



City Research Online

City, University of London Institutional Repository

Citation: Bardutzky, S. and Fahey, E. The subjects and objects of EU law: Exploring a research platform. In: Fahey, E. and Bardutzky, S. (Eds.), Framing the Subjects and Objects of EU law. . Cheltenham: Edward Elgar Publishing.

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <http://openaccess.city.ac.uk/15217/>

Link to published version:

Copyright and reuse: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

City Research Online:

<http://openaccess.city.ac.uk/>

publications@city.ac.uk

**INTRODUCTORY CHAPTER: THE SUBJECTS AND OBJECTS OF EU LAW: EXPLORING A RESEARCH PLATFORM
(CHELTENHAM: EDWARD ELGAR PUBLISHING, FORTHCOMING)**

S. Bardutzky and E. Fahey

18 July 2016

1. INTRODUCTION

1.1 THE ORIGINAL FRAMING OF SUBJECTS (AND OBJECTS) IN EU LAW

The central claim that this book is based on is that the framing of its subjects and objects is an important element in the development and formulating of EU law. What we could call the “original” framing of the subjects, the recognition by the Court of Justice of the European Union (CJEU) in its landmark judgment in *Van Gend en Loos* that the subjects of EU law are not only the Member States but also the individuals (nationals of the Member States), carries an importance of what is usually called constitutional character.¹ Miguel Poiates Maduro described this move as a “subjectivation” of the treaties: EU law has moved from the state-based interpretation of the treaties to the individual-based interpretation.² In Daniel Halberstam’s account, *Van Gend en Loos*, on the one hand contained a “radical [constitutional] disaggregation of the State”, and on the other hand is the beginning of a ‘normative [and democratic] recalibration of the Community system’, a normative ‘turn to the individual’.³ In absence of an external constitutional author for Europe that is often imagined in constitution-making, the reallocation of roles and redefinition of the Member States and the individuals in *Van Gend en Loos* is considered one of the first elements of ‘Europe’s piecemeal constitution’.⁴

By and large, the framing of subjects of EU law in *Van Gend en Loos* was a prelude to a drift of EU law from the logic of public international law. By authoritatively framing the subjects of EU law, the CJEU extracted it from the long-standing debate concerning the dichotomy between subjects (more so than objects) in Public International law. In public international law, the perceived redundancy of the subjects’ formulation has brought about many alternative theorisations of the ‘actors’ of public international law. For example, it has churned out those seeing a reformulation from subjects and object to ‘participants’,⁵ to escape the so-called ‘prison’ of the distinction.⁶ Rather, the entire discourse of public international law has operated as a fight for inclusion as regards subjects and objects.⁷ A discourse as to ‘subjects’ appears to form an unavoidable part of every contemporary public international law treatise.

¹See ‘The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals’ in Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* ECLI:EU:C:1963:1, [1963] ECR 1, 12. Bruno De Witte, ‘The European Union as an International Legal Experiment’ in Gráinne de Búrca and J H H Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012) 19; B De Witte, ‘EU Law: Is it International Law?’ in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2014) 174.

² Maduro, *We the Court - The European Court of Justice and the European Economic Constitution*, Oxford Hart Publishing, 1998), 9.

³ Halberstam, Daniel, *Constitutionalism and Pluralism in Marbury and Van Gend. The Past And The Future Of Eu Law: Revisiting The Classics On The 50th Anniversary Of The Rome Treaty*, M.P. Maduro, L. Azoulay, eds., 2008 29. p. 114. See also D Halberstam, ‘The Bride of Messina: Constitutionalism and Democracy in Europe’ (2005) 30 ELR 775, 777.

⁴ Halberstam, 116

⁵ eg Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994), referencing the Yale School.

⁶ Andrea Bianchi, *Non-State Actors and International Law* (Ashgate, 2009).

⁷ *Ibid.*

It is stated that many international lawyers agree what the subjects doctrine is without explaining it.⁸ One may note that in public international law, the subjects doctrine has been argued to act as the ‘clearinghouse’ between sources and substance.⁹ It is a discourse perceived to be perpetuated by subjective positivists or old-fashioned positivists. The subjects discourse of public international law has most famously ignited a debate on the place of non-state actors in public international law. Instead, some call for more elaborate conceptual tools to systematize the lexicon of non-state actors and their role played in contemporary international law. Yet whether the solution lies in ‘relativizing the subjects’ or ‘subjectivising the actors’ remains for some time open to doubt.¹⁰

1.2 THE CRITIQUES OF THE ORIGINAL FRAMING OF THE SUBJECTS OF EU LAW

What kind of a subject is the subject of EU law as framed in *Van Gend en Loos*? The Court does not offer an extensive reasoning for its redefinition of the circle of subjects and recognition of individuals as subjects of EU law. It relies on the finding that, first, that ‘[i]ndependently of the legislation of Member States, Community law [...] not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.’¹¹ Second, behind the Court’s framing of the subjects is the fact that the Treaty has established institutions ‘endowed with sovereign rights, the exercise of which affects Member States and also their citizens.’¹² Lastly, the individual is also a subject as he is accorded political subjectivity in the sense of having a say in the decision-making of the then Community, or in the words of the Court, he is ‘called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.’¹³

The quotes reveal the individual as a predominantly liberal subject, on the one hand a bearer of rights and duties, particularly the newly recognized EU law rights. On the other hand, a subject of a supranational political order, someone who ‘cooperates in the functioning’ of the Union. This is a predominantly liberal understanding of the subject, where the main elements that make the individual a subject are legal entitlements, entitlement to political participation and freedom. This is the liberal subject of EU law, as Halberstam would put it, “legally freed from the constitutional confines of her MS and endowed with what Robert Cover would have called an immediate ‘jurisgenerative’ capacity at the supranational level”.¹⁴

What needs to be added is that the constituting of the individual as legal subject of EU law comes with expectations from that same individual. The individual becomes a ‘legal vigilante’ (or ‘Private Attorney General’) of this legal order.¹⁵ By invoking rights and entitlements conferred

⁸ See José E Alvarez, ‘Are Corporations “Subjects” of International Law?’ (2011) 9 *Santa Clara Journal of International Law* 1; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006).

