioxide: Guidance Document 3 - Criteria for Transfer of Responsibility to the Competent Authority* (European Communities 2011) (Commission Guidance Document 3) 14 <http://ec.europa.eu/clima/policies/lowcarbon/ccs/implementation/docs/gd3_en.pdf> accessed 23 March 2015.

satisfied that the CO_2 is 'completely' and 'permanently' contained. It is true that guidance as to what constitutes 'complete' and 'permanent' storage has been given, but this is contained in a non-binding (though persuasive) document.[102] The competent authority does have an incentive not to accept the transfer, as it would thus avoid the associated liabilities.[103] Still, it will be aware that uncertain or unreasonable conditions for transfer would undermine investment in CCS.[104] The decision on transfer will then, perhaps, depend on the level of political support for CCS within that Member State at any given time, which may vary and thus create unnecessary uncertainty for operators and investors.[105] Crucially, even if transfer of responsibilities has taken place, the operator may still find himself exposed to unexpected liability through the Article 18(7) 'claw back' provision, which allows for post-transfer recovery of costs 'including [in] cases of deficient data, concealment of relevant information, negligence, wilful deceit or a failure to exercise due diligence'. It is, without a doubt, necessary and reasonable for such a provision to exist. However, this formulation is particularly open-ended in the complete absence of definitions for each of the terms and situations that are being referred to.[106] As Durrant argues when comparing the Australian regime to the EU CCS Directive, the result is that '[…] under both [schemes], proposed operators must make provision for the possibility, in the absence of any other temporal or quantum limits, of almost indeterminate liability arising from these CCS projects'.[107]

It can therefore be argued that binding criteria as to what constitutes complete and permanent containment of the CO_2, as well as criteria for the manner in which the pre-transfer period is to be determined, should be adopted within the CCS Directive.[108] In relation to post-transfer recovery of costs, it is vital that precise definitions be given. Legal certainty is needed in relation to these aspects, as they carry considerable weight in investment decisions.[109] In this context, experience from several CCS demonstration projects across four Member States has shown that uncertainty surrounding the transfer of responsibilities constitutes an important challenge.[110] One proposed solution is the removal of the 20 year rule altogether[111] and its replacement with clear and certain criteria. Alternatively, it has been suggested that risk levels are not expected to vary significantly between storage

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[102] ibid 4-11, with a particular emphasis on the content of the operator's transfer report. As Havercroft and Macrory (n 72) note at 38, the competent authority is ultimately allowed to exercise its 'own independent judgment'.

[103] Haan-Kamminga, Roggenkamp and Woerdman (n 74) 247.

[104] ibid.

[105] In this respect it has been pointed out that the objectivity of the competent authority in relation to the transfer decision is doubtful and that it may find itself under political pressure (Dentons (n 97) 29).

[106] Havercroft and Macrory (n 72) 44.

[107] Nicola A Durrant, 'Carbon Capture and Storage Laws in Australia: Project Facilitation or a Precautionary Approach?' (2010) 18 Environmental Liability Journal 148, 168.

[108] Tom Kerr, Ian Havercroft and Tim Dixon, 'Legal and Regulatory Developments Associated with Carbon Dioxide Capture and Storage: A Global Update' (2009) 1 Energy Procedia 4395, 4400.

[109] Haan-Kamminga, Roggenkamp and Woerdman (n 74) 247.

[110] Dentons (n 97) 28.

[111] ibid.

sites, in light of the site selection criteria under Article 4 of the CCS Directive.[112] A standard pre-transfer period at EU level would therefore be desirable in order to prevent both a 'race to the bottom' and a 'race to the top' between Member States in relation to safety standards.[113]

B. Environmental Liability under the ELD

i. Balance

The set of rules contained in the Environmental Liability Directive ('ELD') can perhaps be characterised as the only type of leakage liability imposed on CCS operators that is insufficiently rigorous from the point of view of environmental protection.[114] Even for the types of environmental damage or potential damage for which the operator may be held strictly liable,[115] there are two particularly important defences which may be available if the Member State in question opted to implement them: the 'permit' defence and the 'state of the art' defence.[116] In theory, operators may use these defences in cases of leakage where there was no fault or negligence on their part and where they were either fully complying with the terms of their storage permit or the activity causing the leakage was not considered likely to be harmful at the time. These two defences may prove to be particularly useful given the characteristics of CCS and may cover a large number of cases involving prudent operators who were neither at fault nor negligent. Nevertheless, they may not have access to these defences, as some Member States may have opted not to implement them. In this context, it could be suggested that the availability of these two defences should be made compulsory in the case of CCS, in light of the need to acknowledge that there is little benefit in holding scientific knowledge failures against operators, when this may hinder the deployment of a socially useful project.

Still, there are disadvantages in relying on the ELD to regulate operators' environmental liability. In this respect, Bradshaw notes the importance of the distinction between framing certain obligations as matters of compliance with the storage permit, as opposed to matters of liability.[117] There is a symbolic discrepancy between the obligation of the competent authority to carry out corrective measures in respect of leakage if the operator fails to do so under the permit,[118] and the lack of

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[112] CATO 2 (n 95) 10.

[113] ibid.

[114] This is because Article 2 of the ELD (n 81) gives a restrictive definition to 'environmental damage', covering only damage to protected species and natural habitats under EU law, damage to water covered by the EU Water Directive and land damage affecting human health. As Havercroft and Macrory (n 72) note at 27, this may only cover an extremely low number of cases.

[115] ELD (n 81) art 3(1)(a) imposes strict liability for damage or imminent threats of damage caused by Annex III activities, which include CCS.

[116] Under art 8(3) of the ELD (n 81) compulsory defences include the 'third party defence' (despite appropriate safety measures being in place) and compliance with a compulsory order or instruction. Optional defences under art 8(4) include compliance with an authorisation (the 'permit defence') and the 'state of the art defence' (the activity was not considered likely to cause damage according to the state of scientific and technical knowledge at the time).

[117] Carrie Bradshaw, 'The New Directive on the Geological Storage of Carbon Dioxide' (2009) 11 EL Rev 196, 201-202.

[118] CCS Directive (n 19) art 16(4); Bradshaw (n 117) 202.

an equivalent obligation on the authority in the context of preventing environmental damage under the ELD.[119] Indeed, under Articles 5(4) and 6(4) of the ELD, respectively, the relevant authority *may* take preventive or remedial actions and then recover the costs, should the operator fail to act. It could be said that the issue is of little practical relevance in light of the first obligation under the CCS Directive, yet the corrective measures necessary to remedy the leakage itself may not always be synonymous with the measures necessary to prevent or remediate *environmental* damage. In addition to the fact that operators' environmental liability is not capped, the Member State is also not bound to intervene, not even as a last resort for the prevention or remediation of environmental harms resulting from CCS. This discrepancy can therefore also be said to reflect an imbalance between the responsibilities of private and public stakeholders for the risks associated with CCS.

C. Risks of Payment for Leakage under the ETS Directive

i. Balance

Through the inclusion of CCS projects under the EU Emission Trading System ('ETS'), CO_2 that is captured and stored in accordance with the CCS Directive will be treated as an avoided emission and will therefore not give rise to the obligation for surrender of allowances.[120] In order to maintain the environmental integrity of the EU ETS, operators will be required to surrender allowances only for the quantity of leaked CO_2, on a yearly basis.[121] However, it is unclear from the perspective of balance why it is only the operator that is required to bear the (potentially) prohibitively expensive burden of purchasing allowances, particularly in light of the extremely high and strict financial penalties that are imposed for the failure to comply with this obligation.[122] The competent authority only bears this liability post-transfer, a point which is, again, uncertain.[123] This question emerges more clearly from the perspective of legal certainty.

ii. Legal certainty

While the obligation imposed on operators to buy credits under the ETS in the event of leakage makes intuitive sense, both as a 'penalty' (providing an incentive for operators to observe a high standard of care) and as 'compensation' (for breaching the environmental integrity of the EU ETS), there is a difficulty caused by the potentially significant variation in the price of carbon at two relevant times: the point of storage of the CO_2 (the moment at which it becomes an avoided emission) and the (unpredictable) point of occurrence of leakage. This relates to uncertainty surrounding the level of the carbon price years into the future, which can lead to two situations:

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[119] Bradshaw (n 117) 202.
[120] ETS Directive (n 82) art 12(3a).
[121] ETS Directive (n 82) art 6(2)(e).
[122] Currently a penalty of 100 EUR per tonne of excess CO_2 emitted, under art 16 of the ETS Directive (n 82). This penalty will be imposed even when the breach was unintentional, for instance in the context of an unpredictable leak (n 72) 35.
[123] CCS Directive (n 19) art 18.

(i) The price of carbon at the point of leakage may be lower than the operators' financial gain from having stored that quantity of CO_2. While a relatively low future carbon price is unlikely in light of the expected tightening of environmental protection measures, the situation may nevertheless arise, for instance, due to an economic crisis.[124] In this context, it has been argued that such a price 'may fail to address any financial gain which could be garnered from a failure to remedy leakages' and that climate liability should be addressed through a penalty that is more 'dissuasive' than the ETS system.[125] Such an argument, however, overlooks the reality that the maximum an operator can be required to do, is to apply industry best practice and the highest standard of care during CCS operations. The familiar reasoning applied to penalties under criminal law (the harsher the punishment, the greater the deterrent effect) cannot apply to CCS as there is only so much risk mitigation that human knowledge and skill can achieve. There is a point beyond which a high financial penalty will lose its deterrent effect and start to lower the chances of investment in CCS being secured at all. Liability should therefore not exceed this level. Furthermore, it is arguably unreasonable to penalise operators for fluctuations in the strength of the European economy or for the failure of the EU ETS system to reflect the true price of emissions at any given time.

(ii) The price of carbon at the point of leakage may be significantly higher than the operator's financial gain from having stored the CO_2. This is arguably a more likely and a more concerning scenario, as it exposes the operator to unquantifiable liability. This risk may also be heightened by uncertainty surrounding the actual quantity of CO_2 that has leaked, the measurement of which may give rise to debates particularly in relation to the precise point in time at which leakage started to occur.[126]

Rather than imposing the burden of this uncertainty exclusively upon operators, there is a more suitable approach to addressing climate liability. Firstly, to include CCS under the ETS in the sense that stored CO_2 is treated as not emitted (maintain the current approach[127], but to deal with the responsibility of surrendering allowances for leaked CO_2 in a different manner and under a different legal instrument, such as the CCS Directive.[128] An option would be to spread the possible financial burden of this obligation between three 'layers' of relevant parties (as proposed in chapter three). The operator would be liable to buy credits up to a predetermined cap. If the leakage exceeds that cap, the mutual operators' fund would intervene up to a second cap; if that second cap is exceeded as well, the State would contribute the rest of the amount. This proposal would bring a vital dose of legal certainty. If the carbon price at the point of leakage is higher than at the point of storage and, if the level of the operator's cap is exceeded, the financial burden will

[124] The Commission notes that carbon prices dropped from €30 in 2008 to €5 in 2013 as a result of the global recession (n 15) 4.
[125] Bradshaw (n 117) 202.
[126] As leakage measurement techniques will likely be provided in the monitoring plan, disagreements may only arise in relation to the start of leakage (Haan-Kamminga (n 83) 317).
[127] As Russell (n 31) notes at 11, the 'avoided emission' method of accounting for CCS adopted by the ETS Directive is more effective than treating the technology as an offset.
[128] This is because the ETS Directive does not currently allow Member States to cap liability in respect of allowances, though such an exception could be introduced in respect of CCS (n 72) 36.

be shared between the three stakeholders in light of the broader social utility of CCS and of the need to incentivise investment in the first place. A similar balance could be achieved through the setting of a simple cap and floor price for emission allowances,[129] with the Member State contributing the amount that is needed above the cap, though this would require an amendment of the ETS Directive. Importantly, capping operators' climate liability would ensure that appropriate insurance products could be much more easily obtained than at present, when no such products exist for the cover of ultimately unquantifiable liability.[130]

4. Proposals for Reform

It is important not to lose sight of the fact that the choices made in the drafting of the CCS Directive, particularly its shortcomings with respect to balance and legal certainty are the result of a minimum harmonization strategy and not of an unsupportive policy. The EU did not seek to intrude into the choices of national legal systems more than was necessary to provide a general framework for regulating the most challenging component (that of CO_2 storage) of a still controversial technology.[131] Such an approach is profoundly incompatible with the rhetoric of a necessity and urgency for commercial-scale deployment of a key climate change mitigation strategy[132], which requires a strongly supportive regulatory framework. Yet given the nature of the EU, it may prove difficult to secure the agreement of all Member States on such a framework. Particularly in respect of the liability regime, the challenge is to devise a set of reforms which carefully balance the achievement of three aims: ensuring political acceptability, ensuring the long-term environmental integrity of CCS projects (avoiding moral hazard), and incentivising rapid and widespread commercial deployment. This chapter proposes an approach for the combined achievement of these aims.

A. Ensuring Political Acceptability

The idea of amending the CCS Directive so as better to balance the operator's obligations and shift a proportion of its pre-transfer liabilities onto the Member State, may be countered by pointing to the nature of the legal instrument used (a Directive, rather than a Regulation) and to the decision on a minimum harmonization strategy. However, it is important to note that the approach taken does not reflect a long-term strategy for the regulation of CCS at EU level; it merely reflects the most convenient option available at the time for securing the rapid adoption of a key legal instrument regulating a relatively novel and controversial technology. The Commission's report

[129] Dentons (n 97) 28.
[130] ClimateWise (n 91) 5.
[131] The choice of using a Directive was made in order to secure the agreement of the majority of Member States, as it inherently leads to a significant degree of discretion as to the manner of its transposition into national law. CATO (n 95) 3.
[132] 'CCS is (…) vital for meeting the Union's greenhouse gas reduction targets'. COM (n 15) 3.

on the CCS Directive[133] may very well conclude, in light of the currently slow take up of CCS, that the uncertainty surrounding operators' liabilities is an obstacle to investment which must be reduced through amendments, either providing more clarity to the existing rules or introducing a re-distribution of risks between operators and competent authorities.

If such reforms are proposed, there is one aspect which should arguably be emphasised in order to secure their political acceptance. This relates to the idea that under Article 4(1) of the CCS Directive, Member States retain discretion as to which parts of their territory, if any, are allowed for CO_2 storage and the extent to which storage is allowed. They exercise full control over these decisions. Therefore, insofar as Member States decide to allow the deployment of CCS on the whole or parts of their territory[134], an argument should be put forward that the broader interests of achieving Europe's (and ultimately, the world's) energy security and climate change mitigation goals justify a restriction of their discretion as to how the burden of uncertainty is to be distributed, in order to ensure the commercial viability of CCS.

The main advantage of this approach is symbolic, yet sends a powerful message that is more compatible with EU policy statements. It is symbolic in the sense that if a Member State is not particularly supportive of CCS or remains sceptical as to its viability, it retains the right to prohibit CCS on the whole or parts of its territory under both approaches. However, in relation to those Member States which allow CO2 storage, a more 'intrusive' and balanced liability regime at EU level would send the message that if CCS is to be deployed this is to be done at the necessary scale.

B. Ensuring Long-term Environmental Integrity

As Tysoe argues, 'prevention is better than cure'.[135] Given that the overarching purpose of the CCS Directive is to ensure the 'environmentally safe storage of CO_2'[136] and that what is needed first and foremost for the achievement of this goal is rigorous site selection,[137] a much stronger emphasis on this aspect arguably needs to be reflected in the Directive. This is because, currently, the criteria for site selection under Article 4 are not sufficiently defined. There are 'difficult concepts' which are in need of clarification and may not have been defined through national legislation.[138] One example is UK legislation, which merely refers back to definitions under the Directive.[139] Article 3 of the CCS Directive only gives general definitions to elements such as 'storage complex' and 'significant risk'. Notably, the meaning of the term 'leakage' is made dependent on the ambiguous definition of 'storage

[133] Due on 31 March 2015, under Article 38(2) of the CCS Directive (n 19).
[134] Particularly as such parts may be chosen strategically in order to reduce risks associated with storage; for instance, the UK has chosen, as a matter of policy, to allow CCS deployment only offshore, where risks to human health are lower. Armeni (n 90) 21.
[135] S Tysoe, 'Carbon Capture and Storage: Pulling Down the Barriers in the European Union' (2009) 223 IMechE 281, 285.
[136] CCS Directive (n 19) Preamble para (49).
[137] As argued in ch 1.
[138] Armeni (n 90) 22.
[139] ibid.

complex'.[140] Insofar as the Member State has not clarified these concepts through legislation, the ambiguity at the level of EU law is simply transferred to the national level, possibly creating the potential for disputes on whether leakage has occurred or may occur within the meaning of the relevant legislation.[141] Such ambiguity is undesirable in light of the importance of site selection for the minimisation of leakage risks.

The soft approach taken at EU level has been to provide detailed guidance on site selection and monitoring in a non-binding document.[142] A better approach would arguably be to translate such guidance into detailed, clear and binding norms on site selection and management. It has been proposed that a storage site be deemed safe where the characterisation and assessment process either predicts no leakage or predicts minor leakage only, for reasons which are clear and understood.[143] It has also been suggested that a clear and realistic definition be given to the notion of 'permanence' under the CCS Directive by setting a time horizon for acceptable risks of leakage.[144]

There are two strong arguments in favour of uniformity at EU level on these issues. Firstly, there is a collective interest in avoiding climate damage due to leakage from improperly selected sites. Secondly, if the aim is to deploy CCS at commercial scale, there is a collective interest in ensuring that public perception throughout the EU of the nascent CCS industry is positive. For this to be achieved, perceptions must be built on practical experience gained in relation to carefully selected and safely managed storage sites, which are unlikely to experience leakage and cause environmental damage. As Reiner and Herzog note, '[…] significant problems in the early years of a technology's development affected public perceptions and produced regulatory regimes and political battles that took decades to reform or resolve'.[145]

C. Incentivising Commercial Deployment

i. A 'layered' approach to liability

The third component of the proposed approach would address the shortcomings of the current CCS liability regime in terms of balance and legal certainty. The proposal

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[140] CCS Directive (n 19) art 3.

[141] As Hamann (ed) notes, 'Bearing in mind that the storage complex comprises the storage site and the surrounding geological formations, the determination of a case where leakage has occurred is difficult to establish'. Kristin Hamann (ed), 'ECO_2 Briefing Paper No 3: Assessing the Risks, Costs, Legal Framework and Public Perception of Offshore CCS' (ECO_2 Project 2013) 12 <http://oceanrep.geomar.de/22701/> accessed 23 March 2015.

[142] Commission, *Implementation of Directive 2009/31/EC on the Geological Storage of Carbon Dioxide Guidance Document 2: Characterisation of the Storage Complex, CO_2 Stream Composition, Monitoring and Corrective Measures* (European Communities 2011) (Commission Guidance Document 2) <http://ec.europa.eu/clima/policies/lowcarbon/ccs/implementation/docs/gd2_en.pdf> accessed 23 March 2015.

[143] CATO 2 (n 95) 6.

[144] ibid 50.

[145] DM Reiner and HJ Herzog, 'A Search for Regulatory Analogs to Carbon Sequestration' (2003) I and II Greenhouse Gas Control Technologies 235, 241 <http://sequestration.mit.edu/pdf/ghgt6_paper_135.pdf> accessed 23 March 2015.

is to structure the liability regime through a simple three-tier or 'layered' approach, introduced at EU level through an amendment to the CCS Directive.[146] The idea is well-known, having been explored and applied in the context of various industries, such as oil and gas and nuclear energy.[147] As Adelman and Duncan note, CCS requires a 'hybrid' liability regime, which maps onto the characteristics of such projects and their risk profiles, particularly the combination between short-term and long-term risks.[148] Crucially, a layered approach ensures that the broader social utility of CCS and the need to encourage investment is adequately factored into the liability regime, by spreading the burden of uncertainty between stakeholders at all stages of the project.

The first layer would involve a limitation or capping of the liability of the operator for all pre-transfer risks associated with leakage under the CCS Directive. The operator would therefore bear the burden of uncertainty and would be required to show that financial security will cover its liabilities under the CCS and ETS Directives, in a manner that is similar to the current approach. However, a vital dose of legal certainty would be injected through the setting of a cap, which would not only allow the operator accurately to predict its financial exposure (thereby facilitating investment decisions) but also ensure that it is able to find and purchase appropriate insurance products. As de Figueiredo argues, this approach can allow 'the various instruments that are available for managing liability [to] be used according to their strengths' and in this respect, insurance is particularly suitable for the management of short-term and quantifiable risks.[149] The difficulty of establishing such a cap through an EU instrument could be addressed by allowing Member States a degree of discretion as to the case-by-case setting of the cap, limited by a set of EU-wide criteria, which, for instance, link the value of the cap to a proportion of the quantity of CO_2 stored at any given site.

The second layer would consist of a national operators' common fund created, for instance, through financial contributions which are calculated based on the quantity of CO_2 stored at each site.[150] Importantly, payments from this fund would only be made when a particular operator's liability exceeds the first layer

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[146] This is the approach taken in the US in relation to nuclear liability by the Price-Anderson Act. Mark Anthony de Figueiredo, 'The Liability of Carbon Dioxide Storage' (DPhil thesis, Massachusetts Institute of Technology 2007) 65-66.

[147] In the context of CCS, transferring this idea has been suggested by several commentators: David E Adelman and Ian J Duncan, 'The Limits of Liability in Promoting Safe Geologic Sequestration of CO_2' (2011) 22 DELPF 1; de Figueiredo (n 146); Stuart Haszeldine, 'Geological Factors in Framing Legislation to Enable and Regulate Storage of Carbon Dioxide Deep in the Ground' in Ian Havercroft, Richard Macrory and Richard B Stewart (eds), *Carbon Capture and Storage: Emerging Legal and Regulatory Issues* (Hart Pub 2009) 20; Rudiger P Tscherning, 'Long-term Liabilities for Carbon Dioxide Capture and Storage in Germany: What Contribution Can Developments in the United States of America Make to a Revised Draft Carbon Capture and Storage Law?' (University of Dundee) <www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car14_20_551876070.pdf> accessed 23 March 2015; CATO 2 (n 95) 91; Tysoe (n 135) 285.

[148] David E Adelman and Ian J Duncan, 'The Limits of Liability in Promoting Safe Geologic Sequestration of CO_2' (2011) 22 DELPF 1, 65.

[149] de Figueiredo (n 146) 393.

[150] Such a method would arguably avoid the difficulty of basing the contribution on the probability of leakage, as suggested by Tysoe (n 135) 285.

cap.[151] Again, this is a well-known and flexible mechanism for the pooling of risk in the context of various industries.[152] Similarly to the first layer liability cap, there is value in setting the general rule, drafting a set of criteria at EU level for calculating contributions and leaving a degree of discretion to Member States as to how the fund is to be set up and managed.

The third layer would be comprised of the Member State. Its financial contribution would be required to compensate for leakage which exceeds both the first layer cap and the capacity of the common fund, an event which, as highlighted throughout chapter one, is extremely unlikely for carefully chosen sites.

ii. Advantages of the approach

This proposal would address a number of concerns that could be raised in relation to the structure of the liability regime and would arguably ensure both the achievement of balance and legal certainty.

Firstly, it is often emphasised that the risk and magnitude of potential leakage is generally low, therefore one possible argument would be that operators should have no difficulty in simply accepting unlimited liability for leakage until transfer to the competent authority takes place.[153] Such an argument, however, ignores the idea outlined in chapter one; that there always remains an element of uncertainty and a possibility of knowledge failure. This type of uncertainty would either prevent insurers from accepting the risk on behalf of operators or would dictate a prohibitively expensive premium.[154] As Professor Abraham notes, 'compensation of victims, deterrence of catastrophic loss, and even the symbolism entailed in imposing legal responsibility are important goals […]. But each of these goals depends in some measure on a functioning liability insurance market'.[155] Even if the operator had sufficient financial strength to self-insure, the possibility of unquantifiable liability on four different levels (obligations under the CCS Directive, environmental liability under the ELD, purchase of allowances under the ETS Directive and liability under delict/tort law) cannot form the basis of any wise investment decision unless the financial gains from CCS are extremely high (which, at the moment, they are not).[156] In this context, the layered approach would ensure that the liability of the operator is predictable and quantifiable by setting a cap, an aspect of significant importance for the obtainment of insurance at reasonable premiums.

Secondly, there are two advantages of a layered approach to liability that have an attractive cumulative effect. On the one hand, it reflects a hierarchy of exposure to the risk that is mindful of proximity to and control over the source of leakage (from the primary exposure of the operator in question, to the secondary exposure of the mutual operators' fund, to the 'last resort' type of exposure of the

[151] de Figueiredo (n 146) 392.
[152] ibid.
[153] Haan-Kamminga (n 83) 325.
[154] ClimateWise (n 91) 31.
[155] Kenneth S Abraham, 'Environmental Liability and the Limits of Insurance' (1988) 88 Columbia Law Review 942, 945.
[156] Meadowcroft and Langhelle (n 70) 234 – it is 'doubtful' that the current price of CO_2 will be able to incentivise investment.

Member State).[157] On the other hand, it is based on a realistic assessment of the risk of leakage. Since this is considered low to begin with, then it is even lower for the parties further down the hierarchy of exposure and should therefore cause little objection on the part of Member States.

Thirdly, it is important not to overlook the sole purpose for which CCS is being pursued at all, that of addressing the global danger that is climate change. If CCS is deployed at commercial scale and proves to be generally successful, with no significant leakage occurring at any stage, it is not only individual operators who stand to benefit but the EU as a whole and perhaps humanity in general. The current EU regulatory approach of requiring operators to be prepared for the possibility of leakage of the whole quantity of stored CO_2 not only reflects an unrealistic assessment of the risk but also reflects an unwillingness on the part of society to accept some of the risk associated with an activity that is ultimately undertaken for its benefit. The Member State does indeed relieve the operator of at least three out of four types of liability upon transfer of responsibilities for the storage site, but the precise terms of this transfer are currently surrounded by uncertainty, to the point where it may not occur at all.[158] In this context, the layered approach can be considered a balanced allocation of the burden of uncertainty that encourages investment while ensuring that there is still a significant incentive to avoid moral hazard.

5. Conclusion

The creation of an EU liability framework for CO_2 storage, contained in the 2009 CCS Directive, undoubtedly represents a positive first step towards addressing a difficult regulatory and political question. The approach taken to the division of responsibilities for the risk of leakage has secured the adoption of an EU instrument governing CCS projects where none would have existed. An emphasis on ensuring the environmentally safe deployment of CCS through minimisation of leakage must remain a priority, if the full benefits of the technology are to be achieved and if climate change mitigation efforts are to be supplemented, rather than undermined. In this respect, liability is a powerful risk allocation instrument with great potential for incentivising safe operation of storage sites.

However, there is arguably a level beyond which liability will start to lose its positive effects and simply act as an insurmountable barrier for investment. Particularly through its provisions on financial security, financial contribution and the obligation to surrender emission allowances in the event of leakage, the CCS Directive can be said to exceed this level and places the pre-transfer burden of uncertainty exclusively on CCS operators. The necessity of avoiding moral hazard, of requiring operators to exercise high standards of care and of penalising them should they fail to do so cannot be denied. However, it is unreasonable to require guarantees of complete and permanent storage where no entity, private or public, would be able to provide such guarantees. The collective EU interest in climate

[157] de Figueiredo (n 146) 400.
[158] As argued above in section 2.

change mitigation justifies a redistribution of the burden of uncertainty that is reflective of the ultimate purpose and importance of CCS. A layered approach to liability could provide a better balance and more legal certainty in this respect.

Nevertheless, in proposing reforms it is important to be mindful of the political dynamics which characterise the EU legal system. The challenge is to find appropriate solutions for CCS that are also politically acceptable. Member States may be reluctant to accept amendments which may place a higher burden on public funds, regardless of how unlikely the event of significant leakage actually is. Still, the argument must be emphasised that Member States retain their freedom to decide whether to allow CCS on their territory. If a decision is made to deploy CCS, then it must be done properly, in light of the broader European and global interests involved. It is hoped that the upcoming Commission review and proposals for amendment of the CCS Directive will achieve the difficult task of correcting its shortcomings in a politically acceptable manner.

