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EPILOGUE. *HIGH HOPES*: AUTONOMY AND THE IDENTITY OF THE EU

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ABSTRACT: This epilogue rejects the idea that the principle of autonomy is an end in itself or a tool for judicial self-empowerment. On the contrary, we support the contention that that principle serves first and foremost as a means of promoting and protecting the values on which the EU is founded. In so doing, that principle also contributes to defining the identity of the EU as a common legal order. Compliance with those values does not mean that the Member States must adopt a specific constitutional model. Instead, those values limit themselves to providing a framework of reference within which the Member States may make their own constitutional choices. Finally, it is submitted that in times when authoritarian tendencies are on the rise, the principle of autonomy allows the EU to operate as a beacon of freedom, democracy and justice for the wider world.

KEYWORDS: identity – common legal order – values – constitutional alignment – framework of reference – international law.

I. INTRODUCTION

This *Special Section* of *European Papers* is devoted to studying the principle of autonomy from the perspective of legal theory. The authors have put forward a series of theories,

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sometimes conflicting, sometimes complementary, that seek to explain the nature of that principle, its content and how it functions in the EU legal order.

In this epilogue, we seek to shed light on an aspect of the principle of autonomy that has always been present, often implicitly, in the contributions to this *Special Section*. As the title of the epilogue indicates, we aim to explore the inextricable link between the identity of the EU as a "common legal order"[1] and the principle of autonomy. In our view, the principle of autonomy is not an end in itself, but a means to an end. That principle serves to protect and promote the values contained in art. 2 TEU – *i.e.*, respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. That protection and promotion is its "endgame". In doing so, it must also safeguard the structural tenets on which the EU is founded, since those tenets implement those values.

The principle of autonomy is governed by two different, albeit interrelated, dynamics. On the one hand, it operates as a *shield* against external norms that may constitute a threat to the values contained in art. 2 TEU and a threat to the EU constitutional framework. On the other hand, autonomy operates as a *sword* that contributes to defining what European integration is all about, by serving as a guiding compass for the EU to navigate a course through often unchartered waters.[2] In protecting and promoting liberal values, the principle of autonomy enables the EU to find its own identity, whilst allowing room for openness towards the laws of the Member States and international law.[3]

In order to explore the inextricable link between autonomy and identity, this epilogue is divided into three sections. First, we explore the elements that define the identity of the EU. It is submitted that the values contained in art. 2 TEU constitute the core of that identity. In turn, since the EU constitutional structure is instrumental in protecting and promoting those values, the principle of autonomy must also protect that structure. Autonomy is, in essence, about protecting and promoting values and structures (section II). Once the *raison d'être* of the principle of autonomy is clarified, section III looks at the way in which that principle requires the Member States to align their own constitutional identity with the values on which the EU is founded. By requiring such constitutional alignment, it is posited that the principle of autonomy defines what it means to be a member of the EU. In section IV, we turn to international law. The principle of autonomy also prevents the EU and/or the

[1] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, para. 127, and case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98, para 145.

[2] K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' (2021) HJIL 47, 87. Those two dynamics of autonomy may also be recast as 'wall-identity' referring to 'the act of making something distinct from something else' and as 'mirror-identity' 'consisting of the positive identification of some common elements through a moment of self-reflection'. See, in this regard, G Martinico, 'The Autonomy of EU Law: A Joint Celebration of *Kadi II* and *Van Gend en Loos*' in M Avbelj, F Fontanelli and G Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2014) 157–171, 158.

[3] D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' (2023) European Papers www.europeanpapers.eu 1403, 1427 (noting that "[a]utonomy is ordering pluralism of legal systems in the European Union").

Member States from entering into international agreements that may threaten the autonomy of the EU legal order, by removing from the judicial system of the EU disputes that may concern the interpretation and application of EU law. Again, precluding such jurisdictional stripping amounts to protecting the values contained in art. 2 TEU. Moreover, cases like *Schrems*[4] show that the principle of autonomy may also produce a specific type of "Brussels effect", *i.e.* that of requiring economic operators –and public authorities – located in third countries to align their practices to the values on which the EU is founded, notably that of respect for fundamental rights.[5] Finally, we support the contention that in times when authoritarian tendencies are on the rise, the principle of autonomy allows the EU to operate as a beacon of freedom, democracy and justice for the wider world. That is why this epilogue has *high hopes* for the principle of autonomy.

II. The identity of the EU and European values

With the entry into force of the Treaty of Lisbon, the notion of "national identity", enshrined in art. 4(2) TEU, drew the attention of academic literature and, to some extent, national courts that sought to rely on that Treaty provision in order to limit the competences of the EU and the primacy of EU law.[6] However, little or no attention was paid to the existence (or absence) of an "EU identity". Does the EU have an identity? And if so, what is it? Alternatively, is the EU only defined by the objectives it pursues? Is the EU just its internal market or has it evolved into something more? Far from being trivial, those questions are of constitutional importance because they help us understand the very Leitmotiv of European integration. In the so-called *Conditionality Judgments*, the Court of Justice provided some valuable insights into what the identity of the EU is.