⁹ Jan Klabbers, ‘(I Can’t Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors’ in A Bianchi (ed), *Non-State Actors and International Law* (Ashgate 2009) 55.

¹⁰ A Bianchi, ‘Relativizing the Subjects or Subjectivizing the Actors: Is That the Question?’ in A Bianchi (ed), *Non-state actors and international Law* (Ashgate 2009) xi ff.

¹¹ *Van Gend en Loos*

¹² *Van Gend en Loos*

¹³ *Van Gend en Loos*

¹⁴ Halberstam in Azoulai/Maduro p. 30.

¹⁵ Weiler 2014, p. 96

upon him by EU law, before national courts, he participates in a decentralized system of enforcement of EU law, praised for its efficiency.¹⁶ The vindication of the individual's rights under EU law, which pursues his private interests, is utilized for the public interest of upholding EU law in relation to the Member State.¹⁷ Weiler's critique of the original framing of subjects and objects of EU law is based primarily on the inadequate democratic legitimacy that would be capable of supporting the transformation of the EU legal order and its relationship with Member State law that ensued from the introduction of direct effect and the recognition of the individual as subject of EU law.¹⁸ For Weiler, this turns an individual citizen into an object rather than a subject of EU law.¹⁹ Yet: what can be described as 'instrumentalisation' or 'objectification' from the perspective of a liberal subject, can also be captured by a different understanding of what is the subject of EU law.

1.3 SUBJECTS CONSTITUTED BY EU LAW

The proposal here is to look beyond the understanding of a legal subject as a bearer of rights and duties and someone who is active in the law-making process. The other dimension that attention should be paid to here as well is that the (legal) subject is defined and recognized by the government and by the law. To apply the term used by Louis Althusser: the subject is constituted when he is 'interpellated'. For example, when a person that turns around when the policeman calls him on the street.²⁰ The policeman, by hailing the passer-by, creates out of him a subject answerable to law, to the state, to the legal system.²¹ The identity of Althusser's subject had been ascribed to him beforehand. The subject only recognized himself in the call, answering to this identity.²²

This reading of the 'word' subject is helpful as it allows for a broad range of entities that can recognize themselves as subjects of EU law due to the fact that EU law constitutes them and ascribes an identity to them. Compared to the idea that EU Law has two narrow categories of subjects as proclaimed by the ECJ in *Van Gend en Loos*, based on recognizing the subjects as members of these two categories of politically empowered bearers of rights, this understanding bears the promise of a much wider platform. A wide range of different individuals and entities, including for example citizens of countries that are not Member States, or stateless persons. Legal persons are a vastly important group of subjects of EU law, and despite the fact that the framing of subjects of EU law was triggered by a corporation, the reasons given by the court, to a large extent, refer to a citizen of a Member State as the "new" subject of EU law that takes his place next to the Member State. Other entities may be constituted and recognize themselves in this way – subnational units, organs of the Member States (Fasone), cities (van Zeben).

Many of these examples may be seen as subjects (or enjoying at least traces of subjectivity) in the meaning of the word laid down above: as bearers of (some) rights (or duties), as entities who enjoy standing in different procedures of EU Law. Every legal system could be observed in

¹⁶ Ibidem.

¹⁷ Weiler ibidem.

¹⁸ Weiler 99 ff.

¹⁹ Weiler 102

²⁰ Althusser, Ideology and Ideological State Apparatuses, 118; See Luis Althusser, *Lenin and Philosophy and other essays* (Monthly Review Press 2001).

²¹ Mansfield Subjectivity 53.

²² Andy Blunden, Althusser' Subjected Subject.

this way, recognizing a richness of different legal subjects that it constitutes. It would seem, however, that EU law might offer particularly fertile grounds for this approach: despite limited competences, it seems to touch upon a large number of suspects in very different ways, defining countless positions for them. A different understanding of the term subject, one that does not rely on being a bearer of rights, is liberating in the sense that we do not need to focus on the rights and entitlements of the subjects in order to observe and describe a wide spectrum thereof. It also allows us to use the lexicon of subjects to think of law beyond the rights and entitlements. In that sense, the exercise of reframing the subjects of EU law, as we think about it here, has a strong descriptive dimension.

1.4 SUBJECTS AND LAW

But if the concept of legal subject can be widened to beyond the meaning of bearer of rights etc., in what sense, then, are thusly constituted, and recognized subjects of EU law still “legal subjects”? We draw on Damjan Kukovec’s insight in this volume that “[w]e are all constantly deciding and creating our social and legal life in every social setting.”²³ The power of a legal subject to decide goes beyond what is usually considered to be the power of a legal subject: voting, initiating, litigating and so on.²⁴

A dimension of the legal subject that should not be overlooked is the subject’s contribution to the understanding of law. The value in studying law using the lexicon of subjects and objects is that we can perceive “subjects and objects of legal interpretation as equal partners in the constitution of the legal system”.²⁵ Jack Balkin’s account presents a call for a more balanced view of law, one in which it is not only the object (i.e. law, the legal doctrine, the legal system) that is studied, but also the legal subject – the interpreter, the ‘understander’ of law.²⁶ We find that a balanced role of both subjects and objects of law in observing the law is of particular pertinence in EU law – a legal system that is interpreted by a vast multitude of different entities, natural and legal persons, courts, judges, lawyers, governments etc., belonging to a number of different legal traditions, political and ideological orientations and economic circumstances. In the EU, these traditions, orientations and circumstances vary to a larger extent than in any national legal system.

