On the Identification of an EU Legal Norm

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I. Introduction

The nature of governance in the European Union is a well-discussed subject. This article intends to explore the relationship between governance and law as a type of governance output. Governance in the EU has been described to be pluralistic and heterarchical, and the norms produced in the governance process may have effects approximating to law. However, such norms are usually regarded as 'soft law' as they do not emanate from certain institutional processes. This article argues that the nature of pluralistic governance sets the context for a wider rule of recognition for what may be considered as *legal* norms. However, the pluralistic governance by itself does not provide the rule of recognition. This paper therefore argues for the shaping of a *meta* principle or institution at the EU level to identify what may be an EU legal norm. Such a *meta* institution or rule would not only be independent of the political realities of EU governance, but could also serve as a bedrock of social legitimacy for the citizenry who are increasingly alienated from the complexity of EU governance.

Part II of this article will discuss briefly the dominant rule of recognition for *legal* norms in the EU. This rule is arguably based on accepted institutions for norm-creation in the EU. Part III then discusses how the boundaries of the rule of recognition may be challenged by pluralism in EU governance. Part IV then reviews selections in the copious literature on modern EU governance and suggests that it may be apt to regard some governance output that is not recognized as law, under the rule of recognition based on accepted centres for norm-creation, to be law. Legal pluralism seems to support such an argument. Part V discusses the theory of legal pluralism, but argues that legal pluralism does not provide any answers as to how a rule of recognition may be formulated to distinguish between governance output that should be treated as law and otherwise.

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As the context of pluralistic governance alone cannot serve as a rule of recognition for what may be considered a legal *norm,* Part VI argues that there is a need to fashion a meta-legal principle of norm identification in the EU to serve as a rule of recognition. The benefits of clarifying what may amount to EU legal norms are discussed in terms of how the transparency, legitimacy, and accountability of EU governance may be improved. Part VII then argues that Fuller's internal morality of law can provide a framework for such a rule, and explains why Fuller's theory is selected.

II. Accepted Institutions for Norm-Creation as Rule of Recognition

The European Community is a unique international order that may arguably be regarded as 'legalized'. The theory of legalization, in the context of international relations, predicts that states would participate in multilateral arrangements that would increasingly commit them to formulate clear and dependable norms, which would either become hard or soft law.[1] Under legalization, all norms are regarded as law, the hardness or softness of which only reflects certain attributes of the norm, and does not affect the intrinsic character of the norm as law. In sum, legalization describes the increasing reliance upon law by states to define the *order juridique* among themselves. The EU has been described as a highly legalized order,[2] and its governance has been dominated by the use of law. The EU is bound by its legalized commitment *inter se* by treaties, and much policy at the EU level has been implemented through the use of Community law. The institutions involved in creating Community law are established by the Treaties of Rome and Amsterdam, and law is given a status in the Community flanked by the doctrines of direct applicability or direct effect,[3] and the supremacy of Community law.[4] Governance by law in the EU is an important part of EU governance and the role of law in the EU is foundational and important. The governance by law reflects the importance of the rule of law as a cherished notion and common value held by the Community.[5]

The identification of what is an EU legal norm is not however so straightforward. The basic approach one would likely take is to say that an EU legal norm is one that proceeds from a recognized institutional process. There are recognized

[1] Judith Goldstein, Miles Kahler, Robert O'Keohane and Anne-Marie Slaughter, 'Introduction to Legalisation and World Politics' (2000) 54 International Organisation 385.

[2] Claire R Kelly, 'Realist Theory and Real Constraints' (2004) 44 Virginia Journal of International Law 545.

[3] Case 26/62 *NV Algemene Transport—en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

[4] *Commission v Belgium* Case 77/69 [1970] ECR 237; *Commission v Italy* Case 254/83 [1984] ECR 3395.

[5] Chris Patten, 'Globalisation and the Law' (2004) 1 European Human Rights Law Review 6.

institutional processes for legislation production and judicial precedent.[6] Under the Community Method of law-making, the law may be initiated by the Council of Ministers or European Commission. This law must then be adopted by the Council of Ministers (by qualified majority voting), and now, co-decided by the European Parliament.[7] The legislative instruments that may be utilized are: Regulations, which are directly binding and applicable to Member States; or Directives, which set out the substantive results that Member States cannot derogate from. Directives would only take effect in Member States upon the implementation of the Directives into national law, and thus, there may be room for Member States to provide for additional or other requirements that are not contained in the Directives.[8] The formulation and implementation of Community laws would also be underpinned by comitology procedures which compel the Commission to consult and discuss with the committees of experts within the Commission on particular subject areas regarding the formulation of substantive laws.[9] Further, the EU has recently adopted the Lamfalussy procedure in enacting laws in the area of securities regulation.[10] This procedure allows fast-track legislation to be made, by allowing the Commission to make supplementary legislation to primary Directives. Thus, the Commission's enactment of delegated legislation is a recently accepted institutional process for securities regulation in the EU.

It may be apt to say that the basic answer to how an EU legal norm may be identified is based on the institutional origins of the norm. The institutional origins consist of accepted *centres and processes* for norm-creation. The rule of recognition for a legal norm is based on a fact of enactment by a recognized body with legislative competence or judicial decisions emanating from a recognized judiciary.[11]

[6] Judicial precedent has been key to the development of Internal Market law on what constitutes barriers to freedom of movement of goods, services, and persons. For freedom of movement of goods, see *Cassis De Dijon* Case 120/78, *Rewe-Zentral AG V Bundesmonopolverwaltung für Branntwein* [1979] ECR 649; clarified by *Keck* and *Mithouard*, joined cases C-267–268/91 [1993] ECR I-6097. See generally, Arnull et al, *Wyatt and Dashwood's European Union Law* (London: Sweet & Maxwell 2003) at 321ff; For freedom of movement of services, see *Bosman* Case C-415/93 [1995] ECR I-4921; *Alpine Investments BV v Minister van Financien* Case C-384/93 [1995] ECR I-1141. See generally, Andenas and Roth (eds), *Services and Free Movement in EU Law* (Oxford: OUP 2002). Kenneth Armstrong and Simon Bulmer are also of the view that the European Court of Justice would provide the key to Single Market integration; see *Governance of the Single European Market* (Manchester: Manchester University Press 1998) at 265.

[7] Treaty of Amsterdam.

[8] See generally, Arnull et al, *Wyatt and Dashwood* (2003), op cit.

[9] See Andrea M Corcoran and Terry L Hart, 'The Regulation of Cross-Border Financial Services in the EU Internal Market' (2002), for an excellent summary of the law-making process in the EU.

[10] Financial Services: Building a Framework for Action, COM (1998) 625 1, and Communication on Implementing the Framework For Financial Markets: Action Plan, COM (1999) (232) (hereinafter known as the 'FSAP'), as well as its endorsement in the Final Report of the Committee of Wise Men on the Regulation of European Securities Markets (February 2001) (hereinafter known as the Lamfalussy Report). See Niamh Moloney, 'The Lamfalussy Legislative Model: A New Era for the EC Securities and Investment Services Regime' (2003) 52 (2) ICLQ 499; Gerhard Hertig and Ruben Lee, 'Four Predictions About the Future of EU Securities Regulation' (2003) 3(2) JCLS 359.

[11] HLA Hart, *The Concept of Law* (Oxford: Clarendon, 2nd edn 1994) at 95.

This is a common model for how state institutions produce law. States create law through legislative, executive, and judicial institutions. Institutional processes provide the basis for recognizing what is law by virtue of the pedigree of source.

However, EU governance is unique in nature. On the one end, pure supranational depictions of the EU have long been rejected, as the EU lacks super-state or federal characteristics[12] and its constitutionalism has often been in doubt.[13] On the other end, the EU is more than merely intergovernmentalism[14] as not only Member States drive policymaking, but supranational EU institutions have a considerable share of policymaking powers. EU governance also involves many actors at different levels, whether transnational or sub-national, and governance output ranges from hard law to procedures, policies, dialogue, and other forms of influences.[15] Therefore, is a rule of recognition that is based on accepted centres and processes for norm-creation, arguably derived from state-based conceptions, appropriate for the various governance outputs of the EU? State-based conceptions are easy to understand and accept. The ease with which we have accepted the traditional rule of recognition is now posing challenges in the context of the reality of EU governance.