In those two cases, Hungary and Poland each brought an action for annulment against Regulation 2020/2092,[7] which protects the EU budget in the case of breaches of the principles of the rule of law in the Member States by means of a conditionality mechanism. In application of the conditionality mechanism, breaches of those principles may, for example, entail the suspension of payments from the EU budget to the Member State concerned, provided that those breaches "affect or seriously risk affecting the

[4] See case C-362/14 *Schrems* ECLI:EU:C:2015:650. See also case C-311/18 *Facebook Ireland and Schrems* ECLI:EU:C:2020:559.

[5] We borrow the expression "Brussels Effect" from A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2019). See also A Bradford, 'The Brussels Effect' (2012) Northwestern University Law Review 1.

[6] See, for example, the special issue published by European Public Law on that topic. See D Fromage and B de Witte, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives' (2021) EPL 411. Regarding national courts, see case C-430/21 *RS (Effect of the decisions of a constitutional court)* ECLI:EU:C:2022:99.

[7] Regulation (EU, Euratom) 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.

sound financial management of the [EU] budget or the protection of the financial interests of the Union in a sufficiently direct way".[8] Nevertheless, the suspension "must be lifted where the impact on the implementation of the budget ceases, even though the breaches of the principles of the rule of law found may persist".[9] Hungary and Poland argued *inter alia* that the conditions for the receipt of financing from the EU budget "must be closely linked either to one of the objectives of a programme or of a specific EU action, or to the sound financial management of the Union budget".[10] However, the Court of Justice took a different view, holding that the conditionality mechanism can also entail "horizontal conditionality", meaning that the condition in question can be linked to the value of the rule of law contained in art. 2 TEU.

At the outset, the Court of Justice proceeded to stress the cardinal importance of the values on which the EU is founded. Before accession, a candidate State for EU membership must align its own constitution and national identity with those values. Once accession takes place, it is therefore presumed that the new Member State respects the values on which the EU is founded and thus may join a legal structure based on the principle of mutual trust. In the light of that principle, each Member State is equally committed to upholding those values and in so doing, to respecting EU law provisions that implement them. Next, "[c]ompliance with those values", the Court held, "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".[11] On the contrary, that compliance must be guaranteed for as long as a Member State remains within the EU, since it is essential for the enjoyment of all the rights derived from the application of the Treaties to that Member State. Most importantly for present purposes, the Court of Justice reached the following conclusion, which merits quotation in full: "The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the *very identity* of the European Union as a *common legal order*. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties."[12]

There is a lot to unpack from that concluding paragraph. First, the Court of Justice observed that the values contained in art. 2 TEU flow from the constitutional traditions common to the Member States. Those values are not the result of a "top-down" approach but follow a "bottom-up" dynamic. They crystallise the struggle of previous generations of Europeans who strived for freedom, democracy and justice. They form part of our common heritage as Europeans.

Second, the Court of Justice established a conceptual link between those values and the identity of the EU as a common legal order. That link serves to cultivate a sense of

[8] Art. 4(1) Regulation 2020/2092 cit.

[9] *Hungary v Parliament and Council* cit. para 113, and *Poland v Parliament and Council* cit. para 127.

[10] *Hungary v Parliament and Council* cit. para 123, and *Poland v Parliament and Council* cit. para 141.

[11] *Hungary v Parliament and Council* cit. para 126, and *Poland v Parliament and Council* cit. para 144.

[12] *Hungary v Parliament and Council* cit. para 127, and *Poland v Parliament and Council* cit. para 145 (emphasis added).

belonging to a community of values where traditional elements forming part of national identity, such as language, history and tradition, are not relevant. The EU endorses a new type of identity that operates outside the paradigms of the nation-State. The identity of the EU brings all Europeans together, since we can all identify with the values contained in art. 2 TEU, regardless of our national identity. That identity is the bedrock on which to build "the process of creating an ever-closer union among the peoples of Europe".[13] We, Europeans are diverse in that we may speak a different language, pray to a different god or have a different understanding of family life and yet we are united because we share and cherish those founding values. As a community of values, the EU is "united in diversity".

Last but not least, the Court of Justice stated that the EU has the obligation to defend those values. That last sentence echoes the principle of autonomy. As two contributors to this *Special Section* have rightly observed, that principle may operate as a "shield" that protects the constitutional tenets of the EU legal order,[14] which include first and foremost the values contained in art. 2 TEU. This is corroborated by the reasoning of the Court leading to that concluding paragraph, since it recalls previous findings grounded in the principle of autonomy. As it did in *Repubblika*,[15] the Court observed that respect for those values is a prerequisite for the accession of any State applying to become a member of the European Union.[16] As it did in Opinion 2/13 and *Associação Sindical dos Juízes Portugueses*, it also stressed the importance of the link between the structural principle of mutual trust and the common values contained in art. 2 TEU. It held that the EU "legal structure … is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded".[17]

[13] Preamble to the Treaty on European Union.

