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1. DROIT INSTITUTIONNEL

De Búrca G., « Poland and Hungary's EU membership: on not confronting authoritarian governments », International journal of constitutional law, 2022, 22 p. (advanced article).

This Reflection considers why Poland's and Hungary's membership of the European Union has remained in many ways unaffected by widespread, serious, and documented actions on the part of those two governments which have gravely weakened the rule of law, democracy, and human rights. The Reflection does not argue for expulsion of these states, but investigates why it is that the European Union's political institutions and actors (rather than its supranational bodies) have not been willing to confront Poland and Hungary more robustly. The willingness of EU actors to overlook growing authoritarianism in Poland since the Russian invasion of Ukraine highlights these concerns even more starkly.

- Accédez au texte intégral

2. CITOYENNETÉ DE L'UNION

WEINGERL P. et TRATNIK M., « Climbing the wall around EU citizenship: has the time come to align Third-Country Nationals with Intra-EU migrants? », European journal of international law, 2022, 24 p. (advanced article).

This article addresses, about labour migration, the following question: once migrant workers from non-EU countries have been admitted into the EU, should they be treated like workers from EU countries for purposes of free movement? The EU migration acquis is one of the most politically charged issues covered by the EU Treaties. As EU citizens, nationals of member states enjoy a set of free movement and political rights that can be exercised in other member states in accordance with the principle of non-discrimination on grounds of nationality (Art.18 TFEU). This principle is arguably not applicable to third-country nationals. Thus, member states are free to accord unequal treatment to third-country nationals as compared to privileged EU immigrants. The pressing question is whether it is desirable to maintain different levels of rights for third-country nationals who have been legally admitted and whose connection to the host member state does not otherwise differ from that of EU citizens who have exercised their mobility rights. To answer that question, this paper examines arguments for and against treating migrant workers from EU countries and non-EU countries equally. It will show how these arguments push in different directions depending on whether they concern the political, human, social, cultural or economic impact of such differential treatment. Our analysis strongly suggests that, on balance, there are convincing reasons for aligning both treatment of long-term resident migrant workers.

- Accédez au texte intégral

3. DROITS FONDAMENTAUX

KÖNIG, CARSTEN, « Zum Verfassungsrang der Grundfreiheiten und des europäischen Wettbewerbsrechts. », Europarecht, 2022/1, p. 48-74.

Die Grundfreiheiten und das europäische Wettbewerbsrecht zählen seit jeher zu den Eckpfeilern der europäischen Wirtschaftsverfassung. Ihr normenhierarchischer Höchstrang im EU-Primärrecht ist jedoch nicht unumstritten. Es hält sich vielmehr hartnäckig die These, die wirtschaftlichen Freiheiten hätten ihre hervorgehobene Stellung auf illegitime Weise erlangt und sollten eigentlich nicht zum materiellen Verfassungsrecht der Union gehören. Der folgende Beitrag stellt sich dem entgegen. Er argumentiert, die These von der illegitimen Konstitutionalisierung lasse sich nicht halten und der Verfassungsrang der Grundfreiheiten und des europäischen Wettbewerbsrechts sei angesichts ihrer freiheitsschützenden Funktion und ihrer Bedeutung für den Binnenmarkt wohlverdient.

- Accédez au texte intégral

VAN DEN BRINK M., « When can religious employers discriminate? : the scope of the religious ethos exemption in EU law », European law open, 2022/1, p. 89-112.

When are religious employers exempt from the prohibition of discrimination (i.e., when can they discriminate against non-adherents)? The European Union (EU) Equality Framework Directive exempts religious employers from the prohibition of religious discrimination, but the scope of the religious ethos exemption is disputed and its interpretation by the Court of Justice of the European Union (CJEU) in Egenberger and IR v JQ has been criticised for being ultra vires and for disrespecting the constitutional identities of the EU Member States. This article clarifies the religious ethos exemption, by examining the underlying legal and normative issues that determine its scope. It shows that the scope of the exemption depends not just on the Framework Directive but also on the relationship between EU law and national constitutional law and that between EU law and international law. Thus, this article not only provides clarity regarding the religious ethos exemption, but also uses these judgements as an opportunity to revisit these related constitutional issues, and in particular the role of the CJEU and EU legislature in defining the place of national constitutional identity in EU law.

- Accédez au texte intégral

4. MARCHÉ INTÉRIEUR

De Gregorio G. et Dunn P., « The European risk-based approaches : connecting constitutional dots in the digital age », Common market law review, 2022/2, p. 473-500.

In recent years, risk has become a proxy and a parameter characterizing EU regulation of digital technologies. Nonetheless, EU risk-based regulation in the digital age is multi-faceted in the approaches it takes. This article considers three examples: the General Data Protection Regulation; the proposal for the Digital Services Act; and the proposal for the Artificial Intelligence Act. These three instruments move across a spectrum, from a bottom-up approach (the GDPR) to a top-down architecture (the AI Act), going through an intermediate stage (the DSA). It is argued, however, that despite the different methods, the three instruments share a common objective and project: they all seek to guarantee an optimal balance between innovation and the protection of rights, in line with the developing features of European (digital) constitutionalism. Through this lens, it is thus possible to grasp the "fil rouge" behind the GDPR, the DSA and the AI Act as they express a common constitutional aspiration and direction.

- Accédez au texte intégral

5. ESPACE DE LIBERTÉ, DE SÉCURITÉ ET DE JUSTICE

MOLINARI C., « Accordi di soft law in materia di rimpatri: carta bianca per le istituzioni UE? », Diritto, immigrazione e cittadinanza, 2022/1, p. 51-73.

Soft law has been growing rapidly in different spheres of Union action, including external migration management. Soft migration deals backed by the EU or, more frequently, directly concluded at the EU level have multiplied in recent years. This raises several constitutional issues, which have formed the object of a rich academic debate. This article contributes to the debate by developing two related considerations. First, it argues that the justification behind the use of soft deals in the field of readmission has so far been the sheer side-stepping of constitutional guarantees, which has become, in this field, an end in itself. Secondly, it asserts that, even if certain constitutional constraints can arguably be side-lined through the use of soft deals, others must necessarily remain operative to guarantee that public powers are not used arbitrarily. The principle of institutional balance has a crucial role to play in this respect.

- Accédez au texte intégral

7. POLITIQUE ÉCONOMIQUE ET MONÉTAIRE

ROSAS A., « EMU in the case law of the Union Courts: a general overview and some observations », European papers : a journal on law and integration, 2021/3, p. 1397-1414.

The main objective of this Article is to map and categorize the CJEU's case law relating to EMU. Although in purely quantitative terms, this is not a huge task, there are already enough relevant court rulings to enable the establishment of a taxonomy distinguishing between four different categories of EMU-related case law. The first and foremost category will comprise cases dealing with the fundamentals of EMU, including clarifying the distinction between monetary policy and economic and other policies. This category includes a number of well-known cases of great political importance, such as Pringle, Gauweiler, Weiss, Kotnik and Florescu. A second category relates to the nature of the EU as a system of multilevel governance and the need to determine whether the competence to act is at national or Union level or a mix of the two. Cases in point include UK v ECB (security clearing), Berlusconi and Rimšēvičs. A third group of cases relates to issues of responsibility and liability, including questions of the liability of "abnormal" EU bodies or settings such as the Troika or the Euro Group. Fourth, especially the Banking Union has triggered cases relating to prudential supervision and other more technical issues. This analysis will be completed by some concluding remarks, including the question of the intensity of judicial control (standard of re-view), viewing the EMU case law in a broader context.

- Accédez au texte intégral

8. PROTECTION DES CONSOMMATEURS

BOUFFARD J., « Le champ d'application ratione finis : l'apparition d'un champ d'application relatif aux finalités de la règle par l'interprétation judiciaire de la directive de 2005 relative aux pratiques commerciales déloyales », Revue trimestrielle de droit européen, 2022/1, p. 39-56.

Connaître le champ d'application d'une directive permet de délimiter les contours de l'obligation de transposition conforme. Il n'est pourtant pas toujours aisé à déterminer, en particulier lorsque cette notion est renouvelée par le droit de l'Union européenne. Tel est précisément le cas pour la directive de 2005 relative aux pratiques commerciales déloyales. Pour ce texte, l'interprétation du juge européen fait de la finalité un critère de détermination du champ d'application. Un nouveau champ d'application, appelé *ratione finis*, est ainsi consacré. Mais il l'est de manière critiquable. Il se base en effet sur un fondement juridique faible, tout en étant interprété de façon extensive, afin de permettre l'application de la directive à des textes ne poursuivant cette finalité que de façon accessoire.

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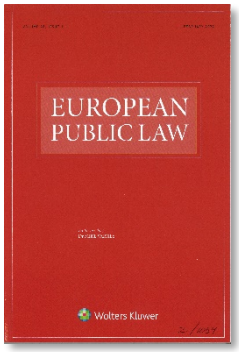
10. PROPRIÉTÉ INTELLECTUELLE



GRECO G., « EUIPO Boards of Appeal in the light of the principle of fair trial », European public law, 2022/1, p. 19-34.

The EUIPO's Boards of Appeal are called upon to decide on appeals against decisions by the bodies of 'first instance'.
However, their judicial function has always been denied. Conversely, the essay tends toplace the Boards of Appeal of the EUIPO in any case within the concept of 'court', as defined by the ECtHR, within the framework of Article 6 ECtHR, because it assesses their independence, impartiality, and in general the guarantees required by the 'fair trial', until concluding that it is a paradigmatic model in the overall administration and judicial system.

- Accédez au texte intégral

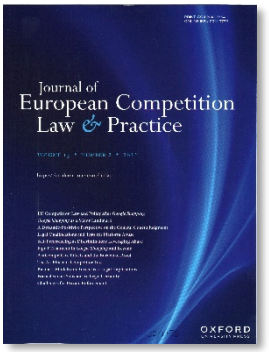
11. MARCHÉS PUBLICS

TELLES P., « Extremely urgent public procurement under Directive 2014/24/EU and the COVID-19 pandemic », Maastricht journal of European and comparative law, 2022/2, p. 215-228.

The COVID-19 pandemic swept throughout the EU swiftly and led to significant changes in how we live and operate. Some of those changes occurred in public procurement as well, with Member States struggling to react to the dissemination of the virus. The purpose of this paper is to assess what scope the EU's public procurement legal framework provides to deal with a crisis, and how the rules should be interpreted. This paper will show how the EU public procurement legal framework deals with extreme urgency situations and how it has been intentionally designed to allow Member States flexibility within very clearly defined boundaries. This means that the path to award contracts without competition on the grounds of extreme urgency is narrow due to Article 32(2)(c) of Directive 2014/24/EU1 and the case law from the CJEU. The narrowness of this path is due to the exceptional nature of procedure and the obligation for the contracting authority to discharge the tight grounds for use in full for every contract. Therefore, this paper concludes that the view exposed by the European Commission that the pandemic is a single unforeseeable event amounts to an incorrect reading on how the grounds for the use of Article 32(2)(c) operate. If such interpretation was already too broad in April 2020, it certainly is no longer in line with the transition from an unfolding crisis into a new and more permanent equilibrium.

- Accédez au texte intégral

13. DROIT DE LA CONCURRENCE



HORNKHOL, LENA, « Article 102 TFEU: equal treatment and discrimination after Google Shopping », Journal of European competition law & practice : JECLAP, 2022/2, p. 99-111.

Google Shopping has ultimately established the underlying principles and legal test for independent discrimination abuses.
The general principle of equal treatment is applicable in an Article 102 TFEU context.
Discrimination constitutes an independent abuse when it gives rise to exclusionary effects, which must be considered in the light of the individual circumstances of each case.
Based on the general principle of equal treatment, the legal test for independent discrimination applied in Google Shopping is transferrable to other scenarios.

- Accédez au texte intégral

14. AIDES D'ÉTAT

NICOLAIDES P., « The evolving interpretation of Article 107(3)(b) TFEU », European State aid law quarterly, 2022/1, p. 31-42.

This article reviews the evolving case law on Article 107(3)(b) TFEU. It is now established that State aid must be appropriate, necessary and proportional. However, this article finds that it is still not clear in the case law how they are to be applied in conjunction with each other. Several judgments of the General Court delivered in 2021 also indicate that the principle of proportionality can refer to both the amount of aid as well as to the scope of the aid measure. The 2021 judgments of the General Court represent a departure from previous case law in so far as they dispense with any assessment of the impact of State aid on trade and competition. Since aid on the basis of Article 107(3)(b) aims to remedy a serious economic disturbance, it is also presumed to be in the interest of all Member States. Pending cases before the Court of Justice may still reverse this new interpretation of the application of Article 107(3)(b).

- Accédez au texte intégral

20. COMPÉTENCE DES JURIDICTIONS DE L'UNION ET RÈGLES DE PROCÉDURE

DIMITROVA Y. et PICOD F., « La prescription dans l'action en responsabilité contre l'Union européenne », Revue des affaires européennes : R.A.E., 2021/4, p. 853-861.

Under article 46 of the Statute of the ECJ, proceedings against the Union in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Union. The main difficulty is to determine the starting point of the delay. Another difficulty consists in identifying the admissible causes of interruption.

- Accédez au texte intégral

Poland and Hungary's EU membership: On not confronting authoritarian governments

Gráinne de Búrca*

This Reflection considers why Poland's and Hungary's membership of the European Union has remained in many ways unaffected by widespread, serious, and documented actions on the part of those two governments which have gravely weakened the rule of law, democracy, and human rights. The Reflection does not argue for expulsion of these states, but investigates why it is that the European Union's political institutions and actors (rather than its supranational bodies) have not been willing to confront Poland and Hungary more robustly. The willingness of EU actors to overlook growing authoritarianism in Poland since the Russian invasion of Ukraine highlights these concerns even more starkly.

1. Singling out Poland and Hungary?

Many member states are persistent violators of EU law, and every one of the European Union's twenty-seven member states appears multiple times each year before the Court of Justice of the European Union (CJEU) charged with infringing various provisions of EU law. Looking at the most recent statistics from 2020 published by the European Commission: Spain, Greece, Italy, and Belgium are among the top offenders (together with former member state the United Kingdom), followed by Poland, with Germany just behind. Eight other member states are next, followed by Hungary in sixteenth place.[1] There seem to be a great many persistent violators when it comes to flouting EU law. And while some of these violations are likely to be relatively technical, many of them are serious and deliberate violations where a member state knowingly avoids complying with EU law requirements.[2] So why single out Poland and

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1 *Monitoring the Application of EU Law: 2020 Annual Report*, COM (2021) 432 (July 23, 2021).

2 For recent criticism of the Commission for its failure to properly pursue many of these infringements, see R. D. Kelemen & T. Pavone, *Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union* (Dec. 27, 2021), https://ssrn.com/abstract=3994918.

Hungary for special condemnation, and why inquire about the EU's policy of political non-confrontation?

The chorus of critical voices raised against Poland and Hungary in recent years and the questioning of their status as EU member states is not because they are more frequent violators than other states, nor even because the Polish Constitutional Tribunal has recently challenged the supremacy of EU law[3]—something which other national constitutional courts had already to some degree done, even if not so frontally[4]—but because what they have been challenging and violating are said to be the core values on which the European Union is founded. In other words, it is not so much that these two states have been regularly breaching binding EU laws and regulations. Indeed, there is only sparse EU law governing the requirements of "democracy," and until very recently, when the new Rule of Law Conditionality Regulation was adopted,[5] there was equally sparse EU law concerning the "rule of law," although there is a fairly substantial body of EU law governing human rights. Instead, the crux of the matter is that the actions of the two states are challenging what the EU calls its basic *values*.

2. What are the EU's "values" and what is their real status?

What does it mean for these states to be challenging the EU's basic values? This is not a purely rhetorical statement, in part because since the coming into force of the Amsterdam Treaty in 1999, the early articles of the EU Treaties now contain an explicit list of the "values" (initially called "principles" in the Amsterdam Treaty but later changed to "values" in the Lisbon Treaty of 2010) on which the European Union is said to be based.[6] Article 2 of the Treaty on European Union (TEU or "Maastricht Treaty") asserts that the EU is based on the values of the rule of law, democracy, and human rights (as well as "equality," "human dignity," and "freedom"), and declares that these values are "common to the Member States."[7] Backing up the assertion that the values are common to EU member states is Article 49 TEU, which specifies that respect for the values set out in Article 2 is a prerequisite and a condition for accession by any state to the European Union. Accompanying Articles 2 and 49 TEU in making clear that respect for human rights, democracy, and the rule of law (as well as equality, dignity, and

[3] Trybunał Konstytucyjny [Constitutional Tribunal], Ref. No. K 3/21, Judgment, 7 Oct., 7 2021 (Pol.), https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej.

[4] The most prominent is the German Constitutional Court, which has questioned rulings of the CJEU, and has set firm conditions and boundaries around its acceptance of the principle of supremacy of EU law.

[5] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, 2020 O.J. (L 433 I) 1 [hereinafter Regulation 2020/2092].

[6] Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, 37 I.L.M. 253 [hereinafter Treaty of Amsterdam]; Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

[7] Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253 [hereinafter TEU].

freedom) are basic EU values and conditions for membership, Article 7 TEU establishes a censure procedure whereby the voting rights of any member state which is found to have breached one of these values in a serious and persistent way may be suspended.

There is, therefore, no ambiguity in today's EU Treaty text, at least, about the current centrality of these values, and their stated importance to the EU and its ongoing legal and political functioning. On the other hand, these values were certainly not always expressed as a core dimension of EU law. In fact, these principles, later renamed values, were first included in the EU treaties as late as the 1990s, initially in weak form in the Maastricht Treaty in 1993 and then more strongly in the Amsterdam and Lisbon Treaties in 1999 and 2009. But for the first four decades of European integration from 1952 until 1992, there was no reference to such principles or values in the treaties. It is generally well known that after the failure of the draft European Political Community Treaty and European Defence Community Treaty in 1952, which would (had they been adopted and ratified) have integrated a bill of rights and included political conditionality, the European Economic Community (EEC), European Coal and Steel Community (ECSC), and European Atomic Energy Community treaties made no mention of human rights as part of EU law until around 1970.[8] At that point the European Court of Justice reversed its earlier case law in which it had explicitly rejected human rights as part of the law of the new European communities, and announced that EU law was indeed "inspired by" the general principles common to member state constitutions and by human rights treaties which they signed, and that analogous principles formed part of EU law.[9] Apart from the early absence of any reference to human rights, there was also no reference in the original EEC treaty in 1957 to any political conditions for accession to the new European communities. The treaty article dealing with accession, Article 237 EEC, did not specify any conditions, and the only rather indirect reference to the political character of member states was in a clause of the preamble to the EEC Treaty mentioning the states' resolve to strengthen "the safeguards of peace and liberty." The expectation that states seeking EU membership should be democracies and should observe the rule of law was first expressed in a Declaration on European Identity in 1973,[10] and again in the 1978 Declaration on Democracy,[11] later to be developed in greater detail as the so-called Copenhagen Criteria in 1993.[12] However, compliance on the part of candidate member states with

[8] Gráinne de Búrca, *The Road Not Taken*, 105 Am. J. Int'l L. 649 (2011). *See also* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]; Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty]; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter Euratom Treaty].

[9] Case 11/70, Internationale Handelsgesellschaft (1970) E.C.R. 114.

[10] Declaration on European Identity, Dec. 14, 1973, cl. 9, 12 Bull. Eur. Communities 118 (1973), www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf.

[11] Declaration on Democracy at the Copenhagen European Council, Apr. 8, 1978, 11 Bull. Eur. Communities 5 (1978).

[12] European Council Conclusions at the Copenhagen European Council, June 21–22, 1993, https://ec.europa.eu/commission/presscorner/detail/en/DOC_93_3.

these criteria was not included in the EU treaties as a constitutional requirement until the adoption of the Treaty of Amsterdam in 1997.[13]

I will return, towards the end of the Reflection, to this issue and to the question whether the early reluctance and delay in making explicit the EU's political and legal commitments to democracy and the rule of law is in some way linked to divisions within the EU today; and further, to ask whether there is any reason to doubt the assertion in the EU treaties that it is these values, and not others such as economic liberalization or market integration, that are core to the EU's identity and *raison d'être* today. But at the very least, the history of the expression of these values in European primary law suggests some (at least initial) caution about making them explicit and, even more importantly for present purposes, ongoing reservations about backing the values up with real enforcement mechanisms.

Following the abandonment of the 1953 draft European Political Community Treaty (which had contained explicit human rights conditions for accession[14]) and up until the time of the 1973 declaration, although the question had from time to time arisen, and particularly when Spain under Franco sought an association agreement and eventual admission to the European communities,[15] the idea that the new project of European integration was open only to democracies remained at best implicit. But with the prospect of eastward enlargement after the fall of the iron curtain in 1989, the references to EU fundamental values including democracy, human rights, and the rule of law became increasingly explicit and prominent in primary EU law, culminating in the eventual inclusion of what are now Articles 2, 7, and 49 TEU. By the time that Poland and Hungary joined the EU, the requirement that member states should respect democracy, human rights, and the rule of law both at the time of their accession and on an ongoing basis had certainly been made fully clear and explicit.

3. How seriously have Poland and Hungary breached the European Union's stated values?

In what ways have Poland and Hungary undermined these stated values to a degree that goes beyond the array of substantial breaches of EU law and human rights violations for which all EU member states are responsible at times? The essence of the response to that question is that while the two states formally retain various characteristics of majoritarian electoral democracies, the ruling parties in each of the two countries over a number of years have acted to consolidate their power and to undermine many core elements of their country's liberal democratic political system in a

[13] Ronald Janse, *The Evolution of the Political Criteria for Accession to the European Community, 1957–1973*, 24 Eur. L.J. 57 (2017).

[14] *See* Draft Treaty embodying the Statute of the European Community, Adopted at the Ad Hoc Assembly in Strasbourg, Mar. 9, 1953, art. 116 [hereinafter European Political Community Treaty] (specifying that "accession to the Community shall be open to the Member States of the Council of Europe and to any other European State which guarantees the protection of human rights and fundamental freedoms mentioned in Article 3").

[15] Janse, *supra* note 13.

wide range of ways, moving them—albeit in different ways and to different degrees—closer to the authoritarian end of the political spectrum. These ways include:

(i) Poland and Hungary subjecting the courts to political control including by reducing the retirement age of existing judges and replacing them with government-friendly appointees;[16] and appointing government-friendly figures to other supposedly independent institutions such as the public prosecutor's office;

(ii) establishing government-approved disciplinary procedures (and, in Poland's case, a special "disciplinary chamber") and using these to discipline or terminate the appointment of judges who question aspects of the government's agenda or who refer cases on the independence of judges,[17] or on other topics to which the government objects, such as asylum law in Hungary,[18] to the CJEU;

(iii) repressing and de-funding civil society groups who challenge or question aspects of governmental policy (Hungary in particular,[19] but also Poland[20]);

(iv) exercising increasing control over media freedom and dismantling media pluralism (Hungary[21] and Poland[22]);

[16] On Hungary, see C-286/12, Commission v. Hungary, ECLI:EU:C:2012:687; on Poland, see C-619/18, Commission v. Poland, ECLI:EU:C:2019:531; C-192/18, Commission v. Poland ECLI:EU:C:2019:924.

[17] For Poland, see Case C-791/19, Commission v. Poland, ECLI:EU:C:2021:596. For Hungary, see *Disciplinary Action Threatens Judge for Turning to EU Court of Justice*, Hung. Helsinki Comm. (Nov. 7, 2019), https://helsinki.hu/en/disciplinary-action-threatens-judge-for-turning-to-cjeu/; Case 564/19, Criminal Proceedings against IS, ECLI:EU:C:2021:949 (ruling in the case referred by Judge Vasvári).

[18] Eszter Zalan, *Hungarian Judge Claims She Was Pushed Out for Political Reasons*, Eur. Observer (July 6, 2021), https://euobserver.com/democracy/152349.

[19] The Commission brought Hungary before the CJEU to challenge the law seeking to restrict external funding to civil society: C-78/18, Commission v. Hungary, ECLI:EU:C:2020:476. When Hungary failed to implement the judgment, the Commission in 2021 pursued penalty payment proceedings against the government. At this point, the government, continuing its cat-and-mouse game with EU law enforcement, repealed the law, but immediately adopted a new law containing a fresh set of restrictions on civil society funding: Amnesty International, Hungary Repeals Controversial Laws Restricting the Right to Association but Concerns Remain, EUR 27/4526/2021, July 29, 2021, www.amnesty.org/en/documents/eur27/4526/2021/en/.

[20] Stanley Bill, *Counter-Elite Populism and Civil Society in Poland: PiS's Strategies of Elite Replacement*, 36 E. Eur. Pol. & Societies 118 (2020).

[21] *See Conclusions of the Joint International Press Freedom Mission to Hungary*, Int'l Press Inst. (Dec. 3, 2009), https://ipi.media/wp-content/uploads/2019/12/Hungary-Conclusions-International-Mission-Final.pdf.

[22] Media Freedom Rapid Response, Democracy Declining: Erosion of Media Freedom in Poland: Mission Report, Int'l Press Inst. (Nov.–Dec. 2020), https://ipi.media/wp-content/uploads/2021/02/20210211_Poland_PF_Mission_Report_ENG_final.pdf; Madeline Roache, *Polish Media and Opposition Fight to Save Press Freedom from State Control*, Open Democracy (Aug. 20, 2021), www.opendemocracy.net/en/polish-media-and-opposition-fight-save-press-freedom-state-control/. In August 2021, the Polish Parliament passed a law on media ownership seeking to restrict foreign ownership of the media, in a move widely understood to be directed at critical media coverage of the government: Jon Henley, Polish Parliament Passes Controversial New Media Ownership Bill, Guardian (Aug. 11, 2021), www.theguardian.com/world/2021/aug/11/poland-coalition-under-threat-as-parliament-votes-on-controversial-media-bill. The bill however was vetoed by the Polish President in December 2021. *Polish President Vetoes Media Law Criticised by US and EU*, Guardian (Dec. 27, 2021), www.theguardian.com/world/2021/dec/27/polish-president-vetoes-media-law-criticised-by-us-and-eu.

(v) smearing and harassing critics, including through civil and criminal defamation actions,[23] and repressing freedom of expression (e.g. seizing equipment of investigative journalists without warrant);[24]

(vi) repression of particular disfavored groups and minorities, including LGBTQ+ communities (Hungary and Poland),[25] targeting asylum seekers—e.g. by denying them food and rejecting EU laws on reception and treatment,[26] escalating anti-migrant rhetoric (Hungary and Poland); introducing laws to permit pushbacks of asylum seekers in breach of international law (Poland);[27] and (Hungary) blocking or (Poland) proposing to withdraw from the Istanbul Convention on Preventing and Combating violence against women;[28]

(vii) using the apparatus of law and order, and in particular the public prosecution offices, in a highly selective way to protect ruling elites; refusing to investigate prominent cases of corruption and illegality, and using the police and powers of prosecution to discipline and harass political opponents (Poland);[29]

(viii) using COVID as an opportunity to introduce wide executive and Prime Ministerial powers; for example, to declare a state of "medical" emergency, to avoid scrutiny of government (Hungary in particular).[30]

These are not unsubstantiated allegations, but well-documented practices, policies, and laws which have been confirmed by many observers from both within and outside

[23] Mike Ticher, *Long Arm of Law and Justice: the Sydney Professor under Attack from Poland's Ruling Party*, Guardian (Oct. 4, 2020), www.theguardian.com/world/2020/oct/04/long-arm-of-law-and-justice-the-sydney-professor-under-attack-from-polands-ruling-party.

[24] *Polish Police Search Journalist's Home, Seize Equipment over Alleged Threats to Legislator*, Comm. to Protect Journalists (Oct. 6, 2021), https://cpj.org/2021/10/polish-police-search-journalists-home-seize-equipment-over-alleged-threats-to-legislator/.

[25] For action being taken by the European Commission against Poland and Hungary due to their restrictions on the rights of LGBTQ+ persons, see Eur. Comm'n, Press Release, *EU Founding Values: Commission Starts Legal Action against Hungary and Poland for Violations of Fundamental Rights of LGBTIQ People* (July 15, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668.

[26] Eur. Comm'n, Press Release, *Commission Takes Hungary to Court* (July 25, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260; Org. for Sec. & Co-operation in Eur., Statement by the Hungarian Helsinki Comm., *Systemic Violations of Asylum-Seekers' Human Rights in Hungary Continues* (Sept. 30, 2019), www.osce.org/files/f/documents/1/d/434198_0.pdf.

[27] Eur. Council of Refugees & Exiles, *Poland: Parliament Approves "Legalisation" of Pushbacks* (Oct. 15, 2021), https://ecre.org/poland-parliament-approves-legalisation-of-pushbacks-council-of-ministers-adopt-bill-to-construct-border-wall-another-life-is-lost-at-border-with-belarus/.

[28] Sandrine Amiel, *Istanbul Convention: Poland Moves a Step Closer to Quitting Domestic Violence Treaty*, EuroNews (Apr. 1, 2021), www.euronews.com/2021/04/01/istanbul-convention-poland-moves-a-step-closer-to-quitting-domestic-violence-treaty; Hilary Margolis, *Hungary Rejects Opportunity to Protect Women from Violence*, Hum. Rts. Watch (May 8, 2020), www.hrw.org/news/2020/05/08/hungary-rejects-opportunity-protect-women-violence.

[29] Grzegorz Makowski, *Corruption Thrives as Rule of Law and Democratic Oversight Weakens in Poland*, Transparency Int'l (Feb. 4, 2021), www.transparency.org/en/blog/corruption-thrives-as-rule-of-law-and-democratic-oversight-weaken-in-poland. *See generally* Robert Sata & Ireneusz Pawel Karolewski, *Caesarean Politics in Hungary and Poland*, 36 E. Eur. Pol. 206 (2020).

[30] Kriszta Kovács, *Hungary and the Pandemic, a Pretext for Expanding Power*, Verfassungsblog (Mar. 11, 2021), https://verfassungsblog.de/hungary-and-the-pandemic-a-pretext-for-expanding-power/. *See also Hungary Extends COVID-19 State of Emergency Until Jan. 1, 2022*, Xinhuanet (Sept. 29, 2021), www.news.cn/english/europe/2021-09/29/c_1310215897.htm.

the two states in question. The Council of Europe's Venice Commission for Democracy through Law, a highly reputable body with representatives from sixty-two states and composed of constitutional experts from universities, supreme and constitutional courts, national parliaments, and civil services, has expressed ongoing concern about the undermining of the independence of the Polish judiciary;[31] the EU's Commission has brought numerous "infringement proceedings" against both Poland and Hungary for many of the actions listed above and has condemned these actions in its annual rule-of-law report;[32] and the CJEU has found infringements in virtually all of those cases.[33] The EU's European Parliament has adopted resolutions condemning the actions of both member states, and formal censure proceedings under Article 7 TEU have been initiated by the EU Commission in the case of Poland, and by the European Parliament in the case of Hungary, against both member states.[34] Civil society groups within Poland and Hungary, as well as multiple external and international human rights organizations (including Amnesty, Human Rights Watch, the International Bar Association, the International Federation for Human Rights, and many more[35]) have repeatedly condemned many of the different laws and changes introduced by the governments in both states, as well as their combined effect in undermining democracy.

While Viktor Orbán has famously asserted that Hungary is an "illiberal democracy"—suggesting that it is democratic but not liberal, in eschewing most of the liberal constraints on power including independent institutions and many elements of rights protection—Hungary has been moving closer to an elective autocracy in many respects. Elections take place, but several of the important preconditions for free and fair elections—a free and pluralistic media, freedom of association for civil society groups, and other independent institutions, as well as absence of government tampering with the electoral system—have been significantly undermined.[36]

[31] *See, e.g.*, Urgent Joint Opinion No. 977/2020 of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme Court and some other Laws, issued 16 January 2020, CDL-AD(2020)017 (June 22, 2020). The Venice Commission has adopted numerous critical opinions in relation to the various measures adopted by both Poland and Hungary.

[32] *See* Eur. Comm'n, *2021 Rule of Law Report: Communication and Country Chapters*, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters_en (last visited Mar. 9, 2022).

[33] For an overview, see Laurent Pech, Patryk Wachowiec, & Dariusz Mazur, *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU (In)Action*, 13 Hague J. on Rule L. 1 (2021).

[34] M Michelot, *The Article 7 Proceedings against Poland and Hungary: What Concrete Effects?*, Notre Europe (May 6, 2019), https://institutdelors.eu/en/publications/__trashed/.

[35] See the many institutional signatories to the Open Letter to the European Commission on the rule of law in Hungary and Poland: Open Letter, *Concerns Regarding the Rule of Law and Human Rights in Poland and Next Steps under the Article 7(1) TEU Procedure*, Int'l Fed. Hum. Rts. (Dec. 18, 2020), www.fidh.org/en/region/europe-central-asia/poland/concerns-regarding-the-rule-of-law-and-human-rights-in-poland-and.

[36] András Rácz, Free But Not Fair Elections in Hungary (2018), https://icds.ee/wp-content/uploads/2018/04/ICDS_Analysis_Free_But_Not_Fair_Elections_in_Hungary_Andras_Racz_April_2018.pdf. See also the reports on Hungary in V-Dem Inst., Autocratization Turns Viral: Democracy Report 2021 (2021), www.v-dem.net/static/website/files/dr/dr_2021.pdf; Freedom House, Nations in Transit: Dropping the Democratic Façade (2020), https://freedomhouse.org/report/nations-transit/2020/dropping-democratic-facade.

In other words, even the electoral component of democracy is weakened by the fact that the party in power increasingly controls the state, quashing and punishing political and civil society opposition; shutting down, expelling, or controlling independent institutions, silencing critical voices; and funneling money towards loyalists.[37] And while there is some hope at present that a united opposition, despite these restrictive circumstances, might nonetheless manage to defeat Orbán's ruling party in elections in April 2022, many of the changes his government has introduced have been enacted into the Constitution, making it more difficult for any future opposition parties that may come into government to undo them without a two-thirds majority.[38]

In Poland, a greater degree of freedom of association and civic space remains, and while the public media are increasingly under governmental control, there has not yet been a takeover of the private media in the way there has in Hungary. Nevertheless, an attempt by a state-owned company to buy out a large number of regional newspapers,[39] and a proposal for a controversial tax on the private media which would exempt state media,[40] represent steps in that direction. The systematic undermining of judicial independence and attempts to bring other independent institutions under the control of the ruling party have seriously corroded Poland's formerly consolidated democratic system. According to the rankings of *Freedom House* in 2021, Hungary is no longer a democratic system, while Poland is no longer a consolidated democracy but has fallen to being "semi-consolidated." It has also fallen sharply in the democratic and rule-of-law rankings compiled by other organizations such as the *World Press Freedom Index* and the *World Justice Project*, as well as the Economist Intelligence Unit.

4. No power of expulsion?

What has been the consequence for their EU membership of Hungary's move from being a democracy into an authoritarian system, and the steep decline in the quality of Poland's democratic system, particularly with regard to judicial independence? The answer is that both states retain full EU membership, with all the rights and privileges that entails. In the remainder of this Reflection, I consider how and why this is the case, given that neither member state would currently fulfil the criteria for membership, and what that means for the EU.

[37] *See* Selam Gebrekidan, Matt Apuzzo, & Benjamin Novak, *The Money Farmers: How Oligarchs and Populists Milk the E.U. for Millions*, N.Y. Times (Nov. 3, 2019), https://nyti.ms/3pUxXET.

[38] *But see* Kim Scheppele, *Escaping Orbán's Constitutional Prison*, Verfassungsblog (Dec. 21, 2021), https://verfassungsblog.de/escaping-orbans-constitutional-prison/.

[39] Claudia Ciobanu, *Warsaw Court Blocks Takeover of Polish Regional Media by State-Owned Orlen*, Reporting Democracy (Apr. 12, 2021), https://balkaninsight.com/2021/04/12/warsaw-court-blocks-takeover-of-polish-regional-media-by-state-owned-orlen/. The Bill, however, was vetoed by the Polish President in December 2021: *Polish President Vetoes Media Law Criticised by US and EU*, Guardian (Dec. 27, 2021), www.theguardian.com/world/2021/dec/27/polish-president-vetoes-media-law-criticised-by-us-and-eu.

[40] *Poland to Redraw Media Tax Proposal Following Protests*, U.S. News (Feb. 16, 2021), www.usnews.com/news/business/articles/2021-02-16/poland-to-redraw-media-tax-proposal-following-protests.

The first and simplest answer to the question why their membership remains unaffected is that there is no formal mechanism to expel a member state from the European Union contained in the EU treaties. Indeed, until the enactment of Article 50 TEU by the Lisbon Treaty in 2010, there was no express provision for a member state to leave the EU voluntarily, either. Nevertheless, even in the absence—prior to 2010—of a treaty provision on leaving the EU, few doubted the political reality of the fact that if a member state wanted to leave, it would do so, even if the political process would be messy. Could the same perhaps also be said about an implicit power of expulsion of a "rogue" member state? In other words, if there was an implicit power of exit before the enactment of Article 50 TEU, why not an implicit power of expulsion too, before—and perhaps even after—its enactment?

Several arguments can be made against such an implied power. In the first place, Article 7 TEU sets out the contours of a power of *suspension* of voting rights in the Council for any state found to have seriously and persistently violated the values of democracy, human rights, or the rule of law, and the inclusion of this power of suspension arguably excludes any implied power to expel. Article 8 of the Statute of the Council of Europe (a larger Europe-wide organization of forty-seven states), by comparison, includes a power to suspend the rights of a member state which has seriously violated the obligation to respect human rights and the rule of law and the obligation to collaborate sincerely with the Council of Europe, as well as a power to request such a state to withdraw from the Council of Europe, and the power to expel a state which refuses in these circumstances to withdraw.[41] Indeed, Russia was recently expelled from the Council of Europe on 16 March 2022. However, a similarly explicit power to expel an EU member state was proposed but rejected during the drafting process of the precursor to Article 50 TEU, during the Convention on the Future of Europe.[42] This seems to point to a deliberate decision having been taken not to provide for an expulsion option. The European Court of Justice in the *Wightman* case concerning Brexit also took the view that no such power to compel a Member State to leave the EU exists.[43] Finally, commentators have argued that, even in international organizations which do enjoy a power of expulsion, the move to expel is generally seen as a very last resort, rarely to be used,[44] and particularly in an organization as closely integrated as the EU.[45] Among the many negative effects that expulsion could have on the citizens of the member state, being expelled would mean the likely revocation of their EU citizenship, a status which the EU conferred by virtue of their holding the nationality of a member state.

[41] For discussion of the Council of Europe expulsion option and when it should be exercised, see Kanstantsin Dzehtsiarou & Donal K. Coffey, *Suspension and Expulsion of Members of the Council of Europe: Difficult Decisions in Troubled Times*, 68 Int'l & Comp. L. Q. 44 (2019).

[42] See Elmar Brok et al. of the European People's Party, Suggestion for amendment of Article I-59, http://european-convention.europa.eu/Docs/Treaty/pdf/46/46_Art%20I%2059%20Brok%20EN.pdf (last visited Mar. 9, 2022).

[43] C-621/18, Wightman v. Secretary of State for Exiting the EU, ECLI:EU:C:2018:999, ¶¶ 65, 67, 69, 72.

[44] Louis B. Sohn, *Expulsion or from an International Organization*, 77 Harv. L. Rev. 1381 (1964). See, however, the recent vote on 16 March 2022 under Article 8 of the Statute of the Council of Europe to expel Russia from the Council of Europe.

[45] Boyko Blagoev, *Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality?*, 16 Tilburg L. Rev. 191 (2011).

Others, however, have argued that it cannot be the case that an international organization whose founding instruments do not explicitly provide for expulsion could never expel a state no matter how bad the circumstances, and that it is important that an organization like the EU should be able to avail itself of residual rules of international law such as the "material breach" provision of Article 60 of the Vienna Convention on the Law of Treaties to terminate the treaty as between a persistent rogue state and the other parties to the treaty.[46] Indeed, Dutch Prime Minister Mark Rutte in 2021 raised the question, when Poland and Hungary tried to block the adoption of the EU budget, including an extensive pandemic relief fund, because of the proposed "rule of law conditionality" Regulation which accompanied it at the time, whether it would be possible to establish an alternative European Union organization without those two member states.[47] Even short of a formal power of expulsion, of course, an EU member state could presumably be requested to withdraw. The absence of a formal expulsion mechanism would not necessarily prevent a political move of this kind, although there would be no way of compelling the requested state to exit.

Hence the first and clearest answer to the question why Poland and Hungary are both still member states despite their growing authoritarianism is that there is, at present, no explicit EU power of expulsion, and at the very least some doubts about whether an implicit power of expulsion could exist under international law, or whether a request to leave would have any effect.

5. Political reluctance to confront Poland and Hungary

Setting aside the dramatic option of expulsion, however, the contention of this Reflection is that there has been a notable *political* unwillingness to confront Poland or Hungary in a robust way, a reluctance to challenge their actions or to impose a real political cost. In particular, despite sharp and continued criticism from civil society groups, from international organizations and independent bodies over several years, and despite the extensive array of actions corroding democracy in both states, there has been little by way of response from the Council of Ministers, the European Union's main intergovernmental institution.

After considerable prevarication and delay, the first step in the censure proceedings under Article 7 TEU (which could eventually lead to a suspension of the voting rights of a member state) was initiated against each of the two states, but in neither case was the procedure initiated by the Council of Ministers. In the case of Poland, it was the European Commission, a body which is relatively independent of the member states,

[46] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. *See also* Joseph Blocher, Mita Gulati, & Larry Helfer, *Can Greece Be Expelled from the Eurozone? Toward a Default Rule on Expulsion from International Organizations*, *in* Filling the Gap in Governance: The Case of Europe 127 (Franklin Allen et al., eds., 2016), https://scholarship.law.duke.edu/faculty_scholarship/3600/.

[47] Tom Theuns, *Could We Found a New EU Without Hungary and Poland?*, EuObserver (Sept. 21, 2020), https://euobserver.com/opinion/149470. This issue had been raised years ago in Jerzy Makarczyk, *Legal Basis for Suspension and Expulsion of a State from an International Organization*, 25 German Y.B. Int'l L. 476 (1982).

which triggered the Article 7 procedure in 2017, and in the case of Hungary the European Parliament eventually moved to open the procedure in 2018. But only the first step towards initiating these proceedings has been taken, and they have remained effectively frozen since that time. The reason for the deadlock is that despite multiple "discussions" in the Council (in which Hungary and Poland apparently made lengthy and unenlightening PowerPoint presentations without much by way of real engagement), the requisite next step under Article 7(1) TEU, which would be a decision by four-fifths of the twenty-seven-member Council that there is "a clear risk of a serious breach by a Member State of the values in Article 2 TEU," has not been taken. In other words, there appears to be little political appetite among member state governments, or at least among a sufficient number of them, to censure Hungary and Poland, despite extensive and increasingly comprehensive departures from democratic standards. Part of the reluctance—but certainly only a part—can be explained by the fact that even if the next step were to be taken under Article 7(1) by a majority decision of the Council of Ministers that a risk of serious breach of EU values existed, a further step involving a unanimous decision by the European Council under Article 7(2) that such a serious and persistent breach actually did occur is ultimately required before any move to suspend voting rights under Article 7(3) could take place. And since there are currently two offending member states, it is virtually certain that each would block the requisite unanimity required to censure the other. It is also possible that the member state representatives in the Council of Ministers consider that it is not worth spending the small amount of political effort needed to move to the next step of the Article 7 procedure if it will stall at that stage, or perhaps they do not want the inability of the EU to use its censure procedure effectively to be so sharply highlighted. Nevertheless, the fact remains that they have chosen to eschew the opportunity afforded by the availability of a majority vote under Article 7(2) to express the European Union's political opposition to Poland's and Hungary's attack on the EU's supposedly fundamental values.

A second and potentially robust mechanism for confronting Poland and Hungary is that of funding conditionality—i.e. making the grant of (extensive and much-coveted) cohesion and structural funds dependent on compliance with EU values. Not only would the denial of such funding be unwelcome to the governments in its own right, but the denial of funding could also undermine the popularity of the governments which arguably rests at least in part on their EU-backed domestic spending. While certain forms of budgetary conditionality—including macroeconomic conditionality but also social conditionality—existed already under EU law,[48] it was only in 2020 that a Regulation adopting a rule-of-law conditionality mechanism for EU funding was adopted.[49] At the time it was being adopted, Poland and Hungary threatened to veto the entire EU budget, including the post-Covid stimulus known as the Next Generation

[48] Peter Berkowitz, Ángel Catalina Rubianes, & Jerzy Pieńkowski, *The EU's Experience with Policy Conditionalities*, Org. Econ. Co-operation & Dev. (Apr. 28, 2017), www.oecd.org/cfe/regionaldevelopment/Berkowitz_Conditionalities-for-More-Effective-Public.pdf; Jorge Núñez Ferrer et al., Cntr. for Eur. Pol'y Stud., The EU Budget and its Conditionalities: An Assessment of their Contribution (2018), www.ceps.eu/ceps-publications/the-eu-budget-and-its-conditionalities/.

[49] Regulation 2020/2092, *supra* note 5.

EU Fund, due to their opposition to the new rule-of-law conditionality regulation.[50] The Regulation was already quite limited in scope, in the sense that it links rule-of-law conditionality firmly to the protection of the EU's financial interests,[51] but the heads of state and government of the member states within the European Council weakened it further by adopting a declaration specifying that before the measure could be applied in relation to any member state, the Commission would have to first adopt guidelines on its application, and that these guidelines should not be concluded until after the Court of Justice had ruled on any action for annulment of the Regulation.[52] This highly unusual political intervention by the European Council to soften and delay any activation by the Commission of the budgetary conditionality mechanism drew extensive criticism.[53] Hence, while the EU member states did eventually agree to adopt a form of rule-of-law conditionality, it was enacted in rather a limited form which may be difficult for the Commission to use, and it was further postponed and softened in order to alleviate the threatened Polish and Hungarian veto.

A further and somewhat shameful concession made by the EU member states to Hungary was to yield to Victor Orbán's opposition to the nomination as EU Commission President of Franz Timmermans, an EU official who had shown himself to be unintimidated and willing to challenge Hungary and Poland firmly on rule of law issues.[54]

It is worth noting, however, that while member state governments have chosen not to take the next step with Article 7 TEU proceedings, and have not been willing to bring infringement proceedings themselves under Article 259 of the Treaty on the Functioning of the European Union against either Poland or Hungary, some individual governments have more recently begun to show their support for the actions of the other EU institutions challenging Poland and Hungary.[55] The legal representatives of five member states supported the Commission in its infringement action against Poland in relation to the Disciplinary chamber,[56] while the legal

[50] *EU Budget Blocked by Hungary and Poland Over Rule of Law Issue*, BBC (Nov. 16, 2020), www.bbc.com/news/world-europe-54964858.

[51] *See* Regulation 2020/2092, *supra* note 5, art. 4 (providing that the EU can act against a member state under the Regulation when "breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way").

[52] Eur. Council Conclusions, EUCO 22/20 (Dec. 11 2020), https://data.consilium.europa.eu/doc/document/ST-22-2020-INIT/en/pdf. The CJEU gave its judgment on the legality of the Regulation on February 16, 2022, ruling, as expected, that the Regulation was validly adopted: Joined Cases C-156/21, Hungary v. Parliament and Council and C-157/21, Poland v. Parliament and Council, ECLI:EU:C:2022:97.

[53] *See, e.g.*, Kim Scheppele, Laurent Pech, & Sebastian Platon, *Compromising the Rule of Law while Compromising on the Rule of Law*, Verfassungsblog, Dec. 13, 2020, https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/.

[54] *Hungarian Press Roundup: PM Orbán Opposes Timmermans' Candidacy*, Hungary Today (July 2, 2017), https://hungarytoday.hu/hungarian-press-roundup-pm-orban-opposes-timmermans-candidacy/.

[55] Consolidated Version of the Treaty on the Functioning of the European Union art. 15, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[56] These were Belgium, Denmark, the Netherlands, Finland, and Sweden: Hans Von Der Burchard, *Commission, 5 EU Members Clash in Court with Poland over Rule of Law*, Politico.eu (Dec. 1, 2020), www.politico.eu/article/five-eu-countries-and-commission-clash-with-poland-over-rule-of-law-at-court-hearing/.

representatives of ten member states appeared in court to support the EU Regulation on Rule of Law conditionality in response to Hungary and Poland's challenge to the validity of that measure.[57] Further, during a Council meeting in June 2021, Hungary was challenged and openly criticized by multiple member state representatives in relation to its new law banning the portrayal or "promotion" of homosexuality among those aged under eighteen.[58] And it is clear that some governments are more concerned than others about democratic erosion in Hungary and Poland. Yet there is a continued unwillingness on the part of the member state governments, whether alone or within the EU Council of Ministers, to take firm political action, and they have continued to avoid confronting Hungary and Poland directly with the fundamental unacceptability and incompatibility of their authoritarian practices and policies with EU membership.

6. Supranational confrontation of Poland and Hungary

On the other hand, while the EU's intergovernmental bodies—the Council and the European Council—have remained mostly silent or unwilling to take firm action against Poland and Hungary, the supranational and independent bodies, particularly the Commission and the Court of Justice, have been more active.[59] While the Commission has not as yet followed the advice of some scholars advocating for "systemic" infringement proceedings to be brought against the two states,[60] and has been slower to act against Hungary than against Poland particularly in relation to judicial independence,[61] it has nevertheless brought multiple infringement proceedings against both Hungary and Poland, including cases seeking urgent interim measures, and seeking the imposition of a penalty payment.[62] The Commission has also used the proposed disbursement of EU pandemic funding, and its supervision of member state national recovery plans, to put pressure on Poland and Hungary to respect the rule of law,[63] and has suggested that it may soon invoke the new rule of law conditionality

[57] John Morijn, *A Closing of Ranks: 5 Key Moments in the Hearing in Cases C-156/21 and C-157/21*, Verfassungsblog (Oct. 14 2021), https://verfassungsblog.de/a-closing-of-ranks/.

[58] Ben Hall & Mehreen Khan, *Orban Left Bruised and Isolated after Showdown over LGBT+ Rights*, Fin. Times (June 27, 2021), https://on.ft.com/37komks.

[59] For a more critical appraisal, see Laurent Pech, Patryk Wachowiec, & Dariusz Mazur, *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action*, 13 Hague J. on Rule L. 1 (2021).

[60] Kim Scheppele, Dimitry Kochenov, & Barbara Grabowska-Moroz, *EU Values Are Law after All: Enforcing EU Values through Systemic Infringement Procedures*, 39 Y.B. Eur. L. 3 (2020).

[61] *See* Andre Fojo, Judicial Review in the Resistance against Authoritarianism (2022) (Unpublished article) (on file with author).

[62] *See, e.g.*, C-791/19-R, Commission v. Poland, Order, Apr. 8, 2020, ECLI:EU:C:2020:277. *See also* C-204/21 R, Commission v. Poland, Order, Oct. 27, 2021, ECLI:EU:C:2021:878 (imposing a EUR 1 million fine per day on Poland for non-compliance with its interim measures order in C-204/21 R). And in February 2021, the Commission initiated a second infringement procedure against Hungary seeking a penalty for non-compliance with the CJEU's ruling in C-78/18, Commission v. Hungary, ECLI:EU:C:2020:476.

[63] Paola Tamma, *Hungary's Recovery Cash in Limbo*, Politico.eu (Sept. 30, 2021), www.politico.eu/article/hungary-eu-recovery-fund-limbo-viktor-orban/.

Regulation to withhold other forms of EU structural funding too.[64] The CJEU has given rulings in many infringement cases and also in multiple other preliminary references from national courts involving authoritarian-style measures adopted by Poland and Hungary. Infringement proceedings have been brought to the Court against Hungary in relation to its forced closure of the Central European University in Budapest, its imposition of restrictions on civil society organization and funding, forcing the early retirement of judges in order to fill the courts with government-friendly appointees, violation of EU asylum rules, and criminalization of support for refugees, among others. Numerous rulings have also been given by the CJEU against Poland in relation to its interference with the independence of the Supreme Court and the ordinary courts, by forcing the early retirement of judges, significantly increasing the number of judges, and filling the tribunals with political appointees; and the establishment of a government-friendly Disciplinary Chambers of the Supreme Court to discipline judges whose rulings displease the government, for example by making preliminary references to the Court of Justice on issues related to judicial independence. The CJEU has so far condemned both Poland and Hungary in all of the many infringement cases brought by the Commission.

Similarly, in multiple cases referred to the CJEU via the preliminary reference procedure from various Hungarian and Polish courts, which raised questions about the compatibility with EU law of measures taken to undermine their independence and subject them to disciplinary action, the CJEU reaffirmed the obligation to maintain an independent judiciary as a core requirement of EU law.[65] The CJEU also imposed a pecuniary penalty of EUR 1 million per day on Poland for failing to implement an interim order of the Court to suspend the judicial disciplinary mechanism which had been condemned in earlier CJEU proceedings.[66] Most recently, the CJEU has upheld the validity of the Rule of Law Conditionality Regulation in a challenge brought by Poland and Hungary, and ruled that the values inArticle 2 TEU "define the very identity of the EU as a common legal order" and that they "cannot be reduced to an obligation which a candidate state must meet in order to accede to the European Union and which it may disregard after its accession."[67]

[64] *EU Might Propose Freezing Funds for Poland and Hungary Before April*, U.S. News (Jan. 25, 2022), www.usnews.com/news/world/articles/2022-01-25/eu-might-propose-freezing-funds-for-poland-and-hungary-before-april.

[65] Case C-585/18, A.K. (Independence of the Disciplinary Chamber of the Supreme Court), ECLI:EU:C:2019:982; Case C-216/18 PPU, Minister for Justice and Equality (Deficiencies in the system of justice), ECLI:EU:C:2018:586.

[66] C-204/21 R, Commission v. Poland, Order, Oct. 27, 2021, ECLI:EU:C:2021:878.

[67] Joined Cases C-156/21, Hungary v. Parliament and Council and C-157/21, Poland v. Parliament and Council, ECLI:EU:C:2022:97, paras 144–145. Despite much positive commentary, the CJEU's judgment has not gone without criticism. *See, in particular*, Katharina Pistor, *The EU Court Punts on the Rule of Law*, Project Syndicate (Feb. 21, 2022), www.project-syndicate.org/commentary/eu-court-hungary-poland-rule-of-law-by-katharina-pistor-2022-02 (arguing that the Court indulged in "textual legalism" by going out of its way to emphasize that the new conditionalities were linked to sound budget management and were not intended to be punitive of rule-of-law breaches).

The European Parliament too—another supranational EU body, although a more political one than the Court or Commission—has been active in condemning the actions of the Polish and Hungarian governments. While it has mainly done so through resolutions, debates, and oral condemnations, the Parliament also played a key role in triggering Article 7 proceedings against Hungary, and more recently brought proceedings against the Commission to condemn it for failing to institute "funding conditionality" proceedings designed to withhold EU funding from member states which are violating the rule of law.[68]

The Polish and Hungarian governments, however, have been active and creative in denying, blocking, delaying, challenging, or watering down various possible confrontational measures, sometimes by using the EU's own legal and political toolkit against it. Their conduct in relation to the EU has not always been characterized by an aggressive or hostile response (although there have also been numerous of these, as with Orban's poster campaign against then Commission President Juncker,[69] or Poland ruling party members comparing the EU to the Soviet Union or the Nazi occupation[70]), but usually by a well-calibrated set of legal reactions which may often mislead external observers. Both Poland and Hungary have played a cat-and-mouse game with the European Union, regularly introducing what appear to be reforms in response to CJEU rulings, for example on Hungary's "transparency law" which sought to restrict civil society funding,[71] or Poland's reaction to CJEU rulings about forcing the retirement of Supreme Court judges, when in fact the reforms largely avoid the implications of the rulings and continue the substance of the violation in a slightly different way. Similarly, the Polish government proposal to address the EU's objections to the judicial Disciplinary Chamber was another example of an eleventh—or perhaps more accurately thirteenth—hour tactical retreat in order to avoid the forfeiture of EU pandemic relief funding.[72] The move by the Polish Prime Minister in 2021 to ask the government-friendly constitutional tribunal to rule on the compatibility with the Polish Constitution of the EU treaties was a more openly confrontational stance on Poland's part, reflecting perhaps a decision to call the EU's bluff in the expectation that no real political censure would follow while gaining credit with Law and Justice Party (PiS) supporters at home.[73]

[68] EU *Presses Ahead to Sue Commission for Dragging Its Feet on Rule of Law*, August 31 2021, https://www.euractiv.com/section/justice-home-affairs/news/ep-presses-ahead-to-sue-commission-for-dragging-its-feet-on-rule-of-law/

[69] Georgi Gotev, *Hungary to Replace Juncker with Timmermans in Poster Campaign*, Euractiv (Mar. 4, 2019), www.euractiv.com/section/eu-elections-2019/news/hungary-to-replace-juncker-with-timmermans-in-poster-campaign/.

[70] *Leader Says Poland Wants to Be in EU, but Remain Sovereign*, U.S. News (Sept. 15, 2021), www.usnews.com/news/business/articles/2021-09-15/leader-says-poland-wants-to-be-in-eu-but-remain-sovereign.

[71] Lydia Gall, *Hungary's Scrapping of NGO Law Insufficient to Protect Civil Society*, Hum. Rts. Watch (Apr. 23, 2021),www.hrw.org/news/2021/04/23/hungarys-scrapping-ngo-law-insufficient-protect-civil-society.

[72] Jan Cienski, *Poland Takes Half Step Back to Cool Legal Conflicts with EU*, Politico.eu (Feb. 7, 2022), www.politico.eu/article/poland-takes-a-half-step-back-in-ending-legal-conflicts/.

[73] Trybunał Konstytucyjny [Constitutional Tribunal], Ref. No. K 3/21, Judgment, 7 Oct., 7 2021 (Pol.).

7. Examining the political failure to confront

What is it that explains the unwillingness of EU member governments, and the intergovernmental institutions of the European Union, to confront Hungary and Poland over their deliberate erosion of democratic and rule-of-law standards? Given how openly and continuously the two states have been defying core values asserted as foundational to the EU, why have the EU's political institutions been reluctant to equip themselves with stronger instruments to enforce rule-of-law and democracy requirements, and reluctant to use the instruments that they had created?

One possible explanation could be that the relative lack of response of member state governments to the rejection of liberal democracy in Poland and Hungary points to Article 2 TEU being primarily a form of virtue-signaling or symbolism, rather than a real statement of the values which are fundamental to the EU. In that sense, and returning to the discussion at the beginning of this Reflection, the question is whether the fact that respect for democracy and the rule of law were added so late to the treaties as EU values and as conditions for accession was not accidental, and that these are not in fact core values for the European Union. When the EEC was founded in 1957, it was as an economic community—with the aim of ensuring peace and prosperity, to be sure, but without any central commitment being expressed or made to other political values. The fact that democracy, human rights, and the rule of law were included at a much later stage, and—most importantly—without adequate mechanisms to enforce them, would not necessarily transform them into genuinely foundational values. Indeed, some might point to the fact that the closest a member state has come to risking having to leave the European Union (and the Eurozone) was probably the case of Greece during the Eurocrisis as evidence of the priority of economic over political integration in Europe. Further, as has been discussed in detail during decades-long debates over the "democratic deficit" of the EU, the European Union's own political system is, at best, a thin and complex form of transnational democracy which lacks some of the important dimensions that characterize national democracies, in particular responsiveness to the electorate. The fact that the EU is a transnational organization composed of states rather than being itself a nation state means that its own democratic qualities do not easily map onto those of fully politically integrated nation states, and this may give rise to skepticism or at least doubt about what the commitment to democracy in Article 2 entails for the organization itself.

Nevertheless, for a number of reasons, including the discussion in Section 2 of these political values being assumed if not formally expressed, in the early years of European integration, I am not convinced by the argument in the previous paragraph that the declared EU commitment to human rights, democracy, and the rule of law is symbolic only. However, it is unquestionably the case that EU member states have always been reluctant to give the EU a role in *monitoring* these values, and such mechanisms as have been created to monitor them—including Article 7 TEU—have been made deliberately cumbersome and difficult to use. The consequences of this reluctance on the part of member states to be held accountable to the European Union for the quality of democracy, human rights, and the rule of law within their own political systems, and

hence their reluctance to establish robust monitoring mechanisms for the European Union's declared values, have become all too obvious in recent years in relation to how the EU has addressed the erosion of democracy and the rule of law in Hungary and Poland.

Below I suggest various reasons, some of which are related, as to why the European Union's political institutions and many member states have been unwilling to confront Poland and Hungary in a more robust way about their authoritarian drift.

The first reason relates to the typical reluctance of states within international organizations to sanction one another. Compare, for example, the small number of interstate complaints and cases brought within the European Convention on Human Rights system with the hundreds of thousands of individual complaints brought.[74] Such interstate enforcement is reasonably rare, in the absence of armed conflict or other significant adverse externalities imposed on a state by the breaches of human rights by another state. And within the European Union, the functioning of the Council of Ministers is dominated by inter-governmentalism, not only in the sense that Poland and Hungary will support one another against criticism or action by others, but that other governments too are often reluctant to openly censure a fellow Member State. Governments may well fear that if they act against another member state government, there could later be retaliation against them in another form. These considerations have been referred to in the EU context as arguments of "reciprocal deference" and "state self-preservation."[75] And indeed the *modus operandi*—what might even be called the DNA—of the European Union is such that it has tended always to avoid confrontational strategies as between its members, and to prefer legal to political action. Confrontation, in the shape of legal enforcement actions, is frequently left to the Commission, enabling the member state governments to operate like a club. This reflects the European Union's long-term self-understanding, even in the absence of explicit early conditionality requirements for membership, as a community of "like-minded" states, and it may be that they are reluctant to abandon or modify this understanding even when the "like-mindedness" is no longer there.

A second and related reason for political non-confrontation may be that, although Poland and Hungary are the two member states which have moved furthest towards the authoritarian end of the political spectrum, there are other member states in which institutions of democracy or the rule of law have been weakened or undermined in recent times. Serious rule-of-law problems in Malta were brought to light with the murder of Daphne Caruana Galizia; and the European Parliament has expressed concerns in relation to judicial independence in Malta, as well as in Slovakia and Romania. Freedom of the press has been under attack in Bulgaria (which in 2021 was ranked 112 out of 180 in the World Press Freedom Index published by Reporters

[74] *See, e.g.*, Geir Ulfstein & Isabella Rassini, *The Interstate Application under the European Convention on Human Rights: Strengths and Challenges*, EJIL:Talk! (Jan. 24, 2018), www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/ (comparing twenty-four inter-state applications over seven decades with over 750,000 individual applications).

[75] Kim Scheppele & R. Daniel Kelemen, *Defending Democracy in EU Member States: Beyond Article 7 TEU*, *in* EU Law in Populist Times: Crises and Prospects 413 (Francesca Bignami ed., 2020).

without Borders). In Slovenia, populist Prime Minister Janša, an outspoken admirer of Hungarian Viktor Orbán, has also approved and echoed Hungary's anti-migrant platform and rhetoric, and government challenges to freedom of the press there as well as to the European Union's anti-corruption efforts have raised serious concerns. Many other examples could be given, which highlight some additional reasons why a number of EU member governments may be at best reluctant to confront Poland and Hungary for their anti-democratic attacks on institutions such as judicial independence and press freedom.

A third possible reason is that member states—and possibly other EU actors—may believe that tough confrontation including through suspension of rights or withdrawal of EU funding will not help to resolve the problem of growing authoritarianism in Poland and Hungary, and might even escalate or further entrench the situation, and increase domestic support for those two governments. The hope may be that these governments will eventually be defeated despite their attempts to control their electoral systems. The uniting of the Hungarian opposition to challenge Orbán temporarily raised the possibility of his defeat in the April 2022 election, for example.[76] The calculus on the part of the European Union may be that it is better to wait it out, not to risk alienating the government in question, or pushing it to consider leaving the EU, but rather to hope that political change will come from within these states despite the ruling parties' efforts to retain power through limiting democratic opposition, controlling the media, and punishing political adversaries. Relatedly, since the population of both Hungary and Poland appears divided, with a significant percentage of the citizenry both supporting EU membership and opposing the antidemocratic actions of their current government, other member state governments may fear that taking robust action such as suspension of rights or refusal of EU funding might weaken the position of those parts of the population or abandon them, rather than helping them mobilize to defeat the authoritarian government.

A fourth possible reason for avoiding confrontation, censure, or sustained political pressure on Poland and Hungary could be the recent and damaging experience of Brexit. Following the departure of the United Kingdom, member states may well fear further fracturing or fragmenting of the EU, with the concomitant risk of additional weakening and dilution of its global standing and influence, and they may be willing to overlook the steep democratic decline within these two member states in order to avoid that. Angela Merkel's urging of EU leaders to avoid confronting Poland and to find a compromise which would keep the European Union united has reflected this kind of position.[77]

A final possible reason for avoiding tough political action is the fear of driving states like Hungary closer towards actors like Russia, creating further geopolitical instability

[76] Fears about political interference in this crucial election have led the Organization on Security and Cooperation in Europe to call for a full-scale electoral monitoring mission. Lili Bayer, *OSCE Recommends Full-Scale Electoral Monitoring Mission in Hungary*, Politico.eu (Feb. 5, 2022), www.politico.eu/article/osce-recommends-full-scale-election-mission-in-hungary-viktor-orban/.

[77] Mujtaba Rahman, *Europe's Next Rule of Law Problem: Angela Merkel*, Politio.eu (Oct. 26, 2021), www.politico.eu/article/europe-rule-of-law-angela-merkel-poland-hungary/.

or security risks for the European Union. While this has been a concern for some time, the brutal Russian invasion of Ukraine in February 2022 has dramatically exposed the dangers posed by Russia to European security and peace.

None of these reasons necessarily implies that the EU collectively or even the majority of member state governments individually are indifferent to the sharp decline in democracy in Hungary and Poland. The values expressed in Article 2 TEU may well reflect a sincere commitment on the part of most EU member states, even if there are laggards and challenges from populist governments from time to time. But there are, as argued above, likely to be several and in some case interwoven reasons why the EU's intergovernmental actors have refrained from imposing real pressure on Poland and Hungary. Apart from their longstanding reluctance to engage in mutual or collective monitoring of (anti)democratic policies and practices, the reticence of the European Union's intergovernmental actors in this respect reflects in part a kind of calculated gamble that the situation might not be improved by confronting, seeking to suspend the rights of, or denying EU funding to states like Hungary and Poland; and that treating them as "normal" member states and seeking to persuade them through diplomatic and other softer means to reform, while leaving attempts at limited legal enforcement to the Commission and Court, is likely to work better in the long run. This strategy may reflect an assumption that if a long game is played, the autocratic systems may eventually fall and the "rogue" states will return to democracy through their own internal political processes. Other member states may hope that repeated Commission actions before the Court of Justice, penalty payments imposed by the CJEU, rule-of-law reports from the Commission, monitoring of EU pandemic funding, and condemnations by the European Parliament will be sufficient to induce reform or domestic political defeat for the authoritarian political parties, and a renewed domestic commitment to constitutional democracy.[78]

8. Criticizing the political unwillingness to confront

But what if the gamble is mistaken? What are the risks for the EU of failing to confront its increasingly authoritarian member states?

An initial assumption on the part of member state governments may be that there are few externalities or costs for other member states to bear from the authoritarian direction of Poland and Hungary. Most of the costs of authoritarian systems may seem to be borne by that state's own population, and particularly by those segments of the population who do not support, or are not in favor with, the authoritarian government and its program. However, there are significant costs and risks associated with

[78] The question whether sanctions actually work to promote democracy or not is a much-debated and empirically contested one, with an extensive scholarly literature on the issue. For some recent contributions, see Christian Von Soest & Michael Wahman, *Not All Dictators Are Equal: Coups, Fraudulent Elections, and the Selective Targeting of Democratic Sanctions*, 52 J. Peace Res. 17 (2015); Nikolay Marinov & Shmuel Nili, *Sanctions and Democracy*, 51 Int'l Interactions 765–778 (2015); and *Special Issue: Regional Sanctions and the Struggle for Democracy*, 42 Int'l Pol. Sci. Rev. 437 (2021).

the strategy of political non-confrontation. In the first place, there are risks and costs for the European Union in failing to confront the turn away from liberal democracy in Hungary and Poland. Second, there are costs for its individual member states and their populations. Third, there are also risks to the values themselves, to the meaning of democracy, and to the rule of law in the European Union.

In the first place, the stature and authority of the European Union as a promoter of democracy and human rights elsewhere and its authority to speak out against authoritarianism in other parts of the world are weakened significantly by the fact that two of its own members have become increasingly autocratic. The distinctiveness of the European Union as a regional organization in the world has become bound up with being not just a wealthy economic bloc but a liberal democratic one committed to the values of human rights, democracy, and the rule of law. Further, the European Union's policies of neighborhood and enlargement, both of which are premised on respecting human rights and democratic conditionality, are undermined by the existence of member states with increasingly authoritarian political systems. It is difficult for EU negotiators to remind prospective candidates about the Copenhagen criteria if it is quite evident to them that those criteria are not taken seriously or enforced within the Union.

In the second place, the EU is damaged in other ways by the decaying democratic standards in Hungary and Poland. National courts in states across the EU including the Netherlands,[79] Germany,[80] Ireland,[81] and Spain[82] have recently questioned the independence of the Polish judiciary, and have hesitated or refused to surrender suspects to Poland under the European Arrest Warrant system. The more this practice spreads, and not only in the context of the Arrest Warrant system, the more the EU's functioning as a legal system and a single market is likely to be undermined. The operation of the European Union relies on a significant degree of trust between member states, including trust between their judiciaries and other institutions, and this is likely to break down if there is increasing refusal by national judiciaries to cooperate with their counterparts in member states in which the judiciary is politically controlled. A somewhat different example of the risks to member states of the erosion of judicial independence in another member state was highlighted in a recent Irish case which concerned not an arrest warrant, but a custody dispute over children whose Polish mother refused to return the children to Ireland (where they

[79] *International Legal Assistance Division Decides against Surrender of a Polish Accused*, DE RECHTSPRAAK (Feb. 10, 2021), www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/International-Legal-Assistance-Division-decides-against-surrender-of-a-Polish-accused.aspx.

[80] Anna Wójcik, *Muzzle Law Leads German Court to Refuse Extradition of a Pole to Poland under the European Arrest Warrant*, RULE L. (Mar. 6, 2020), https://ruleoflaw.pl/muzzle-act-leads-german-to-refuse-extradition-of-a-pole-to-poland-under-the-european-arrest-warrant/.

[81] Case C-216/18 PPU, LM, Minister for Justice and Equality (Deficiencies in the system of justice), ECLI:EU:C:2018:586.

[82] *A Spanish Court Is Questioning Independence of Polish Judicial System*, TVN24.PL (Oct. 3, 2018), https://tvn24.pl/tvn24-news-in-english/a-spanish-court-is-questioning-independence-of-polish-judicial-system-ra873141-2582920.

were born and where their father lived) after a vacation in Poland. A Polish court had ruled in favor of the father and declared that the children had been unlawfully kept in Poland, but this judgment was overturned after the Minister for Justice, who is also the Public Prosecutor, intervened to make an "extraordinary complaint" to the Supreme Court to annul the lower court ruling.[83] The reporting of this case in Ireland drew attention specifically to concerns about the erosion of judicial independence and of Polish governmental interference in the legal system, and to the impact even on citizens elsewhere in the European Union, including in cases which have no obvious political dimension.

In the third place, the EU institutions themselves are composed of representatives and nominees from the member states—this includes the Council of Ministers, the Commission, the Court of Justice, the European Parliament, and multiple other EU institutions and agencies. To the extent that the representatives from Poland and Hungary are supporters of the ruling party and reflect or implement authoritarian and illiberal values, the EU and its institutions are brought under pressure to move in the same direction. This is not a far-fetched or implausible scenario. To give just two examples: the Polish government recently nominated as its candidate to fill a vacancy at the European Court of Justice Mr. Rafal Wojciechowski, who was one of the judges on the contested Constitutional Tribunal who ruled, at the government's request, that provisions of the EU treaties were unconstitutional;[84] and Olivér Várhelyi, who was nominated by Hungary as Commissioner for Enlargement, has been sharply criticized for compromising rule-of-law standards.[85]

Finally, there is as much chance that by "playing the long game" and failing to confront Hungary and Poland, authoritarianism will spread rather than abate. Slovenia is currently run by a right-wing demagogue and conspiracy theorist, Janez Janša, who is a close ally of Orbán's. The independence of the judiciary in Romania is seriously compromised.[86] Far-right and extremist parties have gained in popularity in various other member states. All EU member states, including Hungary, may now have united in opposition to Russia's aggressive invasion of Ukraine, but the risks of ignoring or underestimating the dangers of authoritarianism whether within or outside the EU

[83] Colm Keena, *Father "Shattered" after Court Rules Wife Can Keep Children in Poland*, Irish Times (Oct. 26, 2021), www.irishtimes.com/news/social-affairs/father-shattered-after-court-rules-wife-can-keep-children-in-poland-1.4710077.

[84] Krzysztof Bates, From TK Przyłębska to the CJEU? The government presented a controversial candidacy to the EU, GamingDeputy, www.gamingdeputy.com/from-tk-przylebska-to-the-cjeu-the-government-presented-a-controversial-candidacy-to-the-eu/ (last visited Mar. 10, 2022). Another and potentially more troubling example is the case of Marek Opiola, a Polish former PiS deputy whose renewal as a member of the European Court of Auditors was rejected twice by a large majority of members of the European Parliament, but who was nonetheless approved by the European Council (since the vote of MEPs is advisory only). For critical comment, see David Sadler, *From the Diet to the European Court of Auditors, the Questionable Career of the Polish Marek Opiola*, Globe Echo (Feb. 13, 2022), https://globeecho.com/news/europe/from-the-diet-to-the-european-court-of-auditors-the-questionable-career-of-the-polish-marek-opiola/.

[85] https://www.euractiv.com/section/enlargement/opinion/commission-compromising-rule-of-law-standards-in-the-interest-of-orban-vucic-axis/.

[86] *See* Case C-83/19, Asociaţia "Forumul Judecătorilor Din România," ECLI:EU:C:2021:393.

have been highlighted again.[87] If it is clear to emerging autocrats in other member states that no effective action will be taken against them by the EU, they have every incentive to continue and to expand their anti-democratic actions.

These, then, are the risks of non-confrontation, of having asserted democracy, human rights, and the rule of law as foundational EU values, but having created weak political enforcement mechanisms, including a difficult-to-activate suspension clause that requires unanimity at a crucial stage, and a funding conditionality procedure that requires rule-of-law concerns to be linked to the European Union's financial interests. The gamble that EU member states are taking in failing to confront Hungary and Poland is that the nature of the European Union itself will gradually change, both with the breakdown of mutual trust and mutual recognition on which the internal market and the area of judicial cooperation depends, and with the spread of authoritarianism both within the EU institutions and in other member states. Even the values themselves—the meanings given to democracy, the rule of law, and human rights within EU law and policy—are constantly weakened and eroded by the toleration of and the failure to challenge authoritarian practices.

The temptation to stand back and let things unfold and assume they will gradually resolve over time may be strong, and national governments have to some extent given in to this temptation. But the risk to be contemplated is a European Union which is not just one with small reversible pockets of illiberalism and clear paths out of authoritarianism over time, but an entity which is primarily a large regional market and is little different from other free trade areas and regions dominated by politically authoritarian systems. And in that case, the assertion of values in Article 2 TEU would indeed be little more than the flimsiest of window dressing, a relic of more optimistic times.

[87] Any suggestion that the European Union should turn a blind eye to Poland's democratic backsliding in order to maintain unity and support amid the Ukraine crisis has already been sharply criticized. *See* Eva Lętowska, *The Rule of Law in a Time of Emotions*, Verfassungsblog (March 4, 2022), https://verfassungsblog.de/rule-of-law-in-a-time-of-emotions/; Janos Amman, *Ukraine No Excuse for Polish Rule of Law Problems*, Euractiv (Mar. 4, 2022), www.euractiv.com/section/europe-s-east/news/eu-liberals-leader-ukraine-no-excuse-for-polish-rule-of-law-problems/.

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Climbing the Wall around EU Citizenship: Has the Time Come to Align Third-Country Nationals with Intra-EU Migrants?

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Abstract

This article discusses legal migration in the EU, in particular labour migration. It addresses the following question: once migrant workers from non-EU countries have been admitted into the Union, should they be treated like workers from EU countries for purposes of free movement? The EU migration acquis *is one of the most politically charged issues covered by the EU Treaties. As EU citizens, nationals of member states enjoy a set of free movement and political rights that can be exercised in other member states in accordance with the principle of non-discrimination on grounds of nationality affirmed in Article 18 TFEU. This principle is arguably not applicable to third-country nationals. Thus, member states are free to accord unequal treatment to third-country nationals as compared to privileged EU immigrants. The pressing question is whether it is desirable to maintain different levels of rights for third-country nationals who have been legally admitted and whose connection to the host member state does not otherwise differ from that of EU citizens who have exercised their mobility rights. To answer that question, this paper examines arguments for and against treating migrant workers from EU countries and non-EU countries equally for purposes of free movement. It will show how these arguments push in different directions depending on whether they concern the political, human, social, cultural or economic impact of such differential treatment. Our analysis strongly suggests that, on balance, there are convincing reasons for aligning the treatment of long-term resident migrant workers from non-EU countries with that of migrant workers from EU member states.*

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1 Introduction

In recent years, the EU immigration *acquis* has been predominantly focused on asylum and illegal migration. This article, by contrast, addresses legal migration in the EU, specifically for purposes of employment.[1] It ponders the following question: once migrant workers from non-EU countries have been admitted into the Union, should they be treated in the same way as migrant workers from EU member states for purposes of free movement?

In particular, the article examines the disparity between the free movement rights of EU national workers and the limited intra-EU mobility rights of so-called third-country nationals (TCNs) who have been granted long-term resident (LTR) status in accordance with the EU Long-Term Residence Directive (LTRD).[2] Around 39 million non-nationals live in EU member states, approximately 22 million of whom are TCNs. Although the legal situation of TCN workers has, in some areas, become aligned with that of EU nationals enjoying free movement as part of EU integration,[3] the fact remains that '[c]ompared to EU workers, TCNs cannot claim … equal treatment "within the scope of the Treaty"'.[4] As EU citizens, nationals of a member state enjoy a set of free movement and political rights that can be exercised in other member states in accordance with the principle of non-discrimination on grounds of nationality affirmed in Article 18 of the Treaty on the Functioning of the European Union (TFEU). This principle, which is a general principle of law[5] and has the status of a fundamental right by virtue of Article 21(2) of the EU Charter of Fundamental Rights (Charter),[6] is not applicable to TCNs.[7] Thus, inequality in the treatment of TCNs by members states,

1 Persons whose right to residence is dependent on a primary beneficiary (e.g. TCN family members of migrating EU citizens) are beyond the scope of this article.

2 Council Directive 2003/109/EU of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L16/44, amended by Directive 2011/51, OJ 2011 L 132/1. On the implementation of this Directive in practice, see Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents', COM(2019) 161 final.

3 See F. Wollenschläger *et al.*, *Analytical Report on the Legal Situation of Third-Country Workers in the EU as Compared to EU Mobile Workers* (2018), available at https://ec.europa.eu/social/BlobServlet?docId=20576&langId=en, at 1. The status resulting from this partial approximation is sometimes referred to as 'denizenship'. See T. Hammar, *Democracy and the Nation State* (1990).

4 Wollenschläger *et al.*, *supra* note 3, at 30.

5 See Case C-115/08, *ČEZ*, [2009] ECR I-10265 (ECLI:EU:C:2009:660), at para. 91.

6 The Charter is directed only at EU institutions and member states when implementing EU law; it cannot be used to extend the competences of the Union. See Article 6(1) TEU and Article 51(2) Charter.

7 See Joined Cases C-22/08 and C-23/08, *Vatsouras* and *Koupatantze*, [2009] ECR I-04585 (ECLI:EU:C:2009:344). See also Brouwer and De Vries, 'Third-Country Nationals and Discrimination on the Ground of Nationality: Article 18 TFEU in the Context of Article 14 ECHR and EU Migration Law: Time for a New Approach', in M. van den Brink, S. Burri and J. Goldschmidt (eds), *Equality and Human Rights: Nothing But Trouble?* (2015) 123, at 140; Iglesias Sánchez, 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles for Enhancing Coherence', 15 *European Journal of Migration and Law* (*EJML*) (2013) 137; McCormack-George, 'Equal Treatment of Third-Country Nationals in the European Union: *Why Not?*', 21 *EJML* (2019) 53, at 65; Wiesbrock, 'Granting Citizenship-related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship?', 14 *EJML* (2012) 63.

as compared to privileged EU migrants, still remains possible to a considerable extent. There has even been talk of an 'apartheid européen',[8] with non-EU nationals being assigned a lesser status.[9]

The EU migration *acquis* is one of the most politically charged areas covered by the EU Treaties. The constant flow of persons across borders between member states is essential to the EU's very existence and a principle affirmed in Article 3(2) of the Treaty on European Union. However, this principle does not extend to TCNs, whose movement in the internal market is subject to restrictions imposed to accommodate national political considerations. Thus, TCNs legally resident in one member state must submit to standard immigration procedures if they want to move to another member state. Despite living and working in a member state just like the member state's own citizens and migrating EU citizens, and despite paying the same taxes and the same social security contributions, TCNs are treated worse simply because of their nationality. This could be problematic from a human rights perspective, because such differential treatment can, in certain cases, amount to unjustified discrimination against TCNs.[10] This practice is also at odds with Article 79 TFEU, which requires the Union to develop a common immigration policy aimed at ensuring '*fair treatment* of third-country nationals residing legally in Member States'.[11] Thus, the question is whether it is legally tenable to maintain different levels of rights for TCNs who have been legally admitted and whose connection to the host member state does not otherwise differ from that of EU citizens exercising their mobility rights.[12]

To address this question, the present article will start by analysing the legal and policy framework that constitutes the EU legal migration *acquis*. After briefly explaining our use of the concept of equality to assess the tenability of differential treatment of EU and TCN migrant workers, Section 2 will discuss the legislation relating to the status of TCNs in the EU and demonstrate how TCN migrant workers are treated less favourably than EU migrant workers, noting the social and economic implications of such unequal treatment based on nationality. Section 3 will examine the political, human, social, cultural and economic arguments for and against treating EU and TCN migrant workers equally in terms of freedom of movement within the EU and show how these arguments push in different directions. To frame our analysis of those arguments, we will refer to the competing and contrasting interests and narratives – individual rights vs national sovereignty

8 E. Balibar, *Nous, citoyens d'Europe? Les frontières, l'État, le peuple* (2001).

9 See Kochenov and Van den Brink, 'Pretending There Is no Union: Non-derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU', EUI Working Paper LAW 2015/07 (2015), at 9. See also Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal', Jean Monnet Working Paper 08/10 (2010).

10 See Morano-Foadi and De Vries, 'The Equality Clauses in the EU Directives on Non-discrimination and Migration/Asylum', in S. Morano-Foadi and M. Malena (eds), *Integration for Third-Country Nationals in the European Union: The Equality Challenge* (2012) 16, at 17; McCormack-George, *supra* note 9, at 74. See also Muir, 'Enhancing the Protection of Third-Country Nationals against Discrimination: Putting EU Anti-Discrimination Law to the Test', 18 *Maastricht Journal of European and Comparative Law* (2011) 136.

11 Emphasis added.

12 Morano-Foadi and De Vries, *supra* note 14, at 41.

(discretion) narratives – that are reflected in the EU legal migration *acquis* as it currently stands.[13]

Although there is abundant academic literature on the status of TCNs, it is limited in scope because it examines only some of these aspects of the question.[14] Our aim is to provide a comprehensive analysis of the arguments for and against equal treatment of TCN and EU national migrant workers for the purpose of free movement within the EU. We will adopt a broad approach, relying not only on the Treaties but also on international law, most notably the European Convention on Human Rights (ECHR). The conclusion we reach is that, on balance, there are convincing reasons for according equal treatment to LTR migrant workers and EU national workers.

2 Setting the Scene: The EU Legal Migration *Acquis* and the Differential Treatment of EU and TCN Migrant Workers

A *Theoretical Framework: The Concept of Equality*

The principle of equality is closely linked to the idea of justice.[15] It operates at moral, political and legal levels.[16] In this article, the terms 'equality' and 'inequality' are used to refer to substantive (in)equality in EU equality law, reflected in the differentiation between EU nationals and TCNs with regard to their status as migrant workers. We adopt an understanding of equality that goes beyond an essentially formal, procedural Aristotelian approach, according to which like matters should be treated alike.[17] Our understanding is supported by the EU equality directives, which combine formal and substantive approaches to equality.[18] While substantive equality can be understood in diverse ways, we perceive it as an attribute of human dignity.[19]

[13] Strumia, 'European Citizenship and EU Immigration: A Demoi-cratic Bridge between the Third Country Nationals' Right to Belong and the Member States' Power to Exclude', 22 *European Law Journal* (*ELJ*) (2016) 417; Thym, 'EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook', 50 *Common Market Law Review* (*CMLRev*) (2013) 709.

[14] The academic literature looking at the nature and differences of EU citizenship and the status of TCNs is rich and extensive. Attention has also been paid to the aforementioned competing rules, narratives and rationales in which the EU immigration *acquis* is embedded. This paper does not aim to further the debate on the approximation of the treatment of TCNs to that of nationals of the EU from the lens of EU citizenship and its exclusionary and potential spillover effect on EU immigration rules.

[15] T. Tridimas, *The General Principles of EU Law* (2006), at 59.

[16] *Ibid*.

[17] See, e.g., Fredman, 'Substantive Equality Revisited', 14 *International Journal of Constitutional Law* (2016) 712, at 716.

[18] See, e.g., Benedi Lahuerta, 'Taking EU Equality Law to the Next Level: In Search of Coherence', 7 *European Labour Law Journal* (2016) 348; De Vos, 'The European Court of Justice and the March towards Substantive Equality in European Union Antidiscrimination Law', 20 *International Journal of Discrimination and the Law* (2020) 62.

[19] Small and Grant, 'Dignity, Discrimination, and Context: New Directions in South African and Canadian Human Rights Law', 6 *Human Rights Review* (2005) 25, at 25; S. Fredman, *Discrimination Law* (2nd ed, 2012), at 19; Tridimas, *supra* note 18, at 59; Benedi Lahuerta, *supra* note 21; AG Opinion in C-303/06, *Coleman* (ECLI:EU:C:2008:61), at para. 8.

In EU law, the principle of equality is relied on as a legal concept.[20] It is a fundamental value mentioned in Article 2 TEU and, as such, has constitutional value. More than this, it is also a cornerstone of European integration,[21] underpinning the internal market. In the course of the Union's development, it has transformed from a means of economic integration into an instrument of citizen empowerment.[22]

The principle of equality is a valuable analytical tool for our purposes since, as Tridimas explains, equality implies consistency and rationality. A decision-maker must treat similar cases consistently.[23] This is an idea expressed in Article 7 TFEU, which states that '[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'. The economic freedoms protected by the Treaty thereby acquire not just legal but also normative priority.[24] In this context, the question arises as to whether EU national and TCN migrant workers find themselves in sufficiently similar positions to trigger the application of this principle. The following subsection will seek to answer that question by using the notion of substantive inequality to identify the main differences between the treatment of EU national and TCN migrant workers under existing EU law and policy.

B *The Existing Legal and Policy Framework: Fair Treatment of TCNs*

The EU's migration policy has progressively developed over time. The Lisbon Treaty conferred on the EU competence to 'develop a common immigration policy', as distinct from the power merely to adopt measures, which the Council already possessed under the Treaty establishing the EEC.[25] The Lisbon Treaty also brought this policy within the scope of the ordinary legislative procedure.[26] The common immigration policy forms part of the area of freedom, security and justice (AFSJ) of Title V of the TFEU (Articles 67–80). Article 79(2)(b) TFEU provides the legal basis for legislative measures defining the rights of TCNs legally resident in a member state, including the conditions governing their freedom of movement to, and residence in, other member states.[27] Further, the Charter provides that TCNs authorized to work in the EU are entitled to working conditions equivalent to those of EU citizens[28] and that TCNs legally resident in the EU may be granted freedom of movement and residence in accordance with the Treaties (i.e. Article 79 TFEU).[29] However, member states retain wide

[20] Tridimas, *supra* note 18, at 60.

[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.*, at 76.

[24] Nic Shuibhne, 'The Social Market Economy and Restriction of Free Movement Rights: *Plus c'est la même chose?*', 57 *Journal of Common Market Studies* (2019) 111, at 112.

[25] Wilderspin, 'Article 79 TFEU', in M. Kellerbauer, M. Klammert and J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2019) 837, at 841.

[26] Article 79(2) TFEU.

[27] On this provision, see Wilderspin, *supra* note 28, at 843–846; S. Peers, *EU Justice and Home Affairs Law*, vol. I: *EU Immigration and Asylum Law* (2016), at 326.

[28] Article 15(3) Charter; see also Recital 2 LTRD.

[29] Article 45(2) Charter; see Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/17; S. Peers *et al.* (eds), *EU Immigration and Asylum Law* (2nd ed., 2012), at 297.

discretion when it comes to access to their labour markets, as Article 79(5) TFEU allows them to 'determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work'.

Article 67(2) TFEU requires the common immigration policy to be 'fair' towards TCNs. The aim of fair treatment of TCNs is reiterated in Article 79 TFEU, which provides the legal basis for developing a common migration policy.[30] Consequently, TCNs legally resident in the EU have a constitutional right to fair treatment. The fair treatment obligation was not contained in the Treaties before Lisbon, although at Tampere in 1999 the European Council called upon EU institutions to accord fair treatment to TCNs legally resident in the EU.[31] The Tampere Council's exhortation for TCNs, and especially LTRs, to be granted 'a set of uniform rights which are as near as possible to those enjoyed by EU citizens' made equal opportunities and equality central to their integration.[32] Thus, the integration of TCNs started to be perceived as a matter of equality.[33] However, the legal contours of 'fair treatment' remain undefined. As argued by Carrera and others, EU policy on legal and labour migration is not detached from the international, regional and EU human rights principles and legal commitments and third-country worker labour standards to which most EU member states have willingly adhered. The notion of 'fairness' advanced in the 1999 Tampere programme must therefore be read and interpreted in light of the standards set in those instruments.[34] The underlying question is whether the Article 79 TFEU requirement of 'fair treatment' requires equal treatment of Union citizens and TCNs in certain contexts – specifically, as regards the intra-EU mobility rights of TCN workers.

The treatment of TCNs is for the most part left to highly fragmented secondary legislation. The number of TCNs who can avail themselves of EU rights has grown in recent years through the enactment of secondary legislation granting entry and residence rights to certain categories of third-country nationals – namely, long-term residents,[35] students,[36] researchers[37] and highly qualified workers.[38] The various EU migration directives grant residence and labour market access rights; require equal

[30] *Ibid.*, at 801.

[31] European Council, Presidency Conclusions Tampere 15 and 16 October 1999, at paras 18, 20, 21. See also Article 15(3) Charter; Recital 2 LTRD; Thym, 'Immigration', in K. Hailbronner and D. Thym (eds), *EU Immigration and Asylum Law: A Commentary* (2nd ed., 2016) 271, at 288.

[32] European Council, *supra* note 33.

[33] Malena and Morano-Foadi, 'Integration Policy at European Union Level', in S. Morano-Foadi and M. Malena (eds), *Integration for Third-Country Nationals in the European Union: The Equality Challenge* (2012) 45, at 46.

[34] Carrera *et al.*, *The Cost of Non-Europe in the Area of Legal Migration* (2019), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631736/EPRS_STU(2019)631736_EN.pdf (last visited 22 February 2022), at xvi. See also McCormack-George, *supra* note 9, at 65; Groenendijk, 'Legal Migration', in P. de Bruycker *et al.* (eds), *From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration* (2019) 64; Thym, 'EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook', 50 *CMLRev* (2013) 723.

[35] Directive 2003/109, *supra* note 2.

[36] Directive 2004/114, OJ 2004 L 375/12.

[37] Directive 2005/71, OJ 2005 L 289/15.

[38] Directive 2009/50, OJ 2009 L 155/17.

treatment with nationals of the host member state; provide for family reunification; address the issue of social security coordination; and guarantee mobility within the EU. Thus, the legal situation of TCN workers has, in some areas, become aligned with that of EU nationals enjoying free movement as part of EU integration.[39] However, as the 2018 Commission's analytical report highlights, important differences remain. The report points out that while the free movement of EU workers is guaranteed by directly enforceable provisions of EU primary law, similar rights for TCNs depend on the enactment of EU secondary law. This leaves a wide margin of discretion when it comes to designing the regime.[40]

The most general piece of EU legislation in this field is the Long-Term Residents Directive (LTRD), adopted in 2003,[41] which confers a limited number of specific equal treatment rights[42] after five years of legal residence, as well as a limited right to reside in another member state. The LTRD has been criticized for shortcomings concerning the acquisition of LTR status and the rights that come with long-term residence.[43] First, under Article 5(1), the condition relating to duration of residence will be met only if the five years have been spent in a single member state, which excludes TCNs who have resided in various member states for a total of five years but without staying for five consecutive years in any one of them. Second, under Article 5(2), member states are allowed to impose integration conditions and to be the sole judge of whether they have been fulfilled. The conditions they impose bear a strong resemblance to the language and/or civic integration tests that member states use as part of their naturalization processes.[44] As Guild observed, this 'reinforces the impression that the EU consists of many labour markets, not one'.[45]

While Article 11(1) LTRD grants equal treatment rights to LTRs, member states have the possibility to restrict them under Article 11(2)–(4). The LTRD's principal deficiency, however, is arguably that it denies TCNs access to the opportunities offered by the internal market.[46] Given that LTR status is governed by EU law, it could be considered inconsistent with the internal market logic to make legal residence for five consecutive

[39] Wollenschläger *et al.*, *supra* note 5, at 1.

[40] *Ibid.*, at iii.

[41] See Thym, *supra* note 33, at 427–519; D. Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship: An Analysis of Directive 2003/109* (2011). For further references, see Thym, *supra* note 33, at 427.

[42] See Article 11 LTRD.

[43] See, e.g., Peers, 'Implementing Equality? The Directive on Long-Term Resident Third-Country Nationals', 29 *European Law Review* (*ELRev*) (2004) 437; Carrera and Wiesbrock, 'Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU', 12 *EJML* (2010) 337; Della Torrea and De Langeb, 'The "Importance of Staying Put": Third Country Nationals' Limited Intra-EU Mobility Rights', 44 *Journal of Ethnic and Migration Studies* (2018) 1409.

[44] Kochenov and Van den Brink, *supra* note 11, at 6.

[45] Guild, 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration', in C. Costello and M. Freedland (eds), *Migrants at Work* (2014) 98, at 107.

[46] Wiesbrock, 'Free Movement of Third-Country Nationals in the European Union: The Illusion of Inclusion' 35 *ELRev* (2010) 455; Kochenov and Van den Brink, *supra* note 11; Iglesias Sánchez, 'Free Movement of Third Country Nationals in the European Union? Main Features, Deficiencies and Challenges of the New Mobility Rights in the Area of Freedom, Security and Justice', 15 *ELJ* (2009) 791.

years in a single member state the principal requirement for acquiring such status. Moreover, LTR TCNs have only a limited right to reside in a second member state. As the 2019 Fitness Check revealed, 'the majority of Member States continue to require the same procedures, conditions (including market tests), or proof of residence as for first-time applicants, both under EU and national schemes'.[47] Arguably, this does not contribute to the effective attainment of an EU-wide labour market,[48] which is more attractive for TCNs than the labour markets of individual member states.[49] Against this background, a question that deserves attention is, what role does the principle of mutual trust play in this set-up, given that the concept of an internal market – and the ASFJ – is based upon this principle.

In its 2019 report on the implementation of the LTRD,[50] the Commission concluded that the Directive had not yet achieved its objectives, since most member states had not actively promoted recourse to EU LTR status but were continuing almost exclusively to issue national long-term residence permits. In 2017, around 3.1 million TCNs held an EU LTR permit, compared to around 7.1 million holding a national long-term residence permit. As regards intra-EU mobility, the Commission found that most member states' implementation of the Directive had not really contributed to the realization of the EU internal market, since few LTRs had exercised the right to move to another member state – a situation also explained by the fact that exercising this right is subject to too many conditions and national administrations were not sufficiently conversant with the procedures or found it difficult to cooperate with their counterparts in other member states.

As the Treaty of Lisbon and the Charter have widened the legal basis for measures relating to TCNs legally resident in the EU, the way is now open for the EU legislator to make substantial amendments to the LTRD. In its communication of 23 September 2020, the Commission has already announced a revision of the LTRD, 'which is currently under-used and does not provide an effective right to intra-EU mobility. The objective would be to create a true EU long-term residence status, in particular by strengthening the right of long-term residents to move and work in other Member States.'[51]

This new impetus given by the Commission needs to be seen in the light of the widely recognized fact that the EU is undergoing a demographic change, which is likely to result in a decline in the working-age population and an increase in the proportion of elderly people.[52] These trends will have a considerable impact on member

47 Commission, 'Fitness Check on EU Legislation on legal migration' SWD (2019) 1055 final, Part I, at 93.

48 Cf. Recital 18 LTRD. For further confirmation, see Case C-508/10, *Commission v. Netherlands* (ECLI:EU:C:2012:243), at para. 66; Commission, 'Report from the Commission to the European Parliament and the Council on the Implementation of Directive 2003/109/EC Concerning the Status of Third-country Nationals Who Are Long-term Residents', COM (2019) 161 final, at 9.

49 Commission, *supra* note 49, at 97.

50 Commission, *supra* note 50.

51 Commission, 'Communication from the Commission on a New Pact on Migration and Asylum', COM (2020) 609 final at 26.

52 K. Eisele, *The External Dimension of the EU's Migration Policy* (2014), at 93.

state labour markets and on future economic growth, making EU action in the field of legal migration all the more important and necessary.[53] Thus, it will be interesting to see how member states respond to the Commission's calls to grant more rights to LTR TCNs more than 20 years after the ambitious Tampere programme and the adoption of the LTRD.

C *Differences between EU National Workers and TCNs Covered by the LTRD*

TCNs who are covered by the LTRD are treated less favourably than migrating EU citizens in several respects. As mentioned above in the Introduction, the protection from discrimination on grounds of nationality which EU citizens enjoy under Article 18 TFEU and Article 20(1) Charter does not apply to TCNs.[54] Further, Article 20(2)(a) TFEU and Article 45(1) Charter guarantee economically active and self-supporting EU citizens the right to move and reside freely within the territory of the member states; it is they who decide autonomously whether to avail themselves of that right. The most notable difference between the right of permanent residence enjoyed by EU citizens and LTR status accorded to TCNs is that member states may make the latter conditional upon compliance with integration measures. No such conditions exist for EU citizens, whose integration or non-integration in the new member state is left to their discretion.[55] EU citizens have unlimited access to employment[56] and self-employment activities, whereas member states may restrict the openness of their labour markets to TCNs and may give preference to EU citizens over TCNs. As regards family reunification, EU citizens can benefit from the Family Reunification Directive 2003/86,[57] while the less favourable rules of Article 16 LTRD apply to TCNs. Moreover, Article 11 LTRD allows member states to limit social assistance for TCNs to core benefits and to restrict their access to employment or self-employed activities in situations where, under existing national or EU legislation, these activities are reserved for nationals, or EU or EEA citizens. While migrating EU workers are free to move their residence from one host member state to another, TCNs have only a limited right to do so, as provided in Articles 14–23 LTRD. Another safeguard at the disposal of member states is the possibility they have to withhold LTR status on grounds of public policy and public security. With regard to public security, the CJEU has held that member states enjoy wide discretion in determining whether or not there is a threat to such security.[58]

[53] See Commission, 'The Demographic Future of Europe – From Challenge to Opportunity', COM (2006) 571 final, at 4–5. See also S. Carrera and C. Formisano, *An EU Approach to Labour Migration: What Is the Added Value and the Way Ahead?*, CEPS Working Document 232 (2005).

[54] See Case C-22/08, *Vatsouras* (ECLI:EU:C:2009:344).

[55] Thym, *supra* note 17, at 711.

[56] The exception concerning public employment is broader for TCNs than it is for EU citizens. See Halleskov Storgaard, 'The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?', 7 *EJML* (2005) 299, at 311–312.

[57] Directive 2003/86, OJ 2003 L 251/12.

[58] Bornemann, 'Threats to Public Security in EU Immigration Law: Finding the Right Discretion' (2020), available at https://europeanlawblog.eu/2020/01/06/threats-to-public-security-in-eu-immigration-law-finding-the-right-discretion/.

The CJEU has in the past placed limitations on the discretion exercised by member states in relation to integration tests[59] and core benefits.[60] In *Parliament v. Council* it stated: 'The fact that the concept of integration is not defined cannot be interpreted as authorizing Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights.'[61] The Court has addressed the protection against expulsion afforded to LTR TCNs under the LTRD in several cases where member state law fell short of such protection.[62] In *P and S*,[63] the Court found that the integration test of Article 5(2) LTRD concerns integration conditions before LTR status is granted, but integration measures imposed after the acquisition of LTR status fall outside that provision.[64] While member states may impose integration requirements after LTR status has been obtained, failure to comply with those requirements does not entail the revocation of LTR status.[65] In *Commission v. Netherlands*,[66] the CJEU ruled that the fees for applying for LTR status must not be so high as to prevent TCNs from applying.[67] Arguably, the same goes for integration tests that are too demanding. In both cases, the LTRD would be deprived of any *effet utile*.