It will be argued that the rule of recognition for an EU legal norm is inadequate, when it is challenged with the pluralism in EU governance. The pluralism in EU governance means that there are many centres of governance that may produce norm-like output. These centres of governance would unlikely be included in the traditional rule of recognition as sources for legal norms. Pluralism in EU governance may entail a reconceptualization of what governance may give rise to law, and how to recognize such governance output as law. (This may sound just like an endorsement of legal pluralist theories; however, I shall discuss legal pluralism and argue that legal pluralism does not provide sufficient solutions for widening the rule of recognition.)

First, it will be argued that even in the Community method, there is pluralism in governance. This is because EU governance that produces legislation in the form of Directives needs national transposition to be effective. Where Directives are concerned, there is a further layer of national governance involved in national transposition. I will describe this process as a process of 'multiversalism'. Multiversalism reflects pluralism in the nature of traditional EU governance, and already raises a query as to whether multiversal norms may be regarded as EU legal norms.

[12] J Weiler, *The Constitution of Europe—Do The New Clothes Have An Emperor And Other Essays on European Integration* (Cambridge: CUP 1999) at chapters 6 and 7. See also J Weiler, 'A Constitution for Europe? Some Hard Choices' in J Weiler, Iain Begg and John Peterson (eds), *Integration in an Expanding European Union—Reassessing the Fundamentals* (London: Blackwell Publishing 2004) at 17ff.

[13] See Jo Shaw, 'Process, Responsibility and Inclusion in EU Constitutionalism' (2003) 9(1) ELJ 43, and Antje Weiner, 'Editorial: The Evolving Norms of Constitutionalism' (2003) 9(1) ELJ 1.

[14] Paul Craig, 'The Nature of the Community: Integration, Democracy and Legitimacy' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford: OUP 1999).

[15] Part IV.

Next, the rule of recognition is arguably inadequate when it confronts other forms of dynamistic and pluralistic forms of governance in the EU. Such governance gives rise to governance output which may resemble law. But such governance output is likely not to be regarded as law, as the centres or processes of norm-creation are not recognized by the rule of recognition. However, the theory of legal pluralism urges the acceptance of these plural, and hitherto, 'unrecognized' centres and processes, as sources for norm-creation. This article will argue that although pluralism in governance brings to question the possible indications of norm-creation, pluralism in governance is itself insufficient to justify any unrecognized centre or process as norm-creating. The theory of legal pluralism is also unable to supply a precise rule of recognition. There is a need for a meta-legal principle of identification of *legal norms* in the EU, and this is consistent with the foundational value of law as a tool of constitutive and governance importance in the EU. The clarification of what may be a legal norm or otherwise would also help to improve transparency and accountability in governance, and the legitimacy of governance in the EU.

III. Pluralism in EU Governance—Challenging the Boundaries of the Rule of Recognition

A. Multiversal Norm-Creation and the Community Method

The traditional institutional processes that give rise to hard law in the EU, with particular reference to the enactment of Directives, create a phenomenon of pluralism in norm-creation. This phenomenon will be described as 'multiversalism', a term coined by this author. Multiversalism allows pluralism in the locations of norm-creation, entailing multiple sources of law for the same issue area.

EU legislation that is in the form of Directives has direct effect on Member States,[16] but needs to be implemented through national transposition. In implementing the Directives, all the responsible national agencies across the EU would be locations or centres for norm production. The nature of the Directive is that it is a legislative measure that gives rise to 25 other legislative measures applicable at a national level. Although this is in line with the proportionality requirement found in the Treaty of Rome, the Directive inherently gives rise to pluralism in norm-creation in hard law.[17]

National transposition gives rise to many sets of national laws emanating from the primary EU Directive, producing 'multiversal' norms of the same subject matter. 'Multiversal norms' is a term coined in this article by analogical reference

[16] Case 26/62 *NV Algemene Transport—en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

[17] Article 3b, Treaty Establishing the European Community.

to the idea of the 'multiverse' espoused by Sir Martin Rees.[18] Rees' conception of the universe is that there may not be one universe, but a series of parallel universes which we cannot detect, and this coheres with the parallel realities espoused by the theory of quantum mechanics, which to put most simplistically, is a theory that says that there could be parallel and opposite realities of a same event that is happening concurrently and what we know as 'fact' is only the experience of one of these realities.[19]

To use the idea of the multiverse analogically, in the area of EU Directives, Directives are regarded as law at EU level, but as these Directives need national transposition, where Member States are concerned, the actually applied and enforced law is the nationally transposed version, which may or may not be on all fours with the Directive, as long as the 'results' of the Directive are achieved. Thus, EU Directives produce many sets of parallel laws, all subsisting alongside each other and equally effective, as no one Member State's interpretation is binding on another Member State's courts. There is a certain superiority of the European Court's jurisprudence which could pronounce a Member State as not being compliant in transposition,[20] and the Court can enforce the Directives against Member States who fail to transpose them. Individuals whose rights have been affected by failure of transposition have a direct right to enforce against the Member State in the European Court.[21] However, these measures relate to failure to transpose, and the yardstick for judging transposition is that 'results' of Directives are achieved. The Court cannot dictate the shape of actual transposition of the Directives. Directives therefore by nature lend themselves to the proliferation of multiversal norms. The European Court's jurisprudence does not affect the ultimate parallelism of national laws, and there is no mechanism that allows the Court to assess national laws in comparison against each other. It is likely that each Member State would not produce exactly the same multiversal norms, as the textual law is likely to be adapted into national law, reflecting the colour and culture of national law.[22] Hence, multiversal norms seem to be a form of pluralistic governance co-opting EU institutions and national agencies. Hence, would multiversal norms be recognized as European law or national law?

It is arguable that multiversal norms are European legal norms. The EU is served by a common European Court of Justice which could provide common interpretation of EU laws under the preliminary reference procedure in Article 234 of the Treaty of Rome. The preliminary reference procedure allows a national

[18] Martin Rees, *Our Cosmic Habitat* (London: Weidenfield and Nicholson 2001).

[19] John Gribbin, *In Search of Schrodinger's Cat: Quantum Physics and Reality* (London: Bantam 1984).

[20] Article 226 of the Treaty of Rome.

[21] *Francovich v Italy* Cases C-6/90 & C-9/90 [1991] ECR I-5357.

[22] Ulrich Haltern, 'Integration Through Law' in Wiener and Diez (eds), *European Integration* (Oxford: OUP 2004) at 177ff. See also Vivian Grosswald Curran, 'Remembering Law in the Internationalising World' (2005) 34 Hofstra Law Review 93.

court uncertain of how to interpret a particular EU law to refer it to the Court for a preliminary ruling. Even though technically speaking, only that national court and its subordinates are bound by the ruling, a fellow court in another Member State faced with a similar issue may consider such interpretation very persuasive and regard such interpretation as a supranational precedent.[23] However, interpretive guidance from the European Court and individual non-transposition proceedings against Member States are piecemeal and ad hoc in nature and merely tweak rather than dictate the shape of national transposition. Thus, the substantive content of multiversal norms may still be highly dependant on national shaping.

Multiversal norms have emanated from a primary EU Directive, and can be interpreted by the European Court. However, they are applied nationally and interpreted by national courts as well. Multiversal norms may arguably have a dual nature of being both European and domestic. They are European in that their origins are traced to Community law, and they could be the subject of interpretation or enforcement by the European Court. However, they are equally subject to shaping by national agencies in transposition, by interpretation and enforcement in national courts, and by national agencies. This phenomenon is described by another commentator as a form of fragmentation in the sources of European law.[24]

Even in the Community method, the phenomenon of multiversalism produces norms that are ubiquitously European as well as national. This is due to the pluralism in EU governance that co-opts both EU institutions and national governments and agencies. It may be arguable that a rule of recognition appropriate for identifying EU legal norms has to be framed against the context of pluralistic governance in the EU. It has increasingly been observed that EU governance is supplied by a variety of transnational and sub-national actors engaged in a variety of processes.[25] Some of these actors have evolved into recognized centres for norm-creation, but many of them have not. The following discusses the expansion of the rule of recognition to encompass new centres and processes of norm-creation. However, this expansion arguably lags behind the expansion of pluralism in EU governance itself.