[14] D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' cit. 1406-1407 (in his view, understanding autonomy as a shield does not fully grasp the role of autonomy in the case law of the Court of Justice, given that autonomy is "the Court's 'one big thing', which has made the EU legal system what it is today"), and J van de Beeten, 'On Metaphor and Meaning: The Autonomy of EU legal order Through the Lens of Project and System' (2023) European Papers www.europeanpapers.eu 1441, 1442. Moreover, while other contributors do not use the expression "shield", they seem to agree with the fact that the principle of autonomy contributes to protecting the EU legal order. See, *e.g.*, C Eckes, 'The Autonomy of the EU Legal Order: The Case of the Energy Charter Treaty' (2023) European Papers www.europeanpapers.eu 1465, 1466 (who observes that "[t]he Court of Justice is very protective of the normative or jurisdictional autonomy of the EU legal order").

[15] The Court of Justice cited joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others* ECLI:EU:C:2021:1034 paras 160–161 and the case law cited, which goes all the way back to case C-896/19 *Repubblika* ECLI:EU:C:2021:311 paras 60–61.

[16] *Repubblika* cit. para. 61.

[17] *Hungary v Parliament and Council* cit. para. 125, and *Poland v Parliament and Council* cit. para. 143. In those paragraphs, the Court cited Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 paras 166–168; case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 para. 30, and *Repubblika* cit. para. 62.

It follows that the EU must defend the values contained in art. 2 TEU, given that they define its very identity as a common legal order. Logically, the question that arises is whether it is only for the political process to defend those values or whether the Court of Justice and national courts also play a leading role in protecting them. Stated differently, what is the legal value of values?[18] Are they merely a statement of policy guidelines or intentions that lack any binding legal effects? Is the enforceability of values a political question? In the *Conditionality judgments*, the Court of Justice replied in the negative to those questions, ruling that the values contained in art. 2 TEU pervade the entire body of EU law. It held that "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which… are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States".[19]

The principles that give concrete expression to those values relate both to the substantive nature of EU law and to the constitutional structure of the EU. For example, the fundamental freedoms set out in the Treaties and the fundamental rights enshrined in the Charter give concrete expression to values contained in art. 2 TEU. Similarly, the right to effective judicial protection gives concrete expression to the value of respect for the rule of law within the EU.[20]

Those values also permeate throughout the constitutional structure of the EU. Five structural principles may illustrate this point. Both the primacy of EU law and mutual trust give concrete expression to the value of equality. As the Court of Justice recently ruled in *Euro Box Promotion and Others* and in *RS*, "Article 4(2) TEU provides that the Union is to respect the equality of Member States before the Treaties. However, the Union can respect that equality only if the Member States are unable, under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature."[21] That same finding of "concrete expression" can be held to apply to the principle of direct effect, which is inherently linked to the protection of rights that EU law confers upon individuals. Similarly, the principles of conferral and institutional balance seek to uphold the values of respect for the rule of law within the EU, while protecting individual liberty from the arbitrary exercise of public power.[22]

As the case law of the Court of Justice demonstrates, those values are in a mutual reinforcing relationship. As is the case at national level, the values of respect for democracy,

[18] Expression borrowed from LS Rossi, 'La valeur juridique des valeurs. L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels' (2020) RTDE 639.

[19] *Hungary v Parliament and Council* cit. para. 232, and *Poland v Parliament and Council* cit. para. 264.

[20] *Associação Sindical dos Juízes Portugueses* cit. para. 32.

[21] *Euro Box Promotion and Others* cit. para 249, and case C-430/21 *RS (Effect of the decisions of a constitutional court)* cit. para. 55.

[22] As James Madison noted, those two principles give rise to a "double security" to the rights of individuals, because "[t]he different governments will control each other [i.e. federalism], at the same time that each will be controlled by itself [*i.e.*, separation of powers]". See J Madison, 'The Federalist No 51' in A Hamilton, J Madison and J Jay, *The Federalist Papers* (Oxford University Press 2008) 256.

the rule of law and fundamental rights are interdependent at EU level. There can be no democracy without the rule of law and fundamental rights, because democratic choices must respect the rules of the game and may not alienate discrete and insular minorities. There can be no rule of law without fundamental rights and democracy, because the rule of law within the EU must serve to protect individual freedom and to establish a system of governance of laws, not men. There can be no respect for fundamental rights without democracy and the rule of law, since only a system of democratic governance may provide effective protection to the exercise of individual freedom.

Yet, one cannot rule out the fact that the values contained in art. 2 TEU may occasionally conflict with one another. This conflict is nothing new, nor is it unique to the EU legal order, but forms part of the daily life of liberal democracies when confronted with hard choices. For example, a democratic government may adopt decisions limiting the exercise of individual freedom, and courts may subsequently set aside those decisions in order to uphold that freedom.[23] In the same way, upholding the rule of law may sometimes oppose an unfettered protection of fundamental rights.[24]

However, the existence of a conflict of values has nothing to do with the argument put forward by van de Beeten in this *Special Section*, according to which the principle of autonomy would prioritise the structure of the EU legal order over values.[25] The problem with that argument is that it is based on the (incorrect) assumption that the EU constitutional structure is an empty shell. Whilst we are firm supporters of judicial reasoning grounded in structural considerations,[26] we reject the idea that the EU constitutional structure is "value-neutral". On the contrary, that structure is a means of protecting and promoting the values contained in art. 2 TEU and it is not an end in itself. Put differently, the principle of autonomy protects the EU constitutional structure because the latter gives concrete expression to the values contained in art. 2 TEU. As Judge Kukovec

[23] When exercising their powers of judicial review, courts may set aside laws that give concrete expression to democratic principles in order to protect constitutional rights. In the US, this conflict of values is known as the counter-majoritarian difficulty.

