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EDITORIAL

EUROPEAN INTEGRATION THROUGH INTERNATIONAL LAW? THE STRANGE STORY OF THE GLOBAL TAX PROJECT

Day after day, the project to reform the current worldwide accepted system of corporate taxation is taking shape, commonly referred to as the global tax project.

At the beginning of March, a deal to back this project was reached within the G7. This informal agreement was upheld by the G7 Finance Ministers meeting on June 5, 2021, in London. In the first days of July, a working Statement drafted within the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting was signed by 139 countries, representing more than 90 percent of the world GDP (Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 1 July 2021, www.oecd.org). The Statement sets out that this reform is designed to address the tax challenges arising from the digitalisation of the economy and to ensure a fair distribution of taxing rights among countries concerning the largest multinational enterprises (MNEs), including digital companies. The project is based on two principles. Pillar 1 partly shifts taxation from the country where enterprises are based to the countries where they do business. Pillar 2 establishes a minimum threshold of corporate taxation, provisionally set at 15 percent. According to an Agenda set within the G20, this triumphal march should be finalized in the Fall through an agreement specifying the details of the project.

The innovative character of this prospective reform is uncontroversial and as such was it presented by the world press. The immense wealth and power concentrated in the hands of some MNEs by the opportunities offered by the digital economy upset the historical link between public authority and private individuals and enterprises. More and more, States vie to grant tax advantages to MNEs to lure them within their jurisdiction and, by so doing, enjoy some benefit deriving from the armature produced by their presence on the territory at the cost of renouncing to conspicuous tax revenues and, symbolically more importantly, of creating huge inequalities and humiliating the role of public powers.

In the minds of its proponents, the prospective global tax may put a limit to the race to the bottom, which is featuring the tax competition among countries, which produces a huge transfer of wealth from the States, deprived of ever larger shares of revenues to finance their public policies, to the private MNEs, which further increase their prosperity and power (see the Special Section 'Regulatory Competition in the EU: Foundations, Tools and Implications' edited by Francesco Costamagna (2019) *European Papers* 123



and, in particular, P van Cleynenbreugel, 'Regulating Tax Competition in the Internal Market: Is the European Commission Finally Changing Course?' therein).

Looking from the prism of *realpolitik*, the principle of taxation in the country where MNEs do business and earn a profit is primarily aimed at re-shifting the balance of power between States and MNEs. This explains why, paradoxically, this project is advocated by the traditionally most powerful States and not so much by the poor States, which, at least theoretically, should be the main beneficiaries of the redistribution of wealth it may produce.

From a legal viewpoint, this endeavour, noble or not, will not be easily realized. Absent a global authority having the competence to legislate in fiscal matters, the enduring claim to absolute sovereignty by States entails that the global tax project will see the light of the day through its incorporation in a voluntary agreement, which, to be efficient, should gather a universal or quasi universal consent.

All in all, the road to institute a global tax through international, though paved with good intentions, is presumably longer than expected. However, despite these difficulties, it is worth going along it. That road symbolically depicts the overwhelming need to govern the new social and economic dynamics triggered by the new technologies and the difficulties to do it through a decentralised approach. It remains to be seen whether this project will be as revolutionary as it promises and if it will inaugurate a new course in the international economic relations based on a common and fair approach to collective issues.

In spite of the laudable intentions of the Commission and the Parliament, the European Union did not have a prominent place in promoting this project.

The obvious reason for these difficulties is that the competence of the Union in taxation is quite weak and, in particular, does not cover direct taxation. The lack of a solid ground may explain why the feeble attempts by the Commission to promote analogous initiatives in the more integrated European context failed. In the Communication COM(2020) 313 final from the Commission to the European Parliament and the Council of 15 July 2020 on Tax Good Governance in the EU and beyond, the Commission unsuccessfully proposed to anticipate on the European scene the introduction of a minimum corporate tax.

The difficulties are even increasing with the regard to the participation of the Union in the global tax project. In its Communication COM(2021) 251 final of 18 May 2021 to the European Parliament and the Council on Business Taxation for the 21st Century, the Commission, after reaffirmed that "the EU needs a robust, efficient and fair tax framework that meets public financing needs, while also supporting the recovery and the green and digital transition by creating an environment conducive to fair, sustainable and job-rich growth and investment", did not unveil how it can be realized. The Communication proposes to implement a possible agreement on a new corporate global tax through two directives. Pillar 1 of the project should be implemented by a new directive, whose legal ba-

sis is not unveiled by the Communication. Pillar 2, the most spectacular innovation concerning the minimum global rate, should be implemented through “the pending proposal for recasting the Interest and Royalties Directive (IRD), which has been in the Council since 2011”. In the view of the Commission, the new proposal, lodged in 2020, should be recast to “make the benefits of the Directive (which eliminates withholding tax obstacles to cross-border interest and royalty payments within a group of companies) conditional on the interest being subject to tax in the destination state”.

After pointing out that “some Member State held the view that the IRD should go further and set a minimum level of tax in the destination state as a condition for benefiting from the absence of withholding tax”, the Commission, optimistically, added that “agreement on Pillar 2 will resolve this issue”.

This last passage is crucial to identify the difficulties of the Union in shaping tax policies having a redistributive effect (see the Communication COM(2021) 251 final cit. point 2.2.). Although implicitly, the Commission admitted that international law can attain worldwide a goal hardly attainable by the EU in the restricted European space. At first sight, this appears to be a living paradox. How is it possible that an international agreement may attain, at the global level, a goal unattainable within the limited and by far more integrated European context?

The reason is easily explained by a combination of two factors: the segmentation of the competence assigned to the EU and the complexity and cumbersomeness of its decision-making procedure.

First, the Union cannot use the powers of action bestowed upon it by the Member States to pursue indifferently any objective assigned to it. Expressly, art. 5(2) TEU, laying down the principle of conferral, namely the “Alpha and the Omega” of the integration project, states that “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”. This provision has been constantly interpreted in the sense that each competence of the Union has two components: the powers of action and the objectives assigned to it. This bijective relation makes it illegal for the Union to use a means of action to pursue an objective assigned to another competence. The application of that principle to the case at hand entails that, to fight tax competition and to prevent corporate tax rulings, the EU Institutions must use its competence in fiscal matters.

Unfortunately, no provision of the Treaties confers to the Union competence to that effect. Tax competition consists in the exploitation of the disparities of Member States fiscal legislation to grant advantages to private undertakings. The Union does possess the competence to prevent States’ actions distorting the competition under art. 107 TFEU, and the competence to harmonise Member States fiscal legislation under art. 115 TFEU. However, these two competences can be hardly combined.

Attempts to qualify tax rulings as State aid hitherto failed to pass the test of the selective advantages, as evidenced by joint cases T-778/16 and T-892/16, where the Gen-

eral Court annulled a decision of the Commission which had qualified two Irish tax rulings as State aid in favour of two Irish subsidiaries of Apple Incorp. (see *Apple Sales International and Apple Operations Europe v Commission* ECLI:EU:T:2020:338).

Nor more successful has been the attempt to harmonize diverging Member States' legislation on direct taxation. Under art. 115 TFEU, the power of the Union is conditional to the demonstration that the disparities among Member States legislation directly affect the establishment or functioning of the internal market. However, for decades, competition between jurisdictions fuelled by diverging Member States' regulations was considered as a magnification of the internal market philosophy, aimed to streamline the resources and create an efficient balance between demand and supply, even at the cost of lowering the standard of protection for collective interests.

But there is a further difficulty of procedural nature. Art. 115 TFEU provision requires unanimity in Council. The fact is that the requirement of unanimity within the Council is, paradoxically, more complex and cumbersome than the requirement of the consent of the parties to an international agreement. Whereas under international law, unanimous consent is required only from the States which intend to become a party to the agreement, under European Law the consent is required by all the States of the Union. This additional requirement confers to each State member of the Union the power to vetoing a further process of integration by the remaining States. To overcome this veto power, recourse ought to be had to an even more cumbersome procedure, namely the enhanced cooperation, which, in practice, never took root in the EU legal system.

Tax competition is a clear example of the perverse effect produced by the requirement of unanimity in an integrated system. Whereas under general international law, every State is free to assess its interest and to opt-out from a new legal regime but it cannot impede others from setting it up, this is precisely the effect of a negative vote in the European system.

The difference is not only theoretical but has far-reaching practical consequences. By nature, normative consensual regimes do have a subtle capacity to attract the consent of outsiders. This is likely the intent of the supporters of the global tax project. To properly function, such a project ought to be universal in nature: an objective that will be hardly achieved in the short run. However, the fact that it will be set up, that it will enter into force and produce advantages for its parties, that it will meet the expectations of the international community as a whole, that – last but not least – it is supported by the economic superpowers, could win the resistance of the objectors and trigger a race to join it.

If international law can be used – and it regularly is used – as a factor of disintegration of the European legal space, sometimes it can be used in the reverse sense, namely as a powerful element of integration.

This may be precisely the destiny of the global tax project. Despite their efforts, the EU supranational Institutions are encountering insurmountable obstacles to harmonize

the National systems of corporate taxation to reduce, at least partly, the tax competition which thrives across Europe. The conclusion of an international agreement aimed to harmonize tax legislations worldwide could break the deadlock and prompt a corresponding development at the European level.

From a political viewpoint, it could be more convenient for the recalcitrant MS to accept the European Union as the sole actor at the negotiating table, than to run the risk to remain outside a new system supported and participated by all the main global stakeholders. This “international moment” could be even more momentous from a legal viewpoint. In its Communication COM(2021) 251 final cit., at para. 2.2., the Commission maintained that the agreement on the global tax, whose contents are still uncertain, should be implemented through Union’s acts. If the Union had the competence to implement that agreement, according to reverse logic, it should have the competence to conclude it. The obvious assumption is that, in the view of the Commission, that competence should be based on the ERTA doctrine, namely on the affectation that the agreement will likely produce on pre-existing EU common rules: presumably, the Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, and on the Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, both based on art. 115 TFEU. The equally obvious objection is that very likely none of the two Directives will cover the presumable scope of the agreement, with the consequence that the agreement should be concluded in mixed form.

There is, however, a further possibility. The case at hand illustrates a process of inverse harmonization, whereby the harmonization proceeds from the general to the particular, namely from the global arena to the regional European arena. But, of course, to harmonize a wider or even universal space than Europe, the use of an international instrument such as an agreement is necessary. Indeed, through EU acts, the Union can only harmonize the internal, not the external market. Is it too audacious to contend that the Union alone has the power to conclude the agreement of the global tax on the basis of art. 216 TFEU, which confers to the Union the power to conclude an agreement if “necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties”?

It is well known that the existence of this implied power was first ascertained by Opinion 1/76 (*Draft Agreement establishing a European laying-up fund for inland waterway vessels* ECLI:EU:C:1977:63) where the Court of justice ruled that “the power to bind the Community vis-a-vis third countries [...] flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the (Union)” (para 4). The doctrine was tailored on the factual situation of the case, where an internal regulation not binding for third States would have been manifestly inappropriate

to attain its purposes, namely to regulate the navigation on the river Rhine. Yet, the harmonization of corporate taxation shows us a similar factual situation. An internal harmonization preventing the tax competition between Member States by no means could prevent tax competition by third States. It follows that a global agreement may prove to be necessary to regulate an issue that is global in nature.

But is the regulation of tax competition one of the objectives of the Treaties? How can the Union claim to be empowered to participate in an agreement having the objective to harmonize corporate taxation worldwide if it proved hitherto unable to harmonize corporate taxation internally?

A positive answer could be formulated on the basis of the new set of objectives and values of the Union guiding its external action. In Opinion 2/15 (*Free Trade Agreement between the European Union and the Republic of Singapore* ECLI:EU:C:2017:376), after holding that “Article 3(5) TEU obliges the European Union to contribute, in its relations with the wider world, to ‘free and fair’ trade”, the Court went on by adding that “it follows that the objective of sustainable development henceforth forms an integral part of the common commercial policy” (paras 146-147). In Opinion 1/17 (*Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)* ECLI:EU:C:2019:341:341) the Court made a further step by qualifying free and fair trade as one of the objectives of the Union (paras 84, 200 and 213). The Court used the objective of free and fair trade to enlarge the scope of the Common commercial policy, namely a policy having a specific objective to be pursued. *A fortiori* it could be used in a situation where the agreement is the indispensable tool to attain that objective “within the framework of the Union’s policies”, under the very terms of art. 216.

The story of the global tax may thus resurrect the doctrine 1/76, infrequently invoked and even more infrequently used in the international practice of the Union; it can invert the ordinary relation between internal rules and external powers and create a situation where the Union uses its external competence to attain objectives unattainable through domestic measures; it can give a tangible sign that the external action of the Union will be guided by its ethical values and not, or not only, by selfish interests. It can contribute to a new and fairer approach to the global governance of the economy which, after all, is one of the objectives and values of the Union.

E.C.



ARTICLES

A NEW LEGAL FRAMEWORK FOR EU-UK RELATIONS: SOME REFLECTIONS FROM THE PERSPECTIVE OF EU EXTERNAL RELATIONS LAW

PETER VAN ELSUWEGE*

TABLE OF CONTENTS: I. Introduction. – II. A complex legal structure including a Trade and Cooperation Agreement and supplementing agreements. – III. Legal basis: a pragmatic use of the Treaty provision on association (art. 217 TFEU). – IV. The option of an EU-only agreement and its consequences. – V. Provisional application and the role of the European Parliament. – VI. Concluding remarks: pragmatism and flexibility in EU-UK relations.

ABSTRACT: The withdrawal of the United Kingdom (UK) from the European Union (EU), commonly known as Brexit, resulted in the establishment of a new bilateral legal framework for the future development of EU-UK relations. The new framework is based on a Trade and Co-operation Agreement (TCA) in combination with more specific supplementing agreements concerning the exchange of classified information and the peaceful use of nuclear energy. Without entering into a detailed substantive analysis of these agreements, several innovative elements can be highlighted from the perspective of EU external relations law. This includes, in particular, the governance structure of the new legal framework, the use of art. 217 TFEU (on association) as a legal basis, the “EU-only” nature of the TCA and the provisional application without prior involvement of the European Parliament. It is argued that these key features are largely the result of an unprecedented process of negotiations under the time pressure of the expiry date for the transitional application of EU law in the UK.

KEYWORDS: Brexit – United Kingdom – TCA – association – provisional application – mixity.

I. INTRODUCTION

On 24 December 2020, European Commission President Ursula von der Leyen announced the successful conclusion of the negotiations on a new legal framework for the *post*-Brexit relations between the European Union (EU) and the United Kingdom (UK).¹

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¹ Remarks by Commission President Ursula von der Leyen at the press conference on the outcome of the EU-UK negotiations, Brussels, 24 December 2020, ec.europa.eu.



This involves a rather complex legal structure including a Trade and Cooperation Agreement (TCA) in combination with an Agreement concerning security procedures for exchanging and protecting classified information (the “Security of Information Agreement” (SIA)). In addition, a separate Agreement for cooperation on the safe and peaceful uses of nuclear energy accommodates the consequences of the UK’s withdrawal from the European Atomic Energy Community (Euratom).²

In order to avoid the ramifications of a “no-deal” scenario, the Council quickly adopted the necessary decisions (by written procedure) allowing for the signature and provisional application of the new bilateral agreements from 1 January 2021 onwards.³ The full entry into force of the new legal framework requires the consent of the European Parliament and a decision of the Council concluding the agreements.⁴ With this procedure, a long and often frustrating exercise of unprecedented negotiations under a very tight time schedule comes to an end.

Without entering into a detailed substantive analysis of the deal, this contribution includes some reflections about the specific features of the new arrangement from the perspective of EU external relations law.⁵ In particular, it focuses on the innovative legal structure of a TCA in combination with supplementing agreements (II), the use of art. 217 TFEU as a pragmatic legal basis for this new construction (III), the EU-only nature of the agreements (IV) and their provisional entry into force in anticipation of the consent of the

² The text of the TCA, SIA and the Agreement on Safe and Peaceful Uses of Nuclear Energy was published on 31 December 2020. After an exercise of legal scrubbing, a new numbering was adopted. See European Council Document of 19 April 2021 n. 5198/21. The final version was published in OJ (2021) L 149 and 159.

³ Decision 2020/2252/EU of the European Council of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information; and Decision 2020/2253/EU of the European Council (Euratom) of 29 December 2020 approving the conclusion, by the European Commission, of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy and the conclusion, by the European Commission, on behalf of the European Atomic Energy Community, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part.

⁴ Art. 218 TFEU; art. 783 foresees the provisional application until 28 February 2021 but this date was changed to 30 April 2021 on the basis of Decision 1/2021 of the Partnership Council established by the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part of 23 February 2021 as regards the date on which provisional application pursuant to the Trade and Cooperation Agreement is to cease.

⁵ On the *post-Brexit* EU-UK legal framework, see also: A Lazowski, ‘Mind the Fog, Stand Clear of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework – Part I’ (2020) European Papers www.europeanpapers.eu 1105.

European Parliament (V). Finally, the contribution concludes with some general remarks about the broader implications of the new legal framework (VI).

II. A COMPLEX LEGAL STRUCTURE INCLUDING A TCA AND SUPPLEMENTING AGREEMENTS

The new legal framework of EU-UK relations is more sophisticated than what may be derived from the initial announcement that both parties agreed on a TCA.⁶ In fact, the TCA is only the core of a rather sophisticated legal structure defining the future bilateral relations between the EU and the UK. This can already be derived from the preamble and the first provisions of the TCA, which refer to the establishment of a “broad relationship” including also “supplementing agreements” forming part of the overall bilateral relations as governed by the TCA.⁷ In other words, the TCA does not only cover the trade and economic dimension of the new relationship between the EU and the UK. It also provides for a general governance structure involving the establishment of an overarching bilateral institutional framework and rules on dispute settlement.⁸

This construction seems influenced by the EU’s experiences with Switzerland. Following the latter’s non-ratification of the Agreement on the European Economic Area (EEA) in 1992, EU-Swiss relations are based on a dense network of sectoral bilateral agreements without a common institutional framework. On several occasions, the EU recalled that this *lacuna* creates legal uncertainty for citizens and businesses.⁹ In particular, the absence of horizontal provisions on dispute settlement and the lack of procedures to deal with the dynamic evolution of EU law revealed the limitations of this highly fragmented model of sectoral bilateralism.¹⁰ A new EU-Swiss Institutional Framework Agreement, negotiated in 2018, is expected to solve these problems. However, the Swiss Federal Council still has to take the

⁶ The term “Trade and (Economic) Cooperation Agreement” has been used in the past as a first step towards the development of closer bilateral relations and often in anticipation of more ambitious agreements at a later stage. This was, for instance, the case in the development of relations with the countries of the former Council for Mutual Economic Assistance (COMECON) at the end of the 1980s. See, in this respect, M Maresceau, ‘Bilateral Agreements Concluded by the European Community’ (2004) *Collected Courses of The Hague Academy of International Law – Recueil des cours* 309.

⁷ See: arts 1 and 2 TCA.

⁸ See “Part one: common and institutional provisions” and “Part six: dispute settlement and horizontal provisions” of the TCA. For comments, see: M Konstantinidis and V Poula, ‘From Brexit to Eternity: The Institutional Landscape under the EU-UK Trade and Cooperation Agreement’ (14 January 2021) *European Law Blog* europeanlawblog.eu.

⁹ European Council Conclusions of 28 February 2017, EU relations with the Swiss Confederation.

¹⁰ For a criticism of the Swiss model of sectoral bilateralism, see: A Lazowski, ‘Enhanced Multilateralism and Enhanced Bilateralism: Integration Without Membership in the European Union’ (2008) *CMLRev* 1433-1458.

necessary steps towards its signature and conclusion. In any event, the EU Council consistently emphasised that the conclusion of the new framework agreement is a precondition for the further development of the bilateral relationship with Switzerland.¹¹

Against this background, it is not surprising that the European Council defined the existence of a solid governance system as one of the priorities for the management of future EU-UK relations.¹² From the outset of the Brexit-process, a sector-by-sector approach based on “cherry-picking” has been excluded. Instead, the EU consistently stressed the requirement of a “level-playing field” based on a balance of rights and obligations and including horizontal provisions on supervision, dispute settlement and enforcement. This commitment was also explicitly included in the joint Political Declaration accompanying the EU-UK Withdrawal Agreement.¹³

The overall management of the EU’s relations with third countries is typically part of a comprehensive framework agreement – often explicitly called “Association Agreement” or “Partnership and Cooperation Agreement” depending upon the level of ambition. Such framework agreements embrace all areas of cooperation in a single document, including a wide variety of issues ranging from political dialogue to trade and sectoral cooperation. Recent examples are the Association Agreements concluded with countries such as Ukraine, Moldova and Georgia, the Comprehensive and Enhanced Partnership Agreement (CEPA) with Armenia or the Partnership Agreement on Relations and Cooperation with New Zealand.¹⁴ An alternative approach is followed in the EU’s relations with Canada. Instead of a comprehensive agreement covering all areas of cooperation, the EU’s bilateral relations with Canada are based on separate agreements covering the trade and political dimensions respectively.¹⁵ Under this model, every agreement is concluded under a separate legal basis and operates as a self-standing legal instrument with its own institutional provisions. The new legal framework of EU-UK relations does not easily fit in one of those existing models and has a number of innovative features.

First, the TCA and SIA are separate agreements which are nevertheless tied together in the sense that the SIA is “a supplementing agreement” to the TCA. Both agreements are concluded under a single procedure with art. 217 TFEU as the substantive legal basis (see *infra*). The separate EURATOM agreement on the peaceful use of nuclear energy constitutes another “supplementing agreement”. Accordingly, the TCA forms the basis for “a

¹¹ European Council Conclusions of 19 February 2019, EU relations with Switzerland.

¹² European Council guidelines (art. 50 TEU), Brussels, 23 March 2018, EUCO XT 20001/18, see www.consilium.europa.eu.

¹³ Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom [2020] 118.

¹⁴ See the Treaty Office Database of the European External Action Service for an overview of the existing EU agreements with third countries, ec.europa.eu.

¹⁵ The Comprehensive Economic and Trade Agreement (CETA) [2017] and the Strategic Partnership Agreement with Canada [2016].

broad relationship” allowing for the addition of new supplementing agreements in the future.¹⁶ Such new bilateral agreements shall, in principle, also fall within the overall framework for bilateral EU-UK relations as governed under the TCA irrespective of whether they will be concluded by the EU alone or together with its Member States or on behalf of EURATOM.¹⁷ Accordingly, the EU-UK bilateral relations can further develop under the common roof of the TCA governance structure.

Second, the special nature of the EU-UK legal framework implies that the TCA has a very peculiar structure. In essence, it combines a number of horizontal provisions which are applicable to all EU-UK bilateral agreements – including the ones that may be added in the future – and rather detailed substantive provisions governing the bilateral trade, transport, energy and fisheries relations as well as matters relating to citizens’ security such as data exchange, fundamental rights and judicial cooperation in criminal matters. The result is a rather complex agreement which does not entirely follow the traditional structure of other framework agreements governing the EU’s relations with third countries. For instance, bilateral framework agreements traditionally define the general objectives and “essential elements” governing the bilateral relations at the beginning and include a title on the institutional framework and dispute settlement at the end of the agreement. In the TCA, the common institutional framework is defined at the outset whereas the essential elements and the basic horizontal principles underpinning the bilateral EU-UK relations are only included at the end.

Third, the EU-UK legal framework does not include any particular provisions on “political dialogue” which is a typical component of bilateral framework agreements. This is a consequence of the UK’s desire to keep issues of foreign policy, external security and defence cooperation out of the negotiations.¹⁸ As a result, there is no legal arrangement to coordinate joint responses to foreign policy challenges, such as the alignment of sanctions. It appears that the UK prefers to opt for a more informal arrangement on foreign policy questions based on *ad hoc* consultations with EU Member States and the European External Action Service (EEAS). This is largely comparable to the EU’s relations with the United States (US), which also lack a bilateral legal framework for the alignment of foreign policy decisions.¹⁹

Fourth, notwithstanding its title and despite public references by UK Prime Minister Boris Johnson to “a Canada-style trade deal”, the TCA is not comparable to the EU’s trade

¹⁶ Arts 1 and 2 TCA.

¹⁷ Art. 2(2) TCA.

¹⁸ ‘EU-UK Trade and Cooperation Agreement: protecting European interests, ensuring fair competition, and cooperation in areas of mutual interest’, in European Commission Press release IP/20/2531 of 24 December 2020.

¹⁹ See, in this respect, V Szép and P Van Elswege, ‘EU Sanctions Policy and the Alignment of Third Countries. Relevant Experiences for the UK?’ in J Santos Vara, R Wessel and P Polak (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2020) 234.

agreements concluded with other third countries. In particular, the scope of the agreement goes far beyond what is included in traditional trade and cooperation agreements. It suffices to refer to the detailed provisions on transport, fisheries or judicial cooperation in criminal matters to see the difference. Another difference is the absence of provisions on Investor-State Dispute Settlement (ISDS), which is one of the most contentious elements under the EU's Comprehensive Economic Trade Agreement (CETA) with Canada.²⁰ In other words, the scope of the EU-UK TCA differs in several respects from the EU's agreements with other trade partners.

Fifth, whereas EU agreements with neighbouring countries largely focus on a process of legal approximation, the approach of the TCA is essentially different. This is, of course, a logical result of the different starting points; rather than aiming at bringing diverging legal systems together, the EU-UK agreement aims to avoid a far-reaching divergence following the UK's withdrawal from the EU legal system. Accordingly, the EU-UK TCA allows for the adoption of remedial and rebalancing measures when subsidies or different legal standards in areas of social or environmental protection are capable of affecting the trade and investment climate between the parties.²¹

III. LEGAL BASIS: A PRAGMATIC USE OF THE TREATY PROVISION ON ASSOCIATION (ART. 217 TFEU)

The new legal framework of EU-UK relations is based on art. 217 TFEU, which allows for the conclusion of "agreements establishing an association involving reciprocal rights and obligations, common action and special procedure".²² This may be surprising, since no single reference to the word "association" can be found in the title or the text of the TCA or its supplementing agreements. Nevertheless, this is not unprecedented in the EU's treaty-making practice.²³ After all, the choice of the substantive legal basis for the conclusion of an international agreement is a purely internal EU matter which is, in principle, not subject to negotiations with the third party.²⁴ With respect to EU-UK relations, the use of art. 217 TFEU was in any event already envisaged in the joint Political Declaration. The parties explicitly noted that "the overarching institutional framework could take the form of an Association Agreement".²⁵ Whether or not the term "association" is mentioned in the title or text of the agreement may thus have a political significance but it is not essential from a legal point of view.

²⁰ CETA between Canada, on one part, and the European Union and its Member States, on the other part.

²¹ See art. 760 TCA.

²² Art. 217, consolidated version of the Treaty on the Functioning of the European Union [2016].

²³ An example is the Trade, Development and Cooperation Agreement (TDCA) with South Africa, which has been concluded on the legal basis of ex art. 310 EC (current art. 217 TFEU).

²⁴ This may lead to some unexpected surprises for the third countries. On the example of Switzerland, see: M Maresceau, 'Bilateral Agreements Concluded by the European Community', cit. 155.

²⁵ Political Declaration cit. point 120.

Art. 217 TFEU is a very flexible legal instrument. Whereas it implies the creation of “special, privileged links with a non-member country”, the actual content of the established relationship is not pre-defined. As clarified by the Court of Justice in *Demirel*, art. 217 TFEU empowers the Union “to guarantee commitments towards non-member countries in all the fields covered by the Treat[ies]”.²⁶ Depending on the outcome of the negotiations, the scope of an association agreement may thus vary from little more than a free trade agreement to a level of integration that comes close to membership.²⁷ The only limit is that third countries cannot be granted decision-making powers within the EU institutions.²⁸

In the past, the EU has concluded a wide variety of association agreements with third countries in Europe and beyond.²⁹ Apart from the divergence in terms of their exact scope and objectives, also the form can differ significantly. Whereas art. 217 TFEU is mostly used for the conclusion of single, comprehensive framework agreements, different models are possible as well. A notorious example is the “sectoral association” of Switzerland under the so-called “Bilaterals I” package of seven sectoral bilateral agreements concluded in 1999. The Commission had originally proposed the relevant sectoral legal bases for the seven agreements but, for reasons of legal pragmatism, the Council concluded the Bilaterals I as a “horizontal package” on the basis of art. 217 TFEU.³⁰ Accordingly, a single Council decision was adopted for the joint conclusion of the seven agreements even though the word “association” had never been used in the negotiations. On the basis of a so-called “guillotine clause”, all seven agreements entered into force simultaneously and the termination of one of them results in the termination of all seven.

It seems that this approach somewhat inspired the procedure for the joint signature and conclusion of the TCA and SIA through a single legal instrument with art. 217 TFEU as its legal basis. Both agreements are “intrinsically linked” implying that the dates of their entry into force and (potential) termination coincide.³¹ The key difference with the EU-Swiss Bilaterals I is the inclusion of a horizontal governance structure in the TCA (see *supra*) as well as the envisaged dynamic development of bilateral EU-UK relations in the

²⁶ Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400 para. 9 and case C-81/13 *UK v Council* ECLI:EU:C:2014:2449 para. 61.

²⁷ W Hallstein, former Commission president, declared that “association can be anything between full membership minus 1% and a trade and co-operation agreement plus 1%”, in: D Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* (Sheffield Academic Press 1999) 23.

²⁸ K Schmalenbach, ‘Art. 217 (ex-art. 310 EGV) [Assoziierungsabkommen]’, in C Callies and M Ruffert (eds), *EUV/AEUV Kommentar* (Beck 2016) para. 7.

²⁹ For overview and typology, P Van Elsuwege and M Chamon, ‘The Meaning of Association Under EU Law. A Study on the Law and Practice of EU Association Agreements’, in Study for the AFCO Committee of the European Parliament, February 2019, www.europarl.europa.eu.

³⁰ M Maresceau, ‘Bilateral Agreements Concluded by the European Community’ cit. 415.

³¹ Arts 779 TCA and 20 SIA.

sense that future supplementing agreements will be integrated in the established framework.³² Accordingly, the EU-UK model of a combination between a broadly defined TCA and supplementing bilateral agreements falling under a common institutional framework is a rather innovative form of association.

The pragmatic use of art. 217 TFEU as the legal basis for the new EU-UK legal framework has important procedural consequences. In particular, the comprehensive scope of art. 217 TFEU – covering the entire range of EU competences – avoids the more complex exercise of determining the substantive legal bases for the TCA and SIA respectively. This would imply a “centre of gravity test” based on an analysis of the aim and content of the respective agreements. It is well known that this is not always an easy exercise, which frequently leads to inter-institutional conflicts.³³ Moreover, the outcome is often a rather complex combination of relevant Treaty provisions. For instance, the substantive legal basis of CETA is a combination of arts 43(2), 91, 100(2), 153(2), 192(1) and 207(4) TFEU whereas the separate EU-Canada Agreement on security procedures for exchanging and protecting classified information is based on art. 37 TEU. In combining the process for the signature and provisional application of the EU-UK TCA and SIA in a single document, based on the single legal basis of art. 217 TFEU, potential discussions on internal competence delimitation could thus be avoided. In addition, recourse to art. 217 TFEU requires unanimity in the Council,³⁴ which is an important safeguard for the protection of the Member States’ interests when the latter are no contracting parties in their own right (see *infra* at IV).

Finally, it is noteworthy that the EU’s neighbourhood clause, included in art. 8 TEU, did not play any significant role in the procedure leading to the adoption of the new EU-UK legal framework. Neither the Commission, in its proposal, nor the Council, in its decision on the signature and provisional application of the TCA and SIA, referred to art. 8 TEU. Nevertheless, the wording of art. 1 TCA is very similar to the text of art. 8(1) TEU with a reference to the establishment of “an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation”. Even though art. 8(2) TEU provides that the Union may conclude “specific agreements” for this purpose, it appears that this provision cannot be used as an autonomous substantive legal basis. Its general wording and unusual location under Title I on “common provisions” of the TEU as well as the absence of specific procedural guidelines under art. 218 TFEU point in this direction.³⁵ As a result, art. 8 TEU operates as an essentially political provision defining

³² Art. 2.

³³ P Van Elsuwege, ‘The Potential for Inter-Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty’ in M Cremona and A Thies (eds), *The European Court of Justice and External Relations: Constitutional Challenges* (Hart 2014) 117.

³⁴ Art. 218(8) TFEU.

³⁵ See on this discussion: P Van Elsuwege and R Petrov ‘Towards a New Generation of Agreements with the Neighbouring Countries of the European Union? Scope, Objectives and Potential Application of art. 8 TEU’ (2011) ELR 697.

the general framework of the EU's neighbourhood relations without affecting the EU's competence for the conclusion of international agreements as defined in the more specific provisions of the Treaties.³⁶

IV. THE OPTION OF AN EU-ONLY AGREEMENT AND ITS CONSEQUENCES

Notwithstanding its comprehensive scope, covering areas of exclusive and shared EU competences, the TCA is an "EU-only" agreement implying that the Member States are not contracting parties in their own right. This is remarkable since Member States' representatives in the Council usually prefer the conclusion of a mixed agreement whenever non-exclusive EU competences are involved.³⁷ That the option of "mixity" was not used in relation to the EU-UK TCA is thus a political decision of the Member States, which is obviously connected to the specific features of the Brexit process. It is well known that the procedure for the conclusion of mixed agreements involves legal and practical hurdles, often due to delays in the national ratification process as a result of specific issues in single Member States.³⁸ Given the uncertainties related to the UK's withdrawal process and its implications for individuals and businesses, it appears that the advantages of the faster "EU-only" procedure played a crucial role in the Member States' decision to exceptionally drop their traditional insistence on mixity.

From a legal point of view, mixed agreements are only obligatory when exclusive Member State competences are at stake. When an agreement, such as the EU-UK TCA, only covers exclusive and shared EU competences, the Council can decide to exercise the shared EU competences so that the agreement is not mixed but concluded by the Union alone.³⁹ One of the main reasons for the Member States' usual reluctance to opt for this formula is that it may trigger an "AETR/ERTA effect" in the sense that subsequent agreements would

³⁶ On art. 8 TEU see also: S Blockmans, 'Friend or Foe? Reviewing EU Relations with its Neighbours Post-Lisbon' in P Koutrakos (ed.), 'The European Union's External Relations a Year after Lisbon' (CLEER Working Papers 3-2011) 116.

³⁷ A noticeable exception is the Stabilisation and Association Agreement with Kosovo, which has been concluded as an EU-only agreement due to the non-recognition of the independence of Kosovo by five EU Member States. See: P Van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilisation and Association Agreement between the EU and Kosovo' (2017) *European Foreign Affairs Review* 393.

³⁸ See, for example, the problems in the ratification process of the EU-Ukraine Association Agreements as result of a Referendum in the Netherlands. For comments, see: P Van Elsuwege, 'The Ratification Saga of the EU-Ukraine Association Agreement: Some Lessons for the Practice of Mixed Agreements' in: S Lorenzmeier, R Petrov and C Vedder (eds), *EU External Relations Law. Shared Competences and Shared Values in Agreements between the EU and its Eastern Neighbourhood* (Springer 2021) 95. See more generally on this topic also: G Van der Loo and R Wessel, 'The Non-ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) *CMLRev* 735.

³⁹ A Rosas, 'Mixity: Past, Present and Future: Some Observations' in M Chamon and I Govaere (eds), *EU External Relations Post-Lisbon. The Law and Practice of Facultative Mixity* (Brill 2020) 8.

then be considered as affecting the “common rules” established on the basis of the Council’s exercise of shared EU competences in the procedure for the conclusion of the initial agreement.⁴⁰ It is precisely to avoid such a scenario that the Council Decision on the signature and provisional application of the TCA explicitly provides that the exercise of Union competence through this agreement “shall be without prejudice to the respective competences of the Union and of the Member States in relation to other agreements with third countries or supplementing agreements with the UK”.⁴¹ It is noteworthy that also the European Commission issued a statement on competence, included in the minutes to the Council Decision, in which it also considers that the exercise of shared EU competences through the TCA has no implications for other agreements.⁴² In addition, Austria and Cyprus issued specific statements stressing the non-affectation of Member State competences in areas of social security cooperation and air transport services.⁴³

The most important consequence of the “EU-only” nature of the EU-UK TCA is the exclusion of a process of Member State ratifications, which requires the involvement of national (and regional) parliaments. It is well known that this may lead to several unexpected hurdles, often related to domestic politics – such as in the case of the Dutch referendum on the EU-Ukraine Association Agreement⁴⁴ – or specific national interests – such as the decision of the Cypriot parliament to halt the approval of CETA due the allegedly ill-protection of Halloumi cheese.⁴⁵ For EU-only agreements, the ratification procedure is limited to the adoption of a Council decision after the consent of the European Parliament implying that such domestic considerations are less likely to derail the swift conclusion of the agreements.

Whereas the avoidance of mixity thus has clear procedural advantages, the counter-argument may well be that the side-lining of national parliaments affects the democratic scrutiny of an important arrangement such as the EU-UK TCA. However, this is not entirely correct in the sense that the democratic control at EU level is essentially the role of the European Parliament, which has to give its consent before the agreement can fully enter into force. In accordance with art. 318(10) TFEU, the European Parliament is to be “immediately and fully informed at all stages of the procedure”.⁴⁶ Moreover, national parliaments can still play their role in controlling the position of their national governments

⁴⁰ *Ibid.*

⁴¹ Art. 10 Council Decision 2020/2252 cit.

⁴² Annex to Council Decision 2020/2252 cit., Communication CM 5525/20 of the Council of the European Union of 29 December 2020, 7, see data.consilium.europa.eu.

⁴³ *Ibid.* 4-5.

⁴⁴ P Van Elsuwege, ‘The Ratification Saga of the EU-Ukraine Association Agreement: Some Lessons for the Practice of Mixed Agreements’ cit.

⁴⁵ B Moens, ‘Haloumi Cheese Puts EU’s Canada Deal to the Test’ (4 August 2020) Politico www.politico.eu.

⁴⁶ See further below at section V on the interpretation of art. 218(10) TFEU and the role of the European Parliament in the procedure for the conclusion of international agreements.

in the Council.⁴⁷ In this respect, the requirement of unanimity in the Council for agreements concluded under art. 217 TFEU also provides a guarantee for the protection of Member State interests.

Finally, it is noteworthy that the Member States are given the right to send one representative to accompany the Commission representative, as part of the Union delegation, in meetings of the Partnership Council and of other joint bodies established under the TCA.⁴⁸ This *droit de regard* guarantees that Member States can be present during discussions with the UK, notwithstanding the EU-only nature of the TCA. Of course, the presence of the Member States cannot undermine the Treaty provisions on EU external representation. Pursuant to art. 17(1) TEU, this implies that the Commission is to represent the Union and to express the Union's positions as established by the Council. When the adoption of legally binding decisions is at stake, the EU's positions are defined in accordance with the procedure defined in art. 218(9) TFEU.

V. PROVISIONAL APPLICATION AND THE ROLE OF THE EUROPEAN PARLIAMENT

The strict time schedule as determined by the EU-UK withdrawal agreement with the perspective of a cliff-edge scenario on 1 January 2021 significantly complicated the normal procedures. Whereas the negotiation of international agreements usually takes several years, the EU-UK negotiations were finished in a record time of ten months. One of the consequences is that the normal process of "legal scrubbing", i.e. the final legal-linguistic revision of the agreed text of the agreements, could exceptionally not be done before the date of signature. This was solved pragmatically through the exchange of diplomatic notes at a later stage and with a proviso in the Council decision that the revised texts "shall replace *ab initio* the signed versions of the Agreements".⁴⁹ Another consequence is that the European Parliament had insufficient time to appropriately scrutinise the agreements before giving its consent in accordance with art. 218(6) TFEU. For this reason, the agreement only provisionally entered into force on 1 January 2021 in anticipation of the finalisation of the EU's ratification process.⁵⁰

The practice of provisional application has an explicit legal basis in art. 218(5) TFEU and is well-established with respect to the EU's international agreements. Moreover, it is a generally accepted procedure envisaged under art. 25 of the 1969 Vienna Convention

⁴⁷ In this respect, it is noteworthy that the Netherlands issued a statement to the Council decision on signature and provisional application clarifying that the Dutch parliament will be allowed "to further scrutinise the agreements and exercise its role prior to the adoption of the Council decision on conclusion of the Agreements". See: Annex to Council Decision 2020/2252 cit.

⁴⁸ This arrangement is foreseen in art. 2 of Decision 2020/2252 cit.

⁴⁹ *Ibid.* art. 12.

⁵⁰ Art. 783 TCA.

on the Law of Treaties (VCLT).⁵¹ Whereas it is frequently used to overcome the lengthy national ratification process in the event of mixed agreements, provisional application can also apply in relation to EU-only agreements.⁵² From this perspective, and taking into account the urgency of the situation with a transition period ending on 31 December 2020, the provisional application of the EU-UK agreements is a logical step in anticipation of their formal conclusion and full entry into force.

Due to the late finalisation of the negotiations, only few days before the expiry of the transition period, the Council Decision on signature and provisional application of the new EU-UK agreements was adopted without the prior involvement of the European Parliament. Whereas this state of affairs is perfectly legal and in accordance with the requirements defined in art. 218(5) TEU (see *infra*), it is nevertheless remarkable in light of the political commitments made by Commission President Von der Leyen. In her “guidelines for the next European Commission 2019-2024”, she explicitly mentioned that “my Commission will always propose that provisional application of trade agreements take place only once the European Parliament has given its consent”.⁵³ During the oral hearings in the European Parliament, the Commissioner-designate for trade (at that time Phil Hogan) made a similar commitment.⁵⁴

The European Parliament’s insistence on a right to give its consent before the Commission issues a proposal on provisional application must be seen in light of its long-term struggle to play a more active role in the procedure for the conclusion of international agreements.⁵⁵ Based on its “right to be immediately and fully informed at all stages of the procedure”, laid down in art. 218(10) TFEU, the Parliament argues that it must have an opportunity to express its views on provisional application at an early stage. Without such an option, it fears to be confronted with a *fait accompli* in light of the far-reaching implications of withholding consent at a later stage.⁵⁶ For this purpose, the European

⁵¹ See, on the practice of provisional application: M Chamon, ‘Provisional Application of Treaties: The EU’s Contribution to the Development of International Law’ (2020) EJIL 883 B Driessen, ‘Provisional Application of International Agreements by the EU’ (2020) CMLRev 741.

⁵² An example are the EU’s agreements on fisheries or civil aviation safety. See e.g., Council Decision (EU) 2019/2025 of 18 November 2019 on the signing, on behalf of the European Union, and the provisional application of the Protocol to amend the International Convention for the Conservation of Atlantic Tunas; Decision 2020/1026/EU of the European Council of 24 April 2020 on the signing, on behalf of the Union, and provisional application of the Agreement on civil aviation safety between the European Union and Japan.

⁵³ U Von der Leyen, ‘A Union that Strives for More. My Agenda for Europe’, Political Guidelines for the Next European Commission 2019-2024, ec.europa.eu.

⁵⁴ M Damen and W Igler, ‘Commitments made at the hearing of Phil Hogan, Commissioner-designate Trade’ (European Parliament Briefing PE.639.308, October 2019), www.europarl.europa.eu.

⁵⁵ R Passos, ‘The External Powers of the European Parliament’ in P Eeckhout and M Lopez-Escudero (eds), *The European Union’s External Action in Times of Crisis* (Hart 2016) 85.

⁵⁶ R Passos, ‘Some Issues Related to the Provisional Application of International Agreements and the Institutional Balance’ in J Czuczai and F Naert (eds), *The EU as a Global Actor - Bridging Legal Theory and Practice* (Brill-Nijhoff 2017) 383.

Parliament's Rules of Procedure provide that a parliamentary debate on provisional application may be organised and that the Council can be invited not to provisionally apply an agreement until the European Parliament has given its consent.⁵⁷

In practice, the European Parliament is normally heard before the Commission initiates the procedure for the provisional application of an agreement. However, this cannot be regarded as a legally binding obligation in view of the text and purpose of art. 218(5) TFEU. This provision does not foresee an active role for the European Parliament in the process leading to provisional application. It is precisely a characteristic of the "provisional" nature of the application that the consent of the European Parliament is still pending and must be given at a later stage before the Council can adopt a decision on the conclusion of the agreement. Hence, requiring the formal consent of the European Parliament before an agreement can provisionally enter into force seems to be a bridge too far from the perspective of the EU's institutional balance.⁵⁸ Of course, the European Parliament needs to be informed in a timely manner so that it can perform its political control under art. 14(1) TEU but this does not involve decision-making powers beyond the scope of art. 218(6) TFEU.⁵⁹ In other words, the absence of the European Parliament's consent in the procedure leading to the provisional application of the EU-UK agreements is not a legal problem. Nevertheless, it is politically sensitive in light of the Commission's earlier commitments. It is, therefore, no surprise that the leaders of the political groups in the European Parliament and the President of the European Parliament, David Sassoli, stressed that the decision on the provisional application of the EU-UK agreements without the prior involvement of the European Parliament is to be considered as "a unique exception", which should not serve as a precedent for future procedures.⁶⁰

VI. CONCLUDING REMARKS: PRAGMATISM AND FLEXIBILITY IN EU-UK RELATIONS

Without entering into the substantive details of the new EU-UK legal framework, several specific features can be highlighted from the perspective of EU external relations law. First of all, the construction of a TCA in combination with supplementing agreements provides a rather innovative and flexible structure for the further development of EU-UK bilateral relations. The TCA provides a solid institutional basis for further cooperation, including horizontal provisions on dispute settlement and review procedures. The SIA and the EURATOM agreement on nuclear energy constitute the first supplementing agreements of a broader bilateral network which can be further expanded in the future. The

⁵⁷ Rule 115 of the Rules of Procedure of the European Parliament, www.europarl.europa.eu.

⁵⁸ B. Driessen, 'Provisional Application of International Agreements by the EU' cit. 764.

⁵⁹ *Ibid.* 760.

⁶⁰ 'European Parliament to scrutinise deal on future EU-UK relations', in European Parliament Press release of 28 December 2020, www.europarl.europa.eu.

existence of a single governance system avoids the multiplication of parallel structures and the creation of additional bureaucracy.⁶¹ This is an important lesson, which seems to be drawn from the experience of EU-Swiss relations.

Second, the unprecedented nature of the withdrawal process in combination with a very tight schedule for negotiations required a pragmatic approach from all institutional actors. This resulted in rather exceptional practices such as the combined adoption of the TCA and SIA under the common legal basis of art. 217 TFEU, the preference for a facultative EU-only agreement and recourse to provisional application without the prior involvement of the European Parliament. Whereas these options are all possible from a legal point of view, they are nonetheless politically sensitive. In particular, the “EU-only” nature of the TCA is remarkable in light of the broad scope and political significance of the agreement. It is, therefore, not surprising that several Member States and also the European Commission clarified that this arrangement is without prejudice to any future agreements. Be that as it may, the example of EU-UK relations reveals how the legal toolbox of the EU’s external relations is sufficiently sophisticated to address particular challenges.

Third, the adoption of the new EU-UK legal framework is not the end of the Brexit process. The TCA and the existing supplementing agreements constitute the basis for the further development of the bilateral relations in the coming years. Additional supplementing agreements on specific sectoral issues can be expected to be discussed in the (near) future. For instance, on financial services, the ambition was to agree by March 2021 on an additional Memorandum of Understanding establishing a framework for regulatory cooperation in this area. Additional arrangements are also envisaged for the mutual recognition of professional qualifications.⁶² In this respect, the necessary measures can be discussed and adopted in the Partnership Council, which is the core institutional body established under the TCA.⁶³

Finally, the absence of provisions on cooperation in the field of CFSP is a remarkable gap in the new legal framework of EU-UK relations. In contrast to traditional framework agreements, the TCA does not include a specific chapter on “political dialogue” nor are there any provisions on political cooperation or foreign and security matters.⁶⁴ Nevertheless, the option of a specific “Political Dialogue on Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP)” was explicitly envisaged in the

⁶¹ This feature was also highlighted in the Commission’s Proposal COM (2020) 855 final of 25 December 2020 for a Council decision on the signing and provisional application of the TCA and SIA, 8.

⁶² Art. 158 TCA.

⁶³ On the powers of the Partnership Council, see: art. 7 TCA.

⁶⁴ The only exception is a specific clause on ‘future accessions to the Union’ (art. 781), which implies a commitment from the EU to notify the UK about new requests for accession of a third country to the Union and the involvement of the Partnership Council as platform for discussion about its implications for the UK and for EU-UK relations.

joint Political Declaration setting out the framework for the future of EU-UK relations.⁶⁵ In addition, the exchange of information on the alignment of sanctions, participation to CSDP missions and operations and the exchange of intelligence were on the agenda.⁶⁶ Apparently, the UK did not wish to negotiate provisions in these areas at this stage.⁶⁷ As a result, there is currently no framework in place to jointly respond to foreign policy challenges such as the imposition of restrictive measures on third country nationals. This leads to a gradual divergence in the EU's and UK's sanctions regimes, which is already visible in the sense that 113 persons and entities which are on the EU's sanctions list were not subject to UK sanctions at the beginning of 2021.⁶⁸ Hence, it appears that the UK prefers a relationship which is largely based on informal cooperation in the field of foreign policy, security and defence. It remains to be seen to what extent this approach is tenable in the long term. It is probably one of the issues to be taken into account when the newly established bilateral legal framework will be evaluated as foreseen in art. 776 of the TCA.⁶⁹ Unavoidably, pragmatism and flexibility will remain important principles for the elaboration of the newly bilateral legal framework of EU-UK relation.

⁶⁵ Political Declaration cit. point 95.

⁶⁶ *Ibid.* points 97-104.

⁶⁷ 'EU-UK Trade and Cooperation Agreement: protecting European interests, ensuring fair competition, and cooperation in areas of mutual interest' cit.

⁶⁸ M Lester, 'Which EU Sanctions Targets has the UK not Sanctioned?' (12 January 2021) European Sanctions www.europeansanctions.com.

⁶⁹ According to this provision, the TCA, its supplementing agreements and any matters related thereto will be jointly reviewed five years after the entry into force of the TCA and every five years thereafter.



ARTICLES

ACTIVATING *ULTRA VIRES* REVIEW: THE GERMAN FEDERAL CONSTITUTIONAL COURT DECIDES *WEISS*

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ABSTRACT: In its famous PSPP judgment, the German Federal Constitutional Court activated for the first time its *ultra vires* doctrine and declared that both the Secondary Markets Public Sector Asset Purchase Programme of the European Central Bank and its interpretation by the CJEU violated the proportionality requirements by not examining in a comprehensive and substantiated manner the economic policy effects that its practical implementation inevitably entails. However, this judgment is based on a manifestly erroneous interpretation of the relationship between the principles of proportionality and conferral and constitutes a concealed attempt to redefine the methods of interpretation of EU law and to impose the traditional perception of the constitutional court about the role of central banking and the existence of an absolute and inviolable separation between monetary and economic policy. At the same time, the constitutional court breaks its promise to exercise its *ultra vires* review in a cooperative spirit and fails to exhaust the institutional means that were available to it in order to resolve the matter in a legally appropriate and amicable manner that would not essentially amount to a precarious attempt to adjudicate economics.

KEYWORDS: German Federal Constitutional Court – Economic and Monetary Union – Secondary Markets Public Sector Asset Purchase Programme – *ultra vires* – proportionality – conferral.

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I. INTRODUCTION

More than a quarter of a century has passed since the day that the German Federal Constitutional Court (FCC) proclaimed in its seminal *Maastricht* judgment its capacity to review whether the EU institutions respect the limits of their conferred competences and to pronounce inapplicable at national level all legal instruments adopted by them in transgression of these boundaries.¹ This *ultra vires* doctrine inspired the case law of several other national constitutional courts, which announced their intention to operate in exceptional circumstances as an *ultima ratio* against the violation by the EU institutions of the principle of conferral.² There has even been an instance, in which one of those constitutional courts explicitly set aside a ruling given by the Court of Justice of the European Union (CJEU) in the context of the preliminary reference procedure on the basis that it constituted an illegal *ultra vires* act.³ In another occasion, a supreme national court refused in essence to abide by a preliminary ruling on the rationale that judge-made principles of EU law cannot take precedence over national law.⁴ However, both those cases had limited practical impact and were treated as isolated occurrences of judicial revolution against the interpretation of EU law that could partly be explained by the particular circumstances of the legal proceedings concerned.

¹ German Federal Constitutional Court judgment of 12 October 1993 2 BvR 2134/92, 2 BvR 2159/92 *Maastricht*.

² Spanish Constitutional Court declaration 1/2004 *European Constitution*, annotated by CB Schutte, 'Tribunal Constitucional on the European Constitution. Declaration of 13 December 2004' (2005) EuConst 281 and R Alonso Garcia, 'The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy' (2005) German Law Journal 1001; Polish Constitutional Tribunal judgment of 11 May 2005 K 18/04 *Accession Treaty*, annotated by K Kowalik-Banczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' (2005) German Law Journal 1355; Czech Constitutional Court decision of 26 November 2008 Pl. ÚS 19/08 *Treaty of Lisbon I*, annotated by P Briza, 'The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008' (2009) EuConst 143.

³ Czech Constitutional Court decision of 31 January 2012 Pl. ÚS 5/12 *Slovak Pensions*, available at www.usoud.cz. See on that case R Zbiral, 'A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed *Ultra Vires*' (2012) CMLRev 1475; J Komarek, 'Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*; Judgment of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*' (2012) EuConst 323; G Anagnostaras, 'Activation of the *Ultra Vires* Review: The *Slovak Pensions* Judgment of the Czech Constitutional Court' (2013) German Law Journal 959.

⁴ Danish Supreme Court judgment of 6 December 2016 Case 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A, (Dansk Industri)*. An unofficial translation of that judgment is available at domstol.dk. See on that case U Sadl and S Mair, 'Mutual Disempowerment: Case C-441/14 *Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* and Case n. 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A*' (2017) EuConst 347 and E Gualco, '"Clash of Titans 2.0". From Conflicting EU General Principles to Conflicting Jurisdictional Authorities: The Court of Justice and the Danish Supreme Court in the *Dansk Industri* Case' European Papers (European Forum Insight of 26 March 2017) www.europeanpapers.eu 223.

The FCC emphatically reaffirmed on various occasions its role as the ultimate protector of constitutionality against the *ultra vires* introduction and interpretation of EU law.⁵ However, it had refrained until recently from giving practical effect to its reserve power and had confined itself to the exercise of theoretical criticism against the extensive interpretation of the competences of the EU institutions and to the emission of increasingly clear warning signals that its judicial tolerance towards the relevant preliminary rulings of the CJEU was approaching its limits.⁶ It is not surprising therefore the almost unprecedented magnitude of the attention that the first ever activation of its *ultra vires* review gave rise to, following its judgment on the Secondary Markets Public Sector Asset Purchase Programme (PSPP) of the European Central Bank (ECB).⁷ In that case, the constitutional court concluded in substance that both the contested programme and its interpretation by the CJEU violated the proportionality requirements by not examining in a comprehensive and substantiated manner the economic policy effects that its practical implementation inevitably entails. The judgment essentially instructs the ECB to adopt within a transitional period of no more than three months a new decision that clearly demonstrates that the monetary policy objectives of the said programme are properly balanced against the economic and fiscal policy effects resulting from its application. Otherwise, the *Bundesbank* may no longer participate in the implementation and execution of the programme and to the purchase of government bonds on the secondary markets that this entails.⁸ The constitutional court also imposes on the federal government and the national parliament the obligation to clearly communicate their legal views to the ECB and to take steps seeking to ensure that the latter conducts

⁵ German Federal Constitutional Court judgment of 30 June 2009 2 BvE 2/08 *Treaty of Lisbon*. This ruling gave rise to an immense amount of academic literature. See amongst others D Doukas, 'The Verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not Guilty but Don't Do it Again!' (2009) ELR 866; J Ziller, 'The German Constitutional Court's Friendliness Towards European Law: on the judgment of Bundesverfassungsgericht over the Ratification of the Treaty of Lisbon' (2010) EPL 53; D Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the *Lisbon* judgment of the German Constitutional Court' (2009) CMLRev 1795; D Grimm, 'Defending Sovereign Statehood Against Transforming the European Union into a State' (2009) EuConst 353; R Bieber, 'An Association of Sovereign States' (2009) EuConst 391; T Lock, 'Why the European Union is not a State' (2009) EuConst 407; C Schönberger, '*Lisbon* in Karlsruhe: *Maas-tricht's* Epigones at Sea' (2009) German Law Journal 1201; D Halberstam and C Möllers, 'The German Constitutional Court Says "*Ja zu Deutschland!*"' (2009) German Law Journal 1241. See also German Federal Constitutional Court judgment of 6 July 2010 2 BvR 2661/06 *Honeywell*. See on that case C Möllers, 'Constitutional Review of European Acts Only Under Exceptional Circumstances' (2011) EuConst 161.

⁶ German Federal Constitutional Court judgment of 21 June 2016 2 BvR 2728/13 *OMT judgment*. See on that case A Pliakos and G Anagnostaras, 'Saving Face? The German Federal Constitutional Court Decides *Gauweiler*' (2017) German Law Journal 213 and M Payandeh, 'The OMT Judgment of the German Federal Constitutional Court' (2017) EuConst 400.

⁷ German Federal Constitutional Court judgment of 5 May 2020 2 BvR 859/15 *PSPP judgment*.

⁸ German Federal Constitutional Court *PSPP judgment* cit. paras 234-235.

the required proportionality assessment of the programme.⁹ That is by far the most important part of the judgment, even though the constitutional court also makes several very significant observations about the potential impact of the PSPP on the principle of prohibition of monetary financing and explicitly concludes that the creation of any risk sharing regime between the national central banks would automatically amount to a violation of the constitutional identity.¹⁰

The vivid academic debate around that judgment illustrates an impressive range of interesting and important issues that arise from it. Some commentators stress that the case effectively underlines the inherent structural problems of the current Economic and Monetary Union (EMU) and brings back to the fore the urgent need for its institutional reform.¹¹ Others propose the introduction of novel institutional mechanisms capable of resolving the crises that are likely to arise in the judicial relations between the CJEU and the supreme national courts of the Member States.¹² Particular interest is also paid on the repercussions of the judgment for the fundamental EU principles and the operation of the preliminary reference procedure, as well as to the prospects of initiating infringement proceedings against Germany for violation of the Treaties.¹³ Finally, serious concerns are expressed about the potential impact of the judgment on the case law of other national constitutional courts and the risk of its being abused by the governments of those Member States that are currently facing issues with the observance of the rule of law.¹⁴

Undoubtedly, the PSPP judgment constitutes an overt rejection of the exclusive prerogative of the CJEU to rule as the sole arbiter on the invalidity of the acts of the EU institutions.¹⁵ The negation of that exclusive privilege is actually inherent in the very existence of the *ultra vires* review, given that its operation is based on constitutional law grounds but allows in essence to interpret indirectly the provisions of the Treaties and to examine accordingly the legality of EU acts adopted on their basis. Even if one were to assume

⁹ *Ibid.* paras 229-233.

¹⁰ *Ibid.* paras 180-221 and 222-228 respectively.

¹¹ See particularly to this end P Dermine, 'The Ruling of the Bundesverfassungsgericht in *PSPP* – An Inquiry into its Repercussions on the Economic and Monetary Union' (2020) *EuConst* 525.

¹² See especially D Sarmiento and JHH Weiler, 'The EU Judiciary After Weiss: Proposing A New Mixed Chamber of the Court of Justice' (2 June 2020) *Verfassungblog* verfassungsblog.de and O Garner, 'Squaring the PSPP Circle. How a "declaration of incompatibility" can reconcile the supremacy of EU law with respect for national constitutional identity' (22 May 2020) *Verfassungblog* verfassungsblog.de.

¹³ See for instance S Poli and R Cisotta, 'The German Federal Constitutional Court's Exercise of *Ultra Vires* Review and the Possibility to Open an Infringement Action for the Commission' (2020) *German Law Journal* 1078; FC Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's *Ultra Vires* Decision of May 5, 2020' (2020) *German Law Journal* 1116.

¹⁴ See indicatively in this respect S Biernat, 'How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland' (2020) *German Law Journal* 1104 and FC Mayer, 'To Boldly Go Where No Court Has Gone Before' cit. 1124.

¹⁵ Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452.

though that it is permissible to conduct such a review outside the institutional context of the Treaties, that still leaves to ascertain if the legal reasoning adopted by the constitutional court in order to arrive at its *ultra vires* verdict is normatively convincing and methodologically coherent. As it will be explained, the case reveals the existence of conflicting approaches between the constitutional court and the CJEU on the operation and the content of the legal principles of proportionality and conferral. However, the underlying rationale of the PSPP ruling is much more profound and relates to the contradictory views that the two courts have about the role of the ECB in the current eurozone architecture and the existence of a possible overlap between economic and monetary policy.

II. THE PRELIMINARY REFERENCE OF THE GERMAN CONSTITUTIONAL COURT AND THE PRELIMINARY RULING OF THE COURT OF JUSTICE

The legal proceedings concerned the PSPP of the ECB.¹⁶ This programme was adopted as part of the quantitative easing policy of the ECB, in order to serve the objective of maintaining price stability by supporting aggregate consumption and investment spending in the euro area so as to restore the historically low inflation rates that existed at the time of its implementation to levels below but close to two per cent. The programme authorized the Eurosystem to purchase on the secondary markets government bonds of the eurozone Member States meeting the eligibility criteria set by the ECB on the basis of certain allocation keys. Although it was originally planned to apply for one and a half years, that period was subsequently extended on several occasions and it is estimated that at the time that the constitutional court gave its judgment the total volume of the programme already amounted to more than two trillion euros.¹⁷

As it was expected, a group of individuals brought legal proceedings before the FCC contesting the validity of the programme. The applicants maintained in essence that the programme amounts to an *ultra vires* act because its adoption exceeds the mandate of the ECB and infringes the prohibition of monetary financing.¹⁸ The constitutional court stayed the proceedings and referred a number of questions on the validity of the scheme, stressing in its preliminary request the existence of strong indications that its adoption

¹⁶ Decision 2015/774/EU of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme. See on this programme S Grund and F Grle, 'The European Central Bank's Public Sector Purchase Programme (PSPP), the Prohibition of Monetary Financing and Sovereign Debt Restructuring Scenarios' (2016) ELR 781.

¹⁷ See for example M Sinner and F Canepa, 'ECB wins court's backing for buying government debt' (11 December 2018) Reuters www.reuters.com.

¹⁸ Arts 119 and 127 TFEU (monetary policy mandate of the European Central Bank) and art. 123(1) TFEU (prohibition of monetary financing).

violates the Treaties.¹⁹ According to the constitutional court, the contested programme officially pursues a monetary policy objective and it also uses monetary policy instruments to attain that aim. In order to ascertain though whether that measure is covered by the mandate of the ECB, it is necessary to conduct an overall assessment and evaluation that also takes into account its expected effects. That further requires to subject the ECB to a full judicial review as regards the exercise of its competences that is also intended to make up for the absence of political control over that institution.²⁰ In the case at issue, the programme produces foreseeable and knowingly accepted economic policy effects that go beyond the mandate of the ECB. More specifically, it has a significant positive effect on the economic situation of the national banks that increases their credit rating and improves the refinancing conditions of the eurozone Member States enabling them to obtain loans on the capital market under much more favourable conditions. Given the above, tolerating the problematic economic policy effects of the contested programme could prove to violate the principle of proportionality in relation to its legitimate monetary policy objectives. This is even more so given that the programme and its implementation lack a specific statement of reasons, as concerns in particular the question whether the intended monetary policy effects of the bond purchase scheme were balanced against its foreseeable economic policy consequences.²¹ As regards the alleged violation by the programme of the prohibition of monetary financing, the constitutional court admits that the purchase by the Eurosystem of government bonds on the secondary market is not generally precluded. However, the contested scheme has specific features that give rise to doubts as regards the observance of that prohibition. This is primarily because its modalities create a virtual certainty among market operators that issued government bonds will be purchased by the Eurosystem. That artificially improves the credit rating and the refinancing conditions of the eurozone Member States and reduces the incentive of their national governments to pursue a sound budgetary policy.²²

Responding to the reservations expressed by the constitutional court, the CJEU concluded in *Weiss* that the PSPP is not in violation of the Treaty provisions.²³ As concerns the mandate of the ECB, the preliminary ruling focuses on the proclaimed objective of the scheme. It stresses that the specification of the aim of maintaining price stability as

¹⁹ German Federal Constitutional Court order of 18 July 2017 2 BvR 859/15. See on this preliminary request A Lang, 'National Courts *Ultra Vires* review of the ECB's policy of quantitative easing: An analysis of the German Constitutional Court's preliminary reference order in the *PSPP* case' (2018) CMLRev 923.

²⁰ Art. 130 TFEU.

²¹ German Federal Constitutional Court order 2 BvR 859/15 cit. paras 108-123.

²² *Ibid.* paras 81-99.

²³ Case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000. See indicatively on that preliminary ruling M Bobic and A Dawson, 'Quantitative easing at the Court of Justice – Doing whatever it takes to save the euro: *Weiss and Others*' (2019) CMLRev 1005; M Van der Sluis, 'Similar, Therefore Different: Judicial Review of Another Unconventional Monetary Policy in *Weiss*' (2019) LIEI 263; A Pliakos and G Anagnostaras, 'Adjudicating Economics II: The Quantitative Easing Programme Declared Valid' (2020) ELR 128.

the restoration of inflation rates to their original target level by easing the monetary and financial conditions in order to support aggregate consumption and investment spending in the euro area is not vitiated by a manifest error of assessment. Thus, the objective pursued by the bond purchase programme can be validly attached to the primary objective of the monetary policy of the EU. This conclusion is not invalidated by the fact that the programme is capable of having considerable effects that might possibly be pursued also through economic policy measures. The CJEU stresses in this respect that the authors of the Treaties did not intend to make an absolute separation between economic and monetary policy. Furthermore, the conduct of monetary policy will almost always entail an impact on interest rates and bank refinancing conditions that necessarily has consequences also for the financing conditions of the public deficit of the Member States. If the ECB were precluded altogether from adopting such measures when their effects are foreseeable and knowingly accepted, that would practically prevent it from using the means made available to it by the Treaties in order to achieve monetary policy objectives. This might represent an insurmountable obstacle to its accomplishing the tasks assigned to it by primary law.²⁴ Examining then the proportionality of the programme as to the monetary policy objectives, the preliminary ruling underlines that the ECB must be allowed a broad discretion when it prepares and implements an open market operations scheme that obliges it to make choices of a technical nature and to undertake complex forecasts and assessments. Based on this reasoning, the CJEU eventually concludes that the programme is suitable to attain its monetary policy objective and that the means that it employs in this respect are absolutely necessary to contribute to the effective attainment of that objective. It also adds that the ECB properly weighed up the various interests involved in the implementation of the PSPP by adopting measures that are intended to circumscribe the risk of losses and to take it into account.²⁵ Turning then on the alleged violation of the prohibition of monetary financing, the preliminary ruling stresses that the ECB built sufficient safeguards into its intervention in order to ensure that the latter does not reduce the impetus of national governments to follow a sound budgetary policy.²⁶

III. NOT *ULTRA VIRES*! THE PROBLEMATIC LEGAL REASONING OF THE GERMAN CONSTITUTIONAL COURT

It was clear from the outset that the preliminary ruling would not satisfy the constitutional court, since it explicitly rejects its position of principle that the examination of conferral requires to subject the ECB to complete judicial review and to conduct an overall assessment and evaluation of the measures that it adopts in the performance of its powers taking also into account their predictable economic policy effects. However, one could

²⁴ *Weiss and Others* cit. paras 53-70.

²⁵ *Ibid.* paras 71-100.

²⁶ *Ibid.* paras 101-158.

still expect that the constitutional court would reluctantly accept the legality of the PSPP while exercising at the same time severe criticism against the limited judicial review that the CJEU performs over the ECB and the broad margin of appreciation that it recognizes to this specific institution.

That seemed even more likely, given the policy that the constitutional court had adopted in the recent past in relation to the Outright Monetary Transactions (OMT) programme of the ECB.²⁷ That programme authorized the Eurosystem to purchase on the secondary markets unlimited quantities of government bonds issued by selected eurozone Member States in order to restore the monetary policy transmission mechanism and to safeguard the singleness of monetary policy that was imperilled by the extreme spreads in the interest rates on the bonds of certain Member States that were at least partly caused by irrational and speculative market behaviour. In its historic first ever preliminary request on the legality of that programme, the constitutional court explicitly warned that it would consider the scheme as *ultra vires* unless it was interpreted by the CJEU in the restrictive way required in its preliminary reference.²⁸ However, the CJEU confirmed in *Gauweiler* the validity of the OMT programme on the basis of a legal reasoning that focused in essence on the proclaimed monetary policy objective of the scheme and underlined the need to recognize a wide margin of appreciation to the ECB.²⁹ The constitutional court retreated then from its original position and considered the programme as legal, expressing though

²⁷ Governing Council of the ECB, Outright Monetary Transactions (OMT Programme). The technical features of the programme were announced in a press release, European Central Bank, *Technical features of Outright Monetary Transaction* www.ecb.europa.eu.

²⁸ German Federal Constitutional Court order of 14 January 2014, 2 BvR 2728/13. See on that preliminary request M Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) EuConst 263 and I Pernice, 'A Difficult Partnership Between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU' (2014) Maastricht Journal of European and Comparative Law 3. See also the contributions in the Special Issue of (2014) German Law Journal 108.

²⁹ Case C-62/14 *Gauweiler and Others* ECLI:EU:C:2015:400. See on that preliminary ruling P Craig and M Markakis, '*Gauweiler* and the legality of Outright Monetary Transactions' (2016) ELR 4; G Anagnostaras, 'In ECB We Trust ... The FCC We Dare! The OMT Preliminary Ruling' (2015) ELR 744; V Borger, 'Outright Monetary Transactions and the Stability Mandate of the ECB: *Gauweiler*' (2016) CMLRev 139; A Hinarejos, '*Gauweiler* and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union' (2015) EuConst 563; M Claes and JH Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' (2015) German Law Journal 917; H Sauer, 'Doubtful it Stood Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment' (2015) German Law Journal 971; F Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2015) German Law Journal 1003; S Simon, 'Direct Cooperation Has Begun: Some Remarks on the Judgment of the ECJ on the OMT Decision of the ECB in Response to the German Federal Constitutional Court's First Request for a Preliminary Ruling' (2015) German Law Journal 1025. See also the contributions in the Special Issue (February 2016) Maastricht Journal of European and Comparative Law.

serious reservations as regards in particular the measure of judicial control that the CJEU had exercised over the ECB and the performance of its functions.³⁰

That being so, the very first question that comes to mind is why the constitutional court did not consider as *ultra vires* the interpretation given by the CJEU to the OMT programme even though the legal reasoning of the *Gauweiler* preliminary ruling was almost identical to the one adopted in *Weiss* as regards the PSPP of the ECB. The next question that arises in this respect is why the constitutional court refrained from imposing in the *Gauweiler* case the obligation on the ECB to conduct a more comprehensive and substantiated proportionality review of the contested scheme that would also take into account its expected economic policy effects, even though it had clearly expressed in its preliminary reference the position that the specific features of the OMT programme effectively turned it into an economic policy instrument. These questions become even more interesting if one concentrates on the particular characteristics of those two asset purchase programmes. It becomes then apparent that the OMT scheme contravened much more patently the conditions that the case law of the constitutional court has imposed as necessary prerequisites, in order to consider as legal any programme involving the purchase of government bonds by the Eurosystem.³¹ More precisely, that programme had a selective nature and authorized the purchase of bonds issued only by the more severely hit by the sovereign debt crisis Member States. It further had no temporal restrictions, and it did not impose any specific limitations on the volume of the government bonds that could be purchased on the secondary market. Despite those features, that programme was not considered by the constitutional court to be in violation of the Treaties. One could therefore be excused for thinking that if such a programme managed to escape the *ultra vires* review of the constitutional court, the same conclusion would have been arrived at much more comfortably in relation to the bond purchase scheme contested in the legal proceedings in *Weiss*.

Furthermore, the constitutional court stresses in its PSPP ruling that in order to conclude that an EU act violates the principle of conferral it must be established that the violation of competences is sufficiently qualified. That requires that the said act manifestly exceeds the mandate of the institution concerned, resulting in a structurally significant shift in the division of competences to the detriment of the Member States.³² That confirms the *Honeywell* case law of the constitutional court, suggesting that its *ultra vires* review will be exercised only in very exceptional circumstances.³³ One would therefore expect that an *ultra vires* ruling would be supported by references to a number of bibliographical and other sources, attesting the existence of such a manifest violation. However, there is not a single such reference in the entire PSPP judgment as concerns the

³⁰ *OMT judgment* cit.

³¹ *PSPP Judgment* cit. paras 201-203 and 215-217.

³² *Ibid.* para. 110.

³³ *Honeywell* cit. para. 61.

contested programme and its interpretation by the constitutional court.³⁴ Instead, that latter court notes that the mere fact that commentators in legal scholarship and politics have argued for the permissibility of certain measures does not generally rule out that such measures can be found to constitute a manifest exceeding of competences.³⁵ In other words, the constitutional court suggests that an EU act can be pronounced as *ultra vires* even in case the existence of a qualified infringement of the principle of conferral is based exclusively on its own legal interpretations. That is so even if the legal proceedings relate to matters that are by their very nature open to subjective appreciation and assessment, such as the quality of the statement of reasons required in order to substantiate the proportionality of a policy measure and the rigorousness of the judicial control that should be exercised in that regard.

However, the most problematic aspects of the *ultra vires* ruling of the constitutional court only become apparent if one concentrates on the legal methodology adopted by that court to challenge the validity of the PSPP. In order to be able to exercise its judicial review over that particular scheme, the constitutional court must first circumvent the preliminary ruling that has considered it as valid. However, it relies in this respect on a blatant misinterpretation of the common constitutional traditions of the Member States and arrives at conclusions that violate the very letter of the Treaties. At the same time, it breaks its promise to interpret the national constitution in a cooperative and European friendly manner and chooses to ignite a multilevel crisis instead of resorting to the available institutional mechanisms in order to resolve a dispute that appears at first reading to concern a primarily procedural matter.

III.1. THE ATTEMPT TO REDEFINE THE METHODS OF INTERPRETATION OF EU LAW: THE MISCONSTRUCTION OF THE ROLE OF PROPORTIONALITY

It is more than apparent that the *Weiss* preliminary ruling is at the centre of the attention and the criticism of the constitutional court. There are of course several objections that could be possibly expressed as regards in particular the manner in which that preliminary ruling overlooks at certain points the concerns and the arguments raised in the preliminary request of the constitutional court.³⁶ However, the constitutional court chooses a rather indirect method in order to exercise its *ultra vires* review over that preliminary ruling by focusing on a matter that seems on its surface to relate primarily to the application and the content of the principle of proportionality.

The constitutional court accepts that the application and interpretation of EU law falls principally to the CJEU, including the determination of the applicable methodological

³⁴ See also in this respect FC Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020' (2020) EuConst 733, 752-753.

³⁵ *PSPP Judgment* cit. para. 113.

³⁶ See for example M Bobic and A Dawson, 'Quantitative easing at the Court of Justice' cit.

standards. It immediately adds though that these standards are based on the constitutional legal traditions common to the Member States, which are notably reflected in the case law of the national constitutional courts and the other apex courts. It notes in this respect that the application of these methods and principles by the CJEU cannot and need not completely correspond to the practice of national courts, given the particularities of the EU legal order. However, the traditional European methods of interpretation and more broadly the general legal principles that are common to the laws of the Member States must not be manifestly ignored. Based on this reasoning, the constitutional court articulates the conditions under which it will consider itself bound by an interpretation given in the context of the preliminary reference procedure. It explains that it will respect the outcome of a preliminary request so long as the CJEU applies recognized methodological principles and its ruling is not arbitrary from an objective perspective, even when it adopts a position against which weighty arguments could be possibly made.³⁷

It is apparent that the above construction amounts in essence to the introduction of a new *Solange*, clearly inspired by the famous case law of the constitutional court in the area of fundamental rights protection.³⁸ However, this time the focus is not on a substantive issue but rather on the recognized methodological standards of interpretation of EU law.³⁹ The constitutional court seems implicitly to take into account the autonomy of the EU legal order, to the extent that it specifically acknowledges that the particularities of EU law give rise to considerable divergencies with regard to the importance and weight accorded to the various means of interpretation. Furthermore, it confirms its *Honeywell* case law by reiterating that the mandate conferred upon the CJEU to ensure that the law is observed in the interpretation and application of the Treaties necessarily entails that this body should be granted a certain margin of error in the performance of its powers.⁴⁰ However, the manner that this new *Solange* is applied in practice suggests that the ultimate objective of its introduction is to authorize the constitutional court to impose its own understanding as regards the limits of monetary policy and the measure of judicial review that must be exercised over the ECB. That is attempted in a covert way, under the pretext of the need to respect the common constitutional traditions of the Member States.

The means chosen to attain that objective is the principle of proportionality. The constitutional court starts from the premise that this principle is recognized in all Member States and that its application necessarily requires a final balancing of all opposing legal interests at stake, including an assessment of the effects that the introduction of a given

³⁷ *PSPP Judgment* cit. para. 112.

³⁸ German Federal Constitutional Court judgment of 22 October 1969 2 BvR 197/83 *Solange II*.

³⁹ See also to this end D Petric, “Methodological *Solange*” or the spirit of *PSPP* (18 June 2020) European Law Blog Europeanlawblog.eu.

⁴⁰ *Honeywell* cit. para. 66.

measure may possibly entail.⁴¹ It also argues that such an assessment is carried out by the CJEU in virtually all other legal areas, save that of the EMU.⁴² The eventual aim of the constitutional court is to conclude that the preliminary ruling in *Weiss* runs counter to the recognized European methods of interpretation and that it is therefore methodologically arbitrary from an objective perspective. However, in order to be able to arrive at such a conclusion it must first bring this alleged violation of the common constitutional standards of interpretation as regards the principle of proportionality under the scope of its *ultra vires* review. In other words, it must prove that by applying proportionality in an erroneous manner the CJEU has patently exceeded the limits of its competences in a manner that specifically runs counter to the principle of conferral.⁴³ That requires in turn to establish the existence of a connection between proportionality and the principle of conferred powers.⁴⁴

In its attempt to attest the existence of that connection, the constitutional court manifestly misinterprets the role that the Treaties and the relevant case law of the CJEU accord to proportionality as concerns the question of allocation of competences. It considers that this principle has a corrective function and that it constitutes the key determinant in the division of competences between the EU and its Member States.⁴⁵ The existence of a link between the principle of proportionality and the delimitation of competences is underlined by the constitutional court at many points throughout its judgment.⁴⁶ Based on this construction, the constitutional court concludes that the preliminary ruling in *Weiss* is methodologically untenable and incomprehensible because it attaches no legal relevance whatsoever to the serious economic policy effects that the contested asset purchase programme entails in practice.⁴⁷ That renders the principle of proportionality practically meaningless as regards the delineation between monetary policy and economic policy, since the suitability and necessity of the programme are not balanced against the significant economic policy effects that it necessarily produces to the detriment of the competences of the Member States.⁴⁸ Furthermore, the wide margin of appreciation that the CJEU recognizes to the ECB as regards the exercise of the competences and its readiness to accept without closer scrutiny the proclaimed monetary policy objective of its contested programme affords in essence to that institution the ability to decide autonomously on the scope of its mandate and to choose freely any means it considers suitable to carry out its functions even if the benefits are rather slim.⁴⁹ As a result, the preliminary ruling in *Weiss* constitutes an *ultra*

⁴¹ *PSPP Judgment* cit. paras 124-125 and 132.

⁴² *Ibid.* paras 146-153.

⁴³ *Ibid.* para. 110 and the case law mentioned therein.

⁴⁴ Arts 5(1) and (2) TEU.

⁴⁵ *PSPP Judgment* cit. paras 133 and 142.

⁴⁶ *Ibid.* paras 119, 123, 127, 139, 154, 156, 163, 177.

⁴⁷ *Ibid.* paras 119, 133, 141, 153.

⁴⁸ *Ibid.* paras 127, 133, 138.

⁴⁹ *Ibid.* paras 136-137 and 140-143.

vires act given that its interpretation of the monetary policy mandate of the ECB encroaches upon the competences of the Member States for economic and fiscal policy matters by empowering that institution to pursue its own economic policy agenda by means of an asset purchase programme.⁵⁰ For that reason, the constitutional court cannot rely on that preliminary ruling and it must conduct its own review in order to ascertain whether the Eurosystem remained within the competences conferred upon it by the provisions of the Treaties in the adoption and implementation of the PSPP.⁵¹ It eventually concludes that the ECB manifestly violated the proportionality principle by not balancing the monetary policy objective of the contested asset purchase programme against the economic policy effects resulting from the means used to achieve it. For this lack of balancing and lack of stating the reasons informing such balancing, the actions of that institution exceed its monetary policy mandate and amount to an *ultra vires* act.⁵²

Although the reasoning of the constitutional court seems to centre around the principle of proportionality, a closer reading of the PSPP ruling reveals that what actually lies at its core is the principle of conferred powers and the controversy about the correct methodological approach that should govern its application.⁵³ However, nothing in the Treaties suggests that proportionality is connected to the allocation of competencies as argued by the constitutional court. On the contrary, their very text makes it clear that proportionality and subsidiarity impose limitations on the exercise of the competences of the EU.⁵⁴ Hence, the proportionality principle comes into play only once it has been established that a given competence can be validly exercised by an EU institution.⁵⁵ Therefore, its purpose is to control the exercise of that legitimately conferred competence. Its potential infringement may lead to the conclusion that a given measure is invalid, but not for the reason that it has been adopted in violation of the principle of conferral. The entire legal reasoning of the constitutional court is based therefore on a patent misconception of the operation of proportionality that considers as part of the recognized methods of interpretation a fictional aspect of that principle.

That misinterpretation becomes even more apparent if one looks at the way proportionality is applied by the case law of the CJEU. The constitutional court seems to consider

⁵⁰ *Ibid.* paras 162-163.

⁵¹ *Ibid.* para. 164.

⁵² *Ibid.* paras 165-178.

⁵³ See also F de Abreu Duarte and M Mota Delgado, 'It's the Autonomy (Again, Again and Again), Stupid!: Autonomy Between Constitutional Orders and the Definition of a Judicial Last Word' (6 June 2020) [Verfassungsblog verfassungsblog.de](https://verfassungsblog.verfassungsblog.de).

⁵⁴ Art. 5(1) TEU. See also M Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) *German Law Journal* 979, 985.

⁵⁵ See on the application of this principle T Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 175-192 and TI Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) *ELJ* 158.

that the preliminary ruling in *Weiss* accepted implicitly the existence of a connection between proportionality and conferral and recognized to that former principle a compensatory function that intends to make up for the generous interpretation of the competences conferred to the ECB.⁵⁶ It is nevertheless apparent that no such link can be established from the case law of the CJEU. Every time it is called upon to examine the existence of a potential exceeding of competences, the CJEU starts by assessing whether the contested measure is covered by the mandate of the institution concerned. It is only in case of a positive answer that the judicial review may potentially proceed to the next stage that relates to the observance of the proportionality principle. That is the approach followed in both preliminary rulings given thus far on the validity of the asset purchase programmes of the ECB.⁵⁷ A similar policy has also been adopted in other legal areas, particularly when the case concerns the appropriateness of the legal basis chosen for the adoption of a given legal act.⁵⁸

III.2. THE ATTEMPT TO REDEFINE THE METHODS OF INTERPRETATION OF EU LAW: THE MISCONSTRUCTION OF THE INTENSITY OF THE PROPORTIONALITY REVIEW

It is apparent therefore that the reasoning employed by the constitutional court in order to bring proportionality under the scope of its *ultra vires* review is manifestly erroneous. However, equally problematic are the conclusions that it arrives at as regards the content of that principle and the obligations that it imposes in relation to the acts of the ECB. The constitutional court accuses in essence both that institution and the CJEU for not examining the principle of proportionality in its strict sense, by failing to take into account the considerable economic policy effects of the PSPP and by not balancing them against its proclaimed monetary policy objective. For the preliminary ruling, that renders it methodologically untenable and objectively arbitrary.⁵⁹ For the contested programme, the consequence is that it lacks an adequate statement of reasons to allow to carry out a comprehensive and substantiated judicial review and to reach a conclusive assessment as to whether the programme in its specific form is still covered by the mandate of the ECB.⁶⁰ For that reason, the constitutional court imposes in essence the obligation on the federal government and the national parliament to require from the ECB to conduct a new proportionality assessment of the programme and to adopt a new decision that demon-

⁵⁶ *PSPP Judgment* cit. para. 128.

⁵⁷ *Gauweiler and Others* cit. paras 46-65 and 66-92 respectively and *Weiss and Others* cit. paras 53-70 and 71-100 respectively.

⁵⁸ See for example Case C-482/17 *Czech Republic v Parliament and Council* ECLI:EU:C:2019:1035.

⁵⁹ *PSPP Judgment* cit. paras 133-153.

⁶⁰ *Ibid.* paras 167-179.

strates in a comprehensible and substantiated manner that the monetary policy objective that it pursues is proportionate to the economic and fiscal policy effects resulting from the application of the scheme.⁶¹

There are nevertheless several objections that can be raised against that understanding of the content of the principle of proportionality and its practical application specifically in the area of the EMU. The first one is that the Treaties only refer to the appropriateness and necessity strands of proportionality review.⁶² The Protocol on the application of the principles of subsidiarity and proportionality makes some reference to the need to take into account the effects of the proposed measures but this obligation is imposed on the EU legislature and concerns primarily the application of the principle of subsidiarity.⁶³ Turning then to the relevant case law of the CJEU, the conclusion is that the assessment of proportionality usually centres around the appropriateness and the necessity requirements.⁶⁴ It is only in very rare cases that it goes beyond the stage of the necessity review and extends to proportionality *stricto sensu*.⁶⁵ The constitutional court expressly admits this reality and makes reference to an extensive list of cases, in which that approach has been followed.⁶⁶ However, later in its judgment it concludes that the preliminary ruling in *Weiss* is methodologically incomprehensible because it allegedly contradicts the approach taken by the CJEU in virtually all other areas of EU law.⁶⁷

Looking more closely at the cases that the constitutional court refers to in order to prove the application of stricter judicial standards outside the area of the EMU, it is immediately apparent that most of those cases concern the exercise of judicial review over national measures and not acts of the EU institutions.⁶⁸ One could certainly argue that it is not automatically permissible to apply more relaxed standards, when the validity of EU law is at stake. That is indeed correct but turning back to the case law mentioned by the constitutional court the second important observation is that this relates primarily to the

⁶¹ *Ibid.* paras 232-235.

⁶² Art. 5(3) TEU.

⁶³ Protocol n. 2 of the Treaty of the European Union on the application of the principles of subsidiarity and proportionality [2004].

⁶⁴ See indicatively in this respect Case C-58/08 *Vodafone and Others* ECLI:EU:C:2010:321 para. 51; Case C-59/11 *Association Kokopelli* ECLI:EU:C:2012:447 para. 38; Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28 para. 50; Case C-202/11 *Las* ECLI:EU:C:2013:239 para. 23.

⁶⁵ See T Marzal, 'From Hercules to Pareto: Of bathos, proportionality, and EU law' (2017) ICON 621.

⁶⁶ *PSPP Judgment* cit. para. 126.

⁶⁷ *Ibid.* paras 146-153.

⁶⁸ See indicatively in this respect Case C-300/06 *Voß* ECLI:EU:C:2007:757; Case C-110/05 *Commission v Italy* ECLI:EU:C:2009:66; Case C-280/18 *Flausch and Others* ECLI:EU:C:2019:928.

areas of fundamental rights protection, free movement of goods and the general principles of EU law.⁶⁹ In those areas, the balancing assessment required by the constitutional court is indeed possible given that it is usually easy to specify both the opposing legal interests involved and the effects that the application of a given measure may practically entail.⁷⁰ On the contrary, the exercise of a similar judicial review over matters of monetary and economic policy is particularly problematic.⁷¹ This is because the complexity and technicality of the issues arising in those areas require the existence of economic expertise that courts do not normally possess.⁷² If they were to perform the kind of proportionality review required by the constitutional court, they would be obliged to rely on the expert analyses of third parties. That would ultimately turn their review into a matter of prioritization of the one economic analysis over the other and would inevitably undermine the credibility of any judicial conclusion.⁷³

Furthermore, it is not at all easy to ascertain the legal interests that should be balanced against the pursued objective of a monetary policy measure. In its preliminary ruling in *Weiss*, the CJEU referred to the risk of losses related to the application of the PSPP and stressed that the ECB had taken sufficient measures to circumscribe that risk.⁷⁴ The constitutional court notes that it can be objectively assumed that the introduction of those safeguards serves the budgetary autonomy of the Member States and promotes fiscal policy interests that are not covered by the ambit of monetary policy.⁷⁵ Although it accepts that the adoption of those measures can be a relevant factor in the examination of proportionality *stricto sensu*, the constitutional court requires though the extension of that review also to the foreseeable economic policy effects of the scheme.⁷⁶ However, it is a particularly challenging task to establish the economic policy effects that a monetary policy measure is likely to produce and to assess their impact in relation to its pursued

⁶⁹ See indicatively in this respect Joined Cases C-435/02 and C-103/03 *Springer* ECLI:EU:C:2004:552 (fundamental rights); Case C-148/15 *Deutsche Parkinson Vereinigung* ECLI:EU:C:2016:776 (free movement); Case C-407/18 *Addiko Bank* ECLI:EU:C:2019:537 (principle of effectiveness).

⁷⁰ See for example the balancing of the competing legal interests in Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333. See on that preliminary ruling F Ronkes Agerbeek, 'Freedom of expression and free movement in the Brenner corridor: the Schmidberger case' (2004) ELR 255; A Biondi, 'Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights' (2004) EHRLR 51; G Facenna, 'Eugen Schmidberger Internationale Transporte Planzüge v Austria: Freedom of Expression and Assembly vs Free Movement of Goods' (2004) EHRLR 73; G Gonzales, 'EC Fundamental Freedoms v. Human Rights in the Case C-112/00 Eugen Schmidberger v. Austria [2003] ECR I-5659' (2004) LIEI 219.

⁷¹ See also I Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe' (2020) German Law Journal 1090, 1097.

⁷² See particularly in this respect M Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review' (2014) German Law Journal 265, 270-272.

⁷³ See also G Anagnostaras, 'In ECB We Trust...The FCC We Dare! The OMT Preliminary Ruling' cit. 753.

⁷⁴ *Weiss and Others* cit. paras 93-99.

⁷⁵ *PSPP Judgment* cit. para.132.

⁷⁶ *Ibid.* paras 134-137.

objective. Given the vagueness surrounding the boundaries between economic and monetary policy and the extreme volatility of the circumstances in the respective areas, it is therefore very precarious to make predictions as to the type and magnitude of the consequences that a policy choice made in the one area may potentially generate in the other. It is not accordingly feasible to perform the balancing assessment required by the constitutional court over largely unspecified policy effects that cannot be properly measured in advance so as to be apt to the exercise of effective judicial review. It appears therefore that the only balancing test that can reasonably take place in that regard is the restrained cost benefit analysis review performed by the preliminary ruling in *Weiss*. That is intended to ensure that the potential negative side effects of a given measure do not manifestly outbalance the benefits linked to its primary monetary policy objective.

Arguably then, the case reveals the existence of conflicting methodological approaches around the content and the intensity of proportionality review in the monetary policy area. The CJEU applies a teleological approach that focuses on the proclaimed objective of the PSPP and the nature of the instruments used in order to attain it. On the contrary, the constitutional court requires the adoption of an effects-based approach that also includes a stricter balancing assessment. Contrary though to the conclusions of that constitutional court, there is no evidence to substantiate its claim that the latter approach stems from the national constitutional traditions of the Member States.⁷⁷ Even if one were to accept though that the adoption of an effects-based approach in the monetary policy area is indeed preferable, this would not render the preliminary ruling in *Weiss* an illegal *ultra vires* act. That is because the proportionality review of the programme made by the CJEU finds support in the text of the Treaties and does not contradict the relevant case law in other areas of EU law. It is therefore both reasonable and methodologically coherent and cannot be considered as untenable and objectively arbitrary.

III.3. BREAKING THE PROMISE OF EXERCISING THE *ULTRA VIRES* REVIEW IN A COOPERATIVE AND EUROPEAN FRIENDLY WAY

The objections that can be raised against the PSPP ruling of the constitutional court do not concern only the substance of the legal reasoning it employs in order to contest the proportionality assessment of the PSPP and its interpretation by the preliminary ruling in *Weiss*. They also relate to the readiness of that constitutional court to give practical effect to its reserve power, without exhausting the institutional means that were available to it in order to resolve the matter in a legally appropriate and amicable manner. In its *Honeywell* ruling, the constitutional court had stressed that its *ultra vires* review would be exercised in a manner that is open towards European law so as to protect the precedence

⁷⁷ See also in this respect E Venizelos, 'Passive and Unequal: The Karlsruhe Vision for the Eurozone' (27 May 2020) [Verfassungsblog verfassungsblog.de](https://verfassungsblog.de/verfassungsblog/).

of application accorded to the provisions of EU law and to ensure their uniform application.⁷⁸ This promise is theoretically reiterated in its PSPP ruling, to the extent that the constitutional court confirms that all tensions should be resolved in a cooperative manner and mitigated through mutual respect and understanding.⁷⁹ It is also emphatically noted that *ultra vires* review should be exercised with restraint, giving effect to the openness of the constitution to European integration.⁸⁰

The promise of a European friendly exercise of *ultra vires* review is nevertheless violated in practice by the failure of the constitutional court to make a second preliminary reference, specifically on the issue of the proportionality of the contested bond purchase programme. That would be the institutionally suitable mechanism to express its objections against the statement of reasons provided by the ECB and the interpretation of the programme made by the CJEU. That would give the opportunity to the ECB to explain whether it had performed the balancing assessment required by the constitutional court prior to the implementation of the programme and to provide the necessary evidence to substantiate its allegations. It would also allow the CJEU to react on the methodological approach to proportionality adopted by the constitutional court and to explicate its own position. After all, it should not escape attention that the principal criticism of the constitutional court against the PSPP related to its inadequate statement of reasons that made it impossible to reach a conclusive decision regarding its validity under the principle of conferral. That did not rule out that the programme in its specific form could still be considered as legal, on the basis of a comprehensive and substantiated proportionality assessment undertaken by the ECB.⁸¹ Instead of proceeding to such a second preliminary reference, the constitutional court chose to consider the programme as *ultra vires* for its alleged lack of balancing and lack of stating the reasons informing such balancing and to require a new assessment by the ECB.

However, the *Taricco* case attests that resorting again to the preliminary reference procedure constitutes an effective and much more preferable alternative to a unilateral *ultra vires* ruling for the resolution of issues that have remained unsettled by a previous preliminary request.⁸² In that case, the interpretation given by the CJEU in relation to national limitation periods liable to prevent the prosecution of serious infringements affecting the financial interests of the EU amounted in essence to a violation of the principle of legality in criminal matters as protected under Italian constitutional law.⁸³ More specifically, that interpretation contravened the overriding principle of the Italian constitutional

⁷⁸ *Honeywell* cit. paras 56-59.

⁷⁹ *PSPP Judgment* cit. para. 111.

⁸⁰ *Ibid.* para. 112.

⁸¹ *Ibid.* para. 179.

⁸² Case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936.

⁸³ Case C-105/14 *Taricco and Others* ECLI:EU:C:2015:555.

legal order that criminal offenses and penalties must be established by precise rules that cannot be applied retroactively. When the case was brought before it, the Italian Constitutional Court lodged a request for a new preliminary ruling on the matter. In its preliminary reference, it clearly implied that it would activate its constitutional counter limits in case the original interpretation of EU law remained the same.⁸⁴ The CJEU eventually adopted an approach that reassured the constitutional concerns raised by its initial interpretation, relying on the existence of new information that had not been brought to its attention at the time of its previous preliminary ruling.⁸⁵

That the *Taricco* paradigm could indeed have been followed also as regards the PSPP is very vividly illustrated by the events that took place after the *ultra vires* ruling of the constitutional court. The ECB reacted by releasing a number of unpublished documents to the *Bundesbank*, including the minutes of its meetings before the launching of its quantitative easing policy.⁸⁶ Those meetings concerned the prospects of buying sovereign bonds from the secondary markets and the effects that such a programme could entail. The ECB also published the official account of its last monetary policy meeting. In that meeting, its board members debated over the effectiveness of its currently applicable monetary policy instruments and the measure of their potential side effects on the area of economic and financial policy.⁸⁷ This information was forwarded to the German government, which expressed the position that these documents confirmed that the ECB had indeed assessed the proportionality of the PSPP in a manner that fully met the requirements of the constitutional court.⁸⁸ A similar position on the proportionality of that programme was also adopted by the German parliament.⁸⁹

It is not certainly incontestable that the release of that information satisfies completely the standard of evidence required by the constitutional court in relation to the proportionality of monetary policy measures, given that it is virtually impossible to assess in a sufficiently precise manner the potential consequences that a given policy choice may possible

⁸⁴ Italian Constitutional Court judgment of 23 November 2016 n. 27/2017 www.cortecostituzionale.it.

⁸⁵ *M.A.S. and M.B.* cit. para. 28. See on that case C Rauegger, 'National Constitutional Rights and the Primacy of EU Law: M.A.S.' (2018) CMLRev 1521; G Piccirilli, 'The Taricco Saga: The Italian Constitutional Court continues its European Journey' (2018) EuConst 814; M Bonelli, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union' (2018) Maastricht Journal of European and Comparative Law 357; F Vigano 'Melloni overruled? Considerations on the "Taricco II" judgment of the Court of Justice' (2018) New Journal of European Criminal Law 18.

⁸⁶ See the letter sent by the President of the ECB to the European Parliament of 29 June 2020 www.ecb.europa.eu.

⁸⁷ Account of the monetary policy meeting of the Governing Council of the ECB www.ecb.europa.eu.

⁸⁸ G Chazan and M Arnold, 'German finance minister moves to resolve court stand-off with ECB' (29 June 2020) Financial Times www.ft.com.

⁸⁹ B Jennen, 'German Parliament Backs ECB Bond-Buying After Court Standoff' (2 July 2020) Bloomberg www.bloomberg.com.

have in another legal area.⁹⁰ However, there was clearly room to seek additional clarification from the ECB and it is also apparent that this institution would have responded positively to such a request in case of a new preliminary reference looking specifically at the proportionality of its contested programme. Instead of availing itself of the institutional mechanisms provided for by the Treaties, the constitutional court made a conscious choice to operate outside the framework of EU law and to exercise its reserve power in a very sensitive legal area characterized by the generalized and significant impact that every single action may potentially have on the entirety of the eurozone Member States. One could therefore be excused for thinking that such a policy patently contravenes its promise for a restrained and European friendly exercise of its *ultra vires* review.

IV. ON THE ROLE OF CENTRAL BANKING AND THE RELATIONSHIP BETWEEN ECONOMIC AND MONETARY POLICY

However, the case is much more than a mere conflict of methodological approaches on the operation and content of the principle of proportionality. A closer reading of the reasoning of the constitutional court reveals that its misconstrued reliance on the recognized European methods of interpretation and the introduction of the new *Solange* ultimately serve its traditional perception of the role of central banking and its position about the measure of judicial control that should be exercised over the ECB in the performance of its functions. The underlying rationale of the *ultra vires* ruling of the constitutional court seems to be that there exists a strict separation between economic and monetary policy that can never be violated, not even in cases of emergency.

IV.1. THE APPLICABLE MEASURE OF JUDICIAL REVIEW OVER THE POLICY MEASURES OF THE EUROPEAN CENTRAL BANK

It is well known that the CJEU and the constitutional court have conflicting views about the intensity of the judicial control that the ECB should be subject to. That was already very apparent ever since the first historic preliminary reference of that constitutional court on the validity of the OMT programme. In that case, the constitutional court stressed that the independence of the ECB diverges from the requirements that the constitution puts in place in relation to the democratic legitimation of political decisions. It considered accordingly that the mandate of this institution should be interpreted narrowly, in order to meet these requirements. That makes it therefore necessary to carry out a comprehensive judicial review of its policy acts.⁹¹ That position of principle has been

⁹⁰ Also see in this regard P Nicolaidis, 'The ECB is Responding to the Federal Constitutional Court of Germany: A Comparison of Monetary Policy Accounts' (29 June 2020) EU Law Live eulawlive.com.

⁹¹ German Federal Constitutional Court order 2 BvR 2728/13 cit. paras 58-60.

repeated since by the constitutional court on every possible occasion.⁹² For that court, the transfer of monetary powers to an independent ECB does not violate the democratic principle only under the condition that the mandate of that institution is strictly limited to matters of monetary policy serving the aim of price stability and it is not extended to any other policy areas. This position is emphatically reiterated in the PSPP ruling and it is also connected to the corrective function that the principle of proportionality supposedly plays for the purposes of safeguarding the competences of the Member States.⁹³

There are two principal objections against the exercise of such a comprehensive judicial review. The first one is that the imposition of a rigorous legal control over the acts of the ECB obliges that institution to operate under the constant threat that every single policy choice it makes may be potentially interpreted by the courts as a transgression of its powers. Hence, the refusal to recognize sufficient leeway to the ECB in the performance of its functions amounts to the exercise of an indirect pressure on it to adapt its strategy to the understanding of the monetary policy requirements by the courts. This runs counter to the very idea of having an independent body that is protected against any external interference, regardless of its source.⁹⁴

The second objection is that the courts do not possess the required expertise and legitimacy to proceed to such a comprehensive review. Courts lack the necessary expertness to successfully adjudicate economics, in view of the complexity and the technicality of the issues that need to be assessed in that area. By advocating in favour of a full judicial review of the acts of the ECB, the constitutional court is actually imposing upon the judiciary a responsibility that it is virtually impossible to carry out effectively. Seen in this perspective, the exercise of such a review over the policy choices of the ECB exceeds the judicial mandate of the courts and gives rise to serious legitimacy issues.⁹⁵ The courts that are called upon to rule on the validity of the acts of that institution are not elected and their legitimacy originates not only from their independence but also from their expertise. It is the nature and the level of that expertise that ascertains the scope of their mandate.⁹⁶ In other words, the restrictive judicial review required by the constitutional court gives rise to the same democratic concerns as those that it is intended to address. Only that this time these concerns relate to the legitimacy and accountability of the judiciary.

Albeit not making specific reference to the inherent limits of its mandate, the CJEU proceeds on the premise that it is not for the judicature to substitute its own assessment of

⁹² *OMT judgment* cit. paras 187-189 and German Federal Constitutional Court order 2 BvR 859/15 cit. paras 102-103.

⁹³ *OMT judgment* cit. paras 136, 143, 156, 160 and 163.

⁹⁴ Art. 130 TFEU.

⁹⁵ See in this respect H Sauer, 'Doubtful it Stood...: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment' cit. 979-980.

⁹⁶ See particularly in this regard *Weiss and Others* ECLI:EU:C:2018:815 opinion of AG Wathelet para. 117.

economic and technical facts for that of the much better equipped in that area ECB. It recognizes therefore to that institution a broad margin of appreciation to make complex and often controversial technocratic assessments and to give preference to the one course of action over the other.⁹⁷ As a result, the policy choices made by the ECB should not be contested so long as they seem to be based on a reasoned economic analysis. Judicial intervention is allowed only in exceptional circumstances, if there exists conclusive evidence that the measure at issue is manifestly inappropriate to attain the monetary policy objectives.⁹⁸ That constitutes in essence an extension to the ECB of the test traditionally applied by the CJEU as concerns the exercise of judicial review over the acts of the EU legislature. In those cases, the CJEU ultimately examines the proportionality of the restrictions imposed by the contested legislative measure and bases its legality assessment on the so called “manifestly inappropriate test”. This test aims to respect the complex policy choices that the EU legislature is obliged to make in the exercise of its rule making powers.⁹⁹ Accordingly, a violation of proportionality only exists if its actions are evidently erroneous in relation to the objectives that they pursue. That leaves a considerable margin of appreciation to the EU legislature, taking into account that it is usually called upon to undertake intricate assessments in an area that necessarily entails various political and economic choices.¹⁰⁰

In its *ultra vires* ruling, the constitutional court contests explicitly the suitability of that test for the exercise of judicial review over the ECB. Once again, it relies on its own understanding of proportionality and its misconstrued connection to the principle of conferral. Although that test is applied by the CJEU at the proportionality stage of its review and only after it has been established that a given measure is covered by the mandate of the ECB, the constitutional court considers that it is by no means conducive to restricting the competences of that institution that are limited to monetary policy. Based on that construction, it argues that the exercise of such a restrained judicial review allows the ECB to expand gradually its competences on its own authority. As a result, the limited standard applied by the CJEU fails to give sufficient effect to the principle of conferral and paves the way for a continual erosion of the competences of the Member States.¹⁰¹ Consequently, the connection between proportionality and conferral attempted by the constitutional court is not simply the means to bring the preliminary ruling in *Weiss* under the scope of its *ultra vires* review. It is also the medium chosen to impose the views of that constitutional court as regards the intensity of the legality control that should be exercised over monetary policy measures.

⁹⁷ It seems though that a more rigorous judicial review applies in the area of banking supervision. See in this respect Case T-733/16 *Banque postale v ECB* ECLI:EU:T:2018:477. See on that case C Bosque and A Pizarroso, ‘Welcome to Hard Look Review ECB’ (28 January 2019) EU Law Analysis eulawanalysis.blogspot.com.

⁹⁸ *Gauweiler and Others* cit. paras 68-81 and *Weiss and Others* cit. paras. 73-81.

⁹⁹ See indicatively in this respect W Sauter, ‘Proportionality in EU Law: A Balancing Act?’ (2013) CYELS 439.

¹⁰⁰ Case C-380/03 *Germany v European Parliament and Council* ECLI:EU:C:2006:772 and case C-343/09 *Afton Chemical* ECLI:EU:C:2010:419.

¹⁰¹ *PSPP Judgment* cit. para. 156.

IV.2. THE EXISTENCE OF AN OVERLAP BETWEEN MONETARY AND ECONOMIC POLICY AND THE ROLE OF THE EUROPEAN CENTRAL BANK

That is not the first time that the constitutional court attempts to influence the interpretation and application of the Treaty provisions in the area of the EMU. In its celebrated preliminary request on the validity of the OMT programme, it made an apparent effort to pre-occupy the outcome of the preliminary ruling by replacing in its reference the announced objective of the contested scheme with its own legal understanding of the monthly bulletins of the ECB and by reading in them arbitrarily an intention to neutralize spreads on government bonds of selected Member States and to safeguard the composition of the euro currency area. It relied then on this alleged immediate objective of the bond purchase programme, in order to consider irrelevant the assertion of that institution that its intervention on the secondary market was intended to restore the operation of its weakened monetary policy transmission mechanism and to serve thus a genuine monetary policy objective.¹⁰² In its preliminary reference in *Weiss*, the constitutional court adopted a seemingly more cooperative attitude that accepted the legitimacy of the announced objective of the programme and concentrated its criticism on the specific modalities of that scheme and the conditions of its implementation. One could still notice though in that preliminary reference a concealed attempt to misinterpret the preliminary ruling in *Gauweiler* and to make it look as if it had endorsed the basic positions of the constitutional court.¹⁰³

The novelty of the approach adopted by the constitutional court in its PSPP ruling is that it is now contesting specifically the methodology used by the CJEU in order to consider a given measure as a valid monetary policy instrument. Its argument is that the preliminary ruling in *Weiss* violates a general principle of EU law, by failing to interpret it in the light of the common national constitutional traditions. If one looks though under the surface, this reliance on the recognized European methods of interpretation ultimately serves the position of the constitutional court that there exists in the Treaties an absolute separation between economic and monetary policy that cannot be violated under any circumstances.

Once again, there is no convergence on that issue between the CJEU and the constitutional court. One can easily identify the source of that confrontation in the split made by the Treaties between monetary and economic policy. The former belongs to the exclusive competence of the EU and is conducted by the ECB and the national central banks of the eurozone.¹⁰⁴ The latter is left to the Member States but the Eurosystem supports the general economic policies in the EU with a view to contributing to the attainment of

¹⁰² German Federal Constitutional Court order 2 BvR 2728/13 cit. paras 70-72 and 95-98.

¹⁰³ German Federal Constitutional Court order 2 BvR 859/15 cit. For more on that particular point see A Pliakos and G Anagnostaras, 'Adjudicating Economics II: The Quantitative Easing Programme Declared Valid' cit. 139-140.

¹⁰⁴ Art. 3(1)(c) TFEU and art. 282(1) TFEU.

its objectives.¹⁰⁵ The artificial nature of this separation has not gone unnoticed.¹⁰⁶ The practical problems arising therefrom became even more evident after the emergence of the eurozone crisis, given that the implementation of financial reform programmes on the one hand and the adoption of open market operations measures on the other made it necessary to ascertain if and to what particular extent there can possibly be an overlap between the exercise of monetary and economic policy.

Pringle made it clear that these two policy areas are not impermeably sealed.¹⁰⁷ The CJEU stressed in this respect that an economic policy act cannot be treated as equivalent to an act of monetary policy for the sole reason that it may also have indirect effects on the stability of the euro.¹⁰⁸ *Gauweiler* confirmed later that the opposite is also true and that a monetary policy measure cannot be considered as an illegal economic policy act for the sole reason that it also produces indirect economic effects.¹⁰⁹ That case law established therefore the existence of an inevitable interconnection between economic and monetary policy under EU law, something that had already been largely accepted in the academic literature.¹¹⁰ However, it did not clarify the notion of indirect effects as concerns in particular the extent of the practical impact that a monetary policy act could legitimately have in the area of economic policy.

Although clearly advocating in favour of a more restrictive demarcation between monetary and economic policy, the constitutional court concluded eventually that such indirect economic effects are in principle acceptable so long as the measure concerned remains predominantly of a monetary policy character.¹¹¹ In its preliminary reference in *Weiss*, the constitutional court took the opportunity to elaborate on that matter and to

¹⁰⁵ Arts 120 and 127(1) TFEU.

¹⁰⁶ A Hinarejos, 'Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union' cit. 563; T Tridimas and N Xanthoulis, 'A Legal Analysis of the Gauweiler Case: Between Monetary Policy and Constitutional Conflict' (2016) *Maastricht Journal of European and Comparative Law* 17; HCH Hofmann, 'Controlling the Powers of the ECB: delegation, discretion, reasoning and care. What Gauweiler, Weiss and others can teach us' (ADEMU Working Paper 2018/107) 28.

¹⁰⁷ Case C-370/12 *Pringle* ECLI:EU:C:2012:756. For more on this case see V Borger, 'The ESM and the European Court's Predicament in *Pringle*' (2013) *German Law Journal* 113; P Craig, '*Pringle* and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) *EuConst* 263; B de Witte and T Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: *Pringle*' (2013) *CMLRev* 805; G Beck, 'The Court of Justice, Legal Reasoning, and the *Pringle* Case-Law as the Continuation of Politics by Other Means' (2014) *ELR* 234.

¹⁰⁸ *Pringle* cit. paras 56 and 97.

¹⁰⁹ *Gauweiler and Others* cit. paras 59 and 110.

¹¹⁰ P Craig and M Markakis, 'Gauweiler and the Legality of Outright Monetary Transactions' cit. 21; M Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review' cit. 269–272; J Bast, 'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review' (2014) *German Law Journal* 167, 174–176.

¹¹¹ *OMT judgment* cit. para. 196.

provide its own understanding of the notion of indirect effects. It argued in this respect that the economic policy effects of a measure that allegedly pursues a monetary policy objective can only be considered as indirect if the following two requirements are met.¹¹² First, if these effects do not constitute purposely accepted consequences of the measure that are foreseeable with certainty. Secondly, if they are not comparable in weight to the legitimate monetary policy objective pursued by the act. According to the constitutional court, such substantial and intentional effects could mean that the measure concerned should be qualified as predominantly of an economic policy nature.¹¹³

The preliminary ruling in *Weiss* explicitly rejected such a possibility, starting from the premise that it is not the intention of the Treaties to make an absolute separation between economic and monetary policy. Thus, a measure adopted by the Eurosystem can validly produce substantial economic effects so long as it still pursues a genuine monetary policy objective and employs means that are indeed of a monetary policy nature. Such effects may also be intentional and foreseeable, provided that they are required in order to serve the monetary policy objective pursued by the measure at issue.¹¹⁴ The CJEU seems to have introduced in this regard a novel version of the effectiveness principle. Even widespread and intentional spillover effects between the areas of monetary and economic policy are acceptable, so long as these are actually necessary to guarantee the effective exercise by the ECB of its conferred powers. To state it otherwise, the separation between monetary and economic policy is bent whenever this is required so that the ECB can effectively employ a monetary policy instrument that is available to it. Provided that this is the case, the legality of the measure will then be ascertained on the basis of the standard proportionality review carried out by the CJEU.

In its PSPP ruling, the constitutional court explicitly rejects the above understanding of the notion of indirect effects and underlines that its interpretation by the CJEU violates primary law by extending in essence the competences of the EU also to matters of economic policy.¹¹⁵ By connecting proportionality and conferral and by concluding that the preliminary ruling of the CJEU is untenable and methodologically incomprehensible to the extent that it omits to proceed to a balancing assessment and to take into account the knowingly accepted and foreseeable economic effects of the contested programme, the constitutional court relies therefore on the misconstrued European standards of interpretation in order to impose by the back door its own vision about the role of the ECB and the relationship between economic and monetary policy. It could be thus sustained that the principal concern of the constitutional court is the existence of a continuously increasing monetarization

¹¹² German Federal Constitutional Court order 2 BvR 859/15 cit. para. 119.

¹¹³ *Ibid.* para. 121.

¹¹⁴ *Weiss and Others* cit. paras 58-67.

¹¹⁵ *PSPP Judgment* cit. paras 142 and 161-162.

of fiscal means and objectives that confers indirectly economic advantages to the less competitive eurozone Member States outside the strict conditionality context of financial assistance measures.¹¹⁶ It has even been argued that the *ultra vires* ruling of the constitutional court attests in essence the priority given by that court to the rigorous observance of fiscal rules over the effective attainment of the objective of price stability.¹¹⁷

This vision of the constitutional court corresponds in essence to the traditional understanding of central banking.¹¹⁸ It also finds support in the formal separation between monetary and economic policy embedded in the Treaties and the fact that the creation of the ECB was based predominantly on the institutional model of the *Bundesbank*. However, it is maintained that this static conception of the mandate of that institution fails to take account of the evolution of its role since its inception and especially of the new economic and legal reality that arose as a result of the eurozone crisis.¹¹⁹ The argument is that the authors of the Treaties failed to provide the necessary tools to the euro area to effectively combat such a crisis and that the ECB had therefore to intervene more actively in order to cover this gap, also by means of unconventional monetary policy measures. This in turn changed the original ruled-based nature of the EMU and led progressively to the emergence of a more policy-oriented conception, also as concerns the mandate of the ECB.¹²⁰

According to the CJEU, the ECB had the competence to cover the gap left in the institutional framework of the Treaties. Albeit rather implicitly, the preliminary ruling in *Weiss* seems to be making exactly that point by referring to the intentional portrayal in the Treaties of the primary objective of monetary policy in a general and abstract manner without spelling out precisely the way that this should be given concrete expression in quantitative terms. The implication therefore is that the ECB is in principle entitled to specify that objective and to choose the appropriate instruments that it must use for its

¹¹⁶ See in this regard M Wilkinson, 'Fight, flight or fudge? First reflections on the PSPP judgement of the German Constitutional Court' (5 June 2020) [Verfassungsblog verfassungsblog.de](https://verfassungsblog.verfassungsblog.de).

¹¹⁷ G Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' (21 May 2020) [European Law Blog Europeanlawblog.eu](https://europeanlawblog.eu).

¹¹⁸ See in this respect S Baroncelli, 'The Independence of the ECB after the Economic Crisis' in M Adams, F Fabbrini and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014) 125, 126–129; A Hinarejos, 'Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union' cit. 571–573; T Beukers, 'The New ECB and Its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention' (2013) *CMLRev* 1579.

¹¹⁹ See particularly in this regard S Baroncelli, 'The *Gauweiler* Judgment in View of the Case Law the European Court of Justice on European Central Bank Independence: Between Substance and Form' (2016) *Maastricht Journal of European and Comparative Law* 79, 88.

¹²⁰ A Hinarejos, 'Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union' cit. 575–576.

attainment, according to the particular circumstances of each individual case. This specification will only be challenged if it is vitiated by a manifest error of assessment.¹²¹ Consequently, the mandate of the ECB is such that it can also cover the adoption of unconventional monetary policy measures intended to supplement the traditional monetary policy tools made available by the Treaties.

Apparently, the constitutional court is not convinced by this line of reasoning and the effectiveness requirements that seem to underpin it. Even though it seems now ready to accept that the adoption of unconventional monetary policy measures is an instrument that should in principle be available to the ECB, it is nevertheless apparent that it makes their implementation conditional on the existence of very restrained legal specifications.¹²² Its new *Solange* and its attempt to confine the methodological autonomy of the CJEU constitute therefore the new tools to control the observance of those limits and to preserve the formal architecture of the EMU.

V. CONCLUDING OBSERVATIONS

It appears that the crisis ignited by the *ultra vires* ruling of the constitutional court will not have a catastrophic effect on the PSPP, following the coordinated actions made by the ECB and the national actors concerned to prevent the escalation of the situation. That is not to say that the ECB will adopt a new policy decision, as essentially instructed by the constitutional court. However, the release of its previously unpublished documents allowed the *Bundesbank* to conclude that the requirements of the constitutional court had been met and that it could continue its participation to the programme.¹²³ One might therefore think that the constitutional court has won this round and that this experience could even lead in the future to a more transparent and meticulous legal reasoning of the monetary policy measures enacted by the ECB.

However, the fact remains that this was the wrong decision at the worst possible moment. This is not only because of its unconvincing and incoherent legal analysis and the virtually impossible to meet standard of evidence that it imposes as regards the proportionality of monetary policy acts. It is not even because it conveys the message that it is for each national court to contest the binding nature of a preliminary ruling according to its own understanding of the recognized European methods of interpretation, undermining the operation of the preliminary reference procedure and its spirit of fruitful cooperation and encouraging a confrontational attitude by other constitutional and supreme courts. It is primarily because any *ultra vires* ruling in the area of the EMU is by its very nature capable to produce transnational effects, exceeding the particular circumstances

¹²¹ *Weiss and Others* cit. paras 55-56.

¹²² German Federal Constitutional Court order 2 BvR 859/1 cit. para. 98.

¹²³ A Weber 'Bundesbank Will Continue Bond Buying as German Court Spat Ends' (3 August 2020) Bloomberg www.bloomberg.com

of the case and the boundaries of any single Member State. It compromises the credibility of the ECB and its ability to perform its powers in an independent and strictly technocratic manner, responding quickly and effectively to the evolving challenges and to the reactions of the markets. It is likely therefore to affect adversely the eurozone and the economies of its Member States and to seriously imperil the process of European integration. However, it should not be for the courts to undertake such an essentially political role. This would manifestly overstep the limits of their mandate and the boundaries of their judicial competence.¹²⁴ To paraphrase a bit the *ultra vires* ruling of the constitutional court, that role belongs according to the common national constitutional traditions to the elected and democratically accountable political actors. These should be left free to choose the appropriate course of action against those monetary policy measures that they consider to be in violation of the Treaties.¹²⁵

Very ironically, the constitutional court is very likely to realize fairly soon how precarious it is to attempt to adjudicate economics ignoring the extreme volatility of the circumstances pertaining in that area. At the wake of the outbreak of the corona virus crisis, the ECB adopted the temporary Pandemic Emergency Purchase Programme (PEPP) as part of its quantitative easing policy.¹²⁶ It appears that this new asset purchase programme has already been chosen as the next target of a constitutional complaint.¹²⁷ The problem is though that this new scheme closely follows the regulatory logic of the PSPP, including its whatever it takes approach and the absence of a specific balancing of its potential economic policy effects.¹²⁸ It also has certain particular characteristics that make it even more problematic in the light of the legality criteria introduced by the constitutional court, especially as concerns the absence of conditionality in relation to the government bonds that are eligible for purchase.¹²⁹ Responding apparently to the *ultra vires* ruling of the

¹²⁴ See in this regard FC Mayer, 'Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference' (2014) German Law Journal 111, 134–136. See also German Federal Constitutional Court order 2 BvR 2728/13 of 14 January 2014 cit., Dissenting Opinion of Justice Lübbe-Wolff para. 28.

¹²⁵ German Federal Constitutional Court order 2 BvR 2728/13 of 14 January 2014 cit., Dissenting Opinion of Justice Gerhardt para. 23.

¹²⁶ Decision 2020/440/EU of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17).

¹²⁷ K Matussek, 'ECB's Foes Focus on Next Target: The Virus Rescue Plan' (7 May 2020) Bloomberg, www.bloomberg.com.

¹²⁸ See in this regard A Viterbo, 'The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank' European Papers (European Forum Insight of 26 June 2020) www.europeanpapers.eu 671. See also I Feichtner, 'In the Name of the People? – The German Constitutional Court's Judgment on the European Central Bank's Public Sector Purchase Programme' (13 May 2020) justmoney.org.

¹²⁹ PSPP Judgment cit. paras 207–208 and 216.

constitutional court, the ECB has stressed emphatically that this new programme respects completely the proportionality requirements.¹³⁰ The constitutional court itself has considered it necessary to confirm in its press release that its *ultra vires* ruling does not concern any financial assistance measures adopted by the EU in the context of the corona virus crisis.¹³¹ However, it will be interesting to see how that same court will manage to tackle its own legal reasoning in order to consider the programme as valid given that nobody can realistically envisage even the possibility of an opposite ruling.

“Emergency brake mechanisms are most effective if they do not have to be applied in practice”.¹³² These words of the until-recently President of the constitutional court remind us that such mechanisms could be possibly acceptable as means for the exercise of institutional pressure and the stimulation of a fruitful judicial dialogue but should never be practically activated, certainly not when they are likely to affect the entirety of the Member States and their citizens. Unfortunately, the constitutional court forgot very quickly the prudent advice of its now former President.

¹³⁰ See in this respect Reuters Staff, ‘ECB’s Lagarde defends bond buys against northern challenge’ (8 June 2020) www.reuters.com.

¹³¹ German Federal Constitutional Court press release of 5 May 2020, *ECB decisions on the Public Sector Purchase Programme exceed EU competences* www.bundesverfassungsgericht.de.

¹³² A Voßkuhle, ‘Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund’ (2010) *EuConst* 175, 195.



ARTICLES

THE CONSTRAINTS OF POWER STRUCTURES ON EU INTEGRATION AND REGULATION OF MILITARY PROCUREMENT

NATHAN MEERSHOEK*

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ABSTRACT: Ever since the Maastricht Treaty, the EU has been increasingly engaged in the military domain. More recently, many initiatives on *intergovernmental* EU cooperation have emerged in the area of Common Security and Defence Policy, such as those initiatives in the context of permanent structured cooperation (PESCO). At the same time, the Commission initiated policies and legislation on military industries based on the *supranational* regime of the internal market, such as the Defence Procurement Directive (DPD) which was adopted by the European Parliament and the Council in

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2009. The EU Treaties, however, include a clear exception for military equipment and recognise national security as the sole responsibility of the Member States. The DPD aims to liberalise European armaments industries by imposing public procurement obligations on Member States for their military procurement. Such obligations, however, may conflict with the national security strategies of the Member States aimed at the survival of domestic industry. Consequently, Member States often still rely on the Treaty-based exception. This *Article* aims to provide a new legal approach to this conflict by, first, looking at the historic and legal context in which policies and legislation came about, secondly, determining the function of military procurement based on international relations theories and, thirdly, evaluating the internal market policies and legislation within this context. Finally, the author sets out a theoretical basis for legal interpretation of EU military procurement law. To overcome the conflict, the author argues for reconsideration of the internal market legal base of the military procurement regime and regulation of the legally controversial offset agreements.

KEYWORDS: public procurement – military equipment – common security and defence policy – EU strategic autonomy – industrial policy – NATO.

I. INTRODUCTION

While military spending around the world is – once again – increasing rapidly, the viability of Europe's major source of military security (NATO) is under pressure. The Treaty of Maastricht [1992] established a legal basis in the EU Treaties for a common security and defence policy (CSDP), but the current political landscape lacks any prospect of far-reaching progress on this, as it would require unanimity among the Member States. Nevertheless, the EU adopted the Defence Procurement Directive (DPD) in 2009 to foster integration of European military industries by means of liberalisation.¹ The DPD imposes obligations on the Member States to organise non-discriminatory tenders for their procurement of military equipment (hereafter, military procurement). Europeanisation of military industries is deemed to foster economies of scale. This should lead to greater European self-sufficiency in producing military equipment and thereby strengthen the EU's strategic autonomy as a global actor. Military procurement, however, exclusively takes place at the domestic level, where it is structured by military-political incentives.

European integration has always been considered a "peace project",² achieving peace by economic instead of military means. Economic interdependence – between Germany and France in particular – was thought to bring balance to the European geopolitical order and peace and welfare to its citizens. Much of liberal thinking post-World War II predicted that this type of economic globalisation would systemically change the relations between

¹ Directive 2009/81/EC of the European Parliament and the European Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

² In 2012, the EU even received the Nobel Peace Prize for "the advancement of peace and reconciliation, democracy and human rights in Europe".

those states that opened their markets. Their diplomatic relations would no longer primarily be determined by structures of military power, but rather by those of economic power.