B. Pluralism in Sources of Law from Other Centres of Norm-Creation

Besides accepted institutional centres for norm-creation, other non-traditional centres for norm-creation have been developing in the EU. The White Paper

[23] Much writing has been proffered in the area of judicial dialogue, cross-fertilization of judicial precedent, and creation of a judicial community whether at EU or international level of more common values. See Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191.

[24] Grosswald Curran, 'Remembering Law' (2005), op cit.

[25] Part IV.

on Commission Organisation issued after the resignation of the Santer Commission[26] emphasized the need for the Commission to concentrate on developing core competencies such as policy development and enforcement, and to delegate more technical functions to agencies.[27] Thus, European agencies, in administering specific areas of competence such as food safety or drug licensing, would be producing administrative practices directly applicable to the ground level, and thus, a body of administrative norms is produced. One commentator discussed the role of the European Agency for Pharmaceuticals and concluded that as the agency has *ex ante* powers of approval and licensing, and the making of administrative decisions that entails a relatively significant exercise of power and discretion, such an agency is producing its own administrative law that would have to be complied with.[28] Such administrative law is practically binding and arguably amounts to law.

Another example of a source of regulatory norms in the EU is that of self-regulating technical standards. Technical standards such as product safety for different kinds of goods were not seen to be capable of harmonization via the legislative method in the EU. This is because legislation is regarded as too rigid, and there are already national and international bodies with detailed technical expertise formulating their own standards of acceptability. Thus, substantive technical standards are produced by bodies such as CEN[29] or CENELEC[30] and not EU agencies or lawmakers directly. However, legislative initiatives were taken to set up an agency[31] to test and verify those standards, as well as to provide a procedural infrastructure for the recognition of technical standards,[32] so as to achieve incremental convergence at the EU level. Thus, there are two layers of non-traditional norms that are produced here: the self-regulating standards that are practically adopted and complied with, and the administrative norms that give certification to these standards. Both sets of norms may not have less binding effect than what may be conventionally regarded as *legal* norms.

Another area that is rapidly developing is the area of EU securities regulation. Legislative reform has taken place recently over the last four years, culminating in the enactment of new Directives in securities regulation.[33] However, the

[26] *Designing Tomorrow's Commission: A Review of the Commission Organisation and Operations* (7 July 1999).

[27] A discussion can be found in P Craig, 'The Fall and Renewal of the Commission: Accountability, Contract and Administrative Organisation' (2000) 6(2) ELJ 98.

[28] See Sebastian Krapohl, 'Credible Commitment in Non-Independent Regulatory Agencies: A Comparative Analysis of the European Agencies for Pharmaceuticals and Foodstuffs' (2004) 10(5) ELJ 518.

[29] Comité Européen de Normalisation.

[30] Comité Européen de Normalisation Électrotechnique.

[31] The European Testing and Certification Organisation.

[32] Commission Communication 1985, discussed in Armstrong and Bulmer, *Governance* (1998), op cit at 151.

[33] The Prospectus Directive 2003/71/EC, Market Abuse Directive 2003/6/EC OJ L096, Transparency Directive 2004/109/EC OJ L390/38, Markets in Financial Instruments Directive 2004/39/EEC OJ L145/1.

Commission has appointed the Committee of European Securities Regulators ('CESR') to undertake regulatory convergence in the national transposition of the Directives. CESR has no enforcement powers against Member States, and no institutional status. CESR's governance is a type of networked governance, as its membership consists of all the national securities regulators, and its role is to facilitate dialogue and exchange between national regulators and propose convergent measures for national regulators to take. In its facilitative role however, CESR has issued guidelines and standards on how Directives should be interpreted and transposed, and seeks to provide influential governance across the EU in achieving 'regulatory convergence'.[34]

It has been recognized for some time in the study of international relations that governance of certain issue areas can be provided by networks of technical departments of various nation states. This was first espoused by David Mitrany[35] as neofunctionalism.[36] Neofunctionalism predicted the rise of substate actors such as functional departments carrying out functional regulation, and that networks of these would gradually overtake the making of international law by states. Although pure versions of neofunctionalism are no longer in vogue, it is still acknowledged that a significant amount of delegated policy making to internationally coordinated functional departments has created a form of transnational governance, by 'network' action.[37] The growth of such coordinated transnational governance produces legal or quasi-legal norms[38] which are mainly manifested in commercial law.[39]

CESR's governance output includes standards and guidelines that may become influential or practically binding. I will briefly illustrate with one example. Under the Market Abuse Directive, national regulators are tasked with the administration of detecting and enforcing against abusive practices such as insider dealing and market manipulation on securities markets. However, as some trading practices may resemble market manipulation, but take place for legitimate reasons, Member States are allowed to create exemptions. In order to foster 'regulatory convergence', CESR introduced procedural criteria for how Member States may

[34] CESR discusses its role in the Himalaya Report (25 October 2004), available at <http://www.cesr-eu.org>.

[35] David Mitrany, *The Functional Theory of Politics* xi–xx (1975).

[36] Douglas M. Johnston, 'Functionalism in the Theory of International Law' (1988) 26 Canadian Yearbook of International Law 3.

[37] Kal Raustiala, 'The Architecture of International Cooperation—Transgovernmental Networks and the Future of International Law' (2002) 43 Virginia Journal of International Law 1. See also Sol Picciotto, 'Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism' (1996–7) 17 Northwestern Journal of International Law and Business 1014.

[38] Jost Delbruck, 'Prospects for a World Internal Law? Legal Developments for a Changing International System' (2002) 9 Indiana Journal of Global Studies 401, in which is argued that legal pluralism would allow the recognition of sources of law from non-state sources such as functional networks.

[39] Anu Piilola, 'Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation' (2003) 39 Stanford Journal of International Law 207.

adopt 'Accepted Market Practices' in order to streamline the exemptions that Member States would put into place.[40] CESR acknowledges that this is a limited form of 'streamlining' as it does not guarantee uniform approaches in Member States. However, CESR was trying to institutionalize procedural rules to determine how the sub-layers of administrative norms should be made by national regulators, so that there is some consistency in administrative thought. In a way, such procedural norms may control to what extent the multiversal syndrome results from the Directives.

This guideline has been rather influential upon Member States as Member States seem to be applying the guideline in deciding what practices to exempt. Exempted practices are all notified to CESR as well. This form of governance exerted by CESR has created governance output in the form of an influential guideline. But CESR is not a recognized centre for norm-creation, and this guideline arguably does not amount to law. However, its influence may be approximate to law. This gives rise to the query whether governance output from other similar centres of governance in the EU *should* be regarded as law and how this recognition may be accorded. After all, governance by a disaggregation of governance units (including international, transnational, national institutions, and sub-national groups, referred to as a new form of 'networks') is proposed by an eminent political scientist to be the 'New World Order'.[41] Thus, there may be a need to reconceptualize what governance output means and what should amount to law.

IV. New Forms of Plural and Dynamistic Governance in the EU

In this Part, a brief survey of the increasingly plural and complex nature of EU governance will be discussed. It will be argued that, as plural locations for governance will generate governance output, pluralism in governance itself is the context which provides an opportunity to examine governance output and determine whether some forms of governance output should amount to law.

EU governance in general is increasingly 'metaconstitutional',[42] in that a centralized or hierarchical method of governance similar to state constitutionalism is inappropriate. Plural centres of power, tolerance for more uncertain outcomes, and an emphasis on procedural and dialogic aspects of governance such as the

[40] CESR, *Market Abuse Directive—First Set of CESR Guidance and Information on Common Operation of the Directive* (11 May 2005), available at <http://www.cesr-eu.org>.