1.5 POLITICAL CAPACITY OF THE SUBJECTS OF EU LAW

Our interest in the dimension of the subject of EU law as the understander or interpreter of EU law does not mean that we are prepared to overlook the political dimension of the subjects of EU law. When observing its political dimension, the subject of EU law again reveals itself as an ambiguous and versatile. A look at the legal sources reveals that the Treaties constituted a variety of political subjects of the European Union. The drafters drew a distinction between representative democracy and participatory democracy, without clarifying the relationship

²³ Damjan Kukovec

²⁴ Ibidem

²⁵ Jack Balkin, ‘Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence’ (1993) 103 Yale Law Journal 105, 134.

²⁶ Balkin, *ibid.* The work of Sinisa Rodin is also an analysis of the subject as understander and interpreter of EU law, focussed on the ECJ understanding and interpreting EU law. See Rodin.

without them, possibly creating tensions between the two approaches to democracy.²⁷ But representative and participatory democracy are primarily distinguished as there are different circles of subjects drawn by the Treaties.

The definition of subjects of representative democracy of the European Union resembles the original framing of subjects of EU law in *Van Gend en Loos*. It is the citizens that are represented in the European parliament; and it is the Member States that are represented in the European Council and in the Council, and expected to be democratically accountable to *their* citizens (Art. 10/II TEU). These are the subjects, to borrow Joseph Corkin's phrase whose "involvement [has been] institutionalised through the EU's lawmaking process."²⁸ These circle of subjects also appears in other accounts, e.g. they are perceived by Juergen Habermas as the subjects of constitutional change in the European Union.²⁹ The subjects of participatory democracy are defined in a number of partly overlapping circles, with only some of the forms reserved for citizens, acknowledging representative associations as well as the civil society, and even reaching the widely defined universe of "parties concerned" (Art. 11).

This, of course, means that the circle of political subjects as constituted by the Treaties transcends the geographical or territorial boundaries of the Union, encompasses foreign or multinational corporations with considerable interest in the end result of the decision-making process of the EU legislature. The work of Emilia Korkea-aho illustrates how the lexicon of subjects and objects can serve to identify cases where political capacity is enjoyed by the interested parties from non-EU countries can lead to access deficit between economic and non-economic subjects.³⁰

A distinct class of political subjects of the EU – as 'constituted' by Art. 12 TEU are the parliaments of the Member States. Mentioning the national parliaments in the Treaties, a development introduced by the Treaty of Lisbon, is a great illustration how expectations that EU law has from its subjects, and the identity it assigns to them, go hand in hand with the creation of formal rights and empowerment to participate in the political process.³¹

1.6 POLITICAL CAPACITY OF THE SUBJECTS AND THE 'SUBJECTIFICATION' OF THE EUROPEAN CITIZEN

The category of the subjects of EU law as 'originally framed' in *Van Gend en Loos*, the citizens of the Member States, is particularly worthy of attention on account of the complexity of the citizen as subject of EU law. The citizen as subject is extremely complex especially due to the political dimension of his subjectivity: the political capacity as recognised by the Treaties is only one layer thereof. Citizens of the Member States are not only EU citizens and subjects of EU law. In line with the understanding of 'subject' that we have laid down earlier, they are constituted and defined also by their national legal systems: and competing legal claims of overlapping legal systems can be observed from the perspective of subjects as well.

²⁷ Acar Kutay Limits of Participatory Democracy in European Governance, (2015) 21(6) European Law Journal 803–818.

²⁸ Corkin in this volume

²⁹ Habermas Crisis of the EU The Crisis of the European Union in the Light of a Constitutionalization of International Law (2012) 23(2) EJIL, 335–348.

³⁰ Korkea-aho in this volume

³¹ Work of Cristina Fasone in this volume.

Furthermore: individuals-citizens of Member States are 'subjectified'. That means that they are exposed to regulatory expectations, strategies and pressures that are exerted by government power. In this understanding of the subject, individuals are made subjects by a form of *power*, and this power 'categorises the individual, marks him by his own individuality, attaches him to his own identity'.³² The individual faces a 'double bind' as he is not only controlled by the government. The power to which he is exposed also causes his individualization, and he is individualised by the power, in procedures, imposed upon him, through which he understands himself.³³ The understanding that a subject constituted and shaped by the exercise of governmental power has been applied to EU law by Marco Dani in a critique of European citizenship as a progressive narrative.³⁴ Dani draws our attention to the conflict that can emerge between contradictory supranational and national regulatory strategies, signalling the erosion of a citizen as a constitutional subject.³⁵

An additional layer has to be added to the already complex coexistence of the two identities of the subject that is at the same time subject of EU law as well as a citizen of a Member State. EU law has been offered as an answer to the question of external effects of the Member State law on the citizens of other Member States who have no political capacity that they could exercise in relation to the making of this law but are nevertheless affected by it, and, in certain constellations, (part-)constituted by it as its "quasi-subjects".³⁶

1.7 TRANSFORMATIONS IN EU LAW

It is our observation that to an important extent, the transformations that we have witnessed in EU since the moment that we have referred to as the original framing of the subjects and objects to EU law, and the consequent to a large extent ever-increasing growth in the scope, relevance, sphere of application and reach of EU law all the way to the 2009 entry into force of the Lisbon Treaty, can also be observed as oscillations in the conflict between two overlapping layers of the individual citizen's subjectivity. A milestone in this process was in the beginning of the nineties: both via the judicial creation of the *Francovich/Brasserie de Pecheur* doctrine of state liability for failure to implement EU law as well as through the Maastricht strengthening of the infringement proceedings with the introduction of financial penalties.³⁷ The introduction of sanctions for the breach of EU law can be observed in different light from the perspective, on the one hand, of EU law as a legal system, and from the perspective of the subjects of EU law on the other hand. From the former perspective, the introduction of sanctions can be hailed as the 'perfection' of EU law (stemming from *lex perfecta – lex imperfecta* dichotomy).³⁸

³² Michel Foucault **The Subject and Power** *Critical Inquiry*, Vol. 8, No. 4. (Summer, 1982), pp. 777-795. 781.

