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# *Alternatives to EU Membership and the Rational Imagination*

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*(unfinished very first draft not to be quoted)*

## **1. Introduction**

Any post-Brexit settlement will be negotiated and develop within an environment which will contain intense and disparate pressures both to align UK law with EU law and to assert its difference from it. Pressures for alignment include the *modi vivendi* which have constellated around the legal status quo, adoption of many EU regulatory standards is necessary for access not merely to the EU market but to many other markets around the world, the fear of possible retaliation by the EU, and a desire not to be seen as the most sexist, dirtiest, consumer unfriendly administration in Europe if one adopts less protective laws than those adopted not merely by the twenty seven EU States but by accession and EFTA States. If the countervailing list is less numerous, it is also very powerful. The referendum will be interpreted as an instruction to repeal unpopular EU laws. In addition, if Brussels law-making generated its own political economy of stakeholders eager to influence it, interests marginalised by this and with privileged access to British sites of law-making will now press not only for reform but to redress years of perceived disadvantage.

None of the settlements between the EU and various non-EU States – be these with Norway, Switzerland, Turkey or Canada – being circulated as off-the-peg alternatives were developed to deal with this strength of political competition. Nor were they designed to accommodate the size of the stakes at issue. The United Kingdom would be the second largest export market for the European Union after the United States and, by even the most conservative estimates, about one seventh of UK law is EU derived.<sup>1</sup> Most problematically, copying these arrangements does not address what any new settlement should be for. This might be heavily contested, but there must be some sense of what the United Kingdom should seek to derive from it.

The starting point for this essay is that whilst commitments will have to be made in any initial arrangement between the United Kingdom and the Union, this fissile environment and the uncertainty generated by the sheer range of interactions between the two territories, inevitably means that there will be some contingency to these. It is unrealistic to see British government

preferences, the politics surrounding it or the wider European environment as being sufficiently stable over the medium-term to prevent significant revisiting.

If mediating contestation surrounding change and commitments is, therefore, likely to be a central task of any settlement, focus should be directed to its institutional regime. Instead, turn to ensuring that the decision-making procedures for governing the settlement are seen as authoritative (input legitimacy) and that adopted measures mediate in a structured and adaptive manner the tensions surrounding securing the good or averting the bad. The latter goes not merely to the content of the measure but also to its binding qualities and how it addresses dissent (output legitimacy).

The interplay of these pressures is likely to be unpredictable, poorly mediated by party systems, and vulnerable to administrative rent-seeking, capture and crude populism.

All are off-the-peg models taken from existing Union arrangements. They foreclose consideration of arrangements not involving the European Union which might offer more attractive possibilities.

The central cleavage challenging input legitimacy is between managerial and adversarial politics. The fissile environment surrounding Brexit will both provide incentives for tensions to be managed and will incite political contestation. It will be argued, from regional experience elsewhere that the best route for managing these tensions may be selective participation in EU law-making. However, as such an arrangement would likely be administered, there is a danger that it would disenfranchise many 'outsider elites' who have an expectation to be involved in policy-making and of wider interest beyond that. The former can be met by a mechanism similar to that in NAFTA which would require the UK and EU to make commitments about the values and interests surrounding the arrangement NGOs and other stakeholders able to raise these with an independent commission who can seek that these be met. The latter could be met by the use of citizen initiatives to challenge application of the arrangement, in particular.

The central challenge facing output legitimacy is the management of multiplicity. Any arrangement must secure commitments, be adaptive, prevent mission creep and mediate the distributive and symbolic consequences of its application. This management of multiplicity raises questions about both the normative qualities of the settlement and the institutional machinery for enforcement. According to its primacy over national law realises only the first of these well. Multiplicity is better secured by an arrangement such as the EEA which requires public authorities to interpret national law in the light of the settlement. There remain the consequences of intended deviation, however, and the prize of Brexit is the possibility for this to occur. Institutionally, inter-State actions have worked extremely badly within regional arrangements whilst infringement proceedings by a central secretariat before a regional court have been highly effective, albeit insufficiently pluralised and transparent. What to do with a disliked judgment, however? The best might be to learn something from Ecuador and the Andean Court of Justice. These are referred to a political commission of national representatives who can reject the ruling but only if it gives its own interpretation.