[41] Anne-Marie Slaughter, *A New World Order* (New Jersey: Princeton University Press 2004).

[42] Neil Walker, 'Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe' in G de Búrca and J Scott (eds), *Constitutional Changes in the EU: From Uniformity to Flexibility?* (Oxford: Hart Publishing 2000) at 9.

duty to negotiate and listen, are increasingly taking root in the EU.[43] There may be various procedural linkages between multi-levels of governance in the EU. Many commentators largely agree that the EU is characterized by a form of multi-level governance, espoused by Blank, Marks, and Hooghe.[44] They argue that EU governance is a multi-level kind where many interactive layers of supranational, state, and sub-state actors play a part in constituting the governance of an issue area. Cohen and Sabel call the EU a 'deliberative polyarchy' which has a central framework in some respects, but engages in a deliberative type of learning or decision-making process that is highly negotiative and intergovernmental in nature.[45] This hierarchical form of governance is without clear hierarchy and there are many and different centres of power, producing constant dialogue, negotiation, and renegotiation,[46] and decentred processes of regulation and decision-making.[47] Commentators are however divided as to whether such pluralism in governance would remain or would move towards 'deliberative supranationalism' as espoused by Joerges, who believes that there would be a centralized form of EU governance in sight.[48] The dispersal of governance is arguably due to the impossibility of EU institutions having all the necessary resources to regulate, thus displacing national agencies.

In the governance of any particular issue area, a number of governance actors may be involved. Kenneth Armstrong and Simon Bulmer describe each issue area of EU attention as a 'regime of governance'. A regime of governance means an issue area that was first initiated for study by EU institutions and at an EU level, subsequently achieving legislation, the development of legal norms, and policy continuation, so that it becomes a 'governance regime' within the system of EU governance in general.[49] In each regime of governance, there may be various actors who may influence the governance in that area. For example, in the area of EU securities regulation, the EU institutions, national regulators, national governments, and a network of national regulators known as CESR ('Committee

[43] Walker, ibid, Jo Shaw, 'Constitutionalism and Flexibility in the EU—Developing a Relational Approach' in de Búrca and Scott (eds), *The Evolution*, op cit, at 331, and Johan P Olsen, 'Reforming' in Weiler, Begg and Peterson (eds), *Integration in an Expanding European Union—Reassessing the Fundamentals* (London: Blackwell Publishing 2004).

[44] G Marks, L Hooghe, and K Blank, 'European Integration from the 1980s—State-Centric vs Multi-Level Governance' (1996) 34(3) JCMS 341.

[45] 'Sovereignty and Solidarity: EU and the US' in Karl-Heinz Ladeur (ed), *Public Governance in the Age of Globalisation* (London: Ashgate 2004) at 157.

[46] Jo Shaw, 'Process, Responsibility and Inclusion', op cit. Damian Chalmers also emphasizes the dialogic aspects of EU governance as chiefly 'deliberative' in nature; see 'The Reconstitution of European Public Spheres' (2003) 9(2) ELJ 127.

[47] See generally Julia Black's writings: 'Constitutionalising Self-Regulation' (1996) 59 MLR 24, 'Decentring Regulation' in (2001) *Current Legal Problems* 103, 'Mapping the Contours of Contemporary Financial Services Regulation' (2002) 2(2) JCLS 253. See also Gunther Teubner, 'Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?' in Ladeur (ed), *Public Governance* (2004), op cit.

[48] See C Joerges, 'Deliberative Supranationalism—Two Defences' (2002) 8 (1) ELJ 133.

[49] Armstrong and Bulmer, *Governance* (1998), op cit at 56.

of European Securities Regulators') are all involved in determining the law and policy of EU securities regulation. In the area of administering Articles 81 and 82 of the Treaty of Rome dealing with the prohibition of anti-competitive practices in the EU, the European Commission used to centralize the administration upon itself, and it has recently co-opted other actors, ie, national regulators and courts to be involved as governance actors.[50] The dynamics between national agencies and EU level agencies is also a frequently discussed subject in multi-level governance.[51] Further, it is also acknowledged that public institutions are not the only ones in the 'regulatory space',[52] and that the inherent dispersal of resources and competencies allows governance to be undertaken by a multitude of actors.

The Treaty of Amsterdam endorsed the ideas of flexibility and differentiated integration within the EU, which means, the possibility of enhanced cooperation[53] between some Member States excluding others. This has produced some governance of a highly legalized nature in the form of the Schengen group, but may also be merely dialogic. The Treaty of Nice then endorsed the open-method of coordination of procedural learning and reflexive comparative methodologies in employment law development in the EU. The open-method of coordination ('OMC') is perhaps even a step further in terms of unique regulatory design, as it allows co-regulation,[54] which is the participation of networks of bureaucracies, organizations, and affected actors in the making of norms that would bind themselves. The OMC[55] also sees coordination at the EU level as being fluid and flexible, and allows Member States to experiment with 'tentative' levels of coordination, based on their perception of how this may affect national interests. The OMC avoids the rigidity of a legislative regime and cession of powers.[56]

[50] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, OJ 2003 L1/1 (hereinafter referred to as 'Regulation 1'); James S Venit, 'Brave New World: The Modernisation and Decentralisation of Enforcement under Articles 81 and 82 of the Treaty' (2003) 40 CMLR 545; Hans M Gilliams, 'Modernisation: From Policy to Practice' (2003) 28(4) ELR 451; James M Turner, 'Mega Mergers: Mega Problems' (2001) 17 American University Law Review 131, in which the benefits of centralization of merger law under the Competition Commission was briefly discussed.

[51] Termed as 'decentered integration'; see Edoardo Chiti, 'Decentralisation and Integration in Community Administration: A New Perspective on European Agencies' 2004 10(4) ELJ 402.

[52] Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (2001) Public Law 329.

[53] This is the idea of 'enhanced cooperation' between certain and not other Member States that are more ready to do so. See John Usher, 'Enhanced Cooperation or Flexibility in the Post-Nice Era' in Anthony Arnull and Daniel Wincott (eds), *Accountability and Legitimacy in the EU* (Oxford: OUP 2002).

[54] Anthony Arnull, 'What is Governance' (2001) 26(5) ELR 411.

[55] See J Scott and David M Trubek, 'Mind the Gap: Law and New Approaches to Governance in the EU' (2002) 8(1) ELJ 1. See also Colin Scott, 'The Governance of the EU: The Potential for Multi-Level Control' (2002) 8(1) ELJ 59. There is also some opinion that the OMC is more consistent with proportionality, see C Scott, above, and with subsidiarity, see Phil Sypris, 'Legitimising European Governance: Taking Subsidiarity Seriously with the Open Method of Coordination', EUI Working Paper 2002/10 (Florence: European University Institute 2002).

[56] Grainne de Búrca, 'The Constitutional Challenge of New Governance in the EU' (2003) 28(6) ELR 814–39 in which it is argued that some forms of rigidity may still be desired to prevent the

Governance as defined by the Commission's White Paper on EU Governance[57] means 'rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence'. Where a variety of actors may be involved in the governance of a 'regime of governance' as earlier described, different actors may influence the regime of governance in different ways. Such influence may produce linkages, dialogue, norms, standards, or processes, some of which could become persistent. Where the influence of governance achieves persistence,[58] patterns may be established in formal or semi-formal structures.[59] Where certain rules, patterns or norms achieve a de facto binding effect as an almost permanent and formal type of governance, perhaps such output may arguably be regarded as legal *norms*.[60]

A convenient dichotomy in law that has been recognized in recent years is the dichotomy between hard and soft law. Hard law, in the context of understanding what is a legal norm, means legal obligations which have been fashioned with precision and whose interpretation and adjudication is delegated to a third party, using defined processes.[61] Following from that, obligations or norms that do not totally attain the character of hard law would be characterized as soft law. It could be that these obligations or norms are not defined with sufficient precision, or that interpretation and adjudication are not delegated to a third party, or that such interpretation or adjudication is not carried out under a defined process. It is possible to fall short of any of the three requirements of hard law, and such other norms would be generally treated as soft law.

