SOVEREIGNTY IN THE SHARED LEGAL ORDER OF THE EU: CORE VALUES OF REGULATION AND ENFORCEMENT

Edited by
Ton van den Brink
Michiel Luchtmans
Miroslava Scholten
Sovereignty in the Shared Legal Order of the EU: Core Values of Regulation and Enforcement
Ton van den Brink, Michiel Luchtman and Miroslava Scholten (eds.)

© 2015 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk

ISBN 978-1-78068-219-8
D/2015/7849/140
NUR 828


No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.
This book, *Sovereignty in the shared legal order of the EU: Core Values of Regulation and Enforcement*, is a valuable addition to the literature on EU law and governance. It is the product of the Utrecht Centre for Regulation and Enforcement in Europe (Renforce), which was established in 2013. The book asks important questions, and the authors, individually and collectively, pursue the inquiries with skill and insight. It explores the EU’s core values, assessing how these shape EU policy when it interacts with regulation and enforcement at national level within the regime of shared administration that characterizes service delivery in most areas of EU governance.

Two more particular inquiries serve as the focus for the analysis that runs throughout the book. The first concerns how such core values impact on the relationship between: European territoriality and national territory; EU and national citizenship; and between national institutional autonomy and European regulatory initiatives. The second question is related but distinct, with the focus being on how conflicts between diverging core values are addressed within this shared legal order, and more particularly how they play out in the three domains of territory, citizenship and regulatory authority. The authors are fully mindful of the symbiotic link between EU core values and those that subsist at national level, with the latter influencing the former as well as vice-versa in a way that is continually evolving.

The thesis of the research project is profitably pursued through a combination of studies of different policy areas, which are followed by three more cross-sectoral studies on the concepts of authority, citizenship and regulation. The sectoral policy studies perforce differ in detail, but they nonetheless address the same key issues. They ask which are the core values within the particular policy domain; why they have that status; how such values interact with each other in the three domains adumbrated above; and the nature of the symbiotic link between the EU and the national orders, viz, the way in which the core values are themselves influenced by change in the shared legal order. The three more horizontal, cross-cutting chapters complement the vertical studies, bringing out common themes and probing the rationale for difference.

The theme explored in the book is challenging, a fact which the authors readily acknowledge. The very identification of EU core values is a considerable intellectual task in and of itself. The discourse leading to the conception of core
values adopted for the purpose of the book is however valuable in its own terms, since such matters are all too often assumed in conclusory terms, without being clear as to the analytical and normative assumptions that drive the conclusion. The authors articulate a conception of core values, in the context of this Renforce research project, as being those multiple (legal) values, which function as the standard of normative evaluation, which are not instrumental and which are inherent in the shared European-national legal order. This includes a specific sub-set of constitutional core values.

It is recognized that the divide between intrinsic and instrumental values can be difficult to maintain. It is also recognized throughout the study that different policy domains may contain their own core values, that the particular conception of such values may differ in different domains, or that they may vary in terms of their relative significance according to the subject matter studied.

This book will be of interest to all those concerned with law and governance in the EU. It raises issues that are central to the kind of shared polity that is the EU. It tackles concerns that have been prevalent within the EEC since its inception, notwithstanding the fact that they may manifest themselves differently over time. The authors make no pretence that there are easy answers to the questions posed, but the book advances our understanding of this important terrain.

Professor Paul Craig,
St John's College, Oxford
CONTENTS

Preface ........................................................................................................................................... v
Abbreviations .................................................................................................................................... xv

Chapter 1
Sovereignty in a Shared Legal Order: On the Core Values of Regulation and Enforcement in the EU
Michiel Luchtman, Ton van den Brink and Miroslava Scholten .......... 1
1. Core values of regulation and enforcement in a shared legal order .... 1
2. Approach and methodology: the concept of sovereignty as an analytical tool ... 3
3. This volume ............................................................................................................................... 5
4. Acknowledgements .................................................................................................................. 7

