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EDITORIAL

“GETTING BREXIT DONE”: IT IS JUST THE BEGINNING, NOT THE END

After 47 years of membership, the United Kingdom has left the European Union at the end of January 2020. Boris Johnson, the UK's Prime Minister and prominent, if not accidental, face of the Vote Leave camp was at freedom to strike a gong and tick a box on his “to do” list. According to Downing Street 10, Brexit was done and dusted, exactly as promised during the election campaign of 2019. With this, the election leitmotif: “Getting Brexit Done” has joined its predecessor “Brexit means Brexit” in the pantheon of catchy, but painfully empty slogans that can be parroted *ad nauseam*. But, truth to be told, Brexit is far from being done, and removal of the “B-word” from the official governmental megaphone does not change a thing. For anyone *au courant* with EU affairs, it is rather obvious that the hardest part of Brexit is yet to be delivered.

The entry into force of the Withdrawal Agreement (Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 12 November 2019, www.ec.europa.eu) is a watershed moment in the history of EU integration. For the first time the European Union has lost a Member State. The United Kingdom may have not been the most passionate about the integration project; it joined the Communities not out of love but convenience. The consecutive governments in London for years have successfully pleaded the UK's uniqueness in order to gain a plethora of opt-outs and exceptions. Still, though, the United Kingdom was one of the biggest and, by the same token, influential members of the club. It was also a considerable contributor to the EU budget, even though it benefited from a rebate ever since the then Prime Minister Margaret Thatcher uttered her famous “no, no and no”. But, in 2016 the voters have spoken and the majority, however slim, expressed a desire to part the ways with the European Union. The pertinent question at this stage is how to shape the post-marriage of convenience relationship. Almost five decades of joint history, combined with economic integration and interdependence as well as the geographical proximity between the two sides dictate a robust and comprehensive framework. Alas, while this view is shared in Brussels, it has completely gone missing in London. With this in mind it is apt to take stock of recent developments.

The Withdrawal Agreement – which provides a legal framework for Brexit – regulates primarily the separation issues. It deals, *inter alia*, with the acquired rights of EU and UK migrating citizens, the UK contributions to the EU budget and future arrange-

ment for Northern Ireland. Furthermore, it also serves as a foundation for the transitional period, keeping the UK outside of the EU institutional framework but inside of the Internal Market and all other EU policies. So, Brexit is not done yet; it is in progress. The end of transition is penciled in for 31 December 2020, with a possibility of a single extension, either for 1 or 2 years. The *raison d'être* is logical and persuasive: to give extra time to negotiate an agreement/or agreements governing their future relations. Sadly, "no extension" has become a mantra on the UK side of the fence; at least for now it is hard to see how the Conservative government in London could be persuaded to maintain the status quo for another one or two years. The end result is that both sides may run out of time, which in turn would lead to a cliff-edge scenario. If that were to happen, it would properly cut the ties between the two sides. While the trade would be governed by the WTO framework, all other areas of co-operation would cease with an immediate effect. As shocking as it may be, this seems to be a possible end of the Brexit debacle. But before we get there the EU and the UK will surely embark on the negotiations. In this respect, the Political Declaration (Revised Political Declaration, 17 October 2019, www.ec.europa.eu), which was agreed to alongside of the Withdrawal Agreement, was meant to serve as a beacon for safe navigation. This, however, may not be the case after all. During the first weeks after UK's formal departure from the European Union we have witnessed a rather dramatic bifurcation of priorities. Not surprisingly, the European Commission took the Political Declaration as a point of departure in its work on the draft negotiation mandate. At the same time, the authorities in London started to act as if the Political Declaration was not worth the paper it was written on. Tony Barber has argued in *Financial Times* that the EU and its Member States are "waking up" late to the UK's change of stance.¹ While this may be partly true, it does not take into account the simple fact that the EU is a rule driven organisation. Thus, even though the Political Declaration is not binding, the EU takes it seriously. After all, it also bears the signature of the UK's Prime Minister. It is a gentlemen's agreement, which presupposes that there are gentlemen on both sides of the table. This, of course, is a presumption that is proving to be a fallacy. There is a number of reasons why the EU and its Member States should be alarmed. Firstly, the emerging UK's position backtracks from the commitments made in the Political Declaration (and worse, in the Withdrawal Agreement). The main contentious dossiers include the ultimate role of the Court of Justice in the dispute settlement *modus operandi*, the regulatory alignment required from the UK and the need for checks to be conducted on goods crossing the sea between the Great Britain and Northern Ireland. While the first two are explicitly dealt with in the Political Declaration, the latter is regulated in the binding tailor-made Protocol annexed to the Withdrawal Agreement and will serve as a point of departure for the Joint Committee entrusted

¹ See T. BARBER, *Johnson's Brexit goals are independence and power*, in *Financial Times*, 18 February 2020, www.ft.com.

with adoption of detailed rules. In its opening salvos, the UK Government has argued it has no desire to agree to the first two items on the list and, likewise, it does not accept that there may be any friction in trade between the two parts of the UK separated by the Irish Sea. Taken at face value, such a volte-face may be received as a signal that the United Kingdom and its negotiators are not to be trusted. This may have profound implications for the forthcoming negotiations with the EU as well as countries around the World. Why one would engage in negotiations with a partner who is not trustworthy and happy to break its prior commitments as it finds it fit? The feeling may be exacerbated by the cacophony coming from different UK officials. In the first weeks of February they've employed the *modus operandi* known way too well from the negotiations of the Withdrawal Agreement. Once again, the EU operated under a strictly defined and clearly structured negotiation mandate, while the UK started by making its positions known *qua* speeches delivered by a variety of representatives. It was only at the end of February when its formal mandate was published. It clearly shows that gone are the days when T. May's frictionless trade based on a comprehensive agreement was the mainstream desiderata. The new mantra is a Canada style free trade agreement, which – contrary to what Boris Johnson claims – does not offer a tariff free trade for all goods. The alternative plan, according to the UK's Prime Minister, is an Australian style deal. As diplomatically pointed out by Ursula von der Leyen, the President of the European Commission, such a model does not exist. Whether it is yet another example of Boris Johnson's flexible relationship with the truth, or a purposeful figure of speech to cover up a “no deal” and trade under WTO rules is irrelevant. Yet it shows how miles apart in their negotiation objectives the two sides are. All of this creates a rather toxic climate, which may preclude a successful completion of negotiations.

Why it is all happening now is hard to tell, but a few options seem possible. Firstly, this may be a part of grand negotiation strategy designed at Downing Street 10 by the Prime Minister and his entourage. Such bulldozer tactics would aim to push the European Union to the wall and, should the UK not get what it desires, just to walk out of the talks and engage in the well-practiced *modus* of blaming Brussels for everything. An open threat in this respect is included in the UK's negotiation mandate. If it were to materialize, it would only prove that the very same team acted in bad faith during the renegotiation of Political Declaration in the fall of 2019. Secondly, it may also imply that once again London will engage in the Japanese style kabuki theatre. To put it differently, all this muscle flexing is merely a smokescreen aimed at hard core Brexiteers, who – when the time comes – pay little attention to the small print but focus on rhetoric instead.

So, what one can expect from the forthcoming negotiations? Surely, a lot of staged drama, the UK tabloids screaming of EU bullies and treason as well as posturing on both sides of the English Channel. The devil, however, will be in the detail. If, contrary to its economic interests, the UK opts for a very basic trade agreement focusing on goods, it is likely to have it served on the plate. Anything more than that will see the negotia-

tors going in circles and discussing endlessly the regulatory alignment, the role of the Court of Justice and the other usual suspects. For such charades there is very little time left. One thing is certain, though. The Brexit spectacle has come to the end of Act 1. After a short interval, a way more dramatic Act 2 has begun. There is no detailed and comprehensive script, just a few sketches. Inevitably, it will be largely improvised.

A.L.



ARTICLES

HOW CITIZENSHIP DIVIDES: THE NEW LEGAL CLASS OF TRANSNATIONAL EUROPEANS

GARETH DAVIES*

TABLE OF CONTENTS: I. Introduction. – II. The selective nature of Union Citizenship. – III. The right to live in another Member State. – IV. The right to equal treatment. – V. The family rights of mobile citizens. – VI. adjudication rights. – VII. Separate, privileged, threatening. – VIII. The logic of Union Citizenship. – IX. Conclusion.

ABSTRACT: Union Citizenship is intended to bring Europeans together. This *Article* explores one of the ways in which it may divide them. It argues that Union Citizenship creates a new transnational class, and gives the members of that class a legal status with the following characteristics: they are legally *separate*, or differentiated, from other Europeans; they are *privileged*, and they are *threatening*, in the sense that their rights have the potential to disrupt or undermine institutions and laws in a way that is disadvantageous to non-members of that class, or at least likely to seem so. The members of that class share certain qualities: they are economically self-sufficient, they live lives in which their families or work or study are cross-border, and they are only partially allowed to share in the solidarity of static national majorities. On the other hand, their link with the EU is legally direct and important, and they often have more in common with each other than with locals: they form a European community. They could be described as economically successful, partially uprooted, truly European, cosmopolitan outsiders. It is almost as if EU law has set out to create a class whose role in Europe is an echo of that fulfilled by the Jews that the continent lost.

KEYWORDS: European Union citizenship – free movement – European integration – cosmopolitanism – inequality – individualism.

I. INTRODUCTION

Union Citizenship is intended to bring Europeans together. It is often commented that the extent to which it can, and does, achieve this is limited, and that it can even have exclusionary and anti-egalitarian effects.¹ This *Article* develops that latter idea, examin-

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¹ E.g. M. EVERSON, *The Legacy of the Market Citizen*, in J. SHAW, G. MORE, *The New Legal Dynamics of European Union*, New York: Clarendon Press, 1995, p. 73 *et seq.*; F. SCHARPF, *The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"*, in *Socio-Economic Review*, 2010, p. 211 *et seq.*; A. SOMEK, *Solidarity Decomposed: Being and Time in European Citizenship*, in *European Law Review*, 2007, p. 787

ing the way in which Union Citizenship law actively divides Europeans into groups, and gives legal effect to the differences and conflicts between those groups. The suggestion made is that Union Citizenship delineates a distinct sub-set of Europeans, a transnational class, and gives the members of that class a legal status with the following characteristics: they are legally *separate*, or differentiated, from other Europeans; they are *privileged*, and they are *threatening*, in the sense that their rights have the potential to disrupt or undermine institutions and laws in a way that is disadvantageous to non-members of that class, or at least likely to seem so.

This is obviously problematic, even if there are also justifications that can be put forward. A conclusion considers some of the reactions which the legal picture described here might inspire, as well as attempting to contextualise it: in a time of nationalism, and in a European Union built as a response to tribal conflict, what reflections are inspired by a regime that treats Europe's cosmopolitans as a group apart, and defines that group partially in terms of its economic vigour, its externality to local moral and social norms, the foreignness of its families, and its limited and conditional right to access the solidarity of the mass?

The core argument, however, is about the working of law. The *Article* treats Union Citizenship as a legal construct, a bundle of rights with a label. For while it may have social, personal, ideational, and political consequences, the pathways to these all begin from the laws which bring that Citizenship into being and give it a certain form and scope.

More specifically, Union Citizenship is discussed here as a legal intervention in the rights, status, and relationships of people in Europe, and the aim is to characterize that intervention. What lines are drawn, which privileges are granted and to whom, and how are the positions of Europeans changed relative to each other? In other words, citizenship is treated as relational, and there is an attempt to map the legal relational changes and new relational networks which Union Citizenship brings about.

Conclusions from this about the social consequences of Union Citizenship must be cautious. Whether the legal shape of Union Citizenship corresponds to public perceptions or responses is a further, and very different, question. However, this *Article* tries to show the direction in which the law is pushing, revealing what one might call the implicit preferences of the law. It gives us a glimpse of the vision of Europe that is inherent in Union Citizenship, as it is currently built. The hope is that this will contribute to thinking about whether the legal vision of Union Citizenship matches the one that policy, politics

et seq.; 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.*; E. SPAVENTA, *Earned Citizenship: Understanding Union Citizenship Through its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, 2014, p. 204 *et seq.*; C. O'BRIEN, *I Trade, Therefore I Am: Legal Personhood in the European Union*, in *Common Market Law Review*, 2013, p. 1643 *et seq.*; M. RUHS, "Migrants", "Mobile Citizens", and the Borders of Exclusion in the European Union, in F. DE WITTE, R. BAUBÖCK, J. SHAW (eds), *Freedom of Movement Under Attack: Is it Worth Defending as the Core of EU Citizenship?*, in *EUI Working Papers*, 2016, p. 39 *et seq.*

or indeed European integration promote and desire. It will add to understanding of the kind of citizenship that we are creating, and should be trying to create.

Given the emphasis on Union Citizenship as a legal construct, discussion is structured around the major rights attached to it; the rights to reside in another Member State, to be treated equally there (rights to work, study and do business being specific instances of this), to be accompanied by one's family, and to have disagreements about these rights heard by the Court of Justice. For each of these, it will be shown how they keep mobile Citizens as a group apart. A preliminary section considers the personal scope of Union Citizenship, and how its apparent application to all Europeans conceals a more selective substance.

II. THE SELECTIVE NATURE OF UNION CITIZENSHIP

Union Citizenship is granted to all citizens of the Member States.² This universality is important to the task that it is often hoped it will achieve – bringing Europeans together.³ It is a shared, common, status, which perhaps will stimulate some degree of shared, common identity.⁴

However, the fact that a legal status is shared does not mean that it does not also create differences, and in the discussion below the emphasis will be on the way in which Citizenship law nevertheless allows some persons to assert rights that others cannot, and in this way creates new legal divisions.

Is this idea that a shared status also creates differences in rights paradoxical? Not really. All citizens of a state may be born with the same legal rights to become Members of Parliament, police officers, or wealthy. However, as a matter of fact only some will, and the members of those groups may enjoy specific rights, privileges or law-based advantages that non-members do not. Formal equality of opportunity translates inevitably, almost by definition, into substantive inequality of outcome.

Union Citizenship law has some elements shared by all EU citizens – the right to vote in European Parliament elections, write to the ombudsman, and, most importantly, to become a mobile Citizen,⁵ or to put it more accurately, since physical movement is not always necessary to engage substantive Citizenship law, to live a transnational life within the EU.⁶ If that life is lived, then other rights are activated and come into force, the ones to

² Art. 20 TFEU.

³ A. MENÉNDEZ, E. OLSEN, *Challenging European Citizenship: Ideas and Realities in Contrast*, London: Palgrave Macmillan, 2020, pp. 86-89.

⁴ *Ibid.*; J. HABERMAS, *Citizenship and National Identity*, in B. VAN STEENBERGEN (ed.), *The Condition of Citizenship*, London: SAGE Publications Ltd, 1996, ch. 3; S. O'LEARY, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, The Hague: Kluwer, 1996.

⁵ Arts 20 and 24 TFEU.

⁶ E.g. Court of Justice: judgment of 2 October 2003, case C-148/02, *Garcia Avello*; Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*; D. KOCHENOV (ed.), *A Real European Citizenship: A*

be discussed here. Thus Citizenship can be understood as containing two levels: the right to join a club, and the rights that are accorded to those who do actually join.

The right to join is however a very abstract concept for many, and most Europeans have no intention, ambition or capacity to become members: their lives are national, and they see them remaining this way.⁷ The most powerful Citizenship rights are, for these people, marginal features of their life. Just like a Supreme Court ruling granting the right to go topless on the beach or give children home-schooling might be important to a few, upsetting to a few others, and utterly unimportant to most, the Citizenship rights which form the substance of the enormous legal and political science scholarship, and which are at the heart of Court of Justice judgments and Commission policy considerations, are really just important for a relatively small percentage of people: those who are in, or want to be in, the club.⁸

This is unusual. National citizenship is, for most national citizens, the legal basis of much of their life: it is the source of the right to live where they do, and to work, be treated at least equally to those around them, and to enjoy everyday economic and social rights as well as political rights – and even if they are not candidates for office they may well take their voting seriously. If they lost that status, they would suddenly find their lives turned upside down. By contrast, Union Citizenship is the legal basis of almost nothing in the lives of most Europeans.⁹ Only when they join the transnational club does it become real, and then it takes on a role equivalent to national citizenship: in a host state it is the basis of their everyday rights of participation. If we were then to use the idea of citizenship in similar ways in the national and European context we might then say that all nationals of the Member States are potential Union Citizens, but only members of the transnational club are actual ones. Union Citizens are those whose lives cross borders.

At once a picture emerges of how Union Citizenship creates a new legal class of Europeans. However, for those who object to the twisting of terminology, it is not necessary to the argument. Let us concede that the status of Union Citizen is universal and make the point above in a more conservative way. Union Citizenship contains two levels of rights. Some are exercisable by all nationals of Member States. However, the most important and impactful Citizenship rights are only exercisable by a transnational sub-

New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe, in *Columbia Journal of European Law*, 2011, p. 55 *et seq.*

⁷ R. BAUBÖCK, *The New Cleavage Between Mobile and Immobile Europeans*, in F. DE WITTE, R. BAUBÖCK, J. SHAW (eds), *Freedom of Movement Under Attack*, cit., p. 19 *et seq.*

⁸ M. GRANGER, *Revisiting the Foundations of European Union Citizenship: Making it Relevant to All European Union Citizens*, *EUcitizen Policy Brief*, 2016, available at www.publications.ceu.edu.

⁹ 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: The Role of Rights*, Cambridge: Cambridge University Press, 2017, p. 634 *et seq.*

set of these nationals.¹⁰ Looking at the substance of these latter rights shows *i)* who has the right to exercise them, and *ii)* how the legal position of this selected group compares with and interacts with the rights of those around them.

III. THE RIGHT TO LIVE IN ANOTHER MEMBER STATE

The most fundamental right granted to Union Citizens is to move and reside throughout the EU.¹¹ The movement right as such is less controversial and less litigated, and less radical: it is not unusual that citizens of wealthy countries can enter other wealthy countries and stay there for short periods with minimal formalities. However, the right to stay for longer, to live, in a host state of one's choice, is a significant innovation and a right that has transformed the lives of many Europeans. Particularly for citizens of poorer or smaller Member States, but also for any citizen with interests or connections beyond their own nation, it expands the borders of their world enormously.

As the scholarship tells us, this right is subject to conditions.¹² They will not be rehearsed here in detail, but broadly speaking the right to live abroad is subject to the requirement that a Citizen either be economically active to a non-marginal extent, or be self-sufficient in resources.¹³ These are intended to be, and to a great extent are, co-extensive: they capture the person who either through their work, or their resources, is capable of a materially autonomous life and does not need the assistance of the state.¹⁴

The scholarly emphasis when considering these conditions has been on the excluded: the poor and the sick and those who are unable to get an adequate job or start a business.¹⁵ These weaker members of society do not enjoy residence rights in another state, and those who through bad luck or other causes fall out of the category of self-sufficient and into the weaker group risk losing those rights.

¹⁰ A. MENÉNDEZ, E. OLSEN, *Challenging European Citizenship*, cit., p. 111 *et seq.*; F. DE WITTE, *Kick Off Contribution*, in F. DE WITTE, R. BAUBÖCK, J. SHAW (eds), *Freedom of Movement Under Attack*, cit., p. 1 *et seq.*

¹¹ Art. 21 TFEU; Art. 7 of the Directive 2004/58/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.

¹² N. SHUIBHNE, *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 889 *et seq.*; S. SANKARI, S. FRERICH, *From Resource to Burden: Rescaling Solidarity with Strangers in the Single Market*, in *European Law Journal*, 2017, p. 806 *et seq.*; G. DAVIES, *Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency*, in *College of Europe Research Papers in Law*, No. 2, 2016, available at www.coleurope.eu.

¹³ Art. 7 of Directive 2004/58, cit.

¹⁴ Court of Justice: judgment of 3 June 1986, case C-139/85, *Kempf v. Staatssecretaris van Justitie*; judgment of 21 February 2013, case C-46/12, *N.*; G. DAVIES, *Migrant Union Citizens and Social Assistance*, cit.; C. O'BRIEN, *I Trade, Therefore I Am*, cit., p. 1643 *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. 937 *et seq.*

¹⁵ N. SHUIBHNE, *Limits Rising, Duties Ascending*, cit., p. 889 *et seq.*; A. ILIOPOULOU-PENOT, *Deconstructing the Former Edifice of Union Citizenship? The Alimanovic Judgment*, in *Common Market Law Review*, 2016, p. 1007 *et seq.*; E. SPAVENTA, *Earned Citizenship*, cit., p. 204 *et seq.*; C. O'BRIEN, *Civis Capitalist Sum*, cit., p. 937 *et seq.*

The policy of this is easy enough to understand: Member States only wish to admit those who are not a burden, and who are net contributors. However, it has made the very idea of Union Citizenship vulnerable to critique – that it is not a real citizenship at all, because at the heart of citizenship is an idea of universality, which is not present.¹⁶ It is a market citizenship, where rights are linked to socio-economic status, and are only for market actors: for those who can flourish on their own in the market.¹⁷

Yet while it is quite right to pay attention to the victims of this rule, to the excluded, it is also worthwhile to consider what the distinction means for the *included*. What are the consequences for those who *do* enjoy free movement rights of the fact that others do *not*? What message is sent to these lucky ones by the fact that they are among the selected? What self-image are they invited to embrace? What is the character of the group that comes into being once the boundaries have been drawn?

Perhaps most obviously, the (lawfully) mobile are the strong, a social elite.¹⁸ They are, by definition, the successful, the entrepreneurial, the self-makers. This is what the law demands of them – a corollary thus, of who the group excludes – but it is also the character of the voluntary migrant: those who move are, the scholarship tells us, more likely to be individualist, to have a frontier mentality, and to be young and well-educated.¹⁹ To call them an elite invites criticism from those who point to the many Eastern European workers doing poorly paid jobs in the West, and the situations of employment exploitation that are disproportionately filled by foreigners.²⁰ Yet if we do not compare the factory worker or farm labourer's life with that of the doctor, but instead with what it would have been if they had not moved to another Member State, then their choice to move may be more understandable, and it becomes apparent that in most cases they took a brave step towards improving their life. In that step lies their privilege: they had the courage, the character, and the personal resources to do so, whereas others in their position in their home state may not have. Free movers are primarily those who judge that they can improve their lives by their own actions, and who are able to actually do this. They feel – and are – capable of surviving and flourishing in a new state. Whether this capacity is because of their youth and qualifications, their energy and optimism, their courage, or their vulgar wealth, they are, in a humanly

¹⁶ D. KOCHENOV, *On Tiles and Pillars: EU Citizenship as a Federal Dominator*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 3 *et seq.*; C. O'BRIEN, *Civis Capitalist Sum*, cit., p. 937 *et seq.*

¹⁷ M. EVERSON, *The Legacy of the Market Citizen*, cit., p. 73 *et seq.*; N. SHUIBHNE, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, p. 1597 *et seq.*; A. SOMEK, *On Cosmopolitan Self-Determination*, in *Global Constitutionalism*, 2012, p. 405 *et seq.*

¹⁸ P. NEUVONEN, *Free Movement as a Means of Subject-Formation: Defending a More Relational Approach to EU Citizenship*, in F. DE WITTE, R. BAUBÖCK, J. SHAW (eds), *Freedom of Movement Under Attack*, cit., p. 13 *et seq.*

¹⁹ G. DAVIES, *European Union Citizenship and the Sorting of Europe*, in *Journal of European Integration*, 2020, forthcoming, preview available at www.doi.org.

²⁰ C. O'BRIEN, *Civis Capitalist Sum*, cit., p. 937 *et seq.*

important sense, a privileged group.²¹ Union Citizenship sets them free, liberates them from the constraints of their home state.²²

Yet in using their freedom they become outsiders in new ways: they have only a limited claim on the solidarity of the native mass in their host state.²³ The implicit contract in their residence is: “As long as you look after yourself, you are also contributing to us, and will be accepted. But if you fail to look after yourself, you should go”. The relationship to the host community is not really one of membership, but more in the nature of a transaction.²⁴ Two messages are sent to the mobile citizen. One is that their self-interest is also an act of contribution – the better they serve themselves, the better they serve their host. The other is that there is no need for them to feel commitment beyond their legal obligations – because there is none in the other direction. If better opportunities come up elsewhere, they should feel free to go. Indeed, they have almost a moral imperative to go: for following the logic of citizenship, they can contribute more there. The lawful mobile citizen is defined as one who gives by taking.²⁵

This is an interestingly toxic mix of self-interest and moral superiority,²⁶ comparable in some ways to the obligation to make as much profit as possible which is experienced by firms. Just as the director may respond to social critique by saying “but we have an obligation to serve the economic interests of the firm, and the shareholders”, the Union Citizen must look after themselves first. Since their relationship with their host state is conditional on the possibility of personal success, it follows easily that they must, above all, follow the path of that success. The mobile citizen is, in essence, an itinerant entrepreneur.²⁷

²¹ P. NEUVONEN, *Free Movement as a Means of Subject-Formation*, cit., p. 13 et seq.

²² F. DE WITTE, *Emancipation Through Law?*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, Oxford, Portland: Hart, 2016, p. 15 et seq.

²³ Art. 7 of Directive 2004/58, cit.; Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*; F. STRUMIA, *From Alternative Triggers to Shifting Links: Social Integration and Protection of Supranational Citizenship in the Context of Brexit and Beyond*, in *European Papers*, Vol. 3, 2018, No 2, www.europeanpapers.eu, p. 733 et seq.

²⁴ 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, pp. 11-12; J. HANDLER, *Social Citizenship and Workfare in the United States and Western Europe: The Paradox of Inclusion*, Cambridge: Cambridge University Press, 2004.

²⁵ D. KRAMER, *From Worker to Self-Entrepreneur: The Transformation of Homo Economicus and the Freedom of Movement in the European Union*, in *European Law Journal*, 2017, p. 172 et seq.

²⁶ J. 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.; A. SOMEK, *Alienation, Despair and Social Freedom*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, cit., p. 35 et seq.

²⁷ A. SOMEK, *On Cosmopolitan Self-Determination*, cit., p. 405 et seq.; D. KRAMER, *From Worker to Self-Entrepreneur*, cit., p. 172 et seq.

IV. THE RIGHT TO EQUAL TREATMENT

The core right for a mobile citizen settled in a host state is the right to be treated equally to nationals of that state.²⁸ Conceptually, this encompasses the rights to work, study and start a business, even though the Treaty frames those as autonomous rights. It also encompasses all the other social, personal and economic interactions with the state: it is well-established that there are no fields of national law outside the reach of the non-discrimination principle.²⁹

At first glance this would seem to be an integration principle par excellence: it would seem to allow the foreigner to legally merge with the locals, and facilitate their doing so socially.³⁰ Non-discrimination is typically understood precisely as the abolition of distinctions.

Yet equality can be understood in different ways, and the Court of Justice has given it a substantive meaning. It can at times be called in aid to ensure formal identity of treatment, to enforce uniformity, but the most influential and important case law has concerned indirect discrimination, where equally applicable rules cause disadvantage for the foreigner, and these foreigners have been able to rely on the Aristotelian principle that discrimination is also found where “different situations are treated similarly”. Substantive equality provides a legal basis for the argument that “I should be exempted from this rule, because it causes me particular inconvenience, because of some characteristic that I have connected to the fact that I come from abroad”. This is almost the opposite of integration: it is a right to participation without assimilation, to be an outsider within.³¹

There are striking examples of this, but before moving to those it should be noted that this person-centred approach is typical of EU law more generally.³² The Court places a low value on the social and administrative merits of having a clear rule which applies to all persons in the same way – Republican uniformity, we might call it – and in many contexts insists on the importance of examining the particular facts, seeing whether the application of the rule is proportionate and justifiable in that particular sit-

²⁸ Art. 18 TFEU.

²⁹ A. TOTH, *The Principle of Subsidiarity in the Maastricht Treaty*, in *Common Market Law Review*, 1992, p. 1079 *et seq.*; Garcia Avello, *cit.*

³⁰ L. AZOULAI, *The European Individual as Part of Collective Entities*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, *cit.*, p. 203 *et seq.*; S. COUTTS, *The Absence of Integration and the Responsibilisation of Union Citizenship*, in *European Papers*, Vol. 3, 2018, No 2, www.europeanpapers.eu, p. 761 *et seq.*

³¹ D. ACOSTA, J. MARTIRE, *Trapped in the Lobby: Europe’s Revolving Doors and the Other as Xenos*, in *European Law Review*, 2014, p. 362 *et seq.*

³² D. KOCHENOV, *EU Citizenship: Some Systemic Constitutional Implications*, in *European Papers*, Vol. 3, 2018, No 3, www.europeanpapers.eu, p. 1061 *et seq.*; G. DAVIES, *Bureaucracy and Free Movement*, in *Nederlands Tijdschrift voor Europees Recht*, 2003, p. 81 *et seq.*

uation.³³ Thus despite the general rule that a non-economic migrant cannot access social assistance, the Court has said that a blanket-ban may be disproportionate, and it is necessary to look at all the individual circumstances of the person concerned, to see whether in fact a degree of public assistance to an individual may be justified.³⁴ In an individual case this gives an impression of greater justice than an inflexible rule, but it also reverses the burden of adaption that is normally present in law: instead of individuals being eligible if they meet the relevant criteria, criteria are assessed to see if it is reasonable to apply them to the mobile citizen in the case. This casuistic approach is applied to benefit rules more generally and makes them inherently conditional and subject to doubt in as much as they are applied to cross-border situations.³⁵

Within the right to equal treatment, the substantive approach amounts to a right to be seen as one is – a right to recognition as different.³⁶ It puts the presumptive burden of adaption on the state, in a striking difference with the relationship of the non-mobile to national rules: the non-mobile must simply comply. It is in the nature of rules that they are blunt instruments of policy, and in many situations will work sub-optimally, yet the efficiency and transparency of having a universal rule typically outweighs the inefficiencies inherent in applying a one-size-fits-all approach to the diversity of human contexts. In general, the citizen cannot say “but I am special: this rule causes me unreasonable inconvenience”. The mobile citizen, however, can. Their difference is more special than others.³⁷

The most common, and perhaps least controversial, example of substantive equality is in the field of qualifications, where mutual recognition ensures that foreign qualifications are treated as equivalent to domestic ones, irrespective of the differences that of course exist.³⁸ This approach is not absolute, and major differences are taken account of, but minor differences are glossed over in the interests of practicality. Inevitably, knowledge and skills required to obtain a qualification are not identical across the Member States, and a student who could not quite manage to get her degree in State A, or even to get admitted to the course, might have been able to in State B. Yet if she is

³³ C. O'BRIEN, *Real Links, Abstract Rights and False Alarms: The Relationship Between the ECJ's "Real Link" Case Law and National Security*, in *European Law Review*, 2008, p. 643 *et seq.*

³⁴ Court of Justice, judgment of 19 September 2013, case C-140/12, *Brey*; D. KOCHENOV, *The Citizenship of Personal Circumstances in Europe*, in D. THYM (ed.), *Questioning EU Citizenship*, Oxford: Hart, 2018, p. 37 *et seq.*

³⁵ Court of Justice: judgment of 11 July 2002, case C-224/98, *D'Hoop*; judgment of 26 February 2015, case C-359/13, *Martens*; judgment of 20 June 2013, case C-20/12, *Giersch and Others*; judgment of 13 December 2012, case C-379/11, *Caves Krier Frères*; C. O'BRIEN, *Real Links, Abstract Rights and False Alarms*, *cit.*, p. 643 *et seq.*

³⁶ C. TAYLOR, *The Politics of Recognition*, in A. GUTMANN (ed.), *Multiculturalism and the Politics of Recognition*, Princeton: Princeton University Press, 1992, p. 25 *et seq.*

³⁷ D. KOCHENOV, *On Tiles and Pillars*, *cit.*, p. 3 *et seq.*

³⁸ C. BARNARD, *The Substantive Law of the EU*, Oxford: Oxford Press University, 2016, pp. 276-284.

studying in A that will be her bad luck, and she can choose a different career, whereas the equally able student from B will have their degree recognized as equivalent. It is a minor injustice, necessary in the cause of making movement possible, but it shows the rough edges of the principle of mutual recognition.

It was in the context of qualifications however that the Court developed the idea of the U-turn: that when a citizen returns to their home state after exercising rights abroad they should be treated not as a national once again, but as a migrant.³⁹ Their legal status is not akin to those of their countrymen who stayed but to “other” foreigners in their home state. Thus the Dutchman who returns to the Netherlands can rely on mutual recognition to have his Belgian qualifications recognized. This seems, and is, quite reasonable but it has since been extrapolated to a general free movement principle with far-reaching consequences.⁴⁰ Thus the migrant who returns is treated by EU law not as a national in their home state, but in almost all respects – most importantly regarding family rights, below – in the same way as a foreigner, enjoying all of the rights of a mobile citizen. For they are, of course, mobile: they have proved it.

The striking aspect of this is that it redefines the group who enjoy Union Citizenship rights. That group is no longer defined by their (relative) nationality or their foreignness, but by their mobility, or, by the fact of their cross-border lives.⁴¹ To enter the club, it does not matter where you are, or where you come from, but only whether your life straddles borders – whether you are a functional cosmopolitan. It is no longer sufficient to understand Union Citizenship rights in terms of integrating or protecting foreigners in host states. That is just a part of their effect. Their effect globally is more accurately described as protecting the mobile from the norms and preferences of the immobile.⁴² They provide an opt-out from certain aspects of national norms where these norms fail to take account of the particular needs or characteristics of mobile persons.⁴³

A more sensitive example of substantive equality occurs in naming law. For various reasons many Member States have rules on surnames, both for children and couples. These are often legacy laws, reflecting past traditions rather than current strong public feeling, but there is also generally little public appetite for change. They entrench cus-

³⁹ Court of Justice, judgment of 7 February 1979, case C-115/78, *Knoors v. Staatssecretaris van Economische Zaken*.

⁴⁰ Court of Justice: judgment of 7 July 1992, case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department*; judgment of 12 March 2014, case C-456/12, *O.*; judgment of 14 October 2008, case C-353/06, *Grunkin and Paul*; judgment of 5 June 2018, case C-673/16, *Coman and Others*.

⁴¹ On the idea of decoupling Union Citizenship from nationality see: D. KOCHENOV, *Ius Tractum of Many Faces*, cit., p. 169 *et seq.*; F. STRUMIA, *From Alternative Triggers to Shifting Links*, cit., p. 733 *et seq.*

⁴² F. DE WITTE, *Emancipation Through Law?*, cit., p. 15 *et seq.*

⁴³ L. MADURO, *We the Court: The European Court of Justice and the European Economic Constitution*, Oxford, Portland: Hart, 1998; K. LENAERTS, J. GUTIÉRREZ-FONS, *Epilogue on EU Citizenship: Hopes and Fears*, in D. KOCHENOV, *EU Citizenship and Federalism*, cit., p. 751 *et seq.*

toms that are so widely accepted as to be uncontroversial – except for a few people for whom they cause inconvenience, amongst whom are the mobile, who navigate between the norms of different states. Thus the Court finds consistently that where Citizens adopt names in one state, and then move to another that does not allow such names, that latter state must not apply its rules to them.⁴⁴ It can, of course, continue to apply those rules to the immobile. Naming traditions are legitimate, but the mobile citizen – foreign or not – cannot be expected to be part of them.

The naming case law is striking, but for impact it pales beside the case law on recognition of marriages. The Court never tires of emphasizing that it is for Member States to decide whether they wish to marry same sex couples or not.⁴⁵ However, in *Coman* it found that this freedom of moral choice does not extend to their approach to foreign same sex marriages: these must be recognized.⁴⁶ The gay couple with a valid Dutch marriage must be recognized as married, and enjoy the associated residence rights, even in Member States that have no gay marriage.

This is a matter of considerable political salience, where feelings run high. The policy logic of the decision is easy enough – otherwise it would be difficult for some couples to move to some states – but that does not diminish the divisive social consequences: there are now two legal marriage regimes, one for the immobile and one for the mobile. Any person who does not accept the norms of their home state has merely to become a cosmopolitan – live abroad – and they acquire a new legal status, with different and more far-reaching rights. The traditions, values and customs which Member States like to argue are the basis of rules such as these, are the traditions, values and customs of the immobile. The mobile belong to a more individualistic, liberal, and pan-European norm-world. They can essentially take rights that they have exercised in one Member State to other Member States, creating a personal value-bubble that is insulated from the details and variation of local laws.

V. THE FAMILY RIGHTS OF MOBILE CITIZENS

For many mobile citizens the most significant right granted by EU law is that to be accompanied by their family. The reason why this has become so important, and so litigated, is because it extends not just to family members who are not themselves EU citizens, but even to those who are not yet in the EU.⁴⁷ Thus by moving to another Member State, a Union Citizen gains the right to bring in their spouse and children, and sometimes other

⁴⁴ *Garcia Avello*, cit.; *Grunkin and Paul*, cit.; Court of Justice: judgment of 12 May 2011, case C-391-09, *Runevič-Vardyn and Wardyn*; judgment of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*.

⁴⁵ Court of Justice, judgment of 1 April 2008, case C-267/06, *Maruko*; *Coman and Others*, cit.

⁴⁶ *Coman and Others*, cit.

⁴⁷ Art. 7 of Directive 2004/58, cit.; Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock and Others*.

family members, from outside the EU.⁴⁸ In a time when immigration law is often strict, and even spouses are not easily imported to many Member States, and language and income requirements are increasingly common, this ability to simply avoid national immigration law is potentially life-changing and much valued by those who use it.

Exile is perhaps a high price to pay for love, however, and so it is particularly significant that this right, as others, can be brought home: the returning migrant is, as discussed above, assimilated to foreigners.⁴⁹ They have joined the transnational club, and are not thrown out of it because they are back in their home state. As with marriage, the regime for immigration in any given Member State now divides into two: there is a typically strict one, for the immobile, and a much more generous one for the self-sufficiently mobile. These market entrepreneurs exist entirely outside national immigration rules, even to the extent of procedure: not only do their family members enjoy an almost unconditional right to be with them, but the associated formalities are limited, and not constitutive of their right, often in contrast with the sacred paperwork that is a common part of national immigration law.⁵⁰

There are practical reasons for this generous approach: a more restrictive one could be hard to police. However, it goes beyond merely establishing the migrant as an equal in their host state, and emphasizes their separateness. It also seems to go beyond merely removing obstacles to movement, and to actively stimulate it.⁵¹ The right to bring in family from outside the EU seems like a reward for exercising free movement rights, suggesting the idea that in moving the Citizen is benefitting Europe, and so deserves every facility to ease that movement. There is something almost diplomat-like in the legal construction which ensures that wherever these people go they must not have to engage with the details or restrictions of local immigration law. One element of this is the privilege, and the other is the recognition of the mobile citizen as an outsider, not assimilated to locals but isolated within them in their special status.

The U-turn as a technique to avoid national immigration law has now become a staple of every immigration lawyer, and is widely known. Yet it has not reached the massive scale that one might expect. Numbers using it are limited, and most citizens prefer to work slowly and painfully through the national legal requirements if they wish to bring family in from outside the EU. This, if anything, shows how separate the mobile are: for some, the idea of moving across the border in order to facilitate rights is a no-brainer, an easy step. For most, it is huge and intimidating. How people feel about lead-

⁴⁸ *Metock and Others*, cit.