[24] This situation arises where an enhanced protection of fundamental rights would require the Court of Justice to overstep the limits of its own jurisdiction, thereby modifying the Treaties via judicial interpretation. See, *e.g.*, case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:462; and case C-263/02 P *Commission v Jégo-Quéré* ECLI:EU:C:2004:210.

[25] J van de Beeten, 'On Metaphor and Meaning: The Autonomy of EU Legal Order Through the Lens of Project and System' cit. 1459-1460, who notes that "the case law of the [Court of Justice] shows that the need to maintain the functioning and existence of the EU legal system on its own terms can clash with the objectives and values pursued by the EU" and then proceeds to find that "the autonomy of EU law … expresses *a structural bias towards the very structure of [the] EU legal order*."

[26] For example, we have recently posited that the judgment of the Court of Justice in case 26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1, is underpinned by a reasoning based on structural considerations. The same applies to the case law relating to art. 19 TEU and judicial independence. See, in this regard, K Lenaerts and JA Gutiérrez-Fons, '*Van Gend* and the Union Legal Order' in P Craig and R Schütze (eds), *Landmark Cases in EU Law* (Hart Publishing, forthcoming)

rightly observes in this *Special Section*, the idea of "autonomy *or* values" is not well founded because those values "form the fundamental part of autonomy's axiology". [27]

In support of his argument, van de Beeten relies on two examples taken from the case law of the Court of Justice, *i.e.*, Opinion 2/13 and *Getin Noble Bank*.[28] Regarding Opinion 2/13, he criticises the passage where the Court held that "[t]he autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU".[29] Is this passage to be read as the Court of Justice giving priority to structure over values? As mentioned above, the question is based on an incorrect assumption because the EU constitutional structure is imbued with values. Moreover, this passage reflects the Court of Justice's commitment to upholding the value of respect for the rule of law within the EU. Compliance with that value means that the Court of Justice must not overstep the limits that the authors of the Treaties and the Charter sought to impose on the EU system of fundamental rights protection. Notably, with respect to the Member States, this means applying the Charter only when they are "implementing EU law", within the meaning of art. 51(1) thereof. Furthermore, one could argue that this passage is actually promoting and protecting the value of respect for human rights, in so far as international obligations that lower the level of fundamental rights protection guaranteed by the Charter may not be incorporated into the EU legal order.[30]

In relation to *Getin Noble Bank*, van de Beeten observes that the Court of Justice "has quietly abandoned the more stringent test developed in *Banco de Santander*". The problem with that statement is that *Getin Noble Bank* and *Banco de Santander* do not belong to the same line of case law. In other words, *Getin Noble Bank* is not the right comparator to examine whether *Banco de Santander* remains good law. In *Banco de Santander*, the Court of Justice was asked to examine whether the Spanish Central Tax Tribunal, a body that was not part of the national judiciary, could be considered a "court or tribunal" within the meaning of art. 267 TFEU. Overruling its previous findings in *Gabalfrisa*,[31] the Court replied in the negative, holding that the criterion of independence, as developed in *Associação Sindical dos Juízes Portugueses*, was not fulfilled. The Court has continued to develop that line of case law in *NV Construct* and *Minister Sprawiedliwości*.[32]

[27] D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' cit. 1426.

[28] Opinion 2/13 cit., and case C-132/20 *Getin Noble Bank* ECLI:EU:C:2022:235.

[29] Opinion 2/13 cit. para 170.

[30] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission ("Kadi I")* ECLI:EU:C:2008:461 paras 281–285.

[31] Joined cases C-110/98 to C-147/98 *Gabalfrisa and Others* ECLI:EU:C:2000:145.

[32] In case C-403/21 *NV Construct* ECLI:EU:C:2023:47, the Court of Justice found, on the basis of the information available to it, that the Romanian National Council for the Resolution of Disputes was to be considered a "court or tribunal" within the meaning of art. 267 TFEU. See paras 47–58. Similarly, in case C-55/20 *Minister Sprawiedliwości* ECLI:EU:C:2022:6, the Polish Bar Association Disciplinary Court had access to the preliminary reference mechanism. See paras 48–79.