However, just as much as interdependence logic, the European project was triggered and shaped by military balance-of-power logic. Military capabilities, which are still within the ambit of the nation state, require a strong industrial and technological base. Integration of military industries in the EU is therefore limited. After the failure to establish the European Defence Community (1954), the Treaty of Rome [1957] provided a clear exception from EU law for the production and trade of military equipment. Realist theories on international relations provide an explanation for this. Economic integration between states perhaps makes their relationships more complex and often prevents them from going to war. Yet, order is, in the last resort, attained by military power. In shaping international relations, the role of the military industry is then fundamentally different from other economic sectors.

Existing legal literature is preoccupied with the legal logic of the rules imposed by the internal market and the CSDP dimensions of EU law. This *Article*, instead, considers the prospects of military-industrial integration by looking at the EU Treaties as a system regulating the military-political relations between sovereign states. By explaining the role of military power's industrial component in the relations between states based on international relations theories, this *Article* provides an external perspective on the EU's legal regime on military procurement. This interdisciplinary approach to EU law is necessary to answer the following research question: is the function of military procurement in international relations sufficiently safeguarded within the Commission's internal market approach to regulating it? The concept of balance of power is considered of paramount importance for answering this question, as it is the primary source of stability in systems lacking centralised authority.

In the context of the research question, both the objective of the DPD and the absence of a set of rules for the legally controversial (but politically feasible) topic of offsets are scrutinised. Offsets (at least direct offsets) consist of obligations for suppliers to include the national industry of the procuring state in their supply chain, thereby distorting the "normal" market function in which suppliers select sub-contractors freely. First, the roots of the legal structures of the EU Treaties are set out so as to understand the role of military power in the processes which shaped the EU Treaties. Secondly, these structures are tested against different theories on international relations to understand the function of the legal norms and the hierarchy between them. Thirdly, EU legislation and policies which aim to integrate military industries by liberalisation are evaluated based on the previous theoretical insights. Finally, a more functional approach to military procurement and the constraints imposed by structures of military power on regulating it is proposed. The concluding remarks address the implications of this for the legality of the DPD's objective and offsets.

II. LEGAL STRUCTURES OF MILITARY INTEGRATION AND COOPERATION IN THE EU

In the years after World War II, Cold War tensions, in particular the outbreak of the Korean War in 1950,³ were pressuring a Western European need for West Germany to rearm itself. The political elites in Western Europe and the US considered that the aggression of North Korea could be a prelude to a Russian attack on Western Europe.⁴ The prospect of German rearmament had, however, been the reason for France's reluctance to let Germany join NATO. The designer of the Schuman plan and French government official,⁵ Jean Monnet, therefore considered the integration of the military forces of the two countries as the only solution to Europe's security problem. Soon after launching the Schuman plan (proposing integration of coal and steel resources), Monnet was urging the French government to come up with a similar proposal for integrating the future German military forces with the French, because: "a German contribution to Western defence is indispensable and German rearmament unacceptable".⁶ In October 1950, the French Prime Minister René Pleven adopted Monnet's proposal and came up with a plan for a common European Defence Community (EDC), entailing a united European army based on integrating all of the Member States' military capabilities under a common political and military authority.⁷ If Germany were to rearm, then it would only do so under the control of a supranational authority.

To evaluate the EU's legal regime on military procurement it is first necessary to consider its historic roots which can be traced back to the failure of the EDC and the subsequent accession of Germany to NATO. By considering the developments in the EU Treaties regarding the military domain and their relationship with the North Atlantic Treaty (hereafter, NATO Treaty),⁸ the legal foundation for and limitations on the EU's military procurement regime are exposed.

II.1. THE TREATY OF ROME [1957]: ECONOMIC EUROPE AS AN ALTERNATIVE TO THE FAILED EUROPEAN DEFENCE COMMUNITY

Even though the six potential Member States reached political agreement in 1952, the EDC Treaty never came into force. In August 1954, it was the French parliament that refused to ratify it. The consequences of ratification of this Treaty would have been radical

³ This is also mentioned as the occasion that triggered the idea of a European army by Monnet himself, see: J Monnet, *Memoirs* (Third Millennium Publishing 2016; originally published in 1978) ch. 14.

⁴ See to that extent, in the broader historic context of the European Defence Community: E Fursdon, *The European Defence Community: A History* (Palgrave Macmillan 1980) 51, 67-68.

⁵ At that time, Jean Monnet was, as Commissioner-General of the French National Planning Board, in charge of the post-war economic revival of France.

⁶ Memorandum to President of the French Council of Ministers, 18 September 1950 www.cvce.eu.

⁷ Statement by René Pleven on the establishment of a European army, 24 October 1950 www.cvce.eu.

⁸ The North Atlantic Treaty of 4 April 1949.

for the endurance of national military capabilities. First, it would have drastically restricted the Member States in recruiting national armed forces. Only for the specific cases mentioned in art. 10 of the EDC Treaty would this still have been possible, although maintenance of these national armed forces should at no time have compromised participation in the European Defence Forces.⁹ Secondly, the Treaty included a general prohibition of the development, production and procurement of war material. The procurement of military equipment at the European level would have been commissioned by the supranational institution, “the Commissariat”.¹⁰ This procurement would have been executed through “the most extensive possible competitive bidding”; awarding contracts exclusively on the basis of lowest price.¹¹ The same institution would have been exclusively in charge of granting licences to authorise Member States to produce, import or export equipment for their national armed forces.¹² The EDC’s Member States would only have been authorised to produce, import or export military equipment to an extent which did not go “beyond their needs”. Moreover, for exports of military equipment, Member States would only have been authorised if the Commissariat would have “considered” it consistent with the “internal security of the Community”.¹³ Both for industrial and operational decision-making in the military domain, power would thus have shifted from the sovereign nation states to a supranational European authority.

After the failure of the EDC Treaty, Germany became a member of NATO in May 1955, rendering NATO, and particularly the British and American participation therein, the primary source of military security for Western Europe. Unlike the EDC, NATO is based on the principle of collective self-defence and national responsibilities, rather than supranational military defence. The European integration project was subsequently built on the idea of economic integration by the Treaty of Rome [1957].

In contrast to the economic provisions of the EDC Treaty, the drafters of the Rome Treaty took the exact opposite approach towards military industries. The idea of comprehensive economic integration is simple, although its legal implications are rather complex. By merging the economies of the Member States, greater welfare is stimulated by the efficiency gains which accompany the wider competition between companies. Instead of placing production under the supervision of supranational authorities – as for coal and steel – the Treaty of Rome strictly limited the sovereignty of its signatories on their regulatory and trading capacities by the rules on the internal market and competition. Actions of governments were to be constrained by the forces of a free European market. Instead of preventing war through military integration, the Treaty of Rome sought to make the prospect of war impossible through economic interdependence.

⁹ Arts 9 and 10 of the Treaty Constituting the European Defence Community (EDC Treaty) [1952].

¹⁰ Art. 104 of the EDC Treaty.

¹¹ *Ibid.* art. 104(3).

¹² *Ibid.* art. 107(1) and (4).

¹³ *Ibid.* art. 107(4)(c), (d), (e).

As military integration had just been rejected by the French parliament, the Treaty of Rome included an exception (hereafter, the armaments exception) from the application of the rules of the Treaty for the “production of or trade in arms, munitions and war material” as far as a Member State “considers” this necessary “for the protection of the essential interests of its security” (current art. 346 TFEU). The political sensitivity of this area is clear from the term “considers”. This implies that applying the exception depends on a subjective test by the national government, whereas (in rule of law systems) legal exceptions should normally be justified based on objective criteria.¹⁴ Hence, the armaments exception is the most far-reaching legal codification of the constraints of power structures on EU integration and regulation of military procurement, which is the subject-matter of this *Article*.

The Court of Justice of the EU eventually ruled in *Commission v Spain* (1999) that the armaments exception, like all derogations from EU law involving public safety, deals with “exceptional and clearly defined cases” and does not therefore lend itself “to a wide interpretation”.¹⁵ More recently, in *Schiebel Aircraft* (2014), the Court indicated that the derogation based on art. 346 TFEU should also adhere to the principle of proportionality.¹⁶ As a consequence, there is at least some degree of legal scrutiny over decisions of national governments to derogate from the internal market regime in their military procurement. Legal debate on the nature of the armaments’ exception is mostly concerned with the intensity of the proportionality test.¹⁷

II.2. AFTER THE LISBON TREATY (2009): STRATEGIC AUTONOMY BASED ON NATIONAL OR SUPRANATIONAL RESPONSIBILITIES?

The Treaty of Maastricht (1993) introduced a legal basis into the EU Treaties for a Common Foreign and Security Policy (CFSP), including a Common Security and Defence Policy (CSDP). As in the 1950s, it was again the prospect of a strengthened (by then unified) Germany that triggered the deepening of European integration. However, the collapse of the Soviet Union at the beginning of the 1990s, also triggered a decline of the military interests of the US in Europe which pressured the EU into becoming more self-reliant. In December 2003, the European Council launched its first security strategy. At the same time, two military operations in the Balkans were initiated, after which more missions undertaken by the Member States in an EU context followed.¹⁸ The 2003 Security Strategy stressed the importance for the EU to share in the “responsibility for global security”.

¹⁴ For example: art. 36 TFEU which requires “justification” and excludes “arbitrary discrimination” or “disguised trade restrictions”.

¹⁵ Case C-414/97 *Commission v Spain* ECLI:EU:C:1999:417 para. 21.

¹⁶ Case C-474/12 *Schiebel Aircraft* ECLI:EU:C:2014:2139 para. 37.

¹⁷ M Trybus, ‘The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions’ (2002) CMLRev 1347, 1368-1372.

¹⁸ For an extensive overview of the 12 EU-based military operations since 2003 (at the time of writing this *Article*) and analysis on the basis of justification and policy-embeddedness, see: T Palm and B Crum, ‘Military Operations and the EU’s Identity as an International Actor’ (2019) *European Security* 513, 522-526.

Mentioning the US as the dominant military actor in the world ever since the “end of the Cold War”, it proclaimed that no country could tackle global security issues on its own.¹⁹

The tone in the EU’s Global Strategy of 2016²⁰ is slightly different. The principles and values that the EU seeks to promote in its external actions did not significantly change, but the prolonged means to achieve it did. The Strategy identifies moving defence to a more European level as one of the five priorities of the EU’s external actions. It stresses that, regardless of the existence of NATO to protect most of the EU Member States, the EU should be more capable of contributing to this and to “act autonomously if and when necessary”.²¹ This “strategic autonomy” requires technological and industrial means to sustain sufficient military capabilities. According to the Strategy, this means that “while defence policy and spending remain national prerogatives, no Member State can afford to do this individually”.²² For the strong technological and industrial base, a “fair, functioning and transparent internal market” is deemed necessary. National defence (procurement) programmes are considered insufficient to address capability shortfalls, thus collaborative procurement should be increased.²³

The most significant change to the EU’s defence instruments which was consequently made was the Council decision which established permanent structured cooperation (PESCO) in December 2017.²⁴ PESCO was established on the basis of art. 46 TEU, which was added to the CFSP frameworks by the Lisbon Treaty [2009].²⁵ 25 of the 28 EU Member States decided to participate in PESCO.²⁶ The uniqueness of PESCO, according to the European External Action Service (EEAS), is the legally binding nature of the common “more binding” commitments included in the annex to the Council decision.²⁷

The more binding commitments stress the need for collaboration in developing and utilising capabilities. They require commitment to the joint use of existing capabilities, commitment to help overcome European capability shortcomings and demand a European collaborative approach in addressing capability shortcomings.²⁸ The vague language of these commitments, however, leaves much discretionary power at the national level. When it

¹⁹ European Council, A secure Europe in a better world – European Security Strategy, of 8 December 2003, Council doc. 15895/03, 3.

²⁰ European External Action Service, Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union’s Foreign and Security Policy (2016).

²¹ *Ibid.* 19.

²² *Ibid.* 20.

²³ *Ibid.* 45–46.

²⁴ Decision 2017/2315/CFSP of the Council of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.

²⁵ See also Protocol n. 10 of the Lisbon Treaty [2007].

²⁶ Only the UK, Denmark and Malta did not join.

²⁷ European External Action Service, Permanent Structured Cooperation (PESCO) – Factsheet. Deepening Defence Cooperation among EU Member States, eeas.europa.eu.

²⁸ Decision 2017/2315 cit., annex, More binding common commitments n. 10, 15 and 16.

comes to public procurement and industrial policy, the participating Member States for instance committed to “the intensive involvement of a future European Defence Fund in multinational procurement with identified EU added value” and to ensuring “that all projects with regard to capabilities led by participating Member States make the European defence industry more competitive via an appropriate industrial policy which avoids unnecessary overlap”.²⁹ This vagueness is not as strange as it might at first have seemed, now that it has been proclaimed in the considerations of the Council decision that participation in PESCO is voluntary and that it “does not in itself affect national sovereignty or the specific character of the security and defence policy of certain Member States”.³⁰

The effect of these commitments on procurement liberalisation is therefore minimal and depends on the legal and political-economic structures of concrete projects. PESCO merely provides a platform for the participating Member States to take part in the joint development of military capabilities (be it industrial, technological or operational). By December 2019, there were 47 ongoing projects with a cross section of the Member States involved in each of them. Projects vary from a project of 24 Member States working together on military mobility by simplifying and standardising military transport procedures, to a project involving only France and Italy for designing and developing a new prototype for a military ship.³¹ In operational terms, it can therefore easily be argued that PESCO is effective in enhancing – and deepening – cooperation among those parties which participate. The extent to which the commitments are in effect legally binding is, however, more questionable. The nature of PESCO is inherently (as it is project-based) based on cooperation rather than integration (like other CFSP policies, its obligations are intergovernmental rather than supranational).

The participating Member States need to review annually how they fulfil the “commitments” in their National Implementation Plans. The possibilities for holding to account those Member States which fail to fulfil the commitments are very limited. As exemplified by Blockmans, the commitments can therefore be seen as “political declarations of intent” rather than legally binding and enforceable rules.³² The National Implementation Plans enable the High Representative for Foreign Affairs and Security and the Council to monitor the fulfilment of the commitments by the Member States, but there is no severe sanction mechanism apart from the *shaming* of the rule-breakers and suspension.³³ Suspension may seem like an effective enforcement tool, because – as foreseen in art. 46(4) TEU – suspension of a Member State which “no longer fulfils the criteria or is no longer able to meet the commitments” can take place through a qualified majority vote in the

²⁹ *Ibid.* n. 8 and 19.

³⁰ Recital 4 of Decision 2017/2315 cit.

³¹ The projects mentioned are Military Mobility (6 March 2018) and European Patrol Corvette (EPC – 12 November 2019); an overview can be found on the website of PESCO.

³² S Blockmans, ‘The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding Pesco?’ (2018) CMLRev 1785, 1820.

³³ *Ibid.* 1821.

Council. However, it will often only further endanger the credibility of PESCO in general because it will hamper inclusivity.

II.3. THE LEGAL ROOTS OF THE NATO CONSTRAINT ON EU MILITARY INTEGRATION

As stressed in section II.2, serious steps towards more institutionalised military cooperation were taken with the Lisbon Treaty. The legal status of these commitments becomes, however, more troublesome when simultaneously considering obligations from the NATO Treaty.³⁴ For systemic understanding of the EU's legal regime on military procurement, it is necessary to consider these different sources of law (public international law, EU CFSP law and EU internal market law), their political origins and their hierarchy.

NATO is based on the principle and legal norm of collective self-defence. Just as importantly, the NATO Treaty obliges its signatories to "maintain and develop their individual and collective capacity to resist armed attack", i.e. to possess sufficient military capabilities for effective collective self-defence.³⁵ In 2014, the NATO countries agreed that this means that defence expenditure should entail 2 per cent of their GNP and that 20 per cent of this should be spent on "major equipment".³⁶ The EU Treaties since the Treaty of Lisbon include a collective self-defence clause as well in art. 42(7) TEU, and PESCO includes similar expenditure and investment commitments. The legal primacy of military security for those Member States which are also part of NATO lies, however, with the transatlantic organisation. The EU's collective self-defence clause itself stresses that NATO "remains the foundation of their collective defence and the forum for its implementation". Moreover, art. 42(2) TEU requires coherence between the EU's CSDP and NATO's security and defence policies. Regardless of the political-historical logic behind these limitations on EU integration, the NATO constraint has a legal logic as well. Art. 351 TFEU emphasises that "rights and obligations arising from agreements concluded before 1 January 1958 [...] shall not be affected by the provisions of the Treaties".

It seems that the flexibility of the CSDP obligations and the Treaty-based primacy of NATO obligations for most Member States make legal compatibility likely, whether always politically feasible or not. However, what about the military procurement obligations arising from the EU's internal market regime? The primacy of the NATO Treaty, as envisioned by art. 351 TFEU should be respected there as well. When it comes to the relationship between international obligations and EU law, the Court of Justice of the EU usually solves

³⁴ The nexus between NATO obligations and the EU's internal market regime has also been extensively evaluated in a recent study by the author and others commissioned by the Dutch Ministry of Defence, see: E Manunza, N Meershoek and L Senden, 'The Ecosystem for the Military Logistics Capabilities of the Adaptive Armed Forces: In the Light of the NATO Treaty, the EU Treaties and National Public Procurement and Competition Law' Utrecht University Centre for Public Procurement & RENFORCE 2020 www.uu.nl, original version in Dutch language.

³⁵ Art. 3 of the North Atlantic Treaty.

³⁶ Wales Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales, 5 September 2014, para. 14, www.nato.int.

such tensions by consistent interpretation. The jurisprudence of the Court on the security exceptions to the internal market regime shows that such consistent interpretation is normally possible in a procurement context as well. In *Van Duyn v Home Office* (1974), the Court established that, although derogations must be interpreted narrowly for the effectiveness of EU law, situations in which public policy concerns can justify such derogation vary between different countries and different time periods.³⁷

These circumstances include the membership of a military alliance. In *Campus Oil* (1984), the Court implicitly accepted the fact that Ireland was not a member of any alliance and maintained a policy of neutrality as supporting Ireland's security arguments to impose trade restrictions on oil importers to maintain national energy capabilities.³⁸ Moreover, it is settled case law that derogation from the EU Treaties based on public security includes the foreign policies of Member States. In *Werner* (1995), the Court noted that it is difficult (and too artificial) to draw a hard distinction between security and foreign policy, as the former necessarily depends on the latter. In a globalised world, it would be dysfunctional to consider the security of a state in isolation and to neglect the overall security of the international community and the legal obligations arising from this international context. Therefore, the Court concluded that "the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a Member State".³⁹ That considerations of foreign policy, or more specifically NATO membership, may justify derogation from the EU's public procurement regime was emphasised by the Court in *Commission v Belgium* (2001). The Court accepted derogation by Belgium from EU public procurement law without conducting an in-depth proportionality assessment, after acknowledging that the invoked security interests related to Belgium's responsibility for the security of not only its own military installations, but also those on the premises of NATO.⁴⁰

II.4. INTERIM CONCLUSION: NATIONAL CAPABILITY COMMITMENTS VS THE INTERNAL MARKET?

Participation in capability projects of PESCO can foster industrial cooperation and integration. However, for creating a liberalised internal market for military equipment, the project-based PESCO – let alone the *intergovernmental* CFSP in general – is not enough. Already, since the 1990s, the Commission has therefore been promoting the prospect of such an integrated market through the *supranational* internal market means. Conse-

³⁷ Case 41/74 *Van Duyn v Home Office* ECLI:EU:C:1974:133 para. 18.

³⁸ Case 72/83 *Campus Oil* ECLI:EU:C:1984:256. For the arguments of Ireland in particular, see case 72/83 *Campus Oil* ECLI:EU:C:1984:154, opinion of AG Sir Gordon Slynn, 2759.

³⁹ Case C-70/94 *Werner v Bundesrepublik Deutschland* ECLI:EU:C:1995:328 paras 25-27.

⁴⁰ Case C-252/01 *Commission v Belgium* ECLI:EU:C:2003:547 para. 30.

quently, tensions arise between the ambitions of the Commission, the CFSP and the national security of the Member States relying on their own or NATO capabilities.⁴¹ This section of the *Article* has clarified where these ambitions come from. To scrutinise these tensions systemically it is, however, necessary to conceptualise the nature of the military prerogative of the Member States. This prerogative is rooted in the international system in which nation states are the only sovereign actors. Different theories on international relations stress the primacy of military security therein. By constructing this theoretical context, it becomes possible to evaluate the Commission's internal market initiatives in a broader and more systemic context.

III. THE FUNCTION OF MILITARY PROCUREMENT IN FOREIGN POLICY

The UN Charter famously proclaims that members of the UN "shall refrain in their international relations from the threat or use of force".⁴² Almost 75 years after the coming into force of the UN Charter, the significance of military capabilities in global politics is still difficult to overlook. Capabilities can roughly be divided into *operational* capabilities and *industrial* capabilities. Operational capabilities consist of the ability to act by deploying forces outside one's territory, depending on geography, recruitment of troops and the logistic capabilities⁴³ to move these troops. Industrial capabilities consist of the material assets which are necessary to operate effectively; including all procurement of military equipment by the national defence ministry.⁴⁴ Although much of the industrial capabilities are initially developed by private parties, national governments are the key actors in shaping industries, as they cover the demand side of these markets. Governments shape these industries through their public procurement policies and industrial policies, with the primary purpose of fulfilling their operational military needs to the best extent possible. The extent to which they succeed in this then partly determines their capabilities as international actors. Analysis in this *Article* is limited to the industrial component of military capabilities.

⁴¹ Opposed to the view and logic expressed in this *Article*, Eisenhower has argued that – among other things – based on this "enhanced cooperation" the security interests of the Member States increasingly converge and should be perceived as consistent, limiting the possibilities to invoke security exceptions, see: D Eisenhower, 'The Special Security Exemption of Article 296 EC: Time For A New Notion of "essential Security Interests"?' (2008) ELR 577, 582-583.

⁴² UN Charter of 24 October 1945, art. 2(4).

⁴³ For an analysis of possible legal obligations arising from EU internal market law for the maintenance of military-logistic capabilities in cooperation with private sector parties, see: E Manunza, N Meershoek and L Senden, 'The Ecosystem for the Military Logistics Capabilities of the Adaptive Armed Forces: In the Light of the NATO Treaty, the EU Treaties and National Public Procurement and Competition Law' cit.

⁴⁴ More indirectly, this also includes self-sufficiency in food and raw materials such as oil (economic power), see for instance: HJ Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (4th edn. Knopf 1967) 109-112 and J Mearsheimer, *The Tragedy of Great Power Politics* (WW Norton & Company 2001) 55, 67 ff. For a distinction between power in peacetime and power in wartime, see: R Aron, *Peace and War: A Theory of International Relations* (Praeger 1967) 57-61. In the present *Article*, "industrial capabilities" refers to military equipment (including technologies).

Just as legal theories deal with systems of principles and rules, theories on international relations deal with power. Power is often seen as the capability to achieve certain outcomes or, more simply put, the ability to get what you want.⁴⁵ The procurement regulation at issue is, however, not directly concerned with political or behavioural outcomes, which are, in any case, problematic to analyse systematically as they depend on a great multitude of variables⁴⁶ and coincidences. The regulation concerns the material base of power, so it concerns the *input* rather than the *output* (desired result) of political processes. Meaningful analysis is then based on military power in terms of capabilities (limited in this *Article* to industrial capabilities).⁴⁷ Military-industrial capabilities strongly link with economic power, as this provides an industrial foundation for military forces, and wealth in general, as it enables governments to afford it.⁴⁸ When referring to “power structures”, as in the title of this *Article*, I refer to the function of power in the international system. It is presumed that industrial capabilities are a significant factor in that. This *Article* does not, however, aim to specify this role as such: the focus is on the interaction between law and these capabilities.

Different theories contain different explanations about the influence of power structures on the development and procurement of military equipment and *vice versa*. An extensive overview of these theories would go beyond the purpose of this *Article*. The focus is therefore primarily on two different approaches that are present in the legal tension in the EU Treaties between national security based on realism and European (market) integration based on interdependence. The convincingness of different theoretical assumptions in explaining the military-industrial policies of nations is evaluated. The analysis will start with posing the main methodological question for explaining legal regimes in light of the political forces which created them. This provides a theoretical framework for the interrelationship between law and power. In the same section, the relevance of realism for understanding EU military procurement law is elaborated on, as realism poses the methodological question. Building on this, the focus shifts to interdependence and institutionalism which provide more understanding of states creating and adhering to legal regimes without ideologically neglecting the role of power.

⁴⁵ See, e.g., JS Nye Jr, *The Future of Power* (Public Affairs 2011) 3, 5-6.

⁴⁶ As well as legal and political variables, these can also have a sociological or behavioural-psychological nature.

⁴⁷ Mearsheimer argues that equating power with outcomes is problematic for studying international relations, as one of the most interesting aspects of this area is how “power, which is a means, affects political outcomes, which are ends”. The focus should thus be on capabilities and the way in which they could be used. See: J Mearsheimer, *The Tragedy of Great Power Politics* cit. 57-60.

⁴⁸ *Ibid.* 60-75. However, this awareness was already active in the economic theories of Adam Smith (“Of the expense of defence”), see: A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford University Press 1976 - first published in 1776) 689.

III.1. OVERCOMING THE “REALIST CHALLENGE” IN EU LAW: FROM REALISM TO FUNCTIONALISM

Realism has a long-lasting tradition in philosophy and legal-political theories. In its essence, realism is based on the belief that power precedes morality and law rather than *vice versa*.⁴⁹ In the international system there can be a lack of effective authority as there is no centralised authority. Morgenthau therefore considered the refusal to “identify the moral aspirations of a particular nation with the moral laws that govern the universe” to be one of the main principles of realism in international relations, as power comes first. In his theory of international relations, human nature is considered as the driving force of politics. He considered the “political” human as power-seeking and acting out of self-interest in a world in which one is either dominating or dominated. International politics should then be explained by power defined in terms of such interest.⁵⁰ To remain free from the domination of others one first needs a secure space, which can be found in the sovereign nation state. International politics are then principally concerned with states seeking to maintain these spaces, by pursuing strategies of state survival. If power precedes morality, there is no limit on the means of domination, and survival is assured by acquiring superior means to potential dominators. Hence, military power is the primary source of authority in international relations.

Lacking a world government, the international system is characterised by anarchy, in which sovereign states are continuously protecting and enhancing their own interests. As a result, conflict – ultimately turning into war – is always near, and can even be considered the *ultima ratio* of power in international relations.⁵¹ Following that line of thought, Waltz considered war in international relations as “the analogue of the state in domestic politics”.⁵² The difference between the state and war lies in the existence of a monopoly of legitimate physical force in the domestic system, which the decentralised international system lacks. Possessing adequate military capabilities – including as technologically advanced

⁴⁹ For Machiavelli there could be no effective morality without effective authority which is secured through military power “for war is the sole art looked for in one who rules”, see: N Machiavelli, *The Prince* (Dover Publications 1992 – first published in 1532) 37. This was more bluntly paraphrased by Carr as considering that there can be no effective morality without effective authority, as “Morality is the product of power”, see: EH Carr, *The Twenty Years’ Crisis, 1919-1939: An Introduction to the Study of International Relations* (Harper & Row 1964 - first published in 1939) 64.

⁵⁰ HJ Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* cit. 4-14 (footnote 43) (“Six Principles of Political Realism”). Morgenthau’s approach, to a far extent, builds on the political philosophy of Thomas Hobbes, for who the function of the sovereign state was “to live peaceably amongst themselves, and be protected against other men”, that is (internal) peace and (external) defence, see: T Hobbes, *Leviathan* (Oxford University Press 1996 – first published in 1651) 115,115.

⁵¹ EH Carr, *The Twenty Years’ Crisis, 1919-1939: An Introduction to the Study of International Relations* cit. 109. The idea of war as the ultimate instrument of (international) politics originates from the work of Carl von Clausewitz, see: C von Clausewitz, *On War* (Oxford University Press 2008 - first published in 1832) 13, 28-29.

⁵² K Waltz, *Man, the State, and War: a Theoretical Analysis* (Columbia University Press 2018 - first published in 1954) 96.

equipment as those of other sovereign states – becomes vital for national security as a source of survival. If all sovereign states are guided by self-interest, dependency on foreign actors for the development and production of armaments makes one vulnerable. Procurement of military equipment developed and produced outside one's own secure space should be kept to a minimum. Although autarky in armaments production and complete technological autonomy are unrealistic in a globalised economy, somehow it remains the ideal for the realist. Even the founder of free market economic theory, Adam Smith, considered protectionism feasible in all industries that contributed to a state's military power.⁵³

How does one then identify and explain legal norms in such anarchy? Does law have any potential at all? If so, can it be a tool to shape the system or is it merely a force within boundaries set by the system? These questions reflect what Slaughter considers the "realist challenge" of international law.⁵⁴ Overcoming this challenge requires an interdisciplinary approach to the understanding of legal norms that seek to regulate the relationships of sovereign states. Such an approach only works when accepting, on the one hand, that as proclaimed by Slaughter "the postulates developed by political scientists concerning patterns and regularities in state behaviour must afford a foundation and framework for legal efforts to regulate that behavior",⁵⁵ as these patterns can predict the potential effectiveness of these efforts. These patterns are what in the title of this *Article* are referred to as "power structures". On the other hand, one needs to presume that law has the potential of altering processes and outcomes of interaction between nations, as long as these legal regimes to some extent reflect existing power structures. In other words: to be an effective force, law must be functional.

This can be traced back to the functional approach to international law that Morgenthau envisioned in his earlier work.⁵⁶ Vigorously opposing the fundamentals of a positivist understanding of international law as a self-sufficient system which can be "understood without the normative and social context in which it actually stands", Morgenthau constructed a basis for a functional theory of international law at a most critical moment for the viability of international law. The invasion of Poland by Nazi Germany had just revealed the failure of the League of Nations and the previous appeasement policy of the UK towards Germany to maintain stability. According to Morgenthau, law stands in a dual functional relationship with the social forces of a particular time and space.⁵⁷ In a more normative

⁵³ A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* cit. 452, 463. Smith used this argument to support the British Acts of Trade and Navigation (1651) which completely excluded all non-British ships from shipping goods to Britain. This is obviously a much broader exception to free trade than that provided by either art. 36 TFEU or art. 346 TFEU.

⁵⁴ A Slaughter, 'International Law and International Relations Theory: A Dual Agenda' (1993) AJIL 205, 207-208. This "challenge" occurred in particular after World War II had revealed the shortcomings of the post-World War I institutionalisation of international relations in bringing peace and stability.

⁵⁵ *Ibid.* 205.

⁵⁶ See: HJ Morgenthau, 'Positivism, Functionalism and International Law' (1940) AJIL 260, 274.

⁵⁷ *Ibid.* 274.

sense, international law is the “function of the civilisation in which it originates”, meaning that it represents ethical values which are current in a society. At the same time, it is a “social mechanism” seeking to achieve certain objectives, be they of an economic or even military nature. The main consequence of such a functionalist approach is that law is only valid when the rules can either achieve a common interest or a balance of power.⁵⁸

III.2. SYSTEMIC CONSTRAINTS ON INTERNATIONAL COOPERATION AND EUROPEAN INTEGRATION

When it comes to cooperation, realism assumes that states pursue “relative gains” rather than absolute gains. For a state, the question is not merely whether integration improves life for its citizens, but, first, whether it strengthens the state’s position in the international system. Just as power precedes morality, so security precedes welfare. Bull had already noted in 1982 that enhancing military integration in Europe would require a change of policy in Britain, shifting away from its focus on transatlantic cooperation. But even after the UK joined the European Community (EC) in 1973 this was still problematic. As Bull stressed, the UK had not become the equal of France and West Germany in European politics as the UK had presumed when joining.⁵⁹ Even after the UK had joined the EC, some sort of bipolar Franco-German power structure in the decision-making processes of the Community remained. After the collapse of the Soviet Union and the process from a *unipolar* international system (dominated by the US) towards a more *multipolar* system, the influence of the US in Europe gradually decreased, along with the relative power of one of its closest European allies, the UK.

The consequence of states pursuing relative gains, according to Waltz, is that integration is deterred by the fears of inequality in gains and dependency; both threatening state survival.⁶⁰ Unlike the presumptions of free market economics, there is no automatic harmony⁶¹ in anarchy. When a state feels threatened, it will increase military spending to gain security after which other states will follow, and so on. In the view of Mearsheimer this leads to an international system in which states (particularly “great powers”) must be offensive actors rather than merely defensive, as one can never be certain about the intentions of other states.⁶² Increased military spending will only foster overall (global) security when it improves the balance of power. There will always be conflict between the economic advantages of integration and the expensive security guarantee of autonomy. Military procurement is illustrative of the struggle, as military spending in general is “unproductive for

⁵⁸ *Ibid.* 275. See also: HJ Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* cit. 266.

⁵⁹ H Bull, ‘Civilian Power Europe: A Contradiction in Terms?’ (1982) JComMarSt 149, 160-161.

⁶⁰ K Waltz, *Theory of International Politics* (Random House 1979) 105-106.

⁶¹ Adam Smith called this “the invisible hand”. As opposed to the effects of individual security spending on overall security, this means that overall welfare is increased when all actors egoistically pursue their own welfare.

⁶² J Mearsheimer, *The Tragedy of Great Power Politics* cit. 31.

all and unavoidable for most”.⁶³ It would consequently be wrong to focus on economics when contextualising the law on military procurement. Economics can provide understanding of different types of secondary considerations, but the function of military procurement originates from the constraints imposed by global structures of military power. To take away the constraints on military cooperation and integration, their legal regimes should be built on balance-of-power logic rather than the economic logic of European integration.

III.3. BALANCE OF POWER AND TROUBLED ALLIANCE

EU law is traditionally viewed from a common interest side of things, as exemplified by art. 1 TEU which mentions “the process of creating an ever closer union”. One must, however, systematically distinguish between aims and means. As art. 3(1) TEU, sets out the overarching aims of the EU are to “promote peace, its values and the well-being of its peoples”. The other paragraphs of the provision, which set out the means, indeed tend to emphasise supranational “common interest” means such as the internal market. Nevertheless, when the promotion of peace in a specific case is best served by more inter-governmental balance-of-power means, it takes precedence. In the words of Morgenthau, the balance of power should not be seen as a “choice of power politics”, but as a “manifestation of a general social principle” and that as such it is “not only inevitable” but also an “essential stabilizing factor in a society of sovereign nations”.⁶⁴ One of the major weaknesses of balance-of-power policies, namely the uncertainty of power calculations and alliances, can be countered by law,⁶⁵ but how is the balance of power reflected and safeguarded in EU law? A distinction should first be drawn between the balance of power in the world and among actors within the EU.

The historical overview in section II showed that major shifts in European integration were guided by balance-of-power logic, which in 1954 obstructed military integration. The idea of a common defence provided by the EDC and the incorporation of military policies into EU law by the Treaty of Maastricht were both guided by (a French) fear of a militarily dominant Germany. Paradoxically, the EDC also failed because of a French fear of the loss of military control because of the presence of a militarily dominant Germany in it. Consequently, the military relations between France and Germany were institutionalised within NATO by the principle of collective self-defence. There are now, however, two major problems in the EU-NATO relationship. First, NATO’s establishment and success in protecting Europe from Soviet invasion depended on US hegemony within the alliance. Now that the US has been neglecting its hegemonic role,⁶⁶ a multipolar power structure within NATO arises. After Brexit, only two out of the four dominant actors within NATO

⁶³ K Waltz, *Theory of International Politics* cit. 107.

⁶⁴ HJ Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* cit. 161.

⁶⁵ *Ibid.* 196-215.

⁶⁶ This can be illustrated by the US’ recent plans to withdraw military troops from Germany, see: ‘Donald Trump orders 9,500 US troops to leave Germany’ (6 June 2020) The Guardian www.theguardian.com.

are EU Member States. Cooperation within such a multipolar structure is more complex,⁶⁷ as it hampers unity and thereby creates uncertainty in military strategy. The second problem starts with not all EU Member States being in NATO. However, even among those EU Member States which are part of NATO, priorities differ. The Baltic States and Poland, bordering the initial threat for which NATO was founded, are more likely than France or Italy to prioritise transatlantic cooperation over the EU.⁶⁸

Within the EU, the identified problems make the achievement of a balance of power more complex. The uniqueness of the EU is that in many policy areas the Member States have limited their sovereign rights and transferred competence to the EU. In those areas, balance of power takes on a legal-constitutional form, almost as in democratic states, by dividing powers among different institutions (*trias politica* for instance) and ideally imposing systems of checks and balances. As art. 4(1) TEU states that national security has remained the sole responsibility of the Member States, it can be assumed that the military domain is not one of these areas. Balance of power in military affairs is consequently a more political process taking place between the Member States. In section IV, the limitations on the residual role of the Commission are elaborated. Although the EU now consists of almost five times as many states as after the Treaty of Rome, the balance of power is often still considered to centre round a French-German consensus. This is even more the case now that the UK has left the EU. Evaluating the balance of power in the EU by looking at France and Germany only is, however, problematic because of the identified problems at the NATO level. German-French consensus will not necessarily lead to a balance of power in military affairs, as the other 25 Member States have two concrete and allied alternatives to EU cooperation. In other words, France and Germany as the main EU powers potentially compete with the UK and the US for the alliance of the smaller European states. The EU's strategic autonomy then depends on unity beyond a simple French-German power balance.

III.4. BALANCE OF POWER AND MILITARY-INDUSTRIAL POLICYMAKING

Military procurement takes place at the national level, where the operational capabilities are located. Accepting the functional similarity of states (all pursuing their survival) means that in their procurement policies they all primarily strive for military security in terms of relative gains. What makes their procurement policies different is the intensity of the constraints that power structures impose on them. This depends on their capabilities.

⁶⁷ See for instance: J Mearsheimer, *The Tragedy of Great Power Politics* cit. 338 on 'The Causes of Great Power War' where he explains why war or conflict is more likely in multipolar power structures, as opposed to unipolar or bipolar structures.

⁶⁸ See 'Donald Trump orders 9,500 US troops to leave Germany' cit., after President Trump's statements on withdrawing troops from Germany, Polish President Duda asked for some of these troops to be sent to Poland instead, see: C Oprysko and Z Wanat, 'Trump Says He Will "Probably" Reassign Troops from Germany to Poland' (24 June 2020) POLITICO www.politico.eu.

The military-industrial policy of the Netherlands (as well as other European countries with similar capabilities) post-World War II illustrates an international system in which states are constrained by systemic pressures.⁶⁹ The Netherlands did not aspire to be self-sufficient in military industries, as this would have been unrealistic. To maximise national-industrial capabilities within the boundaries of the system therefore, from the 1970s onwards the Netherlands employed offset policies. Simply put, a direct offset means that when importing equipment, the exporting company (the prime contractor) agrees to involve Dutch sub-contractors in the development or production of the equipment. Often such offsets come with some sort of technology transfer from the prime contractor to the sub-contractor, stimulating technological innovation in the national industry (often through licensed production). By involvement in the development and production processes, national industry is stimulated, contrary to what happens when the equipment is imported without an offset agreement. In the latter scenario, the equipment could be acquired for a lower price. As stated by a former Dutch Minister of Economic Affairs, the extra cost serves an industrial policy purpose by aiming to level, however slightly, the unequal nature of the international military equipment market.⁷⁰

The most well-known example of this policy is the participation of the Netherlands in the US-led project of the development of the F-35 fighter plane and the eventual procurement of these planes. In 1997, the Dutch government decided to participate in the development of the F-35 fighter plane, later triggering their procurement. Although there is a multitude of reasons that lay behind the Dutch involvement in the project, it seems clear that access to US military technology – which was deemed superior to European alternatives – and the traditionally close relations between the Netherlands (the Royal Netherlands Air Force in particular) and the US were decisive.⁷¹ As opposed to the European alternatives such as the Tornado, Eurofighter Typhoon and Saab JAS39 Gripen programmes, the development phase of the F-35 programme was fully controlled by the US, which aimed to retain monopolies in high technology industries.⁷² The involvement of companies from the non-US partners in the programme has been mainly in the production phase. Moreover, the lead contractors (Lockheed Martin and Boeing) had already been selected before other countries joined the programme, and were located in the US.

⁶⁹ With regard to this example, see: E Dirksen 'The Defence-Industry Interface: The Dutch Approach' (1998) *Defence and Peace Economics* 83, 91.

⁷⁰ Letter of the Dutch Minister of Economic Affairs to the Second Chamber of Parliament, Enforceability of offset-agreements of 21 June 1996 Nr. 24 793, 4, original version in Dutch language.

⁷¹ See: G Scott-Smith and M Smeets, 'Noblesse oblige: The Transatlantic Security Dynamic and Dutch Involvement in the Joint Strike Fighter Programme' (2012-2013) *International Journal* 49 and S Vucetic and KR Nossal, 'The International Politics of the F-35 Joint Strike Fighter' (2012-2013) *International Journal* 3 and in C Klep, *Dossier-JSF* (Boom/Amsterdam 2014) 11, 68.

⁷² This comparison was made by Hartley in: K Hartley, 'Collaboration and European Defence Industrial Policy' (2008) *Defence and Peace Economics* 303, 308.

As explained by Scott-Smith and Smeets,⁷³ Dutch participation and gradually expanding involvement in the F-35 project was first and foremost a geopolitical decision rather than an economic one. A “deep-rooted” preference of the Royal Netherlands Air Force (RNAF) for cooperating with the US was primarily based on the aim to secure alignment with a global “superpower”.⁷⁴ This fits in with the aspect of realism as set out in this section. For a country with limited capabilities to increase its power it is better to align with a global superpower than a regional (European) one: it triggers a greater relative power increase. Only once the decision had been made to participate in the F-35 programme, did industrial reasons become increasingly important to expand the involvement and to procure the aircraft. In their study, Van de Vijver and Vos estimated a turnover value of the F-35 programme for Dutch companies of over €9.2 billion and over 23,000 man-years of employment.⁷⁵ In time, the Dutch aerospace industry became dependent on the F-35 programme and the Dutch involvement in it. So, even when Saab, in 2008, once again offered the Gripen planes to the Netherlands for a significantly lower cost price, the Netherlands was by then engaged too deeply with the F-35 project and had become too industrially dependent on it to switch.⁷⁶ Although such collaboration is complex, realists would simplify the crux of these decision-making processes by stating that the military benefits of alliance with the US superseded economic concerns, just as these type of benefits supersede morality and law. Concerns of military power constrain the achievement of economic gains by collaboration rather than vice versa, as security is – more generally – a precondition for economic welfare.

III.5. EDA’S INTERGOVERNMENTAL APPROACH TO OFFSETS

A striking example of the difference between intergovernmental and supranational regulation of military procurement is the approach to offsets of the EU Defence Agency (EDA). The Codes of Conduct of EDA on Defence Procurement and on Offsets seek to promote transparency and objectivity in procurement procedures of military equipment and limit the use

⁷³ G Scott-Smith and M Smeets, ‘Noblesse oblige: The Transatlantic Security Dynamic and Dutch Involvement in the Joint Strike Fighter Programme’ cit. 66-69.

⁷⁴ Stemming from the US context, such preferences are sometimes also linked to what is referred to as the “military-industrial complex”, which was introduced by former US President Eisenhower. It refers to informal ties between the military, politicians and industry actors, influencing (and possibly corrupting) such acquisition processes, see: Transcript of President Dwight D. Eisenhower’s Farewell Address (1961), www.ourdocuments.gov. See also: K Hartley, ‘The Arms Industry, Procurement and Industrial Policies’ (2007) *Handbook of Defense Economics* 1139, 1155-1156.

⁷⁵ M Van de Vijver and B Vos, ‘The F-35 Joint Strike Fighter as a Source of Innovation and Employment: Some Interim Results’ (2006) *Defence and Peace Economics* 155, 158.

⁷⁶ Moreover, the Dutch Court of Auditors concluded in a report presented to the Dutch Parliament in March 2019 that the time-planning of the programme was completely dependent on political decision-making in the US, leaving the Dutch only with the choice to “get on the bus, or let it pass”, see: Netherlands Court of Audit, *Lessons Learned from the JSF Project: Keeping Major Defence Procurement Projects under Control* of 06 March 2019 english.rekenkamer.nl, original in Dutch language.

of offsets.⁷⁷ At the same time, it seems to acknowledge offsets as a legitimate instrument to ensure that military spending has a positive impact on national strategic industry or even the economy in general. Indirect offsets in particular (elaborated on in section III.6), however, remain problematic in the context of the EU's rules on public procurement and the internal market because the industrial obligations which they impose on suppliers can hardly be linked to national security. According to the Commission, these even, by definition, distort a free (liberalised) and integrated market.⁷⁸ However, the EDA's Code of Conduct does not distinguish between direct and indirect offsets. Next to promoting transparency, the strongest commitment which the Code of Conduct imposes is that offsets should not exceed the value of the procurement contract.⁷⁹ The question of market distortion is omitted, leaving it as a matter of proportionality.

III.6. INTERDEPENDENCE AND INSTITUTIONALISM: FINDING CERTAINTY IN LEGAL REGIMES

Compared with realism, institutionalism and interdependence provide more optimism for a rule-based international order, beyond merely shaping and facilitating a balance of power. Keohane and Nye's theory of complex interdependence offers both an additional and alternative approach to global politics. Although core realist assumptions are accepted, interdependence grants a less dominating role to states as the main actors in international politics and the use of force as their primary – and of last resort – policy instrument.⁸⁰ Deepened transgovernmental relations by increased international trade constrain the actions of states in different ways from the ways in which realism perceives the use or threat of military force to do. Consequently, international relations have become more like domestic politics. Next to military power, there is a multitude of issues involved, lacking a clear hierarchy.⁸¹ Particularly in a region as economically integrated as the EU, the *high politics* of national (military) security do not necessarily dominate the *low politics* of welfare.⁸²

As opposed to the previously discussed direct offsets in military procurement, indirect offsets are a straightforward example of the interaction between high politics and

⁷⁷ EDA, The Code of Conduct on Defence Procurement of the EU Member States Participating in the European Defence Agency, 21 November 2005 and EDA, The Code of Conduct on Offsets, 24 October 2008.

⁷⁸ See: Communication COM(2007) 764 final from the Commission of 5 December 2007 - A strategy for a stronger and more competitive European defence industry, 7. See also: Directive 2009/81/EC cit.

⁷⁹ EDA, The Code of Conduct on Offsets cit. 3.

⁸⁰ RO Keohane and JS Nye Jr, *Power and Interdependence* (4th edn. Longman 2012 – first published in 1977) 19.

⁸¹ *Ibid.* 22-23. In Waltz's structural realist approach, the structure is determined by military power only and all behaviour is explained within this structure, see: K Waltz, *Theory of International Politics* cit. Interdependence theory, on the contrary, relies on issue structure in which "different issue areas often have different political structures that may be more or less insulated from the overall distribution of economic and military capabilities", *Ibid.* 42.

⁸² *Ibid.* 19.

low politics. By means of indirect offsets, national governments oblige foreign suppliers of military equipment to place orders with domestic industrial actors which are not directly connected with the imported goods.⁸³ Hence, military expenditure is used to promote low-politics objectives, aiming to stimulate national industries and increase employment. This does, however, not indicate that military industries are interchangeable with other economic sectors. Indirect offsets are mostly used when direct offsets are impossible because of a lack of relevant industry in the procuring state. The hierarchy in which military concerns supersede general economic concerns remains.

According to Keohane and Nye, increase in non-discriminatory international trade and the development of huge multinational companies after World War II took place in a "political environment favourable to large-scale institutionalized capitalism".⁸⁴ One of the core presumptions of this "economic process model" of explaining international relations is that economic welfare is the dominant political goal for national governments. Although economic interdependence and integration lead to loss of national autonomy, once interdependence has been institutionalised withdrawal is difficult, as the welfare costs of disrupting economic (international) relations will generally outweigh the autonomy benefits. Military power is then not considered a suitable policy instrument to address issues lacking a direct security concern and is thus not always the last resort option. Keohane and Nye therefore consider realism as inadequate to explain much of international relations because it relies on a presumed hierarchy of issues in which military security always takes precedence. In their alternative approach, different issues are considered to occur in different political structures. Following this approach of issue structuralism, these different issues should then be analysed in isolation.⁸⁵

The example of the Dutch participation in the F-35 programme is more complicated to explain based on issue structuralism. Although the Netherlands deliberately sacrificed much more of its autonomy than it would have done within a similar European project, the prospects of relative gains were higher, as it ensured alliance with a global superpower rather than with regional European powers. At the same time, the conviction of the Dutch government that the project was feasible was triggered by the disaster of Srebrenica in 1995, where the Dutch military was incapable of protecting the Bosnian population from the Serbian military because of NATO's failure to provide air support.⁸⁶ This

⁸³ E Dirksen 'The Defence-Industry Interface: The Dutch Approach' cit. 91.

⁸⁴ RO Keohane and JS Nye Jr, *Power and Interdependence* cit. 33.

⁸⁵ *Ibid.* 43.

⁸⁶ This is pointed out by Scott-Smith and Smeets in G Scott-Smith and M Smeets 'Noblesse oblige: The Transatlantic Security Dynamic and Dutch Involvement in the Joint Strike Fighter Programme' cit. 54 and mentioned in C Klep, *Dossier JSF* cit. 20. Interestingly, the failure of Europe to act in the Yugoslav wars is often also mentioned as triggering higher involvement by the EU in military affairs, see for instance: T Palm and B Crum 'Military Operations and the EU's Identity as an International Actor' cit. and T Palm, 'Normative Power and Military Means: The Evolving Character of the EU's International Power' (Dissertation: Vrije Universiteit Amsterdam 2017) 20.

made it clear that the Netherlands needed to be more self-sufficient (less dependent on international cooperation) in operational terms. By engaging in the F-35 programme its relative power in the international system increased and meanwhile the domestic aerospace industry could survive.

To evaluate the EU's regime on integrating military industries on the basis of interdependence and institutionalism, it is necessary to consider the role which these theories prescribe to institutions and the precondition of issue linkage.

III.7. THE ROLE OF INTERNATIONAL INSTITUTIONS

Interdependence-based theories tend to stress the equal importance and reinforcing relationship between wealth and power as the goals of states.⁸⁷ Even when accepting that nations are preoccupied with relative gains rather than absolute gains, Keohane prescribes systemic value to international institutions. These international institutions, first, allow "small and weak states" to form coalitions and align their policies.⁸⁸ Secondly, these regimes "change the calculations of advantage that governments make".⁸⁹ They facilitate cooperation by creating patterns of legal liability which reduce uncertainty of outcomes. Regimes also solve the problem of asymmetrical information which impedes cooperation in a state of anarchy.⁹⁰ They thereby reduce the fear of states about the intentions of others. By engaging in international institutions and committing themselves to shared purposes, it is then presumed that the behaviour of states is significantly influenced. In particular, the reliability of states would be affected if one state fails to fulfil its commitments. A decrease in reliability would then make states lose power as well. This approach implies that diplomacy is a dynamic process in which international institutions influence states and vice versa.

It should, however, be noted here that the EU's legislation on military procurement is more ambitious than just changing the ways in which states approach military industries. It is obvious that institutionalised collaboration in military affairs (mostly within the context of CSDP) has created awareness among EU Member States that they often are stronger together, but the legislation seeks to reduce the ability to choose between a domestic or European approach. In concrete cases, it is difficult to decide when national security interests necessitate a domestic approach. However, if military industries are completely Europeanised, some states will lose their industrial capabilities which they now have, while the international and the EU-CSDP systems still pressure them to be self-sufficient in operational capabilities.

⁸⁷ This definition is used by Keohane in: RO Keohane, *After Hegemony: Cooperation and Discord in World Political Economy* (Princeton University Press 1984). He refers to: R Gilpin, *U.S. Power and the Multinational Corporation: The Political Economy of Foreign Direct* (Basic Books 1975) 43.

⁸⁸ RO Keohane and JS Nye Jr, *Power and Interdependence* cit. 30.

⁸⁹ RO Keohane, *After Hegemony: Cooperation and Discord in World Political Economy* cit. 26.

⁹⁰ *Ibid.* 85.

III.8. ISSUE LINKAGE AS A PREREQUISITE FOR INSTITUTIONALISM

The main condition under which cooperation and integration can take place is “issue linkage”. Keohane considers issue areas to be the scope of international regimes and to include different issues that are regarded as so closely linked by governments that they should be dealt with together.⁹¹ Regimes, in that sense, facilitate the linkage of issues to one another.⁹² More importantly, they provide incentives for compliance, even when this is for a specific issue which is not beneficial, by “retaliatory linkage”. When a state chooses to disturb a certain issue in a regime this will not only affect cooperation or integration on this issue, but it will disturb the functioning of the regime as a whole. It might even disturb other regimes which exist within the same network.⁹³ Accepting Keohane’s understanding of regimes means that the potential effectiveness of placing new rules within a regime depends on whether the new issue is regarded as so closely linked that it should be dealt with together with the other issues. Alternative to this “substantive linkage”, Haas considers linkage to be possible through some sort of *do ut des* (“tactical linkage”) or when non-linkage would create great uncertainty (“fragmented linkage”).⁹⁴ For tactical linkage it is, however, still necessary that different issues have similar value for the sovereignty of the actors, meanwhile fragmented linkage relies on the impossibility to deal with something at a national level. If one of the linkage methods is not sufficiently present but linkage is institutionalised anyway, incentives for compliance are deemed to be minimal.

According to Trybus, sovereignty for EU Member States in the area of defence would imply “defence autarky”, i.e. being fully independent from any other nations through self-sufficiency.⁹⁵ It is clear that even for the European nations with the largest capabilities (UK, Germany and France) autarky will not be such a realistic option, because this would come with too high a cost. Unwillingness of governments to increase military expenditure at the cost of welfare-oriented policies, in a general sense, fits interdependence theories. In particular, at the national level, in a context of budgetary constraints, the boundaries between security and socio-economic policy objectives become increasingly blurred. However, this does not indicate that issues of military and economic power can easily be linked to each other in an international regime. It only indicates that military security and wealth reinforce each other, as military power requires an industrial and technological base to produce armaments. Likewise, military power requires a population from which to recruit troops. In a more general sense, wealth is simply necessary – in the last resort

⁹¹ *Ibid.* 61.

⁹² *Ibid.* 91.

⁹³ *Ibid.* 104.

⁹⁴ EB Haas, ‘Why Collaborate? Issue Linkage and International Regimes’ (1980) *World Politics* 357, 372.

⁹⁵ M Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context*, (Cambridge University Press 2014) 40-41.

– to make going to war affordable.⁹⁶ The available budgetary and industrial means in a state for military procurement alter the state's capabilities, not its function.

III.9. INTERIM CONCLUSION: LINKING MILITARY SECURITY TO THE INTERNAL MARKET?

Military power and its industrial base are fundamentally different from economic power and non-military sectors of the economy in the ways in which they structure power in international relations. These differences lie in their substance (the military function instead of an economic function; therefore, no substantive linkage) and their value for the functioning of a state (as state survival is primarily ensured by military power; thus, no tactical linkage). In a state-centric world, possessing military capabilities is inherently a national matter (so, no fragmented linkage). Consequently, the linkage of the military-industrial capabilities of states with other economic capabilities, as the internal market-based DPD aims to achieve, cannot find a theoretical basis in realist, interdependence or institutionalist theories. The requirements for successful issue linkage are not met, as the military-power logic of states in military procurement cannot be equated with the economic-power logic of states in engaging in the internal market.

IV. THE COMMISSION'S PURSUIT OF EU STRATEGIC AUTONOMY BY INDUSTRIAL AND PROCUREMENT POLICIES

Defining and implementing the CFSP is the prerogative of the European Council and the Council. The Treaty of Maastricht did, however, create political momentum for intervention by the Commission in domestic industrial policies on military equipment. This started with a 1996 policy document. The actions of the Commission in the field of military industries are based on the internal market competence of the EU, as the Commission lacks competence on CFSP matters. In internal market affairs, the Commission can initiate legislation and monitor compliance. In the 1990s, the end of the Cold War had led to significant cuts in military spending by the Member States. This had triggered a crisis in military industries, both in terms of employment and industrial capabilities. The Commission stressed that international competition was threatening the existence of the European military industry and that overcoming this required a "traditional"⁹⁷ European approach based on economic efficiency in procurement policies.⁹⁸ The Commission also mentioned the lack of competitiveness of European industry by mentioning that "inclusive of intra-EU trade: 75% of imported major conventional weapons came from the US in the

⁹⁶ Mearsheimer considers that military forces are built on societal resources of which "the size of a state's population and its wealth are the two most important components for generating military might", see: J Mearsheimer, *The Tragedy of Great Power Politics* cit. 60-61.

⁹⁷ "Traditional" in the sense that it is based on the legal frameworks of the internal market adopted with the Treaty of Rome which established the European Community.

⁹⁸ Communication COM(96) 10 final from the Commission of 24 January 1996, The challenges facing the European defence-related industry, a contribution for action at European level, 3.

1988-92 period".⁹⁹ Most EU Member States appeared to be more deeply integrated with the US than with each other.

The Commission took on a rather ambiguous approach to European security in its 1996 policy paper by claiming that this depended on two factors. First, the creation of a "centre of stability" should take place through expansion, by letting in all European countries wishing to join the EU. Secondly, this stability should be reached by establishing a "fully fledged" CFSP.¹⁰⁰ For the latter, it was deemed essential to develop a common armaments policy; this ambition can still be found in art. 42(3) TEU. Both the establishment of the EDA and PESCO, however, reveal that this approach led to differentiated integration rather than deepened integration in the field of defence. Geographical expansion of the EU and deepening integration, even though they both aimed to foster security, do not go hand in hand, nor do they necessarily reinforce each other. The lack of binding legal commitments also raises questions about how "fully fledged" the EU's defence policy is.

The Commission furthermore contested the broad interpretation and application of the art. 346 TFEU exception by the Member States by proclaiming that the exception does not grant any general powers to the Member States. More concretely, the Commission stressed that the exception does not fully exclude armaments from the scope of EU law. Only when objectively necessary for the protection of national security interests, can the exception be invoked. This approach – which, as mentioned, departs from a literal interpretation of the text of art. 346 TFEU – gained legal strength from a judgment of the CJEU in 1999. In the context of Spain exempting the import of armaments from VAT contrary to an EU directive, the Court ruled that Spain had "not demonstrated that the exemptions provided for by the Spanish Law are necessary for the protection of the essential interests of its security".¹⁰¹ In a more recent judgment the Court even read some sort of proportionality test into the exception.¹⁰² This shows that there is a limit to the discretionary power of the Member States to invoke art. 346 TFEU.

To understand the difficulties of linking military security integration to the internal market regime in a more practical sense, this section evaluates the Commission's most prominent policies and legislation in this field, i.e. the Defence Procurement Directive (DPD) and the European Defence Fund (EDF), based on the theoretical findings of section III.

⁹⁹ *Ibid.* 7.

¹⁰⁰ *Ibid.* 11.

¹⁰¹ *Commission v Spain* cit. para. 22.

¹⁰² *Schiebel Aircraft* cit. para. 37.

IV.1. THE DEFENCE PROCUREMENT DIRECTIVE (DPD 2009)

The jurisprudence of the Court eventually opened the way for the Commission to propose sector-specific procurement legislation for the military sector.¹⁰³ The DPD was subsequently adopted in 2009 by the EU legislature on the basis of art. 114 TFEU, the EU's competence to harmonise legislation relating to the internal market.¹⁰⁴ The Directive is not based on art. 42(3) TEU, thus it cannot – theoretically – be considered part of a common armaments policy as envisioned by the Commission in 1996. The fact that arms exports are still regulated within the realms of the CFSP confirms this.¹⁰⁵ Considering the exclusion of legislative competence in the area of the CFSP, adopting a Directive would have been impossible. This does not, however, make the Directive less ambitious. In the Preamble the legislature proclaims that “the gradual establishment of a European defence equipment market is essential for strengthening the European Defence Technological and Industrial Base and developing the military capabilities required to implement the European Security and Defence Policy”.¹⁰⁶

There is a clear logic in these objectives. The CSDP requires industrial military capabilities to be developed in a more transnational setting. As this sector is characterised by public *monopsonists* (i.e., the demand side is exclusively covered by governments), integration is only possible when governments refrain from protectionism in their procurement. For the smaller countries to take advantage of the extended economies of scale, collaborative procurement is often needed. Even if military capabilities remain at the national level, integration of industries can strengthen the overall EU industrial capabilities by the efficiency gains. Combined with increased spending, economies of scale should also foster technological innovation which is crucial in an international system characterised by state competition and technological arms races.¹⁰⁷

Next to the substantive legal implications for the procurement policies of the Member States, the main institutional implication of the entry into force of the Directive in 2011 is perhaps more ground-breaking. By initiating the Directive, the Commission strengthened its position in military affairs. It created a legislative basis for enforcement, as the Commission has a general competence to monitor the compliance of Member

¹⁰³ See for this line of thinking, based on the idea of the Commission engaging in “judicial politics”: M Blauberger and M Weiss, ‘If You Can’t Beat Me, Join Me!’ How the Commission Pushed and Pulled Member States into Legislating Defence Procurement’ (2013) *Journal of European Public Policy* 1120, 1134-1135.

¹⁰⁴ In addition, the Directive has been based on the specific internal market legal bases of the freedom of establishment (current art. 53(1) TFEU) and the freedom to provide services (current art. 62 TFEU). See: Directive 2009/81/EC cit.

¹⁰⁵ Common Position 2008/944/CFSP of the Council of the EU of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

¹⁰⁶ Recital 2 of Directive 2009/81/EC cit. Interestingly, the objectives of the supranational DPD resemble the Treaty-based tasks of the intergovernmental EDA; see, in particular: art. 45(1)(b) and (e) TEU.

¹⁰⁷ See for instance: ‘Mind Control - Artificial Intelligence and War’ (5 September 2019) *The Economist*, www.economist.com.

States with the EU Treaties.¹⁰⁸ The proper implementation and application of Directives is a part of this. As mentioned before, the Commission cannot monitor the compliance of Member States within the area of the CFSP.

When it comes to offsets, the implications of the Directive are surrounded with ambiguity. It has been argued that the Commission intentionally left this issue outside¹⁰⁹ the Directive, as including its strict interpretation on the compatibility of it with primary EU law would not be accepted by the Council.¹¹⁰ At the same time, any inclusion of regulation on certain types of offsets would undermine the Commission's position on the inherently discriminatory nature of these. Offsets can then only be justified on a case-by-case basis on grounds of public or national security. Nevertheless, with the Directive the Commission got "a foot in the door".¹¹¹ To fully shape its strict approach on offsets, the next step for the Commission was to "step through the door".¹¹² In January 2018, the Commission opened infringement procedures against both Denmark and the Netherlands for imposing unjustified offset requirements on foreign suppliers, thereby infringing primary EU law and incorrectly transposing the Directive.¹¹³ The fact that Denmark does not participate in EDA or PESCO makes these infringement procedures politically extra sensitive.

The Directive does not regulate or even mention offsets but it does offer an alternative. Contracting authorities may require a successful tenderer to sub-contract a maximum of 30 per cent of the contract to third parties¹¹⁴ and they may oblige tenderers to sub-contract based on non-discriminatory and transparent procedures.¹¹⁵ There is, however, no obligation to do so. In procurement procedures in which it is likely that a domestic company will win, there is little to no incentive for a Member State to require competitive bidding for sub-contracts. According to Trybus, the sub-contracting regime of the DPD is a compromise between the Member States with the bigger industries (prime-con-

¹⁰⁸ Art. 258 TFEU.

¹⁰⁹ Although the Directive provides rules on sub-contracting, see: art. 21 and Title III of Directive 2009/81/EC cit.

¹¹⁰ M Weiss and M Blauburger, 'Judicialized Law-Making and Opportunistic Enforcement: Explaining the EU's Challenge of National Defence Offsets' (2016) JComMarSt 444, 452-453. This is also explicitly mentioned in: para. 18 of Guidance Note – Offsets, 12-02-2016 Directive 2009/81/EC cit.

¹¹¹ See: M Weiss and M Blauburger, 'Judicialized Law-Making and Opportunistic Enforcement' cit. 453 ff.

¹¹² *Ibid.*

¹¹³ Press release, COM IP/18/357 of the Commission of 25 January 2018, Defence procurement: Commission opens infringement procedures against 5 Member States. However, from these five infringement procedures, already four have been dropped by the Commission after negotiations. Only the procedure against Denmark (see Commission database: infringement nr. INFR(2017)2187) is still open (at the time of writing). This is remarkable, as enforcement of EU public procurement rules in the defence sector is one of the key responsibilities which was assigned to the Commission's new Directorate-General for Defence Industry and Space by the Von der Leyen Commission.

¹¹⁴ Art. 21(4) Directive 2009/81/EC cit.

¹¹⁵ Art. 21(3) and 51 Directive 2009/81/EC cit.

tracting capabilities) and the ones with smaller industries (sub-contracting capabilities).¹¹⁶ That the regime is an outcome of political compromise is certainly true, but the question remains whether the rules are capable of fully liberalising the major EU military supply chains. When there is no obligation to do so, the Member States with prime-contracting capabilities will have little incentive to use the options. Following realist logic of state competition, the Member States with the sub-contracting capabilities will subsequently have less incentive to use the DPD at all, and instead will invoke art. 346 TFEU to buy domestically or impose offsets on a foreign supplier. Compromise or not, the sub-contracting regime of the DPD does not genuinely reflect the balance-of-power logic put forward above, in section III.

The figures of the 2015 evaluation of the Directive by the Commission do not show a complete shift towards an open and integrated military sector. From the roughly €80 billion of military procurement by the Member States, only €19.3 was procured within the regime of the Directive.¹¹⁷ It seems that the exception of art. 346 TFEU is still extensively used by the Member States to procure military equipment outside of the Directive's regime. Considering that more than half of the value of military procurement within the regime of the Directive took place in the UK, future compliance with the rules of the Directive is – to put it mildly – not so certain.

IV.2. THE EUROPEAN DEFENCE FUND (EDF 2021-2027)

The Council and the European Parliament reached political agreement in 2019 to adopt the Commission's proposal for a European Defence Fund (EDF), worth €13 billion, for the budget period 2021-2027.¹¹⁸ The budget and with it the ambitions of the EDF were, however, significantly reduced to €7 billion in 2020 because of the political compromise on the general EU budget in the context of the COVID-19 crisis.¹¹⁹ The objective of the fund is clear. In line with its legal basis in the EU Treaties (art. 173 TFEU), the fund aims to foster the competitiveness of the EU's industry. More particularly, the efficiency and innovation capacity of the EU's defence technological and industrial base should be strengthened

¹¹⁶ M Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context* cit. 452-453.

¹¹⁷ Staff Working Document SWD(2016) 407 final from the Commission of 30 November 2016, Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security, 10, 33, 34. See also the document which the SWD accompanied: Report COM(2016) 762 final from the Commission to the European Parliament and the Council of 30 November 2016 on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with art. 73(2) of that Directive.

¹¹⁸ Resolution TA/2019/0430 of 18 April 2019 of the European Parliament on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund European Commission Press Release, 'EU Defence Gets a Boost as the European Defence Fund Becomes a Reality' (29 April 2021) ec.europa.eu.

¹¹⁹ European Council (EUCO 10/20), Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, 21 July 2020, 53.

for the sake of increasing the EU's "strategic autonomy and freedom of action" in the international order.¹²⁰ It is clear from both the preamble and the award criteria for funding that "technological autonomy" is considered the crucial factor in this objective.¹²¹ Eligible projects should contribute to "the innovation and technological development of European defence industry" and thereby increase independence from third country technologies.¹²² Obviously, these aims are deemed to be achievable only in a "more integrated defence market in Europe".¹²³ The Commission will be the institution responsible for determining eligibility and allocation of funds. Broadly speaking, this integration should happen on three different levels.

First, integration should be fostered at the level of the supply side. Projects are only eligible for funding when undertaken within a consortium consisting of at least three different entities which are established in at least three different Member States.¹²⁴ Moreover, all the infrastructure to be used as well as the executive management structures must be on EU territory during the project. None of the recipients or involved sub-contractors can be under the control of a non-associated third country or an entity based in such a country. This is intended to safeguard the "security and defence interests of the Union and its Member States" as established in the CFSP.¹²⁵

Secondly, integration should be stimulated throughout the supply chains of military equipment. A consortium should, in that regard, contribute to cross-border cooperation, in particular by including as sub-contractors from Member States other than the recipients. The legislation does not, however, in itself oblige the consortia which receive such funding to select their sub-contractors on the basis of non-discriminatory and transparent procedures. As mentioned above (section IV.1), this is possible, but not obligatory when procuring within the regime of the DPD.

Thirdly, integration is sought on the demand side through the promotion of collaborative procurement. In a general sense, it is mentioned that it is important that Member States intend to jointly procure the final product of a project.¹²⁶ For certain development activities, it is required that at least two different Member States have already expressed the intention to procure the final product in a coordinated way.¹²⁷ Collaborative procurement is also stimulated by the Council's PESCO decision, under which the participating Member States are also committed to involvement in the EDF.

¹²⁰ Art. 3(1) Resolution 0430 (2019) cit.

¹²¹ *Ibid.* recital 3.

¹²² *Ibid.* art. 13 (b) and (d).

¹²³ *Ibid.* recital 1.

¹²⁴ *Ibid.* art. 11(4).

¹²⁵ *Ibid.* art. 10.

¹²⁶ *Ibid.* recital 22.

¹²⁷ *Ibid.* art. 23(3).

IV.3. THE LEGAL FICTION OF “ECONOMIES OF SCALE” BY COOPERATION

The different initiatives of the Commission in the military domain designate fragmentation as a crucial obstacle to a strong European defence industrial base.¹²⁸ Such a base is deemed to be a prerequisite for the EU's strategic autonomy. The obvious economic argument against this fragmentation is that it is inefficient because potential economies of scale are not achieved.¹²⁹ “Unnecessary overlap” (as mentioned in the PESCO commitments) resulting in duplication is the consequence of a “systematic bias” for national solutions. Particularly when it comes to Research and Development (R&D) – characterised by major investments and limited public budgets – integration is considered crucial. In its impact assessment of the EDF, the Commission essentially blames fragmentation on the demand side of the market. If only Member States would collaborate more closely and refrain from buying domestically, the supply side would follow, which would then increase economies of scale. The free-market logic of the Commission is tempting, but the political economy of military procurement is dominated by military power rather than economics.

An example of this fragmentation, according to the Commission, is the development and production of combat aircraft. By the end of the 20th century there were three different projects being undertaken in Europe: the Eurofighter Typhoon (Germany, UK, Italy and Spain among the countries involved in the development, production and procurement), Dassault Rafale (France) and the Saab Gripen (Sweden). At the same time, the UK, the Netherlands, Denmark and Norway were financially engaged in the development and production of the F-35 project which was effectively controlled by the US government. As the Commission argues, the research costs of the three European projects exceed the costs of the F-35 project, yet the US-led project will produce more than double the number of aircraft.¹³⁰ The figures on which the Commission bases its assessment seem, however, quite meaningless when considering the different European projects separately, as there are significant differences in cost-efficiency. The research costs of Saab Gripen (€1.48 billion) are much lower than those of the Typhoon (€19.48 billion) or the Rafale (€8.61 billion) relative to its expected output.

Looking at the politics of these projects brings more systemic understanding. As pointed out by Hartley, the savings in development and production costs are often only theoretical. In practice there is a departure from the economies of scale of “perfect collab-

¹²⁸ See: Press release, COM IP/16/4088 of the European Commission of 30 November 2016 on European Defence Action Plan: Towards a European Defence Fund.

¹²⁹ This is exemplified in the impact assessment by the Commission of the European Defence Fund, see: Staff Working Document SWD(2018) 345 final from the Commission of 13 June 2016 Impact Assessment – Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Fund, 14-15.

¹³⁰ According to a study conducted by the Centre for Studies on Federalism (CSF) and the Istituto Affari Internazionali, see: V Briani, *The Costs of Non-Europe in the Defence Field* (CSF 2013) 1, 16. This is referred to in the EDF's impact assessment by the Commission, see: Staff Working Document SWD(2018)345 final cit. 15.

oration", as work-sharing is often based on political equity and offsets rather than efficiency.¹³¹ France was initially part of the Typhoon programme, but withdrew from it in 1985 and eventually started its own programme. As mentioned by Heinrich, there is "ingrained resistance" in a "state-centric world" to hand over control of weapon systems to foreign nations, thus France apparently insisted on getting 50 per cent of the work share.¹³² If one follows a realist understanding of European politics it cannot come as a surprise that including the three major European military powers in such a cooperative programme might result in failure of cooperation. Achieving a balance of power is much more complex in a multipolar power structure – as opposed to a unipolar or bipolar structure.

Even though cooperation has a great efficiency potential, a twofold fear (in comparison with both the UK and Germany) of a relative loss of power was for France perhaps too much. The much higher efficiency in research spending of the Saab Gripen and F-35 programmes could in that regard also relate to a lower intensity of systemic pressures against cooperation because there was a unipolar power structure within these programmes; this meant that one actor was "holding the balance". At the same time, realism provides an explanation for the reasons of a state such as the Netherlands to prioritise participation in the F-35 programme. Here, only the US and the UK had a deeper level of involvement, whereas in the Typhoon programme the Netherlands would have competed for control with four more powerful European countries. Less absolute political control within a certain programme does not indicate fewer relative gains.

This reality is also visible in the 2018 Defence Industry Strategy of the Dutch government. In the maritime sector, it envisions a dominant position for domestic industry, as there are prime-contracting capabilities domestically. The lower level of industrial capabilities in the aviation industry and industries providing equipment for the land forces does not trigger a more economic approach, as the Commission foresees. Instead, the strategy seeks to compensate this by international cooperation rather than through a European market-based approach.¹³³ In practice such a cooperative approach indicates the use of offsets as in the F-35 programme. Offsets can, in that light, be considered a balance-of-power policy. Based on the proposed functional approach to EU law, it triggers the question whether effective regulation should include a legal framework for these offset agreements.

¹³¹ K Hartley, 'The Arms Industry, Procurement and Industrial Policies' cit. 1172-1173. Hartley also specifically evaluated the collaboration inefficiencies of the Typhoon programme, which led to cost increases, delays and reduced quantities, see: K Hartley, 'The Political Economy of Arms Collaboration', in R Matthews, *The Political Economy of Defence* (Cambridge University Press 2019) 244-250.

¹³² MN Heinrich, 'The Eurofighter Typhoon Programme: Economic and Industrial Implications of Collaborative Defence Manufacturing' (2015) *Defence Studies* 341, 353.

¹³³ The Netherlands Ministry of Defence and the Netherlands Ministry of Economic Affairs and Climate Policy, 'Memo: Defence Industry Strategy', www.government.nl, see the charts on 23.

IV.4. FROM FRAGMENTATION TO “EUROPEAN CHAMPIONS”?

At the same time, France and Germany are promoting a so-called “European champions” approach, seemingly suiting the Commission’s urge for greater economies of scale.¹³⁴ The Franco-German proposal for this renewed European industrial policy approach was paradoxically a reaction to the Commission’s blocking of the *Siemens-Alstom* merger in the rail infrastructure sector on the basis of EU competition law. Fragmentation in the military sector is, however, more complex than a lack of large companies. According to the Commission, trans-border consolidation in the military sector has often led to “multi-domestic” companies rather than multinational ones. The use of offsets in particular stands in the way of deep integration, since it obliges these multi-domestic companies to include domestic industry in the supply chain.¹³⁵ Considering this, it is not so strange that Competition Commissioner Vestager responded to the blocking of the merger by stressing the need for a level playing field for European companies, for instance by using the public procurement rules.¹³⁶ The Commission pursues economic integration through a system of free competition, not through mergers.

However, also within the ambit of EU public procurement law, the proposed liberalisation of the European military industry brings with it the fear of the smaller EU Member States of an internal market dominated by “European champions” located in the major industrial countries (after Brexit: France and Germany; also, to a lesser extent, Italy, Spain and Sweden).¹³⁷ The larger industrial Member States then have a much greater potential for relative gains than the smaller ones. Consequently, complete liberalisation would disrupt the balance of power between the stronger and weaker states in the EU. As mentioned before (in section III.3), most of these “weaker” states are not powerless, as they can choose to prioritise NATO cooperation over an EU-based approach.

¹³⁴ See: Bundesministerium für Wirtschaft und Energie, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century* www.bmwi.de. More recently, however, the German government also published a strategy proposing to keep certain parts of “strategic industry” within their own borders, see: Bundesministerium für Wirtschaft und Energie, *Strategiepapier der Bundesregierung zur Stärkung der Sicherheits- und Verteidigungsindustrie* www.bmwi.de.

¹³⁵ Staff Working Document SWD(2018) 345 final cit. 15. Contrary to the findings in: M Kluth, ‘European Defence Industry Consolidation and Domestic Procurement Bias’ (2017) *Defense and Security Analysis* 158, 171. Kluth compared the amount of domestic procurement (of Germany, France, UK and Italy) in the period before and after several consolidations that led to European cross-border companies (Airbus, MBDA Missile Systems, Thales and SELEX) in the areas of missiles, airborne radar and shipborne radar. Across the different segments, he found a decline of domestic procurement bias from 65 per cent to 43 per cent after several mergers in the military sector.

¹³⁶ Statement by Commissioner Vestager statement/19/889 of 6 February 2019 on the proposed acquisition of Alstom by Siemens and the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland.

¹³⁷ See for instance the SIPRI Arms Industries Database 2018, which included only EU-based companies from France, Germany and Sweden in its global top 50 of arms producing companies: www.sipri.org.

To overcome this fear, the Commission has given special attention to SMEs in the EDF and the DPD. It is, however, questionable whether the regulatory frameworks succeed in this. Under the regulatory regime of the EDF, there seems to be no general requirement of competitive bidding for sub-contracts. It is likely that at least between the participating Member States there will be some sort of competitive bidding for sub-contracts, as only cross-border consortia are eligible for funding. The DPD, however, only grants contracting authorities the possibility of requiring competitive bidding for sub-contracts. Cross-border access for SMEs remains difficult if the Member States with the larger industries do not require competitive bidding for sub-contracts when they procure under the regime of the Directive. Consequently, for the Member States with smaller industries, there will often be no political incentive to use the Directive at all. These Member States traditionally sought to balance the power of the bigger industrial states by making use of off-sets, which are left unregulated by the DPD and often considered illegal by the Commission. If these Member States want to include their domestic SMEs within the framework of the DPD, they can only do so while granting access to SMEs from other Member States without the guarantee of reciprocity. Only budgetary constraints on military spending can sometimes trigger the usage of the Directive, as offset agreements can be costly. In times of increasing military spending, these constraints are less dominant.

IV.5. INTERIM CONCLUSION: THE PROBLEM OF LINKING MILITARY SECURITY WITH THE INTERNAL MARKET

This section on the legislation and policies initiated by the Commission exposed – in a more practical sense – that linking military security integration to the internal market regime is problematic. The next section seeks to provide a theoretical basis to overcome this problem.

V. A THEORETICAL BASIS FOR EU MILITARY PROCUREMENT LAW

Economic and political integration in post-war Europe brought improved welfare conditions and greater stability to the continent. At the same time, there is profound ambiguity between the aims and means of integration. The EU's most important aim has always been peace, thus European integration has always come with significant geopolitical implications. However, only since the Maastricht Treaty have the EU's means intruded into the military domain. In the context of CSDP, the EU has been engaged in military missions outside its own territory and several initiatives for closer cooperation have been launched. But the EU's military capabilities are rather limited, as they are severely constrained by the military sovereignty of its Member States when compared with actors with similar or smaller economic capabilities (US and China, but also regional powers such as Russia, Turkey, Iran and Saudi Arabia).

These constraints are first on the operational capabilities and secondly on the industrial capabilities. First, although PESCO has increased and structured military cooperation, the EU itself cannot deploy military forces. This results in severe political constraints on the EU's operational capabilities, as collaboration depends on political compromise between Member States with diverging geopolitical interests. Secondly, the military prerogative of the Member States constrains the EU's industrial capabilities because of the inefficiencies that accompany both fragmentation and intergovernmental collaboration. According to the Commission, these inefficiencies severely constrain the competitiveness of European military industries in the world, leading to dependence on imports from third countries.

V.1. THE PRIMARY ROLE OF MILITARY-INDUSTRIAL CAPABILITIES AND BALANCE OF POWER

The limit on EU industrial capabilities has left the Member States with great discretionary power in their responsibility to ensure their own capabilities. To strengthen the industrial base underpinning an effective CSDP – and perhaps to compensate for the lack of operational autonomy – the Commission has been seeking to minimise the limits on the EU's industrial capabilities by requiring Member States to procure military equipment on the basis of free market principles. However, European liberalisation would bring with it winners and losers. Ensuring relative gains in a rule-based system becomes rather complex in a multipolar power structure. In the period before the Maastricht Treaty, a large proportion of the cross-border arms trade of EU Member States was still with the US, implying a more unipolar structure in Europe based on US hegemony. For a country with a relatively small or mid-sized industry like the Netherlands, greatly relying on the economic activities of sub-contractors, it was sensible to participate in the US-led F-35 programme rather than one of the European programmes. For smaller NATO states facing a higher intensity of systemic pressures, like the Baltic States, alignment with the US is even more necessary in the absence of EU capabilities. In both cases, international cooperation outside the EU frameworks is used to seek a greater balance of power between the bigger and smaller Member States. Offset agreements are a tool for this. The absence of rules on offsets and the presupposed illegality of offsets often make the DPD an ineffective instrument for these states' military policies.

These power struggles show the relevance of realism for studying military procurement. The governments of EU Member States pursue relative gains in their industrial activities, not only as opposed to third countries, but also compared with each other. The latter is shown by the *economically* inefficient, yet *militarily* effective French pursuit of its own striker plane programme. In a more general sense, it is also shown by the failed attempt of the UK to become a dominant actor within the EU. In military terms, the period after the collapse of the Soviet Union has been a period of transition. Before then, the EU's power structures were still determined by the security umbrella of the US. Since the Maastricht Treaty, the EU has made great efforts to become a more autonomous actor

in global politics, mostly by intergovernmental military means. The question remains whether the DPD fits the EU's overall military approach.

V.2. GENERAL IMPLICATION FOR EU SUPRANATIONAL REGULATION

The DPD and the EDF are, from a constitutional perspective, particularly interesting examples of the EU's pursuit of strategic autonomy. This is because their legal frameworks are supranational, while the EU Treaties place strong limits on the autonomous nature of the military and security competences in the domain of the CFSP. Evaluation of the legality and (potential) effectiveness of these supranational EU actions therefore needs to take the power structures into account of which the relevant Treaty provisions and its secondary legislation are a product. These power structures are based on capabilities. Without EU capabilities, the national security prerogative remains the basis for law and politics.

For the procurement regime, this means that proclaiming that it takes national security in a general sense into account is insufficient. The nature of the security interests of a country like France differs drastically from that of the security interests of Lithuania when security is defined in terms of capabilities. Hence, a more dynamic approach is necessary. In a general sense, this fits the jurisprudence of the CJEU on security exceptions. It does not, however, fit the legal framework of the DPD. Regulation can only be successful when different existing capabilities/security dynamics and balance of power are appreciated. To put it more simply: restraining Member States by imposing free market principles on their military procurement does not suffice when leaving open the option for winning tenders to execute contracts unrestrained by the same principles. This becomes even more problematic when considering that there is a great differentiation between the amounts of state ownership and state aid of the EU Member States in military industries. For the smaller countries, regardless of the DPD, reliance on the armaments exception will still be necessary.

V.3. THE NEED FOR A DYNAMIC ARMAMENTS EXCEPTION TO THE MILITARY PROCUREMENT REGIME

It might appear paradoxical to argue for both a more *dynamic* and more *systemic* approach to EU law on military procurement, but this is inherent to the way in which interdependence and realist presumptions interact and conflict in the legal system imposed by the EU Treaties. Interdependence is traditionally framed as the norm (internal market), and realism (national security) as the exception. Legal interpretation by the Court of Justice of the EU has played a stimulating role in the integration of the EU's internal market. The Court has done this through *teleological* (wide) interpretation of the norms and *restrictive* (narrow) interpretation of the exceptions. The latter sometimes goes against the

literal meaning of legal provisions.¹³⁸ This approach makes sense when considering the purpose of the EU Treaties. If Member States were to use the exception excessively so as to circumvent their duty to contribute to the establishment of an internal market – especially by adopting protectionist measures – it would undermine the achievement of the EU's objectives. In the military domain this is fundamentally different, because the norms themselves were adopted as alternatives to integration of military capabilities (operational and industrial). This is both apparent in the security derogations to the internal market regime and in the intergovernmental frameworks for military cooperation.

Moreover, with the Lisbon Treaty the supranational internal market pre-occupation of the EU Treaties systemically shifted towards a more intergovernmental peace and security focus. art. 3(1) TEU now reads that the overarching objective of the EU Treaties is to “promote peace, its values and the well-being of its peoples”. When it comes to peace, the EU contributes through the CFSP, lacking supranational obligations like the ones which the DPD prescribes.

When interpreting the public security and national security exceptions to the internal market rules (hence, to public procurement obligations) this context should first be understood. This does not mean that industrial integration in the EU is impossible or infeasible. In an international order in which the interests of the US and the EU increasingly diverge, most Member States can only be effective actors through the EU.¹³⁹ However, the legal and political security prerogative of the Member States does indicate that the security exception needs a systemic understanding just as much as the interdependence norm does. First, this means that security needs an interpretation that suits the different security interests of Member States (along with their differences in capabilities). Secondly, the free-market norm can only be effectively imposed on the Member States as far as markets are genuinely free. This requires enhanced consistency between the enforcement of the EU's public procurement rules and competition and state aid rules. Punishing a Member State for directly awarding a contract to a national company could be rather meaningless when the “legal” alternative is to open its procurement procedures to different types of subsidised foreign companies. Thirdly, the security exceptions should enable the use of offsets when these are necessary for effective national security strategies pursuing the maintenance of capabilities. For the DPD to constitute an effective and consistent legal regime on military procurement, it should regulate offsets.¹⁴⁰

¹³⁸ See *supra*, section II.2, especially the cases *Commission v Spain* cit. para. 22 and *Schiebel Aircraft* cit. para. 37.

¹³⁹ See for instance the Churchill lecture given by the Prime Minister of the Netherlands in 2019 in which he stresses the need for the EU to become a stronger actor in the global order, M Rutte, ‘The EU: From the Power of Principles towards Principles and Power’ (13 February 2019) www.government.nl.

¹⁴⁰ EU Regulation of offsets has also been proposed, although based on different reasoning, by Heuninckx, see: B Heuninckx, ‘346, The Number of the Beast? A Blueprint for the Protection of Essential Security Interests in EU Defence Procurement’ (2018) PPLR 51, 71-74.

VI. CONCLUDING REMARKS

The security exceptions in the EU Treaties grant wide discretionary powers to the Member States when it comes to military procurement. To a large extent, it could be argued that Member States sought to keep all their sovereign powers in the area of military procurement when adopting the Treaty of Rome in 1957. European integration is goal-driven and somewhat expansionist in that regard. The severe limitations which the EU Treaties include on competences when it comes to military security are a natural result of power structures which are shaped by varying degrees of national capabilities. In reverse, power structures constrain the potential of liberalising and integrating military industries in the EU. These constraints bear two legal consequences for effective EU regulation of military procurement.

First, the appropriateness of the legal basis of the DPD in the internal market sphere of EU law, instead of regulation in the intergovernmental sphere of the CFSP, needs to be re-evaluated.¹⁴¹ The means used by the DPD are perhaps reconcilable with the system of the EU Treaties, as the DPD leaves open the option of derogation based on art. 346 TFEU. However, the DPD's aim of complete liberalisation conflicts with the structures of the EU Treaties which rather reflect full sovereignty of Member States over their military capabilities.¹⁴² Establishing an integrated market for military equipment based on economic logic is unachievable and contradictory to the military-power logic which guides national decision-making and European legal structures for military cooperation (for instance within PESCO). If these opposing legal structures were to be irreconcilable, the EU Treaties would precede secondary law like the DPD. The legality of the DPD and its legal base would be at stake.

Secondly, balance-of-power policies in military procurement are often pursued by means of offset agreements. The facts that the legislature refused to regulate these agreements and that the Commission still considers those agreements to be almost always illegal reveal the great legal uncertainty that surrounds them. It did not, however, cause the Member States to stop using them. Balance-of-power policies *in abstracto* are legitimate tools by which smaller Member States can curb the power of the dominant actors in European (military) politics. However, when there are *in concreto* no clear legal constraints on them, integration of markets for military equipment is hampered more than necessary. As argued in this *Article*, the role of power structures in military procurement fundamentally differs from other public procurement, as military industries fundamentally differ from other economic sectors. It cannot be expected therefore that the

¹⁴¹ The issue of the DPD's legal basis has also been raised in: ER Manunza and CEC Jansen, 'Een interne markt voor defensieopdrachten?' (11 June 2019) Staatscourant research.vu.nl 8.

¹⁴² Especially since the EDA (which was established in 2004) has been assigned with the same objectives as those pursued by the DPD. Art. 45(1) TEU thus provides an alternative legal basis (which is more specific than art. 114 TFEU) for the fulfilment of the DPD's objectives.

military domain is simply integrated on the basis of trade liberalisation. Limiting the liberalising effect of the rules by legalising the use of offsets based on objective criteria does not stand in the way of military integration in political terms. It would only indicate integration based on military logic rather than economic logic. To achieve military-strategic autonomy, the EU and its Member States should accept that it is a matter of military power with economic implications rather than the other way around.



ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF CJEU – FIRST PART

edited by Marise Cremona, Claire Kilpatrick and Joanne Scott

THE COURT OF JUSTICE IN THE ARCHIVES: INTRODUCTION

This Special Section is one of the fruits of a research project designed to reflect on the potential offered to legal scholars by the archives of the Court of Justice of the European Union (CJEU). Although the Court of Justice (together with the European Central Bank) is exempt from the obligation that applies to the other EU institutions to deposit their historical archives with the Historical Archives of the European Union (HAEU) at the European University Institute in Florence,¹ it may decide to do so voluntarily.² In 2014 the Court of Justice decided to deposit its archives with the HAEU, and in 2016 took the decision to open them to the public.³ Since July 2017 the archives of the Court of Justice covering the first thirty years (1952 – 1982) of case law of the European Communities,⁴ deposited in the HAEU, have been available to the public.⁵

¹ Regulation (EU) 2015/496 of the Council of 17 March 2015 amending Regulation (EEC, Euratom) 354/83 as regards the deposit of the historical archives of the institutions at the European University Institute in Florence. The original Regulation of 1983 (Regulation (EEC, Euratom) 354/83 of the Council of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community) established the principle that the institutions' archives should be preserved and made available to the public, normally subject to a 30-year rule; the Regulation of 2015 reflects the institutions' practice by stipulating that the archives are to be deposited with the Historical Archives of the EU at the EUI. It is accompanied by a Framework Partnership Agreement between the European Commission, on behalf of the depositing institutions, and the EUI: Framework Agreement n. SG-FPA-2015-1.

² Art. 8(1) and (3) of Regulation 354/83 cit. as amended by Regulation 2015/496 cit.

³ Decision of the Court of Justice of the European Union of 10 June 2014 concerning the deposit of the historical archives of the Court of Justice of the European Union at the Historical Archives of the European Union (European University Institute). The files are made available in electronic form.

⁴ Since the current 1982 cut-off date refers to the closing of the procedure, in practice the most recent cases available date from 1978-80.

⁵ HAEU, *CJUE Holding* archives.eui.eu. The administrative archives of the Court are now also available to the public, including documentation on the composition of the Court, its personnel and functioning: HAEU, *CJUE.04 Administration* archives.eui.eu.



The judicial archives include the original signed versions of Court judgments and orders and the *dossiers de procédure originaux*, or original procedure records. These *dossiers* include the procedural documents related to the case, including letters on the appointment of the *juge rapporteur* and Advocate General in the case, the pleadings, evidence, and supporting documents, documents submitted by the referring court in the case of preliminary rulings, submissions and observations, orders made and the report for the oral hearing. Thus, the judgment constitutes a relatively small proportion of each *dossier*. Instead, they contain information about the parties, their lawyers, the presentation of the facts, sources that draw on national legal categories and legal scholarship to shape Community Law in a particular dispute, interim proceedings, the many steps of internal court management including decisions on who might intervene before the Court of Justice, and information on the interaction between the oral hearing and the written procedure. The *dossiers* available to scholars and the public are electronic versions of the originals,⁶ and are subject to a prior check and possible redaction by the Court. When a request for a case *dossier* is received for the first time, the electronic version of the *dossier* is checked by the Court and redacted to remove sensitive or confidential information before it is released.⁷ In addition, the publicly available *dossier* does not include the record of the Court's private deliberations: when deciding to make its case archives available the Court, in reference to art. 35 of its Statute, confirmed that "[u]nder no circumstances shall access be given to documents relating to the secrecy of the deliberations".⁸ Despite these restrictions,⁹ the *dossiers* nonetheless contain a wealth of material capable of enriching our understanding of individual cases, of the working of the Court as an institution, and of those who played a part in the evolution of European law. To reiterate a point made by Niamh Nic Shuibhne, the published reports of the cases in this first 30-year tranche all include the report for the hearing prepared by the *juge rapporteur*. Since 2012 the reports for the hearing have not been published,¹⁰ and the contents of the *dossiers de procédure* for cases after that date, once they are eventually made available, will be all the more valuable as a source of information.

⁶ They can therefore be consulted online. For the procedure to request a case dossier, see HAEU, CJUE.01.01-02.03 *Dossiers de procédure originaux* archives.eui.eu.

⁷ Regulation 354/83 cit. art. 2 excludes "records containing information on the private or professional life of individual persons".

⁸ Decision of the Court of Justice of 10 June 2014, art. 4(2). Art. 4(1) of the Court's Decision refers to art. 35 of the Court's Statute which provides that the Court's deliberations are to remain secret. This provision applies also to the General Court (art. 53 of the Court's Statute), and to the Civil Service Tribunal (art. 7(1) of Annex 1 to that Statute).

⁹ On the impact of redaction, see in particular the analysis by Munro and Williams of the Van Duyn dossier: R Munro and R Williams, 'Caught in the Red(Act): Insights from the Van Duyn Dossier' in this Special Section.

¹⁰ Regulation (EU, Euratom) 741/2012 of the European Parliament and of the Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto, art. 1(4), amending art. 20 of the Court's Statute so as to remove the obligation of the *juge rapporteur* to present a report at the oral hearing.

A project led by the editors of the Special Section has analysed a selection of these cases with the aim of exploring how and why the archives of the Court of Justice are worthy of the attention of a wide range of scholars of European law, as well as scholars from different disciplines, including legal historians and sociologists.¹¹ In the last decade, a productive ‘discovery’ of the Court of Justice by legal historians and sociologists has occurred.¹² Legal historians have worked with documentary and oral evidence to analyse the historical processes that shaped European law.¹³ Sociologists have stressed the fabrication of EU law and the legal entrepreneurs who played key roles: the lawyers, the legal services of the institutions, the *référéndaires* and the routines and networks they establish.¹⁴ Such work productively destabilises existing narratives of EU law produced by legal scholars and political scientists.¹⁵ Yet the archival sources used to develop such work have, given their very recent opening, not been those of the Court of Justice itself but mainly personal archives or accounts, and the work done to date has almost exclusively focused on a few key cases such as *Van Gend en Loos* and *Costa v ENEL*. From this perspective the opening of the Court’s archives is, as Morten Rasmussen says, a “game changer”.

How, then, might the game be changed? The aim of this project has been first to illustrate the potential of the archives of the Court of Justice as an object of study and the opportunities and challenges the *dossiers de procédure* present, and second, to identify

¹¹ See European University Institute, *The Court of Justice in the Archives* ecjarchives.eui.eu. The project is directed by Joanne Scott, Claire Kilpatrick, Marise Cremona and Dieter Schlenker; for all researchers and the project’s advisory board, see further ecjarchives.eui.eu.

¹² For an account see M Rasmussen, ‘Towards a Legal History of European Law’ in this Special Section.

¹³ See for example B Davies, *Resisting the European Court of Justice: West Germany’s Confrontation with European Law 1949-1979* (Cambridge University Press 2012); B Davies and M Rasmussen, ‘Toward a New History of European Law’ (2012) *Contemporary European History* 305; A Boerger and M Rasmussen, ‘The Making of European Law: Exploring the Life and Work of Michel Gaudet’ (2017) *American Journal of Legal History* 51; R Byberg, ‘The History of the Integration Through Law Project - Creating the Academic Expression of a Constitutional Legal Vision for Europe’ (2017) *German Law Journal* 1531; V Fritz, *Juges et avocats généraux de la Cour de Justice de l’Union européenne (1952-1972): une approche Biographique de l’histoire d’une révolution juridique* (Klostermann 2018); V Fritz, ‘Activism on and off the Bench: Pierre Pescatore and the Law of Integration’ (2020) *CMLRev* 475.

¹⁴ See for example A Vauchez, ‘The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of EU Polity’ (2009) *ELJ* 1; A Vauchez, *Brokering Europe Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015).

¹⁵ See for example J Bailleux, ‘Michel Gaudet, a Law Entrepreneur: The Role of the Legal Service of the European Executives in the Invention of EC Law and the Birth of the Common Market Law Review’ (2013) *CMLRev* 359; F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017); R Schütze, ‘Re-reading *Dassonville*: Meaning and Understanding in the History of European Law’ (2018) *ELJ* 376; W Phelan, *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (Cambridge University Press 2019); L Clément-Wilz (ed), *Le rôle politique de la Cour de Justice de l’Union européenne* (Larcier 2019); C Kilpatrick and J Scott (eds), *New Legal Approaches to Studying the Court of Justice* (Oxford University Press 2020).

and initiate a reflection on the ways in which the archives may enhance, or even redirect, CJEU-focused scholarship. We have selected cases from a variety of areas in which key developments took place in the first 30 years of the Court's case law: free movement of workers; free movement of goods; gender equality; access to justice; external relations; and competition law.¹⁶ EU legal scholars have the technical know-how to deconstruct the filters through which the raw material of "facts" and "law" are passed to produce a judgment. At the same time, this exercise sheds new light on practices of rational reconstruction of successive judgments of the Court of Justice that remain a central organising feature of EU legal scholarship. In the procedures and routines and personnel practices revealed in new detail by the *dossiers*, we can obtain deeper insights into the manufacture of Court of Justice judgments. The crucial moments, sources or people behind certain outcomes may emerge from careful archival analysis.

Alongside a set of Working Papers analysing each *dossier* using a template developed within the project,¹⁷ those working on the selected cases have reflected on a number of themes emerging from the *dossiers*. These include the roles of diverse actors and institutions, the paths taken (and not taken) in legal argument in a complex litigation, and the interaction between procedure and substantive law. This Special Section brings together a group of *Articles* exploring those themes through the medium of ten individual case studies, accompanied by reflections from others who have participated in the project from different perspectives and disciplines. It serves to introduce the possibilities offered by the Court archives, and some of the ways in which the *dossiers de procédure* may enrich our reading of case law and contextualise legal scholarship. The authors of the ten case studies, and the editors of the Special Section, are themselves legal scholars. We have approached our study – inevitably – from this perspective, accompanied by fruitful dialogue with colleagues, represented here by Antoine Vauchez, and Morten Rasmussen, who have prompted methodological reflections as to best practice. As Niamh Nic Shuibhne expresses it at the start of her paper, we began by reflecting on why we, as lawyers, might read the case *dossiers* and what we might look for in this newly available material. We were, in particular, interested in the light the *dossiers* might throw on the legal argumentation in the case, on the interplay

¹⁶ The twelve case dossiers studied were Case 9/56 *Meroni v Haute Autorité* ECLI:EU:C:1958:7 and Case 10/56 *Meroni v Haute Autorité* ECLI:EU:C:1958:8; Case 25/62 *Plaumann v Commission* ECLI:EU:C:1963:17 (not included in this Special Section); joined cases 56/64 and 58/64 *Consten and Grundig v Commission of the EEC* ECLI:EU:C:1966:41; Case 22/70 *Commission v Council, (ERTA)* ECLI:EU:C:1971:32; Case 8/74 *Procureur du roi v Dassonville* ECLI:EU:C:1974:82; Case 41/74 *Van Duyn v Home Office* ECLI:EU:C:1974:133; Opinion 1/75 *Arrangement OCDE - Norme pour les dépenses locales* ECLI:EU:C:1975:145; Case 43/75 *Defrenne v Sabena (Defrenne II)* ECLI:EU:C:1976:56; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* ECLI:EU:C:1978:49; Case 149/79 *Commission v Belgium* ECLI:EU:C:1982:195; Case 244/80 *Foglia v Novello* ECLI:EU:C:1981:302.

¹⁷ For Working Papers analysing each of the selected dossiers, from which the authors of the case studies presented here have drawn, see European University Institute, *The Court of Justice in the Archives* cit.

between different actors, including those less visible from the published report, on the social, political and economic context of the dispute, and on the dynamic between substance and procedure in the handling of the cases. And we were conscious of the process characterised by Antoine Vauchez as “meaning-building”,¹⁸ the way in which a particular narrative of key cases is constructed over time, and asked to what extent the material in the *dossiers* might challenge these dominant readings. We were also conscious of the need to be cautious; the *dossiers* may improve our understanding but they have their limits. They may provide important insights and evidence, opening up possibilities rather than revealing certainties, and inviting, as Morten Rasmussen puts it, “a conscious effort to abandon the neat narratives of legal progress in favour of a messier, more complex, but ultimately more accurate and richer story”.

The *Articles* in this collection do indeed illustrate the potential for such a fine-grained study of individual cases, as well as the offering a glimpse, in the paper by Lola Avril and Constantin Brissaud, into the potential for other more horizontal studies of the archive.

One of the more striking findings, across the cases in this set of studies, concerns the handling of legal arguments. The *dossiers* are a useful corrective to any temptation one might feel – sometimes enhanced by the style in which judgments are written – to treat the prevailing arguments as somehow inevitable. It is not simply a matter of giving more weight to one argument than to another; nor is it possible, certainly from this small sample, to detect a preference for one style of argument over another.¹⁹ Rather, in several cases arguments emerge from the documents in the *dossier* that were effectively ignored in the judgment.²⁰ The analysis also demonstrates the willingness of the Court to bring into play new arguments or to reinterpret arguments made in the pleadings and submissions.²¹ The *dossiers* also allow us a flavour of the interaction between different actors in the to-and-fro of argumentation, often in ways not visible from the published report of the case. Thus, for example, the *Meroni dossier* indicates the influence of Alberto Trabucchi on the evolution of the High Authority's case, and the *Foglia II dossier* provides evidence of the influence of the

¹⁸ A Vauchez, ‘EU Law Classics in the Making: Methodological Notes on Grands arrêts at the European Court of Justice’ in F Nicola and B Davies (eds), *EU Law Stories* cit. 30.

¹⁹ See for example the discussion by J Kukavica and A Petti of the Court's treatment of different styles of argument in Opinion 1/75 cit. and *ERTA* cit. respectively. J Kukavica, ‘The Garden Grows Lusher: Completing the Narratives on Opinion 1/75’ being published in the second part of this Special Section; A. Petti, ‘*ERTA* and Us: shifting constitutional equilibria on the visions of Europe’ in this Special Section.

²⁰ See for example, the arguments supporting the existence of a genuine dispute in *Foglia II* cit.; D Ginés, ‘The Court of Justice, Genuine Disputes and Jurisdictional Control: Making Sense of *Foglia II* in light of its *Dossier*’ being published in the second part of this Special Section.

²¹ See for example, the weight given to the principle of institutional balance in *Meroni* cit., or the use made of the principle of sincere cooperation in *ERTA* cit. Opinion 1/75 cit. is a somewhat unusual case, as the published report of the Opinion does not contain any summary of the submissions, the dossier thus revealing these for the first time, giving us the possibility of assessing the sources of the arguments adopted (and introduced) by the Court. M Patrin, ‘*Meroni* Behind the Scenes. Uncovering the Actors and Context of a Landmark Judgment’ in this Special Section; A Petti, ‘*ERTA* and Us’ cit.; J Kukavica, ‘The Garden Grows Lusher’ cit.

French government's submissions on the Court's judgment. We also see the ways in which these interactions may be iterative, as parties or other actors respond to each other's arguments, and how the arguments deployed before the Court may reflect a broader discussion between the institutions, or within academic literature.²²

The interplay between procedure and substance is of course a feature of any litigation. Among the cases analysed here, two aspects of that interaction stand out. The first is the importance of admissibility and the way in which the discussion of admissibility may be used by the Court to frame its approach to the substantive legal issue. Thus, in *ERTA*, the Court uses admissibility to introduce the question of Community competence; and in Opinion 1/75 and in *Foglia II* the Court uses admissibility to shape its reading of its own jurisdiction in different types of procedure. The second is the use of evidence in cases such as *Dassonville*, *Defrenne*, *Van Duyn* and *Consten and Grundig*. This evidence is used not only to substantiate a particular factual scenario but also to explain the economic, legal or social context of what may appear on its face to be a highly technical case.²³ The move from a technical set of facts to a statement of broad principle, which often appears as a characteristic of the Court's judgments, is not necessarily driven simply by the Court itself but may be seen to emerge as a response – albeit unacknowledged – to evidence of the broader contextual significance of the case.

For many of the authors of the case studies which follow, an important reflection on re-reading a case in the light of its *dossier de procedure* is the contrast between the 'real time' of the documents in the *dossier* and the patina the case has accrued over subsequent years. In reading the *dossier* we see the case afresh, have our attention drawn to previously unseen dynamics between actors and arguments and appreciate its contingency, a significant added-value for lawyers accustomed to constructing rational (or at least persuasive) frameworks of law and analysing their evolution over time. This is something more than contextualisation, than knowing more about the story behind the case. It gives us a more immediate sense of the ways in which law is made, and by whom.

Marise Cremona*, Claire Kilpatrick and Joanne Scott*****

²² See for example the discussion of differing interpretations of measures of equivalent effect to quantitative restrictions in the *Dassonville* case, and the position of the different actors in *Consten and Grundig* cit. J Muller, '*Procureur du Roi v Dassonville*, the Judicial Dossier behind the Measure Equivalent to Trade Restriction Formula' in this Special Section; G Bacharis, '*Consten and Grundig* and the Inception of EU Competition Law' in this Special Section.

²³ See for example the discussions of the *Dassonville* and *Meroni* cases. J Muller, '*Procureur du Roi v Dassonville*' cit.; M Patrin, '*Meroni* Behind the Scenes' cit. As expressed by M Rasmussen in 'Towards a Legal History of European Law' cit.: "the borderline between legal doctrine and its social context [is] always fluctuating and fuzzy".

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ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF CJEU – FIRST PART

edited by Marise Cremona, Claire Kilpatrick and Joanne Scott

THE COURT OF JUSTICE IN THE ARCHIVES PROJECT: AN INITIAL REFLECTION

ANTOINE VAUCHEZ*

TABLE OF CONTENTS: I. Introduction. – II. The cases selected and the content of the dossiers – III. Re-assessing landmark cases.

ABSTRACT: This *Article* offers an initial reflection on the output of the “Court of Justice in the Archives” project represented by the case studies included in this Special Section. The value of this collective endeavour is not a matter of finding the (legal or historical) truth hidden in some unpublished part of the dossier that would allow us to settle on the real “origins” of EU law. The project contributes to deepening our understanding of landmark cases decades later, during which time their meaning and scope have been simplified and codified as “EU law answers to EU law questions” at the cost of losing their many legal, sociological and economic layers. As the *Articles* bring back defeated and the marginalized arguments, and exemplify how things could have gone otherwise, the reader is led to a thought-experiment that can prove extremely useful in reopening the legal and political imagination of EU law, emancipating it from a sense of necessity and exposing more explicitly the normative choices made by the Court. And as alternative legal pasts of Europe emerge, it may become easier to conceive of alternative futures for EU legal integration.

KEYWORDS: Court of Justice of the European Union – landmark cases – *dossier de procédure* – judicial reasoning – legal scholarship – socio-legal studies.

I. INTRODUCTION

The “Court of Justice in the Archives” project and the 10 case-studies published in this Special Section are the product of an unusual alignment of planets as the long-awaited (albeit partial) opening of the archives of the Court of Justice of the European Union (CJEU) meets with a renewed interdisciplinary interest in CJEU landmark cases. While quantitatists have built large-n databases of CJEU judgments for decades, qualitativists were still

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missing an empirical platform to test in a systematic manner the added-value of a within-case approach to EU case law. In a rare collective experiment, this new *Article* strand examines the social and political embeddedness of the EU's case law and engages in thick descriptions of its dynamics on the ground. Researchers are "encountering" thousands of pages of original empirical material.¹ While the authors of the case studies are all doctoral candidates in law and have not become historians or sociologists in the process of writing these *Articles*, they have used methodological tools and concepts from other disciplines to understand the dynamics of legal change. This rare meeting of the minds from scholars of political science, history and law may be an unexpected side-effect of the relocation of the EUI Historical Archives and the EUI Law Department to the Villa Salvati. This project owes a lot to the efforts pursued by Marise Cremona, Claire Kilpatrick and Joanne Scott, who have opened this new research platform as a friendly and open-minded collective experiment. I am grateful to them for allowing me on board!

II. THE CASES SELECTED AND THE CONTENT OF THE DOSSIERS

True enough, the 10 *dossiers* selected here are not representative of EU case law as a whole: they are cases that have "survived" the long and competitive path to (EU law) glory.² Yet, taken together, they offer a good mix of different types of legal procedures (opinions, preliminary rulings, judgments), legal domains (competition law, external relations, access to justice, gender equality) and time periods (from *Meroni* in 1956 to *Foglia* in 1981). Moreover, their status as "landmark cases" makes them particularly suitable for this research experiment. There is indeed no better way to test the added value of studying the *dossier de procédure* than to choose judgments whose meaning have been consolidated over several decades and through numerous volumes of legal commentary. Indeed, more often than not, legal commentaries are only written on the basis of the Court's *arrêt* and of the Advocate General's (AG's) opinion. Efforts to understand the dynamics of a case are especially limiting when the Court, as abundantly demonstrated in the papers, only makes very selective references to the arguments of the parties, while at the same time raising new issues *proprio motu*. The opening of the Archives takes us from the tip of the iceberg to an appraisal of (something approaching) its total size.

¹ For reviews of these new interdisciplinary encounters in the field of EU law scholarship, see the *Article* by M Rasmussen in this Special Section 'Towards a Legal History of European Law' and A Vauchez, 'From Close-Ups to Long Shot in Search of the "Political Role" of the Court of Justice of the European Union' in C Kilpatrick and J Scott (eds), *New Legal Approaches to Studying the Court of Justice* (Oxford University Press 2020) 45, 61.

² A Vauchez, 'EU Law Classics in the Making. Methodological Notes on *Grands Arrêts* at the European Court of Justice', in F Nicola and B Davies (eds), *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (Oxford University Press 2017) 21, 34.

Of course, the set of archival documents available remains incomplete: beyond the *délibéré*, access to which is forbidden by law,³ some key procedural documents are missing. This includes the draft judgment (and related memos) of the reporting judge which are critical in the initial framing of the case.⁴ As access to the administrative archive of the CJEU is yet to come, it is close to impossible to enter the micro-politics of the Court, particularly in matters as strategic as the practice of case-assignment to *juge rapporteurs* and *avocats généraux*.⁵ In addition, one must add the fact that the redacting of the *dossier de procédure* by the Court's archival services has been quite extensive, particularly with respect to the *rapport d'audience*. With the sanitization of the files ranging from 10% to 40%, it seems that the interpretation of privacy issues and commercial secrets is not only restrictive but also lacks stability and precise criteria.

However, despite the dead ends and holes, these files provide very substantial material with each *dossiers de procédure* ranging from 200 to 2500 pages! In fairness, a large part of these files is not very relevant, as a lot of institutional correspondence between the parties and the *greffier* of the Court are merely procedural documents. Yet others prove much richer. The submissions and *mémoires* of the different parties to the case provide a unique entry-point into the framing of competing legal strategies of Member States, individuals, firms, EC institutions, etc. A whole world of actors directly involved in the procedure emerges: long-time players of EU law litigation such as the competition lawyer Jacques Lassier (here in *Grundig*) or future CJEU judges such as Antonio Trabucchi, a legal consultant for the High Authority at the time of *Meroni*, or Antonio Tizzano, a law professor and lawyer of the *Simmenthal* company as well as “one-shotters” and forgotten figures like Arturo Cottrau who represented Italian steel companies in dozens of proceedings before the Court in the 1950s and 1960s. The submissions' annexes bring evidentiary documents (often the biggest part of the *dossiers*) that are a rich testimony to the history of EU law argumentation with variegated sets of economic and social data from national statistical institutes, comparative legal arguments drawn from the case law of national

³ Interestingly, the Regulation (EU) 2015/496 of the Council of 17 March 2015 amending Regulation (EEC, Euratom) 354/83 as regards the deposit of the historical archives of the institutions at the European University Institute in Florence recognizes the “the specific nature of the activities of the Court of Justice of the European Union (CJEU) and the European Central Bank (ECB)” which “justifies their exclusion from the obligation set out in this Regulation to deposit their historical archives at the EUI. The CJEU and the ECB may deposit their historical archives at the EUI on a voluntary basis”.

⁴ For a full account of these holes in the archive, see F Nicola, ‘Waiting for the Barbarians: Inside the Archive of the European Court of Justice, New Legal Approaches to Studying the Court of Justice’ in C Kilpatrick and J Scott (eds), *New Legal Approaches to Studying the Court of Justice* cit. 91.

⁵ In his study of case assignment in the Court ever since 2002, Christoph Krenn is able to correlate case assignment to the statute and reputation of judges and identifies a group of elite judges: Koen Lenaerts has acted as *juge-rapporteur* in Grand Chamber cases of the course of 11 years in a variety of cases stretching from issues of citizenship, taxes, economic governance, fundamental rights, etc. Cf. C Krenn, ‘A Sense of Common Purpose. On the Role of Case Assignment and the Judge-Rapporteur at the European Court of Justice’ in M Rask Madsen, F Nicola and A Vauchez (eds), *Researching the European Court of Justice. Methodological Shifts and EU Law's Embeddedness* (Cambridge University Press 2021).

courts, conventions from international organizations such as the International Labour Organization (ILO), etc. Another interesting yet often neglected procedural document is the *questions posées aux parties* by the Court, which allows us to grasp how judges progressively turn the many stakes of a case into a limited set of EU law alternatives. Lastly, the *rapport d'audience*, often the most redacted part of the *dossier*, is a unique entry point into the oral exchanges at the Court.

III. RE-ASSESSING LANDMARK CASES

Some readers may be disappointed with the outcome of this full (archival) immersion as there are hardly any hidden secrets or “smoking guns”. However, the authors have been clever enough to avoid a merely anecdotal perspective, limited to giving a more human and lively context to CJEU landmark cases (a perspective which does, however, prove useful for the sake of teaching EU law). The authors have also resisted the temptation to frame their work as a quest to find new heroes that might serve as substitutes for our traditional ones, i.e. CJEU judges. The value of this collective endeavour is not a matter of finding the (legal or historical) truth hidden in some unpublished part of the *dossier* that would allow us to settle on the real “origins” of EU law. More importantly, the project contributes to deepening our understanding of landmark cases decades later, during which time their meaning and scope have been simplified and codified as merely “EU law answers to EU law questions” – at the cost of losing their many legal, sociological and economic layers.

Seen from the *dossiers’ perspective*, landmark cases hardly seem recognizable. As the various parties to the case take centre stage, judicial decision-making appears like a choral process of production, thereby downplaying the usual image of CJEU judges as sole creators of EU law. As scholars are finally able to apply the “symmetry principle” dear to science and technology studies (STS) scholars and consider all parties to the case (including the dissenting or losing legal voices), it is possible to contextualise the final judgment in a dense web of competing social and economic claims, competing legal strategies and alternative judicial solutions, regardless of the case outcome. As a result, our understanding of the “hermeneutic space” of the judgment is considerably enriched. Issues that had been ignored (or silenced) by the Court in the decision are brought back into the limelight. In Opinion 1/75 on trade agreements, the most heated legal discussions among parties were the ones related to the *kompetenz-kompetenz* of the Court itself (regarding its competence to decide on the exclusive nature of the Community’s competence to conclude international agreements) - one that the Court strategically refused to address in its final decision. As Jaka Kukavica puts it in his *Article*: “the Court’s silence has entirely obscured what was one of the more important issues of Opinion 1/75 in the eyes of the Member States” On the other hand, issues that had not been put forward by any of the parties, teleological arguments in particular, are added by the Court *proprio motu* along the way.

As the files immerse the reader in the complexities of the cases and their multidimensional stakes, one gets a sense of *openness* and *contingency* often lost in the consolidated teleological narrative of EU case-law. As one follows the different operations of law from *soumissions* to *mémoires* and from the *questions posées aux parties* to the *rapport d'audience*, the picture gets surprisingly more dynamic than in the usual account, where the parties appear as driven by pre-existing interests. Something actually *happens* during the proceedings themselves: arguments are abandoned, legal strategies are revised, and key legal issues emerge incidentally during the proceedings. Sometimes, the importance of the case is “discovered” *chemin faisant* as the procedure unfolds, leading to changes in strategy and legal setting.⁶ As one tracks these changes in the strategies of actors, it is possible to assess how cases evolve in their meaning and scope all along the procedure. In *Meroni*, for example, the debated issue moves from discrimination and abuse of power to judicial protection and delegation.⁷ As scholars are able to retrieve alternatives and identify moments of bifurcation, the sense of necessity that has often hampered the reading of EU case-law dissipates. The outcomes of cases are not foreordained and the path taken is often hard to anticipate ahead of the trial itself.⁸

Yet, this new material does not only allow us to zoom in to account for the inner dynamics of the case itself; it also enables us to escape the remits of the case and zoom out to grasp its embeddedness in the wider social, economic and political processes of its times. As the parties bring arguments and evidentiary documents from Member States and international organizations, one can see how society finds its way *into* EU case-law and it becomes possible to track the many threads that connect the case to the political and social battles of the time. To put it differently, “the context” never lies *outside* of the case but it is to be found right at the core the *dossier* itself. *Defrenne II* is a perfect example here as “the context” continuously feeds into the Court with the Paris Summit of 1972, its new emphasis on EU social policies and its concretization in a series of three EU directives regarding equal pay, equal treatment at work and equal treatment in social security.⁹ Similarly, the judicial recognition of the formula on “Measures having equivalent effect to a quantitative restriction” in *Dassonville* is deeply intertwined with the many initiatives taken in parallel by the Commission from the Directive 70/50 to its 1985 White paper “on the completion of the Single Market”.

⁶ As is *Dassonville* (case 8/74 *Dassonville* ECLI:EU:C:1974:82) where the case moves from the Second Chamber to the Full Court: see J Muller, ‘*Procureur du Roi v Dassonville*, the Judicial *Dossier* Behind the Measure Equivalent to Trade Restriction Formula’ in this Special Section.

⁷ M Patrin, ‘*Meroni* Behind the Scenes, Uncovering the Actors and Context of a Landmark Judgment’ in this Special Section.

⁸ This open-ness should not however lead to underestimate structural slopes in CJEU litigation: see A Vauchez, ‘From Close-Ups to Long Shot in Search of the “Political Role” of the Court of Justice of the European Union’ cit.

⁹ S Tas, ‘*Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*: A glance into a landmark case with more potential than what it is known for’, to be published in the Second Part of this Special Section.

As the Court is repositioned in context, it becomes easier to assess, beyond the legal issues, the distributional consequences of its judgments such as the case of *Meroni*, where a small steel company claimed to be disadvantaged *vis-à-vis* large firms by the equalization mechanism and the average prices of ferrous scrap introduced by the High Authority. In the end, the richer the material available, the more it becomes possible to overcome the sharp divide between “inside” and “outside” of the Court, or between the “case” and its “context”. The new picture of the case-law that emerges runs counter to the usual image of the Court as self-standing and autonomous institution.

As the *Articles* bring back the defeated and the marginalized arguments, and exemplify how things could have gone otherwise, the reader is led to a thought-experiment that can prove extremely useful to reopen the legal and political imagination of EU law. To put it differently, re-opening the files of the Court’s foundational cases allows for a counterfactual exercise. *What if* competition law had been defined differently in *Grundig*? *What if* the Court had accepted the Member States’ argument on the difference between public and private? This is not just a play of mind as it emancipates EU law from a sense of necessity and it exposes more explicitly the normative choices made by the Court all along the way.¹⁰ Just as alternative legal pasts of Europe emerge to the forefront, it may become easier to conceive of alternative futures for EU legal integration.

¹⁰ I Venzke, ‘What if? Counterfactual (Hi)Stories of International Law’ (Amsterdam Law School Research Paper 66-2016).



ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF CJEU – FIRST PART

edited by Marise Cremona, Claire Kilpatrick and Joanne Scott

MERONI BEHIND THE SCENES: UNCOVERING THE ACTORS AND CONTEXT OF A LANDMARK JUDGMENT

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TABLE OF CONTENTS: I. Introduction. – II. *Meroni* and the evolution of EU law. – II.1. Overview of the case. – II.2. The long and contested life of *Meroni* in EU law. – III. Actors and institutions behind the *Meroni* judgment. – III.1. *Meroni*: shedding light on the context and on the economic rationale. – III.2. The High Authority: the dynamic nature of the case. – III.3. The Court: an innovative judgment of a conservative Court? – IV. Concluding remarks.

ABSTRACT: *Meroni* is one of the most controversial cases in EU jurisprudence, one bearing profound consequences for the evolution of the EU legal and institutional system. For over sixty years the 1958 judgement has set the conditions for power delegation in the EU. It also first formulated the well-known principle of institutional balance. It remains very topical still today, as shown by the recent *ESMA* case, which raised again the issue of power delegation to external agencies. This *Article* looks behind *Meroni*'s scenes, by analysing the recently released CJEU *dossier de procédure*. Through a "law in context" analysis, it provides innovative insights into the economic and social background of the dispute. It investigates the parties' submissions and their arguments, showing how actors and institutions shaped the Court's reasoning. Ultimately, the *Article* unveils the dynamic nature of the case, arguing that far from being a necessary outcome, the Court's judgment was crafted step by step upon the arguments of the parties, in an unexpected legal build-up leading from judicial protection, to power-delegation up to the principle of institutional balance.

KEYWORDS: *Meroni* – power delegation – principle of institutional balance – judicial protection – Court of Justice of the European Union – legal history.

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I. INTRODUCTION

Meroni is one of the earliest EU cases and is possibly the first judgment that has had a long-lasting influence on the EU's institutional architecture.¹ It was formulated back in 1958 by the then Court of the European Coal and Steel Community (ECSC). Yet the principles it expounded are still applied and discussed today. As noted by Craig: "The *Meroni* principle has stood for fifty years as a constitutional limit to delegation and continues to be applied".² It circumscribes external delegation of executive powers of a non-discretionary nature on the basis of the *principle of institutional balance*.

The opening of the archives of the Court of Justice of the European Union (CJEU) now offers the opportunity to look behind the scenes of *Meroni*. The *dossier de procédure originale* contains unpublished materials, including the written submissions of the parties, evidence, procedural correspondence, as well as the Report of the *Juge Rapporteur* (see Annex for the composition of the *dossier*).³

This *Article* provides a first assessment of the content of the *dossier de procédure*. It adopts a *law-in-context* approach, examining the judgment in the light of the context in which it emerged and of the actors that contributed to shaping it. The purpose is not only historical. Assessing *Meroni* in its context helps to shed light on the reasoning that led to the ruling, and thus provides an innovative perspective on the judgment itself. As noted by Di Donato, "what constitutes a judicial fact depends not only on the norms that qualifies the event in legal terms, but also on the perspectives and on the roles played by the actors concerned and by the community to which they belong, as well as by the context within which the facts take shape".⁴ Reconstructing *Meroni's* "story" appears even more important as it is an old and technical case, the context of which has been largely lost over time.

The *Article* focuses on the submission of the parties, which represents the most interesting aspect of the *dossier de procédure*. It helps retrace the legal reasoning and it unveils the dynamic nature of the case. Ultimately, the *Article* argues that far from being a necessary outcome, the Court's judgment was crafted step by step upon the arguments of the parties, leading from judicial protection, to the issues of power-delegation and institutional balance. The first part provides an overview of the case and situates *Meroni* within the academic debate. The second part investigates the parties' submissions, explaining the context of the dispute and showing how actors and institutions shaped the Court's reasoning. The conclusions summarise the main findings and illustrate the *dossier's* added value.

¹ Case 9/56 *Meroni v High Authority (Meroni I)* ECLI:EU:C:1958:7; Case 10/56 *Meroni v High Authority (Meroni II)* ECLI:EU:C:1958:8.

² P Craig, *EU Administrative Law* (Oxford University Press 2018) 155.

³ To be noted that the CJEU *Meroni*-related *dossiers de procédure* are actually two, as two are the original cases (*Meroni I* cit. and *Meroni II* cit.). The two cases were not joined during the proceedings. However, as the procedures ran in parallel and the two *dossiers de procédure* contain almost the same documents, in this report I will consider the two cases jointly. *Meroni I* will be taken as the main reference.

⁴ F Di Donato, *The Analysis of Legal Cases: A Narrative Approach* (Routledge 2020) 1.

II. *MERONI* AND THE EVOLUTION OF EU LAW

II.1. OVERVIEW OF THE CASE

In *Meroni* two Italian companies contested two individual decisions of the High Authority of the ECSC (High Authority) requiring payment to an obligatory ferrous-scrap equalisation system. The equalisation system was introduced in the Communities at a time of shortage of ferrous scrap in the internal market to prevent the price of Community ferrous scrap from rising to the higher prices of imported ferrous scrap. All steel companies had to share the costs of the equalisation system which was operated via some private law agencies based in Brussels.⁵ The Brussels agencies determined the rate of contribution that applied to each company.