⁴⁹ *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department*, cit.; *O.*, cit.; *Grunkin and Paul*, cit.; *Coman and Others*, cit.

⁵⁰ Court of Justice, judgment of 25 July 2002, case C-459/99, *MRAX*; judgment of 8 April 1976, case C-48-75, *Royer*.

⁵¹ C. COSTELLO, *Metock: Free Movement and "Normal Family Life" in the Union*, in *Common Market Law Review*, 2009, p. 587 *et seq.*

ing a cross-border life is a significant dividing factor between Europeans, and most do not want to, or cannot, do it.⁵² The class that Union Citizenship constructs legally appears to correspond to real social differences – the world of mobility is not suited to everyone, although for those used to it, it is hard to imagine or remember what a nationally bounded life entails.

VI. ADJUDICATION RIGHTS

The preliminary reference procedure is usually described in terms of its importance for the uniformity and coherence of the EU legal system as a whole.⁵³ However, it is also a guarantor of individual rights.⁵⁴ In the context of citizenship, it ensures that the mobile citizen whose rights are infringed by a Member States does not have to rely purely on the national judiciary to vindicate their rights. The obligation on final courts to refer ensures that, by appealing, any Union Citizen who feels that they are not getting the right answer in the national courts can obtain a reference, and hear the views of the Court of Justice on their case.⁵⁵

Formally, as we know, the Court merely rules on the interpretation of EU law, leaving its application to the national court.⁵⁶ However, in practice it often indicates whether a given national measure or rule should be seen as compatible with EU law, or at least provides a framework for that consideration which is often determinative of the outcome and usually influential.⁵⁷ The Court has been a consistent friend of self-sufficient migrants, repeatedly expanding and guaranteeing their rights against Member States pushing for restrictive interpretations.⁵⁸

National courts are not always migrant-hostile, nor hostile to EU law. However, the quality and character of their use of EU law varies greatly, and few would doubt that a mobile citizen generally has a better chance of a favourable outcome with a reference than without one. One reason is that the rights that a mobile citizen exercises are important to integration. Free movement is where individual goals and the goals of EU law

⁵² R. BAUBÖCK, *The New Cleavage Between Mobile and Immobile Europeans*, cit., p. 19 et seq.; A. AZMANOVA, *After the Left-Right (Dis)continuum: Globalization and the Remaking of Europe's Ideological Geography*, in *International Political Sociology*, 2011, p. 384 et seq.

⁵³ K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, Oxford: Oxford University Press, 2014, p. 48 et seq.

⁵⁴ *Mouvement contre le racisme, l'antisémitisme et la xénophobie MRAX*, cit.; *Royer*, cit.; C. COSTELLO, *Metock: Free Movement*, cit., p. 587 et seq.

⁵⁵ Art. 267, para. 3, TFEU.

⁵⁶ T. TRIDIMAS, *Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction*, in *International Journal of Constitutional Law*, 2011, p. 737 et seq.; J. WEILER, *Van Gend en Loos*, cit., p. 94 et seq.

⁵⁷ J. WEILER, *Van Gend en Loos*, cit., p. 94 et seq.

⁵⁸ G. DAVIES, *Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication*, in *Journal of European Public Policy*, 2018, p. 1442 et seq.

come together.⁵⁹ Thus in serving their own desires and self-interests, the mobile citizen is also acting as an agent of integration. Restrictive national measures are not just an inconvenience for the claimant but also an obstacle to the achievement of EU policy.

The Court is thus structurally predisposed to a mobility-friendly reading of EU law.⁶⁰ It is then a considerable advantage to the mobile citizen that they have access to this sympathetic court, and in some ways a remarkable advantage: that they can go to a tribunal whose function is not to approach the state-citizen dispute from some hands-off, neutral, perspective, but to ensure that free movement is protected.

This could be seen as just redressing a disadvantage: national laws and institutions, and to some extent national judges, are inevitably permeated by national values and traditions. The choices and perspectives that construct the national society have also constructed them. The same, on the other hand, can be said *mutatis mutandis* about the Court of Justice and free movement in Europe – the values that construct the transnational also permeate that Court and its legal system. Thus just as a typical immobile national citizen has access to an adjudicator embedded in his life-world, so too has a mobile citizen access to one embedded in hers. To each their court.

VII. SEPARATE, PRIVILEGED, THREATENING

As has been shown above, in all the important aspects of the law concerning mobile Citizens, EU law does not simply assimilate them to the locals around them, but instead gives them a distinct legal status. It allows their difference to be asserted and protected, and enables them to challenge local laws which fail to take account of that difference and which cause them unnecessary inconvenience. The mobile citizen is, in this way, not just legally distinct, but also privileged. Their family, procedural and equality rights are superior to those of the immobile, and the burden of adaption is reversed. Unlike the ordinary citizen who must accept his anonymity in the face of a rule, the mobile citizen has the right to recognition of his individual characteristics. This is not just a practical legal advantage. In giving greater recognition to their personhood and particularity it also amounts to the treatment of mobile Citizens as persons of higher status.

All they have to do for this is move, and give up their right to call on the local community for financial assistance. This emphasizes their outsider status – that their relationship with the national community has changed, with the obligations on both sides

⁵⁹ D. KOSTAKOPOULOU, *European Union Citizenship: Writing the Future*, in *European Law Journal*, 2007, p. 623 *et seq.*; J. WEILER, *Van Gend en Loos*, cit., p. 94 *et seq.*; G. DAVIES, *Nationality Discrimination in the European Internal Market*, The Hague: Kluwer Law International, 2003, p. 187 *et seq.*: "It could be said that the citizen has been co-opted by the Community as a tool to restructure the European state, via his exercise of free movement and non-discrimination. From a Community perspective, the Citizen's primary obligation may then be to use and assert these rights".

⁶⁰ G. DAVIES, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, in *Common Market Law Review*, 2006, p. 63 *et seq.*

reduced. It is a trade-off that is worth it for those whose lives and interests cross borders, and who are strong. EU law has created a portable, personally adapted, protective and privileged legal status for the cosmopolitan social elite.

The threat which this creates for the immobile is multifaceted. At its most concrete and vulgar, mobility of persons puts pressure on public institutions and the welfare state to change and reform. Union Citizenship is a part of the mobility regime, overlapping with free movement of workers and services. All of these aspects of mobility potentially destabilize public institutions by requiring them to adapt to the needs of the cross-border client, who often wishes to opt-out of a universal national system and participate in a foreign one.⁶¹ The law here is nuanced, and the effects of this adaptation on the quality of services or the financing of institutions may be minimal or positive: it is not the case that in allowing individuals to seek healthcare or education abroad, or to transfer their pensions or social security, the law constructs a directly extractive regime. Rather it simply exposes rigidities and over-regulation and compels flexibility and openness.

However, this apparently harmless or even beneficial effect may not seem so benign to all, for the adaptation that is encouraged is often in the direction of more market-based provision, fragmentation of state monopolies, and a more individualistic and diverse conception of the provision of essential public services – for these are the adaptations that make mobility easier to encompass.⁶² However welcome those changes may be for some, for those most dependent on solidarity and collective provision they create an atmosphere of insecurity; freedom of choice always has its losers.⁶³

As Somek has commented, the law on how mobility and welfare interact invariably puts the welfare state in the defensive position, requiring institutions to make arguments of threat and impending disaster, and to think up justifications for excluding individual requests.⁶⁴ The law here is a series of stories in which the mobile Citizen is in the sympathetic role, and the institutions are the bad guys, having to plead poverty and fragility. In doing so they construct an image of themselves as on the edge of collapse,

⁶¹ F. DE WITTE, *Justice in the EU: The Emergence of Transnational Solidarity*, Oxford: Oxford University Press, 2015; S. GREER, S. RAUSCHER, *Destabilization Rights and Restabilization Politics: Policy and Political Reactions to European Union Healthcare Services Law*, in *Journal of European Public Policy*, 2011, p. 220 et seq.; A. SOMEK, *Solidarity Decomposed*, cit., p. 787 et seq.; G. DAVIES, *The Process and Side-Effects of Harmonisation of European Welfare States*, in *Jean Monnet Working Paper*, No. 02, 2006, p. 1 et seq.

⁶² M. DANI, *The Subjectification of the Citizen in European Public Law*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, cit., p. 55 et seq.; G. DAVIES, *The Process and Side-Effects of Harmonisation*, cit., p. 1 et seq.; S. REYNOLD, *Aim and Duty, Sword and Shield: Analysing the Cause and Effects of the Malleability of "Social Integration" in EU Law*, in *European Papers*, Vol. 3, 2018, No 2, www.europeanpapers.eu, p. 693 et seq.; F. SCHARPF, *The Asymmetry of European Integration*, cit., p. 211 et seq.

⁶³ A. MENÉNDEZ, *European Citizenship After Martínez Sala and Baumbast. Has European Law Become More Human But Less Social?*, in L. MADURO, L. AZOULAI (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford: Hart, 2010, p. 363 et seq.

⁶⁴ A. SOMEK, *Solidarity Decomposed*, cit., p. 787 et seq.

unable to be kind, incapable of meeting needs. Free movement humiliates welfare institutions, and in doing so frightens those who need them most.⁶⁵

Narrowing in on the specific Union Citizenship rights that are the subject of this *Article*, their effects on the immobile are also better described in terms of insecurity and humiliation than in terms of quantifiable harm. After all, nothing in Citizenship law changes the legal rights of the immobile, and their position may well be benefitted in as much as mobile Citizens tend to contribute economically to host states. The immobile are primarily left alone by EU law, and perhaps made a little richer. Nevertheless, they have a number of reasons to understandably fear Union Citizenship.

One threat that it creates is demographic. The exit of the young, often well educated, and entrepreneurial creates economic and social problems as well as portraying the state as failed and unattractive.⁶⁶ How is that for those left behind? The discussion above focused on the mobile Citizen in their state of residence, but the states of departure are no less affected by Citizenship law because they are not the subject of its litigation. That they are absent from the law is a corollary of the fact that they are not chosen by the mobile, but it is also a compounding of the effects of that fact: first a loss of youth, then of voice.

Within the destination states, Union Citizenship also creates a loss of status for the immobile. Their absolute rights may not be changed, but their relative rights are.⁶⁷ They are no longer first in their own nation.⁶⁸ Outsiders have a superior legal position in socio-economic matters.⁶⁹ That is not the case in political rights, yet this may be little comfort when, as has been noted, politics is both bounded by the requirements of the EU and disproportionately influenced by the needs of the cross-border.⁷⁰ There is legal degradation in being an immobile citizen in a legal system which grants hierarchically superior rights to the mobile, and which requires the choices of the immobile mass to be adapted to their

⁶⁵ *Ibid.*; G. DAVIES, *The Humiliation of the State as a Constitutional Tactic*, in F. AMTENBRINK, P. VAN DEN BERG (eds), *The Constitutional Integrity of the European Union*, The Hague: TMC Asser Press, 2010, p. 147 *et seq.*

⁶⁶ I. KRASDEV, *Eastern Europe's Illiberal Revolution: The Long Road to Democratic Decline*, in *Foreign Affairs*, 2018, p. 49 *et seq.*; A. SOMEK, *Solidarity Decomposed*, *cit.*, p. 787 *et seq.*

⁶⁷ D. KOCHENOV, *On Tiles and Pillars*, *cit.*, p. 3 *et seq.*; A. MENÉNDEZ, E. OLSEN, *Challenging European Citizenship*, *cit.*, p. 3 *et seq.*

⁶⁸ See discussion of the implications of this in: D. KOSTAKOPOULOU, *European Union Citizenship*, *cit.*, p. 630 *et seq.*

⁶⁹ A. MENÉNDEZ, E. OLSEN, *Challenging European Citizenship*, *cit.*, p. 3 *et seq.*

⁷⁰ M. DANI, *The Subjectification of the Citizen*, *cit.*, p. 55 *et seq.*; G. DAVIES, *Democracy and Legitimacy in the Shadow of Purposive Competence*, in *European Law Journal*, 2013, p. 2 *et seq.*; F. DE WITTE, *Interdependence and Contestation in European Integration*, in *European Papers*, Vol. 3, 2018, No 3, www.europeanpapers.eu, p. 475 *et seq.*; F. DE WITTE, *Transnational Solidarity and the Mediation of Conflicts of Justice in Europe*, in *European Law Journal*, 2012, p. 694 *et seq.*

needs and convenience. This fragmenting of the normative order, Somek argues, creates a society of alienation, in which for most people it is harder to be free.⁷¹

If national democracy then seems to entail an element of charade, many would respond that this is not really because of the EU or its citizenship, but the pressures of the modern global world: nations that want prosperity must accept the changes required to flourish in the global marketplace.⁷² However, without entering into that debate, it is EU law, partly via Citizenship, which is the immediate bearer of this message. The messenger, whether we think this fair or not, is often the most convenient target to shoot at. How else can a distant and anonymous sender be reached?

Finally, there is a threat to culture and identity. Local traditional values are subordinated to those of cosmopolitan outsiders. Thanks to the U-turn, nationals who reject prevailing norms have an alternative to the democratic process: they can avoid them.⁷³ Those who value those prevailing norms cannot use democracy to fully protect them. Conservative norms are not just undermined, but defined as obstacles to movement, and thereby positioned by EU law in opposition to freedom, to progress, to European values – and thus to Europe.

It is really the very fabric of the national community that is being changed. From closed, solidaristic, normative, and defined, it becomes more open, liberal, conditional and up for challenge.⁷⁴ For the strong that may be emancipatory, but for others, those who thrive on boundedness, it makes their social, economic and cultural place seem uncertain, and threatens their security.⁷⁵ The conditions for them to flourish in the nation state are diminished, without these being reproduced on a European scale.

VIII. THE LOGIC OF UNION CITIZENSHIP

If Union Citizenship cannot be well explained as a mechanism to create unity, or a shared identity, by any direct means, it can nevertheless be understood as an integrative measure – but a more indirect one. In providing strong rights and protection from local immobile norms it actively encourages and facilitates the movement of the selected, the self-sufficient, and in doing so actively promotes diversity of a kind within Member States. It prevents them from compelling adaption by the mobile Citizen, and re-

⁷¹ A. SOMEK, *Alienation, Despair and Social Freedom*, cit., p. 35 et seq.; A. SOMEK, *On Cosmopolitan Self-Determination*, p. 405 et seq.

⁷² R. BELLAMY, *State Citizenship, EU Citizenship and Freedom of Movement*, in F. DE WITTE, R. BAUBÖCK, J. SHAW (eds), *Freedom of Movement Under Attack*, cit., p. 9 et seq.

⁷³ F. DE WITTE, *Emancipation Through Law?*, cit., p. 15 et seq.

⁷⁴ C. JOPPKE, *The Inevitable Lightning of Citizenship*, in *European Law Journal of Sociology*, Cambridge: Cambridge University Press, 2010, pp. 9-32.

⁷⁵ A. SOMEK, *On Cosmopolitan Self-Determination*, cit., p. 405 et seq.; C. JOPPKE, *Liberal Citizenship is Duty-Free*, in R. BAUBÖCK (ed.), *Debating European Citizenship*, Cham: Springer, 2019, pp. 199-203; A. AZMANOVA, *After the Left-Right (Dis)continuum*, cit., p. 384 et seq.; R. BAUBÖCK, *The New Cleavage*, cit., p. 19 et seq.

quires the state to accept and adapt to difference.⁷⁶ This in turn disrupts norms and institutions and poses a challenge to the more inward-looking preferences of the immobile majority and to the boundaries that they construct. The mobile Citizen becomes an agent of change, giving Member States a nudge towards forms more suited to open markets and globalization.⁷⁷

Free movers also have an economic purpose. In encompassing workers, the self-employed, the studying, and the wealthy, Union Citizenship reflects the current understandings of which actors are important to the economy, and ensures that these are freely available across the continent. This in turn helps firms be mobile, so that the mechanism of wealth-creation is, at least to a degree, decoupled from individual states.⁷⁸ It is not just certain individuals who are more loosely embedded in their Member States thanks to Union Citizenship, and more able to think and act in a pan-European way, but also firms and universities.

As well as this, mobile Citizens have a political function. They are, at least potentially, clients of the EU. As a new institutional construct, the EU runs the risk of being a government without a people, with associated political fragility. In ensuring that mobile Citizens in a new state continue to exercise EU rights directly, rather than merely being assimilated to locals, Union Citizenship law helps to create a direct Citizen-Union bond. Union Citizenship was originally spoken of as an attempt to bring the Member State citizen closer to the Union. For the immobile person, this is implausible.⁷⁹ However, for the mobile class, given the way they are separated and privileged, it is easily imaginable, and means that Union Citizenship can be understood as a mechanism to create a truly European political class, with a degree of identification with, and loyalty to, the EU.

IX. CONCLUSION

Mobile Union Citizens form a distinct legal class, and the rights they enjoy encourage the formation, or strengthening, of a corresponding distinct social class. That hardly seems like a contribution to unity or integration, and yet via indirect means, somewhat Machiavellian ones, it may have integrative effects. That could be seen as a soft way to leverage change in Europe, exposing Member States to the foreign and letting that work its effects.⁸⁰ It could also be a route to backlash, humiliating the immobile and turning the mobile into objects of demonization.

⁷⁶ D. KOSTAKOPOULOU, *European Union Citizenship*, cit., p. 623 *et seq.*

⁷⁷ R. BELLAMY, *State Citizenship*, cit., p. 9 *et seq.*; C. JOOPKE, *Liberal Citizenship is Duty-Free*, cit., pp. 199-203.

⁷⁸ M. FERRERA, *Loyalty Matters: The Delicate Balance Between Jurisdictional Competition and Political Order*, in *European Papers*, Vol. 4, 2019, No 1, www.europeanpapers.eu, p. 169 *et seq.*

⁷⁹ M. DANI, *The Subjectification of the Citizen*, cit., p. 55 *et seq.*; D. KOSTAKOPOULOU, *European Union Citizenship*, cit., p. 623 *et seq.*

⁸⁰ C. JOOPKE, *The Inevitable Lightning of Citizenship*, cit., p. 9 *et seq.*; D. KOSTAKOPOULOU, *European Union Citizenship*, cit., p. 623 *et seq.*

The characteristics by which this class is defined are striking; they are economically important, relatively successful, self-sufficient, and yet treated as normative and cultural outsiders who are protected from the immobile majority. They have a transactional rather than solidaristic relationship with that majority, with rights that are hierarchically and substantively superior to the immobile, but which are conditional on their economic independence. Above all, in having the right to demand adaption to their foreign characteristics, they destabilise national laws and institutions, potentially giving the immobile majority the feeling that their will is being frustrated, their chosen social forms undermined, and their status in their home state diminished.

The idea of a rootless cosmopolitan elite with many of the social and economic characteristics above, and a similarly tense relationship with more rooted and immobile citizens, is fairly ubiquitous, but the granting of a specific and privileged legal status to that group is a distinctive European step. In this European context it also invites parallels with Europe's Jews. They too were part of European states, and yet often seen as outsiders within them.⁸¹ They too were economically successful, and thanks to their connections with other Jews often distinctively transnational both in identity and lives.⁸² They were sometimes seen as the most European of Europeans, but were also vulnerable because of this. Their alleged lack of loyalty to the nation and cosmopolitan rootlessness, as well as their alleged alien values, were, still are, core features of anti-Semitism.⁸³

A psychoanalytic perspective might invite us to wonder if the continent is trying to regrow its lost limb, to repair its self-harm, and create a class that is an echo of the one it lost.⁸⁴ The way that the law protects the mobile citizen, the stranger within, from identity-denying assimilation demands seems like a lesson learned from the past. However, in entrenching the strangeness of that stranger, it is also a reconstruction of it.

Developing those speculations is outside the scope of this *Article*. Yet it reminds us that to socially engineer the continent by creating mobile Citizens and setting them loose to destabilise the world of the immobile is a dangerous game. At best, it could be a cunning, if not quite transparent, intervention which helps Member States become more open and outward-looking, and thereby more stable and successful and better able to serve all their population, not just the mobile. At worst it could be stimulating perceptions of difference, and pouring oil on the perennially smoldering conflict between those whose interests and character are best served by openness, and those whose nature and circumstances are better suited to a more bounded world. It may be

⁸¹ Z. BAUMAN, *Jews and Other Europeans: Old and New*, Oxford: Berghahn Books, 2008, pp. 121-133.

⁸² J. MULLER, *Capitalism and the Jews*, Princeton: Princeton University Press, 2011; C. AUST, *The Jewish Economic Elite: Making Modern Europe*, Indiana: Indiana University Press, 2018.

⁸³ H. SPECTOR, *The Cosmopolitan Subject and the Question of Cultural Identity: The Case of Crime and Punishment*, in *Crime, Media, Culture*, 2017, pp. 21 *et seq.*

⁸⁴ S. CLARKE, *Theory and Practice: Psychoanalytic Sociology as Psycho-Social Studies*, in *Sociology*, 2006, p. 1153 *et seq.*

that this dangerous path is still the best option, in a world where there are no safe policy choices. Certainly, there is much in free movement and Union Citizenship to embrace. However, precisely those lawyers and scholars who do value its positive effects need to pay attention to its risks, to stop them from bringing down the legal edifice of European openness once again.



ARTICLES

RULE OF LAW CONDITIONALITY IN EU FUNDS: THE VALUE OF MONEY IN THE CRISIS OF EUROPEAN VALUES

MARCO FISICARO*

TABLE OF CONTENTS: I. Introduction – II. Defending the budget or the rule of law? – III. Why using spending conditionality? – IV. Scheme of the proposal. – V. Addressing the legal shortcomings of the proposal. – V.1. Is the proposal compatible with the principle of conferral? – V.2 The Commission's excessive discretionary power: a challenge to the rule of law? – VI. No more "Money for nothing": is there room for solidarity? – VII. Conclusions.

ABSTRACT: The *Article* critically engages with the recent Commission's proposal for a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (Rule of Law Conditionality). It first considers the reasons underlying the proposal and the Commission's choice to resort to spending conditionality in the context of the rule of law crisis. In the second part, it addresses two main rule of law issues arising from the draft regulation itself: on one hand, it attempts to define the boundaries of the Union's competence to establish a Rule of Law Conditionality in the management of EU funds; on the other, it highlights the broad discretionary power the Commission reserved for itself and the relative shortcomings in terms of legal certainty, transparency and non-arbitrariness. Finally, the *Article* focuses on the complex relation between conditionality and solidarity in the EU internal dimension and analyses the proposal from this particular perspective.

KEYWORDS: rule of law – conditionality – solidarity – European Union – multiannual financial framework – budget.

I. INTRODUCTION

Prominent scholars have stressed the importance of drawing "red lines" to add "substance and bite to the European values" in the struggle against "illiberal democracies"

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within the European Union.¹ According to them, we might even witness a potential “constitutional moment”: indeed, the Union’s response to the rule of law crisis will tell us “whether illiberal democracies become part of the European public order as laid out in Art. 2 TEU, or are opposed by it”,² and this will deeply impact on the future path of the European integration process.

From this perspective, the Commission’s proposal for a regulation on the protection of the Union’s budget in case of generalised deficiencies as regards the Rule of Law in the Member States³ – aimed at introducing a form of Rule of Law Conditionality in the management of EU funds – looks much like an attempt to draw a bold “red line” in this respect.

The mechanism envisaged by the Commission is intended to strengthen the Union’s ability to enforce its founding values *vis-à-vis* recalcitrant Member States by enriching the rule of law toolbox with what appears to be a much more persuasive instrument compared to the currently available ones.

This is the main reason why Rule of Law Conditionality has been endorsed by some scholars⁴ and warmly welcomed within the EU institutional framework,⁵ especially by the European Parliament, which first encouraged the Commission to put forward the proposal⁶ and then approved it in first reading.⁷

However, as evidenced also by the Court of Auditors’ opinion on the draft regulation⁸ and by a fierce plenary debate held at the European Parliament,⁹ the proposed

¹ A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, M. TABOROWSKI, M. SCHMIDT, *A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines*, in *Common Market Law Review*, 2018, p. 983 *et seq.*

² *Ibid.*, p. 984.

³ Commission Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final.

⁴ G. HALMAI, *The Possibility and Desirability of Rule of Law Conditionality*, in *Hague Journal on the Rule of Law*, 2019, p. 171 *et seq.*; R. D. KELEMEN, K. L. SCHEPPELE, *How to Stop Funding Autocracy in the EU*, in *Verfassungsblog*, 10 September 2018, verfassungsblog.de.

⁵ European Committee of the Regions, Opinion COR 2018/02389 of 9 October 2018, *The Multiannual Financial Framework package for the years 2021-2027*; European Economic and Social Committee, Opinion EESC 2018/02955 of 18 October 2018 on Proposal for a regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States.

⁶ European Parliament Resolution A8-0048/2018 of 14 March 2018 on the next MFF: Preparing the Parliament’s position on the MFF post-2020, para. 119.

⁷ European Parliament Legislative Resolution P8_TA/2019/0349 of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States.

⁸ Court of Auditors, Opinion 1/2018 of 12 July 2018 concerning the proposal of 2 May 2018 for a regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States.

mechanism raises significant and still unresolved critical issues to be addressed both in academic debate and public discussions.

This *Article* is intended to be an attempt to stimulate further reflections on this topic in view of the current political negotiations on the Commission's package of proposals for the financial period 2021-2027,¹⁰ amongst which the Rule of Law Conditionality draft regulation is a considerable matter of dispute.

The next months will be crucial for the future of the proposal. There seems to be fairly wide agreement among Member States on the need to establish a stronger link between budget and values by making use of the conditionality tool,¹¹ but the inclusion of the draft regulation within the proposals for the next Multiannual Financial Framework (MFF) renders difficult to foresee its outcome.

The first part will focus on the reasons behind the proposal (section II) and the rationale underlying the Commission's choice to resort to the controversial conditionality tool to attain its objectives (section III).

In the second part, I will critically engage with two relevant and still unanswered rule of law questions arising from the proposal. Firstly, I will investigate if, and to what extent, such a mechanism is in line with the principle of conferral and whether Art. 322, para. 1, let. a), TFEU is a feasible legal basis for it (section V.1). Secondly, I will consider whether the discretionary powers deriving from the proposal for the Commission are compatible with some of the key components of the rule of law, such as the principles of legal certainty, transparency and non-arbitrariness of the executive power (section V.2).

In the third and last part, I will briefly consider the challenges arising from the complex relation between conditionality and solidarity in the EU *internal* dimension and I will then look at the proposal from this perspective (section VI).

II. DEFENDING THE BUDGET OR THE RULE OF LAW?

As it is clear from the proposal's title onwards, the Commission's declared aim is defending the Union's budget against the negative externalities deriving from generalised

⁹ The video of the Plenary of 16 January 2019 on the Rule of Law Conditionality Proposal is available at the following link: www.europarl.europa.eu.

¹⁰ For an overview see Communication COM(2018) 321 final of 2 May 2018, *A Modern Budget for a Union that Protects, Empowers and Defends: The Multiannual Financial Framework for 2021-2027*.

¹¹ This has been confirmed by the Member States' contributions to the Commission's initiative *Further strengthening the Rule of Law within the Union – state of play and possible next steps* available at ec.europa.eu. Indeed, leaving aside the foreseeable opposition of Poland and Hungary, the proposal has enjoyed support from Belgium, Finland, France, Germany, Netherlands, Slovenia, Spain, Sweden and Portugal. Interestingly, the Slovak Republic – member of the so-called “Visegrád group” – did not oppose the proposal, although highlighting some issues to be clarified, including the questions of competence, legal certainty and compatibility with the Treaties, as well as the use of reversed qualified majority in the decision-making process.

rule of law deficiencies in the Member States. According to the Commission, “respect for the rule of law is an essential precondition to comply with the principles of sound financial management”, which can be ensured by the Member States only if public authorities act in accordance with the law and if their decisions can be subject to effective judicial review by independent courts and by the Court of Justice.¹² If this is not the case, the Union should be able to adopt appropriate measures “in order to protect the Union’s financial interests from the risk of financial loss”.¹³

Alongside the need to protect the budget, the Commission’s proposal is evidently prompted by the growing awareness about the ineffectiveness of the available mechanisms for the enforcement of EU values, that became dramatically patent in Poland and Hungary. The Commission does not conceal this intent, acknowledging that the proposal comes as the result of a “clear request from institutions such as the European Parliament as well as from the public at large for the EU to take actions *to protect the rule of law*”.¹⁴

Facing the emersion of “rule of law backslidings”¹⁵ throughout Europe, it becomes clear that, given the nature of the EU legal order and the deep interdependence among Member States, domestic constitutional crises cannot be seen as purely internal problems anymore. Indeed, when the effective application of EU law cannot be ensured by national judges acting as independent decentralised European judges, it is also the rule of law at the Union level to be under threat. Likewise, Union’s policies are largely founded on mutual trust, that is in turn built “on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU”.¹⁶ As emerged in the *LM* case¹⁷ on the execution of a European Arrest Warrant, systemic rule of law deficiencies inside a Member State can undermine mutual trust and, thus, the correct functioning of the EU legal order as a whole.

Despite some recent successes coming from Luxembourg, the actions taken at the Union level to deal with Hungary and Poland have shown an overall weakness of the current EU rule of law toolbox, revealing a significant mismatch between the authority of the EU in protecting values within Member States and its real ability to intervene.¹⁸

¹² Proposal for a regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States COM/2018/324 final, recitals 4 and 5.

¹³ *Ibid.*, p. 2.

¹⁴ *Ibid.*, p. 1 (emphasis added).

¹⁵ L. PECH, K. L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017, p. 3 *et seq.*

¹⁶ Court of Justice, opinion 2/13 of 18 December 2014, para. 168.

¹⁷ Court of Justice, judgment of 25 July 2018, case C-216/18 PPU, *LM*.

¹⁸ J.W. MÜLLER, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, in *European Law Journal*, 2015, p. 141 *et seq.*

Art. 7 TEU, as is well known, had never been used until the 20th of December 2017, while since this date it has been triggered twice – first by the Commission against Poland¹⁹ and then by the European Parliament *vis-à-vis* Hungary.²⁰ However, this move has not led the Council to the determination of a clear risk of a serious breach of the values enshrined in Art. 2 TEU so far. Commission and Parliament busted the “nuclear” myth about the activation of Art. 7 TEU,²¹ but the Council’s inaction has unequivocally shown that this procedure can hardly play a leading role in addressing rule of law crises, due to its strict procedural threshold.

Furthermore, the 2014 Rule of Law Framework²² – created by the Commission to prevent that a systemic threat to the rule of law in a Member State could reach the level of a “clear risk of a serious breach” within the meaning of Art. 7 TEU – has revealed several limits in its first application against Poland. Despite one Rule of Law Opinion and four Rule of Law Recommendations²³ issued by the Commission, Poland has not changed its policies in a substantive manner; in addition, the length of the procedure (from 1 June 2016 to 20 December 2017) has arguably allowed Polish authorities to further consolidate the violations.

Some positive outcomes resulted very recently from the strong involvement of the Court of Justice in tackling the rule of law crisis.

Actually, the impact of the first infringement proceedings launched by the Commission against Hungary in 2012 was anything but satisfactory, mainly because of the inevitable length of the procedure and of the “creative compliance”²⁴ by Hungarian authorities with the Court’s judgments.²⁵ However, since the end of 2017 a series of fundamen-

¹⁹ Commission, Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland – Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final of 20 December 2017.

²⁰ European Parliament Resolution P8_TA(2018)0340 of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

²¹ D. KOCHENOV, *Busting the Myths Nuclear: A Commentary on Article 7 TEU*, in *EUI Working Papers*, no. 10, 2017.

²² Communication COM(2014) 158 final of 11 March 2014 from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*.

²³ Commission Opinion of 1 June 2016 regarding the Rule of Law in Poland; Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland; Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374; Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 and (EU) 2017/146; Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.

²⁴ A. BATORY, *Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU*, in *Public Administration*, 2016, p. 685 *et seq.*

²⁵ See Court of Justice, judgment of 6 November 2012, case C-286/12, *Commission v. Hungary*; judgment of 8 April 2014, case C-288/12, *Commission v. Hungary*. In the first case, concerning the measures lowering

tal rulings revealed the willingness of the Court to act as the guardian of the “orthodoxy” of the European constitutional order.²⁶

In the *Białowieża Forest* case, the Court stated that – “[in order] to guarantee the effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded” – it has power under Art. 279 TFEU to impose a periodic penalty payment on a Member State in the event of non-compliance with the interim measures ordered.²⁷ This is meant to give additional teeth to infringement proceedings because, for penalty payments to be applied, it is no longer necessary to wait until the State fails to comply with the Court’s judgment according to Art. 260 TFEU.

Furthermore, in the groundbreaking judgment *Associação Sindical dos Juizes Portugueses* of 27 February 2018,²⁸ the Court took the unexpected opportunity, coming from a group of Portuguese judges wishing to protect their wages from austerity policies, to provide the Commission with a new powerful tool to challenge domestic measures affecting the independence of the judiciary, namely the second subparagraph of Art. 19, para. 1, TEU.

To understand how, in what has been elegantly called a “judicial serendipity”,²⁹ Portuguese judges came to the rescue of the Polish judiciary, suffice it to say that the second subparagraph of Art. 19, para. 1, TEU is at the heart of the recent landmark judge-

the retirement age of legal officials (judges, prosecutors, and notaries), the Court notably treated a case on judiciary independence as a non-discrimination case and, although Hungary was found in breach of EU law, the judgment was substantially nullified by Hungarian authorities at the execution stage. Indeed, Hungary offered generous financial compensation as an alternative to the restoration of positions and did not ensure for the judges willing a restoration to return to their former positions. In the second case, concerning the independence of the data protection authority, the judgment of the Court did not prevent Hungary from prematurely ending the authority’s term of office. See Z. SZENTE, *Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them*, in A. JAKAB, D. KOCHENOV (eds), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance*, Oxford: Oxford University Press, 2017, p. 456 et seq.; K.L. SCHEPPELE, *Understanding Hungary’s Constitutional Revolution*, in A. VON BOGDANDY, P. SONNEVEND (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, London: Hart, Beck, 2015, p. 111 et seq.

²⁶ E. CANNIZZARO, *Il ruolo della Corte di giustizia nella tutela dei valori dell’Unione europea*, in *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l’Union: Le long parcours de la justice européenne*, Torino: Giappichelli, 2018, p. 159 et seq.

²⁷ Court of Justice, order of 20 November 2017, case C-441/17 R, *Commission v. Poland (Forêt de Białowieża)*, paras 102-108 (emphasis added).

²⁸ Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses*.

²⁹ M. BONELLI, M. CLAES, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary*, in *European Constitutional Law Review*, 2018, p. 622 et seq.

ments *Commission v. Poland I*³⁰ and *II*³¹ – in which the Court found the Polish reforms of the judiciary incompatible with the principle of judicial independence.

In particular, the case *Commission v. Poland I*, concerning the independence of the Polish Supreme Court, is a paradigmatic example of the increased ability of the Court of Justice to tackle rule of law backslidings compared to the past. Indeed, following the provisional measures ordered by the Vice-President of the Court according to Art. 160, para. 7, of the Rules of Procedure³² and then confirmed by the Court,³³ Poland amended the Law on the Supreme Court on the 21st of November 2018, even before the Court's ruling of June 2019. The combination of the use of the expedited procedure with the adoption of interim measures proved to be an effective way to react through infringement proceedings to rule of law crises.

However, this tool appears to be more suited to tackling specific EU Law violations than problems of a systemic nature.³⁴ Besides, the Court can only intervene *ex post* and there are few if any instruments to react in case a State refuses to comply with the Court's judgements.³⁵

Lastly, it should be highlighted that further developments could be expected from preliminary reference procedures in light of the recent ruling on the *A. K. (Indépendance de la chambre disciplinaire de la Cour suprême)* case, in which the Court emphasised national judges' obligation of disapplying any domestic provision reserving exclusive jurisdiction to a non-independent court according to EU Law.³⁶

Undoubtedly, the situation looks way better than in May 2018, when the Commission first proposed the Rule of Law Conditionality draft regulation. Nevertheless, the proposal has lost none of its interest since the Commission seems committed to provide a political

³⁰ Court of Justice, judgement of 24 June 2019, case C-619/18, *Commission v. Poland (Indépendance de la Cour suprême)*.

³¹ Court of Justice, judgement of 5 November 2019, case C-192/18, *Commission v. Poland (Indépendance des juridictions de droit commun)*.

³² Order of the Vice-President of the Court of 19 October 2018, case C-619/18 R, *Commission v. Poland (Indépendance de la Cour suprême)*.

³³ Court of Justice, order of 17 December 2018, case C-619/18 R, *Commission v. Poland (Indépendance de la Cour suprême)*.

³⁴ Even if some scholars already suggested a way out: K. L. SCHEPPELE, *Enforcing the Basic Principles of EU Law through Systemic Infringement Actions*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, p. 105 *et seq.*; M. SCHMIDT, P. BOGDANOWICZ, *The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU*, in *Common Market Law Review*, 2018, p. 1061 *et seq.*

³⁵ M. STEINBEIS, *Now Let Him Enforce It*, in *Verfassungsblog*, 1 September 2018, verfassungsblog.de. For a general analysis on the Union's difficulties in terms of centralized enforcement see R. BIEBER, F. MAIANI, *Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?*, in *Common Market Law Review*, 2014, p. 1057 *et seq.*

³⁶ Court of Justice, judgement of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, *A. K. (Indépendance de la chambre disciplinaire de la Cour suprême)*.

response beyond the judicial avenues. Most notably, in July 2019 the Commission called the European Parliament and the Council to adopt “rapidly” the proposal, even declaring that it has been exploring whether the impact of rule of law problems on the implementation of other EU policies requires further mechanisms beyond the proposed regulation.³⁷ In addition, the Commission devised a new mechanism – the “Rule of Law Review Cycle” – intended to strengthen the monitoring of rule of law related developments in the Member States.³⁸ Therefore, the Commission is still looking for new ways to improve the enforcement of EU values against recalcitrant Member States and to protect EU policies from the negative effects produced by rule of law backslidings within Europe.

Furthermore, the Finnish Presidency of the Council publicly declared its support to the Rule of Law Conditionality proposal, showing its willingness to continue discussions “on establishing a well-balanced mechanism to protect the EU budget in case of rule of law deficiencies”³⁹ and devoting a section of the MFF negotiating box to the draft regulation.⁴⁰

In conclusion, the Rule of Law Conditionality proposal should be understood in light of the political context described above. Despite the fact that the proposal is formally built on the need to protect the budget, EU institutions seem reasonably more concerned about *defending the rule of law through the budget* than *the budget through the rule of law*.

III. WHY USING SPENDING CONDITIONALITY?

In this section, I will explain what “spending conditionality” is and why the Commission resorted to it in order to defend the budget and, most importantly, the rule of law.

Conditionality is not new on the European scenario, being a long-standing principle in the EU *external* dimension. One needs only think of the use of conditionality in development cooperation and foreign trade policies,⁴¹ as well as in neighborhood⁴² and enlargement⁴³ strategies.

³⁷ Communication COM(2019) 343 final of 17 July 2019, *Strengthening the rule of law within the Union. A blueprint for action*, pp. 15-16.

³⁸ *Ibid.*, pp. 9-12.