EU laws produced by recognized centres of norm-creation using institutional processes are recognized as *legal norms* and also hard law. However, the increasing pluralism in EU governance has allowed other sources for norm-creation to develop, some of which has been recognized, and it is arguable that the boundaries of recognized sources of law may be expanding. However, these *other* norms may be of a different nature from traditional hard law. These *other* norms have generally

OMC from being too fluid, such as premising the OMC upon a Charter of fundamental rights and instituting certain processes in which OMC should take place.

[57] COM 2001/428 final.

[58] Networks of political interests resolving common issues or problems may produce a relatively stable institution. See Robert D Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (New Jersey: Princeton University Press 1984); Anne-Marie Slaughter, *A New World Order* (2004), op cit, continues to affirm the influential governance aspects of networks.

[59] This may be described as processes of institutionalization, as 'normative patterns of behaviour to solve problems of cooperation in a social context, providing a more or less permanent platform for conflict resolution'; see C Mantzavinos, *Individuals, Institutions and Markets* (Cambridge: CUP 2001). Institutionalization may also occur through permanent aggregations of transaction cost, as posited in New Institutional Economics, see O Williamson, 'The Institutions of Governance' (1998) 88(2) American Economic Review 75.

[60] Christopher Harding, 'The Identity of EU Law: Mapping out the European Legal Space' (2000) 6(2) ELJ 128.

[61] Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) International Organisation 421.

been labelled as soft law. Soft law is however not treated as law.[62] It has been opined that soft law is used especially to provide experiments which may temporarily derogate from characteristics of uniformity that is traditionally achieved under hard law.[63] Soft law is arguably experimental in nature and is tended not to be regarded as permanent.[64] The nature and purposes of soft law may arguably justify not recognizing soft law as law. Although the hard/soft law dichotomy may provide some form of justification for limiting the rule of recognition to accepted institutional sources of hard law, the hard/soft dichotomy is not that stark. Legalization theorists, as discussed in Part II, view the hardness or softness of law along a spectrum, and do not think that they are that different in nature, although they may provide different effects. Further, as there are degrees of softness in law, some of which approximate closely to hardness, it would be difficult to dismiss certain types of soft law as clearly distinguishable from hard law, or as being merely experimental and transient. Finally, soft law may influence decisions and policy, and the potency of soft law may arguably match hard law in terms of equivalence.

I turn now to the popular theory of legal pluralism that seems to be able to provide a new basis for recognizing as law the governance output of non-recognized centres and processes, including soft law.

V. Legal Pluralism and Justifying Plural Locations for Norm-Creation

The theory of legal pluralism seems to justify the view that norms produced by diverse centres of governance should be regarded as law, as these norms may achieve practically influential effects no different from law. This would mean that much soft law in the EU may be regarded as equivalent in status to traditional hard law.

Under the theory of legal pluralism, it is posited that law may emanate from various sources, and not just state-mandated sources.[65] Santos envisages an

[62] See Case 310/85 *Deufil GmbH & Co KG v Commission* [1987] ECR 901, in which the Court discussed the status of Commission Communications, arguably a type of soft law. The Court states that the effect of such Communications is not law, but a policy solution to a particular situation. See Mads Andenas, 'The Financial Market and the Commission as Legislator' (1998) 19(4) Company Lawyer 98–103.

[63] Eric Philippart and Monika Sie Dhian Ho, 'Flexibility and Models of EU Governance' in de Búrca and Scott (eds), *Constitutional Change* (2000), op cit at 299, argue that pluralistic methods of governance such as enhanced cooperation would ultimately deal better with diversities. Bruno de Witte also argues that pluralistic methods of governance would not necessarily result in disintegration and regression. See ' "Old Flexibility": International Agreements Between Member States of the EU' in de Búrca and Scott (eds), op cit, at 31.

[64] Francis Snyder, 'Soft Law and the Institutional Practice in the European Community', EUI Working Paper No 93/5 (Florence: European University Institute 1993).

[65] A detailed examination of various forms of legal pluralism is in Warwick Tie, *Legal Pluralism: Toward a Multicultural Conception of Law* (Dartmouth: Ashgate 1999).

interaction or dialogue between different legal sources so that legality is itself a porous legal order, ie 'the non-determined interpenetration of regulatory mechanisms associated with the state and the popular classes is seen to produce a form of legality that is characterized by an acentric complex of social networks'.[66] This theory may provide the basis for acceptance of various locations of norm creation, especially locations such as inter-state networks and self-regulating standards. Legal pluralism tends to accept controversial sources of law such as *lex mercatoria* in private contract law in the EU,[67] as well as commercial law on a global level which appears to be emanating out of decentralized sources.[68]

Legal pluralism has its genesis in primarily non-state sources. These decentralized sources are non-state actors and in the words of Jost Delbruck, '[T]he new international legal order is complemented by the relatively autonomous development of legal regimes by non-state actors, ie by lawmaking beyond the state ("law without a state"). Thereby a pluralistic legal order develops that consists of the existing law, the partially transformed international law, and the (relatively) autonomous body of (transnational) law.'[69] Gunther Teubner also argues for a legal pluralism that is based on a variety of indeterminate sources of law.[70]

The acceptance of legal pluralism would provide an opportunity for the EU to openly accept as 'legal norms' various possibilities such as soft law and ubiquitously 'supranational' codes produced by networked governance. However, the danger of representing as law various normative-like orders is that no one is able to draw clearly the boundaries between law and other normative social orders not law.[71]

For example, a network may produce a procedure for how meetings are to be called. Should such a procedure be regarded as 'law' under legal pluralism? If such a procedure is 'law', how should it be enforced, and how should it be amended? It is arguably inappropriate to regard all 'governance' outputs of diverse centres

[66] Boaventura de Sousa Santos, 'Law and Community: The Changing Nature of State Power in Late Capitalism' 8 International Journal of Sociology of Law 379–97.

[67] Mel Kenny, 'Globalisation, Interlegality and Europeanised Contract Law' (2003) 21 Pennsylvania State International Law Review 569.

[68] Klaus Peter-Berger, 'The New Law Merchant and the Global Market: A 21st Century View of Transnational Commercial Law' (2000) 3(4) International Arbitration Law Review 91.

[69] 'Prospects for a World (Internal) Law? Legal Developments in a Changing International System'(2002) at 430.

[70] Gunther Teubner, 'Neo-spontanes Recht und duale Sozialverfassungen in der Weltgesellschaft?', in Dieter Simon and Manfred Weiss (eds), *Zur Autonomie des Individuums—Liber amicorum für Spiros Simitis* (Baden-Baden: 2000) 441, quoted in Klaus Gunther, 'Legal Pluralism and the Universal Code of Legality: Globalisation as a Problem of Legal Theory' (2003), accessed through the New York University School of Law website hosting papers as part of the reading program, at <http://www.law.nyu.edu/clppt/program2003/readings/gunther.pdf>.

[71] William Twining, 'Reviving General Jurisprudence' in M Likoksy (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (London: Butterworths 2002) at 4. See also Gunther Teubner, *Global Law Without A State* (Aldershot: Dartmouth 1997) in which it is argued that the boundaries between law and other social orders not law are evolving dependent on the pressures law exerts on society and vice versa.

of governance as law. However, how does one draw the difference between a governance output that should be regarded as law and a governance output that is not law?