D *Differences among TCN Workers*

Even among TCNs there are substantial differences in their legal positions under the various sources of EU law. The differences in treatment can be attributed to the nexus between external relations and migration policies.[68] All TCN migrants who reside in the Union enjoy human rights protection under both international law instruments (e.g. the UN Migrant Worker Convention) and regional frameworks such as the ECHR, where the prohibition of discrimination plays a central role.[69] A large group of TCNs also benefit from more specific equal treatment guarantees under relevant association, cooperation and partnership agreements that the EU, the E(E)C and individual member states have concluded with third countries pursuant to what is now Article 217 TFEU. When considering the treatment of TCNs, it is therefore important to draw

[59] See Case C-540/03, *Parliament v. Council* (ECLI:EU:C:2006:429); Case C-579/13, *P and S* (ECLI:EU:C:2015:369); Case C-508/10, *Commission v. Netherlands* (ECLI:EU:C:2012:243); Case C-153/14, *Minister van Buitenlandse zaken v. K and A* (ECLI:EU:C:2015:453).

[60] Case C-571/10, *Kamberaj* (ECLI:EU:C:2012:233). See also Case 303/19, *Istituto Nazionale della Previdenza Sociale* (ECLI:EU:C:2020:958).

[61] Case C-540/03, *Parliament v. Council* (EU:C:2006:429), at para. 70.

[62] See Joined Cases C-503/19 and C-592/19, *Subdelegación del Gobierno en Barcelona* (ECLI:EU:C:2020:629); C-448/19, *Subdelegación del Gobierno en Guadalajara* (ECLI:EU:C:2020:467); Case C-636/16, *López Pastuzano*, (ECLI:EU:C:2017:949).

[63] Case C-579/13, *P and S* (ECLI:EU:C:2015:369).

[64] *Ibid.*, at paras 35, 36, 38.

[65] Thym, *supra* note 33, at 459.

[66] Case C-508/10, *Commission v. Netherlands* (ECLI:EU:C:2012:243). Similarly, Case C-153/14, *Minister van Buitenlandse zaken v. K and A* (ECLI:EU:C:2015:453), at para. 71, concerning the cost of an integration test for TCNs under Directive 2003/86.

[67] See also Case C-309/14, *CGIL and INCA* (ECLI:EU:C:2015:523).

[68] Eisele, *supra* note 55, at 444.

[69] For a detailed analysis, see *ibid.*, at 129–188.

a distinction between those who are subject to such agreements and those who are not. That said, there are also considerable differences between the agreements themselves, resulting in highly differing statuses for the nationals of the associated or partner countries.[70]

The most liberal as regards TCN rights is the European Economic Area (EEA) agreement with Norway, Iceland and Liechtenstein, which extended the EU rules on free movement of persons to EEA nationals.[71] It is largely matched by the bilateral treaty on free movement of persons with Switzerland.[72] For this reason, the position of EEA and Swiss migrant workers will not be taken into consideration in this article. The 'second best' from the viewpoint of the TCNs is the 1973 association agreement with Turkey,[73] Article 12 of which envisaged the possibility of full free movement of workers. That has not been realized, however, and in 1987 the Court ruled that the free movement provisions were only a goal and did not confer 'directly effective' rights on individuals.[74] Turkish workers are granted employment rights that 'grow' with the length of their legal stay in the EU and residence rights connected to their employment. This contrasts with the stabilization and association agreements with Western Balkan countries and the Euro-Mediterranean agreements with Algeria, Morocco and Tunisia, which do not contemplate the free movement of persons.

It must be emphasized that the commitments made by the EU and member states in these agreements relate to TCNs who are 'legally employed in the territory of a Member State' and generally require equal treatment with the member state's nationals in respect of working conditions, remuneration and dismissal.[75,76] The agreements do not provide for any entry, residence or employment rights of TCNs. Such rights are subject to the member states' immigration rules and any bilateral agreements between an individual member state and third countries. Member states have full discretion to decide whether or not to enter into such agreements, and it will generally depend on conditions within their respective labour markets. The post-Lisbon common immigration policy referred to in Article 79 TFEU does not impinge on that freedom.

When discussing the rights of TCNs under the above agreements, the role of the CJEU should not be overlooked. The Court has rendered numerous decisions in which it has interpreted the agreements liberally, to the benefit of TCNs. It has rendered more than 50 decisions in relation to the EEC-Turkey Association Agreement alone.

[70] *Ibid.*, at 189–274.

[71] Agreement on the European Economic Area, OJ 1994 L 1/3. See Case C-92/02, *Kristiansen* (ECLI:EU:C:2003:652), at para. 24.

[72] OJ 2002 L 114/6. See Peers, 'The EC-Switzerland Agreement on Free Movement of Persons: Overview and Analysis', 2 *EJML* (2000) 127; Kochenov and Van den Brink, *supra* note 11, 19–20.

[73] OJ 1973 C 113/1.

[74] Case-12/86, *Demirel* (ECLI:EU:C:1987:400).

[75] See, e.g., Articles 47(1)(a) and 49(1)(a) of the Stabilization and Association Agreements with Bosnia and Serbia; Article 17(1) of the Association Agreement with Ukraine; Articles 23 and 20 of the Partnership and Cooperation Agreement with Moldova, Russia and Georgia; Article 64(1) of the Association Agreement with Morocco.

[76] Carrera and Wiesbrock, *supra* note 45, at 346; Eisele, *supra* note 55, at 440.

The Court was disposed to attribute extensive rights to Turkish nationals, beyond those provided for under the EEC Treaty.[77] In *Demirel*,[78] it held that the EEC Treaty provided the Community the competence to regulate the entry and stay of nationals of EC-associated states. The Court inferred from Article 238 TEEC (now Article 217 TFEU) that an association agreement creates a special relationship between the EC and the associated state, covering all areas regulated in the EEC Treaty, including the freedom of movement for workers.[79] In *Sevince*,[80] the Court ruled on the direct effect of Article 6(1) of Decision No. 1/80 of the Association Council created by the EEC-Turkey Association Agreement. The direct effect of provisions concerning rights for persons in association and partnership agreements was also confirmed in later cases, such as *Kziber*[81] relating to a provision in the EEC-Morocco Cooperation Agreement, *Gloszczuk*[82] relating to Article 44(3) of the Association Agreement with Poland, *Wählergruppe Gemeinsam*[83] relating to Article 10(1) of Decision No. 1/80 and *Simutenkov*[84] relating to Article 23(1) of the Partnership and Cooperation Agreement with Russia.

It should be noted that even the association agreement with Turkey, which is the most liberal,[85] does not provide for any (free) movement rights *between* member states. Turkish and other TCN workers remain tied to the first member state that accepted them.[86] The LTRD was the first piece of EU legislation to grant certain categories of TCN workers a very limited right to move to another member state.

3 Arguments For and Against the Equal Treatment of TCNs with EU Migrant Workers

The relevant differences of treatment between EU and LTR migrant workers having been identified, the question now arises as to whether those differences are legitimate or necessary in light of the consistency and rationality requirements implicit in the principle of equality. Are there any good reasons to restrict intra-EU mobility rights of TCNs and to treat TCNs who have been legally resident in the host member state for five years differently from EU workers? To answer these questions, we will analyse arguments for and against distinguishing between those two categories of workers and show how these arguments push in different directions. The relevant arguments fall

77 Hailbronner and Polakiewitz, 'Non-EC Nationals in the European Community: The Need for a Coordinated Approach', 39 *Duke Journal of Comparative and International Law* (1992) 49, at 55.

78 Case-12/86, *Demirel* (ECLI:EU:C:1987:400).

79 *Ibid.*, at para. 9.

80 Case C-192/89, *Sevince* (ECLI:EU:C:1990:322), at para. 26.

81 Case C-18/90, *Kziber* (ECLI:EU:C:1991:36), at para. 29.

82 Case C-63/99, *Gloszczuk* (ECLI:EU:C:2001:488), at para. 38.

83 Case C-171/01, *Wählergruppe Gemeinsam* (ECLI:EU:C:2003:260).

84 Case C-265/03, *Simuntenkov* (ECLI:EU:C:2005:213), at para. 29.

85 Tezcan/Idriz, 'Free Movement of Persons between Turkey and the EU: To Move or Not to Move? The Response of the Judiciary', 46 *CMLRev* (2009) 1621, at 1622.

86 Association Council Decision 1/80 did not grant such a free movement right. See *ibid.*, at 1644.

into five broad areas, largely interconnected: the political, the social, the cultural, the human and the economic.

To frame our analysis of those arguments, we will use a set of competing and contrasting interests and narratives. They characterize the current configuration of the EU legal migration *acquis*, which is pervaded by two thematic strands: the individual rights and the national sovereignty (discretion) narratives.[87] Although not entirely contradictory, these two narratives reflect the tension between, on the one hand, sensitivity to individual rights and, on the other hand, sensitivity to the limits of EU competence and the preservation of national autonomy.[88]

These competing and contrasting interests and narratives can be related to broader thematic issues. First, they are linked to the principle of conferral, and further to the vertical and horizontal competence conundrum in the Treaties. To this end, the contrast between the member states' and the Union's interests in this field is addressed through the competing theories of intergovernmentalism and Europeanization.[89] Second, in examining the EU migration *acquis,* reference will also be made to the contrasting visions of trust. Mutual trust, and the related principle of mutual recognition, is a fundamental regulatory mechanism in the context of the internal market and the AFSJ.[90]

To examine the lack of free movement rights for TCNs in terms of its coherence and consistency with the EU legal framework, we adopt a purposive perspective which squares well with the aforementioned thematic issues. To this end, we examine the unequal treatment of TCNs through the lens of the objectives of the EU legal migration *acquis*. The very first sentence of Article 1 TEU highlights that the member states confer competences on the EU 'to attain objectives they have in common'. According to the CJEU case law, it is crucial to consider the objectives of relevant rules when analysing the presence of differential treatment in comparable situations.[91]

A *The Political*

We will examine the political aspect from the perspective of the EU's constitutional constraints, and especially the principle of conferral and the EU's purposive competences.[92] We will focus on the vertical dimension of competence issues as reflected in approaches to the question of EU legal migration at EU institutional and member state levels.

Immigration matters have always been at the very heart of state sovereignty and to this day continue to be a particularly sensitive policy area for governments and

[87] See Strumia, *supra* note 17; Thym, *supra* note 17; see also D. Chalmers, G. Monti and G. Davies, *European Union Law: Text and Materials* (2nd ed., 2010), at 518.

[88] S. Weatherill, *Law and Values in the European Union* (2017), at 390.

[89] Carrera, 'Integration of Immigrants in EU Law and Policy: Challenges to Rule of Law, Exceptions to Inclusion', in L. Azoulai and K. de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (2014) 149, at 150. See also Farcy, 'Labour Immigration Policy in the European Union: How to Overcome the Tension between Further Europeanisation and the Protection of National Interests?', 22 *EJML* (2020) 198.

[90] Strumia, *supra* note 17, at 26.

[91] See, e.g., Joined Cases C-443/14 and C-444/14, *Alo* (ECLI:EU:C:2016:127), at para. 54.

[92] Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence', 21 *ELJ* (2015) 2, at 2.

societies.[93] The national sovereignty narrative is concerned with security issues and borders. Non-EU nationals are considered in terms of their perceived cultural, political and social risks, be it as potential sources of crime, political threats or threats to local public services or labour markets.[94] Another important concern of member states is the potential burden that TCNs can place on their social welfare systems. Advocates of equal treatment for TCNs must bear in mind that freedom of movement for EU nationals means not only the right to reside but also to receive the full range of social rights – minimum salary, financial assistance for families with children, unemployment payments, etc.[95] While this may be a legitimate concern, given the limited competences conferred by the Treaties and the unequal distribution of the burden across the EU, we will not elaborate further on this issue. Currently, the LTRD allows member states to limit equal treatment in respect of social assistance and social protection to 'core benefits' (Article 11(4)).

The legal situation of TCNs has only gradually edged towards the centre of EU attention. This trend started with rights granted to TCNs on the basis of EU association agreements or in their capacity as members of EU workers' families.[96] Since then, the EU legal framework has progressively bestowed on the Union more far-reaching competences in the field of immigration, in particular with the insertion in the TEU in 1997 under the Treaty of Amsterdam of a new title on 'visas, asylum, immigration and other policies related to free movement of persons'. The Treaty of Amsterdam's 'communitarisation'[97] or Europeanization of migration policies led to the adoption of EU secondary legislation in this field. Today, the Treaty of Lisbon explicitly gives the EU the task of developing a common immigration policy aimed at, inter alia, ensuring the efficient management of migration flows and the fair treatment of TCNs legally resident in a member state. However, the national sovereignty narrative is strongly present, as Article 79(5) TFEU leaves member states free to determine the volume of TCNs admitted.

As a result, the EU's power to legislate in respect of TCNs is greater than in the area of EU citizenship, which is dependent on (and additional to) member state nationality and thus, in principle, subject to the autonomy of the member states. So far, however, this power has proved to be only apparent, as the secondary legislation introduced on the basis of Article 79 TFEU does not match the Tampere programme's commitment to 'near equality'.[98] Thus, despite calls by the Commission, the Parliament[99] and even several member states, more transnationalism in Treaty rules has in practice not

[93] Eisele, *supra* note 55, at 1.

[94] Chalmers, Monti and Davies, *supra* note 92, at 493, 518.

[95] Hailbronner and Polakiewitz, *supra* note 81, at 80.

[96] See Title III, on workers' families, of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, OJ 1968 L 257/2.

[97] Eisele, *supra* note 55, at 8.

[98] Halleskov Storgaard, *supra* note 59.

[99] As early as 1985, the Parliament had demanded that the rights enjoyed by migrant workers from within the Community be extended to workers from third countries. See EP Resolution of 9 May, OJ 1985 C 141/462, at 467.

resulted in LTR TCNs possessing the same rights as EU citizens to move freely and take up employment in any member state. Although the text proposed by the Commission was by and large modelled on the existing rules on freedom of movement of workers, the LTRD as finally adopted takes a much less inclusive approach towards TCNs, as it is based on member states' existing immigration rules.[100] The intergovernmentalism features prevailed in a competing model lying midway between 'more Europe' and the principle of subsidiarity in the field of immigration, borders and asylum. As Walker argued, the LTRD nonetheless marks the most significant development in the membership politics of the EU, as it governs residents with neither member state nor supranational European citizenship.[101] The grant of LTR status to TCNs is, in his words, 'a significant if still limited watershed in a protracted politics of recognition'.[102]

One of the underlying rationales for the cautious approach of member states might lie in their fear of the Court's activism, based on their experiences with the Court's expansive interpretation of the rights of TCNs in the framework of EU association agreements and the derived rights of TCN family members.[103] The member states might be concerned that granting further residence and free movement rights through amendments to the LTRD would eventually result in widening the rights of the LTR TCNs beyond the limits they agreed to. Already in 1992, Hailbronner and Polakiewitz[104] fiercely criticized the Court's decisions in *Demirel* and *Sevince* for extending the market freedoms to nationals of associated states; it had reasoned as if Turkey were already part of the EEC, since it applied rules identical to those it would have applied to a member state. They found that the Court overlooked the distinction between a progressive and dynamic Community legal order and the limited framework of association law, as well as the rules of international law on the interpretation of treaties and, probably most importantly, the principle of reciprocity.[105] Such a de facto policy resulting from Community action was in their view impermissible, especially given the extent of member state sovereignty over migration policy.[106]

Against this background, although the Commission had hoped for more extensive rights for TCNs in the LTRD, it had to accept the fine-tuning done by member states to accommodate their sovereignty-related concerns. Some saw the LTRD as an intermediate stage, hoping for a directive with more expansive TCN rights in the future, especially in light of the novelties introduced in the Lisbon Treaty.[107] Although almost

[100] Halleskov Storgaard, *supra* note 59, at 302.

[101] Walker, 'Denizenship and Deterritorialisation in the European Union', in H. Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (2009) 261, at 265.

[102] *Ibid.*

[103] For examples in the field of EU association agreements, see Section 2.D above. For examples of alleged judicial activism concerning the rights of family members, see, e.g., Case C-127/08, *Metock* (ECLI:EU:C:2008:449); Case C-133/15, *Chavez-Vilchez* (ECLI:EU:C:2017:354); Case C-200/02 *Zhu and Chen* (ECLI:EU:C:2004:639). See also Luedtke, 'One Market, 25 States, 20 Million Outsiders? European Union Immigration Policy' (2005), available at http://aei.pitt.edu/4555/1/05_Luedtke.pdf, at 27.

[104] Hailbronner and Polakiewitz, *supra* note 81, at 57.

[105] *Ibid.*, at 58.

[106] Hailbronner and Polakiewitz, *supra* note 81, at 59.

[107] See, e.g., Luedtke, *supra* note 108, at 27.

20 years have passed since the LTRD negotiations and almost 15 since the adoption of the Lisbon Treaty, there are still no signs of real supranationalism in the field of the EU migration *acquis*. However, the Commission has not given up. Towards the end of 2020, it published its communication on the New Pact on Migration and Asylum.[108] Given that 'the EU is currently losing the global race for talent',[109] the Commission saw legal migration as a means of providing the skills and talents that the EU needs. It therefore proposed, inter alia, a 'Skills and Talent package' that would include a revision of the LTRD to provide LTRs with a right to intra-EU mobility.

To sum up, the competence conundrum is still largely permeated by the discretion narrative, despite the safeguards in the Treaty and in the secondary legislation.[110] Moreover, that narrative is fuelled by member state fear of Court activism and by limited mutual trust in the field of EU legal migration and the AFSJ more generally. Thus, the political considerations, as expressed in the legal framework and political reality, push in the direction of more control for member states at the expense of the free movement of LTR TCNs, though this could soon change on account of the negative demographic trend in the EU.

B *The Social and the Cultural*

In assessing the social and cultural arguments, we will focus on the question of civic integration, which is the dominant immigrant integration policy in Europe.[111] This policy, as its name implies, promotes integration as opposed to assimilation, which would evoke forced identity change.[112] Integration coheres with the discretion narrative, which emphasizes state discretion rather than individual rights.[113] It suggests that member states may legitimately guard the boundaries of their national communities. A second theme corroborates this impression: inclusion presupposes integration, as the entrant is required to fit into the social and cultural fabric of the host member state.[114]

The introduction of EU citizenship in 1992 shattered prevailing economic approaches to European integration and kindled debate over issues of polity formation, such as European democracy and legitimacy, European constitutionalism and the formation of a European demos.[115] It is beyond the scope of this article to discuss the different conceptions of European membership. We accept the 'hard' version

[108] See Commission, *supra* note 53.

[109] *Ibid.*, at 23.

[110] E.g. Article 79(5) TFEU and the public policy and public security exceptions.

[111] Joppke, 'Civic Integration in Western Europe: Three Debates', 40 *West European Politics* (2017) 1153.

[112] *Ibid.*

[113] Strumia, *supra* note 17. In the rights narrative, respect for the substance of European citizenship provides another driver of inclusion, distinct from integration.

[114] *Ibid.*

[115] Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change', 68 *Modern Law Review* (*MLR*) (2005) 233. See also Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', 1 *ELJ* (1995) 219; Weiler, 'To Be a European Citizen: Eros and Civilization', 4 *Journal of European Public Policy* (1997) 495.

of the no demos thesis, according to which, as Weiler explained, integration is not about creating a European nation or people, but about an ever-closer union among the peoples of Europe.[116] To this end, the integration requirements imposed on LTR TCNs could be understood as serving to protect 'a shared European way of life'.[117]

Member state security rights, which are the main driver behind the constraints placed upon the intra-EU mobility of LTRs, should be examined in the light of the fact that LTRs have been legally resident in the host member state for at least five years. Thus, LTRs could be seen as the least controversial group of TCNs from the point of view of member states and integration standards. They are, at least to some extent, already integrated into a member state – by its own choice.[118] For this reason, LTRs are the group of TCNs in respect of which one might expect a high degree of mutual trust between member states. However, member states still treat LTRs with caution, even though they have arguably developed some degree of 'Europeanness'.[119] The question is whether there are convincing reasons for the strikingly different operation of mutual trust between member states when it comes to granting LTR status (no or very limited mutual trust in other member states despite the adoption of harmonization measures) as compared to the granting of EU citizenship (full mutual trust in other member states despite nationality laws not being harmonized).

The treatment of LTRs contrasts with statistics on the issuance of Blue Cards in the EU pursuant to the 2009 EU Blue Card Directive. The EU Blue Card is a work and residence permit for non-EU/EEA nationals, which grants more extensive intra-EU mobility rights to TCNs taking up highly qualified employment. While Germany issued almost 80 per cent (29,000) of the total number of EU Blue Cards issued in 2019 and almost 50 per cent (5,600) in 2020, one third of these (9,400 in 2019 and 1,500 in 2020) were issued to Indian nationals. They represented a quarter of all EU Blue Cards issued, followed by nationals of Russia, China, Ukraine, Turkey, Brazil, the United States, Iran, Egypt and Tunisia.[120] In light of these figures, the European way of life argument is inconsistent with the reality, which shows that LTRs are not granted more extensive intra-EU mobility rights despite having lived in the EU for five years.

In practice, therefore, the social and cultural considerations also push in the direction of more control for member states at the expense of mutual trust and free movement rights, even though this seems inconsistent with the approach taken towards EU citizens (full trust) and certain categories of TCNs as compared to LTRs, especially in light of the fact that LTRs have fulfilled integration requirements.

[116] Weiler, *supra* note 120, at 219.

[117] See Chalmers, Monti and Davies, *supra* note 92, at 493. In its current set-up, the Commission includes a commissioner with a portfolio originally – and controversially – named 'Protecting our European Way of Life'.

[118] Halleskov Storgaard, *supra* note 59, at 323.

[119] *Ibid.*, at 324.

[120] Eurostat, *Residence Permits – Statistics on Authorisations to Reside and Work* (2021), available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Residence_permits_%E2%80%93_statistics_on_authorisations_to_reside_and_work (26 March 2022).

C *The Human*

Our consideration of the human dimension will focus on respect for human rights, which is a value fundamental to both the EU and the member states (Article 2 TEU). It has to be acknowledged that there is a bias in the human rights perspective, since it prioritizes individuals over societies. Thus, what is good for an individual (e.g. an LTR worker) is not necessarily good for the EU, and especially not for member states as it may conflict with their desire to retain at least some degree of sovereignty over immigration matters. Here again, the rights vs. national sovereignty (security) dichotomy surrounding the treatment of TCNs in the EU is evident.[121] The EU institutions (and the preamble to the LTRD) have nonetheless stressed that the intra-EU mobility rights of TCNs contribute to the realization of the objectives of the internal market.[122] Thus, in this context the individual rights narrative seems to be aligned with the transnationalist aspirations of the EU institutions. Be that as it may, the individual dimension of the human rights perspective contrasts with the collective dimension exposed by the political, social and cultural arguments discussed above, where the society is put on a pedestal.

One of the fields in which the impact of EU law is most relevant in terms of fundamental rights is the AFSJ.[123] Immigration law is central to the AFSJ, covering questions that by nature impact on fundamental rights, for the very essence of immigration law is to regulate entry and status, and therefore to establish lines of differentiation between individuals.

International law is progressively coming to consider nationality as a suspect ground for discrimination.[124] The ECtHR has decided several cases brought by TCNs complaining against the differential treatment accorded to them due to their non-EU nationality.[125] In the early cases of *Moustaquim v. Belgium* and *C. v. Belgium*,[126] the ECtHR dismissed their complaints, holding that, where preferential treatment is given to nationals of other member states, 'there is objective and reasonable justification for it, as Belgium belongs, together with those States, to a special legal order',[127] adding in *C. v. Belgium* that the EU had 'established its own citizenship'.[128] Although the Court did not explain what in this special legal order justified the differential treatment, it must be the far-reaching reciprocity obligations between member states regarding the

[121] Strumia, *supra* note 17, at 125; Thym, *supra* note 17, at 730: 'Among lawyers, State discretion in migratory matters is usually described as an expression of sovereignty, while the perspective of migrants is presented on human rights grounds'.

[122] See, e.g., Commission, *supra* note 53.

[123] Iglesias Sánchez, *supra* note 9.

[124] See Human Rights Committee, *Van Oord v. Netherlands*, Communication of 23 July 1997 No. 658/1995, UN Doc. CCPR/C/60/D/658/1995; Human Rights Committee, *Karacurt v. Austria*, Communication of 4 April 2000 No. 965/2000, UN Doc. CCPR/C/74/D/965/2000.

[125] For an in-depth analysis of these cases, see Brouwer and De Vries, *supra* note 9, at 126–135.

[126] ECtHR, *Moustaquim v. Belgium*, Appl. no. 12313/86, Judgment of 18 February 1991; ECtHR, *C. v. Belgium*, Appl. no. 21794/93, Judgment of 7 August 1996.

[127] *Moustaquim v. Belgium*, at para. 49.

[128] *C. v. Belgium*, at para. 38.

treatment of their respective nationals.[129] The ECtHR again dismissed the complaint of discrimination based on nationality in *Bigaeva v. Greece,* decided in 2009.[130] This time, the Court found that it fell within the Greek authorities' margin of appreciation to require lawyers to possess Greek nationality or the nationality of another member state.[131] In *Weller v. Hungary*,[132] however, the ECtHR found that exclusion from maternity benefit because the TCN mother did not have Hungarian or another EU nationality amounted to a violation of a combined reading of Article 14 and 8 ECHR. The reciprocity argument was expressly rejected by the ECtHR in *Koua Poirrez v. France*,[133] *Andrejeva v. Latvia*,[134] *Ribać v. Slovenia*,[135] *Fawsie v. Greece* and *Saidoun v. Greece*.[136]

Withholding social benefits from TCNs because of their (non-EU) nationality was at issue in the ECtHR cases *Gaygusuz v. Austria* in 1996, *Luczak v. Poland* in 2007 and *Dhahbi v. Italy* in 2014. All three applicants were LTRs in the respondent states. The Court found that the applicants worked there and contributed to the countries' social security schemes on an equal footing with the states' own nationals.[137] Consequently, their differential treatment amounted to an infringement of Article 14 ECHR read in conjunction with Article 1 of Protocol No. 1. Whereas in the two earlier cases the ECtHR recognized the right of TCNs to be treated equally with the respondent state's own nationals, *Dhabhi v. Italy* was the first case in which it explicitly addressed the position of TCNs in comparison with that of nationals of another EU member state.

With *Gaygusuz v. Austria*, the ECtHR started a line of decisions holding that differences in treatment based solely on nationality require 'very weighty reasons' for them to be justified.[138] Since several cases concerned applicants in specific, precarious situations (*Andrejeva* and *Ribać* were, at least de facto, stateless; *Fawsie* and *Saidoun* were refugees; and *Koua Poirrez* was disabled) which may have influenced the decision of the Court, we will focus on the three social security cases *Gaygusuz v. Austria*, *Luczak v. Poland* and *Dhahbi v. Italy.* All three applicants were migrant workers and had for many years been legally resident in the respondent states. They paid taxes, were affiliated to the local social security schemes and paid their contributions. As affirmed by

[129] See, e.g., Bundesverwaltungsgerichtshof [Federal Administrative Court], 30 March 2010, BVerwG 1 C 8.09, at para. 65; On this decision, see Eisele, 'The External Dimension of the EU's Migration Policy, Different Legal Positions of Third-Country Nationals in the EU', in J. Niessen and E. Guild (eds), *Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (2014), at 199.

[130] ECtHR, *Bigaeva v. Greece*, Appl. no. 26713/05, Judgment of 28 May 2009, paras 36, 41.

[131] *Ibid.*, at para. 40. See also Brouwer and De Vries, *supra* note 9, at 129.

[132] ECtHR, *Weller v. Hungary*, Appl. no. 44399/05, Judgment of 31 March 2009, paras 38–40.

[133] ECtHR, *Koua Poirrez v. France*, Appl. no. 40892/98, Judgment of 30 September 2003.

[134] ECtHR, *Andrejeva v. Latvia* (Grand Chamber), Appl. no. 55707/00, Judgment of 18 February 2009.

[135] ECtHR, *Ribać v. Slovenia*, Appl. no. 57101/10, Judgment of 5 December 2017, at paras 65–67.

[136] ECtHR, *Fawsie v. Greece*, Appl. no. 40080/07, Judgment of 28 October 2010; ECtHR, *Saidoun v. Greece*, Appl. no. 40083/07, Judgment of 28 October 2010.

[137] ECtHR, *Gaygusuz v. Austria*, Appl. no. 17371/90, Judgment of 16 September 1996, at para. 46; ECtHR, *Luczak v. Poland*, Appl. no. 77782/01 27 November 2007, at para. 55; ECtHR, *Dhahbi v. Italy*, Appl. no. 17120/09, Judgment of 8 April 2014, at para. 52.

[138] *Koua Poirrez v. France*, at para. 46; *Luczak v. Poland*, at para. 48; *Andrejeva v. Latvia*, at para. 87; *Fawsie v. Greece*, at para. 35; *Saidoun v. Greece*, at para. 37.

the Court, their situation in this respect was no different from that of the state's own nationals in the first two cases and that of other EU nationals in *Dhahbi v. Italy*. Since the differential treatment they received was based solely on their nationality, the Court held that the respondent states had breached the prohibition of discrimination laid down in Article 14 ECHR.

We can therefore conclude from the above cases that the ECtHR considers the differential treatment of LTR TCNs solely on the ground of their nationality as discriminatory and a violation of Article 14 ECHR. This applies especially to TCN migrant workers, whose situation does not differ to any significant extent from that of workers who are nationals of the member state or migrant workers from other EU member states. It is debatable, however, whether this approach can be transposed to other aspects of the treatment of migrant workers, such as free movement and residence rights. It could be argued that the above ECtHR cases were mainly related to 'privileged' TCNs who enjoyed various equal treatment rights under the relevant association, partnership and cooperation agreements.

D *The Economic*

The freedom of movement of persons constitutes one of the four fundamental freedoms underlying the Union's internal market. It developed from the economic logic of setting up a common market as provided for in the Treaty of Rome. Thus, from its inception the EU dealt with immigration matters from an economic point of view.[139]

The Lisbon Treaty places the EU migration *acquis* in the framework of the AFSJ. Thus, TCNs are not covered by the free movement rights as part of the internal market. Most of the rights accorded to TCNs by EU secondary legislation rely on the extension of the qualified equal treatment principle in specific spheres.[140] TCNs are entitled to substantive equality only in the labour market of the host member state that granted them worker status. The question is, should they be covered by the free movement *acquis*?

It is possible to find strong historical connections between anti-discrimination legislation and the idea of the right to work.[141] Exploring these connections is instructive for determining the objectives of Article 79 TFEU. Although Article 79, situated in the AFSJ, does not explicitly mention labour market measures, it is accepted that it confers competence to adopt rules on economic migration.[142] In fact, the aim of regulating the migration of TCNs is to help fill shortages in the EU labour market, thereby fostering competitiveness and growth in the EU.[143] Thus, although the provisions of the ASFJ are framed in general terms, the EU's legal migration policy is underpinned

[139] Eisele, *supra* note 55, at 2.

[140] Iglesias Sánchez, *supra* note 9, at 137.

[141] Collins, 'Progress towards the Right to Work in the United Kingdom', in V. Mantouvalou (ed.), *The Right to Work: Legal and Philosophical Perspectives* (2014) 227, at 232.

[142] Wilderspin, *supra* note 28, at 842.

[143] See, e.g., Recital 18 LTRD.

by a strong internal market ethos. This is reflected also in the Commission's New Pact on Migration and Asylum.

The situation of TCN migrating workers is very similar to that of EU migrating workers. Early case law[144] shows that during the establishment of the common/internal market, member states tried to discriminate against workers from other member states by denying them rights which the member states were required to respect under the T(E)EC. Those actions were initially regarded as serving the economic aim of permitting intra-EU migration in order to reduce unemployment in the internal market and ensure the availability of skills responding to the needs of member states. Not until the Maastricht Treaty did the right of workers to freedom of movement come to be seen as an aspect of their right to EU citizenship, with the result that as EU citizens they automatically had the right to move to another member state.[145] Now history is repeating itself in relation to TCNs. Just as in the interpretation of the rights of Union citizens several decades earlier, the rights of TCNs based on secondary legislation are steadily expanding beyond the realm of employment-related rights.[146] The path dependency of European integration, as Thym argued, supported the impression that free movement would serve as a model for TCNs.[147] Thus, economically, there might be good reasons for extending EU citizenship rights to long-term TCNs.[148] However, TCNs are still far from enjoying equal treatment with EU citizens generally.

The internal market rationale underpinning the granting of rights to TCNs is confirmed by the case law of the CJEU. In *P and S*, the CJEU ruled on national legislation that imposed on LTR TCNs a civic integration obligation, attested by an examination, under pain of a fine.[149] It recalled that Recitals 4, 6 and 12 of the preamble to the LTRD showed that the LTRD's principal purpose was the integration of TCNs who have settled long-term in the host member state.[150] Further, it highlighted two aspects of the integration of TCNs: firstly, interaction and social relations between TCNs and nationals of the host member state and, secondly, TCNs' access to the labour market and vocational training.[151]

The CJEU seems to follow the functionalist approach to a certain extent, since the principle of non-discrimination on the grounds of nationality is already affecting its interpretation of the many equivalent concepts in EU migration law and in EU law on the free movement of persons.[152] Also Advocates General (AGs) have expressed similar concerns to ours, while highlighting a strong internal market component.[153] In its

[144] See, e.g., Case C-152/73, *Sotgiu* (ECLI:EU:C:1974:13); Case C-33/74, *Van Binsbergen* (ECLI:EU:C:1974:131); Case C-293/83, *Gravier* (ECLI:EU:C:1985:69).

[145] Collins, *supra* note 148, at 248.

[146] Wiesbrock, *supra* note 48, at 89.

[147] Thym, *supra* note 36, at 713.

[148] Hedemann-Robinson, *supra* note 13, at 354.

[149] Case C-579/13, *P and S* (ECLI:EU:C:2015:369).

[150] *Ibid.*, at para. 46.

[151] *Ibid.*, at para. 47.

[152] Case C-311/13, *Tümer* (ECLI:EU:C:2014:2337); Wiesbrock, *supra* note 48, at 63; Iglesias Sánchez, *supra* note 9; Case C-578/08, *Chakroun* (ECLI:EU:C:2010:117), at paras 46, 52.

[153] See, e.g., Opinion of AG Tanchev in Case C-302/19, *Istituto Nazionale della Previdenza Sociale* (ECLI:EU:C:2020:452).

judgment in *Istituto Nazionale della Previdenza Sociale*, the Court relied on the Opinion of the AG and stressed the added value that TCN workers bring not only to the host member state but to the EU economy as a whole.[154]

It has been contended that the fact that rights provided under EU law cannot be exercised throughout the whole of the EU is at odds with the quintessence of the internal market, which is free movement of production factors throughout the entire EU. Scholars have called into question the legitimacy of drawing a distinction, when applying the principle of free circulation, between the free movement of workers and the free movement of goods, which applies to all goods, including those coming from a third country.[155]

It is true that 'people and products are simply different'.[156] As Roth and Oliver argued, 'in so far as natural persons are concerned, the Community has moved on from treating them merely as units of production or other economic units to considering them as human beings'.[157] In this respect, it has been argued that the free movement of workers should be regarded as having a higher moral value than goods.[158] The introduction into the Treaty of the provisions on the citizenship of the Union has acted as a catalyst in this process.[159] As Roth and Oliver pointed out, there is nothing in the Treaty which allows such a differentiation between commodities and work, except for (now) Article 18 TFEU dealing with discrimination on the basis of nationality.[160] Nonetheless, this differentiation has been regarded as justification for different principles governing the four freedoms and for granting horizontal direct effect to free movement of persons (EU citizens), as opposed to free movement of goods.[161] But should this universal truth result in lesser rights for people who do not hold the appropriate nationality despite their continuous participation in and contribution to the internal market, as is the case with LTRs?

As revealed by these economic considerations, consistency and rationality demand that equal treatment rights be granted also to LTRs. It seems inconsistent with the goals and functioning of the internal market to exclude TCNs from free movement in the EU when their full participation in the internal market on the demand side as recipients of services and purchasers of goods has long been permitted.[162] Treating

[154] Case C-302/19, *Istituto Nazionale della Previdenza Sociale* (ECLI:EU:C:2020:957), at para. 34.

[155] Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', 15 *Columbia Journal of European Law* (2009) 169, at 224.

[156] N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (2013), at 203.

[157] Oliver and Roth, 'The Internal Market and the Four Freedoms', 41 *CMLRev* (2004) 407, at 439.

[158] *Ibid.*

[159] *Ibid.* See also Cremona, 'Citizens of Third Countries: Movement and Employment of Migrant Workers within the European Union', 2 *Legal Issues of European Integration* (1995) 87, at 87–88; Van den Bogaert, 'Free Movement of Workers and the Nationality Requirements', in H. Schneider (ed.), *Migration, Integration and Citizenship* (2005) 55, at 60.

[160] Oliver and Roth, *supra* note 166.

[161] See, e.g., White, 'In Search of the Limits to Article 30 of the EEC Treaty', 26 *CMLRev* (1989) 235.

[162] Hedemann-Robinson, *supra* note 13, at 332; Wiesbrock, *supra* note 48, at 90.

them thus shows that their role is perceived as instrumental and subordinate to the economic and political interests of the EU and the MS.[163]

4 Conclusion

Of the five categories of arguments examined in this article, only the human and the economic unequivocally push in the direction of treating TCN migrant workers and EU national workers equally for the purpose of free movement of workers. The political, social and cultural considerations are to a large extent permeated with the national sovereignty (security) narrative, though this could soon change as a consequence of the negative demographic trend in the EU. However, if looked at through the lens of consistency and rationality, required by the principle of equality and expressly reflected in Article 7 TFEU, the human rights and economic perspectives carry more persuasive legal and normative force. Thus, our analysis strongly suggests that, on balance, there are convincing reasons that push in the direction of treating LTR migrant workers equally with EU national workers.

ECtHR case law helps to clarify the legal standards with which the EU legal framework on the treatment of TCNs must comply following the entry into force of the Lisbon Treaty.[164] An examination of relevant ECtHR case law forms the basis for setting out the legal parameters of the Article 79 TFEU fair treatment obligation, whereby 'very weighty reasons' are required for any differentiation to be able to withstand the Article 14 ECHR prohibition on discrimination. Although Article 14 ECHR does not oblige the EU, or member states, to expand the protection of Article 18 TFEU to TCNs, it may stand in the way of differences of treatment between a state's own nationals and TCNs.

Since measures based on Article 79 TFEU need to fulfil the EU competence objectives in this field, we posit that 'very weighty reasons' need to be assessed against the internal market paradigm. As this article has shown, ECtHR case law supports the argument that there is little room for unequal treatment of TCNs workers and EU migrant workers in a member state when it comes to working conditions and other employment-related matters. Yet, as currently interpreted, ECtHR case law does not seem to support equal treatment in respect of intra-EU mobility rights for TCNs workers. Thus, the pressing question remains as to whether the unequal treatment of TCNs who have been legally admitted and whose connection to the host member state does not otherwise differ from that of EU citizens exercising their mobility rights[165] could be justified by the legal and policy principles underpinning the EU. As the historical and purposive

[163] *Ibid.*, at 347; S. Carrera and R. Hernández Sagrera, *The Externalisation of the EU's Labour Immigration: Towards Mobility or Insecurity Partnerships?*, CEPS Working Document 321 (2009), at 34. See also Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique', 3 *EJIL* (1992) 65, at 69.

[164] Article 6(2) TEU contains the legal basis for the EU to accede to the ECHR. Negotiations for accession are still ongoing.

[165] Morano-Foadi and De Vries, *supra* note 14, at 41.

dimensions of workers' rights in the EU have shown, EU anti-discrimination law and the right to work share common origins. This has been somewhat forgotten in the context of TCN workers. Their status as migrant workers does not differ substantially from the status of EU migrant workers, except in respect of nationality, and the rights attached to their status pursue the underlying market objective. The CJEU has consistently held that when assessing whether situations are objectively comparable, the objective pursued by the relevant rules is crucial.[166] In the light of Article 14 ECHR case law, it is hard to imagine what 'very weighty reasons' could justify (EU and national) measures that treat TCNs workers and EU citizens unequally in comparable situations. Against this background, it is precisely the obligation of 'fair treatment' that will often necessitate 'equal treatment'.

The consistent interpretation of the principle of mutual trust, as the foundation of equal treatment in the EU, requires that the other member states trust the first member state, as happens when EU citizenship is indirectly granted through member states bestowing their nationality on TCNs. The denial of free movement rights to TCNs weakens one of the most significant achievements of European integration. So long as such a large number of economic migrants are excluded, held back by putative borders between member states, there can be no true internal market for persons.

[166] See, e.g., Joined Cases C-443/14 and C-444/14, *Alo* (ECLI:EU:C:2016:127), at para. 54.

Zum Verfassungsrang der Grundfreiheiten und des europäischen Wettbewerbsrechts

Von Carsten König, Köln*

Die Grundfreiheiten und das europäische Wettbewerbsrecht zählen seit jeher zu den Eckpfeilern der europäischen Wirtschaftsverfassung. Ihr normenhierarchischer Höchstrang im EU-Primärrecht ist jedoch nicht unumstritten. Es hält sich vielmehr hartnäckig die These, die wirtschaftlichen Freiheiten hätten ihre hervorgehobene Stellung auf illegitime Weise erlangt und sollten eigentlich nicht zum materiellen Verfassungsrecht der Union gehören. Der folgende Beitrag stellt sich dem entgegen. Er argumentiert, die These von der illegitimen Konstitutionalisierung lasse sich nicht halten und der Verfassungsrang der Grundfreiheiten und des europäischen Wettbewerbsrechts sei angesichts ihrer freiheitsschützenden Funktion und ihrer Bedeutung für den Binnenmarkt wohlverdient.

I. Einleitung

Der Verfassungsrang der Grundfreiheiten und des europäischen Wettbewerbsrechts wird selten hinterfragt. Das Binnenmarktrecht scheint so sehr zur „DNA" der Union zu gehören, dass seine hervorgehobene Stellung in den EU-Verträgen selbstverständlich erscheint. Rangfragen spielen zudem im EU-Recht traditionell eine geringere Rolle als im nationalen Recht, was vor allem daran liegt, dass der EuGH von seiner Verwerfungskompetenz in Bezug auf Sekundärrecht nur zurückhaltend Gebrauch macht.[1] Im demokratietheoretischen Schrifttum wird jedoch seit geraumer Zeit die These vertreten, das EU-Recht sei in erheblichem Maße überkonstitutionalisiert. Dadurch sei das Verhältnis von Recht und Politik zulasten der Politik verschoben, was die demokratische Legitimität der Union gefährde. Ein zentraler Teil der Kritik richtet sich gegen die Konstitutionalisierung der Grundfreiheiten und des Wettbewerbsrechts. Es wird behauptet, der EuGH habe diese zentralen Stützen des Binnenmarktrechts durch die Doktrinen von der unmittelbaren Anwendbarkeit und vom Anwendungsvorrang dem Zugriff der demokratisch legitimierten Gesetzgeber in den Mitgliedstaaten und auf der Unionsebene entzogen und durch seine marktliberale Rechtsprechung deren sozial- und wirtschaftspolitische Spielräume übermäßig beschnitten.

Diese These, die besonders prominent von *Fritz W. Scharpf* und *Dieter Grimm* vertreten wird,[2] soll im Folgenden gewürdigt und kritisch analysiert werden. Dafür werden zunächst der Hintergrund der Konstitutionalisierung und die demokratietheoretische Kritik erläutert (II.). Sodann wird untersucht, wie die Grundfreiheiten und das Wettbewerbsrecht ihre hervorgehobene Stellung erhalten haben und ob die Kritik daran berechtigt ist (III.). Es folgt eine Auseinandersetzung mit den wichtigsten materiellen Gründen für den Verfassungsrang der Grundfreiheiten (IV.) und des Wettbewerbsrechts (V.), die zeigen wird, dass deren Einbeziehung in das EU-Verfassungsrecht sachlich gerechtfertigt ist. Das bedeutet aber nicht, dass die demokratietheoretische Kritik keine Folgen haben sollte, was anschließend erklärt wird (VI.). Am Ende steht eine kurze Zusammenfassung der wichtigsten Thesen (VII.).

II. Konstitutionalisierung und Überkonstitutionalisierung

Der Begriff der Konstitutionalisierung beschreibt in seinem Kern die schleichende Verrechtlichung politischer Herrschaftsausübung durch formelle und materielle Verfassungselemente.[3] Er wird vor

allem im Völkerrecht verwendet, passt aber überall dort, wo eine Rechtsordnung zunächst ohne formale Verfassung in Kraft gesetzt wird, sich dann aber allmählich Prinzipien, Institutionen und Verfahren herausbilden, die sich typischerweise in Verfassungen finden. In Bezug auf die EU werden als Kennzeichen ihrer Konstitutionalisierung u. a. genannt die unmittelbare Anwendbarkeit wichtiger Teile des Unionsrechts, der Anwendungsvorrang vor dem Recht der Mitgliedstaaten, die Formalisierung des supranationalen Gesetzgebungsverfahrens und die Entwicklung einer eigenen Grundrechtsordnung.[4] Von zentraler Bedeutung ist außerdem das umfassende Rechtsschutzsystem, welches auch der EuGH hervorhob, als er im Jahr 1986 den EWG-Vertrag erstmals als „Verfassungsurkunde" der Gemeinschaft bezeichnete.[5]

Ein bedeutendes Element der Konstitutionalisierung ist die Herausbildung einer gestuften rechtlichen Ordnung,[6] da typisches – und in der Rechtspraxis wohl wichtigstes – Strukturelement von Verfassungen deren Vorrang vor dem einfachen Gesetz ist.[7] In der Verrechtlichung der Herrschaft durch den Vorrang der Verfassung kommt dessen historisch besonders wichtige Funktion der Herrschaftsbegrenzung zum Ausdruck.[8] Damit Demokratie nicht zu einer Herrschaft der Mehrheit über die Minderheit verkommt, muss auch der demokratisch legitimierte Gesetzgeber an übergeordnete Prinzipien gebunden werden. Außerdem gibt es Themen, die von derart grundlegender Bedeutung für die gesellschaftliche Ordnung sind, dass sie sich für Entscheidungen durch regelmäßig wechselnde Mehrheiten nicht eignen.[9]

Die entscheidende Frage ist natürlich, welche Grundsätze für das Gemeinwesen so wichtig sind, dass sie der Politik entzogen sein sollen.[10] Für die EU wird argumentiert, sie sei in erheblichem Maße „überkonstitutionalisiert".[11] *Dieter Grimm* sieht hierin die „wichtigste Ursache des europäischen Demokratieproblems".[12] Die EU-Verträge seien voll von Regelungen, die im Staat auf der Ebene des einfachen Rechts geregelt wären.[13] Dadurch sei das Verhältnis von Recht und Politik in bedenklichem Maße zulasten der Politik verschoben. Entscheidungen von hohem politischen Gewicht würden in einem unpolitischen Modus außerhalb der demokratischen Prozesse getroffen. Die Kommission und der EuGH seien im Anwendungsbereich des EU-Primärrechts „gegen die Politik immunisiert".[14] Die politischen Instanzen der Union, der Rat und das Parlament, seien hier von jeder Mitwirkung ausgeschlossen. Um der Legitimations- und Akzeptanzschwäche der EU entgegenzuwirken, sei eine Repolitisierung erforderlich. Rat und Parlament müssten die Möglichkeit bekommen, Entscheidungen des EuGH durch Gesetzesänderungen für die Zukunft „umzuprogrammieren".[15] Dafür schlägt *Grimm* vor, das Primärrecht auf das „verfassungsfunktional notwendige Maß" zurückzuführen und alle Vorschriften über die Politiken auf die Ebene des sekundären EU-Rechts herabzustufen. Konkret plädiert er für eine Vertragsänderung, die den gesamten AEUV in Sekundärrecht umwandeln würde.[16]

Als konkrete Beispiele für die Überkonstitutionalisierung und ihre negativen Folgen nennt *Grimm* die Grundfreiheiten und das europäische Wettbewerbsrecht.[17] Hier trifft sich seine Kritik mit der von *Fritz W. Scharpf*, der schon 1999 argumentiert hatte, durch die Konstitutionalisierung des Wettbewerbsrechts (inkl. der Grundfreiheiten) hätten die Kommission und der EuGH den Mitgliedstaaten „die Möglichkeit genommen", finanzielle und wirtschaftliche Interaktionen „jeweils eigenen marktkorrigierenden Regelungen zu unterwerfen".[18] Besonders bekannt ist *Scharpfs* These, der europäischen Integration wohne eine „Asymmetrie zwischen negativer und positiver Integration" inne, die die Balance zwischen Staat und Markt systematisch zuungunsten des Staates und seiner Fähigkeit, regulierend in Marktprozesse einzugreifen, verschiebe.[19] Aus seiner Sicht liegt

ein zentrales Problem darin, dass die Asymmetrie zwischen negativer und positiver Integration „marktkorrigierende" politische Interventionen gegenüber „marktschaffenden" Maßnahmen systematisch benachteilige.[20] Dadurch sei die „konstitutionelle Gleichrangigkeit zwischen dem Schutz wirtschaftlicher Freiheit und marktkorrigierender Interventionen" verloren gegangen.[21] Als Beispiel dient ihm der Bedeutungsverlust der gemischten Wirtschaftsordnung im Bereich der Daseinsvorsorge.[22] Auf nationaler Ebene habe es hier nie ein Primat des Wettbewerbs gegeben und über die richtige Balance zwischen Markt und Intervention sei politisch von demokratisch legitimierten Gesetzgebern entschieden worden. Infolge der Konstitutionalisierung gebe es aber keinen Bereich der Daseinsvorsorge mehr, der noch dem Einfluss des europäischen Wettbewerbsrechts entzogen sei.[23] Die Kommission habe dies genutzt, um mithilfe ihrer wettbewerbsrechtlichen Kompetenzen die Liberalisierung immer weiterer Sektoren voranzutreiben; genannt werden beispielhaft die Telekommunikation, der Luftverkehr, der Güterkraftverkehr, Postdienstleistungen und der Energiemarkt.[24]

Grimm und *Scharpf* sorgen sich vor allem um die demokratische Legitimität der EU. Ein wichtiger Teil ihrer Kritik betrifft die Frage, wie es zur Konstitutionalisierung des Primärrechts und damit zur Priorisierung der Grundfreiheiten und des Wettbewerbsrechts gekommen ist. Im Zentrum der Argumentation stehen die EuGH-Urteile *Van Gend & Loos* (1963)[25] zur unmittelbaren Anwendbarkeit des Zollverbots und *Costa/Enel* (1964)[26] zum Anwendungsvorrang des Gemeinschaftsrechts vor dem nationalen Recht. Erst durch diese Entscheidungen (und nicht etwa durch den Willen der Gründungsstaaten) sei der EWG-Vertrag in

den Rang einer Verfassung gehoben und mit Vorrang gegenüber dem Recht der Mitgliedstaaten ausgestattet worden. *Grimm* nennt diese Rechtsprechung „revolutionär"[27] und *Scharpf* spricht gar von einem „revolutionary act of judicial self-empowerment" und einem „coup d'état".[28] Während in älteren Texten von *Scharpf* meist das Verhältnis von europäischem und nationalem Recht im Vordergrund steht, beklagen beide Autoren heute außerdem, dass der EuGH durch die Konstitutionalisierung nicht nur die Spielräume der Mitgliedstaaten, sondern auch die des EU-Gesetzgebers beschränkt habe.[29] Dem Gerichtshof wird also u. a. vorgeworfen, durch die extensive Auslegung der Verträge seine eigene Position zulasten der demokratisch legitimierten Gesetzgebungsorgane gestärkt zu haben.

III. Selbstermächtigungsthese und Demokratieproblem

Die demokratietheoretische Kritik wiegt schwer und sie ist mehrschichtig, weil sie nicht nur das Verhältnis von nationalem und europäischem Recht betrifft, sondern auch und vor allem das Verhältnis von Recht und Politik auf der europäischen Ebene. Um der Komplexität der Thematik einigermaßen gerecht zu werden, soll hier in zwei Schritten vorgegangen werden. Zunächst wird es in diesem Abschnitt darum gehen, wie es zu der Konstitutionalisierung der Grundfreiheiten und des Wettbewerbsrechts kam und ob sich aus einer eher prozeduralen Sicht sagen lässt, ihr Verfassungsrang sei legitim. In den Abschnitten IV. und V. folgen dann Überlegungen zu einer inhaltlichen Rechtfertigung des Vorrangs der wirtschaftlichen Freiheiten und der daraus folgenden Bindungen für den EU-Gesetzgeber.

Will man also zunächst die These nachprüfen, der EuGH habe die Grundfreiheiten und das Wettbewerbsrecht quasi im Alleingang konstitutionalisiert, sind die im Zentrum der Kritik stehenden Urteile *Van Gend & Loos* und *Costa/Enel* ein guter Ausgangspunkt. Denn die Überzeugungskraft der Selbstermächtigungsthese hängt auch davon ab, wie der EuGH die unmittelbare Anwendbarkeit und das Vorrangprinzip begründet hat und welche weiteren rechtsdogmatischen Argumente sich für

diese zentralen Grundsätze des Unionsrechts anführen lassen.[30] Dafür sind die vertraglichen Grundlagen mit in den Blick zu nehmen und es ist zu überprüfen, welche Rolle die *Vertragsstaaten* bei der Konstitutionalisierung gespielt haben. Denn gerade für das EU-Primärrecht ist die Legitimation über die Mitgliedstaaten und deren Parlamente von zentraler Bedeutung.

1. Unmittelbare Anwendbarkeit

Interessanterweise berief sich der Gerichtshof in *Van Gend & Loos* außer auf Art. 12 EWGV über das Zollverbot (dessen unmittelbare Anwendbarkeit im konkreten Verfahren in Frage stand) und die Präambel des Vertrags vor allem auf Art. 177 EWGV, der damals das Vorabentscheidungsverfahren regelte. Die dem EuGH danach zukommende Aufgabe, eine einheitliche Auslegung durch die nationalen Gerichte zu gewährleisten, sei „Beweis dafür, daß die Staaten davon ausgegangen sind, die Bürger müßten sich vor den nationalen Gerichten auf das Gemeinschaftsrecht berufen können".[31] In der Tat lässt sich diese Schlussfolgerung kaum bestreiten. Das Vorabentscheidungsverfahren war aber natürlich keine Idee des Gerichtshofs, sondern eine solche der Gründungsstaaten, die sich gerade nicht am Völkerrecht orientierten, sondern an ähnlichen Verfahren im nationalen Verfassungsrecht.[32] Auch ist offenkundig, dass die Gründungsstaaten einige Vorschriften des EWG-Vertrags so formuliert hatten, dass deren unmittelbare Anwendbarkeit bei methodengerechter Auslegung geradezu zwingend war. Ein gutes Beispiel ist Art. 85 Abs. 2 EWGV (heute Art. 101 Abs. 2 AEUV), der in Bezug auf koordinierte wettbewerbswidrige Praktiken von Unternehmen schlicht anordnete: „Die nach diesem Artikel verbotenen Vereinbarungen und Beschlüsse sind nichtig." Schon einige Monate vor *Van Gend & Loos* hatte der EuGH daher im *Bosch*-Urteil vergleichsweise beiläufig die unmittelbare Anwendbarkeit von Art. 85 Abs. 2 EWGV bejaht.[33] Schon diese einfachen Erwägungen zum Sinn des Vorabentscheidungsverfahrens und zum Wortlaut zentraler Vorschriften des EWG-Vertrags legen nahe, dass die These von der Selbstermächtigung in Bezug auf die Doktrin von der unmittelbaren Anwendbarkeit übertrieben ist, weil sie dem Inhalt des Vertrages und damit auch der Rolle der Vertragsstaaten nicht gerecht wird. Sie würdigt vor allem nicht hinreichend, dass schon die Gründungsstaaten – und nicht erst der EuGH – die EWG ganz bewusst und in Abkehr von völkerrechtlichen Traditionen als neuartiges supranationales Gebilde mit echten eigenen Hoheitsrechten, eigenen Organen, eigenen Handlungsformen und Rechtssetzungsverfahren[34] sowie einem einzigartigen Rechtsschutzsystem konzipiert hatten.[35]

Auch wird man anerkennen müssen, dass es dem EuGH in *Van Gend & Loos* – zumindest wenn man ihn beim Wort nimmt – vor allem darum ging, die nach damaligen völkerrechtlichen Maßstäben ungewöhnliche *Subjektivierung* des Gemeinschaftsrechts herauszuarbeiten. Die Idee, dass auch Individuen Träger völkerrechtlicher Rechte und Pflichten sein können, setzte sich damals im internationalen Menschenrechtsschutz und im Völkerstrafrecht allmählich durch, war von universeller Anerkennung aber noch weit entfernt.[36] Der EuGH hob nun jedoch hervor, die Schaffung eines gemeinsamen Marktes betreffe die Einzelnen unmittelbar; der EWG-Vertrag sei daher mehr als ein Abkommen, dass nur Verpflichtungen zwischen Staaten begründe. Das werde durch die Präambel bestätigt, finde aber eine „noch augenfälligere Bestätigung" in der Schaffung von Organen, denen Hoheitsrechte übertragen seien, deren Ausübung die Staatsbürger in gleicher Weise wie die Mitgliedstaaten berühre. Auch seien die Staatsangehörigen berufen, durch das Parlament und den Wirtschafts- und Sozialausschuss zum Funktionieren der Gemeinschaft

beizutragen. Es folgt die oben bei Fn. 31 schon zitierte Würdigung des Vorabentscheidungsverfahrens. Die Argumente gipfeln sodann in der folgenden berühmten Passage:

„Aus alledem ist zu schließen, daß die Gemeinschaft eine neue Rechtsordnung des Völkerrechts darstellt, [...] eine Rechtsordnung, deren Rechtssubjekte nicht nur die Mitgliedstaaten, sondern auch die Einzelnen sind. Das von der Gesetzgebung der Mitgliedstaaten unabhängige Gemeinschaftsrecht soll daher den Einzelnen, ebenso wie es ihnen Pflichten auferlegt, auch Rechte verleihen."[38]

Der eigentliche Coup des *Van Gend & Loos*-Urteils lag also nicht in der „Selbstermächtigung" des EuGH (dessen starke Stellung und weite Befugnisse im EWG-Vertrag angelegt waren), sondern in einer *Ermächtigung der Bürger*, europäische Freiheiten notfalls auch gegen ihre Nationalstaaten durchzusetzen.[38] Denn dass der EWG-Vertrag unmittelbar auch die Bürger berechtigen sollte, ergab sich aus dem Vertragstext weniger deutlich als die zentrale Rolle des Gerichtshofs bei der Wahrung des Gemeinschaftsrechts.[39] Der EuGH betonte aber von Anfang an die individualschützende Funktion des Vorabentscheidungsverfahrens nach Art. 177 EWGV und schloss damit eine Lücke im Rechtsschutzsystem der Gemeinschaft, das für einfache Bürger keine Möglichkeit vorsah, die Einhaltung von

Gemeinschaftsrecht mit direkten Klagen zu erzwingen.[40] Der frühere Richter des BVerfG und Präsident des EuGH *Hans Kutscher* hat deshalb sogar formuliert: „Das Verfahren nach Artikel 177 EWG-Vertrag dient *in erster Linie* dem Schutz des Bürgers gegen unrechtmäßige Eingriffe."[41] Berücksichtigt man diesen doppelten Hintergrund der Subjektivierung zentraler Garantien des Gemeinschaftsrechts und der Stärkung des Individualrechtsschutzes durch das Vorabentscheidungsverfahren, erscheint es paradox, dass ausgerechnet die Doktrin von der unmittelbaren Anwendbarkeit für Akzeptanzprobleme der EU (mit-)verantwortlich gemacht wird.[42]

2. Vorrang des Unionsrechts

Damit richtet sich die Aufmerksamkeit auf die Frage, ob denn zumindest die Anerkennung des Anwendungsvorrangs durch den EuGH ein revolutionärer Akt der Selbstermächtigung war. Auch dafür spricht wenig, wenn man die Begründung des Urteils *Costa/Enel* im Einzelnen nachvollzieht.[43] Der EuGH knüpft darin an seine Ausführungen in *Van Gend & Loos* zu den Besonderheiten der durch den EWG-Vertrag geschaffenen Rechtsordnung an. Die Mitgliedstaaten hätten die Gemeinschaft mit Hoheitsrechten ausgestattet und dadurch ihre eigenen Souveränitätsrechte beschränkt. Könnten sie nachträgliche einseitige Maßnahmen gegen die gemeinsame Rechtsordnung ins Feld führen, würde dies entgegen Art. 5 Abs. 2 EWGV die Ziele des Vertrags gefährden und Art. 7 EWGV widersprechende Diskriminierungen zur Folge haben. Die Verpflichtungen, welche die Mitgliedstaaten bei der Gründung der Gemeinschaft eingegangen seien, wären keine unbedingten mehr, wenn sie nachträglich in Frage gestellt werden könnten. Der EWG-Vertrag enthalte aber klare Bestimmungen über einseitiges Vorgehen und Genehmigungsverfahren für Ausnahmen, „die gegenstandslos wären, wenn die Staaten die Möglichkeit hätten, sich ihren Verpflichtungen durch den bloßen Erlaß von Gesetzen zu entziehen". Der Vorrang werde auch durch Art. 189 EWGV über die unmittelbare Geltung von Verordnungen bestätigt.[44] Auch diese Bestimmung wäre „ohne Bedeutung", wenn die Mitgliedstaaten sie „einseitig ihrer Wirksamkeit berauben könnten". Schließlich stellt der Gerichtshof fest:

„Aus alledem folgt, daß dem vom Vertrag geschaffenen, somit aus einer autonomen Rechtsquelle fließenden Recht wegen dieser seiner Eigenständigkeit keine wie immer gearteten innerstaatlichen Rechtsvorschriften vorgehen können, wenn ihm nicht sein Charakter als Gemeinschaftsrecht aberkannt und

wenn nicht die Rechtsgrundlage der Gemeinschaft selbst in Frage gestellt werden soll. "[46]

Mehr noch als in *Van Gend & Loos* argumentierte der EuGH in *Costa/Enel* also mit konkreten, von den Gründungsstaaten formulierten Vorschriften, die zumindest in der Gesamtschau tatsächlich kaum einen anderen Schluss zuließen, als dass der Gemeinschaftsrechtsordnung Vorrang vor dem Recht der Mitgliedstaaten zukommen sollte. Ergänzend lässt sich erneut auf das ausgefeilte, nach damaligen völkerrechtlichen Maßstäben ungewöhnliche Rechtsschutzsystem verweisen. Besondere Beachtung verdient das Vertragsverletzungsverfahren, denn die Gründungsstaaten hatten den EuGH in Art. 169, 170 EWGV nicht nur ermächtigt, auf Antrag der Kommission oder eines Mitgliedstaats zu entscheiden, ob ein Mitgliedstaat „gegen eine Verpflichtung aus diesem Vertrag verstoßen" hat, sondern in Art. 171 EWGV auch festgeschrieben, dass der betroffene Staat „die Maßnahmen zu ergreifen [hat], die sich aus dem Urteil des Gerichtshofs ergeben". Es ist methodisch gesehen kein allzu kühner Schluss, daraus ein Verbot der Mitgliedstaaten zu entnehmen, ihr gemeinschaftswidriges nationales Recht weiter anzuwenden.[46] Oder eben andersherum: eine Pflicht, dem Gemeinschaftsrecht Vorrang einzuräumen. Erneut zeigt sich also, dass die These von der Selbstermächtigung über das Ziel hinausschießt, weil sie den Blick zu stark auf den EuGH verengt und die Rolle der Gründungsstaaten bei der Gestaltung der europäischen Verträge nicht ausreichend würdigt.

Aus heutiger Sicht kommt hinzu, dass die Vertreter der Mitgliedstaaten in ihren Erklärungen zur Schlussakte von Lissabon ausdrücklich festgehalten haben, „dass die Verträge und das von der Union auf der Grundlage der Verträge gesetzte Recht im Einklang mit der ständigen Rechtsprechung des Gerichtshofs der Europäischen Union unter den in dieser Rechtsprechung festgelegten Bedingungen Vorrang vor dem Recht der Mitgliedstaaten haben".[47] Wichtig ist, dass die Mitgliedstaaten hier nicht nur den Vorrang als solchen anerkennen, sondern sich ausdrücklich auch der diesbezüglichen Rechtsprechung des EuGH unterwerfen. Die Erklärung ist zwar rechtlich unverbindlich, kann aber als Auslegungshilfe herangezogen werden und war in Deutschland Bestandteil des mit großer Mehrheit beschlossenen Zustimmungsgesetzes zum Vertrag von Lissabon,[48] woraus sich zumindest aus deutscher Sicht eine erhebliche legitimierende Wirkung hinsichtlich des Vorrangprinzips ergibt.

Schließlich gilt es zu erkennen, dass der Vorrang des Unionsrechts vor dem Recht der Mitgliedstaaten für die hier behandelte Frage der *Konstitutionalisierung* der Grundfreiheiten und des europäischen Wettbewerbsrechts nicht von zentraler Bedeutung ist. Denn die Vorrangdoktrin besagt bekanntlich, dass *alles* Unionsrecht

vor allem Recht der Mitgliedstaaten vorrangig ist.[49] Die Grundfreiheiten und das Wettbewerbsrecht könnten sich gegen nationales Recht also auch durchsetzen, wenn sie lediglich im Sekundärrecht enthalten wären. Bei der Frage, welche materiellen Prinzipien zum Verfassungsrecht der Union gehören bzw. gehören sollten, geht es also weniger um das Verhältnis von Unionsrecht und nationalem Recht, als darum, welchen Bindungen der Unionsgesetzgeber unterliegen soll. Versteht man die Konstitutionalisierung des Unionsrechts vor allem im Sinne der Ausprägung einer

Binnenhierarchie, muss man also nicht den Anwendungsvorrang vor dem nationalen Recht, sondern vielmehr den Vorrang des EU-Primärrechts vor dem Sekundärrecht in den Blick nehmen. Dieser Vorrang versteht sich aber praktisch von selbst.[50] Denn es sind die Verträge, denen die Organe ihre Existenz verdanken und die sie überhaupt erst ermächtigen, Sekundärrecht zu schaffen. Der Vorrang des Primärrechts bzw. Nachrang des Sekundärrechts kommt u. a. in Art. 13 Abs. 2 EUV zum Ausdruck, der die Organe an die Verfahren, Bedingungen und Ziele der Verträge bindet.[51] Speziell für das Gesetzgebungsverfahren wird er außerdem aus Art. 288 Abs. 1 AEUV abgeleitet, der für die Sekundärrechtssetzung auf die „Zuständigkeiten der Union" verweist.[52] In aller Deutlichkeit ergibt sich der Vorrang des Primärrechts schließlich aus dem Rechtsschutzsystem, welches den EuGH u. a. in Art. 263 Abs. 2, 264 Abs. 2 und 267 Abs. 1 lit. b) AEUV ermächtigt, Rechtshandlungen der Organe für nichtig zu erklären, wenn sie den Vorgaben der Verträge nicht entsprechen.

3. Demokratische Legitimität

Die Kritik von *Grimm* und *Scharpf* ist jedoch keine rechtliche, sondern eine demokratietheoretische. Die entscheidende Frage auf dieser Ebene ist, ob die unmittelbare Anwendbarkeit und der Vorrang der Grundfreiheiten und des europäischen Wettbewerbsrechts der demokratischen Legitimität der EU geschadet haben. Auf gewisse Weise kann man dies so sehen, denn wo immer der Einzelne die Befugnis erhält, unter Berufung auf höherrangige individuelle Freiheiten gegen demokratisch legitimierte Gesetze vorzugehen, verringern sich die Spielräume der aktuell mit der Gesetzgebung beauftragten Volksvertreter. So ist es bei den Grundrechten[53] und so ist es auch bei den wirtschaftlichen Freiheiten der EU-Verträge. Es lässt sich kaum bestreiten, dass deren hohe normhierarchische Stellung bei der

Deregulierung vieler europäischer Märkte in den 1980er- und 1990er-Jahren eine Rolle gespielt hat. Wirtschafts- und sozialpolitisch kann man über die Auswirkungen trefflich streiten.[54] Aus demokratietheoretischer Sicht liegt das Problem – wie von *Scharpf* und *Grimm* beklagt – vor allem darin, dass der hohe Rang der Wirtschaftsfreiheiten die Handlungsspielräume der Legislative beschränkt. Wo sich primärrechtlich abgesicherte Freiheiten durchsetzen, müssen eben auch demokratisch legitimierte Gesetze weichen. Die Politik kann über die richtige Balance zwischen wirtschafts- und sozialpolitischer Gestaltung und individuellen Freiheiten nicht mehr rein politisch entscheiden, sondern ist bei der Ausübung ihres Ermessens an höherrangige rechtliche Prinzipien gebunden.

Das ist aber keine Besonderheit der wirtschaftlichen Freiheitsrechte, sondern gilt genauso für personale Freiheitsrechte, also z. B. die Meinungs- und die Versammlungsfreiheit, und überhaupt für alle Grundrechte und alle sonstigen Rechtsprinzipien, die in der Normenhierarchie über dem einfachen Gesetz stehen.[55] Allerdings folgt daraus keine völlige „Entpolitisierung",[56] sondern nur eine rechtliche Einhegung der politischen Gestaltungsprozesse. Denn die höherrangigen Prinzipien erhalten in der Regel keinen absoluten Schutz, sondern verstehen sich als Optimierungsgebote;[57] typisch ist außerdem, dass unterschiedliche Prinzipien miteinander kollidieren und deshalb in Bezug auf konkrete Regelungsprobleme abgewogen und in Einklang gebracht werden müssen. Diese zentrale Aufgabe der „Prinzipienentfaltung"[58] obliegt in erster Linie dem Gesetzgeber, was die (Verfassungs-)Gerichte durch die Gewährung weiter Einschätzungs- und Abwägungsspielräume anerkennen. Das gilt auch für die Grundfreiheiten und die Wettbewerbsfreiheit, die sich keineswegs immer gegen mitgliedstaatliche Gesetze und Sekundärrecht durchsetzen, sondern für deren Anwendung der EuGH eine komplexe Dogmatik entwickelt hat, in die selbstverständlich auch eine

Abwägung mit kollidierenden Prinzipien integriert ist.[59] Letztlich stellt die Konstitutionalisierung der wirtschaftlichen Freiheiten vor allem sicher, dass sie von der Legislative überhaupt beachtet werden müssen und dass Beschränkungen rechtfertigungs- und begründungsbedürftig sind. Sie sind aber auch rechtfertigungs- und begründungs*fähig*, müssen dafür aber legitimen Zwecken dienen und verhältnismäßig

sein.[60] Die Bedeutung höherrangiger Prinzipien als „Rahmen und Grenzen"[61] der Rechtssetzung zeigt sich also nicht zuletzt in einer prozeduralen Komponente, die dem Gesetzgeber nicht vorschreibt, *was* er zu regeln hat, sondern *wie* er dabei vorgehen muss.[62] Einige der wichtigsten EuGH-Urteile zu den Grundfreiheiten lassen sich z. B. schlicht dadurch erklären, dass es schon an einigermaßen plausiblen Erklärungen, Begründungen und Rechtfertigungen für die freiheitsbeschränkenden Maßnahmen fehlte.[63]

Demokratietheoretisch lässt sich ein Vorrang individueller Freiheiten auch damit rechtfertigen, dass sie ihrerseits in demokratisch legitimierten Verfahren anerkannt werden und zwar oft in solchen, die gegenüber der ordentlichen Gesetzgebung eine gesteigerte Legitimität aufweisen. So ist die Beschränkung des einfachen Gesetzgebers durch die Grundrechte demokratietheoretisch kein Problem, sondern gerade Ausdruck der unterschiedlichen Legitimitäten der Verfassung und des einfachen Gesetzes. Aus dieser Sicht kann man durchaus kritisieren, dass der EuGH schon für den EWG-Vertrag und das darauf beruhende Sekundärrecht einen Vorrang sogar vor nationalem Verfassungsrecht anerkannt hatte,[64] denn *dieser* Vertrag war nur nach den Regeln für die Transformation von Völkerrecht legitimiert worden. Mittlerweile haben viele Mitgliedstaaten aber „nachgerüstet" und verlangen für die Ratifizierung von EU-Primärrecht qualifizierte Mehrheiten oder gar ein Referendum.[65] Im Zusammenspiel mit den Verfahrensanforderungen auf der EU-Ebene (heute Art. 48 EUV) lässt sich den EU-Verträgen damit heute eine Legitimität bescheinigen, die derjenigen nationaler Verfassungen nicht nachsteht und sie sogar teilweise übersteigt. Was konkret die Legitimität der Grundfreiheiten und des Wettbewerbsrechts angeht, gilt es außerdem anzuerkennen, dass diese seit jeher zum Kern der Verträge gehören und durch keine der bisherigen Änderungen wesentlich verändert, sondern im Gegenteil immer wieder bestätigt wurden. Selbst wenn man in der Anerkennung von unmittelbarer Anwendbarkeit und Vorrang eine die Grenzen der Auslegung übersteigende, schöpferische Rechtsfortbildung des EuGH sehen wollte, müsste man daher respektieren, dass diese Rechtsprechung den Mitgliedstaaten seit den 1960er-Jahren bekannt ist und sie

dennoch keine der bisherigen Vertragsrevisionen für Änderungen genutzt haben.[66] Außerdem geht es in Bezug auf Grundfreiheiten und Wettbewerbsfreiheit in der Regel „nur" um Kollisionen mit einfachen Gesetzen der Mitgliedstaaten oder EU-Sekundärrecht (also nicht um nationales Verfassungsrecht) und zumindest insoweit dürfte sich kaum bestreiten lassen, dass die EU-Verträge im Vergleich die höhere Legitimität aufweisen.[67]

Hervorzuheben ist außerdem, dass gerade die vor allem von *Scharpf* besonders stark kritisierte Deregulierungspolitik heute zum großen Teil auf Sekundärrecht beruht, also parlamentarisch legitimiert ist.[68] Das lässt sich etwa für das Recht der Netzwirtschaften anschaulich nachweisen, wo jeweils vier „Pakete" zum Energierecht[69] und zum Eisenbahnrecht[70] sowie kaum weniger zahlreiche Verordnungen und Richtlinien zum Telekommunikationsrecht[71] und zum Postrecht[72] eine deutliche Sprache sprechen. Der EU-Gesetzgeber ist hier keineswegs außen vor geblieben, sondern hat im

Gegenteil eine aktive, legitimierende Rolle gespielt. Ähnliches lässt sich auch für das nationale Recht feststellen, sodass sich insgesamt das Bild ergibt, dass die Politik der Deregulierung – auch wenn sie in den Wirtschaftsfreiheiten der Verträge zweifellos ein rechtliches Fundament fand – immer auch von politischen bzw. parlamentarischen Mehrheiten getragen war.

Schließlich ist zu betonen, dass – worauf gerade *Scharpf* in seinen Arbeiten immer wieder hingewiesen hat[73] – demokratische Legitimität nicht nur „input-orientiert" begründet werden kann, sondern auch „output-orientiert", also nicht nur im Sinne einer Herrschaft *durch* das Volk, sondern auch nach dem Maßstab einer Herrschaft *für* das Volk. Danach sind politische Entscheidungen legitim, „wenn und weil sie auf wirksame Weise das allgemeine Wohl im jeweiligen Gemeinwesen fördern".[74] Wichtig ist, dass es sich vor allem um unterschiedliche analytische Perspektiven handelt und es nicht darum geht, beide Ansätze gegeneinander auszuspielen und z. B. Schwächen auf der Input-Seite mit Stärken auf der Output-Seite zu „rechtfertigen". Die Output-Perspektive kann aber hilfreich sein, um diejenigen Aspekte zu erkennen und zu beschreiben, die neben der Volks- bzw. Mehrheitsherrschaft zur demokratischen Legitimität beitragen.

Hierzu zählen z. B. Gewaltenteilung, Minderheitenschutz und die Gewährleistung individueller Freiheitsrechte.

Unter diesem Aspekt kommt aber auch der oben (III. 1.) beschriebenen Subjektivierung wichtiger Vorschriften des Primärrechts eine legitimierende Funktion zu, weil sie das europäische Recht näher an die Bürger herangeführt hat.[75] Die Subjektivierung hat die EU-Bürger zu aktiven Mitgliedern der europäischen Rechtsgemeinschaft gemacht und ihnen damit eine andere Rolle zugewiesen als die meisten Völkerrechtsordnungen, die nur Staaten als relevante Akteure anerkennen. Durch die Subjektivierung begegnen die Staaten den Bürgern in der EU „auf der Ebene der Gleichordnung".[76] Sie lässt sich als Ausdruck der von der Union angestrebten Bürgernähe deuten (vgl. Art. 1 Abs. 2, Art. 10 Abs. 3 EUV) und verwirklicht einen effektiven Rechtsschutz (Art. 47 GRC).[77] *Ernst-Joachim Mestmäcker* hat es als „Entlastung" bezeichnet, dass die Beteiligung der Bürger an der Anwendung des Gemeinschaftsrechts geeignet sei, Konflikte zwischen den Mitgliedstaaten „zu neutralisieren und zu entpolitisieren" und dies mit dem traditionellen Völkerrecht verglichen, wo Konflikte durch „gegenseitige Konzessionen und Repressionen" ausgeglichen würden.[78] Die „Mobilisierung des Bürgers für die Durchsetzung des Rechts"[79] kann außerdem zur praktischen Wirksamkeit des Unionsrechts beitragen, was der EuGH in seiner Rechtsprechung oft betont hat.[80] Die private Rechtsdurchsetzung soll die öffentliche dabei nicht ersetzen, sondern ergänzen, wie es z. B. im Wettbewerbsrecht geschieht. Ob man die Effektivierung des Unionsrechts durch Bürger- bzw. Unternehmensklagen positiv oder negativ bewertet, mag aber natürlich auch davon beeinflusst sein, ob man das subjektivierte Unionsrecht seinerseits für zweckmäßig und legitim hält.[81]

Auch vor diesem Hintergrund soll im Weiteren untersucht werden, welche materiellen Gründe den Verfassungsrang der Grundfreiheiten und des europäischen Wettbewerbsrechts stützen. Dabei wird es nur darum gehen, den Verfassungsrang als solchen zu erklären, nicht darum, ob es innerhalb der europäischen Verfassung eine bestimmte Hierarchie gibt[82] und welche Stellung die wirtschaftlichen Freiheiten darin ggf. einnehmen. Es wird sich zeigen, dass sich die Bedeutung der Grundfreiheiten und des Wettbewerbsrechts bei Weitem nicht darauf beschränkt,

eine bestimmte wirtschaftspolitische Grundrichtung vorzugeben. Vielmehr geht es auch und vielleicht sogar in erster Linie um den Schutz von Freiheitsrechten und ihre zuvor bereits

beschriebene Funktion, politische Gestaltungsmacht zu zügeln und sie einem Rechtfertigungs- und Begründungszwang zu unterwerfen. Daneben kommt den wirtschaftlichen Freiheiten erhebliche Bedeutung für die Gewährleistung des Binnenmarktes zu, der seinerseits weit mehr ist als nur ein wirtschaftspolitisches Projekt.

IV. Verfassungsrang der Grundfreiheiten

Der Vorrang der Grundfreiheiten vor dem einfachen Gesetz, d. h. ihre Funktion als die Gesetzgebung begrenzende Prinzipien, lässt sich vor allem unter zwei Aspekten rechtfertigen, nämlich ihrer Bedeutung für den Schutz individueller Freiheiten und für den Binnenmarkt.

1. Freiheitsschutz

Den Grundfreiheiten kommt in ihrer Ausprägung als subjektive öffentliche Rechte eine vergleichbare freiheitsschützende Funktion wie die Grundrechten zu.[83] Das zeigt sich anschaulich, wenn man sich klar macht, wie stark sich die Anwendungsbereiche der Grundfreiheiten und der wirtschaftlichen Grundrechte überschneiden.[84] Das gilt vor allem für die Berufsfreiheit nach Art. 15 GRC und die unternehmerische Freiheit nach Art. 16 GRC. Deren Überschneidung mit den Grundfreiheiten wird in Art. 15 Abs. 2 GRC anerkannt, der auf Art. 26, 45, 49 und 56 AEUV Bezug nimmt. In den amtlichen Erläuterungen zur Charta findet sich der Hinweis, in Art. 15 Abs. 2 GRC seien die Arbeitnehmerfreizügigkeit, die Niederlassungsfreiheit und die Dienstleistungsfreiheit „aufgenommen" worden.[85] Deutlich zeigt sich die Überschneidung z. B. auch im *PI*-Urteil des EuGH, in dem Verstöße sowohl gegen Art. 49 AEUV als auch gegen Art. 15 Abs. 2 und Art. 16 GRC festgestellt und bis hin zur Rechtfertigung der Eingriffe parallel begründet wurden.[86] Die Rechtsprechung ist zwar noch im Fluss,[87] aber es deutet sich eine Idealkonkurrenz an,[88] die veranschaulicht, dass Grundfreiheiten und

wirtschaftliche Grundrechte – soweit es um Rechte derselben Person geht[89] – dieselbe freiheitsschützende Stoßrichtung haben.

Vor allem *Matthias Ruffert* vertritt die These, die Grundfreiheiten seien als besondere Berufsfreiheit der europäischen Marktbürger zu verstehen und daher *lex specialis* gegenüber der allgemeinen Berufsfreiheit nach Art. 15 GRC.[90] Die Grundfreiheiten würden danach die berufliche bzw. unternehmerische Betätigung in grenzüberschreitenden Fällen schützen, Art. 15, 16 GRC hingegen auch für Fälle ohne Binnenmarktbezug gelten. Dieses Verständnis dürfte in der Tat die Rechtslage seit Inkrafttreten der Charta am besten wiedergeben. Die Spezialität der Grundfreiheiten – wohlgemerkt in ihrer Ausprägung als subjektive öffentliche Rechte, insbesondere als Abwehrrechte gegen freiheitsbeschränkende Maßnahmen – lässt sich vor allem auf Art. 15 Abs. 2 und Art. 52 Abs. 2 GRC stützen. Wortlaut und systematische Stellung des Art. 15 Abs. 2 GRC sprechen dagegen, dass hier ohne rechtliche Bedeutung an die Grundfreiheiten lediglich erinnert werden soll.[91] Näher liegt, in der Vorschrift die Bestätigung zu sehen, dass die Grundfreiheiten eben auch besondere Ausprägungen der Berufsfreiheit sind. Für die konkrete Anwendung dieser besonderen Berufsfreiheiten folgt aus Art. 52 Abs. 2 GRC, dass sie in Einklang mit den maßgeblichen Vorschriften des AEUV erfolgen soll, was wiederum bedeutet, dass „vorrangig" die Art. 26, 45, 49 und 56 AEUV zu prüfen sind.[92] Das darf man nicht dahin missverstehen, dass die Grundfreiheiten dadurch wertungsmäßig über die Grundrechte gehoben würden.[93] Vielmehr geht es allein um einen pragmatischen Umgang mit der Idealkonkurrenz, der eine ineffiziente Doppelprüfung vermeiden soll. Obwohl bzw. gerade weil eigentlich sowohl die Grundfreiheiten des AEUV als auch die Berufsfreiheit der Charta einschlägig sind, soll sich der Rechtsanwender auf die Prüfung der

Grundfreiheiten beschränken können, was insofern Sinn ergibt, als zu den Grundfreiheiten deutlich mehr Rechtsprechung existiert als zur Berufsfreiheit.

Aus dem Spezialitätsverhältnis ergeben sich wichtige Folgerungen: Hat man einmal erkannt, dass die Grundfreiheiten in ihrer subjektiv-rechtlichen Dimension besondere Ausprägungen der heute in Art. 15, 16 GRC verankerten wirtschaftlichen Grundrechte sind, liegt einerseits auf der Hand, dass ihnen genauso wie allen anderen Grundrechten Verfassungsrang zukommen sollte. Andererseits ließe sich in Zweifel ziehen, dass es der Grundfreiheiten heute überhaupt noch bedarf. Denn wenn die Grundfreiheiten nur Unterfälle der allgemeinen Berufsfreiheit sind,

könnte man stattdessen auch direkt auf diese zurückgreifen. *Ruffert* hält es in der Tat für vorstellbar, „die Grundfreiheiten durch eine allgemeine Berufsfreiheit zu substituieren", allerdings erst „[a]uf einem höheren Integrationsstand".[94] Diese Einschränkung ist wichtig, denn erklärte man die Grundfreiheiten vorschnell für verzichtbar, würde damit auch eine über mehrere Jahrzehnte hinweg mühsam entwickelte, ausdifferenzierte Dogmatik verschüttet, die im Bereich der europäischen Wirtschaftsgrundrechte bisher keine adäquate Entsprechung findet. Die Rechtsprechung sollte sich daher zunächst darauf konzentrieren, mithilfe der Brückennormen Art. 15 Abs. 2 und Art. 52 Abs. 2 GRC auf eine einheitliche Strukturierung der Grundfreiheiten, der Berufsfreiheit und der unternehmerischen Freiheit hinzuarbeiten. Das Ziel wäre erreicht, wenn der einzige dogmatische Unterschied irgendwann darin läge, dass die Grundfreiheiten anders als die Grundrechte einen Binnenmarktbezug voraussetzen. Zumindest unter dem Aspekt des Freiheitsschutzes könnten die Grundfreiheiten dann – aber eben auch erst dann – tatsächlich entbehrlich werden.

2. Binnenmarkt

Der Verfassungsrang der Grundfreiheiten lässt sich außerdem mit ihrer Bedeutung für die Herstellung und Erhaltung des europäischen Binnenmarktes rechtfertigen. Der Binnenmarkt wird in Art. 26 Abs. 2 AEUV über die Grundfreiheiten definiert, nämlich als „Raum ohne Binnengrenzen, in dem der freie Verkehr von Waren, Personen, Dienstleistungen und Kapital gemäß den Bestimmungen der Verträge gewährleistet ist". Vor allem in dieser Funktion wird den Grundfreiheiten allgemein eine große Bedeutung als „Stützpfeiler der unionsrechtlichen Wirtschaftsverfassung"[95] beigemessen.[96] Auch der EuGH hat verschiedentlich die dienende Funktion der Grundfreiheiten für die Gewährleistung des Binnenmarkts und der Wirtschafts- und Währungsunion betont.[97] Das nimmt den Grundfreiheiten nicht ihre individualschützende Funktion und bedeutet auch nicht, dass der Freiheitsschutz dem Binnenmarktziel untergeordnet wäre. Vielmehr stehen beide Funktionen der Grundfreiheiten gleichberechtigt nebeneinander und sind daher auch unabhängig voneinander geeignet, deren hohen Stellenwert und Rang in der Normenhierarchie zu begründen.

Der Binnenmarkt ist seinerseits kein Selbstzweck, sondern vor allem historisch stark mit der Schaffung einer europäischen Friedensordnung verbunden. *Robert Schuman* wollte mit seinem Vorschlag einer Europäischen Gemeinschaft für Kohle und Stahl sicherstellen, dass jeder Krieg zwischen Frankreich und Deutschland „nicht nur undenkbar, sondern materiell unmöglich" wird. So heißt es dann auch in der Präambel des EKGS-Vertrags, die Vertragspartner seien entschlossen, an die Stelle „der jahrhundertealten Rivalitäten einen Zusammenschluss ihrer wesentlichen Interessen zu setzen" und durch die Errichtung einer wirtschaftlichen Gemeinschaft den „ersten Grundstein" zu

legen. Besonders deutlich kommt diese Zielsetzung des Binnenmarkts auch in der Präambel zum EWG-Vertrag zum Ausdruck, in der die Vertragsparteien ihre Entschlossenheit bekräftigen, „*durch diesen Zusammenschluß ihrer Wirtschaftskräfte* Frieden und Freiheit zu wahren und zu festigen".[98] Man sollte dies nicht als ideologische Überhöhung des Binnenmarktprojekts abtun oder sich damit zufrieden geben, dass „auch wenn man die EU wegdenkt" heute kein Krieg mehr zwischen ihren Mitgliedstaaten droht.[99] Es lässt sich kaum bestreiten, dass gerade die wirtschaftliche Integration die Mitgliedstaaten in einer Weise zusammengeführt und voneinander abhängig gemacht hat, dass eine Desintegration kaum noch möglich scheint. Das wird durch den *Brexit* nicht widerlegt, sondern im Gegenteil durch die Schwierigkeiten seiner Umsetzung nochmals unterstrichen. Hier zeigt sich nämlich eindrucksvoll, dass die rechtliche Integration vergleichsweise leicht beendet werden kann (trotz aller Schwierigkeiten, die mit der nachträglichen Entflechtung verbunden sind), dass die wirtschaftliche Integration aber so starke Bindungskräfte entfaltet, dass ein Ausscheiden aus dem Binnenmarkt mit deutlich größeren Hürden verbunden ist als ein Austritt aus der politischen Union.

V. Verfassungsrang des Wettbewerbsrechts

Auch der Verfassungsrang des europäischen Wettbewerbsrechts bzw. seines Kernbestands, wie er in den Art. 101-109 AEUV zum Ausdruck kommt,[100] kann einerseits mit seiner individualschützenden Funktion gerechtfertigt werden, andererseits mit seiner Bedeutung für den Binnenmarkt.

1. Freiheitsschutz

In Bezug auf den Freiheitsschutz gilt es zu erkennen, dass die Freiheit der Bürger heute nicht mehr nur durch Staaten bedroht wird, sondern auch – und in manchen Bereichen vielleicht sogar vor allem – durch private Akteure,

insbesondere marktmächtige Unternehmen.[101] Der Schutz individueller Freiheiten gegen wirtschaftliche Macht ist eines der wichtigsten Ziele des Wettbewerbsrechts und stand historisch gesehen oft sogar stärker im Vordergrund als seine wohlfahrtsfördernden Effekte. Das gilt interessanterweise gerade auch für die USA, wo lange die machtbegrenzende Funktion des Sherman Act betont wurde, bevor dann ab den 1960er-Jahren die Maximierung der Konsumentenwohlfahrt in den Fokus rückte.[102] Vielfach wurde die Begrenzung privater Macht durch das Wettbewerbsrecht auch in einen Zusammenhang mit der Erhaltung freiheitlich-demokratischer Strukturen gestellt.[103] Ebenso wird dem europäischen Wettbewerbsrecht eine freiheitsfördernde Funktion bescheinigt, auch wenn seine ökonomischen Zwecke meist stärker betont werden. *Franz Jürgen Säcker*, einer der profiliertesten Streiter für ein freiheitlich ausgerichtetes Wettbewerbsrecht, sieht in der modernen Wettbewerbspolitik eine „Ergänzung der politischen Demokratie" und beklagt, dass die freiheitsschützende Funktion des Wettbewerbsrechts in der europäischen Diskussion nicht ausreichend gewürdigt werde.[104] Rechtliche und ökonomische Theorien hätten „die mit der demokratisch-rechtsstaatlichen Aufgabe der rechtlichen Bindung der Staatsmacht durch die Verfassung korrespondierende Funktion des Wettbewerbs, nämlich die rechtliche Bindung privater Macht, in der Vergangenheit systematisch vernachlässigt".[105]

Auch andere Autoren betonen die große Bedeutung des Wettbewerbsrechts für die Begrenzung privater Macht und den Schutz individueller Freiheiten.[106] Ebenso wird diese Zielrichtung von der Rechtsprechung bestätigt. So hat der BGH jüngst im *Facebook*-Beschluss den Missbrauch einer marktbeherrschenden Stellung u. a. damit begründet, dass einigen Nutzern „ein Leistungsinhalt aufgedrängt" werde, „den sie möglicherweise nicht wünschen" und kritisiert, den Nutzern werde

insoweit „keine Wahlmöglichkeit gelassen".[107] Der BGH betont, die Wahlfreiheit der Verbraucher werde typischerweise durch den wettbewerblichen Prozess und seine Funktion, Angebot und Nachfrage zu koordinieren, gewährleistet. Wenn diese Koordinierungsfunktion erheblich beeinträchtigt sei, könne das Missbrauchsverbot des § 19 Abs. 1 GWB einem marktbeherrschenden Unternehmen jedoch

„besondere Pflichten" auferlegen, „die den im wettbewerblichen Prozess erwartbaren Wahlmöglichkeiten der Abnehmer Rechnung tragen". Das gelte umso mehr, je stärker die Verhaltensweisen des marktbeherrschenden Unternehmens zugleich dessen Marktstellung absichern oder verstärken.[108] Deutlicher lässt sich die freiheitsschützende Funktion des Wettbewerbsrechts kaum zum Ausdruck bringen.

Mit seiner freiheitsschützenden Funktion lässt sich der Verfassungsrang der zentralen Vorschriften des europäischen Wettbewerbsrechts plausibel erklären.[109] Hat man einmal erkannt, dass der Einhegung privater Macht in der modernen Gesellschaft eine vergleichbar große Bedeutung zukommt wie ehemals der Zügelung des Staates,[110] liegt auf der Hand, dass sich das Volk kraft seiner verfassungsgebenden Gewalt sinnvollerweise nicht nur Schutz gegen staatliche Freiheitsbeschränkungen ausbedingen würde, sondern auch gegen private. Auch die private Macht ist nicht schon als solche problematisch, ihre Ausübung muss aber – wie die des Staates – gewissen Regeln unterliegen. Natürlich gehören diese Regeln nicht insgesamt in die Verfassung, aber so geht das EU-Recht auch nicht vor. Es regelt nur die wichtigsten Grundsätze im Primärrecht, nämlich das Kartellverbot (Art. 101 AEUV), das Verbot des Marktmachtmissbrauchs (Art. 102 AEUV) und die grundlegenden Anforderungen an wettbewerbsverzerrende staatliche Privilegien (Art. 106 AEUV) und Beihilfen (Art. 107 AEUV). Nur diese Eckpfeiler des europäischen Wettbewerbsrechts sind wegen ihres Verfassungsrangs der politischen Gestaltung durch den Gesetzgeber enthoben und können daher nur durch Vertragsänderungen angepasst werden.[111]

Zu betonen ist schließlich noch, dass es gerade auch auf die Bindung des EU-Gesetzgebers ankommt und nicht nur auf die in den Art. 101, 102 AEUV primär adressierten Unternehmen oder die durch Art. 106, 107 AEUV vor allem verpflichteten Mitgliedstaaten.[112] Die wesentlichen Grundprinzipien des Schutzes vor privater Machtausübung sind genauso wie die vergleichbaren Abwehrrechte gegen unverhältnismäßige staatliche Eingriffe von so elementarer Bedeutung, dass es richtig ist, ihren Kerngehalt auch der Verfügungsgewalt des Sekundärrechtsgebers zu entziehen. Dass dafür auch eine praktische Notwendigkeit besteht, zeigt z. B. die aktuelle Diskussion über die Privilegierung „europäischer Champions" in der Fusionskontrolle.[113] Das deutsche und das französische Wirtschaftsministerium haben vorgeschlagen, industriepolitische Erwägungen in der Fusionskontrolle künftig stärker zu berücksichtigen, damit europäische

Unternehmen im internationalen Wettbewerb auch durch die Gewährung von Größenvorteilen unterstützt werden können.[114] Zu befürchten steht, dass die Vorteile der europäischen Champions im internationalen Wettbewerb auch mit Nachteilen für die europäischen Verbraucher erkauft würden, weil die gewonnene Marktmacht nicht nur international, sondern auch auf den europäischen Märkten eingesetzt werden könnte. In dieser und in ähnlichen Situationen setzt der Verfassungsrang des europäischen Wettbewerbsrechts den EU-Gesetzgeber zumindest unter Rechtfertigungsdruck und kann so dazu beitragen, übermäßige Beschränkungen individueller Freiheiten zu verhindern.

2. Binnenmarkt

Was sodann die Bedeutung des Wettbewerbsrechts für den Binnenmarkt angeht,[115] wird der Zusammenhang zwischen diesem und dem Wettbewerbsschutz u. a. durch das Protokoll Nr. 27 zum AEUV anerkannt, in welchem es heißt, „dass der Binnenmarkt [...] ein System umfasst, das den Wettbewerb vor Verfälschungen schützt".[116] Die Bedeutung des Wettbewerbsrechts für den Binnenmarkt ist auch in der Literatur einhellig anerkannt, die mitunter sogar auf die „konstitutive Bedeutung des Wettbewerbsschutzes für die europäische Integration" verweist.[117] Der EuGH hebt hervor, es handele sich bei den Vorschriften des Wettbewerbsrechts um „grundlegende Bestimmungen", die für die Erfüllung der Aufgaben der Union und „insbesondere für das Funktionieren des Binnenmarktes unerlässlich" seien.[118] Bereits im *Grundig*-Urteil (1965) hat der Gerichtshof dies anschaulich damit begründet, dass der EWG-Vertrag, der nach seiner Präambel und seinem Inhalt darauf gerichtet sei, „die Schranken zwischen den Staaten zu beseitigen" nicht zulassen könne, „daß die Unternehmen neue Hindernisse dieser Art schaffen".[119] Das europäische Wettbewerbsrecht hat also genau wie die Grundfreiheiten eine dienende Funktion in Bezug auf die Gewährleistung des Binnenmarkts und der Wirtschafts- und Währungsunion.[120] Diese Funktionen treten neben die sonstigen Funktionen des Wettbewerbsrechts und unterscheiden das europäische Wettbewerbsrecht von nationalen Wettbewerbsrechten, zumal gerade die Binnenmarktfunktion auch in der praktischen Anwendung des europäischen

Wettbewerbsrechts zum Ausdruck kommt.[121] Die Tatsache, dass das Wettbewerbsrecht in den meisten nationalstaatlichen Verfassungen keine Erwähnung findet,[122] ist daher kein gutes Argument gegen dessen Anerkennung als materielles Verfassungsrecht der Union, denn die EU ist eben kein Nationalstaat, sondern eine supranationale Gemeinschaft ganz eigener Art, und der europäische Binnenmarkt ist eine ihrer wichtigsten Stützen.

VI. Grenzen und Gefahren

Auch wenn die Grundfreiheiten und das Wettbewerbsrecht ihren normenhierarchischen Vorrang also verdienen, bedeutet dies allerdings nicht, dass man der demokratietheoretischen Kritik keine weitere Beachtung schenken müsste. Sie erfüllt eine wichtige Funktion, indem sie das Bewusstsein dafür schärft, dass der Vorrang mit „demokratischen Kosten" einhergeht,[123] weil er die Gestaltungsspielräume des Gesetzgebers beschränkt. Die Kritik hat eindringlich in Erinnerung gerufen, dass der Vorrang keine Selbstverständlichkeit sein darf, sondern erklärt und begründet werden muss. Daneben ergeben sich weitere, konkrete Folgerungen: Vor allem ist auch innerhalb der jeweiligen Binnensysteme darauf zu achten, dass nur die wesentlichen Grundprinzipien konstitutionalisiert werden. Außerdem ist zu überlegen, ob sich die demokratischen Kosten senken lassen, z. B. durch Verschiebungen im institutionellen Gefüge und eine Stärkung der Input-Legitimation.[124] Beide Aspekte sollen abschließend am Beispiel des Wettbewerbsrechts veranschaulicht werden.

Bedenklich erscheint zunächst die Tendenz des EuGH zu einer extensiven Auslegung bzw. Fortbildung der Art. 101, 102 AEUV. Das gilt weniger für deren materiellen Gehalt, da es sich um Generalklauseln mit Regelbeispielen handelt, die Vertragsstaaten insoweit also bewusst weite Auslegungsspielräume geschaffen haben. Problematisch ist aber, in welchem Umfang der EuGH in den letzten Jahren die *Rechtsfolgen* von Verstößen gegen die Wettbewerbsvorschriften fortgebildet hat, denn die Art. 101, 102 AEUV bieten dafür kaum Anhaltspunkte und Art. 103 AEUV betont die Gestaltungsmöglichkeiten des Gesetzgebers. Noch rechtfertigen lässt sich mit der

individualschützenden Funktion des Wettbewerbsrechts, dass der EuGH im *Courage*-Urteil (2001) unter weitgehender Missachtung des Wortlauts festgestellt hat, aus Art. 101 AEUV (damals Art. 85 EGV) ergebe sich im Lichte des Effektivitätsgebots, dass „jedermann" Ersatz des Schadens verlangen kann, der ihm durch wettbewerbswidriges Verhalten zugefügt wurde.[125]

Die Anerkennung dieses Anspruchs hält sich noch im Rahmen der oben (III. 1.) als Ermächtigung der Bürger beschriebenen Subjektivierung und lässt sich mit deren Bedeutung für einen effektiven Freiheitsschutz erklären. Der Gerichtshof ist aber weitergegangen und hat in einer Reihe von Urteilen detaillierte Anforderungen an den Schadensersatzanspruch und seine Durchsetzung formuliert.[126] Alle Entscheidungen betreffen zwar „nur" die Pflichten der Mitgliedstaaten bei der Effektivierung von Art. 101, 102 AEUV durch nationale Vorschriften, weil der EuGH aber jeweils mit dem Primärrecht argumentiert hat, wird überwiegend davon ausgegangen, dass der Sekundärrechtsgeber denselben Bindungen unterliegt.[127]

Darin läge nun aber wirklich eine erhebliche materielle Überkonstitutionalisierung, denn der EuGH hätte im Wege der Rechtsfortbildung einen großen Teil des Kartellschadensersatzrechts dem Gestaltungsspielraum des EU-Gesetzgebers entzogen, ohne dass sich dies mit den oben diskutierten Zwecken des Wettbewerbsrechts rechtfertigen ließe. Wer wollte ernsthaft behaupten, dass der Zugang zu Kronzeugendokumenten oder die Einzelheiten der Verjährung zum materiellen Verfassungsrecht der Union zählen sollten, weil andernfalls Freiheitschutz oder Binnenmarkt auf dem Spiel stünden? Der EuGH zeigt für diese Problematik bisher keine Sensibilität, was vor allem deshalb erstaunt, weil der Sekundärrechtsgeber bereits tätig geworden ist. Spätestens seit im November 2014 die Kartellschadensersatzrichtlinie[128] verabschiedet wurde, musste dem Gerichtshof klar sein, dass er mit jeder weiteren Aussage zum Primärrecht dieses zementiert und damit auch die Spielräume des Gesetzgebers immer weiter einschränkt.[129] Bisher gibt es keine Anhaltspunkte dafür, dass es dem EuGH gerade darauf angekommen wäre und dagegen spricht auch die Zurückhaltung, die er in anderen Bereichen, z. B. bei den Grundfreiheiten, gegenüber Eingriffen in die Sekundärrechtssetzung zeigt.[130] Es bleibt zu hoffen, dass der Gerichtshof die Spielräume für den EU-Gesetzgeber wieder öffnet, indem er die Konstitutionalisierung des Kartellschadensersatzrechts relativiert. *Wulf-Henning Roth* hat dafür vorgeschlagen, die genannten Rechtsfortbildungen nur als „gesetzesvertretendes Sekundärrecht" einzustufen, weil mit ihnen eine Gesetzgebung nach Art. 103 AEUV ersetzt worden sei.[131] Dafür spricht, dass die aufgezählten Entscheidungen des EuGH alle die Rechtslage

vor Inkrafttreten der Schadensersatzrichtlinie betreffen, also einen Zeitraum, in dem es an einschlägigem Sekundärrecht noch fehlte. *Jens-Uwe Franck* meint sogar, der EuGH habe zumindest mit einigen der genannten Rechtsfortbildungen das institutionelle Gleichgewicht verletzt und der Unionsgesetzgeber sei daher an diese Vorgaben nicht gebunden.[132] Einen weiteren Ansatzpunkt könnte die Tatsache bieten, dass der EuGH in den genannten Entscheidungen immer nur Pflichten der Mitgliedstaaten formuliert und sich dafür oft auf den in Art. 4 Abs. 3 EUV verankerten und an die Mitgliedstaaten adressierten Effektivitätsgrundsatz gestützt hat.[133] Er könnte also argumentieren, der Unionsgesetzgeber sei durch seine Rechtsprechung nicht gleichermaßen gebunden. Dafür lässt sich auch anführen, dass Art. 103 Abs. 1 AEUV vom Sekundärrechtsgeber nur „zweckdienliche" Verordnungen und Richtlinien erwartet, also dessen Gestaltungsspielraum betont.