## **2. The Suffocating European Embrace**

The sway of these centripetal pressures is best illustrated by the Swiss example. A study of all legislation adopted by the Swiss Parliament between 1990 and 2010 found that 32.74% of all Swiss legislation adopted by the Swiss parliament during that twenty year period was concerned with implementing EU law or aligning Swiss legislation with EU law.<sup>ii</sup> This is a significant amount, on a par with EU State parliaments. Even more telling, 73.1% of that sum was not concerned with meeting treaty obligations with the EU but with the unilateral bringing Swiss law into line with EU law. Furthermore, some of the cheer that might be brought for the 'Leave' camp from the Swiss example might not apply with the United Kingdom. The study found, therefore, that 41.3% of the measures were simply making Swiss law compatible with EU law. There was no copy-out of EU legislation but just ensuring that Swiss law did not breach it. A further 19%, moreover, involved just partial adaptation of Swiss law with some Swiss law complying with some EU law but not all of it. If this indicates quite some wiggle room for States wishing to adapt to the nearby presence of the Union, much of this derives from Switzerland not facing the same pressure of the legal status quo as the United Kingdom. It had to change laws to comply with Swiss law, and the concern is to minimise that compliance. The opposite occurs with the United Kingdom who has to change laws

if it wishes to deviate from EU law. The advantages of legal tradition and minimising disruption are simply not there in the British case nor is there a ready legal template upon which to fall.

### **3. Input Legitimacy: The Managerial versus Adversarial Politics Fault-line**

The best place to start with decision-making is to consider whether centralised procedures, involving a mix of EU and British officials, will be needed to manage any arrangement or whether this can be done through domestic decision-making procedures with central procedures only needed for dispute settlement. It might seem odd to leave the European Union simply to re-enter an arrangement where one is still governed by EU officials, albeit in a looser way. There are a number of reasons why collective decision-making might still happen. One is the power of the law. Article 50 TEU talks of a single agreement setting out the terms of withdrawal, and, implicitly, the terms of a post-exit settlement. Such an agreement will be something of a paper tiger if there are no institutions to monitor and govern it given the range and density of the issues likely to be covered by it. Another is collective reassurance. Each party will be looking for credible commitments over a range of issues in a context the traditional EU mechanisms are now absent. A treaty with no provision for monitoring will simply not give that. The final issue is collective problem-solving. A treaty with no collective decision-making may be too inflexible to deal with the evolution of issues of mutual concern, may become outdated, and may be insufficiently responsive to unanticipated events.

The most trailed possibility for collective decision-making is the European Economic Area. EFTA States can lobby the Commission in the formulation of any legislative proposal but, after that, EEA measures are aligned through a Joint Committee, compromising EFTA and EU officials with the enacted EU law, transposed into national law and subject to similar oversight through the EFTA Court and EFTA Supervisory Authority as with EU law by the Court of Justice and the Commission. Critics state that this allows EFTA States little voice whilst subjecting them to all the rigour of EEA law. This overstates tend to the case. EFTA States can delay alignment of measures where their 'constitutional requirements' require parliamentary approval. The phrase is interpreted widely so 24 measures were subject to this process in the six month period prior to 1 March 2016. Formally, implementation is still required but it appears that some room for mutual accommodation exists within this.

An arrangement with an expanded version of the 'constitutional requirements' doctrine might seem to allow for sufficient defection from EU law by the United Kingdom whilst allowing it some voice. Anything disliked would not be applied with agreement to minimise effects on EU interests, albeit that it would be understood that the non-application of EU legislation might result in a denial of access to the EU market in question for the product, service or type of undertaking regulated by that EU law. However, alone, it is unlikely to work for a number of reasons. It places the United Kingdom in a 'take it or leave it' situation when faced with imperfect but not egregious EU legislation. This can put strain on the 'constitutional requirements' doctrine as cases can be both to let the imperfections go so as not to disrupt relations or to reject any imperfection on the ground that it is not optimal for the United Kingdom. There is, thus, a danger of the procedure being used erratically. On this, if the European Union may be willing to tolerate some divergence by States with economies the size of Norway or Iceland, this indulgence might be less so for the United Kingdom whose actions will affect a far higher number of EU interests.