Chapter 2
Core Values: Tensions and Balances in the EU Shared Legal Order
Anna Gerbrandy and Miroslava Scholten .................................. 9
1. Introduction .............................................................................................................................. 9
2. Core values: a theoretical perspective .......................................................... 10
   2.1. Delineation of the concept of core values ..................................................... 10
   2.2. Which are the core values of the EU? .......................................................... 16
       2.2.1. Seemingly uncontested core values ................................................. 17
       2.2.2. Constitutional values of the shared legal order as core values .... 19
3. Core values: a reality check ......................................................................................... 21
   3.1. Core values in the vertical case studies .................................................... 22
   3.2. Labelling core values: on what basis? ...................................................... 23
   3.3. Interaction between core values in the EU shared legal order .......... 24
       3.3.1. Core values in conflict ............................................................... 24
       3.3.2. Core values in transformation/evolution .................................. 27
4. Conclusion ......................................................................................................................... 28
Chapter 3

Efficiency or Justice? Compensating for Power Imbalances under EU Telecommunications, Air Transport and Gender Equality Law

Anoeska Buijze, Ingrid Koning and Linda Senden ........................................... 31

1. Introduction .................................................................................. 31
2. The balancing of competing values ..................................................... 33
   2.1. The electronic communications directives ...................................... 34
   2.2. The air passenger rights regulations ............................................... 37
   2.3. The proposed EU directive on improving the gender balance on company boards ................................................................. 41
3. The balancing of EU and national powers; a system of shared authority? ... 45
   3.1. Authority and territory in the electronic communications directives .... 46
   3.2. Authority and territory in air passengers’ rights ................................. 48
   3.3. Authority and territory in gender equality ...................................... 52
4. Actual citizens’ empowerment? .......................................................... 56
   4.1. Electronic communication services ............................................... 56
   4.2. Air passengers’ rights ................................................................ 57
   4.3. Gender equality ........................................................................ 58
5. Conclusion .................................................................................... 59

Chapter 4

Regulation and Enforcement of Economic Freedoms and Social Rights: A Thorny Distribution of Sovereignty

Albertine Veldman and Sybe de Vries ......................................................... 65

1. Introduction .................................................................................. 65
2. EU economic and social values .......................................................... 67
   2.1. The core values identified: economic freedoms ................................ 67
   2.2. The core values identified: social protection .................................... 70
3. Institutional impediments for the reconciliation and coherent regulation of the union’s social and economic values ........................................ 74
   3.1. ‘Decoupling’ of the economic and social spheres in the formative stage of the European common market ........................................... 74
   3.2. The complementation of the internal market and the endeavour for a social Europe ................................................................. 75
4. The way the reconciliation problem has been handled so far..................... 77
   4.1. New modes of governance .......................................................... 77
   4.2. Integration through law: a pivotal role for the CJEU ......................... 78
       4.2.1. Balancing public interests with the Treaty freedoms ............... 78
       4.2.2. Balancing fundamental rights with the Treaty freedoms .......... 80

viii
4.2.3. Balancing fundamental social rights with the Treaty freedoms.... 82
5. EU Charter: new horizon for reconciling social and economic values? ...... 86
6. Conclusion.................................................................................... 91

Chapter 5
Shifts in Authority and their Relation with Underlying Core Values:
EU Competition Law and Financial Law Compared
Bas van Bockel and Ton Duijkersloot ............................................ 93

1. Introduction ................................................................................ 93
2. Setting the parameters: the assumptions underlying 'core values' .......... 95
   2.1. 'Aims', or 'values'?................................................................. 96
   2.2. The 'battle over the soul of antitrust'.................................... 97
   2.3. Aims or values in financial market regulation and supervision .... 99
   2.3.1. Traditional aims and values ................................................. 99
   2.3.2. Values and the EU integration process............................... 101
3. Regulation and enforcement: the governance of market regulation .... 101
   3.1. Introduction ........................................................................ 101
   3.2. Decentralization and differentiation in EU competition law ........ 102
   3.3. Competition law and territoriality ....................................... 104
   3.4. Europeanization of financial market regulation ................. 105
   3.4.1. The old system ............................................................... 105
   3.4.2. The financial crisis: first steps to more Europeanization? ...... 106
   3.4.3. Europeanization of financial market regulation and supervision continued ......................................................... 108
   3.4.4. Europeanization of regulation: the Single Rule Book ....... 109
   3.4.5. Europeanization of supervision and enforcement:
          the Europeanized regime ................................................. 110
   3.4.6. The new Europeanized system: links with the elements of
          territory and the role of the citizen ..................................... 112
4. Conclusion.................................................................................. 113