By contrast, *Getin Noble Bank* involved a part of the national judiciary (the Supreme Court of Poland) whose independence was called into question because of several irregularities in its appointment process. Sitting in a single court formation, it had made a reference to the Court of Justice. Whether that reference was admissible raised new and important questions: could a "court or tribunal" within the meaning of art. 267 TFEU cease to be one where it was no longer independent? And if so, what was the standard of proof? Whereas the answer to the first question seems straight forward, the second question is very complex. One must not forget that the preliminary reference procedure is ill fitted for fact-finding. It is not for the Court of Justice to establish the relevant facts of the case at hand but for the referring court.[33] That inability to establish the relevant facts becomes problematic when doubts arise regarding the independence of the referring court. For example, the latter may rely on the black letter of the law in order to support its independence, whilst other parties to the proceedings may pinpoint factual and legal elements to the contrary. As the Court of Justice has held, in order to determine whether a court is independent, one must undertake 'an overall assessment of a number of factors which, taken together, serve to create in the minds of individuals reasonable doubt as to the independence and impartiality of the judges'.[34] In the context of the preliminary reference procedure (and different from what is the case in infringement proceedings), the Court of Justice lacks jurisdiction to undertake that overall assessment, since it implies examining the factual and legal context of the case at hand. This may explain the rebuttable legal presumption that was adopted by the Court of Justice in *Getin Noble Bank*. Unable to establish itself the facts, the Court of Justice requires an impartial court to carry out that assessment. That is the reason why it requires a final judgment of a national court or of an international court holding that the judge in question is not independent.[35] In our view, that presumption seeks to strike the right balance between the criterion of independence as a precondition for having access to the preliminary reference procedure and the role of the Court of Justice in the context of that procedure. That presumption does not give priority to structure over values, but, in our view, seeks to accommodate two aspects of the same

[33] See, *e.g.*, joined cases C-52/16 and C-113/16 *SEGRO* ECLI:EU:C:2018:157 para. 98 and case law cited, where the Court of Justice held that "in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts is a matter for the national court".

[34] See, to that effect, case C-824/18 *A.B. and Others* (*Appointment of judges to the Supreme Court – Actions)* ECLI:EU:C:2021:153 paras 131–132, and case C-487/19 *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* ECLI:EU:C:2021:798 paras 152–154.

[35] In respect of the judge at issue, the ECtHR found that he was not independent. See ECtHR *Advance Pharma sp. z o.o v. Poland* App. n. 1469/20 [3 February 2022]. However, as the Court of Justice observed in *Getin Noble Bank* (judgment delivered on 29 March 2022), that judgment of the ECtHR could not be taken into account, since it was not yet definitive (it became final on 3 May 2022) and, moreover, delivered after the closing of the oral part of the procedure (which took place on 8 July 2021, when AG Bobek delivered his Opinion). See, in this regard, *Getin Noble Bank* cit. para. 73.

value of respect for the rule of law, *i.e.*, judicial independence and the need for the Court of Justice to respect the limits of its own jurisdiction.

III. A constitutional moment: becoming a member of the EU

The Court of Justice has consistently held that respect for the values contained in art. 2 TEU is what being a Member State of the EU is all about. On the one hand, a candidate State for EU membership must align its own constitution and national identity with those values as *conditio sine qua non* for accession. The so-called Copenhagen Criteria imply, *inter alia*, a strict control of that alignment. The decision to align its own constitutional arrangements with EU values is a sovereign choice of the candidate State for EU membership.[36] However, if such a State fails to do so, art. 49 TEU bars it from becoming a member of the EU.[37]

Acquiring the status of Member State is, therefore, a "constitutional moment" for the State concerned since at that very moment, the legal order of the new Member State is deemed by the "Masters of the Treaties" to uphold the values on which the EU is founded. The principle of mutual trust applies, from day one, to that new Member State. This stands in sharp contrast to third countries in relation to which compliance with those values cannot be presumed. Accordingly, as the Court wrote in Opinion 1/17 (*EU-Canada CET Agreement*), the principle of mutual trust does not apply to third countries as a matter of principle.[38] That said, a third country may gain that trust, if it establishes a special relationship with the EU and is equally committed to upholding the values on which the EU is founded.[39]

On the other hand, after accession, the Member State in question commits itself to respecting those values for as long as it remains a member of the EU. That ongoing commitment means that there is "no turning back the clock" when it comes to respecting the values contained in art. 2 TEU. Accession is the starting point in value protection and not the finish line. A Member State can always improve its own level of value protection. However, EU law precludes such a Member State from engaging in an authoritarian drift or from falling into democratic backsliding. "Compliance with those values", the Court of Justice has held, "cannot be reduced to an obligation which a candidate State must meet

[36] The same applies where a Member State decides to withdraw from the EU. See case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999 para. 50.

[37] That provision states that "[a]ny European State *which respects the values referred to in Article 2* and is committed to promoting them may apply to become a member of the Union." (Emphasis added). *Repubblika* cit. para.61.

[38] Opinion 1/17 *EU-Canada CET Agreement* ECLI:EU:C:2019:341 para. 129 (holding that "[the] principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State").