Britain Goes to War: An Analysis of the Developing Role of the House of Commons in Determining Whether HM Forces Should Be Deployed on Military Operations

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Abstract

Conventionally, the exercise of British foreign policy matters has been reserved for the executive. However, recent conflicts involving Britain suggest that this traditional position is undergoing a fundamental transformation in order to enhance democracy and accountability by augmenting the role of Parliament in conflict decisions. This revolution ultimately stems from the necessity to renew trust and confidence in Britain's democratic institutions and to ensure that there is sufficient oversight and scrutiny of governmental decisions. The purpose of this analysis is to highlight that the present position in the United Kingdom regarding Parliament's role in decisions to pursue military action is wholly unclear. By analysing the development of the legislature's role and the emergence of a constitutional convention the current inadequacies will be exposed and various suggestions for reform will be offered.

Keywords: British Constitutional Law, the Royal Prerogative, Constitutional Conventions, Armed Forces, War Powers, Military Action, International Accountability

1. Introduction

> How odd – perhaps bizarre – it is that the approval of both Houses of Parliament is required for pieces of technical, and often trivial, subordinate legislation, whereas it is not needed at all before men and women can be committed to the possibility of disfigurement or death.[1]

Currently the deployment of British Armed Forces (HM Forces) to an armed conflict is certified by the Royal Prerogative, which is exercised by the executive on behalf of the Crown. These powers have evolved in the British Constitution over hundreds of years; however, the prerogative power for war making has survived predominantly unharmed into the twenty-first century.[2] In recent years the debate has been amplified due to conflicts in Iraq and Syria, which have highlighted the increasing role of the House of Commons in constraining the Government on major issues of

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[1] Rodney Brazier, *Constitutional Reform* (2nd edn, OUP 1999) 123.

[2] James Gray and Mark Lomas, *Who Takes Britain to War?* (The History Press 2014) 11.

foreign policy. Consequently, there are justifiable concerns that the balance between legislative and executive power over the armed forces may not be configured in such a way as to ensure the highest conceivable level of democracy, accountability and transparency in decision-making.[3] Clearly, given the huge implications, it is critical that decisions to go to war be subjected to rigorous scrutiny and review.[4] Unquestionably, when it comes to an issue that is of such fundamental importance to the nation, to the greatest extent possible approval should be sought from the people's representatives in the Commons. The flow of power from British citizens to the Government should be balanced by the ability of Parliament to hold the Government to effective account.[5] Consequently there is a growing feeling within the constitutional system that Parliament must have a role in deployment decisions.[6] In Britain's modern democracy it is now evident that resistance to the assertion of the role of Parliament is crumbling.[7] However, it is apparent that this 'democratisation' of war could have far-reaching consequences. Therefore, it is vital that parliamentary involvement does not imperil the necessity to, above all, protect national interests. Admittedly, this issue is complex, with no rapid or straightforward solution. Clearly, there are strong differences of opinion amongst politicians and the public at large, thus a resolution must be approached cautiously and astutely. Nonetheless, this must not detract from the urgent need for clarity regarding the role of Parliament in decisions to commit British forces.

This analysis will critically examine the development of the relationship between the Government and the House of Commons in determining whether HM Forces should be deployed overseas. Its main objective is to convey that regardless of arguments in its favour, the unfettered use of the Royal Prerogative to go to war is no longer politically tolerable. It is clear that despite claims of an emerging constitutional convention, the current role of Parliament is unclear and clarification is urgently required. Different reformation proposals will be assessed in order to satisfy calls for democracy in war-powers (the power to declare war) while preserving the aptitude of the executive to take the country to war if this

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[3] Stuart Wilks–Heeg and Andrew Black, 'Despite David Cameron's Defeat on Intervening in Syria, the UK Parliament Actually Has Relatively Weak War Powers Compared to Legislatures in Other Democracies' (The London School of Economics and Political Science, 30 August 2013) <http://blogs.lse.ac.uk/europpblog/2013/08/30/despite-david-camerons-defeat-on-intervening-in-syria-the-uk-parliament-actually-has-relatively-weak-war-powers-compared-to-legislatures-in-other-democracies/> accessed 17 November 2015.

[4] Nigel White, *Democracy Goes to War: British Military Deployments under International Law* (OUP 2009) 269.

[5] Lord Chancellor and Secretary of State for Justice, *The Governance of Britain* (Cm 7170, 2007) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf> accessed 17 November 2015.

[6] House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 422, 4 March 2004) <www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422.pdf> accessed 17 November 2015; Philip Towle, '*Going to War: British Debates from Wilberforce to Blair* (Palgrave Macmillan 2009); House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force* (HL Paper 46, 24 July 2013) <www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/46/46.pdf> accessed 17 November 2015.

[7] HC Deb 15 May 2007, vol 460, col 512.

commitment is necessary. It will be recommended that a parliamentary resolution is preferable to allow Parliament's role to become a more permanent fixture in the British Constitution.

2. The Conventional Position

The British Constitution is unusual due to its 'uncodified' nature. Unlike the vast majority of countries there is no single consolidated document portraying the balance between the divisions of the state and their legal powers and limits. The British Constitution has instead evolved over centuries and represents an accumulation of legislation, judicial precedent, treaties and conventions. A further historic source of the constitution is what some see as the 'democratically unsatisfactory anomaly'[8] known as the Royal Prerogative.[9] This chapter will discuss the conventional position regarding the decision to deploy the armed Forces by assessing the Royal Prerogative and the traditional role of Government and Parliament.

A. The Royal Prerogative

The Royal Prerogative is a notoriously difficult concept to define.[10] Nevertheless, Dicey explains the term as 'the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers.'[11] However, despite complications in defining this term, the most perplexing characteristic is unquestionably that its exercise does not require the approval of Parliament.[12] The Public Administration Select Committee identified three main areas of prerogative powers: the legal prerogatives of the Crown,[13] the Crown's constitutional prerogatives[14] and the prerogative

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[8] Andrew Blick, *Codifying – or Not Codifying – the UK Constitution: A Literature Review* (King's College London: Centre for Political and Constitutional Studies, February 2011) 10. <www.parliament.uk/pagefiles/56954/CPCS%20Literature%20Review%20(4).pdf> accessed 17 November 2015.

[9] The main prerogative powers include regulating the civil service, making treaties, declaring war, deploying the armed forces and granting pardons, see Lucinda Maer and Oonagh Gay, *The Royal Prerogative* (House of Commons Library, 2009) (SN/PC/0386) 4.

[10] Sebastian Payne provides reasons for this in 'The Royal Prerogative' in S Payne and M Sunkin (eds), *The Nature of the Crown: A Legal Analysis and Political Analysis* (OUP 1999) 77; House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 422, 4 March 2004) 5 <www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422.pdf> accessed 17 November 2015 .

[11] Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1961) 424.

[12] Thomas Poole, 'United Kingdom: The Royal Prerogative' (2010) 8 International Journal of Constitutional Law 146.

[13] House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 422, 4 March 2004) 5 <www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422.pdf> accessed 17 November 2015.

[14] ibid 6.

executive powers.[15] The legal authority for conducting defence of the realm rests with the latter. This is said to be the most significant of the prerogative powers.[16]

Under the Royal Prerogative, which derives from the Bill of Rights 1689,[17] the Government on behalf of the Crown can make decisions pertaining to defence and the armed forces. This long-standing constitutional convention means that the executive has liberty of action in this field; Parliament has no formal, legally established role. The nature of the war prerogative ensures that the Government's freedom to act is not constrained, which makes it possible, in theory, vicariously to pursue national interests. Consequently, for centuries, the executive has been able to exercise authority in the name of the Monarch without consulting the British population and their representatives.[18]

The inherently undemocratic nature of the prerogative has led to it repeatedly being described by the judiciary as 'the clanking of mediaeval chains of the ghosts of the past.'[19] The exercise of prerogative powers is inconsistent with Britain's central constitutional values: parliamentary supremacy and the rule of law. Firstly, 'while parliamentary approval is not generally needed before action is taken, ministers are responsible to Parliament for their policies and decisions.'[20] Secondly, decisions by the Government to use the armed forces are not reviewable by the courts and therefore bypass normal methods of democratic control.[21] Consequently, there is an urgent need to re-evaluate the balance between the demands of democratic accountability in the modern era and the effective prosecution of war.[22]

B. The Traditional Relationship between the Government and Parliament

Strictly speaking, the Government is accountable to Parliament. Every year, Parliament must vote either in favour of or against the level of defence expenditure, and every five years, it must renew the legal basis for the existence of the armed

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[15] ibid.

[16] House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 422, 4 March 2004) 9 <www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422.pdf> accessed 17 November 2015; AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th edn, Pearson Education Limited 2007) 260.

[17] The Bill of Rights 1689; The Bill of Rights is discussed in depth in Lucinda Maer and Oonagh Gay, *The Bill of Rights 1689* (House of Commons Library, 5 October 2000) (SN/PC/0293).

[18] Secretary of State for Justice and Lord Chancellor, *The Governance of Britain* (Cm 7170, 2007) 15; Colin Warbrick, 'The Governance of Britain' (2008) 57 ICLQ 209, 212.

[19] *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL) 29 (Lord Atkin); *Council of Civil Service Unions v Ministers for the Civil Service* [1985] AC 374 (HL) 417 (Lord Roskill); *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2001] 2 WLR 1219; Thomas Poole, 'United Kingdom: The Royal Prerogative' (2010) 8 International Journal of Constitutional Law 146, 147.

[20] AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th edn, Pearson Education Limited 2007) 324.

[21] *China Navigation Co Ltd v Attorney General* [1932] 2 KB 197 (CA); *Chandler v Director of Public Prosecutions* [1964] AC 763 (HL) 798 (Viscount Radcliffe).

[22] Nigel D White, 'International Law, the United Kingdom and Decisions to Deploy Troops Overseas' (2010) 59 ICLQ 814, 815.

forces and the system of military law through the passage of an Armed Forces Bill.[23] At first glance, these measures satisfy the prerequisite set out in Article VI of the Bill of Rights, that 'the raising or keeping of a standing army within the kingdom in time of peace unless it be with the consent of Parliament is against the law.'[24] However, in practice, Parliament's powers lack substance and effect. In theory prerogative power could allow the Government to send armed forces into conflict without parliamentary debate, or, pivotally, without their consent.[25]

Nevertheless, the power to deploy the armed forces is not absolute. Despite the fact that there is no formal process for involving Parliament, it has always been the Government's practice, unless requirements of secrecy or security dictate otherwise, to keep Parliament regularly informed of the existence and progress of overseas engagements.[26] As Brazier observes: 'Governments naturally encouraged Parliamentary reticence.'[27] In fact, the Commons Library Parliamentary Information List indicates that over two-hundred statements or debates on defence matters have taken place in the House since December 1982.[28] This 'informative' as opposed to 'consultative' nature is evident when analysing various historical precedents. The Second World War represents this traditional position whereby Parliament is kept informed but the Government controls the depth and presentation of information. When war against Germany was declared in 1939, Neville Chamberlain openly told the House that they were 'not in possession of all the information which we have.'[29] Thus, there were numerous debates and statements on the war but use of the Royal Prerogative remained distinctly unfettered and unquestioned.

The reality of applying the prerogative in foreign affairs is exhibited by the settlement of the Falklands in 1982.[30] Margaret Thatcher, during a Commons discussion over the conflict, reaffirmed that 'it is the inherent jurisdiction of the Government' to reach these decisions.[31] The leader of the opposition, Neil Kinnock, claimed 'the House of Commons has the right to make a judgment.'[32] However, Mrs Thatcher asserted that 'the Government has this responsibility, will shoulder that responsibility before this house and defend their decision.'[33] Thus, the Government confined Parliament's involvement to fourteen statements and a further five

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[23] Armed Forces Act 2011; Stuart Wilks-Heeg, Andrew Blick and Stephen Crone, 'Parliament Has Relatively Weak War Powers Compared to Legislatures in Other Democracies' (Democratic Audit UK, 29 August 2013) <www.democraticaudit.com/?p=1340> accessed 17 November 2015.

[24] The Bill of Rights 1689, art VI.

[25] The Secretary of State for Justice and Lord Chancellor, *The Governance of Britain: War Powers and Treaties: Limiting Executive Powers* (Cm 7239, October 2007) 22 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/243164/7239.pdf> accessed 17 November 2015.

[26] ibid.

[27] Philip Towle, *Going to War: British Debates from Wilberforce to Blair* (Palgrave Macmillan 2009) 130.

[28] House of Commons Library, *House of Commons Debates on Deployment of Armed Forces* (SN/PC/3254).

[29] HC Deb 3 September 1939, vol 351, col 291.

[30] Nigel D White, 'International Law, the United Kingdom and Decisions to Deploy Troops Overseas' (2010) 59 ICLQ 814, 815.

[31] HC Deb 11 May 1982, vol 23, col 597.

[32] ibid.

[33] ibid col 598.

adjournment debates before Argentinian surrender, yet none resulted in a hostile vote.[34] In fact, subsequent instances reveal that there has been no parliamentary approval in: the Suez crisis; the Gulf War; the deployment of the RAF in Bosnia during the 1990s by the Major Government; the persistent air strikes against targets in Serbia and Kosovo by the Blair Government and the long campaign in Afghanistan.[35] Therefore, it is clear that the use of the Royal Prerogative to take Britain to war was not challenged in any meaningful sense up to and including the Afghanistan Conflict in 2001 since there was 'no vote on any matter of substance.'[36]

Evidently, the manner in which the Commons oversees governmental decisions can vary, either by the involvement of select committees, parliamentary questions and debates (in both Houses), or, on some occasions, a vote. But the Government, in exercising its own political judgment, decides the extent of Parliament's involvement; its course of action is not dictated by legal requirements.[37] Thus, it is at the discretion of the Prime Minister to seek approval for his policy in an international crisis should he desire. Each individual case is different and therefore there are variations concerning whether Parliament should be involved or not.[38] Nevertheless, to many, this concept of the Prime Minister and the Cabinet taking the country to 'war' on the basis of powers inherited from medieval monarchs is criticised. The lack of parliamentary involvement in these instances may be accurately identified as an absence of democratic accountability over the most important decision a government can make.[39]

3. Changing Expectations

There are several imperative factors, which over recent decades have influenced the debate over Parliament's role in war-powers. As a result, the democratically elected legislature and the country as a whole are increasingly unwilling to leave use-of-force decisions solely to the executive.[40] This chapter analyses the changing nature of

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[34] James Gray, 'Crown versus Parliament: Who Decides on Going to War?' (Royal College of Defence Studies, July 2003) 5 <www.ukdf.org.uk/assets/downloads/GR175CrownversusParliament-WhoDecidesonGoingtoWarbyJamesGrayMP.pdf> accessed 17 November 2015.

[35] Gavin Philipson, ''Historic' Commons' Syria Vote: The Constitutional Significance (Part 1)' (UK Constitutional Law Association, 19 September 2013) <http://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/> accessed 17 November 2015.

[36] James Gray, 'Crown versus Parliament: Who Decides on Going to War?' (Royal College of Defence Studies, July 2003) 14 <www.ukdf.org.uk/assets/downloads/GR175CrownversusParliament-WhoDecidesonGoingtoWarbyJamesGrayMP.pdf> accessed 17 November 2015.

[37] Nigel D White, 'International Law, the United Kingdom and Decisions to Deploy Troops Overseas' (2010) 59 ICLQ 814, 815.

[38] Wolfgang Wagner, Dirk Peters and Cosima Glahn, *Parliamentary War Powers around the World, 1989-2004. A New Dataset* (Geneva Centre for the Democratic Control of Armed Forces (DCAF), Paper no 22, 2010) 100 <www.dcaf.ch/content/download/35832/526881/file/OP_22.pdf> accessed 17 November 2015.

[39] Claire Taylor and Richard Kelly, *Parliamentary Approval for Deploying the Armed Forces: An Introduction to the Issues* (House of Commons Library, Research Paper 08/88, December 2008) 15.

[40] ibid 16.

military operations, the increasing role of international accountability and the effect these changes have had on the developing role of Parliament in scrutinising governmental decisions.

A. The Changing Nature of Military Operations

In recent years there has been a crucial change in the nature of conflict in which Britain is involved and it is apparent that a new kind of 'war' is developing, primarily since the majority of recent conflicts concern either 'failed states' or anti-terrorism operations.[41] Straightforward invasions have become less common, the last being the invasion of Iraq in 2003.[42] Nigel Inkster observes: 'inter-state warfare has rather gone out of fashion (…) however, we are seeing a lot of internal intra-state disputes.'[43] Consequently, there is increasing difficulty in drawing clear distinctions between military and diplomatic engagements in foreign crises.[44] This has been further complicated by the emergence of new, unconventional security threats such as international terrorism.[45]

Additionally, the role of the media in shaping public opinion as regards waging war is now impacting upon the advancement of conflicts. An emerging characteristic of this 'new war' is that the media now more powerfully mediates the relationship between citizens and their political institutions.[46] Shaw suggests that the nature of Western warfare changed after the Vietnam War since it became clear that it is necessary to legitimise a military intervention in the eyes of the public in order for it to succeed.[47] However, contrary to Shaw's claim, it can be observed that most people in Britain have become more sensitive to civilian and military casualties, not least because of the 'ubiquity of television cameras which can show the destructive

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[41] House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force* (HL Paper 46, 24 July 2013) 5 <www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/46/46.pdf> accessed 17 November 2015.

[42] Patrick Cockburn, 'The Nature of War Has Changed, Which is Bleak News for Syria's Minorities' *The Independent* (London, 1 March 2014) <www.independent.co.uk/voices/comment/the-nature-of-war-has-changed-which-is-bleak-news-for-syrias-minorities-9162694.html> accessed 11 November 2014.

[43] House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force* (HL Paper 46, 24 July 2013) 16 <www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/46/46.pdf> accessed 17 November 2015.

[44] The techniques of warfare have also evolved particularly in relation to technological enhancement in surveillance, intelligence-gathering, and cyber-warfare. See House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force* (HL Paper 46, 24 July 2013) 16 <www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/46/46.pdf> accessed 17 November 2014.

[45] David Jenkins, 'Efficiency and Accountability in War Powers Reform' (2009) 14 Journal of Conflict & Security Law 145, 146.

[46] J Strömbäck, 'Four Phases of Mediatization: An Analysis of the Mediatization of Politics' (2008) 13(3) The International Journal of Press/Politics 228–46; Chiara de Franco, *Media Power and the Transformation of War* (Palgrave Macmillan 2010) 2.

[47] Martin Shaw, *The New Western Way of War: Risk-Transfer War and Its Crisis in Iraq* (Polity 2005) 75; Chiara de Franco, *Media Power and the Transformation of War* (Palgrave Macmillan 2010) 5.

effect of war.'[48] People are able more intimately to follow British involvement in conflict and observe the realities of life at war for soldiers and the effect on enemy territory. The international community justifiably has an extremely low tolerance for casualties in military missions that are essentially humanitarian – that is, for missions in which clear national interests do not appear to be at stake.[49] This is evident in considering the differences in support for 'wars of necessity' and 'wars of choice'.[50]

Furthermore, the role of relatives of soldiers who have been killed has been heightened since many have taken to questioning publicly the lawfulness of past deployments. Baroness Hale concluded that this is not a significant factor in enhancing the role of Parliament because 'the lawfulness of war is an issue between states, not between individuals or between individuals and the state.'[51] Nevertheless, these declarations can affect the public's view of a decision to wage war and reduce its credibility.[52] In recent years the need for involvement in humanitarian concerns and human rights abuses has emerged as a standard justification for overseas intervention. But while these incidences may be genuine, the media's reporting tends to be 'unbalanced, often misleading and occasionally fabricated.'[53]

Moreover, due to the legal implications of declaring war, and notwithstanding the questionable legality of such a move in the first place, most states have moved away from using the term 'war' and prefer instead terms like 'armed conflict' and 'hostilities.'[54] Though 'war' is still used colloquially and many conflicts are described as 'wars' for the sake of convenience,[55] war, by definition, is between two countries. Ultimately, recent conflicts are less interstate and more intrastate. The UK has made no declaration of war since Siam in 1942, and it is unlikely that it will ever make another.[56] Developments in international law since

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[48] Philip Towle, *Going to War: British Debates from Wilberforce to Blair* (Palgrave Macmillan 2009) 130.
[49] John Mueller, 'Force, Legitimacy, Success, and Iraq' in D Armstrong, T Farrell and B Maiguaschca (eds), *Force and Legitimacy in World Politics* (CUP 2005) 116.
[50] For an in depth discussion of these terms see House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility* (HL Paper 235 – I, 27 July 2006) 12 <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf> accessed 17 November 2015.
[51] *R (Gentle) v The Prime Minister* [2008] UKHL 20, [2008] 1 AC 1356 [57] (Baroness Hale).
[52] For example, this was evident in the Iraq War in 2003 since many believed that countless lives were lost unnecessarily. See Philip Towle, *Going to War: British Debates from Wilberforce to Blair* (Palgrave Macmillan 2009) 165.
[53] Patrick Cockburn, 'The Nature of War Has Changed, Which is Bleak News for Syria's Minorities' *The Independent* (London, 1 March 2014) <www.independent.co.uk/voices/comment/the-nature-of-war-has-changed-which-is-bleak-news-for-syrias-minorities-9162694.html> accessed 11 November 2014.
[54] Claire Taylor and Richard Kelly, *Parliamentary Approval for Deploying the Armed Forces: An Introduction to the Issues* (House of Commons Library, Research Paper 08/88, December 2008) 15.
[55] Useful distinctions of war can be found at Yoram Dinstein, *War, Aggression and Self-Defence* (3rd edn, CUP 2001) 3; Paul Bowers, *Parliament and the Use of Force* (The House of Commons Library, SN/IA/1218, 25 February 2003) 5.
[56] House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility* (HL Paper 235 – I, 27 July 2006) 7 <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf> accessed 17 November 2015.

1945 may well have made the declaration of war redundant as a recognised international legal mechanism.

Clearly, there are difficulties regarding where the line should be drawn with parliamentary scrutiny. This was demonstrated in the recent debate over UK military involvement in Syria.[57] The changing nature of war has thus brought many challenges for the relationship between Parliament and Government since recent conflicts have been inherently controversial and complicated.

B. Changing International Accountability

Since British constitutional law has provided little by way of legal constraint on the prerogative powers of the Government to deploy military forces, the focus has been on international law to restrict executive decisions and therefore hold them to account.[58] Pivotally, the majority of recent interventions involving the commitment of the British armed forces have been in collaboration with other states or as part of the UK's commitment to multi-national institutions such as the UN, EU, and NATO.[59]

International law regulates interstate relations to the benefit of all states and provides a 'discourse on the legitimacy of using force.'[60] However, methods of enforcement are somewhat limited, because Britain possesses the power to veto the proposals of the most effective international organ – the United Nations Security Council (UNSC).[61] Interestingly, the use of force was prohibited under Article 2(4) of the UN Charter[62] due to the millions of lives lost during the World Wars of the twentieth century. The only exceptions permitted are the use of force in self-defence[63] and when authorized by the UNSC for the purposes of protecting

[57] The conflict in Syria will be discussed in depth later in this article.

[58] The House of Lords Select Committee has acknowledged the important role of international law: 'The rules of international law on the use of force take on an enhanced significance as the only apparent limitation on the prerogative.' See House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility* (HL Paper 235 – I, 27 July 2006) 15 <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf> accessed 17 November 2015.

[59] The Secretary of State for Justice and Lord Chancellor, *The Governance of Britain: War Powers and Treaties: Limiting Executive Powers* (Cm 7239, October 2007) 24 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/243164/7239.pdf> 17 November 2015.

[60] David Armstrong, Theo Farrell, and Helene Lambert, *International Law and International Relations* (CUP 2007) 117.

[61] Nigel D White, 'International Law, the United Kingdom and Decisions to Deploy Troops Overseas' (2010) 59 ICLQ 814, 817.

[62] 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' See Charter of the United Nations (24 October 1945) art 2(4).

[63] Article 51 of the UN Charter recognizes 'the inherent right of individual or collective self-defence.' The right of self-defence is subject to the two key principles of customary law on the use of force: necessity and proportionality. See Charter of the United Nations, art 51.

international peace and security.[64] There have been attempts by states in recent years to expand the right of self-defence to using force in response to terrorist attacks and anticipatory self-defence.[65] However, these are in fact only attempts and therefore not considered to be international law.[66]

At an individual level, states may unintentionally be driven by countervailing self-interests to violate international law – arguably the US-led war against Iraq is an example of this since many in the US and UK polities falsified the threat from Iraq's weapons of mass destruction programmes.[67] However, this war was undertaken not only in violation of international law but in defiance of global opinion.[68] Never before in history had there been such outcry from across the world to stave off an impending war, but it was to no avail.[69] America and Britain proceeded without UN authority and without any real threat, resulting in a violation of international law.[70]

In October 2002, President George Bush warned the UN that failure to act against the Saddam Hussein regime would lead the organization 'to betray its founding and prove irrelevant to the problems of our time.'[71] He severely criticized the UNSC for not 'living up to its responsibilities.'[72] In doing so Mr Bush was clearly testing the power and application of international law. Sadly the realities of proceeding without UN authority became apparent in the late recognition that the UN was the only legitimate institution able to 'broker a viable alternative to permanent military occupation.'[73] This disdain for international law demonstrated by using force without UNSC authorisation has galvanised international opposition to the US role in world affairs and has made it more difficult for the country to persuade other states to follow its lead.[74]

Perhaps if the UK Government and the US[75] had abided by international law initially the Iraq War would never have occurred. Richard Falk appropriately

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[64] Chapter VII provides that the UNSC may authorise the use of force to protect or restore individual peace and security. See Charter of the United Nations, ch VII; David Armstrong, Theo Farrell and Helene Lambert, *International Law and International Relations* (CUP 2007) 117.

[65] David Armstrong, Theo Farrell and Helene Lambert, *International Law and International Relations* (CUP 2007) 123.

[66] ibid.

[67] ibid 147.

[68] On 15 February 2003, eleven million people demonstrated against the Iraq War in eighty countries. See Richard A Falk, *The Costs of War: International Law, the UN, and World Order after Iraq* (Routledge 2008) 2.

[69] ibid 3.

[70] Nigel D White, *Democracy Goes to War: British Military Deployment under International Law* (OUP 2009) 252.

[71] George Bush, 'Full Text of Bush Speech on Iraq' (BBC News, Ohio, 8 October 2002) <http://news.bbc.co.uk/1/hi/world/americas/2309049.stm> accessed 17 November 2015.

[72] Heraldo Munoz, *Solitary War: A Diplomat's Chronicle of the Iraq War and Its Lessons* (Fulcrum Publishing 2008) 1.

[73] ibid 2.

[74] For examples see Christian Reus-Smith, *American Power and World Order* (Polity 2004); David Armstrong, Theo Farrell and Helene Lambert, *International Law and International Relations* (CUP 2007) 139.

[75] The dreadful experience of the Vietnam War would also never have occurred if the US had revelled in international support. See Richard A Falk, *The Costs of War: International Law, the UN, and World Order after Iraq* (Routledge 2008) 3.

maintains that 'contrary to popular belief, respecting the restraints of international law better serves the national interest' of states.[76] Evidently, one of the key lessons of the Iraq War has been the revalidation of the UN seal of approval and recognition of the legitimacy it provides to actions consistent with its charter and agreed upon by member states through its organs. By receiving a UN resolution, a government appeals to international law to bolster the legitimacy of its military interventions and provide justification to both the wider public and the international community of its decision to deploy troops. The government can proceed in the knowledge that it has international backing, which provides considerable support should decisions prove erroneous. This renewed appreciation for international advocacy and accountability has paved the way for meaningful reform between the British Government and the Commons. Britain has been forced to consider its domestic accountability mechanisms.

