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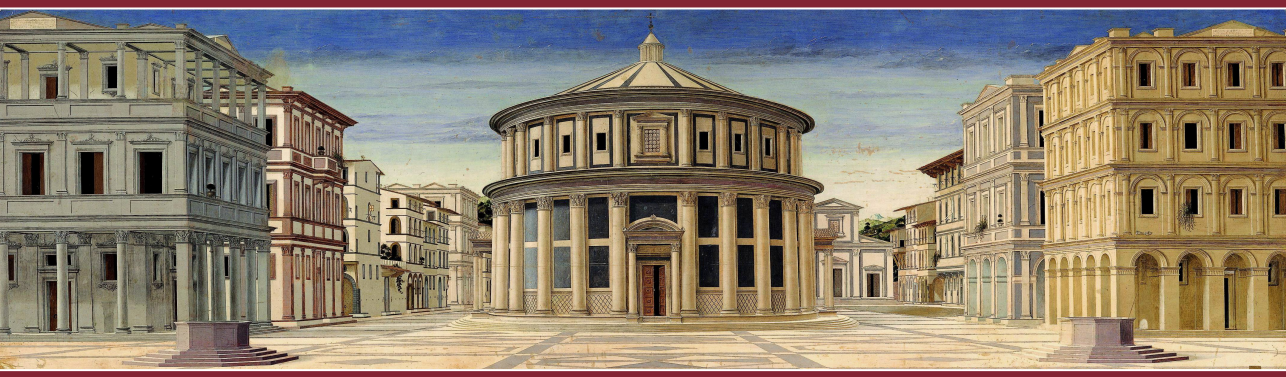

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EUROPEAN FORUM

Editorial

Fundamental Values and Fundamental Disagreement in Europe

On 12 September 2018, two events occurred, both with considerable legal and political implications, and seemingly inspired by different conceptions about the role of European fundamental values and principles.

The first event is a resolution adopted by the European Parliament – on the basis of a large majority – calling upon the Council to determine the existence of a clear risk of a serious breach by Hungary of the fundamental values of the Union – the so-called preventive procedure established by Art. 7, para. 1, TEU (P8_TA-PROV(2018)0340). The second event is the order in joint cases C-208/17 P to C-210/17 P, *NF and Others v. European Council*, by which the Court of Justice declared the appeals lodged against the three orders of the General Court of 28 February 2017 manifestly inadmissible, which, in turn, had declared as inadmissible three actions for annulment against the EU-Turkey Statement of 18 March 2016 (see case T-192/16, *NF v. European Council*; case T-193/16, *NG v. European Council*; case T-257/16, *NM v. European Council*: hereinafter, *NF*).

It would be highly improper, of course, to establish a link between these two events, pronounced by different institutions, on different subjects and having a totally different factual and legal background. Yet, the temporal coincidence prompts a parallel analysis of these two decisions, which seem to occupy the two opposite ends on the ideal scale measuring the substantial, not formal, adherence of the EU to its fundamental values.

The European Parliament is not the first institution to trigger the Art. 7, para.1, TEU procedure. As is well known, on 20 December 2017 the Commission adopted a reasoned proposal for a Council Decision on the determination of a clear risk of a serious breach of the rule of law by the Republic of Poland (COM(2017) 835 final). However, a parliamentary resolution appears to be the most appropriate means of initiating this procedure. The triune nature of the Parliament – an institution; a political institution; a political institution representing the European citizens – endows its resolutions with a special form of legitimacy, that neither the Commission nor one third of the Member States – the other two actors entitled to start this procedure – possess.

The Parliament was certainly aware of this special mission. The resolution was approved by an overwhelming majority going well beyond the double threshold established by Art. 354, subparagraph 4, TFEU. All the political groups, except the Europe of Nations and Freedom (ENF), formed part of the majority, thus highlighting the political

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cohesion of the Parliament. To support the resolution, the European People's Party (EPP) had to sacrifice its internal cohesion and was dramatically ripped apart. The event was followed with growing trepidation by public opinion and received much coverage by the international press. The resolution constitutes, therefore, a momentous passage in the constitutional life of the Union; as such, it can be hardly treated condescendingly by the Council.

The resolution of 12 September 2018 has been criticised for being discretionary and inspired by questionable political wisdom. These critiques appear largely unfounded. The political nature of the resolution mirrors the political nature of the substantive goods that Art. 7 TEU is designed to protect, namely democracy and the rule of law, that, at least up to a certain threshold, seem to be immeasurable by predetermined, objective and impartial standards (see D. KOCHENOV, *The Missing EU Rule of Law?* and J.H.H. WEILER, *Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law*, both published in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, respectively at p. 290 *et seq.* and at p. 313 *et seq.*). Moreover, in the light of the still immature stage of the process of political integration, a determination by a technical organ of the respect of the EU fundamental values by Member States would be improper. It would exacerbate the perception of the EU as a technocracy aimed at subjugating the free expression of popular will and, therefore, do more harm than good.

The special legitimacy derived from the parliamentary vote may also have some implications on the effectiveness of the EU's reactions to the illiberal course taken by Hungary: the Achilles heel of Art. 7 TEU procedures.

The competence conferred on the Union under Art. 7 TEU has an exclusive nature only insofar as it concerns a systemic breach of the fundamental values of the Union; a breach that, otherwise, would fall outside the scope of EU law. It follows that individual breaches to fundamental values, that interfere with the application of EU law, come within the purview of the EU's competence and can be dealt with by other "ordinary" means of redress. As is well known, the Commission has proposed using the infringement procedure to determine the existence of breaches of fundamental values of EU law that have allegedly entailed a violation of specific rules and principles of Union law.

The main problem with these alternative means of redress, a notion not necessarily limited to infringement procedures, lies in the fact that they are entrusted to technical organs, not directly endowed with democratic legitimacy: a mortal sin in a struggle against democracies that, although "illiberal", are blessed with popular legitimacy. Beneath the mantle of the Art. 7 TEU procedure started by the Parliament, these "ordinary" means of redress, designed to put an end to "ordinary" breaches of EU law, will become part and parcel of the systemic reactions to the authoritarian drift of a Member State and, therefore, vested with the broader function of exerting political pressure on that State (see Court of Justice: judgment of 6 November 2012, case C-286/12, *Commis-*

sion v. Hungary and judgment of 8 April 2014, case C-288/12, *Commission v. Hungary* [GC], where this link was only surreptitious and emerged only from the opinions of AG Kokott delivered on 2 October 2012, case C-286/12, para. 56, and of AG Wathelet delivered on 10 December 2013, case C-288/12, para. 83).

All in all, the symbolic and political weight of the move of the Parliament might enhance – although to a limited extent – the effectiveness of the Art. 7 preventive procedure. It may trigger a chain of reactions that could halt, if not even reverse, the illiberal course of some of the Member States. It is to be regretted that, in crises intimately connected with the "core business" of the Parliament, namely democracy, the drafters of Art. 7 TEU did not rely to a much greater extent on that institution to provide a bulwark to challenge any wild call towards despotism.

Let us now pass to the story of *NF*, definitively closed by the Court of Justice's order of 12 September 2018: a well-known story on which there is no need to dwell at length.

The story starts in 2016, when some asylum seekers brought in front of the General Court an annulment action against the EU-Turkey Statement, an act of uncertain legal nature, that had stopped a massive influx of migrants crossing the borders of the EU from Turkey.

The dubious consistency of the measures adopted in the Statement with mandatory principles and rules of EU law – and possibly also with principles of public morality – raised a lively debate among scholars and practitioners. To that debate *European Papers* has considerably contributed by hosting writings from opposite camps and inspired by antithetical ethical and legal perspectives, in the belief that this is the best way to accomplish its cultural mission (see, E. CANNIZZARO, *Denialism as the Supreme Expression of Realism – A Quick Comment on* NF v. European Council, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 251 *et seq.*; G. FERNÁNDEZ ARRIBAS, *The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 303 *et seq.*).

Under no circumstances was this debate settled by the three orders of the General Court of 28 February 2017. The inadmissibility of these annulment actions had been pronounced on the basis of the doctrine that an international arrangement, negotiated by the President of the European Council, visibly acting in this capacity, drafted within the headquarters of the European Council, and mentioning the European Council as one of its parties, was not attributable to the European Union but rather to the Member States, acting within the European Council.

This doctrine was neither upheld nor reversed by the Court of Justice's order of 12 September 2018. The Court found that the appeals lacked the minimal requirements of coherence, clarity and intelligibility, without which a review of validity could not be car-

ried out (see, in particular, paras 16 and 17 of the order) and dismissed the appeals accordingly.

It is certainly not the intent of this *Editorial* to challenge the veracity of the reasons stated by the Court of Justice. The confidentiality of the written documents, in which the pleas of appeal are formulated, protects them from unwarranted criticism. But, even admitting that the appeals were badly drafted, to the point of making it difficult – perhaps very difficult – to draw clear and coherent arguments in favour of the annulment of the decision of the General Court, nonetheless, in the opinion of the current author, the Court of Justice should have attempted the impossible and tried to deduce these arguments from the available documents and to review the legality of the Statement. There were two reasons for doing so.

First, there was the need to restore the credibility of the EU judicial institutions, shaken by the controversial arguments made in the three orders of 28 February 2017, which give the impression that the real intent of the General Court was to shield the EU-Turkey Statement from judicial review.

To dispel that impression, the decision on appeal, regardless of its outcome, should have been supported by clear, transparent and verifiable arguments. By dismissing the case as being manifestly inadmissible, without considering the merits of the appeals, the order of 12 September 2018 tends to reinforce the idea that, in the EU legal order, there are *arcana imperii* still immune from judicial scrutiny.

There is a further criticism that can be directed towards the unfortunate end of the *NF* story, grounded in a technical assessment of the legal consequences of the declaration of manifest inadmissibility.

Under the principles of EU procedural law, as a consequence of a declaration of inadmissibility of an appeal, the decision taken in first instance becomes final and acquires the authority of *res judicata*. According to settled case law, the force of *res judicata* is not only attached to the operative part, but also to the *ratio decidendi* of that decision which is inseparable from it. It follows that the *ratio decidendi* of the three orders of 28 February 2017, namely that the Statement is to be attributed to the Member States and not to the European Union, is now final and endowed with the force of *res judicata*.

This outcome does not solely affect the interest of the Court of Justice in presenting itself as the impartial custodian of the European legality. It also affects the European public interest. In the three orders of the General Court of 28 February 2017, the European Council and its President are presented, on the basis of very controversial arguments, as agents of the Member States. This is the finding that, in the light of the order of 12 September 2018, has now acquired the authority of *res judicata*. Even if it were inspired by the noble purpose of protecting the European *contrat social* threatened by the migrant crisis, the price to be paid, in terms of the subversion of fundamental principles of the EU order, seems far too high.

There is no relation, of course, between these two events, that only by accident must have occurred on the same date. Their only connecting factor lies in the diverse, perhaps opposite, conception of the inspiring principles of the process of integration in Europe. On 12 September 2018, the European Parliament embraced the fundamental values of Europe as its own mission and brandished its democratic legitimacy as a sword against the popular legitimacy that, *hélas*, supports the path towards illiberal democracy. On the same date, the Court of Justice abstained from unveiling the mysteries that still surround one of the most controversial instruments of the Union's migrant policy; by so doing, it abdicated its role as ultimate custodian of the principles and values of the process of European integration.

These two events symbolise how fragile and inconsistent the conduct of the various actors of this process may be. At the same time, they remind us of the need to maintain firmly the fundamental values, common to the EU and to its Member States, as the only polar star to navigate the troubled waters of integration.

E.C.

ARTICLES

INTERDEPENDENCE AND CONTESTATION IN EUROPEAN INTEGRATION

FLORIS DE WITTE*

ABSTRACT: The past years has seen a dramatic rise in the contestation of the European Union and its policies. This *Article* seeks to understand this rise as a result of the way in which we "do" integration. This method, which heavily relies on the use of law to prevent the creation of negative externalities among the Member States, has increasingly limited the scope for political self-determination within and between the Member States. The ensuing contestation, it is argued, cannot solely be resolved by re-assessing the role of law in the process of integration, but requires a significant institutional reconfiguration as well.

KEYWORDS: interdependence – institutional structure of EU – nature of EU law – contestation – conflict – legitimacy of the EU.

I. INTRODUCTION

This history of European integration has been a history of structuring ties of interdependence between Member States. This interdependence between States is at once the problem that the integration process attempts to solve *and* its very purpose – the *end*

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of integration.[1] The ambiguous relationship between interdependence and integration explains, it will be argued, both the nature of the integration process as well as the increase in contestation that it has engendered in the past decades.

At the start of the process of European integration, interdependence between States in specific policy areas was primarily understood as something that could prevent the imposition of costs between neighbouring States – be it in economic, social or military terms. On this account, a range of institutional innovations, on both the national and supranational level, were meant to create the preconditions for a stable relationship of interdependence between States. This consisted, on the one hand, of an institutional structure that allowed for collective decision-making, thereby solidifying existing ties of interdependence and internalising the imposition of costs between Member States. On the other hand, it was based on a very specific role for law – which became an integrative force in and of itself. On this view, the authority of the EU legal order is explicitly justified with reference to its potential to manage the interdependence between Member States. In the last decades of integration, the interdependence between Member States has been extended to politically salient areas such as migration and budgetary politics, with an increasing need for law to stabilise the ensuing complexity (section II).

The history of European integration has also been a history of ever greater contestation of the EU's authority. Properly understood, this contestation centres on *what the EU does*, rather than the EU in itself. The main sites where such contestation has emerged – ranging from distributive politics to differentiated integration and Brexit – have one thing in common. In these domains, the EU struggles to legitimise its policy orientation because it uses law to constrain domestic political mandates. In this fashion, EU law keeps generating sites of conflict and resistance throughout the policy domains that it engages with. The use of law as an instrument to tie Member States to the common project and prevent the imposition of costs between them, in other words, destabilises rather than stabilises the project of integration. Crucially, the EU increasingly struggles to articulate a way to productively institutionalise this contestation and the ensuing political conflict (section III).

These two stories of European integration suggest that if we want to analyse the EU's current predicament, and think of ways to overcome it, we ought to think of ways in which the EU can become more sensitive to instances of contestation. The question that is crucial to the legitimacy of the EU, then, has changed from 1957. If in 1957 the question was how to manage interdependence between Member States; the question today is how to manage contestation in conditions of interdependence.[2] Some com-

[1] See F. Schimmelfennig, D. Leuffen, B. Rittberger, *The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation*, in *Journal of European Public Policy*, 2015, p. 771, who argue that interdependence lies at the core of all theoretical and explanatory accounts of integration.

[2] For the sake of simplicity, I refer everywhere to "EU" rather than European Economy Community (EEC) or European Community (EC).

mentators have suggested that the answer lies in the use of law. What we ought to aim for, in other words, is contestation *through* law. The logic, here, is that the process of integration through law can only be meaningfully resisted by judicial actors on the national level. Other commentators have suggested that what we need is not contestation through law, but contestation *of* law. This solution focuses on the re-assertion of the primacy of politics over law. The way in which this ought to happen is disputed. While some commentators suggest that the Council is the most appropriate site for "taking back control", others have suggested that national parliaments or national electorates ought to be in the driving seat.

This *Article* suggests that the twin processes of interdependence and contestation demand that we move away from such solutions. On the one hand, contestation in conditions of interdependence requires decisions to be taken beyond the level of the nation State. After all, national decisions affect citizens in other States that have not been consulted on the choice. On the other hand, contestation in a situation of interdependence requires the process through which decisions are taken to be sensitive to *substantive* policy claims. Strengthening the hold of institutions that represent national interests over the course of integration achieves the opposite: rather than allowing citizens to contest and control the direction of the integration process, it creates even more need for legal constraints on national decisions, justified in order to manage their external effects (section IV).

This *Article* calls for a re-imagination of how we "do" integration in a way that allows the EU to be sensitive to its own limits. This would require a simultaneous concern with structuring ties of interdependence across borders *as well as* with the contestation or resistance that the management of these ties engender. In the long term, widespread contestation *of* the EU may be prevented only by creating a space for contestation *within* the EU.

II. Institutionalising interdependence

The conceptual puzzle that undergirds much of EU law is the puzzle of interdependence. In a sense, interdependence is the constructive translation of the destruction brought about by the two world wars. It takes as given the tendency of Europe's powers to create significant costs on their neighbours, be it in economic, social, or military terms. The immediate preoccupation for most European States, after the Second World War, then, was to create a structure through which these costs could be prevented – or at least anticipated and mediated. The process of European integration can be seen as such a structure. It seeks – in different, and arguably contradictory ways – to prevent, anticipate and mediate in conflicts among its Member States that are generated where one State's internal decision imposes an external cost on its neighbour. Confusingly, one of the solutions to the *problem* of interdependence has been the *perpetuation* of interdependence – the logic being that once nation States are inextricably tied to each other, economic or military con-

flict becomes an exercise in self-harm, and, thereby, extremely unlikely. This interaction between the negative side to interdependence (which understands it as a *problem*, in so far as it allows States to impose costs on each other) and the positive side to interdependence (which understands interdependence as the *solution* and starting point towards more peaceful relations between States) has been central to the integration process – and can explicitly be traced in the Schuman declaration.[3]

From the start of the integration process, then, a central question has been how to manage the interdependence between States. What makes the different options to achieve this more or less attractive is not only their capacity to instantiate ties of interdependence, and to prevent the imposition of costs by States on neighbouring States; but also their capacity to do so in a way that respects each State's independence, sovereignty, or autonomy. This is the problem that the European project has grappled with from the start, and has come back with a vengeance after the Euro-crisis, refugee crisis, and Brexit: how to institutionalise the tension between, on the one hand, the interdependence between States, and, on the other hand, the independence of States.[4]

At the core of this tension – that is central to the legitimacy of the EU – lies the principle of congruence. This principle is firmly rooted in democratic theory, and suggests that democratic authority is to a large extent premised on the approximation (or congruence) between those making a decision and those affected by that decision, that is, between the objects and subjects of rule.[5] We may think it is inappropriate if Member State A builds a fossil fuel factory on the border with Member State B, with the prevailing winds carrying any pollution into the territory of Member State B. This allows Member State A to reap the benefits of its decision while externalising the costs onto Member State B. Member State B, on the other hand, is faced with the costs while not having access to the associated benefits. At the same time, this example loses much of its problematic nature if the citizens of Member State B democratically accept the decision of Member State A, or are compensated for it by having access to Member State A's energy supplies. What lies at the

[3] Schuman Declaration of 9 May 1950, available at www.europa.eu.

[4] M. JACHTENFUCHS, C. KASACK, *Balancing Sub-unit Autonomy and Collective Problem-solving by Varying Exit and Voice. An Analytical Framework*, in *Journal of European Public Policy*, 2017, p. 598.

[5] Often referred to as the "all-affected principle" as well. See, for example, R. DAHL, *After the Revolution. Authority in a Good Society*, Yale: Yale University Press, 1970, p. 64; L. BECKMAN, *Democratic Inclusion, Law, and Causes*, in *Ratio Juris*, 2008, p. 348 *et seq.*; R. GOODIN, *Enfranchising All Affected Interests, and Its Alternatives*, in *Philosophy and Public Affairs*, 2007, p. 40 *et seq*. The principle of congruence, however, is more than a formalistic instrument that can help us determine the scope of democratic inclusion required. It serves important substantive functions, too. Beyond the evident representative element, the principle of congruence also serves to internalise dissent, mediate conflict, and legitimise any coercive action taken in the implementation of a certain decision.

core of the principle of congruence, then, is that the legitimacy of a decision requires a link between those making a decision and those affected by it.[6]

There is, of course, an evident conceptual blind spot to the principle of congruence or affect: the question *who* ought to be involved in making a decision is conditional upon the substantive outcome of that same decision.[7] In other words: if the citizens in Member State A vote in favour of building a fossil fuel factory on the border with Member State B, the citizens of Member State B ought to have been involved in making that decision. If, on the other hand, the citizens of Member State A decide *not* to build the reactor, the citizens of Member State B do *not* need to be involved. If we take the principle of congruence to its logical extreme, the personal scope of decision-making changes depending on the nature of the policy question and the specific *answer* to every question.

Traditionally, this blind spot has been overcome by the use of proxies. As Goodin highlights, geographical proximity and the ethno-historical alliances that have crystallised into bounded political communities are used as shortcuts. The assumption, here, is that choices made by individuals or groups that live in close proximity, or that are historically intertwined, are likely to affect fellow members of that group.[8] The institutional machinery of the nation State has served to solidify these shortcuts. At the same time, these proxies have always been unstable, as the perpetual wars and shifting borders in Europe highlight. More importantly, they have always remained proxies. As Goodin puts it, "constituting a demos on the basis of shared territory or history or nationality is thus only an approximation to constituting it on the basis of what really matters, which is interlinking interests".[9] In the past decades, the use of the nation State as a proxy for congruence has become increasingly anachronistic. The advent of the internet, the technological ease of communication, travel, and business has massively increased the capacity of States at other ends of the world to impose costs on each other. Russia has been accused of meddling in the United States (US) elections through hacking; the United Kingdom (UK) threatens the EU by slashing its corporate tax rates after Brexit; the US' decision to withdraw from the Paris Agreement will have an effect on living conditions in Bangladesh; Facebook's global privacy settings are dictated by litigation brought in Ireland by an Austrian activist; a war in Syria brings European politics close to collapse; and rating agencies in New York affect the life of pensioners in Greece. All these examples suggest, at the very least, that the spatial unit of the nation State is increas-

[6] R. GOODIN, *Enfranchising All Affected Interests, and Its Alternatives*, cit., p. 51; R. DAHL *After the Revolution*, cit., p. 64.

[7] As a result, much of academic work on the principle has dealt with how to institutionalize it. See for example L. BECKMAN, *Democratic Inclusion, Law, and Causes*, cit., and R. GOODIN, *Enfranchising All Affected Interests, and Its Alternatives*, cit., with alternative accounts. Law seems to play an important role for both in determining the appropriate scope for the principle.

[8] R. GOODIN, *Enfranchising All Affected Interests, and Its Alternatives*, cit., p. 48.

[9] *Ibid.*, p. 49.

ingly unable to remain committed to the principle of congruence – which requires approximation between those making a decision and those affected by it.[10]

This is most clearly felt if we turn the principle of congruence on its head. After all, it is not only about ensuring the approximation between those making a decision and those affected by it; but also requires that *those that are affected by a decision ought to be able to change it*. This shows how far we are removed from meeting the principle of congruence today. It also explains the purchase of the political narrative of "taking back control" that is emerging in many western countries, as well as, ironically, its impossible realisation on the national level. At the same time, focusing on the notion that those affected by a decision should have the capacity to alter it ("taking back control") serves to open up space and imagination towards novel ways of achieving it. It leads us in the direction of an idea of congruence that focuses on the active agency of a community of affected individuals, rather than a managerial approach that constrains the capacity of groups of citizens or States to make decisions that affect outsiders.

This section traces how the EU understands the principle of congruence. It does so by disentangling the different understandings of interdependence that are implicit in the functioning of the EU. It suggests that, originally, the scope and nature of the ties of interdependence between Member States was managed by creating transnational forums for decision-making and for the enforcement of those decisions. In such a setting, congruence is secured by enhancing the reference group for the making of *the type of decisions that are likely to affect others* (sub-section II.1). Law plays an important role in this solution. The notion of "integration through law", wherein legal principles serve to constrain the capacity of Member States to go back on its commitments or impose costs on its neighbours, has become the central instrument for the management of interdependence between States. On this view, congruence is secured by preventing the imposition of costs among States (sub-section II.2). The last decades of integration have seen a move towards creating interdependence between Member States in some of the most salient policy domains – ranging from immigration control to fiscal policies – which makes securing the principle of congruence increasingly complex. Legal constraints now operate in fields that were previously considered the bread and butter of domestic politics (sub-section II.3). As the following section will highlight, this move has led to a significant increase in contestation of the EU.

II.1. The institutions of interdependence

The solution to interdependence that the original Treaty establishing the European Economic Community (EEC Treaty) suggested rested on the pooling of sovereignty, with the management of certain policy areas being transferred to the level beyond the State.

[10] F. de Witte, *EU Law, Politics, and the Social Question*, in *German Law Journal*, 2013, p. 583.

As such, the creation of a range of novel institutions, such as the European Commission, the Court of Justice, and the Parliamentary Assembly served to aid the process through which States – now formally meeting as part of the Council – would make *collective* decisions, the enforcement of which would be delegated to impartial and apolitical institutions. Interdependence, and the impossibility of State decisions to impose costs on its neighbours, then, was secured by insisting that certain *types* of decisions that had this potential were taken collectively on the European level. This also explains why integration was primarily limited to policy domains where the risk of cross-border externalities were considered to be the highest, and where cooperation therefore offered the biggest potential to inextricably link Member States (such as coal, steel, and the production and distribution of food). Conversely, policy areas that were considered to impose few costs across borders, or where cooperation was unlikely to structurally link Member States' together, such as welfare policies, were left on the national level.[11]

The EU's institutional structure, on this view, was meant to create the preconditions for a stable relationship of interdependence between Member States. Joint decision-making in Brussels, and constrained capacity of policy options at home, then, would prevent and institutionalise conflict and cost-attribution across borders. The joint exercise of state power would simultaneously safeguard Member State power and eviscerate its potential to impose costs on others.[12] At the most basic level this is, of course, still a central part of the EU's functioning. Standardisation or harmonisation of Member State rules is nothing more than an expression of State power in a way that prevents (or at least internalises) the uneven imposition of costs between those States. Congruence, in such a model, is secured by scaling up the reference group for the making of decisions: if all decisions are taken jointly, the uneven imposition of costs and benefits is automatically mediated. The upshot of this method is that it also captures the more positive understanding of interdependence, which sees interdependence as a *solution* rather than a problem. On this view, the creation of an institutional structure for collective co-decision would make Member States structurally sensitive to each other's needs, prevent the gratuitous use of vetoes, socialise its members, gradually entangle their economic interests, and lead to the articulation of shared or collective values across the Member States. In such a setting, waging war would, to use Schuman's words, be "not merely unthinkable, but materially impossible". The obsession of academics and politicians with the idea of a European identity stems from this mode of "doing" integration: as something that would simultaneously result from the creation of collective institutions and further galvanise their effectiveness.

[11] See e.g. S. GIUBBONI, *Social Right and Market Freedom in the European Constitution*, Cambridge: Cambridge University Press, 2006, p. 29 *et seq*. and J. RUGGIE, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, in *International Organization*, 1982, p. 379 *et seq*.

[12] A. MILWARD, *The European Rescue of the Nation State*, Abingdon: Routledge, 2000, p. 3.

In the initial phase of integration, then, interdependence was structured by scaling up the level of decision-making of the *type* of decisions that were considered to lead to costs between neighbouring States. The problem with this approach is, of course, that it perpetuates the very problem that it is meant to solve. Joint decisions on the European level, after all, remain conditional upon the acquiescence of each individual State. The two main crisis of the early decades of integration – the collapse of the proposed European Defence Community and the "empty chair" crisis, whereby De Gaulle refused to participate in Council discussions – indicate this point well: domestic opposition in *one* Member State could stop the whole process.[13] Rather than *solving* conceptually the problem of how States could affect the interests of others, then, the earliest days of integration focused on institutionalising this potential. This is not to say that it failed in its objective: the secondary effects of socialisation and cooperation cannot be underestimated, nor can the move to qualified majority voting (with its potential to sidestep this type of institutional paralysis) be explained without it.[14]

II.2. Interdependence through law?

The introduction to the Commission's 2017 *White Paper on the Future of the EU* highlights another way to structure the interdependence between States. It reads: "Sixty years ago, inspired by that dream of a peaceful, shared future, the EU's founding members [...] agreed to settle their conflicts around the table rather than in battlefields. *They replaced the use of armed forces by the force of law*".[15] This story is one that EU lawyers are familiar with. It is the story of integration through law, which, essentially, describes how law has become the instrument through which interdependence between States is stabilised. Properly understood, this "integration through law" is a complement to the institutional solution outlined in the previous section rather than a substitute. The doctrines of direct effect and supremacy, on this view, serve to prevent "selective exit" by Member States that attempt to go back on their commitments towards integration, or that attempt to impose costs on their neighbours.[16] Such behaviour becomes *legally impossible*. Securing congruence, in other words, is simultaneously the justification for, and the objective of, the particular nature of the EU's legal order.[17]

[13] R. Dwan, *Jean Monnet and the European Defence Community 1950-54*, in *Cold War History*, 2001, p. 141.

[14] Thanks to Niamh Dunne for pointing this out.

[15] Communication COM(2017) 2025 final of 1 March 2017 from the Commission, *White Paper on the Future of the EU: Reflections and Scenarios for the EU27 by 2025*, p. 6. Emphasis added. See also L. Azoulai, *"Integration Through Law" and Us*, in *International Journal of Constitutional Law*, 2016, p. 450.

[16] J.H.H. Weiler, *The Transformation of Europe*, in *Yale Law Journal*, 1991, p. 2412.

[17] See S. Saurugger, *Politicisation and Integration Through Law: Whither Integration Theory?*, in *West European Politics*, 2016, p. 933.

The starting point for this story are the rulings by the Court in *Van Gend en Loos* and *Costa v. ENEL*.[18] In creating the doctrines of direct effect and supremacy, the Court altered the relationship between law and politics in the process of integration.[19] The legal norms in the Treaty – primarily the free movement provisions – became directly applicable within domestic legal orders, and automatically displaced conflicting national norms.[20] This "new legal order" that is created, then, understands law to be both the *object* and *agent* of integration.[21] The justification for this particular role of law is that it can successfully manage interdependence between States by insulating its central norms from political contestation on the national level, and by constraining the capacity of States to make choices that impose costs on their neighbours.[22]

This is best explained with reference to the free movement provisions. These provisions guarantee the free circulation of goods, services, capital, workers, and, more recently, citizens. National decisions, even if democratically legitimated, that prevent such circulation – whether by the imposition of discriminatory rules or indistinctly applicable rules that limit market access – are illegal under EU law, and are declared inapplicable.[23] This structure clearly hamstrings the capacity of national political actors to determine policy outcomes, allowing only those choices that are sufficiently sensitive to the interests of outside actors. And that is *exactly* the point of the free movement provisions, of course: to secure congruence by making domestic political choices sensitive to the interests of outsiders that are affected by those choices. As Azoulai has put it, the free movement provisions "help the Member States to "recontextualise" the decision-making process at national level to force them to take account of interests coming from or situations in other Member States, which are not only interests of firms but also of citizens, workers or students".[24] Even more explicitly, AG Maduro's opinion in *CEZ* highlights that the interpretation of the free movement provisions ought to be "guided by the goal of making national authorities, insofar as is possible, attentive to the impact of their deci-

[18] Court of Justice: judgment of 5 February 1963, case 26-62, *Van Gend en Loos*; judgment of 15 July 1964, case 6/64, *Costa v. ENEL*.

[19] J.H.H. WEILER, *The Transformation of Europe*, cit., p. 2403.

[20] A. VAUCHEZ, *Démocratiser l'Europe*, Paris: Seuil, 2013, pp. 39-40.

[21] See M. CAPPELLETTI, M. SECCOMBE, J. WEILER (eds), *Integration Through Law: Europe and the American Federal Experience*, Antwerpen: De Gruyter, 1987; D. AUGENSTEIN (ed.), *"Integration Through Law" Revisited: The Making of the European Polity*, Abingdon: Routledge, 2012; L. AZOULAI, *"Integration Through Law" and Us*, cit., p. 461.

[22] See also D. GRIMM, *The Democratic Costs of Constitutionalism: The European Case*, in *European Law Journal*, 2015, p. 460.

[23] Traditional account is M. POIARES MADURO, *We, the Court. The European Court of Justice and the European Economic Constitution*, Oxford: Hart, 1998, p. 166; C. JOERGES, *Unity in Diversity as Europe's Vocation and Conflict Law as Europe's Constitutional Form*, in *LSE Europe in Question Discussion Paper Series*, no. 28, 2010, www.lse.ac.uk.

[24] L. AZOULAI, *The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation*, in *Common Market Law Review*, 2008, pp. 1342-1343.

sions on the interests of other Member States and their citizens since that goal can be said to be at the core of the project of European integration and to be embedded in its rules".[25] The role of law, then, in the EU, is to manage interdependence by simply making certain domestic policy choices legally unavailable.

This centrality of law as the instrument to manage interdependence and secure congruence comes with a number of assumptions about law, the most crucial of which is that it can somehow *replace* politics. Not only does it suggest that law can replace politics *for the purpose of managing interdependence between States* – in so far political agreement on the European level is no longer necessary to push forward integration; but also that the use of law in and of itself can somehow stabilise that process integration. As Azoulai puts it, "this vision presented law not only as a functional tool but as a cultural or symbolic form, as a carrier of a new spirit of cooperation and solidarity, and as a medium capable of containing political, economic and social forces, as well as the cement capable of holding these divergent forces together".[26] More than that, law is understood as being able to "stabilise expectations, command authority, institutionalise certain values, resolve differences and communicate collective decisions to all parts of society",[27] in particular because EU law is enforced through domestic judicial and administrative actors, which are imbued with a degree of social authority that derives from the domestic constitutional settlement.[28] As we will see below, this depoliticised and depoliticising nature of EU law becomes more problematic once contestation emerges around the values that it articulates.[29]

Integration through law, then, sees to the construction of a new order that takes its authority from the successful construction and management of interdependence.[30] Or, to put it another way, the reason why we *need* EU law to be so powerful is simultaneously to tie Member States to their common ambitions, and to manage the complex structures of interdependence that exist between States. Only by significantly constraining the room for manoeuvre of national political actors can EU law ensure that they do not take decisions that impose costs on other States, their citizens or companies.

At the same time, the story of integration through law is only partially committed to the idea of congruence. While its authority derives from the fact that it prevents a decision of State A that does not comply with the collectively-agreed rules or that imposes costs on

[25] Opinion of AG Maduro delivered on 22 April 2009, case C-115/08, *Land Oberösterreich v. ČEZ*, paras 1 and 23.

[26] L. AZOULAI, *"Integration Through Law" and Us*, cit., p. 450.

[27] D. CHALMERS, *The Unconfined Power of European Union Law*, in *European Papers*, 2016, Vol. 1, No 2, www.europeanpapers.eu, p. 412. Note that Chalmers does not think EU law has the ability to secure this.

[28] J.H.H. WEILER, Van Gend en Loos*: The Individual as Subject and Object and the Dilemma of European Legitimacy*, in *International Journal of Constitutional Law*, 2014, p. 94 *et seq*.

[29] See *supra*, section 2.

[30] L. AZOULAI, *"Integration Through Law" and Us*, cit., p. 450.

State B; it is not capable, in and of itself, of articulating a more positive or active understanding of congruence whereby those citizens that are affected by a certain decision are also able to change it. For the latter, the institutional route discussed in the previous section remains crucial. Problematically, however, the constraints that exist on legislative action by the EU institutions – ranging from high majority thresholds, joint-decision traps and limited competences to inertia and unbridgeable differences in political economy between the Member States – mean that EU law often operates in isolation from its institutional component.[31] This has led to an often-rehearsed critique that the way in which integration takes place – wherein legal constraints rather than political preferences dominate the EU's policy orientation – leads to problems of legitimacy for the Union.[32]

II.3. 1992-2019: Ever further interdependence

Around the time of the Treaty of Maastricht (1992), the web of interdependence at the centre of the integration project becomes even more intricate. While integration before 1992 focused mainly on low-salience and regulatory policies, in 1992 it moves into high-salience, redistributive and politically contested policy domains. The perpetuation of ever further interdependence between Member States in these areas – which include those most central to a State's sovereignty, such as monetary and border policies – creates a problem for its management. While EU law has been central in this management, it increasingly operates in isolation from the institutional process that was meant to ensure congruence in the management of the ties of interdependence. In consequence, as we will see in the next section, EU law increasingly struggles to legitimately settle high-salience policy questions.

The two policy domains in which this escalation of interdependence is clearest are Schengen and the creation of the European Monetary Union (EMU). Both, of course, carry significant advantages for the integration process, such as the decrease of transaction costs and administrative burdens, as well as being symbolic markers for the progress of the process of integration. What is clear, in both policy domains, however, is that the increase in inter-state interdependence is significant. Once a single monetary policy is agreed, after all, Member States become interdependent in welfare policy, labour and employment policy, and fiscal policy. The decision of the Greek government to offer holiday payments to Greek pensioners, for example, appears to have such an impact on Finnish fiscal sustainability that judicial constraints on the former are justified

[31] The seminal works here are J.H.H. Weiler, *The Transformation of Europe*, cit.; and F. Scharpf, *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press, 1999.

[32] See generally J.H.H. Weiler, *The Transformation of Europe*, cit., and F. Scharpf, *Governing in Europe*, cit. See also McCrea, who locates the contestation as collapse of the socio-economic consensus between the six founding Member States in the early decades of integration. R. McCrea, *Forward or Back: The Future of European Integration and the Impossibility of the Status Quo*, in *European Law Journal*, 2017, p. 73.

with reference to the latter. These interdependencies are *created* by the decision to have a single monetary policy. They are not a pre-existing interdependence that requires management to secure peaceful cooperation between States, but a constructed one. The very decision to launch the EMU, in fact, was explicitly justified with reference to need to institutionalise and contain the economic potential of a reunified Germany and its D-mark.[33] Once again, this shows the ambivalent link between interdependence and the process of integration: it is perceived as the very purpose of integration, but also as a problem that requires careful management.

The Schengen agreement can be understood in similar terms. It is clear that without internal borders, Member States become interdependent in domains as diverse as asylum, terrorism prevention, criminal law or the enforcement of judicial and administrative decisions. A decision by Spain, for example, to open its borders in Ceuta and Melilla, or not extradite a certain criminal, might lead to the collapse of, say, the Dutch government. And, once again, judicial constraints on the former are justified with reference to the need to prevent the latter. These complex webs of interdependence do not necessarily exist by virtue of the close geographical proximity between Member States. They have been created by a deliberate decision to abolish internal borders between the Member States that participate in Schengen. The Schengen Agreement is premised partially on the desire by the participating Member States to "strengthen the solidarity between their people".[34] As Durkheim had already noticed, creating complex webs of interdependence is the most effective way of generating a sense of organic solidarity.[35] It might be a stretch to suggest that the Schengen agreement had the explicit purpose of strengthening the interdependence between the Member States. At the same time, it cannot be underestimated how close the symbolic narrative of Schengen, especially when tied to the simultaneous emergence of EU citizenship, comes to that vision.

What has typified the development of the Schengen area, the scope of Union citizenship, and the EMU ever since its inception is the reliance on law to secure its smooth functioning. As legislative action by the EU in these areas was thought to be politically too divisive (or legally constrained with reference to domestic constitutional guarantees) core questions related to the management of, say, the welfare state, fiscal policies, criminal law, or law enforcement were left on the national level. Instead, the increase in

[33] H. SCHULZ-FORBERG, B. STRATH, *The Political History of European Integration: The Hypocrisy of Democracy-through-Market*, Abingdon: Routledge, 2014, p. 48. On an alternative reading, the EMU can be understood as part of the globalization drive, which similarly understands interdependence as a good *per se*. D. RODRIK, *The Globalization Paradox*, Oxford: Oxford University Press, 2012.

[34] Preamble to the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders.

[35] See Durkheim for idea of organic solidarity as implicit in complex webs of interdependence: E. DURKHEIM, *The Division of Labour in Society*, Basingstoke: Palgrave, 1984.

interdependence between Member States is stabilised by constraining the type of decisions that Member States are allowed to take in these areas. EU law serves to constrain national policy autonomy so that domestic decisions conform to the standards and principles that govern the EU's policy. The stability and growth pact or Dublin Regulation serve, on this view, the same purpose: to ensure that Member States' domestic policy choices do not impose costs on its neighbouring States.

This indicates how the pursuit of congruence becomes ever more skewed in the EU: the exercise of law, which constraints national policy choices with reference to the need to prevent the imposition of costs on neighbouring States, is no longer accompanied by its institutional component, which serves to ensure that all those affected by a policy decision get to have a voice in creating it.[36] The way in which the Euro-crisis has been "solved" is indicative of this – the six-pack, the golden budget rule, the stability and growth pact, the prescriptive mandate for the European Central Bank (ECB), and the codification of the ban on haircuts, and the constitutionalisation of austerity in *Pringle* are all examples of the reliance on law in the management of possible externalities generated by the creation of the EMU.[37] Crucially, this depoliticising role for EU law has been explicitly justified with reference to its capacity to prevent Member States from imposing costs on each other. To the extent that political institutions *have* played a role in adopting these rules, it is clear that Treaty provisions on the equality between States, on the substantive constraints imposed by the competence catalogue, and on the involvement of representative institutions have been stretched beyond recognition.[38] All this leads to a problem in the pursuit of congruence. More and more often, EU law imposes constraints on national policy choices that Member States are unable to resist *even* when their democratic mandate suggests that they should.[39]

The evolution of the integration process since 1992 makes the assessment of the state of interdependence in the EU even more muddled and ambivalent. In the first decades of integration the principle of congruence was more or less protected by the combination of, on the one hand, an institutional structure through which all affected Member States could articulate their views on a policy question, and, on the other hand, a legal order that secured compliance with the agreed policy orientation and made unavailable

[36] F. SCHARPF, *The Asymmetry of European Integration, or: Why the EU Cannot Be a "Social Market Economy"*, in *Socioeconomic Review*, 2010, p. 218.

[37] Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.

[38] See M. DAWSON, F. DE WITTE, *Constitutional Balance in the EU After the Euro-crisis*, in *The Modern Law Review*, 2013, p. 817; S. GARBEN, *Confronting the Competence Conundrum: Democratising the European Union Through an Expansion of Its Legislative Powers*, in *Oxford Journal of Legal Studies*, 2015, p. 55.

[39] More cynically, one could even say that this process was reinforced by national politicians, more interested in being part of intergovernmental power structures than in representing particular groups in their societies under scrutiny of domestic representative institutions. C. BICKERTON, *European Integration: From Nation States to Member States*, Oxford: Oxford University Press, 2012, p. 113.

those domestic policy choices that imposed costs on neighbouring States.[40] Over the course of the process of integration, and as more and more interdependence between Member States was created in high-salient policy fields, this balance has been gradually lost. Given that legislative action in these areas is legally or politically difficult and heavily contested, the EU has increasingly secured congruence through the use of law. The use of law, here, is justified with reference to the need to stabilise the interdependent relationship between States.[41] Crucially, however, it also exacerbates the partial commitment to the principle of congruence that is implicit in the very nature of EU law. EU law is successful in preventing the imposition of costs by one State on another by constraining domestic rules on taxation, border controls, environmental policy or domestic budgets. At the same time, EU law is structurally incapable of articulating or institutionalising the more active component of the principle of congruence, which suggests that all that are affected by a certain decision ought to be able to *change* that decision.

III. Institutionalising contestation

The history of the European integration process is not only a story of ever closer interdependence. It is also indisputably a history of ever increasing contestation. Until the early 2000s, integration had famously been described as premised on a "permissive consensus" among the EU's electorates about the nature, direction, and organisation of the EU.[42] The period since the early 2000s has seen the emergence of numerous sites of conflict and resistance to the EU – which range from problematizing specific policy orientations or institutions, to all-out rejections of its very existence. Such contestation comes from political and judicial actors alike, has emerged in each Member States (if in different forms), from all sides of the political spectrum, and in almost all policy areas that the EU engages with. The last decades, in other words, have turned the "permissive consensus" into a "constraining dissensus".[43]

My argument, in this *Article*, is that the story of interdependence and the story of contestation are closely linked. Simply put, the increasing contestation of the EU and its policies can be traced back to how we "do" integration, and particularly the reliance on law. EU law is, as we will see below, structurally unable to internalise and institutionalise contestation as to the substantive norms and values that it articulates. This means that EU law struggles to legitimise those norms and values. This structural inability to internalise

[40] Even if, of course, some of these dynamics where clearly already at play before 1992. See *supra* note 31.

[41] See on the role of law and the (ab)use of the narrative of "there is no alternative", M. Wilkinson, *The Euro Is Irreversible! … Or Is It?: On OMT, Austerity and the Threat of "Grexit"*, in *German Law Journal*, 2015, p. 1049 *et seq*.

[42] L. Hooghe, G. Marks, *A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, in *British Journal of Political Science*, 2009, p. 5.

[43] *Ibidem*.

contestation points towards a wider and more conceptual problem, whereby the distance between those affected by EU law norms and those able to alter them has increased exponentially over the past decades. Empirical work, for example, seems to suggest much more resistance against *what the EU is doing* than against the EU as such.[44] For domestic electorates, however, changing what the EU *does* is much more difficult that simply leaving the EU. This premise lies at the very core of the EU's current crisis, and is best unpacked by looking at the diverse sites where contestation of the EU has emerged.

This section highlights different sites of contestation in the EU, and traces this contestation back to the predominant use of EU law in securing congruence and stabilising interdependence between States. The problem with this approach to the management of interdependence is that it does not leave sufficient space for the more active component of the principle of congruence, which focuses on the need for those affected to be able to *change* a decision. First, contestation has emerged where EU law tries to make sense of redistributive questions. This can be seen in the context of the free movement – think of the contestation of the conditions under which migrants can access welfare benefits in their host State – but also in the context of the Euro-crisis (sub-section III.1). The second site of contestation is where EU law balances between individual rights and collective public policy norms – which is aimed at the conceptual and normative centrality of the individual in the nature of EU law (sub-section III.2). The third site of contestation that has emerged is where the EU's norms are perceived to lead to identity costs on the national level. This can be traced in the refugee crisis, and, perhaps more structurally, in the process of differentiated integration (sub-section III.3). Brexit, finally, can be understood as the re-articulation of contestation of particular values or norms of EU law in a much more explosive format. The rejection of the whole edifice of integration is the logical conclusion of the processes discussed above. Without possibility to contest what the EU *does*, the only alternative form of contestation becomes the contestation of what the EU *is* (sub-section III.4).

If the purpose of European integration, as discussed above, is to structure the ties of interdependence between Member States, EU law is increasingly unable to deliver this. If anything, EU law's tendency to articulate a type of society, citizen, and polity that it considers appropriate continues to generate sites of conflict and resistance throughout the policy domains that it engages with.[45] Such conflict about the values or norms that a polity articulates is not problematic *per se*. However, to translate substantive policy contestation into a productive and legitimating force, any polity requires a sophisticated institutional structure that can internalise such claims and make sense of them. What we see in the EU, instead, is the realisation that the management of interdepend-

[44] S. Hobolt, J. Tilley, *Blaming Europe: Responsibility Without Accountability in the European Union*, Oxford: Oxford University Press, 2014.

[45] L. Azoulai, *"Integration Through Law" and Us*, cit., p. 460.

ence does not stabilise but destabilises the process of integration. The reason for this is a complete disregard to the more active component of the principle of congruence: whereby those affected by a decision ought to be able to alter that decision.

III.1. Beyond the regulatory polity

The first site where major conflict and contestation emerges in the EU is where it redistributes. This takes place across its policies, but is most explicit in the austerity drive that has followed the Euro-crisis and in the controversy surrounding access to welfare benefits for intra-EU migrants in the host State. In both areas, contestation is articulated in terms of justice. Should Greek hospitals have their budgets slashed in order to repay banks in creditor States? Should an economically inactive Belgian national have access to basic subsistence allowances if he has lived in Poland for three years? The answers to these questions differ from person to person – as they are based on moral or intuitive sensitivities for equality, desert, and need. Such differences exist within and across polities. The difference is that *within* polities, sophisticated institutional machineries exist that can collect the individuals' answers, mediate between them, and legitimise the redistributive outcome. On the European level, all prerequisites for such institutional machinery are currently lacking. Instead, redistributive choices in the EU are primarily legitimised through *law*.

The rights that a migrant EU citizen has in her host State, for example, are solely determined by the Court's interpretation of Directive 2004/38,[46] the conditions of "real link", "degree of integration" and the length of economic activity.[47] The austerity conditions imposed on financially struggling Member States are negotiated politically, but in such a rigid legal framework that any choice but austerity is in fact considered illegal under EU law. The constitutionalisation of austerity by the Court in *Pringle* and *Gauweiler*[48] allows statements such as Schäuble's quip that debt relief for Greece is *illegal* under EU law and German constitutional law.[49] Contestation about these values – about the appropriate division of resources in society – in other words, has no place in the EU polity and cannot be internalised within its institutional structure.

[46] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[47] This does not mean that these judicial doctrines are unrelated to considerations of justice – but simply that these have not been politicized. See F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity*, Oxford: Oxford University Press, 2015.

[48] Court of Justice, judgment of 16 June 2015, case C-62/14, *Gauweiler* [GC].

[49] See C. Gerner-Beuerle, *There is Little Legal Basis for Wolfgang Schäuble's Claim That Debt Restructuring Is Incompatible with Euro Membership*, in *The London School of Economics Politics and Policy (EUROPP) Blog*, 22 July 2015, www.blogs.lse.ac.uk.

What follows is a legitimacy problem. When faced with openly redistributive questions, EU law relies on its trusted method of legally enshrining policy orientations. This tactic is predominant throughout the EU's policy domains. As Davies and Bartl highlight, the justification for legislative action from the side of the EU is its capacity to attain highly prescribed functional objectives, such as abolishing barriers to trade or securing free competition.[50] This level of functional prescription serves to do two things at once. On the one hand, it prevents the capacity of states to impose costs on its neighbours, as domestic decisions that go against these functional objectives are illegal. On the other hand, it prevents dissent, and makes those functional objectives incontestable.[51] Once the EU moves beyond these clearly defined regulatory or functional objectives, however, it struggles to source authority for its policy choices – as a consequence of its operation in isolation from sophisticated political processes that can institutionalise the clash of competing claims.[52] The EU is unable to internalise the struggle, mutually incompatible claims, and coercive authority that typifies redistributive questions.[53] What follows, instead, is redistribution without politicisation, premised on a deeply unstable use of EU law.

III.2. Beyond the individual

The second site where contestation of the EU has emerged is where it tries to balance individual with collective values. It struggles to do so appropriately – or at least legitimately – because of the way in which EU law operates. The EU's legal authority, as many scholars have argued, is premised on the creation of a range of individual rights on the EU level that can be asserted against public policy decisions on the national level. This structurally skews EU law in favour of individual rights, and, typically, against collective values that have been democratically agreed upon on the national level, which may range from social protection,[54] communitarian ideas of justice,[55] health protection[56] or consumer protection.[57] The centrality of individual rights in the EU order has led Weiler to suggest that we can best understand individual rights as a mode of governance of the EU. This suggests that the role of individual rights serves not only to secure the objectives of the EU, but also to prevent contestation of its values. The legal order created

[50] G. Davies, *Democracy and Legitimacy in the Shadow of Purposive Competence*, in *Oxford Journal of Legal Studies*, 2015, p. 1 *et seq.*; M. Bartl, *The Way We Do Europe: Subsidiarity and the Substantive Democracy Deficit*, in *European Law Journal*, 2015, p. 23 *et seq*.

[51] A. Vauchez, *Démocratiser l'Europe*, cit., p. 20.

[52] On why the EU does not meet these standards see *infra*, section IV.3.

[53] See D. Chalmers, *The European Redistributive State and a European Law of Struggle*, in *European Law Journal* , 2012, p. 667 *et seq*.

[54] Court of Justice, judgment of 11 December 2007, case C-438/05, *Viking* [GC].

[55] Court of Justice, judgment of 16 May 2006, case C-372/04, *Watts* [GC].

[56] Court of Justice, judgment of 23 December 2015, case C-333/14, *Scotch Whisky Association*.

[57] Court of Justice, judgment of 5 February 2004, case C-24/00, *Commission v. France (French Vitamins)*.

by EU law in fact piggybacks on the domestic constitutional order, and employs domestic judicial institutions to enforce the primacy of individual rights derived from EU law where they clash with domestic norms of public policy.[58]

More often than not, these individual rights are *economic* in nature, such as the free movement provisions. In a recent example, the Scottish policy to introduce a minimum price per unit of alcohol to limit alcohol addiction was rejected by the Court with reference to the individual right of producers of alcohol to be able to effectively compete on the Scottish alcohol market.[59] The way in which the Court makes sense of the clash between such an individual right and a norm of public policy – through the principle of proportionality – betrays an additional structural bias in favour of the former. In a number of cases, domestic policy choices, such as the fight against alcohol addiction,[60] or the right to strike,[61] or norms governing the availability of pharmacies in rural areas, have been invalidated because they restrict the individual right to trade more than absolutely necessary.[62]

This bias in the Court's methodology exacerbates the bias that is already implicit in EU law: it not only favours individual rights compared to collective values; but also favours economic values compared to non-economic values. This additional bias can be traced back to the EU's understanding that its authority is sourced from granting individuals access to opportunities, values, or goods that cannot be made available by Member States alone.[63] As Chalmers has argued, this has led to the excessive responsabilisation of the individual, which alienates them from an understanding of life as embedded in a range of daily activities that link to wider communities.[64] EU law, then, is not only structurally blind to collective values by virtue of the way in which it has constructed its legal authority; it also understands the individual as an actor in isolation from collective values and the processes that generate those values.

The problem with the EU's structural focus on the individual as a disembedded subject is that it creates resistance. Such resistance might emerge where economic values trump cherished collective values, and where EU law is understood as pitting mobile EU citizens against immobile EU citizens in access to jobs or welfare structures.[65] Whether these conflicts are empirically demonstrable or not is beside the point. The point is that such contestation finds no place *within* the EU: individualism, and the protection of individual rights, lies both at the conceptual and normative core of EU *law*. Contestation

[58] J.H.H. Weiler, Van Gend en Loos, cit., p. 94.

[59] *Scotch Whisky Association*, cit.

[60] *Ibidem*.

[61] *Viking* [GC], cit.

[62] Court of Justice, judgment of 19 October 2016, case C-148/15, *Deutsche Parkinson*.

[63] D. Chalmers, *The Unconfined Power of European Union Law*, cit., p. 413.

[64] *Ibid*., p. 407; A. Somek, *Alienation, Despair and Social Freedom*, in L. Azoulai, S. Barbou des Places, E. Pataut (eds), *Constructing the Person in EU Law*, Oxford: Hart, 2016, p. 36 *et seq*.

[65] *Viking* [GC], cit. See also A. Vauchez, *Démocratiser l'Europe*, cit., pp. 70-71.

of these values is made practically impossible. Even where the EU possesses the legislative competences to overturn the *status quo* as decided in a ruling by the Court, this requires a majority of institutional support that is – on the domestic level – reserved for constitutional amendments, and, ultimately, can still be overturned by the Court with reference to its compatibility with the free movement provisions.[66] What is left is a range of salient and highly politicised policy questions that can no longer be decided with reference to the needs and desires of those affected by them.

III.3. Beyond uniformity

The third site of contestation of the EU can be found where the EU is perceived to be insensitive to the identity of and the difference between its Member States. This type of contestation takes place in different forms, which all challenge the assumption of uniformity that is central to EU law. What underlies this challenge is the claim that certain questions that go to the identity or self-understanding of a community ought to remain in the hands of that community. Crucially, this is not contestation of the process of integration as such. Rather, it is contestation of the way in which we "do" integration, which leaves insufficient space for Member States to contest the instances where EU law is insensitive to a state's self-understanding or perceived identity.

On the most structural level, this rejection can be traced in the process of differentiated integration. At the moment, only six Member States participate in all EU policies. All others having opted out of one or more policy areas.[67] This differentiation can be explained by the fact that different policy questions are considered salient or controversial in different States. As Schimmelfennig, Leuffen, and Rittberger have highlighted, differentiated integration can in fact best be seen as an interaction between interdependence and politicisation.[68] While the former is a driver of integration, the latter is a brake on integration. In other words, the higher the policy interdependence between States in a certain policy area, the greater the desire for integration and cooperation (and the greater the cost of non-cooperation). Conversely, the higher the politicisation of a policy question, by which the authors mean the extent to which a policy question is considered salient in the domestic setting or tied to national identity, the higher the costs of integration, and the

[66] A good example is the recast Posting of Workers Directive, Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM/2016/0128 final. See for a conceptualization of the potential to revert judicial decisions in the EU, D. Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints on Legal Integration in the EU*, Oxford: Oxford University Press, 2015.

[67] Austria, Belgium, France, Germany, Slovenia, Portugal. See for a schematic overview, www.delorsinstitute.eu.

[68] F. Schimmelfennig, D. Leuffen, B. Rittberger, *The European Union as a System of Differentiated Integration*, cit., p. 766.

more resistance and contestation that integration will produce.[69] It is not particularly complicated to understand the logic here: Member States are aware that cooperation in policy area X means that they will no longer be able to control the norms that govern that policy area. EU law, after all, will trump domestic political choices. If the domestic electorate – for cultural, social, political, or ethical reasons – thinks that a specific outcome in policy area X is crucial to their autonomy, identity, or self-understanding as a community, they are likely to resist integration in this policy domain.

Other examples of this tension between uniformity and national self-understanding can be found throughout EU law. A recent example is the Hungarian referendum, which sought to resist a (lawful) decision to re-allocate refugees throughout the EU.[70] The referendum question was phrased as follows: "Do you want to allow the European Union to mandate the resettlement of non-Hungarian citizens to Hungary without the approval of the National Assembly?". The question was rejected by 98 per cent of voters, albeit with only 44 per cent turnout. The point, here, however, is not the outcome of the vote. The point is the way in which the question and debate were framed. The focus seems not to be the compulsory migrant quota, but the capacity of the EU to cause both identity and autonomy costs for Hungary *without the approval of Hungarian Parliament*. What appears to be contested is less the substantive decision of the EU, but rather its very capacity to make these specific type of decisions.[71] A less dramatic example is the German Constitutional Court's famous *Lisbon* ruling, in which it offered an account of national constitutional identity that suggested that certain policy areas were so central to the identity of the German State that the self-determination and autonomy of its citizens would be irreparably affected if they were ever decided on the European level, and without explicit consent of the German Parliament.[72] While the language employed in these two examples might be radically different, the message is the same: the EU is incapable of being sensitive to claims of identity or self-understanding of a community. In consequence, the EU ought to not intervene in the policy domains linked to those claims.

This critique is, in fact, also immanent to EU law. On this account, EU law lacks the expressive capacity that we associate with national law. EU law is considered to be insufficiently sensitive to the social context within which it operates, and does not reflect the cultural, social, or symbolic traits of its environment.[73] Chalmers, for example, sug-

[69] *Ibid.*, p. 778.

[70] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

[71] This is obviously mirrored in Brexit and the narrative of "taking back control". See more on this in the following sub-section.

[72] Federal Constitutional Court of Germany, judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, *Gauweiler (Lisbon Treaty)*.

[73] G. Davies, *Social Legitimacy and Purposive Power: The Ends, the Means and the Consent of the People*, in D. Kochenov, G. de Búrca, A. Williams (eds), *Europe's Justice Deficit?*, Oxford: Hart, 2015, p. 259 *et seq*.

gests that the EU's "concern to secure authority by legislating better to realise certain shared activities leads to expertise heavily influencing both the incidence of EU law and to a disregard of those activities which link daily life experiences to wider processes of identity formation".[74] The result is that the subjects of EU law, that is, its citizenry, experiences EU law as something that, to put it as simple as possible, misses the point. EU law articulates an idea of community, of the individual and her life that is shallow, one-dimensional and not particularly emancipatory.[75] What lacks, then, both in the *way* we integrate and in the DNA of EU law, is space for identity, difference and contestation. This lack of space, it is argued, is the source of much of the recent contestation of the EU, and can, once again, be traced back to the reliance on law to secure (uncontestable) functional objectives. It can also, of course, be traced back to the principle of congruence, in so far that integration is understood to lead to irreparable loss of the electorates' capacity to affect policy change.

III.4. Brexit and structural contestation of the EU

Brexit can be understood as the culmination of the above types of contestation. It shows, simply put, that *substantive* contestation of any specific part of the integration process can transform into *structural* contestation of the edifice of integration as such, when contestation cannot be institutionalised or internalised. Contestation as such, as Dahrendorf has long argued, can be a productive and legitimising force for a polity.[76] Substantive political conflict over, say, the conditions of austerity, the limits to free movement or the possible solutions to the refugee crisis need not be problematic for the EU. It is not something that will inevitably lead to the end of integration, or cause problems in the management of interdependence. More than that, allowing citizens that are affected by these policy choices to contest them is healthy for a polity: it makes the polity sensitive to discontent, it engenders passion, channels discontent towards the centre, offers institutional mediation of conflict, legitimizes the eventual policy orientation and its enforcement, and bolsters the authority of the polity.[77] Political conflict at once "articulates the presence of dominance and problematizes it", allowing citizens to understand policy orientations as contingent, and incentivizing their engagement within the institutional machinery of the polity.[78]

[74] D. Chalmers, *The Unconfined Power of European Union Law*, cit., p. 405.

[75] See on latter point P. Neuvonen, *Equal Citizenship and Its Limits in EU Law: We the Burden?*, Oxford: Oxford University Press, 2016.

[76] R. Dahrendorf, *The Modern Social Conflict*, Berkeley: University of California Press, 1988.

[77] See M. Dani, *Rehabilitating Social Conflicts in European Public Law*, in *European Law Journal*, 2012, p. 621 *et seq.*; D. Chalmers, *The European Redistributive State and a European Law of Struggle*, cit., p. 667; M. Dawson, F. de Witte, *From Balance to Conflict: A New Constitution for the EU*, in *European Law Journal* , 2016, p. 209.

[78] D. Chalmers, *The European Redistributive State and a European Law of Struggle*, cit., p. 673.

But for conflict and contestation to be productive forces, these forces require careful institutionalization, which entails, at the very least, substantive space for policy contestation, an institutional monopoly on voice, and a structural sensitivity for newly-emerging discontent.[79] If contestation can be productive for a polity when it is properly institutionalized, it is lethal for a polity without such institutionalization. The EU – and more specifically Brexit – shows why that is the case. To put it as simple as possible, without the possibility of contestation *within* a polity, discontent spills over as contestation *of* the polity.

Analysis of electoral data after the Brexit vote shows a remarkable cleavage between a group of citizens who fare well under (or are used to) conditions of global competition and global opportunities,[80] and those who feel that they have lost out because of the process of globalisation – be it economically, socially, or culturally.[81] This new cleavage, between internationalists and nationalists, was largely mirrored in the French presidential elections of 2017, and has been a prominent theme in elections throughout the EU. Arguably, the emergence of this cleavage results (at least partially) from EU law *because EU law prevents it from being articulated*. On the EU level, a commitment to "internationalism", in the form of the free movement of factors of production, citizens, and austerity, is constitutionalised. That means that it cannot be altered without the unanimous consent of twenty-eight governments, their parliaments, and their electorates. To put this point as starkly as possible, a 50.1 per cent majority of Maltese parliament can resist any changes to this commitment to internationalism even if all other Member States would want to.

On the national level, contestation of that commitment is equally difficult. Given the incapacity of one government to change this commitment, national political parties have an obvious incentive to prevent its politicisation. Even if they are elected on the back of a promise to change the conditions of free movement (or austerity, migration law, state aid rules), they will not be able to uphold those promises – as Tsipras most recently demonstrated.[82] The result has been a thorough depoliticisation of the commitment to internationalism. And so while the centre-left parties throughout the EU may be uncomfortable with the liberal premise of the internal market; and the centre-right parties may disagree with the rules on free movement of persons; neither has meaningfully contested those core substantive principles governing the process of integration. Parties on the extreme left and right, on the other hand, have a much easier

[79] On what the institutionalization of conflict really requires see M. DAWSON, F. DE WITTE, *From Balance to Conflict*, cit., and M. DANI, *Rehabilitating Social Conflicts in European Public Law*, cit.

[80] S. HOBOLT, *The Brexit Vote: A Divided Nation, a Divided Continent*, in *Journal of European Public Policy*, 2016, p. 1259 *et seq*.

[81] M. DAWSON, *The EU Must Face the New Politics of Globalisation*, in *German Law Journal*, 2016, p. 17.

[82] M. WILKINSON, *Constitutional Pluralism: Chronicle of a Death Foretold?*, in *European Law Journal*, 2017, p. 213 *et seq*.

sell. Whether it is Mélanchon or Le Pen, the premise is simple: only by leaving the EU will we be able to control economic policy or migration policy in a way that is sensitive to what the affected citizens want from it.[83] In other words, the absence of space for contestation within the EU caused a translation of substantive contestation of a certain policy orientation into structural contestation of the EU as such.

Brexit, then, as the culmination of decades of contestation of the EU, reveals a number of things about EU law. First, it shows the dark side of the current method of managing interdependence. The reliance on law throughout the process of integration is justified by its capacity to prevent Member State from taking decisions that impose costs on their neighbours. As such, it secures the principle of congruence: Member State B, whose citizens have not been consulted about a decision made by Member State A, won't have to face the costs of that decision. At the same time, it is structurally blind to the active version of the principle of congruence, whereby those citizens affected by a decision ought to be able to change it. In the EU, this is structurally impossible. This dark side of EU law causes substantive contestation of a particular norm in EU law to spill over into structural contestation of the whole edifice of integration. As Peter Mair and Robert Dahl have put it, without possibility of opposition and contestation *within* the EU, dissatisfaction quickly translates as opposition to and contestation *of* the EU.[84] Robert Dahl, in fact, is almost prophetic when, in 1965, he projects a new type of structural contestation that emerges when salient political questions are managed rather than politically contested.[85]

If the first lesson from Brexit is that contestation is to be internalized if it is not to translate into structural opposition to the EU, the second lesson is that law cannot be central in that process.[86] The current conditions of integration, in particular in the interdependence in Schengen and EMU, has created a perfect storm, whereby the policy domains in which Member States are now interdependent are exactly those that are most salient domestically. The EU's policy orientation in these areas is bound to create contestation and conflict, yet is still managed through law, which is structurally blind to such contestation and makes the EU politically unresponsive. More than that, the above sections have highlighted an immanent critique of EU law, which is perceived to have little expressive capacity, to disembed the individual from the social context within

[83] A slightly different take on these structural forces against the EU can be that the problem is *quantitative* – that there is simply not enough policy questions left on the national level to win or lose elections on, making anti-systemic and identity politics more attractive.

[84] P. MAIR, *Ruling the Void*, London: Verso, 2013, p. 138, with reference to Dahl's idea of opposition of principle. See R. DAHL, *Reflections on Opposition in Western Democracies*, in *Government and Opposition*, 1965, p. 7 *et seq*.

[85] R. DAHL, *Reflections on Opposition in Western Democracies*, cit., pp. 21-22. See also P. MAIR, *Ruling the Void*, cit., p. 141.

[86] L. AZOULAI, *"Integration Through Law" and Us*, cit., p. 450.

which she operates, and to struggle to articulate forms of solidarity.[87] In the current conditions of integration, then, we must rethink the role of EU law as the glue that structures the interdependence between Member States. The following sections will discuss the institutional preconditions for the EU to transition from a polity that is fundamentally based on securing congruence through law to one that is more sensitive to political claims and the capacity of the EU's electorate to affect policy outcomes.

IV. Institutionalising integration

The two stories of European integration recounted in the previous sections suggest that if we want to analyse the EU's current predicament, we ought to think of how to institutionalise contestation in conditions of interdependence. The question that is central to the legitimacy and stability of the EU, then, has changed from 1957. If in 1957 the question was how to manage interdependence between Member States; the question today is how to manage contestation in conditions of interdependence.

The first section to this paper has suggested that the principle of congruence might offer some insights. That principle articulates a standard of legitimacy: those affected by a certain decision ought to be the ones making that decision. If we think this through in the European context it can mean one of two things. On the one hand, it can justify the creation of instruments that prevent State A from taking a decision that affects the citizens in State B (who have not been able to participate in making that decision). This first option, which focuses on the prevention of externalities created by domestic decisions, is central in the way in which the EU currently operates, and is central to the functioning of EU law. On the other hand, the principle of congruence could also be attained by scaling up the level at which a certain decision is made.[88] This would suggest that a decision that affects citizens in States A *and* B ought to be made collectively, while decisions that affect only the citizens in State A can be make domestically. This second route, of course, is implemented in the EU through the demarcation of competences and the institutional structure that legislates in the areas transferred to the EU. What the second section of this paper has argued, in the simplest terms, is that the centrality of law in the functioning of the EU (the first option) has not left sufficient space for the second option, which is premised on political and institutional cooperation. The arrival in quick succession of the three major crises of the EU's history have highlighted, moreover, that using law only gets us to a certain point. Law lacks the capacity to resolve the tension between interdependence and independence in a manner that is legitimate and authoritative where it operates in isolation from political contestation.

[87] D. Chalmers, *The Unconfined Power of European Union Law*, cit., p. 405.
[88] R. Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, cit., p. 63.

The current conditions of integration, typified by ever more interdependence in policy domains that are highly salient and politicised, are likely to engender more and more contestation in and of the EU. Without changes to the way in which such contestation is institutionalised, it is likely to spill over from a substantive domain into a structural contestation of the EU as a whole. Ultimately, interdependence cannot be managed without remaining sensitive to the claims of those that are faced with its consequences. How can we rethink the way in which we manage interdependence under the current social and political conditions of wide-spread contestation? Several scholars have (more or less explicitly) engaged with this question. They fall in three camps. In the first camp we find those that argue for contestation of the EU *through* law. The logic, here, is that much of the power of the EU, and its incapacity to institutionalise contestation, emerges through the force of its legal order (sub-section IV.1). In the second camp we find those that argue for contestation *of* law. They argue for an explicit (and legally enshrined) retrenchment of the power of EU law, and a strengthening of the power of political actors within the existing institutional framework of the EU (sub-section IV.2). The third camp suggests that contestation in conditions of interdependence inevitably requires substantive policy decisions to be taken beyond the level of the nation State. What requires changing, then, is the way in which decisions are made in the EU. In short, this argument suggests that the EU needs to become more sensitive to the *substantive* policy claims and substantive contestation in the way it takes decisions (sub-section IV.3).

IV.1. Contestation *through* law?

The first way in which the space for contestation could be created is through legal means. Much of the depoliticising nature of the EU and the inability to contest its values comes from the doctrines of direct effect and supremacy. Limiting the reach of these doctrines, the thinking goes, can carve out more space for contestation of the substantive orientation of the integration project on the national level. The crucial actors in this vision of resistance to the EU are national courts. The doctrines of direct effect and supremacy are crucially dependent on national courts: without the latter's capacity to restrain domestic political decisions and overturn those decisions when they conflict with EU law, EU law loses much of its effectiveness.

Several authors have suggested that the effects of EU law ought to be resisted by national courts. Menéndez, for example, has argued that the national constitutional courts ought to more actively resist the dismantling of the principles of the *Rechtsstaat* in the aftermath of the Euro-crisis;[89] while Davies has argued that the British contestation of the consequences of free movement could (even should) have been articulated by the judicial

[89] A. Menendez, *The Existential Crisis of the European Union*, in *German Law Journal*, 2013, p. 525.

branch.[90] More assertiveness by the judicial branch in channelling contestation, the argument goes, would prevent substantive contestation *on a specific element* of EU law from spilling over in *structural* contestation of the integration project as such.[91] In simpler terms, then, articulating contestation *through* law would make EU law more sensitive to the effect it has on certain salient political questions on the national level.

Instances of domestic judicial resistance against EU law are increasing, and, crucially, are often justified with explicit reference to the need to re-assert a balance between the power of law and the power of politics in the process of integration.[92] The *Bundesverfassungsgericht* has articulated, in a range of decisions,[93] a limit to the authority of EU law that is explicitly premised on the need to preserve the capacity of German representative institutions to decide on certain core policy questions that are closely tied to the redistributive and cultural identity of the German State.[94] In *Ajos*,[95] the Danish Supreme Court argued that judge-made general principles of EU law – in this case the principle of non-discrimination on the basis of age – cannot displace conflicting Danish law (that is, the supremacy of EU law does not extend to include such general principles).[96] The logic, here, is, once again, that the Danish Parliament has never consented with the general principle of non-discrimination based on age, and that principle could, therefore, not be of use in displacing conflicting Danish labour law. The underlying logic suggests that the real issue was the redistributive effect that the principle could have in Denmark – and that such redistributive effects must necessarily be mediated through political processes.

Finally, the Italian Constitutional Court, in *M.A.S. and M.B.*,[97] had to deal with a complex question relating to the statutory limitation on the value added tax (VAT) fraud. In the answer to a previous preliminary reference, the Court had understood this limitation period to be part of procedural criminal law, while under Italian law, it is considered part of substantive criminal law.[98] In a somewhat surprising move, the Italian Constitutional

[90] G. Davies, *Brexit and the Free Movement of Workers: A Plea for National Legal Self-assertiveness*, in *European Law Review*, 2017, p. 925 *et seq*.

[91] P. Mair, *Ruling the Void*, cit., p. 138.

[92] Obviously giving this power to judicial institutions comes with a range of problems of legitimacy and institutional capacity. See, for example, D. Chalmers, *The Unconfined Power of European Union Law*, cit., p. 422.

[93] Federal Constitutional Court of Germany, *Gauweiler (Lisbon Treaty)*, cit.

[94] C. Möllers, D. Halberstam, *The German Constitutional Court Says: "Ja Zu Deutschland"*, in *German Law Journal*, 2009, p. 1241 *et seq*.

[95] Supreme Court of Denmark, judgment of 6 December 2016, case 15/2014, *Danski Industri & Ajos*.

[96] M. Madsen, H. Olsen, U. Sadl, *Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the* Ajos *case and the National Limits to Judicial Cooperation*, in *European Law Journal*, 2017, p. 140 *et seq*.

[97] Italian Constitutional Court, order of 23 November 2016, no. 24/2017, *M.A.S. and M.B.*

[98] G. Rugge, *The Italian Constitutional Court on Taricco: Unleashing the Normative Potential of National Identity?*, in *Questions of International Law*, 2017, www.qil-qdi.org, p. 21 *et seq*.

Court argued that the rules governing statutory limitation periods are part of the Italian constitutional identity, which would, in turn, exempt them from being displaced by conflicting EU law. What is of interest, for us, is not so much whether it could plausibly be argued that these specific rules are indeed part of Italy's constitutional identity. More crucial is the assertion that *anything* (be it an entire policy area, an internal administrative rule or specific provision of criminal law) that is considered to fall under the header "national constitutional identity" is thereby immediately immune to displacement by virtue of EU law. The legal basis for this assertion is Art. 4, para. 2, TEU, which explicitly highlights that "the Union shall respect [...] national identities, inherent in the fundamental structures, political and constitutional" of the Member States. The eagerness with which national constitutional courts have used this provision to ringfence certain elements of national law and even entire policy areas from EU interference is not surprising. It offers, after all, both a *method* to contest the power of EU law (by way of suspension of the very premise of the power of EU law) and a *language* that justifies such displacement in terms of fundamental values or virtues of a politically constituted community. What follows, then, is a vision of integration whereby national courts ensure that certain salient redistributive, moral, cultural or social preferences can be decided on the national level without risk being displaced by EU law. Implicitly, this amounts to a wider claim about the limit of legal authority: certain decisions can only legitimately be made if decided through a process of political contestation and mediation.

EU law, in this way, becomes automatically and structurally sensitive to instances of substantive contestation. The argument presented in this section, then, could have softened the austerity drive in Greece by insisting on certain social standards, could have prevented the reformulation of collective labour agreements in Sweden and Finland, allowed Hungary to suspend its obligations under the relocation obligation, or the UK to decide on the conditions under which its public services could operate. The main advantage of contestation *through* law, then, is that it *works*: EU law simply cannot enforce its norms where the domestic order suspends its application, which can offer breathing space for the domestic political system to articulate alternative values.[99] There are, of course, evident drawbacks to this approach – both in terms of the institutional capacity of national courts in articulating policy contestation and in terms of the externalities of such contestation on the other Member States and their citizens.

IV.2. Contestation *of* law?

A different approach that would make the EU more sensitive to contestation of its values is one that explicitly challenges the role of law, and attempts to reassert the prima-

[99] Obviously, the Commission could start an infringement procedure against a Member States, even if it might not be particularly wise politically, and unlikely unless judicial actors openly and explicitly contest the authority of EU law.

cy of the political institutions in the way in which the EU is run. As Scharpf, one of the proponents of this route, summarises: "the rationale of the rules suggested is to enlarge, at the same time, the action spaces of national and European political processes and to reduce the constraints imposed by non-political domination".[100] On this view, a double approach is required. First, it requires an explicit retrenchment of the role of law in the integration process. Authors such as Scharpf and Grimm have called for this and argued that EU law needs to be "deconstitutionalised" and "repoliticised".[101] What they mean by this is that, at the moment, due to the principles of supremacy and direct effect, certain values enshrined in the EU treaties cannot possibly be displaced.[102] This critique is mainly directed at the EU's "economic constitution". The free movement provisions, in a way, have constitutionalised a commitment to globalisation that can be resisted neither by national political action (which would be illegal under EU law) nor by action on the European level (because of the limited competence catalogue or heterogeneity of policy preferences that inhibits consensus).[103] The solution offered, by these authors, is not to contest the power of law through resistance by judicial actors. Instead, they argue for a reconceptualization of the role of the EU law norms, presumably either by scrapping policy orientations from the Treaty and listing them in secondary legislation, which can more easily be amended, by explicitly highlighting that limitations in secondary legislation can affect primary Treaty provisions, or lowering voting thresholds to allow for political rejection of a Court ruling.[104]

The explicit retrenchment of the role of law is only the starting point, however. The second part of this approach sees to the strengthening of control of political actors over the contours, direction, and intensity of integration. While commentators differ in where to locate this new power – ranging from Council to national parliaments – they argue that only by empowering national political actors can the EU remain sufficiently sensitive to the needs and desires of the electorate. The implicit assumption is that only on the national level can we find a political sphere that is sufficiently sophisticated so as to be able to mediate between alternative and conflicting policy orientations. In essence, this boils down to the normative claim that interdependence between Member States can only be managed legitimately by remaining sensitive to the independence of those Member States.[105]

[100] F. Scharpf, *After the Crash: A Perspective on Multilevel European Democracy*, in *European Law Journal*, 2015, p. 400.

[101] D. Grimm, *The Democratic Costs of Constitutionalism*, cit., p. 460; F. Scharpf, *After the Crash*, cit., p. 384.

[102] D. Grimm, *The Democratic Costs of Constitutionalism*, cit., p. 460.

[103] F. Scharpf, *After the Crash*, cit., p. 384.

[104] As, for example, is currently done in Art. 21 TFEU.

[105] This is the core premise of demoïcracy. See F. Scharpf, *De-constitutionalisation and Majority Rule: A Democratic Vision for Europe*, in *European Law Journal*, 2017, p. 315 *et seq.*, and K. Nicolaïdis, *European Demoicracy and Its Crisis*, in *Journal of Common Market Studies*, 2013, p. 351 *et seq*.

The exact institutions that should benefit from this recalibration of political power is unclear. Some authors suggest that we should focus on national parliaments. Chalmers, for example, argues that national parliaments are best placed to police the democratic authority of EU action.[106] This suggest that EU legislative action must remain conditional upon a majority of national parliaments consenting to it, and would even allow individual national parliaments to suspend the application of EU law where EU law is considered to impose more costs than benefits.[107] What underlies this vision of political authority for the EU is an insight, shared by authors such as Bellamy and Bickerton, that the national political space is the only one sufficiently sophisticated to allow for meaningful political expression by citizens.[108] Ensuring that the political power on the European level remains conditional upon national consent, then, is a way of ensuring that the domestic electorate can contest and can affect policy outcomes that determine their lives. Other authors, such as Scharpf, argue that the most appropriate forum for political control of the EU's policy orientation is the Council. His proposal is based on a number of "groundrules" that serve to simultaneously protect (political) minorities and accommodate diversity, while preventing the creation of a range of veto-players that leads to institutional paralysis.[109] In other words, Scharpf calls for protection of the autonomy of Member States, and their capacity to contest and resist norms emanating from the EU; but at the same time understands that the interdependence between States requires a more flexible system for decision-making. His solution to this conundrum is to institutionalise the role of opt-outs.[110] As a rule, in Scharpf's model, Member States should be allowed to opt-out of EU legislation, unless the possibility of opt-outs is excluded by a qualified majority of Member States.

This second route towards making the EU more structurally sensitive to contestation of its values and norms lies in decreasing the hold of law over the process of integration, and shifting power towards domestic political actors (be they representative or executive), whose authority is, crucially, premised on the consent of their electorates. The logic, here, is that by bolstering the power of national actors within the EU's decision-making process, the EU will become more sensitive to forms of contestation that emerge throughout its Member States.

[106] D. CHALMERS, *Democratic Self-government in Europe: Domestic Solutions to the EU Legitimacy Crisis*, in *Policy Network Paper*, May 2013, www.policy-network.net.

[107] Albeit with explicit reference to the need to limit the imposition of externalities on neighbouring States. See D. CHALMERS, *Democratic Self-government in Europe*, cit., p. 12.

[108] R. BELLAMY, D. CASTIGLIONE, *Three Models of Democracy, Political Community and Representation in the EU*, in *Journal of European Public Policy*, 2013, p. 206 *et seq.*; C. BICKERTON, D. HODSON, U. PUETTER, *The New Intergovernmentalism: European Integration in the Post-Maastricht Era*, in *Journal of Common Market Studies*, 2015, p. 703 *et seq*.

[109] F. SCHARPF, *After the Crash*, cit., pp. 395-398.

[110] F. SCHARPF, *De-constitutionalisation and Majority Rule*, cit., p. 327.

IV.3. Contestation in conditions of interdependence

Under the current social and political conditions of integration, typified by vast redistribution and deep interdependence between States, it is difficult to think of ways in which to institutionalise contestation. The proposals discussed in the two previous sections attempt to do so by carving out more space for political actors on the national level, and by somehow allowing these national actors to opt-out or suspend the application of EU law where it conflicts with salient political choices on the national level. This way, it is thought, the integration process becomes structurally sensitive to emerging discontent, and substantive contestation does not spill over into structural contestation of the EU. In a way, then, this new flexibility to suspend EU law *strengthens* rather than weakens the legitimacy and stability of the EU.

Arguably, the problem with this approach is that it is based on a paradox. The explicit objective of the approach is to ensure that certain decisions (typically those of a distributive, identity, or cultural nature) can be made, altered, and controlled by the national electorate. However, the attempt to achieve this objective by bolstering the political control of *national* actors has an important side effect, in so far as it irrevocably *decreases* the capacity of the electorate of their neighbouring State to do exactly the same.[111] In situations of interdependence, in other words, the capacity of national electorates to affect the outcome of a decision (or change it) are inextricably linked. A Hungarian decision that prevents the entry of refugees *does* have an effect on its neighbouring States; a ruling by the German Constitutional Court that defines debt relief for Greece illegal *does* have an effect on Greece's internal policy choices; a Finnish decision to set aside *Viking* with reference to its fundamental commitment to the right to strike *does* have an effect on companies in Estonia; and a rejection by the Greek population of certain effects of austerity *does* have an effect on the other Member States and citizens in the Eurozone. Making the EU sensitive to *national* resistance, in other words, does not appear to solve the fundamental question of how to institutionalise contestation while remaining sensitive to the principle of congruence, which suggests that *all* affected by a decision ought to be the ones making that decision, and, implicitly, that those affected by a decision ought to be able to alter it. More than that, allowing more scope for national political actors exponentially increases their capacity to impose costs on their neighbours – which is, of course, the very problem that the integration process attempts to solve.

If we take the principle of congruence as the starting point, on the other hand, we can begin to understand the changes that are required to make the EU structurally sensitive to contestation *under conditions of interdependence*. These changes, it is argued, are threefold.[112] First, the principle of congruence requires that policy decisions made on the

[111] This is something that even its proponents are aware of. See F. Scharpf, *After the Crash*, cit., p. 403; and D. Chalmers, *Democratic Self-government in Europe*, cit., p. 21.

[112] See for further elaboration, M. Dawson, F. de Witte, *From Balance to Conflict*, cit., p. 208.

European level *can actually be changed*. At the moment, the policy orientations in areas as diverse as state aid, employment policy, industrial policy, monetary policy or migration policy are constitutionally entrenched, and would require Treaty revision for any changes. As Scharpf has put it, this leads to a situation of, "politicisation without the possibility of autonomous policy choices, [which] is more likely to produce frustration, alienation, apathy or rebellion rather than democratic legitimation."[113] What is needed, then, is the capacity of the electorate to alter the EU's policy preferences throughout all its policy domains. This will not only ensure that those preferences are democratically legitimated and secure the principle of congruence, but also imbue the EU's electorate with the dynamism and passion that comes from simply *being able to change things*.[114] Opening up the EU's policy direction to contestation requires, as Scharpf calls is, a "deconstutionalisation" of the Treaty, whereby the direction is not be legally ringfenced from political contestation, but decided *through* a process of political contestation. This requires stripping the Treaty to its bones: no longer will it detail policy orientations or policy objectives. These will be up for grabs through the decision-making process. Instead, the Treaty will detail the institutional configuration of the EU, as well as the fundamental rights that ensure equal and free participation of all Europeans to the decision-making process.

The second precondition in securing the principle of congruence in conditions of interdependence is to ensure that conflict is institutionalised along functional rather than national lines. This is crucial for the contestation of policy preferences to be a productive rather than a destructive force. At the moment, contestation in the EU is played out along national lines: the conflict between those in favour of austerity and those against is not institutionalised substantively, but is institutionalised as a number of creditor States against a number of debtor States. These national cleavages obscure the underlying functional complexity and internal differentiation, and are sticky: they follow from the assumption that political mandates are given in national general elections.[115] And so Tsipras and Merkel both come to the table with a strong mandate that requires opposing policy outcomes, which cannot – because of the interdependence between states – be realised simultaneously.[116] It is not difficult to understand why that makes conflict in the EU at the moment such a destructive force: given that we cannot *both* accept and reject austerity,

[113] F. SCHARPF, *After the Crash*, cit., p. 398.

[114] R. DAHL, *Can International Organisations Be Democratic? A Skeptic's View*, in I. SHAPIRO, C. HACKER-CORDON (eds), *Democracy's Edges*, Cambridge: Cambridge University Press, 1999, p. 20; G. DAVIES, *Democracy and Legitimacy in the Shadow of Purposive Competence*, cit., p. 6.

[115] See for a critique, C. OFFE, *Europe Entrapped: Does the EU Have the Political Capacity to Overcome Its Current Crisis?*, in *European Law Journal*, 2013, p. 595 *et seq*.

[116] The structure of EMU in fact structurally pits Member States and national parliaments against each other. See L. BINI SMAGHI, *Governance and Conditionality: Toward a Sustainable Framework?*, in *Journal of European Integration*, 2017, p. 755 *et seq*.

some Member States (and the voice of their electorate) is simply side-lined. Their ability to affect the conditions under which they live, then, dissolves.

A way to get past these national cleavages is to attempt to construct *functional* cleavages. These cleavages are traditionally found on the national level, and offer conflicting policy orientations on the basis of functional differentiation. The traditional cleavages can be based on geography, age, religion, class, or political ideology.[117] What such functional cleavages would allow us to do on the transnational level, is to understand what *all* citizens affected by a policy choice in EMU, Schengen, or the internal market want *as a collectivity*. Just as there will be Greeks in favour of austerity and Germans opposing it, so there will be a split between citizens who are in favour and against globalisation, that win or lose because of free movement, that oppose or support the EU's social pillar, the EU's treatment of refugees, genetically modified organisms (GMOs), or the EU's approach to combating piracy. The creation of transnational functional cleavages has the potential to significantly bolster the democratic legitimacy of the EU, as it allows all citizens affected by a certain decision to be part of making that decision, and, if necessary, to amend it. It is not a coincidence that Derrida and Habermas saw the transnational protests against the war in Iraq – simultaneously taking place in Madrid, Paris, London, Berlin and Rome – as immensely meaningful: this was perhaps the first articulation of a transnational cleavage that could genuinely legitimize transnational action.[118] Crucially, the creation of transnational cleavages on the European level would allow us to engage with a cleavage that the Member States have struggled to internalize, which is the one that pits those in favour of globalization and free movement against those who fear its economic, social, or cultural dislocating effect. As we have seen, the inability of Member States to internalize this cleavage has greatly enhanced the appeal of the fringes of domestic politics.

The conceptual and practical difficulties in moving from a system based on national cleavages to a system based on functional cleavages are, evidently, many.[119] As Bartolini has argued, the productive institutionalization of conflict requires a level of sophistication and centre formation that is currently absent on the European level.[120] Fostering open conflict in the absence of strong institutional structures is more likely to lead to political rupture than to legitimate policy discussions.[121] This leads us to the third precondition in securing the principle of congruence on the European level. It would require radical institutional changes. For one, it would mean that (something akin to) the

[117] S.M. LIPSET, S. ROKKAN, *Party Systems and Voter Alignments*, New York: The Free Press, 1967, p. 6.

[118] J. HABERMAS, J. DERRIDA, *15 February, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe*, in *European Law Journal*, 2003, p. 291 *et seq*.

[119] See for further elaboration and conceptualization, M. DAWSON, F. DE WITTE, *From Balance to Conflict*, cit., pp. 211-214. See also S. BARTOLINI, *Restructuring Europe*, Oxford: Oxford University Press, 2005, p. 41.

[120] S. BARTOLINI, *Restructuring Europe*, cit., pp. 354-370.

[121] *Ibid.*, p. 408. See also F. SCHARPF, *After the Crash*, cit., p. 398.

European Parliament becomes the primary site for contestation, and has the monopoly on voice in the management of that contestation.[122] Such a monopoly on voice is necessary to ensure that discontent gets directed towards a single site that can mediate it. This, in turn, presupposes the creation of Europe-wide electoral lists for the EP elections (something that is currently discussed as an option for the vacant UK seats), and the creation of genuine transnational parties that contest the elections with their own vision for the EU, each with their own agenda and candidate for the presidency of the Commission. It would also entail a massive shift in power away from the Council to the benefit of the EP, and the generation of a culture of contestation (rather than consensus) within the EP.[123] The EP and Commission would relate to each other like national parliaments relate to the national government. The latter would reflect the majorities in the former, and the former will hold the latter accountable. The Council, as a representation of the Member States, would be reformed as a European Senate, in which each state holds the same number of seats, and which votes by simple majority. This would lead to a system whereby functional cleavages dominate the policy discourse, and Europe's citizens can partake in the creation of the rules that bind them in a way that reflects their equal status. It would, ultimately, allow the EU to legitimately and democratically answer the EU's current issues: how to deal with its borders, how to redistribute resources, and how to deal with Brexit. At the moment, the closest we get to understanding what citizens actually want from the EU on these issues is from Eurobarometer, which is perhaps an even more damning indictment of the state of European democracy than the low turn-out for EP elections.

The institutional reconfiguration towards an EU that can answer the basic political questions of our times also presupposes a constitutional framework that consists of institutional and administrative rules, and enumerates certain democratic principles and fundamental values that are *not* open for contestation.[124] These suggestions might sound unfeasible and to push us towards a path of a federal EU. At the same time, it is the only path that can ensure that the substance of what the EU *does* remains sensitive to what citizens want the EU to do. Only by becoming sensitive to the functional cleavages that divide the EU's electorates can the EU secure the principle of congruence while maintaining the complex web of interdependence as it currently exists.[125]

[122] S. BARTOLINI, *Restructuring Europe*, cit., p. 385.

[123] See for more precise recommendations M. DAWSON, F. DE WITTE, *From Balance to Conflict*, cit., p. 214.

[124] See S. BARTOLINI, *Restructuring Europe*, cit., pp. 386-390, who convincingly argues that cultural and territorial cleavages need to be placated for conflict to be institutionalized productively.

[125] Another solution, of course, is to decrease interdependence and the instances of contestation by going back on the commitments to open internal borders and monetary union.

V. Conclusion

This *Article* has highlighted a tension at the heart of the integration process. On the one hand, it is committed to managing the interdependence between states in a way that prevents conflict between them. On the other hand, the EU is increasingly criticised for the substantive choices that it makes in managing this interdependence, and for its inability to institutionalise the ensuing contestation. It was argued that the reason for this increase in contestation lies in how we "do" integration, that is, how the EU attempts to manage the interdependence between its members. The EU has relied predominantly on law – which serves to depoliticise policy questions and tie national actors to a centrally decided policy orientation. As EU law's reach is extended into more salient policy domains – which distribute resources, or articulate a particular vision of community and the individual – EU law struggles to secure legitimate policy outcomes. What is more, without the possibility to contest such choices, contestation that starts in a certain policy area risks spilling over into a contestation of the process of integration as such, as we saw with Brexit.

The starting point for understanding this dynamic is the principle of congruence. This principle suggests that the citizens (or States) affected by a decision ought to play a part in making that decision. This serves to prevent the illegitimate imposition of costs by a decision in State A on its neighbouring States; and to ensure that those affected by a decision remain in a position to alter it. As the process of integration has progressed, the EU has focused more and more on the former, and forgotten about the latter. The capacity of Member States to decide on salient political questions with reference to the preferences of their electorate has progressively decreased and is progressively governed by the constraints imposed by EU law. At the same time, it has become impossible for the citizens affected by a certain EU policy to alter it. This makes the EU structurally insensitive to the discontent that it generates.

Under the current conditions of integration – characterised by vast redistributive practices, and a complex web of interdependence in the most salient of policy domains – the EU must be much more sensitive to the discontent that it generates. As Azoulai reminds us, integration is ultimately about making visible, solidifying, and eventually institutionalising the myriad relationships between citizens within and across borders, whereby "the recognition of interconnectedness is the precondition for mutual trust".[126] Law *could* be an instrument for this, but that would require a significant rethinking of its place in the process of integration.[127] More structurally, what is required is that the EU carve out a space where this mutual interconnectedness can be translated into political idea(l)s of how to live together. Before anything else, this presupposes a space for internal contestation *within* the EU as a way to prevent external contestation *of* the EU. Only by harnessing the preferences of its citizens can the EU sustain the complex web

[126] L. Azoulai, *"Integration Through Law" and Us*, cit., p. 462.
[127] *Ibid.*, p. 461.

of interdependence in a way that is neither authoritarian nor executive. If Brexit is to serve as a lesson for the EU – rather than the beginning of a low and inexorable process of ever-increasing contestation – the EU must reimagine how it "does" integration.

ARTICLES

The Accountability of the European Stability Mechanism and the European Monetary Fund: Who Should Answer for Conditionality Measures?

Francesco Pennesi*

ABSTRACT: This *Article* analyses the judicial and political accountability of the European Stability Mechanism (ESM) in light of the seminal *Mallis* and *Ledra* cases (respectively, Court of Justice: judgment of 20 September 2016, case C-105/15 P, *Mallis and Malli v Commission and ECB* [GC]; judgment of 20 September 2016, case C-8/15 P, *Ledra Advertising v. Commission and ECB* [GC]). It seeks to determine to what extent the intergovernmental nature of the ESM has shielded its activity from the accountability mechanisms established within EU law. It then assesses whether the Proposal, recently issued by the Commission, to transform the ESM into an EU body, the European Monetary Fund (EMF), would improve the accountability of this body. It is argued that embedding conditionality policies in the European constitutional legal order constitutes a necessary, but not a sufficient step. To achieve this objective, it is necessary to couple a close judicial scrutiny by the Court of Justice with an equally substantial democratic oversight by the European Parliament.

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KEYWORDS: European Stability Mechanism – European Monetary Fund – financial assistance – conditionality – Eurogroup – accountability.

I. INTRODUCTION

The financial and economic turmoil which stormed Europe during the last decade has painfully demonstrated the necessity to provide stability support to EU Member States when they experience a financial crisis. Unsurprisingly, when States forge between themselves a currency union such as the Eurozone, they also lose the ability to see one member of the currency club going bankrupt without experiencing tremendous knock-on effects. A certain degree of fiscal solidarity is necessary, and not even a legal prohibition of constitutional nature such as the no bail-out clause can prevent Member States from assisting each other in order to prevent a systemic crisis.[1]

The European Stability Mechanism (ESM) is the last and main crisis-management tool created by Member States whose currency is the euro for this scope.[2] Its purpose is to raise funds and provide support "to the benefit of ESM Members which are experiencing or are threatened by severe financing problems if indispensable to safeguard the financial stability of the euro area as a whole or of its Member States".[3] The ESM represents, in line with other legal instruments adopted to counteract the effects of the present crisis and possibly prevent the next one, an intergovernmental experiment.[4] It was created through an international law agreement, namely the Treaty establishing the European Stability Mechanism (TESM), on the basis of the Member States' treaty

[1] V. BORGER, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, in *European Constitutional Law Review*, 2013, p. 7 *et seq.* See Art. 125 TFEU. As well known, Art. 125 TFEU established that a Member State "shall not be liable for or assume the commitments" of other central governments. However, such clause was the object of a teleological interpretation by the Court of Justice that made Art. 125 TFEU compatible with national measures of financial assistance, as long as they are provided under strict conditionality. See Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*. For a definition of systemic risk, see S. SCHWARCZ, *Systemic Risk*, in *Georgetown Law Journal*, 2008, p. 204.

[2] The ESM is the third mechanism created by the EU to provide financial assistance within the Eurozone. Before the ESM, the EU had established two financial mechanisms, namely the European Financial Stabilisation Mechanism (EFSM) and then the European Financial Stability Facility (EFSF). Whilst the first was established through EU law, based on Art. 122 TFEU, the latter was a limited company under Luxembourg law. See Regulation (EU) 407/2010 of the Council of 11 May 2010 establishing a European financial stabilization mechanism and the Decision of the representatives of the governments of the euro area Member States meeting within the Council of the European Union of 10 May 2010.

[3] Art. 3 of the Treaty establishing the European Stability Mechanism (TESM).

[4] For a comprehensive literature review on the position of EU legal scholarship concerning legal reforms during the euro-crisis see T. BEUKERS, *Legal Writing(s) on the Eurozone Crisis*, in *EUI Working Papers*, no. 11, 2015, and G. MARTINICO, *EU Crisis and Constitutional Mutations: A Review Article*, in *Revista de estudios politicos*, 2014, p. 247 *et seq.*

making power, without the formal participation of the Union.[5] From a legal point of view, the ESM is an international organization, and does not belong to the EU legal order. However, it is not completely detached from the European Union, as the ESM enjoys a strong institutional and teleological proximity with EU law.

Institutionally, the ESM employs three EU Institutions – the EU Commission, the European Central Bank (ECB) and the CJEU – entrusting them with important tasks. From a teleological point of view, the ESM also shares with EU law a clear integrationist objective, namely the financial stability of the euro area.[6] This is now explicitly mentioned in EU primary law, as Member States amended the TFEU. The latter now authorises Member States whose currency is the euro to "establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole".[7]

However, this is only part of the story, as the main connection between the TESM and EU law is provided by "conditionality", given that "the granting of any required financial assistance under the mechanism will be made subject to strict conditionality".[8] Financial assistance, henceforth, cannot be provided unless the beneficiary state accepts to comply with the conditions imposed by the ESM and outlined in a Memorandum of Understanding (MoU). In the recent *Florescu* case, the MoU was defined by the Court of Justice as the document giving concrete form to an "agreement between the EU and a Member State on an economic programme, negotiated by those parties, whereby that Member State undertakes to comply with predefined economic objectives in order to be able, subject to fulfilling that agreement, to benefit from financial assistance from the EU".[9] The case concerned the Romanian bail-out, which was provided by the EU through a financial facility based on Art. 143 TFEU.[10] However, as long as we substitute the EU with the ESM, the definition can also be applied to MoUs concluded by the ESM. In other words, the MoU is a legal *agreement* between the beneficiary Member State and the ESM, whose purpose is to establish the conditions ("economic objec-

[5] Treaty establishing the European Stability Mechanism, Brussels, 2 February 2012.

[6] *Pringle*, cit., para. 164. For the teleological proximity between the ESM and EU law, as well as a review of the legal scholarship concerning European integration through intergovernmental treaties, see A. Petti, *EMU Inter-se Agreements: A Laboratory for Thinking about Associative Institutionalism*, Firenze: European University Institute, 2015, p. 10.

[7] Art. 136, para. 3, TFEU. European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro. Despite the decision coming after the establishment of the ESM, the validity of the Mechanism was still ratified by the Court of Justice. See *Pringle*, cit., para. 73.

[8] Art. 136, para. 3, TFEU.

[9] Court of Justice, judgment of 13 June 2017, case C-258/14, *Florescu and others*, para. 34.

[10] Art. 143 TFEU provides the EU with a legal basis to assist Member States whose currency is not the euro in case of a crisis of the balance of payment that could endanger the internal market or the common commercial policy. See also the Regulation establishing the facility enacting this provision: Regulation (EC) 332/2002 of the Council of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balance of payments.

tives") upon which the former can receive financial assistance from the latter. Once the MoU is stipulated, the conditions thereby enshrined must be implemented by the beneficiary Member State through national measures, according to national legislative procedures. Since there is almost no policy area left untouched by conditionality policies, ranging from labour and health policy to pension costs and judiciary systems, national measures implementing the MoU can encroach upon fundamental rights guaranteed at the national level and international level. Furthermore, ESM conditionality can interfere with many areas pre-empted by EU law, as well as many rights protected by the Charter of Fundamental Rights of the European Union (the Charter).[11]

Although its activity is institutionally and teleologically close to, as well as potentially intertwining with the EU legal order, the ESM does not satisfy EU standards in terms of accountability. In particular, the Mechanism does not have the same "relatively democratic and transparent mode of decision-making" and a "relatively efficient judicial enforcement system" capable of reviewing political decisions and protecting individual rights.[12] When an EU Member State can no longer service its debt, the assistance provided by the mechanism must be directed at restoring fiscal and financial autonomy.[13] However, the question of *how* to achieve this result is a political question masked by the supposed technocratic nature of the ESM itself. As the conditions attached to stability programmes impose deep socio-economic transformations to the recipient Member State, the ESM is called to exercise an extensive political competence. One must bear in mind that with great political powers (should) come great accountability. In particular, the ESM should explain and justify its conduct to an elected, democratic body (political accountability), and its activity should be susceptible to judicial review (legal accountability).[14] Citizens affected by conditionality measures will hardly find legitimate an executive power whose activity is beyond judiciary and parliamentary control. Besides the disenfranchisement of citizens, the lack of legal and political accountability can lead to

[11] For the extensive reach of conditionality over fundamental and social rights, see M. Ioannidis, *Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis*, in *Common Market Law Review*, 2016, p. 1237 *et seq.*, and M. Dawson, *The Governance of EU Fundamental Rights*, Cambridge: Cambridge University Press, 2017, p. 189.