[39] Case C-897/19 PPU *Ruska Federacija* ECLI:EU:C:2020:262 paras 44, 77.

in order to accede to the [EU] and which it may disregard after its accession".[40] The Member States must respect those values "at all times".[41]

That said, compliance with the values contained in art. 2 TEU does not rule out constitutional diversity. Value alignment must *not* be confused with constitutional modelling.[42] As the Court of Justice made clear in *Euro Box Promotion and Others* and in *RS*, the rule of law within the EU does not seek to impose 'a particular constitutional model' to which all Member States must aspire.[43]

Imposing such a model would be contrary to the principle of respect for national identity enshrined in art. 4(2) TEU, which expressly states that the EU shall respect the identities of the Member States, 'inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. Instead, as the Court of Justice pointed out in the *Conditionality Judgments*, "[the Member] States enjoy a certain degree of discretion in implementing the principles of the rule of law".[44] However, the obligation to implement those principles "as to the result to be achieved may [not] vary from one Member State to another".[45] This is because the Member States share a common understanding of the rule of law despite having "separate national identities" which the EU respects.[46]

It follows from the case law of the Court of Justice that EU law provides for a framework of reference within which the Member States may make their own constitutional choices.[47] Those choices may vary from one Member State to another, but no choice must give rise to authoritarian tendencies that would call into question the values contained in art. 2 TEU.[48] On the contrary, those choices must, first, be sufficient in themselves to guarantee compliance with those values and, second, not constitute a value regression. Subject to those two limitations, a Member State may organise its own system of checks and balances as it wishes.

[40] *Hungary v Parliament and Council* cit. para. 126, and *Poland v Parliament and Council* cit. para. 144.

[41] *Hungary v Parliament and Council* cit. para. 234, and *Poland v Parliament and Council* cit. para. 266.

[42] See, in this regard, case C-397/19 *Statul Român – Ministerul Finanţelor Publice* ECLI:EU:C:2020:747, opinion of AG Bobek points 100 and 101.

[43] *Euro Box Promotion and Others* cit. para. 229 and the case-law cited, and *RS (Effect of the decisions of a constitutional court)* cit. para. 43.

[44] *Hungary v. Parliament and Council* cit. para. 233, and *Poland v. Parliament and Council* cit. para. 265.

[45] *Ibid*.

[46] *Hungary v. Parliament and Council* para. 234, and *Poland v. Parliament and Council* para. 266.

[47] S Prechal, 'Effective Judicial Protection: Some Recent Developments – Moving to the Essence' (2020) 13 *Review of European Administrative Law* 175, 187 (pointing out that '[an] issue like the independence of the judiciary operates in a specific institutional, political, legal and cultural context. What is unacceptable in one system may seem rather normal in another. There should certainly not be "one-size fits all solutions"; space should be left to the Member States to make their choices').

[48] A von Bogdandy, 'Towards a Tyranny of Values?' in A von Bogdandy, P Bogdanowicz, I Canor, C Grabenwarter, M Taborowski and M Schmidt (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 73, 91 (observing that the values contained in art. 2 TEU "do not constitute 'laws of construction', but rather 'red lines'").

Arguments that consider that framework as being "ultra vires" are ill founded, since without that framework, the EU cannot operate. The values contained in art. 2 TEU would become an empty promise. The constitutional structure of the EU would collapse in the absence of a rule of law based on common values. Value alignment and the prohibition of value regression are two essential conditions for a Member State to participate in the European integration project.[49]

Accordingly, the framework within which the Member States may make their own constitutional choices is an essential component of the identity of the EU. In some ways, the relationship between the identity of the EU and national identities mirrors that of EU citizenship and nationality, and that of the EU principle of democracy and national democracies. Just like EU citizenship and nationality, the identity of the EU and national identities are not in competition but they add up to each other. Similarly, just like the EU principle of democracy and national democracies, the identity of the EU and national identities are in a mutually reinforcing relationship when it comes to protecting and promoting European values. On the one hand, the identity of the EU is grounded in the constitutional traditions common to the Member States that draw on national identities. On the other hand, the identity of the EU prevents the Member States from deviating from those traditions, thereby protecting national identities from incorporating authoritarian elements.

IV. The principle of autonomy and the wider world

In the field of international law, the principle of autonomy also seeks to protect that framework of reference. International obligations that would call into question the values contained in art. 2 TEU and the EU's constitutional structure cannot be incorporated into the EU legal order.

However, just as the identity of the EU allows room for national diversity, that identity enables the EU to interact with the wider world, provided that the international obligations in question do not call into question the framework of reference. Again, that proviso boils down to protecting and promoting European values.

For example, in *Achmea*,[50] the Court of Justice held that the principle of autonomy precludes a provision (*i.e.*, an arbitration clause) contained in a Bilateral Investment Treaty ("BIT") concluded by two Member States (the Netherlands and Slovakia), the effects of which would be to remove from the jurisdiction of national courts investor-related disputes that may involve the interpretation and application of EU law. According to the BIT in question, investor- related disputes were to be solved by an arbitral tribunal that was not part of the judicial system of the two Member States concerned. The Court of Justice reasoned that the arbitration clause contained in the BIT "could prevent those disputes from being resolved in

[49] *Repubblika* cit. para. 63; compare opinion of AG Tanchev in case C-824/18 *A.B. and Others* (*Appointment of judges to the Supreme Court – Actions)* ECLI:EU:C:2020:1053 point 83.