³⁹ Note from the Presidency to the Council of 15 July 2019, *Implementation of the Strategic Agenda*, 11187/1/19, p. 4. See also the relative section on the website of the Finnish Presidency of the Council, in which it declares its aim “to pursue negotiations on making the receipt of EU funds conditional on the respect for the rule of law”, eu2019.fi.

⁴⁰ Note from the Presidency to the Council of 5 December 2019, *Multiannual Financial Framework (MFF) 2021-2027: Negotiating box with figures*, 14518/1/19, p. 8.

⁴¹ There is an extensive literature on the so-called “human rights clauses”: see inter alia E. FIERRO, *The EU's Approach to Human Rights Conditionality in Practice*, The Hague: Kluwer Law International, 2003; L. BARTELS, *Human Rights Conditionality in the EU's International Agreements*, Oxford: Oxford University Press, 2005. For a recent account see T.P. HOLTERHUS, *The Legal Dimensions of Rule of Law Promotion in EU Foreign Policy: EU Treaty Imperatives and Rule of Law Conditionality in the Foreign Trade and Development Nexus*, in *Göttingen Journal of International Law*, 2018, p. 71 et seq.

However, conditionality has recently experienced an impressive development also in the EU *internal* dimension and has gradually become a powerful EU internal governance tool. Indeed, although some forms of internal conditionalities already existed in the past,⁴⁴ its remarkable expansion may be depicted as one of the most characterizing effects of the financial and sovereign debt crisis on the governance structure of the European Union. Initially, conditionality arrangements have been employed within emergency financial assistance measures (financial assistance conditionality); later on, their use has gone beyond the emergency governance and has been *normalised*, becoming today a key aspect of the EU budgetary framework and of the regulations governing European Structural and Investment Funds (spending conditionality).

Since the first bailouts of non-euro area countries under the Medium-Term Financial Assistance Facility (MTFA)⁴⁵ and of eurozone countries pursuant to the European Financial Stabilisation Mechanism (EFSM),⁴⁶ conditionality has been the distinctive feature of all the tools created, inside or outside the EU legal order, to provide financial assistance to the Member States most affected by the economic crisis.⁴⁷ The participation of the International Monetary Fund (IMF) in all the bailout interventions has undoubtedly contributed to shape this practice, conditionality being a traditional instrument of the IMF lending policies. The Court of Justice itself emphasised conditionality's crucial role in the landmark *Pringle* case,⁴⁸ where "strict conditionality" has been deemed to be necessary for the compatibility of bailout measures under the European Stability Mechanism

⁴² The European Neighbourhood Policy, launched in 2004, was reviewed in 2015: Joint Communication JOIN(2015) 50 final of 18 November 2015 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Review of the European Neighbourhood Policy*.

⁴³ On Membership Conditionality see K.E. SMITH, *The Evolution and Application of EU Membership Conditionality*, in M. CREMONA (ed.), *The Enlargement of the European Union*, Oxford: Oxford University Press, 2003, p. 105 *et seq.*; C. HILLION, *The Copenhagen Criteria and Their Progeny*, in C. HILLION (ed.), *EU Enlargement: A Legal Approach*, Oxford, Portland: Hart, 2004; D. KOCHENOV, *EU Enlargement and the Failure of Conditionality*, Alphen aan Den Rijn: Kluwer Law International, 2008.

⁴⁴ Art. 7 TEU may be actually depicted as a form of value-based conditionality. Another example is offered by the former macro-economic conditionality attached to the Cohesion Fund: see Protocol on economic and social cohesion annexed to the Treaty on European Union, signed at Maastricht on 7 February 1992; Council Regulation (EC) 1164/94 of 16 May 1994 establishing a Cohesion Fund, Art. 6.

⁴⁵ Council Regulation (EC) 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments.

⁴⁶ Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism. The EFSM's legal basis in the Treaties is Art. 122, para. 2, TFEU.

⁴⁷ M. IOANNIDIS, *EU Financial Assistance Conditionality after "Two Pack"*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2014, p. 61 *et seq.*

⁴⁸ Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.

(ESM) with Art. 125 TFEU.⁴⁹ A significant reference to conditionality is today provided also in EU primary law, following the amendment of Art. 136 TFEU⁵⁰ adopted by the European Council in 2011.⁵¹ Furthermore, it is worth noting that the European Central Bank has developed an influential *implicit* and *explicit* conditionality policy in the context of the crisis' management.⁵²

As regards spending conditionality, the Commission supported its extension in 2010 with the main purposes of providing "fair, timely and effective incentives for compliance with the Stability and Growth Pact rules"⁵³ and making the management of EU funds more effective and results-oriented.⁵⁴ The idea was then transposed in a comprehensive manner into the proposals for the 2014-2020 financial period and represents today a cornerstone of the current budgetary framework⁵⁵ – especially in the Common Provisions Regulation (CPR) on ESI Funds,⁵⁶ but also in the budgetary regulations related to other EU policies.⁵⁷ To give an idea of the huge expansion of spending

⁴⁹ *Ibid.*, paras 129-147. See B. DE WITTE, T. BEUKERS, *The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle*, in *Common Market Law Review*, 2013, p. 805 *et seq.*

⁵⁰ Currently, Art. 136, para. 3, TFEU reads as follows: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict *conditionality*" (emphasis added).

⁵¹ 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.

⁵² A. VITERBO, *Legal and Accountability Issues Arising from the ECB's Conditionality*, in *European Papers*, Vol. 1, 2016, No 2, www.europeanpapers.eu, p. 501 *et seq.*

⁵³ Communication COM(2010) 250 final of 12 May 2010 from the Commission, *Reinforcing economic policy coordination*, p. 5.

⁵⁴ Commission, *Investing in Europe's future*, Fifth report on economic, social and territorial cohesion, 2010, pp. 25-27.

⁵⁵ For a detailed analysis of spending conditionality in the 2014-2020 financial period see V. VITÄ, *Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality*, in *Cambridge Yearbook of European Legal Studies*, 2017, p. 116 *et seq.*

⁵⁶ Regulation (EU) 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

⁵⁷ For instance, see the "green conditionality" attached to Agricultural Funds (Arts 43-47 of the Regulation (EU) 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009) or the "human rights conditionality" included in Home Affairs funds (Art. 3, para. 4, of the Regulation (EU) 515/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and re-

conditionality in the 2014-2020 financial period, suffice it to say that over 75 per cent of the EU budget is currently covered by some kind of conditionality arrangements.⁵⁸ A glance at the package of proposals for the next Multiannual Financial Framework presented by the Commission in May 2018 further confirms that this trend is not going to change in the near future.⁵⁹

Generally speaking, spending conditionality is a mechanism that links the disbursement of EU funds to the fulfilment of conditions aimed at pursuing horizontal policy goals. In other words, it exploits the potential of the budget as a tool to exercise leverage on the Member States' behaviour in order to encourage their convergence towards the policy objectives defined by the Union.

Rule of Law Conditionality, as envisaged in the Commission's proposal, would be a form of *negative* and *ex post* spending conditionality. Indeed, it would entail a *negative* and *ex post* reaction (e.g. suspension or reduction of EU Funds) should a Member State present generalised rule of law deficiencies that affect or risk affecting the principles of sound financial management or the protection of the Union's financial interests.

In my view, three main reasons lie at the roots of the Commission's choice to resort to spending conditionality.

Firstly, spending conditionality appears to be the easiest way to defend the budget, as it allows the Union to strictly control and eventually prevent the States affected by generalised rule of law deficiencies from using EU funds when there is a threat to the principle of sound financial management or to the Union's financial interests. With this in mind, Rule of Law Conditionality would primarily serve a *precautionary function*, avoiding the risk of financial loss caused, for instance, by a non-independent judicial review on EU funded operations.

Secondly, during the current financial period spending conditionality has shown good results in terms of compliance.⁶⁰ This is particularly true for *ex ante* conditionalities: according to the Commission, "around 75% of all applicable *ex ante* conditionalities were fulfilled at the time of adoption of ESI Fund programmes", while "for the non-fulfilled ones, over 800 distinct action plans were included in the programmes".⁶¹ This could have been prompted the Commission to make use of this tool to achieve analo-

pealing Decision No 574/2007/EC, in combination with Art. 47 of the Regulation (EU) 514/2014 of the European Parliament and of the Council of 16 April 2014, laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management).

⁵⁸ V. VIṬA, *Revisiting the Dominant Discourse on Conditionality*, cit., p. 124.

⁵⁹ For an overview on conditionality in the proposals for the financial period 2021-2027 see V. VIṬA, *Research for REGI Committee – Conditionalities in Cohesion Policy*, European Parliament, Policy Department for Structural and Cohesion Policies, 2018.

⁶⁰ V. VIṬA, *Revisiting the Dominant Discourse on Conditionality*, cit., p. 139.

⁶¹ Commission, *My Region, My Europe, Our Future*, Seventh report on economic, social and territorial cohesion, 2017, p. 179.

gous results in terms of rule of law compliance. From a more general point of view, EU recent practice highlights an increasing use of spending conditionality as an instrument of “centralised enforcement” in those areas where the traditional trust on “decentralised enforcement” is no longer perceived as sufficient to secure EU Law compliance.⁶² As an example, one needs only think of the enforcement of the European Monetary Union (EMU) normative framework. Indeed, alongside the EMU sanctions toolbox, since the early nineties a macro-economic conditionality has been attached to the Cohesion Fund⁶³ and it now covers all ESI Funds thanks to the 2014-2020 reform of the CPR.⁶⁴

Thirdly, constitutional crises concretely arose in some of the Member States that have traditionally benefited the most from EU Funds.⁶⁵ Therefore, “going for the wallet”⁶⁶ appears to be a persuasive way to “encourage” these countries to maintain adherence to the European values. It is unrealistic to think that the Commission has not taken into account this practical consideration before developing the proposal. Still, this element underpins one of the main concerns related to Rule of Law Conditionality, and to spending conditionality in general, that is the fear that equal treatment between Member States will not be ensured. Inevitably, the EU budget being largely aimed towards redistribution, spending conditionality has a higher impact on the poorest regions and, if not carefully used, could be “poison for the continent”, as stressed also by Jean-Claude Juncker.⁶⁷

Actually, some authors⁶⁸ argue that it would already be possible, under the current CPR, to suspend the flow of funds in case of rule of law deficiencies inside a Member State. They came to this conclusion by reading Art. 142, para. 1, let. a), CPR⁶⁹ in the light

⁶² R. BIEBER, F. MAIANI, *Enhancing Centralized Enforcement of EU Law*, cit.

⁶³ Protocol on economic and social cohesion annexed to the Treaty on European Union, signed at Maastricht on 7 February 1992; Council Regulation (EC) 1164/94 of 16 May 1994 establishing a Cohesion Fund, Art. 6.

⁶⁴ Arts 23-24 of Regulation (EU) 1303/2013, cit. For an overview on macroeconomic conditionality in cohesion policy, let me refer to M. FISICARO, *Condizionalità macroeconomica e politica di coesione: la solidarietà europea alla prova dei vincoli economico-finanziari*, in *Rivista Giuridica del Mezzogiorno*, 2019, p. 413 et seq. and the references made therein.

⁶⁵ For the 2014-2020 period, see the operating budgetary balance between EU expenditure and revenue by country: ec.europa.eu.

⁶⁶ F. HEINEMANN, *Going for the Wallet? Rule of Law Conditionality in the Next EU Multiannual Financial Framework*, in *Intereconomics*, 2018, p. 297 et seq.

⁶⁷ J.-C. JUNCKER, *German Plan to Link Funds and Rules Would Be ‘Poison’*, in *Politico*, 1 June 2017, www.politico.eu.

⁶⁸ I. BUTLER, *Two Proposals to Promote and Protect European Values Through the Multiannual Financial Framework: Conditionality of EU Funds and a Financial Instrument to Support NGOs*, *Civil Liberties Union for Europe*, in *Liberties*, March 2018, www.liberties.eu; R. D. KELEMEN, K. L. SCHEPPELE, *How to Stop Funding Autocracy in the EU*, cit.

⁶⁹ Art. 142 of Regulation 1303/2013, cit.: “1. All or part of the interim payments at the level of priorities or operational programmes may be suspended by the Commission if one or more of the following conditions are met: a) there is a serious deficiency in the effective functioning of the management and

of Art. 47 of the Charter of Fundamental Rights of the European Union and of the case-law of the Court of Justice.⁷⁰ However, I find it difficult to endorse this position, because it looks overstressing the relevant CPR provision and Court's ruling.⁷¹ Even admitting the feasibility of this interpretation, the Commission's choice to put forward a specific proposal in this respect and to stimulate a discussion in the Council and, most importantly, in the European Parliament seems appropriate in light of the legal and political implications stemming from the use of a budgetary conditionality related to the rule of law in the context of the European constitutional crisis.

IV. SCHEME OF THE PROPOSAL

Before focusing on the problematic issues arising from the Commission's proposal, it is essential to briefly explain how the mechanism would work. Thus, I will describe the *substantive requirements* to activate the mechanism (Art. 3), the *content* of the measures that may be adopted (Art. 4), and the *procedure* outlined by the Commission (Art. 5). For the sake of clarity, this section will be limited to the explanation of the Commission's proposal, while the relevant European Parliament's amendments will come into consideration in the next sections.

Starting from the *substantive requirements* to trigger the mechanism, Art. 3 of the Proposal reads as follows: "Appropriate measures shall be taken where a generalised deficiency as regards the rule of law in a Member State affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union".

Therefore, as anticipated, a "generalised deficiency as regards the rule of law" is not sufficient in itself to trigger the mechanism, being necessary to show a *concrete* or *potential* link ("affects" or "risks affecting") with the need to protect the budget. This is in line with the genuine nature of spending conditionality, that can be used to pursue horizontal policy objectives, but needs to maintain a sufficiently direct link with spending.

control system of the operational programme, which has put at risk the Union contribution to the operational programme and for which corrective measures have not been taken. [...]".

⁷⁰ Court of Justice, judgement of 17 September 2014, case C-562/12, *Livima Lihaveis*.

⁷¹ Art. 142, para. 1, let. a), CPR refers to a very specific factual situation, that is the existence of "a serious deficiency in the effective functioning of the *management and control system* of the operational programme", that is the complex administrative system envisaged at the national level according to Arts 72-74 CPR. The Court's judgement on *Livima* does not deal with conditionalities and it is related to the previous financial period (2007-2013). The case concerned a provision, contained in a programme manual adopted by a monitoring committee in the context of the 2007-2013 operational programme established by Latvia and Estonia, that precluded to appeal before a national court the decision of that monitoring committee rejecting an application for aid. In its ruling, the Court held such provision to be incompatible with Art. 47 of the Charter (*Livima*, cit., paras 57-76). However, it is not evident from the reading of Art. 142 CPR in light of *Livima* that deficiencies in the functioning of the judiciary could be considered equivalent, technically speaking, to deficiencies in the management and control system related to the use of EU funds.

Pursuant to the general definition outlined in Art. 2, let. b), a “generalised deficiency as regards the rule of law” is “a widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law”. This definition should then be read in combination with Art. 2, let. a) – which attempts to clarify the “essentially contested concept”⁷² of “rule of law”⁷³ – and Art. 3 of the Proposal – which provides a non-exhaustive list of possible deficiencies that can affect the Union’s financial interests⁷⁴ and some examples of generalised rule of law deficiencies.⁷⁵

As regards the *content* of the “appropriate measures”, it differs on the basis of the method of implementation of the budget (direct, indirect or shared management), but it basically consists in the reduction or suspension of commitments or payments related to EU Funds. Importantly, Art. 4, para. 2, establishes that the imposition of the measures shall not exempt Member States from implementing the programmes and making payments to the final recipients or beneficiaries.

Turning to the criteria to be followed for the determination of the specific measures, Art. 4, para. 3, states that the measures shall be “proportionate to the nature, gravity and scope of the generalised deficiency as regards the rule of law”, and shall, “insofar as possible, target the Union actions affected or potentially affected by that deficiency”.

The Commission’s proposal provides for a swift and easy *procedure* to adopt the above-mentioned measures. The main actors are the Commission and the Council, while the European Parliament only needs to be informed by the Commission of any measure proposed or adopted.

⁷² J. WALDRON, *Is the Rule of Law an Essentially Contested Concept?*, in *Law and Philosophy*, 2002, p. 137 *et seq.*

⁷³ Art. 2, let. a), of the Proposal for a Regulation COM(2018)324, cit.: “the rule of law’ refers to the Union value enshrined in Article 2 of the Treaty on European Union which includes the principles of legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection by independent courts, including of fundamental rights; separation of powers and equality before the law”.

⁷⁴ Art. 3, para. 1, of the Proposal for a Regulation COM(2018)324, cit., that refers to generalised rule of law deficiencies affecting, in particular: a) the proper functioning of the authorities implementing the Union budget; b) the proper functioning of investigation and public prosecution services in relation to fraud, corruption or other breaches of Union law relating to the implementation of the Union budget; c) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points a) and b); d) the prevention and sanctioning of fraud, corruption or other breaches of Union law relating to the implementation of the Union budget; e) the recovery of funds unduly paid; f) the effective and timely cooperation with the European Anti-fraud office and with the European Public Prosecutor’s Office.

⁷⁵ Art. 3, para. 2, of the Proposal for a Regulation COM(2018)324, cit.: “a) endangering the independence of the judiciary; b) failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests; c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law”.

The *procedure* outlined in Art. 5 is composed of four different stages: notification; dialogue; proposal; adoption.

Where the Commission – taken into account “all relevant information” – finds it has “reasonable grounds” to believe that a generalised rule of law deficiency in a Member State affects or risks affecting the Union’s budget, it shall send a written notification to that Member State, which can make observations and may propose the adoption of remedial measures within a time limit specified by the Commission.

At the end of the dialogue stage, if the Commission decides that a generalised rule of law deficiency is established, it “shall” submit a proposal for an implementing act on the “appropriate measures” to the Council. The text of the draft regulation therefore suggests that the Commission enjoys a margin of discretion in assessing whether a generalised rule of law deficiency is established; while, if this is the case, it is obliged to make a proposal.

When a proposal for an implementing act on the appropriate measures is submitted, the decision would be deemed to have been adopted, unless the Council rejects the proposal within one month by qualified majority (so-called “reversed qualified majority”). The Council could also amend the proposal, acting by a qualified majority. If the Member State submits to the Commission evidence to show that the generalised rule of law deficiency has been remedied or has ceased to exist, the measures may be lifted following the same procedure.

Apparently, the proposed mechanism would allow the EU to act with greater ease in relation to rule of law backslidings affecting the budget than in the past. This is due, in particular, to the Commission’s choice to resort to reversed qualified majority. Notably, this voting mechanism has been spreading in the EMU normative framework since the outbreak of the crisis – especially following the so-called Six-Pack and Two-Pack⁷⁶ – in order to make the implementation of the relative rules and procedures quasi-automatic.⁷⁷ For the same reason, reversed qualified majority has also been employed in Art. 23, para. 10, CPR with regard to the corrective arm of the macro-economic conditionality attached to ESI Funds. Nevertheless, it has to be stressed that, despite the appeal to reversed qualified majority, neither EMU sanctions nor macro-economic conditionality have ever been *effectively* applied. Macro-economic conditionality has been actually triggered once against Hungary, but the suspension of the commitments related to the Cohesion Fund has never produced effects because the Council lifted the

⁷⁶ Art. 1, paras 9 and 13, of the Regulation (EU) 1175/2011 amending Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Art. 10 of the Regulation (EU) 1176/2011 on the prevention and correction of macro-economic imbalances; Art. 14 of the Regulation (EU) 472/2013 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.

⁷⁷ See European Central Bank, *Reinforcing Economic Governance in the Euro Area*, 10 June 2010, p. 5.

measures before their entry into force.⁷⁸ Besides, it has been shown that even if the decision was *formally* linked to the failure to address excessive deficits, it was – at least also – an attempt to use conditionality as a means of exerting pressure on Hungarian authorities after the entry into force of the new Constitution.⁷⁹

Thus, until now, practice has not offered reasonable elements to conclude that reversed qualified majority could effectively make the application of sanctions quasi-automatic. This voting mechanism, to a certain extent, shifts the *political* decision from the Council to the Commission, but there are reasons to believe that this move has not helped *depoliticise* the enforcement of sanctions.

V. ADDRESSING THE LEGAL SHORTCOMINGS OF THE PROPOSAL

The idea of linking the budget to the respect of values, if carefully framed, sounds reasonable. However, paradoxically, the proposal itself poses some rule of law issues that need to be addressed. Firstly, it has to be investigated if, and to what extent, the EU actually owns competence to provide for a Rule of Law Conditionality in EU Funds, that is if the proposal is in accordance with the principle of conferral established in Art. 5 TEU (see *infra*, section V.1). Secondly, the proposal entrusts the Commission with a wide discretionary power, that raises questions about its compatibility with the long-standing EU fundamental principle of legal certainty,⁸⁰ as well as with the principles of transparency and non-arbitrariness of the executive power (see *infra*, section V.2).

In this context, the Commission has to deal with the unclear limits outlined in the Treaties for the enforcement of values and has been moving in a largely uncharted territory where the boundary between what is compatible or not with the Treaties is very thin.

Addressing the rule of law limits of the proposal is crucial at least for two reasons. On one hand, the Union being a “community based on the rule of law”⁸¹ means that it shall respect the rule of law in its action. It is hardly conceivable that the Union could effectively pretend respect of the rule of law by the Member States, while at the same time acting outside its legal limits. On the other, it has already been stressed that one of

⁷⁸ On 13 March 2012, the Council adopted the implementing decision suspending commitments from the Cohesion Fund for Hungary with effect from 1 January 2013. Just three months later, on 22 June 2012, the Council adopted the implementing decision lifting the suspension of commitments from the Cohesion Fund for Hungary.

⁷⁹ Editorial comments, *Hungary's New Constitutional Order and “European unity”*, in *Common Market Law Review*, 2012, pp. 879-880; F. CASOLARI, *Respect for the Rule of Law in a Time of Economic and Financial Crisis: the Role of Regional International Organizations in the Hungarian Affaire*, in *Italian Yearbook of International Law*, 2013, p. 234.

⁸⁰ Court of Justice, judgment of 22 March 1961, joined cases C-42/59 and C-49/59, *SNUPAT v. High Authority*; judgment of 9 July 1981, case C-169/80, *Gondrand and Garancini*, para. 17; judgment of 14 April 2005, case C-110/03, *Belgium v. Commission*, para. 30.

⁸¹ See, famously, Court of Justice, judgment of 23 April 1986, case C-294/83, *Les Verts v. Parliament*, para. 23.

the main concerns related to the proposal is that it could become a vehicle of discrimination and further divisions between Member States, exacerbating the political conflict between Western and Eastern Europe. Ensuring legal certainty and limiting the Commission's discretionary power looks therefore essential in order to make the enforcement procedure more transparent and accountable, so as to guarantee equal treatment between Member States.

V.1. IS THE PROPOSAL COMPATIBLE WITH THE PRINCIPLE OF CONFERRAL?

At the outset, the proposal once again poses the issue of the Union's competence to provide for new tools to defend EU values beyond the one specifically established in the Treaties, namely Art. 7 TEU.

Notably, the problem already arose following the Commission's launch of the Rule of Law Framework in 2014. In that occasion, the Council Legal Service issued an opinion, stating that the new mechanism was not compatible with the principle of conferral.⁸² Basically, the Council Legal Service contended that Art. 7 TEU is the only procedure according to which the Union can address rule of law shortcomings inside Member States and that, as a consequence, "there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States [...] neither to amend, modify or supplement the procedure laid down in this Article".⁸³

The Opinion has been strongly criticised by scholars, arguing that since the Commission is entitled to trigger Art. 7 TEU, it owns an *implicit* power to investigate any potential risk of a serious breach of EU values.⁸⁴

However, the question has lost relevance since the Commission actually used the Rule of Law Framework to address the Polish case and no opposition came either from Poland or from the Council.⁸⁵

⁸² Opinion of 27 May 2014 of the Legal Service of the Council, doc. 10296/14.

⁸³ *Ibid.*, para. 24.

⁸⁴ D. KOCHENOV, L. PECH, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *European Constitutional Law Review*, 2015, p. 512 *et seq.* For the same argument see R. BARATTA, *Rule of Law 'Dialogues' Within the EU: A Legal Assessment*, in *Hague Journal on the Rule of Law*, 2016, p. 357 *et seq.*; L. BESSELINK, *The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives*, in A. JAKAB, D. KOCHENOV (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press, 2017, p. 128 *et seq.* *Contra* N. LAZZERINI, *Less is more? Qualche rilievo sulla legittimità e sul merito delle recenti iniziative delle istituzioni europee in materia di salvaguardia dei valori fondanti dell'Unione*, in *Rivista di Diritto Internazionale*, 2016, p. 514 *et seq.*; G. DI FEDERICO, *The Protection and Promotion of the Rule of Law in the European Union: State of the Art, Criticalities and Future Perspectives*, in *The Turkish Yearbook of International Relations*, 2015, p. 1 *et seq.*

⁸⁵ As is known, in the aftermath of the Opinion, the Council launched a purely intergovernmental "Dialogue" mechanism on the rule of law (See C. CLOSA, *Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, cit., p. 15 *et seq.*), but then there was no opposition to the Commission's choice to trigger the Rule of Law Framework *vis-à-vis* Poland.

The Rule of Law Conditionality proposal raised the issue again. The proposed mechanism, by means of secondary law, would indeed provide for an attractive alternative to Art. 7 TEU to be included in the Union's rule of law toolbox.

The Council Legal Service has dealt with this matter by issuing a non-public opinion,⁸⁶ in which it apparently considered the proposal incompatible with Art. 7 TEU.⁸⁷ This comes as no surprise in light of the position expressed by the Council Legal Service on the Rule of Law Framework. Indeed, according to that view, "respect for the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described at Article 7 TEU".⁸⁸

In this light, it is not far-fetched to consider Rule of Law Conditionality as a form of suspension of "certain of the rights deriving from the application of the Treaties" under the terms of Art. 7, para. 3, TEU, since secondary law is the application of the Treaties. To this extent, the mechanism would be a way to bypass the strict substantive and procedural requirements provided by Art. 7 TEU to impose sanctions against Member States infringing EU values. This is the reason why some authors deemed it to be hardly reconcilable with EU primary law.⁸⁹

Furthermore, it is at least doubtful that a strong counter-argument could stem from the combined provisions of Art. 311, para. 1, TFEU and Art. 3, para. 1, TEU, according to which "the Union shall provide itself with the means necessary to attain its objectives", and so also the promotion of its values.⁹⁰ No doubts that the Union can and should use its budget to pursue its founding objectives, but *within* the limits imposed by the principle of conferral. Indeed, the existence of a general objective does not necessarily imply the existence of a competence. In the case at hand, this is further confirmed by the Declaration no. 41 annexed to the Treaties, stating that even an action based on Art. 352 TFEU cannot be aimed to pursue *only* the objectives set out in Art. 3, para. 1, TEU.⁹¹

⁸⁶ Opinion of 25 October 2018 of the Legal Service of the Council, doc. 13593/18. The Council has been sued before the General Court for the full-disclosure of the Council Legal Service Opinion: see General Court, case T-252/19, *Pech v. Council*, pending.

⁸⁷ The Polish government, in response to the reflection period on the rule of law launched by the Commission last April, makes explicit reference to the Council Legal Service's Opinion in order to support the proposal's incompatibility with Art. 7 TEU: ec.europa.eu. In addition, some scholars have already commented the Opinion: K.L. SCHEPPELE, L. PECH, R.D. KELEMEN, *Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU Budget-Related Rule of Law mechanism*, in *Verfassungsblog*, 12 November 2018, verfassungsblog.de.

⁸⁸ Opinion of the Legal Service of the Council, cit., para. 17.

⁸⁹ M.J. RANGEL DE MESQUITA, *European Union values, Rule of Law and the Multiannual Financial Framework 2021-2027: The Commission's Proposal to Protect the EU Budget Against Threats to the Rule of Law*, in *ERA Forum*, 2018, p. 287 et seq.

⁹⁰ For this argument see V. VIŤÁ, *Conditionalities in Cohesion Policy*, cit., pp. 53-54.

⁹¹ Declaration no. 41 on Article 352 of the Treaty on the Functioning of the European Union.

However, the Commission has shown to be well aware of the problem, and it therefore chose the proposal's legal basis in an accurate manner. In particular, the Commission founded its proposal on Art. 322, para. 1, let. a), TFEU which empowers the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to adopt by means of regulations "the financial rules which determine in particular the procedure to be adopted for *establishing and implementing the budget* and for presenting and auditing accounts".⁹² This provision allows the Commission to circumvent the problem by focusing on the protection of the budget and, accordingly, framing the proposal on the link between the existence of generalised deficiencies as regards the rule of law in a Member State and the need to protect the Union's financial interests.

In my view the solution is convincing, but it does not come without a price. Using Art. 322, para. 1, let. a), TFEU as legal basis means that a sufficiently direct link with spending shall be ensured. It would therefore be desirable to improve the drafting of the proposal with regard to both the *substantive requirements* and the *content* of the measures to be adopted in order to strengthen this link.

Concerning the *substantive requirements*, I generally agree with Viorica Viță in stating that the broad conditions required to trigger the mechanism (Art. 3) should be replaced with a "set of clear, precise, objective and sufficiently shared rule of law grounds, with a sufficiently direct link to EU spending" (e.g. independent, impartial and effective judicial review of EU funded operations).⁹³

Turning to the *content of the measures*, Art. 4, para. 3, of the proposal establishes that they shall be "*proportionate to the nature, gravity and scope of the generalised deficiency as regards the rule of law*", and shall, "*insofar as possible, target the Union actions affected or potentially affected by that deficiency*". This provision looks barely coherent with the aim of protecting the budget and paves the way for the use of Rule of Law Conditionality as a pure sanctioning mechanism to be activated in case of breach of the rule of law. On one hand, the guiding parameter for the choice of the measures should not be the nature, gravity and scope of the rule of law deficiency in itself, but rather the *effects* of the rule of law deficiency on the financial interests of the Union.⁹⁴ On the other, the expression "insofar as possible" opens the door to the application of measures even in cases where those measures would not help protect the budget, and therefore acting as pure sanctions for the existence of a generalised rule of law deficiency.

Apart from that, and even more importantly, the lack of a sufficiently direct link would entail the risk of an *ex post* judicial review of the measures adopted. Indeed, in case the

⁹² Emphasis added.

⁹³ V. VIȚĂ, *Conditionalities in Cohesion Policy*, cit., p. 56.

⁹⁴ This point has been stressed also by the Court of Auditors, which stated that "proportionality should be ensured by taking into account the seriousness of the situation, its duration, its recurrence, the intention and the degree of cooperation of the Member State and the effects of the generalised deficiency on the respective EU funds" (ECA Opinion 1/2018, para. 20).

Commission fails to prove a significant link, the relative acts would likely be subjected to the scrutiny of the Court of Justice,⁹⁵ and eventually annulled for *excès de pouvoir*.

Thus, the use of Art. 322, para. 1, let. a), TFEU as legal basis arguably shifts the problem from the *competence* to the *legality* of the exercise of powers, the Commission being called to prove in the particular case the existence of a sufficiently direct link between the generalised rule of law deficiency in the Member State and the financial interests of the Union, as well as between the measures adopted and the need to protect the budget. Therefore, the Court of Justice would inevitably play a crucial role, and much would depend on how the Court would deal with cases of *potential* link between the generalised rule of law deficiency in a Member State and the need to protect the budget.

V.2. THE COMMISSION'S EXCESSIVE DISCRETIONARY POWER: A CHALLENGE TO THE RULE OF LAW?

The second rule of law issue raised by the proposal is that of the nearly unlimited discretionary power that the Commission has reserved for itself, with consequent shortcomings in terms of legal certainty, transparency and non-arbitrariness. Indeed, the criteria for some crucial decisions, such as the initiation of the procedure and the Commission's qualitative assessment, are not clearly defined; besides, reversed qualified majority voting makes the Council's rejection or amendment quite difficult. The Court of Auditors clearly highlighted the problem and made several recommendations in this regard, some of which have been followed by the European Parliament in its first reading position.

At the outset, it is not clear what a "generalised deficiency as regards the rule of law" is. As already noted (see *supra*, sections III and V.1), the proposal weaves a very broad general definition⁹⁶ with some generic examples,⁹⁷ and is vaguely drafted on the *substantive requirements* needed for the mechanism to be activated.

No further indication derives from a systematic interpretation since the Commission has apparently renounced to create a clear link with the existing rule of law toolbox. Indeed, the expression "generalised deficiency as regards the rule of law" is different from both the "systemic threat to the rule of law" required to activate the 2014 Rule of Law Framework and the "clear risk of a serious breach" or the "existence of a serious and persistent breach" needed to trigger Art. 7 TEU. Thus, the relationship between the different mechanisms is far from evident. It is known that, according to the Commission, a "systemic threat to the rule of law" is meant to be something less than a "clear risk of a serious breach". However, it is unclear whether a "generalised deficiency"

⁹⁵ E.g. the necessity of a "sufficiently direct link" has been highlighted in General Court, judgment of 19 April 2013, joined cases T-99/09 and T-308/09, *Italy v. Commission*, paras 50-53.

⁹⁶ Proposal for a regulation COM(2018)324, Art. 2, let. b): "a widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law".

⁹⁷ *Ibid.*, Art. 3, para. 2.

is considered to be more or less than a “systemic threat” or a “clear risk of a serious breach”. The definition given by the Commission is hardly of help in this regard, raising therefore not only an issue of legal certainty, but also one of consistency.⁹⁸

Moreover, the Court of Auditors suggested to clarify criteria and sources of guidance for the Commission’s qualitative assessment in order to “improve the transparency, traceability and auditability of the proposed mechanism as well as legal certainty and non-arbitrariness of the executive powers proposed to be conferred to the Commission”.⁹⁹

Actually, the proposal already provides for some guidance sources. According to Art. 5, para. 2, the Commission may take into account “all relevant information, including decisions of the Court of Justice of the European Union, reports of the Court of Auditors, and conclusions and recommendations of relevant international organisations”.¹⁰⁰ Among these, the reference to the Court of Justice’s decisions is extremely helpful if we look at the recent efforts shown by the Court in defining, *inter alia*, the principle of judicial independence.¹⁰¹

However, the transparency of the proposed mechanism would undoubtedly benefit from a more specific articulation of the “relevant information” the Commission may take into account. In this context, the recourse to rule of law indicators on the model of the Venice Commission’s Rule of Law Checklist¹⁰² could be considered. Other possible guidance sources are chapters 23 and 24 applicable to EU accession negotiations¹⁰³ and the criteria adopted in the framework of the Cooperation and Verification Mechanism (CVM) on Bulgaria and Romania.¹⁰⁴

Likewise, the problems highlighted above reflect on the lifting of measures as well: if it is unclear when a generalised rule of law deficiency arises, it is also hard to assess when it has been remedied or has ceased to exist.

Besides, as the Court of Auditors stressed, while the proposal sets strict deadlines for the Member State concerned and for the Council, there are no precise deadlines for the Commission. Even if the Commission has in any case the obligation to act within a

⁹⁸ For this argument see also V. VIṬA, *Conditionalities in Cohesion Policy*, cit., p. 55.

⁹⁹ ECA Opinion 1/2018, para. 19.

¹⁰⁰ Art. 5, para. 2, of the Proposal for a regulation COM(2018)324, cit.

¹⁰¹ Court of Justice, judgement of 19 September 2006, case C-506/04, *Wilson*; judgement of 7 February 2019, case C-49/18, *Escribano Vindel*; *Commission v. Poland (Indépendance des juridictions de droit commun)*, cit.; *Associação Sindical dos Juizes Portugueses*, cit.; *LM*, cit.;. On the evolution of the principle of judicial independence in the recent Court’s case-law see C. CINNIRELLA, *Lo statuto di indipendenza del giudice nazionale al vaglio della Corte di Giustizia*, in *Ianus*, 2019, forthcoming.

¹⁰² European Commission for Democracy through Law, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016.

¹⁰³ The applicable chapters of the *acquis* are available at the following link: ec.europa.eu.

¹⁰⁴ An overview on the Cooperation and Verification Mechanism is available on the Commission’s website: ec.europa.eu.

reasonable timeframe, it would be recommendable to fix similar deadlines at least with regard to the lifting of measures.¹⁰⁵

Following some of the Court of Auditors' recommendations, the European Parliament approved relevant amendments in its first reading position.

As regards the sources of guidance for the Commission's qualitative assessment, the Parliament significantly mentioned also the accession criteria and the CVM.¹⁰⁶ In my view, referring in particular to the accession criteria is even more appropriate because as long as the Member States have already agreed to shape their domestic legal orders so as to meet the Copenhagen criteria and thus acceding to the European Union, then requiring that those criteria will be met also after the membership has been obtained cannot be regarded as arbitrary. In addition, it would give at least a partial answer to the so-called "Copenhagen dilemma",¹⁰⁷ that is the mismatch between the EU capacity to impose a political conditionality *before* accession and the difficulties faced in ensuring continued compliance *after* accession.

Furthermore, and interestingly, the European Parliament proposed the institution of a panel of independent experts in constitutional law and financial and budgetary matters operating within the scope of the Rule of Law Conditionality with advisory tasks.¹⁰⁸ One expert would be designated by the national parliaments of each Member State and five experts would be appointed by the European Parliament itself. The panel would assist the Commission in identifying generalised deficiencies as regards the rule of law in a Member State that affect or risk affecting the principles of sound financial management or the protection of the financial interests of the Union. To this end, the Panel would express an *opinion* that the Commission shall take into account during the Rule of Law Conditionality enforcement, and it would make public an *annual summary of its findings* based on the monitoring of the situation as regards the rule of law in the Member States.

It is not the first time that the European Parliament – endorsing a proposal notoriously made by Müller¹⁰⁹ – proposed the creation of the so-called "Copenhagen Commission", an independent organism that monitors the respect of values by the Member States. The Parliament has in fact recommended to create a mechanism of this kind several times already since the adoption of the Tavares Report in 2013.¹¹⁰ The Rule of

¹⁰⁵ ECA Opinion 1/2018, para. 24.

¹⁰⁶ European Parliament Legislative Resolution (2019)0349, amendment 52.

¹⁰⁷ Viviane Reding, former Vice-President of the Commission – EU Justice Commissioner, *Safeguarding the rule of law and solving the "Copenhagen dilemma": Towards a new EU-mechanism*, Speech of 22 April 2013, SPEECH/13/348, europa.eu.

¹⁰⁸ European Parliament Legislative Resolution (2019)0349, amendment 45.

¹⁰⁹ See most recently J.-W. MÜLLER, *Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, cit., p. 206 *et seq.* In the same book, see contra K. TUORI, *From Copenhagen to Venice*, p. 225 *et seq.*

¹¹⁰ European Parliament Resolution A7-0229/2013 of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, para. 70 and paras 73-83. The call for an EU monitoring

Law Conditionality Proposal gave the opportunity to the European Parliament to reiterate its proposal, but with a limited scope, the panel being tasked with monitoring and advisory functions only within the scope of application of the Rule of Law Conditionality.

Even if the creation of a panel of experts does not remove the problems of legal certainty underlined above, this proposal has to be welcomed because it would help outline parameters to assess both the political and legal accountability of the Commission with regard to the implementation of the mechanism.