While international law has an influence on debates in British politics, it is not always a decisive factor in preventing the final decision to go to war. Critically, serious doubts over the legality of operations have not deterred past governments from making such decisions as in Suez or Iraq, nor have they 'prevented Parliament from supporting, or at least not undermining those decisions.'[77] There are current proposals for international legal advice to be put before Parliament during discussions over proposed interventions.[78] It is therefore anticipated that Parliament will be better placed to challenge governmental actions. It is evident that Parliament is now less willing to go into an intervention without support from international bodies, in order to provide legitimacy and verify the legality of deployments. Therefore, participation in the international institutions created in the twentieth century has drawn attention to Britain's national constitutional system and has arguably contributed to the assertion of the role of Parliament as a check on the executive's military powers.[79] Increased control of the executive, both at a national and international level,[80] seems appropriate to hold the Government effectively to account in decisions which may ultimately result in the death of men and women. By using international law as a key reference point, it is apparent that Parliament is adopting a far more critical response to decisions to go to war.[81]

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[76] ibid 17.

[77] Nigel White, *Democracy Goes to War: British Military Deployments under International Law* (OUP 2009) 279.

[78] House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility* (HL Paper 235 – I, 27 July 2006) 28 <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf> accessed 17 November 2015.

[79] For a more in depth discussion into the effect of international developments on the national position, see Lori Fisler Damrosch, 'The Interface of National Constitutional Systems with International Law and Institutions on Using Military Forces: Changing Trends in Executive and Legislative Powers' in Charlotte J Ku and K Harold (eds), *Democratic Accountability and the Use of Force in International Law* (CUP 2002) 39.

[80] Nigel D White, 'The United Kingdom: Increasing Commitment Requires Greater Parliamentary Involvement' in Charlotte J Ku and K Harold (eds), *Democratic Accountability and the Use of Force in International Law* (CUP 2002) 307.

[81] Nigel D White, *Democracy Goes to War: British Military Deployments under International Law* (OUP 2009) 280.

C. The Changing Relationship between Government and Parliament

The relationship between Parliament and Government is fundamental to each political system. Philip Norton states: 'Parliaments provide the means by which the measures and actions of government are debated and scrutinised on behalf of citizens,'[82] thus providing a system for the concerns of voters, whether as individuals or as groups, to be expressed. Therefore, in theory, the Prime Minister and the Cabinet have authority to decide upon military decisions, with accountability to Parliament through common techniques of oversight, as well as possessing ultimate control due to its ability to bring down a government by a vote of no confidence,[83] and through monetary control.[84] However, it is questionable whether these rules are sufficiently robust when it comes to decisions about military force. As a result, there are demands on Parliament to assert its authority fully over conflict decisions in Britain's liberal democracy. Admittedly, constitutional theorists and parliamentarians have questioned the Royal Prerogative for many years, but the Syria vote, the Iraq War and subsequent arguments over the legality of military intervention are regarded as having contributed significantly to raising the political profile of the issue.[85]

i. The Iraq War

In 2003 the Government entered 'unchartered constitutional waters'[86] when it allowed three full-scale parliamentary debates resulting in a substantive vote, for the first time before an operation began. This vote on military engagement in Iraq represents a dynamic adjustment in Parliament's role and the British Constitution.[87] But what was different about the run-up to the Iraq War in comparison with other conflicts? Why did Mr Blair consent to giving the Commons a vote on the matter? Crucially, the conflict was different because there was no consensus about the validity of Western involvement, or even the legal justification for such a war. Unlike previous conflicts, the Iraq War was highly contentious. The Second World War, Korean War, Falklands War, and First Gulf War, as well as military action in places

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[82] Philip Norton, *Parliaments and Governments in Contemporary Western Europe, vol 1* (Routledge 2013) 1.
[83] It is developed constitutional practice that in the event of a no confidence motion a government will resign. The issue of confidence motions will be discussed in section 6 of this paper. For further information see Richard Kelly, *Confidence Motions* (Parliament and Constitution Centre, House of Commons Library, 13 May 2013).
[84] Changes have also been made in the Government's institutional arrangements in order to create an internal accountability mechanism. The National Security Council was created in 2010 and reflects a cross-departmental approach in an attempt to build confidence in the Government's decisions in the areas of security and defence. For more information see Joe Devanny and Josh Harris, *The National Security Council: National Security at the Centre of Government* (Institute for Government 2014) <www.instituteforgovernment.org.uk/sites/default/files/publications/NSC%20final%202.pdf> accessed 17 November 2015.
[85] Claire Taylor and Richard Kelly, *Parliamentary Approval for Deploying the Armed Forces: An Introduction to the Issues* (House of Commons Library, Research Paper 08/88, December 2008) 15.
[86] James Gray, 'Crown versus Parliament: Who Decides on Going to War?' (Royal College of Defence Studies, July 2003) 14 <www.ukdf.org.uk/assets/downloads/GR175CrownversusParliament-WhoDecidesonGoingtoWarbyJamesGrayMP.pdf> accessed 17 November 2015.
[87] The outcome of the vote was 412 in favour of action and 149 against. See HC Deb 18 March 2003, vol 401, col 907.

such as Bosnia, Sierra Leone, Kosovo and even to an extent Northern Ireland, enjoyed a significant degree of parliamentary and public consensus about their necessity.[88] The nation supported executive use of the Royal Prerogative and thus it was perfectly reasonable for the Prime Minister to make use of it. However, Mr Blair adopted an interventionist strategy and it can be argued that he acted purely on the basis of political expedience after success in Kosovo.[89] According to Philip Towle: 'The worst thing about Mr Blair's missions-pretty-impossible is that they have become coated with a patina of national pride. They seek to blend past glories with present imperatives.'[90]

Mr Blair acted on impulse and the philosophy that 'it is better to intervene and try to make a difference than stay out and cope with the consequences at a later time.'[91] While Mr Blair was not advocating removal of the Royal Prerogative, he was acknowledging demands for greater democratic involvement in war making. However it is clear that prime ministerial use of the prerogative depends on the nation trusting their leader to use it accurately and justly. Perhaps Mr Blair's unprecedented vote on Iraq was a symptom of the national collapse in confidence in his regime.[92] Fundamentally, parliamentary support for Iraq was clouded by uncertainty surrounding the adequacy of the intelligence information released to the Commons before the vote.[93] At the time of submission of this paper the long-overdue Chilcot Commission[94] is failing to publish its results.[95] Undeniably, the Iraq War resulted in an immense loss of confidence in the executive since Parliament consented on the basis of false assertions[96] that there were weapons of mass

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[88] James Gray and Mark Lomas, *Who Takes Britain to War?* (The History Press 2014) 40.

[89] For more information on the nature of the war in Kosovo see ibid 153-56.

[90] John Pilger, 'Blair Has Made Britain a Target' *The Guardian* (London, 21 September 2001) <www.theguardian.com/world/2001/sep/21/afghanistan.britainand911> accessed 17 November 2015; Philip Towle, *Going to War: British Debates from Wilberforce to Blair* (Palgrave Macmillan 2009) 66.

[91] 'Blair issues Africa Action Call' (BBC News, 31 May 2007) <http://news.bbc.co.uk/1/hi/uk_politics/6706623.stm> accessed 17 November 2015; Philip Towle, *Going to War: British Debates from Wilberforce to Blair* (Palgrave Macmillan 2009) 142.

[92] James Gray, 'Crown versus Parliament: Who Decides on Going to War?' (Royal College of Defence Studies, July 2003) 28 <www.ukdf.org.uk/assets/downloads/GR175CrownversusParliament-WhoDecidesonGoingtoWarbyJamesGrayMP.pdf> accessed 17 November 2015.

[93] A report by the Foreign Affairs Committee sought to establish whether accurate and complete information was presented to Parliament in the period leading up to the military action, particularly in respect of weapons of mass destruction. This issue of information released to Parliament will be discussed in greater depth in the concluding chapter of this paper. See House of Commons Foreign Affairs Committee, *The Decision to Go to War in Iraq* (HC 813- I, 3 July 2003) <www.globalsecurity.org/intell/library/reports/2003/iraq_uk-hc-813.pdf> accessed 17 November 2015; 'The decision to go to war in Iraq' *The Guardian* (London, 8 July 2003) <www.theguardian.com/media/2003/jul/08/Iraqandthemedia. politicsandiraq> accessed 17th January 2015.

[94] The Chilcot Commission was set up in June 2009 to investigate the causes of and justifications for the Iraq War. See HC Deb 15 June 2009, vol 494, col 23.

[95] Patrick Wintour, 'Iraq Inquiry: Cameron to Demand Chilcot Name Publication Date' *The Guardian* (London, 4 August 2015) <www.theguardian.com/uk-news/2015/aug/04/iraq-inquiry-cameron-demand-chilcot-names-publication-date> accessed 17 November 2015.

[96] David Jenkins, 'Efficiency and Accountability in War Powers Reform' (2009) 14 Journal of Conflict & Security Law 145, 146.

destruction present in Iraq. Parliament is now sceptical of the actions of the Government and is requiring more extensive evidence before sanctioning force.

The controversy over the invasion of Iraq, which perhaps more than anything has motivated calls for reform, demonstrates just how nationally divisive such decisions can be.[97] A general consensus has emerged across the political spectrum that there is a desperate need for war-powers to be subject to greater parliamentary scrutiny.[98]

ii. The Significance of the Vote on Syria

The decision to convene Parliament over Syria and its use of chemical weapons on 29 August 2013 represents a watershed moment for the broader debate on Parliament's role in conflict situations.[99] Prime-Minister David Cameron proposed that a 'strong humanitarian response is required' and that 'this may, if necessary, require military action.' [100] This vote was the first time the long-established constitutional principle of the Prime Minister making the ultimate decision regarding waging war had been truly breached. Mr Cameron, whether deliberately or inadvertently, significantly strengthened the position of Parliament. However, the vote on Syria was different from the vote on Iraq in one key respect: Mr Blair treated the vote in 2003 as tantamount to a vote of no confidence in his leadership,[101] whereas Mr Cameron made no suggestion that he would resign if he lacked the support to carry out his planned attack on the Assad regime.

Nonetheless, the House rejected the motion by 332 to 220.[102] This victory in the House 'represents a constitutional landmark'[103] because it was the first time that the Government had been defeated since the late eighteenth century[104] and was publicly forced to reverse its policy. The Commons revealed that it 'now has real teeth and that it is not afraid to use them.'[105] David Cameron displayed in the most

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[97] ibid.

[98] See Julian Glover, 'Queen's Powers Should Be Removed, Says Cameron' *The Guardian* (London, 6 February 2007) <www.theguardian.com/politics/2006/feb/06/uk.conservatives> accessed 17 November 2015.

[99] The House of Commons debated a substantive motion, scheduled by the Prime Minister. See House of Commons Political and Constitutional Reform Committee, *Parliament's Role in Conflict Decisions: A Way Forward* (HC 892, 20 March 2014) 6 <www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/892/892.pdf> accessed 25 September 2015.

[100] ibid.

[101] Peter Harris, 'The Implications of the Syria Vote: How Britain Goes to War (or Not)' (OpenDemocracy, 11 September 2013) <www.opendemocracy.net/ourkingdom/peter-harris/implications-of-syria-vote-how-britain-goes-to-war-or-not> accessed 17 November 2015.

[102] HC Deb 29 August 2013, vol 556, col 1547.

[103] Catherine Haddon, 'War, Peace and Parliament: Experts Respond to the Government's Defeat on Syrian Intervention' (The London School of Economics and Political Science, 2 September 2013) <http://blogs.lse.ac.uk/politicsandpolicy/war-peace-and-parliament-experts-respond-to-the-governments-defeat-on-syrian-intervention/> accessed 17 November 2015.

[104] Claire Mills, P*arliamentary Approval for Deploying the Armed Forces: An Update* (House of Commons Library, SN05908, 13 October 2014) 9.

[105] Gavin Philipson, ''Historic' Commons' Syria Vote: The Constitutional Significance (Part 1)' (UK Constitutional Law Association, 19 September 2013)

dramatic way that the legislature would make the ultimate decision, which represents a direct challenge to the Royal Prerogative.[106] On losing he claimed that the Government had got the message that the House did not support military action and would 'act accordingly.'[107] Whether one agrees with this decision and the outcome or not, the vote was a reassertion of parliamentary supremacy: a strong message to the executive that in the United Kingdom ultimate power resides with Parliament and not the Prime Minister.[108]

4. Has a Constitutional Convention Emerged?

Subsequent to the above, it has been suggested that a constitutional convention[109] has been created requiring prior parliamentary approval for any future military action, thus limiting the prerogative power. In theory, these 'unwritten maxims of the constitution'[110] exist to regulate the conduct of those holding public office.[111] Several well respected governing bodies, alongside the Government itself, have recognised the existence of conventions.[112] However, conventions arise out of continued practice, and therefore it is never certain at what point the practice becomes, or ceases to be, a convention. As Aileen McHarg suggests, 'conventions develop; they are not made.'[113] This chapter will examine the development of a 'constitutional convention'. By analysing the evolution of Parliament's role, it

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<http://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/> accessed 17 November 2015.

[106] HC Deb 29 August 2013, vol 556, col 1428.

[107] ibid col 1556; Gavin Philipson, ''Historic' Commons' Syria Vote: The Constitutional Significance (Part 1)' (UK Constitutional Law Association, 19 September 2013) <http://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/> accessed 17 November 2015.

[108] James Hallwood, 'Comment: The Syria Vote Was a Triumph of Parliamentary Sovereignty' (The Constitutional Society, 30 August 2013) <www.consoc.org.uk/2013/08/comment-the-syria-vote-was-a-triumph-of-parliamentary-sovereignty/> accessed 17 November 2015.

[109] There is significant debate over the definition of constitutional conventions: AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1961) 417; Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 81; Geoffrey Marshall and Grahame C Moodie, *Some Problems of the Constitution* (5th edn, Hutchinson 1971) 67; Phillip O'Hood, *Constitutional and Administrative Law* (7th edn, Sweet & Maxwell 1987) 113.

[110] John Stuart Mill, *Considerations on Representative Government* (first published 1861, Prometheus 1991) 87.

[111] AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th edn, Pearson Education Limited 2007) 24.

[112] House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 422, 4 March 2004) 25 <www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422.pdf> accessed 17 November 2015; House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility* (HL Paper 235 – I, 27 July 2006) 35 <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf> accessed 17 November 2015; HC Deb 10 March 2011, vol 524, col 1066.

[113] Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 Modern Law Review 853, 857.

becomes evident that the substance of the 'convention' is vague, suggesting that alternative reform measures may be more suitable in order to bring clarity.

A. The Emergence of a Constitutional Convention

It is useful at this point to apply Jennings's tripartite test to establish if a convention exists. Firstly, what are the precedents?[114] Next, did the actors in the precedents believe that they were bound by a rule?[115] And finally, is there a reason for the rule?[116] Applying this test, there is a clear 'reason for the rule'. Gavin Philipson sums up this reason well: 'To allow the Commons to perform its constitutional role as a check upon the executive, ensuring democratic scrutiny of a vitally important decision.'[117] Marshall's view of conventions as the 'critical morality', as opposed to the 'positive morality', of the constitution implies that it is the third part of Jennings' test, which is the *sine qua non* of a convention.[118] Therefore, as Jennings states 'a single precedent with a good reason may be enough to establish the rule.'[119] The simple fact is that constitutional actors have treated the vote in 2003 as the foundational precedent.

However, despite the well-established and accepted status[120] of this test there are complications. The second criterion seems to imply as Jeremy Waldron proposes, that these are 'rules that pull themselves up by their own bootstraps' since 'if they weren't accepted by those they bind, they wouldn't be rules at all.'[121] It is arduous to argue that governmental players believe themselves to be completely bound by the rule. Therefore, a test which discusses the 'precedents' and the specific beliefs of the actors in those precedents is too narrow an enquiry. Notwithstanding this, it is difficult to see how it is possible for actors in the initial case to have considered themselves to be bound by a rule, which was not then existent.[122] As a result, it is

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[114] Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 136.
[115] ibid.
[116] ibid.
[117] Gavin Philipson, ''Historic' Commons' Syria Vote: The Constitutional Significance (Part 1)' (UK Constitutional Law Association, 19 September 2013) <http://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/> accessed 17 November 2015.
[118] For a more detailed discussion of 'positive morality' and 'critical morality,' see Peter Russell, 'Constitutional Conventions: The Rules and Forms of Political Accountability' (1986) 36(2) University of Toronto Press 221, 223. The idea of conventions as the 'critical morality' of the constitution means they are conceived as 'the rules that the political actors ought to feel obliged by, if they have considered the precedents and reasons correctly'. See TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013) 60.
[119] Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 136.
[120] This test has been accepted worldwide as discussed in the following article, with reference to the Canadian Supreme Court, see Peter Russell, 'Constitutional Conventions: The Rules and Forms of Political Accountability' (1986) 36(2) University of Toronto Press 221.
[121] Jeremy Waldron, *The Law* (Routledge 1990) 64; Joseph Jaconelli, 'Do Constitutional Conventions Bind?'(2005) 64 Cambridge Law Journal 149, 150.
[122] Gavin Philipson, ''Historic' Commons' Syria Vote: The Constitutional Significance (Part 1)' (UK Constitutional Law Association, 19 September 2013) <http://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/> accessed 17 November 2015.

plausible to conclude that Jennings' second principle is to be disregarded in relation to the first precedent.

Additionally, it appears confusion exists regarding what constitutes the birth of a constitutional convention. Malcolm Rifkind proposes that where a constitutional lawyer or theorist uses the word 'convention' he or she is using it in a 'very careful, prescribed and detailed sense', but when used by a politician in the middle of a crisis the term 'does not necessarily (…) [have] precisely the same significance.' [123] Therefore, perhaps these declarations of a newly established convention constitute a 'premature conclusion',[124] especially since some key military decisions have been taken without 'sufficient' political oversight. In 2006 ministers took little interest in the placement of British forces in Helmand, a province in Afghanistan, and were not consulted when troops moved into northern areas, radically altering the nature of the operation.[125] Perhaps the impact of the Iraq War on the subsequent development of Parliament's role has been exaggerated.

However, it is puzzling, as recognised by many influential writers on the subject (for example, Dicey), that though conventions have no formal legal enforcement, they are nevertheless followed. [126] The Lords Constitution Committee argues that: 'Whilst a convention is not justiciable, it is regarded by all relevant parties as binding. Constitutional conventions may therefore be regarded as practices, which are politically binding, (…) but not legally binding.'[127]

Essentially, conventions will be obeyed because of political difficulties which may follow if they are disobeyed. Many political leaders now justifiably argue that it would be impossible for the Government to make a decision to enter a conflict without Parliament's vote. Nick Clegg proposes that this situation is now 'unimaginable.' [128] The conflict in Libya during 2011 [129] was pivotal, as the Government granted a debate because it believed it was *required* to do so under the

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[123] Law in Action, 'Can the PM Go to War?' (BBC Radio 4, 23 October 2014) <www.bbc.co.uk/programmes/b04lq28r> accessed 17 November 2015; TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013) 65.

[124] Colin Warbrick, 'The Governance of Britain' (2008) 57 ICLQ 209, 211.

[125] The Government confined itself to making statements to Parliament about its intentions without providing the opportunity for a full-scale debate or vote. See James De Waal, *Depending on the Right People: British Political-Military Relations, 2001- 2010* (Chatham House (The Royal Institute of International Affairs), November 2013) vi <www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Security/chr_deWaal1113.pdf> accessed 17 November 2015.

[126] In some circumstances a breach of convention may result in a breach of law. For examples, see AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1961) 446; Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 128.

[127] House of Lords Select Committee on the Constitution, *The Pre-emption of Parliament* (HL Paper 165, 1 May 2013) 11 <www.publications.parliament.uk/pa/ld201213/ldselect/ldconst/165/165.pdf> accessed 17 November 2015.

[128] HC Deb 15 May 2007, vol 460, col 492; Andrew Sparrow, 'Clegg Questioned by MPs about Scotland and Constitutional Reform: Politics Live Blog' *The Guardian* (London, 9 September 2014) <www.theguardian.com/politics/blog/live/2014/sep/09/clegg-questioned-by-mps-about-scotland-and-constitutional-reform-politics-live-blog> accessed 17 November 2015.

[129] This action was approved by a vote of 557 to 13. See HC Deb, 21 March 2011, vol 525, col 802.

existing convention.[130] Thus, the vote over Libya satisfied all three of the criteria in the Jennings test, conveying progression towards a basic convention, though it is important to acknowledge that the debate was retrospective. Consequently, as Jennings claims, conventions 'provide the flesh which clothes the dry bones of the law.'[131] This implies that conventions allow decision-makers easily to keep in touch with societal progressions. In most cases conventions can be easily amended to reflect different circumstances faced by decision-makers in the twenty-first century by the birth of a new precedent.

Parliament was likewise recalled in September 2014 for approval to bomb the Islamic State;[132] does Britain now have a clear convention, albeit a recent one? It would appear that ideally before a commitment to take military action the Government should secure a parliamentary debate and abide to some extent by the decision of the House. Yet Parliament's approval of action against the Islamic State in Iraq demonstrates that MPs, in the light of Syria, are not completely averse to the use of force as a foreign policy tool.[133] The Government acknowledged this convention in 2011[134] and it has henceforth been included in the Cabinet's Manual.[135] It states that the convention should be observed apart from in emergencies where such action would not be feasible or appropriate.[136] If the political actors have considered the precedents and reasons correctly they ought to feel obligated to comply with the convention.[137] However, the substance of the new convention is open to debate due to differences in past precedents and the Government's choice not to enforce the dictum in certain circumstances.

B. Is the Current Position Satisfactory?

Undeniably, there has been a 'seismic shift in the British constitution'; an evolution that has crept up quietly but which ultimately serves to constrain the executive and

[130] Gavin Philipson, ''Historic' Commons' Syria Vote: The Constitutional Significance (Part 1)' (UK Constitutional Law Association, 19 September 2013) <http://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/> accessed 17 November 2015 (emphasis added).
[131] Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 81.
[132] This action was approved by a vote of 524 to 43. See HC Deb 26 September 2014 vol 585 col 1360.
[133] James Strong, 'The Accidental Prerogative: Why Parliament Now Decides on War' (Political Insight, 2 November 2014) <www.psa.ac.uk/insight-plus/blog/accidental-prerogative-why-parliament-now-decides-war> accessed 17 November 2015.
[134] HC Deb 10 March 2011, vol 524, col 1066.
[135] Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (1st edn, October 2011) 44 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf> accessed 17 November 2015.
[136] ibid.
[137] Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?' (UK Constitutional Law Association, 25th September 2013) <http://ukconstitutionallaw.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/> accessed 17 November 2015.

empower Parliament.[138] Critically, the nature of a convention means that the maxim can be brought to an end simply if political players choose not to enforce it, or no longer believe it exists. A future Parliament may yet decide to give up its new prerogative, as due to the conventional nature of the power, it is not enshrined in law.[139] As a result, it is evident that 'most constitutional conventions are putty in the hands of the executive,'[140] since the Prime Minister is still free to act without involving Parliament. Fundamentally, the executive has a strong interest in maintaining its freedom to act; they will not want to let go of unfettered power.[141] Joshua Rozenburg furthers this argument: 'If presidents and prime ministers are sure they are acting in the best interests of those who elected them, they will still be free to act. What emerged (…) is, after all, just a convention.'[142]

Evidently a pattern is developing – but is Britain out of its depth? Has this all happened too fast and without any real thought for the constitutional consequences? Gray and Lomas affirm this view and fear 'the Iraq and Syria votes mean that this particular genie is well out of the bottle.'[143] Accordingly, Peter Harris believes 'the seeds sown in 2003 have long since sprouted and now seem poised to take root as a fixture of the British constitutional system.'[144] Despite it being most likely that the political players did not intend to create a convention, they are now bound by it. Conventions cannot be enforced in the courts but these precedents are difficult to ignore.[145] As discussed earlier, Tony Blair brought the original vote more 'as a matter of political necessity than out of a sense of constitutional obligations.'[146] Yet there are

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[138] James Hallwood, 'Comment: The Syria Vote Was a Triumph of Parliamentary Sovereignty' (The Constitutional Society, 30 August 2013) <www.consoc.org.uk/2013/08/comment-the-syria-vote-was-a-triumph-of-parliamentary-sovereignty/> accessed 17 November 2015.

[139] James Strong, 'The Accidental Prerogative: Why Parliament Now Decides on War' (Political Insight, 2 November 2014) <www.psa.ac.uk/insight-plus/blog/accidental-prerogative-why-parliament-now-decides-war> accessed 17 November 2015.

[140] Stuart Weir, ''Not in Our Name': Why MPs Remain Powerless to Stop Britain Going to War' (OpenDemocracy, 25 March 2013) <www.opendemocracy.net/ourkingdom/stuart-weir/'not-in-our-name'-why-mps-remain-powerless-to-stop-britain-going-to-war> accessed 17 November 2015.

[141] HL Deb 1 May 2007, vol 691, col 983.

[142] Joshua Rozenberg, 'Syria Intervention: Is There a New Constitutional Convention?' *The Guardian* (London, 2 September 2013) <www.theguardian.com/law/2013/sep/02/syria-military-action-constitutional-convention> accessed 17 November 2015.

[143] James Gray and Mark Lomas, 'Is a Commons Vote a Better Way of Taking Britain to War than the Royal Prerogative Was?' *New Statesman* (London, 2 September 2014) <www.newstatesman.com/politics/2014/09/commons-vote-better-way-taking-britain-war-royal-prerogative-was> accessed 18 November 2015.

[144] Peter Harris, 'The Implications of the Syria Vote: How Britain Goes to War (or Not)' (OpenDemocracy, 11 September 2013) <www.opendemocracy.net/ourkingdom/peter-harris/implications-of-syria-vote-how-britain-goes-to-war-or-not> accessed 18 November 2015.

[145] For example, the Queen must give her assent to a bill that is passed by both Houses of Parliament. However, if the Queen refused, there would be a gross violation of usage, but the matter is not recognised under English Law and therefore could not be brought before judges to enforce it. Dicey discusses this in depth. See Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1961) 440.

[146] Gavin Philipson, ''Historic' Commons' Syria Vote: The Constitutional Significance (Part 1)' (UK Constitutional Law Association, 19 September 2013) <http://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/> accessed 18 November 2015.

many examples of the executive bypassing Parliament in the past without petulance. In 1995 the RAF joined an almost forgotten air campaign that brought the civil war in Bosnia to an end.[147] Many are unfamiliar with this event[148] but in fact the RAF carried out 144 air-strikes and at the time no complaints regarding the lack of parliamentary involvement were made.[149]

Perhaps the Royal Prerogative has been set aside without any reasonable thought concerning its replacement. Unquestionably, this is not the correct basis for immense constitutional reform. As Mark Lomas proposes, 'We need to quickly come up with an equally workable, robust, and durable alternative mechanism.'[150] It is critical that an urgent solution be provided in order to alleviate the national emasculation which has ensued.

On the other hand, in an idiosyncratic way the British Constitution has quietly delivered. The uncodified and complicated constitution has shown that it is also an organic and pragmatic creature.[151] One may argue that the imperfections of the constitution itself are often mitigated by its ability to evolve and adapt to changes in society. In Britain, a democratic state that emphasises executive accountability to Parliament, constitutional obligations exist based neither on legislation nor on judicial decisions. These rules may continue in force long after the original reasons for them are forgotten.[152] While in some respects such a system may have its benefits, further clarification and strengthening is needed to define Parliament's role, firstly to uphold the House's original resolution against the Government's equivocation, and secondly to ensure that decisions to commit troops abroad will be subject to parliamentary scrutiny in the House.[153]

It cannot be denied that the previous system is now not operational and very urgently needs fixing or replacing. However, until Parliament's role is clarified and definitive steps are taken, Britain's reputation will remain uncertain and the respect of her allies will quickly turn to contempt as her inability to lead or take decisive action becomes ever more apparent.

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[147] David Blair, 'When Did We Decide that Parliament Must Always Vote on Any Form of Military Action Whatsoever?' *The Telegraph* (London, 19 August 2014) <http://blogs.telegraph.co.uk/news/davidblair/100283480/when-did-we-decide-that-parliament-must-always-vote-on-any-form-of-military-action-whatsoever/> accessed 20 November 2014.

[148] ibid.

[149] Likewise, in 2000 the Labour Government intervened in Sierra Leone by deploying 1,500 troops and again there was no vote. See David Blair, 'When Did We Decide that Parliament Must Always Vote on Any Form of Military Action Whatsoever?' *The Telegraph* (London, 19 August 2014) <http://blogs.telegraph.co.uk/news/davidblair/100283480/when-did-we-decide-that-parliament-must-always-vote-on-any-form-of-military-action-whatsoever/> accessed 20 November 2014.