Ein zweites legitimatorisches Problem des europäischen Wettbewerbsrechts neben der drohenden Überkonstitutionalisierung des Schadensersatzrechts ist die schwache Input-Legitimation der Sekundärrechtssetzung.[134] Gemäß Art. 103 Abs. 1 AEUV können Verordnungen und Richtlinien zur Umsetzung der Art. 101, 102 AEUV vom Rat auf Vorschlag der Kommission beschlossen werden. Dasselbe gilt nach Art. 109 AEUV für Sekundärrechtsakte zur Umsetzung des Beihilfenrechts. Das Parlament ist in beiden Fällen lediglich anzuhören, was in der Literatur zu Recht kritisiert wird.[135] Die schwache Beteiligung des Parlaments ist der Bedeutung des Wettbewerbsrechts nicht angemessen. Es ist daher zu begrüßen, dass die Kommission ihre Vorschläge für die Schadensersatzrichtlinie[136] und die NCA+-Richtlinie[137] auch auf Art. 114 AEUV gestützt und damit das ordentliche Gesetzgebungsverfahren ausgelöst hat. Genauso sollte sie bei allen künftigen Vorschlägen auf Grundlage von Art. 103, 109 AEUV vorgehen. Mit der nächsten Vertragsrevision sollte hier das ordentliche Gesetzgebungsverfahren vorgesehen werden. Auch die Ermächtigungen in Art. 106 Abs. 3 und Art. 108 Abs. 4 AEUV wären dann zu überprüfen.

VII. Fazit

Die wichtigsten Ergebnisse lassen sich wie folgt zusammenfassen:

1. Die demokratietheoretische Kritik von *Grimm* und *Scharpf* hat mit der Überkonstitutionalisierung ein zentrales Problem der europäischen Rechtsordnung offengelegt. Beide betonen zu Recht, dass es die Legitimität und Akzeptanz der Union gefährdet, wenn das Primärrecht die Gestaltungsspielräume des EU-Gesetzgebers zu stark beschränkt. Es ist deshalb mit Blick auf künftige Vertragsrevisionen sorgfältig zur prüfen, welche Vorschriften inhaltlich so bedeutsam sind, dass sie in die Verfassung der Union gehören, und welche stattdessen zum Sekundärrecht herabgestuft werden sollten.

2. Die These, die Hauptverantwortung für die Konstitutionalisierung trage der EuGH, erweist sich hingegen als übertrieben. Sie würdigt nicht hinreichend, dass die Gründungsstaaten die damalige Europäische Wirtschaftsgemeinschaft als völlig neuartige Rechtsordnung konzipiert hatten, die sich weder mit Maßstäben des Völkerrechts noch mit denen des Verfassungsrechts richtig erfassen lässt. Die unmittelbare Anwendbarkeit zentraler Garantien des Gemeinschaftsrechts und das Vorrangprinzip waren im EWG-Vertrag angelegt. Sie sind seit *Van Gend & Loos* und *Costa/Enel* durch mehrere Vertragsrevisionen bestätigt worden und verfügen heute über ein großes Maß an Legitimität.

3. Die Subjektivierung wichtiger Vorschriften des Primärrechts hat die Bürger zu aktiven Mitgliedern der europäischen Rechtsgemeinschaft gemacht und dadurch die Legitimität der Union gestärkt. Die Bürger wurden in die Lage versetzt, für hoheitliche Beschränkungen ihrer wirtschaftlichen Freiheiten eine Rechtfertigung zu verlangen. Wirtschafts- und sozialpolitische Maßnahmen bleiben möglich, müssen aber legitimen Zwecken dienen und verhältnismäßig sein.

4. Die Grundfreiheiten erfüllen in ihrer subjektiv-rechtlichen Ausprägung eine ähnliche freiheitsschützende Funktion wie die wirtschaftlichen Grundrechte. Sie lassen sich als spezielle Fälle der Berufsfreiheit und der unternehmerischen Freiheit nach Art. 15, 16 GRC verstehen, deren historische Bedeutung im besonderen Schutz grenzüberschreitender wirtschaftlicher Tätigkeiten liegt. Daneben gewährleisten die Grundfreiheiten den Binnenmarkt als zentrale Stütze der europäischen Integration. Beide Funktionen rechtfertigen ihren Verfassungsrang.

5. Auch das europäische Wettbewerbsrecht dient dem Schutz individueller Freiheiten, denn es begrenzt die Ausübung privater Macht. Der Freiheitsschutz gegenüber privaten Akteuren ist in der

modernen Gesellschaft ähnlich wichtig wie der Freiheitsschutz gegenüber dem Staat. Das rechtfertigt es, auch die Grundprinzipien des Wettbewerbsrechts in die Verfassung aufzunehmen. Außerdem erfüllt auch das Wettbewerbsrecht eine wichtige Funktion für den Binnenmarkt.

6. Die demokratietheoretische Kritik zeigt aber, dass eine Überkonstitutionalisierung vermieden werden muss. Der EuGH sollte deshalb bei der Fortbildung des Primärrechts behutsam vorgehen und die Spielräume des EU-Gesetzgebers nicht übermäßig beschränken. In der Vergangenheit ist er teilweise sehr weit gegangen, z. B. bei der Entwicklung des Kartellschadensersatzrechts. Um die demokratische Legitimität des europäischen Wettbewerbsrechts weiter zu erhöhen, sollte außerdem das Parlament stärker an der Sekundärrechtssetzung beteiligt werden.

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1 Vgl. *M. Nettesheim*, in: Oppermann/Classen/Nettesheim, Europarecht, 8. Aufl. 2018, § 10, Rn. 39; ausf. *M. Nettesheim*, Normenhierarchien im EU-Recht, EuR 2006, S. 737 ff.

2 Grundlegend vor allem *F. W. Scharpf*, Regieren in Europa, 1999; Auszüge daraus auch in: *F. W. Scharpf*, Negative und positive Integration, in: Höpner/Schäfer (Hrsg.), Die Politische Ökonomie der europäischen Integration, 2008, S. 49 ff.; *D. Grimm*, Europa ja – aber welches?, 2016; *D. Grimm*, Auf der Suche nach Akzeptanz, Leviathan 43 (2015), S. 325 ff.; *D. Grimm*, Die Zukunft der Verfassung II, 2012, S. 241 ff., 262 ff. Siehe außerdem *F. W. Scharpf*, Towards a More Democratic Europe: De-Constutitionalization and Majority Rule, ZSE 15 (2017), S. 84 ff.; *F. W. Scharpf*, Individualrechte gegen nationale Solidarität, in: Höpner/Schäfer a. a. O., S. 89 ff.; *D. Grimm*, The Democratic Costs of Constitutionalisation: The European Case, European Law Journal 21 (2015), S. 460 ff.; *D. Grimm*, Europe's Legitimacy Problem and the Courts, in: Chalmers/Jachtenfuchs/Joerges (Hrsg.), The End of the Eurocrats' Dream, 2016, S. 241 ff.

3 *A. Peters*, Fragmentation and Constitutionalization, in: Orford/Hoffmann (Hrsg.), The Oxford Handbook of the Theory of International Law, 2016, S. 1011, 1015 ff.; *C. Möllers*, Verfassungsgebende Gewalt – Verfassung – Konstitutionalisierung, in: Bogdandy/Bast (Hrsg.), Europäisches Verfassungsrecht, 2. Aufl. 2009, S. 227, 265 f.; *J. H. H. Weiler*, The Constitution of Europe, 1999, S. 221 ff.; *J. H. H. Weiler*, The Transformation of Europe, Yale Law Journal 100 (1991), S. 2403, 2407.

4 *J. Saurer*, in: Pechstein/Nowak/Häde (Hrsg.), Frankfurter Kommentar zu EUV, GRC und AEUV, 2017, Art. 289 AEUV, Rn. 18 m. w. N. Grundlegend *J. H. H. Weiler*, Transformation (Fn. 3) S. 2413 ff. Vgl. auch EuGH, Gutachten 1/91 (EWR I), ECLI:EU:C:1991:490, Slg. 1991, I-6079, Rn. 21 über die Schaffung des Europäischen Wirtschaftsraums.

5 EuGH, Rs. 294/83 (Les Verts/Parlament), ECLI:EU:C:1986:166, Slg. 1986, 1339, Rn. 23.

6 *J. Saurer*, in: Pechstein/Nowak/Häde (Hrsg.), Frankfurter Kommentar zu EUV, GRC und AEUV, 2017, Art. 289 AEUV, Rn. 19. Vgl. auch *C. Möllers* (Fn. 3), S. 260 ff.

7 *P. Unruh*, Der Verfassungsbegriff des Grundgesetzes, 2002, S. 399 ff.; *H. A. Wolff*, Ungeschriebenes Verfassungsrecht unter dem Grundgesetz, 2000, S. 279 ff., jeweils m. w. N.

8 *C. Möllers* (Fn. 3), S. 234 ff.; *D. Grimm*, Europa (Fn. 2), S. 95 ff.

9 Vgl. West Virginia State Board of Education v Barnette, 319 U.S. (1943), S. 624, 638.

10 Vgl. *E.-J. Mestmäcker*, Zur Wirtschaftsverfassung in der Europäischen Union, FS Willgerodt, 1994, S. 275 ff.; *E.-J. Mestmäcker*, On the Legitimacy of European Law, RabelsZ 58 (1994), S. 615, 629 ff.

11 Siehe vor allem die in Fn. 2 genannten Beiträge von *D. Grimm* und *F. W. Scharpf*. Ähnlich *C. Möllers* (Fn. 3), S. 264: „Die Verträge sind unterformalisiert und übermaterialisiert."

12 *D. Grimm*, Europa (Fn. 2), S. 145.

13 Ebd., S. 40, 146.

14 Ebd., S. 41, 88, 127, 214.

15 Ebd., S. 45.

16 Ebd., S. 45 f.

17 Ebd., S. 13 f., 35, 84, 87, 146, 189.

18 *F. W. Scharpf*, Integration (Fn. 2), S. 49.

19 Ebd., S. 49, 54 ff.

20 Ebd., S. 54.

21 Ebd., S. 60.

22 Ebd., S. 61 ff.

23 Ebd., S. 63.

24 Ebd.

25 EuGH, Rs. 26/62 (Van Gent & Loos), ECLI:EU:C:1963:1, Slg. 1962, 3.

26 EuGH, Rs. 6/64 (Costa/E.N.E.L.), ECLI:EU:C:1964:66, Slg. 1964, 1141.

27 *D. Grimm*, Europa (Fn. 2), S. 36, 125.

28 *F. W. Scharpf*, De-Constitutionalization (Fn. 2), S. 86; *F. W. Scharpf*, After the Crash: A Perspective on Multilevel European Democracy, European Law Journal 21 (2015), S. 384, 386.

29 *F. W. Scharpf*, De-Constitutionalization (Fn. 2), S. 85; *D. Grimm*, Europa (Fn. 2), S. 41, 86 f., 214 f.; *D. Grimm*, Akzeptanz (Fn. 2), S. 332 f.

30 *D. Grimm*, Akzeptanz (Fn. 2), S. 329 meint, die Legitimitätskritik ließe sich von der Frage trennen, ob die Urteile „richtig oder falsch waren". Wenn die Urteile methodisch gesehen richtig waren, bedeutet dies aber auch, dass sie in den Verträgen eine hinreichende Stütze finden und dass es deshalb auch auf *deren* Legitimität ankommt. Dazu noch unten bei Fn. 65-66.

31 EuGH, Rs. 26/62 (Van Gent & Loos), ECLI:EU:C:1963:1, Slg. 1962, 3, 25.

32 *M. Broberg/N. Fenger*, Das Vorabentscheidungsverfahren vor dem Gerichtshof der Europäischen Union, 2014, S. 19; vgl. auch *C. Tomuschat*, Die gerichtliche Vorabentscheidung nach den Verträgen über die europäischen Gemeinschaften, 1964, S. 25 ff.

33 EuGH, Rs. 13/61 (De Geus en Uitdenbogerd/Bosch u. a.), ECLI:EU:C:1962:11, Slg. 1962, 89, 111. Vgl. auch die damals öffentlich noch nicht bekannte Aufstellung der auslegenden Erklärungen v. 6.5.1957, abgedruckt bei Schulze/Hoeren (Hrsg.), Dokumente zum Europäischen Recht, Bd. 3, 2000, S. 308: „Der Ausschuss der Delegationsleiter erkannte an, dass die Bestimmungen des Artikels 88 bedeuten sollen, dass die Vorschriften des Artikels 85 sofort anwendbar sind, d. h. mit Inkrafttreten des Vertrags."

34 Besonders innovativ war die unmittelbare Geltung von Verordnungen gemäß Art. 189 Abs. 2 EWGV (heute Art. 288 Abs. 2 AEUV), s. dazu anschaulich *M. Rossi*, Europäische Integration durch Gemeinschaftsrecht und Gerichtsbarkeit, in: Müller-Graff (Hrsg.), Der Zusammenhalt Europas – In Vielfalt geeint, 2009, S. 107, 113 f.

35 Zu Folgen für die demokratische Legitimität noch unten (III. 3.).

36 Vgl. *M. Kotzur*, Die anthropozentrische Wende – menschenrechtlicher Individualschutz im Völkerrecht, FS Stern, 2012, S. 811, 815 ff., 821 f.; *M. Kau*, Der Staat und der Einzelne als Völkerrechtssubjekte, in: Graf Vitzthum/Proelß (Hrsg.), Völkerrecht, 8. Aufl. 2019, S. 159 ff., Rn. 14 ff.

38 EuGH, Rs. 26/62 (Van Gent & Loos), ECLI:EU:C:1963:1, Slg. 1962, 3, 25.

38 So auch *P. Behrens*, in: Ellger/Schweitzer (Hrsg.), Die Verfassung der europäischen Wirtschaft, 2018, S. 11, 15; *P. Behrens*, Wider die De-Legitimierung der Direktwirkung von Binnenmarkt- und Wettbewerbsrecht, EuZW 2017, S. 81, 82. Vgl. auch *D. Grimm*, Akzeptanz (Fn. 2), S. 328 f.

39 Hier liegt also die wahre schöpferische Leistung des EuGH, vgl. auch *A. Hatje*, Unmittelbare, individuelle Rechte begründende Wirkung des Art. 12; Auslegung des Art. 177; neue Rechtsordnung des Völkerrechts, NJW 2017, S. 3056 f.

40 *M. A. Dauses*, Das Vorabentscheidungsverfahren nach Artikel 177 EWG-Vertrag, 1985, S. 30. Einzige Ausnahme war die Individualnichtigkeitsklage gemäß Art. 173 Abs. 2 EWGV (heute Art. 263 Abs. 4 AEUV).

41 Vorwort, in: *M. A. Dauses* (Fn. 40), S. VI (Hervorhebung C.K.).

42 Zu Folgen der Subjektivierung für die demokratische Legitimität noch unten (III. 3.).

43 EuGH, Rs. 6/64 (Costa/E.N.E.L.), ECLI:EU:C:1964:66, Slg. 1964, 1141, 1269 f.

44 Diesen Punkt betonte auch schon *H. P. Ipsen*, Das Verhältnis des Rechts der europäischen Gemeinschaften zum nationalen Recht, in: Aktuelle Fragen des europäischen Gemeinschaftsrechts, 1965, S. 1, 26 f.

46 EuGH, Rs. 6/64 (Costa/E.N.E.L.), ECLI:EU:C:1964:66, Slg. 1964, 1141, 1270.

46 Vgl. EuGH, Rs. C-101/91 (Kommission/Italien), ECLI:EU:C:1993:16, Slg. 1993, I-191, Rn. 24 m. w. N.

47 Erklärung Nr. 17, ABl. EU 2012 C 326/337, 346.

48 BGBl. 2008 II S. 1038, 1154 f.

49 EuGH, Rs. C-409/06 (Winner Wetten), ECLI:EU:C:2010:503, Slg. 2010, I-8015, Rn. 53; Rs. C-106/77 (Simmenthal), ECLI:EU:C:1978:49, Slg. 1978, 629, Rn. 17 f.; Rs. C-11/70 (Internationale Handelsgesellschaft), ECLI:EU:C:1970:114, Slg. 1970, 1125, Rn. 3 f.

50 *M. Ruffert*, in: Calliess/Ruffert (Hrsg.), EUV/AEUV, 5. Aufl. 2016, Art. 288 AEUV, Rn. 8 („unbestritten"); *M. Nettesheim*, in: Oppermann/Classen/Nettesheim (Fn. 1), § 9, Rn. 66 („eindeutig"); näher *W. Schroeder*, Das Gemeinschaftsrechtssystem, 2002, S. 364.

51 Vgl. auch Art. 51 Abs. 1 GRC.

52 *W. Schroeder*, in: Streinz (Hrsg.), EUV/AEUV, 3. Aufl. 2018, Art. 288 AEUV, Rn. 20.

53 Vgl. nur *R. Poscher*, Grundrechte als Abwehrrechte, 2003; *M. Jestaedt*, Grundrechtsentfaltung im Gesetz, 1999; *A. v. Arnauld*, Die Freiheitsrechte und ihre Schranken, 1999.

54 Wohl auch aus wirtschaftspolitischer Sicht kritisch *F. W. Scharpf*, Regieren (Fn. 2), S. 63: „Radikalismus der Markt-Liberalisierung"; deutlich positiver *F. J. Säcker*, Die Konvergenz von unionsrechtlicher und mitgliedstaatlicher Verfassung der Wirtschaft gemäß der Zielvorgabe in Art. 3 Abs. 3 EUV, in: Säcker (Hrsg.), Freiheit durch Recht, 2016, S. 301, 318: „Öffnung monopolartig verkrusteter Ausnahmebereiche".

55 Dazu ausführlich *D. Grimm*, Europa (Fn. 2), S. 95 ff.; *D. Grimm*, Democratic Costs (Fn. 2), S. 460 ff.

56 So aber *D. Grimm*, Europa (Fn. 2), S. 45, 108.

57 Grundlegend *R. Alexy*, Theorie der Grundrechte, 1985, S. 75 ff. Zur Kontroverse um die Prinzipientheorie instruktiv *R. Poscher*, Theorie eines Phantoms – Die erfolglose Suche der Prinzipientheorie nach ihrem Gegenstand, RW 2010, S. 349 ff.; kritisch auch schon *R. Poscher*, Grundrechte (Fn. 53), S. 75 ff.

58 In Anlehnung an *M. Jestaedt*, Grundrechtsentfaltung (Fn. 53).

59 *D. Ehlers*, in: Ehlers (Hrsg.), Europäische Grundrechte und Grundfreiheiten, 4. Aufl. 2014, § 7, Rn. 67 ff.; *H. D. Jarass*, Elemente einer Dogmatik der Grundfreiheiten, EuR 1995, S. 202 ff.; *H. D. Jarass*, Elemente einer Dogmatik der Grundfreiheiten II, EuR 2000, S. 705 ff.

60 Vgl. etwa *A. Hatje*, Wirtschaftsverfassung im Binnenmarkt, in: Bogdandy/Bast (Fn. 3), S. 801, 809: „elastisches Verhältnis von Wettbewerb und Intervention", ausf. ebd. S. 840 f. Siehe auch *F.*

J. Säcker, Die soziale Marktwirtschaft – ein wirtschaftsverfassungsrechtliches Leitbild im Wandel der Zeiten, in: Säcker, Freiheit (Fn. 54), S. 815, 830 f.; *F. J. Säcker*, Konvergenz (Fn. 54), S. 318 f.

61 Vgl. EuGH, Rs. 279/82 (Jerzak), ECLI:EU:C:1983:228, Slg. 1983, 2603, Rn. 10; Rs. 26/78 (Viola), ECLI:EU:C:1978:172, Slg. 1978, 1771, Rn. 9.

62 Instruktiv *R. Poscher*, Grundrechte (Fn. 57), S. 415: „Indem die Grundrechte das Verhalten der staatlichen Gewalt regeln, regeln sie weitgehend regelndes Verhalten.", ausführlich ebd. S. 100 ff., 153 ff.

63 So z. B. EuGH, Rs. 120/78 (Cassis de Dijon), ECLI:EU:C:1979:42, Slg. 1979, 649, Rn. 10 f., wo sich der EuGH von der deutschen Bundesregierung nicht überzeugen ließ, dass der geringe Alkoholgehalt französischer Branntweine die Gesundheit der deutschen Verbraucher gefährde.

64 EuGH, Rs. 11/70 (Internationale Handelsgesellschaft), ECLI:EU:C:1970:114, Slg. 1970, 1125, Rn. 3 f.

65 Vgl. *A. Peters*, Europäische Öffentlichkeit im europäischen Verfassungsprozess, EuR 2004, S. 375, 388 f.; Wissenschaftliche Dienste des Deutschen Bundestages, Änderungsverfahren nach Art. 48 Abs. 3 EUV – Ratifizierungsverfahren in den EU-Mitgliedstaaten, 2016, WD 3 – 3000 – 290/15.

66 So auch *I. Brinker*, Zweifel an der Rechtsgemeinschaft in Europa?, NZKart 2017, S. 609, 610.

67 Für Deutschland ergibt sich dies aus Art. 23 Abs. 1 S. 3, Art. 79 Abs. 2 GG.

68 So auch schon *F. Mayer*, Die Europäische Union als Rechtsgemeinschaft, NJW 2017, S. 3631, 3635; *P. Dann*, Parlamentarische Legitimation der Binnenmarkt- und Wettbewerbspolitik der EU, in: Bast/Rödl (Hrsg.), Wohlfahrtsstaatlichkeit und soziale Demokratie in der Europäischen Union, 2013, S. 93 ff.

69 Ausführlich *M. Schmidt-Preuß*, in: Säcker (Hrsg.), Berliner Kommentar zum Energierecht, Bd. 1/1, 4. Aufl. 2019, Einl. B, Rn. 3 ff.; *J.-P. Schneider*, in: Schneider/Theobald, Recht der Energiewirtschaft, 4. Aufl. 2013, § 2, Rn. 33 ff.

70 *J. Kühling/K. Weinbeck*, in: Kühling/Otte (Hrsg.), AEG/ERegG, 2020, Einf. Rn. 9 ff.; *G. Hermes*, in: Beck'scher AEG-Kommentar, 2. Aufl. 2014, Einf. B.

71 *R. Klotz*, in: Säcker (Hrsg.), TKG, 3. Aufl. 2013, Einl. II, Rn. 45 ff.; *W.-D. Grussmann/R. Honekamp*, in: Beck'scher TKG-Kommentar, 4. Aufl. 2013, Einl. B, Rn. 95 ff.

72 Z.B. VO (EU) 2018/644 über grenzüberschreitende Paketzustelldienste, ABl. EU 2018 L 112/19; RL (EG) 2008/6 zur Vollendung des Binnenmarktes der Postdienste, ABl. EU 2008 L 52/3.

73 *F. W. Scharpf*, Regieren (Fn. 2), S. 16 ff. Grundlegend *F. W. Scharpf*, Demokratietheorie zwischen Utopie und Anpassung, 1970, S. 21 ff.

74 *F. W. Scharpf*, Regieren (Fn. 2), S. 16.

75 *I. Brinker* (Fn. 66), S. 610; *E.-J. Mestmäcker*, Systembezüge subjektiver Rechte, FS K. Schmidt, 2009, S. 1197, 1214 ff.; *D. Poelzig*, Normdurchsetzung durch Privatrecht, 2012, S. 272 ff., 326 ff. Zur Bedeutung subjektiver Rechte im Unionsrecht ausf. auch *M. Nettesheim*, Subjektive Rechte im Unionsrecht, AöR 132 (2007), S. 333 ff.; *J. Masing*, Die Mobilisierung des Bürgers für die Durchsetzung des Rechts, 1997.

76 So *E.-J. Mestmäcker*, Systembezüge (Fn. 75), S. 1217.

77 Zu letzterem *F. J. Säcker*, Konvergenz (Fn. 54), S. 321 m. w. N.

78 *E.-J. Mestmäcker*, Systembezüge (Fn. 75), S. 1214 f.

79 So der Titel der Arbeit von *J. Masing* (Fn. 75).

80 Ausführlich dazu z. B. *C. Heinze*, Schadensersatz im Unionsprivatrecht, 2017, S. 16 ff.; *M. Ebers*, Rechte, Rechtsbehelfe und Sanktionen im Unionsprivatrecht, 2016, S. 249 ff.; *D. Poelzig* (Fn. 75), S. 257 ff.

81 Für eine eher ökonomische Rechtfertigung siehe z. B. *J. Haucap/J. Kühling*, Das Wettbewerbsprinzip als europäischer Sündenbock, FAZ. v. 7.10.2016, S. 18.

82 Dazu ausführlich *M. Nettesheim*, Normenhierarchien (Fn. 1), S. 742 ff.; *W. Schroeder* (Fn. 50), S. 363 ff.; *A. Peters*, Elemente einer Theorie der Verfassung Europas, 2001, S. 341 ff., 442 ff. Grundlegend *P. Pescatore*, Die Gemeinschaftsverträge als Verfassungsrecht, FS Kutscher, 1981, S. 319, 326 ff.

83 Die Grundfreiheiten werden in der Literatur oft mit den Grundrechten verglichen oder als solche angesehen, siehe *R. Streinz*, in: Merten/Papier, Handbuch der Grundrechte in Deutschland und Europa, Bd. VI/1, 2010, § 151, Rn. 11 m. w. N.; *E.-J. Mestmäcker*, Systembezüge (Fn. 75), S. 1216.

84 Instruktiv *E.-J. Mestmäcker*, Systembezüge (Fn. 75), S. 1216: „Die Grundfreiheiten europäisieren die [...] in den meisten Mitgliedstaaten grundrechtlich gewährleisteten wirtschaftlichen Freiheitsrechte."

85 ABl. EU 2007 C 303/17, 23.

86 EuGH, Rs. C-230/18 (PI/Landespolizeidirektion Tirol), ECLI:EU:C:2019:383, Rn. 65. Ähnlich schon EuGH, Rs. C-390/12 (Pfleger), ECLI:EU:C:2014:281, Rn. 57-60 (zur Dienstleitungsfreiheit).

87 Nachweise bei *J. Kühling*, in: Pechstein/Nowak/Häde (Hrsg.), Frankfurter Kommentar zu EUV, GRC und AEUV, 2017, Art. 15 GRC, Rn. 27.

88 So ausdrücklich *V. Skouris*, Die Rolle der Grundfreiheiten in der Europäischen Wirtschaftsverfassung und ihr Verhältnis zur Grundrechte-Charta, in: Ellger/Schweitzer (Fn. 38), S. 53, 62; kritisch *T. Kingreen*, in: Calliess/Ruffert (Fn. 50), Art. 34-36 AEUV, Rn. 27.

89 Das schließt nicht aus, dass Grundrechte und Grundfreiheiten verschiedener Personen genauso wie Grundrechte verschiedener Grundrechtsträger miteinander kollidieren können. Vgl. ausf. *W. Kahl/M. Schwind*, Europäische Grundrechte und Grundfreiheiten – Grundbausteine einer Interaktionslehre, EuR 2004, S. 170 ff.

90 *M. Ruffert*, in: Calliess/Ruffert (Fn. 50), Art. 15 GRC, Rn. 26 f.; *M. Ruffert*, in: Ehlers (Fn. 59), § 19, Rn. 21 f.; *M. Ruffert*, in: Epping/Hillgruber (Hrsg.), BeckOK-GG, 48. Ed. 2021, Art. 12, Rn. 6. Vgl. auch *T. Mann*, in: Sachs (Hrsg.), Kommentar zum GG, 9. Aufl. 2021, Art. 12 GG, Rn. 11; *I. Pernice*, Grundrechtsgehalte im Gemeinschaftsrecht, 1979, S. 174 f.

91 So aber wohl *C. Schubert* in: Franzen/Gallner/Oetker (Hrsg.), Kommentar zum europäischen Arbeitsrecht, 3. Aufl. 2020, Art. 15 GRC, Rn. 31; *R. Streinz*, in: Streinz (Fn. 52), Art. 15 GRC, Rn. 14.

92 In diesem Sinne z. B. EuGH, Rs. C-233/12 (Gardella), ECLI:EU:C:2013:449, Rn. 39-41.

93 Dagegen wehrt sich mit Recht *V. Skouris* (Fn. 88), S. 64 ff.

94 *M. Ruffert*, in: Calliess/Ruffert (Fn. 50), Art. 15 GRC, Rn. 27; *M. Ruffert*, in: Ehlers (Fn. 59), § 19, Rn. 22.

95 So die Formulierung von *D. Ehlers*, in: Ehlers (Fn. 59), § 7, Rn. 1. Ähnlich *T. Kingreen*, Die Struktur der Grundfreiheiten des Europäischen Gemeinschaftsrechts, 1999, S. 13: „prägende Komponenten der gemeinschaftsrechtlichen Wirtschaftsverfassung".

96 *E.-J. Mestmäcker/H. Schweitzer*, Europäisches Wettbewerbsrecht, 3. Aufl. 2014, § 2, Rn. 30-35; *M. Schmidt-Preuß*, Die soziale Marktwirtschaft als Wirtschaftsverfassung der Europäischen Union, FS Säcker, 2011, S. 969, 978 f.; *M. Ruffert*, Die Leistungsfähigkeit der Wirtschaftsverfassung, AöR 134 (2009), S. 197, 229 ff.; *U. Everling*, Wirtschaftsverfassung und Richterrecht in der Europäischen Gemeinschaft, FS Mestmäcker, 1996, S. 368 f.; *J. Basedow*, Von der deutschen zur europäischen Wirtschaftsverfassung, 1992, S. 39 ff.

97 EuGH, Gutachten 1/91 (EWR-I), ECLI:EU:C:1991:490, Slg. 1991, 6079, Rn. 17 f.

98 Hervorhebung C.K.

99 So eine Formulierung von *D. Grimm*, Europa (Fn. 2), S. 29, der zu Recht darauf hinweist, dass die friedenssichernde Funktion nicht mehr genügt, um der EU eine hohe Akzeptanz in der Bevölkerung zu sichern.

100 Daneben besteht das europäische Wettbewerbsrecht heute zu einem großen Teil aus Sekundärrecht, vgl. nur *G. Wiedemann*, in: Wiedemann (Hrsg.), Handbuch des Kartellrechts, 4. Aufl. 2020, § 1, Rn. 7 ff.

101 Vgl. *A. Hatje* (Fn. 60), S. 804.

102 Mit einem Plädoyer für eine Rückbesinnung auf die Wurzeln *L. Khan*, Amazon's Antitrust Paradox, Yale Law Journal 126(2017), S. 710, 737 ff..

103 *P. H. Brietzke*, The Constitutionalization of Antitrust, Valparaiso University Law Review 22 (1988), S. 275; *R. Pitofsky*, The Political Content of Antitrust, University of Pennsylvania Law Review 127(1979), S. 1051.

104 *F. J. Säcker*, in: Säcker/Bien/Meier-Beck/Montag (Hrsg.), Münchener Kommentar zum Wettbewerbsrecht, Bd. 1, 3. Aufl. 2020, Einl. Rn. 5 f., 16.

105 Ebd., Rn. 18. Ähnlich auch schon *F. J. Säcker*, Zielkonflikte und Koordinationsprobleme im deutschen und europäischen Kartellrecht, 1973, S. 20 ff. Vgl. auch *F. J. Säcker*, Macht im Zivilrecht, in: Säcker, Freiheit (Fn. 54), S. 167 ff.; *F. J. Säcker*, Die privatrechtliche Dimension des Wettbewerbsrechts, ZWeR 2008, S. 348 ff.

106 Grundlegend z. B. *E.-J. Mestmäcker*, Über das Verhältnis des Rechts der Wettbewerbsbeschränkungen zum Privatrecht, AcP 168 (1968), S. 235 ff.; *F. A. v. Hayek*, Rechtsordnung und Handelnsordnung, in: Zur Einheit der Rechts- und Staatswissenschaften, 1967, S. 195, 215 ff.; *F. Böhm*, Privatrechtsgesellschaft und Marktwirtschaft, ORDO 17 (1966), S. 75 ff.; *F. Böhm*, Wettbewerb und Monopolkampf, 1933, S. 187 ff. und passim.

107 BGH, Beschl. v. 23.6.2020, NZKart 2020, S. 473, 476 f., Rn. 58.

108 Ebd., Rn. 123. Die Wahlfreiheit der Nutzer wird ferner betont in Rn. 86, 91, 102, 120 f., 127, 130 f.

109 So auch *J.-M. Luczak*, Die Europäische Wirtschaftsverfassung als Legitimationselement europäischer Integration, 2009, S. 256: „Der Vorrang von Markt und Wettbewerb im Gemeinschaftsrechtssystem ist [...] verfassungstheoretisch auch aus seiner Ausrichtung auf den Schutz individueller Handlungsrechte ableitbar."

110 Vgl. z. B. die Beiträge von *F. Möslein* (§ 1), *E.-J. Mestmäcker*, *H. Schweitzer*, *M. Renner*, *J-U. Franck* (§ 20) und *F. Kainer/H. Schweitzer* in: Möslein (Hrsg.), Private Macht, 2016.

111 Einen änderungsfesten Kern der Verträge wie nach Art. 79 Abs. 3 GG lehnt die h. M. ab, s. nur *C. Ohler*, in: Grabitz/Hilf/Nettesheim (Hrsg.), 73. EL 2020, Art. 48 EUV, Rn. 24 f. m. w. N. sowie oben Fn. 82.

112 In eine ähnliche Richtung schon *J. Basedow* (Fn. 96), S. 50.

113 Siehe dazu z. B. *A. Mundt*, Je größer, desto besser? Europäische Champions werden nicht durch wettbewerbsbeschränkende Fusionen geschaffen, ifo-Schnelldienst 8/2019, S. 2 4 ff.

114 Bundeswirtschaftsministerium/Ministère de L'Économie et des Finances, A Franco-German Manifesto for a European Industrial Policy Fit for the 21st Century, 19.2.2019.

115 Zur Verknüpfung von Binnenmarkt und Wettbewerbsrecht *J. Laitenberger*, EU-Wettbewerbsregeln, Binnenmarkt und 60 Jahre Römische Verträge, NZKart 2017, S. 89 ff.

116 ABl. EU 2008 C 115/309.

117 So *T. Ackermann*, in: Riesenhuber (Hrsg.), Europäische Methodenlehre, 3. Aufl. 2015, § 21, Rn. 4.

118 So ausdrücklich z. B. EuGH, Rs. C-453/99 (Courage), ECLI:EU:C:2001:465, Slg. 2001, I-6297, Rn. 20. Vgl. auch schon EuGH, Rs. 6/72 (Continental Can), ECLI:EU:C:1973:22, Slg. 1973, 215, Rn. 23-25.

119 EuGH, Rs. 56/64 (Consten und Grundig), ECLI:EU:C:1966:41, Slg. 1966, 429, 388.

120 EuGH, Gutachten 1/91 (EWR-I), ECLI:EU:C:1991:490, Slg. 1991, I-6079, Rn. 17 f.

121 *A. Jones/B. Sufrin/N. Dunne*, EU Competition Law, 7. Aufl. 2019, S. 43 f.; *E.-J. Mestmäcker/H. Schweitzer* (Fn. 96), § 11, Rn. 13 ff.; *C. D. Ehlermann*, Der Beitrag der Wettbewerbspolitik zum Europäischen Binnenmarkt, WuW 1992, S. 5 ff.

122 So *D. Grimm*, Europa (Fn. 2), S. 87, 146.

123 So die Formulierung von *D. Grimm*, Europa (Fn. 2), S. 95, 112 ff.

124 Zum Begriff der Input-Legitimation oben (III. 3. bei Fn. 73-74).

125 EuGH, Rs. C-453/99 (Courage), ECLI:EU:C:2001:465, Slg. 2001, I-6297, Rn. 26.

126 Vgl. z. B. EuGH, Rs. C-435/18 (Otis), ECLI:EU:C:2019:1069, Rn. 32; Rs. C-557/12 (Kone), ECLI:EU:C:2014:1317, Rn. 33 f.; Rs. C-360/09 (Pfleiderer), ECLI:EU:C:2011:389, Slg. 2011, I-5161, Rn. 28 ff.; Rs. C-536/11 (Donau Chemie), ECLI:EU:C:2013:366, Rn. 29 ff.; Rs. C-295/04 (Manfredi), ECLI:EU:C:2006:461, Slg. 2006, I-6619, Rn. 77 ff.

127 *J.-U. Franck*, in: Immenga/Mestmäcker (Hrsg.), Wettbewerbsrecht, 6. Aufl. 2020, Vor §§ 33-34 a GWB, Rn. 16; *C. Kersting*, Kartellrechtliche Haftung des Unternehmens nach Art. 101 AEUV, WuW 2019, S. 290, 293; *H. Schweitzer*, Die neue Richtlinie für wettbewerbsrechtliche Schadensersatzklagen, NZKart 2014, S. 335, 343.

128 ABl. EU 2014 L 349/1.

129 Kritisch auch *A. Reidlinger*, Das autonome EU-Kartellschadenersatzrecht des EuGH: Uferlose Haftung jenseits zivilrechtlicher Grenzen?, FS G. Wiedemann, 2020, S. 643, 649 und passim.

130 Dazu z. B. *M. Nettesheim*, in: Oppermann/Claasen/Nettesheim (Fn. 1), § 10, Rn. 39.

131 *W.-H. Roth*, Privatrechtliche Kartellrechtsdurchsetzung zwischen primärem und sekundärem Unionsrecht, ZHR 179 (2015), S. 668, 681 f.

132 *J.-U. Franck*, in: Immenga/Mestmäcker (Fn. 127), Vor §§ 33-34 a GWB, Rn. 19; *J.-U. Franck*, Striking a Balance of Power Between the Court of Justice and the EU Legislature: The Law on Competition Damages Actions as a Paradigm, European Law Review 43 (2018), S. 837, 852 f.

133 *J.-U. Franck*, in: Immenga/Mestmäcker (Fn. 127), Vor §§ 33-34 a GWB, Rn. 16 weist zu Recht darauf hin, dass der EuGH zwischen der Anwendung des Effektivitätsgrundsatzes und einer effet utile-Auslegung der Art. 101, 102 AEUV nicht immer ausreichend trennt. Insoweit wäre eine Klarstellung erforderlich.

134 Ausführlich dazu *P. Dann* (Fn. 68), S. 104 ff.

135 *S. Korte*, in: Säcker/Bien/Meier-Beck/Montag (Hrsg.), Münchener Kommentar zum Wettbewerbsrecht, Bd. 1, 3. Aufl. 2020, Art. 103 AEUV, Rn. 6; *C. Nowak*, in: Pechstein/Nowak/Häde (Hrsg.), Frankfurter Kommentar zu EUV, GRC und AEUV, 2017, Art. 103 AEUV, Rn. 20. Besonders ausführlich und kritisch *P. Dann* (Fn. 68), S. 104 ff.

136 ABl. EU 2014 L 349/1.

137 ABl. EU 2019 L 11/3.

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CORE ANALYSIS

When can religious employers discriminate? The scope of the religious ethos exemption in EU law

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Abstract

When are religious employers exempt from the prohibition of discrimination (i.e., when can they discriminate against non-adherents)? The European Union (EU) Equality Framework Directive exempts religious employers from the prohibition of religious discrimination, but the scope of the *religious ethos exemption* is disputed and its interpretation by the Court of Justice of the European Union (CJEU) in *Egenberger* and *IR v JQ* has been criticised for being *ultra vires* and for disrespecting the constitutional identities of the EU Member States. This article clarifies the religious ethos exemption, by examining the underlying legal and normative issues that determine its scope. It shows that the scope of the exemption depends not just on the Framework Directive but also on the relationship between EU law and national constitutional law and that between EU law and international law. Thus, this article not only provides clarity regarding the religious ethos exemption, but also uses these judgements as an opportunity to revisit these related constitutional issues, and in particular the role of the CJEU and EU legislature in defining the place of national constitutional identity in EU law.

Keywords: religious discrimination; religious freedom; EU non-discrimination law; national identity; employment

1. Introduction

When can religious employers discriminate against non-adherents? Can the Church discriminate against non-Christians in the appointment of clergy? Can an Islamic school dismiss teachers who do not observe the core principles of the Islamic faith? Can a Christian hospital refuse to employ qualified doctors who are not members of the Church? European Union (EU) Member States think differently about such questions. Some grant religious employers broad exemptions from the prohibition of discrimination;[1] others have narrowly circumscribed the right of such organisations to discriminate against non-adherents.[2] However, the scope of the *religious ethos exemption* is no longer determined by national law alone. The EU Equal Treatment Framework Directive provides a legal framework for combating discrimination on the grounds of religion and belief, disability, age and sexual orientation, in the area of employment and occupation.[3] The Framework Directive also lists several exemptions from the prohibition of

[1]Examples are given below.

[2]As is the case in the Netherlands (see, Netherlands Institute of Human Rights, Judgement in Case 2015-68, decided on 9 June 2015 and Opinion in Case 2012-84, decided 4 May 2012) and it seems also in Belgium (see, Constitutional Court, Judgement no 39/2009, of 11 March 2009) and Spain (European Equality Law Network, 'Country Report on Non-Discrimination: Spain' (2020) 46-48. Available at: <https://www.equalitylaw.eu/downloads/5227-spain-country-report-non-discrimination-2020-1-56-mb> (last accessed 12 February 2022).

[3]Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L303/16).

discrimination, including a religious ethos exemption that religious employers can use to justify discrimination on the grounds of religion and belief. The scope of this exemption is disputed, however, and there are different interpretations as to when religious employers are exempt from the prohibition of discrimination under EU law (see below). To clarify the scope of this exemption, this article studies the relevant legal provisions and principles. As we will see, its scope depends not only on the Framework Directive but also on our response to deeper questions of EU constitutional law. In attempting to shed light on the religious ethos exemption, this article also seeks to advance the debate on related constitutional questions and controversies.

Tensions over the exemption have mounted following two rulings by the Court of Justice of the European Union (CJEU) in the cases *Egenberger* and *IR v JQ*.[4] The *Egenberger* case concerned a dispute between the Protestant Church and an applicant for a job involving the task to draw up a report on the UN Racial Discrimination Convention. The applicant had not been invited for an interview because she was not a member of the Church. The *IR v JQ* case involved a conflict between IR (a Catholic non-profit organisation carrying out the work of Caritas) and a doctor who used to work for IR. He had been dismissed for entering into a marriage that was invalid under canon law. In both cases, the Bundesarbeitsgericht (German Federal Labour Court) asked the CJEU to clarify the conditions under which religious employers may discriminate against non-adherents. It also asked whether principles of national constitutional law could be invoked to exempt compliance with these conditions. The CJEU ruled that the scope of the religious ethos exemption must be narrowly construed and that principles of national constitutional law cannot exempt compliance with the conditions set out in the Framework Directive. These decisions led the Bundesarbeitsgericht to construe the internal autonomy of religious organisations more narrowly than before by the Bundesverfassungsgericht as a matter of German constitutional law,[5] to the dismay of many experts of German constitutional and church law.[6] The defendant in the *Egenberger* case, the Protestant Church, subsequently lodged a constitutional complaint with the Bundesverfassungsgericht, alleging that the CJEU exceeded the limits of EU competence and violated the constitutional identity of Germany.[7]

To those not familiar with these disputes and the issues they raise, let me provide some essential legal and societal background. The Framework Directive was adopted in 2000, shortly after the Treaty of Amsterdam expanded the EU's competence to enact legislation to combat discrimination. Until then, EU non-discrimination law only prohibited discrimination on grounds of nationality and gender, as a corollary to the EU's ambition to establish an internal market among the Member States.[8] The Framework Directive is in part a continuation of this goal of creating a level playing field for companies, regardless of which domestic market they are active in, but it also serves as a tool to deliver social policies beyond the internal market. According to its 11th Recital, it contributes to 'the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity,

[4]Case C-414/16 *Egenberger*, ECLI:EU:C:2018:257; Case C-68/17 *IR v JQ*, ECLI:EU:C:2018:696.

[5]BAG, 8 AZR 501/14 (25 October 2018); BAG, 2 AZR 746/14 (20 February 2019). See in addition the decision of the Karlsruhe Labour Court prohibiting the use of religion as a condition for a secretarial function within the Church. ArbG Karlsruhe, 1 Ca 171/19 (18 September 2020).

[6]For criticism, Hans Michael Heinig, 'Why *Egenberger* Could be Next', available at: <https://verfassungsblog.de/why-egenberger-could-be-next/> (last accessed 12 February 2022); Peter Unruh, 'Im Spannungsfeld von Antidiskriminierung und kirchlicher Selbstbestimmung – Zur Einordnung und Kommentierung der neuen religionsrechtlichen Tendenzen des EuGH' in Diakonie Deutschland (ed), *Evangelische Identität und Pluralität Perspektiven für die Gestaltung von Kirche und Diakonie in einer pluraler werdenden Welt* (2018); Gregor Thusing and Regina Mathy, 'Das deutsche kirchliche Arbeitsrecht vor dem EuGH – Tendenz- oder Transzendenzschutz?' in Hermann Reichold (ed), *Tendenz- statt Transzendenzschutz in der Dienstgemeinschaft? Aktuelle Anstöße zur Loyalitätsfrage durch den Europäischen Gerichtshof* (Verlag Friedrich Pustet 2019).

[7]Frankfurter Allgemeine Zeitung, 'Das erste Karlsruher Nein? (2 May 2019); Heiko Sauer, 'Kirchliche Selbstbestimmung und deutsche Verfassungsidentität Überlegungen zum Fall Egenberger' <https://verfassungsblog.de/kirchliche-selbstbestimmung-und-deutsche-verfassungsidentitaet-ueberlegungen-zum-fall-egenberger/> (last accessed 10 May 2021).

[8]Mark Bell, 'The Principle of Equal Treatment: Widening and Deepening' in PP Craig and G De Búrca (eds), *The Evolution of EU law* (2nd ed, Oxford University Press 2011).

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and the free movement of persons'. According to the CJEU, moreover, the Directive is 'a specific expression … of the general prohibition of discrimination laid down in Article 21 of the Charter'.[9] So far, the vast majority of litigation in relation to the Directive has concerned age discrimination. It took a while before the CJEU was finally confronted with religious discrimination, and in terms of numbers, this protected ground has generated the fewest court cases.[10] These few cases have, however, generated some of the most controversial judgements.[11]

The question in *Egenberger* and *IR v JQ* was essentially when employers can justify religious discrimination as a legitimate occupational requirement. Article 4 of the Framework Directive provides two similar, yet distinct, occupational requirement exceptions that can be used to justify discrimination. Article 4(1) lays down the *general occupational requirement exception*:

> Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

This exception covers any of the grounds protected by the Directive, not just religion or belief, and is in principle uncontroversial. Some jobs are such that differentiation on the basis of a characteristic related to a protected ground is hard to avoid. A typical example is the choice of a modelling agency for a female model to advertise women's clothing.[12] The exception can also be invoked to justify discrimination on the grounds of religion or belief. The same modelling agency can reject someone who insists on wearing the Islamic headscarf to model in a shampoo commercial. As we shall see, Article 4(1) can also be used by employers with an ethos based on religion or belief to exempt specific employment practices from the prohibition of discrimination.

More controversial is the *religious occupational requirement exception* in Article 4(2) of the Framework Directive, specifically for churches and other employers with an ethos based on religion or belief:

> Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive will thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

[9]Case C-507/18, *Associazione Avvocatura per I diritti LGBTI*, ECLI:EU:C:2020:289, para 38.

[10]For these statistics, Raphaële Xenidis, 'The Polysemy of Anti-Discrimination Law: The Interpretation Architecture of the Framework Employment Directive at the Court of Justice' 58 (2021) Common Market Law Review 1649, 1652–5.

[11]See also the headscarf cases: Case C-157/15 *Achbita*, ECLI:EU:C:2017:203; Case C-188/15 *Bougnaoui*, ECLI:EU:C:2017:204; Joined Cases C-804/18 and Case C-341/19, *IX v Wabe* and *MH Müller Handels*, ECLI:EU:C:2021:594.

[12]See, Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (2nd edn, Oxford University Press 2012) 382.

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This provision has rightly been criticised by Ellis and Watson as 'possibly one of the most opaque to be found on any statute book', an example of legal compromise at its worst – sloppily worded and even apparently contradictory.[13]

There are serious disagreements regarding the meaning of Article 4(2) and its added value relative to Article 4(1), and the provisions are often interpreted through a national lens. The prevailing view in the English literature seems to be that Article 4(2) 'adds nothing' to Article 4(1).[14] For example, Rivers has said that the difference between both exceptions is 'impossible to grasp'.[15] But ask a German constitutional lawyer, and we will most likely hear a very different view; namely, that Article 4(2) contains a much broader exception to the non-discrimination duty. The fact that this provision refers to national constitutional law (twice!) tells them that it may be interpreted in accordance with national constitutional law, including constitutional principles that grant religious employers a broader exemption from the prohibition of discrimination than Article 4(1) of the Framework Directive. Furthermore, they often draw attention to Article 17(1)of the Treaty on the Functioning of the European Union (TFEU) in support of this view, which provides that 'the Union respects and does not prejudice the status under national law of churches and religious associations or communities'.[16]

The practical significance of such interpretative disagreements becomes clear when we examine more closely the scope of the internal autonomy of religious organisations under German law. Article 140 of the German Constitution in conjunction with Article 137(3) of the Weimar Constitution provides that 'every religious community administrates its own affairs without interference of state or community'. Thanks to a broad interpretation by the Bundesverfassungsgericht, religious organisations enjoyed sweeping exemptions from the application of secular labour law: they are allowed to discriminate against non-adherents in all their employment activities.[17] In this context, it is essential to understand that these organisations play a crucial role within the German welfare state: they run hospitals, kindergartens, nursery homes, and the like – the two main churches combined are Germany's second-largest employer after the state, employing around 1.5 million people.[18] And all these employees may be required to be members of the Church and act in accordance with its religious doctrines, and they may be dismissed for misconduct. This is why a medical doctor working for a Catholic hospital could be dismissed for entering into a marriage invalid under canon law, a situation unheard of in most other Member States.

To place the German law on the regulation of religious employers in its wider European context, some EU Member States provide an exemption that is similar in scope.[19] For instance, the Cypriot constitution provides for the full autonomy of the established religious

[13]Ibid 394.

[14]Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press 2010) 133. See also, Jane Calderwood Norton, *Freedom of Religious Organizations* (1st ed, Oxford University Press 2016) 79; Ellis and Watson, *EU Anti-Discrimination Law* 395. But see, for a different perspective, Ronan McCrea, *Religion and the Public Order of the European Union* (Oxford University Press 2014) 166–7.

[15]Rivers, *The Law of Organized Religions* 133.

[16]See, for example, Stefan Greiner, 'Kirchliche Loyalitätsobliegenheiten nach dem "IR"-Urteil des EuGH' (2018) Neue Zeitschrift für Arbeitsrecht, 1289–94; Claus Dieter Classen, 'Das kirchliche Arbeitsrecht unter europäischem Druck – Anmerkungen zu den Urteilen des EuGH (jeweils GK) vom 17 April 2018 in der Rs. C-414/16 (Egenberger) und vom 11 September 2018 in der Rs. C-68/17 (IR)' (2018) Europarecht 752–67.

[17]BVerfG 70, 138 – Loyalitätspflicht (4 June 1985); BVerfG 2 BvR 661, 12 (22 October 2014). See, for further discussion, Gerhard Robbers, Church Autonomy in the European Court of Human Rights – Recent Developments in Germany, 26 JL & Religion 281 (2010).

[18]Josef Hien, 'The Return of Religion? The Paradox of Faith-Based Welfare Provision in a Secular Age' [2014] MPifG Discussion Paper 14/9.

[19]For instance, the European Commission issued a reasoned opinion to Ireland in 2008 for its broad interpretation of the exemption. See further, Amy Dunne, 'Tracing the Scope of Religious Exemptions under National and EU Law: Section 37(1) of the Irish Employment Equality Acts 1998–2011 and Ireland's Obligations Under the EU Framework Directive on Employment and Occupation, Directive 2000/78/EC' 31 (2015) Utrecht Journal of International and European Law 33.

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organisations,[20] and Austrian law allows church-run breweries, lumber mills and hotels to recruit staff on the basis of their religious beliefs.[21] Whether the discriminatory practices of religious organisations in those countries penetrate society as deeply as in Germany is not always clear, however, as they may not play as large a role in the provision of social welfare. What is clear is that religious employers in other Member States enjoy a narrower exemption from the prohibition of discrimination. According to the Spanish Constitutional Court, religious employers may discriminate against employees only if their employment is closely linked to the employer's ethos.[22] We find a similar standard in the case law of Dutch courts.[23] Finally, some Member States, such as Sweden and France, do not provide for a separate exemption for employers with an ethos based on religion and belief in their domestic law.[24]

However, *Egenberger* and *IR v JQ* are interesting not only because they once again raise the question of how the EU should deal with moral diversity and demonstrate what far-reaching legal and social implications EU law may have in this regard. Broader lessons can be learned from these judgements for EU law – lessons that must be understood to determine the scope of the religious ethos exemption and to assess the criticism that has been levelled at these judgements. Most importantly, is it the case that the judgements are *ultra vires* and did the CJEU fail to observe its duty to respect the constitutional identities of the Member States? As should be clear by now, the scope of the exemption depends not just on Article 4 of the Framework Directive, but also on other aspects of EU constitutional law; in particular, on the relationship between EU law and national constitutional law and that between EU law and international law. A discussion of the relevant legal principles should help to clarify the scope of the religious ethos exemption and resolve existing disagreements, or at least to clarify the reasons that explain why the CJEU reached different conclusions than some of its critics had liked. Following a discussion of the normative rationale of the principle of religious autonomy in section 2, the three elements that condition the scope of the exemption will be examined in turn. Section 3 defines the relationship between Articles 4(1) and 4(2) of the Framework Directive, section 4 considers to what extent the religious ethos exemption is conditioned by national constitutional law, and section 5 assesses to what degree the influence of EU law on the internal autonomy of religious employers is constrained by international law.

2. The normative rationale for religious autonomy

Barring an appropriate justification, a person's religious beliefs cannot normally be invoked to treat that person less favourably than other persons. What then is the justification for exempting religious employers from the obligations of EU non-discrimination law? What values does the

[20]European Equality Law Network, 'Country Report on Non-Discrimination: Cyprus' (2021) 65. Available at <https://www.equalitylaw.eu/downloads/5529-cyprus-country-report-non-discrimination-2021-1-91-mb> (last accessed 12 February 2022).

[21]European Equality Law Network, 'Country Report on Non-Discrimination: Austria' (2021) 42–3. Available at <https://www.equalitylaw.eu/downloads/5474-austria-country-report-non-discrimination-2021-1-41-mb> (last accessed 12 February 2022).

[22]European Equality Law Network, 'Country Report on Non-Discrimination: Spain' (2021) 50–1. Available at <https://www.equalitylaw.eu/downloads/5479-spain-country-report-non-discrimination-2021-1-56-mb> (last accessed 12 February 2022).

[23]European Equality Law Network, 'Country Report on Non-Discrimination: The Netherlands' (2021) 50. Available at <https://www.equalitylaw.eu/downloads/5518-netherlands-country-report-non-discrimination-2021-1-44-mb> (last accessed 12 February 2022).

[24]European Equality Law Network, 'Country Report on Non-Discrimination: Sweden' (2021) 49. Available at <https://www.equalitylaw.eu/downloads/5493-sweden-country-report-non-discrimination-2021-1-61-mb> (last accessed 12 February 2022); European Equality Law Network, 'Country Report on Non-Discrimination: France' (2021) 70. Available at <https://www.equalitylaw.eu/downloads/5530-france-country-report-non-discrimination-2021-pdf-1-75-mb> (last accessed 12 February 2022).

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principle of religious autonomy promote that the law seeks to protect? To ascertain the purpose behind the religious ethos exemption, we need to know the deeper values underpinning this principle. This is all the more important as the exemption is clearly at odds with the central purpose of EU non-discrimination law: it protects religious groups whose behaviour may inflict expressive harm on non-adherents and restrict their socio-economic opportunities. This section explains that the normative rationale for religious autonomy must be found in the value of religious freedom, not of religious organisations but of their individual members. This points to a deeper normative and legal tension at the heart of Article 4 of the Framework Directive, between the right to religious freedom and the right to be free from religious discrimination. Tensions arise particularly as more value is placed on the right to religious freedom, or put another way, as a broad scope of the autonomy of religious organisations is considered necessary for the protection of this right.

Intuitively, one might think that the right of religious organisations to have their internal autonomy respected is a right they enjoy because there is something valuable and worthy of protection about these organisations, as such. According to Rivers, the foundational principle behind the law on organised religions is that of religious autonomy, by which he means 'the power of a community for self-government under its own law'.[25] However, it seems incorrect to think that the value of religious autonomy resides in the protection it affords to religious organisations *qua* organisations. Instead, EU non-discrimination law protects the internal autonomy of religious organisations in order to protect the individual autonomy of their members.[26] Individual autonomy is widely regarded as one of the cornerstones of liberal society, which encompasses the capacity of individuals to choose from an adequate range of valuable options without coercion or manipulation.[27] Decisional autonomy in relation to religion seems integral to the realisation of individual autonomy, for the simple reason that religion is a valuable option to many persons. In this respect, religion is like other valuable options such as the freedom to enter into social relationships with others.[28] And just as liberal societies must value the autonomy of individuals in social matters, they must, as Calderwood Norton observes, 'value autonomy in relation to religious matters too'.[29] That is, they must respect and guarantee individuals' freedom to choose their religious beliefs and to engage in the attendant religious practices and rituals.[30]

The performative dimension of religion varies greatly from one religion to another, but religion often has a communal dimension. Religious organisations serve as a place for collective religious practice and prayer and allow individual believers to observe and pursue their deeply held religious beliefs. Individual believers thus have an autonomy-related interest in being able to participate in the services and ceremonies of their religious community. They also have an autonomy-related interest in their religious community being able to uphold its religious principles. After all, as Laborde points out, 'a religious association that is unable to insist on adherence to its own religious tenets as a condition of membership is unable to be a religious association'.[31] Such an organisation would also be unable to provide its members with a place to practise and observe their religious beliefs. The right to religious autonomy is therefore a right

[25]Rivers, *The Law of Organized Religions* 334.

[26]Calderwood Norton, *Freedom of Religious Organizations*. See also, Rivers, *The Law of Organized Religions* 334.

[27]Which are two of the three components of autonomy on the account of Joseph Raz, *The Morality of Freedom* (Clarendon Press 1988) 372–8.

[28]Tarunabh Khaitan and Jane Calderwood Norton, 'The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions' 17 (2019) International Journal of Constitutional Law 1125, 1137–41.

[29]Calderwood Norton, *Freedom of Religious Organizations* 16.

[30]Of course, the right to manifest a belief can be limited. See, in this regard, *Eweida and others* App no 48420/10 (ECtHR, 15 January 2013) para 80.

[31]Cécile Laborde, *Liberalism's Religion* (Harvard University Press 2017) 179.

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rooted in the interests of the members of the organisation.[32] That is, religious organisations in liberal societies enjoy a right to religious autonomy – including a prima facie right to discriminate against non-adherents and to enforce sanctions against members employees who refuse to abide by their religious principles – to protect the joint interest of their individual members to live by their deepest commitments.[33]

However, while this provides a principled justification for exempting religious employers from certain obligations under EU non-discrimination law, the question is not just whether, but also in respect of which employment activities discrimination on the grounds of religion and belief should be permissible. Underlying this question is a fundamental tension in the relationship between two fundamental rights for the protection of religion: the right to freedom of religion and the right to be free from religious discrimination. These rights often complement each other in protecting religion, but they serve distinct interests that can be incompatible.[34] As Khaitan and Norton Calderwood have explained, the right to freedom of religion is best understood as protecting our individual autonomy in religious affairs, whereas the right against religious discrimination is best understood as protecting us against the disadvantages that may result from membership of a religious group.[35] Non-discrimination law is centrally concerned with preventing differentiation between persons based on their membership of salient social groups.[36] However, the exercise of the right to freedom of religion by individual adherents, or by them collectively as part of a religious organisation, may interfere with the right to be free from discrimination and impose specific disadvantages on certain social groups – on non-adherents but also on women or sexual minorities.[37] The question then is how to balance these competing rights: when to restrict religious autonomy and when to accept discrimination?

There is a relatively straightforward answer to this question from a liberal democratic perspective. Access to important opportunities should not depend on religious affiliation, just as it should not depend on gender, race or sexual orientation. The state has a moral obligation to protect its citizens from discrimination on the basis of such personal characteristics and to guarantee equality of opportunity in, among others, the labour market.[38] Exceptions to the prohibition of discrimination must therefore be both adequately justified and narrowly circumscribed. The protection of the right to religious freedom may justify an exception for religious organisations, but the exception must not go beyond what is necessary to protect an individual adherent's freedom to live by her deepest commitments. In a liberal society, the right of religious organisations to discriminate on religious grounds in employment and occupation should therefore be limited to employees

[32]See, on the relation between collective group rights and the rights of individual members, Raz, *Freedom of Religious Organizations* 208.

[33]Khaitan and Calderwood Norton, 'The Right to Freedom of Religion and the Right against Religious Discrimination' 1141.

[34]See, in particular, Khaitan and Calderwood Norton, 'The Right to Freedom of Religion and the Right against Religious Discrimination'; Tarunabh Khaitan and Jane Calderwood Norton, 'Religion in Human Rights Law: A Normative Restatement' 18 (2020) International Journal of Constitutional Law 111. See, for other assessments of the relationship between the two rights, Ilias Trispiotis, 'Religious Freedom and Religious Antidiscrimination' 82 (2019) The Modern Law Review 864; Ronan McCrea, 'Squaring the Circle: Can an Egalitarian and Individualistic Conception of Freedom of Religion or Belief Co-Exist with the Notion of Indirect Discrimination?' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing, an imprint of Bloomsbury Publishing Plc 2018).

[35]Khaitan and Calderwood Norton, The Right to Freedom of Religion and the Right against Religious Discrimination'.

[36]For a prominent account of socially salient group membership, Kasper Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (Oxford University Press 2014) chapter 1.

[37]At an individual level, we are of course familiar with clashes between the right to freedom of religion and the right to non-discrimination in disputes over the refusal of marriage registrars to celebrate same-sex weddings and of employees to shake hands with their colleagues.

[38]For explorations of the moral justifications for non-discrimination law, see, among others, Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2016); Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford University Press 2020); Lippert-Rasmussen, *Born Free and Equal?*.

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who carry out religious functions. The closer the occupational activities are to an organisation's religious ethos, the stronger the claim to an exemption from the prohibition of discrimination. For an exception to be justified according to liberal democratic principles, these activities will most likely need to involve the teaching and promotion of the organisation's religious ethos. What is certain, however, is that the internal autonomy of religious organisations and their right to discriminate on the grounds of religious belief will need to be strictly delimited if they are to be compatible with such principles.[39]

From the EU's point of view, the answer to the question regarding how to strike a balance between the right to religious autonomy and the right not to be discriminated against is decidedly less straightforward. Some Member States have, for historical or other reasons, drawn the scope of the principle of religious autonomy far more broadly than would be permissible under liberal democratic premises. Although the EU should also be judged on how far its policies adhere to liberal principles such as individual autonomy and equality, many also believe that it is consistent with or even required by liberal principles that the EU should accommodate national cultures and identities,[40] including, in that case, national conceptions of the place of religion in society.[41] Besides, the EU is not obliged or empowered to right every wrong at the national level. This is not the place to delve deeply into such matters; suffice it to say that a degree of respect by the EU for national constitutional principles and democratically legitimated norms seems consistent with liberal principles.

In any case, the Framework Directive falls somewhere midway between protecting liberal norms of non-discrimination and equal opportunity and observing national constitutional conceptions on the appropriate position of religion. On the one hand, the Directive aims to reduce the disadvantages faced by individuals on the basis of socially salient personal characteristics, including religion and belief. To that aim, it provides that the Member States may allow employers with an ethos based on religion and belief to discriminate on these grounds, but only on the conditions set out in Article 4. These conditions do not completely exempt religious employers from the prohibition of discrimination or allow them to determine for themselves when religion is a legitimate condition of employment.[42] Some of the conditions are strict, in fact, and, on the face of it, demand a close connection between the occupational activity and the religious ethos of the organisation for discrimination based on religion and belief to be justified. On the other hand, Article 4(2) also refers to national constitutional principles, which suggests that it values the right of Member States to determine the position of religion in their society and allows for a wider conception of the principle of religious autonomy than can be justified from a strictly liberal democratic point of view. Of course, this does not answer how wide the scope of the religious ethos exemption in EU law is. For that, we have to examine more closely Article 4 of the Framework Directive and the place of this provision in the overall scheme of EU law (i.e., its interaction with national constitutional law and international law).

3. Article 4 of the Framework Directive

This section seeks to ascertain the meaning of Article 4 of the Framework Directive; that is, the two occupational requirement exceptions that religious employers may invoke to justify religious discrimination in employment and occupation: the general occupational requirement exception

[39]Laborde, *Liberalism's Religion* 178–90.

[40]For a defence of this position, Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015) 89–94. She draws extensively on liberal scholars like, Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995); Yael Tamir, *Liberal Nationalism* (3rd printing and 1st paperback printing, with new preface) (Princeton University Press 1995).

[41]For discussion of that issue, Daniel Augenstein, 'Religious Pluralism and National Constitutional Traditions in Europe' in Camil Ungureanu and Lorenzo Zucca (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (2012).

[42]As affirmed by *Egenberger*, paras 42–69.

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in Article 4(1) and the religious occupational requirement exception in Article 4(2). This section will discuss what constitutes a reasonable interpretation of the conditions set out in these provisions, which must be met to justify the use of religion and belief as an occupational requirement. The references to national constitutional law in Article 4(2) will not be discussed yet, since the relationship between EU law and national constitutional law is the subject of analysis in the following section.

It might be thought that employers with an ethos based on religion and belief will only be interested in the exception in Article 4(2), given that this provision seems to be broader in scope than the exception in Article 4(1) and is specifically designed to protect their internal autonomy. However, Article 4(2) provides that 'Member States may maintain national legislation in force . . . or provide for future legislation incorporating national practices existing at the date of adoption of this Directive'. A condition for its application is therefore that Member States have incorporated the exception into their domestic legislation, which not all have done.[43] The religious ethos exemption of employers established in countries that have not transposed Article 4(2) will be conditioned exclusively by Article 4(1) – again, subject to the condition that it is enshrined in national legislation. Let me therefore discuss both exceptions in turn.

It is apparent from the conditions set out in Article 4(1) that the exception set out therein is narrow in scope. It provides that differences in treatment based on a protected personal characteristic are justified if the difference constitutes a 'genuine and determining' occupational requirement that pursues a 'legitimate objective that is proportionate'. Recital 23 of the Framework Directive supports this view and states that the exception applies in 'very limited circumstances'. Likewise, and in accordance with legislative intent, the CJEU has decided that the exception must be 'interpreted strictly';[44] that the occupational requirement must be 'objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out'.[45] Advocate General Sharpston summarised the case law on the exception as follows: 'the derogation must be limited to matters which are absolutely necessary in order to undertake the professional activity in question.'[46] Although Article 4(1) has not, to date, been applied in disputes involving religious employers wishing to discriminate against (potential) employees on the basis of their religious beliefs, the above means that such discrimination is most likely only permissible when sharing the religious beliefs of the organisation is strictly necessary for the exercise of the occupational activity in question. As Vickers put it, most likely only 'in the case of those employed in religious service, whose job involves teaching or promoting the religion, or being involved in religious observance'.[47] In other words, Article 4(1) does not authorise the broad type of exemptions that religious organisations enjoy in Member States such as Germany or Austria.

Whether such exemptions are permissible under Article 4(2), instead, depends on the meaning of that provision. It provides that a person' religion or belief is a legitimate ground for discrimination if it constitutes 'a genuine, legitimate and justified occupational requirement'. The CJEU has interpreted the terms 'genuine, legitimate and justified' as follows: The term *genuine* means that 'professing the religion or belief on which the ethos of the church or organisation is founded must appear necessary because of the importance of the occupational activity in question for the

[43]Including Sweden and France.

[44]Case C-447/09 *Prigge and Others*, EU:C:2011:573, para 72; Case C-416/13 *Vital Pérez*, EU:C:2014:2371, para 47. For a more extensive discussion of the case law, see Ellis and Watson, *EU Anti-Discrimination Law* chapter 9; Justyna Maliszewska-Nienartowicz, 'Genuine and Determining Occupational Requirement as an Exception to the Prohibition of Discrimination in EU Law' in Thomas Giegerich (ed), *The European Union as Protector and Promoter of Equality* (Springer 2020); Sara Iglesias Sanchez, 'The Concept of "Genuine and Determining Occupational Requirements" in EU Equality Law: A Critical Approach' in Giegerich, *The European Union as Protector and Promoter of Equality*.

[45]*Bougnaoui* para 40.

[46]Case C-188/15 *Bougnaoui*, ECLI:EU:C:2016:553, Opinion of AG Sharpston, para 96.

[47]Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (2nd ed, Hart Publishing 2016) 145. See also, McCrea, *Religion and the Public Order of the European Union* 162.

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manifestation of that ethos or the exercise by the church or organisation of its right of autonomy'.[48] The term *legitimate* means that 'the requirement of professing the religion or belief on which the ethos of the church or organisation is founded is not used to pursue an aim that has no connection with that ethos or with the exercise by the church or organisation of its right of autonomy'.[49] The term *justified* means that the organisation must be capable of showing 'that the supposed risk of causing harm to its ethos or to its right of autonomy is probable and substantial, so that imposing such a requirement is indeed necessary'.[50] The interpretation of these terms bears a striking resemblance to the CJEU's understanding of the principle of proportionality: to be lawful, the occupational requirement must in essence be appropriate and necessary.[51]

Although this interpretation seems reasonable, it leaves plenty of uncertainty as to its application in concrete and specific cases. When do religion and belief constitute a 'genuine, legitimate and justified' occupational requirement in accordance with Article 4(2), and how exactly does the meaning of these criteria differ from that of the terms 'genuine' and 'determining' in Article 4(1)? The crucial difference between the two provisions seems to lie in the condition in Article 4(1) that the occupational requirement must be 'determining'. As explained above, it follows from this condition that having a particular religion or belief must be strictly necessary for the performance of an employment activity. It would thus appear that no such requirement of strict necessity is imposed by Article 4(2). But what does this mean in practical terms?

The following example can help to spell out the difference between Articles 4(1) and 4(2) more clearly. Nowhere is the role of religious organisations in the provision of public services more controversial than in the area of education.[52] A significant proportion of schools in many Member States have a religious ethos, which can lead them to discriminate against teachers on religious grounds in decisions on their employment or dismissal. Membership of a particular religious community may be a condition of employment, and the violation of the religious principles of this community reason for dismissal, even if sharing these principles is not strictly necessary to undertake the teaching job in question. It is one thing for a faith-based school to expect a religion teacher to share its ethos but quite another to make religious membership a condition of employment for mathematics or physics teachers. As far as my understanding of physics and mathematics goes, being religious is not a 'determining' requirement to be able to teach these subjects – it is not strictly necessary to be able to teach principles of mathematics or physics. If this is correct, faith-based schools may use Article 4(1) to justify the expectation that religion teachers share their religious ethos, but they cannot invoke this provision to require that physics or maths teachers do so. However, a Member State may permit them to rely on Article 4(2) to justify the use of religion as an occupational requirement for all teaching positions. After all, it seems plausible that the use of religion as an occupational requirement in respect of all teachers at faith-based schools is a genuine, legitimate and justified – genuine because the religiosity of teachers is important for the school to manifest its ethos; legitimate because such a requirement pursues an aim connected to its religious ethos; and justified because it can prevent probable and substantial harm to its ethos. Such harm may result from the fact that schools are otherwise unable to provide their pupils with the desired religious environment. Thus, faith-based schools for which religion is an occupational requirement are likely to meet the three conditions set out in Article 4(2), at least as the CJEU understood them.

As this example suggests, the religious occupational requirement exception in Article 4(2) is wider in scope than the general occupational requirement exception in Article 4(1). Nonetheless,

[48]*Egenberger* para 65; *IR v JQ* para 51.

[49]*Egenberger* para 66; *IR v JQ* para 52.

[50]*Egenberger* para 67; *IR v JQ* para 53.

[51]See, in particular, *IR v JQ* para 54. In *Egenberger* para 68, by contrast, the CJEU mentioned the proportionality requirement as an additional and separate requirement, but this was confused. After all, the CJEU understood the terms genuine, legitimate, and justified to ensure that the occupational requirement is appropriate and necessary, thus proportionate.

[52]For detailed discussion, Rivers, *The Law of Organized Religions* chapter 8.

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the conditions set out in the former do limit the internal autonomy of religious organisations significantly. In particular, organisations that discriminate against individuals on the basis of their religious beliefs will not always meet the condition in Article 4(2) that the occupational requirement is 'justified'. This is because many types of employment within religious organisations can be performed by non-adherents without probable or substantial harm to the organisation's ethos – think of positions as medical specialists, janitors or legal advisers. For instance, it is highly unlikely that a medical specialist responsible for treating ailing patients will harm the ethos of a Catholic hospital substantially if he is not married according to the principles of canon law. A religious employer that requires such employees to share and act in accordance with its religious ethos will be acting contrary to the conditions in Article 4(2) that have been discussed so far.

An exception is employers with a religious ethos which, as the UK Employment Tribunal once said, 'permeates ... the work, and daily life, and activities in the workplace'.[53] The employer in question, the Leprosy Mission, began and ended formal meetings with prayer and began each working day with half an hour of prayer and gospel reading. With such employers, all employment activities can be deemed to be covered by the exemption in Article 4(2), as it would do probable and substantial harm to their ethos if they were required to employ non-adherents. In contrast, the occupational activities of employers where religion does not permeate every aspect of the workplace do not automatically benefit from the protection that Article 4(2) can provide. In this respect, the Bundesarbeitsgericht seems to have ruled correctly, following *IR v JQ*, that religion cannot be a requirement for employment as a surgeon in a hospital, and following *Egenberger*, that being a member of the Church cannot be a requirement for employment as a legal expert with the responsibility to draft a report on the UN Convention on the Elimination of All Forms of Racial Discrimination.[54] In neither case was religion a genuine, legitimate and justified occupational requirement, necessary to prevent probable and substantial damage to the employer's religious ethos.

4. Respect for religious organisations under national constitutional law

As we have seen, the scope of the religious ethos exemption is determined not only by Article 4 of the Framework Directive but also by this provision's relationship to the various provisions of EU law that demand respect for national constitutional values. At least three different provisions suggest that principles of national constitutional law must be considered in the application of the exemption. First, Article 4(2) of the Framework Directive itself: the last sentence of its first paragraph provides that it 'shall be implemented taking account of Member States' constitutional provisions and principles', and its second paragraph states that:

> Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, *acting in conformity with national constitutions and laws*, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.[55]

In addition, the Treaties also place the EU under an obligation to take national constitutional law into account. According to Article 4(2) of the Treaty on European Union (TEU) (*nota bene*: a different Article 4(2)), EU institutions must 'respect the equality of Member States before the Treaties as well as *their national identities, inherent in their fundamental structures, political and*

[53]UK Employment Tribunal, *Mohammed v Leprosy Mission* [2009] Case no 2303459/09.

[54]BAG, 8 AZR 501/14 (25 October 2018); BAG, 2 AZR 746/14 (20 February 2019). ArbG Karlsruhe, 1 Ca 171/19 (18 September 2020).

[55]Italics mine.

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constitutional'.[56] Finally, Article 17(1) TFEU requires that the EU 'respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States', a requirement that seems to find more specific expression in Article 4(2) of the Directive.

Seemingly in contravention of these provisions, the CJEU declined to accommodate principles of German constitutional law in *Egenberger* and *IR v JQ* and decided to curtail the autonomy hitherto enjoyed by religious organisations under the German constitution. The fact that these judgements did not assign greater weight to the German constitutional principle of religious autonomy law has probably been the main source of frustration and criticism.[57] This section will address such criticism and examine the extent to which the scope of the religious ethos exemption should be conditioned by principles of domestic constitutional law. Did *Egenberger* and *IR v JQ* give insufficient weight to such principles? As we shall see, this is a terribly complex question – far more complicated than critics of the judgements have realised – the answer to which depends on certain underlying assumptions concerning Treaty interpretation and the optimal relationship between the CJEU and the EU legislature. We will further see that the CJEU can and probably should be criticised for showing a lack of respect for principles of national constitutional law concerning the status of religious organisations, regardless of our assumptions on these underlying issues. On the other hand, the extent to which this criticism is justified depends heavily on our assumptions about, in particular, the degree of weight that should be assigned to the choices of the legislature. If the application of a principle of judicial deference to legislation was appropriate, the judgements are not manifestly flawed; if not, they violate Article 4(2) TEU or Article 17(1) TFEU (section 4.A). If, however, yielding to and enforcing the criteria set out in Article 4(2) of the Framework Directive was appropriate, the CJEU only failed to take due account of principles of national constitutional law in its interpretation of this provision (section 4.B).

A. Articles 4(2) TEU and 17(1) TFEU

Articles 4(2) TEU and 17(1) TFEU impose an obligation on the EU to respect fundamental norms of national law – the former to respect the constitutional identities of the Member States; the latter to respect norms of national law governing the status of churches and other religious associations. It is not entirely clear how the two provisions relate to each other, but the prevailing view, defended by several Advocates General, is that Article 17 TFEU 'gives specific effect to and complements the more general requirement enshrined in Article 4(2) TEU on respect for the national identity of the Member States'.[58] The CJEU has not made its position explicit but seems to hold the same view. After all, it concentrated exclusively on Article 17(1) TFEU in *Egenberger* and *IR v JQ*, even though Article 4(2) TEU also seemed relevant. Moreover, as we shall see below, both provisions are subject to the same principles of interpretation. This interpretation of Article 17(1) TFEU as a concretisation of Article 4(2) TEU is, in my view, reasonable and will therefore be followed in the following analysis.

Before addressing the criticism that the CJEU should have accommodated German constitutional law, it is useful to consider what was said about Article 17(1) TFEU in *Egenberger* and *IR v JQ*. In essence, the CJEU held that the provision does not affect the interpretation of the Framework Directive:

[56]Italics mine.

[57]See section 4.A.

[58]Case C-74/16 *Congregación de Escuelas Pías Provincia Betania*, ECLI:EU:C:2017:135, Opinion of AG Kokott, para 31; Case C-414/16 *Egenberger*, EU:C:2017:851, Opinion of AG Tanchev, para 95; Case C-193/17 *Cresco Investigation*, ECLI:EU:C:2018:614, Opinion of AG Bobek, para 23.

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> Article 17 TFEU expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities; *that article is not such as to exempt compliance with the criteria set out in Article 4(2) of Directive 2000/78* from effective judicial review.[59]

In support of this conclusion that Member States must comply with the criteria set out in Article 4(2) of the Framework Directive despite Article 17 TFEU, the CJEU observed that the latter provision had been considered during the legislative process leading to the adoption of the Directive:

> The wording of Article 17 TFEU corresponds, in essence, to that of Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Treaty of Amsterdam. The fact that Declaration No 11 is expressly mentioned in recital 24 of Directive 2000/78 shows that the EU legislature must have taken that declaration into account when adopting the directive.[60]

Thus, because the EU legislature had considered the requirements of Article 17 TFEU, the CJEU adhered to a principle of judicial deference to legislation and imposed the conditions set out in Article 4(2) of the Framework Directive on religious employers.

Two objections have been raised to the position that Article 17(1) TFEU does not affect the interpretation of Article 4(2) of the Framework Directive. First, by restricting the autonomy of religious associations, the CJEU is said to have exceeded the limits of EU competence as determined by Article 17(1) TFEU.[61] This objection is not convincing. While the status of churches and other religious associations is indeed a national competence, it is settled case law that Member States must exercise their competences in conformity with EU law.[62] Recall, in this context, the *Kreil* judgement, in which the CJEU held that the organisation of the armed forces – obviously a national competence – must be exercised with due regard to EU non-discrimination law.[63] In the same vein, it ruled in *Parris* that marital status falls within the competence of the Member States, but that this competence must be exercised in conformity with EU non-discrimination law.[64] *Egenberger* and *IR v JQ* bear striking resemblances – the status of religious associations is a national competence, but one that must be exercised in accordance with the criteria set out in Article 4(2) of the Framework Directive. In this respect, the CJEU's reasoning was predictable and rests on hardly contestable principles of interpretation. As de Witte has rightly reminded us, the 'obligations contained in an international Treaty surely restrict the exercise of state competences, without those competences themselves being transferred to the international level'.[65] It should not surprise, in other words, that matters falling within the 'competence of the Union may have a religious dimension'.[66]

The second objection is more powerful and occupies the remainder of this section: it contends that the Framework Directive should have been interpreted in accordance with Articles 17(1)

[59]*IR v JQ* para 48; *Egenberger* para 58 (italics mine).

[60]*IR v JQ* para 48; *Egenberger* para 57.

[61]For example, Greiner, 'Kirchliche Loyalitätsobliegenheiten nach dem "IR"-Urteil des EuGH'; Classen, 'Das kirchliche Arbeitsrecht unter europäischem Druck'.

[62]See, for example, Case C-267/06 *Maruko*, EU:C:2008:179, para 59; Case C-443/15 *David L Parris*, ECLI:EU:C:2016:897, para 58. For further discussion, Bruno de Witte, 'Exclusive Member State Competences – Is There Such a Thing?' in Sacha Garben and Inge Govaere (eds), *The Division of Competences Between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing 2017) 61–2.

[63]Case C-285/98, *Kreil*, ECLI:EU:C:2000:2, para 16. See also, *David L Parris*.

[64]*David L Parris* paras 57–8.

[65]de Witte, 'Exclusive Member State Competences' 62.

[66]Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (Oxford University Press 2011) 243. See also, Case C-414/16 *Egenberger*, ECLI:EU:C:2017:851, Opinion of AG Tanchev, para 98.

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TFEU and 4(2) TEU, with a view to ensuring its compatibility with EU primary law. This objection is rooted in established case law pursuant to which 'all Community acts must be interpreted in accordance with primary law as a whole' in order not to affect their validity.[67] Instead, the CJEU held in *Egenberger* and *IR v JQ* that Article 17 TFEU does not 'exempt compliance with the criteria set out in Article 4(2)'. Critics therefore claim that by failing to interpret the Framework Directive in accordance with EU primary law, the CJEU violated the EU's constitutional limits.[68] Let me explain why the issue is not as straightforward as they suggest.

Most would agree that the EU should tread carefully when its decisions risk encroaching on principles of national constitutional law, provided that these principles respect the fundamental values that form the foundation of the EU legal order as set out in Article 2 TEU.[69] However, as is generally accepted too, the obligation under Articles 17(1) TFEU and 4(2) TEU to respect the constitutional identities of the Member States – including provisions of national constitutional law governing the status of religious associations and communities – is conditional rather than absolute; it does not attribute automatic precedence to the constitutional principles of the Member States, but rather requires that a balance is struck between principles of national constitutional law and competing standards of EU law.[70] Therefore, it is not sufficient for critics of *Egenberger* and *IR v JQ* to show that these judgements affect the status of religious associations under national constitutional law. Rather, they must demonstrate that an improper balance was struck between the German constitutional principle of religious autonomy and the prohibition of discrimination under EU law.

What might seem to support such a position is that the appeal to the protection of principles of national constitutional law within the scope of application of EU primary law was brushed aside rather hastily and without further justification in *Egenberger* and *IR v JQ*. It used to be the case that the principle of proportionality was the 'common denominator for all national identity claims'.[71] As such, Member States could cite national constitutional law to justify a derogation from EU law, provided that the derogation is 'based on objective considerations and is proportionate to the legitimate objective of the national provisions'.[72] In *Egenberger* and *IR v JQ*, however, the CJEU defined the place of national constitutional identity in EU law differently, not through the application of the principle of proportionality but by adherence to the principle of judicial deference to the EU legislature. It did not weigh principles of national constitutional law against competing norms of Union law but simply held that Article 17(1) TFEU could not 'exempt compliance with the criteria set out in Article 4(2) of Directive 2000/78'. National constitutional law was not accommodated because the EU legislature had enacted the competing norm of EU law, a norm which, moreover, was meant to protect the national autonomy of the Member States albeit within the conditions set by EU non-discrimination law.

The application of a principle of judicial deference to legislation as the instrument for settling national identity claims may have fed into scepticism about *Egenberger* and *IR v JQ*. As a means of

[67]Joined cases C-402/07 and C-432/07 *Sturgeon and Others*, ECLI:EU:C:2009:716, para 48.

[68]See Heinig, 'Why *Egenberger* Could be Next'; Unruh, 'Im Spannungsfeld von Antidiskriminierung und kirchlicher Selbstbestimmung'; Thusing and Mathy, 'Das deutsche kirchliche Arbeitsrecht vor dem EuGH'.

[69]See, for example, Cloots, *National Identity in EU Law*; Armin Von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' 48 (2011) Common Market Law Review 1417; Gerhard van der Schyff, 'The Constitutional Relationship between the European Union and its Member States the Role of National Identity in Article 4(2) TEU' 37 (2012) European Law Review 563.

[70]Case C-213/07 *Michaniki*, Opinion of AG Maduro, ECLI:EU:C:2008:544, para 33; Von Bogdandy and Schill, 'Overcoming Absolute Primacy' 1441; Monica Claes, 'National Identity: Trump Card or Up for Negotiation?' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013); van der Schyff, 'The Constitutional Relationship between the European Union and its Member States'.

[71]Ana Bobić, 'Constitutional Pluralism is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice' 18 (2017) German Law Journal 1395, 1409.

[72]Case C-391/09 *Runevič-Vardyn and Wardyn*, ECLI:EU:C:2011:291, para 83; Case C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806 81; Case C-438/14 *Bogendorff*, ECLI:EU:C:2016:401, para 48.

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determining whether national constitutional law must be respected, this principle seems rather blunt in comparison with the principle of proportionality. In contrast to the principle of judicial deference, the application of the proportionality principle would allow for a more exacting review of EU law, whereby all factors relevant to determining whether it impermissibly infringes national constitutional law can be considered.[73] It should be noted, however, that *Egenberger* and *IR v JQ* are not isolated cases: the CJEU has also favoured deference to legislation in other judgements where national constitutional law was relied on to justify derogations from the application of EU law. In *Melloni*, the CJEU refused to accommodate the right to a fair trial in Spanish constitutional law because the contested norm of EU law had been adopted by the EU legislature – it effected 'a harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered in absentia, which *reflects the consensus reached by all the Member States*'.[74] In *M.A.S.*, on the other hand, it decided that the principle of legality under Italian constitutional law warranted a derogation from EU law, because 'the limitation rules applicable to criminal proceedings relating to VAT *had not been harmonised by the EU legislature*'.[75] Thus, whether priority is accorded to principles of national constitutional law depends, according to the most recent case law, not only on the substance but also on the source of the contested norm of EU law, on the EU institution that issued the norm.

It is also worth observing that these judgements seem to be part of a more general trend in the case law towards deference to the EU legislature. The case law on the free movement of persons is illustrative in this regard. First, until a few years ago, the legislative conditions under which EU citizens could claim equal access to social assistance were frequently disregarded; they were interpreted in accordance with EU primary law to expand the conditions for obtaining social assistance set out therein.[76] In recent years, however, the CJEU has followed the criteria set out in the Citizenship Directive more closely – a decision motivated by the fact that 'the principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression in Article 24 of Directive 2004/38'.[77] In other words, its decision not to interpret legislative provisions in accordance with EU primary law was based on the legislature having taken primary law – the principle of non-discrimination – into account and having established more precise conditions for its application. Second, that the CJEU seems more prepared these days to accept the constraints set out in legislation is also clear from the case law conditioning the exportability of social security benefits. In earlier case law, the CJEU at times ignored legislative provisions prohibiting their exportability by interpreting these provisions in light of principles of EU primary law.[78] By contrast, in more recent case law it has

[73]Which may explain why many favour the use of the principle of proportionality, Von Bogdandy and Schill (n 71) 1441; van der Schyff, 'The Constitutional Relationship between the European Union and its Member States' 579; François-Xavier Millet, 'The Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (1st ed, Oxford University Press 2014) 263; Theodore Konstadinides, 'Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse' 34 (2015) Yearbook of European Law 127.

[74]Case C-399/11 *Melloni*, ECLI:EU:C:2013:107, para 62 (italics mine). See also, Case C-399/11, *Melloni*, ECLI:EU:C:2012:600, Opinion of AG Bot, para 126.

[75]Case C-42/17, *M.A.S. and M.B.*, ECLI:EU:C:2017:936, para 44 (italics mine). For a good analysis of both decisions, Clara Rauchegger, 'National Constitutional Rights and the Primacy of EU Law: M.A.S.' 55 (2018) Common Market Law Review 1521.

[76]Among them, Joined cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, ECLI:EU:C:2009:344; Case C-413/99 *Baumbast*, ECLI:EU:C:2002:493; Case C-184/99 *Grzelczyk*, ECLI:EU:C:2001:458.

[77]Case C-333/13 *Dano*, ECLI:EU:C:2014:2358, para 62. See also, Case C-67/14 *Alimanovic*, ECLI:EU:C:2015:597; Case C-299/14 *García-Nieto*, ECLI:EU:C:2016:114. For extensive discussion of these developments, Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' 52 (2015) Common Market Law Review 889; Daniel Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' 52 (2015) Common Market Law Review 17.

[78]Case C-287/05 *Hendrix*, ECLI:EU:C:2007:494, paras 52; Case C-406/04 *De Cuyper*, ECLI:EU:C:2006:491, para 39; Case C-228/07 *Petersen*, ECLI:EU:C:2008:494, para 52.

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enforced legislation more strictly, as another approach 'would ultimately undermine the very fabric of the system which Regulation 1408/71 sought to establish'.[79]

Although some of the above judgements have attracted serious criticism, it is hardly surprising that the CJEU exercises judicial deference and self-restraint, two judicial virtues that every court should display when applying the law.[80] It is sometimes assumed that adjudication by the CJEU must, as the case law of the European Court of Human Rights (ECtHR), 'start from a position of deference' to national institutions.[81] Yet such an assumption of equivalence ignores the fact that the CJEU and ECtHR are very different courts, embedded in an entirely different institutional context. Crucially, the CJEU exercises authority not just vertically vis-à-vis national institutions, but also horizontally relative to other EU institutions, including the legislative process. Moreover, the EU can only effectively realise its objectives through a joint course of action that binds all Member States, and the most effective way of determining this course of action is through the legislative harmonisation of national standards. It would thus be very hard for the EU to realise its objectives if the CJEU were to start from a position of deference to national institutions each time they act contrary to the choices of the EU legislature. On the contrary, for reasons of institutional legitimacy and institutional capacity, it is justified to adopt a position of deference to the EU legislature.[82]

It is not, however, my intention to reopen this debate, for the more specific question that interests me here is whether deference to the EU legislature is also virtuous when its decisions encroach on the constitutional principles of the Member States – clearly a very controversial approach in a very controversial area of EU law. As I will explain, the use of a principle of judicial deference to legislation seems, under specific conditions at least, an appropriate way of deciding national identity claims. This should also explain why the CJEU's decision in *Egenberger* and *IR v JQ* to adhere to a principle of deference seems justifiable.

EU law can outweigh national constitutional identities for various reasons. For example, it is generally accepted that Member States cannot rely on their national identities to justify conduct that violates the fundamental values enshrined in Article 2 TEU – human dignity, freedom, democracy, equality, the rule of law and respect for human rights.[83] But even when national constitutional principles are in accordance with these fundamental values, there may be valid reasons for according precedence to EU law. For instance, another reason for not automatically giving priority to a Member State's constitutional choices is that they might harm the citizens of other Member States or run counter to the collective interest of the EU as a whole. *Melloni*

[79]Case C-211/08, *Commission v Spain*, ECLI:EU:C:2010:340, para 79. See also, Case C-208/07 *von Chamier-Glisczinski*, ECLI:EU:C:2009:455, paras 64–5; Case C-345/09 *van Delft*, ECLI:EU:C:2010:610. For excellent analysis, Herwig Verschueren, 'The EU Social Security Co-Ordination System: A Close Interplay between the EU Legislature and Judiciary' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012); Nicolas Rennuy, 'The Emergence of a Parallel System of Social Security Coordination' 50 (2013) Common Market Law Review 1221.

[80]Jan Zglinski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020).

[81]Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' 17 (2011) European Law Journal 80, 115. See also, Zglinski (n 82) 159.

[82]Jeff King, *Judging Social Rights* (Cambridge University Press 2012) 130, including the literature referred to. For discussion of arguments in favour of judicial self-restraint in the interpretation of EU legislative decisions, Martijn van den Brink, 'The European Union's Demoicratic Legislature' International Journal of Constitutional Law (forthcoming); Gareth Davies, 'Legislative Control of the European Court of Justice' 51 (2014) Common Market Law Review 1579; Phil Syrpis, 'The Relationship Between Primary and Secondary Law in the EU' 52 (2015) Common Market Law Review 461.

[83]For example, Armin von Bogdandy and others, 'Guest Editorial: A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines' 55 (2018) Common Market Law Review 983; Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' 15 (2019) European Constitutional Law Review 391; Christian Calliess and Anita Schnettger, 'The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (2019) 365–7.

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provides a good example that illustrates this point: the EU could not effectively tackle cross-border crime if Member States could refuse to extradite their nationals as a matter of national constitutional law. *Coman* does so too: the EU would not be able to ensure the free movement of all EU citizens if respect must be owed to constitutional norms that refuse to recognise marriage between same-sex couples.[84] Other examples could be given, but the point should be clear: the EU's capacity to take into account and defend interests that are not represented in national decision-making processes would be undermined if Member State constitutional identities would automatically outweigh other transnational interests.[85] This is not to say that EU law must automatically prevail; it merely shows why a fair balance must be found between the competing interests pursued by the EU as a whole and by the Member States individually.

As Claes has observed, finding this balance requires that 'all available channels for communication and conversation are used'.[86] Logically speaking, this includes the EU legislative process.[87] That is, it seems only natural that the CJEU should take legislative decisions into account when assessing whether EU law should accommodate national constitutional law. The EU legislature provides a forum, however imperfect, in which the interests of the individual national peoples and of the citizens of the European Union are represented, and where a compromise can be found between the different and sometimes conflicting national and European societal goods. Member States can pursue their individual interests and defend their own fundamental social choices within the legislative process, but not unilaterally, prejudicing the citizens of other Member States or the interests of the Union as a whole.[88] It forces Member States to negotiate their interests within the constraints imposed by the supranational environment in which the legislative process is embedded. The legislative process may in many respects be imperfect, but the alternatives do not seem to offer a fairer representation of the interests involved in European integration.[89] This is why legislature may be considered, at least prima facie, to provide a fair basis for defining the place of national constitutional identity in EU law, and why it is appropriate for the CJEU to assign significant weight to legislative decisions in cases where national constitutional law is in danger of being affected.

Yet, the crucial question seems to be not whether judicial deference to legislative acts that encroach on a Member State's constitutional identity is ever justified, but under which conditions it is. A full examination of this question is beyond this article's remit; I will just note that, if ever it is justified, it will be under the two conditions set out by the CJEU in its case law. In *Melloni*, it motivated its decision to exercise deference by pointing out that the legislative act reflected the consensus reached by all Member States.[90] In *Egenberger*, it did so on the basis that the legislature had taken into account national constitutional law (i.e., the status of churches and other religious organisations under national law).[91] Especially when both conditions are met – the legislature has taken into account national constitutional norms and the legislative action has been agreed upon

[84]Case C-673/17 *Coman and Others*, ECLI:EU:C:2018:385.

[85]Floris de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law' 50 (2013) Common Market Law Review 1545.

[86]Claes, 'National Identity' 123.

[87]See also, Cloots, *National Identity in EU Law* 196; M Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?' 33 (2014) Yearbook of European Law 298, 323.

[88]Francis Cheneval, Sandra Lavenex and Frank Schimmelfennig, '*Demoi*-Cracy in the European Union: Principles, Institutions, Policies' 22 (2015) Journal of European Public Policy 1; Francis Cheneval and Kalypso Nicolaidis, 'The Social Construction of Demoicracy in the European Union' 16 (2017) European Journal of Political Theory 235; van den Brink, 'The European Union's Demoicratic Legislature'.

[89]On comparing imperfect alternatives, Neil K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1997); Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press 2006).

[90]Case C-399/11 *Melloni*, ECLI:EU:C:2013:107, para 62 (italics mine). See also, Case C-399/11, *Melloni*, ECLI:EU:C:2012:600, Opinion of AG Bot, para 126.

[91]*Egenberger* para 57.

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by all Member States affected – deference to the choices of the legislature seems reasonable and appropriate. Such circumstances at least warrant a heightened degree of judicial deference. This, of course, leaves open the question of what degree of deference is appropriate if one of these two conditions has not been met, but this question is not relevant to our assessment of the scope of the religious ethos exemption in EU law. The EU legislature had considered the status under national law of churches and other religious associations and its act, the Framework Directive, reflects the consensus of all Member States. This gives us reason to believe that the CJEU's use of a principle of judicial deference to legislation as an instrument for deciding national identity claims in *Egenberger* and *IR v JQ* was reasonable.

B. National constitutional law in the Framework Directive

It may seem as if adhering to a principle of judicial deference to legislation will be damaging to national constitutional identities, but this does not need to be the case. First, as we saw in the *M.A.S.* judgement, adherence to this principle means that the CJEU will be more inclined to respect national constitutional law when there is no harmonising legislation in place. Moreover, if the CJEU is committed to this principle (i.e., to respecting the constraints set out in legislation), it should yield to principles of national constitutional law where legislation so provides. This seems to follow from settled case law, according to which provisions of EU law that make 'no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation'.[92] Inversely, Member States should be entitled to interpret EU law in light of their national law where legislation makes express reference to it.[93] It would be inconsistent and unprincipled if the CJEU were to apply only those legislative criteria that limit the authority of the Member States and to disregard legislative provisions that leave room for national difference.

There lies the main problem with the CJEU's reasoning in *Egenberger* and *IR v JQ*. It held that Article 17(1) does not exempt compliance with the criteria set out in Article 4(2) of the Framework Directive, but then applied those criteria selectively. It ignored the part of this provision that refers to national constitutional law. As we have seen, Article 4(2) not just provides that it applies on the condition that religion or belief constitute 'a genuine, legitimate and justified occupational requirement', but refers to national constitutional law twice – the first paragraph states that it 'shall be implemented taking account of Member States' constitutional provisions and principles'; the second paragraph that:

> Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

And while the criteria encroaching on national constitutional law – genuine, legitimate and justified – were strictly adhered to, the CJEU said nothing about provisions of national constitutional law despite the references thereto in Article 4(2). The judgements are therefore vulnerable to the criticism that they applied the conditions set out in this provision partially and selectively. In view of the broad meaning accorded to the principle of religious autonomy in German constitutional

[92]Case C-195/06 *Österreichischer* Rundfunk, ECLI:EU:C:2007:613, para. 24; C-66/08 *Kozłowski*, ECLI:EU:C:2008:437, para 42; Case C-400/10 PPU *McB*, ECLI:EU:C:2010:582, para 41. See for further discussion, Cloots, *National Identity in EU Law* 337–40.

[93]Which seems to have been the approach followed in Case C-51/15, *Remondis*, EU:C:2016:985, paras 40–1.