The European Parliament followed also the Court of Auditors' recommendation concerning the need to fix time limits to the Commission. Indeed, it stated that the Commission shall decide whether or not to adopt and to lift measures "within an indicative time limit of one month, and in any case within a reasonable timeframe".¹¹¹ It is not formulated as a strict deadline, but it is a useful benchmark to check the Commission's action.

Lastly, the European Parliament proposed a sharp change in the decision-making process so as to play a crucial role alongside the Commission and the Council. The procedure differs from the one outlined by the Commission in the last stages. Indeed, the Commission would take a decision on the measures to be adopted and, contextually, submit to the European Parliament and the Council a proposal to transfer to a budgetary reserve an amount equivalent to the value of the measures adopted. The transfer proposal would be considered to be approved unless, within four weeks, the European Parliament by simple majority or the Council by qualified majority amend or reject the proposal. The Commission's decision would enter into force if neither the European Parliament nor the Council reject the transfer proposal within the four-week period. The new procedure would limit the powers entrusted to the Commission and give the Parliament a more decisive role also in terms of political control on the Commission's action. This would also offer a partial answer to the general problem – beautifully captured in an *Editorial* of this *Journal* – represented by the "mortal sin" of entrusting to technical organs, not directly endowed with democratic legitimacy, "a struggle against democracies that, although 'illiberal', are blessed with popular legitimacy".¹¹²

However, as some authors already underlined,¹¹³ the involvement of the Council and the European Parliament in this stage raises doubts in light of the functions and powers for budgetary implementation entrusted to the Commission by Art. 17, para. 1, TEU and

mechanism on the respect of values was reiterated in 2016 and, most recently, in 2018: See European Parliament Resolution P8_TA(2016)0409 of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights; European Parliament Resolution P8_TA-PROV(2018)0456 of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights.

¹¹¹ European Parliament Legislative Resolution (2019)0349, amendments 54 and 63.

¹¹² EDITORIAL, *Fundamental Values and Fundamental Disagreement in Europe*, in *European Papers*, 2018, Vol. 3, No 2, www.europeanpapers.eu, p. 469 *et seq.*

¹¹³ For the same argument see V. VITÁ, *Conditionalities in Cohesion Policies*, *cit.*, p. 58.

Art. 317, para. 1, TFEU. In other words, the Treaties suggest that the European Parliament and the Council should “establish” the Union’s budget,¹¹⁴ while the Commission should “implement” it.¹¹⁵ From this perspective, entrusting the co-legislators with budgetary implementation functions may result in a distortion of the institutional balance provided by the Treaties in this area. Unsurprisingly, Art. 236, para. 4, let. b), of the current Financial Regulation states that the rule of law conditionality attached to the disbursement of funds in the *external* action should be implemented only by the Commission.¹¹⁶

VI. NO MORE “*MONEY FOR NOTHING*”: IS THERE ROOM FOR SOLIDARITY?

Beyond the rule of law limits of the proposal, there is a more general and outstanding issue intrinsically related to the mechanism and, overall, to spending conditionality: the relation between conditionality and solidarity in the EU internal dimension.

The impressive development of spending conditionality has in fact challenged the long-standing paradigm based on what may be defined a *functional decoupling* between conditionality and solidarity, the former being related to the EU *external* action while the latter being the principle shaping the EU *internal* dimension.

Although in a different matter, this separation has been stressed by Marise Cremona, who argued that “the intrusive, one-sided and peremptory requirements of pre-accession conditionality can be justified precisely because, once a member, the candidate state will be a part of a community of solidarity, of mutual interdependence and trust”, that is to say that “once accession has taken place, the benefits of membership are not conditional upon keeping the rules”.¹¹⁷

Union’s recent practice with conditionalities in the internal dimension has put in doubt this paradigm, so as to agree with Viorica Vița’s view that “the influx of conditionality in the EU internal budgetary process suggests a paradigm shift towards a conditional solidarity, contingent upon Member States’ continuous performance under the treaties”.¹¹⁸ As a result, a “*de facto* conditional solidarity”¹¹⁹ would metaphorically take the place of the Schuman’s plan towards a *de facto* solidarity.

¹¹⁴ Art. 314 TFEU.

¹¹⁵ Art. 317 TFEU.

¹¹⁶ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, Art. 236, para. 4, let. b): “The corresponding financing agreements concluded with the third country shall contain [...] a right for the Commission to suspend the financing agreement if the third country breaches an obligation relating to respect for human rights, democratic principles and the rule of law and in serious cases of corruption”.

¹¹⁷ M. CREMONA, *EU Enlargement: Solidarity and Conditionality*, in *European Law Review*, 2005, pp. 21 and 19.

¹¹⁸ V. VIȚĂ, *Revisiting the Dominant Discourse on Conditionality*, cit., p. 119.

¹¹⁹ *Ibid.*, p. 143.

This is particularly true for ESI Funds: since cohesion policy is aimed at “reducing disparities between the levels of development of the various regions” so as to promote the Union’s “overall harmonious development” (Art. 174 TFEU), an unwise use of conditionality has the potential to further exacerbate existing social rifts throughout Europe.

However, conditionality and solidarity are not condemned to be always antithetic. Instead, there are cases in which these principles can be reconciled in a cross-fertilisation perspective, so that conditionality could incentivize and foster solidarity. As an example of this positive relation, one may think of the so-called green conditionalities attached to Agricultural Funds,¹²⁰ that may even promote “solidarity between generations” according to Art. 3, para. 3, TEU.

The Commission’s proposal for a Rule of Law Conditionality is unequivocally intended to strengthen the link between budget and values, making the flow of EU funds *conditional* on the respect for the rule of law. Beyond the reasons underlined above (see *supra*, section II), this comes also as the result of a more political consideration, evidenced in the public discussions on the matter. As beautifully captured by *The Economist*, the Union realised that it has been actually funding governments acting in breach of the European common values, and therefore “tolerating and enabling” these States to “campaign against the EU from Monday to Friday and collect its subsidies at weekends”.¹²¹ This disturbing finding arguably contributed to reinforce the need for the Union’s institutions to make clear that “this is not a Europe *à la carte*”¹²² – to use the words of the co-rapporteur at the European Parliament – and that taking part in the European project is not a way to make “money for nothing”.

This perspective – that appears *prima facie* reasonable in political terms – may however be focused just on solidarity in institutional relations (“sincere cooperation” in legal terms), while disregarding the impact of such a mechanism on the citizens living in the State potentially affected. In this respect, it should not be overlooked the fact that if it is true that the mechanism could hopefully stimulate a response against illiberal democracies, there are reasons to fear that it could instead enhance mistrust and skepticism against the European Union.

If we look at the proposal from this perspective, it seems that just a tiny space has been reserved to solidarity.

Of course, our analysis concerns a proposal and, therefore, we have no indication coming from practice. In addition, regrettably, no impact assessment has been undertaken

¹²⁰ Regulation 1307/2013, Arts 43-47.

¹²¹ *The EU Is Tolerating – and Enabling – Authoritarian Kleptocracy in Hungary*, in *The Economist*, 5 April 2018, www.economist.com.

¹²² Translation from the original in Spanish “Esto no es una Europa a la carta”. Extract from the intervention of Eider Gardiazabal Rubial at the Parliament’s plenary debate of the 16th of January 2019 (minute 20:30), www.europarl.europa.eu.

by the Commission, despite the potential effects on final beneficiaries.¹²³ This despite the fact that, already before the proposal, the European Parliament – calling the Commission to propose a mechanism whereby Member States that do not respect EU values can be subject to financial consequences – had warned that “final beneficiaries of the Union budget can in no way be affected by breaches of rules for which they are not responsible”.¹²⁴

As it appears from some of the proposal's provisions, the Commission took this issue into account, but in practice it proves difficult to avoid that the costs of the measures would be poured on citizens.

Art. 4, para. 2, of the proposal importantly establishes that, normally, the imposition of the measures “shall not affect the obligation [...] to implement the programme or fund affected by the measure, and in particular the obligation to make payments to final recipients or beneficiaries”. However, the Court of Auditors¹²⁵ accurately underlined that there is no provision outlining how this would be ensured and, besides, Art. 68, para. 1, let. b), of the proposed CPR makes payments to beneficiaries conditional on the availability of funding.¹²⁶

The European Parliament approved some significant amendments in this regard:¹²⁷ on the one hand, it called the Commission to appropriately inform final beneficiaries and recipients about their rights and to provide adequate tools for them to inform the Commission about any breach of the obligations imposed on Member States; on the other, it attempted to envisage specific ways for the Commission to ensure that the measures would not affect final beneficiaries.

Nonetheless, this is arguably just part of the problem. Even admitting that the mechanism would not affect payments to final beneficiaries, EU Funds are largely allocated to medium-long term investments (e.g. infrastructures, transports, research) and in some countries represent a relevant percentage of the whole package of public investments.¹²⁸ It is worth noting that the 2019 EU Justice Scoreboard shows, *inter alia*, the ESI Funds' support to some domestic justice reforms in line with the rule of law.¹²⁹ Restricting, suspending or reducing the flux of EU Funds to these countries inevitably

¹²³ This point is stressed also by the Court of Auditors (ECA Opinion 1/2018, para. 18).

¹²⁴ European Parliament Resolution A8-0048/2018, para. 119.

¹²⁵ ECA Opinion 1/2018, paras 26-27.

¹²⁶ Art. 68, para. 1, let. b) of the Commission Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument, COM(2018) 375 final.

¹²⁷ European Parliament Legislative Resolution (2019)0349, amendments 49-50.

¹²⁸ For instance, in the period 2015-2017, cohesion policy funding covered 61,17 per cent of the public investments in Poland, 55,46 per cent in Hungary, 48,54 per cent in Bulgaria and 44,86 per cent in Romania: see cohesiondata.ec.europa.eu.

¹²⁹ Commission, *The 2019 EU Justice Scoreboard*, COM(2019) 198 final, 26 April 2019, para. 2.3.

affects the population as a whole in the medium-long term and has the potential to fuel further divisions in Europe.

VII. CONCLUSIONS

In this *Article*, I tried to provide an overview of what I consider to be the main problems arising from the Rule of Law Conditionality proposal.

If it appears legitimate and, to some extent, necessary for the Union both to effectively intervene in case of *domestic* constitutional crises and to protect the budget from the negative externalities related thereto, it has been shown that spending conditionality is a quite controversial tool which needs to be used in a very careful way.

The emersion of rule of law backslidings in Europe pushed the Union to come to terms with its constitutional limits and to look for new paths to play a crucial constitutional role *vis-à-vis* Member States. However, in a moment when the Union's *input* (process), *output* (results) and *telos* (promise) legitimacy is daily questioned¹³⁰ and domestic rule of law crises have triggered a process of fragmentation from within, respect for the European rule of law and close attention to the impact of EU policies on citizens are fundamental for the Union to play a genuine constitutional role, especially given the lack of a strong political *consensus*.

From this perspective, it is worth noting that, in the different field of the economic crisis, an EU response hardly reconcilable with these *caveats*¹³¹ has already shown its costs on the European project and some authors further suggested the existence of a linkage between economic instability, sovereign debt management and constitutional crises.¹³²

Therefore, in the context of the negotiations related to the Rule of Law Conditionality proposal, it is crucial to reconcile as much as possible the mechanism with both the EU fundamental principles of rule of law and solidarity.

¹³⁰ J. H. H. WEILER, *Europe in Crisis – On 'Political Messianism', 'Legitimacy' and the 'Rule of Law'*, in *Singapore Journal of Legal Studies*, 2012, p. 248 *et seq.*

¹³¹ C. KILPATRICK, *Abnormal Sources and Institutional Actions in the EU Sovereign Debt Crisis – ECB Crisis Management and the Sovereign Debt Loans*, in M. CREMONA, C. KILPATRICK (eds), *EU Legal Acts: Challenges and Transformations*, Oxford: Oxford University Press, 2018, p. 70 *et seq.*; C. KILPATRICK, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, in *Oxford Journal of Legal Studies*, 2015, p. 325 *et seq.*; M. RUFFERT, *The European Debt Crisis and European Union Law*, in *Common Market Law Review*, 2011, p. 1777 *et seq.*; C. KILPATRICK, B. DE WITTE (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, in *EUI Working Papers*, no. 5, 2014; A. POLOU, *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.*

¹³² On the mutual influences between the challenges facing the "rule of law in the Union" and the "rule of law by the Union" see Editorial Comments, *The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems*, in *Common Market Law Review*, 2016, p. 597 *et seq.* For the case of Hungary see 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, pp. 25-28.

Acting beyond these needs does not seem the right way to “take values seriously”.¹³³ It looks at least optimistic to think that relying heavily on economic sanctions and conditionalities could help shape constitutional homogeneity throughout Europe.

¹³³ A. T. WILLIAMS, *Taking Values Seriously: Towards a Philosophy of EU Law*, in *Oxford Journal of Legal Studies*, 2009, p. 549 *et seq.*



ARTICLES

EU AGENCIES AND THE ISSUE OF DELEGATION: CONFERRAL, IMPLIED POWERS AND THE STATE OF EXCEPTION

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ABSTRACT: The delegation doctrine has evolved together with the Union's objectives and executive tasks. Yet the Court has continued to apply the principles set out at the origins of the European integration. The Treaty-makers have not intervened to offer a new legal framework as concerns the establishment and empowerment of agencies. As such, the issue of delegation has been stretched and cut on the Procrustean bed of the process of agencification, forcing a substantial reinterpretation of the concept of discretionary powers. The present *Article* will analyse the possibility of an interpretative expansion of the specific sectoral legal bases as to include the competence of delegating powers on agencies within the powers conferred to the Union. It will then move on analysing the possibility of that being an implied power of the Union. Finally, it will be suggested that the process of agencification has been primarily based on a pragmatic political need for credibility and long-term regulatory stability in order to effectively respond to what has been felt as emergency. These options represent the good, the bad and the ugly of a legal doctrine meant to apologize for an affirmed and ever-expanding practice of governance. Since the existence of agencies cannot be neglected nor their mushrooming can be acquiesced, the present analysis, beyond the apology, will attempt to shed some light over the jurisprudence of the Court, highlighting the risks arising from the lack of an agency model and, in general, from the unregulated process of agencification.

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I. INTRODUCTION

Agencies are among the most mysterious creatures of the Treaties. Even though the constitutional legislator has recognized EU agencies as part of the administrative framework of the Union and has regulated several of the logical consequences arising from their establishment and empowerment,¹ yet the *quomodo* and the *quantum delegatur* can at most be deduced from the Treaties.

The present *Article* will analyze the issues of the establishment and of delegation of powers to European agencies, researching the legal bases² conferred to the Union allowing for the agencification process to take place. In the first part an overview will be offered of the main functions attributed to agencies and of the fundamental principles regulating the delegation of power in the EU.

The *Article* will then tackle the legal bases for the establishment and empowerment of agencies. In particular, it will examine the practices adopted by the EU legislator who has relied on both Art. 352 TFEU and on sectoral specific legal bases, such as Art. 114 TFEU. After having analyzed the main drawbacks of the use of the flexibility clause, as well as of the use of agencification as a means of harmonization, the attention will be drawn on the findings of the Court in its rulings in *ENISA* and *Short selling*. The analysis will focus on whether the legal bases have been broadly interpreted as to make of the power to establishing and empowering agencies a conferred one, or whether this has been considered as implied.

Finally, it will be argued that none of these reconstructions properly fit as a legal justification of the process of agencification. It will then be suggested that this process has been primarily based on a pragmatic political need for credibility and long-term

¹ More specifically, agencies are mentioned in Arts 9 TEU (principle of equality before institutions); 15 TFEU (principle of transparency); 16 TFEU (right to protection of personal data); 24 TFEU (right to receive answers from institution in the same language of the applicant); 71 TFEU (internal security); 123, para. 1, TFEU (prohibition of overdraft facilities); 124 TFEU (prohibition of privileged access to credit); 127, para. 4, TFEU (submission of opinions by the ECB); 130 TFEU (independence of the ECB); 263, 265, 267 and 277 TFEU (judicial remedies); 287 TFEU (control by the Court of Auditors); 298 TFEU (EU administration); 325 TFEU (protection of the financial interests of the Union). The Charter of Fundamental Rights also makes several references to agencies as concerning the right to good administration (Art. 41), access to documents (Art. 42), recourse to the Ombudsman for cases of maladministration (Art. 43), scope of application (Art. 51) and implementation of the principles contained in the Charter (Art. 52).

² The present *Article* will not tackle the broader aspects connected to the political legitimization of agencies, considered as non-majoritarian, “technical” regulatory bodies. Without pretense of exhaustiveness, some considerations about the agencies’ legitimacy will be made in the last section, when it will be discussed the possible emergence of a state of exception.

regulatory stability in order to effectively respond to what has been felt as emergency. Specific attention will be drawn on the consequences of a technique of governance based on the normalization of the state of exception, particularly considering the shortcomings for the agencies' legitimacy.

II. AGENCIFICATION AND THE ISSUE OF DELEGATION

II.1. AGENCIES AS DELEGATE ENTITIES: OVERVIEW OF THE DELEGATED FUNCTIONS

Delegation of powers to agencies raises concerns as the means for the delegating authority – i.e. the principal – to exercise effective control over the agent. When delegating implementing powers to the Commission, for example, Art. 291, para. 3, TFEU requires the establishment of a procedure empowering Member States to control the exercise of the implementing powers.³ Agencies are not mentioned among the beneficiaries of the delegation under Arts 290 and 291 TFEU, nonetheless they also apparently operate in a regime of delegation of powers.⁴ For that reason, means of control have been established as procedural and organizational requirements such as the representation on the Boards and the nomination of the Directors. However, the *ad hoc* way of establishing agencies leaves to the contingent political bargaining the decision concerning their

³ Since it is necessary, for a power to be delegated, that the principal retains the competence while only the exercise of the related power is shifted to the agent, some authors have argued that the system provided for by Art. 291 TFEU does not constitute a delegation. See M. CHAMON, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, Oxford: Oxford University Press, 2016, p. 237. In the frame of Art. 291 TFEU, in fact, the competence of adopting implementing measures is attributed to the Member States. Since the EU legislator does not have the competence of adopting implementing measures, the conferral to the Commission seems rather to be the creation of a power allowed in exceptional circumstances. However, since Art. 291, para. 3, TFEU prescribes that the control shall be exercised by the Member States, other authors have adopted a different reconstruction of the theory of delegation, according to which the power of the Member States may be delegated to the Commission by the intervention of a third authority – the EU legislator – hierarchically superior. See R. BARENTS, *The Autonomy of Community Law*, The Hague: Kluwer Law International, 2004, p. 224. As concerns this hierarchical superiority, one may argue that the EU legislator is overarching the Member States exclusively in their function of EU implementing authorities – i.e. merely intended as federal executive agents of the Union.

⁴ AG Jääskinen in his Opinion in *Short selling* stressed the fact that powers are not delegated but rather conferred on agencies. See Opinion of AG Jääskinen delivered on 12 September 2013, case C-270/12, *United Kingdom v. European Parliament and Council (Short selling)*, para. 91. However, the Court has found that the main criteria applicable to the delegation are also applicable in the case of conferral of powers to agencies. See Court of Justice, judgment of 22 January 2014, case C-270/12, *United Kingdom v. European Parliament and Council (Short selling)*, paras 45 to 50. Given this legal framework, the subtle distinction proposed by M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 237 between the various types of delegation and the claim that the system provided for by Art. 291 TFEU does not constitute a delegation, is not decisive for analysing the legal boundaries to the establishment and empowerment of EU agencies, see *infra*, sub-section IV.1.

internal organization, thus resulting in an extreme heterogeneity concerning the means of control the principal has over the agency.⁵

As reported by the academic literature, the comparison of the agencies' governing bodies immediately shows the difficulty of finding a common model, given that the only harmonized areas concern the budget, the access to documents and treatment of personal data.⁶ That confirms the frustration of aspiring to a classification of agencies intended to explain the state of play of the phenomenon and predict its possible evolution. However, a classification of the powers attributed to agencies – through an exemplification of some measures that agencies may adopt – will try to compensate this descriptive insufficiency with the relevance of the information provided.⁷

As concerns the powers of which agencies are vested, it shall preliminarily be noted that any attempt of classification is also obstructed by the fact that agencies often express themselves through formally non-binding acts.⁸ However, apart from the difficulty of classifying powers expressed in the form of comply or explain guidelines, agencies have been vested of five kinds of powers: i) regulatory powers (often referred to as quasi-regulatory powers); ii) decision-making powers affecting individuals; iii) consultative powers; iv) operational powers and v) informational and coordinating powers.⁹

Even though, formally, agencies are not vested with regulatory powers, it is undeniable that at least the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA) express, *de facto*, this function. As noted by the academic literature, the European Securities and Markets Authority (ESMA) is entrusted with regulating in detail the financial markets by issuing non-binding acts. However, these acts have repercussions on the identification of the responsibility of financial markets' actors and thus present a level of compliance not dissimilar to that of a binding measure.¹⁰ The second category of power is clearly exemplified by agencies, such as the European Union Intellectual Property Office (EUIPO) and the Community Plant Variety Office (CPVO) that are entrusted of certificatory powers in attributing patents in the fields, respectively, of trademarks and plant variety. Consultative agencies have the role of assisting the Commission in its decision-making activity by providing it with scientific and technical

⁵ Cf. M. CHAMON, *EU Agencies: Does the Meroni Doctrine Make Sense*, in *Maastricht Journal of European and Comparative Law*, 2010, p. 288.

⁶ M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 100.

⁷ For a quantitative analysis of the variation in the reliance of legislators on EU agencies, see M. MIGLIORATI, *Relying on Agencies in Major European Legislative Measures*, in *West European Politics*, 2020, p. 159 *et seq.*

⁸ See J. ALBERTI, *L'utilisation d'actes de soft law par les agences de l'Union européenne*, in *Revue de l'Union européenne*, 2014, p. 162.

⁹ See J. ALBERTI, *Le agenzie dell'Unione europea*, Milano: Giuffrè, 2018, p. 190.

¹⁰ *Ibid.*, pp. 192-197, who also brings the examples of the European Union Agency for Railways (ERA), European Union Aviation Safety Agency (EASA) and Agency for the Cooperation of Energy Regulators (ACER).

analysis. An example may be the role of the European Medicines Agency (EMA) in the procedure for authorizing pharmaceutical products¹¹ or the role of EFSA in the procedure for authorizing smoke flavorings.¹² These agencies are somehow at crossroad with those having regulatory powers. The main element of differentiation may be found in the possibility allowed to the Commission to dissent from the opinion issued by the agency, even though the academic literature has shown that statistically the Commission tends to merely ratify these opinions.¹³ Operational functions consist in furnishing concrete operational support in the context of a certain activity. A clear example is the one of the European Border and Coast Guard Agency (FRONTEX), which assists the Member States in controlling the EU borders with its own means and staff members.¹⁴

Finally, the informational and coordinating function consists in the exchange of information and best practices with the national competent authorities and in their coordination for the optimal achievement of EU law's implementation objectives. This function is characteristic of a process of integration between the EU and national level of administration and helps foster mutual trust: it is thus mostly achieved by consensus and without the adoption of binding acts.

As the functions attributed to agencies have assumed a fundamental character in the ordinary administration of the EU, the problem has arisen as to the limits of the delegation of powers. Since the EU can only exercise the powers that have been conferred to it, the choice of the correct legal basis has a constitutional significance.¹⁵ The corollaries of the choice of the legal basis, for what concerns the empowerment of EU agencies, are not confined only to the effects on the institutional balance but also involve an impact on the mandate of the agencies, on their collocation within the institutional framework and on the supervision of their action.

The European legislator has adopted different approaches during the different waves of agencification, moving from the use of the flexibility clause to the adoption of a specific sectoral legal basis and, then, to the adoption of Art. 114 TFEU.

¹¹ See Arts 9 and 10 of Regulation (EC) 726/04 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency.

¹² Art. 9 of Regulation (EC) 2065/2003 of the European Parliament and of the Council of 10 November 2003 on smoke flavourings used or intended for use in or on foods.

¹³ T. GEHRING, S. KRAPHOL, *Supranational regulatory agencies between independence and control: the EMEA and the authorization of pharmaceuticals in the European single market*, in *Journal of European Public Policy*, 2007, p. 208.

¹⁴ Art. 38 of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624.

¹⁵ Court of Justice, opinion 2/00 of 6 December 2001, *Cartagena Protocol*, para. 5.

II.2. FUNDAMENTALS OF THE DELEGATION OF POWERS: *MERONI*, *ROMANO* AND THE PRINCIPLE OF INSTITUTIONAL BALANCE

From a theoretical perspective, the issue of the delegation of power to agencies has been largely dominated, until the *Short selling* case, by the so-called *Meroni*¹⁶ doctrine. Back at the times of the European Coal and Steel Community (ECSC), Art. 53 ECSC allowed the High Authority to institute a financial mechanism to attain the ECSC's objectives. When such a mechanism was established, the High Authority delegated its execution to two agencies – so-called Brussels's agencies – constituted under Belgian private law. Their powers consisted, notably, in determining the amount and collecting the contributions paid by all the undertakings using ferrous scraps and monitoring their solvency conditions. Meroni refused to pay the contributions, claiming that the decision was not motivated and that the undertakings concerned were not offered the possibility to bring their considerations before the High Authority.

The first problem the Court found in the delegation made to the agency can be summed up in the principle *nemo plus iuris ad alium tranferre potest quam ipse habet*, since the decisions of the agency were not subjected to the Treaty, as it would have been the case where the same decisions would have been adopted by the high Authority.¹⁷ Then the Court introduced what has been seen as a prototype of the principle of institutional balance. It found that the delegation of the power to adopt purely executive acts is permitted, since these acts can be reviewed in the light of the criteria set out in the delegation while, on the opposite, the delegation of discretionary powers would render vain this guarantee, thus infringing the Treaty.¹⁸ Even though the acts of the Agency were to be approved by the High Authority, the finding that the latter had no further function than adopting the data furnished by the Agency, led the Court to declare the delegation under scrutiny illegitimate and to annul it. The principle of institutional balance as a constraint to delegating powers to agencies, was then made more explicit in the successive *Romano*¹⁹ ruling.

The case concerned Mr. Romano, an Italian retired worker living in Belgium who was entitled to receive his pension in both countries. The controversial issue was the definition of the exchange rate for converting the Italian pension into Belgian Francs. The exchange rate used by the Belgian authority was in fact that defined by the Decision of the Administrative Commission on Social Security of Migrant Workers,²⁰ to whom the Council had conferred the power to adopt such a decision that was claimed

¹⁶ Court of Justice, judgment of 12 June 1958, case C-9/56, *Meroni v. High Authority*.

¹⁷ *Ibid.*, p. 150.

¹⁸ *Ibid.*, p. 152.

¹⁹ Court of Justice, judgment of 14 May 1981, case C-98/80, *Romano*.

²⁰ Decision 101/1975/EEC of 29 May 1975 of the Administrative Commission of the European Communities.

to be of legislative nature. As underlined by AG Warner, even if the Treaty recognized the power of the Council to confer legislative powers to the Commission, it did not, however, allow the conferral to a body such as the Administrative Commission, which is not “a creature of the Treaty”.²¹ Moreover, the Administrative Commission was not mentioned in Arts 173 and 177 EEC (now Arts 263 and 267 TFEU) and, thus, their acts were not opposable before the Court. These suggestions brought the Court to finding the conferral incompatible with the Treaty and that the Decision of the Administrative Commission was not binding for the referring Labor Tribunal.

As concerns the principle of institutional balance, the Court did not, as in *Meroni*, just refer to impossibility to attack the acts of the agency, but it made express reference to Art. 155 EEC,²² thus giving a new constitutional dimension to the principle. In fact, as it has been shown by the doctrine, the idea of institutional balance that the Court had in mind in *Meroni* was mostly conceived as a guarantee for individuals.²³ On the opposite, the evolution of the jurisprudence has offered an interpretation of the principle as regulating inter-institutional relationships.

Notably, in *Chernobyl*²⁴ the Court found that the lack of the European Parliament’s active legitimation to bring an action of annulment before the Court undermined its role in the institutional framework of the EU. From this case, some authors have argued that the principle is to be intended as a “dynamic balance”, so that it is not necessary to amend the Treaties in order to innovate the institutional frame: what only matters is that this process is “accompanied by a strengthening or rebalancing of the existing institutions and functions”.²⁵

The Court itself, even when finding the principle of institutional balance within the Treaties, has motivated its creative interpretation of the Treaties as being in the name of the “maintenance”²⁶ of the balance, thus implicitly recognizing a dynamic nature to the principle. The Court seems thus proposing a reading of the principle as meaning that what should be respected and preserved is not the allocation of powers as defined

²¹ Opinion of AG Warner delivered on 20 November 1980, case C-98/80, *Romano*, p. 1264.

²² *Romano*, cit., para. 20. Art. 155 EEC was deputed to describe the role, tasks and functions of the Commission, as it would now be Art. 17 TEU.

²³ J.-P. JACQUÉ, *The principle of the institutional balance*, in *Common Market Law Review*, 2004, p. 384.

²⁴ Court of Justice, judgment of 4 October 1991, case C-70/88, *European Parliament v Council (Chernobyl)*, para. 26.

²⁵ E. VOS, *Agencies and the European Union*, in T. ZWART, L.F.M. VERHEY (eds), *Agencies in European and Comparative Perspectives*, Antwerp: Intersentia, 2003, p. 131. The author proposes to strengthen the Commission supervisory powers and to ensure judicial review by the Court. That view was contested by AG Van Gerven in his Opinion delivered on 30 November 1989, case C-70/88, *European Parliament v Council (Chernobyl)*, para. 6. The Court, however, did not confirm his idea – notably, that in order to change the institutional balance as defined in the Treaties it was necessary an intervention of the constituent power – and operated a *revirement* with respect to its previous jurisprudence, recognizing the active legitimation of the European Parliament to bring actions of annulment before the Court.

²⁶ *Chernobyl*, cit., paras 23 and 26.

by the Treaties, but rather the abstract function²⁷ of each institution within the EU polity, as may be deduced from the Treaties.

In this sense, the express reference to Art. 155 EEC made in *Romano*, should have made the ruling resilient to the constitutional evolution of the EU where, even though acts of agencies have been expressly made subject to judicial control, the position of the Commission has been even reinforced. It is not without surprise, then, that when the Court has been called to apply the *Romano* ruling to a case of delegation of powers to ESMA, it has stated that the latter does not add anything to *Meroni* as concerns the conditions governing the delegation of powers to agencies.²⁸

III. THE PROCESS OF AGENCIFICATION AND THE PRACTICE OF DELEGATION: IN SEARCH OF THE LEGAL BASES CLOTHING THE EMPEROR

III.1. THE USE OF THE FLEXIBILITY CLAUSE AS A LEGAL BASIS

The first wave of agencification saw a massive establishment of agencies through the means of Art. 352 TFEU. Notably, the choice of establishing agencies on the basis of Art. 352 TFEU imposes to reach unanimity within the Council.²⁹ Moreover, the procedure under Art. 352 TFEU does not permit the participation of the Parliament as a co-legislator.

AG Jääskinen argued that this procedure anyway fosters the democratic legitimacy of agencies, since under Art. 352, para. 2, TFEU, the Commission is asked to draw national Parliaments' attention on the proposal, in order for them to make an assessment of subsidiarity.³⁰ This argument does not count among the most persuasive. In fact, on one side, all legislative proposals are subjected to the procedure of the Protocol on the application of the principles of subsidiarity and proportionality and, on the other, there is a substantial difference between the control of subsidiarity made by national Parliaments and the participation of the European Parliament as a co-legislator. The control of national Parliaments, in fact, is limited to the control of the respect of the principle of

²⁷ For a complete reconstruction of the principle see, *ex multis*, K. LENAERTS, A. VERHOEVEN, *Institutional Balance as a Guarantee for Democracy in EU Governance*, in C. JOERGES, R. DEHOUSSE, *Good Governance in Europe's Integrated Market*, New York: Oxford University Press, 2002, p. 35. A different reading of the principle has been offered by G. MAJONE, *Delegation of Regulatory Powers in Mixed Polity*, in *European Law Journal*, 2002, p. 330. The author argues that if the delegation of competences to agencies is read in the context of the politicization of the Commission, as means of reliving the latter of technical tasks, then the agencification process strengthens the institutional balance, intended as a principle related to the cooperation between institutions in the law-making process more than a strict circumscription of the powers attributed to each of them.

²⁸ *Short selling*, cit., para. 65.

²⁹ As highlighted by C. TOVO, *Le agenzie decentrate dell'Unione europea*, Napoli: Editoriale Scientifica, 2016, p.137, the political process that leads the research of consensus has an impact on the quality and on the quantity of functions that are delegated to agencies.

³⁰ Opinion of AG Jääskinen, *Short selling*, cit., para. 58.

subsidiarity and does not have binding effects unless the reasoned opinion issued represents at least one third of all the votes allocated to national Parliaments.³¹

Since the use of the flexibility clause is restricted to the sole cases where the action of the Union should prove necessary, some authors have found a further problem in its adoption as the legal basis for establishing agencies that can be endorsed. Notably, it has been argued that, under this provision, it becomes hard to distinguish between the necessity of establishing the agency for the attainment of an objective of the EU, and the necessity of empowering the agency: thus, agencies provided with modest powers may be at odds with the requirement of necessity set in Art. 352 TFEU.³² Moreover, it has been highlighted that a distinction should be drawn between the creation of an agency and the process of agencification. The dimension of the issue, in fact, is liable to be read as a Treaty amendment – expressly prohibited through the means of Art. 352 TFEU in the Court's Opinion 2/94³³ – in the measure that it constitutes a process of reform of the EU's administration method.³⁴

Moreover, it shall be noted that in its Opinion 2/94,³⁵ the Court has expressly prohibited the use of the flexibility clause in all cases where the Union has been conferred a power, even if it is implied. That could make the use of the flexibility clause illegal since the power to establish agencies may be considered as an implied power.³⁶

At any rate, from the third wave of agencification onwards, Art. 352 TFEU has been only used as a legal basis for the establishment of the Fundamental Rights Agency (FRA) and of the Global Satellite Agency (GSA).³⁷ Moreover, until the Parliament will not receive a full co-decision power under Art. 352 TFEU, it is improbable that the praxis will step back relying on the flexibility clause, since the full participation of the European Parliament in the legislative procedure leading to the establishment of a new agency provides it with a stronger legitimization and, thus, a more effective capacity of performing the tasks of which it is entrusted. In accordance with this trend, the Commission, on occasion of the draft interinstitutional agreement of 2005,³⁸ sought to extent to

³¹ Art. 7, para. 2, Protocol (No. 2) on the Application of the Principles of Subsidiarity and proportionality.

³² See M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 137.

³³ Court of Justice, opinion 2/94 of 28 March 1996, para. 30.

³⁴ Cf. M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 139.

³⁵ Opinion 2/94, cit., para. 29.

³⁶ See *infra*, sub-section III.4.

³⁷ Cf. C. Tovo, *Le agenzie decentrate*, cit., p.133. The author highlights how the establishment of these two agencies shall be seen as a confirmation of the new trend, rather than as an exception. The use of Art. 352 TFEU, in fact, has been required by the fact that the competences attributed to the two agencies do not find any correspondent among the sectoral specific policies attributed to the Union.

³⁸ Commission Draft Interinstitutional Agreement of 25 February 2005 on the operating framework for the European regulatory agencies, COM(2005) 59 final.

EU agencies the jurisprudence of the Court concerning the application of Art. 352 TFEU,³⁹ confining the latter provision to a merely residual application.

III.2. THE SPECIFIC SECTORAL LEGAL BASES: ART. 114 TFEU AND THE APPROXIMATION THROUGH AGENCIFICATION

Since the third wave of agencification,⁴⁰ agencies have been mostly established on the basis of the specific sectoral legal bases attributing a material competence to the EU. At first glance, recourse to the specific sectoral legal bases may be seen as an improvement in the practice of agencification, it permits the measures to be adopted following the ordinary legislative procedure, thus granting a greater participation of the European Parliament.

The main problem, however, is that these provisions do not make any reference to the fact that the legislator may have a competence to adopt organizational arrangements in order to exercise the attributed competence. For that reason, concerns have been raised by the academic literature sustaining that the creation of a body having autonomous legal personality is more likely to appear as an institutional decision than the exercise of a material competence.⁴¹

Among the specific sectoral legal bases used by the legislator, Art. 114 TFEU has contributed the most to the blossoming of EU agencies,⁴² even though it has not always been peacefully accepted. In occasion of the establishment of European Medicines Agency (EMA), in fact, the Council Legal Service (CLS) found illegitimate the proposal made by the Commission of establishing the agency on the basis of Art. 100A of the EEC Treaty (now Art. 114 TFEU). The CLS had made a clear distinction between the creation of an agency and the conferral of powers to it. In particular, the CLS had sustained that the concept of *rapprochement* could not be extended to national measures that do not exist and that, for their specificities, cannot be adopted by Member States individually.⁴³

Ten years later, however, in occasion of the establishment of European Food Safety Authority (EFSA), the CLS declared that Art. 352 TFEU should have been used for the establishment of agencies only whether there would have been no other legal basis in the Treaty, since the creation of an agency, *per se*, does not require to recur to the flexibility

³⁹ Court of Justice, judgment of 26 March 1987, case C-45/86, *Commission v. Council*, para. 13.

⁴⁰ Cf. S. GRILLER, A. ORATOR, *Everything under control? The "way forward" for European agencies in the footsteps of the Meroni doctrine*, in *European Law Review*, 2010, p. 6. The first agency to be established without recourse to Art. 352 TFEU was the European Environment Agency (EEA).

⁴¹ R. ADAM, A. TIZZANO, *Manuale di diritto dell'Unione europea*, Torino: Giappichelli, 2014, p. 109.

⁴² As reported by C. TOVO, *Le agenzie decentrate*, cit., p.133, eight agencies have been founded on the basis of Art. 114 TFEU.

⁴³ See M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 143, who refers to the document of the Legal Service of the Council of the European Communities of 19 November 1991, 9525/91, para 14. See also J. ALBERTI, *Le agenzie dell'Unione europea*, cit., p. 132.

clause.⁴⁴ It then considered that Art. 114 TFEU could be used for the adoption of measures that, even if not directly constituting measures of harmonization, contributed to the intent of harmonizing the internal market, notably by reducing recourse to Art. 36 TFEU by Member States and, thus, preventing the emergence of barriers to the free movement of goods.⁴⁵ The CLS, motivating the difference with its previous opinion concerning the EMA, stated that the EFSA was not entrusted of replacing national laws through the establishment of a central authority responsible for authorizing the products considered to be legal, but had a genuine purpose of harmonization. It, however, did not take position concerning the fact that the measure could have not been taken by Member States individually.

This juridical tension between the exercise of a material competence and the arguably implied competence of establishing an institutional body for its exercise, has found its first settlement in occasion of the *ENISA* judgement.

III.3. THE *ENISA* RULING: A BROADER INTERPRETATION OF ART. 114 TFEU AS TO INCLUDE THE POWER OF ESTABLISHING AND EMPOWERING AGENCIES?