³³ Foucault Subject and Power 785; Hall Subjectivity 92.

³⁴ Marco Dani, 'The Subjectification of the Citizen in European Public Law' (2015) EUI Working Paper LAW 2015/02, 1-2 <<http://hdl.handle.net/1814/34701>> accessed 19 March 2016

³⁵ Dani, *ibid.*

³⁶ Corkin in this volume. See Everson in this volume for the critique of this perspective in the analysis of the crisis.

³⁷ Art. 260 TFEU

³⁸ Baquero Cruz, Julio (2006) "The Changing Constitutional Role of the European Court of Justice," *International Journal of Legal Information*: Vol. 34: Iss. 2, Article 7.

From the perspective of the citizen of a Member State as subject of EU law with a political dimension of his subjectivity, strengthening EU law with sanctions can also translate into more intensive pressure on the subject that is the target of government strategies. If the financial loss as the consequence of a breach of EU law is intended to incentivize the national politics not to breach EU law, then the principal mechanism to achieve this is through electoral accountability of the national government, cascading the pressure to comply with the supranational regulatory strategy down to the individual subject – the taxpayer and voter. At the same time, enforcement of EU law in its current form exemplify well the schism between the subjects of EU *law* and what is the political dimension of these subjects - their capacity to form political decisions in the Member State. If on the one hand observing financial liability of Member States through the definition of subject as constituted by government regulatory pressures reveals the role of the subject in the functioning of the enforcement system, on the other hand the ECJ and the doctrine perceive the infringement proceedings as proceedings of an »objective character«. ³⁹ The government of the Member State, standing before the ECJ attempting to defend the Member State from the accusations of infringement, is barred from raising any kind of »subjective« defence that would link the failure to comply with EU law to the Member State's parliament, courts, or subnational units. ⁴⁰

1.8 (IN)COHERENCE OF THE SUBJECT

An important feature of studying law by observing its subjects and objects is, as was posited above, a quest for a balanced role of subjects and objects as equal partners of legal interpretation, in which instead of the study of law being completely dominated by the jurisprudence of the object, attention is also paid to the role of the subject. And accordingly, “instead of seeing legal coherence as a preexisting feature of an object apprehended by a subject, we should view legal understanding as something that the legal subject brings to the legal object she comprehends.” ⁴¹ However, if the contribution of the subject to the law and the subject's legal understanding is not to be overlooked, then we also cannot assume that the subject itself is coherent. ⁴² In Balkin's account, where the legal subject is an individual person, this is largely because the subject is herself socially constructed. Transplant this idea into the study of EU law, and a broad spectrum of incoherencies of the subject reveal themselves. The citizenship of one of the Member States of the citizen as subject of EU law would seem to importantly determine the subject's “social construction”. Acknowledging the incoherence of the subject of EU law allows us to factor into our study of EU law, for example, the centre-periphery dynamics at work in EU law, as explored in this volume by Damjan Kukovec. ⁴³

³⁹ Lenaerts, Procedural law of the EU.

⁴⁰ Take the example of the Data Retention Directive, where Member States were threatened with fines or fined for the non-implementation of a directive that was subsequently found to be in violation of human rights. (ECJ C-270/11, Commission v Sweden, ECLI:EU:C:2013:339). The pressure of EU law onto the political subject to not only accept but via parliamentary accountability contribute to compliance with EU law is in conflict with the subject's identity as a constitutional subject.

⁴¹ Balkin.

⁴² Balkin

⁴³ Kukovec in this volume.

1.9 THE SUBJECT AND THE CRISES

It is our claim that the platform of subjects and objects of EU law offers a valid starting point for the study of the crises that the European Union has faced in the recent years - most importantly the financial crisis which has so far seen a broad corpus of literature emerging attempting to analyse it within EU law and legal scholarship. The financial crisis and the responses to it have to a large extent changed the constitutional landscape of the European Union and its law.⁴⁴ The national decision-making in Member States where austerity measures have been imposed by the representatives of the lenders has been dubbed 'no-choice' democracy. This, and similar diagnoses seem to call for a revisiting of the role of the subject in the crisis situation.

While the observation that the pressures exerted on the subject by the government pursuing its regulatory strategies increase as the manoeuvre space of national decision-making narrows down can reliably be made, it would seem that these processes have taken on new forms. Is there space for any political capacity of the subject within the broader frame of the subjectification pressures experienced by both categories of subjects with the political dimension, citizens/individuals as well as Member States? The contribution of Emiliios Christodoulidis on the substitution of *subjective* choice and decision-making with the *objective* out-put requirements casts a shadow on doubt on this being possible altogether.⁴⁵ Or, from the other perspective, where is the *power* now, in the new *societas economica* analysed by Everson in her contribution? Rather than the exercise of power from the sporadically conflicting supranational and national government, as we have observed *pre-crisis*, who is the source of the governmental pressures on the subject now, *post-crisis*?⁴⁶

2. THE OBJECTS OF EU LAW

2.1 ON ACTORS AND EU LAW

One major difficulty faced in approaching a method to the identification of the objects EU law is that there is no agreed definition of an *actor* under EU law.⁴⁷ Instead, a sharp distinction is drawn there between the masters of the treaties and those amenable to judicial review or those with legal personality. The grant of legal personality under EU law has been accorded on a wholly pragmatic rather than conceptual basis.⁴⁸ Many new actors created in recent times are not technically institutional actors: for example, the European External Action Service (EEAS), the European Cybercrime Centre (EC3) or the European Public Prosecutors Office (EPPO). Instead, they are carved up in other ways, for example, in the case of the EC3 as 'desks' of other institutions, e.g. Europol. This does not appear to preclude their autonomous development.⁴⁹

⁴⁴ Menendez. Also Dawson & De Witte 'From Balance to Conflict: A New Constitution for the EU' Mark Dawson and Floris de Witte 'From Balance to Conflict: A New Constitution for the EU' Mark Dawson and Floris de Witte *European Law Journal* Volume 22, Issue 3, page 386, May 2016.