[50] Case C-284/16 *Achmea* ECLI:EU:C:2018:158.

a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law".[51] In addition, the Court also stated that such arbitration clause calls into question the principle of mutual trust, since it is based on the assumption that courts of the Member State where investments are made do not offer effective judicial protection to the rights that EU law confers on investors.[52] Accordingly, one may argue that the reasoning of the Court of Justice in *Achmea* is grounded in two values. The Court of Justice seeks to guarantee the principle of effective judicial protection of EU rights, which gives concrete expression to the value of respect for the rule of law. It also seeks to protect the principle of mutual trust that, in turn, gives concrete expression to the value of equality. By contrast, in Opinion 1/17 (*EU-Canada CET Agreement*), the Court of Justice found that the mechanism for settling disputes between investors and States contained in the CETA entered into by Canada, on the one hand, and the EU and its Member States, on the other hand, did not adversely affect the autonomy of the EU legal order. That mechanism provided for the creation of a Tribunal, an Appellate Tribunal (the "envisaged tribunals") and, in the long term, a multilateral investment tribunal. However, unlike the arbitral tribunal at issue in *Achmea*, the envisaged tribunals did not compromise the judicial dialogue between the Court of Justice and national courts, since those tribunals did not enjoy jurisdiction to interpret and apply EU law other than that relating to the provisions of CETA.

Moreover, there is another aspect of the principle of autonomy that is worth exploring, *i.e.*, the fact that that principle contributes to producing a specific type of "Brussels effect". As Bradford explains, the Brussels effect seeks to describe the phenomenon through which the EU "externalize[s] its law and regulations outside its borders through market mechanisms, resulting in the globalization of standards".[53] She posits that five conditions have to be met in order for EU standards to produce that extraterritorial effect.[54] First, the EU must enjoy market power, in so far as companies located in third countries may want to benefit from "the high value of market access to the EU". Second, the EU enjoys regulatory competences in the area in question. Third, it has exercised those competences by adopting strict standards. Fourth, those standards have "inelastic targets", meaning that there is no risk of escaping EU regulation by

[51] *Ibid*. para. 56. In case C-109/20 *PL Holdings* ECLI:EU:C:2021:875 paras 47, 56, the Court of Justice added that the principle of autonomy also precludes "national legislation which allows a Member State to conclude an ad hoc arbitration agreement with an investor from another Member State that makes it possible to continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement, where that clause is contained in an international agreement concluded between those two Member States and is invalid on the ground that it is contrary to [the Treaties]". The Court of Justice reasoned that such an ad hoc arbitration agreement would in fact entail "a circumvention of the obligations arising for [the Member State concerned] under the Treaties" in the light of the *Achmea* judgment.

[52] *Achmea* cit. para. 58.

[53] A Bradford, 'The Brussels Effect' cit. 3.

[54] A Bradford, *The Brussels Effect: How the European Union Rules the World* cit. 25–66.

relocating to a foreign jurisdiction. Fifth and last, EU standards are indivisible in that foreign companies have economic incentives to apply those standards worldwide.

In our view, the principle of autonomy may produce a concrete type of Brussels effect, *i.e.*, that of requiring economic operators – and public authorities – located in third countries to accommodate their practices to the values on which the EU is founded. The case law of the Court of Justice in the area of data protection may illustrate this point. As Bradford explains, the Brussels effect may take place in that area, given that the five conditions mentioned above are likely to be met. Indeed, access to the EU digital market offers unlimited business opportunities. The area of data protection has been heavily regulated by the EU legislature, even more so with the adoption of the GDPR.[55] In addition, in *Google Spain* the Court of Justice interpreted Directive 95/46,[56] the predecessor of the GDPR, in a way that applies to "an undertaking that has its seat in a third State but has an establishment in a Member State", in so far as their activities are "inextricably linked".[57] It appears that the GDPR goes a step further in so far as it also applies to undertakings that are not established in the EU but whose activities target EU residents.[58] Moreover, there are economic incentives for undertakings to control data in the same way regardless of the origins of that data, since adopting different data processing practices would be difficult and costly.[59]

For example, in *Schrems*, the Court of Justice for the first time declared an EU measure invalid on the ground that it did not respect the essence of two fundamental rights, namely, the right to respect for private life and the right to effective judicial protection. That case concerned a preliminary reference made by the High Court of Ireland in which that court questioned the validity of Commission Decision 2000/520 (the "Commission Decision") providing that personal data could be transferred from the EU to the United States on the basis that the *safe harbor privacy principles* applicable to organisations established in the

[55] Regulation 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.

[56] See Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, repealed by Regulation 2016/679 cit.

[57] Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317 para. 55 (holding that "it must be held that the processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out 'in the context of the activities' of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable").

[58] See art. 3(2) Regulation 2016/679 cit.

[59] A Bradford, *The Brussels Effect: How the European Union Rules the World* cit. 162 (who observes that "[w]hether the Brussels Effect occurs therefore often comes down to the question of non-divisibility of the products and services across global users. Various examples suggest that, for today's global digital companies, maintaining different data practices across global markets is often both difficult (due to technical non-divisibility) and costly (due to economic non-divisibility)").