The *ENISA* ruling⁴⁶ can be seen as the judgment that marked the legitimacy of the use of Art. 114 TFEU for the establishment – and empowerment – of agencies. The case was promoted by the United Kingdom which sought the annulment of the measure establishing the agency, claiming that Art. 114 TFEU was not the appropriate legal basis. The claimant argued that the establishment of an agency could not be achieved at national level by the simultaneous enactment of identical individual measures and, thus, could not be considered as a harmonization measure.⁴⁷

The Court rejected the claim, finding that Art. 114 TFEU not only confers discretion to the legislator as regards the choice of the most appropriate technique of approximation⁴⁸ – including the choice of attributing the power to the agency to enact individual measures⁴⁹ – but it also attributes the power of taking measures having an institutional character, as establishing an agency.

Implicitly following the suggestion of the AG Kokott,⁵⁰ the Court considered that the establishment of the agency cannot be separated from its empowerment. Acting as a

⁴⁴ Opinion of the Legal Service of the Council of 18 May 2001, n. 8891/01, para. 3.

⁴⁵ *Ibid.*, para. 9.

⁴⁶ Court of Justice, judgment of 2 May 2006, case C-217/04, *United Kingdom v European Parliament and Council (ENISA)*.

⁴⁷ *Ibid.*, para. 12.

⁴⁸ Cf. Court of Justice, judgment of 6 December 2005, case C-66/04, *United Kingdom v European Parliament and Council (Smoke flavourings)*, para. 45.

⁴⁹ Court of Justice, judgment of 9 August 1994, case C-359/92, *Germany v. Council*, para. 37.

⁵⁰ Opinion of AG Kokott delivered on 22 September 2005, case C-217/04, *United Kingdom v European Parliament and Council (ENISA)*, para. 27.

means to the end, in fact, it seems that it is not possible to conceive the creation of an agency as an objective in itself.⁵¹ The Court then found that since the tasks conferred on *ENISA* were “closely linked to the subject matter of the acts approximating the laws, regulations and administrative provisions of the Member States”⁵² and since the complexity of the area with which the legislature was confronted may have led to differences in the transposition in the Member States, the establishment of the agency was rightly based on Art. 114 TFEU.

What the Court did not examine is whether the decision to adopt an extraordinary organizational measure as the establishment of an agency was proportionate – *rectius* necessary, suitable and *stricto sensu* proportionate – to perform the given set of tasks⁵³ or there were at hand lighter organizational alternatives. In other words, even though it is the function sought for an agency that gives it an appreciable substance, the test of proportionality shall not be circumscribed to the tasks conferred to the agency but shall be extended also to the establishment of the agency as a proper means to perform those tasks in light of all possible alternatives.⁵⁴

At any rate, the Court concluded that Art. 114 TFEU granted the power of establishing a “Community body responsible for contributing to the implementation of a process of harmonization”.⁵⁵ This finding of the Court seemed to offer the possibility of abroad reading of Art. 114 TFEU – and by analogy any other specific sectoral legal basis – as including the power of establishing and empowering EU agencies. Moreover, the wide margin of discretion that the Court attributes to the legislator in choosing the most appropriate measure for the approximation *ex* Art. 114 TFEU seems to exclude the possibility of exercising an implied power, the latter being strictly circumscribed by the requirement of indispensability. Notwithstanding, in its subsequent ruling in *Short selling*, the Court did not directly use Art. 114 TFEU as a provision to the effect of which powers may be conferred on European Securities and Markets Authority (ESMA), thus nourishing the uncertainty concerning the legal basis allowing for its establishment.

⁵¹ This statement is generally agreeable, since it must be recognized that the establishment of an agency is necessarily, conceptually bound to the powers that are meant to be conferred on it. Notwithstanding, the distinction between the two acts makes sense in the context of the actual state of play of EU law where, even though there exist the legal bases for exercising powers such as those conferred to agencies, nothing is said as concerns their establishment. Similarly, cf. M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 152.

⁵² *ENISA*, cit., para. 45.

⁵³ For a similar position see M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 168.

⁵⁴ A possible problem of this solution may be that it takes the legislative measure empowering the agency as the parameter of the proportionality test, while Art. 5, para. 4, TUE prescribes that “the content and form of a Union act shall not exceed what is necessary to achieve the objectives of the Treaties”. Hence, the legislative measure would be elevated to primary law, as explicating the objectives of the Treaties.

⁵⁵ *ENISA*, cit., para. 44.

III.4. *SHORT SELLING* AND THE SHADOW OF THE IMPLIED POWERS

More precisely, in its *Short selling* ruling, the Court stated that “while the Treaties do not contain any provision to the effect of which powers may be conferred on a Union body, office or agency, a number of provisions in the FEU Treaty nonetheless presuppose that such possibility exists”.⁵⁶ If the possibility of framing the empowerment – and thus also the establishment, since the Court treats the two measures as a *unicum* – of EU agencies as an implied power was to be excluded, the Court could have stated, *sic et simpliciter*, that the norm allowing for the conferral of powers on ESMA was precisely Art. 114 TFEU.

This path of reasoning relying on other provisions of the Treaties, added to the fact that treating the establishment of an agency as a conferred power under Art. 114 TFEU does not resolve the theoretical problem of drawing institutional consequences from norms establishing material competences, have cast the shadow that the establishment of agencies may be considered as an implied power.⁵⁷ The doctrine of implied powers has its roots in the judgment of the Court *Germany and others v. Commission*, where it was found that: “where an Art. of the EEC Treaty — in this case Art. 118 — confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task”.⁵⁸

In the context of the *ENISA* case, the European Parliament had claimed that, whether the Court should have not found in Art. 114 TFEU the correct legal basis for establishing ENISA, it could have nonetheless been considered as the exercise of an implied power conferred on the Union legislature by that very provision.⁵⁹ However, the power to establish an agency shall be kept distinct from the powers at issue in the case *Germany and others v. Commission*. There was at stake the possibility for the Commission to ask for a notification by the MS whether Art. 118 of the EEC Treaty entrusted it of arranging consultations. The Court then found that the task conferred on the Commission to arrange consultations would have stayed a dead letter if the consultations were not to be started somehow.⁶⁰

⁵⁶ *Short selling*, cit., para. 79.

⁵⁷ See J. ALBERTI, *Le agenzie dell'Unione europea*, cit., p. 129; A. VON BOGDANDY, J. BAST, *The Federal Order of Competences*, in A. VON BOGDANDY, J. BAST (eds), *Principles of European Constitutional Law*, München: Hart, 2010, p. 282.

⁵⁸ Court of Justice, judgment of 9 July 1987, joined cases 281/85, 283/85, 284/85, 285/85 and 287/85, *Germany and others v Commission*, para. 28.

⁵⁹ *ENISA*, cit., para. 28, where the Parliament stated that the creation of the agency could have been seen “as indispensable to the achievement of the objectives pursued by the specific directive”. It shall be noted that in its *Germany v. Council* ruling, the Court clearly affirmed that the implied power should be implied by an Art. of the Treaties. It does not seem that the directive to which the Parliament refers may have the necessary status of primary law in order to provide the Union legislature for any implied power. Reasoning *a contrario*, the European legislator would have an unlimited power to extend its competences by issuing secondary legislation whose objectives require the exercise of non-conferred powers in order to be achieved.

⁶⁰ *Germany and others v. Commission*, cit., para. 29.

On the contrary, the establishment of an agency appears as the exercise of a power that, even though related to the exercise of the conferred material competence, goes far beyond what is strictly indispensable to carry out the tasks assigned by the material competence. Moreover, in the judgment *Germany and others v. Commission*, the Court expressly stated that the provision conferring the task on the Commission would have been wholly ineffective without the exercise of the implicit competence contested. It does not seem to be the same in regard to EU agencies: would the harmonizing competence *ex Art. 114 TFEU* be completely ineffective if the power to establish agencies EU was not recognized to the EU? It seems that agencification is nothing more than a political choice, among many others, as the means to achieve and perform a conferred task or objective. It is not strictly indispensable, even though it may be considered as the most efficient means: that would not justify the adoption of the theory of implied powers, since the principle of conferral shall be deemed as prevailing over opportunity or efficiency issues.

However, it should be kept in mind that with the Lisbon Treaty agencies have gained mentions within the primary law. One might argue that, if the competence to establish agencies was not recognized, all the mentions made within the Treaties to their acts and, in general, to their existence, would stay a dead letter. Even though tempting, this reconstruction would result in a completely new doctrine of implied powers. The test of indispensability characterizing the doctrine of implied powers, in fact, would not apply in the sense of considering the establishment of the agency as indispensable for the exercise of the material competence conferred to the Union, but rather in the sense that it is indispensable for the norms referring to agencies not to stay dead letter with regard to the acts of agencies mentioned there.

This understanding would have the effect of breaking any causal link between the legal basis adopted for exercising the implied power and the conferred power giving rise to the implied one. Which is to say that it would not matter whether the establishment of an agency is indispensable for attaining the objective, for example, of harmonizing national measures under Art. 114 TFEU: since it is indispensable not to render vain some parts of the Treaty, the power of establishing agencies can be discretionary exercised by the EU legislator in any field of competence. Moreover, if such powers were to be considered implied from the provisions of the Treaties referring to agencies, these legal bases should have been adopted by the legislature, in combination with others, in the funding acts of agencies. This phenomenon, however, cannot be observed.

Such broad conception of the doctrine of implied powers does not seem to be coherent with a European polity where implied powers shall be collocated within the boundaries set by the principle of conferral.⁶¹ Furthermore, as already mentioned, if the power of establishing EU agencies were to be considered as implied, the jurisprudence

⁶¹ See A. VON BOGDANDY, J. BAST, *Principles*, cit., p. 282. The authors notice how, on the opposite, under international law implied powers are simply considered to be at odds with the concept of conferred powers.

of the Court concerning the flexibility clause would prohibit the use of Art. 352 TFEU⁶² for exercising such power.

In this regard, AG Jääskinen in his Opinion adopted a different position. He claimed that the legal basis for establishing an EU agency may well be Art. 114 TFEU⁶³ but, given the particular case at hand, the powers conferred to ESMA did not correspond to the requirements of the approximating measures as defined by that provision.⁶⁴ Thus, he proposed the use of Art. 352 TFEU as the most appropriate legal basis. While, as will be shown, the AG considered as implied the power to sub-delegate or to confer implementing powers to agencies on the basis of Art. 291 TFEU,⁶⁵ he did not apply the same rationale to the conferral of powers on the basis of Art. 114 TFEU. He rather seemed to interpret the ENISA ruling as offering a broad lecture of Art. 114 TFEU as to include the power of establishing and conferring tasks to agencies. Nonetheless, the doubt may still arise that such a broad interpretation allowing for the exercise of measures having an institutional character shall anyway be considered as the recognition of an implied power. It is in fact unclear what shall be deemed differentiating the latter interpretation from the one, eventually *contra legem*, widening the exhaustive list of beneficiaries of the delegation provided for by Art. 291 TFEU.

Having said that, even though the Court has recognized the legitimacy of establishing EU agencies, it is still not clear how exactly this power may be reconciled with the principle of conferral. In fact, while on one side reliance on the doctrine of implied powers does not seem suitable for justifying the process of agencification, on the other the Court has been reticent in affirming that this power can be directly based on specific sectoral legal bases.

IV. THE NUDITY OF THE EMPEROR: *SHORT SELLING* AND THE PROCLAMATION OF THE STATE OF EXCEPTION

IV.1. *SHORT SELLING*: THE UNBEARABLE LIGHTNESS OF BEING DELEGATED POWERS

With its ruling in *Short selling* the Court has brought what the academic literature has defined as a “constitutional revolution” in the doctrine of delegation of powers.⁶⁶ The case was brought by the United Kingdom which claimed that: *i*) the discretionary powers granted to ESMA violate the *Meroni* doctrine;⁶⁷ *ii*) Art. 28 of Regulation 236/2012⁶⁸

⁶² In its Opinion 2/94, cit., para. 29 the Court has found that the flexibility clause, being a subsidiary means, cannot be used whether the Treaty confers to the Union an express or implied power to act.

⁶³ Opinion of AG Jääskinen, *Short selling*, cit., para. 34.

⁶⁴ *Ibid.*, para. 53.

⁶⁵ *Ibid.*, paras 87 and 90.

⁶⁶ D. ADAMSKI, *The ESMA doctrine: a constitutional revolution and the economics of delegation*, in *European Law Review*, 2014, p. 812 *et seq.*

⁶⁷ *Short selling*, cit., paras 28 to 34.

also violates the *Romano* doctrine, since the decisions that ESMA is empowered to take are generally applicable;⁶⁹ *iii*) the delegation also violates Arts 290 and 291 TFEU since agencies are not included among the beneficiaries of the delegation of supplementing and implementing powers;⁷⁰ *iv*) Art. 114 TFEU cannot be considered as an appropriate legal basis for the adoption of Regulation 236/2012 since it has no harmonizing effects.⁷¹ For the purpose of the present exposure, the analysis will proceed backwards, starting from the last of the pleas.

Supporting the applicant's plea, in his Opinion AG Jääskinen stressed the fact that Art. 28 of Regulation 236/2012, more than having any harmonizing outcome,⁷² had the effect of replacing national decision-making with EU-level decision-making through the creation of an emergency mechanism,⁷³ thus being incompatible with Art. 114 TFEU. Nonetheless, since ESMA's powers were considered to be necessary in order to achieve the aims of the internal market, the AG proposed to use Art. 352 TFEU as a legal basis.⁷⁴ The Court, on the contrary, recalling its previous ruling in *ENISA*, found that the purpose of the powers provided for in Art. 28 of Regulation 236/2012 satisfied the requirements laid down in Art. 114 TFEU.⁷⁵

As concerns the claim that the delegation of powers to ESMA is in breach of Arts 290 and 291 TFEU, it shall be recalled that these Arts do not contain any reference to agencies.⁷⁶ After acknowledging this lack of reference, notwithstanding AG Jääskinen found "particularly appropriate" the delegation of implementing powers on agencies, especially when complex technical assessments are required, considering that if Art. 291 TFEU was not to be given such an extensive interpretation, the other provisions of the Treaties referring to the acts and decisions of agencies would have been deprived of any content.⁷⁷ It seems that the AG interpreted the possibility of conferring powers to agencies as an implied power of the Union and then proposed an analogical interpretation of Art. 291 TFEU, suggesting that the conferral of implementing powers to agencies

⁶⁸ Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps Text with EEA relevance.

⁶⁹ *Short selling*, cit., paras 56 and 57.

⁷⁰ *Ibid.*, paras 69 and 70.

⁷¹ *Ibid.*, para. 90.

⁷² Opinion of AG Jääskinen, *Short selling*, cit., para. 52.

⁷³ *Ibid.*, para. 51.

⁷⁴ *Ibid.*, para. 55.

⁷⁵ *Short selling*, paras 116 and 117.

⁷⁶ The absence of EU agencies in Arts 290 and 291 TFEU has been defined as a "neglect" of agencies by Treaty reformers. See E. Vos, *EU agencies on the move: challenges ahead*, in *Swedish Institute for European Policy Studies*, 2018, p. 23.

⁷⁷ Opinion of AG Jääskinen, *Short selling*, cit., para. 87.

could have been considered as a “midway solution” between the exceptional delegation to the Commission or the Council and the ordinary entrustment of MS.⁷⁸

Moreover, AG Jääskinen considered that the powers vested in ESMA had not been conferred by an implementing act but rather by a legislative one and, thus, distinguished between the sub-delegation of implementing powers to agencies made by either the Commission or the Council from the conferral⁷⁹ of implementing powers to agencies made by the legislature.⁸⁰ From this analysis, it seems to arise a further distinction between, on one side, the sub-delegation and the conferral of implementing powers – that constitute the exercise of an implied power and an analogical application of Art. 291 TFEU to the case of agencies – and, on the other, the conferral of powers on the basis of Art. 114 TFEU, which lies instead on a broader interpretation of the legal basis.

The Court, however, avoided this distinction and, interestingly, held that the delegation of competences to ESMA shall be understood comprehensively, as an enchainment of subsequent delegations in the frame of a unique legislative will.⁸¹ It found that for the purpose of Arts 290 and 291 TFEU, the power conferred through Art. 28 of Regulation 236/2012 shall not be considered in itself, but in the context of all the powers already conferred on ESMA to entrust the agency of effective powers to safeguard the financial markets in some defined sectors of competences. By adopting that perspective, the conferral of powers to the agency cannot be regarded as undermining the rules governing delegation established in Arts 290 and 291 TFEU. ESMA is an agency of the Union created by the European legislator and to which its creator confers powers, do not delegate them. The fact that it is the comprehensiveness of the delegations to bring the Court to this conclusion, suggests that the element of differentiation between a situation of delegation of powers – subject to the discipline of Arts 290 and 291 TFEU – and the rather atypical situation of conferral of powers, consists in the evidence of a project of the legislator to build, through separate legal acts, a unique regulatory, supervisory and sanctioning asset of powers of which the agency is entrusted. More precisely, it consists in the *effet utile* of the powers vested in ESMA in order to preserve the functioning and integrity of the financial system of the Union.

⁷⁸ *Ibid.*, para. 86.

⁷⁹ *Ibid.*, para. 91. In order to sustain the existence – in EU law – of such a conferral of powers by the EU legislature, the AG made a parallelism with Art. 257 TFEU. He found that the power of instituting a special body with jurisdictional competences is a clear demonstration that the EU legislators can delegate powers that they could not exercise by themselves. Thus, in order not to be at odds with the principle of *nemo plus iuris ad alium transferre potest quam ipse habet*, this kind of empowerment must be a conferral of power and not a delegation. It may be noted that, unlike Art. 257 TFEU, there is no provision in the Treaties conferring to the EU legislature the same powers as concerns agencies.

⁸⁰ *Ibid.*, para. 90.

⁸¹ *Short selling*, cit., paras 84 to 86.

As concerns the applicability of *Romano*, the Court stated that it could not be considered as adding anything to the requirements already set in *Meroni*.⁸² The Court was not called to judge upon a possible infringement of the institutional balance, but merely on the nature of the measures that ESMA was allowed to enact. On that point the Court found that the *Romano* ruling was not to be read as prohibiting agencies from adopting measures of general application – since this possibility can now be found in the Treaties at Arts 263 and 277 TFEU – but as merely prescribing that the discretion accorded to them shall be clearly circumscribed by the legislator.⁸³

Examining the legality of the delegation of powers to ESMA, the Court was called to apply the criteria set out by the *Meroni* doctrine. In his Opinion, AG Jääskinen first stated that some of the principles set out in *Meroni* had been overruled by the Lisbon Treaty. Notably, the fact that the acts of the agencies are now attackable before the Court and that agencies can now be vested with the power of taking binding decisions.⁸⁴ Subsequently, the AG noted that the *Meroni* doctrine, as concerns the *nemo plus iuris* principle and the necessity to sufficiently define the delegated powers in order to avoid their arbitrary exercise, was still applicable to the sub-delegation of implementing powers to agencies.⁸⁵ He then found that the one at issue was not a sub-delegation, but rather a direct conferral of implementing powers by the legislature subtracted from the restriction set out in *Meroni*.⁸⁶ This notwithstanding, he finally concluded – not without a sort of astonishment – that the principles expressed in the *Meroni* ruling were to be considered as being still applicable to evaluate the legality of the conferral.⁸⁷

Interestingly, even the Court, while finding that the “conferral of powers” to ESMA was not regulated by Arts 290 and 291 TFEU,⁸⁸ it nonetheless applied the criteria of *Meroni* to test the legality of the powers vested in ESMA by Art. 28 of Regulation 236/12. The Court started its reasoning by highlighting the substantial difference between the bodies of private law at issue in the *Meroni* ruling and ESMA, a European Union entity, created by the EU legislature.⁸⁹ Notwithstanding this prelude, that could have also

⁸² *Ibid.*, paras 65 and 66.

⁸³ This flattening of *Romano* on *Meroni* operated by the Court does not take account of the fact that in the *Romano* ruling, the precedent of *Meroni* was not even recalled. Moreover, as already mentioned, the principle of the institutional balance was of fundamental importance in the *Romano* ruling and was framed in different terms than *Meroni*. Thus, the statement of the Court that *Romano* cannot impose further conditions to the delegation as those set out in *Meroni* can be seen as a rushed conclusion, merely confined to the kind of measures that can be delegated and not excluding the review of the impact that the power conferred may have on the EU inter-institutional relationships.

⁸⁴ Opinion of AG Jääskinen, *Short selling*, cit., paras 73 and 74.

⁸⁵ *Ibid.*, para. 88.

⁸⁶ *Ibid.*, paras 90 and 91.

⁸⁷ *Ibid.*, para. 92.

⁸⁸ *Short selling*, cit., para. 83.

⁸⁹ *Ibid.*, para. 43.

brought to the declaration of inapplicability of the doctrine *tout court*, the Court proceeded by applying the *Meroni* test to the powers conferred to ESMA.

Notably, after recalling the fundamental condition set out by its *Meroni* ruling, viz the fact that the delegation of clearly defined executive powers is permitted since they are amenable of “strict judicial review” provided that their exercise can be evaluated “in the light of the objective criteria determined by the delegating authority”,⁹⁰ the Court found that the discretion attributed to ESMA was to be considered as sufficiently circumscribed by the legislator for three reasons. First, because ESMA’s powers could have only been exercised in well-defined circumstances and to specifically address, “a threat to the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union”.⁹¹ Secondly, because ESMA had the duty to balance the benefits of its action with the possible negative effects.⁹² Lastly, because ESMA was required to consult other competent authorities and to periodically review its measure, thus been limited in the exercise of its discretion.⁹³

It should be noted that the consultation requirement does not provide the consulted entities with any veto power and that the temporary nature of the measure does not affect its discretionary nature. Furthermore, if one also looks at the broadness of the criterion of the threat to the orderly functioning of the financial markets and to the fact that the balance made by ESMA is also extremely technical and based on scientific evidence, it becomes clear that the Court has substantially allowed the delegation of discretionary powers to agencies, or at least it has reinterpreted the concept of discretionary measures as defined in *Meroni*. Moreover, the Court did not take account of the fact that the powers conferred on agencies necessarily embrace political issues⁹⁴ and that the General Court had expressly affirmed in its previous case law that where an EU authority is required to make a “complex assessment, it enjoys a wide measure of discretion, the exercise of which is subject to limited review”.⁹⁵

It would have been an interesting logical exercise to reconcile the requirement expressed by the Court that powers delegated to agencies must be clearly delineated with the finding of the General Court that agencies have “a broad discretion in a sphere which entails *political, economic and social choices*”.⁹⁶ At any rate, it seems that, even

⁹⁰ *Ibid.*, para. 41.

⁹¹ *Ibid.*, para. 46.

⁹² *Ibid.*, para. 47.

⁹³ *Ibid.*, para. 50.

⁹⁴ To the extent that some authors have affirmed that “the traditional depoliticized agency model seems thus in the EU to convert into a model of politicized depoliticization”. M. EVERSON, C. MONDA, E. VOS, *What is the Future of European Agencies?*, in M. EVERSON, C. MONDA, E. VOS (eds), *European Agencies in Between Institutions and Member States*, Alphen aan den Rijn: Wolters Kluwer, 2014, p. 236.

⁹⁵ Court of First Instance, judgment of 19 November 2008, case T-187/06, *Schröder v. CPVO*, para. 59.

⁹⁶ General Court, judgment of 7 March 2013, case T-96/10, *Rütgers Germany and others v. ECHA*, para. 134 (emphasis added).

though the empowerment of EU agencies lies in a constitutional grey area between the conferral and the delegation of powers, nonetheless the criteria defining the boundaries to the exercise of discretionary powers set out in *Meroni* – even though reinterpreted – remain good law.⁹⁷

IV.2. THE CREATION OF AGENCIES AS AN EXCEPTIONAL MEASURE DICTATED BY A STATE OF NECESSITY

Among scholars, some doubted about the relevance of *Meroni* for EU agencies, since agencification was not a process of delegation, but rather one of Europeanisation of administrative powers.⁹⁸ Even though one may undoubtedly agree from a political perspective, it is still necessary to wear the lens of the jurist in order to see under what legal conditions, such process of Europeanisation has taken place. A doctrine of the living constitution would allow for constitutional praxis – even *praeter legem* – as mirroring the development of the society over the static letter of the constitutional text. However, the idea of an institutional practice *contra* or *praeter legem* has been clearly rejected by the Court in the judgments *Refugee status*⁹⁹ and *Beef labelling*.¹⁰⁰ These practices, defined by the Court as “derived legal basis”, were considered as an illegal means for the adoption of measures, since their use would have had the effect of altering the decision-making procedure provided by the Treaties. Hence, the process of agencification cannot formally rely on such a safe harbor.

Yet a way must be found to reconnect the application of the *Meroni* doctrine to the conferral of powers, the discretion of the legislator with the exercise of an implied power, the exercise of a material competence with a decision that has an institutional character. As Italians refrain from believing in the possibility of bridging Sicily with the mainland, but still the fascination of such an unthinkable infrastructure bewilders even the most skeptical, so the building of an intellectual bridge may here be proposed between all these antipodes.

Along the beams of emergency, this bridge may be built. Some authors have proposed that the delegation of powers may be possible even in the absence of an explicit

⁹⁷ Cf. M. SIMONCINI, *Administrative Regulation Beyond the Non-Delegation Doctrine. A Study on EU Agencies*, Oxford: Hart, 2018, pp. 33-40. M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 248 has defined this *Meroni* doctrine – as results after the *Short selling* ruling – as the “EU *Meroni* doctrine”, juxtaposed to the “ECSC *Meroni* doctrine”.

⁹⁸ R. DEHOUSSE, *Misfits: EU Law and the Transformation of European Governance*, in C. JOERGES, R. DEHOUSSE (eds), *Good Governance in Europe's Integrated Market*, Oxford: Oxford University Press, 2001, p. 221.

⁹⁹ Court of Justice, judgment of 6 May 2008, case C-133/06, *European Parliament v. Council (Refugee status)*, paras 56-57.

¹⁰⁰ Court of Justice, judgment 13 December 2001, case C-93/00, *European Parliament v. Council (Beef labelling)*, para. 42.

provision for doing so “under the pressures of practical necessity”.¹⁰¹ This merely expresses the ancient principle of law – dated back to the *Decretum Gratiani* – “*si propter necessitate aliquid fit, illud licite fit: quia quod non est licitum in legem, necessitas facit licitum. Item necessitas legem non habet*”.¹⁰² The state of exception cannot be shaped in juridical terms: it is at the border line between politics and law,¹⁰³ it presents itself as the legal shape of what cannot be legally shaped.

The fact that the rulings in *Meroni* and *Romano* are dated far back in the history of the European integration does not only give to the analysis the fascination of a historical reconstruction. Since then, the Union has changed profoundly: its competences have probably widened above the most flourishing neo-functionalist expectations. Together with competences, it has grown the regulatory apparatus of the EU as well and its governance framework.

In its *Romano* ruling the Court prohibited the delegation of the power to adopt acts having the force of law.¹⁰⁴ What was unpredictable back at the time was that the Union would have faced a time when the adoption of acts of general application would have become indispensable to carry out the tasks conferred to the Union itself. As noted by the academic literature, institutional experimentation is needed for the Union to evolve and find its optimum structures of government.¹⁰⁵

Hence, regulatory policies, through the design of non-legal, indirect and informal means, have found their way out of the legal constraints imposed by the Court.¹⁰⁶ When the *Short selling* case was submitted to the judges of Luxemburg, some authors legitimately fearing about the improbability of an extensive interpretation of Arts 290 and 291 TFEU as to legitimize the delegation of decision-making powers to ESMA, stated that the case may have resulted in a “foolish judicial disregard for the vital need to ensure continuing financial stability within Europe”.¹⁰⁷ The Court was sensible to these fears and, in its *Short selling* ruling, expressly affirmed that: “by the expression ‘measures of

¹⁰¹ Cf. M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 236.

¹⁰² As reported by G. AGAMBEN, *Stato di eccezione*, Torino: Bollati Boringhieri, 2003, p. 35.

¹⁰³ *Ibid.*, p. 10. The author defines the state of exception as a “land of nobody between the juridical order and the political fact”. On the contrary, Santi Romano considered necessity as the primary source of all the law and of the State itself: “[i]f necessity has no law, it makes itself the law: it is an authentic source of law. It is the primordial source of the whole law”. S. ROMANO, *Sui decreti-legge e lo stato di assedio in occasione del terremoto di Messina e Reggio-Calabria*, in *Rivista di diritto costituzionale e amministrativo*, 1909, p. 260.

¹⁰⁴ *Romano*, cit., para. 20.

¹⁰⁵ T. TRIDIMAS, *Financial Supervision and Agency Power: Reflections on ESMA*, in N.N. SHUIBHNE, L.W. GORMLEY (eds), *From Single Market to Economic Union*, Oxford: Oxford University Press, 2012, p. 66.

¹⁰⁶ On the use of *soft law* by agencies as means to get around the limits set out by the jurisprudence of the Court concerning the adoption of measures having the force of law, see M. CHAMON, *Le recours à la soft law comme moyen d'éviter les obstacles constitutionnels au développement des agences de l'UE*, in *Revue de l'Union européenne*, 2014, p. 152.

¹⁰⁷ M. EVERSON, *European Agencies: Barely Legal?*, in M. EVERSON, C. MONDA, E. VOS (eds), *European Agencies in between Institutions and Member States*, Alphen aan den Rijn: Kluwer Law International, 2014, p. 50.

approximation' the authors of the FEU Treaty intended to confer on the Union legislature, depending on the general context and the specific circumstances of the matter to be harmonized, discretion as regards the most appropriate method of harmonization for achieving the desired result, especially in fields with complex technical features".¹⁰⁸

This statement went beyond merely recalling the spread view that regulating the markets needs a powerful and efficient regulatory framework. The range of that statement is better understood in the light of the fact, found by the Court, that Art. 28 of Regulation 236/2012 does not fall within the field of application of Arts 290 and 291 TFEU. It rather shall be considered as "forming part of a series of rules designed to endow the competent national authorities and ESMA with powers of intervention to cope with adverse developments which threaten financial stability within the Union and market confidence".¹⁰⁹

What is most surprising is that the Court itself qualifies this set of rules empowering national authorities as "emergency rules".¹¹⁰ Even more explicitly, AG Jääskinen stated that the powers conferred on ESMA had the effect of creating an "EU level emergency decision-making mechanism".¹¹¹ He argued that it is the need for complex technical assessments to implement EU measures that justifies – and has always allowed for – "derogating from general principles on implementation in the Treaty".¹¹² All these elements have brought some authors to conclude that "this is nothing less than an emergency doctrine".¹¹³

The emergency realm of the rules conferring powers on ESMA is even more blatant when considered that the agency has the power of substituting itself to national authorities in cases of inaction. If the decision-making power attributed to ESMA was, as declared by the Court, merely a consequence of its expertise and technical authority, then it would have not needed authoritative powers.¹¹⁴ What justifies the attribution of such powers is the time constraint in intervening regulating the financial markets in situations where any hour may be fundamental to avoid losses and to safeguard the integrity and stability of the financial markets. In other words, it seems here fitting the Latin formula *e facto oritur ius*: in the state of exception the fact is converted into law and, at the same time, also the law is suspended and obliterated in facts.¹¹⁵

¹⁰⁸ *Short selling*, cit., para. 102.

¹⁰⁹ *Ibid.*, para. 85.

¹¹⁰ *Ibid.*, para. 109.

¹¹¹ Opinion of AG Jääskinen, *Short selling*, cit., para. 51.

¹¹² *Ibid.*, para. 87.

¹¹³ C. JOERGES, *Integration Through Law and the Crisis of Law*, in D. CHALMERS, M. JACHTENFUCHS, C. JOERGES (eds), *The End of the Eurocrats' Dream*, Cambridge: Cambridge University Press, 2016, p. 311.

¹¹⁴ *Ibid.*

¹¹⁵ G. AGAMBEN, *Stato di eccezione*, cit., p. 40.

Once the lens through which reading the agencification process are set, the technique of an emergency legislation becomes more and more evident. As the academic literature highlighted,

“agencies have been particularly resorted to in responding to crises, such as the ‘mad cow’ (Bovine Spongiform Encephalopathy – BSE) crisis and the oil tanker Erika crisis. The financial crisis led to the creation of another three supervisory authorities: the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA) and another agency, the Single Resolution Board (SRB). And, in relation to the current refugee crisis, the EU transformed the European Agency for the Management of Operational Cooperation at the External Borders (Frontex) into another, more powerful agency: the European Border and Coast Guard or the new Frontex. In this crisis, the role of the European Police Office (Europol) has also gained importance”.¹¹⁶

Even ENISA, as recognized by the Court in the homonymous case, was established as an answer to the fact that “the Community legislature was confronted with an area in which technology is being implemented which is not only complex but also developing rapidly. [...] it was foreseeable that the transposition and application of the Framework Directive and the specific directives would lead to differences as between the Member States”.¹¹⁷

Since the need for administrative experimentation is indeed necessary, it would be irrational for the legal order to renounce its own survival in the name of the respect of the pre-established law. That would be the case if, considering the institutional frame of the EU as fixed and unchangeable, an institutional deficit would be let arising as a consequence of the expansion of the tasks assigned to the EU not accompanied by a proportionate remodeling of its institutional capacities.¹¹⁸ This appears to be in line with the *Short selling* doctrine with which the Court has allowed the delegation – or at least substantially amended the definition – of discretionary powers. The need of having a body able to effectively intervene, in fact, would be irremediably undermined if that entity could not exercise a certain latitude of discretion, thus putting into discussion the foundation itself of the delegation.

The ability of a legal order to create solutions – beyond the codified law – necessary to its survival is an unwritten law that does not need to be explicitly codified. The prob-

¹¹⁶ E. Vos, *EU agencies on the move*, cit., p. 13. Cf. also M. SIMONCINI, *Administrative Regulation*, cit., p. 51, according to whom crises have acted as a driving force for the establishment of EU agencies.

¹¹⁷ ENISA, cit., para. 61.

¹¹⁸ Cf. M. EVERSON, G. MAJONE, *Réforme institutionnelle: agences indépendantes, surveillance, coordination et contrôle procédural*, in O. DE SCHUTTER, N. LEBESSIS, J. PATERSON (eds), *Gouvernance dans l'Union européenne*, Luxembourg: Office des publications officielles de la Communauté européenne, 2001, p. 153. Similarly, see also E. NOËL, J. AMPHOUX, *Les Commissions*, in W.J. GANSHOF VAN DER MEERSCH, M. WAELBROECK, L. PLOUVIER, G. VANDERSLEBEN (eds), *Droit des Communautés européennes*, Brussels: Larcier, 1969, p. 186.

lem is the normalization of a state of necessity that is at odds, by definition, with the necessity justifying the exceptional measures. The inability of the EU to codify the praxis of agencies' establishment cannot be regarded as a justification. Not to have a legally binding standardized model for establishing and empowering EU agencies¹¹⁹ corresponds to the political will of the EU institutions. Political philosophers maintain that the creation of permanent states of exception has become an essential practice of modern democratic states.¹²⁰ The state of exception is in fact a means through which the law includes in itself the "living".¹²¹ Since it became the rule, it shifts from an exceptional measure into a technique of government.¹²²

So far as agencies are concerned, it seems that it is the necessity – *rectius* the emergency – of granting an effective governance of the Union policies that has constituted the legal basis for their establishment. Necessity, in fact, is a subjective concept related to the objective sought: it is for that reason that it cannot be considered as a source of law *per se*, but rather as conversion of a political fact into law.¹²³

IV.3. NORMALIZING THE STATE OF EXCEPTION: DRAWBACKS OF THE LACK OF REGULATION

In the mid-1930s Carl Schmitt prophesied the irreversible crisis of parliamentary democracy.¹²⁴ Already after the First World War, he noted a general trend among the major industrialized countries characterized by the progressive suppression of the distinction between the legislative and the executive powers. This trend was justified in view of simplifying the legislative process and keeping legislation in harmony with the constant changes of the society. The constitutional evolution after the Second World War has been characterized by the perpetual attempt of reconciling delegation and parliamentary democracy. This trend has resulted in a new conception of democratic legitimization, not rooted anymore in direct representation, but rather in a system of indirect control over the administrative sphere by the executives who are in turn responsible before Parliaments, com-

¹¹⁹ It shall be noted that the 2012 Common Approach on Decentralised Agencies merely constitutes a non-binding instrument. For an analysis of the Common Approach's tenuous contribution to the agency model see M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 97.

¹²⁰ G. AGAMBEN, *Stato di eccezione*, cit., p. 11.

¹²¹ *Ibid.*, p. 12.

¹²² *Ibid.*, p. 16.

¹²³ *Ibid.*, p. 41. For an interesting reconstruction of the establishment of the EMU as an emergency measure see C. JOERGES, *Integration Through Law*, cit., pp. 317-322.

¹²⁴ C. SCHMITT, *Une étude de droit constitutionnel comparé. L'évolution récente du problème des délégations législatives*, in *Introduction à l'étude du droit comparé. Recueil d'études en l'honneur d'Edouard Lambert*, translated by P. Roubier and H. Mankiewicz, Paris: Sirey, 1938, p. 200.

plemented by forms of direct participation and control by independent courts.¹²⁵ One of the main features of the state of exception, in fact, is the abolition of the separation of powers which becomes an ordinary way of government.¹²⁶

It appears that regulatory powers, in order to meet the constant changes of society, must be depoliticized, subtracted to the political bargaining, viz subtracted from the discussion around the most fundamental issues concerning their exercise. It would be in fact misleading to understand this process of depoliticization as the creation of a reign of technocracy where the political dimension is absent. As already noted, the sharp distinction between political decision-making and technocratic activities is merely artificial,¹²⁷ to the extent that some authors have identified an agency model of “politicized depoliticization”.¹²⁸ The meaning of such a depoliticization is rather the substitution of political discourse with technical and scientific information: in other words, agencified and depoliticized regulatory powers are not apolitical, but rather undemocratic.¹²⁹ What is absent is not the conflictual dimension of the political decision but rather the entrustment of its resolution to the majoritarian opinion forming the public will. As it has been noted, in the post-crisis economic governance, “democracy has been marginalized by a rhetoric of emergency, existential threats and economic necessities, even when the issues involve deep distributional conflicts”.¹³⁰ What can be observed, thus, is a trend of depoliticization of democracy, by subtracting the decision-making from the direct influence of elected entities, subjected to the ever-changing will of the people.

This process is sustained by a felt need for credibility and long-term stability that binds the political actors through rules and relegates the control of the technical measures to independent Courts. While judicial control is circumscribed to the respect of the procedure and the manifest error of reasoning,¹³¹ thus not being conceivable as an

¹²⁵ P. LINDSETH, *Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity*, in C. JOERGES, R. DEHOUSSE (eds), *Good Governance in Europe's Integrated Market*, Oxford: Oxford University Press, 2001, p. 145.

¹²⁶ G. AGAMBEN, *Stato di eccezione*, cit., p. 16.

¹²⁷ Cf. M. EVERSON, C. JOERGES, *Re-conceptualising Europeanisation as a public law of collisions: comitology, agencies and an interactive public adjudication*, in H.C.H. HOFMANN, A.H. TÜRK (eds), *EU Administrative Governance*, Cheltenham: Edward Elgar Publishing, 2006, p. 530.

¹²⁸ M. EVERSON, C. MONDA, E. VOS, *European Agencies*, cit., p. 236.