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law, the CJEU should have clarified what, within the meaning of Article 4(2), it means to take national constitutional law into account.[94]

Having said that, it is not evident that the CJEU should have reached a different conclusion in *Egenberger* and *IR v JQ* if it had interpreted Article 4(2) by reference to national constitutional law. First, the judgements respect the second paragraph of Article 4(2). According to Greiner, this paragraph must be read as *lex specialis* to the first paragraph, supporting the autonomy of the Member States in determining the internal autonomy of the established churches and their institutions.[95] This interpretation is incorrect: the second paragraph has no value at all and is merely stating the obvious. It says that the Directive will not prejudice the right of churches and other employers with an ethos based on religion and belief, 'provided that its provisions are otherwise complied with'. But that goes without saying: provisions of EU law do not prejudice anything provided they are otherwise complied with. So, contrary to what might appear at first sight, the second paragraph of Article 4(2) does not exempt religious employers from EU non-discrimination law, nor does it authorise them to define their own sphere of autonomy or to determine independently when religion is an appropriate occupational requirement.[96] It does not alter the meaning of the Directive at all, so does not need to be considered in determining which matters are within the internal autonomy of religious organisations.

This is different with regard to the statement in the first paragraph that provisions of national constitutional law shall, in the interpretation of Article 4(2), be taken into account. The CJEU failed to address this criterion. More specifically, it failed to clarify how its decision took account of the German principle of religious autonomy and how national courts may take into account national constitutional law. But while this omission exhibits the sort of incoherence that critics of *Egenberger* and *IR v JQ* may rightly draw attention to, taking into account principles of national constitutional law is not the same, of course, as preserving or protecting such principles. In this regard, it must be noted that it would be impossible to fully respect national constitutional law while ensuring that the use of religion is a genuine, legitimate, and justified occupational requirement. It just so happens that certain national constitutional courts – including the German Constitutional Court – take such a broad view of the principle of religious autonomy that employers can use religion as an occupational requirement in situations where it is not genuine, legitimate or justified. Article 4(2) requires that provisions of national constitutional law be considered, not necessarily that they are complied with; the latter interpretation cannot be reconciled with the other conditions set out in that provision.

That poses the question of what it means and requires to take national constitutional provisions and principles into account. First, the CJEU must at least show that it is conscious of what is at stake (i.e., that it is aware of the fact that its decisions may affect fundamental norms of domestic law). The dissatisfaction with *Egenberger* and *IR v JQ* is undoubtedly partly due to the CJEU just ignoring the status of churches and other religious organisations in German constitutional law. Second, it must explain how it takes into account principles of domestic constitutional law, and it must offer sound reasons for decisions that do not accommodate such principles. Why does it consider deference to the legislature's choices justified and why were principles of national constitutional law not upheld even though legislation requires these principles to be taken into account? We may expect the CJEU to have considered such questions, but also to give clear and considered answers thereto. Finally, it seems appropriate to interpret Article 4(2) as giving national constitutional principles on the status of religious organisations the benefit of the doubt when it is

[94]Given that AG Tanchev reflected on the issue in his Opinion in *Egenberger* paras 63–4, the CJEU must have known about this.

[95]Greiner, 'Kirchliche Loyalitätsobliegenheiten nach dem "IR"-Urteil des EuGH'; Stefan Greiner, 'Konsequenzen aus der EuGH-/BAG-Rechtsprechung zur Kirchenmitgliedschaft als Einstellungs- bzw. Kündigungskriterium' in Hermann Reichold (ed), *Kirchliches Arbeitsrecht auf neuen Wegen: Reformbedarf im Recht der Loyalitätsobliegenheiten und in der Pflege* (LIT Verlag 2020) 17.

[96]See also, *IR v JQ* para 46.

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unclear whether the other criteria set out in this provision are met. However, surely there is an important difference between providing some leeway to national constitutional law and complete deference thereto. *Egenberger* and *IR v JQ* are not sufficiently motivated as concerns the EU's obligation to respect national constitutional law, but it does not seem unreasonable that Article 4(2) was interpreted as restricting the principle of religious autonomy under German constitutional law.

5. The legal status of concordats under EU law

In addition to Article 4 of the Framework Directive and the interaction between EU law and national constitutional law, the third determinant of the scope of the religious ethos exemption in EU law is the relationship between EU law and international law. This third determinant was not at issue in *Egenberger* and *IR v JQ*, but must nonetheless be considered if we are to determine when religious organisations may discriminate against non-adherents. This is because the legal status of religious organisations is partly governed by legal agreements between the Member States and these organisations. Such agreements regulate matters as diverse as the provision of pastoral care in the army and prison, the imposition and collection of church taxes, and the involvement of religious organisations in providing social welfare. Of these agreements, those concluded with the Catholic Church are in a way unique: such 'concordats' are concluded with the Holy See and thus have treaty status under international law.[97] Catholic organisations that may not receive the protection they desire under EU law, via Article 4(2) of the Framework Directive or national constitutional identity, may therefore wish to invoke international law to protect their internal autonomy. Of course, these concordats are binding only on the parties that have signed them – the Member States or their respective regions and the Holy See – but due to the 'triangular status' between national, international, and EU law, their legal status within the national legal orders depends on the relationship between EU law and international law.[98] Thus, insofar as concordats regulate activities falling within the scope of the Framework Directive, the Directive's application to the employment practices of Catholic employers will depend on the position of international law in relation to EU law.[99] This is why it is necessary to consider this relationship.

Around a dozen Member States have signed multiple agreements with the Holy See. Many of these concordats are not of interest to us, however, for the simple reason that they do not concern employment and occupation. For instance, many concordats deal with the civil status of marriages contracted under Canon law or the financing of the Catholic Church and their activities through state taxes. Moreover, concordats dealing with employment often regulate only specific employment activities that already are exempt by Article 4(2) of the Framework Directive from the prohibition of discrimination – for example, concordats regulating religious education in Catholic schools. So, only where concordats grant Catholic employers privileges that are contrary to the provisions of the Framework Directive, the question of the relationship between EU law and international law is pertinent.

The relevant Treaty provision in this regard is Article 351 TFEU, on the status of prior agreements of the member states with third countries:

[97]That the status of the Holy See amounts to statehood will be assumed to be correct but is not universally accepted. John R Morss, 'The International Legal Status of the Vatican/Holy See Complex' 26 (2015) European Journal of International Law 927.

[98]Katja S Ziegler, 'The Relationship between EU Law and International Law' in Dennis M Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (John Wiley & Sons, Inc 2016) 43.

[99]See also, Peter M Huber, 'Konkordate und Kirchenverträge unter Europeänisierungsdruck?' (2008) Archiv für katholisches Kirchenrecht 411.

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> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned will take all appropriate steps to eliminate the incompatibilities established. Member States will, where necessary, assist each other to this end and will, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States will take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

This section studies the interpretation of this provision by the CJEU in order to determine whether and under what conditions concordats concluded by the Member States exempt Catholic employers from the obligations under EU non-discrimination law.

According to the CJEU, Article 351 TFEU allows 'the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder'.[100] EU institutions cannot 'impede the performance of the obligations of Member States which stem from a prior agreement'.[101] To this end, it ruled in *Minne* that secondary legislation 'cannot apply to the extent to which [incompatible] national provisions were adopted in order to ensure the performance by the Member State of obligations arising under an international agreement concluded with non-member countries'.[102] In effect, therefore, Article 351 TFEU 'allows a derogation from the principle of primacy of EU law',[103] which also applies, of course, to agreements concluded by Member States with the Holy See. To be clear, concordats do not bind the EU as regard to the third country in question. One condition for the EU to be bound by an international agreement to which it is not a party is that all Member States are parties to that agreement,[104] which is not the case as far as concordats are concerned. Thus, the fact that some Member States have concluded agreements with the Holy See on the rights and privileges of the Catholic Church does not prevent the EU from adopting non-discrimination legislation bearing on the Catholic Church. Such legislation just does not abrogate the obligations of Member States under a prior agreement with the Holy See, so the Framework Directive cannot limit the application of provisions of national law adopted to ensure that the obligations arising under a concordat are met.

As Article 351 TFEU states clearly, it applies only to international agreements concluded with third countries 'before 1 January 1958 or, for acceding States, before the date of their accession'. Concordats not concluded before that date do not justify non-compliance, therefore, with the obligations under EU non-discrimination law. For instance, Portugal and Slovakia concluded their concordats mid-May 2014,[105] after their date of accession – in the case of Slovakia, only two weeks

[100]Case C-264/09 *European Commission v Slovak Republic*, ECLI:EU:C:2011:580, para 41; Case C-84/98 *European Commission v Portuguese Republic*, ECLI:EU:C:2000:359, para 53; Case C-812/79 *Burgoa*, ECLI:EU:C:1980:231, para 8.

[101]*Burgoa* (n 102) para 9.

[102]Case C-13/93 *Minne*, ECLI:EU:C:1994:39, para 19. See also, Case C-158/91 *Levy*, ECLI:EU:C:1993:332, para 22.

[103]Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' 34 (2011) Fordham International Law Journal 1304, 1321.

[104]Case C-135/10 *Società Consortile Fonografici*, ECLI:EU:C:2012:140, para 41; Case C-188/07 *Commune de Mesquer*, ECLI:EU:C:2008:359, para. 85. For further discussion, Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (2014) 109–16; Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 2065–79.

[105]For a complete list see, <https://www.iuscangreg.it/accordi_santa_sede.php> (last accessed 14 April 2021).

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after its accession – and will thus not exempt these countries from compliance with the Framework Directive.[106] On the other hand, most Member States that have signed an agreement with the Holy See did so prior to 1958 or their accession to the EU. For example, the 1933 *Reichskonkordat* concluded between the Holy See and the then-emerging Nazi regime is still in force,[107] as is the concordat signed that same year by the fascist regime of Austria. These agreements grant extensive rights and privileges to the Catholic Church and would allow Germany and Austria to invoke a derogation from EU non-discrimination law *if* it would affect the rights the Church enjoys under these agreements. To illustrate this point, it might be that the defendant in *IR v JQ* – Caritas, a humanitarian and social welfare organisation under the control of the Catholic Church – could invoke Article 351 TFEU to claim an exemption from EU non-discrimination, but not the defendant in *Egenberger*, the Protestant Church. After all, agreements signed with the Protestant Church have no treaty status under international law.

Yet, contrary to what Article 351 TFEU may seem to suggest, prior agreements concluded with third countries do not enjoy unconditional primacy over EU law. Based on a contextual interpretation of Article 351 TFEU,[108] the CJEU found in *Kadi* that it 'may in no circumstances permit any challenge to the principles that form part of the very foundations of the [EU] legal order'.[109] Hence, Member States cannot oppose the application of EU non-discrimination law on the basis of concordats that violate the fundamental values laid down in Article 2 TEU,[110] including basic human rights and core principles of liberal democracy. However, it is not clear that concordats have this effect. Although equality is among the foundational principles listed in Article 2 TEU, and concordats may be a contributing factor to discrimination by institutions under the control of the Catholic Church, it is probably not the case that every restriction on the principle of equality automatically contravenes Article 2 TEU. Indeed, it is unlikely that Member State will automatically infringe the values enshrined in Article 2 TEU by not giving full effect to the principle of equality. Ultimately, it will be for the CJEU to determine whether Article 351 TFEU can be invoked to uphold the rights that the Catholic Church derives from prior agreements concluded by the Member States with the Holy See, but at first glance, it seems unlikely that Article 2 TEU would prevent this.

But the protection afforded by Article 351 TFEU to prior agreements is limited by another obligation: Member States must renegotiate commitments with third countries that are incompatible with EU law. The second paragraph of Article 351 TFEU provides that, 'to the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established'. It follows from the case law of the CJEU that this is a strict obligation: a failure to comply with the obligation cannot be justified by reference to extraordinary difficulties in renegotiating the agreement with a third country. If a Member State is not in a position 'to adjust an agreement, it must denounce the

[106]That is also the case when the new agreement is a renegotiation of the old agreement. 'The Member States are prevented not only from contracting new international commitments but also from maintaining such commitments in force if they infringe Community law'. Case C-467/98 *European Commission v Kingdom of Denmark*, ECLI:EU:C:2002:625, para 39.

[107]For excellent further reading, Ernst-Wolfgang Böckenförde, Mirjam Künkler and Tine Stein, *Religion, Law, and Democracy: Selected Writings Vol II* (Oxford University Press 2020) chapter 2. See also, Frank J Coppa (ed), *Controversial Concordats: The Vatican's Relations with Napoleon, Mussolini, and Hitler* (Catholic University of America Press 1999).

[108]On contextual interpretation, Case C-283/81 *CILFIT*, ECLI:EU:C:1982:335, para 20. See further, Anthony Arnull, *The European Union and Its Court of Justice* (2nd ed, Oxford University Press 2006) 608.

[109]Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, ECLI:EU:C:2008:461, para 304. For discussion, Gráinne De Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' 51 (2010) Harvard International Law Journal 1; N Türküler Isiksel, 'Fundamental Rights in the EU after Kadi and Al Barakaat' 16 (2010) European Law Journal 27.

[110]Pieter Jan Kuijper and others, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (2nd ed, Oxford University Press 2015) 799–800; Ziegler, 'The Relationship between EU Law and International Law' 49.

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agreement'.[111] Therefore, those Member States whose obligations towards the Holy See are, following the judgements in *Egenberger* and *IR v JQ*, incompatible with Article 4(2) of the Framework Directive will be required to renegotiate these commitments and to eliminate the incompatibilities with this provision. In the event that this proves impossible, they will be required to denounce their concordats to ensure the full effectiveness of EU non-discrimination law. In renegotiating their commitments, Member States will, according to Article 351 TFEU, 'where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude'. The Commission may be tasked with the responsibility 'to take any steps which may facilitate mutual assistance between the Member States concerned and their adoption of a common attitude'.[112] For now, Article 351 TFEU will exempt Catholic organisations from the prohibition of discrimination on grounds of religion and belief in so far as their right to discriminate against non-adherents is governed by an agreement with the Holy See, but prior international commitments that have an impact on the scope of the religious ethos exemption should not create a permanent derogation from EU non-discrimination law.

6. Conclusion

This article has sought to clarify the scope of the exemption of employers with an ethos based on religion and belief from the prohibition of discrimination on grounds of religion and belief in EU law. In doing so, it has attempted to shed light on several questions of EU constitutional law. The judgements in the *Egenberger* and *IR v JQ* cases show that the relationship between EU and national constitutional law remains a delicate issue, although these judgements have also raised questions about the limits of EU competence. The criticism that the CJEU exceeded these limits turned out to be incorrect. The status of churches and other religious associations is indeed within the competence of the Member States, but it should not be controversial that this competence must be exercised in accordance with EU non-discrimination. However, whether the CJEU assigned sufficient weight to principles of national constitutional law in its decisions is a more delicate question, whose answer depends on certain prior assumptions such as on the proper domain of legislative authority. As explained, we have good reasons to think that the application of a principle of judicial deference to legislation can be justified where legislation may affect the constitutional identities of the Member States, especially under specific conditions that are met by the Framework Directive. But the judgements in *Egenberger* and *IR v JQ* also show the importance of further discussion on the proper place of national constitutional identity in EU law and on the responsibilities of the legislature in defining that place.

The scope of the religious ethos exemption depends in total on three factors: in addition to the interaction between EU law and national constitutional law, it depends on the interpretation of Article 4 of the Framework Directive and on the interaction between EU and international law.

There is no single correct interpretation of these factors and thus of the scope of the exemption, but the latter two factors are significantly less controversial than the relationship between EU law and national constitutional law. What seems clear and relatively uncontroversial is that the occupational requirement exception in Article 4(1) of the Framework Directive is narrow in scope: it allows discrimination against non-adherents only when sharing the employer's religious ethos is strictly necessary for the performance of a function, for example, when it involves teaching or promoting religious beliefs. What also seems fairly uncontroversial is that derogations from EU non-discrimination law caused by prior international agreements with the Holy See cannot be permanent; they must be eliminated by renegotiating the agreements. Disagreement on the precise scope of the religious ethos exemption will relate primarily to the meaning of

[111]Case C-170/98 *European Commission v Kingdom of Belgium*, ECLI:EU:C:1999:411, para 42.

[112]Case C-205/06 *European Commission v Republic of Austria*, ECLI:EU:C:2009:118, para 44; Case C-294/06 *European Commission v Republic of Sweden*, ECLI:EU:C:2009:119, para 44.

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Article 4(2) and, in that connection, the respect that must be shown to principles of national constitutional law. It is to be hoped that the CJEU will find the opportunity to find more satisfactory answers to the questions this provision raises in future cases.

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THE EUROPEAN RISK-BASED APPROACHES: CONNECTING CONSTITUTIONAL DOTS IN THE DIGITAL AGE

GIOVANNI DE GREGORIO AND PIETRO DUNN*

Abstract

In recent years, risk has become a proxy and a parameter characterizing EU regulation of digital technologies. Nonetheless, EU risk-based regulation in the digital age is multi-faceted in the approaches it takes. This article considers three examples: the General Data Protection Regulation; the proposal for the Digital Services Act; and the proposal for the Artificial Intelligence Act. These three instruments move across a spectrum, from a bottom-up approach (the GDPR) to a top-down architecture (the AI Act), going through an intermediate stage (the DSA). It is argued, however, that despite the different methods, the three instruments share a common objective and project: they all seek to guarantee an optimal balance between innovation and the protection of rights, in line with the developing features of European (digital) constitutionalism. Through this lens, it is thus possible to grasp the "fil rouge" behind the GDPR, the DSA and the AI Act as they express a common constitutional aspiration and direction.

1. Introduction

Technologies have always provided opportunities, while raising challenges requiring regulators to find a balance between fostering innovation and mitigating risks. Throughout history, technologies have been used to achieve and serve various purposes, providing, on the one hand, new phases for societal growth and questioning, on the other hand, the *status quo*.

Digital technologies are no exception. The Union thus faces new regulatory challenges in the algorithmic society, where large multinational social platforms sit between traditional nation States and ordinary individuals, and

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where algorithms and AI agents are employed by public and private actors.[1] Although digitized systems and environments have brought with them great societal advantages, they have also given rise to unprecedented communication systems and networks which amplify risk.[2] COVID-19 has greatly accelerated this process, by making the digital environment more necessary than ever.[3] Moreover, 21st century technologies have also reset the terms of a range of individual fundamental rights and liberties (e.g. privacy and data protection, freedom of expression, non-discrimination, etc.), *vis-à-vis* both public institutions and private actors.[4]

In this context, the term "risk" has been defined in many ways.[5] A vernacular interpretation identifies it with a danger which may or may not take place, and which can only be foreseen to a certain extent. More technically, however, risk is a combination of the probability of a defined hazard occurring and the magnitude of the consequences that hazard may entail.[6] Risk can thus serve as a proxy for decision-making, based on the forecasting of future positive and negative events.[7] This assessment is mainly done through the practices of risk analysis (or risk management), that is, through a set of methodologies, templates, and processes meant to help make rational decisions based on potential future opportunities or threats.[8] In other words,

1. Balkin, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", 51 *UC Davis Law Review* (2018), 1149–1210.

2. Lupton, "Digital risk society" in Burgess, Alemanno and Zinn (Eds.), *Routledge Handbook of Risk Studies* (Routledge, 2016), pp. 301–309. With respect to the specific challenges posed by digital technologies to competition law, see Sørensen, "Digitalisation: An opportunity or a risk?", 9 JECLAP (2018), 349–350.

3. Buil-Gil et al., "Cybercrime and shifts in opportunities during COVID-19: A preliminary analysis in the UK", 23 *European Societies* (2020), S47–S59.

4. Van Dijck, "Datafication, dataism and dataveillance: Big data between scientific paradigm and ideology", 12 *Surveillance & Society* (2014), 197–208; Zuboff, *The Age of Surveillance Capitalism. The Fight for a Future at the New Frontier of Power* (PublicAffairs, 2019); Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge University Press, 2019); Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (New York University Press, 2018); De Gregorio, "From constitutional freedoms to the power of the platforms: Protecting fundamental rights online in the algorithmic society", 11 *European Journal of Legal Studies* (2019), 65–103; Pollicino, *Judicial Protection of Fundamental Rights on the Internet* (Hart, 2021).

5. Gellert, "Understanding the notion of risk in the General Data Protection Regulation", 34 *Computer Law & Security Review* (2018), 279–288, at 280.

6. Gellert, *The Risk-Based Approach to Data Protection* (OUP, 2020), p. 27.

7. Ibid., at p. 28. On this point, see also Bernstein, *Against the Gods. The Remarkable Story of Risk* (John Wiley & Sons, 1996).

8. Risk analysis encompasses two steps: the first one is risk assessment, i.e. the measurement of risk itself, which represents the scientific and quantitative component; the second one, i.e. risk management (*stricto sensu*), is the policy component and consists of the decisional phase. On this point, see Gellert, op. cit. *supra* note 5, at 280; Hutter, "Risk, regulation, and management" in Taylor-Gooby and Zinn (Eds.), *Risk in Social Science* (OUP,

assessing risk leads to a degree of certainty based on probabilistic logics. Coherently, risk regulation can be perceived as an attempt to face the rise of what has been defined as the "risk society",[9] through a rational and technocratic approach that fosters more efficient, objective, and fair governance,[10] whilst fighting against "over-regulation, legalistic and prescriptive rules, and the high costs of regulation".[11] In fact, risk may be employed differently as a parameter to structure regulation depending on the ultimate goal of the regulator, which could be that of eliminating all risks, of simply reducing them to an acceptable level, of reducing them until costs become unbearable or, finally, of striking a proportionate balance between risks and costs of regulation.[12] As will be argued in the following sections, the latter perspective is the one characterizing precisely the development of the EU's risk-based policies in the digital age.

Within this framework, "risk regulation" is a broad term, often conflated with "risk-based regulation". In this respect, Quelle suggests a categorization based on the actual role played by risk.[13] "Risk regulation", *stricto sensu*, would thus identify more precisely those cases where risk is ultimately the object of regulation itself, and thus functions as the rationale behind governmental intervention. In this sense, "risk regulation" would be identifiable as a "governmental interference with market or social processes to control potential adverse consequences".[14] Conversely, "risk-based regulation" uses risk as a tool to prioritize and target enforcement action in a manner that is proportionate to an actual hazard: in other words, it tends to "calibrate" the enforcement of the law based on concrete risk scores.[15] In this

2006), pp. 202–227. As highlighted by Alemanno, "Regulating the European risk society" in Alemanno et al. (Eds.), *Better Business Regulation in a Risk Society* (Springer, 2013), pp. 37–56, at p. 53, EU law also recognizes risk communication as a third component, which essentially entails "providing information on levels of health, safety, and environmental risks, their significance, and their management".

9. Beck, *Risk Society. Towards a New Modernity* (Ritter tr., Sage Publications, 1992).

10. Hutter, "A risk regulation perspective on regulatory excellence" in Coglianese (Ed.), *Achieving Regulatory Excellence* (Brookings Institution Press, 2017), pp. 101–114.

11. Macenaite, "The 'riskification' of European data protection law through a two-fold shift", 8 EJRR (2017), 506–540, at 509. See also Black, "The emergence of risk-based regulation and the new public risk management in the United Kingdom", (2005) *Public Law*, 510–546, at 512.

12. Coglianese, "The law and economics of risk regulation", *University of Pennsylvania, Institute for Law & Economics Research Paper No. 20-18*, (2020) at p. 9.

13. Quelle, "Enhancing compliance under the General Data Protection Regulation: The risky upshot of the accountability and risk-based approach", 9 EJRR (2018), 502–526, at 509.

14. Hood, Rothstein and Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (OUP, 2001), at p. 3.

15. Quelle, op. cit. *supra* note 13.

context, laws might merge together these two aspects, by governing risk through a risk-based approach.

Different approaches to risk regulation have already been developed in Europe.[16] Indeed, in recent decades, risk as an approach to public governance and regulation has, in general, gathered increasing momentum across all Western countries.[17] In the UK, as highlighted by Black, risk management had already become a key feature in developing regulation during the first decade of the 21st century.[18] The same process has recently affected EU law as well.[19] According to Macenaite,[20] risk regulation initially developed as a response to the risks to the environment and to human health and safety stemming from new technologies or industries. Subsequently, its scope of action grew and came to encompass a wider range of fields.[21]

Since the launch of the Digital Single Market Strategy,[22] the Union has increasingly relied on a risk-based approach. Rather than just setting new rights and safeguards, the Union has tried to regulate risks by increasing the accountability of both public and private actors with respect to the risks and potential collateral effects resulting from their activities. The emergence of the risk-based approach within the EU's digital policies is particularly evident when considering the recent legislative developments concerning the fields of data, online content, and artificial intelligence. Nonetheless, the way such an approach has been articulated varies significantly.

The General Data Protection Regulation (GDPR) follows a bottom-up perspective, in the sense that the evaluation of risk and the choice of mitigating measures are not defined by the law, but are primarily left to the discretion of the targets of regulation themselves, i.e. to data controllers and processors. In this sense, as will be further highlighted below, the principle of accountability is the result of a legislative strategy aiming to greatly reduce the imposition of duties coming from "above".[23] Quite the opposite, the proposed Artificial

16. Macenaite, op. cit. *supra* note 11.

17. Van der Heijden, "Risk as an approach to regulatory governance: An evidence synthesis and research agenda", 11 *Sage Open* (2021), available at <doi.org/10.1177%2F2158244021103220 2>, (all websites last visited 24 Jan. 2022).

18. Black, op. cit. *supra* note 11.

19. See, among others, Vieweg, "Risk and the regulatory State – various aspects regarding safety and security in the fields of technology and health" in Micklitz and Tridimas (Eds.), *Risk and EU Law* (Edward Elgar, 2015), pp. 19–32.

20. Macenaite, op. cit. *supra* note 11, 508–509.

21. Cf. Alemanno, op. cit. *supra* note 8.

22. COM(2015)192 final, "A Digital Single Market Strategy for Europe".

23. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), O.J. 2016, L 119/1.

Intelligence Act (AI Act) takes a very different point of view, in that, although it provides for very different degrees of responsibility and imposes differentiated duties depending on the risk scores of regulated AI systems, it does not leave the task of evaluating such risk scores to the targets of regulation: in fact, it is the AI Act itself that, on a top-down basis, identifies directly the various categories of risk.[24] Finally, in the field of online content, the Digital Services Act (DSA) aims at creating a hybrid system, which mixes the two opposite perspectives of the GDPR and the AI Act by identifying on a top-down basis four risk categories for providers of intermediary services, while leaving them ample leeway to choose which measures to employ to reduce the negative externalities their activities entail. In particular, as will be highlighted in the following sections, the DSA suggests that "very large online platforms" make frequent impact assessments of the systemic risks their services entail, and act accordingly to mitigate them.[25]

This framework suggests that the EU's digital policy is increasingly turning to risk-based regulation strategies. However, the way this regulatory technique is elaborated in practice is far from unitary. While the GDPR features a bottom-up risk-based approach, the AI Act adopts a top-down architecture, and the DSA presents features pertaining to both a top-down and a bottom-up perspective. Such diversified legislative styles may cause a regulatory fragmentation which could deeply affect not only the goals of the internal market but also EU constitutional principles, primarily the rule of law.

Nonetheless, we maintain that a *fil rouge*, though variously elaborated, can be identified as a unifying connector of those three approaches. Such a unifying feature is represented by the common European constitutional values guiding the GDPR, the AI Act, and the DSA. Although they represent very different expressions of the EU's risk-based approach, they share the same constitutional goal, that is the fostering of fundamental rights and democratic values as counter-limits to the predominance of pure market logics in the algorithmic society. In particular, they share a constitutional-driven soul, in that they are all characterized by the goal of balancing appropriately the need to foster fundamental rights and freedoms in the digital environment while, at the same time, protecting economic freedoms, as engines of innovation, which are key to the Digital Single Market. In this sense, from a constitutional standpoint, the three instruments are unified in their aspiration to foster a model of "optimizing constitutionalism" – that is a "mature" approach to risk

24. COM(2021)206 final, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts.

25. COM(2020)825 final, Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act, DSA). See, in particular, Arts. 26–27.

regulation which, rather than simply aiming at minimizing risks at all costs by imposing "maximum" precautions ("precautionary constitutionalism"), seeks to design "optimal" precautions that do not excessively constrain the various actors playing in the market.[26]

Moreover, the suggested characterization of these three different instruments is a direct reflection of the transformation of the EU's approach itself which, in the last twenty years, has shifted from an eminently liberal market-based perspective to a constitutional-driven strategy.[27] Whereas digital policies were initially driven by the purpose of fostering the development of digital services in the internal market, the developing popularity of the concept of risk follows the increasing role of constitutionalism within the European project. We thus argue that the EU's risk-based approach and the rights-based approach have not only come to coexist in the Union's digital policy but have, to a greater extent, become intimately connected.[28]

In this context, Section 2 of this article focuses on analysing the bottom-up risk-based approach of the GDPR. Section 3 analyses the Union's approach to risk related to content moderation, looking at the hybrid model of the DSA. Section 4 highlights the top-down architecture of the AI Act. Section 5 aims to catch the differences and similarities between these sources, underlining how, notwithstanding their profound technical divergence, they are generally moved by a common constitutional spirit, driven by the normative phase of European digital constitutionalism which aims to ensure the protection of fundamental rights and democratic values in the algorithmic society.

2. The General Data Protection Regulation: The bottom-up approach

The first instrument analysed in this article from a risk-based perspective is the GDPR. The GDPR has been a landmark step in the path of the EU's data protection law which, since 1995, had been governed by the Data Protection Directive.[29] In the Explanatory Memorandum to the initial proposal for the GDPR, the Commission stressed how EU law had to be brought up to date to fit the new societal context, where technology has come to allow both private actors and public administrations "to make use of personal data on an

26. See Vermeule, *The Constitution of Risk* (Cambridge University Press, 2014), p. 77.

27. De Gregorio, "The rise of digital constitutionalism in the European Union", 19 *International Journal of Constitutional Law* (2021), 41–70.

28. Cf. Gellert, op. cit. *supra* note 6.

29. Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. 1995, L 281/31.

unprecedented scale in order to pursue their activities".[30] The changing strategy of the Union can be examined by comparing the first recitals of the Data Protection Directive with those of the GDPR, which underlines the shift of focus from the central role of data circulation within the internal market to the protection of individual fundamental rights.[31]

It should not come as a surprise if this transition from a market-driven to a constitutional-oriented perspective was translated into law through the adoption of a risk-based approach that, as has already been stressed and will be further shown in the following sections, ultimately represents an attempt to strike an "optimal" balance among conflicting constitutional interests. The principle of accountability,[32] pursuant to which data controllers must be able to prove they comply with the general principles set by the GDPR,[33] is itself strictly intertwined with the rationale of this approach.

There is not one single way to comply with the requirements of the GDPR. In fact, data controllers are entrusted with the responsibility of ensuring that the processing of personal data is aligned with the protection of the general principles it sets. This form of delegation characterizes the bottom-up structure of the GDPR. Although remaining within the context of Union rules, the way such rules and principles are elaborated in practice is mainly up to the targets of regulation. Data controllers are thus required to evaluate which risks their processing activities entail, and actively to shape the measures and techniques necessary to guarantee individual data protection and privacy rights in accordance with such specific risks.

The meaning of the principle of accountability can thus be better understood by focusing on the dynamic definition of data controllers' responsibility, which is based on the nature, scope, context, and purposes of processing, as well as on the risks of varying likelihood and/or severity for the rights and freedoms of natural persons.[34] Therefore, the data controller is required to ascertain concretely the degree of risks to data subjects' fundamental rights when processing personal data, and, based on that assessment, design the appropriate mitigation responses. If a data controller is

30. COM(2012)11 final, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

31. GDPR, cited *supra* note 23, Recitals 1–2.

32. Ibid., Art. 5(2).

33. Thus Castets-Renard, "Accountability of algorithms in the GDPR and beyond: A European legal framework on automated decision-making", 30 *Fordham Intellectual Property, Media & Entertainment Law Journal* (2019), 91–137, at 107: "Accountability starts with an agent and the outcome of its actions; the data holder (controller or processor) is accountable for ensuring compliance with the principles (and rights of the data subject). The data holder is also supposed to have a mechanism in place to ensure compliance".

34. GDPR, cited *supra* note 23, Art. 24.

not able to prove that they have put in place measures sufficient for complying with the general principles of the Regulation, then they will be held liable for damages. The GDPR thus relies directly on the targets of regulation as far as the definition of risk scores is concerned: the law does not establish any risk thresholds itself, but leaves such a sensitive duty to those private and public actors who are in charge of processing individual personal data. In this sense, the risk-based approach of the GDPR may be defined as bottom-up, as opposed to the DSA and, even further, to the AI Act, as will be explained in the next sections.

The duty to evaluate the perils connected to any processing of personal data, and consequently to introduce remedies and safeguards, emerges not only from the rules governing data controllers' responsibilities, but also from the principle of privacy by design and by default.[35] Both provisions require precisely that data controllers "implement appropriate technical and organisational measures" to ensure full compliance with the GDPR, based on the riskiness of their processing activities. As noted by Quelle, such a legal regime requires data controllers and data processors to engage in a form of "compliance 2.0", i.e. "a form of compliance that does not merely 'tick boxes', but is tailored to respect the rights and freedoms of data subjects".[36] Therefore, not all data controllers are required to implement the same risk mitigation systems in order to be compliant with the GDPR.

In fact, this diversity raised concerns during the GDPR adoption process. As highlighted by Gellert,[37] leaving data controllers to define the margin of data protection safeguards could foster the interests of corporations rather than the interests of citizens. The new system implemented by the GDPR would contradict the foundations of the EU data protection regime, which, as underscored by Lynskey, was traditionally "rights-based".[38] Instead, the GDPR's risk-based foundation departs from a different *modus operandi*. Whereas the former follows a binary logic, whereby processing is either legal or illegal, the latter follows the "granular, scalable, logic of risk analysis" and is thus concerned with "how much risk one can take" rather than with "whether the processing is too risky or not".[39] In this sense, the rights-based approach and the risk-based approach can be ascribed respectively to the

35. Ibid., Art. 25(1).

36. Quelle, op. cit. *supra* note 13, at 506.

37. Gellert, op. cit. *supra* note 6, at p. 2 et seq.

38. Lynskey, *The Foundations of EU Data Protection Law* (OUP, 2015). According to the author, at pp. 35–36, a data protection regime can be considered as being rights-based if, on the one hand, it is "rights-conferring" (i.e. it grants rights to individuals) and, on the other hand, "if it 'gives expression to' a fundamental right or if its design and interpretation are consistent with its underlying conception as a fundamental right".

39. Gellert, op. cit. *supra* note 6, at p. 2.

"command-and-control" model, which refers "to the command of the law and the legal authority of the State",[40] and to the class of "meta-regulations", a sub-category of principle-based regulations[41] where the purpose becomes that of "encouraging the industry to put in place its own systems of management which are then scrutinized by regulators".[42]

It follows from the above that, whereas the resort to a command-and-control system in the field of data protection implies that rules apply indiscriminately to any controller and data processing, the scalable element of a risk-based approach leads to a multiform protection of data which is inherently diverse depending on the actual target of regulation. Obligations may, therefore, be objectively "uneven", reflecting the interests of the actors called to comply with the GDPR, but this different outcome is justified in that it is the consequence of a specific balancing test operated directly by data controllers based on the principle of accountability.

This last aspect, which is precisely what characterizes the GDPR as a bottom-up risk-based regulation, where the balancing between interests is made directly by the targets of regulation rather than by the law, emerges from a range of different provisions. The GDPR, for instance, introduces the requirement that controllers carry out a data protection impact assessment (DPIA) whenever a specific type of processing is likely to result in a "high" risk to the rights and freedoms of natural persons.[43] In this case, data controllers are called to define when a processing is high risk in order to decide whether or not a DPIA is required in a certain context. Such an obligation represents a typical point of contact between the managerial practices of risk management and regulation, so much so that Alemanno defines risk assessment as a "*Grundnorm*", i.e. as "the privileged methodological tool for regulating risk in Europe".[44] Impact assessment is a "process for simultaneously documenting an undertaking, evaluating the

40. Hutter, op. cit. *supra* note 8, at p. 203. According to Gellert, op. cit. *supra* note 6, at p. 46, "Command and control regulation can best be described as mirroring an 'Austinian' understanding of the law, that is, a set of standards and behaviour issued by the Sovereign, and associated to sanctions in case of non-respect".

41. Gellert, op. cit. *supra* note 6, at p. 20.

42. Gunningham, "Enforcement and Compliance Strategies" in Baldwin, Cave and Lodge (Eds.), *The Oxford Handbook of Regulation* (OUP, 2010), at p. 113.

43. GDPR, cited *supra* note 23, Art. 35(1). Para 3 of the same provision expressly states that a DPIA is always required "in the case of (a) a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person; (b) processing on a large scale of special categories of data referred to in Article 9(1), or of personal data relating to criminal convictions and offences referred to in Article 10; or (c) a systematic monitoring of a publicly accessible area on a large scale".

44. Alemanno, op. cit. *supra* note 8, at p. 41.

impacts it might cause, and assigning responsibility for those impacts",[45] and its main purpose is indeed to offer guidance to data controllers as to which organizational tools they should adopt in light of its conclusions.

The GDPR thus delegates data controllers the fundamental role of identifying on their own the proper means to comply with legal requirements. Such a "power", however, comes with a price, since it implies that data controllers become truly responsible for any negative impact on the fundamental rights and liberties of data subjects. Through such a model, the targets of the GDPR are granted a broader discretion than would be possible under a binary command-and-control approach, but precisely for this reason they are made accountable for their increased autonomy and their choices. It is no wonder, therefore, that the principle of accountability represents one of the most important and well-known core features characterizing the entire system of EU data protection law.

The risk-based approach of the GDPR is, in other words, inherently grounded upon the "responsibilization of the regulatee".[46] The traditional top-down legislative dialectic shifts towards a more collaborative architecture, where the governed must implement the appropriate risk management strategies to avoid liability.[47] The key word becomes, in this sense, "proportionality", which functions both as a principle and as a guiding standard.[48] Proportionality, on the one hand, guarantees that businesses and organizations are not compelled to adopt excessively costly measures but, on the other hand, obliges them to keenly evaluate and balance all existing risk factors in order to respond to them in a satisfactory way. In other words, the purpose is to find an optimal balance.

The way the EU legislature has elaborated the GDPR's risk-based approach seemingly reflects and is consistent with the general trend, more and more common within EU law and case law, by which the pursuit of desirable outcomes for society is sought also through the horizontal involvement of the targets of regulation and the delegation to them of balancing powers and tasks traditionally vested in public institutions.[49] As will emerge from the following

45. Moss et al., *Assembling Accountability. Algorithmic Impact Assessment for the Public Interest* (Data & Society, 2021), at p. 10. In their work, the authors identify and describe ten constitutive components that must be taken into account when establishing accountability under any impact assessment regime: (a) sources of legitimacy; (b) actors and forum; (c) catalysing event; (d) time frame; (e) public access; (f) public consultation; (g) method; (h) assessors; (i) impacts; (j) harms and redress.

46. Gellert, op. cit. *supra* note 6, at p. 20.

47. Ibid., at p. 23.

48. Ibid.

49. See, among others, Pollicino, op. cit. *supra* note 4; De Gregorio, op. cit. *supra* note 4; Bassini, "Fundamental rights and private enforcement in the digital age", 25 ELJ (2019), 182–197; Durante, *Computational Power. The Impact of ICT on Law, Society and Knowledge*

section, this tendency to rely on private actors for the enforcement of publicly-relevant interests also characterizes the Digital Services Act proposal which aims to regulate online content by imposing on Internet intermediaries due diligence duties to moderate illicit and harmful materials in the online environment. This is mainly done, again, through a risk-based approach which translates into a delegation of public power into the hands of private actors. However, the way such an approach is elaborated differs partly from the technique employed by the GDPR.

3. The Digital Services Act: Mixing the bottom-up and top-down approaches

The second instrument analysed in this work is the DSA which is characterized by what the European Commission itself defined as a "supervised risk management approach, with an important role of the governance system for enforcement".[50] In December 2020, the European Commission presented a package of two draft regulation proposals commonly referred to as the DSA and the Digital Markets Act (DMA),[51] aimed at fostering the twofold goal of creating "a safer digital space in which the fundamental rights of all users of digital services are protected" and establishing "a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally".[52] The DSA explicitly foresees a general and horizontal, rather than sectoral, reform of intermediary liability for third-party content. In the opening of its Explanatory Memorandum to the DSA, the Commission expressly stated that, since the adoption of the e-Commerce Directive,[53] new digital services have

(Routledge, 2021). Moving across the Atlantic, cf. Balkin, "Free speech is a triangle", 118 *Columbia Law Review* (2018), 2011–2056, highlights how contemporary speech regulation generally relies on delegating to private digital actors the evaluation of the illegal or harmful nature of a specific online content. Cf. Klonick, "The new governors: The people, rules and processes governing online speech", 131 *Harvard Law Review* (2018), 1598–1670.

50. DSA, cited *supra* note 25, Explanatory Memorandum, at 1. On the role of risk within the DSA, see also Efroni, "The Digital Services Act: Risk-based regulation of online platforms", *Internet Policy Review* (2021), available at <policyreview.info/articles/news/digital-services-act-risk-based-regulation-online-platforms/1606>.

51. COM(2020)842 final, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act).

52. European Commission, "The Digital Services Act Package", 31 Aug. 2021, available at <digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>. See, on this topic, Eifert et al., "Taming the giants: The DMA/DSA package", 58 CML Rev. (2021), 987–1028.

53. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-commerce Directive), O.J. 2000, L 178/1.

emerged, revolutionizing our daily lives and our economy but, at the same time, giving rise to new risks and challenges, both for society as a whole and individuals using such services.[54]

Like the GDPR, the DSA also adopts a risk-based approach, in the sense that the targets of regulation, in this case the providers of intermediary (digital) services, are subject to duties and obligations which are proportional and calibrated to the concrete risks potentially resulting from the provision of their services. However, in this case, the European Commission distanced itself from the pure bottom-up structure adopted by the GDPR. Indeed, the DSA sets of its own accord the various categories into which online intermediaries should be divided, based on risk thresholds established from above. In other words, in the case of the DSA, a (preliminary) risk assessment is made directly from the top. Nonetheless, depending on the category they are assigned to, providers have varying degrees of discretion as to how to actively manage the risks arising from their own services. Depending on how they have been classified, they maintain a certain leeway as to the definition of their risk-mitigation strategies. We argue, therefore, that the model envisaged within the DSA is neither purely bottom-up nor purely top-down: rather, it represents a "third way" in between the two.

At first glance, the DSA does not really engage in a revolutionary transformation of the current regime.[55] The new provisions[56] simply transpose into the DSA[57] the e-Commerce Directive's "safe harbour" approach,[58] which is still kept as a background general rule.[59] It does, however, confirm that strand of Court of Justice case law inaugurated with *Google France*[60] and *L'Oréal*,[61] by explicitly stating that such a system is justified only in as much as providers act neutrally "by a merely technical and automatic processing of the information provided by the recipient of the service".[62] Moreover, to

54. DSA, cited *supra* note 25, Explanatory Memorandum, at 1.

55. See Cauffman and Goanta, "A new order: The Digital Services Act and consumer protection", (2021) EJRR, available at <doi.org/10.1017/err.2021.8>, at 6 et seq.

56. DSA, cited *supra* note 25, Arts. 3–5, 7.

57. Edwards, "Articles 12–15 ECD: ISP liability. The problem of intermediary service provider liability" in Edwards (Ed.), *The New Legal Framework for E-Commerce in Europe* (Hart Publishing, 2005), pp. 93–136; Yannopoulos, "The immunity of internet intermediaries reconsidered?" in Taddeo and Floridi (Eds.), *The Responsibilities of Online Service Providers* (Springer, 2017), pp. 43–60.

58. E-Commerce Directive, cited *supra* note 53, Arts. 12–15.

59. The "safe harbour" doctrine was strongly inspired by Section 230 of the US Communication Decency Act 1996. On the topic, see among others Citron and Wittes, "The Internet will not break: Denying Bad Samaritans Sec. 230 immunity", 86 *Fordham Law Review* (2017), 401–424.

60. Case C–236/08, *Google France*, EU:C:2010:159.

61. Case C-324/09, *L'Oréal*, EU:C:2011:474.

62. DSA, cited *supra* note 25, Recital 18.

address the challenges raised by online platforms, the DSA complements the system of exemption of liability by introducing an ample array of new due diligence obligations "for a transparent and safe online environment". These safeguards represent the true expression of the risk-based approach adopted in the DSA at the intersection of the bottom-up and top-down approaches of the GDPR and AI Act.

These new obligations do not apply indiscriminately to all providers, but are scaled based on the services they offer and on their dimensions. A small group of provisions thus applies to all providers of intermediary services,[63] whereas the scope of application of the subsequent Articles becomes progressively narrower, covering in turn: hosting providers;[64] online platforms;[65] and "very large online platforms" (VLOPs).[66] As clarified by the proposal, online platforms represent a subset of the class of hosting providers which are characterized by the fact that they do not only store information provided by the recipients of their services but, on request, they disseminate such information to the public.[67] An online platform, moreover, ought to be considered a VLOP when it provides its services to a number of average monthly recipients in the EU that is equal or higher than 45 million.[68]

The new due diligence obligations move in two main directions. On the one hand, the DSA introduces transparency duties,[69] which are particularly strict and detailed for online platforms[70] and VLOPs.[71] These include the need to publish transparency reports regularly and the duty of online platforms,[72] and VLOPs,[73] to give users information about advertising practices.[74] On the other hand, the DSA requires an active involvement in the fight against illegal content and illegal activities on the Internet, on penalty of a fine.[75] Most notably, all hosting providers must put in place notice-and-action mechanisms to allow individuals or entities to notify them of the presence of supposedly

63. Ibid., Arts. 10–13.
64. Ibid., Arts.14–15.
65. Ibid., Arts. 16–24.
66. Ibid., Arts. 25–33.
67. Ibid., Art. 2(h).
68. Ibid., Art. 25.
69. Ibid., Art. 13.
70. Ibid., Art. 23.
71. Ibid., Arts. 30–33.
72. Ibid., Art. 24.
73. Ibid., Art. 30.
74. The focus on advertising transparency, as a means to fight phenomena such as online disinformation, reflects the agenda proposed by the EC in its European Democracy Action Plan (EDAP). COM(2020)790 final, "On the European democracy action plan".
75. DSA, cited *supra* note 25, Art. 42.

illegal content.[76] Following such notification, the hosting provider is presumed to have actual knowledge or awareness of the specific item of information, and is, therefore, not able to enjoy any liability exemption.[77]

The resulting system envisaged by the DSA translates into what Balkin defined as "new-school speech regulation",[78] and reflects a desire to intervene through positive actions in the regulation of freedom of expression,[79] since it aims at controlling the digital networks themselves by emphasizing *ex ante* prevention through forms of collaborative cooperation between the private and the public. However, the Commission also took into account the risks connected to "collateral censorship",[80] and therefore tried to introduce within the DSA some antibodies to counteract drifts in directions endangering liberties. Most notably, together with the ban on general monitoring,[81] Article 17 introduces an obligatory internal complaint-handling system for online platforms against moderation decisions. Complaints will have to be decided on in a "timely, diligent, and objective manner" and, most interestingly, platforms will have to ensure that they are not solved based uniquely on the use of automated means.[82] In this sense, online platforms are thus required to protect individuals and society from the risk of their services being misused with illegal intent, while, at the same time, carefully balancing their decisions so as to avoid the unwarranted result of violating users' fundamental right to freedom of expression.

76. Ibid., Art. 14.

77. Online platforms are, in addition, required to "suspend, for a reasonable period of time and after having issued a prior warning, the provision of their services to recipients of the service that frequently provide manifestly illegal content" (Art. 20) and to inform authorities of any information suggesting "that a serious criminal offence involving a threat to the life or safety of persons has taken place, is taking place or is likely to take place" (Art. 21).

78. Balkin, "Old-school/new school speech regulation", 127 *Harvard Law Review* (2014), 2296–2342, at 2306.

79. Kuczerawy, "The power of positive thinking", 8 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* (2017), 226–237; De Gregorio, "Democratising online content moderation: A constitutional framework", 36 *Computer Law & Security Review* (2020), available at <doi.org/10.1016/j.clsr.2019.105374>.

80. Balkin, op. cit. *supra* note 78, at 2298; on the notion of "collateral censorship" see also Balkin, "Free speech and hostile environments", 99 *Columbia Law Review* (1999), 2295–2320, at 2298.

81. DSA, cited *supra* note 25, Art. 7.

82. Ibid., Art. 17(3) and (5). Art. 12(2), moreover, introduces some important substantial parameters for the enforcement of providers' terms and conditions: in particular, intermediaries are required to act with "due regard to the rights and legitimate interests of all parties involved, including the applicable fundamental rights of the recipients of the service as enshrined in the Charter". On Art. 12(2) DSA, see Appelman, Quintais and Fahy, "Article 12 DSA: Will platforms be required to apply EU fundamental rights in content moderation decisions?" (*DSA Observatory*, 13 May 2021), available at <dsa-observatory.eu/2021/05/31/article-12-dsa-will-platforms-be-required-to-apply-eu-fundamental-rights-in-content-moderation-decisions/>.

As mentioned above, through the choice to adopt an asymmetric[83] approach as to the obligations imposed on the targets of regulation, the DSA welcomes the principle of proportionality, which represents a key feature of Union risk-based digital regulation. Besides, the text of the proposal requires that VLOPs make a yearly assessment of "any significant risks stemming from the functioning and use made of their services in the Union",[84] also taking into account the role of their content moderation, recommender, and advertising systems. Based on those risk assessments, VLOPs shall have to "put in place reasonable, proportionate and effective mitigation measures, tailored to the specific systemic risks identified".[85] As a matter of fact, proportionality is explicitly mentioned in the Explanatory Memorandum as a driving principle of the DSA.[86] Nonetheless, at least at a first stage, the calibration of the duties provided for in Chapter III is mainly based on an assessment operated directly by the law. Providers of intermediary services are assigned to a certain category based on objective criteria set by the legislature *a priori* and on a top-down basis.

The structure of the DSA, in this sense, reduces the role of an aspect which is a key feature of the GDPR, i.e. the "responsibilization of the regulatee", which inevitably translates into the principle of accountability investing the targets of regulation. Put in this perspective, a critical difference emerges between the GDPR and the DSA, which is the role granted to the principle of accountability, as a result of the abandonment of a pure bottom-up approach to risk regulation. However, provisions such as those obliging VLOPs to assess the systematic risks connected to their services, and to act accordingly,[87] show that the gap between the DSA and the GDPR is only partial, and not complete. To a certain extent, providers are still autonomous in their risk mitigation duties. The establishment of an internal complaint-handling mechanism is a key example of this. Online platforms, both "very large" and "smaller", have to pay extra attention when proceeding to remove user-generated content or disabling access to recipients of their services, in that they have to respond to the latter if they unjustly limit their freedom of expression. In this sense, VLOPs and other online platforms are in many ways directly responsible and accountable for how they enforce their policies and the law.

83. Barata et al., "Unravelling the Digital Services Act package", *IRIS Special 2021-1* (European Audiovisual Observatory, Strasbourg 2021).

84. DSA, cited *supra* note 25, Art. 26.

85. Ibid., Art. 27. Recital 68 suggests that VLOPs might avail themselves of self- and co-regulatory agreements when adopting the necessary risk mitigation measures and, to this end, Art. 35 encourages the drafting of codes of conduct, also at the initiative of the European Commission or of the future European Board for Digital Services.

86. DSA, cited *supra* note 25, Explanatory Memorandum, at 6–7.

87. Cf. Barata et al., op. cit. *supra* note 83.

Ultimately, the approach followed by the DSA can be defined as hybrid. The overall structure of the DSA can be represented as a spectrum ranging from a predominantly top-down, compliance-based discipline to an increasingly bottom-up approach. Since they carry the most risks and since, due to their dimensions and revenues, VLOPs can put in place the appropriate measures for risk assessment, management, and mitigation,[88] these platforms are in many ways held accountable for their policies and for the harms and dangers arising from their infrastructures. Be that as it may, the DSA represents an essential and intermediate stage in the evolution of the Union's risk-based regulation of the digital landscape. The third stage is represented, as will be shown throughout the following section, by the AI Act.

4. The Artificial Intelligence Act: The top-down approach

With the AI Act, the shift from a bottom-up to a top-down approach to digital risk-based regulation is seemingly complete. The proposal, which was presented by the Commission in April 2021, represents a new critical step in the developing digital strategy of the Union. Also in this case, the choice was to resort to a risk-based approach aiming, on the one hand, to protect and foster "Union values, fundamental rights and principles",[89] and, on the other hand, to provide a set of uniform rules for ensuring the development of these technologies in the internal market.

The Union had long been aware of the need to intervene in this field. The White Paper on Artificial Intelligence underscored that AI, as "a collection of technologies that combine data, algorithms and computing power",[90] will represent a fundamental tool for the improvement of many aspects of our society (e.g. healthcare, farming, climate change mitigation, efficiency of production, security, etc.). Apart from being in many instances a potential hazard for safety, in the sense that a flaw in the design or in the training of an AI product may lead to injuries or other physical damages affecting natural persons,[91] automated systems, especially when they are delegated sensitive decision-making tasks, may also have a critical impact on a range of fundamental rights.[92] AI systems can be especially problematic because of

88. Cf. DSA, cited *supra* note 25, Recitals 54–56.

89. AI Act, cited *supra* note 24, Explanatory Memorandum, at 1.

90. COM(2020)65 final, "White Paper on Artificial Intelligence – A European approach to excellence and trust", at p. 2.

91. Think, for instance, of autonomous cars, or of automated components of planes, toys, and medical devices.

92. European Union Agency for Fundamental Rights (FRA), *Getting the Future Right. Artificial Intelligence and Fundamental Rights* (Publications Office of the EU, 2020);

their inherent opacity and lack of transparency,[93] and, on the other hand, because they can lead (and have often led) to incorrect, biased and discriminatory results.[94]

For this reason, the Union has focused its policy objectives on building an "ecosystem of trust" in order to foster the development of AI technologies while protecting citizens in the algorithmic society.[95] Besides, in 2019, the appointed High-Level Expert Group on AI had identified the seven key requirements for trustworthiness,[96] based on four ethical principles: respect for human autonomy, prevention of harm, fairness, and explicability.[97] Those seven key requirements – one of which is precisely the principle of accountability – represented a fundamental source of inspiration for the drafters of the AI Act.

With the purpose of building a legal framework fostering "trustworthy AI", the European Commission finally adopted a top-down risk-based approach in the AI Act, structured on four levels of risk referring to certain AI systems and their applications.[98] As for the DSA, the choice of such a risk-based model was ascribed to the goal of introducing a proportionate and effective system,

Pasquale, *New Laws of Robotics. Defending Human Expertise in the Age of AI* (Belknap Press, Harvard University Press, 2020).

93. Burrell, "How the machine 'thinks': Understanding opacity in machine learning algorithms", 3 *Big Data & Society* (2016), available at <doi.org/10.1177%2F2053951715622512>; Pasquale, *The Black Box Society. The Secret Algorithms that Control Money and Information* (Harvard University Press, 2015).

94. See, among others, Llansó et al., *Artificial Intelligence, Content Moderation, and Freedom of Expression* (TWG, 2020), available at <www.ivir.nl/publicaties/download/AI-Llanso-Van-Hoboken-Feb-2020.pdf>; Oliva, Antonialli and Gomes, "Fighting hate speech, silencing drag queens? Artificial Intelligence in content moderation and risks to LGBTQ voices online", 25 *Sexuality & Culture* (2021), 700–732; Pasquale, op. cit. *supra* note 92; Davidson, Bhattacharya and Weber, "Racial bias in hate speech and abusive language detection datasets", *Third Workshop on Abusive Language Online* (Florence, 2019), available at <dx.doi.org/10.18653/v1/W19-3504>.

95. White Paper on Artificial Intelligence, cited *supra* note 90, at p. 3.

96. Human agency and oversight; robustness and safety; privacy and data governance; transparency; diversity, non-discrimination and fairness; societal and environmental well-being; accountability.

97. High-Level Expert Group on Artificial Intelligence, *Ethics Guidelines for Trustworthy AI* (2019), available at <digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>. See Floridi, "Establishing the rules for building trustworthy AI", 1 *Nature Machine Intelligence* (2019), 261–262.

98. AI4EU Observatory Team, "The New Frontiers of European AI Regulation: How We Are Moving Toward Trustworthiness" (AI4EU, 2 July 2021) available at <www.ai4europe.eu/news-and-events/news/society/ethics/new-frontiers-european-ai-regulation-how-we-are-moving-toward>; Ebers, "Standardizing AI – The case of the European Commission's proposal for an Artificial Intelligence Act" in Di Matteo, Cannarsa and Poncibò (Eds.), *The Cambridge*

capable of combining both market-related and rights-related interests.[99] In this case, however, providers and users of AI systems are provided with little, if any, discretion as to the concrete and case-by-case assessment of the risks inherently connected to them.

Rather than entrusting providers and users of AI systems with the task of developing their own risk mitigation system, as is the case of the GDPR and, to a large extent, of the DSA, the AI Act restricts the margins of discretion. What truly changes with the AI Act is how the assessment of risk is carried out and by whom: in the GDPR, such a task is in the hands of data controllers; in the DSA, the Union legislature sets a top-down framework applicable to all providers of intermediary services, while still leaving space for a certain margin of discretion as far as enforcement of the law is concerned (especially in the case of VLOPs). With the AI Act, conversely, the shift towards a top-down approach seems significantly more evident, with the creation of a system where the leeway granted to producers and users is much more limited.

First, the AI Act proposal prohibits some practices involving systems whose use is deemed to be "unacceptable".[100] This category includes applications that manipulate human behaviour to circumvent the free will of users (e.g. voice-assisted toys that encourage minors to engage in dangerous behaviour) or that set up, by public authorities or on their behalf, the creation of a personal rating system based on personal behaviour or characteristics. It also includes the use of real-time biometric recognition systems in publicly accessible spaces for the purposes of law enforcement, unless this is necessary for one of a limited number of legitimate aims. All these AI technologies have been held *a priori* as too dangerous for the fundamental rights of people and invasive of their sphere of personal liberty.

Second, the Commission identifies a "high-risk" threshold for AI systems.[101] Technologies are held to be high-risk when they are used as a safety component of a product, or are themselves products, which are covered by the Union harmonization legislation listed in Annex II, or even when they are simply required to undergo a third-party conformity assessment, with a view to the placing on the market or putting into service of that product, pursuant to that same legislation. The Commission also provides in Annex III a list of additional AI systems which are to be considered as high-risk, including tools used for educational or professional training, where the algorithm can be used to assess a candidate's merit to access a scholarship; or,

Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics (Cambridge University Press, forthcoming 2022), available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=3900378>.

99. AI Act, cited *supra* note 24, Recital 14.

100. Ibid., Art. 5; see Explanatory memorandum 5.2.2.

101. Ibid., Art. 6.

in the context of employment and selection of workers, AI software used by human resources offices to automatically categorize CVs. The Commission is empowered to adopt delegated acts to update Annex III, based on a list of criteria.[102] High-risk AI systems have to comply with a long and extensive series of requirements.

Most interestingly, high-risk AI systems seem to represent the only class where the legislature truly adopts a liability system more similar to that set by the DSA and, to a certain extent, that of the GDPR. Providers and users of those systems will have to establish, implement, document, and maintain a risk management system, with a view to adopting suitable measures to face any known or foreseeable hazard.[103] Additionally, providers of high-risk AI systems are required to put in place a quality management system to ensure compliance with the entire Regulation.[104] In this case, therefore, providers and users are given a margin of discretion to adopt necessary risk mitigation measures. However, it should be noted that the draft regulation still provides for a long list of duties and requirements which must be complied with; therefore, the room for manoeuvre granted to the targets of regulation is arguably only residual.

Third, some AI applications are included in a category characterized by "limited risks".[105] These include systems intended to interact with natural persons (such as chatbots), emotion recognition, or biometric categorization systems, as well as systems capable of generating "deep fake" contents. Providers and users of such tools must comply with specific transparency requirements. A person must therefore be informed that they are interacting with a chatbot, that they are being subjected to automated emotion recognition, or to biometric categorization, or that the content they see before them has been created artificially by an AI technology.

Finally, "minimal risk" is associated with AI applications that do not have the same invasiveness as those described above. For example, video games or spam filters applied to e-mail services are placed in this category. From this survey, it is clear that the spectrum embracing the set of AI applications with minimal risk is very broad and offers both the interpreter and the operator an opaque, albeit vast, range of application possibilities. Minimal risk AI applications are not subject to any specific duty or obligation, although the Commission and Member States may encourage and facilitate the drawing up

102. Ibid., Art. 7.
103. Ibid., Art. 9.
104. Ibid., Art. 17.
105. Ibid., Art. 52.

of codes of conduct intended to foster on their part the voluntary application of the requirements set for high-risk systems.[106]

In this case, the shift from a bottom-up to a top-down interpretation of risk-based regulation, already partially emerging from the DSA, reached its apex.[107] The categories of risk are defined directly by the Commission and set in stone within the law. The list of "unacceptable", and therefore prohibited, AI systems is directly set by the law and is independent of any *a posteriori* risk assessment by providers or users of those systems. The definition of high-risk technologies is also already defined by the law: in this case, the category is seemingly less rigid and more open to *ex post* change, since a procedure to amend the Annex III is possible. However, it is once again up to the Commission to make the necessary adjustments. The AI Act sets a range of risk criteria: however, in this case, they are meant as a guide for the Commission itself, and not for the targets of regulation. Moreover, although it is true that a risk management system for high-risk AI systems is introduced, extensive top-down rules specify how to implement it, thus leaving a relatively limited margin of discretion to providers and users. Additionally, high-risk systems have to comply with a far-reaching set of duties and obligations which follow a binary compliance/non-compliance logic.

The choice to adopt such a top-down approach to the risk regulation of AI directly affects the principle of accountability. As demonstrated in the previous sections, accountability is a direct corollary of a regulatory system which, to a certain extent, delegates to its targets the power to decide how to balance their own interests with the need to protect, guarantee and foster the rights and liberties of individuals, as well as the fundamental values characterizing the constitutional heart of the Union. The AI Act, which has been criticized for a range of reasons, including the lack of adequate remedies, has seemingly abandoned the bottom-up structure which characterized the first phase of risk-based digital regulation in the EU.[108]

Nonetheless, notwithstanding the critical aspects of the proposal, the system designed within the AI Act is arguably in line with Union risk-based regulation as a fundamental rights-driven framework. As will be highlighted

106. Ibid., Art. 69.

107. Pollicino et al., "Regolamento AI, la 'terza via' europea lascia troppi nodi irrisolti: ecco quali", *Agenda Digitale*, 21 May 2021, available at <www.agendadigitale.eu/cultura-digitale/regolamento-ai-la-terza-via-europea-lascia-troppi-nodi-irrisolti-ecco-quali/>.

108. Cf. Smuha et al., "How the EU can achieve legally trustworthy AI: A response to the European Commission's proposal for an Artificial Intelligence Act", SSRN, 5 Aug. 2021, available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=3899991>; Veale and Zuiderveen Borgesius, "Demystifying the draft EU Artificial Intelligence Act: Analysing the good, the bad, and the unclear elements of the proposed approach", 22 *Computer Law Review International* (2021), 97–112.

through the next section, the way risk-based regulation has been articulated is itself a product and a reflection of the general shift of the Union's approach towards the digital environment, characterized by the evolution from a liberal to a gradually more interventionist and constitutional-driven approach.

5. The EU's risk-based approach as a fundamental rights-driven system

The previous sections have underlined how risk has become a central feature of contemporary EU legislation with respect to digital technologies and the challenges characterizing the algorithmic society. At first glance, the development of such diverse approaches to risk regulation as those embodied by the GDPR (bottom-up), the DSA (hybrid), and the AI Act (top-down) might represent a cause for concern and preoccupations, given the apparently magmatic and chaotic character of the legal framework as a whole. The existence of such a wide array of legislative sources, all setting additional and new – and apparently inconsistent and incoherent – duties, could be regarded as potentially ineffective with respect to both ultimate goals of the Digital Single Market Strategy, i.e. the fostering of an innovative internal market and the contextual protection of fundamental rights.

At the outset, it should be clarified that the scope of the three described legislative sources is not unique. The targets of regulation are themselves different (although they can certainly coincide): thus, the GDPR applies to all actors, both public and private, that process individual personal data; the DSA is addressed only to a specific category of entities, i.e. that of providers of intermediary services, which are primarily private; the AI Act regulates the functioning of automated systems and, therefore, influences the activities of both providers and users of those systems, be they private or public actors. However, as has been outlined throughout the previous sections, what truly distinguishes the three instruments is how they each approach risk governance and how they develop a balance between the various interests at stake.

What changes, at a deeper level, is the way risk regulation itself is dealt with, and the relationship between regulator and regulatee. In the GDPR, the regulatee is responsible for balancing their own interests with that of the data subject and, for that choice, may be held accountable. As for the DSA and the AI Act, the decision concerning such balancing of conflicting interests shifts progressively from the regulatee to the regulator. Partly, such a mutation can be ascribed to the fact that the approval procedure of the GDPR was coordinated by a different Directorate-General from that of the DSA and the

AI Act,[109] and under the work of a different European Commission. However, the cause for such a development seems to be, ultimately, a slight change of direction as far as Union digital policies are concerned. The overall legal imprinting, indeed, has seemingly shifted from an eminently liberal (and negative) to a more clearly democratic (and active) approach, as a result of the rise of European digital constitutionalism.[110]

However, on a closer look, although they take different approaches and develop regulatory solutions which in many cases seem to conflict with one another, the three instruments share a common constitutional project. Notwithstanding the fact that they are different as to the means employed, the GDPR, the DSA, and the AI Act thus represent, each and every one of them, a step towards the establishment of a common framework for European digital constitutionalism, characterized by the consolidation of a democratic constitutional approach to address the challenges of the algorithmic society.[111] The purpose of fostering a human rights-driven and democratic-oriented framework for the digital environment is what allows us to bring together and give sense to the apparent inconsistency between the choices made by these three different instruments.

The three instruments, indeed, strive to find a balance between the various constitutional interests at stake. As a matter of fact, within the framework of the digital policies of the Union, the notion of risk itself ends up being a proxy for such a constitutional exercise, precisely the search for an equilibrium between, on the one hand, individual fundamental rights, and, on the other hand, the construction of an internal market where economic initiative can be fully enjoyed. With respect to the digital landscape, the Commission has proved to be aware of how much potential developing technologies have in the context of a globalized economy but, at the same time, is also concerned with the threats brought about by practices such as big data analysis and the spread of online digital services and algorithmic tools.[112] Through the employment of a risk-based approach, the purpose has been that of trying to push for both goals: the "economic" one, i.e. the building of an economically sustainable Digital Single Market, and the "constitutional" one, i.e. the introduction of a human-centric approach to digital policies respectful of individual fundamental rights and democratic values.

The three Acts, in this sense, aim to foster a European Digital Single Market that is not only driven by innovation but that is also respectful of the European

109. Indeed, the GDPR approval procedure was governed by the DG for Justice and Consumers, whereas the DSA and the AI Act have been mainly developed by the DG for Communications Networks, Content and Technology.

110. See De Gregorio, op. cit. *supra* note 27.

111. Ibid.

112. COM(2020)67 final, "Shaping Europe's digital future".

(constitutional) values enshrined in the Treaty on European Union, the EU Charter of Fundamental Rights, and the European Convention on Human Rights.[113] This common goal has its roots in the characteristics of European constitutionalism in which the logic of balancing permeates the entire constitutional architecture. Against this backdrop, no right or liberty, most notably economic freedom, may be invoked as a justification to destroy other individual fundamental rights. The prohibition on abuse of rights, enshrined in the ECHR,[114] and the EU Charter,[115] is part of this constitutional puzzle, which is primarily driven by human dignity.[116] The ultimate goal of European constitutionalism is, in other words, the search for an optimal balance between market interests and fundamental rights.

Such a constitutional architecture gradually invested the digital environment itself, and it is evident when looking at the role of the ECJ which has paved the way towards the rise of European digital constitutionalism. Following the institutionalization and recognition of the EU Charter as primary Union law, the role of the ECJ as a constitutional court has become even more relevant, and this role has been especially evident within the field of data protection law.[117] Through the development of a consistent body of case law, including *Digital Rights Ireland,*[118] *Google Spain*,[119] and *Schrems I*[120] and *II*,[121] the Court helped build the overall constitutional structure of the rights to data protection and privacy.[122]

In *Google Spain*, the ECJ shed light on how the application of fundamental rights such as those protected by the EU Charter should be based on an optimal

113. On the role of proportionality and balancing within modern constitutionalism, at a global and especially at a European level, see Stone Sweet and Mathews, "Proportionality balancing and global constitutionalism", 47 *Columbia Journal of Transnational Law* (2008), 72–164.

114. Art. 17 ECHR.

115. Art. 54 CFR.

116. As stated in *Omega*, even before the Lisbon Treaty, "the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law". Case C-36/02, *Omega Spielhallen und Automatenaufstellungs- GmbH* v. *Oberbürgermeisterin der Bundesstadt Bonn*, EU:C:2004:614, para 34.

117. Pollicino, op. cit. *supra* note 4, at pp. 110 et seq.

118. Joined cases C-293 & 594/12, *Digital Rights Ireland Ltd* v. *Minister for Communications, Marine and Natural Resources* and *others and Kärntner Landesregierung and others*, EU:C:2014:238.

119. Case C-131/12, *Google Spain SL and Google Inc.* v. *Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (Google Spain)*, EU:C:2014:317.

120. Case C-362/14, *Maximillian Schrems* v. *Data Protection Commissioner (Schrems I)*, EU:C:2015:650.

121. Case C-311/18, *Data Protection Commissioner* v. *Facebook Ireland Limited and Maximillian Schrems (Schrems II)*, EU:C:2020:559.

122. Fabbrini, "The EU Charter of Fundamental Rights and the rights to data privacy: The EU Court of Justice as a human rights court", *iCourts Working Paper Series No. 19,* (2015).

assessment of the various interests at stake.[123] In this decision, years before the GDPR, the ECJ ended up entrusting search engines with the duty to evaluate the stances of all actors involved, and to balance them with the potential damages that published content might cause to a data subject's privacy rights. In this sense, the ECJ anticipated the bottom-up risk-based approach characterizing the GDPR, by entrusting search engines, as data controllers, with the responsibility for ensuring individuals' rights as set in the Data Protection Directive.[124] Later case law reveals, instead, a more interventionist approach. Notably, in the *Schrems* decisions, the ECJ autonomously struck down both the Safe Harbour Decision and the Data Privacy Shield on the grounds that they were not fully compliant with the principles of the GDPR and were not sufficient to protect EU citizens from the risks connected to their data being transferred to the United States.[125] In this sense, a slight shift from a bottom-up to a top-down perspective arguably occurred within the case law of the ECJ itself.

This process is directly reflected by the EU's digital risk-based regulation, which is, ultimately, an attempt to regulate the digital market by striking the optimal balance between innovation and protection of constitutional and democratic values, although this is done by adopting various perspectives and points of view. The main example of this is, clearly, the GDPR. This instrument focuses specifically on the right to privacy and data protection, extensively defined at the outset in its contents and elaborations (e.g. lawfulness of processing;[126] transparency;[127] right to information;[128] right of access by data subject;[129] right to rectification;[130] right to be forgotten;[131]

123. As is well known, one of the major concerns in *Google Spain* was the need to ensure a correct balance between the data subject's right to privacy and the public's interest to being informed. See Case C-131/12, *Google Spain*, para 81.

124. Thus Pollicino, op. cit. *supra* note 4, at p. 194: today "Google enjoys broad margins of discretion in deciding whether to delist information": in doing so, it has to engage in the balancing and enforcement of individuals' fundamental rights online.

125. As highlighted by Ojanen, the ECJ, in Case C-362/14, *Schrems I*, expressly specified that the right to privacy has a core which cannot be negotiated nor balanced with other interests. The ECJ thus evaluated that, in the case at hand, the Safe Harbour Decision did not respect the core, i.e. the "essence" of the rights set by Arts. 7 and 8 CFR. Ojanen, "Making the essence of fundamental rights real: The Court of Justice of the European Union clarifies the structure of fundamental rights under the Charter: ECJ 6 October 2015, Case C-362/14, *Maximillian Schrems* v *Data Protection Commissioner*", 12 EuConst (2016), 318–329.

126. GDPR, cited *supra* note 23, Arts. 6 et seq.

127. Ibid., Art. 12.

128. Ibid., Arts. 13–14.

129. Ibid., Art. 15.

130. Ibid., Art. 16.

131. Ibid., Art. 17.

portability[132]), and represents the first stage of a regulatory trend where fundamental rights are at the forefront. The Regulation's bottom-up approach is, ultimately, an attempt to set the limits to market interests by identifying the core principles that digital technologies should respect. In this sense, this framework fully discloses the constitutional characterization of the GDPR as a meta-regulation founded on a principle-based logic where privacy and data protection are the guiding principles of technological development.

The same goal, although from different perspectives, is also sought by the other two instruments. The DSA and the AI Act are also intended as a response to the negative externalities, in terms of fundamental rights and human dignity, which are inherently connected to digital innovation. However, the techniques these two instruments employ are rather different in that they leave behind the liberal imprint of the GDPR, pursuant to which the targets of regulation are themselves vested with the task of balancing rights and powers, and adopt a progressively more interventionist approach.

The DSA, as an intermediate step, protects fundamental rights by focusing on identifying the risk categories to which providers of intermediary services should be ascribed and establishing, through a "supervised" method, how those actors should address the dangers entailed by their businesses. Like the GDPR, the ultimate goal of the DSA is to find an optimal equilibrium capable of combining digital innovation and the constitutional values of the EU. What changes is the distribution of scaling and balancing duties. Whereas the GDPR wholly delegates such duties to data controllers, the DSA operates a first risk assessment itself, based on which obligations are imposed on Internet service providers. Subsequently, the various legal regimes assigned to regulated actors allow for different degrees of discretion. In other words, balance is sought through a double evaluation, so that responsibility for finding the appropriate equilibrium is shared by the legislature and by the targets of regulation.

The AI Act, on the other hand, directly regulates the use and functioning of AI systems. Throughout the entire Explanatory Memorandum and text of the draft law, the need to protect natural persons from the dangers of these tools is at the forefront, although this purpose is sought directly through vertical regulation. Even in this last case, however, the choice to establish different categories is the direct consequence of the aspiration for an optimal balance. Again, the main difference does not alter the spirit of the law which is, once again, a reflection of the European constitutional spirit. The difference simply concerns the means employed and, more precisely, the distribution of the balancing task itself, which is, in this case, mainly a prerogative of the European Commission.

132. Ibid., Art. 20.

The three legislative instruments analysed thus reflect the general evolution of Union digital policies, moving from a liberal to a more active and constitutional-driven approach, aimed at fostering and guaranteeing fundamental rights and democratic values in the algorithmic society. If such a perspective is taken, the resort to such diverse elaborations of the risk-based approach to the protection of digital fundamental rights can lose its apparent disconnect. Through the lens of digital constitutionalism, it is possible to retrieve a common purpose, that is the balancing of fundamental rights, market, and innovation interests, with a view to ensuring as much as possible a framework of "constitutional optimization".[133]

This approach may represent an essential standpoint to address also future legislative reforms and policy initiatives, considering that the three instruments ultimately reflect a unique goal and aspiration, though the means they use might appear, to a large extent, different. The GDPR, the DSA, and the AI Act are part of a unique constitutionalizing process investing the foundations of the digital age: this way, as part of a unitary (although sometimes not fully clear) picture, the three instruments can offer valuable insights on the direction of European digital constitutionalism itself. Further research in this sense could help predict the outcomes and developments of the EU's digital policies, as well as represent an invaluable asset to suggest new legislative solutions compatible and consistent with that picture.

6. Conclusions

Risk regulation has gathered increasing momentum across Western democracies and has become increasingly popular as a regulatory tool to foster Union policies in a range of operative fields, including, lately, the governance of the Digital Single Market in the context of the algorithmic society.

The legislative (and constitutional) strategy of the EU's digital policy underwent an evolution with respect to its own approach to risk-based regulation, with a progressive but radical shift from a bottom-up (GDPR) to a top-down (AI Act) approach. The GDPR highlights the relevance of fundamental rights becoming the guide for data controllers and processors when assessing the risks for data subjects in the processing of personal data. Rather than introducing a long and extensive set of compliance-based duties and obligations, the GDPR focuses on the accountability and general principles which represent the horizontal translation of the right to privacy and data protection. The designation of the means adopted to comply with general

133. Vermeule, op. cit. *supra* note 26.

principles is, nonetheless, a task left to the discretion of data controllers. Fundamental rights thus become a parameter which organizations need to consider when balancing their own interests with the duty to protect individuals' fundamental rights. An inevitable consequence of this system is that legal accountability for those choices falls entirely on data controllers.

The DSA adopts a different view, in that it provides for a framework where the balancing between the goal of protecting fundamental rights and that of fostering the Digital Single Market is shared between the government and the governed. Risk assessment follows a two-phase procedure. In the first stage, it is a top-down regulation that categorizes providers of intermediary services in groups based on a general and *a priori* evaluation of objective risk criteria. Only at a second stage are private actors called to perform a further balancing operation where more specific risk mitigation measures are defined. The role of intermediaries, therefore, comes into play only at a subsequent moment, and is itself scaled depending on the category they have been assigned to by the law. As a consequence, accountability, rather than being a "monolithic" principle, equally applicable to all targets of regulation, takes the form of a spectrum, at one end of which VLOPs, as actors almost fully responsible for their fundamental rights policies, can be found.

Finally, the AI Act completes the shift from a bottom-up to a top-down approach towards risk regulation. As seen in section 4, the provisions set within the regulation proposal are a result of a risk assessment operated directly by the law, in which four risk categories for AI systems are identified. Again, a preliminary decision is operated directly by the law, and the solution is a pyramidal structure similar to that defined by the DSA. However, a different regulation follows such a categorization. In a way which is rather different from, if not the opposite of, the system introduced by the DSA, the AI Act couples higher levels of risk with relatively little margin of discretion as to the measures to employ for risk mitigation. The risk-based approach, as a technique for fostering a proportionate and calibrated scheme of duties and obligations, takes in the AI Act a top-down turn where providers and users of AI systems must comply with requirements already established by the law, in a manner which draws the prospective regulation nearer to a command-and-control system.

The GDPR, DSA and AI Act all share this common constitutional feature, and resort to risk as a proxy to develop a framework adequately and fairly balancing the various economic and constitutional interests purported by the Union in the regulation of the Digital Single Market. This ultimate role of risk as an optimal balancing technique allows a connection to be made between the provisions contained within the three analysed instruments, which are otherwise characterized by differing, if not opposing, structures and models.

Such differences acquire a deeper meaning if put in the context of the constitutional pattern rapidly developing in the digital framework of the Union. The shift from a bottom-up, liberal perspective to an increasingly top-down, active approach is also apparent from the ECJ case law in recent years. If the EU's constitutional experience is characterized by the endeavour to strike an equal, and proportionate, balance between the various interests of social parties, the *fil rouge* at the heart of the GDPR, DSA, and AI Act is precisely that they strive to create a digital environment which embraces European constitutional values and principles.

Although the means may be different, as has been extensively highlighted throughout the previous sections, the GDPR, the DSA, and the AI Act all share the same purpose. As pointed out above, the major goal of the EU's risk-based digital policies as driven by the characteristics of European constitutionalism is, ultimately, the (optimal) balance between the promotion of economic freedoms to foster the internal market and the protection of fundamental rights and democratic values. Therefore, to connect the dots and make sense of the complex set of legal instruments, the lens of European digital constitutionalism can offer us valuable insights to understand the future developments of the EU's digital strategy and help suggest constitutional solutions to address the challenges of the algorithmic society.

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ACCORDI DI *SOFT LAW* IN MATERIA DI RIMPATRI: CARTA BIANCA PER LE ISTITUZIONI UE?

di Caterina Molinari

Abstract: *La soft law sta prendendo piede rapidamente in diversi settori di azione dell'Unione, tra cui la gestione della migrazione esterna. Gli accordi di soft law in materia di migrazione sostenuti dall'UE o, più spesso, conclusi direttamente a livello dell'UE si sono moltiplicati negli ultimi anni. Da questo fenomeno derivano numerose conseguenze dal punto di vista costituzionale, oggetto di intenso dibattito da parte della dottrina. Il presente saggio fornisce un contributo a tale dibattito, sviluppando due considerazioni tra loro correlate. In primo luogo, si ipotizza che la giustificazione a sostegno del ricorso ad accordi di soft law nel settore della riammissione sia stata sinora unicamente l'elusione delle garanzie costituzionali, diventata ormai un fine a sé in quest'ambito. In secondo luogo, si sostiene che, sebbene alcuni vincoli costituzionali possano effettivamente venir meno ricorrendo ad accordi di soft law, altri debbano necessariamente restare operanti per impedire che i poteri pubblici siano esercitati arbitrariamente. Essenziale in tal senso è il rispetto del principio dell'equilibrio istituzionale.*

Abstract: *Soft law has been growing rapidly in different spheres of Union action, including external migration management. Soft migration deals backed by the EU or, more frequently, directly concluded at the EU level have multiplied in recent years. This raises several constitutional issues, which have formed the object of a rich academic debate. This article contributes to the debate by developing two related considerations. First, it argues that the justification behind the use of soft deals in the field of readmission has so far been the sheer side-stepping of constitutional guarantees, which has become, in this field, an end in itself. Secondly, it asserts that, even if certain constitutional constraints can arguably be side-lined through the use of soft deals, others must necessarily remain operative to guarantee that public powers are not used arbitrarily. The principle of institutional balance has a crucial role to play in this respect.*

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ACCORDI DI *SOFT LAW* IN MATERIA DI RIMPATRI: CARTA BIANCA PER LE ISTITUZIONI UE*

di Caterina Molinari**

SOMMARIO: 1. Introduzione. – 2. Gli accordi di soft law nel settore della riammissione. – 3. Giustificazione del ricorso alla soft law nel settore dei rimpatri. – 3.1. Motivazioni addotte a favore del ricorso alla soft law in altri settori. – 3.2. Assenza di capacità esplicativa di tali motivazioni nel settore della riammissione. – 3.3. Stato di diritto e aggiramento strategico dei vincoli costituzionali. – 4. Conciliazione tra accordi di soft law e il principio-base di ordine costituzionale della governance responsabile. – 4.1. I confini inevitabili degli accordi di soft law. – 4.2. Un principio idoneo: equilibrio istituzionale e accordi di soft law. – 5. Conclusione.

1. Introduzione

La *soft law* sta prendendo piede rapidamente in diversi settori di azione dell'Unione nell'ambito del più ampio fenomeno denominato *new governance*[1]. Benché non sia semplice fornire una definizione precisa di tale istituto, con l'espressione *soft law* ci si riferisce per lo più a strumenti non vincolanti dotati comunque di un certo grado di forza normativa[2]. Tale

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1. In particolare, l'espressione *soft law* pone l'accento su una delle varie caratteristiche del metodo di *new governance*, in particolare il carattere non vincolante delle norme che essa produce. Cfr. J. Scott e D.M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, in *European Law Journal*, n. 8.2002, pp. 2 e 6; G. de Búrca e J. Scott, *Introduction: New Governance, Law and Constitutionalism*, in *Law and New Governance in the EU and the US*, a cura di G. de Búrca e J. Scott, Oxford e Portland, Hart, 2006, pp. 2-4.

2. L. Senden, *Soft Law in European Community Law*, Oxford e Portland, Hart, 2004, pp. 109-111; D.M. Trubek, P. Cottrell e M. Nance, *'Soft Law', 'Hard Law' and EU Integration*, in *Law and New Governance in the EU and the US*, a cura di G. de Búrca e J. Scott, Oxford e Portland, Hart, 2006, p. 65; G. Weeks, *Soft Law and Public Authorities: Remedies and Reform*, Oxford e Portland, Hart, 2016, pp. 1-2; S. Garben, *Competence Creep Revisited*, in *Journal of Common Market Studies*, n. 57.2019, p. 207.

forza normativa può poi variare in funzione dei meccanismi coercitivi e persuasivi disponibili in relazione ad ogni specifico strumento. Da ciò si può quindi desumere che il carattere più o meno vincolante degli strumenti normativi non sia caratterizzato da una natura binaria, ma piuttosto si declini in una gamma più ampia[3], spaziando da meccanismi dotati di un limitato potere coercitivo e sanzionatorio sino a meccanismi del tutto vincolanti. In seno all'UE la *soft law* si è concretizzata, a mero titolo esemplificativo, in linee guida emesse in base al metodo di coordinamento aperto nel settore dell'occupazione e della politica sociale[4]; in «documenti orientativi, note [e] comunicazioni interpretative della Commissione»[5] nel settore ambientale e in indirizzi di massima per le politiche economiche in quello fiscale[6]. Nell'ambito dell'azione esterna dell'Unione intesa in senso ampio, dagli scambi commerciali alla gestione della migrazione, la *soft law* ha preso la forma di *memoranda* d'intesa (MI)[7],

3. M. Brus, *Soft Law in Public International Law: A Pragmatic or a Principled Choice? Comparing the Sustainable Development Goals and the Paris Agreement*, in *Legal Validity and Soft Law*, a cura di P. Westerman, J. Hage, S. Kirste, A.R. Mackor, Cham, Springer, 2018, pp. 263-264 parla di un *continuum* tra *hard law* e *soft law*. Cfr. altresì le conclusioni dell'avvocato generale Bobek del 12 dicembre 2017 sul caso *Belgio c. Commissione*, C-16/16 P, EU:C:2017:959, pt. 4 e 82.

4. Cfr. C. de la Porte, *Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas*, in *European Law Journal*, n. 8.2002; D. Friedrich, *Policy process, governance and democracy in the EU: the case of the Open Method of Coordination on social inclusion in Germany*, in *Policy & Politics*, n. 34 2006; D.M. Trubek *et al.*, *op. cit.*, pp. 76-82; C. Kilpatrick, *New EU Employment Governance and Constitutionalism*, in *Law and New Governance in the EU and the US*, a cura di G. de Búrca e J. Scott, Oxford e Portland, Hart, 2006; M. Büchs, *New governance in European social policy: the open method of coordination*, Basingstoke, Palgrave Macmillan, 2007.

5. M. Eliantonio, *Soft Law in Environmental Matters and the Role of the European Courts: Too Much or Too Little of It?*, in *Yearbook of European Law*, 2018, p. 497.

6. D.M. Trubek *et al.*, *op. cit.*, p. 82 ss.; S. Deroose, D. Hodson, J. Kuhlmann, *The Broad Economic Policy Guidelines: Before and after the Re-launch of the Lisbon Strategy*, in *Journal of Common Market Studies*, n. 46.2008.

7. Cfr. *memorandum* d'intesa su un contributo finanziario svizzero ai nuovi Stati membri https://www.eda.admin.ch/dam/europa/en/documents/abkommen/MoU-erweiterungsbeitrag-2007_en.pdf accesso in data 12 maggio 2021; *memorandum* d'intesa tra l'Unione europea e l'Ucraina in materia di macro-assistenza finanziaria all'Ucraina per 1 miliardo di euro del 14 settembre 2018 https://ec.europa.eu/info/sites/info/files/economy-finance/mou_protocol_version_eu.pdf accesso in data 12 maggio 2021; *memorandum* d'intesa tra il Consiglio d'Europa e l'Unione europea del 23 maggio 2007, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680597b32 accesso in data 12 maggio 2021.

partenariati[8], dichiarazioni[9] e altri strumenti di cooperazione non vincolanti[10]. Ci si riferirà collettivamente a tali strumenti con l'espressione «accordi di *soft law*».

Gli interrogativi che si pongono a fronte del ricorso alla *soft law* da parte delle istituzioni dell'UE sono numerosi, dato che l'aumento dei casi di ricorso alla *soft law* e agli strumenti di *new governance* mina alla base i principi fondamentali dell'ordinamento giuridico dell'Unione, in particolare la sua natura autosufficiente e gerarchica[11], la completezza del suo sistema di rimedi giurisdizionali[12] e, di conseguenza, la sua autonomia[13]. In altri termini, la natura "sperimentale"[14] della *soft law* implica il rischio di una progressiva perdita di

8. Es. *addendum* del 2011 del segretariato generale del Consiglio alla nota punto 'I/A', dichiarazione congiunta su un partenariato di mobilità tra l'Unione europea e l'Armenia, doc. 14963/11; *addendum* del 2008 del segretariato generale del Consiglio alla nota punto 'I/A', dichiarazione congiunta su un partenariato di mobilità tra l'Unione europea e la Repubblica di Moldavia, doc. 9460/08.

9. Dichiarazione UE-Turchia del 18 marzo 2016, comunicato stampa del Consiglio europeo e del Consiglio 144/16. Tale dichiarazione è stata qualificata come accordo degli Stati membri – piuttosto che dell'UE – dal Tribunale dell'Unione europea (ordinanza del 28 febbraio 2017 in *N.F. c. Consiglio europeo*, T-192/16, EU:T:2017:128). Tuttavia, la suddetta qualificazione è stata ampiamente – e correttamente, ad avviso di chi scrive – contestata dalla dottrina maggioritaria (es. E. Cannizzaro, *Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council*, European Papers, n. 2.2017; S. Carrera, L. Den Hertogh e M. Stefan, *It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal*, CEPS Policy Insight 2017/15; M. Gatti e A. Ott, *The EU-Turkey Statement: legal nature and compatibility with EU institutional law*, in *Constitutionalising the external dimensions of EU migration policies in times of crisis: legality, rule of law and fundamental rights reconsidered*, a cura di S. Carrera, J. Santos Vara e T. Strik, Rochester, Edward Elgar, 2019).

10. Es. azione congiunta UE-Afghanistan per il futuro in materia di questioni migratorie, 4 ottobre 2016, https://eeas.europa.eu/headquarters/headquarters-homepage/11107/joint-way-forward-on-migration-issues-between-afghanistan-and-the-eu_en; allegato I del 2017 della Commissione alla decisione C(2017) 6137 final relativa alla firma delle procedure operative standard UE-Bangladesh per l'identificazione e il rimpatrio delle persone prive di autorizzazione a soggiornare; allegato del 2017 alla nota punto 15762/17 alle procedure di ammissione per il rimpatrio di cittadini etiopi dagli Stati membri dell'Unione europea, 15762/17.

11. N. Walker, *EU Constitutionalism and New Governance*, in *Law and New Governance in the EU and the US*, a cura di G. de Búrca e J. Scott, Oxford e Portland, Hart, 2006, p. 20; C. Eckes, *The autonomy of the EU legal order*, *Europe and the World: A law review*, p. 2.

12. Il concetto di sistema completo di rimedi giurisdizionali è stato ripetuto plurime volte dalla Corte, *inter alia* in Corte giust., sentenza del 25.6.2020, *CSUE c. KF*, C-14/19 P, ECLI:EU:C:2020:492, pt. 60; Corte giust., sentenza del 5.11.2019, *Banca centrale europea c. Trasta Komercbanka*, C-663/17 P, ECLI:EU:C:2019:923, pt. 54; Corte giust., sentenza del 28.3.2017, *Rosneft*, C-72/15, ECLI:EU:C:2017:236, pt. 66-67; Corte giust., sentenza del 3.10.2013, *Inuit c. Parlamento e Consiglio*, C-583/11 P, ECLI:EU:C:2013:625, pt. 92; Corte giust., sentenza del 3.9.2008, *Kadi e Al Barakaat c. Consiglio*, cause riunite C-402/05 P e C-415/05 P, EU:C:2008:461, pt. 81; Corte giust., sentenza del 23.4.1986, *Les Verts*, causa 294/83, ECLI:EU:C:1986:166, pt. 23.

13. In merito al rapporto tra completezza, gerarchia, sistema giudiziario e autonomia dell'ordinamento giuridico dell'UE cfr. ad esempio B. Kunoy e A. Dawes, *Plate Tectonics in Luxembourg: the ménage à trois between EC law, international law and the European Convention on Human Rights following the UN sanctions cases*, in *Common Market Law Review*, n. 46.2009; C. Eckes, *op. cit*. I. Govaere, *Interconnecting Legal Systems and the Autonomous EU Legal Order: A Balloon Dynamic*, in *The Interface Between EU and International Law: Contemporary Reflections*, a cura di I. Govaere e S. Garben, Oxford e Portland, Hart, 2019; I. Govaere, *Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order*, in *Mixed Agreements Revisited: The EU and its Member States in the World*, a cura di C. Hillion e P. Koutrakos, Oxford e Portland, Hart 2010.

14. In merito all'utilizzo dell'espressione «sperimentalismo democratico» come sinonimo di *new governance* cfr. M.C. Dorf e C.F. Sabel, *A Constitution of Democratic Experimentalism*, Columbia Law review, n. 98.1998.

efficacia di quei meccanismi e principi propri dell'ordinamento giuridico dell'Unione concepiti affinché il potere non venga esercitato arbitrariamente. Questa circostanza allontana ulteriormente la realtà della produzione normativa dell'Unione dall'idea di una UE fondata sullo stato di diritto[15].

Dal momento che mette in discussione le fondamenta dei valori dell'ordinamento giuridico dell'Unione, la *soft law* merita di essere analizzata dal punto di vista del diritto costituzionale dell'UE. Ciò è tanto più vero quando la *soft law* è utilizzata in settori, come lo spazio di libertà, sicurezza e giustizia (SLSG), caratterizzati da un lato da uno stretto legame con la sovranità nazionale[16] e dall'altro dalla "natura costituzionale"[17] del loro oggetto, essenzialmente correlato ai diritti fondamentali[18].

La correlazione diretta tra i diritti fondamentali e gli aspetti esterni dello SLSG emerge chiaramente se si pensa ad episodi degli ultimi anni, come quello in cui la guardia costiera libica ha sparato a tre migranti sudanesi[19] o quello relativo all'incendio divampato nell'*hotspot* di Moria in Grecia, che ha lasciato migliaia di migranti all'addiaccio e abbandonati a se stessi[20].

15. S. Carrera, J.S. Vara e T. Strik, *The external dimensions of EU migration and asylum policies in times of crises*, in *Constitutionalising the external dimensions of EU migration policies in times of crisis: legality, rule of law and fundamental rights reconsidered*, a cura di S. Carrera, J. Santos Vara e T. Strik, Rochester, Edward Elgar, 2019; C. Molinari, *The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns*, in *European Law Review*, n. 44.2019; L. Marin, *Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border*, in *Journal of Contemporary European Research*, 7.2011.

16. J. Monar, *Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the 'Area of Freedom, Security and Justice'?*, in *European Constitutional Law Review*, n. 1.2005, p. 226.

17. Tradizionalmente, nell'ambito del costituzionalismo europeo, rappresentato innanzitutto dalle Costituzioni nazionali degli Stati membri dell'UE, i diritti fondamentali sono concepiti quali elementi essenziali dei testi costituzionali (P. *Craig, Constitutions, Constitutionalism, and the European Union*, *European Law Journal*, n. 7.2001, p. 141; K. Tuori, *European Constitutionalism*, Cambridge, Cambridge University Press, 2015, p. 16). A partire dalla riforma di Lisbona dei Trattati (Trattato di Lisbona che modifica il trattato sull'Unione europea e il trattato che istituisce la Comunità europea, firmato a Lisbona il 13 dicembre 2007, GUUE C 306, 17.12.2007, p 1-271), la Carta dei diritti fondamentali dell'UE fa ufficialmente parte del diritto primario dell'Unione e l'impegno a rispettare i diritti fondamentali è inserito nell'elenco dei valori fondamentali dell'UE di cui all'art. 2 TUE.

18. La gestione della migrazione, in particolare, incide su numerosi diritti fondamentali, tra cui il diritto assoluto a non essere sottoposti a torture e a trattamenti inumani o degradanti (integrato dal principio di non respingimento (*non-refoulement*)), il diritto di richiedere protezione internazionale, il diritto alla libertà, il diritto alla vita privata, nonché alla tutela giudiziaria effettiva di tutti questi diritti.

19. Il 27 luglio tre migranti sudanesi avevano tentato di fuggire al momento dello sbarco sulla costa della Libia, dopo essere stati respinti mentre cercavano di raggiungere l'Europa. La guardia costiera libica aprì il fuoco contro di loro, uccidendoli (Alexander Morgan, l'UE condanna l'uccisione in Libia di tre migranti diretti in Europa, 29.7.2020. https://www.euronews.com/2020/07/29/un-deplores-deadly-shooting-of-three-europe-bound-migrants-in-libya accesso in data 12 maggio 2021).

20. AP, migranti sfollati a Lesbo protestano in seguito all'incendio divampato nel campo profughi di Moria, 14.9.2020. https://www.euronews.com/2020/09/12/displaced-migrants-on-lesbos-island-protest-in-wake-of-fire-at-moira-camp accesso in data 12 maggio 2021.

Nel *background* giuridico di entrambi gli episodi rientrano degli accordi di *soft law*. Infatti alla guardia costiera libica sono assicurati finanziamenti e formazione con il sostegno sia dell'Italia che dell'UE[21], in base al MI tra Italia e Libia[22], recentemente rinnovato[23]. Per quanto concerne il campo profughi di Moria, la sua popolazione è aumentata sensibilmente in seguito alla dichiarazione UE-Turchia[24], trasformandosi *de facto* in un Centro di detenzione per i migranti che attendono di essere rimpatriati in Turchia[25].

Tutto ciò proietta una luce inquietante sull'incremento del ricorso agli accordi di *soft law* nello SLSG, sia che tali accordi siano "semplicemente" sostenuti dall'UE, sia che, più frequentemente, siano conclusi direttamente a livello dell'UE, come nel caso della azione congiunta UE-Afghanistan per il futuro (*EU- Afghanistan Joint Way Forward* – JWF)[26] (2016), della successiva Dichiarazione congiunta UE-Afghanistan (Joint Declaration on Migration Cooperation between Afghanistan and the EU)[27] (2021), delle procedure operative standard UE-Bangladesh (*EU-Bangladesh Standard Operating Procedures* – SOP)[28] (2017) e delle procedure di ammissione UE-Etiopia (*EU-Ethiopia Admission Procedures* – AP)[29] (2018). Tali accordi fanno sorgere interrogativi di non poco conto. Molto dibattute in dottrina sono, ad esempio, le questioni relative alla tutela giurisdizionale

21. Comunicato stampa della Commissione Fondo fiduciario dell'UE per l'Africa adotta un programma di 46 milioni di euro a sostegno della gestione integrata della migrazione e delle frontiere in Libia, 28.7.2017. file:///C:/Users/u0116137/Zotero/storage/CHL2UA2C/IP_17_2187.html accesso in data 12 maggio 2021.

22. *Memorandum* d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica italiana. http://www.governo.it/sites/governo.it/files/Libia.pdf accesso in data 12 maggio 2021. Per una versione in lingua inglese cfr. *memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic*. https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf accesso in data 12 maggio 2021.

23. Euronews, Libia-Italia: scattato il rinnovo del *memorandum* sui migranti, 2.2.2020. https://it.euronews.com/2020/02/02/libia-italia-scattato-il-rinnovo-del-memorandum-sui-migranti accesso in data 12 maggio 2021.

24. Dichiarazione UE-Turchia del 18 marzo 2016, comunicato stampa del Consiglio europeo e del Consiglio 144/16.

25. In merito alla correlazione tra la dichiarazione UE-Turchia e la trasformazione degli *hotspot* greci in Centri di detenzione cfr. Maria Margarita Mentzelopoulou e Katrien Luyten, *Hotspots at EU external borders State of play*, *briefing* del Servizio Ricerca del Parlamento europeo (*European Parliamentary Research Service* – EPRS) del 2018. https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623563/EPRS_BRI(2018)623563_EN.pdf accesso in data 12 maggio 2021.

26. Azione congiunta UE-Afghanistan per il futuro in materia di questioni migratorie, 4 ottobre 2016, https://eeas.europa.eu/headquarters/headquarters-homepage/11107/joint-way-forward-on-migration-issues-between-afghanistan-and-the-eu_en.

27. Dichiarazione Congiunta UE-Afghanistan sulla cooperazione in materia di migrazione, 26 aprile 2021.

28. Allegato I del 2017 della Commissione alla decisione C(2017) 6137 final relativa alla firma delle procedure operative standard UE-Bangladesh per l'identificazione e il rimpatrio delle persone prive di autorizzazione a soggiornare.

29. Allegato alla nota punto 15762/17 procedure di ammissione UE-Etiopia per il rimpatrio dei cittadini etiopi dagli Stati membri dell'Unione europea, 15762/17.

effettiva dei diritti dei migranti coinvolti[30] e alla responsabilità giudiziaria delle istituzioni, degli organi e delle Agenzie dell'UE che hanno un ruolo nella conclusione degli accordi di *soft law*[31].

Per ragioni di economia, il presente contributo si sofferma solo su uno dei numerosi interrogativi di ordine costituzionale di particolare rilevanza: la *giustificazione* che si cela dietro il ricorso agli accordi di *soft law* nel settore della riammissione. Dopo una breve introduzione agli accordi di *soft law* in materia di rimpatri (sezione 2) il presente saggio svilupperà due considerazioni in materia.

In primo luogo, il presente contributo ipotizza che la giustificazione a supporto del ricorso ad accordi di *soft law* nel settore dei rimpatri sia stata sinora unicamente l'elusione delle garanzie costituzionali, diventata ormai un fine in sé per il ricorso alla *soft law* in questo ambito. In un ordinamento giuridico fondato sullo stato di diritto questo specifico utilizzo degli accordi di *soft law* è criticabile *tout court* (sezione 3).

In secondo luogo, il presente contributo sostiene che, sebbene alcuni vincoli costituzionali possano effettivamente venir meno ricorrendo ad accordi di *soft law*, altri devono necessariamente restare operanti per garantire che i poteri pubblici non siano esercitati arbitrariamente. Tra questi, il presente articolo esamina il principio dell'equilibrio istituzionale, la cui rigorosa applicazione agli accordi di *soft law* impedirebbe che questi ultimi vengano utilizzati come strumento per escludere alcuni attori istituzionali in favore di altri (sezione 4).