⁴⁵ Christodoulidis in this volume

⁴⁶ Everson in this volume.

⁴⁷ See M Ruffert, 'Personality under EU Law: A Conceptual Answer Towards the Pluralisation of the EU' (2014) 20 (3) *European Law Journal* 346.

⁴⁸ Ruffert.

⁴⁹ Mauro Gatti, 'Diplomats at the Bar: The European External Action Service Before EU Courts' (2014) 39 (5) *European Law Review* 664.

Formalist understandings of those who are the objects of EU law are thus unable to capture much about EU law. It lacks realism about autonomy and institutional behaviour.

Executive actors of the EU (ranging from the European Council, the Euro group, ECOFIN, FAC) increasingly impinge upon domestic politics, often significantly so.⁵⁰ Similarly, the dominance of the Franco-German partnership in resolving Euro crises has made a significant impact at European Council level- even if MS are still perceived to continue to exercise influence in the executive context.⁵¹ Inwards-out, new 'presidential' configurations of power in all EU institutions through asserted institutional autonomy outside of the treaties also significantly EU inter-institutional dynamics.⁵² How do we account for this role circularity when we consider the subjects and objects of EU law? We seek to incorporate a broader perspective on actors in EU law and seek to look at those beyond or outside of the analytical capture of EU law.⁵³ Beyond individual actors per se as entities or objects, the taxonomy or typology of the objects of EU law necessitates further analytical method, to which this account next turns.

2.2 FROM SUBJECTS TO OBJECTS OF EU LAW

As to the question of how we understand the term 'the objects of EU law' as a term of art, this project adopts the view that a range of analytical approaches warrant exploration. As outlined above, on a purely *empirical* analysis, the treaties reference a vast array of terms as to entities other than Member States in the treaties, citizens, third parties, interests, third countries but do not employ the generic term of objects, or anything specific about 'others'. The limitations of such an empirical approach are thus rather straightforward. There is an overt circularity at the heart of deciphering subjects and objects. This is principally because in various ways, the 'subject' that we write of, includes 'Member States', 'state institutions' and 'individuals' To an extent, they are all, 'subjects'. Yet they are also 'objects' and, simultaneously, also subjects. So too the *treaties* that constitute the EU. They are objects of subjective (MS) agreements, but then take on an objective character over those same subjects. There are multiple objects of EU law who are also the subjects of EU law but not involved in its making, for example, Norway or Switzerland, hence a construction of participation or active engagement is not necessarily instructive. Likewise, individuals are, or should be, both subjects (the source of law) and objects (objects of the law). In other words, they are all *both* subject *and* object *at one and the same time*. To escape from the formalism and positivism that we wish to escape from, we may readily and unintentionally fall back into by trying to effect an equally radical separation between 'subjects' and 'objects' and, in so doing, reproduce the legitimacy gap that we want to overcome.

⁵⁰ Uwe Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (OUP 2014); Deirdre Curtin, 'Challenging Executive Dominance in European Democracy' (2014) 77 *The Modern Law Review* 1; Henri De Waele 'Strained Actorness – The 'New' European Council in Theory and Practice' in Elaine Fahey (ed.), *The Actors of Postnational Rule-Making: Contemporary Challenges of EU and Public International Law* (Routledge 2015).

⁵¹ Puetter.

⁵² Mark Bovens and Deirdre Curtin, 'An Unholy Trinity of EU Presidents? The Political Accountability of Post-Crisis EU Executive Power' in D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrat's Dream: Adjusting to European Diversity* (CUP 2016) 190.

⁵³ Consider e.g. E Jones, A Menon and S Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012) focussing upon 'personalities' Member State cleavages, Institutions and Member States as the 'typology' of actors in the EU in a multi-disciplinary context.

As a result, we assert that there is a significance to taxonomising analytical methods to the subjects and objects of EU law. Strictly speaking, the *objects* of EU law remain more troublesome, less opaque and more multifarious than its subjects, even if a perfect or clear separate of them both might be unsatisfactory. One method might be to consider to approach the question of the objects of EU law as a descriptive question of *jurisdiction and procedure*, which is of much contemporary significance in caselaw, heavily centered upon secondary law and specifically environmental and financial and banking regulation in its focus.⁵⁴ Such an approach appears to run into difficulties with its singular emphasis upon territoriality in an era of law beyond the Nation State, its definition of law and rules, its constructivist tendencies and its limited range of casestudies qua fields of law.

A further alternative would be to matter-of-factly consider the objects of EU law as a *construct*, flowing from foundational jurisprudence warranting a broader methodology to engage with its contours. It is one which is commonplace in contemporary environmental law, EU taxation, banking and financial services law, EU refugee and migration law, data protection, to EU competition law, it is now a commonplace occurrence of EU law that it has global reach.⁵⁵ The claim of global reach is usually substantiated by its authors to the effect that EU policy documents and legislation regularly attempt to link the internal to the external in EU law and policy with much transparency, including more frequently mooted its extra-territoriality. EU politics also emphasises the global ambitions of EU law, as warranting exploitation. Yet this does not necessarily provide us with real analytical clarity as to the category of others, institutions, entities or countries which are the recipients or takers of EU law *qua* others.