A twist to accommodate this could be provided by structures similar to those present in the Mercosur, the dominant regional trade arrangement in South America. Its decision-making structures produce a welter of legal binding measures which have produced difficulties for individual States where these touch on politically sensitive issues. A practice, therefore, developed of 'presidentialisation' whereby the presidents of the States meet to resolve legal impasses or problems with legal compliance. This role is far central to the operation of the Mercosur than is the case with the European Council in the European Union with the Presidencies often engaged with the fine detail of trade.<sup>iii</sup> Within a UK-European Union arrangement, the United Kingdom would disapply EU laws under a version of the 'constitutional requirements' doctrine. In instances where this was problematic, it would be resolved through meetings between the British Prime Minister, the Presidents of the European Council and the Commission and possibly the Head of Government holding the rotating Presidency. The costs of this act as a disincentive to overuse of the 'constitutional requirement' doctrine whilst giving the State the greatest opportunity to express voice about the costs of an EU measure and seek accommodation. There are however, disadvantages. Such a procedure might work well where parties have a certain parity, such as Argentina and Brazil. It has worked less well for smaller States with disputes between these State and the larger Mercosur States being the ones which end up in regional or international courts.<sup>iv</sup>

More pivotally, it concentrates power around a single figure, the Prime Minister, and this might be problematic where there is a swirl of competing domestic interests pulling in different ways.

This being so, it might be thought best to do away with or have minimal centralised processes. Advocates of this approach can point to the European Union-Switzerland agreements and the North American Free Trade Agreement (NAFTA). Neither has significant central machinery to govern trade, with the former loosely administered by a Joint Committee comprising Union and Swiss officials and the latter by the Free Trade Commission comprising high ranking officials from the three States party to it. Levels of trade between the both EU and Switzerland and the United States and Canada are very high. If Switzerland has enabled this trade through aligning many of its laws with EU law, the process is more uneven with Canada. If one can point to alignment of its food safety, automobile and climate change legislation with that of the United States and less than 20% of its industrial standards being home grown,<sup>v</sup> there are significant differences between it and American approaches in product liability, anti-trust, chemicals and pharmaceuticals law. If the Canadian example offers hope for those wishing a looser relationship with the Union, its starting place is different from that between the United Kingdom and the European Union. British legislation is already aligned with EU law so that deviating from it EU law might disrupt trade relations in a manner that would not take place in North American as it would be unsettling the legal basis for such relations. The Swiss example offers a more salutary lesson as to the limited responsiveness and adaptability of such arrangements. Every time, a new issue arises Switzerland has had to conclude a new treaty with the European Union, so that these now reach over two hundred. This is not unique to Switzerland with ASEAN and Closer Economic Relations between Australia and New Zealand following a similar pattern. This is a terrible ad hoc approach to policy making with some agreements taking years to secure and some never being secured. Many ASEAN States have sought a treaty on the rights of their workers in other ASEAN States, yet despite there being talk of it since 2004 and high levels of abuse, there is still no more than a Declaration on this.<sup>vi</sup> A more general indictment of this are the high levels of autonomous adaptation in Switzerland. The unilateral incorporation of EU law into Swiss law is an admission of all the fields where the Swiss would wish to be collectively engaged but cannot. Finally, following on from its experience with Switzerland, the European Union has intimated that it is no willing such arrangements in the future. To be sure, this might change but that very possibility indicated the unpredictability of such arrangements.

If neither structured defection from EU law nor decentralised decision-making work well, there is an intermediate position, selective participation, which might offer some advantages. The best example is the '-X' formula used within ASEAN. This allows for measures to be taken by a smaller number of States where not all ten ASEAN States can agree. Within a European context, this would involve the presentation of a Commission draft followed by a period of negotiation between all members of the Council plus the United Kingdom before the matter is formally presented to the Council and the Parliament for adoption. Prior to this, the United Kingdom would notify the Union whether it wished to participate in the measure or not, and the Union would have to indicate whether it wished the United Kingdom to participate. If this provides too much latitude to either side for non-participation, a modified version can be found in the 1996 Food Treaty between Australia and New Zealand, which requires proper reason giving for non-participation. This provides for harmonisation of food standards but New Zealand, as the smaller economy, can choose not to participate a large number of grounds, which include food safety, environmental and cultural ones.

With this, the United Kingdom would only be bound by EU legislation that it desired whilst it would the European Union a way to tie in the United Kingdom in areas of mutual advantage. Central disadvantages to selective participation are the complexity added to EU law-making and, no doubt, a fear amongst EU States that might foster a European Union à la carte. More challenging is the risk of a ratchet effect and EU law being less adaptable. For it would be difficult to apply the same arrangements to repeal or amend of the legislation. One party could give notice to the other that it no longer wishes to be bound by it, but, no doubt, there would have to be the possibility to allow the other to give its views and account of them to be taken as well as a notice period to be run. All this would act as disincentives to legal reform.