¹²⁹ Even though sceptical as the most appropriate meaning to assign to the word “democratic”, cf. M. EVERSON, C. JOERGES, *Re-conceptualising*, cit., p. 531.

¹³⁰ J.P. OLSEN, *Democratic accountability and the changing European political order*, in *European Law Journal*, 2018, p. 90.

¹³¹ In the *Artogodan* ruling, for example, it was clearly stated that: “the Court cannot substitute its own assessment for that of the [agency]. It is only the proper functioning of the [agency], the internal consistency of the opinion and the statement of reasons contained therein which are subject to judicial review”. See the Court of first instance, judgement of 26 November 2002, joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00, *Artogodan GmbH and Others v Commission of the European Communities*, para. 200.

alternative to a control on the merit of the agencies' action,¹³² the legitimacy of the technical decision is granted as far as it satisfies the regulatory demands of the electorate.¹³³ In this process, the core of legitimacy has in fact shifted from popular elections to the efficiency of the action undertaken, thus turning entities with functional expertise into a milestone of the legitimate institutional architecture.¹³⁴ Moreover, as noted by the academic literature, it is not clear at all how democratic accountability may ever be granted, "when governance is embedded in networks across levels of government, institutional spheres, and public-private realms and based on informal partnership and dialogue rather than hierarchical command and formal control relationships".¹³⁵

In this context, a mistake by the agency or a softening of the emergency narrative are sufficient for agencies not to be perceived anymore as legitimate regulatory actors. On the contrary, a clear regulatory framework would both make their action more transparent and bolster their legitimacy.

Furthermore, the unregulated process of agencification based on the normalization of the state of exception as a technique of governance, has also the effect of altering the institutional balance. Delegation of powers to EU agencies, in fact, has a strong impact on the distribution of powers between the EU centralized level of administration and the decentralized national one. In that sense, it is emblematic that some authors have defined agencies as "Trojan horses"¹³⁶ in order to describe the process of gradual concentration of executive powers through agencification. In other words, this gradual concentration of executive powers has the effect of altering what has been defined as the EU executive federalism, where Member States should be entrusted of the enforcement of EU law.¹³⁷ From a different perspective, it has been argued that the process of agencification makes the principle of subsidiarity obsolete since Member States, by participating in the organs of the agencies, realize a joint enforcement of EU law that scatters any juxtaposition between the Union and the Member States as legitimized executive entities.¹³⁸ This incertitude with regard to the role of agencies with respect to the principle of subsidiarity, bolstered by an unregulated process of agencification that does not allow to collocate agencies in the institutional framework of the Union, contributes hindering the legitimacy of agencies as a model of governance.

¹³² For an analysis of the different means of *ex ante*, *ex post* and ongoing control, see E. Vos, *EU agencies on the move*, cit., p. 42.

¹³³ G. MAJONE, *Regulating Europe*, London: Routledge, 1996, p. 299.

¹³⁴ Cf. J. P. OLSEN, *Democratic accountability*, cit., p. 91.

¹³⁵ *Ibid.*, p. 91.

¹³⁶ M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 115.

¹³⁷ N. PETERSEN, *Democracy Concept of the European Union: Coherent Constitutional Principle or Prosaic Declaration of Intent*, in *German Law Journal*, 2005, p. 1520.

¹³⁸ See J. ALBERTI, *Le agenzie dell'Unione europea*, cit., p. 141.

Moreover, the absence of a standardized, binding regulatory framework for the establishment and empowerment of agencies undermines the equal representation of both the EU institutions and the Member States. Since the structure and concrete functioning of each agency is decided following an *ad hoc* procedure, it becomes the product of the contingent political bargaining, and the result of conflicting political interests that impede the creation of a transparent agency model.¹³⁹ In particular, the representation of the Member States will be assured in order to foster the process of integration between the national and the EU level of administration and the development of mutual trust between national competent authorities and between the latter and the centralized level. On the contrary, an adequate representation of the EU institutions would be beneficial both to bolster the democratic and political accountability of agencies and render effective the supervision by the principal(s) over the exercise of the delegated powers by the agent. A standardized agency model would in fact allow to provide adequate information to the delegating authorities that would enable them to effectively monitor the activities of the agencies and concretely have the possibility of exercising their role of setting the political address that should guide the technical activity of the agencies.

To sum up, the lack of a regulatory framework for agencies ultimately hinders their legitimacy, confining them in a constitutional grey area, a land of nobody between a general legislative competence and the principle of conferral.

V. CONCLUSIONS

As emerged by this analysis of the process of agencification, many uncertainties still surround the establishment and empowerment of agencies. The legal bases upon which powers have been vested in agencies are made of an invisible fabric, resembling the notorious clothes of the Emperor that only the foolish cannot see. While the procession of agencification goes on, the legislator parades exhibiting the legal bases clothing its action, before a plethora of observers going along with the pretence. Yet an innocent cry echoes from the depth of the analysis: The Emperor is not wearing anything at all. The procession, however, must go on.

Metaphors aside, uncertainties arise from the fact that a doctrine of implied powers does not seem to be applicable to justify a process of reform of the institutional framework of the Union and, even if it were applicable, that would be at odds with the use of Art. 352 TFEU as a legal basis. This notwithstanding the Court has not been clear in stating whether the specific sectoral legal bases can be broadly interpreted as to include the powers of establishing and empowering agencies. Moreover, it is still not even clear how a legal basis empowering the Union to exercise a material competence could be

¹³⁹ Cf. M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 52.

interpreted as including the power of adopting measures having an institutional character, without considering such power as implied.

As concerns the actual legislative practice, the use of the flexibility clause as a legal basis for the establishment of agencies is only limited by the self-restraint of the institutions. It is exemplary the fact that as soon as it was envisaged the establishment of agencies whose powers did not find a corresponding legal basis in the Treaties, Art. 352 TFEU has been readily dusted off.¹⁴⁰ As it has been shown, recourse to the flexibility clause is not only at odds with the application of the doctrine of implied powers to the establishment of agencies, but it also exacerbates the legitimacy deficiencies of agencies by reducing the role of the European Parliament.

Even though the *Short selling* ruling has ultimately legitimated the delegation of discretionary powers to agencies, the alleged declaration of a state of emergency justifying the taking of exceptional measures cannot overcome the lack of a specific provision within the Treaties and shall be considered – in conformity with its emergency character – as a merely transitory solution.¹⁴¹ This permanent transitory and experimental position, in which lies EU agencies, undermines the transparency of their acts and hinders their legitimacy as well as the perceived democratic legitimacy of the whole Union.¹⁴²

A clear regulatory framework, set by primary law, providing for a legal basis for the establishment and empowerment of agencies, as well as the fundamental general principles concerning their functioning and the delegation of powers, would indeed be needed.¹⁴³ This could define the exceptional character of the decision of establishing an agency by requiring, for example, a duty of motivation on grounds of necessity, specifically considering why it is not possible to achieve the same objectives by delegating powers to the Commission or to the Council. Recourse to the ordinary legislative procedure may be rendered mandatory as well as consultation of national authorities: this would both guarantee the involvement of the European Parliament and foster the integration of national executive bodies through the process of agencification. Agencies' accountability could be bolstered by an express duty of periodical information to the European Parliament, while the latter's power of control would be strengthened if accompanied by the possibility to propose the withdrawal or the redefinition of the powers conferred.

Such a regulation would not only have the effect of assigning a legal land – within the institutional design of the EU – to agencies, but it would also and foremost enhance their

¹⁴⁰ Notably FRA and GSA, see *supra*, III.1.

¹⁴¹ European Parliamentary Research Service, *EU Agencies, Common Approach and Parliamentary Scrutiny*, 2018, p. 70, available *online*.

¹⁴² Cf. M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 52.

¹⁴³ The political debate has known several attempts of introducing a specific legal basis for agencies. None of them, however, ever succeeded in reaching the necessary political consensus. See M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., pp. 372-381. The author offers a complete review of the proposals of reform that have been advanced by both politicians and academics.

accountability and legitimacy. Within the frame of a regulation, in fact, the possibility for economic and political interests to be disguised as scientific truths would be rendered more difficult.¹⁴⁴ A legislative guidance would, furthermore, tear the veil of mystery surrounding agencies and elevate them to a status of legitimate creatures of the Treaties.

On the contrary, at the present stage, it is only possible to apologize for the process of agencification either by trying to make it fit within the conferred powers, by broadly interpreting the legal bases offered by the Treaties, either by relying on an extended version of the doctrine of implied powers or, as a last instance, by relying on a doctrine of emergency where the facts are converted into law. While awaiting for the next Treaty reform, the juridical hermeneutics, powerless before the profound mutation of the modern democratic societies, cannot do but unveiling the inconsistencies of the legislative practices and of the jurisprudence, with the hope of inspiring the future trends and the wish that, meanwhile, the “perfection-seeking” dynamics of European law¹⁴⁵ may permeate the process of agencification.¹⁴⁶

¹⁴⁴ Cf. R. DEHOUSSE, *Misfits*, cit., p. 223.

¹⁴⁵ J. BOMHOFF, *Perfectionism in European Law*, in *Cambridge Yearbook of European Legal Studies*, 2012, p. 75.

¹⁴⁶ Cf. M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 61.



INSIGHTS

SPECIAL SECTION – WHAT'S IN A NAME?

THE *PSAGOT* JUDGMENT AND QUESTIONS OF LABELLING OF SETTLEMENT PRODUCTS

THE CJEU'S JUDGMENT IN *ORGANISATION JUIVE EUROPÉENNE AND VIGNOLE PSAGOT*: SOME INTRODUCTORY REMARKS

EVA KASSOTI* AND STEFANO SALUZZO**

ABSTRACT: In *Psagot* (judgment of 12 November 2019, case C-363/18, *Organisation juive européenne and Vignoble Psagot* [GC]), the CJEU was asked whether foodstuffs originating in a territory occupied by Israel must, under EU law, bear an indication to the effect that they come from an “Israeli settlement”. The case revolved mainly around the interpretation of Arts 9, para. 1, let. i), and 26, para. 2, let. a), of Regulation 1169/2011 on the provision of food information to consumers, although it entailed a number of questions regarding the relevance of international law for the European Union. The aim of this Special Section is to analyse, from a variety of angles, the reasoning of the Court of justice in the recent *Psagot* case and the implications deriving from it for both the EU and the international legal order. The Special Section is composed of three contributions. The first addresses the interpretation of EU consumer law and labelling regulations and critically analyses the Court's unqualified inclusion of international law considerations in the broader concept of “ethical considerations” that may influence consumers' purchasing choices. The second focuses on the consistency of the Court's decision with its previous case-law on occupied territories and the characterization of the Israeli settlements under international law. The third contribution analyses the relevance of the international law principle of non-recognition for the *Psagot* case and its relationship with the duty of the EU to observe international law.

KEYWORDS: EU consumer law – labelling – ethical considerations – occupied territories – international humanitarian law – duty of non-recognition.

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I. INTRODUCTION

The aim of this Special Section is to analyse, from a variety of angles, the reasoning of the Court of Justice of the European Union in the recent *Psagot* case and the implications deriving from it for both the EU and the international legal order¹.

Over the past few years, the CJEU has heard an increasing number of cases involving questions pertaining to trade with occupied territories. In 2016 in the context of the *Front Polisario* case² and in 2018 in the context of the *Western Sahara Campaign UK* case,³ the Court was called upon to rule on the territorial scope of the EU-Morocco Association⁴ and Liberalization⁵ agreements and on the territorial scope of the EU-Morocco Fisheries Partnership Agreement⁶ as well as of the 2013 Fisheries Protocol⁷ respectively. These judgments have been criticised in the literature mainly because of the Court's selective and artificial reliance on international law.⁸ It has been claimed that, although purportedly relying on international law, upon closer scrutiny, the CJEU applied principles of international law without taking into account how these principles are understood and applied in in-

¹ Court of Justice, judgment of 12 November 2019, case C-363/18, *Organisation juive européenne and Vignoble Psagot* [GC] (hereinafter, *Psagot*).

² Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC].

³ Court of Justice, judgment of 27 February 2018, case C-266/16, *Western Sahara Campaign UK* [GC].

⁴ Euro-Mediterranean Agreement of 26 February 1996 establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (EU-Morocco Association Agreement).

⁵ Agreement of 13 December 2010 in the form of an Exchange of Letters between the European Community and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 of and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (Liberalization Agreement).

⁶ Fisheries Partnership Agreement of 28 February 2007 between the European Community and the Kingdom of Morocco.

⁷ Council Decision 2013/785/EU of 16 December 2013 on the conclusion, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (2013 Fisheries Protocol).

⁸ For an overview see E. KASSOTI, *The EU and Western Sahara: An Assessment*, in *European Law Review*, 2018, p. 751 *et seq.* See *contra* E. CANNIZZARO, *In Defence of Front Polisario: The ECJ as a global jus cogens maker*, in *Common Market Law Review*, 2018, p. 569 *et seq.* See also P. HILPOLD, "Self-determination at the European Courts: The Front Polisario Case" or "The Unintended Awakening of a Giant", in *European Papers*, Vol. 2, 2017, No. 3, www.europeanpapers.eu, p. 907 *et seq.*; A. EL OUALI, *L'Union Européenne et la question du Sahara: entre la reconnaissance de la souveraineté du Maroc et les errements de la justice européenne*, in *European Papers*, Vol. 2, 2017, No. 3, www.europeanpapers.eu, p. 923 *et seq.*; E. MILANO, *Front Polisario and the Exploitation of Natural Resources by the Administrative Power*, in *European Papers*, Vol. 2, 2017, No. 3, www.europeanpapers.eu, p. 953 *et seq.*; A. RASI, *Front Polisario: A Step Forward in Judicial Review of International Agreements by the Court of Justice?*, in *European Papers*, Vol. 2, 2017, No. 3, www.europeanpapers.eu, p. 967 *et seq.*

ternational practice.⁹ According to this line of argumentation, the Court simply “instrumentalised” international law in order to avoid pronouncing on the politically sensitive question of Moroccan sovereignty over Western Sahara and, thus, by extension, on the repercussions of the EU’s policy and practice towards Western Sahara.¹⁰

Apart from the relevant jurisprudence of the CJEU, there have been some noteworthy developments regarding trade with occupied territories at the national level too. The Irish Control of Economic Activity Bill is a case in point. The Control of Economic Activity Bill¹¹ was introduced to the Seanad (Ireland’s upper house) in early 2018. The Bill essentially seeks to make the importation or sale of goods produced in settlements established in occupied territories, the provision of certain services, as well as the extraction of resources from an occupied territory a criminal offence.¹² Should the Bill become law, Ireland will be the first EU Member State to criminalise trade with settlements. The objective of the Bill, as it is expressly stated therein, is to comply with Ireland’s obligations under the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War and under customary international humanitarian law.¹³ At the same time, the main criticism levelled against the Bill is that it constitutes a measure that restricts trade unilaterally – thereby allegedly violating Ireland’s obligations under EU law.¹⁴ More particularly, the Irish government opposes the adoption of the Bill on the grounds of its alleged incompatibility with EU law which will – as the argument goes – expose Ireland to legal action not only by the European Commission, but also by any private parties claiming to have been adversely affected thereby.¹⁵ As a result, it is unlikely that the Bill will be enacted as law. The example of the Irish Bill illustrates the difficulties of reconciling a unilateral domestic measure purporting to secure compliance with a Member State’s obligations under inter-

⁹ E. KASSOTI, *The ECJ and the Art of Treaty Interpretation: Western Sahara Campaign UK*, in *Common Market Law Review*, 2019, p. 235. J. ODERMATT, *Council of the European Union v. Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario) – Case C-104/16 P*, in *American Journal of International Law*, 2017, p. 737.

¹⁰ E. KASSOTI, *The Council v. Front Polisario Case: The Court of Justice’s Selective Reliance on International Rules on Treaty Interpretation*, in *European Papers*, Vol. 2, 2017, No 1, www.europeanpapers.eu, pp. 30-40. J. ODERMATT, *Council of the European Union v. Front populaire*, cit., pp. 736-738.

¹¹ Control of Economic Activity (Occupied Territories) Bill 2018, introduced by Senators Frances Black, Alice-Mary Higgins, Lynn Ruace, Colette Keheller, John G. Dolan, Grace O’Sullivan, and David Norris, 24 January 2018, available at data.oireachtas.ie.

¹² *Ibid.*, p. 5.

¹³ *Ibid.*, p. 3.

¹⁴ Statement by the Minister of State at the Department of Foreign Affairs and Trade (Deputy Helen McEntee), Debate on the Control of Economic Activity Bill: Report and Final Stages, Seanad Éireann Debate, 5 December 2018, available at www.oireachtas.ie.

¹⁵ *Ibid.*; see also Statement by the Minister of State at the Department of Foreign Affairs and Trade (Deputy Simon Coveney), Debate on the Control of Economic Activity Bill, Dail Éireann Debate, 23 January 2019, available at www.oireachtas.ie.

national law with EU law, a legal regime under which the exclusive competence to regulate external commercial policy has been conferred on the Union.

From an international law vantage point, trading with occupied territories poses a number of complex questions. The cases that have come before the Court showcase the typology of problems that economic dealings with such territories may entail. First, such dealings raise questions regarding the legality of international agreements concluded with the occupying power that extend to the occupied territories. The Western Sahara litigation saga dealt exactly with that question; in that line of case-law the Court found that the EU-Morocco agreements could not be considered as covering Western Sahara as this would be contrary to the EU's obligations under international law.¹⁶ A second set of problems relates to questions of importation and labelling of settlement products. The *Psagot* case concerned the latter issue; in the case at bar, the CJEU was essentially asked whether foodstuffs originating in a territory occupied by Israel must, under EU law, bear an indication to the effect that they come from an "Israeli settlement".

By way of contrast to the Western Sahara litigation saga, where recourse to international law rules on treaty interpretation was necessary in order to delimit the territorial scope of the relevant EU-Morocco agreements, the *Psagot* case revolved mainly around the interpretation of Arts 9, para. 1, let. i), and 26, para. 2, let. a), of Regulation 1169/2011 on the provision of food information to consumers.¹⁷ At the same time, international law still played a significant role in the Court's findings. The Court held that the establishment of settlements in some of the territories occupied by Israel gave expression to a policy of population transfer by Israel outside its territory contrary to international humanitarian law – a policy which has been condemned both by the UN and the EU.¹⁸ Citing the EU's commitment to contribute to the strict observance of international law under Art. 3, para. 5, TEU, the Court held that the omission of the indication that a foodstuff comes from an "Israeli settlement" located in a territory occupied by Israel is likely to mislead consumers as to its true place of provenance. The Court buttressed this conclusion with reference to the objectives of Regulation 1169/2011, which include the provision of information to consumers in order to enable them to make informed choices with particular regard to health, economic, environmental, social and ethical considerations. According to the Court, since the list of such considerations is non-exhaustive, considerations pertaining to the observance of international law may be relevant in that context.¹⁹ Additionally, compliance with international law may also be considered "as part of ethical assessments capable of influencing customers' purchasing decisions, particularly since some of those rules

¹⁶ *Council of the European Union v. Front Polisario* [GC], cit., para. 123; *Western Sahara Campaign UK* [GC], cit., paras 72-73.

¹⁷ Regulation (EU) 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

¹⁸ *Psagot* [GC], cit., para. 48.

¹⁹ *Ibid.*, paras 53-54.

constitute fundamental rules of international law.”²⁰ In this light, the CJEU concluded that in the case of foodstuffs originating in territories occupied by Israel, Regulation 1169/2011 prescribes that the foodstuffs in question must bear both the indication of that territory and the indication that they come from an “Israeli settlement”.

Unsurprisingly, the judgment has caused a political stir – despite the Advocate General’s statement that nothing in the judgment “should be construed as expressing a *political* or moral opinion in respect of any of the questions” raised by the case.²¹ The US has stated that the labelling requirement identified by the Court “serves only to encourage, facilitate, and promote boycotts, divestments and sanctions (BDS) against Israel.”²² In the same vein, Israel’s Minister of Foreign Affairs has stressed that “the court’s decision is wrong, promotes boycotts against Israel and gives a tailwind to the haters of Israel”.²³ On the other hand, while Palestinian officials have welcomed the ruling, they have implied that it does not go far enough. According to the Secretary General of the Palestine Liberation Organization (PLO): “our demand is not only for the correct labelling reflecting the certificate of origin of products coming from illegal colonial-settlements, but for the banning of those products from international markets”.²⁴

In the light of the significant – albeit perhaps indirect - role that international law played in this case, we have invited three colleagues, namely Olia Kavenskaia, Sandra Hummelbrunner and Cedric Ryngaert, to reflect on what, we at least, consider the most important international and EU law issues that the *Psagot* ruling gives rise to. The rest of this *Introduction* will briefly map out the relevant *problematique* and outline the content and the structure of this Special Section.

II. INTERNATIONAL LAW AND THE INTERPRETATION OF EU CONSUMER LAW

First of all, international law played an important role in the Court’s interpretation of Regulation 1169/2011. The issue of the Court’s recourse to international law in interpreting EU consumer law in this case is dealt with by Olia Kavenskaia in her *Insight*. Kavenskaia critically analyses the Court’s unqualified inclusion of international law considerations in the broader concept of “ethical considerations” that may influence consumers’ purchasing

²⁰ *Ibid.*, para. 56.

²¹ Opinion of AG Hogan delivered on 13 June 2019, case C-363/18, *Organisation juive européenne, Vignoble Psagot Ltd v Ministre de l’Économie et des Finances*, para. 8 (emphasis in the original).

²² US Department of State, Press Statement, Decision by EU Court of Justice on Psagot Case, 12 November 2019, available at www.state.gov.

²³ R. AHREN, *US condemns ‘anti-Israel bias’ in EU court verdict on settlement labelling*, in *The Times of Israel*, 13 November 2019, available at www.timesofisrael.com.

²⁴ State of Palestine, Palestine Liberation Organization, Statement by Dr Saeb Erekat on the ruling of the European Court of Justice on the labelling of Israeli settlement products, 12 November 2019, available at www.nad.ps.

choices pursuant to Art. 3 of Regulation 1169/2011 – without any justification or clarification of what that concept may entail in the context of EU consumer law.

More fundamentally, the very fact that the Court argues that violations of international law rules may be part of the considerations influencing consumer behaviour, “particularly since some of those rules constitute *fundamental rules of international law*”,²⁵ does not sit well with its reluctance to pronounce on the EU’s own obligations as a third party towards occupied territories. The examination of the issue at bar strictly through the lens of EU consumer law coupled with the broadened definition of “ethical considerations” to incorporate international law considerations – even in the absence of any evidence that the concept may include such considerations – shows a certain degree of willingness on behalf of the Court to pass the buck to final consumers. This approach is particularly problematic in the light of the fact that the EU is bound by international law not to recognise illegal situations or be complicit in the commission of internationally wrongful acts, whereas individuals have no such obligations/responsibility since they are not subjects of international law.

III. CONTEXTUALISING *PSAGOT* IN RELATION TO OTHER CASE-LAW INVOLVING OCCUPIED TERRITORIES

The judgment also raises questions in relation to how it fits with the line of case-law dealing with occupied territories, namely *Anastasiou*,²⁶ *Brita*,²⁷ *Front Polisario* and *Western Sahara Campaign UK*. This question has been tackled by Sandra Hummelbrunner in her *Insight*. Hummelbrunner argues that *Psagot* is consistent with the CJEU’s previous case-law on occupied territories and that it confirms the Court’s tendency, in this specific context, to avoid addressing the EU’s and Member States’ international law duties vis-à-vis these territories.

While this argument undoubtedly carries much persuasive force, it remains that case that, in *Psagot*, the Court – in no uncertain terms – characterised Israel’s presence in the Palestinian territories as occupation and condemned its settlement policy as being inconsistent with international law.²⁸ This constitutes a welcome departure from previous case-law where the Court has carefully avoided any reference to the status of a territory as “occupied”, a judicial strategy which was undoubtedly deployed *inter alia* in order to avoid being drawn into political storms.

This was, for instance, the case in *Anastasiou*, where the Court did not address at all the argument put forward by the Greek Government to the effect that acceptance of the

²⁵ *Psagot* [GC], cit., para. 56 (emphasis added).

²⁶ Court of Justice: judgment of 30 September 2003, case C-140/02, *Anastasiou III*; judgment of 4 July 2000, case C-219/98, *Anastasiou II*; judgment of 5 July 1994, case C-434/92, *Anastasiou I*.

²⁷ Court of Justice, judgment of 25 February 2010, case C-386/08, *Brita*.

²⁸ *Psagot* [GC], cit., paras 34, 48, 56.

certificates issued by the Turkish authorities in Northern Cyprus would be tantamount to violating a number of UN Security Council Resolutions condemning the Turkish occupation and calling upon all member of the international community not to recognise the self-proclaimed Turkish Republic of Northern Cyprus.²⁹ Although the Court did acknowledge the *de facto* partition of the island, the problems stemming from this situation were merely regarded as pertaining to the “internal affairs of Cyprus” which should be resolved “exclusively by the Republic of Cyprus, which alone is internationally recognized.”³⁰ Similarly, in *Brita*, despite an express invitation by the Advocate General to analyse the legal status of Israel’s presence in the West Bank for the purpose of establishing the territorial scope of the EU-Israel Association Agreement,³¹ the Court decided the matter solely with reference to the “politically detached” principle of *pacta tertiis*.³² On this basis, the Court concluded that the territorial scope of the EU-PLO Association Agreement implicitly restricted the territorial scope of the EU-Israel Association Agreement.³³ In the same vein, the Court omitted any reference to the status of Western Sahara as a territory occupied by Morocco in determining the territorial scope of the relevant EU-Morocco agreements in the context of the Western Sahara litigation saga.³⁴ In this light, the Court’s unequivocal endorsement of the legal status of the Palestinian territories as territories occupied by Israel and its pronouncement to the effect that the Israel’s settlement policy contravenes rules of international humanitarian law shows not only a considerable degree of openness towards international law, but also a certain amount of boldness in handling politically charged questions that was patently absent in previous cases.

IV. THE DUTY OF NON-RECOGNITION: THE ELEPHANT IN THE ROOM?

As seen above, the CJEU in *Psagot* was essentially confronted with the question of mandatory labelling of settlement products. From an international law point of view, this question is closely intertwined with that of the legality of importation of such products at the first place. In turn, assessing the legality of importation of settlement products necessitates the examination of the scope of the duty of non-recognition.³⁵ The propo-

²⁹ P. KOUTRAKOS, *Legal Issues of EC-Cyprus Trade Relations*, in *International and Comparative Law Quarterly*, 2003, p. 492.

³⁰ *Anastasiou I*, cit., para. 47.

³¹ Opinion of AG Bot delivered on 29 October 2009, case C-386/08, *Brita*, paras 109-112.

³² G. HARPAZ, E. RUBINSON, *The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita*, in *European Law Review*, 2010, p. 566.

³³ *Brita*, cit., paras 50-53.

³⁴ See *Western Sahara Campaign UK* [GC], cit.

³⁵ For the duty of non-recognition see International Court of Justice: *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276*, advisory opinion of 21 June 1971, para. 121; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, para. 159. For the debate regarding the scope of the duty

sition that these two issues (namely importation and labelling of settlement products) are not easily decoupled when it comes to adjudicating questions of trade with occupied territories is evidenced by the 2015 Commission "Interpretative Notice on indication of origin of goods from the territories occupied by Israel since 1967" – a notice which was also cited in the judgment.³⁶ Therein, the Commission grounded the requirement of labelling settlement products as such on the EU's duty not to recognise an illegal situation.³⁷ Thus, the question arises as to whether the *Psagot* judgment sheds any light on the underlying issue of the legality of importation of settlement products – in light of the EU's duty of non-recognition.

This question was tackled by Cedric Ryngaert in his contribution to this Special Section. As Ryngaert argues, the Court's main task in this case was to interpret EU consumer law – a body of rules that does not lend itself easily to the application of the duty of non-recognition. In this sense, the peculiarities of the case were such that did not allow the Court to delve into a detailed examination of the issue of the importation of settlement products.

Although it is true that the interpretation of EU consumer law and the duty of non-recognition make strange bedfellows, the fact that the Court avoided any reference to the duty of non-recognition is not as unproblematic as it initially appears. Instead of narrowly focusing on EU consumer law, the Court could have simply argued that allowing labels to indicate that Israel is the country of origin of foodstuffs originating from an Israeli occupied territory would amount to recognizing Israeli sovereignty over the territory. This proposition is further buttressed by the text of the 2015 Commission Interpretative Notice which, as mentioned above, links mandatory origin labelling for settlement products with the EU's duty of non-recognition. However, had the Court pronounced on the duty of non-recognition, it could have been faced with the difficulty of defining its exact scope – thereby potentially having to address the underlying issue of the legality of importation of settlement products.

Interestingly, the Court came close to making an argument on the basis of the duty of non-recognition in para. 48 of its judgment. In particular, the Court argued that Israel's settlement activity violates international humanitarian law and concluded by stressing that the EU is duty-bound to observe international law under Art. 3, para. 5, TEU. Now, in the absence of any further explanation, no logical connection exists between these two statements. Indeed, Israel violates international humanitarian law by pursuing its settlement policy and, indeed, the EU is bound to observe international law on the basis of Art. 3, para. 5, TEU. But clearly something is missing – how are Israel's viola-

of non-recognition, see E. KASSOTI, *The EU's Duty of Non-Recognition and the Territorial Scope of Trade Agreements covering Unlawfully Acquired Territories*, in *Europe and the World: A Law Review*, 2019, p. 6.

³⁶ *Psagot*, cit., paras 12-16.

³⁷ European Commission, Interpretative Notice on indication of origin of goods from the territories occupied by the Israel since June 1967, 2015, points 1-2.

tions of international humanitarian law related to the EU's duty to observe international law? In order to make sense of this paragraph, the only logical conclusion that can be deduced is that there is a missing link between Israel's violations of international law and the EU's duty to observe international law. Thus, the Court seems to imply here that the EU has certain international law duties arising from Israel's violations of international law, namely the duty of non-recognition. Otherwise, the reference to the EU's duty to contribute to the strict observance of international law would not only be a *non sequitur* but also redundant. The same argument, namely that Israel violates international humanitarian law by maintaining its settlement policy and that consumers could be misled as to the true place of provenance of settlement products unless they are clearly labelled as such, could be made without any reference to the EU's duty under Art. 3, para. 5, TEU. In this light, by omitting any reference to the duty of non-recognition and by framing the question of labelling of settlement products purely in terms of consumer protection, the Court eschewed engagement with the EU's own duties in relation to the importation and labelling of these products.

V. CONCLUDING REMARKS

Overall, the *Psagot* judgment offers a fresh counterbalance to a string of case-law pertaining to trade with occupied territories marked by a characteristic reluctance to pronounce on the international legal status of the territories in question. In *Psagot*, the CJEU departed from its previous overcautious approach and made abundantly clear that the Palestinian territories in question are occupied by Israel and that Israel's settlement policy violates international humanitarian law. At the same time, the Court shied away from pronouncing on the EU's own international law duties and responsibility vis-à-vis these territories – something that somewhat detracts from the judgment's persuasive force. Furthermore, it remains to be seen how the judgment will influence the labelling of products coming from other occupied territories such as Western Sahara. In principle, the Court's findings seem to apply to all products originating from occupied territories. Therefore, on balance, the judgment constitutes an important stepping-stone in closing the gap between the EU's internationalist rhetoric and its practice on the ground in relation to occupied territories.

We are deeply grateful to the three authors for having accepted our invitation and for having contributed with their ideas to the debate and to *European Papers* for hosting this Special Section.



INSIGHTS

SPECIAL SECTION – WHAT'S IN A NAME?

THE *PSAGOT* JUDGMENT AND QUESTIONS OF LABELLING OF SETTLEMENT PRODUCTS

MISINTERPRETING MISLABELLING: THE *PSAGOT* RULING

OLIA KANEVSKAIA *

ABSTRACT: Mandatory origin labelling of products from occupied territories has been a delicate matter in the EU external trade policy. In the recent judgement *Psagot* (judgment of 12 November 2019, case C-363/18, *Organisation juive européenne and Vignoble Psagot* [GC]), the Court of Justice considered consumers' ethical considerations related to violations of international law as a reason for mandatory origin labelling of products originating in the Israeli settlements. This *Insight* argues that, in its decision, the Court missed a number of opportunities to clarify some essential concepts of EU food law, consumer protection and customs law and, as such, provided a ruling that is based on flawed and unconvincing argumentation. The Court's broad interpretation of the notion "ethical considerations" under Regulation 1169/2011 opens a Pandora's box of trade-restrictive practices while at the same time, continues the EU inconsistent policy towards trade with occupied territories.

KEYWORDS: EU external relations – origin marking – consumer protection – food information – average consumer – ethics in EU law.

I. INTRODUCTION

The CJEU has a long history of interpreting compliance of its institutions with public international law. Whereas Art. 3, para. 5, TFEU stipulates that the European Union should contribute to the "strict observance and the development of international law" and respect "the principles of the United Nations Charter," the Court's use of international law provisions in its reasoning has been subjected to fierce critique. It has been argued, for instance, that the Court's recourse to international treaties is artificial, and its application of the treaty provisions selective.¹

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¹ E. KASSOTI, *The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)*, in *European Papers*, Vol. 2, 2017, No 1,

In the recent *Psagot* judgment, the Court was presented with an opportunity to interpret EU law regarding origin indication for products imported from a territory occupied by the State of Israel since 1967.² In particular, the Court was invited to examine whether Regulation 1169/2011 on the provision of food information to consumers³ requires a mandatory indication “Israeli settlement” for products originating in the Israeli settlements. The Court, following the opinion of AG Hogan delivered earlier this year,⁴ held that labels that provide a place of origin that is factually incorrect can deceive consumers and prevent them from making informed purchasing choices.⁵ Yet, the Court’s broad interpretation of Art. 3, para. 1, of the Regulation, implying that *under this Regulation*, consumers’ choices are guided by ethical considerations related to violations of international law, has certain flaws. With little to no explanation from the Court on the link between “ethical considerations” and “international law,” as well as its omission to address the notion of the “average consumer” and to examine other relevant instruments of EU law, the Court’s finding that observance of international law should be seen as a separate ground for labelling of goods from occupied territories for the purpose of providing information and enable consumers to make an informed choice, leaves much to be desired.

This *Insight* argues that by shunning politically-sensitive discussions, the Court offered a decision which is reductive and not well-substantiated. Had the Court provided a thorough analysis of the relevant provisions of EU consumer law and made a recourse to customs and trade law, its conclusions would have been more convincing and legitimate. Instead, by mixing observance of international law and technical customs law requirements, the ruling opens a Pandora’s box of EU selective and, arguably, discriminatory trade policy towards other disputed and occupied territories.

II. THE CJEU RECOURSE TO INTERNATIONAL LAW IN DECISIONS ON DISPUTED TERRITORIES

The earlier case law of the Court of Justice attached considerable weight to the enforcement of international treaties and observance of international law in the EU legal

www.europeanpapers.eu, p. 23 *et seq.*; P. HILPOLD, *Self-determination at the European Courts: The Front Polisario Case* or “*The Unintended Awakening of a Giant*”, in *European Papers*, Vol. 2, 2017, No 3, www.europeanpapers.eu, p. 907 *et seq.*; G. BECK, *The Court of Justice of the EU and the Vienna Convention on the Law of Treaties*, in *Yearbook of European Law*, 2016, p. 484 *et seq.*

² Court of Justice, judgment of 12 November 2019, case C-363/18, *Organisation juive européenne and Vignoble Psagot* [GC] (hereinafter, *Psagot*).

³ Regulation (EU) 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

⁴ Opinion of AG Hogan delivered on 13 June 2019, case C-363/18, *Organisation juive européenne e Vignoble Psagot*.

⁵ *Psagot* [GC], *cit.*, para 36.

order.⁶ In the past decade, however, the Court's interpretation of public international law has arguably become more restrictive: in *Kadi*, for instance, the Court did not allow for the primacy of a United Nations Security Council (UNSC) Resolution over EU law and found that the EU act implementing the UNSC resolution infringed the appellant's fundamental right to respect for property;⁷ whereas in *Intertanko*, it refused to assess the validity of EU law in the light of the UN Convention on the Law of the Sea binding the Member States.⁸ In its more recent decisions in *Polisario*,⁹ the Court was criticized for shedding the EU's image as a committed supporter of international legal order by its arbitrary and selective use of international law.¹⁰

While dealing with the relationship between the EU and international legal orders, the Court has been invited on a number of occasions to rule on matters related to the importation of agricultural products from territories that have been claimed by States with which the EU had concluded preferential trade agreements (PTAs). Similar to the UNSC, the EU has been known to openly condemn these States' military and civil presence on disputed territories; yet, the EU has never imposed boycotts or adopted trade sanctions to restrict its economic activities with these regimes.¹¹ In this regard, the questions the Court was asked to consider ranged from the Member States' obligation under EU law to refuse movement certificates and origin marks issued by the customs officials of Turkish Republic of Northern Cyprus, a territory within the island of Cyprus whose sovereignty is recognized by no State other than Turkey (*Anastasiou* line of cases),¹² to the territorial scope of application of the EU Association Agreement with Israel to Israeli settlements in West Bank (*Brita*),¹³ and a number of EU Agreements with Morocco to Western Sahara (*Polisario*, *West Sahara Campaign UK*),¹⁴ a non-governing territory that has been occupied by the Kingdom of Morocco.

In *Anastasiou II and III*, the Court came to its decision through technical customs rules of EU law and by way of considering the purpose of the certificates mandatory

⁶ See J. ODERMATT, *The Court of Justice of the European Union: International or Domestic Court?*, in *Cambridge International and Comparative Law*, 2014, p. 69 *et seq.*, and M. MENDEZ, *The legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, in *European Journal of International Law*, 2010, p. 83 *et seq.*

⁷ Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi* [GC].

⁸ Court of Justice, judgment of 3 June 2008, case C-308/06, *Intertanko* [GC].

⁹ Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC] (hereinafter, *Polisario*); General Court, judgment of 10 December 2015, case T-512/12, *Council v. Front Polisario*.

¹⁰ E. KASSOTI, *The Council v. Front Polisario Case*, *cit.*, p. 23 *et seq.*

¹¹ An exception would be the EU Sanctions Programme adopted in response to Russia's actions against Ukrainian territorial integrity.

¹² Court of Justice: judgment of 30 September 2003, case C-140/02, *Anastasiou III*; judgment of 4 July 2000, case C-219/98, *Anastasiou II*; judgment of 5 July 1994, case C-434/92, *Anastasiou I*.

¹³ Court of Justice, judgment of 25 February 2010, case C-386/08, *Brita*.