Chapter 6
Sovereignty, Stability and Solidarity: Conflicting and Converging Principles
in EU Economic Governance
Ton van den Brink and Jan Willem van Rossem............................. 117

1. Introduction................................................................................ 117
2. Defining sovereignty, solidarity and stability .............................. 119
   2.1. Sovereignty in three member states .................................... 119
      2.2.1. Germany ................................................................. 119
Chapter 7

The Development of Core Values and the Ambition of the EU in the Field of Administrative Law and Contract Law: Will a General EU Administrative and Contract Law Become a Reality?

Sonja Kruisinga, Anoeska Buijze and Anne Keirse

1. Introduction ......................................................................................................................................... 143
2. The goals of the EU and the harmonization of national laws ............................................................... 144
3. Shared authority and the EU’s competence to enact general laws ...................................................... 145
   3.1. Boundaries of the EU’s legislative competence ........................................................................ 145
   3.2. The competence to harmonize private law .............................................................................. 146
      3.2.1. European contract law in the old days ........................................................................... 146
      3.2.2. Concrete steps towards a European contract law .......................................................... 148
      3.2.3. No competence to enact a European Civil Code ............................................................ 149
   3.3. The competence to enact a general European administrative law ............................................. 150
4. The recent proposals ............................................................................................................................ 153
   4.1. The draft regulation on a common European sales law ............................................................... 153
      4.1.1. The legal basis of the draft regulation on a common European sales law .................... 154
      4.1.2. The scope of application of the draft regulation on a common European sales law .... 156
   4.2. The EP resolution and the model rules ....................................................................................... 159
5. Citizens’ rights and internal borders .................................................................................................. 162
   5.1. The role of the citizen in the proposals ..................................................................................... 162
6. Preliminary conclusions: core values, shared authority, citizens and territory ...................................... 166
Chapter 8
The Room for Social Policy Conditions in Public Procurement Law
Frans PENNINGS and Elisabetta MANUNZA ............................................ 173

1. Introduction: why EU procurement law was cautious towards social considerations ................................................................. 173
2. Social conditions as a core value in procurement procedures ......................................................................................... 177
3. Experiences with social return – the case of the Netherlands ......................................................................................... 179
4. EU public procurement law ....................................................................................................................................................... 182
   4.1. Principles of EU public procurement law ......................................................................................................................... 182
   4.2. The CJEU case law on social return ............................................................................................................................. 183
       4.2.1. The Beentjes judgment under Directive 71/305 .......................................................................................... 183
       4.2.2. The Max Havelaar judgment under Directive 2004/18 ........................................................................ 185
   4.3. Preliminary conclusions ....................................................................................................................................................... 186
   4.4. The 2014 directive on public procurement ................................................................................................................. 187
       4.4.1. The basic principles of the Directive .................................................................................................................. 187
       4.4.2. Preliminary conclusions vis-à-vis social return .......................................................................................... 189
5. Dutch national public procurement legislation ................................................................................................................. 191
6. The experiences with social return and procurement law ................................................................................................. 193
7. Conclusion .................................................................................................................................................................................. 194

Chapter 9
Freedom, Security and Justice for Whom? The Case Study of Bulgarian Street Prostitution in France
Brenda C. Oude BREUIL and Tony MARGUERY ............................................ 197