It is difficult to think how selective participation would deal with disorganised political debates, complex distributive questions or issues with a powerful iconography. It and the other arrangements are, furthermore, dominated by national administrative interests be this through central procedures being peopled by them; administrative negotiation and coordination of mutual commitments; or administrative alignment of laws with hegemonic norms. Policy drift and capture is, thus, a high risk particularly where, as with Brexit, issues might be divisive, stakes are high, and incentives strong for parties to secure influence. There is, moreover, a culture of insider stakeholders within administrative politics which might be at odds with the plurality of views



within the country. One has only to compare the relatively satisfied position of those consulted by the Foreign Office in the *Balance of Competences* review with the knife-edge opinion polls on UK membership at the time of writing.

All regional arrangements have struggled to secure political pluralism and contestation, accountability and transparency. An international parliamentary assembly involving the United Kingdom and the European Union would be implausible after Brexit. Centralised forums for stakeholders have also limited democratic clout. Brussels policy-making is dominated, albeit unevenly, by industrial and commercial interests with many of these having a strong interest in transnational rules. A similar pattern emerges when one looks at the pattern of stakeholders within the ASEAN and Mercosur.

Political pluralisation would inevitably, therefore, have to focus around domestic structures. Two reforms will be suggested: one to capture 'outsider elites', politically engaged parties marginalised by any administrative process, and the other to offer something to other parties whose relatively rare institutional engagement with politics leaves them further disenfranchised.

The best example of securing the position of 'outside elites' is the North American Agreement on Environment Cooperation (NAACE). A side-agreement on environment protection to NAFTA, it set up a separate institutional structure to allow environmental groups and interests marginalised by NAFTA to raise concerns about the environmental performance of the parties. In particular, it allows NGOs and others to complain to a central Secretariat if they believe that a State is not complying with the Agreement. Although this is formally a complaint about legal compliance, the obligations are very general, including commitments to continual improvement and effective enforcement of environmental laws. The Secretariat then prepares a factual record setting out whether there has been a breach: something it has pursued reasonably actively against all three NAFTA States. Such a structure within a Brexit scenario would involve setting out a series of commitments – be it on the environment, protection of SMEs, labour or consumer rights - which any party could take to a corresponding Commission if they believe that these were breached with the latter able to issue a recommendation requiring the Union and the United Kingdom to reconsider their position if they believed this to be the case. Such a process could provide opportunity structures to parties possibly marginalised by national administrative processes.

Such structures can also be hijacked by particular interests, and there is a danger of a ratchet effect where they are continually used to thicken commitments between the United Kingdom and the European Union. To counterbalance this drift towards centralisation, a second reform is proposed. There is a case for use of citizens' initiatives to make a case that a particular law should be disapplied. The advantage of citizen initiatives is that they are accessible to groups who might be side-lined by other procedures, and they act as a counterweight to procedures which militate towards centralisation. It would not be as simple as a law being struck down once a certain threshold had been reached, but it would be a case for a parliamentary committee to carry out an impact assessment, consult, and, if it agreed with the initiative, to fast-track reform or repeal of that law whilst taking care to minimise impacts on Union interests and citizens.

#### **4. Output Legitimacy: Managing Multiplicity**

Brexit may occur in a context characterised by a high number of parties relying on acquired rights and expectations that the current legal regime around which they have organised their lives will continue; mistrust between the United Kingdom and the European Union about the sincerity of their commitments to each other; and a vortex of pressures within the United Kingdom to enact 'Britain First' laws on subjects such as migration, fisheries, and agriculture and to deregulate in certain other fields, notably labour and environmental law.

Within such tumult, any arrangement, almost independently of its content, must provide both credible commitments between the UK and the EU and a modicum of legal certainty about what can be legally done to allow actors across the United Kingdom and wider afield to organise their lives. It must also deal with unanticipated consequences or uncertainties in the application of the arrangement. It may want to have processes to articulate (all or some of) the values set out in the arrangement. It must address the distributive consequences which arise from its application. It must guard both against competence creep. It must, finally, not generate decision traps whereby its norms prevent action but its decision-making processes are insufficiently supple to rectify the failures of the norm.

All the above is misleading in the sense that legal settlements have no agency of their own, but this style is used to convey the point that these questions go both to the style of normative effect

generated by these settlements and to the mechanisms established to resolve disputes and provide authoritative interpretation.