[12] B. De Witte, *Treaty Games. Law as Instrument and as Constraint in the Euro Crisis Policy*, in F. Allen, E. Carletti, S. Simonelli (eds), *Governance for the Eurozone. Integration or disintegration?*, Philadelphia: FIC Press, 2012, pp. 154-155.

[13] *Pringle*, cit., para. 137. See also European Court of Auditors, Special Report 18/2015, Financial assistance provided to countries in difficulties, p. 11.

[14] P. Craig, *Accountability*, in A. Arnull, D. Chalmers (eds), *The Oxford Handbook of European Union Law*, Oxford: Oxford University Press, 2015, p. 431 *et seq.*; M. Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, in *European Law Journal*, 2007, p. 447 *et seq.*; M. Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, in *West European Politics*, 2010, p. 946 *et seq.*; M. Busuioc, *European Agencies: Law and Practices of Accountability*, Oxford: Oxford University Press, 2013; M. Markakis, *Political and Legal Accountability in Economic and Monetary Union*, 2017, unpublished PhD thesis.

power concentration, abuse of executive discretion as well as underperformance in terms of effectiveness and efficiency.[15]

The problem is that the international nature of the ESM has partially shielded the Mechanism and its implementing acts from those two forms of accountability. The TESM confers jurisdiction to the CJEU, but only for disputes arising between ESM Member States, or between the latter and the ESM[16] The TESM does not provide any remedy to individuals who have been substantially affected by the activity of the Mechanism. The acts of the ESM and their implementation at national level, despite having substantial effects on EU citizens, are not reviewable by the CJEU since they are not EU law acts.[17] Citizens can neither start a direct action against the activity of ESM bodies under Art. 263 TFEU, nor request a preliminary reference concerning the legality of ESM acts, as both ESM bodies and acts are extraneous to the EU legal order. At the present stage, the only option for EU citizens to challenge ESM-based conditionality measures before the CJEU is to initiate an action for damages against EU Institutions – the EU Commission and the ECB – for their activity within the ESM framework. However, the requirements imposed by the Court to obtain compensation on this judicial path are extremely difficult to satisfy, and until now the Court has always ruled against the applicants seeking to redress the damages experienced because of austerity measures.[18] Henceforth, the activity of the ESM remains largely outside the scope of the Court's scrutiny.

If the judicial accountability of the ESM is very problematic, the political oversight is even more lacking. The ESM is subject only to a weak democratic control from the European Parliament. The TESM does not even mention the latter, despite the fact that the Mechanism relies on the activity of other EU Institutions. The European Parliament is therefore not only excluded from the ESM decision-making governance, but also lacks any instrument to render the ESM directly accountable. The only route available to keep track of the ESM activity is Regulation 472/2013, which established that the MoU signed by the Commission should be consistent with an EU-based program, precisely the Macroeconomic Adjustment Program (MAP).[19] For accountability purposes, the Regulation imposes to the Commission and the ECB only reporting obligations towards the Euro-

[15] M. BOVENS, *Analysing and Assessing Accountability*, cit., pp. 465-466.

[16] Art. 37 TESM. Art. 273 TFEU expressly permits the conferral by Member States of new jurisdictional competences to the Court of Justice. The CJEU's new competences within ESM law were deemed compatible with EU law in *Pringle*, cit., paras 170-177.

[17] C. KILPATRICK, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, in *European Constitutional Law Review*, 2014, p. 393 *et seq.*

[18] Court of Justice, judgment of 20 September 2016, case C-8/15 P, *Ledra Advertising v. Commission and ECB* [GC]. See also General Court, judgment of 3 May 2017, case T-531/14, *Sotiropoulou et al. v. Council of the European Union*.

[19] Art. 7 of Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

pean Parliament. Overall, the latter has no power to influence the drafting of the MoU/MAP, whose conditions are decided outside the scope of its democratic control.

The present *Article* intends to analyse the legal and political accountability of the ESM, also in light of its possible transformation in the European Monetary Fund (EMF). The first part (I) will assess how the extreme institutional proximity between the Eurogroup (an assembly established by EU law) and the Board of Governors (a body established by the TESM) creates a gap in the judicial and political accountability of ESM-based conditionality programmes. The focus will then shift to the accountability of the Commission (II), which after the *Ledra* case can be subjected to a damages action when it exercises its tasks on behalf of the Mechanism. Although welcomed as a positive step towards accountability *for* conditionality measures, this *Article* will claim that this judgment goes in the opposite direction, as it leads the Commission to be held accountable for conditionality policies that it does not control. Finally, the *Article* will analyse the Proposal to establish a European Monetary Fund (III), assessing whether the transformation of the ESM into an EU-law based body would improve its accountability.

An important disclaimer is necessary. The present *Article* will merely focus on legal and political accountability at the European level. It will therefore not take into consideration the compatibility of ESM activity with domestic constitutions and their fundamental rights' guarantees.[20] In a similar vein, it will not analyse the accountability mechanisms provided by national parliaments.[21] Instead, it will focus on the accountability ensured by the CJEU and the European Parliament. Although domestic constitutional courts and national parliaments certainly have a role to play in overseeing national measures implementing the MoU, only supranational institutions can effectively hold the ESM accountable for its activity. If accountability is the process through which a judicial or elected body monitors, evaluates and eventually sanctions an executive power for its activity, then the former and the latter must operate on the same level, without any mismatch in terms of power, competence and scope of activity.[22] Since the ESM is clearly a supranational actor, it is not realistic to expect national courts and parliaments to engage with the ESM on an equal footing. Furthermore, establishing a common, effective and legitimate mechanism of accountability at the European level constitutes the

[20] See C. KILPATRICK, B. DE WITTE (eds), *Social Rights in Crisis in the Eurozone: The Role of Fundamental Rights Challenges*, in *EUI Working Papers*, no. 5, 2014. See also C. KILPATRICK, *Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry*, in *EUI Working Papers*, no. 34, 2015.

[21] See C. FASONE, *National Parliaments Under "External" Fiscal Constraints. The Case of Italy, Portugal and Spain Facing Eurozone Crisis*, in *LUISS Guido Carli School of Government Working Papers*, no. 19, 2014.

[22] For the definition of accountability, see M. BOVENS, *Analysing and Assessing Accountability*, cit., p. 450: "Accountability is a relationship between and actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences".

only manner to preserve the equality of EU citizens *vis-à-vis* conditionality policies.[23] Only supranational institutions such as the CJEU and the European Parliament can hold the ESM accountable for *every* citizen of the European Union. On the other hand, domestic courts and parliaments lack the mandate, the vision as well as the legitimacy to operate on behalf of all the European citizenry. The principle of equality is openly disregarded when the degree of protection granted to EU citizens against illegitimate conditionality measures depend upon the activism, dimension and importance of their domestic constitutional court or parliament.[24]

II. We are one, but we are not the same. The *Mallis* case and the accountability of the Eurogroup and the Board of Governors

II.1. The Cypriot bail-out

At the beginning of 2012, the Cypriot economy was in severe distress, with markets doubting the stability of its banking system and the creditworthiness of the country. The two major Cypriot banks were in desperate need of recapitalisation, and the government had no choice but to request financial assistance from the ESM. As already stated above, assistance by the Mechanism is based on "strict conditionality", which means that the loan cannot be disbursed unless the beneficiary state agrees to comply with the conditions imposed by the ESM.

On 27 June 2012, the Eurogroup indicated that the Republic of Cyprus, in order to obtain financial assistance from the ESM, was to negotiate a MoU with the *troika*, composed by the Commission, the ECB and the International Monetary Fund (IMF). In the case of Cyprus, the most notable condition required during the negotiations was the bail-in of the two main banks of the country. There is a bail-in every time the resolution of financial firms is partially covered by the resources of creditors and depositors. Therefore, the restructuring of the Cypriot banking system would have required equity shareholders, bondholders, and uninsured depositors to pay for the merger and recapitalisation of the two credit institutions. In March 2013, the Republic of Cyprus decided

[23] See F. Fabbrini, *After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States*, in *German Law Journal*, 2015, p. 1003 *et seq.*

[24] The EU legal scholarship has highlighted the "constitutional unbalances" created by the euro-crisis and the reform of the European Monetary and Economic Union (EMU) within the Eurozone. Whereas domestic parliaments and constitutional courts have seen their powers diminished during and after the financial crisis, the effects have not been equally distributed within the Eurozone, creating a strong divide between creditor and debtor countries, as well as between big and small ones. Some courts and parliaments have maintained (if not increased) their competences, whereas others have seen theirs substantially reduced. See M. Dawson, F. De Witte, *Constitutional Balance in the EU after the Euro-crisis*, in *Modern Law Review*, 2013, p. 817 *et seq.* and C. Joerges, *Brother, Can You Paradigm?*, in *International Journal of Constitutional Law*, 2014, p. 769 *et seq.*

to accept this condition, reaching a political agreement with the other members of the Eurozone and crystallising this consensus in a "draft" memorandum of understanding.

On 16 March 2013, the Eurogroup welcomed the acceptance of the Cypriot authorities to bail-in the national banking system.[25] On 25 March 2013, the Eurogroup issued a statement indicating that it had reached an agreement related to the key elements of the stability support, including the plan to bail-in the two main banks.[26] The same day, the Governor of the Central Bank of Cyprus put them into resolution.[27] Over the course of two months, precisely between March and April 2013, most of the account holders of the two credit institutions with more than 100,000 euro in their deposits lost substantial parts of their belongings.[28]

II.2. The *Mallis* case

A group of depositors identified the Eurogroup as the main culprit behind the decision to bail-in the Cypriot banking system. The Eurogroup was the only EU actor to endorse the bail-in before its implementation at national level, and its statement on 25 March 2013 was issued the same day of the resolution. They claimed that this act was the legal source imposing upon national Cypriot authorities the bail-in procedure. Henceforth, they initiated an action for annulment against the statement of the Eurogroup issued on 25 March 2013.[29] Since they were uncertain whether the Eurogroup, an informal body without legal personality, could be a defending party in the proceeding, the plaintiffs decided to bring the action not only against the latter, but also against the Commission and the ECB, claiming that they were the *de facto* authors of the statement. Ultimately, they brought before the CJEU every EU actor involved in the management of conditionality measures, hoping that the Court could hold at least one of them judicially accountable for the conditions attached to the financial aid.

Both the General Court in the first instance and the Court of Justice in appeal dismissed the claim on similar grounds.[30] The Court of Justice analysed the role of the Eurogroup in the management of conditionality policies relying on a textual interpretation of

[25] Eurogroup statement on Cyprus of 16 March 2013, cited in P. Demetriades, *A Diary of the Euro Crisis in Cyprus. Lessons for Bank Recovery and Resolution*, Cham: Palgrave Macmillan, 2017, p. 102.

[26] Eurogroup statement on Cyprus of 25 March 2013, cited in P. Demetriades, *A Diary of the Euro Crisis in Cyprus*, cit., p. 103. See also the journalistic sources reported by T. Beukers, *The New ECB and Its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention*, in *Common Market Law Review*, 2013, p. 1579 *et seq*.

[27] Court of Justice, judgment of 20 September 2016, case C-105/15 P, *Mallis and Malli v Commission and ECB* [GC], para. 19.

[28] C. Duve, P. Wimalasena, *Who Decides Whether Bail-in is Legal? What Comes after Cyprus and Greece?*, in *Law and Financial Markets Review*, 2015, p. 180 *et seq.*

[29] *Mallis and Malli v Commission and ECB* [GC], cit.

[30] The focus of this section will not be on the General Court's judgment, but merely on the Court of Justice's ruling in appeal.

the provisions of EU law dedicated to this assembly. The latter is a body composed by the finance ministers of the Member States whose currency is the euro.[31] A protocol of the Treaties further establishes that "the ministers of the Member States whose currency is the euro shall meet informally. Such meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the common currency. The Commission shall take part in the meetings. The European Central Bank shall be invited to take part in such meetings".[32] Based on those provisions, the Court of Justice found that the Commission and the ECB participate in the Eurogroup meetings as mere observers, without any decision-making power. Henceforth, they cannot be considered the authors of the contested statement.[33] They certainly perform relevant tasks in the management of conditionality policy, such as negotiating the MoU, however those duties are entrusted to the Commission and the ECB by the Board of Governors, a body of the ESM, and on the basis of the TESM.[34] In other words, those two institutions act within the ESM framework as agents of an international body (the Board of Governors) on the basis of international law (the TESM).[35] Henceforth, their activity within the ESM framework cannot be linked to the Eurogroup, which belongs to the EU legal order.

Concerning the Eurogroup, the Court analysed whether the latter and its statements could be subjected to an action of annulment on the basis of Art. 263 TFEU. It dismissed the action because of the legal nature of the Eurogroup, which is considered an informal body without decision-making powers. Firstly, an action for annulment is only possible against EU institutions, listed by Art. 13, para. 1, TEU, as well as bodies, offices and agencies of the Union. The Court found that the Eurogroup does not belong to either of those two groups, being a mere "forum of discussion" where finance ministers of the euro area meet "informally".[36] It cannot be considered an EU Institution, as it is not listed in Art. 13, para. 1, TEU. Similarly, it does not constitute a configuration of the Council of the European Union, as those configurations are established in a Council Decision that does not mention the Eurogroup.[37] Finally, it cannot be regarded as an office, body or agency of the EU within the meaning of Art. 263, para. 1, TFEU, given its informality and lack of legal personality.[38] Concerning the statement, the Court of Justice

[31] Art. 137 TFEU.

[32] Protocol no. 14 on the Eurogroup.

[33] *Mallis and Malli v Commission and ECB* [GC], cit., para. 57.

[34] *Ibid.*, para. 54-56. The duties of EU Institutions within the ESM framework will be analysed in section III.1.

[35] *Mallis and Malli v Commission and ECB* [GC], cit., para. 52.

[36] Protocol no. 14 on the Eurogroup.

[37] Decision 2009/937/EU of the Council of 1 December 2009 adopting the Council's Rules of Procedure.

[38] Opinion of AG Wathelet delivered on 21 April 2016, joined cases C-105/15 P to C-109/15 P, *Mallis and Malli v. Commission and ECB*, para. 64, according to which "whenever the TFEU Treaty has sought to make art. 263 TFEU applicable without requiring the possession of legal personality, it has expressly named the institutions, offices, agencies and bodies in question, be that the European Council or the

found that it was an act "of a purely informative nature", which intended to inform the general public of the existence of a political agreement between the Eurogroup and the Cypriot authorities regarding the necessity to grant financial assistance.[39] Given its declaratory scope, the announcement never had the objective of producing legal effects *vis-à-vis* third parties, which constitutes a requirement for judicial review at the European level. In conclusion, the statements of the Eurogroup cannot produce legal effects; therefore, they are not reviewable by the Court of Justice.[40]

II.3. The political and legal accountability of the Eurogroup

If the Eurogroup is only an informal forum of discussion, then who is responsible for conditionality? More precisely, who decided to allocate the rescuing cost of the Cypriot banking system to the creditors and clients of the two banks? The implicit message of the Advocate General and the Court seems to be that, since the EU did not grant stability support to Cyprus, then EU law cannot provide an answer. Instead, as the assistance was granted by the ESM, we should look into the source of international law regulating its activity, notably the TESM. This intergovernmental Treaty gives extensive decision-making powers in the field of conditionality to a particular body, the Board of Governors, which has the exact same composition of the Eurogroup, it being formed by the finance ministers of the Eurozone.[41] The Board takes the decision "to provide stability support by the ESM, including the economic policy conditionality as stated in the memorandum of understanding, and to establish the choice of instruments and the financial terms and conditions".[42]

The procedure for granting financial assistance established in the TESM clearly confirms that the Board is the main decision-making body behind conditionality measures. A Member State seeking financial assistance must forward a request to the Board of Governors, which will take a final decision after the Commission, in liaison with the ECB and possibly the IMF, has assessed the existence of a threat to the financial stability of the Eurozone.[43] The details of the conditionality attached to the financial assistance are

Committee of Regions". The analysis of the AG on the legal nature of the Eurogroup was endorsed by the Court of Justice at para. 61.

[39] *Mallis and Malli v Commission and ECB* [GC], cit., para. 59.

[40] See Opinion of AG Wathelet, *Mallis and Malli v. Commission and ECB*, cit., para. 54. See also P. Craig, *The Eurogroup, Power and Accountability*, in *European Law Journal*, 2017, pp. 234-249; S. Shaelou, A. Karatzia, *Some Preliminary Thoughts on the Cyprus Bail-in Litigation: A Commentary on Ledra and Mallis*, in *European Law Review*, 2018, p. 248 *et seq.*; P. Craig, M. Markakis, *The Euro Area, Its Regulation and Impact on Non-Euro Member States*, in P. Koutrakos, J. Snell (eds), *Research Handbook on the Law of the EU's Internal Market*, Cheltenham: Edward Elgar, 2017; R. Smits, *ESM Conditionality in Court: Two Advocate Generals on 14 Cypriot Appeal Cases Pending in Luxembourg*, in *Acelg Blog*, 22 April 2016, acelg.blogactiv.eu.

[41] Art. 5 TESM.

[42] Art. 5, para. 6, TESM.

[43] Art. 13, para. 1, TESM.

included in the MoU, a document drafted by the state concerned and the Commission, once again in liaison with the ECB and wherever possible together with the IMF. However, these EU institutions act only because they are *entrusted* by the Board of Governors and are under its direct supervision.[44] For example, the Commission can sign the MoU only with the approval of the Governors.[45] Hence, overall, the Board of Governors constitutes the main decision-making body of the ESM. It is responsible for making the most important decisions, including capital calls, the disbursement of stability support, and the availability of financial instruments.[46] While other institutions such as the Commission and the ECB carry out the tasks conferred by the TESM, they do not do it autonomously but as *agents* of the *Mechanism*, acting on behalf *of the Board* and under its direct control.[47] The relationship of principal-agents between the Board and the EU Commission was confirmed in the seminal *Pringle* case, where the Court established that the duties conferred to the latter, "important as they are, do not entail any power to make decisions of their own".[48]

This means that while the Eurogroup is not responsible for the conditionality attached to the ESM activity, the real "culprit" is a body with the *exact same* composition as the Eurogroup, which is also chaired by the same president.[49] Although the Eurogroup cannot be equated with the Board of Governors, as the former is established by EU law and the latter by an international treaty, the TESM, this is an extreme case of institutional proximity, with two institutional actors composed by the same persons operating in two different, yet substantially linked, spheres of the law. The interpretation offered by the General Court and the Court of Justice is perfectly in line with the text of the Treaties, in particular the Protocol on the Eurogroup. However, there is a clear mismatch between this formalistic reading and two factual evolutions which have occurred during the euro-crisis. The first is the "institutional evolution" experienced by this assembly, which has acquired a prominent role in the management of conditionality policies.[50] As the assembly where finance ministers are seated, the Eurogroup disposes

[44] Art. 13, para. 3, TESM.

[45] Art. 13, para. 4, TESM.

[46] Art. 5 TESM.

[47] See Opinion of AG Wathelet, *Mallis and Malli v. Commission and ECB*, cit., para. 108.

[48] *Pringle*, cit., para. 161.

[49] Art. 5 establishes the possibility for the finance ministers to confirm the President of the Eurogroup also as President of the Board of Governors or to nominate a third person. So far the first choice has been preferred, in the person of Jeroen René Victor Anton Dijsselbloem first and Mario Centeno later. See Opinion of AG Whatelet, *Mallis and Malli v. Commission and ECB*, cit., para. 71. The decrees which established the resolution were published on 29 March 2013. See Central Bank of Cyprus, decrees 103 and 104 of 29 March 2013.

[50] P. Craig, *The Eurogroup, Power and Accountability*, cit., p. 237, according to which the Eurogroup would be a classic instance of institutional evolution, "whereby a body originally conceived to have a more limited role came to occupy a far more prominent position, outstripping in the process the constitutional vestments with which it was garbed, as judged by the Treaty provisions to deal with it".

"the power of the purse", and has acquired the competence to make emergency decisions concerning the disbursement of financial assistance.[51] The case of Cyprus constitutes a telling example of this *de facto* power, which is not sanctioned by any legal basis within EU law. The bail-in was a – again, *de facto* – ultimatum handed by the Eurogroup to the Cypriot Government and Parliament. Since it was necessary to decide within two days how to recapitalise the banking system, national ministers acting within the Eurogroup decided to preserve their budgetary resources and allocate part of the burden of the operation to the creditors of the bank. The authorship of the decision to proceed with the bail-in rests with the Eurogroup, whose announcement occurred just two days before the national law establishing the procedure.[52] The words of the Cypriot finance ministry may be more enlightening than every other analysis: "Programme partners had formulated their own comprehensive macroeconomic adjustment programme. Subsequently, the new government had only very little time and scope to further negotiate aspects of the MoU. The most controversial aspect of the final MoU was the application of the bail-in instrument on bank deposit. The Government was forced to accept this measure under duress".[53]

The second factual evolution is the establishment of the Board of Governors. This body gives the President and the members of the Eurogroup the possibility to dismiss the clothes of EU law and wear the ones provided by the TESM, thus taking conditionality decisions that are binding for Member States whose currency is the euro and produce substantial effects on EU citizens.

As the resources of the ESM come from the fiscal capacity of the Member States, it is normal that national finance ministers want to have the final say on when and how to disburse financial assistance.[54] What is less justifiable, however, is that they can make

[51] L. Van Middelaar, *Taking Decisions or Setting Norms? EU Presidencies between Executive and Legislative Power in a Crisis-driven Union*, in B. Steunenberg, W. Voermans, S. Van den Bogaert (eds), *Fit for the Future. Reflections from Leiden on the Functioning of the EU*, Den Haag: Eleven International Publishing, 2016, p. 7 *et seq*.

[52] Cf. factual backgrounds of the *Mallis* and *Ledra* cases: *Mallis and Malli v Commission and ECB* [GC], cit., paras 13-22 and *Ledra Advertising v. Commission and ECB*, cit., paras 14-24.

[53] Answer given by the Cypriot finance minister to the questionnaire forwarded by the European Parliament. European Parliament, *Questionnaire supporting the own initiative report evaluating the structure, the role and operations of the 'troika' (Commission, ECB and the IMF) actions in euro area programme countries*, 24 April 2014, www.europarl.europa.eu. See also M. Dawson, *The Governance of EU Fundamental Rights*, cit.

[54] Only the initial, paid-in capital of the ESM budget comes directly from national budgets (Art. 41 TESM). The rest comes from market operations, as the ESM can raise funds by issuing capital market instruments and engage in money market transactions. However, its creditworthiness and ability to raise funds is only as strong as the one of the Member States belonging to the organisation. For a legal analysis of the ESM financial toolkit, see V. Borger, *The European Stability Mechanism, a Crisis Tool Operating at Two Junctures*, in B. Wessels, M. Haentjens (eds), *Research Handbook on Crisis Management in the Banking Sector*, Cheltenham: Edward Elgar Publishing, 2015, p. 150 *et seq*.

such decisions completely outside the judicial control of the CJEU. When the finance ministers act under the ESM framework, taking the guise of the Board of Governors, they enjoy impunity *vis-à-vis* private persons given the international nature of this body, which is fully extraneous to the European legal order.[55] On the other hand, the actions of the Eurogroup fall outside the scope of judicial scrutiny, it being considered an "informal forum" whose decisions are not acts producing legal effects.[56]

It is noteworthy that the absence of judicial control is not compensated by a more sophisticated system of democratic oversight. In the EU institutional landscape, the only institutions capable of influencing the Eurogroup decision-making would be the European Council and the Eurosummit, being them the EU highest executive bodies.[57] However, it is difficult to see how those institutions, also representing the interests of national governments, could improve the accountability of the Eurogroup. The European Parliament has democratic oversight, although weak and indirect, only over the activity of the Commission and the ECB, whose representatives have reporting obligations to the competent Parliament committee.[58] The only direct link between the Eurogroup and the Parliament is provided by self-imposed reporting obligations, such as the commitment of the Eurogroup President to inform the European Parliament about the Eurogroup priorities.[59] In 2013, the European Parliament reported that "the ultimate political responsibility for the design and approval of the macroeconomic adjustment programmes lies with the EU finance ministers and their governments", deploring "the absence of EU-level democratic legitimacy and accountability of the Eurogroup when it assumes EU-level executive powers".[60]

When Protocol n. 14 was drafted, the Eurogroup was supposed to be a mere political forum to discuss, at the ministerial level, potential economic reforms. A few years later, the euro-crisis substantially changed the nature of the powers that the finance ministers could exercise within the European economic governance. This assembly is no longer an informal body to discuss political projects, but it is now a decision-making executive with management, oversight and implementation competences in the field of conditionality.[61] The problem lies in the fact that such evolution did not occur under EU law, but was sanctioned by an international treaty which established another body mirroring the Eurogroup. Although the decision to not recognise this transformation re-

[55] *Pringle*, cit., paras 178-182.

[56] *Mallis and Malli v Commission and ECB* [GC], cit., para. 59.

[57] P. Craig, *The Eurogroup, Power and Accountability*, cit., p. 240.

[58] The accountability powers of the European Parliament towards the activity of the ECB and the Commission within the ESM network will be assessed in section IV.

[59] See European Council, *Role of the Eurogroup President*, www.consilium.europa.eu.

[60] European Parliament Report 2013/2277/(INI) of 28 February 2014 on the enquiry into the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, para. 50.

[61] P. Craig, *The Eurogroup, Power and Accountability*, cit., p. 237.

spects the formal veil which separates EU from international law, it has severe consequences for the mechanisms of judicial and political accountability provided by the European legal order.[62]

III. The man the authorities came to blame? The institutional liability of the Commission in the *Ledra* case

III.1. The legality of European institutions acting outside the Treaties

Despite its international law nature, the ESM framework heavily involves European institutions, especially the EU Commission and the ECB, entrusting them with executive and monitoring tasks.[63] In particular, the Commission is called to assess requests for financial support, evaluate their urgency, negotiate the MoU with the recipient Member State, monitor compliance with the conditionality attached to the financial assistance[64] and finally participate in the meetings of the Board of Governors and the Board of Directors as an observer.[65] Given the relevance of those tasks, the activity of the Commission within the ESM framework was judicially challenged in 2012, altogether with the validity of the ESM itself, well before the *Ledra* and *Mallis* cases.

In the seminal *Pringle* judgment, the Court of Justice stressed the role of the Commission as agent of the ESM, whose activity within the TESM "solely commits the ESM".[66] Furthermore, it endorsed the commixture of international law and EU Institutions, subject to two constitutional caveats. Firstly, Member States are entitled to borrow EU Institutions only in areas that do not fall under an exclusive competence of the European Union.[67] The Court clearly stated that this condition, in the case of the TESM, was fully satisfied, as the Mechanism was neither affecting the field of monetary policy (an exclusive competence of the Union) nor the Treaty articles related to economic policy (a coordinating competence). This caveat was expressly directed at Member States, limiting their powers to borrow EU Institutions.

The second requirement was more difficult to assess, as it required that the new tasks created through international law must never alter "the essential character of the

[62] *Ibidem*.

[63] The TESM also relies on the Court of Justice: Art. 37 TESM. This section will merely deal with the role of the Commission within the ESM framework. The independent and technocratic nature of the ECB would require a separate treatment of this institution, which, for space limitation, it is not possible to carry out here. For an academic work dealing also with the role of the ECB, see A. Karatzia, M. Markakis, *What Role for the Commission and the ECB in the European Stability Mechanism?*, in *Cambridge International Law Journal*, 2017, p. 232 *et seq.*

[64] See Art. 13, para 1, Art. 4, para. 4, and Art. 13, paras 3 and 7, TESM respectively.

[65] Art. 5, para. 2, and Art. 6, para. 2, TESM.

[66] *Pringle*, cit., para. 161.

[67] *Ibid.*, para. 158.

powers conferred on those institutions" by the Treaties.[68] The Court did not further elaborate on this condition, without clarifying how to draw the line between the essential and non-essential character of EU Institutions' tasks. This lacuna left scholars pondering the extent of the obligation of the Commission and the ECB to respect EU law when they were acting outside the EU constitutional framework.[69] Can the Commission still be considered the "guardian of the treaties" even when it is acting outside them?

In an obiter dictum in *Pringle*, the Court briefly touched upon the responsibility of the Commission *vis-à-vis* EU law in the ESM framework, ruling that it has the duty to "ensure that the Memoranda of understanding concluded by the ESM are consistent with European Union law".[70] It is important to also notice that the TESM provides a similar requirement, although smaller in scope. Art. 13, para. 4, of the TESM establishes the obligation of the Commission to sign the MoU on behalf of the ESM, but only insofar as the document is drafted in full compliance with a particular area of EU law, namely the measures of economic policy coordination. Hence, both EU law and the TESM converged in obliging the Commission to ensure the consistency and coherency between the MoU and EU law.

III.2. The action for damages: the right path to ensure the liability of the ESM?

The *Ledra* case has provided further insight concerning the applicability of EU law to the activity of EU Institutions acting outside the Treaties.[71] The ruling involved the same factual background as the *Mallis* judgment, namely the attempt of account holders of the restructured Cypriot banks to partially redress the losses they incurred during the bail-in procedure. The Court reiterated the distinction between the international nature of the ESM and the European legal order, stating that the TESM-based activity pursued by the ECB and the Commission commits the ESM alone.[72] Furthermore, it confirmed that their acts within the ESM framework, including the signature of the MoU, cannot be imputed to them, but only to the ESM.[73]

The surprising part of the judgment came when the Court of Justice addressed the role of the European Commission in bail-out procedures. The Court reaffirmed that en-

[68] *Ibid.*, para. 162.

[69] A. Karatzia, M. Markakis, *What Role for the Commission and the ECB in the European Stability Mechanism*, cit.; S. Peers, *Towards a New Form of EU Law? The Use of EU Institutions Outside the EU Legal Framework*, in *European Union Constitutional Law Review*, 2013, p. 37 *et seq.*; P. Craig, Pringle *and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance*, in *European Constitutional Law Review*, 2013, p. 263 *et seq.*

[70] *Pringle*, cit., para. 104.

[71] *Ledra Advertising v. Commission and ECB* [GC], cit. The case was decided by the Court of Justice reunited in the Grand Chamber. This section is analysing only the appeal before the Court of Justice, and not the case before the General Court.

[72] *Ibid.*, para. 51.

[73] *Ibid.*, para. 52.

trusting new tasks to EU institutions cannot alter the essential nature of their powers, which in the case of the Commission includes its role as guardian of the Treaties.[74] Acting under the ESM framework does not change the Commission's obligation to promote the general interest of the Union and to oversee the correct application of EU law. Furthermore, the TESM also provides for the Commission's duty to secure the consistency between ESM and EU law.[75] These responsibilities entail a specific consequence, namely the duty of the Commission to "refrain from signing a memorandum of understanding whose consistency with EU law it doubts".[76] The Court considered that the essential role of the Commission ("guardian of the Treaties") also entails the obligation to ensure the consistency between EU and ESM law.[77] This new reading of the Commission's tasks under the ESM framework is not only relevant from an institutional viewpoint, but also has practical effects on EU citizens who are affected by conditionality measures potentially inconsistent with EU law. They are now able to bring an action for damages for non-contractual liability against the Commission.[78] The admission of this action constitutes a novelty in this area of the law, as it allows individuals to hold ESM agents responsible for their activity when the latter is incompatible with EU law, including the Charter.

Hereafter, the Court analysed whether the ECB and the Commission had incurred in non-contractual liability for their action, having included the bail-in as a condition in the MoU, or their inaction, having not prevented that such a condition was included in the MoU.[79] In particular, the Court analysed whether the decision to impose a bail-in procedure as a condition for assistance constituted a "serious breach of a rule of law intended to confer rights on individuals", being it the main requirement for a successful action for damages.[80] Such a rule of law was identified with the right to property of the plaintiffs, whose economic resources were used to restructure the Cypriot banking system without their consent.[81] The Court started its analysis by pointing out that such a right is not absolute, and it can be restricted by public authorities when such restrictions meet objectives of general interests and comply with the principle of proportionality.[82] In the case at hand, the restrictions imposed by the Commission did not constitute a disproportionate and intolerable interference with the plaintiffs' right to property, as they were pursuing a legitimate objective, namely the financial stability of

[74] *Ibid.*, para. 57.

[75] Art. 13, paras 3 and 4, TESM.

[76] *Ledra Advertising v. Commission and ECB* [GC], para. 59.

[77] See A. Poulou, *The Liability of the EU in the ESM Framework*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 131.

[78] Art. 268 and Art. 340, paras 2 and 3, TFEU.

[79] *Ledra Advertising v. Commission and ECB* [GC], para. 63.

[80] Court of Justice, judgment of 4 June 2000, case C-352/98 P, *Bergaderm and Goupil v. Commission*, para. 42.

[81] Cf. Art. 17, para. 1, of the Charter. *Ledra Advertising v. Commission and ECB* [GC], cit., para. 68.

[82] *Ibid.*, para. 70.

the Eurozone.[83] Given the level of financial integration within the Eurozone, international banks are incredibly interconnected, so much so that the failure of one or more of them can have knock-on effects not only on other financial firms, but also on other sectors of the economy.[84] Here the Court seems to take into consideration the concept of systemic financial crisis, which materialises when the failure of a financial institution can compromise the globalised financial system in which it operates and spread risks to other non-financial sectors of the economy.[85] In light of the systemic risks posed by the collapse of the Cypriot banking system to the financial stability of the Eurozone, the Commission and the ECB had the right to substantially restrict the right of property of the plaintiffs, using part of their deposits and bonds for the resolution of the two credit institutions. Henceforth, the Court ruled that the Commission and the ECB had not adopted an unlawful conduct, as their activity was legally justified.[86]

III.3. Does the *Ledra* case (indirectly) improve the judicial accountability of ESM conditionality?

It is important to understand whether the *Ledra* case, which allows an action for damages against the Commission, can render the ESM-based activity of this Institution more accountable.[87] Furthermore, since we are dealing with the activity of the Commission *within* the ESM framework, it is necessary to assess whether the new judicial avenue offered by the Court of Justice could *indirectly* improve the judicial accountability of the ESM itself. In other words, does *Ledra* constitute a step in the right direction towards a more accountable management of conditionality measures?[88]

The action for damages cannot hinder the ability of EU Institutions to make political decisions within the boundaries of EU law. Restricting the room for manoeuvre of the EU when political powers are exercised would finally lead the Court of Justice to substitute the political judgment of EU Institutions with its own. Henceforth, the requirements to have a successful action for damages are very difficult to satisfy. Plaintiffs must demonstrate "a sufficiently serious breach of a rule of law conferring rights to an indi-

[83] *Ibid.*, para. 71.

[84] *Ibid.*, para. 72.

[85] See S. Schwarcz, *Systemic Risk*, cit.

[86] *Ledra Advertising v. Commission and ECB* [GC], cit., para. 75.

[87] This analysis is also relevant for the effectiveness of this action *vis-à-vis* the activity of EU Institutions not only when they operate within the ESM framework, but more generally in the European Economic Governance. See General Court: judgment of 24 January 2017, case T-749/15, *Nausicaa Anadyomène SAS and Banque d'escompte v. ECB*, and judgment of 3 May 2017, case T-531/14, *Sotiropoulou and others v. Council*.

[88] For a positive, but conditioned answer, see A. Hinarejos, *Bailouts, Borrowed Institutions and Judicial Review: Ledra Advertising*, in *EU Law Analysis*, 26 September 2016, eulawanalysis.blogspot.co.uk and R. Repasi, *Judicial Protection Against Austerity Measures in the Euro Area:* Ledra *and* Mallis, in *Common Market Law Review*, 2017, p. 1154.

vidual", a proof of damage and a causal link between the two elements.[89] The first requirement is particularly burdensome, given that only when the EU Institution or body has substantially reduced or no discretion, the burden of proof that needs to be provided by the plaintiff would scale down to a "mere infringement of EU law".[90] However, as stated in the introduction, the nature of conditionality policies is inherently political, as they involve political decisions concerning how to restore the financial and fiscal stability of the beneficiary Member State. Furthermore, the ESM only operates in emergency situations, as it can intervene only when the stability of the Eurozone is at risk. This put the plaintiff in an impossible position, as they will obtain compensation only when they demonstrate that EU Institutions have seriously breached EU law taking complex decisions during an emergency situation.

The very high burden of proof required by plaintiffs, however, is only one of the problematic issues of *Ledra*. The second one lies in its institutional implausibility, as the judgment requires the Commission to be liable for an activity which lies outside its own decision-making powers. The Court's case law regarding the Commission's role in the ESM framework appears to be contradictory. On the one hand, the Commission was continuously deemed to be a mere agent of the ESM, with no "power to make decisions of its own" (*Pringle* case).[91] On the other, in *Ledra,* it was requested to ensure the consistency between the ESM and EU law. One of the two points must concede to the other. Either the Commission is devoid of decision-making power within the ESM, and it cannot be responsible for unlawful conditionality measures, or it has such power, and then the findings in *Ledra* are well grounded. Although the lack of transparency in the management of conditionality renders it difficult to determine which Institution is responsible for a decision, the Commission plays an ancillary and implementing role within the ESM.[92] It is responsible for the negotiation, drafting and signing of the MoU, but it carries out those activities as an agent of the real decision-maker, namely the finance ministers of the Eurozone. This is the reason why its activity on the basis of the TESM "solely commits the ESM".[93]

The Cypriot case provides a revealing illustration of the principal-agent relationship between the ministers and the Commission. The plaintiffs in both the *Ledra* and *Mallis* cases requested judicial protection against a very specific condition imposed by the

[89] *Bergaderm and Goupil v. Commission*, cit., para. 42.

[90] Court of Justice, judgment of 10 December 2002, case C-312/00 P, *Commission v. Camar and Tico*, para. 54, and General Court, judgment of 2 March 2010, case T-16/04, *Arcelor v. Parliament and Council*, para. 53.

[91] *Pringle*, cit., para. 161. Cf. Opinion of AG Wathelet, *Mallis and Malli v. Commission and ECB*, cit., para. 108.

[92] For the lack of transparency, see A. KARATZIA, M. MARKAKIS, *What Role for the Commission and the ECB in the European Stability Mechanism*, cit., p. 240.

[93] *Pringle*, cit., para. 161.

ESM on the Republic of Cyprus, the bail-in of the two main Cypriot banks.[94] This condition was explicitly requested by the finance ministers of the Eurozone, who announced this solution acting as the Eurogroup in March 2013, and formally approved the disbursement of financial aid – which was conditioned to the bail-in – acting as the Board of Governors.[95] The Commission does not even vote in those two bodies, as it participates in both of them as an observer without voting rights.[96]

Finally, since the ESM is an international organisation extraneous to the EU legal order, EU law does not provide any legal basis to impose a financial penalty on the ESM. Therefore, a successful damages action directed against the Commission for its activity within the ESM framework could only be compensated by the EU budget. This would certainly be paradoxical, as the EU would be requested to pay for unlawful activity carried out by an international body, although with the participation of the Commission. Given the paucity of the EU budget, the success of such action is even less plausible.[97] Overall, the very high burden of proof required to succeed, the institutional implausibility and the financial risks for the EU budget prevent the action for compensation inaugurated in *Ledra* from improving the judicial accountability of ESM-based conditionality policies.

[94] See Commission, *The Economic Adjustment Programme for Cyprus*, Occasional Paper no. 143/2013, p. 107.

[95] Jeroen Dijsselbloem, President of the Eurogroup and the Board of Governors at the time of the Cypriot crisis, proudly acknowledged that the decision to bail-in the Cypriot Banking system was taken by the Eurogroup: "We found out that Cyprus not only had a massive banking sector, far oversized for the size of this island's economy, it was fully loaded with foreign deposit holders, many from Russia of whom we were not sure where the money was actually coming from. But as a politician I know one thing that we were not going to save with European and Cypriot taxpayers' money: Russian deposits. [...] it was a very difficult decision [...] but the outcome was the right decision [...] We did a bail-in on the investors, capital-holders and even the large deposit holders in Cyprus". See J. DIJSSELBLOEM, *Europa Lecture*, 17 January 2017, available at www.universiteitleiden.nl.

[96] Art. 5, para. 3, TESM, and Protocol no.14 on the Eurogroup.

[97] See General Court, order of 10 November 2014, case T-292/13, *Evangelou v. Commission and ECB*, a case concerning the legal expenses to be paid by the bailed-in plaintiffs who unsuccessfully participated in an action against the Commission and the ECB: "The ECB, for its part, merely stated that the case was of fundamental economic and political importance. However, it must be noted that if the Court had granted the applicants the compensation that they claimed they were entitled to, other holders of deposits in Cypriot banks which suffered a reduction in value at the material time could, in theory, have sought similar compensation. This could potentially have resulted in the European Union and the ECB being ordered to pay very large sums by way of compensation. It is therefore appropriate to conclude that the dispute represented a major economic interest for the Commission and the ECB".

IV. Are the times really a-changing? The possible transformation of the ESM into the European Monetary Fund

IV.1. The Commission's Proposal

The decision to set up the ESM was taken by Member States at the height of the euro crisis in 2012.[98] The urgency to react as quickly as possible to market speculations on the survival of the Eurozone led Member States to resort to international law. Legal scholars criticised this solution, as EU law did not prevent the establishment of a permanent stability mechanism within the European legal order, especially after the amendment of Art. 136 TFEU.[99] The Commission acknowledges that the decision to set-up the ESM as an international law-based institution created a "complex landscape where judicial protection, respect of fundamental rights and democratic accountability are fragmented and unevenly implemented".[100]

In December 2017, the Commission delivered a package of new legislative proposals aimed at completing the Economic and Monetary Union by 2025, including the project to transform the ESM into the European Monetary Fund (EMF).[101] This Proposal, based on the flexibility clause, Art. 352 TFEU, would turn the ESM into a "unique legal entity under EU law", with the ambitious objective to link its decision-making governance to the "robust accountability framework of the Union together with a fully-fledged judicial control".[102] The flexibility clause can be used as a legal basis to adopt appropriate measures, including establishing a new EU body, only when the requirements are satisfied. The EU must have the necessity to take action within the framework of EU policies. The aim of this action must be the achievement of an EU law objective, and finally the Treaties must not provide any other legal basis. In its Proposal, the Commission

[98] See Commission Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM(2017) 827 final of 6 December 2017.

[99] *Ibid.*, p. 5. See also Communication COM(2012) 777 final/2 of 28 November 2012 from the Commission, *Blueprint for a Deep and Genuine Economic and Monetary Union*, and see M. Schwarz, *A Memorandum of Misunderstanding – The Doomed Road of the European Stability Mechanism and a Possible Way Out: Enhanced Cooperation*, in *Common Market Law Review*, 2014, p. 389 *et seq.*, who claims that the Mechanism could have been established within the EU legal order through the enhanced cooperation procedure, and M. Dawson, F. De Witte, *Constitutional Balance in the EU after the Euro-crisis*, cit., according to whom the recent legal reforms within the EU economic governance, and in particular the intergovernmental establishment of the ESM, would have deprived the EU from the ability to successfully mediate political conflicts.

[100] Proposal for a Regulation COM(2017) 827, p. 3.

[101] See Communication COM(2017) 821 final of 6 December 2017 from the Commission, *Further Steps Towards Completing Europe's Economic And Monetary Union: A Roadmap*. Also C. Gortsos, *The Proposed Legal Framework for Establishing a European Monetary Fund (EMF): A Systematic Presentation and a Preliminary Assessment*, in *SSRN*, 17 December 2017, ssrn.com; M. Ioannidis, *Towards a European Monetary Fund, Comments on the Commission Proposal*, in *EU Law Analysis*, 31 January 2018, eulawanalysis.blogspot.com.

[102] Proposal for a Regulation COM(2017) 827, p. 3.

claims that those criteria are fully satisfied, as the establishment of the EMF is necessary to preserve the financial stability of the euro area and the Treaties have not provided any other provision to achieve this objective.[103] In *Pringle*, the Court of Justice did not rule whether the EU could lawfully establish the ESM within the EU legal order through Art. 352 TFEU, but clarified that EU primary law lacks an appropriate provision to establish a stabilisation mechanism.[104] Furthermore, the revised version of Art. 136 TFEU allows only Member States to establish a stability mechanism, and not the EU. Henceforth, the Commission is certainly right when it asserts that the first two requirements are complied with. However, it has been questioned whether the establishment of the EMF can be truly considered necessary, given that a stability mechanism is already in place – the ESM – for the same purpose.[105] In other words, it appears decisive to evaluate whether the last requirement, the "necessity test", is satisfied. First of all, it is difficult to imagine the Court of Justice preventing the realisation of a clear integrationist objective such as the transfer of the ESM into the EU legal order, transforming the management of ESM conditionality from an international law-based activity into an EU procedure under its judicial scrutiny. Besides, after Brexit, the European Union will be identified more and more with the Eurozone. The latter will represent 85 percent of the EU economy.[106] With the exceptions of Denmark and Sweden, all the remaining non-euro Member States are under the legal obligation to adopt the common currency.[107] If a stability mechanism is indeed necessary to preserve the financial stability of the Eurozone, and the latter is more and more central in the project of European integration, then it is very hard to claim that such a mechanism should not be integrated within the EU legal order. Finally, the Commission could claim that the establishment of the EMF is necessary to ensure that the objective of financial stability is achieved in a manner that is consistent with EU law, and in particular with the principle of effective judicial review.[108] Since bringing the ESM under the umbrella of EU law is the only way to put its activity under the judicial scrutiny of the CJEU, this line of reasoning could constitute another way to satisfy the "necessity test" required by Art. 352 TFEU. The main obstacle

[103] *Ibid.*, p. 5.

[104] *Pringle*, cit., paras 64 and 67.

[105] M. Ioannidis, *Towards a European Monetary Fund, Comments on the Commission Proposal*, cit.

[106] E. Maurice, *EU Mulls Post-Brexit Balance of Euro and Non Euro-Zone States*, in *EUobserver*,15 December 2017, euobserver.com.

[107] This is not to say that after Brexit the EMU will not be characterised by asymmetric integration, which constitutes an inherent element of the Economic and Monetary Union. See S. Van den Bogaert, V. Borger, *Differentiated Integration in EMU*, in B. De Witte, A. Ott, E. Vos (eds), *Between Flexibility and Disintegration. The Trajectory of Differentiation in EU Law*, Cheltenham: Edward Elgar, 2017, p. 209 *et seq.*

[108] Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*, where the Court ruled, in a case also related to the compatibility of conditionality policies with EU law, that "the very existence of effective judicial review designed to ensure compliance with EU law is of the very essence of the rule of law", para. 36.

to the success of the Commission's Proposal does not seem to lie in the legality of the chosen legal basis, but rather on the political will of EU Member States. The flexibility clause can be used only if the Proposal of the Commission obtains the unanimous consent of the Council, besides the one of the European Parliament. Furthermore, EU Member States should conclude an intergovernmental agreement to transfer the ESM's funds into the newly established EMF, which also requires unanimity.[109] Certain national governments have already expressed their opposition to the EMF, since the latter, as we are going to see, may start a process characterised by the strengthening of the decision-making authority of the Commission at the expenses of their prerogatives.[110]

Despite the declarations of the Commission, the establishment of the EMF could hardly be considered an institutional revolution, as the Fund would succeed the ESM "with its current financial and institutional structures essentially preserved".[111] Indeed, the Statute of the EMF, annexed to the Proposal, is broadly similar to the TESM, with the exception of a few "targeted adjustments".[112] As the EMF would become an EU body, it would be subjected to the *Meroni* and *Romano* doctrines, which constitutionally delimitate the extent and degree of powers that the EU can delegate to EU agencies and bodies.[113] In those two cases, the Court established that the latter could only exercise "clearly defined executive powers", and should not acquire "discretionary powers, implying a wide margin of discretion, which may, according to the use which is made of it, make possible the exercise of actual economic policy".[114] In addition, EU agencies or bodies could not take "acts having the force of law".[115] Without any legal adjustment, the EMF would not satisfy those requirements, as conditionality policies would allow the latter to exercise discretionary powers, which in certain cases may even amount to exercising economic and budgetary policies in lieu of the beneficiary Member State. In addition, the acts of the EMF could become indistinguishable from "acts having the force of law" every time the MoU would establish conditions that are so detailed that do not leave any margin of discretion to national authorities called to implement them.

[109] Proposal for a Regulation COM(2017) 827, p. 5.

[110] For example, German Chancellor Angela Merkel is opposing the idea of turning the ESM into an EU body. See G. CHAZAN, *Angela Merkel Snubs Emmanuel Macron on Plan for EU Monetary Fund*, in *Financial Times*, 17 April 2018, www.ft.com. She expressed the preoccupation that such transformation may put the mechanism under the control of the Commission, at the expense of the tight control so far exercised by Eurozone Governments. However, the establishment of the EMF as an EU body constitutes one of the objectives of the coalition agreement of the current Government in Germany, see L. GUTTEMBURG, N. KOENIG, L. RASCHE, *Merkel on EU Reforms, a Decryption*, in *Jacques Delors Institute*, 6 June 2018, www.delorsinstitut.de.

[111] Proposal for a Regulation COM(2017) 827, p. 5.

[112] *Ibid.*, p. 6.

[113] Court of Justice: judgment of 13 June 1958, case 9-56, *Meroni v. High Authority*; judgment of 14 May 1981, case 98/80, *Romano*.

[114] *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community*, cit.

[115] *Giuseppe Romano v. Institut national d'assurance maladie-invalidité*, cit.

Although the Court has recently reiterated the constitutional importance of those two cases, it has also *de facto* enlarged the degree of powers that can be delegated by the EU. In a recent landmark case the Court has allowed the European Securities and Markets Authority (ESMA) to acquire the power to prohibit or restrict certain financial activities in case they threaten the orderly functioning and integrity of EU financial markets.[116] Such power entails a wide margin of discretion, since it requires ESMA to evaluate whether a financial market risk materialises, and implies the adoption of legal acts of general application, as prohibiting certain financial products have a general effect upon investors. Nevertheless, the Court found such competence in line with the *Meroni* doctrine. In addition, it held that "the institutional framework established in the TFEU, in particular art. 263 and 277 TFEU, expressly permits Union bodies, offices and agencies to adopt acts of general application".[117] A comparison could be made between the power of ESMA to prohibit certain financial activities and the one of the EMF to provide financial assistance. Both competences pursue the same objective, namely the financial stability of the European Union. They both involve "certain decision-making powers in an area which requires the deployment of specific technical and professional expertise".[118] Nevertheless, these similarities cannot overcome the differences. The management of financial assistance involves a much broader margin of discretion than the one granted to ESMA, as the content of the MoU can potentially encroach on every area of macroeconomic policy. There would be no clear parameter or criteria to restrict the discretion of the EMF when it establishes the conditions attached to financial assistance. Art. 13 of the Statute only provides that "the content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen", also providing a general duty of consistency with "the measures of economic policy coordination provided for in the TFEU".[119] On the other hand, the discretion of ESMA is substantially restrained by the ESMA Regulation and by various conditions and criteria established by EU secondary law.[120]

Since the powers exercised by the EMF as an EU body would be too wide and discretionary to comply with the *Meroni* and *Romano* doctrines, the latter must be closely controlled by another EU Institution, called to take the political and legal responsibility for its activity. To this end, the Commission's Proposal establishes that the Council must endorse the decisions taken by the Board of Governors.[121] This is indeed a very effective solution, as the Board of Governors takes all the most important and discretionary decisions. An

[116] Court of Justice, judgment of 22 January 2014, case C-270/12, *United Kingdom v. European Parliament and Council of the European Union*, so-called *Short Selling* case.

[117] *Ibid.*, para. 65.

[118] *Ibid.*, para. 82.

[119] Statute of the EMF, Art. 13, para. 2.

[120] *Ibid.*, paras 46 and 51.

[121] Art. 3 of the Proposal for a Regulation COM(2017) 827.

endorsing act by the Council can solve the problem of delegation, providing at the same time a direct link between the activity of the EMF and the one of the Council. The endorsement can be granted in two different ways. Normally, the Board must transmit its acts to the Council immediately after their adoption, and they enter into force only once the latter approve them. However, in specific cases, the emergency procedure can be activated, according to which the act of the Board has legal effects unless the Council forwards an objection. The endorsement procedure is not a new institutional device in EMU. For example, the Commission is called to endorse the draft regulatory and implementing technical standards issued by the European Supervisory Agencies (ESAs), and the ECB Governing Council to endorse the draft decisions of the ECB supervisory board within the context of the Single Supervisory Mechanism (SSM).[122] Although the EMF cannot be strictly compared to the ESAs and the ECB supervisory board, it seems that the EU increasingly relies on this endorsement procedure, through which an expert body drafts decisions and an EU Institution endorses them to give them the force of law, in order to ensure accountability and institutional balance within the EMU.[123]

Other important "targeted adjustments" can be found in the management of stability operations. Although Arts 12 and 13 of the Statute of the EMF broadly reproduce the same articles of the TESM, few but relevant differences can be found. In particular, the ESM can provide financial assistance only "if indispensable to safeguard the financial stability of the euro area as a whole *and* of its Member States", whereas the EMF could do the same when the risks concern the financial stability "of the euro area *or* of its Member States".[124] This means that the EMF could provide assistance not only when a financial crisis has systemic effects for the Eurozone, but also when the latter endangers only the stability of the Member State affected. This would hardly revolutionise the activity of the EMF, as the disbursement of financial assistance would still ultimately depend upon a decision of the Board of Governors.[125] This means that deciding when a crisis can or cannot have systemic consequences for the EU largely remains a political decision to be taken by the Board of Governors. Given the level of financial integration reached within the Eurozone, it is also important to wonder whether it is still possible to

[122] For the endorsement procedure of the Commission *vis-à-vis* the ESAS: Arts 10 and 15 of Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC. For the endorsement procedure of the ECB Governing Council *vis-à-vis* the Supervisory board, see Art. 26, para. 8, of Regulation (EU) 1024/2013 of the Council of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions. See also M. LAMANDINI, R. MUÑOZ, *EU Financial Law. An Introduction*, Padova: CEDAM, 2016, pp. 154 and 189.

[123] Thanks to Nathan de Arriba-Sellier for raising this point.

[124] Art. 12 TESM. See M. IOANNIDIS, *Towards a European Monetary Fund, Comments on the Commission Proposal*, cit.

[125] Art. 13, para. 4, Statute of the EMF.

have a financial crisis threatening the financial stability of a Member State without endangering the Eurozone as a whole.[126]

Concerning the procedure to disburse financial assistance, the Statute of the EMF contains some remarkable innovations. Firstly, the IMF is no longer mentioned among the actors involved in the procedure. In the TESM, the IMF had the task, "wherever possible", to negotiate the MoU along with the Commission and the ECB.[127] It was also entrusted, again "wherever possible", with the task of monitoring the compliance of the beneficiary Member State with conditionality.[128] This is no longer the case in the Proposal, as the IMF is partially substituted by the EMF, whose role in the procedure is greatly enlarged. In particular, the EMF is called to negotiate the MoU together with the Commission and the ECB and to sign it along with the Commission.[129] It is worth reflecting on those modifications. The IMF has been a relevant actor in the sovereign debt crisis, both as lender and as active participant of the *troika*, being responsible for the management and implementation of conditionality together with the EU Commission and the ECB. However, since the third Greek stability programme in 2015, the IMF is not participating in the bail-out with its own resources, due to disagreements with the Commission concerning the sustainability of the Greek public debt.[130] However, it is still part of the *troika*, monitoring the compliance of Greek authorities with the Commission and the ECB.[131] At the moment, it is not clear whether the IMF would again be involved in future programmes, also in light of the fact that the EU has acquired the necessary expertise to manage supranational loans without the IMF. However, since the IMF is an international organisation extraneous to the EU legal order, it is debatable whether it would need a legal source of European origins to operate within the *troika.* Its involvement within EMF-based conditionality will not depend upon the Statute of the EMF, and cancelling any mention of the IMF will not prevent its involvement in case the Board of Governors and the beneficiary Member State would decide to rely on the IMF again.

In the Proposal, the EMF would have a more active role in the troika than the ESM, being called to negotiate the MoU and sign it together with the Commission. Whereas the signing of the MoU, as we have seen in analysing the *Ledra* case, implies important legal consequence for the EMF, its formal participation in the negotiations would allow

[126] For a complete report of the current state of financial integration in the European Union, see D. VALIANTE, *Europe's Untapped Capital Markets, Rethinking Integration after the Great Financial Crisis*, CEPS Paperback, London: Rowman & Littlefield, www.ceps.eu.

[127] Art. 13, para. 3, TESM.

[128] Art. 13, para. 7, TESM.

[129] Art. 13, paras 3 and 4, of the Statute of the EMF.

[130] C. BAN, L. SEABROOKE, *From Crisis to Stability, How to Make the European Stability Mechanism Transparent and Accountable*, Transparency International EU, 2017, transparency.eu, p. 27.

[131] The IMF is participating in the third Greek stability programme through an "agreement in principle" that does not entail any disbursement. IMF, *IMF Managing Director Christine Lagarde to Propose Approval in Principle of New Stand-by Arrangement for Greece*, IMF Press Release no. 17/225, 15 June 2017, www.imf.org.

the EU to rely on the expertise developed by the ESM during the sovereign debt crisis. Curiously, the Proposal does not give any role to the EMF in monitoring the compliance with conditionality. This is in stark contrast with the current role played in this area by the ESM, which is now involved in monitoring the compliance of Greece with its third programme.[132] The ESM has successfully increased its involvement on the Greek bail-out on the basis of its large exposure to the country's debt.[133] Henceforth, it is peculiar to note that the Commission Proposal does not give to the EMF a competence that the ESM is already exercising *de facto*.

Those adjustments to the procedure to provide financial assistance should not be over-evaluated. Overall, they provide a shift of competences *within* the *troika*, but not *between* the *troika* and the finance ministers of the Eurozone. As we have seen, the procedure established in Art. 13 TESM is based on a clear division of powers between the Board of Governors, whose task is to take the most important decisions related to conditionality, and the *troika*, formed by the Commission, the ECB and the IMF, called to implement them. Under the EMF, this hierarchical relationship between the Board and the *troika* would remain untouched. The only change would be *within* the *troika*, where the Commission and the EMF would take over what was previously done by the IMF. In other words, the Proposal of the Commission would transform the ESM into an EU body, but it would not change the inherently intergovernmental manner in which it provides financial assistance. Exactly like the ESM, the Eurozone national governments would sit at the apex of the EMF governance.[134] This does not mean that inserting the ESM in the EU legal order would have no consequences on the governance and activity of the Mechanism. In fact, we must also take into consideration the hidden institutional transformations that the establishment of the EMF may bring in the long term. The EU has a long history of such transformations, with institutions shaping their form and activity *vis-à-vis* others through formal and informal interinstitutional arrangements, as well as legal and political principles.[135] Henceforth, it is important to take into consideration not only the text of the Commission Proposal, but also the effect that would have on the EMF the fact that its activity would be carried out within a constitutional ecosystem which is shaped by the mutual interaction of different constitutional actors. For example, being part of the EU constitutional framework, the EMF would be required to

[132] C. Ban, L. Seabrooke, *From Crisis to Stability*, cit., p. 19. The ESM is currently participating in the monthly missions to Greece in order to attend, together with the Commission, the ECB and the IMF, technical discussions related to the implementation by Greek authorities of conditionality policies.

[133] *Ibid.*, pp. 19-20.

[134] Art. 3 of the Statute of the EMF.

[135] For a seminal article concerning the concept of transformation within the EU legal order, see J. Weiler, *The Transformation of Europe*, in *Yale Law Journal*, 1991, p. 2403 *et seq.*, for an application of this concept within the EMU, see M. Ioannidis, *Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis*, cit.

comply with the principle of institutional balance and the duty of sincere cooperation among institutions.[136] In a similar vein, a stricter judicial oversight from the Court of Justice may in the long term substantially modify the system of checks and balances characterising the EMF governance. Over time such constraints may render the instrument more accountable, and even radically change the way conditionality is implemented in Europe and perceived by European citizens.[137]

IV.2. The legal accountability of the EMF

From the point of view of legal accountability, namely the availability of judicial review at the European level, the transformation of the ESM into the EMF would constitute a major improvement. In order to understand the importance of this change, it is useful to review the difficulties faced by EU citizens to bring ESM-based conditionality measures before the CJEU.[138]

Individuals cannot challenge the acts of the ESM, as the latter is an international organisation based on the TESM, which does not provide any standing for non-privileged applicants. The ESM Institutions such as the Board of Governors and the Board of Directors enjoy a similar impunity. Individuals cannot initiate an action for damages against those bodies nor an action for annulment against their acts. Therefore, the intergovernmental nature of the ESM put this organisation outside the reach of individual complaints. On the other hand, challenging national measures implementing ESM-based conditionality seems equally arduous. The Court of Justice can hear a preliminary referral only when a national court refers a question related to the interpretation of EU law or the interpretation and validity of an act of EU institutions, bodies, offices and agencies. The question is whether the MoU, the document drafted by the Commission containing the conditions implemented by national authorities, should be considered an act of EU law according to Art. 267, para. 1, TFEU. The case law of the Court of Justice clearly shows that not all MoUs have the same legal nature. Instead, the dividing line between the EU or International Law nature of the MoU seems to be the legal basis according to which the Commission signs the agreement. When financial assistance is provided by the ESM, the Commission does not act according to EU law, but on the basis of Art. 13, para. 3, TESM. Therefore, the Commission signs the MoU *on behalf* of the

[136] Art. 13, para. 2, TFEU.

[137] Other important adjustments include the competence of the EMF to provide a common backstop to the Single Resolution Fund, the possibility for faster decision-making in specific urgent situations, and the possibility to develop new financial instruments. Due to space constraints, this section will merely focus on those adjustments that are the most relevant for the accountability of the EMF, in order to understand whether the latter would be more accountable than the ESM.

[138] For a more complete overview, see C. Kilpatrick, *The EU and Its Sovereign Debt Programmes: The Challenges of Liminal Legality*, in *EUI Working Papers*, no. 14, 2017, and A. Karatzia, *An Overview of Litigation in the Context of Financial Assistance to Eurozone Member States*, cit.

ESM producing an act of international law (TESM) which is not reviewable by the Court of Justice.[139] However, the situation is different when financial assistance is based on EU law. In the recent *Florescu* case, the Court analysed the legal nature of the MoU signed between the Commission and Romania.[140] The Romanian programme was provided by a facility mechanism based on Art. 143 TFEU and was entirely regulated by a Council Regulation.[141] The Court noted that, within the Romanian assistance programme, the Commission was signing the MoU on the basis of Art. 3 of the Regulation 332/2002.[142] Hence, the agreement was "an act whose legal basis lies in the provisions of EU law", which "constitutes an act of an EU Institution within the meaning of Art. 267(b) TFEU".[143]

The *Florescu* case clearly shows that, at least in terms of access to the Court of Justice, the legal basis according to which financial assistance is provided *does* make a substantial difference for individuals seeking justice. At the same time, it also reiterates that the only avenue available to individuals affected by the ESM activity is the action for damages inaugurated in *Ledra*. A solution that, as we have seen above, is far from ideal. Given this difficult situation, AG Wathelet decided to use his opinion on the *Mallis* case to provide advice to future plaintiffs aspiring to challenge the national implementation of ESM-based conditionality.[144] He noted that the content of the MoU – establishing the conditionality attached to ESM financial assistance – is reproduced, "in varying degrees of detail", also in a EU law-based program, the Macroeconomic Adjustment Program (MAP). The MAP is proposed by the Commission and approved by a Council decision.[145] Therefore, plaintiffs may ask national courts to refer the Council decision to the Court of Justice, thereby challenging the compatibility between the MAP and EU law.

This theory has not been tested so far. If the MAP were to be found illegal, the Commission and the Council would be obliged to modify it. It is not clear whether the ESM would also be under the obligation to change the MoU in order to adapt it to the amended MAP. In theory, the MAP and the MoU are two different conditionality agreements belonging to two different legal orders, the former to the EU and the latter to the

[139] *Ledra Advertising v. Commission and ECB* [GC], cit., para. 52.

[140] *Florescu and others*, cit. See M. MARKAKIS, P. DERMINE, *Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter:* Florescu, in *Common Market Law Review*, 2018, p. 643 *et seq*.

[141] See *supra*, footnote 10.

[142] *Florescu and others*, cit., para. 33.

[143] *Ibid.*, para. 35. Although only implicitly, the Court of Justice also reached a similar conclusion in a case concerning the Portuguese bail-out. As the Portuguese programme was partially based on EU law (the EFSM), the Court admitted a referral concerning the compatibility between an MoU-based austerity measure and EU law. Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*.

[144] Opinion of AG Wathelet, *Mallis and Malli v. Commission and ECB*, cit., para. 85. In the legal scholarship, the first to detect the relationship between the MoU and the MAP was C. KILPATRICK, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, cit.

[145] Art. 7 of Regulation 472/2013.

TESM.[146] So far, every time the stability programmes needed to be modified, the Commission first modified the MoU, and only later were those changes incorporated in the MAP; not the other way around.[147] The Greek programme represents an important exception, as the MAP was never amended, notwithstanding the numerous changes made to the MoU.[148] Only the Court of Justice, if given the opportunity, could clarify whether there is a duty of consistency between the MAP and the MoU, and which Institutions are obliged to uphold it.[149]

The overview provided above shows the low degree of judicial accountability enjoyed by the ESM vis-a-vis individual plaintiffs. Only ESM Member States could bring an action before the CJEU, leaving citizens and legal persons with the only possibility of resorting to strategic litigation to find a way into the Court of Justice. Transforming the ESM into the EMF would improve the situation in many aspects, although the degree of judicial accountability of the new body would still not match the importance of its activity. The acts adopted by the EMF and its bodies would always be reviewable by the CJEU, as the latter has the competence to "review the legality of acts of bodies, offices or agencies of the Union intended to produce effects vis-a-vis third parties". As clarified in *Florescu*, MoUs signed by the EMF and the Commission would also fall under the scrutiny of the Court of Justice, as they would become EU law acts.[150] However, the persisting problem would still be how to bring such acts before the Court, given the relatively stringent admissibility criteria. Individual plaintiffs could not bring an action for annulment, neither against EMF acts nor against national acts implementing the MoU. As those measures are not addressed to specific individuals, plaintiffs could never overcome the *Plaumann* standing test, as it would be impossible to find a legal act adopted within the framework of conditionality programmes being of "direct and individual concern" to them.[151] The action for compensation, which is currently available only against the Commission and the ECB, could also be triggered against the Board of Governors and the Board of Directors, as un-

[146] See R. REPASI, *Judicial Protection Against Austerity Measures in the Euro Area:* Ledra *and* Mallis, cit., p. 1138, according to whom the MAP "co-exist with the MoU and partly overlap in content. They are, however, legally not synchronized with each other. Modifications of the one have to be reproduced with regard to the other in accordance with the respective procedures".

[147] The numerous reviews at the Cypriot MAP can be found at the EU Commission's website, ec.europa.eu. C. KILPATRICK, *The EU and Its Sovereign Debt Programmes*, cit., p. 16.

[148] C. KILPATRICK, *The EU and Its Sovereign Debt Programmes*, cit., p. 16.

[149] For a negative answer, see R. REPASI, *Judicial Protection Against Austerity Measures in the Euro Area:* Ledra *and* Mallis, cit., p. 1138. For a positive one, see M. MARKAKIS, P. DERMINE, *Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter:* Florescu, cit., according to whom the Commission would have a "dynamic" obligation to adjust the MAP with the MoU "throughout the duration of the programme".

[150] *Florescu and others*, cit.

[151] See two early attempts to initiate an action of annulment against austerity measures: General Court: order of 27 November 2012, case T-541/10, *ADEDY and others v. Council* and order of 27 November 2012, case T-215/11, *ADEDY and others v. Council*.

der the EMF they would be transformed into EU law-based bodies. However, the difficulties facing the plaintiffs in *Ledra* to demonstrate a manifest and grave damage suffered by conditionality policies would still be present under the EMF. Henceforth, the main avenue for EU citizens to see EMF-based conditionality policies adjudicated by the Court of Justice would still be the preliminary referrence.[152]

The most welcome change for the judicial accountability of the EMF would be the introduction of an approval mechanism by the Council for decisions taken by the Board of Governors.[153] As we have seen before, currently the most important conditionality decisions, such as the one to proceed with the bail-in in Cyprus, are taken either informally by the Eurogroup or outside the EU legal order by the ESM Board of Governors. The finance ministers of the Eurozone can therefore easily escape judicial control. The establishment of the EMF would finally provide individuals with an avenue to challenge those decisions, as they could always send a preliminary reference on the interpretation or validity of the approval decision by the Council.[154] Individuals would still need to convince a national judge to refer a question to the Court of Justice, demonstrating that the national law under scrutiny derives from EU law and is relevant for the judgment before the national court, but at least there would be a clear act from an EU Institution – the Council – enshrining the conditionality attached to financial assistance.[155] The informal nature of the Eurogroup would no longer constitute an obstacle to judicial review, as its decisions would always be backed up by a formal act of an EU Institution challengeable according to Art. 263 TFEU.

Transforming the ESM into an EU body would be important not only to provide better access to judicial review, but also because it would oblige the EMF to fully uphold the Charter. Even if the Statute of the EMF only establishes that the EMF should fully observe Art. 28 of the Charter, the entire Charter always applies to "institutions, bodies, offices and agencies of the Union".[156] This would mean that conditionality policies would always have to be fully consistent with EU primary law, including the Charter. The Court of Justice has stressed the need for full consistency between EU law and the MoU in both the *Pringle* and *Ledra* cases.[157] However, such duty has so far only fallen on the

[152] This is the main conclusion reached by R. Repasi, *Judicial Protection Against Austerity Measures in the Euro Area:* Ledra *and* Mallis, cit., in the field of ESM conditionality, and it would also apply to the activity of the EMF.

[153] Art. 3 of the Proposal for a Regulation COM(2017) 827.

[154] Art. 1 of the Proposal for a Regulation COM(2017) 827.

[155] National judges have to set out the precise reasons why a ruling from the Court of Justice is necessary to enable them to give a judgment. Court of Justice, judgment of 4 May 2016, case C-547/14, *Philip Morris Brands and others.* The Court of Justice can refuse to rule in case the interpretation of EU law requested is unrelated to the case before the national court or it is merely hypothetical. Court of Justice, judgment of 21 December 2016, case C-444/15, *Associazione Italia Nostra Onlus.*

[156] Art. 51 of the Charter.

[157] *Pringle*, cit., para. 164; *Ledra Advertising v. Commission and ECB* [GC], cit., para. 58.

shoulders of the Commission. As it was claimed in the section II, this constitutes an excessive task, as the latter has no control over the real decision-making power of the ESM framework (the Eurogroup/Board of Governors). The situation would change with the establishment of the EMF. As the latter would sign the MoU together with the Commission, they would jointly be responsible for the full compliance of conditionality measures with EU law. This would be a favourable change, relieving the Commission from the unfair responsibility scheme created by the *Ledra* case.

Finally, the EMF would have an autonomous self-financed budget, which would not be part of the EU budget.[158] This would disentangle the paradoxical situation described above, according to which damages caused by an international organization could potentially pose risks to the financial balance of the EU budget. The CJEU would finally have the competence to see that losses and damages caused to individuals are made good by the EMF with its own budget, which is much larger than that of the EU.[159]

IV.3. The political accountability of the EMF

Arts 5 and 6 of the Proposal are specifically dedicated to the accountability of the EMF, establishing that the EMF "shall be accountable to the European Parliament and to the Council for the execution of its tasks". In particular, the EMF shall submit an annual report to the Commission, the Council and the European Parliament (Art. 5, para. 2). Furthermore, the European Parliament may ask the Managing Director of the EMF to report the activity of the Fund to the competent committees, as well as to ask questions to the EMF, who would be under the obligation to answer orally or in writing (Art. 5, para. 3, and Art. 5, para. 4). Finally, the chair and vice-chairs of the competent committees of the European Parliament would have the right to hold confidential oral discussions behind closed doors with the Managing Director (Art. 5, para. 5).

These *ex post* accountability mechanisms are already used by the European Parliament.[160] Regulation 472/2013 establishes the duty of the Commission to keep the European Parliament informed about its activity within the European Economic Governance. In particular, the Commission shall inform the European Parliament every time a Member State is subjected to an enhanced surveillance, MAP and a post-programme surveillance.[161] In addition, the Commission has the duty to draft a comprehensive re-

[158] Art. 29 of the Proposal for a Regulation COM(2017) 827.

[159] Although it would probably be necessary to adopt further secondary legislation in order to detail how to retrieve such losses and to give the CJEU a strong legal basis to scrutinise and condemn the EMF to repay individuals with the EMF budget.

[160] For the mechanisms of accountability that can be used by the European Parliament within the European economic governance, see C. Fasone, *European Economic Governance and Parliamentary Representation. What place for the European Parliament?*, in *European Law Journal*, 2014, p. 164 *et seq.*

[161] Arts 3 and 7 of Regulation 472/2013.

port every five years to be submitted to the European Parliament.[162] Although the Regulation does not specifically target the ESM, the activity of the Commission under the Regulation and under the TESM substantially overlaps. For example, when the European Parliament is acquiring information concerning the MAP, it is also indirectly overseeing the content of the MoU, given that those two documents have a similar content and they are both drafted by the Commission.

The European Parliament is aware of the fact that conditionality policies are decided outside its democratic control and decision-making. The Parliament denounced "the lack of transparency in the MoU negotiations" and lamented the effects of such opacity "on the trust of citizens in democracy and the European project".[163] In order to ameliorate this situation, the ECON Committee has established a specific working group, the Financial Assistance Working Group (FAWG), whose objective is to follow more closely the implementation of ESM-supported programmes.[164] The FAWG organises meetings and prepares hearings with the actors involved in the management of conditionality policies (ECB, Commission, IMF and ESM) and national authorities.[165] The FAWG plainly recognises and accepts the exclusion of the European Parliament in the decision-making process of conditionality management, but still attempts to enhance the democratic oversight of the ESM through public and private meetings and hearings.[166] The main problem of the FAWG is that it mostly works on a voluntary basis, meaning that the institutions invited can not only refuse to attend the meeting or the hearing, but are also free to decide the amount of information to be released.[167] Naturally, turning down an invitation by the FAWG would be politically controversial, rendering the possibility of such an event rather remote. Nevertheless, refusing to disclose sensible information or disclosing it on a confidential basis are already common working elements of the FAWG.

The Proposal of the Commission would certainly improve the legal framework upon which the European Parliament obtains information from the Mechanism and EU Institutions. The EMF would be obliged to answer the questions of the competent parlia-

[162] Art. 19 of Regulation 472/2013.

[163] European Parliament Report 2013/2277/(INI), para. 30.

[164] The Financial Assistance Working Group was established by the Conference of Presidents of the European Parliament, ordinary meeting of 21 January 2016.

[165] A description of the activities of the FAWG, which is part of the Economic and Monetary Affairs Committee, can be found at the European Parliament website, www.europarl.europa.eu.

[166] See for example the exchange of views between the FAWG and the EU Commission Vice President Valdis Dombrovskis on Greece at ec.europa.eu. See also the words of Roberto Gualtieri, Chair of the FAWG, during the mission in Greece: "The European Parliament cannot decide how the programme is implemented on a day-to-day basis, but we will continue to ensure the full transparency of the programme and to provide a proper democratic debate on these issues that are central to the stability and prosperity of the euro area", www.europarl.europa.eu.

[167] The reporting obligations established by Regulation 472/2013 and by the Treaties are mandatory for the Institutions involved.

mentary committee.[168] The European Ombudsman would acquire the competence to watch its activity.[169] EU citizens may start petitions concerning the EMF's activity at the European Parliament.[170] In extreme circumstances, the European Parliament may even establish a committee of inquiry to investigate the EMF's violations of EU law.[171] This would definitely improve the quality and quantity of information at the European Parliament's disposal. However, this would only partially improve the democratic oversight of the Fund, as the Parliament would still not be able to participate in the EMF's decision-making. It would not be requested to give its consent to the disbursement of financial assistance. It would also lack any ratification power over the appointment of the Board of Governors or Directors. The Proposal only establishes the right of the Parliament to be consulted during the appointment of the Managing Director.[172] This is in stark contrast with the accountability powers of the European Parliament in the Banking Union, where its approval is required for the appointment of both the Chair and Vice-Chair of the Single Supervisory Mechanism and the Single Resolution Board.[173] Overall, the fact that the European Parliament would lack *ex ante* powers of control over the activity of the EMF would constitute an obstacle to its democratic oversight. Collecting information through reporting obligations and transparency instruments has little value if one cannot act on it.

V. Final remarks

This *Article* has attempted to draw an introductory analysis of the recent Proposal of the European Commission to transform the ESM into an EU law-based body, the EMF. Previous EU legal scholarship has successfully demonstrated that the intergovernmental nature of the ESM has shielded this body from proper judicial accountability.[174] On

[168] See Art. 230 TFEU, and Art. 5 of the Proposal for a Regulation COM(2017) 827.

[169] Art. 228 TFEU.

[170] Art. 227 TFEU.

[171] Art. 226 TFEU.

[172] Art. 7 of the Statute of the European Monetary Fund.

[173] Art. 26, para. 3, of Regulation (EU) 1024/2013 of the Council of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, and Art. 56, para. 6, of Regulation (EU) 806/2014 of the of the European Parliament and the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) 1093/2010. See M. Markakis, *Political and Legal Accountability in the European Banking Union: A First Assessment*, in *Hungarian Yearbook of European Union Law*, 2016, p. 535 *et seq.*

[174] See R. Repasi, *Judicial Protection Against Austerity Measures in the Euro Area:* Ledra *and* Mallis, cit.; C. Kilpatrick, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, cit.; see also P. Dermine, *The End of Impunity? The Legal Duties of "Borrowed EU Institutions" Under the European Stability Mechanism Framework*, in *European Constitutional Law Review*, 2017, p. 369 *et seq.*; and A. Poulou, *Financial Assistance Conditionality and Human Rights Protection: What Is the Role of the EU Charter of Fundamental Rights?*, in *Common Market Law Review*, 2017, p. 991 *et seq.*

the same line, this *Article* has highlighted two major problems, namely the judicial impunity of the Eurogroup/Board of Governors and the mismatch between the actual powers of the Commission under the TESM and its responsibility under the *Ledra* judgment. The main problem of the ESM lies in the low level of accountability enjoyed at the European level by the Eurozone finance ministers. In particular, the institutional transformation of this assembly, converted from a forum of discussion into a decision-making power in the field of conditionality, has occurred largely outside the judicial scrutiny of the Court of Justice. By the same token, making the Commission responsible for damages caused by conditionality does not represent an effective and fair solution, as it risks holding the Commission responsible for decisions taken by the Board of Governors. In the final section, it is claimed that the EMF, fully integrated into the EU constitutional framework, would indeed have a larger degree of judicial accountability. The duty of the Council to endorse the main decisions of the Board of Governors would improve the accountability of the Eurozone finance ministers, whereas the Commission would share its responsibility for signing the MoU with the EMF itself. Those changes would fix the accountability unbalances that we have highlighted analysing the *Mallis* and *Ledra* cases. Nevertheless, it is important to understand whether the CJEU can actually improve the overall legitimacy of the Mechanism.

Providing financial assistance entails a redistribution of fiscal resources. How to manage fiscal solidarity constitutes the political question *par excellence*, and the conflicts it creates cannot be solved by a judicial body. Regardless of the EU or international law nature of the financial assistance provided, the Court has never found a conditionality policy unlawful, granting always the widest possible margin of discretion to EU Institutions pursuing the objective of financial stability, often at the expense of fundamental rights protected by the Charter or the principle of legal certainty.[175] In doing so, the Court has not only showed a great degree of judicial restraint, but has also successfully steered away from political conflicts. When the problem is so inherently political, the solution must come from politics. Analysing the Proposal of the Commission, this *Article* concludes that the ESM substantially lacks democratic accountability. Although the EMF would bring some meaningful improvements, the European Parliament would still be excluded from the direct management of conditionality measures, lacking at the same time effective *ex post* accountability mechanisms.

Therefore, the establishment of the EMF would be a welcoming step towards a more legitimate exercise of conditionality policies, as it would put the activity of the Mechanism under the full scrutiny of the Court of Justice, but not towards its democra-

[175] For the violation of the principle of legal certainty by conditionality during the euro-crisis, see P.M. RODRIGUEZ, *A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis*, in *European Constitutional Law Review*, 2016, p. 265 *et seq.* See also *Florescu and others*, cit., para. 1, and General Court, judgment of 7 October 2015, case T-79/13, *Accorinti and others v. ECB*.

tisation. The democratic accountability of the EMF would be in line with the low level of democratisation of the EMU, where the European Parliament struggles to have its voice heard.[176] Rather than a revolution, the EMF would therefore constitute a necessary base upon which further improving the legitimacy and democracy of conditionality. Future stability programmes should occur within the remits of the constitutional safeguards provided by the EU architecture. As it is often the case with European integration, establishing the EMF should be considered an incremental step towards other reforms, rather than an end point. Once the Mechanism becomes an EU body, then it will always be possible to further increase its accountability, whereas further, incremental improvements would be impossible as long as it is an international organisation. Conditionality provided by the EMF in the EU constitutional legal order would be far from perfect, but still much better than the one provided outside of it.

[176] For an overview of the democratic shortcomings of the EMU, see L. Daniele, P. Simone, R. Cisotta (eds), *Democracy in the EMU in the Aftermath of the Crisis*, Cham: Springer, 2017.

ARTICLES

LAW AND FOREIGN POLICY BEFORE THE COURT: SOME HIDDEN PERILS OF *ROSNEFT*

LUIGI LONARDO*

TABLE OF CONTENTS: I. Introduction. – II. Background to the dispute and the questions referred. – III. Jurisdiction: the criticism. – IV. The Court and preliminary rulings. – IV.1. Law. – IV.2. Politics. – V. Conclusion.

ABSTRACT: The landmark decision of the Court of Justice in *Rosneft* (judgment of 28 March 2017, case C-72/15) has been mostly praised by academic commentators for opening the doors of preliminary rulings in the Common Foreign and Security Policy (CFSP), and for upholding the rule of law in that area. While this *Article* mostly welcomes the momentous pro-integrationist implications of the mechanism of preliminary ruling through the immediacy of dialogue between Member States' and EU Courts, it also criticises the decision in *Rosneft*. In particular, it argues that the Court's reasoning to establish jurisdiction over a restrictive measure perpetuates a line of case law that hides risks, both for the judicial protection of individuals, and for the institutional balance and the separation of powers. By such critique, this *Article* partially departs from mainstream scholarship, which sees in *Rosneft* a positive development for the respect for the rule of law in CFSP. While that progress is entirely commendable, this *Article* elaborates upon and criticises other potential consequences of the Court's decision on what constitutes a reviewable act pursuant to Art. 275 TFEU.

KEYWORDS: Common Foreign and Security Policy – Rosneft – restrictive measures – integration – jurisdiction – preliminary ruling.

I. INTRODUCTION

Law and politics pulsate with different rhythms. The first develops steadily, somewhat silently, almost hidden from the clamour of press coverage, and, absent revolutionary events, with minor variations over the long run. The other is by nature more volatile, public and publicised, and is interested in a shorter time-horizon.[1]

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[1] The idea of diverging time horizons is in K. ALTER, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, in *International Organization*, 1998, p. 121. See generally

Like two planets orbiting in the dense universe of human action, sometimes, law and politics align before courts, and when they do, they generate an awesome spectacle for intellectual contemplation. It happened before the Court of Justice in *Rosneft*.[2]

Since the end of 2013, unrest and military activities in Eastern Ukraine, including Russia's annexation of Crimea, have resulted in highly tense relationships between the EU and Russia. Western leaders widely condemned Russia's action, and as an answer to what it perceived as an aggressive, illegitimate, and illegal Russian foreign policy, in 2014 the EU adopted economic sanctions aimed at targeting Russian economy, with the ultimate aim of bringing peace to Ukraine.

In *Rosneft*, the CJEU was asked to review the validity of some of these measures. It was the first request ever received for a preliminary ruling under Art. 267 TFEU on the interpretation and on the validity of an act adopted in the field of the Union's political and security international relations, the Common Foreign and Security Policy (CFSP).[3] The political, symbolic, and economic repercussions of the issues at stake would, alone, make the case worthy of analysis. However, apart from the outcome on the substance of the case – the Court confirmed the sanctions established by the Council – *Rosneft*'s greatest significance lies in how the Court adjudicated on two procedural issues: its power to give preliminary rulings and its jurisdiction to review CFSP acts.

The Court's decision follows a well-established trend of affirming jurisdiction on certain CFSP acts in order to further the rule of law,[4] a line of cases that has been widely praised by scholars.[5] This *Article*, instead, takes issue with the reasoning – developed in previous cases and followed by the Court in *Rosneft* – adopted to establish jurisdiction on restrictive measures,[6] as it opens the door to possible perilous intrusions in the substance of political CFSP decisions, while at the same time not fully guaranteeing to applicants the right to an effective remedy.[7]

the seminal study of H.J. BERMAN, *Law and Revolution. The Formation of the Western Legal Tradition*, Cambridge: Harvard University Press, 1983.

[2] Court of Justice, judgment of 28 March 2017, case C-72/15, *Rosneft* [GC].

[3] Previously, the Court had judged on restrictive measures during preliminary ruling procedures, but never on CFSP acts. Court of Justice: judgment of 14 March 2017, case C-158/14, *A and others* [GC]; judgment of 29 April 2010, case C-340/08, *M and others*.

[4] The "integration thread" is described by P. KOUTRAKOS, *Judicial Review of EU's Common Foreign and Security Policy*, in *International and Comparative Law Quarterly*, 2018, p. 4.

[5] Recent contributions are P. VAN ELSUWEGE, *Upholding the Rule of Law in the Common Foreign and Security Policy:* H v. Council, in *Common Market Law Review*, 2017, p. 841 *et seq.*; C. ECKES, *Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction*, in *European Law Journal*, 2016, p. 492 *et seq.*; S.O. JOHANSEN, H v Council et al., *A Minor Expansion of the CJEU's Jurisdiction over the CFSP*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 1297 *et seq.*

[6] This contribution only addresses the decision on the second limb of Art. 275 TFEU, and not the decision on compliance with Art. 40 TEU.

[7] Art. 47 of the Charter of Fundamental Rights of the European Union (the Charter).

Indeed, while commentators have essentially endorsed the Court's case law on jurisdiction on restrictive measures, including the one in *Rosneft*[8] – this *Article* seeks to show the danger from a "dynamic" perspective, that is, considering how the Court may decide future cases.[9]

The Court found that it has jurisdiction on restrictive measures targeting persons "defined by reference to specific entities", not on measures of general application. This decision is unconvincing and passible of three criticisms. First, the distinction is arbitrary, and appears not to be honoured by the Court itself. Second, the distinction is problematic because it appears to conflate the requirements for jurisdiction with those for *locus standi* of applicants; together with the very strict interpretation of rules on standing, this means that applicants can challenge only provisions that refer to them individually, and not restrictive measures adversely affecting them but contained in rules of general application.[10] Third, and this is the dynamic aspect, the distinction does not sufficiently guarantee that the Court will not breach the fundamental principle of separation of powers, if, in the future, it reviewed political decisions.[11]

[8] G. BUTLER, *The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy*, in *European Constitutional Law Review*, 2017, p. 691: "In light of the jurisdiction CFSP cases, and the Court's assertion of jurisdiction in them, more questions seem to have been raised than answered. This is by no means a negative development, as it assumes that the Treaties will eventually level the differentiation between CFSP and non-CFSP, despite the specific limitation imposed on the Court"; P. VAN ELSUWEGE, *Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft Case*, in *Verfassungsblog*, 6 April 2017, verfassungsblog.de: "The Court's preliminary ruling in *Rosneft* is important in many respects. It upholds the coherence of the EU system of judicial protection as far as the adoption of targeted sanctions is concerned and brings further legal clarity about the validity and interpretation of those sanctions".

[9] Similarly, albeit much more radically, to what S. Poli did in her article: S. POLI, *The Common Foreign Security Policy After* Rosneft*: Still Imperfect but Gradually Subject to the Rule of Law*, in *Common Market Law Review*, 2017, p. 1828 *et seq.*; G. BUTLER, *The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy*, cit., p. 685 criticises future implications for forum shopping.

[10] That is, a set of criticisms similar to those that can be moved to the strict doctrine of *locus standi* developed by the Court passible. See T. TRIDIMAS, S. POLI, *Locus Standi of Individuals Under Article 230(4): The Return of Euridice?*, in A. ARNULL, P. EECKHOUT, T. TRIDIMAS (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, Oxford: Oxford University Press, 2008, p. 70 *et seq.*

[11] Arguably, it has already reviewed a political decision, in *H* (Court of Justice, judgment of 19 July 2016, case C-455/14 P, *H v. Council and Commission* [GC]). In that case, AG Wahl wrote in his opinion that "the decision – taken by the Head of Mission of the [European Union Police Mission (EUPM)] – to fill a position of prosecutor in a regional office of the mission, instead of having a legal officer in its headquarters, is an operational decision and not a purely administrative matter. That decision has, indeed, significant consequences on the manner in which the EUPM discharges its tasks and the effectiveness of its action. The administrative element in the contested decisions (the allocation of human resources) is thus only secondary to the main foreign policy element, which concerns the reorganisation of EUPM's operations at theatre level", and that "the General Court was correct to conclude that it did not have jurisdiction to review the validity of the contested decisions"; see opinion of AG Wahl delivered on 7 April 2016, case C-455/14 P, *H v. Council and Commission*, paras 85 and 89. P. KOUTRAKOS, *Judicial Review of EU's Common Foreign and Security Policy*, cit., p. 14.

At the same time, the Court's decision to hear preliminary rulings on CFSP, albeit sustained by shaky teleological arguments, may have far-reaching positive repercussion for EU integration in this policy area. With *Rosneft*, the Court has deliberately opened the tap of preliminary ruling: a spring, *splendidior vitro*,[12] through which the lymph of the immediacy of judicial dialogue between national and EU Courts may flow and shape the future of CFSP.

II. Background to the dispute and the questions referred

The EU imposed sanctions against Russian and Ukrainian companies since March 2014,[13] with further measures being adopted on 31 July 2014 as the crisis unfolded.[14] The restrictions consist of travel or import bans,[15] asset freeze, targeted measures against individuals associated with threats to Ukraine's territorial integrity and, crucially for the action begun in *Rosneft*, the prohibition for EU natural or legal persons from engaging in contractual relations with certain Russian state-owned companies and banks.

Rosneft, whose majority is owned by a company that belongs to the Russian Federation,[16] is the leading Russian petroleum company. It lodged a case for judicial review before the High Court of Justice of England and Wales.[17] Rosneft challenged, via the UK's domestic implementing act, the provisions of Regulation 833/2014 ("the Regulation") imposing the requirements of prior authorisation for the sale of some items, the prohibition to supply services related to oil exploration and production in Russia, and the obligation for Member States to establish the rules on penalties;[18] and those of Decision 2014/512 ("the Decision") prohibiting the provision of financial services to Russian entities, establishing a system of prior authorisation for the sale, supply, transfer or export of certain technologies suited to specific categories of oil exploration and produc-

[12] Brighter than glass.

[13] Council Decision (CFSP) 2014/145 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine and Regulation (EU) 269/2014 of the Council of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, subsequently amended several times.

[14] Council Decision (CFSP) 2014/512 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine and Regulation (EU) 833/2014 of the Council of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, and later amendments.

[15] Council Decision (CFSP) 2014/386 of 24 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol, as later amended.

[16] See Rosneft, *Rosneft at a glance*, www.rosneft.com.

[17] High Court of Justice of England and Wales, judgment of 9 February 2015, *R (OJSC Rosneft Oil Company) v. Her Majesty's Treasury et al*.

[18] Art. 3, Art. 3a, Art. 4, para. 3, Art. 4, para. 4, Art. 5, para. 2, let. b) to d), Art. 5, para. 3, Arts 8 and 11 of Regulation 833/2014, cit.

tion projects in Russia, and a prohibition on the provision of associated services necessary for those projects.[19] The Decision and the Regulation list Rosneft in their annexes as a company subject to some of the restrictions they provide for. Rosneft also brought a direct action pursuant to the fourth paragraph of Art. 263 TFEU against the same measures: it promises to be another highly sensitive case.[20]

The UK Court filed for a preliminary ruling as it held that, in order to resolve the dispute, it needed to determine whether certain provisions of the Decision and the Regulation were invalid – and that it could not do so without referring three questions to the Court of Justice.

By question 1, the referring court asked whether the Court of Justice had jurisdiction to give a preliminary ruling on the validity of an act adopted on the basis of provisions relating to the CFSP, such as Decision 2014/512.

By question 2, let. a), the referring court sought a ruling on the validity of some provisions of the Decision and of the Regulation. Before answering this question, the Court made some preliminary observations on its own jurisdiction to review restrictive measures pursuant to Art. 24 TEU and Art. 275 TFEU. The Court then proceeded to reject Rosneft's pleas, and to confirm, on the substance, the validity of the Decision and of the Regulation.

By questions 2, let. b), and 3, the referring court asked whether the principles of legal certainty precluded a Member State from imposing criminal penalties for the infringement of the provisions of Regulation 833/2014 before the scope of those provisions and, therefore, of the associated criminal penalties, had been clarified by the Court. The Court replied in the negative.

This *Article* only addresses some procedural questions touched upon by the Court, as these carried the most far-reaching consequences.[21] Building on this author's analysis of the Court's reasoning on its jurisdiction over restrictive measures (jurisdiction on question 2, let. a), and question 1), the *Article* explores and contextualises the legal and political significance of *Rosneft* – here departing from mainstream scholarship.

III. Jurisdiction: the criticism

The much awaited judgment on the highly technical issue of the scope of the CJEU's review restrictive measures still resulted – albeit only implicitly – in the Court scrutiny of the Decision and, ultimately, of the EU's choices to target the Russian petroleum sector. This also implied a rejection of the political question (*acte de gouvernment*) doctrine, proposed by the Commission in its submission and discussed at the oral hearing, which

[19] As defined in Art. 1, para. 2, let. b), and Arts 4, 4a and 7 of, and Annex III to, Decision 2014/512, cit.
[20] General Court, judgment of 13 September 2018, case T-715/14, *NK Rosneft and others v. Council*.
[21] This *Article* does not discuss the Court's judicial review on the ground of Art. 40 TEU.

would have entailed the Court's refusal to review the political choices underling restrictive measures.[22]

There is fundamental uncertainty over the scope of the Court's Jurisdiction on CFSP: Art. 24 TEU reads that "The Court of Justice of the European Union shall not have jurisdiction with respect to these [*scil.*, CFSP] provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions [establishing restrictive measures] as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union".

That second paragraph mandates that

> "the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union".

In *Rosneft*, the Court was asked to review the validity of the CFSP Decision and of the Regulation. The Court's judgment did not involve much reasoning on the delicate issue of the jurisdiction on the Decision, nor did it recall its previous hesitant case law.[23] Instead, the Court acknowledged that it only has jurisdiction to review a CFSP act in two cases: either if it is a restrictive sanction, or to monitor compliance with Art. 40 TEU. Logically, the next step was to decide what provisions of the CFSP Decisions were restrictive measures against natural or legal persons.[24]

In order to identify the restrictive measures reviewable under Art. 275 TFEU, in *Kala Naft*,[25] confirmed by the Court of Justice on appeal because no appellants had challenged the finding,[26] the General Court used the distinction, first appeared in *Kadi*, between measures of "general nature, their scope being determined by reference to objective criteria and not by reference to identified natural or legal persons" and "decision providing for restrictive measures against natural or legal persons within the meaning

[22] Discussed below. S.O. JOHANSEN, *EU Sanctions Against Non-EU Countries: The CJEU Will Soon Address Some Key Legal Issues*, in *EU Law Analysis*, 26 February 2016, eulawanalysis.blogspot.com.

[23] Court of Justice: opinion 2/13 of 15 December 2014; judgment of 21 July 2016, case C-455/14 P, *H v. Council and Commission* [GC], cit.

[24] As mentioned, this *Article* does not discuss the Court's decision on compliance with Art. 40 TEU.

[25] General Court, judgment of 24 April 2012, case T-509/10, *Manufacturing Support & Procurement Kala Naft v. Council*.

[26] Court of Justice, judgment of 24 January 2014, case C-348/12 P, *Council v. Manufacturing Support & Procurement Kala Naft*, para. 99. See also General Court, judgment of 2 June 2016, case T-160/13, *Bank Mellat v. Council*, paras 33-37.

of the second paragraph of Article 275 TFEU".[27] The General Court found jurisdiction only on the latter.

In *Gbagbo*, the Court of Justice found – when deciding on locus standi of the applicants! – that "as regards measures adopted on the basis of provisions relating to the Common Foreign and Security Policy, such as the contested measures, it is the individual nature of those measures which, in accordance with the second paragraph of Article 275 TFEU and the fourth paragraph of Article 263 TFEU, permits access to the Courts of the European Union".[28]

In *Rosneft*, the Court found that the articles of the Decision providing for a system of prior authorisation and prohibition to enter in certain contractual relationships with Russian companies "prescribe measures the scope of which is determined by reference to objective criteria, in particular, categories of oil exploration and production projects. [...] those measures do not target identified natural or legal persons, but are applicable generally to all operators involved in the sale, supply, transfer or export of certain technologies that are subject to the prior authorisation requirement and to all the suppliers of associated services".[29] Since those were measures of general application, the Court found it did not have jurisdiction to review their validity.[30] The Court of Justice instead exercised its jurisdiction over the restrictive measures introduced pursuant to the other provisions of Decision 2014/512 that were at issue, namely Art. 1, para. 2, let. b) to d), and Art. 7, para. 3, and Annex III. It held that "it is clear that the persons and entities subject to those measures are defined by reference to specific entities. Those provisions prohibit, inter alia, the carrying out of various financial transactions with respect to entities listed in Annex III to that decision, one of those entities being Rosneft".[31]

Moreover, the Court justified its findings by specifying, at para. 102, that it is "settled case-law that restrictive measures resemble both measures of general application, in that they impose on a category of addressees determined in a general and abstract manner a prohibition on making available funds and economic resources to entities listed in their annexes, and also individual decisions affecting those entities" (the *Kadi* distinction). And, at para. 103, it recalled that "as regards measures adopted on the basis of provisions relating to the CFSP, it is the individual nature of those measures which, in accordance with the second paragraph of Article 275 TFEU, permits access to the Courts of the European Union" (the *Gbagbo* principle).

[27] Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission* [GC], para. 37.

[28] Court of Justice, judgment of 23 April 2013, case C-478/11 P, *Gbagbo and others v. Council* [GC], para. 57.

[29] *Rosneft* [GC], cit., para. 98.

[30] *Ibid.*, para. 99.

[31] *Ibid.*, para. 100.

As far as the Regulation was concerned, the Council maintained that the Court could not adjudicate on it because Rosneft was essentially trying to challenge a decision of principle which falls within CFSP.[32] AG Wathelet had taken the view that since the Regulation was adopted on the basis of Art. 215 TFEU, "even if it merely repeats verbatim, or adds to, or further specifies measures laid down in a CFSP decision, as is the case here with Decision 2014/512 and Regulation No 833/2014" this implies that the measures (both Decision and Regulation) are subject to judicial review because they became "dependent on compliance with the TFEU" (this crucial passage is dealt with in a footnote of the AG opinion!).[33] The Court followed the AG's opinion, and recognised that the Regulation is a TFEU act, on which the Treaty confers jurisdiction.

On the point of jurisdiction on the CFSP Decision, *Rosneft* is passible of at least three critiques. First, for the purposes of jurisdiction, the distinction between "measures [that] do not target identified natural or legal persons" and measures that do is purely arbitrary. It is not warranted by the fundamental Treaties, be it by literal, systematic, or purposive interpretation.

Most importantly, the Court itself appears not to follow this arbitrary distinction: in *Rosneft*, while the Court stated it does not have jurisdiction over measures of general application, it nonetheless adjudicated on the compatibility of the Decision's objectives with Art. 21 TEU.[34] To this author's mind, however, the objectives of the Decision "do not target identified natural or legal persons, but are applicable generally to all operators"[35] and therefore, following the Court's own finding, should not have been reviewed. Arguably, moreover, they constitute a "political choice" by EU institutions and therefore should have not been reviewed in any case (see the third point below).

Second, and following from the previous comment, the arbitrary distinction is problematic because, together with the over formalistic interpretation of the fourth paragraph of Art. 263 TFEU, the Court bars applicants from challenging sanctions having a "substantial adverse effect on their interests"[36] but that are contained in rules of general application.

Indeed, the Court in *Rosneft* appears to conflate the condition for reviewability with the requirements for *locus standi*. The requirement mentioned in Art. 275 TFEU ("proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty") is, it is submitted, exclusively for the purposes of *locus standi* and of the kind of action. One might reasonably argue that Art. 275 TFEU excludes, for example, that restrictive measures may be reviewed in proceedings originating from prelim-

[32] *Ibid.*, para. 102.

[33] Opinion of AG Whatelet delivered on 31 May 2016, case C-72/15, *Rosneft*, para. 103.

[34] *Rosneft* [GC], cit., para. 116.

[35] *Ibid.*, para. 98.