As Meroni did not pay its contribution as requested by the Brussels agencies, the High Authority adopted two individual enforceable decisions with an ultimate payment request.⁶ Meroni sought the annulment of the two decisions, alleging infringement of procedural requirements and a failure to state the reasons for the decisions, arguing that no adequate information was provided with regard to the composition and the method of calculation of the sum claimed. It also contended that the Brussels agencies had put in place a discriminatory system.

Following the opinion of the Advocate-General (AG), the Court annulled the two decisions. The AG stressed the need to ensure adequate judicial protection when delegating powers to private law associations.⁷ The Court also found that the delegation of power to the Brussels agencies infringed the Treaties, as the High Authority could not confer upon the delegated agencies powers different from those which it itself received under the Treaties.⁸ In addition, however, the Court went beyond the arguments of the applicant and of the AG to examine whether a delegation of power to private law bodies was at all possible under the Treaties. It ruled that such a delegation was only possible if limited to “clearly defined executive powers, the exercise of which can be subject to strict review in the light of objective criteria” and could not involve discretionary powers.⁹ The Court based its arguments on the *principle of institutional balance*, or, as it is worded in this ruling, “balance of

⁵ These agencies were: the Imported Ferrous Scrap Equalization Fund and the Joint Bureau of Ferrous Scrap Consumers.

⁶ Decision 22/54 and 14/55 of the High Authority of the European Coal and Steel Community of 26 March 1954 and of 26 March 1956 establishing machinery for the equalization of ferrous scrap imported from third countries.

⁷ *Meroni I* cit. and *Meroni II*, opinion of Advocate General (AG) Roemer cit. 194.

⁸ *Meroni I* cit. 150.

⁹ *Ibid.* 152.

powers", as a fundamental guarantee for the undertakings established by the Treaties, that would be made ineffective by a delegation of discretionary power.¹⁰

II.2. THE LONG AND CONTESTED LIFE OF *MERONI* IN EU LAW

Meroni stands out in the early jurisprudence of the Court of Justice, which tended to be rather low key and focused on technical trade issues.¹¹ Certainly a case of high technical and economic relevance, *Meroni* nonetheless established pivotal legal principles of EU law, which distinguish it from the shy jurisprudence of the European Coal and Steel Community (ECSC) Court.

Starting from the 1990s, when the process of agencification in the EU intensified, the *Meroni principle* was at the centre of intense debate.¹² Scholars struggled with the dilemma of reconciling the ever-growing need for the delegation of important (and often discretionary) powers to external agencies with a legal doctrine that seemed to prohibit such a delegation. As new bodies were granted broad-ranging powers in many regulatory fields,¹³ several authors observed that *de facto* EU agencies already enjoyed powers that went well beyond what would be allowed under the *Meroni doctrine*.¹⁴ Some argued that the *Meroni principle* did not directly apply to agencies;¹⁵ others endorsed a more flexible reading that narrowed non-delegation to basic choices, thus allowing for some discretion.¹⁶

¹⁰ *Ibid.* The Court observed that delegation was necessary to achieve the Community's general objectives set out in art. 3 of the ECSC Treaties. However, it recalled that these objectives were binding on the "Institutions of the Community... within the limits of their respective powers, in the common interest".

¹¹ V Fritz, *Juges et Avocats Généraux de La Cour de Justice de l'Union Européenne (1952-1972) : Une Approche Biographiques de l'Histoire d'une Révolution Juridique* (Klostermann 2018) 140; A Vauchez, *L'Union par le Droit : L'invention d'un Programme Institutionnel pour l'Europe* (Presses de Sciences Po 2013) 76.

¹² M Chamon, 'EU Agencies: Does the Meroni Doctrine Make Sense?' (2010) *Maastricht Journal of European and Comparative Law* 281.

¹³ Among others: the European Medicines Agency (EMA), the European Aviation Safety Agency (EASA), the European Chemicals Agency (ECHA), the European Food Safety Authority (EFSA), the European Securities and Markets Authority (ESMA).

¹⁴ K Lenaerts was among the first authors to question the constitutional limits of the delegation of executive powers to agencies. See K Lenaerts, 'Regulating the Regulatory Process: "Delegation of Power" in the European Community' (1993) *ELR* 23. See further: E Vos and M Everson, 'European Agencies: What About the Institutional Balance?' (Maastricht Faculty of Law Working Paper 4-2014) 4.

¹⁵ R Dehousse, 'Misfits: EU Law and the Transformation of European Governance' (Jean Monnet Working Paper 2-2002); E Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies' (2009) *CMLRev* 1395.

¹⁶ G Majone, 'Delegation of Regulatory Powers in a Mixed Polity' (2002) *ELJ* 319 ff.; S Griller, A Orator, 'Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine' (2010) *ELR* 3 ff.; R Schütze, '"Delegated" Legislation in the (new) European Union: A Constitutional Analysis' (2011) *ModLRev* 661, 673.

Largely, the protection of the rights of individuals under delegation emerged as a key concern.¹⁷

For a long time, the CJEU did not provide additional guidance on how to interpret *Meroni*.¹⁸ Only recently, in the *ESMA* case, the United Kingdom directly referred to *Meroni* to challenge the agency's powers to prohibit or impose conditions on short-selling of financial products.¹⁹ This was seen as the much-awaited opportunity to test the applicability of the *Meroni doctrine* to agencies and to clarify its scope. However, the *ESMA* judgment did not entirely settle the issue. The Court reconfirmed the relevance of *Meroni* for EU agencies, but it found that the powers delegated to ESMA were sufficiently circumscribed to comply with the *Meroni* conditions.²⁰ In fact, the *Meroni doctrine* is still very much alive as shown by the powers endowed to agencies in new regulatory fields such as the Banking Union.²¹

III. ACTORS AND INSTITUTIONS BEHIND THE *MERONI* JUDGMENT

Only a tiny percentage of the arguments of the parties contained in the *dossier de procédure* are reflected in *Meroni*'s public documents (see Annex). Therefore, the parties' submissions reveal many aspects of the dispute that were previously unknown. They uncover who was driving the case and why, identifying the actual actors behind the legal reference to parties and institutions. They also help to retrace how the legal reasoning evolved. What emerges from the dossier is in fact a dynamic process. The parties shifted their arguments during the procedure and the Court reformulated them in the final judgment.

Looking at the actors in *Meroni* is critical because the case precedes the season of *constitutionalisation* of the EU legal order, which started in the 1960s with *Van Gend en Loos* and

¹⁷ J.-P. Jacqué noted that the principle of institutional balance originally worked as a "substitute for the principle of the separation of powers" to protect the rights of individuals. J-P Jacqué, 'The Principle of Institutional Balance' (2004) CMLRev 383. M. Chamon warned that the key concern for the Court in 1958 was the judicial protection of the rights of private parties and not the delimitation of the powers of the different institutions. M Chamon, 'EU Agencies between *Meroni* and *Romano* or the Devil and the Deep Blue Sea' (2011) CMLRev 1055; M Chamon, 'EU Agencies: Does the Meroni Doctrine Make Sense?' cit.

¹⁸ In some rulings in the 2000s it confirmed the general applicability of *Meroni*, but it never clarified its scope nor its direct applicability to modern agencies. Case C-301/02 P *Tralli v ECB* ECLI:EU:C:2005:306; joined cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* ECLI:EU:C:2005:449; joined cases T-369/94 and T-85/95 *DIR International Film and Others v Commission* ECLI:EU:T:1998:39.

¹⁹ Case C-270/12 *United Kingdom v European Parliament and Council* ECLI:EU:C:2014:18.

²⁰ E Vos and M Everson, 'European Agencies: What About the Institutional Balance?' cit.; M Chamon, 'The Empowerment of Agencies under the Meroni Doctrine and Article 114 TFEU: Comment on United Kingdom v Parliament and Council (Short-selling) and the Proposed Single Resolution Mechanism' (2014) ELR 380.

²¹ Lately, the Single Resolution Board (SRB), the central authority within the European Banking Union, was given extensive powers, including to formally decide on the resolution of a bank. The SRB delegation has not so far been challenged in Court, yet it raises again the question of what level of discretion could be tolerated by the Court under the *Meroni* jurisprudence. See P Lintner, 'De/Centralized Decision Making Under the European Resolution Framework: Does Meroni Hamper the Creation of a European Resolution Authority?' (2017) European Business Organization Law Review 591.

Costa/ENEL.²² Some of *Meroni*'s actors went on to have prominent roles in the new Court's leadership. In the following sections I explain how the main actors influenced the outcome of the case. I do so by compiling some biographical information with the analysis of the submissions in the CJEU *dossier the procédure*. Table 1 provides an overview.

Actor	Role	Observations	Impact on CJEU
Aldo Meroni	Applicant	Most active private undertaking in front of the CJEU	Low
Arturo Cottrau	Lawyer of the applicant	Most active euro-litigant in the early years	Low
Giulio Pasetti	Agent of the High Authority	Active HA's and Commission's legal agent	Low
Antonio Trabucchi	Advisory agent of the High Authority	As CJEU judge he will be key actor of constitutional turn of the CJEU (Van Gend en Loos) and then AG in important cases	High
Karl Roemer	Advocate General	Longest serving AG. Will issue opinions in important cases (Nold, Dassaonville, Defrenne)	High
Jacques Rueff	Juge Rapporteur	Well known French economist, important influence in focusing the Court on competition and internal market	Medium
The ECSC Court's judges	The Court	Rather low-profile Court with an economic focus and an heterogenous composition	Medium

TABLE 1. Main actors of the Meroni case.

III.1. *MERONI*: SHEDDING LIGHT ON THE CONTEXT AND ON THE ECONOMIC RATIONALE

Meroni & Co Industrie Metallurgiche were two Italian medium-size steel companies. According to data by Vauchez and Marchand, Meroni was among the ten major actors before the CJEU during the period 1954-1978.²³ Arturo Cottrau, Meroni's lawyer, was equally one of the most active euro-litigants until 1963. He specialised in ECSC pricing and represented several Italian coal and steel companies in over sixty proceedings before the Court of Justice.²⁴ *Meroni* was one of his first cases and by far the most important.

Meroni's submission provides a new perspective on the litigation context and the interests that were driving the actors. We learn that there were at the time widespread

²² Case 26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1; case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

²³ C Marchand and A Vauchez, 'Lawyers as Europe's Middlemen: A Sociology of Litigants Pleading to the European Court of Justice' in J Rowell and M Mangenot (eds), *A Political Sociology of the European Union. Reassessing Constructivism* (Manchester University Press 2011) 68, 74.

²⁴ *Ibid.* 75 and 78.

concerns for the functioning of the system, that the contribution rate affected disproportionately the economic performance of small undertakings (in particular on the Italian market), and that the agencies were dominated by big Italian steel companies.²⁵ Meroni repeatedly raised the issues of discrimination and of the economic consequences of the system, arguing that: “Therefore a situation has emerged where few big companies dominate the market at the expenses of the other ones which have to provide for their supply of raw material day per day and that, if maintained, will lead small undertakings to total economic collapse, leaving full space to the big industrial companies”.²⁶

These contextual elements are important to grasp the economic ideology behind the judgment. The ECSC Court was predominantly an “economic Court”. Vauchez notes that from the very beginning the Court was eager to endorse an economic doctrine marked by enthusiasm for competitive markets.²⁷ The objective to promote fair competition arguably influenced the position of the Court, revealing concerns that an Italian Small and Medium-sized enterprises (SMEs) was struggling to find its place in a market dominated by “big companies”. But they are even more important to understand why judicial protection became such a relevant issue in the case. The controversy was not about technical measurements of a neutral body that was just implementing the directives of the High Authority. It was about an agency (mostly managed by big companies) that was responsible for defining the rate of payment for many other undertakings. Fixing the contribution rate, which might appear at first to be a highly technical issue (especially if considered in light of the powers and the “discretion” that EU agencies enjoy nowadays), mattered a great deal in economic terms for the undertakings that participated in the mechanism. In the undertakings’ view, it was crucial that they preserved their legal rights to challenge a decision with which they did not agree, regardless of whether the decision was taken directly by the High Authority or by an agency which had received a mandate to carry out the task. The issue was therefore far more political and sensitive than it may appear at first sight fifty years later.

III.2. THE HIGH AUTHORITY: THE DYNAMIC NATURE OF THE CASE

The High Authority was represented by its agent Giulio Pasetti. Starting from the rejoinder, Pasetti was assisted by Professor Alberto Trabucchi. Pasetti was an agent for the High Authority in several Court cases during the 1950s and 1960s. He was a former student of Prof.

²⁵ Reference was made to other Court cases raising similar issues and Meroni even quoted a speech of a Member of the European Parliament (MEP) mentioning the problem. Dossier de Procédure Original *Meroni I*, HAEU CJUE-0564 50.

²⁶ Dossier de Procédure Original *Meroni I* cit.

²⁷ A Vauchez, *L’Union Par Le Droit: L’invention d’un Programme Institutionnel pour l’Europe* cit. 76.

Trabucchi and he invited Trabucchi to plead in front of the Court on several occasions.²⁸ Together Pasetti and Trabucchi also published an Italian edition of the EC Treaties.²⁹

Trabucchi was a renowned private law professor. He served as a judge in the CJEU from 1962 and was Advocate-General between 1973 and 1976.³⁰ Despite his private law focus, Trabucchi was very influential in the Court throughout his career. He joined the bench right at the moment of the Court's ideological shift towards a proto-federal agenda. In the landmark judgment of *Van Gend en Loos* he was instrumental in pushing for a constitutional interpretation of the Treaties.³¹ *Meroni* was one of the first cases in which Trabucchi was involved as an external agent.³² His specialisation in private law arguably led him to recognise the importance of the legal protection of private companies.³³ As I argue below, Trabucchi was indeed instrumental to shifting the High Authority's defence towards a strategy that took due account of judicial protection.

The submission of the High Authority unveils the dynamic nature of the case. Its position changed substantially during the procedure and led the Court to address the issue of power delegation and to formulate the well-known *Meroni doctrine*. One can distinguish two phases in the High Authority's defence.

Initially, in its response, the High Authority argued that it could not be made responsible for the deliberations of the Brussels Agencies. If there was any misuse, this was to

²⁸ V Fritz, *Juges et Avocats Généraux de La Cour de Justice de l'Union Européenne (1952-1972) : Une Approche Biographiques de l'Histoire d'une Révolution Juridique* cit. 326.

²⁹ G Pasetti and A Trabucchi, *Codice Delle Comunità Europee* (Giuffrè 1962). The "codice" merely gathered and commented on EC Treaty provisions in force at the time and was probably also aimed at providing Trabucchi with some "European" credentials (the author thanks A Arena for pointing to this element).

³⁰ Subsequently, Trabucchi was *Juge Rapporteur* in *Walt Wilhelm* (Case 14/68 *Walt Wilhelm and Others v Bundeskartellamt*, ECLI:EU:C:1969:4) and Advocate General in important cases, such as case 4/73 *Nold KG v Commission* ECLI:EU:C:1974:51, 8/74 *Dassonville* ECLI:EU:C:1974:82 and 43/75 *Defrenne v SABENA* ECLI:EU:C:1976:39 See V Fritz, *Juges et Avocats Généraux de La Cour de Justice de l'Union Européenne (1952-1972) : Une Approche Biographiques de l'Histoire d'une Révolution Juridique* cit. 325-329.

³¹ M Rasmussen, 'Law Meets History. Interpreting the Van Gend En Loos Judgment' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 103; B Davies and M Rasmussen, 'From International Law to a European Rechtsgemeinschaft: Towards a New History of European Law, 1950-1979' in J Laursen (ed), *The Institutions and Dynamics of the European Community, 1973-83* (Nomos 2015) 97.

³² Trabucchi was associated as an external agent to the High Authority's defence in the summer 1957. Seeking external support was seemingly a usual habit of the European executive in its early days. Thus, Trabucchi pleaded eleven times for the European institutions before his appointment as judge. C Marchand and A Vauchez, 'Lawyers as Europe's Middlemen: A Sociology of Litigants Pleading to the European Court of Justice' cit. 79 and 85.

³³ This also emerges from the oral hearing that can be consulted at the historical archives of the European Commission in Brussels. Pleading in front of the Court, Trabucchi reiterated the importance of judicial protection of undertakings and the responsibilities of the High Authority in controlling the Brussels agencies. See Historical Archives of the European Commission, Report of Oral Hearing, BAC 371/1991 77.

be attributed to the agencies, whose deliberations however could not be challenged directly. "The High Authority adopts the data furnished by the Brussels Agencies without being able to add anything thereto. Any other specific explanations would mean unauthorized interference in another body's powers for the purpose of explaining the factors involved in the elaboration of its decisions".³⁴

This statement reveals the High Authority's initial litigation strategy, which aimed to distance itself from the deliberations of the Brussels agencies, as if they were independent bodies that had the power to act unilaterally. In so doing, the High Authority introduced the key elements of power delegation and of the related legal protection. The issues were picked up by Meroni first and then reformulated by the AG and the Court. This line of defence indeed implied that undertakings would be deprived of any means to defend themselves as they could neither challenge the High Authority's decisions, nor the decisions of the Brussels agencies, that enjoyed even wider powers than the High Authority itself, whose decisions "can always be contested before the Court of Justice".³⁵

It is interesting to note the change in defence strategy of the rejoinder (Phase two): "The actual declaration of intention is to be sought in the decision of the High Authority establishing the system, and everything else constitutes an application of the criteria contained in that legislative measure".³⁶

The shift in the argument is evident: The High Authority adopted the conclusions of the agencies not because they were issued by a separate independent body, but because they were technical expressions of criteria already established by law. Arguably, the High Authority realised that shifting responsibility onto the Brussels agencies could be risky and it would deprive undertakings of their legal protection guarantees, while endowing external agencies with extraordinary powers.

To sum up, the dossier points to a clear change in the defence strategy of the High Authority. What happened between the response and the rejoinder that led the High Authority to change its strategy so drastically? Meroni's reply unveiled several shortcomings with respect to judicial protection. However, something else happened: Trabucchi entered the picture. It is not unreasonable to conclude that his arrival had something to do with the change.

However, the judgement of the Court barely considered the arguments of the rejoinder and only focused on the initial defence of the High Authority. The change of strategy can only be fully appreciated when reading the two unpublished High Authority's submissions contained in the *dossier*. Thus, the second phase of the defence constitutes a "path not taken". It remains an open question what the Court's position would have been had the High Authority adopted the rejoinder's line of defence from the beginning or if the

³⁴ *Dossier de Procédure Original Meroni I* cit. 5.

³⁵ *Ibid.* 44.

³⁶ *Ibid.* 12-13.

Court had considered the arguments put forward in the rejoinder rather than those of the response.

III.3. THE COURT: AN INNOVATIVE JUDGMENT OF A CONSERVATIVE COURT?

The Court issuing the *Meroni* judgment was a *sui generis* Court with regard to its composition. It was presided over by the Italian M. Pilotti. Together with the Luxembourgish Ch. L. Hammes and the German O. Riese, Pilotti was one of the few renowned judges sitting on the bench. The rest of the Court was composed of lawyers who had been active in politics (the Belgian L. Delvaux), in the public service (the Dutch A. Van Kleffens), in trade unions (P. Serrarens, also from the Netherlands), and even of an economist (the French J. Rueff).³⁷ Overall, this heterogeneous group of judges led scholars to consider the first Court of Justice as a “specialised economic Court”, that limited itself to coal and steel trade issues and generally relied on a literal interpretation of the Treaties.³⁸ According to Vauchez and Fritz, these early judgments were rather “unspectacular” and the technical nature of the Court made it unfit to pronounce grand legal principles.³⁹

What led such a conservative and technical court to a landmark judgment such as *Meroni*? The analysis of the submissions of the parties allows us to retrace key elements that probably influenced the Court’s approach. It shows that the Court’s own position partly emerged from the reinterpretation of the parties’ arguments; that the Juge-Rapporteur Rueff and the AG Roemer were instrumental in directing the reasoning of the Court; and that some arguments, such as the *principle of institutional balance*, were introduced by the Court *ex novo*.

a) The reinterpretation of the parties’ arguments.

As shown in the previous sections, the Court built its reasoning on judicial protection and power delegation upon the parties’ submissions, but it adapted them substantially to meet its needs. First, it was the High Authority’s initial defence that led the Court to address power delegation to external bodies in the first place. As the Court relentlessly remarked: “the High Authority uses the Brussels agencies as a shield”.⁴⁰ Second, the Court reinterpreted *Meroni*’s claims about legal protection and discrimination as a matter of power delegation, linking the need to ensure the legal guarantees of private undertakings to the type and extent of powers delegated to the Brussels agencies. This paved the way to the formulation of the principle of limited delegation in the Court’s judgment.⁴¹

³⁷ V Fritz, *Juges et Avocats Généraux de La Cour de Justice de l’Union Européenne (1952-1972): Une Approche Biographiques de l’Histoire d’une Révolution Juridique* cit. 34. In the Court there were two Dutch judges, however Serrarens was not appointed for his nationality but rather to integrate the “interests of the workers”.

³⁸ A Vauchez, *L’Union Par Le Droit: L’invention d’un Programme Institutionnel pour l’Europe* cit. 76.

³⁹ *Ibid.* 76-77; V Fritz, *Juges et Avocats Généraux de la Cour de Justice de l’Union Européenne (1952-1972): Une Approche Biographiques de l’Histoire d’une Révolution Juridique* cit. 140.

⁴⁰ *Meroni I* cit. 142.

⁴¹ *Ibid.* 146.

b) The Advocate General and the Juge Rapporteur.

Juge Rapporteur Rueff and Advocate-General Roemer played a crucial role in steering the legal reasoning towards the issues of judicial protection and power delegation.

Rueff was a renowned French economist with liberal views. He was judge at the CJEU from 1952 to 1962. Before joining the bench, in addition to being a Professor, he worked for the Society of Nations and for the *Banque de France*, and held important advisory positions for the French Government.⁴² He wrote books on monetary stability and political economy, theorising the expansion of the internal market.⁴³ Arguably, Rueff was appointed *Juge Rapporteur* in the *Meroni* case because of his economic expertise. His report, which was previously not in the public domain, identified the fundamental legal question as the relationship between the High Authority and the Brussels agencies, thus directing the attention of the Court to the issue of power delegation. He observed: "Thus the role played by the Brussels agencies, even if they are not parties in the case, constantly emerges during the procedure".⁴⁴

One of the longest-serving Advocates-General, the German lawyer Karl Roemer served in this position from 1953 to 1973. Roemer was the AG in important cases, such as *Van Gend en Loos*, *Plaumann* and *Continental Can*. He was known for a rather cautious approach to the Court's new narrative about the constitutional legal order.⁴⁵ Conversely, in *Meroni*, his observations about judicial protection paved the way to a landmark judgment. As noted by Chamon, for AG Roemer, judicial protection was certainly the legal focus of the case.⁴⁶ The issue was not so much the possibility to delegate power nor the type of delegation, but the need to guarantee legal protection: at the very least "it is necessary to require that the guarantees laid down by the Treaties as to legal protection shall continue to exist even in the case of delegation".⁴⁷ If the delegation had contained provisions allowing for judicial review, it would have arguably been legal for AG Roemer.

c) The Court's own arguments.

Despite these many influences, the examination of the *dossier* shows that the Court's conclusions did not stem necessarily from the arguments of the parties. The evidence provided by the parties pointed to several shortcomings in terms of judicial protection in

⁴² Notably, in 1958, at the beginning of his second mandate at the Court, Rueff was appointed by French President De Gaulle to preside over a committee of experts to implement a large economic recovery plan. See V Fritz, *Juges et Avocats Généraux de la Cour de Justice de l'Union Européenne (1952-1972): Une Approche Biographiques de l'Histoire d'une Révolution Juridique* cit. 302-309.

⁴³ CS Chivvis, *The Monetary Conservative: Jacques Rueff and Twentieth-Century Free Market Thought* (Northern Illinois University Press 2010); F Teulon and B Fischer, 'L'analyse libérale des crises financières: un hommage à Jacques Rueff' (2011) *Vie et Sciences de l'Entreprise* 46.

⁴⁴ Dossier de Procédure Original *Meroni I* cit. 4.

⁴⁵ A Vauchez, "'Integration-through-Law". Contribution to a Socio-History of EU Political Commonsense' (EUI Working Paper RSCAS 10-2008).

⁴⁶ M Chamon, 'EU Agencies: Does the Meroni Doctrine Make Sense?' cit. 281.

⁴⁷ *Meroni*, opinion of AG Roemer, cit. 190.

the activities of the Brussels agencies, hence the decision of the Court is not entirely surprising. However, the Court could have just annulled the decision for lack of statement of reasons, or it could have, as suggested by the AG, concluded that the delegation of power was illegal because it did not uphold necessary legal protection guarantees. The Court, instead, went beyond what was strictly necessary to resolve the dispute and introduced some legal arguments of its own.

The last part of the judgment contains arguments that are nowhere to be found in the proceedings. The Court limited delegation to “clearly defined executive powers”, ruling out any discretion by the delegated bodies. In addition, it came up with the *principle of institutional balance* as a safeguard to these limitations.⁴⁸

IV. CONCLUDING REMARKS

The *Meroni doctrine* remains one of the most controversial developments in the CJEU jurisprudence for its institutional implications and its impact on the EU legal system. The analysis of the *dossier de procédure* can help us to look behind the scenes to understand what motivated the parties and the Court, thus offering an innovative perspective on the judgment. This *Article* so far has shed light on the litigation strategies of the parties and on the reasoning of the Court. As a conclusion, I would like to stress four main observations that have emerged from the analysis.

First, it cannot go unnoticed that at a first screening of the documents the litigation is not about delegation, nor about institutional balance – the two things for which the judgment is mostly known. These issues are brought into the dispute incidentally, mainly because of the High Authority's defence strategy, which insisted on the impossibility of reviewing the decisions of the Brussels agencies. Power delegation was linked to the need to uphold the legal guarantees of the undertakings, which would be deprived of their rights if the interpretation of the High Authority had been accepted. The analysis of the *dossier* would thus confirm the views of those scholars who have identified judicial protection as the main concern of the case.⁴⁹

Second, the analysis of the *dossier* shows that there is an inherent dynamism in the evolution of the case. The outcome was not “necessary” nor “inevitable”. In this sense, as noted by Davies and Nicola, *Meroni* shows that EU law evolves in a contingent manner.⁵⁰ There was a constant reinterpretation of the arguments of the parties in the light of the Court's key concerns. One might say that the reasons for which the Court annulled the High Authority's decision had little to do with the original complaints. Moreover, the issue of institutional balance does not feature anywhere but in the final judgment. This is an

⁴⁸ *Meroni* cit. 152.

⁴⁹ M Chamon, ‘EU Agencies: Does the Meroni Doctrine Make Sense?’ cit.; JP Jacqu , ‘The Principle of Institutional Balance’ cit.

⁵⁰ F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* cit. 3.

argument that the Court introduced on its own initiative. It was not a necessary or inevitable step. The Court did not have to pronounce itself on the matter. The AG had indeed reached similar conclusions on the basis of judicial protection, without introducing any positive rules about the type of delegation at stake.

Third, the *dossier* points to the crucial role of key actors. Trabucchi was arguably behind the shifting position of the High Authority. An experienced euro-lawyer such as Cottrau could seize the weakness of the High Authority's defence to put the spotlight on the lack of judicial protection. Finally, Rueff and Roemer were instrumental in redirecting the attention of the Court to the legal core of the case: judicial protection and how to guarantee it when powers are delegated.

Finally, the *dossier* sheds light on the context of the dispute. Through the arguments of the parties we get a better grasp on the economic background and on the potential disruptions of a system that was put in place to help the economic operators in the internal market. The issue was therefore much more sensitive than it might seem at first sight. Under these circumstances, for the Court it was probably not foremost to determine whether in the specific case of *Meroni* the High Authority provided appropriate justifications for its decisions. Rather, it was much more important to ensure that undertakings still preserved their legal rights in circumstances under which the High Authority had directed another entity to carry out tasks that were part of the High Authority's mandate.

To conclude, *Meroni* stands out as an early example of the Court's creativity in dissecting important legal principles from the Treaties – a practice that would later characterise the revolutionary generation of *van Gend en Loos* and *Costa/ENEL*. However, *Meroni* cannot entirely be seen as a precursor of the later constitutional turn of the CJEU jurisprudence. On the one hand, the focus on legal protection and institutional balance are cornerstones of the successive Court's jurisprudence and have contributed to a progressive vision of EU law grounded in an alternative principle to the traditional separation of power to safeguard legal guarantees. On the other hand, the doctrine of limited delegation reflects a rather conservative approach to the interpretation of power delegation and of the role of EU institutions, which relies upon a problematic and inflexible distinction between discretionary and clearly defined executive powers.



ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF CJEU – FIRST PART

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CONSTEN AND GRUNDIG AND THE INCEPTION OF AN EU COMPETITION LAW

GRIGORIOS BACHARIS*

TABLE OF CONTENTS: I. Introduction. – II. Overview of the case. – III. The *dossier(s)*. – IV. The path not taken. – V. Conclusion. – Annex.

ABSTRACT: *Consten and Grundig* was fundamental in shaping EU competition law and giving it its distinctive character. Issued in 1966, before the creation of a vast body of EU case law on competition, it introduced many of the fundamental concepts and guiding principles of EU competition law. Especially its emphasis on market integration and the Court's treatment of vertical agreements through a purportedly "formalist" approach remain both influential and controversial to this day. The release of the *dossier de procédure* sheds light on the thought processes that led to this judgment. The Court's choice to stick with the "object" analysis when dealing with vertical restraints harmful to market integration was by no means unavoidable. The parties and the intervening governments followed an intricate litigation strategy, informed by robust argumentation and a wealth of evidence based on economic data and comparative law, which was never analysed in its entirety by the Court or the subsequent literature. The *dossier* helps contextualise the Court's choice to disregard this line of argumentation and to underline the centrality of the single market imperative for the application of competition law. At the same time, it provides a valuable insight into how the various actors involved in the dispute (not just the parties and the Court but also personally the lawyers, and the representatives of the States) perceived their role and interacted with each other during those early, formative days of EU competition law.

KEYWORDS: *Consten and Grundig* – competition law – vertical agreements – exclusive distribution – restrictions by object – market integration.

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I. INTRODUCTION

In July 1966, the Court of Justice of the European Union (CJEU) handed down its judgement in Cases 56 and 58/64 (jointly referred to as the *Consten and Grundig* case).¹ Issued before the creation of a vast body of EU caselaw on competition matters, and long before the acquisition of expertise and experience by the Commission as an antitrust enforcer, it constituted a milestone. Many of the Court's findings eventually guided the development of competition law in the EU with all its peculiar characteristics.² The present *Article* was written as part of the wider project on the Archives of the European Union.³ The opening of the Archives could prove invaluable in acquiring a better understanding of the workings of the CJEU and the development of the case law. The *Article*, drawing on insights offered by the *dossier*, focuses on the Court's controversial decision in *Consten and Grundig* to emphasize market integration considerations above everything else, a highly significant step in the evolution of EU competition law doctrine. By consulting the files contained in the archives it becomes eminently clear that both the parties and the Advocate General (AG) formed their litigation strategies based on the analysis of economic data and that therefore a less formalist approach could have been a perfectly viable choice for the Court. The CJEU's eventual, *conscious* choice to reject such an approach reflects the centrality of the single market imperative for the application of competition law in Europe and affirms the importance that the Court placed on securing open borders for free trade in the EU.

II. OVERVIEW OF THE CASE

In the 1960s competition law was not as well established in Europe as it was in the US.⁴ Launched in the aftermath of the Second World War, the European project incorporated provisions creating a common market in order to foster economic growth. Likewise, a main goal of EU competition law was the elimination of internal boundaries, mainly in the distribution of goods.⁵

¹ Joined cases 56/64 and 58/64 *Consten and Grundig v Commission of the EEC* ECLI:EU:C:1966:41 (hereinafter *Consten and Grundig*).

² R Whish and D Bailey, *Competition Law* (Oxford University Press 2015) 639.

³ For more info on the Archives project see ecjarchives.eu.

⁴ See generally on the history of antitrust in Europe DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press 1998).

⁵ EM Fox and D Gerard, *EU Competition Law: Cases, Texts and Context* (Edward Elgar 2017) 22; G Monti, *EC Competition Law* (Cambridge University Press 2007) 39; L Warloutzet, 'The Difficult Quest to Implement Cartel Control: *Grundig-Costen* (1966) and *Philip Morris* (1987)' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 261, 262.

The *Consten and Grundig* case involved an appeal against a 1964 decision by the Commission that had found the two companies in breach of the EEC Treaty's competition provisions due to an exclusive dealing agreement.⁶ In brief, the Court found that an exclusive distribution agreement, according to which Consten (a French company) was appointed as the sole and exclusive distributor in France of the German-based Grundig was incompatible with the current art. 101(1) TFEU.⁷ This protection was reinforced with a supplementary trademark licence agreement that was crucial in helping the two companies seal off the market, allowing them to sue any third-party importer for trademark violations. The applicant companies sought an annulment of the Commission decision, claiming that their distribution agreement violated EU law. The Italian and German government intervened in favour of the applicants,⁸ whereas the companies Leissner and UNEF intervened in favour of the Commission. In *Consten and Grundig* the EEC Commission argued, and the Court agreed, that the aim of promoting market integration at an EU level trumped most other considerations. That is, even restrictions on competition among distributors of the same brand through absolute territorial protection of this kind violated art. 101(1) of the Treaty. The mere potential to divide the market along national lines was a danger that could not be justified by any potential efficiency enhancements that agreement might bring about.

Additionally, the Court made some important preliminary findings. Specifically, it confirmed that (current) art. 101(1) TFEU applied not only to horizontal but also to vertical agreements.⁹ Vertical agreements between firms operate at different levels of the supply chain, whereas horizontal operate at the same level. The Court found that both types of agreements as long as they affect trade between Member States belonged to the ambit of art. 101(1) TFEU.¹⁰ Furthermore, the Court emphasized the extent of the margin of appreciation available to the Commissions when applying art. 101(3) TFEU.¹¹ Lastly, it confirmed that agreements relating to intellectual property rights fell under the scope of EU competition law.¹²

⁶ Décision 64/566/CEE de la Commission du 23 September 1964 relative à une procédure au titre de l'art. 85 du traité (IV-A/00004-03344 "Grundig-Consten").

⁷ Then art. 85(1) EEC Treaty. Current Treaty numbering will be used in the text unless otherwise indicated.

⁸ The reasons behind their interventions are persuasively revealed in L Warloutzet, 'The Difficult Quest to Implement Cartel Control: *Grundig-Costen* (1966) and *Philip Morris* (1987)' cit. 269. Namely, both governments thought that exclusive agreements of the kind were useful for penetrating foreign markets and where hostile to potential institutional consequences of the overreach of the Commission.

⁹ Note that the Court stated later in the recent *Allianz Hungaria* case that vertical agreements are "often less damaging to competition than horizontal agreements". See case C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160.

¹⁰ The current Guidelines on the Effect on Trade Concept contained in Arts. 101 and 102 TFEU (The Guidelines on interstate trade) draw substantially on the caselaw developed first in *Consten and Grundig* cit., and R Whish and D Bailey, *Competition Law* cit. 151.

¹¹ R Whish and D Bailey, *Competition Law* cit. 178.

¹² On the relation between antitrust and IP in Europe see S Anderman and H Schmidt, *EU Competition Law and Intellectual Property Rights: The Regulation of Innovation* (Oxford University Press 2011).

A small digression is warranted here to better understand the factual context of the decision. After the first competition Regulation (17/62) was adopted, the Commission had to be notified of many vertical agreements, and especially exclusive distribution agreements, like the one in question. As Warlouzet notes, “distribution agreements were crucial for the process of European integration, but they were hard to gauge from the competition policy point of view”.¹³ The integration of national markets was facilitated by such agreements, which allowed products to travel easily between states. They were particularly useful for sellers of complex products which required aftersales service, such as electronics products.¹⁴ Thus the CJEU in *Société Technique Minière (STM)* – handled almost simultaneously to *Consten and Grundig* – held that agreements for exclusive distributorship did not normally infringe art. 101(1) TFEU when the element of absolute territorial protection was absent.¹⁵ In some cases, that is, exclusivity could be considered necessary to penetrate the market. In *Société Technique Minière* the CJEU based its conclusion on the so-called “free-rider problem”, which explains the motives of a distributor requiring territorial exclusivity from its supplier.¹⁶ However that case was different from *Consten and Grundig*. The contract did not completely insulate French territory and parallel imports were allowed. Hence the Court was able to distinguish the cases.¹⁷

Nonetheless, AG Roemer supported a different conclusion.¹⁸ His arguments broadly tracked the structure of the applicants’ submissions in *Consten and Grundig*. AG Roemer reasoned that even agreements involving absolute territorial protection allowed German producers to enter the French market and called for an approach based on the concrete economic effects of the agreement and for the annulment of the Commission’s decision. *STM* and *Consten and Grundig* should thus not be distinguished. This divergence of opinion is paralleled by the different priorities set by the German and French governments

¹³ L Warlouzet, ‘The Difficult Quest to Implement Cartel Control: *Grundig-Costen* (1966) and *Philip Morris* (1987)’ cit. 266.

¹⁴ *Ibid.*

¹⁵ Case 56/65 *Société Technique Minière v Maschinenbau Ulm* ECLI:EU:C:1966:38. The preliminary ruling in *STM* came two weeks before the one in *Consten and Grundig* cit. All five judges that participated in *STM* were on the panel of *Consten and Grundig* cit. See the analysis in KK Patel and H Schweitzer (eds), *The Historical Foundations of EU Competition Law* (Oxford University Press 2013) 147. On the different strands of case law based on *Consten Grundig* cit. and *STM*, see P Ibáñez Colomo, ‘Article 101 TFEU and Market Integration’ (2016) *Journal of Competition Law & Economics* 749. AG Roemer was also Advocate General in both cases.

¹⁶ *Ibid.* 251.

¹⁷ D Hildebrand, *The Role of Economic Analysis in EU Competition Law* (Kluwer Law International 2016) 282.

¹⁸ Advocate General at the Court of Justice from 1953 to 1973. For a short bio of the Advocate General see curia.europa.eu. He is probably most famous for his Opinion in the seminal *Van Gen en Loos* case see A Grilli, ‘Aux origines du droit de l’Union européenne: le “Ius Commune” national dans les conclusions des Avocats Généraux: Karl Roemer et Maurice Lagrange (1954-1964)’ (2008) *Tijdschrift voor Rechtsgeschiedenis* 155.

during the early years of the European project.¹⁹ The latter was much more welcoming of stronger enforcement against competitive restraints as a way to facilitate a more integrated common market. Germany was ambivalent; it considered similar agreements useful in penetrating new markets after the tariff barriers went down.²⁰ Roemer was approached by officials from the German Ministry of Economics,²¹ who were conservative with respect to the development of European law as a supranational law. He himself shared that scepticism.²² Roemer's conclusion was that the economic evidence presented by the Commission was unconvincing and that the empowerment of the Commission institutionally was too far-reaching.²³

Consequently, the impact of *Consten and Grundig* was significant. Any form of absolute territorial protection would be deemed illegal by object. This contributed to the Commission being flooded with a massive number of exclusive distribution agreements to be notified, as before the case was decided by the Court there was widespread belief that these agreements would not fall under the prohibition of art. 101(1) TFEU.²⁴ This in turn led to the adoption of Regulation 67/67, the first block exemption regulation, which resulted in the automatic exemption of similar agreements.²⁵ Most importantly, the judgment confirmed that "when market integration considerations are at stake, the Court tends to follow a *sui generis* approach...".²⁶ This *sui generis* approach does not consider the economic and legal context in which the agreement was concluded, content with finding illegality when market integration is put at risk. *Consten and Grundig* and the later caselaw of the Court on

¹⁹ L Warloutzet, 'The difficult quest to implement cartel control: *Grundig-Costen* (1966) and *Philip Morris* (1987)' cit. *passim*.

²⁰ Warloutzet posits that the German government was hesitant of overturning the first significant decision by the Commission as this would deal a substantive blow to the European integration process. L Warloutzet, 'The Difficult Quest to Implement Cartel Control: *Grundig-Costen* (1966) and *Philip Morris* (1987)' cit. 278.

²¹ Among others Ulrich Everling (future judge at the CJEU), see L Warloutzet, 'The difficult quest to implement cartel control: *Grundig-Costen* (1966) and *Philip Morris* (1987)' cit. 278-279.

²² *Ibid*.

²³ *Ibid*. 280.

²⁴ J Goyder, *EU Distribution Law* (Hart 2011) 68. 20,000 exclusive distribution agreements were notified to the Commission before the judgment. Only 6,000 of those included problematic clauses and could potentially harm competition, see SP Ladas, 'Exclusive Distribution Agreements and the Common Market Antitrust Law' (1964) *The Antitrust Bulletin* 761, 767; E Steindorff and K Hopt, 'European Economic Community-The Grundig-Consten Case, a Landmark Decision of the European Court of Justice on Common Market Antitrust Law' (1966) *AmJCompL* 811, 814-817.

²⁵ Regulation (EEC) 67/67 of the Commission of 22 March 1967 on the application of art. 85(3) of the Treaty to certain categories of exclusive dealing agreements (art. 85(3) is now art. 101(3) TFEU). G Monti, *EC Competition Law* cit. 357; It is interesting that even Commissioner von der Groeben intimated that the Commission rendered this decision in order to push harder for the adoption of a group exemption Regulation, SP Ladas, 'Exclusive distribution agreements and the common market antitrust law' cit. 769.

²⁶ M Fox and D Gerard, *EU Competition Law: Cases, Texts and Context*, cit. 20.

export bans of similar kind can be explained by reference to this crucial fact.²⁷ The *dossier* helps illuminate how the Court reached this distinctive approach.

III. THE *DOSSIER(S)*

The *Consten and Grundig* file is rather extensive, something typical for a competition law case. Such cases require large amounts of documentary evidence, most of all economic data. The file spans 5 *dossiers* and 2500 pages in total. It contains a vast number of submissions, evidentiary and procedural documents, Court orders, etc.²⁸ One of the remarkable characteristics of the case is that it consists of two separate applications for annulment of the contested decision of the Commission, which the Court decided to join. The result is that many documents seem not to be in the right order, especially in the first 3 *dossiers*, and even though almost all documents from the *Grundig* case seem to be included, many of the documents from the *Consten* case are not (e.g., the submissions of the applicant Consten constitute a notable absence).

A large portion of the *dossier* is made up of documentary evidence, for example:

- a) The contract between Consten and Grundig;
- b) Documents relating to the Supplementary Agreement relating to the GINT trademark;²⁹
- c) Economic data on operations of the Companies in France and Germany, especially their margins, prices, and overall comparison of market conditions in the two countries;³⁰
- d) The Commissions' decision and evidence submitted in this process;
- e) Caselaw of national courts.³¹

As the factual situation was complicated and the issues of law novel, the submissions and arguments of the parties were extremely extensive.³² According to a rough count undertaken by the judge rapporteur, the arguments raised by both applicants and interveners could be boiled down to 31 distinct complaints on issues of law and fact, substance and procedure. While there was definitely overlap in the arguments used by the two applicants, it was not absolute.³³ Many arguments were only brought by one and not

²⁷ See generally on the caselaw, D Hildebrand, *The Role of Economic Analysis in EU Competition Law* cit. 281 ff.

²⁸ *Dossier de Procédure Original Consten Grundig*, HAEU CJUE-0886/87/88/89/90. The archival references correspond to the original Codes C2-14-054 to C2-14-057. For ease of reference the five *Dossiers* will be referred to as *Dossiers* 1 to 5 in the text below, Page numbers refer to individual documents.

²⁹ E.g., *Dossier de Procédure Original Consten Grundig*, HAEU CJUE-0886 cit., Annexes 2 and 3, *Dossier* 1.

³⁰ *Ibid.*, Annex 1 to Doc 15, *Dossier* 1, 46 -62.

³¹ E.g., *Dossier de Procédure Original Consten Grundig*, HAEU CJUE-0887 cit., Doc 7, *Dossier* 2, 35.

³² *Ibid.*, Doc 7, *Dossier* 2, 102, 104.

³³ E.g., *Dossier de Procédure Original Consten Grundig*, HAEU CJUE-0886 cit., Doc 1: Grundig's submission, *Dossier* 1; *Ibid.* Doc 21: Consten's reply, *Dossier* 3, 97.

the other applicant, though they do not appear to directly conflict with each other.³⁴ This can be easily explained by the fact that the parties did not have a common litigation strategy and that the cases were joined at a later stage.³⁵

Furthermore, a look into the *dossier* illuminates the contributions of the actors involved in litigating this dispute. Jacques Lassier, Robert Collin, and Georges Le Tallec³⁶ all established their reputation during this case. They eventually became renowned experts in EU competition law and pioneers in the field. There is still an important prize awarded to competition scholars named the Jacques Lassier prize.³⁷ Their interest in competition matters and their knowledge of both national and international economic law (mainly French and German) shaped the dispute and could have influenced the final decision. It must be noted moreover that Le Tallec went on to draft a commentary on the case, seemingly adopting a position consistent with the one he developed as counsel for the Commission.³⁸ Without a doubt, their involvement in the case and their subsequent fame shows the enduring importance of *Consten and Grundig*. It is noteworthy that French experts were involved, and that they based their arguments on French law, which was stricter on vertical restraints and allowed the use of trademarks for suppressing export prohibitions.

In terms of their litigation strategy, all parties made extensive reference to economic data (gross margins in France and Germany, price comparisons, overhead costs, etc.).³⁹ There are vast annexes to the submissions that contain multiple documents relating to the conclusion of the contested contracts,⁴⁰ the registration of the trademark,⁴¹ ongoing legal disputes relating to parallel imports, etc.⁴² The process is at times reminiscent of a civil or administrative process under national law, with its broad usage of documentation

³⁴ E.g., the complaint concerning the classification as a directive was raised by Consten. It is hard however to tell apart each applicant's arguments from each other, as Consten's initial submissions are absent from the file.

³⁵ *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0886 cit., Doc 1: Order of the Court joining the cases, *Dossier 2*.

³⁶ As lawyers for UNEF, Leissner and the Commission.

³⁷ C McFadycan, 'Maitre Jacques Lassier 1920-1979' (1979) *International Bar Journal* 8; R Franceschelli, R Plaisant and J Lassier, *Droit Européen de la Concurrence, Articles 86 à du traité C.E.E.* (Delmas 1966).

³⁸ G Le Tallec, 'Die Wettbewerbsregeln in der Europäischen Wirtschaftsgemeinschaft nach der Rechtsprechung des Gerichtshofs. Die Konsequenzen für Ausschliesslichkeitsverträge' (1966) *Aussenwirtschaftsdienst des Betriebsberaters* 437.

³⁹ See e.g., *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0886 cit., Doc 15, *Dossier 1*, 222; and the tables that can be found there about the revenue of Grundig between 1961 and 1965 and import tariffs paid in France, *ibid.* 271. Just in this reply the economic and factual arguments of Grundig span twenty pages. There is even talk of technical details, such as radio frequencies, *ibid.* 284. Also see *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0888 cit., Doc 21, *Dossier 3*, 101 indicating the volume of sales of radios in France.

⁴⁰ E.g., *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0886 cit., Annexes in Doc 1, *Dossier 1*, 73 ff.

⁴¹ *Ibid.*, Annexes in Doc 7, *Dossier 1*, 199.

⁴² *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0888 cit., Doc 21, *Dossier 3*, 112-128.

to prove arguments both in fact and in law. This makes sense, given that the case concerns competition law, which was relatively underdeveloped at that stage in Europe. The parties thus did not hesitate to employ arguments based on national law, mainly contract, antitrust, unfair competition and trademarks.⁴³ More specifically the parties make reference to decisions of Dutch and Italian courts on the legality of prohibition of parallel imports, but also to French unfair competition and trademark law.⁴⁴ Even more notable is the fact that references to US law abound.⁴⁵ For instance, the Sherman Act is used by Grundig and the Commission in order to support their definition of what constitutes an “agreement” as an issue of law.⁴⁶ This can be explained by that fact that US law served as the model for the introduction of antitrust in the EU.⁴⁷ The parties also referred to the previous proceedings, before both the national courts and the Commission to support their arguments. For example, the cases of UNEF and Leissner, which were mentioned above, were discussed at length.⁴⁸ Lastly, it also is notable that the parties made extensive reference to previous decisions of the Court of Justice and of the Court of the European Steel and Coal Community to support their claims, even though the body of case law at this point in time could be characterised as meagre at best.⁴⁹

IV. THE PATH NOT TAKEN

In spite of all this wealth of argumentation and evidence adduced before it, the CJEU focused on principle rather than the facts of the specific case. It clarified that market integration was paramount, and that this by itself was enough for a finding of a violation of art. 101(1) TFEU by the contested agreement.⁵⁰ The *dossiers* support the opinion that that the Court did not ignore any significant arguments by the parties, but seemed to consciously reject them in favour of this formalist approach. Crucially, it explicitly denied that

⁴³ *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0886 cit., Doc 7, *Dossier 1*, where the Commission refers to the case law of the German Federal Supreme Court, in answer to a claim from the applicants. Another example is the discussion of the French law doctrine of opposability aux tiers, see *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0886 cit., Doc 15, *Dossier 1*, 20; *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0887 cit. Doc 7, *Dossier 2*, 19.

⁴⁴ *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0887 cit., Doc 15, *Dossier 2*, 33 under footnote 40, 35.

⁴⁵ *Ibid.* 31 under footnote 37.

⁴⁶ *Ibid.* 10.

⁴⁷ See DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* cit. *passim*.

⁴⁸ See e.g., the Annexes in UNEF's submissions where the cases before the French court are invoked, *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0887 cit., Annexes to Doc 13, *Dossier 2*, 21.

⁴⁹ *Ibid.* Doc 15, *Dossier 1*, 40, referring to the *Bosch* decision of the CJEU. Also, *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0888 cit., Doc 18, *Dossier 3*, 7.

⁵⁰ KK Patel and H Schweitzer (eds), *The Historical Foundations of EU Competition Law* cit. 40. It has been rightly pointed out that it was the Commission that was the first to identify integration as a central goal of 101(1) TFEU.

a cost benefit analysis would be appropriate in this case, even though the parties' litigation strategy centred around this.⁵¹ The Court had all the information in front of it to engage in such an analysis of the competitive merits of the agreement but simply was not convinced by the hundreds of pages of economic data submitted by the parties. The CJEU disregarded pages upon pages of submissions by the applicants and interveners concerning the peril of free riding and the positive economic effects of territorial protection in promoting interbrand competition.⁵² In fact, in favouring a clearly pro-market integration approach with its judgment, it seemed to strive towards guaranteeing legal certainty, as agreements similar to this one would be almost always be held illegal. Thus, the files -while not upending received wisdom concerning this case- could indicate that the judgment in *Consten and Grundig* was even *meant* to shape EU competition law in a novel way, at this early stage of its development. This explains the fact that the Court's decision is relatively short, especially compared with the extensive submissions of the parties and the opinion of AG Roemer. When it accepted the Commission's findings almost in their entirety in a relatively brief judgment, instead of examining further the actual effects on the agreement on the market, the CJEU endorsed an approach to competition law and vertical restraints that would be open to criticism as being unsophisticated and ignorant of dominant economic thought even at the time.⁵³ However, this tactic also helped the Court to establish itself as the motor of integration and made integrationist teleology "the cornerstone of its interpretive strategy".⁵⁴

To try to imagine an alternative approach, one could follow the parallel development of the case law concerning distribution agreements in the US. In short, this can be described as marked by the "eventual disappearance of the per se rule".⁵⁵ The US Supreme

⁵¹ Six year after the Commission released a statement, emphasizing that primary focus during the first ten years of Community competition policy was on restraints which jeopardized the unity of the Common Market, see the Commission Report on Competition Policy, 2 CCH CoMm. MKT. REP. 9507 (1972). This is why most of the cases during this period involved vertical agreements and clauses involving some kind of territorial protection.

⁵² Some examples are: the applicants' and defendants' detailed discussion -both in the context of art. 101(1) and (3) TFEU- on whether after service and guarantees could only be provided in the presence of absolute territorial protection agreements: *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0886 cit., Doc 1, *Dossier 1*, 58; *Ibid.* Doc 15, *Dossier 1*, 72-73; *Ibid.* Doc 7, *Dossier 1*, 54-55; *Ibid.* Doc 7, *Dossier 2*, 105 ff. (i.e. the main filings and replies of the parties). Another example is *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0888 cit. Doc 13, *Dossier 2*, 19 where UNEF argued comprehensively that the system of advance orders was not necessary for the better distribution of goods as evidenced by Grundig wholesalers inside of Germany. Cf. however Consten's answer to that argument in *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0888 cit., Doc 20, *Dossier 3*, 9-10.

⁵³ KW Dam, 'Exclusive Distributorships in the United States and the European Economic Community' (1971) *The Antitrust Bulletin* 111, 117; A Andrie, 'Evidence before the European Court of Justice, with Special Reference to the Grundig/Consten Decision' (1968) *CMLRev* 35, 48.

⁵⁴ DJ Gerber, 'The Transformation of European Community Competition Law' (1994) *HarvInt'l LJ* 96, 108.

⁵⁵ S Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Hart 2010) 76.

Court was in general more positively predisposed to vertical distribution agreements. The first case where this uncertainty as to the *per se* illegality of vertical restraints was mentioned was *White Motor Co v US*, which, interestingly, is also mentioned by the Advocate General and the applicant parties in their submissions.⁵⁶ Nevertheless, under the subsequent *United States v Arnold, Schwinn and Co.* a distributor agreement for imposition of absolute territorial restrictions was declared *per se* illegal.⁵⁷ This case essentially overturned *White Motor Co* for a brief time and is reminiscent of *Consten and Grundig*. Yet the Supreme Court's hard line against exclusive agreements with territorial protection did not survive the changes in antitrust law under the influence of the Chicago School and was repudiated shortly after. Furthermore, the reason that the Supreme Court adopted this stance had nothing to do with market integration. Indeed, the case that overruled this rule was *Sylvania*, with the Court ruling that non-price restraints on distributors can improve economic efficiency.⁵⁸ Thus, a less formalistic and more economic approach can be imagined under EU law too in view of the US developments. The Court however did not comment directly on the material on US law in its judgment. It only included a reference to this line on argumentation *in passim* on the section that outlines the submissions of the parties.⁵⁹ This section, which used to precede the operative part and the grounds of the decision itself in earlier judgements of the CJEU, is merely copied *verbatim* from the judge rapporteur's report.⁶⁰ The fact that the Court abstained from commenting reinforces the point made above concerning the conscious shaping of EU competition law by the Court: the framework of US antitrust was simply not appropriate in view of the integrationist goal of the Court.

In Europe the crucial element that led to the divergence is the market integration objective pursued by the Treaty.⁶¹ However, potentially the Court could have chosen to

⁵⁶ Though most scholarship accurately point out that the *per se* rule works quite differently compared to art. 101 TFEU as a whole, see R Whish and D Bailey, *Competition Law*, cit. 127. This point was also made by the Commission in the present case see *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0887 cit., Doc 7, *Dossier 2*, 85.

⁵⁷ US Supreme Court judgment of 12 June 1967 *United States v Arnold, Schwinn & Co.* 1967 [U.S.]. Schwinn was cited by the Commission in support of its arguments, *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0887 cit., Doc 7, *Dossier 2*, 85.

⁵⁸ US Supreme Court judgment of 23 June 1977 *Continental T.V., Inc. v GTE Sylvania, Inc.* 1977 [U.S.]. This process culminated in case *Leegin Creative Products* where the Court went as far as to pronounce that interbrand competition was the goal of the Sherman Act. See US Supreme Court judgment of 28 June 2007 *Leegin Creative Leather Products, Inc. v PSKS, Inc.* 2007 [U.S.].

⁵⁹ *Consten and Grundig* cit. para. 327.

⁶⁰ Can be found in *Dossier de Procédure Original Consten Grundig*, HAEU CJEU-0889 cit., Doc 8, *Dossier 4*, 197.

⁶¹ S Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* cit. 4. One reason for viewing vertical integration preferably could have conceivably been the wish of early European policy makers of creating large "European champions". See e.g., H Buch-Hansena and A Wigger, 'Revisiting 50 Years of Market-Making: The Neoliberal Transformation of European Competition

reconcile economic efficiency and market integration relating to vertical agreements in a different manner. The path it could have chosen would have reflected the specific circumstances of the case before it. Instead of conceding a wide margin of appreciation to the Commission, the Court could have chosen to at least look into its economic context in order to ascertain whether it really constitutes a restraint of competition.⁶² Considering export bans of this kind as an effects-based violation would have been one solution, albeit one vastly different from the Court's own. An alternative solution, closer to the CJEU's integrationist approach, would have been to allow for more leeway for possible justification of similar agreements in terms of art. 101(3) TFEU, especially in cases where competition between products of different manufacturers is promoted and a practice can encourage market integration in regards to interbrand competition, as the applicants suggested themselves.⁶³ After all, even the Commission has gradually detached itself from its earlier interventionist policy, moving towards an acceptance that consumer welfare should be the benchmark against which agreements are tested.⁶⁴

V. CONCLUSION

In *Consten and Grundig*, the Court reached a remarkable conclusion, the impact of which continues to be felt today.⁶⁵ By promoting the single market objective over and beyond economic efficiency concerns, the Court affirmed its peculiar role as the Court of Justice of a supranational organisation with specific goals and objectives.⁶⁶ In later cases the market integration objective has been both affirmed and refined.⁶⁷ The *dossier* can help explain how this line of case law was formed. The Court followed a *sui generis* approach which does not focus exclusively on the specific economic and legal context of which an individual agreement is part. On the other hand, the Advocate General's arguments (and those of the applicants) also remain influential. The Court could have placed more emphasis on economic considerations and underlined the importance of undertaking a

Policy' (2010) Review of International Political Economy 20, 28. It must be underlined however that this is only a hypothesis and more research is needed in order to support it.

⁶² See the classic critique of the European approach in BE Hawk, 'System Failure; Vertical Restraints and EC Competition Law' (1995) CMLRev 973.

⁶³ See Regulation 67/67 cit. that provides exceptions that could apply to such cases. See also the discussion about the possibility of excluding temporary territorial protection from the scope of the *Consten and Grundig* decision in E Steindorff and K Hopt, 'European Economic Community' cit.

⁶⁴ However, see P Ibáñez Colomo, 'Article 101 TFEU and Market Integration' cit. 756: "While the enforcement of Article 101(1) TFEU to vertical restraints has undergone a substantial transformation, the Commission has not changed its views on the treatment of agreements aimed at partitioning national markets".

⁶⁵ *Ibid. passim.*

⁶⁶ See the subsequent cases: joined cases 100/80 to 103/80 *Musique Diffusion française v Commission* ECLI:EU:C:1983:158.

⁶⁷ Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* ECLI:EU:C:2009:610.

comprehensive assessment of the economic impact of agreements. This stance reflects modern thought on vertical restraints and their impact on consumer welfare, especially in US law. It also seems to be more compatible with the more economic approach adopted by the Commission itself since the nineties.⁶⁸ Ultimately, it is not the aim of this *Article* to weigh in on this debate. What can be said though is that one look in the *dossier* reveals exactly how even at the time of the founding of the European project the choice of the Court was contentious, and how forcefully the applicants defended their right for the case to at least be reviewed under a more economic approach.

⁶⁸ G Monti, *EC Competition Law* cit. 364: "The reasoning in *Consten and Grundig* is unlikely to be repeated by the Commission".

ANNEX

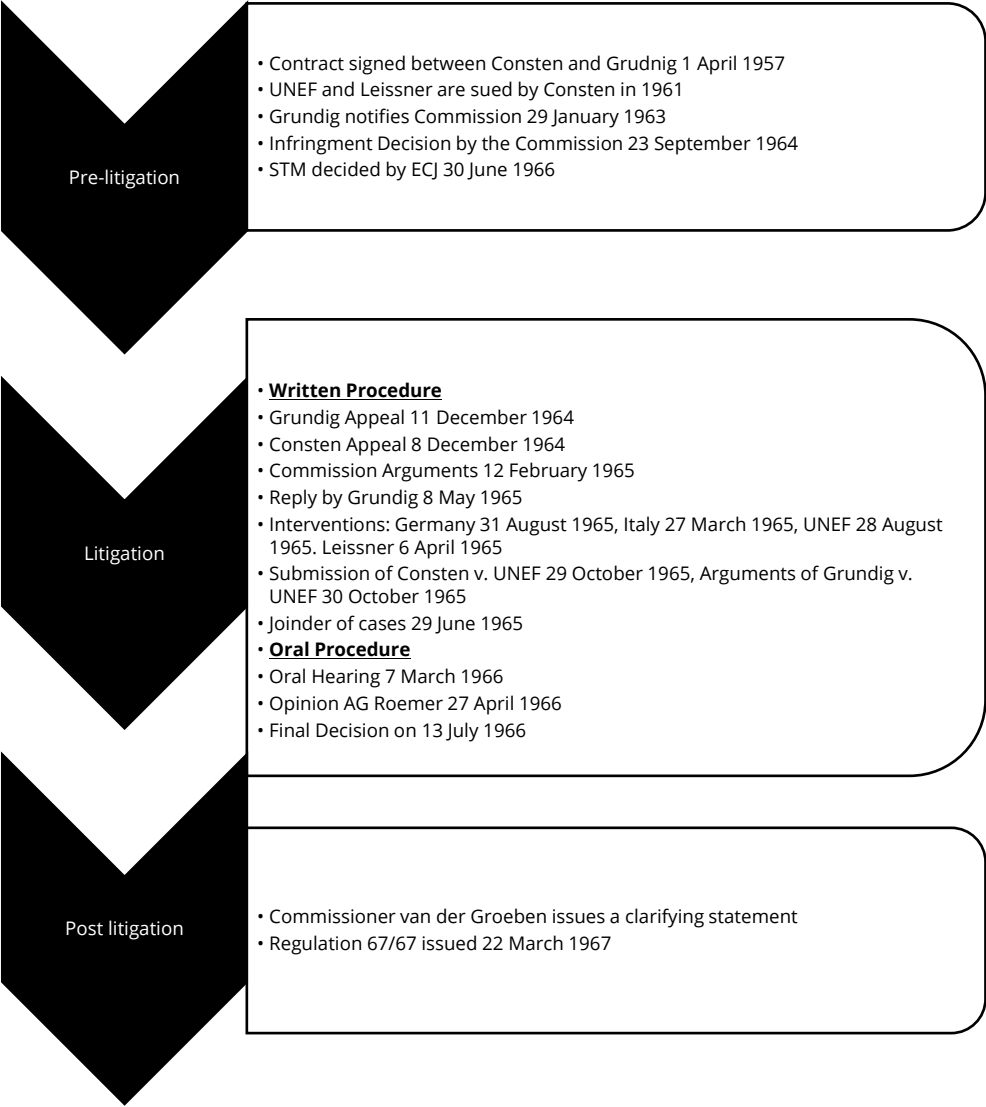


FIGURE 1. Timeline of the case.

Position of Actors	Application of art. 101(1) TFEU to Vertical Restraints	Effect on Trade	The Object / Effect Distinction	Art. 101(3) TFEU	Severability of Provisions of Treaty	Arguments on Market integration as the objective of art. 101 TFEU
Grundig	Not Applicable	No	Yes	Applicable	Yes	Rejected
Consten	?	?	NM	Applicable	Yes	NM
Commission	Applicable	Yes	Yes	Not Applicable	No	Yes
Leissner	Applicable	Yes	Yes	Not Applicable	NM	Yes
UNEF	Applicable	Yes	Yes	Not Applicable	NM	Yes
Italy	Not Applicable	NM	NM	Applicable	Yes	NM
Germany	Not Applicable	NM	Yes	Applicable	Yes	Yes, but ultimately rejected
Advocate General	Applicable	Yes	Yes	Applicable	Yes	Rejected
The Court	Applicable	Yes	Yes	Not Applicable	Yes	Yes

* NM stands for Not Mentioned

FIGURE 2. Actors and main arguments.



ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF THE CJEU – FIRST PART

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ERTA AND US: SHIFTING CONSTITUTIONAL *EQUILIBRIA* ON THE VISIONS OF EUROPE

ALESSANDRO PETTI*

TABLE OF CONTENTS: I. Introduction. – II. A constitutional moment: admissibility subordinated to competence. – III. The tension between the institutional and the organic visions of Europe: the nature of the contested act. – IV. *ERTA* and us: contested equilibria between the two visions of Europe? – V. Concluding remarks.

ABSTRACT: The *ERTA* case marks the constitutional inception of EU external relations. It laid the foundations for the legal framework governing the exercise of the EU's external competences and is often associated with the development of the doctrine of implied powers. The main tenets of the Court's pronouncement continue to define the fabric of the EU's external action. As the first Commission v Council litigation, *ERTA* encapsulates a still perceivable tension between two visions of Europe. One emphasises the autonomy of the EU institutional framework, the other regards the EU institutions as common organs in the hands of the Member States. *ERTA's dossier de procédure* constitutes a unique laboratory to assess the development of the EU as a legal order and an international actor. Its precious documents offer new sources to appreciate the abovementioned tension and unravel the shifting constitutional equilibria emerging from the interplay between EU and Member States treaty-making powers. Building on the archival research, this *Article* reflects on the inner working of the Court's judicial strategy. It seeks to shed novel light on the genealogy of the fascinating debate on the constitutional underpinnings of EU external relations.

KEYWORDS: legal nature of the Council decisions – nature of the EU legal order – institutional and organic visions of Europe – sincere cooperation – *effet utile* – autonomy.

I. INTRODUCTION

It is difficult to overestimate the significance of the *ERTA* case for the development of EU external relations law. *ERTA* involved a dispute arising from the Member States' negotiations

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of the *European Agreement Concerning the Work of Crews of Vehicles Engaged in International Road Transport (ERTA)*. Negotiations continued also after the adoption of Community Regulation 543/69 on harmonisation of social legislation relating to road transport¹ covering similar matters to those regulated by the international agreements. The Commission brought an action for annulment against the “proceedings” of the Council’s meeting relating to the negotiation and the conclusion by the Member States of the ERTA agreement. Indeed, notwithstanding that the subject matter of working conditions of crews employed in international road transport had been covered by Community rules, the Member States continued to negotiate the ERTA only with some concertation within the Council.

In *ERTA* the Court defined the constitutional underpinning of the EU external action. Departing from the advice of the Advocate General (AG), the Court established that the scope of the EU’s international capacity was not limited to expressly conferred competences. Indeed, it introduced the principle of parallelism between the Community’s internal and external powers: “With regard to the implementation of the provisions of the Treaty the system of internal Community measures may not therefore be separated from that of external relations”.²

Moreover, the Court sanctioned the existence of the Community external competence while simultaneously characterizing it as exclusive:³ “[...] each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules”.⁴

In its interpretation of the Treaty system, the Court largely followed the arguments of the Commission. It established, however, that in this specific case, the Council had not infringed its Community law obligations. The Court also found that the Member States, in carrying on the negotiations and concluding the agreement in the manner decided on by the Council, acted in accordance with their obligations under art. 5 [now art. 4(3) TEU] of the Treaty.⁵ The Commission thus lost the case.

II. A CONSTITUTIONAL MOMENT: ADMISSIBILITY SUBORDINATED TO COMPETENCE

The analysis of the *dossier* enables a different perspective on this landmark judgment bringing to the fore revealing elements of the Court’s judicial strategy. The *dossier* highlights the reticence of the Court in engaging with the submission of the Council on the

¹ Regulation (EEC) 543/69 of the Council of 25 March 1969 on the harmonisation of certain social legislation relating to road transport.

² Case 22/70 *Commission v Council (ERTA)* ECLI:EU:C:1971:32 para. 19.

³ P Eeckhout, *EU External Relations Law* (Oxford University Press 2012) 74.

⁴ *ERTA* cit. para. 17.

⁵ *Ibid.* para. 90.

ascertainment of the very nature (*nature propre*) of the Council's contested proceedings. The contested act, against which the Commission brought an action for annulment, pertained to the Member States' negotiation of the ERTA international agreement. The importance of the ascertainment of the nature of the act, which constituted a primary aspect of the Council's defence, does not sufficiently emerge from the reading of the judgment alone. As will be discussed in the next section, the ascertainment of the different nature attributed to the contested act entails entering into the debate on different visions of Europe. In this respect, the institutional disagreement arose regarding the relationship between the art. 173 EEC [263 TFEU] and art. 189 EEC [288 TFEU]. The Council contended that its proceedings of 20 March 1970 did not constitute an act within the meaning of art. 173 of the EEC Treaty, against which proceedings could be instituted.⁶ It posited a strict relation between art. 173 and 189 EEC. Neither on the basis of form nor content could the contested proceedings be considered a regulation, directive or decision within the meaning of art. 189. Therefore, the combined reading of arts 189 and 173 did not allow an action for annulment against the contested act.⁷

Interestingly, the Council contemplated the possibility of art. 173 EEC being broader in scope than art. 189 EEC hence admitting that actions of annulment could be brought against acts that are not envisaged in art. 189. In this case, however, the Council stressed the necessity to assess the very nature⁸ of the contested proceedings and whether they could be assimilated, on the basis of their legal tenor and effects, to regulations, directives, or decision or to recommendations and opinions. According to the Council if, as it claimed, the proceedings were to be found to have no legal effects, no action for annulment could be brought.⁹ Furthermore, the Council clarified that the proceedings were intended to express political approval of this agreement. The contested "act" thus merely represented the acknowledgment that the endeavours of the Member States to adopt a common position had a specific outcome.¹⁰

The Commission engaged in an analysis of the nature of the act under review, underlining the legal effects of the proceedings. It maintained that the Council did not confine itself to recognising the coordination existing between the Member States.¹¹ The deliber-

⁶ *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Council's objection for inadmissibility, 1; *Dossier de Procédure Original ERTA* HAEU CJUE-1171 cit., report of the oral hearing, 4; *ERTA* cit. 267 and para. 34.

⁷ *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Council's objection for inadmissibility cit. 8-10 and 12; *ERTA* cit. para. 35.

⁸ *Ibid.* 10 (*nature propre* in the original version).

⁹ *Ibid.* 9-12.

¹⁰ *Ibid.* 16-17; *ERTA* cit. 267 and para. 35.

¹¹ *Dossier de Procédure Original ERTA* HAEU CJUE-1171 cit., Council's application for annulment, 6; *Dossier de Procédure Original ERTA* HAEU CJUE-1171, report of the oral hearing cit. 8; *ERTA* cit. 268.

ations it adopted had at the very least to be regarded as amounting to approval. Moreover, actual directives on the negotiations were issued to the Member States.¹² As a matter of fact, the Council proceedings resulted in the lack of any Community involvement in the formulation and conclusion of the ERTA as the participation in this agreement was left to the Member States alone. Furthermore, as was clear from various passages of the Council's contested proceedings, the Member States accepted an ERTA treaty text which was incompatible with Regulation 543/69.¹³ The Commission also questioned the logic of the Council's arguments, highlighting two instances of *petitio principii*. First, the premise of the Council's argument was that the only purpose of its deliberation was to recognise the coordination between the States. The conclusion was that annulment of that deliberation would not affect the reality of such coordination.¹⁴ Secondly, it contested the reasoning according to which, since the Council was not competent to authorise the Member States to negotiate and conclude the ERTA, its act had no legal effect. This would have involved, paradoxically, that Community institutions could never initiate proceedings on the ground of lack of competence.¹⁵

Interestingly, the Court decided to subordinate the foregoing considerations on admissibility to the assessment of Community powers. The Court maintained that in order to ascertain the legal nature of the Council's proceedings, a preliminary assessment should be carried out on whether at the date of the proceedings, the power to conclude ERTA was vested in the Community or in the Member States. The Court therefore decided to tackle first the question on substance casting it in terms of powers and competences, and not in terms of the legal nature of the act. It thus left the issue of admissibility for a subsequent stage. These insights help to better appreciate the defining constitutional moment brought about by the Court's judicial strategy.

In powerful commentary on the *ERTA* judgment, McNaughton qualified the decision as a defining "foundation stone of the "new legal order of international law" referred to by the ECJ in its *Van Gen den Loos* decision". In domains covered by EU competence, "*ERTA* established the supremacy of EU law over Member States' law externally, in the same

¹² *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Commission's response to the objection of in-admissibility, 14-15; *Dossier de Procédure Original ERTA* HAEU CJUE-1171, report of the oral hearing cit. 7; *ERTA* cit. 268. Not explicitly referred to by the Court but relied upon in *ERTA* cit. para. 53.

¹³ *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Commission's response to the objection of in-admissibility cit. 16; *Dossier de Procédure Original ERTA* HAEU CJUE-1171, report of the oral hearing cit. 8; *ERTA* cit. 268. Not explicitly referred to by the Court but relied upon in *ERTA* cit. paras 54-55.

¹⁴ *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Commission's response to the objection of in-admissibility cit. 20-21; *Dossier de Procédure Original ERTA* HAEU CJUE-1171, report of the oral hearing cit. 9; *ERTA* cit. 268-269. Not explicitly referred to by the Court but endorsed in *ERTA*, cit. paras 60-61.

¹⁵ *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Commission's response to the objection of in-admissibility cit. 18-20; *Dossier de Procédure Original ERTA* HAEU CJUE-1171, report of the oral hearing cit. 8; *ERTA* cit. 268.

way that *Costa* established the supremacy of EU law over national law within the EU".¹⁶ It is indeed a distinct constitutional moment from *Costa* and *Van Gen den Loos* which is precisely characterised by the prominence of the competence discourse in the establishment of the EU as an international actor. The Court could have reached the same results by applying a rule of primacy.¹⁷ The judicial strategy on the subordination of the admissibility issue to that of substance reinforces this constitutional reading of *ERTA*.

Additional elements emerging from the *dossier's* analysis shed light on the Court's constitutional stance. In particular, the *dossier* reveals how the Court's elaboration of the principle of parallelism goes well beyond the submissions of the parties. The Council claimed that the Commission's thesis, according to which confining the scope of Community action to unilateral internal measures would have required a specific provision, amounted to a claim that the Community enjoys external powers whose scope reflects the scope of its internal powers. Instead, the Council claimed that it was apparent that there were subject matters that fell within the scope of the Treaty without entailing competence transfers for external affairs.¹⁸ The Commission, however, maintained that it had never argued the existence of a "parallelism between the Community's internal and external competences".¹⁹ Instead, it highlighted the need to rely on such general principles of interpretation of the Treaty as *effet utile* and the effectiveness and uniformity of Community law.²⁰

Moreover, the *dossier* illustrates that the Court introduced on its own initiative the principle of sincere cooperation in the appraisal of the circumstances of the case. Indeed, the principle was not mentioned in the submissions of the parties nor in the Opinion of the Advocate General. The use of the principle of sincere cooperation epitomises a typical attitude of the Court that has been defined as principled and pragmatic.²¹ In its principled reasoning, the Court referred to sincere cooperation to highlight the duties of Member States "to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions" and the duty "to abstain from any measure which may jeopardise the attainment of the objectives of the Treaty".²² Referring to the principle of sincere cooperation, the Court then pragmatically ruled that the Member States, following the instructions of the Council, had acted in conformity with art. 5 EEC and therefore the Council did not fail in its obligations arising from art. 75 and 228.²³

¹⁶ A McNaughton, 'Acts of Creation: The *ERTA* Decision as a Foundation Stone of the EU Legal System' in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 135.

¹⁷ P Eeckhout, 'Bold Constitutionalism and Beyond' in MP Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 219.

¹⁸ *Dossier de Procédure Original ERTA* HAEU CJUE-1171 cit., Council's submission of defence, 5.

¹⁹ *Dossier de Procédure Original ERTA* HAEU CJUE-1171 cit., Commission's reply to the Council's defence.

²⁰ *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Council's submission of defence cit. 5.

²¹ P Eeckhout, *EU External Relations Law* cit. 75.

²² *ERTA* cit. para. 21.

²³ *Ibid.* para. 91.

By deciding to address the issue of admissibility after its pronouncement on the substance of the dispute, the Court made a constitutional move. It defined the constitutional underpinnings of the EC external relations based on competences and more specifically on the parallelism between the exercise of internal and external competences. At the same time, it pragmatically mitigated this bold constitutional stance by stressing the principle of sincere cooperation to govern the articulation of Community and Member States' external powers.

III. THE TENSION BETWEEN THE INSTITUTIONAL AND THE ORGANIC VISIONS OF EUROPE: THE NATURE OF THE CONTESTED ACT

The foregoing considerations do not give justice to the reasons behind the Court's reticence in addressing the issue of admissibility; this requires closer scrutiny of the legal nature of the Council's proceedings. It is worth highlighting that *ERTA* was the first instance of a judicial dispute arising between the Commission and the Council before the European Court of Justice. The Advocate General himself underlined the "unusual and exceptional nature" of the dispute bringing the two most prominent institutions of the European Community (at that time) against each other.²⁴ (Since then, of course, this has become a familiar feature of external relations litigation.) A closer look at the submissions of the Council and the Commission reveal how they encapsulate two different visions of Europe. On the one hand, the Council seemed to embrace an organic vision of the Community, premised on the assumption that the Community institutions could be considered as organs in the hands of the Member States. On the other hand, the Commission, largely followed by the Court, promoted an institutional vision of the Community stressing the autonomy and the distinctiveness of the Community legal framework.²⁵

These two visions of Europe resulting from the various submissions of the parties available in the *dossier* help to better understand the crucial considerations introduced by the Advocate General. AG Dutheillet de Lamothe invited the Court to answer the question of whether the contested deliberation of the Council could be considered an act of an institution of the Community. This would be the case if the negotiation of the *ERTA* fell within the scope of one of the Treaty articles relating to the Community external authority. Only under these circumstances could the application be considered as admissible. In the latter case, instead, the contested proceedings should be considered not as an "act of a Community authority but of the Council as unifying agency of the Member States [*comme organe de la collectivité des États membres*]"'.²⁶

²⁴ Case 22/70 *Commission v Council (ERTA)* cit., opinion of AG Dutheillet de Lamothe 284.

²⁵ For a reflection on the tension between the organic and institutional visions of the EU see L Azoulai, 'The Many Visions of Europe' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014).

²⁶ *ERTA*, opinion of AG Dutheillet de Lamothe, cit. para. 289.

The dispute about the nature of the act, not adequately accounted for in the publicly available materials, and about the admissibility of the action for annulment displays its significance if put against the background of the lively academic discussions taking place during the years immediately preceding the delivery of the *ERTA* judgment. In this respect, it is worth reviewing the scholarly works of the *juge rapporteur*, a function that is described as that of “a key figure in the process of deliberation”.²⁷ In *ERTA*, the *juge rapporteur* was Pierre Pescatore, who, in his lifetime, served as director of political affairs at the Luxembourg ministry of foreign affairs, as professor of law and judge. He thus played a crucial role in shaping the drafting of legal norms in European negotiations, the doctrinal conceptualisation of the law of European integration.²⁸

In 1966, he authored an inspiring contribution entitled *Remarques sur la nature juridique des “décisions des représentants des états membres réunis au sein du Conseil”*.²⁹ Here, he pointed out that the Council, in some circumstances, does not act as a Community institution in the strict sense (*une institution proprement communautaire*) but as a diplomatic venue of the representatives of the Member States (*reunion diplomatique des Représentant des Etats membres*). In these circumstances, he noticed, the acts of the Council would not be part of the system of the acts emanating from the institutions. In fact, although these acts rely upon the *structure organique* created by the Treaty, they do not derive their legal force from Community competence but from the international competence of the Member States.³⁰ Pescatore *qua* judge, instead, preferred not to dwell on the relationship between the international law actions of the Member States and Community acts. The Court’s pronouncement is indeed silent on this issue. In light of Pescatore’s previous scholarly work on the *nature juridique des décisions*, judge Pescatore, and the Court, could have interpreted the contested proceedings as being of an international law nature and originating from the international law powers of the Member States acting within the Council.

In the judgment no mention is made of this tension and of its implications. Such a reticence is striking if one takes into account that this issue is a salient feature in the various submissions of the Council accessible in the *dossier*. There appears therefore to be a remarkable restraint on the part of the Court originating from the Judge’s report where the Council’s request to the Court to investigate the *nature propre* of the act was

²⁷ A Arnall, *The European Union and Its Court of Justice* (Oxford University Press 2006) 9.

²⁸ Monumental his P Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (Sijthoff 1974).

²⁹ P Pescatore, ‘Remarques sur la nature juridique des ‘décisions des représentants des Etats Membres réunis au sein du Conseil’ (1966) Sociaal-economische wetgeving 582.

³⁰ Il s’agit d’actes à caractère diplomatique (ou international), complémentaires à la fois des traités eux-mêmes et du système d’actes institutionnels que ceux-ci ont mis en place; bien que ces “décisions” s’appuyent sur la structure organique créée par les traités européens, ils ne sont pas, pour autant, couverts formellement par les attributions de pouvoir prévues par ces traités. Ces actes relèvent non pas de la compétence communautaire, mais bien plutôt de la compétence internationale des états membres. P Pescatore, ‘Remarques sur la nature juridique’ cit. 579–580.

left in the background. Arguably, a subsequent scholarly work by Pescatore helps to make sense of this Court's prudent attitude in addressing matters of international law. He explained that reliance on criteria and arguments deriving from international law could lead to a "disintegration" of the Community legal order by introducing into the Community "trojan horses loaded with such thoughts".³¹

As convincingly highlighted by German scholarship reflecting on the work of the prominent Luxembourgish judge and scholar, this "introversion of the legal argument" – or economy of judicial reasoning – amounted to a strategy of judicial restraint aimed at marking the distinction between international law and Community law.³² Along these lines, Pescatore stressed that the Court wanted to react against a contractual conception of the Community intended as a "common organ"³³ serving the need to represent determined interests of a group of Member States.³⁴ The Court wished to promote, instead, an institutional vision of the Community giving prominence to its autonomy and distinctiveness especially in the external relations domain.³⁵ However, as the next section shows, the oscillation between the principled embracing of the institutional vision and the pragmatic choice for the organic vision brought uncertainties in the development of the EU legal order.

In light of the foregoing, one may wonder when the juxtaposition of the two visions of Europe originated. Although it is rather hard to find a definitive answer to this question, it should be noticed how the original French version of the judgment refers to the *cadre*

³¹ "Diese Zurückhaltung hat mancherlei Gründe, von denen der eindeutigste wohl in der Sorge besteht, das Gemeinschaftsrecht durch Einführung völkerrechtlicher Wertmaßstäbe nicht desintegrieren zu lassen. [...] Daraus geht nämlich hervor, daß Dinge wie: formlose Änderung und Aufhebung der Verträge, Außerkraftsetzung des Gemeinschaftsrechts durch widersprechende staatliche Gesetze und, in *gravierenden Konfliktsituationen* der Vorrang der staatlichen Macht vor dem Recht im Völkerrecht immerhin erwägenswerte Fragen sind. Wenn solche Denkweisen, in der Tat für völkerrechtliche Argumentation repräsentativ sind, muß man verstehen, daß der Gerichtshof es vermeidet, ein mit solchen Ideen befrachtetes trojanisches Pferd in das Gemeinschaftsrecht einzuführen" (emphasis added): P Pescatore, 'Die Rechtsprechung des Europäischen Gerichtshofs zur innergemeinschaftlichen Wirkung völkerrechtlicher Abkommen' in R Bernhardt, WK Geck, G Jaenicke and H Steinberg (eds), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte. Festschrift für Hermann Mosler* (Springer-Verlag 1983) 663 footnote 5.

³² D Thym, 'Foreign Affairs' in A Von Bogdandy and J Bast, *Principles of European Constitutional Law* (Hart Publishing 2010) 320-321. See also M Kottmann, *Introvertierte Rechtsgemeinschaft: Zur Richterlichen Kontrolle Des Auswärtigen Handelns Der Europäischen Union* (Springer-Verlag 2014).

³³ See the AG in *ERTA* referring repeatedly to the possibility identifying the Council as an "organe de la Communauté".

³⁴ See for instance, P Pescatore, 'Some Thoughts on the Allocation of Power in the External Relations Field' in A Bleckmann, *Division of Powers Between the European Communities and Their Member States in the Field of External Relations: Colloquium, 30 and 31 May 1980* (Kluwer 1981) 75; P Pescatore, 'Les Communautés en tant que personnes de droit international' in JW Ganshof van der Meersch, *Les Nouvelles: droit des Communautés européennes* (Larcier 1969) 113.

³⁵ L Azoulai, 'Appartenir à l'Union européenne. Liens institutionnels et relations de confiance entre Etats membres de l'Union' in C Mestre (ed), *Europe(s), droit(s) européen(s): une passion d'universitaire: Liber amicorum en l'honneur du professeur Vlad Constantinesco* (Bruylant 2015) 33.

des institutions communes that is different in meaning from the official English translation reading "framework of Community institutions"; with the latter being legally sounder.³⁶ Azoulai contends that the ambiguity of the original version might be considered deliberate. Indeed, the Court "borrow[ed] and slightly alter[ed] an expression used in competing theories [those considering the institutions as "common organs"³⁷ in the hands of the Member States] in order to underline the difference with its own position".³⁸

IV. ERTA AND US: CONTESTED EQUILIBRIA BETWEEN THE TWO VISIONS OF EUROPE

The foregoing reflection emphasizes that the legacy of the *ERTA* case is not limited to introducing the competence discourse in the EU external relations law. The submission of the parties available in the *dossier* allows us to capture broader issues of the debate on the nature of the EU legal order that go beyond the traditional competence-based analysis of the case. Indeed, a related process of constitutionalisation occurred, aimed at shielding the specific characteristics of EU law from international law elements in the EU decision-making process that may result from the intrinsic composition of the Council and from the international law powers resting with the Member States. However, establishing an equilibrium between the principled constitutional attempt and the Member States' international prerogatives finds no easy solutions.

The Court's reasoning in *ERTA* displays an oscillation between the institutional and the organic vision of the Community. Indeed, the Court embraced two different conception of the Community at the same time. This is particularly evident from the Court's findings of the exclusivity of the Community competences where two visions of the *effet utile* of Community law are contemplated and simultaneously endorsed. According to the Commission, conceding that Member States still enjoyed external powers in the domains covered by Community law would open the road to material conflicts between the Community rules and the rules originating from *ERTA*. In the Council's view, instead, the Member States' concerted action in close association with the Community institutions was adequate to preserve the *effet utile* of Community law.³⁹

The Court's attitude in this case fostered a compromise between the parties' stances more than contributing to the overall coherence of its findings. When establishing that the Member States had not infringed the Treaty provisions in the specific case, the Court seemed to embrace, for reasons of pragmatism, the organic vision of the Community put

³⁶ L Azoulai, 'The Many Visions of Europe' cit. 173.

³⁷ D Anzilotti, 'Gli organi comuni nelle società di Stati' (1914) RivDirInt 605. Here Anzilotti engaged in a debate with Fusinato on the legal nature of the International Institute of Agriculture. See more recently: C Santulli, 'Retour à la théorie de l'organe commun' (2012) RGDI 565.

³⁸ L Azoulai, 'The Many Visions of Europe' cit. 174.

³⁹ See *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Council's submission of defence cit. 6; *Dossier de Procédure Original ERTA* HAEU CJUE-1171, report of the oral hearing cit. 13.

forward by the Council. When it defined in principle the existence and exclusivity of the Community external powers, it embraced the institutional vision, thus also endorsing the Commission's view.

It is perhaps due to this ambiguous oscillation between principles and pragmatism that some of the issues raised in *ERTA* continue to be subject to contestation. Certainly, the exceptions to the institutional conception of the EU upheld by the Court are not numerous. They exist primarily when the EU institutions were used to coordinate and oversee funds stemming from the financial capacity of the Member States.⁴⁰

The contested equilibria between the two visions of Europe emerging from the study of the *ERTA dossier* continue to inform the contemporary case law. The contestation of the nature of the act in *ERTA* could be interpreted as a manifestation of a debate of a deeper essence of the Union as a legal order oscillating between the institutional and organic visions of Europe, a debate that is still a live one. Indeed, in the *Air Transport Agreement* case,⁴¹ the Commission brought an action for annulment against a Council "hybrid" decision on the signature of an agreement on the accession of Norway and Iceland to the EU-US Open Sky Agreement. The contested act was adopted by the Council and the "Representatives of the Member States meeting in the Council". The Commission claimed that the Council had infringed the procedural rules for the signature and conclusion of international agreements, namely art. 218 TFEU (similarly to what the Commission held in *ERTA* for the then art. 228 EEC) and that the infringement of those rules amounted to a violation of the principle of sincere cooperation.

As was the case in *ERTA*, the Council also questioned the admissibility of the action relying on the fact that the contested act was not to be considered an act having legal effects and that it was not an act of the Council against which an action for annulment might be brought in pursuance to art. 263 TFEU (in *ERTA* 173 EEC). The Court resolved the dispute largely along the lines suggested by Advocate General Mengozzi to annul the decision at issue.⁴² The AG had argued that the "merger" of EU and intergovernmental channels could constitute "a dangerous precedent of contamination of the autonomous decision-making process of the institutions that is liable, therefore, to cause damage to the autonomy of the EU as a specific legal system".⁴³ This stance impressively recalls Pescatore's scholarly work on the caution towards international law arguments introduced into the EU legal system capable of becoming trojan horses and the oscillation between organic and institutional visions of the EU.

⁴⁰ See for instance joined cases C-181/91 and C-248/91 *Parliament v Council and Commission (Bangladesh)* ECLI:EU:C:1993:271; case C-316/91 *Parliament v Council (Lomé)* ECLI:EU:C:1994:76; case C-370/12 *Thomas Pringle v Government of Ireland and Others* ECLI:EU:C:2012:756.

⁴¹ Case C-28/12 *Commission v Council* ECLI:EU:C:2015:282.

⁴² *Ibid.* para. 49.

⁴³ *Commission v Council* cit., opinion of AG Mengozzi, para. 80.

The complexity of the EU's external action continues to display a certain ambiguity when it comes to the joint exercise of EU and Member States powers in politically sensitive domains. This occurs, for instance, in the case of the EU-Turkey Statement on the Syrian refugee crisis. Here, along similar lines of the admissibility dispute in *ERTA*, the very legal nature of the statement as an act that could be subject to judicial review under art. 263 TFEU was contested. The Court found that the statement, published by means of a press release was adopted by the Heads of State and Government of the members of the European Union in their international law capacity and not by the European Council acting as a European Institution.⁴⁴ Again we find support for an organic vision of Europe whereby the Council, or the European Council are considered more as a unifying agency in the hands of the Member States than the institutions of the EU. This vision has been recently endorsed in the context of the review of the decision for nominating the members of the EU Courts. Indeed, the act of appointment of a EU judge is considered as "adopted by representatives of the Member States, acting not in their capacity as members of the Council of the European Union or of the European Council but as representatives of their governments" and thus not subject to judicial review by the EU Courts.⁴⁵

V. CONCLUDING REMARKS

The study of the *ERTA dossier* brings a novel perspective in the analysis of the underlying tensions between the EU actions and the exercise of Member States powers. It offers new prisms of analyses to assess the shifting equilibria between different conceptions of Europe that are of particular relevance today in times of contestation of the constitutional tenets of the Union and its integration project. In particular, the study of the submissions of the parties available in the *dossier* allows us to make sense of an articulated institutional litigation revolving around the nature of the acts of the institutions that can be regarded as a proxy for the debate on the nature of the EU as a legal order. These findings hence broaden the perspective on the traditional accounts of the *ERTA* judgment focusing prominently on competences.

The *Article* has showed how the balance between principle and pragmatism is a manifestation of an equilibrium of a deeper essence, that of the tensions between two visions of Europe that characterises the development of the EU still today. In the constitutional maturity of the EU, while the Court promotes the institutional vision through a consistent emphasis on procedural rules, the organic vision of the EU sporadically emerges in politically sensitive issues or more generally when the EU's genetic and operational dependence on the powers of the Member States challenges the autonomy of the EU legal order.

⁴⁴ Case T-192/16 *NF v European Council* ECLI:EU:T:2017:128 para. 69.

⁴⁵ Case T-550/20 *Sharpston v Council* ECLI:EU:T:2020:475 para. 34. I am grateful to Marise Cremona for signalling this point to me.



ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF THE CJEU – FIRST PART

edited by Marise Cremona, Claire Kilpatrick and Joanne Scott

PROCUREUR DU ROI V DASSONVILLE: THE JUDICIAL *DOSSIER* BEHIND THE MEASURE EQUIVALENT TO TRADE RESTRICTION *FORMULA*

JUSTINE MULLER*

TABLE OF CONTENTS: I. Introduction. – II. The hidden sources in written observations: *Dassonville* and the EEC's definition of MEEQR. – II.1. New sources revealed. – II.2. MEEQR as an ongoing discussion in EEC institutions. – III. Behind the CJEU *formula*, the story of wholesalers and the technicity of trade regulations. – III.1. The unseen critics: personal attacks and blame on the neighbour. – III.2. Technicity of MEEQR, the importance of evidence in the procedural *dossier*. – IV. Conclusion.

ABSTRACT: In 1974 the Court of Justice of the European Union (CJEU) stated that measures having an effect equivalent to quantitative restrictions were prohibited. The famous *Dassonville formula* is known and repeated by judges and students alike. The release by the CJEU of the *dossier de procédure* provides however a new take on the story that led to one of its most notable decisions. The discovery of new arguments, sources and evidence offers valuable insights into the parties' interests and goals. Behind the *formula*, technical and personal arguments are hidden. The *dossier* puts the *Dassonville* case back in its context. This context reveals how the definition of measure having equivalent effect to quantitative restrictions was an ongoing subject in all the institutions of European Economic Community. The *dossier* thus extends understanding of the *Dassonville* case and sheds light on the circumstances that led to the famous *formula* that was elaborated therein.

KEYWORDS: European Court of Justice – trade – measure equivalent – archive – procedure – single market.

I. INTRODUCTION

Dassonville is considered a landmark case in EU law. It is known for its definition of measures having equivalent effect to quantitative restriction (MEEQR). In the then European Economic Community (EEC), and today European Union's single market, quantitative

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restrictions to trade are forbidden by art. 30 of the Treaty of Rome (EEC Treaty) (currently art. 34 TFEU).¹ It reads: “quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”. Measures that are not restrictions to trade *per se* but create the same effect are considered equivalent and prohibited in the same way. *Dassonville* is the first key case of the Court of Justice of the European Union (CJEU) to deal with this question of MEEQR. The Court adopted a broad view and opened the path for other landmark cases such as *Cassis de Dijon* in 1979.² *Dassonville* is said to be the most important judgement ever decided on the EEC internal market.³

In 1970 Dassonville (or to be precise, father and son Benoît and Gustave Dassonville) imported Scotch whisky into Belgium after purchasing it from French importers. With a view to the whisky being sold in Belgium, the French wholesalers affixed “British Customs Certificate of Origin” labels on the bottles. This label was not however considered a certificate of origin by the Belgian authorities and thus did not properly satisfy the objective of the Royal Decree n. 57. The Public Prosecutor instituted proceedings against Dassonville for forgery with fraudulent intent. Fourcroy and Breuval, which were the exclusive importers and distributors of the two specific brands of whisky into Belgium, brought a civil claim in parallel to the criminal case. By judgment of 11 January 1974, the Belgian court referred to the CJEU with two questions pursuant to the preliminary reference procedure.⁴

At the time of the decision, the EEC was pursuing its integration objective. For Commissioner Spinelli the European Union was “still in its infancy”.⁵ Globally the EEC was facing two crises: a monetary crisis and an oil crisis that started in 1973, a year before the decision. These events stimulated talks about the Economic and Monetary Union but also seemed to have convinced Heads of States that a common political will on foreign affairs was needed.⁶ This was thus a time of constructing what was subsequently to become the European Union. Concomitantly, the EEC was expanding. Negotiations on accession started with Denmark, Ireland, Norway and the United Kingdom in 1970. Three of them, including the UK, joined the EEC in 1973. This means that the facts of the *Dassonville* case, which occurred in 1970, took place when the UK was still a third country to the EEC. Moreover, the decision was taken at the end of a transitional period. The Treaty of Rome, establishing the Common Market, provided for a transitional period of twelve years.⁷ Many articles of the Treaty were thus just starting to be enforced, including art. 30, which is interpreted in the *Dassonville* case.

¹ Art. 30 of the Treaty establishing the European Economic Community.

² P. Graig and G. de Búrca, *EU Law, Text, Cases and Materials* (Oxford University Press 2015).

³ M. Derlén and J. Lindholm, ‘Goodbye *van Gend en Loos*, Hello *Bosman*? Using Network Analysis to Measure the Importance of Individual CJEU Judgments’ (2014) ELJ 667.

⁴ Belgian 1st instance Court judgement of 11 January 1974, n. 370.

⁵ W. F. Vanthoor, *A Chronological History of the European Union. 1946-2001* (Edward Elgar 2002).

⁶ *Ibid.*

⁷ Art. 8 of EEC Treaty cit.

The famous *Dassonville formula* is well-known and repeated by judges and students alike. However, the release by the CJEU of the *dossier de procédure* provides a new take on the story that led to one of its most notable decisions. Reading through the *dossier* two striking elements are unearthed. First, the parties' written observations extend the understanding of legal arguments that were only summarized in the Court's decision (see II). A comprehensive examination of parties' legal sources shed light on the context of the *Dassonville* case and place the *formula* into an ongoing discussion on MEEQR. Second, the *dossier* reveals the prominent place of facts and evidence (see III).

II. THE HIDDEN SOURCES IN WRITTEN OBSERVATIONS: *DASSONVILLE* AND THE EEC'S DEFINITION OF MEEQR

The central elements in the *dossier* are the written observations. The basis for the parties' arguments are presented in full which provides the reader with a thorough understanding of their reasoning. The written observations also bring to light the various sources underpinning the parties' legal arguments, many of which were not identified in the CJEU decision (see II.1). These newly found sources place the *Dassonville* case back in the context of the construction of the internal market when the definition of MEEQRs was the subject of discussion amongst all EEC institutions (see II.2).

II.1. NEW SOURCES REVEALED

The *dossier* reveals the importance of international law as a reference for the parties' legal reasoning. Some of these sources are mentioned in the CJEU decision and some were discarded. To give examples, Fourcroy and Breuval mentioned an agreement between France and Germany to support their argument that refusing products because they do not have certificate of origin is a widespread practice.⁸ The Commission used an Organisation for Economic Co-operation and Development (OECD) code as well as the General Agreement on Tariffs and Trade (GATT) to give its definition of a quantitative restriction.⁹ The GATT, and in particular its art. III.1, is also put forward as part of the context in which art. 30 and subsequent arts concerning the free movement of goods should be interpreted. For the Commission, the authors of the EEC treaty had the GATT in mind whilst drafting the Treaty and the same approach to states' freedom to regulate must be taken by the Court.¹⁰ Another indication that international law played a significant role in the participating parties' argumentations is the importance of the Paris Convention on intellectual property.¹¹ Cited by all the parties arguing for the legality of the Belgian regulation,

⁸ Agreement between France and Germany of the 8th March 1960, art. 6/2 in *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Fourcroy and Breuval written observations 10.

⁹ *Dossier de Procédure Original Dassonville*, HAEU CJUE-1553 cit. Commission written observations 7.

¹⁰ *Ibid.* 11.

¹¹ Paris Convention for the Protection of Industrial property of 20 March 1883.

the full text of the Paris Convention is present in the *dossier* (see Annex VII of the UK's written observation). This convention is 60 pages long, which makes this document the longest included of the *dossier*. It is followed, in terms of length, by an annex containing Dassonville's written observation which includes 45 pages setting out the legislation of different European countries on proof of origin and examples of certificates. International or comparative law thus played an important role for both sides in substantiating their reasoning.

Specific types of sources used in several written observations are totally absent from the CJEU decision. Both Fourcroy and Breuval¹² and the Commission used legal literature to substantiate their arguments. For instance, Fourcroy and Breuval¹³ referred to Ulmer. The Commission referred to Ulmer twice.¹⁴ The Commission also referred to other legal and economic articles as evidence that their preferred meaning of MEEQR was well-established.¹⁵ The Commission also engaged with the literature on the question of the unlimited power of Member States to regulate trade if the measures are applied indiscriminately to domestic and imported products. The Commission presented and criticised Ver Loren van Themaat's approach on this question.¹⁶ From this, the Commission representatives developed their legal reasoning, based principally on the French notion of *abus de droit*. Only the last few sentences of this paragraph appear in the Court's Decision. The *dossier* here makes possible a more comprehensive understanding of the Commission's reasoning and legal grounds.

Work from the Commission is also cited in two written observations. The Commission refers to its own previous work on MEEQR and notably its written observations in the *International Fruit Company* case.¹⁷ The UK Government also refers to Commission work but to express its disagreement.¹⁸ The UK denounces the opinion expressed by the Commission in one of its Working Papers.¹⁹ The UK considers that the Commission's definition of MEEQR "represents an unwarrantable extension of the clear words of the Treaty".²⁰

¹² *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, I 14 Fourcroy and Breuval written observations cit. 8-9.

¹³ 'Concurrence déloyale – droit comparé' in *Dossier de Procédure Original Dassonville*, HAEU CJUE-1553, Fourcroy and Breuval written observations cit. 9.

¹⁴ 'Zum Verbot mittelbarer Einfuhrbeschränkungen im EWG-Vertrag' A.W.D., July-August 1973' in *Dossier de Procédure Original Dassonville*, HAEU CJUE-1553, Commission written observations cit. 9.

¹⁵ "Les mesures d'effet équivalent au sens des articles 30 et suivants du Traité de Rome' (1968) *Revue Trimestrielle de droit européen*" in *Dossier de Procédure Original Dassonville*, HAEU CJUE-1553, Commission written observations cit. 9.

¹⁶ *Ibid.* 12, referring to the piece of P Vorloren van Themaat (1967) *Social Economische Wetgeving* 632.

¹⁷ Joined cases 51/71 to 53/71 *International Fruit Company NV and others v Produktschap voor groenten en fruit* ECLI:EU:C:1971:128.

¹⁸ *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit., UK written observations, 4.

¹⁹ Working Paper n. 191/XI/74-E of 19 February 1974 in *Dossier de Procédure Original Dassonville*, HAEU CJUE-1553, UK written observations cit. 4.

²⁰ *Ibid.* 5.

They also underline the non-binding force of such working papers. This is particularly interesting knowing that the UK was a new Member State. The UK had only acceded to the EEC a year prior to the decision and was still a third country when the facts occurred. Moreover, art. 30 did not yet have direct effect in the UK.²¹ This shows the strong will of the UK to be involved in the development of EEC law and reveals tensions with the Commission. Moreover, all these sources relate directly to the concept of a MEEQR and show that the definition was already in progress in EEC institutions and legal literature. The *Dassonville* case thus seems less of a breakthrough on the part of the CJEU and more like another brick in the construction of the MEEQR definition for the EEC internal market.

II.2. MEEQR AS AN ONGOING DISCUSSION IN EEC INSTITUTIONS

The *dossier* provides several indications that put the *Dassonville* case in context. In fact, references to other sources demonstrate how the definition of MEEQR was at the time a topic of interest for all EEC institutions and several legal scholars. The CJEU *formula* was not created out of the blue but was part of a broader discussion.

In 1974 the Commission had already produced several documents on MEEQRs. The Commission pointed out in its written observation that during the transition period, important Directives on art. 30 had been published.²² They argued that 10 years of experience had provided the Commission with the opportunity to elaborate the appropriate definition of MEEQRs, of which Directive 70/50²³ on MEEQRs was deemed the supreme example. This Directive is cited by all parties except the UK, which shows that this was a leading text on the question of MEEQRs and that the Commission had already discussed the topic extensively. Moreover, the Commission's written observations show the deep analysis and work already done by the Commission on the question of the concept of a MEEQR. Firstly, the Commission was conducting a pilot procedure on exclusive contracts and their compatibility with several common market rules. Working with a French distributor of Scotch whisky, they were making several modifications to the contract so that it was appropriately adapted to the provisions of the Treaty.²⁴ Secondly, the UK's reference to a Commission Working Paper on the topic demonstrate further the Commission's influence on the question of MEEQRs.²⁵

²¹ R Schütze, 'Re-reading Dassonville: Meaning and Understanding in the History of European Law' (2018) ELJ 376.

²² *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Commission written observations cit. 8; Directives 3745/66 and 3748/66 of the Commission of 7 November 1966 and Directives 70/50/CEE of 17 and 22 December 1969.

²³ Directive 70/50/EEC of the Commission of 22 December 1969 based on the provisions of art. 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty.

²⁴ *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Commission written observations cit. 3.

²⁵ *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, UK written observations cit. 4.

The European Parliament was also invested in reaching a definition of MEEQRs. Parliamentary questions had been addressed by Members of the European Parliament to other EEC institutions. Be they oral or written, such questions are considered a direct form of parliamentary scrutiny and an important democratic tool.²⁶ The *dossier* shows the importance of those parliamentary questions by their presence in the parties' written observations and their annexes. They were actually cited by more parties than appears in the decision. One question from M Deringer (169/67)²⁷ is also cited in the Commission's observation in addition to that of Dassonville. Fourcroy and Breuval, the UK and Belgium referred to the question by M Cousté.²⁸ Fourcroy and Breuval also made reference to another written question to the Commission that is not mentioned in the decision.²⁹ These parliamentary questions to the Commission show how the concept of a MEEQR had already been a much discussed and important topic for the EEC institutions.

The judicial institution of the EEC was also already involved in the discussion surrounding MEEQR at that time, but this is, however, not explicitly pointed out in the *dossier*. The *Dassonville* case legal context shows the ongoing work of the CJEU on the matter. Art. 30, on which the case is based, had only been subject to interpretation for four years at the time of the judgement.³⁰ The first case on this article was *International Fruit*.³¹ This case is abundantly cited by the participating parties since three of the four written observations refer to it. In this case, the CJEU had started to provide its own definition, notably by stating that only a potential effect on trade was enough for a measure to qualify as a MEEQR.³² In 1973 the Court went further in the *Geddo v Ente Nazionale Risi* case.³³ With this case, the CJEU already provided an abstract judicial definition of MEEQR.³⁴ Surprisingly, this case was cited neither by the parties nor the CJEU. The absence of reference to this case, especially by the Court, leads to the question formulated by Schütze: "what were the Court's intellectual and textual inspiration?".³⁵ One can hypothesise that the Court's goal was to give a strong and definitive definition of MEEQR. The wording of the definition supports this interpretation. It is seen as a *formula* since it is short and abstract. Secondly, the case was first assigned to the second chamber but was ultimately decided by the Full Court.³⁶ This change of chamber shows that *Juge Rapporteur* Mackenzie Stuart

²⁶ European Parliament research service blog, *Parliamentary questions* ephinktank.eu.

²⁷ *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit., written question of M Deringer and written question n.118/66-67.

²⁸ *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit. written question of M Cousté.

²⁹ *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit. written question 197/69.

³⁰ R Schütze, 'Re-reading *Dassonville*: Meaning and Understanding in the History of European Law' cit. 376.

³¹ *Ibid.*

³² *Ibid.*

³³ *Case 2/73 Riseria Luigi Geddo v Ente Nazionale Risi* ECLI:EU:C:1973:89.

³⁴ R Schütze, 'Re-reading *Dassonville*: Meaning and Understanding in the History of European Law' cit. 376.

³⁵ *Ibid.*

³⁶ *Ibid.*

must have, at some point, decided or realized that this case was important – maybe because it was an opportunity for the CJEU to give its definitive interpretation of art. 30.³⁷ The lack of textual inspiration, and in particular the absence of reference to the Directive 70/50 in the Court's decision, might be explained by the fact that the Court gave its own definition, different from the one laid down in the Directive. This would add to the case being seen as important by the judges and the choice to change chamber.

The questions posed by the Court to the Commission is another key feature of the *dossier* indicating an ongoing discussion on MEEQRs. The court questions the Commission on other complaints arising from the importation of products with protected designation of origins. This indicates the importance of framing this question in an EEC context and not as just the Belgian problem. Such a question could mean that the CJEU objective was already to produce a *formula* (see question sent May 10, 1974) and thus not only to partake in but to conclude the discussion on MEEQRs.

Dassonville as a landmark case must thus be put in the context of an ongoing discussion on the scope of art. 30. Many EEC institutions were involved: the Commission, with the adoption of Directive 50/70, the Parliament with the various written questions, and the CJEU in several earlier cases.

III. BEHIND THE CJEU *FORMULA*, THE STORY OF WHOLESALERS AND THE TECHNICITY OF TRADE REGULATIONS

The full name of the case, *Procureur du Roi v Benoît and Gustave Dassonville*, was coined during the procedure. At the beginning, case was referred to by the name of the three whisky sellers: Dassonville and Fourcroy and Breuval. There is no explanation in the *dossier* for this change of name, but it shows the prime importance, at least at first, of the parties. This is supported in the *dossier* by the striking significance of personal grudge amongst the parties (see III.1) but also the high technicity of the evidence (see III.2).

III.1. THE UNSEEN CRITICS: PERSONAL ATTACKS AND BLAME THE NEIGHBOUR

The *dossier* and in particular the parties' written observations give the reader an opportunity to observe hidden tensions. CJEU decisions offer a summary of each parties' legal arguments but the *dossier* provides a closer and more comprehensive look into legal, moral and personal quarrels.

³⁷ The fact that the *Dassonville* case was not considered as possibly ground-breaking at first would explain the lack of intervention from France which had not submitted written observations.

Three written observations, from Dassonville, Fourcroy and Breuval and the Belgian government, include personal attacks and criticism of the lack of EEC harmonization. Dassonville accused Belgium of protectionism.³⁸ Fourcroy and Breuval and Belgium attacked differences between France and Belgium.³⁹

Dassonville, which asserted that the Belgian law is a MEEQR, questioned the goal of the contentious Royal Decree n. 57. It explained that such a measure, which dated from 1934, was surely enacted in a “protectionist spirit”.⁴⁰ The Decree was adopted in a purely national context and was solely aimed at regulating domestic trade. This situation had led incidentally to the reinforcement of monopolies for national distributors. Furthermore, Dassonville expressed its concern about a generalization of the protectionist system if the court did not find the Decree to be a MEEQR. To them, using the pretense of safeguarding trade rules in each Member State would lead to a complete shutdown of the single market and go directly against the EEC Treaty’s objectives.⁴¹

Belgium also promoted harmonization of norms in the single market, but it argued that this harmonization had to be achieved by France following the same rules as Belgium. The Belgian government defended its regulation and argued that it was a good way of protecting designations of origin. A finding that the Decree was a MEEQR would lead to a serious abuse and hinder the protection of designations of origin. Since there was no harmonization on this question at the EEC level, each Member State ought to be free to regulate. There was a small insinuation that France did not adequately protect designations of origin and that this is why the whisky was not accepted.⁴² Fourcroy and Breuval did not make small insinuations. Rather, they stated plainly that France did not offer sufficient protection. They claimed that France was in breach of its international commitments regarding designations of origin because products were circulated under a simple pink excise bond.⁴³

Both parties attacked the other in a language that was more vigorous than reported in the Court’s decision. In addition to arguments on the insufficient harmonization of rules amongst EEC Member States, the Court’s decision omitted strong personal attacks on the part of each of the private parties. For example, Fourcroy and Breuval stated that Dassonville forged a fake certificate rather than bother to ask for one.⁴⁴ Though Dassonville’s argument that Fourcroy and Breuval were only acting in the interest of conserving their

³⁸ *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit. Dassonville written observations 10 and 12.

³⁹ *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Fourcroy and Breuval written observations cit. 12 and 19 Belgian Government observation 11.

⁴⁰ *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Dassonville written observations cit. 10.

⁴¹ *Ibid.*, 12.

⁴² *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit. Belgian Government written observations 11.

⁴³ *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Fourcroy and Breuval written observations cit. 11.

⁴⁴ *Ibid.*

monopoly is mentioned in the decision, it is presented in greater detail in their written observations. In several pages, they aimed to expose how the Decree was instrumentalized by the other party. In addition, they gave more information about the reality of the monopoly. They believe that, by solidarity, the French companies “Amer Picon” and “Simon Frères” refused to provide them with the relevant attestation of origin.⁴⁵ They also observed that some sales receipts from French distributors were marked “export prohibited”.

This additional reasoning is interesting to understand exactly what made the Belgian legislation a MEEQR. Small facts and insights into the business practices add to the conclusion that it was in fact difficult or impossible for Dassonville to obtain the appropriate certificate. The reader is offered a more factual and technical view of the *Dassonville* case and is able to go further than the *formula*’s brief understanding of what exactly constitutes a MEEQR.

III.2. TECHNICITY OF MEEQR, THE IMPORTANCE OF EVIDENCE IN THE PROCEDURAL DOSSIER

The decision is overall less factual and more focused on the mechanics of EEC law than the *dossier*. For instance, the argument that the certificate of designation of origin needed to mention the name of the Belgian importer is a key element in both Dassonville’s and the Commission’s submissions. It shows that the proper certification was impossible to obtain for Dassonville and the powerful effect of the monopoly of Fourcroy and Breuval. This element is not developed in the Decision even though it is presented as a major component of the parties’ reasoning. This distance between the focus on facts by the parties and the focus on legal reasoning by the Court may be explained by the judges’ intention to use the *Dassonville* case to define MEEQRs with a *formula*.

The significant space that the annexes take in the *dossier* is also a sign of the technicality of the case. The annexes of the parties’ written observation are found in 12 different documents and represent 34 per cent of the *dossier*.⁴⁶ This is an impressive number since the written observations represent only 17 per cent and the procedure-related documents represent 22 per cent. Annexes are thus the most important documents (in length) in the *dossier*. In addition, the annexes of the UK observations are found at several occurrences in the *dossier*. This manifests the importance, throughout the CJEU procedure, of the actual method of certification of designations of origin in the UK. Moreover, the Commission and Dassonville both insisted on other measures that could have been used to achieve the aim of protecting designation of origin. Dassonville’s annex contains 45 pages of different certificates of origins and legislation in Europe in order to provide examples of other means of protection that are less trade restrictive.

⁴⁵ *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Dassonville written observations cit. 14.

⁴⁶ Of the 458 pages accessible to the reader.

The importance of such technical issues is again exemplified by the questions from the Court to the UK government. The Court asked for more precision on “what would amount to sufficient details” for the UK Government. This question related to UK observation’s annex IV that presented UK regulation on Scotch whisky’s certificates of origin.⁴⁷ The part relevant to the question was marked manually by a line from a red pen. It states that a person outside of the UK can request certification providing that they give “sufficient details” of the consignment. The Court inquired what these “sufficient details” were because they were fundamental to determine if *Dassonville* was able to obtain the certificate of origin for the whisky they were selling in Belgium. Unfortunately, we do not have the answer to the question in the *dossier*. Nonetheless, the question in itself reveals the investigative work of the court on technical details. The *dossier* thus offers great insight into all the documents necessary to understand the existing practices of both the UK and Belgium in order to determine if the Royal Decree was a MEEQR. With the *dossier*, the reader can enhance his or her understanding of *Dassonville* and go beyond the famous *formula*.

IV. CONCLUSION

This *Article* demonstrated the richness of the CJEU procedural *dossier* and the insights that a reader can gain from it. A comprehensive analysis of the parties’ written observations has shown how deeply linked the *Dassonville* case was with the development of the EEC internal market and the end of the transition period. The influence that these newly uncovered sources ultimately had on the Court’s decision is impossible to determine but the *dossier* places the *Dassonville formula* in a broader context: one that includes the European Parliament, the Commission and European legal scholars. The *dossier* also grounds the famous *formula* in the reality as experienced by the different parties. Written observations and annexes demonstrate the crucial role of evidence and facts in the case. The *dossier* helps the reader see beyond the *formula* in many ways. This *Article* does not expect to have exhaustingly extracted the value of the procedural *dossier* but it hopes to have teased out some of its key aspects.

⁴⁷ *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit. UK Annex IV, WP 5.



ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF CJEU – FIRST PART

edited by Marise Cremona, Claire Kilpatrick and Joanne Scott

CAUGHT IN THE (RED)ACT: INSIGHTS FROM THE *VAN DUYN DOSSIER*

REBECCA MUNRO* AND REBECCA WILLIAMS**

TABLE OF CONTENTS: I. Introduction. – II. Case overview. – III. Insights from the dossier. – III.1. Documents in the dossier. – III.2. References to political and domestic policies. – III.3. Influential actors in *Van Duyn*. – III.4. Methodological issues with redaction. – IV. Conclusion.

ABSTRACT: *Van Duyn v Home Office* (case 41/74) was the UK's first preliminary reference procedure case and is best known for its role in developing the meaning of direct effect, free movement of workers and public policy under EU law. The Court of Justice in the Archives project sought to find the "added value" of analysing the *dossier de procédure* alongside already publicly available documents relating to landmark EU cases. In the case of *Van Duyn*, the dossier did provide some additional insight into the case, such as the inclusion of the UK's High Court decision and references to the UK's domestic political context and policy making. However, the dossier largely reflected already publicly available documents relating to the case, demonstrating the transparency of the Court's decision-making process. This being said, 11 per cent of the dossier was redacted, potentially undermining this *Article's* aforementioned conclusion. Here, finding the balance between protecting the privacy of individuals and the secrecy of the Court with ensuring public transparency and subsequent academic investigation was particularly apparent. Nonetheless, being granted access to redacted documents would be beneficial to achieve the full potential of the dossier when using the archives of the Court of Justice for research.

KEYWORDS: direct effect – free movement of workers – non-discrimination – public policy – art. 48 EEC – art. 3 Directive 64/2.

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I. INTRODUCTION

The archives of the Court of Justice were opened in December 2015 in the Historical Archives of the European Union (HAEU) at the European University Institute in Florence, Italy. These archives contain the *dossiers de procédure* for all cases decided by the Court of Justice of the European Union (CJEU) after an initial 30 years wait period from their judgment dates. These *dossiers* include a variety of documents that were not available to the public before the archives were opened. The Court of Justice in the archives project seeks to demonstrate the opportunities and challenges the *dossiers de procédure* present for relevant academic communities and lay solid foundations for ongoing work as more cases are released. Historical and legal methodologies are combined to analyse landmark cases with the intention to build on recent historical and sociological scholarship in EU law and bring the archives “to life”.

This *Article* is on the United Kingdom (UK)’s first preliminary reference procedure (PRP) case, *Van Duyn v Home Office*.¹ *Van Duyn* was selected as a landmark case to explore in the Archives project because of this, and also due to its role in establishing one of the EU’s key legal principles, the doctrine of direct effect. The legal reasoning adopted by the courts in *Van Duyn* largely reflects that adopted in *Van Gend en Loos*, another case famously associated with the doctrine.² The main effect of *Van Gend en Loos* and *Van Duyn* has been to put the individual at the centre of European law and to transform economic duties to enforceable individual rights which allows private individuals to drive forward the integration process. The legacy of these cases has played a significant role in deciding other landmark EU cases, including *Reyners*,³ *Defrenne*,⁴ and *Jany*.⁵

Van Duyn was also one of the first attempts by the Court to address the concepts of “public policy” and “personal conduct”. The *Van Duyn* judgment was actually criticised as erring on the side of caution in terms of establishing guidelines for determining the scope or definition of “personal conduct” and for leaving the public policy exception largely to the discretion of Member States. However, it is important to note that the judgment is significant because, while this broader discretion has not been upheld in subsequent cases,⁶ it represented an effort by the Courts to balance the competing interests of Member State and Community goals, including integration and harmonisation.

This *Article* will firstly provide an overview of the case. It will then detail the insights that have been provided from analysing the *dossier*, including information which had not

¹ Case 41/74 *Van Duyn v Home Office* ECLI:EU:C:1974:133 (hereinafter: *Van Duyn*).

² Case 26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1.

³ Case 2/74 *Reyners v Belgian State* ECLI:EU:C:1974:68.

⁴ Case 149/77 *Defrenne v Sabena* ECLI:EU:C:1978:130.

⁵ Case C-268/99 *Jany and Others* ECLI:EU:C:2001:616.

⁶ For the evolution of the case law, see case 30/77 *Régina v Bouchereau* ECLI:EU:C:1977:172; joined cases 115/81 and 116/81 *Adoui and Cornuaille v Belgian State* ECLI:EU:C:1982:183; case C-36/02 *Omega* ECLI:EU:C:2004:614.

been available previously and insights provided by an analysis of the parties' legal argumentation. It will illustrate that the parties' argumentation was largely reflected by the court thus highlighting the transparency of the Court's process. It will then turn to some of the obstacles faced in undertaking archival research. A significant obstacle included the redaction of all documentation from the Oral Proceedings thus undermining our findings and the ability to assess the extent to which the *dossier* "added value" to an analysis of the *Van Duyn* case.

II. CASE OVERVIEW

Miss Van Duyn was a Dutch national who was offered employment in the UK as a secretary with the Church of Scientology. She was interviewed by UK immigration officials on 9 May 1973 and was refused leave to enter on the grounds that it "was undesirable to give anyone leave to enter the United Kingdom on the business of or in the employment of... [Scientology]".⁷ The case occurred during a period in which the UK government had concerns relating to the practice of Scientology and its impact on society. The UK had condemned the practice of Scientology in a number of government statements,⁸ concluded an inquiry into its effects,⁹ and taken a number of actions to curb its growth.¹⁰ There was no indication, however, that the activities of the Church of Scientology were considered unlawful in the UK, and no legal restrictions were placed upon such activities for British nationals.¹¹

The UK acceded to the European Committees just prior to the case and, even after this accession, the British Government maintained its stance against Scientology in its legal reasoning. It claimed in its defence that EEC law did not "preclude it from continuing to refuse entry and work permits to persons concerned with the Church of Scientology".¹² Miss Van Duyn claimed that her refusal of leave to enter was unlawful on the basis of

⁷ *Van Duyn* cit. para 1.

⁸ For example, the UK Minister for Health described Scientology as a "pseudo-psychological cult" whose practices were "socially harmful", see K Robinson, Hansard, written answer 25 July 1968 in UKHC Vol. 769, Col.190 hansard.parliament.uk.

⁹ J Foster, *Enquiry into the Practice and Effects of Scientology* (DA Information Service 1971).

¹⁰ This included not providing work permits or extensions to foreign nationals who were in the UK. for the purpose of attending the Church of Scientology, see UK House of Common Debate *Scientology* cit. api.parliament.uk

¹¹ *Van Duyn* cit. para. 1.

¹² *Ibid.* para 3.

Community rules on the free movement of workers and art. 48 of the EEC treaty (currently art. 45 TFEU)¹³, Regulation 1612/68¹⁴ and art. 3 of Directive 64/221.¹⁵ Thus, the UK High Court asked the CJEU for a preliminary ruling on three matters: (1) the direct effect of art. 48 of the EEC Treaty; (2) the direct effect of art. 3 of Directive 64/221; and (3) Member State derogations made on the basis on public policy, with a particular focus on the meaning of personal conduct in this context, and whether employment restrictions were allowed to be made for non-nationals when they were not equally applied to nationals.¹⁶

The Court held that art. 48 and art. 3(1) both had direct effect. In contrast to subsequent Court decisions regarding derogations made on the grounds of public policy, the Court found that it was lawful for the UK government to prevent Van Duyn's entry into the UK, even though practising Scientology in the UK was not strictly unlawful. Whilst this *Article* does not intend to cover the facts of the case in depth, the table below illustrates the positions held by the parties on the matters submitted to the Court (Table 1) for ease of understanding the subsequent analysis of the *dossier*.

Position of Actors	Direct Effect of art. 48	Direct Effect of art. 3 Directive 64/221	Employment amounting to Personal Conduct	The Discrimination of Non-nationals working at Socially Undesirable Organisation
Van Duyn	Directly Effective	Directly Effective	Does not amount to personal conduct	Discriminates
The UK	Directly Effective	Not Directly Effective	Can amount to personal conduct	Does not discriminate
The Commission	Directly Effective	Directly Effective	Can amount to personal conduct	Discriminates
Advocate General (AG)	Directly Effective	Directly Effective	Can amount to personal conduct	Does not discriminate
The Court	Directly Effective	Directly Effective	Can amount to personal conduct	Does not discriminate

TABLE 1. Summary table of positions of actors on submitted questions.

¹³ Art. 48 of the Treaty Establishing the European Community [1957].

¹⁴ Regulation (EU) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

¹⁵ Directive 64/221/EEC of the Council of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

¹⁶ See *Van Duyn* cit. for the exact questions submitted to the CJEU.

III. INSIGHTS FROM THE DOSSIER

There are a number of insights that have resulted from the analysis of the *dossier*. *Van Duyn* is an example where the added value of the analysis of the *dossier* is perhaps less evident when compared to other *Articles* in the Special Section. The *dossier* was the shortest in the project. Moreover, its contents were somewhat standard for a case being heard at the Court. Aside from the case file for the prior High Court Judgment, the content was mostly generic institutional correspondence and official reports (see Table 2). In addition, the procedures, institutional process and legal reasoning are largely accurately reflected in the previously available materials. However, the fact that these submissions were accurately reflected by the Court was an interesting finding in itself. Aside from references to domestic policy or political context, the Court synthesised the arguments of the parties very accurately. This is a positive finding for the reputation and transparency objectives of the Court, as it shows that the public are being correctly informed about Court of Justice cases and their procedure.

Category of Doc	No. of Docs	% of No. of Docs (122 total available)	No. of pages	% of the Dossier (331 pages total)
Submissions by the Parties	5	4%	45	14%
Procedure-related docs	116	95%	191	58%
Report of Oral Hearing	1	0.8%	14	4%
Opinion of AG	1	0.8%	14	4%
Final Judgment	1	0.8%	23	7%
Docs not available to public	N/A	N/A	37	11%

TABLE 2: Categorisation of *dossier* by document type.