The style of normative effect goes, in particular, to the binding qualities of any settlement and measures adopted under it. There is a chimera that credible commitments and legal certainty can only be realised if the arrangement can be invoked in domestic courts and take precedence over national law. This is notwithstanding that courts may be poorly placed to realise the other goals set out and the grant of *a priori* precedence to one legal order over another independently of content seems both rigid and amoral. It is furthermore not clear how central primacy and direct invocation in national courts are to securing legal certainty or credible commitment. Only a very small proportion of EU law, probably less than 1%, is actually invoked in domestic courts with the vast majority setting out instructions to domestic and EU institutions and conferring few rights at all.<sup>vii</sup> The latter is only enforced through infringement proceedings in which the Commission takes the government before the Court of Justice with the vast majority settled before they reach the Court of Justice, with many settlements almost certainly not complying with EU law perfectly.<sup>viii</sup> In similar vein, there is no primacy of EEA law in Norway but in November 2015, it enjoyed a better transposition rate of EU Directives than any EU State.<sup>ix</sup> Conversely, Mercosur law enjoys primacy over national law and can be invoked in national courts, but there are perennial problems of enforceability. At the time of writing, Venezuela is not applying the most high profile of Mercosur rights, the right for Mercosur citizens to reside in other Mercosur States for two years. In attenuated fashion, CARICOM, the Caribbean common market, provides that, subject to domestic constitutional procedures, it shall provide legally binding rights and obligations for nationals of the Member States. There have, however, been regular problems with observance of its legal norms. Finally, there are regional arrangements which have no supporting judicial system but where compliance seems relatively good. NAFTA is the pre-eminent example. Canada and the United States do not allow NAFTA provisions to be invoked in courts against their laws. However, as they both passed extremely detailed legislation implementing NAFTA commitments, this seems to secure reasonably good levels of compliance. Conversely, ASEAN has no underpinning court system, and enforceability has been an issue there, most notably over securing compliance with commitments to abate the transboundary haze that blights the region from forest fires.

If any arrangement does not have to have primacy, it is worth considering what binding qualities it should have. Successful arrangements, be these NAFTA or the EEA, rely on a general

commitment to transpose their obligations into national law. Insofar as these are then protected by national law, there should be few problems. There are difficulties where national law deviates either intentionally or unintentionally from the arrangement. To guard against the latter, there is something to be said for a requirement that national law be interpreted in the light of the arrangement and its measures. This takes place within the EEA, and was how the United Kingdom approached its EU law obligations prior to 1989.<sup>x</sup> There is little evidence that this compromised legal certainty or mutual commitments.

The more challenging case is where the United Kingdom would wish to deviate from any commitments. There may, furthermore, be good reasons for this. The distributive consequences are egregious. There is a decision trap or the commitment offends some notion of political community. All these arguments should override those of legal certainty or *pacta sunt servanda*. Indeed, a point of Brexit would be that Parliament regains the possibility to make political judgments over these.

However, this raises institutional questions, namely what procedures should be available to monitor when intentional deviance is taking place – as it will often not be admitted – and what procedures should be put in place to protect the interests of EU citizens and others.

There is one monitoring procedure which has worked extremely badly. It is that where States monitor each other and disputes are resolved through an escalating scale of negotiation, mediation, conciliation and finally arbitration or litigation before an international court. These procedures do not work well simply because they are rarely deployed: be it in ASEAN, the ANDEAN Community, Caricom, Mercosur or NAFTA. There is, moreover, a reason for this. A regional arrangement sets up recurring contacts between States across a wide range of issues. It makes little sense to hijack these through litigation or arbitration over a single issue that may take years to resolve.

Monitoring has worked best, therefore, where there has been an independent prosecutor. Common to a number of international human rights arrangements, it is present in the ANDEAN Community, the European Union, and EEA. All allow a central secretariat to bring Member States to a central court. Proceedings against all States within all these organisations occur with significant regularity. There are good reasons. These institutions insulate the politics of output legitimacy where a different constellation of values and interests are at stake from those of input

legitimacy. There is little opportunity for logrolling or for States to fear reprisals because of assertive litigation. Furthermore, there are institutional incentives for the secretariat to pursue a relatively aggressive strategy for budget and reputation related reasons. As this develops, it builds, in turn, its own constituencies who turn to it when there is a sense of grievance.