¹⁴ *Polisario* [GC], *cit.*; Court of Justice, judgment of 27 February 2018, case C-266/16, *Western Sahara Campaign UK* [GC] (hereinafter, *Western Sahara Campaign*).

under the applicable EU Directive, without referring to the rules of public international law.¹⁵ In *Brita*, however, the Court invoked the principle of the relative effect of the treaties of Art. 34 of the 1969 Vienna Convention on the Law of the Treaties (VCLT), consolidating the international law principle of *pacta tertiis nec nocent nec prosunt* (which implies that treaties do not impose any obligations or confer any rights on third States).¹⁶ The Court reasoned that allowing products from West Bank to be handled under the EU-Israel Association Agreement would require Palestinian customs authorities to refrain from their duties under the EU Association Agreement with the Palestine Liberation Organization (PLO), thus creating obligations for a third party without its consent.¹⁷ Remarkably, and unlike the decision in *Psagot*, the Court did not have any recourse to the status and legality of the Israeli settlements under international humanitarian law.¹⁸

The Court increased its reliance on public international law in the *Polisario* and *Western Sahara Campaign UK* judgments. In the latter, the Court concluded that the Fisheries Partnership Agreement between the EU and Morocco¹⁹ and the 2013 Fisheries Protocol²⁰ did not apply to Western Sahara and the waters adjacent to its territory since the opposite would breach the right to self-determination for the people of Western Sahara, as well as other EU commitments under international law.²¹ In *Polisario*, the CJEU again resorted to the Vienna Convention and held that since following its Art. 31, para. 3, let. c, treaties should be interpreted in the context of the relevant rules of international law, including the right to self-determination of the Sahrawi people, the EU-Morocco Liberalisation

¹⁵ *Anastasiou II*, cit., para. 36; *Anastasiou III*, cit., paras 46-49. Frid de Vries finds that such “pragmatic” solution does not deprive the citizens of the territories from the benefits of the agreement. R. FRID DE VRIES, *EU Judicial Review of Trade Agreements Involving Disputed Territories: Lessons from the Front Polisario Judgment*, in *Columbia Journal of European Law*, 2018, p. 519. Cf. N. MUNIN, *Can Customs Rules Solve Difficulties Created by Public International Law?: Thoughts on the ECJ’s Judgment, in the Brita Case (C-386/08)*, in *Global Trade and Customs Journal*, 2011, p. 204.

¹⁶ *Brita*, cit., paras 44 and 52.

¹⁷ *Ibid.*, paras 52-53.

¹⁸ By the same token, the Court of Justice did not take into consideration the meaning of the “territory” in the Association Agreement between the EU and Israel. E. KONTOROVICH, *Economic Dealings With Occupied Territories*, in *Columbia Journal of Transnational Law*, 2015, p. 597 *et seq.*

¹⁹ Council Regulation No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, concluding the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco.

²⁰ Council Decision 2013/785/EU of 16 December 2013 on the conclusion, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco.

²¹ *Western Sahara Campaign [GC]*, cit., para. 63. For further analysis, see J. ODERMATT, *Fishing in Troubled Waters: ECJ 27 February 2018, Case C-266/16, R (on the application of Western Sahara Campaign UK) v Commissioners for Her Majesty’s Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, in *European Constitutional Law Review*, 2018, p. 751 *et seq.*

Agreement did not apply to Western Sahara.²² The Court held that, since Morocco does not exercise its full sovereign power over Western Sahara, and due to the absence of an explicit treaty provision intending to bind the Kingdom of Morocco with respect to the territories under its international responsibility, the application of the EU-Morocco Agreements to Western Sahara is *a priori* precluded by Art. 29 VCLT (which provides that “the treaty is binding upon each party in respect of its entire territory”).²³ In this regard, the Association Agreement also cannot be binding to the people of Western Sahara as a “third party” under Art. 34 VCLT in the absence of their consent.²⁴ This decision has received fierce critique for, among others, Court’s erroneous and selective use of Arts 31 and 34 VCLT,²⁵ its disregard of *de facto* application of the Liberalization Agreement to Western Sahara²⁶ and the missed opportunity to have a recourse to trade law which, arguably, would have resulted in a stronger and more effective judgement.²⁷

None of the discussed cases, however, has dealt with the question of whether rules of public international law should be taken into account by the EU technical rules on labelling and certification for products from disputed territories. The only instrument clarifying the Commission’s position on this matter is the Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967,²⁸ stating that products from the West Bank and Golan Heights that originate from Israeli settlements should be accompanied by origin marking with additional geographical information that the product comes from settlements, *to the extent that the indication of origin is mandatory*.²⁹ The *Psagot* case concerned indication of origin for Israeli wine produced by the Israeli

²² *Polisario*, cit., para. 92; for further analysis, see, among others, C. RYNGAERT, R. FRANSEN, *EU Extraterritorial Obligations With Respect to Trade with Occupied Territories: Reflections after the case of Front Polisario before EU Courts*, in *Europe and the World: a Law Review*, 2018, p. 1 et seq.; A. RASI, *Front Polisario: A Step Forward in Judicial Review of International Agreements by the Court of Justice?*, in *European Papers*, Vol. 2, 2017, No 3, www.europeanpapers.eu, p. 967 et seq.; E. MILANO, *Front Polisario and the Exploitation of Natural Resources by the Administrative Power*, in *European Papers*, Vol. 2, 2017, No 3, www.europeanpapers.eu, p. 907 et seq.; E. KASSOTI, *The Council v. Front Polisario Case*, cit., p. 23 et seq.; S. HUMMELBRUNNER, A.C. PRICKARTZ, *It’s Not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union*, in *Utrecht Journal of International and European Law*, 2016, p. 19 et seq.

²³ *Polisario* [GC], cit., paras 94-97.

²⁴ *Ibid.*, para. 106.

²⁵ P. HILPOLD, *Self-Determination at the European Courts*, cit., p. 917 et seq.; E. KASSOTI, *The Council v. Front Polisario Case*, cit., p. 37 et seq.

²⁶ J. ODERMATT, *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario). Case C-104/16P*, in *American Journal of International Law*, 2017, p. 737 et seq.; R. FRID DE VRIES, *EU Judicial Review of Trade Agreements Involving Disputed Territories*, cit., p. 522; E. KASSOTI, *The Council v. Front Polisario Case*, cit., p. 40.

²⁷ R. FRID DE VRIES, *EU Judicial Review of Trade Agreements Involving Disputed Territories*, cit., p. 500.

²⁸ European Commission, Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967, C(2015) 7834 final (hereinafter, Interpretative notice).

²⁹ Interpretative Notice, cit., paras 8 and 10.

Vignoble Psagot Ltd in the West Bank. The contested Ministerial Notice³⁰, which stipulated the mandatory origin indication of “Israeli settlement” on Israeli products imported from the West Bank or the Golan Heights, was claimed not to take into account Regulation 1169/2011 on the provision of food information to consumers. The case was referred for the preliminary ruling by the French Council of State, asking the CJEU to decide whether EU law, and in particular Regulation 1169/2011, requires mandatory indication of “Israeli settlement” for products originating in territories occupied by Israeli since 1967 (first question). If this question was answered negatively, the Court was asked to clarify whether the provisions of Regulation 1169/2011 allow Member States to require those indications (second question). *Psagot* is thus remarkable for the fact that the Court was invited to interpret the EU consumer protection rules in relation to imports from disputed territories, rather than reviewing EU acts in the light of international law.

III. COURT’S ANALYSIS IN *PSAGOT*: MANDATORY INDICATION OF THE COUNTRY OF ORIGIN OR THE PLACE OF PROVENANCE OF FOODSTUFFS

To answer the first question, the Court considered Arts 9, para. 1, let. i), and 26, para. 2, let. a), of Regulation 1169/2011, which provide that the indication of the country of origin or the place of provenance is mandatory where its omission may mislead the consumer as to the true origin of the good, and where the information provided otherwise may imply different country of origin or place of provenance.³¹ After providing a brief legal analysis, the Court held that indication of “Israeli settlement” as a place of provenance for products originating in the settlements is indeed mandatory under the provisions of the Regulation since the absence of this information would preclude consumers from making informed choices. This section discusses the Court’s findings and identifies the flaws in its reasoning.

III.1. “COUNTRY OF ORIGIN” V. “PLACE OF PROVENANCE”

As a first step of its analysis, the Court examined the differences between the concepts of “country of origin” and “place of provenance” under EU law. As for the former, the Court referred to the determination of origin of Art. 60 Union Customs Code (UCC).³² At the outset, the CJEU established that the term “country” is a synonym for “State, a sovereign entity exercising, within its geographical boundaries, the full range of powers recognized by international law”; whereas the term “territory” refers to entities other

³⁰ French Ministry of the Economy and Finance, *Avis aux opérateurs économiques relatifs à l’indication de l’origine des marchandises issues des territoires occupés par l’État d’Israël depuis juin 1967*, 24 November 2016.

³¹ *Psagot* [GC], cit., para. 21.

³² As per Art. 2, para. 3, of the Regulation. *Psagot* [GC], cit., para. 27.

than States.³³ With that in mind, the Court referred to its earlier considerations in *Polisario* and *Western Sahara* on a separate status of such “territories” under international law.³⁴ Hence, it was concluded that Art. 26, para. 2, of Regulation 1169/2011 applies to the products originating both in “countries” as well as in “territories.”³⁵

The Court continued with stating that under international humanitarian law, Israeli settlements are *territories* subject to a limited jurisdiction of the State of Israel and either enjoy the right to self-determination (West Bank), or are part of a different State (the Golan Heights).³⁶ Yet, it noted that “territory” within the meaning of the UCC does not equal to “place of provenance”, within the meaning of Regulation 1169/2011, which defines “place of provenance” as “any specific geographical area *within the country or territory of origin of a foodstuff*, with the exception of a producer’s address”.³⁷ Since the term “settlement” refers to specific geographical area and also has a “demographic dimension,” implying a population of foreign origin, settlements can be deemed as the place of provenance within the meaning of the Regulation.³⁸ Hence, following the Court’s reasoning, the West Bank and the Golan Heights are territories under international humanitarian law,³⁹ while the Israeli settlements in these territories are the “place of provenance” under Regulation 1169/2011.⁴⁰

Quite surprisingly, the Court did not proceed with any further clarification regarding the actual acquisition of origin for the product at issue, mainly noting that the product originated in the country or territory where they have been either wholly obtained or have undergone a substantial transformation.⁴¹ For instance, it is unclear whether the Court’s decision would have been different if the wine in question was bottled, packaged, or processes in the territory *within* Israel’s internationally recognized borders.⁴² Likewise, the striking absence of any reference to the EU-Israel and EU-PLO Association Agreements, as well as to its earlier case law on the territorial scope of these treaties, suggests that the Court considers the technical customs rules of the UCC in isolation from their context and is engaging in fragmentary application of the EU customs law. Arguably, a more thorough analysis that takes into consideration processes and pro-

³³ *Psagot* [GC], cit., paras 29-30.

³⁴ *Ibid.*, para. 31.

³⁵ *Ibid.*, para. 32.

³⁶ *Ibid.*, paras 3-35.

³⁷ *Ibid.*, para. 40-41.

³⁸ *Ibid.*, para. 43.

³⁹ *Ibid.*, para. 34.

⁴⁰ *Ibid.*, para. 45.

⁴¹ *Ibid.*, para. 27.

⁴² Cf. N. GORDON, S. PARDO, *The European Union and Israel's Occupation: Using Technical Customs Rules as Instrument of Foreign Policy*, in *Middle East Journal*, 2015, p. 76 *et seq.*; M. HIRSCH, *Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip*, in *Fordham International Law Journal*, 2002, p. 575 *et seq.*

duction methods in the context of rules of origin in EU PTAs, would have strengthened this part of the Court's reasoning and render it more appropriate in the light of European trade and customs policy.

The Court also seems reluctant to explain, or even to mention, the applicable principles of international law on which its arguments are built: only when proceeding with the notion of misleading consumers, the Court decides to refer to the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) and the UN Security Council's resolutions regarding the situation in Palestine and recalls, in the very same paragraph, the EU's commitment under Art. 3, para. 5, TFEU to contribute to the strict observance of international law.⁴³ Given the importance that the Court attaches to the observance of international law in the findings of this judgement, its scarce reference to the applicable international principles, treaty provisions and EU case law, as well as their analysis in the context of the judgment, is rather astonishing.

III.2. MISLEADING CONSUMERS REGARDING THE PRODUCTS' TERRITORY OF ORIGIN AND PLACE OF PROVENANCE

The Court continues with the reasoning that the omission to indicate "Israeli settlement" as a place of provenance would deceive consumers. Firstly, it submits that the indication of the country of origin "made in Israel" is misleading since the products originate in the *territories* that are not considered as part of the State of Israel under international law.⁴⁴ Yet, a sole indication of the *territory* of origin is also deceiving, since consumers cannot, in all reasonableness, distinguish Palestinian and Israeli goods from these territories: accordingly, even though Regulation 1169/2011 requires indication of the country of origin or the place of provenance, in case of products originating in settlements, the indication of *both* territory of origin and the place of provenance is thus mandatory.⁴⁵

While the Court was correct in suggesting that without indicating the place of provenance, consumers cannot distinguish between Palestinian or Israeli origin of foodstuffs, its earlier argument that consumers should be informed that products do not originate in Israel to prevent them from being "misled as to the fact that the State of Israel is present in those territories as an occupying power, and not as a sovereign entity"⁴⁶ is rather striking. Firstly, origin marks are not supposed to inform consumers about the legality of a State's presence in other territories, and neither should they intend to educate consumers on international law. Secondly, this reasoning is in stark contrast with the Court's further findings that consumers may make their purchasing choices based on the product's origin (see section III.3), which undeniably implies that

⁴³ *Psagot* [GC], cit., para. 48.

⁴⁴ *Ibid.*, paras 34-36.

⁴⁵ *Ibid.*, para. 46.

⁴⁶ *Ibid.*, para. 37.

consumers are *already* informed about the status of these territories under international law and have taken a negative stance towards settlements' products.

III.3. CONSUMER PROTECTION AND MANDATORY NATURE OF ORIGIN MARKS

The most remarkable finding of the Court relates to its interpretation of Art. 3, para. 1, of the Regulation 1169/2011 as a provision that introduces international law considerations into consumer protection. While stating that mandatory indication of "Israeli settlement" on products originating in settlements is supported by the objectives of the Regulation to "ensure a high level of consumer protection in relation to food information, taking into account the difference in perception of consumers,"⁴⁷ the Court refers to Art. 3, para. 1, providing that to protect their health and interests, "consumers should make informed choices and use safe foods, with particular regard to health, economic, environmental, social and ethical considerations". The Court notes that this list is non-exhaustive and that other types of considerations may also be relevant for consumers' purchasing decisions, such as consideration related to the observance of international law,⁴⁸ meaning that consumers may base their choices whether to buy certain products depending on whether these products are imported from regimes that violate international humanitarian law.⁴⁹ Bypassing the discussion on the EU and its Member States obligations under international law towards trade with such regimes (which, given the nature of the case, were reasonably expected to be addressed), the Court continued with stating that the breach of the rules in international humanitarian law may also be subject of ethical assessment by consumers and hence, influence their choice.⁵⁰

The Court concluded that considerations of international law constitute a separate ground for mandatory indication of products' origin and are encapsulated in the term "ethical considerations" of Art. 3, para. 1, of the Regulation. As it will argued in section IV, such reasoning of the Court misses a number of crucial points, which in theory could have provided convincing arguments in favour of the Court's approach, and is moreover based on a wrong interpretation of the Regulation.

IV. OBSERVANCE OF INTERNATIONAL LAW AS A GROUND FOR MANDATORY ORIGIN MARKING

As such, the Court's reasoning in *Psagot* poses new questions regarding the Court's use of international law in technical trade rules. The Court's broad interpretation of the term "ethical considerations" of Art. 3, para. 1, of Regulation 1169/2011, as well as its

⁴⁷ *Ibid.*, para. 52.

⁴⁸ *Ibid.*, para. 54.

⁴⁹ *Ibid.*, para. 55.

⁵⁰ *Ibid.*, para. 56.

use of international humanitarian law as a reason behind consumers' commercial choices, is not only poorly substantiated but arguably also misinterprets the objectives of the Regulation, which predominantly relate to consumer health and safety, and ignores other relevant provisions of EU law that deal with unfair commercial practices.

Firstly, the Court takes the premise that consumers are well-informed and that observance of international humanitarian law forms a part of their ethical assessment when deciding whether to purchase a product. It is unclear how the Court arrived at this conclusion: while consumers may be acquainted with information regarding the UN and the EU position towards the Israeli settlement policy through different media channels, it is questionable whether such type of information equips them to make any assessments with regard to the observance of the applicable provisions of, among others, the Geneva Convention and UN Resolutions (unless, of course, they have expressed a considerable interest in this question).⁵¹ Seemingly, a reference to "political or moral beliefs" rather than "considerations of international law" would have been more appropriate.⁵²

Secondly, and related to the first point, the Court's and AG's failure to explain in their reasoning the notion of "average consumer" is rather striking, especially given the existence of guidelines and case law that favour the broad interpretation of the "average consumer".⁵³ AG Hogan notes in this regard that the *average* consumer is well-informed due to his or her behaviour,⁵⁴ and thus that "some reasonably well informed, and reasonably observant and circumspect consumers may regard [the fact that the product originates in settlements] as an ethical consideration that influences their consumer preferences and in respect of which they may require further information".⁵⁵ The

⁵¹ Indeed, as noted by the AG, an "average consumer" is "reasonably well informed" (Opinion of AG Hogan, *Psagot*, cit., paras 47-48), which some scholars have suggested to imply that the consumer has "a rough idea, but not necessarily a detailed knowledge, about the product or service in question," see R. INCARDONA, C. PONCIBO, *The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution*, in *Journal of Commercial Policy*, 2007, p. 24.

⁵² For instance, in *Kattenburg v. Canada*, briefly discussed further in this section, the Federal Court of Canada came to a similar conclusion by referring to consumers' freedom of speech to express their political view in a "peaceful" way through their purchasing decisions, invoking the Canadian Charter of Rights and Freedoms, Federal Court of Canada, decision of 27 July 2019, *Kattenburg v. Canada (Attorney General)*, para 117. In this regard, it should also be recalled that while the EU indeed may promote the respect for international law under its Common Foreign and Security Policy (CFSP) through, for instance, sanctions and embargoes, the case in question dealt with the EU consumer policy, which arguably provides narrower space for incorporation of international law.

⁵³ I.e. European Commission Staff Working Document, Guidance on the Implementation/Application of the Directive 2005/29/EC on Unfair Commercial Practices, SEC(2009) 1666 final, which for instance emphasize that the notion of average consumer should also be interpreted in line with Art. 114 TFEU requiring high level of consumer protection. Furthermore, CJEU case law confirms that the "average consumer" is somebody who is not "weak" and is always in a position to acquire information and act on it. B.D. DUIVENVOORDE, *The Consumer Benchmarks in the Unfair Commercial Practice Directive*, Heidelberg: Springer, 2015, p. 23.

⁵⁴ Opinion of AG Hogan, *Psagot*, cit., para. 48.

⁵⁵ *Ibid.*, para. 56.

AG referred to the Unfair Commercial Practice Directive (UCPD)⁵⁶ when discussing provision of misleading information to consumers:⁵⁷ yet, clarifications regarding the “average consumer test” that, according to the Directive, “national courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case”,⁵⁸ seems to be omitted from his reasoning.

Instead of building on the AG’s analysis of misleading practices under the UCPD and remedying his omission to introduce the “average consumer” test, which arguably could have strengthened the Court’s conclusion, the Court chose to stick to its arguments under Regulation 1169/2011. Yet, neither Art. 3 or 26 of Regulation 1169/2011 refer to the “average consumer”: Art. 3 requires a high level of protection for the “final consumer” –“the ultimate consumer of a foodstuff who will not use the food as part of any food business operation or activity.”⁵⁹ Moreover, Art. 4, para. 2, of the same Regulation stipulates that where food information is mandatory to enable consumers to make informed choices, “account shall be taken of *a widespread need on the part of the majority of consumers* for certain information to which they attach significant value or *of any generally accepted benefits* to the consumer”.⁶⁰ As such, Regulation 1169/2011 only refers to the “average consumer” when discussing the forms of expression or presentation of information on the labels.⁶¹ Consequently, it is unclear how the Court’s reasoning that consumers will take into account international law considerations in making a decision to purchase a product is reconcilable with the notion of “consumer” under the food information Regulation.⁶²

Curiously, the average consumer test was also neglected by the Federal Court of Canada in *Kattenburg v. Canada*, issued earlier this year.⁶³ The case likewise concerned mandatory designation of “Israeli settlement” on the label of settlements’ wines. The Federal

⁵⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. Note that pursuant Art. 6, para. 1, of the UCPD, its definition of a “misleading practice” under this Directive relies on the notion of the average “consumer.”

⁵⁷ Opinion of AG Hogan, *Psagot*, cit., para. 73.

⁵⁸ Directive 2005/29/EC, cit., recital 18.

⁵⁹ This definition is provided in Art. 3, para. 18, (18) of Regulation (EU) 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the principles and requirements of food law, and is referred to by Art. 2, para. 1, let. a), of Regulation 1169/2011.

⁶⁰ Emphasis added.

⁶¹ Recital 43 and Art. 25(1) of Regulation 1169/2011, cit.

⁶² In this regard, Schebesta and Purnhagen note that Regulation 1169/2011 is “preliminary dedicated to the formulation of positive objective information, such as the size of the front on packaging [...]” while “[t]he UCPD, by contrast, relies on the average consumer in order to determine whether information already used in the market is misleading”, H. SCHEBESTA, K.P. PURNHAGEN, *An Average Consumer Concept of Bits and Pieces: Empirical Evidence on the Court of Justice of the European Union’s Concept of the Average Consumer in the UCPD*, in *Wageningen Working Paper Law and Governance*, 2019/02, p. 8.

⁶³ Federal Court of Canada, *Kattenburg v. Canada*, cit.

Court of Canada held that labelling of settlement products as “products of Israel” misleads the “average reasonable consumer” and prevents him or her from expressing their political views through purchasing choices, thereby limiting their freedom of expression.⁶⁴ Another remarkable observation is that similarly to AG Hogan,⁶⁵ the Canadian Court considered inapplicable the UK Supreme Court findings in *Richardson v. Director of Public Prosecution*, which held that the number of consumers whose purchasing decisions may be affected by the knowledge of the true provenance of the goods is insufficient for the number required to reach the benchmark of the “average consumer”.⁶⁶

Thirdly, even assuming that the CJEU had no obligation to address the benchmarks for – the average or majority (of) – consumer(s), it has still erred in judgment when considering the objectives of Regulation 1169/2011. As such, despite the broad definition of “food information”,⁶⁷ nothing in the Regulation implies that its objective to protect consumer health and interests pertain to the grounds other than food safety and quality.⁶⁸ This also appears from its Art. 39, para. 2, on national measures on mandatory origin, which Member States are permitted to introduce if there is a link between a products’ certain *qualities* and its origin. In fact, when dealing with the second question presented to the Court,⁶⁹ the AG determined that the reason that a country of origin or a place of provenance has certain importance to the consumers’ decision is insufficient to allow national mandatory origin marking under Art. 39, para. 2.⁷⁰ This reasoning of the AG does not sit well with his and the Court’s conclusion that the EU-wide origin labelling should be mandatory for the reasons other than those related to food quality or consumption.

In concluding that violations of international law fall within consumers’ ethical assessment, the Court seemed to have followed the AG’s assumption that within the meaning of Regulation 1169/2011, “ethical considerations” refers to the broader context than the ingredients or quality of foodstuffs, which consumers may take into account due to, for instance, their religions or social beliefs.⁷¹ Indeed, one can suppose that there is an overlap between ethical considerations and the rules of international law,

⁶⁴ *Ibid.*, paras 85-86. Thus, the Court came to this conclusion through invoking consumers’ fundamental rights, rather than their ethical considerations.

⁶⁵ Opinion of AG Hogan, *Psagot*, cit., paras 61-68.

⁶⁶ Supreme Court of the UK, judgement of 5 February 2014, 2012/0198, *Richardson and another v. Director of Public Prosecutions*.

⁶⁷ Generally meaning “information concerning a food and made available to the final consumer by means of a label”, Art. 2, para. 2, let. a), of Regulation 1169/2011; see also Art. 9, para. 1, of the Regulation.

⁶⁸ Earlier case law discussing misleading practices under the food information Regulation related, for instance, to the presence of certain ingredients in products, i.e. Court of Justice, judgment of 4 June 2015, case C-195/14, *Teekanne*.

⁶⁹ Note that the second question was not addressed by the Court since the first question was answered affirmatively.

⁷⁰ Opinion of AG Hogan, *Psagot*, cit., para. 85.

⁷¹ *Ibid.*, paras 50-51.

for instance, where business or State practices violate the internationally acceptable labour rules.⁷² But in the absence of earlier case law clarifying the concept of “ethics” in EU consumer law, the AG’s and the Court’s reasoning is insufficient and lacks any justification. In fact, very few examples of the ethical dimension in food law and EU consumer protection relate to animal slaughter, animal welfare or environmental impact of certain foods’ consumption.⁷³ All this considered, “ethical considerations” under Regulation 1169/2011 are thus likely to have a connection to the quality, ingredients or presentation of foodstuffs, or to its production and processing methods.

Arguably, instead of stretching the scope of the term “ethical considerations” to consumers’ perception of the matters related to international law, the Court should have reviewed the legislative history of Regulation 1169/2011: as a matter of fact, such approach was taken by the Federal Court of Canada, and resulted in a more thorough decision.⁷⁴ This exercise would have provided the Court of Justice’s decision with increased legitimacy, as well clarified the objectives of the Regulation.

Finally, the Court’s decision questions the EU selective foreign policy towards products imported from disputed territories: if European consumers consider observance of international law when purchasing products originating in Israeli settlements, why would they not take these considerations into account, for instance, when buying products from Western Sahara that are labelled as “made in Morocco?”⁷⁵ In fact, while some Member States understand the mandatory provision of the place of provenance as applicable to products from *all* occupied territories, and not only those from the Israeli

⁷² Ethical considerations have also been discussed outside the food safety domain: for instance, in the 2016 Canada-EU Comprehensive Economic and Trade Agreement (CETA), ethical rules implied independence and impartiality of individuals serving on the CETA Tribunal, Art. 8.30 of CETA; cf. M. FRISCHHUT, *The Ethical Spirit of EU Law*, Heidelberg: Springer, 2019, p. 31 *et seq.*

⁷³ E.g. European Commission, *White Paper on Food Safety*, COM (1999) 719 final; K. MYLONA, P.A. MARAGKOUKAKIS, A.K. BOCK, J. WOLLGAST, S. LOURO CALDEIRA, F. ULBERTH, *Delivering on EU Food Safety and Nutrition in 2050 – Future Challenges and Policy Preparedness*, JRC Science for Policy Report, 2016, available at <https://publications.jrc.ec.europa.eu/repository/handle/JRC101971> (discussing such issues as child labour, environmental sustainability and animal welfare as ethical factors); see also the 2019 Eurobarometer “Food Safety in the EU” (Special Eurobarometer Wave EB91.3), commissioned by the European Food Safety Authority (EFSA), available at www.efsa.europa.eu.

⁷⁴ Federal Court of Canada, *Kattenburg v. Canada*, *cit.*, para. 97.

⁷⁵ In this regard, the EU policy towards occupied territories is particularly questionable given that the recent Council’s Decision to include Western Sahara into the scope of the EU-Morocco Association Agreement (Council Decision (EU) 2018/1893 of 16 July 2018 regarding the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part), which would not only allow Saharan products to be labelled as “made in Morocco” but, arguably, also violates EU’s obligations under international law. See E. KASSOTI, *The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement*, in *European Papers*, Vol. 4, 2019, No 1, www.europeanpapers.eu, p. 307 *et seq.*

settlements,⁷⁶ others consider a country-wide boycott targeting specifically products of Israeli settlements.⁷⁷ Such practices, while currently taking place only at the level of parliamentary discussions, eventually risk undermining the EU Common Commercial Policy. In this regard, the Court's decision in *Psagot* is unlikely to satisfy any of the two camps by still "allowing" the EU trade with Israeli settlements and limiting the requirement to provide indication of place of provenance to the Israeli settlements' products.

The idea that the EU is shaping its foreign policy through the arguably, discriminatory customs rules is not novel.⁷⁸ In an optimistic scenario, the *Psagot* judgement will induce the EU to reassess its trade policies and technical measures towards disputed territories other than those occupied by Israel. On this occasion, alas, the Court missed an opportunity to reflect on international law considerations in relation to the territories other than Israeli settlements.

V. CONCLUSION

Origin indications that are misleading are bad from the perspective of consumer protection, and hence need to be addressed under EU consumer law. And while *Psagot* may as well carry some positive consequences, the Court's erroneous reasoning and lack of argumentation render this decision ambiguous and unconvincing.

Among other things, the Court overlooked the relevant provisions of the UCC and the UCPD Directive, demonstrating incorrect application and interpretation of the term "average consumer". Furthermore, the Court's broad understanding of the notion of "ethical considerations" of Regulation 1169/2011 does not appear to be based on the proper reading of this regulation. This selective use of EU law adds to the Court's – already traditional – selective use of international law: for instance, the *Psagot* decision does not address EU obligations under international law, such as the duty of non-recognition (discussed further in this Special Section), or the obligation to ensure respect for international humanitarian law. This upholds the CJEU's contemporary cautious and conditional approach to international law,⁷⁹ its reluctance to give formal valid-

⁷⁶ Motion from the Member of the Parliament Voordewind, 14 November 2019.

⁷⁷ Control of Economic Activity (Occupied Territories) Bill 2018, introduced by Irish Senators Frances Black, Alice-Mary Higgins, Lynn Ruace, Colette Keheller, John G. Dolan, Grace O'Sullivan, and David Norris, 24 January 2018, available at data.oireachtas.ie; see also the Introduction to to this Special Section, namely E. KASSOTI, S. SALUZZO, *The CJEU's Judgment in Organisation juive européenne and Vignoble Psagot: Some Introductory Remarks*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 753 et seq.

⁷⁸ N. GORDON, S. PARDO, *The European Union and Israel's Occupation*, cit., p. 74 et seq.

⁷⁹ G. DE BURCA, *Internalization of International Law by the CJEU and the US Supreme Court*, in *International Journal of Constitutional Law*, 2015, p. 1001 et seq.

ity to the principles of international law in the EU and its perseverance to maintain the autonomy of the EU legal order from international law.⁸⁰

Given the absence of previous case law, clarification of “ethical considerations” in the EU consumer law is indeed highly desirable. With the evolution of trade practices and food production methods, the issue of ethics may become central also in technical trade and customs rules. Yet, even if the EU consumer protection goes as far as including broader considerations of international law, with which the author disagrees, the Court’s failure to provide a clear and concise analysis of EU consumer law, food law and customs law undermines the potentially broader objectives of its judgement.

To end on an optimistic note, the aftermath of the *Psagot* ruling may inspire other cases on mandatory provision of the place of provenance for products originating in occupied territories, such as Western Sahara and Nagorno-Karabakh. This, in turn, may shed more light onto misleading practices and eventually, provide the EU with a chance to rectify its inconsistent and discriminatory external trade policies.

⁸⁰ B. DE WITTE, *European Union Law: How Autonomous is its Legal Order?*, in *Zeitschrift für öffentliches Recht*, 2010, p. 141 *et seq.*



INSIGHTS

SPECIAL SECTION – WHAT'S IN A NAME?

THE *PSAGOT* JUDGMENT AND QUESTIONS OF LABELLING OF SETTLEMENT PRODUCTS

CONTEXTUALISATION OF *PSAGOT* IN LIGHT OF OTHER CJEU CASE LAW ON OCCUPIED TERRITORIES

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ABSTRACT: This *Insight* is dedicated to a contextualisation of *Psagot* (judgment of 12 November 2019, case C-363/18, *Organisation juive européenne and Vignoble Psagot* [GC]), in light of previous rulings of the CJEU in cases involving occupied territories, namely the cases *Anastasiou I – III*, *Brita*, *Council v. Front Polisario*, and *Western Sahara Campaign UK*. The *Psagot* judgment was certainly influenced by this case law. Regrettably, this finding also concerns the Court's tendency to shy away from applying the EU's and the Member States' obligations under international law head-on.

KEYWORDS: *Organisation juive européenne and Vignoble Psagot* – C-363/18 – CJEU – occupied territories – trade – labelling of goods.

I. INTRODUCTION

In *Psagot*, the CJEU was asked by the French *Conseil d'État* whether, under EU consumer protection law, foodstuffs must bear an indication that they originate in a territory occupied by the State of Israel and, as the case may be, that they come from an Israeli settlement within that territory.¹ Needless to say, the *Psagot* case has not only proven interesting from the perspective of EU consumer protection law, but has shone a spotlight on thorny issues in relation to trade in goods from occupied territories. In the *Psagot* case, the illegality of the occupation of the West Bank and the Golan Heights as well as of the Israeli settlements was the centre of attention. In essence, the case boiled down to the question of whether consumers in the EU have a right to know that food-

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¹ Court of Justice, judgment of 12 November 2019, case C-363/18, *Organisation juive européenne and Vignoble Psagot* [GC] (hereinafter, *Psagot*).

stuffs imported from Palestinian territory actually originate from occupied territory and, if so, from an Israeli settlement located within such territory. Since the case concerns a highly politicised conflict, it is no surprise that the Court's answer in the affirmative was not well received by all. AG Hogan's disclaimer that nothing in his Opinion to the *Psagot* case nor in the ultimate judgment of the Court of Justice "should be construed as expressing a *political* or moral opinion in respect of any of the questions raised by this reference",² did not ward off criticism to the contrary. Yet, the Court was not spared legal critique either. A commentator even went as far as to claim that the Court has acted *ultra vires*, asserting that the labelling requirements established on the basis of EU consumer protection law amounted to foreign policy sanctions, the adoption of which falls within the purview of the Council.³ While this is a legally interesting – albeit bold – claim,⁴ the focus of this *Insight* is to contextualise the *Psagot* judgment in light of the Court's previous rulings in cases involving occupied territories, namely the cases *Anastasiou I – III*,⁵ *Brita*,⁶ *Council v. Front Polisario*,⁷ and *Western Sahara Campaign UK*⁸ (section III). Beforehand, it is shortly outlined why trade with occupied territories, and with Israeli settlements in particular, is a delicate matter (section II).

II. TRADE WITH OCCUPIED TERRITORIES, A DELICATE MATTER

Importing goods from occupied territories is a delicate matter because it may contribute to sustaining occupation by making it lucrative for occupying powers,⁹ and raises issues under the principle of self-determination.¹⁰ In particular, importing goods from

² Opinion of AG Hogan delivered on 13 June 2019, case C-363/18, *Organisation juive européenne e Vinoble Psagot*, para. 8 (emphasis in the original).

³ M. POLZIN, *Außenpolitik statt Verbraucherschutz: EuGH-Urteil zur Kennzeichnungspflicht von Lebensmitteln aus israelischen Siedlungen ist ultra vires*, in *Verfassungsblog*, 19 November 2019, www.verfassungsblog.de.

⁴ To this effect see O. HARDAN, *Völkerrecht und Verbraucherschutz: Zur Kennzeichnungspflicht von Lebensmitteln aus israelischen Siedlungen*, in *Verfassungsblog*, 21 November 2019, www.verfassungsblog.de.

⁵ Court of Justice: judgment of 30 September 2003, case C-140/02, *Anastasiou III*; judgment of 4 July 2000, case C-219/98, *Anastasiou II*; judgment of 5 July 1994, case C-434/92, *Anastasiou I*.

⁶ Court of Justice, judgment of 25 February 2010, case C-386/08, *Brita*.

⁷ Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC].

⁸ Court of Justice, judgment of 27 February 2018, case C-266/16, *Western Sahara Campaign UK* [GC].

⁹ Note, however, that under the laws of occupation the exploitation of natural resources of occupied territories is only legal if it benefits the inhabitants of the territory (Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 55). See B. SAUL, *The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources*, in *Global Change, Peace & Security*, 2015, pp. 316–317.

¹⁰ On the legal issues raised by trading goods from occupied territories see S. HUMMELBRUNNER, A.C. PRICKARTZ, *It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union*, in *Utrecht Journal of International and European Law*, 2016, p. 28 et seq.; E. KASSOTI,

occupied territories may undermine a people's right to freely determine their future political status, including the possible formation of an independent State,¹¹ and the right of peoples and nations to freely dispose of the natural resources occurring in their territories.¹² What is more, it may even be in breach of the "obligations of all States not to recognise the illegal situation resulting from [a breach of a people's right to self-determination] and, additionally, an obligation not to render aid or assistance in maintaining this situation".¹³ This "obligation not to recognise as legal" was formulated by the International Court of Justice (ICJ) as an emanation of the right to self-determination of a people, which is an obligation *erga omnes*,¹⁴ the observance of which is in the legal interest of all States, and can thus be enforced by all of them.¹⁵ The "duty not to recognise as legal" is of particular relevance, where occupying powers claim territorial sovereignty over the territory they occupy, the consequence being that States have to abstain from behaviour that would imply recognition of such claims.¹⁶ Besides raising this issue of non-recognition, the *Psagot* case also concerns legal problems raised by the Israeli settlements in the West Bank, including East Jerusalem, and the Golan Heights. According to the ICJ, these settlements – together with the wall established by Israel – violate the right to self-determination, in that they amount to a *fait accompli* that prejudices the future frontier between Israel and Palestine and, therefore, impedes the exercise by the

The Legality under International Law of the EU's Trade Agreements covering Occupied Territories: A Comparative Study of Palestine and Western Sahara, in *CLEER Papers*, no. 3, 2017, p. 1 *et seq.*

¹¹ International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, advisory opinion of 21 June 1971, para. 53.

¹² General Assembly, Resolution 1803 (XVII) of 14 December 1961, *Permanent sovereignty over natural resources*, UN Doc. A/RES/1803 (XVII), in which the permanent sovereignty over natural resources is denoted "as a basic constituent of the right to self-determination".

¹³ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004 (hereinafter, *Wall Opinion*), para. 159. On the significance of the duty of non-recognition in the context of the *Psagot* case, see Cedric Ryngaert's contribution to this special issue: see C. RYNGAERT, *Indications of Settlement Provenance and the Duty of Non-recognition under International Law*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 791 *et seq.* For an assessment of the role of the duty not to recognise as legal in the context of trade relations see E. KASSOTI, *The EU's Duty of Non-Recognition and the Territorial Scope of Trade Agreements covering Unlawfully Acquired Territories*, in *Europe and the World: A Law Review*, 2019, p. 1 *et seq.*

¹⁴ *Wall Opinion*, cit., para. 155.

¹⁵ To this effect, see International Law Commission, Articles on State Responsibility for Internationally Wrongful Acts (hereafter, ARSIWA), UN Doc. A/RES/56/83, Art. 42; and International Law Commission, Draft Articles on the Responsibility of International Organizations (hereafter, DARIO), UN Doc. A/66/10, Art. 43. Note that the enforcement of *erga omnes* obligations through "third parties" is highly disputed.

¹⁶ To this effect see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, cit., para 121; M. DAWIDOWICZ, *Trading Fish or Human Rights in Western Sahara*, in D. FRENCH (ed.), *Statehood and Self-Determination*, Cambridge: Cambridge University Press, 2013, pp. 267–274.

Palestinian people of its right to self-determination.¹⁷ Moreover, the ICJ found that the Israeli settlements are in breach of Art. 49, para. 6, of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), according to which an occupying power “shall not deport or transfer parts of its own civilian population into the territory it occupies”. In view of the fact that this convention applies *erga omnes partes*, the ICJ established that all States parties to the Geneva Convention IV are bound “to ensure compliance by Israel with international humanitarian law as embodied in that Convention”.¹⁸ Since all of the EU’s Member States are party to that convention, they are all bound by this third-party obligation.