Nonetheless, some nuanced insights into *Van Duyn* were still attained from completing research for the Project on the *Van Duyn dossier*. Firstly, gaining access to the *dossier* enabled analysis of documents which were previously unavailable to better understand the development of *Van Duyn's* legal argumentation and reveal some of the individualities and realities of the case (I). The *dossier* also provided further insight into different actors' use of political and social context in their legal argumentation (II). The multidisciplinary approach of the Archives Project also enabled consideration of the influence of the judges on the case's progression (III). Lastly, while much of the *dossier* was accurately reflected in the final Court Judgment, the *Van Duyn dossier* did present some methodological limitations as a result of significant redaction of documents related to the case's Oral Proceedings.

III.1. DOCUMENTS IN THE *DOSSIER*

While the High Court judgment was available in domestic case reports before the release of the *dossiers*, its inclusion in the *dossier* shows the case in its entirety chronologically, bringing High Court documents alongside Court documentation to follow the case's progression from start to finish.¹⁷ It was interesting to note the Advocate General stated explicitly that the evidence put forth in the High Court Judgment was considered in the formulation of his Opinion.¹⁸ The European Court's judges, on the other hand, did not explicitly refer to the High Court Judgment in its reasoning. The inclusion of the High Court judgment in the *dossier* therefore enabled consideration of how legal argumentation had developed from the beginning of the preliminary reference procedure and whether the different EU actors engaged with Member States' legal reasoning on the national level.

In addition, the *dossier* included some previously unavailable documents that showed some of the realities and peculiarities of Van Duyn bringing her case against the UK Government. For instance, an exchange of letters between Van Duyn's legal team and the UK government showed that Van Duyn's legal team sent correspondence to the Home Office on numerous occasions to request the UK government's position on the admission of EEC nationals who intended to take up employment with a Scientology establishment.¹⁹ It was clear from these letters that Van Duyn's legal team were having to chase up the Home Office for a response to their query. Their request was eventually met, more than two months later, when the UK affirmed its position that EEC nationals could be denied entry on the basis of "public policy".²⁰ Gaining an awareness of this exchange did not provide any great insight into the legal argumentation used in the case. However, it did serve as a reminder of the realities of litigation and added another dimension to the often clinical interpretations of landmark EU cases such as *Van Duyn*.

III.2. REFERENCES TO POLITICAL AND DOMESTIC POLICIES

Whilst the legal arguments presented in the *dossier* were largely reflected in the final judgement, there were a number of references made by the UK to its political and domestic policies, which were omitted in the final Court judgement. For instance, the UK highlighted that it had not made Scientology illegal in the UK despite deeming it "socially harmful" and drew political parallels with similar organisations it deemed contrary to the public good, such as the Irish Republican Army (IRA) in Northern Ireland.²¹ The UK em-

¹⁷ High Court of Justice (England), Chancery Division, order of 27/11/1975.

¹⁸ *Van Duyn v Home Office* cit., opinion of the Advocate General (AG) Mayras.

¹⁹ *Dossier de Procédure Original Van Duyn*, HAEU CJEU-1594 37-41.

²⁰ *Ibid.* 41.

²¹ *Ibid.* 135.

phasised that it did not make IRA membership or activities illegal even though they considered them contrary to the public good.²² The UK stressed that it did not have the policy making powers to make a “socially harmful” organisation illegal even when the individual connected to such an organisation is a national. This perhaps also was an attempt to imply that the UK had a liberal democratic political philosophy that did not permit restrictions on issues such as religious freedom.²³ Additionally, the UK chose to highlight practical lines of reasoning when arguing that it would be difficult for large numbers of officials to implement art. 3(1) on the ground.²⁴ Yet, specific details of these political examples and practical considerations were omitted in the final Court judgment. This was perhaps an attempt to depoliticise the discussion in the case of the IRA in Northern Ireland. It may also have been an attempt by the Court to streamline their argumentation in the decision (as was the Court’s style at the time) to avoid excessive engagement with national policies. The AG, by contrast, did generally highlight the UK’s “particularly liberal form of Government” in not penalising organisations it deemed “socially harmful”.²⁵ The AG even stated the UK’s liberal stance towards Scientology (i.e., not making its activities illegal) would “doubtless be quite different in other Member States”.²⁶ Paradoxically, the UK deviates from its liberal stance towards association with “socially harmful” organisations when it considered Van Duyn’s personal conduct. In fact, the UK deemed Van Duyn’s connections with the Church of Scientology was enough to limit her freedom of movement. Nonetheless, the AG did not engage explicitly in his report with the IRA example presented by the UK.²⁷

By gaining access to these small omitted arguments provided by the UK from the Archives, it was possible to fully compare the actors’ legal reasoning and consideration of political and social context in the case. More specifically, it was possible to delineate that the Court very rarely used contextual sources of argumentation, preferring instead a streamlined, legalistic approach. It also emphasised the differences in legal argumentation between the AG and the Court. The AG, by referring to the High Court judgment and emphasising the “liberal form of Government” in the UK, appeared more willing to engage with Member States’ political context than the Court.²⁸ While neither the AG nor the Court referred to the IRA example provided by the UK, knowing that these actors had access to the examples provided at the time sheds more understanding on why there were differences in their legal reasoning style.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.* 137.

²⁵ *Van Duyn* cit., opinion of AG Mayras, 13.

²⁶ *Ibid.*

²⁷ *Van Duyn* cit. 13.

²⁸ *Dossier de Procédure Original Van Duyn* HAEU CJEU-1594 cit. 250.

III.3. INFLUENTIAL ACTORS IN *VAN DUYN*

Carrying out multidisciplinary research into the landmark cases was also an objective of the Archives Project. Undertaking historical and sociological research into the judges deciding the case shed light on the argumentation developed by the Court, even if this insight was not gained solely from the *dossier*. Interestingly, Robert Lecourt and Pierre Pescatore were both judges for *Van Duyn*. Lecourt was renowned for having a strong EU integration focus. He sat as a judge on the *Van Gend en Loos* case and also acted as Judge Rapporteur in other landmark cases, such as the *Costa v ENEL* case, which established EU law supremacy over national law.²⁹ In *Le juge devant le Marché commun* he provided a detailed discussion on the Court and its cooperation with national judges in PRP which he highlighted as being particularly crucial in preventing diverging interpretations of Community law in different Member States and upholding the uniform nature of EU law.³⁰ This is one of the core premises of the *Van Duyn* judgment when conceptualising the legal boundaries of the public policy exception. Furthermore, Pescatore's involvement in the case is interesting in light of his subsequent publications concerning the doctrine of direct effect in which he has described the doctrine as "the infant disease of community law".³¹ In 2015, Pescatore reiterated his conception of the doctrine whereby he noted that "direct effect is the normal state of health of the law" and that "it is only the absence of direct effect which causes concern and calls for the attention of legal doctors".³² This perhaps explains why the Courts' reasoning was often not informed by party submissions or contextual references, but by its own overarching motivations, such as ensuring the effective functioning of the Community Order through EU law. Whilst it was possible to identify the judges presiding on the case before accessing *Van Duyn's dossier*, the Project's multidisciplinary focus has enabled a more holistic understanding of the case.

III.4. METHODOLOGICAL ISSUES WITH REDACTION

Around 11 per cent of the *dossier* material has been removed from the *dossier* file provided by the Archives of the Court of Justice. It is unclear what was included in these pages, other than knowing that 37 of the 93 Oral Procedure related documents are redacted (around 40 per cent) and all of the Instruction-related pages (4 pages in total). The Court decides which information is redacted and does not need to provide reasons for redacting information from the *dossier*. Redaction is justified where 1) documents refer

²⁹ Case 6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66.

³⁰ R Lecourt, *Le juge devant le Marché commun* (Institut universitaire de hautes études internationales 1970) 69.

³¹ P Pescatore, 'The Doctrine of Direct Effect: An Infant Disease of Community Law' (1983) ELR 155.

³² *Ibid.*

to the Court's private deliberations³³ and 2) where documents and records contain information on the private or professional life of individual persons.³⁴ It is unclear why the oral proceedings were redacted from the *dossier* given that they are usually open to the public and therefore unlikely to contain information that would be regarded as secret or confidential.

This redaction was therefore a limitation of using the Archives for academic investigation as it was not possible to analyse the development of any legal argumentation during the oral proceedings. The absence of these documents from this analysis could even undermine the previous conclusion made that the Court largely accurately reflected the *Van Duyn* proceedings in the final judgement. This highlights the issue of finding the balance between protecting individuals and the secrecy of the Court to ensure judicial freedom³⁵ and ensuring that public transparency and subsequent academic investigation are possible. Having access to redacted documents, or the reasonings behind such a redaction would be beneficial to fully assess the historical and sociological context of EU case law. This concurs with previous research work that additionally called for French translations and judges' notes on comparative law decision-making to also be added to the *dossiers* to shed light on the Court of Justice's full judicial process.³⁶ Engaging with broader debates on which court documents should or should not be accessible to the public is beyond the scope of this *Article*. However, it can be said that for future archival research on the *dossiers*, attention should be paid to the redacted sections of the *dossier* as well as the unredacted content. Both can offer insight into the working of the Court at the time and have interesting implications for the historical, sociological and legal research that is being undertaken when exploring the archives of the Court of Justice. This was one of the most significant takeaways from using the case *dossier* to analyse *Van Duyn*.

IV. CONCLUSION

This *Article* has demonstrated some of the added value that undertaking archival research can have on the analysis of key cases before the Court of Justice. From the UK's references to the Troubles in Northern Ireland to correspondence documenting the realities of liaising with ministerial offices as a lawyer, it is clear that new subtle insights were found on the parties and their positions in the case of *Van Duyn*. Despite this, the *Van Duyn dossier* demonstrated that the Court accurately reflected the arguments and submissions of the

³³ Decision of the Court of Justice of the European Union of 10 June 2014 concerning the deposit of the historical archives of the CJEU at the HAEU (European University Institute) [2015], C 406/2. art. 4(1).

³⁴ *Ibid.*

³⁵ The Statute of the Court of Justice of the European Union, art. 2 states "The deliberations of the [ECJ] shall be and shall remain secret."

³⁶ F Nicola, 'Waiting for the Barbarians: Inside the Archive of the European Court of Justice' in C Kilpatrick and J Scott (eds), *New Legal Approaches to Studying the Courts of Justice* (Oxford University Press 2020) 63, 90.

parties, thereby showing the transparency of the Court when documenting the judicial process in its publicly available documents. Redaction was the main obstacle faced when using the *Van Duyn dossier* to gain a greater understanding of the case. It was not possible to analyse large portions of the case's oral proceedings, which also potentially undermined the aforementioned conclusions on the transparency of the Court. It was beyond the scope of this *Article* to engage in debates concerning the balance between protecting individuals and the secrecy of the Court to ensure judicial freedom with ensuring public transparency and subsequent academic investigation. However, gaining access to redacted documents, or at least the reason behind their redaction, would be beneficial for future research. In the meantime, future archival research should pay attention to the redacted, as well as unredacted, sections of the *dossier*. There is a story to tell behind every redaction, and these stories could help to add further insight into a case beyond that provided by the Court Judgement, the Advocate General's report and additional documents provided in the *dossier*.



ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

edited by Mads Andenas, Cristina Contartese, Luca Pantaleo and Tarjei Bekkedal

OPINION 1/17 AND ITS THEMES: AN OVERVIEW

CRISTINA CONTARTESE* AND MADAS ANDENAS**

TABLE OF CONTENTS: I. Introduction. – II. Autonomy. – III. The principle of equal treatment and effectiveness. – IV. The right of access to an independent tribunal.

ABSTRACT: This *Article* introduces the Special Section on “Opinion 1/17: Between European and International Perspectives”, by providing an overview on the Opinion’s main issues, that is, autonomy, the principle of equal treatment and effectiveness, and the right of access to an independent tribunal.

KEYWORDS: Opinion 1/17 – autonomy – principle of equal treatment and effectiveness – right of access to an independent tribunal – CETA – international investment law.

I. INTRODUCTION

This Special Section examines Opinion 1/17¹ by the Court of Justice of the European Union (CJEU) from different angles that take into consideration its European and international dimensions. It contains some of the *Articles* presented at the workshop “Opinion 1/17: European and international perspectives”, which was held in Paris on 12 and 13 June 2019, and organised under the auspices of the University of Oslo, Faculty of Law, the European Law and Governance School/EPLO (Athens), the Hague University of Applied Sciences and

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¹ Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341.



the *Centre Universitaire de Norvège à Paris*.² The purpose of this *Article* is to present Opinion 1/17 together with the structure of this Special Section.

In Opinion 1/17, which was delivered on 30 April 2019, the CJEU was asked to rule on the compatibility of the Investor-State Dispute Settlement Chapter (ISDS) under the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (CETA) with the EU Treaties and the EU Charter of Fundamental Rights (EU Charter). Both the AG Bot³ and the CJEU held that the CETA Chapter on ISDS was compatible with EU primary law. As is well known, Opinion 1/17 is one of the most recent CJEU's rulings on the complex relationship between the EU and international investment law.⁴ Even if the request for an opinion was addressed by Belgium under art. 218(11) TFEU for mainly internal reasons,⁵ it raised important concerns that were widely shared in the European and international community. Opinion 1/17 was, somehow, requested with perfect timing. First of all, the EU was negotiating and/or concluding several agreements containing an ISDS mechanism similar to the CETA model.⁶ Secondly, increasing criticisms towards ISDS progressively materialised in a proposal to create a Multilateral Investment Court (MIC).⁷ Concerns on the rule of law, transparency, independence and impartiality of investment arbitration were all at stake within this debate. As the CJEU recalls in Opinion 1/17, the CETA Investment Court System ("ICS") is a step towards the establishment of a MIC.⁸

² For the programme of the workshop, see www.elgs.eu. This event was part of a series of annual workshops on pressing issues in international law, held in Paris in 2017-2019, that also addressed the EU and bilateral investment treaties and CJEU's judgment in case C-284/16 *Achmea* ECLI:EU:C:2018:158.

³ Opinion of Advocate General Bot in Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:72, for a comment on the AG Opinion, see H Schepel, *A Parallel Universe: Advocate General Bot in Opinion 1/17* (7 February 2019) European Law Blog europeanlawblog.eu.

⁴ See, in particular, the *Achmea* judgment cit. For a comment, see C Contartese and M Andenas, 'EU Autonomy and Investor-State Dispute Settlement Under *Inter Se* Agreements Between EU Member States: *Achmea*' (2019) CMLRev 157.

⁵ See L Ankersmit, 'Investment Court System in CETA to be Judged by the ECJ' (2016) European Law Blog europeanlawblog.eu.

⁶ See L Pantaleo, *The Participation of the EU in International Dispute Settlement* (Springer 2019).

⁷ On the path towards the MIC, see M Bungenberg and A Reinisch (eds), 'From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court. Options Regarding the Institutionalization of Investor-State Dispute Settlement' (2018) European Yearbook of International Economic Law; S Puig and G Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' 112 (2018) AJIL 361, 363-66.

⁸ Opinion 1/17 cit. paras 7, 44, 108, 118. See European Commission, 'The Multilateral Investment Court Project' (10 October 2018) trade.ec.europa.eu; Negotiating Directives of the Council of the European Union for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes EU Doc 12981/17 ADD 1.

The questions that Belgium asked to the CJEU were redefined by the Court into the three following issues of compatibility: “the autonomy of the EU legal order”;⁹ “the general principle of equal treatment and the requirement of effectiveness”;¹⁰ “the right of access to an independent tribunal”.¹¹ The Opinion, in sum, assessed both institutional and substantive aspects of the compatibility of the CETA ICS with the EU Treaties as well as with the EU Charter.¹² It is around these themes that this Special Section has been conceived and structured. It proves the relevance of this ruling for the relationship between EU and international investment law, nevertheless, it is only a piece of this complex puzzle. To what extent extra-EU Member States Bilateral Investment Treaties are compatible with EU law,¹³ how the *Achmea* judgment will impact on the Energy Charter Treaty (ECT),¹⁴ what role the EU will play in the development of the proposed MIC,¹⁵ and how the *Micula*-scenario will evolve,¹⁶ are only some of the issues that are already attracting the attention of European and international legal scholars, and will continue to do so in the near future.

⁹ Opinion 1/17 cit paras 106-161.

¹⁰ *Ibid.* paras 162-188.

¹¹ *Ibid.* paras 189-244.

¹² For comments on Opinion 1/17, see, amongst others, the Special issue on ‘Reflections on Opinion 1/17 (CETA)’ (2020) *Europe and the World: A law review*; A Berramdane, ‘Les implications de l’avis 1/17 de la CJUE sur le mécanisme de RDIE prévu dans les accords commerciaux et d’investissements de l’UE’ (2020) *Revue de droit des affaires internationales* 819; F Iorio, ‘Opinion 1/17: Has the EU Made Peace with Investment Arbitration?’ (2019) *Revue de droit des affaires internationales* 407; L Pantaleo, ‘The Autonomy of the EU Legal Order and International Dispute Settlement in the Wake of Opinion 1/17’ (2019) *Studi sull’integrazione europea* 775; C Rapoport, ‘Balancing on a Tightrope: Opinion 1/17 and the ECJ’s Narrow and Tortuous Path for Compatibility of the EU’s Investment Court System (ICS)’ (2020) *CMLRev* 1725; L Bosek, ‘On the CETA’s Compatibility with European Union Law in Light of Opinion No 1/17 of the Court of Justice of 30 April 2019’ (2020) *Zeitschrift für Europarecht, internationales Privatrecht und Rechtsvergleichung* 248.

¹³ See JR Vidal Puig, ‘Investment Arbitration in the EU Following *Achmea* and Opinion 1/17’ (European Central Bank Working Paper Series 19-2019) 20, 24-25.

¹⁴ In Opinion 1/20, the CJEU will have to rule on the compatibility of the ECT with EU law, more specifically, on whether the draft modernised Energy Charter Treaty is compatible with art. 19 TEU and art. 344 TFEU; and whether art. 26 ECT or other ECT provisions allow for intra-EU disputes. See M Happold, ‘Belgium asks European Court of Justice to Opine on Compatibility of Energy Charter Treaty’s Investor-State Arbitration Provisions with EU law’, www.ejiltalk.org.

On the possible impact of Opinion 1/17 on the MIC, see C Titi, ‘Opinion 1/17 and the Future of Investment Dispute Settlement: Implications of the Design of a Multilateral Investment Court’ (2020) SSRN ssrn.com or dx.doi.org/; C Jamieson, ‘Assessing the CJEU’s Decisions in *Achmea* and Opinion 1/17 in Light of the Proposed Multilateral Investment Court’ (2020) *European Investment Law and Arbitration Review* 213.

¹⁶ The *Micula* saga started as an intra-EU arbitration dispute between two Swedish investors and Romania, and continued as a State aid case before the EU judiciary. In case T-624/15 *European Food and Others v Commission* ECLI:EU:T:2019:423, the General Court concluded that the EU Commission, according to whom the implementation of the compensation award by Romania was in breach of EU State aid rules, exceeded its powers in State aid review. In August 2019, the Commission brought an appeal against the judgment of the General Court (case C-638/19 P *Commission v European Food and Others*, pending).

II. AUTONOMY

The first of the three themes is autonomy. Although external autonomy was for a long time a somehow marginal topic in academic debate, its increasing relevance strongly emerged as a reaction to two rulings of the CJEU, in particular: the *Kadi* case, in 2008,¹⁷ and Opinion 2/13, in 2014.¹⁸ Nowadays, autonomy has attracted the attention of European and international legal scholars. However, autonomy still remains a nebulous concept. Under EU law, it is not only difficult to know how to define it, but it is also problematic to identify clearly when it applies and what legal consequences it generates.¹⁹ Compared to the most recent rulings of the CJEU, where the Court strongly stressed the autonomous nature of the EU legal orders *vis-à-vis* other international regimes, the tone of Opinion 1/17 appears somehow softer. Unlike *Kadi* and Opinion 2/13, one may perceive a sort of “sensitivity” for the EU as an international actor in the field of international investment law. If in *Kadi*, the Court categorically excluded a balancing exercise between the safeguarding of EU autonomy and deference towards the UN Security Council, and in Opinion 2/13 between the safeguarding of EU autonomy and the protection of human rights, in Opinion 1/17 the need to allow the path towards a MIC may have played a role.²⁰ The Court, in sum, did not want to interfere

¹⁷ Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461. As is well known, the *Kadi* saga is composed of a set of judgements, but it is in the judgment delivered in 2008, that the CJEU used a strong language to assert EU autonomy.

¹⁸ Opinion 2/13 *Adhésion de l'Union à la CEDH* ECLI:EU:C:2014:2454.

¹⁹ Amongst the abundant literature, see in particular, C Eckes, ‘The Autonomy of the EU Legal Order’ (2020) *Europe and the World: A Law Review* 19; V Moreno-Lax, ‘The Axiological Emancipation of a (Non-) Principle: Autonomy, International Law and the EU Legal Order’ in I Govaere and S Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing 2019) 45; NN Shuibhne, ‘What is the Autonomy of EU Law, and Why Does that Matter?’ (2019) *Nordic Journal of International Law* 9; I Govaere, ‘Interconnecting Legal Systems and the Autonomous EU Legal Order: A Balloon Dynamic’ (2018) *Research Papers in Law*, College of Europe; J Odermatt, ‘The Principle of Autonomy: an Adolescent Disease of EU External Relations Law?’ in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Oxford 2018) 291; C Contartese, ‘The Autonomy of the EU Legal Order in the CJEU’s External Relations Case-Law: From the “Essential” to the “Specific Characteristics” of the Union and Back Again’ (2017) *CMLRev* 1627; M Klamert, ‘The Autonomy of the EU (and of EU law): Through the Kaleidoscope’ (2017) *ELR* 815; S Vezzani, ‘L’autonomia dell’ordinamento giuridico dell’Unione europea. Riflessioni all’indomani del Parere 2/13 della Corte di Giustizia’ (2016) *RivDirInt* 68; K Ziegler, ‘Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law’ in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Human Rights Law* (Cheltenham, Edward Elgar 2017), 267-307.

²⁰ For an analysis of Opinion 2/13 in the light of Opinion 1/17 from the perspective of international responsibility, see V Pergantis and SO Johansen, ‘The EU Accession to the ECHR and the Responsibility Question: Between a Rock and a Hard Place’ in N Levrat, Y Kaspiarovich, C Kaddous and RA Wessel (eds), *The EU and its Member States’ Joint Participation in International Agreements* (Hart Publishing, forthcoming).

with the current negotiations under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).²¹ The AG's statement confirms this perception: "the assessment [of the CETA ICS] should be conducted by also taking into account the fact that [it] is merely a step towards the creation of a multilateral investment court and related appellate mechanism [...]. I am therefore of the view that account should be taken of both the experimental and dynamic nature of the mechanism under examination".²² One may be tempted to conclude that the "selfish" era of the CJEU's case-law is over.²³ Upon a closer look, however, Opinion 1/17 turns out to be in line with the previous strong protectionist approach of EU autonomy. The jurisdiction of the CETA ICS is, in fact, interpreted narrowly to the extent that the tribunal "has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures [...] and, on that basis, to order the Union to pay damages".²⁴ The CJEU has, in sum, neutralised any potential impact of the ICS on the EU legal order. Whereas in the academic debate, it has also been argued that the CETA ICS could still have "unwanted" "indirect" effects on the EU legal order,²⁵ what emerges is that the CJEU has established a high threshold for an international court to be compatible with the EU Treaties.²⁶ Most importantly, in Opinion 1/17, the CJEU extends the application of the principle of autonomy from the structural/institutional dimension of the EU legal order to its substantive aspects.²⁷ This is what the Court does with its emphasis on the EU democratic process and the level of protection of public interests. As Lenaerts points out, in this part of the reasoning Opinion 1/17 "innovates the most".²⁸

As was mentioned above, the debate on autonomy increasingly attracts the attention of EU and international legal scholars, not surprisingly, therefore, four out of the seven

²¹ M Cremona, 'The Opinion Procedure Under Article 218(11) TFEU: Reflections in the Light of Opinion 1/17' (2020) *Europe and the World: A Law Review* 7-8; P Koutrakos, 'The Anatomy of Autonomy: Themes and Perspectives on an Elusive Principle, Building bridges: Central Banking Law in an Interconnected World' (2019) ECB Legal Conference 96, who refers to it as "policy pragmatism".

²² *Accord ECG UE-Canada*, opinion of AG Bot cit. para. 246.

²³ See C Riffel, 'The CETA Opinion of the European Court of Justice and its Implications—Not that Selfish After All' (2019) *JIEL* 503.

²⁴ Opinion 1/17 cit. para. 153.

²⁵ S Hindelang, 'The Price for a Seat at the ISDS Reform Table – CJEU's Clearance of the EU's Investment Protection Policy in Opinion 1/17 and its Impact on the EU Constitutional Order' in A Biondi and G Sangiuolo (eds), *Judicial Protection and EU Free Trade Agreements* (Edward Elgar Publishing forthcoming); GC Leonelli, 'CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test' (2020) *Legal Issues of Economic Integration* 43.

²⁶ N Lavranos, 'CJEU Opinion 1/17: Keeping International Investment Law and EU Law Strictly Apart' (2019) *European Investment Law and Arbitration Review* 240.

²⁷ P Koutrakos, 'The Anatomy of Autonomy: Themes and Perspectives on an Elusive Principle, in Building Bridges: Central Banking Law in an Interconnected World' (2019) ECB Legal Conference 99; C Contartese, 'Achmea and Opinion 1/17: Why Do *Intra* and *Extra*-EU Bilateral Investment Treaties Impact Differently on the EU Legal Order?' (European Central Bank Legal Working Paper Series 19-2019) 7, 13-15.

²⁸ K Lenaerts, 'Modernising Trade whilst Safeguarding the EU Constitutional Framework: an *Insight* into the Balanced Approach of Opinion 1/17' (2019) Belgian Ministry of Foreign Affairs-Brussels diplomatie.belgium.be 9.

Articles of this Special Section are devoted to this topic. The first one is written by Antonis Metaxas who looks at Opinion 1/17 in light of the CJEU's previous judgments and opinions on autonomy. After defining autonomy as a concept, the author focuses on three aspects: the vertical allocation of competences between the EU and its Member States, the role of the preliminary reference mechanism, and the CJEU's exclusive competence on the interpretation and application of EU Law. Whereas the CJEU hold that the ICS does not undermine EU autonomy, the author raises concerns on the possibility that the ICS Appellate Tribunal could still be able to interpret EU law. In the second *Article*, Arman Melikyan compares Opinion 1/17 with some previous CJEU's cases and observes that "in this particular context the international law of investment court system is being designed by the EU itself, taking into account EU internal constitutional structure". The author stresses the role of the European Commission, that "made sure that the investment court system and the transformed international investment order would be in perfect harmony with the EU internal integrity". Melikyan also analyses the impact of Opinion 1/17 on the future establishment of the MIC, and on the development of the autonomy of EU law. In the third *Article*, Szilárd Gáspár-Szilágyi criticizes the academic analysis that investigates autonomy through – what he defines as – a formalistic approach. The author argues that autonomy can rather be understood when examined in the context of legal and non-legal considerations. Amongst these latter, he identifies the strength of the international dispute settlement mechanism under consideration, the parties to the agreement, and the implications for EU policies. Gáspár-Szilágyi challenges the definition of autonomy as a structural principle, as elaborated by some legal scholars. He concludes that the CJEU would essentially use autonomy as a "shapeshifter" *vis-à-vis* international law: "A mechanism that depending on not just legal conditions, but also *non-legal* considerations, can morph into a shield against international law or it can embrace it". The last of the four *Articles* links Opinion 1/17 to Opinion 2/13, and raises an important question on the future negotiations of the EU accession to the European Convention on Human Rights (ECHR), that is, whether some aspects of the Draft agreement on the EU accession to the ECHR could be amended in light of Opinion 1/17. Specifically, Luca Pantaleo and Fabienne Ufert ask whether the co-respondent mechanism – as conceived under the Draft agreement on the EU accession to the ECHR and rejected by the CJEU in Opinion 2/13 – could be replaced by what the authors call the "internalisation model" under the CETA. This latter, which is compatible with the EU Treaties, foresees that the EU should identify who – the EU or its Member State – will act as the respondent before the CETA ICS. After examining the main European Court of Human Rights' case-law concerning the responsibility of EU Member States, and describing the internationalisation model, the two authors conclude that "the extension of the internalisation model to the ECHR, while not being immune from critical aspects, appears to be a safe avenue to be followed also in the field of human rights litigation – at least from an EU law perspective".

III. THE PRINCIPLE OF EQUAL TREATMENT AND EFFECTIVENESS

Another concern that Belgium raised refers to the alleged difference in treatment between enterprises and natural persons of EU Member States that invest within the EU and Canadian investors. The latter are entitled to bring a case before the CETA ICS, whereas the former cannot. The second aspect that the CJEU examines is, therefore, the general principle of equal treatment. More specifically, the Court assessed whether the ISDS mechanism under the CETA complies with art. 20 EU Charter, which guarantees “equality before the law”,²⁹ and with art. 21(2) EU Charter, which prohibits discrimination on grounds of nationality.³⁰ First of all, the Court recalls that the EU Charter enjoys the same legal status as the EU Treaties and, as a consequence, the compatibility of an international agreement, under art. 218(11) TFEU, can be assessed in light of the EU Charter as well.³¹ Then, it considers the scope of application of these two provisions. Whereas art. 21(2) EU Charter, which corresponds to art. 18(1) TFEU, is not meant to apply to cases where the difference at stake is that between nationals of EU Member States and nationals of non-Member States, the right enshrined in art. 20 EU Charter is “available to all persons whose situations fall within the scope of EU law, irrespective of their origin”.³² Art. 21(2) EU Charter, in sum, brings no relevance on the alleged discrimination in the treatment of EU investors as compared with Canadian investors, and the analysis focuses on art. 20 EU Charter. Following its well-settled case-law, the CJEU recalls that “equality before the law” requires that “comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified”,³³ and that their comparability “must be assessed in the light of all the elements that characterise them and, in particular, in the light of the subject matter and purpose of the act that makes the distinction in question, while the principles and objectives of the field to which the act relates must also be taken into account”.³⁴ According to the Court, the situations of Canadian investors that invest within the Union is not comparable to that of investors of EU Member States that invest within the Union:³⁵ “those Canadian persons, in their capacity as foreign investors, are to have a specific legal remedy against EU measures, whereas enterprises and natural persons of the Member States who, like those Canadian persons, invest within the Union, are not foreign investors there and will therefore not have access to that specific legal remedy and nor will they be able [...] to invoke directly the provisions contained in that agreement before the courts and

²⁹ Art. 20 EU Charter “Equality before the law”: “Everyone is equal before the law”.

³⁰ Art. 2 EU Charter “Non-discrimination”: (2) “Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited”.

³¹ Opinion 1/17 cit. paras 164-167.

³² *Ibid.* paras 168-175, 172.

³³ *Ibid.* para. 176.

³⁴ *Ibid.* para. 177.

³⁵ *Ibid.* para. 180.

tribunals of the Member States and of the European Union".³⁶ As for the requirement of effectiveness of EU law, the Court focuses, as requested in the Opinion, on EU competition law, and holds that the CETA does not affect it.³⁷

Whereas the CJEU relies on its consistent case-law to reach these conclusions, the explanation on the reasons why Canadian investors in the EU are in a different position compared to EU investors are not satisfactory.³⁸ The *Article* by Tarjei Bekkedal tackles this issue by identifying a conflict between EU law's autonomy and unity. According to the author, the CJEU's interest in strongly protecting the autonomy of the EU and EU law goes to the detriment of unity. This is due to the fact that autonomy, in light of the CJEU's case-law, requires the separation between the EU and an international legal order, whereas unity of law would entail coherence within a legal system. As for the interpretation of art. 20 EU Charter, the systemic requirement of unity would require that "within EU law itself, there is only one Law, which applies to all", whereas the CETA ISDS mechanism amounts to an exception since it establishes "a specific legal system with specific rights for investors of a specific nationality". Therefore, there would no longer exist one law for all. Bekkedal argues that this outcome, far from being the result of an objective legal reasoning, is rather "a legal, constitutional and political choice that is decisive as to how the reasoning must be constructed". The Court, in sum, aimed at supporting the development of international investment law over the promotion of equality.

IV. THE RIGHT OF ACCESS TO AN INDEPENDENT TRIBUNAL

The third and final issue assessed in Opinion 1/17 concerns the compatibility of the CETA ICS with art. 47 EU Charter, that is, the right to a remedy before an "independent and impartial tribunal previously established by law" (second paragraph), and to "effective access to justice" (third paragraph).³⁹ As is very well known, this topic is part of the broader debate on the rule of law, which is currently one of the most sensitive issues within the EU. Poland and Hungary have been under the spotlight of the European Parliament and the Commission under art. 7 TEU procedure. The "Polish case", finally, was brought before the CJEU.⁴⁰

³⁶ *Ibid.* para. 181.

³⁷ *Ibid.* paras 178-188.

³⁸ See C Riffel, 'Does Investor-State Dispute Settlement Discriminate Against Nationals?' (2020) German Law Journal 197.

³⁹ Art. 47 EU Charter "Right to an effective remedy and to a fair trial": "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this *Article*. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

⁴⁰ See, in particular, case C-192/18 *Commission v Poland* ECLI:EU:C:2019:924; case C-619/18 *Commission v Poland* EU:C:2019:531; case C-216/18 *PPU Minister for Justice and Equality v LM (Deficiencies in the system of*

Seen from this perspective, Opinion 1/17 is also interesting because it adds an international dimension to such a debate, that is, it raises the question as to what extent certain guarantees must be upheld under an EU international agreement.⁴¹

In Opinion 1/17, the CJEU emphasizes that, whereas some procedural rules of the CETA ICS are based on traditional ISDS mechanisms, they foresee innovative elements on the ICS' composition and on how it will deal with its cases: this is a permanent tribunal of 15 Members; each case will be heard by three Members who are not pre-selected; the appeal will be heard by the CETA Appellate Tribunal.⁴² According to the CETA Parties, these features imply that they want to create an investment system which is "independent, impartial and permanent", "inspired by the principles of public judicial systems", and has moved "decisively away from the traditional approach of investment dispute resolution".⁴³ Without questioning the formal classification of the CETA ICS – as "judicial bodies" or "judges" – for the CJEU, it is undisputed that those tribunals will exercise judicial functions. The issue is whether the CETA ICS meets the (EU law) requirements of independence and impartiality, and guarantees accession to it.

As for the requirement of independence, the CJEU recalls its previous case-law by distinguishing between its two aspects: external and internal.⁴⁴ The external independence requires that the CETA ICS acts autonomously, that is, in absence of a hierarchical or subordinate relationship with other sources. In this respect, certain guarantees are essential, such as guarantees against removal from office, and a level of remuneration commensurate to their functions. The internal dimension of independence is related to impartiality, and aims to ensure objectivity and the absence of interests in the outcome of the proceedings. In sum, "those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it".⁴⁵ The CJEU seems satisfied with the fact that, despite the lack of detailed provisions, the CETA will have to comply, *inter alia*, with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("the IBA Guidelines").

justice) ECLI:EU:C:2018:586. See P Van Elswege and F Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) EuConst 8.

⁴¹ See C Vajda and S Mair, 'The Applicability of Article 47 of the Charter of Fundamental Rights to International Agreements to which the Union is a Contracting Party' in D Petrlik, M Bobek, J Passer and A Masson (eds), *Evolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux, Liber amicorum Jiri Malenovský* (Bruylant 2020) 551.

⁴² Opinion 1/17 cit. para. 195.

⁴³ *Ibid.*

⁴⁴ See, in particular, case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117.

⁴⁵ Opinion 1/17 cit. para. 204.

As for the guarantee of accessibility, it implies the possibility that any investor that falls under the category identified by the CETA may bring a dispute before the CETA ICS. On the accessibility to the CETA ICS, the CJEU notes that the CETA does not provide any legally binding commitments on the financial accessibility for small or medium-sized investors. Nevertheless, the Court relies on Statement n. 36 according to which “there will be better and easier access to this new court for the most vulnerable users, namely [small and medium-sized enterprises] and private individuals”, and on the adoption of additional rules by the CETA Joint Committee.⁴⁶ In assessing the compatibility of the CETA ISDS with art. 47 EU Charter, the CJEU consistently relies on its settled case-law, what strikes, however, is its “trust” on what the CETA does not say expressly and on other texts, such as Parties statements and guidelines.

Two *Articles* of this Special Section examine the right of access to an independent tribunal from different perspectives: the first one focuses on a purely internal procedural issue, whereas the second one links the CJEU’s analysis to the international debate. Eleftheria Neframi’s *Article* questions whether art. 47 EU Charter, taken autonomously, is the appropriate ground for review under the Opinion procedure. The author, after analysing the different scope of this provision’s paragraphs and observing that it enjoys a specific function in the EU legal order, concludes that “external relations are outside the scope of art. 47 of the Charter”. There are two solutions that Neframi suggests in order to safeguard the principle of judicial protection and the right of access to an independent tribunal without recourse to art. 47 EU Charter. The first one relies on the principle of autonomy; the second solution refers to the assessment of compatibility of the CETA’s ISDS mechanism with the substantive provisions of the common commercial policy. According to the author, this latter is to be preferred. The *Article* by Güneş Ünüvar analyses the requirements of independence and impartiality of the CETA ICS investigating their interplay with the legal ethics rules codified under international treaties or guidelines. Ünüvar, more specifically, identifies some inconsistencies in the CJEU’s approach towards these latter. In particular, the author points out that the CJEU wrongly refrained from properly distinguishing between international court judges and international arbitrators, and emphasises that this could also undermine the ongoing reform of international investment law. The Court, the author argues, was probably aware that the Commission would have replaced the reference to the IBA’s Guidelines with an *ad hoc* Code of conduct for permanent judges in line with the nature of the ICS.

⁴⁶ *Ibid.* paras 216-217.



ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

edited by Mads Andenas, Cristina Contartese, Luca Pantaleo and Tarjei Bekkedal

OPINION 1/17: AUTONOMY OF EU LEGAL ORDER AND THE CONFLICTING CONTEXT OF INTERNATIONAL INVESTMENT ARBITRATION

ANTONIS METAXAS*

TABLE OF CONTENTS: I. Introduction. – II. The concept of autonomy. – III. The fundamental aspects of the principle of autonomy in the light of Opinion 1/17. – III.1. Opinion 1/17 and the allocation of competences. – III.2. Opinion 1/17 and the preliminary reference procedure. – III.3. Opinion 1/17 and the control of EU law. – IV. Evaluating the principle of autonomy after Opinion 1/17. – V. Conclusions.

ABSTRACT: Opinion 1/17 generated substantial scientific debate about the impact of Investor State Dispute Settlement mechanisms on the dynamic notion of the “autonomy” of the EU legal order. While analysing Opinion 1/17, it is important to evaluate the arguments that convinced the Court in reaching the conclusion that the creation of an Investment Court System provided in CETA to handle investment disputes is compatible with EU law. Focus on the merits of these arguments is amplified by the constant efforts of the CJEU to safeguard its strategic position as the sole guardian of the EU Treaties and of the EU legal order as a whole. The present analysis primarily explores the critical points in the Court’s arguments that are related to the notion of autonomy. The primary argument put forth is that the rationale behind Opinion 1/17 leaves an existent, however narrow, risk for the adequate preservation of the autonomy of EU legal order that needs to be addressed. This enhances the need for the CJEU to find in the future ways for an *inclusion* of the arbitral dispute settlement structures. Inevitably so, the present analysis highlights the fundamental necessity to preserve the autonomy of EU legal order while exploring the pathway to reconcile two necessities: the need for an autonomous ‘self-dependence’ of the Union’s legal system and the need of conciliation in the field of international investment arbitration. The strategic importance of safeguarding the autonomy of EU Law, a *conditio sine qua non* for the overall EU integration process, should better rely on practical, technical ways for its observance than to policy influenced fluctuations of its normative substance. KEYWORDS: Opinion 1/17 – autonomy – preliminary reference procedure – EU legal order – interpreting EU law – international investment arbitration.

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I. INTRODUCTION

The relationship between existing Investor State Dispute Settlement (hereafter ISDS) mechanisms and EU law has been an issue of great debate in the past years relating to the fundamental principle of autonomy of the EU legal order. The 2018 landmark *Achmea* ruling has been the most debated judgment in this context until Opinion 1/17.¹

The Court of Justice of the European Union (CJEU) handed down its Opinion 1/17² on the compatibility of the Comprehensive Economic and Trade Agreement (CETA) agreement between Canada and the EU with EU law, on the 30th of April 2019.³ CETA is one of the most recent free trade agreements adopted by the EU, including European Union-Singapore Free Trade Agreement (EUSFTA) with Singapore and European Union-Vietnam Free Trade Agreement (EUVFTA) with Vietnam, that include provisions on investment protection. Opinion 1/17 of the CJEU on CETA keeps the debate on the principle of autonomy topical, claiming that the establishment of the CETA Tribunal and Appellate Tribunal for disputes between investors and the contracting parties is consistent with EU law. In particular, the Court found that the relevant provisions in CETA do not violate the principles of autonomy, equal treatment, and effectiveness. The request for an opinion by the Court originated from a fierce dispute within Belgian internal politics, with Wallonia demanding from the Government in Brussels to expressly consult the CJEU on the legal merits of that agreement. Respecting that decision from its regional parliament, Belgium asked the CJEU, *inter alia*, whether such an agreement was compatible with the principle of autonomy of the EU legal order.

Opinion 1/17 touches a number of important and controversial issues. The following analysis does not intend to provide an overview of all key issues raised by the Court but will rather focus predominantly on the approach adopted by the CJEU as regards safeguarding the autonomy of EU legal order. The primary objective is to identify the elements in the Court's argumentation that could potentially pose a risk for the autonomy of the EU legal order. The basic argument put forth is that the reasoning behind Opinion 1/17 raises a narrow but nevertheless existent risk-potential as regards the adequate preservation of EU Law autonomy; a risk that needs to be addressed. At a second level, this analysis argues in favour of the need for the CJEU to find ways for a comprehensive inclusion of the arbitral dispute settlement structures. If anything is clear after Opinion 1/17 is that autonomy of EU Law should better rely on practical, technical ways for its observance of its scope and fluctuations of a judicial standpoint. A practical tool in this direction could be, as it is here argued, *inter alia* a 'smart' use of the preliminary reference procedure, provided for in art. 267 TFEU.

¹ Case C-284/16 *Achmea* ECLI:EU:C:2018:158.

² Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:72.

³ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [14 January 2017] 23.

The substantiation of these arguments can be materialized through the examination of the elements that constitute the *concept* of autonomy of the EU legal order, as well as how these elements have been identified, featured and interpreted before – and throughout – Opinion 1/17.

II. THE CONCEPT OF AUTONOMY

An independent legal system, should it aim to remain “independent” must safeguard its autonomy. Autonomy could be defined as the lack of normative *control* (not mere influence) from outside sources as regards (at least) the central structural decisions it entails and the values it reflects. In this sense, safeguarding its autonomy is not an “egoistic” perception and tendency but rather a precondition of the very existence of a given coherent legal order. Given that the EU, seen as a project with a mainly political *telos*, is founded on the legitimation of a distinctive and autonomous legal order,⁴ the concept of autonomy constitutes a structural existential principle which is inextricably linked to the development so far as well as the further evolution of the European integration process.⁵ Further than “merely” a system with primacy over the laws of the Member States, the principle of autonomy of EU law essentially provides that the common set of rights and obligations deriving from the Treaties to form the EU legal order will be sheltered from external factors that would undermine its coherence.

The normative substance of the autonomous EU legal order takes of course, its more concrete form precisely at the extreme crucial constellation, when there is a genuine *collision* with national and/or international law.⁶ In addition to the above, it needs to be underlined that the existential cornerstone of the EU Legal order, the supremacy principle, is also predominantly based on the basic assumption of structural autonomy of the EU legal order. Since the *Costa* case, the CJEU’s jurisprudence has highlighted the principle of supremacy as the *key* methodological tool of conflict resolution. The legal consequence of the principle of supremacy is the inapplicability of national rules that are in conflict

⁴ A Metaxas, ‘Reflections on the Distinctive Character of the EU Legal Order’ (2016) *Efimerida Dioikitikou Dikaïou* 346.

⁵ See NN Shuibhne ‘What is the Autonomy of EU Law, and Why Does that Matter?’ (2019) *ActScandJurisGent* 9. See also on the principle of autonomy B De Witte ‘European Union Law: How Autonomous is its Legal Order?’ (2010) *Zeitschrift für Öffentliches Recht* 141; J Odermatt ‘The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?’ in M Cremona (ed) *Structural principles in EU external relations law* (Hart 2018) 291.

⁶ NN Shuibhne ‘What is the Autonomy of EU Law, and Why Does that Matter?’ cit. 4. See also A Metaxas ‘State of Exception as the New *Legitimitas*: Some Thoughts on the Necessity of an Interdisciplinary Approach of EU Law’ (2018) *Efimerida Dioikitikou Dikaïou* 642.

with EU law (*Anwendungsvorrang*).⁷ The notion of autonomy has been particularly constructed in the Court's case law. The pivotal role of the CJEU is illustrated in many respects, as the Court is acting as the "guardian" of the EU normative framework, under the EU's *sui generis* status. Historically, the CJEU did not hesitate to act as an activist court that *constructed* and *ab initio* formed to a large extent the dogmatic pillars of the EU legal order even in cases where those pillars did not have a clear foundation in the Treaties.⁸

The Court founded the approach of the EU as a *Rechtsgemeinschaft*, a "community of law", whose dogmatic constitution is based on a sequence of interrelated theoretical doctrines and procedural mechanisms: supremacy of EU Law, direct effect and the principle of State liability for breaches of EU Law, are the most symbolic fundamental principles based on which the EU Legal order was (is) not just shaped but indeed constructed.⁹ In the landmark judgment *Van Gend en Loos*, the CJEU claimed that at stake with the principle of autonomy is the control or monopoly of jurisdiction of the Court aiming to protect the essential characteristics of the EU and its legal order. This approach of the Court inevitably leads to the necessity to identify and analyse the ways and forms in which CJEU's monopoly of jurisdiction is manifested and legitimized, thus identifying the various aspects of autonomy itself.

III. THE FUNDAMENTAL ASPECTS OF THE PRINCIPLE OF AUTONOMY IN THE LIGHT OF OPINION 1/17

There are three dominant criteria structuring the principle of autonomy and highlighting its legitimacy and necessity, namely the allocation of competences between the EU and the Member States, the importance of the preliminary reference mechanism, and the control *of* and *on* EU Law.¹⁰

⁷ A Metaxas 'Reflections on the Distinctive Character of the EU Legal Order' cit 3. See also case-6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66.

⁸ *Ibid.*

⁹ Case 26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1; *Costa v E.N.E.L.* cit. 6, 597-598; Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italian* ECLI:EU:C:1991:428. See also M Dougan 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in G De Búrca and PP Craig (eds) *The Evolution of EU Law* (2nd Edition, Oxford University Press 2011) 407.

¹⁰ F De Abreu Duarte 'Autonomy and Opinion 1/17 –A Matter of Coherence' (31 May 2019) European Law Blog europeanlawblog.eu; See also B De Witte 'European Union Law: How Autonomous is its Legal Order?' cit. 4; S Gaspar-Szilágyi 'A Standing Investment Court under TTIP from the Perspective of the CJEU' (2019) *The Journal of World Investment & Trade* 701; J Odermatt 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (EUI Working Papers 7-2016); P Eeckhout 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' (2013) CLP 169; I Govaere and S Garben (eds) *The Interface Between EU and International Law: Contemporary Reflections* (Bloomsbury 2019).

III.1. OPINION 1/17 AND THE ALLOCATION OF COMPETENCES

The first aspect of autonomy is about the division of competences between the Union and Member States. Essentially, this is related to the definition of the scope of the sovereignty of the Member States in the field of law making. On this issue, Opinion 1/17 seems to offer solid ground on the argument that provisions in CETA essentially offer CJEU undisputed monopoly of jurisdiction for the determination of the division of competencies. Already in Opinion 1/91 the Court identified autonomy in terms of protection against adverse effects on the allocation of responsibilities defined in the Treaties, while special emphasis was placed on its own competence both to articulate and to assure respect for that definition.¹¹

The power to effectively control external interaction is therefore highly concentrated on the Court. This dimension is clearly reflected in the jurisprudence of the CJEU. In Opinion 1/91, the Court claimed that if the European Economic Area (EEA) Court could be called upon to interpret the expression “Contracting Party”, then the autonomy would be breached as it “is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice pursuant to art. 164 of the EEC Treaty”.¹² Furthermore, in Opinion 2/13 the Court stated that:

“However, the fact remains that, in carrying out that review, the ECHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member states and on the EU. [...] Such a review would be liable to interfere with the division of powers between the EU and its Member states”.¹³

Last, it should be also noted that the Court has constantly defended its monopoly to declare an unlawful act of EU law to be void (case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*),¹⁴ this being also an expression of this profound fundamental assumption: the autonomy of the EU legal order.¹⁵ In CETA, art. 8.21 on the determination of the respondent

¹¹ Opinion 1/91 *Accord EEE - I* ECLI:EU:C:1991:490 para. 2.

¹² *Ibid.* paras. 34-35. F De Abreu Duarte ‘Autonomy and Opinion 1/17 – A Matter of Coherence’ cit. 9, refers also to the *Mox Plant* case (case C-459/03 *Commission v Ireland* ECLI:EU:C:2006:345 para. 177) where the Court stated: “The act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member states pursuant to Community law”.

¹³ Opinion 2/13 *Adhésion de l'Union à la CEDH* ECLI:EU:C:2014:2454 paras 224-225.

¹⁴ Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452.

¹⁵ See J Bast ‘Autonomy in Decline? A Commentary on Rimšēvičs and ECB v Latvia’ (13 May 2019) *Verfassungsblog verfassungsblog.de*, with reference to the very important recent judgment of the Court in the *Rimšēvičs* case (case C-202/18 *Rimšēvičs v Latvia* ECLI:EU:C:2019:139) where the CJEU for the first time declared a national legislative act of a Member State void.

for disputes, states that “the European Union shall, after having made a determination, inform the investor as to whether the European Union or a Member State of the European Union shall be the respondent”.¹⁶ In Opinion 1/17, the Court makes a clear mention on the weight of this element for the autonomy of EU Law. The Court argues that, by explicitly providing the power to determine whether a possible dispute should be brought against a Member State or against the Union is granted on the Union and not on the CETA Tribunal, the exclusive jurisdiction of the Court to give rulings on the division of powers between the Union and its Member States is preserved.¹⁷

III.2. OPINION 1/17 AND THE PRELIMINARY REFERENCE PROCEDURE

The second crucial aspect of autonomy as well as an indispensable tool for safeguarding its essence, is the respect for the mechanism of preliminary reference that safeguards the fundamental link of the Court with national courts. This link is a *conditio sine qua non* for the strategic structural task assigned to the CJEU under art. 267 TFEU, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals.¹⁸ In this framework, the responsibilities but also the privileges of national courts and tribunals to ensure their functioning as EU courts within that system must be protected.¹⁹ Legal redress for the individual is thus safeguarded and further homogenous evolution of EU law is guaranteed through the preliminary ruling procedure.²⁰ Such provisions are present in the *Achmea* case, based by the CJEU actually on art. 19(1) TEU, thus hinting towards a connection between the principle of autonomy of EU law and the rule of law.²¹

Opinion 1/17 seems -at a first glance- to be departing from the requisitions of this element, since CETA does not provide of any function that could simulate a system of preliminary ruling in the Investment Court System it introduces. The CJEU however, assesses that this does not pose a threat to the application of EU law due to the way it -EU law- is described in CETA. In several occasions in Opinion 1/17, the Court of Justice refers to art. 8.31(2) of the CETA stipulating that “the Tribunal will have to confine itself to an examination of EU law ‘as a matter of fact’ and will not be able to engage in interpretation of points of law”.

¹⁶ Art. 8(21) CETA.

¹⁷ Opinion 1/17 cit.

¹⁸ *Van Gend en Loos v Administratie der Belastingen* cit. 8 para. 7. See also, Opinion 2/13 cit. 12 para. 176.

¹⁹ NN Shuibhne ‘What is the Autonomy of EU Law, and Why Does that Matter?’ cit.4.

²⁰ JHH Weiler ‘Revisiting Van Gend en Loos: Subjectifying and Objectifying the Individual’ in A Tizzano, J Kokott and S Prechal (eds) *50th Anniversary of the Judgment in Van Gend en Loos 1963-2013* (Office des Publications de l’Union Européenne 2013) 11. See also C Closa, D Kochenov and JHH Weiler, ‘Reinforcing Rule of Law Oversight in the European Union’ (EUI Working Papers 87/2014).

²¹ See also S Hindelang ‘Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU’s Judgement in *Achmea* Put in Perspective’ (2019) ELR 383.

Overall, in contrast to traditional regional or international courts, the CJEU is not only assigned with the application, interpretation and validation of secondary EU legal instruments and with the interpretation of primary EU law, but it has also established itself as a constitutional-type court. In this latter capacity, well before Opinion 1/17, the Court has developed principles and mechanisms (primacy, direct effect) to define the relationship between the EU and Member State legal orders. The Court has been engaged in a constant dialogue with the Member State courts through the preliminary reference mechanism under art. 267 TFEU. More importantly, the Court has created an intricate case-law on the relationship between the EU legal order and international law.²² The preliminary ruling procedure is therefore inherently linked to the autonomy of EU Law, being described as “essential” and “indispensable to the preservation of the very nature of European Union law”.²³ This statement can be originally found in Opinion 1/09, on the establishment of a European and Community Patents Court, and provides the principal argument for the CJEU to not allow the possibility for such a court to ignore domestic courts and acquire exclusive jurisdiction over that part of EU law. CJEU underlined that “the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties”.²⁴

In 2018, in the landmark *Achmea* case, the significant role of the preliminary reference procedure was highlighted extensively. According to the CJEU, arbitral courts could not be seen as courts in the sense of art. 267 TFEU, as they stood outside the EU’s legal system and could not interpret EU law.²⁵ In *Achmea*, the Court argued that “the judicial system as thus conceived, has as its keystone the preliminary ruling procedure provided for in art. 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties”.²⁶ In addition, as aptly mentioned by Biltgen “the scope of *Achmea* is essentially limited to arbitration clauses in BITs between Member

²² S Gaspar-Szilágyi ‘A Standing Investment Court under TTIP from the Perspective of the CJEU’ cit. 9. See also B De Witte ‘Direct Effect, Primacy, and the Nature of the Legal Order’ in G De Burca and PP Craig (eds) *The Evolution of EU Law* cit. 346.

²³ Opinion 1/09 *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets* ECLI:EU:C:2011:123 paras 3 and 89.

²⁴ *Ibid.* para. 85.

²⁵ J Hillebrand Pohl ‘Intra-EU Investment Arbitration after the *Achmea* Case: Legal Autonomy Bounded by Mutual Trust?’ EuConst 767.

²⁶ *Achmea* cit.1 para. 37.

States and does not destroy bridges between the Courts of the EU and those of Member States".²⁷

Regarding the future of investment treaty arbitration, the *Achmea* ruling may urge Member States to terminate their intra-EU BITs, even though most such BITs provide for "sunset clauses" – an extended period of applicability following termination.²⁸ However, it has been often argued that autonomy means different things in different contexts, thus its practical implementation remains unclear.²⁹ For example, it has not been clarified yet what autonomy means in relation to the Energy Charter Treaty (ECT) and arbitral tribunals have consistently refused to accept the relevance of *Achmea* in that context.³⁰ However, intra-EU investment arbitration based on the ECT seem to have the capacity to generate distressful conditions with the possibility of conflicting obligations originating on the one hand from EU law and on the other hand from an arbitral award based on the ECT when EU Member States act as respondents. This situation is practically similar to *Achmea*, regardless the obvious differentiation of the EU being also a party to the ECT together with each Member State.³¹

It needs to be noted that the debate on the role of EU public policy in arbitration, when confronted with the recent discussion on the potential inclusion of ISDS in EU investment and trade agreements, does entail proposals to soften EU procedural law in the field of preliminary reference procedure under art. 267 TFEU to allow arbitral panels to seek preliminary rulings before the CJEU.³² In particular, as it has been concluded in several decisions, ISDS arbitration tribunals acting under a BIT of a Member State would be entitled to request the Court of Justice for preliminary rulings where the claimant investor had the alternative option to bring its case to a national Court.³³ In the *Achmea* case however, the Court raised the question with regard to the necessary mechanisms that would ensure the uniform and consistent interpretation of Union law as EU law formed part of the applicable law. In assessing whether an *ex ante* mechanism (the investment tribunal

²⁷ See F Biltgen 'The Concept of Autonomy of EU Law: from Opinion 2/13 (Accession to the ECHR) to *Achmea* and Opinion 1/17 (CETA) in *Building Bridges: Central Banking Law in an Interconnected World* (December 2019) ECB Legal Conference, 80 www.ecb.europa.eu.

²⁸ F Biltgen 'The Concept of Autonomy of EU Law: from Opinion 2/13 (Accession to the ECHR) to *Achmea* and Opinion 1/17 (CETA) cit. See also S Hindelang 'Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgement in *Achmea* Put in Perspective' cit. 19.

²⁹ See C Contartese 'Achmea and Opinion 1/17: Why Do Intra and Extra-EU Bilateral Investment Treaties Impact Differently on the EU Legal Order?' (European Central Bank Legal Working Paper Series -2019).

³⁰ P Koutrakos 'More on Autonomy—Opinion 1/17 (CETA)' (2019) ELR 293.

³¹ A Pinna 'The Incompatibility of Intra-EU BITs with European Union Law, Annotation Following ECJ, 6 March 2018, Case 284/16, *Slovak Republic v Achmea BV* (2018) Paris Journal of International Arbitration, Cahiers de l'arbitrage 73. See also J Kokott and C Sobotta 'Investment Arbitration and EU Law' (2016) CYELS 3, 7.

³² BA Warwas 'The State of Research on Arbitration and EU Law: Quo Vadis European Arbitration?' (EUI Working Papers –23-2016).

³³ J Basedow 'EU Law in International Arbitration: Referrals to the European Court of Justice' (2015) *JIntlArb* 367.

seeking a preliminary ruling from the CJEU) or an *ex post* control (the investment tribunal's award being reviewed by a domestic court in the EU), could consist such mechanisms, the Court held that neither approach was legally feasible or, at the end, satisfactory.³⁴

Returning to Opinion 1/17, the provision in CETA regarding the Tribunal's position to confine itself to an examination of EU law 'as a matter of fact' seems to be the critical point in CJEU's rationale. In this provision the CJEU finds sufficient support and legitimacy in its objective that the Investment Court System is not given the competence to interpret EU law, thus such a competence remains an exclusive privilege of the CJEU.³⁵ The same confidence is shared by the Opinion of Advocate General Yves Bot delivered on 29 January 2019. On the CETA provision that the Tribunal may consider the domestic law of a Party as "a matter of fact", the Advocate General states that "consideration of the Parties domestic law must not entail the CETA Tribunal amending that law. It must take account of that law as it stands".³⁶

AG Bot makes a comparison with the *Achmea* judgment stating that "unlike in the case of bilateral investment treaties between Member States such as that at issue in the case which gave rise to the judgment in *Achmea*, EU law does not form part of the international law applicable between the Parties".³⁷ Opinion 1/17 is therefore resting on the element that the Investment Court System (ICS) cannot interpret EU law and, consequently, on the notion that by considering the domestic law "as a matter of fact", the ICS must follow the prevailing interpretation given by the courts or authorities accepted by the institutions or the courts of the European Union. Further protection against the possibility of misinterpretation of EU law seems to be entrusted in the establishment pursuant to CETA art. 8.28(1) of an Appellate Tribunal set to review awards rendered by the ICS. This is based again on the notion that the Appellate Tribunal will be taking EU law into consideration as "a matter of fact". In this context, the Appellate Tribunal can revise or overturn an award of the CETA Tribunal on the basis of "manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law".³⁸ It can be assumed that such a provision is meant as an additional reassurance against the possibility of an error by the Tribunal in its appreciation of the relevant domestic law, that would then be corrected through the process of the review of its awards by the Appellate Tribunal.

The issue that arises by the aforementioned analysis relates directly to the critical element of EU law being considered as "a matter of fact" -an element through which the CJEU builds its assurances on the autonomy of EU legal order- being used as a tool to secure the proper function of both the CETA Tribunal and Appellate Tribunal. Keeping in mind that the concept is new in CETA, a structure in which the Appellate Tribunal will

³⁴ See C Contartese 'Achmea and Opinion 1/17: Why Do Intra and Extra-EU Bilateral Investment Treaties Impact Differently on the EU Legal Order?' cit.27.

³⁵ *Ibid.*

³⁶ Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:72, opinion of AG Bot.

³⁷ *Ibid.* para. 110.

³⁸ *Ibid.* para. 27.

review an ICS award on its merit to take account of EU law “as it stands”, entails a specific risk: the Appellate Tribunal in order to deliver its judgment on the ICS award, risks eventually interpreting EU law thus deconstructing the fundamental argumentation behind Opinion 1/17.

It needs to be noted however, that there are cases where investment tribunals need to come to an interpretation of domestic law when for example it needs to be clarified whether a contract was lawfully dismissed under domestic law. A typical example was *Malicorp v Egypt* where such a clarification was necessary in order to confirm whether any rights susceptible of expropriation persisted.³⁹ In order, for example, to decide whether an expropriation was done “under due process of law”, as art. 8.12(1)(b) requires, a tribunal may need to examine if the State complied with domestic legal procedures when expropriating the investor. Such an assessment of a local court judgment’s consistency with domestic law could be considered as partial interpretation of the local court’s engagement in abuse of domestic law, leading to a denial of justice and a breach of CETA art. 8.10(2)(a). It should therefore be considered that however slim, the possibility of infringement of art. 8.31.2 of the CETA does exist.

III.3. OPINION 1/17 AND THE CONTROL OF EU LAW

A third aspect linked to autonomy relates to the level of control the CJEU holds over the proper application of EU law in case a dispute settlement body misinterprets and/or violates EU law. Member States can be on the receiving end of violation measures imposed by the Commission should the CJEU find that a domestic court failed to uphold EU law. Following the insofar analysis, Opinion 1/17 needs to be evaluated on this critical aspect too. In his Opinion AG Bot comments that “infringement of Article 8.31.2 of the CETA would constitute an error in the application of applicable law”.⁴⁰ AG Bot identifies such an infringement in the event the Tribunal would end up formulating its own interpretation of EU law, without considering the interpretation of that law accepted by the institutions or the courts of the European Union.

Furthermore, AG Bot emphasises that a review by the Appellate Tribunal should be conducted only in the event that there is nothing in the EU legal order to clarify the meaning to be given to a provision of EU law. In Opinion 1/17 we find that the CJEU responds to the question by emphasizing that such an examination by the Appellate Tribunal could not be considered as the equivalent to an interpretation of domestic law. Again, the Court’s argumentation is based on the notion that in such a case the domestic law would be taken ‘as a matter of fact’ thus the risk of ending up with an interpretation by the CETA Tribunal does not exist. It needs to be noted that the aforementioned argumentation

³⁹ International Centre for Settlement of Investment Disputes (ICSID) judgement of 27 February 2011 *Malicorp Limited v The Arab Republic of Egypt*.

⁴⁰ *Accord ECG UE-Canada*, opinion of AG Bot, cit. para. 154.

essentially denies the possibility of infringement of CETA art. 8.31(2) rather than stipulating – or even indicating – on the suggested action taken in case of such an infringement.

So far, in cases where national courts in Member States fail to uphold EU law, either by not complying with the interpretation offered by the CJEU following an answer to a preliminary ruling, or by not requesting a mandatory preliminary ruling in the first place, the CJEU retains its competence to submit corresponding sanctions.⁴¹ Not only that: according to the famous *Köbler* judgment, Member States are obliged to compensate the damage caused to individuals in cases where an infringement of EU law stems from a decision of a Member State court adjudicating at last instance.⁴² In the landmark judgment *Commission v France* rendered in 2018, the CJEU condemned for the first time a Member State for a breach of art. 267(3) TFEU in the context of an infringement action, after the French administrative Supreme Court (*Conseil d'Etat*) failed to make a necessary preliminary reference. This decision is undoubtedly a crucial step towards a more complete system of safeguards put by the Court in order to be able to remain in full control of the system of the EU legal order as a whole. All these instruments cannot be activated in the case of tribunals that are not competent to apply EU law like ICS provided for by CETA as described in the following analysis (see Section IV).

Corresponding examples related to this issue can be found in Opinion 1/09 where it is stated that “...it is clear that if a decision of the Patent Court were to be in breach of European Union law, that decision could not be the subject of infringement proceedings nor could it give rise to any financial liability on the part of one or more Member State...”.⁴³ This is due to the fact that the European and Community Patents Court (PC) is not attached to a Member State that could be held responsible for the infringement of EU law.

Similar concerns rose, in CJEU's Opinion 2/13 regarding the procedure established by Protocol No 16 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Protocol provided for the highest courts and tribunals of the Contracting Parties to be able to request the ECHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or the Protocols thereto. CJEU expressed its concerns that the procedure established by Protocol No 16 may apply “even though EU law requires those same courts or

⁴¹ J Covelo de Abreu ‘Infringement Procedure and the Court of Justice as an EU Law's Assurer: Member States' Infringements Concerning Failure to Transpose Directives and the Principle of an Effective Judicial Protection’ in D Moura Vicente (ed) *Towards a Universal Justice? Putting International Courts and Jurisdictions into Perspective* (Brill Nijhoff 2016) 468.

⁴² Case C-224/01 *Köbler* ECLI:EU:C:2003:513. See A Metaxas ‘Member State Liability for judicial breaches of EU Law’ (2013) *Efimerida Dioikitikou Dikaïou* 727.

⁴³ Opinion 1/09 cit. para. 88.

tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU".⁴⁴

In Opinion 1/17 however, CJEU's prospective on the issue seems to alter from its previous concerned standpoint. The Court accepts that CETA art. 8.28.2(b) allows the Appellate Tribunal to identify possible errors in the appreciation of relevant domestic law. However, the CJEU rests confident on the concept that preceding provisions in CETA offer assurance that the intention of the Parties to the agreement was not to attribute jurisdiction to the Appellate Tribunal to interpret domestic law.⁴⁵ It is therefore evident that while with Opinion 1/17 the Court does not change its prospective on the importance of retaining its competence to submit corresponding sanctions in case of infringement, it accepts that in CETA such an infringement is simply not possible, thus no concerns need to be raised. However indicative of the Court's intention to offer a "softer" approach towards its safeguarding tone on the issue of control of EU law, it needs to be highlighted that such an approach is not without risk. The simple notion that the intention of the Parties was not to confer jurisdiction to the Appellate Tribunal to interpret domestic law, does not actually avert the possibility for such a development. In such a case, Opinion 1/17 offers no clarification neither on what would follow such an infringement nor on what would that -in essence- mean for its control of EU law.

IV. EVALUATING THE PRINCIPLE OF AUTONOMY AFTER OPINION 1/17

Out of the three afore mentioned aspects of autonomy, the significance of the mechanism of preliminary reference as a fundamental element structuring the relationship between the CJEU and domestic courts has been intensively outlined. Opinion 1/17 could come here as a surprise, since in essence, it opens the possibility for the ICS provided by CETA to override the mechanism of preliminary reference. It needs, however, to be noticed that it was the Commission itself that first came with a proposal on the integration of arbitration with the EU legal regime, a proposal that although not eventually materialized, did renew the scientific debate on the need to combine arbitration within the EU procedural law system. In its 2015 Communication to the European Parliament, the Commission declares its resolve to ensure that "EU bilateral agreements will begin the transformation of the old investor-state dispute settlement into a public Investment Court System composed of a Tribunal of first instance and an Appeal Tribunal operating like traditional courts".

The Commission proposed engaging in an effort with other international partner to build consensus for a fully-fledged, permanent International Investment Court and to support the incorporation of investment rules into the World Trade Organization (WTO). Ac-

⁴⁴ Opinion 2/13 cit. para. 196.

⁴⁵ Opinion 1/17 cit. paras 131 and 133.

cording to the Commission, such action could lead to a clear code of conduct to avoid conflicts of interest, with “independent judges with high technical and legal qualifications comparable to those required for the members of permanent international courts, such as the International Court of Justice and the WTO Appellate Body” offering an opportunity to “simplify and update the current web of bilateral agreements and to set up a clearer, more legitimate and more inclusive system”.⁴⁶

The Commission’s proposal is indicative of the pressuring necessity to establish a connection between investor-state dispute settlement bodies and the EU procedural legal order.⁴⁷ Discussion, on the position EU public policy holds towards ISDS in EU investment agreements should be expected to eventually result in a framework that eases EU procedural law in the field of preliminary reference procedure to allow arbitral tribunals to seek preliminary rulings before the CJEU. Opinion 1/17 should be considered as a ruling that will undoubtedly impact negotiations on ISDS going forward well beyond Europe. At the ongoing negotiations at United Nations Commission on International Trade Law (UNCITRAL) Working Group III, EU is indeed proposing establishing a permanent multilateral investment court with an appeal mechanism and full-time adjudicators as the only reform option that can effectively respond to all the concerns on multilateral reform of ISDS. CETA’s investment dispute settlement mechanism could constitute the basis for potential bilateral agreements to which the EU is party.⁴⁸

It needs to be stressed however that, on the issue of the interpretation of EU Law, under the CETA provisions the “risk” of the Appellate Tribunal eventually de facto ending up interpreting EU law, is still present. On this critical issue, as presented earlier in this analysis, CJEU’s argument in Opinion 1/17 is that while art. 8.28(2)(b) of the CETA offers the Appellate Tribunal the ability to identify possible errors in the appreciation of relevant domestic law, the preceding provisions make it clear that it was not the *intention* of the Parties to confer on the Appellate Tribunal jurisdiction to interpret domestic law. Referring simply to the *intention* of the Parties does not seem to offer adequate argumentation against the aforementioned risk.

This, in turn, leads to a final issue raised by Opinion 1/17 regarding the provision that “any meaning given to domestic law by the Tribunal shall not be binding upon the courts or authorities of that Party”.⁴⁹ Although such a provision solves the issue of not changing the nature of EU law or case-law for the CJEU, it does not eliminate the possibility of exposing the Member-States to conflicting situations between the ICS and CJEU. In the -slim but not eliminated- possibility that the ICS makes a “mistake” interpreting domestic law

⁴⁶ Communication COM(2015) 497 final from the Commission of 14 October 2015 Trade for All: Towards a more responsible trade and investment policy.

⁴⁷ G Bermann ‘Reconciling European Union Law Demands with the Demands of International Arbitration’ (2011) *FordhamIntlJ* 1193, 1197.

⁴⁸ See more on: M Bungenberg and C Titi ‘CETA Opinion – Setting Conditions for the Future of ISDS’ (5 June 2019) *EJIL:Talk!* www.ejiltalk.org.

⁴⁹ Opinion 1/17 cit. para. 130.

“as a matter of fact”, the respective MS would be exposed to rulings by the ICS for acts which could even have been enacted by imposition of EU law, while on the other hand the CJEU could impose sanctions to a MS that would be moving to legislative changes in order to comply with rulings by the ICS triggered by Canadian investors.

V. CONCLUSIONS

Opinion 1/17 has rightfully generated substantial scientific debate regarding the future of EU law autonomy and its relationship with Investor State Dispute Settlement mechanisms. The interest in analysing Opinion 1/17 lies on examining the arguments that convinced the Court in reaching the conclusion that the creation of an Investment Court System provided in CETA to handle investment disputes, is compatible with EU law. Focus on the merits of these arguments is amplified by the fierce efforts of the CJEU to safeguard its central position as the guardian of the EU Treaties. Following an analysis of the fundamental aspects that determine the autonomy of EU legal order, it can be concluded that the critical point in Opinion 1/17 that holds the CJEU rationale together, is its resolve that the Tribunal provided by CETA will have to confine itself to an examination of EU law “as a matter of fact”. This concept seems to be the key in Opinion 1/17 since by taking EU law “as a matter of fact”, the ICS provided in CETA will neither be able to engage in interpretation of points of law nor make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU’s constitutional framework. According to the Court, these two elements safeguard that autonomy of EU legal order is preserved. Regardless of the Court’s resolve though, concerns could be raised with regard to the small -but nevertheless present- possibility of the Appellate Tribunal ending up interpreting EU law, as well as the CJEU’s limited, if not non-existent, ability to control the situation in case of such an infringement of CETA’s art. 8.31(2). The Court’s resolve that the mere *intention* of the Parties as regards the Appellate Tribunal’s jurisdiction to interpret domestic law is adequate safeguard against the aforementioned risk, could be interpreted as an indication of the CJEU’s inclination towards a more flexible stance regarding the standards under which autonomy of EU legal order is preserved. One should expect that these concerns will be the topic of fierce scientific dialogue as well as further Opinions and judgements by the CJEU in the future.



ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

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THE LEGACY OF OPINION 1/17: TO WHAT EXTENT IS THE AUTONOMOUS EU LEGAL ORDER OPEN TO NEW GENERATION ISDS?

ARMAN MELIKYAN*

TABLE OF CONTENTS: I. Introduction. – II. EU and a reformed international investment order. – II.1. Post-Lisbon intra-EU developments and traditional ISDS clauses. – II.2. ISDS Novelty outdated? Commission's reform agenda and the comprehensive economic and trade agreement with Canada (CETA). – II.3. Main legal issues connected to the new generation ISDS mechanisms and the constitutionality of the EU legal order. – III. Autonomy of the EU law and international legal order. III.1. Architecture and meaning of autonomy of EU legal order. – III.2. Participation of the EU in international dispute settlement: dynamics before Opinion 1/17. – IV. Game of thrones in Opinion 1/17: lessons and prospects. – IV.1. A new *de minimis* for the principle of autonomy of EU law? – IV.2. Breakdown of "umbrella principle" under the light of ICS. – IV.3. Other issues in Opinion 1/17. – IV.4. Significance of Opinion 1/17. – IV.5. An alternative of an alternative: can multilateral investment court tackle the legitimacy crisis of ISDS, reformed ICS, and comply with the CJEU's golden principle? – V. Conclusion.

ABSTRACT: The EU-led investor-state dispute settlement (ISDS) reforms have recently gathered significant attention. The EU obligation to contribute to the development of international law through its post-Lisbon exclusive competences in the area of foreign direct investments is what set the stage for the EU to become a fully-fledged global investment actor. As a result, since 2018 the EU has launched an ambitious reform agenda, aimed at transforming the traditional ISDS mechanisms into Investment Court System (ICS) with the ultimate goal of establishing a Multilateral Investment Court. This project, however, could not have circumvented the long-standing sensitive issue of the interplay between international dispute settlement systems and the autonomy of EU law, thus positioning the Court of Justice of the European Union (CJEU) as the ultimate arbitrator of this global agenda. This *Article* scrutinises how the CJEU conciliated the doctrine of the autonomy of EU legal order with the Investment Court System in Opinion 1/17 departing from its well-known autonomy-preservationist saga. It also examines the key institutional transformations of Investment Court System and how it differs from traditional

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ISDS and other dispute settlement mechanisms. Finally, the *Article* analyses the impact of the conclusions of Opinion 1/17 on the future of global investment reforms, in particular, the establishment of the Multilateral Investment Court and further development of the doctrine of the autonomy of EU law.

KEYWORDS: CETA – ISDS – CJEU – Investment Court System – autonomy of EU legal order – Opinion 1/17.

I. INTRODUCTION

In 2018, following a large flow of criticism against the traditional investor-state dispute settlement (ISDS) mechanisms and political discussions, the European Commission officially launched an ambitious global ISDS reform agenda promising to address all concerns.¹ The purpose of the reforms was re-institutionalisation of the investment arbitration in order to ensure that transparency, legitimacy and consistency are observed.² In particular, the lack of legitimacy and consistent case-law is to be solved through interim and long-lasting solutions. The plan to establish a multilateral investment court is seen through and conditional upon the success of a transitional investment court system. By now, the EU has included Investment Court System (ICS) clauses in a number of free trade agreements, including the Comprehensive Economic and Trade Agreement with Canada (CETA), Investment Protection Agreement with Vietnam, EU-Mexico Free Trade Agreement, EU-Singapore Investment Protection Agreement. As anticipated, this global constitutional agenda raised some fundamental political and legal questions. Primarily, beyond the scepticism towards the substance of the reforms, this initiative brought up the long-standing issue of conciliation of the autonomous EU legal order and international law in the field of investment.

The question reached its existential importance when one of the regional parliaments of the Kingdom of Belgium (Parliament of Wallonia) threatened to block one of the biggest EU trade projects (CETA) based on this very issue. Subsequently, at the request of Belgium, the Court of Justice of the European Union (the Court) was called on to rule on the question of the compatibility of the CETA Investment Court System with the autonomy of the EU legal order.³ Especially, after the radical outcome of *Achmea* case on the question of the compatibility of intra-EU ISDS, the European Commission, the keen supporter of the abolishment of ISDS between Member States, found itself in its own trap – how to reconcile the autonomy of EU law and the EU-third State ISDS mechanisms given the legacy of the existing EU case-law. This time the stakes were even higher. It would not constitute yet another episode in “(in)compatibility case” saga, but would rather decide the destiny of a global reform agenda. The approach of the Court in Opinion 1/17 was to determine the future of the international investment arbitration in the form of an investment court system between

¹ European Commission, *The Multilateral Investment Court Project* trade.ec.europa.eu.

² EU Trade Stakeholder Meeting, *Establishment of a Multilateral Investment Court* trade.ec.europa.eu.

³ Diplomatie Belgium, CETA: *Belgian Request for an Opinion from the European Court of Justice* diplomatie.belgium.be.

the EU and third countries, as well as the feasibility of establishing a multilateral investment court, and the interrelation between the EU law and international law, in general.

The transformation of the EU legal order throughout the European integration process has seen a number of novelties. The never-defined *sui generis* legal order has been attributed certain constitutional characteristics in order to differentiate it from both national and international legal orders. Over the years the borderline between the EU and international legal orders has become more and more fragile and sometimes explosive. Whether the diverse international dispute settlement instruments can peacefully coexist with the *autonomous new legal order*,⁴ has become a question of constitutional importance. The EU expansion of common commercial policy, its increasing global engagement in almost all spheres of international law particularly sharpens the problem of how the EU should open itself to international legal order.

Traditionally, CJEU has been portrayed as an “autonomy protectionist” court when faced with the choice of accepting or rejecting the submission of the EU under an international dispute settlement mechanism. However, in Opinion 1/17 the CJEU gave a new perspective to the fundamental question of interplay between the autonomous EU law and international dispute settlement mechanisms. It found that investment court system is compatible with the EU legal order, giving a green light to the global investment system re-institutionalisation efforts of the EU and favouring the development of the international law. By doing this, it set a new standard of what kind of international dispute resolution mechanisms could potentially be compatible with the autonomy of the EU legal order.

The purpose of this *Article* is to examine the approach of the EU towards the emerging ISDS reforms, the effects of those reforms on the internal EU legal *aquis*, and how the Court rebranded autonomy of EU law to allow the continuity of the global reforms in Opinion 1/17. This *Article* will demonstrate that the choice the EU made for the new generation ISDS reforms was not between *globalism* and *preservationism* in a classic sense. Different from the other cases of EU-international law clashes, in this particular context the international law of investment court system is being designed by the EU itself, taking into account EU internal constitutional structure. Thus, this *Article* argues that the EU puts forward a third option between the polarised black and white. In particular, when designing the reform, the European Commission made sure that the investment court system and the transformed international investment order would be in perfect harmony with the EU internal integrity. The first part of this *Article* will hence examine the issue of setbacks of the traditional ISDS, the need for the Commission-initiated reform agenda and the creation of ICS and related potential risks. It then tackles the interrelation of the international investment law with the *sui generis* legal system of the EU. It focuses on the critical analysis of the umbrella concept of autonomy of EU law, under the light of key case-law. Finally, the *Article* analyses the impact of the conclusions of Opinion 1/17 on the future of global investment

⁴ Case 26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1.

reforms, in particular, the establishment of the multilateral investment court and further development of the doctrine of the autonomy of EU law.

II. EU AND A REFORMED INTERNATIONAL INVESTMENT ORDER

II.1. POST-LISBON INTRA-EU DEVELOPMENTS AND TRADITIONAL ISDS CLAUSES

The entry into force of the Treaty of Lisbon marked a new area in the international economic law on a European and global scale. The transformation of EU common commercial policy has not only further empowered the EU to act as a single voice on international scene but has also created a powerful international economic actor. Among other areas, the inclusion of foreign direct investments (FDI) into art. 207 of the Treaty on the Functioning of the European Union was a major step forward and allowed the EU to negotiate and conclude international investment agreements. However, art. 207 covers only *direct* foreign investment. As it pertains to the other crucial aspects of investment protection agreements, such as non-direct foreign investments and especially investor-state dispute resolution mechanisms, they fall outside the ambit of exclusive competences of the EU and thus must be exercised with the Member States.⁵ Such internal structural complexity undoubtedly has resulted in longer and more complicated procedures of negotiating and concluding trade/investment agreements. Another major issue has been the growing criticism of civil society towards the traditional structure of investor-state dispute settlement mechanisms as the EU started negotiating some of its biggest trade deals with the United States and Canada.⁶

Present investment arbitration-like mechanisms have always existed in various forms throughout history with the prototype being the trade concessions in the 10th century.⁷ The objective of an international investment treaty is to grant additional guarantees and legal sustainability to foreign businesses to invest in other countries. The ISDS was introduced as procedural protection of substantive guarantees of foreign investors, in the form of an impartial and independent forum from the judicial system of the host state.⁸ This was a solution to the politically explosive state-to-state diplomatic protection mechanism⁹ and potentially biased and government-oriented national court system of

⁵ Opinion 2/15 *Accord de libre-échange avec Singapour* ECLI:EU:C:2017:376.

⁶ BO Giupponi, 'Recent Developments in the EU Investment Policy: Towards an Investment World Court' (2016) *J. Arb. Stud.* 183.

⁷ C Tietje and F Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership' (2014) *Parlementaire Monitor* www.parlementairemonitor.nl 15-16. See also J Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010) 80. See also R Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press 1984) 7.

⁸ R Sappideen and LL He, 'Dispute Resolution in Investment Treaties: Balancing the Rights of Investors and Host States' (2015) *JWT* 87-88.

⁹ I Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1992) *ICSID Rev* 5.

the host state,¹⁰ which became an effective means to directly enforce the protection of the substantive rights deriving from international agreements.¹¹ Throughout the time, ISDS has proven to be an effective means of solving disputes under public international law between the states and the investors. The growing trust in investment arbitration and “the million-dollar awards” rendered annually by arbitral tribunals demonstrate the success of these mechanisms. While being a meaningful instrument for the states to solve their investment disputes circumventing the diplomatic roads, ISDS mechanisms started to be heavily questioned mainly based on their lack of democratic legitimacy.¹² Other areas of criticism include lack of transparency, consistency, predictability, as well as the absence of an appeals mechanism.¹³

Much of the present-day criticism comes from the so-called “over-empowerment” of investors through these “neutral platforms”. In recent years, a trend was noticed to contest some of the sovereign regulations and laws of the host states if the investor sees them unfavourable for its own business activity.¹⁴ While the numbers demonstrate clearly suppressed risks,¹⁵ NGO-driven vigorous criticism continues to contest the legitimacy of ISDS mechanisms. With no right or wrong answer, it all boils down to be a matter of perspective, exigence of time and influence of social-political dynamics. As Puig and Strezhnev described in the article “The David Effect and ISDS”: “This debate about ISDS’ role and purpose within a global governance system can be framed as a tale of two types of underdogs: relatively weak governments fighting corporate power or defenceless private actors fighting arbitrariness”.¹⁶

II.2. ISDS NOVELTY OUTDATED? EU REFORM AGENDA AND THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT WITH CANADA (CETA)

In recent years the ISDS mechanisms have become an indispensable part of the growing number of EU-third country investment agreements or comprehensive trade agreements containing substantive investment clauses. Initially the “new generation” comprehensive agreements with Canada, as well as the suspended Transatlantic Trade and Investment

¹⁰ C Tietje and F Baetens, ‘The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership’ cit. 22.

¹¹ *Ibid.*

¹² A Dimopoulos, ‘The Involvement of the EU in Investor-state Dispute Settlement: A Question of Responsibilities’ (2014) CMLRev 1672.

¹³ United Nations Conference on Trade and Development UNCTAD, World Investment Report 2013: *Global Value Chains: Investment and Trade for Development* unctad.org 172.

¹⁴ I Austen, ‘TransCanada Seeks \$15 Billion from U.S. over Keystone XL Pipeline’ (6 January 2016) New York Times, www.nytimes.com.

¹⁵ As of 31 July 2020, 37% of all 740 concluded ISDS cases were decided in favour of state and 20% settled according to United Nations Conference on Trade and Development (UNCTAD) Investment Dispute Settlement Navigator, investmentpolicy.unctad.org

¹⁶ S Puig and A Strezhnev, ‘The David Effect and ISDS’ (2017) EJIL 731.

Partnership Agreement, included substantive investment clauses and procedural guarantees of investors' rights through traditional ISDS mechanisms.¹⁷ From the start of negotiations of these agreements, the civil society organisations gradually became dissatisfied with the investment chapter and particularly the ISDS clauses¹⁸ and blamed the institutions for trading away the rule of law and democracy of the Union.¹⁹

The main criticism towards the traditional model of ISDS mechanism emerged especially after the start of negotiations of the Transatlantic Trade and Investment Partnership Agreement with the US, an agreement between the two largest economies. It was identified that the main problems were the lack of guarantees of independence of the arbitrators, the lack of consistency and foreseeability of the awards, the inexistence of appeals procedure and the high costs of arbitration.²⁰ The idea was to reform and legitimise the existing traditional investor protection system in order to allow the Union to freely exercise its Common Commercial Policy competences and pursue public policy objectives. With the ultimate objective being the establishment of Multilateral Investment Tribunal, the EU identified the transition from ISDS to Investment Court System in separate EU-third country agreements, as the first step and the short-term goal. Following the results of the online public consultation on the ISDS mechanism of TTIP of 2014²¹ (which were equally relevant for CETA ISDS), the EU launched a reform project of ISDS which was soon suggested to be discussed with Canada in order to be incorporated into the CETA Agreement, and later in the Investment Partnership Agreement with Vietnam.

Inspired by the World Trade Organisation (WTO) Dispute Settlement model, the Investment Court System in CETA has a number of differences in comparison with traditional ISDS. The two key components of the ICS are the appointment of judges and the appellate system. The long criticized *ad hoc* nature of the ISDS and the appointment of judges – found their solutions.²² According to art. 8.27 of CETA, the EU and Canada establish a permanent

¹⁷ The international arbitration approach of the World Bank's International Center for Settlement of Investment Disputes (ICSID). See also, H Lenk, 'An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada' (2016) 1 *European Papers*, 1, 665-677, www.europeanpapers.eu

¹⁸ I Laird and F Pettillon, 'Comprehensive Economic and Trade Agreement, ISDS and the Belgian Veto: A Warning of Failure for Future Trade Agreements with the EU?' (2017) *Global Trade and Customs Journal* 168.

¹⁹ P Eberhardt, B Redlin and C Toubeau, 'Trading Away Democracy How CETA's Investor Protection Rules Threaten the Public Good in Canada and the EU' (November 2014) *Corporate Europe Observatory* corporateeurope.org 4-6.

²⁰ Opinion 1/17 *Compatibility of ISDS with EU Law* ECLI:EU:C:2019:341, opinion of AG Bot, para. 15.

²¹ European Commission, *Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in Transatlantic Trade and Investment Partnership Agreement (TTIP)* trade.ec.europa.eu.

²² MN Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (Brill 2017) 219.

tribunal consisting of fifteen judges to rule on disputes between the parties of the Agreement (EU, Member States and Canada) and the investors. The appointment of judges by the CETA Joint Committee was another forward-moving step by the Parties,²³ since previously agreed traditional method was the choice of arbitrators by the disputing parties on an *ad hoc* basis.²⁴ This, of course, gave rise to questions, such as why should undemocratically elected arbitrators decide the legality of actions of the legitimate authorities. The solution found in CETA allows to cut the direct ties and dependency between the parties and the arbitrators, and puts the judges under the obligation to comply with the rules of ethics²⁵ which gives more guarantees for the latter to act more independently and impartially. Furthermore, the reform suggests almost the same requirements for the ICS judges as those put on the judges of the International Court of Justice and WTO.²⁶

The second important aspect of the ISDS reform concerns the insertion of the Appellate Tribunal. One of the most criticized aspects of traditional ISDS found its solution in art. 8.28. This marks a clear departure from the definitively binding nature of ISDS tribunal decisions and submits the latter under an institutionalized appeal mechanism. As for the appointment procedure, the members of the Appellate Tribunal are appointed through the same procedure as the judges of the Tribunal. The case before the Appellate Tribunal is reviewed by a three-judge panel.²⁷

The reformed model has, as AG Bot called, a “hybrid nature that is a form of compromise between an arbitration tribunal and an international court”.²⁸ This innovative mechanism, however, does not tackle all the shortcomings. One of the major sources of inspiration for the critics – the lack of guarantees of independence of judges and the whole fairness of ICS trials – still remains only partially tackled.²⁹

II.3. MAIN LEGAL ISSUES CONNECTED TO THE NEW GENERATION ISDS MECHANISMS AND THE CONSTITUTIONALITY OF THE EU LEGAL ORDER

The beginning of 2018 marked a big shock for the arbitration world with the release of the *Achmea* case and the complete rejection of the intra-EU ISDS with the conviction of being

²³ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017], art. 8.27(2) eur-lex.europa.eu (entered into force provisionally on 21 September 2017).

²⁴ F Baetens, ‘The European Union’s Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges’ (2016) LIEI 370.

²⁵ CETA cit. art. 8.30.

²⁶ *Ibid.* art. 8.27(4).

²⁷ *Ibid.* art. 8.28.

²⁸ Opinion 1/17, opinion of AG Bot, cit. para. 18.

²⁹ GV Harten, ‘The EU-Canada Joint Interpretative Declaration on the CETA’ (Osgoode Hall Law School Legal Studies Research Paper, 6-2017). See also, I Laird and F Petillion, ‘Comprehensive Economic and Trade Agreement, ISDS and the Belgian Veto: A Warning of Failure for Future Trade Agreements with the EU’ cit. 167-174.

by its very nature incompatible with the constitutional-judicial order of the EU. The Court was, however, particularly prudent and specifically provided that *Achmea* judgment does not concern the EU-third country ISDS and that those international control mechanisms are not by default incompatible with the EU legal order.³⁰ In conceptualizing its reforms, the Commission was very careful not to fall into its own trap of the *Achmea* arguments. In order to create a safe environment and minimize the future possible discussions on ICS incompatibility with the EU law, the Commission produced a carefully designed framework in order not to trespass into the “intimate space” of CJEU or put the “EU balloon”³¹ under the threat of unexpected deformation. How did CETA circumvent the *Achmea effect* and become an example of EU-international investment law reconciliation?

The answer to the above question demands a thorough analysis of a number of features found in the Investment and Dispute Settlement Chapters of CETA. First and foremost, it must be recalled that CETA is an international agreement signed by the EU and its Member States on one side and Canada on the other side. This means that as any EU international agreement, CETA does not enjoy the advantage of direct effect, unless explicitly granted by the CJEU.³² Lack of direct effect means that the individuals and companies within the EU and Canada cannot directly benefit from their rights and protections under the agreement in front of their domestic courts. The investment court system remains the only functioning platform to exercise CETA's investor protections. The explicit mentioning of no direct effect in the Agreement, as well as a clear statement of dissociation of the two systems from each other.³³ Therefore, the investor has to choose whether to go through the protections prescribed under either the domestic/EU law or those under the international protection mechanisms of CETA. The triggering of any of those means automatically excluding the possibility of invoking the other.

As it pertains to the judicial interrelation and the immunity guarantees of the autonomy of EU law, CETA explicitly provides a clearly defined scope of jurisdiction of the Investment Court System.³⁴ It is competent to rule only on issues concerning non-discriminatory treatment and investment protection, where the investor claims to have suffered damages.³⁵ Any claims falling outside the scope of art. 8.18 will be discontinued.³⁶ Furthermore, the Agreement moves on with some strict delimitations of the applicable law and the interpretation of law by CETA Tribunals. It can only base its decisions on the CETA

³⁰ Case C-284/16 *Achmea* ECLI:EU:C:2018:158 para. 57.

³¹ An expression used in articles by Inge Govaere. See I. Govaere, ‘Interconnecting Legal Systems and the Autonomous EU Legal Order: A Balloon Dynamic’ (Research Paper in Law 2-2018); ‘TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order’ (Research Papers in Law 1-2016).

³² I Govaere, ‘TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order’ cit. 7.

³³ CETA cit. art. 30.6

³⁴ *Ibid.* art. 8.18.

³⁵ *Ibid.* art. 8.18(1).

³⁶ *Ibid.* art. 8.18(5).

rules, interpreted under the light of international public law, primarily, the Vienna Convention on the Law of Treaties. The tribunal does not have the jurisdiction to rule on the cases based on the domestic law of the parties, including the EU law or interpret them. The only exception would be a case where “for greater certainty” ICS can take the domestic law into account. In this case, it would be compulsory to follow the interpretation of the specific legal norms given by the relevant courts. Moreover, the appreciations of the Tribunal or Appellate Tribunal shall not bind the courts of the parties.³⁷

Apart from the procedural issues, CETA also solved one of the major setbacks of traditional investment agreements. It strengthens the right of national democratically elected governments of the parties to freely regulate in the public interest³⁸ without being dependent on the objectives of a specific international arrangements at the price of democracy and rule of law.

This being said, the Investment Court System is not only characterized with accomplishments but also a number of setbacks, which caught the eye of the civil society organisations that qualified it as “an equally dangerous twin of ISDS”.³⁹ While it seems that the Commission did everything to prevent the possible anger of the Court on the issue of its exclusive jurisdiction on the matters of EU law, many NGOs and Member States are not convinced that in practice there will be no overlaps. There are some firm doubts about the re-politicization of the appointment procedure of judges by delegating it to the Joint Committees composed of the political representatives of the parties.⁴⁰ Also, the independence of judges remains controversial, since the ethics rules are not advanced enough to ban any engagement in a parallel case as an arbitrator⁴¹ and the compensation of judges is done on a case-by-case basis.⁴² Furthermore, some critics raise the issue of non-compliance of the very idea of foreign investor protection mechanism with the principle of non-discrimination which is an EU general principle of law. All these issues have been raised before CJEU by Belgium in Opinion 1/17. It is interesting that none of those questions were regarded to be problematic in the eyes of Canadian courts or the public.

³⁷ *Ibid.* art. 8.31(2).

³⁸ *Ibid.* art. 8.9(1) and (2).

³⁹ P Eberhardt, ‘The Zombie ISDS Rebranded as ICS, rights for Corporations to Sue States Refuse to Die’ (17 February 2016) Corporate Europe Observatory corporateeurope.org 18.

⁴⁰ MN Cleis, *Analysis of Existing Reform Proposals in The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* cit. 219.

⁴¹ I Laird and F Petillion, ‘Comprehensive Economic and Trade Agreement, ISDS and the Belgian Veto: A Warning of Failure for Future Trade Agreements with the EU?’ cit. 170.

⁴² *Ibid.* 170-171; P Eberhardt, ‘The Zombie ISDS Rebranded as ICS, Rights for Corporations to Sue States Refuse to Die’ cit. 18.

III. AUTONOMY OF EU LAW AND INTERNATIONAL LEGAL ORDER

III.1. ARCHITECTURE AND MEANING OF AUTONOMY OF EU LEGAL ORDER

The principle of autonomy is not referred anywhere in the EU Treaties. Yet its usage and high standard attributed by the CJEU dictates particular caution. Originally the word “autonomous” meant “having its own laws” (*auto* meaning “self” and *nomos* meaning “law”). An entity that can be described as autonomous is capable of choosing its actions without external influence, direction or control.⁴³ Currently, the principle of autonomy of EU law has become one of the general principles of EU law.⁴⁴ Through several landmark judgments, the CJEU shaped the constitutional principles and conditions of EU law that govern the participation of the EU in international dispute settlement mechanisms. The concept of autonomy of EU law was first implied in the landmark cases *Van Gend en Loos*⁴⁵ and *Costa v Enel*.⁴⁶ The key element of those judgments is the differentiation of the Union from national and international legal orders and the creation of a new legal order. The underlying reason why we need an “autonomous and not an ordinary union” according to the two landmark decisions lies in the objectives of the integration. In particular, it would not have been possible to establish a common market without internal frontiers, if the Union was not autonomous. Furthermore, the autonomy of EU law over time has also encompassed the idea of constitutional order, as a self-sufficient and coherent system of norms, which is different from an ordinary international legal order.⁴⁷ What makes the principle of autonomy even more mysterious and specific is “the umbilical cord” with its inventor and defender – the CJEU, which is the ultimate decision-maker for the matters of EU law. As it was stated in the landmark Opinion 2/13, “in order to ensure that the specific characteristics and the autonomy of [...] are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law”.⁴⁸

Furthermore, the European Union is an “ever closer union”, which means an ongoing and dynamic integration with the continuous transfer of more competences. The multifac-

⁴³ J Odermatt, ‘When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law’ (EUI Working Papers, MWP 2016-2017) 1.

⁴⁴ D Gallo and FG Nicola, ‘The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication’ (2016) *FordhamIntlJ* 1081.

⁴⁵ *Van Gend en Loos v Administratie der Belastingen* cit., “The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”

⁴⁶ Case 6/64 *Costa v E.N.E.L* ECLI:EU:C:1964:66.

⁴⁷ K Lenaerts, ‘The Autonomy of European Union Law’ (2019) *I Post di Aisdue* 10.

⁴⁸ Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 174.

eted progressive augmentation of the powers of the Union throughout the integration process brought even more interrelations and clashes with the international law.⁴⁹ The overarching question remains whether the term autonomy also means “absolute”. Advocate General Bot in Opinion 1/17 argued that the word autonomy should not be understood as a synonym of “autarchy”.⁵⁰ The broader view at the concept of autonomy seems to concern the interrelation between several entities, rather than complete independence from each other.⁵¹ The actual wording of the landmark judgment *Van Gend en Loos* was never about limitlessness or absolutism of the European Community or its isolation from the universe of the international legal order, but about *defining the relationship of the EU vis-à-vis other entities*. Together with the preservationism of the *EU aquis* and autonomy from international and national law, the EU is also bound by the concept of loyalty towards “the strict observance and development of international law”, as a fundamental principle of EU law.⁵²

III.2. PARTICIPATION OF THE EU IN INTERNATIONAL DISPUTE SETTLEMENT: DYNAMICS BEFORE OPINION 1/17

The umbrella concept of autonomy of EU legal order that encompasses the special characteristics of the EU has become an assessment standard for compatibility of EU's participation in international dispute resolution mechanisms. In general terms, the existence of any international dispute settlement mechanism for the European Union is conditioned upon the respect of the autonomy of the EU legal order.⁵³ Several landmark cases contributed to the development of this doctrine, including Opinion 1/91 on Draft Agreement on the European Economic Area, Opinion 2/13 on Draft Agreement of Accession of the European Union to the European Convention of Human Rights, Opinion 1/09 on the Draft Agreement on the European Patent Court, Opinion 1/00 on the establishment of European Common Aviation Area, *Achmea* case, and finally, Opinion 1/17 on the hybrid ISDS of CETA Agreement. When examining the question of the compatibility of EEA Draft Agreement with the EU Treaties in 1991, the Court admitted that “an international agreement providing for a system of courts, including a court with jurisdiction to interpret its

⁴⁹ I Govaere, ‘Interconnecting Legal Systems and the Autonomous EU Legal Order: A Balloon Dynamic’ cit. 1-2.

⁵⁰ Opinion 1/17, opinion of AG Bot, cit. para. 59.

⁵¹ J Odermatt, ‘When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law’ cit. See also, B De Witte, ‘European Union Law: How Autonomous is its Legal Order?’ (2010) *Zeitschrift für öffentliches Recht* 141-142: “the autonomy of EU law is not absolute but relative; it does not mean that EU law has ceased to depend, for its validity and effective application, on the national law of its member states, nor that it has ceased to belong to international law”.

⁵² J Etienne, ‘Loyalty towards International Law as a Constitutional Principle of EU Law’ (Jean Monnet Working Paper 03-2011) 21.

⁵³ *Achmea* cit. para. 57. See also Opinion 2/13 cit. para 183; Opinion 1/09 *Draft agreement – Creation of a unified patent litigation system* ECLI:EU:C:2011:123 para. 76.

provisions, is not in principle incompatible with the Community law".⁵⁴ The international agreement that was duly concluded by the EU and entered into force, should respect the specific characteristics of EU legal order.⁵⁵ The analysis of participation of the EU in international dispute settlement mechanisms shall be conducted not on a case-by-case basis or a chronological order. I will rather scrutinise the special characteristics, principles and conditions of EU autonomy that have been developed through the case-law of the CJEU.

In its first case about the external aspects of the autonomy of EU law – Opinion 1/76 on Draft Agreement establishing a European laying-up fund for inland waterway vessels – CJEU found that *legal-institutional link* between two different legal orders is not compatible with the Treaties.⁵⁶ In particular, the Court demonstrated that the fact that its members were required to serve as judges on Fund Tribunal established under the Draft Agreement is incompatible with the nature of EU legal order. A similar approach can be found in Opinion 1/91 on Draft Agreement relating to the creation of the European Economic Area.⁵⁷

Another important element in the principle of autonomy of EU law is the exclusion of the power of international tribunals to issue *binding interpretations of EU law*. This issue is closely related to the exclusion of *power to rule on the EU's internal division of competence*. In Opinion 1/00 on the establishment of European Common Aviation Area, the Court established that its role is to ensure that the fundamental characteristics of the power balance of the Union and its institutions remain unaltered in compliance with the Treaties.⁵⁸ The CJEU highlighted the fact that it should have exclusive authority and a final say in the matters concerning the interpretation and application of EU Treaties. In particular, it was stated that, "Any interpretation of EU Treaties by other international courts would not have binding effect on the Union and its institutions".⁵⁹ Another landmark decision by the CJEU commenting on this aspect of autonomy of EU law is Opinion 1/09 on Draft Agreement on the Creation of a unified patent litigation system.⁶⁰ The European Patent Convention aimed to establish a two-stage judicial body and listed sectorial EU law as applicable law. Hence, the European Patent Court would have jurisdiction *ratione materiae* to hear disputes concerning EU law. The agreement, nevertheless, allowed for the prior involvement of CJEU in cases before the European Patent Court that would re-

⁵⁴ Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* ECLI:EU:C:1991:490 para. 40.

⁵⁵ K Lenaerts, 'Droit international et monisme de l'ordre juridique de l'Union' (2010) *Revue de la Faculté de droit de l'Université de Liège* 506-507.

⁵⁶ Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* ECLI:EU:C:1977:63 paras 21, 22.

⁵⁷ Opinion 1/91 cit.

⁵⁸ Opinion 1/00 *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* ECLI:EU:C:2002:231 para. 12.

⁵⁹ *Ibid.* para. 13.

⁶⁰ Opinion 1/09 cit.

quire examination, application and interpretation of EU law. In its analysis, the Court recalled that the special nature of the EU as a new legal order separate from ordinary international agreements. One of the special characteristics is that only EU courts and courts of the Member States have the right to apply and interpret the EU law. The European Patent Court is placed “outside the institutional and judicial framework” of the Union.⁶¹ Thus, the Court found that despite the fact that the ECJ may be asked to deliver a preliminary ruling on certain matters, the fact that an international court can apply and interpret EU law would “alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law”.

According to art. 344 of the Treaty on the Functioning of the European Union, “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”. This means that *it must be excluded that the international court’s jurisdiction extends over intra-EU disputes where EU law issues are at stake*. This issue was scrutinised in one of the most controversial and political decisions of the Court. In Opinion 2/13 on the Draft Agreement of Accession of the European Union to the European Convention of Human Rights and Fundamental Liberties, the Court noted that “an international agreement cannot affect the allocation of powers fixed by the Treaties or, *consequently*, the autonomy of the EU legal system, observance of which is ensured by the Court”.⁶² From this perspective, the mere possibility that the Member States or the EU are able to submit an application to the European Court of Human Rights against each other on a question governed under EU law will go counter to the objective of art. 344 TFEU, and the overall nature of the EU law.⁶³ A similar reasoning can be found in *Achmea* case.

The issue of *EU acts not subject to judicial review at the EU level* has only been examined in Opinion 2/13.⁶⁴ In this opinion, the CJEU noted that the conferral of the jurisdiction to carry out judicial review of EU acts (such as CFSP acts) exclusively to a non-EU body would undermine the autonomy of the EU legal order.

To summarise, there are five main principles that need to be respected as constituting elements of the umbrella concept of autonomy of EU law, when it comes to the design of an international dispute settlement to which the EU is a party. First and foremost, there can be no organic link between the CJEU and the established international court, secondly, the latter cannot have the power to rule on the EU’s internal division of competence, thirdly, it cannot have the power to issue binding interpretations of EU law, fourthly, it must be excluded that such international court’s jurisdiction extends over intra-EU disputes where EU law issues are at stake, and finally, an international court or

⁶¹ *Ibid.* para. 71.

⁶² Opinion 2/13 cit. para. 201, emphasis added.

⁶³ *Ibid.* para. 212.

⁶⁴ *Ibid.* paras 249-257.

tribunal cannot exceed the CJEU's own jurisdiction so as to include EU acts not subject to judicial review at EU level.

IV. GAME OF THRONES IN THE OPINION 1/17: LESSONS AND PROSPECTS

IV.1. A NEW *DE MINIMIS* FOR THE PRINCIPLE OF AUTONOMY OF EU LAW?

With Opinion 1/17 the guardian of the autonomy of the EU legal order has once again been challenged to rule on the possible implications of an external control mechanism on the internal integrity of the Union. The Court stood in front of a new opportunity to change the evolution of the external dimension of EU autonomy or to contribute to the traditional saga. The debates and discussions before the Court's ruling was published, mainly rolled around the fear of whether Opinion 1/17 would follow the steps of Opinion 2/13 and *Achmea* judgment, or whether it would accept the opinion of AG Bot. The questions referred to the Court in Opinion 1/17 are to a large extent similar to the ones the Court answered in *Achmea* and Opinion 2/13, however, it is undisputed that the objects in the three cases are different. Therefore, as much as some elements can be analogical, the Investment Court System of the CETA Agreement does not interrelate with the autonomy of the EU law the same way as the European Court on Human Rights and intra-EU ISDS. The particular importance of this opinion lied in its potential global consequences and timing, given the EU initiated international investment reform agenda in times of continuous collapse of the multilateral rules-based order.

As noted in previous chapter, despite few examples of compatibility, the CJEU had frequently blocked EU's accession to international dispute settlement mechanisms. Whether it was due to unreasonably high standard of the principle of autonomy or actual deficiencies of international courts and tribunals in question has become a topic of large-scale academic, political and legal debates over the past years. In particular, the Court has been heavily criticised for being too protectionist of its own jurisdiction. Pursuant to the Belgian submission, the Court found itself between EU's political objectives of promoting and modernizing investment protection and advancement of international law, on one side, and the need to safeguard the EU's constitutional framework, on the other side. It was given the opportunity to provide further clarification, elaborate on the exigencies of characteristics constituting the general principle of autonomy governing to a large extent EU's external action.

While the outcome of Opinion 1/17 gave rise to more questions than answers, it made clear that the Court does not view the principle of autonomy of EU law from an absolutist perspective. The implications of acceptance of CETA investment court system are far-reaching, spreading beyond this specific dispute settlement mechanism and even beyond green lighting ISDS reforms and establishment of multilateral investment court. Above all, it became proof that it is possible to interpret the principle of autonomy in a

way to conciliate two rivalling phenomena of securing internal constitutional integrity of the Union and boosting its involvement in international legal order.

The questions referred to the CJEU in Opinion 1/17 were whether Chapter 8 (“Investments”) Section F (“Resolution of Investment Disputes between Investors and States”) of the CETA Agreement is compatible with: 1) the exclusive jurisdiction of the Court over the definitive interpretation of EU law; 2) the general principle of equal treatment; 3) the requirement of the effectiveness of EU law; 4) the right of access to an independent and impartial tribunal⁶⁵.

Opinion 1/17 repeats CJEU’s earlier jurisprudence on the autonomy of EU law. Primarily, it reiterates the general statement of presumption of compatibility of international courts with the autonomy of EU law that can be found in earlier case-law. In particular, “an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law”.⁶⁶ Then the Court stresses that the only condition for creation or accession to such an international court is “that there is no adverse effect on the autonomy of EU legal order”.⁶⁷ It then explains that the very *raison d’être* of autonomy of EU law “resides in the fact that the Union possesses a constitutional framework that is unique to it”.⁶⁸ And thus, it concludes that it is necessary to examine whether Investment Court System in CETA may prevent the Union from operating in accordance with its constitutional framework.⁶⁹ When assessing compliance with the special characteristics comprising umbrella principle of autonomy of EU law, the Court paid particular attention to the *institutional interplay between CETA judicial system and CJEU, the issues of applicable law and exclusion of binding interpretations of EU law and EU institutional framework and protection of level of public interest*. The Court did not make assessments under art. 344 TFEU and the issue regarding EU acts not subject to judicial review at EU level, as they were not applicable in the case of CETA.

IV.2. BREAKDOWN OF THE “UMBRELLA PRINCIPLE” UNDER THE LIGHT OF ICS

The CJEU has a central role in the principle of autonomy, as it is not only just another EU institution, but the guardian of EU’s constitutional framework. Over the years through its case-law, the Court has stated multiple times that it has “exclusive jurisdiction over definitive interpretation of EU law”.⁷⁰ In Opinion 1/17 the Court stressed that the Treaties have established a judicial system to preserve the autonomy of EU legal order through

⁶⁵ Opinion 1/17 paras 46-69.

⁶⁶ *Ibid.* para. 106.

⁶⁷ *Ibid.* para. 107.

⁶⁸ *Ibid.* para. 110.

⁶⁹ *Ibid.* para. 112.

⁷⁰ Opinion 2/13 cit. para. 246.

consistent and uniform interpretation of EU law.⁷¹ In its assessment of whether there is any adverse effect by the establishment of Investment Court System to its exclusive jurisdiction, the Court took into account two elements: first, there is no legal-institutional linkage between the CJEU and ICS, and second, ICS does not in any way interfere with the exclusive jurisdiction of CJEU over the definitive interpretation of EU law. In particular, unlike in Opinion 1/76 where CJEU and Fund Tribunal were institutionally connected through its judges expected to serve in an international court, CETA creates a completely separate universe of law and judicial mechanisms, which stand “outside the judicial system of Parties”.⁷² The Court also observes that the fact that ICS stands outside the judicial systems of its parties derives from the very purpose of CETA and its judicial system “to give complete confidence to the enterprises and natural persons of a Party that they will be treated, with respect to their investments in the territory of the other Party, on an equal footing with the enterprises and natural persons of that other Party, and that their investments in the territory of that other Party will be secure”.⁷³ The Court also states that not providing for a preliminary ruling procedure between the courts is consistent as CETA tribunals do not interpret any law other than CETA under the light of international law.⁷⁴ Therefore, there is *no legal-institutional linkage between the Investment Court System and CJEU which would have adverse effects on the autonomy of EU legal order*. As it pertains to the exclusion of any interference to CJEU’s power to interpret EU law, the Court found that CETA’s judicial mechanism is designed in a way that its exclusive jurisdiction to give rulings on the division of powers between the Union and its Member States is preserved. This is explained by the exclusion of EU law from the “applicable law” of CETA and thus the law which can potentially be interpreted and applied by ICS.

Another key concern rightfully raised by the referring government was the *issue of applicable law, and the effects of the legally binding CETA Tribunal decisions on the EU institutions*. As it is provided in CETA, the disputing party “recognises and complies with the award without delay”.⁷⁵ Consequently, the decisions of the CETA ICS are binding on the Union. Given the nature of the decisions, the European Commission was very careful when designing and negotiating CETA in order to avoid possible incompatibility issues. In particular, the drafters explicitly mentioned that Investment Court System has jurisdiction to apply and interpret CETA rules in the light of international law in general and Vienna Convention on the Law of the Treaties in particular.⁷⁶ As for the other aspect of the issue – the effect of such binding decision – the Court stated that as long as the EU measure is not “amended or withdrawn” by the international dispute settlement mechanism,

⁷¹ Opinion 1/17 cit. para. 111.

⁷² *Ibid.* para. 200.

⁷³ *Ibid.* para. 119.

⁷⁴ *Ibid.* para. 134.

⁷⁵ CETA cit. art. 8.41(2)

⁷⁶ *Ibid.* art. 8.31(1).

the constitutional framework of the EU institutions, the cornerstone of which is the autonomous and democratic EU legislative procedure, is preserved.⁷⁷

It can be observed that as a general rule the ICS is not conferred with the power to apply and interpret domestic law of the parties, including the EU law. However, understanding that in judicial practice as an investment tribunal it would be impossible for the CETA Tribunals to completely avoid reviewing EU law, the European Commission stipulated the exact framework within which an EU rule can come under scrutiny. In particular, art. 8.31(2) states

*“The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.”*⁷⁸

By the virtue of the first sentence of art. 8.31(2) of CETA, Investment Court System is different from the international dispute settlement mechanisms that have been examined by the Court, such as the United Patent Court, as domestic laws are excluded from the jurisdiction of ICS.⁷⁹ The Court further noted that inevitably CETA Tribunals, on the basis of the information and arguments presented by investors may need to consider the domestic measures in question as “a matter of fact”, which means that this type of examination cannot be regarded as an interpretation of EU law.⁸⁰ Consequently, ICS can only examine EU law as a matter of fact, and follow the prevailing interpretation given to it by the courts of the EU. Finally, the last sentence of this provision clarifies that any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.⁸¹ This means that CJEU will not be bound by the “meanings” given to particular EU provisions by ICS Tribunals when interpreting and applying EU law. Without engaging into an overall, substantive analysis of this question, the Court concluded that the safeguards under CETA are sufficient to ensure that the Investment Court System will not threaten its exclusive jurisdiction in interpreting and applying EU law.

In Opinion 1/17 the Court for the first time explicitly acknowledged to what extent and in which form can the EU law be considered by an international tribunal differentiating between considering domestic law as a matter of fact and as a matter of law concepts. Even though this is a new phenomenon in CJEU’s vocabulary of the principle of EU autonomy, it has a long history of usage in international public law. Being created in Common

⁷⁷ Opinion 1/17 cit. paras 150-151.

⁷⁸ CETA cit. art. 8.31(2), emphases added.

⁷⁹ Opinion 1/17 cit. paras 121-125.

⁸⁰ *Ibid.* para. 131.

⁸¹ CETA cit. art. 8.31(2).

Law, the notion of “law as a matter of fact” has been applied by various international courts. In *Certain German Interests in Polish Upper Silesia* (1925), the Permanent Court of International Justice (hereinafter PCIJ) considered municipal laws as “mere facts”. In particular, PCIJ stated that its role is limited within the assessment of whether by applying a certain law Poland acted in compliance with Geneva Convention vis-à-vis Germany, without having to interpret the Polish law as such.⁸² WTO Appellate Body has also stated multiple times that domestic law can be regarded as evidence of facts on state practice, as well as evidence on state compliance with international obligations.⁸³ As it pertains to the EU law itself, in *AES v Hungary*, when deciding the nature of the applicable law, the arbitration tribunal stated that the EU competition law regime will be considered as a matter of fact. In particular, it stated that EU law:

“has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders [...] It will be considered by this Tribunal as a fact, always taking into account that a state may not invoke its domestic law as an excuse for alleged breaches of its international obligations”.⁸⁴

Along these lines, it is equally worth mentioning, that *domestic law as a fact* phenomenon cannot be regarded as an absolute concept. In certain situations, even though the international treaties explicitly mention only international agreements as applicable law, the domestic law can nonetheless be applied as a law rather than a fact.⁸⁵

This particularly concerns situations which are entirely regulated by domestic laws, such as property rights or breach of contracts. This issue was raised in front of the North American Free Trade Agreement (NAFTA) tribunals, given that the North American Free Trade Agreement provided that only international law can constitute applicable law. Despite this explicit rule, the NAFTA tribunals in different cases concluded that in certain cases it would be impossible to resolve a dispute without regarding the *domestic law as a matter of law*.⁸⁶

⁸² PCIJ, *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) [25 August 1925] 19.

⁸³ WTO Appellate Body Report, 16 January 1998, WT/DS50/AB/R, India – US, Patent Protection for Pharmaceutical and Agricultural Chemical Products, para. 66; WTO Appellate Body Report, 15 December 2008, WT/DS342/AB/R, China – Canada, Measures Affecting Imports of Automobile Parts, para. 225.

⁸⁴ International Centre for Settlement of Investment Disputes (ICSID), 23 September 2010, ARB/07/22, AES Summit Generation Ltd and AES-Tisza Erőmű Kft v Republic of Hungary, para. 7.6.6. www.italaw.com.

⁸⁵ J Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press, 2017) 106. A Bjorklund, ‘Applicable Law in International Investment Disputes’ in C Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner’s Guide* (Brill 2014) 274; International Centre for Settlement of Investment Disputes (ICSID), 12 September 2014, ARB/08/6, Perenco Ecuador Ltd v Ecuador (Decision on Remaining Issues of Jurisdiction and on Liability), para. 522. www.italaw.com.

⁸⁶ J Hepburn, *Domestic Law in International Investment Arbitration* cit. 107. See also, International Centre for Settlement of Investment Disputes (ICSID), 22 May 2012, ARB(AF)/07/4, Mobil Investments Canada Inc v Canada, <https://www.italaw.com/sites/default/files/case-documents/italaw1145.pdf>.

The biggest concern, however, is that in practice there is no water-tight division between regarding law “as a matter of fact” and “as a matter of law”, as all searches for meaning demand a certain level of interpretation. Thus, it brings up some valid concerns on whether the Court of Justice agreed to advance a legal fiction. Yet, what the CJEU seems to find affordable guarantee on the part of CETA is that ICS must follow prevailing interpretation given to domestic law by the courts and authorities of parties and even the so-called meanings given to municipal law are not binding on the parties. CJEU considers it a matter of principle that EU law interpretation is its *exclusive* competence immune from national and international courts and tribunals. The mere fact that CETA tribunals could interpret EU law could have been sufficient for the CJEU to consider such an event incompatible with the autonomy of the EU legal order as it did in *Achmea* case.

Despite a certain lack of clarity and potential risks, it must be nonetheless noted that Opinion 1/17 is a milestone in Court’s practice as it differentiated the acceptable extent of the binding nature of decisions of international dispute settlement mechanisms – as long as the EU law is perceived as factual evidence under international public law. After a long line of incompatibility cases by CJEU, the impact of Opinion 1/17 goes beyond CETA and investment court system. The CJEU gave clarity on its exigencies of the principle of autonomy of EU law vis-à-vis EU’s engagement in international dispute settlement mechanisms. In particular, the Court elaborated what it means to not be bound by interpretations of EU law by international tribunals. By further modulating the principle of autonomy, the CJEU opened a door for safe interconnection with international legal order.

The third important aspect of the principle of autonomy tackled by the Court in Opinion 1/17 is whether there is *an adverse effect by ICS Tribunals on the EU institutions* to act in accordance with the EU’s constitutional framework. In particular, the Kingdom of Belgium and other governments argued: “CETA Tribunal might, in the course of its examination of the relevant facts, which may include the primary law on the basis of which the contested measure was adopted, weigh the interest constituted by the freedom to conduct business, relied on by the investor bringing the claim, against public interests, set out in the EU and FEU Treaties and in the Charter”.⁸⁷ In other words, the argument stated that Investment Court System could be called upon to decide on the effect of an EU measure, adopted on the basis of a public interest set out in primary EU law, violates the investment treaty. To answer this question, the CJEU engaged itself in the examination of several substantive provisions of CETA, namely art. 8.9(1). CJEU explicitly stated several times that ICS does not have jurisdiction to call into question the level of protection of public interest by the EU institutions.⁸⁸ In particular, the Court established that having to withdraw or amend an EU legislation following assessments made by a tribunal “outside EU legal order” would adversely affect the autonomous institutional set-up of the Union.

⁸⁷ Opinion 1/17 cit. para. 137.

⁸⁸ *Ibid.* paras 153, 156, 159, 160.

The Court stated several times that it is incompatible with the EU constitutional framework for an international tribunal to interfere with the EU's right to regulate with an aim of achieving legitimate policy objectives. As it was mentioned by the President of CJEU, the examination of the CJEU of the right to regulate in the public interest vis-à-vis international courts is the protection of "essence of democratic process leading to adoption of EU norms" which is an integral part of the institutional autonomy of EU.⁸⁹ Furthermore, in Opinion 1/17 the Court admitted that an investor may complain from a measure of general application.⁹⁰ What the Court protects within the assessment of the right to regulate in the public interest is the internal institutional processes of law-making of the EU to be immune from international courts.⁹¹ Thus, it can be concluded that the CJEU differentiates two distinct judicial assessments regarding the right to regulate in the public interest by an international court operating outside the institutional system of the EU. On one hand, the Court found that the sole fact that a legal measure of general application can come under scrutiny of the ICS Tribunals as a matter of fact under the light of CETA is not *per se* incompatible with the unique constitutional framework of the EU. On the other hand, what the Court finds intolerable is conducting an assessment regarding "the level of protection of a public interest that led to the introduction of such restrictions by the Union with respect to all operators who invest in the commercial or industrial sector at issue of the internal market".

Therefore, the Court distinguished the assessment of law as a matter of fact which led to a breach of EU's obligations under CETA, and examination of the level of protection of public interest itself as a guideline for sovereign EU law-making in a particular field. The latter can lead to adverse effects on the competences of EU institutions. It must also be noted that a quantitative increase in the number of individual cases where an EU measure of general interest was found to be discriminatory vis-à-vis investors by the ICS Tribunals, will inevitably over time lead to qualitative changes, i.e. legislative amendments. Nonetheless, this process must remain entirely sovereign from an external judicial system.

Another delicate question regarding the power division between the EU and its Member States concerns the power balance of responsibilities of the EU and the Member States and one of the core elements propelling the incompatibility of the EU accession to the Strasbourg Court.⁹² CETA provides for a so-called "rule of proceduralisation"⁹³ under art. 8.21, leaving the right of internally determining the responsible entity for each case

⁸⁹ K Lenaerts, 'Modernising Trade whilst Safeguarding the EU Constitutional Framework: An Insight into the Balanced Approach of Opinion 1/17' (6 September 2019) Speech at the Belgian Ministry of Foreign Affairs.

⁹⁰ Opinion 1/17 cit. para. 143.

⁹¹ *Ibid.* para. 150.

⁹² Opinion 1/17, opinion of AG Bot, cit. para. 159.

⁹³ C Contartese and M Andenas, 'EU Autonomy and Investor-state Dispute Settlement under Inter Se Agreements between EU Member States: *Achmea*' (2019) CMLRev 157.

on the EU.⁹⁴ By doing this the negotiators made sure that the agreement would not alter the power balance or the reciprocal relations between the EU and its Member States.⁹⁵ The Court of Justice has also referred to this issue⁹⁶ as a part of its analysis on the possible adverse effects of the decisions of the tribunal on the EU institutions and their autonomy to regulate autonomously.⁹⁷ CJEU noted that the Union shall decide whether “the Union will itself be the respondent, or the whether it shall leave that position to the investment host Member State”. This means that the Court will be the final decision-maker on the issue of the respondent,⁹⁸ and therefore, exercise its exclusive jurisdiction on preserving the power balance between the EU and Member States.

IV.3. OTHER ISSUES IN OPINION 1/17

Belgium has raised another painful question for the CJEU – whether CETA ISDS is compatible with the right to an independent and impartial court provided and guaranteed by the EU law. The examination of this question coincides with the issue of utmost sensitivity for CJEU these days – the rule of law and independence of the judiciary. Hungary⁹⁹ and Poland¹⁰⁰ are facing backslide regarding the independence of judges and their Treaty commitments concerning the rule of law, in general.¹⁰¹ The Court has previously stated the importance of these principles for European integrity. In *Associação dos Juizes Portugueses*, the Court found that the independence of judges is crucial in order to ensure the effective application of EU law, including to allow individuals to benefit from the principle of fair trial provided for by the Charter of Fundamental Rights.¹⁰² In Opinion 1/17, the Court stated that the EU is bound by those principles when it enters into relations with other countries, regardless of whether the latter shares them.¹⁰³ Furthermore, the Court recognised that the “hybrid” ISDS of CETA exercises judicial functions¹⁰⁴ and the very existence of creating such a judiciary outside the legal systems of the parties is to “give

⁹⁴ Regulation (EU) 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

⁹⁵ Opinion 1/17, opinion of AG Bot, cit. para. 159.

⁹⁶ Opinion 1/17 cit. para. 140.

⁹⁷ *Ibid.* paras 137-138.

⁹⁸ Opinion 1/17, opinion of AG Bot, cit. para. 162.

⁹⁹ R. Staudenmaier, ‘EU Parliament Votes to Trigger Article 7 Sanctions Procedure against Hungary’ (12 September 2018) DW p.dw.com.

¹⁰⁰ European Commission Press Release of 24 September 2018, *Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court* ec.europa.eu.

¹⁰¹ A Brzozowski, ‘France and Germany Pile Pressure on Poland and Hungary over Rule of Law’ (10 April, 2019) EURACTIV www.euractiv.com.

¹⁰² Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117 para. 34.

¹⁰³ Opinion 1/17 cit. paras 190-192.