The challenge with independent prosecutors, however, is that it is once again about administrative politics. All procedures raise concerns about the transparency and accountability of the process, and whether sufficiently plural interests and values are taken into account in the pursuit or non-pursuit of litigation and the negotiation of settlements. If this is seen as essentially a regulatory process than a diplomatic one (as it tends to be seen) then there are a number of ways of pluralising this. These include (as happens within the EU) requiring the Secretariat to consider any complaint brought by any party, and to give reasons for taking it up or not. At the moment, this requirement is weak in EU law, however, with neither reasons required to be adequate nor any recourse if the Commission just refuses to prosecute. There is a strong case, as in EU competition or State aids law, for compelling the Commission to prosecute unless it can provide details reasons why not. Even more unsettling is the lack of involvement of parties – be it the complainant or other affected parties – in any subsequent settlement. In this, there is a strong case for settlements being made public, and, before any settlement is formally adopted, hearings being taken by both the British and European Parliament along the ‘notice and comment’ lines adopted in the United States. If either rejects the settlement, the matter should go to court with both parliaments able to provide *amicus curiae* briefs.

What happens if the court or tribunal makes a ruling, and the United Kingdom wishes to reject it. This is surely the purpose of parliamentary sovereignty! An interesting innovation lies here in the ANDEAN Community. The latter accepts the principle of primacy of ANDEAN over national law, but the primacy of the ANDEAN Court. Its rulings can be referred to a Commission comprising representatives of each of the States who can make a ruling on what the law is, and seek settlement. There is a case for this. Any party deviating from the settlement should be required to carry out an impact assessment to show that it has minimised costs for the interests and citizens of the other. After that, there should be an attempt to reach political settlement. If that is not possible, it is surely right that the United Kingdom (or the EU) can deviate from the arrangement accepting that it may be subject to proportionate countermeasures.

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<sup>i</sup> Hc library

<sup>ii</sup> S. Jenni, 'Europeanization of Swiss Law-Making: Empirics and Rhetoric are Drifting Apart' (2014) 20 *Swiss Political Science Review* 208.

<sup>iii</sup> R. Malamud, 'Presidential Diplomacy and the Institutional Underpinnings of MERCOSUR: An Empirical Examination' (2005) 40 *Latin American Research Review* 138

<sup>iv</sup> Award 1/2005 *Retread Tyres from Uruguay*, Decision of 19 December 2005 (Mercosur Permanent Review Tribunal); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14; Award 1/2012 *Suspension of Paraguay from Mercosur Institutions*, Award of 21 July 2012.

<sup>v</sup> [http://www.scc.ca/sites/default/files/publications/SCC\\_AR\\_2015\\_ENG\\_Final\\_LR.pdf](http://www.scc.ca/sites/default/files/publications/SCC_AR_2015_ENG_Final_LR.pdf)

<sup>vi</sup> This was first, committed to in 2004 and is still no nearer a conclusion. 1.1.4 .Vientiane Action Programme, Adopted by the Heads of State/Government at the 10th ASEAN Summit, 29 November 2004.

<sup>vii</sup> Five directives accounted for 73% of all reported instances of directives being invoked in British courts in the first twenty five years of membership. D. Chalmers, 'The positioning of judicial politics in the United Kingdom' (2000) 23 *WEP* 169, 1979. In the five year period, 2007-2011, there was similarly about one ECJ judgment across the Union for every 35 single market legislative instruments. D. Chalmers and L. Barroso, 'What Van Gen den Loos stands for' (2014) 12 *I-CON* 105, 125.

<sup>viii</sup> The Court ruled on 44 infringement proceedings in 2014 of which the Commission won 41, Court of Justice of the European Union, *Annual Report 2014* (2015, OOPEC, Luxembourg) 107. Most of these cases originated from 2012. 1405 cases were entered into EU Pilot that year by the Commission, the procedure for resolution of issues where it thinks there is a case to answer, European Commission, *Monitoring the application of Union law: 2012 Annual Report*, COM (2013) 726, 7.

<sup>ix</sup> In May 2015, the EFTA Surveillance Authority recorded Norway as failing to transpose 0% of the Directives required of it against an EU average of 0.7% in the corresponding fields. EFTA States had 978 Directives to transpose against 1115 for the EU States. EFTA Surveillance Authority, *Internal Market Scoreboard No 36, EEA EFTA STATES of the European Economic Area* (2015, October 2015, EFTA Surveillance Authority, Brussels) 6-8.

<sup>x</sup> Case E-1/07 *A* [2007] EFTA Ct Rep 246.