2. Gli accordi di *soft law* nel settore della riammissione

L'uso della *soft law* in materia di questioni migratorie non è un fenomeno nuovo. Già nel 2007, pochi anni dopo aver acquisito la competenza di concludere accordi internazionali in materia di rimpatri (i cosiddetti accordi di riammissione), l'UE identificava i partenariati per la mobilità come lo strumento principale tramite il quale inquadrare la cooperazione estera su questioni migratorie[32]. Tali partenariati sono precisamente strumenti di *soft law* e

30. Tra gli altri, C. Molinari, *EU Institutions in Denial: Non-Agreements, Non-Signatories, and (Non-)Effective Judicial Protection in the EU Return Policy*, Maastricht Faculty of Law Working Paper 2019/2, p. 8; V. Moreno-Lax *The Migration Partnership Framework and the EU-Turkey Deal: Lessons for the Global Compact on Migration Process?*, in: *What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration*, RWI Working Paper 2017/1.

31. Tra gli altri, J. Santos Vara, *Soft international agreements on migration cooperation with third countries: a challenge to democratic and judicial controls in the EU*, in *Constitutionalising the external dimensions of EU migration policies in times of crisis: legality, rule of law and fundamental rights reconsidered*, a cura di S. Carrera, J. Santos Vara e T. Strik, Rochester, Edward Elgar, 2019, pp. 33-35.

32. Comunicazione della Commissione COM(2007) 248 definitivo del 16.5.2007 in materia di migrazione circolare e partenariati per la mobilità tra l'Unione europea e i Paesi terzi.

tracciano linee guida in merito alla cooperazione tra UE e Paese terzo firmatario in materia non solo di rimpatri, ma anche di controllo delle frontiere, immigrazione regolare ed integrazione. Questi strumenti di *soft law* sono intesi come un primo passo verso la conclusione di due Trattati internazionali veri e propri da negoziare, di volta in volta ed in parallelo, col Paese terzo: un accordo di riammissione, in genere nell'interesse dell'Unione, ed un accordo di facilitazione del rilascio dei visti, in genere nell'interesse del Paese terzo[33]. Quest'uso della *soft law* come tappa propedeutica alla negoziazione di strumenti vincolanti di diritto internazionale non desta particolari preoccupazioni, poiché i diritti e gli obblighi assunti dalle parti in questione, formalizzati proprio al momento della conclusione di tali strumenti secondo le procedure prescritte dal quadro costituzionale (nel caso di specie, dall'art. 218 TFUE), rimangono soggetti al livello di scrutinio democratico e giurisdizionale prescritto da tale quadro. Lo stesso non può dirsi degli accordi informali di riammissione che si sono moltiplicati negli ultimi anni a seguito della crisi migratoria del 2015 sul modello della dichiarazione UE-Turchia del 18 marzo 2016[34]. Quest'ultima è stata concepita come risposta emergenziale all'aumento del flusso migratorio osservato a partire dal 2014-2015 e contiene impegni riguardanti non solo i rimpatri (come evidenziato dalla ben nota frase di apertura: «Tutti i nuovi migranti irregolari che hanno compiuto la traversata dalla Turchia alle isole greche a decorrere dal 20 marzo 2016 saranno rimpatriati in Turchia»), ma anche il controllo delle frontiere ed i reinsediamenti. Pur non trattandosi di un accordo vincolante, tale dichiarazione ha avuto conseguenze notevoli sia sulla gestione dei migranti arrivati in Grecia a seguito della sua conclusione sia sul rafforzamento delle frontiere tra Grecia e Turchia, anche grazie al notevole impegno economico assunto dall'Unione e dai suoi Stati membri in favore del partner turco con la creazione dello Strumento per i rifugiati in Turchia[35], che ha comportato un esborso da 6 miliardi di euro a sostegno degli sforzi sostenuti dalla Turchia per limitare il flusso di immigrati irregolari verso la Grecia. La dichiarazione in sé non altera i diritti riconosciuti agli immigrati irregolari ed, in particolare, ai richiedenti asilo. Le parti si impegnano a rimpatriare verso la Turchia coloro che non hanno diritto di restare sul suolo europeo, a seguito di una determinazione fatta seguendo le procedure dettate dalla legislazione interna. Tuttavia, è innegabile che l'enfasi posta sui rimpatri abbia avuto conseguenze notevoli sulla gestione degli arrivi in Grecia, con la trasformazione del campo di Moria in un *hotspot* chiuso e sovraffollato che ha comportato un notevole deterioramento delle condizioni di vita dei richiedenti asilo e degli immigrati

33. COM (2011) 743 definitivo del 18.11.2011, *L'approccio globale in materia di migrazione e mobilità*.

34. Dichiarazione UE-Turchia del 18 marzo 2016, comunicato stampa del Consiglio europeo e del Consiglio 144/16.

35. Si veda la scheda informativa pubblicata dalla Commissione (Factsheet: The EU Facility for Refugees in Turkey https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/frit_factsheet.pdf/).

irregolari ivi bloccati e con l'emergere di notevoli ostacoli pratici nel garantire loro il sostegno e l'assistenza necessarie al fine di esercitare i propri diritti[36]. Ciò nonostante, grazie alla sua – reale o percepita – efficacia nella riduzione della pressione migratoria sulla Grecia, la dichiarazione UE-Turchia è diventata velocemente, nella narrativa istituzionale dell'UE, un modello di cooperazione riuscita in materia migratoria. Nel contesto della comunicazione programmatica emessa dalla Commissione nel 2016 in merito al nuovo quadro di cooperazione in materia migratoria in risposta alla crisi, la dichiarazione UE-Turchia viene esplicitamente indicata come un modello da seguire[37] ed il ricorso alla *soft law* in sostituzione, piuttosto che in preparazione, dei Trattati internazionali di riammissione viene esplicitamente avallato[38]. Questa manovra estrapola la dichiarazione dal quadro emergenziale nel quale era nata e la normalizza, trasformandola in un nuovo standard. Dal 2016 in poi, con l'eccezione dell'accordo di riammissione concluso con la Bielorussia nel 2020[39] sulla base di un mandato risalente al 2011 e quasi immediatamente sospeso[40], l'Unione non ha concluso alcun nuovo Trattato vincolante di riammissione. Si sono invece moltiplicati gli accordi *di soft law* in materia. Esempi in tal senso sono l'azione congiunta UE-Afghanistan per il futuro (*EU- Afghanistan Joint Way Forward* – JWF)[41] (2016), recentemente sostituita dall'analoga Dichiarazione congiunta (Joint Declaration on Migration Cooperation between Afghanistan and the EU)[42] (2021), le procedure operative standard UE-Bangladesh (*EU-Bangladesh Standard Operating Procedures* – SOP)[43] (2017), e le procedure di ammissione UE-Etiopia (*EU-Ethiopia Admission Procedures* – AP)[44] (2018). La Commissione afferma di aver concluso accordi di questo tipo anche con Guinea, Gambia e Costa d'Avorio, anche se il relativo testo non è stato pubblicato, nemmeno in forma di comunicato stampa.

36. E. Córdova Morales, *The Black Holes of Lesbos: Life and Death at Moria Camp: Border Violence, Asylum, and Racisms at the Edge of Postcolonial Europe*, in *Intersections. East European Journal of Society and Politics*, 7.2021.

37. Comunicazione della Commissione COM(2016) 385 definitivo del 7.6.2016 sulla creazione di un nuovo quadro di partenariato con i Paesi terzi nell'ambito dell'Agenda europea sulla migrazione.

38. *Ibid.*

39. Accordo, tra l'Unione europea e la Repubblica di Bielorussia relativo alla riammissione delle persone in soggiorno irregolare, Gazzetta ufficiale dell'Unione europea, L 181, 9 giugno 2020.

40. Consiglio, Bielorussia: il Consiglio sospende le disposizioni sulla facilitazione del rilascio dei visti per i funzionari del regime bielorusso, comunicato stampa del 9.11.2021, https://www.consilium.europa.eu/it/press/press-releases/2021/11/09/belarus-council-suspends-visa-facilitation-provisions-for-officials-of-the-belarus-regime/.

41. Azione congiunta UE-Afghanistan per il futuro in materia di questioni migratorie, 4 ottobre 2016, https://eeas.europa.eu/headquarters/headquarters-homepage/11107/joint-way-forward-on-migration-issues-between-afghanistan-and-the-eu_en.

42. Dichiarazione Congiunta UE-Afghanistan sulla cooperazione in materia di migrazione, 26 aprile 2021.

43. Allegato I del 2017 della Commissione alla decisione C(2017) 6137 final relativa alla firma delle procedure operative standard UE-Bangladesh per l'identificazione e il rimpatrio delle persone prive di autorizzazione a soggiornare.

44. Allegato alla nota punto 15762/17 procedure di ammissione UE-Etiopia per il rimpatrio dei cittadini etiopi dagli Stati membri dell'Unione europea, 15762/17.

Gli accordi di *soft law* appena menzionati hanno un contenuto in tutto analogo a quello dei Trattati di riammissione conclusi dall'Unione negli anni precedenti la crisi migratoria: essi (i) stabiliscono l'impegno del Paese terzo a riammettere i propri cittadini[45] – e, nel caso della dichiarazione UE-Turchia, i cittadini di Paesi terzi[46] – ; (ii) indicano quali documenti saranno accettati come mezzi di prova ai fini di stabilire la cittadinanza e quali come validi documenti di viaggio[47]; e (iii) determinano quanti rimpatriati o voli di rimpatrio possano essere ammessi dal Paese terzo nell'arco di un determinato lasso di tempo[48]. Il rispetto di tutte queste norme di dettaglio è garantito dalla creazione di gruppi di lavoro congiunti per monitorarne l'attuazione[49]. Inoltre, il testo di tali accordi di *soft law* spesso contiene disposizioni in merito alla data di inizio della cooperazione in materia di riammissione ed alle condizioni per eventuali sue modifiche o sospensioni[50].

Date queste premesse, non sembra esservi alcuna differenza di sostanza tra accordi di *soft law* in materia di riammissione e Trattati internazionali aventi lo stesso oggetto. Soprattutto nel quadro delle relazioni esterne, dove il rispetto degli obblighi è determinato da questioni di reputazione e rapporti di forza più che dalla possibilità concreta di una sanzione in sede giudiziaria, è difficile pensare che simili accordi di *soft law*, che pure si considerano esplicitamente come non vincolanti, abbiano realmente una forza normativa inferiore a quella dei Trattati in materia di rimpatri. In questo contesto, è naturale chiedersi quale sia la giustificazione alla base del ricorso alla *soft law* in questo settore e se tale giustificazione sia in qualche modo legittima, sulla base del quadro costituzionale di riferimento, dal momento che molte delle garanzie da esso approntate a proposito della conclusione di strumenti di diritto vincolanti vengono meno rispetto agli accordi di *soft law*, come discusso in seguito. Le prossime sezioni si occupano di proporre degli elementi di risposta a tale quesito.

45. AP UE-Etiopia sezione 1.2; JWF UE-Afghanistan.

46. Dichiarazione UE-Turchia e piano d'azione pt. 1.

47. JWF UE-Afghanistan, parte II; SOP UE-Bangladesh pt. 1-4; AP UE-Etiopia sezioni 2-4.

48. JWF UE-Afghanistan, parte III; SOP UE-Bangladesh pt. 5.

49. JWF UE-Afghanistan, parte IV; SOP UE-Bangladesh punto 6; dichiarazione UE-Turchia dal secondo all'ultimo paragrafo; AP UE-Etiopia sezione 5(2).

50. JWF UE-Afghanistan, parti IV, VIII e IX; SOP UE-Bangladesh pt. 6; Dichiarazione UE-Turchia e piano d'azione pt. 1 e 6; AP UE-Etiopia sezione 6.

3. Giustificazione del ricorso alla *soft law* nel settore dei rimpatri

3.1. Motivazioni addotte a favore del ricorso alla soft law in altri settori

Il rapporto tra *soft law* e garanzie costituzionali ha attirato in misura sempre maggiore l'attenzione della dottrina, dato che l'utilizzo della *soft law* è diventato un fenomeno dilagante nell'ordinamento giuridico dell'Unione.

I sostenitori del ricorso alla *soft law* ne esaltano diverse qualità[51] che la rendono uno strumento particolarmente idoneo per la gestione della *governance* interna. La *soft law*, quando è prodotta da meccanismi modellati sulla base del metodo di coordinamento aperto (*Open Method of Coordination* – OMC)[52], ha il vantaggio di essere *partecipativa e non gerarchica*, dato che è il frutto del coordinamento transnazionale tra reti di soggetti posti sullo stesso livello che si impegnano a raggiungere determinati obiettivi e controllano l'uno il comportamento dell'altro. Tale impostazione rende probabilmente alcuni tipi di strumenti di *soft law* più *trasparenti*, dato che il processo decisionale non solo è visibile, ma è anche aperto agli *input* di tutte le parti interessate[53]. Inoltre, la *soft law* è in grado di *adattarsi alle peculiarità dei contesti nazionali*, basandosi su vari tipi di impegni da parte dei diversi Stati membri o su linee guida generiche piuttosto che su norme dettagliate. Infine, la *soft law* è uno *strumento flessibile su cui è più semplice trovare un accordo*. Per natura, non prevede l'espletamento di lunghe procedure (come ad esempio la procedura di ratifica a cui sono tipicamente sottoposti gli accordi internazionali vincolanti). Inoltre, la *soft law* è connotata da un costo reputazionale contenuto (proprio a fronte della sua natura non vincolante) e non assoggetta i suoi autori ai classici meccanismi di responsabilità[54].

La capacità della *soft law* di generare sinergie tra gli esperti e la società civile e di orientare l'azione, consentendo al contempo di operare opportune differenziazioni, è considerata il suo principale punto di forza in ambiti quali la politica sociale e la tutela dell'ambiente. Sicuramente, per raggiungere determinati obiettivi, come il coordinamento delle politiche nazionali o il sostegno degli Stati membri dell'UE nell'applicazione di

51. Cfr ad esempio l'elenco dei potenziali vantaggi della *soft law* in M. Eliantonio e O. Stefan, *Soft Law Before the European Courts: Discovering a 'common pattern'?*, in *Yearbook of European Law*, 2018, pp. 457-458; D.M. Trubek *et al.*, *op. cit.*, pp. 73-74.

52. A tale riguardo cfr. ad esempio L. Tholoniat, *The Career of the Open Method of Coordination: Lessons from a 'Soft' EU Instrument*, *West European Politics*, 33.2010; E. Szyszczak, *Experimental Governance: The Open Method of Coordination*, European Law Journal, 12.2006.

53. G. de Búrca e J. Scott, *Introduction: New Governance*, *op. cit.*, p. 3. Ma cfr. altresì l'opposto punto di vista – che dà conto della diversità di approccio dei decisori in materia di *soft law* nei diversi contesti – che lamenta la carenza di trasparenza degli strumenti di *new governance* e della *soft law* in particolare (M. Eliantonio, *op. cit.*, p. 497, che cita L. Senden, *Soft Post-Legislative Rulemaking: A Time for More Stringent Control*, *European Law Journal*, 19.2013, p. 65).

54. Dal punto di vista democratico (L. Senden, Soft Post-Legislative Rulemaking, *op. cit.*, p. 71) e giudiziario (M. Eliantonio e O. Stefan, *op. cit.*, pp 459-460).

normative tecniche, la *soft law* vanta un potenziale di cui la *hard law* è sprovvista. In particolare, la *soft law* è in grado di raggiungere settori impervi per la normativa vincolante, anche per ragioni legate alla limitatezza delle competenze attribuite all'Unione in certe materie, nonché di integrare la legislazione quadro che necessita di un'attuazione incrementale e di *input* costanti da parte di esperti[55]. Conseguendo tali obiettivi, la *soft law* perfeziona il quadro normativo creato dalle norme vincolanti tradizionali senza prevalere su di esse.

Queste riflessioni non sembrano però in grado di giustificare il ricorso ad accordi di *soft law* nell'ambito esterno dello SLSG e, in particolare, nel settore della riammissione.

3.2. Assenza di capacità esplicativa di tali motivazioni nel settore della riammissione

In primo luogo, il ricorso ad accordi di *soft law* nel settore della riammissione non rende i negoziati né più trasparenti, né più partecipativi. Al contrario, la negoziazione di accordi di *soft law* esclude attori che invece avrebbero voce in capitolo, come ad esempio il Parlamento europeo (il Parlamento), ed è condotta in modo opaco. A questo punto è importante sottolineare che l'art. 218 TFUE prevede una procedura specifica da seguire per la negoziazione e la conclusione di accordi internazionali formali, che garantisce da un lato una serie di importanti prerogative a favore del Parlamento[56] e dall'altro lato un certo livello di trasparenza[57]. Per contro, all'interno dei Trattati non è prevista alcuna procedura per l'adozione di accordi di *soft law* e questa assenza ha sino ad ora fatto sì che tali accordi venissero conclusi da(gli Stati membri in seno al) Consiglio europeo[58] o dalla Commissione[59]. Il Parlamento non è stato coinvolto nei negoziati e non è stato tenuto informato durante lo svolgimento degli stessi[60]. Inoltre, spesso non è consentito neppure l'accesso *ex post* ai

55. Operando in tal modo, la *soft law* può integrare la *hard law*, dando vita a quadri ibridi, come quello descritto da de Búrca in relazione alla direttiva sull'uguaglianza razziale (G. de Búrca, EU Race Discrimination Law: A Hybrid Model?, in *Law and New Governance in the EU and the US*, a cura di G. de Búrca e J. Scott, Oxford e Portland, Hart, 2006).

56. In base all'art. 218(6) (v) TFUE, letto unitamente all'art. 79(2) TFUE, gli accordi nel settore della politica comune in materia di immigrazione, compresa la riammissione, necessitano del consenso del Parlamento europeo. Inoltre, l'art. 218(10) TFUE prevede che il Parlamento sia «immediatamente e pienamente informato in tutte le fasi della procedura».

57. La trasparenza *ex ante* è limitata, ma assicurata, dall'attività di "supervisione" svolta dal Parlamento in qualità di istituzione rappresentativa dei cittadini dell'UE. La trasparenza *ex post* è garantita dalla possibilità di accedere al testo definitivo della decisione di concludere un accordo internazionale e dell'accordo internazionale stesso, dato che tali testi sono pubblicati nella Gazzetta ufficiale dell'UE, in base a quanto previsto dall'art. 297 TFUE.

58. È il caso della dichiarazione UE-Turchia (sulla paternità della quale cfr. nota 9).

59. È il caso delle SOP UE-Bangladesh e delle AP UE-Etiopia.

60. Cfr. ad esempio il paragrafo introduttivo delle interrogazioni parlamentari con richiesta di risposta scritta E-000957-18, formulata dal membro del Parlamento europeo Judith Sargentini alla Commissione in data 15 febbraio 2018 (https://www.europarl.europa.eu/doceo/document/E-8-2018-000957_EN.html accesso in data 12 maggio 2021), in cui si legge che «in data 29 gennaio 2018, il Consiglio ha approvato le procedure per rimpatriare i cittadini etiopi nel proprio

documenti dei negoziati o, talvolta, al testo definitivo degli accordi di *soft law*. Ad esempio, nella sentenza *Access Info Europe*[61], il Tribunale dell'Unione europea ha confermato il diniego da parte della Commissione di consentire l'accesso alla documentazione preparatoria relativa alla dichiarazione UE-Turchia, invocando una delle eccezioni alla regola generale relativa all'accesso ai documenti di cui all'art. 4(1) del regolamento trasparenza[62].

In virtù della medesima eccezione e, in particolare, dell'esistenza di un interesse pubblico alla non divulgazione con riguardo alle relazioni internazionali dell'Unione[63], all'autrice del presente contributo è stato negato l'accesso al testo definitivo di altri accordi informali non pubblicati, come ad esempio le buone pratiche UE-Guinea per l'efficiente funzionamento delle procedure di rimpatrio[64].

Paese di origine. *Né il Consiglio, né la Commissione hanno pubblicato il testo e quindi il Parlamento europeo si è visto costretto a basare la propria valutazione su una versione non ufficiale*. Da quella versione si evince chiaramente che tali procedure di rimpatrio si applicano sia al rimpatrio volontario in Etiopia che a quello forzato, nonché alla riammissione in tale Paese» (corsivo aggiunto) e E-002443/2020, formulata dai membri del Parlamento europeo Bettina Vollath e Birgit Sippel alla Commissione in data 22 aprile 2020, in cui si legge che «l'azione congiunta UE-Afghanistan per il futuro in materia di questioni migratorie è stata negoziata nel 2016 *senza la partecipazione ufficiale del Parlamento* e formalmente non ha efficacia giuridica» (corsivo aggiunto). Cfr. altresì il punto 73 della risoluzione non legislativa del Parlamento europeo del 13 marzo 2019 (15093/2016 – C8-0107/2018 – 2015/0302M(NLE) https://www.europarl.europa.eu/doceo/document/TA-8-2019-0170_EN.html accesso in data 12 maggio 2021, in base al quale il Parlamento «deplora la mancanza di supervisione parlamentare e controllo democratico rispetto alla conclusione dell'azione congiunta per il futuro») e il punto 19 della risoluzione del Parlamento europeo del 14.12.2017 relativa alla situazione in Afghanistan (2017/2932(RSP)) https://www.europarl.europa.eu/doceo/document/RC-8-2017-0678_EN.html accesso in data 12 maggio 2021), in cui si legge che il Parlamento «prende atto della conclusione dell'accordo informale di riammissione tra l'UE e l'Afghanistan previsto dall'azione congiunta per il futuro; *deplora la mancanza di vigilanza parlamentare e di controllo democratico sulla conclusione di tale accordo*; invita i governi della regione ad astenersi dal rimpatriare gli afghani; segnala che ciò costituisce una violazione diretta del diritto internazionale umanitario e che il crescente numero di rifugiati che subiscono tale trattamento non fa che rafforzare i gruppi terroristici e creare maggiore instabilità nella regione; sottolinea che i rimpatri in Afghanistan mettono a grave rischio la vita dei rimpatriati, in particolare delle persone sole che non dispongono di una rete familiare o di amici in Afghanistan e che hanno poche possibilità di sopravvivenza; sottolinea che l'assistenza e la cooperazione dell'UE devono essere mirate a conseguire lo sviluppo e la crescita nei Paesi terzi e a ridurre e, infine, eliminare la povertà, e non a incentivare i Paesi terzi a cooperare alla riammissione dei migranti irregolari, dissuadere con la coercizione le persone dal mettersi in viaggio o arrestare i flussi verso l'Europa» (corsivo aggiunto).

61. Sentenze del 7 febbraio 2018, *Access Info Europe c. Commissione*, T-851/16 e T-852/16, EU:T:2018:69 e EU:T:2018:71.

62. Regolamento (CE) n. 1049/2001 del Parlamento europeo e del Consiglio del 30 maggio 2001 relativo all'accesso del pubblico ai documenti del Parlamento europeo, del Consiglio e della Commissione, GUUE L 145, 31.5.2001, pp. 43-48.

63. *Access Info Europe c. Commissione*, causa T-851/2016, cit., pt. 41-42 e 43; *Access Info Europe c. Commissione*, causa T-852/2016, cit., pt. 41-42 e 45. Per un commento cfr. C. Molinari, *The General Court's Judgments in the Cases Access Info Europe v. Commission (T-851/16 and T-852/16): A Transparency Paradox?*, in *European Papers*, 3.2018).

64. Il segretariato generale del Consiglio ha sottolineato che il documento richiesto «costituisce una delle modalità pratiche relative al rimpatrio e alla riammissione tra l'UE e i Paesi terzi. Le prese di posizione contenute in quei documenti sono volte ad attuare gli impegni assunti da entrambe le parti per sviluppare una cooperazione nel settore del rimpatrio e della riammissione, definendo congiuntamente le procedure, le *best practice* e le disposizioni operative dettagliate per l'efficiente funzionamento del processo di riammissione. Con riferimento alle summenzionate questioni sensibili, la loro divulgazione rivelerebbe ad altri *partner* negoziali l'approccio strategico all'attuazione del mandato dell'UE, in tal modo

In secondo luogo, per quanto attiene all'azione esterna, la *soft law* non è più adattabile alla diversa natura dei contesti nazionali di quanto non lo siano i Trattati internazionali vincolanti, dato che questi ultimi sono negoziati con singoli Paesi terzi e, quindi, diversificati in base agli interessi ed ai rapporti che l'Unione intrattiene con ciascuno di essi. In effetti, il ricorso a strumenti quali i partenariati per la mobilità[65], che prevedono la partecipazione a fianco dell'Unione solo di alcuni Stati membri e non di tutti, ha consentito l'introduzione di una geometria variabile[66], allineando la partecipazione e gli incentivi al legame bilaterale tra i vari Stati membri e il relativo Paese terzo[67]. Inoltre, nell'ambito del diritto vincolante, gli accordi misti già consentono la partecipazione di alcuni Stati membri e non altri ad un Trattato internazionale negoziato dall'UE[68], risolvendo al contempo il problema di doversi rapportare esplicitamente con il confine tra competenze nazionali e sovranazionali durante i negoziati con i Paesi terzi, dal momento che i rispettivi ambiti di azione sono stabiliti dall'Unione internamente[69].

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indebolendo la posizione negoziale di quest'ultima, complicando gli ulteriori sviluppi dei meccanismi di riammissione attualmente in corso e compromettendo altresì la conclusione di ulteriori accordi dello stesso tipo. Altri *partner* negoziali, qualora avessero accesso ai suddetti documenti, potrebbero utilizzare gli accordi già raggiunti come leva per i negoziati. La garanzia di riservatezza è fondamentale per il successo di questa complessa operazione, finalizzata a preservare sia gli interessi che i valori dell'UE. La divulgazione [del documento] metterebbe quindi a repentaglio la tutela dell'interesse pubblico con riguardo alle relazioni internazionali. Di conseguenza, il segretariato generale deve negare l'accesso a tale documento.».

65. Strumenti informali di cooperazione tra UE, determinati Stati membri e un Paese terzo volti a regolare tutti i settori di cooperazione con tale Paese terzo in materia di migrazione, dalla riammissione alla migrazione legale. Sono stati presentati come strumento nella comunicazione della Commissione COM(2007) 248 final del 16.5.2007 in materia di migrazione circolare e partenariati per la mobilità tra l'Unione europea e i Paesi terzi.

66. In merito al concetto di geometria variabile e all'aumento dell'importanza di tale "struttura" per l'ordinamento giuridico dell'UE cfr. De Witte, *Variable geometry and differentiation as structural features of the EU legal order*, in *Between Flexibility and Disintegration The Trajectory of Differentiation in EU Law*, Rochester, Edward Elgar, 2017.

67. In merito al funzionamento dei partenariati per la mobilità cfr. C. Alberola e S. Langley, *Independent Evaluation of the Mobility Partnerships between the European Union and Cape Verde, Georgia and Moldova*, Maastricht Graduate School of Governance, International Centre for Migration Policy Development, 2018; L. Den Hertog, *Funding the EU-Morocco 'Mobility Partnership': Of Implementation and Competences*, in *European Journal of Migration and Law*, 18.2016; S. Brocza e K. Paulhart, *EU mobility partnerships: a smart instrument for the externalization of migration control*, in *European Journal of Futures Research*, 3.2015.

68. Gli accordi misti consistono in accordi internazionali conclusi sia dall'Unione che dai suoi Stati membri (tutti o solo alcuni di essi). Sono necessari quando l'accordo riguarda sia materie che rientrano nell'ambito di competenza dell'Unione, sia materie che rientrano nell'ambito di competenza esclusiva degli Stati membri, mentre sono facoltativi (come riaffermato recentemente da Corte giust. nella sentenza del 5.12.2017, *Germania c. Consiglio (COTIF)*, C-600/14 EU:C:2017:935, pt. 68) quando riguardano settori oggetto di competenza concorrente. In quest'ultima ipotesi, l'Unione può agire da sola, ma tale azione risulta spesso difficile o impossibile dato che gli Stati membri non intendono farsi da parte (come nel caso oggetto della controversia presentata alla Corte in Corte giust., parere 2/15 del 16.5.2017 (*Accordo di libero scambio con la Repubblica di Singapore*), EU:C:2017:376, pt. 243-44); di conseguenza, nella pratica, l'*impasse* si risolve con il ricorso ad un accordo misto. Gli accordi misti sono oggetto di numerosi approfondimenti in dottrina. *Inter alia*, C. Hillion P. e Koutrakos, *op. cit.*; Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, EUI Working Paper 2006/22.

69. G. De Baere, *Constitutional Principles of EU External Relations*, 2008, p. 235.

In terzo luogo, gli accordi di *soft law* non consentono di raggiungere obiettivi che non possono essere negoziati nell'ambito di accordi di riammissione vincolanti. In realtà, come osservato in precedenza, accordi informali quali la dichiarazione UE-Turchia, l'azione congiunta UE-Afghanistan per il futuro, le procedure operative standard UE-Bangladesh e le procedure di ammissione UE-Etiopia hanno un contenuto del tutto analogo a quello degli accordi di riammissione vincolanti.

In conclusione, gli unici elementi che differenziano gli accordi di *soft law* dagli accordi formali consistono nella loro flessibilità (spesso a scapito dell'Unione, come dimostrano le minacce turche di non attenersi più alla dichiarazione UE-Turchia)[70] e nei costi di negoziazione più contenuti (dovuti anche alla carenza di trasparenza che connota i negoziati).

Sulla base di quanto esposto *supra*, si potrebbe sostenere che la *soft law* non rivesta un ruolo complementare nel settore della riammissione se messa a confronto con la *hard law*, ma offra più che altro, come principale vantaggio, la possibilità di eludere in ottica strategica[71] i vincoli di carattere procedurale e sostanziale propri dell'ordinamento giuridico dell'UE, che opererebbero nei confronti dei Trattati internazionali vincolanti.

3.3. Stato di diritto e aggiramento strategico dei vincoli costituzionali

In un ordinamento giuridico che pretende di configurarsi come autonomo e fondato su una serie di valori tra cui il rispetto dello stato di diritto, il ricorso a forme alternative di *governance* con lo scopo precipuo di eludere la legge, piuttosto che di migliorarla o integrarla, risulta problematico e potrebbe indurre a concludere che tale utilizzo della *soft law* sia incostituzionale *tout court*.

L'esistenza di un'UE intesa come ordinamento giuridico distinto sia dal diritto nazionale che da quello internazionale si basa sulla rivendicazione di autonomia formulata ormai da tempo immemore dalla Corte di giustizia UE (Corte o Corte giust.)[72]. A sua volta, l'idea dell'Unione come ordinamento giuridico autonomo riposa in particolare sul presupposto del suo rispetto dello stato di diritto ossia del rispetto dei meccanismi di attribuzione delle

70. Reuters, Il presidente della Turchia Erdogan minaccia di inviare i rifugiati siriani in Europa, 10 ottobre 2019. https://www.reuters.com/article/us-syria-security-turkey-europe/turkeys-erdogan-threatens-to-send-syrian-refugees-to-europe-idUSKBN1WP1ED accesso in data 12 maggio 2021.

71. C. Molinari, *The EU and its Perilous Journey*, *op. cit.*, p. 826; S. Carrera *et al.*, *It wasn't me!*, *op. cit.*, p. 2; V. Moreno-Lax, *op. cit.*, p. 32.

72. Cfr. Corte giust., parere 1/91 del 14.12.1991 (accordo SEE), EU:C:1991:490, pt. 35; Corte giust., parere 1/00 del 18.4.2002 (accordo SACE), EU:C:2002:231, pt. 11-12; Corte giust., sentenza del 30.5.2006, *Commissione c. Irlanda*, C-459/03, EU:C:2006:345, pt. 123; Corte giust., sentenza del 3.9.2008, *Kadi c. Consiglio*, cause riunite C-402/05 P e C-415/05 P, EU:C:2008:461, pt. 282; Corte giust., parere 2/13 del 18.12.2014 (Accesso alla CEDU), EU:C:2014:2454, pt. 168-200; Corte giust., parere 1/17 del 30.4.2019 (CETA), EU:C:2019:341, pt. 106-111.

competenze previsti nei Trattati e dei valori fondamentali di cui all'art. 2 TUE[73]. In assenza del presupposto fondamentale dello stato di diritto, la rivendicazione di autonomia dell'Unione non solo sarebbe difficile da comprendere, ma sarebbe altresì pericolosa, dato che i principi del primato e dell'applicabilità diretta sarebbero in grado di minare alla base lo stato di diritto anche negli ordinamenti giuridici nazionali degli Stati membri[74].

La Commissione ha fornito una definizione propria all'UE di stato di diritto nel 2014, quando ha affermato che lo stato di diritto come valore dell'Unione ricomprende al proprio interno una serie di principi, tra cui i «principi di legalità (secondo cui il processo legislativo deve essere trasparente, responsabile, democratico e pluralistico); certezza del diritto; divieto di arbitrarietà del potere esecutivo; indipendenza e imparzialità del giudice; controllo giurisdizionale effettivo, anche per quanto riguarda il rispetto dei diritti fondamentali; uguaglianza davanti alla legge.»[75].

Gli accordi di *soft law* conclusi in assenza di un controllo democratico, in modo opaco, senza rispettare le relative procedure previste dalla legge e nel tentativo di eludere il controllo giurisdizionale sembrano porsi in palese contrasto con tale definizione di stato di diritto. E ciò è tanto più vero quando i suddetti accordi di *soft law* incidono in modo

73. In base a quanto affermato dalla Corte al pt. 110 del suo parere 1/17, la «autonomia [dell'Unione] consiste [...] nella circostanza che l'Unione è dotata di un quadro costituzionale che le è proprio. Rientrano in tale quadro i valori fondatori enunciati nell'articolo 2 TUE, ai sensi del quale l'Unione "si fonda sui valori del rispetto della dignità umana, della libertà, della democrazia, dell'uguaglianza, dello stato di diritto e del rispetto dei diritti umani", i principi generali del diritto dell'Unione, le disposizioni della Carta, nonché le disposizioni dei Trattati UE e FUE, che contengono, segnatamente, le norme sull'attribuzione e la ripartizione delle competenze, le norme sul funzionamento delle istituzioni dell'Unione e del sistema giurisdizionale di quest'ultima, nonché le norme fondamentali nei settori specifici». Al pt. 316 della sentenza *Kadi I* della Corte giust., quest'ultima sottolinea nuovamente la correlazione tra stato di diritto e autonomia: «il controllo da parte della Corte della validità di qualsiasi atto comunitario sotto il profilo dei diritti fondamentali deve essere considerato come l'espressione, in una comunità *di diritto*, di una garanzia costituzionale derivante dal Trattato CE, quale sistema giuridico *autonomo*, che non può essere compromessa da un accordo internazionale». Analogamente, i pt. 168-170 del parere 2/13 affermano che la «costruzione giuridica [dell'Unione] poggia sulla premessa fondamentale secondo cui ciascuno Stato membro condivide con tutti gli altri Stati membri, e riconosce che questi condividono con esso, una serie di valori comuni sui quali l'Unione si fonda, così come precisato all'articolo 2 TUE. Questa premessa implica *e giustifica* l'esistenza della fiducia reciproca tra gli Stati membri quanto al riconoscimento di tali valori [...]. Al centro di tale costruzione giuridica si collocano proprio i diritti fondamentali, quali riconosciuti dalla Carta [...]. [L]'autonomia di cui gode il diritto dell'Unione rispetto al diritto dei singoli Stati membri nonché rispetto al diritto internazionale *esige* che l'interpretazione di tali diritti fondamentali *venga garantita* nell'ambito della struttura e degli obiettivi dell'Unione». Il ragionamento della Corte in merito all'autonomia fa emergere una caratteristica basilare dell'ordinamento giuridico dell'Unione: quest'ultimo è stato creato tramite la legge (i Trattati) e non può permettersi alcuna rivendicazione di sovranità (o di autonomia) preesistente, sia essa precedente o ulteriore rispetto all'attribuzione di cui ai Trattati. Di conseguenza, l'UE può esistere solo come ordinamento fondato sullo stato di diritto, come previsto dai Trattati con il loro sistema di bilanciamento dei poteri e le loro garanzie per la separazione delle competenze.

74. Questo aspetto è stato acutamente evidenziato da D. Kochenov, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, *Yearbook of European Law*, 34.2015, p. 94), il quale afferma altresì nel medesimo contributo che l'Unione *non è e non è mai stata* una comunità fondata sullo stato di diritto, affermazione su cui l'autrice del presente contributo non si trova d'accordo.

75. Commissione, *Comunicazione COM(2014) 158 final «Un nuovo quadro dell'UE per rafforzare lo stato di diritto»*, 11 marzo 2014, p. 4.

significativo – benché indiretto – su una serie di diritti fondamentali dei soggetti coinvolti senza predisporre alcuna garanzia in merito ad un'effettiva tutela di questi diritti da parte del giudice[76].

Tuttavia, quanto esposto *supra* non implica che la *soft law* sia sempre incostituzionale e incompatibile con lo stato di diritto, semplicemente perché non è prevista dai Trattati. Le modalità con cui i valori fondamentali di un sistema di governo sono tutelati al meglio possono ben evolvere nel tempo[77]. Di conseguenza, gli strumenti di *new governance*, tra cui la *soft law*, possono essere concepiti in modo da non minare alla base l'essenza stessa dello stato di diritto, evitando in particolare che i poteri pubblici siano esercitati in maniera arbitraria[78].

A tal fine, la *soft law* non deve celare una mera strategia volta ad aggirare il quadro costituzionale dell'Unione, ma deve piuttosto tentare di perseguire obiettivi di flessibilità, celerità ed efficacia, rispettando al contempo i vincoli imposti per lo meno da alcuni parametri costituzionali. Riflettere su quali questi possano essere risponde all'invito formulato da Neil Walker di integrare *soft law* e *hard law* all'interno di un paradigma coerente di *governance*, tramite quello che egli definisce «costituzionalismo riflessivo»[79], in una perenne ricerca di soluzioni in grado di perseguire l'obiettivo fondamentale di un auto-governo *responsabile*[80], all'interno di un panorama mutevole sia dal punto di vista fattuale che giuridico[81].

4. Conciliazione tra accordi di *soft law* e il principio-base di ordine costituzionale della *governance* responsabile

4.1. I confini inevitabili degli accordi di soft law

Se rivendicare autonomia significa accettare la responsabilità derivante dall'auto-governo, allora le norme costituzionali da cui non si può prescindere anche qualora si faccia

76. Come sottolineato dalla Commissione stessa, i principi riconducibili al concetto di stato di diritto «non sono meri requisiti procedurali e formali, bensì il mezzo per garantire il rispetto della democrazia e dei diritti dell'uomo.» (*Ibid*.).

77. G. de Búrca e J. Scott, *Epilogue: Accountability Without Sovereignty*, in *Law and New Governance in the EU and the US*, a cura di G. de Búrca e J. Scott, Oxford e Portland, Hart, 2006, p. 396.

78. T. Konstantinides, *The Rule of Law in the European Union : The Internal Dimension*, Oxford, Hart, 2017, p. 12.

79. N. Walker, *op. cit.*, 2006, pp. 35-36.

80. Indicato da Walker come aspirazione ultima del costituzionalismo europeo, inestricabilmente correlato alla rivendicazione dell'Unione di essere un ordinamento giuridico autonomo (*ivi*, p. 34) L'idea essenzialmente corrisponde all'essenziale rivendicazione di responsabilità individuata, ad esempio, da de Búrca e Scott come il cuore dell'ideale dello stato di diritto (Búrca e Scott 2006b, p. 400).

81. Walker osserva a riguardo che «un modello binario [volto a contrapporre una *new governance* ad una *old governance*] potrebbe spingerci a favorire religiosamente uno solo dei due modelli in una serie di contrapposizioni intrecciate tra nuovo e vecchio, progressismo e conservatorismo, mettendo da parte il merito, in termini di resilienza, di alcuni dei vecchi valori dello "stato di diritto"» (*ivi*, p. 22).

ricorso a strumenti di *new governance* sono proprio le norme volte a garantire che le istituzioni si assumano la responsabilità delle proprie azioni. Si tratta delle norme che separano e attribuiscono competenze e funzioni in modo tale da introdurre un sistema di bilanciamento dei poteri nel sistema di *governance* dell'Unione, conseguendo l'obiettivo fondamentale dello stato di diritto, vale a dire evitare l'esercizio arbitrario e non controllato dei poteri pubblici. L'individuazione di tutti i principi atti ad espletare tale funzione e l'analisi delle loro implicazioni per gli accordi di *soft law* è un'operazione che esula dall'ambito del presente contributo. Tuttavia, si ritiene che, tra tali principi, l'equilibrio istituzionale sia particolarmente idoneo per imbrigliare gli accordi di *soft law* all'interno di confini accettabili dal punto di vista costituzionale, così da offrire un certo margine di flessibilità senza incorrere nel rischio di un'elusione strategica delle norme di legge. Segue un breve approfondimento per spiegare il motivo di tale affermazione.

4.2. Un principio idoneo: equilibrio istituzionale e accordi di soft law

Il principio dell'equilibrio istituzionale è tradotto[82] dall'art. 13(2) TUE, in base al quale «[c]iascuna istituzione agisce nei limiti delle attribuzioni che le sono conferite dai Trattati, secondo le procedure, condizioni e finalità da essi previste». Nessun elemento all'interno del testo dei Trattati impedisce di applicare il principio dell'equilibrio istituzionale agli accordi di *soft law*. Al contrario, il principio si applica ogni qual volta un'istituzione dell'UE "agisca", anche per il tramite di accordi di *soft law*[83].

La Corte ha interpretato tale principio come garanzia per le prerogative di ciascuna istituzione, in particolare nell'ambito delle reciproche relazioni[84].

Il principio dell'equilibrio istituzionale definisce le rispettive funzioni degli attori istituzionali dell'UE, tracciando confini flessibili tra questi ultimi e predisponendo un

82. La Corte stessa utilizza il termine «traduce» in questo caso (es. Corte giust., sentenza del 16.7.2015, *Commissione c. Consiglio*, C-425/13, EU:C:2015:483, pt. 69), dato che il principio dell'equilibrio istituzionale non è interamente codificato all'interno di tale articolo, come sottolineato da S. Platon, *The Principle of Institutional Balance: Rise, Eclipse and Revival of a General Principle of EU Constitutional Law*, in *Research Handbook on General Principles of EU Law*, a cura di K. Ziegler, P. Neuvonen, V. Moreno-Lax, Rochester, Edward Elgar, 2022.

83. Come confermato da Corte giust., sentenza del 28.7.2016, *Consiglio c. Commissione* (memorandum *d'intesa con la Svizzera*), C-660/13, EU:C:2016:616.

84. Nella propria sentenza del 22.5.1990, *Parlamento europeo c. Consiglio*, causa 70/88, EU:C:1990:217, pt. 21-22, la Corte giust. ha precisato che le «prerogative [del Parlamento] costituiscono uno degli elementi dell'equilibrio istituzionale voluto dai Trattati. Questi hanno infatti instaurato un sistema di ripartizione delle competenze fra le varie istituzioni della Comunità secondo il quale ciascuna svolge una propria specifica funzione nella struttura istituzionale della Comunità e nella realizzazione dei compiti affidatile. Il rispetto dell'equilibrio istituzionale comporta che ogni istituzione eserciti le proprie competenze nel rispetto di quelle delle altre istituzioni. Esso impone altresì che possa essere sanzionata qualsiasi eventuale violazione di detta regola.». Cfr. altresì Corte giust., sentenza del 14.4.2015 *Consiglio c. Commissione*, C-409/13, EU:C:2015:217, pt 64; Corte giust., sentenza del 6.5.2008, *Parlamento europeo c. Consiglio*, C-133/06, EU:C:2008:257, pt. 57.

sistema di reciproco bilanciamento dei poteri. Non è un caso che la struttura istituzionale dell'UE, caratterizzata dall'equilibrio istituzionale[85], sia definita come una *caratteristica essenziale del diritto dell'Unione*, strettamente correlata all'autonomia del suo ordinamento giuridico nella giurisprudenza della Corte[86]. L'attribuzione alle varie istituzioni di una serie predefinita di ruoli e di compiti rappresenta una condizione per un auto-governo responsabile, nonché una delle modalità con cui le competenze sono suddivise all'interno dell'ordinamento giuridico dell'Unione, in modo da evitarne un esercizio arbitrario e non controllato.

L'equilibrio istituzionale riguarda sia la produzione della *hard law* che della *soft law* ed è applicabile nei confronti di entrambe. Ad avviso di chi scrive, tale principio dispiega la propria forza normativa in tutta la sua portata in particolare quando nei Trattati dell'UE non sia prevista alcuna procedura decisionale per l'adozione di determinati atti[87], come nel caso degli accordi di *soft law*. In realtà, le norme dei Trattati che definiscono procedure decisionali in modo dettagliato cristallizzano e, quindi, tutelano una variegata pluralità di prerogative istituzionali. Ad esempio, descrivendo la procedura per concludere un accordo internazionale vincolante, l'articolo 218 TFUE specifica già la modalità con cui le varie istituzioni sono chiamate ad interagire. Di conseguenza, con riferimento agli accordi formali negoziati in base alla procedura prevista nel suddetto articolo, il principio dell'equilibrio istituzionale svolge tutt'al più una funzione interpretativa complementare[88]. Per contro, in assenza di una procedura codificata, l'equilibrio istituzionale diventa fondamentale per impedire alle istituzioni di agire arbitrariamente, ricordando che ad ognuna di esse è

85. *Inter alia*, Corte giust., sentenza del 6.9.2017, *Repubblica slovacca e Ungheria c. Consiglio*, cause riunite C-643/15 e C-647/15, EU:C:2017:631, pt. 145.

86. Cfr. P.-J. Loewenthal, *Article 13 TFEU: Commentary*, in *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, a cura di M. Kellerbauer, M. Klamert, J. Tomkin, Oxford, Oxford University Press, 2019, p. 129; e Corte giust., parere 2/13, *cit*. pt. 158 e 165. Curiosamente, la Corte afferma che «le attribuzioni che i Trattati UE e FUE conferiscono a tali istituzioni» devono essere rispettate anche quando le istituzioni agiscono al di fuori del quadro dell'Unione, in qualità di istituzioni «prese in prestito» (Corte giust., sentenza del 27.11.2012, *Pringle*, C-370/12, EU:C:2012:756, pt. 158).

87. In generale le procedure decisionali sono stabilite in base ai relativi fondamenti giuridici, che consentono essenzialmente di affermare se al Consiglio e al Parlamento debba essere attribuito il medesimo peso nel processo decisionale in un determinato settore di competenza. Si noti che il peso delle due istituzioni delineato con riferimento al processo legiferativo interno è essenzialmente riprodotto nel settore delle relazioni esterne dall'art. 218 TFUE, che istituisce una simmetria tra procedura legislativa ordinaria a livello interno e necessario consenso del Parlamento per la conclusione di un accordo internazionale a livello esterno (Corte giust., sentenza del 4.9.2018, *Commissione c. Consiglio*, C-244/17, EU:C:2018:662, pt. 22; Corte giust., parere 1/15 del 26.7.2017 (Codice di prenotazione), EU:C:2017:592, pt. 146; Corte giust., sentenza del 24.6.2014, *Parlamento europeo c. Consiglio*, C-658/11, EU:C:2014:2025, pt. 56).

88. S. Prechal, *Institutional Balance: A Fragile Principle with Uncertain Contents*, in *The European Union after Amsterdam*, a cura di T. Heukels, N. Blokker and M. Brus, 1998, pp. 277-278. Come sottolineato da B. Bertrand, *Le principe de l'équilibre institutionnel: la double inconstance*, in *Europe: actualité du droit de l'Union européenne*, 2016, p. 4, in questi casi la funzione normativa dell'equilibrio istituzionale è già svolta dal principio di legalità.

attribuita una serie di prerogative nell'ambito dell'architettura generale dell'UE, nonché in ciascun settore di competenza della stessa, compreso quello della riammissione[89].

Le prerogative in capo a ciascuna istituzione nel settore della riammissione possono essere dedotte da una lettura combinata delle disposizioni generali relative alle istituzioni (articoli 13-19 TUE) e della base giuridica relativa al settore della riammissione (articolo 79(3) TFUE). Benché non direttamente applicabile, l'articolo 218 TFUE va tenuto in conto, nella misura in cui fornisce indicazioni utili in merito al ruolo che le varie istituzioni sono tenute a svolgere nell'ambito delle relazioni esterne dell'UE dopo Lisbona.

La lettura combinata delle suddette disposizioni induce a concludere che la Commissione è chiamata a rappresentare l'Unione esternamente e a condurre negoziati sulla base delle decisioni politiche adottate dal Consiglio. Al Parlamento spetta un'importante funzione di controllo politico nel settore. Esso deve quindi essere tenuto informato in merito ai principali sviluppi dei negoziati, nonché essere consultato dal Consiglio prima che quest'ultimo assuma una decisione definitiva[90]. Inoltre, il ruolo decisionale del Consiglio deve integrarsi nell'attività di orientamento del Consiglio europeo, ma non deve essere sostituito dalla stessa. Infine, la ripartizione delle competenze tra le istituzioni deve essere oggetto di una rigorosa attività di sorveglianza da parte della Corte, a sua volta soggetta al principio di equilibrio istituzionale[91] e, al contempo, incaricata di garantirne il rispetto.

In base al principio dell'equilibrio istituzionale, i singoli attori sono tenuti a rispettare tale ripartizione dei ruoli, per quanto tramite intese procedurali flessibili, anche al momento della conclusione di accordi di *soft law* in materia di riammissione. Sino ad oggi non è stato così.

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89. Per una prima riflessione sulla potenziale funzione dell'equilibrio istituzionale nel delimitare la *soft law* cfr. S. Prechal, *op. cit.*, pp. 289-294.

90. La competenza del Parlamento è stata interpretata in maniera estensiva dalla Corte con riferimento alla conclusione di accordi internazionali formali (cfr. ad esempio, Corte giust., sentenza del 14.6.2016, *Parlamento europeo c. Consiglio*, C-263/14, EU:C:2016:435, pt. 70-76 e Corte giust., sentenza del 24.6.2014, *Parlamento europeo c. Consiglio*, C-658/11, EU:C:2014:2025, pt. 85). La Corte ha evidenziato altresì l'esistenza di una simmetria tra il ruolo decisionale del Parlamento a livello interno e le sue competenze a partecipare al processo decisionale a livello esterno e ha osservato che gli autori del Trattato hanno optato per tale scelta nell'intento di tutelare l'equilibrio istituzionale (sentenza del 4 settembre 2018, *Commissione c. Consiglio*, C-244/17, EU:C:2018:662, pt. 22 e 30; sentenza del 24 giugno 2014, *Parlamento europeo c. Consiglio*, C-658/11, EU:C:2014:2025, pt. 56. Inoltre, la Corte ha sottolineato spesso che «la partecipazione effettiva del Parlamento al processo decisionale, conformemente alle procedure previste dal Trattato, rappresenta un elemento essenziale dell'equilibrio istituzionale voluto dal trattato medesimo. Tale competenza costituisce l'espressione di un principio democratico fondamentale, secondo il quale i popoli partecipano all'esercizio del potere per il tramite di un'assemblea rappresentativa» (Corte giust., *Repubblica slovacca e Ungheria c. Consiglio*, cause riunite C-643/15 e C-647/15, pt. 160 e relativa giurisprudenza citata all'interno).

91. Come la Corte ha costantemente ricordato, il principio è volto a tutelare le prerogative di *ciascuna* istituzione e, al contempo, a delinearne i rispettivi limiti di azione (cfr. ad esempio la sentenza sul *memorandum* d'intesa con la Svizzera, Corte giust., C-660/13, cit., pt. 31-32). Cfr. altresì S. Prechal, *op. cit.*, p. 281, in particolare la giurisprudenza citata alla nota 40; J.-U. Franck, *Striking a Balance of Power between the Court of Justice and the EU Legislature: The Law on Competition Damages Actions as a Paradigm*, *European Law Review*, n. 43.2018.

L'esempio più eclatante di sovvertimento di tale equilibrio istituzionale è la dichiarazione UE-Turchia, negoziata (dagli Stati membri all'interno del) Consiglio europeo senza tenere in alcuna considerazione la ripartizione dei ruoli tra le istituzioni[92].

Tuttavia, l'elusione dell'attribuzione costituzionale delle competenze caratterizza anche gli altri accordi summenzionati. In realtà, l'azione congiunta UE-Afghanistan per il futuro, le procedure operative standard UE-Bangladesh e le procedure di ammissione UE-Etiopia sono state tutte negoziate dalla Commissione sulla base delle direttive precedentemente fornite dal Consiglio[93]. In questo modo il Parlamento è stato escluso sia dalla loro negoziazione che dalla loro conclusione, in aperto contrasto con quanto disposto dalla giurisprudenza della Corte, in base alla quale «la prassi [di un'istituzione] non potrebbe in effetti sottrarre alle altre istituzioni una prerogativa loro attribuita dagli stessi Trattati»[94].

La qualificazione di tali accordi come non vincolanti ha – di per sé – implicato la possibilità di escludere un controllo diretto da parte della Corte in base all'articolo 263 TFUE, dato che quest'ultimo è limitato agli atti «destinati a produrre effetti giuridici nei confronti di terzi». Naturalmente, il controllo diretto degli accordi di *soft law* dipende in parte dall'interpretazione dell'articolo 263 TFUE fornita dalla Corte. Il Consiglio e la Commissione possono tentare di eludere il controllo politico da parte del Parlamento e il controllo giudiziale da parte della Corte tramite il ricorso ad accordi di *soft law*, ma è in ultima analisi la Corte a decidere se la forza normativa dei suddetti accordi sia sufficiente per consentire di operare un controllo di legittimità. Inoltre, resta sempre possibile operare un controllo indiretto per il tramite del procedimento pregiudiziale.

Sino ad ora la Corte non ha chiarito del tutto quali siano i criteri volti a stabilire se un'eventuale misura di *soft law* possa essere o meno sottoposta a controllo giurisdizionale[95].

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92. In merito alla paternità della dichiarazione cfr. nota 9. La procedura di negoziazione della dichiarazione è stata caratterizzata dal ruolo predominante del presidente del Consiglio europeo, dal mancato coinvolgimento del Parlamento e del Consiglio e dal ruolo limitato della Commissione. Si noti che la Commissione aveva peraltro rivestito un ruolo essenziale nella conclusione del piano d'azione (Commissione (2015) MEMO/15/5860, piano d'azione comune UE-Turchia) sulla base del quale è stata elaborata la dichiarazione e che il suo presidente era peraltro presente al momento della conclusione della dichiarazione.

93. Come emerge dagli scambi istituzionali relativi ai progetti di testo dei suddetti accordi (cfr. segretariato generale del Consiglio, «Nota punto al Comitato dei rappresentanti permanenti n. 12191/1 6, 22 settembre 2016, progetto di adozione di un'azione congiunta UE-Afghanistan per il futuro in materia di questioni migratorie»; Commissione, «Decisione C(2017) 6137 relativa alla firma delle procedure operative standard UE-Bangladesh per l'identificazione e il rimpatrio delle persone prive di autorizzazione a soggiornare»; segretariato generale del Consiglio, «Nota punto al Comitato dei rappresentanti permanenti n. 15762/17, 18 dicembre 2017, procedure di ammissione UE-Etiopia per il rimpatrio dei cittadini etiopi dagli Stati membri dell'Unione europea»).

94. Sentenza del 10 luglio 1986, *Wybot*, causa 149/85, EU:C:1986:310, pt. 23; cfr. P.-J. Loewenthal, *op. cit.*, p. 130 e la relativa giurisprudenza citata all'interno (nota 11).

95. Ad esempio cfr. C. Molinari, *EU Institutions in Denial*, *op. cit.*, p. 8 in merito alla manifesta contraddizione tra il criterio del controllo giurisdizionale degli strumenti di *soft law* nelle sentenze del Tribunale dell'Unione europea *Stanze di compensazione* (Corte giust., sentenza del 4.3.2015, *Regno Unito c. Banca centrale europea*, T-496/11,

Parte della dottrina ha chiesto apertamente alla Corte di indicare più chiaramente quale sia l'ambito della propria giurisdizione nei confronti della *soft law* ogni qual volta quest'ultima sia volta a produrre effetti dal punto di vista giuridico[96]. Tali esigenze sono state avvertite anche dalla Corte stessa, come dimostra il suggerimento dell'avvocato generale Bobek di adottare un'interpretazione estensiva del requisito di cui all'art. 263 TFUE, alla luce della «proliferazione dei vari strumenti di *soft law*»[97].

Benché ancora lontana dalla chiarezza auspicata dagli osservatori, la Corte ha già sottoposto a controllo alcuni accordi di *soft law* e ha ribadito la centralità del principio dell'equilibrio istituzionale sanzionando l'ingerenza della Commissione nella funzione decisionale propria del Consiglio[98]. Si auspica che, qualora alla Corte si presenti l'occasione di ribadire la rilevanza delle prerogative del Parlamento nella negoziazione degli accordi di *soft law*, non se la lasci sfuggire.

Se si considera sino a che punto la Corte si è spinta in passato per tutelare le prerogative del Parlamento alla luce del principio dell'equilibrio istituzionale, talvolta in aperto contrasto con i Trattati[99], non si può non concludere che sarebbe possibile una presa di posizione in merito all'esclusione del Parlamento tramite gli accordi di *soft law*. Ad avviso di chi scrive, l'interpretazione dei Trattati operata dalla Corte sembra spingersi oltre e suggerire, in particolare, che tutelare il ruolo del Parlamento sarebbe non solo possibile, ma addirittura necessario, anche quando lo stesso Parlamento sembri volersi spogliare volontariamente del proprio diritto di contestare la propria esclusione[100]. Naturalmente, la mancata iniziativa parlamentare in tal senso limita in pratica le possibilità che la Corte sia chiamata a pronunciarsi in merito, data la limitata natura dei ricorsi disponibili, in particolare, alle parti private[101].

EU:T:2015:133, pt. 40-48) ed *E-control* (Corte giust., sentenza del 19.10.2016, *E-Control c. ACER*, T-671/15, EU:T:2016:626, pt. 83).

96. M. Eliantonio e O. Stefan, *op. cit.*, p. 15.

97. Conclusioni dell'avvocato generale Bobek in C-16/16 P, *cit.*, pt. 4. Cfr. altresì le conclusioni dell'avvocato generale Bobek del 15.4.2021 sul caso *Fédération bancaire française (FBF)*, C-911/19, EU:C:2021:294, pt. 107 e 144.

98. Sentenza sul *memorandum* d'intesa con la Svizzera.

99. *Parlamento europeo c. Consiglio*, causa 70/88, cit., pt. 25-26: è compito della Corte «garantire la piena applicazione delle disposizioni dei Trattati sull'equilibrio istituzionale, e far sì che al pari delle altre istituzioni il Parlamento non possa subire lesioni delle sue prerogative senza disporre di un ricorso giurisdizionale, tra quelli previsti dai Trattati, esperibile in modo certo ed efficace. *Il fatto che nei Trattati non vi sia una disposizione che attribuisca al Parlamento il diritto di agire con ricorso per annullamento può costituire una lacuna procedurale, ma è un elemento che non può prevalere sull'interesse fondamentale alla conservazione ed al rispetto dell'equilibrio istituzionale* voluto dai Trattati istitutivi delle Comunità europee.» (corsivo aggiunto).

100. Dato che l'attribuzione delle competenze alle istituzioni prevista dai Trattati non può essere modificata dalle istituzioni stesse (cfr. ad esempio Corte giust., sentenza del 28.4.2015, *Commissione c. Consiglio*, C-28/12, EU:C:2015:282, 42 e la relativa giurisprudenza citata all'interno).

101. La lettura restrittiva data dalla Corte in merito alla ricevibilità dei ricorsi in annullamento presentati da privati sulla base dell'art. 263 TFEU è stata rilevata già da tempo. Le voci critiche al riguardo non mancano e trovano propria formulazione più nota nelle conclusioni dell'avvocato generale Jacobs sul caso *UPA*, C-50/00 P, EU:C:2002:197.

5. Conclusione

La prima parte del presente contributo ha individuato la giustificazione a supporto degli accordi di *soft law* nell'ordinamento giuridico dell'Unione, giungendo alla conclusione secondo cui, sino ad ora, tali accordi sono stati adottati con lo scopo precipuo di aggirare i vincoli costituzionali. In un ordinamento giuridico autonomo basato sullo stato di diritto tale obiettivo è chiaramente incostituzionale, soprattutto quando implica l'utilizzo di strumenti in grado di incidere sui diritti fondamentali.

Il presente saggio ha ipotizzato che gli accordi di *soft law* possano essere conclusi in modo compatibile con la struttura costituzionale dell'Unione. In particolare, tali accordi potrebbero perseguire legittimamente gli obiettivi di flessibilità e celerità senza rinnegare gli imperativi fondamentali imposti dal principio dello stato di diritto: responsabilità nell'esercizio della *governance* pubblica e assenza di arbitrarietà nell'esercizio dei poteri pubblici.

Per rispettare i suddetti imperativi, gli accordi di *soft law* dovrebbero essere adottati in ossequio ai principi dell'ordinamento giuridico dell'UE che garantiscono l'attribuzione di responsabilità senza vincolare necessariamente le istituzioni al rispetto di rigide procedure. Tra tali principi, l'equilibrio istituzionale è particolarmente idoneo al compito di garantire un inquadramento sufficientemente duttile, poiché offre un certo grado di flessibilità e, al contempo, è in grado di indirizzare le azioni e le interazioni istituzionali.

La seconda parte del presente articolo ha esaminato più nel dettaglio il potenziale insito nel principio dell'equilibrio istituzionale in relazione agli accordi di *soft law*, sottolineando che quelli conclusi sino ad ora dall'Unione nel settore della riammissione non hanno rispettato il suddetto principio, avendo escluso sistematicamente il Parlamento ed avendo tentato di eludere lo scrutinio della Corte. Quest'ultima è stata individuata come l'istituzione incaricata di garantire il rispetto del principio dell'equilibrio istituzionale. A tale riguardo, il contributo ha ipotizzato, in particolare, che la tutela giudiziaria delle prerogative del Parlamento sarebbe possibile e auspicabile[102].

In conclusione, il presente saggio ha evidenziato l'esigenza di un approccio agli accordi di *soft law* nel settore della riammissione basato sul rispetto di una serie di principi necessari per tutelare il fondamentale istituto dello stato di diritto, con particolare riferimento alla responsabilità correlata all'esercizio dei poteri pubblici. Si sostiene che quest'ultima non

102. La Corte stessa ha sottolineato l'importanza di tutelare il ruolo del Parlamento all'interno della struttura istituzionale dell'Unione, dato che «la partecipazione effettiva del Parlamento al processo decisionale [...] costituisce l'espressione di un principio democratico fondamentale, secondo il quale i popoli partecipano all'esercizio del potere per il tramite di un'assemblea rappresentativa» (*Repubblica slovacca e Ungheria c. Consiglio*, cause riunite C-643/15 e C-647/15, cit., pt. 160 e relativa giurisprudenza citata all'interno).

debba essere accantonata con leggerezza in nome della flessibilità, della celerità o dell'efficacia.

ARTICLES

THE LAW OF THE ECONOMIC AND MONETARY UNION: COMPLEMENTING, ADAPTING OR TRANSFORMING THE EU LEGAL ORDER?

edited by Fernando Losada *and* Klaus Tuori

EMU IN THE CASE LAW OF THE UNION COURTS: A GENERAL OVERVIEW AND SOME OBSERVATIONS

ALLAN ROSAS*

ABSTRACT: The main objective of this *Article* is to map and categorize the CJEU's case law relating to EMU. Although in purely quantitative terms, this is not a huge task, there are already enough relevant court rulings, up to 31 December 2020, to enable the establishment of a taxonomy distinguishing between four different categories of EMU-related case law. The first and foremost category will comprise cases dealing with the fundamentals of EMU, including clarifying the distinction between monetary policy and economic and other policies. This category includes a number of well-known cases of great political importance, such as *Pringle* ECLI:EU:C:2012:756, *Gauweiler* ECLI:EU:C:2015:400, *Weiss* ECLI:EU:C:2018:1000, *Kotnik* ECLI:EU:C:2016:570 and *Florescu* ECLI:EU:C:2017:448. A second category relates to the nature of the EU as a system of multilevel governance and the need to determine whether the competence to act is at national or Union level or a mix of the two. Cases in point include *UK v ECB (security clearing)* ECLI:EU:T:2015:133, *Berlusconi* ECLI:EU:C:2018:1023 and *Rimšēvičs* ECLI:EU:C:2019:139. A third group of cases relates to issues of responsibility and liability, including questions of the liability of "abnormal" EU bodies or settings such as the Troika or the Euro Group. Fourth, especially the Banking Union has triggered cases relating to prudential supervision and other more technical issues. This analysis will be completed by some concluding remarks, including the question of the intensity of judicial control (standard of review), viewing the EMU case law in a broader context.

KEYWORDS: Court of Justice – case law – judicial review – EMU – euro crisis – banking union.

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I. Introduction

While the Court of Justice of the European Union (CJEU)[1] has since its beginning been an important part of the European Union institutional framework and played a crucial role in the shaping of European economic and political integration, the last 20 years or so have marked an even greater role for the two Union Courts in Luxembourg, the European Court of Justice and the General Court, in dealing with issues of considerable economic, political and constitutional significance. This development has led me to ask whether, in the context of European affairs, "all roads lead to Luxembourg" and whether the Luxembourg courts have become the final arbiter of all major problems facing the EU today.[2]

If put in these terms, the answer to the question is "no". Not all major problems are submitted to these courts, as some of these problems are dealt with by the national courts of the EU Member States (which are to be considered as forming part of the EU judicial system in the broad sense)[3] while others are solved – or regrettably often not solved – by the EU political institutions, the Commission, the Council and the European Parliament (EP), or other EU bodies such as the agencies. It should in any case be recalled that the Union are not in full control of their docket, as cases can only be brought before them by national courts, EU institutions or bodies, EU Member States or private parties.

Yet, it is undeniable that the Union Courts have become more and more involved in settling disputes which are deemed to be important, catch the public eye and, especially since the entry into force of the Lisbon Treaty in 2009, cover a broad range of issues including sensitive areas such as asylum and immigration, criminal law, respect for the rule of law, including the independence and impartiality of the judiciary, and Brexit (the UK's withdrawal from the Union).

One particular area where the role of judicial control has gained a lot of attention of late is the Economic and Monetary Union (EMU) area. The EMU regime has raised monetary and economic issues that were not previously issues of Union law nor were such issues generally perceived as judicial questions anywhere in the world. Also in the EU, the first decade of the common currency saw very few EMU related issues being brought before the courts. However, during the last ten or so years, the EMU regime has triggered tens of cases before the Union Courts, some of which may be considered vitally important for the future of EMU and even the EU itself.

One of the aims of the present *Article* is simply to map and roughly categorise the EMU-related case law of the CJEU up to the end of 2020, with a certain emphasis on ECJ case law,

[1] According to art. 19(1) TEU, the broader institutional concept of the "Court of Justice of the European Union" includes the Court of Justice, the General Court and specialised courts. The EU Civil Service Tribunal having been dissolved in 2016, there are at the time of writing no specialised tribunals.

[2] A Rosas, 'The European Court of Justice: Do All Roads Lead to Luxembourg?' (CEPS Policy Brief 3/2019).

[3] See, e.g. A Rosas, 'The National Judge as EU Judge: Some Constitutional Observations' (2014) SMU Law Review 717.

as most of the more important cases have been handled by this Court rather than the General Court.[4] The notion of EMU-related case law will be understood here in a broad sense, to include, *inter alia*, issues relating to the application of the legislation concerning the Banking Union.[5] Space does not allow a detailed analysis of individual decisions of the Union Courts. On the other hand, some concluding observations will be made on certain aspects which seem particularly relevant in an EMU context, such as the question of the intensity of judicial review and that of the interaction between Union law and national law.

The perspective will be that of a former judge of the ECJ, who is not to be considered an expert on EMU. In fact, it has to be realised that, given the broad and varied range of issues facing the Union courts, the judges of the ECJ, and to an increasing degree also the General Court, are supposed to be generalists rather than experts on particular areas of law. Trusting the judicial review of EMU rules and decisions to such a generalist court carries with it the advantages and disadvantages of any judicial review carried out by any court with a general rather than specialised mandate. In the view of the present author, the advantages outweigh the disadvantages, but this, of course, is a matter of opinion.

II. Four main categories of CJEU cases

It seems possible and instructive to distinguish between four main categories of EMU relevant case law: *i*) general questions relating to the nature and functioning of EMU in a situation of serious disturbance of the economy and financial system such as the euro and debt crisis starting in 2007,[6] including the powers of the European Central Bank (ECB) and the possibility of financial assistance to Member States in particular difficulties; *ii*) issues of division of competence and powers between Union institutions and bodies and national authorities and between Union institutions and bodies themselves (problems of multilevel governance); *iii*) questions relating to responsibility and liability, notably actions for damages brought by private parties and financial sanctions against Member States; *iv*) more technical issues related to the Banking Union in particular, including the

[4] The most important EMU-related cases have usually been initiated as requests for preliminary rulings submitted by national courts by virtue of art. 267 TFEU. All preliminary rulings are handled by the ECJ while the General Court is principally engaged with actions for annulment brought by private parties under art. 263 TFEU. Infringement actions brought by the European Commission against a Member State under art. 258 TFEU, or by a Member State against another Member State under art. 259 TFEU, are handled by the ECJ but in the EMU area, art. 126(10) TFEU excludes the right to bring infringement actions under paras 1-9 of this article (which deals with the avoidance of excessive government deficits).

[5] For an overview of EMU-related law, including the Banking Union, see, e.g. A Rosas and L Armati, *EU Constitutional Law: An Introduction* (Hart 2018) 224.

[6] On the constitutional aspects of the euro and debt crisis see, e.g. Ka Tuori and Kl Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014); A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); A Rosas and L Armati, *EU Constitutional Law* cit. 224 ff.

question of prudential supervision of banks. It should be underlined that this is a rough categorisation; there is a certain overlap between these categories.

II.1. EMU and the euro and debt crisis in general

Cases belonging to the first category include probably the most well-known EMU relevant cases decided by the ECJ, notably *Pringle*, *Gauweiler and Others* (hereinafter *Gauweiler*) and *Weiss and Others* (hereinafter *Weiss*).[7] All three cases, which were initiated as requests for preliminary rulings by national courts, *Pringle* by the Irish Supreme Court and *Gauweiler* and *Weiss* by the German Federal Constitutional Court, relate in one way or another to the euro and debt crisis or its aftermath. Some cases of general institutional interest, two of which preceded the euro and debt crisis, will be mentioned in section II.2 below.

The main legal question raised in *Pringle* was whether Union law allowed the establishment of a permanent stability mechanism, the European Stability Mechanism (ESM), to provide financial assistance to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, not by a Union legal act but by an intergovernmental treaty.[8] The answer of the ECJ was in the affirmative. It was based on an analysis of a number of TEU and TFEU provisions of relevance for EMU, such as the no-bail-out clause in art. 125 TFEU, which prohibits the Union and Member States from being liable for, or assume the commitments of, other Member States. The Court held that on certain conditions (such as strict conditionality) the granting of financial assistance is not covered by that provision, as the granting of such assistance in accordance with the ESM Treaty "in no way implies that the ESM will assume the debts of the recipient Member State".[9] The judgment, *inter alia*, also deals with the distinction between economic and monetary policy (concluding that the ESM regime belonged to the realm of economic policy, which unlike monetary policy is not an area of Union exclusive competence)[10] and the possibility of Union institutions (in this case the Commission, the ECB and the ECJ) to be involved in the functioning of the ESM, despite its intergovernmental nature.[11]

From a general constitutional point of view, it is to be noted that in *Pringle*, the ECJ affirmed that despite the general lack of jurisdiction of the Court to rule on the validity of Union primary law (such as the TEU and the TFEU), that does not prevent the Court from

[7] Case C-370/12 *Pringle* ECLI:EU:C:2012:756; case C-62/14 *Gauweiler and Others* ECLI:EU:C:2015:400; case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000.

[8] *Pringle* cit. The predecessors of the ESM were the European Financial Stabilisation Facility (EFSF), established in 2010 on an intergovernmental basis, and the European Financial Stabilisation Mechanism (EFSM), established in the same year but by a Union legislative act. On the functioning of these financial support mechanisms see European Stability Mechanism, *Safeguarding the Euro in Times of Crisis: The Inside Story of the ESM* (Publications Office of the European Union 2019).

[9] *Pringle* cit. para. 139.

[10] *Ibid*. paras 55-63, 93-98.

[11] *Ibid*. paras 153-177.

examining the validity of a European Council decision, adopted under the so-called simplified revision procedure by virtue of art. 48(6) TEU, to amend art. 136 TFEU (the provision was amended by inserting a reference to the possibility of Member States to establish a stability mechanism).[12] This was so because the Court must be able to determine whether the conditions for applying the simplified revision procedure had been complied with.

The status of the ESM and the role of the Commission and the ECB in the activities of the ESM also became relevant in cases concerning the restructuring of the Cyprus banking sector. In *Mallis and Malli v Commission and ECB* (hereinafter *Mallis*), annulment of a statement was sought from the Euro Group, which is a framework for informal meetings of ministers from euro Member States.[13] In dismissing the action, the General Court and the ECJ based their reasoning not only on the informal nature of the Euro Group but also, in line with what had already been stated in *Pringle*, observed that the Commission and the ECB did not have decision-making powers in the framework of the ESM. These two institutions could not have a wider role in the Euro Group than in the ESM, as it was the latter that had concluded a memorandum of understanding with Cyprus and the contested Euro Group statement was of a purely informative nature. Another Cyprus-related case involving an action for compensation against the Commission and the ECB relating to the ESM will be commented upon below (section II.3).

Gauweiler and *Weiss* both concerned the legality of programmes of the European System of Central Banks (ESCB) to purchase government bonds on the secondary market, that is, not directly from governments but from unspecified owners through the capital markets. In *Gauweiler* the programme, which was termed Outright Monetary Transactions (OMT), was limited to countries subject to the conditionality attached to a European Financial Stability Facility (EFSF) or ESM programme.[14] The OMT programme, while announced by the ECB in August and specified in September 2012, was never implemented to actually buy government bonds, however. This fact and some other peculiarities of the programme led many governments to invite the ECJ not to reply to the questions put by the national court. However, in line with the presumption of relevance the ECJ normally attaches to requests for preliminary rulings – and perhaps also because the requesting court was the German Federal Constitutional Court, which had never before submitted a case to the ECJ – the Court did reply (although in view of the non-implemented nature of the programme, the Court could well have declined to answer).

[12] *Ibid*. paras 30-38. See also A Rosas and L Armati, *EU Constitutional Law* cit. 239.

[13] Joined cases C-105/15 P, C-109/15 P *Mallis and Malli v Commission and ECB* ECLI:EU:C:2016:702. The status and task of the Euro Group, which are laid down in Protocol No 14 annexed to the TEU and the TFEU, have been further clarified in case C-597/18 *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:1028 referred to in section II.3.

[14] *Gauweiler* cit.

The Court held that the relevant provisions of the TFEU and of the Statute of the ESCB and of the ECB did permit the ESCB to adopt the OMT programme. The main issues considered in the judgment were the definition of monetary policy (the programme was held to fall under monetary policy and thus the remit of the ESCB, although it could have some secondary effects for economic policy),[15] the question whether the principle of proportionality had been respected[16] and whether the programme was in conformity with art. 123 TFEU,[17] which, *inter alia*, prohibits the ESCB from purchasing debt instruments "directly" from Member States (including governmental bodies).

The ECJ judgment in *Gauweiler* was not greeted with any enthusiasm by the German Federal Constitutional Court, which nevertheless came to the conclusion – albeit grudgingly – that the outcome could be tolerated.[18] The tension which could be seen between the approach of the ECJ and that of the German court was brought into open conflict in the context of *Weiss*.[19] This ECJ judgment concerned a more recent secondary markets public sector asset purchase programme (PSPP). As the programme was based on a legal act (an ECB decision),[20] the ECJ was asked to rule not only on the interpretation of relevant provisions of the Treaties (in this case art. 4(2) TEU relating to national constitutional identity and arts 123 and 125 TFEU referred to above) but also on the validity of the ECB Decision. Despite the strong doubts as to the legality of the programme expressed by the German Federal Constitutional Court, the ECJ ruled that consideration of most of the questions asked (a question relating to the sharing of losses of national central banks was declared inadmissible by the ECJ) disclosed no factor of such a kind as to affect the validity of the ECB Decision.

With respect to the definition of monetary policy and the distinction between it and economic policy the judgment builds on and develops what was already said in *Pringle* and *Gauweiler*. The Court observed, *inter alia*, that "the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies".[21] With regard to the aim of the ECB programme to avoid deflation and achieve annual inflation rates closer to two per cent, the Court observed that "in order to exert an influence on inflation rates, the ESCB necessarily has to adopt measures that have certain effects on the real economy, which might also be sought – to different ends – in the context of economic policy".[22] The part of the judgment dealing with the principle of proportionality is in line with what the Court said in *Gauweiler* and is based on the traditional approach of the Court to the intensity

[15] *Ibid*. paras 42-65.

[16] *Ibid*. paras 66-92.

[17] *Ibid*. paras 93-126.

[18] German Federal Constitutional Court judgment of 21 June 2016 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13.

[19] *Weiss* cit.

[20] Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme with later amendments.

[21] *Weiss* cit. para. 60. See also paras 50-73.

[22] *Ibid*. para. 66.

of judicial review in situations where Union bodies are required to make choices of a technical nature and to undertake complex forecasts and assessments (see further below).[23] Finally, the judgment, while again building on the judgment in *Gauweiler*, discusses in some detail the interpretation of art. 123 TFEU and in particular the conditions that the asset purchasing programme is not *de facto* taking place in the primary market, by making the private investor merely an intermediary of the ESCB, or does not encourage the Member State in question to follow sound budgetary principles.[24]

As is well known, the Court's ruling that these conditions were fulfilled and the reasoning given did not convince the requesting national court, which, by referring, *inter alia*, to the principles of conferral and democratic legitimation and the need to uphold a clear distinction between monetary and economic policy, ruled that the judgment constituted an *ultra vires* act that was not binding upon the Federal Constitutional Court.[25] In its view, the ECJ judgment was not comprehensible and therefore had to be considered arbitrary. This was because the ECJ had not carried out a proper proportionality assessment, demonstrating that the effects on economic policy did not go too far. Failure of the ECB to carry out such an assessment also vitiated its decisions. While German institutions such as the Federal Government and the Central Bank had an obligation not to comply with such *ultra vires* acts, the Constitutional Court accorded these two institutions a period of three months to verify that a new ECB decision demonstrate that the programme was proportionate.

No such decision has been adopted by the ECB, which does not consider itself bound by the German Constitutional Court's judgment. The ECB has on the other hand cooperated with the German Central Bank (which, of course, is a member of the ESCB) with respect to information of relevance for a proportionality assessment.[26] In view of this information, the German Federal Government and the Central Bank have determined that the Bank may as a member of the ESCB continue to participate in the PSPP.[27] It is too early to say what, if any, will be the reaction of the Constitutional Court to these declarations and any new information being made available to it, including complaints by the litigants. If the Court were to prohibit the Central Bank from participating in the PSPP and the latter complied, the ECB could, under art. 35(6) of the Statute of the ESCB and the ECB, bring an infringement action against the Central Bank before the ECJ. The problems arising from the judgment of the German Federal Constitutional Court, as compared with the ECJ judgment, will be further commented upon below (section III).

[23] *Ibid*. paras 71-100.

[24] *Ibid*. paras 101-158.

[25] German Federal Constitutional Court judgment of 5 May 2020 2 BvR 859/15 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16.

[26] See, e.g. ECB, *Press release – ECB takes note of German Federal Constitutional Court ruling and remains fully committed to its mandate in European Central Bank* (5 May 2020) www.ecb.europa.eu. In March 2020, the ECB initiated a Covid19 pandemic emergency purchase programme (PEPP), initially amounting to 750 billion euro and in June increased by an additional 600 billion.

[27] See, e.g. D Utrilla, 'Three Months after Weiss: Was Nun?' (5 August 2020) EU Law Live eulawlive.com.

There are some other judgments which can be mentioned in the context of the first category, as they relate to special measures that the Union and Member States instigated with a view to mitigating the disturbance of the economy and financial system and the threat to the financial stability of the Union caused by the euro and debt crisis. To mention briefly a few examples, in *Kotnik and Others* (hereinafter *Kotnik*) the main issue was the conditions relating to burden-sharing and the writing off equity capital and so-called subordinated debt that could be attached to the granting of state aid to banks in the context of the financial crisis and the legal nature of a Commission Communication to that effect.[28] In *Dowling and Others* (hereinafter *Dowling*), at issue were measures to recapitalise a national bank by an increase in share capital and the issuance of new shares in a manner derogating from a Union company law directive[29] but called for by the need to overcome the Irish banking crisis and implement the programme of Union financial assistance to Ireland under the EFSM[30] and a Memorandum of Understanding (MoU) entered into between the Commission and Ireland.[31] *Florescu and Others* also related to a financial assistance programme but in this case in favour of a non-euro Member State (Romania) facing difficulties as regards the balance of payments.[32] At issue was not the legality of the programme as such but the legality of particular austerity measures imposed by national law, including in the light of fundamental rights.[33] A somewhat similar problem arose in a case concerning austerity measures affecting the salaries of Portuguese judges and whether those measures constituted a violation of the principle of independence and impartiality of judges.[34]

[28] Case C-526/14 *Kotnik and Others* ECLI:EU:C:2016:570. In its replies to questions put by the Slovenian Constitutional Court, the ECJ largely upheld the conditions formulated in the Commission Communication.

[29] Second Council Directive 77/91/EEC of the European Council of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

[30] See Regulation (EU) 407/2010 of the European Council of 11 May 2010 on establishing a European financial stabilisation mechanism.

[31] Case C-41/15 *Dowling and Others* ECLI:EU:C:2016:836. The ECJ concluded that the company law directive did not preclude the special measures, which were taken in a situation of "serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union" (*Dowling* cit. para. 55).

[32] See art. 143 TFEU and Regulation (EC) 332/2002 of the European Council of 18 February 2002 on establishing a facility providing medium-term financial assistance for Member States' balances of payments, as amended.

[33] Case C-258/14 *Florescu and Others* ECLI:EU:C:2017:448. The ECJ held that the concrete measures undertaken under national law (implying the lowering of income of some judges) were not required by the Union programme but were measures of national law and moreover that they were not in violation of fundamental rights.

[34] Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117. The Court concluded that the austerity measures were not far-reaching enough to compromise the independence of the judges concerned.

It is evident that the case law discussed above raises fundamental issues of constitutional significance. The question that seems to be horizontally most relevant for Union law in general is the problem dealt with in *Pringle* in particular concerning the conditions for introducing, in a broader EU context, intergovernmental mechanisms such as the ESM which are formally outside Union law strictly speaking. Another aspect of general interest is the question of the intensity of judicial control when the Court is faced with complex questions of an economic nature. While the cases discussed here certainly raised novel issues relating specifically to the EMU regime it should, on the other hand, be recalled that dealing with "law and economics" was not something entirely new for the Court, as the traditional emphasis of Union law used to be on such areas as agricultural law, the four economic freedoms and competition and state aid law. Of more specific EMU relevance is the important distinction between monetary and economic policy which was at issue in *Gauweiler* and *Weiss* in particular. Problems of a constitutional nature have been also addressed in some cases more specifically dealing with institutional questions and issues of multilevel decision-making. It is to such questions I shall now turn.

II.2. Problems of multilevel decision-making

The EU should more and more be seen through the lens of multilevel constitutionalism and multilevel governance.[35] This implies, inter alia, that Union law, including Union institutions, bodies, offices and agencies, and national law, including national authorities, are increasingly intertwined.[36] EMU law, including Banking Union law,[37] offers ample illustration. The use of both Union and national bodies, and Union bodies at different levels, in the pursuit of common goals inevitably raises questions as to which level is primarily competent and bears main responsibility for the carrying out of certain tasks. Some of these questions have been put to the Union Courts as well.

At the outset, two cases should be mentioned which predate the euro and debt crisis. The institutionally more important of the two is *Commission v Council*, dealing with an initiative to instigate sanctions against France and Germany for failure to respect the deficit limits of the Stability and Growth Pact (SGP).[38] The Court annulled a Council decision to hold the excessive deficit procedure "in abeyance for the time being", ruling that while the responsibility for ensuring compliance with the SGP lied essentially with the Council, the procedures laid down in art. 126 TFEU were not at its discretion. The outcome did not change the fact that the procedure under art.126 TFEU was very much controlled by the

[35] See, e.g. A Rosas and L Armati, *EU Constitutional Law* cit. 48, 50-51, 77, 85, 98, 102, 294.

[36] A Rosas, 'International Law – Union Law – National Law: Autonomy or Common Legal System?' in D Petrlik, M Bobek and JM Passer (eds), *Évolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux: Liber Amicorum Jiří Malenovský* (Bruylant 2020) 261.

[37] On the Banking Union see, e.g., G Bándi, P Darák, A Halustyik and PL Láncos (eds), *FIDE XXVII Congress European Banking Union, Congress Proceedings* (Wolters Kluwer, 2016).

[38] Case C-27/04 *Commission v Council* ECLI:EU:C:2004:436.

Council and that the possibility of sanctions against Member States that failed to respect the deficit limits remained subject to political rather than legal considerations. Efforts to make the excessive deficit procedure and economic and fiscal surveillance more robust have been made in the context of the euro and debt crisis (e.g. the so-called Six and Two Pack legislation) but the emphasis has been on preventive measures and conditionality for financial assistance rather than sanctions.[39]

The other case preceding the euro and debt crisis worth signalling here is a case brought by the Commission against the ECB relating to the powers of the European Anti-Fraud Office (OLAF) with regard to the ECB.[40] The Court annulled an ECB decision based on the idea that a regulation concerning OLAF's investigatory powers[41] would not be applicable to the Bank. The judgment confirms the broad scope of powers of OLAF.

With respect to more recent cases, in *United Kingdom v Parliament and Council*, the former contested the powers of intervention concerning short selling and certain aspects of credit default swaps conferred on the European Securities and Markets Authority (ESMA), a Union agency.[42] The case concerned the delegated powers of ESMA both as compared with Union legislative and executive institutions and national authorities. The ECJ dismissed the action in its entirety, implying that the legality of the provision empowering ESMA to adopt certain decisions relating to short selling and credit default swaps was upheld.[43] The United Kingdom was more successful in an action against the ECB brought before the General Court, in which it sought the annulment of a policy framework published by the ECB, in so far as it set a requirement for so-called central counterparts (CCPs) involved in the clearing of securities to be located in a Member State party to the Eurosystem (in other words, the policy framework ruled out the location of such clearing-house activities in the UK).[44] Referring, inter alia, to the principle of conferral and the wording of various texts of primary and secondary law, the General Court made a distinction between payment clearing systems and securities clearing systems and held that the ECB lacked competence to regulate the activities of the latter, including a competence to lay down a location requirement for CCPs.

Some of the cases brought before the Union Courts relate to regulatory procedures involving both Union and national authorities in the course of the same procedure. In *Berlusconi and Fininvest* (hereinafter *Berlusconi*), the main issue was the legal nature of the

[39] A Rosas and L Armati, *EU Constitutional Law* cit. 231-236. But see case C-521/15 *Spain v Council* ECLI:EU:C:2017:982 referred to in section II.3.

[40] Case C-11/00 *Commission v ECB* ECLI:EU:C:2003:395.

[41] Regulation (EC) 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

[42] Case C-270/12 *United Kingdom v Parliament and Council* ECLI:EU:C:2014:18.

[43] The contested provision was Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, art. 28.

[44] Case T-496/11 *United Kingdom v ECB* ECLI:EU:T:2015:133.

involvement of a national banking authority (the Italian Central Bank) in a procedure leading to the adoption, by the ECB, of a definitive decision approving or rejecting the acquisition of a qualifying holding in a credit institution and the jurisdiction of national courts to review the legality of preparatory acts adopted by the national authority.[45] Referring above all to the fact that the preparatory acts were not binding on the ECB, the ECJ held that the Union Courts had exclusive jurisdiction to review the validity of the ECB decision and, as an incidental matter, to determine whether the preparatory national acts were vitiated by defects such as to affect the validity of the ECB decision. National courts were thus precluded from hearing an action contesting the conformity of the preparatory acts with Union or national law. The relation between the ECB and national authorities was also present in an action for annulment brought by a German bank contesting the decision of the ECB to subject the bank solely to the ECB's supervision under the system of prudential supervision of credit institutions.[46]

In *Rimšēvičs v Latvia* (hereinafter *Rimšēvičs*), the decision of the national authority at issue was not a preparatory act but the very decision the annulment of which was sought, not from a national court but from the ECJ.[47] While the Union Courts may not, as a general rule, annul national decisions (although they may determine the incompatibility of a national rule or decision with Union law), the ECJ in this case annulled the decision of the Latvian Anti-Corruption Office to temporarily prohibit the Governor of the Central Bank of Latvia from performing his duties. The outcome is explained by the particular status of national central banks as part of the ESCB and an express provision (art. 14.2.) in the Statute of the ESCB and of the ECB, which provides that a national decision to relieve a Governor from office "may be referred to the ECJ by the Governor concerned or the Governing Council" of the ECB. The Court classified such an action as an action for annulment, akin to actions under art. 263 TFEU. The Court, in its reasoning, observed that the ESCB "represents a novel legal construct in EU law" which brings together national institutions and a Union institution and constitutes a "highly integrated system" including "a dual professional role" and a "hybrid status" of the governor of a central bank.[48] This constellation (relation between the ECB and national central banks) was also at issue in an infringement case initiated by the Commission against Slovenia, which concerned the search and

[45] Case C-219/17 *Berlusconi and Fininvest* ECLI:EU:C:2018:1023.

[46] The action was first brought before the General Court, which dismissed the action (see case T-122/15 *Landeskreditbank Baden-Württemberg v ECB* ECLI:EU:T:2017:337). The judgment was upheld by the ECJ on appeal in case C-450/17 P *Landeskreditbank Baden-Württemberg v ECB* ECLI:EU:C:2019:372.

[47] Joined cases C-202/18 and C-238/18 *Rimšēvičs v Latvia* ECLI:EU:C:2019:139.

[48] See also A Rosas, 'International Law – Union Law – National Law: Autonomy or Common Legal System?' cit. 279; T Tridimas and L Lonardo, 'When Can a National Measure be Annulled by the ECJ?' (2020) ELR 732, 744 who refer to the judgment as forming part "of a trajectory of increasing hybridity where traditional boundaries between EU and State action break down".

seizure operations carried out by national law enforcement authorities in the premises of the national central bank, without coordination with the ECB.[49]

When looking at the cases referred to in this section, two major observations come to mind. First, some of the cases concern the powers of various Union institutions and the question who is responsible for what. While at issue have been specific powers as defined in different components of the EMU regime, it is difficult to discern any EMU-specific feature in the approach of the Court to the nature and intensity of judicial review (in other words, the Court seems generally to have dealt with these cases as any question relating to the delimitation of the powers of Union institutions). The second observation takes us beyond the powers of Union institutions and bodies in the strict sense and raises the question, dealt with in some of the cases considered (notably *Berlusconi* and *Rimšēvičs*), of the involvement of national authorities in broader EU regimes and the interplay between Union and national bodies. While these cases do relate to the specificities of the Banking Union, they at the same time bring to the fore a general tendency in EU constitutional developments, implying an increased involvement of the national level in EU decision-making.[50]

II.3. Questions of liability and responsibility

It is not surprising that the euro and debt crisis, and the measures to mitigate it and to restore the financial stability of the euro area, have triggered litigation relating to issues of liability and responsibility, in particular claims for compensation for damages alleged to have been caused by Union institutions or bodies. Under this heading account will be taken both of cases concerning liability and damages and of a case relating to financial sanctions against Member States. The consideration of relevant cases will be of a summary nature and provide examples rather than an exhaustive presentation.

Some of the cases relate to measures taken in the context of the particular difficulties facing Greece. At least two actions were brought by private investors and commercial banks respectively against the ECB in view of the measures taken by the Bank with regard to the restructuring of the Greek public debt and the related cut in the values of bond holdings.[51] These actions were dismissed by the General Court. An action against the EU Council brought by private persons whose pensions had been reduced suffered the same result.[52] The General Court, in dismissing these actions, referred, in addition to a number of arguments relating to the conditions for invoking the non-contractual liability of the Union, to the broad discretion conferred on the ECB, the exercise of which entails complex evaluations of an economic and social nature and of rapidly changing situations.[53]

[49] Case C-316/19 *Commission v Slovenia (Archives de la BCE)* ECLI:EU:C:2020:1030, referred to in section II.4.

[50] A Rosas, 'International Law – Union Law – National Law: Autonomy or Common Legal System?' cit.

[51] Case T-79/13 *Accorinti and Others v ECB* ECLI:EU:T:2015:756 and case T-749/15 *Nausicaa Anadyomène and Banque d'escompte v ECB* ECLI:EU:T:2017:21.

[52] Case T-531/14 *Sotiropoulou and Others v Council* ECLI:EU:T:2017:297.

[53] See, e.g. *Accorinti and Others v ECB* cit. para. 68.

As already noted above (section II.1), the banking crisis affecting Cyprus and the measures involving a restructuring of the financial sector triggered not only actions for annulment but also compensation demands corresponding to the diminution in value of bank deposits. In *Ledra Advertising v Commission and ECB* (hereinafter *Ledra*), an action brought against the European Commission and the ECB sought both the annulment of parts of a MoU concluded between Cyprus and the ESM but signed by the Commission on behalf of the ESM, and compensation.[54] With respect to the latter, the General Court held that it lacked jurisdiction in so far as the actions for compensation were based on the illegality of the MoU, as this could not be imputed to the Commission or the ECB. On this point the ECJ disagreed, distinguishing between actions for annulment and actions for compensation. In view of the role played by the ECB and Commission in the conclusion of the MoU, including the obligation of the Commission to ensure that the MoU was not in breach of Union law, it could not be excluded that these two institutions could incur liability. On substance, however, the actions were dismissed as there was no violation of art.17 of the EU Charter of Fundamental Rights (right to property).

It should also be mentioned that there is a recent case where the applicants claimed compensation not only from Union institutions in the strict sense but also the Euro Group, which according to Protocol No. 14 on the Euro Group annexed to the TEU and the TFEU is a forum enabling ministers from euro Member States to "meet informally". While the General Court found also this aspect of the action admissible, the Advocate General of the ECJ proposed to set aside that part of the judgment and to uphold the plea of admissibility raised by the Council.[55] The judgment of the Court, in agreeing with the Advocate General that the actions directed against the Euro Group be declared inadmissible, confirmed the informal nature of this body.[56]

Finally, the possibility of imposing financial sanctions against a Member State for breach of Union legislation relating to economic and budgetary surveillance[57] has given rise to at least one case before the ECJ. On the recommendation of the Commission, the Council adopted a decision imposing a fine on Spain for the manipulation of deficit data, in accordance with a regulation relating to the effective enforcement of budgetary surveillance in the euro area.[58] Spain contested the decision before the ECJ, which dismissed the action, finding, *inter alia*, that there had been no infringement of the right to defence, the right to good

[54] Joined cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* ECLI:EU:C:2016:701.

[55] Joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:390, opinion of AG Pitruzzella.

[56] Joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:1028.

[57] On the so-called Six Pack and Two Pack legislation relating to economic and budgetary surveillance see A Rosas and L Armati, *EU Constitutional Law: An Introduction* cit. 229-236.

[58] Regulation (EU) 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area.

administration or the applicable legislation and that the fine imposed (18,93 million euro) was not disproportionate.[59]

As already mentioned at the beginning of section II.2, the main emphasis in fiscal and budgetary surveillance has been on preventive measures and conditionality related to financial assistance to Member States in difficulties. It is the latter aspect in particular that has triggered a series of cases where private parties have claimed for damages invoking the liability of Union institutions. Such actions have generally failed and this arguably for two main reasons: first, the involvement of the Union institutions has been atypical, and the granting of assistance has been at least formally in the hands of intergovernmental mechanisms such as the ESM. Second, the threshold for obtaining compensation is probably higher in situations of severe crisis, where the authorities cannot be expected to act with exactly the same degree of diligence as in "normal" circumstances. That said, the ECJ has not been blind to the realities surrounding the granting of crisis aid and imposing conditions in that regard, refusing to free Union institutions from all liability. Finally, that only one case concerns sanctions taken against a Member State confirms the limited role played by such repressive measures in the area of economic and fiscal surveillance.

II.4. Issues relating to the banking union

There are a number of other court cases relating in one way or another to the Banking Union but which do not clearly fall under any of the three categories dealt with above. As many of them are of a primarily technical nature reference will only be made briefly to some examples.

Most of the cases at issue relate to the application of a regulation conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions and some related legal acts pertaining to the Banking Union.[60] A number of actions for annulment of various decisions of the ECB were brought by credit institutions before the General Court. To mention but a few examples, some cases concerned how the prudential supervision was to be organised in the case of a group consisting of different entities and the submission of the group to prudential supervision on a consolidated basis and the consequence of such consolidated supervision e.g. for capital requirements.[61] Some other cases concerned the discretionary powers of the ECB in refusing to accept the exclusion of certain conditions from the so-called leverage ratio.[62] In this context it could also be noted

[59] Case C-521/15 *Spain v Council* ECLI:EU:C:2017:982.

[60] Regulation (EU) 1024/2013 of the Council of the European Union of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

[61] Case T-712/15 *Crédit mutuel Arkéa v ECB* ECLI:EU:T:2017:900 and case T-52/16 *Crédit mutuel Arkéa v ECB* ECLI:EU:T:2017:902. These actions were dismissed.

[62] Suffice it to mention here the case numbers of some of these cases: case T-745/16 *BPCE v ECB* ECLI:EU:T:2018:476, case T-751/16 *Confédération nationale du Crédit mutuel v ECB* ECLI:EU:T:2018:475, case T-

that in a recent judgment, Slovenia was condemned for having unilaterally seized at the premises of the Central Bank of Slovenia documents connected to the performance of the tasks of the European System of Central Banks and of the Eurosystem.[63]

From a more general Union law point of view, the most interesting case is *ECB v Trasta Komercbanka and Others* (hereinafter *Trasta Komercbanka*), which concerns the representation of a party (a bank) in its action for annulment against the ECB decision to withdraw the bank's authorisation. This took place in a situation where the bank had become insolvent and the liquidator withdrew the power of attorney of the lawyer representing the bank and where also the shareholders of the bank brought an action for annulment.[64] The ECJ, in disagreeing with the findings of the General Court, held that the bank, by virtue of its right to effective judicial protection, could still be represented by the lawyer who had brought the case, despite the liquidator having revoked his power of attorney, but, on the other hand, that the shareholders were not directly concerned by the ECB decision to withdraw the authorisation and thus did not have *locus standi*.

Finally, the Single Resolution Mechanism introduced in the framework of the Banking Union (its "second pillar") and the system of *ex ante* contributions that banks have to make to the Single Resolution Fund and to a national resolution fund in particular[65] has given rise to at least two cases, one a preliminary ruling procedure before the ECJ and the other an action for annulment before the General Court. In *Iccrea Banca*, the main issue was the calculation of the contributions to a national resolution fund.[66] In three recent actions for annulment brought by German banks, the General Court annulled the decisions of the Single Resolution Board concerning the calculation of the annual contributions to the Single Resolution Fund on several grounds, including failure to state reasons.[67]

As was the case with some of the cases considered in section II.2 above, the cases considered in the present section relate principally to the institutional aspects of the Banking Union and the respective powers of the ECB and other bodies. While these cases are not generally of constitutional significance, they demonstrate a fairly regular involvement of the General Court and/or the ECJ in the judicial control of decisions pertaining to the Banking Union and seem to suggest that judicial review in this area is fairly robust.

757/16 *Société Générale v ECB* ECLI:EU:T:2018:473, case T-758/16 *Crédit Agricole v ECB* ECLI:EU:T:2018:472 and case T-768/16 *BPN Paribas v ECB* ECLI:EU:T:2018:471. In all these cases, the decisions of the ECB were annulled.

[63] *Commission v Slovenia (Archives de la BCE)* cit.

[64] Joined cases C-663/17 P, C-665/17 P and C-669/17 P *ECB v Trasta Komercbanka and Others* ECLI:EU:C:2019:923.

[65] See, e.g. Commission Delegated Regulation (EU) 2015/63 of the European Commission of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the payments of contributions to resolution financing arrangements.

[66] Case C-414/18 *Iccrea Banca* ECLI:EU:C:2019:1036. The ECJ concluded that certain liabilities could not be excluded from the calculation of contributions.

[67] Case T-411/17 *Landesbank Baden-Württemberg v SRB* ECLI:EU:T:2020:435; case T-414/17 *Hypo Vorarlberg Bank v SRB* ECLI:EU:T:2020:437; and case T-420/17 *Portigon v SRB* ECLI:EU:T:2020:438 (appeals for the three cases are still pending).

This is so especially when it comes to the limits to the powers of the relevant institutions, where there is less room for administrative discretion.