[36] Opinion of AG Jacobs delivered on 21 March 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, para. 60.

inary rulings[37] (whereas the Court did not even consider this hypothesis, see the reasoning outlined *infra*, section V). The requirement that the act individually targets the applicant is not relevant for the establishment of jurisdiction,[38] but only for establishing the interest of the applicant in the proceedings. Such was the opinion of AG Wathelet,[39] who criticised the opposite finding of the General Court in *Sina Bank*[40] and *Hemmati*.[41]

Quite a distinctive issue, in theory, is that the Court opted for an over formalistic reading of the fourth paragraph of Art. 263 TFEU which may be detrimental to the effectiveness of judicial protection in CFSP.

If this author's interpretation of *Rosneft* is correct, such development is hardly tenable for an organisation, such as the EU, which is built on the respect for the rule of law (Art. 2 TEU) and recognised the right to an effective remedy as a fundamental right.[42]

Third, the distinction does nothing to prevent the potential breach of the fundamental principle of separation of powers, if the Court reviewed political decisions.[43] The exclusion of the Court's jurisdiction from CFSP acts in Art. 24 TEU was meant to safeguard this principle,[44] not to bar individual applicants from challenging sanctions. Partially moved by this concern, in *Rosneft*, the Commission suggested the introduction of a "political question doctrine" to help defining boundaries of the Court's jurisdiction. Under this doctrine, the Court could not review purely political choices. While it would be almost revolutionary for the EU – there is no textual provision for such a doctrine – this is a tool well known in other jurisdictions,[45] especially in the United States, where, especially in the highly sensitive domain of foreign affairs, it has been object of debate for centuries.[46] The objections to the introduction of a political question doctrine are that there is no mention of this in the treaties; that it would only increase the uncertainty; and that it would be difficult to reconcile it with the exertion of upholding the rule of law in EU's action.[47]

[37] A point raised, and refuted, by S. Poli, *The Common Foreign Security Policy After Rosneft*, cit., p. 1805.

[38] It appears to be the opinion of AG Mengozzi delivered on 30 May 2018, case C-430/16 P, *Bank Mellat*.

[39] Opinion of AG Whatelet, *Rosneft*, cit., paras 88-89.

[40] General Court, judgment of 4 June 2014, case T-67/12, *Sina Bank v. Council*.

[41] General Court, judgment of 4 June 2014, case T-68/12, *Hemmati v. Council*.

[42] Art. 47 of the Charter; Art. 6 of the European Convention on Human Rights.

[43] A similar critique is expressed by P. Koutrakos, *Judicial Review of EU's Common Foreign and Security Policy*, cit., p. 13, with regard to case *H v. Council and Commission* [GC], cit.

[44] Opinion of AG Wahl, *H v. Council and Commission*, cit.

[45] Opinion of AG Whatelet, *Rosneft*, cit., para. 52; G. Butler, *Implementing a Complete System of Legal Remedies in EU Foreign Affairs Law*, in *Columbia Journal of European Law*, 2018, forthcoming.

[46] The classic is T. Franck, *Political Questions, Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?*, Princeton: Princeton University Press, 1992. The seminal work on the role of law in international relations is E.H. Carr, *The Twenty Years Crisis 1919-1939*, London: Palgrave, 2016, published for the first time in 1939.

[47] P. Van Elsuwege, *Upholding the Rule of Law in the Common Foreign and Security Policy*, cit.

IV. The Court and preliminary rulings

The decision on the very first question asked by the referring court, the affirmation of the Court's jurisdiction on preliminary rulings in CFSP, might prove to be the most important and long-lasting effect of *Rosneft.* This is where it most clearly appears that divergence between the rhythm of politics and the rhythm of law mentioned in the beginning of this *Article*.

IV.1. Law

The United Kingdom, Czech, Estonian, French and Polish Governments, and the Council argued that, pursuant to the last sentence of the second subparagraph of Art. 24, para. 1, TEU and Art. 275 TFEU, the Court does not have jurisdiction to give a preliminary ruling on the validity of CFSP measures.[48] The Court reached the opposite conclusion.

To ascertain whether it has jurisdiction on CFSP measures, that is, on the two exceptions provided for in Art. 24 TEU, the Court split its reasoning into two question: first, does the Court have jurisdiction to monitor compliance with Art. 40 TEU in preliminary rulings procedures? Second, does the Court have jurisdiction to review sanctions in preliminary ruling procedures?

On the first, the Court correctly noted that nothing in the Treaties specifies the procedure to ensure compliance with Art. 40 TEU. As such, the general rule that the Court shall have jurisdiction to give preliminary rulings on the validity of EU institutions' acts is applicable.[49]

On the second, the Court grounded its jurisdiction on several textual and teleological arguments,[50] the first of which was the consideration of the architecture of judicial protection under EU law. Such system, the Court recalled, consists of both the action for annulment and the preliminary ruling procedures: an applicant can avail itself of both in order to challenge the validity of an act of the institutions, and these include CFSP acts.[51]

In addition, declaring jurisdiction on preliminary rulings of measures falling within CFSP – the Court's argument goes – avoids the potential deterioration of the protection of fundamental rights which would derive from each national court being able to monitor CFSP decisions in the absence of a centralised mechanism. If national courts had jurisdiction when the Court of Justice of the EU does not, this might lead to diverging and

[48] *Rosneft* [GC], cit., para. 58.

[49] *Ibid.*, para. 62. See Art. 19, para. 3, let. b), TEU.

[50] P. Koutrakos, *Judicial Review of EU's Common Foreign and Security Policy*, cit., p. 22.

[51] *Rosneft*, cit., para. 78. This is the "complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions". See also para. 71 of the judgment and G. Butler, *Implementing a Complete System of Legal Remedies in EU Foreign Affairs Law*, cit.

potentially even conflicting interpretations of the same CFSP measure.[52] Furthermore, as the Court noted, preliminary rulings on the validity of a decision providing for restrictive measures might be necessary, since implementation is in part the responsibility of the Member States.[53] Moreover, even though this was not mentioned in *Rosneft*, the lack of the Court jurisdiction to hear on preliminary rulings would be at issue with the third paragraph of Art. 267 TFEU and the *CILFIT* doctrine, in case the request arose "in a case pending before a court or tribunal of a Member States against whose decisions there is no judicial remedy under national law".[54]

Other arguments on which the Court based its jurisdiction were the respect for the rule of law (derived from Arts 2, 21 and 23 TEU and the precedent of *H*), and the right to effective judicial remedy as enshrined in Art. 47 of the Charter. Completely excluding the Court's jurisdiction from an area of EU law such as CFSP would seriously hinder the system of judicial protection.[55] Even though it is left to the discretion of national courts to decide whether to make a reference for a preliminary ruling as well as what are the questions to be referred, completely ruling out the opportunity for an applicant (or the national court) to make such a request is indeed against Art. 47 of the Charter. This is so even though, as mentioned, Art. 275 TFEU appears to say that the Court only has jurisdiction to review restrictive measures in direct actions. All the more so if one accepted the submission of the Council in its appeal in *H*, that is, that the national court does not have the power to annul the CFSP decision. This would leave a legal vacuum for the annulment of the provision (differently from *Inuit*,[56] where the Court found that existence of alternative legal remedies allowed for a restrictive rule on judicial remedy).

As Professor Koutrakos correctly points out, this decision is based, ultimately, on a teleological approach which is inconsistent with the letter of Art. 24 TEU and Art. 275 TFEU.[57] Indeed, the very rationale for the role of national courts – so downplayed in *Rosneft* – is the express constitutional limitation of power of the CJEU over CFSP decisions.

The teleological reasoning of the Court in this occasion, albeit of far-reaching consequences detailed in the next section of this *Article*, is perfectly in line with decades of the Court's pro-integrationist case law. It would be disingenuous to be surprised by it.

[52] This is also one of the concerns of the referring court in *Rosneft*. See opinion of AG Whatelet, *Rosneft*, cit., para. 27. For this reason, the AG suggested that the Court can issue preliminary rulings in CFSP. Opinion of AG Whathelet, *Roseneft*, cit., paras 61-62.

[53] *Rosneft* [GC], cit., para. 71.

[54] Court of Justice, judgment of 6 October 1962, case 283/81, *CILFIT v. Ministry of Health*. See also T. TRIDIMAS, *The European Court of Justice and the National Courts: Dialogue and Instability in the Shadow of a Centralised Constitutional Model*, in D. CHALMERS, A. ARNULL (eds), *The Oxford Handbook of European Union Law*, Oxford: Oxford University Press, 2015, p. 403 *et seq*.

[55] See *Rosneft*[GC], cit., para. 75, and case law there cited.

[56] Court of Justice, judgment of 3 October 2013, case C-583-11 P, *Inuit Tapiriit Kanatami and others v Parliament and Council* [GC].

[57] P. KOUTRAKOS, *Judicial Review of EU's Common Foreign and Security Policy*, cit., p. 24.

Despite the questionable reading of the Treaties through which the Court reached its decision, however, *Rosneft* is likely have pro-integrationist consequences.

IV.2. Politics

The importance of preliminary ruling in the historical and legal construction of the European Union cannot be overestimated. This is why the "jewel in the crown of the [Court of Justice]'s jurisdiction"[58] has been object of a vast amount of scholarship.[59] Mention will only be made, schematically, of two opposing views on the relationship between Member States and the Court.

A narrative of EU integration through law[60] assumes that the Court of Justice could bring about closer integration between Member States, even against the interests of some of those countries. Thus, "national governments paid insufficient attention to the Court's behaviour during the 1960s and 1970s when the Court developed a powerful set of legal doctrines and co-opted the support of domestic courts for them".[61] The doctrines at issue were, most notably, those of direct effect and supremacy, which resulted in increasingly more integration, giving rise to Weiler and Stein's "constitutionalisation" of European law,[62] to historians' constitutional practice,[63] or to Haas's process of functional spill-over.[64]

By contrast, others have developed an account of EU integration and Court of Justice decision-making that acknowledges the leading role of Member States.[65] The relationship between Member States and the Court is, the argument goes, one of principal

[58] The metaphor is in P. Craig, G. de Búrca, *EU Law. Texts, Cases and Materials*, Oxford: Oxford University Press, 2013, p. 442.

[59] Apart from the contributions cited in the footnotes below, see T. Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure*, in *Common Market Law Review*, 2009, p. 9 *et seq.*; P. Craig, *The ECJ, the National Courts and the Supremacy of Community Law*, in I. Pernice, R. Miccu (eds), *The European Constitution in the Making*, Berlin: Nomos Verlagsgesellschaft, 2004, p. 25 *et seq.*, available at www.ecln.net; the importance of judicial dialogue between the CJEU and national courts has been repeatedly affirmed in the Court's case law: Court of Justice, opinion 1/09 of 8 March 2011; *CILFIT v. Ministry of Health*, cit.

[60] The phrase is borrowed from the seminal work by M. Cappelletti, M. Seccombe, J.H.H. Weiler (eds), *Integration trough Law*, Berlin, New York: De Gruyter, 1986.

[61] G. Garrett, D. Kelemen, H. Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, in *International Organization*, 1998, p. 149 *et seq*.

[62] E. Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, in *American Journal of International Law*, 1981, p. 1 *et seq.*; and J.H.H. Weiler, *The Transformation of Europe*, in *Yale Law Journal*, p. 2403 *et seq.*

[63] B. Davies, M. Rasmussen, *Towards a New History of European Law*, in *Contemporary European History*, 2012, p. 305.

[64] E. Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957*, Notre Dame: University of Notre Dame Press, 1958.

[65] Among many, A. Stone Sweet, *The European Court of Justice and the Judicialization of EU Governance*, in *Yale Law School Faculty Scholarship Series*, no. 70, 2010.

to agent. This approach suggests that the Court's autonomy, and even activism, was not bestowed by judges on passive national governments, but instead favoured by, and indeed the outcome of precise calculations of, the Member States.

One does not necessarily need to subscribe to either of these two narratives, however, to acknowledge the fact that the Luxembourg Court, throughout its history, has indeed given judgments whose indirect consequences were not immediately challenged, commented upon, or possibly even grasped, by Member States governments.[66] A new wave of historical scholarship of European integration has recently emerged[67] and cast light on the fact that the development of EU law did not happen on the public scene nor it attracted the attention and coverage of contemporary press.[68] Rasmussen's study of archival sources on the history of *Van Gend en Loos*,[69] for example, is telling of the diverging rhythms of law and politics. While the Dutch and Belgian governments argued that the Court of Justice did not even have jurisdiction to hear the preliminary reference in *Van Gend en Loos*, the potential effect of which was clear to the legal service's lawyers,[70] national governments accepted almost completely passively the judgment.[71] This comparison is not meant to play-up the significance of *Rosneft* and to equate its revolutionary impact to that of *Van Gend en Loos*, but rather to provide a famous example of how judicial logic defies – indeed, escapes – the political will of Member States.[72]

Ultimately, it may be the task of the historian, rather than of the lawyer, to ascertain to what extent a given decision is a turning point in the history of European integration, whether its consequences were intended, and by whom. However, it is already possible to draw attention on two key features that make *Rosneft* a significant decision: the time-horizon of the Court, and the role it assigns to individuals, is at odds with that of Member States.

The Court confirmed that the Council could target the Russian oil sector, and as such entered into the realm of politics by completely endorsing EU choices. But, while the substance of the case was politically very pleasant for EU Member States (and conversely, Rosneft's representative lamented that the decision was "illegal, groundless and

[66] K. ALTER, *Who Are the "Masters of the Treaty"?*, cit., p. 147.

[67] M. RASMUSSEN, *Rewriting the History of European Public Law: The New Contribution of Historians*, in *American University International Law Review*, 2013, p. 1187 *et seq*. And the special issues of the *Journal of European Integration History*, 2008.

[68] M. RASMUSSEN, *Revolutionizing European Law: A History of the* Van Gend en Loos *Judgment*, in *International Journal of Constitutional Law*, 2014, p. 137 *et seq.*

[69] Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*.

[70] M. RASMUSSEN, *Revolutionizing European Law*, cit., p. 159.

[71] *Ibid*., p. 161.

[72] La Bruyère wrote that "to think only of oneself and of the present time is a source of error in politics": J. DE LA BRUYÈRE, *Les Caractères ou les Mœurs de ce siècle, 1688*, Paris: Folio, 2011, p. 483.

politicised"),[73] the Court found a way to formally review, for the time being, this kind of highly sensitive foreign policy decisions. In other words: this judgment might pass unnoticed because the Court did nothing surprising on the substance. What if, in the future, it found that it was "unnecessary" to target Russia?[74]

The Court is also enhancing the role of individuals in CFSP by granting them an immediate avenue to justice through preliminary ruling. While the Treaties explicitly anchor individuals' role in CFSP to the review of sanctions for actions "brought in compliance with Article 263 TFEU", the Court has potentially opened the doors of dialogue between legal or physical persons and EU Courts on matters of foreign policy. This is all the more relevant since the Commission cannot initiate infringement proceedings under Art. 258 TFEU against Member States for failure to meet CFSP obligations. Even though the infringement procedure is not aimed at protecting individual rights, individuals do "cooperate" with the Commission by providing news over non-compliance of Member States in other areas of EU law.[75] Not so in CFSP.

Where the lymph of preliminary ruling might lead, it is impossible to foresee. But it is not impossible that this mechanism will act as a catalyst for further integration in CFSP, not dissimilarly from what happened in other areas of EU law.[76] The seminal work by Poiares Maduro, *We the Court*, is enlightening as to the developments allowed by preliminary rulings, which put private actors in direct touch with the Court of Justice in the context of Art. 34 TFEU.[77] Such communication shaped themes of governance around the prohibition of restrictions to trade, an area of fundamental constitutional dialogue[78] in which the Court has restricted the power of Member States while "in return" conferring rights upon individual. May the same dialogue happen in CFSP? Moreover, preliminary rulings are certainly beneficial for domestic and EU Courts, but, like any dialogue, are prone to be the space of confrontations and even challenges[79] – whose appropriateness is doubtful in foreign policy matters.

[73] A. Beesley, H. Foy, *European Court Upholds Russia Sanctions After Rosneft Challenge*, 28 March 2017, www.ft.com.

[74] The test of necessity – with regard to the attainment of the objective of Art. 21, para. 2, TEU "maintaining peace and international security" – is in *Rosneft* [GC], cit., para. 115.

[75] On the role of individuals in initiating infringement proceedings see P. Craig, G. de Búrca, *EU Law. Texts, Cases and Materials*, cit., p. 410.

[76] P. Koutrakos, *Judicial Review of EU's Common Foreign and Security Policy*, cit., p. 23, criticises the "distinctly integrationist" perspective of *Rosneft*.

[77] See M. Poiares Maduro, *We the Court. The European Court of Justice and the European Economic Constitution*, Oxford: Hart, 1998.

[78] T.K. Hervey, *Miguel Poiares Maduro, We The Court: The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 EC*, in *European Public Law*, 2000, p. 629.

[79] See recently, the German Constitutional Court reference in Court of Justice, judgment of 16 June 2016, case C-62/14, *Gauweiler* [GC], and the Danish Supreme Court reference in Court of Justice, judgment of 19 April 2016, case C-441/14, *Dansk Industry* [GC] and subsequent developments, see R.

V. Conclusion

The Court in *Rosneft* established its jurisdiction on the basis of an incorrect distinction.

Differentiating between measures of general applications and measures targeting specifically individuals is not a basis on which the fundamental Treaties established the jurisdiction of the Court. If such a distinction exists in the TFEU, it is purely for the purposes of establishing *locus standi*. Conflating the conditions for jurisdiction with those for *locus standi* may lead to poor effectiveness of the fundamental rights of judicial protection of those who try to challenge the sanctions. Moreover, the distinction does not prevent the Court from adjudicating upon purely political acts – which was, arguably, the purpose of the exclusion of its jurisdiction from CFSP.

Granted, in *Rosneft*, both the reasoning on the compatibility of the measures with the EU-Russia agreement, and on their compliance with the principle of proportionality show that the Court has left a wide margin of discretion to the Council. It would seem that, as the case law now stands, the Council discretion's only limit would be that of manifest unreasonableness. Any measure that is not obviously inappropriate is acceptable.

However, by confirming the Council's choices, the Court has basically assumed the prior logical step: that it can, indeed, decide whether or not to confirm what the Council does.

If, and only if, the case law continued with this utterly unobtrusive approach it would be in line with the EU constitutional principle of separation of powers and with the legal distinctiveness of CFSP. At the moment, the Court is adjudicating upon political questions,[80] albeit admittedly, since it has so far left broad discretion to the Council, it has always confirmed that institution's choice.

In *Rosneft*, the Court confirmed EU's foreign policy choices and seconded the political palpitation: this time round. Any change to this reasoning, and it will be obvious where the hidden consequences of *Rosneft* lay.

HOLDGAARD, D. ELKAN, G.K. SCHALDEMOSE, *From Cooperation to Collision: the ECJ's* Ajos *Ruling and the Danish Supreme Court's Refusal to Comply*, in *Common Market Law Review*, 2018, p. 1 *et seq*.

[80] Such as that on the very necessity to target Russia in order to maintain international peace and security, *Rosneft* [GC], cit., para. 115.

ARTICLES

CONFLICTS BETWEEN FUNDAMENTAL FREEDOMS AND FUNDAMENTAL RIGHTS IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION: A COMPARISON WITH THE US SUPREME COURT PRACTICE

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ABSTRACT: This *Article* analyses how the Court of Justice decides on conflicts between fundamental freedoms and fundamental rights in the EU. The practice of the Court will be compared with similar cases from the practice of the US Supreme Court where rights protecting economic activity and other rights come to conflict. This comparison demonstrates that the challenges faced by the Court of Justice regarding conflict of rights cases are not peculiar. The relevant case law of the Court has been the subject of criticism. The criticisms raised in relation to the way of resolving conflicts of rights by the Court of Justice could be eliminated either by the refinement of judicial argumentation of the Court or, following the example of US law, by legislation.

KEYWORDS: fundamental rights – fundamental freedoms – conflict of rights – tests – balancing – proportionality.

I. INTRODUCTION

One of the fundamental objectives of the European integration has been the establishment of the internal market: a market without internal frontiers, in which the

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free movement of goods, persons, services and capital is ensured. In parallel with guaranteeing these fundamental freedoms, fundamental (human) rights have also gradually gained recognition in the EU. The simultaneous recognition and application of the four fundamental freedoms and fundamental rights sometimes result in conflicts between them that require the Court of Justice and national courts to decide which one should prevail.

Human rights play a legitimising role in any legal system. However, not only can the recognition of human rights contribute to the legitimacy of a social system, but also how courts settle conflicts between different rights can increase or decrease that legitimacy. This brings the legal argumentation of adjudicating organs to the fore. In any legal culture, the judicial reasoning appearing in decisions must have a convincing force to ensure acceptance by the parties concerned and by the society. An appropriate justification is indispensable for any judicial decision. Judicial argumentation is built upon legal reasoning. Interrelated legal sources must constitute a coherent legal argumentation in order to appropriately justify a decision. Appropriate legal justification helps to exclude interpretative uncertainties and to further the legitimacy of the court marginalising non-legal (for instance political) considerations and arguments. This also promotes legal certainty, since it enables individuals to foresee the rules applicable to them and adapt their conduct appropriately to these rules.

In construing EU law, the Court of Justice relies on grammatical, contextual, comparative and teleological methods of interpretation.[1] The use and interplay of these techniques aim at giving a single convincing answer to any issue related to EU law. Moreover, principles, such as the proportionality test, provide a formal framework by which the Court of Justice can adhere to legal reasoning instead of political or moral considerations. Delivering a well-justified judgment may be particularly difficult if a court has to address a conflict between different rights. From this perspective, the decisions of the Court have been the subject of strong criticism for various reasons. First, it has been asserted that the Court of Justice does not treat fundamental freedoms and fundamental rights as equal, but gives automatic priority to fundamental freedoms. In the relation between fundamental freedoms and fundamental rights, fundamental rights are simply treated as exceptions to the fundamental freedoms and the protection of fundamental rights may justify the restriction of the fundamental freedoms. Second, it has often been called into question whether its method of balancing, based on the proportionality test, is predictable enough. Third, the Court of Justice has sometimes been criticised for not being sufficiently sensitive regarding certain non-economic values, such as social rights.

[1] L.N. Brown, T. Kennedy, *The Court of Justice of the European Communities*, London: Sweet & Maxwell, 1994, p. 299 *et seq.*

Many times, these features of the judicial reasoning of the Court of Justice have been explained by the economic-oriented teleology of EU integration or the need to apply the methodology used by the Court in internal market law cases. As a matter of course, the internal market case law of the Court has been centred on the fundamental freedoms principally promoting economic integration. However, the economic orientation does not imply that cases concerning conflicts of rights could not be addressed in a way more responsive to the criticisms related to the relationship between fundamental freedoms and fundamental rights.

The aim of the *Article* is to reveal that most of these criticisms related to judicial reasoning are not peculiar to EU law and they are not inevitable. To demonstrate this, I will refer to some similar cases from the judicial practice of the US Supreme Court, where it had to decide on the conflict between rights protecting economic activity and other rights. The concerns raised in the legal literature related to the practice of the Court of Justice could be eliminated primarily by the refinement of the case law.[2] This would require the following changes in the approach of the Court of Justice: as fundamental rights are not only about public interest, but they are based largely on individual interests, they cannot be seen as an exception following the pattern of the public policy exception of the TFEU or overriding reasons related to the public interest in accordance with the case law of the Court; accordingly, fundamental rights should be treated as an independent factor and not simply as a means which advances the general interest; fundamental freedoms serve equally private interests and not only public interests; therefore, fundamental freedoms and fundamental rights should be treated as equal, even formally; in the framework of the proportionality test, the Court should examine not only the restrictions inflicted by the exercise of the fundamental rights on fundamental freedoms, but also the restrictions caused by the fundamental freedoms on fundamental rights. Moreover, the analysis will also demonstrate that US federal law offers an alternative way to address conflicts between rights of economic nature and other rights: legislation. I will argue that, although legislation could promote legal certainty in conflict of rights cases in EU law, the refinement of the case law of the Court still seems necessary and, at the moment, a more viable option.

The practice of the Court of Justice and the US Supreme Court has already been compared from various perspectives, including the protection of fundamental rights in

[2] From the vast literature see in particular V. TRSTENJAK, E. BEYSEN, *The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU*, in *European Law Review*, 2013, p. 293 *et seq*., and S. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon – An Endeavour for More Harmony*, in S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds), *The Protection of Fundamental Rights in the EU after Lisbon*, Oxford: Hart, 2013, p. 59 *et seq*. Further literature discussing particular concerns is cited in detail below.

general[3] or in terms of multilevel constitutionalism.[4] However, less attention has been paid so far to the comparison of the judicial practice of the two courts regarding conflict of rights. More specifically, the emphasis is put on the conflicts between fundamental freedoms or fundamental rights before the Court of Justice which will be compared with US Supreme Court cases on collisions between rights protecting the economic activity of business players and other (fundamental) rights. US law does not know the term "fundamental freedoms" as EU law does. This explains why this *Article* focuses on rights protecting economic activity in the context of US law, since these may be considered as functional equivalent to EU fundamental freedoms.

Subsequent to the introduction, section II will briefly discuss the relation between fundamental freedoms and fundamental rights in EU law. Section III examines the comparability of the judicial practice of the Court of Justice and the US Supreme Court as far as conflict of rights is concerned, and then, section IV discusses the criticisms raised regarding the case law of the Court of Justice. Section V demonstrates that similar situations and concerns are not unfamiliar in US law. This will be followed by elucidating that some of the concerns raised by the legal literature regarding the case law of the Court of Justice on conflict between fundamental freedoms and fundamental rights could be eliminated either by the refinement of the approach of the Court or by legislation (section VI). The conclusion summarises the lessons which may be drawn from the analysis (section VII).

II. Fundamental freedoms and fundamental rights in EU law

As known, the Treaty establishing the European Economic Community (EEC Treaty) did not contain any provision on human rights, let alone certain specific rights significant in terms of the free movement of persons.[5] It was the Court of Justice which gradually contributed to the acknowledgment of the role of fundamental rights in the EU legal system.

[3] See in particular F. Fabbrini, *Fundamental Rights in Europe*, Oxford: Oxford University Press, 2014; M. Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the US Supreme Court*, in *International Journal of Constitutional Law*, 2006, p. 623 *et seq.*

[4] See in particular A. Torres Pérez, *Conflicts of Rights in the European Union*, Oxford: Oxford University Press, 2009; A. Torres Pérez, *The Dual System of Rights Protection in the European Union in Light of US Federalism*, in E. Cloots, G. de Baere, S. Sottiaux (eds), *Federalism in the European Union*, Oxford: Hart, 2012, p. 110 *et seq.*; M. Wells, *Judicial Federalism in the European Union*, in *Houston Law Review*, 2017, p. 697 *et seq.*; D. Halberstam, *Comparative Federalism and the Role of the Judiciary*, in G.A. Caldeira, R.D. Kelemen, K.E. Whittington (eds), *The Oxford Handbook of Law and Politics*, Oxford: Oxford University Press, 2008, p. 142 *et seq.*; H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, Dordrecht, Boston, Lancaster: Martinus Nijhoff, 1986.

[5] S.A. de Vries, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon*, cit., p. 59. See Art. 7 of the EEC Treaty on the prohibition of discrimination and Art. 119 of the EEC Treaty on equal pay for male and female workers for equal work. See also G. de Búrca, *The Evolution of Human Rights Law*, in P. Craig, G. de Búrca (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, p. 475 *et seq.*

In *Stauder*, the Court treated fundamental human rights as "enshrined in the general principles of Community law and protected by the Court".[6] In the *Internationale Handelsgesellschaft* ruling, the Court laid down that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice".[7] It also added that the protection of fundamental rights has been inspired by the constitutional traditions common to the Member States.[8] In *Nold*, the Court further stated that international treaties for the protection of human rights on which the Member States collaborated or of which they are signatories also constitute a yardstick to be followed in Community law.[9] The judiciary practice of the Court has been complemented only later by treaty amendments. The Single European Act referred to the promotion of "democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States". Due to the amendments introduced by the Treaty of Maastricht, the TEU required the respect of fundamental rights by the EU as guaranteed by the European Convention of Human Rights and, as they result from the constitutional traditions common to the Member States, as general principles of Community law.[10] The Treaty of Amsterdam inserted a provision into the TEU which declares that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".[11] The Charter of Fundamental Rights of the European Union (Charter) was adopted together with the Treaty of Nice and became binding when the Treaty of Lisbon entered into force.

In relation to the fundamental freedoms, the role of fundamental rights is manifold. First, in the case law of the Court of Justice, fundamental rights have appeared at the level of the justification when a Member State wished to derogate from any of the fundamental freedoms. Any derogation from the fundamental freedoms must comply with fundamental rights.[12] In this function, fundamental rights foster the effectiveness of fundamental freedoms, because the required compliance with fundamental rights decreases the cases when the fundamental freedoms may be derogated. Second, several cases arose later in which the enforcement of fundamental rights led to a restriction of the fundamental freedoms and *vice versa*.[13] This is an opposite tendency to the first one. Here, fundamental rights restrict fundamental freedoms and they give

[6] Court of Justice, judgment of 12 November 1969, case 29/69, *Stauder*, para. 7.

[7] Court of Justice, judgment of 17 December 1970, case 11/70, *Internationale Handelsgesellschaft*, para. 4.

[8] *Ibid*.

[9] Court of Justice, judgment of 14 May 1974, case 4/73, *Nold*, para. 13.

[10] Art. F, para. 2, TEU.

[11] Art. 6, para. 1, TEU.

[12] The first case where this was established is Court of Justice, judgment of 18 June 1991, case C-260/89, *ERT AE*, para. 43.

[13] See in particular Court of Justice: judgment of 12 June 2003, case C-112/00, *Schmidberger*; judgment of 22 December 2010, case C-208/09, *Sayn-Wittgenstein*, discussed later.

some latitude to those Member States and private persons which rely on fundamental rights against fundamental freedoms.

Conflicts between fundamental freedoms and fundamental rights may imply a collision between the provisions of the TFEU on fundamental freedoms and fundamental rights. However, it may also happen that it is not directly the TFEU free movement provisions that are concerned, but instead some secondary EU legislation adopted to apply fundamental freedoms in a specific field.[14]

The practice of the Court of Justice contributed to the reception of fundamental rights in the system of EU law and thus brought about a potential conflict between fundamental rights and fundamental freedoms. In a series of cases, the Court had to interpret the relation between fundamental freedoms and fundamental rights. Resolving the conflicts of fundamental freedoms and fundamental rights is not an easy task. They share certain similar features, but they also have distinguishing characteristics.[15] Fundamental freedoms as well as fundamental rights enjoy a constitutional status in the legal system of the EU.[16] Fundamental freedoms are based on the provisions of the TFEU, while fundamental rights are enshrined by the Charter of Fundamental Rights. The Charter may be interpreted as granting the rank of "fundamental right" to fundamental freedoms, to the extent that it includes the right of Union citizens "to move and reside freely within the territory of the Member States"[17] and the freedom to conduct a business.[18] From the practice of the Court of Justice, it follows that both are considered as principles of EU law and to be fundamental.[19] Despite their fundamental nature, neither of them is absolute: they may be subject to restrictions.

Nevertheless, there are also some differences between them. Fundamental freedoms are limited to situations related to the internal market and necessitate a cross-border element. On the contrary and generally speaking, fundamental rights have a broader field of application and apply also in purely domestic situations. In the context of EU law, however, the application of fundamental rights is more limited. The

[14] V. TRSTENJAK, E. BEYSEN, *The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU*, cit., p. 311.

[15] On the comparison of fundamental human rights and economic freedoms, for example, see V. SKOURIS, *Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance*, in *European Business Law Review*, 2006, p. 233 *et seq.*; E. SPAVENTA, *Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU*, in M. DOUGAN, S. CURRIE (eds), *50 Years of the European Treaties*, Oxford: Hart, 2009, p. 354 *et seq.*

[16] R. LANE, *The Internal Market and the Individual*, in N.N. SHUIBHNE (ed.), *Regulating the Internal Market*, Cheltenham: Elgar, 2006, p. 258.

[17] Art. 45, para. 1, of the Charter.

[18] Art. 16 of the Charter.

[19] See in particular concerning the free movement of goods Court of Justice: judgment of 9 December 1997, case C-265/95, *Commission v. France*, paras 24 and 27; *Schmidberger*, cit., para. 51 and para. 78; concerning the free movement of workers, judgment of 15 December 1995, case C-415/93, *Bosman*, para. 93.

Charter of Fundamental Rights is applicable to the institutions, bodies, offices and agencies of the EU and to the Member States only when they are implementing Union law.[20] According to the Court of Justice, fundamental rights as general principles of EU law are to be taken into consideration within the scope of application of EU law.[21] Thus, outside the scope of EU law, fundamental rights cannot have an impact on the assessment of a case in the system of EU law.

It has been claimed by several authors that fundamental rights and fundamental freedoms are functionally different. In this view, fundamental freedoms aim principally at eliminating protectionism and promoting economic integration and they promote individual freedom only incidentally, while fundamental rights are devoted to safeguarding the autonomy of individuals.[22] Although this argument undoubtedly has merits, some qualification must be made. While, the economic teleology of fundamental freedoms is undeniable, the Court of Justice has already pointed to the protection of individuals through market freedoms very early. It follows from the *Van Gend en Loos* judgment that EU law grants rights to individuals and these include fundamental freedoms.[23] Legal unification and harmonisation by EU legislation, as well as the judiciary practice of the Court of Justice aim at breaking down the hurdles imposed by the Member States on the economic activity of private persons. The fundamental freedoms ensure the autonomy of individuals in the internal market and confer on them a weapon primarily against state intervention, but in some cases also against hindrances raised by private persons.[24] Fundamental freedoms are means in the hands of individuals to strike down the obstacles to their market activity pursuing their self-interests. "The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by [the provisions of the EEC Treaty] to the diligence of the Commission and of the Member States".[25] In this way, market actors

[20] Art. 51, para. 1, of the Charter.

[21] See in particular *ERT AE*, cit., paras 41-42; Court of Justice, judgment of 18 December 1997, case C-309/96, *Annibaldi*, paras 12-13. The relation between the scope of the Charter and fundamental rights as the general principles of EU law is debated in the legal literature. See for example L.F.M. BESSELINK, *The Protection of Fundamental Rights post-Lisbon – The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions*, pure.uva.nl, p. 26 *et seq.*; S.A. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon*, cit., p. 72 *et seq.*

[22] E.J. LOHSE, *Fundamental Freedoms and Private Actors – Towards an "Indirect Horizontal Effect"*, in *European Public Law*, 2007, p. 172 *et seq.*; J. MORIJN, *Conflicts between Fundamental Rights or Conflicting Fundamental Rights Vocabularies?*, in E. BREMS (ed.), *Conflicts between Fundamental Rights*, Antwerp: Intersentia, 2008, p. 608.

[23] Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend & Loos*.

[24] Court of Justice, judgment of 6 June 2000, case C-281/98 *Angonese*, paras 31-36; *Bosman*, cit., para. 83.

[25] *Van Gend en Loos*, cit., para. 13.

become agents of economic integration.[26] Private autonomy promotes the free market and economic progress. As Lane asserted, "it is the pursuit of self-interest through the autonomy of the individual that he or she best serves the interests of the Community".[27] Derogations from the fundamental freedoms are admitted exceptionally based on various state or public interests, but they are to be construed narrowly. Too far-reaching limits tighten not only private autonomy, but have a harmful effect on the operation of market forces.[28] As Petersmann remarks, the autonomy of the individual is the "common core" of the markets and human rights.[29]

Of course, the above statements do not rule out that the enforcement of fundamental freedoms by individuals equally serves the broader objective of market integration, which is in the interest not only of individuals, but also the societies of the Member States. In promoting individual interests and autonomy, fundamental freedoms resemble fundamental rights. Moreover, broadening the scope of economic freedoms beyond economically active persons and the introduction of Union citizenship attenuate the exclusivity of the economic orientation of fundamental freedoms. In addition, the incorporation of certain aspects of the fundamental freedoms into the Charter of Fundamental Rights also contributes to the approximation of fundamental freedoms and fundamental rights.

Neither the Treaties nor the Charter give any guidance on how to resolve a conflict between fundamental freedoms and fundamental human rights. The Court of Justice has never analysed the similarities and differences between fundamental freedoms and fundamental rights in its decisions. Still, at present the Court is the body which has to resolve conflicts between fundamental freedoms and fundamental rights. As my intention in this *Article* is to compare the adjudication of the Court of Justice with the US Supreme Court, it is pertinent to examine as a next step whether the case law of the two courts is comparable at all.

III. Comparability of the case law of the Court of Justice and the US Supreme Court on conflicts of rights

A preliminary question is whether the case law of the Court of Justice and the US Supreme Court is comparable at all as far as conflicts of rights are concerned. No doubt, the comparison is rendered difficult by several circumstances. The Court of Justice and

[26] C. Harding, *Economic Freedom and Economic Rights: Direction, Significance and Ideology*, in *European Law Journal*, 2018, p. 25.

[27] R. Lane, *The Internal Market and the Individual*, cit., p. 273. See also J. Baquero Cruz, *Free Movement and Private Autonomy*, in *European Law Review*, 1999, p. 617.

[28] See R. Lane, *The Internal Market and the Individual*, cit., p. 271 *et seq.*

[29] E.-U. Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, in *Loyola of Los Angeles Law Review*, 2003, p. 435.

the US Supreme Court represent undoubtedly different legal cultures: the US Supreme Court is deemed to be a common law court, while the adjudication of the Court of Justice follows in many respects civil law traditions. The Court of Justice is the highest level court of a multi-layered court system of a regional integration, whereas the US Supreme Court carries out judicial functions in a federal state. The composition of the US Supreme Court may be seen as more political due to the appointment process. The judicial style of reasoning of the two courts is also different. The Court of Justice uses an impersonal magisterial style, so that the decision does not reflect any disagreement between judges. On the contrary, the opinions of the US Supreme Court contain both the majority opinion and the dissenting views in a far less formal style.

Nevertheless, the author's view is that a comparison is possible. This follows from several factors. First and foremost, the position and the role of the Court of Justice and the US Supreme Court show a resemblance; they are both the highest courts in multilevel judicial systems.[30] Second, the progress of the development of human rights was similar in the EU and in the US. The US Constitution did not contain human rights. They gained acknowledgment some years later in the Bill of Rights. The absence of fundamental rights in the US Constitution was explained by the limited powers enjoyed by the federal government and the vigilance over human rights by the states. The development of EU law is parallel to this, as fundamental rights gained recognition only at a later stage of the integration process.[31] Finally, the rights examined in this *Article* and the problems (the conflicts) faced by the two courts have similar nature. The US Supreme Court does not use the same categories as the Court of Justice. Most importantly, the concept of "fundamental freedoms" or "economic freedoms" is missing in US law and we do not even find a list of rights protecting the economic activity in the US Constitution or its Amendments. This is not to say, however, that economic activity is not protected in the US constitutional system. Business activity is protected *inter alia* through the Due Process Clause enshrined in the Fourteenth Amendment and the right of property under the Fifth Amendment. Both fundamental freedoms and fundamental rights enjoy constitutional status in the EU.[32] Therefore, their conflict may be comparable with the conflicts of rights ensured by the Amendments of the US Constitution. Regarding the US Supreme Court, the enquiry will also cover the conflict between the rights protecting economic activity under the Amendments and the statutory right to take

[30] See E. MAK, *The US Supreme Court and the Court of Justice of the European Union*, in E. FAHEY, D. CURTIN (eds), *A Transatlantic Community of Law*, Cambridge: Cambridge University Press, 2014, p. 13.

[31] M. CAPPELLETTI, D. GOLAY, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, in M. CAPPELLETTI, M. SECCOMBE, J.H. WEILER (eds), *Integration through Law. Vol. 1. Methods, Tools and Institutions. Book 2. Political Organs, Integration Techniques and Judicial Process*, Berlin: de Gruyter, 1986, p. 339.

[32] M. POIARES MADURO, *Striking the Elusive Balance between Economic Freedom and Social Rights*, in P. ALSTON (ed.), *The EU and Human Rights*, Oxford: Oxford University Press, 1999, p. 452.

collective action. Terminological differences do not change the fact that the conflict between the same interests and rights exist in both the EU and the US legal systems. Following a functional approach, it may be noticed that adjudication at the highest level in both the EU and in the US fulfils an equivalent role concerning settling conflicts between various rights. This is the reason why I find the comparison between the Court of Justice and the US Supreme Court viable.

This conclusion is not altered by the fact that the application of the fundamental freedoms requires as a main rule some cross-border element in EU law. This is not a necessary precondition with fundamental rights in the US, but in most cases the cross-border element is present or at least could be easily created by the interstate provisions of services or the mobility of customers.

The US Supreme Court has had to address cases involving a conflict of different rights on several occasions. There are, however, fewer cases where the US Supreme Court had to consider a collision between a right of an economic nature and another right. The next sections will prove that the conflict of rights adjudication of the Court of Justice and the US Supreme Court shows certain similarities and the comparison can throw a different light upon the relevant case law of the Court of Justice.

IV. Criticisms related to the Court of Justice case law

The judicial practice of the Court of Justice has been the subject of severe criticisms in the legal literature. Most importantly, the pertinence of the hierarchical priority of fundamental freedoms over fundamental rights, the treatment of fundamental rights as an exception, the balancing between fundamental freedoms and fundamental rights and the role attributed to social rights have been called into question. The *Article* centres on these concerns. This does not mean, however, that other questions may be ignored, amongst which, for example, those related to the impact of the judiciary practice of the Court on the allocation of competences between the EU and the Member States.

Several authors explain the above features of the Court of Justice case law by the economic nature of integration[33] or by the fact that the examination of the applicability of fundamental freedoms enjoys priority in order to ascertain whether the case falls under the scope of application of EU law.[34] My intention is to demonstrate that this approach is not self-evident at all and that there are other ways available to approach such cases. First and foremost, I will discuss the criticisms raised in relation to the judicial practice of the Court on the conflict between fundamental freedoms and fundamental rights.

[33] M. Cappelletti, D. Golay, *The Judicial Branch in the Federal and Transnational Union*, cit., p. 323.
[34] V. Skouris, *Fundamental Rights and Fundamental Freedoms*, cit., p. 237.

IV.1. HIERARCHY

First of all, the decisions of the Court of Justice have been contested because fundamental rights are subordinated to fundamental freedoms. Fundamental rights have been considered as part of public policy or requirements related to public interest, which may justify a restriction of the fundamental freedoms.

Neither the Treaties nor the Charter addresses the issue of the hierarchical relation between fundamental freedoms and fundamental rights explicitly. While most authors advocate for the equivalence of fundamental freedoms and fundamental rights,[35] the case law of the Court of Justice shows a different approach, at least in formal terms. In *Schmidberger*, which will be discussed later in detail, the referring court explicitly asked whether the free movement of goods provisions prevail over the fundamental rights concerned in the case, namely the freedom of expression and freedom of assembly.[36] The Court did not provide a clear answer to this question as to the hierarchy regarding fundamental freedoms and fundamental rights. Even so, the approach of the Court on the hierarchy between fundamental freedoms and fundamental rights may be decipherable from its decisions.

In most judgments, where the Court of Justice has measured fundamental rights against fundamental freedoms, fundamental rights were considered as exceptions which may justify restrictions to fundamental freedoms. Fundamental rights are usually considered as a component of public policy, an explicitly mentioned derogation in the TFEU, or as overriding reasons in the public interest, i.e. exceptions elaborated by the Court, which may justify restricting the fundamental freedoms. This implies that fundamental freedoms are hierarchically superior to fundamental rights.

In a first line of cases, human rights arguments have been linked to the protection of public policy. Human dignity (*Omega*)[37] and the principle of equality (*Sayn-Wittgenstein*)[38] were protected, for instance, as part of public policy. In other decisions, the Court of Justice treated fundamental rights as overriding requirements related to the public interest. In the *Familiapress* judgment,[39] concerning the Austrian prohibition on the sale of newspapers which included prize games, the maintenance of press diversity and thus safeguarding the freedom of expression qualified as "an overriding re-

[35] V. TRSTENJAK, E. BEYSEN, *The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU*, cit., p. 311 *et seq.*; V. SKOURIS, *Fundamental Rights and Fundamental Freedoms*, cit., p. 237 *et seq.*; C. LADENBURGER, *European Union Institutional Report*, in J. LAFFRANQUE (ed.), *The Protection of Fundamental Rights Post-Lisbon. The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, Reports of the XXV FIDE Congress Tallinn 2012, Tallin: Tartu University Press, 2012, p. 200.

[36] *Schmidberger*, cit., para. 70.

[37] Court of Justice, judgment of 14 October 2004, case C-36/02, *Omega*.

[38] *Sayn-Wittgenstein*, cit.

[39] Court of Justice, judgment of 26 June 1997, case C-368/95, *Familiapress*.

quirement justifying a restriction on the free movement of goods",[40] while in *UPC*, the Court considered cultural policy and, through this, the freedom of expression as "an overriding requirement relating to the general interest".[41]

Both approaches permitted the Court of Justice to use its usual scheme of examination applied in internal market law: any restriction on the fundamental freedoms must be justified either based on an express provision of the TFEU or based on an exception developed in the Court case law. The consequence of this is that a restriction of the fundamental freedoms, even based on the protection of the fundamental rights, is presumed to be unlawful. This also implies that fundamental freedoms enjoy priority over fundamental rights, although the Treaties and the Charter do not provide for such a hierarchy between them. Moreover, in practical terms, this means that the person relying on fundamental rights against the application of a fundamental freedom has to bear the burden of proof.[42]

From a purely formal perspective, the Court of Justice does not solve a collision between a fundamental freedom and a fundamental right. Instead, fundamental freedoms are juxtaposed with public policy or an overriding reason related to the general interest. In my view, this practice might intend to mitigate the conflict between fundamental freedoms and fundamental rights.

There is a narrow area where the Court of Justice explicitly laid down a hierarchy between rights. The Court established that there are rights which admit no restriction, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment.[43] This implies that the right to life or the prohibition of torture enjoys priority even over fundamental freedoms. There is a hierarchical relationship here. The priority of these rights seems straightforward. However, we can find instances where there was a potential conflict between these non-restrictable rights and fundamental freedoms. In the *Grogan* case, the Court held that the national prohibition on distributing information about clinics in other Member States where abortion is lawfully carried out falls outside the scope of Community law if the information had been spread by a student association not related to the clinics concerned. But what would happen if the advertisement had been published by the clinics themselves, or if a pregnant woman had gone to another Member State to benefit from abortion as a service?[44] This would clearly fall un-

[40] *Ibid.*, para. 18.

[41] Court of Justice, judgment of 13 December 2007, case C-250/06, *UPC*, para. 41.

[42] S.A. DE VRIES, *Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice*, in *Utrecht Law Review*, 2013, p. 187; S.A. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon*, cit., p. 88; C. HARDING, *Economic Freedom and Economic Rights*, cit., p. 25.

[43] *Schmidberger*, cit., para. 80.

[44] N.N. SHUIBHNE, *Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law*, in *European Law Review*, 2009, p. 246 *et seq.*

der the scope of the free movement of services. How should the conflict between the freedom to provide services and the right to life of the foetus and of the mother be resolved? We can just try to guess at it. Similar problems may also arise when someone travels to another Member State for the purpose of having recourse to euthanasia as a lawful service, while this is prohibited in the Member State where he lives.[45]

However, this pre-defined relation between fundamental freedoms and fundamental rights involves a formal assessment of the collision. The formal priority of fundamental freedoms over fundamental rights aims rather at fitting conflict of rights cases into the traditional scheme of examination of internal market law cases. In this sense, this is rather a rhetoric device. Conflicts between fundamental freedoms and fundamental rights are not necessarily solved in favour of the fundamental freedoms. Therefore, the substantive assessment of the concrete case may have the result that the fundamental freedoms must give way to fundamental rights. I will address this question in detail in the following sub-section.

IV.2. Balancing by the Court of Justice

Although, from the above analysis, it would follow that fundamental freedoms prevail over fundamental rights, this is only the formal point of departure of the Court of Justice. The *a priori* primacy of fundamental freedoms must be examined in the light of the method of balancing used by the Court of Justice and national courts. The Court cannot escape a substantive assessment of the conflict between fundamental freedoms and fundamental rights despite the formal priority of fundamental freedoms. In a given case, either a fundamental freedom or a fundamental right may gain priority against the other one. This leads us to take under scrutiny the substantive assessment of conflicts between fundamental freedoms and fundamental rights by the Court.

The proportionality test serves the function of legally justifying the decision of the Court of Justice. It plays a legitimising role in the judicial reasoning. When fundamental freedoms and fundamental rights must be measured against each other, the Court applies the proportionality test. As a matter of fact, this determines in a given case whether fundamental freedoms or fundamental rights will prevail. The substantive balancing carried out by the Court can mitigate the formal, pre-defined hierarchy between fundamental freedoms and fundamental rights.

The proportionality test is widely used in constitutional and human rights adjudication as a method of legal reasoning. This is a flexible tool which enables the court to give a legally buttressed and structured answer to the question before the court. Concerning conflicts between fundamental freedoms and fundamental rights, the way how the principle is interpreted and applied, allows the Court to give

[45] *Ibid.*, p. 251 *et seq.*

preference either to an integrationist or a human rights favouring interpretation. Undoubtedly, the proportionality test is usually considered as an appropriate tool to balance between diverging interests and justify a judgment. The use of the proportionality test may provide a legal reasoning which ensures that the decision is not arbitrary. Nevertheless, the outcome of the application of the proportionality test is not always predictable. The Court of Justice makes proportionality decisions on the basis of the facts of the case concerned. As it is almost always possible to distinguish cases along the facts, the proportionality review provides the judges with considerable room to manoeuvre.[46] In addition to the singularity of the facts, the intensity of the proportionality test and the margin of discretion left to the referring national court are also changing, hence a proportionality review rarely has a precedent creating force.[47]

The proportionality test applied by the Court of Justice has been the subject of criticisms by some authors in particular from two angles: from the point of view of the respect for national standards of human rights protection and from the perspective of the room left to national courts in the framework of the preliminary ruling procedure.[48]

It has been said that the Court of Justice applies "oscillating methods"[49] or it "is struggling to find the right test".[50] It seems indeed that the proportionality test applied by the Court has its own variations. *Omega* and *Sayn-Wittgenstein* may be contrasted with *Viking* and *Laval*, as has been done by some authors.[51] In *Omega* and *Sayn-Wittgenstein*, the Court showed deference to national constitutional orders permitting the restriction of the fundamental freedoms based on the protection of fundamental rights. In *Omega*, the Court acknowledged that the level of protection of public policy may vary between the Member States.[52] The game which could be prohibited by Germany on the basis of the protection of public policy was permitted in the UK. In *Viking* and *Laval*, the Court gave priority to the freedom of establishment and the freedom to provide services respectively over the right of trade unions to take collective action, in spite of a higher level of protection ensured in some national laws for that right. This is particularly striking in *Viking*, where the Finnish Constitution acknowledged explicitly the right to strike. To put in another way, *Omega* and *Sayn-Wittgenstein* recognise the

[46] G. BECK, *The Legal Reasoning of the Court of Justice of the European Union*, Oxford: Hart, 2012, p. 324.

[47] See *ibid.*, p. 325.

[48] *Ibid.*, p. 178.

[49] A. VELDMAN, *The Protection of the Fundamental Rights to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR*, in *Utrecht Law Review*, 2013, p. 109.

[50] S.A. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon*, cit., p. 90; S.A. DE VRIES, *Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice*, cit., 188.

[51] S.A. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon*, cit., p. 90 *et seq.*

[52] *Omega*, cit., para. 31.

competence of the Member States to determine the content of their public policy, while in *Viking* and *Laval* the Court imposed a limit on the national competence in defining the content of fundamental rights. Moreover, *Viking* and *Laval* seem to suggest that trade unions have a much narrower leeway to justify a restriction than do Member States.[53] It is generally acknowledged that private parties may rely on the same express TFEU exceptions and overriding requirements related to the public interest as Member States may do.[54] However, contrary to Member States, private actors can rarely justify a restriction on grounds of public interest.[55]

Under Art. 267 TFEU, the task of the Court of Justice is the interpretation of EU law, while its application in the given case, including the balancing exercise, the proportionality review and the choice between the fundamental freedoms and fundamental rights is left to the courts of the Member States. Spaventa asserts that treating fundamental rights as a general interest exception, which may justify a restriction on the free movement provisions, imposes "upon the Member States a restrictive approach to fundamental rights".[56] This is somewhat counterbalanced by the margin of discretion conferred to the Member States through the proportionality test.[57] However, the leeway left to the referring national court varies. It is less transparent when the Court of Justice applies the proportionality test in a manner which does not leave any practical autonomy for the referring national court and when the application of the proportionality test is allowed to be carried out by national courts. *Familiapress* is an example of granting some freedom of decision to the national court,[58] while the breadth of the margin of discretion of the national court was much limited in *Viking* and *Laval*.[59]

As discussed above, in solving conflicts between fundamental freedoms and fundamental rights, the Court faces difficult questions. As we have already anticipated, the accommodation of social rights in the EU legal order has posed a further challenge for the judges of the Court. This is examined in the next sub-section.

IV.3. Fundamental freedoms and social rights

The original objective of the EU was economic integration. However, successive treaty amendments brought certain social objectives and social rights to the fore. The European Social Charter (ESC) was adopted in 1961, but the EU is not a party thereto.

[53] A. Veldman, *The Protection of the Fundamental Rights to Strike within the Context of the European Internal Market*, cit., p. 109.

[54] L.W. Gormley, *Private Parties and the Free Movement of Goods: Responsible, Irresponsible, or a Lack of Principles?*, in *Fordham International Law Journal*, 2015, p. 1010 *et seq.*

[55] *Ibid*.

[56] E. Spaventa, *Federalisation Versus Centralisation*, cit., p. 357.

[57] *Ibid*.

[58] A. Torres Pérez, *Conflicts of Rights in the European Union*, cit., p. 173.

[59] G. Beck, *The Legal Reasoning of the Court of Justice of the European Union*, cit., p. 304.

Even so, the Single European Act referred to the ESC,[60] and later the TEU has been amended by the Treaty of Amsterdam to include an equivalent reference.[61] In some judgments, the Court of Justice has also relied on the ESC.[62] Moreover, Chapter IV of the Charter of Fundamental Rights also includes social rights.

There is undoubtedly a tension between the promotion of the internal market and other objectives. The relation between fundamental freedoms and fundamental rights has not been made unequivocal by the Treaties, the Charter of Fundamental Rights and Court of Justice case law. Market integration, fundamental rights and social objectives all find some buttress in the text of the Treaties, which can support divergent interpretations in the event of conflict between fundamental freedoms and fundamental rights.[63] As a consequence, the institutions interpreting these provisions, such as the Court, enjoy a considerable freedom in pursuing a free market objective or the promotion of social rights.[64] I will focus here on the relation between fundamental freedoms and the right to take collective action, as this has been discussed by the Court of Justice and similar cases may be also found in the practice of the US Supreme Court.

There are two much debated judgments where the Court of Justice had to interpret the right to collective action by trade unions, the above-mentioned *Viking* and *Laval* decisions. *Viking* and *Laval* do not differ much from the previous judgments. The Court found that the right to take collective action for the protection of workers is a legitimate interest which may justify a restriction of one of the fundamental freedoms as an overriding reason of public interest.[65] The fact that the Court favoured in these cases fundamental freedoms over the right to take collective action sparked, however, heated debates.

In most of the conflict of rights cases, the reasoning of the Court of Justice and the outcome of the cases were welcomed by the legal literature. This was the case, even if the proportionality test used by the Court has shown some volatility and this has been sometimes criticised. On the contrary, *Viking* and *Laval* were fiercely contested by trade unions and workers' organisations, as well as by some representatives of legal science, for favouring the free movement rights of employers over the rights of employees and for ignoring the different levels of protection adopted in the Member States.[66] This is undoubtedly due to the fact that *Viking* and *Laval* concerned more broadly the issue of social dumping. Giving priority to the freedom of establishment and the freedom to

[60] Preamble, Single European Act.

[61] Preamble, TEU.

[62] See in particular Court of Justice: judgment of 15 July 2010, case C-271/08, *Commission v. Germany* [GC], para. 37; judgment of 18 December 2007, case C-341/05, *Laval* [GC], para. 90; judgment of 11 December 2007, case C-438/05, *Viking* [GC], para. 43.

[63] See D. Nicol, *Europe's Lochner Moment*, in *Public Law*, 2011, p. 322.

[64] *Ibid*.

[65] *Viking* [GC], cit., paras 75 and 77; *Laval* [GC], cit., paras 101 and 103.

[66] See, for example, European Trade Union Confederation, *ETUC Response to Court Judgements Viking and Laval*, www.etuc.org.

provide services involved a decision permitting social dumping and the reduction of the standards of working conditions.

Viking and *Laval* are often distinguished from the other cases. While, for example in *Omega* and *Sayn-Wittgenstein*, the Court of Justice preferred the protection of fundamental rights to fundamental freedoms, in these cases the freedom of establishment and the freedom to provide services prevailed. The previous cases could be better explained by weighing the conflicting interests by the proportionality test. Formally speaking, the judicial reasoning of the Court in *Viking* and *Laval* does not differ from the earlier judgments. It might seem, however, that in *Viking* and *Laval* the Court made a policy decision in the disguise of the proportionality test. From the perspective of legal argumentation, perhaps the Court could have clarified why it granted priority to fundamental freedoms over the right to take collective action. Here, the elucidation of policy considerations could have contributed to this. The formalistic tool of the proportionality test seems not to be suitable to give weight to such policy considerations. As it has been argued, the template of proportionality simply hides the policy-oriented motivation of the decisions of the Court.[67] The proportionality test gives the pretence of legal argumentation for policy decisions. It must be noted, however, that if the Court had made its policy choice explicit where the proportionality test does not function, it would have taken over the role of legislation in policies (sometimes intentionally) not well articulated. Such an approach would also affect the interinstitutional relations within the EU.

The room of the referring national court to give weight to the protection of fundamental rights according to national standards was significantly limited. This is often explained by the fact that, in *Viking* and *Laval*, the reliance on the right to collective action could be seen as a means of protectionism infringing the free movement provisions.[68] An interesting corollary of the Court of Justice case law is the scope of permitted restrictions. It must be stressed that, according to the established practice of the Court, fundamental freedoms may not be restricted, neither by a Member State nor by a private person, for economic reasons. The purpose of this rule is the prevention of protectionism. However, this does not hold for fundamental rights. Fundamental rights may be restricted for economic reasons, such as the unhindered exercise of the fundamental freedoms.

We have seen above that the practice of the Court of Justice on solving conflicts between fundamental freedoms and fundamental rights has been challenged for various reasons. The next section will demonstrate that some of these concerns are also present in US law and thus they are not peculiar to EU law.

[67] F. FONTANELLI, *The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights*, in *Oxford Journal of Legal Studies*, 2016, p. 659.

[68] L.F.M. BESSELINK, *The Protection of Fundamental Rights post-Lisbon*, cit., p. 24; C. LADENBURGER, *European Union Institutional Report*, cit., p. 200; C. SEMMELMANN, *The European Union's Economic Constitution under the Lisbon Treaty: Soul-searching Shifts the Focus to Procedure*, in *European Law Review*, 2010, p. 535.

V. The case law of the US Supreme Court

V.1. Hierarchy

We have seen that the Court of Justice case law gives *a priori* primacy to fundamental freedoms over fundamental rights, but this is only a formal point of departure. Due to the substantive balancing through the proportionality test, either fundamental freedoms or fundamental rights may prevail in the event of a conflict between them.

The US Constitution and its Amendments do not provide explicitly for a hierarchy between the various rights. However, fundamental rights are distinguished from other rights.[69] Fundamental rights are those rights which are explicitly or implicitly considered as fundamental by the US Supreme Court. A further difference exists between the rights from the angle of the standard of review in the event of interference and thus the level of their protection also varies. Like in EU law, neither fundamental rights nor any other rights operate as trumps in US law in the event of a conflict between rights. This is also true for the fundamental rights protecting economic interests which, like other rights, are not absolute. As we will see, a pre-defined hierarchy has not even been applied in the event of a conflict between fundamental rights protecting economic activity and the statutory right to take collective action.

There are few cases in the practice of the US Supreme Court where a conflict between a fundamental right protecting economic activity and another right had to be settled. One of the reasons for this may be that many times fundamental rights protecting an economic activity are contrasted with some public interest of the state, the legislation of which is under review. Sometimes, the public interest protected also embodies the protection of a fundamental right. The legal argumentation of the US Supreme Court does not necessarily extend to the issue of the conflict of rights but instead focuses on the interference of state legislation with one of the fundamental rights concerned. For instance, in *Sorrell v. IMS Health Inc.*, the US Supreme Court had to decide whether a Vermont statute, which prohibited the sale, disclosure and use of prescriber-identifying information (the prescribing practices of individual doctors) by pharmacies in the absence of the prescriber's consent, had violated the free speech rights of pharmaceutical manufacturers.[70] Pharmaceutical companies use these pharmacy records for promoting their drugs. The majority of the judges held that speech promoting pharmaceutical marketing is a form of expression protected under the Free Speech Clause of the First Amendment which had been violated by the Vermont stat-

[69] On the hierarchy of rights in US law, see M.R. Konvitz, *Fundamental Rights*, New Brunswick: Transaction, 2001, p. 1 *et seq.*

[70] US Supreme Court, judgment of 23 June 2011, *Sorrell, Attorney General of Vermont, v. IMS Health Inc.*

ute.[71] The US Supreme Court made a short hint to personal privacy and human dignity in relation to handling the data concerned, but it did not address the conflict between free speech and human dignity directly. The US Supreme Court reviewed state legislation and not individual rights in the light of the First Amendment. *Sorrell* and many other instances show that the US Supreme Court focuses on the restriction of certain rights by governmental measures. The latter are usually supported by some broader general interest objective, such as the protection of public health, although they could be often formulated as reflecting the protection of individual rights. This approach followed also in other cases hides direct conflicts between rights and has the consequence that there are not too many cases where rights protecting economic interests and other rights collide directly. In the remaining cases, however, fundamental rights protecting economic activity are treated independently and not as a part of a broader public interest criterion, unlike in EU law. In these cases, the US Supreme Court cannot avoid weighing the conflicting rights against each other.

V.2. Balancing

The constitutionality review of governmental measures by the US Supreme Court takes different forms and ranges from the rational basis review to strict scrutiny through various intermediate standards. When assessing conflicts of rights, the same applies. The US Supreme Court does not rely on a single uniform test, but instead a tiered scrutiny. The test applicable varies according to the nature of the case and the right concerned. Each type of the tests examines the relation between the measure and the governmental objective or interests pursued by that measure. Strict scrutiny requires that the measure must be narrowly tailored, must be the least restrictive means of achieving the objective and the government act must be justified by a compelling state interest. Intermediate scrutiny requires that the governmental measure substantially promotes an important governmental interest. Finally, the most relaxed rational basis review simply requires that a governmental measure shall be rationally related to a legitimate government interest. It is often subject of dispute which level of judicial scrutiny is to be applied in a given case. The inconsistency of the application of the tiered review by the US Supreme Court has been challenged in the legal literature.[72]

Unlike in the EU multilevel judicial system, the opinions of the US Supreme Court do not, however, require "implementation" by state courts. The US Supreme Court decides rights conflicts directly and the outcome of the case depends entirely upon the test applied by the US Supreme Court. On the contrary, strictly formally and legally the

[71] US Constitution, Amendment I: "Congress shall make no law [...] abridging the freedom of speech, or of the press".

[72] J. Mathews, A. Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, in *Emory Law Journal*, 2011, p. 797.

Court of Justice is limited to interpret EU law and then the referring national court has to decide the case, though Court rulings often predetermine the correct application of EU law and thus the decision of the referring court.

In *PruneYard Shopping Center v. Robins*, the US Supreme Court had to deal with the conflict between the freedom of expression and the right to property.[73] A group of students solicited signatures in PruneYard Shopping Center in order to protest against a resolution by the United Nations condemning Zionism. The students' conduct was peaceful. A security guard requested them to leave the shopping centre as the shopping centre's regulations prohibited any publicly expressive activity not directly related to the commercial purposes of the shopping centre. The students left the shopping centre immediately, but later on they filed suit in a California state court against the denial of their access to the shopping centre. The case reached the California Supreme Court, which stated that the California Constitution protects free speech and petitioning and the federally protected right of property of the owner of the shopping mall had not been violated. This judgment was also confirmed by the US Supreme Court, which established that a State may "adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution".[74] The rules enshrined in a state constitution which permit the exercise of free speech and petition rights for individuals on the property of a privately owned shopping centre open to the public does not violate the shop owner's property rights under the Fifth[75] and Fourteenth Amendments[76] and free speech rights under the First and Fourteenth Amendment.[77] A State may impose reasonable restrictions on property rights as long as the restriction does not amount to taking without just compensation or contravene any other federal constitutional provision.

The US Supreme Court held that any restriction on property rights must be reasonable. The effect of the freedom of expression on property rights, however, was not thoroughly analysed by it. The US Supreme Court briefly pointed out that the exercise of the freedom of expression did not cause an interference with normal business operations. Thus, its impact on commerce was marginal. Indeed, property was not taken, but the exercise of business activity might be affected, even by peacefully soliciting for signatures or leafleting: the shop owner has to provide maintenance and security in the building; some customers may be distracted by the demonstrators and

[73] US Supreme Court, judgment of 9 June 1980, *Pruneyard Shopping Center v. Robins*.

[74] *Ibid.*, p. 81.

[75] US Constitution, Amendment V: "[...] nor shall private property be taken for public use, without just compensation".

[76] US Constitution, Amendment XIV, s. 1: "[...] nor shall any State deprive any person of life, liberty, or property, without due process of law".

[77] *Ibid.*: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law".

they may therefore choose another shopping mall.[78] All these cause loss of the profit for the store owners. In addition, a mall owner may feel it necessary to express that he does not agree with the views of the demonstrators. In any case, these concerns may cause additional risks and costs for the owners of the shopping mall and the stores. Undoubtedly, there could have been several alternatives available to exclude or reduce the impact of the freedom of expression, in particular using other media, such as television, radio or internet.[79] The use of these media, however, may involve some costs for those exercising the freedom of expression, while the demonstrators in this case could "free ride" the premises of the shopping mall. The US Supreme Court held that a mall owner may adopt regulations on time, manner etc. However, from the judgment it might be inferred that a mall owner has to tolerate even a continuous presence of the same or a different group which intends to express its views.[80]

As we have seen, the Court of Justice does not have jurisdiction to review national acts on human rights grounds if the matter falls outside the scope of application of EU law.[81] Art. 51 of the Charter of Fundamental Rights adds that the measures of the Member States are covered by the Charter "only when they are implementing Union law". The US Supreme Court can assert jurisdiction regarding federal and state acts even if the act of a state falls within the competence of the state.[82] Therefore, it could be said that, at first sight, the US Supreme Court established a uniform constitutional order with regard to the protection of human rights and this assertion could be contrasted with EU law.[83] However, the impact of the decision of the US Supreme Court in *PruneYard* is that, despite the previous judiciary practice of the US Constitution allowing property owners to exclude protestors from their property, the states may impose a different, higher standard for the freedom of expression limiting property rights.[84] Thus, the relationship between the freedom of expression and property rights is largely determined by state constitutions, and in this way, the US Supreme Court acknowledged the diversity of the level of protection in state constitutions. The judgment discussed the relationship between the freedom of expression and property rights, but it could be easily accommodated in an EU cross-border context as a restriction of the freedom to

[78] L.M. COHEN, *Pruneyard Shopping Center v. Robins: Past, Present and Future*, in *Chicago-Kent Law Review*, 1981, p. 390 *et seq*.

[79] *Ibid*., p. 395.

[80] G.C. SISK, *Returning to the PruneYard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, in *Harvard Journal of Law & Public Policy*, 2009, p. 403 *et seq.*

[81] *ERT-AE*, cit., para. 42. See X. GROUSSOT, L. PECH, G.T. PETURSON, *The Reach of EU Fundamental Rights on Member State Action after Lisbon*, in S.A. DE VRIES, U. BERNITZ, S. WEATHERILL (eds), *The Protection of Fundamental Rights in the EU after Lisbon*, Oxford: Hart, 2013, p. 99 *et seq.*

[82] US Supreme Court, judgment of 8 June 1925, *Gitlow v. People of the State of New York*.

[83] X. GROUSSOT, L. PECH, G.T. PETURSON, *The Reach of EU Fundamental Rights on Member State Action after Lisbon*, cit., p. 101.

[84] L.M. COHEN, *Pruneyard Shopping Center*, cit., p. 387 *et seq.*

provide services or receive services by the freedom of expression protected by Art. 11 of the Charter of Fundamental Rights. In such a context, the approach of the US Supreme Court may be considered to be parallel to the statements of the Court of Justice in *Omega* or *Sayn-Wittgenstein*, where the Court recognised the constitutional peculiarities of the Member States in protecting their public policy and leaving significant leeway for the Member States. Furthermore, more specifically *Familiapress* and later *Schmidberger* allowed the restriction of the fundamental freedoms on the grounds of the protection of the freedom of expression.

Some civil rights cases in the judiciary practice of the US Supreme Court concerned the conflict between the property right of the owner and the equal protection rights of others under the Civil Rights Act of 1964.[85] The Civil Rights Act of 1964 was adopted primarily on the basis of the Commerce Clause, but partly as the implementation of Section 5 of the Fourteenth Amendment.[86] The selection of the Commerce Clause as a legal basis was justified by the *Civil Rights Cases of 1883*.[87] In the *Civil Rights Cases of 1883*, the US Supreme Court found the Civil Rights Act of 1875[88] unconstitutional and held that the Congress did not have the power under the Fourteenth Amendment to prohibit racial discrimination by private owners of public accommodation, as opposed to discriminatory state law or action.[89]

The adoption of the Civil Rights Act of 1964 under the Commerce Clause somewhat distracted the attention from any potential conflict between the right to equality protected by the Fourteenth Amendment and other rights, such as property rights which protect economic activity. *The Heart of Atlanta Motel v. United States* brought back the attention to this question. Here, the owner of a large motel claimed that the enforcement of the prohibition of discrimination enshrined in Title II of the Civil Rights Act of 1964 (Injunctive relief against discrimination in places of public accommodation) exceeded the Congress' powers under the Commerce Clause and breached the Fifth Amendment as being deprivation of property or liberty without due process of law, since the owner had been deprived of the right to choose its customers and operate its business as he wished.[90] The hotel owner also argued that they were subject to involuntary servitude, in violation of the Thirteenth Amendment, when they were required to rent rooms to certain

[85] US Congress, Civil Rights Act of 1964, 2 July 1964.

[86] Art. I, section 8, of the US Constitution: "The Congress shall have Power [...] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

[87] US Supreme Court, judgment of 16 October 1888, *Civil Rights Cases*.

[88] US Congress, Civil Rights Act of 1875, 27 February 1875.

[89] R.C. CORTNER, *Civil Rights and Public Accommodations – The Heart of Atlanta Motel and McClung Cases*, Lawrence: University Press of Kansas, 2001, p. 17 *et seq.*

[90] US Supreme Court, judgment of 14 December 1964, *The Heart of Atlanta Motel v. United States*.

persons against their will.[91] Before the enactment of the Civil Rights Act of 1964, the motel did not rent rooms to black people and it intended to continue this practice. The US Supreme Court held that the Commerce Clause was a proper legal basis to adopt the provisions concerned, since the motel served interstate travellers. The US Supreme Court established that it must be ascertained "(1) whether the Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate".[92] The determination of how to eliminate the obstacles to interstate commerce was considered to be a matter of policy which falls within the discretion of the Congress. The method chosen must, however, be "reasonably adapted to the end permitted by the Constitution".[93] The US Supreme Court only briefly addressed and rejected the claims concerning deprivation of property and involuntary servitude, referring to some of its previous opinions. As Justice Black pointed out in his concurring opinion, it would have been ironic to apply the guarantee of due process adopted to prohibit racial discrimination in order to deprive the Congress of power to eliminate such discrimination.[94] Justice Douglas, while concurring, argued that the decision should have been based on the legislative power contained in section 5 of the Fourteenth Amendment.[95] In his opinion, the prohibition of racial discrimination must have been applied irrespective of the commercial activity and intra- or interstate nature of the business.

On the same day, the US Supreme Court reached a similar conclusion in *Katzenbach v. McClung*, where the owners of a restaurant claimed that Title II of the Civil Rights Act of 1964 was unconstitutional.[96] It was held that the prohibition of discrimination concerning restaurants falls within the commerce power of the Congress and, in the given case, the substantial portion of the food served in the restaurant moved in interstate commerce. In this case, however, no reference to the deprivation of property or to involuntary servitude was made by the restaurant owners. Nevertheless, the concurring opinions delivered in *Heart of Atlanta*, which also concerned the Fourteenth Amendment, also applied to *Katzenbach*.

We have seen that, although the Court of Justice applies the proportionality test in all cases, it has still its own variations. Sometimes, the Court has been criticised for its lack of consistency in applying the proportionality test. This is even more so in the US Supreme Court. In solving rights conflicts, it does not use the proportionality test or any

[91] US Constitution, Amendment XIII, s. 1: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction".

[92] US Supreme Court, *The Heart of Atlanta Motel v. United States*, cit.

[93] *Ibid.*, p. 262.

[94] *Ibid.*, p. 278.

[95] *Ibid.*, pp. 279-286.

[96] US Supreme Court, judgment of 14 December 1964, *Katzenbach v. McClung*.

other consistently applied test. The variations are even more palpable than in the Court of Justice case law, and the determination of the applicable test often constitutes a subject of legal dispute before the US Supreme Court. The US Supreme Court had recourse to the rational basis review in *PruneYard*. In *The Heart of Atlanta*, a two-prong test was applied, requiring a rational basis for the legislation and the reasonability and appropriateness of the selected means. This latter requirement seems to be close to the examination of the suitability of the measure under the proportionality test of the Court of Justice. This was, however, applied to the analysis of whether the Commerce Clause was an appropriate legal basis for the Civil Rights Act of 1964 and not regarding the Fourteenth Amendment or the potential conflict between the right to equality and the Fifth and Thirteenth Amendment. The heterogeneity of the judicial reasoning of the US Supreme Court is further confirmed if we examine a particular type of conflict, namely the conflict between fundamental rights and the right to collective action in the following sub-section.

V.3. The right to take collective action and economic activity

In the EU, social rights gained recognition progressively. However, it is still debated what is the exact role of social rights in EU integration. We have seen how fervent debates the *Viking* and *Laval* judgments stirred in the EU. The development of social rights in the US has had also its own limits. The International Covenant on Economic, Social and Cultural Rights has been signed, but not ratified by the US.[97] US law resisted constitutionalising social rights. The US Constitution and its Amendments do not refer to social rights. Although Franklin Delano Roosevelt proposed a second bill of rights containing social rights in 1944, this was not adopted.[98] Social rights are instead protected by state or federal law and generally miss the "fundamental right" status under the US Constitution.[99] In the US, the lack of recognition of social rights at federal level was the subject of criticism and the necessity of safeguarding social rights is a recurrent claim made by some legal scholars.[100] Nevertheless, the US Supreme Court also had to address the conflict between fundamental rights protecting economic activity and social rights. A returning question has been the right of workers to take collective action and the rights of the business owners.

[97] International Covenant of Economic, Social and Cultural Rights, adopted in New York on 16 December 1966, entered into force on 3 January 1976.

[98] C.R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever*, New York: Basic Books, 2004.

[99] T. Zimmerman, *Prospects for Economic, Social and Cultural Rights under US Law*, in *Whittier Law Review*, 1993, p. 554.

[100] See for example C.R. Sunstein, *The Second Bill of Rights*, cit.; W.E. Forbath, *Social and Economic Rights in the American Grain: Reclaiming Constitutional Political Economy*, in J.M. Balkin, R.B. Siefel (eds), *The Constitution in 2020*, Oxford: Oxford University Press, 2009, p. 55.

The US Supreme Court had to decide in many cases on the rights of trade unions and the rights of the companies concerned, regarding labour disputes. Although we find reference to the "fundamental" nature of the right of employees to self-organisation and to select their representatives for collective bargaining or other mutual protection in the case law of the US Supreme Court, such a right is not mentioned in the US Constitution and its Amendments.[101] The right to collective action is a statutory right. The US Supreme Court recognised in these cases that the business as a going concern is protected under property rights. Thus, strikes and boycotts organised by trade unions were many times considered as interfering with the right of property.

In *Gompers v. Bucks Stove & Range Co.*, the officers of a trade union and some staff members of the trade union journal were prohibited by court injunction to continue a boycott organised by them against the Bucks Stove company because of a controversy over working time.[102] In a related contempt procedure, the defendants claimed that the injunction and the contempt proceedings violated the liberty of speech and press. Although the Supreme Court recognised the right of association of workers, it stressed that the court protects individuals against the vast power of trade unions. This was justified by the fact that the campaign pursued by the trade union exceeded "any possible right of speech which a single individual might have".[103] In addition, the US Supreme Court noted that "the court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained".[104] The freedom of speech and press were thus contrasted here with the right of property and the freedom of speech of the private person concerned by the trade union action.

In *Truax v. Corrigan*, a restaurant owner did not accept the terms and conditions of employment demanded by the staff and a trade union of which the cooks and waiters of the restaurant were members.[105] As response, the staff and the trade union began a strike and boycott against the restaurant, discouraging customers to turn in the restaurant. The boycott caused a serious loss in the restaurant's takings. However, an Arizona statute ruled out granting a restraining order or injunction in the event of a peaceful strike and boycott. The majority of the US Supreme Court established that despite the state statute, the boycott violated the Due Process Clause[106] and the Equal Protection Clause of the Fourteenth Amendment.[107] Here again, the business was considered as a

[101] US Supreme Court, judgment of 12 April 1937, *NLRB v. Jones & Laughlin Steel Corp*.

[102] US Supreme Court, judgment of 15 May 1911, *Gompers v. Bucks Stove & Range Co*.

[103] *Ibid.*, p. 439.

[104] *Ibid.*, p. 438.

[105] US Supreme Court, judgment of 19 December 1921, *Truax v. Corrigan*.

[106] US Constitution, Amendment XIV, s. 1: "[...] nor shall any State deprive any person of life, liberty, or property, without due process of law".

[107] *Ibid.*: "[...] nor deny to any person within its jurisdiction the equal protection of the laws".

property right "and free access for employees, owner, and customers to his place of business is incident to such right".[108]

Another case where the US Supreme Court made a ruling on the conflict between the rights of trade unions and business owners was *Dorchy v. State of Kansas*.[109] Dorchy, an officer of a trade union, was prosecuted and sentenced since he called the workers of a mining company to strike because of a claim of payment which was allegedly due to a former employee. The Court of Industrial Relations Act of Kansas, however, forbade conspiring to induce others to strike in mining. The prohibition also covered the officers of labour unions. Justice Brandeis, speaking for the court, confirmed that "the right to carry on business – be it called liberty or property – has value".[110] He found that the strike intended only to compel the employer to effect payment and that Dorchy's stale claim due to a former employee is not a legitimate purpose. Finally, the US Supreme Court established that "neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike".[111] The decision did not balance the rights concerned, but simply ascertained the impermissible nature of the strike.

A common feature of these cases is that the US Supreme Court did not undertake a thorough balancing exercise, but simply granted priority to property rights. *Truax v. Corrigan* resembles the *Viking* case, where the national standard of the protection of fundamental rights, namely the right to take collective action, was set aside in order to foster economic activity. It seems that the deference to state standards is weaker concerning the right to take collective action, both in the EU and the US. This may be contrasted by the state-level defence of other fundamental rights in the practice of both courts (in the EU *Omega*, *Familiapress* and *Sayn-Wittgenstein* as well as *PruneYard* in the US). It must be also noted that the rulings in *Viking* and *Laval* are applicable only to cases related to cross-border collective actions. Accordingly, Member States may define the boundaries of the right to collective actions for purely internal situations in accordance with their preferences. As opposed to this, the US practice has been applicable to situations without cross-border element, too.

The above analysis demonstrates that the US Supreme Court also faces the issue of conflict between fundamental rights protecting economic activity and other rights. Some of the difficulties are also similar. It suffices to refer to the variations of the tests applied to measure conflicting rights against each other or the problem of the collision of fundamental rights protecting economic interests and social rights. This proves that EU institutions, and in particular the Court of Justice, is not in an entirely unique situation when it has to address the conflict between various rights. The next section

[108] US Supreme Court, *Truax v. Corrigan*, cit., p. 327.
[109] US Supreme Court, judgment of 25 October 1926, *Dorchy v. State of Kansas*.
[110] *Ibid.*, p. 311.
[111] *Ibid.*, p. 307.

will outline how some of the concerns related to the judicial practice of the Court of Justice could be surmounted by the refinement of the judicial reasoning of the Court or by legislation. In this account, the above comparison with the case law of the US Supreme Court will be used to mark how the necessary refinement of the practice of the Court of Justice could be achieved.

VI. An alternative approach in EU law

VI.1. An alternative judicial method for solving conflicts between fundamental freedoms and fundamental rights

In US law, fundamental rights protecting economic activity are treated as equal to other fundamental rights without any pre-defined hierarchy. Such an approach could be followed in EU law. As it has been explained, the *a priori* preference for fundamental freedoms is rather a formal one which is counterbalanced by the substantive assessment based on the proportionality test. Indeed, in the cases analysed above, with the exception of *Viking* and *Laval*, the Court of Justice accepted the derogation from fundamental freedoms to protect certain fundamental rights. However, the traces of a more nuanced approach may be discovered in the *Schmidberger* and the *Dynamic Medien* judgments of the Court.[112]

a) Schmidberger and Dynamic Medien.

In the *Schmidberger* judgment, the Court of Justice examined the relation between the freedom of expression and assembly and the free movement of goods regarding the closure of a commercially important motorway in the Alps by an environmental organisation.[113] In this case, the Austrian government argued that the freedom of expression and assembly had to be given priority as "fundamental rights are inviolable in a democratic society".[114] The Court of Justice did not make such a definite statement. The protection of the right of expression and the right of assembly were considered by the Court as legitimate interests, which may justify a restriction of the free movement of goods.[115] Acknowledging the broad discretion enjoyed by national authorities in this regard, the Court found that the fact that the Austrian authorities did not prohibit the demonstration did not violate the free movement of goods provisions of Treaty establishing the European Community (EC Treaty), read together with Art. 5 of the EC Treaty.[116]

[112] Court of Justice, judgment of 14 February 2008, case C-244/06, *Dynamic Medien*.

[113] See C. Brown, *Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria. Judgment of 12 June 2003, Full Court*, in *Common Market Law Review*, 2003, p. 1499.

[114] *UPC*, cit., para. 17.

[115] *Schmidberger*, cit., para. 74.

[116] *Ibid.*, para. 94.

Schmidberger is seen by several authors as a judgment where the Court of Justice implemented the equality of fundamental rights and economic freedoms and balances them accordingly.[117] Others drew the conclusion from the judgment that fundamental rights prevail over fundamental freedoms.[118] Indeed, the Court mentions the "need to reconcile" fundamental rights and the free movement of goods[119] and the judgment requires balancing the interest in the free movement of goods and the interests of the demonstrators.[120] A more relaxed attitude may be also traced in the substantive assessment of the Court. Usually, the Court of Justice does not seem to be really interested in the restricting effect of fundamental freedoms on fundamental rights. The single exception is *Schmidberger*. Here, the Court did not simply examine the restrictive effects of the demonstration to the free movement of goods, but it also pointed to the impact of a potential ban of the demonstration on the freedom of expression of the participants.[121]

Another important feature of the judgment is the treatment of fundamental rights. In *Schmidberger*, the Court of Justice decided for the first time to tackle the encounter of a fundamental freedom and fundamental rights directly. Here, the Court found an answer to the clash between the free movement of goods and the right of expression and the right of assembly without categorising the latter as the part of public policy or overriding requirements related to the public interest. Interestingly, even in this case, the Court of Justice might have been able to bypass this through referring to the protection of the environment or public health in accordance with the purpose of the demonstrators, as these are exceptions recognised under the current Art. 36 TFEU as well as in the practice of the Court of Justice. The Court rejected this approach since the state measure concerned was the authorisation of the demonstration related to the exercise of the right of expression and assembly, and the aims of the protestors were irrelevant.[122]

Tridimas points out that, in *Schmidberger*, the Court of Justice did not categorise the freedom of expression and the freedom of assembly either as an express exception under Art. 30 EC Treaty or as a mandatory requirement or overriding reason related to the public interest.[123] Semmelmann goes even further and construes fundamental (so-

[117] See T. TRIDIMAS, *The General Principles of EU Law*, Oxford: Oxford University Press, 2006, p. 298 *et seq.* and p. 338.

[118] M. AVBELJ, *European Court of Justice and the Question of Value Choices Fundamental Human Rights as an Exception to the Freedom of Movement of Goods*, in *New York University School of Law Jean Monnet Working Paper*, no. 6, 2004, jeanmonnetprogram.org, p. 71.

[119] *Schmidberger*, cit., para. 74.

[120] *Ibid.*, para. 90.

[121] *Ibid.*, paras 89-90.

[122] *Schmidberger*, paras 66-68.

[123] T. TRIDIMAS, *The General Principles of EU Law*, cit., p. 338.

cial) rights as giving rise to an "independent justification".[124] Indeed, the judgment of the Court of Justice talks about the "legitimate interest" in protecting fundamental rights.[125]

However, the impact of *Schmidberger* has been limited. In my view, balancing was possible without setting up a hierarchy among the rights concerned, since the conflict between the free movement of goods and the freedom of expression and assembly in *Schmidberger* was only partial.[126] The free movement of goods provisions had to give way to those fundamental rights only for a limited duration and regarding a limited place. This result can be contrasted with cases where there has been a full conflict between fundamental freedoms and fundamental rights.

Formally, even in *Schmidberger*, the Court of Justice used its usual technique: fundamental freedoms come first and any restriction of them must be justified even if the restriction is due to the protection of fundamental rights.[127] And more importantly, in its later decisions, the Court changed its approach as described above. Since then, it considers fundamental rights as general interests related to an overriding reason capable of justifying a restriction of fundamental freedoms. The signs of a similar approach may be discovered only in the *Dynamic Medien* judgment, where concerning a requirement on age-limit label for image storage media distributed via mail the Court established that the right of the child to protection is a legitimate interest which can justify a restriction on the fundamental freedoms.[128]

Schmidberger and *Dynamic Medien* indicate a more careful approach by the Court of Justice. Fundamental rights are not taken as part of the public policy or as overriding requirements in the public interest, but they are considered as independent "legitimate interests". However, after having attributed an independent role to fundamental rights in both cases, the Court applied its usual methodology and treated the freedom of expression and assembly as well as the right of the child to protection as reasons justifying a restriction on the fundamental freedoms. The fact, therefore, remains that fundamental rights were considered as exceptions to the free movement of goods provisions, though atypical ones. To eliminate the concerns discussed above, a more thorough refinement of the approach of the Court of Justice would be necessary.

b) Refinement of the judicial practice of the Court of Justice.

Schmidberger and its assessment by the legal literature provide important lessons as to the refinement of the case law of the Court. Retuning should concern the

[124] C. SEMMELMANN, *The European Union's Economic Constitution under the Lisbon Treaty*, cit., p. 535.

[125] *Schmidberger*, cit., para. 74.

[126] Skouris put somewhat similarly regarding *Schmidberger*: "[...] there was no real conflict between fundamental rights and fundamental freedoms [...]". V. SKOURIS, *Fundamental Rights and Fundamental Freedoms*, cit., p. 236.

[127] *Schmidberger*, cit., paras 74 and 78. See also E. SPAVENTA, *Federalisation Versus Centralisation*, cit., p. 356.

[128] *Dynamic Medien*, cit., para. 42.

predefined hierarchical relationship between fundamental freedoms and fundamental rights, the treatment of fundamental rights as an exception and balancing through the proportionality test.

Several authors support the method of balancing advocated by AG Trstenjak in *Commission v. Germany*.[129] Indeed, AG Trstenjak's opinion points well to those issues which require refinement. German local authorities awarded service contracts on occupational old-age pensions without a call for tenders at EU level. The German government argued that the contracts were awarded to entities specified by the collective agreement which enabled workers to take part in the designation of the entities in order to take their interests better into account. According to the Commission, the collective agreement violated EU public procurement rules. AG Trstenjak examined the compatibility of the collective agreement with EU public procurement directives, as well as the freedom of establishment and the freedom to provide services. The right to bargain collectively, as a right closely connected to the right to collective action, is a fundamental right in the EU legal order[130] and the right to negotiate and conclude collective agreements is also protected by the Charter of Fundamental Rights.[131] AG Trstenjak took as a point of departure that fundamental freedoms and fundamental rights are of equal ranking; there is no hierarchical relationship between them.[132] From this angle, she called into question the idea that fundamental rights may justify a restriction on the fundamental freedoms through written or unwritten grounds of justification.[133] Instead, she proposed that fundamental freedoms and fundamental rights constitute similarly legitimate objectives which may permit the restriction of the other.[134] Any potential conflict between them must be resolved with the help of the proportionality test.[135] Both restrictions by fundamental rights on fundamental freedoms and by fundamental freedoms on fundamental rights are to be examined.[136] A similar "double proportionality" test was favoured by de Vries.[137] However appealing this approach is, the Court of Justice did not follow its AG in *Commission v. Germany*. The Court held that the fact that the right of collective bargaining is a fundamental right cannot exclude the application of the EU public procurement directives and the provisions on the freedom of estab-

[129] Opinion of AG Trstenjak delivered on 14 April 2010, case C-271/08, *Commission v. Germany*.

[130] *Ibid.*, para 78, see also footnote 31 of the opinion.

[131] Art. 28 of the Charter.

[132] Opinion of AG Trstenjak, *Commission v. Germany*, cit., para. 81.

[133] *Ibid.*, para. 184.

[134] *Ibid.*, para. 188. See also *ibid.*, para. 81 and para. 84.

[135] *Ibid.*, paras 189-192.

[136] L.F.M. Besselink, *The Protection of Fundamental Rights post-Lisbon*, cit., p. 24. See also D. Schiek, L. Oliver, *EU Social and Labour Rights and EU Internal Market Law, Study for the EMPL Committee*, 2015, www.europarl.europa.eu, p. 87 and p. 89.

[137] S.A. de Vries, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon*, cit., p. 92 *et seq.*

lishment and the freedom to provide services. Although the Court referred to the reconciliation of the right to collective bargaining and fundamental freedoms, as implemented by secondary law, it concentrated on the compatibility of the collective agreement with secondary legislation and found against Germany.[138]

As several authors suggest, the Court of Justice should give fundamental rights the status of a free-standing exception to the fundamental freedoms in addition to the explicit exceptions set out in the TFEU and the justifications elaborated in the case law of the Court.[139] I have already pointed out that the *a priori* hierarchy in favour of the fundamental freedoms is rather a formal rhetorical device, counterbalanced by the substantive assessment through the proportionality test, and therefore it is not necessary. Some authors suggest that the examination of the fundamental human rights in the light of the economic freedoms is a necessary step, since the Court of Justice can assert jurisdiction only if the economic freedoms apply.[140] Of course, to assert jurisdiction, the Court has to examine first whether the case falls within the ambit of EU law. However, after having ascertained that the case falls under the scope of application of EU law, the Court could treat fundamental freedoms and fundamental rights as equal. Furthermore, concepts like public policy and general interest are used usually in human rights adjudication to justify a restriction of human rights.[141] This is turned round in the case law of the Court of Justice: fundamental rights are themselves considered as public policy or overriding reason in the general interest.

In my view, it is not free from concerns that the Court of Justice favours a vision of human rights in which they are considered preponderantly as an instrument to promote public interest. In most cases, the reference to a public interest criterion could be explained by the facts of the case. It is clear that human rights do not serve individual interests exclusively. However, it is equally true that human rights do not exclusively protect the public interest. If we look through the above cases decided by the Court of Justice and the US Supreme Court, we have to affirm that sometimes the extent to which fundamental rights served a general public good is questionable. In *Omega*, public policy might have defended human dignity, but did not contribute to the interests of service providers and those wishing to take part in the game. The same holds for those obsessed with riddles in *Familiapress*. Although the importance of environmental protection cannot be denied, the action of the environmental organisation in *Schmidberger* breached not only the interests of transport companies, but probably confused the weekend plans of thousands of weekend passengers. In *Prune Yard*,

[138] *Commission v. Germany* [GC], cit., para. 44.

[139] J. Morijn, *Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution*, in *European Law Journal*, 2006, p. 39.

[140] V. Skouris, *Fundamental Rights and Fundamental Freedoms*, cit., p. 237.

[141] J. Morijn, *Conflicts between Fundamental Rights or Conflicting Fundamental Rights Vocabularies?*, cit., p. 613.

where the US Supreme Court recalled that property rights may be restricted by regulation in the common interest,[142] the use of the property by the demonstrators served neither the interests of the mall owner nor those of retailers and customers.[143] If the latter opt to move to another shopping centre in another State, this causes a loss to state revenues which could have been used for public services.[144] It is not easy to outline the contours of "public interest". Undoubtedly, public interest may not be defined as "everyone's interest", but sometimes it seems questionable whether fundamental rights always fit into the public interest concept of the courts. In addition, the restriction of fundamental rights based on economic considerations is not necessarily limited to a better enforcement of public interest. In *Viking* and *Laval*, the right to collective action was restricted in favour of the economic interests of companies which intended to rely on the freedom of establishment and the free movement of services. The interests of employers were favoured against those of the group of local workers.

Fundamental rights are not necessarily linked to the protection of public interest and could have been stripped off this "public interest vesture". This would confirm that fundamental rights could be treated as independent, self-standing reasons and should be balanced in such a quality against the fundamental freedoms. The Court of Justice acknowledged that private persons may rely on the exceptions of public policy, public security and public health that are open to the Member States. However, individuals pursue their self-interest, and not the sometimes quite abstract public interest. This holds also for fundamental rights. They are in principle linked to individuals. Human rights equally serve the self-realisation of the individuals or groups and the pursuit of their interests. The protection of public policy and the overriding reasons usually serve the protection of some collective interests instead of individual ones which are in the primary focus of human rights protection.[145] In *Schmidberger*, AG Jacobs contrasted restrictions on the fundamental freedoms on the grounds of broader general interest objectives and restrictions based on the protection of the fundamental rights of individuals. This would imply an "individualised" human rights concept.[146] Yet, later in the same opinion, AG Jacobs considered the protection of fundamental rights as a legitimate public interest objective.[147] In *Schmidberger* and *Dynamic Medien*, the Court of Justice referred to fundamental rights as a "legitimate interest" which may reflect an individualised view of fundamental rights. However, as we have seen, these references were juxtaposed with contrary statements where fundamental rights were considered

[142] US Supreme Court, *PruneYard Shopping Center v. Robins*, cit., p. 85.

[143] R.A. EPSTEIN, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robins*, in *University of Chicago Law Review*, 1997, p. 34.

[144] *Ibid.*, p. 44.

[145] J. MORIJN, *Balancing Fundamental Rights and Common Market Freedoms in Union Law*, cit., p. 39.

[146] Opinion of AG Jacobs delivered on 11 July 2002, case C-112/00, *Schmidberger*, para. 89.

[147] *Ibid.*, para. 103.

purely as public interest. As both fundamental freedoms and fundamental rights aim at promoting individual interests and private autonomy, the former on the market, while the latter more broadly, they could be treated on the same footing.

The consequent enforcement of the equality of fundamental freedoms and fundamental rights also implies that the balancing between the two should take respective restrictions into account, as was examined by the Court of Justice in *Schmidberger* and proposed by AG Trstenjak in *Commission v. Germany*. Both fundamental rights and fundamental freedoms constitute mutual exceptions. Fundamental rights may justify a restriction to the fundamental freedoms as fundamental freedoms may be a reason for justifying a restriction to a fundamental right. The economic orientation of the integration or the ascertainment of whether the case falls under the scope of EU law does not foreclose the examination of the restrictions on the fundamental rights caused by the exercise of economic freedoms beyond the impact exercised of the fundamental freedoms on the fundamental rights.

Such a refinement is not without practical implications, although most often the outcome of the cases would not differ from the current practice. This is because the Court of Justice would continue to apply the open-textured proportionality test, though in a modified form. The focus of the Court should be, however, changed. This would require the examination of the proportionality of restrictions not only to the fundamental freedoms, but also to the fundamental rights. A further practical consequence concerns the burden of proof. The burden of proof that any restriction to a fundamental freedom is proportionate falls at the present on the party relying on the fundamental right. By the change in the approach of the Court of Justice, the burden of proof would be shared between the parties: one demonstrating the proportionality of the restriction to the fundamental freedom, while the other that of the restriction to the fundamental right.

In summary, I find that the protection of fundamental rights should be given an equal rank with fundamental freedoms, even formally, and this should be treated as an independent, legitimate objective. In my opinion, this would not impede the Court of Justice from first ascertaining that the case falls under the scope of application of EU law. After this first preliminary step, fundamental freedoms and fundamental rights could be balanced as equal with the help of the proportionality test. In applying the proportionality test, restrictions on both fundamental freedoms and fundamental rights should be examined. The same approach could be used in the event of the conflict between fundamental freedoms and social rights. Moreover, we will see below that, in addition to the judicial method, the American example offers another path, namely the legislative balance of fundamental rights and the right to collective action.

VI.2. Legislation for solving conflicts of rights

The judicial way is the most common solution for deciding conflicts between rights protecting economic activity and fundamental rights. Law and legal techniques, such as

the tiered balancing or proportionality, serve as a formal framework for legal reasoning as well as a means of justifying a decision and make it more convincing for the parties concerned and the public. In my view, the proportionality test applied by the Court of Justice is an open-ended test which rarely predetermines the outcome of the case in conflict of rights issues. The substantive assessment of the case and the balancing through the proportionality test is decisive, but the court enjoys a large room to manoeuvre in deciding the outcome of the case.

Nevertheless, there is also another path, namely the legislative intervention in settling such conflicts. Judicial decisions give guidance in a given case, but usually they leave certain room for divergent interpretations in future. Therefore, it seems that legislation can provide more predictability for any potential dispute on clash of rights. The US experience on solving rights conflicts by legislation may provide lessons for the EU.

Divergent interpretations by state courts after *PruneYard*[148] raised the idea of the need for legislation to better accommodate the right of access of those who wish to express their political views in a shopping mall and the mall owners.[149] No legislation has been, however, adopted in this field.

Another instance is balancing the rights of labour force and business owners. Here, the Congress intervened by the adoption of the National Labor Relations Act of 1935 (NLRA), also known as the Wagner Act.[150] The NLRA recognises, among others, the workers' right "to self-organisation, to form, join, or assist labor organisations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection". In addition, the NLRA set up the National Labor Relations Board to address industrial disputes concerning industrial actions. Thus, federal legislation substituted to a large extent the judicial assessment of workers' rights and the freedom of market action. Litigation concerning social rights gave rise to legislation also in several other fields in the US.[151] However, the adoption of the NLRA has not even exempted the judiciary from addressing cases where the workers' and employers' rights got into conflict.[152]

[148] W. BURNETT HARVEY, *Private Restraint of Expressive Freedom: A Post-PruneYard Assessment*, in *Boston University Law Review*, 1989, p. 929.

[149] Supreme Court of Connecticut, judgment of 17 January 1984, *Cologne v. Westfarms Associates*; C.J. BERGER, PruneYard *Revisited: Political Activity on Private Lands*, in *New York University Law Review*, 1991, p. 670 *et seq.*

[150] US Congress, National Labor Relations Act of 1935, 5 July 1935, paras 151–169.

[151] J. KING, *American Exceptionalism over Social Rights*, in L. LAZARUS, C. MCCRUDDEN, N. BOWLES (eds), *Reasoning Rights*, Oxford: Hart, 2014, p. 368.

[152] See in particular US Supreme Court: judgment of 27 February 1939, *National Labor Relations Board v. Fansteel Metallurgical Corp.*; judgment of 30 April 1956, *Labor Board v. Babcock & Wilcox Co.*; judgment of 20 April 1988, *Edward J. DeBartolo Corp., v. Florida Gulf Coast Building and Construction Trades Council and National Labor Relations Board*; judgment of 27 January 1992, *Lechmere, Inc. v. National Labor Relations Board*.

Even the application of the NLRA has required judicial interpretation and the same holds for issues falling outside of the scope of application of the NLRA.

The conflict between fundamental freedoms and fundamental rights could be settled in principle by the way of legislation in the EU following the American example. In certain fields, the EU adopted some provisions in order to solve conflicts between various rights, but these legal sources do not concern specifically the conflict between the fundamental freedoms and fundamental rights.[153] Legislation could, to a certain extent, refine the relationship between the right to collective action and the rights of business owners in the US. Fabbrini proposed that a similar path should be followed by the EU.[154] However, as the failure of the Monti II Regulation shows, there is little chance to find a politically acceptable solution.[155] The Proposal for the Monti II Regulation laid down the mutual respect for the freedom of establishment, the freedom to provide services and the right to collective action based on the proportionality principle. Nevertheless, some of the Member States blocked the legislative procedure under the subsidiarity control mechanism.[156] The reaction of the Member States clearly indicated the lack of support for the legislative solution.[157] Moreover, it is highly questionable whether such conflicts could be resolved in a pre-defined abstract framework. Even in the event of adopting such a legislative act, the Court of Justice and national courts would preserve its balancing function between the fundamental freedoms and fundamental rights.