[150] James Gray and Mark Lomas, *Who Takes Britain to War?* (The History Press 2014) 163.

[151] James Hallwood, 'War, Peace and Parliament: Experts Respond to the Government's Defeat on Syrian Intervention' (The London School of Economics and Political Science, 2 September 2013) <http://blogs.lse.ac.uk/politicsandpolicy/war-peace-and-parliament-experts-respond-to-the-governments-defeat-on-syrian-intervention/> accessed 18 November 2015.

[152] AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th edn, Pearson Education Limited 2007) 25.

[153] Stuart Weir, ''Not in Our Name': Why MPs Remain Powerless to Stop Britain Going to War' (OpenDemocracy, 25 March 2013) <www.opendemocracy.net/ourkingdom/stuart-weir/'not-in-our-name'-why-mps-remain-powerless-to-stop-britain-going-to-war> accessed 17 November 2015.

5. The Necessity for Parliamentary Involvement

The accountability of those in authoritative positions is a fundamental element of democracy. Nonetheless, it is a highly complex concept, with many elusive and even contradictory meanings.[154] Nigel White defines the term as the means by which 'those in power and making decisions should have to account for those decisions to their peers, and to the electorate.'[155] With regard to war-powers in Britain, increased parliamentary participation is a critical factor in the ongoing struggle to address the unequal balance of power between an overly dominant executive and a weak Parliament in order to make Government truly accountable.[156]

Ultimately, if Parliament demonstrates its support for an engagement, there will be little for a Prime Minister to lose by allowing the vote.[157] By permitting its involvement he or she stands to gain both substantive and perceived legitimacy,[158] and a significant degree of political cover if the decision proves erroneous.[159] For example, Jack Straw advises: 'I dread to think what the situation would have been (…) if we had not put the decision to go to war in Iraq to the House.'[160] However, parliamentary approval not only enhances legitimacy, but also in the long run will restore trust and confidence in politics. The last decade has been notable not merely for its controversial wars but for the exposure of inherent failures in major British state institutions, which have damaged Britain's political reputation and have left the public somewhat disheartened and less willing to trust the information it is given.[161] Evidently, there is now a public appetite fully to investigate policies rather

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[154] Graham P Thomas, 'United Kingdom: The Prime Minister and Parliament' (2004) 10(2-3) The Journal of Legislative Studies 4.

[155] Nigel D White, *Democracy Goes to War: British Military Deployments under International Law* (OUP 2009) 269.

[156] Stuart Weir, ''Not in Our Name': Why MPs Remain Powerless to Stop Britain Going to War' (OpenDemocracy, 25 March 2013) <www.opendemocracy.net/ourkingdom/stuart-weir/'not-in-our-name'-why-mps-remain-powerless-to-stop-britain-going-to-war> accessed 17 November 2015.

[157] For the purposes of this analysis the primary focus will be on increasing the participation of the elected legislative body in British politics: the House of Commons. However, it is acknowledged that there is an existing debate over the role of the House of Lords in conflict decisions. For further information see House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility* (HL Paper 235 – I, 27 July 2006) 38 <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf> accessed 18 November 2015.

[158] House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force* (HL Paper 46, 24 July 2013) 14 <www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/46/46.pdf> accessed 18 November 2015.

[159] James Strong, 'The Accidental Prerogative: Why Parliament Now Decides on War' (Political Insight, 2 November 2014) <www.psa.ac.uk/insight-plus/blog/accidental-prerogative-why-parliament-now-decides-war> accessed 17 November 2015.

[160] House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force* (HL Paper 46, 24 July 2013) 14 <www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/46/46.pdf> accessed 18 November 2015.

[161] The financial crisis exposed immense shortcomings in government regulation of a powerful and emphatic banking sector. The parliamentary expenses scandal likewise portrayed a critically important national institution in a way that the country found wholly unacceptable. See James De

than assume what politicians say is completely accurate.[162] David Cameron suggests 'restoring trust in politics means restoring trust in Parliament – and one way to do that is to enhance the role of Parliament in scrutinising the Government's decisions.'[163] Mr Cameron's argument is justifiable and confirms the importance of Parliament's role in exercising prospective oversight of the executive's decision-making.

However, it is apparent that there are commentators, albeit a minority, who are fundamentally opposed to Parliament having a role in the deployment of troops. Michael Gove states:

> I have an unfashionable view, which is that the legislature shouldn't fetter the actions of the executive unnecessarily when it comes to matters of life and death and necessary military action. I think there is a change in the way MPs see their role.[164]

Gove suggests that, in essence, the executive is appointed to make these decisions and the Commons will scrutinise their choices if appropriate. Clearly, as Lord Hurd proposes, '[w]e should only go into major conflict with a very strong measure of authority behind the Government's decision.'[165] Undoubtedly problems arise where Parliament appears not to support a proposed intervention since there is a risk that conflict decisions could become embroiled in 'politicisation'. Roger Green argues that 'National unity is always of paramount importance' and that 'there is no place for attempts at party political advantage.'[166] The Government and the country as a whole were publically humiliated when rebel Conservative and Liberal Democrat MPs, together with the Labour Party, removed their support for the Prime Minister's motion over Syria, which then conveyed a complete lack of agreement on Britain's next steps. This has landed Britain in unprecedented territory and has arguably undermined the credibility of the country to its allies. However it must be remembered that 'even the most presidential of Prime Ministers do not govern in a

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Waal, *Depending on the Right People: British Political-Military Relations, 2001-2010* (Chatham House (The Royal Institute for International Affairs), November 2013) 32 <www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Security/chr_deWaal1113.pdf> accessed 18 November 2015.

[162] The Iraq experience also suggests that it may become normal for detailed inquiries to be conducted into all major British deployments, albeit after their conclusion. See ibid 33.

[163] David Cameron, 'Modernisation with a Purpose' (Conservative Party Speeches, London, 6 February 2006) <http://conservative-speeches.sayit.mysociety.org/speech/600142> accessed 18 November 2015.

[164] Isabel Oakeshott and Jack Grimston, 'Gove: PM Must Have Final Say on War' *The Sunday Times* (London, 29 September 2013) <www.thesundaytimes.co.uk/sto/news/Politics/article1320617.ece> accessed 18 November 2015.

[165] House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 422, 4 March 2004) 9 <www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422.pdf> accessed 18 November 2015.

[166] Roger Green, *Review: Crown versus Parliament: Who Decides on Going to War?* (UK Defence Forum, 22 September 2010) <www.defenceviewpoints.co.uk/reviews/review-crown-versus-parliament-who-decides-on-going-to-war> accessed 20 February 2014.

political vacuum.'[167] The Royal Prerogative cannot be characterised as some sort of '*personal uninhibited mandate*' [168] – this is a hugely simplistic observation. The prerogative avoids the risk of an otherwise perfectly legitimate military action being thwarted by the opposition seeking party political advantage or by pacifists.[169]

The role of the Prime Minister is consistently to act in the nation's best interests and this must not be hindered. It can be claimed that given the gravity of their decisions, Prime Ministers should not be forced to deal with the consequences of a lost vote. James Gray supports this view: 'Parliamentary votes on war should only be used for propaganda and morale purposes.'[170] Thus, the parliamentary view ought to be obtained and respected, but division should never be used truly to decide whether or not to go to war. Healthy discussion, and some disagreement, in Parliament reinforces the role of democracy, since if there is major disparity in public opinion then this should be reflected in Parliament.[171]

However, this apparent 'democratisation' of war could have longstanding and far-reaching constitutional, diplomatic and military consequences. Alistair Burt firmly believes that the Government should take executive action and then inform Parliament; if it disagrees then the issue of a vote of no confidence arises.[172] He presents a realistic view: 'I don't think you can handle foreign affairs by having to convince 326 people each time you need to take a difficult decision.'[173] Is it really appropriate to delegate this decision to 650 MPs? David Blair proclaims that if parliamentary approval is vital, 'at best, our decision-making in a time of crisis would be delayed. At worst, it could be paralyzed.'[174] Clearly the efficiency of a deployment must not be curtailed by the need to seek approval from Parliament. Britain's response to an international crisis would be slowed down and complicated

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[167] Peter Harris, 'The Implications of the Syria Vote: How Britain Goes to War (or Not)' (OpenDemocracy, 11 September 2013) <www.opendemocracy.net/ourkingdom/peter-harris/implications-of-syria-vote-how-britain-goes-to-war-or-not> accessed 18 November 2015.

[168] James Gray and Mark Lomas, *Who Takes Britain to War?* (The History Press 2014) 83 (emphasis added).

[169] James Gray, 'Crown versus Parliament: Who Decides on Going to War?' (Royal College of Defence Studies, July 2003) 4 < www.ukdf.org.uk/assets/downloads/GR175CrownversusParliament-WhoDecidesonGoingtoWarbyJamesGrayMP.pdf> accessed 18 November 2015.

[170] ibid 28.

[171] Arguably voting against the Government 'is not unpatriotic but simply an exercise of their democratic rights which need not harm the international reputation of their country.' See Dirk Peters, 'War, Peace and Parliament: Experts Respond to the Government's Defeat on Syrian Intervention' (The London School of Economics and Political Science, 2 September 2013) <http://blogs.lse.ac.uk/politicsandpolicy/war-peace-and-parliament-experts-respond-to-the-governments-defeat-on-syrian-intervention/> accessed 18 November 2015.

[172] Patrick Wintour & Nicholas Watt, 'Alistair Burt Reveals Anger over Syria Vote at Westminster' *The Guardian* (London, 30 December 2013) <www.theguardian.com/politics/2013/dec/30/alistair-burt-anger-syria-westminster> accessed 18 November 2015.

[173] ibid.

[174] David Blair, 'When Did We Decide That Parliament Must Always Vote on Any Form of Military Action Whatsoever?' *The Telegraph* (London, 19 August 2014) <http://blogs.telegraph.co.uk/news/davidblair/100283480/when-did-we-decide-that-parliament-must-always-vote-on-any-form-of-military-action-whatsoever/> accessed 18 November 2015.

which could ultimately serve to reduce its influence in the world.[175] Notwithstanding this, there is valid concern over how qualified MPs are to preside over decisions to deploy the armed forces.[176]

Nonetheless, it is of paramount importance that the armed forces know the nation is supporting them. Lord Guthrie suggests that the questions asked by troops in the field of conflicts are, 'Is Parliament, the Government behind us?'[177] Evidently, Parliament's approval will help improve the morale of the armed forces, principally if Parliament's view is overwhelmingly supportive. Therefore, as the House of Lords' Select Committee states, the prerogative '*is outdated and should not be allowed to continue as the basis for legitimate war-making in our 21st century democracy.*'[178] Jack Straw supports this proposal: 'The Royal Prerogative has no place in modern western democracy (…) it has been used as a smoke-screen by Ministers to obfuscate the use of power for which they are insufficiently accountable.'[179]

Despite progress over the last decade the formal position of Parliament in conflict decisions remains ambiguous. It is evident that the current position is inadequate, but politicians and theorists seem perplexed as to the best way to bring about reformation. The emerging convention does not provide a sufficient degree of certainty that the Commons will be consulted in the decision to deploy the armed forces overseas.

Both the Lords Constitution Committee Paper[180] and the Government's White Paper [181] considered war-powers in other jurisdictions.[182] However, while

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[175] For reasons of relevance and space this article will not assess the effect delay could have on engaging in military action. However, Malcolm Rifkind discusses how formalisation could affect Britain's commitment to international institutions such as NATO and the United Nations. See Law in Action, 'Can the PM Go to War?' (BBC Radio 4, 23 October 2014) <www.bbc.co.uk/programmes/b04lq28r> accessed 18 November 2015.

[176] In reality both Houses benefit enormously from the specific expertise of members who have held positions in a wide variety of valuable areas such as senior civil service positions, senior positions in the military and in foreign and diplomatic services. For further information see HL Deb 28 Nov 2013 vol 749 col 1618.

[177] House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force* (HL Paper 46, 24 July 2013) 15 <www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/46/46.pdf> accessed 18 November 2015.

[178] House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility* (HL Paper 235 – I, 27 July 2006) 41 <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf> accessed 18 November 2015 (emphasis added).

[179] Jack Straw, 'Abolish the Royal Prerogative' in Anthony Barnett (ed), *Power and the Throne: The Monarchy Debate* (Vintage 1994).

[180] Jurisdictions assessed include the United States, Australia, Canada, Netherlands, Germany and France. See House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility* (HL Paper 235 – I, 27 July 2006) 46-57 <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf> accessed 18 November 2015.

[181] The Secretary of State for Justice and Lord Chancellor, *The Governance of Britain: War Powers and Treaties: Limiting Executive Powers* (Cm 7239, October 2007) 66-88 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/243164/7239.pdf> 18 November 2015.

comparisons are useful in reconsidering the war prerogative, they must always be analysed cautiously in the light of Britain's uncodified constitution and the doctrine of parliamentary supremacy. Each country has its own unique political history and level of military sophistication,[183] though, in broad terms, it is clear that the role of legislatures in conflict decisions is increasing at an international level.[184]

In 2001 the member states of the Western European Union unanimously called for greater democratic accountability and scrutiny in the deployment of the armed forces.[185] In comparison with other European countries, the UK Parliament has consistently been regarded as a legislature with extraordinarily weak powers with respect to 'circumscribing the war-making capabilities of the executive.'[186] Dieterich, Hummel and Marschall's survey of parliamentary 'war-powers' places the UK among four other democracies in which such powers were found to be weak.[187] Moreover, a clear majority, 15 out of 25 democracies surveyed, have either 'strong' or 'very strong' parliamentary war-powers.[188] This systematic comparison of parliamentary control provisions across states enables conclusions to be drawn regarding the development of control procedures internationally.[189] It is clear that Britain should follow the international trend towards increasing democracy by reforming war-powers and bringing the country into line with arrangements in other nations.

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[182] For an in-depth examination of different democratic countries' constitutional practices on war powers see Charlotte J Ku and K Harold, *Democratic Accountability and the Use of Force in International Law* (CUP, December 2002); Claire Taylor and Richard Kelly, *Parliamentary Approval for Deploying the Armed Forces: An Introduction to the Issues* (House of Commons Library, Research Paper 08/88, December 2008) 41-55.

[183] Claire Taylor and Richard Kelly, *Parliamentary Approval for Deploying the Armed Forces: An Introduction to the Issues* (House of Commons Library, Research Paper 08/88, December 2008) 41.

[184] Anne Wittman proposes that 'executives in democratic nations are becoming wary of sending troops overseas without consulting their legislatures.' See Anne Wittman, 'Voting For and Against War' (2007) 63(5) The World Today 9.

[185] Assembly of Western European Union, *National Parliamentary Scrutiny of Intervention Abroad by Armed Forces Engaged in International Missions: The Current Position in Law* (2001) <www.bits.de/CESD-PA/WEU1762.pdf> accessed 18 November 2015.

[186] Stuart Wilks–Heeg and Andrew Black, 'Despite David Cameron's Defeat on Intervening in Syria, the UK Parliament Actually Has Relatively Weak War Powers Compared to Legislatures in Other Democracies' (The London School of Economics and Political Science, 30 August 2013) <http://blogs.lse.ac.uk/europpblog/2013/08/30/despite-david-camerons-defeat-on-intervening-in-syria-the-uk-parliament-actually-has-relatively-weak-war-powers-compared-to-legislatures-in-other-democracies/> accessed 18 November 2015.

[187] Sandra Dieterich, Hartwig Hummel and Stefan Marschall, *Parliamentary War Powers: A Survey of 25 European Parliaments* (Geneva Centre for the Democratic Control of the Armed Forces, Paper 21, 2010) 72 <www.philfak.uniduesseldorf.de/fileadmin/Redaktion/Institute/Sozialwissenschaften/Hummel_ PAKS_2010_01.pdf> accessed 15th February 2015.

[188] ibid.

[189] Wolfgang Wagner, Dirk Peters and Cosima Glahn, *Parliamentary War Powers around the World, 1989-2004. A New Dataset* (Geneva Centre for the Democratic Control of Armed Forces (DCAF), Paper no 22, 2010) 12 < www.dcaf.ch/content/download/35832/526881/file/OP_22.pdf> accessed 18 November 2015.

6. The Formalisation of Parliament's Role in Military Action

As has been previously observed,[190] it is a 'cardinal principle' of the constitution that ministers are responsible to Parliament.[191] Consequently the time has come to respond to calls for war-powers to be more profoundly anchored in the consent of the legislature.[192] However, there are clear difficulties in invoking a straightforward and effective solution since the issue is 'a great deal more complex than once thought.'[193]

Two main options for reform exist. Firstly, and most radically, the prerogative could be abolished and substituted with a statute, which would set out the procedure to be followed whereby the legislature may authorise the use of force in specific circumstances. In considering all of the arguments the second option is the more plausible and realistic – to ensure the recent convention is 'firmed up'[194] by way of a House of Commons resolution. This final chapter will assess the possible future of war-powers by examining the various options for reform and will stress the importance of establishing a parliamentary resolution.

A. Is Formalisation the Way Forward?

The main political parties and more fundamentalist reformers favour formalising Parliament's role in legislation, urging 'the total surrender of the power to decide to the will of the House of Commons.'[195] Nick Clegg believes that the role of Parliament should be 'as strengthened and as fixed as possible.'[196] Arguably legislation would provide transparency and clarity to Parliament's role, thus ensuring that the Government could not bypass the parliamentary process without good cause. Jack

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[190] House of Lords Select Committee on the Constitution, *The Accountability of Civil Servants* (HL Paper 61, 20 November 2012) 10 <www.publications.parliament.uk/pa/ld201213/ldselect/ldconst/61/61.pdf> accessed 18 November 2015.

[191] House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force* (HL Paper 46, 24 July 2013) 14 <www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/46/46.pdf> accessed 18 November 2015.

[192] House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 422, 4 March 2004) 17 <www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422.pdf> accessed 18 November 2015.

[193] House of Commons Political and Constitutional Reform Committee, *Parliament's Role in Conflict Decisions: A Way Forward* (HC 892, 20 March 2014) 12 <www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/892/892.pdf> accessed 18 November 2015.

[194] Catherine Haddon, 'Parliament, the Royal Prerogative and Decisions to Go to War' (Institute for Government, 6 September 2013) <www.instituteforgovernment.org.uk/blog/6589/parliament-the-royal-prerogative-and-decisions-to-go-to-war/> accessed 18 November 2015.

[195] James Gray and Mark Lomas, *Who Takes Britain to War?* (The History Press 2014) 163.

[196] House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force* (HL Paper 46, 24 July 2013) 8 <www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/46/46.pdf> accessed 18 November 2015.

Straw suggests that it should no longer 'be a matter of grace and favour by the Prime Minister as to whether the House is asked for its view.'[197] Evidently, the necessary balance of power between the legislature and the executive is yet to be reached.[198] Government goodwill is not enough and a substantive vote should be a more permanent fixture rather than an act of 'generosity' if the Government desires.[199] Consequently, in 2011, the Foreign Secretary committed 'to enshrine in law for the future the necessity of consulting Parliament on military action.'[200] Since then the Government has justifiably shown no appetite for pursuing this endeavour, and successive governments and parliamentary committees have opposed this proposal[201] due to a number of serious overriding weaknesses.

One of the primary issues with enacting legislation is the risk of rendering deployment decisions justiciable, through judicial review.[202] By reforming the war prerogative, the judiciary may find itself in the unprecedented and awkward position of carrying what should be the legislature's burden of holding the executive to account. The courts are ill-suited for this role. Parliament, on the other hand, provides the proper stage and must embrace full political responsibility. The Government is clearly sensitive about this prospect since, if parliamentary approval were specified in primary legislation, the domestic courts might be able to rule on the lawfulness of a deployment. The legality of a deployment overseas is a matter which should be resolved between Parliament and Government without interference from the judiciary.[203] However, the courts have shown increased willingness to contribute as demonstrated in the recent case of *Smith v Ministry of Defence*.[204] While it is accepted that the courts would only be involved where there was a serious

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[197] ibid 17.

[198] HC Deb 15 May 2007, vol 460, col 503.

[199] James Gray, 'Crown versus Parliament: Who Decides on Going to War?' (Royal College of Defence Studies, July 2003) 18 <www.ukdf.org.uk/assets/downloads/GR175CrownversusParliament-WhoDecidesonGoingtoWarbyJamesGrayMP.pdf> accessed 18 November 2015.

[200] HC Deb 21 March 2011, vol 525, col 799.

[201] Gavin Philipson, '"Historic" Commons' Syria Vote: The Constitutional Significance (Part II) – The Way Forward' (UK Constitutional Law Association, 29 November 2013) <http://ukconstitutionallaw.org/2013/11/29/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-ii-the-way-forward/> accessed 18 November 2015.

[202] This is discussed at length in House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force* (HL Paper 46, 24 July 2013) 18 <www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/46/46.pdf> accessed 18 November 2015.

[203] Due to the policy and strategic issues Lord Reid proposes, questions about the instigation of war are non-justiciable ones that are best left to political processes within the executive and legislative branches. See *Chandler v Director of Public Prosecutions* [1964] AC 763, 791 (Lord Reid); *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2759 (QB); House of Commons Political and Constitutional Reform Committee, *Parliament's Role in Conflict Decisions: A Way Forward* (HC 892, 20 March 2014) 15 <www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/892/892.pdf> accessed 18 November 2015.

[204] The Supreme Court held that certain actions and decisions of military personnel could give rise to liability under human rights legislation and the common law of negligence. The GCHQ case also departed from the time-honoured approach whereby the courts would not question the exercise of the prerogative but would determine its existence and definable limits. See *Council of Civil Service Unions & Others v Minister for the Civil Service* [1985] AC 374; *Smith v Ministry of Defence* [2013] UKSC 41, [2014] AC 52.

failure by the Government to abide by the statute, this susceptibility to challenge could still have severe adverse effects, particularly on the morale and operational independence of the armed forces, since they would continually need to have regard for the 'judge over their shoulder.'[205]

Additionally, with formalisation there comes difficulty in creating solid, workable definitions due to the complexities of precisely defining what is an 'armed conflict' as they can vary greatly in nature and scope.[206] Essentially, it is not possible to pre-empt all eventualities and the country must respond to individual circumstances.[207] Ironically, it is conceivable that the result of formalisation could be further uncertainty due to the difficulties in identifying those deployments to which legislation would apply.[208] If attempts were made truly to understand military capabilities in the West, and as a nation Britain considered what a legitimate use of force is, then perhaps credible steps could be made towards establishing a method of deciding when and how its use is justified.[209]

Hence, it is clear that the constitutional and legal implications of legislating require detailed and expert assessment.[210] The enactment of legislation is dubious

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[205] 'It is of paramount importance that the work that the armed forces do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong.' See *Smith v Ministry of Defence* [2013] UKSC 41, [2014] AC 52 [100] (Lord Hope). See also the Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill* (Vol 1, HL Paper I66- I/HC Paper 551-I, 31 July 2008) 88; Thomas Tugendhat and Laura Croft, *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power* (Policy Exchange 2013) 4
<www.policyexchange.org.uk/images/publications/the%20fog%20of%20law.pdf> accessed 18 November 2015.

[206] It has been argued that the most straightforward attitude would be for the term to have the same meaning as it does in international humanitarian law, under the situations laid out in the Geneva Convention of 1949. See International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention, 12 August 1949); Secretary of State for Justice and Lord Chancellor, *The Governance of Britain: War Powers and Treaties: Limiting Executive Powers* (Cm 7239, October 2007) 25
<www.gov.uk/government/uploads/system/uploads/attachment_data/file/243164/7239.pdf> 18 November 2015.

[207] There is also currently no explanation of what constitutes an emergency for the purposes of an exception under legislation or resolution. Clearly in certain exceptional circumstances it will not be possible to consult the Commons before making a conflict decision. In these instances retrospective approval is appropriate. For an in depth study on the issue of retrospectivity see Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill* (Vol 1, HL Paper I66- I/HC Paper 551-I, 31 July 2008) 92
<www.publications.parliament.uk/pa/jt200708/jtselect/jtconren/166/166.pdf> accessed 18 November 2015.

[208] House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility* (HL Paper 235 – I, 27 July 2006) 33
<www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf> accessed 18 November 2015.

[209] This matter is discussed at length in James Gray and Mark Lomas, *Who Takes Britain to War?* (The History Press 2014) 66.

[210] James De Waal, *Depending on the Right People: British Political-Military Relations, 2001-2010* (Chatham House (The Royal Institute for International Affairs), November 2013) 34
<www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Security/chr_deWaal1113.pdf> accessed 18 November 2015.

due to the degree of political and military flexibility available with the current convention. While the uncertainty of conventions is widely criticised, this flexibility can be an advantage since it allows for continuous political development.[211] Thus, it is apparent that the crux of the argument is that 'the relative advantages of certainty versus flexibility will depend on the context.'[212] Each situation must be evaluated and assessed on its own merits. Such wide discretion offered by convention remains necessary in order to provide flexibility where an emergency arises.

Ultimately the establishment of a parliamentary resolution would both end uncertainty as to the existence of a convention and also clarify to an extent its terms, since such perplexities must be resolved.[213] This would ensure that the Government of-the-day could not unilaterally alter the mechanism as a way of evading the constraints imposed by the convention,[214] thus resolving a key negative feature of conventions: the body bound by them is frequently responsible for outlining their content and therefore can dilute the developed practice. Conventions can be fragile and tenuous, with Lord Hennessy identifying how 'they can crumble at the touch of a powerful, insensitive and determined executive.'[215] A comprehensive resolution will effectively formalise Parliament's role whilst being sufficiently flexible to permit improvements to be made.[216] It appears to be an equitable compromise between flexibility and accountability, hence avoiding the risk of blurring the separation of powers by sanctioning judicial review of conflict decisions.

Recently the Government has shown resistance to implementing legislation and instead has supported a detailed Commons resolution to certify the participation of Parliament.[217] Nonetheless, despite the Coalition Government's

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[211] Soft law in the form of conventions is not necessarily flexible. Their assumed flexibility is both conceptually and historically dubious in some circumstances. For examples, see CJG Sampford, ''Recognise and Declare': An Australian Experiment in Codifying Constitutional Conventions' (1987) 7 Oxford Journal of Legal Studies 369, 401; Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 Modern Law Review 853, 867.

[212] Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 Modern Law Review 853, 867.

[213] Gavin Philipson, '"Historic" Commons' Syria Vote: The Constitutional Significance (Part II) – The Way Forward' (UK Constitutional Law Association, 29 November 2013) <http://ukconstitutionallaw.org/2013/11/29/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-ii-the-way-forward/> accessed 18 November 2015.

[214] Adam Tomkins, *The Constitution After Scott: Government Unwrapped* (Clarendon Press 1998) 62; Gavin Philipson, '"Historic" Commons' Syria Vote: The Constitutional Significance (Part II) – The Way Forward' (UK Constitutional Law Association, 29 November 2013) <http://ukconstitutionallaw.org/2013/11/29/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-ii-the-way-forward/> accessed 18 November 2015.

[215] HC Deb 28 November 2013, vol 571, col 1615.

[216] It is important to acknowledge that while there is nothing to guarantee that a process set out in a resolution would be binding it would at least ensure there is transparency by reducing the convention to writing. See Erskine May, *Parliamentary Practice* (23rd edn, Butterworths Law 2004) 420.