III. Concluding observations

In considering the case law referred to above, the first observations which comes to mind is that the EMU regime, especially as it has developed as a consequence of the euro and debt crisis, has given rise to a fairly extensive case law which covers a broad range of subjects. Another general observation would be that a part of the case law, notably the cases considered in section II.1 above, has concerned issues of central importance not only for the EMU legal regime (for instance the status and powers of the ESM, the powers of the ECB and the power sharing between the ECB and national banking authorities) but also the EU constitutional order in general. The way economic and monetary policy is conducted is of crucial importance for the Union's present and future development and the cases that have been submitted to the Union Courts, the ECJ in particular, have contributed to setting the basic parameters of the EMU regime.[68]

Considering the particular role played by the Union Courts, as compared to the political institutions, it should be recalled, first of all, that courts do not determine their own agenda as the cases before them are initiated either by national courts (under the preliminary ruling procedure) or by Union institutions, Member States or private parties (in the form of infringement actions, actions for annulment or actions for compensation). Most of the cases considered above have been preliminary ruling requests made by national courts. Whatever procedure is at hand, the question of the *intensity of judicial review* becomes a central issue. In the EMU-related cases, the Union Courts have generally held that the Union institutions enjoy broad discretion with respect to economic and/or monetary choices to be made. To cite an example, in *Gauweiler* the ECJ stated that as regards judicial review of compliance with the principle of proportionality, since the ESCB is required "to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion".[69] The Court was quick to add, however, that such an approach may require a more robust review when it comes to a "review of compliance with certain procedural guarantees" and that those guarantees include the obligation of the ESCB "to examine carefully and impartially all the relevant elements of the situation and to give an adequate statement of the reasons for its decisions".[70]

That the intensity of judicial review may vary depending on the issues at hand, in particular whether it is a question of substance or procedure, is nothing exceptional but is characteristic of much of the review conducted by the Union Courts. The intensity of

[68] See further Ka Tuori and Kl Tuori, *The Eurozone Crisis: A Constitutional Analysis* cit.; A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* cit.

[69] *Gauweiler* cit. para. 68.

[70] *Ibid*. para. 69.

judicial review is not a pure black-and-white distinction between broad discretion and light-touch review on the one hand, and absence of discretion and intensive, "full" review on the other.[71] It is more of a sliding scale and sometimes variations in the intensity of review in the context of one and the same case. The fact that the Union Courts grant broad discretion with respect to substantive choices especially if they are of a technical nature or involve complex assessments is nothing peculiar for EMU-related matters. It is entirely appropriate that in such situations judges – unlike what seems to be the approach of the German Federal Constitutional Court – show judicial restraint and do not, for instance, pretend that they have a better understanding of monetary policy than those who have the main responsibility for its conduct. The main task of courts in this area should not be to decide issues of ideological, economic or technical choice but to verify that the choice made is within the confines of the law. The situation is different when at issue are basic questions of competence and the powers of institutions, and respect for applicable procedures, rather than exactly how the powers are exercised when complex economic assessments are at stake.

It is true that in many of the cases considered above, the ECJ in particular has upheld the legality of decisions adopted by Union institutions. These outcomes, on the other hand, have most often than not been in line with the positions taken by all or most EU Member States. The fact that a decision is upheld does not, of course, prove that the Court's assessment is wrong. Moreover, if the law is ambiguous or in any case open to different interpretations, it is entirely legitimate, as it would seem that the ECJ has done, to give some preference to an interpretation which is in line with what the expert institutions such as the ECB have assessed to be in the interest of the effectiveness of monetary policy and perhaps even necessary with a view to saving the common currency. That said, judicial interpretation should, of course, follow established methods of interpretation. In this respect, it is simply not true that the Union Courts generally favour a teleological instead of textual interpretation. The Union Courts normally proceed in the following order of reasoning: textual interpretation, systemic or contextual interpretation and teleological interpretation.[72] If the text is clear enough, that is often the end of the story. Words matter. To take an example from the EMU area, the ECJ in *Gauweiler*[73] and *Weiss*[74] paid attention to the fact that art. 123 TFEU prohibits the ECB and national central banks from purchasing debt instruments "directly" from national governments or national public bodies. Why would this word have been inserted if the idea was to prohibit generally also "indirect" purchases (on the secondary market)?

[71] A Rosas, 'Standard of Review: Court of Justice of the European Union (CJEU)' (April 2019) Max Planck Encyclopedia of International Procedural Law www.opil-ouplaw-com.

[72] See also A Rosas and L Armati, *EU Constitutional Law* cit. 40-48.

[73] *Gauweiler* cit.

[74] *Weiss* cit.

Another feature of general interest pertaining to the relevant case law is the way it has been dealing with the interaction between Union law and national law and the recent phenomenon of national law assuming direct Union law relevance in the context of the Banking Union in particular. The cases of *Berlusconi*[75] and *Rimšēvičs*[76] are instructive in this respect. Especially in *Rimšēvičs*, the legal nature of the action brought by the ECB with respect to a national decision affecting the status of the Governor of a national central bank was not entirely clear. The ECJ characterised the action as an action for annulment, akin to the actions covered by art. 263 TFEU. With this precedent, the traditional approach, according to which Union Courts may not annul national decisions, has seen its first exception.

Another feature of institutional significance relates to the distinction between Union institutions and bodies and intergovernmental institutions which are Union-relevant, such as the ESM. In *Pringle*, the ECJ accepted that in the area of economic policy (which is a non-exclusive Union competence) such a mechanism could be created at an intergovernmental level while also drawing upon some involvement of Union institutions (such as the Commission and the ECB).[77] Such intergovernmental mechanisms on the other hand may create uncertainties as to the existence of judicial controls and liability. In *Ledra*,[78] the ECJ showed that it is sensitive to the problem of formally non-Union institutions such as the ESM performing *de facto* tasks of direct Union relevance and drawing upon the participation in its work of the Commission and the ECB. Non-contractual liability of these two institutions could not be excluded. At least in the context of civil liability, formal constructions may not completely trump what is going on in the real world.

The sensitivities and perhaps also complexities of the EMU legal and economic regime are put in stark relief by the recent judgment of the German Federal Constitutional Court, holding that both an ECB decision and a judgment of the ECJ are *ultra vires* and hence do not bind the German Court. While it is not possible to analyse further the German judgment and its implications here, suffice it to note that generalising the approach taken by the German Constitutional Court, implying that the principle of proportionality must be applied by the Union Courts, and then, arguably, by all national courts in the 27 Member States,[79] in the same peculiar and far-reaching way as it is done by the German Court, would severely jeopardise the functioning of not only the EMU regime but also the EU constitutional and legal order in general.

[75] *Berlusconi* cit.

[76] *Rimšēvičs* cit.

[77] *Pringle* cit.

[78] *Ledra* cit.

[79] On the principle of primacy and its relation with the principle of the equality of Member States see K Lenaerts, 'No Member State is More Equal than Others. The Primacy of EU Law and the Principle of the Equality of the Member States before the Treaties' (8 October 2020) Verfassungsblog verfassungsblog.de.

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Le champ d'application *ratione finis*. L'apparition d'un champ d'application relatif aux finalités de la règle par l'interprétation judiciaire de la directive de 2005 relative aux pratiques commerciales déloyales

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L'essentiel

Connaître le champ d'application d'une directive permet de délimiter les contours de l'obligation de transposition conforme. Il n'est pourtant pas toujours aisé à déterminer, en particulier lorsque cette notion est renouvelée par le droit de l'Union européenne. Tel est précisément le cas pour la directive de 2005 relative aux pratiques commerciales déloyales. Pour ce texte, l'interprétation du juge européen fait de la finalité un critère de détermination du champ d'application. Un nouveau champ d'application, appelé ratione finis, est ainsi consacré. Mais il l'est de manière critiquable. Il se base en effet sur un fondement juridique faible, tout en étant interprété de façon extensive, afin de permettre l'application de la directive à des textes ne poursuivant cette finalité que de façon accessoire.

1. Le droit de l'Union européenne est peu étudié par les privatistes français(1). Pourtant, les règles substantielles qu'il édicte, et qui concernent de nombreux domaines relevant du droit privé, contiennent des éléments remarquables par leur originalité par rapport au droit purement national. Tel est notamment le cas pour la notion de champ d'application, renouvelée sous l'influence du droit de l'Union européenne.

2. Le champ - ou domaine(2) - d'application d'une règle correspond à « la délimitation de l'étendue couverte par une règle, [du] champ dans lequel elle a vocation à recevoir application »(3). L'étude du champ d'application est primordiale lorsque l'on s'intéresse à l'incidence des normes européennes en droit national, puisque, dans le champ d'application de la norme européenne, les législateur et juge nationaux doivent respecter le régime prévu(4). Une telle étude est d'autant plus déterminante pour les directives du fait du processus législatif décomposé des directives : d'abord, les autorités européennes édictent un texte, puis celui-ci est transposé dans les droits nationaux afin de produire tous ses effets(5). Connaître le champ d'application permet de déterminer les contours de l'obligation de transposition conforme : dans celui-ci, l'État membre est tenu par les règles prévues par la directive, en-dehors il retrouve sa marge de liberté. Les limitations du champ d'application seront autant d'« îlots de liberté »(6) pour le législateur national qui y retrouve sa marge de manoeuvre pour règlementer les pratiques comme il l'entend. Une particularité est cependant à noter concernant la notion de champ d'application d'une directive. Le champ d'application des dispositions nationales permet de déterminer si des faits d'espèce sont couverts par les règles. En ce sens, il concerne uniquement les faits d'espèce. Le champ d'application d'une directive vise également des faits. Néanmoins, il ne peut le faire que par le moyen de dispositions nationales en raison de son absence d'effet direct. Ainsi, le champ d'application d'une directive concerne à la fois les faits et les textes nationaux.

3. La question de la détermination du champ d'application se pose avec plus d'acuité pour les directives

d'harmonisation totale parce que celles-ci disposent à la fois du régime minimum devant être assuré dans les droits nationaux - comme toutes directives -, mais également son maximum. Dès lors, les États membres ne peuvent pas déroger au régime prévu par le texte européen. Cette méthode assure la meilleure intégration du droit de l'Union européenne de la consommation dans les droits nationaux en nuisant au pluralisme de ces derniers (7). Elle créé cependant des difficultés de détermination de la marge de manoeuvre des autorités nationales dans la transposition du texte européen. Puisqu'il s'agit d'une directive, les États membres ont tendance à adapter ses règles, alors que la directive d'harmonisation totale n'admet aucune différence de régime possible dans son champ d'application. L'étude du champ d'application apparaît, dès lors, « déterminant[e] » (8) pour les directives d'harmonisation totale, d'autant qu'une directive mal transposée ne disparait pas du droit interne, du fait de l'obligation d'interprétation conforme pesant sur le juge national.

4. La difficulté de transposer une directive d'harmonisation totale a été illustrée par la directive relative à la responsabilité des produits défectueux (9), laquelle a permis à de nombreux auteurs de mesurer les conséquences de l'harmonisation totale (10). Si cette directive a fini par être transposée de manière conforme (11), tel n'est pas le cas de la deuxième directive intéressant le droit privé et dont toutes les dispositions sont d'harmonisation totale : la directive de 2005 relative aux pratiques commerciales déloyales (ci-après la « Directive »).

5. Cette Directive dispose des règles pesant sur le professionnel lorsqu'il réalise une pratique commerciale à l'égard du consommateur. La prohibition instituée de la déloyauté dans ce domaine permet « la protection du consentement du consommateur [...], tout au long du processus contractuel » (12). À la lecture de ce texte, on constate que les quatre domaines classiques d'application (13) sont expressément prévus par la Directive et qu'aucun ne fait référence aux finalités. Ainsi, son champ d'application *ratione personae* vise les professionnels et les consommateurs (14). Quant à son champ d'application *ratione materiae*, il concerne les pratiques commerciales, autrement dit, les actes émanant d'un professionnel et « en relation directe avec la promotion, la vente ou la fourniture d'un produit aux consommateurs » (15). Son champ d'application *ratione loci* est constitué par tout le territoire des États membres de l'Union européenne (16). Enfin, son champ d'application *ratione temporis* se décompose. D'une part, la Directive est entrée en vigueur au lendemain de sa publication au Journal officiel de l'Union européenne (17), soit le 12 juin 2005. À cette date, il est, par exemple, possible pour un justiciable d'arguer d'une invocabilité d'interprétation conforme pour les faits en cours (18). D'autre part, les autorités nationales compétentes avaient jusqu'au 12 juin 2007 pour adopter les « dispositions législatives, réglementaires et administratives nécessaires pour se conformer à la présente directive » (19) et jusqu'au 12 décembre 2007 pour les appliquer (20).

Prévu expressément, il semblait donc aisé de déterminer le champ d'application de la Directive 2005/29. Néanmoins, l'étude de ces quatre domaines ne suffit pas, du fait de la découverte par l'interprétation du juge européen d'un champ d'application relatif aux finalités.

6. En droit français, la finalité des règles de droit ne constitue pas un champ d'application, mais peut seulement aider à leur détermination (21). Concernant la Directive de 2005 relative aux pratiques commerciales déloyales, il apparaît que la finalité de la disposition nationale est une composante de son champ d'application. Avant de démontrer l'existence d'un tel champ d'application, nous souhaitons apporter une précision terminologique. Un objectif est un « énoncé téléologique » (22), « un but que la règle assigne non seulement à son auteur (bien souvent l'État), mais aussi à ceux auxquels elle impose des obligations » (23). Une finalité est considérée comme « ce qu'il s'agit d'obtenir » (24), ou encore « la fin vers laquelle elle tend, le but qu'elle doit permettre de concrétiser » (25). Les deux notions sont souvent définies l'une par rapport à l'autre (26). Une nuance existe néanmoins entre elles. La finalité « renvoie à la chose elle-même et non à son concepteur » (27), à la différence de l'objectif. Ce dernier est, cependant, très

souvent utilisé dans le même sens que celui de la finalité. Tel est précisément le cas de la Directive. En effet, l'intitulé de son article premier - « objectif » - laisse penser qu'il s'agit d'une présentation des intentions du législateur européen. Le contenu de cet article vient contredire cette affirmation, puisqu'il dispose de « l'objectif de la présente directive ». Il s'agit bien, dès lors, de présenter les finalités de la Directive 2005/29, non les objectifs du législateur. Ainsi, à l'instar du texte européen sous étude et des auteurs (28), nous utilisons les objectifs et les finalités en tant que synonymes.

La Directive consacre un nouveau - et cinquième - champ d'application que nous appelons *ratione finis* (**I**). Cependant, cette consécration n'est pas exempte de - nombreuses - critiques (**II**).

I - La consécration du champ d'application *ratione finis*

7. La démonstration de la consécration d'un champ d'application relatif aux finalités des règles de droit nationales se dédouble. D'une part, il s'agit de déterminer la finalité composant le champ d'application de la Directive (**A**). D'autre part, son rattachement à un champ d'application distinct sera étudié (**B**).

A - La finalité de la règle de droit nationale, composante du champ d'application

8. La prise en compte des objectifs par une directive n'est guère étonnante. En effet, toute directive prévoit par nature des finalités, des objectifs (29) à travers la fixation de résultats à atteindre pour les États membres (30). Ainsi est-elle qualifiée de « norme téléologique » (31). La Directive poursuit ainsi, de façon expresse, plusieurs finalités. Elles n'ont, cependant, pas toutes la même portée. Deux d'entre elles - le bon fonctionnement du marché et la protection des consommateurs - aident uniquement à l'interprétation du texte européen (**1**). La troisième - la protection des intérêts économiques des consommateurs - est celle qui est prise en compte dans la détermination du nouveau domaine d'application de la Directive (**2**).

1. Les finalités aidant uniquement à l'interprétation de la Directive : le bon fonctionnement du marché et la protection des consommateurs

9. La Directive énonce expressément ses finalités dans son premier article intitulé « objectif » : sont poursuivis le bon fonctionnement du marché intérieur et la protection des consommateurs (32). La question est ici de déterminer leur portée juridique (33). L'article de la Directive les énonçant n'en tire aucune conséquence, comme les articles suivants. Leur portée juridique est la même que celle de tout autre objectif : ils permettent uniquement de déterminer les intentions du législateur (34) et guident ainsi l'interprétation du texte (35). Aussi, la Cour de justice de l'Union européenne (CJUE) y fait référence lors de réponses à des questions préjudicielles (36). Leur présentation, de manière liminaire, dans la Directive constitue seulement une communication politique des institutions de l'Union européenne destinée à asseoir la légitimité de son action, en précisant, une fois de plus - après les bases légales dans les visas et son premier considérant -, les motivations de son intervention.

2. La finalité consacrée dans le champ d'application de la Directive : la protection des intérêts économiques des consommateurs

10. Après avoir énoncé les objectifs poursuivis par le texte, l'article premier dispose du moyen pour y parvenir : le rapprochement des règles des États membres (37). Le domaine de ce rapprochement est ensuite précisé. Il s'agit des dispositions « relatives aux pratiques commerciales déloyales qui portent atteinte aux intérêts économiques des consommateurs ». La protection des intérêts économiques des consommateurs se situe donc à une place distincte de la

protection, plus générale, des consommateurs. Il est situé, non au début de l'article - où sont prévues les finalités de bon fonctionnement du marché et de protection des consommateurs -, mais à la fin de celui-ci, lors de la précision du moyen permettant de réaliser ces deux finalités. Au-delà de l'analyse de l'article de la Directive relatif aux objectifs, le concept même de protection des intérêts économiques des consommateurs va également dans le sens d'une différenciation avec les deux autres finalités.

La protection des intérêts économiques est l'un des droits fondamentaux reconnus aux consommateurs en droit de l'Union européenne. Négativement, elle se définit comme la protection qui ne concerne ni la sécurité, ni la santé des consommateurs, ces dernières lui étant distinctes (38). Positivement, en revanche, elle n'est pas définie. D'une part, le droit de l'Union européenne se contente de son évocation (39). D'autre part, la doctrine ne définit pas la notion d'intérêts économiques des consommateurs, même dans les études d'ensemble de cette notion, mais l'appréhende en fonction des règles prises sur le fondement de cette protection (40).

11. La protection des intérêts économiques n'ayant qu'un sens négatif, elle permet uniquement de déterminer le domaine de l'action des institutions européennes (41). Elle est ainsi une précision du champ d'application de la Directive (42), et non une simple aide à l'interprétation du texte.

12. L'étude de la jurisprudence de la CJUE confirme cette analyse. À titre liminaire, précisons qu'elle connaît cette finalité seulement lors d'arrêts rendus en interprétation de la Directive à la suite de questions préjudicielles (43).

L'interprétation par la CJUE de la protection des intérêts économiques des consommateurs a évolué. Dans un premier temps, elle n'y fait aucune référence, et vise son contraire en excluant du champ d'application de la Directive les pratiques commerciales « port[ant] atteinte uniquement aux intérêts économiques de concurrents » (44). Le juge européen considérait, par une interprétation littérale, qu'une telle atteinte était une exclusion du champ d'application (45). La solution ne renseignait en rien la protection des intérêts économiques des consommateurs.

Désormais, la CJUE considère, de façon constante, que, puisque la Directive poursuit la finalité de protection des intérêts économiques des consommateurs, toute législation nationale qui ne poursuit pas cette finalité ne relève pas du champ d'application du texte (46). L'exclusion d'une disposition visant à protéger l'atteinte aux intérêts économiques des concurrents est alors une conséquence de cette finalité. La CJUE tient un raisonnement analogue lors de son interprétation de la directive relative aux pratiques commerciales déloyales pour la recherche d'autres objectifs par les dispositions nationales tels que la santé publique (47) ou le droit pour les travailleurs du secteur du commerce à une vie privée et familiale (48). Le juge européen insiste dorénavant sur la finalité poursuivie par les dispositions nationales : c'est elle qui permet de déterminer l'appartenance ou non d'une règle interne au champ d'application du texte européen. L'objectif, la finalité n'est pas un élément d'interprétation du texte européen, mais bien une condition de la délimitation de son domaine.

B - Le rattachement de la finalité à un champ d'application distinct

13. Les finalités de la Directive 2005/29 n'interviennent pas uniquement au stade de son interprétation, mais également au stade de l'étude de son champ d'application. La question de la place de la protection des intérêts économiques des consommateurs dans la détermination de ce dernier se pose alors : il ne s'agit pas d'une précision du domaine *ratione materiae* (**1**), mais d'un nouveau champ d'application, relatif à la finalité **(2)**.

1. L'absence de rattachement au champ d'application matériel

14. Le seul champ d'application dans lequel la précision des finalités pourrait se rattacher est le champ d'application matériel. L'objet de la Directive serait alors de règlementer les pratiques commerciales « qui portent atteinte aux intérêts économiques des consommateurs »(49), et pas toutes les pratiques commerciales déloyales, contrairement à ce que son intitulé(50) et l'article consacré aux définitions posées par la Directive(51) suggèrent. Cette analyse va dans le sens de la formulation de l'article intitulé « objectif ». En effet, dans cet article, la protection des intérêts économiques des consommateurs est directement rattachée aux pratiques commerciales(52).

Pourtant, ce rattachement des finalités au champ d'application matériel ne ressort pas de l'analyse de la jurisprudence européenne. La CJUE fait de l'étude des finalités une étape distincte de la détermination du champ d'application matériel. Elle considère ainsi, d'une part, que la Directive a un « champ d'application matériel particulièrement étendu » seulement par rapport à la généralité de la définition des pratiques commerciales et sans aucune référence aux finalités de ces pratiques(53). D'autre part, elle dissocie l'étude de la finalité de celle du champ d'application matériel, en estimant que la première a une place « liminaire »(54). L'analyse des arrêts de la CJUE invite donc à considérer que la prise en compte des finalités n'appartient pas au champ d'application matériel.

2. Un nouveau champ d'application, relatif aux finalités

15. La précision des finalités ne ressort d'aucun des quatre champs d'application classiques que sont les champs matériel, personnel, temporel et territorial. Le droit de l'Union européenne crée, par conséquent, un cinquième champ d'application, qui peut être qualifié - par souci de parallélisme avec ceux existants - de domaine *ratione finis* (55), c'est-à-dire un champ d'application relatif à la finalité de la disposition nationale. Il est inconnu du droit français, dans lequel les finalités ne constituent qu'une méthode d'interprétation des règles(56), bien que privilégiée par le juge français(57). En-dehors de cette fonction, il n'est jamais question de les étudier pour apprécier le champ d'application d'une règle.

Cette fonction des finalités n'est pas uniquement inconnue du droit français, mais l'est plus généralement de tous les droits nationaux. Le domaine *ratione finis* présente, en effet, la particularité de s'appliquer uniquement lors de la détermination de l'applicabilité du texte européen à une disposition nationale, et non à une situation de faits, contrairement au domaine des règles nationales(58). Cette particularité vient du fait que le champ d'application d'une directive vise non seulement des faits, mais également des dispositions nationales, puisqu'une directive ne peut viser ces premiers que par le biais de ces dernières. Dès lors, un champ d'application *ratione finis* peut exister pour les directives. À l'inverse, une telle existence n'aurait pas de sens pour les dispositions nationales(59).

16. Ce champ d'application est, certes, inconnu du droit français. Il est cependant lié aux quatre domaines classiques. De la même manière que les champs d'application personnel et matériel sont intrinsèquement liés l'un à l'autre(60), le domaine *ratione finis* est lié à ces deux champs. Il n'est ainsi pas possible d'évoquer ces trois domaines indépendamment les uns des autres : la Directive règlemente les pratiques commerciales (champ *ratione materiae*) émanant d'un professionnel à l'égard d'un consommateur (champ *ratione personae*) et qui portent atteinte aux intérêts économiques des consommateurs (champ *ratione finis*).

En résumé, la Directive a un champ d'application relatif aux finalités des dispositions nationales : si celles-ci poursuivent la protection des intérêts économiques des consommateurs, alors elles entrent dans son champ d'application et doivent, dès lors, suivre le régime strict - du fait de l'harmonisation totale - du texte européen. Cette consécration du domaine *ratione finis* est, néanmoins, contestable.

II - La consécration contestable du champ d'application *ratione finis*

17. Plusieurs critiques peuvent être émises à l'égard de la consécration du champ d'application ratione finis : d'abord, quant à son fondement (**A**), puis, quant à sa mise en oeuvre (**B**).

A - Les critiques des fondements de sa consécration

18. Le fondement juridique de la consécration du champ *ratione finis* est contestable (**1**). Sa justification réside plutôt dans son fondement politique (**2**).

1. Le fondement juridique

19. Le fondement retenu par la CJUE pour consacrer le champ d'application *ratione finis* a évolué au cours de ses arrêts, avec, cependant, l'évocation constante, au gré des espèces, du considérant 6 de la Directive.

Dans ses premiers arrêts - lorsqu'elle estimait que la prise en compte des finalités relevait du champ d'application matériel -, la CJUE s'appuyait sur la définition générale des pratiques commerciales (61). Les seules exclusions du champ d'application matériel étaient donc celles énoncées expressément aux considérants 6, 9 et à l'article 3 de la Directive (62).

Depuis que la Cour a fait de la prise en compte des finalités un champ d'application à part entière, elle raisonne en deux temps. Dans un premier temps, elle déclare que la Directive « protège expressément les intérêts économiques des consommateurs », en se fondant sur le considérant 8, puis l'article 1 de la Directive (63). Ces deux dispositions prévoient la protection des intérêts économiques des consommateurs par la Directive. Le juge européen en déduit que « toute législation nationale qui ne poursuit pas des finalités tenant à la protection des consommateurs ne relève pas du champ d'application de ladite directive » (64). Dans un second temps, la CJUE relève l'exclusion du champ d'application issue du considérant 6 : « [D]es législations nationales relatives aux pratiques commerciales déloyales qui portent atteinte "uniquement" aux intérêts économiques des concurrents ou qui concernent une transaction entre professionnels » (65). Elle justifie donc l'apparition du champ d'application *ratione finis* prioritairement sur le fondement des considérants, la référence à l'article 1 de la Directive relatif aux objectifs ne servant qu'à appuyer son raisonnement. Dans un arrêt récent, cependant, le raisonnement a varié : il semblerait que, désormais, la CJUE se détache du considérant 6 en s'appuyant exclusivement sur l'article 1, lu à la lumière d'un considérant relatif, comme l'article 1, aux objectifs de la Directive (66).

Fonder sa décision sur les considérants n'est pas contestable, puisque ceux-ci permettent d'interpréter les textes. Cependant, la lecture intégrale du considérant 6 ne lui donne pas le sens que lui attribue la CJUE (67), ce qui justifie sans doute que la CJUE semble, dorénavant, ne plus s'appuyer dessus (68). En effet, s'il est vrai que ce considérant exclut bien les pratiques commerciales « qui portent atteinte *uniquement* aux intérêts économiques de concurrents ou qui concernent une transaction entre professionnels [nous soulignons] », il invite, dans le cas contraire, à examiner si la pratique « port[e] atteinte *directement* aux intérêts économiques des consommateurs [nous soulignons] ». En outre, le considérant 8 - sur lequel s'appuie la CJUE pour consacrer le champ d'application *ratione finis* - reprend la distinction entre les pratiques qui portent atteinte « *directement* [nous soulignons] aux intérêts économiques des consommateurs » et celles qui portent atteinte « *indirectement* aux intérêts économiques des concurrents [nous soulignons] ». L'article 1 de la Directive n'envisage pas, quant à lui, une telle distinction.

Ainsi, en se fondant sur une partie des considérants, la CJUE applique « en apparence la simple formulation de la Directive »(69), mais élargit considérablement son champ d'application, dans le but d'aboutir à une intégration plus poussée du droit européen des pratiques commerciales déloyales. Cette solution est, par ailleurs, contraire à celle que soutenait la Commission(70), laquelle « n'avait [donc] pas [...] conscience des conséquences de la directive qu'elle avait elle-même proposée »(71). Aussi la prise en compte des finalités dans le champ d'application de la Directive peine-t-elle à trouver un fondement juridique solide au sein de ce texte, celui visé étant instrumentalisé par le juge européen. Comment expliquer une telle solution ? Sans doute, pour des raisons de politique juridique.

2. Le fondement politique

20. La création du champ *ratione finis* achève la nature téléologique du droit européen. En effet, la structure de l'Union européenne et son droit « forment un système, c'est-à-dire un tout structuré, organisé, finalisé »(72), en vue de permettre de réaliser les objectifs communs que se sont donnés les États en se réunissant pour fonder l'Union européenne(73). Le droit de l'Union européenne est ainsi un droit finalisé, téléologique(74). « La directive est l'exemple même [du] modèle [du droit de l'Union européenne] »(75), car, par nature, elle fixe aux États membres des finalités à atteindre(76). Le champ d'application *ratione finis* de la Directive s'inscrit dans cette nature téléologique, puisque l'étude des objectifs, des finalités de la Directive apparaît désormais directement dans son contenu, et pas seulement dans son interprétation : si les dispositions nationales poursuivent les mêmes finalités que la Directive, alors elles entrent dans son champ d'application, sinon elles restent en-dehors.

21. On peut également remarquer que la création du champ d'application *ratione finis*, issue de l'interprétation de la CJUE, est conforme au rôle de cette juridiction. Celle-ci promeut les objectifs des traités(77), en contribuant à l'intégration des droits nationaux par celui européen(78), en élargissant l'influence du droit européen sur les droits nationaux(79). Tenue de motiver ses arrêts(80), la CJUE « masque ses choix derrière un raisonnement légal formel »(81). La solution aboutissant à la consécration du champ d'application *ratione finis* illustre ce mouvement : la CJUE donne l'apparence de s'appuyer sur la lettre de la Directive pour achever la nature téléologique du droit de l'Union européenne, tout en élargissant considérablement le champ d'application de ce texte(82). Elle va au-delà de la lettre du texte, mais également au-delà de la volonté initiale de la Commission(83), pourtant à l'origine du texte. Aussi, la consécration du champ d'application *ratione finis* ne repose pas sur un fondement juridique solide et se justifie par la politique juridique choisie par les institutions européennes, celui d'une intensification de l'influence des objectifs du droit européen sur les droits nationaux.

Cette consécration est également critiquable quant à sa mise en oeuvre.

B - Les critiques de sa mise en oeuvre

22. Les critiques de la mise en oeuvre du champ *ratione finis* se dédoublent entre, d'une part, son étude liminaire (**1**), et d'autre part, son appréciation (**2**).

1. Les critiques liées à son étude liminaire

23. La CJUE étudie « à titre liminaire » la question du champ d'application *ratione finis* dans plusieurs arrêts(84). Est-ce à dire que cette étape doit être antérieure à la détermination des quatre domaines d'application classiques ? Une réponse négative doit être apportée pour plusieurs raisons.

La première est propre à l'articulation entre le champ *ratione materiae* et *ratione finis*. Il n'est pas convaincant que le législateur national chargé de transposer correctement la Directive, ou le juge national si celle-ci est mal transposée, doivent se questionner d'abord sur les finalités de chaque disposition nationale et ensuite sur l'objet de ces dispositions. En effet, de nombreuses règles peuvent avoir pour finalité la protection des intérêts économiques des consommateurs sans nullement concerner les pratiques commerciales. L'objet de la Directive, bien que défini largement, ne concerne qu'une partie des législations protégeant les consommateurs (85). La CJUE en a conscience, puisqu'elle estime que la seule poursuite de la finalité de protection des intérêts économiques des consommateurs par une disposition nationale n'est pas suffisante pour que la Directive s'applique. Il faut également caractériser le champ d'application *ratione materiae* et *ratione personae* de la Directive (86). Le législateur - ou le juge - s'évitera ainsi un travail fastidieux - et inutile pour la plupart des règles protégeant le consommateur - en recherchant l'objet des dispositions, puis les finalités de celles-ci.

La deuxième raison est liée à l'observation de la jurisprudence de la CJUE. La détermination des finalités poursuivies par la disposition nationale n'apparaissait qu'après celle du champ d'application matériel dans les premiers arrêts rendus par la CJUE en interprétation de la Directive (87). Elle préférait alors apporter, dans un premier temps, des précisions relatives au champ d'application matériel, avant d'étudier, dans un second temps, les finalités. Cette permutation de l'ordre du raisonnement entre le domaine d'application matériel et celui relatif aux finalités s'explique par le fait que la CJUE estimait initialement - avant de le consacrer comme un champ d'application à part entière (88) - que les pratiques portant atteinte uniquement aux intérêts économiques de concurrents constituaient une exclusion du champ d'application matériel. Cette solution illustre bien le fait que l'étude du domaine matériel peut se réaliser avant celui *ratione finis*.

L'étude liminaire du champ d'application *ratione finis* voulue par le juge européen paraît, dès lors, critiquable. Pourtant, le juge français y procède parfois, au gré des espèces. Peu d'arrêts ont été rendus sur la compatibilité d'une disposition française par rapport à la Directive et, parmi eux, très peu font référence au champ d'application *ratione finis*. On peut citer deux arrêts qui étudient de façon liminaire ce domaine. Le premier, chronologiquement, est un arrêt de la Cour de cassation. Celle-ci y retient la poursuite de la finalité de protection des consommateurs par une disposition nationale, et donc le fait que celle-ci entre dans le champ d'application de la Directive. Si la Cour de cassation n'étaye ni cette affirmation ni son raisonnement, il est néanmoins remarquable que la considération de la finalité poursuivie par la disposition nationale soit le seul critère mis en avant par les juges dans l'étude du champ d'application de la Directive (89). Le second arrêt, rendu par une cour d'appel (90), étudie, lui aussi, dans un premier temps, les finalités de la disposition. Ce n'est que dans un second temps qu'il relève que la pratique en cause ne concerne qu'une relation entre professionnels et, par conséquent, est hors du champ d'application personnel de la Directive. Cependant, sur pourvoi, la Cour de cassation s'est seulement fondée sur le fait que la pratique est hors du champ d'application personnel de la Directive, sans s'interroger sur la finalité de la disposition (91). Elle ne respecte donc pas l'ordre liminaire de l'étude du champ d'application *ratione finis* de la Directive.

Une dernière critique du champ d'application *ratione finis* reste à envisager : celle de son appréciation.

2. Les critiques de son appréciation judiciaire

24. Deux critiques peuvent être adressées à l'appréciation du champ d'application *ratione finis* tenant, d'une part, à son caractère extensif (**a**), et d'autre part, au large pouvoir qu'elle accorde aux juges nationaux (**b**).

a) Un champ d'application extensif

25. La CJUE a une appréciation très large de la finalité de protection des intérêts économiques des consommateurs. En effet, elle estime qu'entre dans le champ d'application de la Directive toute disposition nationale qui poursuit la protection des intérêts économiques des consommateurs, peu importe que ce soit à titre principal ou non. Pour fonder sa solution, elle relève l'absence de précision, dans la Directive, d'une quelconque hiérarchie entre les finalités poursuivies par les pratiques commerciales et la seule exclusion de celles « qui portent atteinte "uniquement" aux intérêts économiques des concurrents »(92).

Dès lors, la CJUE estime que, si une disposition poursuit à la fois la protection des intérêts des consommateurs et ceux des concurrents, alors elle entre dans le champ d'application de la Directive(93). La conséquence est double. D'une part, il n'est pas nécessaire que la protection du consommateur soit la seule poursuivie par la disposition nationale(94). D'autre part, la protection des intérêts des concurrents n'est pas suffisante pour exclure la législation interne du champ d'application de la Directive. Par ailleurs, la CJUE affirme l'indifférence de la pluralité des objectifs, des finalités poursuivies par une législation nationale : il suffit que l'un des objectifs poursuivis, même secondaire, soit la protection des consommateurs pour que la Directive s'applique(95). Entre ainsi dans le champ d'application de la Directive une disposition nationale interdisant les ventes avec primes, qui a pour objectif principal « le maintien du pluralisme de la presse et la protection des concurrents les plus faibles » et la finalité seulement subsidiaire de la protection des consommateurs(96). Cette interprétation, par la CJUE, a pour effet de faire entrer un nombre important de dispositions nationales dans le champ d'application de la Directive. Ce faisant, elle interprète la Directive de sorte à lui faire produire ses effets dans le champ d'application le plus large(97).

26. L'exclusion des pratiques portant atteinte uniquement aux intérêts économiques des concurrents est critiquable pour deux raisons.

Bien que, selon la CJUE, la solution soit évidente(98), cette exclusion ne ressort pas de la lettre de la Directive, comme nous l'avons déjà remarqué(99). Cette solution est donc apparue seulement après l'entrée en vigueur du texte, par l'interprétation de la Directive par les institutions européennes. Les États membres pouvaient, par conséquent, difficilement la prévoir.

La seconde raison est son caractère « artificie[l] »(100). En effet, les intérêts des consommateurs et ceux des concurrents sont liés les uns aux autres, puisque « toute pratique déloyale porte atteinte aux intérêts des consommateurs, des concurrents, d'autres participants du marché, et, finalement, à l'intérêt général dans la concurrence non faussée »(101). La Directive ouvre la possibilité pour les concurrents d'intenter une action, car ceux-ci ont « un intérêt légitime à lutter contre les pratiques commerciales déloyales »(102). Par conséquent, la Directive connaît l'imbrication des intérêts entre ceux des consommateurs et ceux des professionnels, dont font partie les concurrents. La solution de la CJUE apparaît ainsi d'autant plus artificielle qu'elle se focalise exclusivement sur les intérêts économiques des consommateurs(103).

Le caractère extensif du champ d'application *ratione finis* suscite ainsi plusieurs critiques, justifiant sans doute son absence d'une telle recherche par le législateur français et sa recherche seulement partielle par le juge français(104). Une dernière critique de ce domaine d'application peut être avancée : il s'agit du large pouvoir accordé aux juges nationaux.

b) Un large pouvoir accordé aux juges nationaux

27. Puisque le législateur peut prévoir des finalités, des objectifs à une loi, la question se pose de déterminer si « l'objectif de protection des consommateurs peut n'être que formel (auquel cas une volonté déclarée du législateur suffirait) ou bien si elle doit se traduire par des mesures réelles et effectives de protection du consommateur »(105). Le juge doit-il s'arrêter aux seules finalités présentées par le législateur ou doit-il, au contraire, rechercher les effets de la disposition ? L'interrogation a été tranchée lors d'une question préjudicielle portant sur l'hypothèse dans laquelle une juridiction nationale considérait qu'une loi ne poursuivait pas l'objectif de protection des intérêts économiques des consommateurs invoqué par le législateur national. Dans cette hypothèse, la CJUE estime qu'il convient de retenir l'interprétation du juge national(106). L'approche formelle n'est donc pas retenue : il appartient au juge d'apprécier les effets de la disposition nationale pour déterminer sa finalité. Entrent ainsi dans la Directive les dispositions nationales qui poursuivent effectivement la protection des intérêts économiques des consommateurs. À cet égard, c'est le juge national qui est compétent pour apprécier cette finalité. En effet, par principe, « il n'appartient pas à la [CJUE] de se prononcer, dans le cadre d'un renvoi préjudiciel, sur l'interprétation des dispositions nationales »(107). Une limite à ce principe existe néanmoins : le juge européen peut prendre en compte des éléments de fait et de droit qui lui sont soumis à l'occasion d'une question préjudicielle pour interpréter le droit interne(108).

28. L'approche formelle n'étant pas retenue par la CJUE, les juges nationaux peuvent passer outre la volonté du législateur s'ils estiment que la loi ne poursuit pas effectivement les finalités affichées. L'interprétation du juge peut, dès lors, compléter les objectifs législatifs, ou aller contre ceux-ci s'ils estiment qu'une telle finalité n'est pas poursuivie dans les faits. Cette situation semble aller à l'encontre de la conception de l'office du juge existant en France, censé n'être qu'un interprète des textes(109). Si la recherche des finalités entre dans sa mission d'interprète, il le fait habituellement en recherchant l'intention du législateur. Trois hypothèses sont, dès lors, envisageables.

Soit les finalités du texte ne sont pas expressément inscrites. Dans cette hypothèse, le juge qui les recherche est dans son rôle d'interprète de la loi(110).

Soit le texte prévoit expressément ses finalités et le juge apprécie le texte conformément à celles-ci : cette interprétation ne soulève alors pas de difficulté.

Soit le texte affiche expressément ses finalités et le juge ne les retient pas. Il s'agit d'une interprétation *contra legem* de la loi, à laquelle le juge n'est pas censé procéder au regard de son seul rôle d'interprète de la loi et à laquelle il n'est tenu de procéder pour exécuter son obligation d'interprétation conforme(111). En effet, le juge n'a pas à exécuter son obligation de transposition conforme si une telle interprétation des dispositions nationales aboutit à une interprétation *contra legem* du droit national, et ce, pour des raisons de sécurité juridique(112).

29. L'originalité du droit de l'Union européenne a permis la création du champ d'application relatif aux finalités de la règle nationale, pour la Directive de 2005 relative aux pratiques commerciales déloyales. Ce nouveau champ d'application, découvert par le juge européen, a finalement pour conséquence d'étendre à la fois le domaine de la Directive - et donc l'influence du droit européen sur les droits nationaux - et le pouvoir d'appréciation des juges nationaux.

Mots clés :
CONSOMMATION * Protection des consommateurs * Pratique commerciale déloyale * Interprétation
CHAMP D'APPLICATION * Directive de 2005 relative aux pratiques commerciales déloyales * Finalité * Objectif * Interprétation par la CJUE * Interprétation judiciaire

(1) Dans le cadre de cette étude, « droit européen » sera uniquement synonyme de « droit de l'Union européenne » et ne recouvrera pas son second sens, celui des règles issues de la Convention européenne des droits de l'homme. Pour une critique de cette absence d'étude, v. not. C. Aubert de Vincelles, L. Grynbaum et J. Rochfeld, Où sont les Français ? ou l'urgence de la mobilisation européenne..., D. 2009. 737 s.

(2) « Application », dans G. Cornu (fond.), Vocabulaire juridique, PUF, 13e éd., 2020 : le champ d'application est « synonyme de domaine d'application d'une règle ».

(3) N. Balat, Essai sur le droit commun, thèse Paris II, LGDJ, 2016, n° 78. Le champ d'application a parfois été critiqué, car considéré comme une « notion au contour fuyant » (J. Traullé, L'éviction de l'article 1382 du code civil en matière extracontractuelle, th. Paris I, LGDJ, 2007, nos 124-138 : cette expression est le titre de l'une de ses sections), ne pouvant être cernée. Néanmoins, elle apparaît comme « indispensable, on ne voit guère comment s'en passer », puisqu'aucune véritable proposition n'est émise pour la remplacer (pour la citation et l'idée, A. Gouëzel, La subsidiarité en droit privé, th. Paris II, Economica, 2013, n° 162).

(4) V. not. C. Aubert de Vincelles, La jurisprudence de la Cour de justice de l'Union européenne en matière de droit de la consommation, dans Y. Picod (dir.), Le droit européen de la consommation, Éd. Mare & Martin, 2018. 35 s\., nos 25-28 ; A. Guessoum, Un droit européen des contrats efficace : quelle intensité contraignante ?, dans C. Quézel-Ambrunaz (dir.), Les défis de l'harmonisation européenne du droit des contrats, Université de Savoie, 2012. 107 s\., spéc. p. 113-117.

(5) C. Zolynski, Méthode de transposition des directives communautaires. Étude à partir de l'exemple du droit d'auteur et des droits voisins, th. Paris II, Dalloz, 2007.

(6) Pour reprendre l'expression de Madame Thieriet-Duquesne (Les limites de l'harmonisation totale. Approche critique du vocabulaire juridique européen : l'harmonisation totale, LPA, chron. XXIII, n° 83, 2009. 9 s\., spéc. p. 11).

(7) Y. Picod, Propos conclusifs, dans Y. Picod (dir.), *op. cit.*, p. 193 s\., n° 24.

(8) T. Wilhelmsson, *Scope of the Directive*, dans G. Howells, H.-W. Micklitz et T. Wilhelmsson (dir.), *European fair trading law. The unfair commercial practices directive,* Ashgate, 2013. 49 s\., spéc. p. 50 : nous traduisons *« the limitation of scope is crucial »*.

(9) Directive 85/374/CEE du Conseil du 25 juillet 1985 relative au rapprochement des dispositions législatives, réglementaires et administratives des États membres en matière de responsabilité du fait des produits défectueux. Ce degré d'harmonisation n'apparaît pas à la lecture de la directive et a été découvert par le juge européen (CJCE, 25 avr. 2002, aff. C-52/00, *Commission c/ France*, Rec. 3827, pts 16, 24 et 25, D. 2002. 2462, note C. Larroumet ;

ibid. 1670, obs. C. Rondey ; *ibid.* 2935, obs. J.-P. Pizzio ; *ibid.* 2003. 1299, chron. N. Jonquet, A.-C. Maillols et F. Vialla ; RTD civ. 2002. 523, obs. P. Jourdain ; *ibid.* 868, obs. J. Raynard ; RTD com. 2002. 585, obs. M. Luby ; CJCE, 25 avr. 2002, aff. C-154/00, *Commission c/ Grèce*, Rec. 3879, pts 20, 24 et 25, D. 2002. 2935, obs. J.-P. Pizzio ; *ibid.* 2003. 1299, chron. N. Jonquet, A.-C. Maillols et F. Vialla ; RTD com. 2002. 585, obs. M. Luby).

(10) Outre le nombre important d'articles, de nombreux ouvrages lui sont consacrés, v. par ex. L. M. Kheir Bek, Les fonctions de la responsabilité du fait des produits défectueux : entre réparation et prévention. Étude comparée entre le droit français et le droit américain, PUAM, 2011 ; Y. Markovits, La directive CEE du 25 juillet 1985 sur la responsabilité du fait des produits défectueux, th. Paris I, LGDJ, 1990 ; A. Rideau, De l'intégration et de l'application comparées de la directive 85/374/CEE sur la responsabilité du fait des produits défectueux en France et en Angleterre, th. Paris II, 2000 ; S. Taylor, L'harmonisation communautaire de la responsabilité du fait des produits défectueux. Une étude comparative du droit anglais et du droit français, th. Paris I, LGDJ, 1998.

(11) Le législateur français a modifié les trois dispositions contraires à l'harmonisation totale de la directive de 1985 sur les produits défectueux par les loi n° 2004-1343 du 9 décembre 2004 de simplification du droit du 9 décembre 2004 (art. 29, I, 1°, 2° et 3°) et loi n° 2006-406 du 5 avril 2006 relative à la garantie de conformité du bien au contrat due par le vendeur au consommateur et à la responsabilité du fait des produits défectueux.

(12) N. Sauphanor-Brouillaud *et al.*, Les contrats de consommation. Règles communes, LGDJ-Lextenso, coll. Traité de droit civil, 2e éd., 2018, n° 249.

(13) Dégagés par les travaux de Kelsen (Théorie pure du droit, 1962, traduction française de la 2e éd. de la Reine Rechtslehre par C. Eisenmann, Bruylant-LGDJ, 1999. 18-23).

(14) Directive 2005/29, art. 2, d.

(15) Directive 2005/29, art. 2, d.

(16) Directive 2005/29, art. 22.

(17) Directive 2005/29, art. 20.

(18) Ainsi que pour les lois de transposition en cours, pour engager la responsabilité de l'État membre défaillant (L. Blatière, L'applicabilité temporelle du droit de l'Union européenne, th. Montpellier, éd. CREAM, 2018, n° 151).

(19) Directive 2005/29, art. 19, al. 1.

(20) Directive 2005/29, art. 19, al. 2.

(21) Par le biais de l'interprétation. Pour une étude de la prise en compte des finalités dans l'interprétation d'un texte, v. G. Marmin, La notion de finalité en droit privé, th. Paris XI, 2007, n^{os} 535-613.

(22) P. de Montalivet, Les objectifs sont-ils des règles de droit ?, dans B. Faure (dir.), Les objectifs dans le droit, actes du colloque des 25 et 26 sept. 2009 à La Rochelle, Dalloz, 2010. 46 s\., spéc. p. 46.

(23) D. Truchet, Rapport de synthèse, dans B. Faure (dir.), *op. cit.*, p. 207 s\., spéc. p. 207.

(24) Finalité, dans G. Cornu (fond.), *op. cit.*

(25) G. Marmin, *op. cit.*, n° 5.

(26) Le vocabulaire juridique de l'Association Henri Capitant illustre cette définition par « *l'objectif* atteint ou non [nous soulignons] ». Cette synonymie se retrouve dans la définition de l'objectif, qui est, « en politique législative, le but que se propose la loi ; *la fin* à laquelle est ordonnée une réforme [nous soulignons] ». (« Finalité » et « Objectif », dans G. Cornu (fond.), *op. cit.*, 2020).

(27) G. Marmin, *op. cit.*, n° 121.

(28) Alors qu'il distingue entre les finalités et les objectifs, Monsieur Marmin considère qu'ils sont bien synonymes, puisqu'ils renvoient à la même idée, celle de la finalité *(ibid.,* n^{os} 133-134) ; Madame Usunier utilise les termes finalité et objectif de façon indifférenciée (L'attractivité internationale du droit français au lendemain de la réforme du droit des contrats, ou le législateur français à la poursuite d'une chimère, RTD civ., 2017. 343 s\. : « L'une des *finalités* majeures de la réforme était, précisément, d'améliorer l'attractivité internationale de notre droit. Qu'un tel *objectif* soit assigné à une réforme [...] [nous soulignons] » (spéc. p. 343).

(29) J.-F. Brisson, Objectifs dans la loi et efficacité du droit, dans B. Faure (dir.), *op. cit.*, p. 29 s\., spéc. p. 29.

(30) En effet, « fixer un objectif c'est préciser quel est le résultat à atteindre » *(ibid.)*. Le terme de directive n'est d'ailleurs pas anodin, puisqu'il renvoie à l'adjectif « directif », qui « se dit d'une règle souple destinée à orienter les sujets de droit ou à guider l'interprète dans la poursuite d'une certaine fin, sans enfermer sa mise en oeuvre dans des

prescriptions de détail » (Directif, ive, dans G. Cornu (fond.), *op. cit.*). Les États membres sont liés par « le même objectif, celui qui a été imprimé par la directive » (Y. Gautier, L'État membre et l'exécution du droit communautaire, dans G. Duprat (dir.), L'Union européenne. Droit, politique, démocratie, PUF, 1996. 39 s\., spéc. p. 61).

(31) G. Koubi, Transposition et/ou transcription des directives en droit national, RRJ, n° 1, 1995. 617 s\., spéc. p. 619.

(32) Directive 2005/29, art. 1 : « *L'objectif de la présente directive est de contribuer au bon fonctionnement du marché intérieur et d'assurer un niveau élevé de protection des consommateurs*, en rapprochant les dispositions législatives, réglementaires et administratives des États membres relatives aux pratiques commerciales déloyales qui portent atteinte aux intérêts économiques des consommateurs [nous soulignons] ».

(33) Nous nous questionnons uniquement sur la portée juridique des objectifs de l'article premier de la Directive 2005/29, et non sur celle des objectifs en général, question qui a suscité plusieurs travaux : - En droit européen, les objectifs ont des effets juridiques (v. P. de Montalivet, art. préc., spéc. p. 53 ; - En droit français, la question de la normativité des objectifs pose débat, mais est, pour la large majorité des auteurs, écartée (J. Caillosse, Les rapports de la politique et du droit dans la formulation d'« objectifs », dans B. Faure (dir.), *op. cit.*, p. 13 s\., spéc. p. 18 ; B. Faure, Le phénomène des objectifs en droit. Rapport introductif, dans B. Faure (dir.), *op. cit.*, p. 1 s\., spéc. p. 4). Monsieur Marmin en dégage des manifestations, sans que les objectifs aient d'effet général et automatique *(op. cit.*, Partie 2).

(34) B. Faure, art. préc., spéc. p. 2.

(35) D. Truchet, Rapport de synthèse, dans B. Faure (dir.), *op. cit.*, p. 207 s\., spéc. p. 208.

(36) CJUE, 3 oct. 2013, aff. C-59/12, *Zentrale zur Bekämpfung unlauteren Wettbewerbs e V,* pt 35, D. 2013. 2334 ; Dr. soc. 2014. 464, chron. S. Hennion, M. Del Sol, P. Pierre et M. Hallopeau ; RTD eur. 2014. 730, obs. C. Aubert de Vincelles ; Rev. UE 2014. 436, obs. K. Jakouloff ; *ibid.* 2015. 468, étude J. Lete ; CJUE, 16 avr. 2015, aff. C-388/13, *UPC Magyarország*, pt 43, D. 2015. 917 ; *ibid.* 2016. 617, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud.

(37) Directive 2005/29, art. 1 : « L'objectif de la présente directive est de contribuer au bon fonctionnement du marché intérieur et d'assurer un niveau élevé de protection des consommateurs, en rapprochant les dispositions législatives, réglementaires et administratives des États membres relatives aux pratiques commerciales déloyales *qui portent atteinte aux intérêts économiques des consommateurs* [nous soulignons] ».

(38) TFUE, art. 169, 1 : « Afin de promouvoir les intérêts des consommateurs et d'assurer un niveau élevé de protection des consommateurs, l'Union contribue à la *protection de la santé, de la sécurité et des intérêts économiques des consommateurs*, ainsi qu'à la promotion de leur droit à l'information, à l'éducation et à s'organiser, afin de préserver leurs intérêts [nous soulignons] ». La distinction se réalise entre protection de l'intérêt économique des consommateurs

et protection de leur santé et sécurité. En effet, la promotion de leur droit à l'information, l'éducation et l'auto-organisation « peuvent se rattacher à l'une comme à l'autre des deux premières » (D. Berlin, Politiques de l'Union européenne, Bruylant, 2016, n° 1009).

(39) Ainsi, la Commission et le Parlement visent la protection des intérêts économiques dans certaines directives (par exemple, Directive 93/13/CEE du Conseil, du 5 avr. 1993, concernant les clauses abusives dans les contrats conclus avec les consommateurs, consid. 9). Quant à la CJUE, elle la considère comme une exigence impérative qui permet à une législation nationale la poursuivant de ne pas constituer une entrave à la libre circulation des marchandises. Elle évoque la protection ou la défense des consommateurs, mais celle-ci est entendue comme la protection des intérêts économiques des consommateurs. Celle-ci n'est pas autonome, puisqu'elle est, dans la très large majorité des cas, évoquée avec la loyauté des transactions commerciales. Sur la jurisprudence de la CJUE relative à la protection du consommateur et à la loyauté des transactions commerciales et les rares hypothèses où les deux sont distinctes, v. G. Jazottes, La notion d'exigences impératives dans la jurisprudence de la Cour de justice des Communautés européennes : contribution à l'étude du principe de libre circulation, th. Toulouse 1,1997, n^{os} 262-297 et 310-324. Le célèbre arrêt *Cassis de Dijon* (CJCE, 20 févr. 1979, aff. C-120/78, *Rewe-Zentral*) l'illustre (sur cet arrêt, v. notamment P. Pescatore, Variations sur la jurisprudence *« Cassis de Dijon »* ou la solidarité entre l'ordre public national et l'ordre public communautaire, dans M. Monti, N. von und zu Liechtenstein, B. Versterdorf *et al.* (dir.), *Economic law and justice in times of globalisation. Festschrift Fur Carl Baudenbacher*, Nomos Publishers, 2007. 543 s\.).

(40) C. Aubert de Vincelles, Protection des intérêts économiques des consommateurs. Droit des contrats, JCl. Europe Traité, Fasc. 2010, 2018 (dernière actualisation : 31 déc. 2018) ; C. Aubert de Vincelles, Protection des intérêts économiques des consommateurs. Contrats spécifiques, JCl. Europe Traité, Fasc. 2011, 2020 (dernière actualisation : 31 août 2020) ; P. Gouband, La protection des intérêts économiques des consommateurs en droit communautaire, th. Paris II, 1996. Monsieur Gouband est le seul, à notre connaissance, à avoir tenté une définition assez peu précise de ce concept. Il retient que la protection des intérêts des consommateurs, au sens européen, est constituée de l'ensemble des « règles qui visent à protéger directement les consommateurs » et des « dispositions qui visent à établir une réglementation du commerce ».

(41) La Directive règlemente la protection des intérêts économiques des consommateurs, mais les États membres retrouvent leur compétence pour prendre des dispositions protégeant la santé et la sécurité du consommateur.

(42) Dans un sens proche, mais estimant qu'il s'agit de la protection des consommateurs en général, v. A. Puttemans, Évolution du droit des pratiques commerciales déloyales dans les relations entre consommateurs et professionnels - et si nous lisions mieux les considérants de la directive 2005/29 ?, dans E. Terryn et D. Voinot (dir.), Droit européen des pratiques commerciales déloyales. Évolution et perspectives, Larcier, 2012. 26 s\., spéc. p. 26-27 : la CJUE « laisse aux juges nationaux le soin, pour déterminer si une législation entre dans le champ d'application de la directive, d'apprécier si cette législation poursuit ou non des finalités tenant à la protection des consommateurs ». Dans un sens différent, v. A. Fortunato, qui estime qu'il y a une « con[fusion entre] objectifs et champ d'application de la règle » et considère ainsi que les premiers ne peuvent appartenir au second (Revente à perte : pas de débat possible sur la conformité à la directive de 2005 sur les pratiques commerciales déloyales dans les transactions entre professionnels, AJC, 2018. 88 s\.).

(43) À l'unique exception d'un arrêt en manquement dans lequel la CJUE ne fait qu'évoquer cette finalité sans en tirer aucune conséquence (CJUE, 10 juill. 2014, aff. C-421/12, *Commission c/ Belgique*, pt 3, D. 2014. 2488, obs. Centre de droit de la concurrence Yves Serra ; *ibid*. 2015. 588, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud ; Dr. soc. 2015. 271, chron. S. Hennion et M. Del Sol ; RTD eur. 2014. 730, obs. C. Aubert de Vincelles).

(44) Directive 2005/29, consid. 6.

(45) CJUE, 14 janv. 2010, aff. C-304/08, *Plus Warenhandelsgesellschaft*, pt 39, D. 2010. 258, obs. E. Chevrier ; *ibid*. 790, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud ; RTD eur. 2010. 695, chron. C. Aubert de Vincelles ; CJUE, 9 nov. 2010, aff. C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag*, pt 26, D. 2010. 2829 ; *ibid*. 2011. 974, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud ; Légipresse 2010. 400 et les obs. ; *ibid*. 414, comm. E. Andrieu et N. Sauphanor-Brouillaud ; RTD eur. 2011. 630, obs. C. Aubert de Vincelles.

(46) CJUE, 15 déc. 2011, aff. C-126/11, *INNO*, pt 27, RTD eur. 2012. 679, obs. C. Aubert de Vincelles ; CJUE, 4 oct. 2012, aff. C-559/11, *Pelckmans Turnhout,* pt 19 ; CJUE, 8 sept. 2015, aff. C-13/15, *Cdiscount*, pt 25, D. 2016. 617, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud ; AJCA 2015. 479, obs. C. Pecnard ; CJUE, 3 févr. 2021, aff. C-922/19, *Stichting Waternet*, pts 50-51.

(47) CJUE, 3 févr. 2021, aff. C-922/19, *Stichting Waternet*, pts 52.

(48) CJUE, 4 oct. 2012, aff. C-559/11, *Pelckmans Turnhout*, pt 22.

(49) Directive 2005/29, art. 1.

(50) Directive 2005/29/CE du 11 mai 2005 relative aux pratiques commerciales déloyales des entreprises vis-à-vis des consommateurs.

(51) Directive 2005/29, art. 2, d : aucune référence aux finalités de ces pratiques n'est faite dans cette définition.

(52) Directive 2005/29, art. 1 : « L'objectif de la présente directive est de contribuer au bon fonctionnement du marché intérieur et d'assurer un niveau élevé de protection des consommateurs, en rapprochant les dispositions législatives, réglementaires et administratives des États membres relatives *aux pratiques commerciales déloyales qui portent atteinte aux intérêts économiques des consommateurs* [nous soulignons] ». Dans cet article, l'atteinte aux intérêts économiques des consommateurs est la proposition subordonnée relative des pratiques commerciales

déloyales.

(53) CJCE, 15 mars 2012, aff. C-453/10, *Pereničová et Perenič*, pt 17, D. 2012. 805 ; *ibid.* 2013. 945, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud ; RTD com. 2012. 386, obs. D. Legeais ; RTD eur. 2012. 666, obs. C. Aubert de Vincelles ; CJUE, 7 mars 2013, aff. C-343/12, *Euronics Belgium*, pt 21, D. 2013. 913, obs. E. Petit ; *ibid.* 2487, obs. J. Larrieu, C. Le Stanc et P. Tréfigny ; *ibid.* 2812, obs. Centre de droit de la concurrence Yves Serra ; RTD eur. 2013. 570, obs. C. Aubert de Vincelles ; CJUE, 17 oct. 2013, aff. C-391/12, *RLvS*, pt 37, D. 2013. 2465 ; CJUE, 16 avr. 2015, aff. C-388/13, *UPC Magyarország*, pt 34, D. 2015. 917 ; *ibid.* 2016. 617, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud ; CJUE, 16 juill. 2015, aff. C-544/13 et C-545/13, *Abcur*, pt 74 : la directive possède un « champ d'application matériel particulièrement large, s'étendant à toute pratique commerciale qui présente un lien direct avec la promotion, la vente ou la fourniture d'un produit aux consommateurs ». Et, avec une formulation similaire, CJUE, 20 juill. 2017, aff. C-357/16, *Gelvora*, pt 19, D. 2017. 1604 ; *ibid.* 2018. 583, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud .

(54) CJUE, 15 déc. 2011, aff. C-126/11, *INNO*, préc., pt 22 ; CJUE, 7 mars 2013, aff. C-343/12, *Euronics Belgium*, pt 17, D. 2013. 913, obs. E. Petit ; *ibid.* 2487, obs. J. Larrieu, C. Le Stanc et P. Tréfigny ; *ibid.* 2812, obs. Centre de droit de la concurrence Yves Serra ; RTD eur. 2013. 570, obs. C. Aubert de Vincelles ; CJUE, 8 sept. 2015, aff. C-13/15, *Cdiscount*, préc., pt 24.

(55) « Finis, is, m », pris dans son cinquième sens retenu dans le Gaffiot, signifie « but (d'une chose) » (F. Gaffiot (fond.), Dictionnaire latin-français, version numérique, www.lexilogos.com/latin/gaffiot.php?p=669). Le dictionnaire illustre ce sens par une citation de Cicéron - considéré comme « le plus grand avocat de la latinité » (« Cicéron », dans P. Malaurie, Anthologie de la pensée juridique, Éditions Cujas, 2e éd., 2001. 23-26, spéc. p. 24) -, l'utilisant pour évoquer le but du droit civil : ce mot peut donc recouvrir un sens juridique. Il nous a, par conséquent, semblé être le terme le plus adapté pour traduire « finalité ».

(56) Il a été démontré par Monsieur de Montalivet que certains objectifs pouvaient être de véritables règles de droit (Les objectifs à valeur constitutionnelle, thèse Paris II, Dalloz 2006 ; Les objectifs sont-ils des règles de droit ?, dans B. Faure (dir.), *op. cit.*, p. 46 s\.). Cependant, en droit privé, les finalités d'une norme ne produisent que deux effets : un politique - elles permettent de légitimer l'existence d'une règle -, l'autre juridique - elles permettent d'interpréter la règle lors de leur mise en oeuvre (G. Marmin, *op. cit.*, Titre 1 de la Partie 2).

(57) P. Deumier, Les « motifs des motifs » des arrêts de la Cour de cassation. Étude des travaux préparatoires, dans Principes de justice. Mélanges en l'honneur de Jean-François Burgelin, Dalloz, 2008. 125 s\., spéc. p. 136 : « De loin, l'interprétation "téléologique" est privilégiée », car elle permet de correspondre à l'intention du législateur.

(58) Pour les situations de faits, l'étude des finalités sera uniquement un outil d'interprétation d'une règle non claire.

(59) La prise en compte des finalités dans la transposition des directives a déjà été dégagée par Madame Rochfeld,

mais elle estime que celles-ci entrent dans un « champ d'influence » distinct du « champ d'application » (Les ambiguïtés des directives d'harmonisation totale. La nouvelle répartition des compétences communautaire et interne (à propos de l'arrêt de la CJCE du 4 juin 2009), D. 2009. 2047 s\., n^os^ 3-13 ; « Les implications de la méthode de l'harmonisation totale par les directives. L'exemple de la proposition de directive du 8 octobre 2008 sur les droits du consommateur », dans D. Mazeaud, R. Schulze, G. Wicker (dir.), L'amorce d'un droit européen du contrat. La proposition de directive relative aux droits des consommateurs, Broché, 2010. 153 s\., spéc. n^os^ 5-15). Cette distinction s'explique par la prise en compte du domaine uniquement dans un sens national, une détermination de l'applicabilité à des faits. De la même façon, Monsieur Fortunato estime qu'il y a une « con[fusion entre] objectifs et champ d'application de la règle » et considère ainsi que les premiers ne peuvent appartenir au second (art. préc.). Monsieur Riehm semble considérer que l'étude des finalités du texte entre dans le champ d'application des directives, qu'il qualifie de liberté « intra muros » des États membres lors de la transposition des directives, sans, toutefois, l'affirmer expressément (Produits défectueux : quel avenir pour les droits communs ? L'influence communautaire sur les droits français et allemand, D. 2007. 2749, spéc. n^os^ 24, 27-28).

(60) N. Balat, *op. cit.*, n° 216 : « Le sujet d'une règle de droit est toujours visé conjointement à l'objet de cette règle, et réciproquement » ; H. Kelsen, *op. cit.*, p. 22 : « Ces deux éléments sont indissolublement unis l'un à l'autre » ; É. Untermaier, Les règles générales en droit public français, th. Lyon 3, LGDJ-Lextenso éditions, 2011, n^os^ 275-325.

(61) Cette définition est posée dans la Directive 2005/29, art. 2, d.

(62) CJUE, 14 janv. 2010, aff. C-304/08, *Plus Warenhandelsgesellschaft*, pt 39, D. 2010. 258, obs. E. Chevrier ; *ibid.* 790, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud ; RTD eur. 2010. 695, chron. C. Aubert de Vincelles ; CJUE, 9 nov. 2010, aff. C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag*, pt 26, D. 2010. 2829 ; *ibid.* 2011. 974, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud ; Légipresse 2010. 400 et les obs. ; *ibid.* 414, comm. E. Andrieu et N. Sauphanor-Brouillaud ; RTD eur. 2011. 630, obs. C. Aubert de Vincelles.

(63) CJUE, 15 déc. 2011, aff. C-126/11, *INNO*, préc., pt 27 ; CJUE, 4 oct. 2012, aff. C-559/11, *Pelckmans Turnhout*, pt 19 ; CJUE, 8 sept. 2015, aff. C-13/15, *Cdiscount*, préc., pt 25.

(64) CJUE, 4 oct. 2012, aff. C-559/11, *Pelckmans Turnhout*, pt 20.

(65) CJUE, 15 déc. 2011, aff. C-126/11, *INNO*, préc., pt 28 ; CJUE, 8 sept. 2015, aff. C-13/15, *Cdiscount*, préc., pt 26.

(66) CJUE, 3 févr. 2021, aff. C-922/19, *Stichting Waternet*, pt 50 faisant référence au considérant 23 de la Directive.

(67) Dans le même sens, A. Puttemans, art. préc., spéc. p. 28-29.

(68) Un seul arrêt a été rendu sans s'appuyer sur le considérant 6 (CJUE, 3 févr. 2021, aff. C-922/19, *Stichting Waternet*).

(69) N. Reich *et al., European consumer law*, Intersentia, 2nd éd., 2014, note de bas de p. 143 sous paragraphe n° 289.

(70) T. Verica, Conclusions de l'Avocat général sur l'affaire C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag*, présentées à la CJUE le 24 mars 2010, pt 26 : la Commission « [parvient] à la conclusion que cette disposition ne relèverait pas du champ d'application de ladite directive, car elle poursuivrait en priorité d'autres objectifs, à savoir la préservation du pluralisme des médias et, seulement dans une moindre mesure, la protection des consommateurs, ainsi que la loyauté des transactions commerciales ».

(71) C. Aubert de Vincelles, Leçons jurisprudentielles sur l'harmonisation totale à travers les pratiques commerciales déloyales, RTD eur. 2011. 630 s., spéc. p. 632. Comp. avec l'interprétation judiciaire qui déforme les finalités des lois en réduisant ou étendant leur champ d'application dénoncée par Madame Pignarre (L'effet pervers des lois, dans L'évaluation législative, actes du colloque du 7 avril 1994 au Sénat, PUAM, 1994. 1097 s\., nos 28-34).

(72) P. Pescatore, Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice. Contribution à la doctrine de l'interprétation téléologique des traités internationaux, dans W. J. Ganshof Van Der Meersch (dir.), *Studia ab discipulis amicisque in honorem egregii professoris edita*, Bruylant, vol. 2, 1972. 325 s\., spéc. p. 327.

(73) P. Pescatore, Le droit de l'intégration. Émergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés européennes, A.W. Sijthoff-Leiden, 1972, réimpression Bruylant, 2005. 43.

(74) *Ibid.*

(75) C. Zolynski, *op. cit.*, p. 67.

(76) V. *supra* paragraphe n° 9.

(77) T. Moorhead, *The legal order of the European Union. The institutional role of the Court of justice*, th. Kent law school, Routledge, 2014. 54-55 : les objectifs prévus aux articles 2 et 3 du Traité sur l'Union européenne constituent le « noyau normatif » (nous traduisons *« normative core »)* de l'ordre de l'Union européenne et la Cour de justice cherche à leur conférer le maximum d'effectivité dans ses décisions.

(78) Le droit est un vecteur de l'intégration économique, social et politique des États et des peuples européens : v. notamment C. Mouly, Le droit peut-il favoriser l'intégration européenne ?, RIDC, 1985. 895 à 945 ; J.-P. Jacqué, Le rôle du droit dans l'intégration européenne, Philosophie politique, t. 1, 1991. 119 s\. V. cependant É. Dubout, qui estime qu'« il serait exagéré de prétendre que la Cour de justice serait manifestement plus "activiste" qu'une autre » (Le libéralisme politique de la Cour de justice. Le cas de la liberté d'entreprise, dans L. Clément-Wilz (dir.), Le rôle politique de la Cour de justice de l'Union européenne, Bruylant, 2019. 145 s\., spéc. p. 148.

(79) C. Aubert de Vincelles, La jurisprudence de la Cour de justice de l'Union européenne en matière de droit de la consommation, dans Y. Picod (dir.), *op. cit.*, p. 35 s\., n° 43.

(80) Protocole (n° 3) sur le statut de la Cour de justice de l'Union européenne : JOUE C. 83/210 du 30 mars 2010, art. 36. Il est ainsi possible de considérer qu'une décision de la Cour de justice de l'Union européenne se justifie par référence à une norme plus élevée dans une chaîne de validité dont la plus haute norme se situe dans l'un des traités (J. Bengoetxea, *The legal reasoning of the European Court of justice. Towards a European jurisprudence*, Clarendon press, 1993. 51).

(81) S. Sankari, *European Court of Justice legal reasoning in contex*, Europa Law Publishing, 2013. 50.

(82) V. *infra* paragraphes n^{os} 25-26.

(83) V. références notes de bas de page 68 et 69, sous paragraphe n° 21.

(84) CJUE, 15 déc. 2011, aff. C-126/11, *INNO*, préc., pt 22 ; CJUE, 7 mars 2013, aff. C-343/12, *Euronics Belgium*, préc., pt 17 ; CJUE, 8 sept. 2015, aff. C-13/15, *Cdiscount*, préc., pt 24 ; CJUE, 3 févr. 2021, aff. C-922/19, *Stichting Waternet*, pts 50-51.

(85) Par exemple, la Directive 93/13/CEE du Conseil, du 5 avr. 1993, concernant les clauses abusives dans les contrats conclus avec les consommateurs, poursuit également cette protection. Le cumul avec la Directive 2005/29 a ainsi pu être avancé lors d'une question préjudicielle, CJCE, 15 mars 2012, aff. C-453/10, *Pereničová et Perenič*, pt 17, D. 2012. 805 ; *ibid.* 2013. 945, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud ; RTD com. 2012. 386, obs. D. Legeais ; RTD eur. 2012. 666, obs. C. Aubert de Vincelles. V. sur ce point K. Jakouloff, Des clauses abusives aux pratiques commerciales déloyales : deux directives complémentaires, LPA, n° 115, 2015. 18 s\.

(86) CJUE, 17 oct. 2013, aff. C-391/12, *RLvS*, pt 47, D. 2013. 2465.

(87) CJUE, 14 janv. 2010, aff. C-304/08, *Plus Warenhandelsgesellschaft*, D. 2010. 258, obs. E. Chevrier ; *ibid.* 790, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud ; RTD eur. 2010. 695, chron. C. Aubert de Vincelles ; CJUE, 9 nov. 2010, aff. C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag*, D. 2010. 2829 ; *ibid.* 2011. 974, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud ; Légipresse 2010. 400 et les obs. ; *ibid.* 414, comm. E. Andrieu et N. Sauphanor-Brouillaud ; RTD eur. 2011. 630, obs. C. Aubert de Vincelles. La CJUE étudie le champ d'application matériel aux points 35 à 37 (premier arrêt) et 16 à 19 (second arrêt), puis celui relatif aux finalités aux points 38 à 40 (premier arrêt) et 20 à 28 (second arrêt).

(88) Sur cette évolution, v. *supra* paragraphe n° 12.

(89) Nous n'avons pas eu accès à l'arrêt faisant l'objet du pourvoi et ne pouvons donc pas présenter la solution que les juges bordelais avaient retenu dans cette affaire, ni ne pouvons exposer la solution des juges de renvoi, car la cassation est intervenue sans renvoi.

(90) CA Douai, 31 mars 2016, RG n° 15/02238. Sur cet arrêt, v. M. Malaurie-Vignal, Pour la cour d'appel de Douai, l'interdiction de la revente à perte prévue par l'article L. 442-6 du code de commerce échappe au champ d'application de la directive 2005/29 sur les pratiques commerciales déloyales, CCC, n° 7, 2016, comm. 165.

(91) Crim., 22 nov. 2017, n° 16-18.028, D. 2018. 865, obs. D. Ferrier ; AJ contrat 2018. 42, obs. S. Regnault. Pour un arrêt identique rendu sur un autre numéro de pourvoi dans la même affaire, v. Crim., 16 janv. 2018, n° 16-83.457, D. 2018. 164 ; *ibid.* 2019. 607, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud ; *ibid.* 783, obs. N. Ferrier ; RSC 2018. 915, obs. M.-C. Sordino ; *ibid.* 2019. 101, obs. C. Ambroise-Castérot ; RTD com. 2018. 505, obs. B. Bouloc.

(92) CJUE, 14 janv. 2010, aff. C-304/08, *Plus Warenhandelsgesellschaft*, pts 39-40, D. 2010. 258, obs. E. Chevrier ; *ibid.* 790, obs. H. Aubry, E. Poillot et N. Sauphanor-Brouillaud ; RTD eur. 2010. 695, chron. C. Aubert de Vincelles.

(93) Solution confirmée dans CJUE, 14 janv. 2010, aff. C-304/08, *Plus Warenhandelsgesellschaft*, pts 38-40 et CJUE, 9 nov. 2010, aff. C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag*, pts 21-22.

(94) CJUE, 9 nov. 2010, aff. C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag*, pt 41.

(95) *Ibid.,* pts 21-28.

(96) *Ibid.*

(97) D. Simon, L'interprétation judiciaire des traités d'organisations internationales. Morphologie des conventions et fonction juridictionnelle, th. Nancy 2, A. Pedone, 1981. 343-344, qui constate que le juge des traités internationaux, dont la Cour de justice des Communautés européennes, interprètent les textes de manière à lui faire produire non seulement un effet utile, mais « son plein effet, son efficacité maximale » (p. 343), « la technique de l'effet utile a atteint son stade ultime, en se confondant, dans une large mesure, avec la méthode téléologique » (p. 344).

(98) Cette solution a été affirmée avec force, puisqu'elle a été posée dans un arrêt rendu par la grande chambre de la CJUE (CJUE, 9 nov. 2010, aff. C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag*) et rappelée, par la suite, dans plusieurs ordonnances (CJUE, 30 juin 2011, aff. C-288/10, *Wamo* ; CJUE, 15 déc. 2011, aff. C-126/11, *INNO*), méthode de décision de la CJUE signifiant que le juge européen estime que la solution se déduit facilement de la directive et de sa jurisprudence antérieure (C. Blumann et L. Dubouis, Droit institutionnel de l'Union européenne, Lexisnexis, 6e éd., 2016, n° 1013).

(99) V. *supra* paragraphe n° 19.

(100) B. Keirsbilck, Vers un règlement européen unique relatif aux pratiques commerciales déloyales "b2c" et "b2b" ?, dans E. Terryn et D. Voinot (dir.), *op. cit.*, p. 156 s\., spéc. n° 8.

(101) *Ibid.* Seule une dualité des intérêts semble se dégager dans la directive. Comp. avec J. Azéma, Le droit français de la concurrence, PUF, 2e éd., 1989, nos 6-7 ; C. Flandrois, La loyauté dans la concurrence, th. Lyon 3, 2002, spéc. n° 46, pour qui la relation concurrentielle est une relation tripartite entre les intervenants sur le marché, les concurrents et les consommateurs.

(102) Directive 2005/29, art. 11, 1.

(103) B. Keirsbilck, *The new european law of unfair commercial practices and competition law*, th. Katholieke Universiteit Leuven, Hart publishing, 2011, n° 287.

(104) V. par ex. Crim., 22 nov. 2017, n° 16-18.028 dans lequel la Cour de cassation n'étudie pas ce champ d'application *ratione finis* en avançant l'exclusion d'un autre champ d'application, D. 2018. 865, obs. D. Ferrier ; AJ contrat 2018. 42, obs. S. Regnault.

(105) A. Puttemans, art. préc., spéc. p. 27.

(106) CJUE, 15 déc. 2011, aff. C-126/11, *INNO*, pts 16, 19 et 29. V. également CJUE, 30 juin 2011, aff. C-288/10,

Wamo, pts 26 et 28, qui indiquait, à plusieurs reprises, dans le corps du texte, l'adverbe « effectivement », sans que celui-ci ne soit repris dans son dispositif.

(107) CJCE, 29 avr. 2004, aff. C-482/01 et C-493/01, *Orfanopoulos et Oliveri*, pt 42, D. 2004. 1640 ; RSC 2004. 712, obs. L. Idot.

(108) Pour un exemple, v. CJUE, 4 oct. 2012, aff. C-559/11, *Pelckmans Turnhout*, pts 21-22.

(109) Sur cette question, v. G. Darcy, V. Labrot et M. Doat (dir.), L'office du juge, actes du colloque des 29 et 30 septembre 2006 au Sénat, disponible à l'adresse suivante : www.senat.fr/colloques/office_du_juge/office_du_juge_mono.html.

(110) C. Vocanson, Le texte, dans P. Deumier (dir.), Le raisonnement juridique. Recherche sur les travaux préparatoires des arrêts, Dalloz, 2013. 11 s\., n° 27.

(111) Il ne s'agit pas ici de la question de la normativité des objectifs (celle-ci étant largement déniée par la doctrine, v. références de la note de bas de page 33, sous paragraphe n° 9). Il s'agit uniquement de l'interprétation judiciaire pouvant aller dans un sens inverse que celui avancé par le législateur, et, par conséquent, une interprétation étant contraire à la loi.

Sur le raisonnement *contra legem,* v. notamment C. Vocanson, *op. cit.*, n° 31.

(112) CJCE, 16 déc. 1993, aff. C-334/92, *Wagner Miret c/ Fondo de garantía salarial*, Rec. 6911, pts 21-22, AJDA 1994. 698, chron. H. Chavrier, E. Honorat et P. Pouzoulet ; D. 1994. 14 ; CJCE, 4 juill. 2006, aff. C-212/04, *Adeneler e. a.,* Rec. 6057, pt 110, AJDA 2006. 2271, chron. E. Broussy, F. Donnat et C. Lambert ; D. 2006. 2209 ; Dr. soc. 2007. 94, note C. Vigneau. V. sur ce point, N. Kilgus, Interprétation conforme d'une directive non transposée et jurisprudence *contra legem,* D. actu., 2015 ; R. Kovar, L'interprétation des droits nationaux en conformité avec le droit communautaire, dans La France, l'Europe, le Monde. Mélanges en l'honneur de Jean Charpentier, A. Pedone, 2008. 381 s\.

EUIPO Boards of Appeal in the Light of the Principle of Fair Trial

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The EUIPO's Boards of Appeal are called upon to decide on appeals against decisions by the bodies of 'first instance'.

However, their judicial function has always been denied. Conversely, the essay tends to place the Boards of Appeal of the EUIPO in any case within the concept of 'court', as defined by the ECtHR, within the framework of Article 6 ECtHR, because it assesses their independence, impartiality, and in general the guarantees required by the 'fair trial', until concluding that it is a paradigmatic model in the overall administration and judicial system.

Keywords: EUIPO Boards of Appeal, European Court of Human Rights, Court of Justice of the Eurpean Union, EU Charter of Fundamental Rights, Fair trial

1 FRAMING THE ISSUE

The EUIPO's Boards of Appeal are called upon to decide on appeals against decisions of the Office's services (so-called initial decisions, issued by the bodies of 'first instance').

As regards the function of the Boards of Appeal it has long been considered that

> Since a Board of Appeal enjoys, in particular, the same powers as the examiner, where it exercises them, it acts as the administration of the Office. An action before the Board of Appeal therefore forms part of the administrative registration procedure, following an interlocutory revision by the first department to carry out an examination of Regulation No 40/94.
>
> In the light of the foregoing, the Boards of Appeal cannot be classified as tribunals. Consequently, the applicant cannot properly rely on a right to a fair hearing before the Boards of Appeal of the Office.[1]

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1 Court of First Instance, case T-63/01, 12 Dec. 2002 *Procter & Gamble v. OHIM*, ECLI:EU:T:2002:317, paras 22–23.
All of this is based on the consideration that 'the Boards of Appeal form part of the Office […] […] and also contribute, within the limits set by that regulation, to the completion of the internal market', para. 20. It is also based on the consideration 'that there is continuity in terms of their functions between the various departments of the Office and that the Boards of Appeal enjoy, in particular, the

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The subsequent case-law on EUIPO (formerly OHIM) also followed that approach, based on functional continuity, both with reference to challenges to the actions of the 'examiners' dealing with the registration of a Community trade mark, and also with reference to challenges to decisions of other divisions (opposition and annulment), which are required to resolve disputes between private operators.[2] It has thus been reiterated that the Boards of Appeal of the Office are not judicial but administrative in nature,[3] and are subject to the principle laid down in Article 41 of the Charter of Fundamental Rights.[4]

In particular, the inapplicability of the principles of fair trial,[5] along with the related procedural guarantees, as asserted on numerous occasions, is not explained by the impact of the European Convention on Human Rights and Fundamental Freedoms on institutions of EU law. Conversely, according to the nature and type of the activity carried out by the boards of appeal (which is in theory identical to that carried out by first instance bodies), it may be concluded that, in functional terms, it is not covered by the right to a fair trial.

This is a settled interpretation, which arouses more than a little perplexity. This is not only because a quite different view was recognized with regard to the Boards of Appeal of another Intellectual Property Office (the CPVO qualified as a '*quasi-judicial body*'),[6] but also and above all because the Boards of Appeal of

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same powers in determining an appeal as the examiner. Thus, while the Boards of Appeal […] constitute a department of the Office responsible for controlling […] the activities of the other departments of the administration to which they belong', as held in the judgment cited in para. 21.

2 The procedures concerning the invalidity or revocation of an EU mark are considered as an alternative remedy to a similar application that may be filed with a national court within trade mark infringement proceedings (Art. 63, para. 3 of Regulation 2017/1001/EU).

3 Court of First Instance, case T-273/02, 20 Apr. 2005, *Krüger v. OHIM (CALPICO)*, ECLI:EU:T: 2005:134, para. 62 excluding infringement of Art. 6, No. 1 ECHR, on the right to a fair trial.
See also General Court, cases T-828/14 and T-829/14, 16 Feb. 2017, *Antrax It/EUIPO – Vasco Group (Thermosiphons pour radiateurs)*, para. 38 and, more recently, General Court, case T-727/ 16, 21 Feb. 2018, *Repower*, ECLI:EU:T: 2018:88, para. 86.

4 *See* e.g., on the latter aspect, General Court, cases T-828/14 and T-829/14, 16 Feb. 2017 cit., paras 38–40.
See also General Court, cases T-159/15, 9 Sep. 2016, *Puma v. EUIPO*, ECLI:EU:T: 2016:457, para. 18, which recalls the right to good administration.
See also Court of Justice, Case C-564/16P, 28 Jun. 2018, *Puma v. EUIPO*, ECLI:EU:C: 2018:509, paras 60 et seq., para. 87, which refers to the principle of good administration.

5 *See also* Court of First Instance, case T-273/02, 20 Apr. 2005, para. 62; General Court, 22 May 2014, Case T-228/13, *NIIT Insurance Technologies Ltd v. OHIM (EXACT)*, ECLI:EU:T: 2014:272, para. 52; General Court, case T-197/12, 11 Jul. 2013, *Metropolis Inmobiliarias y Restauraciones v. OHIM – MIP Metro (METRO)*, ECLI:EU:T: 2013:375, para. 53 and General Court, case T-284/11, 25 Apr. 2013, *Metropolis Inmobiliarias y Restaurants v. OHIM — MIP Metro (METROINVEST)*, ECLI:EU:T: 2013:218, para. 62 (all cited in M. Ricolfi, *Trade Marks Treaty. European and National Law* 86 (Turin 2015).

6 It is stated in another more recent judgment of the General Court that the Board 'Is a quasi-judicial body', which is under the obligation to examine carefully and impartially all the relevant elements of the case concerned, ensuring compliance with the general principles of law and with the applicable rules of procedure governing the burden of proof and the taking of evidence' *see* General Court, cases

EUIPO are nevertheless preordained to rule on disputes[7] and therefore have certain judicial functions.

Precisely on account of that judicial function, the Boards of Appeal of the EUIPO fall in any case within the concept of 'court', as defined by the ECtHR, within the framework of Article 6 ECHR. Indeed, the case-law of ECtHR does not necessarily require that, in order for guarantees under Article 6 to apply, that it must be 'a court of law integrated with the standard judicial machinery'; it is rather sufficient that it is a body vested with decision-making powers to resolve a dispute, on the basis of rules of law and on the basis of a suitably structured procedure.[8] Thus, the guarantees of a 'fair trial' are also imposed on administrative procedures concerning a 'contestation' between private entities or between a private and a public administration,[9] which determine its outcome in a binding manner.

It is also known that in this context the (French) notion of '*contestation*' (or the corresponding Italian 'controversie', or the English '*disputes*') must be understood in a broad and functional sense,[10] such as to include various administrative procedures, even if they do not concern disputes in a technical sense.[11] All the more so, procedures aimed at resolving actual disputes,[12] as those decided by the

T-133/08, T-134/08, T-177/08 and T-242/09, 18 Sep. 2012, *Ralf Schräder v. OCVV*, ECLI:EU:T: 2012:430, paras 135, 137 and 190.
The judgment was confirmed on this point by the Court of Justice: 'In paragraph 137 of the judgment under appeal, the General Court justified the application by analogy of the principles established in the judgment in ILFO v High Authority (51/65, EU:C: 1966:21) to the Board of Appeal on the ground that it is a quasi-judicial body. In paragraph 137 of the judgment under appeal, the General Court justified the application by analogy of the principles established in the judgment in *ILFO v High Authority* (51/65, EU:C: 1966:21) to the Board of Appeal on the ground that it is a quasi-judicial body. Therefore, the General Court cannot be criticised for having found that the appellant should have presented to the Board of Appeal prima facie evidence in order to secure from it the adoption of a measure of enquiry' (Court of Justice, Case C-546/12P, 21 May 2015, *CPVO v. Schräder*, ECLI:EU: C: 2015:332, paras 73, 75 and 76).
Compare also the Opinion of the Advocate General of 13 Nov. 2014 (ECLI:EU:C: 2014:2373), para. 76, delivered in the last case cited.

7 As is clear, e.g., from Court of First Instance, case T-407/05, 6 Nov. 2007, para. 51, where it is stated inter alia that 'The review undertaken by the Boards of Appeal is not limited to the lawfulness of the contested decision, but, by virtue of the devolutive effect of the appeal proceedings, it requires a reappraisal of the dispute as a whole, since the Boards of Appeal must re-examine in full the initial application and take into account evidence produced in two times'. Compare also Court of Justice, Case C-625/15P, 8 Jun. 2017, *Schnigal v.*, ECLI:EU:C: 2017:435, para. 83.

8 *See* ECtHR, 5 Feb. 2009, case no. 22330/05, *Olujc v. Croatia*, para. 37.

9 On the scope of the term '*contestation*' *see* ECtHR, 23 Jun. 1981, case no. 6878/75 and 7238/75, *Le Compte, Van Leuvent et De Meyere, v. Belgium*, paras 44 et seq.

10 Compare ECtHR, 23 Jan. 2003, case no. 23379/94, *Kienast v. Austria*, para. 39.

11 Compare on this issue *see* M. Allena, *Art. 6 ECHR. Procedure and Administrative Process* 171 et seq. (Naples 2012), who argues that they should apply to certain authorization, concession or expropriation procedures, etc., as well as to sanctions procedures. Compare also S. Mirate, *Giustizia amministrativa e Convenzione europea dei diritti dell'uomo* 219 et seq. (Naples 2007).

12 This may concern not only the existence of a right, but also the way in which it is exercised and its scope (cf. ECtHR, 23 Oct. 1985, case no. 8848/80, *Bethem v. Belgium*).

boards of appeal at issue in this case actually are,[13] should fall within the scope of Article 6 ECHR.

Moreover, there are a number of cases in which the ECtHR has subjected appeal procedures present in the various legal systems of the signatory States to the Convention to the Article 6 review procedure.[14] This should apply all the more so to the Boards of Appeal of EUIPO, which are often called upon to rule on the legitimacy of initial decisions of the Office, which also have judicial functions.[15]

It is therefore important to establish, according to a perspective already developed in another paper,[16] whether the Boards of Appeal of the EUIPO have all of the characteristics typical of a fair trial and provide the related guarantees. These are, as is well-known, the requirements of independence, impartiality,

See more generally, ECtHR, 5 Oct. 2000, case no. 33804/96, *Mennitto v. Italy*, para. 23: 'The Court reiterates that, according to the principles laid down in its case-law, it must first ascertain whether there was a "dispute" ("contestation") over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question (*see* the following judgments: *Acquaviva v. France, 21 November 1995, Series A no. 333-A, p. 14, § 46; Balmer-Schafroth and Others v. Switzerland, 26 August 1997, Reports of Judgments and Decisions 1997-IV, p. 1357, § 32; Le Calvez v. France, 29 July 1998, Reports 1998-V, pp. 1899-900, § 56; and Athanassoglou and Others v. Switzerland [GC], no. 27644/95, § 43, ECHR 2000-IV)*. Lastly, the right must be a civil right'. *See also* ECtHR, 28 Apr. 2009, case nos. 17214/05, 20329/05, 42113/04, *Savino and others v. Italy*, para. 73.

[13] According to the settled case law cited *above* in footnote 7.
The current legislation also refers to 'dispute' or 'case' (cf. Art. 170, para. 4 of Reg. 2017/1001/EU and Art. 27, para. 4, point A, Reg. 2018/625 on EUIPO). Nor could it be otherwise, since they are appeals against decisions of the offices that are deemed to be detrimental to the rights of the applicants.

[14] A careful review has been carried out by M. Pacini, *Diritti umani e amministrazioni pubbliche* 129 (Milan 2012).
For example, in cases concerning an appeal to an independent Austrian administrative board against the imposition of administrative sanctions (ECtHR, 5 Oct. 2006, case no. 12555/03*, Muller v. Austria*.), an appeal against the transfer of a civil servant lodged before a committee established at the Austrian Ministry of Labour (cf. ECtHR, 9 Nov. 2006, case no. 30003/02, *Stojacovic v. Austria*), an appeal against an order for the demolition of buildings lodged before an English inspectorate, cf. ECtHR (22 Nov. 1997, case no. 19178/91, *Bryan v. United Kingdom*), and an appeal against a refusal to register a trade mark lodged before a division of the Dutch Patent Office (ECtHR, 20 Nov. 1995, case no. 19589/92, *British-American Tobacco v. Netherlands*), etc.

[15] Indeed, as regards Art. 170, para. 4, of Reg. 2017/1001/EU, when dealing with the different institution of mediation, it expressly states '*In the case of disputes subject to the proceedings pending before the Opposition Divisions, Cancellation Divisions or before the Boards of Appeal of the Office* […]': this accordingly constitutes confirmation – on the basis of express legislative classification – not only of the fact that the EUIPO boards of appeal are called upon to resolve disputes, but also of the fact that proceedings pending before opposition and annulment divisions (relating specifically to oppositions and applications for invalidity and annulment) are also aimed at resolving actual disputes. Compare also Court of Justice, Case C-29/05P, 13 Mar. 2007, *OHIM v. Kaul*, ECLI:EU:C: 2007:162, para. 48, with reference to the 'initial' decision on an opposition to the registration of a trade mark, and hence *a fortiori* with regard to the task of the Boards of Appeal.

[16] G. Greco, *Le commissioni di ricorso nel sistema di giustizia dell'Unione europea* (Milan 2020).

equality of arms and protection of the right to make oral representations, publicity and reasonable duration of the proceedings, as well as appropriate decision-making authority to alter any finding of fact or of law in the contested decision).

2 ARTICLE 58 *A* OF THE STATUTE OF THE COURT

The interest in the inquiry is increased by the recent reform of the Statute of the Court of Justice, which introduced the institute of the 'filter' for access to the Court of Justice.[17] Article 58 *a* states that:

> An appeal brought against a decision of the General Court concerning a decision of an independent board of appeal of one of the following offices and agencies of the Union [these are the Boards of Appeal of EUIPO, CPVO, ECHA and EASA, author's note] shall not proceed unless the Court of Justice first decides that it should be allowed to do so.[18]

Therefore, the 'filter' of access to the Court of Justice also applies to the Boards of Appeal of the EUIPO, on the assumption that '*decisions which have already been examined by an independent administrative authority*',[19] or by an '*'independent administrative body*', meaning a body *'whose members are not bound by any instructions when taking their decisions'*.[20] Such intervention by the Boards of Appeal, together with the subsequent one by the General Court, would guarantee, *in fact, 'a two-tier review of legality*', such as to render unnecessary under normal circumstances a further instance of jurisdiction before the Court.

In other words, those Boards of Appeal perform a function that is in some way comparable (and in any case fungible) with that at first instance normally performed by the Court of First Instance (and, where applicable, by the specialized court). Thus, the normal sequence of two instances of jurisdiction constituted by the judgments of the Court of First Instance and then by those of the Court of Justice would be replaced by the different sequence of two instances of jurisdiction

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17 Reform approved by Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 Apr. 2019 amending Protocol No. 3 on the Statute of the Court of Justice of the European Union.

18 This is not a completely new procedural institution, given that a similar mechanism is already provided for, with regard to judgments issued by the General Court concerning appeals against the decisions of specialized courts. In fact, Art. 256, para. 2, second paragraph, TFEU, provides that 'Decisions given by the General Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected'.
The parallelism between these institutes (although very different from each other) is not without implications for the role, if not for the nature, of those Boards of Appeal.

19 *See* the letter from the President of the Court of Justice to the President of the Council of the European Union dated 26 Mar. 2018, interinstitutional file 2018/0900 (COD).

20 *See* Commission Opinion of 11 Jul. 2018, COM (2018) 534 final.

constituted by the decisions of Boards of Appeal and judgments of the General Court.

It must be taken into account that an appeal before the Boards of Appeal is a 'preliminary ruling' with respect to the possible intervention of the EU court. Thus, by limiting the focus to the Boards of Appeal of EUIPO, which moreover have predominant significance in establishing the scope of the relevant litigation,[21] as has been clarified since the first regulation concerning this matter:

> Whereas it is necessary to ensure that parties who are affected by decisions made by the Office are protected by the law in a manner which is suited to the special character of trade mark law; whereas to that end provision is made for an appeal to lie from decisions of the examiners and of the various divisions of the Office; whereas if the department whose decision is contested does not rectify its decision it is to remit the appeal to a Board of Appeal of the Office, which is to decide on it; whereas decisions of the Boards of Appeal are, in turn, amenable to actions before the Court of Justice […]; which has jurisdiction to annul or to alter the contested decision.[22]

Within this context, the assessment of the structural, procedural and decision-making characteristics of the EUIPO Boards of Appeal, in the light of the right to a fair trial, can also have a paradigmatic significance for other boards of appeal[23] set up by other agencies,[24] which share the feature that their interventions have the status of 'preliminary rulings'. And it could provide useful insights on more general issues of the European Union's judicial system, at least as regards judgments on annulment appeals.

[21] It is sufficient to note that the number of decisions of the Boards of Appeal of EUIPO covers almost all of the overall litigation of all Boards of Appeal set up with other agencies, with the further consequence that the appeals cover more than 30% of the entire litigation before the General Court. For data on EUIPO Boards of Appeal updated to Dec. 2020 *see* https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/the_office/appeal_statistics/appeal_stats_2020_en.pdf. In addition, for a comparative analysis of the number of disputes before the different Boards of Appeal of the different agencies/offices: *see* the table published in J. Alberti, *The Draft Amendments to CJEU's Statute and the Future Challenges of Administrative Adjudication in the EU*, in *federalismi.it*, no. 3, 18–19 (2019).

[22] *See* the preamble to Regulation 40/94/EC. Now, instead, the 30th recital to Regulation 2017/1001 states that: 'It is necessary to ensure that parties who are affected by decisions made by the Office are protected by the law in a manner which is suited to the special character of trade mark law. To that end, provision should be made for an appeal to lie from decisions of the various decision-making instances of the Office. A Board of Appeal of the Office should decide on the appeal. Decisions of the Boards of Appeal should, in turn, be amenable to actions before the General Court, which has jurisdiction to annul or to alter the contested decision'.

[23] In this regard, Court of Justice, Case C-546/12P, 21 May 2015, para. 23, of the findings in fact concerning the '*Procedure before the General Court nd the judgment under appeal*'.

[24] On the Agencies of the European Union, *see* P. Craig, *EU Administrative Law* 151 et seq. (Oxford 2018).

3 INDEPENDENCE AND IMPARTIALITY OF THE BOARDS OF APPEAL AND THEIR MEMBERS

According to the settled case law of the ECtHR, 'in order to establish whether a tribunal can be considered as "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence'.[25]

With regard to the EUIPO, Article 166, paragraph 7, of Reg. 2017/1001 formally proclaims, with all-encompassing scope, that 'the President of the Boards of Appeal and the chairpersons and members of the Boards of Appeal shall be independent. In their decisions, they shall not be bound by any instructions'. This must be verified, at least briefly.

Article 166, paragraph 1, stipulates that the President of the Boards of Appeal and the chairpersons of the Boards shall be applied by the Council of the European Union on the basis of a list of not more than three candidates, compiled by the Board of Directors of the EUIPO (in accordance with the procedure laid down in Article 158 for the appointment of the Executive Director). Conversely, the other members of the Boards of Appeal are appointed directly by the Management Board (Article 166, paragraph 5).

Overall, this seems to guarantee a good standard of structural independence. In fact, although it is difficult to consider that the Boards of Appeal have all the characteristics required in order to be recognized as a 'court' within the meaning of Article 267 TFEU,[26] for the purposes of fair trial guarantees *pursuant* to Article 6 ECHR, the fact that these boards are structurally linked to the relevant body is not an insurmountable obstacle.[27]

As regards impartiality, it is known that for the ECtHR, its existence 'must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective

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25 Compare ECHR, *Factsheet – Independence of the Justice System* (Dec. 2020), https://www.echr.coe.int/Documents/FS_Independence_justice_ENG.pdfand in particular ECtHR, 21 Jul. 2009, case no. 34197/02, *Luka v. Romania*,§37.

26 *See* Greco, *supra* n. 16, at 98 et seq.

27 Compare ECtHR, 28 Jun. 1984, case nos. 7819/77; 7878/77, cit., para. 79: '*Members of Boards are appointed by the Home Secretary, who is himself responsible for the administration of prisons in England and Wales* […].
The Court does not consider that this establishes that the members are not independent of the executive: to hold otherwise would mean that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not "independent". Moreover, although it is true that the Home Office may issue Boards with guidelines as to the performance of their functions […]*, they are not subject to its instructions in their adjudicatory role*'.
See also ECtHR, 22 Nov. 1995, case no. 19178/91, cit., para. 38, and ECtHR, 24 Nov. 1994, case no. 15287/89, *Beaumartin v. France,* para. 38.

test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect'[28]: the legislation and institutions briefly reviewed (and particularly the ban on receiving instructions) appear to effectively provide such assurances.

In relation to the EUIPO Boards of Appeal, Article 166, paragraph 9 of Reg. 2017/1001 states, regarding the issue of incompatibility, that the members of the Boards of Appeal must not at the same time belong to another division of the same Office. This strengthens the independence of the Boards of Appeal *vis-à-vis* the other bodies of the same Office, which are then those that issue the acts liable to be challenged before the Boards themselves.

Particular attention must then be paid to the issue of conflicts of interest. In fact, Article 169 (which in actual fact is applicable not only to members of the Boards of Appeal) imposes an obligation to abstain from procedures in which they have a personal interest or on matters in which they have been involved in various ways. In particular, 'Examiners and members of the Divisions set up within the Office or of the Boards of Appeal may not take part in any proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties' (Article 169, paragraph 1).

The obligation to refrain from participation reflects the power of the participants to the appeal proceedings to require recusal, even '*if suspected of partiality*' (Article 169, paragraph 3). This is subject to the dual limitation that 'an objection shall not be admissible if, while being aware of a reason for objection, the party has taken a procedural step'[29] and that in any case 'no objection may be based upon the nationality of examiners or members'.

The provisions applicable to abstentions and recusal are supplemented by Article 44 of the Delegated Regulation (2018/625, cited above), which provides that 'Before a decision is taken by a Board of Appeal pursuant to Article 169(4) of Regulation (EU) 2017/1001, the chairperson or member concerned shall be invited to present comments as to whether there is a reason for exclusion or objection'. Article 169, paragraph 4, cited, provides, in fact, that:

> the Divisions and the Boards of Appeal shall decide as to the action to be taken in the cases specified in paragraphs 2 and 3 without the participation of the member concerned. For the purposes of taking this decision the member who withdraws or has been objected to shall be replaced in the Division or Board of Appeal by his alternate.

[28] ECtHR, 24 Feb. 1993, case no. 14396/88, *Fey v. Austria*, para. 28. To that end, the Court states that subjective impartiality must be presumed until established otherwise, whereas '*even appearances may be of a certain importance*' in relation to objective impartiality.