U.S. ensured an adequate level of protection of these data.[60] After holding that the expression "adequate protection," within the meaning of Directive 95/46, was to be interpreted as meaning that such transfer could only take place where the US legal order offered an "essentially equivalent protection" to that guaranteed under EU law, the Court of Justice observed that the Commission Decision permitted US public authorities, notably the National Security Agency, to have access, on a generalized basis, to the *content* of incoming electronic communications from across the Atlantic.[61] Such access was found to constitute such a serious and intrusive breach of the fundamental right to respect for private life guaranteed by art. 7 of the Charter, that it compromised the very essence of that right.[62] In the same vein, the Commission Decision did not refer to the existence of "any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data."[63] Accordingly, the Court of Justice found that the contested decision did not respect the essence of the fundamental right to effective judicial protection, as enshrined in art. 47 of the Charter.[64]

In the aftermath of the *Schrems* judgment, new so-called "privacy-shield" principles were applicable to organisations established in the US that operated as controllers of data coming from the EU. In the light of those principles, the Commission adopted a new decision allowing the transfer of data from the EU to the US in respect of those organisations.[65] However, in *Schrems II*,[66] the Court of Justice declared the new Commission decision invalid, on the ground that the privacy-shield principles and US law fell short of providing a protection equivalent to the right to respect for private life and the right to effective judicial protection guaranteed by EU law.[67] The *Schrems II* judgment led the Commission and US authorities to adopt a "Trans-Atlantic Data Privacy Framework" that sought to implement the main findings of the Court of Justice in that latter judgment.

[60] Decision 2000/520 of the Commission of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441).

[61] *Schrems* cit. paras 94-97.

[62] *Ibid*. para. 94.

[63] *Ibid*. para. 95.

[64] *Ibid.*

[65] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46 on the adequacy of the protection provided by the EU–US Privacy Shield.

[66] *Facebook Ireland and Schrems* cit.

[67] The Court of Justice found that the access and use by US public authorities of personal data transferred from the EU to that third country was not limited to what was strictly necessary. Notably, US law did not indicate any limitations on the powers conferred on public authorities to implement certain surveillance programmes, nor any guarantees for non-US nationals who were targeted by those programmes (see *Facebook Ireland and Schrems* cit. para. 180). Moreover, US law did not grant to those persons any actionable rights before U.S. courts against the US authorities (*ibid*. para. 181). Whilst the privacy-shield principles provided for the creation of an Ombudsperson mechanism, the latter did not offer guarantees substantively equivalent to those required by EU law, since such a body was not independent, nor had the capacity to issue decisions binding upon US intelligence services (*ibid*. paras 190-197).

Read in the light of the principle of autonomy, the *Schrems I and II* judgments sent a clear message to the EU political institutions: they may not follow standards that lower the level of fundamental rights protection applicable within the EU. In interacting with the wider world, the EU may not forgo its own system of fundamental rights protection, since that protection forms part of our common identity as Europeans. That message is of paramount importance in the digital sphere where data moves fast and free and where territorial boundaries become meaningless. Furthermore, coupled with the Brussels effect, the principle of autonomy not only serves to protect the identity of the EU as a common legal order, but may also favour a "race to the top" worldwide, since it promotes the protection of fundamental rights and, more broadly, that of liberal values. An undertaking that has its seat in a third State and wants to have access to the EU digital market must respect the right to privacy as defined under EU law. Since it may make economic sense for such an undertaking to apply EU standards of fundamental rights protection to all data it collects worldwide, that undertaking has incentives to improve the privacy of the data it controls.

V. Concluding remarks

More often than not, the principle of autonomy is understood as an end in itself or as a tool for judicial self-empowerment. However, we respectfully disagree with such an understanding of that principle.

The principle of autonomy is, first and foremost, a means of protecting and promoting the values on which the EU is founded. In doing so, it serves to define the very identity of the EU as a common legal order. That identity is not built following a top-down approach but stems from the constitutional traditions common to the Member States.

At the outset, the principle of autonomy requires a candidate State for EU membership to align its constitution – and even its own identity – with the values on which the EU is founded. Such constitutional alignment is not a "one-off" objective but an ongoing commitment that applies for so long as a Member State remains within the EU. Since authoritarian tendencies are incompatible with the values contained in art. 2 TEU, the principle of autonomy serves to keep those tendencies at bay. They can never form part of our common constitutional traditions. At the same time, that constitutional alignment reduces the chances of normative conflicts between the identity of the EU and that of the Member State concerned, since both are built on shared values.

In this epilogue, we also posit that the Court of Justice does not choose constitutional structures over fundamental values, since those structures serve to implement and protect those values. In our view, protecting constitutional structures contributes to upholding the values on which the EU is founded, such as respect for the rule of law.

In addition, we sought to demonstrate that the principle of autonomy does not seek to insulate the EU from the wider world. On the contrary, the EU may engage in international obligations, provided that the values on which it is founded are properly

protected. Stated differently, when engaging with other international actors, the EU must not lose sight of its own identity.

Last but not least, coupled with the Brussels effect, the principle of autonomy operates as a powerful instrument that promotes liberal values outside the EU, enabling the latter to operate as a beacon of freedom, democracy and justice for the wider world. In a world where authoritarian regimes are on the rise, we should all have *high hopes* for the principle of autonomy.