1. Introduction .................................................................................................................................................................................. 197
2. Creating an area of freedom, security and justice ................................................................................................................ 200
3. Whose freedom, whose security? Equal citizens, unequal realities ....................................................................................... 203
   3.1. First snapshot: building a ‘normal’ and secure life .......................................................................................................... 203
   3.2. Second snapshot: silence before safety ....................................................................................................................... 207
4. Justice served? Transnational law enforcement meets national territorial obstacles ....................................................................................................................... 209
   4.1. Third snapshot: on the matter of protection .................................................................................................................. 209
   4.2. Fourth snapshot: better a good neighbour than a distant friend .................................................................................. 211
5. Conclusion .................................................................................................................................................................................. 215
Chapter 10
Towards an Ever Clearer Division of Authority Between the European Union and the Member States?
Ton van den Brink ................................................................. 217

1. Introduction ........................................................................... 217
2. Defining authority .................................................................. 219
3. The classic approach to authority: institutional principles shaping the relation between the EU and the member states .......... 220
   3.1. Introduction .................................................................. 220
   3.2. Principle of conferred powers ....................................... 220
   3.3. Subsidiarity ................................................................. 227
   3.4. Proportionality ............................................................ 232
4. National discretion in EU law .................................................. 234
   4.1. Introduction .................................................................. 234
   4.2. Minimum harmonization ............................................. 236
   4.3. ‘Scope discretion’ ...................................................... 237
   4.4. Enforcement discretion ............................................... 239
   4.5. ‘Balancing discretion’ .................................................. 240
   4.6. Elaboration discretion .................................................. 241
   4.7. Conclusion ................................................................... 243
5. Final conclusion ....................................................................... 243

Chapter 11
The European Citizen as Bearer of Fundamental Rights in a Multi-Layered Legal Order
Hanneke van Eijken, Jessy Emaus, Michiel Luchtmann and Rob Widdershoven ........................................ 249

1. Introduction ........................................................................... 249
   1.1. The European composite citizen and its fundamental rights ........ 249
   1.2. Core values, the EU Charter and the link with the vertical studies .... 251
2. Authority, citizenship and fundamental rights ......................... 253
   2.1. The European citizen and multiple sources of fundamental rights .... 253
   2.2. Protection of the European citizen by the EU Charter ............... 254
      2.2.1. Introduction .......................................................... 254
      2.2.2. Acting in the scope of Union law ............................... 255
      2.2.3. Interim conclusions of Section 2.2 ............................. 265
   2.3. Protection of the European citizen by the ECHR and national constitutions ........................................ 266
      2.3.1. Introduction .......................................................... 266
2.3.2. Fundamental rights protection outside the scope of Union law ... 268
2.3.3. The relation between the fundamental rights protection by the ECHR and EU Charter .................................................... 270
2.3.4. The EU fundamental rights protection and national fundamental rights.......................................................... 278
2.4. Interim conclusions of Section 2..................................................... 282
3. Territory and citizenship: fundamental rights at the interface of multiple legal orders.......................................................... 283
3.1. Introduction ........................................................................ 283
3.2. Conflicts of jurisdiction and the foreseeability of applicable law .... 284
3.3. Transnational law enforcement cooperation between national authorities .......................................................... 288
3.4. The rise of EU law enforcement authorities ................................ 291
3.5. Interim conclusions of Section 3 ................................................. 294
4. Conclusion................................................................................ 295

Chapter 12
Core Values Beyond Territories and Borders: The Internal and External Dimension of EU Regulation and Enforcement
Cedric Ryngaert and John Vervaele .............................................. 299
1. Introduction............................................................................. 299
2. The internal market perspective ................................................... 304
3. The perspective of the area of freedom, security, and justice ........... 309
4. The entwining of internal and external territoriality ..................... 315
5. Conclusion............................................................................. 323

Chapter 13
Shaping Sovereignty in the EU Legal Order: The Role of Core Values
Ton van den Brink, Michiel Luchtman and Miroslava Scholten.......... 325

Contributors ............................................................................. 335