Nevertheless, it is noteworthy that the Monti II Regulation did not treat fundamental freedoms and social rights in a hierarchical relationship: they were considered as equal.[158] This implies that the freedom of establishment and freedom to provide services may be restricted in the interest of the protection of fundamental rights and, conversely, the exercise of the fundamental freedoms may be restricted on

[153] Art. 4, para. 2, of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; L.F.M. BESSELINK, *The Protection of Fundamental Rights post-Lisbon*, cit., p. 22; E. BRIBOSIA, I. RORIVE, *In Search of a Balance between the Right to Equality and other Fundamental Rights*, Luxembourg: Publication Office of the European Union, 2010; C. LADENBURGER, *European Union Institutional Report*, cit., p. 192 *et seq.*

[154] F. FABBRINI, *Fundamental Rights*, cit., p. 185.

[155] Commission Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final; A. VELDMAN, *The Protection of the Fundamental Rights to Strike within the Context of the European Internal Market*, cit., p. 117; S. WEATHERHILL, *From Economic Rights to Fundamental Rights*, in S.A. DE VRIES, U. BERNITZ, S. WEATHERILL (eds), *The Protection of Fundamental Rights*, cit., p. 34 *et seq.*

[156] F. FABBRINI, K. GRANAT, *"Yellow Card, but No Foul": The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike*, in *Common Market Law Review*, 2013, p. 115.

[157] F. FABBRINI, *Fundamental Rights in Europe*, cit., p. 189.

[158] Communication COM(2012) 130 final of 21 March 2013 from the Commission, *Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services*, p. 12.

the grounds of the fundamental rights. According to Art. 2 of the Proposal, "the exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms". The application of this principle would have rested with national courts, which should decide along the proportionality test on a case-by-case basis. The right to strike did not gain recognition because it serves an overriding reason in the public interests, but in itself. From this perspective, it corresponds to the approach of the NLRA. The Proposal puts forward the double proportionality test recommended by AG Trstenjak in *Commission v. Germany*: any restriction by a fundamental right to a fundamental freedom must comply with the proportionality test and *vice versa*.[159]

Legislation may demonstrate a commitment to solve the problem of collisions and it may promote legal certainty. Legislation can mark the boundaries of the permitted exercise of rights and sanction non-compliance. However, legislation cannot be considered as an omnipotent panacea. What legislation can do is to lay down certain guiding principles, but courts will continue to have the final word in settling conflict of rights cases. Legislation such as the NLRA can cover only a specific type of conflicts (for example, between employers and employees) without being a solution for other types of collisions between rights. The reconciliation of rights through the proportionality or any other test rests with the courts in any concrete case. The failure of the legislative proposal concerning the right to take collective action and the fundamental freedoms in the EU indicates the lack of political consensus and the delegation of settling conflicts between the two to the Court of Justice and national courts. Such a delegation also means that judicial reasoning should apply the proportionality test in a convincing and predictable way in order to ensure the legitimacy of the judicial balancing and the Court of Justice itself.

VII. Conclusions

The above analysis proves that the challenges faced by the Court of Justice in the case of conflicts between fundamental freedoms and fundamental rights are not peculiar. The practice of the US Supreme Court shows up also similar features. Most of the concerns could be alleviated by two ways: first, the judicial reasoning of the Court of Justice could be refined and, second, legislation may increase predictability.

Regarding the judicial reasoning of the Court of Justice, as Gerards notes, the meaning and position of fundamental rights in the Court case law is far from clear.[160] The relation between fundamental freedoms and fundamental rights and in particular

[159] *Ibid.*, p. 13.

[160] J.H. Gerards, *Fundamental Rights and Other Interests: Should It Really Make a Difference?*, in E. Brems (ed.), *Conflicts between Fundamental Rights*, cit., p. 671 *et seq.*

between fundamental freedoms and social rights is vague. The EU has traditionally followed an economic objective and fundamental rights have been interpreted under the lens of economic integration. More recently, the inclusion of objectives other than economic ones in the Treaties (such as social policy objectives) might change this attitude. Although EU integration may be driven, even now, predominantly by economic purposes, EU law also has to accommodate non-economic values. This requires retuning the treatment of fundamental freedoms and fundamental rights in the judicial reasoning of the Court of Justice.

Neither primary nor secondary EU law stipulates a hierarchy between fundamental freedoms and fundamental rights. The case law of the Court of Justice, however, gives an *a priori* hierarchical priority to fundamental freedoms. Nonetheless, this seems a formal rhetorical device in order to enable the application of the traditional scheme of examination of the Court used in internal market law cases. One could attribute a symbolic value to this, showing that the EU keeps its traditional economic orientation. This does not change the fact, however, that the balancing between the two in the judicial practice of the Court through the proportionality test allows both to prevail in a given case. This is not different from the case law of the US Supreme Court on the collision between fundamental rights protecting economic activity and other rights. The Court of Justice should give even formally equal rank to fundamental freedoms and fundamental rights. There is no need to treat fundamental rights as part of the public policy exception or an overriding reason in the public interest. Fundamental rights should be granted an independent status in EU internal market law.

In solving conflicts by judicial reasoning, the Court of Justice and the US Supreme Court often faced similar situations and the outcome of the cases was also similar. This might seem surprising, since they apply different methods to settle conflicts between various rights: the proportionality test and tiered scrutiny respectively. The Court of Justice applies the proportionality principle in some variations. In the practice of the US Supreme Court, no uniform test is applied to assess a restriction of a right protected by the Amendments of the US Constitution or by statutes. Instead, the US Supreme Court developed several tests. In the cases concerning conflicts between fundamental rights protecting economic activity and other rights we do not see the consequent application of any of the tests. This seems a pragmatic approach which sometimes cares less about the justificatory force of the decisions. Both the EU and the US constitutional adjudication are based on general and very flexible tests which are appropriate to justify almost any decision. This leads us to establish that the adjudication of both the Court of Justice and the US Supreme Court are characterised by vacillating choices between fundamental rights protecting economic activity (using the EU law terminology "fundamental freedoms") and other rights.

Resolving conflicts between fundamental freedoms and fundamental rights in the EU takes place by the Court of Justice. The US example offers an additional means for

solving conflicts of rights: the legislative way. For the conflict between rights protecting economic activity and the right to collective action, the NLRA was enacted in the US. In the EU, an attempt was made to provide a general framework of the exercise of the right to collective action and the freedom of establishment and the freedom to provide services, but this has failed. Although legislation promotes predictability in solving conflict between various rights, the legislator cannot provide a pre-prepared solution for all future cases; therefore judicial decisions are not dispensable even in the case of legislative conflict solving. This underlines the significance of the necessity of the refinement of the approach of the Court of Justice.

Articles

Special Section – Europe and "Crisis" (First Part)

Introduction

Europe finds itself in a problematic, unsettled condition of standing in-between crisis and post-crisis.[1] This is so for at least one reason – Europe's crisis predicament produces transformations in both governance and law at once that alter key institutional and constitutional structures to the point that any possible "post-crisis condition" to come will embody the traces of crisis. These transformation processes include configurations that devalue law or, another variation on the theme of crisis through law, make (governance through) law over-powerful.

Law's value is diminished whenever elementary notions of (European) law are surprisingly yet unequivocally set aside, as it has been the case of the General Court's avoiding engagement with the issue of the potential relevance of the protection of fundamental rights in a highly contentious dispute in relation to the EU-Turkey Statement of 18 March 2016 as challenged before the Court – the context is the so called "refugee crisis".[2] And the law is made over-powerful whenever it becomes instrumental to centralized economization, as in the case of the superimposition of the Economic and Monetary Union Memoranda of Understanding on the "debtor countries".[3]

This co-existence of processes that make law at once weak and over-powerful may sound counterintuitive. And yet, the functional instrumentalisation of law in Europe works in this way – it defies logic (the logic of non-contradiction) and it is complex. One

[1] See M. Dawson, H. Enderlein, Ch. Joerges (eds), *Beyond Crisis. The Governance of Europe's Economic, Political and Legal Transformation*, Oxford: Oxford University Press, 2015; L. Niglia, *Eclipse of the Constitution. Europe Nouveau Siècle*, in *European Law Journal*, 2016, p. 132 *et seq*.

[2] See E. Cannizzaro, *Denialism as the Supreme Expression of Realism. A Quick Comment on NF v. European Council*, in *European Papers*, Vol. 2, No 1, 2017, www.europeanpapers.eu, p. 251-*et seq*.; and General Court, order of 28 February 2017, case T-192/16, *NF v. European Council*. See now Court of Justice, order of 12 September 2018, joined cases C-208/17 P to C-210/17 P, *NF and Others v. European Council* (appeal dismissed as "manifestly inadmissible", pursuant to Art. 181 of the Rules of Procedure of the Court of Justice, namely: "by their arguments, the appellants merely express their disagreement with the General Court's assessment of the facts, while requesting that those facts be assessed again, without claiming or establishing that the General Court's assessment of the facts is manifestly inaccurate, which is inadmissible in an appeal").

[3] See C. Joerges, *Comments on the Draft Treaty on the Democratisation of the Governance of the Euro Area*, in European Papers 2018, Vol. 1, No 3, www.europeanpapers.eu, p. 75 *et seq*.; L. Niglia, *The New Transformation of Europe*, in *American Journal of Comparative Law*, forthcoming.

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needs to become fully aware of this condition of the law's discourse, in particular when at work are crisis developments that go as far as threatening to undo the "new legal order" cathedral, as some commentators hold.[4] Namely: Europe and its nations and collectivities are facing economic and monetary challenges, migration and security risks as well as a variety of forms of nationalism and of "populism" that the insiders conceptualize in terms of "crisis". Each area conveys certain declinations of "crisis" (e.g. economic downturn and austerity measures, or, migration and border control) and idiosyncratic ways in which the law is involved in crisis configurations (e.g. memoranda of understanding and the "strict conditionality" requirement as legalised by the European Council Decision of 25 March 2011 through amending Art. 136 TFEU; EU law in relation to nation-state surveillance of borders, including judicial review). Law is intertwined with "crisis talk" – some label European law "European crisis law". Correspondingly, Europe continues being caught in a state of multiple crises that some identify as defining a permanent critical condition, no longer necessarily leading to a better kind of integration as presumably it has been the case in the past. Law, in this view, plays a key role as structural variable of, and in, crisis configurations. To say it otherwise, crisis is revealing itself as a way to transform Europe once more – constitutionally, politically, socially at once – but no longer according to optimistic predictions of ever greater integration. Today "crisis" is frequently articulated as synonymous with "disintegration".

This Special Section proposes four readings of "crisis" through the law across areas (financial and debt, migration, nationalism and "populism") towards possible ways of crisis resolution. There is need for looking beyond the specifics of each crisis area and understand better the interdependences that lead to crisis through law and the contradictions between, on the one hand, ir-resolution and, on the other hand, potential for resolution.[5]

The Special Section starts with an *Article* by José Luis Villacañas. In agreement with the Editors, the *Article* is published in Spanish, a necessary exception to the linguistic regime of the *e-Journal*. The examples of "crisis" that emerge from this paper are the financial and debt crisis in relation to the EMU governance, and "populism". Villacañas' *Article* is a lucid and rather un-frequent, perhaps even unique, denunciation of the failures of various theories about integration, and about crisis, to deliver in relation to the apparently "external" aspect (to the law) of *the complex relationships between socialization and governance* (crisis as disassociation between socialization and governance). Public debt governance in the EU, it is submitted, hampers the possibility of the project

[4] See e.g. T. SPIJKERBOER, *Minimalist Reflection on Europe, Refugees and Law*, in *European Papers*, 2016, Vol. 1, No 2, www.europeanpapers.eu, p. 533 *et seq*. ("the widespread perception is that Europe has a refugee crisis on its hands, which potentially threatens the European project as a whole").

[5] On this approach see L. NIGLIA, *The Struggle for European Private Law. A Critique of Codification*, Oxford: Hart, 2015. On interdependences see also below and, e.g., D. INNENARITY, *Democracy in Europe. A Political Philosophy of the EU*, London: Palgrave Macmillan, 2018; C. JOERGES, *Comments on the Draft Treaty*, cit.; L. NIGLIA, *The New Transformation*, cit.

of Europe's federalization. The Section continues with a reflection on crisis (specifically, the financial and debt, and the migration, "crises") through *pluralism* by Agustín Menéndez. Here pluralism emerges as being in itself contradictory and in need to be re-understood and re-mapped so as to capture better the state of integration through crisis. Menéndez refers to the need to take seriously law. He argues that, as we have reached the point of Europe's multiple crises resulting in a 'structural crisis of law', there is need to stay away from "purely formal conceptions of law" but nevertheless "to keep the analytical coherence of the concept of law, in the footsteps of classical legal positivism" towards a way ahead of the crisis through rethinking European constitutional law itself. Antonio Lopez's *Article* focuses on crises (financial and debt crisis; crisis through nationalism including within nation-state – specifically, including the so called secession crisis in Spain; and on crisis through "populism") through an analysis of the potential of *constitutionalism* for crisis resolution, as part of a broader debate in which others adopt distinct approaches to the topic of independentism and populism;[6] with a view to do justice to the variety of conflicting positions in a rather contentious debate, Part II of this Special Section will include a comment on Lopez's *Article*. A fourth essay by Leone Niglia *inter alia* considers crisis as modern phenomenon and looks at the role of certain rising political conceptions of *solidarity* in crisis resolution (in relation to the financial and debt crisis and the EU public debt governance), unconcerned with issues of equality among the EU Member States and as such dismissive of understandings of solidarity as legal basis for forms of "alternative conditionality". Such political conceptions of solidarity are critically scrutinized as divisively and adversely impacting on the prospects for crisis resolution through federalization; it is argued instead that federalization in turn needs to be based on conceptions of solidarity and of equality made mutually supportive.

The four *Articles* converge in their pointing to the problematic of the need for recovering the law from the crisis – in arguing that law is resource for crisis resolution. Out of their combined focus on European and comparative constitutionalism, and philosophy of

[6] Contrast Lopez's *Article* in Part II of this Special Section with the following two positions among the many that one can find in the debate: J.L. VILLACAÑAS, *Cataluña: luchar por la verdad*, in *El Mundo*, 19 October 2017, www.elmundo.es: "Los últimos acontecimientos han revelado que los dos actores principales de este conflicto han confiado solo en una última ratio: la fuerza. Una fuerza diferente, pero fuerza. El Gobierno, en la potencia mecánica de la ley; los líderes independentistas, en la fuerza compacta de la comunidad orgánica en la calle. Por eso, ambos actores han impreso a este proceso un aspecto bárbaro, que amenaza los aspectos civilizatorios de nuestras sociedades. Ninguna de esas dos fuerzas es decisoria. Es como si cada uno pretendiera arreglar un jarrón roto con la mitad de las piezas.Por eso no podemos demonizar a ese 40% de catalanes que quieren asegurar su permanencia como pueblo histórico. España debe ayudarles frente a las novedades que la Historia trae consigo". E. CANNIZZARO, *The Thousand Cataluñas of Europe*, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, at p. 463 ("The question thus arises as to whether in European law this monolithic representation of statehood can be attenuated in favour of institutional solutions that reflect more faithfully the pluralistic nature of the modern forms of State").

law,[7] it emerges that law rescued from the corrosive impact of crisis through the four perspectives of pluralism, socialization, constitutionalism and solidarity can help transcend, and contribute towards resolving, the current crisis condition. I surmise that no institutional resolution[8] of the crisis *problématique* will be possible nor credible until these deep issues regarding the role of law in crisis are seriously and openly addressed.

Leone Niglia*

[7] On aspects of (European) comparative constitutionalism see L. NIGLIA, *Market Integration*, in *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford: Oxford University Press, 2018-2019.

[8] See e.g. the Draft Treaty on the Democratization of the Governance of the Euro: S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de démocratisation de l'Europe* , Paris: Seuil, 2017, now commented in this Journal's Special Section, edited by Ségolène Barbou des Places, *Democratising the Euro Area Through a Treaty?*, in *European Papers*, Vol. 3, No 1, 2018, www.europeanpapers.eu.

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ARTICLES
SPECIAL SECTION – EUROPE AND "CRISIS" (FIRST PART)

EUROPA: DE HABERMAS A KANT PASANDO POR EL POPULISMO

JOSÉ LUIS VILLACAÑAS BERLANGA*

TABLE OF CONTENTS: I. La previsión de Habermas. – II. La estabilidad del mundo de la vida como condición. – III. Foucault y el neoliberalismo como solución. – IV. La previsión kantiana. – V. La imposibilidad de un escenario schmittiano.

ABSTRACT: In the framework of his theory of social evolution, Habermas systemically analysed the legitimacy of State-regulated capitalism, in a dual approach that addressed both its objective material dimension and the subjectivity of the psychic individuals that compose it, showing that the experience of the crisis (accentuated after May 1968) was produced by the contradiction of both spheres. Foucault's analysis of neoliberalism, filtered by the Habermasian theory, allow us to affirm that it represented a civilizatory revolution, which established a new organisational principle of the social system, capable of overcoming the crisis of late capitalism's legitimacy, modifying both its objective limits (financialization) and the subjective dimension of motivation (*homo œconomicus*). However, after 2008 we can say that neoliberalism, whose model is pyramidal and undermines the foundations of the welfare state, has not succeeded it its task of naturalising the crisis and avoiding democracy. It has nonetheless debilitated the public sphere: in the European context, a psychic material of individuals socialised in neoliberalism express their existential restlessness in an expressive and unreflective way, far from the ideal of communicative discursive ethics, through populism. Those concerns are partly fuelled by the problem of public debt, which is at the centre of the mediation between the subjective life and the objective political economy. The imbalances it causes (about which Kant already warned us) generates anti-federal impulses, in a low intensity Schmittianism. To redirect those impulses towards a peaceful federation of European states (the Kantian project) is the political task of the present.

KEYWORDS: populism – neoliberalism – European Union – Habermas – Foucault – Kant.

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I. La previsión de Habermas

Cuando hacia 1973 Habermas quería iniciar una "teoría de la evolución social"[1] como base de la teoría de la sociedad, se concentró en los problemas de legitimidad del capitalismo tardío. En su proyecto teórico general, esos problemas podrían encontrar solución en el marco de una teoría de la acción comunicativa. Para ello partió de un concepto de crisis[2] referida al "capitalismo regulado por el Estado" que elaboró desde la teoría de sistemas: crisis es la experiencia de un sistema cuando su posibilidad de superar problemas es menor que las exigencias de autoconservación. Por eso dijo que "las crisis son perturbaciones que atacan la integración sistémica".[3] Habermas era consciente de que esto le obligaba a aceptar toda la terminología de la teoría de sistemas y distinguir entre subestructuras fundamentales que implicaban autoconservación y otras que permiten variabilidad. Sin embargo, la teoría de sistemas le parecía parcial. Él todavía sentía la vieja necesidad de atender sujeto y objeto y consideró que se podría hablar de crisis real sólo cuando a este proceso objetivo sistémico se añadiese la experiencia *subjetiva*. Cuando "los miembros de la sociedad experimentan los cambios de estructura como críticos para el patrimonio sistémico y sienten amenazada su identidad social podemos hablar de crisis".[4] En suma, crisis era una perturbación de la racionalidad objetiva y subjetiva a la vez, algo parecido a lo que Antonio Gramsci podía llamar crisis orgánica.[5] En la crisis, los problemas de estructura deben *experimentarse* como problemas de integración social. Así debe entrar en escena el horizonte anómico. No sólo se desintegran estructuras sociales, sino psiquismos. Al no aceptar un mero fenómeno de conciencia, ni una mera objetividad observable, Habermas intentó una teoría de la *experiencia de la crisis* que fuera diferente de la ideología de la crisis. Como toda experiencia debía afectar al sujeto y al objeto. El sistema debía percibirse como crisis de autogobierno y la opinión pública debía percibirlo como integración social amenazada. Así se captaba el vínculo frágil entre integración sistémica e integración social, racionalidad objetiva y subjetiva, capitalismo y democracia, institución y mundo de la vida, facticidad y validez.

Como se recordará, la aproximación de Habermas tenía un malentendido. Para él, la integración social se realizaba en instituciones con sujetos hablantes y actuantes, y por eso argumentaba que estos humanos conformaban aspectos del mundo de vida estructurados por símbolos. Así Habermas organizaba un desplazamiento que iba des-

[1] Para una introducción a esta problemática aparentemente weberiana cf. J.L. Villacañas, *Racionalización y evolución: teoría e historia de la modernidad en la obra de Habermas*, en *Daimon: Revista de Filosofía*, 1989, p. 177 *et seq.*

[2] Para otras teorías de la crisis, cf. J.L Villacañas, *Crisis: ensayo de definición*, en *Vínculos de Historia*, 2013, p. 121 *et seq.*

[3] J. Habermas, *Problemas de legitimación en el capitalismo tardío*, Madrid: Cátedra, 1999, p. 21.

[4] *Ibid.*, p. 23.

[5] A. Gramsci, *Quaderni dal carcere*, Torino: Einaudi Editore, 1975. Gramsci habla de crisis orgánica por ejemplo en *Quaderno 13*, párr. 23.

de la estructura sistémica, entregada al autogobierno y la adaptación, al mundo de la vida con sus valores e instituciones, entregada a la integración. Un elemento limitaba al otro: la integración sistémica es un límite de la integración social y establece de forma coactiva funciones de dependencia; la integración social es un dato para la integración sistémica, que asume sus coacciones pero no entra en analizar su valor normativo, algo cuya reactivación corresponde en exclusiva al mundo de la vida. Ante la presión del "imperialismo conceptual" de Luhmann, que pretendía absolutizar el aspecto de autogobierno, incluyendo como un medio de él las "pretensiones de validez constitutivas para la reproducción cultural de la vida", al mismo nivel que el dinero, poder e influencia, Habermas se entregó a este dualismo que en el fondo establecía conexiones entre estructuras normativas y condiciones materiales, lo que equivalía al mundo de la vida y su soporte sistémico. Este asunto formaba parte de la teoría de la evolución social porque desde la conexión de estos dos aspectos podían desprenderse los límites que permitían apreciar la continuidad histórica de un sistema social o su relevo. Por eso, para Habermas, era necesario analizar el problema en el contexto de su "sentido histórico". Su función era mostrar los grados de variabilidad de los patrones de normalidad que una sociedad podía soportar sin perder su patrimonio histórico.

Nadie puede ignorar el valor sistemático de esta aproximación, y la invoco porque permite plantear el problema de nuestro presente con claridad: ¿Cuándo estamos en un margen de variación normal, de tal modo que podemos vernos dentro de una formación de la evolución social históricamente asentada?; ¿o cuándo hemos dejado escapar nuestro patrimonio de identidad y ya hemos entrado en otro momento evolutivo? Por supuesto, Habermas estaba interesado en una regulación normativa de la evolución, algo que nosotros no tenemos claro. Pero podemos seguirlo en un trecho. La posibilidad de dilucidar aquellas preguntas pasaba por comprobar las relaciones entre el subsistema de estructuras normativas, los sistemas de estatus, las formas de vida culturales, que marcan la identidad y la integración, con las instituciones políticas y las económicas que marcan el gobierno.[6] En suma, se trataba de hallar criterios de variación del cambio estructural de tal manera que nos permitieran declarar la identidad o no de una formación social. Para ello se usaba el paradigma marxista de principio de organización, que marcaba los límites de los principios sistémicos, autogubernativos y que influía de modo no completamente claro en los arsenales normativos. Así Habermas no solo reconducía a sus nuevos planteamientos sus distinciones clásicas entre teoría y praxis, sino también sus análisis marxistas. Pero a diferencia del marxismo, que establecía una conexión fuerte entre sistema económico y sistema ideológico, Habermas defendía una autonomía de esferas, de tal modo que "la variación de los patrones de normalidad está limitada [no por la infraestructura productiva sino] por una lógica del desarrollo de las estructuras de la imagen del mundo, que no se encuentra a dispo-

[6] J. HABERMAS, *Problemas de legitimación*, cit., p. 29.

sición de los imperativos de incremento de poder".[7] De este modo, mantenía de forma clara la dualidad entre sociedad civil, por un lado, y poder del Estado ampliado con los poderes de regulación económica propios del capitalismo de Estado, por otro.

En realidad, con ecos de sus viejas aproximaciones a Freud, mostró de forma clara que esas estructuras de imagen del mundo estaban en una relación paradójica. Habermas desplegó esa paradoja con un argumento que mostraba la diferencia entre la apropiación de la naturaleza exterior mediante la producción y la apropiación de la naturaleza interior, mediante estructuras simbólicas. Mientras que la primera, con la racionalización objetiva, disminuye la contingencia de la naturaleza exterior, la segunda presenta una "individualización creciente" de la naturaleza interior, que "inmuniza a los individuos socializados contra las decisiones del centro de autogobierno diferenciado".[8] Esto es: Habermas mostró la paradoja del sistema social (relación entre sistema de gobierno y sistema de integración) bajo condiciones de capitalismo avanzado regulado por el Estado: cuanto más se domina genéricamente la naturaleza exterior, más exigencias de individuación plantea la naturaleza interior. Habermas pensaba, de forma coherente, que sólo una individualización psíquica atravesada por la cuestión normativa, anclada en un mundo de vida intersubjetivo, permitiría desplegar al individuo una relación adecuada con el autogobierno, de tal manera que no hiciera estallar la paradoja en un brote anómico. Las exigencias de individuación creciente podrían ser atendidas en los sistemas de integración dependientes del mundo de la vida, de tal manera que no se dirigieran contra los sistemas de gobierno. De este modo, el mundo de la vida, reproduciéndose, no nos llevaría a una crisis evolutiva, sino que estaría en condiciones de regular sus relaciones con el sistema de gobierno, sin romper ni cuestionar su legitimidad. En suma: los psiquismos eran a la vez ambiente y elementos del sistema. Si no se gobiernan con su manera apropiada, mediante renovación del mundo de la vida, entonces amenazarían el sistema desde dentro desafiando al autogobierno. Si dejamos la sociedad solo como producción, autogobierno y poder, entonces nada nos permitía arreglar esa capacidad de inmunizarse que tienen los individuos frente al poder. Como vemos, el libro de 1973 era una respuesta al fenómeno que había estallado en 1968 en París.

II. La estabilidad del mundo de la vida como condición

Habermas mismo fue el que se concentró en la cuestión de la inmunidad y fue él también quien, en su teoría evolutiva, propuso que tras el capitalismo de organización, debía pensarse el momento poscapitalista y posmoderno.[9] De hecho, toda su aspiración era "explorar las posibilidades de una sociedad posmoderna" como atravesada por un principio de organización nuevo. Sin embargo, todo su sistema se basaba en una dife-

[7] *Ibid.*, p. 38.
[8] *Ibidem*.
[9] *Ibid.*, p. 44.

rencia entre el aprendizaje no reflexivo y el aprendizaje reflexivo. Su voluntad era enlazar claramente mundo de la vida prerreflexivo, aprendizaje reflexivo y acción comunicativa capaz de integrar los elementos discursivos, expresivos y volitivos. Aquí se dejaba ver el discípulo de Husserl que mostraba cómo el mundo de la vida debía tornarse reflexivo y someterse a las exigencias de normatividad universal capaz de autorregularlo. Así se forjaría un sujeto capaz de no caer en la paradoja de un dominio interior de consecuencias anómicas. Pero esto era solo un lado de la cuestión. La aspiración de Habermas era apreciar si el capitalismo había pasado a una "formación social poscapitalista que dejó atrás la crisis como la forma en que transcurre el crecimiento económico".[10] Esto implicaba si el capitalismo tardío podía "emprender una autosuperación por vía evolutiva"[11] de tal manera que superara la presencia de las crisis. Pero si no era así, se trataba de saber si, por el contrario, esta crisis podía generar una acción política dirigida a fines de autopreservación o más bien produciría una disfuncionalización anárquica con alto potencial anómico,[12] como había mostrado mayo del 68. Habermas parecía creer en 1973 que la tendencia a la crisis quizá podría superarse, pero que en todo caso, con crisis o sin crisis, era urgente reelaborar el psiquismo de forma reflexiva y asentada en el mundo de la vida, de tal modo que el individualismo inmunizador no fuera el topo del sistema. Por mucho que el sistema se hubiera protegido el flanco objetivo de la crisis, debía proteger el flanco subjetivo de la crisis.

Para garantizar este juego complejo de instancias se tendrían que mantener ciertos límites relativos a los dos sistemas, que Habermas fijó así: el equilibrio ecológico, el equilibrio antropológico, y el equilibrio internacional. Ahora bien, esos límites eran también límites al crecimiento. Habermas no se planteó el auténtico problema entonces; a saber, si el principio organizativo podría seguir siendo el capitalismo, tras reconocer que el sistema productivo tenía límites insalvables si quería mantener estos equilibrios capaces de evitar una crisis sistémica. Sólo así, superada una amenaza de crisis sistémica, el problema del capitalismo tardío podría centrarse en la paradoja que antes apreciamos: una naturaleza externa controlada que tendía a producir una naturaleza interna amenazante. Por supuesto, la pregunta última, la de si un capitalismo capaz de aceptar límites no estaba ya transitando a otra cosa, no fue planteada. El sometimiento a la regulación del Estado parecía inducir a la creencia de que el capitalismo aceptaría una imposición tan dura. Esta era una ilusión óptica.

Teníamos así en 1973 apuntado el diseño de la nueva época del Antropoceno, aquella que comprendía la necesidad de limitar la huella entrópica tanto en la naturaleza como en el psiquismo, lo que implica limitar el crecimiento. Pero incluso bajo ese escenario, el problema central era que "para [conocer] los límites de saturación de los sis-

[10] *Ibid.*, p. 65.
[11] *Ibid.*, p. 78.
[12] *Ibid.*, p. 79.

temas de personalidad no existe señal unívoca".[13] Esto es: la condición más frágil y difícil de cumplir del escenario habermasiano se alojaba en el sistema psíquico. Los límites de la Tierra eran un factor objetivo para Habermas, por mucho que no tuviera a la vista la producción de un estado ecológico anómico. El Equilibrio internacional parecía una situación estable en 1973. El psiquismo y sus complejas dependencias del mundo de la vida era sin embargo una variable indomable. Fue entonces cuando Habermas expuso su tesis fundamental: "Discierno un límite, sin embargo, en el tipo de socialización mediante el cual los sistemas sociales han engendrado hasta hoy sus *motivaciones* de acción".[14] Esa era la prestación del mundo de vida. Por eso se consideraba necesario y Habermas se entregó a la meritoria tarea de protegerlo y describirlo, en un proceso en el que era acompañado en silencio por Blumenberg, pero con un detalle central innovador que Habermas no percibió. Blumenberg siempre creyó que los elementos de la técnica intervienen en las alteraciones del mundo de la vida y que por tanto sufren sacudidas, ajustes y transformaciones en las que debería implicarse una fenomenología.

Resumamos: la crisis como experiencia podía ser evitada bajo dos condiciones: limitación del capitalismo, primera; pero además sólo si los problemas de los límites productivos y sus consecuencias podían ser compensados por renovaciones simbólicas de la identidad individual, capaces de producir motivaciones que permitieran caminar en el mismo sentido de autolimitación que propondría el autogobierno. Esto significaba que la madurez psíquica de la población, dotada de estructuras reflexivas democráticas, acompañaría el cambio del sistema productivo en el sentido de reconocerse limitado en su dominio de la naturaleza. Sólo un sujeto capaz de limitar su entropía podría limitar la entropía ecológica. Pero Habermas no pudo dejar de percibir que todavía era posible una segunda opción que neutralizaba a su manera la amenaza del psiquismo inmune al autogobierno. Pues en efecto, se podía llegar a esta situación: que la capacidad de autogobierno del sistema aumentase cuando las instancias de las decisiones fueran capaces de proclamarse independientes de las motivaciones de los miembros del sistema. Hasta ahora esto no sucedía porque, bajo el Estado, se conectaba el sistema de gobierno, poder y dinero con el mundo de la vida por medio de la democracia, conectando gobierno y motivación. Frente a ella, Habermas entreveía la opción que se seguiría luego del aumento de una gobernanza no democrática ajena a las motivaciones de los miembros del sistema. Para Habermas esta era una mala salida. Pues mientras estuviera vigente el mundo de la vida, la motivación por socialización era inevitable, y la lealtad ante decisiones inmotivadas muy problemática. Esto es: en condiciones de mundo de la vida, el vínculo entre el individuo y el autogobierno no podría dejar de estar producido por la creencia en el valor de las decisiones, en su conexión con las motivaciones. En suma, el problema se planteaba en términos del problema de la legitimación weberiana, que atravesaba todo el libro

[13] *Ibid*., p. 83.
[14] *Ibidem*.

para estallar al final. En suma, sólo se podía ir por el camino de la gobernanza y mantener la estabilidad de los sistemas psíquicos si se modificaba la forma de socialización, se destruía el mundo de la vida y se rompía la identidad de sistemas culturales y sus últimos entornos normativos. Esto fue el camino emprendido justo por aquellos días por el neoliberalismo. Para lograr el nuevo equilibrio, los motivos del actuar deberían estar exentos de normas necesitadas de justificación, ajenas al mundo de la vida, y las estructuras de personalidad no tendrían que ser interpretadas para garantizar la identidad. Esto sólo podría abrirse camino mediante una colonización del interior del psiquismo alrededor de un núcleo *a priori* que no necesitaría reproducirse en sistemas comunicativos, sino darse por supuesto en todos ellos. Ese núcleo *a priori* de colonización del psiquismo debería ser el mismo que el principio capitalista, el principio del dinero y el principio de poder. Esta fue la premisa del *homo œconomicus* y la estrategia que le hizo decir a Thatcher que la economía era un método, que el objetivo era el alma. Cuando el proceso estuviera concluido, la aceptación de decisiones podría ser inmotivada, pues estaría ajustada a la única motivación trascendental. El problema final lo planteaba así Habermas: si en las sociedades del capitalismo tardío ya se imponía la disolución de la organización comunicativa de la conducta.[15] Si era así, se podría eliminar la crisis de legitimidad si se eliminaba la necesidad de la motivación. Como se ve, todo el problema venía a reposar sobre el tratamiento de la motivación. Habermas pensaba descubrir la roca de su apuesta: puesto que no hay otro camino para la motivación que la socialización, parecía contradictorio que se abriera camino una socialización que implicara asentar la motivación de la aceptación del *a priori* de una ocupación absoluta del sujeto por el dinero. Y lo era. Pero se abrió camino. Es como si los diseñadores del neoliberalismo leyeran a Habermas. Y él, enfrascado en contestar a Luhmann, encerrados los dos en una autorreferencialidad autista, no se dio cuenta.

III. Foucault y el neoliberalismo como solución

Lo que Habermas no percibió, lo vio venir Foucault. Aunque el propio Foucault confesó que estaba influido por la Escuela de Frankfurt, es difícil pensar que hubiera leído *Problemas de legitimación en el capitalismo tardío* para la realización del curso de 1978-1979 dedicado al *Nacimiento de la biopolítica*.[16] Por supuesto, Habermas no es citado en él. Sin embargo, ambos libros están conectados de forma misteriosa, tanto que uno viene a responder al otro. El neoliberalismo, esta es mi tesis, debe ser entendido como la solución temporal a los problemas de legitimidad del capitalismo tardío tal y como lo plantaba Habermas. Fue la huida hacia adelante para evitar el siguiente paso regulativo: el de los límites. Esa salida afectaba a las tres condiciones que veía Habermas centrales para transitar a un principio organizativo resistente a las crisis. Primero, al consti-

[15] *Ibid.*, p. 85.

[16] M. Foucault, *El nacimiento de la biopolítica*, Buenos Aires: Fondo de Cultura Económica, 2007.

tuirse con el nuevo pacto Nixon/Mao desarticulaba el equilibrio de las relaciones internacionales basado en la bipolaridad de bloques; segundo, al imponer una motivación *a priori* del sistema psíquico en el dinero, se superaban los límites que los sistemas de socialización ofrecían a la formación de motivación del sistema psíquico mediante procesos de comunicación basados en la ética discursiva; tercero, porque venía a relativizar los límites de la explotación de la naturaleza, primero mediante una insensibilidad al control de la huella entrópica como motivo, y segundo mediante la creciente formación de universos virtuales como ámbito donde habitan objetos de motivación. Al impulsar estas tres innovaciones a la vez, el neoliberalismo estaba en condiciones de ir más allá del capitalismo tardío regulado por el Estado y sus sistemas de equilibrios, cuya última instancia implicaba una concepción democrática. Esto es lo que se apreció cuando Foucault valoró el neoliberalismo como el final de la época de la economía política, siempre centrada en las viejas relaciones entre Estado y Capitalismo.

Pero aunque apreció el asunto central, el libro de Foucault, curiosamente, no estuvo en condiciones de medir la novedad del proceso que pretendía describir. En la medida en que se implicó de una forma excesiva en ver al neoliberalismo en la línea de los liberalismos históricos, como heredero de las viejas batallas por la naturaleza de las cosas, la fisiocracia y el ordoliberalismo, no supo ver que estábamos ante una revolución civilizatoria. Si se hubiera colocado en el terreno evolutivo correcto de Habermas, sin duda habría podido ver que estábamos ante un cambio en el principio organizativo completo del sistema social, capaz de sortear los límites y problemas de legitimación del capitalismo tardío. Eso implicaba un desplazamiento claro del fundamento sistémico de las tomas de decisiones del autogobierno, y una alteración adecuada de las bases psíquicas capaces de ajustarse al nuevo principio. Pero también implicaba, y esto era lo decisivo, una fase posterior del capitalismo que ya no pasaba por el capitalismo regulado por el Estado. En realidad, quiero decir que solo cuando miramos el libro de Foucault desde el libro de Habermas alcanzamos a comprender el extraordinario cambio que estaba describiendo Foucault, que sólo alcanzaba su dimensión epocal desde la doctrina evolutiva de Habermas. Por supuesto, los aspectos negativos del nuevo principio quedaron ocultados adicionalmente por la salutación que de las nuevas técnicas capitalista hicieron los teóricos de la multitud y de la virtualidad. La sobriedad y la mirada compleja de Habermas fueron sencillamente aplastadas por las ideologías filosóficas parisinas que describían los efectos del nuevo capitalismo como el resultado de la emancipación ontológica y el cumplimiento de la liberación de la historia del ser, ese argumento apologético del filósofo nazi Heidegger. Foucault se sintió finalmente incómodo con esa compañía y confesó su apuesta final por la Ilustración.

La capacidad de moverse con clarividencia entre los vínculos filosóficos que nos ofrecen las ideas del presente siempre es limitada. Eso depende de la singularidad extrema y compleja de los sistemas psíquicos sobre todo cuando se empeñan en procesos de búsqueda continuos. Por eso, cuando en 1985, en *Der philosophische Diskurs*

der Moderne,[17] Habermas se aproximó a la obra de Foucault, no pudo ver hasta qué punto *El nacimiento de la biopolítica* era la respuesta real a su obra de 1973. Aunque Habermas conocía algunos de los trabajos de los seminarios de Foucault que intentaban apresar el sentido de una sociedad de normalización,[18] y deseaban resistir a una sociedad disciplinaria amenazante mediante estrategias que estaban más allá de la soberanía;[19] y aunque se aproximó al sentido de la genealogía, no estuvo en condiciones de entender el nuevo sentido de la biopolítica como solución a su problema de legitimación, y el neoliberalismo como aspiración a un nuevo momento evolutivo del capitalismo. El Foucault de Habermas nunca dejó de ser el de *Vigilar y Castigar* y su acusación fue que carecía de los "fundamentos normativos de la crítica"[20] porque en realidad – y en esto tenía razón – no tenía una teoría adecuada de la vida.[21] Visiblemente escandalizado porque Foucault quería hacer una historia que radicalizaba lo que para él ya era la dimensión relativista de Max Weber, y porque no se venía a separar el saber del poder,[22] Habermas decretó que su historicismo radical acababa en un "incurable subjetivismo".[23] Aquí fue despistado por Paul Veyne, cuyo libro *Foucault révolutionne l'histoire*, de 1978,[24] había recogido el guante de dignificar las ciencias humanas con los nuevos desarrollos del autor. Fue una pérdida de perspectiva, inevitablemente condicionada por una falta de diálogo y por el diferente tiempo de la publicación y de la búsqueda.

Pero hoy, con una perspectiva suficientemente mejor, podemos ver que lo que venía a significar el nuevo poder pastoral de la biopolítica en el fondo era el cuidado de la subjetividad en un contexto que ya se había desprendido de toda dimensión escatológica, pero que también había escapado a los poderes decisorios del Estado. En realidad, el nuevo poder pastoral estaba en manos de la sacramentalidad universal del mercado. Abordaba así el problema de la motivación que Habermas había dejado irresuelto y lo hacía produciendo una alteración radical de la vieja formación de la subjetividad desde contextos de interacción social y de intercambio normativo en favor de una creciente naturalización de los motivos del *homo œconomicus*. Este ya podía prescindir de la socialización, elevando a absoluto el ego individual de la economía liberal anclado a su

[17] J. HABERMAS, *Der philosophische Diskurs der Moderne*, Frankfurt am Main: Suhrkamp, 1985.

[18] J. HABERMAS, *El discurso filosófico de la modernidad*, Madrid: Taurus, 1989, p. 346., cita una lección de Foucault en el Collége de France, la del 7 de enero de 1976. Habermas tomó la cita de M. FOUCAULT, *Dispositive der Macht*, Berlin: Merve Verlag, 1978.

[19] J. HABERMAS, *El discurso filosófico*, cit., p. 339.

[20] *Ibid.*, p. 342.

[21] Para desplegar este argumento, cf. J.L. VILLACAÑAS, *Dispositivo: la necesidad teórica de una Antropología*, en R. CASTRO y A. SALINAS (eds), *La actualidad de Michel Foucault*, Madrid: Escolar y Mayo, 2016, p. 185 *et seq*.

[22] J. HABERMAS, *El discurso filosófico*, cit., p. 297.

[23] *Ibid.*, p. 330.

[24] P. VEYNE, *Foucault révolutionne l'histoire*, Paris: Éditions du Seuil, 1978.

principio de utilidad marginal como administración del principio de placer. Al proponer este individuo como parte de la naturaleza de las cosas, el neoliberalismo redujo el reto del dominio de la realidad interior a una variación del reto del dominio de una realidad exterior. El sujeto no tenía como aspiración el control de la realidad natural externa. El único contenido de su psiquismo fue la interiorización de las reglas naturales de la economía liberal, ese conjunto de abstracciones. Con ello, las decisiones tomadas por las agencias de autogobierno sistémico no podían separarse a fortiori de las reglas del psiquismo, ni este podía ofrecerle una resistencia motivacional. Unas regulaban la naturaleza de las cosas en el fuero externo, mientras que el *homo œconomicus* regulaba la misma naturaleza de las cosas en el escenario interno. Con ello el mundo, como pronto denunciaron alarmados los psicoanalistas lacanianos como Jean-Claude Milner, pasaba a ser política de las cosas.[25] En ese mundo, al sujeto singular le estaba reservada la administración de sí mismo según ese principio económico interno, mientras que todo lo demás de él estaba administrado por los otros. Pero las leyes eran las mismas, ya las manejaran las grandes agendas mundiales, ya las manejara el singular. Era una armonía preestablecida que no podía ocultar su aspiración utópica. Por eso el nuevo rostro del gobierno biopolítico se podía permitir abandonar la soberanía y convertirse en una técnica de gobierno pastoral, *omnes et singulatim*.

Por supuesto, tanto desde el punto de vista de la gobernación sistémica, como desde el punto de vista de la integración social, el neoliberalismo significó un cambio de principio organizativo. Pues respecto de lo primero, abandonó las perturbaciones que para el capitalismo tardío suponían las crisis de producción, al dejar de concentrarse en el capitalismo productivo para enrolarse en el tratamiento del dinero, ese objeto abstracto que podía plegarse a las exigencias tanto de la economía liberal, como del principio motivacional unitario e invasivo del psiquismo. Fue esa concentración en el dinero lo que permitió naturalizar el nuevo poder/saber de la gobernanza. Esta decisión central, por lo demás propia de una evolución civilizatoria que presionaba en favor de la virtualidad y la abstracción, la motivación elemental y la superación de la economía política, ofreció al neoliberalismo su apuesta por el capitalismo financiero. Desde el punto de vista de la integración social, se pudieron abandonar todas las formas tradicionales de socialización al vincular el *homo œconomicus* singular a las reglas naturales del dinero. Con ello la socialización, al aceptar la motivación de dinero como la natural y en cierto modo el *a priori* de la nueva subjetividad, pudo esperar desplegarse por la vía de la pura racionalidad formal liberal de la competencia, algo que todavía vemos cuando se quiere incluir economía financiera entre las enseñanzas trasversales escolares. Pues sin el dominio de los sistemas educativos este programa no podrá funcionar. Con la formulación de la teoría de Gary Becker, profusamente citado por Foucault,[26] que

[25] J.-C. Milner, *La politique des choses*, Paris: Navarin, 2005.
[26] M. Foucault, *El nacimiento*, cit., pp. 255-268.

transformó la *ratio* económica en *ratio* general humana, se logró que los dos aspectos del capitalismo (externo e interno) quedaran reunificados. El capitalismo financiero con ello no parecía disponer de límites en su capacidad de crecimiento, en la medida en que reposaba en dimensiones virtuales y abstractas como el dinero. Por supuesto, que acabó generando una teoría propia de los equilibrios de las relaciones internacionales, destruyendo todos los bloques en favor de una globalización que no parecía dejar lugar a decisiones existenciales y políticas.

Hoy sabemos que el caballo de Troya de esta construcción fue la paulatina transformación del fundamento mismo del Estado de bienestar. Pues de ser un agente redistribuidor basado sobre el sistema productivo (mediante pleno empleo o mediante alza de impuestos progresivos), pasó a ser un agente redistribuidor sobre crédito, algo que tiene efectos letales sobre la motivación. Este movimiento ofreció al capitalismo financiero su centralidad y permitió destruir el capitalismo regulado por el Estado que, con el endeudamiento internacional, vio cómo perdía su soberanía a manos de las grandes corporaciones de acreedores. Por supuesto que esta retirada del Estado significó un gran avance en la separación de las grandes decisiones de autogobierno de las estructuras motivacionales de los singulares. Pero sobre todo la aspiración consistía en alterar de manera profunda el significado de la crisis, que ahora pasaba a ser un suceso natural, como una catástrofe. No sólo los singulares debían pensar que la crisis era una secuencia natural de la libertad económica, el resultado de una limitada adaptación darwinista según las reglas del mercado, sino que respecto a ella no había un sujeto soberano que debiera intervenir desde alguna instancia trascendental al mero devenir natural. En la medida en que el Estado era cortocircuitado, el singular encontraba un motivo más para retirar los aportes de motivación a la interacción social y a la democracia. Como Habermas había previsto de forma clara, esto significaba una pérdida de identidad en el mundo de la vida, una separación de los aspectos normativos y simbólicos que reinan en este, una disminución drástica de la acción comunicativa y eso que llamamos una despolitización creciente.

En la clase del 7 de marzo de 1979, Foucault vio algo que Habermas no logró identificar en sus libros. Que la disociación entre lo económico y lo social llevaba consigo una renuncia al pleno empleo que retiraba sus fundamentos al Estado de bienestar[27]. Por supuesto, la investigación de Foucault era bastante preliminar y él mismo no sabía muy cómo avanzar por ese camino, como lo testimonia la lógica de su curso, que iba de la historia del pasado a un presente abierto, pero no entreveía el futuro. Sin embargo, ese libro ha determinado toda la agenda intelectual, en la medida en que nos permitió identificar la destrucción del escenario teórico de Habermas, a saber, el sueño de que los sistemas luhmanianos de autogobierno fueran acompañados por la autorregulación de los sistemas comunicativos de integración, de tal modo que las sociedades occiden-

[27] *Ibid.*, p. 247.

tales fueran reflexivas y prácticas y pudieran encarar con garantías su apertura y riesgos históricos. Pero en cierto modo entonces se concretó el evolucionismo de Habermas, pues se abría una forma alternativa de la teoría marxista de la historia cuajada de elementos utópicos. Era un capitalismo financiero cuyas crisis no producían conciencia de clase. El sueño perfecto. El resto podía cubrirse con el darwinismo de la selección natural, la nueva forma de identificar a los elegidos. Había vidas precarias y vida solventes. Como especies aptas o inaptas, razas superiores o inferiores.[28] Sin embargo, la estructura del pensamiento de Habermas, compleja y articulada, seguía ahí, interesante para plantearnos el reto de pensar el neoliberalismo como un nuevo principio de organización social y sus posibilidades de ser una nueva etapa del capitalismo. Se trataba de ver si ese nuevo principio podía elevarse a formación social capaz de tener más probabilidades de autopreservación que de crisis. Aquí, desde luego, Foucault nos abandona. Por eso es interesante seguir leyendo a Habermas.

IV. La previsión kantiana

Mientras tanto, la crisis del dispositivo neoliberal en 2008 ha mostrado justamente la fragilidad del nuevo sistema de organización basado en el capital financiero y ha tensado todas las aspiraciones a la configuración de un universo capaz de superar los límites y equilibrios que Habermas propuso. El neoliberalismo no era un proyecto, como el de Habermas, para neutralizar la crisis, sino justamente para naturalizarlas. Habermas era realista al plantear que, en Estados dotados de formas democráticas, lo mejor era asentar las condiciones de posibilidad de las mismas, y eso era mantener el mundo de la vida, los procesos de socialización, la articulación de motivaciones sobre normas y los vínculos entre decisiones y motivaciones mediante legitimidad. El neoliberalismo, que no ha podido eliminar la democracia, no ha podido culminar su proyecto de naturalizar la crisis. Y sin embargo, como forma organizativa del nuevo capitalismo, el financiero no puede albergar una promesa universal, como a su manera lo hizo el productivo, pues su naturaleza especulativa librada a su aire es piramidal y no universalizable. Eso ha despertado la necesidad de regulación estatal y con ella ha reforzado la motivación democrática. Todo esto se ha derivado de la indisponibilidad del tiempo: el neoliberalismo ha conocido un estallido de una crisis antes de que la forma de la democracia estuviera devaluada hasta el punto de mantener a los aparatos psíquicos en la indiferencia apolítica. Por lo tanto, ha generado una reacción política que el neoliberalismo quizá no había previsto y que ha procurado denigrar como populismo.

En estas condiciones, basta la primera impresión para mostrar hasta qué puntos nos hemos alejado de las previsiones habermasianas. El neoliberalismo no ha destrui-

[28] Para una elaboración más amplia del argumento, cf. J.L. Villacañas, *Vidas Precarias*, in *Levante EMV*, 10 diciembre 2013, www.levante-emv.com.

do la democracia, pero sí el mundo de la vida capaz de recrearla desde elementos normativos discusivamente forjados. En suma, la política posterior al neoliberalismo tiene que jugar a la democracia con psiquismos sin mundo de la vida, con la materia humana que el neoliberalismo crea. Esto implica sujetos con demandas muy poco articuladas y procedentes de las decepciones que el neoliberalismo ha producido. En unos, protección del dinero de las dimensiones especulativas y del deseo entregado al crédito; en otros, atención de las demandas decepcionadas por el Estado que protege ese dinero entregado a crédito. Esa es la diferencia en el norte y el sur de Europa, dotados de estructuras motivacionales diferentes, procedentes de mundos de vida erosionados de modo muy distintos. En todo caso, los sistemas de interacción social bajo la rúbrica de la atmósfera poscrisis neoliberal ya no pueden ser entregados a la acción comunicativa en condiciones de mundo de la vista estabilizado. Populismo, cuando lo miramos desde Habermas, es la exigencia de reconfigurar mundos de la vida desde las necesidades expresivas, y no tanto comunicativas. Se han abandonado todas las estructuras normativas propias de la ética discursiva. En esta están compensadas las dimensiones expresivas, veritativas y volitivas, con sus aspectos enunciativos, ilocucionarios y perlocucionarios, mientras que en la agenda dominada por el populismo se trata de procesos comunicativos desequilibrados en favor de los vínculos expresivos, vinculados a reducciones motivacionales que no han sido forjadas en los procesos de socialización.

Podemos darnos cuenta de la gravedad de este asunto si comparamos el proceso con los esquemas normativos que Kant definió en *Hacia la paz perpetua*. Hay unanimidad de que la Unión Europea fue imaginada de modo inicial como proceso de federación de Estados por el filósofo Immanuel Kant. Lo decisivo de su aproximación, que reposaba en la necesidad de impedir las guerras y las revoluciones como la de Francia, basadas en los desequilibrios de la deuda pública. Para ello, Kant propuso intensificar lo que parecía que era un proceso inevitable. No se trataba sólo de hacer interdependiente la deuda pública (a favor de Gran Bretaña), sino de interrelacionar las sociedades civiles de los países respectivos mediante los lazos del comercio y del intercambio pacífico de bienes. Lo que Kant pretendía fortalecer de este modo era sociedades civiles homogéneas transnacionales. Es preciso recordar que estas sociedades civiles generarían una competencia entre sí que garantizarían que la paz que regiría sus relaciones no implicase estancamiento y despotismo. De este modo, la competencia de las sociedades civiles substituiría a las guerras como motor de la promoción de la libertad y de la base democrática del liberto. Y esto era necesario para Kant en la medida en que los Estados que formaran parte de esta federación debían ser ante todo Estados republicanos libres y no disminuir su ámbito de libertad a través de los acuerdos a los que llegaran con otros Estados. Kant no planteó nunca las cosas como una disminución de la soberanía propia que era entregada a una instancia ignota, porque no estaba seguro que la federación de Estados diera lugar a otro Estado: "Esta federación no aspira a ninguna adquisición de ningún poder del Estado, sino única-

mente al mantenimiento y aseguramiento de la libertad de un Estado".[29] Era la plenitud de la libertad de cada Estado la que llevaba a la producción de una federación para garantizar sus relaciones pacíficas. Por eso era tan importante que la sociedad civil que le sirviera de base a la federación fuera homogénea a la totalidad de los países federados. Sólo sociedades civiles homogéneas producirían constituciones políticas semejantes y de sentido libre o republicano.

Desde luego, la estrategia con la que Kant configuró el argumento estaba destinada a acabar con la lógica sacrificial y colonial de la soberanía absoluta del Estado y tenía como finalidad garantizar la paz como un derivado de la razón práctica. Para garantizar el final de la lógica sacrificial determinó que la libertad jurídica no se basaba en el principio liberal de "hacer lo que se quiera si no perjudica a nadie", sino de no obedecer ninguna ley a la que no se haya dado aprobación previa. Sobre esta base, llamó a la federación de Estado un *foedus pacificum*, que aspiraba a acabar con las guerras para siempre.[30] Por supuesto que Kant entendía que si esta federación no implicaba con necesidad producir algún tipo de poder legislador supremo (*oberste gesetzgebende Gewalt*)[31] debía implicar al menos algún subrogado del mismo, como forma de ofrecer confianza de que se cumplirá el derecho. Y este subrogado no podía ser sino el *freie Föderalismus*, lo que para Kant era el *bürgerliche Gesellschaftbund*, la federación de la sociedad civil. Si teníamos este subrogado, entonces sería fácil alcanzar unas *öffentlichen Zwangsgesetzen*[32] para así configurar un *Völkerstaat*, o *civitas gentium*. Sin embargo, en la previsión de dificultades, Kant mostró que en todo caso se podía llegar a una federación defensiva. Resulta así claro que el argumento de Kant está atravesado de dudas perennes. Lo que sacamos en limpio de su exposición es que si hay una federación de las sociedades burguesas es más fácil dotar a la federación de una estructura positiva de leyes supremas coactivas y públicas que impidan la guerra. Y él creía que esa federación de la sociedad civil se propiciaba por el espíritu comercial que, en su opinión, "antes o después se apodera de todos los pueblos".[33] Esto era confiar en el *Geldmacht*, el más fiable de todos los poderes del Estado.

Sin embargo, Kant, en los llamados artículos preliminares a un tratado de paz perpetua entre los Estados dejó bien claro que "no debe emitirse deuda pública sobre el comercio exterior del Estado".[34] Kant no tenía nada que objetar a la deuda como forma de financiación y fomentar la economía mediante obras pública o como seguro de años malos y esto tanto dentro como fuera del Estado. Pero deseaba detener su uso como *entgegenwirkende Maschine* que podían usar unos poderes contra otros. Este sistema para

[29] I. KANT, *Zum ewigen Frieden*, Frankfurt am Main: Suhrkamp, p. 211.
[30] *Ibid.*, p. 211.
[31] *Ibid.*, p. 212.
[32] *Ibid.*, p. 212.
[33] *Ibid.*, p. 226.
[34] *Ibid.*, p. 198.

aumentar el poder del Estado le parecía que producía un sistema de crédito (*ein Kreditsystem*) que podía dispararse (literalmente, *ins Unabsehliche anwaschsender*, que crece hasta lo imprevisible), con deudas aseguradas (*gesicherter Schulden*). Aunque no hay unanimidad de los traductores de este parágrafo, su sentido es bastante claro. El Estado no puede endeudarse a cuenta de su comercio exterior, porque esto produce un desequilibrio de poderes, lo que facilita la guerra, al obtener una financiación adicional a sus fuerzas reales que podía ser empleada contra otro Estado. Dicho endeudamiento ofrece una facilidad para hacer la guerra y por eso Kant desea prohibir la emisión de deuda para este fin belicista. Su argumento va dirigido, como es frecuente, contra las invenciones de los ingleses (ese *handelstreibenden Volks*). Aunque es verdad que Kant denuncia la producción artificial de un *Schatz zum Kriegführen*, que inicia una carrera de escalada con los tesoros de los demás pueblos, Kant llama la atención de forma muy clara sobre los efectos desestabilizadores de este proceder. Pues si mantiene la escalada, sólo puede bajar por una caída de las tasas o intereses. Sin embargo, la clave es que hasta llegar ahí, a la caída, se mantendrán altas mucho tiempo sencillamente de forma especulativa o como Kant dice por el fomento o escalada de las operaciones (*Belebung des Verkehrs*).[35] Kant temía que esta detracción de dinero en intereses de la deuda repercutiese de forma negativa en la industria y en las ganancias. Este empobrecimiento de la sociedad en beneficio de la acumulación del tesoro de deuda en manos del Estado le parecía catastrófico porque llevaba de forma clara a la *unvermeidliche Staatsbankrott* y además arrastraría a otros Estados inocentes a un colapso económico.

V. La imposibilidad de un escenario schmittiano

Se ve así que Kant está en nuestra conversación. Constituye nuestra conversación. Pero cuando lo leemos con esta proyección de Habermas y de Foucault, nos damos cuenta de que la argumentación, aparentemente reductora de Kant, deviene central bajo un régimen que hemos llamado neoliberal. Sea como sea el proceso real, no cabe duda de que ese régimen ha hecho de la deuda pública el asunto central de las motivaciones. Enraizado en las vivencias básicas del mundo de la vida en la medida en que depende de viejas experiencias relativas a la estabilidad de la moneda y de los ahorros, este asunto ha sido determinante, según la previsión habermasiana, en la relación entre el mundo de la vida y las instancias de gobierno y ha centrado la agenda democrática. Pero la diferente posición de los pueblos de la federación respecto a estas cuestiones centrales, ha impedido la formación de una federación libre de la sociedad civil. En realidad, si miramos el fondo del argumento de Kant, el problema de la deuda pública adquiere su relevancia central porque una escalada impide la formación de una homogeneidad de sociedades civiles que ha de prestar la base a la federación de pueblos. Y es-

[35] *Ibid.*, p. 199.

to es lo que hemos apreciado realmente tras la crisis de la deuda en Europa. Por supuesto que para estos problemas, el trabajo de Foucault acerca del nacimiento de la biopolítica resulta poco útil. Por supuesto que la relevancia del problema de la deuda, del dinero y de la escalada financiera para la formación del mundo de la vida no implica que el mundo de la vida haya sido completamente colonizado por la dimensión económica. La base del análisis creo que debe ser habermasiana, pero con los matices que han despertado los análisis sobre neoliberalismo. En todo caso, lo único seguro es que la homogeneidad de los pueblos europeos ha sufrido un retroceso, como consecuencia de los desequilibrios en deuda pública.

Llegados a este punto, la cuestión es si ese retroceso en homogeneidad de sociedad civil va a implicar un retroceso en la federación de Estados. Y aquí es donde el problema del neoliberalismo muestra su dimensión abstracta y utópica insuperable. Pues lo que hemos apreciado realmente es que el retroceso en la federación de Estados en el caso de Gran Bretaña no ha tenido tanto que ver con el problema de la deuda, sino con otros asuntos que inciden en el mundo de la vida desde otros componentes. A esa dimensión más integral de los factores propios del mundo de la vida que no está atravesada directamente con los presupuestos implícitos de la seguridad con el dinero, a esa dimensión que está más allá del mundo de la vida colonizado por el neoliberalismo, le podemos llamar dimensión existencial del mundo de la vida. Estamos seguros de que el retroceso en la federación de Estados en el caso británico tiene que ver con estas condiciones existenciales del mundo de la vida y con su franja económica colonizada. Por eso, la cuestión decisiva respecto de Europa es si está en condiciones de sobredeterminar ese mundo de la vida economizada, y los movimientos antifederales que promueve, por la emergencia hasta la conciencia de los demás factores existenciales del mundo de la vida.

Como es natural, aquí como siempre la clave reside en una reflexividad adecuada sobre esta condición existencial del mundo de la vida cuando se lo mira en su integridad. Así, los populismos conservadores han iniciado una reflexión limitada que, en una mimesis de Gran Bretaña, se centra en los elementos de inquietud existencial que produce la emigración y la apertura a poblaciones con mundos de la vida alternativos. Parece sin embargo evidente que sólo una atención adecuada puede mostrar que hay un mundo de la vida europeo suficientemente nítido, cuya fortaleza indudable permitiría exponerse a mundos de vida alternativos sin grandes inquietudes. En este sentido, en la medida en que los órganos de la política tengan como finalidad este fortalecimiento de la homogeneidad existencial, podría encarar con éxito no sólo estos miedos y ansiedades, sino limitar la centralidad de los elementos del mundo de la vida colonizado por la economía. Ahora bien, ¿cuál es la dimensión central del mundo de la vida que emerge a la reflexión cuando se mira de forma central? Este problema es el decisivo, pues pone ante nosotros el verdadero problema que Habermas no estuvo en condiciones de apreciar. Que la motivación, aunque está relacionada con la socialización, no siempre está accesible a los procesos discursivos ni emerge de forma automática en los siste-

mas de opinión pública. La traducción de este problema a nuestro caso es esta: la inquietud existencial es opaca a sus verdaderos motivos y estos no siempre aparecen con claridad en la discusión pública. Por eso, Carl Schmitt supo ver que un método de clarificación de esa inquietud y ansiedad consiste en la creación de un enemigo exterior en el que objetivar nuestro problema existencial. En cierto modo eso es lo que hace de nuevo el populismo, que es un schmittianismo de baja intensidad.

Sin embargo, sabemos que el proceder de Schmitt no hace sino aumentar la escalada de la ansiedad. Concentra poderes, exige instancias soberanas, hace imposible los procesos de federación, desplaza de forma permanente las dimensiones de enemistad como condición de una permanente necesidad de cohesión y genera fracturas en las homogeneidades previas con heterogeneidades incompatibles. El Schmitt de la teología política no ilumina el problema de Europa. El único Schmitt que podría iluminar los problemas de progreso y retroceso de la federación europea sería el de *El nomos de la Tierra*, porque la federación de Estados es también el intento de formación de grandes espacios. Ahora, resulta claro que la formación de grandes espacios según el dispositivo del nomos de la Tierra dista mucho de la formación de federación. En cierto modo, cuando se lee la letra pequeña de Schmitt, la formación de grandes espacios se resuelve sobre el esquema de la dirección hegemónica del pueblo más avanzado en la ordenación de los sistemas de gobierno dentro de ese *Reich* o ámbito. En suma, se trata del viejo dispositivo imperial hegeliano en el que no podemos hacer pie.

Sin embargo, parece claro que la formación de una sociedad civil homogénea, por mucho que ofrezca las bases de una federación libre de pueblos, no es suficiente para resistir la potencia heterogeneizadora del problema de la deuda y que el particularismo que esto produce puede ser ampliado por formas específicas de vivir los demás factores existenciales. Como ya hemos dicho, la solución habermasiana de generar una opinión pública basada en los complejos procesos reflexivos de la ética discursiva y la privilegiada centralidad de la acción comunicativa, es demasiado lenta y no funciona en época de crisis. Su capacidad de transformar las seguridades tradicionales del mundo de la vida es muy limitada, como se vio en los intentos fracasados de generar una constitución europea bajo el modelo de la reproducción del proceso constituyente a nivel europeo. Así las cosas, no vemos ninguna instancia que esté en condiciones de trabajar con los elementos del mundo de la vida en la dirección de una federación de pueblos y sobre esta ceguera crecen los señuelos tradicionales de la soberanía, cuya relación motivacional con el mundo de la vida están muy acreditados. En este escenario el populismo rinde sus mejores servicios. No sólo se venga de la colonización siempre molesta del mundo de la vida por la autoconciencia económica, sino que responde a los miedos e inquietudes existenciales con la invocación de la omnipotencia de la soberanía. Con ello, el proceso federal queda amenazado.

En este círculo se están moviendo gobiernos y opiniones públicas de forma permanente sin encontrar una salida en el laberinto. Y como por principio la reflexión sobre el

mundo de la vida es parcial, este círculo implica a la postre imposiciones de los elementos no reflexionados con toda la violencia de su autoafirmación. ¿Cómo salir de este escenario? ¿Cómo generar una homogeneidad existencial que limite el valor de la heterogeneidad norte/sur desde el punto de vista de la deuda y que encare a la vez las ansiedades de albergar mundos de la vida alternativos en nuestro seno? ¿Y cómo hacerlo sin entrar en la dinámica de amigo/enemigo, cuando el Terror se empeña en inducirnos a creer que esos mundos de la vida alternativos implican una amenaza cotidiana, cuando se nos induce a creer que cada musulmán alberga en su latencia un terrorista?

No lo sabemos. Pero algo es seguro. En la base del proceso europeo está la orientación hacia la paz perpetua. Y justo por eso, la producción de homogeneidad en la sociedad civil está entregada a medios limpios, discursivos. Y sólo estos medios limpios como el comercio, el intercambio y el habla, generalizados, pueden producir la sociedad civil europea que, con su federalismo libre, ofrezca la base al federalismo de los Estados. Y sólo esta federación puede impedir una forma hegeliana imperial de construir el *Reich* europeo. Estas son las líneas rojas que no podemos saltar. Pero estas líneas están muy lejos de servir de base a un proceso constituyente de unidad de pueblo que cambie la actual federación en un Estado federal. Sólo un complemento existencial adecuado puede reducir el peso de la deuda y puede unirnos en la forma de superar las ansiedades y miedos bajo el rótulo de un espacio pacífico. Sólo la incorporación al mundo de la vida de ese complemento existencial puede hacer de Europa esa comunidad existencial que no ha llegado a ser por la formación de su opinión pública por medio discursivos. Y en la búsqueda y el hallazgo de ese complemento existencial homogéneo Europa se la juega como comunidad de pueblos y Estados dispuestos a caminar hacia la paz.

ARTICLES
SPECIAL SECTION – EUROPE AND "CRISIS" (FIRST PART)

THE PAST OF AN ILLUSION? PLURALISTIC THEORIES OF EUROPEAN LAW IN TIMES OF "CRISES"

AGUSTÍN JOSÉ MENÉNDEZ*

ABSTRACT: The deep transformation of the practice of European law calls for a systematic rethinking of the theories with the help of which European law is analysed, reconstructed and assessed. In this *Article*, I test the reconstructive potential and the normative soundness of constitutional pluralism as a constitutional theory to make sense of European integration. In Section II, I disaggregate the concept, by means of setting in their wider context the different conceptions of constitutional pluralism that had been advocated. In Section III, I show why the reconstructive potential of the most sophisticated version of constitutional pluralism, pluralistic federalism, has been drastically limited by the deep transformation of the practice of European law. In Section IV, I consider the limits of constitutional pluralism as a normative theory of European integration. The last section holds the conclusions.

KEYWORDS: European Union law – constitutional theory – legal theory – European integration – constitutional pluralism – supremacy.

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I. Introduction

The way power is organised in Europe has changed deeply and extensively in the last four decades. Such transformations have become most visible in the wake of the several crises that have hit Europe in the last decade. But it would be ill-advised to conclude that the ongoing "constitutional mutation"[1] has been the odd storm gathering in a serene sky. Rather, it is more accurate to say that the crises have exposed the far from new structural tendencies and proclivities and, at the same time, have accelerated and radicalised ongoing processes of change. In other words, the government of the crises has unleashed a new wave of transformation of the European Union,[2] but one that builds on the radical alterations brought about by the understanding of the relationship between politics, economics and law that emerged in the late seventies and consolidated in the early eighties as the single market and economic and monetary union (EMU) were established.[3]

But if the law has changed, if legal practice has changed, should that not have a major impact on the way EU law scholarship is done? In other terms, can theory remain the same when practice has radically changed? That is the question that I try to answer in this *Article*, focusing on the most popular theoretical lenses among European legal scholars, namely "constitutional pluralism".

The *Article* is structured in three parts.

In section II, I disaggregate the concept of "constitutional pluralism" by means of considering both (1) the transformations of pluralistic theories over time, or what is the same, how the different turning points in the evolution of the practice of EU law have resulted in different understandings of "constitutional pluralism", and (2) the underlying continuities, what elements of constitutional pluralism have proved resilient and have consequently endured. This leads me to a first and very important interim conclusion, namely that "pluralistic federalism", as proposed by Weiler and MacCormick, is the most coherent conception of "constitutional pluralism".

In section III, I explore the degree to which "constitutional pluralism" provides guidance in the reconstruction of the actual practice of European law. I find that while "constitutional pluralism" constituted a powerful tool to understand the functioning of European law in the late sixties and early seventies, the drive towards the single market and to economic and monetary union, and even more explicitly so, the government of the crises since 2007 have changed the fundamental structural principles and substantive content of European law to a point at which "constitutional pluralism" distorts more than clarifies the practice of European law.

[1] A.J. Menéndez, *A European Union in Constitutional Mutation*, in *European Law Journal*, 2014, p. 127 *et seq*.

[2] A.J. Menéndez, *The Existential Crisis of the European Union*, in *German Law Journal*, 2013,p. 453 *et seq*.

[3] A.J. Menéndez, *The Crisis of Law and the European Crises*, in *Journal of Law and Society*, 2017, p. 56 *et seq*.

In section IV, I consider the extent to which "constitutional pluralism" can still be recovered as a constitutional theory. That depends, it seems to me, on whether constitutional pluralists take seriously the reasons why they failed to realise the depth and extent of the transformation of European Union law practice, and in particular, the structural implications of the single market and the single currency, and why they failed to take critical distance from the intrinsically centralising doctrines of direct effect and primacy.

II. Pluralistic constitutional pluralism? Disaggregating constitutional pluralism

While no constitutional theory is monolithic, "constitutional pluralism" is perhaps especially prone to the multiplication of variants. The result is that we are faced with an "umbrella" concept, encompassing rather diverse legal and constitutional theories. Attempts have been made at constructing a "systematic" constitutional pluralism out of the core ideas of the authors usually taken to be canonical references of that theoretical orientation.[4] But leaving aside whether it is inherently contradictory to aim at fleshing out a monistic understanding of constitutional pluralism, the fact of the matter is that I remain unpersuaded by the attempt (even if it has contributed to my own understanding of the different authors and theories). If only because the exercise quickly becomes over-theoretical, and at any rate aloof from the actual practice of European law.

So, instead of focusing on the intrinsic theoretical merits of the different conceptions, in this section I proceed first to distinguish the different layers in the evolution of pluralistic thinking about European law, setting them in the context of the shifting practice of European law. By doing so, it is possible not only to relate the different conceptions of constitutional pluralism to the key turning points in the evolution of the practice of Union law, but also to single out the legacy of previous conceptions to the present practice of constitutional pluralism.

II.1. Strategic pluralism

It is no secret that most of the "founding fathers" of Community law were committed to the idea of creating a European federal State; or, in the terms that were not infrequent until the mid-fifties, of a United States of Europe. The substantive content of Community law, and the perception that institutional actors, companies and citizens had of Community law, were expected to play a fundamental role in the process. In summary terms, Community law was to be the constitutional law of the United States of Europe. In itself, this understanding, more than pointing to a pluralistic understanding of the relationship between Union law and national law, points to the projection to the supranational level of the model of a rather centralised State, a trend that had been exacerbat-

[4] K. Jaklic, *Constitutional Pluralism in the EU*, Oxford: Oxford University Press, 2014.

ed in the United States by the efforts first of economic recovery (the New Deal) and then by the strong nationalisation of power during the Second World War.[5]

However, the "founding fathers" of Community law failed at first. The bid to persuade the Court of Justice to construct the Treaty establishing the Coal and Steel Community (ECSC) in the early fifties was not successful. The quasi-constitutional Treaty that would have established the Defence and Political Communities collapsed in 1954. The Rome Treaties establishing the European Economic Community (EEC) and Euratom seemed to kick in the long grass any federal ambitions. Not only the "supranational" features of the Coal and Steel Community were diluted (the EEC Commission was much more of an international secretariat than the High Authority of the ECSC), but the fact of the matter was that there would be three Communities, with three institutional structures and three legal orders.

Out of this series of failures came a recalibration of the strategy of European "centralists". In other words, events forced a pragmatic redefinition of what they aimed at. Instead of a straightforward claim to get Community law acknowledged as the "supreme law of the land",[6] the objective was to break the monopoly of ultimate authority of national legal orders. The recognition of the "equal" standing of Community law would result in opening up the legal and political space within which Community law could be turned into the supreme law of the land (at a later date). The strategy, in short, was *one aiming at* a *monist destination* (the law of a United States of Europe) passing *through a strategic (and transitory) endorsement of pluralism*.

This peculiar blend of pluralism and monism crystallised in litigation before the Court of Justice. The legal service of the Commission persuaded a majority of the Court to endorse strategic pluralism. Firstly, the three supranational legal orders springing from the three Community Treaties were interpreted as if making up one single Community law.[7] Secondly, European law was affirmed as proper law in *Van Gend en Loos*.[8] As is very well-known, the Luxembourg judges affirmed not only that "self-executing" Treaty provisions had full legal effects, but also that the specific effects exerted at the

[5] B. ACKERMAN, *We the People II: Transformations*, Cambridge: Harvard University Press, 1998.

[6] It would have been met with frontal opposition from national institutional actors and national legal communities. In particular, the memory of the postwar democratic constitutional refounding was rather fresh in the minds of national legal communities by the time the early Communities were established in 1951 and 1957. A (very positive) result of the new "constitutional beginning" in France, Italy and Germany was the strong association in national legal and constitutional culture between constitutional supremacy and democratic legitimacy, an association that would have on its own stopped in its tracks the claim that Community law should be regarded as the supreme law of the land. This was clearly understood by "pioneers" of Community law. Exemplary in this regard E. STEIN, *Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the* Costa *Case*, in *Michigan Law Review*, 1965, p. 491 *et seq.*, especially at pp. 514 and 516.

[7] See for example M. LAGRANGE, *The Court of Justice as a Factor in European Integration*, in *American Journal of Comparative Law*, 1966, p. 709 *et seq.*

[8] Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*.

national law were governed by Community law itself. The grounding of the ruling seemed at first sight to be the doctrine of "direct effect" as known in public international law. Indeed, the Court characterised Community law as a "new order of international law". However, the Court fine-tuned the argument so as to be able to rely on international law while at the same time leaving open the question of whether Community law was something else than "classical" international law. Having left the door ajar in *Van Gend en Loos*, the Court pushed it open in *Costa*.[9] The Luxembourg judges found that States could not relativise the obligations they have assumed ratifying the Treaties by means of passing new laws in breach of the Treaties. The Treaties had to enjoy passive force over subsequent national laws, or what is the same, *prevail* over them. While this could be said to stem from the classical doctrine of supremacy in international law, the Court was keen to take distance from international law. The characterisation of Community law as a new order of international law was dropped. Community law was indeed a new legal order, but one different from those of classical international law.[10]

Van Gend en Loos and *Costa* contained powerful "monistic" seeds. The "new" understanding of direct effect pointed to the dilution of the borders between supranational and national law. At least the Community norms affirming the direct effect of Community norms became integral part of national legal orders. Primacy pointed in the same direction, and contained elements of a hierarchy where Community law prevailed over national law. But the monistic bid was very cautious. The immediate impact of the *Van Gend en Loos* ruling itself was marginal and transitory, while in *Costa* the Court affirmed a principle but devoid of immediate consequences. The very "thinness" of Community law, made up of a very small number of regulations and directives at that time, resulted in primacy being a lion incapable of roaring. The reaffirmation of intergovernmental leadership from 1965 onwards resulted in a careful point to point navigation in rather rough waters. The monistic élan of direct effect and primacy would remain dormant for more than a decade.[11]

Still, this original strategic pluralism casts a long shadow not only on EU law scholarship in general, but on pluralistic theories of European law. Strategic pluralism coined the pluralistic image of the "two legal orders", while weaving it in one and the same cloth the key structural principles (of monistic lineage and potential) of direct effect and supremacy.

[9] Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. E.N.E.L.*

[10] E. STEIN, *Toward Supremacy of Treaty-Constitution by Judicial Fiat*, cit., p. 512: "A strong argument can be made, however, that in the *Costa* judgment the Community court in principle embraced the new approach, and held the rule prescribing the supremacy of Community law, although originating in the Community Treaties, binds national courts directly and must be applied by them regardless of any contrary national constitutional provisions concerning Treaty law in general".

[11] E. STEIN, *Treaty-Based Federalism, A.D. 1979: A Gloss on Covey T. Oliver at the Hague Academy*, in *University of Pennsylvania Law Review*, 1979, p. 897 *et seq.*; J.H.H. WEILER, *The Community System: The Dual Character of Supranationalism*, in *Yearbook of European Law*, 1981, p. 275.

II.2. Pluralistic federalism

The erosion of the underlying socio-economic consensus of the fifties and sixties around the democratic and social State revealed the extent to which the proper functioning of the supranational institutional structure and decision-making processes depended not only on institutional engineering, but on wider social, political, economic and cultural circumstances. The "evolutionary achievements" of Community law seemed to be imperilled by the economic and political crises of the Communities. The way out of the impasse was sought, as we will see in more detail in section III, in *l'Europe par le marché*, or what is the same, in the simultaneous emancipation of economic from political integration through the elimination of national economic borders, and in the transformation of the very understanding of economic freedoms and the principle of undistorted competition. While some of the changes (such as the European Monetary System) were decided intergovernmentally, others were effected by the courts, and in particular by the Court of Justice in coalition with national "lower" courts. This was clearly the case of the recharacterisation of economic freedoms, no longer operationalisations of the principle of non discrimination, but of an emerging supranational right to private property (and to entrepreneurial freedom). This move was originally resisted by some national governments and by some national constitutional courts. The latter expressed serious reservations regarding the core elements of strategic pluralism, as described in the previous section.

This was the context in which constitutional pluralism was redefined, expanding it into a full-blown constitutional theory, going beyond the resolution of the conflicts stemming from the structural relations between supranational and national law.

The new type of pluralism, federalistic pluralism, strived to give proper notice of the normative possibilities opened up by the transcendence of the aim of creating a unitary form of United States of Europe. As was said in the introduction to one of the most influential scholarly projects on the theory of European law: "Europe does not need, or could not at least digest, one comprehensive federal system, with a unique set of institutions, courts, administrative agencies and norms to deal with the challenges facing her. Pluralistic federalism would mean the setting up of interlocking circles of institutional arrangements and normative provisions accepted by different groupings of States".[12]

The background assumption was that the European Communities was not a State in the making, but rather a non-state polity that was transforming the sense in which European States were States. Far from power shifting to the supranational centre, the institutional structure and decision-making processes of the Communities had taken a clear intergovernmental turn. Momentous in that regard was the Luxembourg compromise of

[12] M. Cappelletti, M. Seccombe, J.H.H. Weiler, *Integration Through Law: Europe and the American Federal Experience – A General Introduction*, in M. Cappelletti, M. Seccombe, J.H.H. Weiler (eds), *Integration Through Law*, Berlin and New York: De Gruyter, 1986, p. 67.

1966, which stopped in its tracks the move to qualified majority voting in the Council and gave way to a "symmetric form of intergovernmentalism", or what is the same, a form of intergovernmentalism in which the equality of States was not merely formal. Federalistic pluralists assumed that nation-states were not on their way out, but had been reinforced by European integration. As Alan Milward would memorably put it, integration had "rescued" the social legitimacy of nation-states by means of creating the conditions under which national democratic and social *Rechtsstaaten* were feasible. In the process, if one is allowed to use Bickerton's image slightly out of context, sovereign States had been turned into open and cooperative States, into Member States; but still States they were.

Two different but complementary variants of pluralistic federalism would emerge. On the one hand, some pluralists (Cappelletti and Weiler) argued that the federal balance between union and diversity hang in the balance between a symmetrically intergovernmental institutional structure and decision-making process and a directly effective and supreme supranational law ("dualistic supranationalism"), while other pluralists (MacCormick, Walker) regarded the plurality of European legal practice itself as a fundamental source of enduring pluralism (constitutional pluralism *stricto sensu*).

a) Dualistic supranationalism.

Weiler provided in his early work, and in a more complete form in his seminal *The Transformation of Europe*, a detailed reconstruction of the transformation of Community law into an autonomous legal order.[13] The constitutional strategy behind strategic pluralism had been realised by the successive fleshing out of the doctrines of direct effect, primacy and pre-emption. But if law had become a formidable centripetal force in the process of European integration, it was still the case that Community law had not been turned into a "traditional" supreme law of the land. That was so because at the very same time that the primacy of Community law was affirmed, the design of the institutional structure and the decision-making processes of the Communities had been reshaped in such a way as to guarantee that Member States (and first, foremost and most conspicuously, national governments) retained the collective authorship of supranational law. The result of the tension between the two components of this "dualistic" constitution was a polity (and a legal order) that was neither centralised nor fragmented, but rather provided a new (and promising) embodiment of the federal principle: a genuinely *pluralistic* form of federalism. A form based on what Weiler would come to describe as "constitutional tolerance", which guaranteed that when States obeyed Community law, States were actually obeying themselves; or as Weiler himself would

[13] J.H.H. Weiler, *The Transformation of Europe*, in J.H.H. Weiler, *The Constitution of Europe – Do the New Clothes Have an Emperor?*, Cambridge: Cambridge University Press, 1999, p. 28: "The combination of the 'constitutionalisation' and the system of judicial remedies to a large extent nationalised Community obligations and introduced on the Community level the habit of obedience and the respect for the rule of law which traditionally is less associated with international obligations than national ones".

put it, going even further than that, State obedience to Community law was a voluntary, and constantly renewed, act.

b) Constitutional pluralism *stricto sensu*.

Neil MacCormick (followed later by Walker) reached a similar conclusion departing from a rather different disciplinary background. European legal practice, and in particular the complex relationships between supranational and national law, struck the Scottish philosopher as evidence of the core tenets of pluralistic legal theories, including his own institutional theory of law; in particular, European legal practice proved that it was possible to decouple law from the regulatory ideal of a final or sovereign authority (be it a *sovereign* – as in Austin – or a final and ultimate rule of recognition or *Grundnorm* – as in Kelsen or Hart). By the late eighties, it could be observed that the several legal orders coexisting in the territory of the European Communities (mainly, but not exclusively, Community law and national legal orders) discharged the tasks characteristically assigned to law in modern societies (including the production of certainty about common action norms) despite the fact that there was no sovereign or final *Grundnorm* that could be resorted to determine how to solve eventual conflicts between the supranational legal orders. As long as there was a considerable substantive affinity between the co-existing legal orders (a precondition for a pluralistic legal practice), conflicts would remain limited in number and transcendence, and could be solved through means other than formalised legal decision-making. MacCormick's pluralism highlighted the limits of law in general, in line with his characterisation of law as grounded on social practice.[14] His theory of Community law projected this core insight, opening the way to considering the convenience of

[14] Contrary to what was the case with the perhaps two most powerful classical legal positivistic theories of the 20th century (Kelsen's and Hart's), MacCormick made an explicit effort to build legal theory "bottom-up", that is, departing from general social practices (and not elite social practices). This "sociological approach" led MacCormick to relativise the centrality of the "sovereign State", in particular "the law of the Sovereign state". The "bottom up" perspective is perhaps most clearly reflected in his recharacterisation of the rule of Kelsen's *Grundnorm* and Hart's rule of recognition. Cf. N. MacCormick, *Questioning Sovereignty*, Oxford: Oxford University Press, 1999, pp. 23-24: "If one attaches to the austere view of Kelsen, then the grundnorm can only be presupposed – a norm conferring authority on the Constitution and hence on those whom it authorises to make and enforce law [...]. Where one's concern are, as in the present work, with the interface and overlap between law and politics, such austerity is improductive. Law is not only an object of study for legal science, but is in some form an element in the lives and actions of citizens and officials. It has a social dimension for which we must account [...]. It remains true that there is always a custom prior to any Constitution, and there can be a widespread custom of respecting a Constitution and demanding this respect as what is due. Such a customary norm of respect for the Constitution is the securest normative underpinning of it – a shared custom extended in time [...] it is only where states grow overwhelming in ambition that they seek to confine custom to the single function of working as a constitutional foundation, or to negate it altogether as a source of law [...]. At the same time they are apt to seek to redefine all forms of institutional order as existing only by delegation from and permission from the state itself". Cf. also N. MacCormick, *Institutions of Law*, Oxford: Oxford University Press, 2007, pp. 57 and 288.

ultimate legal conflicts being solved through a return to politics (a move which was structurally similar to Weiler's proposed supranational constitutional court).

c) Common ground.

A shared fundamental premise was that the stability of a pluralistic legal practice was not to be taken for granted (or be expected to be assured spontaneously), but required a conscious effort. Three key conditions seem to me to emerge in the writings of pluralistic federalists.[15]

Firstly, the allocation of power between the European Union and the Member States should ensure the capacity of collective action through supranational institutions while avoiding the hollowing out of the national political processes.[16]

Secondly, the institutional structure and decision-making processes should be so designed as to embed Member States into the European Union.

Thirdly, supranational law should remain a major vehicle of pluralistic integration, something that rendered critical its being a carrier of democratic legitimacy (including its role as a belt transmitting legitimacy from the national to the supranational level).

Both Weiler and MacCormick understood (and stressed) that pluralistic federalism was not to be a one-way street. Federalism was not only about unity, but also about diversity. The two authors assumed that the existing institutional structure and substantive content of Union law created the conditions under which diversity could thrive. We will see in section III that there were good reasons to be of a different view already at the very time that Weiler and MacCormick were writing.[17] At this stage in the argument, it is important to stress the structural difference between the *strategic* character of the use of the "two legal orders" image in the early doctrine of Community law and in pluralistic federalism. And, at the same time, the extent to which this image, and the companion doctrines of direct effect and primacy, were left unchallenged by pluralistic federalists.

II.3. Judicial pluralism

By the late 1990s and early 2000s, an asymmetric economic and monetary union was launched (with apparent initial success), and the massive enlargement of EU membership

[15] J.H.H. Weiler, *In Defence of the Status Quo: Europe's Constitutional* Sonderweg, in M. Wind, J.H.H. Weiler (eds) *European Constitutionalism Beyond the State*, Cambridge: Cambridge University Press, 2003, p. 14.

[16] In that regard, existing "federal States", such as the United States and Germany were not role models, on account of their having become too centralised.

[17] The new understanding of economic freedoms was expected to be the linchpin of future political integration (Weiler and Cappelletti) and a further step in the diffusion of power (a form of "market subsidiarity" in the view of MacCormick). Economic and monetary union was welcomed by Cappelletti, on the basis of the observation that monetary power had come to be very unevenly distributed among Member States. By the early 2000s, Weiler saw in the *status quo* (by then heavily shaped by the three elements of *l'Europe par le marché*) the embodiment of constitutional tolerance, a major achievement that could be threatened by the constitutional ambitions of European political actors.

to former Communist countries was scheduled. However, the renewed "expansion" of the breadth and scope of Union law provoked a new wave of resistance to EU law. National constitutional courts imposed new limits on the core elements of the structural principles of relationship between Union law and national law, that is, direct effect and primacy.

It was at that specific turn in European integration that a third set of pluralistic theories of European law emerged. Partially building on (implicitly) strategic pluralism and (explicit) pluralistic federalism, a new set of authors focused on providing pluralistic guidelines to solve the second wave of conflicts between on the one hand the Court of Justice and on the other hand national constitutional or supreme courts. Judicial pluralists affirmed that not only the said conflicts provided the ultimate proof of the pluralistic character of European legal practice (and thus were not to be regarded as proof of its defective character, or symptoms of an underlying "constitutional" malaise) but that it was normatively commendable that instead of being progressively eliminated, conflicts would recur. The very "pluralistic" character of European Union law rendered the occurrence of conflicts a fully normal (and salutary) phenomenon:

> "What if what makes the European legal order unique is that the open question [who decides who decides] should remain open? (...) the values of the question 'who decides who decides' and the lack of an ultimate authority can be linked to the values of constitutionalism as one of its guarantees of limited power; in a multi-level or federal system it is the vertical or federal conception of constitutionalism that requires the issue of who decides who decides to be left unresolved".[18]

But while radical pluralists would stop at that, judicial pluralists strived to reconcile endemic pluralism with the introduction of mechanisms that would reduce or manage "the potential conflicts between legal orders while promoting communication between them".[19]

On the one hand, thus, it should be acknowledged that there is a plurality of equally sound standpoints from which the conflict can be solved. It is not only the case that the correct legal answer to the case at hand could look different from the standpoint of the supranational judges sitting in Luxembourg or the national judges sitting in Rome. Judicial pluralists claim that both claims are equally valid, being a conflict between two perspectives that are constitutional in the same sense, and which should be recognised the same dignity and force.[20]

[18] M. MADURO, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. WALKER (ed.), *Sovereignty in Transition*, Oxford: Hart, 2003, pp. 522-523.

[19] *Ibid.*, p. 524.

[20] It is important to notice that the assumption of pluralistic federalists was very different, namely, that the sense in which supranational law and national law were constitutional was rather different. Indeed, the normative value of European law depended on not becoming constitutional in the same sense as national law was so.

On the other hand, a solution to each of the specific conflicts was needed to ensure that European law, both supranational and national, remained capable of discharging basic integrative tasks. Two main alternatives were put forward.

Firstly, the conflict could be solved by reference to the "thin" ethical principles that underpin both the supranational and the national legal orders, which would ground a set of rules of conflict thus internal to both systems (the rules may be in conflict, but not the underlying principles; going back to the principles, it would be possible to determine which is the adequate rule).[21]

Secondly, the gap between the supranational and national standpoints could be bridged not through the "monistic" harmonisation of the applicable law, but through the development of a sort of common constitutional culture, through which all judges, both supranational and national, would come to consider how to deal with the case from a standpoint that comprises both standpoints (by means of adapting their "own set of perspectives to the possible contacts and collisions with other systems").[22] This entails redefining the very identity of judges, which would be required by this new constitutional culture to regard themselves as judges not only of the legal order to which they are institutionally affiliated (the legal order that makes them judges), but as judges of the "composite" European legal order (opening themselves to "the "recognition and adjustment [...] of the claims to authority made by other legal orders",[23] with their rulings "integrating the claims of validity of both national and EU constitutional law").[24] Judges will be urged to interiorise that their mission, according always to the new constitutional culture, is to engage in the "coherent construction of a common legal order", making their decisions "fitting with previous decisions of other participants",[25] and thus grounded "in a doctrine that could be applied by any other national court in similar situations".[26]

II.4. Pluralistic pluralism or pluralistic federalism?

The layered reconstruction of the evolution of pluralistic theories of European law reveals both the continuities and the discontinuities within constitutional pluralism.

"Pioneering" Community law scholarship developed a form of strategic pluralism that not only may be said to keep on informing the theories underpinning the discourse and decisions of the Court of Justice or the European Commission, but which has pro-

[21] M. Kumm, *Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism*, in M. Avbelj, J. Komárek (eds) *Constitutional Pluralism in the European Union and Beyond*, Oxford: Hart, 2012, p. 54: "a set of universal principles central to liberal democratic constitutionalism undergird the authority of public law and determine which norms take precedence over others in particular circumstances".

[22] M. Maduro, *Contrapunctual Law*, cit., p. 525.

[23] *Ibid.*, p. 526.

[24] *Ibid.*, p. 524.

[25] *Ibid.*, p. 527.

[26] *Ibid.*, p. 530.

vided both the conceptual framework and some of the key elements to which all pluralists have subscribed. Even if only for strategic reasons, it was "pioneering" Community law that introduced the image of the "two legal orders" and that emphasised the autonomy of the supranational and national legal orders. Despite the rather conspicuous monistic élan of the concepts of direct effect (and even more clearly) supremacy, pluralists have kept on discussing the relationships between the two legal orders by reference to such concepts (as has European legal scholarship in general).

Pluralistic federalism broke away from the claim to absolute novelty of Community law characteristic of the scholarship that established the discipline (the "sui-generism") and connected theorising to well-established constitutional (federalism) and jurisprudential (legal pluralism) theories. This was not a form of strategic, but of pluralism *tout court*. That fostered a concern with the preconditions and conditions of stability of a pluralistic practice. While Cappelletti and Weiler emphasised structural institutional and procedural elements, MacCormick and Walker focused on the balance of legal authority claims. Still, the legacy of strategic pluralism was very strong. This reflected in pluralistic federalism taking for granted, without any empirical testing, that the existing institutional and substantive structure of the Communities was conducive to the fostering not only of unity, but also of diversity, even if direct effect and primacy were at the core of their practice.

Judicial pluralism may be regarded as an attempt at operationalising the intuitions of pluralistic federalism, while diluting when not dropping the structural concern of the latter with the political and legal mechanisms needed to ensure the stability of pluralistic legal practice. Judicial pluralists came to assume, not unlike strategic pluralists, the forward march of European integration, while emphasising, contrary to the latter and following MacCormick and Walker, the importance of non-legal sources of integration: thin "ethical" principles and a common constitutional culture. The results were invariably centralising, if not of the law itself, of legal practice and of legal culture.

It can thus be concluded that of the three variants of pluralism, only pluralistic federalism fully and consistently endorsed pluralism as the normative compass of the development of European Union law and considered the conditions under which pluralistic legal practice could be stabilised. Contrariwise, pluralism was only endorsed by strategic and judicial pluralists for tactical reasons. In particular, judicial pluralists put forward guidelines that while formally preserving the autonomy of national orders in full, introduced powerful new integrative forces. Indeed, the thin ethical principles and the common constitutional culture were to be *one* if they were to be of use in solving conflicts. As a result, while judicial pluralism fostered the slowing down of integrative process, no mechanism was built in that could result in pushing integration backwards. Contrary to what is the case with pluralistic federalism, judicial pluralism is by design a one way street.[27]

[27] The merely formally pluralistic character of judicial pluralism is confirmed once we consider what are the material consequences of claiming that it is the very essence of pluralism is that the question of

In the remainder of this *Article*, I focus my analysis on pluralistic federalism as providing both the most consistent and most complete pluralistic theory of European law.

III. The empirical shock: the second and the third European transformations

In this section I show why the empirical claim of pluralistic federalism, that European legal practice has come to be pluralistic, no longer holds. Even if highly plausible when it was first formulated in the late seventies and early eighties, the claim was already then being seriously tested by the evolution of European integration. A second European transformation set in motion in the late seventies (sub-section 1) would end up undermining the balance of power, the symmetric intergovernmentalism underpinning supranational institutional structures and decision-making processes, and the very features of Community law at the core of pluralistic legal practice (sub-section 2). The apparently "on the hoof" decisions and improvised structural changes adopted in the name of containing and overcoming the manifold and overlapping crises that have hit the Union since 2007 have resulted in a third European transformation, rendering delusionary the characterisation of European legal practice as pluralistic.

III.1. The second European transformation

As hinted at in the previous section, monetary (1971) and economic crises (1973 and 1979) revealed the extent to which European integration had proceeded far enough to affect the capacity of Member States to govern the crises, but had still fallen short of rendering feasible coherent collective action. The very features of European integration that were regarded by pluralistic federalists as normatively commendable (the federal enmeshing of decision-making, enumerated competences, national veto rights) came to be portrayed as pathologies undermining European integration.[28] In short, pluralistic federalism clung to a *fixed image* of European law and practice precisely at the time that such law and practice were being revolutionised. In the mid-eighties, a consensus of sorts emerged on the need of "reviving" integration by means of decoupling economic integration from political integration. Three were to come the key building blocks of

who decides should be left open. In a context in which the new understanding of economic freedoms, sponsored by the European Commission, sanctioned by the Court of Justice, and widened by the Single European Act and the Maastricht Treaty, was reshuffling power in favour of capital owners and entrepreneurs, "keeping open the question of who decides" was tantamount to the furthering neutralisation of public power, which could not but radicalise the implications of the ongoing power shift.

[28] Council of the European Communities, *Report on European Institutions presented by the Committee of Three to the European Council (October 1979)*, available at publications.europa.eu. See p. 40 *et seq.*

l'Europe par le marché:[29] *a*) economic and monetary union; *b*) a new understanding of economic freedoms; *c*) the introduction of new procedures of supranational decision-making and criteria dividing the decision-making "labour" among them. Each of them would have led to major changes in the socio-economic structure of the Communities and of its Member States. Jointly, as we will see in subsection *d*), they changed the configuration of the European Union.

a) Economic and monetary union.

The third block of *l'Europe par le marché* was the establishment of an autonomous European monetary order protecting the soundness of money, or what is the same, keeping the store value of money, so that capital could be safely accumulated. Key in that regard was the establishment of the European Exchange Rate Mechanism (ERM), agreed in late 1978 and put in effect in March 1979, then followed by Economic and Monetary Union, agreed in 1992 and implemented in May 1998.[30]

Both ERM and EMU were premised on the "divorce" of monetary and fiscal policy.[31] A different set of institutions, procedures and substantive norms should apply to the making and implementation of on the one hand monetary policy and on the other hand economic and fiscal policy.[32] Monetary policy was to be steered by national central banks enjoying a reinforced autonomy from political institutions (in ERM), or by a fully independent central bank (in EMU). Fiscal policy was to remain in the hands of national political authorities, but subject to major constrains. In both ERM and EMU, States renounced using the levers through which they controlled the terms according to which they issued debt. In particular, central banks were expected to stop acting as lenders of last resorts of States, while States were expected not to (and in EMU formally forbidden to) impose on financial institutions coerced loans. Under EMU, Eurozone States were also prohibited from extending loans to each other and/or to assume financial responsibilities of other Member States.[33]

The architecture of EMU envisaged additional constrains on national fiscal policy.

[29] G. GRIN, *The Battle of the Single European Market*, London: Kegan Paul, 2003; N. JABKO, *L'Europe par le marché. Histoire d'une stratégie improbable*, Paris: Presses de Sciences Po, 2009.

[30] The date at which the parities between national currencies were "irrevocably" fixed.

[31] Something regarded at the time as a necessary means to either curb high inflation (ERM) or to ensure a sustained low level of inflation (EMU).

[32] In the case of EMU this was explicitly codified into the Treaties. In the case of ERM, it was the result of how the system of "managed currencies" was operated, very especially since the second half of the eighties, in which the combination of *de facto* German monetary hegemony and lack of adjustment to exchange rates created the conditions under which all States were forced to follow German monetary policy and renounce to stabilise the economy through monetary policy. The failure to do that (which was a reasonable failure given the political, social and economic implications of "succeeding") accounts for the *de facto* collapse of ERM in 1992.

[33] The "no-bailout pact" was the reverse image of the explicit reference to the mutual provision of financial assistance in case of acute balance of payments imbalances in the original Treaties.

Firstly, *fiscal rules* were written into the Treaties that established the "limits" of national discretion in the implementation of fiscal policy (60 per cent GDP public debt, 3 per cent public deficit). Such rules were formally supported by sanctions (even if the very content of the sanctions implied that they would only be effective *were they not to be applied*). The Stability and Growth Pact of 1997 fleshed out, both procedurally and substantially, the just referred fiscal rules.

Secondly, the "coordination" of national fiscal policies was to be achieved through informal, experimental procedures, which were soon characterised as "governance procedures", in which "guidelines", "benchmarks" and "targets" ("soft law", not law proper) were to be worked out through "deliberation", "peer review" and the development of "best practices".

b) A new understanding of economic freedoms.

Cassis de Dijon[34] opened the way to a radically different understanding of free movement of goods. In the ruling in that case, the Court found that the right to free movement of goods would be breached not only if one State treated imported goods differently from nationally produced goods, but also when national law (even if non discriminatory) placed *obstacles* to the free movement of goods. As a result, free movement of goods was no longer to be understood as the operationalisation of the principle of non-discrimination, but rather as a self-standing, autonomous freedom, ultimately an operationalisation of the right to private property and of entrepreneurial freedom. Free movement of goods thus became a material, and not merely formal, yardstick of review of the validity of national norms.[35]

The transcendence of this jurisprudential change was multiplied by later decisions of the Court of Justice by means of which the judges assimilated the status of the other three economic freedoms (freedom to provide services, freedom of movement and establishment, and last in time but not last in substance, free movement of capital) to that of free movement of goods,[36] despite both the structure and literal tenor of the Treaties.[37]

[34] Court of Justice, judgment of 20 February 1979, case 120/78, *Rewe-Zentral* (*Cassis de Dijon*).

[35] The transcendence of the ruling did not escape the Directorate General Common Market of the European Commission, which had played a key role in the preparation of the intellectual ground on which the ruling was planted. In a Communication that turned out to be very influential, the Commission claimed that the ruling had opened a new path of integration, alternative to unanimous decision-making in the Council. Cf. Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ("Cassis de Dijon").

[36] This was not only a problematic move from a political perspective (due to much higher abrasiveness of the other economic freedoms, very especially freedom of establishment and free movement of capital) but also from legal-dogmatic one, given the literal tenor and structure of the Treaties. The fact that we still find today separate chapters dealing with on the one hand free movement of goods and on the other hand the other economic freedoms, physically separated by the chapter on agricultural policy, is the very literal expression of the "embedded liberalism" economic philosophy that underpinned the Treaties. It is hard to conclude that such a philosophy was the same that was relied upon to release economic from political integration in *Cassis* and its progeny.

c) The division of decision-making labour resulting from the partial move to qualified majority voting.