¹⁰⁴ *Ibid.* para. 197.

complete confidence" in ensuring fair and equitable trial and effective protection of their legitimate interests.¹⁰⁵

Despite the current rule of law crisis in the Union, the Court was eager to base its favourable conclusions on "commitments" and "statements" of the parties using rather futuristic vocabulary, such as "there will be" or "may transform".¹⁰⁶ It is quite surprising for the Court to state that a commitment is a sufficient justification.¹⁰⁷ The Court refers to the fact that the approval of CETA by the Union is conditional upon fulfilling the commitments under Statement 36 of CETA.¹⁰⁸ It is worth mentioning that CETA has already been ratified by the European Parliament on February 15, 2017¹⁰⁹ and the parts regarding the shared competences of the Union are pending approval of the national legislators. The Commission and the Council assure that the agreement will not enter into force until the realisation of the commitments regarding fair and equal access to all investors.¹¹⁰

IV.4. SIGNIFICANCE OF OPINION 1/17

As the President of CJEU stated, "No one has won or lost in Opinion 1/17".¹¹¹ But the legacy of Opinion 1/17 is undoubtedly beyond the CETA's Investment Court System and beyond investment arbitration. It gives a model of safe interconnection between two rivalling legal orders. Thus, it breaks the absolutist and protectionist autonomy saga of recent years and demonstrates the tolerant side of CJEU. Why CETA Investment Court System? Whether the Court gave in to a political pressure to not "killing" CETA, whether not upholding the international reputation of the EU and its global reform agenda would be a big price to pay, or whether CETA indeed provided enough guarantees, are all questions with valid arguments. However, it is impossible to overlook that the European Commission was well-aware of the exigencies of the principle of autonomy. The drafters of CETA carefully accommodated guarantees to avoid clashes between two legal orders based on CJEU's previous "incompatibility" saga. Despite some controversies in the opinion, the Court provides certain criteria on the compatibility of an international dispute settlement mechanism with the autonomy of the EU law, that can open doors to future international mechanisms. The baptism of CETA as a "good law", makes it an example of what CJEU would tolerate as a parallelly existing separate judicial system. Opinion 1/17 becomes a new *de minimis* rule for the principle of autonomy of EU law. It also opens the door for future EU-third country ICS until the establishment of Multilateral Investment Court.

¹⁰⁵ *Ibid.* paras 199-200.

¹⁰⁶ *Ibid.* paras 214-218.

¹⁰⁷ CETA cit. art. 30.1.

¹⁰⁸ Opinion 1/17 cit. para. 221.

¹⁰⁹ European Parliament Press Release of 15 February 2017 *CETA: MEPs back EU-Canada trade agreement* www.europarl.europa.eu.

¹¹⁰ Opinion 1/17 cit. para. 221.

¹¹¹ K Lenaerts, 'Modernising Trade whilst Safeguarding the EU Constitutional Framework: An Insight into the Balanced Approach of Opinion 1/17' cit.

IV.5. ALTERNATIVE OF AN ALTERNATIVE: CAN MULTILATERAL INVESTMENT COURT TACKLE THE LEGITIMACY CRISIS OF ISDS, REFORMED ICS AND COMPLY WITH CJEU'S GOLDEN PRINCIPLE?

The long-term intention of the EU is not only to tackle the legitimacy and effectiveness crisis of investment protection mechanisms in separate agreements, but to adopt a more global and institutionalized approach – establish a multilateral investment court (hereinafter MIC). This commitment can be found in CETA¹¹² and EU-Vietnam Investment Protection Agreement.¹¹³ Those articles are also transitional clauses providing a succession of jurisdiction from ICS to MIC, upon the establishment of the latter. The EU acknowledges that the Investment Court System is not able to tackle the growing pool of FTA's and Investment Agreements and the issues of legitimacy and legal consistency that the existence of different ICS mechanisms can cause.¹¹⁴ As it was already mentioned by the Court in Opinion 1/17, the establishment of the MIC is possible, only if it does not undermine the autonomy of the EU legal order.¹¹⁵ This section concentrates on two essential aspects of MIC (applicable law and judicial structure). It will analyse MIC's possible interrelation with the European Court of Justice under the light of Opinion 1/17.

The negotiations between stakeholder states on the establishment of MIC are currently underway under the auspices of UNCITRAL. The very *raison d'être* of creating a multilateral investment court is to establish a permanent, independent, transparent and legitimate international body which would rule on disputes deriving from international investment agreements and develop a uniform, consistent and predictable case-law. While establishing a functioning legal framework of binding and consistent case-law, account should be taken of how MIC jurisdiction interacts with other international courts and the domestic law of its potential member states. The substantive applicable law is one of the fundamental challenges that needs to be clarified in order for the EU to accede to it. Court of Justice has stated multiple times that no exercise of international legal personality of the Union shall put its exclusive right of interpretation and definitive decision-making on the matters of EU law under question.¹¹⁶ Even though nothing is found in the present Commission proposal on the jurisdictional delimitations of the MIC, the scope of applicable law and interpretative functions of the MIC, given the degree of guarantees found in the CETA agreement on this

¹¹² CETA cit. art. 8.29.

¹¹³ Decision 2019/1096/EU of the European Council of 25 June 2019 on the signing, on behalf of the Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part, art. 3.41.

¹¹⁴ European Commission COM(2017) 493 final of 13 September 2017, Recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes.

¹¹⁵ Opinion 1/17 cit. para. 108.

¹¹⁶ M Bungenberg and A Reinisch, 'From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options regarding the Institutionalization of Investor-State Dispute Settlement' (2018) European Yearbook of International Economic Law 111.

matter, it is not likely that the Commission does not consider this as the negotiations advance. The Working Group III of UNCITRAL has held several meetings so far on certain structural and substantive issues related to the establishment of the court.¹¹⁷

The two possible scenarios of applicable law at the MIC could be either base on the international investment treaty signed between the parties or to go through the International Centre for Settlement of Investment Disputes (ICSID) model and allow the contracting parties to choose their applicable law, which can be domestic law of the party.¹¹⁸ The latter situation is not, as such, problematic from the point of view of international law or international investment practice, but can become a future deadlock from the EU law autonomy point of view. In 2020 UNCITRAL Working Group III on Investor-State Dispute Settlement Reform, suggested to include both existing and future investment treaties within the jurisdiction of MIC.¹¹⁹ On the one hand, this could relax the possible excessive burden of launching massive amendments to bilateral investment treaties, however, this could give rise to issues of applicable law, including interpretations of such applicable law.

In particular, EU Member States individually have more than 1300 Bilateral Investment Treaties (BIT) in force with non-member states. Those BITs have been concluded in different periods of time and are regulated by different methods. For example, the BIT between Spain and Ukraine provides that the arbitration would be based on the provisions of the present agreement, the national law of the party where the investment was made, including the rules regarding conflicts of laws, and the rules and principles universally recognized by International Law.¹²⁰ The fact that some BITs between EU Member States and third countries provide for solving disputes arising between the parties based on domestic laws, puts the EU law, which is integrated into the domestic legal orders of the Member States, under the assessment of the MIC. This could amount to an unacceptable interference into CJEU's exclusive sphere by MIC. Thus, the European Commission will need to ensure that the CETA-model of safeguards are in place in the agreement

¹¹⁷ General Assembly, United Nations Commission on International Trade Law Working Group III (Investor State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS) Multilateral instrument on ISDS reform of 16 January 2020 A/CN.9/WG.III/WP.194 documents-dds-ny.un.org. See also General Assembly, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform, Possible reform of investor-State dispute settlement (ISDS) Appellate and multilateral court mechanisms of 29 November 2019 A/CN.9/WG.III/WP.185 documents-dds-ny.un.org.

¹¹⁸ International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 18 March 1965 art. 42: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".

¹¹⁹ Possible reform of investor-State dispute settlement (ISDS) Multilateral instrument on ISDS reform cit. 6.

¹²⁰ Acuerdo para la Promocion y Proteccion Reciproca de Inversiones entre Espana y Ucrania of 5 May 2000 art. 11(3), www.boe.es.

establishing MIC. CETA standard on applicable law must be observed. In particular, EU law should not be the applicable law in any case, except being assessed as a matter of fact, without its meanings becoming binding on the EU. The treaty establishing the Multilateral Investment Court should consider all the risks connected to the interpretative mandate of the Court and provide for clear and precise delimitations in order to exclude the overlaps with domestic legal orders.

Another possible issue is compliance with the European standard of judicial independence and fairness. Firstly, the EU has the obligation to promote its values through its external actions,¹²¹ including the rights and values enshrined in the Charter of Fundamental Rights of the EU. Art. 47 of the Charter provides for a right to an effective remedy and to a fair trial.¹²² The biggest shift from the ISDS was, of course, the amendment of the appointment procedure of the judges, which made the international dispute settlement more democratically legitimate but also more state – rather than investor-friendly. The standards of independence of the Court is already included as one of the objectives of the reform. It is provided that the judges will be subject to “stringent requirements regarding their qualifications and impartiality” and that they will be appointed according to “an objective and transparent process”.¹²³ There is no clarity around the exact procedure of appointment and the requirements, but it can be deduced that those requirements will not fall below the standards already set by CETA ICS. Also, given that it is an international court, the judges will most definitely be appointed by the member states or a committee composed of the representatives of the member states. Given this one-sided appointment approach the independence and impartiality of the judges would be needed to be reinforced with additional guarantees that are found in the Commission proposal “appointed for a fixed, long and non-renewable period of time”.¹²⁴ This will decrease the dependency of the judges on the states. This reform also marks a shift from traditional arbitral confidentiality to judicial transparency. With the appointment of judges and a strict court system, as well as the principle of transparency and uniform and accessible case-law, the loss of confidentiality principle would become one of the major prices to pay for this *reform*. Although, the Court was quite tolerant with its approach towards the CETA judicial structure, the designing of the MIC judges should be done without any “future commitments” from the establishing parties.

¹²¹ Treaty on the European Union, arts 3(1) and 3(5).

¹²² Charter of Fundamental Rights of the European Union [2012] art. 47: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

¹²³ Recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes cit. para. 9.

¹²⁴ *Ibid.*

Apart from legal challenges, the establishment of MIC seems to also face some political and geopolitical challenges. An establishment of a certain type of world court supposes a global consensus. It is true that the EU and its Member States are the pulses of the global foreign investments comprising the biggest investing and investment hosting market, with the Members States having 1400 out of 3000 international investment treaties in force worldwide.¹²⁵ Does it, however, have sufficient global legitimacy? What about other big economies, like China, Japan, India, Russia and the US? The second biggest investor across the Atlantic, which has long opposed even the WTO Appellate Body, has been clear of its position on the possible establishment of MIC, especially the idea of having an appeal mechanism with wide interpretative powers.¹²⁶ Furthermore, the withdrawal of the US from the compulsory jurisdiction of the International Court of Justice after the Nicaragua case and its general stance on the continuous undermining of the primacy of international legal order,¹²⁷ casts some doubts on the effectiveness of this initiative.

In conclusion, the Multilateral Investment Court is yet to be transformed from idea into a concrete plan and finally a reality. A multilateral solution, whatever the form it might take, could result in increased substantive coherence, legal certainty and consistency, complete institutionalization and legitimacy of judgments. The establishment of such a court however contains some risks of overlapping with the functions of the EU supreme court unless there are precise delimitations on the jurisdiction of the MIC.

V. CONCLUSION

The legal aspects of the external relations of the EU are complex. This complexity is fuelled by external and internal constitutional issues. The EU is a living organism and thus is not only shaped by the Treaties, but also by the dynamic interpretations of the CJEU. From *Van Gend en Loos* to Opinion 1/17, from the first to the last episode of the autonomy saga to date, much has changed. Firstly, the Union has acquired and applied its increasingly growing competences in different areas of international law. The global emerging economic interconnections pushed the EU to act faster and more effectively as a single entity and enter into comprehensive trade relations for the survival of its own internal market. This changed the evolving perceptions about the autonomy of the EU legal order from *dissociation* from the international law to harmonious *interconnection* with it. In order to secure the latter, the EU has proactively launched a tremendous global investment

¹²⁵ European Commission Concept Paper of 5 May 2015, Investment in TTIP and beyond – the path for reform 1 trade.ec.europa.eu.

¹²⁶ K Hughes and P Blenkinsop, 'U.S. Wary of EU Proposal for Investment Court in Trade Pact' (29 October 2015) Reuters www.reuters.com.

¹²⁷ SD Murphy, 'The United States and the International Court of Justice: Coping with Antinomies in the United States and International Courts and Tribunals' (2008) George Washington University Law School, GW Law Faculty Publications and Other Works scholarship.law.gwu.edu.

governance reform agenda to democratise and legitimise the international dispute settlement methods. In light of those developments, Opinion 1/17 became a new milestone of the interplay between international legal order and EU law.

The legal value of Opinion 1/17 is multidimensional, but above all, it is a statement by the EU's top court that the concept of autonomy of EU law is not an immovable shield if there are enough guarantees in place to ensure the uniformity and immunity of EU law from external impact. The opinion demonstrated how the Court has modulated its understanding of autonomy of EU law, by further elaborating its limits in order to accommodate the investment court system and boost the EU's ISDS reform efforts. The impact of Opinion 1/17 can be translated into four main points:

a) *Investment reforms as "Good Law"*: The question in front of CJEU was not simply whether this new mechanism is consistent with the principle of autonomy as developed by the Court. It was rather deep and multifaceted bringing the entire reform agenda under question. Opinion 1/17 acknowledged that CETA is a "*good law*" that can potentially be applied in other international investment agreements of the EU. The Court gave its blessing for the EU initiated massive reforms of the global governance system of international investments. Beyond investment, this mechanism can become a standard acceptable model for other areas too. It must be noted that the death of CETA Investment Court System would also be the death of the whole ambitious global investment governance reforms including the establishment of Multilateral Investment Court, and another step away from EU's obligation of contributing to the development of international law.

b) *International dispute settlement mechanisms can be EU autonomy-friendly*: The core of this case concerned the difficulty of reconciling the principle of autonomy with EU's participation in international dispute settlement mechanism. This issue has increasingly become pressing with CJEU's recent case-law, in particular Opinion 2/13, *Achmea* judgment. After the autonomy-loyal saga of cases, in Opinion 1/17 the Court demonstrated a more flexible and tolerant approach towards an international dispute settlement mechanism. Should this be considered as disloyalty or inconsistency vis-à-vis its own reasoning? The answer lies in the characteristics of CETA Investment Court System. As noted by the Court, the specific features and the unique hybrid nature of the CETA ICS allows us to distinguish it from other international dispute settlement mechanisms previously analysed by the CJEU. Due to the proactivity of the European Commission from the early stages of negotiation, it became possible to ensure that the International Investment law and the model of the dispute settlement in CETA comply with the Court's exigencies of autonomy. In other words, the EU was able to transform the international investment arbitration in a way to adjust to its constitutional architecture. And this approach was praised by the Court.

c) *Softening principle of autonomy of EU law through "as a matter of fact" doctrine and guarantees for the right to regulate*: For the first time in history the CJEU explicitly drew the dividing line between what is acceptable and what is not in terms of immunity of EU law.

The Court found that the EU can be bound by the decisions of the international arbitration tribunal *as a matter of fact*, but not as a matter of law. Since the guardian of EU rule of law is the CJEU, therefore, the interpretation and application of EU law should stay autonomous from international law. However, a question that arises is where is the boundary in practice? Should several decisions of the arbitration tribunal regarding certain facts implicitly foster qualitative changes in terms of EU law? These are all hypothetical risks which will become clearer once CETA ICS functions. As for the other condition, the Court ruled that the sovereign right to regulate in the public interest must be secured in order for the international dispute resolution mechanism to be compatible with the EU's autonomy at the same time allowing EU law of general interest to be examined by CETA Tribunals as a matter of fact.

d) Multilateral Investment Court: Opinion 1/17 does not provide legal analysis on the question of the interrelation of the MIC legal order with the EU law. However, the reasoning of Investment Court System was an implicit green light to the future establishment of MIC. The main possible obstacles on the way of its creation, according to the analysis of this *Article*, are the framework of applicable law, independence of judiciary and the lack of geopolitical legitimacy. Firstly, the applicable law for the disputes at MIC, the nature of its decisions and its interpretative powers would be the first aspects CJEU will be referred to review in case a question of compatibility of the MIC with the EU legal order is challenged. The issue is even more complex, given that each BIT has its own established applicable legal framework, and a vast number of BITs between Member States and third countries mention the domestic law as the applicable law. Secondly, the political will to grant the MIC judges the highest possible guarantees of independence and impartiality found in the proposal of the European Commission is yet to turn into reality. Given that this issue also remains unfinished for the interim investment governance mechanism of ICS, regardless of the "tolerant" position of the CJEU towards CETA ISDS, the lack of clarity around the exact framework could become a critical setback to this court system and the entire reform agenda. Finally, proposed by the EU, a world investment court would not be efficient and serve its global purpose unless it is upheld by the major investment actors. The current lack of global political legitimacy, namely the opposition by the United States, and the crisis of multilateral governance could constitute a major obstacle for the establishment of the Court.

After the recent cases of protecting the principle of autonomy of EU law, Opinion 1/17 became a turning point in the legend of autonomy of the EU law. The Court did not give precedence to international law over EU law in a broad sense. It rather modulated its well-known creation – autonomy of EU law – to accommodate the Commission's carefully designed CETA Investment Court System. Nevertheless, by saving CETA ICS, the Court elaborated what kind of model of international dispute settlement mechanism it considers to be safe and compatible. By this move it saved the principle of autonomy of

EU law from a gradual petrification. An opposite outcome would have had serious consequences on European and global levels. It could give wrong signal about the lack of EU internal unity, question the international reputation of the EU, as well as cease the process of EU initiated ISDS reforms.

The implications of Opinion 1/17 go beyond Investment Court System and even international investment law. By passing CJEU's heavy test of autonomy, CETA Investment Court System has become a conciliated model of interplay between international legal order and the EU law. It means that now international dispute settlement mechanisms have to comply with CETA standards in order to be greenlighted by the CJEU. This is a reminder that Opinion 2/13, *Achmea* case and the rest of the autonomy saga should not be overestimated. In fact, it became a step to reverse the growing criticism towards the Court being rather "protectionist".



ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

edited by Mads Andenas, Cristina Contartese, Luca Pantaleo and Tarjei Bekkedal

BETWEEN FICTION AND REALITY: THE EXTERNAL AUTONOMY OF EU LAW AS A “SHAPESHIFTER” AFTER OPINION 1/17

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ABSTRACT: Academics often get caught up in analysing every minute legal technicality in the Court of Justice's assessment of a foreign dispute settlement mechanism (DSM)'s compatibility with EU law and its autonomy. This is not surprising as the compatibility assessment in essence is a constitutionality check with great ramifications. Instead of this formalistic approach, this article invites academics and practitioners alike to view autonomy as a “shapeshifter”. Just like the “direct effect” of international law in the EU legal order, “external autonomy” will morph into a shield that protects EU law from international law or it will become an embracer of international law and international DSMs. The shapeshifting might in part depend on the extent to which non-legal considerations inform the Court's strict or narrow approaches to the compatibility assessment. The Court achieves this with the help of different techniques, such as the reliance on various hypotheses and fictions, and the summary treatment of certain issues that might be crucial to the assessment.

KEYWORDS: autonomy – CETA – Opinion 1/17 – Opinion 2/13 – direct effect – Investment Court System.

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I. *EUREKA* MOMENTS

The external autonomy (“autonomy”) of EU law in cases that concern the relationship between the EU legal order and various international dispute settlement mechanisms (“foreign DSMs”) is at the centre-point of a growing number of academic publications,¹ including this Special Section on Opinion 1/17. This is not surprising as the assessment of whether a foreign DSM is compatible with EU law and its autonomy is in essence an *ex ante* (e.g. Opinion 1/17) or an *ex post* (e.g., *Achmea*) constitutionality check with great ramifications.

Many academics (myself included) get trapped in traditional doctrinal analyses in which we pick apart every minute legal argument of the Court, as one does when trying to understand a question of constitutionality. We look at the various constitutional criteria the foreign DSM must meet and whether in the specific case the foreign DSM meets those criteria. Then we try to make sense of the Court’s arguments and compare them with previous cases. When discrepancies are found, one is often left with a sense of frustration, asking how one foreign DSM could meet the Court’s criteria when a similar one could not. However, we often forget that the Court is aware of the broader policy implications of its decisions. Because of this, the Court can shape and bend legal concepts in order to (tacitly) address such policy considerations.

In the recent Opinion 1/17² the Court held that the Investment Court System (ICS) under the agreement with Canada (CETA) is compatible with EU law and does not adversely affect the autonomy of the EU legal order. How could this be? Four years ago – even before Belgium requested the CETA Opinion – I had written about this exact scenario, albeit back then I used the Transatlantic Trade and Investment Partnership’s (TTIP) ICS (the model for the CETA ICS) as an example.³ In that *Article* I relied on the numerous conditions set out by the Court in its previous cases – crystallized in Opinion 2/13⁴ – and assessed the ICS against those conditions. However, in that *Article* I came to the opposite conclusion to the one the Court did in Opinion 1/17. Relying on prior cases, I concluded that some aspects of the ICS were *incompatible* with the EU legal order. In the present *Article* I aim to revisit the earlier starting points and share two insights.

¹ Just to name a few of the recent publications: C Contartese and M Andenas, ‘EU Autonomy and Investor-State Dispute Settlement Under Inter Se Agreements Between EU Member States: *Achmea*’ (2019) CMLRev 157; JH Pohl, ‘Intra-EU Investment Arbitration after the *Achmea* Case: Legal Autonomy Bounded by Mutual Trust?’ (2018) European Constitutional Law Review 767; Sz Gáspár-Szilágyi, ‘It is Not Just About Investor-State Arbitration. A Look at Case C-284/16, *Achmea BV* European Papers (European Forum Insight of 30 May 2018) www.europeanpapers.eu 357; C Contartese, ‘EU law as Applicable Law in International Disputes and its Procedural Implications’ in M Andenas, L Pantaleo, M Happold and C Contartese (eds), *The EU External Action in International Economic Law. Recent Trends and Developments* (Springer 2020) 173; NN Shuibhne, ‘What Is the Autonomy of EU Law, and Why Does that Matter?’ (2019) Nordic Journal of International Law 9.

² Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341.

³ Sz Gáspár-Szilágyi, ‘A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union’ (2016) Journal of World Investment and Trade 204.

⁴ Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

The first insight (Part II) is that it is not the conditions of compatibility with the EU legal order and its autonomy that really matter but the ways in which the Court applies them to a specific foreign DSM. Does the Court take an overly *formal*, *strict* approach (like in Opinion 2/13) or does it take a more *lenient* understanding of a potential constitutional “conflict” with EU law and its autonomy (like in Opinion 1/17)? The two approaches materialize in the Court’s usage of certain *techniques*, including the reliance on hypotheticals, the usage of various legal fictions, and the cursory analyses of certain issues, all of which end up influencing the compatibility assessment.

This led to the second insight (part III): external autonomy is a *shapeshifter*. It is one of those concepts – just like the *direct effect* of international law in the EU legal order, on which we have also spilled a lot of ink⁵ – that acts both as a shield and an embracer of international law. One could argue that this is a natural conclusion if one looks at the conditions set out by the Court for a foreign DSM to be compatible with the EU legal order and its autonomy, conditions carefully crafted since Opinion 1/76.⁶ The conditions result either in compatibility or in incompatibility. However, as mentioned, I argue that it is not just the conditions that matter but also the approach the Court takes when it applies them to a specific DSM. These approaches – strengthened with the help of the aforementioned techniques – can mask various *non-legal* considerations, including how the Court’s decision might affect an EU policy field, the strength of the foreign DSM, and the parties to the international agreement.

Therefore, I invite academics and practitioners alike to use a more “law in context” approach when assessing the EU’s external autonomy. Autonomy is more than the sum of the legal conditions for compatibility and as Contartese puts it, its limits are still “nebulous”.⁷ A proper understanding of it cannot be made without taking into account various non-legal considerations that can inform the Court’s decisions.

⁵ Just to mention a few: Sz Gáspár-Szilágyi, ‘EU International Agreements through a US Lens: Different Methods of Interpretation, Tests and the Issue of ‘Rights’ (2014) *European Law Review* 601 609-615; M Mendez, ‘The Legal Effects of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques’ (2010) *European Journal of International Law* 83; A Semertzi, ‘The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements’ (2014) *CMLRev* 1125; H Jackson, ‘Direct Effect of Treaties in the US and the EU, the Case of the WTO: Some Perceptions and Proposals’ in A Arnulf, P Eeckhout and T Tridimas (eds), *Continuity and Change in EU Law. Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008) 365.

⁶ Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* ECLI:EU:C:1977:63.

⁷ C Contartese, ‘The Autonomy of the EU Legal Order in the ECJ’s External Relations Case Law: from the “Essential” to the “Specific Characteristics” of the Union and Back Again’ (2017) *CMLRev* 1627.

II. A STRICT *VERSUS* A LENIENT APPROACH: HYPOTHETICALS, FICTIONS, AND CURSORY ANALYSES

In the following, the *Article* will focus on the Court of Justice's reliance on certain hypotheticals, the usage of various legal fictions, and the cursory analyses of certain issues during the compatibility assessment. These techniques influence whether the Court uses a strict or a lenient approach, which in turn affect the compatibility of a foreign DSM with EU law and its autonomy. I shall contrast the approach used in Opinion 1/17 with prior judgments and opinions of the Court. Furthermore, as the borders of external autonomy are quite porous and in some cases the Court is asked to decide on other issues of compatibility, besides autonomy, the *Article* highlights those examples that do not strictly pertain to the autonomy "test", but which help illustrate the Court's various techniques.

II.1. HYPOTHETICALS CAN MAKE THE DIFFERENCE BETWEEN A STRICT OR A LENIENT APPROACH

Opinion 2/13 on the EU's accession to the European Convention on Human Rights (ECHR) has received ample academic ink.⁸ What strikes the reader are not the numerous conditions the Accession Agreement had to comply with, but the overly *strict approach* the Court took when assessing the compatibility of the safeguard mechanisms to be set up by the Accession Agreement. This strict approach manifests itself in the Court's excessive focus on every *hypothetical* situation that could have created a "potential" conflict between the accession to the ECHR and the EU legal order, further enhanced by the disregard of the practical relevance of some of those hypotheticals.

For example, strictly speaking, the Court was right in holding that the Accession Agreement did not provide for a mechanism that stopped an EU Member State from bringing a case against another EU Member State before the European Court of Human Rights (ECtHR). As is well known, art. 33 of the ECHR allows for inter-State cases in which a party to the Convention can bring a case against another Member for any alleged breaches of the Convention and its Protocols by the latter. Thus, hypothetically, there was a minute chance

⁸ See in German Law Journal, Special Section 'Opinion 2/13 The EU and the European Convention on Human Rights', 2015, the following authors: D Halberstam, "It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward'; C Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13'; Søren Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences'; A Lazowski and RA Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR'; S Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare'. For other academic discussions see Editorial Comments, 'The EU's Accession to the ECHR – a 'No' from the ECJ!' (2015) CMLRev 1; P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) FordhamIntlLJ 955; G Butler, 'A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights. Interview with David Thór Björgvinsson' (2015) Utrecht Journal of International and European Law 104.

that somehow an issue concerning EU law would pop up in such a case. However, what were the chances of this actually happening? Two observations can be made.

Firstly, if the Court takes an absolute view of EU law’s autonomy,⁹ meaning that any threat – even a potential one – to its autonomy is enough to render a foreign DSM incompatible with EU law, then the CETA ICS, just like the Accession Agreement to the ECHR, should also have been incompatible with EU law. For example (see below), the Appellate Tribunal for the CETA ICS is only succinctly described in the actual trade agreement. It is up to the contracting parties to provide further details concerning its set-up and composition, in arrangements following the agreement’s entry into force. In other words, there is a hypothetical chance that the final set-up of the CETA Appellate Tribunal, which the Court could not control in Opinion 1/17, might be incompatible with EU law and its autonomy. Nevertheless, the Court did not find this to be problematic. Thus, one wonders whether the autonomy of EU law is as absolute as the Court says.

Secondly, in the case of Opinion 2/13 there was also an empirical argument to be made concerning the likelihood of cases between EU Member States coming before the ECtHR. So far, a mere 24 cases in the entire existence of the ECtHR were inter-State cases. Of these, only one case (!) concerned EU Member States that were both Members of the EU when the application to the ECtHR was made.¹⁰ Conversely, just in 2018 the ECtHR delivered 1014 judgments following 2738 applications by individuals.¹¹ In other words, hypothetically, there was a (minute) chance for a case between EU Member States to end up before the ECtHR. However, in practice the likelihood that two EU Member States would appear as opponents in a case before the ECtHR – and that case would involve EU law matters the interpretation of which would interfere with the EU legal order and its autonomy – is extremely small (especially given the other safety mechanisms in the Accession Agreement, such as the procedure for the prior involvement of the Court of Justice).

Thus, in Opinion 2/13 the Court used a strict and overly formal approach, based on every hypothetical scenario that could have affected the autonomy of EU law, disregarding the practical relevance of some of the scenarios.

Contrast this approach to the one used by the Court in Opinion 1/17. Much of the conditions for compatibility are the same as in Opinion 2/13, but what differs is the way in which the Court deems that the CETA ICS satisfies them. The Court takes a very *lenient approach*. Three examples come to mind, two which concern the autonomy test and one related to other issues of compatibility with EU law.

⁹ I thank Cristina Contartese for pointing this out.

¹⁰ ECtHR, *Q & A on Inter-State Cases*, www.echr.coe.int and *Inter-State applications by date* www.echr.coe.int; ECtHR, *Slovenia v Croatia*, App n. 54155/16 [15.09.2016] concerning proceedings brought by a Slovenian bank to collect debts owed by Croatian companies.

¹¹ ECtHR, *Analysis of Statistics 2018*, www.echr.coe.int.

Firstly, as mentioned, CETA includes only one article on the Appellate Tribunal of the ICS.¹² The detailed provisions on its actual functioning (procedures to conduct appeals, administrative support, the number of its members) and set-up (appointment of its members and their remuneration) will be provided in a future decision of the CETA Joint Committee.¹³ Thus, hypothetically, there is a chance (not minute) that the Joint Committee could include a clause in its decision that is incompatible with EU law. Still, the Court considered this to be a good enough guarantee that the entire ICS is compatible with EU law.¹⁴ Let me phrase it differently: the Court of Justice found the second-tier mechanism of a future international tribunal to be compatible with EU law, even though the actual text for how that body will function and how it will be set up *did (and does) not yet exist*. One can thus ask whether sufficient safeguard mechanisms exist to ensure that the future CETA Appellate Tribunal shall comply with the Court's strict conditions.

Secondly, the Court did not consider the hypothetical situation of the EU not providing the investor with information on the proper respondent.¹⁵ Over the years the Court has been adamant about ensuring that foreign DSMs would not affect the allocation of competences between the EU and its Member States. To this end, the CETA drafters included a safeguard in art. 8.21(3) of the agreement, pursuant to which the EU would inform the investor on whether it or a Member State is to be the respondent in a dispute before the ICS. This way, the ICS would not need to decide on the issue of EU or Member State responsibility, which could affect the allocation of powers between the EU and its Member States. However, art. 8.21(4) CETA stipulates that in case no such determination is made within 50 days, either the EU or the Member State shall be the respondent depending on who the measure belongs to. In deciding this, there is a chance that the ICS would touch upon issues concerning the allocation of responsibility and competences between the EU and its Member States.

Thirdly, the Court used similar techniques in those parts of the Opinion 1/17 compatibility assessment that did not concern the autonomy of EU law. For example, the Court also had to look at whether the ICS was compatible with the right of access to an independent tribunal, because small and medium sized enterprises (SMEs) might find it too financially burdensome to use the ICS.¹⁶ The Court found that even though no provisions *existed yet* within the treaty text that would ease the access of SMEs to the ICS, the Commission and the Council had given a commitment to implement, rapidly and adequately, measures to ensure the access of SMEs to the ICS, even if the Joint Committee's work would be fruitless.¹⁷ Therefore, hypothetically speaking, there is a chance that no such measures helping

¹² Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [14 January 2017] art. 8.28.

¹³ *Ibid.* art. 8.28(3) and (7).

¹⁴ Opinion 1/17 cit. para. 228 ff.

¹⁵ I would like to thank Cristina Contartese and Luca Pantaleo for suggesting this scenario.

¹⁶ Opinion 1/17 cit. para. 57.

¹⁷ *Ibid.* paras 215-218.

SMEs will be enacted. Nevertheless, it seems that in this case such a hypothetical was not an enough reason to adopt a strict approach and find in favour of incompatibility. In other words, once again, the Court judged the compatibility of a future, foreign DSM with EU law, when the actual text detailing the access of SMEs to the DSM *did (and does) not yet exist*.

In conclusion, the approaches used in Opinion 1/17 and Opinion 2/13 are clearly different and this is in part due to the usage or neglect of certain hypotheticals. This in turn affects the compatibility assessment and the outcomes of the cases. In Part III, I embark on a broader discussion of what this means for the concept of “autonomy”.

II.2. FICTIONS AND ASSUMPTIONS USED AS LEGAL ARGUMENTS

The usage of certain legal fictions and assumptions to substantiate a legal argument is not new in either EU law, national law or international law. However, a growing number of empirical studies in various fields are challenging some of these preconceptions, assumptions and fictions. For example, the liability of Member States for breaches of EU law is often portrayed as part of the “complete system” of remedies that EU law offers, which can complement the deficiencies of other procedures, such as infringement proceedings.¹⁸ Nonetheless, Lock’s 2012 empirical study on Member State liability actions before German and English courts challenged the assumption that Member State liability is an effective remedy. He found that very few cases had been successful as the “suitability of *Frankovich* claims as a means of private enforcement is overestimated”.¹⁹ In investment law as well a rising number of empirical projects²⁰ challenge long held assumptions about investor-state arbitration. Some assumptions, such as that ISDS encourage investments, were even used by Advocate General Bot to substantiate his arguments in his opinion to Opinion 1/17.²¹

Thus, one can rightfully ask the question whether the Court should use legal fictions and assumptions in its compatibility assessment or whether a practical view of these assumptions makes their usage questionable. In the following sections let us look at two

¹⁸ T Lock, ‘Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after *Francovich*’ (2012) CMLRev 1675, 1677.

¹⁹ T Lock, ‘Is Private Enforcement of EU Law’ cit. 1678.

²⁰ G Gertz, S Jandhyala and LN Skovgaard Poulsen, ‘Legalization, Diplomacy and Development: Do Investment Treaties De-Politicize Investment Disputes?’ (2018) World Development 239; S Franck, J Freda, K Lavin, TA Lehmann and A van Aaken, ‘International Arbitration: Demographics, Precision and Justice’ ICCA Congress Series No. 18, Legitimacy: Myths, Realities, Challenges, 2015; M Langford, D Behn and R Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) Journal of International Economic Law 301; JW Yackee, ‘Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?’ (2008) Law & Society Review 805.

²¹ Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:72, opinion of Advocate General Bot, para. 12. According to him ISDS is intended to encourage investments. However, see JW Yackee, ‘Do BITs Promote Foreign Direct Investment?’ cit. For a criticism of AG Bot’s opinion see Sz Gáspár-Szilágyi, ‘AG Bot in Opinion 1/17. The Autonomy of the EU Legal Order v. The Reasons why the CETA ICS might be Needed’ European Law Blog (6 February 2019) europeanlawblog.eu.

fictions used by the Court in *Achmea* and Opinion 1/17; the first one is used to strengthen a stricter approach and the second one substantiates a more lenient approach.

a) Fiction No. 1: Intra-EU investment awards upset the uniform application and effectiveness of EU Law.

Throughout its case law on the compatibility of foreign DSMs with EU law, the Court mentions the need to safeguard the uniform application and interpretation of EU law as a cornerstone to protect autonomy.²² Member State courts have a key role in ensuring this.²³ For example, in Opinion 1/09 and in *Achmea* one of the problems noticed by the Court, was that by creating the European Patent Court and by allowing for intra-EU investment arbitrations, Member State courts would be deprived from hearing certain cases.²⁴ This in turn could affect the uniformity and effectiveness of EU law.

In both cases, the Court used the fiction of the uniform and effective application of EU law to use a stricter approach and to find in favour of incompatibility. However, when it comes to the uniformity and effectiveness of EU law, one should ask the following questions:

1) Does the uniform and effective application of EU law exist in practice?

2) Or, when the evidence on the ground is to the contrary, are there mechanisms in place to ensure the uniformity and effectiveness of EU law?

For example, Pavone's empirical studies on the application of EU law in Member State courts are very telling.²⁵ As he argues, the legal touch of the Court of Justice "within the member states is more patch-worked and contingent than universal and entrenched".²⁶ The effective application of EU law in Member State courts and the national courts' judicial dialogue with the Court of Justice is often impeded by factors including the age of the judge, the education received by the judge, and the judge's relationship to higher national courts.²⁷ One could argue that in very complex, federal-like systems, in which there are existing tensions between federal and sub-federal level courts, it is impossible to ensure always the uniform and effective application of the federal-like law in the sub-units.²⁸ Thus, believing that this is achievable is a fiction. Nevertheless, what should matter is that mechanisms are in place that "catch" the misapplication of the federal-like law.

Thus, when it comes to the integrity and effective application of EU law, the question that should be most important for the Court, is not whether a foreign court will apply or interpret EU law. It clearly will (see Section II.2). What matters is whether mechanisms are

²² Opinion 1/09 *Creation of a unified patent litigation system* ECLI:EU:C:2011:123 para. 84; Opinion 2/13 cit. para. 174.

²³ Opinion 2/13 cit. para. 175; case C-284/16 *Achmea* ECLI:EU:C:2018:158 para. 36.

²⁴ Opinion 1/09 cit.; *Achmea* cit. para. 55.

²⁵ T Pavone, 'Revisiting Judicial Empowerment in the European Union' (2018) *Journal of Law and Courts* 303.

²⁶ T Pavone, 'Dancing in Place: The Spatial Micro-foundation of the EU's Judicial Dialogue' Paper for the 'It Takes two to Tango' workshop (Ede Netherlands, 12-13 June 2019) 6.

²⁷ T Pavone, 'Revisiting Judicial Empowerment' cit. 325-6.

²⁸ See T Lock, 'Is Private Enforcement of EU Law' cit. 1675.

in place that stop such (mis)application and interpretation of EU law taking effect *in the* EU legal order. Such mechanisms do exist when it comes to checking whether foreign DSMs misapply and interpret EU law:

a) art. 267 TFEU – any national court can/has to refer a question to the Court if the award of a foreign DSM has the potential to affect EU law

b) art. 258 TFEU – the Commission can launch infringement proceedings against Member States that enforce the awards of foreign DSMs, which might be incompatible with EU law

c) The supremacy of EU law over any inter-state agreements of Member States²⁹

d) art. 351 TFEU – prior international agreements of the Member States need to be in conformity with EU law. In the case of non-conformity, the Court can force the MS to disapply the international agreement.³⁰

e) art. 344 TFEU – prohibits Member States from submitting a dispute to a foreign DSM concerning the interpretation and application of the EU Treaties.

In *Achmea*, one of the concerns of the Court was that the intra-EU investment tribunal could not ensure the “full effectiveness of EU Law”.³¹ The question is where? *Outside* or *inside* the EU legal order? Outside the EU legal order, the Court cannot control how other courts interpret and apply EU law. A case in point, very recently a US based court held that *Achmea* does not affect the validity of an intra-EU investment award that the US court was asked to enforce under the International Centre for the Settlement of Investment Disputes (ICSID) Convention.³² *Inside* the EU legal order it is a different matter. There, the Court has and should have full control over how EU law is applied and interpreted. Inside the EU legal order (as explained above) there are mechanisms to uphold the integrity and effectiveness of EU law against the decision of intra-EU investment tribunals.

Firstly, there is art. 267 TFEU, which was used when the German Federal Court of Justice referred the question in *Achmea* under the very same mechanism.³³ However, one might argue that the original *Achmea* arbitration is special. In that case, the award could be challenged, because the original arbitration was conducted under UNCITRAL rules in Germany and the German law at the seat of arbitration allowed for the award’s limited

²⁹ Art. 351 TFEU does not protect prior intra-EU agreements. See, case C-301/08 *Bogiatzi* ECLI:EU:C:2009:649 paras 16-20.

³⁰ See joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461 para. 304; joined cases 209 to 213/84 *Ministère public v Asjes* ECLI:EU:C:1986:188; case C-62/98 *Commission v Portugal* ECLI:EU:C:2000:358. J Klabbbers, ‘The Validity of EU Norms Conflicting with International Obligations’ in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 122.

³¹ *Achmea* cit. para. 56.

³² LPP Dechert, ‘Intra-EU Arbitral Award Enforced in the U.S. - *Achmea* Objection Dismissed by D.C. District Court for the First Time’ (19 September 2019) Lexology www.lexology.com.

³³ *Achmea* cit. para. 2.

review.³⁴ Conversely, in the case of ICSID arbitrations the grounds for national review of the award are pretty much non-existent.³⁵ True, but that is when art. 258 TFEU, the supremacy of EU law and art. 351 TFEU (in case there is a conflict between pre-accession ICSID obligations and EU law) kick in. In *Micula* the Commission threatened to bring infringement proceedings against Romania for enforcing an ICSID award while the Romanian Constitutional Court gave primacy to EU law over Romania's competing obligations under the ICSID Convention.³⁶

In other words, one wonders what the revelation in *Achmea* was. As mentioned, it is a fiction that EU law can be applied in a uniform and effective manner everywhere, including *within* the EU. However, there are mechanisms in place within the EU legal order to stop the enforcement of decisions/awards of foreign courts that misapply and interpret EU law, which could affect its uniformity and effectiveness.

b) Fiction No. 2: The CETA Investment Court will not Apply and Interpret EU law.

The second fiction, used to substantiate the Court's lenient approach in Opinion 1/17, is that a CETA paragraph stating that the ICS will only apply domestic law "as a matter of fact"³⁷ means that in practice the said DSM will not apply and interpret EU law.³⁸ This in turn is enough of a guarantee for the autonomy of EU law so that no preliminary reference mechanism between the ICS and the Court of Justice is required.³⁹

I believe this approach to be very problematic if one follows the argument presented in the previous section. The question should not be whether the ICS will apply and interpret EU law. As argued below, in practice the ICS will apply it and interpret it, as it must do so in order to fulfil its functions. Claiming that it will do otherwise, is a fiction.⁴⁰ However, what matters in such cases is whether a mechanism – such as a preliminary reference from the ICS to the Court⁴¹ – exists that would stop the misapplication of EU law. Unfortunately, no such mechanism was included in the CETA ICS and this *should have been* a real cause for concern in light of the approach taken in previous cases.

International investment tribunals routinely apply and interpret EU law, in either the jurisdictional or the merits phase, regardless of whether EU law applies to the dispute as law or fact. In a recent project we looked at how intra-EU investment tribunals reacted to

³⁴ *Ibid.* para. 53.

³⁵ ICSID Convention, art. 53(1).

³⁶ Constitutional Court of Romania *Micula and Others* (File n. 1214D/2015) decision n. 887 of 15 December 2016 (in Romanian).

³⁷ Art. 8.31(2) CETA cit.

³⁸ Opinion 1/17 cit. paras 120-136.

³⁹ *Ibid.*

⁴⁰ There is of course a long-standing debate on where one draws the line between applying law as "fact" to a case and actually applying and interpreting said law as applicable to the case.

⁴¹ Such a mechanism exists in the EU-Swiss and EU-UK Brexit agreements.

the Court’s *Achmea* ruling. We found that in practice intra-EU investment tribunals regularly apply and interpret EU law before upholding their jurisdiction.⁴² In intra-EU investment arbitrations, EU law and *Achmea* are routinely invoked by the respondent EU State or the intervening Commission, as objections to the jurisdiction of the tribunals. In order to address these objections, the investment tribunals have to interpret EU law. For example, in the pre-*Achmea* case of *Euram v Slovakia* the tribunal interpreted art. 344 TFEU as not applying to intra-EU BITs.⁴³ The tribunal in *Masdar v Spain* interpreted the limits of the actual *Achmea* ruling and held that it concerned a BIT between the Netherlands and the Czech and Slovak Federal Republic. Therefore, it “[could not] be applied to multilateral treaties, such as the [Energy Charter Treaty], to which the EU itself is a party”.⁴⁴

EU law will also be applied in the merits phase of an international dispute. This should not be a surprise. International courts that assess the conformity of EU measures with an international treaty *need to apply and interpret EU law, but they cannot invalidate it*. For example, the WTO Panel in *EC Bananas III (Complaint by Ecuador)* concluded that the EU had only one regime for banana imports for the purposes of analysing its conformity with art. XIII GATT, and not two as the Commission claimed.⁴⁵ Furthermore, investment tribunals do not have the power to declare a domestic piece of legislation invalid (it remains unclear why this had to be specifically stated in art. 8.31(2) of CETA). The most they can do is order the respondent State to pay compensation to the investor – or sometimes restitution or specific performance⁴⁶ – following an analysis in which they ascertain whether domestic measures breach the standards of protection provided for in the underlying investment treaty. In other words, during that analysis they will apply and interpret domestic measures, including domestic laws. Claiming that somehow the CETA ICS will not do this in practice is simply a legal fiction.

Yet, it is a legal fiction that in this case helped the Court conclude that the ICS was compatible with EU law. If the Court chose to accept that in reality investment tribunals – including the CETA ICS in the future – and other foreign tribunals regularly interpret and apply EU law (because they have to in order to fulfil their functions) then the Court would have more seriously looked at whether the CETA ICS could affect the autonomy of EU law. If the same standard was applied as in *Achmea*, then the lack of a preliminary reference mechanism from the ICS should have been a cause for concern for the Court.

⁴² Sz Gáspár-Szilágyi and M Usynin, ‘The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice’s *Achmea* Judgment’ (2019) *European Investment Law and Arbitration Review* 29.

⁴³ UNCITRAL *EURAM v Slovak Republic* (Award on Jurisdiction) [22 October 2012] paras 248-267.

⁴⁴ ICSID Case n. ARB/14/1 *Masdar Solar v Kingdom of Spain* (Award) [16 May 2018] para. 679.

⁴⁵ WTO Panel, WT/DS27/R/ECU *European Communities - Regime for the Importation, Sale and Distribution of Bananas* [22 May 1997] paras 7.78-7.82.

⁴⁶ B Demirkol, ‘Remedies in Investment Treaty Arbitration’ (2015) *Journal of International Dispute Settlement* 403.

This example further cements the argument that what matters are not only the conditions of compatibility, but the strict or lenient approach the Court takes to the autonomy and compatibility test, which materialize in the Court's reliance on certain fictions, assumptions, and hypotheses.

II.3. NOT ANALYSING AN ISSUE THOROUGHLY ENOUGH

A third technique used by the Court is to address summarily an issue, which could cause problems on a more thorough analysis. This helps the Court use a more lenient approach and find in favour of compatibility.

Compared to the thorough compatibility analysis in Opinion 2/13, the analysis in *Achmea* is noticeably shorter and leaves out the question of discrimination under art. 18 TFEU,⁴⁷ while in Opinion 1/17 the discussion on whether CETA discriminates between Canadian and EU investors was summarily handled. The question of discrimination does not strictly belong to the part of the conformity assessment that deals with autonomy.⁴⁸ However, it is a good example of how the overall compatibility assessment can be moulded in order to promote some of the policy preferences of the Court.

In Opinion 1/17 Belgium asked the Court whether CETA discriminated against EU investors investing in the EU compared to their Canadian counterparts investing in the EU, as the latter could rely on the ICS, while the former could not. After dismissing the applicability of art. 21 of the Charter on Fundamental Rights to the case (which is a replication of art. 18 TFEU on the prohibition of discrimination based on nationality), the Court found that the more general prohibition of discrimination under art. 20 of the Charter was applicable.

On the face of it, in the CETA Opinion the Court of Justice chose the right elements to compare and found no breach of art. 20 of the Charter. Contrary to the Belgian claim that EU investors investing in the EU were discriminated against Canadian investors in the EU, the Court compared how CETA gives *EU investors investing in Canada* the possibility to resort to the ICS, just as it gives the same possibility to *Canadian investors investing in the EU*.⁴⁹ The Court, however, stopped the analysis at this level and chose not to dissect the realities of intra-EU investments, even if it somewhat hinted at them in para. 181 of the Opinion.

On a more thorough analysis, the Court would have seen that the presence of the ICS in CETA will *indirectly* lead to discrimination *between* different EU investors (not between Canadian and EU investors) investing in another EU Member State. For example, a German and a Polish company investing in Slovakia will have the same remedies (domestic courts and the preliminary reference procedure) against Slovakia in case the latter enacts measures that interfere with their investments. However, if the German company

⁴⁷ Sz Gáspár-Szilágyi, 'It is Not Just About Investor-State Arbitration' cit.

⁴⁸ For the limits of external autonomy see C Contartese, 'The Autonomy of the EU Legal Order' cit.

⁴⁹ Opinion 1/17 cit. para. 180.

is owned or controlled by a Canadian investor, the former will have an extra remedy compared to the Polish company: the CETA ICS (see Figure 1). In investment treaty arbitration it is not only the investor that can bring a claim – either on its behalf or on behalf of the investment-⁵⁰ but in certain instances the locally established company can also bring a case.⁵¹ This means that the German company will have an extra remedy against Slovakia (the CETA ICS), compared to the Polish company.

To conclude, while on the face of it CETA does not discriminate between EU and Canadian investors, on closer examination it will indirectly discriminate between different EU investors investing in another EU state, thus breaching art. 18 TFEU. One may wonder whether the Court was fully aware of this situation and chose not to tackle it in detail, as this could have changed the outcome of compatibility.

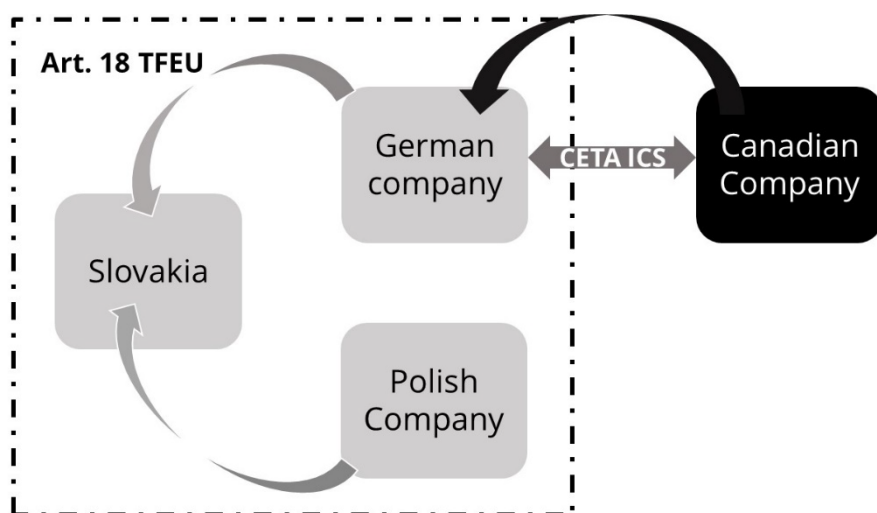


FIGURE 1: Intra-EU investment and the CETA ICS.

III. EXTERNAL AUTONOMY AS A SHAPESHIFTER AND ITS SIMILAR FUNCTIONS TO DIRECT EFFECT

Following the previous discussion, one can ask the simple question what is more important for the compatibility with EU law and its autonomy “test”? Is it the actual, *legal* conditions a foreign DSM must meet; or whether the Court takes a formal or a lenient approach, using the afore-mentioned techniques, which might be informed by various

⁵⁰ See also art. 8.23 CETA.

⁵¹ See ICSID 25(2)(b). CETA allows a case to be brought under the ICSID rules. Furthermore, the Canadian company does not have to own the German company in its entirety. art. 8.1 CETA includes under the term “investment”, among others, enterprises, branches and equity participation.

non-legal considerations, such as the strength of the foreign DSM, the parties to the agreement, or the implications for EU policy?

This is a crucial question as it goes to the heart of what the “external autonomy” of EU law and the compatibility analysis is in practice. Thus, autonomy is not that much a structural principle of EU constitutional law⁵² based on which one can perform a *predictable* constitutional analysis. Instead, it is a *shapeshifter*. A mechanism that depending on not just legal conditions, but also *non-legal* considerations, can morph into a shield against international law or it can embrace it.

Those interested in the relationship between EU and international law may see similarities with the *direct effect* of international law in the EU legal order. As has been noted over the years, the Court of Justice uses direct effect as a way to shield EU law from certain international “threats”, while in other cases it provides “easy passage” to international law.⁵³ Whether or not international law (treaties,⁵⁴ customary international law,⁵⁵ and decisions of DSMs⁵⁶) has direct effect, will often depend more on the ways in which the Court uses the direct effect test⁵⁷ to address non-legal considerations, than the legal conditions for direct effect. Among these, one can mention the purposes for which international law was relied on, the policy field covered by the agreement, or the parties that concluded it.⁵⁸ For example, when the validity of secondary EU law was challenged in light of the GATT⁵⁹ and later the WTO Agreement,⁶⁰ the *lack of direct effect* of the international agreements stopped private parties from invoking them against EU law. The same was true for damages claims by private parties, incurred following the EU’s prolonged breach of WTO rules.⁶¹ Conversely, when the conformity of Member State measures with EU international agreements was involved, the Court found no problem granting international agreements direct effect.⁶²

⁵² See NN Shuibhne, ‘What Is the Autonomy of EU Law’, cit.

⁵³ M Mendez, ‘The Enforcement of EU Agreements: Bolstering the Effectiveness of Treaty Law?’ (2010) CMLRev 1719; M Mendez, *The Legal Effects of EU Agreements. Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford University Press 2013); Sz Gáspár-Szilágyi, ‘EU International Agreements through a US lens: Different Methods of Interpretation, Tests and the Issue of ‘Rights’ (2014) European Law Review 601; A Nollkaemper, ‘The Duality of Direct Effect of International Law’ (2014) European Journal of International Law 105.

⁵⁴ Case 104/81 *Kupferberg* ECLI:EU:C:1982:326; Case C-213/03 *Pêcheurs de l’étang de Berre* ECLI:EU:C:2004:464; Case C-149/96 *Portugal v Council* ECLI:EU:C:1999:574; Case C-240/09 *Lesoochránske zoskupenie* ECLI:EU:C:2016:838.

⁵⁵ Case C-162/96 *Racke v Hauptzollamt Mainz* ECLI:EU:C:1998:293.

⁵⁶ Joined cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* ECLI:EU:C:2008:476.

⁵⁷ Sz Gáspár-Szilágyi, ‘EU International Agreements through a US lens’ cit.

⁵⁸ See M Mendez, *The Enforcement of EU Agreements* cit.

⁵⁹ Case C-280/93 *Germany v Council (Bananas I)* ECLI:EU:C:1994:367.

⁶⁰ Case C-122/95 *Germany v Council (Bananas II)* ECLI:EU:C:1998:94; *Portugal v Council* cit.

⁶¹ *FIAMM and Others v Council and Commission* cit.

⁶² *Pêcheurs de l’étang de Berre* cit.; case C-265/03 *Simutenkov* ECLI:EU:C:2005:213.

Just as in the case of direct effect, I believe there are several important *non-legal* considerations one needs to be aware of when assessing the compatibility of an outside DSM with EU law (see Table 1). In my opinion, such considerations are at least as important as the *legal* conditions developed by the Court.

Case	Treaty Parties	Strength of foreign DSM	Implications of incompatibility for EU	Compatible with EU law
Opinion 1/91 (EEA Court)	(EU + MS) – 3 rd state <i>de facto</i> bilateral	High	Medium	No
Opinion 1/92 (EFTA Court)	(EU + MS) – 3 rd state <i>de facto</i> bilateral	Low	High	Yes
Opinion 1/00 (ECAA)	(EU + MS) – 3 rd state plurilateral	Low	Medium	Yes
Opinion 1/09 (EPC)	MS – MS plurilateral	Medium	Low	No
Opinion 2/13 (ECtHR)	(EU + MS) – 3 rd state plurilateral	High	Medium	No
<i>Achmea</i> (intra-EU ISDS)	MS – MS bilateral	Medium	Medium	No
Opinion 1/17 (CETA ICS)	(EU + MS) – 3 rd state <i>de facto</i> bilateral	Medium	High	Yes
<i>Energy Charter</i> (intra-EU ISDS)	(EU + MS) – 3 rd state plurilateral	Medium	Medium	?
<i>Extra-EU MS BITs</i> (extra-EU ISDS)	MS – 3 rd state bilateral	Medium	High	?

TABLE 1. Other factors that might affect the compatibility of foreign DSMs with EU law.

Firstly, it seems to matter *who concludes or has concluded* the international agreement setting up the DSM. As illustrated in the second column of Table 1, when the cases concerned the compatibility of DSMs set up under agreements concluded by the Member States with other Member States (bilateral in *Achmea*, multilateral in Opinion 1/09), the Court found the DSMs not to be compatible with EU law. On the other hand, in Opinion 1/17, a mixed agreement (concluded by the EU and its Member States on the one side and a third state on the other) that included the brainchild of the EU Commission (the ICS) was deemed to be compatible with EU law and its autonomy. Thus, if it is a Member State agreement, chances are higher that autonomy will shield EU law from the foreign DSM than if it were an EU agreement. Similar trends were noticed when it came to the

granting of direct effect to international agreements in case Member State, and not EU, measures were challenged before the Court.⁶³

Secondly, the “strength and prestige” of the foreign DSMs seem to matter as well.⁶⁴ On the one hand, there are the *less* prestigious and powerful foreign DSMs (see Table 1, third column). In such cases autonomy functioned like an embracer. The EFTA Court (Opinion 1/92) is a small regional court that only has jurisdiction over the EFTA countries,⁶⁵ while disputes under the Agreement on a European Common Aviation Area (Opinion 1/00) are not even handled by a court, but by a Joint Committee.⁶⁶ The CETA Investment Court also cannot be considered a “strong” court, but rather a small or a medium one. It will be a bilateral investment court, which might one day function or not, with a very limited jurisdiction. Furthermore, it can only decide on damages. On the other hand, there are the *more* prestigious and more powerful foreign DSMs with extensive powers. In such cases, the Court decided that the foreign DSMs were not compatible with EU law. The ECtHR is the posterchild for regional human rights protection, with far-reaching judgments that affect 47 countries (not two or three), including all the EU Member States. The European Patent Court and the EEA Court would have also been stronger, regional courts with judgments affecting all EU Member States.

Thirdly, the Court does not exist in a vacuum and is aware of the *wider implications on EU policy* of an incompatibility decision. In order to rank the implications in Table 1 (column four) I asked the following question from the Court’s perspective: If we decide on incompatibility will the implications for EU policy be high or low? The answer will in part depend on the objectives of the underlying international agreement. For example, as Table 1 illustrates, the Court decided in favour of compatibility whenever the implications of a negative decision were high for EU policy. In Opinion 1/92 the EEA Agreement would have most probably failed if the Court said no to the EFTA Court and said no to the EEA Agreement the second time. Similarly, in Opinion 1/17 an opinion on the incompatibility of the CETA ICS with EU law would have frozen the EU’s investment policy, it would have affected the ICS in other EU bilateral agreements⁶⁷ and it would have slowed down the UNCITRAL process to reform ISDS on the multilateral level.⁶⁸

⁶³ See footnote 53.

⁶⁴ For a similar argument, but relating to direct effect see BI Bonafé, ‘Direct Effect of International Agreements in the EU Legal Order: Does It Depend on the Existence of an International Dispute Settlement Mechanism?’ in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 229.

⁶⁵ Opinion 1/00 *Accord sur la création d'un espace aérien européen commun* ECLI:EU:C:2002:231 I-3501 and I-3502.

⁶⁶ Agreement between the European Union and its Member States and the Republic of Moldova of 20 October 2012 on a Common Aviation Area, art. 27.

⁶⁷ Included in the EU-Vietnam and EU-Singapore IPAs.

⁶⁸ UNCITRAL, *Working Group III, Investor-State Dispute Settlement Reform* uncitral.un.org.

In the case of medium or low-level implications for EU policy, the Court decided in favour of incompatibility. One could criticize the choice to rank the implications of Opinion 2/13 in case of incompatibility as medium. However, even though the aim was human rights protection (one of the most important aims of any legal system), not acceding to the ECtHR would not have changed much in human rights protection in the EU. The Member States would remain parties to the Convention and subject to the ECtHR’s jurisdiction, while for matters covered by EU law, the EU Charter of Fundamental Rights also provides far-reaching protection. Furthermore, Charter rights that correspond to rights under the ECHR must have the same meaning and scope as ECHR rights.⁶⁹ Similarly, in the case of *Achmea* the level of implication for EU policy was rather medium than high. If the aim is the protection of investors within the EU, then intra-EU investors already receive ample protection under EU law. Thus, incompatibility would only affect ongoing and future investment cases under intra-EU BITs (not a negligible issue). However, it would not strip intra-EU investors from their EU protections.

Given these factors, it is interesting to see what will happen with Member State BITs with third countries. These agreements are concluded by Member States and the strength of the foreign DSMs is towards medium. Thus, the Court could decide in favour of incompatibility. Nonetheless, the policy implications for such an outcome would be enormous, as it would strip EU investors from protection in third countries (unlike *Achmea*) under more than 1000 Member State BITs with third countries. Thus, the Court might be inclined to decide in favour of compatibility. In the case of intra-EU ISDS under the Energy Charter Treaty, we are confronted with a mixed, multilateral agreement, with a medium DSM. The policy implications of incompatibility are also similar to the ones in *Achmea*. Intra-EU investors will still benefit from the protections of EU law. Thus, the Court would probably decide in favour of incompatibility. It will be interesting to see what techniques the Court will use when these cases come before it and the extent to which they will inform the Court’s decision to use a stricter or more lenient version of the compatibility test.

What about the WTO DSM? It is a multilateral and – up to very recently⁷⁰ – a powerful foreign DSM, which regularly delivers reports against the EU. Why then is it compatible with EU law? This is a fair question to ask. However, in Opinion 1/94 on the EU’s accession to the WTO,⁷¹ the Court was never asked to decide on the *ex-ante* compatibility of the WTO DSM with EU law. Subsequently, the EU acceded to the WTO Agreement and the Court of Justice blocked the direct effect of the WTO Agreement in the EU legal order, *ex post*. If it was not asked to do an *ex ante* control, it made sure it did an *ex post* one.

⁶⁹ Art. 52(3) EU Charter.

⁷⁰ WTO, *Fairwell Speech of Appellate Body Member Peter Van den Bossche*, www.wto.org.

⁷¹ Opinion 1/94 *Accords annexés à l'accord OMC* ECLI:EU:C:1994:384.

IV. CONCLUSIONS

Instead of getting caught up in every minute legal technicality of the Court's assessment of a foreign DSM's compatibility with EU law and its autonomy what I suggest – following Opinion 1/17 – is to view autonomy as a shapeshifter. Just like the direct effect of international law in the EU legal order, autonomy will morph into a shield that protects EU law from international law or it will become an embracer of international law and international DSMs.

The shapeshifting might in part depend on the extent to which non-legal considerations inform the Court's strict or narrow approaches to the compatibility assessment. The Court achieves this with the help of different techniques, such as the reliance on various hypotheses and fictions, and the summary treatment of certain issues that might be crucial to the assessment.



ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

edited by Mads Andenas, Cristina Contartese, Luca Pantaleo and Tarjei Bekkedal

LITIGATING HUMAN RIGHTS DISPUTES AGAINST THE EU AND THE MEMBER STATES: SOME REFLECTIONS IN LIGHT OF OPINION 1/17

LUCA PANTALEO* AND FABIENNE UFERT**

TABLE OF CONTENTS: I. Introduction. – II. The case law of the European Court of Human Rights on the responsibility of EU Members States under the European Convention of Human Rights (ECHR). – III. Overview of the internalisation model. – IV. Adaptability of the internalisation model to human rights litigation. – V. Conclusions.

ABSTRACT: The participation of the EU in international dispute settlement has been the subject of a lively academic debate in recent years. This debate was fuelled by some landmark decisions of the CJEU, which has rejected the compatibility with EU law of the Draft Accession Agreement to the ECHR in Opinion 2/13, while giving the green light to the CETA Investment Court System in Opinion 1/17. In light of the Court's main findings in the latter Opinions, this *Article* claims to assess the adaptability of the model dispute settlement developed under CETA to the ECHR.

KEYWORDS: ECHR – human rights – dispute settlement – CETA – investment court system – internalisation model.

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** Research Assistant, Utrecht University, fabienne-ufert@t-online.de. The *Article* reflects the shared opinions of the authors. Nevertheless, Section II should be attributed to Fabienne Ufert, and Section III to Luca Pantaleo. All other sections should be attributed to both authors. Most of the research as well as the writing of this *Article* was carried out when Luca Pantaleo was still working at The Hague University of Applied Sciences, where his research activities were financially supported by the Lectoraat "Multilevel Regulation". For this reason, he wishes to thank the Lectoraat, and particularly Professor Barbara Warwas for her (not only financial) support. Both authors would also like to thank Prof. Paolo Palchetti for his valuable comments on an earlier draft of this *Article*, as well as Prof. Simone Vezzani and Dr. Cristina Contartese who also provided extremely useful comments on the first draft. It goes without saying that the authors bear full responsibility for any mistakes, errors and omissions contained in this *Article*.



I. INTRODUCTION

The participation of the EU in international dispute settlement has often come under the scrutiny of the Court of Justice of the European Union (CJEU), mostly in the context of Opinions issued in accordance with art. 218(11) TFEU.¹ When it comes to the European Convention on Human Rights (ECHR), in particular, the CJEU has rejected the compatibility with EU law of the Draft Accession Agreement in Opinion 2/13. Without going into too much detail, suffice it to say that one of the most contentious points under that agreement was the co-respondent mechanism, which enabled both the EU and the Member States to become a co-respondent in proceedings brought before the other. According to the CJEU, the main problem with such mechanism lied with the fact that the power to ultimately decide on the acquisition of co-respondent status in a dispute was given to the European Court of Human Rights (European Court). This system, so reasoned the CJEU, would empower the European Court to make determinations in relation to “the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR”, which “necessarily presuppose[d] an assessment of EU law”.² The Court found that this power resulted in an interference with the division of powers between the EU and the Member States as it entailed an assessment on the apportionment of responsibility between the EU and the Member States in instances where the internal division of competence was at stake.³

As a reaction to the rejected co-respondent mechanism on the part of the CJEU, the EU has developed a new model – which will be referred to as the “internalisation model” – that has been included in investment agreements such as Comprehensive Economic and Trade Agreement (CETA).⁴ Under the internalisation model, it is the EU that determines whether the EU or the Member State is to appear as the respondent in a dispute. As will be further explained below, this model was devised with a view to protecting the autonomy of the EU legal order.

¹ Opinion 1/76 *Accord relatif à l'institution d'un Fonds européen d'immobilisation de la navigation intérieure* ECLI:EU:C:1977:63; Opinion 1/91 *Accord EEE – I* ECLI:EU:C:1991:490; Opinion 1/00 *Accord sur la création d'un espace aérien européen commun* ECLI:EU:C:2002:231; Opinion 1/09 *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets* ECLI:EU:C:2011:123; Opinion 2/13 *Adhésion de l'Union à la CEDH* ECLI:EU:C:2014:2454; Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341.

² Opinion 2/13 cit. para. 221.

³ *Ibid.* para. 230.

⁴ In reality, this model is not entirely new. It is largely inspired by a model which was firstly introduced in the so-called Rhine Conventions (Convention of 19 September 1977 for the protection of the Rhine against chemical pollution), and then extended to some minor treaties adopted by the Council of Europe. On these mechanisms see C Contartese and L Pantaleo, ‘Division of Competences, EU Autonomy and the Determination of the Respondent Party: Proceduralisation as a Possible Way-Out?’ in E Neframi and M Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018) 409; as well as L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* (Springer 2019) 36 ff.

This *Article* aims to assess the adaptability of this new model to the settlement of disputes under another legal regime, namely the ECHR. Section II will examine the case law developed by the European Court in cases where the responsibility of EU Member States under the ECHR was at stake. Section III will provide an overview of the so-called internalisation model. Section IV will assess the adaptability of the internalisation model under the ECHR and the legal implications thereof, with a special focus on the system of remedies available under the ECHR. Section V will present some conclusions.

II. THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE RESPONSIBILITY OF EU MEMBER STATES UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS (ECHR)

If a Member State of the EU allegedly violates its obligations under the ECHR, the European Court faces a dilemma because, often, EU Member States may violate their obligations under the ECHR when acting based on an EU measure. Given that the EU itself is not a party to the ECHR, the European Court cannot attribute responsibility to the EU and has thus developed a special system of allocating responsibility between the EU and the Member States. In one of its more recent cases on the matter, *Michaud v France*, the European Court has nicely summarized its approach:

“The Court reiterates that absolving the Contracting States completely from their Convention responsibility where they were simply complying with their obligations as members of an international organisation to which they had transferred a part of their sovereignty would be incompatible with the purpose and object of the Convention [...].⁵ In other words, the States remain responsible under the Convention for the measures they take to comply with their international legal obligations, even when those obligations stem from their membership of an international organisation to which they have transferred part of their sovereignty.⁶ It is true, however, that the Court has also held that action taken in compliance with such obligations is justified where the relevant organisation protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent – that is to say not identical but “comparable” – to that for which the Convention provides [...].⁷ If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.⁸ However, a

⁵ ECtHR *Michaud v France* App n. 12323/11 [6 December 2012] para. 102; ECtHR *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* App n. 45036/98 [30 June 2005] para. 154.

⁶ *Michaud v France* cit. para. 102; *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* cit. para. 15.

⁷ *Michaud v France* cit. para. 103.

⁸ *Ibid.*

State will be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it has exercised State discretion.⁹ In addition, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient”.¹⁰

Based on this premise, the European Court has developed two lines of case law on the responsibility of EU Member States under the ECHR: 1) The Member State bears full responsibility under the ECHR because it is acting based on an EU measure which leaves room for discretion on the part of the Member State. 2) The Member State of the EU is acting based on an EU measure which leaves no room for discretion on part of the Member State. In this case, the European Court has consistently applied the doctrine of equivalent protection. This jurisprudence of the European Court highlights a fundamental aspect: regardless of the discretionary space of the Member State, its conduct is always attributed to the State and never to the EU. This might trigger issues of EU law autonomy, hence, debates surrounding the EU's accession to the ECHR have not lost their relevance. The following two paragraphs shall examine the two lines of case law briefly.

Falling within the first line of case law, in *Matthews v UK*, the European Court held that EU Member States remain responsible under the ECHR not only when they are acting based on a secondary EU measure which leaves room for discretion but also when it comes to EU law with treaty status.¹¹ The European Court found that, due to the primary law status of the act in question, the act could be challenged before the CJEU and thus, the CJEU was not in a position to guarantee an equivalent protection of fundamental rights.¹² Consequently, it was the EU Member State that was required to secure the rights under the ECHR.¹³ In *M.S.S. v Belgium and Greece*, the European Court held that the Member State in question remains responsible under the ECHR even when acting on the basis of an EU Regulation which, despite being generally and directly applicable, contains a so-called derogation clause which gives the concerned Member State some room for manoeuvre in applying the Regulation.¹⁴ In *Cantoni v France*, the European Court found that the fact that national law provisions are based almost *verbatim* on an EU Directive does not exonerate the Member State from its obligations under the ECHR.¹⁵ Lastly, in *Michaud v France*, the European Court held that if an EU Member State acts on the basis of an EU Directive which leaves room for discretion, the presumption of equivalent protection can be triggered if the Member State makes a preliminary reference to the CJEU within its margin of discretion.¹⁶ This is because

⁹ *Ibid.*; ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011] para. 338.

¹⁰ *Michaud v France* cit. para. 103.

¹¹ ECtHR *Matthews v The United Kingdom* App n. 24833/94 [18 February 1999].

¹² *Ibid.* para. 33.

¹³ *Ibid.* para. 34.

¹⁴ *M.S.S. v Belgium and Greece* cit.

¹⁵ ECtHR *Cantoni v France* App n. 17862/91 [11 November 1996] para. 30.

¹⁶ *Michaud v France* cit. paras 114-115.

it is the CJEU that can guarantee an equivalent protection of human rights in the EU to the ECHR because making use of a preliminary reference would deploy the full potential of the human rights supervisory mechanism provided for under EU law.¹⁷ Interestingly, despite the fact that France made no preliminary reference to the CJEU, although the CJEU had never examined the Convention rights at issue, and thus the equivalent protection doctrine did not apply, the European Court found no violations due to the specific circumstances of the case.¹⁸ In summary, the preceding cases demonstrate that an EU Member State bears full responsibility under the ECHR when acting based on EU primary law or EU Regulations which contain so-called derogation clauses that leave room for discretion. Additionally, when acting based on EU Directives which, by their nature, leave room for discretion on part of the Member State. Especially if the Member State did not request a preliminary ruling within that margin of discretion so as to deploy the full potential of the fundamental rights supervisory mechanism provided for under EU law.

In the second line of case law, the most famous judgment is probably the *Bosphorus* judgment in which the European Court clearly established the equivalent protection doctrine.¹⁹ When examining the situation in the case, the European Court found that the protection of fundamental rights by Community law can be considered as equivalent to the protection by the ECHR system and thus the presumption arose that Ireland did not depart from its requirements of the ECHR when it implemented legal obligations flowing from its membership of the European Community.²⁰ Whereas *Bosphorus* was the case in which the European Court thoroughly analysed the level of fundamental rights protection in the EU and then came to the conclusion that it was generally equivalent to the ECHR, the European Court had basically applied the presumption of equivalent protection in previous cases already, for example, in *M & Co v Germany*.²¹ In *Kokkelvisserij*, the European Court made clear that the equivalent protection doctrine does not only apply to actions but also to procedures followed within the EU, such as the CJEU's refusal to allow the applicant to respond to the opinion of the Advocate General during the preliminary proceedings before the CJEU before the case was brought to the European Court.²² The European Court stated that it was prevented from examining the procedure before the CJEU in light of the ECHR directly.²³ In *Avotins v Latvia*, the European Court further extended the application of the equivalent protection doctrine to the principle of mutual trust in

¹⁷ *Ibid.* para. 115.

¹⁸ *Ibid.* paras 115, 132-133.

¹⁹ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* cit. paras 155-156.

²⁰ *Ibid.* paras 155-156.

²¹ *Ibid.* paras 155-156; European Commission on Human Rights *M. & Co. v The Federal Republic of Germany* App n. 13258/87 [9 February 1990].

²² ECtHR *Coöperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v The Netherlands* App n. 13645/05 [20 January 2009], admissibility decision, 6, 8, 16.

²³ *Coöperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v The Netherlands* cit. 17.

EU law because it did not find discretion on part of the Member State.²⁴ Further, the European Court observed that the Latvian Supreme Court had not submitted a preliminary reference to the CJEU but also held that whether the fact that no preliminary ruling was requested hinders the application of the equivalent protection doctrine must be determined on a case-by-case assessment.²⁵ In the present case, the European Court found the second condition to be satisfied and did not find a manifest deficiency of equivalent protection either.²⁶ This is notable because this case happened after the CJEU issued its Opinion 2/13 on the EU's accession to the ECHR in which the CJEU stated that the accession posed such a big threat to the principle of mutual trust and would thus upset the underlying balance of the EU and undermine the autonomy of EU law.²⁷ In summary, the European Court applies the presumption of equivalent protection in cases in which EU Member States act on the basis of EU Regulations which, by their nature, usually do not leave room for discretion on part of the Member State. The European Court also applies the equivalent protection doctrine to procedures followed within the EU, as well as to the EU principle of mutual trust.

Having explained the European Court's system of allocating responsibility between the EU and its Member States, let us reflect on why the co-respondent mechanism was problematic in light of the case law of the European Court. Under the co-respondent mechanism, the European Court had the final word on whether to accept the co-respondency or not. This could be the problem where the EU requested to intervene as a co-respondent and the European Court rejected this on the basis of discretion on part of the Member State. It is exactly to avoid such a situation that the internalisation model was devised.

III. OVERVIEW OF THE INTERNALISATION MODEL

The dilemma outlined in the previous section has been tackled by the framers of EU investment agreements, who have devised a set of tailor-made rules whose main purpose is, in the very essence, to attribute responsibility to the EU and the Member States in a manner that is compatible with the indications given by the CJEU in the relevant case law. The compatibility of that set of rules with EU law has now been confirmed by the Court in Opinion 1/17. One may wonder, therefore, whether the same set of rules could be included in a potentially revised future Accession Agreement to the ECHR. The aim of this section is therefore to provide a brief overview of those rules, of the principles underpinning the choices made by the framers, and of the Court's assessment of this. Before getting underway with such analysis, one methodological clarification seems necessary. The

²⁴ ECtHR *Avotins v Latvia* App n. 17502/07 [23 May 2016].

²⁵ *Ibid.* paras 109, 111.

²⁶ *Ibid.* paras 111-112, 121-125.

²⁷ Opinion 2/13 cit. para. 194.

analysis of the rules laid out in EU investment agreements, which has been termed ‘internalisation model’ in a monographic work published in recent times by one of the authors of this *Article*,²⁸ will be conducted based on the rules of the EU-Canada Comprehensive Economic and Trade Agreement (CETA). Such agreement can, in fact, be considered a sort of model EU investment agreement. All other similar agreements concluded or negotiated by the Union include largely comparable if not identical rules.²⁹ Therefore, only the rules included in CETA will be examined. All references to CETA are to be intended as applicable to all other EU investment agreements unless otherwise indicated in the text.

To begin with, CETA does not contain any rules concerning the allocation of responsibility between the EU and its Member States. Reference to responsibility is entirely omitted. However, one can infer indications concerning issues of responsibility by analysing the rules relating to the submission of a claim against the EU and its Member States by an investor of the other party to the agreement. In particular, CETA contains a mechanism aimed at identifying the respondent to such disputes. Art. 8.21 CETA mandates investors to request the EU (and the EU only) to determine who is to appear as the respondent in a dispute, whether the EU or the Member States. The provision stipulates that the investor must specify the measure that allegedly constitutes a breach of its rights. The EU has to inform the claimant within 60 days as to whether the EU itself or a Member State shall be the respondent in the dispute. The determination thus made cannot be objected by the investor and the arbitral tribunal. However, art. 8.21 CETA does not clarify what are the criteria that will be followed by the EU in order to identify the respondent party.

It is interesting to point out a textual difference between CETA and the EU-Singapore Investment Protection Agreement (EUSA). While CETA does not lay down any other rule concerning the determination of the respondent party and avoids to elaborate on the criteria relied upon by the EU to determine who is going to act as the respondent; EUSA contains a provision according to which in the event that the investor has not been informed on time (that is, a respondent has not been identified),

a) if the measures identified in the notice are *exclusively* measures of a Member State of the EU, the Member State shall be the respondent,

b) if the measures identified in the notice *include* measures of the European Union, the European Union shall be the respondent.³⁰

This provision will provide some guidance on how to determine the respondent in case the EU fails to deliver a response within the prescribed time limit. Although the language employed by this provision contains some degree of ambiguity, it seems safe to affirm that the Member State will be the respondent *only* when the claim challenges measures that

²⁸ L. Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* cit. 99 ff.

²⁹ See e.g. the Investment Protection Agreement of 19 October 2018 between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part in particular art. 3.5.

³⁰ See e.g. ch. 8, art. 21(4) CETA.

were taken *exclusively* by that Member State. In other words, this provision seems to refer to acts taken by the Member State not in execution of EU law obligations and most probably in matters that fall completely outside the scope of EU law. The EU would be the respondent in all other cases. Notably, including where the claim identifies *a)* measures that are partly attributable to the EU and partly to the Member State – in other words, in cases of potential joint responsibility (which is ruled out by CETA and the likes), or *b)* measures taken by the Member State in order to implement EU law obligations.

All in all, the rationale behind the rules concerning the determination of the respondent analysed above seems to be that of avoiding that both the investor and the tribunal pass judgements on issues of EU law. A fictional example will help in illustrating this concept. Suppose that an investor is confronted with a situation in which a Member State has repealed business incentives that the Union has found to be incompatible with its state aid law.³¹ If the choice as to the proper respondent was left to the investor, the latter would have to apply the rules of general international law. According to the provisions of the Articles on State Responsibility (ASR) and on the Responsibility of International Organisations (ARIO), the investor could sue the Member State as the entity to which, under the rules of ASR, the wrongful act – in our example, the repealing of business incentives – is attributable. On the other hand, it could also invoke the (shared) responsibility of the EU under art. 17 ARIO for adopting a binding decision – such as a decision of the Commission or a ruling of the CJEU – that eventually led the Member State to breach the investor's rights. This could happen in the same or in a separate dispute. The international dispute settlement before which such a question is put would most likely have to make determinations concerning the division of powers under EU Treaties.

Without going into too much detail, the Court's case law concerning the participation of the EU in a number of international dispute settlement mechanisms has brought to the fore one main point.³² Namely, that an international tribunal that is able to interpret and apply EU law is at variance with the principle of autonomy.³³ Such a mechanism is

³¹ This is not such a fictional scenario after all. As is well known, this is precisely the situation that materialised in the *Micula* case, where Romania was ordered by an arbitral tribunal to pay compensation to a foreign investor for discontinuing business incentives that were considered illegal state aid under EU law. For an analysis of the case and its implications see C Tietje and C Wackernagel, 'Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the *Micula* Arbitration' (2015) *The Journal of World Investment and Trade* 205.

³² An in-depth analysis of the case law prior to Opinion 1/17 is carried out in L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* cit. 43 ff.

³³ This raises the question of the very nature and purpose of the principle of autonomy. As is well known, the EU is not the only sub-system of international law that has made claims of autonomy. On the contrary, such claims are more common than one may think at first sight. From an international law perspective, the (supposed) autonomy of a sub-system (and especially of international organisations) from the general rules of international law is not an entirely novel question. Actually, it is at the basis of the debate concerning the so-called self-contained regimes. In this sense, there are essentially two aspects of the principle of autonomy. On the one hand, there is the 'internal autonomy', which has to be understood as the

therefore more likely to survive the Court's scrutiny if the EU legal order does not come (directly or indirectly) within its jurisdiction. The two (largely interrelated) points of contention have proved to be the following: *a)* the need to prevent a dispute settlement system from issuing binding interpretations of EU law, and *b)* the need to ensure that it does not make determinations that affect the internal division of powers as fixed by the Treaties. It is clear that the application of the rules of general international law concerning international responsibility, or of any other rule that does not prevent the international dispute settlement in question from making this kind of determinations, is potentially in conflict with the principle of autonomy as interpreted by the CJEU. Unsurprisingly, this is exactly what the CJEU has stated in Opinion 1/09 and in Opinion 2/13, where the co-respondent mechanism was scrutinized. And it is against this background that the set of rules included in CETA was drafted.

In a nutshell, the rules concerning the identification of the respondent included in CETA – despite being procedural in nature – are aimed to circumvent the difficult process of attributing responsibility to a composite entity such as the EU and the Member States.³⁴ By internalising the choice of the respondent party (hence the expression “internalisation model”), the rules in question are intended to prevent the relevant tribunal from making determinations concerning responsibility and attribution, and, through this process, the division of competence as organized by the Treaties.³⁵ In this sense, they should be viewed as an attempt to incorporate the indications given by the CJEU in Opinion 1/09 and Opinion 2/13 in relation to the already mentioned co-respondent mechanism.³⁶ By depriving the investor of the right to choose the respondent, and the tribunal

ability of international organisations to operate independently of their Member States. In the EU legal order, primacy and direct effects can be seen as prime examples of such internal autonomy. On the other hand, the idea of ‘external autonomy’ refers to the ability of an international organization to function on the basis of its own special rules in derogation of, or integration to, the general rules of international law. The case law of the CJEU examined in this *Article* can perhaps be considered a textbook illustration of the external dimension of autonomy. For more details on this issue, see J Odermatt, ‘The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?’ in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart 2018) 291.

³⁴ L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* cit. 108.

³⁵ But see H Lenk, ‘Issues of Attribution: Responsibility of the EU in Investment Disputes under CETA’ (2016) *Transnational Dispute Management* 20-21, who has argued that these rules only have a procedural value and may therefore be set aside by the Investment Court System (ICS) should it come to the conclusion that (international) responsibility should be attributed to a party different than the respondent based on the relevant rules of general international law.

³⁶ It bears noting that the co-respondent mechanism was not the only instrument devised under the DAA. It was accompanied, at least in cases where the EU was the co-respondent, by a rule allowing the so-called prior involvement of the ECJ. See the considerations made by R Baratta, ‘Accession of the EU to the ECHR: the Rationale for the ECJ's prior involvement mechanism’ (2013) *CMLRev* 1305, 1305. It should be emphasized, however, that co-respondency (and, consequently, shared responsibility) is excluded under CETA.

of the power to review such choice, CETA intends to protect the autonomy of the EU legal order from external interference.³⁷

As already mentioned, the CJEU has given its green light to the internalisation model. In fairness, the Court has devoted little attention to it in Opinion 1/17. In a rather cursory assessment of the rules in question, the Court found that these rules: *a*) confirmed that the dispute settlement mechanism established under CETA does not have the power to interpret EU law, and *b*) that the “exclusive jurisdiction of the Court to give rulings on the division of powers between the Union and its Member States was adequately preserved, in contrast to the situation scrutinized in ‘the draft agreement that was the subject of Opinion 2/13’”.³⁸ Irrespective of its succinct nature, it seems fair to consider this finding an endorsement of the internalisation model. The question therefore becomes whether such a model can be exported to other agreements, or if, on the contrary, the peculiar nature of investment disputes makes this model unfit for litigation under other agreements. The purpose of the following section is to assess the adaptability of the internalisation model to the ECHR system.

IV. ADAPTABILITY OF THE INTERNALISATION MODEL TO HUMAN RIGHTS LITIGATION

From the analysis carried out above, two main takeaways can be identified. First and foremost, in cases brought against EU Member States where EU law measures were at stake, the European Court has clearly tended to allocate responsibility to the Member States insofar as they enjoyed a margin of discretion. Otherwise, the responsibility would be attributed to the EU, to which the equivalent protection doctrine would apply. When both the EU and the Member States will be a party to the ECHR, only the first line of cases will be problematic from the perspective of the EU legal order. This is so because in those cases, in the absence of tailor-made rules, the European Court would continue to adopt its analysis of the margin of discretion, which may entail an assessment of the division of powers as fixed by the Treaties, and more generally an interpretation of EU law. The second main takeaway from the preceding analysis is that under the internalisation model, not only the EU is the party that designates the respondent, but it is also the default respondent by definition. As seen above, the Member States play a sort of fall-back, residual role. In this section, we will assume for the sake of argument that the (future revised) Accession Agreement

³⁷ See N Lavranos, ‘Is an International Investor-State Arbitration System under the Auspices of the ECJ Possible?’ in N Jansen Calamita, D Earnest and M Burgstaller (eds), *The Future of ICSID and the Place of Investment Treaties in International Law* (British Institute of International and Comparative Law 2013) 129; SW Schill, ‘Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements’ in M Bungenberg, A Reinisch, and C Tietje, *EU and Investment Agreements: Open Questions and Remaining Challenges* (Nomos and Dike 2013) 37.

³⁸ Opinion 2/13 cit. para. 132.

will lay down an internalisation model that replicates CETA's provisions. Based on this assumption, we will deal with two main issues. First of all, we will examine how the internalisation model will affect the apportionment of responsibility in the problematic cases referred to above, that is cases where EU law measures are at stake, but it is somewhat unclear if and to what extent the Member States enjoyed a margin of discretion (i.e. the problem lies with EU law, or with the Member States' implementation of it). Secondly, we will turn to the question concerning the remedies. Namely, we will analyse if and to what extent the internalisation model in the context of the ECHR will affect the restoration of the victims of human rights violations. In both cases, we will use practical examples taken from Section 2 in order to make the discussion less hypothetical and less theoretical.

Suppose the internalisation model is in place when Mr. Joe Bloggs initiates a dispute in a case similar to *Cantoni v France* mentioned above. After seeing himself convicted by a French criminal court on the basis of what he deems to be an imprecise legal definition, he decides to bring a dispute under art. 7 ECHR. Suppose that unlike in *Cantoni v France*, the French definition includes some minor but potentially decisive differences with respect to the definition contained in the EU directive. Suppose that because of such differences, the French legislation appears to be at variance with the directive, at least *prima facie*. Under the internalisation model, Mr. Joe Bloggs would have to request the EU to identify whether the EU itself or France should be the respondent party. In such a scenario, it is fair to assume that the EU will designate itself as respondent and therefore assume responsibility on behalf of the whole bloc, if only because it would be unclear when the dispute is raised whether the problem lies with the directive or with the French transposition of it. Suppose that during the dispute it becomes apparent that the problem actually lies with French law rather than EU law. Would the fact that the EU rather than France will be found responsible for breaching the ECHR constitute a problem from the perspective of the ECHR, the EU or both?

From the perspective of the ECHR, it seems reasonable to affirm that the main issue would concern the remedial dimension. That is to say, a problem could arise if the European Court were to order a remedy – such as a change in the law – that the EU would not be in a position to execute, at least not directly. This issue, however, will be analysed below. From the perspective of the EU legal order, the potential problem could essentially be that the Union would find itself in violation of its international obligations because of the wrong implementation of EU law on the part of one of its Member States. In reality, however, this would not be such an exceptionally absurd situation. In reality, the readiness of the EU to accept international responsibility that potentially derives from measures adopted by the Member States is rather common in the World Trade Organisation (WTO) regime.³⁹ In some cases, the Union has even battled with the other party to

³⁹ It bears noting that the comparison with the WTO should be handled with extreme care. There are significant differences between the two systems that should not be underestimated. To name but the most

the dispute and with the panel in order to affirm such readiness.⁴⁰ The most remarkable examples of these battles are possibly the *LAN* case,⁴¹ and the *Airbus* case.⁴²

There are multiple legal reasons that can justify the preference for a system whereby the Union appears on behalf of the whole bloc irrespective of the attributability of the specific conduct that gives rise to a dispute, at least from an EU law perspective. First and foremost, in situations where there is no strict correspondence between the external competence at stake (i.e. the competence to act on the international plane) and the internal competence necessary to discharge of the international obligations on the internal plane (i.e. the competence to implement internally a given international obligation), having the EU appearing as the sole respondent might be the only way to preserve the integrity of the division of competence and safeguarding it from any external interferences.⁴³ This is of particular importance whereas EU external exclusive competences are affected. Secondly, and consequently, when the division of competence is in question the sole responsibility on the part of the EU might be the only option compatible with the established case law of the CJEU, which has repeatedly stated that an international dispute settlement cannot determine the division of powers as fixed by the Treaties.⁴⁴ Thirdly, and apart from the requirements of the CJEU, there seem to be also some practical considerations militating in favour of involving the EU only in cases where there is a genuine lack of clarity on the internal division of competence. For an international judgment rendered against the EU would be binding on the Member States as a matter of EU law, as it would benefit of the status of

fundamental, the substantive scope of the entire WTO comes under the external exclusive competence of the EU, which makes it quite logical, at least from an EU law perspective, that the Union is the sole actor on the international level and therefore assumes full responsibility of international law. This situation would obviously not be replicated under the ECHR. The argument made in our analysis, however, remains valid. Irrespective of the internal EU law differences in terms of the competence divide, the WTO regime remains an example of a system under which the Union has assumed responsibility for the conducts of the Member States, and this state of affairs has seldom been challenged by third countries. See on these aspects the thoughtful examination of A Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016) 161 ff.

⁴⁰ See the thoughtful examination of A Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* cit. 178-193.

⁴¹ See WTO DSB, Panel Report, *United States v The European Communities European Communities, EC – Customs Classification of Certain Computer Equipment* case n. ds62 [22 June 1998].

⁴² See WTO DSB, Panel Report, *United States v The European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft* case n. ds316 [30 June 2010]. In this case, it bears noting that the DSB did not endorse the sole responsibility of the Union and apportioned joint responsibility also to the Member States concerned.

⁴³ For a discussion of how an international dispute settlement body may struggle with the understanding of the division of competences between the EU and the Member States, and with the differentiation between categories such as external and internal competences, see A Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* cit. 183 ff.

⁴⁴ A comprehensive discussion of this case law can be found in L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* cit. 48-54.

intermediate source that international law generally enjoys in the EU legal order.⁴⁵ The opposite would not be true. Fourthly and finally, the assumption of international responsibility on the part of the EU on behalf of the regional bloc – without prejudice to the repercussions that this may have internally on the Member States under EU law – is reminiscent of a federal paradigm.⁴⁶ These considerations seem to be equally applicable under WTO rules, investment agreements or the ECHR interchangeably. It seems therefore safe to conclude that the extension of the internalisation model to the ECHR would constitute an acceptable solution as far as the attribution of responsibility – through the determination of the respondent – is concerned, from both an ECHR and an EU law perspective.

The second potentially problematic issue that could arise from the extension of the internalisation model to the ECHR concerns the perspective of the victims of human rights violations. In essence, the problem is as follows. As already clarified, under the internalisation model the EU will be the default respondent. This means that in most cases the judgment of the European Court will be addressed to the Union. It will be the EU that will have to provide the victims with the remedies that the European Court will order. In light of the different types of remedies that the European Court can award, one may wonder whether the fact that the individuals concerned will essentially be deprived – save in residual cases – of the possibility to sue the Member States – with all the consequences therefrom in terms of the decision-making process and structural features of an international organisation as opposed to a State – may give rise to gaps in the system of protection of human right as established by the ECHR.

First and foremost, it seems apposite to briefly recall what are the remedies that can be ordered by the European Court. Under art. 41 of the ECHR, the European Court can award remedies of just satisfaction.⁴⁷ This is a form of reparation which can be awarded only if applied for by the applicant on time, if the internal law of the High Contracting Party concerned only allows partial reparations to be made, and only if necessary.⁴⁸ The European Court may award three types of just satisfaction, namely pecuniary damages, non-pecuniary damages, and costs and expenses.⁴⁹ Specifically, pecuniary damages can be compensation for both loss actually suffered and loss or diminished gain to be expected in the future.⁵⁰ Non-pecuniary damages constitute financial compensation for non-material harm, for example, mental or physical suffering.⁵¹ Moreover, the European Court can order

⁴⁵ See B Van Vooren and R Wessel, *EU External Relations Law, Text, Cases and Materials* (Cambridge University Press 2014) 228-231.

⁴⁶ See L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* cit. 161-162.

⁴⁷ Art. 41 ECHR.

⁴⁸ *Ibid.*; ECtHR Rules of Court of 1 January 2020, rule 60.

⁴⁹ Practice direction issued by the President of the ECtHR in accordance with Rule 32 of the Rules of Court on 28 March 2007, 64.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

the reimbursement of costs and expenses that the applicant has incurred – at the domestic level and subsequently in the proceedings before the Court itself – in trying to prevent the violation from occurring or in trying to obtain redress therefor.⁵² Such costs and expenses typically include costs of legal assistance, court registration fees, travel and subsistence expenses and so on.⁵³ Art. 46 of the ECHR lays down the binding force and execution of judgments which can be understood as compliance by the state or better, *restitutio in integrum* being the first remedy under the ECHR.⁵⁴ It must, however, be noted that, usually, the European Court's award is in the form of a sum of money – evidently based on the three types of just satisfaction damages – and it is only in rare cases that the Court considers a consequential order aimed at putting an end to or remedying the violation in question.⁵⁵ One exemption is the pilot-judgment procedure where the European Court usually orders remedies of *restitutio in integrum*.⁵⁶ The pilot-judgment procedure covers joined cases where the facts of these cases reveal in the Contracting Party concerned the existence of a structural or systematic problem or another similar dysfunction which has given rise or may give rise to similar applications.⁵⁷ In such circumstances, it is in the interest of the European Court to make a consequential order, including clear indications to the respondent government on how to remedy the situation, instead of merely awarding monetary compensation. However, the European Court generally avoids imposing non-monetary remedies (*restitutio in integrum*), either out of respect for the states' discretion regarding the implementation of the Court's judgments or due to concerns of non-compliance.⁵⁸ Thus, just satisfaction often means monetary compensation.

The problem concerning the emergence of a possible reparation gap raises different concerns depending on the remedy ordered by the European Court. As far as monetary compensation is concerned, an order to pay a given sum of money made to the Union does not seem to raise any particular issue from the perspective of the victim. The EU can certainly pay compensation as a result of an international dispute. In some systems

⁵² *Ibid.* 65.

⁵³ *Ibid.*

⁵⁴ Art. 46 ECHR; PJ Kuijper, 'Attribution – Responsibility – Remedy. Some Comments on the EU in Different International Regimes' (2013) *Revue Belge de Droit International*, 57.

⁵⁵ Practice direction cit. 65; V Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2018) *The European Journal of International Law* 1091, 1099 ff.

⁵⁶ D Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* (Martinus Nijhoff 2013) 43-44.

⁵⁷ ECtHR, Rules of Court (2020) cit. Rule. 61(1).

⁵⁸ In certain cases, the European Court has argued that specifying a remedy goes beyond the role of the Court – for example: "It is not for the Court to prescribe specific procedures for domestic courts to follow". ECtHR *Fitt v The United Kingdom* App n. 29777/96 [16 February 2000] para. 24. And: "[I]t is not for the Court to indicate how any new trial is to proceed and what form it is to take". ECtHR *Sejdovic v Italy* App n. 56581/00 [1 March 2006] para. 127; ECtHR *Burmych and Others v Ukraine* App n. 46852/13 [12 October 2017] para. 182; V Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' cit. 1100, 1102-1103.

to which the Union has subscribed – such as EU investment agreements – this is the only remedy that can be ordered.⁵⁹ From the perspective of the EU legal order, some concerns may arise in cases where the EU has appeared as the respondent, but the violation of the ECHR is essentially generated by an act or conduct of a Member State. The same issue may arise under EU investment agreements. In that context, it has been resolved (better: addressed) with the parallel adoption of a system of (internal) rules that will govern the allocation of financial responsibility deriving from investment disputes to which the EU or the Member States are a party.⁶⁰ Without going into too much detail, the idea is that the international and internal dimensions of the disputes are separated and run on parallel tracks. The international responsibility will be borne by the party that has been designated as the respondent by the Union. If monetary compensation is awarded, the respondent will be ordered to make the payment. This is, however, without prejudice to the allocation of the financial implications of the dispute that will be done at the domestic level based on the application of the said rules. For example, if the Union acting as the respondent will be ordered to pay monetary compensation to a foreign investor for a violation that is ultimately caused by the wrong implementation of EU law on the part of a Member State, the EU will retain the possibility to recover the sums thus paid from the Member State in question. This state of affairs, albeit imperfect, should eliminate or at least minimise the risk of a “moral hazard”, that is the Member States hiding behind the Union to get away scot-free for their wrongdoings.⁶¹ It is true, as pointed out by Kuijper, that “a Member State may be a much surer provider of funds than the EU, at least in the eyes of the other, non-EU, contracting parties to the ECHR”,⁶² and possibly also in the eyes of individual claimants. However, this does not seem to be such a massive issue. In view of the relatively negligible sums awarded by the European Court as compensation, especially if compared with the often-astounding amounts that are usually claimed and obtained in investment cases,⁶³ it seems safe to affirm that the victims of human rights violations perpetrated by the EU can be told to rest easy.

⁵⁹ See art. 8.39(1) CETA.

⁶⁰ See Regulation (EU) 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, commented on by L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* cit. 112-121.

⁶¹ In particular, see the concerns expressed by A Dimopoulos, ‘The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities’ (2014) CMLRev 1671, 1676 ff.

⁶² PJ Kuijper, ‘Attribution – Responsibility – Remedy. Some Comments on the EU in Different International Regimes’ cit. 75.

⁶³ As the most striking example of this, one can immediately think of the *Yukos* case, where an UNCITRAL Arbitral Tribunal has awarded an astonishing US\$ 50 billion for damages. See Permanent Court of Arbitration (PCA) final award of 18 July 2014 *Yukos Universal Limited (Isle of Man) v The Russian Federation* case n. 2005-04/AA227.

The situation could be slightly more problematic in cases where the European Court does not only order the payment of monetary compensation. In particular, the problem will arise where the European Court identifies individual measures to remedy the situation that gave rise to a violation of the ECHR (such as *restitutio in integrum*) or even general measures such as a change in law.⁶⁴ In order not to be excessively hypothetical in our analysis, we will try to explain these problematic cases by means of references to practical cases.

As a textbook illustration of the first type of cases, one can think of the *Assanidze v Georgia* judgment.⁶⁵ In this case, the claimant alleged a violation of his right to liberty for being detained despite having obtained an acquittal and even a presidential pardon. The European Court observed that the circumstances of the case “did not leave a real choice to the respondent State but to arrange the immediate release of the applicant”.⁶⁶ As a logical consequence of this finding, the European Court ordered the respondent State to secure the applicant’s release at the earliest possible date.⁶⁷ Even though the *Assanidze* case, and more generally all cases relating to the enforcement and execution of criminal law, concerns a matter that falls outside the remit of EU law, it constitutes a meaningful example of how specific can be the remedies ordered by the European Court in some cases. Under the internalisation model, this scenario would be problematic whereby the Union has been designated as the respondent but the power to execute the individual remedy ordered by the European Court lies with a Member State. To what extent would this situation affect the victim of the human rights violation in question?

First and foremost, it seems reasonable to assume that this scenario will not occur frequently. As stated above, in the ECHR regime compensation is the standard remedy which is awarded in the vast majority of cases. An individualised remedial measure remains rare. However, in those instances where the European Court does order such a measure, it seems safe to observe that the EU legal system does not offer sufficient guarantee that in the situation described above the Member State will execute the judgment

⁶⁴ It is worth noting that the power of the European Court to order remedies other than monetary compensation is not immune from criticism. In particular, it has been suggested that this case law seems to be at variance, or at least in tension, with the role attributed to the Committee of Ministers pursuant to Art. 46, as well as with the margin of appreciation that is generally recognised to the Contracting Parties in complying with the obligations deriving from the ECHR. See in this sense G Bartolini, ‘Art. 41: Equa Soddisfazione’ in S Bartole, P De Sena, and V Zagrebelsky (eds), *Commentario Breve alla Convenzione Europea per la Salvaguardia dei Diritti dell’Uomo e delle Libertà Fondamentali* (CEDAM 2012) 703, 728-729. But see FM Palombino, ‘La “procedura di sentenza pilota” nella giurisprudenza della Corte europea dei diritti dell’uomo’ (2008) *Rivista di diritto internazionale privato e processuale* 91, 101, who suggested that this case law should be understood in light of the principle of acquiescence of the States that have been addressees of the relevant judgments. It goes without saying that this discussion, however fascinating, goes well beyond the scope of this Article. The reader is therefore referred to the literature mentioned.

⁶⁵ ECtHR *Assanidze v Georgia* App n. 71503/01 [8 April 2004].

⁶⁶ See D Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* cit. 22.

⁶⁷ *Assanidze v Georgia* cit. 14th operative provision.

in an effective and timely manner. The only legal instrument available to compel a Member State would be the infringement procedure. In fact, the Member States will be under an EU law obligation to comply with an order of the European Court in a case where the EU is the respondent party. Non-compliance with said order will result in a failure to fulfil its obligations under the EU Treaties pursuant to arts 258 and 259 TFEU, which is a remedy that is not available to natural and legal persons.

The second type of cases is exemplified by the pilot-judgment procedure. Without going into too much detail, this is a special procedure that applies if there are repetitive or similar applications arising in a Contracting Party because of a systemic or structural problem resulting in a breach of the ECHR.⁶⁸ The excessive slowness of the Italian judicial system is the textbook illustration. In such cases, the European Court rather than ordering individualised remedial measures – or sometimes in addition to them – imposes the adoption of general legislative measures that are deemed appropriate to repair the structural deficiencies that have given rise to repetitive applications.⁶⁹ To name but a few notable examples, the European Court has ordered a State to amend its property law so as to achieve a better balance between the competing interests at stake,⁷⁰ or to introduce changes in the electoral system so as to allow individuals serving a prison sentence to vote in national and European elections.⁷¹ Sometimes the European Court requires States to install domestic remedies to avoid the submission of repetitive applications that would overload its docket.⁷² As an illustration of an *ad hoc* internal remedy, one can think again of the Italian example, where a special, fast-track procedure to claim monetary compensation has been made available to those who have suffered a violation of their right to a fair trial under art. 6 ECHR in case of excessive length of domestic proceedings.⁷³

As far as the internalisation model is concerned, it seems that more or less the same reasoning developed in relation to individual remedial measures can be applied to general measures ordered by the European Court in disputes where the respondent is the Union, but the violation is the consequence of a Member State's conduct. The Member State in question would be under an EU law obligation to take the appropriate legislative measures to comply with the order of the European Court, and the EU could resort to the infringement procedure to compel the Member State. Again, this would not be an ideal solution from the perspective of the victims. In fairness, it seems that in such case the

⁶⁸ For a thoughtful overview of the constitutive elements of the pilot-judgment procedure See D Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* cit. 35 ff.

⁶⁹ *Ibid.* 86 ff.

⁷⁰ See ECtHR *Hutten-Czapska v Poland* App n. 35014/97 [19 June 2006], more specifically the fourth operative provision.

⁷¹ See ECtHR *Greens and M.T. v The United Kingdom* App n. 60041/08 and 60054/08 [23 November 2010], especially the sixth operative provision.

⁷² See the analysis provided by D Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* cit. 91 ff.

⁷³ This is the so-called Pinto Law, that is Law n. 89 of 24 March 2001.

Union would have an additional instrument at its disposal in order to mandate the adoption of general measures in the legal order of a Member State. The EU would be able to adopt a decision or even an *ad hoc* directive, which can be addressed to one Member State only in accordance with art. 288 TFEU.⁷⁴ While this possibility alone would not be a particularly effective remedy, things might be different if combined with an effective system of sanctions that could be introduced in secondary legislation, similar to the system of rules that governs financial responsibility under EU investment agreements.

To conclude this section, it seems reasonable to affirm that the extension of the internalisation model to the ECHR in a hypothetical, future EU Accession Agreement could indeed give rise to some gaps in the protection of victims of human rights violations. This conclusion does not apply to cases where only monetary compensation is awarded. However, where other remedial measures are ordered by the European Court, whether individual or general, the victims may in some cases be in an unfavourable situation, if only because they may be confronted with a double level of governance in order to obtain the required redress. However, the existing practice under the ECHR regime seems to be encouraging. States that have been the addressees of decisions of the European Court ordering individual or general measures have demonstrated an overall acquiescence with the content of such decisions, generally taking the required action in order to comply with them more or less in a timely and effective manner.⁷⁵ From this perspective, it appears reasonable to assume that the EU will do everything in its power to ensure that victims of human rights violations will obtain the adequate redress for the losses suffered even where it does not have the power to directly take action in the relevant field.

V. CONCLUSIONS

The analysis carried out above has demonstrated that the extension to the ECHR of the internalisation model adopted under EU investment agreements for the purpose of settling disputes with a composite legal entity such as the Union and its Member States may give rise to some critical issues. This conclusion holds true, in particular, in relation to cases where the European Court orders individual or general measures and not just monetary compensation. In these cases, the fact that under the internalisation model the respondent party may not have the power to take the required measures could lead to potential gaps in the protection of the victims of human rights violations. While this might be true, cases where States are required to afford individual remedies other than compensation, or to take legislative action, are in practice not so recurrent. In addition, it can be reasonably presumed that the EU will be willing to maintain a clean human rights record, so to speak.

⁷⁴ This of course presupposes that the EU has the competence to legislate in the relevant field.

⁷⁵ See the considerations made by FM Palombino, 'La "procedura di sentenza pilota" nella giurisprudenza della Corte europea dei diritti dell'uomo' cit. 101 ff.

As a consequence, one can assume that the Union will use all the hard and soft law instruments, as well as political instruments, to exercise pressure on the non-compliant Member State in order for individuals to obtain an adequate redress. From this perspective, the ability of the EU to effectively use its leeway against the MS to prompt improvement and preserve the image and reputation of the whole regional bloc should not be underestimated. Therefore, the extension of the internalisation model to the ECHR, while not being immune from critical aspects, appears to be a safe avenue to be followed also in the field of human rights litigation – at least from an EU law perspective.

The most contentious point relating to the participation of the EU in the settlement of disputes under the ECHR when it comes to remedies seems to be connected with a different aspect. In fact, based on the established case law of the CJEU, it appears doubtful whether the possibility for the European Court to order primary remedies is compatible with the principle of autonomy of the EU legal order. It should be recalled that the tribunal created under EU investment agreements can only award monetary compensation.⁷⁶ This aspect has been emphasised by the CJEU in Opinion 1/17, where it referred to the fact that the tribunal will be prevented from annulling a measure of a disputing party or require it to change its law so as to render it compatible with the relevant investment agreement.⁷⁷ Although the CJEU did not say it explicitly, it seemed to indirectly suggest that the power to order remedies other than monetary compensation would have been at variance with the principle of autonomy. In particular, with the CJEU's exclusive power to interpret and assess the validity of EU law in accordance with the Treaties. However, this obstacle could perhaps be overcome by means of a provision of the future Accession Agreement that replicates the clause included in EU investment agreements concerning remedies.⁷⁸ Furthermore, under the ECHR system, limiting the power of the European Court to award only monetary compensation could perhaps also be grounded on the wording of art. 41 ECHR, which makes reference to the existence of obstacles of internal law.⁷⁹

Both scenarios, however, seem too unrealistic. Regarding the first, it is difficult to imagine that third countries will agree on the inclusion of such a special rule only to accommodate the requests of the EU. As for the second, it appears equally unlikely that the

⁷⁶ See art. 8.39(1) CETA cit.

⁷⁷ See Opinion 1/17 cit. para. 144.

⁷⁸ A solution which, however, would be far from being an ideal one.

⁷⁹ It bears noting that according to an early thesis supported by some scholars, art. 41 ECHR constitutes a norm by means of which the Contracting Parties have intended to curtail the applicability of the *restitutio in integrum* principle. The thesis is grounded on the combination of the following two elements. On the one hand, judgments of the ECtHR are inherently declaratory. On the other hand, the reference to the domestic legal order of a Party included in that provision – more specifically, the sentence “if the internal law of the High Contracting Party concerned allows only partial reparation” – supposedly suggests that the existence of legal obstacles of domestic law should be taken into account. Therefore, according to this thesis, under the ECHR there is supposedly a full correspondence between compensation (just satisfaction) and restitution. For an account of this debate see G Bartolini, ‘Art. 41: Equa Soddisfazione’ cit. 704-705.

European Court would adopt an *ad hoc* interpretation of a provision of the ECHR only to the benefit of the Union. As a result, this issue remains outstanding.

Finally, it seems safe to affirm that extending the internalisation model to the ECHR could be quite problematic from a political and policy perspective. In the previous pages, we have attempted to demonstrate that such an extension is indeed possible and workable from a strictly EU legal viewpoint. However, it bears noting that the context in which the internalisation model would operate is a very different one. In the field of investment, one cannot realistically expect more than a handful of cases a year being submitted by investors to the dispute settlement mechanism established under EU investment agreements. Conversely, under the ECHR there are thousands of new applications submitted on a monthly basis. For example, according to the latest official statistics in 2019 more than 40,000 new cases were brought to the European Court.⁸⁰ Even though the vast majority of them (more than 38,000) have been struck out mostly due to inadmissibility, litigation under the ECHR remains quite intense.⁸¹ Therefore, it seems reasonable to assume that for the Member States it will be difficult to fully accept the idea of almost entirely giving up their role under the ECHR save for those matters coming under their exclusive competence. Moreover, it is equally difficult to imagine that the EU could light-heartedly bear the brunt of human rights litigation originating under the ECHR. Not to mention that third countries might not be willing to accept a set of rules that would be heavily inspired (almost exclusively) by the need to accommodate the so-called EU exceptionalism.⁸² Moreover, it might be politically (and perhaps also legally) undesirable to introduce such radical novelties to a system that, for better or worse, has been working more or less properly in the last few decades.

All these problematic aspects will soon be clarified. In fact, negotiations concerning the EU accession to the ECHR have recently resumed based on the Council of the European Union's decision to approve supplementary negotiating directives in October 2019.⁸³ Since then, a number of meetings have been held and it appears that some limited progress has been made, including in relation to the issues discussed in this *Article*.⁸⁴

⁸⁰ See the annual statistical report published by the Council of Europe: 'Analysis of Statistics 2019' (January 2020) European Court of Human Rights www.echr.coe.int, 4.

⁸¹ *Ibid.*

⁸² On this see the thoughtful examination made by S Vezzani, 'The International Responsibility of the European Union and of Its Member States for Breaches of Obligations Arising from Investment Agreements: *Lex Specialis* or European Exceptionalism?' in M Andenas, L Pantaleo, M Happold and C Contartese (eds), *EU External Action in International Economic Law. Recent Trends and Developments* (Springer 2020) 281.

⁸³ See the Provisional Agenda of 7 and 8 October 2019 from the Council of the European Union, Justice and Home Affairs Council of 3 October 2019, www.consilium.europa.eu.

⁸⁴ See the overview of the negotiations and related documents available on the relevant webpage of the Council of Europe: EU Accession to the ECHR, www.coe.int, where it clearly appears that some of the issues discussed in this *Article* have been thoroughly discussed and are at the epicentre of the negotiations.



ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

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AUTONOMY OR UNITY? INVESTMENT PROTECTION (ISDS) AND THE PRINCIPLE OF EQUALITY BEFORE THE LAW

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ABSTRACT: According to Opinion 1/17, the ISDS mechanism contained in CETA is in conformity with the fundamental requirement of art. 20 of the Charter of Fundamental Rights that "everyone is equal before the law". The assessment rests on two assumptions. First, in the substantive sense, CETA does not afford a higher level of protection to Canadian investors than EU law affords to European investors. In this respect, investors of different origins are equals who are treated equally. Secondly, ISDS provides specific procedural rights to foreign investors, which cannot be invoked by domestic investors. According to the ECJ, Canadian investors are not legally obliged to have the same trust in the institutional system of the EU as domestic investors. In this respect, Canadian investors are different from European investors, thus it is justified to treat them differently. The *Article* shows that in addition to the Court's assessment of substantive and procedural aspects, art. 20 CFR can be constructed to contain a systemic requirement of unity. The paper identifies a looming conflict between EU law's autonomy and Law's unity that may explain why the Court chose not to engage in a more open-hearted attempt to identify the values inherent in art. 20 CFR. Due to its strong protection of the autonomy of EU law, the ECJ has embraced what is in fact the main problem of the ISDS mechanism – its complete disentanglement from the legal order that it scrutinizes. In the absence of unity, autonomy's guarantor – "everyone" – is cut off.

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KEYWORDS: Autonomy – CETA – discrimination – equality – ISDS – unity.

I. INTRODUCTION

The protection of Foreign Direct Investment (FDI) and the mechanisms for Investor-State Dispute Settlement (ISDS) in (envisaged) trade agreements between the EU and third States, is a topic marked by a high level of agreement – albeit on a very general level. For example, we can all agree that ISDS is both politically and legally controversial. Further, notwithstanding the controversies, everyone also seems to agree that, in one way or the other, ISDS relates to fundamental notions such as “equality” and “the rule of law”. This makes the political and legal controversy somewhat different than in other fields. Quite often, fierce disagreement relates to the balancing of incommensurable values and interests such as freedom to conduct business *versus* the protection of the environment, freedom of movement *versus* mandatory requirements, or employer’s rights *versus* employees’ rights, and so on. Not so in our field. The thousands of people who took to the streets in demonstrations against the envisaged trade agreement between Europe and the United States (The Transatlantic Trade and Investment Partnership (TTIP))¹ argued that the substantive and institutional provisions that constitute the ISDS mechanism are a threat to equality and undermine the rule of law.² The proponents of ISDS argue that it promotes equality and provides complete confidence that the rule of law is observed.³

Opinion 1/17 on the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) is the first occasion in which the European Court of Justice (ECJ) has grappled with these issues.⁴ The Court was asked to assess the compatibility of the envisaged ISDS mechanism in CETA with art. 20 of the Charter of Fundamental Rights of the European Union (CFR).⁵ The provision states, shortly but emphatically, that *everyone is equal before the law*.

¹ On TTIP, see e.g., M Cremona, ‘Negotiating the Transatlantic Trade and Investment Partnership (TTIP)’ (2015) CMLRev 351. On TTIP with references to CETA, see e.g. M Krajewski, *Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS) in TTIP from a Trade Union Perspective* (Friedrich Ebert Stiftung 2014).

² In more academic terms, see, e.g. PH Chase, ‘TTIP, Investor-State Dispute Settlement and the Rule of Law’ (2015) European View 217; M Kumm, ‘An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege’ (2015) ESIL Reflections 1; G Van Harten, ‘A Parade of Reforms: The European Commission’s Latest Proposal for ISDS’ (Osgoode Legal Studies Research Paper 21–2015); I Alvik, ‘The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy’ (2020) EJIL 289.

³ See in particular W Sadowski, ‘Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?’ (2018) CMLRev 1025.

⁴ The Court left the question on discrimination unanswered in case C-284/16 *Achmea* ECLI:EU:C:2018:158 para. 61.

⁵ Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341 paras 51–55.

According to the explanations relating to the Charter, art. 20 CFR “corresponds to a general principle of law which is included in all European constitutions and has also been recognized by the Court of Justice as a basic principle of Community law”.⁶ Pompous as the provision may be, it suited the fundamental and very basic question: whether ISDS promotes or undermines equality and the rule of law. Those who expected a conceptual and principled answer were, however, disappointed. While the Court confirmed that the ISDS mechanism in CETA is in conformity with art. 20 CFR, its analysis left the big questions unanswered.

Contartese and Andenas have observed that the Court’s prior judgment in *Achmea*⁷ “is so concise that it leaves questions unanswered”.⁸ Precisely the same is true for Opinion 1/17. The assessment of the ECJ is thorough with regard to the issues that the Court actually addressed, but, as we shall see, the analysis starts and ends in the middle of things. The Court reduced the fundamental issues at stake to a nitty-gritty technical question that obscured the fact that, principally speaking, the protection of Foreign Direct Investment in conjunction with ISDS implies that everyone is *not* equal before the law. Canadian investors are not “everyone”.

The *Article* undertakes a critical examination of the Court’s approach to art. 20 CFR in Opinion 1/17 to identify the issues that were not raised by the Court, and thus not answered. I will not engage in a strictly dogmatic analysis of whether the Court’s overall conclusion that the ISDS mechanism in CETA is in conformity with art. 20 CFR was correct or not. Nor shall I argue that the Court suppressed important legal questions to avoid issues that are politically sensitive. After all, the integrity of the Court is remarkable, and it has not at all been afraid to enact controversial opinions.⁹ To the contrary, I proceed on the assumption that the Court knows very well what it is doing, and that it acts both consciously and quite politically, even when the text it delivers gives the opposite impression.

My main aim is to make transparent the important constitutional choices that I believe the Court implicitly made. A more engaged application of art. 20 CFR makes it possible to pose the more nuanced questions: Under what circumstances, and pursuant to which conditions, is the ISDS mechanism constitutionally acceptable? I shall argue that this is the case if the ISDS mechanism does not substitute domestic law, but refines it, to promote the protection of the rule of law “within the union itself”.¹⁰ Such justification requires some kind of systemic integration between EU law and the substantive rights

⁶ Explanations relating to the Charter of Fundamental Rights [2007].

⁷ *Achmea* cit.

⁸ C Contartese and M Andenas, ‘EU Autonomy and Investor-State Dispute Settlement Under Inter se Agreements Between EU Member States: *Achmea*’ (2019) CMLRev 157, 159.

⁹ It suffices to mention Opinion 2/13 *Adhésion de l’Union à la CEDH* ECLI:EU:C:2014:2454.

¹⁰ Opinion 1/17 cit. para. 174.

that flow from the trade agreement, and in particular between national courts, the ECJ and the investment tribunals/court.

Integration in this sense, where, in one way or the other, the systems work together and constitute a coherent whole, is referred to in this paper as “unity”. The perfect example would be the close interrelation between national legal orders and the EU legal order. With regard to external relations, such unity would however be at odds with the Court’s established approach, which pursues a formal notion of autonomy that values strict separation between the domestic system and the external system.¹¹ Separation entails that the other system, in our regard the ISDS mechanism, is autonomous as well.¹² Two autonomous systems, operating side by side, is the juxtaposition of “unity”.¹³

“Unity” is about having or controlling supremacy.¹⁴ Conversely, fragmentation might actually undermine the autonomy of separate systems. If there is a conflict between two autonomous legal orders,¹⁵ one must in fact be supreme, and the formal autonomy of the other becomes of theoretical value only.¹⁶ What I want to show is that there is a looming conflict between the requirement of unity that flows from an engaged attempt to identify the values inherent in art. 20 CFR and the Court’s established,¹⁷ but rather old fashioned, concept of autonomy in the field of external relations.¹⁸ This might explain why the Court chose not to engage.

The object of the *Article* is part V B n. 1 and 2 of Opinion 1/17, where the Court reviewed the “compatibility of the envisaged ISDS mechanism with the general principle of equal treatment”. Section II presents the ECJ’s analysis of art. 21(2) CFR, the prohibition

¹¹ *Ibid.* paras 113, 114, 134 and 199.

¹² Cf. GC Leonelli, ‘CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test’ (2020) LIEI 43, 48 and 62.

¹³ For the purposes of this *Article*, this distinction suffices to set out my unpretentious use of the notions “unity” and “autonomy”. For a detailed analysis of the concept of autonomy, see e.g. C Contartese, ‘The Autonomy of the EU Legal Order in the CJEU’s External Relations Case-law: From the “Essential” to the “Specific Characteristics” of the Union and Back Again’ (2017) CMLRev 1627 with further references to a vast literature.

¹⁴ In EU law, the unity between national law and EU law is considered a prerequisite for the autonomy of the latter. EU law claims to have supremacy, and, as a habit of obedience, the Member States accept the claim. Still, due to their sovereignty and the residual capacity of acting disobedient, the Member States control supremacy (cf. the *Solange*-saga or Brexit).

¹⁵ See K von Papp, ‘Clash of “Autonomous Legal Orders”: Can EU Member State Courts Bridge the Jurisdictional Divide Between Investment Tribunals and the ECJ? A Plea for Direct Referral from Investment Tribunals to the ECJ’ (2013) CMLRev 1039.

¹⁶ Historically, the ISDS mechanism was invented to provide a system that was both autonomous and supreme.

¹⁷ See e.g. SØ Johansen, ‘The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences’ (2015) German Law Journal 169, 171 with further references.

¹⁸ This is often referred to as “external autonomy”, which should be distinguished from “internal autonomy”.

of discrimination on grounds of nationality. The Court found this provision to be inapplicable. Section III examines the Court's analysis of art. 20 CFR. On the one hand, the six words of the provision express the principle that is most fundamental to any legal order: "Everyone is equal before the law." On the other hand, the statement is broad and open to interpretation. The "pre-assessment" of art. 21 provided guidance to the Court's application of art. 20 in three regards. First, it made the Court assess the effects of the ISDS mechanism in CETA "within the union itself".¹⁹ Secondly, the Court reapplied the substance of art. 21 CFR within the ambit of art. 20. Thirdly, the inapplicability of art. 21 CFR signalled the outcome of the Court's substantive analysis of art. 20 CFR.

Section IV sketches out an alternative manner in which to interpret art. 20 CFR. It is possible to understand the provision not only as a substantive protection against discrimination, closely related to art. 21 CFR, but also as a systemic requirement that protects Law's unity. The alternative, systemic reading of art. 20 CFR makes it possible (Section V) to make transparent important constitutional choices that the Court implicitly made. Section VI further assess how a *prima facie* violation of art. 20 CFR could have been justified, if the Court had chosen to approach art. 20 CFR differently. The increased transparency brings me to my conclusion in Section VII: With regard to external relations, there is a difference, and a potential conflict, between the autonomy of EU law and the unity of Law. By suppressing the systemic component of art. 20 CFR, the Court conserved the former (autonomy) at the cost of the latter (unity). In my view, this is not a position that flows objectively from legal reasoning; rather the opposite. It is a legal, constitutional and political choice that is decisive as to how the reasoning must be constructed.

II. THE PRE-ASSESSMENT

II.1 THE LEGAL QUESTION

Chapters on the protection of Foreign Direct Investment in trade agreements such as CETA are inspired by the protection offered to foreign investors in Bilateral Trade Agreements (BITs). They provide a specific set of rights, a specific dispute settlement system, specific procedures, specific tribunals/courts and specific remedies (compensation) to foreign investors. CETA attributes such rights to Canadian investors operating in Europe, in return for the same protection of European investors operating in Canada. I will not further elaborate upon the details here, but refer instead to the presentation provided by the Court in Part II of Opinion 1/17. The short version is that ISDS is a mechanism that establishes a separate and autonomous legal system, completely cut off from the ordinary legal system.²⁰ It was invented by developed countries as a way in which to provide

¹⁹ Opinion 1/17 cit. para. 174.