III. ANALYSIS OF THE *PSAGOT* JUDGMENT IN LIGHT OF *BRITA & CO.*

The cases *Anastasiou I – III*, *Brita*, *Council v. Front Polisario*, *Western Sahara Campaign UK*, and the *Psagot* case have in common that they concern trade issues that have occurred because the territories involved, namely “Northern Cyprus”, the West Bank, including East Jerusalem, the Golan Heights, and the Western Sahara, are (largely) occupied. While, naturally, their status as occupied territories has influenced the findings of the Court of Justice, the impact of that status has been quite different, depending on the specific constellations of the case at hand. Yet, what unites them is that the Court, in all of them, exhibits a tendency that could be described as “*semi-völkerrechtsfreundlich*” (“semi-international law friendly”), in that it takes into account the status of occupied territories under international law,¹⁹ but abstains from identifying third party obligations that have to be observed by the EU or the Member States in this respect.

In *Psagot*, the West Bank’s and Golan Heights’ status as occupied territories was of relevance because Arts 9, para. 1, let. i), and 26, para. 2, let. a), of Regulation 1169/2011 on the provision of food information to consumers require an indication of the country of origin or place of provenance of a foodstuff,²⁰ if otherwise consumers would be misled or deceived about the true origin or provenance of the foodstuff concerned.²¹ According to the Court, in case a foodstuff comes from an Israeli settlement located within a territory occupied by Israel, said articles require both the indication of the territory concerned as well as the indication that it comes from an Israeli settlement.²² To this effect, the Court

¹⁷ *Wall opinion*, cit., paras 120-122.

¹⁸ *Ibid.*, para. 159.

¹⁹ Note that the Court of Justice has not used the term “occupied territory”, when dealing with the Western Sahara or the northern parts of Cyprus.

²⁰ Regulation (EU) 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

²¹ For a short summary of the judgment see also Eva Kassoti’s introduction to this special issue: E. KASSOTI, S. SALUZZO, *The CJEU’s Judgment in Organisation juive européenne and Vignoble Psagot: Some Introductory Remarks*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 753 *et seq.*

²² *Psagot* [GC], cit., para. 58.

pointed out that, under international law, the West Bank, including East Jerusalem, and the Golan Heights are territories that are only subject to a limited jurisdiction of Israel as the occupying power, highlighting their distinct international status from that State: while the West Bank is subject of the Palestinian people's right to self-determination, the Golan Heights are part of the Syrian Arab Republic.²³ That being the case, the Court concluded that an indication identifying Israel as the "country of origin" of foodstuffs that actually originate in one of these territories would be liable to deceive consumers, and could mislead them by implying that Israel is not only acting as an occupying power but as a sovereign with respect to these territories.²⁴ Apart from that, the Court abstained from making any pronouncements on possible obligations of the EU arising from the right to self-determination, in particular the duty not to recognise as legal, in that respect.²⁵ Instead, it chose to adjudicate the case at hand within the confines of Regulation 1169/2011. Basically the same applies to the Court's findings as to the mandatory indication of the Israeli settlements as place of provenance, with regard to which the Court noted that, in some of the territories occupied by Israel, these settlements were the result of a policy of population transfer conducted by Israel outside its territory, in violation of international humanitarian law, which has been condemned by the UN Security Council as well as the EU itself.²⁶ In this respect, the Court of Justice referred to Art. 3, para. 5, TEU, which provides that the Union is to contribute to the strict observance of international law, including the principles of the UN Charter.²⁷ Rather than pointing out that all Member States were under an obligation to ensure compliance by Israel with international humanitarian law as embodied in the Geneva Convention IV,²⁸ the Court justified this recourse to considerations of international law via a teleological interpretation of the labelling requirements under Regulation 1169/2011. According to the Court, the aim of the regulation is to ensure a high level of consumer protection in relation to food information (Art. 1, para. 1), and to enable consumers to make informed choices, with particular regard to health, economic, environmental, social and ethical considerations (Art. 3, para. 1). To this effect, the Court established that the observance of international law and, in particular, of "fundamental rules of international law" can be a relevant factor for enabling consumers to make informed choices, since it considered the list of relevant considerations as non-exhaustive. *In casu*, the Court recognised that a consumers' purchasing decision may be informed by the fact that foodstuffs originate from settlements established in breach of international humanitarian law.²⁹ The Court concluded that if a foodstuff from an Israeli

²³ *Psagot* [GC], cit., paras 34-35.

²⁴ *Ibid.*, paras 36-37.

²⁵ On the duty not to recognise as legal see section II above.

²⁶ *Psagot* [GC], cit., para. 48.

²⁷ *Ibid.*, para. 48.

²⁸ On this obligation see section II above.

²⁹ *Psagot* [GC], cit., paras 54-55.

settlement only bore the indication “West Bank” or “Golan Heights”, as the case may be, without mentioning the place of provenance, i.e. the Israeli settlement it originates in, consumers could be led to believe that it comes from an Palestinian or Syrian producer respectively.³⁰

The “semi-völkerrechtsfreundliche” approach of the Court can also be felt in the *Anastasiou* cases, which concerned the occupation of the northern parts of Cyprus by the “Turkish Republic of Northern Cyprus” (TRNC). The constellation in Cyprus is, however, different from that of the West Bank, or Western Sahara for that matter, in that in contrast to the latter, the northern part of Cyprus is – in line with international law and practice – not recognised as a separate and distinct “entity”, but is considered to be part of the Republic of Cyprus. This aspect has informed the Court’s ruling in *Anastasiou I*, in which it found that movement certificates, which establish evidence as to the origin of products, issued by the TRNC was deemed insufficient for obtaining preferential treatment under the ECC-Cyprus Association Agreement, which governed the relationship between Cyprus and the EU before Cyprus’ accession to the EU.³¹ Yet, while the Court pointed out that neither the European Union nor the Member States have recognised the TRNC, it did not refer to the “duty not to recognise as legal” in order to substantiate its findings, but merely expressed a lack of trust in terms of cooperating with authorities of such a non-recognised entity.³²

The Court upheld this approach in *Brita*, in which the goods in question, which undisputedly originated from the West Bank, were accompanied by a formal certificate of Israeli origin: the Court reiterated its findings made in *Anastasiou I*, namely that the validity of certificates issued by authorities other than those designated in the relevant association agreement cannot be accepted.³³ Similarly, it denied that the proof of origin produced by authorities of the exporting State in the context of a subsequent verification procedure bind the authorities of the importing State, unless the customs authorities of the exporting State, upon request, supply sufficient information to enable the real origin of the products to be determined. In this respect, the Court pointed out that the purpose of such procedure is to determine whether the products in question fall within the territorial scope of the EC-Israel Association Agreement, highlighting that the Union takes the view that products obtained in locations “placed under Israeli administration since 1967” do not qualify for preferential treatment under the EC-Israel Association Agreement.³⁴ In line with the fact that the Court stopped short of qualifying the situation of the territories referred to as occupation, it did not justify this pronounce-

³⁰ *Psagot* [GC], cit., paras 49 and 51.

³¹ *Anastasiou I*, cit., paras 37-41.

³² *Ibid.*, paras 38-41. This has been harshly criticised by S. TALMON, *The Cyprus Question before the European Court of Justice*, in *European Journal of International Law*, 2001, p. 727 *et seq.*

³³ *Brita*, cit., paras 55-57.

³⁴ *Ibid.*, paras 59-67.

ment by the “duty not to recognise as legal”. Instead, the Court denied preferential treatment under the EC-Israel Association Agreement with respect to goods originating in the West Bank, by pointing out that interpreting the territorial scope of that agreement so as to confer on Israeli customs authorities competence in respect of products originating in the West Bank would be contrary to the international law principle *pacta tertiis nec nocent nec prosunt*: according to the Court, this would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the EC-Palestine Liberation Organization (PLO) Association Agreement in conjunction with the EC-PLO Protocol.³⁵ The application of the *pacta-tertiis* principle in this context is noteworthy, seeing that pursuant to Art. 34 of the 1969 Vienna Convention on the Law of Treaties (VCLT), to which the Court explicitly referred to, this principle applies to *States*, and, despite the fact that there is an association agreement with the PLO, neither the EU nor all of its Member States recognise Palestine’s statehood. This might explain why the Court, in its reasoning, relied heavily on the EC-PLO Association Agreement, instead of conceding the Palestine territories some form of distinct status under international law. This omission as well as the Court’s indecision to qualify Israel’s presence in the West Bank as occupation have been clearly remedied in the *Psagot* judgment.³⁶

With respect to granting the West Bank and the Golan Heights a “separate and distinct status under international law”, the Court was influenced by its reasoning in the cases *Council v. Front Polisario* and *Western Sahara Campaign UK*,³⁷ in which it took a relatively decisive stance when it came to the application of trade agreements concluded between the EU and Morocco to the parts of Western Sahara occupied by Morocco. Although the Court did not label Morocco’s presence in Western Sahara as occupation, it emphasised that the territory of Western Sahara, by virtue of the principle of self-determination, has a separate and distinct status in relation to that of any State, including Morocco.³⁸ Consequently, the territorial scope of an agreement concluded with Morocco could not be interpreted so as to include the Western Sahara.³⁹ This finding was supported by the *pacta tertiis*-principle, which the Court of Justice, taking into account the Sahrawi people’s right to self-determination, quite progressively applied to the Western Sahara, which it considered to be a “third party” in relation to the agreement concluded between the Union and Morocco.⁴⁰ In *Western Sahara Campaign UK*, the Court even went as far as to state that the EU and Morocco could not have intended to give a special meaning, in the sense of Art. 31, para. 4, VCLT, to the territorial scope provisions in question, since doing so “would be

³⁵ *Brita*, cit., paras 47-52.

³⁶ *Psagot* [GC], cit., paras 31-37.

³⁷ *Ibid.*, para. 29.

³⁸ *Council v. Front Polisario* [GC], cit., para. 92.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, paras 100-103.

contrary to certain rules of general international law that are applicable in relations between the European Union and Kingdom of Morocco, namely the principle of self-determination, [...] and the principle of the relative effect of treaties".⁴¹ Hence, according to the Court, the Union "could not properly support any intention of the Kingdom of Morocco to include" Western Saharan territory within the scope of an agreement concluded with Morocco.⁴² In other words, the Court stopped "short of reprimanding the EU for potentially recognising Moroccan sovereignty over Western Sahara".⁴³ Yet, it appeared to indirectly remind the Union of its duty not to recognise as lawful the situation resulting from a breach of the right to self-determination.⁴⁴

Since the *Psagot* case was about the interpretation of labelling requirements under EU consumer protection law,⁴⁵ and not about treaty relations under international law, the *pacta-tertiis* principle was of no relevance. Yet, the Court, in line with its previous case law discussed above, also abstained from applying the "duty not to recognise as legal" in order to further substantiate its findings, despite the fact that it is possible to argue that allowing for a label which indicates Israel as the country of origin of products originating in the West Bank or the Golan Heights is tantamount to recognising Israel's claims to sovereignty over those territories. Similarly, it did not refer to the obligation of all States parties to the Geneva Convention IV to ensure Israel's compliance with that convention, which prohibits the transfer or to encourage transfers of parts of its own population into occupied territory.⁴⁶ Instead, the Court confined itself to analyse the case from the perspective of EU consumer protection law as much as possible, only "entering the international law sphere" where deemed necessary in order to establish whether or not a certain indication could mislead or deceive consumers as to the "true" country of origin or place of provenance. Also in this respect the *Psagot* judgment is comparable to other judgments, in particular *Anastasiou I*, in which the Court merely referred to the non-recognition of the TRNC in order to make an argument about a lack of trust in cooperating with the TRNC's authorities.⁴⁷ In *Anastasiou II and III*, which concerned phytosanitary certificates relating to fruit from the northern part of Cyprus issued by Turkish authorities, the Court even went as far as to abstain from any pronouncements of the status of the northern part of Cyprus altogether, confining itself to

⁴¹ *Western Sahara Campaign UK* [GC], cit., para. 63.

⁴² *Ibid.*, para. 71.

⁴³ A.C. PRICKARTZ, S. HUMMELBRUNNER, *EU-Morocco Trade Relations, Western Sahara and International Law: The Saga Continues in C-266/16 Western Sahara Campaign UK*, in *European Law Blog*, 28 March 2018, www.europeanlawblog.eu.

⁴⁴ *Ibid.*

⁴⁵ For an analysis of the labelling requirements established in the *Psagot* case, see Olia Kanevskaia's contribution to this special issue: O. KANEVSKAIA, *Misinterpreting mislabelling: the Psagot ruling*, in *European Papers*, Vol. 4, 2019, No 1, www.europeanpapers.eu, p. 763 et seq.

⁴⁶ *Wall Opinion*, cit., paras 120 and 159.

⁴⁷ *Anastasiou I*, cit., paras 38-41.

a “self-contained” interpretation of the EU directive in question – one time accepting that phytosanitary certificates can be issued by a country other than the country of origin,⁴⁸ and one time rejecting that (albeit for particular, yet fragile reasons).⁴⁹

IV. CONCLUSIONS

All in all, it can be held that while the *Psagot* judgment was certainly informed by the Court of Justice’s previous case law on occupied territories, the reasoning therein is characterised by a rather strict focus on EU consumer protection law. This does not mean that the Court did not take into account international law. In fact, the Court relied heavily on primary and subsidiary sources of public international law,⁵⁰ which makes it possible to draw a parallel to the Western Sahara cases, in which the Court of Justice applied principles of international law, including the principle of self-determination and certain principles of treaty interpretation, straightforwardly – albeit in a “creative” and sometimes selective manner.⁵¹ On the other hand, by calling out the illegality of Israel’s occupation of the West Bank and the Golan Heights as well as of the Israeli settlements, the Court has formulated its stance more unequivocally than in its rulings in *Brita*, the Western Sahara cases and in *Anastasiou I-III*.⁵² In this sense, the *Psagot* judgment can be held to be quite *völkerrechtsfreundlich*. However, the Court’s readiness to apply international law ends, where third-party obligations of the EU or the Member States that exist in respect of occupied territories come into play. The Court, in neither of the cases discussed above, directly applied the “duty not to recognise as legal” or the obligation to ensure that occupying powers observe the prohibition of a transfer of civilians to occupied territory. This is understandable, since framing the issue at stake as a matter of complying with the EU’s and the Member States’ obligations *vis-à-vis* occupied territories would mean to recognise these obligations: this would have a *de facto* precedent-setting effect in relation to all occupied territories, and, what is more, could trigger questions as to the EU’s and the Member States’ international responsibility.⁵³ However, invoking

⁴⁸ *Anastasiou II*, cit., paras 20-38.

⁴⁹ *Anastasiou III*, cit., paras 49-52 and paras 57-60.

⁵⁰ To this effect see also J. WEINZIERL, *An unlikely couple: Informed consumer choice in EU law and the Middle East conflict*, in *Völkerrechtsblog: International law & international legal thought*, 14 November 2019, www.voelkerrechtsblog.org.

⁵¹ To this effect see: S. HUMMELBRUNNER, A.C. PRICKARTZ, *EU-Morocco Trade Relations Do Not Legally Affect Western Sahara – Case C-104/16 P Council v Front Polisario*, in *European Law Blog*, 5 January 2017, www.europeanlawblog.eu; A.C. PRICKARTZ, S. HUMMELBRUNNER, *EU-Morocco Trade Relations*, cit.; E. KASSOTI, *The Council v Front Polisario: The Court of Justice’s Selective Reliance on International Rules on Treaty Interpretation*, in *European Papers*, Vol. 2, 2017, No. 1, www.europeanpapers.eu, p. 23 *et seq.*; E. KASSOTI, *The ECJ and the Art of Treaty Interpretation: Case C-266/16 Western Sahara Campaign UK*, in *Common Market Law Review*, 2019, p. 209 *et seq.*

⁵² On the significance of this finding see E. KASSOTI, *The CJEU’s Judgment in Case C-363/18*, cit.

⁵³ To this effect, see also S. HUMMELBRUNNER, A.C. PRICKARTZ, *It’s not the Fish that Stinks!*, cit., p. 35.

these third-party obligations could have supported the Court's findings in the *Psagot* case in some places, and even remedied some of its weaknesses. These particularly concern the Court's reasoning with regard to the mandatory requirement to indicate that foodstuffs originating in the West Bank or the Golan Heights come from an Israeli settlement. While it is true that Arts 9, para. 1, let. i) and 26, para. 2, let. a), of Regulation 1169/2011 allow for an interpretation according to which the observance of international law is a valid point of reference when it comes to enabling consumers to make informed choices, this possibility of "private enforcement" of international law raises issues of legitimacy: under international law, a State or international organisation that is not individually affected by a breach of international law by another State or international organisation may only invoke the responsibility of the latter in case the breach concerns an obligation *erga omnes*.⁵⁴ The Court's reference to Art. 3, para. 5, TEU, according to which the Union is to contribute to the strict observance of international law, does not remedy the problem that the EU cannot be considered to be individually affected by any breach of international law. Art. 3, para. 5, TEU may only provide legitimacy internally at EU level, but cannot be used as a justification *vis-à-vis* a third State, because it is not bound by the EU Treaties.⁵⁵ In order to justify the enforcement of international law via EU consumer protection law, the Court could have simply invoked the Palestinian's right to self-determination, which, as pointed out in section II, is an obligation *erga omnes* that can be enforced by all States, and, arguably, also by international organisations such as the EU.

Apart from that, even if one were to argue that this form of private enforcement was not problematic as it does not amount to actual enforcement action on the part of the EU,⁵⁶ there is still the more general issue of how to apply the Court's approach in *Psagot* to other occupied territories. Is it, for instance, mandatory to indicate that a product originates in Western Sahara or the northern part of Cyprus?⁵⁷ The Court's rul-

⁵⁴ See Art. 42 ARSIWA, cit., and Art. 43 DARIO, cit.

⁵⁵ See Art. 34 VCLT, cit., in which the *pacta-tertiis* principle is codified. To this effect see also K.P. PURNHAGEN, J. VAN ZEBEN, C. AHLBORN, P. OOSTERVEER, *Beyond Food Safety – EU Food Information Standards as a Facilitator of Political Consumerism and International Law Enforcement Mechanism*, in *Wageningen Working Paper Law*, no. 1, 2020, p. 26.

⁵⁶ After all, the Court's interpretation of Arts 9, para. 1, let. i), and 26, para. 2, let. a), of Regulation 1169/2011 only enables consumers to make informed purchasing decisions. It does not immediately or necessarily lead to a boycott of products from Israeli settlements.

⁵⁷ Note that, following the judgments in *Front Polisario v. Council* and *Western Sahara UK Campaign*, it was not possible to import products originating in the part of Western Sahara on the then applicable terms of the EU-Morocco trade agreements in place. However, in July 2019, the Council adopted a decision to revise the EU-Morocco Association Agreement so as to expressly extend its territorial scope to the Western Sahara: Decision (EU) 2018/1893/EU of the Council of 16 July 2018 regarding the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their

ing implies so. Yet, what about the additional indication of a place of provenance? After all, the illegal transfer of civilian population from occupying States to occupied territories has also occurred, e.g., in the Western Sahara,⁵⁸ or the northern part of Cyprus.⁵⁹ That said, it will be hard or even impossible to establish geographically defined places of provenance similar to the Israeli settlements. While this is mostly a practical and not a legal problem, it cannot be denied that Israeli settlements are thereby worse off than, for instance, Turkish entrepreneurs in the northern part of Cyprus, or, Moroccan entrepreneurs in the Western Sahara. On the other hand, only indicating the country or territory of origin could also have a negative economic impact on other entrepreneurs, such as Greek Cypriot entrepreneurs living in the northern part of Cyprus. In such a case, only indicating the country or territory of origin could be equally misleading as a failure to indicate that foodstuff originating in the West Bank comes from an Israeli settlement. While a reference, in the *Psagot* judgment, to the above-mentioned third-party obligations formulated by the ICJ with respect to the territories occupied by Israel could not have solved these issues, it would have, at least in part, helped to neutralise the negative connotations of a political bias against Israeli settlements.

Member States, of the one part, and the Kingdom of Morocco, of the other part. In light of the Court's findings in *Brita* and the Western Sahara cases, it is doubtful that such amendments would stand a chance before the Court of Justice. For a detailed analysis of this issue see E. KASSOTI, *The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement*, in *European Papers*, Vol. 4, 2019, No 1, www.europeanpapers.eu, p. 307 *et seq.*

⁵⁸ See P. VAN ELSUWEGE, *The principle of self-determination in relations between the EU and its neighbours: Between Realpolitik and respect for international law*, in *Zeitschrift für öffentliches Recht*, 2018, p. 761.

⁵⁹ To this effect, see General Assembly, Resolution 3395 (XXX) of 20 November 1975, Question of Cyprus, UN Doc. A/RES/3395(XXX); Security Council, Resolution 550 (1984) of 11 May 1984, UN Doc. S/RES/550.



INSIGHTS

SPECIAL SECTION – WHAT'S IN A NAME?

THE *PSAGOT* JUDGMENT AND QUESTIONS OF LABELLING OF SETTLEMENT PRODUCTS

INDICATIONS OF SETTLEMENT PROVENANCE AND THE DUTY OF NON-RECOGNITION UNDER INTERNATIONAL LAW

CEDRIC RYNGAERT*

ABSTRACT: In its 2015 “Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967”, the European Commission linked the indication of origin of products from Israeli settlements in the occupied Palestinian territories to the duty of non-recognition under international law, *i.e.*, a duty not to recognize illegal situations. In its *Psagot* judgment (judgment of 12 November 2019, case C-363/18 [GC]), however, the CJEU did not engage with this duty, but limits itself to interpreting EU consumer law. It is argued that disputes over the application and interpretation of consumer law indeed do not lend themselves well to the application of the duty of non-recognition. The question remains, however, whether conducting trade relations as regards settlement products amounts to an implicit recognition of Israeli settlement policy in the occupied territories.

KEYWORDS: duty of non-recognition – peremptory norms – public international law – consumer law – settlements – occupation.

I. INTRODUCTION

In 2015, in its “Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967” (hereinafter, Interpretative Notice),¹ the European Commission linked the indication of origin of products from Israeli settlements in the occupied Palestinian territories (OPT) to the duty of non-recognition under international law, *i.e.*, the duty not to recognize illegal situations. In its *Psagot* judgment, however, the CJEU,

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¹ Commission Interpretative Notice 2015/C 375/05 on indication of origin of goods from the territories occupied by the Israel since June 1967.

while noting the Commission's reference to the duty of non-recognition, did *not* ground its decision on this duty.² Instead, its decision that foodstuffs originating in a territory occupied by Israel should bear an indication of settlement provenance, is solely based on EU consumer and customs legislation, albeit interpreted in light of international law.

In this *Insight*, I argue that disputes over the application and interpretation of consumer law do not lend themselves well to the application of the duty of non-recognition, as consumer law is concerned with protecting individual consumer rights and preferences rather than with implementing public international law obligations resting on States and the EU. The question remains, however, whether the mere importation of settlement products into the EU – a question that was not before the Court – amounts to an implicit recognition of Israeli settlement policy in the OPT, in violation of the duty of non-recognition.

II. THE DUTY OF NON-RECOGNITION: THE COMMISSION'S INTERPRETATIVE NOTICE VERSUS THE COURT'S JUDGMENT

According to the Interpretative Notice of the Commission, the aim of indications of origin of goods from the OPT is "to ensure the respect of Union positions and commitments in conformity with international law on the non-recognition by the Union of Israel's sovereignty over the territories occupied by Israel since June 1967".³ Arguably, in so stating, the Commission gave effect to the EU's international duty not to "recognize as lawful a situation created by a serious breach [of a peremptory norm of international law], nor render aid or assistance in maintaining that situation", *i.e.*, the formulation used in Art. 42, para. 2, of the International Law Commission's Draft Articles on the Responsibility of International Organizations (DARIO 2011).⁴

In contrast, in its *Psagot* judgment,⁵ the CJEU remains silent on the duty of recognition, and limits itself to interpreting EU law only, in particular Regulation 1169/2011 on the provision of food information to consumers and Art. 60 of the Union Customs Code.⁶ This limitation follows from the very framing of the reference for a preliminary

² Court of Justice, judgment of 12 November 2019, case C-363/18, *Organisation juive européenne and Vignoble Psagot* [GC] (hereinafter, *Psagot*).

³ Commission Interpretative Notice, *cit.*, para. 2. I have discussed this interpretative notice in an earlier publication in Dutch: C. RYNGAERT, *Product uit de Westelijke Jordaanoever (Israëlische nederzetting) – Europese consumentenlabels voor Israëlische producten uit de bezette gebieden in het licht van het internationaal recht*, in *SEW, Tijdschrift voor Europees en economisch recht*, 2016, p. 162 *et seq.*

⁴ International Law Commission, 2011 Draft Articles on the Responsibility of International Organizations (hereinafter, DARIO), UN Doc. A/66/10, Art. 42. See on peremptory norms Art. 41 DARIO.

⁵ *Psagot* [GC], *cit.*

⁶ Regulation (EU) 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers; Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

ruling. The main question put to the Court by the French *Conseil d'État* was whether "EU law and in particular Regulation No 1169/2011, where indication of the origin of a product falling within the scope of that regulation is mandatory, require, for a product from a territory occupied by the State of Israel since 1967, an indication of that territory and an indication that the product comes from an Israeli settlement if that is the case".⁷

While the Court does not as such engage with the duty of non-recognition under international law, the Court does interpret the aforementioned EU instruments in light of relevant international law. In particular, the Court cites the Palestinian people's right to self-determination and the rules of international humanitarian law, which prohibit policies of population transfer conducted by the State outside its territory.⁸ It does so in the context of interpreting Art. 3, para. 1, of Regulation 1169/2011, which provides that the provision of information to consumers enables them to "make informed choices [...] with particular regard to health, economic, environmental, social and ethical considerations". According to the Court, this list of considerations is not exhaustive, but may include "other types of considerations, such as those relating to the observance of international law".⁹ Thus, the Court relies on international law as a *body of rules that can influence consumer perceptions*.

As it happens, this body of rules may also include the duty of non-recognition of situations created by serious breaches of peremptory norms of international law. In fact, the Court itself points out that "the fact that a foodstuff comes from a settlement established in breach of the rules of international humanitarian law may be the subject of ethical assessments capable of influencing consumers' purchasing decisions, particularly since some of those rules constitute *fundamental rules of international law*".¹⁰ These "fundamental rules of international law" echo the "peremptory norms of international law", which trigger the duty of non-recognition under Art. 42 DARIO. This reading may be confirmed by the Court's citation of para. 159 of the International Court of Justice's Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where the Court held that "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory" – which, in the Court's opinion, violated peremptory norms.¹¹

While the CJEU's judgment in *Psagot* contains this implicit nod to the duty of non-recognition, eventually, in the specific context of EU consumer law, the interpretative recourse to peremptory norms does *not* serve the purpose of grounding a genuine duty of non-recognition. The "fundamental" nature of an international norm is just one rele-

⁷ *Psagot* [GC], cit., para. 20.

⁸ *Ibid.*, paras 34, 35 and 48. The Israeli settlements in the OPT can be considered as a manifestation of such policies.

⁹ *Ibid.*, para. 54.

¹⁰ *Ibid.*, para. 56 (emphasis added).

¹¹ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, p. 136, para. 159.

vant consideration that enables a consumer to take an informed decision regarding the purchase of a particular product. It does not give rise to any *legal* obligations, as the consumer continues to have the *free choice* to purchase a product of Israeli settlement provenance. This is obviously a far cry from a perceived *duty* of non-recognition, which should normally ground a parallel *prohibition*, in this case a prohibition from purchasing the relevant product. Such a duty also does not follow from current international law, which only creates duties of non-recognition for *States and international organizations*, not for individual consumers.¹²

III. CONSUMER LAW AND THE DUTY OF NON-RECOGNITION: A POOR FIT

It is no surprise that the duty of non-recognition only played a background role in *Psa-got*. After all, the judgment only concerned the interpretation of EU consumer law. The aim of consumer law is inherently limited to achieving a high level of protection for consumers and guaranteeing their right to information, by ensuring that they are appropriately informed as regards the products which they consume.¹³ Consumer law can only *indirectly* pursue the goals of the international community not to recognize illegal situations: it limits itself to empowering individual consumers to “vote with their trolley”,¹⁴ *i.e.*, to take more informed transactional decisions regarding products made in conditions related to breaches of fundamental rules of the international legal order.¹⁵ As consumer law ultimately protects consumers (only), States or the EU cannot *instrumentalize* consumer law as a political tool to promote international legal interests if these interests are unrelated to consumer perceptions. As in consumer law, the unit of concern is the consumer, the duty of non-recognition cannot as such ground the attachment of labels containing mandatory information of origin.

¹² International Law Commission, Draft Articles on State Responsibility for Internationally Wrongful Acts of 3 August 2001, UN Doc. A/56/1, Art. 41; Art. 42 DARIO.

¹³ Regulation 1169/2011, *cit.*, recital 3. See on the goals of consumer law also M. DUROVIC, *International Consumer Law: What Is It All About?*, in *Journal of Consumer Policy*, 2019, p. 3, available at www.link.springer.com (describing the main function of international consumer law as “the protection of consumers, *i.e.*, the development of rules which are going to protect the consumers from potential abuse by traders due to the presence of an inequality of bargaining powers – irrespective of where consumer or trader are based”).

¹⁴ The Economist, *Voting with your trolley. Can you really change the world just by buying certain foods?*, Special report of 7 December 2006, in *The Economist*, www.economist.com.

¹⁵ This could be considered as a “nudging” strategy, which aims to nudge consumers in a direction that contributes to the realization of socially or politically desirable goals. There is currently a large amount of behavioural sciences-inspired research going on in consumer law that relates to nudging consumers to behave in a more sustainable fashion. See A. Mathios, H. Micklitz, L. Reisch et al. *Journal of Consumer Policy's 40th Anniversary Conference: A Forward Looking Consumer Policy Research Agenda*, in *J Consum Policy*, 2020, pp. 7-8, <https://doi.org/10.1007/s10603-019-09446-9>.

Since the CJEU's judgment in *Psagot* only pertains to consumer law and individual consumer decisions, Israel's reaction that the Court is a "tool in the political campaign against Israel" appears to be misguided.¹⁶ There may well be consumers whose "purchasing decisions may be informed by considerations relating to the fact that the foodstuffs in question [...] come from settlements established in breach of the rules of international humanitarian law", including peremptory norms;¹⁷ these consumers need to be informed of the exact provenance of these foodstuffs to take a proper transactional decision. However, as AG Hogan pointed out in his opinion, it is not the task of the Court "to approve or to disapprove of such a choice on the part of the consumer: it is rather sufficient to say that a violation of international law constitutes the kind of ethical consideration which the Union legislature acknowledged as legitimate in the context of requiring country of origin information".¹⁸ In other words, even if the Court requires mandatory labelling of settlement produce, it remains *agnostic* as to whether particular consumer choices are good or bad. The Court only acknowledges that some consumers' decisions may be informed by the consideration that fundamental rules of international law are breached, and by political ideology, while refraining from necessarily *supporting* such decisions.¹⁹

In contrast, there may be some more merit in Israel's Foreign Ministry statement that the EU uses double standards and singles out Israeli settlement products, whereas there are "200 ongoing territorial disputes across the world".²⁰ Admittedly, the CJEU itself does not discriminate between territorial situations; in fact, the judgment supports the mandatory indication of provenance of *all* foodstuffs insofar as consumers' transactional decisions may be guided by international law considerations.²¹ It remains, however, that the Commission has produced an Interpretative Notice only in relation to the OPT, and not in relation to comparable territories, such as the Western Sahara (occupied by Morocco), where breaches of peremptory norms may give rise to duties of non-recognition. At the same time, it is not unlikely that consumers care more about the sit-

¹⁶ N. LANDAU, DPA, *EU States Must Label Products From Israeli Settlements, Top Court Says*, in *Haaretz*, 12 November 2019, www.haaretz.com.

¹⁷ *Psagot* [GC], cit., para. 55.

¹⁸ Opinion of AG Hogan delivered on 13 June 2019, case C-363/18, *Organisation juive européenne e Vignoble Psagot*, para. 51.

¹⁹ See on the interaction of political ideology and consumption, for instance, J.C. KIM, B. PARK, D. DUBOIS, *How Consumers' Political Ideology and Status-Maintenance Goals Interact to Shape Their Desire for Luxury Goods*, in *Journal of Marketing*, 2018, p.132-149.

²⁰ N. LANDAU, DPA, *EU States Must Label*, cit.: "The ruling's entire objective is to single out and apply a double standard against Israel. There are over 200 ongoing territorial disputes across the world, yet the ECJ has not rendered a single ruling related to the labeling of products originating from these territories. Today's ruling is both political and discriminating against Israel".

²¹ After all, the CJEU, while deciding specifically on the case before it, which indeed concerned Israeli settlement produce, ruled in general terms that considerations relating to the observance of international law may be relevant in the context of Art. 3, para. 1, of Regulation 1169/2011, cit. Cf. *Psagot* [GC], cit., para. 54.

uation in the OPT than they care about – say – the situation of the Western Sahara, because there is simply more media attention for Israeli settlements in the OPT. At the end of the day, consumer law does not require States or the EU to create or change consumers' perceptions but only to give them sufficient information so that they can give effect to their existing convictions by means of purchasing decisions.²² "Objective" duties of non-recognition, even if considered as self-executory, may have little practical bearing on such subjective perceptions.²³

IV. IMPORTATION OF SETTLEMENT PRODUCTS AS IMPLICIT RECOGNITION

The narrow framing of the *Psagot* case, and its limitation to the interpretation of EU consumer law (albeit in light of international law), do not put to rest the important question of whether the mere fact of allowing the importation of settlement products into the EU is compatible with the duty of non-recognition. In other words: is the EU under an international legal obligation to ban such products from its markets, regardless of consumer perceptions?

Such an obligation can at first sight be derived from the *Namibia* advisory opinion of the International Court of Justice, in which the Court held that the duty of non-recognition imposes "upon [UN] Member States the obligation to abstain from entering into economic and other forms of relationship or dealings with [the occupying power] on behalf of or concerning [the occupied territory] which may entrench its authority over the Territory".²⁴ It is not clear, however, whether, as a matter of positive international law, this duty of non-recognition requires that States and the EU ban settlement products from their markets.²⁵ In the context of this brief *Insight*, I limit myself to noting that there is a fierce academic debate on this issue. Authors such as Dubuisson and Moerenhout have forcefully argued that allowing the importation of products from Israeli settlements amounts to the implicit recognition of a situation of illegality,²⁶ whereas the likes of Kontorovich have argued precisely the opposite.²⁷

²² See on ethical labelling also O. KANEVSKAIA, *Misinterpreting Mislabelling: The Psagot Ruling*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 763 et seq..

²³ M. DAWIDOWICZ, *The Obligation of Non-Recognition of an Unlawful Situation*, in J. CRAWFORD, A. PELLET, S. OLLESON (eds), *The Law of International Responsibility*, Oxford: Oxford University Press, 2010, p. 683.

²⁴ International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276(1970)*, advisory opinion of 21 June 1971, para. 121.

²⁵ C. RYNGAERT, R. FRANSEN, *EU Extraterritorial Obligations with Respect to Trade with Occupied Territories: Reflections after the Case of Front Polisario before EU Courts*, in *Europe and the World: A Law Review*, 2018, p. 17, available at www.scienceopen.com.

²⁶ F. DUBUISSON, *Les obligations internationales de l'Union européenne et de ses Etats membres concernant les relations économiques avec les colonies israéliennes*, in *Revue Belge de Droit International*, 2013, pp. 408-489; T. MOERENHOUT, *The Consequence of the UN Resolution on Israeli Settlements for the EU: Stop*

It is noted that in the *Western Sahara* cases (2015-2018),²⁸ the CJEU had the opportunity to address the scope and content of the duty of non-recognition in the context of economic relations – in those cases bilateral trade and fisheries agreements concluded between the EU and Morocco in respect of goods produced or harvested in the Western Sahara. However, it managed to skirt this controversial issue by relying instead on alternative legal regimes, such as the Charter on Fundamental Rights of the EU, the 1969 Vienna Convention on the Law of Treaties, and peoples' right to self-determination. In an earlier publication, I have criticized the Court for failing to review the said agreements in light of the duty of non-recognition.²⁹

V. CONCLUDING OBSERVATIONS

In *Psagot*, the CJEU did not directly engage with the duty of non-recognition, even if it engaged with international law in the context of gauging consumer perceptions. I have argued in this *Insight* that this lack of engagement with the duty of non-recognition is not surprising, as the case was entirely framed in terms of consumer law. Consumer law protects free and informed consumption choices of individuals, whereas the duty of non-recognition imposes obligations on States and international organizations. Accordingly, the duty of non-recognition and consumer law are a poor fit. After *Psagot*, the fundamental question remains, however, as to whether the very conduct of economic

Trade with Settlements, in *EJIL: Talk!*, 4 April 2017, www.ejiltalk.org. See also the NGO campaign *Made in Illegality*, www.madeinillegality.org.

²⁷ E. KONTOROVICH, *Economic Dealings with Occupied Territories*, in *Columbia Journal of Transnational Law*, 2015, p. 584 *et seq.*

²⁸ Court of Justice: judgment of 21 December 2016, case C-104/16 P, *Front populaire pour la libération de la saquiaelhamra et du rio de oro (Front Polisario) v. Council of the European Union* [GC]; judgment of 27 February 2018, case C-266/16, *Western Sahara Campaign UK* [GC]. Especially the first judgment has been discussed at length in this journal: E. KASSOTI, *The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)*, in *European Papers*, 2017, www.europeanpapers.eu, pp. 339-356; E. KASSOTI, *The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)*, in *European Papers*, 2017, www.europeanpapers.eu, pp. 23-42; P. HILPOLD, *Self-determination at the European Courts: The Front Polisario Case" or "The Unintended Awakening of a Giant"*, in *European Papers*, 2017, www.europeanpapers.eu, pp. 907-922; A. EL OUALI, *L'Union Européenne et la question du Sahara: entre la reconnaissance de la souveraineté du Maroc et les errements de la justice européenne*, in *European Papers*, 2017, www.europeanpapers.eu, pp. 923-952; E. MILANO, *Front Polisario and the Exploitation of Natural Resources by the Administrative Power*, in *European Papers*, 2017, www.europeanpapers.eu, pp. 953-966; A. RASI, *Front Polisario: A Step Forward in Judicial Review of International Agreements by the Court of Justice?*, in *European Papers*, 2017, www.europeanpapers.eu, pp. 967-975; E. KASSOTI, *The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement*, in *European Papers*, 2019, www.europeanpapers.eu, pp. 307-317. See on the relationship with other CJEU judgments also S. HUMMELBRUNNER, *Contextualisation of Psagot in Light of Other CJEU Case Law on Occupied Territories*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 779 *et seq.*

²⁹ C. RYNGAERT, R. FRANSEN, *EU Extraterritorial Obligations with Respect to Trade with Occupied Territories*, *cit.*

relations regarding settlement products violates the duty of non-recognition. In the recent *Western Sahara* cases, the CJEU unfortunately failed to address this question precisely where the circumstances called for it.



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