Among the many effects of *Cassis de Dijon* was that of fostering a transformation of supranational decision-making rules. The Single European Act (re)introduced qualified majority voting in the Council. Despite the rather tortuous literal tenor of the amended drafting of the Single European Act, successive rounds of Treaty amendment resulted not only in the widening of the policies regarding which decisions could be taken by qualified majority voting, but also the granting in such cases of "co-decision" powers to the European Parliament (expected to vote in most cases by simple majority).

It should be emphasised that it was not intended in the Single European Act, or for that matter at any later stage, that qualified majority voting would become the standard decision-making rule. There was, and there remains, a set of policies where unanimity in the Council is still required. This entails that alongside qualified majority voting came (implicit) rules dividing law-making and decision-making labour between different decision-making processes. In very broad terms, the "new" decision-making process (qualified majority) were to be applicable when taking decisions concerning the realisation of the "single market" programme (market-making policies). On the other hand, unanimity in the Council was and is still required when "positive" measures rectifying the distributive consequences of the functioning including socio-economic policies that rectified the pattern of distribution of economic burdens and benefits resulting from the operation of markets (market-correcting policies).

III.2. Effects: unravelling pluralism

The second European transformation eroded the very conditions of stability of a pluralistic European legal practice. National power was limited, fragmented and disciplined through the assignment of negative and disciplinary powers to supranational institutions (the real "winners" were the holders of economic freedom). Symmetric intergovernmentalism was first circumvented through the transformation of entrepreneurs and capital owners into agents of economic integration by virtue of the new understanding

[37] The socio-economic vision of "embedded liberalism" was reflected in the structure and content of the founding Treaties. There was a neat distinction between on the one hand the right to free movement and on the other hand the other economic freedoms. In between the sections devoted to them, we still find the chapter on agriculture. This pointed to a process of economic integration led by trade in goods. Furthermore, the founding Treaty on Economic Community contained a clear schedule of negative integration regarding free movement of goods, while there was no calendar foreseen for freedom of establishment or free movement of capital (there was an expectation that free movement of workers would be fully effective by the end of the four stages leading to the establishment of the common market, but the original assumption was that any such movement would have to be based on a pre-existing job offer). Moreover, the effectiveness of the other three economic freedoms was to be politically shaped and defined through measures of *positive* integration.

of economic freedoms put forward by the Court of Justice and later through the assignment of monetary powers to a federal but non-representative-by-design central bank – and later restrained with the (re)introduction of qualified majority voting. Finally, the role and nature of Community law as the law of integration mutated, as judge-made law and expert-made law competed with intergovernmentally authored Community law, and as governance came hand in hand with common action norms that were hard to characterise as law.

a) Limiting, fragmenting and disciplining national powers.

Fundamental public powers, very especially on what concerned the shaping of the socio-economic structure, were limited, fragmented or nullified on the road to the single market and economic monetary union.

The loss of national powers was the result of the attribution to or appropriation by supranational institutions of *negative powers*, that is powers to prevent Member States from choosing a certain set of policy options. In other words, States lost positive powers while the Union gained merely negative powers, to the benefit of the holders of economic freedoms, and above all, capital owners and entrepreneurs.[38]

The new understanding of economic freedoms altered the European power equation in two main ways. Firstly, the Court of Justice assumed the negative constitutional power to determine what uses of national socio-economic powers were in breach of Community law, on account of placing *obstacles* to the exercise of economic freedoms. Secondly, and as a result, many national socio-economic powers were seriously limited when not annulled. The structural and substantive implications of the new understanding of economic freedoms were amplified by the asymmetric division of labour between supranational decision-making. The said division of labour had two effects. The first was splitting decision-making about issues which, despite being so intertwined as to require being regulated simultaneously, became the subject of different supranational decision-making processes. The second was to create the conditions under which it was much easier to expand the breadth and scope of economic freedoms as negative freedoms, than to correct the distributional effects of economic integration. A clear example is provided by the timing of the liberalisation of capital movements and of the measures to avoid that such liberalisation would result in massive avoidance of taxes on capital income. Before the Single European Act, it was assumed that there could be no liberalisation unless agreement was reached on the measures to be taken to avoid creating massive new opportunities for avoidance. However, in 1988, no longer after the entry into effect of the Single European Act, the decision to liberalise capital movements was speedily taken, while the companion measures to avoid tax evasion were only taken (and then in deeply diluted from) in 2002. Why this different timing? Because liberalisa-

[38] F. SCHARPF, *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press, 1999.

tion of capital movements was negotiated under the shadow of qualified majority voting, while the measures to avoid tax evasion where to be decided unanimously.

Furthermore, economic and monetary union resulted in the assignment to the Council of Ministers of new if originally rather undefined powers to monitor and discipline national fiscal policy, as the means of ensuring compliance with the referred fiscal rules.

The establishment of a European monetary infrastructure (ERM and then EMU) was premised on the renunciation of key national fiscal levers, including those that allowed States to control the terms under which they became indebted. As was also pointed, EMU resulted in the enshrinement in the Treaties of "fiscal rules" setting quantitative limits to national discretion when implementing fiscal policy.

In a limited number of cases, positive powers have accrued to supranational institutions. In such cases, however, powers tend to be "programmed" so as to further the framing and the shaping of national policy choices in line with the substantive choices at the core of the single market and economic and monetary union. This is clearly the case of monetary policy. The European Central Bank (ECB) is assigned the power to implement monetary policy, but has to make use of this power with a view to achieving a very specific objective: price stability.[39] Quite obviously, such a mandate restricts the discretion of the ECB, but also constrains the margin of manoeuvre that States have to pursue socio-economic objectives. If the ultimate and fundamental objective of monetary policy is price stability, it becomes extremely difficult to implement an economic policy aiming at full employment. At those conjunctures in which a choice might have to be made between sticking to full employment while risking higher inflation or sticking to price stability and risking increased unemployment, the bank would favour the latter, and would take monetary decisions undermining the effectiveness of expansionary fiscal policy. The empirical record of conflicts between the German government and the *Bundesbank* in the seventies provides ample empirical illustration of the point.[40]

The result is a division of competences and powers between the Union and the Member States that not only breaks the balance between unity and diversity, but also is substantively biased in favour of a very specific socio-economic structure, one in which sound money, the right to private property and entrepreneurial freedom are central.

b) The circumvention of symmetric intergovernmentalism.

The second European transformation resulted in the emergence of a number of decision-making procedures alternative to the symmetric intergovernmentalism which have evolved in the first European transformation.

Firstly, the new understanding of economic freedoms turned the holders of economic freedoms into (alternative) agents of economic integration, entitled to ignore na-

[39] And only once such objective has been achieved, contribute to the realisation of the overall goals of the Communities.

[40] F. SCHARPF, *Crisis and Choice in European Social Democracy*, Oxford: Oxford University Press, 1991.

tional norms placing "obstacles" to the exercise of economic freedoms. If Member States would nonetheless insist on applying the norms that economic actors claimed breached their economic freedoms, the conflict was not to be solved by the national or supranational political process, but by national courts, which could seek a preliminary ruling from the Court of Justice. In such a way, the formal supranational decision-making rules were left untouched, but an alternative path of economic and legal integration was *de facto* cleared. Indeed, the Commission, which had been the "intellectual actor" behind the ruling in *Cassis de Dijon*, constructed the decision as opening the way for "mutual recognition" emerging as an alternative to positive (and politically mediated) integration. Instead of States agreeing on common regulatory standards according to which economic freedoms would be realised, it would suffice that States recognised as good enough the regulatory standards of all other Member States.[41]

Secondly, at the core of monetary union was the assignment of the power to implement monetary policy to the European System of Central Banks, with the ECB at its apex. This resulted not only in the introduction of a (major) exception to the democratic legitimation of public power (as the German Constitutional Court stressed),[42] but also to the symmetric intergovernmentalism according to which all supranational decisions had come to be taken. The fact that the discretion of the ECB was framed, as just pointed, by a mandate to preserve price stability did not diminish the implications that the institutional and substantive design of EMU had on supranational decision-making. It was a matter of time that the formally neat distinction between fiscal and monetary policy, and the respective allocation of powers between the epistocratic decision-making of the ECB and the national political decision-making, was challenged by economic developments. As I will briefly discuss, that was indeed the case during the European fiscal crisis of the early 2010s.

Moreover, the second European transformation also resulted in a straightforward challenge to symmetric intergovernmentalism. As was pointed in the previous subsection, supranational majoritarian decision-making processes were (re)introduced in the Single European Act, while the range of issues to which they apply has been expanded in successive Treaty amendments. This results in a key, if not the key, piece of the belt transmitting indirect national democratic legitimacy into supranational law being removed. The "loss" in indirect democratic legitimacy was said to be more than compensated by the emergence of the European Parliament as co-decider. But even if that was so (which can be doubted given the limited social legitimacy of the European Parliament) the move to qualified majority deeply transformed the relationship between European law and Member States, which could previously not be imposed supranational laws that they had re-

[41] The sharpest edges of mutual recognition will be cut by means of "minimal harmonisation" as practised from the mid eighties.

[42] German Federal Constitutional Court, judgment of 12 October 1993, 2 BvR 2134.

jected.[43] This was aggravated by the fact that the division of labour between supranational decision-making processes, as we saw when discussing the impact of the second European transformation on the allocation of power in Europe, resulted in the facilitation of measures reinforcing the new understanding of economic freedoms favoured by the Court, while de facto hampering legislation aiming at reregulating economic activity at the supranational level. Successive enlargements would only amplify this bias.[44]

c) A different law of integration.

The second transformation of Union law resulted in three major changes.

Firstly, it altered the sources of Community law, favouring judicialisation and epistocratisation, thus undermining its democratic legitimacy.

Secondly, the neutrality of Community law was compromised, with the emergence of a structural bias in favour of the maximisation of the freedom enjoyed by property owners and entrepreneurs.

Thirdly, means of integration alternative to law started to be used, most conspicuously the soft law characteristic of "governance" arrangements.

The new understanding of economic freedoms resulted in a marked judicialisation of fundamental socio-economic choices. As was pointed out above, economic freedoms became material standards of review, whose substantive content was to be defined autonomously from national law. Given that the Treaties did not contain a thorough substantive definition of economic freedoms, the material content of the economic freedoms was to be fleshed out *case by case*.[45] Judge made law became a central (and very dynamic) component of the law of integration. The Court of Justice, together with national courts, developed the contours of economic freedoms in its rulings, many if not most prompted by preliminary references posed by national courts. As a result, national constitutional courts became natural counterweights, setting limits to the structural implications of the jurisprudence of the Court of Justice. But even if doing so may end up protecting the substantive content of the national constitutions, it further fostered judicialisation.

The asymmetric character of economic and monetary union resulted in fiscal "coordination" being ensured through means of integration other than law. Indeed, lack of political agreement on how to render functional the combination of one monetary policy and several national fiscal policies was the midwife of "governance" (which would then be extended to other policy areas, including those where integration was already proceeding through law).

[43] J.H.H. Weiler, *The Transformation of Europe*, cit., pp. 68-80; J.H.H. Weiler, *European Democracy and Its Critics: Polity and System*, in J.H.H. Weiler, *The Constitution of Europe*, cit., p. 232.

[44] The higher the number of Member States, and the more diverse the socio-economic structures of the Member States, the more difficult it has become to take unanimous decisions.

[45] That had major implications, as the Court tended to reduce fundamental rights positions to subjective rights, to the exclusion of collective rights and collective goods (contrary to what was the case in national constitutional case law).

The law of integration has become biased as a result of the combined effect of the new understanding of economic freedoms and the asymmetric division of labour between decision-making processes. Not only economic freedoms (and through them the right to private property and entrepreneurial freedom) tend to be given higher absolute and concrete weight when in conflict with other rights and collective goods (critically including the rights and goods at the core of the postwar social State)[46] but it is much easier to approve regulations and directives broadening the scope of economic rights than measures correcting the distributional effects of market-making.

Finally, fiscal rules, together with the sanctions foreseen in case of lack of compliance with them, represented a hybrid medium of integration, presented in the form of law, but which was dubious possessed all the structural features characteristic of the latter, if only because, as already hinted, sanctions were bound to be only effective if they had not to be applied. In realistic terms, the States which would meet the conditions for being sanctioned would be States experiencing a major economic downturn and thus in clear breach of fiscal rules. Sanctioning that State in such circumstances would most likely aggravate its economic, fiscal and/or financial crisis. The effects of such worsening economic condition would be felt not only within the national economy of the sanctioned State, but all across the Eurozone. The bigger the economy of the sanctioned State, the bigger and deeper the risk that the sanctions would result in an economic recession in the Eurozone as a whole. Indeed, the reluctance of the Council of Ministers to sanction France and Germany in 2001 constitutes clear evidence of the extent to which sanctions were almost impossible to apply. That may not only require characterising fiscal rules as "stupid", but throws serious doubts about whether they should qualify as law from a pure analytical perspective.

III.3. Encore: the third European transformation

The actual effects and implications of the second transformation remained muted as the process unfolded. Changes were long in coming. Eighteen years lapsed from the rendering of *Cassis de Dijon* to the actual launching of monetary union, while it took a good decade for the structural weaknesses of monetary union to come to the fore. Moreover, and perhaps more decisively, a good deal of the short-term welfare gains of *l'Europe par le marché* were felt almost immediately by most of the population. The unleashing of economic freedoms came hand in hand (and was in itself part) of a process of economic globalisation that altered the international division of labour. Cheap imported goods seemed to increase the purchasing power of Europeans, at the very same time that new opportunities to get indebted compensated the combined effects of the

[46] A.J. Menéndez, *The Guardianship of European Constitutionality: A Structural Critique of European Constitutional Review*, in M. Andenas, T. Bekkedal, L. Pantaleo (eds), *The Reach of Free Movement*, Dordrecht: Springer, 2017, pp. 173 *et seq.*

shrinking income share of wages and the steady increase of wage and wealth inequality. By the same token, the structural divergences between Eurozone States were cloaked by massive flows of capital that created the illusion of the Eurozone periphery catching up with the Eurozone core. The massive growth of private debt, mostly in the periphery, compensated both the deflationary impact of growing inequality and the erosion of the taxing capacity of Eurozone States (in itself resulting from the new understanding of free movement of capital).[47] The long-term social, economic and political costs of fragmenting public power were thus postponed.

To quote Wolfgang Streeck, the second European transformation was rendered possible by several policies through which time was bought, or what is the same, through which the full effects of the policies were pushed into the future.[48] The price to pay will be dear, but will only be paid in the future. And the future, for many purposes, arrived in 2007. Starting then, financial, economic and then fiscal crises hit the European Union and its Member States and revealed the structural tensions at the core of the Europe emerging from the second transformation. As a result, a third transformation was unleashed. At the time of writing, the outcome of this third transformation has been an acceleration and radicalisation of the trends of the second transformation. Public power has been further fragmented and disciplined; the main difference is that this time supranational institutions have acquired sizeable positive powers, through which they have acquired even more leverage to mould national economic and social policies. Supranational decision-making has been further pushed away from symmetric intergovernmentalism with the ascendancy of what has been labelled as "new intergovernmentalism". The latter development has come hand in hand with the further devaluation of democratic law as a means of integration, and the emergence of hybrid common action norms, supported by law-like coercion but applied in circumstances that remain radically indeterminate (and which has been aptly labelled as *Ersatz* law).

a) Powers.

National power has been further fragmented and limited, at the same time that a considerable range of regulatory and positive powers have been shifted to the European Union level (although, as was already the case during the second European transformation, such powers are densely programmed with a view to further constraining national choices).

A new set of rules has been established with a view to further limiting the power of Member States when designing and implementing fiscal policy.

For one, an emerging constitutional convention forbids Eurozone States from defaulting on their debts. Member States have been encouraged to make constitutional commitments to the absolute priority of the payment of principal and interest of debt

[47] See S. KEEN, *Can we Avoid Another Financial Crisis?*, London: Polity, 2017.
[48] W. STREECK, *Buying Time*, London: Verso, 2014.

over any other State expenditure (the pressure has been successful in the case of Spain; see the new tenor of Art. 135 of the Spanish Constitution).

For two, the existing fiscal rules have formally been made more demanding. Not only the fiscal targets to be met by States are tougher, but Member States are now obliged to patriate into their constitutions (or constitutional laws) one of the European fiscal rules, the deficit ceiling (wrongly referred as "golden rule" or "debt brake" in media parlance). Moreover, additional fiscal rules (including the deficit and debt trajectory objectives) have been enshrined into the Stability and Growth Pact.

For three, a set of "macroeconomic indicators" has been established with a view to limiting the discretion of Member States in the overall design of their social and economic policies.

The efficacy of the new fiscal rules is expected to have been increased by the increasing monitoring and disciplinary powers that European institutions have been assigned.

For one, the Commission has seen its powers to monitor and discipline national fiscal and macroeconomic policy strengthened, given the increased authority of its proposals, deemed to be approved if a qualified minority of the Council concurs.

For two, compliance with the obligation to patriate the deficit ceiling has been assigned to the Court of Justice; a review of "European constitutionality" of the actual national reforms (including constitutional reforms) adopted to comply with the obligation could be conducted, and the reform declared in breach of European law.

At the same time, the ECB has been assigned the power to both *monitor and ensure the stability of the financial system as a whole* (macro-prudential supervision, assigned to the Systemic Risk Board, "led" by the ECB) and *to supervise all major financial institutions* (micro-prudential supervision of all major financial institutions of the Eurozone is now in the hands of the newly created supervisory "arm" of the ECB).[49]

Moreover, supranational institutions have been granted positive powers of action, although in most cases such powers are programmed with a view to reinforcing the very objectives to be attained through supranational disciplinary powers.

The Eurozone has acquired the financial means and has set up the decision-making process necessary to provide financial assistance to Member States experiencing fiscal crises. The acceptance of financial assistance is subject to the condition that the assisted State accepts the troika (the ECB, the Commission and the International Monetary Fund (IMF))[50] conditioning national economic and social policy as a whole.

[49] And Member States which may decide to transfer such competence to the ECB.

[50] Quite obviously, the oddest institution out of the three that make up the troika is the IMF, because it is not only independent from the EU as such, but also rather external to it. IMF's involvement was deeply controversial in 2010, even within some national governments (famously including the German one). A full assessment of the actual role of the IMF in Eurozone financial assistance would require access to documents that remain reserved for the time being. But, contrary to what might be expected taking into account the IMF involvement in multilateral financial assistance, there is clear evidence that the Commission and the ECB

The ECB has assumed the role of lender of last resort of Eurozone States, a power that it has pledged to exert by reference to the terms of the financial assistance provided by the Eurozone, and consequently, by reference to their underlying *conditionality*.

Finally, a constitutional convention has emerged according to which the *remit* of monetary policy is to be as wide as necessary to achieve the *goals* of monetary policy, independently of the (narrow) legitimacy basis of the ECB.[51] This implies that the ECB can decide on the shape of its monetary policy independently of whether or not this affects the conduct of national fiscal policies, while the reverse does not hold; or what is the same, it results in monetary policy being acknowledged to trump fiscal policy (what economists characterise as fiscal dominance).

b) Changes to decision-making procedures.

The new competencies attributed to the European Union have all resulted in gains by institutions whose legitimacy is indirectly democratic or are by design non-representative (the ECB) while the competencies and authority of both the European Parliament and of national parliaments (with the rather more formal than substantive exception of some national parliaments, as just indicated) have largely stalled. The clear "institutional" winner is the ECB, an institution that is by design insulated from democratic politics. The same reasoning applies to the Court of Justice, the European Stability Fund, the already created national fiscal authorities, the envisaged European Fiscal Authority and the planned national competitiveness authorities. The "Euro Summit" and the "Eurogroup" have become relevant institutions when it comes to the exercise of a good deal of the (old and new) economic powers in the hands of the European Union. But as was pointed out in the previous section, the way in which the said institutions actually operate has itself been transformed during the crises. What some political scientists call the "new" intergovernmentalism is based not on the equality between Member States, but actually on the (formalised) inequality among States. On the other hand, only with a considerable degree of optimism can be said that representative institutions have merely not gained power. It is indeed telling that while the European Parliament and national parliaments have been assigned mere "debating" powers, an institution external to the EU, the IMF, has been acknowledged, both *de jure* and even more so *de facto*, key powers in the process of granting fi-

have been stronger advocates of policies much more intrusive with national policy autonomy than the IMF itself. Clear evidence of this can be found on the evidence published by the IMF itself on decision-making before the first package of financial assistance to Greece. See IMF's Independent Evaluation Office, *The IMF and the Crises in Greece, Ireland and Portugal*, 8 July 2016, available at www.ieo-imf.org.

[51] Opinion of AG Cruz Villalón delivered on 14 January 2015, case C-62/14, *Gauweiler*, para. 111: "The ECB must accordingly be afforded a broad discretion for the purpose of framing and implementing the Union's monetary policy. The Courts, when reviewing the ECB's activity, must therefore avoid the risk of supplanting the Bank, by venturing into a highly technical terrain in which it is necessary to have an expertise and experience which, according to the Treaties, devolves solely upon the ECB. Therefore, the intensity of judicial review of the ECB's activity, its mandatory nature aside, must be characterised by a considerable degree of caution".

nancial assistance to Eurozone States, and monitoring compliance with the economic programmes to which the said assistance is conditioned.

The move from majority to minority voting on what regards the monitoring, and especially, the disciplining, of national fiscal policy results, *de facto*, in empowering creditor/surplus States (a minority within the Eurozone) against debtor/deficit States. Given the interplay of the rules assigning votes in the Council and the national interests at stake, it is not too far-fetched to see that a Commission seeking to sanction a debtor/deficit State (say Greece) will look for the votes of the creditor/surplus States, namely, Germany, Austria, Finland and the Netherlands, which happen to make up a qualified minority. Similarly, while the European Stability Mechanism can only act by unanimous consent when taking important decisions (including the decision to provide financial assistance to one Eurozone State), there is one exception, which allows decisions by 85 per cent of the votes when there is urgency. Votes have been attributed in a rather peculiar fashion (according to democratic standards), as the voting weight of each State depends on the capital of the Mechanism it has subscribed. This means that some, but not all States, have formal *solo* veto power: Germany, France and Italy. Of which perhaps only Germany can effectively make use of it without setting a precedent that may apply in the long run to itself.

c) The shifting character of EU law.

The combined effect of the centralisation of powers and their assignment to non-representative institutions has been to accelerate the transformation of the character of the law of integration.

The assignment to the Court of Justice of the formal power to review the validity of national decisions "patriating" the debt ceiling into national law, preferably constitutional law, assumes that the Fiscal Compact, as interpreted by the Court of Justice, can trump a national constitutional decision, even if such a decision would be taken after a direct consultation with the national people. It could be said that in abstract terms, such a power merely renders explicit what the Court already implied in *Simmenthal*. Leaving aside what is the best interpretation of the said ruling, the assignment of such a competence to the Court of Justice assumes that the authority of European law (even when formally articulated in an international Treaty that is formally much less authoritative that the EU Treaties) can trump even the intense democratic legitimacy of a national constitutional amendment.

The acknowledgment of a vast discretion in the implementation of monetary policy to the ECB, apparently extending to the very decision on the means to attain "monetary objectives", independently of the effect that the means chosen may have on the discretion of Member States to implement the policies of their competence. Under the form of mere "decisions" (or even mere "press releases"), the ECB is thus empowered to produce norms that drastically limit and condition fiscal policy, or even the overall policy of

a Member State. This was indeed the issue at stake in *Gauweiler*;[52] but more critically, this new vast discretion of the ECB has resulted in massive influence being exerted, without publicity and accountability, on Member States.

The move from qualified majority voting to qualified minority voting (perhaps not by chance formally designated as "reversed qualified majority voting") when it comes to the taking of decisions concerning the monitoring of the degree of compliance of national fiscal policies with supranational fiscal rules, critically including the decision to sanction Member States. The law of integration becomes not only law produced by non-representative institutions, but also law produced by minorities.

Moreover, the crises revealed the extent to which the fragmentation of power unleashed by the single market and the economic and monetary union left both the Union and the Member States ill equipped to provide a coherent response to the financial, economic and fiscal crises. As a result, a good deal of the punctual decisions and the structural reforms taken to contain and overcome the crises have been adopted in breach of the legal procedures, the legally codified division of competences between the Union and the Member States, and of the substantive standards of European constitutionality. It is important to notice that in many instances there has been a clear attempt to justify the breaches of legality with what formally were legal arguments. For one, both national and European constitutional standards have been avoided by means of the pretense that action was governed by public international law. A search for "empty constitutional spaces" has indeed played legal systems against each other, mimicking the very legal strategies of capital holders seeking to flee from the regulatory and tax powers of nation-states. For two, the many constitutional doubts surrounding the substantive content of the legislative reform of European Economic governance (the Six-Pack) were expected to be dispelled by an ex-post amendment of the Treaties, which was however not formally accomplished, but actually codified in the Fiscal Compact.

Furthermore, the crises has resulted in a structural crisis of law. Even if institutional rhetoric emphasizes the extent to which the "new European economic governance" has transcended "soft law" and "voluntary coordination" in favour of "proper" legal rules and "harder" sanctions, the fact of the matter is that we can observe a weakening of the formal properties characteristic of law. For one, the core concept at the heart of the new European economic governance, "structural deficit", is totally indeterminate, an empty shell the concretization of which requires the adoption of a decision on the economic model by reference to which the structural deficit is to be calculated, a decision that is fully left in the hands of the Commission. For two, the "economic programmes" are on the one hand extremely comprehensive and exhaustive and on the other hand require "assisted" Member States compliance with norms that are not only ill-defined, but that can be constantly changed, resulting in the obligations that "assisted" States acquire being in the hands of

[52] Court of Justice, judgment of 16 June 2015, case C-62/14, *Gauweiler* [GC].

the "creditors". For three, European institutions, including the Court of Justice, have shown an increased tendency to interpret European law in a completely *ad hoc* fashion, relying on eclectic mixes of legal theories and understandings.

IV. Reconsidering pluralistic federalism

In section III I showed why European legal practice is no longer pluralistic. Even if pluralists have tended to associate their empirical and normative claims, their claims about what European Union law is and what it should be, there is no reason why the demise of the empirical claim should invalidate the standing of pluralistic federalism as a normative constitutional theory. It is still relevant to consider that the failure of pluralistic federalists to realise the full implications of the second European transformation was partially due to a series of "blind spots" in the theory itself.

IV.1. A nuanced positive assessment of the impact of the second European transformation

Pluralistic federalists failed to realise in full the extent to which the second transformation was bound to undermine the foundations of a pluralistic legal practice.

Weiler cautioned against the possible negative effects of transcending symmetric intergovernmentalism through (re)introducing qualified majority voting, as pointed out above. While the functional rationale of the decision might be commendable, its structural effects on the ultimate balance between unity and diversity could be enormously disruptive.[53] At the same time, Weiler expressed his rather mixed feelings regarding *l'Europe par le marché*, which are worth quoting at length:

> "A 'single European market' is a concept which still has the power to stir. But it is also a 'single European market'. It is not simply a technocratic program to remove the remaining obstacles to the free movement of all factors of production. It is at the same time a highly politicised choice of ethos, ideology, and political culture: the culture of the 'market'. It is also a philosophy, at least one version of which – the predominant version – seeks to remove barriers to the free movement of factors of production, and to remove distortion to competition as a means to maximise utility. The above is premised on the formal equality of individuals".[54]

[53] *Ibid.*, para. 75: "Since the SEA does rupture a fundamental feature of the Community in its foundational period, the equilibrium between constitutional and institutional power, it would follow from the analysis of the foundational period that the change should have implications that go beyond simple legislative efficiency". The same conclusion is emphasised in related publications. See for example *ibid.*, para. 232.

[54] J.H.H. Weiler, *The Transformation of Europe*, cit., pp. 89-90.

Well known are the admonitions of the author of *The Transformation of Europe* about the dangerous mismatch between the high sounding rhetorics of European citizenship and the meagre reality of what was actually established in the Treaty of Maastricht.[55]

Despite these bold criticisms, pluralistic federalists also saw promise in some of the elements of the second and third transformations.

MacCormick expressed the view that the conception of economic freedoms put forward by the Court of Justice in *Cassis de Dijon* and its progeny constituted a guarantee against excessive centralisation: it was a form of subsidiarity, which he labelled as "market subsidiarity".[56] Similarly, Cappelletti, Seccombe and Weiler saw strategic promise in *Cassis de Dijon*. The ruling could create both the demand and supply for further politically mediated integration. [57] Their view seemed to be that mutual recognition could play the role of a creative shock.[58] Cappelletti was openly hopeful on economic and monetary union becoming a vehicle of the deepening of pluralistic federalism.[59] And even if guarded in its assessment, Weiler penned a strong defence of the constitutional *status quo*, which he contrasted with the pitfalls of the constitutionalisation of the Treaties: "And yet the current constitutional architecture, which of course can be improved in many of its specifics, encapsulates one of Europe's most important constitutional innovations, the Principle of Constitutional Tolerance".[60]

IV.2. The blind spots

The mixed assessment of the second European transformation on the side of pluralistic federalists was partially caused by the factors that rendered, at least in the short and mid runs, ambivalent the transformations. However, the evolution of the process of European integration revealed some of the blind spots of the pluralistic federalist theories. I consider in this subsection the three outstanding ones: *a)* insufficient attention to the structural political implications of trade and monetary orders; *b)* an ambivalent conception of the relationship between law and democracy; *c)* the downplaying of the

[55] J.H.H. Weiler, *To Be a European Citizen – Eros and Civilization*, in *Journal of European Public Policy*, 1997, p. 495 *et seq.*

[56] N. MacCormick, *Questioning Sovereignty*, cit., p. 152. The Scottish philosopher added a fundamental proviso, namely, that this would be so provided the scope and legal force of economic freedoms was kept within proper limits. He failed to see that by the late 1990s, it was perhaps already visible that such limits had long be trespassed.

[57] M. Cappelletti, M. Seccombe, J.H.H. Weiler, *Integration Through Law*, cit., p. 31.

[58] This seems to be confirmed by the assessment the authors made of the "Spinelli" Treaty, and by the emphasis the authors placed on the need of reinforcing the actual capacity of public authorities to implement effective fiscal and macroeconomic policies.

[59] Cf. M. Cappelletti, *Verso gli Stati Uniti d'Europa*, in M. Cappelletti, *Dimensioni della giustizia nella società contemporanea*, Bologna: Il Mulino, 1994, p. 185 *et seq*.

[60] J.H.H. Weiler, *In Defence of the Status Quo*, cit., p. 17.

structural implications of the key concepts and principles on which "pioneering" Community law was forged.

a) The politics of *l'Europe par le marché*.

L'Europe par le marché was advocated on the assumption that the single market and economic and monetary union were malleable means of political integration, much as the common market had been in the sixties and seventies. In other words, the deepening of economic integration was regarded as an ecumenical objective, which would not necessarily result in tilting policy in any specific partisan sense.[61] The new "autonomous" understanding of economic freedoms, coupled with the pre-conditions set for joining both the ERM and EMU, would destroy obstacles (mainly in the form of national regulations) on the speedy road to deep economic integration. But it was also expected that as the process unfolded, the demand for reregulation would not only grow, but would be directed to the supranational level of government. The correctness of the assumption seemed to be proved by the experience of the first European transformation.

Unfortunately, not all trade and monetary orders are equally open to be *steered* to achieve a wide range of objectives as defined through the (democratic) political process. Economic servants can indeed turn out to be political masters in disguise, "constraints" forcing the hands of political actors. The point has been made again and again by political economists, including German, French and Italian ordoliberals that in the wake of the Second World War insisted on the strategic importance of international trade and monetary orders, giving the extent to which they unavoidably conditioned the shape of national socio-economic orders.[62]

By the same token, the fact that international and transnational economic relations are governed by norms (such as the economic freedoms of the single market or the fiscal rules of monetary union are) does not by itself turn such orders politically malleable. As the fundamental studies of Albert Hirschman[63] and Marcello De Cecco[64] have shown, the norms of international or transnational trade system and monetary order can be a fitting means of cloaking the exercise of (raw) power.[65] The substantive content of the norms matters, and matters a lot.

[61] J. Delors, *La dynamique de la construction européenne*, in J. Delors, *Le nouveau concert européen*, Paris: Odile Jacob, 1992, p. 149 *et seq*.

[62] W. Röpke, *International Economic Disintegration*, London: William Hodge, 1942; G. Carli, *Cinquant'anni di vita italiana*, Bari: Laterza, 1993.

[63] A. Hirschman, *National Power and the Structure of Foreign Trade*, Berkeley: California University Press, 1945.

[64] M. De Cecco, *The International Gold Standard: Money and Empire*, Oxford: Blackwell, 1984. The definitive edition has just been published in Italian: M. De Cecco, *Moneta e impero. Economia e finanza internazionale dal 1890 al 1914*, Rome: Donzelli, 2017.

[65] For one, the norms of the game can disproportionately favour one of the parties (eventually undermining the interests of others), reflecting the disparities in power of the parties when negotiating or

Once the assumption of political neutrality of economic integration is set aside, it becomes possible to understand why the first European transformation was a politically malleable means of integration, while the second European transformation not only turned the relationship between economic and political integration on its head, but in the process resulted in the undermining of the very conditions of pluralistic federalism. On the one hand, the first European transformation was not only piloted by the common will of the Member States of the Communities through an intergovernmental institutional structure and decision-making processes that equalised the power of the Member States, but the common market was so designed as to reinforce, not weaken, the capacity of each State to choose socio-economic policies fit to the socio-economic circumstances, historical trajectory and the political preferences of the electorate. On the other hand, the second European transformation was triggered by the enervation and pulverisation of public power, at the same time that the substantive choices at the heart of the single market and asymmetric economic and monetary union were bound to end up forcing the hand of national governments when implementing their remaining socio-economic powers. As was already hinted at in section II, the new understanding of the right to freedom of establishment and of the freedom to move capital dramatically reinforced the position of capital holders, to the (economic) detriment of workers.[66] By the same token, turning "price stability" into the fundamental objective to be pursued by the ECB when implementing monetary policy rendered structurally impossible to pursue the objective of full employment in any Eurozone State (at the very same time that contributed to the growth of private debt). In sum, the relative weight of socio-economic rights has been weakened, at the same time that fundamental rights have been wrongly characterised as subjective rights, neglecting that collective rights and collective goods are key fundamental rights positions in the postwar democratic constitutional traditions. European law has thus been transformed into a legal weapon against collective identities, collective goods and collective rights.

b) Constitutionalism and democracy.

The second blind spot of pluralistic federalism concerns the understanding of the relationship between law, constitution and democracy.

Pluralistic federalists have sustained that the proper normative assessment of European Union law requires recalibrating the standards of democratic legitimacy forged in the semblance of nation-states to the "non-state" reality of the European Union, as well as the weight to be granted to democratic legitimacy in the overall legitimacy assessment of European legal practice. On such spirit, Neil MacCormick proposed con-

interpreting the norms. For two, formal norms may cloak in plain sight the discretion of one of the parties, turning into arbitrariness that can be exercised to favour its own interests.

[66] Not by chance, the share of wages in the national product of Eurozone Member States have strongly declined in the last two decades, with the drop being markedly fast in the periphery Eurozone States after 2009.

ceiving the Union as being founded on a "mixed constitution", a concept that provided "a salutary reminder that merely to point to some un- or non-democratic element in a given constitutional setup is not *eo ipso* to damn it. For the issue is one concerning a reasonable balance of elements."[67] The more so because the Union is not a State, and thus the standards to be applied to it should be different from those characteristically used when dealing with States:

> "[T]he idea of a democratic, commonwealth, especially one exhibiting the features of the European Union, being a polyglot, multi-national and trans- or supra- national commonwealth committed both to democracy and to subsidiarity, is a complex, not a simple one. Neither 'rule by the people, for the people', nor 'majority rule', nor 'one person, one vote' nor any other simple concept or slogan will capture it. The different aspects of the value of democracy need to be acknowledged, in their parallelism with different elements or aspects of subsidiarity. An enlightened bureaucracy, provided it is subject to appropriate checks and controls, can also be seen to have an essential utility in a well-constituted order. Market subsidiarity and communal subsidiarity are as important to a democratic commonwealth as rational legislative and comprehensive subsidiarity".[68]

The recalibration of democratic legitimacy standards creates the theoretical space within which it becomes possible to think constitutionalism beyond the State, and in the process, to recharacterise what constitutionalism stands for. This was for example part and parcel of Weiler's characterization of "constitutional tolerance", underpinned by a specific understanding of constitutionalism: "[Our constitutions] are about restricting power, not enlarging it; they protect fundamental rights of the individual; and they define a collective identity which does not make us feel queasy the way some forms of ethnic identity might".[69]

These two premises may well be said to reflect an explicit effort to tackle the unresolved tension between integration and democracy; and in particular, to offer conceptions of democracy and constitutionalism that transcend the attachment of "classical" constitutional theory to an (unrealistic) image of the sovereign nation-state as an autarchic, "closed" sovereign State.

Firstly, the claim that it is necessary to apply different standards of democratic legitimacy when assessing the legitimacy of national law and supranational law is hard to reconcile with the parallel claims that supranational and national law should be recognized equal dignity and force and that the default rule of conflict should be the primacy of Community law. Even if we were to conclude that Union law and national laws are

[67] N. MacCormick, *Questioning Sovereignty*, cit., p. 149.

[68] *Ibid.*, p. 155.

[69] J.H.H. Weiler, *In Defence of the Status Quo*, cit., p. 15. This came hand in hand with a very negative assessment of not only the German, but also the Italian post-war constitution, which was "adopted by the morally corrupted" Italian society of the Second World War.

both democratic, albeit in a different sense, this would not suffice to support the automatic conclusion that we should treat a conflict between supranational and national law as a conflict between two legal orders of equal dignity and force. For that conclusion to be reached, it would be necessary to reject in full a basic principle underpinning all national legal orders (and European Union law), according to which the force and ranking of legal norms should be graduated by reference to their democratic pedigree.

Secondly, the argument in favour of the recalibration of the democratic standards to be applied to European Union law has become increasingly implausible as the full impact of the second and third European transformations has become visible. Even if most of the powers that have been transferred to or assumed by the European Union are negative powers, the Union has gained a formidable capacity to condition, limit and constrain the exercise of national positive powers. The Union, in the apt metaphor proposed by Rubio Llorente, has come to resemble the Pope, only its authority extends to economic, not theological, orthodoxy.[70] It is nevertheless a massive and formidable power, even if exerted by proxy. But that does not detract from the need of this power being democratically legitimated.

Thirdly, pluralistic federalism has failed to provide a clear and stable alternative to the monistic connection between a hierarchically constructed legal order and democracy. Highly hierarchized legal orders can be deeply authoritarian. Still, monistic legal theorists may argue that the regulatory ideal of an ultimate rule of recognition, at the core of the monistic understanding of law, is a necessary even if not sufficient condition for the democratic authorship of the law. For one, the hierarchical ranking of legal norms can be graduated by reference to the strength of their democratic pedigree. For two, a clear cut ranking of laws does not only produce normative knowledge about the substantive content of the law, but renders transparent to citizens which norms should be amended to achieve social and economic change. For three, only a law speaking with one voice can effectively curb the discretion enjoyed by private parties, judges and administrators when applying the law. Bound by several laws, they may well end up being bound by none, as the opportunities to pit one legal system against another would grow exponentially, as empirically proved during the third European transformation.[71]

c) The legacy of concepts: primacy.

[70] F. Rubio Llorente, *"Divide et obtempera?". Una reflexión desde España sobre el modelo europeo de convergencia de jurisdicciones en la protección de los Derechos*, in *Revista Española de Derecho Constitucional*, 2003, p. 49 *et seq.*

[71] Furthermore, a monistic and hierarchical understanding of law may be said to play an aggregative role similar to that of the political regulatory ideal of collective will. Democratic law and democratic politics have to move between the plurality of interests and opinions and collective action, only possible if there are institutional structures and procedures that forge unity out of plurality. Otherwise, public power will remain fragmented and pulverised.

As was pointed above, Weiler was of the view that the monistic élan underpinning primacy could be checked by the collective democratic authorship of Community law guaranteed by symmetric intergovernmentalism, opening the way to a "pluralistic" understanding of supremacy: "The principle of supremacy can be expressed, not as an absolute rule whereby Community (or federal) law trumps Member State law, but instead as a principle whereby each law is supreme within its sphere of competence".[72]

However, structural rules have actually failed to transform pluralism. The latent homogenising drive of primacy was long reawakened by the new conception of economic freedoms put forward by the Court. From *Cassis de Dijon* onwards, the Court reviews the European constitutionality of national laws by reference to a fully supranational substantive yardstick, given that it understands economic freedoms as realisations of an autonomous understanding of substantive rights (private property and economic freedom), not of the merely formal standard of nondiscrimination. Since then, the monistic genie of supremacy has been let out of the dualistic supranationalism bottle, even if at first in a rather unconspicuous manner, because symmetric intergovernmentalism was circumvented, not formally demised.

V. Conclusion: which and whose constitutional theory of European integration?

What can be learnt from the failure of federalist pluralism, and what can be rescued from such failure? Three conclusions seem to me possible.

Firstly, we need a constitutional theory that is conscious of the deeply political character of constitutional law. The constitution is not a device manufactured by lawyers or political scientists (as has been frequently implied in the actual practice of European legal scholarship), but a set of fundamental norms that have been democratically authored (in "revolutionary" constitutionalism, of which the French and Italian constitutions are examples) or democratically endorsed (in "evolutionary" constitutionalism, as in the British and the German ones). A fundamental implication of the intrinsically political character of the constitution is that the concepts and categories of constitutional law are themselves political categories.[73] Thus, what is constitutional and what is not constitutional, what legal force and dignity is to be acknowledged to constitutional norms, are not questions to be decided *through scholarly deliberation*, or by reference to principles elaborated by legal scholars, but are questions to be settled by reference to the democratic legitimacy of the political processes through which the relevant norms were established. In negative terms, we should be alert against the use of "legal-dogmatic" categories that are underpinned by non-democratic understandings of the constitution and constitutionalism. That is not a

[72] J.H.H. Weiler, *The Transformation of Europe*, cit., p. 21, fn. 26.
[73] S. D'Albergo, *La Costituzione tra democratizzazione e modernizzazione*, Pisa: ETS, 1996.

moot risk. The quest for the affirmation of the autonomy of Community law resulted in the rejection of the categories not only of international law (mostly by strategic pluralists) but also of national constitutional law (mostly, but not exclusively, by judicial pluralists). In the latter case, the claim was that such categories had been developed too close to the "sovereign State". Such a move, however, was far too indiscriminate. Even if the story is also complicated, postwar national constitutional law contains key elements of the grammar of democratic constitutional law whose relevance transcends the national character of the setting in which they were developed.[74]

Secondly, we need a constitutional theory that engages with the relationship between economics, politics and law. The structural implications of the second and third European transformations are a powerful reminder of the extent to which the choice of a given socio-economic order can predetermine how public power is organised and exerted. Trade arrangements and monetary orders are not only deeply political, but can be turned into power levers, the more formidable the more they are made of rules that are formally neutral and materially biased. Indeed, the single market and economic and monetary union have proved to be phenomenal "vincoli esterni". Sticking to a "pure" legal analysis, keeping legal analysis aloof of the politics of economic activity leads into a serious risk of unwillingly or unconsciously endorsing the *status quo*. Instead, constitutional theory should be able not only to subject present practice to critical scrutiny (including its sustainability) but also to document its limits. To render the point very concrete. Debates such as the one concerning the legal framework of a European Parliament for the Eurozone have to follow, not preceed, consideration of whether a one-size monetary policy implemented across economies with massive structural differences is compatible with democratic self-government. Similarly, before figuring out the detailed legal regime of Eurozone bonds, it is appropriate to ponder whether democratic choice over fiscal policy is more or less likely if fiscal policy is centralised to render monetary union stable, or if, alternatively, monetary union is cooperatively dismantled. In brief, taking seriously the structure of economic and monetary orders entails that the question cannot be how to shape the law so as to ensure the stability of the *status quo*, but rather how to create and maintain the space for democratic politics, even when this requires radical changes that increase diversity.

Thirdly, we need a constitutional theory that takes the law seriously. European legal scholarship has been very ecumenical regarding the characterisation of common action norms as legal norms. In broad terms, all common action norms that were characterised as legal were deemed to qualify as being law.[75] But should they be? The point is not

[74] D. Grimm, *Constitutionalism*, Oxford: Oxford University Press, 2017.

[75] Among others, the broad policy guidelines through which fiscal policy is coordinated within the European Union, the soft law of the various open methods of coordination, the Memoranda of Understanding that play such an outstanding role in the provision of financial assistance to Eurozone States, or the press releases of the ECB have come to be regarded as sources of law in one way or the other.

to revert to a purely formal conception of law, even less engage in some form of natural law review of positive law, but rather to keep the analytical coherence of the concept of law, in the footsteps of classical legal positivism.[76] Otherwise, we would have moved from a jurisprudence that wrongly identified law with State law, to a jurisprudence that conflates all normative orders into law. Such analytical mistake is bound to be the source of major (normative) risks. Including acknowledging the force and dignity of law (including its procedural legitimacy) to all common action norms, independently not only of whether they actually contribute to the production of normative knowledge (think for example about the radically indeterminate concept of structural deficit at the heart of the new "fiscal rules", a source of arbitrariness) but also of whether they have been produced following the procedure that the law itself establishes, and which is the source of the legitimacy of the resulting norm. To put it differently, does it make sense to characterise a common action norm as law if the action or omission to which it refers is not determined at all – as not infrequently is the case with soft law –, if its determination is subject to constant change – as in the Memoranda of Understanding – or if concretisation can only come through an fully arbitrary decision – as in fiscal rules? By the same token, can a norm be regarded a legal norm if the consequences of its breach are either largely underdetermined or their determination is left at the full discretion of some institutional actor? The way we name common action norms is full of consequences. Characterising soft law, memoranda rules or fiscal rules as law makes them part of the authoritative materials that have to be considered by institutional actors (government, administration, courts) when dealing with specific socio-economic problems, even if such norms have not been produced through the standard procedures of law-making, either because they are part of "governance" arrangements (soft law, Memoranda) or because being rather empty vessels, no substantive decisions was possible when approving the empty legal norm within which they are embedded (fiscal rules). Furthermore, the dividing line between law and other systems of common action norms can also be trespassed if the force of law is acknowledged to norms that have the attributes and properties of law, but which have not been approved through the procedures foreseen for the passing of new legal norms. Consider for example the litigation around the Outright Monetary Transactions (OMT) announced by the ECB in September 2012,[77] or the "joint statement" made by the EU Heads of State or Government and Turkey in March 2016.[78] The argument was made in both cases that there was no legal norm to be reviewed or considered, and thus, there was no legal norm the validity or constitutionality of which could be reviewed. In the OMT case, the ECB had circulated

[76] H. KELSEN, *The Pure Theory of* Law, Berkeley: University of California Press, 1975, pp. 24-27; H. HART, *The Concept of Law*, Oxford: Clarendon, 1961, pp. 9-13 and chapter 2.

[77] ECB Press Release of 6 September 2012, *Technical features of Outright Monetary Transactions*, www.ecb.europa.eu.

[78] EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.

a press release after the ECB President had made a declaration and answered some questions posed by journalists. On what regards EU-Turkey action on migration, European institutions claimed again that the joint statement was no legal act, but a mere political declaration. In both cases, however, it is hard to dispute that a formal legal act (an ECB decision, a formal agreement between the EU and Turkey) could have had very similar effects to the press releases. The key difference being that by avoiding the formalisation of the decision, the ECB and the European Council could avoid the *formal procedure* that the law requires to be followed, which in some cases requires participation of other institutions in the decision-making process, but also facilitates in-depth review of the validity of the decision taken.

Articles

Special Section – Social Integration in EU Law: Content, Limits and Functions of an Elusive Notion

Introduction

This Special Section aims at fuelling the scholarly debate about the implications of the elusive notion of social integration in the framework of the EU legal order. The concept at issue mirrors a society's degree of openness, governing the sliding doors of inclusion and otherness within a given community, whereby the expected level of assimilation of (and compliance with) societal values and rules[1] can reveal significant "managerial effects"[2] on incoming migration flows.[3] Once confined in the realm of sovereign States,[4] social integration is gradually becoming a key cross-cutting category of EU law. Its vocabulary has penetrated the internal market and the various branches of the area of freedom security and justice,[5] with a significant impact on the legal status of individuals, whether EU citizens or third country nationals.

In principle, the concept under consideration reveals a remarkable "integrative" potential, as it identifies the general objective of establishing "an ever-closer union among the peoples of Europe".[6] In the light of it, rights are conferred as a means for enhancing individual emancipation and fostering inclusiveness in national societies.[7] Within the framework of the internal market, the teleology of integration is coupled with the prin-

[1] See J. Schneider, M. Crul (eds), *Theorising Integration and Assimilation*, Abingdon: Routledge, 2012.

[2] D. Kostakopoulou, S. Carrera, M. Jesse, *Doing and Deserving: Competing Frames of Integration in the EU*, in E. Guild, K. Groenendijk, S. Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Abingdon: Routledge, 2009, p. 167.

[3] The identitarian and defensive use of citizenship status and integration policies has been widely discussed. From a legal perspective, see S. Rodotà, *Il diritto di avere diritti*, Roma-Bari: Laterza, 2012, p. 4.

[4] H.J. Trenz, *Narrating European Society. Toward a Sociology of European integration*, London: Lexington, 2016.

[5] The importance that EU law attaches to the individual does not lead to "pure individualism". "EU law strives to convert European individuals into members of social spheres external to the political system of the country of origin": L. Azoulai, *The European Individual and Collective Entities*, in L. Azoulai, S. Barbou de Places, E. Pataut (eds), *Constructing the Person in EU Law*, Oxford: Hart, 2016, p. 203 *et seq*.

[6] See the Preambles of the TEU and the TFEU.

[7] The notion of integration has also been developed from an institutional perspective, as a complex framework of policies and tools to foster equality and inclusion: D. Schieck, *Economic and Social Integration. The Challenge for EU constitutional Law*, Cheltenham: Edward Elgar, 2012.

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ciple of equality and requires the removal of material and immaterial barriers to access to the labour market, essential public services and welfare benefits in the host State.[8] In relation to third country nationals, research demonstrates that investing in early integration in both the education system and labour market has a prominent social and economic impact, which ranges from easier access to essential services to a positive fiscal net contribution.[9] Therefore, in the words of the Commission, integration policies can contribute to making Europe "a more prosperous, cohesive and inclusive society".[10]

Over the years, the goal of social integration has led to a profound reconsideration of some of the traditional legal categories in the EU legal order. In particular, social integration has contributed to the advancement of the European integration process by boosting the extension of rights to new groups of individuals. Across the decades, the original market preference has been replaced by a more complex and mature legal scenario where students, job seekers, retirees, economically inactive citizens, offenders and minors can, at least in principle, enjoy the rights that were once reserved for workers or highly-skilled migrants.[11] The assessment of an individual's degree of connection to the host Member State and the Union's aim to facilitate this gradual ascending process has represented one of the leading factors of this development.

For both EU citizens and third country nationals, a positive attitude toward integration policies is a necessary pre-condition for the full enjoyment of fundamental individual rights and for a gradual increase of – personal and collective – quality of life: integration and rights mutually reinforce each other.

From this point of view, the increasing impact of this notion on EU law might appear paradoxical. In fact, the vocabulary of social integration marks a paradigm shift from mobility to stability and settlement. While promoting free movement, the European legal order attaches key-importance to the degree of sedentary life, the connections with the host State and the eventual stabilisation of movers and migrants. This circular dynamic underpinning the concept of integration stresses the need to seek a balance between diversity and coexistence, rights and duties, solidarity and national interests in a community of law. It highlights the level of complexity that the European Union has

[8] P. Caro de Sousa, *Catch Me if You Can? The Market Freedoms' Ever-expanding Outer Limits*, in *European Journal of Legal Studies*, 2011, p. 162 *et seq*.

[9] Organization for Economic Cooperation and Development, *The Fiscal Impact of Immigration in OECD Countries*, in *International Migration Outlook 2013*, p. 125, available at: www.globalmigrationgroup.org. See also R. King, D. Lulle, *Research on Migration. Facing Realities and Maximizing Opportunities. A Policy Review*, European Commission Research and Innovation Paper of June 2016, available at: ec.europa.eu.

[10] Communication COM(2016) 377 final of 7 June 2016 from the Commission, *Action Plan on the Integration of Third Country Nationals*.

[11] See S. Barbou des Places, *The Integrated Person in EU Law*, in L. Azoulai, S. Barbou des Places, E. Pataut (eds), *Constructing the Person in EU Law*, cit., p. 186 *et seq*. For a more critical perspective see H. Verschueren, *EU Migrants and Destitution: The Ambiguous EU Objectives*, in F. Pennings, G. Vonk (eds), *Research Handbook on European Social Security Law*, Cheltenham: Edward Elgar, 2015, p. 321 *et seq*.

reached over the years and reveals a great deal about the remarkable progress of the European legal order, but also exposes its inherent contradictions.

In fact, social integration is a politically sensitive and elusive concept, which may well foster a defensive and identitarian approach. The ever closer relationship between access to rights and degree of connection to the host society can mirror the dark side of the integration discourse, since it ends up being a condition to have access to rights, rather than an objective to be pursued through the conferral of rights. The positive and the negative dimensions of the concept under consideration lock swords and the clash between these two opposing trends is the *file rouge* of the contributions collected in this Special Section.

In the opening *Article*, Alessandra Lang specifically deals with the normative layer. She unveils how the Union has amplified the outlined divide between the integrative and the defensive potentials underpinning social integration, by introducing a varied set of integration conditions and measures through EU secondary law. Her *Article* provides an in-depth analysis of the current fragmented normative framework on integration conditionality and questions its actual coherence, despite the interpretative efforts undertaken by the CJEU.

The daily contest between national interests and fundamental rights leads EU law to swing between the "empowerment and disempowerment" of the individual.[12]

As a matter of fact, increasing reliance on the factors demonstrating the degree of inclusion in a given community exacerbates the normative exclusionary effect to the detriment of those who fail to demonstrate sufficient attachment to the host society. Such a trend is amplified by a profound change in the political and legal landscape, whereby social integration has been converted from a Union's objective into an individual duty of economic activity, thereby undermining the EU contemporary social aims.[13] Stephanie Reynolds, critically engages with this evolution, by focusing on the scope of the notion of social integration of Union citizens within the internal market in light of the restrictive turn of the Court of Justice in its recent case law. She contends that reliance on social integration duties further marginalises those already at risk of social exclusion, and can eventually undermine the Union's own, wider social goals under the Treaties.

This reversed perspective reveals a certain degree of incoherence within the EU legal order, whereby the achievement of a satisfactory degree of social integration (integration as an objective of the Union) is affected accordingly by the Member States' recurring use of various forms of integration conditionality, with a view to select the individuals deserving access to their territories. The conceptual vagueness of the notion inflates further flexibility – if not uncertainty – into the system and enables national authorities to use (lack of)

[12] M. Dougan, N. Nic Shuibhne, E. Spaventa (eds), *Empowerment and Disempowerment of the European Citizen*, Oxford: Hart, 2012.

[13] N. Nic Shuibhne, *Limits Rising, Duties Ascending. The Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, pp. 889 *et seq*.

social integration as a shield warding off undesired "others".[14] Building on these premises, Stephen Coutts's *Article* takes a positive stance and contends that the emergence of the concept of integration also underscores a moral turn in EU law and policies. In his view, the impact on rights stemming from Union citizenship of a failure to comply with accepted societal values shows that EU law is not immune from some sort of policing role. Rather than focusing on the "managerial" expectations of the Member States, he argues that the development of the integration vocabulary adds substance to EU citizenship. This status can be now framed as a "responsibilised" citizenship, since it overcomes the traditional passive idea of incorporation in the host society and embraces a more dynamic and pro-active dimension. Individuals seeking protection from EU law are therefore required to recognize the common space of values they are given to live in and to behave accordingly, as an elective way of having access to the protection afforded by EU law.

At the same time, in times of "existential crisis"[15] of the European integration process, the socio-economic crisis represents the perfect landscape for regressive national policy choices, where integration conditionality measures constitute just one brick in the solid wall of a general trend towards a weakened Union citizenship. In this regard, building on the last decade of case law on Union citizenship rights, Francesca Strumia addresses the major constitutional crisis that the Union is facing, namely Brexit and the challenges that it poses to EU citizenship. In her view, the notion of social integration can contribute to adapt this supranational status to its next challenge. Under the semblances of a range of genuine links, the degree of social integration can act as a trigger of belonging alternative to nationality and is capable of fending off any Member State's ransom.

The outlined tension between the negative and the positive dimensions of the notion of social integration also challenges the regime of vulnerable categories of third country nationals. In this regard, Emanuela Pistoia completes the Special Section by shedding light on the implications of the notion of social integration for beneficiaries of international protection. The Author reviews the Union's commitment to social integration of this category of people. While acknowledging that both EU law and the case law of the Court of Justice leave room for differential treatment of beneficiaries of international protection as compared with nationals, the paper calls for an increased EU's role in promoting affirmative actions and integration programmes addressed to the former category.

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Stefano Montaldo**

[14] S. MONTALDO, *Us and Them: Restricting EU Citizenship Rights Through the Notion of Social Integration*, in *Freedom, Security and Justice: European Legal Studies*, 2017, p. 34 *et seq*.

[15] See J.-C. JUNCKER, *State of the Union Address 2016: Towards a better Europe – A Europe that protects, empowers and defends*, available at europa.eu.

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ARTICLES
SPECIAL SECTION – SOCIAL INTEGRATION IN EU LAW:
CONTENT, LIMITS AND FUNCTIONS OF AN ELUSIVE NOTION

SOCIAL INTEGRATION: THE DIFFERENT PARADIGMS FOR EU CITIZENS AND THIRD COUNTRY NATIONALS

ALESSANDRA LANG*

ABSTRACT: The *Article* analyses whether and how integration considerations are encapsulated into EU secondary legislation establishing the conditions under which EU citizens and third country nationals can reside in a Member State (acts relating to immigration policy, to asylum policy, and to free movement of citizens of the Union), taking due account of the case-law of the Court of Justice. The aim is to compare the different legal regimes under this particular perspective, in order to evaluate whether the regime applicable to EU citizens can be understood as ontologically different from the regime established for third country nationals or rather as a variation of the same regime.

KEYWORDS: integration measures – free movement of EU citizens – migration – family reunification – international protection – treatment of third country nationals.

I. INTRODUCTION

In an article published in 2004, Kees Groenendijk examined three recently adopted directives on Union citizens,[1] long-term residents[2] and family reunification,[3] to understand

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[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

how the concept of integration was incorporated into those directives.[4] He defined integration as "the active participation of the immigrant in the social, economic and public life of society" and proposed three different perspectives on the relationship between immigration law and integration: 1) "A secure residence status and equal treatment enhance the immigrants' integration in society", 2) "permanent residence status as remuneration for a completed integration", and 3) "lack of integration or assumed unfitness to integrate as a ground for refusal of admission to the country". At the end of the analysis, he concluded that the first perspective was present in all three acts, the second was "fully absent" in the law on free movement of Union citizens, but present in at least one provision of the Directive on long-term residents, while the third, which is "clearly contrary to the principles of free movement of persons and, thus, cannot be applied to EU citizens and their family members", was incorporated into certain provisions of both the Directive on long-term residents and, in particular, the Directive on family reunification.

The aim of this *Article* is to re-examine the three directives from the same perspective but to extend the analysis to other acts of secondary legislation that have been subsequently adopted. The reason for this review is that the three directives have been in force for at least ten years and have been the subject of significant interpretative case-law.[5] Additionally, further acts have been adopted on immigration and international protection. Therefore, acts applicable to third country nationals will be analysed in sections II and III, depending whether they come within migration or asylum policy, and section IV will dwell upon acts applicable to EU nationals. The examination of these acts and their respective case-law seeks to contribute towards the definition of the concept of integration and to verify that the position remains the same whereby there is no room in Directive 2004/38 for the second and third perspectives of the relationship between rules applicable to foreign nationals and integration.

II. Acts relating to immigration policy

The conditions for entry and residence of third country nationals are governed only partially by Union law. It is well known that the Union has had competence in this area for

[2] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[3] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

[4] K. Groenendijk, *Legal Concepts of Integration in EU Migration Law*, in *European Journal of Migration and Law*, 2004, p. 111 *et seq*.

[5] Only the Directive on long-term residents has been amended: Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 extends its scope to beneficiaries of international protection. In addition, subsequent directives have laid down derogatory provisions to Directive 2003/86, as it will be discussed *infra*.

some time,[6] but the exercise of that competence was affected by the decision-making procedure initially followed. The need for a unanimous vote in the Council and the purely advisory role of the European Parliament affected the choices made, which proved to be particularly favourable to the States' interests.[7] The situation has changed now because the ordinary legislative procedure has become applicable, but amending the current acts does not appear to be a political priority of the institutions.[8] Having said that, there is currently no legislation generally governing immigration in the Union.

Conditions for the issuance of short-stay visas have been harmonised. In this area, integration, but in the State of residence, is a factor that the competent authorities must consider when deciding whether to issue an entry visa. Integration, based on family ties or professional status, helps to assess the applicant's intention to leave the Union at the end of the visit for which the issue of a visa is requested.[9]

A number of directives set out the conditions for entry and residence of certain categories of third country nationals.[10] These are (in chronological order): family members;[11] researchers, students, school pupils, trainees, volunteers and *au pairs* (recently recasted),[12] highly qualified workers,[13] seasonal workers,[14] and intra-corporate trans-

[6] The Treaty of Amsterdam inserted Art. 63 in the EC Treaty, as legal basis for legislation on immigration. P. DE BRUYCKER, *L'émergence d'une politique européenne d'immigration*, in P. DE BRUYCKER (ed.), *L'émergence d'une politique européenne d'immigration*, Bruxelles: Bruylant, 2003, p. 376 *et seq*.

[7] F. TRAUNER, A. RIPOLL SERVENT (eds), *Policy Change in the Area of Freedom, Security and Justice: How EU Institutions Matter*, Abingdon: Routledge, 2014.

[8] Communication COM(2015) 240 final of 13 May 2015 from the Commission, *European Agenda on Migration*, which has developed a comprehensive approach to migration, but it has not led to a revision of the legislation on legal migration in force.

[9] Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community code on visas (Visa Code), Annex II, let. b), no. 5.

[10] It should be recalled briefly that Union legislation does not apply to Turkish citizens if it is less favourable than the arrangements in place at the time when the association agreement was concluded, by virtue of the standstill clause under which States cannot modify restrictively the conditions in force at that time. K. HAILBRONNER, *The Stand Still Clauses in the EU-Turkey Association Agreement and Their Impact upon Immigration Law in the EU Member States*, in D. THYM, M. ZOETEWEIJ-TURHAN (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship*, Leiden: Brill, 2015, p. 186 *et seq*.

[11] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

[12] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, and Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, both repealed and replaced by Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.

[13] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

ferees.[15] Of these, only Directive 2003/86 on family reunification mentions conditions for integration, as we will see further below. None of the others, in listing the conditions that the applicant must meet to secure admission, indicates that integration measures or conditions must be satisfied or allows States to impose such measures. Conditions for admission are detailed exhaustively and the State cannot impose additional requirements, which is clear from the wording of these directives. The directives concern the issue of residence permits in relation to a very specific subject matter and the rules are designed to capture those foreign nationals that the States do not want to be integrated or to lay down roots, to the extent that Directive 2014/36 on seasonal workers provides that, before a residence permit can be issued, the Member State must verify whether the person concerned presents a risk of illegal immigration and intends to leave the country after completing the work for which he or she was allowed entry.

Two further directives – the Directive on long-term residents,[16] and the single permit Directive[17] – establish a set of rights that are to be granted to third country nationals who have been admitted to reside in a Member State, on the basis of a permit covered by national or Union law. The former Directive will be discussed in the following section because it is particularly relevant to this *Article*. The latter, however, does not contain any reference to integration conditions or measures, other than a reference in recital 2, which provides that "a more vigorous integration policy should aim to grant [third country nationals who are legally residing in the territory of the Member States] rights and obligations comparable to those of citizens of the Union". However, the Directive does not harmonise the conditions for issuing residence permits. It is therefore up to the States to define these conditions, including any integration conditions.

II.1. Directive 2003/109 on long-term residents

The Directive on long-term residents grants rights and protection against expulsion "to third-country nationals who have resided legally and continuously within [the territory of a Member State] for five years immediately prior to the submission of the relevant

[14] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

[15] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

[16] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[17] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

application"[18] and establishes the conditions under which a long-term resident can move to another Member State (Chapter III).

According to recital 4, "[t]he integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty". Recital 12 adds that "[i]n order to constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive". The Court of Justice has clarified that the principal objective of the Directive is "the integration of third-country nationals who are settled on a long-term basis in the Member States".[19] In *Kamberaj*, that objective becomes an instrument for interpreting the notion of "core benefits" referred to in Art. 11, para. 4, of the Directive. Under that article, States may limit equal treatment in respect of social assistance and social protection to core benefits. The case in question concerned the refusal to grant housing benefit to the applicant in the main proceedings, an Albanian national legally resident in Italy. The Court of Justice firstly states that the objective of integration and equal treatment means that any derogation provided for in the Directive must be interpreted strictly. Secondly, it adds that "[t]he meaning and scope of the concept of 'core benefits' in Art. 11, para. 4, of Directive 2003/109 must therefore be sought taking into account the context of that article and the objective pursued by that Directive, namely the integration of third-country nationals who have resided legally and continuously in the Member States."[20] Therefore, a State cannot limit equal treatment with respect to benefits "which enable individuals to meet their basic needs such as food, accommodation and health".[21]

Art. 5 of the Directive sets out the conditions that States require third-country nationals to prove in order to acquire long-term resident status. These conditions are stable and regular resources and sickness insurance. However, the second paragraph allows States to "require third-country nationals to comply with integration conditions, in accordance with national law". The Directive does not determine what constitutes an integration condition. In its 2011 Report on the application of the Directive, the Commission writes that fourteen States impose integration conditions in relation to language proficiency as well as, possibly, knowledge about the host society or its national legal order. Certain States require third-country nationals to pass an exam while others make it compulsory to follow a course. In assessing compatibility with the Directive, the Commission emphasises the principles of proportionality and effectiveness and com-

[18] Directive 2003/109, cit., Art. 4.

[19] Court of Justice, judgment of 26 April 2012, case C-508/10, *Commission v. Netherlands*, para. 66, referred to a number of time by the subsequent case-law.

[20] Court of Justice, judgment of 24 April 2012, case C-571/10, *Kamberaj* [GC], para. 90.

[21] *Ibid.*, para. 91.

pares the integration conditions required for acquiring citizenship and for granting long-term resident status, on the basis that, in the former case, the State can demand a greater degree of integration than in the latter.[22] But not even the Commission specifies what the integration conditions are or what exact purpose they serve.

The interpretation of Art. 5, para. 2, was at the heart of *P and S*,[23] which concerned a Dutch law introducing an obligation to pass a civic integration examination testing oral and written proficiency in the national language and knowledge of the society. Not only newcomers, but even those who held a long-term residence permit needed to pass the examination within a prescribed period of time, under pain of a fine.

Although strictly *obiter dictum*, the Court of Justice states that Art. 5, para. 2, of the Directive "allows Member States to make the acquisition of long-term resident status subject to prior fulfilment of certain integration conditions".[24] The provision says nothing about the possibility for States to require the fulfilment of integration conditions following acquisition of that status, and for that reason it is not useful in resolving the case. The legitimacy of national legislation is instead assessed on the basis of Art. 11 of the Directive, concerning equal treatment with nationals. It is not the examination itself that is contrary to the principle of equal treatment, since long-term residents and nationals of the host State are not in the same situation in terms of language proficiency and knowledge of society. It is rather the means of implementation that must not infringe Art. 11 or jeopardise the effectiveness of the Directive.[25] Given the purpose of the Directive, namely to allow the integration of long-term residents, ensuring that the person is proficient in the language and has knowledge of the country's society does not conflict with the aim of the Directive and, in fact, facilitates integration as well as access to employment and vocational training. However, where the costs of sitting the examination and the fines imposed in case of failure of the examination are of an amount such as to jeopardise the achievement of the objectives of the Directive, an infringement then exists.

As regards the possibility of moving to another Member State, the long-term resident must comply with the conditions set out in the Directive. In the second State, the person immediately enjoys equal treatment with nationals. It is noteworthy here that the second State can impose integration measures, unless the person has already complied with integration conditions in the State in which he or she has acquired a right of permanent residence. The second State may, however, require the person to attend a language course, by virtue of Art. 15, para. 3. In its 2011 Report, the Commission highlights the difference between integration conditions referred to in Art. 5, para. 2, and

[22] Communication COM(2011) 585 final of 28 September 2011 from the Commission on the application of Directive 2003/109/EC concerning the status of third country nationals who are long-term residents, p. 3.

[23] Court of Justice, judgment of 4 June 2015, case C-579/13, *P and S*.

[24] *Ibid.*, para. 35.

[25] *Ibid.*, paras 44 and 45.

integration measures referred to in Art. 15, para. 3.[26] It seems entirely logical to consider that if the person does not fulfil the integration condition, he or she will not acquire long-term resident status, whereas if he or she does not comply with the integration measure, a fine may be imposed but the residence permit in the second State cannot be refused or withdrawn.[27]

Other provisions of the Directive can also be mentioned here even though they do not directly mention integration. These concern the duration of the person's residence and links with the State of residence. Art. 6 provides that the State may refuse to grant long-term residence status on grounds of public policy or public security but, when taking that decision, it must consider both the type of offence committed and "the duration of residence and [...] the existence of links with the country of residence". According to Art. 12 on protection against expulsion, the State must, before taking any expulsion decision, consider a series of factors including "the duration of residence in [its] territory" and "links with the country of residence or the absence of links with the country of origin".[28] Duration of residence seems to have merely a quantitative connotation, whereas links with the country of residence could include qualitative considerations.

II.2. Directive 2003/86 on family reunification

Directive 2003/86 applies to the family reunification of a third country national who "is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence".[29] Of the directives concerning immigration, this Directive contains the most references to integration. The recitals, after recalling the conclusions of the European Council meeting in Tampere, state that "[f]amily reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the *integration* of third country nationals in the Member State, which also serves to promote economic and social cohesion",[30] and clarifies that family reunification facilitates integration of the sponsor already legally residing in the Union. But the Directive also seeks to encourage the integration of family members insofar as it adds that "[t]he integration of family members should be promoted. For that purpose, they should be granted a status independent of that of the sponsor, in particular in cases of breakup of marriages and partnerships, and access to education, employment and vocational training on the same terms as the person with whom they are reunited, under the relevant conditions".[31]

[26] Communication COM(2011) 585, cit., p. 8.

[27] D. Thym, *Directive 2003/109*, in K. Hailbronner, D. Thym (eds), *EU Immigration and Asylum Law: A Commentary*, München: C.H. Beck, 2016, p. 505.

[28] Art. 12, para. 2, let. a) and d).

[29] Directive 2003/86, cit., Art. 3.

[30] *Ibid.*, recital 4, emphasis added.

[31] *Ibid.*, recital 15.

That assertion is reflected in Art. 14, on the rights enjoyed by family members, and in Art. 15, on the grant of an autonomous residence permit after five years.

The Directive gives Member States the power to put in place integration conditions or measures. No specific measures or conditions are imposed by the Directive but States may require third country nationals to comply with any measure or condition provided for in national law. These can relate specifically to children or to the spouse or to all family members indistinctly.

As far as children are concerned, the third paragraph of Art. 4, para. 1, let. d), provides: "By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive." Recital 12 specifies that this right "is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school."[32] The provision in question, along with others, was the subject of an action for annulment brought by the European Parliament on the grounds that it infringed fundamental rights. The Court dismissed the action because the States, in implementing the provision, need to respect the fundamental rights referred to in that Directive which are not capable of derogation. Unlike the relevant international agreements on human rights (the European Convention on the Protection of Human Rights and Fundamental Freedoms, the 1966 International Covenant on Civil and Political Rights, the 1989 Convention on the Rights of the Child), which do not establish any right to family reunification, the Directive does confer a right despite allowing the State to derogate from its provisions. Those derogations are an expression of the margin of appreciation that the international texts grant to the States and do not exceed the limits imposed by the latter.[33] In other words, the exercise of the right that the Directive confers upon States is always conditional on respect for fundamental rights and, specifically, on the obligation to have regard to the best interests of children, which permeates all of the rules. Although focussed on the subject of integration, the ruling actually is not very useful in terms of an understanding of the concept. The interest lies

[32] Special rules apply if the parent is a highly qualified worker (Directive 2009/50, Art. 15, para. 3), a researcher (Art. 19, para. 3, of Directive 2014/66, and Art. 26, para. 3, of Directive 2016/801) or an intra-corporate transferee (Art. 19, para. 3, of Directive 2014/66). The integration measures may be applied by the Member States only after the person concerned has been granted family reunification. Strictly speaking, these are "integration measures" rather than "integration conditions".

[33] Judgment of 27 June 2006, case C-540/03, *European Parliament v. Council* [GC]. Some legal scholars praised this judgment – see i.e. R. LAWSON, *Family Reunification and the Union's Charter of Fundamental Rights*, in *European Constitutional Law Review*, 2007, p. 324 *et seq*. – while others criticised it, i.e. D. MARTIN, *Case C-540/03, European Parliament v. Council. Comment*, in *European Journal of Migration and Law*, 2007, p. 144 *et seq*.

instead in the definition of the margin of appreciation afforded to the States and in the declaration of the pervasive value of the obligation to respect fundamental rights.[34]

The judgment provides a better understanding of the function of the third paragraph of Art. 4, para. 1, let. d),[35] which is precisely to enable the States to maintain derogations and strict rules, where provided by law, aimed at promoting a prompt reunification of children, so that integration can be achieved primarily through language learning and schooling. The earlier the reunification, the more effective the integration. This axiom is accepted as legitimate by the Court of Justice, which does not ask for any specific justification based on scientific or experiential data. In the cases specified in the provision, the State can therefore presume that the child will find it difficult (or at least less easy) to integrate and can verify this through the use of integration conditions.[36] The fact that the concept of integration is not defined cannot, in the Court's opinion, be interpreted as authorising the States to adopt measures that are contrary to fundamental rights because the Directive sufficiently delimits the scope that they enjoy.[37] Conditions must be laid down in national legislation and the Court will review the measures concerned and their implementation in order to verify respect for the fundamental rights that the Directive incorporates. It also seems to be the case that national measures must guarantee appropriate flexibility to take account of the circumstances applicable to each individual case.[38]

In the same judgment, the Court then makes comments about integration with reference to Art. 8 of the Directive, also considered in the action for annulment brought by the Parliament. That provision enables States to impose a waiting period, before family reunification, of up to two years during which the applicant must have resided lawfully, but which can increase to three years "where the legislation of a Member State relating to family reunification in force on the date of adoption of the Directive takes into account its reception capacity". The Court states that "That provision does not therefore have the effect of precluding any family reunification, but preserves a limited margin of

[34] E. SANFRUTOS CANO, *Arrêt Parlament c. Conseil «Directive réunification familiale»*, in *Revue du Droit Européen*, 2006, p. 706, highlights the didactic attitude of the Court, who offers guidelines for the application and interpretation of the national implementation provisions.

[35] *European Parliament v. Council* [GC], cit., paras from 61 to 76.

[36] The threshold sets at twelve is considered as legitimate choice, for reasons linked to both the minor's past ("the criterion corresponds to a stage in the life of a minor child when the latter has already lived for a relatively long period in a third country without the members of his or her family, so that integration in another environment is liable to give rise to more difficulties", para. 74), and future ("children over 12 years of age will not necessarily remain for a long time with their parents", para. 75). E. DRYWOOD, *Giving with One Hand, Taking with the Other: Fundamental Rights, Children and the Family Reunification Decision*, in *European Law Review*, 2007, p. 406, sees in these words of the Court a worrying disregard of minors' rights.

[37] *European Parliament v. Council* [GC], cit., para. 71.

[38] F. MACRÍ, *La Corte di giustizia sul diritto al ricongiungimento familiare dei cittadini di Stati terzi: la sentenza* Parlamento c. Consiglio, in *Il Diritto dell'Unione europea*, 2006, p. 813.

appreciation for the Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration".[39] It adds, however, that the use of that derogation does not preclude respect for fundamental rights or the need to take into account other factors which, in specific cases, may prevail over the requirement to impose a waiting period.[40]

As far as the spouse is concerned, Art. 4, para. 5, provides: "In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her". The rationale is that the younger the spouse is, the more difficult it will be to integrate.[41] This provision has been interpreted differently by the Commission and by the Court. The Commission has asserted that setting a minimum age for reunification cannot operate as an automatic condition whereby no case-by-case assessment is required. If, following an individual assessment, it transpires that the objective of the provision is not fulfilled, reunification must then be allowed. It is a sort of presumption that can be rebutted by proof of the contrary, with the aim of preventing fraudulent behaviour. So, if the couple has had children, reunification should be allowed provided that "there is no abuse". Furthermore, the requirement must be fulfilled at the moment of the family reunion and not when the application is submitted.[42] In contrast, the Court's interpretation is much more favourable to the State. The *Noorzia* case highlighted the Austrian legislation which provided that at the time when the application for reunification is lodged both the applicant and the spouse must be aged at least 21, failing which the application will be rejected.[43] The objective of the provision is construed by the Court of Justice differently from the interpretation described above. The Court indicates that the States fix the minimum age "at which, according to the Member State concerned, a person is presumed to have acquired sufficient maturity not only to refuse to enter into a forced marriage but also to choose voluntarily to move to a different country with his or her spouse, in order to lead a family life with him or her there and to become integrated there".[44] Here the presumption cannot be rebutted by proof of the contrary. Furthermore, the Court considers that the silence of the Di-

[39] *European Parliament v. Council* [GC], cit., para. 98.

[40] *Ibid.*, para. 99. M. BULTERMAN, *Case C-540/03,* Parliament v. Council*. Comment*, in *Common Market Law Review*, 2008, p. 253, highlights the link between Art. 8 and Art. 17 established by the Court, which did not derive clearly from the wording of the Directive.

[41] K. GROENENDIJK, *Legal Concepts of Integration*, cit., p. 119.

[42] Communication COM(2014) 210 final of 3 April 2014 from the Commission on guidance for application of Directive 2003/86/EC on the right to family reunification, pp. 8-9.

[43] Court of Justice, judgment of 17 July 2014, case C-338/13, *Noorzia*.

[44] *Ibid.*, para. 15.

rective as to the moment when the spouses must fulfil the requirement in question gives the States full discretion over that matter, provided that they set a time period objectively and this does not prevent reunification or make reunification unjustifiably difficult. The Austrian legislation in question is deemed to comply with those requirements.

Art. 7 of the Directive sets out the conditions required for reunification. These are adequate accommodation, sickness insurance, and stable and regular resources. The second paragraph adds: "Member States may require third country nationals to comply with integration measures, in accordance with national law." However, it can be argued *a contrario* from the final paragraph – which specifies that if the third country national in question is a refugee or a family member of a refugee,[45] integration measures may only be applied after family reunification has been granted – that States may, as a general rule, apply those measures before granting reunification. Based on the wording of Art. 7, which uses the terms "integration measures" as opposed to "integration conditions", a technique also followed in Directive 2003/109 which was adopted at around the same time, it could be argued that if failure to meet a condition leads to refusal of reunification, failure to achieve an integration measure cannot produce the same effect but the State can impose special obligations on the family member. The difference in terminology is also highlighted by the Commission in the aforementioned Communication on guidance for application of Directive 2003/86 on the right to family reunification.[46] The Court, however, does not take account of this and has instead held that the Dutch legislation specifying that, before reunification, the family member must pass a civil integration exam aimed at assessing knowledge of the national language and society and that, if the exam is failed, the application for reunification must be rejected could be consistent with Art. 7, para. 2.[47] According to the Court, integration measures must be aimed at facilitating integration, not at filtering the family members who are eligible for reunification.[48] They perform that function if, as in the case in question, they serve to ensure that the family member has a basic knowledge both of the language and of the society. The means by which fulfilment of the obligation was ensured are not, however, deemed compatible with the Directive. The State making use of the derogation must take into consideration the reasons that might explain why the exam was failed as well as the costs of the exam, which must not be unreasonable, having regard to the financial resources of the persons concerned. The first aspect is particularly significant.

[45] The Directives on highly qualified workers, researchers and intra-corporate transferees attain the same result, albeit in a different manner. See *supra*, note 32.

[46] Communication COM(2014) 210 final, cit., p. 17.

[47] Court of Justice, judgment of 9 July 2015, case C-153/14, *K and A*, para. 49. The measure in question is the same one examined by the Court in the light of Directive 2003/109 in *P and S*, cit.

[48] *Ibid.*, paras 52 and 57. M. Jesse, *Integration Measures, Integration Exams and Immigration Control:* P and S *and* K and A, in *Common Market Law Review*, 2016, p. 1075, notes that measures such as the civic integration exam in The Netherlands "are in fact intended to select wanted as opposed to unwanted immigrants".

In short, the Court prohibits the State from automatically basing its refusal to grant reunification on the failure to pass the exam and requires States to consider the reasons for that failure. If the reasons for the failure to pass the exam can be attributed, for example, to the family member's "age, illiteracy, level of education, economic situation or health", the State cannot deny reunification on the grounds of failure to pass the exam.[49] The State is therefore required to admit precisely those persons whom it would actually have preferred to exclude.

III. Acts relating to asylum policy

Specific rules apply to third country nationals in need of international protection and these are set out in a series of regulations and directives adopted in the early part of the century and subsequently amended. These acts concern: determination of the State responsible for examining applications for international protection (the so-called Dublin Regulation);[50] the EURODAC database,[51] which contains data on applicants' fingerprints in order to identify whether an application for international protection has previously been lodged; reception conditions that must be established for applicants for international protection;[52] procedures for examining applications for international protection[53] and definition of status for refugees and beneficiaries of subsidiary protection and associated rights.[54]

III.1. The Dublin Regulation

The Dublin Regulation does not take any account of the applicant's integration prospects when determining the State responsible for deciding on an application for international

[49] *K and A*, cit., para. 58.

[50] Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, repealing Regulation (EC) 343/2003.

[51] Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, repealing Regulation (EU) 2015/2000.

[52] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, repealing Directive 2003/9/EC.

[53] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, repealing Directive 2005/85/EC.

[54] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, repealing Directive 2004/83/EC.

protection. This is evident from the relocation system introduced in 2015 and from the judgment dismissing the action for annulment brought by Hungary and the Slovak Republic. The Court clarifies that the criteria for determining the responsible State as set out in the Dublin Regulation "[do] not specifically seek to ensure that there are linguistic, cultural or social ties between the applicant and the responsible Member State".[55]

The relocation system was designed as a measure of solidarity towards Italy and Greece, both of which, in 2015, had to contend with an unexpected and unforeseeable flow of third country nationals who had reached their territory illegally. Under the Dublin Regulation, the criteria for determining the responsible State are applied in the order in which they are set out. Although the criterion whereby responsibility lies with the State whose borders the applicant has irregularly crossed is one of the last listed, it was actually the one most commonly applicable, with the result that Greece and Italy were forced to examine a greater number of applications than their competent structures were able to handle, thus making the system unsustainable.[56] The solution identified to relieve the pressure on Italy and Greece was the relocation system,[57] under which the other Member States would take charge of a certain number of applicants for international protection, thus becoming responsible for examining the respective applications, notwithstanding the Dublin Regulation. The relocation State for each individual applicant eligible to benefit from the system was identified according to the willingness expressed by the States themselves. "The specific qualifications and characteristics of the applicants concerned, such as their language skills and other individual indications based on demonstrated family, cultural or social ties which could facilitate their integration into the Member State of relocation" could help to identify the State best placed to take charge of and relocate the person.[58] The aim was therefore to seek to relocate

[55] Court of Justice, judgment of 6 September 2017, joined cases C-643/15 and C-647/15, *Hungary and Slovak Republic v. Council* [GC], para. 334.

[56] In reality, only some of the people who arrived lodged an application for international protection in the two States. The majority were seeking to reach other destinations. However, the States where the applications were lodged were often not responsible for examining them and the applicants were transferred to the responsible State, in accordance with the Dublin regulation. However, the Greek reception system had already reached collapsing point to the extent that transfers were no longer possible because they would have constituted a breach of the prohibition on inhuman treatment. M. Den Heijker, J. Rijpma, T. Spijkerboer, *Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System*, in *Common Market Law Review*, 2016, p. 607 *et seq*.

[57] This system was established by Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. The latter decision differs from the former in that it provides for mandatory allocations for States. E. Guild, C. Costello, V. Moreno-Lax, *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece*, Study for the LIBE Committee, 2017, www.europarl.europa.eu.

[58] Recital 28 of Decision 2015/1523 and recital 34 of Decision 2015/1601.

each applicant in the State where they had the greatest possibility of integration. With a certain degree of optimism, the recitals of Decision 2015/1601 provide "[t]he integration of applicants in clear need of international protection into the host society is the cornerstone of a properly functioning Common European Asylum System".[59] Poland, intervening in the action for annulment brought by Hungary and the Slovak Republic, maintains that the decision fails to define the criteria for identifying the State to which the applicant will be relocated, with the effect that persons "could [...] be resettled in distant regions of the European Union with which they have no cultural or social ties, which would make their integration in the society of the host Member State impossible".[60] The Court rejects the ground of complaint and maintains that the elements listed in recital 34 and the consultation mechanism between the relocation State and Italy or Greece, based on solidarity and fair sharing of responsibility between Member States, fulfil that function in a non-arbitrary manner.[61] The Court diminishes the scope of integration requirements in determining the relocation State, giving greater weight to solidarity requirements, quite rightly, because the function of the relocation system is to help Italy and Greece rather than satisfying the wishes of applicants or relocation States. If ease of integration were the main criterion for the allocation of applicants, States would have an easy way of avoiding the obligations laid down in the decision and, more generally, in the entire European Asylum System.

III.2. The Qualifications Directive

Among the acts that make up the European Asylum System, Directive 2011/95 (Qualifications Directive) is the only one that contains express references to integration. Emphasis is placed on the State's obligation to draw up integration programmes to facilitate the integration of beneficiaries of international protection. It is not an instrument for selecting beneficiaries of international protection, given that States are obliged to admit these people and issue them with a residence permit, but for helping them and thus reducing the social costs that can be generated when foreign nationals arrive outside of any planning mechanism. Recital 41 recognises that beneficiaries of international protection have "specific needs" and are confronted with "particular integration challenges". This justifies the treatment that they must receive as well as the need for States to provide "integration programmes [...] including, where appropriate, language training and the provision of information concerning individual rights and obligations relating to

[59] Indeed, the Dublin Regulation does not rank the criteria according to the chance the person concerned has to integrate, except for the criteria connected to family ties. However here again, family ties depend more on the residence permit of the member of the family, than on the degree of kinship as such.

[60] *Hungary and Slovak Republic v. Council* [GC], cit., para. 320.

[61] *Ibid.*, para. 332.

their protection status in the Member State concerned".[62] It is clear from recital 48 that national programmes can be based on "common basic principles for integration".

Art. 34 describes the right to access to integration facilities in the following terms: "In order to facilitate the integration of beneficiaries of international protection into society, Member States shall ensure access to integration programmes which they consider to be appropriate so as to take into account the specific needs of beneficiaries of refugee status or of subsidiary protection status, or create pre-conditions which guarantee access to such programmes".[63] Recital 40, however, specifies that "[w]ithin the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities requires the prior issue of a residence permit." The scope of that provision, which does not have a corresponding provision in the text of the Directive, was appropriately diminished by the Court in the *H.T.* case.[64] This case concerned the revocation of a residence permit for compelling reasons of national security, given that the refugee had provided support to a terrorist organisation. Although revocation is not governed by the Directive, it is nonetheless possible in the Court's view.[65] However, until the person has been expelled, he continues to hold refugee status and is entitled to the treatment established by the Directive. The State cannot therefore deny him the benefits specified. With reference to recital 30 of Directive 2004/83, which corresponds to recital 40 of Directive 2011/95, the Court states:

> "While it is true that recital 30 of Directive 2004/83 provides that Member States may, within the limits set by their international obligations, lay down that 'the granting of benefits with regard to access to employment, social welfare, health care and access to integration facilities requires the prior issue of a residence permit', the condition thus imposed nevertheless refers to processes purely administrative in nature, since the objective of Chapter VII of the Directive is to guarantee refugees a minimum level of benefits in all Member States. Moreover, as that recital does not have a corresponding provision among the provisions of the Directive, it cannot constitute a legal basis allowing Member States to reduce the benefits guaranteed by that Chapter VII where a residence permit is revoked".[66]

In addition to the express reference made to integration in Directive 2011/95, it should be recalled here that the need to facilitate the integration of beneficiaries of

[62] See recital 47of the Directive.

[63] The provision was already present in Directive 2004/83 (Art. 33), but it treated refugees, who were entitled to access to integration programs, and beneficiaries of subsidiary protection, who could have access only if the State considered it appropriate, differently.

[64] Court of Justice, judgment of 24 June 2015, case C-373/13, *H.T.*

[65] P. Dumas, *L'arrêt H.T.: La Cour de justice entre protection et déconstruction des droits garantis aux réfugiès*, in *Revue trimestrielle de droit européen*, 2016, p. 64, highlights that the Court is exercising a sort of "*pouvoir normatif*" to fill the gaps in the Directive.

[66] *H.T.*, cit., para. 96.

subsidiary protection was behind the decision to give them equivalent treatment as that given to refugees. Under the previous Directive 2004/86, the decision to extend the treatment established for refugees to beneficiaries of subsidiary protection was substantially left to the discretion of the States. Directive 2011/95 removed many of the differences in treatment. In particular, it is evident from the preparatory acts that the States, which were favourable to the change, justified the decision to extend to beneficiaries of subsidiary protection the possibility of immediate access to employment after obtaining that status (which the Directive indeed does), on the basis that it facilitated integration into society.[67]

The Court of Justice has since had the opportunity to assess whether a State could take account of integration requirements in granting the treatment provided for in the Directive. In *Alo and Osso*, the Court examined the German system which imposes a residence condition on beneficiaries of international protection to whom welfare benefits have been granted.[68] That obligation is justified by the objective of facilitating their integration. In particular, with the words used in the judgment to summarise the objectives of the provision:

> "the residence condition provided for by German law seeks, on the one hand, to prevent the concentration in certain areas of third-country nationals in receipt of welfare benefits and the emergence of points of social tension with the negative consequences which that entails for the integration of those persons and, on the other, to link third-country nationals in particular need of integration to a specific place of residence so that they can make use of the integration facilities available there".[69]

The Court assesses the conformity of the requirement with the Directive, based on the provisions of the Directive itself, and finds that it is not discriminatory on grounds of nationality, with respect to treatment of nationals and other foreign nationals.[70] As far as the former are concerned, the Court rules out any conflict with the Directive, because beneficiaries of international protection are not in a comparable situation with nationals "so far as the objective of facilitating the integration of third-country nationals is

[67] H. Battjes, *Chapter VII Directive 2011/95*, in K. Hailbronner, D. Thym (eds), *EU Immigration and Asylum Law*, cit., p. 1252; V. Moreno-Lax, M. Garlick, *Qualification: Refugee Status and Subsidiary Protection*, in S. Peers, V. Moreno-Lax, M. Garlick, E. Guild (eds), *EU Asylum Law*, Leiden: Brill Nijhoff, 2015, p. 170.

[68] Court of Justice, judgment of 1 March 2016, joined cases C-443/14 and C-444/14, *Alo and Osso* [GC].

[69] *Ibid.*, para. 58.

[70] The fact that the Court does not consider fundamental rights is criticized, even though the outcome of its reasoning is mostly appreciated. See L. Marotti, *Sul diritto di scegliere la residenza per i beneficiari dello status di protezione sussidiaria: profili evolutivi e aspetti problematici nell'approccio della Corte di giustizia*, in *Diritti umani e diritto internazionale*, 2016, p. 487 *et seq.*; J.Y. Carlier, *Choice of Residence for Refugees and Subsidiary Protection Beneficiaries; Variations on the Equality Principles:* Alo and Osso, in *Common Market Law Review*, 2017, p. 642 *et seq*.

concerned".[71] As regards third country nationals who reside under a different status from beneficiaries of international protection and who receive welfare benefits without being subject to a residence condition, the Court leaves this decision to the national court, which must examine whether beneficiaries of international protection face greater difficulties relating to integration than other foreign nationals.[72] If the national legislation grants welfare benefits to third country nationals residing for reasons other than subsidiary protection only after a certain period of residence, because they were admitted on condition that they were able to support themselves financially, and only after a certain period can they be considered sufficiently integrated, the national court could then conclude that beneficiaries of international protection indeed face greater difficulties relating to integration and that these justify the residence condition.[73] The reasoning is somewhat convoluted. But it is clear that, in this context, integration is a mere consequence of the duration of residence and is dependent on the latter. Since beneficiaries of international protection, unlike foreign nationals, do not need to wait to receive welfare benefits, the presumption is that they are less well integrated and a residence condition can be imposed on them.

IV. Acts relating to free movement of persons

Special rules and acts apply to Union citizens and their family members. They are foreigners for the host State, but as nationals of Member States they benefit of a different treatment than third country nationals. In EU law, these rules and acts are known as free movement of persons. Nowadays, Directive 2004/38 governs the conditions for entry, residence and expulsion of Union citizens and their family members, in a different Member State from that where they have citizenship. It replaces the acts of secondary legislation that previously applied to specific categories of Union citizens[74] or which tackled horizontally the particular problem of restrictions on free movement on grounds of public policy, public security and public health.[75] Unlike these acts, Art. 24 of Directive 2004/38 provides that Union citizens also enjoy equal treatment with nationals of the host State. The previous secondary legislation did not contain any provisions concerning rights associated with residence and, in particular, equal treatment with na-

[71] *Alo and Osso* [GC], cit., para. 59.

[72] According to E. Gunn, *Comment*, in *Journal of Immigration, Asylum and Nationality Law*, 2016, p. 181, the Court leaves too wide a margin of discretion for the national judge.

[73] *Alo and Osso* [GC], cit., para. 63.

[74] Directives 68/360/EEC (workers), 73/148/EEC (self-employed workers), 75/34/EEC (right to remain for self-employed workers), 90/364/EEC (self-sufficient EU citizens), 90/365/EEC (retired workers) and 93/96/EEC (students).

[75] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, and subsequent amendments.

tionals. In fact, Art. 3 of Directive 96/93 on the right to residence for students, provided that "[t]his Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence". Although equal treatment for workers was specified in Regulation 1612/68, which has been interpreted extensively by the Court as we will see shortly, the possibility or otherwise of invoking equal treatment for other Union citizens exercising free movement rights on another basis was directly dependent on primary law.

IV.1. Regulation 1612/68 on free movement of workers

Before examining Directive 2004/38 to identify how the concept of integration is considered in that Directive, a few comments should be made about Regulation 1612/68[76] (now replaced by Regulation 492/2011,[77] which did not introduce any changes of interest to us here). The Regulation and its respective case-law bear witness to the interpretative possibilities offered as a result of the reference to integration contained therein.

The fifth recital (corresponding to the sixth recital in Regulation 492/2011) provided:

> "Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the *conditions for the integration of that family into the host country*" (emphasis added).

The Court of Justice has addressed this recital several times and has referred to elements of this recital for the purposes of interpreting the regulation's provisions, in relation principally, but not exclusively, to family members. Firstly, it has construed the reference to integration to mean that equal treatment must be ensured with nationals of the host country in terms of a child of a migrant worker being able to access the advantages associated with education[78], even though Art. 12 (now 10) of the Regulation did not expressly mention this. Secondly, integration is considered when interpreting Art. 7, para. 2, of the Regulation, which provides that the migrant worker "shall enjoy

[76] Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

[77] Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

[78] Court of Justice: judgment of 11 April 1973, case 76/72, *Michel S.*, regarding benefits provided for with the view of allowing the rehabilitation of the handicapped; judgment of 3 July 1974, case 9/74, *Casagrande*, on measures relating to educational grants; judgment of 15 March 1989, joined cases 389/87 and 390/87, *Echternach and Moritz*, on the assistance granted to cover the costs of students' education and maintenance; judgment of 13 November 1990, case C-308/89, *Di Leo*, on educational grants, where the education or training is pursued in the State of origin.

the same social and tax advantages as national workers". In determining whether a non-economic advantage falls within the scope of Art. 7, para. 2, the Court has highlighted the contribution that this can make to the migrant worker's integration into the host country. In *Mutsch*, the social advantage that contributes towards integration is the right to use one's own language in proceedings;[79] in *Reed* it is the right to obtain a residence permit for an unmarried partner.[80] Thirdly, Art. 11 of the Regulation, interpreted in the light of the fifth recital, has led the Court to state that a spouse, national of a non-member country, has the right to pursue a regulated profession if he or she holds the qualifications required by national law.[81] In these rulings, the reference to integration serves to reinforce equal treatment, which is an instrument for integration and contributes towards the achievement of free movement of workers. In other words, a migrant worker is integrated if the State grants him or his children the same advantages that it grants to a national worker or his children. The State therefore promotes integration through full recognition for migrant workers of equal treatment with nationals.

The most daring interpretation of the regulation and, in particular, of Art. 12, from the perspective of integration, is the Court of Justice's interpretation in *Echternach and Moritz*.[82] The case was unusual because it concerned the possibility for the migrant worker's son to continue his studies in the migrant worker's previous country of residence. The son would have accompanied his parents to the State to which the family moved but, in that State, he would not have been able to complete the education that he began in the other State, because of a lack of coordination. The Court states that integration of the migrant worker in the society of the host country is only possible if the child is able not only to begin his education but also to complete that education. In the subsequent case *Baumbast and R.*, the Court generalises that right to finish one's studies and extends it to cases where the element of necessity found in *Echternach* is not present, thus clarifying that the right is acquired not only when the child is prevented from completing his education in the country to which the family has moved but also simply on account of having started his education.[83]

The migrant worker's child retains that right, which also includes the right to State funding of studies, as well as the associated right of residence, even where the parent has left the country. This is therefore a right (or, rather, a set of rights) that is granted irrespective of the worker's integration in the host State, because it survives the migrant worker's departure. Here it seems more likely that the Court is wishing to keep the mi-

[79] Court of Justice, judgment of 11 July 1985, case 137/84, *Mutsch*.

[80] Court of Justice, judgment of 17 April 1986, 59/85, *Reed*.

[81] Court of Justice, judgment of 7 May 1986, case 131/85, *Gül*. Directive 2004/38 repealed Art. 11 of Regulation 1612/68. Art. 23 of the Directive corresponds to Art. 11 of the Regulation. Regulation 492/2011 does not have any equivalent provision.

[82] *Echternach and Moritz*, cit.

[83] Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast*, para. 53.

grant worker's child within the scope of European Union law and, specifically, within the scope of the right to equal treatment with nationals of the host State, albeit through the fiction of the requirement to ensure the integration of a migrant worker who has now departed. The integration facilitated by this case-law is, at best, that of the migrant worker's child.[84]

The right that the migrant worker's child derives from Art. 12 of Regulation 1612/68 is an independent right, capable of supporting the right of residence of the parent who is the primary carer, even if the latter is a third country national or does not have sufficient resources, where the child is unable, owing to his age or for other reasons,[85] to live on his own in the State in which he is studying.[86]

IV.2. Directive 2004/38

Looking now at Directive 2004/38, the principle established in that Directive can be summarised as follows: all Union citizens have the right of residence for up to three months and retain that right unless they become an excessive burden on the host State. During that period (and unless they are workers), Union citizens are not eligible for social assistance. For periods of residence of more than three months, Union citizens have the right of residence in a Member State other than their own if they are workers or self-employed persons, they are students and have sufficient resources to support themselves financially or if they are neither workers nor students but have sufficient resources to support themselves financially without claiming benefits from the host State.[87] During that period, Union citizens are entitled to equal treatment with nationals, with the sole exception of maintenance grants and student loans, to which they are not entitled unless – again – they are workers. After five years of legal and continuous residence, Union citizens acquire a right of permanent residence, with which certain specific rights are associated. Firstly, residence is no longer subject to conditions. Thus it does not matter if they lose their job or no longer have sufficient resources, circumstances which would previously have caused them to lose their right of residence. Moreover, a person does not become an excessive burden on the host State simply on

[84] In *Echternach and Moritz*, the Court refers to the workers' integration in para. 20 and to the children's integration in para. 35.

[85] Court of Justice, judgment of 8 May 2013, case C-529/11, *Alarape and Tijani*. The child was a 22-year-old doctoral student, but the Court called upon the national judge to evaluate whether he nonetheless needs the presence of his mother to finish his studies.

[86] *Baumbast*, cit.; Court of Justice, judgment of 23 February 2010, case C-480/08, *Teixeira* [GC]; Court of Justice, judgment of 23 February 2010, case C-310/08, *Ibrahim* [GC].

[87] Directive 2004/38: Arts 6 (right of residence for up to three months) and 7 (right of residence for more than three months). On the Directive, see E. Guild, S. Peers, J. Tomkin, *The EU Citizenship Directive. A Commentary*, Oxford: Oxford University Press, 2014; C. Barnard, *The Substantive Law of the EU. The Four Freedoms*, Oxford: Oxford University Press, 2016, p. 331 *et seq.*; C. Morviducci, *I diritti dei cittadini europei*, Torino: Giappichelli, 2017.

account of having applied for or received social benefits. Secondly, a person is fully entitled to non-discrimination on grounds of nationality, and the host State cannot lawfully invoke derogations under Art. 24. Thirdly, a person enjoys enhanced protection against expulsion, which, under Art. 28, para. 2, can be decided only "on serious grounds of public policy or public security".