²⁰ I Alvik, *Contracting with Sovereignty. State Contracts and International Arbitration* (Hart 2011) 97 ff. Cf. Opinion 1/17 cit. paras 113, 114 and 134.

protection to national businesses investing in less developed countries with weak institutions and an unreliable legal system. Contartese and Andenas note that investment courts and tribunals are “an *alternative* to the courts and tribunals of the EU Member States rather than part of their judicial system, since the ISDS was mainly an answer to the alleged bias of the domestic courts towards the host government”.²¹ The alternative system is not open to *everyone*; it exclusively applies to private investors holding the nationality of the state-party to the Treaty. In addition to this formal exclusivity, ISDS is “elitist in the sense that it requires claims of large size to justify commercially the start of the procedure”.²² In the public debate it has been argued, in non-legal terms, that ISDS creates super-rights and that the VIP status of the small group of rights-holders is a threat not only to equality, but also to democracy. If the argument is redressed in legal clothing, it would be that ISDS is contrary to the principle that “everyone is equal before the law”. In the words of the Court in Opinion 1/17: “The doubts set out in the request for an opinion on the compatibility of the envisaged ISDS mechanism with the general principle of equal treatment concern the issue of whether that mechanism complies with Article 20 of the Charter, which enshrines the guarantee of ‘equality before the law’, and with Article 21(2) of the Charter, which prohibits discrimination on grounds of nationality.”²³

The Court proceeded to analyse first the compatibility of the ISDS mechanism with art. 21 CFR, then with art. 20 CFR. While I have structured my presentation of Opinion 1/17 accordingly, the approach deserves a remark. I do not “give away” the opinion by revealing that the Court found art. 21 CFR, the prohibition of discrimination, to be inapplicable. On the contrary, the Court considered art. 20 CFR to be applicable. In practical terms, what the Court did was to re-employ the substance of art. 21 within the framework of art. 20. Therefore, art. 21 CFR played a more important role than its irrelevance suggests, first because it framed the issue and provided a pre-understanding of what the whole matter was about: discrimination in substantive terms. Secondly, the assessment of art. 21 CFR made the Court’s application of art. 20 look rather generous. By accepting to assess the principle of non-discrimination within the ambit of that provision, the Court made art. 20 CFR look “bigger” than art. 21 CFR. In that sense the Court gave lip service to its fundamental nature. However, as the analysis will show, the Court’s approach is conceptually unconvincing. If the finding that art. 21 CFR is inapplicable to matters such as those in Opinion 1/17 is legally sound, it cannot be due to some incidental formality: it must rest on rational reasons that can be substantively justified. Put differently: The inapplicability of art. 21 CFR indicates that if it were applied, ch. 8 of CETA would neverthe-

²¹ C Contartese and M Andenas, ‘EU Autonomy and Investor-State Dispute Settlement Under Inter se Agreements Between EU Member States: *Achmea*’ cit. 174.

²² W Sadowski, ‘Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?’ cit. 1031.

²³ Opinion 1/17 cit. para. 162.

less not entail discrimination in the substantive sense. To re-apply the substantive content of art. 21 CFR within the ambit of art. 20 CFR appears rather pointless. Later, I shall argue that what art. 20 CFR has to add is a systemic component. But – without further ado – let us first examine the Court’s pre-assessment.

II.2 THE COURT’S REJECTION OF ARTICLE 21 CFR

The main concern that motivated the Court’s analysis under art. 21 CFR was that the ISDS mechanism in CETA provides a preferential system to Canadian investors as compared to European investors.²⁴ The favourable treatment of Canadians can be constructed as discrimination of Europeans.

By reference to the explanations relating to the Charter,²⁵ the Court noted that art. 21(1) CFR corresponds to art. 18 TFEU.²⁶ Further, by reference to the judgment in *Vatsouras and Koupatantze*, the Court observed that the first paragraph of art. 18 TFEU is not intended to apply to cases where there is a possible difference in treatment between nationals of Member States and nationals of non-Member States.²⁷ Consequently, the Court regarded art. 21(2) CFR to be irrelevant to the issue of “examining whether the envisaged ISDS mechanism may lead to discrimination in the treatment of EU investors as compared with Canadian investors”.²⁸

The Court’s analysis of art. 21 CFR touches upon the notoriously difficult concept of the scope of EU law. AG Bot noted that “it follows from the second sentence of Article 207(1) TFEU, read in conjunction with Article 21 TEU, that the European Union must, when exercising the competences conferred on it by the EU and FEU Treaties, including those relating to the common commercial policy, respect fundamental rights, of which the principle of equal treatment forms part”.²⁹ This indicates that the matter, as such, was regarded to be within the scope of EU law. On the other hand, the crucial passage in *Vatsouras and Koupatantze* on the interpretation of art. 18 TFEU, from which the inapplicability of art. 21 CFR was derived, reads: “That provision concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries.”³⁰

²⁴ Opinion 1/17 cit. para. 168, compare opinion of AG Bot, ECLI:EU:C:2019:72 para. 185.

²⁵ Explanations relating to the Charter of Fundamental Rights, 17.

²⁶ Opinion 1/17 cit. para. 168.

²⁷ *Ibid.* para. 169, making reference to joined cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* ECLI:EU:C:2009:344 para. 52.

²⁸ Opinion 1/17 cit. para. 170.

²⁹ *Ibid.* opinion of AG Bot cit. para. 195

³⁰ *Vatsouras and Koupatantze*, cit. para. 52.

Thus, the Court found art. 21 CFR to be irrelevant, as discrimination of Europeans as compared to third country citizens is not “within the scope of application of the Treaties”.³¹ Whether a matter can be within the scope of EU law on the one hand, but outside the scope of the Treaties on the other, is a puzzling question. As noted by Fontanelli, the distinction between measures that are outside the scope of EU law and measures that are within the scope of EU law, but which are not precluded by the Treaties, is not clear.³²

As a general observation, it is not satisfactory to consider all non-precluded measures to be within the scope of EU law, as effectively that will entail that every measure that potentially can be made subject to a legal analysis is within the scope of EU law. However, the opposite finding is not satisfactory either. In our regard it suffices to note that the Court proceeded to analyse art. 20 CFR. This marks that, as such, the measure was within the scope of EU law.

The remaining alternatives are that *a)* the discrimination of nationals of the Member States is *formally* outside the scope of the specific provision, in our regard art. 21 CFR; or *b)* that the specific provision does not provide any *substantive* protection to nationals under the specific circumstances. The two alternatives are closely connected. Generally, if the reach of a provision is formally fixed, it is because the fixation is regarded as justified on substantive terms. In other words, if we assume that an application of a provision based on substantive reasoning would (almost) always produce the same outcome, we will normally introduce a formal/fixed definition of its reach, because we know that this will (almost) always be substantively correct. Art. 21 CFR, read in conjunction with art. 18 TFEU, illustrates the point perfectly. The provisions have a general wording and prohibit “discrimination on grounds of nationality.” At the outset, there is nothing that clearly suggests that the provisions do not “apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries”. Rather, this is an interpretation. The fixation is introduced because the substantive justification on which the interpretation rests is deemed to be of general validity. In such instances, continuous reassessment is of no value.

If, for substantive reasons, continuous reassessment is of no value, there is of course no point in giving it another name. We shall keep that in mind when we proceed to analyse the Court’s assessment of art. 20 CFR. As we shall see, what the Court did was to reemploy the substance of art. 21 CFR within the ambit of art. 20. The outcome was then given.

³¹ Art. 21.2 CFR.

³² On the notoriously difficult distinction between measures that are outside the scope of EU law and measures that are within the scope of EU Law but not precluded, see F Fontanelli and A Arena ‘The Charter of Fundamental Rights and the Reach of Free Movement Law’ in M Andenas, T Bekkedal and L Pantaleo (eds.) *The Reach of Free Movement* (Springer 2017) 293.

III. THE COURT'S ASSESSMENT OF ART. 20 CFR

III.1. "WITHIN THE UNION ITSELF"

The court proceeded to analyse art. 20 CFR by reference to the formalistic observation that "On the other hand, Article 20 of the Charter, which provides that 'everyone is equal before the law', does not contain any express limitation on its scope and is therefore applicable to all situations governed by EU law, including those falling within the scope of an international agreement entered into by the Union."³³

According to the Court, art. 20 "is available to all persons whose situations fall within the scope of EU law, irrespective of their origin"³⁴ – but not quite. In the following paragraph, the Court referred to settled case law that establishes that art. 20 of the Charter does not oblige the Union to accord, in its external relations, equal treatment to different non-Member States.³⁵

While trade agreements are being concluded between States, it is not States that benefit from such agreements, but their citizens. The Court's observation about the reach of art. 20 CFR is the mirror image of art. 21 CFR. Principally, the point is that nationals and third-country nationals are not comparable because they belong to different legal regimes. This is a stronger difference than the one we are familiar with from the classical discrimination test. The classical discrimination test asks us to treat those who are equals equally, and those who are different differently, but assumes that those that are subject to the assessment are equals in the fundamental sense: that they fully belong to the same legal regime. The non-applicability of art. 21 CFR and the judgment in *Swiss International Air Lines* do not only prove that third-country nationals are different from EU-citizens, but that they are incomparable.

As we shall see, the Court's analysis of art. 20 CFR is difficult both to access and to understand. The observations above reveal why. It is conceptually difficult to re-apply the substantive content of art. 21 CFR within the ambit of art. 20 CFR to compare that which the preceding analysis has shown to be incomparable. Nevertheless, the Court proceeded on the basis of the classic, textbook definition of the principle of non-discrimination: "Equality before the law, as laid down in that article, enshrines the principle of equal treatment, which requires that comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified".³⁶

³³ Opinion 1/17 cit. para. 171.

³⁴ *Ibid.* para. 172.

³⁵ Case C-272/15 *Swiss International Air Lines* ECLI:EU:C:2016:993 paras 24–26.

³⁶ Opinion 1/17 cit. para. 176.

The only thing that provides rationality to the Court's analysis is the clarification that its scope is the examination of differences in treatment "within the union itself".³⁷ I will use this clarification as a catalyst to understand the different parts of the Court's analysis.

III.2. PROCEDURAL RIGHTS – DIFFERENT DIFFERENTLY

The Court mentioned first that the ISDS mechanism in CETA affords the same protection to EU citizens investing in Canada as compared to Canadian citizens investing in the EU. Correctly, the ECJ dismissed this observation as legally irrelevant.³⁸ It does not concern the effects "within the union itself".³⁹ The Court then proceeded to address the more intriguing problem: that the ISDS mechanism introduces a difference between Canadian persons and enterprises that make investments within the Union, and European persons and enterprises that make investments within the Union. Canadian persons and enterprises that invest in the Union can invoke the ISDS mechanism in CETA; European investors cannot.⁴⁰ The difference is not at all theoretical, as on many occasions the Canadian investor will act on behalf of an enterprise established within the Union, a fact that the Court was well aware of.⁴¹

To understand the Court's analysis, it is of seminal importance to draw a strict distinction between the procedural and the substantive components of the ISDS mechanism. With regard to the procedural aspects, the Court noted in para. 180 that the situation of Canadian enterprises and natural persons that invest in the EU is not comparable to the situation of European enterprises and natural persons. The explanation is given in para. 199 of the Opinion:

"the purpose of inserting in the CETA provisions concerning non-discriminatory treatment and protection of investments, and the creation of tribunals that stand outside the judicial systems of the Parties to ensure compliance with those provisions, is to give complete confidence to the enterprises and natural persons of a Party that they will be treated, with respect to their investments in the territory of the other Party, on an equal footing with the enterprises and natural persons of that other Party, and that their investments in the territory of that other Party will be secure."

At first glance, the explanation is confusing. Read as a whole, it looks like the Court argued that because Canadians and Europeans in Europe should be treated on an equal footing, i.e. because they are equals, it is justified to treat them differently. However, as noted above, it is conceptually difficult to fit the assessment of the incomparable into the textbook definition of non-discrimination. What the Court really said is that, with regard

³⁷ *Ibid.* para. 174.

³⁸ *Ibid.* para. 180.

³⁹ *Ibid.* para. 174.

⁴⁰ *Ibid.* paras 179 and 180.

⁴¹ *Ibid.* para. 182.

to the *confidence* that they should be treated as equals, Canadians and Europeans may legitimately have different expectations, which justifies a difference in treatment with regard to procedural issues:

“In that regard, it must be observed that the reason why Canadian enterprises and natural persons that invest within the Union have the possibility of relying on the provisions of the CETA before the envisaged tribunals is that those Canadian persons, in their capacity as foreign investors, are to have a specific legal remedy against EU measures, whereas enterprises and natural persons of the Member States who, like those Canadian persons, invest within the Union, are not foreign investors there and will therefore not have access to that specific legal remedy and nor will they be able, having regard to the rule stated in Article 30.6.1 of the CETA, to invoke directly the provisions contained in that agreement before the courts and tribunals of the Member States and of the European Union.”⁴²

It is possible to justify the Court’s finding by recourse to art. 2 TEU. The provision is Janus faced. On the one hand, it requires each and every Member State to recognize and respect the law and the common values on which the Union is based.⁴³ On the other, the principle of mutual trust obliges the Member States to consider (other than in exceptional circumstances) that the other Member States actually comply with EU law.⁴⁴ Art. 2 TEU does not oblige third countries, or third-country nationals, to act upon the same expectation.⁴⁵ In this sense they are different. This may explain why the Court found it to be justified to provide to the foreign investor a procedural right that is not available to Europeans.

III.3. SUBSTANTIVE RIGHTS – EQUALS EQUALLY

With regard to substantive protection, the Court applied the other component of the principle of non-discrimination. It considered that European enterprises held by Canadian investors should be treated on an equal footing compared to European undertakings, and found that to be the case. Seminal in this regard is the Court’s preceding analysis of the impact of CETA on the autonomy of EU law. According to the Court: “the discretionary powers of the CETA Tribunal and Appellate Tribunal do not extend to permitting them to call into question the level of protection of public interest determined by the Union following a democratic process”.⁴⁶

In other words, according to the Court’s assessment of CETA, its substantive provisions do not afford more protection or better rights than EU law, correctly applied. This explains why, in its assessment under Article 20 CFR, the Court observed:

⁴² *Ibid.* para. 181.

⁴³ *Achmea* cit. paras 33 and 34.

⁴⁴ Opinion 1/17 cit. para. 128; *Achmea* cit. para. 58.

⁴⁵ *Ibid.* para. 129.

⁴⁶ *Ibid.* para. 156.

"Nor is the equality of treatment of those two categories of persons affected by the fact that the Parties chose not to exclude the possibility of the CETA Tribunal issuing an award in terms of which a fine imposed by the Commission or by a competition authority of a Member State on a Canadian investor, because of an infringement of Article 101 TFEU or Article 102 TFEU, constitutes a breach of one of the provisions of Sections C and D of Chapter Eight of the CETA."⁴⁷

According to the Court, it is highly unlikely ("unimaginable")⁴⁸ that a decision vitiated by such defects that it can fall fault of the protection afforded by CETA, will ever be enacted. Further the Court noted that:

"If a fine vitiated by such a defect or resulting in such expropriation was imposed by the Commission or by a competition authority of a Member State on an EU investor, that investor would have available to it the legal remedies necessary to ensure the annulment of that fine. It follows that, while it is not inconceivable that, in exceptional circumstances, an award by the CETA Tribunal such as that described in the request for an opinion might have the consequence of cancelling out the effects of a fine that has been imposed because of an infringement of Article 101 TFEU or Article 102 TFEU, the effect of that award will not however be to create a situation of unequal treatment to the disadvantage of an EU investor on which a fine vitiated by a similar defect has been imposed".⁴⁹

The rationale of these paragraphs is the equal-equal paradigm: with regard to substantive protection, Canadian investors and European investors holding enterprises established in Europe are to be treated equally. According to the Court they are, because in this respect CETA, correctly applied, and EU law, correctly applied, will produce the same outcomes. Obviously, both the assumption of substantive equivalence and of correct application may be questioned, but I leave that to others.⁵⁰

IV. AN ALTERNATIVE WAY TO MAKE SENSE OF ART. 20 CFR

In Opinion 1/17, the Court approached the notion of "equality" as a substantive right, i.e. as a prohibition of discrimination. The approach assumes that arts 20 and 21 CFR are closely intertwined. While I do not reject that art. 20 CFR protects equality in the substantive sense, I shall argue that the provision can be interpreted so as also to have a systemic component. To identify the systemic and formal requirements that might flow from art. 20 CFR, I shall revisit the wording of the provision. Section IV.1 assesses the meaning of "everyone", Section IV.2 assesses the word "equal", and Section IV.3 assesses the reference to "the law".

⁴⁷ *Ibid.* para. 184.

⁴⁸ *Ibid.* para. 185.

⁴⁹ *Ibid.* para.186.

⁵⁰ Cf. GC Leonelli, 'CETA and the External Autonomy of the EU Legal order: Risk Regulation as a Test' cit. 54, 61.

IV.1. "EVERYONE"

The main argument voiced by the general public against ISDS is that a separate and autonomous legal system is established, to the benefit of private investors holding the nationality of the state-party to the Treaty. As a starting point to which I believe all can agree: Private investors holding the nationality of the state-party to a free trade agreement are not "everyone".

How is the notion "everyone" to be approached? The CFR Commentary introduces an important perspective: "Whereas Article 20 enounces a universalistic claim that 'everyone is equal before the law' Article 21 prohibits 'any discrimination based on any ground'".⁵¹ The prohibition of discrimination on grounds of nationality appears as an individual right, in the sense that *no one* should be discriminated against. The universality of art. 20 CFR gives a more systemic character to the provision. The term "everyone" does not seem to presuppose the identification of discrimination in the traditional sense. After all, it is probably quite rare that "everyone" or a majority is being discriminated against. ISDS illustrates the point perfectly. The general public do not claim that they are being discriminated against in the individual and substantive sense. What they argue is that there should be one legal system for all: that "the law" shall apply equally to "everyone".

From a systemic point of view, the comparison conducted by the Court in Opinion 1/17 is questionable. As we have seen, the Court applied the paradigm of Canadian and European investors, which implies that art. 20 CFR was applied as a guarantor of the rights of the latter. A more inclusive paradigm would have been to compare the interests of "everyone", i.e. the general public, with the interests of Canadian *and* European businesses. From a systemic point of view, the Court's approach to art. 20 CFR is peculiar, first because European businesses are not "everyone". Secondly, both groups that appeared within the paradigm of the Court's comparison (European and Canadian investors) are actually the beneficiaries of Free Trade Agreements (FTAs) and ISDS. European businesses do not claim that they are being discriminated against. To the contrary, the interests of European businesses are the main incentive that explains why the EU negotiates trade agreements that include Chapters on FDI and ISDS.

A straightforward, literal reading of art. 20 CFR, as sketched out above, also makes it possible to question the coherence of the Court's assessment in Opinion 1/17. As shown, the Court found art. 21 CFR to be inapplicable, but reapplied its substantive content within the ambit of art. 20 CFR. To make sense, there must exist some rationale that justifies this manoeuvre.⁵² A possible explanation is found in the academic discussion that

⁵¹ S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Nomos 2014) 565.

⁵² Cf. Section II.2 *supra*.

preceded Opinion 1/17. In his PhD thesis, Hannes Lenk argues in favour of a broad understanding of the principle of non-discrimination enshrined in arts 21 CFR and 18 TFEU. He submits that these provisions not only protect against discrimination in the narrow sense, but also that their main purpose is of a structural character: “to maintain the equality of competitive relationships on the internal market”.⁵³ From that perspective, it is problematic that the ISDS mechanism in CETA provides extra protection to some specific European businesses that operate on the internal market: those who can invoke the ISDS mechanism on behalf of a Canadian investor.

The way in which the Court cut off the reach of art. 21 CFR is, in the first place, a rejection of the structural argument made by Lenk, and marks a more limited individual rights reading.⁵⁴ On the other hand, the reapplication of the substance of art. 21 CFR within the ambit of art. 20 may be regarded as recourse to a similar way of reasoning, underpinned by the fact that the Court referred to the effects “within the union itself”.⁵⁵ To leave the structural issues to art. 20 CFR is in conformity with its systemic character (provided of course that one is willing to acknowledge that art. 20 CFR has a systemic component).⁵⁶ A fundamental question, however, is what these structural issues are. It is difficult to reemploy the internal market rationale of arts 21 CFR and 18 TFEU, referred to by Lenk, within the ambit of art. 20 CFR. Instead, the universal nature of the word “everyone” indicates that the main concern of art. 20 CFR is the constitutional structure of the Union: that there is one law for all. In constitutional terms, the notion of equality is much the same as a requirement of unity.

IV.2. “IS EQUAL”

In Opinion 1/17 the Court referred to a massive amount of case law that establishes that art. 20 CFR provides a substantive right to equal treatment.⁵⁷ With regard to purely substantive issues, it is clear that the protection afforded by art. 20 CFR is much the same as the protection afforded by art. 21 CFR. The question is whether the principle that everyone is equal before the law and the principle that no one should be discriminated against are interchangeable in every respect. A simple example proves that they are not.

Let us say that we all agree that people with blonde hair and people with dark hair should be treated equally, but that we fear that that blondes are subject to arbitrary behaviour. If the latter is true, there exists, in the practical and factual sense, a difference between people with dark hair and people with blonde hair. If we cope with this difference by setting

⁵³ H Lenk, *The EU Investment Court System* (University of Gothenburg 2019) 210.

⁵⁴ Cf. the arguments submitted to the Court, referred to in Opinion 1/17 cit. para. 83.

⁵⁵ Opinion 1/17 cit. para. 174.

⁵⁶ At least, this distinction maintains the settled line of case law that makes clear that art. 18 TFEU and thus art. 21 CFR has no external effects, cf. Section II.2 *supra*. It is in a sense cleaner to cope with the structural effects on the basis of art. 20 CFR.

⁵⁷ Opinion 1/17 cit. paras 176–178.

up a separate, autonomous legal system for people with blonde hair that provides easier access to justice, smoother procedures, better compensation and so on, we constitutionalize the difference between people with dark hair and people with blonde hair that, in the first place, was deemed to be unacceptable from the normative point of view.

The ECJ's basic premise in Opinion 1/17 is that Canadian investors should be treated on an equal footing with domestic investors. The Court found ISDS to be justified because its main rationale is to provide complete confidence that discrimination will not occur. It is questionable whether the risk of arbitrary treatment is in itself a relevant difference. Different treatment is a problem only if those who are being compared are equals, constitutionally speaking. But then you are not different; you should only be treated better than you actually are. Arguably, Opinion 1/17 treats the Canadian investor as the "blonde" in the example above.

It could be argued that the constitutional argument is too theoretical, while, on the other hand, the fear of the Canadian investor is a practical concern that is well founded.⁵⁸ It is, however, easy to think of groups that are more vulnerable and marginalized than huge Canadian multinational corporations, such as e.g. immigrants, foreign workers, the uneducated and the poor. Still, no one has ever come up with the idea of establishing a specific legal system for such groups. There may be several reasons for this; our constitutional instinct is probably one of them. Constitutional principles do not deny practical needs, but foresee them. In the absence of constitutional principles, there is a risk that pragmatic short-term interests and concerns would prevail over more abstract values that are fundamental in the long term. One such value is that within the Union, everyone is equal before the law.

The arguments above show that while the notions of equality and non-discrimination have much in common, they are not in every respect interchangeable. Rather, arts 20 and 21 CFR seem to work in tandem. Art. 21 CFR prohibits discrimination, appears purely substantive and is, like a police officer, ready to act on short notice. Art. 20 CFR might have something to add on how instances of discrimination should be coped with, if they occur; it is more like a Statesman. The systemic, constitutional requirement would be that the legal system must meet its own standards. If the short-term and the long-term constitutional requirements are applied in conjunction, they stipulate not only that discrimination of those who are to be regarded as equals should not occur, but also that if it does, it must be remedied from "within the union itself".⁵⁹ Understood in this sense, the substantive notion of non-discrimination and the systemic notion of equality are not interchangeable, but complementary. Art. 20 CFR suggests that there exists only one Law within the Union, and that it is this Law that must be used to counter occurrences of discrimination, not its substitute i.e. ISDS.

⁵⁸ However, this was not assessed by the Court.

⁵⁹ Opinion 1/17 cit. para. 174.

IV.3. "THE LAW"

The notion of "equality" in art. 20 CFR makes the relationship to art. 21 CFR obvious. Further, the two provisions are neighbours. Still, while art. 21 CFR is important, it would be to overstate matters to equate it with "the law". It is "the law", however, and not art. 21 CFR that art. 20 CFR refers to.

The obvious reference to understand the notion "the law" is the axiom on which EU law rests: that the Union is based on the rule of law.⁶⁰

The notion "the rule of law" is sometimes used in a thick and substantive sense; on other occasions in the thin and formal sense. I shall not engage in this important yet eternal debate. A practical approach is to consult art. 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

Art. 2 TEU lists "the rule of law" on a par with other fundamental values upon which the Union is founded. Nothing in the list suggests that "the rule of law" is an overarching value from which the others flow. Rather, it is a value that complements the other values and principles. While I do not exclude thicker understandings of the notion of "the rule of law", I proceed on the assumption that the notion covers at least the "thin" and formal components of the concept. Armin von Bogdandy provides a minimum account: "In any event, under all understandings, the rule of law requires, as a minimum that the law actually *rules*. There is only rule of law if the law is generally and widely observed and is effective in actually guiding the conduct of persons, both in their general capacities (if they have them) and as private persons".⁶¹

I deduct two fundamental propositions from the minimum account of the rule of law. The first proposition is that it is not sufficient that the law exists; it must also be applied and work in practice: It must "rule". The Court's acceptance of the ISDS mechanism in Opinion 1/17 can be understood from this perspective.⁶²

The second proposition that can be deducted from the formal and "thin" notion of the rule of law applied in conjunction with the formal notion of "equality" is that there is one law for all. If a specific legal system for every man existed, there would be no equality. The latter observation was actually recognized by the Court in Opinion 1/17. Of course, it is for this very reason that the Court so easily cut off the reach of art. 21 CFR. As mentioned above, EU citizens and third-country citizens are incomparable in the strong sense

⁶⁰ E.g. case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586 para. 49.

⁶¹ A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What it Is, What Has Been Done, What Can Be Done' (2014) CMLRev 59, 63.

⁶² Opinion 1/17 cit. para. 199.

because they belong to different legal systems.⁶³ In the absence of unity, any meaningful notion of equality ceases to exist. To the contrary, when equality is assessed “within the union itself”, the unity of the EU legal order is the axiomatic starting point.⁶⁴

IV.4 A CONSTITUTIONAL CHOICE

A linguistic interpretation of art. 20 CFR as conducted above is not sufficient to state that the Court’s assessment in Opinion 1/17 was wrong. Instead, it is an alternative way in which to make sense of the provision. Apart from the fact that the reading flows directly from the wording, the quality of the alternative approach is that it addresses one of the biggest issues in our time: that international (trade) law does not sufficiently take the interests of ordinary people into account.

What I want to highlight is that the choice between a systemic reading of the notion of the rule of law as a requirement of unity, and a reading which instead focuses on compliance, is a constitutional choice. It concerns important values. Because the analysis of the ECJ starts and ends in the middle of things,⁶⁵ the Court did not make the choice transparent, nor did it elaborate upon it. In Section V below I shall cast light over important constitutional dilemmas that were suppressed.

V. THE CONSTITUTIONAL DILEMMAS

In the introduction to this *Article* I noted that the discussion on ISDS is marked by a high level of agreement with regard to the values that are concerned, but fierce disagreement over how these values are to be assessed. The analysis of art. 20 CFR above showed that different approaches and choices are possible.

In its Communication to the Council and the European Parliament on art. 7 TEU, the Commission concludes that: “The European Union is first and foremost a Union of values and of the rule of law. The conquest of these values is the result of our history. They are the hard core of the Union’s identity and enable every citizen to identify with it”.⁶⁶

This Section takes the rule of law as the point of reference, and identifies where opinions start to differ. Section V.1 assesses two different approaches to the rule of law, the first one being that the notion marks something that must be *complied* with, the second being that it is a value on which the legal order of the Union is *founded*. Section V.2 addresses another constitutional dilemma, the choice between measures that promote the

⁶³ Section III.1, *supra*.

⁶⁴ Opinion 1/17 cit. para. 174.

⁶⁵ Section I, *supra*.

⁶⁶ Communication COM(2003)606 final from the Commission to the Council and the European Parliament of 15 October 2003 on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based.

rule of law in the short and in the long term. Section V.3 discusses inclusion *versus* exclusion of national courts.

V.1. *COMPLIANCE WITH THE RULE OF LAW VERSUS THE RULE OF LAW AS A FOUNDATIONAL VALUE*

In a paper in which he defends ISDS, Wojciech Sadowski observes that the fundamental question is what set of values should be common to all Member States and how such values can most effectively be protected. He asserts that: "Necessarily, any such discussion of European Union values must begin with the bedrock principle of respect for the rule of law, which is a fundamental value of the EU recognized in Article 2 TEU".⁶⁷

I agree to this common point of reference. I think we all do. Sadowski proceeds on the basis of the

"common-sense starting point that, in order to confront and overcome vital threats to fundamental values, EU institutions should approach them with an open mind, looking for solutions not only inside the EU legal system but also beyond it, in order to ensure the promotion of and *compliance* with the rule of law in its Member States through all reasonable means. The rationale underlying this proposition is that ensuring *compliance* with the rule of law in each EU Member State should be the most critical strategic objective of the EU".⁶⁸

Interestingly, Opinion 1/17 may be regarded as a response to this "common-sense" claim. The Court found the ISDS mechanism in CETA to be justified, first because in the substantive sense, it does not provide better rights to Canadian investors as compared to European investors,⁶⁹ secondly because: "the purpose of inserting in the CETA provisions concerning non-discriminatory treatment and protection of investments, and the creation of tribunals that stand outside the judicial systems of the Parties to ensure *compliance* with those provisions, is to give complete confidence...".⁷⁰

The constitutional dilemma is that if compliance with the rule of law is being outsourced to an external institution, there is a risk that it loses its foundational character.

With regard to trade agreements with third countries, it may be argued that compliance is a goal in itself. Such agreements have a contractual character and do not pursue a purpose that is bigger than themselves, i.e. the creation of a union. Further, externalization of the dispute resolution mechanism contributes to ensure neutrality. Arguably, this is a good thing. After all, trade agreements with third countries establish rights that

⁶⁷ W Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' cit. 1026.

⁶⁸ W Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' cit. 1027 (emphasis added).

⁶⁹ Section III.3 *supra*.

⁷⁰ Opinion 1/17 cit. para. 199 (emphasis added).

provide that those who are different, and continue to be different,⁷¹ shall be treated (more) equally. In Opinion 1/17 the Court noted:

“at the outset, that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law. Indeed, the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court that is created or designated by such agreements as regards the interpretation and application of their provisions”.⁷²

In this respect it is, however, important to emphasize that the substantive and procedural protection offered by ISDS is different from the substantive rights that flow from the general part of trade agreements such as CETA. Somewhat simplified, a main purpose of ISDS is to ensure that those who, according to domestic law, are equals, are actually treated as equals,⁷³ even though they are under the influence of foreigners. The way in which the ISDS mechanisms supervise and control the application of domestic law is the root of the constitutional dilemma. According to art. 1 TEU, the Member States have conferred competences to the Union to attain objectives they have in common. Art. 2 TEU asserts that the rule of law is among the values that are common to the Member States. Further, according to art. 197(1) TFEU, the “effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest”. Within EU law, compliance is a means to achieve a higher purpose, a Union founded upon the rule of law. Its foundation is the basis for the common trust on which the proper functioning of the Union is dependent.

If compliance is taken out of the hands of the Member States, it indicates that the rule of law is a value that is *not* common to all of the Member States (indeed, this is what Sadowski suggests).⁷⁴ The assertion that the rule of law is among the values that are common to the Member States is, however, not descriptive, but normative. If the values are not shared descriptively speaking, the normative requirement of art. 2 TEU is that they shall be.⁷⁵ Compliance by externalization serves no purpose in this respect.

Art. 20 CFR is an open invitation to discuss the dilemma above. Principally speaking, if the values of art. 2 TEU constitute the “hard core of the Union's identity and enable every citizen to identify with it”,⁷⁶ it indicates that the rule of law must be protected from

⁷¹ Cf. the analysis of art. 21 CFR in Section II *supra*.

⁷² Opinion 1/17 cit. para. 106.

⁷³ *Ibid.* para. 199.

⁷⁴ W Sadowski, ‘Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?’ cit. 1028-1031.

⁷⁵ Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117 para. 37.

⁷⁶ Communication COM(2003) 606 final cit.

“within the union itself”.⁷⁷ Practically speaking, the message voiced by the citizens is that “everyone”⁷⁸ is not able to identify with ISDS. While the Court chose not to openly discuss the matter, this does not imply that it did not make a choice.

V.2. QUICK FIX *VERSUS* LONG-TERM REFINEMENT

Art. 7 TEU provides a legal basis to remedy national institutional deficiencies from within. The main argument of Sadowski seems to be of a practical nature: art. 7 TEU is not sufficiently effective.⁷⁹ I will leave that question open to discussion and instead focus on the insights art. 7 TEU provides with regard to the functioning of the EU legal system.

The first insight is that art. 7 TEU requires the identification of “systemic deficiencies” to be triggered. Isolated infringements are not enough. As observed by von Bogdandy and Ioannidis, “in well-functioning legal systems, [...] infringements trigger social and institutional responses that are essential for sustaining and even developing normative expectations; hence they serve the function of law. There are few better examples of this than within EU law itself. Without the operation of the Union courts, triggered by violations, European Union law would not be as important, both in breath and in depth, as it is today”.⁸⁰

Ginsburg notes that “adjudication is a public good, contributing to the stock of law and enhancing private arrangements that exist in the shadow”.⁸¹ A first problem with ISDS mechanisms, such as in CETA, is that they hastily remedy an alleged problem without a prior assessment of how serious the problem actually is. Below the threshold of art. 7 TEU, non-compliance is a necessary production factor to make law, to refine law, and to promote the rule of law. If the handling of such instances is externalized, the public good is taken out of the hands of those who, according to art. 20 CFR, are Law’s beholders: “everyone”.

Secondly, if ISDS is regarded as a way in which to cope with “illiberal tendencies” and weak institutions in specific Member States,⁸² the insight of art. 7 is that the approach is too sweeping. Art. 7(1) TEU justifies the use of measures addressed to specific Member States as an exception to the principle of equality enshrined in art. 4(2) TEU. In comparison, the ISDS mechanism applies to every Member State, including Member States with well-functioning institutions. To apply the rhetoric of the discrimination test: If ISDS is a measure the justification of which is to counter illiberal tendencies in Europe, its problem is that it treats that which is different alike.

⁷⁷ Compare Opinion 1/17 cit. para. 174.

⁷⁸ Art. 20 CFR.

⁷⁹ W Sadowski, ‘Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?’ cit. 1044-1047.

⁸⁰ A von Bogdandy and M Ioannidis, ‘Systemic Deficiency in the Rule of Law: What it Is, What Has Been Done, What Can Be Done’ cit. 72.

⁸¹ T Ginsburg, ‘International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance’ (2005) *International Review of Law and Economics* 107, 119.

⁸² W Sadowski, ‘Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?’ cit.

Thirdly, and rather fundamentally: art. 7 TEU acknowledges that the rule of law is a value upon which the Union is founded, thus it is this value that must be repaired. In comparison, ISDS is a way in which to provide reparation to an investor because the (rule of) law has been violated. With regard to art. 7 TEU, it goes without saying that any measure that does not promote the rule of law is without any value. The ISDS mechanism, to the contrary, is indifferent in this regard. Its main purpose is to protect the economic interests of the investor. Whether this is achieved by respecting the law, or by way of economic compensation if the law is not respected, is irrelevant.

Against this background, it is not surprising that the principles for compensation in EU law and in International Investment Law are quite different. International Investment Law is constructed upon contractual principles. Such principles have a transactional character. Although contractual relationships do not necessarily have a short-term perspective, that is often the case. Therefore, contract law assesses every breach as an isolated instance. The general rule in investment law is that “state responsibility entails a secondary obligation to provide reparation for the breach. This means that the claimant so far as possible ought to be put in the position in which he would have been had the breach not occurred”.⁸³

Within public law, the starting point is different. The State and its citizens have a long-term, not to say eternal, relationship. This does not exclude a principle of state liability. The basic premise in EU law is the same as in International Investment Law, namely that “the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained”.⁸⁴ However, the substantive principles are crafted to fit the public and constitutional character of the long-term relationship:

“First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterized by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers”.⁸⁵

Sadowski acknowledges the difference and notes that:

“investment arbitration is not as lenient to respondent States as most other international or domestic courts in terms of damages. Domestic courts often feel constrained from ruling against States with respect to the consequences of measures taken in pursuit of their sovereign powers, and even if such judgments are rendered, high damages are rare. In

⁸³ I Alvik, *Contracting with Sovereignty. State Contracts and International Arbitration* cit. 222.

⁸⁴ Joined cases C-46/93 and C-48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte: Factortame and Others* ECLI:EU:C:1996:79 para. 22.

⁸⁵ *Ibid.* para. 45.

proceedings before the European Court of Human Rights, settled case law regarding breach of Article 1 of Protocol No.1 confirms that the compensation need not be full. Confronted with such benchmarks, the approach of investment treaty arbitration favouring the full compensation model (in accordance with the Chorzów Factory principle) is clearly the preferred option for eligible individuals”.⁸⁶

Rather than “lenient”, the principles on State Liability in public law should be described as constitutional. They are constructed to avoid unnecessary regulatory chill. In a long-term relationship, it is more important to preserve, correct and refine the institutional system than to ensure the fullest possible compensation for damages. Instead, the balancing of different concerns aims at the fullest possible realization of the rule of law. To the contrary, the reference to the notion of the “rule of law” appears exaggerated in contractual relationships. Such relationships are marked by the fluid and coincidental relationship between two parties tied together by a contract. Contractual principles on liability protect the short-term economic interest of investors. In Opinion 1/17 the Court chose not to assess the important differences between the principles for compensation and the dilemmas that these differences introduce.

V.3. INCLUSION *VERSUS* EXCLUSION OF NATIONAL COURTS

ISDS provides a system for the protection of individual rights that is completely detached from the domestic system.⁸⁷ In comparison, the EU judicial system is constructed to ensure that national courts are the primary fora for individuals to assert their rights. As Joseph Weiler taught us some 25 years ago, “The national courts and the European Court are ... integrated into a *unitary* system of judicial review”.⁸⁸

Unity promotes important considerations. First, it ensures that national Courts become familiar with EU law, assisted by the preliminary reference procedure. Secondly, it brings EU law closer to the domestic domain and is thus a way of legitimizing it. Thirdly, it makes EU law a common heritage, as national Courts are accessible to everyone. Fourthly, when international law finds its way into national law through the national court system, a mechanism of checks and balances is established. External (international) courts “check” the functioning of the national system. On the other hand, they have no formal authority, but are dependent on the loyalty and acceptance of national Courts. Here lies the balance.

⁸⁶ W Sadowski, ‘Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?’ cit. 1042.

⁸⁷ Cf. the criticism of I Alvik, ‘The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy’ cit. 301.

⁸⁸ JHH Weiler, ‘A Quiet Revolution: The European Court of Justice and its Interlocutors’ (1994) *Comparative Political Studies* 510, 515 (emphasis added).

Von Bogdandy has raised the fundamental question: “Wherein lies the ultimate reason for the quest for unity?” His answer is that: “Unity of the State and unity of administration are both based on the unity of the democratic origin of all sovereign power. All public authority originates with the people. With the enactment, continuation and development of the constitution, this authority is passed on to the various organs within the constitutional framework. All bodies exercising sovereign power continue to be dependent on the unifying origin of that power”.⁸⁹

Art. 20 CFR is an open invitation to discuss whether unity is a mere practical arrangement or a legal requirement. It does not take much creativity to argue that the provision expresses the fundamental principle that all public authority originates with the people. The dilemma of whether to include or exclude national courts is thus a big one. The Court preferred strict separation, autonomy, over unity, but again, it did not provide any reasons for its choice.

VI. JUSTIFICATION

If the Court had chosen to interpret and apply CFR art. 20 in a different manner, the focus would have shifted to justification. In Section VI.1 below I assess possible justifications for the ISDS mechanism and refer to them as the “hidden rational”. By that I imply that the Court was influenced by these considerations, but chose an approach that kept them in the dark. One reason might be that it is somewhat unclear to what extent the principle in art. 20 CFR is open to exceptions. Another – and in my view important – reason, is that there is a looming conflict between the Court’s preservation of the autonomy of EU law in external relations and Law’s unity (Section VI.2).

VI.1. THE HIDDEN RATIONAL

In their written observations, Belgium and the UK submitted that:

“The difference in treatment referred to in the request for an opinion is, in any event, justified by the objective of contributing to free and fair trade, within the meaning of Article 3(5) TEU, and by the objective of integrating all countries into the world economy, as laid down in Article 21(2)(e) TEU. The competence of the Union to conclude, under Article 207 TFEU, agreements concerning direct investments with non-Member States and, under Article 4(1) and (2)(a) TFEU, agreements concerning investments other than direct investments with such States, would be meaningless if the EU law principle of equal treatment were to prohibit the Union from entering into specific commitments with respect to investments deriving from non-Member States”.⁹⁰

⁸⁹ A von Bogdandy, ‘The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System’ (1999) CMLRev 887, 899.

⁹⁰ Opinion 1/17 cit. para. 84.

The Court's approach made it unnecessary to refer to the arguments quoted above. Still, it is reasonable to believe that they influenced the choices made by the Court.

First, the contribution to the promotion of international trade makes agreements such as CETA different from intra-EU agreements.⁹¹ In addition, the ISDS mechanism in CETA "aims at a major reform of investment dispute resolution, based on the principles common to the courts of the European Union and its Member States and of Canada, as well as to international courts recognized by the European Union and its Member States and Canada".⁹² This is an important consideration, having regard to the fact that there exist numerous agreements between the EU-Member States and third countries that include ISDS clauses.⁹³

Secondly, with regard to an international agreement such as CETA, it is relevant to look not only at EU law, but also at the principles of international law. The ECJ's reasoning in Opinion 1/17 seems inspired by the judgment of the European Court of Human Rights (ECtHR) in *James and others v The United Kingdom*, although the latter was not referred to.⁹⁴ *James and others v The United Kingdom* concerned domestic legislation that conferred on tenants residing in houses held on "long leases" (over, or renewed for periods totalling over, 21 years) at "low rents" the right to purchase compulsorily the "freehold" of the property on favourable terms.⁹⁵ The applicants argued amongst other things that the reference of art. 1 of Protocol No. 1 to the European Convention of Human Rights to "the general principles of international law" meant that the international law requirement of prompt, adequate and effective compensation for the expropriation of property of foreigners also applied to nationals.⁹⁶ To the contrary, the ECtHR found that "the general principles of international law are not applicable to a taking by a State of the property of its own nationals".⁹⁷ It dismissed the argument voiced by the applicant that arts 1 and 14 of the ECHR do not permit differentiation on the ground of nationality. The ECtHR noted that differences in treatment do not constitute discrimination if they have an "objective and reasonable justification".⁹⁸ With regard to the latter, the ECtHR observed that:

⁹¹ Compare *Achmea* cit.

⁹² Opinion 1/17 cit. para. 45.

⁹³ Particularly emphasizing this point, JHH Weiler, 'European Hypocrisy: TTIP and ISDS' (21 January 2015) EJIL: Talk! www.ejiltalk.org.

⁹⁴ ECtHR *James and Others v The United Kingdom* App n 8763/79 [21 February 1986]. See also ECtHR *Lithgow and Others v The United Kingdom* App n 9006/80; 9262/81; 9263/81/ 9265/81; 9266/81; 9313/8; 1 9405/81 [8 July 1986]. See I Alvik, 'The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy' cit. 293, 305.

⁹⁵ For a more detailed account, see *James and Others v The United Kingdom* paras. 10 and 11.

⁹⁶ Compare in this regard CETA cit., art. 8.12 (1)(d), which requires "prompt, adequate and effective compensation" cf. Opinion 1/17 cit. para. 17.

⁹⁷ *James and Others v The United Kingdom* cit. para. 66.

⁹⁸ *Ibid.* para. 63.

“Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals”.⁹⁹

Arguably, third-country nationals are more vulnerable in at least one sense: They are unfamiliar with the domestic system in the country of investment. Their ability to assess the quality of local institutions is inferior to that of the locals. ISDS is a way in which to remedy the information problem. Further – and this is a big argument: To the extent that local institutions suffer from deficiencies, it may be argued that the locals must bear the cost of the tidy process of improving the rule of law, while in the meantime foreigners must be provided guarantees that the law is complied with.

The hidden considerations above may explain why the Court chose not to enter into justification mode. As is well known, reasons that can objectively justify discrimination can be applied in two manners: either to allow for an exception, or, alternatively, to prove that the measure was not in fact discriminatory in the first place. The Court’s finding in Opinion 1/17, that equality before the law was not affected, seems to presume that a justification would have existed if the reach of art. 20 CFR had been constructed more broadly.

VI.2. AUTONOMY OR UNITY? THE SILENT CHOICE

There is a problem, however. *If* art. 20 CFR is constructed more broadly, its systemic component must be acknowledged. The requirement of unity cannot first be recognized and then totally disregarded. Instead, the question is: Pursuant to which systemic requirements is ISDSs justifiable? Two requirements stand out:

The first requirement would be that national remedies must be exhausted before the ISDS mechanism can be invoked.¹⁰⁰ Several arguments go in the same direction. First, this is the standard approach in international law. Secondly, this is the only way in which to confirm whether the fear that domestic institutions are hostile to foreigners is real or unfounded. Thirdly, the structure provides that domestic courts can familiarize with foreign investors and their rights. Fourthly, it is the only way in which the ISDS mechanism can serve as an external corrective to dysfunctional domestic institutions. In short: It is the only way in which ISDS can promote international trade *and* the rule of law.

⁹⁹ *Ibid.* para. 63.

¹⁰⁰ Cf. I Alvik, ‘The Justification of Privilege in International Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy’ cit. 311; M Kumm, ‘An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege’ cit.

The second requirement would be that the ISDS mechanism, in one way or the other, must work in tandem with the national system. Different forms of integration is the common approach in international law. It is not, however, the way in which the Court has approached ISDS. In the field of external relations, the choice between autonomy on the one hand, and unity on the other, has already been made. The Court has embraced full separation: autonomy. In my view, this choice explains why it was difficult for the Court to undertake a more engaged interpretation of art. 20 CFR in Opinion 1/17, and why, instead, it resorted to a nitty-gritty, seemingly impeccable, textbook-style assessment. The door was already shut. Instead of trying to open it, the Court locked and bolted it.

VII. CONCLUSION

In Opinion 1/17, the ECJ re-employed the substantive content of art. 21 CFR within the ambit of art. 20 CFR. According to the Court, the ISDS mechanism contained in CETA is in conformity with the fundamental requirement that “everyone is equal before the law”.

The Court’s assessment rests on two pillars. First, in the substantive sense, CETA does not afford a higher level of protection to Canadian investors than EU law affords to European investors. In this respect, investors of different origins are equals who are treated equally. Secondly, ISDS provides specific procedural rights to foreign investors, which cannot be invoked by domestic investors. According to the ECJ, Canadian investors do not have the same confidence in the institutional system of the EU as domestic investors, or, at least, Canadian investors are not legally obliged to have the same trust. In this respect, Canadian investors are different from European investors, thus it is justified to treat them differently.

An important insight of theories on legal realism is that legal findings are not necessarily the outcome of a preceding analysis. Sometimes it is vice versa. In this paper I have shown that it is possible to interpret art. 20 CFR so as to include a systemic requirement of unity: that within EU law itself, there is only one Law, which applies to all. Art. 20 CFR hints at this understanding due to its universalistic character, its use of the word “everyone”, and its reference to the notion of “the law”. If this reading of art. 20 CFR is acknowledged, the ISDS mechanism in CETA stands out as an exception. It creates a specific legal system with specific rights for investors of a specific nationality. There is not one law for all.

I have not argued that the Court was wrong in not choosing a thicker, systemic interpretation of art. 20 CFR. Instead, I have tried to highlight the values that I believe that the Court consciously but silently balanced when it constructed its approach to art. 20 CFR and the accompanying reasoning. The Court favoured short-term compliance with the law over the promotion of the rule of law. It favoured the promotion of international trade over the interests of the population at large.

I hope also to have shown that an important difference exists between the autonomy and the unity of the legal system. Due to its strong protection of its own autonomy and the autonomy of EU law, the ECJ has embraced what is in fact the main problem of the

ISDS mechanism – its complete disentanglement from the legal order(s) that it scrutinizes.¹⁰¹ It is probable that this choice rests on another hidden balancing act, between principled concerns and practical realities. While it is doubtful whether the ISDS mechanism would have been legally acceptable if it were a new invention, it is not. The Court's practical attitude has been to curtail the use of ISDS intra-EU,¹⁰² but to support the initiative that aims to reform the system at the international level.

As with other political choices, the Court's way forward is not without its risks. The preservation of the unity of the legal system is the foundation for its legitimacy. Further, as mentioned in the introduction to this paper, unity is about having or controlling supremacy. In Opinion 1/17, the Court acknowledged that the autonomy of EU law would be adversely affected if external tribunals and courts can call into question the level of protection of a public interest within the Union, enacted on the basis of a democratic procedure,¹⁰³ i.e. by "everyone".¹⁰⁴ At surprising length, the Court stressed why, in its view, "the discretionary powers of the CETA Tribunal and Appellate Tribunal do not extend to permitting them to call into question the level of protection of public interest determined by the Union following a democratic process".¹⁰⁵ The pressing question is how this is to be controlled. In the absence of unity, autonomy's guarantor – "everyone" – is cut off. If the two systems clash there is a risk that the European legal order remains formally autonomous but *de facto* inferior.

¹⁰¹ Cf. Opinion 1/17 cit. paras 113, 114 and 134.

¹⁰² *Achmea* cit.

¹⁰³ Opinion 1/17 cit. paras 150–151.

¹⁰⁴ Charter art. 20.

¹⁰⁵ Opinion 1/17 cit. para. 156.



ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

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ARTICLE 47 OF THE CHARTER IN THE OPINION PROCEDURE: SOME REFLECTIONS FOLLOWING OPINION 1/17

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ABSTRACT: In Opinion 1/17 the CJEU held that the ISDS Mechanism under the CETA is compatible with Union law, including the right of access to an independent tribunal, as enshrined in art. 47(2) and (3) of the Charter. Although the emphasis on access to an independent tribunal, as a separate ground in the compatibility review, has a constitutional dimension, the applicability of art. 47(2) and (3) with regard to an independent dispute settlement mechanism, that stands outside of the judicial systems of CETA's Parties, invites to discuss the place of art. 47 of the Charter in the Opinion procedure. The *Article* suggests distinguishing the right of access to an independent tribunal, which is to be preserved in CETA's ISDS mechanism, from art. 47 of the Charter, in light of its specific scope of application and function in the EU legal order. The CETA's guarantees of judicial protection could be assessed from the perspective of the autonomy claim. However, this would lead to conceptual difficulties that could be circumvented by assessing the guarantee of a right of access to an independent court from the perspective of CETA's compatibility with art. 207 of the TFEU, as the standards of judicial independence can enter substantive primary EU law through their absorption by the Union's objectives in the field of common commercial policy. Promoting judicial protection as part of the trade policy could reinforce the credibility of the Union as an actor in international trade and in international procedural law.

KEYWORDS: ISDS – CETA – art. 47 of the Charter – independence of investment courts – Opinion procedure – autonomy.

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I. INTRODUCTION

In Opinion 1/17, the Court of Justice of the European Union (CJEU or Court) held that the Investor-State Dispute Settlement (ISDS) Mechanism in Chapter 8 of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States is compatible with the right of access to an independent tribunal, as enshrined in art. 47(2) and (3) of the Charter of Fundamental Rights of the European Union.¹ Its holding is based on the Charter's applicability in the framework of the CJEU's advisory Opinion of art. 218(11) TFEU; in the advisory Opinion procedure, the CJEU addresses the Union's competence to conclude an envisaged agreement and that agreement's material compatibility with primary law, which is "a general requirement of compatibility with the EU constitutional framework".² As the Court affirmed in Opinion 1/17:

"A judgment on the compatibility of an agreement with the Treaties may, in that regard, depend, *inter alia*, not only on provisions concerning the powers, procedure or organisation of the institutions of the European Union, but also on provisions of substantive law. The same is true of a question relating to the compatibility of an envisaged international agreement with the guarantees enshrined in the Charter, since the Charter has the same legal status as the Treaties".³

In other words, the Court affirmed that the Charter, in general, and its art. 47, in particular, are primary EU law to which the Union is subject when it "enters into an international agreement that encompasses the establishment of bodies that are primarily judicial in nature and that are called on to resolve disputes between, in particular, private investors and States, such as the CETA Tribunal and Appellate Tribunal".⁴

Of course, as the Charter applies in situations covered by EU law, it also applies when the Union takes external action.⁵ From an EU-legal-order point of view, international agreements concluded by the Union are acts of the institutions, hence they must comply with

¹ Art. 47 of the Charter of Fundamental Rights of the European Union [2012] states: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

² Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341 para. 166.

³ *Ibid.* para. 167. The Court refers to Opinion 1/15 *Accord PNR UE-Canada* ECLI:EU:C:2016:656 para. 70.

⁴ Opinion 1/17 cit. para. 190.

⁵ C Briere and A Navasartian, 'Lex Generalis and the Primacy of EU Law as a Source of the EU's Duty to Respect Human Rights Abroad: Lessons Learned from the Case-Law of the CJEU' in E Kassoti and R Wessel (eds), 'EU Trade Agreements and the Duty to Respect Human Rights Abroad' (CLEER Papers 1-2020) 18; T Destailleur, 'La Charte et l'action extérieure de l'Union européenne. Du déni à l'acceptation ?' in R Tinière and C Vial (eds), *Les dix ans de la Charte des droits fondamentaux de l'Union européenne* (Bruylant 2020) 155; P Cruz Villalon, 'Un principe de continuité? Sur l'effet extraterritorial de la Charte des droits fondamentaux

the Charter when their normative objective interferes with the protection of fundamental rights.⁶ An assessment of the compatibility of CETA's ISDS Mechanism with art. 47(2) and (3) related to access to an independent tribunal, thus, does not question the Charter's applicability to the Union's external action. Rather, it raises a question about the applicability of art. 47(2) and (3) with regard to an independent dispute settlement mechanism that stands outside of the judicial systems of CETA's Parties,⁷ when art. 47(1) only concerns the Union's own judicial system. The external projection of art. 47 could raise some issues of consistency,⁸ given its specific scope and application in the EU legal order.

CETA's Investment Court System (ICS) and the objective to establish a Multilateral Court for the settlement of investment disputes (MIC) unequivocally fall under the Union's external action objectives, related not only to an efficient common commercial policy, but also to promoting the rule of law.⁹ The negotiating directives for a Convention establishing a MIC emphasise the need to guarantee its independence and the right of access thereto.¹⁰ The Court's assessment of the compatibility of the CETA's ISDS mechanism with the right of access to an independent court is not put under question. The present *Article* rather discusses the place of art. 47 of the Charter in the Opinion procedure.

In light of the specific role art. 47 plays in the EU legal order, its examination as an autonomous ground for a compatibility assessment could raise, on the one hand, some consistency questions (II). On the other hand, the compatibility of CETA's ISDS mechanism with the right of access to an independent tribunal needs to be ensured, which raises a question as to whether the issue should fall under the autonomy claim or under the substantive provisions of the common commercial policy (III).

de l'UE' in J Wildermeersch and P. Paschalidis (eds), *L'Europe au présent! Liber Amicorum Melchior Wathelet* (Bruylant 2018) 317; E Neframi, 'La Charte dans l'action extérieure de l'Union européenne' in A Iliopoulou-Penot and L Xenou (eds) *La Charte des droits fondamentaux, source de renouveau constitutionnel européen?* (Bruylant 2020) 149.

⁶ See Opinion 1/15 cit. note 3. M Mendes, 'Opinion 1/15: The Court of Justice Meets PNR Data (Again!)' (2017) *European Papers* www.europeanpapers.eu 803; A Vidaschi, 'The European Court of Justice on the EU-Canada Passenger Name Record Agreement' (2018) *EuConst* 410.

⁷ Opinion 1/17 cit. para 113.

⁸ A Hervé, 'Défendre l'ordre juridique de l'Union en exportant ses valeurs et instruments fondamentaux' (2020) *RTDE* 121; C Vajda and S Mair, 'The Applicability of Article 47 of the Charter of Fundamental Rights to International Agreements to which the Union is a Contracting Party' in D Petrlík, M Bobek, J Passer and A Masson (eds) *Evolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux, Liber amicorum Jiri Malenovsky* (Bruylant 2020) 551.

⁹ M Bungenberg and A Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (Springer 2020) 3; G Sangiulo, 'An International Court System for a Transformative Europe?' in I Bosse Platière and C Rapoport (eds), *The Conclusion and Implementation of EU Free Trade Agreements* (Edward Elgar 2019) 271; E Sardinha, 'Towards a New Horizon in Investor-State Dispute Settlement? Reflections on the Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA)' (2016) *ACDI* 311.

¹⁰ Negotiating Directives of the Council of the European Union for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes EU Doc 12981/17 ADD 1.

II. QUESTIONING ART. 47'S ROLE IN THE OPINION PROCEDURE

Art. 47's role in the Opinion procedure set out in art. 218(11) TFEU is questionable for two reasons: because of first, its scope of application (II.1) and, second, its specific function in the EU legal order (II.2).

II.1. ART. 47'S SPECIFIC SCOPE OF APPLICATION

It is common knowledge that art. 47 applies when there is a violation of rights stemming from EU law, not just with regard to rights guaranteed in the Charter.¹¹ As international agreements concluded by the Union are integral part of the EU's legal order,¹² any investor rights guaranteed by CETA are rights stemming from EU law. As such, they fall under the obligation to provide an effective remedy fulfilling the requirements of a fair hearing.

However, the compatibility of CETA's ISDS mechanism with art. 47 of the Charter is assessed by the Court only with regard to paras 2 and 3 related to the independence of the CETA tribunals and their accessibility. Thus, the question is: Can the guarantees set out in art. 47(2) and (3) be dissociated from (1)?

Indeed, art. 47(1) concerns the obligation incumbent upon the Member States, as also enshrined in art. 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Hence, their domestic courts are part of the Union's judicial system.¹³ In Opinion 2/15, concerning the Union's competence to conclude a free trade and investment agreement with Singapore,¹⁴ the Court held that the establishment of an ISDS mechanism allows an investor, in case of dispute with a Member State, to submit the claim to arbitration. Unlike State-to-State dispute settlement mechanisms, "[s]uch a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature ... and cannot, therefore, be established without the Member States' consent".¹⁵ The fact that provisions establishing an ISDS mechanism are

¹¹ H Hoffmann, 'Article 47' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights, A Commentary* (Oxford Hart Publishing 2014) 1211. See for example, case C-682/15 *Berlioz Investment Fund* ECLI:EU:C:2017:373 para. 49.

¹² Art. 216(2) TFEU. Case 181/73 *Haegeman v Belgian State* ECLI:EU:C:1974:41 para. 5; case 104/81 *Hauptzollamt Mainz v Kupferberg & Cie.* ECLI:EU:C:1982:362 para. 13.

¹³ H Van Harten '(Re)search and Discover: Shared Judicial Authority in the European Union Legal Order' (2014) *Review of European Administrative Law* 20; K Lenaerts, 'L'apport de la Cour de justice à la construction européenne' (2017) *Journal de droit européen* 134; A Rosas, 'The National Judge as EU Judge: Opinion 1/09' in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU Judicial System, Essays in Honor of Pernilla Lindh* (Hart Publishing 2012) 105. C Vajda and S Mair in 'The Applicability of Article 47 of the Charter of Fundamental Rights to International Agreements to which the Union is a Contracting Party' cit. underline also the difference between the remedies regime in the CETA and the rights stemming from EU law that the right to an effective remedy is supposed to preserve.

¹⁴ Opinion 2/15 *Accord de libre-échange avec Singapour* ECLI:EU:C:2017:376.

¹⁵ *Ibid.* para. 292.

not absorbed by the Union's substantive competence,¹⁶ but instead fall under the Member States' implementing competence,¹⁷ could lead to the conclusion that art. 47(1) is projected into the external field. In other words, affirming that recourse to an ISDS mechanism removes competence from the domestic courts means that implementing an investment protection agreement – be it EU-only or mixed – would fall under the domestic courts' competence, in the absence of such mechanism. As the ISDS mechanism in an international agreement is not, in principle, incompatible with EU law,¹⁸ the impact on the domestic courts' implementing competence demands that the Union cannot conclude such an agreement without its Member States.¹⁹ That does not mean, however, that such an ISDS mechanism falls under art. 47(1). In Opinion 1/17, the Court confirmed that CETA's ISDS mechanism stands outside the judicial systems of the parties.²⁰

The question, thus, is whether art. 47(2) and (3) apply in a situation that does not fall under (1). The Court of Justice acknowledged that the Member States' obligation to provide an effective remedy under art. 19 TEU corresponds to the rights guaranteed in art. 47.²¹ The link between the two provisions implies that the effective remedy guarantees

¹⁶ In principle, provisions related to dispute settlement between the parties “form part of the institutional framework for the substantive provisions of the envisaged agreement” and as such, they “are of an ancillary nature and therefore fall within the same competence as the substantive provisions which they accompany”. *Ibid.* paras 303 and 276.

¹⁷ The Court of Justice highlighted that the obligation of the Member States to establish a system of legal remedies ensuring effective judicial review in the fields covered by EU law stems from the obligation of loyal cooperation to ensure the application and respect of EU law, following art. 4(3) TEU (See case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117 para. 34). This obligation corresponds to the Member States' implementing competence following art. 291(1) TFEU (“Member States shall adopt all measures of national law necessary to implement legally binding Union acts”).

¹⁸ The Court of Justice acknowledged that “the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions” (Opinion 2/15 cit. para. 298).

¹⁹ In its judgment *Germany v Council* (Case C-600/14 ECLI:EU:C:2017:935) the CJEU referred to the shared competence to approve provisions concerning other types than foreign direct investments, but not to the shared competence to approve ISDS provisions, when it held that the Union's shared competence can be exercised directly in the external field and that the conclusion of a mixed agreement is not mandatory (para. 68).

²⁰ Opinion 1/17 cit. para. 113.

²¹ In *Berlioz Investment Fund* cit. the Court of Justice held that: “According to art. 47 of the Charter, entitled ‘Right to an effective remedy and to a fair trial’, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. The obligation imposed on the Member States in art. 19(1)(2) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, corresponds to that right” (para. 44). In *Associação Sindical dos Juizes Portuguese* cit. the Court held that: “[T]he principle of the effective judicial protection of individuals' rights under EU law, referred to in art. 19(1)(2) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in arts 6 and 13 of the

in art. 47's paras 2 and 3 also apply with regard to the Member States' obligation, regardless of the concrete exercise of the right to an effective remedy. In other words, as the Court held in *Associação Sindical dos Juizes Portugueses*, a Member State "must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection".²² The Member States' obligation is a systemic one that stems from art. 19 TEU, independent of a concrete violation of a right guaranteed by EU law.²³ In that case, the Court confirmed that the Member States must ensure that domestic courts that may be called upon to apply EU law meet the requirements "essential to effective judicial protection, in accordance with the of art. 19(1)(2) TEU",²⁴ one of which being judicial independence "as confirmed by the second subparagraph of art. 47 of the Charter".²⁵

The right of access to an independent tribunal is, of course, one component of the principle of effective judicial protection, a general principle of EU law, set out in art. 47 of the Charter. However, in Opinion 1/17, the compatibility of the CETA's ICS with EU law is assessed with regard to art. 47 and, consequently, the standards of judicial protection that apply with regard to the Union's system of legal remedies. Indeed, even if art. 47(2) and (3) may apply where (1) does not, their application is linked to the obligation stemming from art. 19 TEU, which concerns the CJEU²⁶ and the Member States' courts. In other words, art. 47 invites the Court to determine the standards of judicial protection as part of the common values at the base of the mutual trust that those values are recognized in all Member States.

Reading the Court's judgments in *Achmea*²⁷ and in *Associação Sindical dos Juizes Portugueses* together, it is clear that the standard of judicial independence assured by art. 47 is "essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under art. 267 TFEU",²⁸ which is the foundation of the EU legal order's autonomy, as expression of the mutual trust and guarantee of the particular nature of the law established by the Treaties.²⁹ Requiring the envisaged ISDS mechanism to respect the conditions of art. 47, in order to be judged compatible with the Treaties, would contradict the main argument of Opinion 1/17 on the basis of which the Court confirmed

European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by art. 47 of the Charter" (para. 35).

²² *Associação Sindical dos Juizes Portugueses* cit. para. 37.

²³ E Neframi, 'La portée intégrative du système juridictionnel de l'Union européenne sous le prisme des obligations incombant aux Etats membres' in A Kämmerer, M Kotzur and J Ziller (eds), *Integration und Desintegration in Europa* (Nomos 2019) 147.

²⁴ *Associação Sindical dos Juizes Portugueses* cit. para. 40.

²⁵ *Ibid.* para. 41.

²⁶ For a recent example of the application of art. 47 with regard to the CJEU, see joined cases C-542/18 *RX-II* and C-543/18 *RX-II* ECLI:EU:C:2020:232.

²⁷ Case C-284/16 *Achmea* ECLI:EU:C:2018:158.

²⁸ *Associação Sindical dos Juizes Portugueses* cit. para. 43.

²⁹ *Achmea* cit. para. 58.

the compatibility of such mechanism with the autonomy of the EU legal order. Indeed, the Court of Justice acknowledged that the principle of mutual trust obliges each of the Member States “to consider, other than in exceptional circumstances, that all the other Member States comply with EU law, including fundamental rights, such as the right to an effective remedy before an independent tribunal laid down in art. 47 of the Charter”.³⁰ While creating an investment tribunal by means of an agreement among the Member States would call the principle of mutual trust into question and, thus, have an adverse effect on the autonomy of EU law, the same cannot be said of an agreement between the Union and a third State.³¹ According to the Court of Justice, “that principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State.”³²

In that regard, suggesting that CETA’s ISDS mechanism must comply with art. 47(2) and (3), when (1) does not apply in the same circumstances, could be inconsistent with the Court’s statement. In Opinion 1/17, the Court made clear that its reasoning in *Achmea* cannot reach the compatibility of CETA’s ISDS mechanism with the principle of autonomy. As a consequence, suggesting art. 47 has a role to play in an art. 218(11) of the TFEU Opinion procedure is inconsistent with art. 47’s scope of application.

II.2. THE SPECIFIC FUNCTION OF ART. 47

In the EU legal order, art. 47 of the Charter has a specific function, which is linked to its limited scope of application. This provision is not at the base of legislative intervention from the Union’s institutions, as fundamental rights guaranteed by the Charter are not autonomous objectives extending EU competence.³³ Of course, fundamental rights guaranteed by the Charter, such as non-discrimination or the protection of personal data, can find specific expression in acts of secondary EU law that are instead based on substantive provisions of the Treaties, which aim to protect the corresponding rights in a specific field. As far as effective judicial protection is concerned, secondary EU law may require the Member States to establish effective legal remedies in certain situations. However, the

³⁰ Opinion 1/17 cit. para. 128.

³¹ On the impact of the judgment in *Achmea*, see C Contartese and M Andenas, ‘Case C-284/16’ (2019) CMLRev 157; M Gatti ‘Opinion 1/17 in Light of *Achmea*: A Chronicle of an Opinion Foretold?’ (2019) European Papers www.europeanpapers.eu 109. On the distinction between *Achmea* and Opinion 1/17 see the Opinion of Advocate General Szpunar in case C-741/19 *République de Moldavie* ECLI:EU:C:2021:164 paras 84 ff. Advocate General Szpunar argues that, following *Achmea*, the arbitration mechanism of the Energy Charter Treaty is not compatible with Union law as far as it applies to an intra-EU dispute, while there is no issue of compatibility concerning disputes involving a Union investor and a third country.

³² Opinion 1/17 cit. para. 129.

³³ On the function of art. 47, see for example, M Safjan and D Düsterhaus, ‘A Union of Effective Judicial Protection: Addressing a Multi-level Challenge Through the Lens of Article 47 CFREU’ (2014) YEL 3; S Prechal, ‘Effective Judicial Protection: Some Recent Developments - Moving to the Essence’ (2019) Review of European Administrative Law 175.

effective remedies such secondary EU law creates are not based on art. 47 of the Charter, but rather, they are based on the underlying substantive law provisions that the legal remedies are supposed to ensure.³⁴

The obligation to provide effective remedies that meet art. 47's standards, then, must be understood in the framework of the Member States' implementing competence and procedural autonomy. Secondary EU law may oblige a Member State to establish legal remedies in a specific field, but the standards of judicial protection are only assessed thereafter, through a balancing exercise that takes account of national procedural rules. Of course, if there is a systemic deficiency in a Member State's judicial system, or if no legal remedies exist, there can be no balance; but, in those cases, the offending Member State's obligations arise from art. 19 TEU,³⁵ rather than art. 47. On the other hand, art. 47 acts as a limit on national procedural rules and practices by limiting the powers of the Member States' domestic courts when acting in their – key – role as EU law judges.

It should be noted that the principle of effective judicial protection in the EU legal order is often closely linked to the principle of effectiveness, according to which national procedural rules must not render the exercise of rights conferred by EU law practically impossible or excessively difficult.³⁶ The difference between art. 47's guarantees and the principle of effectiveness – both act as limits on national procedural autonomy – remains somewhat ambiguous;³⁷ nevertheless, both establish the limits of national procedural autonomy by relying on a balancing exercise that takes account of the principles and rules of the national legal order. Thus, even though art. 47 reflects a fundamental right to an effective remedy, while the principle of effectiveness only emphasises a balance with national procedural autonomy,³⁸ art. 47 and national procedural rules are not in direct conflict. In other words, art. 47 does not – and cannot – give rise to substantive rules of EU law that take precedence over national procedural rules. Rather, when secondary EU law provides a remedy in a specific field, art. 47 acts as the lens through which such secondary law is interpreted, in its balancing with national procedural rules,³⁹ rather

³⁴ O Dubos, 'The Origins of the Proceduralisation of EU Law: A Grey Area of European Federalism' (2015) *Review of European Administrative Law* 18.

³⁵ See case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531; Case C-824/18 *A.B. and Others (Nomination des juges à la Cour suprême - Recours)* ECLI:EU:C:2021:153.

³⁶ Case 33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG c Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188. See among others, A Arnall, 'Remedies Before National Courts' in R Schutze and T Trimidas (eds), *Oxford Principles of European Union Law* (OUP 2018) 1011.

³⁷ S Prechal and R Widdershoven, 'Redefining the Relationship between Rewe-Effectiveness and Effective Judicial Protection' (2011) *Review of European Administrative Law* 31.

³⁸ See joined cases C-439/14 and C-488/14 *Star Storage*, Opinion of Advocate General Sharpston, ECLI:EU:C:2016:307 para. 37.

³⁹ See, e.g., case C-300/17 *Hochtief AG* ECLI:EU:C:2018:635 para. 58. R Caranta, 'The Interplay between EU Legislation and Effectiveness, Effective Judicial Protection and the Right to an Effective Remedy in Public Procurement Law' (2019) *Review of European Administrative Law* 63.

than as an EU-level provision that takes precedence over those national rules. Even where the Court of Justice refers to the primacy of art. 47 over national procedural rules,⁴⁰ its reasoning is based on balancing with national procedural autonomy, which confirms that art. 47 does not impose an autonomous, substantive obligation on the Member States.

In that way, the Court affirms that art. 47's guarantees only establish standards of judicial protection within the judicial system of the Union, with its limited scope of application confirmed by its function in the EU legal order. Even when it acts as the basis for a substantive obligation on the Member States' part to establish access to a tribunal or court,⁴¹ or to ensure the independence of domestic courts⁴² – and not only in case of systemic deficiency – art. 47 only regulates the exercise of the judicial function in a composite judicial system intended to ensure effective implementation of EU law.⁴³ Art. 47's "effective remedy" guarantee is not, and has never been, an autonomous Union objective, is not mirrored in a substantive EU-law provision, and, thus, cannot be projected into the external field.

In Opinion 1/17, the Court of Justice recalled that, in the context of the procedure provided for in art. 218(11) TFEU, "all questions that are liable to give rise to doubts as to the substantive or formal validity of the agreement with regard to the Treaties" are to be examined.⁴⁴ Art. 47, in light of its specific function and scope of application, cannot – by definition – be infringed by a rule contained in an international agreement to which the Union is a party.⁴⁵ On the contrary, provisions of the Charter the external effect of which has been recognized, such as art. 20 which enshrines the guarantee of equality before the law,⁴⁶ and which are mirrored in substantive provisions of the Treaties, could be infringed by rules of an agreement the normative objective of which contravenes the content of such provisions.

Another question that could arise with regard to the function of art. 47 relates to the Member States' obligation to provide an effective remedy according to the standards of art. 47. In line with the Court's focus on the allocation of the competences in its Opinion

⁴⁰ Joined cases C-585/18, C-624/18 and C-625/18 A.K. (*Independence of the Disciplinary Chamber of the Supreme Court*) ECLI:EU:C:2019:982 paras 157-162.

⁴¹ See case C-562/12 *Liivimaa Lihaveis* ECLI:EU:C:2014:2229 para. 71; case C-414/16, *Egenberger* ECLI:EU:C:2018:257 para. 78.

⁴² A.K. (*Independence of the Disciplinary Chamber of the Supreme Court*) cit. para. 154.

⁴³ The Court of Justice confirmed that, beyond the case of systemic deficiency in the rule of law, the requirement of judicial independence of art. 19 TEU does not apply in the absence of direct link with the implementation of EU law. See, joined cases C-558/18 and C-563/18 *Miasto Łowicz (Régime disciplinaire concernant les magistrats)* ECLI:EU:C:2020:234 para. 49.

⁴⁴ Opinion 1/17 cit. para. 167.

⁴⁵ S Adam, *La procédure d'avis devant la Cour de justice de l'Union européenne* (LGDJ 2011) 265 ff.

⁴⁶ Opinion 1/17 cit. paras 171-178. See also Opinion 1/15 cit., as well as the application of the Charter in the *Front Polisario* case (Case C-266/16 *Western Sahara Campaign UK* ECLI:EU:C:2018:118). See K Szepelelak, 'Judicial Extraterritorial Application of the EU Charter of Fundamental Rights and EU Trade Relations- Where We Stand Today?' in E Kassoti and R Wessel (eds), 'EU Trade Agreements and the Duty to Respect Human Rights Abroad' (CLEER Papers 2020) 52.

2/15, and given that the Member States are bound by the Charter when they exercise a competence in a field covered by EU law, would the CETA's ISDS mechanism be subject to art. 47 as expression of the Member States' obligation to provide an effective remedy in the implementation of an international agreement of the Union? One could affirm, however, that the Member States' obligation is fulfilled within the EU judicial system and does not imply establishing an international tribunal. Creating the ICS is a choice in the external action of the Union, covered by its substantive competence. The participation of the Member States in an agreement establishing an ISDS mechanism is necessary because of the implementing Member States' competence at the judicial level. As a consequence, there is no autonomous Member States' competence to provide an effective remedy. The Member States' implementing competence is linked to the Union's substantive competence, the basis of which is not art. 47, but rather art. 207 TFEU.⁴⁷

It could thus be affirmed that art. 47 is not a substantive provision with an external aspect. Asserting the external effect of art. 47 would imply, in the context of the judicial review of restrictive measures, submitting to the Union's standards of judicial protection the assessment of the respect of the fair trial principles in third States. However, the Court of Justice has dissociated the principle of judicial protection as a value of the EU legal order conditioning the respect of its autonomy,⁴⁸ from its application in the EU judicial system on the basis of art. 47 of the Charter. Besides, it is precisely because of the absence of an external effect of art. 47 that the ICS in the EU investment agreements needs to comply with the guarantees of judicial protection pursuant to the principle of reciprocity.⁴⁹ As a consequence, the right of access to an independent tribunal is to be preserved in CETA's ISDS mechanism, but not in virtue of art. 47. The dissociation of that principle from art. 47 is in line with the specific scope and function of the provision and would ensure consistency with the case law of the Court of Justice.

III. JUDICIAL PROTECTION STANDARDS IN THE OPINION PROCEDURE

Recognising that art. 47 does not apply in the Opinion procedure does not affect, however, the need to assess the CETA's ISDS mechanism's compatibility with the principle of effective judicial protection, which is part of EU primary law. The question, in that circumstance, is whether such an assessment should fall under the principle of autonomy (III.1) or under an analysis of compliance with the substantive provision on which the exercise of Union competence is based, the common commercial policy (III.2).

⁴⁷ See *infra*, under III.2, as well as the negotiating directives for the Convention establishing a MIC, cit.

⁴⁸ The case law related to the judicial review of restrictive measures in the field of the Common Foreign and Security Policy refers indeed to the need to preserve the principle of effective judicial protection and not to art. 47 of the Charter. See L Leppavirta, 'Procedural Rights in the Context of Restrictive Measures: Does the Adversarial Principle Survive the Necessity of Secrecy?' (2017) European Papers www.europeanpapers.eu 649.

⁴⁹ See the opinion of AG Bot in Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:72 para. 94.

III.1. JUDICIAL PROTECTION AS PART OF THE AUTONOMY CLAIM?

The principle of autonomy of the EU's legal order occupied an important place in Opinion 1/17 and was the key legal issue raised in Belgium's request. The Court of Justice examined its two dimensions: the preservation of its exclusive competence to interpret and apply EU law and, in a broader sense, the exercise of the EU institutions' powers in accordance with the EU constitutional framework.⁵⁰ The factors that led the Court to conclude that CETA's ISDS mechanism complies with the principle of autonomy relate to the CETA tribunals' limited jurisdiction: they may apply EU law only as a matter of fact and they may not question the level of protection of any public interest provided by the EU legal order.⁵¹ The guarantee of the EU legal order's autonomy thus depends on the CETA tribunal's exercise of judicial power.

The principle of effective judicial protection, on the other hand, could intervene as a parameter when the CETA tribunals' exercise their jurisdiction. Indeed, effective judicial protection covers not only access to an independent tribunal, but also the tribunal's exercise of judicial power to preserve the parties' interests. However, CETA's procedural protection is aligned with a substantive concern – that of preserving the regulatory autonomy of the Union and its Member States.⁵² While access to an independent tribunal is an element of judicial protection that must be guaranteed, judicial protection via the exercise of judicial review is limited by the principle of autonomy. In order to include access to an independent tribunal in the autonomy claim, the tribunal's independence must be considered as part of any guarantee of the exercise of judicial review in accordance with the EU level of protection of public interests. In that sense, CETA's procedural protection standard must include a substantive requirement to preserve regulatory autonomy and the CETA tribunal's independence must be considered as part of any guarantee of the autonomy of the EU legal order. However, the limits of judicial review that the preservation of autonomy requires is not necessarily in line with the effectiveness of judicial protection for investors. Dealing with the independence of the CETA tribunals as a guarantee of a judicial review balancing protection against the EU regulatory autonomy would allow the parameter of independence to be included in the autonomy claim, but would also risk undermining the standard of independence as part of the Union's objective to promote the rule of law. Besides, only the concern related to independence, and

⁵⁰ K Lenaerts, 'Modernising Trade whilst Safeguarding the EU Constitutional Framework: An Insight into the Balanced Approach of Opinion 1/17' (2019) Belgian Ministry of Foreign Affairs-Brussels diplomatie.belgium.be.

⁵¹ Opinion 1/17 cit. paras 106-161. See C Eckes, 'The Autonomy of the EU Legal Order' (2020) *Europe and the World: A Law Review*; L Leonelli, 'CETA and the External of the EU Legal Order: Risk Regulation as a Test' (2020) *Legal Issues of Economic Integration* 43.

⁵² J Klett, 'National Interest vs. Foreign Investment – Protecting Parties through ISDS' (2016) *TuljIntl&Compl* 213; C Titi, 'Opinion 1/17 and the Future of Investment Dispute Settlement: Implications of the Design of a Multilateral Investment Court' (2020) SSRN ssrn.com.

not that related to the guarantee of access to the CETA tribunals, can be linked to the exercise of judicial review in a way that preserves regulatory autonomy, and hence, in accordance with autonomy's requirements.

Another possibility to deal with judicial protection as part of the autonomy claim would be to consider judicial protection standards as values to be preserved from external impact, in line with the *Kadi* case law. It is indeed in the name of the autonomy that the Court of Justice requires respect of the principle of judicial protection in the adoption by external bodies or third States of acts at the base of the Union's restrictive measures.⁵³ Access to an independent tribunal could thus be a requirement in order to ensure compatibility with the value of judicial protection as element of the autonomy claim. However, such assessment of CETA's guarantee of the right of access to an independent tribunal would rather apply with regard to the enforcement of the decisions of the CETA tribunals. In other words, the autonomy claim in the Opinion procedure requires an assessment of the impact of the envisaged agreement's provisions on the exercise of the powers of the institutions in accordance with the EU constitutional framework. The CETA's provisions on access to an independent tribunal can affect the exercise of powers of the institutions in the event they are expected to enforce an award arising out of the ISDS mechanism, which would need to fulfil the relevant standards of judicial protection. As a consequence, this approach to the autonomy claim cannot apply to an *ex ante* compatibility review in the Opinion procedure.

Besides, the Union's objective to be a credible international actor in the establishment of permanent investment courts implies that the prior guarantee of judicial protection standards is preferred to the preservation of the autonomy of the EU legal order via the limits in the enforcement of the investment courts' decisions.

Indeed, the assessment of the CETA's guarantees of judicial protection as a compatibility review between the CETA's provisions and substantive provisions of EU primary law avoids the conceptual difficulties of including judicial protection standards in the autonomy claim. Such a compatibility review does not require recourse to art. 47.

III.2. JUDICIAL PROTECTION AS A PART OF THE COMMON COMMERCIAL POLICY

In Opinion 1/17, the Court of Justice acknowledged the absence of any impact of art. 47 on the non-Member State with which the Union negotiates an international agreement. The Court held that "while Canada is indeed not bound by those safeguards, the Union is so bound and therefore cannot, as follows from the case-law cited in paras 165 and 167

⁵³ See case T-292/19 *Pshonka v Council* ECLI:EU:T:2020:449 paras 81 ff. L Grzegorzczuk, 'Contentieux des mesures restrictives: le contrôle des faits par le juge de l'Union, entre règles spécifiques et principes transversaux' (2016) *Revue des affaires européennes* 479; I Govaere, 'The Importance of International Developments in the Case Law of the Court of Justice: Kadi and the Autonomy of the EU Legal Order' (2009) Research Papers in Law College of Europe aei.pitt.edu.

of the present Opinion, enter into an agreement that establishes tribunals with the jurisdiction to issue awards that are binding on the Union and to deal with disputes brought before them by EU litigants if those safeguards are not provided".⁵⁴

As, on the one hand, the paragraphs to which the Court refers concern the compatibility of an international agreement with the guarantees enshrined in the Charter, on the other hand, art. 47 does not bind Canada, and given the principle of reciprocity,⁵⁵ any guarantees of judicial protection must be verified on the basis of substantive provisions of primary EU law. It should be noted that establishing an independent, multilateral investment court and the right of access to it are part of the Commission's negotiating mandate.⁵⁶ However, that negotiation is based on art. 207 TFEU. Assessing the guarantee of a right of access to an independent court from the perspective of CETA's compatibility with said art. 207 TFEU would circumvent the conceptual difficulties of including art. 47 in the Opinion procedure.

Indeed, in Opinion 1/17, the Court of Justice found that the objective of establishing CETA tribunals, which guarantee non-discriminatory treatment and protection of investments, is "to give complete confidence to the enterprises and natural persons of a Party that they will be treated, with respect to their investments in the territory of the other Party, on an equal footing with the enterprises and natural persons of that other Party, and that their investments in the territory of that other Party will be secure".⁵⁷ As a consequence "the independence of the envisaged tribunals from the host State and the access to those tribunals for foreign investors are inextricably linked to the objective of free and fair trade that is set out in art. 3(5) TEU and that is pursued by the CETA".⁵⁸

The Court's reference to the "free and fair trade" objective links judicial protection to the competence question, thereby including the right of access to an independent tribunal in the Court's compatibility review with regard to the effectiveness of the common commercial policy. While access to the CETA tribunals may also be reviewed in conjunction with the principle of equal treatment,⁵⁹ the standards of judicial independence can enter substantive primary EU law through their absorption by the Union's objectives of the common commercial policy. Of course, Opinion 2/15 makes clear that foreign indirect investments do not fall under art. 207 TFEU.⁶⁰ However, the competence of the Union to approve provisions establishing investment courts stems from the main objective of the investment protection agreements themselves, which is a trade objective. Thus, it is on

⁵⁴ Opinion 1/17 cit. para.192.

⁵⁵ *Supra*, footnote 49.

⁵⁶ *Supra*, footnote 10.

⁵⁷ Opinion 1/17 cit. para. 199.

⁵⁸ *Ibid.* para. 200.

⁵⁹ Indeed, Belgium asked the Court whether Section F of Chapter 8 is compatible with art. 47 of the Charter, considered in isolation or in conjunction with the principle of equal treatment.

⁶⁰ Opinion 2/15 cit. para. 244.

the substantive legal basis of art. 207 TFEU that the Council adopted decisions related to the position of the Union in the framework of the CETA Joint Committee that elaborated the functional rules for CETA tribunals.⁶¹ It is, thus, consistent with the Court's global approach to the common commercial policy, as confirmed in Opinion 2/15, to include judicial protection standards in art. 207 TFEU.

Indeed, pursuant to the global approach of external action objectives arising out of art. 21 TEU and art. 205 TFEU (which led the Court, in Opinion 2/15, to include sustainable development objectives in the scope of the common commercial policy),⁶² it could be affirmed that investment tribunals established in the framework of the common commercial policy need to meet the requirements of effective judicial protection. In that manner, consistency between external action and internal values would be preserved, as the Union acts as a global actor, promoting the rule of law through its trade policy.

IV. CONCLUDING REMARKS

The emphasis on art. 47 of the Charter in Opinion 1/17, as a separate ground in the compatibility review, has a constitutional dimension. Once again, as in *Achmea*, the specific characteristics of the EU legal order, especially with regard to the affirmation and development of the rule of law, are analysed in the investment protection legal framework.

However, art. 47 has a specific role and function in the EU legal order, establishing the guarantees for a composite judicial system at the basis of the principle of autonomy. Preserving the specific function of art. 47 in the balance between effectiveness, procedural protection, and national autonomy in the EU legal order is also of utmost importance in the current rule of law crisis.

⁶¹ Proposal COM(2019) 457 final of the Commission of 11 October 2019 for a Council Decision on the position to be taken on behalf of the European Union in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a decision setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal; Proposal COM (2019) 458 final of the Commission of 11 October 2019 for a Council Decision on the position to be taken on behalf of the European Union in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a decision on the procedure for the adoption of interpretations in accordance with arts 8.31.3 and 8.44.3(a) of CETA as Annex to its Rules of Procedure; Proposal COM (2019) 459 final of the Commission of 11 October 2019 for a Council Decision on the position to be taken on behalf of the European Union in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a decision setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal; Proposal COM (2019) 460 final of the Commission of 11 October 2019 for a Council Decision on the position to be taken on behalf of the European Union in the Committee on Services and Investment established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of rules for mediation for use by disputing parties in investment disputes.

⁶² Opinion 2/15 cit. paras 141-167.

This *Article* affirms that external relations are outside the scope of art. 47 of the Charter. This does not however mean that the principle of judicial protection and the right of access to an independent tribunal have only an internal EU law dimension. The Union's contribution to the development of the WTO dispute settlement mechanism and to the establishment of permanent investment courts confirms that promoting the rule of law is part of the Union's external action. The Court of Justice could assess the CETA's compatibility with the right of access to an independent tribunal without having recourse to art. 47 of the Charter, on the ground either of the principle of autonomy or of the compatibility with the substantive provisions of the common commercial policy. This *Article* argues that while judicial protection as part of the autonomy claim could meet some conceptual limits, promoting judicial protection as part of the common commercial policy could reinforce the perception that the Union is a credible and influential actor in international trade and in international procedural law.



ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

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INVESTMENT COURT JUDGES AND THE “RIGHT TO AN INDEPENDENT TRIBUNAL”: AN ASSESSMENT OF THE QUALIFICATION AND ETHICS RULES IN EU FTAs IN LIGHT OF OPINION 1/17

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ABSTRACT: This *Article* examines an often overlooked aspect of Opinion 1/17 issued by the Court of Justice of the European Union (CJEU): the ethics and qualifications of the new CETA adjudicators. The subject was raised as an additional concern by Belgium in the context of its request for an opinion from the CJEU. More specifically, Belgium asked whether the prospective ethics and qualifications framework applicable to the newly-established investment tribunal members was compatible with the EU legal order, in particular the right to access an independent tribunal, enshrined under the EU Charter of the Fundamental Rights. After laying forth the provisions contained in the CETA, as well as the EU – Vietnam and EU – Singapore Investment Protection Agreements (IPAs), the *Article* analyses the Opinion text in juxtaposition with the legal ethics rules, found in treaties or guidelines worldwide, governing the domain of international adjudicator ethics. The *Article* in particular flags some controversies linked to the Court's analysis of the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration and its (now suspended) referral in the CETA text in connection with the ethics framework governing international judges.

KEYWORDS: international arbitration – European Union – Canada – independence – impartiality – ethics.

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I. INTRODUCTION

This *Article* examines the ethics rules and Codes of Conduct as included in the Comprehensive Economic and Trade Agreement between Canada and the European Union (EU) (CETA)¹, the EU – Vietnam Investment Protection Agreement (EUVIPA)², as well as the EU – Singapore Investment Protection Agreement (EUSIPA – hereinafter collectively referred to as the “Agreements”)³ in the light of recent Opinion 1/17⁴ of the Court of Justice of the European Union (EU). First, it lays forth the provisions in these agreements. In order to avoid repetition, the *Article* generally refers to relevant provisions of CETA, then compares the similarities and differences in EUVIPA and EUSIPA. It juxtaposes the principles and implications contained in these new Agreements with the arguments raised by Belgium and the CJEU in the context of the latter’s Opinion 1/17. The primary issue attached to the ethics and qualifications of prospective Investment Court System (ICS) judges relates to whether the establishment of an investment court complies with the fundamental right to access to an independent tribunal.⁵ The *Article* ultimately assesses whether the ethics rules and qualification requirements are sufficient to guarantee this right, particularly noteworthy as an issue raised by Belgium with its request for the Opinion and subsequently addressed by the Court in its Opinion 1/17.

It also takes into account the recent proposal submitted by the European Commission to the Council with regard to a new Code of Conduct for CETA, overriding the earlier structure largely relying on the International Bar Association (IBA)’s Guidelines (which highlight arbitrators, and not judges, as adjudicators).⁶ While Opinion 1/17 was indeed rendered in connection with the CETA framework only, the structure laid forth below demonstrates that seemingly similar, if not identical, considerations have been driving the making of each Code of Conduct, in their projected final versions. Most conclusions reached by the CJEU while answering the question of access to an independent tribunal *vis-à-vis* the framework established under CETA will therefore apply to EUVIPA and EUSIPA by analogy, due to near-identical provisions in each of these agreements.

¹ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [14 January 2017] 23.

² EUVIPA Council Decision (EU) 2019/1096 of 25 June 2019 on the signing, on behalf of the Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part 1-2.

³ EUSIPA Council Decision (EU) 2018/1676 of 15 October 2018 on the signing, on behalf of the European Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part 1-2.

⁴ Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341.

⁵ This right was enshrined in art. 47 of the Charter of Fundamental Rights of the European Union [2012] (hereinafter Charter).

⁶ International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (IBA 2014), hereinafter IBA Guidelines.

II. PROVISIONS ON ETHICS AND QUALIFICATIONS OF ADJUDICATORS IN THE NEW GENERATION FTAs

II.1. CETA, EUVIPA AND EUSIPA: WHAT IS ACROSS THE BOARD?

A “Tribunal” is established pursuant to art. 8.27 of CETA. In subsequent paragraphs, the provision further stipulates that fifteen “Members of the Tribunal” shall be appointed *ex ante*. Its para. 4 notes that “the Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements”.⁷

Art. 8.30, entitled “Ethics”, lists a number of features and qualifications that must be possessed by the Members of the Tribunal. According to the first paragraph of this article, the Members

“[...] shall be independent. They shall not be affiliated with any government. They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted [...] In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement”.⁸

Art. 3.9 of the EUSIPA similarly regulates the constitution of a first instance tribunal.⁹ Para. 4 outlines the qualifications required from the Members of the Tribunal: *a)* they shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence; *b)* they shall have specialized knowledge of, or experience in, public international law; and that *c)* it is desirable that they have expertise, in particular, international investment law, international trade law, or the resolution of dispute arising under international investment or international trade agreements.¹⁰

⁷ Art. 8.27(4) of CETA cit.

⁸ *Ibid.* art. 8.30.

⁹ Art. 3.9 of EUSIPA cit.

¹⁰ *Ibid.*

Finally, except for minor wording differences¹¹ and two distinct elements under the Ethics provision, the corresponding arts in EUVIPA (3.38¹² and 3.40¹³) are identical to that in CETA.¹⁴ One possibly important divergence between the two agreements is that whereas CETA only refers to “this or any other international agreement” excluding investment disputes under domestic laws of the EU and Canada, EUVIPA bars the Members to act “as counsel or party-appointed expert or witness in any pending or new investment dispute” both in international and domestic law. Another difference is that EUVIPA requires that its Members comply with the Code of Conduct under Annex 11 and not the IBA Guidelines or a similar set of rules.

II.2. CODES OF CONDUCT IN THE AGREEMENTS

As indicated, the Agreements contain either referenced (external sets of rules) or integrated (treaty annexes) Codes of Conduct for its Members. Up until the proposal submitted by the European Commission concerning the adoption of a new Code of Conduct in October 2019, the CETA only contained a reference to the IBA Guidelines instead of a dedicated Code of Conduct.¹⁵ While this is no longer expected to be the case, Opinion 1/17 predates the October 2019 proposal and therefore addresses the IBA Guidelines as the CETA Code of Conduct. The IBA Guidelines are soft law instruments that can be adopted voluntarily by disputing (or contracting) parties as General Standards (GS) to regulate the conduct of arbitrators. In its standard text,¹⁶ each GS is accompanied by an “Explanation” that elaborates on the content and meaning of the said GS.

At first glance, the IBA Guidelines appear to be more detailed in comparison with the Code in the EUVIPA and the proposed Code for the CETA. Under the explanation of the GS 2 concerning the conflicts of interest and situations in which an arbitrator’s impartiality and independence is in question, it expressly offers a definition for “impartial” and “independent” by way of referring to art. 12 of the UNCITRAL Model Law.¹⁷ The GS 2 further explains that doubts regarding the impartiality of an arbitrator “are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances,

¹¹ One such difference is that whereas EUVIPA requires “independence beyond doubt”, CETA refers to “independent”.

¹² Art. 3.38 of EUVIPA cit.

¹³ *Ibid.* art. 3.40.

¹⁴ They differ with regard to the number of appointed judges, as well as their terms; however, the predetermined qualification requirements stated under art. 8.27(4) is identical to those under art. 3.38(4) EUVIPA cit.

¹⁵ European Commission, News of 11 October 2019 Commission presents procedural proposals for the Investment Court System in CETA, trade.ec.europa.eu; IBA Guidelines cit.

¹⁶ *Ibid.*

¹⁷ Art. 12 of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter UNCITRAL Model Law) [2006].

would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case”.¹⁸

The GS refers to non-exhaustive lists of conflicts of interests, such as the ‘Non-Waivable Red List’ annexed to the IBA Guidelines, which illustrate situations where the conflict of interest is so substantial that the parties cannot allow the arbitrator who fits one of these situations to perform as an adjudicator.¹⁹ The list, *inter alia*, includes the following situations: (a) “the arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity”; (b) “the arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case”; and (c) “the arbitrator or his or her law firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her law firm derives significant financial income therefrom.”²⁰ The Guidelines also contain another list of conflict of interests (Waivable Red List), but those that can be overlooked by the parties if they so wish. The IBA Guidelines aim to capture possible specific situations, possibly in an attempt to address what its drafters may have perceived as common or conceivable situations in international economic disputes.²¹

The GS 6, entitled “Relationships”, brings an interesting angle to these rules by asserting that

the arbitrator is in principle considered to bear the identity of his or her law firm, but when considering the relevant facts or circumstances to determine whether a potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator’s law firm, if any, and the relationship of the arbitrator with the law firm, should be considered in each individual case. The fact that the activities of the arbitrator’s firm involve one of the parties shall not necessarily constitute a source of such conflict [...]²²

The GS 6 does not only recognize the possibility that the arbitrators (or in the context of the CETA, the Members of the Tribunal) could be lawyers affiliated with law firms. It also specifically notes that the existence of such affiliation (even with a law firm whose activities involve one of the disputing parties) cannot be considered as a *prima facie* conflict of interest. This acknowledgment has also been clarified in the Explanation for the GS 6, which observes (largely from an arbitral perspective) that “[t]here is a need to balance the interests of a party to appoint the arbitrator of its choice, who maybe a partner at a large law firm, and the importance of maintaining confidence in the impartiality and

¹⁸ GS 2 of IBA Guidelines cit.

¹⁹ The reference to “Non-Waivable” refers to parties’ ability to waive any conflict of interest present for an arbitrator. Likewise, the IBA Guidelines also include a list of “waivable” situations, which can be overlooked by the parties, if they give mutual consent.

²⁰ GS 2 of IBA Guidelines cit.

²¹ This goal is express in the part II of the IBA Guidelines, entitled “Practical Application of the General Standards”.

²² GS6 of IBA Guidelines cit.

independence of international arbitrators [...] the activities of the arbitrator's firm should not automatically create a conflict of interest."²³

The connection with other applicable rules, provisions and clarifications, such as the Non-Waivable Red List in the IBA Guidelines and art. 8.30 of the CETA is also noteworthy. Pursuant to all rules and standards regarding qualifications and eligibility of a Member of the Tribunal, Members who are affiliated with law firms should be able to maintain their relationship with their law firms, provided neither the Member nor their law firm regularly advises one of the disputing parties and extracts a significant financial gain (the Non-Waivable List). They must also not be acting as counsel, witness or expert under any other investment dispute.²⁴ Under these principles, as long as the Member is not personally involved, the affiliated law firm would be able to continue advising or otherwise working on other investment disputes. This being said, the Members, notwithstanding the existence of any affiliation with a law firm, would have to ascertain at all times that they are not involved, at any capacity, in the consideration of any other dispute that could potentially affect their impartiality or independence.

In comparison with the EUVIPA, EUSIPA and the proposed CETA Codes, the IBA Guidelines provide for a more (arbitrator-)specific framework, and clarify a few potential interpretative deadlocks by contextualizing notions. It expressly acknowledges that lawyers, in their practice, might assume multiple roles as counsel, experts, and adjudicators. It is noteworthy that the parties to CETA, by refraining from introducing any modifications or reservations to these 'arbitration-centric' guidelines *vis-à-vis* the new Tribunal put in place, had arguably considered it acceptable that the Members may continue their private practice during their term as appointed Members, subject to abovementioned conditions. Such express recognition and clarifications regarding "double-hatting"²⁵ does not exist under the EUVIPA and EUSIPA frameworks, and such affiliation *per se* with any law firm could, at least theoretically, serve as a basis for any disputing party claiming that the Member is biased, partial, or has the appearance of such.

Following the prospective adoption of the new Code proposed by the Commission, CETA will reaffirm its original, narrow reading of what kinds of "double-hatting" could be permitted. The current reference to the IBA Guidelines will be replaced by the CETA Code of Conduct, effectively replacing the elaborative framework applicable to issues such as disclosure obligations, independence and impartiality, as well as conflicts of interest. According to the Commission, the Code includes in particular

²³ *Ibid.* Explanation to GS6.

²⁴ Art. 8.30 of CETA cit.

²⁵ For a recent empirical analysis of double-hatting in investment arbitration, a phenomenon explained as "individuals [acting] sequentially and [...] simultaneously as arbitrator, legal counsel, expert witness, or tribunal secretary", see M Langford, D Behn and R Lie, 'The Revolving Door in International Investment Arbitration' (2017) JIEL 1.

“detailed rules of conduct applicable to candidates for appointment [...], in particular concerning of disclosure of their past and current activities [...]; detailed rules of conduct applicable to members [...] during [and] at the end of their term of office, including the prohibition of the exercise of specific duties or professions for a specified period after the end of their term of office; a sanction mechanism in the event of non-compliance with the rules of conduct which is effective and fully respects the independence of judicial power”.²⁶

As alluded to above, the proposed Code of Conduct is comparable to those of EUVIPA and EUSIPA. All Codes, *inter alia*, state that members shall be independent and impartial (in CETA Code, they shall also “appear to be independent and impartial”); shall avoid direct and indirect conflicts of interest; they shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism. They all prohibit members of their respective tribunals to incur any obligation and accept any benefit that would in any way interfere, affect or appear to affect their independence and impartiality. The CETA Code additionally notes that members shall not “enter into any relationship, or acquire any financial interest” in this regard.²⁷ CETA proposal does not include the abovementioned provision in EUVIPA concerning the members using their position “to advance any personal or private interests”, and instead specifically refers to financial interests as noted above. Furthermore, the new Code denotes that the members “shall not engage in *ex parte* contacts concerning the proceeding.”²⁸

III. OPINION 1/17 AND THE ETHICS AND QUALIFICATIONS OF MEMBERS OF ICS TRIBUNALS

III.1. THE ISSUES RAISED BY BELGIUM

On 7 September 2017, the Kingdom of Belgium made a request for an opinion, submitted to the Court. The request was as follows: “Is Section f (‘Resolution of investment disputes between investors and states’) of Chapter Eight (‘Investment’) of the [CETA] compatible with the Treaties [TEU²⁹ and TFEU³⁰], including with fundamental rights [emphasizing the Charter of Fundamental Rights of the EU]?”³¹

²⁶ Communication COM(2019) 459 final from the Commission of 11 October 2019 on the position to be taken on behalf of the EU in the Committee on Services and Investment established under CETA 2.

²⁷ art. 4 of CETA (Code of Conduct) cit.

²⁸ *Ibid.*

²⁹ Treaty on European Union (TEU) [2009].

³⁰ Treaty on the Functioning of the European Union (TFEU) [2009].

³¹ Opinion 1/17 cit. para. 1; Kingdom of Belgium Foreign Affairs, Foreign Trade and Development Cooperation Minister Reynders submits request for opinion on CETA (6 September 2017) diplomatie.belgium.be.

The request articulates a number of doubts expressed by Belgium. The first and foremost issue is unsurprisingly the question of “compatibility of the envisaged ISDS mechanism with the autonomy of the EU legal order”,³² a subject comprehensively dealt with in this Special Section. There have been no issues raised regarding the rules of ethics and qualifications applicable to the members of the ICS tribunals *vis-à-vis* the *autonomy* of the EU legal order *per se*. The request made by Belgium generally maintains that the Court “has exclusive jurisdiction over the definitive interpretation of EU law”, and therefore binding interpretations by an external court or adjudicatory organ is considered a potential threat to the EU’s legal autonomy. At its core, the Opinion concerns the prospective adjudicatory activities conducted by the tribunal members themselves. However, none of the primary arguments on the autonomy of the EU legal order relate to the ethics or qualifications of the appointees. Instead, the doubts raised by Belgium concern the rules on ethics and qualifications under the “right of access to an independent tribunal” – a principle enshrined under art. 47 of the Charter.³³ This *Article* (and this Section in particular) will therefore only focus on the impact of the rules on ethics and qualifications of tribunal members as addressed exclusively under Section III.C of the Opinion entitled ‘Doubts as to the compatibility of the envisaged ISDS mechanism with the right of access to an independent tribunal’.

Belgium put forth several arguments as to how the CETA framework might hinder the right of access to an independent tribunal. First argument relates to the difficulties of accessing the CETA Tribunal due to the distribution of fees and expenses related to disputes excessively burdening small and medium-sized enterprises.³⁴ The Court stipulated that “[T]he risk of being obliged to bear the entire costs in expensive proceedings might, according to the Kingdom of Belgium, deter an investor that has only limited financial resources from lodging a claim.”³⁵ Second, Belgium raised a few concerns regarding the method and procedure of remuneration for judges.

It argued that the facts that a) the CETA Joint Committee, as a so-called executive entity, was to decide on remuneration conditions might put the compatibility of the applicable rules “with the principles applicable in relation to the separation of powers”, and b) ICS judges would be paid a ‘monthly retainer fee’ depending on the number of working days dedicated to a dispute (as opposed to a fixed salary) might fail to “shield [the judges] from pressures aimed at influencing their decisions.”³⁶

Belgium raised a third set of concerns with regard to the appointment and removal of judges. Belgium remarked that appointments made by an executive “must necessarily take place following a recommendation by an independent authority”, and that “any decision to remove a judge must involve an independent body, be given in accordance with

³² *Ibid.* para. 46.

³³ Art. 47 of the Charter cit.

³⁴ Opinion 1/17 cit. para. 57.

³⁵ *Ibid.* para. 59.

³⁶ *Ibid.* para. 61.

a fair procedure that respects the rights of defence, and be open to an appeal before a higher judicial body.”³⁷

Finally and most importantly for the purposes of this *Article*, Belgium expressed further doubts with regard to the fact that judges “will have to comply with the IBA Guidelines, pending the adoption of a code of conduct”.³⁸ Belgium further stipulated that “since the IBA Guidelines are intended for arbiters and not for judges, they may contain standards of independence that are not adapted to those acting in a judicial capacity.”³⁹

III.2. THE COURT’S OPINION

The Court eventually delved into the question of whether the envisaged ‘ISDS mechanism’ was a) “judicial in nature and that are called on to resolve disputes between [...], in particular, private investors and States”, and b) compatible with the right to access to an independent tribunal in light of the request and subsequent submissions outlined above. Indeed, since art. 47 of the Charter will only apply to *judicial* organs, the Court’s categorization of the CETA Tribunal as such is of utmost importance.⁴⁰ As the first order of business, the Court asserted that the EU “must ensure [that] the tribunals that are established [pursuant to CETA] will [...] have characteristics of an accessible and independent tribunal.”⁴¹ According to the Court, notwithstanding the Parties’ classification of the CETA Tribunal as judicial or arbitral in nature, “those tribunals will [...] exercise judicial functions.”⁴² This being said, despite its categorization of the CETA Tribunal as a judicial organ for the purposes of the applicability of art. 47, the Court acknowledges that many rules and procedures contained in CETA in fact build upon the arbitral framework. It distinguishes this framework from the old one in connection with the appointment and permanency of its adjudicators, called “judges”. On this point, the Court also seems to emphasize on the ‘judges’ and their

³⁷ *Ibid.* para. 64-65.

³⁸ *Ibid.* para. 67. It was known in advance that eventually, IBA Guidelines would be replaced.

³⁹ *Ibid.* para. 68.

⁴⁰ EU law guarantees right to an effective remedy and to a fair trial before a *court*. Whether or not an adjudicative body qualifies as a ‘tribunal’ (and is therefore subject to art. 47 of the Charter) depends on whether it is a) established by law, b) permanent, c) independent and impartial, d) include an *inter partes* procedure, e) have compulsory jurisdiction, and f) apply rules of law. See, Explanations Relating to the Charter of Fundamental Rights; European Union Agency for Fundamental Rights and Council of Europe, *Handbook of European law relating to access to justice* (January 2016, Luxembourg) 30; Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta v Autoridade Tributária e Aduaneira* ECLI:EU:C:2014:1754; Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* ECLI:EU:C:1997:413 para. 23.

⁴¹ Opinion 1/17 cit. para. 191.

⁴² *Ibid.* para. 197.

exercise of ‘judicial functions’, and the task of applying “rules of law”, exercising “their functions autonomously and will issue decisions that are final and binding.”⁴³

The Court then contended that for CETA to be deemed compatible with the right to access to an independent court, it should give “complete confidence to the enterprises and natural persons of a Party that they will be treated [...] on an equal footing with the enterprises and natural persons of that other Party, and that their investments in the territory of that other Party will be secure.”⁴⁴ It is further added that “the independence of the envisaged tribunals [...] and the access to those tribunals for foreign investors are inextricably linked to the objective of free and fair trade [...] pursued by the CETA.”⁴⁵

After elaborating further on the accessibility of the CETA tribunals, the Court eventually focused on the independence of the envisaged dispute settlement framework *vis-à-vis* the aforementioned right to access to justice. It distinguished between what it called “the external aspect” of independence, whereby a judge is expected to be free from outside influence; as well as “the internal aspect”, whereby a judge is expected to have “an equal distance” from the parties as well as their interests.⁴⁶

For the external aspect, the Court pointed out that the CETA text ensures that the judges are appointed for a fixed term, that they have specific expertise, and that they will receive a remuneration corresponding to the importance of their duties. It further noted that the removal of judges, pursuant to the CETA, can be relevant only where a member’s behaviour “is inconsistent with the obligations [set out in CETA], in particular the prohibition of taking instructions or being in a position of conflict of interest.”⁴⁷ Same guarantees exist for the appeal tribunal.

⁴³ *Ibid.* para. 197. The Court further deems the jurisdiction of CETA tribunals “compulsory” for the respondent as well as the claimant, only if the latter choose to rely on the provisions on CETA (paras 90 and 198) While the CETA tribunals are surely not arbitral tribunals, the *ratione voluntatis* or the so-called voluntary jurisdiction, largely emulates arbitration and its consent-based formation. In many IIAs, states indeed consent to arbitration and specific *fora*. However, this is not sufficient for establishing jurisdiction – let alone declaring that CETA has compulsory jurisdiction *as is*. Therefore, there is no jurisdiction whatsoever until the claimant, in this case foreign investor, chooses to bring a claim against the host state, agreeing to the jurisdictional “offer”. This contrasts an inter-state international court, where states accept jurisdiction of a court *vis-à-vis* disputes among themselves from the outset, thereby “completing” the *voluntatis* cycle. As noted elsewhere in detail, there is no jurisdiction without the submission of a foreign investor at all. Thus, deeming the CETA tribunals as having “compulsory” jurisdiction calls for further qualification of such statement. It surely can have compulsory jurisdiction when the parties both consent to it, however, there is no standing compulsory jurisdiction without a claim. UNCTAD, *Dispute Settlement: International Centre for Settlement of Investment Disputes, Consent to Arbitration* (United Nations 2003) unctad.org 5.

⁴⁴ Opinion 1/17 cit. para. 199.

⁴⁵ *Ibid.* para. 200.

⁴⁶ The internal and external aspects of independence is well-embedded in the Court’s practice. See, Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117 paras 43-44; Case C-216/18 *PPU Minister for Justice and Equality v LM (Deficiencies in the system of justice)* ECLI:EU:C:2018:586 paras 63-65; Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531 paras 71–73.

⁴⁷ Opinion 1/17 cit. para. 225.

The Court generally examined the CETA Joint Committee, its role as an "executive" and whether any of its tasks, prescribed under the CETA, undermines the "external" independence (*inter alia*, independence from the CETA parties). The Court found what while the CETA Joint Committee "has the power to adopt, by mutual consent, decisions that are binding, such as [...] decisions on the interpretation of that agreement [...] without any breach of the requirements under art. 47 of the Charter and, in particular, the requirement of independence."⁴⁸ These decisions are equated with art. 31(3) of the Vienna Convention, which stipulates that while interpreting an international treaty, attention should be given to "any subsequent agreement between the parties".⁴⁹ Ultimately, it finds nothing that might hinder this external independence within the framework of the CETA Joint Committee's tasks and powers. This is immediately followed by a caveat: "it is important [...] that interpretations determined by the CETA Joint Committee have no effect on the handling of disputes that have been resolved or brought prior to those interpretations. If it were otherwise, the CETA Joint Committee could have an influence on the handling of specific disputes and therefore participate in the ISDS mechanism."⁵⁰

The next point of elaboration in the Opinion was the "internal aspect" of the requirement of independence, "in particular impartiality".⁵¹ The Court emphasized that an equal distance to the parties of the dispute as well as the absence of any interest in the outcome of the proceedings of the dispute has to be maintained. By reference to three-member panels (one from each Contracting Party, and one from a third country), as well as the IBA Guidelines' requirements on impartiality and independence, the Court dismissed Belgium's concerns on whether the mode of payment, a retainer's fee as opposed to a regular salary, could hinder the impartiality of the members of the CETA Tribunal.⁵²

Other concerns, such as those related to government payments to Tribunal members, were also addressed. The Court eventually concluded that Members "who receive remuneration from a State but are not however involved [...] in the determination of the policies of the government of that State" should be eligible to act as members without any repercussions or risk of removal, such as professors at public universities.

Before eventually ruling that "the agreement envisaged [CETA] is compatible with the requirement of independence", the Court briefly refers to the IBA Guidelines and the fact that they provide guidance and rules on personal interests with regard to the outcome of

⁴⁸ *Ibid.* para. 234.

⁴⁹ Art. 31(3) of the Vienna Convention on the Law of Treaties (1980).

⁵⁰ Opinion 1/17 cit. para. 236. The issue of *ex post* clarifications provided by treaty parties has stirred immense controversy, particularly in the context of the July 2001 Notes of Interpretation issued by the North American Free Trade Agreement (NAFTA) Free Trade Commission while arbitrations directly relevant to the reaffirmations continued. It was noted that the "reaffirmations" by the states were so fundamental that they effectively constituted amendments. C Brower II, 'Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105' (2005) *VaJIntL* 347.

⁵¹ Opinion 1/17 cit. para. 238.

⁵² *Ibid.* paras 238-239.

the dispute. Most notably, the Court completely sidesteps the Belgian arguments regarding the compatibility of the IBA Guidelines with judges as opposed to arbitrators, in particular its seemingly generous take on double-hatting and outside activities, as detailed above.

IV. REFLECTIONS ON THE OPINION IN LIGHT OF THE AGREEMENTS' FRAMEWORK

IV.1. ARBITRATION *VERSUS* (HYBRID) COURT

The arbitration-based dispute settlement system embedded within the current IIA network has come under attack in recent years for a variety of reasons. Some of the criticisms include the inconsistency of awards, incoherent interpretations and the consequent unpredictability and uncertainty; excessive curbing effect on states' right to regulate (due to extensive protection granted to foreign investors); the perceived risk of "forum-shopping" activities by foreign investors in order to be covered by an (more favourable) IIA;⁵³ a general silence on, or the outright lack of, transparency in arbitral proceedings; legal ethics concerning adjudicators, potential conflicts of interests of arbitrators as "double-hatters", and so on.⁵⁴ Last but not least, the appropriateness of arbitration itself as the method of settlement of disputes with public interest angles has been a long-running critique of the current framework.⁵⁵ Opinion 1/17 itself and the preceding Belgian concerns are consequential off-products of these collective and systemic criticisms and shortcomings, as well as their perceived effect on the EU legal order.

It is in the face of such criticism that the EU has sought to overhaul the ISDS system in favour of an institutionally-grounded and permanent mechanism, as is also evident from its position at the WGIII proceedings with regard to the ICS, and an eventual Multilateral Investment Court (MIC), stemming from its Union-wide foreign investment policy.⁵⁶ In a 2017 submission to the WGIII, the Union justified the use of permanent bodies to settle investment-related disputes as follows:

⁵³ LR Helfer defines "forum-shopping" as follows: "it is not limited to 'an individual petitioner's strategic choice to litigate her claims in one of several available adjudicatory fora', but also 'other consequential choices engendered by the concurrent, overlapping jurisdiction of [...] treaties and tribunals, including attempts by petitioners to litigate identical or related claims in multiple fora at the same time, and attempts to engage in sequential litigation of claims'. L. Helfer, 'Forum Shopping for Human Rights' (1999) UPaLRev 285; Opinion 1/17 cit. para. 240.

⁵⁴ European Parliamentary Research Service, *From Arbitration to the Investment Court System (ICS): The Evolution of CETA Rules* (European Union 2017) 9.

⁵⁵ See generally G Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2008).

⁵⁶ This policy is part and parcel of the EU's overall position at the Working Group III proceedings, as well as its bilateral negotiations with other countries. In January 2020, in its resumed 38th session, the WGIII extensively discussed issues related to, *inter alia*, a permanent, multilateral investment court and the envisaged appellate body that would be embedded within this court. The EU is one of the strongest proponents of more permanency, and its support for the appellate body stems from the appellate mechanism's perceived role in

“Permanent bodies, by their very permanency, deliver predictability and consistency and manage the fact that multiple disputes arise, since they can elaborate and refine the understanding of a particular set of norms over time and ensure their effective and consistent application. [...] When appointing adjudicators in a permanent setting, thought is given to a long-term approach. States have an interest that public actions can be taken and at the same time individual interests protected and they know that the balance between these interests is to be maintained in the long term. Permanent bodies with full-time adjudicators also free the adjudicators from the need to be remunerated from other sources and typically provide some form of tenure. This prevents the adjudicators from coming under pressure to take short-term considerations into account and ensures that there are no concerns as to their impartiality”.⁵⁷

As a result, the new EU investment agreements, all of which contain a *judicial* mechanism that borrows from both arbitral and international court practice, push for more permanency; and seek to achieve more consistency, accountability, as well as more reflexivity *vis-à-vis* the public and its investment-related concerns. The new Codes of Conduct are the very specific response the European Commission has devised to address these issues. Codes are devised as a moral compass for the adjudicator (as well as other actors such as counsel and experts) and they ensure that the adjudicators conduct their duties independently and impartially. As Rogers observes, “vague, open-ended disclosure standards and informal reputational sanctions are no longer a sufficient substitute for formal regulation”⁵⁸ in ISDS, and that the meanings of “independent” and “impartial” have evolved “in response to perceived changes in party expectations and the market for dispute resolution services”.⁵⁹ Given the shift from *arbitration* to a *more permanent mode of dispute settlement* is a perceived “remedy”, it only follows that this shift brings about another shift from *arbitrators* to *judges* as adjudicators⁶⁰ – and a recontextualization of these Codes from the judges’ perspective is therefore necessary.

While it is crucial to flag these topical debates and public controversies, it must also be noted that Opinion 1/17 does not delve into the question of whether a court, or an arbitration, is more fitting for the settlement of investor-State disputes *vis-à-vis* the authority through which they exercise adjudicatory functions. It simply is not a core element in Opinion 1/17 in its own right, and this general issue was not raised by Belgium outside the context of the impact of an external judicial organ’s (the CETA Tribunal) interpretation of the EU law.

bolstering consistent and correct awards. See, UNCITRAL, *Working Group III Submission from the European Union and Its Member States*, A/CN.9/WG.III/WP.159 and Add.1 uncitral.un.org.

⁵⁷ UNCITRAL, Working Group III (WGIII), Submission from the European Union Possible reform of investor-State dispute settlement (ISDS) of 12 December 2017 undocs.org.

⁵⁸ C Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 60.

⁵⁹ *Ibid.* 67.

⁶⁰ This is a distinction flagged by Giorgetti and Abdel Wahab in their draft working paper submitted to the WGIII Academic Forum in October 2019. C Giorgetti and M Abdel Wahab, ‘A Code of Conduct for Arbitrators and Judges’ (2019) www.jus.uio.no.

IV.2. ARBITRATORS *VERSUS* “MEMBERS OF TRIBUNAL” (OR JUDGES)

Having explicit Codes of Conduct governing international adjudicators tasked to settle investor-State disputes is a relatively new idea. Generally, one can observe that the current IIA system spanning thousands of treaties does not provide for a comprehensive normative framework on ethics and qualifications on adjudicators. In the absence of such a framework, the Codes of Conduct envisaged in the new EU FTAs represent “an advance in terms of systematization, visibility, transparency and accountability”⁶¹ not only for the adjudicators themselves, but also for the institutional framework constructed around them. The devised Codes of Conduct embedded within the proposed ICS, represents “a rapprochement to highly critical public opinion”.⁶²

Most Codes of Conduct available to disputing parties, particularly those tailored for arbitration such as the IBA Guidelines and CI Arb Code⁶³, are devised and engineered as soft law instruments, and their application is left at the discretion of the disputing parties. These rules, while different in their exact wording, generally maintain that the adjudicators possess “the required degree of independence and impartiality”, both in appearance and in fact.⁶⁴

What this *required* or *expected* degree threshold for independence and impartiality entails for arbitrators on the one hand, and judges on the other, is not immediately clear.⁶⁵ The assessment of the independence and impartiality of an adjudicator should take into account whether the adjudicator is, for instance, a practitioner acting as a party-appointed arbitrator, or a government-appointed judge at an international institution. It is uncontroversial that certain requirements applicable to arbitrators and judges overlap; such as not being affiliated to a government, not taking instructions from a disputing party, or not having vested financial interest in one of the parties. Given the source and nature of their adjudicatory authority, what kinds of actions could constitute, at the least, an appearance of impartiality for an *ad hoc* arbitrator and a permanent judge may not always be the same. Over the years, several international courts and arbitration institutions have devised provisions addressing these matters, and they seem to indicate that different thresholds exist for international arbitrators and judges.

⁶¹ K Fach Gomez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (Springer 2019) 191.

⁶² *Ibid.* 9.

⁶³ The Chartered Institute of Arbitrators (CI Arb), ‘Code of Professional and Ethical Conduct for Members’ (CI Arb Code) October 2009.

⁶⁴ Rule 3 (Conflicts of Interest) of CI Arb Code cit.

⁶⁵ For a more detailed account of this discussion, see G Ünüvar and T Kreft, ‘Impossible Ethics? A Critical Analysis of the Rules on Qualifications and Conduct of Adjudicators in the New EU Investment Treaties’ in G Ünüvar, J Lam and S Dothan (eds) *Permanent Investment Courts: The European Experiment* (Special Issue European Yearbook of International Economic Law) (Springer 2020) 119.

For instance, art. 16 of the Statute of the International Court of Justice states that “[n]o members of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.”⁶⁶ The subsequent art. 17 notes that “[n]o member of the Court may act as agent, counsel, or advocate in any case.”⁶⁷ While the Statute does not provide further explicit guidance on what would qualify as such, it is accepted that the judges *a)* must give precedence to their duties as ICJ judges, and *b)* should not accept appointments concerning cases that might be submitted to the ICJ later on.⁶⁸ However, seeing it a tradition dating back to the Permanent Court of International Justice, the ICJ had held the view that “a limited participation of Judges in other judicial or quasi-judicial activities of an occasional nature” as well as “occasional appointments as arbitrators” of its judges were not prohibited.⁶⁹ This being said, the Court has also asserted that it “will continue to keep under review any questions that may arise of their compatibility of the functions of the judges with the [SICJ] and with their supervening obligations.”⁷⁰

According to a November 2017 report by Bernasconi-Osterwalder and Brauch, “at least 7 current ICJ judges and 13 former ICJ judges have worked – or are currently working – as arbitrators [...] [t]hose 20 individuals were appointed at least 92 times, either during or before the start of their ICJ terms, and served as arbitrators in at least 90 cases while sitting as ICJ judges [corresponding to] roughly 10 per cent of all known investment treaty cases”.⁷¹ The report further asked whether their “simultaneous role as ICJ judge and arbitrator affect their perceived and actual independence and impartiality”, and observed that this practice “appears to entangle the ICJ in situations that undermine its reputation for independence as the highest authority on public international law.”⁷² This warning seems to have resonated with the Court. In the Seventy-Third Session of the UN General Assembly on October 2018, the President of the ICJ Abdulqawi A. Yusuf said the following:

“Over the years, the Court has taken the view that, in certain circumstances, its Members may participate in arbitration proceedings. However, in light of its ever-increasing workload, the Court decided a few months ago to review this practice and to set out clearly defined rules regulating such activities. As a result, Members of the Court have come to the decision last month, that they will not normally accept to participate in international

⁶⁶ Art. 16 of the Statute of the International Court of Justice (SICJ).

⁶⁷ *Ibid.* art. 17.

⁶⁸ UN Secretary-General, Report of the Secretary-General Conditions of service and compensation for officials other than Secretariat officials, Members of the International Court of Justice of 2 November 1995, UN Document A/C.5/50/18 () www.un.org paras 31-32.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* para. 33.

⁷¹ N Bernasconi Osterwalder and M Brauch, ‘Is “Moonlighting” A Problem? The Role of ICJ Judges in ISDS’ (2017) International Institute for Sustainable Development (IISD) Commentary 1.

⁷² *Ibid.* 5.

arbitration. In particular, they will not participate in investor-State arbitration or commercial arbitration".⁷³

While Mr. Abdulqawi refers only to "its ever-increasing workload" while explaining why the Court decided as such, the emphasis on investor-State arbitration and commercial arbitration indicates that these *fora* are now expressly considered to be incompatible with the Court's and its judges' practices, even if they are occasional. Given ICJ judges are expected, at all times, to prioritize their Court duties as opposed to every other professional engagement, the Court has possibly contended that the time dedicated to ISDS cases might in fact curb the time spent on ICJ cases not only going against the long-held conditions by the Court, but also the high quality expected from the ICJ rulings. In any case, it is clear that commercial and investment arbitrations called for specific mention and an explicit and clear stance on the side of the Court. It is possible that the involvement of ICJ judges in investor-State cases bear the risk of creating an impression of bias.

This approach towards "other professional engagements" appears less stringent in some Codes prepared by bar associations or arbitral institutions, applicable to arbitrators. A case in point is the IBA Guidelines outlined above, and it is particularly relevant as it was the principal ethics guideline for the CETA prior to the proposed Code in October 2019. As noted, the IBA Guidelines GS 6 explicitly states that "[t]he arbitrator is in principle considered to bear the identity of his or her law firm" and that "[t]he fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure."⁷⁴

This explanation is a big departure from the conditions applicable to the ICJ judges, who are, as is evident from the recent limitations imposed on them *vis-à-vis* arbitral appointments, expected not to engage in a broad spectrum of extra-Court conduct. They cannot engage in activities of professional nature – let alone being "in principle considered to bear the identity of his or her law firm".