Intersentia xiii
## ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACER</td>
<td>Agency for the Cooperation of Energy Regulators</td>
</tr>
<tr>
<td>ACM</td>
<td>Authorité Consument en Markt</td>
</tr>
<tr>
<td>AFSJ</td>
<td>Area of Freedom, Security and Justice</td>
</tr>
<tr>
<td>BEPG</td>
<td>Broad Economic Policy Guidelines</td>
</tr>
<tr>
<td>BFP</td>
<td>Business Finance Partnership</td>
</tr>
<tr>
<td>B2C</td>
<td>Businesses and Consumers</td>
</tr>
<tr>
<td>B2B</td>
<td>Contracts Between Businesses</td>
</tr>
<tr>
<td>BRP</td>
<td>Marseille vice squad</td>
</tr>
<tr>
<td>CEBS</td>
<td>Committee of European Banking Supervisors</td>
</tr>
<tr>
<td>CESEDA</td>
<td>Code of Entry and Residence of Aliens and the Right to Asylum</td>
</tr>
<tr>
<td>CESL</td>
<td>Common European Sales Law</td>
</tr>
<tr>
<td>CESR</td>
<td>Committee of European Securities Regulators</td>
</tr>
<tr>
<td>CEIOPS</td>
<td>Committee of European Insurance and Occupational Pensions Supervisors</td>
</tr>
<tr>
<td>CISG</td>
<td>UN Convention on Contracts for the International Sale of Goods</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>Commission</td>
<td>European Commission</td>
</tr>
<tr>
<td>CPVO</td>
<td>Community Plant Variety Office</td>
</tr>
<tr>
<td>CRD</td>
<td>Capital Requirements Directive</td>
</tr>
<tr>
<td>CRD package</td>
<td>Capital Requirements Directive and Capital Requirements Regulation</td>
</tr>
<tr>
<td>DCFR</td>
<td>Academic Draft Common Frame of Reference</td>
</tr>
<tr>
<td>EASA</td>
<td>European Aviation Safety Agency</td>
</tr>
<tr>
<td>EBA</td>
<td>European Banking Authority</td>
</tr>
<tr>
<td>ECB</td>
<td>European Central Bank</td>
</tr>
<tr>
<td>ECHA</td>
<td>European Chemicals Agency</td>
</tr>
<tr>
<td>ECN</td>
<td>European Competition Network</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on human rights</td>
</tr>
<tr>
<td>EDP</td>
<td>Excessive deficit procedure</td>
</tr>
<tr>
<td>EEA</td>
<td>European Economic Area</td>
</tr>
<tr>
<td>EEC</td>
<td>Treaty Establishing the European Community</td>
</tr>
<tr>
<td>EIO directive</td>
<td>Directive on the European Investigation Order</td>
</tr>
<tr>
<td>EIO</td>
<td>European Investigation Order</td>
</tr>
<tr>
<td>EIOPA</td>
<td>European Insurance and Occupational Pensions Authority</td>
</tr>
<tr>
<td>ETS</td>
<td>Emissions Trading System</td>
</tr>
</tbody>
</table>
Abbreviations

EJN  European Judicial Network
EMIP  Excessive Macroeconomic imbalances procedure
EMA  European Medicines Agency
EMU  European Monetary Union
EPPO  European Public Prosecutor’s Office
ESA  European Supervisory authorities
ESMA  European Securities and Markets Authority
ESRB  European Systemic Risk Board
ESFS  European System of Financial Supervisors
ESM  European Stability Mechanism
EU Charter  Charter of Fundamental Rights
EU  European Union
FATF  Financial Action Task Force
FIU  Financial Intelligence Units
FLS  Funding for Lending Scheme
FSAP  Financial Services Action Plan
FSR  Financial Services Regulators
GFCC  German Federal Constitutional Court
ISD  Investment Services Directive
ICAO  International Civil Aviation Organization
JHA  Justice and Home Affairs
JIRS  Specialised Inter-regional Courts
KPCS  Kimberley Process Certification Scheme
MiFID  Markets in Financial Instruments Directive
MiFID2  Second Markets in financial instruments
MTO  Medium-term budgetary objective
NCA  National Competition Authorities
OMC  Open Method of Coordination
OHIM  Office for Harmonisation in the Internal Market
SSMR  Single Supervisory Mechanism Regulation
SSM  Single Supervisory Mechanism
TEU  Treaty on the European Union
TFEU  Treaty on the functioning of the European Union
TSCG  Treaty on Stability, Coordination and Governance
UN  United Nations