[29] For an application of this type, in which the applicant had carried out procedural acts incompatible with recusal, *see* Court of First Instance, case T-63/01, 12 Dec. 2002, *Procter & Gamble v. OHIM*, ECLI:EU:T: 2002:317, para. 25, which will be reported in the following note.

As may be noted, these provisions are detailed and thorough, which undoubtedly guarantee a high standard of impartiality and guarantee the rights of defence in this respect.[30] The provisions are supplemented by those on immovability, since both the chairperson and the other members cannot be relieved of their duties, except on serious grounds by a decision of the Court of Justice, which must be adopted in accordance with the procedures set out in paragraph 1[31] and paragraph 6 respectively[32] of Article 1 166.

4 EQUALITY OF ARMS, PROTECTION OF THE RIGHT TO MAKE ORAL REPRESENTATIONS, PUBLICITY AND THE REASONABLE DURATION OF THE PROCEEDINGS

Proceedings before the Boards of Appeal are subject to stringent procedural requirements from the introductory stage onwards. The requirements of procedural admissibility and the substantive admissibility conditions largely correspond to the usual conditions applicable within judicial proceedings, which thus constitute a reference parameter.

Also as regards the role of private parties and their defence counsel, the right to make oral representations is broadly guaranteed, according to certainly high-quality standards. In fact, pursuant to Article 94, paragraph 1, of Reg. 2017/1001/EU 'decisions of the Office shall state the reasons on which they are based. They

[30] It was held, specifically with reference to the EUIPO Boards of Appeal, that 'the rights of the defence in proceedings before the Boards of Appeal are guaranteed by Article 132 of Regulation No 40/94, which sets out the situations in which members of the Boards may be excluded or objected to and, in particular, which provides, at paragraph 3, that members suspected of partiality may be objected to by any party.
However, under that provision an objection is not admissible if the party concerned has taken a procedural step while being aware of a reason for objection. As the Office rightly submits, that is the case here. First, the applicant failed to plead possible partiality on the part of the Board of Appeal in question or of the member who Rapporteur in the present case was and who was also Rapporteur when the first decision of the same Board was taken in the present case when invited by that Rapporteur to submit observations. Second, by submitting its observations to the Board of Appeal, the applicant took a procedural step within the meaning of the second sentence of Article 132 (3) of Regulation No 40/94 and, accordingly, forfeited the right to demand that the members of the Board of Appeal in question withdraw' (Court of First Instance, case T-63/01, 12 Dec. 2002, *supra* n. 1, paras 24–25).

[31] Compare the text of the legislation: 'They shall not be removed from office during this term, unless there are serious grounds for such removal and the Court of Justice, on application by the institution which appointed them, takes a decision to this effect'.

[32] Compare the text of the legislation: 'The members of the Boards of Appeal shall not be removed from office unless there are serious grounds for such removal and the Court of Justice, after the case has been referred to it by the Management Board on the recommendation of the President of the Boards of Appeal, and after consulting the chairperson of the Board to which the member concerned belongs, takes a decision to this effect'.

shall be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments'.[33]

This requirement is in fact directed primarily at the divisions of 'first instance' of the EUIPO. However, it is certainly applicable – one might say, *a fortiori* – also to the Boards of Appeal, pursuant to Article 48 of Regulation 2018/625, which stipulates that 'Unless otherwise provided in this title, the provisions relating to proceedings before the instance of the Office which adopted the decision subject to appeal shall be applicable to appeal proceedings *mutatis mutandis*'.

According to that principle, the applicant must state, inter alia, 'the grounds of appeal on which the annulment of the contested decision is requested', and 'the facts, evidence and arguments in support of the grounds invoked' (Article 22, paragraph 1, Reg. 2018/625/EU). In turn 'the defendant may file a response within two months of the date of notification of the appellant's statement of grounds' (Article 24, paragraph 1, Reg. 2018/625/EU). Furthermore, it can make by cross-appeal 'where the defendant seeks a decision annulling or altering the contested decision on a point not raised in the appeal' (Article 25, paragraph 1, of the same Regulation).

The defendant's rights to a defence only apply within '*inter partes*' proceedings, i.e., those involving more than one private party. On the other hand, they do not apply to proceedings '*ex parte*' and, that is, with only one private party, due to the salient consideration that the Office, whose decision has been contested before the individual Board of Appeal, is not in turn a 'party' to the appeal proceedings.

The absence of the Office from the appeal procedure – which is an exception within the context of the procedures of the other Boards of Appeal set up by various Union agencies – seems to be a result of the consideration that, in the field of trademarks, the dispute mainly concerns entrepreneurs in opposing positions, whereas the position of the Office is entirely secondary.[34] It thus considered any participation by it in appeal procedures to be superfluous, in spite of the fact that

[33] This is the same principle that applies in general to the EU courts, as Art. 64 of the Rules of Procedure of the General Court provides that 'the General Court shall take into consideration only those procedural documents and items which have been made available to the representatives of the parties and on which they have been given an opportunity of expressing their views'. In fact, 'it would infringe a fundamental principle of law to base a judicial decision on facts or documents of which the parties, or one of them, have not been able to take cognisance and in relation to which they have not therefore been able to state their views'. The fact that these parameters are identical shows that the principle of the right to make representations, which is applicable to the Boards of Appeal, is construed in its 'strongest' meaning providing the greatest guarantees, out of the ways in which it can be understood (Court of Justice, case 42/59, 23 Mar. 1961, *S.N.U.P.A.T. v. High Authority*, ECLI:EU:C: 1961:5 and Court of Justice, Case C-480/99P, 10 Jan. 2002, *Plant and Others. v. Commission,* ECLI: EU:C: 2002:8, para. 24.
On this issue *see also* J. Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford 2011), in particular, at 161 et seq.

[34] Compare P. Biavati & F. Carpi, *Diritto processuale comunitario* 340 (2nd ed., Milan 2000), which deals mainly with subsequent appeals before the General Court; however, the observations are valid even more so for prior administrative appeals. Within this context, it is also relevant to observe that 'the

the object of the appeal is specifically a decision issued by the bodies of the 'first instance' of the Office itself.

In other words, the Office is not in a position to defend its actions. And although that absence is partly offset by the special powers of the Boards of Appeal and by mechanisms for referring to the bodies of 'first instance',[35] it is undoubtedly an anomaly, which entails serious inconvenience both for the Office (the right of which to equality of arms in defending the contested act is undermined), and for the correct application of the legislation on EU marks, considered in itself. So much so, in order to remedy the most serious drawbacks, the intervention of the Office itself was envisaged to present 'comments on questions of general interest' (Article 29 Regulation 2018/625), that counsel for the private parties had not raised.

In any event, the above-mentioned configuration of the appeal procedure implies that the individual Board of Appeal does not have 'third party status' in relation to the Office.

In this context it might be thought that the Board of Appeal absorbs the Office within itself and replaces it, taking over the same functions. This would strengthen the thesis of the so-called 'functional continuity' but would detract beyond any measure the judicial aspect as a body responsible for resolving disputes, which cannot in any way be disregarded.

It is clear that the guarantees of a fair trial apply to private parties and not to the Office that adopted the contested act. Moreover, this applies not only to the introductory phase of the appeal procedure, but also to subsequent phases (which are distinguished by the law into the examination phase and the decision on the appeal), which, moreover, present the typical characteristics of a normal *procedural* progression of the case.

In fact, the development of the procedure, both with regard to the investigation and the final oral stage (including the public hearing), is inspired by criteria not dissimilar from those applicable to proceedings before the Court of First Instance (for example as regards the burden of proof and the limits of the application) and provides similar guarantees also in terms of publicity. The duration of the procedure also appears in practice to be very limited, except for the application of certain *ex officio* powers, which could lead to a referral to the body of the first instance, resulting in delays that are not always foreseeable.

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institutional interest is to ensure that it is only one operator that uses that trade mark, whereas it is less important which of the parties in dispute this one operator is'.

[35] These are ex officio powers, which allow them to raise questions that were not taken into account in the contested ('initial') decision (Art. 27, paras 1 and 2, Reg. 2018/625). Moreover, they may involve the Office, requiring a reconsideration of absolute impediments to registration (Art. 30, Reg. 2018/625).

In conclusion – leaving aside the comments made above concerning the fact that the Office does not participate in the procedure – the principles of a fair trial as regards the private parties are widely respected in terms of the conduct of the procedure itself. This is all the more so considering that there is still a residual requirement (also applicable to the Boards of Appeal), whereby 'In the absence of procedural provisions in this Regulation or in acts adopted pursuant to this Regulation, the Office shall take into account the principles of procedural law generally recognised in the Member States' (Article 107 Reg. 2017/1001/EU).

5 POWERS OF COGNISANCE AND DECISION-MAKING (REVIEW OF TECHNICAL ASSESSMENTS)

As has been stressed, decisions of EUIPO's departments and divisions (first instance decisions) are challenged before the Boards of Appeal. These are often characterized by technical aspects and specialist assessments.

Boards of Appeal are therefore often called upon to review these assessments, which may also be based on indeterminate concepts. Moreover, the legislation itself provides that 'The examination of the appeal shall include the following claims or requests […]: a) distinctiveness [of the trade mark] acquired through use […]; b) recognition of the earlier trade mark on the market acquired through use […]; c) proof of use […]' of the European mark, in cases where time priority is relevant (Article 27, paragraph 3 of Delegated Regulation (EU) 2018/625).

These are, therefore, evaluations relating to indeterminate concepts concerning specialist knowledge (of an artistic, economic and sociological type), which are however compatible with specialist legal activity. Moreover, they concern interests that are in some cases limited essentially to disputes between private parties that do not affect basic public interests. Thus, it is possible to understand the attitude of the relevant Boards of Appeal to a very stringent review, considering also that the composition of the Boards of Appeal is normally extended to technical and non-legal members ('the decisions of the Boards of Appeal shall be taken by three members, at least two of whom are legally qualified' Article 165, paragraph 2, Reg. 2017/1001/EU).

It is now established that, according to the ECtHR case law, every 'court' should be able to decide on any matter of fact and law, and have the possibility to replace the assessments made by public authorities, without being subject to any exclusion in terms of decision-making as if those assessments were intangible ('*ipse dixit*').[36] And this breadth of review also applies in relation to complex technical

[36] In fact, 'The right guaranteed an applicant under Article 6, § 1, of the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be

assessments, since it cannot be admitted – unless we give up the central core of the guarantees of a fair trial – that it is the administration (and not the court) that has the final say in terms of the prerequisites for the exercise of power.[37]

In fact, according to ECtHR, Article 6, paragraph 1 of the Convention is violated in 'cases in which the national courts have not been in a position or have refused to examine a central issue of the dispute because they were considered to be bound by the factual or legal findings of the administrative authorities and were prevented from conducting an independent examination of those matters'.[38]

It is therefore necessary to verify whether the Boards of Appeal are able to carry out such a review (and actually carry it out), with the intensity required by the ECtHR. Moreover, the case law offers us various reasons to answer this question in the affirmative.[39]

In fact, given the mixed technical and legal composition and their specialization, the Boards of Appeal should always be able to enter into the 'merits' of technical assessments (whether complex or not) of the offices of the first instance,[40] piercing the veil of immunity to review (the so-called '*ipse dixit*'), which runs contrary to the principles of a fair trial.

displaced by *ipse dixit* of the executive' (ECtHR, 10 Jul. 1998, Case No. 20390/92 and 21322/92, *Tinnelly and Sons Ltd and Others and McElduff and Others v. United Kingdom*, para. 77).

37 For example it was held that that 'Although […] the decision to be taken necessarily had to be based on technical data of great complexity – a fact does not in itself prevent Article 6 being applicable – the only purpose of the data was to enable the Federal Council to verify whether the conditions laid down by law for the grant of an extension had been met' (ECtHR, 26 Aug. 1997, case 22110/93, *Balmer Schafroth and Others v. Switzerland*, para. 37).

38 *See* G. Raimondi, President of the European Court of Human Rights, in the article *L'intensità del sindacato giurisdizionale sui provvedimenti amministrativi nella giurisprudenza della Corte europea dei diritti dell'uomo*, in *P.A. Person and Administration* 9 et seq. at 19 (2018).

39 There have thus been cases in which the competent Board of Appeal 'found the goods covered by the requested and earlier trade marks to be identical and having compared the two signs at issue from a visual, phonetic and conceptual standpoint, then carried out a global assessment of the likelihood of confusion'. Compare General Court, Case T- 402/07, 25 Mar. 2009, *Kaul v. OHIM – Bayer (ARCOL)*, ECLI:EU:T: 2009:85, para. 10. And again cases in which the Board of Appeal has found that the products concerned had '*similaires, à un degré moyen*', that the signs examined had '*a degré moyen*' of visual similarity, a degree of aural similarity '*supérieure à la moyenne*', that the conceptual comparison was '*neutral*' and that the earlier mark had an inherent '*normal*' distinctive character, concluding that there was therefore a likelihood of confusion '*dans l'esprit du public pertinent faisant preuve d'un niveau d'attention moyen*'. *See* General Court, Case T-647/17, 8 Feb. 2019, *Serendipity and s. C. EUIPO – CKL Holdings (CHIARA FERRAGNI)*, para. 10.
As will be apparent, the review conducted by the Boards of Appeal of the EUIPO can be very extensive, where required by the circumstances. It may also result in a reversal of the evaluations made by the body of first instance, as in the case where'the Board of Appeal […] annulled the decisions of the Cancellation Division on the ground that, contrary to the conclusions they had reached, the proof of genuine use of the earlier national trade mark at issue had been adduced by the proprietor of that'. *See* Court of Justice, case C-418/16P, 28 Feb. 2018, *mobile.de/ EUIPO*, ECLI:EU:C: 2018:128, para. 102.

40 If necessary, it may also receive advice from external experts, whose scientific knowledge they share.

This is certainly not a peculiarity of EUIPO's Boards of Appeal alone. For instance, the Board of Appeal of ECHA (also of mixed composition) had no difficulty in asserting that:

> the Board of Appeal can inter alia replace a decision under appeal with a different decision. Moreover, in conducting its administrative review of Agency decisions, the Board of Appeal possesses certain technical and scientific expertise which allows it to enter further into the technical assessment made by the Agency than would be possible by the European Union Courts. As a result, when examining whether a decision adopted by the Agency is proportionate, the Board of Appeal considers that it should not be limited by the need to establish that the decision is "manifestly" inappropriate to the objective pursued.[41]

All of this, moreover, has been repeatedly established within the case law of the Court, which has recognized, specifically with reference to EUIPO, that:

> through the effect of the appeal brought before it, the Board of Appeal may exercise any power within the competence of the department which was responsible for the contested decision and is therefore called upon, in this respect, to conduct a new, full examination as to the merits of the appeal, in terms of both law and fact.[42]

This recognition occurred within the framework of the so-called functional continuity of EUIPO boards, understood as administrative activity without any judicial aspect. Since, moreover, EUIPO Boards of Appeal are called upon to resolve real disputes (as is also confirmed by the amended Article 58a of the Statute of the Court), the examination *'in terms of both law and fact'* of such disputes may be appreciated in the context of the fair trial and as a manifestation of that intensity of intrinsic union, which is required for this purpose by the ECtHR.

6 IMPLICATIONS ON THE OVERALL SYSTEM OF PROTECTION (ADMINISTRATIVE AND JUDICIAL)

As is known, the right to a fair trial 'constitutes a fundamental right which the European Union respects as a general principle under Article 6(2) EU'.[43] It is also known that, in the absence of formal accession to the Convention, 'fundamental rights, as guaranteed by the European Convention for the Protection of Human

41 *See* Board of Appeal, 23 Sep. 2015, case no. A-005-2014, para. 54.
On another occasion the board held that 'the fact that the Agency has a wide margin of discretion does not, however, prevent the Board of Appeal from examining whether the Agency, when exercising its discretion, took into consideration all the relevant factors and circumstances of the situation the act was intended to regulate' (Board of Appeal, 10 Jun. 2015, case no. A-001-2014, para. 74.

42 Court of Justice, case C-634/16P, 24 Jan. 2018, *EUIPO/ European Food*, ECLI:EU:C: 2018:30, para. 37. For a similar ruling *see* Court of Justice, case C-29/05P,13 Mar. 2007, para. 57.

43 *See* Court of Justice, 1 Jul. 2008, cases C-341/06P and C-342/06P, *Chronopost and La Poste v. UFEX et al.*, ECLI:EU:C: 2008:375, para. 44. Compare also Court of Justice, Case C-305/05, 26 Jun. 2007, *Ordre des barreaux francophones and germanophone and Others*, ECLI:EU:C: 2007:383, para. 29.

Rights and Fundamental Freedoms […] shall constitute general principles of the Union's law'. (Article 6, paragraph 3 TEU).

This is certainly not the appropriate forum to consider the scope of these general principles in greater detail.[44] It is certain that, if the ECtHR case-law was to be applied to trade mark disputes, it would have to be borne in mind that, again according to that case law, it is not necessary that guarantees of a 'court' are also present in the administrative phase of the litigation: this means that any deficiencies in the administrative procedure could be remedied by subsequent judicial intervention, provided that the judicial body has powers of cognisance and decision-making that are suitable to enter into the merits of the case and to ascertain any question of fact and of law, and that it also has the ability to also replace technical assessments with its own assessment.[45]

In our case, however, the overall body of these guarantees cannot be found either in the initial decisions of the divisions of EUIPO (when they take on a judicial nature, as they are intended to resolve a dispute), or in any intervention by the Court of First Instance, following an appeal against a decision of the Boards of Appeal.

It is not apparent in the decisions of the divisions of the EUIPO because they lack adequate independence and are subject to the directions of the Office, which still has as its main purpose '*administration and promotion of the EU trade mark system*' (Article 151, paragraph 1, letter a, of Reg. 2017/1001/EU). It is not apparent in the proceedings before the Court of First Instance because, as has recently been held (albeit in relation to state aid):

> it is settled case-law that the examination which it falls to the Commission to carry out, when applying the private operator principle, requires a complex economic assessment and that, in the context of a review by the Courts of the European Union of complex economic assessments made by the Commission in the field of State aid, it is not for those Courts to substitute their own economic assessment for that of the Commission.[46]

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[44] On the issue of the non-accession of the European Union to ECHR, *see* E. Berry, M. J. Homewood & B. Bogusz, *Complete EU Law* 447 et seq. (Oxford 2019).

[45] Compare ECtHR, 28 May 2002, case no. 34605/97, *Kingsley v. United Kingdom*, para. 32: 'Even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1, there is no breach of the Convention if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1'.
Again, 'The Court recalls that even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 §1" *Albert and Le Compte v. Belgium*, 10 Feb. 1983, § 29, Series A no. 58)' (ECtHR, 27 Oct. 2009, case no. 42509/05, *Crompton v. United Kingdom*, para. 70).

[46] Court of Justice, Case C-160/19P, 10 Dec. 2020, *City of Milan v. Commission*, ECLI:EU; C; 2020:1012, para. 100.

In truth, specifically in the field of trade mark litigation, the Court – which applies a special procedure and which also has a (limited) power to amend rulings – has not shirked back from conducting far-reaching reviews of technical assessments.[47] However, such review has been limited to a mere control for manifest errors in cases involving '*highly technical assessments*'.[48]

Limits of this kind do not exist for the Boards of Appeal of EUIPO. They largely provide (except as noted regarding the failure of the Office to participate in the proceedings) all of the guarantees required for a fair trial.

This is not without significance in the system of administrative and judicial protection that has arisen thanks to the compulsory intervention of the Boards of Appeal (c.d. preliminary ruling) and the reform of Article 58a of the Statute of the Court. This is intended in the sense that the decisions of the Boards of Appeal can constitute a relevant model, allowing the rules of the fair trial to be introduced into that system, according to the dictates of the ECtHR.

[47] Consider, e.g., the judgment in which it is stated that 'in contrast to the Board of Appeal's finding […]the diversification of the intervener's business […]was not demonstrated […]'; 'in contrast to the Board of Appeal's findings, "screwdrivers", […], bear no similarity to the "Laguiole du routard" model […]'; 'The Board of Appeal wrongly held that […]the business name […]had acquired, for knives, an unusually high level of distinctiveness […]'; 'accordingly, […]] the contested decision must be annulled in so far as the Board of Appeal found that there was a likelihood of confusion […]' cf. Trib., 21 Oct. 2014, in Case T-453/11, *Szajner v OHIM - Forge de Laguiole (LAGUIOLE)*, ECLI: EU:T: 2014:901, paras 71, 93, 160 and 166.
Compare *see also* inter alia, General Court, case T-385/09, 17 Feb. 2011, *Annco / OHIM - Freche e fils (ANN TAYLOR LOFT)*, para. 41–42, where it is stated that: 'The Board of Appeal held, by contrast, […] that "loft" was the dominant element of the mark applied for, so that there was a likelihood of confusion, since the goods were identical'.
Compare again General Court, 8 Feb. 2019, in Case T-647/17, para. 84.

[48] Indeed, it was held that 'the General Court can carry out a full review of the legality of the decisions of OHIM's Boards of Appeal, if necessary, examining whether those boards have made a correct legal classification of the facts of the dispute or whether their assessment of the facts submitted to them was flawed'. However, 'Admittedly, the General Court may afford OHIM some latitude, in particular where OHIM is called upon to perform highly technical assessments, and restrict itself, in terms of the scope of its review of the Board of Appeal's decisions […], to an examination of manifest errors of assessment' Court of Justice, 18 Oct. 2012, cases C-101/11P and C-102/11P, *Neuman and Galdeano del Sel v. José Manuel Baena Group*, ECLI:EU:C: 2012:641, paras 39 and 41.

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Extremely urgent public procurement under Directive 2014/24/EU and the COVID-19 pandemic

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Abstract

The COVID-19 pandemic swept throughout the European Union swiftly and led to significant changes in how we live and operate. Some of those changes occurred in public procurement as well, with Member States struggling to react to the dissemination of the virus. The purpose of this paper is to assess what scope the EU's public procurement legal framework provides to deal with a crisis, and how the rules should be interpreted. This paper will show how the EU public procurement legal framework deals with extreme urgency situations and how it has been intentionally designed to allow Member States flexibility within very clearly defined boundaries. This means that the path to award contracts without competition on the grounds of extreme urgency is narrow due to Article 32(2)(c) of Directive 2014/24/EU[1] and the case law from the CJEU. The narrowness of this path is due to the exceptional nature of procedure and the obligation for the contracting authority to discharge the tight grounds for use in full for every contract. Therefore, this paper concludes that the view exposed by the European Commission on its guidance from April 2020 that the pandemic is a single unforeseeable event amounts to an incorrect reading on how the grounds for the use of Article 32(2)(c) operate. If such interpretation was already too broad in April 2020, it certainly is no longer in line with the transition from an unfolding crisis into a new and more permanent equilibrium.

In the context of COVID-19, particularly the need for the crisis to be unforeseeable and the extreme urgency not being attributable to the contracting authority raise significant difficulties for some contracting authorities to discharge the grounds for use of the negotiated procedure without prior notice. This is particularly the case in those situations where governments centralized pandemic-related procurement.

1 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2004] OJ L 94.

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As such, the paper concludes that existing substantive rules for extremely urgent procurement are adequate and, albeit sufficient to respond to crisis situations, that does not entail that the wholesale use of the negotiated procedure without prior notice is necessarily legal.

Keywords
COVID-19, EU, public procurement, emergency procurement

1. Introduction

Within the EU, how public bodies from Member States enter into public contracts is subject to specific rules which have to be complied with under the penalty of a contract being annulled by the courts. These legal obligations originate from EU primary law, namely principles from the Treaty on the Functioning of the European Union, such as equal treatment, non-discrimination, mutual recognition and transparency,[2] as a means to achieve ever deeper integration and the single market. These have then been densified in secondary legislation via successive rounds of Directives since the late 1960s.[3]

The EU's secondary legislation on public procurement aims to ensure free and equal access to economic operators irrespective of where they are based in the Union, so that they can compete for contracts without being discriminated against. Therefore, they aim to help complete the EU's internal market and therefore EU public procurement rules establish that public contracts are to be awarded in accordance with principles such as transparency, competition[4] and equal treatment. As such, the rules impose certain restraints on contracting authorities' behaviour and restrict their margin of discretion[5] by means of defining procedures and obligations to be followed before a contract is awarded and entered into. For example, contract opportunities need to be published in advance so that they are transparent and visible to economic operators, thus potentially generating more competition and guaranteeing equal opportunities for any economic operator that may be interested in taking part.

The EU's current substantive public procurement legal framework[6] is divided into three different Directives that cover different types of public contracts and contracting authorities.

2 On the principle of transparency see I. Georgieva, *Using Transparency Against Corruption in Public Procurement: A Comparative Analysis of the Transparency Rules and their Failure to Combat Corruption* (Springer, 2017) and K. Halonen, R. Caranta and A. Sanchez-Graells, *Transparency in EU Procurements: Disclosure Within Public Procurement and During Contract Execution* (Edward Elgar, 2019).

3 On these early Directives see, P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press, 2004), p. 342 and P. Telles, 'Procurement Financial Thresholds in the EU: the Hidden Relationship with the GPA', 3 *European Procurement and Public Private Partnerships Law Review* (2016), p. 205.

4 On the principle of competition see, A. Sanchez Graells, *Public Procurement and the EU Competition Rules* (2nd edition, Hart, 2015).

5 On discretion in public procurement see S. Bogojevic, X. Groussot and J. Hettne (eds), *Discretion in EU Public Procurement Law* (Bloomsbury, 2020).

6 For a general overview of EU public procurement rules see, A. Semple, *A Practical Guide to Public Procurement* (Oxford University Press, 2015) and C. Bovis, *The Law of EU Procurement* (2nd edition, Oxford University Press, 2015).

Directive 2014/24/EU[7] is the main public sector Directive regulating how public bodies are to deal with works, goods and services contracts. Directive 2014/23/EU[8] applies to concessions and Directive 2014/25/EU[9] to the utilities sector.[10] For this paper's purpose, the analysis will be focused on Directive 2014/24/EU since it covers the purchase of works, goods and services most affected by the COVID-19 crisis, that is, in the healthcare sector.

2. The general procurement rules of Directive 2014/24/EU

Within Directive 2014/24/EU we can find two main legal regimes directly relevant for the healthcare sector. First, the general rules of Title II (Articles 25–73) and then the special rules for social and other services of Title III, Chapter I (Articles 74–77). Overall, the former crystallizes key principles such as transparency, competition and equal treatment, whereas the latter (partially) derogates from said principles under specific circumstances. Furthermore, the special regime only applies to services contracts and not to works or goods, which appear to be the most common areas of procurement connected with COVID-19 where general rules have not been observed. As such, the subsequent analysis will be focused on the general rules and in particular on the extreme urgency exception of Article 32(2)(c).

Directive 2014/24/EU establishes the open and restricted procedures[11] as the default procedures to be used for the award of contracts and it is no surprise that they have been branded as the 'gold standard' for procurement. A trade-off with the level of protection for the principles they afford is their long lead in times that may span multiple months between start and contract award. Therefore, the Directive recognizes that there may be justifiable situations where the contracting authority needs to depart from them, either because some special procedures could be used instead, or time pressures call for quicker turn arounds. For these situations, the Directive rightly includes a suite of cascading options to be adopted depending mostly on the grounds leading to the urgency of the situation. The more urgent the situation, the more derogation can be achieved from the general rules and procedures but at the expense of compromising the main features of

7 On this Directive see, M. Steinicke and P. Vesterdorf (eds*), Brussels Commentary on EU Public Procurement Law* (Bloomsbury, 2018); R. Caranta and A. Sanchez-Graells, *European Public Procurement: Commentary on Directive 2014/24/EU* (Edward Elgar, 2021) and S. Treumer and M. Comba (eds), *Modernising Public Procurement: the Approach of the Member States* (Edward Elgar, 2018).

8 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, [2004] OJ L 94/1. For an overview of the Concessions Directive see P. Bogdanowicz, R. Caranta and P. Telles (eds), *Public-Private Partnerships and Concessions in the EU* (Edward Elgar, 2020).

9 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, [2004] OJ L 94/243.

10 In addition, Directive 2009/82/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, [2009] OJ L 1216/76, applies to the defence sector. On this Directive, B. Heuninckx, *The Law of Collaborative Defence Procurement in the European Union* (Cambridge University Press, 2016) and M. Trybus, *Buying Defence and Security in Europe: the EU Defence and Security Procurement Directive in Context* (Cambridge University Press, 2014).

11 Articles 26–28 of Directive 2014/24/EU.

the system and introducing ever more risks to the principles as we move further away from the general procurement procedures.[12]

The first step in this cascade is to adopt accelerated versions of the open and restricted procedures,[13] which the CJEU has considered multiple times as the legal solution if the timescales allow for their use.[14] These require urgency and said urgency needs to be duly substantiated by the contracting authority, effectively burdening it with justifying the choice. As the only change here are shortened timescales, these procedures represent a minor restriction to the principles established by the Directive. It is thus logical that the bar to clear by the contracting authority is set reasonably low. This is not the case when the need justifies more significant exceptions to the general rules and procedures, namely the recourse to awarding contracts directly via a negotiated procedure without prior publication, which is the focus of the present paper.

3. Negotiated procedure without prior publication

This procedure is the antithesis of legal procurement framework described above and can only be used in the specific cases and circumstances set forth in Article 32 of Directive 2014/24/EU. Whereas the other procedures strive to protect transparency, equal treatment, non-discrimination and competition, the negotiated procedure without prior publication of Article 32 does the opposite by providing significant discretion to the contracting authority to award contracts without being constrained by such principles.

Since the whole procedure is carried out privately until the contract award information is published, there is no transparency in the sense of a contract opportunity and its rules being made public in advance. There are no guarantees of equal treatment between participants or potential participants. As for competition, since the contract can be awarded directly to an economic operator, competition is also not observed. It is no surprise then that this procedure appears at the end of the cascading mechanism of exceptions to the general procurement rules and their standard procedures.

While open and restricted procedures are the standard procedures that can be used by a contracting authority in any circumstance, the negotiated procedure without prior publication is an exceptional procedure.[15] This classification is not without consequence, since the exceptional nature carries with it an obligation to narrowly interpret its grounds[16] to use and with the burden of proof resting in the party invoking them, as recognized by the CJEU in case C-250/07 *Commission v Greece*.[17]

Article 32(2) of Directive 2014/24/EU[18] includes three sets of reasons for the adoption of a negotiated procedure without prior publication. It can be used when one of the standard or special

12 On the integrity risks posed by urgent procurement in the context of COVID-19, see OECD, Policy measures to avoid corruption and bribery in the COVID-19 response and recovery (May 2020) and OECD, Public integrity for an effective COVID-19 response and recovery (April 2020).

13 Articles 27(3) and 28(6) of Directive 2014/24/EU. On these see T. Kotsonis, 'EU Procurement Legislation in the Time of COVID-19: Fit for Purpose?', 4 *Public Procurement Law Review* (2020), p. 199.

14 Case C-24/91, *Commission v Spain*, EU:C:1992:134, para. 15, Case C-126/03, *Commission v Germany*, EU:C:2004:728, para. 23 and Case C-337/05, *Commission v Italy*, EU:C:2008:23, para. 75.

15 Case C-292/07 *Commission v Belgium*, EU:C:2009:246, para. 106. For a more complete taxonomy, P. Telles and L. Butler, in F. Lichere, R. Caranta and S. Treumer (eds), *Novelties in the 2014 Directive on Public Procurement*, p. 131.

16 Opinion of Advocate General Kokott in Case C-385/02 *Commission v Italy*, EU:C:2004:276, para. 30.

17 Case C-250/07 *Commission v Greece*, EU:C:2009:338, para. 34-39.

18 Paragraphs 3 through 5 add other grounds too, but they are not particularly useful in the context of responding to COVID-19 and as such will not be covered in this paper.

procedures was attempted and failed,[19] when only a single economic operator can supply the works, goods or services,[20] or when extreme urgency so requires.[21] For the purposes of the current paper and how to deal with the COVID-19 crisis, it is this latter set of grounds of use that is relevant.

4. Negotiated procedure without prior publication due to extreme urgency (Article 32(2)(c))

The grounds included on paragraph 32(2)(c) are usually described as 'extreme urgency' grounds and have been – correctly – described as a 'get out of jail' card for the general procurement rules,[22] but that is not to say this card is free or not subject to stringent conditions to be exercised.

The paragraph is dense and composed of multiple layers of requirements that need to be met in full so that the negotiated procedure without prior notice may be used. In addition, these grounds for use need to be met for every single contract awarded by this procedure. As such, even in the context of an unfolding crisis like the response to COVID-19,[23] it cannot be considered that the requirements for use of the procedure are automatically complied with simply because there is an overarching crisis to respond to. This is a crucial point that will be addressed when discussing the Commission's Guidance from April 2020[24] in section 5.

The three grounds for use of the negotiated procedure without prior notice are (i) strict necessity, (ii) unforeseeable extreme urgency and (iii) extreme urgency not being attributable to the contracting authority. As mentioned above, it is up to the contracting authority as 'beneficiary' of the procedure to discharge the burden of evidence associated with all the requirements. These grounds are to be assessed *ex-ante*, that is, based on the information the contracting had (or should have had) considered at the time the decision was taken and not with information which was made available afterwards or with the benefit of hindsight. This is necessary to set the correct threshold for the burden of evidence the contracting must discharge for each requirement.

A. Strict necessity

The first requirement is that the intervention, in this case the adoption of a negotiated procedure without prior publication, passes a strict necessity test.[25] To do so it must be the least damaging way to achieve the necessary outcome. This means that only the smallest exception necessary to solve the problem at hand will meet the strict necessity test. This is a logical requirement due to the exceptional nature of this procedure and the possibility of using alternatives less damaging for the principles of transparency, equal treatment and competition. It is posited that this strict

19 Article 32(2)(a) of Directive 2014/24/EU.

20 Ibid., Article 32(2)(b).

21 Ibid., Article 32(2)(c).

22 A. Sanchez-Graells, 'Procurement in Time of COVID', 71 *Northern Ireland Legal Quarterly* (2020), p. 83.

23 On what kinds of purchases would prima facie fit in this context, see L. Valadares Tavares and P Arruda, 'Public Polices for Procurement under COVID19', *European Journal of Public Procurement Markets* (July, 2021), p. 14.

24 Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis (2020/C 108 I/01). This was argued as well in the literature, T. Kotsonis, 4 *PPLR* (2020), p. 201.

25 The wording adopted by Article 32(2)(c) implies only the necessity test is required and not full application of the principle of proportionality. With a similar view, P. Bogdanowicz, 'Article 32', in R. Caranta and A. Sanchez-Graells (eds.) *European Public Procurement: Commentary on Directive 2014/24/EU* (Edward Elgar, 2021), para. 32.21.

necessity requirement applies not only to the moment when the decision to use the negotiated procedure itself is made, but also subsequent decisions on how to configure it in practice. Therefore, even if it is legal to use the negotiated procedure in theory, the actual application of it is still subject to a strict necessity test. Therefore, if the need of the contracting authority can be met in time by consulting three economic operators instead of directly awarding the contract to an economic operator without competition, only the first will comply with the strict necessity test.

It is debatable if such strict necessity makes sense in the context of an emergency since it can generate legal uncertainty and reduce the flexibility available to contracting authorities,[26] but the fact of the matter is that it is the law in force. Furthermore, if one looks at the strict necessity requirement from a systemic perspective approach of its place in the procurement legal framework then it makes perfect sense since it is a complete departure from what said legal framework is trying to achieve. As such, it works as an inbuilt safety mechanism to ensure contracting authorities are not using the flexibility afforded by the exception for situations where it is not needed. And in fact, looking at the bulk of the CJEU's case law on the use of this procedure indicates a clear care in restricting the role of this procedure.[27]

B. Unforeseeable extreme urgency

The second requirement is one of extreme urgency brought about by events unforeseeable by the contracting authority.[28] This requirement is to be divided into two sub-requirements: the extreme urgency in and of itself and the events being unforeseeable. Taken together, these two sub-requirements constitute the core of the reasoning to justify the use of the negotiated procedure without prior publication by a contracting authority.

As for the extreme urgency, the contracting authority needs to be in a situation where the issue requires an immediate solution which would make the use of other procedures such as the accelerated open or restricted procedures unsuitable. For the use of the negotiated procedure on the grounds of Article 32(2)(c), a solution is needed *immediately* and not sometime in the future.[29] It is this *immediateness* that justifies the use of the negotiated procedure because any other option will not be able to solve the contracting authority's issue in time.[30]

As such, it is not possible to use the negotiated procedure to either solve a future problem or to solve a current one in the future in case any other procedure less damaging to the general principles is suitable. The negotiated procedure is instead to be used to serve a need *now*, when time is of the essence to solve an existing problem. In consequence, using an *ex-ante* analysis it is not possible to use this procedure in situations whereby the product being procured will not be available in time to answer to the emergency. In that scenario the correct procedure would either be one of the accelerated procedures (if the requirements are met), or one of the general ones if they are not. This

26 T. Kotsonis, 4 *PPLR* (2020), p. 203.

27 For example, Case C-318/94 *Commission v Germany*, EU:C:1996:149 at para. 18 and Case C-394/02 *Commission v Greece*, EU:C:2005:336, para. 42.

28 On unforeseeable events see Opinion of Advocate General Jacobs in Case 525/03 *Commission v. Italy*, EU:C:2005:343, para. 61.

29 This is the implication of the CJEU's reading on Case C-250/07 Commission v. Greece and also Case C-385/02 *Commission v. Italy*, EU:C:2004:522, para. 27.

30 On this issue, albeit specifically about the purchase of personal protective equipment in England, A. Sanchez-Graells, 'COVID-19 PPE Extremely Urgent Procurement in England', in D. Cowan and A. Mumford (eds.), *Pandemic Legalities* (Bristol University Press, 2021).

leads to the view that immediate procurements undertaken to safeguard uncertain future needs[31] does not fit within the legal definition of extreme urgency of Article 32(2)(c).

The second sub-requirement is that of the urgency being unforeseeable by the contracting authority, thus leading to the question of how compliance with this requirement should be assessed. To reach a conclusion, one must consider if the unforeseeable nature of the urgency is subject to the reasonably diligent test set forth by the *FastWeb* judgment.[32] Although *FastWeb* is a case about Article 31(1)(b) of Directive 2004/18 and therefore the use of negotiated procedure without prior notice due to exclusive rights, the reasonably diligent test it applies to establish if the grounds for use of the procedure are met is relevant in this instance as well. It is fair, however, to say that the threshold for what constitutes a diligent behaviour in a situation of extreme urgency needs to be lower from that of a situation where the other grounds for the negotiated procedure without prior notice is being used. Having said that, if the contracting authority acts diligently, it can avail itself of the procedure, otherwise it cannot do so, and any resulting contract is ineffective. In addition, the Court held in *FastWeb* that the contracting authority must set out in the justification of choice of the procedure 'must disclose clearly and unequivocally the reasons that moved the contracting authority to consider it legitimate to award the contract without prior publication of a contract notice',[33] effectively meaning that it is crucial for the justification to be provided and in full in the contract award notice so that interested parties may have recourse to the appropriate remedies. Even in a situation of urgency, it does not make sense to obviate the need for proper justification of the reasons that led to the use of the negotiated procedure without prior notice.

In practice, what that means is that how the contracting authority acts in the run-up to a decision to use a negotiated procedure without prior publication has an impact in the legality of such decision.[34] That is not to say that there is no scope to use it, only that the contracting authority must provide evidence it acted in a reasonably diligent way. This requirement naturally goes beyond simply claiming an extreme urgency exists and that it was unforeseeable by the contracting authority, therefore rendering moot the idea that simply because of the unfolding COVID-19 crisis it would immediately justify the use of this procedure.

It has been argued that Member States enjoy a margin of discretion with regards to policy decisions where risk is involved, therefore the risk/harm threshold should not be unreasonably high.[35] Whereas it is indeed the case that Member States do enjoy a degree of discretion when undertaking a risk analysis, the second element is a step too far in this regard. First, the unforeseeable extreme urgency is to be assessed on a case-by-case basis, thus implying that for each contract (and each contracting authority) a specific assessment must be carried out. Second, whereas the Member State may have such discretion at a policy-making level, it is not relevant when public bodies (with or without such policy-making powers such as ministries) are operating as a contracting authority awarding contracts. In this context they are constrained instead by the requirements of Article 32(2)(c).

31 With this view, S. Arrowsmith, 'Recommendations for Urgent Procurement in the EU Directives and GPA: COVID-19 and Beyond', in S. Arrowsmith et al., *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic* (Hart, 2021), p. 78.

32 Case C-19/13 *Fastweb* EU:C:2014:2194, para. 50.

33 Case C-19/13 Fastweb, para. 48 and Case C-275/08, *Commission v Germany*, EU:C:2009:632, para 72.

34 With a similar view while focusing on the means of the contracting authority, nature and characteristics of the specific project and good practice in that particular area, P. Bogdanowicz, in R. Caranta and A. Sanchez-Graells (eds.), *European Public Procurement: Commentary on Directive 2014/24/EU*, para. 32.22.

35 S. Arrowsmith, in S. Arrowsmith et al., *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic*, p. 78.

The above shows that the unforeseeable nature of the extreme urgency consists of an objective-subjective test to be discharged and not a purely objective one. It is objective because the cause of urgency must be in general terms be passable as being unforeseeable. But it is subjective as well since it depends on the behaviour of the contracting authority and whether it has acted diligently or not. Therefore, it is conceivable that the same situation may be 'unforeseeable' for one contracting authority but not for another, depending on the information available to and behaviour of each contracting authority.

C. Extreme urgency not attributable to the contracting authority

The next requirement set forth on Article 32(2)(c) relates to the attribution for the situation of extreme urgency. The logic behind this requirement is self-evident and is a defence against actions (or inactions) from the contracting authority which bring about the situation of extreme urgency. It thus implies defining how attribution is to be assessed and which party bears the burden of proof for it. As established above, the burden of proof needs to be discharged by the contracting authority benefiting from the negotiated procedure, and this obligation applies here as well. This sub-criterion is distinct from the previous one as while the other focus on the underlying situation is unforeseeable, this one applies instead to the behaviour of the authority creating or not creating the situation of extreme urgency in itself. Therefore, it is possible for an event to be unforeseeable under the previous criterion and still fail in the urgency being attributable to the contracting authority. For example, an unexpected storm hits a city, damaging a bridge which is not assessed by the local authority. The local authority only assesses the bridge 6 months later in accordance with its regular maintenance schedule, by which time the bridge is now in immediate risk of collapse and needs to have urgent repairs. In this scenario the damaging event is unforeseeable (the storm) but the extreme urgency for the repairs is attributable to the contracting authority since it did not act in due time immediately after the storm.

Article 32(2)(c) is silent regarding how the attribution requirement is to be assessed, that is to say, what test is needed to consider for compliance. It is posited here that this test can be laid down and discharged via two different mechanisms.

The first is based on non-contractual or tortious liability, that is by looking at intention and negligence. In this regard, there is no reference in Article 32(2)(c) for the need for intent by the contracting authority in the creation of the extreme urgency situation. Bearing in mind the objective of the provision, the logical conclusion here is that the attribution requirement does not depend on it but simply upon mere negligence by the contracting authority bringing about the urgency. In addition, this is the only possible interpretation compatible with the obligation of a restrictive interpretation as required for the use of an exceptional rule. Otherwise, the exception is not as narrow as it could be while still achieving its goals. At first sight, this seems like an obvious solution to determine the test, but it is arguable that liability is assessed after the grounds for it have checked and in this way one would prejudge liability, just as in the case where the grounds have not been met.

The other option is to look into Article 32(2)(c) and in particular the requirement analysed in the previous section, that is, the unforeseeable nature, specifically the diligence test. In both cases what is important is the behaviour of the contracting authority in the lead-up to initiating a procedure and as such they share similarities. Whereas in the unforeseeable nature we assess the behaviour vis-à-vis the event that gives origin to the urgency, in this one we look instead into the behaviour in the run-up to initiating the procedure, irrespective of the existence of an event that brought about the extreme urgency and whether it was foreseeable.

Therefore, it is posited here that the diligence test from *FastWeb* could be applicable here. The use of a diligence test in this regard allows us to assess, for example, how the risk arising from an event has been considered and whether the contracting authority's behaviour has discharged its duty in this regard.

There is a concern, however, that the contracting authority would be put in the position of proving a negative in the context of the extreme urgency not being attributable to it since it carries the burden of proof.[36] In reality, the test is not negative but positive, as the contracting authority's threshold is to prove it acted as a reasonably diligent contracting authority,[37] which means looking into the actions it took. In consequence, the logical conclusion is that a contracting authority which cannot prove it was reasonably diligent will be considered to have failed the attribution test.

The attribution test is relevant only within the confines of a single contracting authority as the text of Article 32(2)(c) defines it. It would make no sense for a contracting authority to be deprived of the use of an exceptional tool for the negligence of another contracting authority. In normal times, the behaviour of individual contracting authorities is easily firewalled by the operation of Article 32(2)(c) and the list of Annex II to Directive 2014/24/EU. Every body contained there is an individual contracting authority for the purposes of determining the attribution of extreme urgency.

Usually, public procurement of medical equipment or supplies is done either centrally by the Health Ministry (national or regional) or locally in hospitals or commissioning groups, depending on how each Member State organizes its healthcare sector. Therefore, defining the contracting authority for the purposes of the attribution test in normal times tends to be easy, and to map out its competencies and how they were used seems unproblematic as well.

During an unfolding health crisis like COVID-19, however, we have seen procurement being done very differently, with a rush to centralize procurement activities[38] and, crucially, contract award decisions. Spain re-centralized the health sector which was hitherto a devolved competency and Italy moved at least some local purchasing responsibility to some regional and national bodies.[39] Others, like Ireland[40] and Germany,[41] appeared to have centralized at least some key

36 A. Sanchez-Graells, 'Drilling Down on the Statutory Interpretation of Extreme Urgency Procurement Exemption in the Context of COVID-19', www.howtocrackanut.com/blog/2020/4/16/drilling-down-on-the-statutory-interpretation-of-the-extreme-urgency-procurement-exemption-in-the-context-of-covid-19.

37 Stating the need to apply this test, A. Sanchez-Graells, 'More on COVID-19 Procurement in the UK and Implications for Statutory Interpretation', www.howtocrackanut.com/blog/2020/4/6/more-on-covid-19-procurement-in-the-uk-and-implications-for-statutory-interpretation.

38 Sixty-eight per cent of OECD countries centralised public procurement in the immediate response to COVID-19, OECD, OECD Policy Responses to Coronavirus (COVID-19), Public procurement and infrastructure governance: Initial policy responses to the coronavirus (Covid-19) crisis, July 2020.

39 V. Vecchi, N. Cusumano and, E.J. Boyer, 'Medical Supply Acquisition in Italy and the United States in the Era of COVID-19: The Case for Strategic Procurement and Public–Private Partnerships', 50 *The American Review of Public Administration* (2020), p. 643. On Italy's response in general, G. L. Albano and A. La Chimia, 'Emergency Procurement and Responses to COVID-19: The Case of Italy', in S. Arrowsmith et al., *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic* (Hart, 2021), p. 350.

40 Leading to a large purchase of PPE, which started arriving in late March 2020, RTE, 'Shipment of PPE Supplies Arrives in Ireland from China', 29 March 2020, www.rte.ie/news/2020/0329/1127076-ppe-equipment-china/, with a Chinese ambassador interview providing background info on how the deal was brokered; Embassy of the People's Republic of China in Ireland, 'Coronavirus: China Working with Ireland to Help Combat Virus', 25 March 2020, http://ie.china-embassy.org/eng/sgxw/t1761158.htm, and Embassy of the People's Republic of China in Ireland, 'China and Ireland Work Together to Keep PPE Supply Running Smoothly', 5 April 2020, http://ie.china-embassy.org/eng/sgxw/t1766380.htm.

41 Angela Merkel's speech of 23 April 2020, available at www.lengoo.de/blog/angela-merkel-we-are-walking-on-thin-ice/.

decisions at government level based on direct dealings between government members and their equivalents in countries which could sell them the equipment needed.[42]

The implications of this centralization for the use of the negotiated procedure by governments are significant, since *all* decisions taken by the contracting authority need to be taken into account to assess whether the extreme urgency is attributable to it or not. This means that even decisions taken outside the context of a procurement procedure are relevant, thus including political or wider public health decisions. This is the logical reading of the requirement since it does not limit the scope of decisions to be assessed to any given nature. In addition, this is also the only reading compatible with a narrow interpretation of the grounds for use as required by the exceptional nature of the procedure. In consequence, policy decisions related to allocating resources even when taken under the guise of a risk analysis[43] are subject to the restraints imposed by the grounds of the procedure.

It has been argued, however, that political decisions cannot be syndicated in the context of public procurement and, in consequence, cannot be used to determine the attribution requirement.[44] Such view can be set aside based on multiple arguments. First, what is being syndicated in this context of the attribution is the procurement decision and not the political considerations behind it. The latter continue to produce their effects, but it is possible that for the purposes of the legality of the use of the negotiated procedure they may not assist in meeting the attribution criterion. Second, political decisions in themselves are syndicated in terms of compliance and they do not obviate existing legal obligations. In fact, there is no discussion that even political decisions at legislative or administrative levels are also subject to judicial review, and that is a key tenet of the rule of law. Third, while a decision may be relevant to assess if the attribution criterion is met or not, trying to purge such decision from the analysis seems artificial and contrary to the letter and spirit of Article 32(2)(c) since the article includes no such limitation. Finally, this is an exceptional procedure and one which requires a narrow interpretation of its grounds. If one were to accept that political decisions would be set aside from scrutiny for the purposes of determining the attribution requirement, then potentially the scope of the interpretation (and application) of the procedure would not be as narrow as it could otherwise be. In consequence, such interpretation would be illegal.

5. The Commission's guidance on COVID-19 related procurement

The European Commission published in early April 2020 a guidance document on procurement related to COVID-19.[45] In this document the Commission attempted to explain what different procurement options were available to contracting authorities reacting to the COVID-19 crisis. For the most part, the Commission stayed close to the letter of the law in relation to Directive 2014/24/EU and to (some) case law as well. The guidance sets out how contracting authorities should choose

42 On how countries managed their trade policy in connection with COVID-19 procurement, B. Hoekman et al., 'COVID-19, Public Procurement Regimes and Trade Policy', *The World Economy* (2021), p. 1.

43 S. Arrowsmith, in S. Arrowsmith et al., *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic*, p. 82.

44 A. Sanchez-Graells, 'More on COVID-19 Procurement in the UK and Implications for Statutory Interpretation, www.howtocrackanut.com/blog/2020/4/6/
more-on-covid-19-procurement-in-the-uk-and-implications-for-statutory-interpretation.

45 Communication from the Commission, Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis (2020/C 108 I/01).

between the different procurement mechanisms available to them, starting from the general procedures and moving on firstly to the accelerated procedures and then, only if these are not suitable, to the negotiated procedure without prior notice. In this context, the Commission correctly mentions that each negotiated procedure needs to be justified via an individual report.[46]

It is thus surprising that the Commission did not take the idea of justifying each and every use of the procedure to its logical conclusion, stating instead that '[p]recisely for a situation such as the current COVID-19 crisis which presents an extreme and unforeseeable urgency, the EU directives do not contain procedural constraints', thus effectively negating the application and verification of requirements needed to establish the extreme and unforeseeable urgency. Taken as a single sentence, perhaps the correct interpretation might be different, but further ahead the Commission exposes its views in more detail:[47]

> *These events and especially their specific development has to be considered unforeseeable for any contracting authority.* The specific needs for hospitals, and other health institutions to provide treatment, personal protection equipment, ventilators, additional beds, and additional intensive care and hospital infrastructure, including all the technical equipment *could, certainly, not be foreseen and planned in advance, and thus constitute an unforeseeable event for the contracting authorities*. [emphasis by the author]

Herein lies the crux of the matter with the guidance since it is evident that the Commission is arguing that reacting to the pandemic could not be planned in advance and that it constitutes an unforeseeable event. This is a misguided view of how the rules of Article 32(2)(c) operate and at least as regards what concerns governments, that could not be farther for the truth for four reasons.

The Commission's view is misguided because the COVID-19 pandemic cannot be subsumed into a single event that would lead to any procurement decision connected with it being considered as unforeseeable. However, all elements of Article 32(2)(c) must be individually assessed and present for every single contract awarded under this exceptional regime since they depend on objective and subjective elements as mentioned above. There is no provision in Article 32(2)(c) for a blanket approach such as that professed by the Commission and others.[48] Every single procurement decision taken in the context of the COVID-19 is a reaction to the specificity of each contracting authority at that moment in time and needs to be assessed as such. This also means that our analysis of the unforeseeable nature and the non-contribution to the emergency will depend on the nature of the contracting authority and the moment the grounds of Article 32(2)(c) are to be assessed. As mentioned above, in general, the answer for procurement decisions taken by governments will naturally be different from those taken elsewhere in any given health sector.

As for the remaining reasons why one cannot assume that governments could not foresee the pandemic, first, countries do plan for pandemics and, in fact, for example, Lithuania had since 2010 a State Emergency Plan covering pandemics[49] and the UK carried out multiple pandemic

46 Ibid, p. 4.
47 Ibid, p. 4.
48 T. Kotsonis, 4 *PPLR* (2020), p. 203.
49 J. Dvorak, 'Lithuanian COVID-19 Lessons for Public Governance', in P. Joyce, F. Maron and P. S. Reddy (eds.), *Good Public Governance in a Global Pandemic* (The International Institute of Administrative Sciences, 2020), p. 330.

exercises in 2016, one of them based on the Mers virus[50] and another on a simulated variant of influenza.[51] The question here is really what we consider either to be a negligent or diligent behaviour by contracting authorities depending on what information they have had access to or should have had access to, particularly as regards what concerns governments. Therefore, at least for these as contracting authorities it is obvious that *a* pandemic is predictable and should be planned for in advance. That does not mean of course that all eventualities can be planned in detail, and for those the procedure of Article 32(2)(c) is still available if all grounds are met. That takes the negotiated procedure without prior notice to its correct realm of application, that is, the exceptions that do not fit in the pre-existing pandemic plans. Not having planned at all or not having acted on the existing plans is thus a contributory fact by governments to create the situation of urgency when they act as contracting authorities, irrespective of the adoption of the negligent or diligent behaviour test for attribution.

Second, in response to the H1N1 pandemic influenza of 2009 the Commission set up in 2014 a Joint Procurement Agreement (JPA) for medical countermeasures to which most (though not all) Member States were party at the beginning of 2020.[52] This, in fact, constitutes a degree of planning for future medical emergencies, therefore amounting to a diligent measure to handle a situation such as that of the COVID-19 pandemic. However, not all Member States joined the JPA in 2014, with some only deciding to do so already in 2020, indicating a difference in diligence amongst the Member States.[53] In February 2020, some Member States were already asking the European Commission to activate the JPA for the purchase of medical supplies,[54] thus indicating they were aware of the risks for public health arising from the novel coronavirus and foreseeing the need for medical supplies. Again, this can be interpreted as a measure of diligence by the Member States involved and, in consequence, lack of diligence by those who did not do as such.

The third is the actual delay between the news arising from China in the beginning of the year and the arrival of the COVID-19 pandemic in Europe a couple of months later. The signs were there to see and be acted upon in good time to avoid making matters worse. That included acting regarding the procurement of medical equipment. However, the difference in behaviour between Taiwan, which was exposed to the SARS epidemic a decade ago, and most EU Member States is striking. As far as could be established for this paper, for the purchasing of personal protective equipment (PPE) only Ireland reacted quickly, by centralizing the purchasing of PPE in March and bought directly

50 *The Guardian*, 'Secret Planning Exercise in 2016 Modelled Impact of Mers Outbreak in the UK', 10 June 2021, www.theguardian.com/society/2021/jun/10/secret-planning-exercise-in-2016-modelled-impact-of-mers-outbreak-in-uk.

51 Department of Health and Social Care, 'Annex B: Exercise Cygnus Report (accessible)', (2020).

52 On this mechanism, E. McEvoy and D. Ferri, 'The Role of the Joint Procurement Agreement during the COVID-19 Pandemic: Assessing Its Usefulness and Discussing Its Potential to Support a European Health Union', 11 *European Journal of Risk Regulation* (2020), p. 851.

53 Sweden (February), Poland (March) and Finland (March) only joined in 2020, European Commission, Signing Ceremonies for Joint Procurement Agreement, https://ec.europa.eu/health/preparedness_response/joint_procurement/jpa_signature_en. This was based on the Decision 1082/2013/EU on serious cross-border threats to health which is now under review as part of a new health security framework, Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision No 1082/2013/EU COM(2020) 727 final.

54 *Euobserver*, 'Will Coronavirus Lead to Medicine Shortage in EU?, 14 February 2020, https://euobserver.com/coronavirus/147449.

from China for immediate delivery of 13× the annual spend in those items.[55] As such, it is logical to conclude that Ireland acted diligently (and swiftly) to react at least in part to serve its immediate needs for medical supplies.

As for contracting authorities other than the Health Ministries in Governments, such as hospitals, the answer is indeed more complex and turns on the actual circumstances of each authority. Did they take part in pandemic planning? Were they under the obligation to have pandemic response plans? What were their resource levels in the run-up to the first pandemic wave? It is impossible to be as prescriptive as with Governments which have competences in the field of public health. For these and barring any specific information stating otherwise vis-à-vis the information they had access to, the Commission's guidance was indeed helpful at the time it was issued. But for governments acting as contracting authorities who deployed the negotiated procedure without notice based on the guidance, it helpfully provided a degree of legal cover to the Member States who could point out to it as a justification for poor or illegal procurement practices in the context of COVID-19 procurement.

In conclusion, each pandemic will always be different from the previous ones and require some decisions at governmental level that will necessarily be different as well, with some fulfilling the requirements of Article 32(2)(c) on a case-by-case basis. However, that is different from taking a blanket approach that any procurement decision taken in the context of COVID-19 will be excused from the checks required by such article.

6. Conclusion

This paper has shown how the EU public procurement legal framework, while allowing Member States flexibility on how to react to a crisis such as that of COVID-19, does so with very clearly defined boundaries. In the context of the negotiated procedure without prior notice on grounds of extreme urgency, Article 32(2)(c) and the case law from the CJEU provide a narrow path to its use. This path is narrow due to the exceptional nature of procedure and the grounds for use which are to be discharged in full by the contracting authority.

In the context of COVID-19, particularly the need for the crisis to be unforeseeable and the extreme urgency not being attributable to the contracting authority raise significant difficulties for some contracting authorities, namely governmental departments with public health responsibilities. The Commission issued guidance on the topic in April 2020, but it is posited that the interpretation of the extreme urgency grounds provided there is incorrect since it creates a general presumption of compliance with the requirements which does not find support in the actual text of the Directive. In addition, even if a generous interpretation of the grounds could make sense in early 2020, it certainly does not do so at the time of writing (December 2021) and it is time the guidance was either revoked or amended.

As of late 2021 the COVID-19 pandemic has been running for almost two years, effectively meaning that we are no longer in a situation of crisis but instead on a new permanent equilibrium where our lives changed due to the challenges imposed by the SARS-COV2 virus. Since the requirements for use of the negotiated procedure without prior notice for urgency in Article 32(2)(c) depend on foreseeability and the contracting authority not contributing to the urgency, it is relevant to enquire how the grounds for extreme urgency are to be assessed today.

55 *BBC*, 'Coronavirus: Historic Ireland-China PPE Flights Lands in Dublin', 29 March 2020, www.bbc.co.uk/news/world-europe-52085363.

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Article

Article 102 TFEU, Equal Treatment and Discrimination after *Google Shopping*

Lena Hornkohl*

I. Introduction

In *Google Shopping,* the General Court took a giant leap forward. Remarkably, it held that the general principle of equal treatment, as a general principle of EU law, applies in the context of Article 102 TFEU for dominant undertakings.[1] Based on this finding, it reframed the European Commission decision as an abusive discrimination case, with self-preferencing amounting to an independent form of abuse under Article 102 TFEU. According to the General Court, the legal test requires exclusionary effects, which must be considered in light of the individual circumstances of each case.[2] Contrary to views in the literature,[3] the *Bronner*[4] criteria, particularly indispensability, are not part of this legal test.[5]

This paper, first, introduces the past practice of abusive discrimination law and its roadmap towards *Google Shopping*. It concludes that the prior EU abusive discrimination law practice lacked a clear and consistent approach. In the past, the Commission and the European Courts[6] have predominantly relied on Article 102(c) TFEU to address all kinds of abusive discriminations beyond the provisions wording and purpose in an unsystematic manner. The general principle of equal treatment was at best hinted at in case law. Furthermore, a distinct theory of harm for independent discriminatory abuses did not exist. On the contrary, the development concerning the effects-based approach and the refusal to apply the *Bronner* criteria had already begun to emerge in comparable scenarios.

Key Points

- *Google Shopping* has ultimately established the underlying principles and legal test for independent discrimination abuses.
- The general principle of equal treatment is applicable in an Article 102 TFEU context.
- Discrimination constitutes an independent abuse when it gives rise to exclusionary effects, which must be considered in the light of the individual circumstances of each case.
- Based on the general principle of equal treatment, the legal test for independent discrimination applied in *Google Shopping* is transferrable to other scenarios.

Second, this paper critically analyses the soundness of the Court's argumentation in *Google Shopping* concerning equal treatment and non-discrimination and maps out a consistent framework for the concept of abusive discrimination. It shows that when it comes to the explicit mentioning of equal treatment, the judgment in *Google Shopping* is unprecedented. In addition, the fact that discrimination can constitute an independent form of abuse has been hinted at in *TeliaSonera*[7] but not been stated in case law in such clarity before. Furthermore, the paper concludes that the big leap also consists in the fact that the Court develops a theory of harm for independent discrimination cases. This is in line with past developments in *MEO*[8] or *Post Danmark I*[9], described in detail below, according to which simple discrimination is not sufficient to find an abuse. The legal test for such self-preferencing—exclusionary effects, no indispensability—does not come as a surprise and puts different pieces of past case law together. The European

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1 Case T-612/17 *Google LLC, formerly Google Inc. and Alphabet, Inc. v Commission*, EU:T:2021:763, para 155.
2 Ibid, paras 161, 165.
3 See, for example Bo Vesterhof, 'Theories of self-preferencing and duty to deal—two sides of the same coin?' (2015) 1 Competition Law & Policy Debate 4, 6; Renato Nazzini, 'Google and the (Ever-Streching) Boundaries of Article 102 TFEU' (2015) 6 Journal of European Competition Law & Practice 301, 309.
4 Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG,* EU:C:1998:569.
5 *Google Shopping* (n 1), para 236.
6 Referring to both the Court of Justice of the European Union and the General Court.
7 Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB,* EU:C:2011:83, paras 55, 56.
8 Case C-525/16 *MEO—Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência,* EU:C:2018:270.
9 Case C-209/10 *Post Danmark I*, EU:C:2012:172.

Courts have developed the overall abuse of dominance test to an effects-based approach throughout the years. *MEO* has already shown this explicitly for exploitative discriminations under Article 102(c) TFEU. Taking into account the developments from *TeliaSonera* and *Slovak Telekom*[10], which both included discriminatory elements themselves and led to comparable exclusionary effects, hardly any other outcome for *Google Shopping* could have been expected.[11] Yet, the clarifications regarding the principles are much welcomed, even though, as we will see, the Court's reasoning concerning the *Bronner* criteria, is not always spot on.

Third, it assesses future applications of the Court's test and the role of the principle of equal treatment in light of the historical purpose, changing goals, and developing reality of Article 102 TFEU. It concludes that relying on the general principle of equal treatment in the context of Article 102 TFEU opens the door for a proper non-discrimination theory of harm. A historical perspective shows that abusive discrimination was always supposed to play a much more significant role in the EU competition law framework. In today's context, for dominant digital platforms, who often unequally face their counterparties, a non-discrimination theory of harm can at least maintain a gap-filling function alongside possible specific rules of the proposed Digital Markets Act (DMA)[12].

II. Abusive discrimination law so far: A rocky road

Already in previous case law, it is important to distinguish between a general principle of equal treatment and the legal test for discriminatory abuses. In the rather undogmatic case law, discrimination has played a role as an abuse, even though a clear independent discrimination theory of harm is not ascertainable. Furthermore, it can merely be suspected that the Commission and European Courts based their abusive discrimination cases on the general principle of equal treatment.

A. A certain categorisation of abusive discrimination

Although there has been enforcement of abusive discrimination, the previous case law is incredibly fragmented. Only the essential prerequisites needed for an abusive discrimination case are widely accepted: a dominant company must apply dissimilar conditions to equivalent transactions or equivalent conditions to different transactions.[13] The dominant undertaking can objectively justify discrimination,[14] although justification is rarely accepted.[15]

Beyond that, a consistent framework for defining when discrimination accounts for abuse under Article 102 TFEU is challenging to map out. Doctrine allows for a certain categorisation, which facilitates the analysis. Article 102 TFEU generally deals with exclusionary and exploitative conduct, of which discrimination is one. Exclusionary conduct directly harms competitors of the dominant undertaking, only indirectly harming consumers.[16] An exploitative abuse directly harms customers (or suppliers) or consumers.[17] Further differentiation of discrimination concerns the level of injury. Primary-line injuries cause harm on the dominant firm's level, whereas secondary-line injuries cause harm on upstream or downstream market(s).[18] From this, it seems that exclusion equals primary and exploitation secondary-line injury. This is only partly true. Primary-line injury cases are always exclusionary. Exploitative discriminations always involve secondary-line injuries. However, secondary-line injury cases can be both exploitative and exclusionary. In the case of vertical integration of the dominant company, demonstrated by *Google Shopping*, exclusionary discrimination involves secondary-line injuries. This leads to three categories of abusive discrimination: exploitative discrimination (always causing secondary-line injuries), primary-line exclusionary discrimination, and secondary-line exclusionary discrimination.

10 Case C-165/19 P *Slovak Telekom, a.s. v European Commission*, EU:C:2021:239.

11 Similar conclusions Pablo Ibáñez Colomo, 'Indispensability and an Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping', (2019) 9 Journal of European Competition Law & Practice 532, 544; Vladya M K Reverdin, 'Abuse of Dominance in Digital Markets: Can Amazon's Collection and Use of Third-Party Sellers' Data Constitute an Abuse of a Dominant Position Under the Legal Standards Developed by the European Courts for Article 102 TFEU?' (2021) 12 Journal of European Competition Law & Practice 181, 192, 194–196.

12 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final.

13 Anne Layne-Farrar and Paul Stuart, 'Abusive Discrimination' in Francisco E González Díaz and Robbert Snelders (eds), *Abuse of Dominance under Article 102 TFEU* (Claeys & Casteels 2013), para 9.6.

14 Case C-163/99 *Portugual v Commission,* EU:C:2001:189, para 67; *MEO* (n 8), para 29.

15 Marco Botta and Klaus Wiedemann, 'To discriminate or not to discriminate? Personalised pricing in online markets as exploitative abuse of dominance' (2020) 50 European Journal of Law and Economics 381, 404.

16 European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7 (Commission Guidance on Article 102), para 5.

17 Pinar Akman, 'The Role of Exploitation in Abuse under Article 82 EC' (2009) 11 Cambridge Yearbook of European Legal Studies 165.

18 Layne-Farrar and Stuart (n 13), para 9.2.

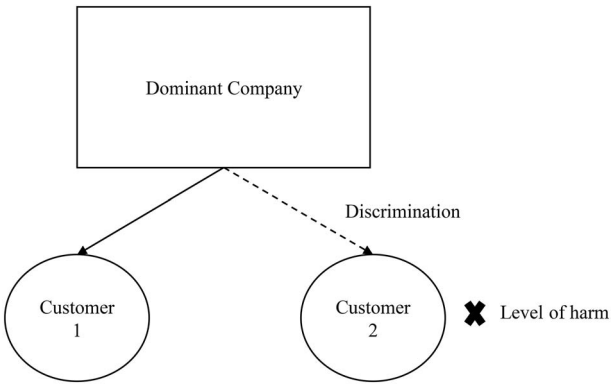

Figure 1: Exploitative discrimination.

B. Bringing together categories and case law: Between chaos and principle on the legal test for abusive discrimination

Even though these categories are relatively straightforward from a theoretical standpoint, their explicit application is almost inexistent in practice. The Commission and European Courts rarely distinguish between the level of injury or between exploitation and exclusion.[19] Although these categories allow for a certain systematisation, they do not clarify the legal test for discrimination. As the following case law demonstrates, an independent theory of harm is difficult to map out. Especially in early case law, the mere application of dissimilar conditions to equivalent transactions without justification was sufficient for abusive discrimination. Other times, the Courts and Commission required an effects-based approach. Sometimes, a discrimination violation was added on top of other already established abusive conducts. Regardless, the cases where the Courts or Commission relied exclusively on a discrimination theory of harm were rare.

1. Exploitative discrimination

Exploitative (secondary-line) discrimination, discrimination harming the supplier or customer of the dominant company, has not been an enforcement priority, at least on the level of the European Commission, and has played a minor role so far.[20] Yet, discrimination was almost exclusively the only theory of harm in these exploitative cases.

Only in very few older exploitative cases, the Commission directly relied on Article 102 TFEU to find an abuse. The *1998 Football World Cup* case is an example where the organisers required spectators to have an address in France to be able to purchase tickets for the world cup.[21] The Commission, backed by the Courts, primarily took recourse to Article 102(c) TFEU. The wording of Article 102(c) TFEU indicates that this subparagraph should only cover exploitative secondary-line injury cases.[22] The fact that 'trading parties' should be placed at a 'competitive disadvantage' shows that Article 102(c) TFEU should not protect the dominant undertakings' rivals.[23] Later, this limitation of Article 102(c) TFEU was at least hinted at in *MEO*, more discussed in detail below, where the Court of Justice of the European Union (CJEU) held that Article 102(c) TFEU does not have to affect 'the competitive position of the dominant undertaking itself on the same market in which it operates'.[24]

However, in many early exploitative discrimination cases, the Commission and the Courts did not address the Article 102(c) TFEU criteria. Rather, geographic discrimination played a significant role as a legal test.[25] In fact, the assessment solely focused on discrimination based on nationality and the conduct's market partitioning effects, as first demonstrated by *United Brands*[26]. Other cases on similar geographic discrimination followed throughout the years where the Commission and Courts used Article 102(c) TFEU as a legal basis while disregarding the provision's conditions.[27] Exploitative cases outside of geographical discrimination were rare. In most of the enforced exploitative secondary-line injury cases,

19 Robert O'Donoghue QC, 'The Quiet Death of Secondary-Line Discrimination as an Abuse of Dominance: Case C-525/16 MEO' (2018) 9 Journal of European Competition Law & Practice 443, 444; see the rare example of *BdKEP* (Case AT.38745) Commission Decision of 20 October 2004, para 93.

20 Christian Bergqvist, 'Discriminatory Abuse—The Missing Link in the More Effect Based Approach' (2020) University of Copenhagen Faculty of Law Legal Studies Research Paper Series no 2020–90, 1, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3491697

21 *1998 Football World Cup* (Case IV/36.888) Commission Decision of 20 July 1999.

22 Damien Geradin and Nicholas Petit, 'Price Discrimination under EC Competition Law: The Need for a case-by-case Approach' GCLC Working Paper 07/2005, 18, available at: https://www.coleurope.eu/sites/default/files/research-paper/gclc_wp_07-05_0.pdf; Layne-Farrar and Stuart (n 13), para 9.3.

23 Geradin and Petit (n 22), 9.

24 *MEO—Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* (n 8), para 24.

25 Geradin and Petit (n 22), 27; Layne-Farrar and Stuart (n 13), para 9.87.

26 Case 27/76 *United Brands v Commission,* EU:C:1978:22.

27 Case 7/82 *GVL v Commission,* EU:C:1983:52; 226/84 *British Leyland v Commission*, EU:C:1986:421; C-179/90 *Merci convenzionali porto di Genova v Siderurgica Gabrielli,* EU:C:1991:464; C-18/93 *Corsica Ferries v Corpo dei Piloti del Porto di Genova,* EU:C:1994:195; C-333/94 P *Tetra Pak II,* EU:C:1996:436; Case T-229/94 *Deutsche Bahn v Commission,* EU:T:1997:155; C-82/01 P *Aéroports de Paris v Commission,* EU:C:2002:617; T-228/97 *Irish Sugar v Commission,* EU:T:1999:246; see also *Brussels National Airport* (Case 95/364/EC) Commission Decision of 28 June 1995; *Portuguese Airports* (Case IV/35.703) Commission Decision of 10 February 1999; *Finish Airports* (Case IV/35.767) Commission Decision of 10 February 1999; *Spanish Airports* (Case 2000/521/EC) Commission Decision of 26 July 2000.

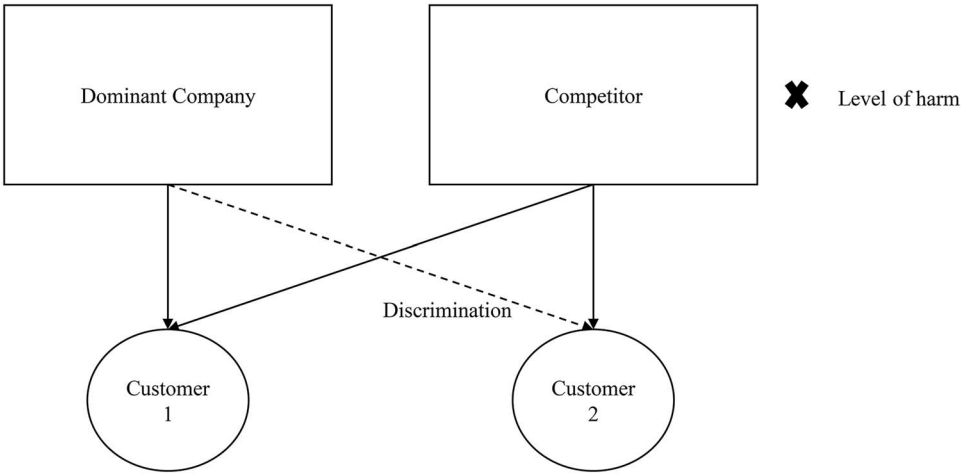

Figure 2: Primary-line exclusionary discrimination.

exclusionary or primary-line conduct was addressed simultaneously, for example, in *British Airways*[28] or *Clearstream*[29]. Until *MEO*, the 'competitive disadvantage' criterion was not assessed, but often presumed.[30] *British Airways* and *Tetra Pak II* underlined the early attitude not to require anticompetitive effects.[31]

In *MEO*, the Court revised its jurisprudence with respect to the 'competitive disadvantage' criterion and adopted an effects-based approach following the *Intel*-judgment[32] to exploitative discriminatory conduct. The CJEU stated that immediate disadvantage affecting the discriminated operator was not enough.[33] According to the CJEU, although potential effects are sufficient, 'it is necessary to examine all the relevant circumstances in order to determine whether price discrimination produces or is capable of producing a competitive disadvantage' by 'distorting competition' between downstream trading parties.[34] An effects-based approach is clearly visible.[35] Whether *MEO* has also reversed the case law of geographical discrimination remains open.[36] There has been no corresponding enforcement in the meantime.

In summary, according to past case law, exploitative discrimination primarily includes geographical discrimination and such discrimination that leads to a competitive disadvantage in the sense of *MEO*. Discrimination against final consumers has not played any role at all, although the Commission, in a note addressed to the OECD in 2018, particularly wanted to use Article 102(c) TFEU to combat personalised prices in the digital age.[37]

2. Primary-line exclusionary discrimination

In a primary-line exclusionary context, the problem arises that many well-established theories of harm under Article 102 TFEU also involve a discriminatory element. Rebates, exclusivity agreements, bonus schemes, price cuts, tying and bundling or other predatory conduct can entail that a dominant company differentiates between downstream customers by giving them diverging conditions, which can foreclose the dominant company's competitors operating on the same upstream market level.[38] Accordingly, the Commission and Courts sometimes handled the mentioned conduct as an (additional) discrimination case in the past, for example, in *Hoffmann-La Roche,* where the Commission, backed by the CJEU, found a discrimination abuse simply because the dominant company only granted fidelity rebates to certain purchasers.[39] In many exclusionary primary-line discrimination cases throughout the years, the European Courts and the Commission did not discuss a legal test for discrimination.[40] Especially, exclusionary effects were not

28 Case C-95/04 P *British Airways v Commission,* EU:C:2007:166.
29 Case T-301/04 *Clearstream v Commission,* EU:T:2009:317.
30 Botta and Wiedemann (n 15), 391.
31 *British Airways v Commission* (n 28), para 145; *Tetra Pak II* (n 27), para. 207.
32 Case C-413/14 P *Intel v Commission,* EU:C:2017:632.
33 *MEO* (n 8), para 26.
34 *MEO* (n 8), para 27.
35 O'Donoghue (n 19), 445.
36 In that direction O'Donoghue (n 19), 445.
37 Commission, 'Personalised Pricing in the Digital Era—Note by the European Union' (28 November 2018).
38 Geradin and Petit (n 22), 20.
39 Case 85/76 *Hoffmann-La Roche v Commission,* EU:C:1979:36, para 134.
40 Joined Cases 40–48, 50, 54–56, 111, 113 and 114–73 *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission,* EU:C:1975:174; T-24/93, T-25/93, T-26/93 and T-28/93 *Companie Maritime Belge,* EU:T:1996:139; *British Airways v Commission* (n 28); see also *Van den Bergh Foods Limited* (Case 98/531) Commission Decision of 11 March 1998, where the wording of Article 102(c) TFEU is used but the provision itself is not mentioned.

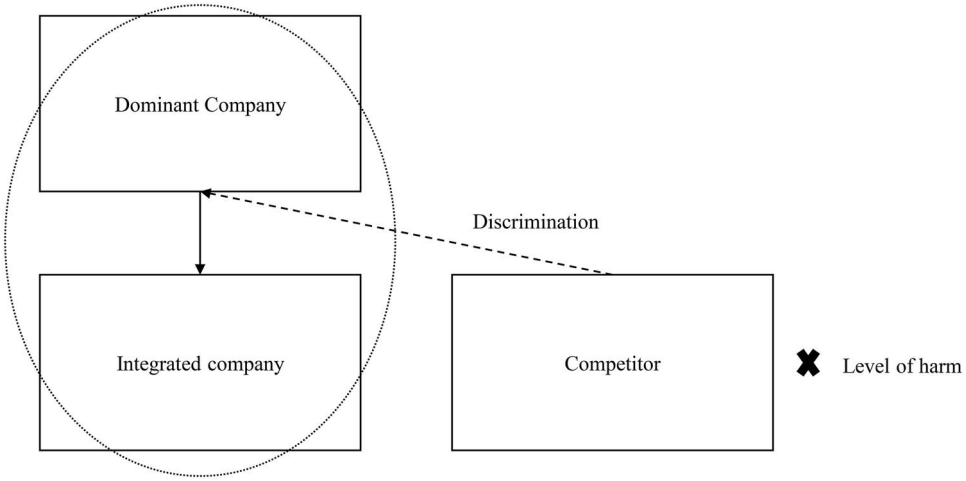

Figure 3: Secondary-line exclusionary discrimination.

required. Instead, they relied on abstract arguments and simply required discrimination to establish an additional violation of Article 102(c) TFEU or Article 102 TFEU next to other forms of predation.[41] In many of these cases, the CJEU and the Commission not only used Article 102(c) TFEU or Article 102 TFEU directly but also other subparagraphs, such as Article 102(a) or (b) TFEU at the same time.[42] A pattern when an anti-discrimination violation was added to a predation case is not evident, which amounts to a certain arbitrariness.[43] According to *Geradin and Petit,* the Commission seemed to have used Article 102(c) TFEU to back up their cases, lower the evidentiary threshold, and impose a higher fine.[44]

Post Danmark I marked an interesting turning point and an end to the (simultaneous) enforcement of primary-line discriminations, at least without an effects-based approach mirroring predation analysis. In *Post Danmark I*, on the national level, the national competition authority first persecuted the predatory pricing conduct as an abusive discrimination case.[45] Contrary, the CJEU underlined that 'the fact that the practice of a dominant undertaking may, like the pricing policy in issue in the main proceedings, be described as 'price discrimination' [. . .] cannot of itself suggest that there exists an exclusionary abuse'[46]. Rather, the CJEU focused on the analysis of the predatory pricing conduct with an effects-based approach, taking into account all the relevant circumstances.[47] The simple application of dissimilar conditions to equivalent transactions to find an exclusionary abuse on a primary-line level seems to have ended with *Post Danmark I*. To the best of the authors' knowledge, primary-line exclusionary discrimination was not enforced solely or with other predatory conduct thereafter. However, *Post Danmark I* does not seem to imply a complete exclusion of independent primary-line exclusionary discriminations as long as exclusionary effects are considered in the analysis.

In summary, although many primary-line exclusionary discrimination cases before *Post Danmark I* simply required unjustified discrimination to find an additional abuse, *Post Danmark I* seemed to clarify that simple discrimination alone is not sufficient, but an effects-based predation analysis is needed.

3. Secondary-line exclusionary discrimination

In secondary-line exclusionary discrimination cases, discrimination causes harm on upstream, downstream or neighbouring markets where the dominant company is also present, such as in the *Google Shopping* scenario. In the past, the case law of the Commission and European Courts contained scarce examples of such conduct without adopting a straightforward legal test. In many cases, Article 102(c) TFEU served as a legal basis, and simple discrimination without considering exclusionary effects was sufficient to ascertain an abuse.[48]

41 Damien Gerard, 'Price Discrimination Under Article 82 (2) (C) Ec: Clearing Up the Ambiguities' GCLC Working Paper 6 July 2005, 23, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113354.
42 For example *British Airways v Commission* (n 28).
43 Gerard (n 41), 23.
44 Geradin and Petit (n 22), 20.
45 *Post Danmark I* (n 9), para 8.
46 Ibid, para 30.
47 Ibid, para 26.
48 *Deutsche Bahn v Commission* (n 27), para 93; *Deutsche Post* (COMP/C-1/36.915) Commission Decision of 15 December 2001, paras 121–134; *BdKEP* (n 19), para 94; *EON* (COMP/39.88) Commission Decision of 26 November 2008, para 52.

Many cases concerned recently liberalised industries or legal monopolies, demonstrated by *Deutsche Bahn*, *Deutsche Post* or *BdKEP*. However, some cases were already unfolded outside these industry areas, such as *Clearstream* or *Belgacom*.[49] *Deutsche Bahn* was one of the rare cases where the Commission had actually gathered evidence that the price discrimination had substantially limited the carriage of containers and, thus, affected the market.[50] Unfortunately, the General Court did not follow-up on this line of arguments indicating an effects-based approach. Furthermore, in the interim relief case *Stena Sealink*, the Commission held that an 'essential facility' is not allowed to favour its own activities in a neighbouring market.[51] However, the Court did not require that the *Bronner* criteria for essential facilities be met.[52] It only held that discrimination is not allowed in essential facilities settings.

Two European Commission decisions, *Deutsche Post* and *BdKEP*, are particularly interesting in comparison to *Google Shopping* because of their explicit discussion of leveraging market power from a dominant to a neighbouring market in a secondary-line discrimination context. In both cases, the Commission found a discriminatory abuse based on (erroneously) Article 102(c) TFEU only by relying on the leveraging itself. In *Deutsche Post,* the Commission held that the company leveraged its dominant position on the market for the forwarding and delivery of cross-border mail in Germany to the market for outgoing cross-border mail in the UK, where it was active but not dominant, thereby discriminating the British Post Office.[53] In *BdKEP*, the Commission found that the discriminatory bonus scheme distorted the cost structure of the commercial mail preparation firms competing upstream with Deutsche Post since they were not able to procure their clients savings on postage. Deutsche Post, dominant on the downstream market for basic postal services, was able to consolidate its clients' mail items to procure them savings on postage, thus extending its dominant position to the upstream market for mail preparation services.[54] Interestingly, the Commission first established an independent leveraging violation as an abuse,[55] only to take recourse to the same leveraging argumentation in the context of exclusionary secondary-line discrimination later. Both cases did not discuss exclusionary effects. Solely the leveraging of market power from one market to the other was sufficient to find an abuse.

Lastly, similarly as in a primary-line exclusionary discrimination context, established theories of harm, such as margin squeeze or refusal to supply, can also involve secondary-line discriminatory elements and may have comparable exclusionary effects.[56] Contrary to the above-mentioned primary-line exclusionary discrimination cases before *Post Danmark I*, the margin squeeze or refusal to supply case law did not find additional discrimination abuses and simply relied on Article 102 TFEU. Nevertheless, arguments surrounding discrimination, such as unequal access or unequal conditions, were involved in the Courts' and Commission's reasoning, specifically concerning the question of whether effects are required or if the 'indispensability' criterion of the *Bronner* refusal-to-deal case-law would need to be fulfilled.[57] The specific situation of *Bronner* and the following case law that warranted 'indispensability' of an 'essential facility' in a refusal-to-deal context, such as *Magill*[58] or *IMS Health*[59], concerned the situation where a vertical integrated dominant company outright either terminates a course of dealing with an upstream or downstream competitor or refuses to start with a (potential) competitor on the upstream or downstream market. The transferability of *Bronner* specifically arose in cases dealing with margin squeezes, such as *TeliaSonera*, or practices present in *Slovak Telekom*, which has been described as a grey area involving both margin squeeze conduct and so-called constructive or implicit refusal to deal[60]. In both cases, the Commission and the CJEU held that although a margin-squeeze or constructive refusal to deal alone is not sufficient to find an abuse, indispensability is also not required.[61] Rather, the practices amount to an abuse when there are exclusionary effects, taking

49 *Clearstream v Commission* (n 29); Commission 'Settlement reached with Belgacom on the publication of telephone directories—ITT withdraws complaint' IP/97/292 (Brussels, 11 April 1997).
50 *HOV-SVZ/MCN* (IV/33.941) Commission Decision of 29 March 1994, para 254.
51 *Stena Sealink/B&I—Holyhead* (IV/34.174) Commission Interim Measure Decision of 11 June 1992, para 41.
52 Nicolas Petit, 'Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf' (2015), 4, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592253.
53 *Deutsche Post* (n 48), paras 121–134.
54 *BdKEP* (n 19), paras 94.
55 Ibid, para 85.
56 Layne-Farrar and Stuart (n 13), para 9.52.
57 *Konkurrensverket v TeliaSonera Sverige AB* (n 7), para 28; *Slovak Telekom* (Case AT.39523) Commission Decision of 15 October 2014, para 364; case C-165/19 P *Slovak Telekom, a.s. v European Commission* (n 10), para 50.
58 Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities,* EU:C:1995:98.
59 Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*
60 Ibáñez Colomo (n 11), 540.
61 *Konkurrensverket v TeliaSonera Sverige AB* (n 7), para 55; Commission Decision in *Slovak Telekom* (n 57), para 364, case C-165/19 P *Slovak Telekom, a.s. v European Commission* (n 10), para 50.

into account the circumstances of a case.[62] By assessing the circumstances of the case, the CJEU specifically included the assessment of discriminatory effects of the relevant conduct.[63] Furthermore, in *TeliaSonera*, the CJEU already hinted that discrimination could constitute an independent form of abuse.[64]

In summary, by applying Article 102(c) TFEU, earlier case law, mainly concerning liberated industries, focused solely on discrimination as abusive conduct, without requiring exclusionary effects. In two Commission cases, the dominant company's leveraging of market power from a dominant to a neighbouring market played a pivotal role. The margin squeeze and constructive refusal refusal-to-deal case law, which both involve secondary-line discriminatory elements, show two crucial developments: (i) next to the conduct itself, i.e. margin squeeze and refusal to deal, exclusionary effects are necessary to establish an abuse and (ii) indispensability only plays a role in the very narrow *Bronner* situations.

C. Indications towards a general principle of equal treatment?

The case law discussed in the previous section dealt with the legal test for the different forms of discrimination, not explicitly with any underlying principle of equal treatment. Neither the Commission nor the European Courts have explicitly mentioned a general principle of equal treatment in the context of Article 102 TFEU. However, the case practice shows that even before *Google Shopping*, there was a trend towards recognising a general principle of equal treatment in Article 102 TFEU, even without explicitly referring to it.

The vast use of especially Article 102(c) TFEU for all kinds of discrimination beyond the wording and disregarding its conditions without requiring any effects, particularly in the early case law, emphasises the role of the principle of equal treatment for these cases. The existence of Article 102(c) TFEU alone appears to have been considered sufficient as a basis for equal treatment in abuse of dominance law. As mentioned above, many established abuses, such as exclusivity agreements or margin squeezes, also have discriminatory elements. Even though the Commission and Courts have not expressly referred to it, the role of equal treatment seems to be at the basis of these cases. This is particularly true in the context of geographic discrimination. The analysis did not focus on distortions of competition but rather on unequal treatment based on nationality or partitioning of the internal market. Other principles and provisions of Union law, such as the general principle of equal treatment, EU citizenship or internal market law, also prohibit such discriminations. The Commission decision in *BdKEP* expressly referred to 'other principles of [Union law] (e.g. discrimination based on nationality or geographical market partitioning)'.[65] This wording illustrates the role that the principle of equal treatment must have played here.

Nevertheless, the development of the abuse of dominance test to an effects-based approach throughout the years did not bypass the discrimination case law. Cases, such as *MEO* for exploitative discrimination, *Post Danmark I* for primary-line exclusionary discrimination, *TeliaSonera*, and *Slovak Telekom* in a secondary-line exclusionary context, confirm this evolution. The case law, thus, moved away from a simple discrimination test towards one that at least also requires anticompetitive effects. Nevertheless, that does not entail that the general principle of equal treatment had lost its meaning before *Google Shopping*. The argumentation, for example, in *TeliaSonera*, explicitly referring to discrimination in the context of 'all the circumstances' needed to be considered in the effects-based test, demonstrates the continuing relevance of the principle of equal treatment. This is admittedly not strong evidence, but it still shows that the principle is not entirely unknown in the context of Article 102 TFEU and has already played a role. Therefore, the case law has at least already pointed in the direction of *Google Shopping*.

III. *Google Shopping*: Clearing up the ambiguities or stating the obvious?

The General Court took a giant leap forward with the *Google Shopping* decision. Based explicitly on the general principle of equal treatment, the General Court clarifies that exclusionary effects are necessary for secondary-line exclusionary discriminations by a vertically integrated company. In other terms, such practice, often described as self-preferencing, constitutes an independent form of abuse under Article 102 TFEU—Article 102(c) TFEU is not mentioned—if it creates exclusionary effects. Even if the remedy in practice requires giving access to a service in a non-discriminatory manner, the Court does not warrant the indispensability of the service.

62 *Konkurrensverket v TeliaSonera Sverige AB* (n 7), paras 28, 31; case C-165/19 P *Slovak Telekom, a.s. v European Commission* (n 10), paras 42, 50, 51.

63 *Konkurrensverket v TeliaSonera Sverige AB* (n 7), para 28; case C-280/08 P *Deutsche Telekom AG v European Commission*, EU:C:2010:603, para 175.

64 *Konkurrensverket v TeliaSonera Sverige AB* (n 7), paras 55, 56

65 *BdKEP* (n 19), para 95.

A. The general principle of equal treatment and article 102 TFEU

1. The giant leap of the general court and its compatibility with article 102 TFEU doctrine

By mainly referring to its case law on geographical discrimination or cases involving the conduct of (formerly) public undertakings in liberalised industries, such as the telecommunications sector, the General Court accepts a general principle of equal treatment in the context of Article 102 TFEU. Right on the outset of the analysis, the Court states that an abuse can take the form of discrimination, 'an unjustified difference in treatment', required by the 'general principle of equal treatment, as a general principle of EU law'.[66] In the course of the analysis, the General Court again mentions the 'general obligation of equal treatment' when it picks up an idea from literature[67] and compares the situation of internet access providers to Google's situation.[68] For internet access providers, Regulation (EU) 2015/2120[69] foresees the principle of network neutrality as a manifestation of the general principle of equal treatment.[70] According to the General Court, the upstream legal obligation of equal treatment for internet access providers is transferrable to Google's downstream level due to their 'ultra-dominant' position on the market of general search services.[71] The Court here again stresses the overall importance of the general principle of equal treatment in the context of Article 102 TFEU for dominant internet companies, focussing on equal opportunity.

As mentioned above, although this idea of equal treatment might have underpinned previous case law, an explicit mentioning of this principle is unprecedented. The cases cited by the General Court did not explicitly mention such a principle. However, even though the Court itself does not touch upon such arguments, applying a general principle of equal treatment in Article 102 TFEU is appropriate and consistent with the historical developments and purposes of the provision. Historically, the EU founding fathers' initial intention was comprehensively regulating unjustified discrimination by private undertakings. Already Article 60(1) ECSC Treaty covered discriminations by all undertakings, not just dominant ones.[72] The Spaak Report also highlighted the role of anti-discrimination for the importance of the internal market, which particularly arises in case of monopolies or dominance.[73]. A prohibition on discrimination for dominant companies was envisaged to prevent any frustrations of the internal market's fundamental objectives. During the further deliberations on the final Treaty of Rome, different forms of abusive anti-discrimination provisions were proposed.[74] The French delegation, for example, proposed an overall prohibition of discrimination to establish a proper and equal level playing field.[75] The subparagraph c of today's Article 102 TFEU was the compromise reached next to a general prohibition of discrimination based on nationality, today set out in Article 18 TFEU.[76] Article 102(c) TFEU alone, albeit properly only covering a specific type of abusive discrimination, can serve as a textual argument that discrimination and, therefore, equal treatment play a role in Article 102 TFEU. This historical outlook supports the essential role of non-discrimination in the context of abuse of dominance. Specifically, the French idea of a level-playing-field is still very prominent today, as we will also see concerning the legal test of discrimination and the Court's mentioning of 'equality of opportunity'[77].

Furthermore, the Court's outright acceptance of a general principle of equal treatment goes in line with the changing reality of markets and accompanying calls to include non-economic goals, such as fairness and equality, in EU abuse of dominance law.[78] Including non-economic goals, such as fairness, must not necessarily

66 *Google Shopping* (n 1), para 155.
67 Pablo Ibáñez Colomo, 'Exclusionary Discrimination under Article 102 TFEU' (2014) 51 Common Market Law Review 141, 144.
68 *Google Shopping* (n 1), para 180.
69 Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union [2015] OJ L 310/1.
70 Case C-807/18 *Telenor Magyarország Zrt. v Nemzeti Média- és Hírközlési Hatóság Elnöke*, EU:C:2020:708, para 47.
71 *Google Shopping* (n 1), para 180.
72 Article 60(1) ECSC prohibited 'pricing practices [. . .], in particular: [. . .]; discriminatory practices involving, within the common market, the application by a seller of dissimilar conditions to comparable transactions, especially on grounds of the nationality of the buyer. [. . .]'.
73 Intergouvernemental Committee of the Messina Conference, Report of the Heads of Delegation to the Ministers of Foreign Affairs (Spaak Report) (21 April 1956), 53.
74 For example, Regierungskonferenz für den Gemeinsamen Markt und Euratom, Entwurf von Artikeln für die Ausarbeitung eines Vertrages über die Gründung eines gemeinsamen europäischen Marktes (Mar. Com. 17), 17; Vorschlag der deutschen Delegation bezüglich der Untersagung von Diskriminierungen (5. November 1956); Entwurf einer Fassung für die Wettbewerbsregeln von einer Expertengruppe unter Berücksichtigung des Meinungsaustausches innerhalb der engeren Gruppe (20. November 1956); Entwurf des Vertrages zur Gründung der Europäischen Wirtschaftsgemeinschaft; Fassung der deutschen Delegation; Artikel 85–94 (18. March 1957).
75 Entwurf eines Protokolls über die Sitzungen der Arbeitsgruppe (10 September 1956).
76 Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008), 132.
77 *Google Shopping* (n 1), para 180.
78 For example Doris Hildebrand, 'The equality and social fairness objectives in EU competition law: The European school of thought' (2017) Concurrences 1.

collide with economic efficiency because we still need a legal test for discrimination. Fairness norms could be used to select amongst various efficient scenarios.[79] Generally, the competition provisions do not stand independently but are part of a more general European legal order and constitutional framework.[80] Protocol No 27 on the internal market and competition refers to Article 3 TEU, which mentions various non-economic goals relevant for Article 102 TFEU. In that sense, the CJEU has already underlined before that competition law plays a role in accomplishing the broader tasks of the Union.[81]

2. Implications of the principle of equal treatment for the article 102 TFEU analysis

Accepting a general principle of equal treatment in Article 102 TFEU, on the one hand, implies that the principle generally needs to be respected when assessing any abusive conduct. Such a trend was already visible in the Court's reasoning in *TeliaSonera*, when it stated that equal treatment must be taken into consideration in an effects-based analysis.[82] On the other hand, recognising the principle entails that unjustified discrimination in itself could constitute an independent abuse, which the Court later emphasises explicitly.[83] The Court underlines this by referring to case law according to which the list of abusive practices in Article 102 TFEU is non-exhaustive.[84] However, recognising the principle of equal treatment does not entail a legal test for an independent discrimination abuse at the same time. This is also the Court's assumption, which points out that only 'certain' types of unequal treatment can fall under Article 102 TFEU.[85]

B. The legal test for exclusionary secondary-line leveraging discrimination

1. Exclusionary effects required

Therefore, the General Court proceeds and sets out the legal test for abusive discrimination, in this case, secondary-line leveraging discrimination of a vertically integrated company. There is no general duty not to discriminate.[86] With regard to the Article 102 TFEU case law increasingly requiring exclusionary effects, unsurprisingly, the Court demands that the abusive practice, here discrimination, must 'have an exclusionary effect'.[87] Although the Court also later deals with the question of what exactly needs to be proven concerning effects and counterfactual analysis, in the context of the legal test itself, it already hinted to the as-efficient competitor principle: not every exclusionary effect is detrimental, particularly when it leads to the exclusion of less efficient competitors.[88]

According to the General Court, the legal test requires a dominant company to use its dominant position for methods different from those governing normal competition, which needs to be assessed 'in the light of the specific circumstances of each case' showing that competition has been weakened.[89] The leveraging of market power from a dominant market to an upstream, downstream or neighbouring market in itself is not sufficient.[90] All the specific circumstances and accompanying practices need to be taken into account, which amounts to a case-by-case analysis.[91] In the present case, the Court accepted the Commission's conclusions that Google's discrimination in the form of self-preferencing was abnormal. It assessed not only the leveraging of market power but also other accompanying practices and circumstances of the relevant markets, such as the importance and irreplaceability of traffic generated by Google's general search engine for comparison shopping services or users' online search behaviour.[92] The Court even goes beyond the Commission's reasoning and explains the economic context and implied the (ir)rationality of a company operating a general search engine that is open to results from external sources, like Google, to favour its own specialised results over third-party results.[93] Furthermore, the Court refers to a change of conduct towards the self-preferencing practice.[94] Overall, interestingly, the General Court mentions several times the 'super' or 'ultra'-dominant position of Google when assessing all the circumstances,[95] a concept whose limits and merit are not entirely clear.

The Court's reasoning clearly moves abusive discrimination away from the above-mentioned early case law

79 See in detail Ioannis Lianos, 'The Poverty of Competition Law—The Short Story' in Damien Gerard and Ioannis Lianos (eds), *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (Cambridge University Press 2019), 65–72.
80 Lianos (n 79), 38; Rutger Claassen and Anna Gerbrandy, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12 Utrecht Law Review 1, 8.
81 See case law cited by Lianos (n 79), 36.
82 *Konkurrensverket v TeliaSonera Sverige AB* (n 7), para 28.
83 *Google Shopping* (n 1), para 240.
84 Ibid, para 154.
85 Ibid, para 180.
86 Already Ibáñez Colomo (n 67), 154, 155.
87 *Google Shopping* (n 1), para 152.
88 Ibid, para 157.
89 Ibid, paras 161, 165.
90 Ibid, paras 162–164.
91 Already Ibáñez Colomo (n 67), 154, 155.
92 *Google Shopping* (n 1), paras 166–176.
93 Ibid, paras 178, 179.
94 Ibid, paras 181–184.
95 Ibid, paras 180, 182.

simply requiring unequal treatment to establish an abuse. In that sense, it is in line with *MEO* and *Post Danmark I*, which already held that simple discrimination is not sufficient to find an abuse. Concerning leveraging the market power from one market to another, *Google Shopping* clarifies that the leveraging alone is insufficient. Thereby, it is going against the Commission decisional practice described above in *Deutsche Post* and *BdKEP*. Leveraging has merit in the analysis but constitutes only one of the circumstances to be taken into account in the effects-based test. The General Court rather creates an independent theory of harm by now requiring exclusionary effects of the discrimination. When such effects arise, the dominant company's conduct is no longer 'competition on the merits'. The effects-based approach, considering all the relevant circumstances, demonstrates a careful balancing by the Court. It has often been held that self-promoting is a common business practice and that dominant companies are not required to promote the products of their competitors' products to the same extent as their own.[96] The Courts effects-based approach distinguishes common business practices of self-promotion from harmful self-preferencing. In that sense, it is also in line with the economics of self-preferencing, which require a case-by-case effects-based assessment.[97]

The General Court's effects-based approach also does not come as a surprise. *MEO* has already shown that discrimination, in that case, exploitative discrimination, can constitute an abuse in the case of anticompetitive effects. Furthermore, the Court required the same effects-based approach in margin squeeze or constructive refusal-to-deal cases, both involving discriminatory elements, such as *TeliaSonera* and *Slovak Telekom*.[98] Thus, known elements from case law have been transposed to Google's situation. *Google Shopping* has once again underlined the importance of assessing all circumstances and accompanying practices to find an abuse. These can but do not have to include leveraging. Furthermore, the circumstances can but do not have to be similar to Google's conduct and position on the relevant and neighbouring markets. Yet, *Google Shopping* illustrates examples of circumstances that can become relevant, particularly in digital markets, such as user behaviour or gateway position. Accordingly, the bar should be set relatively high. The circumstances and accompanying practices, as well as Google's position, were very pronounced in the present case. The General Court also resorted to additional arguments, such as the economic context or Google's 'super'dominance. In addition, the standard should be set high since, as we will see shortly, the Court does not require indispensability and other *Bronner* criteria, while the exclusionary effects of both conducts are comparable.