In arbitration, the fact that a selected arbitrator performs other professional, legal or commercial actions is not only permitted, it is a presupposition and often a default acknowledgment found in voluntary texts set to regulate the ethics of these adjudicators. A judge, appointed by the state to an international court, as the ICJ framework exemplifies, not only primarily identifies as a judge of that institution, but is also expected not to take upon any other professional engagements, and their tasks as ICJ judges will always take precedence. This does not mean that parallel professional engagements in case of arbitrators cannot, under any circumstances, create an impression of bias; however, the threshold will arguably be more permissive and accommodating of the fact that arbitrators are ad hoc appointees. A complete detachment from the rest of the legal practice in favour of arbitral appointments, unless prompted by personal motivations, is not an expectation one might

⁷³ Speech by H.E. Mr Abdulqawi A Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly, 25 October 2018 www.icj-cij.org 11.

⁷⁴ GS 6 of IBA Guidelines cit.

have from an arbitrator. Upon this contextual difference, what might constitute “an appearance of impartiality and independence” might differ in case of an arbitrator and an international court judge. More specifically, the fact that an arbitrator works as a lawyer in a law firm is not a *prima facie* violation and does not create an impression of bias or partiality, pursuant to the GS 6 of the IBA Guidelines. An ICJ judge spontaneously working as a lawyer and principally identifying with his or her law firm would arguably create that impression, particularly in light of the recent views on arbitral appointments.

As the CJEU refers to the International Criminal Court (ICC) as an example in its Opinion,⁷⁵ a brief look at its framework is also informative. The Code of Ethics for the ICC judges is similarly vague, but it bears the mark of prioritization of its judges’ activities at the court. Art. 7, for instance, notes that “[j]udges shall act diligently in the exercise of their duties and shall devote their professional activities to those duties.”⁷⁶ Art. 10 entitled “Extra-judicial activity” bars judges from engaging “in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the Court, or that may affect or may reasonably appear to affect their independence and impartiality.”⁷⁷ Furthermore, judges “shall not exercise any political function”.⁷⁸

Last but not least, emphasis must be made on the persistence and perpetual relevance of this distinction in international law. The perception of arbitrators *vis-à-vis* judges as international adjudicators have always differed throughout the 21st century. Manley O. Hudson, conducting an early comparison of the Permanent Court of Arbitration and the then-new Permanent Court of International Justice in 1922, observed that fundamental differences exist between arbitral tribunals and international courts. He noted:

“The Court of Arbitration is ‘permanent’ in the sense that a panel is always in existence, from which arbitrators may at any time be chosen; the Court of Justice is ‘permanent’ in the sense that eleven definite judges are always ready to sit, without any necessity of their being specially selected after a dispute arises. [...] In the seventeen cases before tribunals formed from the Permanent Court of Arbitration, there has been a decided tendency for the same persons to be chosen as arbitrators. [...] In the new court, the eleven judges or some of the four deputies will be sitting in every case. The possibility of building up a continuous and harmonious system of international law, therefore, seems more promising through the new court than through the Permanent Court of Arbitration. The essential advantages of “permanence” have at last been achieved”.⁷⁹

⁷⁵ Opinion 1/17 cit. para. 101.

⁷⁶ Art. 7 of the ICC Code of Judicial Ethics www.icc-cpi.int.

⁷⁷ *Ibid.* art. 10.

⁷⁸ *Ibid.*

⁷⁹ MO Hudson, ‘The Permanent Court of International Justice’ (1923) Advocate of Peace Through Justice 22 24.

These different approaches to rules on ethics applicable to judges and arbitrators assign different public *personae* to arbitrators and judges, and prescribe degrees of restrictions on certain activities, such as double-hatting, to alleviate the professional engagements these adjudicators might pursue. A judge, may it be an international or national judge (notwithstanding the differences between these two groups), differs markedly from an arbitrator with regard to the manner in which it exercises a judicial function, in part due to institutional features attributed to international courts. As Malintoppi observes, “the professional distinction existing on a national level between Bench and Bar has been elevated to the international plane, albeit in a somewhat informal manner.”⁸⁰ Judges as envisaged under the CETA Tribunal are not party-appointed, and are far more restricted than their arbitrator counterparts handling similar disputes in terms of their extra-judicial activities. Arbitrators, on the other hand, are appointed specifically for disputes, from among professionals who often conduct private practice and bring about a specific expertise stemming from such practice. This distinction is marked by the CJEU in its Opinion, as noted above.⁸¹ Because of these distinctions mentioned (which are by no means exhaustive) between arbitrators and judges, and what might be expected of them regarding their independence and impartiality, the new EU FTA/IPA rules must be evaluated on the basis of their application to *judges* and not *arbitrators*. In light of this additional legal layer, the Court opines not on ethics and qualifications of ISDS *arbitrators* – it delivers an opinion on the CETA “Members of Tribunal”.

IV.3. THE RELEVANCE OF THE COMPATIBILITY OF THE IBA GUIDELINES WITH JUDGES

Opinion 1/17 of the Court does not elaborate on all topics outlined under these reflections. The Court issues an Opinion only in the context of the question posed at it, and answers whether or not the CETA Tribunal, as envisaged under CETA, complies with the right of access to an independent judicial body. It further looks into whether it gives “complete confidence to the enterprises and natural persons of a Party that they will be treated [...] on an equal footing with the enterprises and natural persons of that other Party, and that their investments in the territory of that other Party will be secure.”⁸²

As detailed above, most issues raised by Belgium, such as the remuneration in the form of a retainer fee, appointment and removal of judges, as well as the executive role of the Joint Committee, were addressed to varying degrees of scrutiny. In general, the CJEU is of the opinion that the CETA Tribunal, within the framework as it stood before the new Code proposal of October 2019, did not violate, nor pose a challenge to, the right to

⁸⁰ L Malintoppi, ‘Independence, Impartiality, and Duty of Disclosure of Arbitrators’ in P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 813.

⁸¹ Opinion 1/17 cit. para. 197.

⁸² *Ibid.* para. 199.

access to an independent tribunal. However, the CJEU arguably misses an important opportunity to make a meaningful distinction between international court judges and international arbitrators, in the context of the reference made to the IBA Guidelines as ethical guidance envisioned for judges.

The CJEU is silent on the appropriateness of the IBA Guidelines’ application to judges, as they are rules envisaged for arbitrators. This silence is controversial, in particular, because it leaves an express and relevant concern raised by Belgium in the context of its submission unanswered. It is clear that the CETA (and EUSIPA and EUVIPA by analogy) seeks to prohibit its judges to act as counsel, party-appointed experts, or witnesses in any pending or new investment protection dispute under CETA or any other international agreement.⁸³

This prohibition presents a possible contradiction to several GSs (and, by extension, their Explanations). As alluded to above, the Guidelines are prepared explicitly for arbitrators and with their multiple roles within the arbitration community. In fact, the Guidelines clearly stipulate that they “apply to international commercial arbitration and investment arbitration [...] irrespective of whether or not non-legal professionals serve as arbitrators.”⁸⁴ Several other issues, such as the duration of the obligation of independence and impartiality under GS 1, could also create conflicting and contradictory situations when applied to the CETA Tribunal.⁸⁵

Under the aforementioned Waivable Red List, the IBA Guidelines generally allow parties (subject to all parties’ consent) to waive conflicts of interest that otherwise would not be allowed under the CETA structure. For instance, parties can waive a conflict of interest when “[t]he arbitrator holds shares, either directly or indirectly, in one of the parties”, or when “[t]he arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties.”⁸⁶

Particular attention must be given to GS 6, which acknowledges extra-Court activities and considers arbitrators as principally affiliated to their law firms. GS 6 notes that “[t]he arbitrator is in principle considered to bear the identity of his or her law firm”.⁸⁷ Its Explanation further notes that “[t]here is a need to balance the interest of a party to appoint the arbitrator of its choice, who may be a partner at a large law firm, and the importance of maintaining confidence in the impartiality and independence of international arbitrators.”⁸⁸ None of these observations apply to CETA Tribunal. Contrary to arbitrators, a

⁸³ EUSIPA and EUVIPA contain identical language to CETA, save the additional “domestic laws and regulations”, as noted above.

⁸⁴ IBA Guidelines cit. 3.

⁸⁵ GS 1 stipulates that independence and impartiality extends “until the final award has been rendered or the proceedings have otherwise finally terminated” – given the Members of the CETA Tribunal are not ad hoc, this specification does not carry much substance in a court setting.

⁸⁶ Waivable Red List of IBA Guidelines cit. 21.

⁸⁷ Explanation to GS 6 of IBA Guidelines cit.

⁸⁸ *Ibid.*

judge is primarily considered to bear the identity of the court in which she operates. Extra-judicial appointments are severely restricted under CETA as well as other international courts, and party appointment is an arbitration-specific mechanism that does not exist under CETA. Because of this, not only are arbitration rules and international courts contradictory in principle, but the Guidelines directly come in conflict with the novel aspects of CETA that are perceived to elevate its permanency and institutional legitimacy.

Despite these significant incompatibilities, one explanation as to why the CJEU did not delve deeper into the question is that the Court was aware that the Commission would in fact seek to replace this seemingly “placeholder” reference with a more “appropriate” Code, a better fit to permanent judges.⁸⁹ As it is very likely that the IBA Guideline reference will cease to exist (and that such reference does not exist in EUVIPA, EUSIPA or any other publicly available FTA), its relevance is now arguably moot as far as the CETA framework is concerned. However, as a general policy, the EU should refrain from adopting ethical codes cut out for arbitrators in its future IIAs, if the treaty-making practice is to follow the examples of EUVIPA, EUSIPA, and the CETA.

V. CONCLUSION

As an overlooked aspect of Opinion 1/17, the Belgian inquiry into provisions on the ethics and qualifications of CETA Tribunal members has important implications for arbitrators and judges as international adjudicators. The Opinion comes at a high time for global ISDS reform, and in addition to its analysis of the CETA Framework *vis-à-vis* the autonomy of the EU legal order, reflects upon a fundamental systemic shift from arbitration to an international court. As detailed above, the Court is generally of the opinion that the CETA Framework provides for a system that has the necessary checks and balances in order to maintain impartial and independent decision-making. However, intentionally or not, it leaves some very relevant concerns raised regarding the application of ethics rules made for arbitrators to judges unanswered.

The domain of legal ethics applicable to judges, arbitrators, counsel, witnesses, or any other stakeholder or actor, is already based on profoundly vague and unspecific rules and principles.⁹⁰ This *Article*, while analysing Opinion 1/17, sought to delve deeper into the distinction between arbitrators, ad hoc adjudicators, often with professional affiliations; and judges, who are state-appointed individuals set to resolve (and prioritize) disputes in the context of the international court to which they are appointed. While now seemingly in the past, the reference made to the IBA Guidelines in the CETA text would have been the reflection of a gross confusion of these two fundamentally different

⁸⁹ Opinion 1/17 cit. para. 67.

⁹⁰ K Fach Gomez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* cit. 9; C Rogers, *Ethics in International* cit. 60.

groups of adjudicators – particularly given how the shift from arbitrators to state-appointed “judges” is seen part and parcel of the EU Commission’s new common investment protection policy. Similar contextual mismatches might jeopardize the ongoing reform and legitimization process of international investment law and its instruments. It could further undermine the collective effort to find a compromise and a common ground on how these groups differ, and how their responsibilities manifest and overlap.



ARTICLES

TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – SECOND PART

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LES GARANTIES PROCÉDURALES OFFERTES À LA DÉFENSE FACE AU PARQUET EUROPÉEN

LOUISE SEILER*

TABLE OF CONTENTS: I. La création du Parquet européen: de réels enjeux pour la défense – II. La défense face à l'absence d'uniformité des garanties procédurales. – II.1. Les difficultés liées à la mosaïque de droits nationaux applicables – II.2. Les incertitudes liées au contrôle juridictionnel des actes du Parquet européen. – III. La défense face à l'absence d'égalité des armes. – III.1. Le constat de déséquilibre né de la création du Parquet européen. – III.2. Les propositions visant à rétablir le droit à un procès équitable.

ABSTRACT: With the creation of the European Public Prosecutor's Office (EPPO), the position of the defence is weakened. The EPPO Regulation does not set up specific procedural safeguards that are designed to apply to its proceedings: it mainly refers to national law and the minimum guarantees provided under EU law. Moreover, the national courts have competence to rule on the procedural acts of the EPPO and only a few of these acts are subject to EU judicial review. The defendants, in transnational cases, have no foreseeability on the rights and remedies granted to them. This *Article* is aimed at depicting the main issues that the defence faces in front of the EPPO. More specifically, it focuses on the lack of equality of arms between defence and prosecution in this context. However, the *Article* proposes some remedies that could be put in place in order to improve the defendant's right to a fair trial, in particular the institutionalisation of a European Criminal Defence network.

KEYWORDS: European public prosecutor's office – rights of defence – procedural safeguards – fair trial – judicial review – equality of arms.

I. LA CRÉATION DU PARQUET EUROPÉEN: DE RÉELS ENJEUX POUR LA DÉFENSE

Jusqu'à présent, l'Union européenne (UE) avait œuvré, en matière de coopération judiciaire pénale, pour la mise en œuvre du principe de reconnaissance mutuelle entre autorités judiciaires nationales. Les organes et agences supranationales de l'UE, au premier rang desquels figure Eurojust, n'avaient pour mission que de coordonner les activités des

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autorités répressives nationales et de leur permettre d'utiliser au mieux les mécanismes de coopération à leur disposition. L'objectif était d'assurer une plus grande efficacité de la répression pénale, afin que les barrières constituées par les frontières nationales et la diversité des législations pénales ne puissent empêcher les enquêteurs et les magistrats d'exercer leurs fonctions. Le suspect n'était que l'objet de ces procédures et ne disposait d'aucun droit particulier pour agir sur ces mécanismes.¹ La question de l'harmonisation des droits procéduraux des personnes soupçonnées et poursuivies était envisagée principalement au travers du prisme de la confiance mutuelle entre les systèmes judiciaires, pour assurer la bonne mise en œuvre du principe de reconnaissance mutuelle.²

Avec la création du Parquet européen,³ l'UE est passée à un autre stade. Pour la première fois, une décision de poursuites pénales sera prise au niveau supranational. Les procureurs européens délégués accompliront, au nom et pour le compte de l'organe européen, des actes d'enquête dans les États membres. Ils prendront, à l'encontre des suspects, des mesures coercitives susceptibles de porter directement atteinte à leurs droits. Or, du point de vue de la défense, le constat général est celui d'un affaiblissement de la position du suspect dans les procédures initiées par le Parquet européen. La défense fait en effet face à l'absence d'uniformité des garanties procédurales (II), en raison du renvoi opéré par le règlement de 2017 aux législations pénales nationales et à un contrôle des actes du Parquet européen confié principalement aux juridictions nationales. Elle se retrouve également confrontée à une inégalité des armes en matière de recueil des preuves (III). Elle ne dispose pas des instruments nécessaires lui permettant d'intervenir efficacement lors de l'enquête. Des propositions peuvent cependant être formulées afin de rétablir l'équilibre entre la défense et l'accusation dans le contexte particulier des enquêtes transfrontières confiées au Parquet européen.

II. LA DÉFENSE FACE À L'ABSENCE D'UNIFORMITÉ DES GARANTIES PROCÉDURALES

Le règlement fait, à plusieurs reprises, référence à la nécessité, pour le Parquet européen, de respecter les droits fondamentaux. Cependant, seul l'art. 41 aborde directement la question des droits de la défense. Les suspects et personnes poursuivies bénéficient de la protection offerte par la Charte des droits fondamentaux de l'Union [2012], des droits procéduraux prévus dans le droit de l'Union (notamment les directives sur les garanties procédurales), ainsi que des droits procéduraux que le droit interne leur accorde. De la même façon que le règlement de 2017 n'a pas unifié la procédure régissant les

¹ MC van Wijk, *Cross-Border Evidence Gathering. Equality of Arms Within the UE?* (Eleven International 2017) 66.

² J Vervaele, 'Guest Editorial' (2014) *Eucrim*, 45; MC van Wijk, *Cross-Border Evidence Gathering. Equality of Arms Within the UE?* cit. 83.

³ Règlement (UE) 2017/1939 du Conseil du 12 octobre 2017 mettant en œuvre une coopération renforcée concernant la création du Parquet européen, ci-après "le règlement de 2017".

actes d'enquête du Parquet européen, il n'a pas non plus unifié les garanties procédurales applicables au suspect. En dépit des mentions relatives au droit de l'Union, la défense se retrouvera donc devant une mosaïque de lois nationales qui pourront être appliquées à une même procédure (II.1). Par ailleurs, le règlement prévoit un large recours aux juridictions nationales en ce qui concerne le contrôle juridictionnel des actes du Parquet européen. La défense devra là encore s'en remettre à l'application des droits nationaux, si elle entend contester la validité des actes du Parquet européen (II.2).

II.1. LES DIFFICULTÉS LIÉES À LA MOSAÏQUE DE DROITS NATIONAUX APPLICABLES

L'art. 5(3) du règlement de 2017 vient préciser que les enquêtes et poursuites du Parquet européen sont régies par le règlement. Le droit national ne devrait trouver à s'appliquer que dans la mesure où une question n'est pas réglée par le règlement.

En ce qui concerne les décisions de poursuites prises par le Parquet européen (concernant l'ouverture des enquêtes, l'exercice de son droit d'évocation, le renvoi en jugement ou le classement sans suite), les dispositions du règlement viennent effectivement se substituer aux règles nationales. Des procédures particulières à l'organe supranational sont mises en place pour leur adoption. Il est à noter que la place de la défense, les informations qui lui seraient communiquées à ces différents stades de la procédure ou encore le recueil de ses observations dans ce cadre, ne sont nullement prévus par le règlement.

La difficulté est encore plus grande en ce qui concerne les actes d'enquête réalisés par le Parquet européen. Le choix fait par le règlement de 2017 est de renoncer au principe de territorialité européenne, de ne pas adopter un *corpus* procédural autonome et de soumettre les mesures d'enquête à l'application de la loi nationale de l'État membre dans lequel est établi le procureur européen délégué. En effet, rares sont les dispositions du règlement venant s'appliquer à ces mesures d'enquête. L'art. 30 du règlement ne fait que mettre à la charge des États membres l'obligation de prévoir dans leurs droits nationaux la possibilité, pour les procureurs européens délégués, de recourir à six types de mesures d'enquête, "à tout le moins dans les cas où l'infraction qui fait l'objet de l'enquête est passible d'une peine maximale d'au moins 4 années d'emprisonnement". Les mesures d'enquête peuvent être également assorties de conditions et les plus intrusives peuvent connaître d'autres limitations prévues par le droit national, comme la possibilité de n'y recourir que pour les infractions que l'État membre estime les plus graves.⁴ Les procédures et modalités d'adoption de ces mesures sont par ailleurs régies par le droit national applicable.⁵ En dehors de ces mesures spécifiques visées par l'art. 30 du règlement, les procureurs européens délégués sont "habilités à ordonner toute autre mesure à laquelle les procureurs peuvent avoir recours dans leur État membre, conformément au droit national, dans le cadre de procédures nationales similaires".⁶ La défense pourrait donc

⁴ Art. 30(3) règlement de 2017 cit.

⁵ *Ibid.* art. 30(5).

⁶ *Ibid.* art 30(4).

se réjouir de retrouver ces mécanismes qu'elle maîtrise et, devant le Parquet européen, de conserver les mêmes garanties que celles qui lui sont offertes dans les affaires traitées par les autorités répressives nationales. Mais, d'une part, cette diversité signifie que les suspects et personnes poursuivies par le Parquet européen ne bénéficieront pas de garanties procédurales identiques. Il y a là un risque d'inégalité de traitement entre ces individus.⁷ Par ailleurs, la défense sera confrontée, dans les affaires transfrontières, à une multiplicité de droits procéduraux applicables à un même dossier.

L'une des principales difficultés liées au fait que des législations nationales diverses trouveront à s'appliquer, consiste dans le fait que le Parquet européen est celui qui garde entre ses mains le choix du forum. Le règlement pose certaines règles quant à la répartition des compétences au sein du Parquet européen et la détermination de la juridiction de jugement. Mais elles laissent une certaine marge de manœuvre au Parquet européen, qui dans les dossiers transfrontières, peut décider de réattribuer, de scinder, de joindre des affaires, ou d'exercer des poursuites dans un État membre différent de celui où l'enquête a été menée.

Les critères posés par l'art. 26(4), (5) et (6), ont le mérite d'exister et de ne pas laisser le choix de la juridiction à l'entière discrétion du Parquet européen, mais ils ne sont pas suffisamment précis et objectifs pour éliminer tout risque de *forum shopping*. Le Parquet européen peut être tenté de chercher à assurer l'efficacité de ses enquêtes et poursuites en privilégiant le droit national applicable qui prévoit les règles les moins contraignantes en matière d'admissibilité de la preuve ou de droits de la défense, des divergences notables existant sur ces points malgré l'intervention du législateur européen. Les conséquences sont lourdes pour la défense, qui peut voir un dossier ouvert sous une procédure nationale réattribué à un stade avancé de l'enquête à un autre procureur européen délégué, qui appliquera donc le droit procédural de son État membre. Il faudra alors, pour la personne poursuivie, repenser son système de défense. Il est à espérer que la notion "d'intérêt général de la justice"⁸ puisse être interprétée également en faveur du suspect et non pas seulement de l'efficacité des poursuites, et que la situation délicate dans laquelle ce suspect serait placé, en raison d'un changement de forum intervenant tardivement, soit dûment prise en compte. Certains auteurs proposent, pour prévenir ce risque, que la volonté de la personne poursuivie de voir le procès se tenir dans l'État membre de leur choix puisse être prise en considération.⁹

En ce qui concerne la réalisation des actes d'enquête dans un autre État membre que celui du Procureur européen chargé de l'affaire, le règlement met en place un régime *sui*

⁷ A Weyembergh et C Brière, 'Towards a European Public Prosecutor's Office', Study for the LIBE Committee, PE 571.399 (2016) www.europarl.europa.eu.

⁸ Art. 26(5) règlement de 2017 cit.

⁹ M Panzavolta, 'Choosing the National Forum in Proceedings Conducted by the EPPO: Who Is to Decide?', in L Bachmaier Winter (dir), *The European Public Prosecutor's Office, The Challenges Ahead* (Springer 2018) 59, 83.

generis de coopération directe entre membres du Parquet européen. Le procureur européen délégué chargé de l'affaire va "déléguer" au procureur européen délégué d'un autre État membre l'exécution d'une mesure d'enquête. La justification et l'adoption de ces mesures sont régies par le droit de l'État membre du premier.¹⁰ Mais les mesures déléguées sont mises en œuvre conformément au droit de l'État membre du procureur européen délégué assistant.¹¹ C'est donc la *lex loci* qui trouvera à s'appliquer. Par ailleurs, l'arrestation ou la détention du suspect suit également les règles du droit interne applicable dans le cadre de procédures nationales similaires. Dans les affaires transfrontières, le Parquet européen devra recourir à un mandat d'arrêt européen.¹²

La défense peut donc être confrontée à un dossier dans lequel les preuves qui lui sont présentées ont été recueillies dans divers États membres, en application de divers droits nationaux. Le suspect peut avoir été arrêté dans un autre État membre, là encore selon des modalités qui peuvent être différentes du droit national dans le cadre duquel la défense pourra être amenée à considérer la validité de la mesure. Il sera difficile pour la défense d'apprécier la validité de tels actes au regard de droits nationaux qu'elle ne maîtrise pas toujours. Cela signifie également qu'elle se retrouvera confrontée à des garanties procédurales différentes en fonction du procureur européen qui sera chargé de l'enquête et des règles applicables à une mesure réalisée par "délégation" par un autre procureur européen. Sa capacité à assister à l'interrogatoire d'un témoin, ou à exercer un recours contre une mesure coercitive, s'en trouvera par exemple affectée. En ce qui concerne l'exécution de ces mesures déléguées, l'art. 32 vient introduire une certaine dose de *forum regit actum*, en indiquant que doivent être respectées "les formalités et procédures expressément indiquées par la procureur européen délégué chargé de l'affaire", "à moins qu'elles ne soient contraires aux principes fondamentaux du droit de l'État membre du procureur européen délégué assistant". Il faudrait donc que ce mécanisme soit employé et respecté dès lors que la *lex fori* accorde plus de considération aux droits de la défense. Cela permettrait d'envisager, par exemple, la présence de l'avocat lors de certaines mesures d'enquête, si elle est exigée par la loi du procureur européen délégué chargé de l'affaire, mais non prévue par celle du procureur délégué assistant. Cela ne règle cependant pas les questions liées à la possibilité de prévoir quelles garanties seront offertes à la défense tout au long de la procédure menée par le Parquet européen. Et la mention faite par l'art. 41 au droit de l'Union n'est pas de nature à pallier cet inconvénient majeur.

En effet, le règlement précise que la défense bénéficie des droits consacrés par la Charte des droits fondamentaux de l'Union, ainsi que des droits procéduraux prévus dans le droit de l'Union, notamment par les directives européennes adoptées à ce sujet.

¹⁰ Art. 31(2) règlement de 2017 cit.

¹¹ *Ibid.* art. 32.

¹² *Ibid.* art. 33(2).

L'art. 51(1) de la Charte prévoit que ces dispositions s'adressent aux institutions et organes de l'UE, ainsi qu'aux États membres lorsqu'ils mettent en œuvre le droit de l'Union. Le Parquet européen étant un organe de l'Union, la Charte est applicable aux actes qu'il effectue par lui-même, tant au niveau central que décentralisé,¹³ ainsi qu'aux actes accomplis par les autorités nationales dans le cadre de ses enquêtes, en application tant du règlement de 2017 que de la directive PIF,¹⁴ qui détermine le champ de compétence de l'organe de poursuites européen. Dès lors, les dispositions de la Charte concernant les droits de la défense,¹⁵ mais également le respect de la vie privée et familiale (art. 7) lorsque des perquisitions domiciliaires sont entreprises, de la protection des données à caractère personnel (art. 8) lorsqu'est utilisée une base de données, la protection de la propriété (art. 17) pour les mesures de gel et de confiscation, ou encore du principe *ne bis in idem* (art. 50), devront être respectées par le Parquet européen. Toutefois, cette référence à la Charte n'assure pas à la défense, dans les enquêtes et poursuites menées par le Parquet européen, la possibilité de se prévaloir d'un ensemble précis de garanties procédurales invocables devant lui. Les termes de la Charte, compte tenu de la nature même de cet instrument, restent vagues et généraux.

L'art. 41(2) du règlement de 2017 précise que le suspect ou la personne poursuivie par le Parquet européen jouit "au minimum", des droits procéduraux prévus dans le droit de l'Union, y compris les directives concernant les droits des suspects et personnes poursuivies dans le cadre de procédures pénales. Elles concernent le droit à l'interprétation et à la traduction, le droit à l'information et à l'accès aux pièces du dossier, le droit d'accès à un avocat et le droit de communiquer avec des tiers et d'informer des tiers en cas de détention, le droit de garder le silence et d'être présumé innocent, le droit à l'aide juridictionnelle.¹⁶

Deux limites se posent quant au bénéficiaire que peut tirer de ces directives le suspect ou la personne poursuivie par le Parquet européen. D'une part, l'art. 41(2) précise bien

¹³ V Mitsilegas et F Giuffrida, 'The European Public Prosecutor's Office and Human Rights' in W Geelhoed, LH Erkelens et A Meij (dir) *Shifting Perspectives on the European Public Prosecutor's Office* (Springer 2018) 59.

¹⁴ Directive (UE) 2017/1371 du Parlement européen et du Conseil du 5 juillet 2017 relative à la lutte contre la fraude portant atteinte aux intérêts financiers de l'Union au moyen du droit pénal.

¹⁵ Art. 48(2) de la Charte.

¹⁶ Directive 2010/64/UE du Parlement européen et du Conseil du 20 octobre 2010 relative au droit à l'interprétation et à la traduction dans le cadre des procédures pénales; directive 2012/13/UE du Parlement européen et du Conseil du 22 mai 2012 relative au droit à l'information dans le cadre des procédures pénales; directive 2013/48/UE du Parlement européen et du Conseil du 22 octobre 2013 relative au droit d'accès à un avocat dans le cadre des procédures pénales et des procédures relatives au mandat d'arrêt européen, au droit d'informer un tiers dès la privation de liberté et au droit des personnes privées de liberté de communiquer avec des tiers et avec les autorités consulaires; directive (UE) 2016/343 du Parlement européen et du Conseil du 9 mars 2016 portant renforcement de certains aspects de la présomption d'innocence et du droit d'assister à son procès dans le cadre des procédures pénales; directive (UE) 2016/1919 du Parlement européen et du Conseil du 26 octobre 2016 concernant l'aide juridictionnelle pour les suspects et les personnes poursuivies dans le cadre des procédures pénales et pour les personnes dont la remise est demandée dans le cadre des procédures relatives au mandat d'arrêt européen.

qu'ils jouissent des droits prévus par les directives "telles qu'ont été mises en œuvre en droit interne". Les cas dans lesquels le suspect peut directement invoquer les dispositions des directives elles-mêmes sont ainsi limités. D'autre part, les directives sur les droits procéduraux sont formulées en des termes généraux, posent peu d'obligations précises à la charge des États-membres et leur laissent une large marge de manœuvre pour la traduction de ces droits dans la législation nationale. Il s'agit uniquement d'une référence à des standards communs minimaux que les États membres se doivent de respecter dans leurs procédures nationales. Ces directives ne font d'ailleurs que très rarement référence à des situations de poursuites transnationales. Elles n'offrent pas un véritable niveau européen de protection pour le suspect mis en cause par le Parquet européen.

L'intérêt de cette référence au droit de l'Union réside dans le fait que la défense peut en invoquer les dispositions devant les juridictions nationales, qui sont tenues d'écarter l'application de la loi nationale qu'elles considèreraient comme non compatibles avec les dispositions de la Charte¹⁷ ou des directives. La Cour de Justice de l'Union européenne (CJUE), saisie d'un renvoi préjudiciel, peut ainsi être amenée à interpréter les dispositions du droit de l'Union afin d'éclairer le juge national sur cette éventuelle incompatibilité. Elle peut ainsi guider les juridictions nationales sur l'appréciation qu'elles doivent avoir de la conformité du droit national avec ces dispositions.¹⁸ Cependant, la défense n'a que peu de place dans le mécanisme de déclenchement d'une question préjudicielle. Plus généralement, la question de la possibilité, pour la défense, de soumettre les actes du Parquet européen à un contrôle juridictionnel reste problématique.

II.2. LES INCERTITUDES LIÉES AU CONTRÔLE JURIDICTIONNEL DES ACTES DU PARQUET EUROPÉEN

L'art. 42 du règlement met en place un régime complexe de contrôle juridictionnel des actes du Parquet européen. Les actes de procédure qui sont destinés à produire des effets juridiques à l'égard des tiers sont soumis au contrôle des juridictions nationales compétentes conformément aux exigences et procédures prévues par le droit national.¹⁹ Il en est de même lorsque le Parquet européen s'abstient de prendre de tels actes. La notion d'acte de procédure "destiné à produire des effets juridiques" n'est pas définie par le règlement. Le considérant 87 indique qu'il s'agit des actes adoptés par le Parquet européen avant la mise en accusation et donne des exemples d'actes de procédure qui, à l'inverse, ne sont pas destinés à produire de tels effets, en citant la désignation d'experts

¹⁷ Affaire C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:280 para. 45.

¹⁸ Ainsi, dans un arrêt *Kolev* (affaire C-612/15 *Kolev e.a.* ECLI:EU:C:2018:392), sur le fondement de ces directives, la Cour s'est prononcée sur la possibilité, pour la législation nationale, de prévoir la communication des informations détaillées sur l'accusation à la défense après le dépôt du réquisitoire introductif ou encore d'imposer au juge national d'écarter l'avocat mandaté par deux personnes poursuivies au motif que les intérêts de ces personnes sont contradictoires.

¹⁹ Art. 42(1) règlement de 2017 cit.

ou le remboursement des frais des témoins. Les juridictions nationales devront donc être amenées à interpréter cette notion. La question pourrait ainsi se poser en ce qui concerne la décision d'ouvrir une enquête, à l'encontre de laquelle les États membres n'offrent pas toujours la possibilité d'un contrôle juridictionnel.²⁰

Le règlement ne prévoit qu'un rôle limité des cours européennes dans le contrôle juridictionnel des actes de poursuites du Parquet européen. La Cour de Justice ne s'est vue reconnaître une compétence pour contrôler directement les actes du Parquet européen, sur le fondement de l'art. 263 TFUE, que pour les décisions de classer sans suite.²¹ L'absence d'un contrôle juridictionnel de certaines décisions du Parquet européen par une cour européenne pose question. En ce qui concerne le contrôle de la décision portant sur le choix du forum, seul un recours tel que prévu à l'art. 42(1) du règlement de 2017, c'est à dire devant les juridictions nationales, pourrait être envisagé par la défense.²² La question s'est évidemment posée de savoir si un juge national est le mieux placé pour statuer, au vu des critères posés par le règlement, sur la décision du Parquet européen d'exercer ses poursuites devant sa juridiction.²³ Pourrait-il considérer que les critères posés par le règlement doivent l'amener à rejeter sa compétence et renvoyer le Parquet européen à mieux se pourvoir? Les juridictions nationales ne disposent pas de législations leur permettant de désigner la juridiction étrangère compétente et ne peuvent le plus souvent qu'apprécier leur propre compétence au regard des dispositions du droit national.²⁴ Par ailleurs, certains États membres permettent un contrôle du choix du forum au moment où une décision de renvoi en jugement est prise et d'autres seulement au moment du jugement au fond. Le considérant 87 du règlement prévoit que la décision portant sur le choix du forum peut être soumise à un contrôle juridictionnel "au plus tard au stade du procès". Si rien n'est prévu dans le droit national pour contester plus tôt une telle décision de renvoi, la défense va devoir attendre l'ouverture du procès pour contester la compétence de la juridiction saisie, ce qui compromet ses chances de succès et l'oblige à préparer une défense au fond en cas d'échec de sa contestation. Ceci engendre

²⁰ M Böse, 'Judicial control of the European Public Prosecutor's Office' in T Rafaraci and R Belfiore (dir), *EU Criminal Justice. Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer 2019) 191, 193.

²¹ Art. 42(3) règlement de 2017 cit.

²² Le considérant (87) règlement de 2017 fait ainsi référence aux "actes de procédure concernant le choix de l'État membre dont les juridictions seront compétentes pour entendre les poursuites".

²³ M Panzavolta, 'Choosing the National Forum in Proceedings Conducted by the EPPO: Who Is to Decide?' cit. 80.

²⁴ M Wasmeier, 'The Choice of Forum by the European Public Prosecutor' in LH Erkelens, AWH Meij et M Pawlik (dir), *The European Public Prosecutor's Office, an Extended Arm or a Two-Headed Dragon?* (Asser Press, Springer, 2015) 139, 154.

une inégalité dans l'accès au recours entre les personnes concernées.²⁵ L'absence d'un mécanisme de contrôle au niveau européen sur cette question est donc particulièrement problématique pour la défense.²⁶

Le règlement de 2017 envisage deux possibilités d'exercer un contrôle juridictionnel sur les actes d'enquêtes du Parquet européen: le contrôle *ex-ante* et un contrôle *ex-post*. Le contrôle *ex-ante* consiste à soumettre à l'autorisation du juge national l'exécution d'une mesure d'enquête. Il sera exercé si la loi nationale le prévoit et selon les modalités prévues par elle. L'art. 32(3) subordonne l'exécution d'une mesure "déléguée" à l'obtention d'une autorisation judiciaire auprès de la juridiction nationale, si la loi nationale du procureur européen délégué chargé de l'affaire, ou celle du procureur européen délégué assistant, l'impose. Il s'agit a priori d'une disposition favorable au suspect, qui pourra éventuellement, si le droit national le permet, faire valoir ses arguments dans ce contexte, en invoquant les garanties nationales qui lui sont accordées. Il reste cependant quelques zones d'ombre sur la nature et l'étendue du contrôle que le juge national peut effectuer dans ce cadre, sur le dossier dont il pourrait disposer pour rendre sa décision, sur sa capacité à apprécier pleinement la proportionnalité et la nécessité de la mesure sollicitée.²⁷

Quant au contrôle *ex-post*, la validité des actes du Parquet européen relève en principe du juge national. Cependant, la CJUE est compétente, conformément à l'art. 267 TFUE, pour statuer à titre préjudiciel sur la validité des actes de procédure du Parquet européen, "pour autant qu'une telle question de validité soit soulevée devant une juridiction d'un État membre directement sur la base du droit de l'Union".²⁸ Comme le soulignent certains auteurs, cette vision ignore l'interaction qui existe entre le droit de l'Union et le droit national.²⁹ Par ailleurs, la défense n'a pas un accès direct à la CJUE pour faire trancher la question de la validité d'un acte du Parquet européen ou solliciter l'interprétation d'une disposition du droit de l'Union qui contraindrait le juge national à écarter la disposition nationale contraire. La défense n'a en effet pas le pouvoir de déclencher seule le renvoi préjudiciel,

²⁵ C Van Den Wyngaert, 'Corpus Juris, parquet européen et juge national : vers une chambre préliminaire européenne ?' in G De Kerchove et A Weyembergh (dir), *Vers un espace judiciaire pénal européen* (Université de Bruxelles 2000) 131, 137.

²⁶ Dans le même sens, voir M Wasmeier, 'The Choice of Forum by the European Public Prosecutor's office' cit. 159; V Mitsilegas et F Giuffrida, 'The European Public Prosecutor's Office and Human Rights' cit. 85.

²⁷ L Bachmaier-Winter, 'Cross-border Investigations Under the EPPO Proceedings and the Quest for Balance', in L Bachmaier *The European Public Prosecutor's Office, The Challenges Ahead* cit. 129; HH Hernfeld, 'The Draft Regulation on the Establishment of the European Public Prosecutor's Office - Issues of Balance Between the Prosecution and the Defence', in C Brière et A Weyembergh (dir), *The Needed Balances in EU Criminal Law. Past, Present and Future* (Hart Publishing 2017) 383, 405. Le considérant 88 du règlement de 2017 indique que le juge national peut apprécier la proportionnalité d'un acte du Parquet européen "au regard du principe de proportionnalité, tel qu'il est consacré par le droit national".

²⁸ Art. 42(2)(a) règlement de 2017 cit.

²⁹ M Böse, 'Judicial Control of the EPPO' cit. 195.

elle peut simplement solliciter de la juridiction nationale qu'elle saisisse la CJUE. Pour certains auteurs, le règlement aurait dû prévoir que le renvoi préjudiciel soit "de droit" dans un tel contexte, sauf à considérer l'acte clair et l'absence de doute raisonnable.³⁰

Devant les juridictions nationales, les recours ouverts à la défense vont donc dépendre du droit national. Or, il existe des différences importantes, entre les États membres, sur la possibilité même d'exercer un recours juridictionnel contre les actes du parquet³¹. Par ailleurs, toutes les personnes poursuivies ne pourront pas bénéficier d'un double degré de juridiction ou d'un accès direct à une cour constitutionnelle... En ce qui concerne les actes d'enquête, rien n'est précisé dans le règlement sur la possibilité d'un contrôle en cours de procédure. Tout dépendra de la procédure nationale applicable et un recours peut n'être ouvert à la défense que devant la juridiction de jugement³².

Dans les dossiers transfrontières, une problématique plus générale porte sur l'admissibilité de la preuve recueillie dans un autre État membre que celui du forum. Il est crucial pour la défense d'avoir une visibilité sur ses chances de succès lorsqu'elle soulève l'irrégularité d'une mesure d'enquête en raison du non-respect de la loi applicable ou d'une atteinte à ses droits fondamentaux. L'art. 37 du règlement de 2017 prévoit que "les éléments de preuve présentés à une juridiction par les procureurs européens du Parquet européen ou par la partie défenderesse ne peuvent être déclarés inadmissibles au seul motif qu'ils ont été recueillis dans un autre État membre ou conformément au droit d'un autre État membre". Le seul fait qu'une mesure d'enquête ne respecte pas la législation nationale, par exemple les conditions procédurales entourant son exécution, ne suffit donc pas à écarter des débats les preuves recueillies dans ce cadre. Cependant, le considérant 80 précise qu'ils ne peuvent être écartés sur ce simple motif "pour autant que la juridiction du fond considère que leur admission respecte l'équité de la procédure et les droits de la défense que la Charte confère au suspect et à la personne poursuivie", ainsi que la convention européenne de sauvegarde des droits de l'homme et les principes fondamentaux du droit national relatifs à l'équité de la procédure. Un élément de preuve qui porterait atteinte aux droits de la défense selon la conception que s'en fait la juridiction appelée à statuer, serait donc déclaré inadmissible même s'il respecte les prescriptions du droit national de l'État membre dans lequel il a été recueilli. Il s'agit là d'une forme de garantie pour la défense. Mais elle présente des limites. D'une part, rien n'est prévu dans le règlement concernant les conséquences attachées à la déclaration d'irrégularité ou d'illégalité des épreuves obtenues à l'étranger. Les juridictions peuvent écarter les preuves au motif d'un non-respect des droits

³⁰ HH Hernfeld, 'The Draft Regulation on the Establishment of the European Public Prosecutor's Office – Issues of Balance Between the Prosecution and the Defence' cit. 411.

³¹ Z Durdevic, 'Judicial Control in Pre-Trial Criminal Procedure by EPPO' in K Ligeti (dir) *Toward a prosecutor for the European Union. A comparative analysis* (Hart 2013) 986.

³² S Allegrezza et V Covolo (dir), *Effective Defence Rights in Criminal Proceedings, A European and Comparative Study on Judicial Remedies* (Wolters Kluwer 2018).

de la défense, mais n'y sont pas tenues. Or, l'étendue du contrôle exercé par les juges nationaux sur ces preuves obtenues dans un autre État membre varie grandement d'un État à l'autre,³³ tout comme les conséquences à tirer de l'illégalité des preuves. Si l'on s'en réfère à la jurisprudence de la Cour européenne des droits de l'homme, l'admissibilité des preuves reste une question qui doit être réglée par la législation nationale et les juridictions nationales.³⁴ La Cour ne se prononce pas sur l'admissibilité d'un élément de preuve en particulier, mais envisage l'ensemble de la procédure pour apprécier l'existence ou non d'un manquement à l'art. 6(1) de la Convention. Elle étudie donc la procédure "en bloc", pour vérifier si la défense a eu la possibilité d'être rétablie dans ses droits après le recueil de la preuve illégale, par exemple en pouvant exercer un recours pour en contester la légalité, et si cette preuve a été décisive au regard de la décision de condamnation.³⁵ Il sera ainsi difficile, pour la défense, de prévoir le résultat d'une demande de nullité soulevée devant la juridiction de jugement. Et il sera complexe, pour la juridiction, d'apprécier l'atteinte faite aux droits de la défense en tenant compte de l'ensemble de la procédure, dont une partie a pu se dérouler dans un autre État membre. La Cour européenne des droits de l'homme fait cependant peser des obligations particulières sur les autorités nationales quant à l'admission de preuves attentatoires aux droits de la défense, recueillies dans un contexte transnational, par le biais d'instruments de coopération judiciaire. En effet, elle considère que même si les conditions du recueil d'une telle preuve ne sont pas imputables aux autorités du for, qui n'ont fait que respecter leurs engagements internationaux, ces dernières doivent veiller ensuite au respect du droit au procès équitable et, au besoin, écarter des débats les éléments de preuves recueillis à l'étranger. Le juge doit ainsi tenir compte de l'ensemble de la procédure suivie pour apprécier le respect du principe du procès équitable, y compris les actes menés dans d'autres États membres.³⁶ Les juridictions nationales devront donc être vigilantes sur la façon dont les preuves ont pu être apportées au Parquet européen par le biais, notamment, d'un acte de délégation tel que prévu à l'art. 32 du règlement.

³³ L. Bachmaier-Winter, 'Transnational criminal Proceedings Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law' (2013) *Utrecht Law Review* 127; S. Ruggeri, 'Horizontal Cooperation, obtaining evidence overseas and the respect for fundamental rights in the EU. From the European Commission's proposals to the proposal for a directive on a European Investigation Order: Towards a single tool of evidence gathering in the EU?' in S. Ruggeri (dir), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings* (Springer 2013) 279, 287.

³⁴ L. Bachmaier-Winter, 'Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law' cit.

³⁵ CourEDH *Edwards c Royaume-Uni* Req n. 13071/87 [16 décembre 1992] para. 34; CourEDH *Stanford c Royaume-Uni* Req n. 16757/90 [23 février 1994], para. 24; CourEDH *Ibrahim et autres c Royaume-Uni* Req n. 50541/08, 50571/08, 50573/08 et 40351/09, [13 septembre 2016] para. 241. Z. Durdevic, 'Judicial Control in Pre-Trial Criminal Procedure by EPO' cit. 995; S. Gless, 'Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle' (2013) *Utrecht Law Review* 90, 96.

³⁶ CourEDH *Stojkovic c France* Req n. 25303/08 [27 novembre 2011].

Le modèle de protection des droits du suspect du règlement de 2017, qui voulait assurer une forme de complémentarité entre les niveaux européens, se révèle complexe et potentiellement “dysfonctionnel” pour les individus concernés³⁷. A cette difficulté pour la défense d’avoir une vision claire de la loi procédurale applicable et des recours à sa disposition, s’ajoute une inégalité des armes avec le Parquet européen.

III. LA DÉFENSE FACE À L’ABSENCE D’ÉGALITÉ DES ARMES

L’égalité des armes est un principe fondamental qui s’inscrit dans le droit au procès équitable.³⁸ Il suppose que toute personne a droit à ce que sa cause soit entendue équitablement, dans des conditions qui ne la placent pas dans une situation de net désavantage par rapport à son adversaire.³⁹ A la lecture des dispositions du règlement de 2017, il apparaît que la défense ne bénéficie notamment pas des mêmes facilités que l’accusation dans l’administration de la preuve ou l’accès à l’information (III.1). Pourtant, il est possible d’envisager la mise en place de certains remèdes pour que la défense puisse être dotée d’avantages similaires à ceux dont bénéficie le Parquet européen (III.2).

III.1. LE CONSTAT DE DÉSÉQUILIBRE NÉ DE LA CRÉATION DU PARQUET EUROPÉEN

L’inégalité des armes entre la défense et le Parquet européen s’illustre par le manque de précisions du règlement concernant l’accès à l’information, ainsi qu’à la participation de la défense au recueil des preuves, que ne viennent pas corriger les dispositions actuelles portant sur le droit à l’accès à un avocat.

L’accès à l’information concernant le déroulement de l’enquête, de la procédure, ainsi que le contenu même des charges pesant sur le suspect ou la personne poursuivie est un élément décisif pour préparer efficacement sa défense. Pourtant, le règlement ne prévoit pas de règles particulières sur ces points.

Le Parquet européen chargé de l’affaire ouvre un dossier et y rassemble “l’ensemble des informations et éléments de preuve qui se rapportent à l’enquête et aux poursuites”.⁴⁰ Il doit porter ces éléments, sous forme numérique, au système de gestion des dossiers du Parquet européen,⁴¹ dont l’accès est assuré à tous les procureurs européens et procureurs européens délégués.⁴² Qu’en est-il du droit à l’accès au dossier de la défense? Là encore, le règlement ne prévoit un tel accès que selon les modalités du droit national de l’État

³⁷ M Kaida-Gbandi ‘The Establishment of an EPPD and the Right of the Suspects and Defendants: Reflections upon the Commission’s 2013 Proposal and the Council’s Amendments’, in P Asp (dir), *The European Public Prosecutor’s Office, Legal and Criminal Policy Perspectives* (Stockholm University 2015) 234.

³⁸ CourEDH *Delcourt c Belgique* Req n. 2689/65 [17 janvier 1970] para. 28.

³⁹ CourEDH *Dombo Beheer, B.V. c Pays Bas* Req n.14448/88 [27 octobre 1993] para. 33.

⁴⁰ Art. 45(1) règlement de 2017 cit.

⁴¹ *Ibid.* art. 45(3).

⁴² *Ibid.* art. 46(1).

membre du procureur européen délégué chargé de l'affaire.⁴³ L'accès au dossier peut donc être complexe pour un suspect qui se trouve dans un autre État membre.

Le droit de l'Union ou la Convention européenne des droits de l'homme sont-ils de nature à apporter plus de garanties sur ce point? La Cour européenne des droits de l'homme rappelle que l'accusé doit avoir accès à toutes les pièces du dossier afin de pouvoir utilement préparer sa défense.⁴⁴ Toutefois, en ce qui concerne le moment auquel le dossier doit lui être communiqué, la Cour fait toujours une appréciation au cas par cas, en examinant si, au moment de l'analyse des éléments de preuve par la juridiction de jugement, l'accusé a été mis en mesure de préparer efficacement sa défense.⁴⁵ Par ailleurs, la Cour considère qu'il n'est pas déraisonnable que les autorités internes justifient le défaut d'accès au dossier au stade de l'ouverture d'une procédure pénale, de l'enquête ou de l'instruction, pour des raisons relatives à la protection des intérêts de la justice.⁴⁶

La directive 2012/13/UE⁴⁷ prévoit le droit à l'accès au dossier en son art. 7(2) et (3). Il indique simplement que "l'accès aux pièces [...] est accordé en temps utile pour permettre l'exercice effectif des droits de la défense et, au plus tard, lorsqu'une juridiction est appelée à se prononcer sur le bien-fondé de l'accusation". Des dispositions spéciales sont prévues pour les personnes arrêtées ou détenues, afin qu'elles puissent efficacement contester leur détention. L'accès à certaines pièces du dossier peut être refusé dans des cas limités (menaces sérieuses sur la vie ou droits fondamentaux d'une autre personne, pour sauvegarder un intérêt public, préjudice au bon déroulement de l'enquête...). Les dispositions de la directive ne sont donc pas claires sur le moment et l'étendue de cet accès aux pièces, ni sur les dérogations permettant de s'opposer à cet accès.⁴⁸ Les États membres font par ailleurs une utilisation trop fréquente des dérogations pour empêcher l'accès de la défense au dossier⁴⁹ et les législations nationales se réfèrent tantôt à l'une, l'autre, ou plusieurs de ces restrictions.⁵⁰ Sous la réserve de ne pas porter atteinte au droit à un procès équitable au regard de l'ensemble de la procédure, les États membres conservent donc une large marge de manœuvre.

Sur le moment de la communication à la défense des éléments de preuve contenues dans le dossier de l'accusation, la CJUE a confirmé qu'elle devait être accordée "au plus tard au moment où les débats sur le bien-fondé de l'accusation s'ouvrent effectivement

⁴³ *Ibid.* art. 45.

⁴⁴ CourEDH *Matanović c Croatie* Req n. 2742/12 [4 avril 2017].

⁴⁵ CourEDH *Khodorkovskiy et Lebedev c Russie* Req n. 11082/06 et 13772/05 [25 juillet 2005] para. 579.

⁴⁶ CourEDH *AT c Luxembourg* Req n. 30460/13 [9 avril 2015].

⁴⁷ Directive 2012/13/UE du Parlement européen et du Conseil du 22 mai 2012 relative au droit à l'information dans le cadre des procédures pénales.

⁴⁸ A Pivaty et A Soo, 'Access to the Case Materials in Pre-Trial Stages' (2019), *Eucrim*, 60.

⁴⁹ *Ibid.*

⁵⁰ Agence des droits fondamentaux de l'Union (FRA), 'Rights of Suspected and Accused Persons Across the EU: Translation, Interpretation and Information' (2016) 79, www.fra.europa.eu.

devant le juge compétent pour se prononcer sur ce bien-fondé”.⁵¹ L'accès au dossier peut donc être très tardif, et l'on voit mal comment la défense, dans des affaires transfrontières complexes qui requièrent parfois une action de sa part en amont de la phase de jugement, est considérée comme ayant encore l'opportunité de réagir de manière efficace devant la juridiction de jugement.

L'information délivrée au suspect quant à la nature des charges pesant contre lui n'est pas directement envisagée par le règlement de 2017. La directive 2012/13/UE prévoit que l'information sur l'infraction que les suspects sont soupçonnés d'avoir commise doit être délivrée “rapidement et de manière suffisamment détaillée pour garantir le caractère équitable de la procédure et permettre l'exercice effectif des droits la défense”.⁵² Le caractère suffisamment détaillé ou non de l'information fournie peut donc être soumis à des interprétations divergentes. Quant au moment de la délivrance de l'information, le considérant 19 de la directive précise qu'elle doit être donnée “au plus tard avant le premier interrogatoire officiel du suspect ou de la personne poursuivie par la police ou par une autre autorité compétente”. La directive ne comporte pas de précisions sur le moment exact où la personne doit être avisée de son statut de suspect.⁵³

De façon plus générale, le règlement s'intéresse peu à la communication qui pourrait être établie entre la défense et le Parquet européen lors de l'enquête et de l'exercice des poursuites. Le dialogue entre le suspect et le niveau central du Parquet européen est prévu à *minima*. Le règlement indique qu'une décision prise par le Parquet européen est notifiée au suspect ou à la personne poursuivie, quand le droit interne le prévoit, pour le transfert de la procédure aux autorités nationales (art. 34(8)) et la décision de classement sans suite (art. 39(4)). Tout le reste dépend du contenu du droit national.

La défense est par ailleurs entièrement dépendante des dispositions prévues par les droits nationaux pour tous les besoins de traduction et d'interprétariat qu'elle pourrait avoir. Elle pourra toutefois se prévaloir des garanties minimales fixées en la matière par le droit européen, notamment l'art. 6(3) de la Convention européenne des droits de l'homme et la directive 2010/64/UE,⁵⁴ citée par l'art. 41 du règlement de 2017. Cependant, des limites importantes sont posées par ces textes, notamment en ce qui concerne les pièces qui doivent être traduites. Ainsi, la directive 2010/64/UE prévoit qu'il doit être fourni une traduction écrite et dans un délai raisonnable des documents essentiels pour leur permettre d'exercer les droits de la défense et pour garantir le caractère équitable de la procédure. Il est évident que cette notion de caractère “essentiel” du document en

⁵¹ *Kolev* cit. paras 92 à 94.

⁵² Art. 6 directive 2012/13/UE cit.

⁵³ FRA, ‘Rights of Suspected and Accused Persons Across the EU: Translation, Interpretation and Information’ cit. 63.

⁵⁴ Directive 2010/64/UE du Parlement européen et du Conseil du 20 octobre 2010 relative au droit à l'interprétation et à la traduction dans le cadre des procédures pénales.

question peut poser en pratique des difficultés et faire l'objet d'interprétations divergentes.⁵⁵ La directive prévoit seulement que ces documents doivent comprendre toute décision privative de liberté, acte d'accusation, décision de condamnation ou jugement. La Cour de justice est venue rappeler que seules les autorités nationales décident du caractère essentiel à la procédure des documents à traduire, en dehors de ceux prévus par la liste, non exhaustive, de l'art. 3(2) de la directive.⁵⁶ Dès lors, le droit à l'interprétation du suspect qui communique avec son avocat, où la traduction de leurs échanges écrits, varie grandement d'un État membre à l'autre.

En ce qui concerne la participation de la défense au recueil des preuves, l'art. 41(3) du règlement indique que les personnes poursuivies jouissent de tous les droits procéduraux que le droit interne applicable leur accorde, "y compris la possibilité de présenter des éléments de preuve, de demander la désignation d'experts ou une expertise et l'audition de témoins, et de demander que le Parquet européen obtienne de telles mesures au nom de la défense". Le règlement ne vient pas énumérer les droits qui doivent être prévus par la législation nationale.

En matière de recueil de preuves dans un autre État, le Parquet européen peut compter sur le système inédit de délégation mis en place par le règlement aux arts 31 et 32 du règlement. Le procureur délégué assistant se devra de prêter assistance au procureur délégué chargé de l'affaire dans le cadre d'une affaire transfrontière. La défense, elle, se trouve seule face à la question du recueil de preuves à l'étranger. Tout au plus pourra-t-elle demander au procureur européen délégué, selon ce qui est prévu par le droit national, qu'il sollicite une telle mesure auprès d'un procureur délégué d'un autre État.

La participation active de la défense au recueil des preuves et à l'exécution des mesures d'enquête n'est pas prévue en soi dans le droit européen.⁵⁷ L'art. 6(3)(d) de la CESDH prévoit le droit d'interroger des témoins ou de les faire entendre à décharge. La Cour européenne des droits de l'homme analyse globalement le caractère équitable ou non de l'ensemble de la procédure avant de conclure à une violation sur ce fondement. Elle considère qu'en principe, toutes les preuves doivent être débattues en présence du suspect lors d'une audition publique, afin qu'il puisse les contester dans le cadre d'une procédure contradictoire. Il doit ainsi pouvoir interroger les témoins (ou leur faire poser des questions) et présenter ses observations sur leurs témoignages.⁵⁸ Mais il ne s'agit pas d'un droit absolu et la présence du témoin à l'audience n'est pas obligatoire. La Cour appréciera globalement l'équité de la procédure si l'accusé ne peut pas poser de questions au témoin ou ne peut pas être mis en

⁵⁵ FRA, 'Rights of suspected and accused persons across the EU: Translation, Interpretation and Information' cit. 63.

⁵⁶ Affaire C-216/14 *Covaci* ECLI:EU:C:2015:686.

⁵⁷ MC van Wijk, *Cross-Border Evidence Gathering. Equality of Arms Within the UE?* cit. 83.

⁵⁸ *Ibid.* 34; L Bachmaier-Winter, 'Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law' cit.

présence de celui-ci.⁵⁹ Or, au sein de l'UE, les conditions et le moment de l'audition des témoins varient beaucoup d'un pays à l'autre:⁶⁰ parfois les témoins doivent être présents à audience, parfois ils doivent être interrogés en présence de l'avocat de la défense, parfois leur audition n'est possible que devant un juge...

Au regard de la jurisprudence de la Cour européenne des droits de l'homme, les droits nationaux ne peuvent pas empêcher la défense de présenter des éléments de preuve, mais peuvent conditionner ou limiter à un certain moment de la procédure cette présentation. Il sera ainsi délicat pour la défense d'élaborer une stratégie à long terme sur ce point. Quant à la possibilité de recueillir les éléments de preuve ou de solliciter une mesure d'enquête, les systèmes procéduraux des États membres présentent une grande diversité⁶¹ avec laquelle la défense devra composer. A cet égard, des interrogations existent toujours quant à la compatibilité du règlement de 2017 avec le maintien des juridictions d'instruction dans les États membres qui les connaissent. Si le passage par le juge d'instruction est supprimé, les conséquences quant à la place de défense dans le processus d'enquête devront également être examinées.

La question de l'accès à l'avocat varie également grandement d'un État membre à l'autre. Les textes portant sur les droits fondamentaux reconnaissent la possibilité au suspect d'assurer lui-même sa défense ou d'avoir recours à l'assistance d'un défenseur.⁶² Ce droit recouvre le libre choix de l'avocat⁶³ et le droit à une assistance effective.⁶⁴ La question du moment de l'intervention de l'avocat auprès du suspect est l'une des plus épineuses. La Cour européenne des droits de l'homme insiste sur la nécessité de fournir l'assistance de l'avocat le plus tôt possible pour assurer une défense efficace, sauf à démontrer, à la lumière des circonstances particulières de l'espèce, qu'il existe des raisons impérieuses de restreindre ce droit. Ainsi, la Cour a considéré, dans certaines affaires qui lui étaient soumises, que l'avocat devait assister son client dès le début d'une mesure de garde à vue.⁶⁵ Ces grands principes laissent toutefois une certaine marge d'appréciation aux États membres.⁶⁶ Si la Cour européenne devait considérer la procédure, dans son

⁵⁹ MC van Wijk, *Cross-Border Evidence Gathering. Equality of Arms Within the UE?* cit. 40.

⁶⁰ E Sellier et A Weyembergh (dir), *Criminal Procedural Laws Across the EU – A Comparative Analysis of Selected Main Differences and the Impact over the Development of EU Legislation* Study for the LIBE committee, PE 604.977 (2018) 69 et 70; Z Durdevic, 'Judicial Control in Pre-Trial Criminal Procedure by EPPO' cit. 1000.

⁶¹ MC van Wijk, *Cross-Border Evidence Gathering. Equality of Arms Within the UE?* cit. 209 et 255.

⁶² Art. 6(3) de la Convention européenne des droits de l'homme [1950] et art. 47 de la Charte des droits fondamentaux de l'Union européenne.

⁶³ Art. 6(3) de la Convention européenne des droits de l'homme cit.

⁶⁴ CourEDH *Artico c Italie* Req n. 6694/74 [13 mai 1980].

⁶⁵ CourEDH *Salduz c Turquie* Req n. 36391/02 [27 novembre 2008, *Dayanan c Turquie*, Req n. 7377/03 [13 octobre 2009], *Brusco c France* Req n. 1466/07 [14 octobre 2010].

⁶⁶ *Salduz* cit. para. 51.

ensemble, comme respectueuse du droit au procès équitable, l'éventuelle absence de l'avocat au stade de la garde à vue pourrait ne plus être dirimante.⁶⁷

La directive 2013/48/UE laisse également une certaine marge de manœuvre aux États membres, exigeant que les suspects puissent avoir accès à un avocat "sans retard indu" (art. 3(2)), de façon à leur permettre d'exercer leurs droits de la défense de manière concrète et effective (art. 3(1)), tout en apportant certaines précisions concernant certains événements qui déclencheraient l'ouverture de ce droit.⁶⁸ La directive précise par ailleurs ce que doit recouvrir ce droit à l'assistance d'un avocat: le suspect peut le rencontrer en privé et communiquer avec lui,⁶⁹ à tout moment et dans le respect de la confidentialité des communications. L'avocat peut non seulement être présent mais également participer aux interrogatoires de police ou des autres autorités compétentes, dans les limites, cependant, de ce que prévoit le droit procédural national.⁷⁰ La directive consacre un "double droit d'accès" à l'avocat dans les procédures de mandat d'arrêt européen (avec la possible désignation d'un avocat dans l'État d'émission et d'un avocat dans l'État d'exécution). Mais c'est là la seule mention qui est faite aux situations transnationales.

La même difficulté se rencontre au sujet du droit à l'aide juridictionnelle. Aux termes de la directive (UE) 2016/1919, les États ne sont tenus d'attribuer une aide juridictionnelle que "lorsque les intérêts de la justice l'exigent".⁷¹ Les États membres peuvent appliquer un critère de ressources ou un critère de bien-fondé, ou les deux, pour déterminer si l'aide juridictionnelle doit être accordée. A l'exception de la reconnaissance d'un possible droit à l'aide juridictionnelle à la fois dans l'État d'exécution et celui d'émission en matière de mandat d'arrêt européen, la directive n'envisage pas spécifiquement les contours de ce droit dans un contexte transfrontière.⁷² Face à des enquêtes menées par le Parquet européen dans plusieurs États membres, tout dépendra donc de la bonne volonté de ceux-ci à coordonner leurs systèmes d'aide juridictionnelle et à en octroyer le bénéfice pour une mesure spécifique exécutée sur leur territoire. La possibilité, pour les systèmes d'aide juridictionnelle, de faire face, avec leurs faibles dotations, à des procédures nécessitant pour les avocats de la défense un investissement particulier et la mise à disposition des moyens appropriés, pose question. Ces inquiétudes amènent à s'interroger sur une forme de responsabilité, qui incomberait à l'Union, de mettre en place des mécanismes

⁶⁷ CourEDH *Ibrahim et autres c Royaume-Uni* Req n. 50541/08, 50571/08, 50573/08 et 40351/09 [13 septembre 2016], *Beuze c Belgique* Req n. 71409/10 [9 novembre 2018].

⁶⁸ L'art. 3(2) de la directive 2013/48/UE prévoit ainsi l'accès à un avocat avant un interrogatoire de police ou après une privation de liberté. Les États membres doivent par ailleurs prévoir le droit à la présence de l'avocat "au minimum" lors des trois mesures d'enquête ou de collecte des preuves visées par l'art. 3(3)(c) (séances d'identification des suspects, confrontations, reconstitutions de la scène de crime).

⁶⁹ Art. 3(3)(a) de la directive 2013/48/UE cit.

⁷⁰ *Ibid.* art. 3(3)(b).

⁷¹ Art. 4 de la directive (UE) 2016/1919 cit.

⁷² L. Bachmaier-Winter, 'Fundamental Rights and Effectiveness in the European AFSJ. The Continuous and Never easy Challenge of Striking the Right Balance' (2018) *Eucrim* 56, 58.

particuliers au sujet des procédures du Parquet européen, visant à rétablir le suspect ou la personne poursuivie dans son droit à un procès équitable.

III.2. LES PROPOSITIONS VISANT À RÉTABLIR LE DROIT À UN PROCÈS ÉQUITABLE

Le Parquet européen bénéficie d'un réseau organisé de procureurs européens délégués, qui peuvent solliciter directement l'exécution de mesures d'enquête par le biais d'un système comparable à des "commissions rogatoires" européennes, permettant de limiter les formalités et d'éviter les déplacements. Il bénéficie du soutien du niveau central et des organes ou agences de l'Union (l'OLAF, Eurojust, Europol). Il maîtrise, dans certaines limites, le choix du forum et de la législation nationale applicable à ses actes d'enquêtes. La défense, elle, se heurte à des difficultés propres aux procédures transnationales.⁷³ Il s'agit de la prévisibilité du droit applicable, de l'accès au contenu de ce droit national, des barrières linguistiques, des barrières financières lorsqu'il est nécessaire de faire intervenir plusieurs avocats dans différents États membres,⁷⁴ de l'impossibilité pour les avocats de se déplacer ou d'exercer leur mission dans un autre État, des problématiques concernant l'accès au dossier, des difficultés à contester utilement les actes réalisés à l'étranger ou d'y participer. La défense n'a pas accès aux organes transnationaux de coopération judiciaire et ne peut compter sur aucune forme d'organisation ou de structure transnationale de nature à lui apporter un soutien dans ce cadre. Puisque la création du Parquet européen pourrait entraîner un "affaiblissement structurel de la défense",⁷⁵ il conviendrait d'envisager une réponse structurelle, à l'échelle de l'Union, pour tenter d'y remédier. Deux pistes peuvent être envisagées: des remèdes législatifs visant à harmoniser davantage les dispositions de droit national et à inscrire dans le règlement des garanties procédurales précises dont devrait toujours bénéficier la défense face au Parquet européen, ou une forme d'organisation institutionnelle de la défense pénale européenne, afin qu'elle puisse bénéficier des mêmes facilités que le Parquet européen, en s'appuyant sur un réseau structuré d'avocats établis dans tous les États membres.

La solution la plus évidente pour remédier à la rupture d'égalité des armes entre le Parquet européen et la défense, causée par la multitude de droits nationaux applicables,

⁷³ C'est à dire une procédure au cours de laquelle les actes exécutés dans un autre État font ensuite partie de la procédure ou lors de laquelle différents corps de règles, issus de multiples systèmes juridiques, nationaux ou internationaux, sont applicables. L. Bachmaier-Winter, 'Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law' cit.

⁷⁴ E. Sellier et A. Weyembergh (dir), *Criminal Procedural Laws Across the EU – A Comparative Analysis of Selected Main Differences and the Impact over the Development of EU Legislation* cit. 76; L. Bachmaier-Winter, 'Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law' cit.; S. Gless, 'Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle' cit.

⁷⁵ S. Gless, 'Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle' cit. 100.

serait d'unifier totalement les différents régimes procéduraux applicables aux enquêtes et poursuites du Parquet européen et de prévoir un régime autonome de garanties. Cette solution n'est pas envisageable au regard des choix opérés par le règlement de 2017 et le souci de l'UE de respecter l'autonomie institutionnelle et procédurale des États membres. Tout au plus est-il souhaitable d'appeler à une plus grande harmonisation du droit procédural des États membres.⁷⁶ Il ne paraît pas contraire à ces principes d'envisager que certaines notions soient définies avec précision par le règlement et que certains droits puissent être reconnus à la défense sans qu'ils ne soient conditionnés par leur inscription dans la législation nationale. Cette démarche exigerait cependant de renoncer à une protection *a minima*, en cherchant au contraire à établir un régime qui choisirait d'accorder les garanties les plus élevées prévues par les procédures nationales.

Ces règles autonomes visant à une protection uniforme des droits de la défense, pourraient ainsi ne concerner que les décisions prises par le niveau supranational, sur la base des dispositions du règlement. Il en serait ainsi de la possibilité d'obtenir des informations recueillies par le procureur européen délégué, inscrites dans un système de gestion des dossiers propre au Parquet européen. Le fait de préciser que la défense devrait être avisée d'un renvoi en jugement, voire même associée au processus de décision, pourrait également laisser inchangées les règles procédurales de l'État membre du procureur européen chargé de l'affaire, qui auraient vocation à s'appliquer à une affaire ne relevant pas de la compétence du Parquet européen.

Il serait par ailleurs opportun de préciser, dans le règlement, à quel moment une personne peut être considérée comme un suspect. La législation nationale peut en effet soumettre le statut de suspect à une notification officielle de l'accusation, ou à des critères objectifs comme la prise d'une mesure coercitive pouvant intervenir très tardivement dans l'enquête.⁷⁷ Les directives relatives aux garanties procédurales laissent une grande marge d'appréciation aux États membres quant au moment où les autorités nationales déterminent la qualité de suspect,⁷⁸ ce qui peut retarder le départ de certains droits, à l'image du droit à l'information.

D'autres pistes pour faciliter l'exercice des droits de la défense dans un contexte transnational ont été avancées : il pourrait s'agir de l'adoption d'une directive pour protéger spécifiquement les droits de la défense dans ce cadre⁷⁹ ou encore d'un instrument permettant d'harmoniser la question de l'admissibilité des preuves.

⁷⁶ En ce sens, 'A Manifesto on European Criminal Procedure Law', European Criminal Policy Initiative, ZIS 2013 430, 435.

⁷⁷ G Illuminati, 'Protection of Fundamental Rights of the Suspects or Accused in Transnational Proceedings Under the EPPPO' in L Bachmaier-Winter (dir), *The European Public Prosecutor's Office. The Challenges Ahead* cit. 179.

⁷⁸ *Ibid.*

⁷⁹ E Sellier et A Weyembergh (dir), *Criminal Procedural Laws Across the EU – A Comparative Analysis of Selected Main Differences and the Impact over the Development of EU Legislation* cit. 83.

Enfin, il serait opportun d'envisager l'institutionnalisation d'une défense européenne. Il existe déjà, au sein de l'Union européenne, des instruments permettant aux avocats d'exercer leurs missions dans d'autres États membres et des organisations professionnelles capables de représenter leurs intérêts devant les institutions européennes. Il n'existe cependant pas à ce jour de véritable organisation de défense pénale à l'échelle de l'Union, qui serait le pendant du Parquet européen et qui pourrait mobiliser sur un dossier des avocats spécialistes de la matière pénale dans tous les États membres concernés. Le règlement de 2017 a fait le choix de laisser ces questions entièrement dans les mains des États membres, de leurs réglementations internes et donc, concrètement, de se reposer sur la bonne volonté des avocats à s'organiser, avec les moyens nationaux limités dont ils disposent pour ce faire. Il est pourtant permis de considérer que la mise en place d'une défense pénale européenne organisée est une obligation pesant sur l'Union européenne. En effet, si celle-ci crée une institution qui confère de nouvelles prérogatives à l'accusation, elle devrait établir des institutions qui "renforcent la position des individus concernés par ses mesures"⁸⁰

L'Union européenne pourrait s'inspirer d'exemples d'organisations d'une défense pénale instituées dans des configurations similaires. Ainsi, le Statut de Rome offre la possibilité à l'accusé devant la Cour pénale internationale de disposer du temps et des facilités nécessaires à la préparation de sa défense.⁸¹ Il peut choisir librement son avocat, qui exerce de façon indépendante et dispose de la faculté de constituer une "équipe de défense", en faisant notamment appel à des personnes ressources ou des enquêteurs figurant sur les listes de la Cour. Les frais de représentation et d'assistance peuvent être pris en charge par le système d'aide judiciaire de la Cour.⁸² Le Greffe fournit les services de traduction et d'interprétation. Les Equipes de la Défense peuvent également bénéficier de l'assistance du Bureau du conseil public pour la Défense.⁸³ Il s'agit d'un bureau indépendant, composé de juristes spécialisés, qui peut effectuer des recherches pour les conseils choisis des suspects, leur fournir des avis juridiques...

L'organisation de la défense pénale devant les juridictions fédérales aux États-Unis est également un exemple intéressant. Les cours fédérales sont implantées dans différents *districts* et sont donc amenées à collaborer avec des avocats de différents États.⁸⁴ Le *Criminal Justice Act* de 1964 a établi un système global de désignation et de rémunération des avocats, experts ou services d'enquêtes intervenants dans les procédures fédérales pour le compte de la défense. Chaque *District Court* est tenue d'adopter un plan

⁸⁰ 'A Manifesto on European Criminal Procedure Law' cit. 440.

⁸¹ Art. 67(1)(b) du Statut de Rome [1998].

⁸² *Ibid.* art. 67.

⁸³ Norme 77 du règlement de la Cour.

⁸⁴ Les avocats établis dans les États fédérés n'ont pas automatiquement la possibilité d'exercer leurs fonctions devant les juridictions fédérales. Chaque district du système fédéral pose ses propres règles quant à l'admission des avocats qui interviendront devant ses cours. L'admission préalable auprès d'un barreau étatique est cependant requise.

destiné à fournir une représentation pour toute personne financièrement inapte à obtenir une représentation adéquate. Le terme de "représentation" couvre l'assistance d'un avocat, mais également l'accès aux mesures d'enquête, aux mesures d'expertise et autres services nécessaires pour sa représentation en justice. En ce qui concerne l'assistance d'un avocat, deux possibilités sont offertes: soit le recours aux services d'avocats employés par une *Federal Defender Organization*, qui sont ainsi des employés fédéraux, soit à ceux d'avocats privés inscrits sur des listes dites *CJA panels*. Les listes doivent être approuvées par les cours fédérales. Pour y apparaître et s'y maintenir, une formation spécifique doit avoir été suivie. La création d'une institution similaire au *Federal Public Defender* n'est pas envisageable au sein de l'Union européenne, en raison de l'opposition qu'elle pourrait entraîner auprès des avocats, légitimement très attachés à leur indépendance.⁸⁵ Un mécanisme comparable aux *CJA panels* semble plus à même de répondre aux besoins d'organisation de la défense pénale européenne. Il apparaît particulièrement pertinent, lorsque l'on songe à son éventuelle transposition à l'Union européenne, en raison de la possibilité qu'il laisse de respecter les particularismes des barreaux locaux.

À l'exemple des plans développés dans chaque district aux États-Unis, pourrait être envisagée une solution impliquant à la fois l'échelon européen et l'échelon national autour de la proposition, de la validation et de la mise en œuvre d'un "plan de défense européenne". L'idée est de faciliter la mise en réseau des avocats de la défense et d'envisager un financement impliquant tant le niveau national qu'eupéen. Chaque État membre pourrait être tenu de soumettre à la Commission européenne un plan selon les modalités duquel il sera en mesure de fournir à tout suspect l'accès à une défense efficace. Cette notion couvrirait non seulement l'assistance d'un avocat mais également la possibilité d'obtenir l'exécution d'une mesure d'enquête, de traduction ou d'expertise permise par le règlement sur le Parquet européen et le droit national applicable. La Commission se chargerait du recueil des plans et de leur suivi. Le niveau européen pourrait également proposer des formations communes qui seront dispensées aux avocats⁸⁶ et s'assurer de la bonne coopération entre les différentes organisations nationales de défense pénale. Au niveau national, en accord avec les barreaux, une organisation représentant les avocats chargés d'intervenir dans les dossiers traités par le Parquet européen pourrait être créée dans chaque État membre. Des listes d'avocats pourraient alors être constituées, selon des critères communs à toutes les organisations nationales de défense pénale européenne. Lorsqu'un avocat aurait besoin du concours d'un confrère étranger, il pourrait passer par le biais de cette organisation. S'il était possible aux avocats saisis d'un dossier transfrontière de constituer des équipes de défense élargies, en choisissant

⁸⁵ L'indépendance des avocats vis-à-vis de l'État semble être un impératif partagé par les barreaux européens: Charte des principes essentiels de l'avocat européen et code de déontologie des avocats européens du CCBE, 2013, www.ccbe.eu.

⁸⁶ Sur l'importance de dispenser de telles formations, v. E Sellier et A Weyembergh (dir), 'Criminal Procedural Laws across the EU – A Comparative Analysis of Selected Main Differences and the Impact Over the Development of EU Legislation' cit. 84.

des avocats "assistants" dans d'autres États membres, cela leur permettrait d'avoir plus facilement accès à un dossier ouvert dans un autre État, de solliciter la présence d'un confrère lors d'une mesure d'enquête exécutée dans cet État, de le mandater pour exercer un recours contre une décision rendue par les juridictions nationales lors de la phase d'enquête, etc... L'organisation de défense pénale instituée dans chaque État membre par les plans pourrait apporter également un soutien logistique aux avocats du suspect, à l'image de ce que le Bureau du conseil public pour la défense apporte devant la CPI. Des éclaircissements pourraient être apportés sur la procédure applicable dans l'État membre, le contenu du droit national.

Le financement de ces plans pourrait être une responsabilité partagée entre l'UE et les États-membres. Une mise en commun des moyens entre les États participants, afin de redistribuer plus équitablement les fonds auprès des barreaux qui en ont le plus la nécessité, ne pourrait que servir davantage l'objectif d'assurer un exercice effectif des droits de la défense. Un fonds européen pourrait être créé et géré au niveau de l'UE. Les bénéficiaires seraient les États-membres, mais les fonds seraient versés directement aux organisations de défense pénales.

La question résiduelle est celle de la base juridique et de la forme de l'instrument qui viendrait imposer l'élaboration de ces plans. La question mérite cependant d'être ouverte, par ce qu'il est de la responsabilité de l'UE d'assurer un droit à un procès équitable au suspect mis en cause par son organe de poursuites. Le développement d'un espace de liberté, de sécurité et de justice ne peut se faire sans que la défense y soit pleinement associée.

La position de la défense est principalement régie par les droits procéduraux nationaux, ce qui rend difficile l'exercice concret de ses droits dans le cadre d'enquêtes transfrontières menées par un organe supranational de l'Union. Cela est également préjudiciable au bon fonctionnement du Parquet européen: il est en effet à craindre que les recours ne se multiplient pour que l'étendue exacte des droits de la défense dans le cadre de ses procédures soit précisée, notamment par le biais de questions préjudicielles posées à la Cour de Justice. Pour éviter que les parties en présence ne soient obligées d'attendre la constitution d'une jurisprudence solide sur ces points, il est nécessaire que le législateur de l'Union réfléchisse dès à présent à la possibilité d'unifier le régime des prévenus devant le Parquet européen, ainsi qu'à la mise en place de structures destinées à simplifier l'intervention de la défense dans les affaires transfrontières.



ARTICLES

TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – SECOND PART

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THE BELGIAN *JUGE D'INSTRUCTION* AND THE EPPO REGULATION: (IR)RECONCILABLE?

ANA LAURA CLAES*, ANNE WERDING** AND VANESSA FRANSSEN***

TABLE OF CONTENTS: I. A hybrid judicial actor entering the battlefield against EU fraud. – II. Brief overview of the EPPO's relevant features. – III. The Belgian system of judicial inquiries. – IV. Is a judicial inquiry compatible with the EPPO Regulation? – IV.1. No unambiguous prohibition of judicial inquiries. – IV.2. Interpretation confirmed by the drafting history of the EPPO Regulation. – V. Step-by-step analysis of a judicial inquiry in EPPO cases in Belgium: need for legislative amendments? – V.1. The opening of the EPPO investigation. – V.2. The conduct of the EPPO investigation. – V.3. The reallocation of an EPPO case from one Member State to another. – V.4. The closing of the EPPO investigation. – V.5. The reopening of a closed EPPO case. – VI. The Belgian EPPO Act: preserving the *status quo*. – VI.1. Brief overview of the Belgian EPPO Act. – VI.2. Is the new Belgian legislation in conformity with the EPPO Regulation? – VII. Conclusion.

ABSTRACT: The European Public Prosecutor's Office (hereafter EPPO) was established by way of enhanced cooperation, with the adoption of Council Regulation (EU) 2017/1939 (hereafter EPPO Regulation). It has the power to conduct criminal investigations and to directly act as the prosecuting authority before national criminal courts, which is revolutionary. Interestingly, the EPPO Regulation does not explicitly regulate the relation between the EPPO and national judges at the pre-trial stage, who may intervene punctually or, in some cases, even conduct the investigation. Indeed, some civil law systems have a system of shared investigation powers between the public prosecutor and the investigating judge, meaning that the latter conducts a judicial inquiry, while the former is responsible for the prosecution. This raises the delicate question whether a judicial inquiry is compatible with the EPPO Regulation. This *Article* analyses this question, which hugely impacts the implementation

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*** Professor, ULiège (Belgium), vanessa.franssen@uliege.be. This *Article* is in part based on the findings of a bilingual study conducted at the request of the Belgian Ministry of Justice, which has not been published: V Franssen, F Verbruggen, AL Claes and A Werding, Implementatie van het Europees openbaar ministerie in de Belgischerechtsorde/Mise en oeuvre du parquet européen en droit belge, Brussels, June 2019. This contribution, however, also takes into account more recent developments and was finalised on 30 April 2021.



of the EPPO, with respect to the Belgian legal system, based on a close reading of the EPPO Regulation and taking into account its drafting history. It will argue that the EPPO Regulation is not per se irreconcilable with a judicial inquiry as the Member States did not wish the EPPO Regulation to alter the way in which criminal investigations are organised at national level. Subsequently, it will examine how an EPPO investigation conducted by an investigating judge can practically function and evaluate the Belgian EPPO Act. While the analysis concentrates on Belgium, the underlying reasoning may also be useful for other Member States with a similar legal system.

KEYWORDS: European Public Prosecutor's Office – EPPO Regulation – conformity with EU law – judicial inquiry – investigating judge – Belgium.

I. A HYBRID JUDICIAL ACTOR ENTERING THE BATTLEFIELD AGAINST EU FRAUD

On 12 October 2017, the Council of the European Union adopted the Regulation establishing the European Public Prosecutor's Office (hereafter EPPO and EPPO Regulation).¹ The Regulation was adopted via the procedure of enhanced cooperation, as provided by art. 86(1) of the Treaty on the Functioning of the European Union (hereafter TFEU).² It is the first (and thus revolutionary)³ European body with the power to conduct a criminal investigation and to directly act as a prosecuting authority before national criminal courts.

The final EPPO Regulation is the fruit of conflicting visions and provides a much more complex structure for the EPPO than the one envisaged in the Commission's proposal of 2013.⁴ First of all, during the four years of negotiations on the Regulation,⁵ the EPPO shifted from a rather centralised hierarchical structure led by one person to a strongly

¹ Regulation (EU) 2017/1939 of the Council of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO").

² So far, 22 Member States have joined the enhanced cooperation: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Germany, Greece, Spain, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia and Slovakia. OLAF, *European Public Prosecutor's Office* ec.europa.eu.

³ D Flore, 'Le parquet européen à la croisée des chemins' in S Dewulf (ed), *La [CVDW]. Liber Amicorum Chris Van den Wyngaert* (Maklu 2017) 238.

⁴ Proposals to create the EPPO date back to the nineties with the Corpus Juris. The idea was eventually introduced in art. 86 TFEU. In 2013, the Commission launched the Commission Proposal COM(2013) 534 for a Council Regulation on the establishment of the European Public Prosecutor's Office. For a full history of the debate on the creation of a European public prosecutor's office: L Bachmaier Winter, 'Introduction: the EPPO and the Challenges Ahead' in L Bachmaier Winter (ed), *The European Public Prosecutor's Office: Challenges Ahead* (Springer 2018) V; M Delmas-Marty (ed), *Corpus Juris: Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union* (Economica 1997); D Flore, *Droit pénal européen: Les enjeux d'une justice pénale européenne* (Larcier 2009); W Geelhoud, LH Erkelens and AWH Meij (eds), *Shifting Perspectives on the European Prosecutor's Office* (Springer 2018); V Mitsilegas, *EU Criminal Law* (Oxford Hart 2009); JAE Vervaele, 'The European Community and Harmonisation of the Criminal Law Enforcement of Community Policy: Ignoti nulla cupido?' in C Bassiouni, V Militello and H Satzger (eds), *European Cooperation in Criminal Matters: Issues and Perspective* (Cedam 2008) 31 ff.

⁵ These long negotiations are reflected in the number of recitals.

decentralised model led by a college with representatives from each Member State.⁶ This gives the EPPO a strong intergovernmental flavour, contrary to the federal logic of the centralised model in the Commission's proposal.⁷ Secondly, the references to national law have multiplied. While the proposal of the Commission referred 37 times to national law, the EPPO Regulation now contains 86 references. This shows some distrust among Member States and towards the European level, with a preference to remain in control as much as possible.⁸

Like any other EU regulation, the EPPO Regulation is binding in its entirety and directly applicable in all (participating) Member States. It does not require transposition into national law.⁹ National law will thus have to be interpreted in conformity with the EPPO Regulation and any conflicting rule will be set aside.¹⁰ Nevertheless, as indicated, the EPPO Regulation is full of compromises and refers to national law for several matters instead of regulating them at the European level.¹¹ Hence, the functioning of the EPPO is, to a large extent, governed by national rules of criminal procedure. In order to get national legislation in line with the EPPO Regulation and make the EPPO function properly, some adjustments in the national legislation might, however, be required. Member States will thus inevitably have to manoeuvre between the rules determined in the EPPO Regulation and the margin of appreciation it leaves in order to respect the diversity of rules on national criminal procedure.¹²

⁶ L Bachmaier Winter, 'Introduction: the EPPO and the Challenges Ahead' cit. VI; JAE Vervaele, 'The European Public Prosecutor's Office (EPPO): Introductory Remarks' in W Geelhoud, LH Erkelens and AWH Meij (eds), *Shifting Perspectives on the European Prosecutor's Office* cit. 12 ff.

⁷ For one of the first analyses of the Commission's proposal, see V Franssen, 'Proposed Regulation on the European Public Prosecutor – Thinking Federal?' (8 August 2013) European Law Blog europeanlawblog.eu.

⁸ D Flore, 'Le parquet européen à la croisée des chemins' cit. 230. Or, to quote A Weyembergh and C Brière, the Member States' "willingness to renationalise the EPPO as much as possible, and to keep the strongest control possible over its activities". A Weyembergh and C Brière, 'Towards a European Public Prosecutor's Office (EPPO), Study for the LIBE Committee of the European Parliament' (2016) European Parliament www.europarl.europa.eu 51.

⁹ Art. 288 TFEU.

¹⁰ This follows from the principle of precedence of EU law; art. 5(3) EPPO Regulation cit.

¹¹ L Seiler, 'Le parquet européen: une révolution sans bouleversements' (2019) *Revue de droit pénal et de criminologie* 1188.

¹² V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du parquet européen en Belgique: quelques enjeux et propositions de solution' in C Chevallier-Govers and A Weyembergh (eds), *La création du Parquet européen. Simple évolution ou révolution au sein de l'espace judiciaire européen* (Bruylant 2021) 135, 144 ff.; F Verbruggen, V Franssen, AL Claes and A Werding, 'Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?' (18 November 2019) European Law Blog europeanlawblog.eu.

This *Article* focuses on an issue that the EPPO Regulation does *not* explicitly address, although it is particularly delicate for the implementation of the EPPO in some legal systems,¹³ namely the relation between the EPPO and the national judges at the pre-trial stage.

Today, most civil law systems put the prosecutor at the centre of the pre-trial investigation with the power to decide on the orientation of the investigation and to direct the police and other law enforcement authorities. For certain more intrusive investigation measures, the prosecutor might be legally obliged to obtain the authorisation of a pre-trial judge (e.g., the *Ermittlungsrichter* in Germany).¹⁴ Such obligation is fully compatible with the EPPO Regulation.¹⁵ However, other civil law systems (like Belgium, France, Luxembourg¹⁶ and Spain¹⁷) provide a system of shared investigation powers between the public prosecutor and the investigating judge (*juge d'instruction*). In these systems, the investigating judge not only authorises investigation measures, but can actually conduct the investigation and decide on its orientation. This type of investigation is called a judicial inquiry.¹⁸

This *Article* concentrates on the Belgian system,¹⁹ and the question whether the intervention of the Belgian pre-trial judges in EPPO cases is compatible with the EPPO Regulation. Since the latter is based on the prosecutorial model,²⁰ it is unsure whether, and how, an investigating judge can still carry out the pre-trial investigation.

As it will be argued below, the EPPO Regulation does not prohibit the Belgian judicial inquiry, even though the latter does not match the philosophy behind the EPPO. This does not mean, however, that the conclusion will necessarily be the same for other legal systems with a judicial inquiry. Since some aspects of the organisation of the judicial inquiry might

¹³ In Spain, e.g., this is still one of the main stumbling blocks for the implementation of the EPPO. See e.g., Europa Press, *El CGPJ advierte de las dificultades de adaptar la Fiscalía Europea en España con la actual LECrim* www.europapress.es.

¹⁴ K Ligeti, 'The Place of the Prosecutor in Common Law and Civil Law Jurisdictions' in DK Brown, J Iontcheva Turner and B Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 139, 146.

¹⁵ Arts 30(2) and 30(5) EPPO Regulation cit.: "The procedures and the modalities for taking the measures shall be governed by the applicable national law". This also follows from art. 31 on cross-border investigations. To note that the original proposal of the Commission included an EU-wide requirement of a prior judicial authorisation for the EPPO's most intrusive investigation measures (art. 26(4)). In the final text of the EPPO Regulation, there is no trace left of this partial approximation of national rules.

¹⁶ For a presentation of the powers of the Luxembourgish *juge d'instruction*, see J Nies, 'A Special Toolkit of Investigation Techniques in Luxembourg' in K Ligeti and V Franssen (eds), *Challenges in the field of economic and financial crime in Europe* (Hart 2017) 86-88.

¹⁷ For a presentation of the powers of the Spanish *juez de instrucción*, see L Bachmaier Winter and A del Moral García, 'Spain' in F Verbruggen and V Franssen (eds), *International Encyclopaedia of Laws: Criminal Law* (Wolters Kluwer 2020) 34-35 and 215-217.

¹⁸ K Ligeti, 'The Place of the Prosecutor in Common Law and Civil Law Jurisdictions' cit. 146 and 147.

¹⁹ I.e., the legal system the authors are most familiar with. Nonetheless, the analysis will also encompass some punctual comparison with other legal systems, in particular France, Luxembourg and Spain.

²⁰ Z Đurđević, 'Judicial Control in Pre-Trial Criminal Procedure Conducted by the European Public Prosecutor's Office' in K Ligeti (ed), *Towards a prosecutor for the European union* (Hart 2013), 986, 987.

be different, the solution might differ too. The goal of this *Article* is twofold. On the one hand, it aims to stimulate the reflection process among Member States on whether their legal system meets the requirements of the EPPO Regulation, preferably before making far-reaching and maybe unnecessary adjustments, by the time the EPPO launches its first investigations.²¹ On the other hand, it intends to evaluate some of the changes made recently by the Belgian legislator to implement the EPPO in the national legal order, in particular those relating to the role of the investigating judge and the pre-trial tribunal and court.²²

The analysis will be structured as follows. Part II will briefly summarise the main features of the EPPO Regulation that are relevant for the relation between the EPPO and Belgian pre-trial judges. Next, Part III will provide a concise overview of the functioning of the judicial inquiry under current Belgian law. It should be noted that this system might fundamentally change in the coming years, as a comprehensive reform of Belgian criminal procedure is in the make,²³ but this reform will certainly not be finalised by the time the EPPO becomes operational. Subsequently, Part IV will present the main arguments supporting the thesis that the EPPO Regulation does not prohibit the Belgian judicial inquiry in EPPO cases. This reasoning will be based on the current wording but also on the drafting history of the EPPO Regulation. In Part V, we will conduct a step-by-step analysis of how a judicial inquiry in EPPO cases, from beginning to end, could function within the Belgian legal framework, without changing the way in which criminal investigations are essentially organised. Part VI will assess whether the Belgian EPPO Act has made all necessary amendments with respect to the judicial inquiry to be in line with the EPPO Regulation. In the conclusion, we will present our general findings.

II. BRIEF OVERVIEW OF THE EPPO'S RELEVANT FEATURES

The protection of the EU's financial interests is a shared competence between the EU and its Member States.²⁴ The EPPO is created to enhance this protection through criminal enforcement at EU level. Therefore, the EPPO is competent to investigate and prosecute, for example, fraud involving EU subsidies, VAT-fraud, customs fraud and other criminal

²¹ According to the most recent information, the EPPO would start its operational activities on 1 June 2021. See EPPO, *Start date of EPPO operations: European Chief Prosecutor proposes 1 June 2021 to the European Commission* (7 April 2021) www.eppo.europa.eu.

²² Act of 17 February 2021 holding several provisions in criminal justice matters (*Loi du 17 février 2021 portant des dispositions diverses en matière de justice*), *Moniteur belge* 24 February 2021 (hereafter Belgian EPPO Act).

²³ MA Beernaert, 'Le nouveau Code de procédure pénale en projet: quelques lignes de force' in V Franssen and A Masset (ed), *Actualités de Droit Pénal et de Procédure Pénale* (Anthemis 2019) 133; R Verstraeten and A Bailleux, 'Het voorstel van een nieuw wetboek van strafvordering: algemene beginselen en fase van het onderzoek' in A Bailleux, B Spriet, R Van Herpe, J Vanheule, F Verbruggen and R Verstraeten, *Themis: Straf- en strafprocesrecht* (die Keure 2019) 143.

²⁴ Art. 325 TFEU.

offences like passive and active corruption. The material scope of the EPPO is defined by referral to Directive (EU) 2017/1371 on the fight against fraud to the EU's financial interests²⁵ (hereafter PFI Directive).²⁶ In addition to the offences described in the PFI Directive, the EPPO is also competent for any other criminal offence that is inextricably linked to those in the PFI Directive, including offences committed within a criminal organisation.²⁷

The organisational structure of the EPPO can be summarised as follows. It has a central office in Luxembourg and decentralised offices in the Member States.²⁸ The central level is composed of the European Chief Prosecutor (and his deputies), the College, the Permanent Chambers, the European Prosecutors (who form the College),²⁹ and the Administrative Director.³⁰ The decentralised level consists of the European Delegated Prosecutors (hereafter EDPs) in the participating Member States.³¹ The central level takes up two main tasks. First, the College takes decisions on strategic matters, including determining priorities or deciding on general issues arising from individual cases.³² Second, the Permanent Chamber and the European Prosecutor (of the Member State where the investigation is conducted) supervise and direct specific EPPO investigations.³³ The actual investigation and prosecution measures are undertaken at the decentralised level in the participating Member States, by the EDPs who are part of the national prosecution service.³⁴

The EPPO Regulation emphasises the independence of the EPPO.³⁵ The European prosecutors cannot seek nor take instructions from any person or institution outside the EPPO's structure, and always have to act in the interest of the EU as a whole. For the EDPs this becomes quite complex, as they are "active members of the national prosecution

²⁵ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

²⁶ Art. 22(1) EPPO Regulation cit.

²⁷ *Ibid.* art. 22(3).

²⁸ F Verbruggen, V Franssen, AL Claes and A Werding 'Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?' cit.

²⁹ The European Prosecutors, forming together with the European Chief Prosecutor the EPPO College, were appointed on 27 July 2020. Implementing Decision (EU) 2020/1117 of the Council of 27 July 2020 appointing the European Prosecutors of the European Public Prosecutor's Office.

³⁰ Art. 8(3) EPPO Regulation cit.

³¹ *Ibid.* art. 8(4) and recital 21; AM Santos, 'The Status of Independence of the European Public Prosecutor's Office and Its Guarantees' in L Bachmaier Winter (ed), *The European Public Prosecutor's Office: Challenges Ahead* (Springer 2018) 8.

³² Art. 9 EPPO Regulation cit. and recital 24.

³³ *Ibid.* arts 10 and 12; AM Santos, 'The Status of Independence of the European Public Prosecutor's Office and Its Guarantees' cit. 10-11 and 13-14.

³⁴ *Ibid.* art. 17(2).

³⁵ *Ibid.* art. 6(1).

service”³⁶ and may, besides conducting EPPO investigations, also exercise tasks as national prosecutors.³⁷ It is also important to stress that while investigating and prosecuting, the EDPs have “the *same powers as national prosecutors*”.³⁸ A Belgian EDP will thus have the same investigation and prosecutorial powers as any other Belgian prosecutor.

III. THE BELGIAN SYSTEM OF JUDICIAL INQUIRIES

In Belgium, criminal investigations are always led by a judicial authority, either the public prosecutor or the investigating judge.³⁹ The preliminary inquiry (called the *information*)⁴⁰ is led by a (federal)⁴¹ prosecutor, whereas the judicial inquiry (or *instruction*)⁴² is conducted by an investigating judge.⁴³

There are several possibilities to open a judicial inquiry. It is often the prosecutor who decides to refer a case to the investigating judge and asks him (or her) to investigate specific facts.⁴⁴ For most offences (in particular, crimes and misdemeanours (*délits*)), the victim too can request the investigating judge to start an inquiry, by means of a complaint with civil party petition (*plainte avec constitution de partie civile*).⁴⁵ Furthermore, in some cases, the investigating judge has the power to launch a judicial inquiry at his own initiative (*infra*, mini-judicial inquiry). Once a judicial inquiry is opened, the investigating judge is in charge of and directs the investigation. This means he gives instructions to the police and any other competent authority, which will execute them.

The reason for referral to an investigating judge is that the prosecutor has less extensive powers than the investigating judge.⁴⁶ For instance, only the investigating judge has the power to order the production of traffic and location data concerning electronic

³⁶ *Ibid.* art. 17(2).

³⁷ D Flore, ‘Le parquet européen à la croisée des chemins’ cit. 232-233.

³⁸ Art. 13(1) EPPO Regulation cit. Emphasis added.

³⁹ K Ligeti, ‘The Place of the Prosecutor in Common Law and Civil Law Jurisdictions’ cit. 146.

⁴⁰ Belgian Code of Criminal Procedure (*Code d’instruction criminelle*, hereafter CIC), art. 28*bis*.

⁴¹ The prosecutor (*procureur du Roi*) is competent to investigate and prosecute in his own judicial district. If he wants to accomplish an investigation measure in another district, he has to inform the prosecutor of that district. Arts 137 and 150 Belgian Judicial Code of 10 October 1967 (*Code judiciaire*), *Moniteur Belge* 31 October 1967; art. 23 CIC cit. The Belgian Federal Public Prosecutor’s Office is a distinct prosecution service that can act throughout the whole Belgian territory. It is, for instance, competent to prosecute cases that have an international dimension or concern several districts, or cases regarding terrorist offences or criminal organisations. Arts 143, 144*ter* and 144*quater* Belgian Judicial Code cit; MA Beernaert, HD Bosly and D Vandermeersch, *Droit de la procédure pénale* (la Charte 2017) 340.

⁴² Art. 55 CIC cit.

⁴³ O Michiels and G Falque, *Principes de procédure pénale* (Larcier 2019) 227.

⁴⁴ Art. 61 CIC cit.

⁴⁵ *Ibid.* art. 63(1).

⁴⁶ Nevertheless, it should be noted that the prosecutor has more powers when and as long as there is a situation of *flagrant délit* (i.e., when an offence is being committed or has recently been committed, see arts 41 and 46 CIC cit.).

communications⁴⁷ and to take a DNA sample from a suspect against his will or from a minor below the age of 16 years.⁴⁸

It should be noted, though, that there are quite some cases where the prosecutor can ask an investigating judge to accomplish an investigation measure that falls within the latter's competence *without* formally opening a judicial inquiry. This procedure, created in 1998, is called a "mini judicial inquiry" (*mini-instruction*). The investigating judge can decide to grant or refuse the prosecutor's request. If he decides to authorise the investigation measure, he is allowed to keep the case file and start a judicial inquiry on his own initiative. Otherwise, he is obliged to return the file to the prosecutor.⁴⁹ Nevertheless, a limited number of intrusive measures can never be conducted through a mini judicial inquiry and thus always require a full-blown judicial inquiry, e.g., an arrest warrant which marks the beginning of pre-trial detention,⁵⁰ the search of private premises⁵¹ or the secret interception of private communications.⁵²

As follows from the previous paragraphs, the investigating judge does not merely exercise judicial control over coercive investigation measures. In some cases, he is also in charge of and directs the criminal investigation and thus can be said to wear two "hats".⁵³ This does not mean, however, that during the judicial inquiry, the public prosecutor becomes a powerless bystander. Even though he cannot give orders to the investigating judge, which is a logical consequence of the judge's independence, he keeps several prerogatives.⁵⁴ For instance, the prosecutor may at any moment request access to the file and ask the investigating judge to conduct specific investigation measures.⁵⁵ In

⁴⁷ Art. 88*bis* CIC cit.

⁴⁸ *Ibid.* art. 90*undecies*.

⁴⁹ *Ibid.* 28*septies*. MA Beernaert, HD Bosly and D Vandermeersch, *Droit de la procédure pénale* cit. 624-628.

⁵⁰ Act on pre-trial custody (*Loi du 20 juillet 1990 relative à la détention préventive*), *Moniteur belge* 14 August 1990 art. 16.

⁵¹ Art. 89*bis* CIC cit.

⁵² *Ibid.* art. 90*ter*. It is worth pointing out that this investigation measure also encompasses secret searches in information systems and extends to all content of private communications, even if the communication is no longer in transmission. For a more detailed analysis of this legal provision, see V Franssen and O Leroux, 'Recherche policière et judiciaire sur internet: analyse critique du nouveau cadre législatif belge' in V Franssen and D Flore (eds), *Société numérique et droit pénal. Système, Système, Europe* (Larcier/Bruylant 2019) 161-165.

⁵³ This double hat, giving rise to an "ambivalent role", has been criticised and is one of the reasons why the authors of the reform of the Belgian Code of Criminal Procedure propose to replace the investigating judge by a pre-trial judge (see *infra*). See e.g., MA Beernaert, 'Le nouveau Code de procédure pénale en projet: quelques lignes de force' cit. 136-137.

⁵⁴ MA Beernaert, HD Bosly and D Vandermeersch, *Droit de la procédure pénale* cit. 826-827.

⁵⁵ According to Belgian criminal procedure, the public prosecutor has a general right of action on the basis of art. 1 *Loi contenant le titre préliminaire du code de procédure pénale* and art. 22 CIC cit. R Declercq, *Beginnelen van strafrechtspleging* (6th ed Kluwer 2014) 316; R Verstraeten and F Verbruggen, *Strafrecht en strafprocesrecht voor bachelors* (12th ed Intersentia 2019) 159.

case of refusal, he may appeal the decision of the investigating judge before the pre-trial court (*chambre des mises en accusation*).⁵⁶ In addition, he can always,⁵⁷ and in particular during the supervision of lengthy investigations,⁵⁸ ask the pre-trial court to give orders to the investigating judge⁵⁹ or, in extreme cases, to remove the latter from the case.⁶⁰

When the investigating judge has completed the judicial inquiry, the public prosecutor receives the criminal file back in view of drafting the final submissions⁶¹ in which he defines the charges and indicates whether the case should be referred for trial or dismissed. At this stage, the prosecutor can still request the investigating judge to accomplish further investigation measures to complete the investigation.⁶² When the public prosecutor has drafted his final submissions, he brings the case to the pre-trial tribunal (*chambre du conseil*), which will decide whether or not to refer the case for trial to the competent court.⁶³ Being independent and impartial,⁶⁴ the pre-trial tribunal is obviously not obliged to follow the public prosecutor's final submissions. Under certain conditions, the parties (including the public prosecutor) can appeal the decision of the pre-trial tribunal before the pre-trial court.⁶⁵

It is uncertain whether the judicial inquiry will continue to exist under Belgian law.⁶⁶ Indeed, the previous Belgian government that came into power in 2014 decided to revise the whole criminal procedure and set up a reform commission of experts to prepare a new Code.⁶⁷ The reasons for this comprehensive reform of the Code of Criminal Procedure (*Code*

⁵⁶ This right of appeal is a consequence of the prosecutor's general right of action. Belgian Court of Cassation judgment of 22 March 1994 n. P.94.202 N; Declercq, *Beginselen van strafrechtspleging* cit. 316-317.

⁵⁷ Art. 136bis CIC cit.

⁵⁸ *Ibid.* art. 136bis(1).

⁵⁹ *Ibid.* art. 228.

⁶⁰ *Ibid.* art. 235.

⁶¹ We opted for this term and not "indictment" as this document is not a formal charging decision that brings the case to the trial court. It is the pre-trial tribunal (or, upon appeal, the pre-trial court) that refers the case for trial; this (court) decision determines which suspects are referred, for which facts and under which charges. This terminological distinction is important for the analysis made in Part V.

⁶² Art. 127 CIC cit.

⁶³ *Ibid.* art. 128. Other decisions like e.g., grant the suspension of the ruling are also possible.

⁶⁴ Art. 6(1) of the European Convention on Human Rights [1950] and art. 47(2) of the Charter of Fundamental Rights of the European Union [2012].

⁶⁵ Art. 135 CIC cit.

⁶⁶ Interestingly, the same reflection is ongoing in Spain where a major reform of the Spanish criminal procedure would encompass the abolition of the investigating judge and the creation of a pre-trial judge (*juez de garantías*). The draft bill entailing this reform (*Anteproyecto de Ley de Enjuiciamiento Criminal*) was published in the course of 2020 and can be consulted at: www.mjusticia.gob.es, in particular 59-60. An impact analysis was published in January 2021: 'Anteproyecto de Ley Orgánica de Enjuiciamiento Criminal, Memoria del Análisis de Impacto Normativo', *Ministerio de Justicia* www.mjusticia.gob.es.

⁶⁷ Ministerial Decree setting up the commissions for the reform of criminal law and criminal procedure (*Arrêté ministériel de 30 octobre portant création des Commissions de réforme du droit pénal et de la procédure pénale*), *Moniteur belge* 29 December 2015.

d'instruction criminelle, hereafter CIC) are multiple: the legislation is outdated (it dates back to the 19th century) and, due to many punctual reforms over time, it has become incoherent and a difficult read, resulting in strong critiques.⁶⁸ One of the major novelties of the proposed reform is the creation of a unified pre-trial investigation, which puts an end to the classic distinction between a preliminary and a judicial inquiry. According to the proposal of the experts, the prosecutor would be in charge of the investigation, but would have to request the *ex ante* authorisation of a pre-trial judge (*juge de l'enquête*) for coercive measures that infringe upon fundamental rights or freedoms.⁶⁹ Moreover, the pre-trial judge would exercise judicial control on the investigation.⁷⁰ Clearly, this future system much more resembles the underlying logic of the EPPO, according to which the public prosecutor is in charge of the investigation. Nevertheless, it remains to be seen whether this proposal will eventually result in a new Code of Criminal Procedure.⁷¹ Indeed, the proposed reform is facing quite strong opposition from the judiciary and some legal scholars⁷² as the investigating judge is considered a fundamental feature of Belgian criminal procedure. The new Belgian government, which took office on 1 October 2020, has confirmed its intention to reform the Code of Criminal Procedure, taking the proposals made by the reform commission appointed by the previous government as a starting point for further discussions, but has also indicated that it will appoint a new commission of experts.⁷³

IV. IS A JUDICIAL INQUIRY COMPATIBLE WITH THE EPPO REGULATION?

IV.1. NO UNAMBIGUOUS PROHIBITION OF JUDICIAL INQUIRIES

The functioning of the EPPO is based on the prosecutorial model (without any role for the investigating judge) that can be found in most countries of the EU.⁷⁴ As a consequence, one might read into the provisions of the EPPO Regulation that the EPPO is based on the idea of prosecutors having full investigation and prosecutorial powers and that it

⁶⁸ MA Beernaert, 'Le nouveau Code de procédure pénale en projet: quelques lignes de force' cit. 134.

⁶⁹ *Ibid.* 135 and 141-142; R Verstraeten and A Bailleux, 'Het voorstel van een nieuw wetboek van strafvordering: algemene beginselen en fase van het onderzoek' cit. 146.

⁷⁰ MA Beernaert, 'Le Nouveau Code de procédure pénale en projet: quelques lignes de force' cit. 143-146.

⁷¹ The reform proposed by the Commission resulted in a Bill that was brought before Parliament in May 2020: *Proposition de loi contenant le Code de procédure pénale*, Doc. Parl., Ch. représ., sess. ord., 2019-2020, n. 55-1239/001. However, at the moment of finalising this contribution, the parliamentary discussions have not yet started.

⁷² See e.g., M Claise, 'Ne tirez pas sur le juge financier' in M Cadelli (eds), *La figure du juge d'instruction: réformer ou supprimer?* (Anthemis 2017) 57, 59 and 63.

⁷³ P Maignette and A De Croo, 'Rapport des formateurs/Verslag van de formateurs' (30 September 2020) Média des Bruxelles bx1.be 48-49.

⁷⁴ DA Alvarez, 'The EPPO Implementation. A Perspective from Spain' (2018) *eu crim* 124.

therefore prohibits systems with an investigating judge.⁷⁵ Or, to put it simply, judicial inquiries do not match the philosophy of the EPPO Regulation.

Especially art. 28(1) of the EPPO Regulation could, following this vision, be read as an affirmation that only the EDP can take the lead of the investigation: “The [EDP] handling a case may, in accordance with this Regulation and *with national law*, either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State. Those authorities shall, *in accordance with national law*, ensure that all instructions are followed and undertake the measures assigned to them”.⁷⁶

When reading art. 28(1), the emphasis could indeed rest on the EDP “handling a case” with the power to either undertake the (investigation) measures on his own or to “instruct” the competent national authorities to carry them out, leaving no margin of discretion for these authorities. It could moreover be stressed that the title of art. 28 “Conducting the investigation”⁷⁷ could be interpreted as allowing only the EDPs to conduct, and thus lead, an EPPO investigation.⁷⁸

Nevertheless, neither a provision of the EPPO Regulation, nor its general philosophy based on a prosecutorial model can, in our view, lead to the conclusion that the EPPO Regulation explicitly forbids a system with an investigating judge. Despite the wording of art. 28(1), it does not prescribe in any way that an investigation in EPPO cases can only be led by the EDP himself (contrary to earlier versions of the Regulation, *infra*, IV.2).

⁷⁵ JB Jacquin, ‘Les pouvoirs hors normes du futur parquet européen’ (19 August 2019) *Le Monde* www.lemonde.fr; J Nies, ‘La répartition des rôles entre le Parquet européen et les parquets nationaux’ (2019) *Journal des tribunaux* 11, 13; J Bigot and S Joissains, ‘Rapport d’information fait au nom de la commission des affaires européennes sur la coopération judiciaire en matière pénale et la mise en œuvre du parquet européen’ (16 May 2019) *Sénat* www.senat.fr; L Seiler, ‘Le parquet européen: une révolution sans bouleversements’ cit. 1212; HH Herrnfeld, D Brodowski and C Burchard, *European Public Prosecutor’s Office: Article-by-Article Commentary* (Hart Publishing 2020) 249 and 252.

⁷⁶ Emphasis added. *Cfr* other language versions of the EPPO Regulation: e.g., French: “Le procureur européen délégué chargé d’une affaire peut, conformément au présent règlement et au droit national, soit prendre des mesures d’enquête et d’autres mesures de sa propre initiative, soit en charger les autorités compétentes de son État membre. Lesdites autorités veillent, conformément au droit national, à ce que toutes les instructions soient suivies et prennent les mesures qu’elles ont été chargées de prendre. Le procureur européen délégué chargé de l’affaire utilise le système de gestion des dossiers pour signaler au procureur européen compétent et à la chambre permanente tout événement important concernant l’affaire, conformément aux règles établies dans le règlement intérieur du Parquet européen” (emphasis added). E.g., German: “Der mit einem Verfahren betraute Delegierte Europäische Staatsanwalt kann im Einklang mit dieser Verordnung und dem nationalen Recht die Ermittlungsmaßnahmen und andere Maßnahmen entweder selbst treffen oder die zuständigen Behörden seines Mitgliedstaats dazu anweisen. Diese Behörden stellen im Einklang mit dem nationalen Recht sicher, dass alle Weisungen befolgt werden, und treffen die ihnen zugewiesenen Maßnahmen. Der betraute Delegierte Europäische Staatsanwalt unterrichtet gemäß den in der Geschäftsordnung der EUSTa festgelegten Vorschriften den zuständigen Europäischen Staatsanwalt und die Ständige Kammer durch das Fallmanagementsystem von allen wesentlichen Entwicklungen des Falles” (emphasis added).

⁷⁷ “Conduite de l’enquête” in French and “Führung der Ermittlungen” in German.

⁷⁸ MA Beernaert, ‘Le Nouveau Code de Procédure Pénale en Projet: Quelques Lignes de Force’ cit. 139.

First of all, the EU legislator did not create a European criminal court or European pre-trial courts (as opposed to the proposal made by the *Corpus juris*,⁷⁹ for instance). He limited himself to the creation of a European Public Prosecutor's Office that will act before national courts. In addition, as explained above, there are many references to national law in the EPPO Regulation. To conduct criminal proceedings, the EPPO will thus have to rely, to a large extent, on national rules of criminal procedure. Therefore, Ligeti considers the EPPO Regulation compatible with different forms of authority and division of tasks between the actors in the criminal process at the national level.⁸⁰

Most significant in this regard, is recital 15, which emphasises that “[the] Regulation is without prejudice to Member States’ national systems concerning the way in which criminal investigations are organised”.⁸¹ Furthermore, recital 12 states that, “[i]n accordance with the principle of proportionality [...], this Regulation *does not go beyond what is necessary in order to achieve those objectives* and ensures that *its impact on the legal orders and the institutional structures of the Member States is the least intrusive possible*”.⁸²

In light of these recitals, art. 28(1) of the EPPO Regulation does not necessarily exclude the intervention of an investigating judge in EPPO cases. Otherwise, it would force Member States to change “the way in which criminal investigations are organised” and have a far-reaching impact on “the institutional structures of the Member States”, particularly in Belgium where the Constitutional Court has insisted on the importance of upholding the procedural safeguards offered by the judicial inquiry (which are higher than those in a preliminary inquiry)⁸³ and where, as indicated *supra*, the judicial inquiry is still regarded by many stakeholders as a fundamental pillar of national criminal procedure. Instead, when reading art. 28(1), the emphasis could rest on conducting the investigation “in accordance with national law” (including investigations led by investigating judges), a reference to national law that was added by the Member States during the negotiations (*infra*, IV.2). If art. 28(1) was meant to oblige national legislators to abolish investigating

⁷⁹ For a concise analysis of the role of the pre-trial judge (taking the form of a *juge des libertés*) and the option of creating a European pre-trial court in the *Corpus juris*, see K Ligeti and V Franssen, ‘Le contrôle juridictionnel dans les projets de Parquet européen’ in G Giudicelli-Delage, S Manacorda and J Tricot (eds), *Le contrôle judiciaire du Parquet européen: Nécessité, modèles, enjeux* (Société de législation comparée 2014) 127, 134-139.

⁸⁰ K Ligeti, ‘The Place of the Prosecutor in Common Law and Civil Law Jurisdictions’ cit. 160.

⁸¹ The same interpretation counts for other language versions of the EPPO Regulation. E.g., in German: “Diese Verordnung lässt die nationalen Systeme der Mitgliedstaaten in Bezug auf die art. und Weise, wie strafrechtliche Ermittlungen organisiert werden, *unberührt*”, or in French: “Le présent règlement s’applique *sans préjudice* des systèmes nationaux des États membres concernant la manière dont les enquêtes pénales sont organisées” (emphasis added).

⁸² Emphasis added.

⁸³ See e.g., Belgian Constitutional Court judgment of 25 January 2017 n. 6/2017 (2017) Nullum Crimen 351, case comment by S Raats; Belgian Constitutional Court judgment of 21 December 2017 n. 148/2017, para. B.22.4; R Verstraeten and A Bailleux, ‘Het voorstel van een nieuw wetboek van strafvordering: algemene beginselen en fase van het onderzoek’ cit. 149-150.

judges in EPPO cases, and thus fundamentally change “the way in which criminal investigations are organised”, then this should have been done unambiguously and without the insertion of recital 15 (at the initiative of the Member States, *infra*, IV.2).

As a consequence, even if art. 28(1) determines that the EDP can “instruct”⁸⁴ the competent national authorities to undertake (investigation) measures and that the latter have to “ensure that all instructions are followed and undertake the measures assigned to them”, this does not mean that the public prosecutor can *force* a judge to undertake a certain investigation measure. Another interpretation would make the references to national law, but also the authorisation of the judge, which is a necessary condition for certain intrusive investigation measures in light of European law,⁸⁵ pointless.

Moreover, art. 30(1) of the EPPO Regulation sets that “Member States shall ensure that the European Delegated Prosecutors are entitled to order or request” at least the six investigation measures including the interception of electronic communications and the search of premises,⁸⁶ and art. 30(4) of the EPPO Regulation states that “[t]he European Delegated Prosecutors shall be entitled to request or to order any other measures in their Member State that are available to prosecutors under national law in similar national cases, in addition to the measures referred to in paragraph 1”.⁸⁷ Art. 30(3) and (5) further stresses that Member States can subject these investigation measures to conditions or limitations. The procedures and modalities for taking investigation measures shall thus be governed by the applicable national law. This includes making the investigation measure conditional upon

⁸⁴ In French “charger” and in German “anweisen”.

⁸⁵ For instance, the European Court of Human Rights has emphasised the importance of a judicial warrant with respect to the search of private premises (ECtHR *Sociétés Colas Est and Others v France* App n. 37971/97 [16 April 2002] para. 49) and personal searches (ECtHR *Kobiashvili v Georgia* App n. 36416/06 [14 March 2019] paras 39-41 and 61-71). At the EU level, the need for a court order is explicitly required for the production of “transactional” and content data by service providers in the Commission’s proposal for a Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters (art. 4(2) COM(2018) 225 final). If adopted this way, this will be a new step in the approximation of national law, as the EU legislator has so far only required the intervention of a “judicial authority”, which can be a judge or a public prosecutor. See e.g., art. 6 Framework Decision 2002/584/JHA of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. That said, the Court of Justice has emphasised, with respect to the European arrest warrant, the need for the intervention of an independent (issuing and executing) judicial authority, a standard that is, for instance, not met by German nor by Dutch public prosecutors as they can receive instructions from the executive. Joined cases C-508/18 and C-82/19 PPU *Ministry for Justice and Equality v OG and PI* ECLI:EU:C:2019:456 para. 88; Case C-510/19 AZ ECLI:EU:C:2020:953 paras 56 and 70. Moreover, in the field of data retention, the Court has recently ruled that a measure authorising the real-time collection of traffic and location data must “be subject to a prior review carried out either by a court or by an independent administrative body whose decision is binding”. Joined cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others* ECLI:EU:C:2020:791 para. 189.

⁸⁶ Emphasis added.

⁸⁷ Emphasis added.

the authorisation of a pre-trial judge. Indeed, unlike the Commission's proposal,⁸⁸ the EPPO Regulation does not contain any minimum rules on judicial authorisation and thus leaves national criminal procedure, as far as this aspect is concerned, unaffected.

In this regard, it is also worthwhile referring to recital 87, highlighting that "the procedural acts of the EPPO that are adopted before the indictment and intended to produce legal effects vis-à-vis third parties (a category which includes the suspect, the victim, and other interested persons whose rights may be adversely affected by such acts) are subject to *judicial review by national courts [...] in accordance with the requirements and procedures laid down by national law*".⁸⁹

What follows from the above provisions, is that EDPs will be able to give orders to national authorities such as the police and administrative authorities under the same conditions as prosecutors in similar national cases. However, if national law requires the intervention of a judge, the EDPs will have to "request" the investigation measure.⁹⁰ Whether this judge only intervenes punctually (like the *Ermittlungsrichter* in Germany), *ex ante* or *ex post*, or takes over and leads the investigation from that moment onwards (like the *juge d'instruction* in Belgium) is not defined by the Regulation.⁹¹ An EDP could thus request the Belgian investigating judge to conduct a measure that requires, under Belgian law, his *ex ante* intervention and potentially even request the opening of a judicial inquiry (*supra*, III). The judge being independent and impartial, he could, however, not be obliged to authorise the requested measure.⁹²

Still, it should be stressed that to be able to effectively conduct the investigation and undertake the necessary investigation measures,⁹³ the EPPO strongly relies on national authorities, whether through an order or a request. In light of the principle of sincere cooperation, all national authorities, including the investigating judge, should actively support EPPO investigations and cooperate with the EPPO.⁹⁴

In sum, the EPPO Regulation does, in our view, not prohibit the intervention of an investigating judge in EPPO cases. As Pradel rightly concludes, "la présence active du procureur européen délégué est compatible avec les fonctions du juge national de la mise en état, en application d'une sorte de répartition des pouvoirs sous le double signe de

⁸⁸ Art. 26(4) Proposal for a Regulation COM(2013) 534 cit.

⁸⁹ Emphasis added.

⁹⁰ It should also be noted that, contrary to the Commission's initial proposal, the EPPO Regulation does *not* set minimum requirements regarding the need of a judicial authorisation for intrusive investigation measures. F Verbruggen, V Franssen, AL Claes and A Werding 'Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?' cit.

⁹¹ *Ibid.*

⁹² Pradel comes to the same conclusion: J Pradel, 'Le parquet européen est-il compatible avec les juges nationaux de la mise en état en affaires pénales?' (2019) *Recueil Dalloz* 650.

⁹³ Recital 70 EPPO Regulation cit.

⁹⁴ Recital 69 and art. 5(6) EPPO Regulation cit.; F Verbruggen, V Franssen, AL Claes and A Werding 'Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?' cit.

l'efficacité européenne et de la souveraineté nationale. Le juge d'instruction, notamment, devrait donc être maintenu. Et la confiance mutuelle pourrait faire le reste".⁹⁵ In addition to the above, it should be emphasised that the EPPO still remains a public prosecutor's office⁹⁶ and does not affect the competences of national judges. What matters, to quote the European Commission, is that the EPPO is "the sole competent *prosecution* authority in EPPO cases".⁹⁷ In effect, the existence of a judicial inquiry as organised under Belgian law does *not* affect the EPPO's prosecution powers, it only impacts the way in which the EPPO conducts its investigation. The Belgian judicial inquiry is thus, in principle, not incompatible with the EPPO Regulation, even if it remains to be seen how it will practically function in the context of an EPPO investigation (*infra*, V).

IV.2. INTERPRETATION CONFIRMED BY THE DRAFTING HISTORY OF THE EPPO REGULATION

The above analysis is also supported by the drafting history of the EPPO Regulation. The history of the drafting of the EPPO Regulation indeed shows that the EU Member States did not intend to radically change the relation between public prosecutors and judges. The comparison between the wording of the Commission's original proposal,⁹⁸ intermediate versions of the text and the final Regulation is most telling, in particular with respect to art. 28(1) and recital 15 of the EPPO Regulation.

In the Commission's proposal, art. 18 (corresponding to current art. 28 of the EPPO Regulation) read:

"The designated [EDP] shall *lead* the investigation on behalf of and under the instructions of the European Public Prosecutor. The designated [EDP] may either undertake the investigation measures on his/her own or instruct the competent law enforcement authorities in the Member State where he/she is located. *These authorities shall comply with the instructions of the [EDP] and execute the investigation measures assigned to them*".⁹⁹

⁹⁵ J Pradel, 'Le parquet européen est-il compatible avec les juges nationaux de la mise en état en affaires pénales?' cit.

⁹⁶ This is also expressed by the terms used in certain language versions of the Regulation: e.g., in Dutch "*openbare aanklager*", a term that stresses the accusatory function of a public prosecution service. This choice is somewhat surprising because, in practice, this is just one of the many tasks performed by modern prosecutors. F Verbruggen, V Franssen, AL Claes and A Werding 'Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?' cit.

⁹⁷ European Commission, 'Draft Minutes VTC Meeting of the EPPO Expert Group' (30 June 2020) 3, emphasis added.

⁹⁸ Proposal for a Regulation COM(2013) 534 cit.

⁹⁹ Emphasis added. *Cfr* other language versions of the EPPO Regulation: e.g., in German: "Der benannte Abgeordnete Europäische Staatsanwalt leitet das Ermittlungsverfahren im Namen und nach den Weisungen des Europäischen Staatsanwalts. Der benannte Abgeordnete Europäische Staatsanwalt kann die Ermittlungsmaßnahmen entweder selbst durchführen oder die zuständigen Strafverfolgungsbehörden

The Commission's proposal thus emphasised that the investigation would be led by the EDP and made no reference to national law. Moreover, the Commission's proposal did not contain a recital similar to recital 15 of the EPPO Regulation. This indicates the more European-centred approach of the Commission, advocating in favour of a more far-reaching integration of EU and national law.

As explained above (*supra*, II), some Member States were quite reluctant to create a strongly centralised EPPO.¹⁰⁰ Unsurprisingly, they substantially amended the initial proposal, first in the hope to achieve consensus among all Member States, then opting for enhanced cooperation.¹⁰¹

In the draft regulation of the Council of 31 January 2017,¹⁰² art. 18 of the Commission's proposal was altered to art. 23, which reads as follows: "The [EDP] *handling* a case may, in accordance with this Regulation and with national law, either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State. These authorities shall, *in accordance with national law*, ensure that all instructions are followed and undertake the measures assigned to them [...]".¹⁰³

The verb "lead" was thus deleted and replaced with "handling", which has a less directive connotation. Furthermore, the Council added no less than two references to national law, thereby increasing the role of national law when the EPPO conducts investigation measures.