Simon Roberts is wary of the legal pluralism approach and prefers a more certain framework of legality that is associated with the governing order of a state. He is of the view that law is associated with discrete features and institutions including adjudication and enforcement.[72] The question of definition of law in legal pluralism has eluded many pluralists. Even though one can accept that there is always plurality in a social science and law is no exception, one should perhaps be less quick in classifying as law, social orders that are not immediately associated with discrete institutions of government-like quality. Thus, legal pluralism may arguably be inherently incapable of giving rise to a 'rule of recognition' to provide for what may be regarded as law. A commentator also argues alternatively that legal pluralism may be regarded as capable of giving rise to many and conflicting rules of recognition, but this is regrettable, and a rule of recognition should be streamlined in order to provide non-conflicting law for citizens.[73]

Pluralism in governance is indicative of possibilities in treating some governance output as law. But governance is often due to the complex processes of political bargaining, and some of these processes may lack sufficient stability to produce 'law'. Thus, how do we distinguish between governance output that ought to be regarded as *legal norms* and governance output that ought not to be so regarded? This article argues that there should be a meta-legal principle of norm identification in the EU. This meta-legal principle would transcend the hard/soft dichotomy of law. It is arguable that the hard/soft dichotomy should move on from the embryonic days of soft law. The dichotomy may have been a useful way to describe norms that do not quite possess all of the traditional characteristics of hard law, but nevertheless may be useful and influential. We perhaps should move on from these first characterizations of soft law, as soft law has moved on to develop into a range of possibilities. This article argues that we need to develop a rule of recognition that can properly hold to account governance centres that produce output of influence, which may approximate towards the effects of what we traditionally understand as hard law. This is discussed in Part VI. It is important to reconcile the pluralism in EU governance with the role of law which is a foundational value in the EU. Clarity in norm identification also improves transparency, accountability, and legitimacy in EU governance.

[72] 'After Government? On Representing Law Without A State' (2005) 68 MLR 1.

[73] NW Barber, 'Legal Pluralism and the European Union' (2006) 12(3) ELJ 306. But see Marc Amstutz, 'In-Between World: *Marleasing* and the Emergence of Interlegality in Legal Reasoning' (2005) 11(6) ELJ 766 where it is argued that if one accepts that pluralism in sources of law can exist, then the identification of what actually amounts to a legal norm can be achieved through time, as these norms can be adopted by social consciousness through an evolutionary process of trial and error and reflexive learning.

VI. The Benefits of Clarifying Legal Norms in the EU

In this Part it will be argued that developing a rule of recognition to identify EU legal norms in the diverse governance output of the EU is important for the improvement of transparency of governance, accountability, and legitimacy.

Much of the governance output in the multi-level framework of interaction, dialogue, and policy may be opaque to citizenry that are not 'insiders'. The opaque governance alienates citizenry, and increases citizenry dissatisfaction with the governance.[74] This may explain the French and Dutch rejections of the draft Constitutional Treaty in referendums held in the summer of 2005. Opaque governance also exacerbates the existence of democratic deficit in the EU. Democratic deficit refers to the inability of citizenry to exercise the ultimate sanction: removing EU governance actors by voting. If citizens cannot vote governance actors out, and cannot keep up with what effects governance provides, double frustration entails. There is arguably a need to improve transparency in the governance process, so that citizens may be able to know what the objectives and effects of governance are. In terms of transparency of the governance process, there is a need to improve the observability of governance processes.

Ladeur thinks that the 'observability' of governance actors such as EU agencies and networks is key to its democratic quotient. Such observability should be achieved *inter se* among governance actors, so that they may act as checks and balances vis-à-vis each other, and should also refer to openness and participation by the public.[75] Cohen and Sabel further suggest that EU institutions should inform the public, engage the public in meaningful debate, and allow public feedback.[76]

[74] This phenomenon is described as uncertainty aversion, ie people tend to avoid uncertainty where the information is scarce, and this may explain why the French and Dutch referendums rejected the draft EU Constitutional Treaty in 2005, as the cumulation of opaque governance has caused a loss of confidence to go ahead. See some discussion in Keigo Inukai and Taiki Takahashi, 'Distinct neuropsychological processes may mediate decision-making under uncertainty with known and unknown probability in gain and loss frames' (2006) (Article in Press, Medical Hypotheses), available online from *ScienceDirect.* See also Larry G Epstein, 'A Definition of Uncertainty Aversion' (1999) 66(3) Rev of Econ Stud 579.

[75] Karl-Heinz Ladeur, 'Globalisation and Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?' in Ladeur (ed), *Public Governance* (2004), op cit, at 89.

[76] Renaud Dehousse, 'European Governance in Search of Legitimacy: The Need for A Process-based Approach' in O de Schutter, N Lebessis, and J Paterson (eds), *Governance in the EU* (Office for the Official Publications of the EC 2001). See also 'Sovereignty and Solidarity' in Ladeur (ed), *Public Governance* (2004), op cit. See also Flinders, 'Distributed Public Governance in the EU' (2004) 11(3) Journal of European Public Policy 520. See also Johan P Olsen, 'Reforming' in Weiler, Begg, and Peterson (eds), *Integration* (2004), op cit, which discusses the process-based approach as a form of constitutionalism in the EU.

Transparency by informing the public and allowing public participation is a type of 'input' democracy,[77] but one that has often been criticized as 'diffuse'[78] as the appearance of public participation can be created, but the ultimate calling to account of governance actors is not exactly available. It may be argued that transparency should not only allow the public to observe the governance process, it should also allow the public to understand and question the governance output, and the effects of such output. Where such effects may be influential and may affect rights and obligations, it is apt to consider the issue of liability and citizens' rights, especially with respect to judicial recourse.

This article's central thesis of the need to fashion a meta-legal principle for norm identification in the EU, is inextricably linked to the purposes such an exercise may achieve. A corollary of the expansion of legal norms in the EU is that the effects of such legal norms may be tested and examined, especially by the European Court. In this regard, there are a few issues to consider, namely, liability on the part of Member States, Community and governance centres, judicial review, and *locus standi*.

A. Liability Issues

The expansion of legal norms in the EU may result in expanded state liability. The European Court's willingness to enforce state liability at the request of individuals is evident in case law. In *Francovich,*[79] the Court allowed individuals whose rights have been affected by the non-transposition of Directives to sue for compensation under state liability. This was followed by *Factortame*[80] which clarified what conditions may give rise to state liability, and extended state liability to breaches of community law by executive organs of the state. *Köbler v Austria*[81] then extended state liability to cover breaches of EU law by the judiciary. State liability may also cover breaches of Community law that are indirectly effective.[82] The willingness of the European Court to find state liability may arguably give rise to more situations of state liability, if a rule of recognition came into place to recognize more norms as EU law.[83] Further, as states may not have regarded

[77] Peter Dryberg, 'Accountability and Legitimacy: What is the Contribution of Transparency?' in Anthony Arnull and Daniel Wincott (eds), *Accountability and Legitimacy* (2004), op cit.

[78] Paul Magnette, Christian Lequesne, Nicolas Jabko, and Olivier Costa, 'Diffuse Democracy in the EU' (2003) 10 Journal of European Public Policy 834.

[79] At n 21.

[80] Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany and ex p Factortame Ltd* [1996] ECR I-1029.

[81] Case C-224/01 *Gerhard Köbler v Austria* [2003] ECR I-10239.

[82] *Deutscher Handballbund eV v Maros Kolpak* Case C-438/00 [2003] ECR I-4135. See comment, (2004) 10 Columbia Journal of European Law 379.