A further method might be a *constitutional analysis* of the boundaries of the internal and external of EU law, reflecting upon the objects of EU law as a tangential issue within an analysis of competence. This is common in mainly external relations scholarship, focussing upon international agreements and secondary legislation and its overlap with the internal market. EU external action may 'lead' or even eclipse internal policy development 'outwards' in', which is not necessarily obvious as a matter of EU law.⁵⁶ For example, certain international agreements entered into by the EU have acted as the catalyst for internal EU legislation. The EU-US Passenger Name Records Agreements and EU-US Transatlantic Financial Tracking Programme (TFTP) (Swift) Agreement have triggered the development of comparable internal EU legislative proposals.⁵⁷ This analysis is mostly conducted from the perspective of competence and a discussion of the role of the Court of Justice as to its constitutional significance, with a small

⁵⁴ See Joanne Scott, 'The New EU Extra-territoriality' (2014) 51 (5) *Common Market Law Review* 1343; J Scott 'From Brussels with Love: The Transatlantic Travels of European law and the Chemistry of Regulatory Attraction' (2009) 57 (4) *American Journal of Comparative Law* 897.

⁵⁵ *Ibid.* Bradford; Fahey; Damro.

⁵⁶ Marise Cremona 'EU External Relations: Unity and Conferral of Powers' in Azoulai (ed) *The Question of Competence in the European Union* (OUP 2014)

⁵⁷ Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Record Data to the United States Department of Homeland Security of 17 November 2011; [2012] OJ L 215/5. See Proposal For a Directive on the use of Passenger Name Record data for the prevention, detection investigation and prosecution of terrorist offences and serious crime, COM (2011) 32. The EU-US PNR Agreement originally relied upon *inter alia* Article 114 TFEU which was struck down by the Court as beyond the scope thereof: *European Parliament v Council and Commission*, Joined Cases C-317/04, EU:C:2006:346 and C-318/04, EU:C:2005:190, See E Fahey, 'Law and Governance as checks and balances in Transatlantic Security' (2013) 32 *Yearbook of European Law* 1; see more generally, E Fahey *The Global Reach of EU law* (in contract).

'c'.⁵⁸ Yet what the precise elements of the objects of EU law are now is not discernible from this. There is also little by way of caselaw in this area despite the analytical style here which is predominantly 'court-centric'. Contrasting approaches adopted here in this vein but broadly within this genre are adopted by Fasone (as to National Parliaments as shifting subjects and objects within EU constitutional law) and by Corkin (as to transnational constitutional law and the EU as a political community).

A more concrete approach might be to reject the constitutional character of such an analytic method and to focus upon the questions of the objects of EU law as one requiring an *administrative approach*. From primary law to secondary law and the plethora of administrative instruments deployed in the treaties, they raise a question as to the evolving nature of their scope beyond the EU and its territories, beyond existing partners and deliberately embed an ambiguity as to the ends of EU law. For example, Article 11(3) Treaty on the European Union (TEU) provides that the Commission is obliged to consult in its administrative rule-making with 'the parties concerned', a phrase that appears to encompass stakeholders irrespective of their country of origin and which is interpreted broadly in EU policy documents. Many EU Administrative decisions are addressed to individuals or legal persons in third countries.⁵⁹ There are also many obligations under EU law to initiate coordination or to monitor third country conditions or international progress.⁶⁰ The Ombudsman has significantly expanded the remit of her role in internal relations through conducting extensive analysis of the transparency as to third party interests in EU law.⁶¹ These administrative approaches to the concern as to the others of EU law appears centrally focussed upon EU external relations and environmental law. This is evident in the approaches adopted by Vianello and Korkeo-aho as to EU Administrative and Environmental law (...).

A further complexity to that approach might be suggest that administrative law approaches are themselves limited normatively and their innocuous character creates expectations and consequences which are non-innocuous for third countries and individuals. The question then arises less as to *who* the objects of EU law are but rather *how* they are treated. The Treaty of Lisbon makes clear that the Union, when acting on the international scene, shall not only promote the rule of law but shall also respect it in the development and implementation of its external action.⁶² However, as Vianello will argue, this obligation requires redefining the actorness of the EU in its relations with third countries as well as the actorness of the third

⁵⁸ Cremona, Piet Eeckhout, *The European Internal Market and International Trade – A Legal Analysis* (OUP 1994).

⁵⁹ e.g. Regulation (EC) No 2111/2005 of the European Parliament and the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC [2005] OJ L344/15.

⁶⁰ See Korkeo-aho generally; Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from **renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009]** OJ L140/16 (Renewables Directive), Article 17(7); Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies [2009] OJ L302/1.

⁶¹ Regulation (EC) No 1049/2001 of the European parliament and of the Council of 30 May 2001 regarding public access to European Parliament; Transparency of the Transatlantic Trade and Investment Partnership, Decision of 6 January 2015: <http://www.ombudsman.europa.eu/en/cases/summary.faces/en/58670/html.bookmark> (accessed 24 Feb. 2016); Follow up of European Commission and the reply of the Ombudsman: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/59898/html.bookmark> (accessed 24 Feb. 2016); Decision of 2 September 2014 <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/54678/html.bookmark> (accessed 24 Feb. 2016)..

⁶² Vianello.

countries themselves. Still the approach of the EU must be gauged by a standard and the most frequent reference point in EU law for conduct is in the form of *equal treatment or non-discrimination and respect for fundamental rights*. We argue that such an approach has a distinguished pedigree at the heart of understanding the evolution of EU law beyond a customs union into a more sophisticated supranational project but yet does not necessarily offer clear answers. For example, in contemporary times, much debate in the context of the TTIP negotiations rests upon the treatment of foreign investors under EU law. Examples of this approach might be evident from the casestudies conducted by Poli (on restrictive measures and the broadening range of objects of EU law, rendering them subjects) and Velluti (on the objects of the EU's conditionality in its trade relations with respect to labour rights).