[217] Lord Chancellor and Secretary of State for Justice, *Government Response to the Report of the Joint Committee on the Draft Constitutional Renewal Bill* (Cm 7690, July 2009) 46 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/238549/7690.pdf> accessed 18 November 2015; Peggy Ducoulombier, 'Rebalancing the Power between the Executive and Parliament: The Experience of French Constitutional Reform' [2010] Public Law 707.

commitment to introduce a war-powers resolution, this has not yet materialised.[218] A draft resolution has not been published since 2008.[219] However, this draft was of the 'most timid and executive friendly nature.'[220] It is severely watered-down since maximum flexibility is given to the Prime Minister to decide the timing prior to approval being sought and requires no retrospective approval where there is an emergency or where the deployment is secret.[221] The Democratic Audit proposes that the degree of flexibility the Government seeks to retain is 'precisely the flexibility that has discredited politics in this country in recent years.'[222] Clearly, while a degree of discretion is needed to ensure flexibility in decisions, limits must apply. The Prime Minister should not have the power to decide the timing of the debate. The resolution must be amended to require that Parliament be consulted 'as soon as reasonably practicable' after a policy has been formulated favouring military action.[223]

Moreover, in the drafting of a new resolution, it must be a prerequisite that the Prime Minister provide as comprehensive an account as possible of the evidence justifying the use of force. It is of paramount importance that ministers give accurate and truthful information to Parliament.[224] Information must not be presented in a biased or idiosyncratic way, leading MPs to support a conflict they would not tolerate if more information were presented (though admittedly, this is complicated

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[218] The Political and Constitutional Reform Committee is still awaiting the Government's response to its latest report. To date the Government has stated it is not satisfied that a case for urgency has been portrayed and has thus only committed to making 'progress on this matter in a timely and appropriate manner.' See House of Commons Political and Constitutional Reform Committee, *Parliament's Role in Conflict Decisions: Further Government Response* (HC 1673, 1 December 2011) 2 <www.publications.parliament.uk/pa/cm201012/cmselect/cmpolcon/1673/1673.pdf> accessed 18 November 2015; House of Commons Political and Constitutional Reform Committee, *Parliament's Role in Conflict Decisions: An Update* (6 September 2013) 3 <www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/649/649.pdf> accessed 18 November 2015; House of Commons Political and Constitutional Reform Committee, *Parliament's Role in Conflict Decisions: A Way Forward* (HC 892, 20 March 2014) <www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/892/892.pdf> accessed 18 November 2015.

[219] Lord Chancellor and Secretary of State for Justice, *The Governance of Britain- Constitutional Renewal* (Cm 7342-I, March 2008) 53-56.

[220] Gavin Philipson, '"Historic" Commons' Syria Vote: The Constitutional Significance (Part II) – The Way Forward' (UK Constitutional Law Association, 29 November 2013) <http://ukconstitutionallaw.org/2013/11/29/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-ii-the-way-forward/> accessed 18 November 2015.

[221] Nigel White, *Democracy Goes to War: British Military Deployments under International Law* (OUP 2009) 282.

[222] Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill* (Volume 1, HL Paper I66- I/HC Paper 551-I, 31 July 2008) 90.

[223] Gavin Philipson, '"Historic" Commons' Syria Vote: The Constitutional Significance (Part II) – The Way Forward' (UK Constitutional Law Association, 29 November 2013) <http://ukconstitutionallaw.org/2013/11/29/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-ii-the-way-forward/> accessed 18 November 2015.

[224] Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (1st edn, October 2011) 38 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf> accessed 18 November 2015.

by national security risks associated with consulting the legislature in the public eye). James Gray elaborates on this argument: 'It is not possible without compromising security to release precise details and fresh information that is daily coming in.'[225] By discussing information in Parliament 'an element of surprise for the armed forces' would be removed and intelligence could be compromised.[226] As a result, a third option for reform has been considered: the establishment of a Parliamentary Joint Select Committee to oversee the armed forces.[227] Kenneth Clark appropriately suggests that this proposal is 'very attractive.'[228] Where information vindicating the use of force raises security issues it could be shared on a confidential basis with the committee who can then report on whether the proposed action is justified.[229] This would provide reassurance that an independent endorsement of information is secured[230] and would certify that Parliament is not voting on the basis of false assertions.

Lord MacLennan cautiously suggests that perhaps it is unwise to reach a final conclusion about these matters until the Chilcot Inquiry has been released since this publication will hopefully reveal something about the inner workings of the decision making process that is not currently known.[231] Unquestionably, a failure to rectify these flaws apparent in the draft resolution will render the reformation attempt useless in increasing Parliament's ability to control the Government and will only serve as 'a mask over the undemocratic nature of the prerogative.'[232] However, it seems that no further action will be taken in the short-term due to the recent change in Government. The Government's legislative programme is overcrowded, and parliamentary time and money is subject to strong competing priorities, but

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[225] HC Debate 4 October 2001, vol 372, col 672; James Gray, 'Crown versus Parliament: Who Decides on Going to War?' (Royal College of Defence Studies July 2003) 12 <www.ukdf.org.uk/assets/downloads/GR175CrownversusParliament-WhoDecidesonGoingtoWarbyJamesGrayMP.pdf> last accessed 18 November 2015.

[226] 'War Footing Commons Veto 'dangerous' as Doubt Cast over Plans' *The Telegraph* (London, 4 January 2013) <www.telegraph.co.uk/news/uknews/defence/9779726/War-footing-Commons-veto-dangerous-as-doubt-cast-over-plans.html> accessed 18 November 2015.

[227] House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility* (HL Paper 235 – I, 27 July 2006) 30 <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf> accessed 18 November 2015.

[228] ibid 31.

[229] Perhaps, the Intelligence and Security Committee established by the Intelligence Services Act 1994 could take on this role since they already have access to sensitive information. The committee is made up of members of the Commons and Lords, with none permitted to be a Minister of the Crown. For more information see the Intelligence Services Act 1994, s 10; Gavin Philipson, '"Historic" Commons' Syria Vote: The Constitutional Significance (Part II) – The Way Forward' (UK Constitutional Law Association, 29 November 2013) <http://ukconstitutionallaw.org/2013/11/29/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-ii-the-way-forward/> accessed 18 November 2015.

[230] House of Commons Public Administration Select Committee, *Constitutional Renewal Draft Bill and White Paper* (HC 499, 22 May 2008) 25 <www.publications.parliament.uk/pa/cm200708/cmselect/cmpubadm/499/499.pdf> accessed 18 November 2015.

[231] HC Deb 28 November 2013, vol 571, col 1611.

[232] David Jenkins, 'Efficiency and Accountability in War Powers Reform' (2009) 14 Journal of Conflict & Security Law 145, 156.

uncertainty in the present situation cannot be allowed to remain – there is a desperate need for clarity.

B. Is Formalisation Necessary?

Nevertheless, whilst the Crown may retain the prerogative to take the nation to war, in theory, the Government is accountable to Parliament and is consequently accountable for any war it engages in. Therefore, Parliament is capable of checking the executive without any formal constitutional reform due to the Government's need to retain the confidence of the Commons.[233] If the Prime Minister and the Cabinet took Britain into 'some absurd war that did not have popular support, or did not have the support of this House, the Government would fail without question.'[234] Perhaps then, as David Jenkins suggests, what is needed with regard to reform is 'neither a limiting statute nor questionable attempts to 'make' a new convention,'[235] but a more fundamental evaluation of the political 'unwillingness' of MPs under the current party system to exercise parliamentary legislative supremacy and hold the executive to account for its military endeavours.[236] The reality is that Parliament has generally refrained from interfering with military decisions made under the prerogative. It is expected that this situation will continue even if war-powers are put on a statutory footing or continue to be subject to conventional arrangements.

Consequently, whatever reform measures, if any, Parliament and Government choose to pursue with regard to the war prerogative, the question over control is essentially political rather than strictly legal. Essentially, it is evident that the impetus for legislation is driven by political motivations; it seems more about 'a political statement about where decisions are taken, rather than to correct deficiencies in the legal or military process.'[237] The question could be posed as to whether this a plausible reason to implement such extensive constitutional change. What is certain is that no amount of auxiliary limitations or mechanisms of enforcement can totally counteract Parliament and, to some extent, the courts' unwillingness to hold the executive to account. This stance permeates the American example. In 2004 the select committee [238] considered evidence claiming that

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[233] A vote of no confidence was last successfully used in 1979, when the minority Government led by James Callaghan was defeated in a motion by Margaret Thatcher: 'This House has no confidence in Her Majesty's Government.' See HC Deb 28 March 1979 vol 965 col 589.

[234] HC Deb 21 October 2005, vol 43, col 1108.

[235] David Jenkins, 'Constitutional Reform Goes to War: Some Lessons from the United States' [2007] Public Law 258, 260.

[236] ibid.

[237] House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force* (HL Paper 46, 24 July 2013) 22 <www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/46/46.pdf> accessed 18 November 2015.

[238] House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 422, 4 March 2004) 9 <www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422.pdf> accessed 18 November 2015.

legislation similar to the US War Powers Resolution[239] should be implemented in the UK. Ultimately, the Act is controversial because Presidents have consistently branded it an unreasonable limitation on their power since they are required to report to Congress within 48 hours of military forces being deployed into hostilities.[240] However, in reality, even the introduction of the constitutionally entrenched declare war clause has not prevented the President from using his war powers unilaterally, relegating Congress to performing a negative rather than affirmative role in waging war.[241]

In an extreme situation where legislative support was deficient and the Government continued to insist on its military policy, the Prime Minister could lose the confidence of a majority in the Commons,[242] resulting in the fall of the Government.[243] Though, in practice, the Prime Minister could force authorisation if politically expedient by implementing the whip system, the real threat to the Prime Minister and Government lies with rebellious MPs who may disobey the system and vote of their own accord. Whilst reconciling the need for accountability to Parliament with the size and sophistication of the bureaucratic executive machine is difficult,[244] it is fundamental to Britain's liberal democracy. The British Government's effective control of the Commons primarily by a party majority particularly exacerbates challenges in controlling executive war-powers.[245] Given the grave importance of proper parliamentary accountability, it is time that Parliament started to control its own destiny. However, for Parliament to have any meaningful role, both Government ministers and members of Parliament must mutually commit themselves to institutional co-operation, rather than dominance or deference.[246]

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[239] War Powers Resolution 1973.

[240] War Powers Resolution 1973, s 4(3); David Jenkins, 'Efficiency and Accountability in War Powers Reform' (2009) 14 Journal of Conflict & Security Law 145, 152; James Gray and Mark Lomas, *Who Takes Britain to War?* (The History Press 2014) 81.

[241] David Jenkins, 'Constitutional Reform Goes to War: Some Lessons from the United States' [2007] Public Law 258, 279.

[242] The Fixed-term Parliaments Act 1911 governs confidence motions. See Fixed-term Parliaments Act 1911, s 4.

[243] David Jenkins, 'Constitutional Reform Goes to War: Some Lessons from the United States' [2007] Public Law 258, 263.

[244] Stuart Wilks-Heeg, Andrew Blick and Stephen Crone, 'How Democratic Is the UK? The 2012 Audit: The Democratic Effectiveness of Parliament' (Democratic Audit, Liverpool 2012) para 2.4.3. <http://democracy-uk-2012.democraticauditarchive.com/parliaments-powers-over-the-executive> accessed 18 November 2015.

[245] Since this paper is a discussion primarily of the legal issues involved in reforming the Royal Prerogative, and the issue of party politics is primarily political, there will be no debate or solutions offered in this area. For a detailed discussion on the effect of party politics generally see: Anthony Staddon, 'Holding the Executive to Account? The Accountability Function of the UK Parliament' (2007) 8 <http://siteresources.worldbank.org/PSGLP/Resources/HoldingtheExecuTheAccountabilityFunctionoftheUKParliament.pdf> accessed 18 November 2015; Wilfred Swenden and Bart Maddens, *Territorial Party Politics in Western Europe* (Palgrave-Macmillan 2009).

[246] David Jenkins, 'Constitutional Reform Goes to War: Some Lessons from the United States' [2007] Public Law 258, 259.

7. Conclusion

In conclusion, despite the desperate need for parliamentary involvement in decisions to deploy HM Forces, the specific role of the House of Commons remains unclear. This analysis has demonstrated the difficulties in implementing a straightforward and effective solution regarding the developing role of Parliament since there are considerable benefits and weaknesses on both sides. Ultimately the argument boils down to a preference for either the executive or the legislature as the eminent decision-maker, as each branch possesses characteristics that promote efficiency and accountability. Irrefutably certain matters must be left to the executive, and the decision to go to war is one of them. However, there is extensive scepticism surrounding the wisdom of governmental decisions and this has resulted in reluctance to leave security policy solely in the executive's hands.

The emergence of a convention extending parliamentary participation, despite its hasty birth, must be applauded, trusted and respected. Yet, it is evident that this convention is vague and its terms must be clarified. Given the complications with legislation, Britain's next steps must be more cautious and there are legitimate reasons for enacting a parliamentary resolution. While in Britain's democracy the Government must remain the key decision-maker on matters relating to foreign and defence policy, Parliament must embrace its role as the watchdog of their actions. Britain will be a more accountable nation and thus its actions will be even more effective if Parliament's authorisation is given, despite the fact that the Prime Minister must retain the authority to carry out the action without Parliament's authorisation.

The Prime Minister acts within the complex web that is the uncodified British Constitution. He or she must secure the support of the nation and its representatives, since if any leader sought to take the country to war without at least the tacit consent of Parliament, his position would quickly become untenable. Therefore, it is clear that the direction of constitutional reform of the Crown's war prerogative unquestionably depends upon active civic cognizance by politicians, judges and most importantly the British electorate. Additionally, it is vital that the question of who takes Britain to war not be considered narrowly or in isolation, but that it be evaluated as one aspect of the greater necessity for constitutional reform.

It would appear that the success of the Royal Prerogative in the future may well depend on the Prime Minister's strength of personality, the level of trust he generates and ultimately his oratory skills to persuade both the Commons and the nation to support his endeavours. It is owed to soldiers both past and present who have risked or sacrificed their lives in the course of Britain's long history to enhance democracy and ensure future military engagements are anchored in the support of their elected representatives.

Property Law and Free Movement of Capital Limits to the Implementation of the Ownership Unbundling in the Energy Sector

MAGDALENA OLESIEWICZ*

Abstract

In the efforts to liberalise the EU Energy Sector, the Third Energy Package has introduced Ownership Unbundling as the preferred measure to enhance competition in the sector. However, as under Ownership Unbundling one entity cannot exercise control over generation or supply undertakings at the same time as exercising any right over transmission systems, its introduction was met by opposition not only from Member States but also from the vertically integrated (at the time) energy sector in the EU. Given the invasive nature of the measure, this paper considers the question of its compatibility with the right to property and the free movement of capital under EU law. This debate is especially topical as the European Court of Justice considered some of the issues in 2014 when delivering judgement in the Essent case. This paper critically analyses these issues in the light of a possible Fourth Energy Package introducing compulsory Ownership Unbundling for all Member States of the European Union.

Keywords: Energy Law, Downstream Energy Law, Market Liberalisation, Ownership Unbundling, Free Movement of Capital, Property Law

1. Introduction

The road to liberalisation of energy markets in Europe started in the 1980s. Back then, electricity markets were dominated by Vertically Integrated Utilities (VIUs) that controlled generation, transmission and distribution of power within one company. In order to open up the sector for competition, the Commission introduced sector specific regulations,[1] the First Energy Package (1996-1998) and the Second Energy Package (2003).[2] These required unbundling on an administrative and further on a legal level of the Transmission System Operators (TSO), entities responsible for transmission of energy, as well as the Distribution System Operators

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[1] OU is also introduced via means of the general competition law. This, however, falls outside the scope of this work. For detailed discussion on this see for example: Manuel Braga Monteiro, 'Ownership Unbundling - Sector Specific Regulation and Competition Law Perspectives' (2011) 5 OGEL <http://www.ogel.org/article.asp?key=3171> accessed 16 April 2014.

[2] Council Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity [1996] OJ L027/0020; Council Directive 98/30/EC of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L204/0001.

(DSO), responsible for the distribution system. However, the Energy Sector Inquiry exposed the shortcomings of the regime that were effectively hindering competition and which resulted in downfalls for consumers.[3] The Final Report identified Ownership Unbundling (OU) as a measure that would help to avoid those shortcomings.[4] According to the Third Energy Package, introduced in 2008, OU entails that one entity cannot exercise control over generation or supply undertakings at the same time as exercising any right over transmission systems.[5] This proposal was met with objections from some Member States[6] (MSs) during the drafting process. It was suggested that OU would be interfering with the property rights of the owners of VIUs, as it effectively forces them to sell part of their assets.[7] Furthermore, MSs suggested that OU can be seen as a restriction on the free movement of capital, as effectively those who already invested in one company cannot invest in another, hence their decision on the investment is restricted.[8] This problem was swept under the carpet by the introduction of alternatives available to countries that do not want to introduce full OU.[9]

However, difficulties with OU can be seen in practice in countries that decided to introduce it. For example, Gazprom launched arbitration proceedings against Lithuania, as it feels that due to OU they are forced into the 'fire sale of pipelines.'[10] Furthermore, the Third Energy Package can be seen as an interim measure, with a more radical approach requiring compulsory OU possibly being introduced in the Fourth Energy Package.[11] In light of this, it needs to be established whether the existing property rights and free movement of capital provisions would not limit the introduction of compulsory OU.

In order to determine this, first, the history of liberalisation of the energy sector in the European Union (EU) will be considered, in order to understand the reasoning behind the introduction of OU. This paper will proceed with a critical analysis of property rights and free movement of capital provisions in relation to the OU regime under the Third Energy Package. It will be concluded that the

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[3] Commission, 'Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sector' (Final Report) COM (2006) 851 final, para 73.

[4] ibid para 55.

[5] Council Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55, Recital 11; Council Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94, Recital 11.

[6] Namely Austria, Bulgaria, France, Germany, Greece, Luxemburg, Latvia and the Slovak Republic. See EurActive, 'Eight EU States Oppose Unbundlig, Table 'third way'' (EurActive 2008) <www.euractiv.com/energy/eu-states-oppose-unbundling-tabl-news-219274> accessed 9 April 2015.

[7] ibid.

[8] ibid.

[9] Those alternatives are: Independent Transmissions Operator and Independent System Operator. See below in section 2C.

[10] Denis Pinchuk and Nerijus Adomaitis, 'Gazprom Takes on Lithuania in EU Policy Test Case' (Reauters 2012) <www.reuters.com/article/2012/03/01/gazprom-europe-lithuania-idUSL5E8E126G20120301> accessed 16 April 2014. It needs to be noted, however, that Gazprom is relying on the BIT between Lithuania and Russia, rather than the EU Treaty provisions.

[11] Inigo del Guayo and others, 'Ownership Unbundling and Property Rights in the EU Energy Sector' in Aileen McHarg and others (eds), *Property and the Law in Energy and Natural Resources* (Oxford University Press 2010) 348.

implementation of OU, in principle, should not be limited by property rights and free movement of capital provisions. However, before the introduction of OU as a compulsory solution, it would be desirable to see some concerns being addressed especially regarding compensation for entities, the proportionality of the measure and the relationship of the OU provisions with national constitutional traditions. Some conceptual recommendations for the areas that are causing problems will be suggested.

2. Liberalisation of the Energy Sector in the European Union

The Energy Sector in the EU has been subject to many fundamental changes in the last 30 years. The EU has progressively introduced policies that have been aiming at liberalisation of the energy market. This section will first outline the original situation in the energy sector before liberalisation commenced. This will be followed by discussing legislative changes under the First and the Second Energy Packages. This section will also introduce the analysis of the current regime under the Third Energy Package in order to explain the reasoning for the introduction of measures as intrusive as OU.

A. Beginning of Liberalisation of the Energy Sector

Back in the 1980s, before changes were introduced to the sector, electricity markets were almost completely controlled by VIUs that, to great extent, constituted regulated state monopolies.[12] Those were dominating the energy chain on all levels: generation, transmission, distribution and supply.[13] Such an arrangement of the sector arose from a perception of the energy industry as a natural monopoly, with no room for more than one player on the market.[14] Furthermore, it was seen as the only solution guaranteeing a universal supply of energy to customers, being secure and effective at the same time.[15] This model had been working for years and was seen at the time as the only reasonable way of addressing specifics of the sector.

However, the monopoly model started to be questioned by economists and policy-makers.[16] The existence of the vertically integrated companies was challenged, as they were able effectively to discriminate against their competitors, hindering access of competing generators to the network by imposing discriminatory requirements,[17] charging unreasonably high access and service fees

[12] S van Koten and A Ortmann, 'The Unbundling Regime for Electricity Utilities in the EU: A Case of Legislative and Regulatory Capture?' [2008] 30 Energy Economics 3128, 3129.
[13] Del Guayo and others (n 11) 328.
[14] Damien Geradin, 'Twenty Years of Liberalization of Network Industries in the European Union: Where Do We Go Now?' (2006) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946796> 2 accessed 17 April 2014.
[15] Del Guayo and others (n 11) 329.
[16] Geradin (n 14) 2.
[17] Emmanuel Cabau, 'Unbundling of Transmission System Operators' in Christopher Jones (ed), V*ol.1, The Internal Energy Market, The Third Liberation Package* (3rd edn, Claeys & Casteels 2010) 87.

or simply by refusing access altogether.[18] Effectively competition was limited, as there was little, if any, chance for a new competitor to enter the business, as the network was owned by VIU.[19] Secondly, the monopolistic structure was leading to distortion of competition.[20] This was due to the lack of transparency in energy tariffs embedded into integration, leading to cross-subsidies among customers and activities.[21] Thirdly, the customers were exposed to risks common to all monopolies: ie either charges above the marginal cost for the goods supplied or the services provided, or a lack of sufficient supply of the goods.[22]

Due to developing EU integration, the VIUs started to be challenged by the Commission.[23] In a working document on the Internal Energy Market in 1988 (1988 Working Document), the Commission pointed out that the vertical/horizontal integration of the industry was one of the main obstacles to the creation of the internal energy market.[24] It also became clear that the energy sector should be arranged in compliance with general EC Treaty provisions,[25] thereby guaranteeing implementation of the fundamental economic freedoms of the EU.[26] From this point in time, however, it took 8 years before the EU decided to address those concerns via the First Electricity and Gas Directives.

B. From the First Energy Package to the Final Report on the Sector Inquiry

In order to ensure liberalisation of the market, the EU decided to address the issue by adequate sector specific regulation of the network.[27] In order to prevent the aforementioned issues, unbundling of the network was thought to be the fitting solution, as this would remove some incentives for discrimination against other entities in the sector. The process of unbundling of the sector started with the Directives of 1996 (electricity) and 1998 (gas).[28] The 1996 Directive required an unbundling on the level of accounts as well as management;[29] the 1998 Directive introduced only the accounting unbundling for the internal market in natural gas.[30] Under both Directives the VIUs were obliged to keep separate accounts for each of

[18] Van Koten and Ortmann (n 12) 3130.
[19] Cabau (n 17) 88.
[20] Del Guayo and others (n 11) 329.
[21] ibid.
[22] ibid.
[23] ibid.
[24] Commission, 'The Internal Energy Market. Commission Working Document' COM (1988) 238 final; Del Guayo and others (n 11) 329.
[25] Del Guayo and others (n 11) 327.
[26] ibid.
[27] ibid 329. The importance of such regulation can be observed in the example of the New Zealand experience, where the initial lack of a proper regulatory network led to the failure of liberalisation and the eventual adoption of such a network. See Geradin (n 14).
[28] Council Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity [1996] OJ L027/0020; Council Directive 98/30/EC of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L204/0001.
[29] Council Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity [1996] OJ L027/0020, ch IV and ch VI.
[30] Council Directive 98/30/EC of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L204/0001, ch V.

their activities in the energy chain (generation, transmission and distribution), thereby providing more transparency.[31] This practice of keeping separate accounts, as if activities were carried out by the separate undertakings, was to prevent discrimination, cross-subsidization and distortion of competition.[32] Unfortunately, the insufficiency of these Directives became apparent in the years following their implementation.[33] This led to the adoption of the second package of Directives in 2003 and introduction of minimum obligations with regard to legal and functional unbundling, both on gas and electricity companies.[34]

According to the Second Energy Package, TSO and DSO had to be separate legal entities.[35] Furthermore, the Directives required independent management structures to be put in place between the TSO and DSO and any general supply companies.[36] Moreover, a principle of transparency and non-discrimination was introduced. TSOs were obliged to treat all system users alike when it came to access to information.[37] Furthermore, in order to ensure that the unbundling regime was 'successful in ensuring fair and non-discriminatory access (…) and equivalent levels of competition,'[38] the Commission made it subject to reassessment.

Accordingly, after three years from the introduction of the legal unbundling, the Directorate-General for Transport and Energy carried out the Sector Inquiry. The Final Report published by the Commission made 'uncomfortable reading for many energy companies.'[39] The report clearly pointed out three main limitations of the unbundling regime under the Second Energy Package possibility of discrimination, information leakage and distorted investment incentives.[40] It was underlined that

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[31] Council Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity [1996] OJ L027/0020, art 19; Council Directive 98/30/EC of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L204/0001, art 17.

[32] ibid.

[33] Cabau (n 17) 89.

[34] Council Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/211, Art 10; Council Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/0057, Art 9.

[35] Council Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/211, arts 10 and 15; Council Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/0057, arts 9 and 13.

[36] Council Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/211, Recital 8.

[37] To ensure the effectiveness of this measure, the undertakings were obliged to create so called 'Chinese Walls' (information barriers) between supply and network activities effectively introducing 'information unbundling'. For more detailed discussion see, for example, P Lowe and others, 'Effective Unbundling of Energy Transmission Networks: Lessons from Energy Sector Inquiry' [2007] 1 Competition Policy Newsletter 23, 24.

[38] Council Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/211, art 28(1)(b); Council Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/0057, art 31(1)(c).

[39] Neelie Kroeas as cited in Press Release, 'Competition: Commission Energy Sector Inquiry Confirms Serious Competition Problems' (10 January 2007) <http://europa.eu/rapid/press-release_IP-07-26_en.htm?locale=fr> accessed on 17 April 2014.

[40] Final Report (n 3) para 13-39.

due to these shortcomings customers were suffering.[41] Firstly, there was nothing under the legal ownership unbundling that would stop a TSO from treating its affiliate companies preferentially to competing parties.[42] Secondly, the investment incentives within an integrated company were still present, by reducing the incentives for incumbents to trade on a wholesale market and leading to a sub-optimal level of liquidity in these markets.[43] Thirdly, the non-discriminatory access to information could not really be granted, as nobody could prevent TSOs from passing on market sensitive information to its affiliates.[44] Furthermore, decisions regarding investment in infrastructure (that would help granting access) were based on the supply interest of the integrated companies.[45] In the light of those facts, the natural conclusion was that mere legal unbundling does not cure the malfunctioning of the energy sector that had been pointed out in the 1988 Working Document.[46]

The Commission's report concluded that introduction of OU would allow for the resolution of the aforementioned shortcomings of the regime at the time.[47] The recommendation in the report was based on economic evidence, as well as the fact that OU would help avoiding detailed and complex regulation.[48] The Commission pointed out that the main objective was to ensure that consumers, businesses and the economy were benefiting fully from the opening up of the European energy markets in terms of lower prices and better choice of services.[49] In that sense the Final Report was 'not the end of the story, but more the beginning of a new one'.[50]

C. The Current Regime under the Third Energy Package

OU had already been recognised as the ultimate way of preventing discrimination at the time of the introduction of the Second Energy Package.[51] Therefore, it had not been the Commission's first encounter with the idea of OU when proposing a draft for the Third Energy Package. However, the first time around, the Commission had decided not to introduce this measure, as it would have been politically contentious

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[41] Press Release 'Competition: Commission Energy Sector Inquiry Confirms Serious Competition Problems' (10 January 2007) <http://europa.eu/rapid/press-release_IP-07-26_en.htm?locale=fr> accessed on 17 April 2014.
[42] Final Report (n 3) para 26.
[43] ibid; Neelie Kroes, 'Introductory Remarks on Final Report of Energy Sector Competition Inquiry' (Press Conference, Brussels, 10 January 2007) <http://europa.eu/rapid/press-release_SPEECH-07-4_en.htm?locale=en> accessed on 17 April 2014.
[44] ibid.
[45] Final Report (n 3) para 23.
[46] ibid para 54.
[47] ibid para 55. Later the European Parliament expressed political support for OU as it considered it to be the most effective tool to promote investments in infrastructure on the transmission level. See: Parliament, Resolution of 10 July 2007 for the internal gas and electricity market (Text Adopted) P6 TA (2007) 0326.
[48] Final Report (n 3) para 55.
[49] ibid para 73.
[50] Speech 07/04 (n 43).
[51] Cabau (n 17) 90.

and further could have been questioned as to its legality under the proportionality as well as the subsidiarity principle.[52]

It seems however, that some of these concerns evaporated when legal unbundling proved to be ineffective. Consequently, under the Third Energy Package provisions, OU is the preferred position for TSOs.[53] According to the OU provisions in the Directives, one entity cannot exercise control over generation or supply undertakings at the same time as exercising any right over transmission systems.[54] The Directives also stipulate alternatives, also seen as derogations,[55] that can be used by countries that do not want to introduce OU.[56]

The first alternative is the use of an Independent System Operator (ISO), which allows the vertically integrated companies to retain ownership of their network assets, on the condition that the transmission network be managed by an ISO (entity separated from the vertically integrated company).[57] Such a regulatory mechanism would have to be constituted in order to ensure that the operator remains and acts independently of the vertically integrated company. However, the use of an ISO was not the preferred solution by the Final Report as it was thought that it might lead to prescriptive, more detailed and costly regulation, compared with OU.[58] It also does not address the disincentive to invest in the network as effectively as OU does.[59] The second alternative is that of the Independent Transmission Operator (ITO), whereby a company can remain vertically integrated, albeit with special rules introduced to guarantee ITO independence.[60] This option was added to the Directives as a consequence of pressures from some MSs which demanded amendments to the Commission's original proposal.[61] In January 2007, eight countries, led by Germany and France, sent a letter to the European Parliament expressing their concerns regarding legality, proportionality and efficiency of OU.[62] The MSs saw OU as incompatible with their constitutional laws and free movement of capital provisions. Due to the pressure from the European Council (the Council)

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[52] ibid.