2. Indispensability not required: The link between legal test and remedy

The General Court then discusses the applicability of the *Bronner* criteria in connection with the equal access remedy foreseen in the Commission decision. Contrary to the applicant and voices in the literature,[99] even though fulfilling the remedy requirements warrants giving equal access, and the exclusionary effects of discrimination and refusal to supply might be comparable, the Court rejects to apply the *Bronner* criteria.[100] Still, it notices that Google's general search engine 'has characteristics akin to those of an essential facility'[101], although it is not entirely clear how such a quasi-essential facility differs from an actual essential facility and what this implies for the legal test.

Although rejecting *Bronner*, the Court recognises that many conducts involve an implicit refusal to supply,[102] which goes hand in hand with the argument highlighted here that many abusive behaviours also contain a discriminatory element. This statement could have actually suggested that these practices should be measured against the same standards. On the contrary, the Court effectively turns the argument around: the exclusionary effects and the conducts of margin squeeze, (constructive) refusal to deal, known from *TeliaSonera* and *Slovak Telekom,* and Google's discriminatory practice are comparable. According to the Court, Google's conduct is more comparable to the conduct relevant in *TeliaSonera* and *Slovak Telekom* than to the conduct relevant in *Bronner*. Thus, the Court follows these judgments it explicitly refers to, which only required exclusionary effects and not indispensability.[103] It reserves *Bronner* for specific circumstances.[104] The Court's further reasoning is equally vague and rather formalistic, but not unexpected in its result, given the similar reasoning in *TeliaSonera* or *Slovak Telekom*.[105] According to the Court, a refusal requires a request and a conclusive refusal, which is lacking here.[106]

96 Vesterhof (n 3), 5;
97 Lars Wiethaus, 'Google's Favouring of Own Services: Comments from an Economic Perspective' (2015) 6 Journal of European Competition Law & Practice 506, 511.
98 See Ibáñez Colomo (n 67), 155, 156.
99 See above footnote 3.
100 *Google Shopping* (n 1), para 236.
101 Ibid, para 224.
102 Ibid, para 234.
103 Ibid, para 235.
104 Similar Ibáñez Colomo (n 11), 533.
105 See already Petit (n 52), 8; Ibáñez Colomo (n 67), 157.
106 *Google Shopping* (n 1), para 232.

Furthermore, the exclusionary effect must consist precisely in the refusal as such and not in any other conduct, even if that conduct amounts to an implicit refusal.[107] Similar to *TeliaSonera*,[108] the Court points out that even when the conduct amounts to such an implicit refusal, not every issue of access entails a refusal to supply in the *Bronner* sense.[109] The circularity of this argument cannot be overlooked.

The argument that there is often an implicit refusal to deal—and often a discriminatory element—has merit. It is also true that 'indispensability' otherwise sets quite high standards difficult to overcome. Its broad application would contradict the purpose of Article 102 TFEU.[110] Applying the *Bronner* criteria to this case is indeed not appropriate but for different reasons: Google is not forced to deal with a third party that it did not want to deal with. Rather, Google should not discriminate when dealing with rivals vis-à-vis its own vertically integrated business. Precisely for this reason, however, an elegant solution would have been to analyse the effect of the remedy and identify whether Google is actually forced to deal with a rival (requiring indispensability) or only required to establish equal treatment (not requiring indispensability).[111] However, explicitly in contrast, the Court rules out the possibility of drawing conclusions from the remedy to the legal test.[112] Instead, the Court seems to focus on the fact that if *Bronner* had contained not only a refusal to deal but also other active exclusionary practices, then only exclusionary effects would have been sufficient, and a further indispensability test would not have been necessary.[113] Where only such a formalistic refusal to deal is present, the Court seems to prioritise the freedom of the company to deal with whomever they want, which is why *Bronner* criteria must be added. In the case of an additional or own conduct with exclusionary effects, the *Bronner* criteria are not relevant. As the literature[114] and cases like *Slovak Telekom* have shown, such a formalistic categorisation into proper refusals and implicit refusals to supply is not necessarily practically feasible. It therefore, remains to be seen whether the argumentation here is appeal-proof or rather must focus on the consequences of the legal remedy. For now, indispensability does not form part of the legal test for exclusionary secondary-line leveraging discrimination.

IV. A non-discrimination theory of harm under article 102 TFEU: Closing the gaps

For future cases, *Google Shopping* has shown that discrimination can amount to an abuse where (i) there is unequal unjustified treatment and (ii) an exclusionary effect. Although *Google Shopping* involves secondary-line leveraging discrimination of a vertically integrated company on a digital market, the findings can, in principle, be transferred to other forms of discrimination in the context of Article 102 TFEU. The General Court was clear in that regard: since the general principle of equal treatment is applicable in the context of Article 102 TFEU, unequal treatment can constitute an abuse in certain situations. Such situations can involve all the above-mentioned categories of exploitative and exclusionary discriminations, as long as the parameters developed in *Google Shopping* concerning the legal test, following an effects-based approach and taking into account all the corresponding circumstances or the case, are fulfilled.

The test for exclusionary discrimination, be it in the form of primary-line, be it in the form of secondary-line injury, is clear after *Google Shopping*. The discrimination must have exclusionary effects. The question will arise if, outside of such self-preferencing practices present in *Google Shopping*, particularly in the primary-line context, discrimination will actually amount to its own abusive practice, distinguishable from other conduct, such as rebates or exclusive dealing.[115] Independent discriminations are challenging to imagine especially in the primary-line injury context, as the above-mentioned past case law has heretofore demonstrated. In that context, *Post Danmark I* already marked an end to the practice of adding an anti-discrimination violation to other predation violations. *Google Shopping* demonstrates that discrimination can only constitute an abuse if it actually amounts to an independent practice. In case such a practice becomes apparent also in a primary-line injury context, *Google Shopping* at least harmonised the legal test to the extent that exclusionary effects are required in any case.

There will be a wider scope of application for self-preferencing secondary-line exclusionary discrimination practices like in *Google Shopping*. In the digital context, this will certainly be the case as long as the self-preferencing provisions in the DMA do not come into

107 Ibid, para 232.
108 *Konkurrensverket v TeliaSonera Sverige AB* (n 7), paras 58, 59.
109 *Google Shopping* (n 1), paras 234, 235.
110 Ibid, para 234.
111 Similar linking the remedy to the indispensability test Ibáñez Colomo (n 11), 542.
112 *Google Shopping* (n 1), para 246.
113 Ibid, para 244.
114 Ibáñez Colomo (n 11), 542.
115 Bergqvist (n 20), 8.

force. Those will undoubtedly be applied with priority because the DMA envisages a prima facie prohibition of self-preferencing for digital gatekeepers without having to address effects specifically.[116] Beyond that, however, self-preferencing practices can also become relevant for non-digital markets, which could be the case, for example, with regard to the often-mentioned supermarkets or shopping malls favouring their own products and businesses.[117] However, in these cases, the dimensions and circumstances would have to reach a certain degree, as *Google Shopping* has shown that any exclusionary effects are not enough. As demonstrated above, *Google Shopping* sets the bars quite high. A dominant company's accompanying practices, the extend of its dominant position and the overall circumstances in another self-preferencing case would need to reach a comparable level.

MEO already established the legal test and an effects-based approach for Article 102(c) TFEU for exploitative discriminatory cases of customers. With regard to the legal test for such discriminations, *Google Shopping* has, thus, not changed much. The circumstances relevant in such discriminatory cases need to mirror exploitative effects. The CJEU in *MEO* held that the relevant circumstances are, among others, 'the undertaking's dominant position, the negotiating power as regards the tariffs, the conditions and arrangements for charging those tariffs, their duration and their amount, and the possible existence of a strategy aiming to exclude from the downstream market one of its trade partners which is at least as efficient as its competitors.'[118] The threshold for exploitative discrimination seems to be lower than for exclusionary conduct.[119] However, the Court's explicit reliance on a general principle of equal treatment in the context of Article 102 TFEU could serve as a subtle hint to ramp up enforcement of exploitative discrimination, which has not been an enforcement priority.

In this sense, one could think in particular of enforcement of personalised pricing practices, which fall under the exploitative category in that there is no discrimination between customers, but final consumers.[120] Despite the fact that Article 102(c) TFEU could not be used as a legal basis, since final consumers do not compete with one another and *ergo* cannot be placed at a 'competitive disadvantage', Article 102 TFEU could be relied on directly. Although only very few cases deal with final consumers, there are precedents, like the *1998 Football World Cup* case[121]. Such enforcement would also align with an historical interpretation of Article 102 TFEU.[122] The above-mentioned historical documents additionally show that the original intention of the abuse of dominance provision was to prohibit primarily exploitation, also involving final consumers, to protect those who dealt with the dominant undertakings, not the economic freedom of the dominant companies' competitors.[123] Furthermore, the above-mentioned changing goals of competition policy and Article 102 TFEU equally could play a role here. In todays' context, the increasing capability of undertakings on digital markets, which interact directly with consumers and, through algorithms and big data analysis, have a growing potential to first-degree (price) discriminate between consumers on an individual basis, needs to be taken into account.[124] The exact parameters of a legal test for a personalised pricing abuse will, of course, have to be different from the test *in Google Shopping* or *MEO* as final customers are not in competition with one another, and similar effects are unable to establish. Some suggestions have already been made, which cannot be discussed in detail here.[125] In particular, it must be carefully considered whether geographical discrimination comparable to the cases listed above between consumers from different Member States should be revived for the enforcement of personalised pricing abuses against the background of the general principle of equal treatment and the internal market objective of competition law. As mentioned above, accepting a general principle of equal treatment also means that it needs to be taken into account in the Article 102 TFEU assessment. The Court's express support of this principle in *Google Shopping* underlines that discriminatory personalised pricing abuses may also

116 Article 6(1)(d) DMA.
117 See further examples in Wiethaus (n 97), 508.
118 *MEO—Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* (n 8), para 31.
119 Differenting between 'capable' of distorting competition of MEO and 'likely' in the Commission Guidance Cyril Ritter, 'Price discrimination as an abuse of a dominant position under Article 102 TFEU: MEO' (2019) 56 Common Market Law Review 259, 269.
120 Similar Pinar Akman, 'To Abuse, or not to Abuse: Discrimination between Consumers' (2007) 32 European Law Review 492, 498.
121 *1998 Football World Cup* (n 21).
122 Akman (n 17), 267.
123 Schweitzer (no. 76), 136.
124 OECD, 'Personalised Pricing in the Digital Era—Background Note by the Secretariat' (28 November 2018).
125 See Inge Graef, 'Algorithms and Fairness: What Role for Competition Law in Targeting Price Discrimination Towards End Consumers?' (2018) 24 Columbia Journal of European Law 541; Boris Paal, 'Missbrauchstatbestand und Algoritmic Pricing: Dynamische und individuelle Preise im virtuellen Wettbewerb' (2019) Gewerblicher Rechtsschutz und Urheberrecht 43; Mariateresa Maggiolino, 'Personalized Prices in European Competition Law' (2017) Bocconi Legal Studies Research Paper No 2984840, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2984840.

have a place in Article 102 TFEU enforcement in the future.

V. Conclusion

Google Shopping has elucidated two aspects for independent discrimination abuses in Article 102 TFEU: (i) the general principle of equal treatment is applicable in an Article 102 TFEU-context and (ii) discrimination constitutes an abuse when it gives rise to exclusionary effects, which must be considered in the light of the individual circumstances of each case. The *Bronner* criteria are not part of this legal test. Even though both points were at least in principle already hinted at in the case law beforehand, the situation was rather opaque. *Google Shopping* has clarified the approach. At the same time, the judgment seems to strike a careful balance: indispensability is not needed but effects. Even though the General Court's reasoning concerning indispensability is questionable, the outcome seems correct if one considers the different remedies or reactions required from the dominant company in *Bronner* scenarios compared with *Google Shopping* scenarios.

Generally, as shown here, based on the general principle of equal treatment, the legal test for independent discrimination applied in *Google Shopping* can be transferred to possible other independent discriminations. The present judgment seems to manifest the so-called 'common carrier antitrust' trend, demanding common carrier obligations for vertically integrated online platforms. Especially on digital markets, where the circumstances might be akin to *Google Shopping*, such common carrier antitrust obligations seem to become more prominent for big tech companies.[126] This trend is already demonstrated by ongoing investigations on the EU level, such as the Commission's Amazon probe into the use of non-public independent seller data enabling the company to leverage its dominant position from the market for online marketplace services to multiple downstream markets.[127] In addition, national competition authorities have shown activities in that area, demonstrated, inter alia, by the French Competition Authority's decision in *Google AdX*[128] on self-preferencing in the ad tech industry or the Italian Competition Authority's *Amazon*[129] decision focussing on discriminatory practices of third-party sellers on its marketplace.

It remains to be seen whether there will still be room for application for Article 102 TFEU discrimination enforcement compared with the rules on self-preferencing foreseen in the DMA[130] or already existing similar provisions for digital gatekeepers on Member State level, like in Germany[131]. It also remains to be seen whether such regulations will stand up to a primary law test at all, especially considering the present *Google Shopping* ruling.[132] Where the antitrust authorities identify digital gatekeepers on a first level[133], the respective regulations provide that self-preferencing is, in principle, outright prohibited[134]. On the other hand, *Google Shopping* requires a case-to-case assessment of all relevant circumstances, especially anti-competitive effects. However, the circumstances that the General Court has allowed to suffice in *Google Shopping* to establish an exclusionary abuse, especially the repeated reference to Google's 'super' dominance, cross-market power or gateway position, will also have to be present to establish that a platform is identified as a gatekeeper on the first level according to the mentioned rules.[135] The question of the accompanying circumstances thus takes place on an initial, prior level before the question of a problematic practice can even be raised.

In conclusion, *Google Shopping* has shown that discrimination in Article 102 TFEU can constitute an abuse on its own, the legal test for which fits into the overall Article 102 TFEU doctrine. Except for the rejection of the *Bronner* criteria, which is ultimately appropriate on the merits but questionable in its reasoning, it is to be expected that the CJEU would come to a similar conclusion at an appeal level. The judgment can and will now be used to ramp up the enforcement of abusive, discriminatory practices, primarily on digital markets. The Commission should particularly reconsider using Article 102 TFEU to enforce personalized pricing practices.

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126 Reverdin (n 11), 195.
127 Commission, 'Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices' (Brussels 19 November 2020).
128 French Competition Authority, Case 21-D-11, 7 June 2021, *Google AdX*.
129 Italian Competition Authority, Case n° A528, 9 December 2021, *Amazon*.
130 Article 6(1)(d) DMA.
131 § 19a GWB.
132 Critically Thomas Graf and Henry Mostyn, 'Do We Need to Regulate Equal Treatment? The Google Shopping Case and the Implications of its Equal Treatment Principle for New Legislative Initiatives' (2020) 11 Journal of European Competition Law & Practice 561, 570.
133 Article 3 DMA; § 19a(1) GWB.
134 Article Art. 6(1)(d) DMA; § 19a(2) n.1 GWB.
135 Article 3(1),(2),(6) DMA; § 19a(1) GWB.

The Evolving Interpretation of Article 107(3)(b) TFEU

*Phedon Nicolaides**

This article reviews the evolving case law on Article 107(3)(b) TFEU. It is now established that State aid must be appropriate, necessary and proportional. However, this article finds that it is still not clear in the case law how they are to be applied in conjunction with each other. Several judgments of the General Court delivered in 2021 also indicate that the principle of proportionality can refer to both the amount of aid as well as to the scope of the aid measure. The 2021 judgments of the General Court represent a departure from previous case law in so far as they dispense with any assessment of the impact of State aid on trade and competition. Since aid on the basis of Article 107(3)(b) aims to remedy a serious economic disturbance, it is also presumed to be in the interest of all Member States. Pending cases before the Court of Justice may still reverse this new interpretation of the application of Article 107(3)(b).

Keywords: Article 107(3)(b); appropriateness; necessity; proportionality; common European interest

I. Introduction

Before the outbreak of the financial crisis in 2008 which later formed into an economic crisis, Article 107(3)(b) TFEU was rarely used. The European Commission had applied the provisions of that Article only in one case concerning a privatisation scheme in Greece in the early 1990s.

The situation changed after the collapse of Lehman Brothers in September 2008, the freezing of credit markets and the unprecedented interventions by several Member States to prop up their financial institutions that had been exposed to the sub-prime mortgage market in the US. Because banks whose assets depreciated in value precipitously had to be rescued, initially the Commission considered that Article 107(3)(c) was the correct legal basis.[1]

However, the Commission quickly recognised that the crisis was very different from previous cases of banks in difficulty. It shifted the legal basis of State aid to Article 107(3)(b) which was more flexible and permitted the granting of aid in the form of guarantees to banks that were temporarily illiquid without being insolvent.[2]

The beneficiaries of the measures that were individually approved by the Commission during the financial crisis of 2008-2011 were in their vast majority financial institutions.[3] The Commission prohibited State aid only in one case. Decision 2011/346 on the Portuguese bank BPP found a State guarantee to be incompatible with the internal market because it had been granted illegally without any restructuring plan. Over the period 2008-2019, the Commission adopted close to 600 decisions concerning financial institutions covering such interventions as the recapitalisation of banks with depleted capital, the separation of performing from non-performing assets, the

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1 See, for example, Cases NN 70/2007 *Northern Rock* [2008] OJ C 43 and NN 25/2008 *West LB* [2008] OJ C 189.

2 See Commission Communication on State aid rules in favour of banks ('2013 Banking Communication'), para 3 <https://bit.ly/3JRRcac> accessed 28 March 2022.

3 See Commission Staff Working Paper, The effects of temporary State aid rules adopted in the context of the financial and economic crisis, SEC(2011) 1126 final, fn 54 <https://bit.ly/3INxM55 > accessed 28 March 2022.

issuing of new debt instruments by solvent banks, the sale of certain classes of assets or the resolution of failing banks.

Since the outbreak of the Covid-19 pandemic in early 2020, Article 107(3)(b) has again been used extensively. This time, however, it appears that no financial institution has received any direct aid. Because the pandemic has affected all sectors of the economy the number of measures approved by the Commission in the two-year period 2020-21 has dwarfed the number of measures in favour of financial institutions in the 11-year period 2008-19. I estimate that in the period March 2020 to March 2022 the Commission approved close to 700 schemes and individual measures plus another 500 or so amendments. In addition, about another 130 Covid-19 related schemes and individual aid measures were approved by the Commission in the same period on the basis of Article 107(2)(b) and Article 107(3)(c).[4]

The purpose of this article is twofold. First, it identifies significant changes in the interpretation of Article 107(3)(b) in the case law. Second, it examines the criteria used by the General Court in recent judgments on Article 107(3)(b) and argues that it is not always clear how they are interpreted and what is the standard of proof.

The article is structured as follows. Section II sets the broader context in which the enforcement of Article 107(3)(b) takes place. Section III reviews the approach of the Commission in a few cases outside the financial sector before the outbreak of the pandemic. Section IV examines the reasoning and the criteria of the compatibility of State aid used by the Commission in the non-financial cases. Section V analyses the recent judgments on Article 107(30(b) all of which were delivered in 2021. Section VI presents what appear to be the problematic issues in the case law, and Section VII concludes with a summary of the main findings of the article.

II. Compatibility of Article 107(3)(b) State Aid with the Internal Market

Article 107(3) TFEU provides that

> The following may be considered to be compatible with the internal market:
>
> ...
>
> (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State.

Since aid 'may be' considered to be compatible with the internal market, the Commission enjoys wide discretion in determining whether indeed is or is not compatible. Normally the Commission assesses the compatibility of State aid by taking into account the magnitude of the distortion caused by the aid and the interests of other Member States. Although we will see later on that Article 107(3)(b) does not require a balancing between the interests of the granting Member State and those of other Member States, a number of recent studies have expressed concern about the distortion of competition that may have been caused by the large amounts[5] of Covid-19 related aid that have been approved by the Commission or by the fact that some of that aid went to undertakings in difficulty[6].

1. The Discretion of the Commission

In *Freistaat Sachsen*[7] the General Court held that Article 107(3)(b)

> (169) involves complex assessments of an economic and social nature, to be made within a Community context, which fall within the exercise of the wide discretion which the Commission enjoys under Article [107(3)] of the Treaty.

The same view was repeated in the judgment in *Greece v Commission*[8].

4 DG Competition keeps a list of approved measures on its website <https://ec.europa.eu/competition-policy/document/download/fd113a0a-9c99-4405-aa4c-4ed52134f657_en?filename=State_aid_decisions_TF_and_107_2b_107_3b_107_3c_0.pdf> accessed 28 March 2022.

5 See, for example, Jan van Hove, 'Impact of state aid on competition and competitiveness during the COVID-19 pandemic: an early assessment' (European Parliament, December 2020) <http://www.europarl.europa.eu/RegData/etudes/STUD/2020/658214/IPOL_STU(2020)658214_EN.pdf> accessed 28 March 2022. See also Massimo Motta and Martin Peitz, 'EU state aid policies in the time of COVID-19 (*voxeu.org*, 18 April 2020) <https://voxeu.org/article/eu-state-aid-policies-time-covid-19> accessed 28 March 2022.

6 See Irene Agnolucci, 'Will Covid-19 Make or Break EU State Aid Control?' (2022) 13(1) Journal of European Competition Law and Practice 3-16.

7 Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen & Volkswagen v European Commission* [1999] EU:T:1999:326.

8 Case T-150/12 *Greece v European Commission* [2014] EU:T:2014:191.

This view has been confirmed by the Court of Justice. In *BPP*[9] the Court of Justice ruled that

> (66) the aid which is covered by Article 107(3)(b) TFEU is not ex lege compatible with the internal market, but rather may be considered by the Commission to be compatible with that internal market.

This is because '(67) in the application of Article 107(3) TFEU, the Commission enjoys a discretion, the exercise of which involves complex assessments of an economic and social nature'.

In addition, in *Westfälisch-Lippischer Sparkassen*[10], and in *ABN AMRO*[11], the General Court confirmed that the Commission may impose conditions on the aid beneficiary such as the implementation of a restructuring plan or behavioural constraints such as a ban on bonuses.

However, the discretion of the Commission is not unlimited. According to the General Court, in the recent T-628/20 *Ryanair*[12] case, '(25) the Commission cannot declare State aid, certain conditions of which contravene other provisions of the Treaty, to be compatible with the internal market.' See also a similar statement in the judgment of the Court of Justice in paragraph 44 of *Hinkley Point C*[13].

2. The Meaning of 'Serious Disturbance in the Economy of a Member State'

The General Court explained in *Freistaat Sachsen*[14], that

> (167) it follows from the context and general scheme of that provision that the disturbance in question must affect the whole of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory. This, moreover, is in conformity with the need to interpret strictly a derogating provision such as Article [107(3)(b)] of the Treaty.

The Commission, in Decision 1996/666 that was the subject of the appeal in the *Freistaat Sachsen* case, had acknowledged that the German reunification 'had negative effects on the German economy'. However, 'those [effects] alone [were] not sufficient' for exemption of the aid in question on the basis of Article 107(3)(b).

The Commission adopted a similar approach in subsequent cases too. For example, in Decision 1998/490, paragraph 10.1, it considered that French State aid to Credit Lyonnais (CL) could not be approved on the basis of Article 107(3)(b) because it was not 'designed to remedy serious economic disruption, since its purpose is to resolve the problems of a single recipient, CL, as opposed to the acute problems facing all operators in the industry.'

In Decision 2009/341 concerning German State aid to Sachsen LB, the Commission noted that

> (94) aid cannot be benefiting only one company or one sector but must tackle a disturbance in the entire economy of a Member State. The Commission has consequently decided that a serious economic disruption is not remedied by an aid measure that 'resolve[s] the problems of a single recipient [...], as opposed to the acute problems facing all operators in the industry'.

Then it observed that in the case of Sachsen LB '(95) the problems of Sachsen LB are due to company-specific events' and that no 'systemic effects ... might have resulted from a bankruptcy of Sachsen LB could have reached a size constituting 'a serious disturbance in the economy' of Germany within the meaning of Article [107(3)(b)]'.

This approach of the Commission has been endorsed by the EU courts. It is now well-established that the fact that the objective of the aid is to remedy a serious economic disturbance is not sufficient by itself to establish the compatibility of the aid with the internal market. In *Westfälisch-Lippischer Sparkassen- und Giroverband*[15], the General Court clarified that

> (181) from the actual wording of Article [107(3)(b) TFEU] [it follows] that the Commission, when it

9 Case C-667/13 *BPP* [2015] EU:C:2015:151.

10 Case T-457/09 *Westfälisch-Lippischer Sparkassen* [2014] EU:T:2014:683.

11 Case T-319/11 *ABN AMRO v European Commission* [2014] EU:T:2014:186.

12 Case T-628/20 *Ryanair v European Commission* [2021] EU:T:2021:285.

13 Case C-594/18 P *Austria v Commission* [2020] EU:C:2020:742, para 44.

14 T-132/96 and T-143/96 *Freistaat Sachsen & Volkswagen v European Commission*.

15 Case T-457/09 *Westfälisch-Lippischer Sparkassen- und Giroverband v European Commission* [2014] EU:T:2014:683.

> finds, as in the present case, that State aid is intended to remedy a serious disturbance in the economy of a Member State, is not, by that fact alone, obliged to consider that aid to be compatible with the common market.

This is because

> (182) certain categories of aid provided for by Article [107(3) TFEU], including those intended to remedy a disturbance in the economy of a Member State, 'may' be considered to be compatible with that market.

Although the size of the aid recipient may not decisive, the possible spill-overs from failure of the recipient do matter. The financial sector has received very large amounts of State aid because of its importance to the real economy. In the 2013 Banking Communication, cited above, the Commission considered that State aid to the financial sector could remedy a serious economic disturbance because of the 'interconnectedness and interdependence within the financial sector' that could cause 'contagion', the 'risk of wider negative spill-over effects' and 'have a strong negative impact on the economy as a whole'.[16]

Indeed, the Commission, in Decision 2011/346, which is its sole negative decision on State aid granted to a bank during the financial crisis, found that that

> (66) the applicability of Article 107(3)(b) TFEU was assessed and considered to be applicable, as BPP's failure to comply with its financial obligations could negatively affect the whole Portuguese financial system.

But that was not enough for the compatibility of the aid.

It is also possible that other sectors, such as air or rail transport that connect different parts of an economy, may also have systemic or spill-over effects. Therefore, aid to operators in those sectors may be as necessary as aid to financial institutions to remedy a serious economic disturbance. Section III below will return to this issue.

It is worth noting that in the 2020 Temporary Framework as well as the 2022 Temporary Crisis Framework, it is stated that

> the Union courts have ruled that the disturbance must affect the whole or an important part of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory.[17]

The latter segment of the quoted sentence is correct. However, it appears that no judgment has referred to 'important part' of the economy.

However, it is also worth noting that a recent judgment has clarified that State aid does not have to be able by itself to remedy the serious disturbance. The General Court ruled in case T-388/20 *Ryanair*[18], that

> (41) it must be borne in mind that Article 107(3)(b) TFEU does not require that the aid in question is capable, in itself, of remedying the serious disturbance in the economy of the Member State concerned.

This appears to mean that it is sufficient that the aid may neutralise the effects of the disturbance rather than the cause of it.

Lastly, in the same *Ryanair* case (T-388/20), the General Court held that '(32) Article 107(3)(b) applies both to aid schemes and to individual aid.'

3. Is Assessment of the Impact of Aid on Trade and Competition Also Required?

In several judgments the General Court held that in its assessment of the compatibility of State aid, the Commission also had to take into account the impact in intra-EU competition and trade (see, for example, *AITEC*[19]).

In the *Westfälisch-Lippischer Sparkassen* case, the General Court seemed to acknowledge certain flexibility for the Commission in that it '(184) may assess the impact of aid authorised under [Article 107(3)(b)] on the relevant market or markets in the European

16 2013 Banking Communication, paras 5, 6 and 25.

17 See para 17 of the Temporary Framework for State Aid Measures to Support the Economy in the Current Covid-19 Outbreak https://ec.europa.eu/competition-policy/state-aid/coronavirus_en accessed 28 March 2022. See also para 34 of the Temporary Crisis Framework on for State Aid Measures to Support the Economy Following the Aggression against Ukraine by Russia https://ec.europa.eu/competition-policy/state-aid/ukraine_en accessed 28 March 2022.

18 Case T-388/20 *Ryanair v European Commission* [2021] EU:T:2021:196.

19 Case T-447/93 *AITEC and Others v European Commission* [1995] EU:T:1995:130, paras 136-137 and 141-142.

Union as a whole' and that it '(199) may take into account the foreseeable effects of the aid on competition and intra-Community trade'.

Later on, the General Court appeared to retract that flexibility when it stressed that the Commission was

> (207) bound to examine the impact of aid on competition and trade within the European Union in its economic assessments for the purposes of the application of Article 107(3)(b) TFEU.[20]

In the *HH Ferries* case, the General Court considered that in addition to examining the impact of the aid on trade and competition, the Commission had to carry out a balancing test of the positive and negative effects of State aid. It went on to reject '(214) the Commission's argument that the balancing test is not applicable to the analyses carried out with regard to Article 107(3)(b) TFEU.'

We will see in Section V that the latest case law no longer requires the Commission to assess the impact on competition and trade or to carry out a balancing test.

III. Cases Outside the Financial Sector Before the Pandemic

Before the outbreak of the Covid-19 pandemic, very few decisions had been adopted outside the financial sector on the basis of Article 107(3)(b).

A notable exception was Commission Decision SA.36323 concerning State aid granted by Greece to Public Power Corporation (PPC). In that decision, the Commission explained that it assessed the compatibility of aid on the basis of Article 107(3)(b) by

> (74) taking into account, in particular, the nature and the objective seriousness of the disturbance of the economy of the Member State concerned, on the one hand, and the adequacy, necessity and proportionality of the aid to address it, on the other.

Then the Commission observed that

> (78) the scale and duration of the economic contraction Greece is experiencing goes well beyond the challenges experienced by Member States' economies in the context of the standard business cycle, in which economic slowdowns must be accepted as a part of the normal pattern of growth and development.

Similarly, Commission Decision SA.36871 concerning Greek State aid to Public Gas Corporation [PGC] found that the

> (26) difficult liquidity situation on the energy market - capable of affecting the stability of the energy sector – [created] a situation of 'serious disturbance' of the Greek economy.

Another notable exception was Commission Decision 2018/1040 concerning aid by Greece to Trainose, a train operator. Trainose was the sole provider of passenger rail services. The Commission recognised that there was a serious economic disturbance affecting the whole Greek economy because

> (211) the scale and duration of the economic contraction which Greece is experiencing goes well beyond the challenges experienced by Member States' economies in the context of the standard business cycle, in which economic slowdowns must be accepted as a part of the normal pattern of growth and development.

In paragraph 212 of the decision concerning Trainose, the Commission referred to the 'exceptional effects of the crisis', and the ability of State aid to 'remedy or address its effects'. Then the Commission assessed the compatibility of the aid according to its 'adequacy, necessity and proportionality'. The same criteria were used to assess the compatibility of the aid that was granted to the PPC and PGC.

IV. The Criteria of Adequacy, Necessity and Proportionality

As mentioned above, in its decisions on the PGC, PPC and Trainose, the Commission examined whether the aid was adequate, necessary and proportional.

With respect to the adequacy of the aid, the Commission checked whether the particular aid measures were capable of addressing the serious economic disturbance or countering its effects. Indeed the loans and guarantees in favour of PGC and PPC were found

20 Case T-68/15 *HH Ferries v European Commission* [2018] EU:T:2018:563.

to be capable of resolving the liquidity problems of the beneficiaries. Moreover, the aid prevented negative spill-overs to other sectors of the economy. For example, in the case of PPC, the Commission stated that

> (88) the liquidity support in the form of loans guaranteed by the Hellenic Republic is targeting DEPA and PPC, which are entities that play an indispensable role in the chain of the Greek energy sector, thus also indirectly addressing the liquidity issues arising for the rest of the market participants.
>
> (89) It follows that the targeted support to PPC is an adequate means to address the economic disturbance identified above.

In the case of Trainose, the aid was granted primarily in the form of debt cancellation, grants and equity injection. The aid was

> (231) appropriate to address a specific risk for the railway system and avert discontinuation of provision of rail services to the Greek economy and the population.

With respect to the necessity of the aid, the Commission concluded that without the aid, the liquidity problems and operating losses could not be resolved and moreover, there would be negative spill-overs into the rest of the economy. For the PPC, the Commission concluded that

> (89-90) the necessity of liquidity support to PPC cannot be put into question. ... The aid instrument chosen is a loan and a guarantee limited in time and scope and can be considered proportional to the pursued aims.

In view of its losses, Trainose in particular would go bankrupt without the aid '(232) causing serious disturbances and systemic implications for other Greek undertakings dependent on the transport services'.

With respect to the proportionality of aid, in all three cases the Commission found that the aid was limited to the minimum amount necessary for addressing the liquidity shortfall and covering operating losses. In addition, the State intervention was one-off intervention and temporary.

It should also be noted that in all three decisions the Commission examined whether the aid would have an undue negative effect on competition and intra-EU trade. It concluded that no such effect was likely. However, as will be seen in the next section, recent case law has confirmed that there is no need to examine the impact on competition and trade in the context of Article 107(3)(b).

V. The 2021 Judgments on the Compatibility of Article 107(3)(b) State Aid with the Internal Market

In 2021, the General Court delivered five judgments on the compatibility with the internal market of State aid granted on the basis of Article 107(3)(b) to undertakings outside the financial sector.[21] All judgments concerned airlines, as air transport was extensively impacted by the Covid-19 pandemic. All five judgments arose from appeals lodged by Ryanair against Commission decisions authorising State aid.[22] The numbers of the cases and their outcomes are shown in Table 1 below.

A common thread in all five cases was Ryanair's complaint that it suffered adverse discrimination because it was excluded from the aid measures in question. Therefore, in order to assess the compatibility of the aid measures with Article 107(3)(b), not only did the General Court have to identify the relevant criteria for compatibility, but also to determine the existence of discrimination. The reasoning of the General Court on the issue of discrimination is not considered in this article as it falls outside its scope.[23]

The General Court examined whether the aid complied with the criteria of appropriateness, necessity

21 For a review of how anti-trust and State aid rules have been applied during the pandemic, see Malgorzata Kozak, 'Competition Law and the COVID-19 Pandemic – Towards More Room for Public Interest Objectives?' (2021) 17(3) Utrecht Law Review 118–129. For a wider review of case law on state aid during the pandemic, see Vincent Correia, 'The General Court's Decisions on State Aid Law in Times of COVID-19 Pandemic' Pandemic (2022) 47(1) Air and Space Law 1-24.

22 For a review of State aid to the air transport sector in the context of Covid-19, see Steven Truxal, 'State Aid and Air Transport in the Shadow of COVID-19' (2020) 45(1) Air and Space Law 61-82; Petar Petrov, 'State Aid and COVID-19' (2021) 20(4) EStAL 461-478; Luis Martín-Domingo and Juan Carlos Martín, 'The Effect of COVID-Related EU State Aid on the Level Playing Field for Airlines' (2022) 14 Sustainability 2368; Jakub Kociubiński, 'A negative synergy – A review of direct subsidization mechanisms for scheduled air services following the COVID-19 pandemic in EU law and prospects for improvement' (2020) XL Polish Yearbook of International Law 209-227.

23 This issue is examined in detail in Phedon Nicolaides, 'The Limits of 'Proportionate' Discrimination' (2021) 20(3) EStAL 384-396.

Table 1. Recent judgments on Article 107(3)(b) TFEU

Date of judgment	Case number	Commission decision & MS	Legal basis	Aid measure or beneficiary	Outcome of appeal
17/2/2021	T-238/20	SA.56812 [SE]	Art 107(3)(b)	Scheme	Rejected
14/4/2021	T-388/20	SA.56809 [FI]	Art 107(3)(b)	Finnair	Rejected
19/5/2021	T-465/20	SA.57369 [PT]	Art 107(3)(b)	TAP Portugal	Suspended annulment[a]
19/5/2021	T-628/20	SA.57659 [ES]	Art 107(3)(b)	Scheme	Rejected
19/5/2021	T-643/20	SA.57116 [NL]	Art 107(3)(b)	KLM	Suspended annulment[b]

[a] The Commission decision was re-adopted on 16 July 2021.

[b] The Commission decision was re-adopted on 16 July 2021. In addition, on 27 July 2021, the Commission amended its decision SA.57082 concerning aid to Air France to ensure that no French aid benefits KLM indirectly via the Air France-KLM group.

and proportionality.[24] It should be noted that that was the first time that an EU court applied those three criteria together in reviews of the legality of Commission decisions concerning Article 107(3)(b).

But, it was not the first time an EU institution used those criteria together. For example, the Commission itself included them in the general principles of its 2011 Temporary Framework on State aid to counter the effects of the financial crisis. According to Section 2.1 of the 2011 Temporary Framework on the general principles concerning the applicability of Article 107(3)(b),

> Member States must show that the State aid measures notified to the Commission under this framework are necessary, appropriate and proportionate to remedy a serious disturbance.[25]

Moreover, in its decisions on aid to financial institutions in the period 2008-2011, the Commission also examined whether the aid was appropriate, necessary and proportional, although it did not join them together as an inseparable set of criteria.[26]

However, even before those five cases, it was an established principle that State aid had to be necessary for the achievement of the objective for which it was granted. The Court of Justice ruled in *Kotnik*[27], that

> (48) it is apparent from [Article 107(3)(b) TFEU] that the Commission may consider to be compatible with the internal market aid that is designed to remedy a serious disturbance in the economy of a Member State.
> (49) Within the discretion conferred on it by Article 107(3)(b) TFEU, the Commission is entitled to refuse the grant of aid where that aid does not induce the recipient undertakings to adopt conduct likely to assist attainment of one of the objectives referred to in that provision. Such aid must be necessary for the attainment of the objectives specified in that provision, in the sense that, without it, market forces alone would not succeed in getting the recipient undertakings to adopt conduct likely to assist attainment of those objectives. Aid which improves the financial situation of the recipient undertaking but is not necessary for the at-

24 Proportionality is a fundamental principle of EU law that applies to all institutions and all policy areas. See the analysis in T-I Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16(2) European Law Journal 158-165; W Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15(4) Cambridge Yearbook of European Legal Studies 439-466; C Haguenau-Moizard and Y Sanchez, 'The principle of proportionality in European law' in S Ranchordas and B de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2015); H Hofmann, 'Between Discretion and Proportionality' (University of Luxembourg Law Working Paper no 9, 2020).

25 Commission Communication on a Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis [2011] OJ C 6/5 <https://bit.ly/36DM7nr> accessed 28 March 2022.

26 See, for example, Commission Decision 2008/263 concerning state aid to BAWAG [2008] OJ L 83/7; Commission Decision 2009/341 concerning state aid to SachsenLB [2009] OJ L 104/34.

27 Case C-526/4 *Tadej Kotnik* [2016] EU:C:2016:570.

> tainment of the objectives specified in Article 107(3) TFEU cannot be considered to be compatible with the internal market.

In a later judgment, in T-388/20 *Ryanair*, the General Court expressed the principle of the necessity of the aid using different words:

> (33) the Commission may declare aid compatible with Article 107(3) TFEU only if it can establish that the aid contributes to the attainment of one of the objectives specified, something which, under normal market conditions, the recipient undertaking would not achieve by using its own resources.

Of the five cases in Table 1, only three are reviewed below. The judgments concerning TAP Portugal and KLM resulted in a suspended annulment of the related Commission decisions on the grounds that the Commission had not examined sufficiently the financial links between the various undertakings within the TAP Group and whether KLM could have benefitted from earlier aid that had been granted to Air France, given that KLM and Air France belong to the same corporate group.

1. T-238/20 *Ryanair v European Commission*[28]

In this case the objective of the aid measure was to ensure connectivity within Sweden and between Sweden and other countries. For this reason, the aid was limited to airlines licensed in Sweden.

Although the General Court did eventually rule that in order to determine the compatibility of the aid the Commission was only required to 'ascertain' whether the aid was '(69) necessary, appropriate and proportionate in order to remedy a serious disturbance', it did so fairly late in the judgment and did not carry out a clearly separate analysis of each of those three criteria.

With respect to the necessity of the aid, the judgment appears to conflate appropriateness and necessity, despite the fact that necessity means that without the aid the public policy objective in question cannot be achieved.

With respect to the appropriateness of the aid, the General Court found that the measure in question was indeed appropriate to remedy a serious economic disturbance because it was aimed to airlines that had their principal place of business in Sweden and, therefore, they could ensure its domestic and international connectivity.[29]

With respect to the proportionality of the aid, the General Court pointed out that the Swedish measures limited the aid beneficiaries to airlines that served extensively the Swedish economy and had a durable link with the Swedish territory:

> (45) With regard to the proportionate nature of the aid scheme at issue, it must be noted that, in order to secure Sweden's connectivity, the double requirement of a Swedish licence and air services in Swedish territory through regular flights is the most appropriate for guaranteeing that the presence of an airline on that territory is permanent ....

Therefore, '(46) the aid scheme at issue did not go beyond what was necessary to achieve the stated objective of the Swedish authorities'.

It is important to note that this description of proportionality appears to be different from the standard definition of proportionality in the field of State aid, which relates to the minimum amount of aid that can incentivise the recipient to carry out a project. In cases of damage or of losses incurred as a result of a serious disturbance, it is the minimum amount of aid that compensates for the damage or offsets losses. Rather the description of proportionality in paragraph 46 of the judgment seems to refer to the scope of the measure and to confirm that it did not extend beyond what was necessary for achieving its objective of ensuring connectivity or that the exclusion of airlines not licensed in Sweden was not more restrictive than necessary. This interpretation is borne out by the fact that a few paragraphs later, the General Court stated that '(50) it is therefore not contrary to the principle of proportionality, in light of the objective of the aid scheme at issue, to permit airlines which have a smaller share of the market than [Ryanair] on the overall passenger air transport market relating to Sweden to be eligible for that scheme, in particular where such airlines are of particular importance to that country's connectivity'.

28 Case T-238/20 *Ryanair v European Commission* [2021] EU:T:2021:91.

29 T-238/20 *Ryanair*, para 44.

In other words, the Swedish measure was proportional, despite not being open to all airlines, because it was limited to airlines that were in the best position to contribute to connectivity.

a. Effect on Trade and Balancing Test?

What makes the judgment in case T-238/20 stand out is a novel interpretation of whether Article 107(3)(b) aid must avoid causing an undue negative effect on trade and competition. According to the General Court,

> (67) it follows from the wording of [Article 107(3)(b)] that its authors considered that it was in the interests of the European Union as a whole that one or other of its Member States be able to overcome a major or possibly even an existential crisis which could only have serious consequences for the economy of all or some of the other Member States and therefore for the European Union as a whole. That textual interpretation of the wording of Article 107(3)(b) TFEU is confirmed by comparing it with Article 107(3)(c) TFEU concerning 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest', in so far as the wording of the latter provision contains a condition relating to proof that there is no effect on trading conditions to an extent that is contrary to the common interest, which is not found in Article 107(3)(b) TFEU.

At this point the General Court cited the judgment of the Court of Justice in case C-594/18 P *Austria v European Commission* (*Hinkley Point C*), paragraphs 20 and 39. Yet paragraphs 20 and 39 refer to the absence in Article 107(3)(c) of any mention of the words 'common European interest'. They do not refer to trading conditions. Moreover, the words 'common European interest' in Article 107(3)(b) concern 'important projects', not a serious disturbance. So, it is not easy to understand the logic of the General Court in comparing in the way it did Articles 107(3)(b) and (c).

Nonetheless, the General Court went on to hold that

> (68) in so far as the conditions laid down in Article 107(3)(b) TFEU are fulfilled, that is to say, in the present case, that the Member State concerned is indeed confronted with a serious disturbance in its economy and that the aid measures adopted to remedy that disturbance are, first, necessary for that purpose and, secondly, appropriate and proportionate, those measures are presumed to be adopted in the interests of the European Union, so that that provision does not require the Commission to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition, contrary to what is laid down in Article 107(3)(c) TFEU. In other words, such a balancing exercise would have no raison d'être in the context of Article 107(3)(b) TFEU, as its result is presumed to be positive. Indeed, the fact that a Member State manages to remedy a serious disturbance in its economy can only benefit the European Union in general and the internal market in particular.
>
> (69) It must therefore be held that Article 107(3)(b) TFEU does not require the Commission to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition, contrary to what is laid down in Article 107(3)(c) TFEU, but only to ascertain whether the aid measure at issue is necessary, appropriate and proportionate in order to remedy the serious disturbance in the economy of the Member State concerned.

This novel interpretation of Article 107(3)(b) appears to limit the discretion of the Commission to determine the compatibility of the aid and to impose additional but necessary conditions on aid recipients so as to minimise the distortion caused by the aid despite that fact that in previous case law the General Court confirmed that the Commission was entitled to make its authorisation of aid measures conditional (see the judgments in *Westfälisch-Lippischer Sparkassen- und Giroverband*[30] and *ABN AMRO*[31]).

Moreover, this interpretation of the General Court implicitly contradicts the position of the Court of Justice which ruled in *BPP*[32] that

> (66) the aid which is covered by Article 107(3)(b) TFEU is not ex lege compatible with the internal market, but rather may be considered by the Com-

30 T-457/09 *Westfälisch-Lippischer Sparkassen- und Giroverband*.

31 T-319/11 *ABN AMRO*.

32 C-667/13 *BPP*.

mission to be compatible with that internal market.

With its new interpretation in the Swedish case, the General Court also deviates from its own previous judgments where it held that consideration of the effect on trade and competition was necessary [see *AITEC*[33] and *HH Ferries*[34]).

2. T-388/20 *Ryanair v European Commission*

In this case the objective of the aid, in the form of an individual measure, was to assist Finnair to avoid insolvency as a result of the collapse of air travel caused by Covid-19.

By contrast to the Swedish case, in the Finnair case the General Court ruled at the very outset that

> (3) individual aid such as the one in the present case may be declared compatible with the internal market where it is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of the Member State concerned.

With regard to the necessity of the aid, the only clear explanations in that respect are a few very short statements that the aid measure was '(66) necessary for that purpose' and that '(87) the grant of the State guarantee only to Finnair is necessary in order to pursue that objective [of ensuring sufficient liquidity for Finnair to avoid bankruptcy]'. Other references to necessity were linked to proportionality.

With regard to the appropriateness of the aid, the General Court examined whether the aid was capable of redressing the negative impact of the pandemic. That is, whether

> (42) because of Finnair's importance for the Finnish economy, that measure was in fact intended to remedy the serious disturbance in the Finnish economy caused by the COVID-19 outbreak.

Then it pointed out that

> (43) in reaching that conclusion, the Commission took into account a number of factors, including passenger transport, freight transport, employment, purchases from suppliers and the contribution to gross domestic product (GDP).

Furthermore,

> (56) in view of Finnair's importance in the Finnish economy, its insolvency would have had serious consequences for the Finnish economy in a crisis context and that, therefore, the measure at issue, in so far as it sought to maintain Finnair's operations, was appropriate to contribute to remedying the serious disturbance in that economy.

With respect to the proportionality of the aid, the General Court, first recalled that

> (90) the principle of proportionality, which is one of the general principles of EU law, requires that acts adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question ... ; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

Then it applied that principle to the present case:

> (91) The grant of the State guarantee only to Finnair did not exceed the limits of what was appropriate and necessary to achieve the legitimate objectives pursued by the Republic of Finland and was not therefore disproportionate, contrary to what the applicant claims.

So, we see again the words 'appropriate' and 'necessary' being used in the assessment of compliance with the principle of proportionality. Given that the General Court examined the proportionality of the aid in relation to the limits of what was appropriate and necessary, we must again conclude that the issue at hand was not the amount of aid but the scope of the measure.

a. No Assessment of Impact on Trade and Competition and No Balancing Test

In paragraphs 65-67 of the judgment, the General Court repeated the text of paragraphs 67-69 of the judgment in the Swedish case that there was no need for assessment of the impact of the aid on trade and competition and no need for a balancing test.

33 T-447/93 *AITEC*.

34 T-68/15 *HH Ferries*.

3. T-628/20 *Ryanair v European Commission*

In this case the objective of the aid was to provide liquidity support, in the form of equity and loans, to undertakings affected by Covid-19 and which were strategically important for the Spanish economy. For this reason, the aid was limited to undertakings with their principal place of business in Spain and stable and durable links to the Spanish economy.

As in the other two cases, although the General Court, in paragraph 27 of the judgment, identified the criteria of necessity, appropriateness and proportionality, it did not analyse them separately.

For example, it found that

> (29) since the existence of both a serious disturbance in the Spanish economy as a result of the COVID-19 pandemic and of the significant adverse effects of the latter on the Spanish economy, have been established ..., the objective of the aid scheme at issue satisfies the conditions laid down in Article 107(3)(b) TFEU.
>
> (30) In addition, the criterion of the strategic and systemic importance of the beneficiaries of the aid properly reflects the objective of the aid scheme at issue, namely to remedy a serious disturbance in the Spanish economy within the meaning of Article 107(3)(b) TFEU.

These findings appear to confirm the appropriateness of the aid, even though it is not stated as such.

When it referred explicitly to '(32) the appropriateness and necessity of the aid scheme at issue', in fact the General Court sought to establish, in paragraphs 32-40 of the judgment, that the limitation of the aid to undertakings with stable and durable links to the Spanish economy was suitable or capable of redressing the harm inflicted on the economy by Covid-19. This is borne out by the conclusion of the General Court according to which

> (42) by limiting the benefit of the aid solely to undertakings of systemic or strategic importance for the Spanish economy, ..., the aid scheme at issue is both appropriate and necessary to attain the objective of remedying the serious disturbance in the economy of that Member State.

With regard to the proportionality of the aid and the fact that the aid measure excluded undertakings not established in Spain, the General Court first recalled the appropriateness of the aid to remedy the disturbance:

> (45) The grant of public funds under Article 107(3)(b) TFEU presupposes that the aid provided by the Member State concerned, even though it is in serious difficulty, is capable of remedying the disturbances in its economy, which presupposes that the situation of the undertakings likely to enable the economy to recover is taken into account.

Then, after explaining how undertakings with stable and durable links to the economy were better placed to help the long-term recovery of the economy, the General Court concluded that '(52) the conditions for granting the aid do not go beyond what is necessary to achieve that objective.'

So, again we see that in order to determine the proportionality of the aid, the General Court did not examine the amount of aid that was used to support beneficiary undertakings, but the scope of application of the aid measure and whether it did not exclude undertakings that were equally capable of contributing to the long-term recovery of the economy.

a. No Assessment of Trade Effect or Balancing Test

In paragraphs 66-68 of the judgment, the General Court reiterated almost verbatim the statements in the two earlier judgments that Article 107(3)(b) does not require any assessment of the impact of the aid on intra-EU trade, nor any balancing of the positive and negatives effects of the aid.

VI. The Evolving Interpretation of Article 107(3)(b) TFEU

After two and a half decades of case law and decisional practice by the Commission, it is now fairly safe to conclude that not only there must be a large disturbance affecting the whole economy, but also that aid granted on the basis of Article 107(3)(b) TFEU may also aim to prevent further deterioration of economic conditions. Therefore, aid to a single undertaking is possible not only when that undertaking has been impacted by the disturbance but also when the aid can prevent a worsening of the disturbance as a result of possible failure of that undertaking. In

this respect, the interconnectedness of different economic sectors and possible spill-overs from one sector to another are important factors.

It is also safe to conclude that in assessing State aid granted on the basis of Article 107(3)(b), the Commission will apply the three criteria of appropriateness, necessity and proportionality. These criteria as a set have been endorsed by the General Court. Although it appears that no similar endorsement of the set has been made by the Court of Justice, there is no reason why the Court of Justice would conclude otherwise. It itself has applied them separately in its judgments.

In the Commission's decisional practice the application of the three criteria is much clearer than in the case law of the General Court. More importantly, the 2021 judgments of the General Court indicate that the principle of proportionality does not only apply to the amount of aid, but also the scope of the aid measure. However, what is more certain is that the three criteria must be applied with respect to the objective of the aid measure. For example, if the aid measure aims to ensure connectivity, the scope of the aid measure must exclude undertakings that cannot contribute to connectivity. A wider scope would make the aid measure and, consequently, the dispensed aid amounts disproportional to the objective.

The most significant departure from previous case law by the 2021 judgments of the General Court is that Article 107(3)(b) does not require an assessment of the impact of aid on trade and competition and that the Commission is not required to carry out any balancing test. The Court of Justice has not yet pronounced on this issue. Since there are seven appeals by Ryanair pending before the Court of Justice on Covid-19 cases, we need to wait for the outcome of those appeals before we can conclude whether a balancing test and assessment of the effect on trade and competition can be dispensed.[35]

VII. Conclusions

This article has reviewed the evolving case law on Article 107(3)(b) TFEU. State aid granted on the basis of that provision of the Treaty must be appropriate, necessary and proportional. Although each of the three criteria has been interpreted in numerous cases, it is still not clear in the case law how they are to be applied in conjunction with each other in assessing State aid granted on the basis of Article 107(3)(b).

Several judgments of the General Court delivered in 2021 also indicate that the principle of proportionality can refer to both the amount of aid as well as to the scope of the aid measure.

The 2021 judgments of the General Court represent a departure from previous case law in so far as they dispense with any assessment of the impact of State aid on trade and competition. Since aid on the basis of Article 107(3)(b) aims to remedy a serious economic disturbance, it is also presumed to be in the interest of all Member States. Pending cases before the Court of Justice may still reverse this new interpretation of the application of Article 107(3)(b).

35 For a list of appeals by Ryanair, please see Curia, 'List of result' <https://bit.ly/3NuMXDw> accessed 28 March 2022.

La prescription dans l'action en responsabilité contre l'Union européenne

The prescription in the action of responsibility against the European Union

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Non-contractual liability of the EU – Five year presciption period – Interruption – Action for annulment – Action for failure to act

Under article 46 of the Statute of the ECJ, proceedings against the Union in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Union. The main difficulty is to determine the starting point of the delay. Another difficulty consists in identifying the admissible causes of interruption.

Généralement définie comme une consolidation d'une situation juridique par l'écoulement d'un délai, la prescription est tantôt acquisitive tantôt extinctive. Lorsqu'elle est prévue dans une action en justice visant à obtenir la réparation d'un préjudice, telle que celle qui peut être dirigée contre l'Union européenne, la prescription est extinctive en ce sens qu'elle fait perdre le droit à la réparation d'un préjudice du fait de l'inaction prolongée du titulaire du droit qui peut être qualifié de subjectif.

L'action en responsabilité extracontractuelle contre l'Union européenne prévue par l'article 268 TFUE est peu encadrée par les dispositions du traité, cet article se limitant à établir la compétence de la Cour de justice de l'Union européenne et renvoyant à une disposition finale du traité, l'article 340, alinéas 2 et 3, TFUE qui s'attache au régime de la responsabilité défini par renvoi aux régimes nationaux, l'Union étant tenue de réparer, conformément aux principes généraux communs aux droits des États

membres, les dommages causés par ses institutions ou par ses agents dans l'exercice de leurs fonctions.

Les articles 268 et 340 du TFUE n'indiquent pas précisément les conditions de recevabilité de tels recours, lesquelles ont été définies progressivement par la jurisprudence de la Cour de justice et du Tribunal. Il n'est ainsi pas exigé, comme dans certains droits nationaux, de former une demande de réparation auprès de l'administration de l'Union préalablement au recours contentieux devant la Cour de justice de l'Union européenne. Aucun délai de recours n'a été fixé, à la différence du recours en annulation et du recours en carence définis par les articles 263 et 265 du TFUE.

C'est dans le statut de la Cour de justice de l'Union européenne établi par voie de protocole annexé aux traités constitutifs et qui a la même valeur que ces derniers en vertu de l'article 51 du TUE qu'un délai est fixé non pas en tant que délai de recours mais en tant que délai de prescription.

L'article 46 du statut de la Cour de justice de l'Union européenne, applicable au Tribunal en vertu de l'article 53 du même statut, dispose que :

> « *Les actions contre l'Union en matière de responsabilité non contractuelle se prescrivent par cinq ans à compter de la survenance du fait qui y donne lieu. La prescription est interrompue soit par la requête formée devant la Cour de justice, soit par la demande préalable que la victime peut adresser à l'institution compétente de l'Union. Dans ce dernier cas, la requête doit être formée dans le délai de deux mois prévu à l'article 263 du traité sur le fonctionnement de l'Union européenne ; les dispositions de l'article 265, deuxième alinéa, du traité sur le fonctionnement de l'Union européenne sont, le cas échéant, applicables. Le présent article est également applicable aux actions contre la Banque centrale européenne en matière de responsabilité non contractuelle* ».

Comme on l'a souligné, le calcul du délai ainsi établi « *ne sert pas exclusivement à déterminer si le recours est ou non recevable* », il permet de « *déterminer l'étendue de la période pour laquelle le requérant, recevable dans son action, peut obtenir réparation* »[1]. Le délai de prescription ne saurait dès lors en aucun cas être assimilé à un délai de procédure[2].

La Cour de justice puis le Tribunal ont justement observé que la fonction de la prescription était de concilier la protection des droits de la personne lésée et le principe de sécurité juridique[3]. Il s'agit tout particulièrement de permettre à la personne lésée de réunir les informations nécessaires à l'introduction d'un possible recours et d'éviter en même temps qu'elle diffère indéfiniment l'exercice de son droit à dommages et intérêts[4].

La durée du délai de prescription qui a été fixée par les auteurs du statut de la Cour de justice de l'Union européenne a été déterminée en tenant compte du temps nécessaire à la partie prétendument lésée pour rassembler les informations requises en vue d'un recours et pour vérifier les faits susceptibles d'être allégués à l'appui de ce recours[5].

Ayant une nature différente de celle des délais de procédure et étant beaucoup plus long que ces derniers, le délai de prescription ne saurait se voir ajouter un délai de distance[6] lequel se rapporte précisément aux délais de recours et aux délais de procédure.

Conformément à un principe général de droit commun aux États membres, le juge ne peut pas soulever d'office le moyen tiré de la prescription de l'action[7]. La prescription est une fin de

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[1] J. Rideau, F. Picod, *Code de procédures juridictionnelles de l'Union européenne*, Paris, Litec, 2002, p. 350.

[2] V., en ce sens, CJUE, arrêt du 8 novembre 2012, *Evropaïki Dynamiki/Commission*, C-469/11 P, EU:C:2012:705, point 49.

[3] CJUE, ordonnance du 18 juillet 2002, *Autosalone Ispra dei Fratelli Rossi/Commission*, C-136/01 P, EU:C:2002:458, point 28.

[4] V., en ce sens, CJUE, arrêt du 8 novembre 2012, *Evropaïki Dynamiki/Commission*, C-469/11 P, EU:C:2012:705, point 53.

[5] CJUE, ordonnance du 18 juillet 2002, *Autosalone Ispra dei Fratelli Rossi/Commission*, C-136/01 P, EU:C:2002:458, point 28 ; CJUE, arrêt du 8 novembre 2012, *Evropaïki Dynamiki/Commission*, C-469/11 P, EU:C:2012:705, point 33 ; Trib. UE, ordonnance du 20 mars 2014, *Donnici/Parlement*, T-43/13, EU:T:2014:167, point 47 ; Trib. UE, ordonnance du 2 février 2015, *Gascogne Sack Deutschland et Gascogne/Union européenne*, T-577/14, non publiée, EU:T:2015:80, point 42 ; Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 24.

[6] CJUE, arrêt du 8 novembre 2012, *Evropaïki Dynamiki/Commission*, C-469/11 P, EU:C:2012:705, points 58 et 59.

[7] CJCE, arrêt du 30 mai 1989, *Roquette frères/Commission*, 20/88, EU:C:1989:221, point 12 ; CJUE, arrêt du 8 novembre 2012, *Evropaïki Dynamiki/Commission*, C-469/11 P, EU:C:2012:705, point 51 ;Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 23 ; Trib. UE, arrêt du 13 décembre 2018, *Post Bank Iran/Conseil*, T-559/15, EU:T:2018:948, point 57 ; CJUE, arrêt du 5 septembre

non-recevoir qui peut conduire à éteindre l'action en responsabilité sur demande de la partie défenderesse[8].

Dans le cadre des recours visant à mettre en cause la responsabilité extracontractuelle de l'Union européenne, le Tribunal est désormais compétent pour statuer sur de tels recours en première instance, en vertu de l'article 256 TFUE, et vérifier l'existence d'une prescription. Sur pourvoi, la Cour de justice est compétente pour apprécier si le Tribunal a correctement fait application des dispositions qui régissent la prescription des recours[9], mais elle ne pourra pas non plus statuer d'office, ce qui impose à l'auteur du pourvoi de soulever cette question[10].

La prescription ainsi définie donne lieu à de multiples interrogations tant en ce qui concerne le point de départ du délai qu'en ce qui concerne les événements susceptibles d'interrompre le délai. Ce sont ces deux questions qui retiendront notre attention. Nous examinerons successivement la question du point de départ du délai qui est souvent difficile à déterminer (I) et la diversité des causes de son interruption qui donnent lieu à une recherche aléatoire (II).

I. La difficile détermination du point de départ du délai de prescription

Comme tous les délais de prescription, celui qui a été prévu par le statut de la Cour de justice de l'Union européenne se rapportant aux recours en réparation fondés sur la responsabilité extracontractuelle de l'Union européenne soulève de multiples difficultés concernant la détermination de son point de départ.

Suivant une jurisprudence constante de la Cour de justice, le délai de prescription ne peut commencer à courir avant que ne soient réunies toutes les conditions auxquelles l'obligation de réparation se trouve subordonnée[11]. Les conditions, au nombre de trois, se rapportent à la violation caractérisée du droit de l'Union européenne, au préjudice subi et au lien de causalité entre ladite violation et le préjudice subi[12]. Cette jurisprudence a été appliquée à la lettre par le Tribunal qui énonce l'exigence formulée par la Cour de justice dans des termes proches, voire identiques à ceux choisis par cette dernière[13].

Il arrive que la victime d'un dommage n'ait pu prendre connaissance du fait générateur de ce dommage qu'à une date tardive et n'ait ainsi pu disposer d'un délai raisonnable pour présenter sa requête devant le Tribunal ou sa demande auprès de l'institution de l'Union européenne en cause avant l'expiration du délai de prescription. Dans un tel cas de figure, la prescription ne saurait logiquement lui être opposée, ce qu'ont concédé la Cour de justice puis le Tribunal[14].

2019, *Union européenne/Guardian Europe et Guardian Europe/Union européenne*, C-447/17 P et C-479/17 P, EU:C:2019:672, point 99.

[8] CJUE, arrêt du 8 novembre 2012, *Evropaïki Dynamiki/Commission*, C-469/11 P, EU:C:2012:705, point 54 ; CJUE, arrêt du 14 juin 2016, *Marchiani/Parlement*, C-566/14 P, EU:C:2016:437, point 94 ; Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 23 ;CJUE, arrêt du 5 septembre 2019, *Union européenne/Guardian Europe et Guardian Europe/Union européenne*, C-447/17 P et C-479/17 P, EU:C:2019:672, point 99.

[9] CJUE, ordonnance du 18 juillet 2002, *Autosalone Ispra dei Fratelli Rossi/Commission*, C-136/01 P, EU:C:2002:458, point 26.

[10] CJUE, arrêt du 5 septembre 2019, *Union européenne/Guardian Europe et Guardian Europe/Union européenne*, C-447/17 P et C-479/17 P, EU:C:2019:672, point 100.

[11] CJCE, arrêt du 13 novembre 1984, *Birra Wührer e.a./Conseil et Commission*, 256/80, 257/80, 265/80, 267/80, 5/81, 51/81 et 282/82, EU:C:1984:341, point 10 ; CJCE, arrêt du 27 janvier 1982, *De Franceschi/Conseil et Commission*, 51/81, non publié, EU:C:1982:20, point 10 ; CJUE, ordonnance du 18 juillet 2002, *Autosalone Ispra dei Fratelli Rossi/Commission*, C-136/01 P, EU:C:2002:458, point 30 ; CJCE, arrêt du 17 juillet 2008, *Commission/Cantina sociale di Dolianova e.a.*, C-51/05 P, EU:C:2008:409, point 54 ; CJUE, arrêt du 8 novembre 2012, *Evropaïki Dynamiki/Commission*, C-469/11 P, EU:C:2012:705, point 34 ; Trib. UE, arrêt du 10 janvier 2017, *Gascogne Sack Deutschland et Gascogne/Union européenne*, T-577/14, EU:T:2017:1, point 43.

[12] Pour une étude récente, v. F. Picod, « Recours en indemnité au titre de la responsabilité extracontractuelle de l'Union européenne. Conditions de fond », *JCl. Europe*, fasc. 371, Paris, LexisNexis, 2021.

[13] TPICE, arrêt du 16 avril 1997, *Hartmann/Conseil et Commission*, T-20/94, EU:T:1997:55, point 107 ; TPICE, arrêt du 9 décembre 1997, *Quiller et Heusmann/Conseil et Commission*, T-195/94 et T-202/94, EU:T:1997:191, point 114 ; TPICE, arrêt du 4 février 1998, *Bühring/Conseil et Commission*, T-246/93, EU:T:1998:21, point 66 ; TPICE, arrêt du 25 novembre 1998, *Steffens/Conseil et Commission*, T-222/97, EU:T:1998:267, point 31 ; TPICE, ordonnance du 4 août 1999, *Fratelli Murri/Commission*, T-106/98, EU:T:1999:163, point 25 ; TPICE, arrêt du 31 janvier 2001, *Jansma/Conseil et Commission*, T-76/94, EU:T:2001:26, point 76 ; TPICE, arrêt du 31 janvier 2001, *van den Berg/Conseil et Commission*, T-143/97, EU:T:2001:27, point 58 ; TPICE, arrêt du 7 février 2002, *Schulte/Conseil et Commission*, T-261/94, EU:T:2002:27, point 59 ; TPICE, arrêt du 27 septembre 2007, *Pelle et Konrad/Conseil et Commission*, T-8/95 et T-9/95, EU:T:2007:298, point 61 ; TPICE, ordonnance du 20 mars 2014, *Donnici/Parlement*, T-43/13, EU:T:2014:167, point 48 ; TPICE, arrêt du 21 avril 2005, *Holcim (Deutschland)/Commission*, T-28/03, EU:T:2005:139, point 59 ; Trib. UE, arrêt du 18 septembre 2014, *Georgias e.a./Conseil et Commission*, T-168/12, EU:T:2014:781, point 30 ; Trib. UE, arrêt du 16 décembre 2015, *Chart/SEAE*, T-138/14, EU:T:2015:981, point 56 ; Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 25.

[14] CJCE, arrêt du 7 novembre 1985, *Adams/Commission*, 145/83, EU:C:1985:448, point 50 ; TPICE, ordonnance du 1er avril 2009, *Perry/Commission*, T-280/08, non publiée, EU:T:2009:98, point 36 ;

Il s'agit là d'une tolérance qui ne peut toutefois être admise que de manière exceptionnelle. Dans la plupart des cas, le juge de l'Union sera amené à écarter l'invocation de ce type d'argument fondé sur la prise de connaissance tardive d'un fait générateur du préjudice[15].

La Cour de justice et le Tribunal rappellent en effet que les conditions auxquelles se trouve subordonnée l'obligation de réparation et ainsi les règles de prescription ne peuvent être fondées que sur des critères strictement objectifs[16], faute de quoi des atteintes au principe de sécurité juridique pourraient en découler.

Ainsi, la juridiction de l'Union européenne écarte la thèse selon laquelle le délai de prescription ne commencerait à courir qu'à compter du moment où la victime a une connaissance précise et circonstanciée des faits, étant entendu qu'une telle connaissance ne figure pas au nombre des éléments qui doivent être réunis pour faire courir le délai de prescription[17]. De même, l'appréciation subjective de la réalité du dommage ne saurait être prise en considération dans la détermination du point de départ du délai de prescription[18].

Sur pourvoi, la Cour de justice a ainsi été amenée à annuler un arrêt du Tribunal qui avait déterminé le point de départ du délai de prescription d'une action en responsabilité en s'appuyant sur la perception que les prétendues victimes avaient eue des effets dommageables d'un règlement, la Cour ayant considéré que le déclenchement du délai était lié à la perte objective concrètement occasionnée dans le patrimoine de la partie prétendument lésée consécutivement à l'adoption d'un règlement qui avait pour effet de ne plus garantir le versement direct d'une aide européenne lors d'une insolvabilité[19].

La sévérité de cette jurisprudence ne doit pas être exagérée compte tenu de la longueur du délai de prescription qui contraste avec celle d'un délai de recours en annulation qui laisse place à des appréciations plus souples en ce qui concerne la détermination du point de départ du délai de recours parfois déterminé en fonction de la prise de connaissance effective de l'acte en cause[20].

La jurisprudence de la Cour de justice et du Tribunal révèle qu'une distinction est logiquement opérée entre les actes normatifs et les actes individuels. Il apparaît toutefois que cette distinction n'emporte pas des conséquences fondamentalement différentes.

Lorsque la responsabilité de l'Union européenne trouve sa source dans des actes normatifs de l'Union européenne, le délai de prescription commence à courir à partir du moment où les effets dommageables de ces actes se produisent par la concrétisation du dommage[21]. Ce

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Trib. UE, ordonnance du 20 mars 2014, *Donnici/Parlement*, T-43/13, EU:T:2014:167 , point 49 ; Trib. UE, arrêt du 16 décembre 2015, *Chart/SEAE*, T-138/14, EU:T:2015:981, point 57 ; Trib. UE, arrêt du 10 janvier 2017, *Gascogne Sack Deutschland et Gascogne/Union européenne*, T-577/14, EU:T:2017:1, point 44 ; Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 38.

[15] V., par exemple, CJCE, arrêt du 17 juillet 2008, *Commission/Cantina sociale di Dolianova e.a.*, C-51/05 P, EU:C:2008:409, point 67 ; Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 39.

[16] CJCE, arrêt du 17 juillet 2008, *Commission/Cantina sociale di Dolianova e.a.*, C-51/05 P, EU:C:2008:409, point 59 ; CJUE, arrêt du 8 novembre 2012, *Evropaïki Dynamiki/Commission*, C-469/11 P, EU:C:2012:705, point 36 ; Trib. UE, ordonnance du 20 mars 2014, *Donnici/Parlement*, T-43/13, EU:T:2014:167, point 50 ; Trib. UE, arrêt du 10 janvier 2017, *Gascogne Sack Deutschland et Gascogne/Union européenne*, T-577/14, EU:T:2017:1, point 44 ; Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 40.

[17] CJCE, ordonnance du 18 juillet 2002, *Autosalone Ispra dei Fratelli Rossi/Commission*, C-136/01 P, EU:C:2002:4, point 31 ; CJCE, arrêt du 17 juillet 2008, *Commission/Cantina sociale di Dolianova e.a.*, C-51/05 P, EU:C:2008:409, point 61 ; CJUE, arrêt du 8 novembre 2012, *Evropaïki Dynamiki/Commission*, C-469/11 P, EU:C:2012:705, point 37 ; CJUE, arrêt du 28 février 2013, *Inalca et Cremonini/Commission*, C-460/09 P, EU:C:2013:111, point 70 ; Trib. UE, ordonnance du 20 mars 2014, *Donnici/Parlement*, T-43/13, EU:T:2014:167, point 51 ; Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 40.

[18] CJCE, arrêt du 17 juillet 2008, *Commission/Cantina sociale di Dolianova e.a.*, C-51/05 P, EU:C:2008:409, point 61 ; CJUE, arrêt du 8 novembre 2012, *Evropaïki Dynamiki/Commission*, C-469/11 P, EU:C:2012:705, point 37 ; CJUE, arrêt du 28 février 2013, *Inalca et Cremonini/Commission*, C-460/09 P, EU :C :2013 :111, point 70 ; Trib. UE, ordonnance du 20 mars 2014, *Donnici/Parlement*, T-43/13, EU:T:2014:167, point 51 ; Trib. UE, arrêt du 10 janvier 2017, *Gascogne Sack Deutschland et Gascogne/Union européenne*, T-577/14, EU:T:2017:1, point 44 ; Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 40.

[19] CJCE, arrêt du 17 juillet 2008, *Commission/Cantina sociale di Dolianova e.a.*, C-51/05 P, EU:C:2008:409, point 65.

[20] V. à ce sujet CJCE, arrêt du 5 mars 1980, *Könecke Fleischwarenfabrik/Commission*, 76/79, EU:C:1980:68 ; TPICE, arrêt du 19 mai 1994, *Consorzio gruppo di azione locale "Murgia Messapica"/Commission*, T-465/93, EU:T:1994:56, point 2 ; TPICE, arrêt du 7 mars 1995, *Socurte e.a./Commission*, T-432/93 à T-434/93, EU:T:1995:43 ; TPICE, ordonnance du 30 septembre 1997, *Inef/Commission*, T-151/95, EU:T:1997:141.

[21] CJCE, arrêt du 13 novembre 1984, *Birra Wührer e.a./Conseil et Commission*, 256/80, 257/80, 265/80, 267/80, 5/81, 51/81 et 282/82, EU:C:1984:341, point 10 ; CJCE, arrêt du 27 janvier 1982, *De Franceschi/Conseil et Commission*, 51/81, non publié, EU:C:1982:20, point 10 ; CJCE, arrêt du 13 novembre 1984, *Birra Wührer e.a./Conseil et Commission*, 256/80, 257/80, 265/80, 267/80, 5/81, 51/81 et 282/82, EU:C:1984:341, point 15 ; TPICE, arrêt du 9 décembre 1997, *Quiller et Heusmann/Conseil*

n'est ainsi pas la date d'entrée en vigueur de l'acte réglementaire ni celle de sa publication au *Journal officiel de l'Union européenne* mais la date à partir de laquelle il a produit des effets dommageables sur la victime[22].

Lorsque la responsabilité de l'Union européenne trouve sa source dans des actes individuels pris par ses institutions ou des organes de l'Union, le délai de prescription commence à courir à partir du moment où ces actes ont produit leurs effets dommageables à l'égard des personnes qu'ils visent[23], et ce indépendamment de la date de leur notification au destinataire. Il est toutefois possible que ces moments correspondent. Ainsi, une décision du Parlement européen qui déclare non valide le mandat d'un candidat et confirme le mandat d'un autre candidat est censée produire des effets dommageables à compter du moment où le Parlement européen lui a notifié sa décision[24].

Le doute est parfois permis en ce qui concerne l'acte qui est la source du préjudice subi. S'agissant par exemple d'un rejet d'une offre soumise par une entreprise à la suite d'un appel d'offre, c'est la décision du pouvoir adjudicateur de rejet de l'offre soumise qui constitue le fait générateur de la responsabilité. La prise de connaissance d'une telle décision constitue le déclenchement du délai de prescription, indépendamment de la motivation qui s'y rapporte et qui a pu justifier des informations complémentaires concernant les motifs du refus[25].

La pratique normative révèle dans certaines matières l'existence d'actes à la fois de portée générale, dans la mesure où ils définissent des critères auxquels une personne doit répondre pour faire l'objet de mesures restrictives, et de portée individuelle, dans la mesure où ils interdisent à des personnes déterminées certains actes[26].

Il peut arriver qu'un préjudice prétendument subi trouve sa source dans plusieurs actes de droit dérivé, les uns ayant un caractère normatif, les autres ayant un caractère individuel, ce qui conduira en principe à déterminer plusieurs points de départ de la prescription[27].

En présence d'un fait dommageable qui trouve sa source non pas dans un acte mais dans le traitement jurisprudentiel d'une affaire soumise à une juridiction de l'Union européenne, il y a lieu de s'interroger sur le type de violation commise au détriment d'une des parties ou d'un tiers. Dans le cas d'une prétendue méconnaissance des exigences liées au respect du délai de jugement raisonnable par le Tribunal, le point de départ du délai de prescription ne saurait être fixé à partir du moment où le délai a paru devenir déraisonnable, compte tenu de la subjectivité de l'appréciation. Le Tribunal a considéré, dans de telles circonstances, que le point de départ du délai de prescription devait être fixé à une date à laquelle le fait générateur s'était entièrement concrétisé, ce qui l'a conduit à retenir la date du jugement adopté au terme du délai de jugement prétendument excessif, cette date étant certaine et fixée sur la base de critères objectifs[28].

L'argument parfois avancé suivant lequel le délai de prescription n'aurait commencé à courir qu'à partir de la date de déclaration d'invalidité de l'acte de l'Union européenne par un arrêt de la Cour de justice ou du Tribunal a été rejeté

et Commission, T-195/94 et T-202/94, EU:T:1997:191, point 114 ; TPICE, arrêt du 31 janvier 2001, *Jansma/Conseil et Commission*, T-76/94, EU:T:2001:26, point 76 ; TPICE, arrêt du 31 janvier 2001, *van den Berg/Conseil et Commission*, T-143/97, EU:T:2001:27, point 58 ; TPICE, arrêt du 11 janvier 2002, *Biret et Cie/Conseil*, T-210/00, EU:T:2002:3, point 41 ; TPICE, arrêt du 7 février 2002, *Schulte/Conseil et Commission*, T-261/94, EU:T:2002:27, point 59 ; CJCE, arrêt du 11 juin 2009, *Transports Schiocchet – Excursions/Commission*, C-335/08 P, non publié, EU:C:2009:372, point 33 ; Trib. UE, arrêt du 18 septembre 2014, *Georgias e.a./Conseil et Commission*, T-168/12, EU:T:2014:781, point 30.

[22] CJCE, arrêt du 27 janvier 1982, *De Franceschi/Conseil et Commission*, 51/81, non publié, EU:C:1982:20, point 12.

[23] CJCE, arrêt du 19 avril 2007, *Holcim (Deutschland)/Commission*, C-282/05 P, EU:C:2007:226, point 30 ; TPICE, ordonnance du 1er avril 2009, *Perry/Commission*, T-280/08, non publiée, EU:T:2009:98, point 36 ; CJCE, arrêt du 11 juin 2009, *Transports Schiocchet – Excursions/Commission*, C-335/08 P, non publié, EU:C:2009:372, point 33 ; CJUE, arrêt du 8 novembre 2012, *Evropaïki Dynamiki/Commission*, C-469/11 P, EU:C:2012:705, point 38 ; CJUE, arrêt du 28 février 2013, *Inalca et Cremonini/Commission*, C-460/09 P, EU:C:2013:11, point 55 ; Trib. UE, ordonnance du 20 mars 2014, *Donnici/Parlement*, T-43/13, EU:T:2014:167, point 52 ; Trib. UE, arrêt du 16 décembre 2015, *Chart/SEAE*, T-138/14, EU:T:2015:981, point 56.

[24] Trib. UE, ordonnance du 20 mars 2014, *Donnici/Parlement*, T-43/13, EU:T:2014:167, point 55.

[25] V., par exemple, CJUE, arrêt du 8 novembre 2012, *Evropaïki Dynamiki/Commission*, C-469/11 P, EU:C:2012:705, points 39-41 ; Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 30.

[26] V., par exemple, Trib. UE, arrêt du 18 septembre 2014, *Georgias e.a./Conseil et Commission*, T-168/12, EU:T:2014:781, point 35.

[27] V. notamment CJCE, arrêt du 11 juin 2009, *Transports Schiocchet – Excursions/Commission*, C-335/08 P, non publié, EU:C:2009:372, points 34 et 35.

[28] Trib. UE, arrêt du 10 janvier 2017, *Gascogne Sack Deutschland et Gascogne/Union européenne*, T-577/14, EU:T:2017:1, points 46-48.

comme étant dénué de fondement[29]. Ce n'est pas le constat de l'illégalité qui peut déclencher le délai de la prescription, celui-ci devant commencer au moment où l'acte en cause a produit ses effets dommageables auprès de celui qui en est victime. Il est en effet indifférent, pour le déclenchement du délai de prescription, que l'illégalité du comportement de l'institution de l'Union européenne ait été constatée par une décision de justice, une telle décision n'ayant pas pour effet de différer le point de départ de la prescription[30], alors même qu'elle peut avoir pour effet de renforcer la certitude du requérant en ce qui concerne ses droits, l'illégalité étant à distinguer du préjudice parmi les conditions d'engagement de la responsabilité.

De même, pas plus qu'elle ne saurait constituer un fait interruptif[31], l'introduction d'un recours ou d'une demande d'intervention devant une juridiction nationale ne saurait différer le point de départ du délai de prescription[32].

Une distinction doit être établie entre le préjudice dit instantané et le préjudice dit continu. Dans le premier cas, le préjudice a lieu à un moment précis à partir duquel le délai de prescription va courir. Dans le second cas, le préjudice augmente régulièrement au cours de périodes successives et le montant qui s'y rapporte augmente en proportion du nombre de jours écoulés[33]. Le juge considère alors que la prescription s'applique à la période antérieure de plus de cinq ans à la date de l'acte interruptif, sans affecter les droits nés au cours des périodes postérieures[34]. Il n'est pas exclu que, dans certaines affaires, une part des préjudices comporte un caractère instantané et que l'autre part présente un caractère continu[35].

La distinction entre le préjudice instantané et le préjudice continu suscite inévitablement des discussions.

Ainsi, à propos des préjudices constitués par des frais administratifs et des honoraires d'avocats qui sont présentés comme des préjudices continus par les requérants, le juge de l'Union européenne considère qu'ils ne présentent pas un tel caractère dans la mesure où de tels frais ne sont pas des frais renouvelables en fonction du temps écoulé[36]. Il en va de même de frais de voyage qui se réalisent effectivement à la date de chacun des voyages et qui n'augmentent pas en proportion du temps écoulé[37]. De même, une atteinte à la réputation du fait de l'implication d'une personne dans des procédures administratives, civiles ou pénales se réalise lors de l'engagement de telles procédures et ne saurait dès lors être qualifiée de préjudice continu[38].

À l'inverse, des frais de logement occasionnés à une personne ainsi que des préjudices moraux prétendument subis par celle-ci en raison d'une situation provoquée par un acte ou un comportement d'une institution de l'Union européenne sont susceptibles de présenter un caractère continu[39]. De même, une impossibilité de commercialiser des produits liée à l'adoption d'un acte d'une institution de l'Union européenne peut provoquer un préjudice à caractère continu

[29] TPICE, arrêt du 21 avril 2005, *Holcim (Deutschland)/Commission*, T-28/03, EU:T:2005:139, points 65-67.

[30] CJUE, arrêt du 8 novembre 2012, *Evropaïki Dynamiki/Commission*, C-469/11 P, EU:C:2012:705, point 42 ; CJUE, arrêt du 28 février 2013, *Inalca et Cremonini/Commission*, C-460/09 P, EU:C:2013:111, point 71 ; Trib. UE, ordonnance du 20 mars 2014, *Donnici/Parlement*, T-43/13, EU:T:2014:167, points 56 et 69 ; Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 36.

[31] V. *infra*, II.

[32] CJCE, arrêt du 17 juillet 2008, *Commission/Cantina sociale di Dolianova e.a.*, C-51/05 P, EU:C:2008:409, point 69.

[33] CJUE, arrêt du 28 février 2013, *Inalca et Cremonini/Commission*, C-460/09 P, EU:C:2013:111, point 80 ; Trib. UE, ordonnance du 20 mars 2014, *Donnici/Parlement*, T-43/13, EU:T:2014:167, point 59 ; Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 32.

[34] TPICE, arrêt du 16 avril 1997, *Hartmann/Conseil et Commission*, T-20/94, EU:T:1997:55, point 132 ; TPICE, arrêt du 9 décembre 1997, *Quiller et Heusmann/Conseil et Commission*, T-195/94 et T-202/94, EU:T:1997:191, point 125 ; TPICE, arrêt du 31 janvier 2001, *Jansma/Conseil et Commission*, T-76/94, EU:T:2001:26, point 79 ; TPICE, arrêt du 11 janvier 2002, *Biret et Cie/Conseil*, T-210/00, EU:T:2002:3, point 44 ; TPICE, arrêt du 7 février 2002, *Rudolph/Conseil et Commission*, T-187/94, EU:T:2002:24, point 52 ; TPICE, arrêt du 7 février 2002, *Kustermann/Conseil et Commission*, T-201/94, EU:T:2002:26, point 64 ; TPICE, arrêt du 21 avril 2005, *Holcim (Deutschland)/Commission*, T-28/03, EU:T:2005:139, point 69 ; TPICE, ordonnance du 10 avril 2008, *2K-Teint e.a./Commission et BEI*, T-336/06, non publiée, EU:T:2008:104, point 106 ; Trib. UE, arrêt du 16 décembre 2015, *Chart/SEAE*, T-138/14, EU:T:2015:981, point 58 ; Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 32.

[35] V., par exemple, Trib. UE, arrêt du 16 décembre 2015, *Chart/SEAE*, T-138/14, EU:T:2015:981, point 80.

[36] V., par exemple, CJUE, arrêt du 28 février 2013, *Inalca et Cremonini/Commission*, C-460/09 P, EU:C:2013:111, point 81 ; Trib. UE, arrêt du 16 décembre 2015, *Chart/SEAE*, T-138/14, EU:T:2015:981, point 82 ; Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 33.

[37] Trib. UE, arrêt du 16 décembre 2015, *Chart/SEAE*, T-138/14, EU:T:2015:981, point 86.

[38] Trib. UE, ordonnance du 7 février 2018, *AEIM et Kazenas/Commission*, T-436/16, non publiée, EU:T:2018:78, point 35.

[39] Trib. UE, arrêt du 16 décembre 2015, *Chart/SEAE*, T-138/14, EU:T:2015:981, points 91-93.

renouvelé quotidiennement, chaque jour au cours duquel la commercialisation n'est pas possible[40].

L'existence des intérêts visant à obtenir une indemnisation actualisée du dommage subi a pu être invoquée par les demandeurs en vue de différer le point de départ du délai de prescription. Le Tribunal a justement considéré que la perte quotidienne des intérêts courant sur la valeur du dommage n'empêche pas l'écoulement du délai de prescription, étant observé qu'accepter que ce dernier ne coure pas en raison d'une telle perte quotidienne conduirait à considérer que des actions ne seraient jamais prescrites[41].

En dépit de sa longueur de cinq années, le délai de prescription peut donner lieu à une extension sous la forme d'une interruption causée par divers événements.

II. La recherche aléatoire de causes d'interruption du délai de prescription

Aussi long peut-il paraître, le délai de prescription de cinq ans ne permet pas toujours aux personnes prétendument lésées d'agir efficacement et de saisir la juridiction compétente avant le terme d'un tel délai. L'écoulement du temps peut être dû à de multiples éléments dont certains peuvent être légitimement pris en considération en vue d'interrompre le délai de prescription.

Ainsi la prescription doit-elle être interrompue par le dépôt de la requête du plaignant devant la juridiction compétente mais également, en amont, par le dépôt d'une réclamation auprès de l'administration en cause.

En ce sens, l'article 46 du statut de la Cour de justice de l'Union européenne dispose expressément que la prescription est interrompue « *soit par la requête formée devant la Cour de justice, soit par la demande préalable que la victime peut adresser à l'institution compétente de l'Union* ». Il ajoute que, dans ce dernier cas, « *la requête doit être formée dans le délai de deux mois prévu à l'article 263 du traité sur le fonctionnement de l'Union européenne ; les dispositions de l'article 265, deuxième alinéa, du traité sur le fonctionnement de l'Union européenne sont, le cas échéant, applicables* ».

Comme la Cour de justice l'a observé, ces dispositions de l'article 46 du statut de la Cour de justice de l'Union européenne ont trait exclusivement à l'interruption de la prescription ainsi fixée[42].

La référence faite dans ces dispositions à la « *Cour de justice* » doit être entendue comme étant susceptible de s'appliquer également au Tribunal en vertu de l'article 53 du statut de la Cour de justice de l'Union européenne qui rend expressément applicables les dispositions contenues dans le titre 3 dudit statut relatives à la procédure. Dans la pratique, cet article n'est opératoire que devant le Tribunal dans la mesure où ce dernier est désormais compétent, comme on l'a observé, pour connaître des recours en responsabilité fondés sur l'article 268 du TFUE.

La prescription est ainsi interrompue par la requête formée devant le Tribunal de l'Union européenne ou par la demande préalable que la victime peut adresser à l'institution compétente de l'Union européenne.

Le premier cas de figure ne soulève pas de difficulté dans la mesure où la date d'interruption du délai peut être fixée avec certitude. On pourrait toutefois se demander ce qu'il en est lorsque le recours a été initialement déposé devant une juridiction incompétente pour connaître du recours. À supposer en effet que le requérant dépose son recours en indemnité devant la Cour de justice à une date où l'action n'était pas encore prescrite et qu'elle le soit au moment où ladite requête est transmise au Tribunal, ce dernier aurait à prendre position sur la recevabilité du recours. On pourrait observer qu'en vertu de l'article 54, alinéa 1, du statut de la Cour de justice de l'Union européenne, lorsqu'une requête est

[40] TPICE, arrêt du 16 avril 1997, *Hartmann/Conseil et Commission*, T-20/94, EU:T:1997:55, points 132 et 140 ; TPICE, arrêt du 9 décembre 1997, *Quiller et Heusmann/Conseil et Commission*, T-195/94 et T-202/94, EU:T:1997:191, point 125 ; TPICE, arrêt du 25 novembre 1998, *Steffens/Conseil et Commission*, T-222/97, EU:T:1998:267, point 34 ; TPICE, arrêt du 31 janvier 2001, *van den Berg/Conseil et Commission*, T-143/97, EU:T:2001:27, point 60 ; TPICE, arrêt du 7 février 2002, *Rudolph/Conseil et Commission*, T-187/94, EU:T:2002:24, point 65 ; TPICE, arrêt du 7 février 2002, *Kustermann/Conseil et Commission*, T-201/94, EU:T:2002:26, points 63 et 77 ; TPICE, arrêt du 7 février 2002, *Schulte/Conseil et Commission*, T-261/94, EU:T:2002:27, point 61 ; TPICE, arrêt du 27 septembre 2007, *Pelle et Konrad/Conseil et Commission*, T-8/95 et T-9/95, EU:T:2007:298, point 65.

[41] TPICE, ordonnance du 4 août 1999, *Fratelli Murri/Commission*, T-106/98, EU:T:1999:163, point 28.

[42] CJCE, arrêt du 5 avril 1973, *Giordano/Commission*, 11/72, EU:C:1973:39, att. 6.

adressée au Tribunal et déposée au greffe de la Cour, la requête est immédiatement transmise au greffe du Tribunal et qu'en vertu de l'article 54, alinéa 2, du statut de la Cour, lorsque la Cour de justice relève que la requête qui lui est soumise relève de la compétence du Tribunal, elle le renvoie à ce dernier. Compte tenu de l'esprit de la réforme qui a présidé à l'élaboration de ces dispositions, il devrait être considéré que de tels renvois vers la juridiction compétente, à savoir le Tribunal, visent à préserver les délais de recours[43] et ne pas déclarer le recours irrecevable en raison du dépassement du délai de prescription au moment du dépôt du recours devant la juridiction compétente.

Le second cas soulève nécessairement plus de difficultés dans la mesure où il se rapporte à une demande préalable formée à un stade précontentieux dont les suites réservées à une telle demande ne sont pas toujours connues précisément, compte tenu des méandres et des aléas des procédures administratives qui peuvent conditionner l'exercice des recours subséquents.

C'est la date de réception de la demande qui est déterminante pour l'interruption du délai de prescription et non la date à laquelle l'institution concernée a répondu à la demande[44].

La condition formulée par l'article 46 du statut de la Cour de justice de l'Union européenne s'explique par le fait que la réclamation est normalement préalable à un recours en annulation ou en carence respectivement fondés sur l'article 263 du TFUE et 265 du TFUE. Le libellé du texte pourrait laisser croire que l'interruption est conditionnée par l'exercice subséquent d'un recours en annulation ou en carence selon le cas alors qu'il n'en est rien. C'est un recours en indemnité qui doit être formé dans de tels délais aux fins de l'interruption du délai visée.

Dans ces conditions, l'interruption n'est acquise que si la demande est suivie d'une requête en indemnité consécutive à la décision de rejet dans les deux mois suivant la notification de la décision conformément à l'article 263 du TFUE ou dans les deux mois suivant l'absence de prise de position conformément à l'article 265 du TFUE[45]. Si les lettres adressées à l'institution de l'Union européenne en cause n'ont pas été suivies de recours dans le délai déterminé par référence à ces articles, elles resteront sans effet sur le délai de prescription de cinq ans, prévu par l'article 46 du statut[46]. Autrement dit, aucune interruption n'aura lieu.

L'interruption du délai de prescription provoquée par l'introduction de tels recours formés devant le Tribunal de l'Union européenne n'a pour but que de reporter l'expiration du délai de cinq ans lorsqu'une requête ou une demande préalable, formée dans ce délai, ouvre les délais prévus aux articles 263 ou 265 du TFUE, et non d'abréger la prescription quinquennale lorsque la demande d'indemnisation adressée aux institutions de l'Union européenne n'a pas été suivie d'un recours en annulation ou d'un recours en carence dans les délais prévus à cet effet[47].

Ainsi, on ne saurait reprocher à une entreprise, à la suite d'une demande qu'elle a formulée de manière à ce que l'institution de l'Union européenne en cause, la Commission européenne, remédie à la situation, de n'avoir pas introduit un recours en carence dans le délai de deux mois suivant l'absence de prise de position de l'institution et d'avoir attendu quatre ans pour engager un

[43] J. Rideau et F. Picod, *Code de procédures juridictionnelles de l'Union européenne*, *op. cit.*, p. 521.

[44] TPICE, arrêt du 27 septembre 2007, *Pelle et Konrad/Conseil et Commission*, T-8/95 et T-9/95, EU:T:2007:298, point 80.

[45] CJCE, arrêt du 5 avril 1973, *Giordano/Commission*, 11/72, EU:C:1973:39, att. 6 ; TPICE, ordonnance du 4 août 1999, *Fratelli Murri/Commission*, T-106/98, EU:T:1999:163, point 29 ; TPICE, arrêt du 31 janvier 2001, *Jansma/Conseil et Commission*, T-76/94, EU:T:2001:26, point 81 ; TPICE, arrêt du 31 janvier 2001, *van den Berg/Conseil et Commission*, T-143/97, EU:T:2001:27, point 62 ; TPICE, arrêt du 7 février 2002, *Rudolph/Conseil et Commission*, T-187/94, EU:T:2002:24, point 55 ; TPICE, arrêt du 7 février 2002, *Kustermann/Conseil et Commission*, T-201/94, EU:T:2002:26, point 67 ; TPICE, arrêt du 7 février 2002, *Schulte/Conseil et Commission*, T-261/94, EU:T:2002:27, point 63 ; TPICE, arrêt du 21 avril 2005, *Holcim (Deutschland)/Commission*, T-28/03, EU:T:2005:139, point 71 ; Trib. UE, arrêt du 21 juillet 2016, *Nutria/Commission*, T-832/14, non publié, EU:T:2016:428, points 35 et 36 ; Trib. UE, arrêt du 7 juillet 2021, *HTTS/Conseil*, T-692/15 RENV, EU:T:2021:410, point 38.

[46] V. des exemples dans TPICE, arrêt du 25 novembre 1998, *Steffens/Conseil et Commission*, T-222/97, EU:T:1998:267, point 42 ; TPICE, ordonnance du 4 août 1999, *Fratelli Murri/Commission*, T-106/98, EU:T:1999:163, point 30 ; TPICE, arrêt du 31 janvier 2001, *van den Berg/Conseil et Commission*, T-143/97, EU:T:2001:27, point 63 ; Trib. UE, ordonnance du 20 mars 2014, *Donnici/Parlement*, T-43/13, EU:T:2014:167, point 58.

[47] CJCE, arrêt du 14 juillet 1967, *Kampffmeyer e.a./Commission*, 5/66, 7/66, 13/66 à 16/66 et 18/66 à 24/66, non publié, EU:C:1967:31 ; CJCE, arrêt du 5 avril 1973, *Giordano/Commission*, 11/72, EU:C:1973:39 ; TPICE, arrêt du 18 septembre 1995, *Nölle/Conseil et Commission*, T-167/94, EU:T:1995:169, point 30 ; TPICE, ordonnance du 4 mai 2005, *Holcim (France)/Commission*, T-86/03, EU:T:2005:157, point 39 ; TPICE, arrêt du 27 septembre 2007, *Pelle et Konrad/Conseil et Commission*, T-8/95 et T-9/95, EU:T:2007:298, point 75 ; Trib. UE, arrêt du 21 juillet 2016, *Nutria/Commission*, T-832/14, non publié, EU:T:2016:428, point 37.

recours en indemnité contre celle-ci. L'entreprise ne saurait être considérée comme forclose dans son action en responsabilité au motif qu'elle n'a pas formé un recours en indemnité dans le délai de deux mois suivant une décision de rejet de sa demande auprès de l'institution ou dans le même délai suivant l'absence de prise de position[48].

Comme l'a justement observé le Tribunal, la finalité des dispositions du statut, à savoir les deuxième et troisième phrases de l'article 46 du statut, consiste à protéger les personnes prétendument lésées en évitant de faire entrer certaines périodes en ligne de compte dans le calcul du délai de prescription[49].

Compte tenu de l'imbrication des voies de droit nationales et européennes en matière de recours en réparation de préjudices causés par des actes nationaux pris en application d'une réglementation européenne, on a parfois tenté de soutenir devant la Cour de justice ou le Tribunal que le recours introduit devant une juridiction nationale avait pour effet de suspendre le délai de prescription. La Cour de justice et le Tribunal ont considéré qu'un tel recours ne constituait pas un acte interruptif[50]**.** Une demande de mesures d'instruction, telle que celle visant à obtenir la nomination d'un expert ou de mesures conservatoires présentée devant une juridiction nationale, ne saurait pas davantage avoir un tel effet interruptif[51]**.**

Comme on l'a justement observé dans la doctrine, dans certains cas, le calcul de la prescription est compliqué par l'intervention d'actes des institutions de l'Union européenne visant à faciliter l'indemnisation des victimes. En effet, il arrive que des institutions adoptent des actes consécutivement à un arrêt de la Cour de justice ou du Tribunal qui a constaté une obligation de réparer un préjudice subi par plusieurs opérateurs économiques en vue d'indemniser les victimes d'un tel préjudice[52].

De telles complications peuvent être amplifiées par des engagements des institutions à ne pas invoquer la prescription pendant un certain délai ou jusqu'à l'adoption d'un acte, une telle autolimitation pouvant prendre fin à l'égard des personnes qui n'ont pas présenté une demande d'indemnisation dans les conditions fixées[53].

Dans tous les cas de figure, le juge sera invité à apprécier l'étendue du délai de la prescription avec beaucoup de circonspection.

[48] Trib. UE, arrêt du 21 juillet 2016, *Nutria/Commission*, T-832/14, non publié, EU:T:2016:428, point 36.

[49] Trib. UE, arrêt du 21 juillet 2016, *Nutria/Commission*, T-832/14, non publié, EU:T:2016:428, point 37.

[50] TPICE, arrêt du 4 février 1998, *Bühring/Conseil et Commission*, T-246/93, EU:T:1998:21, point 72 ; CJCE, ordonnance du 18 juillet 2002, *Autosalone Ispra dei Fratelli Rossi/Commission*, C-136/01 P, EU:C:2002:458, point 56 ; CJCE, arrêt du 17 juillet 2008, *Commission/Cantina sociale di Dolianova e.a.*, C-51/05 P, EU:C:2008:409, point 69 ; CJCE, arrêt du 11 juin 2009, *Transports Schiocchet – Excursions/Commission*, C-335/08 P, non publié, EU:C:2009:372, point 30.

[51] CJCE, ord., ordonnance du 18 juillet 2002, *Autosalone Ispra dei Fratelli Rossi/Commission*, C-136/01 P, EU:C:2002:458, point 56.

[52] V. particulièrement TPICE, arrêt du 16 avril 1997, *Saint et Murray/Conseil et Commission*, T-554/93, EU:T:1997:54, points 89-94 ; TPICE arrêt du 9 décembre 1997, *Quiller et Heusmann/Conseil et Commission*, T-195/94 et T-202/94, EU:T:1997:191, points 126-142 ; TPICE, arrêt du 25 novembre 1998, *Steffens/Conseil et Commission*, T-222/97, EU:T:1998:267, points 39-42 ; TPICE, arrêt du 31 janvier 2001, *Jansma/Conseil et Commission*, T-76/94, EU:T:2001:26, points 84-96 ; TPICE, arrêt du 7 février 2002, *Rudolph/Conseil et Commission*, T-187/94, EU:T:2002:24, points 54 et s., TPICE, arrêt du 7 février 2002, *Kustermann/Conseil et Commission*, T-201/94, EU:T:2002:26, points 66 et s., TPICE, arrêt du 7 février 2002, *Schulte/Conseil et Commission*, T-261/94, EU:T:2002:27, points 64 et s. ; TPICE, arrêt du 27 septembre 2007, *Pelle et Konrad/Conseil et Commission*, T-8/95 et T-9/95, EU:T:2007:298, points 68 et s.

[53] V. notamment TPICE, arrêt du 25 novembre 1998, *Steffens/Conseil et Commission*, T-222/97, EU:T:1998:267, points 37 et s. ; TPICE, arrêt du 7 février 2002, *Schulte/Conseil et Commission*, T-261/94, EU:T:2002:27, points 69 et s. ; CJCE, arrêt du 28 octobre 2004, *van den Berg/Conseil et Commission*, C-164/01 P, EU:C:2004:665, points 99 et 100 ; TPICE, arrêt du 27 septembre 2007, *Pelle et Konrad/Conseil et Commission*, T-8/95 et T-9/95, EU:T:2007:298, points 70 et s.