The Directive contains few references to integration. These can be found principally in the recitals and concern two areas: right of permanent residence and protection against expulsion.

As to the right of permanent residence,[88] recital 18 describes it as being a vehicle for integration, specifying that it is a genuine vehicle for integration if "once obtained, [the right of residence is no longer] subject to any conditions".

As regards protection against expulsion, the system introduced in the Directive is summarised in recital 24: "the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be". The system, as the Court does not fail to point out, "is based on the degree of integration of those persons in the host Member State",[89] but does not clarify when the person is integrated, leaving the national authorities to assess that matter. Art. 28 requires a State intending to expel a Union citizen on grounds of public policy or public security, to take account of a series of considerations "such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin". Here integration is qualified by the adjectives "social and cultural" and is mentioned separately from duration of residence, thus the two concepts can be regarded as being different. The provision, read in the light of recitals 23 and 24,[90] can be interpreted in the sense that States must apply the principle of proportionality before taking an expulsion decision, and only if the State's interest in having the individual expelled prevails over the latter's interest in remaining can the State legitimately take the expulsion decision. According to the wording of the Directive, it therefore seems possible to conclude that even an integrated person can be conceived to behave in a manner such as to constitute a threat that is abstractly sufficient to justify an expulsion decision, were it not for the fact that the taking of that decision would be disproportionate in the case in question (because, as Art. 27, para. 2, states: "The personal conduct of the individual concerned must rep-

[88] The right of permanent residence is a novelty in EU law: see E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 183.

[89] Court of Justice: judgment of 23 November 2010, case C-145/09, *Tsakouridis* [GC], para. 25; judgment of 16 January 2014, case C-400/12, *M.G.*, para. 30.

[90] Recital 24 has already been quoted in the text. Recital 23 itself provides that expulsion of Union citizens or their family members can harm those who "have become genuinely integrated into the host Member State".

resent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society").

As regards integration being one of the factors that the State needs to take into account before taking an expulsion decision, mention can be made of the *Tsakouridis* judgment, in which the Court stated the following:

> "a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned [...], on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which [...] is not only in his interest but also in that of the European Union in general".[91]

These words reinforce the idea that even an integrated person can behave in such a way that is abstractly capable of justifying an expulsion decision. Furthermore, they connect integration with social rehabilitation, suggesting that rehabilitation can be more successful in the State in which the person is integrated than in the State of origin. According to the traditional interpretation, expulsion is simply the State's decision to "dispose" of an unwelcome person and is not accompanied by any rehabilitation programme or any form of coordination with the State of origin. The concern is that the State of origin will readmit the person,[92] not that it will rehabilitate him or do anything to deal with the danger that he presents. Social rehabilitation requirements do not appear to be given similar consideration in subsequent judgments, as we will see below.

Integration requirements are therefore behind the requirement for a certain period of residence before being able to claim equal treatment. As already mentioned, Art. 24 of the Directive provides that the degree of equal treatment is determined on the basis of duration of residence. In the *Förster* case, the Court had stated that the period of five years of residence provided for in Dutch law before students could obtain maintenance assistance was an appropriate length of time to ensure that the Union citizen had integrated into the host State.[93] The Directive was not applicable *ratione temporis*, but it is interesting to note that the waiting time is exactly the same as that specified in Art. 24 of the Directive, which the Court nonetheless quoted anyhow. It is safe to assume

[91] *Tsakouridis* [GC], cit., para. 50.

[92] Art. 27, para. 4, of Directive 2004/38 establishes that "the Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute".

[93] Court of Justice, judgment of 18 November 2008, case C-158/07, *Förster* [GC]. The requirement that a Union citizen who is not a worker must demonstrate a certain degree of integration with the host State in order to enjoy equal treatment with nationals had been accepted by the Court in *Bidar*: see Court of Justice, judgment of 15 March 2005, case C-209/03, *Bidar* [GC]. Integration could be ensured by a certain period of residence. In *Förster*, however, the Court accepts that a predefined period of residence is sufficient without the need to conduct a proportionality assessment based on the specific characteristics of the case.

therefore that the justification accepted for the national measure is transposable to the Directive.[94] This conclusion is corroborated by subsequent Court judgments. In *Commission v. Netherlands*,[95] the Court states that where a worker has participated in the employment market of the host State and contributed to the financing of the State through social contributions and taxes, he has a sufficient link of integration to claim equal treatment with nationals and no waiting period can be imposed on him.[96] In *Commission v. Austria*,[97] the Court examined whether the Austrian legislation that granted the benefit of reduced fares on public transport to students whose parents received family allowances in Austria was compatible with the prohibition of discrimination on grounds of nationality. In order not to be indirectly discriminatory, the criterion for selection of beneficiaries should have been established objectively, so as to ascertain that "there is a genuine link between a claimant to a benefit and the competent Member State".[98] This link exists where the beneficiary "is enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training, in accordance with the first indent of Art. 7, para. 1, let. c), of Directive 2004/38".[99]

Besides these express or implied references, the Directive does not mention the concept of integration again. In fact, States cannot stipulate that integration conditions must be fulfilled before the right of residence is granted, even if such conditions are laid down by law. The requirements on which residence is conditional are listed exhaustively in the Directive itself and the States cannot add others.[100]

However, this analysis cannot be limited to an examination of the wording of the Directive and ignore the trend observed in the case-law of the Court, which, consciously or otherwise, has considered the matter of integration in its interpretation of the Di-

[94] According to N. Nic Shuibhne, *The Third Age of EU Citizenship. Directive 2004/38 in the Case Law of the Court of Justice*, in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge: Cambridge University Press, 2012, p. 350, "the Court [...] issued a clear signal of deference to the legislature".

[95] Court of Justice, judgment of 14 June 2012, case C-542/09, *Commission v. Netherlands*.

[96] An additional source of concerns is the case law that makes satisfying not better-defined integration links a condition for access to benefits for frontier workers. On this subject, which falls outside the present paper's focus, because it does not deal with the application of Directive 2004/38, see S. Montaldo, *Us and Them: Restricting EU Citizenship Rights Through the Notion of Social Integration*, in *Freedom, Security & Justice: European Legal Studies*, 2017, p. 40 *et seq.*

[97] Court of Justice, judgment of 4 June 2015, case C-75/11, *Commission v. Austria*.

[98] *Commission v. Austria*, cit., para. 59.

[99] *Ibid.*, para. 64.

[100] Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock* [GC], stating that Art. 10 of Directive 2004/38 lists exhaustively the documents which third-country nationals family members may have to present in order to have a residence card issued (para. 53). The same reasoning, which is grounded on the wording of the provision, may be transposed to Art. 7 of the Directive as well.

rective, with rather worrying outcomes.[101] In the opinion of this author, this case-law has developed without considering the overall picture and has gradually taken a somewhat unexpected direction.

The starting point can be traced back to the judgment in *Lassal*, concerning the right of permanent residence, in which the Court took inspiration from the part of the recitals which read: "The EU legislature made the acquisition of the right of permanent residence pursuant to Art. 16, para. 1, of Directive 2004/38 subject to the integration of the citizen of the Union in the host Member State".[102] Integration becomes a condition for acquiring the right of permanent residence and not as a consequence of that right, as could be assumed from the recitals to the Directive. In *Lassal*, this assertion was perhaps linked to the peculiarities of that case, because the underlying problem for the Court was to determine whether a person who, before the entry into force of the Directive, had resided for five years in the host State and had subsequently been absent from that State for around ten months was able to acquire a right of permanent residence. In giving more weight to the period of residence than the period of absence, the Court follows a substantialist approach whereby any continuous period of residence as a worker or person seeking work guarantees the integration required for acquiring the right of permanent residence. In the ruling, the sentence quoted is placed in the context of the proceedings, because integration is considered to exist in the case of prolonged residence. The point in discussion was, instead, whether the link with the State arising from prolonged residence was jeopardised by an absence of a certain duration.[103] In short, the Court was attempting to attach importance to the period of residence completed before the entry into force of the Directive and consistent with the conditions laid down by the Union law applicable at the time, to avoid any damage being caused to the new system, which was designed to enhance rather than diminish the rights of Union citizens.

In the subsequent *Dias* case,[104] the Court was once again faced with events occurring prior to the entry into force of the Directive. The difference with the previous case is that the applicant in the main proceedings, after residing for a continuous period of five years, remained in the State without working or looking for work and yet retained her residence permit.[105] Referring to its established case-law whereby a residence per-

[101] Among the most critical comments, see N. Nic Shuibhne, *Limits Rising, Duties Ascending: the Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 889 *et seq.*; C. O'Brien, *Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights*, in *Common Market Law Review*, 2016, p. 953 *et seq.*

[102] Court of Justice: judgment of 7 October 2010, case C-162/09, *Lassal*, para. 37; judgment of 16 January 2014, case C-378/12, *Onuekwere*, para. 24.

[103] *Lassal*, cit., paras 48, 55 and 56.

[104] Court of Justice, judgment of 21 July 2011, case C-325/09, *Dias*.

[105] The residence permit was the document that, on the basis of Directive 68/360 applicable to the facts in question, was issued to the worker.

mit does not give rise to any right to reside,[106] the Court states that mere possession of a residence permit does not mean that residence is legal for the purposes of acquiring the right of permanent residence. The legality of the residence depends in fact on whether the conditions laid down in the Directive have been fulfilled. Mrs Dias had left her job voluntarily after childbirth, in order to look after her son and received a social allowance during that period of around one year. The Court does not try to consider whether she could retain the status of worker. It is true that Directive 2004/38 does not include, among the situations in which a worker retains the status of worker despite not working, any periods spent looking after children,[107] but this issue deserves to be looked at sooner or later. The Court ultimately treats as an absence any period of residence that does not meet one of the conditions set out in Art. 7, para. 1, of the Directive. Based on the premise that the right of permanent residence is lost in the case of two-year absences because they call into question "the integration link between the person concerned and that Member State", the Court concludes that this integration link "is also called into question in the case of a citizen who, while having resided legally for a continuous period of five years, then decides to remain in that Member State without having a right of residence".[108] In para. 64, it adds: "The integration objective which lies behind the acquisition of the right of permanent residence laid down in Art. 16, para. 1, of Directive 2004/38 is based not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member State". Here the Court separates integration from presence in the State, giving integration a qualitative connotation not further specified. The assertion, which could have been interpreted as an unfortunate consequence of the characteristics of that case,[109] can be found again in *Onuekwere*.[110] Here the Court was trying to assess whether a period of imprisonment following a criminal conviction could be taken into consideration for the purposes of acquisition of the right of permanent residence. The conclusion is that such residence is not legal pursuant to Art. 16 of the Directive and interrupts continuity of

[106] Court of Justice: judgment of 8 April 1976, case 48/75, *Royer*, para. 47 (on the residence card established by pre-Directive 2004/38 legislation); judgment of 8 October 2009, case C-123/08, *Wolzenburg* [GC], para. 51 (on the document attesting to the permanence of the EU citizens' residence, under Directive 2004/38).

[107] The problem was addressed in Court of Justice, judgment of 19 June 2014, case C-507/12, *Saint Prix*. The Court stated that Art. 45 TFEU itself grounds the maintenance of the right to reside in these cases. C. O'Brien, *Civis Capitalist Sum*, cit., p. 971 *et seq.*, highlights the disproportionate impact upon women exerted by the traditional reading of free movement rights.

[108] *Dias*, cit., para. 63.

[109] If the same facts had occurred after the entry into force of Directive 2004/38, Mrs Dias would not have lost the right of permanent residence, during the period in which she had left work to look after her son and she would have been entitled to any benefit available to nationals of the host State. E. Guild, S. Peers, J. Tomkin, *The EU Citizenship Directive* cit., p. 202, were hoping that this interpretation would be limited "to the transposition period for the Directive".

[110] *Onuekwere*, cit.

residence. Firstly, the Court, after recalling para. 64 of the *Dias* judgment, continues by stating that "[t]he imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law", thus the taking into consideration of such periods would be contrary to the aim pursued by the Directive.[111] Secondly, the Court states that the "condition of continuity of legal residence satisfies the integration requirement which is a precondition of the acquisition of the right of permanent residence".[112] However, this interpretation is not the only interpretation possible. Legal scholars had put forward another interpretation, namely that since, on the basis of recital 17 and Art. 21, only the enforcement of an expulsion decision interrupts continuity of residence, it must be inferred that imprisonment not accompanied by expulsion does not prevent the right of permanent residence from being acquired.[113]

The effect of the case-law mentioned above can be summarised as follows: in order to obtain the right of permanent residence, it is necessary to reside under the conditions laid down in the Directive,[114] in other words as a worker or self-employed person, student or self-sufficient person, or family member, and never to have infringed the law or spent time in prison. In short, the Court, with respect to the system provided for in the Directive, seen through the prism of integration, infers additional obligations to those expressly specified.[115] Furthermore, the Court has denied that periods of residence based on national law or on other provisions of Union law can be taken into consideration for the purposes of acquiring the right of permanent residence.[116]

This case-law has affected the interpretation of other provisions of the Directive. In particular, in order to claim equal treatment under Art. 24, the Court has stated that Un-

[111] *Ibid.*, para. 26.

[112] *Ibid.*, para. 30. Other language versions are even more explicit: In Italian, the words "obbligo d'integrazione" are used and, in French, "obligation d'intégration".

[113] E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 193.

[114] Legal residence is thus defined by recital 17. The Court accepts this interpretation and considers it to be exhaustive, even though other interpretations are possible: see the next footnote.

[115] In her suggestive interpretation of the Directive from the perspective of restrictions on free movement as opposed to from the traditional perspective of rights, N. NIC SHUIBHNE, *Limits Rising, Duties Ascending*, cit., p. 920, adds that "a duty to integrate properly" can be inferred from that case-law.

[116] As to period of residence under national law: "[A] period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in Art. 7(1) of Directive 2004/38 cannot be regarded as a 'legal' period of residence within the meaning of Art. 16(1)": Court of Justice, judgment of 21 December 2011, joined cases C-424/10 and C-425/10, *Ziolkowski* [GC], para. 47. As to period of residence under other provision of EU law, see Court of Justice, judgment of 6 September 2012, joined cases C-147/11 and C-148/11, *Czop and Punakova*, and *Alarape and Tijani*, cit., stating that residence under Art. 12 Regulation 1612/68 (now Art. 10 Regulation 492/2011) cannot be considered as legal residence for the purpose of Art. 16 Directive 2004/38. For critical remarks on these statements, see E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 163 *et seq.*

ion citizens must reside under the conditions set out in the Directive, with any periods of residence accrued in accordance with national law being disregarded.[117]

The integration requirement has since slipped into the application of enhanced protection against expulsion, which is acquired after ten years of residence, pursuant to Art. 28, para. 3, let. a). In the first case in which the Court had to interpret the provision in question, it stated that the ten years of residence are calculated backwards from the date of the expulsion decision.[118] However, the practical usefulness of the provision is called into question by two comments made by the Court. Firstly, the commission of particularly serious offences denotes a lack of willingness to integrate, which removes the protection that the Directive connects with integration into the host State. Secondly, imprisonment also demonstrates a lack of willingness to integrate and interrupts continuity of residence,[119] with the result that a person who is in prison at the time the ten years of residence are calculated will rarely manage to enjoy enhanced protection against expulsion.[120] In fact, the only people who can enjoy this protection are those who have not committed any criminal offence of a particular severity but whom the State nonetheless wishes to expel on grounds of public security. As legal scholars have rightly pointed out, lack of integration risks becoming a ground for expulsion not provided for in the Directive.[121] The Court does not seem to maintain any separation between duration of residence, which reduces the cases in which the State can expel a Union citizen, and integration, which, if limited or absent, can justify the adoption of an expulsion decision in a specific case. The wording of Art. 28, para. 3, let. a), of the Directive does not support the Court's interpretation because, unlike Art. 16, it does not in any

[117] Court of Justice, judgment of 11 November 2014, case C-333/13, *Dano* [GC]. For comments, see D. THYM, *When Union Citizens Turn into Illegal Migrants: The* Dano *Case*, in *European Law Review*, 2015, p. 249 *et seq.*; H. VERSCHUEREN, *Preventing "benefit tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in* Dano*?*, in *Common Market Law Review*, 2015, p. 363 *et seq.* This line of reasoning has subsequently "infected" Regulation 883/2004, on social security, because the fact that a State has limited non-contributory cash benefits to those residing under the conditions set out in Directive 2004/38 has been considered as being compatible with Union law: Court of Justice, judgment of 14 June 2016, case C-308/14, *Commission v. United Kingdom*. For comments, see C. O'BRIEN, *The ECJ Sacrifices EU Citizenship in Vain:* Commission v. United Kingdom, in *Common Market Law Review*, 2017, p. 209 *et seq*. Access to social assistance benefits is one of the most complex matters in the application of the Directive. The wording of the Directive is ambiguous and its application at national law is inconsistent. See P. MINDERHOUD, *Access to Social Assistance Benefits and Directive 2004/38*, in E. GUILD, K. GROENENDIJK, S. CARRERA (eds), *Illiberal Liberal States. Immigration, Citizenship in the EU*, Farnham: Ashgate, 2009, p. 221 *et seq*.

[118] *Tsakouridis* [GC], cit., para. 32.

[119] *M.G.*, cit. para. 31.

[120] M. MEDUNA, *'Scelestus Europeus Sum': What Protection against Expulsion Does EU Citizenship Offer to European Offenders?*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism. The role of Rights*, Cambridge: Cambridge University Press, 2017, p. 405 *et seq*.

[121] L. AZOULAI, *Transfiguring European Citizenship: From Member State Territory to Union Territory*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 189; M. MEDUNA, '*Scelestus Europeus Sum'*, cit., p. 404.

way require that residence be legal.[122] In any event, the case-law in question can also be criticised from a different perspective, namely for the excessively extensive interpretation given to compelling grounds of State security, which ultimately correspond to public policy grounds.[123]

It is clear from the analysis carried out above that a worker is considered automatically integrated provided that he does not commit offences of a particular severity, whereas this is not the case for a Union citizen residing on another basis. If a Union citizen resides under the conditions laid down in the Directive, his residence constitutes, again automatically, a guarantee of integration, both for the purposes of acquisition of the right of permanent residence and enjoyment of equal treatment. The need for qualified integration seems to arise only for a Union citizen who does not meet the conditions laid down in the Directive. However, it is perfectly clear that, under current case-law, a Union citizen who does not meet the conditions laid down in the Directive is automatically excluded from equal treatment, from acquiring the right of permanent residence and from enhanced protection against expulsion, without the possibility of any individual assessment.[124] For such citizens, qualified integration remains a dream that is difficult to realise.

Somewhere between those meeting the conditions laid down in the Directive and those not meeting those conditions, there lies a particular category of Union citizens: job-seekers. After the first three months, they do not reside under the conditions set out in Art. 7 of the Directive, but cannot be expelled, in accordance with Art. 14, para. 4, "for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged". They can be denied welfare benefits until they have found employment. However, the Court has stated that the right to the social assistance benefits that help a job-seeker to find employment originates from the Treaty and cannot be restricted if the job-seeker demonstrates a real and genuine link with the labour market in the host State.[125] In this case, the link, rather

[122] E. Guild, S. Peers, J. Tomkin, *The EU Citizenship Directive*, cit., p. 273.

[123] Not only "the direct involvement in major terrorist offences" (E. Guild, S. Peers, J. Tomkin, *The EU Citizenship Directive*, cit., p. 277), but any serious criminal behaviour risks being labelled as triggering imperative grounds of public security: D. Kostakopoulou, *When EU Citizens Become Foreigners*, in *European Law Journal*, 2014, p. 459. See also extensively M. Meduna, '*Scelestus Europeus Sum*', cit., p. 405.

[124] Also S. Iglesias Sánchez, D. Acosta Arcarazo, *Social Justifications for Restrictions of the Right to Welfare Equality: Students and Beyond*, in P. Koutrakos, N. Nic Shuibhne, P. Syrpis (eds), *Exceptions from EU Free Movement Law. Derogation, Justification and Proportionality*, Oxford: Hart, 2016, p. 101, highlight that the degree of integration possibly reached by those who do not reside according to Directive 2004/38 is immaterial.

[125] Court of Justice, judgment of 4 June 2009, joined cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*. The Court recognised a job-seeker as being a worker first for the purposes of the right of residence for a period of at least six months (see Court of Justice, judgment of 26 February 1991, case C-292/89, *Antonissen*) and then for the purposes of the right of access to employment, including any benefits disbursed by the public authorities for that purpose (see Court of Justice, judgment of 23 March 2004, case C-138/02, *Collins*). The *Vatsouras* judgment has been criticised by legal writers, particularly for the

than being synonymous with integration, serves to avoid abuse by distinguishing between those genuinely seeking employment and those simply stating that they are. However, the more a person is integrated, the more he will be able to demonstrate real and genuine links.

V. Conclusions

Despite the numerous references to integration in the Union's acts and case-law, the notion, despite its importance, remains largely indeterminate.[126] It sometimes corresponds to the reason justifying immediate access to favourable legal treatment; it sometimes relates to a certain period of residence, such that a foreign national is integrated if he has resided for a certain period of time; it sometimes presupposes knowledge of language and culture and it sometimes covers foreign nationals who are in employment.

The three legislative areas examined are very different. The State enjoys a margin of appreciation in the admission of foreign nationals but is obliged to admit applicants for international protection, family members of foreign nationals who are legally residing and Union citizens. The rules governing free movement of persons give the States a lesser margin of appreciation compared with those on immigration. States only enjoy discretion to impose integration conditions and to exclude benefits (whether these be family reunification or acquisition of long-term resident status) in the area of immigration policy. The resulting effect is territorial fragmentation of the applicable rules. In the States that have not exercised derogations, legality of residence and a certain duration of residence are sufficient to presume integration and entitlement to rights whereas, in others, individuals need to demonstrate integration by passing examinations imposed by the State. The discretion enjoyed by the States is extensive but subject to external review by the Court of Justice. Measures may only be applied in the context of derogations, must be laid down by law and must be devised so as not to constitute a selection tool or create a disproportionate obstacle to the exercise of rights.

difficulty in identifying the benefits to which the person seeking employment is entitled compared with those from which he may be excluded. See E. Fahey, *Interpretative Legitimacy and the Distinction Between "Social Assistance" and "Work-Seekers' Allowance": Comment on* Vatsouras, in *European Law Review*, 2009, p. 941 *et seq.*; D. Damjanovic, *Comment*, in *Common Market Law Review*, 2010, p. 859 *et seq.* Indeed, the existence of criteria for identifying the benefits in question is crucial to counteract the tendency of States (especially those with more generous welfare systems) to consider all benefits as being included in the social assistance system and therefore to exclude persons seeking employment from those benefits. This tendency, which the Court seems to support, is clearly reflected in *Collins.* See also Court of Justice, judgment of 15 September 2015, case C-67/14, *Alimanovic* [GC]. A. Iliopoulou-Penot, *Deconstructing the Former Edifice of the Union Citizenship? The* Alimanovic *Judgment*, in *Common Market Law Review*, 2016, p. 1007 *et seq.*

[126] What D. Thym, *Directive 2003/109*, cit., p. 431, wrote in relation to the long-term residents Directive (integration is "a concept which remains surprisingly vague at closer inspection") can easily be extended to the overall legislation analysed in the present *Article*.

The case-law relating to the integration status of Union citizens in the host State seems to be particularly disturbing. The interpretation given by the Court does not appear to originate necessarily from the wording of the Directive, which can be interpreted in different ways. Furthermore, in the area of free movement of persons, integration is not about knowledge of language or local customs but is instead associated with compliance with the law. Individuals are integrated if they reside under the conditions laid down in the Directive and if they do not commit offences and are not imprisoned. Integration becomes the way to introduce additional conditions to those set out in secondary legislation, in relation to access to equal treatment, right of permanent residence and enhanced protection against expulsion. But these conditions do not fall within the framework of express derogations and do not need to meet requirements of transparency, foreseeability and legal certainty such as in the directives on immigration policy.

There is no doubt that free movement of persons is a peculiar system because it is based on the individual's right. However, the approach taken by the Court leads to the exclusion of "undeserving" persons from the right of free movement.[127] Although being undeserving can sometimes be the result of a conscious choice, it is often the result of circumstances. Consider those who have been forced to accept occasional work, perhaps interspersed by periods of inactivity. They are at risk of not acquiring the right of permanent residence.[128]

We have reached a crossroads: either full effect is given to Union citizenship and any importance attached to integration is disregarded, or the uncertainties that the current rules allow are removed, for example by following the example of the Directive on long-term residents where more weight is attached to residence determined on the basis of national law and long-term resident status can be refused on public policy grounds.[129] If the former path is followed, we will move towards the fundamental status that Union citizenship aspires to be; if the latter path is followed, we will achieve a flexible system for treatment of foreign nationals, one that is more transparent and less hypocritical than the current system.

[127] E. Spaventa, *Striving for Equality: Who 'Deserves' to be a Union Citizen?*, in *Scritti in onore di Giuseppe Tesauro*, Napoli: Editoriale Scientifica, 2014, p. 2449 *et seq.*

[128] O'Brien, *Civis Capitalist Sum*, cit., p. 953 *et seq.*, analyses the national legislations, which make the proof of the status of worker more difficult.

[129] The five years of residence necessary for acquiring long-term resident status can be calculated on the basis of a permit governed by Union law or by national law. Under Art. 6 of Directive 2003/1009, the State can refuse to grant that status on public policy or public security grounds. A conviction does not appear to preclude automatically the acquisition of that status, since the provision itself establishes that the severity or type of offence committed is considered in the light of the duration of residence and the existence of links with the host country.

ARTICLES
SPECIAL SECTION – SOCIAL INTEGRATION IN EU LAW:
CONTENT, LIMITS AND FUNCTIONS OF AN ELUSIVE NOTION

AIM AND DUTY, SWORD AND SHIELD: ANALYSING THE CAUSE AND EFFECTS OF THE MALLEABILITY OF "SOCIAL INTEGRATION" IN EU LAW

STEPHANIE REYNOLDS*

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ABSTRACT: Social integration is often depicted as a means of enhancing the Union's legitimacy. Most recently, a reinvigorated "social Europe" has been back on the agenda following the United Kingdom's Brexit vote. And yet, ironically, the EU citizenry often appears resistant to the very mechanisms that seek to make the Union about its *people* rather than the market. To explore this phenomenon, this *Article* conducts a much-need historical analysis of the concept of "social integration" within the EU legal order. The investigation identifies the operation of an economic/social di-

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chotomy operating across European/national dividing lines, established by the Rome Treaty. As the market freedoms expanded, coming into ever-more frequent contact with domestic social policies, this dichotomy ultimately proved to be a myth. And yet, the legacy of the economic/social dichotomy has been not only to leave national social policymaking structurally disadvantaged when it clashes with the market freedoms but to constrain the Union's capacity to offer social integration as a counter-balance to the deregulatory effects of the internal market at the supranational-level: European social policymaking is conceptualised as further interference with the traditionally national social sphere. Efforts to pursue social integration, instead, via the mechanisms of the internal market through Union citizenship have also been inherently limited by its market origins. Indeed, as the political winds have changed, "social integration" has been converted from a Union "aim" into an individual duty of economic activity in that context. This undermines the Union's contemporary social aims, whilst doing little to address perceived Euroscepticism. Instead, a further model of social integration is needed; one which sees domestic and Union activities as jointly contributing to a shared constitutional social space and which is realised through a new method of adjudication that structurally recognises the significance of social goals in the present-day Union.

KEYWORDS: social integration – social policy – single market – free movement – Union citizenship – Court of Justice.

I. INTRODUCTION

Although the Rome Treaty sought "ever-closer union among the peoples of Europe" and to "ensure the economic and social progress" of the Member States,[1] its integrative focus was very much economic. The contemporary functioning of the Single Market arguably vindicates the decision to build European integration on economic foundations. Yet recent political events – not least the UK electorate's decision to leave the EU – might suggest that the Union is now entering a period of "disintegration", casting doubt on the solidity of its integrative roots. Today, integration of a more socially-oriented nature seems to be viewed as crucial to winning the hearts and minds of Europe's citizens. In the context of a "roadmap for a more united, stronger and more democratic union",[2] the Commission President called, *inter alia*, for a Union in which "Europeans wake up to a Europe where we have managed to agree on a strong pillar of social standards".[3]

However, to be effective such an approach must offer something genuinely novel. After all, the Maastricht Treaty sought to expand the EU's decidedly economic *raison d'être* to include social and political union as far back as 1993. Indeed, the vast array of policy

[1] See the Preamble of the 1957 Treaty establishing the European Economic Community (TEEC).

[2] European Commission, *Roadmap for a more united, stronger and more democratic Union*, available at ec.europa.eu.

[3] J.-C. JUNCKER, *State of the Union Address*, 13 September 2017, available at ec.europa.eu. Though returning to the market is also often presented as the way to tackle Euroscepticism. For a critical analysis of this approach, see C. O'BRIEN, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, Oxford: Hart, 2017.

areas covered by the contemporary Treaties have already greatly extended the manner in which the Member States can pursue European integration, albeit that the Union's competence to act differs across various fields. Critically, though each policy area boasts its own successes, the broadening of the Treaties' remit seems to have done relatively little, one way or the other, to convince the "peoples of Europe" of the merits of "ever-closer union". In fact, ironically the EU citizenry – or at least those sections of it able to vote in relevant popular referenda – appears resistant to some of the political and social mechanisms that seek to make the Union about its *people* rather than the market.

Accordingly, as it prepares to enter the post-Brexit era, the EU must pursue social integration differently if it is to avoid the same old pitfalls. As a vital means of informing potential ways forward, this *Article* conducts a much-needed historical analysis of the evolving nature of "social integration" within the Union legal order, providing essential insights into the causes of existing tensions. Ultimately, the investigation demonstrates the inherent malleability of "social integration" as a concept in Union law. Its content has not only evolved over the decades of the EU's development; it can simultaneously represent a number of approaches, which can, themselves, come into conflict with one another.

Specifically, in the Union context, "social integration" can embody, *inter alia*, the aim of social progress, pursued as a mere by-product of the internal market or as an independent EU objective. It can encompass concrete Union social policymaking. It can cover integration in the sense of securing the effectiveness of Union law across the Member States by means of both minimum and maximum standards of social protection whilst facilitating economic activity. It can signify attempts to create a European social space through the negative integrative process of requiring Member States to open up their existing domestic social spaces to non-national EU citizens. This "European social space" can be understood as concrete access to social assistance but also as an effort to re-create the collective bonds of solidarity between *Union* citizens that are traditionally presented as existing between nationals and as underpinning domestic welfare states.[4] Finally, social integration can operate as an individual duty on EU citizens to integrate into their host society. Thus, for the purposes of this discussion, the concept should be understood as an umbrella term for diverse social integration endeavours, rather than an explicitly adopted nomenclature within specified activity.

In order to explore these developments, first, section II examines the early manifestation of social integration as a by-product of economic integration. It identifies the early acceptance of an economic/social dichotomy structured along a European/national divide, which ultimately proved to be a myth as the expansion of the market freedoms led to increased interactions between free movement and national social rules. Falling

[4] On the connection between nationality, citizenship and the welfare state, see e.g. C. O'Brien, *Unity in Adversity*, cit., pp. 9-10.

within the internal market, these tensions were adjudicated in a manner which structurally favoured the Union's economic integrative endeavours.

Section III tracks the emergence of social integration as an independent Union aim. It notes that the strengthening of Union social values has long been seen as a crucial factor in securing Union legitimacy but demonstrates that, regardless of the EU's increasing social competence, the legacy of the economic/social dichotomy has been to constrain the Union's capacity to offer an EU-level social counter-balance to the potentially deregulatory effects of economic integration.

Section IV highlights, nevertheless, that the success of the internal market inspired a new manifestation of social integration in the form of equal access for EU citizens to existing domestic social spaces. Free movement and the Union's social integration endeavours could be used by citizens as twin swords to enforce their rights. This approach appeared to be concretised by the formal recognition of Union citizenship at Maastricht. However, shaped by the structures of the internal market, the social integration potential of EU citizenship has always been inherently restricted and these limitations ultimately paved the way for a new model of social integration focused on individual duty.

Section V charts this metamorphosis of social integration within Union citizenship. It recognises that, in practice, this form of integration is reduced to economic activity and compliance with the domestic criminal law, rendering any broader form of social integration as a means of enforcing one's rights irrelevant. Rather "social integration" operates as a mechanism by which Member States can "shield" the national social sphere from non-national EU citizens. This overlooks the genuine social bonds that non-national EU citizens can form in their host State communities, arguably directly undermining the core integrative ambition of Union citizenship. Meanwhile, this shift in judicial approach has made little difference to the operation of free movement more generally and so is unlikely to address popular concerns about the Union project over the longer-term, while its focus on already marginalised EU citizens undercuts the Union's wider social objectives.

Consequently, section VI proposes that the Court of Justice take a new approach to its adjudication of tensions between the market freedoms and domestic social policies; one which views the latter as potentially contributing to a shared constitutional space. This would require assessment of the reciprocal impacts of economic and social objectives on one another. This more holistic method of adjudication would serve a number of aims. First, it would provide a means by which the Union can pursue its social ambition despite the persistent confines of the economic/social dichotomy. Second, greater flexibility across free movement law generally might reduce the political pressure to limit social integration to the performance of economic duties within the host State, which marginalises sections of the EU citizenry. Finally, an approach more respectful of Member States' "social sovereignty" might actually strengthen the legitimacy of the EU social space, facilitating supranational policymaking, where appropriate, in the future.

II. Explaining the paradox: The historical limitations on European "social integration" as a counter-balance to the internal market

When it comes to social integration, the EU seems to find itself in a paradoxical situation. Socially-oriented activity appears necessary to counteract some of the deregulatory effects of economic integration. Yet, "social Europe" often seems at risk of being represented as further European interference. This section explains this phenomenon. First, it identifies that the Rome Treaty maintained and solidified an economic/social dichotomy across a European/national divide, largely leaving concrete social policymaking within the domestic realm. Second, it highlights that the judicially-driven expansion of the Treaty's market freedoms nevertheless blurred these lines, leading to tensions between the Union's economic rules and domestic social policy. Third, the section demonstrates that, although the economic/social dichotomy had been exposed as a myth, it continues to limit the EU's capacity to pursue social integration, presenting supranational social activity as a further erosion in to the domestic social space.

II.1. The traditional European/national divide in the economic/social dichotomy: social progress as a by-product of economic integration

With the ambition of creating an "ever-closer union among the peoples of Europe" in the aftermath of the Second World War, the European Economic Community (EEC) was always about more than economic integration. Nevertheless, the Rome Treaty clearly created an economic framework for this European project. One of the EEC's primary tasks was the "harmonious development of economic activities" by means of the establishment of a common market and the progressive approximation of the economic policies of the Member States,[5] while the Community's activities, such as the abolition of barriers to freedom of economic movement, focused on this objective.[6]

This is not to say that the Rome Treaty did not have social ambition. Its preamble asserted that the EEC was "resolved to ensure the economic *and* social progress [emphasis added] of its Member States". Nonetheless, structured on a liberal market ideology, social progress was principally viewed as a by-product of economic integration. Art. 2 TEEC proclaimed that an "accelerated raising of the standard of living" would be achieved "by establishing a common market". As Schiek puts it, since "social integration would be the natural result of unfettered markets [...] The EEC itself would only need social policies directly related to the common market".[7] Thus, Rome's limited social chapter focused on promoting improved working conditions and raising the standard of

[5] Art. 2 TEEC.

[6] Art. 3 TEEC.

[7] D. Schiek, *Economic and Social Integration: The Challenge for EU Constitutional Law*, Cheltenham: Edward Elgar, 2012, p. 39.

living for workers,[8] while provisions such as Art. 119 TEEC – requiring Member States to ensure and maintain the principle that women and men receive equal pay for equal work – were, at the time, targeted at preventing distortions of competition.[9]

Nevertheless, from an historical perspective, the Rome Treaty provided an apposite means of accomplishing European integration. Where previous attempts at building the European Defence Community and the European Political Community had failed,[10] the handing over of economic governance to the "spontaneous order of competitive markets",[11] at the European-level spoke to the ordo-liberal ideologies of the era. Meanwhile social integration could be achieved as a welcome side-effect – in terms of raised standards of living – while more concrete social policy-making could be left to individual Member States, given the democratic legitimacy arguably needed in such a "highly political" field.[12] In short: "the original constitutional deal was premised upon a transfer of responsibilities for economic integration to EU institutions while domestic institutions retained their fundamental role in defending social solidarity".[13]

However, the presumption that an economic/social dichotomy could be neatly divided across European/national lines has proven untenable. As the Treaty's market freedoms expanded, the line between the European economic space and the national social sphere became more blurred.

II.2. Expanding the market freedoms into the domestic social space

Most would accept that the contemporary functioning of the internal market is the result, rightly or wrongly, of the progressive extension of the market freedoms, primarily at the instigation of the Court of Justice. Crucially, however, as this subsection demonstrates those same expansions brought free movement into more frequent contact with domestic social policies blurring the lines of the economic/social dichotomy. More importantly, as the next subsection establishes, those interactions were adjudicated through a judicial methodology that prioritised the market freedoms. This revealed the presumptions upon which the Rome Treaty's social integration strategies were based to be fallacious.

As is well-known, over the decades since Rome, the material scope of the market freedoms has broadened to cover indirect discrimination,[14] dual regulatory burdens[15]

[8] Art. 117 TEEC; see also N. Busby, *A Right to Care? Unpaid Work in European Employment Law*, Oxford: Oxford University Press, 2011, pp. 96-97.

[9] N. Busby, *A Right to Care?*, cit., pp. 96-97.

[10] See J. Pinder, *The Building of the European Union*, Oxford: Oxford University Press, 1998.

[11] D. Schiek, *Economic and Social Integration*, cit., p. 230.

[12] *Ibidem*.

[13] K. Armstrong, *Governing Social Inclusion: Europeanization through Policy Coordination*, Oxford: Oxford University Press, 2010, p. 232.

[14] Court of Justice: judgment of 6 June 2000, case C-281/98, *Angonese* [GC] (workers); judgment of 31 March 1993, case C-19/92, *Kraus* (workers and establishment).

and, in most cases, national measures that hinder or make less attractive intra-Union trade.[16] Their personal scope has also been extended, for instance, to the service recipient[17] and the workseeker.[18] Moreover, all of the Treaty's economic freedoms now enjoy some degree of direct effect.[19] Thus, individuals can enforce their free movement rights in national courts, and can, except in exceptional circumstances,[20] rely on the twin doctrines of primacy and effective judicial protection to ensure the immediate disapplication of conflicting domestic rules.[21]

While these developments have undoubtedly helped to underpin the market freedoms as the "pillars of a powerful economic constitution",[22] they also brought free movement into increasingly frequent contact with domestic social policy, broadly conceived, including but not limited to national rules on healthcare,[23] housing,[24] criminal injuries compensation,[25] public health,[26] wage-levels in the context of public procurement,[27] access to social assistance[28] and access to education.[29] As a specific example, the now infamous *Viking* and *Laval* judgments[30] – which saw clashes between the freedoms of establishment and services respectively, on the one hand, and the Scandinavi-

[15] Court of Justice, judgment of 20 February 1979, case 120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* (goods).

[16] Court of Justice: judgment of 30 November 1995, case C-55/94, *Gebhard* (services); judgment of 11 December 2007, case C-438/05, *Viking* [GC] (establishment); judgment of 15 December 1995, case C-415/93, *Bosman* (workers); judgment of 8 July 2010, case C-171/08, *Commission v. Portugal* (capital). Judgment of 24 November 1993, joined cases C-267/91 and C-268/91, *Keck and Mithouard* arguably refocused the goods case-law on differential treatment. However, Court of Justice, judgment of 10 February 2009, case C-110/05, *Commission v. Italy (mopeds)* [GC] and judgment of 4 June 2009, case C-142/05, *Mickelsson and Roos* [GC] suggest a market access approach in certain contexts.

[17] Court of Justice, judgment of 2 February 1989, case 186/87, *Cowan*.

[18] Court of Justice, judgment of 23 March 2004, case C-138/02, *Collins*.

[19] Court of Justice: judgment of 19 December 1968, case 13/68, *Salgoil* (goods); judgment of 4 December 1974, case 41/74, *van Duyn v Home Office* (workers); judgment of 21 June 1974, case 2/74, *Reyners* (establishment); judgment of 8 April 1976, case 48/75, *Royer* (workers, establishment and services); judgment of 14 December 1995, joined cases C-163/94, C-165/94 and C-250/94, *Sanz de Lera* (capital).

[20] Court of Justice, judgment of 28 July 2016, case C-379/15, *Association France Nature Environnement*.

[21] Court of Justice, judgment of 9 March 1978, case 106/77, *Simmenthal*.

[22] D. SCHIEK, *European and Social Integration*, cit., p. 82.

[23] Court of Justice: judgment of 12 July 2001, case C-157/99, *Geraets-Smits and Peerbooms*; judgment of 16 May 2006, case C-372/04, *Watts* [GC].

[24] Court of Justice, judgment of 8 May 2013, joined cases C-197/11 and C-203/11, *Libert*.

[25] *Cowan*, cit.

[26] Court of Justice, judgment of 8 March 2001, case C-405/98, *Gourmet*.

[27] Court of Justice: judgment of 3 April 2008, case C-346/06, *Rüffert*; judgment of 17 November 2015, case C-115/14, *RegioPost*.

[28] Court of Justice: judgment of 23 May 1996, case C-237/94, *O'Flynn*; judgment of 31 May 1978, case 207/78, *Even*; judgment of 30 September 1975, case 32/75, *Cristini*.

[29] Court of Justice, judgment of 7 July 2005, case C-147/03, *Commission v. Austria*.

[30] *Viking* [GC], cit.; Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval* [GC].

an industrial relations model, on the other – could not have occurred without the expansion of the scope of Arts 49 and 56 TFEU to include restrictions to market access and the extension of the direct effect of those provisions horizontally to certain private parties. In both cases the Court of Justice rooted its application of the relevant market freedoms to trade unions in the Union's economic integrative objectives.[31]

Accordingly, over time, these interactions have called into question the validity of the economic/social dichotomy. Rather than simply facilitating social integration in a general sense, by contributing to improved living standards whilst leaving the rest to the Member States, the instruments of the internal market were frequently coming into contact with specific domestic social policies. Moreover, since the market freedoms pursue economic integration principally through a deregulatory logic,[32] the social aims behind national policies were at risk of being overlooked and treated primarily as barriers to movement.

II.3. Unfit for purpose: the structural prioritisation of free movement and the fallacy of the economic/social dichotomy

An examination of the manner in which the Court of Justice adjudicates tensions between the market freedoms and national law demonstrates how and why internal market mechanisms are not yet adequately equipped to acknowledge the social endeavours behind national rules. From the very beginning, the Court has adjudicated tensions between primary free movement law and domestic rules through a two-stage breach/justification procedure.[33] This model asks, first, whether there has been a restriction on the market freedom in question and, second, if this can be justified. This places national law and policy on the procedural back-foot,[34] since it is structurally presented as a *prima facie* wrong that must be defended. Member State rules are treated as *derogations*[35] to be interpreted strictly.[36]

In the context of protectionist or directly discriminatory domestic policies, with which the market freedoms originally interacted, such an approach made sense. Such rules strike directly at the heart of the integrative ambition the Member States had agreed upon at Rome: economic integration via the internal market. However, the

[31] *Laval* [GC], cit., para. 98: "the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by the activities of actors not governed by public law"; *Viking* [GC], cit., para. 34.

[32] L. Mancano, *The Place for Prisoners in European Union Law?*, *in European Public Law*, 2016, p. 721.

[33] Court of Justice: judgment of 8 July 1975, case 4/75, *Rewe-Zentralefinanz*; judgment of 5 October 1977, case 5/77, *Tedeschi*.

[34] C. Barnard, *Social Dumping or Dumping Socialism?*, in *Cambridge Law Journal*, 2008, p. 262 *et seq.*

[35] This is arguably supported by the positioning of the Treaty derogations of Arts 36, 45, para 3, 52, 62 and 65, para. 1, let. b) TFEU *after* the market freedoms in Arts 34, 45, 49, 56 and 63 TFEU. See N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, Oxford: Oxford University Press, 2013, p. 26.

[36] Court of Justice, judgment of 11 September 2008, case C-141/07, *Commission v. Germany*; *Salgoil*, cit.

breach/justification model was retained when the expanded free movement provisions began to interact with the qualitatively different Member State rules on social policy.[37] This raised serious doubts about the economic/social dichotomy upon which the Union's integrative project was originally based. First, Union-level social integration could no longer be viewed only as a congruent by-product of the internal market, since the latter was coming into direct conflict with national-level social measures. Second, relatedly, Member States were not being left alone to "provide the requisite [social] protection without unnecessary interference".[38] Rather the breadth of the free movement provisions was leaving Member States' social policy choices exposed to evaluation by the Court of Justice via an adjudicative framework that left them structurally disadvantaged.

Specifically, significant evidentiary hurdles operate at the justification phase of the Court's two-stage model. Activity conflicting with the market freedoms must pursue a legitimate aim, in a way that is both appropriate and necessary.[39] Necessity is usually defined by reference to whether measures less restrictive of free movement are available.[40] This can impose particularly onerous evidential burdens on domestic social considerations. For instance, in *Commission v. Luxembourg* public order legislation targeted at worker protection but in conflict with free movement had to be "so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons on the territory".[41] Likewise, Gallo points out that within the free movement of capital's golden-shares case-law, the retention of special powers held by the State in formerly public companies is very rarely justified in practice.[42] He identifies the requirement that Member States demonstrate a "genuine and sufficiently serious threat' to the supply of public services, affecting one of the fundamental interests of society"[43] at the justification stage as one of the reasons for this. The Court's adjudicative architecture presumes that "the State performs a regulatory

[37] *Viking* [GC], cit.; *Laval* [GC], cit.; Court of Justice, judgment of 19 June 2008, case C-319/06, *Commission v. Luxembourg*; *Rüffert*, cit.; *Libert*, cit.; *Gourmet*, cit. Indeed, the breach/justification model was reinforced by these expansions. See S. REYNOLDS, *Explaining the Constitutional Drivers behind a Perceived Judicial preference for Free Movement over Fundamental Rights*, in *Common Market Law Review*, 2016, p. 643 *et seq.*

[38] N. BUSBY, *A Right to Care?*, cit., p. 96.

[39] *Gebhard*, cit.

[40] *Ibidem*.

[41] *Commission v. Luxembourg*, cit., paras 29 and 50.

[42] D. GALLO, *On the Content and Scope of National and European Solidarity under Free Movement Rules: The Case of Golden Shares and Sovereign Investments*, in *European Papers*, 2016, Vol. 1, No 1, www.europeanpapers.eu, pp. 824 and 830, citing Court of Justice: judgment of 8 July 2010, case C-171/08, *Commission v. Portugal*; judgment of 4 June 2002, case C-367/98, *Commission v. Portugal*; judgment of 14 February 2008, case C-274/06, *Commission v. Spain*; judgment of 4 June 2002, case C-503/99, *Commission v. Belgium* being the exception.

[43] *Commission v. Spain*, cit., para. 47.

function with the primary aim of restricting market access"[44] and overlooks the fact that "the underlying purpose of golden shares – at least on paper – is the protection of national general interests" in a profit-making environment.[45] Indeed, the manner in which tensions between free movement and domestic social policies are adjudicated can lead to a number of issues that ultimately expose the economic/social dichotomy as a myth.

First, the idiosyncrasies of domestic social spaces can be overlooked despite national competence retention. In *Laval*, a trade union was found to have committed an unjustified breach of Art. 56 TFEU by engaging in collective action to seek to ensure that a Latvian service provider afforded workers who it posted into Sweden the terms and conditions contained in a Swedish collective agreement. The Court accepted worker protection as a legitimate aim, in principle, for restrictions on intra-EU service provision.[46] However, it found that the Posted Workers' Directive (PWD)[47] imposed a ceiling of protection as regards which rules host States could apply to posted workers.[48] As a brief aside, this reveals another variant of social integration focused on the effectiveness of EU law and understood as, at best, the operation of an effective European legal space within which the Union's coordination of maximum standards offers basic protection to workers whilst facilitating economic activity.[49] Although Art. 3, para. 10, Posted Workers' Directive (PWD) allowed for the applications of terms and conditions going beyond the core nucleus of protection contained in the PWD for reasons of public policy, trade unions, as private actors, could not access this justification.[50] This arguably underappreciates the particular role of trade unions within the idiosyncrasies of the Scandinavian social model.[51] Similarly, the Court of Justice held that although the PWD allowed for the imposition of minimum rates of pay, collective action to ensure this could not be justified within a national system of case-by-case determination of that minimum, which made it impossible or excessively difficult for undertakings to determine their obligations.[52] Thus, even though both pay and the right to strike are explicitly ex-

[44] D. GALLO, *On the Content and Scope of National and European Solidarity under Free Movement Rules*, cit., p. 830.

[45] *Ibidem*.

[46] *Laval* [GC], cit., para. 103.

[47] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

[48] *Laval* [GC], cit., para.108.

[49] This arguably does not cohere with the original motives of the EU legislature, which introduced the PWD as an anti-social dumping measure. See e.g. Commission Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM(91) 230 final, para.12.

[50] *Laval* [GC], cit., para. 85.

[51] See M. RÖNNMAR, *Free Movement of Services vs National Labour Law and Industrial Relations Systems: Understanding the* Laval *Case from a Swedish and Nordic Perspective*, in *Cambridge Yearbook of European Legal Studies*, 2007-2008, p. 493 *et seq.*

[52] *Laval* [GC], cit., para. 110.

cluded from the Union's competences,[53] the broad nature of the internal market provisions, and the requirement that Member States comply with Union law when acting within their competence,[54] meant that key aspects of the Scandinavian industrial relations model would, at the very least, need to be re-thought.

Second, alongside an under-appreciation of the idiosyncrasies of domestic social approaches is a lack of consideration of the knock-on consequences of the Court's current adjudicative approach for the practical delivery of national social schemes, funded from budgets that face competing demands. The *Watts* case offers an example of these inter-related issues.[55] There, the fact that service recipients fell within the personal scope of Art. 56 TFEU and that the applicant had paid for medical treatment in another Member State meant that, under certain conditions, she was entitled to claim reimbursement from the UK's National Health Service. This was despite the fact that, as a free-at-the-point-of service healthcare system, funded from general taxation, the NHS had no system for allocating or distributing resources for such reimbursement at that time. As Nic Shuibhne and Maci argue, the Court opens a "precarious avenue of review in the suggestion that it, or any court, can work out the financial 'balance' of an entire national budget by reflecting on whether one policy choice could have been implemented less restrictively".[56]

Finally, the current approach can undermine the specific nature of the social right in question. In *Viking*, the Court called upon the referring court to consider whether measures less restrictive of the freedom of establishment than the collective action under consideration were available.[57] Yet, in the context of disputes between trade unions and cross-border undertakings, any industrial action less restrictive of free movement would also inevitably reduce the effectiveness of exercising the right to strike as a means of securing social protection in the first place.[58] Of course, this might raise questions about how to balance the right to take collection action with the market freedoms of service providers should there be instances of clearly protectionist collective action. However, the requirement that actors pursue a legitimate aim already addresses this concern, without the additional need for a one-sided assessment of the proportionality

[53] Art. 153, para. 5, TFEU.

[54] *Laval* [GC], cit., paras 86-88.

[55] *Watts* [GC], cit.

[56] N. Nic Shuibhne, M. Maci, *Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law*, in *Common Market Law Review*, 2013, p. 1003.

[57] *Viking* [GC], cit., para. 84.

[58] A. Davies, *One Step Forward, Two Steps Back? The* Viking *and* Laval *Cases in the ECJ*, in *Industrial Law Journal*, 2008, p. 126 *et seq.*; T. Novitz, *A Human Rights Analysis of the* Viking *and* Laval *Judgments*, in *Cambridge Yearbook of European Legal Studies*, 2008, pp. 560-561.

of collective action. On the nature of the collective action, domestic rules already seek to demarcate collective action and political protest from more problematic conduct.[59]

The purpose of this discussion, however, is not to assert that the breach/justification model has had particular, deleterious effects on domestic social endeavours in specific cases; nor to suggest, one way or the other, that individual Member States have been making an especially good job of social integration. Rather, what this historical analysis has demonstrated is that, while the Rome Treaty foresaw the pursuit of social integration as a by-product of the internal market, whilst leaving concrete social policymaking to the domestic-level, the reality of the route to economic integration via the internal market has laid bare the presumptions of this economic/social dichotomy. The expansion of the market freedoms has brought them into direct conflict with national social choices, placing the latter on the procedural back-foot. This has arguably contributed to the Union's legitimacy deficit.

II.4. Contributing to a legitimacy deficit?

First, by narrowing the EU's social integration endeavours to social progress as a by-product of the internal market, while largely leaving concrete social policymaking to the Member States, the economic/social dichotomy visible in the Rome Treaty reinforced the idea of the Member States' social sovereignty.[60] However, the subsequent expansion of the market freedoms instead risked triggering competition between domestic regulatory systems. As Schiek notes, though workers might be attracted to Member States with, for example, the best public childcare, since "real people move with less ease than capital", companies and capital will generally benefit from regulatory competition more than workers do,[61] exercising their free movement entitlements to select favourable regulatory environments.[62] This can lead to the perception that the positive effects of European economic integration are mainly enjoyed by an elite population,[63] whilst putting established social entitlements at risk. A high-profile example of this is the Lindsey oil refinery strikes in which British construction workers walked out in protest – some under the controversial slogan "British Jobs for British Workers" – at apparent attempts by an Italian service provider IREM, themselves awarded the contract by

[59] See e.g. Court of Justice, judgment of 9 December 1997, case 265/95, *Commission v. France (Spanish Strawberries)* in which action taken to protest the import of Spanish agricultural produce into France already fell within the French criminal code, though France was found not to be enforcing it in that case.

[60] K. Armstrong, *Governing Social Inclusion*, cit., p. 232.

[61] D. Schiek, *Economic and Social Integration*, cit., p. 86.

[62] Consider e.g. Court of Justice, judgment of 9 March 1999, case C-212/97, *Centros*.

[63] D. Schiek, *Economic and Social Integration*, cit., p. 30.

French multinational TOTAL, to undercut existing wages and conditions by posting migrant workers to the site.[64]

Second, the current breach/justification procedure requires Member States to justify the restrictions their social policy choices impose on free movement by means of high evidentiary hurdles,[65] even where these restrictions might only be indirect or potential.[66] By contrast, the EU is "under no obligation to justify the intrusion in national policies and the rejection of the complementary social values in the name of economic freedoms".[67] Given that the economic/social dichotomy divides across European/national lines, this approach risked looking very much like unchecked interference with Member States' traditional social sovereignty. The legitimacy questions this raises are exacerbated by the fact that much of the momentum for free movement's expansion came from the EU's judicial branch. Horsley argues that, in its free movement case-law, the Court has "interposed itself as a political actor in EU integration"[68] and made policy choices in sensitive areas that, in the Court's absence "would simply not make it onto the discussion table".[69] This arguably risks causing a disconnection between the EU and its citizenry.[70] Consequently, though the reasons for the various Treaty changes since Rome are manifold, a frequently occurring justification has been the need to counter-balance the potentially detrimental effects of the internal market on social progress.

III. "Social Europe": Maintaining the artificial boundaries of social and economic integration

The examples of increased interaction between internal market rules and national social policy provided above are drawn from various points in the Union's developmental history. Accordingly, the analysis should not be understood as linear but as encapsulating a matrix of economic and social dynamics. Within this matrix is the accompanying expansion of the EU's social remit, within which social integration began to manifest as an independent Union aim. This section, first, charts this evolution, establishing that it was motivated, at least in part, by the acknowledgement that the economic/social di-

[64] See A. Ince, D. Featherstone, A. Cumbers, D. Mackinnon, K. Strauss, *British Jobs for British Workers? Negotiating Work, Nation, and Globalisation through the Lindsey Oil Refinery Disputes*, in *Antipode*, 2015, p. 139 *et seq.*

[65] *Gebhard*, cit.: legitimate aim, suitability, necessity and general proportionality.

[66] Court of Justice, judgment of 11 July 1974, case 8/74, *Dassonville*.

[67] D. Schiek, *Economic and Social Integration*, cit., p. 236.

[68] T. Horsley, *Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Lawmaking*, in *Common Market Law Review*, 2013, p. 942.

[69] *Ibid.*, p. 944.

[70] See also S. Schmidt, *Extending Citizenship Rights and Losing it All: Brexit and the Perils of Over-Constitutionalisation*, in D. Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement Solidarity in the EU*, Oxford: Hart, 2018, p. 17 *et seq.*

chotomy was unfit for purpose and the belief that social integration was an essential component in enhancing Union legitimacy. Nevertheless, second, the section identifies the continuing constraints the economic/social dichotomy places on the extent to which the EU can deliver social integration as a counter-balance to the internal market.

III.1. The emergence and evolution of social integration as a (constrained) independent Union aim

The Union's political branches took steps relatively early on to assert that "economic expansion is not an end in itself but should result in an improvement in the quality of life as well as the standard of living".[71] The Council's 1974 Resolution on a Social Action Programme explicitly recognised that social policy had "an individual role to play",[72] and saw this as an important means of "enhancing EEC legitimacy in the eyes of citizens".[73] This was also the period in which the Court recognised the direct effect of the Union's primary law provisions on equal pay.[74] Nevertheless, the Council remained conscious of the traditional social sovereignty of the Member States, emphasising that EEC measures should not seek "a standard solution to all social problems".[75] The EU's social evolution has followed this pattern ever since.

First, the Union strengthens its recognition of its social aims. Thus, the Commission's 1985 White Paper, though still viewing economic integration as an effective stimulus of social progress,[76] accepted that facilitating free movement to "areas of greatest economic advantage might exacerbate existing discrepancies between regions".[77] The subsequent Single European Act (SEA) spoke of an EEC "determined to improve the economic and social situation by extending common policies and pursuing new objectives".[78] By Maastricht, the Union had pledged to "implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields".[79] The Amsterdam Treaty confirmed the Union's "attachment to fundamental social rights"[80] and broadened the EU's social policy endeavours to include "proper social protection" and the "combating of exclusion".[81] The contemporary Union, under the Lisbon Treaty, has as its aim the promotion of peace, its values and the well-being of its peo-

[71] Council Resolution of 21 January 1974 concerning a Social Action Programme.

[72] *Ibid.*, p. 2.

[73] D. Schiek, *Economic and Social Integration*, cit., p. 40.

[74] Art. 119 TEEC in Court of Justice, judgment of 8 April 1976, case 43/75, *Defrenne*.

[75] Council Resolution, Social Action Programme, cit., p. 2.

[76] Communication COM(1985) 310 final of 13 June 1985 from the Commission, *Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985)*, para. 20.

[77] *Ibid.*, para. 21.

[78] Preamble of the 1987 Single European Act (SEA).

[79] Preamble of the 1992 Treaty on European Union.

[80] Preamble of the 1997 Amsterdam Treaty.

[81] Now Art. 151 TFEU.

ple.[82] Crucially, social integration is no longer presented as a by-product of a functioning internal market. Rather, the internal market must "work for the sustainable development of Europe based [*inter alia*] on a highly competitive social market economy, aiming at full employment and social progress".[83] Most recently, the Commission President has called for a European Social Standards Union to foster a "common understanding of what is socially fair in our single market".[84]

Second, these developments are presented as a crucial factor in securing the Union's legitimacy. The move towards political and social union at Maastricht, for example, had been initiated, *inter alia*, by the belief of the French President and German Chancellor that this would offer a means of "strengthening the democratic legitimacy of the union".[85] The Laeken Declaration, which preceded the Convention on the Future of Europe and the drafting of the now abandoned Constitutional Treaty stated that "[c]itizens want results in the fields of employment, combating poverty and social exclusion, as well as in the field of economic and social cohesion".[86]

Third, the growing independence of the Union's social aims was accompanied by new tasks, legislative competences, and decision-making efficiency measures. The SEA, for instance, introduced new competence in relation to the working environment[87] and required the strengthening of economic and social cohesion to be taken into account in the implementation of the internal market.[88] The introduction of co-decision and the expansion of qualified majority voting (QMV) paved the way for greater legislative activity including as regards employment protection for pregnant workers.[89] At Maastricht, the European Economic Community became the European Community,[90] which itself was just one pillar of a European Union alongside new intergovernmental pillars in common foreign and security policy[91] and justice and home affairs.[92] Union citizenship was formalised within Union primary law[93] and new more socially-oriented Titles were

[82] Art. 3, para. 1, TEU.

[83] Art. 3 TEU.

[84] See J.-C. JUNCKER, *State of the Union Address*, cit.

[85] Joint message of 8 April 1990 from François Mitterrand and Helmut Kohl on the necessity of accelerating the construction of Political Europe.

[86] European Council Conclusions of 14-15 December 2001, Annex I on the *Laeken Declaration on the Future of Europe*, pp. 20-21.

[87] Art. 21 SEA/Art.118a, para. 1, TEEC.

[88] Art. 130, let. b), TEEC.

[89] Directive 92/85/EEC of the Council of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding. See also N. BUSBY, *A Right to Care?*, cit., p. 100.

[90] Art. G(A) of the Maastricht Treaty.

[91] Title V TEC.

[92] Title VI TEC.

[93] Art. 8 TEC.

added covering, *inter alia*, culture,[94] public health[95] and consumer protection.[96] While Maastricht had strengthened and broadened the EU's socially-focused activities through the Social Policy Protocol,[97] Amsterdam brought this within the Treaty proper. Moreover, a new Employment Title[98] focused on unemployment was "indicative of a move away from a purely economic conception of the EU towards a more overtly political organisation".[99] Lisbon, *inter alia*, widened the TFEU's horizontal provisions. In particular, the contemporary Union is required, in defining its policies and activities, to take into account the promotion of social protection, high employment, social inclusion, education, training and public health,[100] as well as environmental protection,[101] consumer protection,[102] and combating discrimination.[103]

Nevertheless, each (potential) expansion of the Union's social remit is accompanied, fourth, by reassurances that the EU understands the importance of domestic social sovereignty. Thus, though it asserted that European citizens "undoubtedly supported the Union's broad aims", the Laeken Declaration also accepted that "[m]any also feel that the Union should involve itself more with particular concerns, instead of intervening…in matters by their nature better left to Member States and regions' elected representatives. This is even perceived by some as a threat to their identity".[104]

At Maastricht, the EU's venture into areas such as education was accompanied by statements that it was "fully respectful of the responsibility of the Member States for the content of teaching, organisation of their education systems and their cultural and linguistic diversity".[105] Most notably, with the UK initially opting out of the Social Chapter, Maastricht saw the concept of differentiated participation become part of the Union's integration processes. Lisbon strengthened the national identity clause,[106] while measures such as the emergency brake – which allows a Member State to refer draft legislation to the European Council where it would affect fundamental aspects, or the financial balance, of its social security system – were introduced.[107] Indeed, while the EU's social competence has grown greatly since Rome, the Union is still far from being

[94] Title IX TEC.

[95] Title X TEC.

[96] Title XI TEC.

[97] Agreement on Social Policy concluded between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland, Art. 2.

[98] Then Title XI TEC, now Title IX TFEU.

[99] N. Busby, *A Right to Care?*, cit., p. 100.

[100] Art. 9 TFEU.

[101] Art. 11 TFEU.

[102] Art. 12 TFEU.

[103] Arts 10 and 8 TFEU.

[104] European Council Conclusions of 14-15 December 2001, cit., p. 20.

[105] Arts 126 and 128 TEC.

[106] Art. 4, para. 2, TEU.

[107] Art. 48 TFEU.

able to boast a social constitution as powerful as its economic one. Its ability to offset the effects of economic integration on social integration remains constrained.

III.2. Limits on social integration resulting from the economic/social dichotomy

Though the economic/social dichotomy has proven to be a myth, its legacy is the continuing concern that Union-level social integration represents further European interference rather than a necessary counterweight to the internal market. Consequently, while the Union enjoys a range of exclusive and shared regulatory competences in the internal market domain,[108] the expansion of EU activity into social policy and related areas, such as consumer protection, the environment, education and health is largely restricted to shared[109] or complementary[110] competence, often with a focus on minimum requirements.[111] That is not to say that the EU does not act in key areas, but simply that its general social competences are more limited than its economic powers.[112] Crucially, the free movement provisions have remained largely unchanged,[113] despite the Treaties' wider, evolving social goals. Social concerns are still treated as *derogations* from fundamental market freedoms in the internal market context.[114] In this sense, rather than offering a counterweight to the deregulatory effects of economic integration, and the ultimately insufficient model of social integration as a by-product of the internal market, the notion of European social integration as an independent aim is largely functionally distinct from the internal market. The market freedoms continue to benefit from direct application within the Member States, "enforced by a judiciary enjoying a wider competence than the EU legislator",[115] and so still pose the same challenges to social policy regardless of the Union's own concrete social policymaking. Thus, for instance, the EU's merely complementary competence in the field of health did not preclude the Court from assessing a free-at-the-point-of-delivery healthcare system as a restriction on the free movement of services.[116]

[108] See e.g. Art. 53 TFEU (recognition of qualifications); Art. 50 TFEU (harmonisation of company law); Art. 59 TFEU (liberalisation of the service economy); Art. 103 TFEU (competition rules); Art. 113 TFEU (harmonisation of indirect taxes); Art. 118 TFEU (European intellectual property rights).

[109] Art. 4 TFEU.

[110] Art. 6 TFEU.

[111] E.g. Art. 153, para. 2, let. b), TFEU *inter alia* on workers' health and safety, working conditions, equality between men and women as regards labour market opportunities.

[112] See e.g. N. Counouris, R. Horton, *The Temporary Agency Work Directive: Another Broken Promise?*, in *Industrial Law Journal*, 2009, p. 329 *et seq.*; L. Rodgers, *The Self-employed and the Directive on Working Time for Mobile Transport Workers*, in *Industrial Law Journal*, 2009, p. 339 *et seq.*

[113] With the exception of the removal of e.g. references to transitional periods in relation to establishment and services and the more incremental nature of the free movement of capital.

[114] See e.g. *Laval* [GC], cit.; *Commission v. Luxembourg*, cit.

[115] D. Schiek, *Economic and Social Integration*, cit., p. 229.

[116] *Watts* [GC], cit.

The Treaty's express exclusion of competence as regards pay and the right to strike[117] did not deter the Court from finding that the trade union in *Laval* had unjustifiably breached Art. 56 TFEU, nor did the Court's recognition of the Union's "social purpose",[118] in that case, make any difference to the judicial processing of collective action as a derogation from the free provision of services.

Even if Union-level social integration is needed to offset the effects of economic integration, it seems unlikely that more potent social instruments, at least as regards hard law, could be offered under the Treaties anytime soon. The economic/social dichotomy is indicative of a paradox in the EU's constitutional framework: the Union is often perceived as lacking the popular legitimacy needed to introduce the social and political mechanisms that might otherwise contribute to its legitimacy. Thus, to secure a "yes" vote from the Danish electorate, following its rejection of the Maastricht Treaty, a declaration stated that the newly-formalised EU citizenship was additional to and did not replace national citizenship.[119] This was seemingly rooted, *inter alia*, in concerns that Union citizenship could extend the Treaty's scope into social security.[120] Lisbon removed the Charter from the main Treaty text following the Dutch and French rejection of the Constitutional Treaty, while the Eurobarometer identified social issues as central to the French "no" vote.[121] The European Council had to "carefully note the concerns of the Irish people [...] relating to taxation policy, family, social and ethical issues",[122] before a vote in favour of Lisbon was delivered. Even as President Juncker identified social standards as essential for continuing support for the Union in the post-Brexit era, he emphasised that "national systems will still remain diverse [...] for a long time".[123]

Ultimately, even as the internal market impacts on Member State discretion to pursue social values, the EU might "not be capable of generating the kind of popular legitimacy" needed to secure those values at the Union-level.[124] The Court of Justice is not unaware of the Gordian knot that the judicially-driven process of economic integration has tied the Union's political organs up in. Thus, alongside the expansion of the Treaties' social remit, we must add judicial contributions to the concept of social integration to our evolutionary matrix.

[117] Art. 153, para. 5, TFEU.

[118] *Laval* [GC], cit., para. 105.

[119] European Council Conclusions of 12 December 1992, Annex III, Unilateral Declaration of Denmark to be associated with the Danish Act of Ratification of the Treaty of the European Union and of which the Eleven other Member States will take Cognizance, Declaration on Citizenship of the Union, para. 1.

[120] T. WORRE, *First No, then Yes: The Danish Referendums on the Maastricht Treaty 1992 and 1993*, in *Journal of Common Market Studies*, 1995, p. 242.

[121] Eurobarometer, *The European Constitution: Post-referendum Survey in France*, June 2005, p. 17, available at ec.europa.eu.

[122] European Council Conclusions of 11-12 December 2008.

[123] See J.-C. JUNCKER, *State of the Union Address*, cit.

[124] K. ARMSTRONG, *Social Inclusion*, cit., p. 234.

IV. Free movement as a sword to access the domestic social space: European social integration via the negative processes of the internal market

Though the expansion of the free movement provisions into areas of national social policy exposed the economic/social dichotomy as a fallacy, this judicially-driven negative integrative process pointed to a potential way forward as regards European social integration. Specifically, free movement rights and the aim of social integration could be understood as a sword, securing access to existing domestic social spaces. The inclusion of non-national EU citizens within previously closed-off national social spheres[125] would be emblematic of a socially integrated Union. The potential of this model of social integration, however, has proven to be inherently restricted by its internal market roots and these limitations have ultimately paved the way for social integration to be converted into an individual duty.

The Union's political and judicial branches both recognised fairly early on that the free movement of labour, as a pillar of the internal market, was unlikely to be realised if the needs of the human being behind the EU worker were not met. Thus, Union legislation was introduced, for example, to permit EU workers to be accompanied by certain family members in their host State[126] and for their children to be educated there.[127] Union workers were also entitled to "enjoy the same social and tax advantages as national workers".[128] The Court interpreted this provision widely, extending it to cover not only benefits accompanying worker status but those attached to residence on the host State territory.[129] The acknowledgement that it was necessary to cater for the social aspects of free movement revealed the potential of free movement as a tool of social integration. Indeed, the Commission recognised free movement as "*le premier aspect d'une citoyenneté européenne*" in the early 1960s.[130]

This form of social integration is a negative process, working towards a European social space by requiring Member States to welcome non-national EU citizens into existing domestic social assistance schemes ordinarily the preserve of nationals. As O'Brien notes, "the very concept of the welfare state implies a citizen-state relationship and, by extension

[125] See M. Ferrera, *The Boundaries of Welfare, European Integration and the New Spatial Politics of Social Protection*, Oxford: Oxford University Press, 2005.

[126] Arts 10-12 of Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community; Arts 6, para. 2, and 7, para. 2, of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (CRD).

[127] Art. 12 of Regulation 1612/68, now Art. 10 of Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on the freedom of movement for workers within the European Union.

[128] Art. 7, para. 2, of Regulation 1612/68, now Art. 7, para. 2, of Regulation (EU) 492/2011.

[129] *Cristini*, cit.

[130] Cited in A.C. Evans, *European Citizenship*, in *Modern Law Review*, 1982, p. 500.

is linked to nationality and citizenship. The idea of social justice is bound up with that of solidarity, suggesting a network of relationships and the notion of membership".[131] Thus, this form of social integration not only claims to facilitate the inclusion of non-national EU citizens within the circle of solidarity that is traditionally thought to exist between nationals but also implicitly seeks to encourage their acceptance within that circle.[132] Since the free movement rights of economic actors was the route to this form of social integration, the Court began to broaden the definition of economic actor. "EU worker" covered those whose work was "genuine and effective" even if they were not net contributors to their host State's social security system.[133] The judicial introduction of the "service recipient" opened up, for instance, Member States' criminal injuries compensation schemes to EU citizens who were tourists on their territory.[134] Eventually, in the 1990s, the EU legislature began extending free movement rights to non-economically active EU citizens, though they had to be self-sufficient.[135] In this way, free movement emerged as a tool by which to "transcend the character of European integration as a purely economic project and to develop it in the direction of a political community".[136]

As is well-known, this incremental "market citizenship" culminated in the formal recognition of Union citizenship in the Maastricht Treaty.[137] This strengthened the opportunity for a Court-driven pursuit of social integration via the same negative processes that had been so successful in the internal market. Specifically, exercise of one's personal, primary right to move under Art. 21 TFEU triggered the principle of non-discrimination, under Art. 18 TFEU, and therefore equal access to domestic social welfare systems.[138] *Grzelczyk*[139] implied that this was firmly rooted in the EU's broader integrative ambition: Union citizenship was "destined to be the fundamental status of nationals of the Member States".[140] Accordingly, non-economically active Union citizens were entitled to equal access to national social assistance if they were legally resident in their host State.[141] Though they could not constitute an "unreasonable burden" upon

[131] C. O'Brien, *Unity in Adversity*, cit., p. 9.

[132] O'Brien argues, however, that ultimately Union citizenship is not defined by the social justice obligations that are the traditional rationale behind national welfare states but resolutely remains a market citizenship. C. O'Brien, *Unity in Adversity*, cit.

[133] Court of Justice: judgment of 23 March 1982, *Levin*; judgment of 3 June 1986, case 139/85, *Kempf*.

[134] *Cowan*, cit.

[135] Council Directive 90/364/EEC of 28 June 1990 on the right of residence; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their economic activity; Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students.

[136] N. Nic Shuibhne, *The Third Age of EU Citizenship*, in P. Sypris (ed.), *The Judiciary, the Legislature and the EU Market*, Cambridge: Cambridge University Press, 2013, p. 331, fn. 15.

[137] Art. 20 TFEU.

[138] Court of Justice, judgment of 12 May 1998, case C-85/96, *Martinez Sala*.

[139] Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*.

[140] *Ibid.*, para. 31.

[141] *Ibid.*, para. 44.

domestic welfare, a "certain degree of financial solidarity" was expected between the nationals of the Member States.[142] Under certain conditions, this rationale also saw national jobseekers' allowance extended to Union workseekers[143] and student maintenance made available to EU students,[144] where previously these had been denied.[145]

This fostering of a European social space by ensuring non-national EU citizens' inclusion in the national social sphere also extended to protecting them from expulsions. Thus, in *Orfanopoulos*,[146] the Court held that a "particularly restrictive approach" to expulsions was needed since such removals constituted an obstacle to the primary free movement rights of individuals holding the fundamental status of Union citizen.[147] Later, in *Tsakouridis*, the Court also acknowledged that "expulsion of Union citizens [...] can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State".[148] Thus, integration was something to be maintained and protected and, seemingly, about more than just economic activity.

Nevertheless, since it has its origins in the internal market, the pursuit of social integration through free movement is inherently limited. For non-economically active EU citizens, the Court of Justice expressly introduced integration requirements for access to host State social systems, including the "real link" test[149] and the "certain degree of integration" condition.[150] More broadly, the Court has made plain that integration has "qualitative elements" that principally rest on economic activity[151] and, more recently, on compliance with the values of the host State society as expressed in its criminal code.[152] These developments paved the way for the conversion of "social integration" from a Union aim, which EU citizens could use together with free movement rights as a sword to access domestic social spaces, to an individual duty to contribute to one's host State society, which, if not met, would leave non-national EU citizens excluded from national social assistance. Moreover, the notion of integrating in host State generally boils down to economic activity. In *Commission v. Netherlands*, the Court explained: "The link of integration arises from [...] the fact that, through the taxes which he pays in the host

[142] *Ibidem.*

[143] *Collins*, cit.

[144] Court of Justice, judgment of 15 March 2005, case C-209/03, *Bidar* [GC].

[145] Court of Justice: judgment of 18 June 1987, case 316/85, *Lebon* (jobseekers allowance); judgment of 21 June 1988, case 197/86, *Brown*.

[146] Court of Justice, judgment of 29 April 2004, case C-482/01, *Orfanopoulos*.

[147] *Ibid.*, para. 65.

[148] Court of Justice, judgment 23 November 2010, case C-145/09, *Tsakouridis* [GC], para. 24, citing recital 23 of Directive 2004/38/EC.

[149] *Collins*, cit., para. 47.

[150] *Bidar* [GC], cit., para. 57.

[151] Court of Justice, judgment of 21 July 2011, case C-325/09, *Dias*, para. 64.

[152] Court of Justice, judgment of 16 January 2014, case C-378/12, *Onuekwere*, para. 235.

Member State by virtue of his employment, the migrant worker also contributes to the financing of the social policies of that State and should profit from them under the same conditions as national workers".[153]

Thus, while the notion of a Union citizenship might seem intrinsically connected to the concept of "social integration", its origins in the internal market have meant that what it offers, in practice, has always been more limited. While at first glance, the *Grzelczyk* case might indeed indicate a re-drawing of the boundaries of solidarity as regards non-economically active Union citizens, this was limited, in practice, to financial solidarity for a temporary period. As O'Brien argues, this does "not amount to a direct entitlement for non-nationals to equal treatment, but to a much more muted right to have restrictions on benefit eligibility applied proportionality".[154] *Trojani* made plain that a non-national EU citizen could still be viewed as a potential burden on national social assistance schemes.[155] Subject to proportionality assessments, if a non-economically active EU citizen were not self-sufficient, they could be found not to be legally resident and therefore not to be entitled to equal treatment within the domestic social space. Removals from the host State could merely not be the "automatic" consequence of a request for social assistance.[156] Accordingly, Union citizenship appears, at best, to offer individuals the opportunity to demonstrate that they qualify for access to national solidarity mechanisms, rather than redefine the boundaries of (national) solidarity itself.[157] Any "European social space" created through this process is generally only accessible to those who are economically active or can demonstrate their integration into the host State under other more limited circumstances, calling into question whether it is a truly "social", rather than market-focused, space at all. Interestingly, the Opinion of AG Geelhoed in *Trojani* appears to situate this approach within the economic/social dichotomy: "So long as social security systems have not been harmonised…there remains a risk of social tourism […] And that is certainly not the intention of the EC Treaty, which to a considerable extent leaves responsibility for social policy in the hands of the Member States".[158]

The Court itself has also endorsed the argument that Member States should be able to ensure that providing assistance to non-economically active EU citizens does not have "consequences for the overall level of assistance that may be granted by that State",[159] where historically economic justifications for restrictions on free movement

[153] Court of Justice, judgment of 14 June 2012, case C-542/09, *Commission v. Netherlands*, para. 66.

[154] C. O'Brien, *Unity in Adversity*, cit., p. 37.

[155] Court of Justice, judgment of 7 September 2004, case C-456/02, *Trojani* [GC].

[156] *Ibid.*, para. 45.

[157] This idea was developed thanks to discussions with Harriet Gray about her doctoral thesis on the operation of the principle of solidarity within the EU's Common European Asylum System.

[158] Opinion of AG Geelhoed delivered on 19 February 2004, case C-456/02, *Trojani*, cit., para. 18.

[159] *Bidar* [GC], cit., para. 56.

have not been permitted.[160] Acceptance by the Union's judicial branch of the existence of social tourism, alongside the continued prioritisation of economic activity as a route to wider integration, meant that when the political winds changed – against a broader backdrop of global economic crisis, connected concerns about the Eurozone[161] and a rise of austerity economics – and clamping-down on "rogue EU benefits claim" became increasingly popular within mainstream domestic political rhetoric,[162] Member States already had the necessary tools to re-close their social systems.

V. Restricting free movement rights: "social integration" as an individual duty and Court of Justice-endorsed Member State shield

Crucially, the Court of Justice has recently endorsed these emerging Member State practices of re-closure. Thus, the Union aim of social integration is flipped to an individual duty to contribute to the host State society. Importantly, this duty can generally only be met through economic activity, rendering wider forms of social integration largely immaterial as regards EU citizens' access to domestic social assistance. In this sense, a further Union approach to social integration emerges, that of irrelevance: it is not only diminished as an EU objective; the social integration of Union citizens in host State communities, which might once have been viewed as an aim of EU citizenship, goes unrecognised. This provides Member States with a shield by which to exclude non-nationals from their domestic social assistance scheme, demonstrating that while the negative processes of the internal market might once have been viewed as a route to a "European social space", its constant roots in economic activity have left it unable to reshape the national boundaries of solidarity.[163]

Of course, the Court's recent case-law could be viewed as an acknowledgement of the effects free movement can have on national social spaces, identified in section II. However, in narrowing this reframing of free movement to non-economically active Union citizens, based on under-founded claims about benefit tourism,[164] the Court risks undermining the EU's broader social goals by alienating those EU movers who often require a socially-inclusive approach. Moreover, the effectiveness of the Court's latest citi-

[160] *Commission v. Netherlands*, cit. Where the Court has accepted economic justifications in principle, Member States have usually faced a high evidentiary burden (*Commission v. Austria*, cit.).

[161] See e.g. M. Ruffert, *The European Debt Crisis and European Union Law*, in *Common Market Law Review*, 2011, p. 1777 *et seq.*

[162] See e.g. D. Cameron, *Free Movement within Europe Needs to be Less Free*, in *Financial Times*, 26 November 2013.

[163] See also C. O'Brien, *Unity in Adversity*, cit.

[164] See e.g. C. Dustmann, T. Frattini, *The Fiscal Effects of Immigration to the UK*, in *Journal of the Royal Economic Society*, 2014, p. 593 *et seq.*

zenship decisions, in meeting their presumed purpose of tackling Euroscepticism, is open to serious question.

V.1. Scaling back on social integration via free movement and concretising integration as an individual duty

A shift in judicial approach, from viewing social integration as a Union aim running congruent to free movement and equal treatment rights towards an individual duty, was clearly visible in *Dano*,[165] and confirmed in the Court's subsequent case-law.[166] In *Dano*, the Court held that Germany was entitled to exclude a non-economically active Union citizen from access to a national subsistence benefit because she did not have a right of residence under Directive 2004/38/EC (CRD), which requires long-term residents to be economically active or economically self-sufficient.[167] The Court's methodology marked a change in direction from the *Grzelczyk*-era in three ways. These correspond to a parallel shift, along similar axes, as regards the expulsion of EU citizens from their host State, which will also be discussed where relevant.

First, in *Dano*, the CRD's aim was flipped. Though much of the CRD consolidated the existing requirements attached to residence rights that had operated in the internal market context – i.e. general conditions of economic activity or self-sufficiency – its bringing together of the rights of economically active and non-economically active citizens within one instrument, alongside its introduction of permanent residence rights, and its codification of principles established in the Court's post-Maastricht citizenship case-law, suggested that the CRD sought to bring free movement rights beyond a market logic. And indeed, in its early case-law, the Court had held that the purpose of the Directive was to "facilitate and strengthen" primary and individual free movement rights.[168] The CRD's objective in *Dano*, however, was to ensure that non-economically active Union citizens did not become an "unreasonable burden on the social assistance scheme of the host Member State".[169] Allowing Union citizens who did not meet the Directive's residence requirements to access social benefits "would run counter" to this objective.[170]

In other words, "social integration" for a non-national EU citizen is no longer understood as an aim realised, for instance, through (temporary) "financial solidarity" be-

[165] Court of Justice, judgment of 11 November 2014, case C-333/13, *Dano* [GC].

[166] E.g. Court of Justice: judgment of 15 September 2015, case C-67/14, *Alimanovic* [GC]; judgment of 25 February 2016, case C-299/14, *Garcia-Nieto*; judgment of 14 June 2016, case C-308/14, *Commission v. United Kingdom*.

[167] Art. 7 CRD; *Dano* [GC], cit., para. 82.

[168] Court of Justice: judgment of 25 July 2008, case C-127/08, *Metock* [GC], para. 89; judgment of 7 October 2010, case C-162/09, *Lassal*, para. 30.

[169] *Dano* [GC], cit., para. 74; Court of Justice, judgment of 19 September 2013, case C-140/12, *Brey*, para. 54.

[170] *Ibidem*. See also *Alimanovic* [GC] and *Garcia-Nieto*, cit.

tween Member State nationals but as an individual responsibility not to "burden" one's host State. A similar reinterpretation of the CRD is visible in the case-law on expulsions in which the role of permanent residence rights, under Art. 16 CRD, has shifted from a facilitator of social integration – *inter alia* by enhancing protection from expulsion from the host State within which one has lived for many years – to a reward for (a narrowly defined) social integration. For example, in *Onuekwere*,[171] the Court held that periods of imprisonment could not be considered "legal residence" for the purposes of attaining permanent residence rights.[172] Nor could periods of legal residence before and after time spent in prison be aggregated to accumulate the necessary five years.[173] Although the Court viewed permanent residence rights under the CRD as a "key element in promoting social inclusion" and in strengthening feelings of Union citizenship,[174] it considered the non-compliance by an individual with the values of their host State, as expressed in its criminal code, to undermine integrating links in a manner that was "clearly contrary" to the aim of the Directive.[175] Accordingly, social integration was presented as an individual duty and a precondition for permanent residence status within the host State society.[176] Moreover, an EU citizen's performance of this duty is always on trial, since her/his integrative links can be reduced back down to zero years in the event of criminal activity carrying a custodial sentence.[177]

Second, the focus on the residence requirements contained in the CRD marks a swing away from an emphasis on Union primary law as conferring free movement rights and facilitating the EU's social integration objectives towards a preference for secondary Union legislation as constitutive of free movement rights.[178] EU citizens must fulfil their individual duty, understood as compliance with the residence requirements of the CRD, if they are to be considered sufficiently integrated to access the domestic social space. Thus, in *Dano*, while the Court made a cursory reference to Union citizenship as a personal and fundamental status,[179] it proceeded to treat Art. 24 CRD as a

[171] *Onuekwere*, cit.

[172] Art.28, para. 2, CRD.

[173] *Onuekwere*, cit., paras 30-32.

[174] *Ibid.*, para. 25.

[175] *Ibid.*, para. 26. See also Court of Justice, judgment of 16 January 2014, case C-400/12, *G.*, paras 31-32, in which the Court stated that an individual's integration was a "vital consideration" in determining protection from expulsion.

[176] *Onuekwere*, cit., para. 25.

[177] S. Coutts, *Union Citizenship as Probationary Citizenship:* Onuekwere, in *Common Market Law Review*, 2015, p. 531 *et seq.* refers to this as a "probationary citizenship". In the recent Court of Justice, judgment of 24 April 2018, joined cases C-316/16 and C-424/16, *B.*, concerning the enhanced protection available after ten years' residence, the Court stated that the more solid the integrative links – including from a social, cultural and family perspective – the lower the probability that detention will break those links, para. 72.

[178] N. Nic Shuibhne, *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 894.

[179] *Dano* [GC], cit., paras 57-58.

concrete expression of the Treaty's prohibition of discrimination on grounds of nationality and therefore held that Union citizens could only rely on equal treatment in their host State if they resided there in accordance with the Directive,[180] i.e. through economic activity or self-sufficiency. The subsequent *Commission v. United Kingdom* case was decided entirely by reference to secondary Union legislation and there was no mention of EU citizenship as a fundamental status of Member State nationals.[181]

This has also meant the gradual disappearance of individualised assessments. In the days of *Grzelczyk*, the requirement that Member States consider whether a person, based on their individual circumstances, might still be legally resident and therefore entitled to equal access to domestic social assistance was reflective of the view of social integration as a Union aim. In *Dano*, no individualised assessment was carried out.[182] Instead, the Court appeared to accept that an application for social benefits would indicate a lack of sufficient resources, a consequent absence of residence rights, and therefore, an inability to trigger the equal treatment rights that could entitle an individual to social assistance.[183] Since then, the Court has also found the time-limits contained in the CRD, for instance as regards retention of worker-status or in respect of the initial right of residence under Art. 6 CRD, to cater sufficiently for a person's situation, without an individualised assessment of their personal circumstances being necessary.[184] In addition, it has asserted that "while a single applicant can scarcely be described as an 'unreasonable burden' [...] the accumulation of all individual claims which would be submitted would be bound to do so".[185] Accordingly, social integration is no longer understood as a Union aim that obliges Member States to show financial solidarity to one another's nationals by taking their individual situations into account. Instead, in not performing their economic duty, non-economically active Union citizens are considered a collective, foreign burden. Indeed, in *Garcia-Nieto*, having found it permissible to define "legal residence" and equal treatment by reference to the CRD, the Court considered it unnecessary to answer the referring court's question as regards whether the EU citizens concerned should be able to access equal treatment by demonstrating "a genuine link to their host Member State" in some other way than economic activity or self-sufficiency.[186] Similarly, in *Alimanovic*, the Court did not engage with the applicants' longstanding links with the German labour market, when considering whether they

[180] *Ibid.*, para. 61.

[181] *Commission v. United Kingdom*, cit.

[182] O'Brien considers this to be the result of an overloading of the concept of proportionality in *Brey*, cit.: C. O'Brien, *Unity in Adversity*, cit., pp. 44-52.

[183] *Dano* [GC], cit., para. 80.

[184] *Alimanovic* [GC], cit.; *Garcia-Nieto*, cit. In *Commission v. United Kingdom*, cit., the evidential burden was flipped entirely and imposed on to the Commission.

[185] *Alimanovic* [GC], cit., paras 54-62; *Garcia-Nieto*, cit., paras 49-50.

[186] *Garcia-Nieto*, cit., paras 34 and 54.

should enjoy equal access to social assistance, instead focusing on their formal categorisation as "job-seekers".[187] This approach can hardly be said to reflect a model of social integration focused of redefining the boundaries of the welfare state. In truth, it cannot even be understood as an individual duty to integrate oneself into the host State society, since wider integrative links appear immaterial. Thus, the Union approach to "social integration" in this context appears to be to consider it an irrelevance. The emphasis, instead, is on the much narrower duty to reside in one's host State in strict accordance with the residence requirements of the CRD, which have their origins in the economic integration of the internal market.

Finally, *Dano* sees this approach to integration dominate the wider coordination of the European social space. Specifically, as already touched upon, another understanding of social integration in the EU context might be the coordination of a European social area that offers certain social protections whilst facilitating free movement. However, in *Brey*[188] and *Dano*, the Court held that Member States could require non-national EU citizens to be residing in their territory in accordance with the CRD for access to "special non-contributory cash benefits" under Regulation 883/2004. This was the case even though the latter instrument uses a broader "habitual residence" test,[189] as a means of determining which Member State's social security scheme is responsible for Union citizens in order to ensure that the exercise of free movement rights did not cause individuals to fall between Member State regimes. The Court's approach in *Brey* and *Dano* was extended to benefits falling firmly within the category of "social security" in *Commission v. United Kingdom*,[190] namely child benefit and child tax credit. The Court held that if a claimant were unable to access social security because she/he did not meet the requirements of the "right to reside" test, i.e. residence in compliance with the CRD, this would be because she/he had failed to satisfy a substantive eligibility condition within the applicable domestic social security regime, which it was for individual Member States to lay down.[191] Echoing the fallacious economic/social dichotomy, this over-emphasis on an EU citizen's individual duty to reside in their host State in accordance with the CRD before she/he will be considered sufficiently integrated to access social support there undermines the Union's wider ambition of creating an effective European economic and social space. As the Training and reporting on European Social Security (trESS) Report on the relationship between the coordinating regulations and the CRD makes plain, when Member States are able to define residence at national-level, a

[187] See also C. O'Brien, *Unity in Adversity*, cit., p. 56.

[188] *Brey*, cit.

[189] Arts 1, let. j), and 4 (equal treatment) of Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

[190] *Commission v. United Kingdom*, cit. For comment, see C. O'Brien, *The ECJ Sacrifices EU Citizenship in Vain:* Commission v United Kingdom, in *Common Market Law Review*, 2017, p. 209 *et seq.*

[191] *Commission v. United Kingdom*, cit., para. 71.

person living in their host State might find that they are not considered to be resident in any Member State for the purposes of residence-based benefits, despite having lived within the EU territory for her/his entire life.[192]

In sum, the *Dano* line of case-law indicates a scaling back from the Court's use of the negative processes of free movement to pursue the Union's social integration goals by requiring Member States to open up their existing domestic social spaces. Instead, if it can be considered relevant at all, social integration can only really be conceptualised as a duty to "contribute", which must be met by Union citizens if they are to be considered an equal participant in the host State society. More often than not, this societal duty is to be met through economic activity. Though this is certainly a change in direction for the Court, it is not a total U-turn. An examination of the *Brey* judgment, as a bridge between the *Grzelczyk* and the *Dano* lines of case-law, reminds us that even the case-law traditionally considered as rights-enhancing introduced concepts such as "unreasonable burden" as regards non-economically active Union citizens, while economically active EU citizens could access the domestic social space unencumbered by such conditions. Thus, the Court relied on judgments such as *Grzelczyk*, *Martinez Sala*[193] and *Bidar*[194] to assert in *Brey* that "there is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host State",[195] since non-economically active citizens must not represent an "unreasonable burden" on their host State.[196] Similarly, the requirement of compliance with the host State's criminal law as an individual duty of social integration in *Onuekwere* is not a complete about-turn from the more generous days of *Orfanopoulos*. Like the *Brey* case, the *Tsakouridis* decision acted as a bridge between these two generations of decisions. The manner in which the Court accepted that integrative links might be broken by absences from the host State, including where the EU citizen has only returned there as a result of the enforcement of a criminal sanction, paved the way for criminal conduct to break integrative ties.[197]

Thus, even if the concept of social integration has shifted from a Union aim to an individual duty within the Union citizenship case-law, as a strategy for a socially integrated Europe the opening-up of domestic social spaces via the negative processes of

[192] M. Couchier, M. Sakslin, S. Giubboni, D. Martinsen, H. Verschueren, *The Relationship and Interaction between the Coordination Regulations and Directive 2004/38/EC*, in *trESS Think Tank Report*, 2008, available at ec.europa.eu.

[193] *Martinez Sala*, cit.

[194] *Bidar* [GC], cit.

[195] *Brey*, cit. paras 44-45, citing *Martinez Sala*; *Grzelczyk* and *Trojani* [GC], cit.

[196] *Brey*, cit., para. 54, citing Court of Justice, judgment of 21 December 2011, case C-425/10, *Ziolkowski and Szeja*.

[197] *Tsakouridis* [GC], cit., paras 30-32.

the primary free movement provisions has always been inherently limited in what it can achieve. Its roots in, and recent re-emphasis on, transnational economic activity is exclusionary, exposing "more starkly the differences and disadvantages faced by certain members of society".[198] Consequently, though this evolution of Union citizenship is historically explainable, the current state of play nevertheless undermines the EU's contemporary social objectives.

V.2. Undermining the Union's social aims

Arguably, the pursuit of social integration via the free movement provisions has proved a usefully flexible means of attaining the Union's social goals within the EU's constitutional confines. The Court has been able to overcome the economic/social dichotomy that continues to restrict the social capacities of the Treaties and create a European social space via the negative integration processes of the internal market. This same elasticity has allowed the Court of Justice to pull back when it seems politically expedient, in an attempt to maintain popular support for European integration.[199]

Yet, this very possibility makes plain, first, that a fully inclusive European social space cannot be achieved by pursuing Union social integration via negative free movement processes since it is inherently exclusionary. As O'Brien highlights, the "many characters of the EU citizen, with variegated rights according to circumstance" lead in practice to "steep status gaps and welfare cliff edges for nationals of other States; gaps and losses not currently tolerated for own nationals".[200] Various Member States have used Union citizenship's connections with economic activity to introduce right to reside-style tests for access to their social assistance schemes. Under such tests, now permitted by the Court,[201] resident host State nationals will automatically have the required "right to reside" but non-national EU citizens generally have to be economically active.[202] If the negative integration process outlined above seeks to ensure a socially-integrated Europe by ensuring the equal treatment of all EU citizens within national social mechanisms, then this objective has not been achieved. Host State nationals contribute to the fabric of their communities as a result of numerous factors including residence, family relationships, and community ties. Conversely, non-national EU citizens must primarily rely on economic activity to display their social integration regardless of their broader contributions and participation. Similarly, the case-law on expulsion

[198] S. Coutts, *Union Citizenship as Probationary Citizenship*, cit., p. 531.

[199] For analysis of the broader reasons for a new judicial approach, see U. Šandl, S. Sankari, *Why Did the Citizenship Jurisprudence Change?*, in D.Thym (ed.), *Questioning EU Citizenship*, cit., p. 89 *et seq*.

[200] C. O'Brien, *I Trade Therefore I Am: Legal Personhood in the European Union*, in *Common Market Law Review*, 2013, p. 1649.

[201] *Dano* [GC], cit.; *Commission v. United Kingdom*, cit.

[202] See the dissenting judgment of Lord Walker in the UK Supreme Court, judgment of 16 March 2011, *Patmalniece (Appellant)*, [2011] UKSC 11, who concluded that this rendered the test directly discriminatory.

measures holds non-national EU citizens to a higher standard of social integration by virtue of the very fact that they can be expelled.[203] Specifically, rather than facilitating a European space, *Onuekwere* compartmentalises the Member States as individual "social and cultural units",[204] by reference to their criminal codes. Yet, when a non-national EU citizen commits a crime in her/his host State, she/he will rarely commit acts that distinguish her/him entirely from the criminal conduct of host State nationals. Nor is it likely, that she/he has acted in a way that is totally unproblematic within the value system of their Member State of origin. Thus, nationality still matters in the European social space.[205]

Second, the exclusionary nature of social integration in the context of free movement now risks being in direct conflict with the Union's wider aims and approach. Art. 3, para 3, TEU charges the Union with "combat[ing] social exclusion and discrimination [...] promot[ing] social justice and protection, [and] equality between women and men". While the Union's legislative competence might still restrict the manner in which it pursues these goals, the operation of the free movement provisions risks undermining them altogether. Specifically, the current connection between "integrating links" to one's host State and the financial contributions made to its social security system through economic activity[206] has a gendered tilt in its non-recognition of the societal contributions of non-economic activity. Reproductive labour and the majority of unpaid care work is performed by women and, as O'Brien points out, this "de-valuing of non-economic activity fails on its own terms, in that studies show that national economies are subsidised to a very significant degree by the unpaid labour of parents and carers".[207] More broadly, the permissibility of right to reside tests as "potent barriers"[208] to social support can leave non-economically active Union citizens lawfully present in their host State for residence purposes but not legally resident as regards equal treatment, exposing them to the risk of destitution. Likewise, the impact of expulsions on a different form of social integration, that of social rehabilitation, and the integrative purposes of prisons appear to have been overlooked in

[203] Of course, host State nationals can still face measures that indicate that they are not considered to be fully integrated into society, such as loss of voting rights.

[204] S. COUTTS, *Union Citizenship as Probationary Citizenship*, cit., p. 539.

[205] Recently, in *B.*, cit., the Court required an individual assessment of whether integrative links had been broken, particularly where a non-national EU citizen had lived in their host State from a young age and for over twenty years prior to a custodial sentence. However, it remains possible for imprisonment to break the integrative links.

[206] *Commission v. Netherlands*, cit.

[207] C. O'BRIEN, *Unity in Adversity*, cit., p. 94, citing L. BUCKNER, S. YEANDLE, *Valuing Carers 2015: The Rising Value of Carers' Support*, London, Carers UK report 2015, www.carersuk.org, p. 4.

[208] K. PUTTICK, *EEA Workers' Free Movement and Social Rights after Dano and St Prix: Is a Pandora's Box of New Economic Integration and 'Contribution' Requirements Opening?*, in *Journal of Social Welfare and Family Law*, 2015, p. 253.

Onuekwere,[209] though the Court has acknowledged, very recently, in *B*, that individual behaviour whilst in prison could either indicate continued disconnection, or the re-forging of links, with the host State society.[210]

Third, as well as undermining the Union's aims in a general sense, the evolution of the primary free movement provisions now brings them into increasing conflict with other well-developed areas of EU law and policy, risking a fragmented approach to EU social integration. *Jessy Saint Prix* offers a particularly pertinent example here.[211] In permitting an extension of the situations in which worker status can be retained beyond those contained in Art. 7, para. 3, CRD, to cover pregnancy-related employment breaks, the decisions appears progressive at first glance. However, as Currie identifies, the reliance on worker status as a route to equal treatment in the free movement context is indicative of the gender disparate way in which the internal market, and its secondary legislation, functions in the first place.[212] Indeed, it would appear that the EU's "highly-regarded and well-developed body of gender equality law has failed to have a tangible impact as far as free movement law and policy is concerned".[213] This echoes our finding, in section III, that the internal market and the EU's concrete social objectives remain functionally distinct. Relying on existing free movement law,[214] the Court held that Ms Saint Prix could maintain her access to social assistance by retaining her connection to the labour market and only if she had returned to work "in a reasonable period".[215] Where the realities of pregnancy and childbirth leave a woman unable to resume her economic duties within such a period, Union citizenship will leave her without a safety net.[216]

And yet, while free movement's social justice offering has proven itself rather lacking, the presumed impact of the Court's negative approach to social integration via free movement on what the economic/social dichotomy has long presented as the sovereign domestic social space[217] frequently takes centre-stage in media and public discourse, particularly in the UK. It is therefore arguably unsurprising that in recent years, in the face of rising Euroscepticism, the Court has scaled back on this approach. However this

[209] L. MANCANO, *The Place for Prisoners in European Union Law?*, cit., at p. 742 argues that social rehabilitation is a general principle of EU law.

[210] *B.*, cit., para. 74.

[211] Court of Justice, judgment of 19 June 2014, case C-507/12, *Jessy Saint Prix*.

[212] S. CURRIE, *Pregnancy-related Employment Breaks, the Gender Dynamics of Free Movement Law and Curtailed Citizenship:* Jessy Saint Prix, in *Common Market Law Review*, 2016, p. 555.

[213] *Ibidem*.

[214] *Orfanopoulos*, cit.

[215] *Jessy Saint Prix*, cit., para.41.

[216] S. CURRIE, *Pregnancy-related Employment Breaks*, cit., p. 561.