[53] Council Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55, Recital 11; Council Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94, Recital 8. DSO are only required to legally unbundle. However, this is only a minimum harmonization provision and MSs can go further.

[54] ibid.

[55] Angus Johnson and Guy Block, *EU Energy Law* (Oxford University Press 2012) 37.

[56] Del Guayo et al (n 11) 335.

[57] Council Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55, art 13; Council Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94, art 14.

[58] Final Report (n 3) para 55.

[59] ibid.

[60] Council Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55, ch V; Council Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94, ch IV.

[61] That proposal stipulated only the OU and the ISO as options.

[62] EurActive (n 6).

that adopted a common position in this regard, in January 2008 the Commission was forced to introduce a third option.[63]

In the final shape, therefore, there are two alternatives to OU available to MSs. Those are equally valid, as effectively there is no hierarchy between the options available.[64]

D. Controversy around Ownership Unbundling as the Ultimate Solution

The European Energy policy is aiming at achieving a competitive and efficient energy sector.[65] The OU regime was pointed out as an ultimate solution for the conflict of interest that was inherited in the vertical integration of supply and network activities.[66] Furthermore, it has been argued that OU increases promotion of competition, increases efficiency, simplifies market and company structures, allows privatisation, reduces the risk of arbitrary government intervention and advances the security of supply.[67] It was also pointed out that it would ensure efficient and timely investment in capacity.[68] However, the most important potential advantage of unbundling may be the creation of a level playing field for supply companies.[69]

Nonetheless, OU is questioned as to its effectiveness and appropriateness from economic, political and legal perspectives. It is argued that OU causes direct cost due to the associated reorganisation of business activities and renegotiation of contracts,[70] which in consequence can decrease the creditworthiness of commercial companies and may lead to higher capital costs.[71] Furthermore, there seems to be no empirical evidence at the moment that OU brings benefits to consumers.[72] Also, political concerns exist, as some fear that OU facilitates acquisition of parts of the strategic sector by foreign companies (by this having consequences for the security of supply).[73]

As can be observed the benefits of OU are not without costs. Therefore it is unclear whether on balance it will actually bring the anticipated effects.[74] However, OU on the EU level is not only being challenged as to whether it is the most effective

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[63] Council, 'Communication Concerning Common Position of the Council' COM (2008) 0906.
[64] Johnson and Block (n 55) 37.
[65] Commission, 'Inquiry Pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sector' (Final Report) COM (2006) 851, para 6.
[66] Monteiro (n 1) 6.
[67] M Pollitt, 'The Arguments For and Against Ownership Unbundling of Energy Transmission Networks' [2008] 36 Energy Policy 704, 706; Johnson and Block (n 55) 66.
[68] ibid.
[69] Barbara Baarsma and others, 'Divide and Rule. The Economic and Legal Implications of the Proposed Ownership Unbundling of Distribution and Supply Companies in Dutch Electricity Sector' [2007] 35 Energy Policy 1785, 1787.
[70] Monteiro (n 1) 7.
[71] Baarsma and others (n 69) 1788.
[72] Christian Growitsch and Marcus Stronzik, 'Ownership Unbundling and Gas Transmission Networks-Empirical Evidence' (2011) EWI Working Paper No 11/7 <www.ewi.unikoeln.de/fileadmin/user_upload/Publikationen/Working_Paper/EWI_WP_11-07_unbundling_gas.pdf> accessed 16 April 2014.
[73] Pollitt (n 67) 706.
[74] J Pielow, G Brunekreeft and E Ehlers, 'Legal and Economic Aspects of Ownership Unbundling in the EU' (2009) 2 Journal of World Energy Law 96, 97.

means for stimulating competition, but also as to whether it complies with fundamental rights and freedoms in EU law. The next sections will try to address the latter concerns.

3. Property Law Limits of the Ownership Unbundling

As pointed out in the previous section, the possible incompatibility of OU with rights of property had raised concerns already at the stage of drafting, especially from the German perspective.[75] It is argued that addition of the ISO option in the final version of the Directives can be attributed to the intensive discussion about the question as to whether the position preferred by the Commission satisfies requirements of property protection principles.[76] This is due to the fact that OU entails effective change in the ownership structures of VIUs. The right to peaceful enjoyment of property is one of the fundamental rights recognised on a national, as well as an EU, level. Such potential interference with property rights by public authorities needs to be balanced against the rights of individuals.[77] In this section it will be analysed whether such a balancing exercise was performed correctly with regard to OU. First, sources of protection of the right to property in the EU will be identified, which will be followed by a confrontation of those protection measures with the OU regime in the Third Energy Package.

A. Protection of Right to Property in the EU

Property protection is a common tradition within the essential European constitutional framework.[78] Protection of the right to property has a broader purpose than just serving the individual owner; it also has a social purpose as it encourages innovation, investment and technical development.[79] There are three main sources of property law rights in the European legal order. Firstly, the right to property is recognised in the Charter of Fundamental Rights (the Charter) in Article 17.[80] Secondly, the European Convention on Human Rights (the ECHR) in Protocol One recognises the right to property as a fundamental human right.[81] Even though the EU accession to the ECHR has not been ratified yet, all freedoms protected by the ECHR are accepted as a general principle of European Law according to Art 6(3) TFEU. Furthermore, protection of property is a constitutional tradition common to MSs, and is recognised as a national fundamental right.[82]

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[75] EurActive (n 6).
[76] Del Guayo et al (n 11) 358.
[77] J Pielow and E Ehlers, 'Ownership Unbundling and Constitutional Conflict: A Typical German Debate?' (2008) 2 European Review of Energy Markets 1, 23.
[78] Del Guayo and others (n 11) 337.
[79] ibid.
[80] Provisions found in the Charter are given the same value as the Treaty ones by art 6(1) of the TFEU.
[81] The European Convention on Human Rights, Protocol 1, art 1.
[82] TFEU, art 6(3). The technique of comparative evaluation is used to determine whether a certain right is a part of the common tradition of MSs. It is rare for the Court to refer to a specific

Regarding the subject of protection, the ECJ understands the notion 'property' in a broad sense, as 'all proprietary interests exclusively attributed to a given person.'[83] It is a common position that owners are entitled to undisturbed enjoyment of their property, with almost absolute prohibition of interference with these rights by a national government.[84] However, some limitations on the effect should be introduced to take account of fundamental rights' social functions.[85] A state's power may interfere with the right to property, either by simply restricting the use of it or by deprivation.[86] To illustrate, expropriation is the most obvious example of deprivation where the property is transferred to a state or a third party.[87] A state can restrict the use of property via regulations that are prohibiting a certain use of an asset, however it does not entail the transfer of ownership.[88]

However, if peaceful enjoyment of the property is interrupted by deprivation it must be pursued in the public interest; the measure taken needs to be proportionate and under conditions provided by law.[89] Furthermore, it needs to be subject to fair compensation for loss.[90] In cases of restriction of the use of property, this can only be done to the extent that it is necessary for general interest.[91]

Some aspects of property protection will be dealt with in more detail in the following sections. These will be considered in the light of the OU restrictions on the right to property.

B. Ownership Unbundling in the Light of Property Rights Protection

In the light of the OU provisions it has been questioned whether the right to undisturbed use of owners' assets is respected.[92] Under the new regime the companies are effectively forced to demerge, thus giving up the use of their assets, namely networks (which can constitute up to between 70% and 80% of the balance-sheet value of companies).[93] However, severity of this measure must be balanced against the fact that regulation is aiming at introducing competition in the energy sector, which in the long-term would benefit consumers, businesses and the

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constitutional order of a MS. See Florian Becker, 'Market Regulation and the 'Right to Property' in the European Economic Constitution' [2007] Yearbook of European Law 255, 267.

[83] Del Guayo and others (n 11) 340.

[84] Becker (n 82) 273.

[85] Joined Cases C-20/00 and C-64/00, *Booker Aquacultur and Hydro Seafood* [2003] ECRI-7411, para 68.

[86] The European Convention on Human Rights, Protocol 1, art 1; The Charter of Fundamental Rights, art 17.

[87] Eckart Ehlers, *Electricity and Gas Supply Network Unbundling in Germany, Great Britain and the Netherlands and the Law of the European Union: A Comparison* (Energy & Law 9, Intersentia 2010) 403.

[88] ibid 401.

[89] Charter, art 17; ECHR, Protocol 1, art 1.

[90] Even though compensation is not mentioned in the wording of art 1 of Protocol 1 to the ECHR, it is 'well settled case law of the ECHR that in order to strike a "fair balance" between the demands of the general interests of the State and the requirements of the protection of an individual's rights, there has to be compensation for the owner'. Becker (n 82) 269.

[91] Charter, art 17.

[92] Baarsma and others (n 69) 1792.

[93] ibid.

economy in general.[94] In this section it will be studied whether these objectives can justify such a far-reaching interference with the enjoyment of property rights.[95]

i. Type of restriction: deprivation or mere restriction of the use of property?

As aforementioned, both the ECHR and the Charter differentiate between the mere restriction of property (which bears less severe consequences) and deprivation, which not only has to be justified, but also has to be appropriately compensated. Due to different tests being applied for different types of infringement, this needs to be considered as a first step in examining the legality of the infringement to which the OU allegedly amounts.[96]

Regarding infringement via restriction of the use of property, examples can be found in case law dealing with situations where legislation imposed was controlling how to produce and how much to produce.[97] In the case of OU, however, we deal with a situation where regulation addresses access to property and excludes energy producers from ownership of network assets.[98] It has been suggested that OU should be understood as 'compulsory sale at market value, executed in the interests of the public good of market liberalisation'.[99] Labelling it differently, however, does not change the fact that OU amounts to more than mere restriction of the use of property. A legal obligation is imposed on entities either to sell all shares in a transmission company or at least to sell so many of them that their control over the network is effectively disabled.[100] This has the effect of depriving entities of their property.

Furthermore, it has been pointed out that in order for the infringement to amount to *de facto* expropriation (rather than mere restriction of use), one needs to be deprived of any meaningful use as well as the possibility to dispose of the property.[101] Echlart refers to the *Hauer* case,[102] and claims that the ECJ took a formalistic view in that, due to the mere fact that the owner is able to dispose of his property (even for a much reduced price), the intervention of a state should only amount to the extensive restriction of the use of property.[103] If this were accepted then OU would amount to mere restriction of the use of property, as it would allow an undertaking to sell assets at market price. However it is submitted that what is left out by Echlers is that in *Hauer* disposal of assets was only one of the options, as the owner could still use the land for other non-prohibited purposes.[104] This is not

[94] Council Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55, Recital 1; Council Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94, Recital 1.
[95] Baarsma and others (n 69) 1792.
[96] Becker (n 82) 275.
[97] Kim Talus and A Johnston, 'Comment on Pielow, Brunekreeft and Ehlers on 'Ownership Unbundling'' (2009) 2(2) Journal of World Energy Law & Business 149, 153.
[98] Kim Talus, *EU Energy Law and Policy: Critical Account* (Oxford University Press 2013) para 3.3.3.
[99] Del Guayo and others (n 11) 337.
[100] Becker (n 82) 288.
[101] ibid.
[102] Case C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.
[103] Ehlers (n 87) 403.
[104] *Liselotte Hauer* (n 102) para 23.

afforded to entities in the OU regime, as disposal of assets is the only option they have, further confirming that OU should amount to deprivation. This conclusion would be in compliance with the European Court of Human Rights (ECtHR) case *James v UK*,[105] where it was stated that such compulsory transfer of property effectively amounts to deprivation of the property.[106] The position favoured in this paper is therefore that, under the Charter and the ECHR, OU effectively amounts to deprivation in the light of the protection of property provisions.

If one accepts the assumption that OU amounts to deprivation, what needs to be considered next is the type of deprivation. Deprivation can amount to formal expropriation (transfer to the State or third party) or *de facto* expropriation where the formal position regarding ownership remains the same, but the owner loses all rights attached to his position.[107] It is submitted that even though the party remains free to sell property as s/he wishes, OU effectively requires a transfer of assets to a third party (simply not specifying to whom), and therefore it should be classified as expropriation. However, *de facto* expropriation can be observed when introducing ISO, as even though a party remains the owner, somebody else is making all the important decisions via management.[108]

Therefore, it can be concluded that OU amounts to formal expropriation. What adds an extra dimension to this problem is the fact that protection of property rights is not only a long-standing tradition on an EU level but constitutional in each MS.[109] For example, in Germany full implementation of EU energy regulations would require a partial breach of national constitutional law.[110] Due to the alternatives available in the Third Energy Package, however, those issues have not had to be dealt with yet. However, if OU were to be introduced as compulsory, this issue would have to be addressed accordingly.

ii. Conditions provided by law: competence issues

In order for the deprivation to be legal, it has to be done in accordance with conditions provided by the law. For this to be true with regard to the Third Energy Package, the EU has to have competence to legislate for changes in the energy sector as well as for property ownership allocation.[111]

At the time of introduction of the Third Energy Package, powers of the EU in the energy sector were not expressly recognised. It was therefore argued at the time that provisions are found to fall under the umbrella of Art 95 of the European Community Treaty (EC).[112] What facilitates the issue now is the enactment of the

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[105] *James and others v The United Kingdom* [1986] 8 EHRR 123.
[106] ibid para 32.
[107] Ehlers (n 87) 403.
[108] For more detailed discussion see Pielow and others (n 74) 96; Del Guayo and others (n 11).
[109] Ehlers (n 87) 403.
[110] This is due to the sophisticated system of fundamental rights protection that can be found in the German Constitution. Due to the scope of this work this issue will not be covered in detail. For full discussion see: Del Guayo and others (n 11) 348; Lowe and others (n 37) or E Bohne, 'Conflicts between National Regulatory Cultures and EU Energy Regulations' [2011] 19 Utilities Policy 255.
[111] Becker (n 82) 290.
[112] Michael Hunt, 'Ownership Unbundling: The Main Legal Issues in a Controversial Debate' in Bram Delvaux and others (eds), *EU Energy Law and Policy Issues* (ELRF Collection, 1st edn, Euroconfidentiel

Lisbon Treaty in 2009. Article 194(2) of the Treaty on the Functioning of the European Union (TFEU) stipulates that the energy sector is a field of shared competence, falling within the meaning of Article 5 EC. However, as the energy policy is still not an exclusive competence, it falls under the principle of subsidiarity, which restricts the EU from taking action unless this cannot be achieved sufficiently by MSs.[113] Some suggest that, in order to ensure achievement of an EU integrated energy market, all measures at the national level should first be exploited.[114] However it was also suggested that objectives behind OU, especially the need to ensure a level playing field across the EU energy market, meet conditions set by the subsidiarity principle.[115] Due to the scale of the project this seems to be a more convincing argument.

While this may solve the problem of EU competency in the field of the energy policy, however, the property related competences are set out in Article 345 TFEU (formerly Article 295 EC). The relationship of OU with this provision is not as clear and may introduce barriers for the exercise of competence.

Article 345 TFEU stipulates that the TFEU and the Treaty on European Union 'shall in no way prejudice the rules in MSs governing the system of property ownership.' The scope of the provision is far from clear. It was suggested that the wording of Art 345 TFEU supports a broad applicability.[116] Wide interpretation of the provision would assume that 'system of property ownership' entails 'all constitutional provisions concerning private ownership, in particular expropriation'.[117] This view is supported by a group of academics, who submit that the EU is not competent to legislate when a measure results in expropriation, consequently questioning the legal basis of OU.[118]

However, as many point out, some degree of unification of property law is unavoidable in view of economic integration.[119] Wide interpretation of Art 345 TFEU was objected to by the European Court of Justice (ECJ) in the *Golden share* cases, where the Court limited the powers enjoyed by MSs. National property law measures had been made subject to the principles of the Treaty.[120] Moreover,

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2008) 70. However, it was pointed out that for a measure to be introduced relying on art 95, it has to be intended to improve the conditions for the establishment and functioning of the internal market. Due to potential encroachment of, inter alia, free movement of capital, use of art 95 was questioned. For full discussion see Hunt (n 112) 70-71 or Becker (n 82) 291.

[113] TFEU art 5(3).

[114] Hunt (n 112) 71. Also, note however that Johnston points out that from the ex post judicial review perspective, the approach taken by the ECJ to the review of the validity of the legislation on the basis of subsidiarity has been very much 'hands off': Angus Johnson, 'Ownership Unbundling: Prolegomenon to a Legal Analysis' in M Bulterman, L Hancher, A McDonnell & H Sevenster (eds), *Views of European Law from the Mountain – Liber Amicorum Piet Jan Slot* (Kluwer Law International 2009) 281.

[115] Lowe and others (n 37) 33.

[116] Ehlers (n 87) 150.

[117] ibid.

[118] ibid 430; Becker (n 82) 293.

[119] Talus and Johnston (n 97) 151.

[120] Case C-463/00 *Commission v Spain* (2003) ECR I-4581; Case C-367/98 *Commission v Portugal* (2002) ECR I-4731; Case C-302/97 *Klaus Konle v Austria* (1999) ECR I-3099; Case C-503/99 *Commission v Belgium* (2002) ECR 04809.

exercise of property functions was allowed to be restricted by the Community action in order to advance the goals of the Treaties.[121] As OU is motivated by a specific public interest (enhancement of competition in the energy industry), this could be argued to be a reason why allocation of property should be allowed.[122]

However, this paper argues that the narrow interpretation of the scope of Art 345 TFEU should be considered, especially given that recent case law suggests crystallisation in that direction.[123] According to the drafting history of the provision, Art 345 TFEU was introduced to prevent the EU from interfering in property status, that is changing it from public to private and vice versa.[124] Therefore, some argued that Art 345 TFEU should be seen as protection of the principle of neutrality with regard to ownership, public or private,[125] forbidding the EU from forcing one to privatise or nationalise property.[126] This was confirmed in the *Essent* case, where the ECJ stated that 'Art 345 TFEU is an expression of the principle of neutrality of the Treaties in relation to the rules in MSs governing the system of property ownership.' [127] Therefore, it can be validly argued that the EU should not be precluded from taking action with regard to expropriation.[128]

Thus, as OU does not require MSs to privatise if this is felt to be undesirable,[129] it is submitted that the provisions should not be seen to be outside the competences of the EU, as the principle of neutrality is not interfered with. In the light of the above it can be concluded that the EU has a competence to regulate property allocation, including deprivation, hence interference with property rights, which arises from OU, is under conditions provided for by law.

iii. Proportionality of the Ownership Unbundling

Some suggest that the most difficult criteria to be met by the OU with regard to the test for restrictions on the right to property, is the proportionality requirement.[130] Based on case law the proportionality test consists of three parts: suitability of measure (appropriateness), least restrictive measure (necessity) and proportionality *stricto sensu*.[131] Each of these elements will be considered in turn.

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[121] Case C-309/96 *Daniele Annibaldi v Sindaco de commune di Guidonia and Presidente Regione Lazio* (1977) ECR I-7493.
[122] Del Guayo and others (n 11) 338.
[123] See: Joined Cases C-105/12, C-106/12 and C-107/12 *De Staat der Nederlanden v Essent NV and Essent Nederland BV, Eneco Holding NV, Delta NV* (ECJ, 22 October 2013).
[124] Angelos Dimpopoulos, *EU Foreign Investment Law* (Oxford University Press 2011) 110.
[125] Joined Cases C-105/12, C-106/12 and C-107/12 *De Staat der Nederlanden v Essent NV and Essent Nederland BV, Eneco Holding NV, Delta NV* (ECJ, 22 October 2013), Opinion of AG Jaaskinen, para 41.
[126] Pielow and others (n 74) 106; Bram Akkermans and Eveline Ramaekers, 'Article 345 TFEU (ex art 295 EC), Its Meaning and Interpretation' (2010) 16(3) European Law Journal 292.
[127] *Essent* case (n 123) para 29.
[128] Dimpopoulos (n 124) 111.
[129] Baarsma and others (n 69) 1791.
[130] Del Guayo and others (n 11) 342.
[131] Sabrina Praduroux and Kim Talus, 'The Third Legislative Package and Ownership Unbundling in the Light of the European Fundamental Rights Discourse' (2008) 9 Competition and Regulation in Network Industries 1, 17.

OU brings across-the-board systematic regime change applicable to all MSs.[132] Some authors point out that OU attempts to generalise the differing national property concepts with regard to MSs' energy undertakings.[133] Due to differences between property concepts in MSs, the appropriateness (first prerequisite) of the regime change in all instances can be challenged.[134] However, lack of appreciation of differences between default positions of MSs would be of smaller importance to the court if it were proven that OU is able to achieve the objectives it pursues.[135] On the other hand, it has already been questioned whether OU will have positive effects on competition.[136] As aforementioned, some MSs expressed concerns in this regard during the drafting process and it remains questionable whether OU could bring the desired effects.[137] Nevertheless, in Portugal, encouraging effects followed the introduction of OU.[138] This could potentially overturn arguments against the introduction of OU as an ineffective measure.[139] Therefore, the key to establishing the appropriateness of the measure is the economic and empirical evidence that OU is enabling achievement of effective competition in the electricity markets.[140]

With regard to the necessity of the measure (second prerequisite) it has to be demonstrated that the same effect could not be achieved by other means. However, one has to look no further than the provisions of the Directives, where ISO and ITO are set out as alternatives to OU. They might be seen to suggest, as the Commission itself is implying, that a similar, if not the same, effect, can be achieved by less restrictive means. If the same level of competition can be achieved by those means, it would render OU not 'necessary' and, by the same token, disproportionate.[141] However, what needs to be pointed out is that the Directives stipulate that alternatives are equally 'valid'; it is not stipulated that they are equally 'effective'. Furthermore, as aforementioned, when drafting the Second Energy Package OU had already been considered. However, such a measure could have been legally questionable under the principle of proportionality 'at least until all other options had been tried and demonstrated to be inadequate.'[142] The Final Report suggests that this is what indeed happened. The reason for the introduction of alternatives could be better understood when looked at in the context of political pressure from some MSs at the time of the proposal. Alternatives have been clearly left as measures for those countries that do not feel comfortable with the prospect of OU.[143] Still, it has been pointed out that OU is the only solution that does not fail to rectify the problem inherent in conduct-related rules: commercial incentives of companies and the level

[132] Del Guayo and others (n 11) 342.
[133] ibid.
[134] ibid.
[135] Hunt (n 112) 81.
[136] See supra section 2D
[137] See supra section 2C.
[138] Monteiro (n 1) 18.
[139] ibid.
[140] Praduroux and Talus (n 131) 18.
[141] Del Guayo and others (n 11) 343.
[142] Cabau (n 17) 90.
[143] Becker (n 82) 294.

playing field objective.[144] Even the originally introduced alternative, ISO, is less effective as it leads to prescriptive and burdensome regulation.[145]

On the other hand, it was suggested that the new Directives had been introduced prematurely, as the Final Report had been published based on the situation up to 2005. This was just two years after the introduction of the Second Energy Package, giving little time to see definitive effects.[146] The report was also criticised after its publication in 2007 due to defects in its database and empirical findings.[147] However, taking under consideration the nature of the shortcomings pointed out in the report,[148] it might be questioned whether allowing more time would result in any changes.

When it comes to proportionality *stricto sensu* it would have to be considered whether the burden that OU imposes is not excessive with regard to pursued objectives.[149] Ehlers points out that the application by the ECJ of the principle of proportionality to fundamental rights restrictions as a result of EU legislation has not occurred so far.[150] EU provisions will be held as proportionate if they are not 'manifestly unreasonable', which is the test used by the ECJ when questioning EU legislation.[151] This is because the ECJ is very unwilling to enquire into the EU legislature's motivations and detailed reasons/evidence for the decision that EU level action was necessary.[152] Becker adds that the ECJ may rely on the Community institutions' own assessment rather than evaluating necessity on its own.[153] It is submitted that it will probably not be different in the case of the Third Energy Package. The ECJ would probably be reluctant to engage itself in the discussion regarding the measure's suitability. This is especially because OU constitutes a key element of the EU's Energy Policy.[154] Therefore, it must be concluded that it is not really likely that OU would be successfully challenged based on non-proportionality of the measure.

iv. Compensation

It is settled case law that the substance of the right to property is protected if the compensation provided takes into consideration the value of the investments made.[155] At first sight, is seems that the requirement to compensate is satisfied by the price that is received by the incumbents when selling the network.[156]

However, even though OU does not force owners to give away their assets (rather it effectively requires them to sell them off), some issues in relation to

[144] Praduroux and Talus (n 131) 18.
[145] See section 2C.
[146] Pielow and others (n 74) 104; Hunt (n 112) 88.
[147] Del Guayo and others (n 11) 343.
[148] See shortcomings pointed out in section 2B.
[149] Hunt (n 112) 89.
[150] Ehlers (n 87) 411.
[151] ibid 425.
[152] Hunt (n 112) 89.
[153] Becker (n 82) 294.
[154] Hunt (n 112) 89.
[155] Talus and Johnston (n 97) 153.
[156] Becker (n 82) 294.

compensation can arise.[157] It has been pointed out that the responsibility of a state cannot be shifted on private investors.[158] Therefore, it remains the state's duty to ensure that owners are compensated (for example in the case of the urchaser's insolvency).[159] Furthermore, the purchase price of the networks may, in practice, be lower than the market value.

However, it seems that there is a wide margin of discretion in determining what fair compensation is.[160] As there is no jurisprudence in the ECJ on this level, it was suggested to consider the ECtHR case law, wherein compensation is one of the elements of the proportionality principle.[161] It has been pointed out that 'legitimate objectives of "public interest" such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.' [162] However, as the Charter makes compensation a separate requirement, it can be suggested that its significance is greater than in the ECHR. As the Charter calls for 'fair compensation paid in good time', the ECJ may hesitate more before holding that the compensation requirement has been satisfied. It remains to be seen how the ECJ would approach this issue.

C. Conclusion

With regard to property rights and the OU relationship, it was established that OU amounts to deprivation of property, which is forbidden unless the threefold test is met. It was concluded that OU is likely to meet the first two conditions. The EU has competence to regulate property allocation; therefore deprivation is in accordance with conditions provided by law. Furthermore, it was held that OU would probably meet the proportionality test applied to such cases. It was noted, however, that whether a 'suitable compensation' can be provided by the sale price can be questioned (even though according to ECtHR case law compensation would be 'suitable' even if assets were sold at less than their value). Furthermore, it was noted that conflict may arise between the OU and national constitutional laws.