Yet the lack of a perfect fit in terms of a method (empirical, jurisdictional, constructivist, constitutional, administrative or equal treatment based) need not necessarily cause us concern. Rather, we argue that our project proposes a clearer taxonomy of the *range* of applicable approaches, many of which are evidence within this book within individual casestudies. They remind us of the importance of pushing out the barriers of method that cause us to exclude casestudies, lose sight of contemporary significance or overlook the intellectual 'elephant in the room' (by which we here could mean the role of the CJEU in EU law).

3. THE SUBJECTS AND OBJECTS AS A METHODOLOGICAL FRAMEWORK FOR EU LAW

3.1 A NARRATIVE FOR LEGITIMACY QUESTIONS OF EU LAW, FROM THE INSIDE-OUT AND OUTSIDE-IN

The exercise of framing methodologically and reframing substantively the subjects and objects of EU law is thus motivated by a concern for how to address legitimacy issues of EU law arising from the manifold role circularities prevailing. This is not a new concern- but it is its most fundamental we suggest. The primary interest here is in social legitimacy of EU law in light of the evolving objects of EU law, and a subjects-objects relationship that no longer can rely upon output legitimacy so as to overlook social legitimacy concerns.⁶³ Social legitimacy is a subjective measure; it is based on the subjects and their acceptance of the political regime on a deeper level than merely the popularity of the institutions etc.⁶⁴ It stems from the actor's *belief* that the action, rule or system is morally or legally legitimate.⁶⁵ In that sense, it is an elusive task to look for ways in which the legal system can be changed in order to foster its own social legitimacy. We claim, however, that there is an essential prerequisite for the legal system to obtain acceptance from its subjects. It is to recognize the contribution of the subjects' legal understanding rather than rendering the subject's input into the object of legal understanding invisible.⁶⁶ We focus upon an inquiry into the relationship of the legitimacy of EU law on the one hand and the plurality of different actors, actions and rules as well as the relationships between them on the other hand (and the new and newer objects of EU law..). We thus seek to address

⁶³ Craig; Peers and Costa, *supra*.

⁶⁴ Weiler, J. H. H., *Europe in Crisis - On 'Political Messianism', 'Legitimacy' and the 'Rule of Law'* (2012) *Singapore Journal of Legal Studies*, 248.

⁶⁵ Fahey, *supra*.

⁶⁶ Balkin, *supra*.

through methodology the question of legitimacy in a way which deals realistically with coherence. We argue that structural normative coherence are possible *between* the subjects and objects of EU law....

3.2 LOOKING BEYOND A SYSTEMIC UNDERSTANDING OF EU LAW

We intentionally and consciously seek to side-step a systemic understanding of EU law, which we argue is prevalent in contemporary scholarship. Systemic ordering forms the intellectual basis for the most prominent *re*-engagements in contemporary literature with the development of both transnational legal orders and EU law as discipline.⁶⁷ We suggest that systemic understandings of legal orders or ordering offer little to address the social reality and social acceptance problems of contemporary EU law. We argue that systemic understandings of EU law have a particular circularity to them.⁶⁸ System-based understandings of EU law engage well with its complex multi-level structure and its living components, less so it's substantive legitimacy issues.⁶⁹ Contemporary theorisations of transnational legal order give systems-based analysis significant precedence. Systemic understandings of EU law appear to reify its chaos, anarchy, unpredictability and irregularity. What has systems theory done for law-making beyond the Nation State? We opine that order-based analyses are over- and under-inclusive. The development of the EU as a transnational democracy has no parallel. Why capture Singaporean national authoritarianism or Maoist Cambodia? Systems-based theorisations are striking for their lack of focus upon the individual, whilst also carving out a public space therein. The CJEU has rejected a Hartian understanding of EU law in its core caselaw through its embrace of the subject-objects dialectic. This remains its defining characteristic.

4. THE SUBJECTS-OBJECTS RELATIONSHIP AS A PLATFORM FOR EU LAW

We thus argue that the subject-object relationship provides a particularly useful platform in its lexicon for those grappling with key issues of EU law and policy today. We argue that it supports the normative motivations underpinning the project, specifically to include the many omissions from contemporary EU law as set out in this project, and operates as both a powerful framing and reframing tool in this way. It has both a vagueness and flexibility- which we acknowledge and embrace- which is important in so far as it is malleable and broadly applicable across subject streams and sub-disciplines. It accordingly enables us to look *beyond* primary, secondary law and case law so as to look critically at broader developments, through a philosophically-minded lens which acts as a check upon context, real and actual framing and effects. By acting as an enabling device so as to explicitly articulate a broader context, the subjects-objects formulation thus bring transparency to these broader shifts that are charted by various authors. It is both a lexicon and methodology and shifts discourse in its own way which thus provides a vivid narrative device. We accept the logic of the dual status of subjects and objects as an integral

⁶⁷ See Terence C Halliday and Gregory Shaffer, *Transnational Legal Orders* (CUP 2015) ch 1; Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012), citing inter alia Luhmann and Teubner.

⁶⁸ See also De Witte, *supra*.

⁶⁹ E.g. Gunther Teubner, *Critical Theory and Legal Autopoiesis: Perspectives of Societal Constitutionalism* (Manchester University Press 2016 (forthcoming)).

part of its theoretical structure and contend that it sits on all fours with the theoretical foundations of EU law.