[217] See S. REYNOLDS, *It's Not Me It's You: Examining the Print Media's Approach to 'Europe' in Brexit Britain*, in E. DRYWOOD, M. FARRELL, E. HUGHES (eds), *Human Rights in the UK Media: Fear and Fetish*, London: Routledge, forthcoming.

retreat has seemingly done little to address the apparent increase in antipathy towards the Union project.

V.3. Sacrificing equal treatment in vain: the ongoing question mark over European integration

While the Court might have sought to placate the UK voting public by allowing further exclusions from the national social space in *Commission v. United Kingdom*,[218] this was ultimately "in vain".[219] The UK voted to leave the EU anyway and, while European leaders might take comfort in its history of begrudging participation in Europe, the UK is not the only Member State experiencing rising Euroscepticism.[220] As Nic Shuibhne points out, the "Court is undoubtedly between a rock and a (very) hard place as the original defender of a version of citizenship too detached from a wider mood of integration estrangement". However, as she also advances, by "neither reconcil[ing] rooted [Union citizenship] case-law on conditions and limits with its revised logic, nor openly reversing it",[221] the *Dano* line of case-law will arguably do little to resolve the EU's ongoing popularity crisis.

Specifically, though it might now be mentioned less frequently, Union citizenship remains the "fundamental status" of EU citizens, bestowing primary and personal free movement rights, which require equal access to domestic social spaces as a result of the "certain amount of financial solidarity" between Member States.[222] These rights appear both nebulous and all-encompassing. While the Court has introduced accompanying limitations, including that EU citizens must not pose an "unreasonable burden"[223] on national social assistance schemes and that they must, at times, demonstrate a "real link"[224] or a "certain degree of integration"[225] within their host State, these restrictions are equally open-ended. Consequently, where Member States incorporate Union citizenship's expansive principles into their legal systems, its limitations increasingly operate at the administrative-level.[226] For instance, non-economically active Union citizens might bear the burden of proving to administrative welfare assessors that they are "legally resident" and therefore not an "unreasonable burden" as a mere result of their

[218] *Commission v. United Kingdom*, cit.

[219] C. O'Brien, *The ECJ Sacrifices EU Citizenship in Vain*, cit.

[220] T. Chopin, *Euroscepticism and Europhobia: the Threat of Populism*, in *Fondation Robert Schuman: European Issue No 375*, 2015, www.robert-schuman.eu.

[221] N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit., p. 916.

[222] *Grzelczyk*, cit.

[223] *Ibidem.*

[224] *Collins*, cit.

[225] *Bidar* [GC], cit.

[226] D. Sindbjerg Martinsen, G. Pons Rotger, J. Sampson Thierry, *Free Movement of People and Cross-Border Welfare in the European Union: Dynamic Rules, Limited Outcomes*, in *Journal of European Social Policy*, 2018, p. 1 *et seq.*

application for social assistance.[227] This amounts to a double failure: in exposing Union citizens to "rights cliff-edges",[228] the Union's social claims are undermined; and, since these difficult administrative hurdles are generally only visible to those who must endure them, these placatory limitations on Union citizenship rights are also unlikely to address the EU's perceived legitimacy crisis in any case. This is particularly so when host State nationals continue to be told not only by sections of the media but by mainstream politicians and by the Court itself that social tourism is a sizeable problem.[229]

More importantly, the *Dano* line of judgments do little to foster a European social community. Instead, they isolate the Union's social integration problems to the non-economically active Union migrant, legitimating under-founded[230] claims about social tourism and depicting the relationship between host State nationals and EU citizens as oppositional. This short-term political response might "in the longer-term threaten EU integration as [Union] citizens are marginalised within their host societies and singled out as negative examples" of EU free movement.[231] Indeed, this is already visible in what O'Brien terms a "law as lists" approach to the conferral of residence and equal treatment rights at the administrative-level, in which even economically active Union citizens must overcome arduous administrative obstacles, purportedly introduced to tackle "rogue benefits claims"[232] to demonstrate that they qualify for equal treatment.

Ultimately, the Court's current trajectory of the Union citizenship case-law reinforces the economic/social dichotomy that section II proved to be erroneous. It presents economic activity as the most appropriate trigger for Union action, maintaining the misconception that economic and social matters can otherwise be kept separate. Rather than restricting its review of the free movement provisions to the EU's often most marginalised citizens, and in a manner which does little to involve static EU citizens in the EU project, a wider re-thinking of the Court's approach to free movement is needed; one which accepts that while domestic social policy might clash with the market freedoms it might nevertheless facilitate the Union's wider goals.

[227] E.g. the UK's "right to reside" test, found to be lawful in *Commission v. UK*, cit.

[228] C. O'Brien, *Unity in Adversity*, cit.

[229] European Council Conclusions of 19 February 2016, p. 23; *Dano*, cit. para. 78; see also S. Reynolds, *It's Not Me It's You*, cit.

[230] Eurofound Report, *Social Dimension of Intra-EU Mobility: Impact on Public Services*, 10 December 2015, www.eurofound.europa.eu.

[231] R. Zahn, *Common Sense or a Threat to European Integration? The Court, Economically Inactive EU Citizens and Social Benefits*, in *Industrial Law Journal*, 2015, p. 582.

[232] See e.g. UK Department for Work and Pensions, Press release of 21 February 2014, *Minimum Earnings Threshold for EEA Migrants Introduced*, www.gov.uk, that openly discusses tackling "abuse" though it accompanied UK reforms that impact on the equal treatment rights of EU workers. For analysis, see C. O'Brien, *Unity in Adversity*, cit., p. 263.

VI. Legitimising the European social space through an holistic approach to the Treaties

In particular, the Court of Justice must reconsider its continuing use of the breach/justification methodology, discussed in section II, to adjudicate wider tensions between free movement and domestic social policies. This section argues, first, that the procedural disadvantage facing domestic social activities under the current model does not sufficiently reflect the Union's own contemporary constitutional framework. Second, the section identifies the emergence of a judicial willingness to take a more holistic approach to the Treaties in its adjudicative approaches.

VI.1. The post-Lisbon call for an holistic approach to economic and social integration

Though the Lisbon Treaty did not alter the substantive content of the Union's primary free movement provisions, it signalled a shift in the wider constitutional framework towards greater recognition of its social endeavours.[233] This not only justifies, but requires, the incorporation of social integration as a Union endeavour within the operation of the internal market. The Union's explicit values, laid down in Art. 2 TEU, have a distinctly social dimension, including, *inter alia*, non-discrimination, tolerance, solidarity, and equality between women and men. Art. 3, para. 3, TEU tasks the Union with "combating social justice" and working towards a "highly competitive social market economy, aiming at full employment and social progress". While both Schiek and Armstrong accept that the concept of a "social market economy" is historically rooted in ordo-liberal approaches that generally sought social goals through market means, both reject the argument that this definition is fixed.[234] In the contemporary Union context, it is "more likely that those insisting on this term [...] meant to anchor a compromise between [...] economic and social objectives in the EU constitution of the internal market".[235] As Armstrong notes, prior to Lisbon, social Europe had been pursued only by "adding-in" social values and competences to the Treaties. By contrast, removal of the reference to "undistorted competition" from Art. 3 TEU's description of the internal market marked a clear turn towards social values as constraints on the pursuit of economic goals.[236]

In contrast to the current functional distinction between the internal market and EU social policy, Art. 7 TFEU seeks to avoid compartmentalisation of the Treaties' policy areas, requiring the Union to "ensure consistency between all of its policies and activities, taking all of its objectives into account". More substantively, the TFEU's horizontal claus-

[233] D. Schiek, *Economic and Social Integration*, cit., p. 218.

[234] K. Armstrong, *Governing Social Inclusion*, cit., pp. 243-244; D. Schiek, *Economic and Social Integration*, cit., p. 220.

[235] D. Schiek, *Economic and Social Integration*, cit., p. 220.

[236] K. Armstrong, *Governing Social Inclusion*, cit., p. 244.

es require the Union to take the principles of gender equality,[237] non-discrimination,[238] environmental protection,[239] and consumer protection[240] into account in the formulation and implementation of its policies and activities. Significantly, the Art. 9 TFEU "horizontal social clause"[241] obliges the Union to "take into account the requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion and a high level of education, training and protection of human health" in the definition and implementation of its policies and activities. Finally, the Lisbon Treaty confers primary legal status upon the Charter of Fundamental Rights.[242] This arguably concretises the place of the EU's social goals within its constitutional framework, since the Charter seeks equal status across civil and political, and economic and social rights.[243]

Accordingly, the EU's contemporary constitutional framework, as represented in its values, tasks and human rights agenda "establishes new constitutional demands" that require economic integration to be embedded with social aims and the internal market to be reined in by the Union's social values.[244] Against this backdrop, clashes between the primary free movement provisions and domestic social policies can no longer be conceptualised simply as conflicts between EU law and national rules. They must also be understood as representing tensions between competing Union goals, which cannot continue to be treated as functionally distinct. As Poiares Maduro noted far before the arrival of the Lisbon Treaty:

> "[W]hen market integration [challenges] the regulatory powers of the States, which are in many cases aimed at protecting…social rights, such as the right to education, health and social protection, fair working conditions, minimum income, and, in a broader sense, 'other 'social' rights, such as consumer and environmental protection [it also clashes with] many of [the] rights…recognised in the Treaties as goals of the European Union".[245]

[237] Art. 8 TFEU.

[238] Art. 10 TFEU.

[239] Art. 11 TFEU.

[240] Art. 12 TFEU.

[241] M. FERRERA, *Mapping the Components of Social EU: A Critical Analysis of the Current Institutional Patchwork*, in E. MARLIER, D. NATALI (eds), *Europe 2020: Towards a More Social EU?*, Oxford: Peter Lang, 2010, pp. 57-58.

[242] Art. 6, para. 1, TEU.

[243] N. BUSBY, *A Right to Care?*, cit., p. 24. There are, of course, questions marks over the Charter's capacity to realise this equal status given its distinction between rights and principles and its frequent reference to "national laws and practices" in its social provisions e.g. Art. 28 of the Charter on the right of collective bargaining.

[244] D. SCHIEK, *Economic and Social Integration*, cit., pp. 221 and 224.

[245] M. POIARES MADURO, *Striking the Elusive Balance between Economic Freedom and Social Rights in the EU*, in P. ALSTON, M. BUSTELO, J. HEENAN (eds), *The EU and Human Rights*, Oxford: Oxford University Press, 1999, p. 471.

Accordingly, while Member States pursue their own social integration goals through domestic social policies, their more-established legitimacy also makes them well-positioned to act as agents for the Union's social integration goals, with would otherwise be constrained by the economic/social dichotomy. As Armstrong puts it: "[i]nstead of leaving social solidarity in a sort of constitutional limbo, one might look to the continuing realisation of social solidarity within the boundaries of the nation state but buttressed and reinforced by the interaction between the domestic and European levels".[246] Arguably, such an approach is supported by Art. 2 TEU, which, in identifying values common to the EU and its Member States "implies the potential for creating a shared constitutional space" comprising of both national and EU law.[247]

Crucially, however, since market integration has principally been judicially-driven, and the economic/social dichotomy still places constraints on the Union's legislative organs, the EU's new obligations to incorporate social issues into the design and implementation of its own activities must also apply to the Court. There is no reason why this should not be so. Horsley highlights that the Court has made itself a "leading institutional actor in the integration process. A constitutional responsibility to fully engage with the legal limits to Union lawmaking set out in the Treaties attaches to this decision".[248] Arguably, then, the Court is constitutionally required to change its adjudicative approach, from one that presents national social policy as a *prima facie* unlawful restriction of free movement, which must be defended by means of a one-sided proportionality assessment, towards one that seeks to balance the Union's goals of economic and social integration. Rooted in Alexy's theory of balancing, under which, "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other",[249] such an approach would analyse the effects of free movement and social policy on *each other*, seeking an outcome that is least restrictive of both the Union's economic and social integration goals. Under such a model the Treaty's free movement derogations and the mandatory requirements would no longer be mere "justifications" for the *prima facie* wrongful conduct of restricting the market freedoms, but a mechanism by which the Court can seek to reconcile the Union's competing integrative endeavours through a more reciprocal approach to proportionality.

For example, given the principle of conferral, while a *prima facie* restriction under Art. 56 TFEU would remain the "hook" to Union law that triggers Union judicial assessment in a *Laval*-type case, the existence of Art. 152 TFEU – which requires the Union to promote the role of social partners while taking into account the diversity of national systems – along-

[246] K. ARMSTRONG, *Governing Social Inclusion*, cit., p. 236, though referring to strengthened use of the Open Method of Coordination.

[247] D. SCHIEK, *Economic and Social Integration*, cit., p. 218.

[248] T. HORSLEY, *Reflections on the Role of the Court of Justice as the "Motor" of European Integration*, cit., p. 954.

[249] R. ALEXY, *A Theory of Constitutional Rights*, Oxford: Oxford University Press, 2010, p. 102.

side Art. 153, para. 5, TFEU – which leaves matters of pay and the right to strike within domestic competence – and Arts 28 and 31 of the Charter – which recognise the right to take collective action and to fair and just working conditions respectively – would channel the interaction between free movement and national social activity away from the standard adjudicative model towards a balancing framework. This would take into account not only the effects of collective action on free movement but the potential impact on collective action and worker protection of alternative measures ostensibly less restrictive of free movement. Indicators of impact on both the exercise of the market freedoms and the realisation of social goals and policies can be presented to the Court during oral and written submissions.[250] However, though the Court should act as a forum for the articulation of genuine supranational concerns, final decisions of fact should continue to be taken as closely as possible to the site of the dispute, namely at the level of national courts. The Court is well-placed to highlight to national courts the potential impact of domestic social policies on the EU's economic objectives and require Member States to show give and take[251] where it appears possible to pursue social objectives in a way less restrictive of free movement. It must also acknowledge that what appears less restrictive of free movement might have consequences for the practical realisation of social policies within the continuing idiosyncrasies of domestic social orders. Whilst the Court of Justice has a responsibility to try to frame these competing principles in a systematically coherent way,[252] national courts must be able to decide on the specific balance within a particular factual situation. Not only do they "enjoy the best knowledge of the facts, and can assess the impact of different interpretations",[253] but this approach "tighten[s] the connection between the decision-maker and the policy-maker, as well as to the parties actually affected by the outcome".[254]

As Gallo discusses, elsewhere in the Treaties, the combination of Lisbon's horizontal provisions and substantive derogations is already impacting on how the latter operate. Specifically, the "distinctive feature of [services of general economic interest], as regulated by the EU, is that they do not merely represent a derogation from competition rules under Art. 106, para 2, TFEU [...] but also a positive provision in line with what is now Art. 14 TFEU".[255] As a result, services of general economic interest (SGEIs) do not

[250] On the significance of the preliminary reference procedure in the related area of defining fundamental rights norms, see A. TORRES PEREZ, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*, Oxford: Oxford University Press, 2009, pp. 128-129.

[251] Consider e.g. Court of Justice, judgment of 12 March 1987, case C-178/84, *Commission v. Germany (Beer Purity)*, in which the Court noted that while consumers conceptions may vary from State to State they will also evolve as part of the establishment of the internal market.

[252] N. NIC SHUIBHNE, *The Coherence of EU Free Movement Law*, cit., pp. 183-184 and 225.

[253] A. TORRES PEREZ, *Conflicts of Rights in the European Union*, cit., p. 120.

[254] N. NIC SHUIBHNE, *The Coherence of EU Free Movement Law*, cit., p. 250.

[255] D. GALLO, *On the Content and Scope of National and European Solidarity under Free Movement Rules*, cit., p. 827.

reflect a conflict between EU law and national approaches but are strongly connected to shared European and national interests.[256] This can be contrasted with the approach within the free movement of capital, in which golden-shares are still conceptualised as a derogation from a market freedom. There, "European solidarity" functions only as a corollary of economic integration and not social regulation.[257] This does not mean, of course, that Member State social approaches would win-out every time. Sometimes, measures less restrictive of free movement will exist that do not disproportionately affect the effectiveness of the social endeavours concerned. The crucial factor is the reciprocity of the proportionality assessment.

A more holistic approach to the operation of primary free movement law has three potential advantages. First, acknowledgment that national social policies can contribute to shared social goals, rather than operating only as barriers to economic movement, conceptualises domestic activity as a mechanism by which the EU can pursue its own social integration goals, despite the confines of the economic/social dichotomy. Second, this might then also help to ease the Union's legitimacy headache. Since EU and Member State rules are no longer in conflict but are understood as driven by the same fundamental objectives, supranational social activity is less likely to be viewed as an incursion into the domestic realm. Of course, a new judicial approach is not a catch-all solution but must work alongside other institutional means of working towards a "social Europe". For example, Armstrong has persuasively argued for an Open Method of Coordination-driven social constitutionalism, which would require Member States to explain how exercises of domestic social sovereignty attain the social policy objectives of the Union.[258] Third, greater acknowledgement of the potential of the market freedoms, as a whole, to impact on social concerns might release some of the pressure on the specific interaction between the free movement of persons and domestic welfare systems. The various evolutions of social integration in that area reflect an attempt to be seen to be addressing perceived problems with European integration. However, by artificially sectioning off free movement of persons from the wider tensions between the market freedoms and the national social space, the Court's current approach risks overemphasising the actual impact of this particular interaction, legitimising rather than addressing under-founded concerns about EU immigration, and undermining the Union's own social goals by scapegoating already marginalised sections of the EU population.

VI.2. The emergence of a new adjudicative approach

Post-Lisbon, there has been an emerging acceptance of the need to alter the adjudicative framework in recognition of the Union's broader integrative aims, mainly from the

[256] *Ibidem*.
[257] *Ibid.*, p. 829.
[258] K. Armstrong, *Governing Social Inclusion*, cit., p. 262.

Advocates General. In *Santos Palhota*, AG Cruz Villalón posited that the changes brought about by the Lisbon Treaty, specifically Art. 9 TEU, Art. 3, para. 3, TEU and the primary status of the Charter, required a different approach to restrictions placed on free movement as a result of social policy.[259] Worker protection, for example, could no longer be viewed as a "simple derogation from a freedom, still less an unwritten exception inferred from case-law".[260] Insofar as the Treaty seeks to work towards a high level of social protection,[261] it "authorises the Member States", for the purposes of safeguarding social protection, to restrict the fundamental freedoms and to do so *without* Union law regarding this as something "exceptional", requiring "strict" interpretation.[262] Since the proportionality assessment had to be particularly sensitive to the social protection of workers,[263] AG Cruz Villalón was able not only to consider whether measures less restrictive of free movement were available but whether these would be as *effective* in achieving the goal of social protection.[264]

Similarly, AG Trstenjak argued in *Commission v. Germany* that exposing fundamental social rights to a one-sided proportionality assessment[265] sat "uncomfortably alongside the principle of equal ranking for fundamental rights and freedoms".[266] She called instead for a methodology that sought the optimum effectiveness of both goals, through a reciprocal assessment of free movement and, in this case, collective bargaining, on one another.[267] Although the Court of Justice was not as explicit as its AG in opting for a new model of adjudication, there is still evidence that it saw the need for a more holistic approach to the Treaties.[268] Rather than running the legal issue through the two-stage breach/justification model, the Court spoke of "reconciling competing interests",[269] and achieving "a fair balance" between them.[270]

Since then, however, apart from its recent decision, in *RegioPost*[271] – to allow local authorities to use public procurement to pursue certain social policy objectives, regard-

[259] Opinion of AG Cruz Villalón delivered on 5 May 2010, case C-515/08, *Santos Palhota*.

[260] *Ibid.*, para. 53.

[261] Art. 3, para. 3, TEU.

[262] Opinion of AG Cruz Villalón, *Santos Palhota*, cit., para. 53.

[263] *Ibid.*, para. 55.

[264] *Ibid.*, paras 71-76.

[265] Opinion of AG Trstenjak delivered on 14 april 2010, case C-271/08, *Commission v. Germany*, paras 179-182.

[266] *Ibid.*, paras 183-184.

[267] *Ibid.*, paras 190-191.

[268] Court of Justice, judgment of 15 December 2014, case C-271/08, *Commission v. Germany*.

[269] *Ibid.*, para. 44.

[270] *Ibid.*, para. 52.

[271] *RegioPost*, cit. Specifically, the application of certain minimum wage requirements to tenders. For comment, see C. KAUPA, *Public procurement, Social Policy and Minimum Wage Regulation for Posted Workers: Towards a More Balanced Socio-Economic Integration Process?*, in *European Papers*, 2016,Vol. 1, No 1, www.europeanpapers.eu, p. 127 *et seq.*

less of its previous finding in *Rüffert* that this could constitute a breach of the free movement of services[272] – the Court has done little to reconsider its adjudicative approach to free movement. It seems to have a stronger preference, instead, for isolating the Union's free movement troubles to the area of persons, where it has converted social integration from a Union aim to an individual duty. This is doubly problematic, however, since this does not seem to have addressed the Union's ongoing legitimacy crisis and, in focusing on those EU citizens that are already marginalised, it undermines the Union's own social integration goals.

VII. Conclusion

The historical analysis, conducted here, of the evolution of "social integration" within the Union legal order has shown it to be a malleable concept. Over the decades social integration could be conceptualised as: a mere by-product of the internal market; as a positive Union goal; as concrete supranational policymaking; as a means of securing the effectiveness of Union law by coordinating standards of basic social protection whilst facilitating economic activity; as the creation of a European social space through the negative process of requiring Member States to open up their existing domestic social systems to non-national EU citizens; and as an individual duty imposed on Europe's citizens. This latter incarnation also reveals that different forms of "social integration" can come into conflict with one another. By marginalising those already at risk of social exclusion, "social integration" as an individual duty can undermine the Union's own, wider social goals under the Treaties.

All of these embodiments of social integration have been shaped by the legacy of the Rome Treaty's confirmation of an economic/social dichotomy along European/national dividing lines. Yet, at the same time, these manifestations have also proven this economic/social distinction to be a myth. Against these findings, the Court's continued juxtapositioning of economic and social endeavours, in its adjudication of tensions between free movement and national social rules through a breach/justification methodology, cannot continue. Instead, another new version of social integration is needed; one which sees domestic and Union social activities as jointly contributing to a shared constitutional space, within which the Union's equal economic and social endeavours must be balanced against each other.

[272] *Rüffert*, cit.

ARTICLES
SPECIAL SECTION – SOCIAL INTEGRATION IN EU LAW:
CONTENT, LIMITS AND FUNCTIONS OF AN ELUSIVE NOTION

FROM ALTERNATIVE TRIGGERS TO SHIFTING LINKS: SOCIAL INTEGRATION AND PROTECTION OF SUPRANATIONAL CITIZENSHIP IN THE CONTEXT OF BREXIT AND BEYOND

FRANCESCA STRUMIA*

ABSTRACT: Brexit highlights how supranational citizenship is held to ransom by a European citizen's home Member State. When the home Member State pulls the cord, supranational citizenship can be switched off. This evidences on the one hand the weakness of European citizens' position in their host Member States. On the other hand it challenges the resilience of supranational citizenship as a status. In the eyes of some, the fragility of supranational citizenship that Brexit reveals is but a side effect of democracy. In other views, that fragility and its implications for the rights of individual citizens call for a rescission of supranational citizenship's link of derivation from nationality. This *Article* problematizes the latter link from a novel angle. It explores the role of social integration in building an alternative link, for purposes of rights, status, and belonging, to the national space of a host Member State. Seen from this angle, the derivation link to nationality is just one aspect of supranational citizenship's anchoring to an underlying national space. While European citizenship stays formally linked to nationality of a home Member State, over the course of a European citizen's cross-border experience the substantive link to an underlying national space shifts between home and host Member State. This shift discloses novel opportunities to protect supranational citizenship in the context of a Member State withdrawal from the EU.

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I. INTRODUCTION

As many things Brexit, the problem of citizenship rights after the United Kingdom (UK) EU withdrawal has proven extremely divisive. Reactions span the disinterest of those who see loss of supranational citizenship as a non-issue. The resignation of those who consider it the unavoidable side effect of an exercise in democracy. And the rage of those who hold it as a destiny's joke. If questioned as to their position, many in the first group would probably say that national citizenship is a cosy enough vest not to need a supranational coat as an embellishment. Those in the second would point to the legitimate choice of a majority. Those in the third would reiterate the old promise of the Court of Justice that Union citizenship was destined to be the fundamental status of nationals of the Member States.[1]

Despite this divergence of views, or maybe precisely because of it, the question of citizens' rights has held a central place in the political debate unleashed by the British referendum on leaving the EU; as well as in the negotiations between the UK and the other 27 EU Member States following the formal triggering of Art. 50 of the TEU in March 2017. In the context of the latter negotiations, citizens' rights have represented a threshold issue conditioning progression from a first phase of discussion on the terms of the UK withdrawal to a second phase focusing on the shape of the future relation between the UK and the EU. Beyond the official negotiations, citizens' rights have occupied much space in the media, in the imaginary of scholars, and in the scrutiny of courts.[2]

The debate has been rich and heterogeneous. However it is weakened by two shortfalls. A first shortfall is in the way the problem of citizenship loss has been framed.

[1] For a possible sample of the three positions, see e.g. A. MENÉNDEZ, *Which Citizenship? Whose Europe? The Many Paradoxes of European Citizenship*, in *German Law Journal*, 2014, p. 907 *et seq*. (in the sense that Union citizenship is a misnomer and misses several aspects of traditional citizenship – hence not such a desirable embellishment); M. VAN DEN BRINK, D. KOCHENOV, *A Critical Perspective on Associate EU Citizenship after Brexit*, in *DCU Brexit Institute Working Papers*, no. 5, 2018; D. KOSTAKOPOULOU, Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens*, in *Journal of Common Market Studies*, 2018, p. 854 *et seq*. The Court of Justice first announced the promise in judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para 21.

[2] A Dutch District Court attempted to refer to the Court of Justice the very question of the feasibility of loss of citizenship in February 2018. See A. ARNULL, *UK Nationals and EU Citizenship: References to the Court of Justice and the February 2018 Decisions of the District Court, Amsterdam*, in *EU Law Analysis*, 28 March 2018, eulawanalysis.blogspot.co.uk. The reference has eventually not been submitted following a domestic appeal, see P. TEFFER, Dutch *Request to Clarify Brexit Britons' Rights Annulled*, in *EUobserver*, 19 June 2018, euobserver.com.

At a principles level the debate has become somewhat polarized between a politics and democracy camp, in whose view supranational citizenship is a necessary sacrifice; and a law and fundamental rights camp, in whose view the disposal of citizens' rights and status is an unacceptable legal outcome.[3] At a pragmatic level, attention has focused on the losses of British nationals in the EU and EU citizens in the UK to the detriment of other less evident instances of citizenship loss. A second shortfall is in the approaches proposed to supranational citizenship protection. These have been characterized by a certain narrowness of the short-term response – negotiations have focused on safeguards of the immediately affected rights.[4] And by a certain radicalism of theoretical responses and longer-term reform proposals. Theoretical responses and reform options have mostly focused on how to alter the structure of supranational citizenship, emancipating it from national citizenship.[5]

This article proposes to address both shortfalls. In respect of the former, it reframes the problem of supranational citizenship loss, by articulating it within a matrix of variables. It also shifts the focus from the formal problem of the derivative character of European citizenship to the substantive one of the quality of the relation between a supranational citizen and his home Member State. In respect of the latter, the article looks for answers in host Member State links. It engages, for these purposes, the doctrine of genuine links between international and European law.

The central finding is that EU law and international law support, albeit from different angles, the idea that genuine links to a host country trigger for a number of purposes a relation of belonging alternative to nationality. This suggests in turn that European citizenship's link to an underlying national space can shift, for certain purposes, from a home to a host Member State. While supranational citizenship maintains its link of derivation from national citizenship of a home Member State, it gradually attaches over the course of a cross-border experience, to the national space of a host Member State. This shifting character of European citizenship's link to a national space offers a potential shield in the context of Member State withdrawal.

The *Article* contributes on the one hand to the multifarious literature on Brexit and citizenship. Scholars across disciplines have questioned among others the applicability to the Brexit context of legal doctrines that safeguard Union citizenship rights;[6] the viability of claims for protecting citizens' family rights under the European Convention on

[3] For a sample of the two positions see M. VAN DEN BRINK, D. KOCHENOV, *A Critical Perspective on Associate EU Citizenship*, cit.; D. KOSTAKOPOULOU, Scala Civium, cit.

[4] See *infra*, section II.2.

[5] See *infra*, section II.3.

[6] G. DAVIES, *Union Citizenship-Still Europeans' Destiny after Brexit?* in *European Law Blog*, 7 July 2016, europeanlawblog.eu.

Human Rights (ECHR);[7] the possibility of 'freezing' citizenship rights;[8] the inevitability of the citizenship downgrade that Brexit brings about;[9] and the framing of a EU's duty to protect its citizens.[10] This *Article* adds to that literature by offering an intermediate assessment between accounts focusing on addressing the immediate citizen rights' effects of Brexit, and accounts arguing for an entire rethinking of the premises and structure of supranational citizenship. On the other hand it contributes to the literature on social integration,[11] by linking the EU law side and the international law side of the doctrine of genuine links.

Part II frames the problem of citizenship loss in the context of Brexit. It proposes a matrix of citizenship loss, it considers what aspects of the matrix have been addressed in the current withdrawal arrangements, and it explores how Brexit discloses the fragility of supranational citizenship. Part III focuses on supranational citizenship protection. It explores the options on the table to mitigate the home State link. It then introduces the notion of host State links and it examines their role in both EU and national law. It ultimately articulates how host State links may protect citizenship in the context of Member State withdrawal.

II. Brexit and loss of citizenship

II.1. The matrix of loss of citizenship

Brexit's detrimental effect for the condition of European citizens has been hailed from so many sides that it sounds as almost a platitude at this point. Yet the debate on Brexit and citizenship has foregone a systematic reflection on the dimensions of citizenship loss that Brexit entails.[12] Citizenship loss has been considered in a fragmented, if not opportunistic, fashion. The UK Government has thought of the interests of its nationals in the EU; the EU of the interests of its citizens in the UK; the citizens have fought for the rights,[13] or the sta-

[7] G. Marrero González, *Brexit, Consequences for Citizenship of the Union and Residence Rights*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 5 *et seq.*

[8] P. Mindus, *European Citizenship After Brexit: Freedom of Movement and Rights of Citizenship*, Basingstoke: Palgrave McMillan, 2017.

[9] D. Kochenov, *EU Citizenship and Withdrawals from the Union: How Inevitable is the Radical Downgrading of Rights?*, in *LSE Europe in Question Discussion Paper Series*, no. 111, 2016.

[10] D. Kostakopoulou, Scala Civium, cit.

[11] See e.g. C. O'Brien, *Real Links, Abstract Rights and False Alarms: the Relationship between the ECJ's 'Real Link' Case Law and National Solidarity*, in *European Law Review*, 2008, p. 643 *et seq.*; R. Lyss, *A Right to Belong: Legal Protection of Sociological Membership in the Application of Art. 12(4) of the ICCPR*, in *New York University Journal of International Law and Policy*, 2013-2014, p. 1097 *et seq.*

[12] See e.g. P. Mindus, *European Citizenship After Brexit*, cit.

[13] See e.g. UK Court of Appeal, judgment of 20 May 2016, *Schindler v. Chancellor of the Duchy of Lancaster*, [2016] EWCA 469.

tus they stand to lose.[14] Media have looked for sensation, scholars for a boost to their theories, national courts for some extra visibility. [15] In the whirlwind of the involved interests, the full spectrum of citizenship loss that Brexit entails has hardly been laid bare.

Hence the first challenge in tackling citizenship loss is framing the problem that it raises. There are several sides to citizenship loss with Brexit. These are best illustrated through a matrix intersecting the variable static/mobile with the variable British national EU citizen/non-British national EU citizen.

	Static	Mobile
Non-British national EU Citizens	Loss of potential rights of movement Loss of slice of status	(in the UK) Loss of residence rights (elsewhere) Loss of slice of status and potential rights of movement
British National EU Citizens	Loss of status Loss of potential rights of movement and residence	Loss of status Loss of actual rights of movement and residence

Static British national EU citizens will lose, with Brexit, their European citizenship. European citizenship, under Art. 20 of the TFEU, is indeed an addition to nationality of a Member State. With the UK withdrawal, British nationals will no longer be nationals of a Member State. Loss of European citizenship status entails loss of political voice in the European institutions. It also entails loss of potential rights of movement and residence in the EU. This is a particularly momentous deprivation for those young British nationals who were under age at the time of the UK EU referendum and could not express their vote. Mobile British nationals, who reside in other EU Member States, will also of course lose their citizenship status. This will deprive them of the automatic EU law right to reside and work in their Member State of residence. With the right to reside, they will lose corollary EU law rights to equal treatment for social security and tax purposes,[16] as well as to family reunification with third country national family members.[17] Their political voice in local elections in their host Member State will be silenced from one day to the next. Although *ad hoc* agreements in the context of the withdrawal negotiations look set to address several of these losses, the relevant rights post-Brexit will no longer de-

[14] See A. Arnull, *UK Nationals and EU Citizenship*, cit.

[15] For an argument in this sense in respect of a Dutch District Court proposed reference to the CJEU on EU citizenship rights, see R. McCrea, *Brexit, EU Citizenship Rights of UK Nationals and the Court of Justice*, in *UK Constitutional Law Association Blog*, 8 February 2018, ukconstitutionallaw.org.

[16] See Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

[17] See Art. 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

scend from EU citizenship status. In other words, Brexit will turn "British expats into post-European third country nationals".[18]

Non-British national EU citizens will lose a slice of their European citizenship, the one corresponding to their right to move and reside in the UK. This will represent a loss of potential rights for static non-British national EU citizens and for non-British national EU citizens residing in a Member State other than their own and other than the UK. It will represent a loss of actual rights for non-British national EU citizens living and residing in the UK. For all non-British national EU citizens, Brexit brings about in any case a slight shrinking of status.

The matrix of citizenship loss reveals that Brexit bears on Union citizenship both in terms of lost rights to enter, actually or potentially, practically or virtually, a host Member State; and in terms of weakening of supranational citizenship status. The draft withdrawal agreement addresses some of the actual, practical citizenship rights that are lost with UK exit.[19] However only a further reflection can embrace also the potential and virtual rights that fall victim to Brexit. And spell out as a result the way in which Brexit diminishes the prospects of supranational citizenship.

II.2. Citizens' rights protected in the withdrawal agreement

Several proposals on the treatment of the actual and practical citizens' rights that Brexit threatens have been advanced in the context of the negotiations to date. A first proposal on the treatment of relevant rights came from the European Commission in May 2017.[20] The proposal aimed at ensuring lifetime protection for the rights of Union nationals having exercised free movement prior to the UK's withdrawal. This includes EU citizens in the UK, British nationals in the EU Member States, and their family members, regardless of their nationality. The proposal purported to guarantee to the rights of the mentioned categories the same level of protection after Brexit as enjoyed under EU law.[21] The UK Government published a further proposal in June 2017, in which it first advanced the concept of "settled status".[22] Under the original UK proposal, settled status was to be offered to EU citizens who would have completed five years of continuous residence in the UK by the date of the UK withdrawal, or by the end of a subsequent

[18] P. Mindus, *European Citizenship After Brexit*, cit., p. 29.

[19] Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 March 2018. See *infra*, section II.2.

[20] Commission Position Paper of 12 June 2017 on Essential Principles on Citizens' Rights, ec.europa.eu.

[21] *Ibidem*.

[22] UK Government, Policy Paper of 26 June 2017, *Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU*, www.gov.uk.

two year "grace period".[23] Settled status, under the UK proposal, resembled EU permanent residence but was to be governed by UK immigration law.

In December 2017, the EU and the UK side reached a tentative agreement on the post-Brexit status of British nationals resident in the EU and EU citizens resident in the UK.[24] In comparison to the proposals advanced by both sides during the summer, the December agreement was slightly more generous in terms of citizens' rights protections. First, it purported to protect any EU citizen resident in the UK on Brexit day, and any British national resident in an EU Member State on the same day, regardless of the length of their pre-Brexit residence. Second, the agreement offered protection not only to family members resident with relevant EU citizens or British nationals on Brexit day, but also to those who had been in a family relationship with the protected EU citizen or British national on Brexit day, but would only join him or her in the host State at a later stage. And finally, under the December terms, the post-Brexit rights of the protected citizens were to be grounded in EU rather than in domestic law.[25]

The December terms have largely passed into the draft withdrawal agreement prepared by the European Commission and endorsed by the European Council in March 2018.[26] The draft agreement extends protection of residence rights to a larger group of EU citizens and British nationals. EU citizens whose residence in the UK will begin after Brexit day but before the end of the transition period that will follow are protected.[27] And the same goes, *mutatis mutandis*, for British nationals resident in a EU Member State.[28] The protected citizens will gain permanent residence in the host State after five years of continuous residence. These five years may include both periods of residence prior to Brexit, during the transition period, and following the end of the transition period. The right to permanent residence is based in EU law and is only lost through absences from the host State exceeding five continuous years.[29]

Hence two quadrants of the loss of citizenship matrix – the two referring to mobile citizens – fall within the scope of the protections granted by the withdrawal agreement. The latter agreement however leaves several aspects unprotected. First, while the rights of British nationals in their EU Member State of residence are safeguarded, the rights of the same British nationals to intra-EU mobility are in jeopardy. The withdrawal agreement is silent in this respect. The technical note annexed to the December 2017 joint

[23] *Ibidem*.

[24] Joint report of 8 December 2017 from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Art. 50 TEU on the United Kingdom's orderly withdrawal from the European Union.

[25] *Ibidem*. For an analysis, see F. STRUMIA, *EU Citizens' Rights and EU Citizenship Loss under the Brexit Divorce Deal*, in *ECAS Citizens' Brexit Observatory*, 11 December 2017, ecas.org.

[26] Draft Agreement on the Withdrawal of the United Kingdom, cit.

[27] *Ibid.*, Art. 9, para. 1, let. a).

[28] *Ibid.*, Art. 9, para. 1, let. b).

[29] *Ibid.*, Art. 14.

report reserves the question of free movement for British nationals residing in the EU to further negotiation.[30] Further, for the rights that are protected under the withdrawal agreement, what is lost is the status that they come with under EU law. Both British nationals residing in the EU and EU citizens residing in the UK under the terms of the withdrawal agreement are destined to live as members of a protected immigrant minority rather than as a class of transnational citizens. This aspect is of no small consequence. Beyond the rights explicitly protected under the withdrawal agreement, their condition will be a matter of concessions on the part of the host State government. It will be up to the host State government, for instance, to recognize any political rights to the former holders of EU law rights. Also, under the withdrawal agreement, host States retain the freedom to identify through law conduct that, if occurring after the end of the transition period, may disqualify the citizens protected under the withdrawal agreement from their residence rights.[31] This signals that despite the grounding of rights under the withdrawal agreement in EU law, after Brexit and with the passage of time, rights holders under the agreement will slowly slip out of the protective vest of EU law.

If the withdrawal agreement offers some albeit incomplete protection in respect of the rights covered by two of the quadrants in the matrix of citizenship loss, it does nothing in respect of the other two quadrants. Given the personal scope of the withdrawal agreement, static citizens and their potential rights of movement and residence are left unaddressed.

As are the virtual rights that European citizenship entails beyond movement and residence. European citizenship gives to its holders a stake in a political and territorial community stretching beyond the boundaries of a citizen's state of nationality and embracing the other Member States.[32] With Brexit all British nationals lose that stake. While non-British national EU citizens lose the stake that shared supranational citizenship gave them in the UK legal and political community.

So begins the Brexit induced weakening of the status of supranational citizenship. The withdrawal agreement – assuming it stands at the end of the negotiations and eventually comes into force[33]– can rescue part of supranational citizenship's content from the Brexit fire, however it cannot safeguard the edifice. In respect to the latter, one is left to assess the damage.

[30] Joint technical note of 8 December 2017 expressing the detailed consensus of the UK and EU positions on Citizens' Rights, ec.europa.eu.

[31] Art. 18, para. 2, of the Draft Agreement on the Withdrawal of the United Kingdom, cit.

[32] See L. AZOULAI, *Transfiguring European Citizenship: From Member State Territory to Union Territory*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, pp. 190-191. Also see R. BAUBÖCK, *Democratic Inclusion. Rainer Bauböck in Dialogue*, Manchester: Manchester University Press, 2017.

[33] At the time of writing, the prospect of a "no deal" outcome of the negotiations cannot be written off. See e.g. *The Dangerous Delusion of No Deal Brexit*, in *The Economist*, 2nd August 2018, www.economist.com.

II.3. The home State ransom and the fragility of supranational citizenship

Ultimately Brexit highlights an old feature of European supranational citizenship. European citizenship derives from and depends on the nationality of a Member State. In the language of the Treaties, it is "additional to", and does not replace national citizenship.[34] In scholarly comments, this dependence of European citizenship on nationality has been called a "birth defect",[35] and has warranted the epithet of "parasitic" for European citizenship.[36]

Brexit opens up a new perspective on the dependency of European citizenship on national citizenship. It shows how, in the context of Member State withdrawal, the derivation link between national and European citizenship becomes a short leash. By pulling that leash, the home Member State triggers all the angles of citizenship loss that are recorded in the above considered matrix. It can silence a European citizen's rights of movement and residence, actual and potential, as well as the transnational stakes that European citizenship comes with. Member State withdrawal lays bare, in other words, the fragility of supranational citizenship.

This revealed fragility corroborates the disenchantment with supranational citizenship that specialist literature already manifested from several directions. European citizenship has been accused, among others, of being a misnomer for a limited set of market rights.[37] Of real citizenship it misses, from this point of view, the social and solidarity sides. It has also been criticized for having been made dependent, in legislation and in jurisprudence, on the "law of taking the bus".[38] Its legal protection, in other words, is triggered only by reference to sometimes spurious cross-border links. Supranational citizenship creates and perpetuates, as a consequence, an artificial cleavage between mobile and static citizens.[39]

To these disaffected views, the experience of Member State withdrawal adds a further reason for complaint. It leads to question the very credibility of the project of supranational citizenship. The Court of Justice has repeatedly described Union citizenship

[34] Art. 20 TFEU.

[35] R. Bauböck, *The Three Levels of Citizenship in the European Union*, in *Phenomenology and Mind*, 2015, p. 67.

[36] G. Davies, K. Rostek, *The Impact of Union Citizenship on National Citizenship Policies*, in *European Integration Online Papers*, 2006, eiop.or.at.

[37] See A. Menéndez, *Which Citizenship? Whose Europe?*, cit.

[38] D. Kochenov, *On Tiles and Pillars: EU Citizenship as a Federal Denominator*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 41.

[39] R. Bauböck, *Citizenship in Cloud Cuckoo Land?*, in *Cloud Communities: The Dawn of Global Citizenship?*, *Global Citizenship Observatory*, 2018, globalcit.eu. Also see S. Iglesias Sánchez, *A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., pp. 390-391.

as "destined to be the fundamental status" for nationals of the Member States.[40] This promise of fundamental status embodies part of the legal heritage that the CJEU has ascribed to Member States' nationals. The CJEU has held in some of its seminal judgments that the now EU represents a "new legal order of international law", "the subjects of which comprise not only the Member States but also their nationals".[41] As a result, EU law is intended to confer upon individuals "rights which become part of their legal heritage".[42] The limitations of national sovereignty that European integration has entailed are aimed in part at protecting this legal heritage.

Brexit brings into stark relief the difficulty of reconciling the sovereign power of a Member State to withdraw with the host of individual rights that EU law confers on its natural person subjects. Some comments emphasize that the dismissal of part of that legal heritage is the price of democracy. And there is little that the Court can or should do to meddle with that.[43] This view forgets in part that the high stakes linked to the project of supranational citizenship are not the sole result of judicial enthusiasm. A precise political project,[44] endorsed by repeated democratic iterations,[45] was at the basis of what is now supranational citizenship. This was a project to foster a sense of belonging among the people of Europe through an entrenchment of their special rights.[46] These special rights and the legal heritage that European citizenship has then built around them constitute an important part of a body of law that several theorists, from Philip Jessup to Kaarlo Tuori, have identified as a first concrete example of transnational law.[47] The citizenship loss implications of Member State withdrawal question the very credibility, and reliability of this body of transnational law.

Ultimately, by reminding how short is the leash to which supranational citizenship is attached, Brexit reignites the old debate on the derived nature of European citizenship. The derivative link between national and European citizenship has lent itself to several perspectives of inquiry in the literature. A first perspective questions the nature of the

[40] See e.g., among many, *Grzelczyck*, cit., para 21; Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano* [GC], para 41.

[41] Court of Justice, judgment of 5 February 1963, case 26/62, *van Gend & Loos*.

[42] *Ibidem*.

[43] See e.g. M. VAN DEN BRINK, D. KOCHENOV, *A Critical Perspective on Associate EU Citizenship*, cit., pp. 14-15.

[44] See P. ADONNINO, *A People's Europe. Reports from the ad hoc Committee*, Bullettin of the European Communities 7/85, aei.pitt.edu. The *ad hoc* Committee second report stressed the importance of citizens' "special rights" in order to give the individual citizen a "clearer perception of the dimension and existence of the Community" and advanced a number of proposals in this sense.

[45] To the extent that the project has been realized through Treaty reform, and through secondary legislation.

[46] The European Council endorsed the second Adonnino report and approved its proposals in Milan on 28 and 29 June 1985, under the label "A People's Europe".

[47] See P. JESSUP, *Transnational Law*, New Haven: Yale University Press, 1956; K. TUORI, *On Legal Hybrids and Legal Perspectivism*, in M. MADURO, K. TUORI, S. SANKARI (eds), *Transnational Law. Rethinking European Law and Legal Thinking*, Cambridge: Cambridge University Press, 2014, p. 11 *et seq*.

relation between citizenship and nationality that this link suggests. Kochenov has argued, for instance, that nationality is the status that demarcates citizens from aliens, while citizenship is a set of entitlements.[48] A further perspective focuses on the source of the rights coming with supranational citizenship in light of the derivation link.[49] The same link invites to ponder the multi-level nature of European citizenship.[50]

Under the Brexit light, new nuances emerge for each of these perspectives. Can citizenship as a set of entitlements ever be delinked from nationality as a status? How resilient can the transnational rights linked to European citizenship otherwise be? And which is really the base layer for the multi-level construction of European citizenship?

As the matrix of citizenship loss reveals, all of these questions arise as a result of the home State ransom to which European citizenship is subject. If the home State of a European citizen pulls the leash, the very status of supranational citizenship is lost. This suggests to shift the focus, in the debate on the derivative character of European citizenship, from the latter's formal link of derivation from nationality to its substantive link to a home Member State. In particular, the nature and the elasticity of that link deserve some attention.

III. Citizenship protection between home and host State

III.1. Checks on the home State link

That the dependency on a home Member State endangers a European citizen's citizenship is not a novel finding. The link between a European citizen and his home Member State has been questioned before in this perspective.[51] On the one hand, in the interest of protecting European citizens' rights, EU law imposes some checks on that link. On the other hand, as part of the debate on protection of EU citizens' and British nationals' rights in the wake of Brexit, several potential options to sever, qualify or bypass the home Member State link have been considered in policy and political fora.

In the former respect, while the EU Member States are competent to determine who their nationals are, EU law imposes some checks on the way that determination is

[48] D. Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, in *Columbia Journal of European Law*, 2009, p. 169 *et seq.*

[49] See e.g. Y.N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe*, Chicago: The University of Chicago Press, 1994 (relevant rights are based in personhood rather than nationhood); also see F. Strumia, *In-Between the Lines of the High Court Brexit Judgment: EU Transnational Rights and their Safeguards*, in *EU Law Analysis*, 6 November 2016, eulawanalysis.blogspot.com.

[50] For reflections in this sense see e.g. E. Olsen, *European Citizenship: Mixing Nation State and Federal Features with a Cosmopolitan Twist*, in *Perspectives on European Politics and Society*, 2013, p. 505 *et seq.*; also see R. Bauböck, *The Three Levels of Citizenship*, cit.

[51] For an analysis of the limits of this link see e.g. D. Kochenov, *Ius Tractum of Many Faces*, cit., p. 171 *et seq*.

carried out.[52] At the time of the adoption of the Treaty of Maastricht, the Member States annexed a declaration to the Treaty, to the effect that "the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned".[53] The conclusions of the Edinburgh European Council of December 1992 reiterated the point.[54] The case law of the Court of Justice has long recognized that it is for each Member State to lay down the conditions for the acquisition and loss of its nationality.[55]

However the Court has reiterated that the relevant competence must be exercised "with due regard" to EU law, thereby introducing a check on the way the Member States establish and rescind the link with their own nationals. The court first introduced this proviso, as an *obiter dictum*, in the *Micheletti* case,[56] which concerned recognition of the nationality of a Member State on the part of another Member State for purposes of the exercise of EU law rights. It reconfirmed it in the 2001 *Kaur* case,[57] which revolved around the role of unilateral declarations annexed to the Accession Treaty of the UK in determining who British nationals are for purposes of Community law. The ruling in the 2002 *Chen* case,[58] again concerning in relevant part recognition of nationality of a Member State on the part of another Member State reiterated the proviso. Most recently, the Court confirmed and clarified the proviso in the 2010 *Rottmann* case,[59] concerning withdrawal of a Member State nationality resulting in the loss of EU citizenship.

Mr. Rottmann, originally an Austrian national, naturalized as a German national. Under relevant Austrian law, he automatically lost Austrian nationality upon acquiring German nationality. Mr. Rottmann omitted to mention in his application for naturalization in Germany that he was subject to criminal proceedings in Austria. When the German authorities became aware of this, they withdrew Mr. Rottmann's German nationality on the ground that he had acquired German nationality through deception. Upon losing Germany nationality, Mr. Rottmann would not automatically reacquire Austrian nationality, and would thus lose European citizenship and possibly remain stateless. Mr. Rottmann brought an action for annulment of the withdrawal decision and in the course of the ensuing litigation, the German federal administrative court referred two questions to the CJEU. It asked, in substance, whether EU law prevented either Germany or Austria from applying their respective nationality laws, in a situation where such application would lead

[52] Court of Justice, Judgment of 2 March 2010, case C-135/08, *Rottman* [GC], paras 39 and 48.

[53] Declaration no. 2 annexed to the Treaty of Maastricht.

[54] Conclusions of the Presidency, Edinburgh European Council of 11-12 December 1992, p. 53.

[55] See e.g. Court of Justice, judgment of 7 July 1992, case C-369/90, *Micheletti and others*, para. 10; Court of Justice, judgment of 20 February 2001, case C-192/99, *Kaur*, para. 19.

[56] *Micheletti and others*, cit., para. 10. Also see Court of Justice, judgment of 19 October 2004, case C-200/02, *Zhu and Chen*, para. 37.

[57] *Kaur*, cit.

[58] *Zhu and Chen*, cit.

[59] *Rottmann* [GC], cit.

to a European citizen losing European citizenship and possibly remaining stateless.[60] The Court held that a decision to withdraw nationality in a similar situation is not contrary to EU law and particularly to the provision on European citizenship, provided that such decision respects the principle of proportionality.[61] The thrust of the *Rottmann* judgment is that a decision on nationality which results into the loss of Union citizenship must be proportional in light of the consequences it entails for the person concerned and his family 'with regard to the loss of the rights enjoyed by every citizen of the Union'.[62] To be proportional, the relevant determination must strike an acceptable balance between public interests and individual interests.[63] In other words, the *Rottmann* rule invites national courts to "weigh considerations relating to the national interest [...] against the significance of losing EU citizenship".[64] In this way, the *Rottmann* judgment sets some clear limits against the exercise of the home Member State ransom.

Relevant limits, albeit considered in the literature,[65] cannot help protect the rights of European citizens that are lost in conjunction with a Member State's secession. The type of individual assessment that the *Rottmann* ruling prescribes is not viable in the context of collective loss of citizenship rights as in the case of Member State withdrawal. In the context of Brexit other options have been rather considered to protect citizens' rights from the consequences of the home Member State ransom.

Among these, the ALDE group in the European Parliament has advocated the introduction, as part of the UK withdrawal arrangements, of a form of associate European citizenship.[66] Associate citizenship would be extended to willing British nationals in ex-

[60] *Ibid.*, paras 22-35.

[61] *Ibid.*, para. 59.

[62] "In such a case, it is, however, for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law. Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality." *Ibid.*, paras 55 and 56.

[63] See G. DAVIES, *The Entirely Conventional Supremacy of Union Citizenship and Rights*, in J. SHAW (ed.) *Has the Court of Justice Challenged Member State Sovereignty in Nationality Law?*, *EUI Working Papers*, no. 62, 2011, p. 9.

[64] See J. SHAW, *Setting the Scene: the* Rottmann *Case Introduced*, in J. SHAW (ed.), *Has the Court of Justice Challenged Member State Sovereignty in Nationality Law?*, cit., p. 4.

[65] G. DAVIES, *Union Citizenship. Still Europeans' Destiny after Brexit?*, in *European Law Blog*, 7 July 2016, europeanlawblog.eu.

[66] See European Parliament Committee on Constitutional Affairs, Draft Report of July 2016 on possible evolutions of and adjustments to the current institutional set-up of the European Union, amendment

change for a monetary fee. The proposal has raised much criticism.[67] However, a detailed study has considered it legally feasible within the frame of the existing treaties.[68]

Relying on the possibilities enabled by the existing treaties frame from a different direction, several European Citizens' Initiatives have further challenged the dependency of European citizens' status on a home Member State. A first initiative aims at severing the link between nationality and European citizenship for European citizens affected by Brexit.[69] A second more ambitious initiative labelled "Permanent European Union Citizenship" was submitted in May 2018, following on a previous, now closed, initiative titled "Retaining European Citizenship".[70] A further now closed initiative aimed at enabling the issuance of European passports to British nationals following Brexit.[71] While all these attempts have so far struggled to reach any significant consensus, they do signal the unease that Brexit has raised with the current frame for supranational citizenship rights.[72]

Beyond the policy proposals seeking to emancipate the status of European citizens from the home Member State link, legal avenues to protect citizens' rights despite that link have also been considered.[73] In particular, the possibility to protect European citizens' rights as acquired rights under international law has received early attention in the debate surrounding Brexit.[74] The Vienna Convention on the Law of Treaties and the ECHR represent potential avenues to treat European citizens' rights threatened by Brexit as acquired rights. Both options offer however only weak protection. Relevant provisions of the Vienna Convention protect, in the context of a treaty's termination, the acquired rights of State parties rather than the rights of individuals affected beyond State

882. Also see C. GOERENS, *European Associate Citizenship*, in *Charlesgoerens.eu Blog*, 2017, www.charlesgoerens.eu; G. AUSTIN-GREENALL, S. LYPINSKA, *Brexit and Loss of EU Citizenship: Cases, Options, Perceptions*, in *Citizen Brexit Observatory*, October 2017, ecas.org, pp. 8-10.

[67] See M. VAN DEN BRINK, D. KOCHENOV, *A Critical Perspective on Associate EU Citizenship*, cit.

[68] V. ROEBEN, J. SNELL, P. TELLES, P. MINNEROP, K. BUSH, *The Feasibility of Associate EU Citizenship for UK Citizens post-Brexit*, Study for Jill Evans MEP, 2017, www.greens-efa.eu.

[69] See the initiative *Flock Brexit, EU Citizenship for Europeans: United in Diversity in Spite of jus soli and jus sanguinis*, www.flockbrexit.eu.

[70] See the initiative *Permanent European Union Citizenship*, www.eucitizen2017.org.

[71] See the initiative *European Free Movement Instrument (Choose Freedom Initiative)*, choosefreedom.eu.

[72] For an analysis see G. AUSTIN-GREENALL, S. LYPINSKA, *Brexit and Loss of EU Citizenship*, cit., pp. 9-10.

[73] That is legal avenues beyond any ad hoc arrangement entailed in the withdrawal agreement or agreement on the future UK-EU relation.

[74] See e.g. House of Lords, European Union Committee, *Brexit: acquired rights*, HL 2016-17, p. 82; A. FERNÁNDEZ TOMÁS, D. LÓPEZ GARRIDO, *The Impact and Consequences of Brexit on 'Vested' Rights of EU Citizens Living in the UK and British Citizens Living in the EU-27*, *Study for the AFCO Committee*, 2017, www.europarl.europa.eu; S. DOUGLAS-SCOTT, *What Happens to 'Acquired Rights' in the Event of a Brexit*, in *UK Constitutional Law Association Blog*, 2016, ukconstitutionallaw.org; M. WAIBEL, *Brexit and Acquired Rights*, in *American Journal of International Law Unbound*, 2017, p. 440 *et seq.*

parties.[75] And the ECHR only protects European citizenship rights to the extent these overlap with human rights protected under the Convention. Many key European citizenship rights have no corresponding right under the Convention.[76]

Brexit has thus raised much attention to the possibility of protecting rights of European citizenship through reforming, mitigating or working around the home Member State link. Much less attention has been paid to the balance between home and host Member State links in the experience of supranational citizenship, and to the possible shifts in that balance that Member State withdrawal may inspire or justify. The doctrine of real links offers a vantage point for a reflection in this sense. It governs, in EU law, the respective responsibilities of home and host Member States towards citizens in the exercise of their supranational rights.

III.2 Real links between home and host Member States

Real, or genuine, link tests apply in several areas of EU citizenship and free movement law. In spite of a certain semantic variety in the way they are framed in legislation and case law – genuine or real links to the competent Member State,[77] degrees of integration in society,[78] connections to the employment market of a Member State,[79] degrees of connection to society[80] – relevant tests point in a common direction. They bring considerations of social integration, in a host or home Member State, to bear on the award and distribution of citizenship rights and protections. In particular, they are deployed in two ways. First, they apply as an eligibility criterion for entitlements and benefits. Second, they warrant security of status.

In the former respect, the search for genuine links proving social integration balances the EU law imperative of non-discrimination with the host Member States' recognized interest in fending off undue burdens on their public finances.[81] Social integration becomes a condition of eligibility for fruition of a range of state awarded benefits on an equal treatment basis with nationals of a host Member State. Students, for instance, are eligible for maintenance aid only after five years of uninterrupted residence in a host Member State. In the case law, this residence requirement that is codified in the Citi-

[75] Art. 70, para. 1, let. b) of the Vienna Convention on the Law of the Treaties. Also see International Law Commission, *Draft Articles on the Law of Treaties with commentaries – Commentary to draft Art. 66*, in *Yearbook of the International Law Commission*, 1966, para. 3.

[76] See G. Austin-Greenall, S. Lypinska, *Brexit and Loss of EU Citizenship*, cit., pp. 12-13. An example are political rights conferred by European citizenship. The ECHR gives no protection to relevant rights.

[77] See Court of Justice: judgment of 11 July 2002, case C-224/98, *D'Hoop*, para. 38; judgment of 21 July 2011, case C-503/09, *Stewart*, para. 92.

[78] Court of Justice, judgment of 18 November 2008, case C-158/07, *Förster* [GC], para. 49.

[79] Court of Justice, judgment of 23 March 2004, case C-138/02, *Collins*, para. 71.

[80] Court of Justice, judgment of 22 May 2008, case C-499/06, *Nerkowska*, para. 39.

[81] Court of Justice, judgment of 15 March 2005, case C-209/03, *Bidar* [GC], para. 56.

zenship Directive,[82] is justified as a means to prove a degree of social integration in the host Member State society.[83] On similar grounds, residence requirements can condition the award of jobseekers' allowances.[84] They can be a legitimate means to prove that the claimant is genuinely seeking employment hence warranting a genuine connection between the claimant and the host Member State's employment market.[85]

From a different perspective, social integration is also at the basis of a European citizen's right of permanent residence in a host Member State after five years of continuous residence.[86] The Court has emphasized this point in holding that periods of imprisonment cannot count towards achievement of the relevant right and that they interrupt continuity of residence.[87] They negate indeed the degree of integration that is – according to the Court – at the very basis of the concept of permanent residence.[88]

As a condition of eligibility for rights, genuine link tests apply not only in respect of host Member States, but also in respect of home ones. With regard to students' finance, the Court has repeatedly recognized the legitimate interest of home Member States in conditioning the exportability of awards on the part of home students to the establishment of a real link to their society.[89] With regard to jobseekers' allowances, the Court has recognized that home Member States have, like host ones, a legitimate interest in testing the genuine link between the claimant and their geographical employment market.[90] Enlarging the reasoning to welfare benefits in general, the Court has found, in a case concerning a home Member State, that it is a legitimate interest of the Member State competent to award a benefit, whether home or host Member State, to seek to ascertain a genuine link with the claimant.[91] According to the Court, home Member States may legitimately resort to a range of elements to corroborate that link in case of

[82] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[83] *Bidar* [GC], cit. paras 57 and 59; *Förster* [GC], cit., paras 51-54.

[84] Art. 24, para 2, of Directive 2004/38 carves out social assistance for jobseekers from the guarantee of equal treatment for migrant EU citizens. However the CJEU clarified in *Vatsouras* that "benefits of a financial nature intended to facilitate access to the employment market" are not social assistance. Court of Justice, judgment of 4 June 2009, joined cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, para. 45.

[85] *Collins*, cit., paras 69-72; *Vatsouras*, cit., paras 38-40.

[86] Directive 2004/38, art. 16.

[87] Court of Justice, judgment of 16 January 2014, case C-378/12, *Onuekwere*, paras 24-25; also see judgment of 16 January 2014, case C-400/12, *G*, para 38.

[88] *Ibidem*.

[89] See e.g. Court of Justice: judgment of 26 February 2015, case C-359/13, *Martens*; judgment of 18 July 2013, joined cases C-523/11 and C-585/11, *Prinz and Seeberger*. Also see F. Strumia, C. Brown, *The Asymmetry in the Right to Free Movement of European Union Citizens: the Case of Students*, in *EU Law Analysis*, 12 July 2015, eulawanalysis.blogspot.co.uk.

[90] *D'Hoop*, cit., paras 38-39.

[91] *Stewart*, cit., paras 89-90.

welfare claims from their own nationals. Relevant elements include for instance past presence, connection to the social security system, portion of life spent in the home Member State.[92]

If in the case of host Member State cases genuine link tests work to limit the financial burdens imposed by equal treatment obligations, in the case of home ones they work as a limit to the financial burdens imposed by the obligation not to discourage the exercise of free movement.[93] In practice, the design of genuine link tests on the part of home Member States attracts stricter scrutiny on the part of the CJEU.[94] In theory, the recognition of comparable legitimate interests of respectively host and home Member States points to a further function of the assessment of social integration in EU law. The latter works as a criterion for allocation of responsibility for citizens between home and host Member States.

Resort to such an allocation criterion lends support to accounts emphasizing European citizenship's reliance on residence rather than on nationality. Residence triggers host Member States' responsibility. And absence of residence weakens the responsibility of Member States of nationality. Gareth Davies who famously saw supranational citizenship rights "anywhere one hangs his hat" considered this reliance on residence a natural outcome of the principle of equal treatment for migrant citizens.[95] Along similar lines, Daniel Thym has interpreted recent case law on benefits as pointing to an integration model of supranational social citizenship.[96] Strength of entitlement is proportional to duration of residence. Accounts of this type have fostered a degree of disenchantment with the role of nationality in the EU.[97]

Brexit reemphasizes supranational citizenship's dependency on nationality. Allocation of responsibility for citizens through the scrutiny of genuine links however weakens the implications of that dependency. Even if supranational citizenship itself lays its roots in nationality, the entitlements that come with it have shifting roots. Depending on a

[92] *Stewart*, cit., paras 93-101.

[93] See e.g. *Prinz and Seeberger*, cit., para. 36.

[94] Emblematic is the case of student finance. See F. STRUMIA, C. BROWN, *The Asymmetry in the Right to Free Movement*, cit.

[95] G. DAVIES, *"Any Place I Hang My Hat?" or: Residence is the New Nationality*, in *European Law Journal*, 2005, p. 55.

[96] D. THYM, *The Evolution of Citizens' Rights in Light of the EU's Constitutional Development*, in D. THYM (ed.), *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU*, Oxford: Hart Publishing, 2017, p. 111 *et seq*. Also see Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes* [GC], paras 56 and 58.

[97] See e.g. G. DAVIES, *"Any Place I Hang My Hat?"*, cit.; D. KOCHENOV, *Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship*, in *EUI Working Papers*, no. 23, 2010. But see O'BRIEN, *Real Links, Abstract Rights and False Alarms*, cit., p. 654 (real links preserve the emotional value of national attachments).

European citizen's place of real social integration, they may ripen in host or home Member States.

The second function of genuine links and social integration, as a guarantee of security of status, corroborates the point. In respect of host Member States social integration protects status from loss through expulsion and deportation. Social and cultural integration is one of the factors that a host Member State has to weigh, together with length of residence, before subjecting a European citizen to an expulsion decision on grounds of public policy or public security.[98] With duration of residence, expulsion decisions become subject to more exacting requirements. A permanent resident European citizen can be expelled only on serious grounds of public policy or public security.[99] A European citizen who has resided in the host Member State for ten years can only be expelled on imperative grounds of public security.[100] On the one hand, the weight given to duration of residence for purposes of protection from expulsion suggests an implied presumption of social integration. Length of residence is one of the main elements deployed in EU law as a proof of real connection to, and social integration in, the society of a Member State. On the other hand, the case law emphasizes that even when the threshold of serious grounds of public policy or public security, or imperative ground of public security, are met, the public interest must be weighed against the position of the offender European citizen. In particular, national authorities have to consider, on a case by case basis, the solidity of the European citizen's social, cultural and family ties with the host Member State. They have to assess, in other words, his social integration.

In respect of home Member States genuine links protect status from the erosive effect of experiences of free movement. This protective effect can be detected in case law concerning benefits that are an expression of a national community's cohesiveness and mutual solidarity, such as for instance compensation for war victims. These benefits are outside the material scope of EU law, hence Member States are competent to decide on their award and withdrawal. However they are bound to respect EU law in the exercise of that competence. In particular they cannot act in a way that deters free movement, unless they pursue a legitimate competing purpose. The Court has found that one such legitimate purpose is seeking to establish that there is a connection between the recipient of a war victims benefit and the society of the awarding Member State.[101] In this context, the connection requirement does not work as a criterion to allocate responsibility for a citizenship benefit between home and host Member States. Responsibility for a war victim benefit cannot be transferred to a host Member State. The requirement rather works as a guarantee of enduring status in the home Member State. Free

[98] Directive 2004/38, Art. 28, para. 1.
[99] *Ibid.*, Art. 28, para. 2.
[100] *Ibid.*, Art. 28, para. 3.
[101] See e.g. *Nerkowska*, cit., para. 37.

movement albeit not comparable to an experience of expatriation may diminish the status of a national in his home Member State. It may force him out of the inner circle of belonging that justifies obligations of mutual solidarity. The survival of those obligations may however be justified by additional factors corroborating nationality and evidencing enduring membership in the society of people of the home Member State. Hence the status-protective role of genuine links tests in this domain.

This second function of genuine links suggests that nationality, albeit still holding the formal ropes from which European citizenship hangs, tends to lose relevance over the course of a supranational citizen's cross-border experience. Once a national leaves a home Member State to exercise free movement, nationality may need to be corroborated by other factors to prove an enduring connection to the home Member State. And once a European citizen has entered a Member State other than the one of nationality, he gradually earns status there based on factors other than nationality. Free movement thus triggers a broader system of assessment of belonging in the different parts of a supranational sphere encompassing both home and host Member State.[102] Within this broader sphere, nationality becomes just one of a host of citizenship enabling factors.[103]

Through resizing the role of nationality as an enabling factor for supranational citizenship, social integration increases the relevance of host State links. These links may help shield supranational citizenship from the home State ransom. The potential of the concept of social integration in this sense may be better grasped through extending the analysis to embrace international law. International law jurisprudence on the right to cross-border movement recognizes to social integration a role similar to that emerging in EU free movement law. Social integration contributes, in relevant jurisprudence, to resize the role of nationality in defining the link that warrants an individual's right to enter a country.

III.3. Social integration and the right to enter a country in International law

The right to international free movement is codified in several international law instruments. These include, among others, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the ECHR.[104] In all these instruments, the right to international free movement is defined as

[102] For an account of this broader sphere, see L. Azoulai, *Transfiguring European Citizenship*, cit., pp. 190-191.

[103] In this sense, recent case law of the Court of Justice has assessed the obligations of host Member States in respect of protection from extradition of EU citizens other than their own nationals. See Court of Justice: judgment of 6 September 2016, case C-182/15, *Petruhhin* [GC]; judgment of 10 April 2018, case C-191/16, *Pisciotti* [GC]; order of 6 September 2017, case C-473/15, *Adelsmayr*.

[104] Art. 13 UDHR; Art. 12 ICCPR; Arts 2 and 3 of Protocol 4 to the ECHR.

the composition of two halves. The first half is the right to leave any country, including one's own. The second half is the right to enter one's own country.[105]

The concept of one's own country, for purposes of this international right of entry, is a rather fuzzy one. In some instruments, the right to entry is clearly linked only to the country of nationality.[106] Others refer to the vaguer concept of one's own country.[107]

The most advanced interpretation of what counts as one's own country has emerged through the application of the provisions of the ICCPR on the part of the UN Human Rights Committee. Ever since its adoption of a General Comment on the Right to Free Movement in 1999,[108] the Human Rights Committee has been at the vanguard of the interpretation and application of the relevant right in international law. In particular, the Committee has repeatedly engaged with the right to enter one's own country, prompting an evolution in the definition of the latter concept. It is in the jurisprudence of the Committee in the context of individual communications that social integration has gained a prominent role in this respect.

Already in the 1999 General Comment, the Committee clarified that 'one's own country' is meant as a broader concept than country of nationality. It encompasses at the very least – in the view of the Committee– the countries with which a person has special ties or claims beyond those of a "mere alien".[109] As examples of relevant ties, the General Comment refers to a series of hypotheses of undue manipulation of a person's nationality. These include, for instance, arbitrary deprivation of nationality in violation of international law, denial of nationality in conjunction with the absorption of a country within a new or different national entity, and arbitrary denial of nationality to stateless persons.[110] The General Comment hints however that the list is open and other types of links and ties may qualify a country as one's own. While it does not further define those links and ties, it refers explicitly to the rights of permanent residents in respect to a country of residence.[111] Thereby impliedly opening the way to considerations of social integration.

As to the Committee's approach in communications based on individual complaints of infringement of the international law right to entry, two phases may be distinguished. In an earlier phase going until the early year 2000s, the Committee maintained a more conservative attitude towards the concept of "own country". While reiterating that this is

[105] For an analysis of the relative weight of the two halves respectively in the EU and international law right to free movement, see F. Strumia, *Reassessing the Uncertain Prospects of Free Movement of Persons: A Third Way between the "Economic' and the "Constitutional' Model*, paper presented at the EUSA fifteenth biennial conference, Miami, 4-6 May 2017.

[106] See e.g. Art. 3, para. 2, of Protocol 4 to the ECHR.

[107] Art. 12, para. 4, ICCPR.

[108] Human Rights Committee (CCPR), General Comment no. 27 (1999) on Article 12 (freedom of movement) of 1 November 1999, CCPR/C/21/Rev.1/Add.9.

[109] *Ibid.*, para. 20.

[110] *Ibidem*.

[111] *Ibidem*.

a broader concept than nationality, the Committee in this first phase stopped short of engaging in social integration scrutiny. The seminal case in this phase is *Stewart v. Canada*,[112] in which the Committee examined the complaint of a Scotland-born British national who had lived since the age of seven in Canada, where he was a permanent resident. He had acquired a substantial criminal record in Canada, which eventually made him subject to deportation. The Committee found that Stewart could not claim protection of his right to remain in Canada under the ICCPR as Canada had not become his "own country". Stewart had entered Canada under its immigration laws and would have had the opportunity to apply for nationality. The fact that he refrained from doing so, and disabled himself from doing so through committing crimes, had to be taken as an indication that he had opted to remain an alien.[113] The majority's decision in *Stewart v. Canada* raised however a fierce dissent. Dissenters pointed to the importance of notions of social membership for purposes of assessing whether a country is a person's own. They emphasized that the relevant provision of the ICCPR is concerned with the "strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it".[114] They added that there are factors other than nationality that may create a connection between an individual and a country stronger than the one created by nationality. Among possible factors in this sense, they considered long standing residence, close personal and family ties, and intention to remain, together with the absence of ties to other countries.[115]

While the Committee remained on the position taken in *Stewart* in the subsequent case of *Madafferi v. Australia* decided in 2006,[116] the 2010 communication in *Nystrom v. Canada* inaugurated a new phase in the Committee's appraisal of the concept of own country.[117] The dissenters' view in *Stewart* became the voice of the majority. Nystrom was a Swedish national born in Sweden during his Australian-resident mother's temporary visit to some relatives there. At 27 days old he followed his mother to Australia, where he had since lived. He spoke no Swedish and had no contacts with his relatives in Sweden. He lived in Australia thinking of being a citizen. However when he accrued a substantial criminal record, Australia decided to cancel his transitional visa and to deport him to Sweden. Nystrom claimed that Australia had become his "own country". This time the Committee found in his favour. In drawing its conclusions, the Committee

[112] Human Rights Committee (CCPR), Views of 1 November 1996, communication no. 538/1993, *Charles E. Stewart v. Canada*.

[113] *Ibid.*, paras 12.5 and 12.8.

[114] *Ibid.*, Individual opinion of Elizabeth Evatt and Cecilia Medina Quiroga, cosigned by Francisco José Aguilar Urbina, para. 5.

[115] *Ibid.*, para. 6.

[116] Human Rights Committee (CCPR), Views of 26 August 2004, communication no. 1011/2001, *Francesco Madafferi and Anna Maria Immacolata Madafferi*.

[117] Human Rights Committee (CCPR), Views of 18 July 2011, communication no. 1557/2007, *Nystrom v. Australia*.

appropriated the view of the dissenters in *Stewart* and relied on the strong ties that Nystrom had to Australia.[118] In particular, the Committee referred to the length of Nystrom's residence in Australia, to the fact that he was treated there in many respects like a citizen as he could vote in local elections and serve in the army, to his family ties, his knowledge of the language, and the absence of any ties to Sweden.[119]

A few years later, in *Warsame v. Canada*, the Committee reiterated similar reasoning.[120] Warsame was born in Saudi Arabia of Somali parents. He had never been to Somalia and never claimed his citizenship there. He had lived in Canada since the age of four and was a permanent resident there. Because of his criminal record he had become subject to deportation and as a defence claimed that Canada was his "own country" under the ICCPR. The Committee resorted once again to the special ties rationale.[121] It recognized that Canada was Warsame's own country within the meaning of the ICCPR in consideration of his having lived all his conscious life there and having received there all his education.[122] The absence of any meaningful ties to Somalia corroborated the Committee's conclusion.[123]

Social integration, under the semblances of the "special ties" that bind a person to a country other than the one of nationality, has thus gained a central place in the jurisprudence of the Human Rights Committee. It has become a determining factor in identifying the enduring and consequential connections between a person and a country that allow designating the latter country as the former person's own. In this sense, in international law social integration brings the resizing in the role of nationality that was evidenced in EU law one step further. Beyond being a beacon of status and a condition for rights, social integration acts here as the trigger, alternative to nationality, of a relation of belonging between a person and a country. In this international law capacity, social integration holds the potential to further problematize the derivation link of European citizenship from nationality.

III.4. Protecting supranational citizenship through host State links

Even just as an intellectual exercise, the transposition of the international law "own country" frame to the EU law domain is not without obstacles. In international law one of the factors considered in the assessment of whether a country is a person's own is the absence of ties to other countries.[124] Absence of any such ties strengthens a mi-

[118] *Ibid.*, para. 7.4.

[119] *Ibid.*, para. 7.5.

[120] Human Rights Committee (CCPR), Views of 1 September 2011, communication no. 1959/2010, *Jama Warsame v. Canada*.

[121] *Ibid.*, para. 8.4.

[122] *Ibid.*, para. 8.5.

[123] *Ibidem*.

[124] See e.g. *Nystrom v. Australia*, cit., para. 7.4.

grant's claim for entry. In the case of European citizens, the right to enter a host Member State depends on the very existence of ties, in the form of nationality, to another Member State. Free movement within the EU is not meant to sever a citizen's ties to the Member State of origin.[125] It entails exit from a home Member State, but not expatriation. The European citizen earns his integration in a host Member State while retaining intact his links to the Member State of nationality. In a strict application of the Human Rights Committee "own country" test, this permanence of links to a home Member State would weaken the claim of the European citizen in respect of the host Member State. However, ties to a country of origin are, also in the international law context, one of several factors playing a role in the assessment of whether a country is a person's own. The EU law context warrants holistic consideration of all such factors. It is the peculiarity of European citizenship that it offers the opportunity to articulate one's life between two or more Member States, retaining simultaneous links to all of them. For European citizens, in other words, ties to a Member State of nationality and ties to a host Member State are not in competition, but rather complementary or even parallel. The presence of the former says little as to the intensity of the latter.

Whether through the EU law doctrine of genuine links, or through resort to the international law definition of one's own country on the basis of social membership, social integration ultimately points to a shift in European citizenship's link to an underlying national space. It shows how throughout the development of a citizen's cross border experience, that link shifts, in a number of respects, from a derivation link to a home Member State to an attachment link to a host Member State. The EU law doctrine of genuine links evidences a shift in respect of the rights and status descending from supranational citizenship. The international law doctrine of social membership for purposes of the definition of one's own country inspires a shift in respect of the source of a European citizen's belonging in a host Member State. In international law, social integration changes the relation between a person and his host country from one of hospitality into one of belonging. In the EU context, the relation between a European citizen and his host Member State is originally one of heightened hospitality, rooted in mutual recognition, on the part of the Member States, of the rights and status of their respective nationals.[126] With the European citizen's gradual integration, that relation potentially becomes one of direct belonging. This transformative view of the relation between citizen and host Member State, albeit inspired by international law, finds support in a recent holding of the Court of Justice. The Court suggested in the *Lounes* ruling that "the rights conferred on a Union citizen by Art. 21(1) TFEU [...] are intended among oth-

[125] But see G. DAVIES, *"Any Place I Hang My Hat?"*, cit., p. 53.

[126] F. 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*, in *European Law Journal*, 2016, pp. 437-441.

er things to promote the gradual integration of the Union citizen concerned in the society of the host Member State".[127]

The shifting character of the derivation link discloses in turn a new perspective for the protection of supranational citizenship in the context of Member State's withdrawal. It warrants close scrutiny of a supranational citizen's host Member State links, before dismissing European citizenship entirely together with loss of Member State nationality status. But how exactly can host Member State links protect supranational citizenship? They certainly cannot sever and replace, as things stand, home Member State nationality as the formal source of European citizenship. They can nonetheless serve several other functions.

First, they are a tool in the hands of politicians in the context of withdrawal negotiations. On the one hand they have already been deployed in this respect. The status that the draft withdrawal agreement designs for EU citizens in the UK and British nationals in the EU is a celebration of host Member State links. It is after all but the result of mutual recognition, between the EU Member States on the one hand, and the UK on the other one, of the rights and status of a minority of sufficiently integrated intra-EU migrants.[128] On the other hand, host Member State links could be acknowledged as a general principle orienting the negotiation of further open points. It has been argued that Brexit prompts a transition from the realm of supranational to that of international law, where reciprocity is a key rule.[129] The doctrine of genuine links that, as has been seen, has developed in both supranational and international law, and to some extent sits across the two domains, is well equipped to weather that transition. In particular, host State links could work as a corrective principle, standing for the individual interests of citizens against the sometimes capricious character of reciprocity.

Second, host Member State links are a tool in the hands of administrators called to implement the withdrawal arrangements, as well as of adjudicators. They can work as a criterion of interpretation of the eventual UK withdrawal agreement. On the one hand they could be at the basis of a set of guidelines on the application and implementation of the final withdrawal agreement. Relevant guidelines could help handle the cases of citizens who have troubles evidencing the residence requirements prescribed in the withdrawal arrangements. This could be the case, for instance, of citizens who have been dividing their time between the UK and another EU Member State in part-year residency arrangements. On the other hand, relevant links could help courts, whether the UK ones or the Court of Justice, in reviewing the position of any classes of citizens who may have fallen through the cracks of the withdrawal arrangements. These may in-

[127] *Lounes* [GC], cit., para. 56.

[128] On the grounding of Union citizenship in mutual recognition of belonging, see F. STRUMIA, *Supranational Citizenship and the Challenge of Diversity. Immigrants, Citizens and Member States in the EU*, Martinus Nijhoff, 2013, pp. 278-314.

[129] M. VAN DEN BRINK, D. KOCHENOV, *A Critical Perspective on Associate EU Citizenship*, cit., p. 18.

clude, for instance, citizens who cannot meet the employment status and resources requirements for lawful residence as they have been acting as carers for family members through informal arrangements. Host State links' role as a source of belonging warrants the taking into account, in relevant situations, of a broader range of factors than length and continuity of residence, in assessing individual claims towards host Member States. Similarly, host Member State links could provide a default criterion of adjudication to courts, should the negotiations, and the resulting citizen protective arrangements, fall apart. Failing EU and national law, international law would become the very regime of reference to address citizenship protection instances. The Human Rights Committee "own country" jurisprudence could become directly relevant in a similar scenario.

Third, links to a host State can be a tool in the hands of supranational legislators. They could inspire a post Brexit rethinking of the link between national and supranational citizenship. A rescission of the derivation link of supranational citizenship from national one is unlikely to make the agenda of integration. However a redefinition of European citizenship's link to a national space that allowed it to shift, on the ground of social integration, from home to host Member States would go a long way in entrenching the status of supranational citizenship. A similar reform would respond to the citizenship threats that Brexit has highlighted. However it would be less contentious than some of the existing proposals to protect European citizenship by severing its link to a national citizenship. In particular, other than an associate European citizenship, a European citizenship based on a shifting Member State link would not postulate a vertical link between Union and citizens that would be as hard to establish as it would be to justify. It would rather rely on the shifting of the link of derivation of supranational citizenship from nationality of a Member State of origin to, possibly, residence in a host Member State. This shifting link would also not question the grounding of supranational citizenship in the mutual recognition, on the part of the Member States, of the status and entitlements of their respective nationals. Hence preserving the horizontal and derivative character of European citizenship.[130]

And lastly, host State links can be a tool in the hands of thinkers, whether jurists or philosophers or political theorists, to reconceptualize supranational citizenship even beyond the Brexit context. The above suggested perspectives focus on the situation of migrant citizens, whether British nationals in the EU or EU citizens in the UK. These are the citizens that Brexit most immediately and directly affects. Hence they have monopolized the attention in citizenship debates and negotiations. As Gareth Davies points out, "bad luck for the Brits who stayed at home".[131] And bad luck for those quadrants of the citizen-

[130] On the horizontal character of European citizenship, see F. STRUMIA, *Individual Rights, Interstate Equality, State Autonomy: European Horizontal Citizenship and Its (Lonely) Playground from a Trans-Atlantic Perspective*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 615 *et seq.*

[131] G. DAVIES, *The State of Play on Citizens' Rights after Brexit*, in *European Law Blog*, 6 February 2018, europeanlawblog.eu.

ship loss matrix that do not make it to the eye of the public. Bad luck, that is, unless the citizenship implications of Member State withdrawal prompt a more profound reflection on supranational citizenship. This reflection would have to touch upon the weight of supranational citizenship for static citizens. It would have to consider the stakes that supranational citizenship could and should entail for static citizens in Member States other than their own. Those stakes could be enabled by virtual membership opportunities. And they could be protected through a theory of virtual host Member State links.[132]

Ultimately, engaging host Member State links as a means of citizenship protection yields some novel answers to old questions in the debate on the derivative character of supranational citizenship. The relation between national and supranational citizenship is confirmed as one of derivation. Yet it emerges that the link between supranational citizenship and an underlying national space can shift from home to host Member States over the course of a citizen's cross-border experience. The latter experience does not only activate the transnational rights that European citizenship promises. It gives them resilience by weaving genuine, albeit possibly virtual, links to a host Member State. As those links ripen into stakes in a community other than the one of nationality, European citizens' transnational rights become entrenched. Hence the nature of the base layer for European citizenship's multi-level architecture becomes clearer: that base layer is national in quality, but it is shifting in position.

IV. Conclusion

Lawyers, historians and curious observers from various perspectives will maybe wonder in a few decades what Brexit felt like to scholars a few months before it was due to actually happen. Perhaps some survivors will relate that, between the euphoria of its proposers, and the depression of its disaffected opponents, a certain Brexit fatigue had begun to emerge in academia. A spur of papers, conferences, special issues, *ad hoc* reports, specialist studies had engendered a degree of scholarly exhaustion.

Yet every event, for however doomed, makes history. And hence opens up learning perspectives. Other than a non-issue, an exercise in democracy, or a destiny's joke, Brexit can be seen as a test in the evolution of the troubled notion of supranational citizenship, calling for its mechanisms to engage their next gear.

This *Article* has taken the latter perspective as inspiration to fight back the Brexit exhaustion and as a lens to inform its quest on citizenship. While the debate on citizens' rights in the context of Brexit has focused so far either on plugging the most immediate holes, or in rethinking entirely the architecture of European citizenship, this *Article* has questioned supranational citizenship's ability to adapt to its next challenge. It has found

[132] For an initial reflection in this sense see, F. Strumia, *Global Citizenship for the Stay-at-Homes, in Cloud Communities: The Dawn of Global Citizenship?*, cit.

two answers to its quest. First, there is no need to question supranational citizenship's derivative status and its hanging from national level belonging. Second, and notwithstanding this, social integration, under the semblances of a range of genuine links, acts as a trigger of belonging alternative to nationality. Over the course of a citizen's cross-border experience, the supranational vest, in a number of respects, changes hook and comes to depend from belonging at a national level other than the one of nationality. This shifting ability of its link to a national space ultimately equips supranational citizenship with the potential tools to fend off any Member State's ransom.

ARTICLES
SPECIAL SECTION – SOCIAL INTEGRATION IN EU LAW:
CONTENT, LIMITS AND FUNCTIONS OF AN ELUSIVE NOTION

THE ABSENCE OF INTEGRATION AND THE RESPONSIBILISATION OF UNION CITIZENSHIP

STEPHEN COUTTS*

ABSTRACT: Union citizenship has witnessed a reactive turn in recent years with citizens' rights being more easily restricted. Key to this development is a shift in the use of the concept of integration. This article traces this development through two key areas of law, namely access to social benefits and the effect of criminal behaviour on citizens' rights. It further argues that this shift in the use of integration entails a greater emphasis on the agency of the individual and the responsibilisation of the citizen. An image of the "good EU citizen" emerges as productive and law-abiding.

KEYWORDS: EU citizenship – social benefits – criminal law – agency – Directive 2004/38/EC – responsibilisation.

I. INTRODUCTION

Union citizenship has been experiencing a regressive phase.[1] Early advances in Union citizenship as the fundamental status of nationals of the Member States were secured

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[1] See in particular accounts by N. NIC SHUIBHNE, *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 889 *et seq.*; D. THYM, *The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens*, in *Common Market Law Review*, 2014, p. 17 *et seq.*; E. SPAVENTA, *Earned Citizenship: Understanding Union Citizenship Through Its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, p. 204 *et seq.*

through a robust interpretation of Treaty rights to free movement and especially non-discrimination, reinforced by legislative developments, notably Directive 2004/38/EC (Citizenship Directive).[2] Developments over the last decade across a number of fields, in particular in the field of social benefits and residence rights, have led to a reversal of this trend and a restriction of rights. A growing body of citizens find themselves excluded from the enjoyment of many of the rights of that fundamental status. This has taken place both at the level of national law and most notably in the jurisprudence of the Court of Justice.[3]

The causes of this shift in the case-law of the Court of Justice are many and varied and, as always with judicial developments, difficult to connect to specific social and legal developments.[4] The political environment and the growing popular and political unease with the consequences of Union citizenship in a context of migration concerns have no doubt contributed.[5] Related to this, there is a constitutional argument that this shift represents a not unproblematic rebalancing of the federal bargain in the context of Union citizenship.[6] Finally, there is a doctrinal argument that recent case-law operates as something of a corrective to questionable interpretations of the underlying legislative framework. This interpretation, it is argued, led to an overly individualised test, applied with difficulty by national administrators and resulted in a degree incoherence and even inequality in the operation of Union citizenship.

Regardless of the precise reasons for this shift in the direction of the jurisprudence, key to its operation is a particular legal concept developed by the Court of Justice and one that is now central to the operation and conceptual underpinnings of Union citizenship,

[2] See the critical account of K. HAILBRONNER, *Union Citizenship and Access to Social Benefits*, in *Common Market Law Review*, 2005, p. 1245 *et seq.* For a more positive account see D. KOSTAKOPOULOU, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, in *Modern Law Review*, 2005, p. 233 *et seq*.

[3] See for example restrictions on rights of family reunification of Union citizens in Ireland catalogued in P. BRAZIL, *The Citizens Directive in Irish Law: A Cautionary Tale*, in *Irish Journal of European Law*, 2016, p. 11 *et seq.* and the application of Union citizenship law in the UK in C. O'BRIEN, *Civis Capitalist Sum: Class as the New Guiding Princple of EU Free Movement Rights*, in *Common Market Law Review*, 2016, p. 937 *et seq*.

[4] Although some have faced this necessary task. See in particular contributions to D. THYM (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU*, Oxford: Hart, 2017.

[5] See for example the ease with which the United Kingdom government obtained concessions on citizens' rights in its attempted renegotiation of EU membership. See European Council Conclusions of 18-19 Feburary 2016. See S. REYNOLDS, *(De)Constructing the Road to Brexit: Paving the Way to Further Limitations on Free Movement and Equal Treatment*, in D. THYM (ed.), *Questioning EU Citizenship*, cit., p. 57 *et seq*. See also C. O'BRIEN, *The ECJ Sacrifices EU Citizenship in Vain:* Commission v United Kingdom, in *Common Market Law Review*, 2017, p. 209, noting that the "[t]he ECJ has played politics and lost".

[6] N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen when the Polity Bargain is Privileged?*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 147 *et seq*.

that of "social integration".[7] This concept, used initially to strengthen the rights of Union citizens, is now used as a justification to restrict and condition rights. It is now used to both include and exclude individual Union citizens, depending on the precise factual matrix involved. For it is the limits to, or absence of, integration that the Court has focused on in recent years, implicitly or explicitly. The purpose of this contribution is to outline this development across two fields in particular – economic activity and criminal activity – and their impact on the enjoyment of rights by Union citizens. The argument is that this regressive turn, and the shift in the use of integration as a concept in the field of Union citizenship law, has in fact altered the nature of Union citizenship and has responsibilised the Union citizen. The individual is rendered responsible for his integration into the society of the host Member State. This has led to a greater degree of imputed agency on the part of the Union citizen, an agency however that is used to justify exclusion.

A first section will outline the underlying dimension of Union citizenship in question, namely Union citizenship as a status of integration and how the concept of integration has traditionally interacted with rights. The second and third sections will outline the jurisprudence of the Court in the fields of social benefits and criminal law respectively, focusing on how these cases give rise to a presumption of a lack of integration on the part of Union citizens. This will be followed by a fourth section arguing that these cases represent an evolution of the concept of social integration, placing a greater emphasis on the role and responsibilities of the individual Union citizen for the integration process. It is *through* integration that responsibilities and certain normative elements to Union citizenship emerge.

II. Union citizenship as a status of integration: being and time and the passive citizen

Union citizenship is a multi-faceted institution that can be understood in various ways. It can be understood politically, as a status of identification with and participation in the collective governance of a particular political community, namely the European Union.[8] It can also be understood legally, as a constitutional status attributed to individual na-

[7] For an overview see the work of Azoulai and Barbou des Places, in particular L. Azoulai, *La citoyenneté européenne, un statut d'intégration sociale*, in G. Cohen-Jonathan, V. Constantinesco, V. Michel (eds), *Chemins d'Europe. Mélanges en l'honneur de Jean Paul Jacqué*, Paris: Dalloz, 2010, p. 1 *et seq*., and S. Barbou des Places, *The Integrated Person in EU Law*, in L. Azoulai, S. Barbou des Places, E. Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities*, Oxford: Hart, 2016, p. 186 *et seq*.

[8] For an early evaluation of Union citizenship as a vehicle for political participation in the Union in various ways see A. Wiener, *European Citizenship Practice: Building Institutions of a Non-State*, Boulder: Westview Press, 1998, and a more recent (and somewhat pessimistic) consideration in A. Wiener, *Going Home? "European" Citizenship Practice Today*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 243 *et seq*. For a consideration of the political identity and community building possibilities of Union citizenship see I. Pawel Karolewski, *Citizenship and Collective Identity in Europe*, Abingdon-on-Thames: Routledge, 2010.

tionals of Member States, which carries with it a number of rights, principally amongst them the rights of free movement and non-discrimination. The legal status, which will be the subject of this article, is primarily[9] a horizontal one exercised not *vis-à-vis* the Union as such but *vis-à-vis* other Member States within the Union. It is therefore, as put by Magnette, a set of national rights guaranteed supranationally in the context of an "isopolity".[10] It essentially extends national rights to a certain category of privileged non-nationals, members of associated states. In terms of the broader implications for the political community in the Union, Union citizenship blurs the boundaries between the individual political communities represented by the Member States, rendering them more porous and open to the inclusion of nationals of other Member States.[11] For the individual therefore Union citizenship represents a latent right to move to and become part of other national communities within the Union, revealing, in Strumia's terms, an underlying logic of mutual recognition of belonging within the Union.[12]

Union citizenship can therefore be conceived of as a right to acquire membership in another Member State of the Union; indeed, this conception of Union citizenship has recently been given a strong endorsement by the Court of Justice in *Lounes*.[13] However, this right is not uniform or instantaneous, but variable and acquired overtime and under certain conditions. The concept of integration has come to play a central role in the operation of this dynamic process. Integration into the society of the host Member State is said to be the ultimate goal of Union citizenship.[14] The individual Union citizen is therefore rendered "integrable" in the eyes of Union law.[15] A potential member of the

[9] There is a vertical or supranational dimension to Union citizenship, exercisable against the Union or where the Union directly intervenes to protect certain rights *vis-à-vis* even the Member State of origin. While traditionally a less important dimension of Union citizenship, it has been developing somewhat in recent years. See in particular for example the citizens' initiative on the legislative side and the *Zambrano* (Court of Justice, judgment of 8 March 2011, case C-34/09, *Zambrano* [GC]) line of case-law, recently re-stated and developed in Court of Justice, judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez*. See also Court of Justice, judgment of 6 October 2015, case C-650/13, *Delvigne*, and a comment highlighting both the political but also supranational nature of the right identified in that case in S. COUTTS, Delvigne*: A Multi-Levelled Political Citizenship*, in *European Law Review*, 2017, p. 867 *et seq*.

[10] P. MAGNETTE, *La Citoyennéte européenne*, Bruxelles: Éditions de l'Université de Bruxelles, 1999.

[11] See in particular D. KOSTAKOPOULOU, *European Citizenship: Writing the Future*, in *European Law Journal*, 2007, p. 623 *et seq*.

[12] F. STRUMIA, *Supranational Citizenship and the Challenge of Diversity: Immigrants, Citizens and Member States in the EU*, Leiden: Martinus Nijhoff Publishers, 2013.

[13] Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes* [GC], with the Court effectively finding that naturalization is the natural continuum (and one must assume end-point) of the same process of social integration reflected in and encouraged by Union citizenship itself. See in particular paras 56-58.

[14] Perhaps culminating in naturalisation see *ibidem*.

[15] L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT, *Being a Person in the European Union*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, cit., p. 7.

host society, membership of which only needs to be activated and developed through a process of "integration".

This logic of integration has therefore informed the legal construction and operation of Union citizenship. It has, in short, become a status of integration.[16] This has been achieved primarily via its interaction with the concept of rights. Integration and rights have, in the context of Union citizenship, taken on a complementary and mutually reinforcing character. Rights are at the same time the means and the object of the integration of the individual. A set of rights in the host Member State are initially allocated to an individual to enable him or her to integrate into that society, including secure rights of residence and equal treatment, endowing the individual with security and equality regarding his or her place in the host society. At the same time after a period of residence (acting as a proxy for integration), those rights are strengthened and the conditions for them are relaxed. There is therefore generally a positive feedback loop between rights and integration with rights providing the foundations for integration, which in turn leads to the acquisition (or to be more accurate, the strengthening) of rights. Traditionally, there has been a progressive and unidirectional process of integration in which rights play a key role. As has been acknowledged by the Court,[17] the Citizenship Directive itself and the scheme of rights allocation it establishes reflect this rights-integration dynamic, with the Directive intended to be a "genuine vehicle for integration into the society of the host Member State".[18]

What is striking about the process of integration (for it is a process) of the individual Union citizen is its passive character. Barbou des Places notes the embedded character of the Union citizen, his or her existence as being *situated* rather than free floating and detached.[19] Azoulai similarly points out the insertion of the individual into specific social institutions of the host society.[20] A narrative is typically deployed of the deserving or undeserving citizen. However, it is a strangely objectified existence; the individual is assessed in the context of the social life he or she has constructed in the host society almost as a set of objective facts, divorced from the agency or intentions or normative or attitudinal orientations of the individual towards that host society. Despite the rich connotations of the concept of integration, focusing on the development of a very particular and consequential relationship or social bond between the heretofore "other" individual and the new social collective known as the "society of the home Member State", the actual process and the criteria by which that integration or process is measured are remarkably thin, at least formally. The only true criteria identified in the legislation are

[16] L. AZOULAI, *La citoyenneté européenne, un statut d'intégration sociale*, cit.

[17] For the paradigmatic expression of this conceptualisation of the Directive see again *Lounes* [GC], cit.

[18] Directive 2004/38, recital 18.

[19] S. BARBOU DES PLACES, *The Integrated Person in EU Law*, cit.

[20] L. AZOULAI, *The European Individual as Part of Collective Entities (Market, Family, Society)*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, cit., p. 203 *et seq.*

simply residence and duration of that residence; being and time in the words of Somek.[21] Mere presence, over a sufficient period of time, was deemed to somehow amount to the integration of the individual. Residence as a proxy for integration.[22] Union citizenship in this vision is overwhelmingly passive and strangely devoid of any agency on the part of the individual citizen.

III. The reactive turn: the indigent and the criminal and the absence of integration

The noticeable shift in the case-law is well-documented elsewhere and the below summary is brief, intended as it is to simply provide an overview of these doctrinal developments.[23] These developments will be presented in order to highlight the manner in which certain duties or responsibilities have emerged in more recent trends in Union citizenship through the exclusion of certain individuals, namely those lacking in economic self-sufficiency or activity and those convicted of criminal activity. The developments in both fields, it should be noted, have been judicially-led, although they presumably have not been unwelcome on the part of Member State governments.[24] It is also worth pointing out that in terms of the relationship between the legislature and the judiciary or – to put it another way, the techniques used by the Court of Justice in interpreting the underlying legislation and the consequential degree of departure or otherwise from the strict text of the legislative provisions – the Court has in fact taken opposing stances.[25] In the field of social benefits it has been accused of a too rigid approach

[21] A. Somek, *Solidarity Decomposed: Being and Time in European Citizenship*, in *European Law Review*, 2007, p. 787 *et seq*. Whereas Barbou des Places notes the socially embedded nature and demarketisation of Union citizenship effected by the operation of the concept of integration, Somek's piece (and indeed other work) focuses on the disembedded and individualist, even *bougeois*, nature of Union citizenship as it emerged from the legislative and judicial practice.

[22] See for example Court of Justice, judgment of 6 October 2009, case C-123/08, *Wolzenburg* [GC], in which the Court of Justice accepted residence of five years as a proxy for integration and a link with the host Member State comparable to nationality as applied by the Dutch government in the operation of the Council Framework Decision 2008/909/JHA of 29 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union.

[23] See in particular N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit., and E. Spaventa, *Earned Citizenship*, cit. See in general D. Thym (ed.), *Questioning EU Citizenship*, cit.

[24] See for example the willingness of the European Council to compromise on both welfare exports and security based restrictions on citizens' rights in the aborted deal to avoid Brexit. See European Council Conclusions of 18-19 Feburary 2016, cit. See the useful analysis in S. Reynolds, *(De)Constructing the Road to Brexit*, cit.

[25] I am grateful to Martijn van den Brink for pointing this out.

towards the text of the Directive,[26] whereas in the field of criminal law it has been accused of ignoring the text of the Directive. However, if the *means* have been different in the two strands of case-law, the *outcome* is broadly similar; a greater restriction of the rights of individual Union citizens in cases before the Court of Justice.

III.1. Economic activity and access to social benefits

In the field of social benefits the Court of Justice has recently conducted what amounts to a near *volte-face* in its jurisprudence on the rights of economically inactive migrant Union citizens to equal treatment and in particular the right to access welfare payments in host Member States on the same basis as nationals. Early case-law limited the effect of the conditions and limitations on the right to equal treatment ("counter-limits" so to speak) in this field by reading the secondary legislation (initially the Citizenship Directive and the residence Directives)[27] in light of primary law and in particular the directly effective right to equal treatment found in Art. 18 TFEU, requiring an individualised assessment and an application of the proportionality principle. This body of jurisprudence has recently been reversed, with the Court now establishing the primacy of the Citizenship Directive as the operationally relevant legal instrument, allowing Member States to apply its provisions in a strict and generalised manner.

The early case-law of the Court in this field is well-known for its progressive and holistic interpretation of the relevant law, leading to strengthened rights for individual Union citizens at the expense of Member State control over welfare policies with respect to non-economically active Union citizens. In *Grzelczyk* the Court, alongside introducing the by now ubiquitous and somewhat Delphic statement that Union citizenship was "destined to become the fundamental status of nationals of the Members States",[28] also found that Member States had, through the concept of Union citizenship, accepted a "certain degree of solidarity" with nationals of other Member States such that access to benefits on the same basis as nationals could only be refused if necessary to ensure a certain degree of integration or genuine connection with the society of the host Member State.[29] In *Bidar*, the Court of Justice found that while the principle of equal treatment in the field of social benefits could in theory be legitimately limited, in particular in

[26] The criticism could be reformulated in a perhaps stronger form as ignoring the constitutional context of the underlying legislation, namely the directly effective rights contained in Art. 20 TFEU, and the effect this has, or should have, on the interpretation of the legislation.