4. Free Movement of Capital Limitations to the Ownership Unbundling

Directives, as a secondary EU law, are required by the Court to uphold and respect EU Treaty provisions.[163] In light of this, concerns have been expressed that OU is not compatible with free movement of capital, as stated in Art 63 TFEU.[164] Supporters of this view argue that the freedom granted by the TFEU would be compromised, as

[157] Del Guayo and others (n 11) 342.
[158] Becker (n 82) 294.
[159] ibid.
[160] ibid 295.
[161] Talus and Johnston (n 97) 153.
[162] *James and others v The United Kingdom* [1986] 8 EHRR 123.
[163] Case C-15/83, Denkavit [1984] ECR-2171. Of course national measures are subject to this provision as well.
[164] Ehlers (n 87) 432; Hunt (n 112) 85.

the Energy Directives are banning energy production and supply undertakings from investing in unbundled energy transmission network operators.[165] Effectively it would impact the attractiveness of investment in the affected undertaking.[166] The first part of this section will examine the free movement of capital provisions. Later, there will be an attempt to analyse OU, to see if violation of the fundamental freedom arising as a consequence of the new regime can be justified in the light of the TFEU provisions.

A. Free Movement of Capital Provisions in EU law

The right to invest freely can be found in Art 63 TFEU according to which 'all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.' Therefore, national measures that could prevent or limit the acquisition of shares or deter investors from other MSs from investing the capital in an undertaking should be regarded as restrictions within the meaning of Art 63(1) TFEU.[167] This provision prohibits measures that are both directly and indirectly discriminatory as well as non-discriminatory measures which hinder access to the market.[168] When it comes to the definition of 'capital', the ECJ has recognised that it can constitute an investment into real property.[169] Also, direct investment in a company by means of shareholding and portfolio investment can constitute 'capital' for the purpose of Art 63 TFEU.[170]

The freedom is, however, not an absolute one. In the Treaty it is recognised that MSs may have an interest in limiting free movement of capital; consequently Art 65 TFEU outlines express derogations. Furthermore, restriction can also be accepted if the measure in question is justified by compelling reasons of public interest.[171] In *Commission v Belgium*, it was held that possibilities to restrict the principle of free movement of capital are subject to rigorous requirements.[172] A measure needs to be justified by an overriding requirement of general interest within the meaning of the ECJ's case law.[173] Furthermore, restriction by national legislation must 'be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it.'[174] Also, the restrictions must be non-discriminatory.[175]

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[165] Ehlers (n 87) 431.
[166] It needs to be noted that in a similar matter OU can affect freedom of establishment. For detailed discussion on this aspect please see: Hunt (n 112) 75-81.
[167] Opinion of AG Jaaskinen (n 125) para 56.
[168] Catherine Barnard, *The Substantive Law of the EU* (4th edn, Oxford University Press 2010) 570.
[169] ibid 563.
[170] Joined Cases C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141, para 19; Case C-171/08 *Commission v Portugal* [2010] ECR I-6817, para 49.
[171] Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, para 22; Case C-109/04 *Kranemann* [2005] ECR I-2421, para 34.
[172] Case C-503/99 *Commission v Belgium* (2002) ECR 04809.
[173] Case C-463/00 *Commission v Spain* (2003) ECR I-4581, para 35; Case C-271/09 *Commission v Poland* [2011] ECR I-0000, para 55.
[174] Case C-367/98 *Commission v Portugal* (2002) ECR I-4731, para 37.
[175] Baarsma and others (n 69) 1792.

All in all, the free movement of capital is one of the cornerstones of EU policy. However, it has been recognised that there should be a possibility legally to restrict the freedom if this is justified, proportionate and non-discriminatory. The next section will critically analyse the relationship between free movement of capital and the OU regime.

B. The Ownership Unbundling and Free Movement of Capital Provisions

Concerns have been expressed regarding the potential restrictions imposed on the free movement of capital. This is because, in consequence of OU, a company that owns transmission or generation assets cannot invest in or has to disinvest from other assets.[176] The Dutch Council of State expressed concerns in this regard by stating that OU 'limits investors from other MSs from combining investment in network management and production and supply and it places limitations on the ability of the present shareholders to sell shares to (foreign) private investors.'[177] Here, the other angle of the problem is noticed as, if private ownership is already allowed under a national system, any restrictions upon the free disposal of shares in such assets may breach provisions on the free movement of capital.[178] These concerns were confirmed in the *Essent* case, where 'the group prohibition'[179] and 'the prohibition of unrelated activities',[180] introduced in order to implement OU, were discussed in the context of capital movements.[181]

In light of this, it needs to be examined whether freedom of capital restrictions may be justified with regard to OU. In the following part it will be considered whether OU should be justified by overriding the requirement of general interest and whether it is proportionate and non-discriminatory, thus satisfying the test for lawful restriction of capital movements.

i. Justification of limitations imposed by Ownership Unbundling

As aforementioned, Art 63 TFEU allows limitations on the fundamental freedoms in cases where those can be justified. In the light of the provisions of Art 65 TFEU and the possible justification on the basis of overriding public interest, it will be examined whether OU limitation of the free movement of capital can be justified.

After the proposal of the Third Energy Package, the possibility of justification of OU was examined in the context of existing ECJ jurisprudence. It was noted that the ECJ in the past had recognised energy policy potential as the background to

[176] Hunt (n 112) 74.
[177] As quoted in Johnson (n 114) 284.
[178] ibid 288.
[179] Entailing that a 'system operator shall not be a member of a group of which a legal person or company which generates, supplies or trades in electricity in the Netherlands is also a member.' See *Essent* case (n 123) para 19.
[180] Entailing that 'If a system operator which is not the system operator of the national high-voltage grid is a member of a group within the meaning of Article 24b of Book 2 of the Civil Code, that group may not engage in transactions or activities which may adversely affect the operation of the system concerned'. See *Essent* case (n 123) para 20.
[181] *Essent* case (n 123).

imposing justifiable restrictions on capital movements.[182] This was allowed due to recognition of the need to ensure energy security.[183] However, this justification must be interpreted strictly (only if there is a 'genuine and sufficiently serious threat to fundamental interest of society'[184]). Threat to energy security in the context of OU was suggested by Ehlers not to be 'sufficiently serious.'[185] This is because OU leads to security of supply in the long term (via attracting investment), however not in a direct or immediate manner.[186] It was also argued that the main purpose behind OU provisions is to strengthen a competitive structure in the energy market.[187] This objective of increasing competition, however, has been explicitly recognised as a non-valid basis for justified restriction, due to its purely economic nature.[188] In light of this statement OU could not be justified as a restriction on capital movements.

This, however, could be challenged in light of suggestions that a need to achieve a more competitive and open energy market, which protects consumers against abusive practices, may be regarded as a plausible justification.[189] It was pointed out that those potential benefits to consumers could probably be regarded as being in the general interest.[190] At the time, however, it remained uncertain whether and on what basis OU should be justified.

However, recently the judgement in the *Essent* case, which concerned Dutch legislation introduced in order to implement OU, clarified this point of law.[191] It was held that objectives underlying the OU regime, as an 'overriding reason in the public interest', constituted a justification for a restriction of the free movement of capital.[192] The Court stated that the limitation was allowed if legislation dictated by reasons of economic nature was in the pursuit of an objective in the public interest.[193] In such cases the interest underlying the choice of legislation is to be taken into consideration as an overriding reason in the public interest.[194] Such a development with regard to 'economic objectives' had been suggested earlier by academics.[195]

In light of this, the Court had to decide whether the national measures at issue introducing OU ultimately pursue, by means of objectives behind the introduction of legislation, overriding objectives in the public interest.[196] The Dutch government

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[182] Michael Diathesopoulos, 'Ownership Unbundling in EU & Legal Problems' (2010) 14 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1732212> accessed 16 April 2014.
[183] Case C-483/99 *Commission v French Republic* [2002] ECR I-04781; C72-83 *Campus Oil Limited and others v Minister for Industry and Energy and others* [1984] ECR I-02727.
[184] Case C-483/99 *Commission v French Republic* [2002] ECR I-04781, para 48.
[185] Ehlers (n 87) 168.
[186] ibid 169.
[187] Opinion of AG Jaaskinen (n 125) para 82.
[188] C-174/04 *Commission v Italy* [2005] ECR I-04933.
[189] Monteiro (n 1) 8; Hunt (n 112) 81.
[190] ibid.
[191] *Essent* case (n 123).
[192] ibid para 66.
[193] ibid para 52.
[194] ibid para 53. The route that the Court chose was in accordance with the first of three justifications suggested by the AG in this case. See the AG's opinion at para 85.
[195] J Snell, 'Economic Aims as Justification for Restriction on Free Movement' in Annette Schrauwen (ed), *Rule of Reason: Rethinking Another Classic of European Legal Doctrine* (Europa Law 2005).
[196] *Essent* case (n 123) para 57.

introduced prohibitions in order to transpose the 2003 Directives' provisions, which suggests that there is a need to look at EU legislation in order to establish objectives behind the introduction of the national measure.[197] The Court ultimately looked at objectives behind the 2009 Directives, as it was claimed that those were designed to achieve the same objectives.[198]

Firstly, the Court made a reference to EU jurisprudence where it was stated that an objective of undistorted competition (being one of the objectives of TFEU) can constitute an overriding reason in the public interest, as it is to be achieved in order to protect consumers.[199] The court also, in contrast to Ehlers, recognised that guaranteeing adequate investment in the electricity and gas distribution is aiming at ensuring the security of energy supply and should be taken under consideration as an overriding reason in the public interest.[200] AG Jaaskinen explained that system operators are important to security of supply as the entity controlling the distribution of electricity (as well as gas) controls modern society in all its functions.[201] It is submitted that AG's view is more convincing than Ehlers', as it takes into account not only long-term benefits to security, but also immediate benefits.

Further, as aforementioned, the Court ultimately looked at the objectives behind the introduction of OU in the Third Energy Package. The court referred to recitals to the 2009 Directives, underlining that the EU legislature is aiming at:

> ensuring non-discriminatory access to electricity or gas distribution systems and transparency in the markets, to prevent cross-subsidisation, to ensure adequate investment in networks in order to guarantee the stable security of supply of electricity and gas and to prevent exchanges of confidential information between system operators and the generation/production and supply undertakings.[202]

It was concluded that those objectives might, in principle, justify the identified restrictions on the fundamental freedom as overriding reasons in the public interest.[203] It is regrettable, however, that in light of the criticism of OU and its effectiveness, no time was taken to examine whether the objectives stated in the preamble to the Directives can actually be met by OU. On the other hand, to an extent this can be linked to the discussion about the proportionality of the measures, and consideration of the appropriateness of such measures, issues which were, in this case, explicitly reserved to the referring court.[204] The question of whether OU complies with the principle of proportionality and non-discrimination remains open. These aspects will be discussed in the next section.

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[197] ibid para 60.
[198] ibid para 65. Even though the 2009 Directive did not constitute a legal basis for the case at hand the ECJ had made reference to the objectives that the legislation is aiming to achieve as support for implementation of OU in the Netherlands back in 2003.
[199] ibid para 58.
[200] ibid para 59.
[201] Opinion of AG Jaaskinen (n 125) para 65.
[202] *Essent* case (n 123) para 65.
[203] ibid para 66.
[204] ibid para 67.

ii. Non-discrimination principle and Ownership Unbundling

The next issue that has to be discussed is compliance of OU with the principle of non-discrimination. In this regard, some argue that, based on a reading of provisions of the directives, OU is not discriminatory in its character as, via uniform application to all concerned undertakings within the EU, it aims at achieving approximating legislation in the different MSs.[205] In light of this, OU should be qualified as an 'indistinctly applicable measure.'[206]

However, Hunt pointed out that under the OU provisions, private operators established in one MS may find themselves in a less favourable situation than public operators established in another MS.[207] This would be due to provisions in the Directives, which permit public entities to remain in public hands (by the same token avoiding a situation wherein OU imposes compulsory privatisation breaching Art 345 TFEU).[208] State bodies are 'deemed not to be the same person' for OU purposes.[209] This is allowed on the condition that a public entity or state 'transfer the control rights to another publicly or privately owned legal person'.[210] Hunt argues that discriminatory effects arise from the application of OU, as, in light of the above-mentioned distinction for public entities, private operators established in some MSs could find themselves in a less favourable position than public operators established in another MS.[211]

It is undeniable that in light of this OU could lead to a 'distinctly uneven playing field' created for private sector companies and state owned undertakings.[212] However, in the author's opinion Hunt goes too far in qualifying the effects of OU as 'discriminatory' in the free movement of capital context. This is because discrimination in this context is prohibited on three grounds: nationality, the place of residence of the parties and the place where capital was invested.[213] The situation described by Hunt does not appear to fit into the above-mentioned categories. It seems that a private undertaking from one MS will be in the same situation as a private undertaking from another. Therefore it can be argued that the alleged discrimination occurs only on the 'structure of ownership' level, rather than the

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[205] Monteiro (n 1) 8.
[206] Hunt (n 112) 85.
[207] ibid 86.
[208] Ehlers (n 87) 418.
[209] Council Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55, art 9(7); Council Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94, art 9(6).
This is in contrast to the general position of EU law where different organizational layers and subdivisions of a state are viewed as one entity. See Ehlers (n 87) 418.
[210] Council Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55, art 9(7); Council Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94, art 9(6).
[211] Hunt (n 112) 86.
[212] Sebastian McMichael, 'Does Ownership Unbundling Go a Bridge Too Far for Member States?' (Shepherd & Wedderburn, 30 March 2007) <www.shepwedd.co.uk/knowledge/does-ownership-unbundling-go-bridge-too-far-member-states-0> accessed 16 April 2014.
[213] Barnard (n 168) 569.

national level, for this falls outside the scope of the principle of discrimination in the capital movements context. What appears to be more suitable in this situation is to argue non-equal effects, as done by Ehlers et al and Becker.[214] Private sector companies are not treated in the same manner as state owned companies, as the latter are allowed to unbundle by 'merely allocating each activity to different state organisation[s].'[215]

Notwithstanding which position one takes, the ECJ is likely to find that OU is not formally discriminatory as it applies uniformly to undertakings from each MS.[216] The potential discriminatory/non-equal effects should not stop implementation of OU. It is therefore concluded that in principle national measures implemented in order to introduce OU are in compliance with the non-discrimination principle.

iii. The proportionality principle

As aforementioned, the question remains whether OU constitutes a measure in accordance with the principle of proportionality. The answer to this question cannot be found in the *Essent* case, as there the Court left the decision on the issue of proportionality to the referring court. It remains to be seen how the Supreme Court of the Netherlands will interpret the facts in this case.

One may look for clues in decisions of the courts in the Netherlands in *Essent* before the referral to the ECJ. In the first instance it was decided that 'group ban' measures were a necessary, appropriate and proportional remedy.[217] However, in the appeal case in the Hague it was decided that these measures constituted a disproportionate restriction upon the free movement of capital within the EU.[218] Therefore, some uncertainty remains in this regard. However, it needs to be remembered that at the time when the claim was brought to the court, Dutch legislation imposing OU was voluntary.[219] Therefore, measures introduced by the Dutch government could be seen as disproportionate as at the time the EU Directives were achieving a goal of introducing competition in the energy sector in a less restrictive manner (via legal unbundling).[220] Now that the rules on OU are provided as the default position in the Third Energy Package, it should be more difficult to declare national pieces of legislation implementing the OU to be disproportionate.

Without a definite answer in the case law, we are drawn back to the academic discussion regarding the proportionality of OU. This has already been discussed in this work in the context of protection of property rights.[221] It was pointed out that OU can be seen as appropriate and necessary, bearing in mind the simplifications

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[214] Ehlers (n 87) 418; Becker (n 82).
[215] Pielow and others (n 74) 107.
[216] Hunt (n 112) 86.
[217] Nauta Dutilh and others, 'Court Dismisses Claims of Energy Companies against Enactment of Group Ban' (Lexology, 20 May 2009) <www.lexology.com/library/detail.aspx?g=24b4bfff-47fb-4894-84aa-51ba98835cec> accessed on 17 April 2014.
[218] *Essent, Delta and Eneco v Dutch State* (22 June 2010) as referred to in Johnson and Block (n 55) 68.
[219] The 2003 Directive set out the minimum harmonization, however MSs were free to proceed with stricter unbundling. This is what happened in the Netherlands where ownership unbundling was introduced as a consequence.
[220] Johnson and Block (n 55) 68.
[221] See supra section 3.B.3.

and transparency that it introduces, in comparison to its predecessors. Furthermore, as aforementioned, the ECJ is likely to apply a 'manifestly unreasonable' test, therefore it is unlikely that the ECJ will actually be involved in a detailed discussion over the proportionality of a measure. However, even if it did become involved, the leeway given by the ECJ can be substantial, as OU is the key element of the Energy Policy in the EU.[222]

Therefore, even though some uncertainty remains as to what will be the final verdict on the proportionality of the measures in the *Essent* case, it is concluded that in principle the proportionality requirement will not be challenged when establishing possible interference with movement of capital within legal limits.

C. Conclusion

In the light of the above it is submitted that despite the fact that OU may impose restrictions on the free movement of capital, those should be held to be lawful. This is because the measure can be justified to be an overriding reason in the public interest, and so is in principle non-discriminatory and will satisfy the proportionality test. It ought therefore to be concluded that free movement of capital most likely will not be seen as imposing limitations on the OU regime.

5. Conclusion and Some Conceptual Recommendations

The process of liberalisation of the energy market has come a long way since the 1980s. In effect some positive changes have been seen as the energy market has begun opening up for competition. However, none of the undertaken measures in the First and the Second Energy Package had led to significant improvement, with shortcomings of the regime at the time being identified in the Final Report. The solution suggested by the Commission was the introduction of OU (as one of three options available) in the Third Energy Package in 2009. Over those years, what could be observed was a change of attitude, as the EU no longer relied on market forces to increase competition, rather taking the issue into 'its own hands' and uncritically believing in its capacity to impose market competition by command and regulations.[223]

This work looked into the possible legal obstacles that can be identified to the current regime of OU. Such an analysis is of importance, as measures introduced via the Third Energy Package can be seen as interim measures, with a more radical approach requiring compulsory OU on the horizon if the Fourth Energy Package were to be introduced. Before that can happen, it needs to be established whether the existing property rights and free movement of capital provisions would not limit the EU's ability to introduce such a far-reaching solution.

In the academic debate, conclusions on the limitations of OU could not be more antagonistic. On the one hand, it has been concluded that no insurmountable legal obstacles could be found if the EU legislature were to decide to adopt

[222] Hunt (n 112) 89.
[223] Bohne (n 110) 256.

ownership unbundling as the only model.[224] On the other hand, a group of academics suggests that further OU would be unlawful.[225] This present work agrees more with the first opinion, at the same time noticing some problems with the OU regime that should be addressed before introducing it as compulsory. This part will conclude on the findings of this paper and attempt conceptual recommendations in the areas that are causing problems.

With regard to property rights it was established that OU amounts to deprivation of property, which is forbidden unless the threefold test is met. First of all, interference with rights needs to be done in accordance with conditions provided by law. It was noted that the Treaty imposes limitations on EU competences with regard to property rights, as Art 345 TFEU prohibits any interference with a national property system. However, it was concluded that Art 345 TFEU in and of itself is unlikely to stop OU. Case law suggests that the reading of this provision should be limited to the 'neutrality principle' (ie not forcing privatisation or nationalisation). As OU does not infringe the 'neutrality principle', the EU has a competence to introduce legislation that regulates ownership of assets, hence it satisfies the first requirement.

Regarding the second requirement, the proportionality of the measure, it was pointed out that OU can be seen as appropriate and necessary, as it brings simplifications and transparency in comparison to its predecessors. However, arguments were noted that there is no satisfactory economical or empirical evidence that would prove that OU would bring benefits to consumers. In consequence it could be argued that such a measure as far reaching as OU should not be seen as a proportionate solution if its effectiveness can be questioned. However, the ECJ when asked to review the EU policy is using a 'manifestly unreasonable' test.[226] It would be most unlikely for OU's proportionality to be questioned, taking under consideration that it is a key element of the EU's energy policy. Even though OU is likely to be seen as proportionate by the ECJ, before introduction of compulsory OU it would be seen as desirable for the Commission to order another report. This report should, in a comprehensive manner, compare results achieved in those countries that have decided to introduce OU under the Third Energy Package and those that have chosen alternatives, in order to provide economic and empirical evidence that potentially could end this discussion.

Some problems were also noted regarding the compensation requirement. At the moment it seems that 'suitable compensation' can be provided by the sale price (which according to the ECtHR case law would be 'suitable' even if assets were sold at less than their value). It was pointed out, however, that the responsibility to ensure that compensation is provided remains on the state, as it cannot be imposed on a private person.[227] Therefore, it is claimed that there is a need to establish a system of compensation. However, what needs to be asked is: who would be liable to take care of this, the EU or national governments of MSs?[228] Could the scheme set

[224] Talus (n 98) 88.
[225] Ehlers (n 87) 427; Becker (n 82) 296.
[226] Ehlers (n 87) 426.
[227] Becker (n 82) 294.
[228] Ehlers suggests that the EU was responsible as it initiated the process. See Ehlers (n 87) 414.

up be similar to state aid schemes, or perhaps exemptions? Could time extensions be granted to individual projects?[229] Those questions will need to be considered before any further development of the regime.

It was noted that OU limits capital movements via, *inter alia*, prohibiting a company that owns transmission or generation assets investing in, or forcing it to disinvest from, other assets. It was noted, however, that such interference could be held legal if the measure were justifiable due to general public interest, non-discriminatory and proportionate. After a long academic debate, clarification as to the potential justification of the limitations came with the *Essent* case. The ECJ held that OU, in principle, despite having *prima facie* purely economic objectives, can be justified based on the general public interest if one looks at the interest underlying the choice of legislation. It was also concluded that OU is non-discriminatory in principle as it aims at uniform application of the regime to all MSs, in order to achieve a 'level playing field'. The same conclusions were reached as regards the proportionality of OU as those reached when discussing property rights protection. Therefore, it needs to be concluded that free movement of capital provisions should in principle not constitute an obstacle to the implementation of OU in the EU.

In summary, it can be observed that free movement of capital limitations are causing fewer concerns than property rights protection. What adds an extra dimension to this problem is that protection of property rights is not only a long-standing tradition on an EU level but also constitutional in each MS. On the one hand, when creating an internal market some level of harmonization is unavoidable; on the other hand the Treaty's other objectives include respect for the constitutional traditions of MSs.[230] It will be interesting to see how the balancing exercise between those two objectives will be performed if OU becomes compulsory.

It was, however, pointed out that some aspects of OU may amount to a breach of the 'equality' principle according to which the same situations must be treated in the same manner. The uneven playing field is achieved due to the fact that Art 345 TFEU blocks the Commission from ordering privatisation of the state-owned electricity markets, which results in unequal treatment of public and private sector operators. This seems, however, to be irresolvable without an agreement between MSs to grant the Commission broader competency in the field of property law.

It was suggested that the process of liberalisation of the EU energy market changed the landscape of the energy sector to such an extent that if the Fourth Energy Package provided for compulsory OU, the change may be small enough to be digestible from a property protection and proportionality perspective.[231] The author of this paper believes the contrary: that it will be the most difficult step to take. This is due to the fact that the issues that caused controversy when proposing the Third Energy Package resulted in the introduction of more exemptions and derogations to the EU energy acquis,[232] and hence have not been properly addressed so far.

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[229] A later solution was suggested by Michael Diathesopoulos in Diathesopoulos (n 182).
[230] Ehlers (n 87) 444.
[231] Inigo del Guayo and others (n 11) 359.
[232] Talus (n 98) 88.

It can be argued that the biggest problem at the moment is that of political hurdles;[233] however, those, to an extent, are simply expressions of concerns as to the 'edgy' relationship between OU and fundamental rights as well as freedoms, in addition to its questionable effectiveness. Therefore, the future of potential compulsory OU in the EU energy sector will depend on how well the Commission addresses those concerns.

[233] ibid.

Case Comment: Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft MbH v AMT Futures Ltd [2015] EWCA Civ 143

MUKARRUM AHMED*

Abstract

This short article examines the recent significant ruling of the Court of Appeal on jurisdiction to adjudicate upon a claim for damages for the tort/delict of inducing breach of an English exclusive choice of court agreement against a claimant's legal advisers. The determination of the issue of jurisdiction hinges on whether England is the place where the economic loss occurred pursuant to Article 5(3) of the Brussels I Regulation. It will be argued that the CJEU authorities on allocation of jurisdiction in tort/delict claims lend support to the conclusion that Germany was the place where the 'harmful event' occurred and the damage was also suffered in Germany. A more pragmatic approach to the jurisdictional issue premised on the private law rights and obligations of the parties to the choice of court agreement may end up compromising these principles by according dubious jurisdictional precedence to the place where the indirect consequences of the economic loss occur.

Keywords: Brussels I Regulation, Private International Law, European Union Law, Choice of Court Agreements, Tort/Delict, Pure Economic Loss, Inducing Breach of Contract, Rome II Regulation

In *Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft MbH v AMT Futures Ltd*,[1] the Court of Appeal adjudicated upon whether England is the place where the economic loss occurred under Article 5(3) of the Brussels I Regulation[2] in an action for recovering damages for the tort of inducing breach of an English exclusive choice of court agreement against a claimant's legal advisers.[3] There is established judicial authority in English law for a claim for contractual damages for breach of an English

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[1] [2015] EWCA Civ 143, [2015] QB 699 (Christopher Clarke LJ with whom Tomlinson LJ and Laws LJ agreed).

[2] Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L12/1 ('Brussels I Regulation'). In accordance with Art 81 of the Brussels I Regulation (Recast), the Recast Regulation applies as of 10 January 2015 to legal proceedings instituted (and to judgments rendered) on or after that date. See Council Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

[3] See, generally, M Lehmann, 'Where Does Economic Loss Occur?' (2011) 7 Journal of Private International Law 527; A Dickinson, *The Rome II Regulation* (OUP 2008) ch 4, 327-330; E Lein, 'Chapter 4 - Article 7(2)' in A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (OUP 2015) 155-172.

exclusive choice of court agreement against the counter party.[4] However, it has been argued that in some instances, it may make commercial sense to extend the scope of the recovery beyond the parties privy to the jurisdiction agreement.[5] Potential third parties may include the directors and senior management of the company, the legal advisers of the company, another company within the group of companies or even a competitor company. However, in order to sue a third party, the English courts must have jurisdiction over the matter and a specific cause of action must lie against the third party under the applicable law of the particular legal relationship.

Where an exclusive choice of court agreement is binding between A and B and a third party, C, who is in practical control of B, has directed B to breach the agreement, the English courts have accepted that anti-suit injunctions or claims for damages, could be founded on the tort of inducing breach of contract.[6] In *Kallang Shipping SA v Axa Assurances Senegal ('The Kallang') (No2)*, where Axa Senegal had induced their insureds to breach an arbitration clause by orchestrating proceedings before the courts of Senegal, Jonathan Hirst QC, sitting as a deputy High Court judge, awarded damages against Axa Senegal for procuring a breach of contract.[7] However, as Jonathan Hirst QC stressed, both parties agreed that this issue was to be determined in accordance with English law and no case on Senegalese law was pleaded.[8]

In the context of the Brussels I Regulation, the English High Court held that, in principle, a claim in damages may lie against a claimant's lawyers (a German law firm) for the tort of inducing breach of contract where it can be established that the claimant was advised by them to bring pre-emptive proceedings in breach of a choice of court agreement.[9] In such cases, the immediate potential impediment is not

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[4] See *Union Discount Co Ltd v Zoller and Others* [2001] EWCA Civ 1755, [2002] 1 WLR 1517 (Schiemann LJ); *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749 [36] (Lord Bingham of Cornhill) and [48] (Lord Hobhouse of Woodborough); *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* (*The Alexandros T)* [2014] EWCA Civ 1010, [2014] 2 Lloyd's Rep 544 (Longmore LJ): a significant recent Court of Appeal decision endorsing the damages remedy in the context of the Brussels I Regulation.

[5] Briggs accepts that the claim for compensation may be characterized as 'tortious or non-contractual' and that such a cause of action may fit more easily into the 'public law' rubric of the Brussels I Regulation, but does not explore the issue any further: A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) 326-327, 337. Cf: Raphael describes the possibility of an award of damages outside the contractual case as 'unexplored territory', but in contrast to Briggs argues that, where there is no clear and concrete personal contractual obligation to enforce, it is harder to avoid the conclusion that the award of damages inherently involves an assessment of the jurisdiction of another Member State court, and is thus prohibited: T Raphael, *The Anti-Suit Injunction* (OUP 2008) 296, 331, 341.

[6] See Raphael (n 5) 335-336.