[83] However, there are issues that may occur in bringing a state liability claim that restricts the proceeding of the claim, such as claiming against the right defendant, see G Anagnostaras, 'The Allocation of Responsibility in State Liability Actions: A Modern Gordian Knot?' (2001) 26 ELR 139; Roy W Davis, 'Liability for a Breach of Community Law: Some Reflections on the Question

some governance output as law, there would arguably have been no opportunity for states to give effect to the 'law'. Hence, litigants may bypass the issue of direct effect and go straight for state liability. A number of commentators have warned against excessive use of state liability and encouraged upholding the operation of direct effect to allow citizens to enforce their rights under Community law.[84]

However, if there is a meta-legal principle of identification of norms in place, it should not be assumed that such a principle has no 'up-front' application. As will be discussed, the meta-legal principle is not only capable of *ex post* judicial pronouncement. Thus, states may give effect to these norms before an issue of state liability needs to arise. Further, not all governance output may be recognized as law that is directly effective, as certain conditions of 'unconditionality' and completeness in the obligations created must exist for direct effect.[85] Hence, citizens may have to rely on state liability to test the enforcement of their perceived rights. Finally, the accessibility of judicial enforcement for citizens, whether in direct effect or state liability, is argued to be extremely important in reinforcing European citizenship,[86] especially in these times where citizens feel more alienated from EU governance than ever before. Professor Kostakopoulou has also discussed in a seminal article the important relationship between citizens and the European Court in the institutional development of the idea of 'European citizenship'.[87]

As to the issue of Community liability and the liability of the governance centre in question, would the recognition of legal norms created by governance centres result in their liability being similar to Community liability under Article 235 of the EC Treaty? Before any liability would ensue for governance centres such as networks, such governance centres need to have legal personality to sue and be sued. Under international law, supranational type institutions may gain international legal personalities other than States.[88] However, transnational groups and sub-state actors have not been so elevated. A governance centre whose personality and identity may be morphing and relatively unstable, may inherently

of Who to Sue and the Concept of the "State" ' (2006) 31(1) ELR 69. For procedural issues, see also T Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down?' (2001) 38 CMLR 301.

[84] Erika M Szyszczak, 'Making Europe More Relevant to Its Citizens: Effective Judicial Process' (1996) 21(5) ELR 351; Sacha Prechal, 'Member State Liability and Direct Effect: What's The Difference After All?' (2006) 17(2) European Business Law Review 229.

[85] *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1; *Reyners v Belgian State* Case 2/74 [1974] ECR 631.

[86] Szyszczak, op cit.

[87] Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 MLR 233.

[88] Interpretation of the Agreement of 25 March 1991 Between the WHO and Egypt, Advisory Opinion, 1980 ICJ 73, 89–90 (Dec 20); Ruth Wedgwood, 'Legal Personality and the Role of Non-Governmental Organizations and Non-State Political Entities in the United Nations System', in Rainer Hofmann (ed), *Non-State Actors As New Subjects Of International Law* (Duncker & Humblot 1998) at 23.

not be capable of being regarded as a legal personality. Further, conferring legal personality status on governance centres attracts the consequence of them being able to sue. This ability to sue may be used as strategic leverage in political relations between governance centres, Member States, and EU institutions. It is arguably inadvisable to confer legal personality on governance centres. Although this means that governance centres would not be subject to liability similar to Community liability under Article 235, it is arguable that the more important issue is the availability of judicial review that will be discussed below. Before proceeding to judicial review, I would like to briefly address Community liability.

The expansion of legal norms may expand Community liability, as what is 'unlawful' for Community institutions and its actors may be expanded. However, as provided in *New Europe Consulting v Commission,*[89] the claimant must prove real and certain damage and a direct causal link between the conduct of the institution and the alleged damage.[90] These requirements act as forms of control over actions that may not have merit, as damage must be quantifiable,[91] and the chain of causation must not be broken by intervening events or the behaviour of the applicant himself.[92] It may be queried whether the Community may suffer vicarious liability for governance centres who cannot be sued for liability. A commentator argued that in proceedings against Member States, the state should be vicariously liable for public bodies within the state, and this rule would make it easier for identifying the state as defendant in the European Court.[93] Can an analogical argument be made to impose vicarious liability on the Community for acts of governance centres? The analogy is arguably much weaker as the Community lacks state-like characteristics such as the indivisibility of the state, which featured as a strong argument for state vicarious liability. Governance centres may be connected to the Community in varying degrees of closeness or accountability. Further, in pluralistic governance, the central tenet is the diffusion of governance, and hence, it would be inappropriate to use vicarious liability concepts which import vertical responsibility and hierarchy into defining Community relations with governance centres.

Thus, an expansion of legal norms may widen the possibilities for state liability and Community liability under the current framework, but it is unlikely to create new liabilities for governance centres, and the endowment of legal personality on governance centres is probably inadvisable and unlikely. However, it may nevertheless be important for the legal norms produced by governance centres to be subject to judicial review. This may create an anomalous situation where the governance centre is not a legal personality, but its output is subject to

[89] Case T-231/97 [1999] 2 CMLR 1452.
[90] See also Jurgen Schwarze, *European Administrative Law* (Baden Baden: Sweet and Maxwell Rep 1995) at 508.
[91] Case T-277/97 *Ismeri Europa Srl v Court of Auditors* (15 June 1999) at para 67.
[92] Case 169/73 *Compagnie Continentale v Council* [1975] ECR 117.
[93] Roy W Davis, 'Liability' (2006), op cit.

judicial review. It is submitted that a 'limited and conditional personality' may be adopted to define the status of governance centres. That is to say, if the Court finds, by application of the meta-legal principle of norm identification, that some governance output amounts to law, then the condition precedent for giving limited personality to the governance centre exists, for the purpose of reviewing the legality of such law.

B. Judicial Review

A phenomenal amount of governance output lies in the 'soft law' region, such as CESR's guidelines as discussed in Part II. The soft law may be de facto influential on policy and may affect citizenry in their rights and obligations. If soft law remains as soft law, governance actors that produce such soft law are under no obligation to account for the production of soft law, and the effects of the soft law cannot be examined independently by judicial review. It is arguably insufficient for the amelioration of citizenry alienation to rely merely on the voluntary efforts of certain governance agencies to set up participation channels.

However, it may be argued that the Court should not be empowered with a meta-legal principle of norm identification in order to characterize certain governance actions as law. First, the Court's judicial review may impede the work of governance by causing delays and unnecessary intrusions. But it could be counter-argued that much EU governance takes place in a slow and gradual process anyway,[94] and input from judicial review may be regarded as part of the shaping process that EU governance undergoes. Next, it could be argued that as governance actions may change, the flexibility to change may be unnecessarily impeded by judicial review intrusion. However, it could be counter-argued that the amenability to change is not sufficient to avoid characterization as law for governance output that has the effects of law. Law is itself amenable to change. Finally, it may be argued that allowing the court to review governance output and characterize some effects as law would open the floodgates of litigation to test the status of various governance output.

The existing framework of judicial review is a rather restricted one. Article 230 of the EC Treaty provides for specific personalities who may be subject to review, and thus, a widening of the list to include 'limited and conditional' personalities such as governance centres, *in relation to* legal output, may require a Treaty amendment.[95] Then again, the proposed meta-legal rule for norm identification would arguably need a Treaty amendment as well. Next, the rules on *locus standi*

[94] The Lamfalussy report has remarked on the slowness of EU governance in securities regulation in general, at 13ff.

[95] The European Court's domain of judicial review arguably does not extend to all governance centres, as the subjects of judicial review are identified specifically. See Consolidated Version of the Treaty Establishing the European Community, 24 December 2002, OJ (C 325) 33 (2002) [hereinafter EC Treaty]. Article 224 of the Consolidated Version of the EC Treaty provides: 'Unless the

have been criticized for being very restrictive, as they arguably do not allow a private litigant to challenge laws as such, unless the effect of the law is a 'decision'[96] of 'direct and individual' concern to the applicant.[97] In order to allow private litigants to bring legal norms of governance centres for review, it is submitted that the *locus standi* rules would need reform, so that laws can be challenged.[98] A safeguard that could be in place is the requirement of sufficient interest in the review proceedings, and that may help ensure that floodgates of frivolous litigation would not occur.[99] The present framework for judicial review is arguably too restrictive, and reform towards an expanded access to the Court has been more fervently argued for than warnings regarding floodgates of litigation.

It is submitted that European citizens need clarification on what may be identified as legal norms in the EU, and the governance centres producing the norms must be capable of being called to account. The independent review of such governance actors' legal output may arguably be important to establish satisfactory accountability to citizens and improve the legitimacy of EU governance. Treaty amendments to those effects may arguably be acceptable to citizens in the current climate of rebuilding trust in EU governance.

In the next Part, it will be argued that a meta-legal principle of norm-identification may be fashioned after Fuller's internal morality of law, to give recognition to governance output that may amount to law.