[27] Directive 90/364/EEC of the Council of 8 June 1990 on the right of residence, Directive 90/365/EEC of the Council of 24 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity and Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students.

[28] Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31.

[29] See *ibid.*, para. 44, where the Court speaks of a "certain degree of solidarity" that must be shown migrant Union citizens.

the interest of ensuring a sufficient link with the society of the host Member State, any such limitation would need to be compatible with the principle of proportionality. In particular, the degree of integration of the Union citizen concerned in the host society would have to be taken into account, thus ensuring that the longer a Union citizen's residence and the greater his or her integration the more rights he or she would enjoy.[30] In *Trojani*[31] the Court clarified (or perhaps failed to clarify) the relationship between applying for welfare assistance and the right of residence, which was under the then residence Directive[32] (and is similarly today under the Citizenship Directive) conditional on sufficient resources. In *Trojani* it found that that while applying for welfare benefits may call into question the residence rights of the Union citizen, under no circumstances could the withdrawal of residence rights be an *automatic* consequence of any such application.[33] Before any expulsion could take place it must be demonstrated that the Union citizen constituted an unreasonable burden on the host Member State, necessitating, it may be assumed, an individualised assessment taking into account all the relevant circumstances and applying the principle of proportionality.[34]

Indeed, this interpretation was maintained by the Court of Justice in the more recent case of *Brey*, in hindsight the precursor to the reactive turn in the Court's jurisprudence. In *Brey* the Court, while noting that the right of residence may be called into question by an application for welfare benefits, stressed that this could only take place following a case-by-case assessment, taking into account different circumstances of the case.[35] However, in *Brey* the Court also found that the rights of Union citizens can "be subordinated to the legitimate interests of the Member States [including] the protection of their public finances".[36]

It was this part of the judgment which was subsequently picked up and developed by the Court in *Dano*, which, in a striking phrase, found that "a Member State must [...] have the possibility [...] of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement *solely* in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence".[37] This was achieved by linking the right to equal

[30] Court of Justice, judgment of 15 March 2005, case C-209/03, *Bidar* [GC].

[31] Court of Justice, judgment of 7 September 2004, case C-456/02, *Trojani* [GC].

[32] Directive 90/364, cit.

[33] *Trojani* [GC], cit., para. 45.

[34] The result being a kind of self-reinforcing dynamic between EU rights and national rights and rights to non-discrimination and a right to residence as pointed out in N. Nic Shuibhne, *The Third Age of EU Citizenship*, in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge: Cambridge University Press, 2012, p. 331 *et seq*.

[35] Court of Justice, judgment of 19 September 2013, case C-140/12, *Brey*, para. 67.

[36] *Ibid*., para. 55.

[37] Court of Justice, judgment of 11 November 2014, case C-333/13, *Dano* [GC], para. 78, emphasis added. Of course nothing in the description of the case indicated that Elisabeta Dano and her son had moved to

treatment to residence on the basis of the directive. It was stressed that Art. 24, para. 1, of the Citizenship Directive grants a right of equal treatment to Union citizens resident in another Member State "*on the basis of the Directive*".[38] In effect, this amounted to the Court using the conditions contained in the provisions of the directive relative to lawful residence, and in particular conditions of economic activity or self-sufficiency contained in Art. 7 of the Directive, as conditions to the right of equal treatment contained in Art. 24, para. 1; residence being the bridge between conditions and the right to equal treatment.

The Directive, and the conditions it contains, now appears to constitute the sole reference point for the Court in determining the rights of Union citizens in host member states and hence the degree of their inclusion. Note the absence in *Dano* of any reference to residence on an alternative basis, in particular Art. 21 TFEU or equally an alternative right to non-discrimination such as Art. 18 TFEU, as occurred in earlier case-law.[39] What this means in practice is that it is the Directive alone and the conditions and limitations it contains, that determines the extent to which an individual is entitled to equal treatment and hence access to benefits on the same basis as nationals. From a doctrinal perspective, the Directive is no longer read in light of the primary law rights contained in Arts 21 and 18 and subject to appropriate limits, including a test of proportionality, on foot of those rights.[40]

This reading has been confirmed in the subsequent cases of *Alimanovic*[41] and *Commission v. UK*.[42] In *Alimanovic* what was at stake was not an assessment of the conditions of residence in the Directive but rather the limitations on equal treatment contained in its Art. 24, para. 2. Mrs. Alimanovic and her daughters were deemed jobseekers under Art. 14 of the Directive after having lost their jobs and remaining unemployed for a period of six months. They were therefore still legally resident in the host Member State (Germany) but unfortunately their residence was of the wrong kind and could legitimately be subjected to the limitation on the right to non-discrimination con-

Germany *solely* to claim social assistance. Indeed, what seems problematic about the statement is imputing a primary and exclusive motive to economically inactive migrant Union citizens to acquire social assistance whereas in reality individuals move for a variety of reasons with access to social assistance being merely an incidental and facilitating right rather than being the (sole) objective of the migrant.

[38] *Ibid.*, para. 68, emphasis added.

[39] Court of Justice, judgment of 12 May 1998, case C-85/96, *Martinez Sala*. Indeed, this is precisely the operation at play in *Martinez Sala*, in which the Court found that the then Art. 12 TEC (now Art. 18 TFEU) was a general principle of equal treatment and applied to any Union citizen lawfully resident in another Member State with no need for that lawful residence to be based on Union law.

[40] As for example occurred in Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast*. See M. DOUGAN, *The Constitutional Dimension to the Case Law on Union Citizenship*, in *European Law Review*, 2006, p. 613 *et seq*.

[41] Court of Justice, judgment of 15 September 2015, case C-67/14, *Alimanovic* [GC].

[42] Court of Justice, judgment of 14 June 2016, case C-308/14, *Commission v. United Kingdom*.

tained in Art. 24, para. 2, of the Directive. Importantly, an individualised assessment was not in fact necessary as "Directive 2004/38, establishing a gradual system as regards the retention of the status of 'worker' which seeks to safeguard the rights of residence and access to social assistance, *itself takes into consideration various factors characterising the individual situation of each applicant for social assistance* and, in particular, the duration of the exercise of economic activity".[43] The general assessment contained in the legislation is substituted for the individualised assessment in any particular case.

The point that the Directive rewards economic activity with the granting of rights is underlined in the more recent case of *Gusa* in which the Court found that the status of self-employed could be retained if economic activity ceased under circumstances outside the control of the individual concerned. *Gusa* differs from previous welfare cases in that the outcome is positive for the claimant and the Court departs from its literal approach to the interpretation of the Directive. However, in doing so, it further underlines the importance attached to the performance of economic activity in the allocation of rights. The Court relies on a comparison of multiple language versions of the Directive to reach its conclusion. However, it also justifies the move, by pointing out that, while the Directive makes a distinction between the economically active and inactive in Art. 7, there is no such distinction drawn within the former category;[44] what matters is not what type of economic activity one is performing but the fact of doing so. This is further justified in light of the fact that to do otherwise would "lead to a person who has been self-employed for more than one year in the host Member State, and who has contributed to that Member State's social security and tax system by paying taxes, rates and other charges on his income, being treated in the same way as a first-time jobseeker in that Member State who has never carried on an economic activity in that State and has never contributed to that system."[45] Contribution to the Member State and the health of its finances is paramount in determining the degree of equal treatment an individual can expect.

While the concept of social integration is not mentioned explicitly in the above judgments it is arguable that it is implicit throughout and in particular when considered against the previous body of case-law developed by the Court in this field. Rights and in particular equal treatment have typically followed the social integration of the individual in the host Member State. This is what follows from *Grzelcyk*, *Trojani* and especially *Bidar* and is evident from the scheme and language of the Directive as endorsed by the Court on numerous occasions, most recently in *Lounes*.[46] What the Court has done in *Dano* and *Alimanovic*, is to read the Directive and in particular the conditions and limitations it contains – rather than any individualised assessment of the position of the in-

[43] *Alimanovic* [GC], cit., para. 60, emphasis added.
[44] Court of Justice, judgment of 20 December 2017, case C-442/16, *Gusa*, para. 36.
[45] *Ibid.*, para. 44.
[46] *Grzelczyk*, cit.; *Trojani* [GC], cit.; *Bidar* [GC], cit.; *Lounes* [GC], cit.

dividual – as determinative of the rights that an individual enjoys and hence by implication of the degree or absence of integration of the individual in the society of the host Member State. The Directive and its conditions and limitations and the extent to which the individual fulfils those conditions, now acts as a yardstick for the degree of integration of the Union citizen. In *Alimanovic*, it is the limitation contained in Art. 24, para. 2, which results in the denial of equal treatment to the applicants, itself based on the nature of their residence and in particular the nature of the economic situation. In *Dano* it is the conditions of residence contained primarily in Art. 7 of the Directive, relating to economic activity or self-sufficiency once again, which are deemed to determine whether the individual is entitled to equal treatment with nationals of the host Member State and by implication whether those individuals are sufficiently integrated or otherwise. Finally, in *Gusa* the inverse situation proves the same point; Mr. Gusa is successful in securing rights precisely because of his lengthy economic activity.[47]

While striking and deployed to devastating effect in the *Dano* line of case-law, this reliance on the (economic) conditions of the Directive as constituting appropriate criteria for assessing the rights available to Union citizens and by implication his or her degree of integration in the society of the host Member State, in fact has deeper roots in the case-law of the Court. In a number of cases the Court of Justice has in fact taken the five year period – included in the Directive to signify the point at which an individual acquires permanent residence and hence can be considered sufficiently integrated to be entitled to full equal treatment with nationals of the host Member State – as a legitimate period to ensure that an individual is sufficiently integrated and hence to justify discriminatory treatment of non-national Union citizens.[48] The Court has been happy to draw on the Directive to inform its construction of Union citizenship and in particular the extent to which individuals are sufficiently integrated and hence entitled to rights under Union citizenship.[49] Furthermore, in a number of cases dealing with the acquisition of residence rights under the Directive, the Court has focused on the economic conditions contained in the Directive to demonstrate that the individuals concerned resided in such a fashion so as to ensure their integration and hence their right to particular forms of residence under the Directive. *Lassal* found that periods completed prior to the implementation of the Directive could be taken into account in determining whether an individual was entitled to permanent residence, as what was at stake was the degree of integration of the individual concerned.[50] In *Dias*, the Court found that "the inte-

[47] And self-sufficiency it should be pointed out. For the first year of his residence in Ireland, Mr. Gusa relied on his children for resources. See *Gusa*, cit., para. 16.

[48] Court of Justice, judgment of 18 November 2008, case C-158/07, *Förster* [GC], for student fees and *Wolzenburg* [GC], cit., for equal treatment between nationals and non-national Union citizens in the context of the European Arrest Warrant.

[49] As pointed out in N. Nic Shuibhne, *The Third Age of EU Citizenship*, cit.

[50] Court of Justice, judgment of 7 October 2010, case C-162/09, *Lassal*.

gration objective which lies behind the acquisition of the right of permanent residence laid down in Art. 16, para. 1, of the Citizenship Directive is based not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member State."[51] Hence, only periods of residence completed in compliance with the Directive could be taken into account.[52] A similar point was made in *Ziolkowski*, referring to the conditions of economic activity contained in Art. 7, para. 1, of the Citizenship Directive.[53] In *O and B* and more recently *Coman* the Court found that family reunification rights on the basis of circular migration could only be acquired in the event that "genuine residence" had taken place in the second Member State.[54] Genuine residence is residence "in conformity with the conditions set out in Art. 7, para. 1, of [the Citizenship Directive and] is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State [...]".[55]

The use of in particular the condition of economic activity or self-sufficiency contained in Art. 7 of the Directive has been growing for some time now across Union citizenship law. In *Dias* these conditions are deemed to be "qualitative" elements in addition to mere time and space that demonstrate the degree of social integration and the relationship of the individual Union citizen to the host society. On the basis of fulfilling those "qualitative" conditions, an individual is deemed sufficiently integrated and hence entitled to equal treatment as nationals. In *Dano* the conditions contained in Art. 7 of the Directive are used to determine the extent to which an individual is entitled to equal treatment. In the context of a directive underpinned by a philosophy of social integration, and which uses this concept as the basis of allocating rights to individuals, the denial of rights for want of fulfilling conditions of economic activity leads to the conclusion that economic activity is deemed, under the scheme established by the Directive and interpreted by the Court, an essential element of social integration. It is through the conditions of residence contained in the Directive that the Court has introduced an economic dimension into its test of social integration.

III.2. Crime and integration

If the link between the restriction of rights and integration has been implicit in the case-law on access to social benefits and arises from a general consideration of the case-law in light of the Directive as a whole and its underlying philosophy, in the field of criminal law it has been explicit. The second area where the question of the absence of integration ap-

[51] Court of Justice, judgment of 21 July 2011, case C-325/09, *Dias*, para. 64.

[52] *Ibid.*, para. 55.

[53] Court of justice, judgment of 21 December 2011, joined cases C-424/10 and C-425/10, *Ziolkowski and Szeja*, para. 46.

[54] Court of Justice, judgment of 5 June 2018, case C-673/16, *Coman* [GC], paras 52 to 56.

[55] Court of Justice, judgment of 5 June 2018, case C-456/12, *O and B* [GC], para. 53.

pears is in the interaction of crime and the acquisition or maintenance of rights of residence under the Directive. The Court has, through an assessment of the extent to which an individual may or may not remain in a particular Member State, introduced a qualitative dimension into the integration test, seeking from the Union citizen some form of good behaviour or compliance with the norms and values of the host society as embodied in its criminal law. This has occurred in two areas in particular, firstly in the traditional field of expulsion measures and secondly in a more recent set of judgments considering the effect of imprisonment on the acquisition of residence rights under the Directive.[56]

Integration as a concept was properly introduced into the field of expulsion of Union citizens in the case of *Ofanopoulous and Oliveri*,[57] in which two individuals, long term resident in Germany,[58] were issued with deportation orders on the grounds of Directive 64/221/EC (since replaced by the Citizenship Directive) for repeated drug offences.[59] In its judgment the Court of Justice, echoing the jurisprudence of the European Court of Human Rights (ECtHR) on this point,[60] introduced a proportionality test that stressed the degree of integration of the individual concerned and the balance that needed to be struck between the individual rights of the individual subject to deportation to family and private life on the one hand and the broader societal interests in public security and public policy on the other.[61]

The importance of the integration was later reflected in the Citizenship Directive in two ways. Firstly, codifying the Court of Justice's jurisprudence on the matter, a general proportionality test was to be applied to all expulsion decisions to take into account their family and private life and the degree of their integration in the host society.[62] Secondly, the Directive introduced a structured and gradual system of protection whereby the protection an individual enjoys increases with their degree of integration. For the first five years, individuals may be expelled on grounds of public security and

[56] This section draws on work already completed and published in S. COUTTS, *Union Citizenship, Social Integration and Crime: Duties Through Crime*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, cit., p. 228 *et seq*. See also L. AZOULAI, S. COUTTS, *Restricting Union Citizens' Residence Rights on Grounds of Public Security*, in *Common Market Law Review*, 2013, p. 553 *et seq*., and S. COUTTS, *Union Citizenship as Probationary Citizenship:* Onuekwere, in *Common Market Law Review*, 2015, p. 531 *et seq*.

[57] Court of Justice, judgment of 29 April 2004, joined cases C-482/01 and C-493/01, *Orfanopoulos and Oliveri*, paras 97-99. There is a discussion of the concept in Opinion of AG La Pergola delivered on 17 February 1998, case C-348/96, *Calfa* shortly before *Orfanopoulos and Oliveri*, cit.

[58] The former from the age of 13, the latter from birth.

[59] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of speacial measurs concernign the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

[60] With the Court of Justice specifically citing the landmark case of European Court of Human Rights, judgment of 2 August 2001, no. 6009/10, *Boultif v. Switzerland*. See *Ofanopoulous and Oliveri*, cit., para. 99.

[61] The notion of proportionality was foreshadowed in this area in Opinion of AG La Pergola, *Calfa*, cit.

[62] Citizenship Directive, Art. 28, para. 1.

public policy, subject to the general principles governing such decisions including that they are based on the personal conduct of the individual concerned, are in accordance with the principle of proportionality and take into account the degree of integration of the individual. After acquiring the status of permanent residence, a Union citizen is entitled to enhanced protection and may only be expelled if he or she constitutes a "serious threat to public security or public policy".[63] After ten years of residence or in the case of minors subject to the principle of the best interests of the child,[64] a Union citizen may only be expelled on "imperative grounds of public policy or public security".[65] Thus the degree of protection increases in line with the period of residence of an individual and, in accordance with the scheme established by the Directive, in line with his or her degree of integration in the society of the host Member State.

Note that for the final category of individuals (those resident for ten years and minors) there is not only a difference in degree in terms of the seriousness of the offence that justifies expulsion but also a difference in kind; it is only for imperative grounds of public policy that an individual may be expelled. The legislator therefore made a distinction between the broader category of "public policy and public security" and simply "public security". One would be forgiven for assuming that public policy therefore refers to a narrower and alternatively defined category of actions posing a threat to society. While the distinction is certainly not water-tight and there exists an overlap between the two concepts, ordinarily public security would connote some form of attack against the institutions or essential infrastructure of the state or constitute a major security threat because of the magnitude of the risk, such as that posed by a major terrorist attack. Public policy on the other hand would refer to the key values of *ordre public*, including maintenance of peaceful coexistence and enjoyment of personal rights typically protected by ordinary criminal law. Thus while public policy might, in certain circumstances, refer to the public morality of a Member State,[66] it would appear that public security would not.

That distinction was ignored by the Court of Justice when interpreting Art. 28, para. 3, in *Tsakouridis* and in *P.I.*[67] While accepting that the new regime required a higher degree of threat in terms of seriousness in order to expel such individuals, the Court made no meaningful qualitative distinction between the concepts of public policy and public security, instead finding that a threat to public security existed wherever there was a threat to "a fundamental interest of society or of the host Member State, which might pose a direct threat to the calm and physical security of the population".[68] The

[63] *Ibid.*, Art. 28, para. 2.

[64] *Ibid.*, Art. 28, para. 3, let. b).

[65] *Ibid.*, Art. 28, para. 3.

[66] See for example Court of Justice, judgment of 4 December 1974, case 41/74, *van Duyn*.

[67] Court of Justice: judgment of 23 November 2010, case C-145/09, *Tsakouridis* [GC]; judgment of 22 May 2012, case C-348/09, *P.I.* [GC].

[68] *Ibidem*.

definition therefore allowed Member States to include within that concept acts that would be normally considered ordinary criminal offences (albeit of a particularly serious nature) such as drug trafficking and the sexual assault of minors.[69]

Not only was definition of public security absorbed into the general definition of public policy and public security but in terms of the assessment of the seriousness of the threat, the Court appeared to adopt a curiously moralistic approach, defining the particular acts as "serious" not by reference to the threat posed by the individuals concerned or the possible harm caused by their acts but rather by the extent to which they offended against the moral sentiments of the host society. Rather peculiarly for a concept such as "public security", which implies a harm based rather than normative assessment of the act, what was at stake for the Member States was their values.[70] The concept was to include threats not simply to the physical security of the host society but also to the "calm and physical security" of the population, implying some perturbation caused by a particular act.[71]

This logic has been taken one step further in the joined cases of *K and HF*, which concerned the exclusion of individuals convicted of war crimes from the Netherlands and Belgium respectively. Three points in the judgment stand out. Firstly, public policy now encompasses a "direct threat to the *peace of mind* of the population",[72] mere presence of an offensive character, it would appear is sufficient to justify exclusion; it is not future harm which is the issue here but offense.[73] Secondly, this is justified by reference to the fundamental values of the a Member State and "social cohesion" as well, interestingly to the fundamental values of the Union as expressed in Arts 2 and 3 TEU.[74] Finally, in a significant move, past conduct alone is sufficient to justify an expulsion measure, if that past conduct demonstrates a continuing "disposition hostile to the fundamental values" of the Union.[75] The analysis is backward looking, at the past conduct of the individual and the offence he has caused (and continues to cause by his mere presence) rather than the future threat of harm.[76]

[69] Respectively, *Tsakouridis* [GC], cit., and *P.I.* [GC], cit.

[70] *P.I.* [GC], cit., paras 21 and 29, referring to the "particular values of the legal order of the Member State".

[71] *Ibid.*, paras 28-29.

[72] Court of Justice, judgment of 2 May 2018, joined cases C-331/16 and C-366/16, *K and HF* [GC], para. 42, emphasis added.

[73] It is worth pointing out that mere offence is normally not considered sufficient grounds for criminalisation under classic liberal theories of the criminal law based on the harm principle. See J. FEINBERG, *The Moral Limits of the Criminal Law: Offense to Others*, Oxford: Oxford University Press, 1985.

[74] *K and HF* [GC], cit., para. 44.

[75] *Ibid.*, para 60.

[76] Intriguingly, that offence was caused not by any act directed against the political community of the Member State concerned but rather by a war crime, i.e. a crime against humanity as a whole.

What emerges from these cases is therefore not a security threat per se, or at least not primarily a security threat, but rather the commission of an act that offends against the values of the host Member State and its society. And it is this offence which justifies the exclusion of the individual from that society.

This reading of crime and its relationship with integration was explicitly endorsed by the Court of Justice in a second set of cases dealing with the impact of periods of imprisonment on the acquisition of residence rights, including the acquisition of enhanced protection under Art. 28, paras 2 and 3. In *Onuekwere*[77] and *MG*[78] the Court found that "the imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law".[79] Repudiation of the values of the host society was deemed to amount to a refusal to integrate. The result was that rights to permanent residence and hence enhanced protection under Art. 28, para. 2, and enhanced protection from expulsion under Art. 28, para. 3, in the case of *MG*, which were said to depend on a certain level of "qualitative" integration, were refused. Note that in *Onuekwere* it is not the period spent in prison as such that interrupts the process of integration but rather the act constituted by the commission of the underlying crime. It is the absence of integration, evidenced by the commission of the underlying crime, itself characterised as a repudiation of the values of the host society, which leads to a loss of rights by Union citizens and their family members. It would appear that respect for the values of the host society (at least as they are reflected in the criminal law of the Member State) is now a component in the assessment of the degree of integration of the Union citizen.[80]

The solution adopted in *Onuekwere* and *MG* was not without its problems. Is it in fact the underlying crime or the period in prison which breaks the links of integration? In particular, can it really be said that all crimes resulting in a custodial sentence necessarily indicate a repudiation of the values of the host society, at least to the extent that this would result in some form of rupture and failure of social integration? Equally, can periods spent in prison, where rehabilitation, closely linked with social reintegration, is a stated aim, be necessarily excluded from any assessment of the degree of integration of the Union citizen? These questions have recently been addressed by the Court of Justice in *B and Vomero*.[81]

In *B and Vomero* the Court upheld the core findings in *Onuekwere* and *MG* while nuancing it somewhat to take into account some of the issues just mentioned. Three findings in particular stand out. Firstly, the Court confirmed the need to acquire permanent residence in order for an individual to be eligible for the enhanced protection

[77] Court of Justice, judgment of 16 January 2014, case C-378/12, *Onuekwere*.
[78] Court of Justice, judgment of 16 January 2014, case C-400/12, *MG*.
[79] *Onuekwere*, cit., para. 26.
[80] For a more detailed account see S. Coutts, *Union Citizenship as Probationary Citizenship*, cit.
[81] Court of Justice, judgment of 17 April 2018, joined cases C-316/16 and C-424/16, *B and Vomero* [GC].

found in Art. 28, para. 3, of the Directive.[82] While not explicitly stated in the Directive, such a finding stems from the logic of the Directive as one based on progressive integration of the individual concerned.[83] Secondly, as in *Onuekwere* and *MG*, the ten year period mentioned in Art. 28, para. 3, is to be calculated backwards and may be broken by absences. Thus, even once acquired an individual will always face a risk of losing enhanced protection. Finally, and where *B and Vomero* adds to *Onuekwere* is in the introduction of an "overall assessment" of the integrative links of an individual when determining whether or not that ten-year period has been broken. However, while imprisonment will no longer lead to the automatic break of the ten-year period, it will "in principle" do so.[84] This overall assessment of the integrative links of an individual and the extent to which he or she has become "disconnected from the society of the host Member State"[85] must take into account the nature and the circumstances of the offence and the experience of the individual while in detention, which may operate to both further alienate that individual or lead to his reintegration. In addition, the social and family circumstances and his degree of integration into the host society prior to the commission of the offence must be taken into account.[86]

IV. Qualitative criteria of integration and the rise of the responsibilised citizen

These series of cases represent both change and continuity in the context of the concept of social integration and its use by the Court. Certainly, in terms of the broad trajectory of Union citizenship case-law and in particular the treatment of individual rights, this represents a dramatic restriction on individuals' rights and a reassertion of Member State interests in exclusion and the limitation of rights. However, it is argued that the roots of this approach can in fact be found within previous practice; both in the concept of integration and the jurisprudential technique employed by the Court of Justice. This development was not predicted and was certainly not inevitable, but nonetheless it is an evolution of past practice.

Union citizenship remains a status of integration. It is this notion which governs the gradual inclusion of the individual Union citizen within the society of the host Member State; it regulates the relationship between the Union citizen and the host society and allocates rights on that basis. This dynamic is evident either on the basis of jurispru-

[82] This may be particularly problematic when read in conjunction with the *Dano* line of case-law. It is very possible that an individual may reside in a Member State for decades without gaining permanent residence for various reasons (broken employment periods, absences).

[83] *B and Vomero* [GC], cit., para. 58.

[84] *Ibid.*, para. 70.

[85] *Ibid.*, para. 74.

[86] *Ibid.*, para. 72.

dence focusing on individual circumstances or by taking the scheme established by the Directive. Integration is still the operative principle for allocating rights to individuals, only now it is the absence of integration that limits those rights. Integration as a concept cuts both ways.

There is a broader continuity with the general approach of the Court of Justice to assessing the position of Union citizens in the host society. As pointed out by Barbou des Places, the Court operates a narrative technique; the life of the individual as a whole is assessed, as is her engagement in the various dimensions of the host society.[87] And while one may deplore the legal incoherence and possible inequality that may arise from such an individualised approach to judging,[88] it is undeniable that this focus on the narratives and social circumstances of the individual also lies at the heart of both the expulsion cases – such as *P.I.*, where the applicant and his crimes are demonised – and in the social welfare cases – such as *Dano*, where the Court paints a picture of a distinctly economically unproductive member of society, and hints by reference to her lack of education and language skills of not simply a failure to engage in the economic life of the host Member State, but indeed the very absence of any capacity to so engage. Indeed, we can contrast this with *Gusa*, where Mr. Gusa is presented as an individual who has never relied on the host Member State, even during his first year of unproductive residence in Ireland and indeed in subsequent years contributed fully, a key factor in his eventual success.[89]

However, if there is continuity in the importance and the operation of the principle of integration in Union citizenship law, there is also an important evolution. In terms of outcome, clearly there is a shift towards exclusion and limitation of rights. It seems integration is a malleable legal concept that can be deployed to both enhance the rights of individuals but also to justify their limitation and indeed exclusion from the host society as in the case of the expulsion and imprisonment jurisprudence.

However, it is also arguable that there is a shift in the nature of Union citizenship, or rather the role that the Union citizen is expected to play within the scheme of the Directive. As noted above in past cases, while a narrative technique has certainly been deployed, there has been a certain passivity about the role of the Union citizen and its relationship to rights acquisition. The individual was the object of integration; it was a socialisation process that happened to him or her.

Recent cases appear to focus on the acts and inactions of the individual and impute an agency to him or her more striking than in previous cases. Moreover, it is an agency that is used to attribute responsibility for his or her integration. Ultimately, therefore the individual is responsible for the consequences of the lack of integration, namely a

[87] S. Barbou des Places, *The Integrated Person in EU Law*, cit.

[88] M. Everson, *A Very Cosmopolitan Citizenship: But Who Pays the Price?*, in M. Dougan, N. Nic Shuibhne, E. Spaventa (eds), *Empowerment and Disempowerment of the European Citizen*, Oxford: Hart, 2012, p. 163 *et seq.*

[89] *Gusa*, cit., para. 16.

loss of rights and exclusion. Note, for example, the role that imprisonment now plays in the overall assessment of the integrative links of offenders discussed in *B and Vomero*. It is the actions of the individual in prison that matter; the extent to which he or she engages in rehabilitation services or furthers his or her disconnect from society. The Court speaks of the "behaviour"[90] and the "attitude"[91] of the person during detention. Similarly, note in *Gusa*, the key role that active economic contribution to the host society plays in the plaintiff's ultimate success. The Court underlines the fact that he is a deserving plaintiff because the cessation of his self-employment is due to circumstances outside his control,[92] implying that otherwise he would be responsible for his reduced circumstances and hence his right to equal treatment could be withheld.

Moreover, this is not a generalised, abstract responsibility but is translated into very concrete sets of obligations. One set of cases point to a responsibility to refrain from offending behaviour and from breaching the core values of the host Member State, at least as they are expressed in criminal law. While to some extent passive (merely refraining) it does reflect a broader expectation of conduct and of good conduct and a more general attitude of respect towards the values of the host society. More concrete still are the obligations generated from the conditions contained in the Directive to engage in economic activity, be it active or passive. Market citizenship[93] is back with a bang, if in fact it ever went away.[94]

This in turn generates certain normative expectations and builds a normative dimension into Union citizenship; the Union citizen is a law-abiding, economically productive member of the host society. These might be said to be features of "good citizenship" everywhere, but in Union law these are linked with very real consequences and in fact make the membership in the host Member State contingent on their being met. The precise content of these duties appears to be a mix of Union and national. Responsibilities are owed to the host Member States, however, particularly in the criminal law cases, there is reference to Union interests or values.[95] Likewise the social benefits cas-

[90] *B and Vomero* [GC], cit., para. 73.

[91] *Ibid.*, para. 74.

[92] *Gusa*, cit., para. 42.

[93] M. Everson, *The Legacy of the Market Citizen*, in J. Shaw, G. More (eds), *New Legal Dynamics of European Union*, Oxford: Claredon Press, 1995, p. 73 *et seq.* See also D. Kramer, *Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed*, in *Cambridge Yearbook of European Legal Studies*, 2016, p. 270 *et seq.* for an analysis in light of neoliberalism.

[94] See N. Nic Shuibhne, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, p. 1597 *et seq.*

[95] In *Tsakouridis* [GC], cit., para. 46, and *P.I.* [GC], cit., paras 26-28, reference is made to EU legislation criminalising certain behaviour to justify considering that behaviour sufficiently serious to warrant expulsion. In *K and HF* [GC], cit. direct reference is made to the values of the Union as expressed in Arts 2 and 3 TEU in paras 44 and 60.

es may very well reflect the construction of a broader ideal of the market citizen.[96] For if these cases to some extent responsibilise the Union citizen, it is a responsibility that is used to justify exclusion. In the case of criminal law and residence rights this is very obviously a case of literal exclusion from the territory of the host Member State and hence necessarily from its society.[97] In the case of welfare assistance it is an exclusion from the community of solidarity (at the very least).[98] A comprehensive and universal welfare system has long been recognised as a vehicle for social inclusion and to facilitate full participation of the individual in the social and political life of the community.[99] Denial of these rights to economically inactive Union citizens is in effect denial of their right to participate in a full and meaningful way in the host society.

[96] M. EVERSON, *The Legacy of the Market Citizen*, cit.

[97] For a discussion of the shifting concepts of territory at play in cases of exclusion and residence in Union citizenship law see L. AZOULAI, *Transfiguring European Citizenship: From Member State Territory to Union Territory*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 178 *et seq*.

[98] Note that as the Court stresses in *B and Vomero*, reliance on the social assistance regime of the host society may lead to expulsion for those who do not enjoy permanent residence. See *B and Vomero* [GC], cit. para. 55. See also *Brey*, cit.

[99] For the classic statement see T.H. MARSHALL, *Citizenship and Social Class*, London: Pluto Press, 1992.

ARTICLES
SPECIAL SECTION – SOCIAL INTEGRATION IN EU LAW:
CONTENT, LIMITS AND FUNCTIONS OF AN ELUSIVE NOTION

SOCIAL INTEGRATION OF REFUGEES AND ASYLUM SEEKERS THROUGH THE EXERCISE OF SOCIO-ECONOMIC RIGHTS IN EUROPEAN UNION LAW

EMANUELA PISTOIA*

ABSTRACT: Economic and social rights are key for a successful integration of aliens. Indeed, they represent a considerable part of the content of the international protection status in the Qualification Directive, in accordance with the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and other relevant human rights treaties. However, in some cases EU rules allow a differential treatment of beneficiaries of international protection as compared with nationals and, despite the unification of statuses accomplished in the recast Qualification Directive, to some extent a distinctive treatment of beneficiaries of subsidiary protection status is still tolerated in this area. This is even more true for those who are merely asylum seekers: the relevant legal machinery is built around the idea that they should receive differential treatment. A review of the Union's commitment to social integration of beneficiaries of international protection also extends to its competences concerning affirmative actions and integration programmes.

KEYWORDS: socio-economic rights – beneficiaries of international protection – non-discrimination – affirmative actions – integration programmes – asylum seekers.

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I. Introduction

The notion of integrating aliens – or of integrating them *socially*, which in common parlance means the same – is equal parts clear and vague. If it undoubtedly suggests the process whereby aliens become full members of society in the country where they have settled down (or the successful result of such a process),[1] then the idea of becoming full members of a society is everything but definite, especially for those who do not acquire citizenship.[2] A case in point of this ambiguity can be seen in the area of family life. Recital 4 of the Family Reunification Directive's preamble clarifies that family reunification – i.e. the entry into and residence in a Member State of a family member of a third-country national legally residing in that Member State – is deemed to facilitate integration of aliens because it "helps to create sociocultural stability".[3] The Office of United Nations High Commissioner for Refugees (UNHCR) has the same approach.[4] Yet the concept of "social integration" of members of a minority can be understood as their ability to enter into relationships in the private sphere with those belonging to the majority, including forming a couple and getting married.[5] Both views make perfect sense.

[1] Social integration corresponds to one of the "three durable solutions available to refugees", which the United Nations High Commissioner for Refugees (UNHCR) refers to as "local integration": UNHCR Executive Committee, Conclusion no. 104 of 7 October 2011 on Local Integration, www.unhcr.org. A full picture of the legal issues of refugees' local integration is in C. Murphy, *Immigration, Integration and the Law. The Intersection of Domestic, EU and International Legal Regimes*, Farnham: Ashgate, 2013, pp. 79-87.

[2] At least legally, naturalization is the ultimate tool for the social integration of aliens. Art. 34 of the 1951 Geneva Convention relating to the Status of Refugees (hereinafter, the Geneva Convention) encourages naturalization as it lays down the obligation to facilitate it "as far as possible", to expedite and remove obstacles in the related proceedings. No word on the matter is contained in the Qualification Directive (see below, footnote no. 10), to the criticism of the UNHCR: UNHCR, Annotated Comments of 29 April 2004 on the Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, p. 46. It should be highlighted that the EU has no competence on measures regarding naturalization of aliens in Member States.

[3] Directive 2003/86/EC of the Council of 22 September 2003 on the right to family reunification. The statement in recital 4 is suitable for all aliens, yet it is useful to point out that Directive 2003/86 is applicable when the sponsor is entitled to international protection within the meaning of the Common Asylum System of the Union (CAS) (but not when he/she is still awaiting a final decision on his/her refugee status). Interestingly, UNHCR, Note on the integration of refugees in the European Union, May 2007, www.unhcr.org, conveys the same vision on the role of family unity for a successful integration of refugees. The reason given in the Note is that "[f]amily members can reinforce the social support system of refugees" (para. 35).

[4] UNHCR, Note on the integration of refugees in the European Union, cit., para. 35.

[5] R. Medda-Windischer, *Nuove minoranze. Immigrazione tra diversità culturale e coesione sociale*, Padova: CEDAM, 2010, p. 203. The Author broadly refers to social relationships of any kind, also including friendships and charity work. On the problematic interaction between majority and minority with regard to societal integration of members of the latter (especially if the minority is made of migrants) see D. Kostakopoulou, *Liberalism and Societal Integration: In Defence of Reciprocity and Constructive Pluralism*, in *Netherlands Journal of Legal Philosophy*, 2014, p. 127 *et seq.*: the analysis is framed in and aimed at

From a legal perspective, the two-way process through which integration is often described[6] is not one involving free political choice but rather one with a solid background in international and Union law (as well as in the constitution of the Member States).[7] Both directions of this process are guided by the law. The fact that refugees (and indeed any other aliens) cannot be obliged to forego their own cultural identity (which is the limit to the first direction of the integration process focussing on refugees' adjustment to the host society) is an exercise of their civil rights. In turn, the fact that host communities and public institutions should make the necessary adaptations to meet the needs of newcomers – i.e. the second direction of the process – is grounded in these same rights. Hence the law, particularly international and EU law, includes the notion of social integration and highly contributes to define its content. If multiculturalism is patently compliant with international and EU legal requirements, assimilation is subject to legal constraints that neutralize its polarization *vis-à-vis* multiculturalism inasmuch as they stand in the way of cancelling cultural diversity and also discriminating against aliens.

Moreover, the bi-directional process described above can hardly be different for refugees and for other aliens legally residing in an Member State. Therefore, it seems to me that this is of little interest in an essay on social integration of those entitled to international protection within the meaning of the EU Common Asylum System and/or those who have applied for such status (whom I occasionally refer to as "refugees" for the sake of brevity). Instead, I find it more interesting to investigate the legal tools and/or grounds for which they might receive differential treatment as compared with other aliens. Since a legal assessment of differences in treatment should be focused primarily on the aim of those differences, the issue of the definition of social integration remains key. With the concept of the bi-directional process in the background, and

further developing a philosophical concept of societal integration which I wittingly sidestep here as of little help for the present reflections.

[6] UNHCR, Note on the integration of refugees in the European Union, cit., para. 1. The integration policies developed by the European institutions took their cue from a definition of integration built on the concept of two-way process, in the European Council Conclusions of 19-20 June 2003: G. CAGGIANO, *L'integrazione dei migranti fra* soft-law *e atti legislativi: competenze dell'Unione e politiche nazionali*, in G. CAGGIANO (a cura di), *I percorsi giuridici per l'integrazione. Migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento italiano*, Torino: Giappichelli, 2014, p. 32. See also Council of the European Union, document 14615/04 of 19 November 2004, *Common Basic Principles for Immigrant Integration Policy in the European Union*; Communication COM(2005) 389 final of 1 September 2005 from the Commission, *A Common Agenda for Integration. Framework for the Integration of Third-Country Nationals in the European Union*. According to D. KOSTAKOPOULOU, *The Anatomy of Civic Integration*, in *The Modern Law Review*, 2010, p. 933 *et seq.*, the said two-way process is betrayed through the development of a civic integration paradigm which, in reality, embodies a one-way process; the Author argues that, despite the reiteration of the two-way process doctrine, this paradigm is left room in EU law.

[7] In the context of an overabundance of literature on the topic, C. MURPHY, *Immigration, Integration and the Law*, cit., pp. 87-124 provides a streamlined overview of the role of international human rights law in addressing integration issues.

bearing in mind the open-ended, neutral idea of integration that underpins many legal and policy acts, it seems reasonable to rely on a purposeful and flexible notion through which a refugee may perceive himself/herself, and be perceived, as a member of his/her host community despite being a recent addition. This is possible only if his/her presence is secure and those concerned have reached a certain stability in terms of the ability to sustain themselves economically, to undertake economic activity or to obtain employment, to access a decent accommodation, to send their children to school and to develop a private and cultural life.

To this end, economic and social rights are key.[8] Hence, I first review the EU rules on the matter as applicable to those entitled to international protection, with a focus on their differential treatment compared with nationals of the host State and on their equal treatment with other aliens entitled to reside there. Along this line of reasoning, I next consider the domestic discriminatory measures aimed at the integration of those granted subsidiary protection status, which have been submitted to the Court of Justice for preliminary ruling in the case of *Alo and Osso*.[9] A review of those grounds for discrimination that have been respectively ruled out or green-lighted, on the basis of EU law, provides the occasion to further evaluate the peculiar situation of beneficiaries of international protection concerning integration. As national treatment can do little for social integration of those who are particularly vulnerable like refugees and those who flee from a real risk of suffering serious harm (as per the definition of subsidiary protection status), affirmative actions and integration programmes can make a difference: I briefly investigate the Union's competence and practice in this connection. As a last point, I consider the integration of those who spend time awaiting a decision on their status in the framework of Directive 2011/95 (the Qualification Directive):[10] as convincingly pointed out, especially if they have entered a Member State illegally in such a way as to have never been entitled to a residence permit there, their early experience in their country of asylum-to-be will probably be crucial to the quality of the relations that they then develop with that country. If social

[8] This has been acknowledged in multiple sources with no exception. See UNHCR Executive Committee, Conclusion on Local Integration, cit., let. k); Communication COM(2011) 455 final of 20 July 2011 from the Commission, *The European Agenda for the Integration of Third Country Nationals*.

[9] Court of Justice, judgment of 1 March 2016, joined cases C-443/14 and C-444/14, *Alo and Osso* [GC].

[10] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. Directive 2011/95 recast former Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

integration also involves a sense of belonging, the treatment of asylum seekers might also be an important social integration issue.[11]

II. Economic and social rights equal to those of nationals

The portion of Qualification Directive concerning the content of international protection embraces economic and social rights in Arts 26-30. They are as follows: access to employment, including employment-related education opportunities and vocational training (Art. 26), access to education (Art. 27), access to procedures for recognition of qualifications (Art. 28), social welfare (Art. 29) and healthcare (Art. 30). These rights are granted under the same conditions as nationals, with three exceptions: access to education for adults, which States are obliged to allow under the same conditions as third-country nationals legally resident (Art. 27, para. 2); social assistance, which States are free to limit to core benefits[12] as regards beneficiaries of subsidiary protection status (Art. 29, para. 2); and access to accommodation, which should be ensured under equivalent conditions as third-country nationals legally resident (Art. 32, para. 1, of Directive 2011/95). The two latter provisions are mitigated as follows: Art. 29, para. 2, of Directive 2011/95 closes with the obligation, should States opt for limiting social assistance to core benefits, to provide them "at the same level and under the same eligibility conditions as nationals"; whereas Art. 32 of Directive 2011/95 lays down, with a certain degree of ambiguity, States' endeavour to put into operation "policies aimed at preventing discrimination of beneficiaries of international protection and at ensuring equal opportunities regarding access to accommodation". With regard to access to accommodation, the standard is aligned with that of host State nationals after beneficiaries of international protection obtain a residence permit as long-term stayers within the meaning of Directive 2003/109, after five years of lawful residence in a Member State:[13] here,

[11] I leave aside social integration of minors, including unaccompanied minors, since they raise specific legal issues which deserve a separate analysis: see F. Ippolito, G. Biagioni (eds), *Migrant Children: Challenges for Public and Private International Law*, Napoli: Editoriale Scientifica, 2016.

[12] Recital 45 of the Qualification Directive details core benefits through a non-exhaustive list covering minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, "in so far as those benefits are granted to nationals under national law". The list in recital 45 reflects that contained in recital 13 of the Directive 2003/109 of the Council of 25 November 2003 on the status of third-country nationals who are long-term residents, which similarly allows States to limit the right to social assistance to core benefits by way of derogation to the general rule on equality of treatment with nationals. Hence, the interpretation of the Court of Justice that the list in Directive 2003/109 is non-exhaustive and requires a restrictive interpretation can extend to the mirroring list in Directive 2011/95: Court of Justice, judgment of 24 April 2012, case C-571/10, *Kamberaj* [GC], paras 85-87. On this point see S. Peers, *The Court of Justice Lays the Foundations for the Long-Term Residents Directive:* Kamberaj, Commission v. Netherlands, Mangat Singh, in *Common Market Law Review*, 2013, p. 542.

[13] Based on Directive 2003/109, in addition to the requirement of a five-year lawful and uninterrupted stay in a Member State (Art. 4), eligible conditions for long-term residence status are the availability of

according to Art. 11, para. 1, let. f), the holders of a long-term residence permit are entitled to the same treatment as nationals. However, even refugees who are long-term residents might not be treated with the national standard regarding access to education for adults: Art. 11, para. 3, let. b), of Directive 2003/109 allows States to require evidence of adequate language knowledge and to meet conditions on prior education.[14] The same applies regarding the right to social assistance, as also those granted long-term stayer status may have access to core provisions only.[15]

Granting rights equal to those of nationals is a tremendous tool of social integration. From a legal perspective, this makes a community established in a certain territory (i.e. in a certain State) homogeneous *vis-à-vis* the law, with no A-level and B-level individuals. Moreover, from a practical perspective, it makes it easier for refugees to reach that state of stability earlier identified in terms of social integration. Bestowing equality of rights is a highlight of the alien integration policy found in the conclusions of the Tampere European Council Presidency.[16]

stable and sufficient resources and health insurance (within the terms of Art. 5) and the fact that the applicant is not a danger for public order and public security in the host State (Art. 6). Directive 2003/109 applies to beneficiaries of international protection following Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection. The previous five-year stay requirement is adapted to the latter (Art. 1, point 3, let. b), of Directive 2011/51). On the integration of long-term stayers see, *ex multis*, M. JESSE, *Missing in Action: Effective Protection for Third-Country Nationals from Discrimination under Community Law*, in E. GUILD, S. CARRERA, K. GROENENDIJK (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Farnham: Ashgate, 2009, p. 187 *et seq*., for reflections on the persistent differential treatment of long-term stayers (a point which would be a complement to the present analysis yet I have no room to address here accurately), and to A. DI STASI, R. PALLADINO, *La perdurante frammentarietà dello "statuto" europeo del soggiornante di lungo periodo tra integrazione dei mercati ed integrazione politico-sociale*, in *Studi sull'integrazione europea*, 2012, p. 375 *et seq*.; A. DI STASI, *L'integrazione del lungo soggiornante*, in G. CAGGIANO (ed.), *I percorsi giuridici per l'integrazione*, cit., p. 241 *et seq*.

[14] Based on the no-prejudice clause of Art. 1, point 6), of Directive 2011/51, Art. 11, para. 3, let. b), of Directive 2003/109 should not be interpreted in such a way as to lower the degree of protection granted to beneficiaries of international protection in the corresponding provision of the Qualification Directive.

[15] See Art. 11, para. 4, of Directive 2003/109. However, since Art. 1, point 6), of Directive 2011/51 establishes that Art. 11, para. 4, of Directive 2003/109 shall be without prejudice to the Qualification Directive, beneficiaries of refugee status (who are not covered by Art. 29, para. 2, of the Qualification Directive) should be excluded from the application of such a lower degree of protection.

[16] See European Council Conclusions of 15-16 October 1999, para. 18. The passage refers to the integration of third country nationals, who in the economy of the Conclusions as well as in the language of the European Union constitute a different category. However, there is no reason to understand it as *excluding* those third-country nationals who are entitled to international protection. Regardless, EU law commentators constantly assess issues pertaining to non-discrimination between aliens and nationals of the Member States or among aliens without taking into account beneficiaries of international protection: see, for instance, P. SIMONE, *Il principio di non discriminazione nella giurisprudenza della Corte di giustizia: i criteri applicativi*, in I. CASTANGIA, G. BIAGIONI (eds), *Il principio di non discriminazione nel diritto dell'Unione europea*, Napoli: Editoriale Scientifica, 2011, pp. 48-54; B. NASCIMBENE, *Comunitari ed extracomunitari: le ragioni del doppio standard*, in *La condizione giuridica dello straniero nella giurisprudenza*

In the 1951 Geneva Convention on the Status of Refugees (the Geneva Convention), contracting States are obliged to grant refugees equivalent rights as *aliens*. This is true for acquisition of property (Art. 13), wage-earning employment (Art. 17), self-employment (Art. 18), professions (Art. 19), housing (Art. 21), and post-elementary education (Art. 22, para. 2).[17] What are the grounds for such an increase in the level of protection of refugees in EU law, given that the legal base for the Union's common policy on asylum, subsidiary and temporary protection requires compliance with the Geneva Convention and the 1967 Protocol (Art. 78, para. 1), a requirement echoed in Art. 18 of the Charter of Fundamental Rights of the European Union (Charter) on the right to asylum? From the preamble of the Qualification Directive it emerges that the grounds are twofold: the Charter (recital 16), and some unnamed international treaties to which the Member States are parties so that their participation in the Union requires coordination with such treaties (recital 17). More specifically, the choice to set the level of protection for refugees at that of nationals of the Member States is determined by the universal character of the economic and social rights they establish and by the principle of non-discrimination.

Recital 16 of the Qualification Directive explains that its purpose is "to promote the application" of some specific provisions of the Charter. Those worth mentioning in the present analysis are Art. 14 (right to education), Art. 15 (freedom to choose an occupation and right to engage in work), Art. 16 (freedom to conduct a business), Art. 21 (non-discrimination) and Art. 34 (social security and social assistance) of the Charter. Arts 26-29 of the Qualification Directive clearly mirror Arts 14, 15, 16 and 34 of the Charter, read in combination with the prohibition on discrimination on several grounds (particularly race, colour, ethnic origin and nationality) in Art. 21.[18] Interestingly, the choice to award beneficiaries of international protection the same level of protection as nationals (in relation to those economic and social rights deemed crucial for their integration) predates the

costituzionale, Atti del seminario svoltosi a Roma il 26 ottobre 2012, Milano: Giuffrè, 2013, p. 95 *et seq*., available at www.cortecostituzionale.it; C. FAVILLI, *L'applicazione ai cittadini di Paesi terzi del divieto di discriminazione sulla base della nazionalità*, in G. CAGGIANO (ed.), *I percorsi giuridici per l'integrazione*, cit., p. 115 *et seq.*; E. BROUWER, K. 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, J. GOLDSCHMIDT (eds), *Equality and Human Rights: Nothing but Trouble?*, Utrecht: SIM, 2015, p. 123 *et seq*.

[17] Instead, under the Geneva Convention contracting States are obliged to grant refugees equal rights with citizens as regards protection of intellectual property (Art. 4), rationing measures (Art. 20), elementary education (Art. 22, para. 1), public relief and assistance (Art. 23), and labour legislation and social security (Art. 24).

[18] The role of the Charter in support of migrants' integration is discussed in F. IPPOLITO, *La Carta dei diritti fondamentali quale strumento per l'integrazione dei cittadini comunitari ed extracomunitari: un primo bilancio*, in G. CAGGIANO (ed.), *I percorsi giuridici per l'integrazione*, cit., pp. 97-100: the Author shows the Charter's accomplishments based on Art. 18 but, while positive on the unexploited potentialities of this provision and of Art. 21, para. 1, she is skeptical about the role of Art. 21, para. 2, on the prohibition on discrimination on grounds of nationality.

awarding of binding legal effects upon the Charter, in 2009.[19] Directive 2004/83, repealed by the current Qualification Directive, had already set that level of protection,[20] the only substantial change having been that regarding the right to have access to employment-related education opportunities for adults, vocational training and practical workplace experience (an aspect of the right to have access to employment). Not only were beneficiaries of subsidiary protection status not entitled to the application of the same rules as nationals, but they could only benefit from such right "under conditions to be decided by the Member States".[21] Instead, under the domain of the current Qualification Directive all beneficiaries of international protection are entitled to "equivalent conditions as nationals",[22] this increased level of protection results from the establishment of a uniform status for refugees and for persons eligible for subsidiary protection.[23]

The preamble of Directive 2004/83 did not elaborate upon the reasons for granting all those within the Directive's scope of application the same protection as nationals rather than as other aliens legally residing in the Member States (at least in principle). In connection with social assistance, it merely mentioned it being "appropriate [...] to avoid social hardship":[24] indeed, a consideration reiterated in the recast Directive.[25] Interestingly, both preambles highlight the need to act without discrimination precisely in one area, namely social assistance, where the content of the status is such as to establish discrimination between nationals as well as between beneficiaries of international protection.[26] Regardless, the principle of non-discrimination on grounds of nationality ended up protecting the social rights of aliens in the framework of the European Convention on Human Rights (the Convention) many years ago, the Convention being a major

[19] I refer to 2009 as the year of the entry into force of the Lisbon Treaty, signed on 13 December 2007, which marks the acquisition by the Charter of the same legal value as the Treaties, pursuant to Art. 6, para. 1, TEU.

[20] F. IPPOLITO, *Cittadini provenienti da Paesi terzi: applicabilità e contenuto (variabile) del principio di non discriminazione*, in I. CASTANGIA, G. BIAGIONI (eds), *Il principio di non discriminazione*, cit., p. 132.

[21] Art. 26, para. 4, of Directive 2004/83. The exception did not cover beneficiaries of refugee status, who were already entitled to national treatment. The differential treatment of beneficiaries of subsidiary protection status in Art. 26, para. 4, of Directive 2004/83 received harsh criticism from the UNHCR. See UNHCR, Annotated Comments, cit., pp. 41-42. On the (almost complete) elimination of differences between refugees and those granted subsidiary protection status in the recast Qualification Directive see below, Section III.

[22] Art. 26, para. 2, of the Qualification Directive.

[23] See recital 39 of the Qualification Directive. On this point see further below, Section III.

[24] Recital 33 of Directive 2004/83.

[25] Recital 45 of the Qualification Directive.

[26] On the discrimination between beneficiaries of international protection in connection with social assistance see below, Section III.

source of general unwritten principles of EU law along with the common constitutional traditions of the Member States.[27]

If in Directive 2011/95 the Charter is acknowledged as the background for certain rules which indeed existed even before the Charter itself (at least with a legal value), the international treaties referred to in its recital 17 as complementing the said background did exist already at the time of Directive 2004/83, although they were not at all mentioned therein.[28] Those unspecified treaties no doubt include the Convention and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). Other potentially relevant treaties are the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[29] the 1979 Convention on the Elimination of All Forms of Discrimination against Women, and the 1989 Convention on the Rights of the Child.[30] The ICESCR does not make explicit the application of the rights there recog-

[27] The ice-breaker in this area is European Court of Human Rights, judgment of 31 August 1996, case no. 39/1995/545/631, *Gaygusuz v. Austria.* A criticism of the European Court of Human Rights for this course of action is found in M. BOSSUYT, *Should the Strasbourg Court Exercise More Self-Restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations*, in *Human Rights Law Journal*, 2007, p. 321. The limited reach of *Gaygusuz* in the legislation of European States is argued (with regret) in M.-B. DEMBOUR, Gaygusuz *Revisited: The Limits of the European Court of Human Rights' Equality Agenda*, in *Human Rights Law Review*, 2012, p. 689 *et seq*. More generally, on the role of the European Court of Human Rights in the achievement of social rights of aliens by means of Art. 14 of the Convention (in combination with other provisions, given the necessary link between Art. 14 and other Convention's rights), E. BREMS, *Indirect Protection of Social Rights by the European Court of Human Rights*, in D. BARAK-EREZ, A. GROSS (eds), *Exploring Social Rights: Between Theory and Practice*, Oxford: Hart, 2007, pp. 158-159; M. DAHLBERG, *Should Social Rights Be Included in Interpretations of the Convention by the European Court of Human Rights?*, in *European Journal of Social Security*, 2014, p. 252 *et seq*.

[28] It clearly emerges from UNHCR, Annotated Comments, cit., that the UN Office did consider the international human rights treaties mentioned (yet unnamed) in the recast Qualification Directive as fully applicable to the content of international protection already at the time of Directive 2004/83. The Annotated Comments make it clear that they go beyond the Geneva Convention and that (alas!) they were not fully reflected in Directive 2004/83 (p. 35).

[29] The ICERD lays down the obligation to prohibit and to eliminate any form of racial discrimination in the enjoyment of economic, social and cultural rights (Art. 5): those relevant in the light of the Qualification Directive as compared with the Geneva Convention are the right to work (as detailed in a series of specific rights); the right to housing; the right to public health, medical care, social security and social services; and the right to education and training. The role of ICERD in the protection of refugees' rights on grounds of non-discrimination with nationals requires the careful assessment of the specific circumstances of the case, since it or ICERD does not apply "to distinctions, exclusions, restrictions or preferences made by a State Party [...] between citizens and non-citizens": Art. 1, para. 2, ICERD. On this point, including references to the practice of the ICERD Committee, see M. SSENYONJO, *Economic, Social and Cultural Rights in International Law*, Oxford: Hart, 2009, pp. 292-294.

[30] The Commission on Human Rights, Resolution 1999/44 of 27 April 1999, *Human Rights of Migrants*, relies on the following non-exhaustive list of instruments: the International Covenants on Human Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; and the Convention on the Rights of the Child.

nised to aliens, particularly to refugees, asylum seekers and those legally resident in a State. However, this can be inferred from both the phrasing of all the provisions establishing the actual rights ("everyone" is entitled), and from Art. 2, para. 2, ICESCR on the prohibition of discrimination on the basis of one's national origin.[31] These arguments have long led the Committee on Economic, Social and Cultural Rights to understand ICESCR rights as extending to all those within the jurisdiction of States parties.[32] Notwithstanding the enduring absence of official documents on the ICESCR as a source of rights for refugees in completion and supplement to the Geneva Convention, there must be no doubt on the matter. The New York Declaration for refugees and migrants, adopted by the UN General Assembly in 2016, is a recent authority in this regard, having clarified that human rights are for "all refugees and migrants, regardless of status".[33] A further argument in favour of this conclusion derives from Art. 2, para. 3, which allows developing countries to determine to what extent they would grant economic rights to aliens: this is clearly an exception, the general rule being the applicability of economic rights regardless of nationality.

[31] Economic and Social Council, Report of the Special Rapporteur on prevention of discrimination and the rights of non-citizens of 26 May 2003, UN Doc. E/CN.4/Sub.2/2003/23.The application of human rights to aliens in general terms (i.e. in connection to all human rights and to any category of aliens) is extensively argued on the basis of the prohibition on discrimination on ground of nationality in A. MARCHESI, Upholding the promise of Article 15: *sul complesso rapporto fra cittadinanza e diritti umani*, in S. MARCHISIO, C. CURTI GIALDINO, R. CADIN, L. MANCA (eds), *Scritti in memoria di Maria Rita Saulle*, Napoli: Editoriale Scientifica, 2014, pp. 888–892. On equality and non-discrimination in the ICESCR, see extensively M.C.R. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development*, Oxford and New York: Clarendon Press, 1998, p. 153 *et seq*: interestingly, the Author dwells upon the reluctance of the Covenant Committee to be steadily in defence of the equal treatment of aliens, which in his view is due to State practice (pp. 172–174).

[32] See, for instance, Committee on Economic, Social and Cultural Rights, General Comment no. 19, *The Right to Social Security*, E/C.12/GC/19, 4 February 2008, para. 23: "All persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalized groups, *without discrimination on any of the grounds prohibited under article 2, paragraph 2, of the Covenant*" (emphasis added). See also Commission on Human Rights, Resolution 1999/44, cit., whose preamble includes the following: "every State party to the International Covenant on Economic, Social and Cultural Rights must undertake to guarantee that the rights enunciated in that Covenant will be *exercised without discrimination of any kind, including on the basis of national origin*" (emphasis added). Clear examples of the application of the ICESCR to refugees and asylum seekers emerge from the observations of the Committee on Economic, Social and Cultural Rights concerning the practice of specific States: see F. BESTAGNO, *Gli obblighi internazionali in materia di abitazione adeguata*, in F. BESTAGNO (ed.), I *diritti economici, sociali e culturali. Promozione e tutela nella comunità internazionale*, Milano: Vita e pensiero, 2009, p. 106. In legal literature, see also M. SSENYONJO, *Economic, Social and Cultural Rights*, cit., pp. 288-289.

[33] General Assembly, New York Declaration for refugees and migrants of 3 October 2016, UN Doc. A/RES/71/1, para. 5. It is mainly concerned with human rights of refugees and migrants: its perspective is not to establish new rights for them but to reaffirm existing rights and to make sure that they are fully respected.

I would tend to see the Qualification Directive as evidence of the non-discriminatory character of social and economic rights on national grounds, or at least an authoritative contribution to their understanding in such a way.[34]

The European Social Charter is one of the international treaties the preamble of the recast Qualification Directive may be deemed to refer to.[35] It applies to refugees within the meaning of the Geneva Convention (whereas the Union directives also cover those falling within the scope of the subsidiary protection status) to the extent that it is possible, with the said Convention and "any other existing international instruments applicable to those refugees" marking the less favourable level of protection compatible with the Social Charter itself.[36]

III. Cases where discrimination between refugees and nationals, or between those respectively granted refugee status and subsidiary protection status on social and economic grounds, is allowed

Nothing in Directive 2011/95 prevents Member States from treating beneficiaries of international protection and nationals equally as regards their social and economic rights. This derives from its Art. 3, which allows the introduction or retention of more favourable standards regarding the content of international protection.[37] The equalization with nationals could be either a free political choice or a requirement found in constitutions. In the latter case, Art. 53 of the Charter leaves room for higher constitutional standards. Unlike in *Melloni*,[38] they are not barred by the principle of primacy of EU law as they do not conflict with Directive 2011/95 (Art. 3).

The fact remains that, as pointed out above, the Charter allows for a differential treatment between refugees and nationals only when justified. The recognition of the

[34] Despite its alleged flaws, which will be discussed in Section III, I deem as authoritative the Qualification Directive's contribution because the Directive is a legally binding act, plus it refers to existing obligations of the Member States.

[35] The European Social Charter does not apply to aliens if not nationals of other State parties. In S. Cantoni, *La tutela internazionale del principio di uguaglianza*, cit., p. 559, this is understood as allowing a discrimination between nationals and aliens in the enjoyment of social rights.

[36] See the Appendix to the Revised European Social Charter ("Scope of the Revised European Social Charter in terms of persons protected"), Section 2. According to European Council on Refugees and Exiles (ECRE), Information Note of 7 October 2013 on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), www.ecre.org, p. 12, Directive 2011/95 should be applied in a manner compatible with the European Social Charter.

[37] Art. 3 is supported by recital 14 of the Qualification Directive.

[38] Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni* [GC], para. 58. As further specified immediately below, in this Section, the third country nationals standard is compliant with the Charter inasmuch as it is justified.

right to social and housing assistance "in accordance with the rules laid down by Union law and national laws and practices" (Art. 34, para. 3, of the Charter) in no way gives free rein to unjustified disparate restrictions at the level of EU secondary law or in domestic legislation.[39] I shall now examine whether this is the case, given that the preamble of Directive 2011/95 provides no explanation. The analysis takes advantage of the case-law of the European Court of Human Rights (the European Court) on Art. 14 of the Convention, which is a standard of interpretation of the Charter within the terms of Art. 51, para. 3, of the latter.[40] The European Court traditionally keeps the bar of discrimination on social and economic rights relatively low, as it acknowledges a very wide margin of appreciation for States in socio-economic subject-matter.[41]

The European Court carries out its assessment on the existence of discrimination by identifying a comparator who corresponds to the grounds of the discrimination, i.e. a type of individual with whom the alleged victim of discrimination is comparable in terms of shared characteristics. A difference in treatment is impermissible if the comparator is awarded the benefit denied to the applicant with no objective and reasonable justification.

The question arises as to whether nationals are comparators to those granted international protection as far as Arts 29, para. 2, and 32, para. 1, of the Qualification Directive are concerned. Beyond nationality itself, which by definition cannot be used except for in very special situations,[42] the distinctive element separating the two could be the latter's temporary right of residence in a certain State.[43] Should this element be deemed applicable and relevant given the rights at stake, the differential treatment allowed by Directive 2011/95 would be in line with the Convention and hence with the Charter; otherwise, the national measures laying down such differential treatment would constitute a breach of the Convention and the Charter.

[39] The Court of Justice had the occasion to rule on domestic legislation on social assistance and it relied on Art. 34 with no deference whatsoever based on para. 3: S. PEERS, *The Court of Justice Lays the Foundations*, cit., p. 549.

[40] In the Explanations to the Charter it is stated that Art. 21, para. 1, should be applied in compliance with Art. 14 of the Convention as long as its content mirrors that of Art. 14.

[41] European Court of Human Rights: judgment of 21 February 1986, no. 8793/79, *Jaimes v. the United Kingdom*, para. 46; judgment of 23 October 1997, nos 21319/93, 21449/93, 21675/93, *National and Provincial Building Society v. the United Kingdom*, para. 80; judgment of 12 April 2006, nos 65731/01 and 65900/01, *Stec v. the United Kingdom*, para. 52, and many others. Such a wide margin of appreciation in socio-economic matters is due to the governments' direct knowledge of the local society and its needs, which leads the Court to ensure a particularly high degree of respect for the legislature's policy choices unless they are "manifestly without reasonable foundation".

[42] To put it with the European Court of Human Rights, mere nationality can be a legitimate grounds for distinction for "very weighty reasons": *Gaygusuz v. Austria*, cit., para. 42 (as well as subsequent judgments on the matter).

[43] In European Court of Human Rights, judgment of 27 September 2011, no. 56328/07, *Bah v. United Kingdom*, para. 41, an alien with indefinite leave to remain in the defendant State was deemed to have an equivalent status to citizenship of that State, i.e. a national of that State was regarded as comparator.

The European Court is open to considering nationals and refugees on equal footing because their statuses involve a poor amount of choice and are therefore difficult (if not impossible, in case of refugees) to change.[44] However, the point here is relevant because in the Qualification Directive those granted refugee status, as well as their family members, are entitled to a residence permit for at least three years with the possibility of renewal (Art. 24, para. 1, of the Qualification Directive); further, those granted subsidiary protection status and their family members should be issued a residence permit valid for at least one year and, in case of renewal, for at least two years (Art. 24, para. 2, of the Qualification Directive). These residence permits are short-term,[45] and therefore their holders cannot in principle be considered equal to nationals. Nevertheless, it is believed that the factual situation underpinning those statuses should prevail because those who hold them remain entitled to reside in a Member State.[46] Moreover, thanks to renewals refugees have a substantially indefinite leave to remain in a host State. Concerning those granted subsidiary protection status, if "in case of renewal" means that States are not obliged to establish the renewal of their residence permits such that applicants can be required to go through the entire application procedure each time their permits expire, their situation is indeed different from that of nationals.[47] This should surely be assessed State by State.

Limitations to social assistance (Art. 29, para. 2, of the Qualification Directive) and access to accommodation (Art. 32, para. 1, of the Qualification Directive)[48] are surely a result of financial considerations. In principle, they constitute legitimate purposes for differential treatment affecting economic and social rights: this clearly emerges from the case-law of the European Court.[49] Some circumstances could favour a positive as-

[44] *Bah v. United Kingdom*, cit., paras 45 and 47.

[45] See the criticism on this choice in UNHCR, Annotated Comments, cit., pp. 39-40, where it is argued that beneficiaries of international protection should be better granted permanent residence.

[46] Cessation of status is respectively regulated in Arts 11 and 16 of of Directive 2011/95. The UNHCR highlights that the burden of proof lies on host States: see UNHCR, Guidelines on International Protection of 10 February 2003, no. 3: Cessation of Refugee Status under Art. 1C, paras 5 and 6 of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses).

[47] I believe that this interpretation should be ruled out as unreasonable, yet the phrasing of Art. 24, para. 1, of Directive 2011/95 is ambiguous. I also believe that the different treatment of those granted refugee status and those granted subsidiary protection status in this area is unreasonable, since in principle the prerequisites respectively applicable in the two cases are subject to an equal degree of variability over time. As a matter of fact, this degree of variability heavily depends on specific cases, but surely a general distinction between prerequisites in the terms of Art. 24, para. 1, of Directive 2011/95 appears ill-founded.

[48] According to UNHCR, Annotated Comments, cit., pp. 45-46, the alignment of the level of protection regarding access to accommodation to third country nationals legally resident is not compliant with the Geneva Convention, nor is it supposedly such with relevant human rights treaties. Similarly, in ECRE, Information Note, cit., pp. 15-16, the Union is urged to grant national treatment in accordance with the Geneva Convention. Art. 21 of the Geneva Convention calls for a "treatment as favourable as possible".

[49] European Court of Human Rights, judgment of 8 April 2014, no. 17120/09, *Dhabhi v. Italy*, para. 53.

sessment of the proportionality of the said limitations *vis-à-vis* their alleged budgetary purpose. The one applicable to both is that they are mere possibilities left to the political and economic assessment of the Member States.[50] Concerning access to accommodation, as a matter of fact the differential treatment compared with nationals may prove limited in time, since beneficiaries of international protection may soon find themselves eligible for long-term residence status.[51] In addition, access to accommodation does not extend to housing benefits, which furthermore cannot be regarded as core social provisions covered by the related limitation.[52] Concerning the latter, Art. 29, para. 2, of the Qualification Directive might not *per se* be in breach with the Charter because it should be interpreted restrictively and deemed applicable only to those provisions that the bodies in the Member States responsible for the implementation of the Directive expressly intended to cover.[53]

However, the extent of domestic provisions departing from equal treatment with nationals should also be compliant with the Charter: States' choices in this connection fall within its scope of application set out in Art. 51, para. 1. Here the assessment of the actual restrictions may have a different outcome and particularly the proportionality test may even vary from State to State, since it is to be based on domestic provisions. Such is the parallel application of the Charter – i.e. *vis-à-vis* the EU institutions and *vis-à-vis* the Member States – in connection with an EU act which leaves discretion to Member States: it brings along a dual test of compliance, and it ends up placing upon States the heaviest burden of keeping up with its requirements.

Based on the case-law of the European Court the exclusion of beneficiaries of international protection from non-core social provisions and their differential treatment from nationals regarding access to accommodation calls for a case-by-case assessment. In order to avoid cases where differential treatment is unjustified, national law enshrining the said exclusion or discrimination should establish limitations and exceptions. Indeed, it is very difficult for such an exclusion or discrimination to be compliant with the Charter (and obviously with the Convention, which applies to national conducts) when solely based on nationality and on the status of beneficiaries of international protection who otherwise meet the applicable eligibility conditions.[54] For instance, restrictions should be firmly anchored to their budgetary justification: as it is well known, in *Dhabhi* the margin of appreciation of States in the social security field, though admittedly very wide, was not deemed so wide as to exempt third country nationals (TCNs) from a fami-

[50] In principle, an EU directive provision potentially in breach with the Charter is not such insofar it awards discretion to the Member States. Court of Justice, judgment of 27 June 2006, case C-540/03, *Parliament v. Council* [GC], para. 98.

[51] See above, at the beginning of Section II.

[52] *Kamberaj* [GC], cit., para. 92.

[53] *Ibid.*, paras 86-87.

[54] *Gaygusuz v. Austria*, cit., paras 42-48.

ly allowance solely on the grounds of nationality.[55] Along the same line of reasoning, a mere budgetary justification might work differently depending on the length of the applicant's stay in a Member State, especially with regard to benefits that are contingent on previous payment of contributions.[56]

Discrimination in access to education for adults is less clear. Although it must be due to the absence of international obligations in this area, it is very doubtful that this is a sound basis for granting refugees (as well as other TCNs legally resident, if this is the case) different treatment from that of nationals. Moreover, Art. 27, para. 2, of Directive 2011/95 does not refer to a right to receive free education, nor does it limit discrimination to free education and training, which could be justified on financial grounds. Hence, there is no solid budgetary reason behind the differentiation, whose sole justification seems to be the nationality of the would-be adult students. If such an open-ended and broad exception can be deemed compatible with the Charter,[57] the burden to find solutions that do not constitute a breach of the latter falls entirely upon States.

Directive 2011/95 marks a firm step forward towards the establishment of a uniform status for refugees and persons eligible for subsidiary protection. This is one of the objectives of the Directive, following the Stockholm Programme.58 The Stockholm Programme and recital 9 of Directive 2011/95 preamble share similar language, in the sense that the uniform status for the two groups of persons who are beneficiaries of international protection is inspired by the legal base in Art. 78 TFEU. In my opinion, this interpretation does not correspond to the phrasing of Art. 78 TFEU, which enables the Parliament and the Council to adopt measures on the uniform status of refugees (let. a)) *and* measures on the uniform status of subsidiary protection (let. b)). Instead (or in addition, should one lean towards the understanding of Art. 78 TFEU in the sense criticized here), granting those concerned equal treatment is in compliance with the Char-

[55] *Dhabhi v. Italy*, cit., para. 53.

[56] In *Gaygusuz v. Austria*, cit., para. 41, the right to emergency assistance claimed by the applicant qualified as a pecuniary right because the applicable legislation linked it to the payment of contributions to an employment insurance fund.

[57] In *Parliament v. Council* [GC], cit., para. 98, the Court of Justice did not rule unconditionally against the existence of a breach of the Charter in the Family Reunification Directive because of the discretion it leaves to Member States (on this point see above, footnote 50). Instead, the fact that such discretion was limited did play a role. The provisions awarding discretion in the two directives are very different, so drawing precise benchmarks from that precedent is not appropriate. However, given that the margin of assessment in Art. 27, para. 2, of the Qualification Directive is virtually unlimited (as explained in the text), this casts doubts on the compatibility of this provision with the prohibition on discrimination on grounds of nationality established in the Charter.

[58] Council Conclusions of 2 December 2009 on *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, paras 6.2 and 6.2.1. The objective concerning the uniform status for those granted international protection, in pursuance of the Stockholm Programme, is highlighted in recital 9 of Directive 2011/95.

ter,[59] as well as with a number of international instruments binding on the Member States (starting with the Convention).[60] This emerges clearly from the comments of the UNHCR to the earlier version of the Qualification Directive, where the difference between the two statuses was pronounced.[61]

Against this background, it should be noted that one of the very few persistent differences is the exception to the right to national treatment concerning social assistance: as repeated above, the exception is exclusively for those granted subsidiary protection status (Art. 29, para. 2, of Directive 2011/95), while those granted refugee status have equal rights as nationals. Given the preceding comments, such a distinction between beneficiaries of international protection is hard to defend:[62] they are all in need of protection; they have neither chosen to place themselves in their situation, nor do they have the possibility to change it. Hence, if their differential treatment is exclusively due to their status, it appears discriminatory. The other possible reason is that the length of their residence permits is different (as long as States do not opt for unified rules); yet the shorter leave of stay for those granted subsidiary protection status is not such as to

[59] See for instance ECRE, Information Note, cit., p. 15, where the elimination of the difference of treatment regarding healthcare is linked to Art. 35 of the Charter.

[60] On the role of the Convention in the approximation of the refugee and the subsidiary protection statuses accomplished in Directive 2011/95 see ECRE, Information Note, cit., p. 12.

[61] The difference in content of the refugee status as compared to the subsidiary protection status currently lies in the length of residence permits (Art. 24 of the Qualification Directive); in travel documents (Art. 25 of the Qualification Directive), where the difference is apparently due to the practical reason that refugees would typically not have carried them; and in the right to access to social assistance (Art. 29 of the Qualification Directive). In the framework of the previous Qualification Directive, further differences lay in the right to access to employment, insofar as beneficiaries of subsidiary status could be subject to prioritisation "for a limited period of time to be determined in accordance with national law" (Art. 26, para. 3, of Directive 2004/83); in the right to employment-related education opportunities for adults, vocational training and practical workplace experience, which for beneficiaries of subsidiary protection could be subject to conditions to be decided by the Member States (Art. 26, para. 4, of Directive 2004/83); in the right to health care, which for the latter could be limited to core provisions (Art. 29, para. 2 of Directive 2004/83); and in the right to access to integration facilities (Art. 33 of Directive 2004/83). Moreover, the benefits of international protection could be withdrawn whenever the subsidiary protection status (but not the refugee status) had been "obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a person eligible for subsidiary protection" (Art. 20, para. 7, of Directive 2004/83). Besides commenting on specific provisions of Directive 2004/83, the UNHCR expressed its worries on the extensive difference in treatment between the content of refugee status and subsidiary protection status at large: see UNHCR, Annotated Comments, cit., p. 36.

[62] The criticism that attributes the persistent differences in the treatment of beneficiaries of subsidiary protection *vis-à-vis* those granted refugee status to an old-fashioned "economic protectionism" is particularly spot-on here: G. MORGESE, *La direttiva 2011/95/UE sull'attribuzione e il contenuto della protezione internazionale*, in *La Comunità internazionale*, 2012, p. 274.

justify a differential treatment in social assistance at large.[63] Moreover, the aforementioned comment on the relevance of the statuses rather than on the length of residence permits applies here as well.

Another interesting issue concerns what should be understood by "third-country nationals legally resident", to whom States are obliged to give uniform access to education, to social assistance and to accommodation of those granted international protection status (as limited to beneficiaries of subsidiary protection with regard to social assistance). It is well-known that EU legislation covers limited categories of third-country nationals in terms of their right of residence in Member States. They have different statuses, with rules set out in dedicated directives. The reason for understanding "third-country nationals legally resident" as "legally resident in accordance with EU law", notably with those directives, is that of uniformity. Moreover, such an interpretation is consistent with the Court of Justice's traditional course of action of pursuing the autonomy of EU law from the legislation of the Member States. Yet this interpretation could well be questioned on grounds of the fragmented approach of the Union to the matter, which makes it difficult if not arbitrary to identify the legal regime to be extended to refugees. It seems reasonable to rely on Directive 2003/109 in connection with those beneficiaries of international protection who have been legally residing in a Member State for at least five years, even if they have not yet obtained the status of long-term residents. This solution is surely compliant with the principle of non-discrimination, since awarding long-term resident refugees the same treatment as, for instance, seasonal workers could well be deemed disproportionate. Instead, for the others national law seems the only reasonable option. As pointed out earlier in this section, States' action on the matter falls within the scope of the Charter: this is deemed to ensure a common minimum standard.

IV. The case of discriminatory residence-related benefits

While granting beneficiaries of international protection the right to access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories, Directive 2011/95 enigmatically states that Member States are also allowed leeway as to their "dispersal". In so doing, States should nonetheless prevent them from being discriminated against and offer them equal opportunities regarding access to accommodation. This provision raised worries among stakeholders in connection with Art. 26 of the Geneva Convention, which obliges States to ensure the right of choice of residence and freedom of movement to refugees under the same conditions

[63] The difference in the length of residence permits for beneficiaries of refugee status and for beneficiaries of subsidiary protection status respectively received harsh criticism: UNHCR, Annotated Comments, cit., p. 40; ECRE, Information Note, cit., p. 13.

as other aliens.[64] The Qualification Directive features a provision mirroring Art. 26 of the Geneva Convention in Art. 33.

National measures on dispersal of beneficiaries of international protection have become a current topic thanks to the landmark case of *Alo and Osso*. Here the application of geographical restrictions was not assessed *per se*, but insofar as entailing discrimination with nationals of the host State and with other third-country nationals legally resident there, in alleged breach with the Qualification Directive. More specifically, German law sets out that residence permits granted to beneficiaries of international protection may be combined with an obligation of residence in a defined area if they are in receipt of social benefits. The Court first ascertained that an obligation of residence constitutes a limitation to freedom of movement within the meaning of Art. 26 of the Geneva Convention and, consequently, of corresponding Art. 33 of the Qualification Directive.[65] Since the latter prohibits obligations of residence on beneficiaries of international protection as long as they are discriminatory in comparison with other third-country nationals, the Court carried out an assessment on the existence of such discrimination. Moreover, given that the restriction on freedom of movement was linked to the reception of social benefits, Art. 29 of Directive 2011/95 also came to the fore. As stated above, according to Art. 29 social assistance should be awarded on equal footing with nationals including core provisions, which can well be denied to beneficiaries of subsidiary protection status (the applicants were such); yet, if granted, the national treatment rule should apply.[66]

Jumping to the findings of the Court, an obligation of residence linked to the receipt of social benefits is in breach with Arts 29 and 33 of the Qualification Directive as long as it is aimed at the apportionment among the competent territorial bodies of the financial burden. However, it is not such as long as it is aimed at facilitating the social integration of beneficiaries of integration protection. Both findings rely on an assessment focussed on whether the obligation of residence is discriminatory against beneficiaries of international protection with respect to nationals and other third-country nationals: it was deemed respectively discriminatory as compared to German nationals as long as it was aimed at the distribution of the financial burden, and in principle non-discriminatory as compared to other third-country nationals as long as it was aimed at enhancing social integration.

The referring judge's (and the subsequent Court of Justice's) choice to carry out the assessment on the discriminatory character of the contested national measure separately in connection with its alleged twofold purpose appears commendable.[67] As

[64] ECRE, Information Note, cit., p. 16.

[65] *Alo and Osso* [GC], cit., paras 22-40.

[66] *Ibid.*, paras 49-50.

[67] The compatibility of the purpose of sharing the financial burden related to social benefits with Arts 29 and 33 of the Qualification Directive is the object of question 2 (*Alo and Osso*, cit., paras 41-56); the

emerged in Section III, whether or not a measure establishing a distinctive treatment *vis-à-vis* two comparable individuals is in fact discriminatory depends on its purpose and its pursuit thereof – e.g. if its purpose is illegitimate, or if it pursues a legitimate purpose in a disproportionate fashion. Equally praiseworthy is the Court of Justice's assessment of the situation of the applicants with different comparators in connection with the two different purposes mentioned above. When evaluating discrimination on grounds of the aim of sharing the financial burden of social assistance among territorial bodies, the Court compared the applicants *as beneficiaries of subsidiary protection* with refugees proper, other third-country nationals legally resident, and German nationals who were recipients of corresponding social benefits.[68] When evaluating discrimination on grounds of the aim of facilitating the social integration of those in receipt of social benefits, the Court considered the applicants as beneficiaries of international protection in general terms and compared them with nationals, only to immediately rule any further assessment out,[69] and with third-country nationals legally resident in Germany for reasons other than political, humanitarian or otherwise arising from international law.[70] Hence, the Court's methodology in this case is deemed to be flawless.

Turning to the merit of the Court of Justice's conclusion on social integration, it can be shared mainly to the extent that it calls for a case-by-case assessment and leaves the final word to national authorities.

As anticipated, the Court held the obligation of residence aimed at beneficiaries of international protection as non-discriminatory in comparison with other third-country nationals equally in receipt of social benefits. The reason is that the situation of the two social groups in relation with social integration is typically different: unlike beneficiaries of international protection, the stay of other third-country nationals legally resident in Germany is generally subject to a condition that they are able to support themselves; in addition, they are usually eligible for social benefits only after a certain period of continuous legal residence. This leads to the presumption that those third-country nationals are usually sufficiently integrated in Germany, so that the application to the sole beneficiaries of international protection of the obligation of residence when in receipt of social benefits is non-discriminatory. Indeed, such obligation is "to prevent the concentration in certain areas of third-country nationals in receipt of welfare benefits and

compatibility of the purpose of facilitating the social integration of those in receipt of such benefits with Arts 29 and 33 is the object of question 3 (*Alo and Osso* [GC], paras 57-64).

[68] *Alo and Osso* [GC], cit., para. 56.

[69] *Ibid.*, para. 59. The Court ruled that a comparison with German nationals was not relevant because they and beneficiaries of subsidiary protection were not in a comparable situation as far as the objective of facilitating social integration was concerned: hence the (implicit) conclusion that there was no breach of Art. 29 of Directive 2011/95.

[70] *Alo and Osso* [GC], cit., para. 63. The statement that the Court compared the applicants as beneficiaries of international protection in general terms is based on this paragraph (i.e. the core of the Court's reasoning).

the emergence of points of social tension with the negative consequences which that entails for the integration of those persons".[71]

The problem here is not that this line of reasoning is ill-founded. The problem is that it is based on the assumption that, unlike other third-country nationals legally resident in a Member State, beneficiaries of international protection who are eligible for social benefits have not yet spent a long period of time in their host State, have never been able to support themselves and have little if no social network capable of helping them improve their situation. This may be true or not, depending on the circumstances, yet the Court ruled in favour of such an assumption.

Hence, with great respect, what is *not* commendable in the Court's decision is that, in the wake of Directive 2011/95, it marks an openness towards restrictions on the freedom of movement of beneficiaries of international protection which is indeed worrying.[72]

In addition, it is a matter of common knowledge that a network with fellow countrymen or countrywomen or with fellow beneficiaries of international protection is the best tool for social integration, particularly as regards access to accommodation and to the labour market. Therefore, dispersal is often questionable in terms of social integration, and more specifically it may have a negative impact on the right to work and on access to accommodation of those concerned.[73]

Last, if it is true that the Court calls for a case-by-case assessment, it gives no guidelines for this assessment to be carried out in accordance with the Qualification Directive and with the Charter.

V. What room is there for integration measures or affirmative actions established or coordinated at the Union level?

Equality of rights with nationals as a tool for social integration of beneficiaries of international protection is as essential as it is unsatisfactory for their patently different factual situation. The UNHCR has long insisted on the necessity for States to take a proactive attitude in this connection and to make an effort to overcome refugees' vulnerability, which makes their road to social integration particularly tough.[74] It must be

[71] *Ibid.*, para. 58.

[72] It has been argued that in *Alo and Osso* the Court used social integration as a precondition for being given access to social rights: K.M. de Vries, *The Integration Exception: a New Limit to Social Rights of Third Country Nationals in European Union Law?*, in D. Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity of the EU*, Oxford: Hart, 2017, pp. 278-281.

[73] Interestingly, in ECRE, Information Note, cit., p. 16, the apparent discretion on national dispersal mechanisms raises concerns in connection with its impact on the right to work of beneficiaries of international protection.

[74] UNHCR, Note on the integration of refugees in the European Union, cit., *passim*. On this point see also powerful statements of ECRE, Position on the integration of refugees, December 2002, www.ecre.org, para. 61 *et seq*.

acknowledged that the European institutions have always shown awareness in this connection. The preamble of Directive 2011/95 could not be clearer: "In order to enhance the effective exercise of the rights and benefits laid down in this Directive by beneficiaries of international protection, it is necessary to take into account their specific needs and the particular integration challenges with which they are confronted".[75]

This statement matches up with several provisions.

The goal of some of them is to make it possible for beneficiaries of international protection to take advantage of a set of rights that would otherwise remain a dead letter. For instance, equal treatment with nationals in access to procedures for recognition of qualifications means little in absence of documentary evidence of such qualifications and the possibility of retrieving it from one's country of nationality (or of habitual residence, in case of stateless persons) for an array of practical reasons linked either to the situation of the applicant or his/her country of nationality or habitual residence, or simply to the related costs. Hence, Art. 28, para. 2, lays down the obligation for States to "endeavour to facilitate full access for beneficiaries of international protection who cannot provide documentary evidence of their qualifications to appropriate schemes for the assessment, validation and accreditation of their prior learning." This leaves States broad discretion, but at least establishes an obligation of result, which marks some progress from the absence of any such provisions in Directive 2004/83.[76]

In a way, the goal to have beneficiaries of international protection assert their rights is shared by Art. 34 of Directive 2011/95 on access to integration facilities. Art. 34 sets out States' obligation to "ensure access" to integration programmes tailored in such a way as to meet the special needs of those granted international protection, or "to create preconditions which guarantee access to such programmes". The link of integration programmes with the actual enjoyment of the rights laid down in Directive 2011/95 is highlighted in the preamble. Recital 47 details that such programmes should include language training if needed and "the provision of information concerning individual rights and obligations relating to their protection status in the Member State concerned". The deletion, in Art. 34, of discrimination between refugees proper and those granted subsidiary protection status is another welcome novelty of the recast Qualification Directive.[77]

Sometimes, in the context of a right granted to nationals and beneficiaries of international protection on an equal footing, the specific needs of the latter call for special treatment. Accordingly, the right to healthcare closes with a specific obligation which

[75] Recital 41 of Directive 2011/95. See also, Communication COM(2011) 455 final, cit., para. 1.4.

[76] This novelty in the recast Qualification Directive is welcome in ECRE, Information Note, cit., p. 14.

[77] Directive 2004/83 contained a provision corresponding to Art. 34 of the current Directive 2011/95 with regard to those granted refugee status (in Art. 33, para. 1), plus one laying down the same obligation to the advantage of those granted subsidiary protection status "[w]here it is considered appropriate by Member States" (Art. 33, para. 2, of Directive 2004/83). The removal of such differential treatment was encouraged in UNHCR, Annotated Comments, cit., p. 46.

takes into account that those who qualify for refugee and subsidiary protection status often have a traumatic background. I refer to Art. 30, para. 2, of Directive 2011/95 which binds States to provide them with adequate healthcare, under the same eligibility conditions as nationals, including treatment of mental disorders when needed. Among those entitled to such special healthcare are "persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict". Indeed, physical recovery and mental healing are key for social integration of those granted international protection, primarily for children and other particularly vulnerable persons, but also for adults. Regrettably, it is unclear whether such appropriate, specific healthcare is due to beneficiaries of international protection unconditionally, with the sole exception being the requirement of making it equally open to nationals, or is due only if made available to nationals who share the vulnerability conditions listed in Art. 30, para. 2. It seems to me that both options are compatible with the phrasing of Art. 30, para. 2, of Directive 2011/95. The latter is consistent with the way socio-economic rights are traditionally interpreted, yet it substantially weakens the impact of Art. 30, para. 2, as an integration tool for beneficiaries of international protection, beyond its obvious content in terms of protection of human rights. The former is considerably more far-reaching. In its favour, it should be considered that the contrary interpretation would frustrate the *effet utile* of Art. 30, para. 2, while recital 41 of the preamble sets as a goal of Directive 2011/95 the necessity to take into account refugees' specific needs "in order to enhance the effective exercise of the rights and benefits laid down" therein. For those States who do not provide adequate healthcare for nationals sharing the same vulnerability as refugees, Art. 30, para. 2, would be entirely absorbed in para. 1. In addition, an unconditional obligation for States to provide beneficiaries of international protection with the special healthcare laid down in Art. 30, para. 2, is not contradictory with the last part of recital 41. This rules out more favourable treatment than that awarded to nationals of those within the remit of Directive 2011/95: not only is such favourable treatment not required in the interpretative option supported here but, as highlighted above, its exclusion is a fundamental point also in this interpretative option.

The last part of recital 41 referred to above shows that Directive 2011/95's determination to meet the special needs of those granted international protection in order to support their social integration is not accompanied by a policy of affirmative actions to their advantage. The Union retains the competence to take measures to this end, as laid down in Art. 18 TFEU. The Directive does not even remain neutral in this connection, as recital 41 of the preamble reads as follows: "[The] taking into account [of specific needs and the particular integration challenges of beneficiaries of international protection] should normally not result in a more favourable treatment than that provided to their own nationals, without prejudice to the possibility for Member States to introduce or

retain more favourable standards". Since this statement is contained in the preamble, its interpretation as calling on States to avoid affirmative actions should be rejected. It is believed that, if binding, such a measure would have no legal basis in the EU Treaties beyond being in breach with the Charter.

Needless to say, the Union's aversion to affirmative actions is entirely inconsistent with its much reiterated commitment to support the integration of those granted international protection by addressing their specific needs and by making efforts to overcome their vulnerability. It is true that, since affirmative actions entail a reverse discrimination of other TCNs and/or own nationals, they have a social impact that host States are surely better placed to assess and deal with. However, a Union role in their coordination could bring balance to the Common Asylum System because it would help minimize the appeal of some States *vis-à-vis* others as "granters" of international protection. Moreover, establishing minimum standards at the Union level would discourage States with growing anti-immigration feelings from reducing their integration efforts.

The Qualification Directive does not set minimum standards concerning integration programmes either: as said earlier, Art. 34 establishes a mere obligation to give access to such programmes and to ensure that they are fit for the specific needs of those granted international protection. Yet, like that for affirmative actions, an enhanced role of the Union could help harmonize States' integration facilities and contribute to make all of them equally attractive and successful in the achievement of a common goal.[78] The existence of a legal base in the TFEU enabling the Union to harmonize national integration programmes is very doubtful. Art. 78 TFEU, which is focused on refugees and subsidiary/temporary protection, says nothing as to a competence of the Union regarding the integration of those who fall within its remit, while Art. 79, para. 4, TFEU, focussed on other TCNs, does enable the Union to take measures in this area. The joint reading of those provisions could lead to the exclusion of any competence of the Union on the integration of refugees and beneficiaries of subsidiary or temporary protection. Indeed the opposite interpretation has prevailed, since Arts 78, para. 2, and 79, paras 2 and 4, TFEU constitute the legal base of the Asylum, Migration and Integration Fund, which supports EU countries also in actions related to the integration of persons whose stay is secure.[79] Yet such

[78] ECRE's considerations on national and regional governments being best placed to develop integration strategies are definitively to agree with (ECRE, Position on the integration of refugees, cit., paras 64-66), yet the building of a successful *common* asylum system in the Union requires Member States to be equally committed to integration of beneficiaries. The application of common minimum standards throughout all the Member States is a natural development to this end. That should rely on the previous screening of measures already tested and the identification of those which proved more effective or essential, to the advantage of less experienced or deficient States.

[79] Regulation (EU) 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC.

legal base is limited to support actions, "excluding any harmonisation of the laws and regulations of the Member States".[80] However, funding specific activities within Member States is a powerful tool for the Union to push States towards a harmonized system of integration programmes. On a positive note, the Commission has long made available financial support in the framework of the above-mentioned Fund (drawing resources from the European Regional Development Fund and the European Social Fund): such support covers national services on language-learning and vocational training, access to the labour market, and campaigns aimed at raising awareness of both local communities and migrants, among others.[81] The role of European funding in this connection could be further enhanced by building on States' practice on the implementation of the Qualification Directive: interestingly, recital 48 of its preamble calls for the evaluation of such implementation in such a way as to consider "the development of common basic principles for integration". The competence on support actions should well be used to improve the application of such principles.

VI. Asylum seekers in a state of limbo

The socio-economic rights and the prohibition against discrimination on grounds of nationality laid down in the Charter – as well as in the Convention and other international human rights treaties – are fully applicable to those awaiting a decision on their application for international protection.[82] However, in principle their unique situation leaves room for them to be treated differently. Here the role of human rights law is to place restrictions on States' reluctance to award those in that uncertain position socio-economic rights: as usual, these restrictions are compliant with the Charter (and with other international treaties) only if they have a legitimate purpose and if they are proportionate.

[80] Art. 79, para. 4, TFEU is generally referred to as the specific legal base for integration: G. Caggiano, *Riflessioni su proto-integrazione dei richiedenti asilo e diversità culturale*, in *SIDIBlog*, 29 June 2016, www.sidiblog.org, section 2. Regarding Art. 79, para. 4, TFEU as the new legal base, introduced by the Lisbon Treaty, of newly acquired Union competences on the integration of migrants see extensively L. Daniele, *Immigrazione e integrazione. Il contributo dell'Unione europea*, in G. Caggiano (ed.), *I percorsi giuridici per l'integrazione*, cit., pp. 64, 68, 73-77. For the evolution of the EU action in support of the integration of migrants (including beneficiaries of international protection) also in connection to the changes in legal bases, starting from the Court of Justice landmark judgment of 9 July 1987, joined cases 281/85, 283/85, 285/85, 287/85, *Germany v. Commission*, on the lack of the European Community competence on cultural integration of migrants, through the role of European funding (and beyond), see G. Caggiano, *L'integrazione dei migranti fra* soft-law *e atti legislativi*, cit., pp. 30-38.

[81] G. Caggiano, *Riflessioni su proto-integrazione*, cit., para. 5.

[82] Economic and Social Council, Report of the Special Rapporteur, cit., para. 26. In general terms on the application of the Charter to asylum seekers see F. Ippolito, *Migration and Asylum Cases Before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?*, in *European Journal of Migration and Law*, 2015, p. 22 *et seq*.

Despite the said constraints, European Union law allows Member States to place asylum seekers in a limbo which can become detrimental to their social integration should their application be approved – especially if the related proceedings prove lengthy, as they often do. This clearly emerges from the Qualification Directive, whose provisions usually apply only after a decision on the applicant's status has been taken. Indeed, nothing in that Directive prevents States from taking a different course of action: the various provisions on a certain right needing to be awarded after (if not *immediately* after) status is granted[83] are not aimed at preventing those rights from being awarded earlier. Instead, they ensure that States do not delay their implementation. However, those who make an application for international protection in a Member State, as long as they are allowed to remain in the territory as applicants (along with their family members if covered by such application), fall within the scope of Directive 2013/33, i.e. the Reception Conditions Directive (Art. 3).[84] Hence, the relevant legal machinery is built around the idea that they should receive differential treatment.

Early efforts towards the social integration of those seeking international protection – also referred to as proto-integration of asylum seekers –[85] are increasingly being called for. There is surely a political necessity for these measures: the reasons why they are key for future successful integration have been explained convincingly; moreover, some interesting thoughts on their usefulness (e.g. that of vocational training) in case applicants are repatriated have also been put forward.[86] The Reception Conditions Directive is very underdeveloped in this connection: for instance, it lays down that Member States "*may allow* applicants access to vocational training" (Art. 16), but says nothing on language classes for adults. One may guess that, if provided, the latter might help discourage those secondary movements of asylum seekers towards States where they experience no language barrier, whose prevention are a priority at the time of writing. Moreover, some provisions may be not in breach with the Charter and other human rights obligation of the Member States, but they appear short-sighted in terms of future social integration. For instance, based on Art. 17, para. 3, of Directive 2013/33 material reception conditions and healthcare may be made subject to the condition that "applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence": in such cases, applicants may be required to cover or contribute to the related costs or be asked for a refund (Art. 17, para. 4, of Directive 2013/33). After all, receiving free material support by public authorities is usually

[83] See Arts 24 (on residence permits), 26 (on access to employment) and 31 (on unaccompanied minors) of Directive 2011/95.

[84] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

[85] G. CAGGIANO, *Riflessioni su proto-integrazione*, cit., section 2.

[86] UNHCR, Note on the integration of refugees, cit., esp. paras 8-10. Para. 12 underlines the beneficial effects of vocational training for reintegration of rejected asylum seekers upon return.

provided only if recipients are unable to cover the related costs; sometimes the same applies to public healthcare, to a minor extent. However, withdrawing financial resources from individuals who find themselves in a position to start a career or business, find accommodation, learn a new language, receive or update their education or training, and so on – in a country where they have typically no background – may obviously be counterproductive. To say the least, States should be encouraged to established loan schemes for those who obtain the status, or to apply Art. 17 of Directive 2013/33 only to those who are not successful in their applications (although this may discourage them from seeking asylum).

As usual with EU directives, States are free to apply more favourable conditions (Art. 4 of Directive 2013/33). However, practice has shown that most States have little inclination to raise standards or to award rights not provided for in directives (e.g. access to education for adults). Unfortunately, especially regarding immigration policy, States tend to make only the minimum effort.

Beyond taking note of the gaps in the Reception Conditions Directive, in a legal analysis on the limbo it creates for asylum seekers, their differential treatment should be subject to assessment.

Under Art. 15, para. 1, of Directive 2013/33 asylum seekers should have access to the labour market "no later than 9 months from the date when the application for international protection was lodged". This provision appears purely discriminatory as it allows a differential treatment with no credible justification. Indeed, there is no way to link the uncertain future of applicants in the host country or their alleged temporary presence there to a "grace period" of nine months (maximum) before they can take advantage of their right to have access to work.

VII. Conclusions

By establishing national treatment as the standard rule applicable to socio-economic rights, the Qualification Directive overall represents a good platform for the social integration of beneficiaries of international protection. Generally speaking, its shortcomings arise not from the number of exceptions to such rule, which is limited, but from their far-reaching character.

The exceptions are such because they contradict the commitment to social integration of migrants on which the European institutions constantly insist, and likewise the main actors in the area including UNHCR. For instance, allowing States to exclude beneficiaries of international protection from access to accommodation contributes to the marginalization of the weakest persons in a society. These are typically newcomers, as those who obtain long-term residence status are awarded access to accommodation on the same grounds as nationals. At the same time, if they hold subsidiary protection sta-

tus they can also be excluded from non-core social assistance provisions, which can make their integration path even more difficult.[87]

Moreover, the few provisions derogating from the national standard award States huge discretion.

It is true that, while implementing the Qualification Directive, States are acting within the scope of application of the Charter, so that their discretion is firmly bound to the latter's provisions on specific socio-economic rights and on the prohibition against discrimination. *Alo and Osso* shows that this may be a sound safety net: the alignment of freedom of movement to third-country nationals legally resident (Art. 33 of the Qualification Directive) did not prove a blank check to discriminate between beneficiaries of international protection and nationals of the host State. All the more so this emerges from *Kamberaj*, where the Charter channelled the interpretation of a rule establishing an exception to the national standard in such a way as to considerably limit its reach.[88]

However, beyond potentially impairing socio-economic rights of beneficiaries of international protection as a matter of fact, such discretion has other disadvantages. As already highlighted, it creates imbalances in the Common Asylum System because it lays the foundations for remarkable differences in the social integration toolkit of the Member States. Moreover, it favours a level of litigation between beneficiaries of international protection and national or regional authorities which does no good to the former's sense of belonging to their host society, which is the essence of social integration. To date, the Court of Justice has shown no inclination to consider such broad discretion to be in breach with the Charter. This places the burden of keeping with the Charter's standards mainly upon States. They could at least reduce the lottery of the case-by-case assessment by national judicial authorities (correctly encouraged by the Court of Justice in *Alo and Osso*) by establishing precise conditions and exceptions to domestic legal provisions which take advantage of the derogations allowed to the national treatment.

[87] See A. EIDE, A. ROSAS, *Economic, Social and Cultural Rights: a Universal Challenge*, in A. EIDE, C. KRAUSE, A. ROSAS (eds), *Economic, Social and Cultural Rights. A Textbook*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 2001, p. 18: the right to social assistance is deemed essential when a person does not have the necessary property available or is not able to secure an adequate standard of living through work.

[88] As said above, *Kamberaj* concerns a rule in Directive 2003/109, whose content is reflected in a rule of the Qualification Directive.

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