[7] *Kallang Shipping SA v Axa Assurances Senegal ('The Kallang') (No 2)* [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep 124 [90]-[94] (Jonathan Hirst QC J). See also *The Duden* [2008] EWHC 2762 (Comm), [2009] 1 Lloyd's Rep 145 (Jonathan Hirst QC J); David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell 2010) 493-494; T Raphael, *The Anti-Suit Injunction: Updating Supplement* (OUP 2010) 69.

[8] *Kallang Shipping SA v Axa Assurances Senegal ('The Kallang') (No 2)* [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep 124 [90].

[9] *AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft MbH* [2014] EWHC 1085 (Comm), [2015] 2 WLR 187 (Popplewell J).

the existence of the cause of action or legal basis,[10] but satisfying an English court that it has jurisdiction under Article 5(3) of the Brussels I Regulation.[11] The High Court has held that such jurisdiction exists, pursuant to Article 5(3) of the Brussels I Regulation, because to induce breach of an English choice of court agreement is to deprive the claimant of the benefit of a clause conferring exclusive jurisdiction on the English courts, which constitutes harm suffered in England.[12]

The German law firm responsible for inducing the breach of the choice of court agreement appealed the High Court decision on the issue of whether or not the English courts have jurisdiction to entertain the action under the Brussels I Regulation. Overturning the first instance decision, the Court of Appeal held that the English court had no jurisdiction over the claim. Both the event giving rise to the damage and the damage itself occurred in Germany, not in England. That was the place of the 'harmful event' for the purposes of Article 5(3) of the Brussels I Regulation. The Court of Appeal relied on the leading CJEU authorities[13] and reached the conclusion that the German law firm procured the former clients to start proceedings in Germany in consequence of which AMT Futures Ltd suffered loss predominantly in Germany.[14] The court rejected an argument that the harm suffered was the loss of the benefit promised to the claimant – that they would only be sued in England. The harm was the commencement of proceedings in Germany and the damage suffered was the cost and expense caused by the litigation, which was suffered in Germany.

The localization of economic loss in Germany is in line with the principle that the victim's domicile should be avoided when determining the location of the economic loss unless the direct and immediate loss occurred there.[15] This principle of localizing economic loss was followed by the CJEU in its recent decision in *Harald Kolassa v Barclays Bank plc* where it ruled that the courts in the Member State of the investor's domicile have jurisdiction 'in particular when the loss occurred itself directly in the applicant's bank account held with a bank established in the area of

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[10] Liability for the tort of inducing breach of contract was established in English law by the famous case of *Lumley v Gye* (1853) 2 E & B 216 and the actionable wrong was recognized as part of Scots law in *British Motor Trade Association v Gray* 1951 SC 586, 1951 SLT 247 (Lord Russell). *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 is the current leading authority on the tort of inducing breach of contract in English law and was followed by Lord Hodge in *Global Resources Group v MacKay* 2008 SLT 104, 106-107. Lord Hodge identified five characteristics which appear to be the essential elements of the delict: (1) Breach of contract (2) Knowledge on the part of the inducing party that this will occur (3) Breach which is either a means to an end for the inducing party or an end in itself (4) Inducement in the form of persuasion, encouragement or assistance (5) Absence of lawful justification. See J MacLeod, 'Offside Goals and Induced Breaches of Contract' (2009) 13 Edinburgh Law Review 278; J Thomson, *Delictual Liability* (Bloomsbury Professional 2014) 44-47.

[11] The provision equivalent to Article 5(3) of the Brussels I Regulation in the Recast Regulation is Article 7(2).

[12] *AMT Futures Ltd v Marzillier* [2014] EWHC 1085 (Comm), [2015] 2 WLR 187 (Popplewell J).

[13] Case 21/76 *Bier v Mines de Potasse d'Alsace* [1976] ECR 1735; Case C-220/88 *Dumez France and Tracoba v Hessiche Landesbank (Helba)* [1990] ECR I-49; *Marinari v Lloyd's Bank plc* [1996] QB 217; *Reunion Europeene SA v Spliethoff Bevrachtingskantoor BV* [2000] QB 690; Case C-168/02 *Kronhofer* [2004] ECR I-6009.

[14] *Marzillier v AMT Futures Ltd* [2015] EWCA Civ 143, [2015] QB 699 (Christopher Clarke LJ with whom Tomlinson LJ and Laws LJ agreed).

[15] Lehmann (n 3) 537-540.

jurisdiction of those courts'.[16] In *Kronhofer*,[17] the ECJ stated that in determining the place of loss, the fact the ultimate adverse effects of the damaging behaviour were felt in Austria, where the claimant lived and where his assets were concentrated, could not be taken into account.[18] The court gave two reasons for this. First, to hold otherwise would run counter to the objectives of the Brussels Convention, which aims at enabling the claimant easily to identify the court in which he may sue and the defendant reasonably to foresee in which court he may be sued.[19] Secondly, to take into account the location of the claimant's assets would give jurisdiction to the courts of the claimant's home, a solution that is generally not favoured by the Brussels Convention.[20]

That said, Christopher Clark LJ stated that the first instance judge's analysis is a powerful[21] and attractive one as there is much to be said for the determination of what is in essence an ancillary claim in tort for inducement of breach of contract to be made in the court which the contract breaker agreed should have exclusive jurisdiction in respect of that contract, rather than in the courts of the country where the inducement and breach occurred.[22] However, the former consideration is not a determining factor in the allocation of jurisdiction under the Brussels I Regulation. It is submitted that the arguments favouring the pragmatic and remedy driven quest of localizing the economic loss in England militate against a reasoned and systemic response to the issue of multilateral jurisdictional allocation within the Brussels I Regulation regime.

Counsel for the German law firm also obtained permission to advance an additional ground of appeal, which was not argued before the judge at first instance. [23] Hugh Mercer QC argued that the High Court could not exercise jurisdiction over the German law firm in relation to the subject matter of the action because any such claim necessarily and unavoidably offended against EU law principles. Insofar as an injunction was claimed it would involve the court in being asked to grant an order restraining a party from commencing proceedings before a properly constituted court of a Member State.[24] Insofar as damages were sought it involved the court being asked to determine issues which breached the principle of effectiveness of EU law (*effet utile*) and the principle of mutual trust and constituted a collateral attack on the assumption of jurisdiction by the German courts and of judgments or court settlements obtained by investors in Germany, when under the

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[16] Case C-375/13 *Harald Kolassa v Barclays Bank plc* ECLI:EU:C:2015:37, [2015] WLR (D) 32; *Universal Music International Holding BV v Michael Tétreault Schilling and Others*
(Case C-12/15) is a pending preliminary reference before the CJEU from the Hoge Raad der Nederlanden (Netherlands) on Article 5(3) of the Brussels I Regulation including the questions of how a court should establish whether an economic loss is an 'initial loss' or a 'consequential loss' and in which country does the economic loss occur.

[17] Case C-168/02 *Kronhofer* [2004] ECR I-6009.

[18] ibid [21].

[19] ibid [20].

[20] ibid.

[21] [2015] EWCA Civ 143 [49] (Christopher Clarke LJ).

[22] ibid [57].

[23] ibid [59].

[24] See Case C-159/02 *Turner v Grovit* [2004] ECR I-3565; Case C 185/07 *West Tankers Inc v Allianz SpA (The Front Comor)* [2009] 1 AC 1138.

Regulation any such attack was permitted only in the court where the substantive proceedings had been commenced.

However, Christopher Clarke LJ observed *obiter* that the additional ground of appeal was not well founded.[25] In doing so he emphasized the divide between issues of jurisdiction which were a matter for the German courts and the private law rights and obligations of the parties in relation to the contractual choice of court agreement and ancillary claims in tort for inducing breach of the choice of court agreement. In support of his contention, Christopher Clarke LJ also endorsed and reiterated the recent landmark ruling of Longmore LJ in *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T),*[26] that EU law was no obstacle to enforcing a cause of action for the award of damages for breach of an exclusive jurisdiction clause.[27] However, it should be noted that Longmore LJ's ruling on the compatibility of the damages remedy with EU law is itself not free from controversy. Moreover, it is highly unlikely that the CJEU would on a preliminary reference from the English courts declare that a unilateral private law remedy arising from the contractual right not to be sued in a non-elected forum is compatible with the Brussels I Regulation.[28] It is submitted that the relative effect of jurisdiction

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[25] [2015] EWCA Civ 143, [2015] QB 699 [61] (Christopher Clarke LJ).

[26] [2014] EWCA Civ 1010, [2014] 2 Lloyd's Rep 544 [15]-[22] (Longmore LJ).

[27] [2015] EWCA Civ 143, [2015] QB 699 [62] (Christopher Clarke LJ).

[28] See M Illmer, 'Chapter 2 – Article 1' in A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (OUP 2015) 79; G Cuniberti and M Requejo, 'La sanction des clauses d'élection de for par l'octroi de dommages et intérêts' (ERA Forum 2010-1, SSRN, 18 February 2010) <http://ssrn.com/abstract=1689417> or <http://dx.doi.org/10.2139/ssrn.1689417> accessed 15 December 2014; Briggs (n 5) ch 8, 330-338; TC Hartley, *Choice of Court Agreements under the European and International Instruments* (OUP 2013) ch 10, 220; R Fentiman, *International Commercial Litigation* (OUP 2010) 90; J Harris, 'Agreements on Jurisdiction and Choice of Law: Where Next?' [2009] Lloyd's Maritime and Commercial Law Quarterly 537, 547; CJS Knight, 'The Damage of Damages: *Agreements on Jurisdiction and Choice of Law*' [2008] Journal of Private International Law 501, 509; E Peel, 'Introduction' in Pascal de Vareilles-Sommieres (ed), *Forum Shopping in the European Judicial Area* (Hart Pub 2007) 1, 15-17; R Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe' in ibid 43-45; A Nuyts, 'The Enforcement of Jurisdiction Agreements further to *Gasser* and the Community Principle of Abuse of Right' in ibid 57; P Briza, 'Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way out of the Gasser-Owusu Disillusion?' [2009] Journal of Private International Law 537, 548-554; cf Raphael (n 5) 294; F Blobel and P Späth, 'The Tale of Multilateral Trust and the European Law of Civil Procedure' (2005) 30 European Law Review 528, 545-546, highlight the counterproductive effects of secondary remedies on the principle of mutual trust in the European Union; P Gottwald, 'art 23 EuGVVO' in T Rauscher, J Wenzel and P Wax (eds), *Münchener Kommentar zur Zivilprozessordnung* (3rd edn, Beck 2008) [79]; P Mankowski, 'Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?' [2009] IPRax 23-35, argues that all claims that directly or indirectly sanction a claim not to sue in a *forum derogatum* militate against the ratio underpinning the inhibition of anti-suit injunctions in *Turner v Grovit* since a right not to sue abroad is not recognized under the Brussels I regime; for another analysis of the relevance of *Turner v Grovit* for the damages remedy, see, T Pfeiffer, 'Die Absicherung von Gerichtsstandsvereinbarungen durch Vereinbarung eines materiell-rechtlichen Kostenerstatungsanspruchs' in W Hau and H Schmidt (eds), *Facetten des Verfahrensrecht Liber amicorum Walter F. Lindacher* (Heymanns 2007) 77, 81ff; A Dutta and C Heinze, 'Prozessführungsverbote im englischen und europäischen Zivilverfahrensrecht' Zeitschrift für Europäisches Privatrecht (ZEuP) [2005] 428, 458-461, suggest that damages in relation to the foreign court's substantive liability award are impermissible, but that damages in respect of litigation costs are more defensible, though still doubtful.

agreements as subsisting, independent and enforceable contractual obligations will necessarily distort the international allocative or distributive function of such agreements within a multilateral jurisdiction and judgments order such as the Brussels I Regulation.[29] In this regard, the private law enforcement of jurisdiction agreements has been pejoratively referred to as 'the privatization of court access' within a commercial dispute resolution focused English common law of conflict of laws.[30]

Marzillier v AMT Futures Ltd is the first case in the English courts concerning Article 5(3) of the Brussels I Regulation in relation to the tort of inducing breach of a contract. The Court of Appeal's localization of the economic loss in Germany may end up inhibiting future claims for damages for inducing breach of an English choice of court agreement in the English courts. The decision may also be significant for the English courts when approaching the localization of economic loss under Article 7(2) of the Brussels I Regulation (Recast) more generally. It is submitted that the approach of the Court of Appeal in localizing economic loss is firmly rooted in European Union private international law principles and the CJEU's leading authorities which favour neither the place where the country in which the event giving rise to the damage occurred nor the country or countries in which the indirect consequences of that event occur. This mature and systemic approach to the localization of loss seeks to ensure that the rights of the claimant and the defendant are evenly balanced without unduly prejudicing either. The immediate pragmatic value of localizing the economic loss in England would have sacrificed the certainty and predictability of the European Union private international law regime and accorded dubious jurisdictional precedence to the place where the indirect consequences of the economic loss occur.

The Court of Appeal decision may also have significant implications for the applicable law of the cause of action under the Rome II Regulation.[31] Article 4(1) of the Rome II Regulation uses the same criterion of the 'place where the damage occurred' that is the second prong of the tort jurisdiction under Art 5(3) of the Brussels I Regulation[32] (now Art 7(2) Brussels I Regulation (Recast)) in order to determine the applicable law of the tort. As the parallel interpretation and coherence of the European instruments on private international law is an objective in its own

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[29] Briggs (n 5) 526, refers to the national private law enforcement function of a jurisdiction agreement as 'the principle of relative effect'; See *Penn v Lord Baltimore* (1750) 1 Ves Sen 444, on the separation of an enforceable *in personam* obligation from the *erga omnes* right to property abroad over which the English courts have no jurisdiction. For the public international conception of private international law as a set of universal higher level secondary rules for the allocation of regulatory authority, see, Alex Mills, 'Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law' in H Muir Watt and DP Fernandez Arroyo (eds), *Private International Law and Global Governance* (OUP 2014) 245.

[30] See H Muir Watt, 'Party Autonomy in International Contracts: From the Makings of a Myth to the Requirements of Global Governance' (2010) 3 European Review of Contract Law 1, 29-32.

[31] Regulation (EC) No 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations [2007] OJ L199/40 ('Rome II Regulation').

[32] In Case 21/76 *Bier v Mines de Potasse d'Alsace* [1976] ECR 1735, the European Court of Justice has interpreted the predecessor provision of Article 5(3) of the Brussels I Regulation as giving the claimant the option to sue at the place of the event giving rise to the damage or the place where the damage occurred.

right,[33] the applicable law for the tort of inducing breach of contract may also localize in Germany.[34] However, it may be argued that English law is the law governing the tort by virtue of the choice of law agreement being construed as extending its cover to cases of tortious liability under Article 14 of the Rome II Regulation.[35] Secondly, it may also be argued that the applicable law under Article 4(1) can be displaced in favour of the manifestly closer relationship based on a contract that is closely connected with the tort in question.[36] Arguably, the English dispute resolution agreement is closely connected with the tort of inducing breach of contract. However, as indicated by the use of the word 'manifestly', a high threshold of connection must be passed for Article 4(3) to apply.[37] As a result, the escape clause can only be resorted to in exceptional circumstances.

The UK Supreme Court has recently granted permission to appeal to AMT Futures Ltd (the 'Appellant').[38] From the foregoing, it is likely that the UK Supreme Court will prefer the principled stance of the CJEU case law in relation to the jurisdictional allocation of tort claims as opposed to a more pragmatic approach which would accord questionable jurisdictional precedence to the place where the indirect consequences of the economic loss occur. Moreover, if it is held that the English court does possess jurisdiction over the claim then a re-examination of the principal issue underlying Longmore LJ's decision in *Starlight Shipping Co* v *Allianz*

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[33] See Recital 7 of the Rome II Regulation; E Lein, 'The New Rome I/Rome II/Brussels I Synergies' (2008) 10 Yearbook of Private International Law 177.

[34] Cf R Plender and M Wilderspin, *The European Private International Law of Obligations* (4th edn, Sweet & Maxwell 2015) 551; R Plender and M Wilderspin, *The European Private International Law of Obligations* (3rd edn, Sweet & Maxwell 2009) 532; I Bach, 'Article 4' in Peter Huber (ed), *Rome II Regulation* (Sellier 2011) 86. In line with the decision regarding Article 5(3) of the Brussels I Regulation in [2014] EWHC 1085 (Comm), [2015] 2 WLR 187 (Popplewell J), both Plender and Wilderspin and Bach argue against such a conclusion by favouring the law governing the contract.

[35] Reference was made to issues concerning the scope of Article 14 of the Rome II Regulation in the Court of Appeal decision in *Marzillier v AMT Futures Ltd* [2015] EWCA Civ 143, [2015] QB 699 [12] (Christopher Clarke LJ); See Th M de Boer, 'Party Autonomy and its Limitations in the Rome II Regulation' (2007) 9 Yearbook of Private International Law 19, 27.

[36] Art 4(3) of the Rome II Regulation. For a discussion of the accessory connecting factor in Article 4(3) of the Rome II Regulation, see, M Czepelak, 'Concurrent Causes of Action in the Rome I and II Regulations' (2011) 7 Journal of Private International Law 393, 405-409; Plender and Wilderspin, *The European Private International Law of Obligations* (2015) (n 34) 68, and L Collins and others (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell 2006) 1568, argue that the better view is that a contractual obligation regulated by the Rome I Regulation does not preclude a concurrent cause of action in tort governed by the Rome II Regulation; cf A Briggs, 'Choice of Choice of Law?' [2003] Lloyd's Maritime and Commercial Law Quarterly 12; for the English substantive private law position allowing claims for concurrent liability, see *Henderson v Merrett Syndicates* [1995] 2 AC 145 (HL) (Lord Goff of Chieveley); cf Lord Justice Jackson, 'Concurrent Liability: Where Have Things Gone Wrong?' (Lecture to the Technology and Construction Bar Association and the Society of Construction Law, 30 October 2014) examines the boundary between contract and tort in Roman, French, German and English common law and concludes that contracts should not, and generally do not, generate duties of care in tort which mirror the contractual obligations.

[37] Recitals 14 and 18 of the Rome II Regulation; See, generally, CSA Okoli and GO Arishe, 'The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation' (2012) 8 Journal of Private International Law 513, 536.

[38] *AMT Futures Ltd v Marzillier and others* Case No: UKSC 2015/0091 (SupremeCourt.uk, 28 July 2015) <www.supremecourt.uk/docs/permission-to-appeal-2015-0607.pdf> accessed 10 September 2015.

Marine & Aviation Versicherungs AG (The Alexandros T) may become necessary – whether the damages remedy is indeed compatible with the principle of effectiveness of EU law (*effet utile*) and the principle of mutual trust. The possibility of a preliminary reference to the CJEU under Article 267 TFEU cannot also be foreclosed.[39]

[39] The English courts, in the litigation that followed the CJEU's *West Tankers* ruling, appear to be very reluctant to refer matters to the CJEU for a preliminary ruling. It seems that the negative perception of the CJEU's triumvirate of decisions in *West Tankers*, *Turner*, and *Gasser* may have a part to play in this reluctance to refer matters for a preliminary reference. Moreover, the English courts may wish to continue to rely on alternatives to anti-suit injunctions regardless of their potential incompatibility with the CJEU's interpretation of the Brussels I Regulation. See M Illmer, 'English Court of Appeal Confirms Damages Award for Breach of a Jurisdiction Agreement' (Conflictoflaws.net, 31 July 2014) <http://conflictoflaws.net/2014/english-court-of-appeal-confirms-damages-award-for-breach-of-a-jurisdiction-agreement/> accessed 31 July 2014; A Dickinson, 'Once Bitten – Mutual Distrust in European Private International Law' (2015) 131 Law Quarterly Review 186, 190-191.

European Law Students' Association, Aberdeen University

The European Law Students' Association (ELSA) is the world's largest independent law student association with more than 38,000 members worldwide. ELSA Aberdeen offers law students a perfect platform to develop their existing skills, acquire new ones and meet fellow students and legal professionals throughout Europe. ELSA Aberdeen assists law students in being internationally minded and professionally skilled.

We have held many successful events so far. These include a careers evening organised together with one of the largest commercial law firms in Europe - CMS Cameron McKenna. The aim of the event was to provide law students with an understanding of commercial-business awareness skills and highlight the significance of such skills. During this event we also raised money for CMS' charity of choice - War Child. The evening attracted a great number of students and we were pleased to receive very positive feedback from students. We also held a very insightful seminar together with the Romanian Union of Students (RoNUS) on the Syrian refugee crisis and current challenges relating to immigration. Our guest speaker, Dr Mihai Delcea, Head of the Consular Office of Romania in Edinburgh, spoke to around 70 students about free movement within the European Union, the current humanitarian crisis and human rights protection. Another great event that we organised was a trip to the Scottish Parliament where law students were given a general tour through the Parliament building and found out more about its history, work and procedures.

We are planning to hold a seminar on renewable energy topics with Dr Olivia Woolley and a guest speaker from Robert Gordon University, Dr Alan Owen, where they will share their knowledge and experience of the subject matter. Students should also keep an eye on our 'Energy Project Aberdeen' which will be running from 24th November. It is a debate forum that will touch upon important legal issues in the Energy sector.

We are very ambitious and enthusiastic about our plans for this academic year and are currently working hard on different activities that would bring the society to a whole new level.

Regina Gabbasova
President ELSA Aberdeen

Lawyers Without Borders Student Division, Aberdeen University

Lawyers Without Borders Student Division at the University of Aberdeen is a pro bono student society, which seeks to support the work of the Parent Organisation, Lawyers Without Borders (LWOB). LWOB is a global group of volunteer lawyers from around the world who offer pro bono service to rule of law projects, capacity building and access to justice initiatives. Set up in 2012, the Aberdeen University society is the first and only LWOB student division is Scotland and we support LWOB by undertaking research projects from the Parent Organisation as well as NGOs that require legal help. In addition we raise funds for both our society and the Parent Organisation in order to provide pro bono lawyers with the resources they need in order to aid jurisdictions with less capable or developing legal structures.

Last year we completed numerous research projects, such as an access to justice report in Zimbabwe amongst others, all of which were well received. Further we had great success by creating a societal International Advocacy Competition, with a prize exclusively created by Terra Firma Chambers Edinburgh and we are in the process of planning our annual Human Rights conference for spring 2016. This conference allows us to open up our topics and society to a wider and insightful non-law based audience. Aside from the research sections we also have an amazing Events and Fundraising Team. We are well known for our Mary Berry style bake sales and have recently co-hosted a Lawyers & Salsa night; something unusual but an event that allowed our members to mingle and enjoy the social side of being part of such a society. When working pro bono it is important for people to be able to work together and social events like these are a key part in helping the smooth workings of a busy group.

We are an incredibly passionate and committed society which tries to bring together like-minded people and give them the opportunity to use their acquired academic legal knowledge in a practical way. Thus, allowing them to gain confidence and experience in legal writing and presentation skills. Moreover, it gives them a chance to see the law from a different perspective. In Scotland and the UK we are very fortunate to have a sophisticated meticulous legal system that has been shaped by great minds over hundreds of years. However, not every country has such a luxury and many are unaware of how different the legal systems of developing countries or those in conflict zones can be. Just like Scotland they need the Law, but for them it has fallen short. Our society aims to open the eyes and minds of students to see that despite being an ancient concept the law is still ever changing. Aberdeen University LWOB Student Division allows students to play an intrinsic part in helping to create and shape solid fair and just legal systems in countries which have not been lucky enough to experience this already.

Kirsty Paterson-Hunter
President AULWOB

Legal Research Society (LRS Aberdeen)

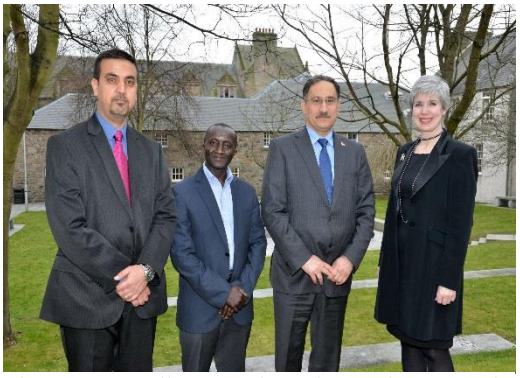

Photo: His Excellency Ambassador Zaid Noori with Head of Aberdeen Law School, Anne-Michelle Slater, Mohamad Janaby and Buba Bojang.

The University of Aberdeen's Legal Research Society (LRS) is a research student-run initiative, regularly hosting academic events and serving as a forum for both PhD and LLM by Research students. For two years, under the presidency of Buba Bojang (now a third-year PhD student), the LRS has made an increasing impact on the academic environment of both the School of Law and the University of Aberdeen in general.

In 2013, the LRS hosted a panel discussion on the military conflict in Ukraine and its political and legal implications resulting from it. The discussion was led by two members of staff of the University, Mr James H Wyllie (Reader in International Relations) and Dr Dirk Hanschel (now Honorary Reader at the School of Law and Professor at the University of Halle, Germany). Similarly, in 2014, the LRS hosted a panel discussion entitled 'The Campaign to counter ISIS: Legal, Political and Strategic Perspectives,' featuring – among others – His Excellency Ambassador Zaid Noori (Consul General of the Republic of Iraq to the United Kingdom). Both events sparked a lively debate among the large audiences present and thereby contributed to the strategic goals of the University of Aberdeen in creating a high-quality student experience and embedding a culture of internationalisation across the University's activities. When this volume goes to print, the LRS will already have hosted another event on the United Nations and the Rule of Law in relation to Africa and Asia. The event features His Excellency Prof Rahmat Mohamad, Secretary-General of the Asian-African Legal Consultative Organisation (AALCO).

On a monthly basis, the LRS also hosts round-table discussions for research students at the School of Law. The round-tables allow student-researchers to exchange and discuss their progress in research in an informal setting, as well as to gather feedback on their presentations and papers before submitting them to academic conferences and journals. Through this, the LRS is taking part in facilitating the high-standard research both of the students and of the School's research community.

Following its many successes, the LRS has also received credit for its activities from outwith the University's community: In 2015, Mr Bojang was awarded the City of Aberdeen Quincentenary Prize for his outstanding achievement and engagement for the University of Aberdeen through his role as President of the LRS. For the year ahead, the LRS is planning to engage further with the University and to expand its network to other institutions. The LRS is always looking to invite guest speakers and strengthen cooperation with other universities; if you would like to contact them feel free to do so at lrs@abdn.ac.uk.

LRS Executive Committee

Guidelines for Contributors

The purpose of the Review is to showcase the work of the students of Aberdeen, highlighting the many areas of law which are taught and researched at this institution. As such, submissions are welcome from students and graduates of the University of Aberdeen on any area of law, including, but not limited to: Business Law, Commercial Law, Competition Law, Energy Law, Criminal Law, EU Law, Human Rights, Intellectual Property Law, Private International Law, Property Law, Public and Constitutional Law and Public International Law.

Several types of articles will be considered:

- Case Notes (500 to 1,500 words on a recent judicial development)
- Book Reviews (500 to 1,500 words on a recent publication)
- Essays and Short Articles (1,500 to 4,000 words)
- Full Research Papers (4,000 to 10,000 words)

All the limits specified above are indicative and include footnotes.

Submissions are welcome from students at all stages, from first year undergraduate to postgraduate and PhD level. Students may submit a piece of work which has been written for part of their degree, or may write something specifically for the Review. Articles must provide a critical analysis of a particular area of law, publication or judicial decision. Comment should be original, relevant and aim to make an interesting contribution to the academic debate. Every piece of work is reviewed anonymously by the student Editorial Board, before being sent for Peer Review. Submissions may be accepted outright, accepted subject to modification, or rejected. Constructive comments will be sent to the author.

Published articles will be compiled in an annual issue which will be available on HeinOnline and in Scottish law libraries.

All submissions must conform to the Oxford Standard for Citation of Legal Authorities (OSCOLA).

For further information on submitting an article, subscribing to the journal or becoming involved in a supportive capacity, please contact us via the details on our website: http://www.abdn.ac.uk/law/student-activities/aberdeen-student-law-review-95.php

This publication has been generously sponsored by Stronachs LLP.

All those involved with the Aberdeen Student Law Review would like to thank Stronachs for their support.

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