VII. A Meta-Legal Principle of Norm-Identification

A meta-legal principle of norm identification in the EU should arguably move away from accepted *centres and processes* as forming the basis of the rule of recognition. This is because such a rule is arguably too state-based and limited. An

Statute of the Court of Justice provides otherwise, the provisions of this Treaty relating to the Court of Justice shall apply to the Court of First Instance.'

[96] A decision is specific and limited to a number of addressees, and not of general application like law. See *Plaumann v Commission* Case 25/62 [1963] ECR 95.

[97] 'Direct concern' means that the effect of the measure would be reasonably foreseen at its inception, and not resulting from intervening acts, see *Les Verts v Parliament* Case 294/83 [1986] ECR 1339. Individual concern means that the measure must relate to a specific group differentiated from the general, see *Danielson v Commission* Case T-219/95r [1995] ECR II 305–1.

[98] Much has been written on this to encourage expansion of the restricted *locus* rules. See H Rasmussen, 'Why is Article 173 Interpreted Against Private Plaintiffs?' (1980) 5 ELR 112; C Harding, 'The Private Interest in Challenging Community Action' (1980) 5 ELR 354; R Greaves, 'Locus Standi under Art 173 EEC when Seeking Annulment of a Regulation' (1986) 11 ELR 119; C Harlow, 'Towards a Theory of Access for the European Court of Justice' (1992) 12 Yearbook of European Law 213; Arnull et al, *Wyatt and Dashwood* (2003) op cit, at 237.

[99] In an article dealing with expanding judicial review before the Court of First Instance it is argued that arguments of floodgate fears are not well-founded. See Marie-Pierre Granger, 'Towards A Liberalisation Of Standing Conditions For Individuals Seeking Judicial Review Of Community Acts: *Je´Go-Que´Re´ Et Cie SA v Commission and Unio´N de Pequeños Agricultores v Council*' (2003) 66 MLR 124.

appropriate rule of recognition should arguably be capable of recognizing that there is a variety of governance methods and processes, and such processes and methods are liable to change. A rule that needs to rely on the acceptance of certain processes or methods as being capable of norm-creation may become outpaced very quickly. It is suggested that the rule of recognition should provide a framework that recognizes as law such governance output that manifests certain characteristics recognized in the framework. In working out the list of these characteristics, it is suggested that one should turn to Fuller's work on a procedural framework for identifying law.[100] Fuller's work provides a list of characteristics for identifying law, and this list is capable of relative stability and permanence.

Fuller himself provides eight features in his list for the internal morality of law: 1) the quality of generality of application, 2) the fact of promulgation, 3) rules dealing with retroactivity of laws, 4) sufficient clarity, 5) avoidance of contradictions, 6) not requiring the impossible, 7) sufficient constancy of the law through time, and 8) congruence between official action and declared rule.[101] Fuller's list is the starting point for the fashioning of a meta-legal principle for the identification of legal norms in the diverse governance output in the EU. If the EU arrives at a list of procedural principles in the identification of 'EU legal norms' which apply in every issue area, and to every governance centre, that would not only identify important norms that have the effect of law in an issue area, but this meta-legal principle could become a procedural institution akin to a unique EU 'rule of law', and could serve as a way to reinforce social acceptance and legitimacy for the complex EU governance.

In considering Fuller's list, it is suggested that the quality of generality of application be interpreted as generality of application to a regime of governance concerned, as norms produced for one regime of governance may not be 'generally applicable' to other regimes of governance, and may even be contradictory to the norms of other regimes. In differentiated integration, the quality of 'general application' should be interpreted as generally applicable to the regime of governance undertaken by the group involved in enhanced cooperation. So, very specific or selective measures may be excluded from being regarded as 'legal output'. Next, the fact of promulgation is one that this article suggests should not be regarded as a condition precedent to identifying legal output, but should be a requirement imposed when such legal output has been identified. Governance centres are unlikely to have formal processes of 'promulgation', and perhaps only simple publication may be expected. If publication is used as a condition precedent for identifying law, governance centres may simply not publish and become more opaque, so that its output may not be reviewed. This will be counterproductive to the suggestions made in this article. Thus, Fuller's condition of 'fact of promulgation' may be interpreted as 'capable of being published', and the fact of

[100] See Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press 1964).
[101] Ibid at ch 2.

publication itself could, by extension, be a requirement imposed on the governance centre concerned.

The other elements on Fuller's list pertain to the substantive quality of the legal output, and the administrative capability of applying the legal norms. This article intends to try and apply Fuller's list to a specific type of governance output, in order to persuade of the potential of Fuller's list to serve as a rule of recognition. The governance output in question is the Committee of European Securities Regulators' guidelines and standards for regulatory convergence in EU securities law. These guidelines and standards are at best soft law as CESR does not have institutional status to be recognized as producing law. First, CESR's guidelines for regulatory convergence are defined in the Himalaya Report of 25 October 2004 (which sets out the agenda of regulatory convergence and the mechanisms of convergence), and are applicable to all Member States. Specific convergence guidelines on substantive law are capable of being generally applicable. For example, CESR Standard No 1 on Financial Information[102] deals with the use of international accounting standards based on the antecedent EU Regulation.[103] Other standards include Standards for Securities Clearing and Settlement in the EU which deals with issues such as linkages between trade and settlement systems, settlement cycles and operating times, and safe structures for securities lending and borrowing.[104]

Next, CESR has published its guidelines and standards via its website, and as Member State regulators are privy to CESR discussions in quarterly meetings, national regulators are kept informed. These guidelines and standards are certainly capable of being made known to the intended domain of application, and capable of being published. It may be argued that in this age of website publishing, many things are equally available to the public, including internal guidelines or procedures. However, internal guidelines and procedures may be more amenable to change, and may not meet the requirement of constancy in Fuller's list, and arguably would not amount to law. The substantive guidelines and standards produced by CESR are also very detailed and prescriptive, and are likely to be relatively permanent. They have the features of sufficient clarity and constancy in order to be recognized as norms. This article suggests that these norms are arguably justiciable, ie capable of judicial interpretation by the European Court. The criterion of justiciability will filter out those norms which are vague principles at an experimental stage, therefore not amounting to a legal norm. Finally, the guidelines and standards are also capable of being applied by administrative action, as they are clearly addressed to administrators, and do not require the impossible.

[102] (1 March 2003), available at <http://www.cesr-eu.org/index.php?docid=192>.

[103] Regulation (EC) No 1725/2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002.

[104] (22 October 2004), available at <http://www.cesr-eu.org/index.php?docid=2534>.

If CESR's guidelines may, under the proposal in this article, amount to law, what may be the consequences? If these guidelines may amount to law, then CESR may have 'limited personality' for purposes of judicial review. Judicial review could check the powers of CESR and arguably empower citizens in understanding what effects governance centres are producing, and whether such effects should be questioned or enforced. This may arguably be the bridge between citizens and the legitimacy of governance in the EU. Other consequences may be that state contraventions or Community contraventions of these norms may result in state or Community liability. However, if such norms have the effect of legal norms and serve the purpose of influential governance in the EU, why should citizens not be able to enforce rights that may be provided by these norms?

VIII. Conclusion

Although EU governance is plural and dynamistic in nature, producing a phenomenal amount of governance output, only norms that are produced from recognized institutional processes amount to law in the EU. It is submitted that the rule of recognition for what may be an EU legal norm is very limited at the moment, and does not cohere with the pluralism in EU governance and the influential effects of some governance output which may be regarded as soft law. It is suggested that a meta-legal principle of norm identification needs to be fashioned to recognize certain soft law as law. This is necessary so as to clarify for citizens the real effects of EU governance and empower citizens to call such governance centres to account. This however means that judicial review should be reformed, and state and Community liability could be expanded. It is submitted that these proposals may need Treaty amendments, but it is time for the EU to take stock of its governance landscape and the role of law, and to return to the fundamental value of the rule of law, in order to properly regard some governance effects as law, so that citizens may be able to duly enforce rights, seek clarification, and request independent judicial review. Such participation by citizens may be necessary to secure accountability by governance centres, and reinforce their legitimacy in EU governance.