This book attempts to show how the transformational character of EU integration can be accurately captured through the specific study of the transformation of subjects and objects and, vice versa, in a set of particular case studies on its active and dynamic quality. The study of subjects and objects also enables us to consider the internal/ external nexus of contemporary EU law with greater precision and transparency. It facilitates our specific study of territory, neighbourhood and the expanding portfolio of those captured by sanctions, regulation and conditionality all under one theoretical 'roof'. Most significantly, we aim to step back holistically and examine the EU project and its unfolding series of crises through the lens of subjects and objects. We can uncover much about exclusions and inclusions, legitimacy and regulatory capture in this period as a result. As a result, we reach at the width and depth of EU law. The lexicon of subjects and objects in particular forces a more specific 'take' upon who is most active and passive here, who is left out and the place of markets, risk and uncertainty in our methodological framing.

5. FORMAT OF THIS BOOK

This book is divided into four distinct parts. The first is the most theoretical and seeks to consider the normative motivation and theoretical underpinnings of the subject/ object discourse (Part I). The next section considers explicitly the idea of transformations from subjects to objects and objects to subjects, thereby capturing the dynamic character of the subject/ object relationship (Part II). The sections thereafter consider the expansive quality of the subjects and objects relationship as to EU law and focus upon the external dimension of EU law and its link to the internal, with respect to the range of actors, entities and subjects that it encompasses, excludes or captures (Part III). This leads to the final section which seeks to approach methodologically the question of how we understand EU crises. It considers, who has been the subject and object of EU measures? Who has been excluded? How do we frame discourse on crises? Who is most active or passive? How can we better capture a legitimacy narrative? (Part IV)

In each section, the authors were asked to address some of the following questions, where possible and applicable to their account. This, in Part I, all authors were asked to consider the following:

- i. Is the dialectic between subjects and objects useful to capture EU law? Does it provide you with a platform, a means or simply a lexicon to tell your case study?
- ii. Does reaching for the lexicon of subjects and objects help not only to present your theoretical contribution or case study, but also to advance your cause or normative claim within your case study?
- iii. Do you find the subjects/objects to be more useful as a lexicon with which integration can be described or as a narrative device (with the flexibility to present a narrative holistically)?

- iv. Is EU law expansionary in its objects and limiting in its subjects generally? Or expansionary as to both?
- v. Are the PIL origins of EU law easily forgotten or practically overlooked?
- vi. Do you agree that the lexicon and method of subjects and objects can be a reframing exercise of how we understand EU law?
- vii. What is the most powerful motivation to re-orientate or reframe the subjects and objects of EU law?

In Part II, contributing authors were asked to consider the following questions:

- i. Articulate if there is a transformation which is central to your case study or a by-product of it. Do you judge this transformation as positive?
- ii. Who or what undergoes the transformation in your case study or account? Are there several such active/dynamic elements?
- iii. Can the expansion of the scope, reach and relevance of EU law since the milestone in *Van Gend en Loos* be described as a transformation in the position of EU law's subjects and objects? Particularly in your case study?
- iv. Is the transformation in your case study best described as a shift from subjects to objects (or objects to subjects) or as a change in the quality/meaning/position of the subject or object?
- v. Does the application of the lexicon of subjects and objects to your case study or abstract considerations lead you to identify an omission of EU law? If so, is this omission a legal issue, a socio-political issue or something else?
- vi. How, particularly, are individual persons visible in your account of subjects and objects of EU law?
- vii. Are citizens both subjects and objects through national and supranational dichotomies?
- viii. Which is more common shifts from objects to subjects or subjects to objects?
- ix. Is a discussion of objects also possible without subjects? Could you exclude citizens from your account?
- x. Does the transformational quality/active/dynamic quality of subjects and objects assist your case study?
- xi. Articulate what the subjects/objects distinction lends to your account.
- xii. Is this account partially/wholly/substantially transformational? (We don't mind but please be explicit)

Authors in Part III were asked to consider the following questions:

- i. Can you articulate the internal/external nexus of EU law in your case study?
- ii. How does subjects/ objects align to the internal/external?
- iii. Are objects 'external' only?
- iv. How do objects become subjects in EU external relations law? Who is involved? Who is most active or instrumental?
- v. What is the role of fundamental rights in the shift between subjects and objects here? How do you frame fundamental rights?
- vi. Do exclusions from rights to fair procedures/legitimate explanations cause greater challenges for objects or subjects? What makes you form this judgment? Do primary or secondary sources assist you most? What hierarchical structure of norms assist you in your analysis (please be explicit if possible)?
- vii. What is external about your case study? Is this well understood or accepted, do you think?
- viii. How does the subject/object dynamic change your case study? How would it tell it without it or what added value does it present to you?

And in Part IV, authors were asked the following set of questions:

- i. Define crises in your account.
- ii. Do the crises need to be understood holistically (e.g. by approaching the different crises in the EU – financial, migrant, Brexit... - in order with a common understanding of a crisis) to describe the transformational shift from subject to object? Is a discrete case study e.g. migration or the euro crisis sufficient?
- iii. Have crises generally changed the subjects and objects of EU law? Why? How?
- iv. Does subjects/objects dialectic capture well/wholly/partly an exclusion from the crises?
- v. What does the subject/object lexicon add to your crises case study?
- vi. How does the subject/object dialect assist your case study? Does it develop a legitimacy narrative better?
- vii. Are citizens or individual persons the biggest victims of the crisis/crises in your case study? Does the relevance of citizens as subjects diminish in the crisis? Would you describe the citizens as objects as a result of the crisis in your case study?
- viii. Is there an external dimension to the crisis that appears in your case study?
- ix. If the crisis you develop has seen the multi-level form of the EU change e.g. EU Executive impinges more upon national politics, is the 'subject' eroded? If so, how do you understand the active quality of erosion?

[Next: Summary of casestudies...]