Moreover, in the above draft Regulation, the Council inserted a recital 10, which is identical to the text of current recital 15 of the EPPO Regulation, marking clearly the Member States' desire to leave more autonomy to the national legal system.

The wording of the Regulation thus shifted from an EDP *leading* an investigation and giving orders to national authorities, to an EDP *instructing* national authorities to conduct

in dem Mitgliedstaat, in dem er seinen Standort hat, dazu anweisen. Diese Behörden befolgen die Weisungen des Abgeordneten Europäischen Staatsanwalts *und führen die ihnen übertragenen Ermittlungsmaßnahmen durch*"; in French: "Le procureur européen délégué désigné mène l'enquête au nom et sur instructions du procureur européen. Le procureur européen délégué désigné peut soit procéder aux mesures d'enquête de sa propre initiative, soit donner instruction en ce sens aux autorités répressives compétentes de l'État membre où il est affecté. Ces autorités se conforment aux instructions du procureur européen délégué *et exécutent les mesures d'enquête dont elles sont chargées*" (emphasis added).

¹⁰⁰ Even before the Commission presented its proposal, France and Germany published a common memo in which they advocated in favour of a less European-centred EPPO. See D Flore, 'Le parquet européen à la croisée des chemins' cit. 234 and the references made there. Shortly after the publication of the Commission's proposal, several national parliaments objected too, raising a so-called yellow card: V Franssen, 'National Parliaments Issue Yellow Card against the European Public Prosecutor's Office' (4 November 2013) European Law Blog europeanlawblog.eu.

¹⁰¹ D Flore, 'Le parquet européen à la croisée des chemins' cit. 234-235.

¹⁰² Draft regulation Council doc. n. 5766/17 Interinstitutional File 2013/0255 (APP) Proposal for a Regulation of the European Council of 31 January 2017 on the establishment of the European Public Prosecutor's Office.

¹⁰³ Emphasis added.

an investigation measure according to national law and thus leaving unaffected the way in which criminal investigations are organised at the national level. Consequently, if national law requires the intervention of an investigating judge and/or the opening of a judicial inquiry for a certain measure, this should be possible in EPPO cases.

These arguments hold true for the final version of the EPPO Regulation, since the wording of art. 28(1) and recital 15 remained unchanged in the later stages of the negotiations.¹⁰⁴

To conclude, there is no provision in the Regulation that *expressly* states that the EPPO must be able to conduct the investigation on an exclusive basis and the letter of the EPPO Regulation does, in our opinion, not prohibit Member States from preserving the current role of the investigating judge conducting a judicial inquiry in EPPO investigations.¹⁰⁵ National criminal procedural law continues to apply to criminal proceedings relating to EPPO cases.¹⁰⁶ The foregoing analysis of the drafting history of a key article and recital of the EPPO Regulation corroborates that reading. The long negotiation process, the shift from a federal to a decentralised logic, and the insertion of multiple references to national law clearly show that the Member States did not wish for the EPPO Regulation to interfere too much with the national legal systems.

V. STEP-BY-STEP ANALYSIS OF A JUDICIAL INQUIRY IN EPPO CASES IN BELGIUM: NEED FOR LEGISLATIVE AMENDMENTS?

Once clarified that a judicial inquiry is not prohibited by the EPPO Regulation, the question remains to determine how an EPPO investigation conducted by an investigating judge could practically function in the Belgian legal system without requiring a major overhaul. Even if the role of the investigating judge as such is not incompatible with the Regulation, some legislative changes might still be necessary. In this Part, we will therefore discuss the different stages of an EPPO investigation in the hypothesis of a judicial inquiry, analysing at each step whether Belgian legislation is in conformity with the provisions of the Regulation, and if not, what amendments are needed. Next, in Part VI, we will present the relevant provisions of the Belgian EPPO Act, which was adopted in February 2021, and assess whether the amendments made are sufficient to resolve the problems identified in this Part.

¹⁰⁴ With the only minor and irrelevant exception that the final version reads “those” authorities and not “these”.

¹⁰⁵ This thesis is supported by J Pradel, ‘Le parquet européen est-il compatible avec les juges nationaux de la mise en état en affaires pénales?’ cit. 650.

¹⁰⁶ Y De Vries and SJ Lopik, ‘Het Europees openbaar ministerie komt eraan: waakhond of papieren tijger?’ (2019) *Nederlands tijdschrift voor Europees recht* 7.

V.1. THE OPENING OF THE EPPO INVESTIGATION

An EPPO investigation can start in two ways.¹⁰⁷ On the one hand, the EDP himself can start an investigation when there are reasonable grounds to believe that an offence falling within the competence of the EPPO is being or has been committed.¹⁰⁸ On the other hand, the EDP can exercise its right of evocation, i.e., take over a case from a judicial or law enforcement authority of a Member State that initiated the investigation and that, according to its obligation based on art. 24(2) of the EPPO Regulation, informed the EPPO about the existence of this investigation.¹⁰⁹ Notwithstanding that the EPPO and national authorities have shared competences (i.e., both can prosecute EPPO offences), the EPPO's competence has priority.¹¹⁰ However, the right of evocation exists only as long as the national investigation has not been finalised and provided that an indictment has not been submitted to a court.¹¹¹

The EPPO has to exercise this right of evocation within five days after receiving all the relevant information from the national authorities.¹¹² During the five days period for the decision of evocation, the national authorities have to "refrain from taking any decision under national law that may have the effect of precluding the EPPO from exercising its right of evocation".¹¹³ Nevertheless, they have to "take any urgent measures necessary, under national law, to ensure effective investigation and prosecution".¹¹⁴ If the EPPO decides to exercise its right of evocation, the national competent authorities will hand over the file to the EPPO and stop their own investigation.¹¹⁵

In case of disagreement between the EPPO and the national authorities over the question whether the criminal conduct falls within the material scope of the EPPO, "the national authorities competent to decide on the attribution of competences concerning prosecution at the national level shall decide who is to be competent for the investigation".¹¹⁶ It is thus up to the Member States to decide which authorities will take this decision.

¹⁰⁷ Art. 25(1) EPPO Regulation cit. See also arts 41-42 of the Internal Rules of Procedure of the European Public Prosecutor's Office, College Decision 003/2020 of 12 October 2020 (hereafter IRP).

¹⁰⁸ Art. 26(1) EPPO Regulation cit.

¹⁰⁹ *Ibid.* arts 24(2) and 27.

¹¹⁰ *Ibid.* art. 25(1) and recital 58.

¹¹¹ *Ibid.* art. 27(7).

¹¹² *Ibid.* art. 27(1).

¹¹³ Recital 58 seems to be broader than art. 27(2) as it states that "the authorities of Member States should refrain from acting, unless urgent measures are required, until the EPPO has decided whether to conduct an investigation", whereas art. 27(2) only mentions "any decision under national law that may have the effect of precluding the EPPO from exercising its right of evocation".

¹¹⁴ Art. 27(2) EPPO Regulation cit.

¹¹⁵ *Ibid.* art. 27(5).

¹¹⁶ *Ibid.* art. 25(6).

Clearly, the above rules do not cause a problem when a Belgian investigation is led by a national (local or federal) public prosecutor. Yet, does the EPPO's right of evocation create any difficulty when the ongoing investigation is a judicial inquiry?

Firstly, we can assume that the terms "judicial or law enforcement authority of a Member State"¹¹⁷ include the investigating judge. Therefore, the latter has the obligation to inform the EPPO if an investigation is initiated (whether at his own initiative or at the request of the public prosecutor or the victim, *supra*, III) concerning an offence that could fall within the competence of the EPPO. After informing the EPPO and while awaiting its decision, the investigating judge will still be able to take urgent investigation measures but, in accordance with art. 27(2) of the EPPO Regulation, will have to refrain from any measure that would render impossible the exercise of the EPPO's right of evocation.

Secondly, once the EPPO decides to use its right of evocation, it will take up the role of the public prosecutor, with all the rights this involves (*supra*, III). Yet, considering that the EPPO Regulation does not prohibit a judicial inquiry as the EU legislator did not wish to interfere too much with the way in which the criminal investigation is organised in the national legal systems, the investigating judge will continue to direct the judicial inquiry. The Belgian EDP handling the case for the EPPO will thus have the same position as a Belgian prosecutor in a judicial inquiry, with access to the case file and the possibility to request the investigating judge to undertake certain investigation measures (*supra*, III).

Admittedly, one could claim that the wording of art. 27(5) of the EPPO Regulation, requiring that if the EPPO exercises its right of evocation, the competent authorities of the Member States "transfer the file and refrain from carrying out further acts of investigation in respect of the same offence", prohibits the investigating judge from continuing the investigation after the EPPO's decision to exercise its competence. It should be noted, though, that art. 27(5) employs the terms "competent national authorities" and not, as in art. 24(2), "judicial or law enforcement authority" that initiated the investigation. So, in our view, it can be argued, also in the light of a general reading of the EPPO Regulation, that it is up to the Belgian public prosecution service – which is the competent national authority for the prosecution – to transfer the file to the EPPO and to refrain from requesting the investigating judge to conduct further acts of investigation in respect of the same offence.

Finally, the EPPO may only exercise its right of evocation "provided that the national investigation has not already been finalised and that an indictment has not been submitted to a court".¹¹⁸ The EU legislator thus uses a double criterion.

In Belgium, as explained above (*supra*, III), when the investigating judge has completed the judicial inquiry, he sends the criminal file back to the public prosecutor, who drafts the final submissions and brings the case to the pre-trial tribunal. The latter will

¹¹⁷ *Ibid.* art. 24(2).

¹¹⁸ *Ibid.* art. 27(7).

then decide whether or not to refer the case for trial to the competent court.¹¹⁹ This decision, once final, formally puts an end to the judicial inquiry and, at the same time, submits the case to the trial court.¹²⁰

It should be noted, though, that there may be a considerable lapse of time (months, sometimes even years) between the prosecutor's final submissions and the referral or dismissal decision. Amongst other factors, this is due to the fact that the pre-trial tribunal can decide that the investigation is incomplete and refer the file back to the public prosecutor with the suggestion to accomplish certain investigation measures.¹²¹ The latter can then request¹²² the investigating judge to undertake additional investigation measures (with a right to appeal in case of refusal), or the judge can do so at his own initiative.¹²³ Subsequently, after having completed the investigation, which may again take considerable time, especially in cross-border investigations, the investigating judge turns the file over to the public prosecutor, who will draft new final submissions and bring the case, once more, to the pre-trial tribunal.

The formal closing of the judicial inquiry with the referral or dismissal decision of the pre-trial tribunal, in our view, also corresponds to what the EU legislator had in mind when using the term "indictment".¹²⁴ As a result, the EPPO could exercise its right of evocation until the decision of the Belgian pre-trial tribunal (or court)¹²⁵ has become final.

That said, for the sake of efficiency, it does not seem desirable to exercise this right after the national public prosecutor has brought the case with his (first) final submissions to the pre-trial tribunal. This could indeed delay the proceedings. Therefore, it would be useful for the EPPO to first consult its national counterpart before evoking the case, as provided by art. 27(4) of the EPPO Regulation: "the EPPO shall, *where appropriate*, consult

¹¹⁹ Art. 128 CIC cit.

¹²⁰ Roughly summarized, the investigating judge's competence ends when the pre-trial tribunal or court refers the case to the trial court or dismisses the case. For more details, see M Franchimont, A Jacobs and A Masset, *Manuel de procédure pénale* (Larcier 2012) 600 paras 68 and 608-618.

¹²¹ To note that the pre-trial tribunal cannot *order* the prosecutor (nor the investigating judge) to undertake such measures.

¹²² As explained in Part III, the public prosecutor can never *oblige* the investigating judge to undertake certain measures. The same holds true for the pre-trial tribunal, as it situated to the same organisational level as the investigating judge – both belong to the court of first instance. Only the pre-trial court (upon appeal) can *order* the investigating judge to do so (art. 228 CIC cit.).

¹²³ M Franchimont, A Jacobs and A Masset, *Manuel de procédure pénale* cit. 616.

¹²⁴ To note that the meaning of the term "indictment" is not entirely clear in the EPPO Regulation, especially for systems with a pre-trial hearing (*infra*, V.4). For one, art. 27(7) refers to the submission of the indictment "to a court". This "court" could be a pre-trial or a trial court, which makes a significant difference (*supra*, footnote 61). For another, the translation of the term "indictment" in other language versions of the Regulation creates confusion: e.g., "acte d'accusation" (in French), "Anklage" (in German) and "tenlastelegging" (in Dutch). For further analysis, see V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution' cit. 148-149.

¹²⁵ In the case there is an appeal against the decision of the pre-trial tribunal. See *supra*, III.

the competent authorities of the Member State concerned *before deciding* whether to exercise its right of evocation".¹²⁶

V.2. THE CONDUCT OF THE EPPO INVESTIGATION

As indicated above, the EDP will take up the role of prosecutor in a judicial inquiry and will have the *same rights and powers as a national prosecutor* in that situation¹²⁷. Once the EPPO investigation is formally opened, the Belgian EDP will thus be able to request¹²⁸ the Belgian investigating judge to take investigation measures in accordance with the rules of Belgian criminal procedure. In the hypothesis that a judicial inquiry has not yet been started, the EDP will have to ask an *ex ante* authorisation for coercive measures using the procedure of the mini judicial inquiry (*supra*, III). If the investigating judge refuses to authorise the requested measure, the EDP will be able to contest this decision before the pre-trial court. By contrast, if the coercive measure is not possible under a *mini-instruction* in accordance with art. 28*septies* CIC, the EDP will have to open a judicial inquiry.

According to arts 10(5) and 12(3) of the EPPO Regulation, the Permanent Chamber and the supervising European Prosecutor may give instructions to the EDP "whenever necessary for the efficient handling of the investigation or prosecution or in the interest of justice, or to ensure the coherent functioning of the EPPO". Does this hierarchical right potentially create problems in the Belgian legal context? In fact, the EPPO Regulation itself endeavours to avoid conflicts between such instructions and national law. Indeed, the aforementioned provisions explicitly state that the instructions should be "in compliance with applicable national law". If the Permanent Chamber or the European Prosecutor were to instruct the EDP to take a certain measure which the latter considers not to be in compliance with Belgian law (for example, a remote search of a computer system without the prior authorisation of an investigating judge,¹²⁹ or a search of private premises without launching a judicial inquiry)¹³⁰, then he would have to "immediately inform the Permanent Chamber, proposing to amend or revoke the instructions received".¹³¹ Should the Permanent Chamber deny the EDP's request, the latter "may submit a request for review to the European Chief Prosecutor".¹³²

¹²⁶ Emphasis added.

¹²⁷ The compatibility of a judicial inquiry with a cross-border EPPO investigation will not be analysed in this *Article*.

¹²⁸ As explained above (*supra*, IV.1), there is no obligation under art. 30(1) and (4) of the EPPO Regulation to give the EPPO the right to give orders to the investigating judge.

¹²⁹ Art. 88*ter* CIC cit.

¹³⁰ *Ibid.* art. 28*septies*.

¹³¹ Art. 47(1) IRP cit.

¹³² *Ibid.* art. 47(2).

V.3. THE REALLOCATION OF AN EPPO CASE FROM ONE MEMBER STATE TO ANOTHER

While the EPPO Regulation does not prohibit the Belgian judicial inquiry in EPPO cases, there are, however, two situations where the rules of the EPPO conflict with Belgian law. The first one¹³³ concerns the reallocation of an EPPO case from one Member State to another. According to art. 26(5) of the EPPO Regulation:

“Until a decision to prosecute [...] is taken, the competent Permanent Chamber may, in a case concerning the jurisdiction of more than one Member State and after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned, decide to:

- (a) reallocate the case to a European Delegated Prosecutor in another Member State;
- (b) merge or split cases and, for each case choose the European Delegated Prosecutor handling it, if such decisions are in the general interest of justice and in accordance with the criteria for the choice of the handling European Delegated Prosecutor [...]”.¹³⁴

Since the EPPO Regulation does not make a difference between a preliminary and a judicial inquiry, the Permanent Chamber must be able to reallocate a case in both situations until a final decision on the referral for trial has been made. The EPPO Regulation thus obliges Member States to allow a public prosecutor to remove a case from an investigating judge or pre-trial court, even if those judges do not agree. This raises the fundamental question whether a prosecutor can withdraw a case pending before a judge and override the latter’s decision. In principle, judges are independent and cannot be forced to follow orders or decisions of the public prosecution service (*supra*, III).

Under current Belgian law, there are, however, already a number of situations where the public prosecutor’s office can decide on the outcome of the criminal proceedings, notwithstanding the case is pending before a judge.

The public prosecutor’s office can, first of all, conclude an out-of-court settlement with the suspect during the judicial inquiry¹³⁵ and thereby terminate the criminal proceedings.¹³⁶ This settlement is, however, subject to judicial review. Indeed, the pre-trial court will check whether different conditions (including the proportionality of the agreement in the light of the seriousness of the facts and the suspect’s personality) are fulfilled,

¹³³ For the second one, see *infra*, V.5.

¹³⁴ See also arts 49-51 IRP cit.

¹³⁵ It should be noted that this possibility, which was created in 2011, was strongly criticised by legal scholars exactly because it derogates from the fundamental principle that a public prosecutor cannot remove a case pending before a judge and override the latter’s decision, all the more since there was no meaningful judicial review. In 2016, the law was amended to meet the concerns expressed by the Constitutional Court and further punctual amendments were made in 2018. For an analysis of the current legal framework, see H Van Bavel and D Delwaide, ‘Enième réforme de la transaction pénale: la fin des controverses?’ (2018) *Journal des Tribunaux* 765.

¹³⁶ Art. 216*bis*(2) CIC cit.

and if that is the case, approve the settlement.¹³⁷ Similar rules apply to the mediation procedure laid down in art. 216*ter* CIC.¹³⁸

Second, as indicated above (*supra*, III), the public prosecutor's office can also request the pre-trial court to remove the investigating judge from the case in certain specific cases.¹³⁹

Third, in case multiple investigating judges think they are competent to conduct the investigation, there are different ways to dismiss one investigating judge in favour of another. Following the formal procedure (called the *règlement des juges*),¹⁴⁰ the Belgian Court of Cassation decides which investigating judge can continue the inquiry. The rules of this procedure are, however, cumbersome and therefore not often applied. A more favourable solution, developed in practice, is an informal dismissal of one investigating judge by the pre-trial tribunal, after consultation between the public prosecutors concerned.¹⁴¹ In our view, this informal procedure could also be used to reallocate the case to an EDP in another Member State.

Still, the problem remains how the EPPO can reallocate a case in favour of an EDP in another Member State if the pre-trial tribunal does not agree with this decision of the EPPO. At present, a Belgian public prosecutor cannot force a pre-trial tribunal to approve his decision. Since an overall reform of Belgian criminal procedure is in the make (*supra*, III), it is not desirable to make major adjustments at this point. Nevertheless, reallocation must be possible because of the primacy of EU law.

We believe inspiration can be drawn from an existing procedure for reallocating cases to international criminal tribunals. International criminal tribunals (except for the International Criminal Court) have primacy over the Belgian courts. If the prosecutor of an international criminal tribunal gives notice that he wishes to prosecute facts that are subject to a judicial inquiry in Belgium, the Court of Cassation will withdraw the case from the pre-trial judges after verifying that the facts fall within the competence of the tribunal and that no error was made regarding the person concerned. Such verification does not involve an assessment of the possible charges.¹⁴²

¹³⁷ *Ibid.* art. 216*bis*(8).

¹³⁸ For an extensive analysis, see C Marr, 'La médiation pénale à la suite de la loi du 18 mars 2018: de la médiation à la "procédure médiation et mesures"' in V Franssen and A Masset (eds), *Actualités de droit pénal et de procédure pénale* (Anthemis 2019) 293.

¹³⁹ Art. 235 CIC cit.

¹⁴⁰ *Ibid.* art. 525 ff.

¹⁴¹ MA Beernaert, HD Bosly and D Vandermeersch, *Droit de la procédure pénale* cit. 873-878, para. 1135: there is no text that explicitly provides for this possibility, but there is well established case law.

¹⁴² After the withdrawal, prosecution in Belgium is no longer possible, unless the international tribunal has decided not to deliver an indictment or that the procedure is inadmissible. Arts 47-49 *Loi concernant la coopération avec la Cour pénale internationale et les tribunaux pénaux internationaux*. See, for example, Belgian Court of Cassation judgment of 9 July 1996 n. P.96.0869.F. C Van den Wyngaert, P Traest and S Vandromme, *Strafrecht en strafprocesrecht in hoofdlijnen* (Maklu 2017) 1257-1258.

The Belgian legislator could create a similar procedure for reallocating EPPO cases to another Member State. Under this procedure the pre-trial tribunal and court would be *obliged* to confirm the withdrawal decision of the Permanent Chamber of the EPPO after a formal check of the material competence of the EPPO and the criteria for withdrawal of art. 26(5) of the EPPO Regulation. This way, the legislator would avoid that the Permanent Chamber is able to withdraw cases without intervention of a judge, and would ensure the protection of the suspect's right to a "natural judge", which is part of the right to a fair trial, while also respecting the decision of the Permanent Chamber, as intended by the EU legislator.

V.4. THE CLOSING OF THE EPPO INVESTIGATION

According to the EPPO Regulation, once the investigation is completed, the EDP has to send a report to the supervising European Prosecutor with a draft decision on the outcome of the case:¹⁴³ prosecution¹⁴⁴ (with possibility for a simplified prosecution procedure if national law provides for it),¹⁴⁵ referral to the national authorities,¹⁴⁶ or dismissal.¹⁴⁷ The supervising European Prosecutor subsequently transmits the draft decision to the Permanent Chamber,¹⁴⁸ which will take the final decision.¹⁴⁹ However, pursuant to art. 36(1) of the EPPO Regulation, the Permanent Chamber cannot dismiss a case if the EDP has proposed to bring the case to judgment. This provision also shows the high degree of decentralisation of the EPPO.¹⁵⁰

When there is only one Member State that has jurisdiction over the case and the Permanent Chamber decides to prosecute, it will bring the case to prosecution in the Member State of the handling EDP. By contrast, when several Member States have jurisdiction,¹⁵¹ the Permanent Chamber will, in principle, also decide to bring the case to prosecution in the Member State of the handling EDP.¹⁵² Nevertheless, it may decide to prosecute in

¹⁴³ Art. 35 EPPO Regulation cit.

¹⁴⁴ *Ibid.* art. 36.

¹⁴⁵ *Ibid.* art. 40.

¹⁴⁶ Because the EPPO is not competent, because the conditions of arts 25(2) and (3) are not fulfilled anymore, or on the basis of the principle of prosecutorial discretion. Art. 34 EPPO Regulation; M Caianiello, 'The Decision to Drop the Case in the New EPPO's Regulation: Res Iudicata or Transfer of Competence?' (2019) *New Journal of European Criminal Law* 186, 191.

¹⁴⁷ Art. 39 EPPO Regulation cit.

¹⁴⁸ *Ibid.* art. 35.

¹⁴⁹ Unless the Permanent Chamber has delegated its decision-making power to conclude the case before. Art. 55(1) IRP cit.

¹⁵⁰ T Huisjes, 'Een Europees Openbaar Ministerie: kansen en risico's' (2019) *Proces* 150.

¹⁵¹ Arts 23 and 26 EPPO Regulation cit.

¹⁵² *Ibid.* art. 36(3).

another Member State if there are sufficiently justified grounds to do so, taking into account the criteria set out in art. 26(4) and (5) of the EPPO Regulation.¹⁵³

Furthermore, art. 36(4) of the EPPO Regulation provides that “the Permanent Chamber may, on the proposal of the handling [EDP], decide to join several cases, where investigations have been conducted by different [EDPs] against the same person(s) with a view to prosecuting these cases in the courts of a single Member State which, in accordance with its law, has jurisdiction for each of those cases”.

Once decided in which Member State the case will be tried, “the competent national court within that Member State shall be determined *on the basis of national law*”.¹⁵⁴

How can these decisions of the Permanent Chamber be reconciled with the outcome of a judicial inquiry? As indicated in Part III, the pre-trial tribunal and court decide in Belgium on the outcome of the judicial inquiry after receiving the public prosecutor’s final submissions. In contrast to e.g., French law,¹⁵⁵ a Belgian investigating judge *cannot* refer the case to trial; neither does he have the power to bring the case to the pre-trial court, which will decide on referral. Only the public prosecutor can do so – this belongs to his prosecutorial powers.

If the Permanent Chamber decides to prosecute in Belgium, to refer the case to the Belgian authorities or to dismiss the case, and the judicial inquiry took place in Belgium, there should not be any difficulties. Following the above reasoning that the EPPO Regulation does not preclude a judicial inquiry and, more generally, does not affect the role of national judges, the intervention of pre-trial tribunals at the end of the investigation remains unchanged. It should be noted that many legal systems, even without an investigating judge, provide for some kind of “filter” at the end of the investigation, consisting in a pre-trial or preliminary hearing.¹⁵⁶ Moreover, the EPPO Regulation explicitly refers to national law when it comes to determining the competent national court in the Member State where the prosecution of the EPPO case is taking place.¹⁵⁷ Consequently, if the EDP receives the case file from the Belgian investigating judge after the judicial inquiry has been terminated, he drafts the final submissions, which reflect the decision taken by the Permanent Chamber, and brings the case to the pre-trial tribunal.

At this stage, different scenarios are possible.

¹⁵³ *Ibid.*

¹⁵⁴ Art. 36(5) EPPO Regulation cit. Emphasis added.

¹⁵⁵ In France, the investigating judge also intervenes as a pre-trial tribunal at the end of the investigation, by adopting *ordonnances de règlement*. Arts 177-184 French Code of Criminal Procedure (*Code de procédure pénale*).

¹⁵⁶ For instance, in Italy, where the investigating judge was abolished in 1989 and the investigation is conducted by the public prosecutor, there is a preliminary hearing that very much resembles the role of the pre-trial tribunal in Belgium. See e.g., A Di Amato and F Fucito, ‘Italy’ in F Verbruggen and V Franssen (eds), *International Encyclopaedia of Laws: Criminal Law* (Wolters Kluwer 2016) 175-178.

¹⁵⁷ Art. 36(5) EPPO Regulation cit.

First, if the EPPO decides to prosecute, the pre-trial tribunal remains free to decide otherwise, in which case the EPPO will have to respect this decision. In this regard, there is no difference between the EPPO and the national public prosecutor's office (*supra*, III).

Second, if the EPPO decides to refer the case to the national authorities on the basis of art. 34 of the EPPO Regulation¹⁵⁸ the EDP will transfer the case to the Belgian public prosecutor's office. The latter will then take up its role within the judicial inquiry, either by preparing the final submissions or by requesting the investigating judge to conduct further investigation measures.

Finally, if the EPPO decides to dismiss the case, it should be mentioned that the grounds for dismissal of a case pursuant to art. 39(1) of the EPPO Regulation are not necessarily the same grounds for which the Belgian pre-trial tribunal may finally decide to dismiss a case,¹⁵⁹ like e.g., the dissolution of a suspect or accused legal person.¹⁶⁰ This is however not problematic since art. 39(1) refers to national law; it is thus up to the pre-trial tribunal to take the final decision on the (grounds for) dismissal.

Nevertheless, there may be some difficulties if the Permanent Chamber decides to prosecute in another Member State although the judicial inquiry took place in Belgium.¹⁶¹ Recital 78 of the EPPO Regulation is quite explicit: the EPPO Regulation, "*requires*"¹⁶² the EPPO to exercise the functions of a prosecutor, which includes [...] the choice of the Member State whose courts will be competent to hear the prosecution".¹⁶³ Hence, the EPPO Regulation could be interpreted as requiring the Permanent Chamber to decide formally on the competent Member State for trial. Member States are thus obliged to allow a public prosecutor to remove a case from the Belgian investigating judge. To solve this problem, the legislator could hold on to the same solution as the one we advise to adopt when it comes to the reallocation of an EPPO case from one Member State to another (*supra*, V.3).

V.5. THE REOPENING OF A CLOSED EPPO CASE

The second exception to the general principle that a decision taken by the EPPO cannot override the decision of a judge concerns the reopening of a closed EPPO case. According

¹⁵⁸ See also art. 57 IRP cit.

¹⁵⁹ For further analysis, see V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution' cit. 147.

¹⁶⁰ Under Belgian criminal procedure, the dissolution of the legal person does not necessarily put an end to the prosecution. Art. 20(2) Act holding the preliminary title of the Code of Criminal Procedure (*Loi contenant le titre préliminaire du code de procédure pénale*); S Van Dyck and V Franssen, 'De strafrechtelijke verantwoordelijkheid van vennootschappen: wie, wanneer en hoe?' in Orde van advocaten Kortrijk (ed), *De vennootschap in de verschillende takken van het recht* (Larcier 2013) 36-39.

¹⁶¹ Pursuant to art. 36(3) or art. 36(4) of the EPPO Regulation cit.

¹⁶² In French: "Le présent règlement fait obligation au Parquet européen".

¹⁶³ Recital 78 EPPO Regulation cit. Emphasis added. Moreover, recital 79 states that: "[t]he Member State whose courts will be competent to hear the prosecution should be chosen by the competent Permanent Chamber on the basis of a set of criteria laid down in this Regulation".

to art. 39(2) of the EPPO Regulation, the Permanent Chamber must be able to decide to reopen a case when new facts surface that were not known to the EPPO at the time of the decision to dismiss the case.¹⁶⁴

Under Belgian law, if a case was dismissed by the pre-trial tribunal or court after a judicial inquiry and new facts (called *charges nouvelles*) appear, the public prosecutor will ask the investigating judge to start a new judicial inquiry. However, at the end of this new judicial inquiry, it is up to the pre-trial tribunal to assess independently the existence of new 'charges', together with the question whether or not to refer the case for trial to the competent court.¹⁶⁵

Yet, if the Permanent Chamber decides to reopen a closed EPPO case on the basis of new facts, the Belgian pre-trial tribunal and court seem to be bound by this decision. In other words, the Belgian tribunal or court will *not* be able to assess the existence of new facts as it does in non-EPPO cases. The wording of art. 39(2) of the EPPO Regulation ("shall not bar further investigation") appears to aim at that result. While this requires an adjustment in the conduct of the proceedings, there is no need for a legislative amendment. This "conflict" between the EPPO Regulation and national criminal procedure can be solved by interpreting the Belgian criminal procedure in conformity with EU law.

VI. THE BELGIAN EPPO ACT: PRESERVING THE *STATUS QUO*

In the meantime, the Belgian legislator has adopted new legislation to implement the EPPO into the national legal order. In this Part, we will first present some key features of this new legislation and, subsequently, focus on the judicial inquiry to assess whether the law meets the concerns expressed above to ensure conformity with EU law.

VI.1. BRIEF OVERVIEW OF THE BELGIAN EPPO ACT

The most important changes introduced by the Belgian EPPO Act for the purpose of our analysis are the following.¹⁶⁶

First of all, the Belgian legislator opted to create an autonomous, stand-alone public prosecutor's office for the Belgian European Prosecutor (hereafter EP)¹⁶⁷ and EDPs, rather

¹⁶⁴ Art. 39(2) EPPO Regulation cit. and art. 59 IRP cit.; M Caianiello, 'The Decision to Drop the Case in the New EPPO's Regulation: Res Iudicata or Transfer of Competence?' cit. 194.

¹⁶⁵ Arts 246-248 CIC cit.; M Franchimont, A Jacobs and A Masset, *Manuel de procédure pénale* cit. 607-608.

¹⁶⁶ This overview does not include the legislative changes regarding the relation between the EDPs and the customs administration, which enjoys far-reaching autonomous investigation and prosecutorial powers under Belgian law. For an analysis of the concerns in that respect, see V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution' cit. 162-172.

¹⁶⁷ The EP is included as well, even though he is formally speaking part of the central office of the EPPO, presumably to ensure that he can conduct the EPPO investigation personally, in accordance with art.

than integrating them into the existing public prosecutor's offices (e.g., in the Federal Prosecutor's office, as we have proposed elsewhere).¹⁶⁸ This new public prosecutor's office is competent for the whole Belgian territory when prosecuting EPPO offences.¹⁶⁹ When conducting EPPO investigations, the EP and EDPs have the same investigation and prosecutorial powers as other Belgian public prosecutors.¹⁷⁰ Consequently, whenever a national public prosecutor needs to request the authorisation of an investigating judge, so will the EP and EDP. Furthermore, the EP and EDPs will exercise the function of public prosecutor before national trial courts.¹⁷¹

Secondly, when initiating an investigation concerning an offence that belongs to the material competence of the EPPO, the District Public Prosecutor (*procureur du Roi*), the Prosecutor General (*procureur général*) and the Federal Prosecutor (*procureur fédéral*) are obliged to inform the EDPs without undue delay.¹⁷² The specific rules for this notification will be determined in a (still to be adopted) memorandum (*circulaire*) of the College of Prosecutors General (*collège des procureurs généraux*). After the notification, the EDPs will decide whether to exercise the EPPO's competence.¹⁷³ In case of disagreement, the District Public Prosecutor, the Prosecutor General or the Federal Prosecutor can challenge the decision of the EDPs to conduct the criminal proceedings before the College of Prosecutors General, which, after consulting the EDPs and the national public prosecutor, shall decide who is competent to deal with the case. No appeal is possible against the decision of the College of Prosecutors General.¹⁷⁴ The College of Prosecutors General may, however, also decide to refer a question to the Court of Justice for a preliminary ruling in accordance with art. 42(2)(c) of the EPPO Regulation. By contrast, in non-EPPO investigations, it is up to the *Federal Prosecutor* to decide which public prosecutor's office is competent.¹⁷⁵ Unfortunately, the explanatory memorandum to the EPPO Bill¹⁷⁶ does not give a justification for this different procedure in EPPO cases.

Thirdly, and most importantly for the subject of this contribution, the Belgian legislator has chosen to leave intact the judicial inquiry when it comes to EPPO cases. That said,

28(4) of the EPPO Regulation. Nevertheless, this reference could, in our view, have been omitted as the EPPO Regulation defines the role and powers of the EP.

¹⁶⁸ V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution' cit. 151-154.

¹⁶⁹ Art. 156/1(1) Belgian Judicial Code cit., inserted by art. 3 Belgian EPPO Act cit.

¹⁷⁰ Art. 47*quaterdecies* CIC cit., inserted by art. 7 Belgian EPPO Act cit.

¹⁷¹ Art. 156/1(2) Belgian Judicial Code cit.

¹⁷² *Ibid.* art. 156/1(3).

¹⁷³ *Ibid.* art. 156/1(4), para. 1.

¹⁷⁴ *Ibid.* art. 156/1(4), para. 2.

¹⁷⁵ *Ibid.* art. 144*ter*(3).

¹⁷⁶ Explanatory Memorandum to the EPPO Bill, *Doc. Parl.*, Ch. représ., sess. ord., 2020-2021, n. 55-1696/001, 11-12.

specialised investigating judges will be designated.¹⁷⁷ The selected judges should have useful experience in investigating offences which belong to the competence of the EPPO. Unlike the EDPs, these investigating judges can still work on other (i.e., non-EPPO) cases but shall give priority to those brought before them by an EDP (or the EP if he decides to conduct the EPPO investigation himself). In the event the specialised investigating judge is legally impeded, another non-specialised investigating judge belonging to the same court of first instance can, however, take over.¹⁷⁸

VI.2. IS THE NEW BELGIAN LEGISLATION IN CONFORMITY WITH THE EPPO REGULATION?

The Belgian legislator thus agrees with our point of view that the judicial inquiry is not incompatible with the EPPO Regulation. Creating an exclusive group of investigating judges for EPPO matters was not strictly necessary; yet, it does send an important (political) signal to the EU that EPPO cases are treated as a priority and it ensures that the investigation is conducted by a judge who is familiar with the hybrid and rather complex functioning of the EPPO.

Following art. 5(6) and recital 69 of the EPPO Regulation, the Belgian investigating judge will of course have to sincerely cooperate with the EPPO.¹⁷⁹ Conversely, the EPPO is also obliged to assist the investigating judge on the basis of the principle of loyalty that applies between the EU and its Member States.¹⁸⁰ Therefore, it is of utmost importance for the investigating judge to have all relevant information at his disposal, in particular in the context of a mini judicial inquiry, in order to be able to decide whether the requested investigation measure is useful, proportionate and necessary.¹⁸¹

It is important to highlight that the choice made by the Belgian legislator to maintain the judicial inquiry (and, of course, the mini judicial inquiry, where the investigating judge only intervenes punctually, but with the possibility to take over the investigation; *supra*, III) in EPPO cases, differs notably from the approach taken by the French legislator, who decided in December 2020 that EPPO investigations would always be conducted under the authority of the EDP, thus excluding the possibility of a judicial inquiry in EPPO cases,¹⁸² and

¹⁷⁷ Art. 79 Belgian Judicial Code cit., amended by art. 2 Belgian EPPO Act cit. The designation of these judges is the responsibility of the First President of the respective courts of appeal.

¹⁷⁸ Art. 62*bis* CIC cit., as amended by art. 9 Belgian EPPO Act cit.

¹⁷⁹ Art. (5)6 and recital 69 EPPO Regulation cit.

¹⁸⁰ Case C-2/88 *Zwartfeld and Others* ECLI:EU:C:1990:440.

¹⁸¹ *Cfr* art. 30(5) EPPO Regulation.

¹⁸² Arts 696-115(2), 696-116 and 696-117 French Code of Criminal Procedure, as amended by Act n. 2020-1672 of 24 December 2020 on the EPPO, on environmental criminal law and on special criminal law (*Loi n. 2020-1672 du 24 décembre 2020 relative au Parquet européen, à la justice environnementale et à la justice pénale spécialisée*), *Journal officiel de la République française* 26 December 2020 (hereafter French EPPO Act).

the Luxembourgish legislator, who will most likely follow the French example.¹⁸³ Interestingly, though, in Luxembourg the Council of State (*Conseil d'Etat*) has rendered a highly critical opinion on the EPPO Bill, in particular because the role of the investigating judge and his relation with the EDP is not clearly defined and because the proposed legislation is difficult to reconcile with national rules regarding the judicial inquiry.¹⁸⁴ Most recently, the Spanish government approved a draft bill¹⁸⁵ which attributes to the EPPO the authority to lead the investigation and opts for a pre-trial judge (*juez de garantías*) who will authorise certain investigation measures.¹⁸⁶ If this draft bill is adopted, Spain will thus also discard the investigating judge in EPPO cases and perhaps, later on, also for all other cases. Indeed, like in Belgium, a broader reform of the Spanish criminal procedure is being prepared, including the abolition of the investigating judge in favour of a prosecutorial investigation with the punctual intervention of a pre-trial judge.¹⁸⁷ And similar to Belgium, fundamental concerns have been expressed with respect to this aspect of the reform, which affects one of the essential characteristics of Spanish criminal procedure.¹⁸⁸

While the choice to maintain the judicial inquiry is, for the reasons put forward in Part IV, reconcilable with the EPPO Regulation, the question arises whether the Belgian EPPO Act adequately addresses the concerns expressed above in Part V. Contrary to the French EPPO Act and the Luxembourgish EPPO Bill,¹⁸⁹ the Belgian EPPO Act is rather limited, thereby avoiding – quite rightly so – to repeat the provisions of the EPPO Regulation, which are directly applicable. Moreover, the Act also relies to a certain extent on further implementation by the College of Prosecutors General.

With respect to the *opening* of an *EPPO investigation*, the Belgian legislator explicitly deals with the obligation to notify the EPPO set forward in art. 24(2) of the EPPO Regulation. Whereas in our view the investigating judge could be considered a “judicial or law enforcement authority of a Member State” (*supra*, V.1), the Belgian EPPO Act allocates the

¹⁸³ Bill of 1 February 2021 on the implementation of the EPPO Regulation and amending the Code of Criminal Procedure (*Projet de loi relative à la mise en application du règlement (UE) 2017/1939 du Conseil du 2 octobre 2017 mettant en oeuvre une coopération renforcée concernant la création du Parquet européen et modifiant le Code de procédure pénale*), Ch. sess. ord. 2020-2021 n. 7759 (hereafter Luxembourgish EPPO Bill). See in particular the newly inserted art. 136-6(1) of the Luxembourgish Code of Criminal Procedure.

¹⁸⁴ Council of State, Opinion on the Luxembourgish EPPO Bill, 27 April 2021, Ch. sess. ord. 2020-2021 n. 7759/05, 6-8.

¹⁸⁵ The full text of the Spanish EPPO Draft Bill is available at: leyprocesal.com.

¹⁸⁶ Iustel, *El Consejo de Ministros aprueba el Anteproyecto de Ley de la Fiscalía Europea* (28 April 2021) www.iustel.com.

¹⁸⁷ See footnote 66.

¹⁸⁸ See e.g., L Bachmaier Winter, ‘Jueces de instrucción o fiscales’ (28 April 2020) ABC www.abc.es.

¹⁸⁹ It is worthwhile pointing out that the Luxembourgish Council of State severely criticises the approach of the government following the French example, arguing that national law should not repeat the provisions of the Regulation and only provide for further rules if the Regulation refers to national law or requires further implementation. Council of State, Opinion on the Luxembourgish EPPO Bill, 27 April 2021, Ch., sess. ord., 2020-2021, n. 7759/05, 2-3.

obligation to inform the EPPO to the public prosecutor,¹⁹⁰ even in case of a judicial inquiry.¹⁹¹ The specific rules for the notification will be further detailed in a memorandum of the College of Prosecutors General. This approach is not necessarily problematic since the public prosecutor plays an active role in the Belgian judicial inquiry and is often the party who decides to open a judicial inquiry (*supra*, III). However, if the public prosecutor for some reason would fail to inform the EPPO, the investigating judge, in our view, still has the obligation to do so pursuant to art. 24(2) of the EPPO Regulation.

In contrast, the Belgian EPPO Act does unfortunately not clarify the *relation between the EPPO and the pre-trial tribunal and court*. As explained in Part V, there are two situations where the Permanent Chamber must be able to overrule the Belgian pre-trial tribunal and court. On the one hand, there is the issue of the *reallocation of EPPO cases* to another Member State. For the sake of legal certainty, the right to a fair trial (access to a judge) and the smooth functioning of the EPPO, we proposed a procedure where the pre-trial tribunal and court would be obliged to confirm the withdrawal decision of the Permanent Chamber of the EPPO after a formal check. The Belgian EPPO Act falls short in this respect.

On the other hand, the Permanent Chamber must be also able to decide to *reopen a case* when new facts surface that were not known to the EPPO at the time of the decision to dismiss the case.¹⁹² If it decides to do so, the Belgian pre-trial tribunal and court are, in our opinion, bound by this decision. Here too, the Belgian legislator did not explicitly address the issue and decided to merely rely on the direct applicability of the EPPO Regulation and the primacy of EU law. While this approach is surely defensible, it requires national authorities (also those which are not specialised in EPPO cases) to know the EPPO procedure in order to avoid procedural mistakes.

VII. CONCLUSION

Following the analysis above, a careful reading of the EPPO Regulation does, in our view, not exclude the co-existence of the EPPO with the Belgian investigating judge in EPPO cases. The EU legislator deliberately created a margin of appreciation for the Member States. The recently adopted Belgian EPPO Act gratefully uses this margin of appreciation to avoid major changes to the way in which criminal investigations are organised under national criminal procedure at a moment where a fundamental reform of the system is in preparation. Therefore, the Belgian legislator essentially preferred a *status quo* for the implementation of the EPPO. As the above step-by-step analysis in Part V has demonstrated, only minor legislative adjustments were indeed needed for the EPPO to be able to perform its tasks in

¹⁹⁰ Art. 156/1(3) Belgian Judicial Code cit.

¹⁹¹ Explanatory Memorandum to the EPPO Bill, *Doc. Parl.*, Ch. représ. sess. ord. 2020-2021 n. 55-1696/001, 15.

¹⁹² Art. 39(2) EPPO Regulation cit. and art. 59 IRP cit.; M Caianiello, 'The Decision to Drop the Case in the New EPPO's Regulation: Res Iudicata or Transfer of Competence?' cit. 194.

the current Belgian legal system, without abolishing the judicial inquiry. Other conflicts can easily be solved by interpreting Belgian law in conformity with EU law.

To show its commitment to the EPPO project, Belgium opted for the creation of a separate public prosecutor's office, consisting in a first phase of two EDPs who will work exclusively on EPPO investigations, in combination with the designation of specialised investigating judges, who will give priority to EPPO investigations. As we have argued elsewhere, the creation of an isolated mini structure will not facilitate the integration of the EDPs in the national system, nor smoothen the cooperation with existing national authorities causing tensions between the latter and the new EU body in terms of budget, qualified police investigators and technical resources. We would indeed have preferred a more integrated approach, while safeguarding the independence of the EDPs in conducting their investigations.¹⁹³

In contrast, the designation of specialised investigating judges seems like a good middle-ground solution. Still, one might regret that the Belgian EPPO Act was formulated in a very general way and does not address some of the specific problems highlighted in Part V. Even if the issues with the hierarchical structure of the Permanent Chamber in relation with the Belgian investigating judge and pre-trial tribunal/court can be solved, to a certain extent, by the direct application of the EPPO Regulation, the Belgian EPPO Act could have brought more legal certainty by explicitly regulating them.

Meanwhile, other countries with a judicial inquiry have chosen (France), or are likely to choose (Luxembourg, Spain) a different solution and set aside the investigating judge in EPPO investigations. What will be the impact of those radical choices in the internal legal order, remains to be seen. Without a doubt, the solution opted for by those other Member States puts Belgium in a unique position, but in our view the only correct one to avoid significant internal problems which would undermine the future investigations of the EPPO.¹⁹⁴ As Bachmaier Winter rightly pointed out when referring to the problem of

¹⁹³ V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution' cit. 149-154.

¹⁹⁴ If a new set of procedural rules had been created merely for offences falling within the EPPO's competence, while maintaining the existing rules for all other offences, the question would have arisen whether the difference in treatment (different procedures and levels of protection of defence rights) between suspects in EPPO investigations (without the possibility of a judicial inquiry), and suspects in ordinary national investigations (with a judicial inquiry) would not constitute an unlawful discrimination and hence create serious constitutional problems. As explained in Part III, in recent years, the Belgian Constitutional Court has increasingly criticised the discrepancies in applicable safeguards - between pre-trial and judicial inquiries (see the references in footnote 83). Therefore, if the Belgian legislator had opted for such a set of separate procedural rules for EPPO offences, discarding the judicial inquiry, it would not have been unlikely for the Constitutional Court to annul these rules, especially because there is no explicit EU prohibition to maintain the judicial inquiry in EPPO cases. This could, consequently, have undermined a large number of pending EPPO cases. For a further analysis, see V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution' cit. 159-160.

legal transplants and the increasingly predominant model of prosecutor-led investigations: “Estar en minoría no significa estar equivocado”.¹⁹⁵

Ultimately, only the Court of Justice can provide certainty on the correct interpretation of the EPPO Regulation, either upon a reference for a preliminary ruling, or presuming the European Commission would disagree with the options chosen by the Belgian legislator, via infringement proceedings against Belgium.¹⁹⁶ But by that time, the reform of Belgian criminal procedure might be a fact, which would put a definitive end to the discussion.

¹⁹⁵ Free translation: “Being in the minority does not mean being wrong”. L Bachmaier Winter, ‘Jueces de instrucción o fiscales’ cit.

¹⁹⁶ For a more detailed analysis, see F Verbruggen, V Franssen, AL Claes and A Werding ‘Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?’ cit.; V Franssen, A Werding, AL Claes and F Verbruggen, ‘La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution’ cit. 159-160.



ARTICLES

TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – SECOND PART

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LE PARQUET EUROPÉEN: PERSPECTIVES SUISSES

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ABSTRACT: The establishment of the European Public Prosecutor's Office represents an important step in the construction of the European criminal law area. In terms of its tasks, structure and *modus operandi*, it bears many similarities to the Swiss *Ministère public de la Confédération*, which is a prosecuting body responsible for investigating and supporting the prosecution of offences falling within Swiss federal jurisdiction. The challenges facing the European Public Prosecutor's Office are thus comparable to those which the *Ministère public de la Confédération* has been facing for many years. However, there are also a number of major differences. This contribution provides an overview of the two prosecution bodies in question. Some general elements relating to the future cooperation between the European Public Prosecutor's Office and Switzerland are also discussed.

KEYWORDS: European criminal law – criminal procedural law – international jurisdiction – federal criminal systems – European Public Prosecutor's Office – Ministère public de la Confédération suisse.

I. LE PARQUET EUROPÉEN ET LE MINISTÈRE PUBLIC DE LA CONFÉDÉRATION SUISSE: DEUX INSTITUTIONS COMPARABLES

La mise en place du Parquet européen représente un pas considérable dans la construction de l'espace pénal européen. Par les tâches qui lui incombent, sa structure et son mode de fonctionnement, il présente de nombreuses similitudes avec le Ministère public de la Confédération suisse, organe de poursuite chargé d'enquêter sur les infractions relevant de la

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juridiction fédérale suisse et de soutenir l'accusation s'agissant desdites infractions. L'absence, dans les deux systèmes, d'un tribunal unique compétent pour connaître des recours dirigés contre tous les actes de procédure du parquet en est un exemple. Les défis auxquels le Parquet européen va faire face sont ainsi comparables à ceux auxquels le Ministère public de la Confédération suisse est, depuis de nombreuses années, confronté.

Plusieurs différences majeures sont néanmoins également à signaler. Tel est le cas en particulier du champ des compétences du Parquet européen, plus étroit par rapport à celui incombant au Ministère public de la Confédération, mais aussi du niveau décentralisé du Parquet européen, inconnu du système suisse, ou encore de l'absence, au niveau européen, d'une juridiction unique devant laquelle sera portée l'accusation. Ces différences trouvent leur origine dans de nombreux facteurs systémiques et conjoncturels, compromis et choix politiques et juridiques.

Le présent *Article* opère tout d'abord (II) une comparaison critique des caractéristiques essentielles des deux systèmes. Il vise en particulier à exposer, de manière intelligible et condensée, aux juristes européens la solution retenue en Suisse, présenter ses avantages et inconvénients et esquisser des pistes de réflexion sur la base des leçons qui peuvent en être tirées pour le Parquet européen.

L'*Article* aborde ensuite (III) la délicate question des interactions, prenant la forme de la coopération judiciaire entre le Parquet européen et les autorités, fédérale et cantonales, de poursuite en Suisse, en particulier dans le domaine économique et la transmission d'informations bancaires, qui ne va pas sans poser de problèmes en l'état actuel de la législation suisse en la matière.

II. LE PARQUET EUROPÉEN ET LE MINISTÈRE PUBLIC DE LA CONFÉDÉRATION SUISSE: CONVERGENCES ET DIVERGENCES

Le Ministère public de la Confédération est l'organe de poursuite de la Confédération suisse. Il existe en parallèle aux systèmes de poursuite des 26 cantons formant la Confédération. À bien des égards, il présente des similitudes avec le Parquet européen, mais d'importantes divergences existent également. Tour à tour, différents critères seront abordés, permettant de mettre en lumière les convergences et les divergences entre le système mis en place en Suisse, d'une part, et au sein de l'Union européenne, d'autre part. Ainsi, seront traités dans le présent *Article* la structure des deux entités (II.1), leur compétence *ratione loci* (II.2) et, brièvement, *ratione materiae* (II.3), la détermination du for (II.4), la question de la nature des règles de procédure qu'applique le Ministère public de la Confédération, d'une part, et le Parquet européen, d'autre part (II.5) et, finalement, les tribunaux compétents (II.6).

II.1. STRUCTURE

Le Parquet européen connaît un double niveau, central et décentralisé. Le premier, à savoir le Bureau central, est composé du collège, des chambres permanentes, du chef du Parquet européen et de ses adjoints, des procureurs européens et du directeur administratif (art. 8(3) du Règlement (UE) 2017/1939 du Conseil du 12 octobre 2017 mettant en œuvre une coopération renforcée concernant la création du Parquet européen, ci-après: Règlement 2017/1939). Quant au second (art. 8(2) Règlement 2017/1939), il est constitué de procureurs européens délégués affectés dans les États participants (art. 13 Règlement 2017/1939).

Chaque État participant compte au moins deux procureurs européens délégués (art. 13(2) Règlement 2017/1939), qui disposent au moins des mêmes pouvoirs que les procureurs nationaux. Les procureurs européens délégués peuvent avoir la casquette supplémentaire de membre du ministère public de leur État (art. 13(1) et (3) Règlement 2017/1939).

Le Ministère public de la Confédération ne connaît qu'un niveau central. Pour des raisons d'efficacité des procédures pénales, le Ministère public de la Confédération est structuré en quatre divisions correspondant au domaine abordé. Ainsi, la protection de l'État, le terrorisme et les organisations criminelles sont traitées par la division STK (*Staatsschutz, Terrorismus, kriminelle Organisationen*), la criminalité économique est du ressort de la division WiKri (*Wirtschaftskriminalität*), l'entraide judiciaire internationale et le droit pénal international relèvent de la division RV (*Rechtshilfe, Völkerstrafrecht*; cette division assiste en outre toutes les divisions lorsqu'elles sont confrontées à des questions relevant de l'entraide judiciaire et des contacts internationaux et coordonne les activités du Ministère public de la Confédération en la matière, art. 7(4) du Règlement sur l'organisation et l'administration du Ministère public de la Confédération)¹ et l'analyse financière forensique de la division FFA (*Forensische Finanzanalyse*). Le siège du Ministère public de la Confédération est à Berne, mais pour des raisons notamment de représentativité des différentes régions linguistiques, la division WiKri est répartie entre quatre antennes sises dans quatre villes différentes, à savoir Berne et Zurich (cantons des mêmes noms, germanophones), Lausanne (canton de Vaud, francophone) et Lugano (canton du Tessin, italophone).

II.2. COMPÉTENCE *RATIONE LOCI*

La compétence *ratione loci* du Parquet européen est déterminée à l'art. 23(a) à (c) Règlement 2017/1939. Elle se fonde sur les principes de:

- La territorialité: l'infraction est commise en tout ou en partie sur le territoire d'un ou de plusieurs États membres participants (art. 23(a) Règlement 2017/1939);

¹ Règlement du 11 décembre 2012 sur l'organisation et l'administration du Ministère public de la Confédération, ci-après: RMPC.

- La nationalité active: l'infraction est commise par un ressortissant d'un État membre participant, pour autant qu'un État membre participant soit compétent à l'égard de l'infraction lorsqu'elle est commise en dehors de son territoire (art. 23(b) Règlement 2017/1939);

- La puissance publique: l'infraction est commise par une personne qui, au moment de la commission, soumise au statut des fonctionnaires ou au régime applicable aux autres agents, pour autant qu'un État membre participant soit compétent à l'égard de l'infraction lorsqu'elle est commise en dehors de son territoire (art. 23(c) Règlement 2017/1939). Cette compétence est subsidiaire à la compétence territoriale de l'art. 23(a) Règlement 2017/1939.

La compétence du Ministère public de la Confédération est déterminée par les règles ordinaires du Code pénal suisse,² en particulier les arts 3 à 8 CP et les éventuelles dispositions de la partie spéciale du CP ainsi que celles des autres lois comportant des dispositions pénales (droit pénal accessoire). Elle se fonde sur les principes de:

- La territorialité: l'infraction est commise en Suisse, que ce soit sous l'angle du lieu de l'acte ou du lieu du résultat (arts 3 et 8 CP);

- La nationalité active ou passive: l'infraction est commise par ou contre un ressortissant suisse, pour autant que l'auteur se trouve sur le territoire suisse et ne soit pas extradé (art. 7(1) CP);

- La protection: l'infraction est commise contre les intérêts essentiels de l'État suisse (art. 4 CP);

- La représentation: la compétence est liée à l'adage *aut dedere aut judicare*, lorsque la Suisse est liée par une convention internationale lui imposant une telle compétence (arts 6 et 7(2)(a) CP);

- L'universalité: l'infraction est un crime grave portant atteinte aux intérêts les plus essentiels à l'humanité, étant précisé que cette notion est comprise de manière large et ne se limite pas aux *core crimes* (arts 5 et 7(2)(b) CP notamment);

- La puissance publique: l'infraction est commise à l'étranger par des fonctionnaires suisses et porte atteinte à leurs devoirs de fonction ou est commise en rapport avec ces devoirs (art. 16 de la Loi fédérale du 14 mars 1958 sur la responsabilité de la Confédération, des membres de ses autorités et de ses fonctionnaires).

II.3. COMPÉTENCE *RATIONE MATERIAE*

La Parquet européen a pour mission de rechercher, poursuivre et renvoyer en jugement les auteurs et complices des infractions dirigées contre les intérêts financiers de l'Union européenne (art. 4 Règlement 2017/1939). La compétence *ratione materiae* du Parquet européen est limitée et définie à l'aide d'un catalogue figurant dans la Directive (UE) 2017/1371 du Parlement européen et du Conseil du 5 juillet 2017 relative à la lutte contre la fraude portant atteinte aux intérêts financiers de l'Union au moyen du droit pénal.

² Code pénal suisse du 21 décembre 1937, ci-après: CP.

L'art. 22(1) *in fine* Règlement 2017/1939 ajoute que, s'agissant de certaines infractions, le Parquet européen n'est compétent que si l'infraction a un lien avec le territoire d'au moins deux États membres participants et entraîne un préjudice d'un montant total d'au moins 10.000.000 EUR. Par ailleurs, le Parquet européen est compétent à l'égard des infractions relatives à la participation à une organisation criminelle si les activités criminelles de ladite organisation consistent essentiellement à commettre une des infractions susmentionnées (art. 22(2) Règlement 2017/1939). À l'avenir, le champ de compétence du Parquet européen pourrait être étendu à la lutte contre la criminalité grave ayant une dimension transfrontière (consid. 11 Règlement 2017/1939; art. 84(4) TFUE), en particulier le terrorisme affectant plusieurs États membres participants.

Lorsque le préjudice financier causé par l'infraction pénale est inférieur à 10.000 EUR, l'exercice de la compétence n'est possible que si "les répercussions du dossier à l'échelle de l'Union sont de nature à rendre nécessaire la conduite d'une enquête par le Parquet européen" ou si "des fonctionnaires ou d'autres agents de l'Union, ou des membres des institutions de l'Union, pourraient être soupçonnés d'avoir commis l'infraction" (art. 25(2)(a) et (b) Règlement 2017/1939). Le Parquet européen s'abstient en outre d'exercer sa compétence, pour certaines infractions tombant pourtant dans son champ de compétence, dans deux cas de figure, l'un lié au maximum de la peine encourue (art. 25(3)(a) Règlement 2017/1939) et l'autre au préjudice encouru par une autre victime (art. 25(3)(b) Règlement 2017/1939, sauf s'il apparaît que le Parquet européen est mieux placé pour poursuivre et que l'État membre participant concerné y consent, art. 25(4) Règlement 2017/1939).

La compétence *ratione materiae* du Ministère public de la Confédération suisse est plus large que celle du Parquet européen.³ Les infractions couvertes ont été sélectionnées en faisant appel à trois critères, à savoir:

- La nature de l'infraction;
- La qualité spécifique du lésé;
- La qualité spécifique de l'auteur.

Les dispositions pertinentes du Code de procédure pénale suisse⁴ ne désignent pas expressément les infractions contre les intérêts financiers de la Suisse, mais listent de façon exhaustive les infractions concernées. Ainsi, font partie du champ de compétence du Ministère public de la Confédération notamment:

- La fabrication de fausse monnaie (art. 23(1)(e) CPP; titre 10 CP);
- Le faux dans les titres lorsqu'il s'agit de titres fédéraux (art. 23(1)(f) CPP; titre 11 CP);

³ Voir M Ludwiczak Glassey et H Rodriguez-Vigouroux, 'Le Parquet européen: un "Ministère public de la Confédération" de l'Union européenne?' (2019) *Pratique juridique actuelle* 705, archive-ouverte.unige.ch, 707 ss.

⁴ Code de procédure pénale suisse du 5 octobre 2007, ci-après: CPP. Voir D Bouverat, 'Commentaire des art. 23 ss. CPP', in Y Jeanneret, A. Kuhn et C. Perrier Depeursinge (dir), *Code de procédure pénale suisse. Commentaire romand* (Helbing Lichtenhahn 2019); D Kipfer, G Nay et M Thommen, 'Commentaire de l' art. 23 CPP', in MA Niggli, M Heer et H Wiprächtiger (dir), *Basler Kommentar Schweizerische Strafprozessordnung – Jugendstrafprozessordnung* (Helbing Lichtenhahn 2011).

- Les infractions commises contre l'État et la défense nationale suisses (art. 23(1)(h) CPP; art. 260*bis* et titres 13 à 15 et 17 CP);

- Les affaires complexes qui relèvent de la lutte contre la criminalité organisée – dont fait partie le terrorisme qui n'est pas défini comme tel dans le droit pénal suisse – et économique (arts 260*ter*, 260*quinqies*, 305*bis*, 305*ter*, 322*ter* à 322*septies* CP), lorsque les actes ont été commis pour une part prépondérante à l'étranger ou dans plusieurs cantons sans qu'il y ait de prédominance évidente dans l'un d'entre eux (art. 24(1)(a) et (b) CPP).

Toutes les infractions dont a à connaître le Ministère public de la Confédération sont définies dans le CP, code unifié qui est également appliqué par les autorités de poursuite cantonales. La compétence *ratione materiae* du Ministère public de la Confédération permet à cette autorité d'exercer les poursuites pénales dans tous les cas où les intérêts de la Suisse dans son ensemble sont en jeu, sans que le champ n'en soit limité aux seuls intérêts financiers.

Le Ministère public de la Confédération peut déléguer aux autorités cantonales la poursuite et le jugement, voire exceptionnellement le seul jugement, de certaines affaires pourtant de son ressort (art. 25 CPP).

À la lecture des dispositions du Règlement 2017/1939 et du CPP suisse, on constate qu'il existe, pour certaines infractions, des compétences concurrentes tant entre le Parquet européen et les parquets des États membres participants, qu'entre le Ministère public de la Confédération et les ministères publics cantonaux. Ces situations peuvent donner lieu à des conflits de compétence.

Lorsqu'un conflit de compétence *ratione materiae* intervient entre le Ministère public de la Confédération suisse et un ministère public cantonal, la Cour des plaintes du Tribunal pénal fédéral est compétente (art. 28 CPP et art. 37(1) de la Loi fédérale sur l'organisation des autorités pénales de la Confédération).⁵

Au contraire, lorsqu'un tel conflit intervient entre le Parquet européen et un État membre participant, aucune autorité européenne n'est désignée pour trancher. Le Règlement 2017/1939 précise que lorsqu'un parquet national ouvre une enquête dans un cas où le Parquet européen pourrait être compétent, l'État membre participant doit en informer le Parquet européen afin de lui permettre d'exercer, le cas échéant, son droit d'évocation (art. 24(2) Règlement 2017/1939 qui renvoie à l'art. 27 Règlement 2017/1939). Lorsque le Parquet européen exerce sa compétence, les parquets nationaux s'abstiennent d'exercer la leur pour les mêmes faits (art. 25(1) Règlement 2017/1939). En cas de désaccord entre le Parquet européen et le parquet national sur la question de savoir si le comportement incriminé relève de la compétence du Parquet européen le Règlement 2017/1939 ce sont les "autorités nationales compétentes pour statuer sur la répartition des compétences en cas de poursuites à l'échelle nationale qui déterminent qui doit être compétant pour instruire l'affaire" (art. 25(6) Règlement 2017/1939).

⁵ Loi fédérale du 19 mars 2010 sur l'organisation des autorités pénales de la Confédération, ci-après: LOAP.

L'existence d'une autorité fédérale pour statuer sur les conflits de compétence *ratione materiae* entre le Ministère public de la Confédération et les ministères publics cantonaux permet une pratique uniforme en la matière.

II.4. DÉTERMINATION DU FOR

Afin de déterminer le for, c'est-à-dire identifier quel État membre participant, et donc quel procureur européen délégué, sera chargé de la poursuite, l'art. 26(4) Règlement 2017/1939 établit une série de critères. Le premier est celui du lieu où "l'activité criminelle a lieu principalement" ou, si plusieurs infractions liées ont été commises, le lieu où "la plus grande partie des infractions ont été commises". Il est possible de déroger au premier critère en tenant compte, par ordre de priorité, des critères suivants:

- Le lieu de résidence habituelle de l'auteur;
- La nationalité de l'auteur;
- Le lieu du principal préjudice financier.

Le Ministère public de la Confédération ne connaissant pas de niveau décentralisé, la question de la détermination du for ne se pose pas vraiment. Quant à la répartition des cas entre les sections, elle est faite par le procureur général (art. 12(1) RMPC).

Dans le cas du Ministère public de la Confédération, la question des conflits de for ne se pose pas. En revanche, en application de l'art. 26(5) Règlement 2017/1939, entre les procureurs européens délégués des différents États membres participants, la chambre permanente compétente du Bureau central peut réattribuer, scinder ou joindre les affaires, tout en désignant le procureur européen délégué qui en sera chargé, cela après consultation des procureurs européens et/ou des procureurs européens délégués concernés. La décision doit être prise dans "l'intérêt général de la justice" et doit être guidée par les critères susmentionnés.

II.5. RÈGLES DE PROCÉDURE

Malgré une importante harmonisation des législations, l'Union européenne ne connaît pas de code de procédure pénale unique. Les règles de procédure applicables sont donc, sous réserve des règles prévues par les arts 34 ss. Règlement 2017/1939, celles de l'État membre participant dont émane le procureur européen délégué chargé de la procédure. Il y a lieu de préciser que les éléments de preuve présentés à une juridiction par les procureurs du Parquet européen ou par le défendeur ne peuvent être déclarés inadmissibles au seul motif qu'ils ont été recueillis dans un autre État membre participant ou conformément au droit d'un autre État membre participant (art. 37(1) Règlement 2017/1939).

En Suisse, un code fédéral de procédure pénale (CPP) est en vigueur depuis le 1^{er} janvier 2011. Il est appliqué tant par les autorités de poursuite cantonales que par le Ministère public de la Confédération. Auparavant, le droit pénal matériel était déjà unifié et ce depuis longtemps mais, s'agissant de la procédure, les autorités pénales des cantons

appliquaient leurs codes de procédure pénale, pendant que le Ministère public de la Confédération appliquait des règles distinctes qui figuraient dans la Loi fédérale sur la procédure pénale,⁶ abrogée depuis. Ainsi, coexistaient, il y a à peine quelques années, 27 ensembles de règles de procédure différents. Les différents cantons connaissaient des règles distinctes, sans qu'une véritable catégorisation ne puisse être faite en fonction de leur localisation géographique ou encore de la langue officielle du canton. Les disparités compliquaient tant la coopération entre les cantons que la coopération internationale, sans évoquer les obstacles posés à la circulation des praticiens, en particulier les avocats.

Il n'est pas possible d'opérer ici une comparaison de toutes les règles de procédure connues des différents systèmes et de celui instauré par le CPP, nous nous limiterons à présenter, à titre d'exemple, les quatre grands modèles en matière de procédure préliminaire connus de la PPF et des codes cantonaux, en mettant en exergue leurs différences notables, et celui choisi pour le CPP.⁷

Le premier modèle était celui dit du "juge d'instruction I". La poursuite pénale était dirigée par un juge d'instruction indépendant. La police judiciaire lui était subordonnée, ce qui impliquait qu'il n'y avait pas de distinction entre les phases d'investigation policière et d'instruction à proprement dite. La procédure pénale avait ainsi lieu en un seul temps: le juge d'instruction ouvrait la poursuite pénale et l'activité de la police était subordonnée à ses ordres. Le ministère public n'était pas habilité à donner de directives au juge d'instruction. Il n'intervenait qu'en qualité de partie dans la procédure préliminaire. Lorsque cette procédure était close, il dressait l'acte d'accusation et soutenait l'accusation devant les tribunaux.

Ce premier modèle était appliqué par cinq cantons (Vaud – canton francophone; Glaris et Zoug – cantons germanophones; Fribourg et Valais – cantons bilingues allemand- français).

Le deuxième modèle était dit du "juge d'instruction II". Tant le juge d'instruction que le ministère public intervenaient dans la procédure préliminaire. Le juge d'instruction était soumis au pouvoir d'instruction du ministère public, dans une mesure qui variait en fonction des législations cantonales et des pratiques mises en place par les autorités judiciaires cantonales. La coopération entre le juge d'instruction et le ministère public variait, elle aussi, selon les cantons. Dans certains cantons, le juge d'instruction possédait la compétence de classer une affaire ou, au contraire, de mettre le prévenu en accusation devant le tribunal. Dans d'autres cantons en revanche, le juge d'instruction n'avait que la compétence d'instruire l'affaire et, éventuellement, celle de la classer. Dans la plupart des cantons, seul le ministère public avait le pouvoir de mettre le prévenu en accusation et de soutenir l'accusation devant le tribunal.

⁶ Loi fédérale du 15 juin 1934 sur la procédure pénale, ci-après: PPF.

⁷ Conseil fédéral suisse, Message relatif à l'unification du droit de la procédure pénale, 21 décembre 2005, Feuille fédérale 2006 www.admin.ch 1057 1078 ss.

Ce deuxième modèle était appliqué par dix cantons suisses (Appenzell Rhodes-Extérieures, Bâle-Campagne (pour certaines infractions), Lucerne, Nidwald, Obwald, Schaffhouse, Schwyz, Thurgovie – cantons germanophones; Berne – canton bilingue allemand-français; Grisons – canton trilingue allemand-italien-romanche).

Le troisième modèle, dit du “ministère public I” était issu du droit français. Il reposait sur l’intervention d’un juge d’instruction indépendant et par la séparation en deux étapes de la procédure préliminaire. Avant l’intervention du juge d’instruction, la police judiciaire menait les investigations sous la direction du ministère public. Ensuite, ce dernier requérait du juge d’instruction qu’il ouvre une instruction. Le ministère public n’avait alors que des droits de partie, sans avoir la possibilité de donner des instructions. Lorsque l’instruction était close, le juge d’instruction transmettait le dossier au ministère public qui décidait de mettre le prévenu en accusation ou de classer la procédure.

Ce troisième modèle existait dans la PPF et dans les codes de cinq cantons (Argovie, Uri – cantons germanophones; Genève, Jura et Neuchâtel – cantons francophones).

Le dernier modèle était celui du “ministère public II”. Il était caractérisé par l’absence totale du juge d’instruction. Le ministère public conduisait l’intégralité de la procédure préliminaire: il dirigeait les investigations de la police, conduisait l’instruction, dressait l’acte d’accusation et soutenait l’accusation devant le tribunal. L’absence de morcellement des compétences rendait la procédure efficace, mais impliquait la mise en place d’un tribunal des mesures de contrainte et un renforcement des droits de la défense afin d’assurer un contrepoids aux importants pouvoirs dont disposait le ministère public.

Six cantons connaissaient ce quatrième et dernier modèle au moment de l’adoption du CPP (Appenzell Rhodes-Intérieures, Bâle-Campagne (pour les infractions relevant de la criminalité économique), Bâle-Ville, Saint Gall, Soleure et Zurich – cantons germanophones; Tessin – canton italophone).

En mars 2000,⁸ le peuple et les cantons ont approuvé une modification de la Constitution fédérale suisse,⁹ conférant ainsi à la Confédération la compétence générale de légiférer en matière de procédure pénale (art. 123(1) Cst.) qui appartenait jusque-là aux cantons. De nombreux facteurs ont conduit à cette décision, parmi lesquels:¹⁰

- Le respect des principes de l’égalité devant la loi et de la sécurité juridique;
- L’impact harmonisateur de longue date de la jurisprudence relative à la Constitution fédérale et la Convention européenne des droits de l’homme;
- L’internationalisation, la professionnalisation et la spécialisation de la criminalité, ainsi que le besoin de lui adresser une réponse adéquate;
- La nécessité de simplification du système, emportant des avantages tant au stade de la recherche et de l’enseignement universitaire que pour la pratique des avocats ou

⁸ A ce propos, voir Message (2005) 1068 cit.

⁹ Constitution fédérale de la Confédération suisse du 18 avril 1999, ci-après: Cst.

¹⁰ Message (2005) 1070 ss. cit.

encore pour le recrutement de personnel au sein des autorités pénales et qui peut désormais avoir lieu au-delà des frontières cantonales.

C'est le dernier modèle, soit celui du "ministère public II" – donc pas le modèle jusqu'à connu du Ministère public de la Confédération – qui a été retenu par le législateur fédéral, sur proposition du pouvoir exécutif. Ce choix a été dicté en particulier par la volonté d'assurer l'efficacité de la poursuite pénale tout en préservant les intérêts légitimes des personnes impliquées dans la procédure, sans conférer de superpouvoir aux autorités de poursuite pénale, mais en optimisant les processus entrant dans la procédure préliminaire. Le CPP n'est pas une synthèse des 27 systèmes qu'il remplace, mais il ne constitue pas non plus une solution complètement novatrice. Il s'inspire des différents régimes qui étaient en place tout en les développant et les adaptant aux exigences du droit pénal moderne. Il vise à créer un juste équilibre entre les intérêts, diamétralement opposés, des participants à la procédure pénale.

Un temps considérable – 11 ans se sont écoulés entre la votation populaire et l'entrée en vigueur du CPP – a été nécessaire pour la mise en place des modifications qu'entraînait l'adoption de nouvelles règles de procédure uniformisées pour l'ensemble du territoire suisse, autorités cantonales et Ministère public de la Confédération compris.

II.6. TRIBUNAUX COMPÉTENTS

Les actes de procédure entrepris tant par le Parquet européen que par le Ministère public de la Confédération sont soumis au contrôle juridictionnel de tribunaux décentralisés. Concernant le Parquet européen, il s'agit des tribunaux nationaux compétents (art. 42 Règlement 2017/1939). S'agissant du Ministère public de la Confédération, ses décisions prises en cours de procédure, par exemple la mise en détention du prévenu, peuvent être attaquées devant le Tribunal des mesures de contrainte du canton dans lequel le Ministère public de la Confédération mène la procédure (art. 65(2) LOAP). Les Tribunaux des mesures de contrainte sont indemnisés par la Confédération pour leur activité au profit de la Confédération (art. 65(4) LOAP).

En revanche, les recours contre les décisions desdits tribunaux cantonaux sont adressés à une autorité fédérale, à savoir la Cour des plaintes du Tribunal pénal fédéral (art. 65(3) LOAP). En dernier ressort, le Tribunal fédéral peut être saisi (arts 79 et 80 de la Loi sur le Tribunal fédéral).¹¹ Tel n'est pas le cas des actes du Parquet européen, pour lesquels aucune autorité de l'Union européenne n'intervient, sous réserve des questions préjudicielles qui peuvent être soumises à la Cour de justice de l'Union européenne (art. 42(2) Règlement 2017/1939).

Les procureurs européens délégués portent l'accusation en principe devant les tribunaux ordinaires de leur État membre participant (art. 36 Règlement 2017/1939). Excep-

¹¹ Loi fédérale du 17 juin 2005 sur le Tribunal fédéral, ci-après: LTF.

tionnellement, lorsque des motifs particuliers interviennent, un autre État membre participant peut être désigné selon les mêmes critères que ceux utilisés pour la fixation du for (*supra* II.4). Le système varie ainsi en fonction des différents États membres participants. L'importance du recours aux questions préjudicielles que ces tribunaux peuvent poser à la Cour de Justice de l'Union européenne n'est pas négligeable.

Le Ministère public de la Confédération, quant à lui, soutient l'accusation devant une instance fédérale unique à savoir, depuis 2004, la Cour des affaires pénales du Tribunal pénal fédéral (art. 35(1) LOAP) puis, en seconde instance, devant la Cour d'appel de ce même tribunal (art. 38(a) ss. LOAP) qui est entrée en fonction le 1er janvier 2019. En dernier ressort, le Tribunal fédéral statue (art. 80(1) LTF). Auparavant, l'accusation était portée directement devant le Tribunal fédéral, sans que les tribunaux cantonaux ne soient mis à contribution.

L'instauration d'une juridiction unique pour statuer sur le fond sur toutes les affaires traitées par le Ministère public de la Confédération présente des avantages non négligeables, en particulier pour des raisons d'uniformisation des pratiques. Lorsqu'une infraction tombe dans le champ des compétences concurrentes du Ministère public de la Confédération et des cantons (*supra* II.3), l'accusation est portée par les ministères publics cantonaux devant les autorités judiciaires cantonales, alors que la Ministère public de la Confédération soutient l'accusation, comme dit précédemment, devant le Tribunal pénal fédéral. Un rôle important d'harmonisateur de la pratique est alors joué par le Tribunal fédéral, instance judiciaire suprême suisse qui connaît des recours à la fois contre les jugements cantonaux que du Tribunal pénal fédéral.

III. LA COOPÉRATION ENTRE LE PARQUET EUROPÉEN ET LA SUISSE

Vu l'importance de la place financière suisse, il est très probable que la conduite des poursuites par le Parquet européen impliquera d'obtenir des informations et moyens de preuve de la part de la Suisse. Nous pensons là en particulier à la documentation bancaire. Les liens entretenus entre l'Union européenne et la Suisse étant forts et les procédures du ressort du Parquet européen ayant un caractère international, il est à prévoir que la Suisse va, elle aussi, adresser des demandes d'entraide au Parquet européen. Une coopération judiciaire internationale en matière pénale efficace entre le Parquet européen et la Suisse devra ainsi être mise en place.

Le premier obstacle auquel se heurte la réflexion est le fait que le législateur suisse n'a pas prévu la coopération avec une entité autre qu'un État, à l'unique exception des juridictions pénales internationales pour autant que leur compétence porte sur les crimes internationaux les plus graves. Ainsi, hormis s'agissant de ces juridictions internationales, la Suisse ne peut, en l'état actuel de sa législation, pas accorder l'entraide à des entités qui ne

sont pas des États. Le Parquet européen est manifestement concerné par cette impossibilité.¹² Une révision de la loi fédérale sur l'entraide internationale en matière pénale¹³ est toutefois en cours,¹⁴ le Conseil fédéral (pouvoir exécutif) a soumis en novembre 2019 une proposition à l'Assemblée fédérale (pouvoir législatif) allant dans ce sens.¹⁵ Il est possible que la question soit traitée lors des prochaines sessions parlementaires, soit au printemps ou en été 2020, mais il ne peut être préjugé de l'issue des débats parlementaires et des votes, dans la mesure où le champ de la nouvelle disposition légale proposée est large et concerne potentiellement toutes sortes d'entités non étatiques.

En admettant que la révision soit acceptée par le législateur suisse, une coopération internationale en matière pénale avec le Parquet européen sera théoriquement possible. Il s'agit alors de se demander plus concrètement quelle forme elle pourra prendre.

L'art. 104 Règlement 2017/1939 traite de la question de la coopération avec les États qui ne sont pas membres de l'Union européenne (États tiers), en offrant plusieurs possibilités. Les deux premières possibilités se fondent sur un accord international applicable entre le Parquet européen et l'État tiers (art. 104(3) et (4) Règlement 2017/1939). En l'état actuel, il n'existe aucun accord international conclu entre le Parquet européen et la Suisse permettant de fonder cette coopération. L'extension d'un accord de coopération préexistant n'est pas non plus prévue, à notre connaissance. Ainsi, les deux premières possibilités offertes par le Règlement 2017/1939 ne peuvent être utilisées.

La troisième possibilité offerte par le Règlement 2017/1939 (art. 104(5), 1^{re} hypothèse, Règlement 2017/1939) emporte certains doutes du point de vue suisse. Elle consiste à faire usage de la casquette nationale du procureur européen délégué. Le magistrat se prévaudrait alors des accords conclus entre son État et la Suisse pour obtenir la coopération. Il va sans dire que le Parquet européen, pour lequel agit le procureur européen délégué, n'est pas identifiable à l'État en question. Il est également incontestable que les accords conclus avec la Suisse varient en fonction des États membres de l'Union européenne participants au Parquet européen. Le recours à cette solution aurait ainsi pour conséquence que la coopération reposerait sur une multiplicité de bases légales.¹⁶ Il en résulterait une géométrie très variable qui n'est pas souhaitable, ce d'autant que les pièces fournies par la Suisse seraient au final toutes utilisées pour les besoins de poursuite de la même autorité, à savoir le Parquet européen.

¹² Dans ce sens Office fédéral de la justice, Modification de l'art. 1 EIMP: combler les lacunes dans le domaine de la coopération avec les institutions pénales internationales. Rapport explicatif relatif à l'avant-projet du 27 août 2018, www.ejpd.admin.ch 13.

¹³ Loi fédérale du 20 mars 1981 sur l'entraide internationale en matière pénale (EIMP).

¹⁴ Objet parlementaire 19.063, www.parlament.ch.

¹⁵ Conseil fédéral suisse, Message concernant la révision de l'art. 1 de la loi sur l'entraide pénale internationale, 6 novembre 2019, Feuille fédérale 2019 7007.

¹⁶ A ce propos, voir aussi M Ludwiczak Glassey, 'La coopération en matière pénale entre le Parquet européen et la Suisse comme État tiers. Futur ou conditionnel?', (2019) *Eucrim* 205 ss.; UI Naves, *L'entraide pénale entre le Parquet européen et États* (Université de Genève, archive-ouverte.unige.ch) 17 ss.

La dernière possibilité prévue par le Règlement 2017/1939 consiste pour le Parquet européen à solliciter la coopération “dans une affaire particulière et dans les limites de sa compétence matérielle” (art. 104(5), 2^e hypothèse, Règlement 2017/1939). Cette coopération au cas par cas impliquerait pour le Parquet européen de se conformer aux conditions fixées par les autorités suisses concernant l'utilisation des informations fournies. C'est la voie qui sera vraisemblablement privilégiée, même si elle se heurte, elle-aussi, à un obstacle lié à l'étendue de la coopération accordée par le Parquet européen sur demande de la Suisse. En effet, d'après le Règlement 2017/1939, le Parquet européen peut fournir aux États tiers qui le demandent “des informations ou des preuves qui sont déjà en sa possession” (art. 104(6) Règlement 2017/1939). Il s'agit pour le Parquet européen de déterminer ce que signifie exactement cette formulation. Toutefois, il sied de garder à l'esprit que, lorsqu'elles seront sollicitées par le Parquet européen, les autorités suisses pourront non seulement fournir des informations et moyens de preuves en leur possession, mais aussi les obtenir en vue de la transmission, ce qui découle des dispositions applicables du droit suisse de l'entraide. Si la compréhension de la formulation de l'art. 104(6) Règlement 2017/1939 est littérale, la réciprocité, principe fondamental en matière de coopération internationale,¹⁷ ne sera pas respectée. Il reste à voir si les autorités suisses compétentes pour l'exécution des demandes d'entraide, puis les tribunaux contrôlant la bonne exécution, valideront une telle coopération sans réciprocité.

IV. CONCLUSION

Vu depuis la Suisse, le Parquet européen en construction ne manque pas de rappeler le Ministère public de la Confédération. Celui-ci fait face, depuis de nombreuses années, aux contraintes liées à la nature fédérale de l'État suisse et aux multiples différences (linguistiques, culturelles etc.) qui caractérisent les entités fédérées tout en défendant les intérêts de l'État fédéral. L'adoption, somme toute très récente, d'un Code fédéral de procédure pénale représente un pas majeur dans l'unification de la mise en œuvre du droit pénal suisse. Nous avons présenté des divergences importantes entre les systèmes suisse et de l'Union européenne. Toutefois, de multiples ressemblances ont également été pointées dans la présente contribution et pourraient ainsi nourrir la réflexion des juristes européens confrontés aux défis liés à la mise en place du Parquet européen.

¹⁷ A propos de ce principe, voir notamment C Sager, ‘Der Gegenrechtsgrundsatz im Rechtshilferecht – ein alter Zopf?’ (2014) *Pratique juridique actuelle* 224 ss.; P Popp, *Grundzüge der internationalen Rechtshilfe in Strafsachen* (Helbing Lichtenhahn 2001) 291 ss.



ARTICLES

TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – SECOND PART

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EXISTE-T-IL DES GARANTIES EUROPÉENNES RELATIVES À LA PROTECTION DE LA VIE PRIVÉE DANS LE CADRE DE L'ENQUÊTE PÉNALE?

MAXIME LASSALLE*

TABLE OF CONTENTS: I. La nécessité d'une harmonisation accrue de la procédure pénale européenne. – II. L'existence de garanties protégeant les intérêts des États. – II.1. Un droit primaire garantissant l'efficacité des enquêtes. – II.2. Un droit dérivé garantissant le respect des droits nationaux. – III. L'émergence de garanties protégeant les droits des individus. – III.1. Des garanties implicites fondées sur la Charte. – III.2. Des garanties rejetées par le droit pénal européen.

ABSTRACT: European Union criminal law covers cooperation in criminal matters and the investigative powers granted to European delegated prosecutors. Therefore, it provides for the use of investigative measures interfering with the right to privacy. Those measures are taken on the basis of national law implementing European Union law and they must comply with the Charter of Fundamental Rights of the Union. However, the Charter does not explicitly specify the guarantees applicable to such investigative acts. Moreover, the competences of the European Union in criminal procedure are intended only to balance the effectiveness of European investigations and the interests of Member States. Therefore, secondary law does not directly aim at protecting fundamental rights. This situation is becoming increasingly problematic insofar as the case law of the Court of Justice itself tends to request guarantees regarding the use of those measures. For example, a minimum degree of suspicion is a requirement that must be met for those measures to be used. Similarly, targeted persons have to be notified of the measure and have access to effective remedies. Such requirements are currently rejected by European union secondary law.

KEYWORDS: procedural guarantees – privacy – cooperation in criminal matters – investigative measures – data protection – competences of the European Union.

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I. LA NÉCESSITÉ D'UNE HARMONISATION ACCRUE DE LA PROCÉDURE PÉNALE EUROPÉENNE

Les procédures pénales des États membres de l'Union européenne sont à ce point diverses, notamment en ce qui concerne le respect du droit à la vie privée, qu'il pourrait paraître surprenant de s'interroger sur l'existence de garanties européennes dans ce contexte. La question se pose, pourtant, parce qu'il existe des indices de l'émergence, dans la jurisprudence de la Cour de justice de l'Union européenne et dans le domaine du traitement de données à caractère personnel par les autorités publiques, de "garanties suffisantes permettant de protéger efficacement (les) données à caractère personnel contre les risques d'abus ainsi que contre tout accès et toute utilisation illicite de ces données".¹ Le terme utilisé est parfois celui de "*garanties appropriées*".²

La garantie des droits est définie comme un "ensemble de disposition et procédés [...] qui tendent à empêcher par des interdictions ou d'une manière générale par un système quelconque de limitation du pouvoir la violation des droits de l'homme par les gouvernants".³ Les garanties européennes en matière de protection du droit à la vie privée dans le cadre de l'enquête pénale pourraient ainsi être définies comme des dispositions prévues par le droit de l'Union européenne et visant à assurer que l'ingérence dans le droit à la vie privée causée par une mesure d'enquête prise en application du droit de l'Union soit proportionnée.⁴

Compte tenu du caractère encore émergent et donc encore indéfini de ces garanties dans la jurisprudence de la Cour de justice, il est difficile de déterminer à quoi des garanties européennes applicables au cadre plus général des actes d'enquête portant atteinte au droit à la vie privée dans le cadre de l'enquête pénale pourraient correspondre. Pour mieux comprendre ce dont il pourrait s'agir, on peut faire référence aux États-Unis, où la référence en matière de garanties relatives à la protection de la vie privée dans le cadre de l'enquête pénale est incontestablement le quatrième amendement de la Constitution. Celui-ci énonce que "[l]e droit des citoyens d'être protégés dans leurs personnes, domiciles, papiers et effets, contre les perquisitions et saisies non motivées ne sera pas violé, et aucun mandat

¹ Affaires jointes C-293/12 et C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238 para. 54.

² Affaires jointes C-203/15 et C-698/15 *Tele2 Sverige* ECLI:EU:C:2016:970 para. 117. Le droit dérivé fait également référence à un "niveau de protection adéquat" et à des "garanties appropriées" dans le contexte de transferts vers les États tiers (règlement (EU) 2016/679 du 27 avril 2016 relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, et abrogeant la directive 95/46/CE, arts 45 et 46).

³ G Cornu (dir), *Vocabulaire juridique* (PUF 2018) 485-486.

⁴ Le terme de "garanties essentielles européennes" est parfois utilisé pour qualifier les garanties proposées par la Cour européenne des droits de l'homme: WR Wiewiorowski, 'Surveillance for Public Security Purposes. Four Pillars of Acceptable Interference with the Fundamental Right to Privacy' in G Vermeulenowski et E Lievens (dir), *Data Protection and Privacy under Pressure. Transatlantic Tensions, EU Surveillance and Big Data* (Maklu, 2017) 171. Ces garanties ne seront pas ignorées mais ce sont les garanties prévues par la Cour de justice, souvent par référence à la jurisprudence de la Cour européenne des droits de l'homme, qui seront davantage développées.

ne sera délivré, si ce n'est sur présomption sérieuse, corroborée par serment ou affirmation, ni sans qu'il ne décrive spécifiquement le lieu à fouiller et les personnes ou les choses à saisir".⁵ Ce sont bien des garanties -un mandat, une présomption sérieuse- et celles-ci s'appliquent à un objet précis, à savoir les "perquisitions et saisies".

L'objet des garanties européennes qu'il s'agit d'étudier, à savoir les actes d'enquête portant atteinte au droit à la vie privée, ne peut être délimité de manière stricte tant la portée des droits à la vie privée et à la protection des données à caractère personnel est encore incertaine.⁶ On ne peut citer, sans prétendre à l'exhaustivité, que quelques-unes de ces mesures qui ont fait l'objet d'affaires devant la Cour de justice ou devant la Cour européenne des droits de l'homme: les perquisitions,⁷ les écoutes téléphoniques,⁸ la géolocalisation⁹ ainsi que l'accès aux données de télécommunication,¹⁰ aux données PNR,¹¹ aux données bancaires et aux adresses IP.¹²

La question de l'existence de garanties européennes applicables dans ces circonstances est d'apparence très théorique. Elle a toutefois une portée pratique puisqu'il s'agit de déterminer le degré d'harmonisation qui pourrait être nécessaire dans l'encadrement de ces différentes mesures par le droit européen. Certes, l'encadrement de ces mesures relève en grande partie du droit national. La question d'une harmonisation, au moins minimale, des garanties applicables à ces mesures, se pose tout de même. En effet, il existe déjà un cadre juridique européen relatif aux mesures d'enquête portant atteinte au droit à la vie privée dans le cadre de l'enquête pénale. Celui-ci appréhende dans une certaine mesure l'exécution par des autorités nationales de mesures d'enquête décidées dans un contexte européen, par exemple par qu'il s'agit de la mise en œuvre de demandes de coopération ou, à l'avenir, du recours aux pouvoirs d'enquête des procureurs européens délégués. Parce que les autorités nationales mettent alors en œuvre le droit européen, celles-ci doivent respecter la Charte.

⁵ Le texte en version originale est le suivant: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

⁶ Voir par exemple: CourEDH *Benedik c Slovénie* Req n. 62357/14 arrêt du 24 avril 2018, [16 Novembre 2004] opinion concurrente de la juge Yudkivska, jointe par le juge Bošnjak. La définition américaine du champ d'application du quatrième amendement est elle aussi sources de nombreuses difficultés, qui ne pourront être développées ici. Compte tenu de la jurisprudence de la Cour de justice, les droits à la vie privée et à la protection des données seront considérés ensemble.

⁷ Affaire C-94/00 *Roquette frères* ECLI:EU:C:2002:603.

⁸ CourEDH *Kruslin c France* Req n. 11801/85 [24 avril 1990]; CourEDH *Huvig c France* Req n. 11105/84 [24 avril 1990]; CourEDH *Zakharov c Russie* Req n. 47143/06 [4 décembre 2015].

⁹ CourEDH *Uzun c Allemagne* Req n. 35623/05 [2 septembre 2010].

¹⁰ CourEDH *Ben Faiza c France* Req n. 31446/12 [8 février 2018].

¹¹ Avis 1/15 ECLI:EU:C:2017:592.

¹² CourEDH *Benedik c Slovénie* Req n. 62357/14 [24 avril 2018].

Pour l'heure, l'encadrement européen des mesures d'enquête portant atteinte au droit à la vie privée est éclaté entre plusieurs sources. La coopération en matière pénale suit une approche de l'espace pénal européen basée sur la coopération,¹³ et donc sur des instruments visant à coordonner les droits des États européens.¹⁴ Les pouvoirs d'enquête du parquet européen suivent quant à eux une approche fondée en principe sur l'harmonisation et la création d'un modèle unifié de collecte de preuves.¹⁵ C'est encore davantage une approche fondée sur un modèle unifié qui est envisagée dans le projet "*e-evidence*" puisque celui-ci vise à créer un instrument d'enquête européen, et donc à prévoir les garanties qui l'accompagnent.¹⁶

Dans tous les cas où le droit de l'Union touche à des mesures d'enquête portant atteinte au droit à la vie privée dans le cadre de l'enquête pénale, par exemple pour organiser la coopération entre États ou le fonctionnement du parquet européen, un minimum de règles communes, européennes, est nécessaire pour organiser l'exécution de ces mesures d'enquête. Il existe donc déjà bien des règles européennes applicables aux actes d'enquête portant atteinte au droit à la vie privée, et certaines sont qualifiées de garanties, par exemple par les textes eux-mêmes,¹⁷ par la Commission européenne,¹⁸ ou par la doctrine,¹⁹ dans ce contexte.

Le recours à ce terme illustre le problème de la détermination de l'objet des garanties dont il est question. En effet, la conciliation de ce qui est qualifié de garantie dans le contexte actuel avec ce qui est qualifié de garantie dans la jurisprudence de la Cour de justice, encore émergente, n'est pas évidente. Le recours à ce terme est trompeur car il présuppose de déterminer quel est l'objet d'une garantie, ce qu'elle est supposée garantir et ce qu'elle a vocation à protéger. Or s'il existe bien des garanties en droit de l'Union,

¹³ JR Spencer, 'The Principle of Mutual Recognition' in RE Kostoris (dir), *Handbook of European Criminal Procedure* (Springer 2018) 281.

¹⁴ M Daniele, 'Evidence Gathering' in RE Kostoris (dir), *Handbook of European Criminal Procedure* (Springer 2018) 353.

¹⁵ *Ibid.* 355.

¹⁶ La spécificité de ce projet, notamment en ce qui concerne les garanties applicables, est développée dans la contribution d'Hélène Christodoulou, Laetitia Gaurier et Alice Mornet intitulée "La proposition 'e-evidence': révélatrice des limites de l'émergence d'une procédure pénale européenne ou compromis nécessaire?" dans ce même numéro. Ce projet ne sera ainsi plus évoqué dans cet article.

¹⁷ Le chapitre III de la directive 2014/41/UE du 3 avril 2014 concernant la décision d'enquête européenne en matière pénale est par exemple intitulé "procédures et garanties pour l'État d'exécution".

¹⁸ Livre vert COM(2003) 75 final de la Commission du 19 février 2003 sur les garanties procédurales accordées aux suspects et aux personnes mises en cause dans des procédures pénales dans l'Union européenne (livre vert). Ces garanties sont vues comme le pendant de la mise en œuvre du principe de reconnaissance mutuelle: Programme de mesures destiné à mettre en œuvre le principe de reconnaissance mutuelle des décisions pénales du 15 janvier 2001 10.

¹⁹ Par exemple: G Taupiac-Nouvel, 'Le principe de reconnaissance mutuelle des décisions pénales dans l'UE: principe fondateur de l'Europe pénale' in D Guérin et B De Lamy (dir), *La Chambre criminelle de la Cour de cassation face aux droits européens* (Institut universitaire Varenne 2017) 75. L'auteur évoque toutefois la question du mandat d'arrêt européen.

celles-ci concernent essentiellement la souveraineté des États (II), les garanties pour les droits des individus n'étant encore qu'émergentes (III).

II. L'EXISTENCE DE GARANTIES PROTÉGÉANT LES INTÉRÊTS DES ÉTATS

Les garanties explicitement prévues ou envisagées par le droit de l'Union n'ont pas pour objet la protection des droits fondamentaux des individus mais la protection des intérêts des États membres et des autorités nationales. Le droit primaire de l'Union européenne reconnaît essentiellement un rôle au droit pénal de l'Union dans le but d'améliorer l'efficacité des enquêtes (II.1). Le droit secondaire prévoit, en conséquence, des garanties permettant d'équilibrer les intérêts des deux États parties à la coopération, en renvoyant au droit des États membres la question des garanties relatives à la protection des droits des individus (II.2).

II.1. UN DROIT PRIMAIRE GARANTISSANT L'EFFICACITÉ DES ENQUÊTES

La compétence de l'Union européenne en matière de coopération judiciaire est l'exemple principal illustrant le rôle du droit de l'Union en matière de procédure pénale. L'art. 82(2) du Traité sur le fonctionnement de l'Union européenne prévoit l'adoption de "règles minimales", dans la mesure où cela est "nécessaire pour faciliter la reconnaissance mutuelle des jugements et décisions judiciaires, ainsi que la coopération policière et judiciaire dans les matières pénales ayant une dimension transfrontière". Ces règles portent sur "l'admissibilité des preuves entre les États membres" et "les droits des personnes dans la procédure pénale".

Si les droits des personnes dans la procédure pénale sont cités, leur protection et l'harmonisation des garanties applicables pour protéger ces droits ne constitue pas un objectif autonome d'harmonisation.²⁰ L'objectif majeur, le rôle de la compétence de l'Union en matière de procédure pénale, est la "facilitation" de la coopération. Cela signifie en premier lieu, dans le contexte des mesures portant atteinte au droit à la vie privée, que le rôle du droit de l'Union est d'assurer que les mesures d'enquêtes dont les autorités nationales ont besoin dans le contexte d'une enquête transnationale puissent être mises en œuvre par leurs partenaires européens et surtout que les preuves collectées soient admissibles dans les éventuelles poursuites qui s'en suivront.²¹ En conséquence, le droit

²⁰ D Flore, *Droit pénal européen. Les enjeux d'une justice pénale européenne* (Larcier 2014) 336; M Kusak, *Mutual admissibility of evidence in criminal matters in the EU: a study of telephone tapping and house search* (Maklu 2016) 33; M Marty, *La légalité de la preuve dans l'espace pénal européen* cit. 336; A Weyembergh, 'L'harmonisation des procédures pénales au sein de l'Union européenne' (2004) Archives de politique criminelle 37.

²¹ Tel est l'objectif premier du droit pénal européen: G Vermeulen, *Free Gathering and Movement of Evidence in Criminal Matters in the EU: Thinking Beyond Borders, Striving for Balance, in Search of Coherence* (Maklu 2012) 44; G Vermeulen Gert et L van Puyenbroeck, 'Approximation and Mutual Recognition of

dérivé prévoit bien la mise en œuvre et la facilitation du recours à des mesures portant atteinte au droit à la vie privée, mais il n'a pas pour objet d'assurer que la mise en œuvre de ces mesures soit conforme au droit à la vie privée.

En matière de coopération policière et administrative, la compétence de l'Union européenne vise aussi à faciliter la coopération, l'efficacité des enquêtes, et ignore également la question des garanties applicables aux actes exécutés en application du droit de l'Union européenne. Selon l'art. 87 TFUE, l'Union "développe une coopération policière qui associe toutes les autorités compétentes des États membres, y compris les services de police, les services des douanes et autres services répressifs spécialisés dans les domaines de la prévention ou de la détection des infractions pénales et des enquêtes en la matière", ce qui donne compétence législative à l'Union pour établir des mesures portant notamment sur "la collecte, le stockage, le traitement, l'analyse et l'échange d'informations pertinentes".²² Là encore, le seul enjeu est l'accessibilité des informations, les droits des personnes concernées ne sont même pas envisagés.

L'art. 86(3) TFUE relatif au parquet européen aurait pu être lu comme donnant compétence à l'Union pour aller plus loin, afin qu'elle prévoie elle-même directement l'intégralité de l'encadrement des actes d'enquête du parquet européen, dont le contenu des garanties applicables. Les progrès dans l'efficacité des enquêtes pourraient ainsi être accompagnés de progrès dans la protection des droits fondamentaux. Cet article prévoit en effet que le règlement relatif au parquet européen précise "les règles de procédure applicables à ses activités [...] et les règles applicables au contrôle juridictionnel des actes de procédure qu'il arrête dans l'exercice de ses fonctions". Cette référence aux "règles applicables" et donc à une certaine harmonisation avait créé des attentes relatives à l'émergence d'un "principe de légalité procédurale européen"²³ et un projet de recherche avait d'ailleurs proposé de déterminer précisément les modalités de mise en œuvre des actes d'enquête du parquet européen.²⁴

Le droit primaire a clairement pour objectif de favoriser les enquêtes transnationales. Il prévoit ainsi que certaines mesures d'enquêtes, y compris des mesures portant atteinte au droit à la vie privée, puissent être utilisées dans le cadre d'enquête ayant une portée européenne. La compétence de l'Union est ainsi limitée: si elle doit favoriser les enquêtes européennes, elle est beaucoup plus restreinte dans sa capacité à harmoniser les procédures pénales nationales s'agissant des garanties applicables. Le droit primaire de l'Union

Procedural Safeguards of Suspects and Defendants in Criminal Proceedings Throughout the European Union' in M Cool, B De Ruyver et M Easton (dir), *EU and International Crime Control* (Maklu 2010) 43.

²² Art. 87(a) TFUE.

²³ J Tricot, 'Lectures analytiques guidées. Quel modèle de procédure?' (2018) RSC 635.

²⁴ K Ligeti, 'Model Rules for the Procedure of the EPPO' in K Ligeti (dir), *Toward a Prosecutor for the European Union: Draft Rules of Procedure* (Hart à paraître). Voir la règle 32. Il était ainsi proposé de créer une mesure spécifique, autonome par rapport au droit national, et détaillant le régime applicable aux mesures d'accès aux données bancaires.

privilège ainsi les garanties de l'efficacité de l'enquête tout en renvoyant implicitement aux compétences des États membres s'agissant des garanties pour les individus.

II.2. UN DROIT DÉRIVÉ GARANTISSANT LE RESPECT DES DROITS NATIONAUX

L'une des caractéristiques essentielles du droit dérivé de l'Union, fondé sur les compétences limitées de l'Union, est de renvoyer en grande partie vers le droit national et donc ne procéder qu'à une harmonisation minimale de la procédure pénale.²⁵ Le droit dérivé applicable aux actes d'enquête prévoit ainsi bien des garanties mais celles-ci n'ont que pour objet la protection des intérêts des États. Il renvoie ainsi aux droits nationaux en ce qui concerne les garanties de protection des droits des individus.

C'est le cas en matière de coopération judiciaire. La directive concernant la décision d'enquête européenne prévoit une liste de mesures d'enquêtes, dont certaines portent atteinte au droit à la vie privée, ainsi que des "dispositions particulières relatives à certaines mesures d'enquête".²⁶ Cependant, celles-ci n'ont pas vocation à protéger directement le droit à la vie privée des personnes affectées par les mesures en question et leur finalité est seulement de faciliter l'exécution des mesures d'enquête.²⁷

Elle prévoit aussi des dispositions générales, applicables à toutes les mesures d'enquête, que celles-ci portent atteinte au droit à la vie privée ou pas, prévoyant explicitement des normes qualifiées de garanties. Ce sont toutefois des garanties pour l'État d'émission²⁸ ou pour l'État d'exécution²⁹ de la demande de coopération. Ce sont ainsi des

²⁵ Plusieurs auteurs ont souligné la tendance du droit pénal européen à renvoyer au droit national. Voir en particulier: E Sellier et A Weyembergh, *Criminal Procedural Laws across the European Union - A Comparative Analysis of Selected Main Differences and the Impact They Have over the Development of EU Legislation* (Parlement européen LIBE Committee PE 604.977 2018) 31; I Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence' (2015) *New Journal of European Criminal Law* 8. L'auteur parle de "légalité procédurale" en faisant référence à un principe européen.

²⁶ Chapitre IV de la directive 2014/41 cit. Ce n'était pas le cas auparavant, dans la décision-cadre 2008/978/JAI du 18 décembre 2008 relative au mandat européen d'obtention de preuves visant à recueillir des objets, des documents et des données en vue de leur utilisation dans le cadre de procédures pénales. Cette décision-cadre avait un champ d'application très limité et ne visait en pratique qu'avec exécuter des perquisitions ou saisies définies comme "toute mesures de procédure pénale en vertu de laquelle une personne physique ou morale est légalement tenue de remettre des objets, des documents ou des données, ou d'apporter son concours à la remise de ces objets, documents ou données et qui, en cas de non-exécution, est susceptible d'exécution forcée sans le consentement de la personne en question ou peut donner lieu à une sanction" (art. 2(e)). Le fait de créer un catalogue des actes d'enquête européens aurait pu être l'occasion de prévoir aussi les garanties applicables à ces actes.

²⁷ Communication COM(2003) 688 final du 14 novembre 2003 sur la proposition de décision-cadre du Conseil relative au mandat européen d'obtention de preuves tendant à recueillir des objets, des documents et des données en vue de leur utilisation dans le cadre de procédures pénales. La Commission précise que sa proposition de directive "contient des garanties spécifiques pour les États d'émission et d'exécution afin d'améliorer l'efficacité, la cohérence et la visibilité de certaines des normes applicables à l'obtention d'éléments de preuve au niveau de l'Union européenne" (12, para. 46).

²⁸ Le chapitre II est intitulé "procédures et garanties pour l'État d'émission".

²⁹ *Ibid.*

motifs de non-reconnaissance ou de non-exécution qui sont qualifiés de garanties pour l'État d'exécution.³⁰ L'objet de ces garanties est essentiellement de limiter le recours à la coopération judiciaire pour ne pas solliciter les autorités d'un État sans que cela soit nécessaire. Par exemple "l'autorité d'émission indique les raisons pour lesquelles les informations demandées sont pertinentes aux fins de la procédure pénale concernées".³¹ Les autres dispositions et motifs de refus,³² et en particulier celles qui sont liées au principe de double incrimination,³³ ont pour seul objectif de protéger les principes classiques de la souveraineté des États, les intérêts des États membres.

Certaines de ces garanties pour les États sont parfois comprises par la doctrine³⁴ ou présentées par la Commission européenne³⁵ comme des garanties pour les droits individuels. Or ces garanties pour les États ne correspondent pas à la définition de garantie pour les individus, à savoir des dispositions prévues par le droit de l'Union européenne et visant à assurer que l'ingérence dans le droit à la vie privée causée par une mesure d'enquête prise en application du droit de l'Union soit proportionnée. Par exemple, le cas du motif de refus d'exécution applicable lorsqu'il "existe des motifs sérieux de croire que l'exécution de la mesure d'enquête indiquée dans la décision d'enquête européenne serait incompatible avec les obligations de l'État d'exécution conformément à l'art. 6 du traité sur l'Union européenne et à la Charte"³⁶ ne constitue pas en tant que tel une garantie européenne pour les droits des individus.³⁷ Ce motif ne fait que renvoyer au devoir des États de protéger le droit à la vie privée sur le fondement de leur droit national lorsque ce droit entre en conflit avec les nécessités de la coopération. Il ne prévoit pas les garanties que les États devraient appliquer.

Il en va de même pour d'autres motifs de refus. Par exemple, l'autorité d'exécution peut avoir recours à une autre mesure que celle qui est demandée si la mesure d'enquête en question ne serait pas disponible dans le cadre d'une procédure nationale similaire.³⁸

³⁰ Art. 11 de la directive 2014/41 cit. En ce qui concerne les garanties pour l'État d'émission, il n'est pas possible d'en distinguer parmi les procédures prévues pour ce même État.

³¹ Art. 28(3) de la directive 2014/41 cit.

³² *Ibid.* art. 11(b) et (d).

³³ *Ibid.* art. 11(e) et (g).

³⁴ G Taupiac-Nouvel, 'Le principe de reconnaissance mutuelle des décisions pénales dans l'UE: principe fondateur de l'Europe pénale' cit. 94. L'auteur semble par exemple assimiler "motifs de non-exécution communs" et "harmonisation des garanties procédurales". Elle le fait toutefois dans un contexte particulier car elle analyse la reconnaissance mutuelle en prenant uniquement l'exemple du mandat d'arrêt européen.

³⁵ Communication COM(2003) 688 final cit. Selon cette proposition, "les motifs justifiant le refus d'exécuter le mandat européen d'obtention de preuves offrent des garanties supplémentaires" (para. 48).

³⁶ Art. 11(f) de la directive 2014/4 cit.

³⁷ I Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence' cit.

³⁸ Art. 10(1)(b) de la directive 2014/41 cit. Pour illustrer la notion de disponibilité de la mesure dans le cadre d'une enquête nationale similaire, la directive donne ainsi l'exemple suivant: "lorsque la mesure d'enquête ne peut être réalisée que dans le cas d'infractions présentant un certain degré de gravité, à l'encontre

En l'absence de mesure alternative, l'exécution sera refusée.³⁹ Il en va de même lorsque la mesure demandée est limitée dans l'État d'exécution à une liste ou à une catégorie d'infractions ou à des infractions passibles de sanctions d'un certain seuil et que l'infraction sur laquelle porte la décision d'enquête européenne n'est pas comprise dedans.⁴⁰ Certes, ces motifs limitent potentiellement le recours à des mesures d'enquête portant atteinte au droit à la vie privée. Cependant, toutes ces limitations renvoient au principe *locus regit actum* qui constitue certes une garantie indirecte pour les droits des individus mais qui ne fait que renvoyer aux garanties prévues par le droit national. Lorsqu'une mesure de coopération est exécutée, elle respecte en principe le cadre de protection des droits fondamentaux appliqué par l'État requis, l'autorité d'exécution, dans le cadre de la coopération, mais il n'existe pas de garantie autonome européenne pour les individus.

Il en va de même pour les pouvoirs attribués aux procureurs européens délégués. Le règlement mettant en œuvre une coopération renforcée concernant la création du Parquet européen liste certaines mesures d'enquête qui doivent être à disposition du procureur, dont certaines portent atteinte au droit à la vie privée. Cette liste des mesures diffère sensiblement de celle qui est prévue par la directive concernant la décision d'enquête européenne car elle comprend par exemple les perquisitions,⁴¹ la production d'objet et de documents⁴² et la production de certaines données informatiques.⁴³ Il existe ainsi une différence de traitement de certaines mesures portant atteinte au droit à la vie privée, la production de données informatiques étant par exemple ignorée de la directive concernant la décision d'enquête européenne. Cela confirme que l'existence de dispositions spécifiques à certaines mesures portant atteinte au droit à la vie privée dans le droit dérivé européen est liée à des considérations autres que la protection des droits des individus.

Le règlement européen se limite essentiellement à confier aux procédures pénales nationales la mise en œuvre des pouvoirs des procureurs européens délégués.⁴⁴ Il est ainsi possible d'affirmer que dans l'ensemble "les procédures et les modalités d'adoption des mesures sont régies par le droit national applicable"⁴⁵ et que ce droit est mis "à disposition" des procureurs européens délégués.⁴⁶ Comme pour la coopération judiciaire,

de personnes faisant l'objet d'une certaine suspicion, ou avec le consentement de l'intéressé" (considérant 10 de la directive 2014/41 cit).

³⁹ *Ibid.* art. 10(5).

⁴⁰ *Ibid.* art. 11(1)(h). Ce motif ne s'applique toutefois pas aux mesures qui ne sont pas jugées "intrusives" par le droit de l'État requérant (art. 11(2) de la directive 2014/41 cit).

⁴¹ Art. 30(1)(a) du règlement 2017/1939 du 12 octobre 2017 mettant en œuvre une coopération renforcée concernant la création du Parquet européen.

⁴² Art. 30(1)(b) du règlement 2017/1939 cit.

⁴³ *Ibid.* art. 30(1)(c).

⁴⁴ *Ibid.* art. 30(2) et (3).

⁴⁵ *Ibid.* art. 30(5) du règlement 2017/1939 cit.

⁴⁶ J. Tricot, 'Lectures analytiques guidées. Quel modèle de procédure?' cit. Les enquêtes menées par les procureurs européens délégués se feront en application du règlement et, surtout, en application du droit national (art. 28(1) du règlement 2017/193 cit.).

le principe est donc celui du respect des États membres en ce sens que, s'ils doivent accepter l'émergence d'un parquet européen, ils demeurent en grande partie compétents pour encadrer ses actions. Le droit européen n'intervient pas dans ce domaine car les garanties permettant de protéger le droit à la vie privée relèvent du droit national.

De telles garanties pour les États, n'existent même pas en matière de coopération policière, fondée sur le principe de disponibilité qui "impose aux États membres de faire en sorte que les informations utiles à l'action répressive, c'est-à-dire qui sont de nature à permettre, faciliter ou accélérer, la prévention ou la détection des infractions pénales ou encore les enquêtes en la matière [...] soient partagées avec les autorités compétentes équivalentes des autres États membres si elles ont besoin de ces informations pour l'accomplissement de leurs tâches légales".⁴⁷ Les informations disponibles en application de ce principe sont celles qui sont "accessibles sans mettre en œuvre de mesures coercitives" et plus précisément ce principe s'applique aux informations et aux renseignements, à savoir "tout type d'informations ou de données détenues par des autorités publiques ou par des entités privées et qui sont accessibles aux services répressifs sans prendre de mesures coercitive".⁴⁸ Les garanties pour les États sont ainsi écartées lorsque les mesures demandées ne sont pas coercitives, car les mesures coercitives sont en principe rattachées à la coopération judiciaire.⁴⁹ Cela a pour effet que des mesures portant atteinte au droit à la vie privée mais non considérées comme coercitives peuvent être utilisées sans que les garanties pour les États ne soient respectées.⁵⁰

III. L'ÉMERGENCE DE GARANTIES PROTÉGEANT LES DROITS DES INDIVIDUS

Le droit primaire de l'Union ne donne qu'une compétence limitée à l'Union européenne, et le législateur européen a lui-même exploité cette compétence de manière minimale en cherchant à ménager les intérêts des États. Le cadre juridique européen a ainsi pour

⁴⁷ Communication COM(2005) 490 de la Commission du 12 octobre 2005 sur une proposition de décision-cadre relative à l'échange d'informations en vertu du principe de disponibilité 9.

⁴⁸ Art. 2(d)(ii) de la décision cadre 2006/960/JAI du Conseil du 18 décembre 2006 relative à la simplification de l'échange d'informations et de renseignements entre les services répressifs des États membres de l'Union européenne.

⁴⁹ R Zimmermann, *La coopération judiciaire internationale en matière pénale* (Staempfli Editions SA 1999) 2. Pour une partie de la doctrine, par le fait que l'encadrement relatif à l'exécution des mesures ayant une finalité probatoire devrait alors être plus important que celui qui est appliqué aux mesures n'ayant pas une telle finalité, voir E De Busser, 'The Architecture of Data Exchange' (2007) *Revue internationale de droit pénal* 35. Voir toutefois G Vermeulen, *Free Gathering and Movement of Evidence in Criminal Matters in the EU* cit. 19; G Vermeulen, W De Bondt et C Ryckman (dir), *Rethinking International Cooperation in Criminal Matters in the EU: Moving beyond Actors, Bringing Logic Back, Footed in Reality* (Maklu 2012) 91.

⁵⁰ Voir par exemple, en matière d'enquêtes financières, E Sellier et A Weyembergh, 'Criminal Procedural Laws Across the European Union - A Comparative Analysis of Selected Main Differences and the Impact They Have over the Development of EU Legislation' cit. 34; M Lassalle, *L'accès transnational aux données bancaires dans le cadre de l'enquête pénale* (Larcier 2021).

objet de favoriser les intérêts des enquêtes et d'équilibrer les intérêts des États souhaitant coopérer. Or, la méthode utilisée, à savoir le renvoi au droit national en ce qui concerne les garanties relatives aux droits des individus, pose problème. En effet, la Cour de justice est en train de construire des garanties, encore implicites, visant à reconnaître des garanties propres aux systèmes juridiques de l'Union puisque fondée sur la Charte des droits fondamentaux (III.1). Cependant, compte tenu du cadre juridique existant, ces garanties nouvelles, et donc la Charte, risquent de ne pas être respectées lorsque les États membres mettent en œuvre le droit de l'Union (III.2).

III.1. DES GARANTIES IMPLICITES FONDÉES SUR LA CHARTE

La question de l'existence de garanties européennes relatives à la protection de la vie privée dans le cadre de l'enquête pénale pose des problèmes de sources. L'émergence de ces garanties est en effet étrangère au droit pénal européen, un droit régissant spécifiquement le rôle de l'Union en matière pénale. Ces garanties émergent dans la jurisprudence de la Cour de justice applicable au cas très particulier de l'accès aux données relatives aux moyens de télécommunications, et s'applique à toute forme d'accès par des autorités étatiques dans le contexte de la prévention, la recherche, la détection et la poursuite d'infractions pénales.⁵¹ Ces garanties s'appliquent ainsi à un secteur plus étroit que celui des actes d'enquête portant atteinte au droit à la vie privée; les perquisitions ne sont par exemple pas concernées. En même temps, cette jurisprudence s'applique au-delà du droit pénal, puisqu'elle s'étend aux actes de toutes les autorités étatiques dans le contexte de la prévention, la recherche, la détection et la poursuite d'infractions pénales.

Malgré cela, la jurisprudence de la Cour de justice propose bien des garanties applicables aux actes d'enquête portant atteinte au droit à la vie privée et à la protection des données personnelles⁵² qui devraient aussi s'appliquer à l'enquête pénale.⁵³ Elle propose des garanties substantielles et des garanties procédurales.⁵⁴

En ce qui concerne les garanties substantielles, la garantie la plus importante est celle d'une suspicion préalable relative à la commission d'une infraction pénale d'une certaine gravité. Dans l'affaire *Tele 2*, la Cour de justice cite l'arrêt *Zakharov c Russie* de la Cour européenne des droits de l'homme et exige que l'accès aux métadonnées relatives à l'usage des télécommunications ne soit accordé que concernant les "personnes soupçonnées de projeter, de commettre ou d'avoir commis une infraction grave ou encore d'être impliqué d'une

⁵¹ *Tele2 Sverige* cit. para. 115.

⁵² Ces deux droits ne sont pas distingués dans la jurisprudence de la Cour de justice.

⁵³ Si la jurisprudence de la Cour de justice visait de manière générale la prévention, la recherche, la détection et la poursuite d'infractions pénales, son application au cas spécifique de la procédure pénale n'a été confirmée que plus tardivement: affaire C-746/18 *Prokuratuur* ECLI:EU:C:2021:152.

⁵⁴ L'explication de cette classification ne peut pas être développée ici. On peut estimer que les garanties substantielles sont relatives aux conditions de recours à une mesure alors que les garanties procédurales visent à permettre un contrôle du respect des conditions substantielles relatives à une mesure. Sur cette distinction, voir M Lassalle, *L'accès transnational aux données bancaires dans le cadre de l'enquête pénale* cit.

manière ou d'une autre dans une telle infraction".⁵⁵ La jurisprudence de la Cour de justice est ainsi légèrement distincte de la jurisprudence de la Cour européenne des droits de l'homme qui prévoit la garantie de "l'existence d'un soupçon raisonnable à l'égard de la personne concernée",⁵⁶ appliquée pour les seules écoutes téléphoniques.⁵⁷

Cette suspicion doit porter sur les infractions pénales les plus graves. La Cour de justice estime ainsi, toujours dans le contexte de l'accès aux métadonnées de communication, que "seule la lutte contre la criminalité grave est susceptible de justifier un tel accès aux données conservées".⁵⁸ La Cour se refuse toutefois à proposer une définition de cette criminalité grave.⁵⁹ Une telle limitation à des infractions graves ne s'applique pas à toutes les mesures d'accès aux données personnelles, et exclut notamment les données d'identification relatives à l'usage des moyens de télécommunications, jugées moins sensibles.⁶⁰

La Cour de justice exige aussi, dans l'arrêt *Tele 2*, que l'accès aux données personnelles soit "limité au strict nécessaire".⁶¹ Ce critère permet de généraliser l'exigence classique de la Cour européenne des droits de l'homme de limiter la durée des mesures de surveillance,⁶² mais il reste lui aussi à être adapté pour chaque mesure d'enquête portant atteinte au droit à la vie privée.

Ces trois limitations substantielles, à savoir le degré de suspicion, la gravité de l'infraction qui fait l'objet de l'enquête et la limitation de la mesure à ce qui est strictement nécessaire, sont bien des critères à prendre en compte. Toutefois, leur force demeure relativement faible du fait du contexte très spécifique, l'accès aux métadonnées relatives aux moyens de télécommunications, dans lequel elles émergent. Si ces garanties sont bien exigées par la Cour, elles demeurent confinées à un secteur très particulier et ne

⁵⁵ *Tele2 Sverige* cit. para. 119. La Cour prévoit des "situations particulières" pour la protection des intérêts vitaux de la sécurité nationale, de la défense ou de la sécurité publique lorsqu'ils sont menacés par des activités de terrorisme.

⁵⁶ *Zakharov c Russie* cit. para. 260. Il s'agit de mettre en évidence des "indices permettant de la soupçonner de projeter, de commettre ou d'avoir commis des actes délictueux ou d'autres actes susceptibles de donner lieu à des mesures de surveillance secrète".

⁵⁷ La jurisprudence de la Cour européenne des droits de l'homme est difficile à manier car elle s'est développée essentiellement dans le domaine des écoutes téléphoniques. Les garanties qu'elle propose diffèrent aussi parfois de celles qui sont utilisées par la Cour de justice. Si la jurisprudence de la Cour européenne des droits de l'homme peut donc être prise en exemple dans la construction des garanties européennes (voir par exemple les conclusions de l'avocat général Henrik Saugmandsgaard Øe délivrées le 19 décembre 2019, affaire C-311/18 *Data protection commissioner c Facebook Ireland* ECLI:EU:C:2020:559 para. 204; il les qualifie ailleurs de "garanties minimales" (para. 303)), elles doivent être prises avec précaution.

⁵⁸ *Digital Rights Ireland* cit. para. 115.

⁵⁹ Voir toutefois à ce sujet: conclusions de l'avocat général Henrik Saugmandsgaard Øe délivrées le 3 mai 2018, affaire C-207/16 *Ministerio Fiscal* ECLI:EU:C:2018:788 paras 93-121.

⁶⁰ *Ministerio Fiscal* cit. para. 57.

⁶¹ *Tele2 Sverige* cit. para. 119.

⁶² La durée de la mesure est alternativement considérée comme une qui doit être prévue par la loi ou qui est prise en compte au cas par cas dans l'analyse de proportionnalité. Voir par exemple *Uzun c Allemagne* cit. para. 69.

sauraient être considérées comme des garanties applicables à l'ensemble des actes portant atteinte au droit à la vie privée.⁶³

En plus des garanties substantielles, la Cour de justice exige aussi des garanties procédurales, concernant le contrôle du recours à ces mesures d'enquête et de leur exécution.⁶⁴ En premier lieu, il s'agit d'un contrôle *a priori* par une autorité indépendante. Dans l'arrêt *Tele2*, la Cour fait un renvoi vers la jurisprudence de la Cour européenne des droits de l'homme applicable essentiellement aux écoutes téléphoniques,⁶⁵ et exige que l'accès aux données de communication soit "subordonné à un contrôle préalable effectué soit par une juridiction soit par une entité administrative indépendante, et que la décision de cette juridiction ou de cette entité intervienne à la suite d'une demande motivée de ces autorités".⁶⁶ Ce contrôle *a priori* s'applique "sauf cas d'urgence dûment justifié".⁶⁷

En plus du contrôle *a priori*, l'exécution de la mesure d'enquête elle-même doit être contrôlée *a posteriori*. Dans l'affaire *Tele2*, la Cour de justice estime ainsi que les personnes concernées par les mesures d'accès à des données personnelles doivent être informées "dès le moment où cette communication n'est pas susceptible de compromettre les enquêtes".⁶⁸ La finalité de cette notification est de rendre effective les voies de recours accessibles aux personnes dont les données ont fait l'objet d'un traitement. Plus précisément, il s'agit de "permettre à la personne concernée d'exercer le droit d'opposition au traitement de ses données à caractère personnel visé à l'art. 14 de la directive ou le droit de recours en cas de dommage subi prévu aux arts 22 et 23 de celle-ci".⁶⁹

Cette terminologie, issue du droit à la protection des données, est à transposer en matière de procédure pénale. L'application de ces principes dans le contexte de l'enquête pénale aurait pour effet de reconnaître des droits de notification et des droits de recours

⁶³ En réalité, ces garanties peuvent être adaptées à la gravité des actes d'enquête et trouvent à s'appliquer, par exemple à la géolocalisation en temps direct, dès lors qu'elles ont un lien avec les communications électroniques. Voir, en ce sens, l'affaire C-511/18 *La Quadrature du net* ECLI:EU:C:2020:791.

⁶⁴ Seules les exigences de la Cour de justice sont présentées ici. Des exigences comparables existent dans la jurisprudence de la Cour européenne des droits de l'homme, applicables aux écoutes téléphoniques. Il semble toutefois que là où la Cour européenne des droits de l'homme prévoit des modalités de contrôle alternatives, la Cour de justice prévoit des modalités de contrôle cumulatives.

⁶⁵ La Cour de justice renvoie vers: CourEDH *Szabo et Vissy c Hongrie* Req n. 37138/14 [12 janvier 2016] paras 77 et 80. Toutefois, dans cet arrêt, la Cour européenne des droits de l'homme n'estime pas que le contrôle *a priori* est absolument nécessaire et peut être remplacé par un contrôle *a posteriori*.

⁶⁶ *Tele2 Sverige* cit. para. 120.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* para. 121.

⁶⁹ Par renvoi: affaire C-553/07 *Rijkeboer* ECLI:EU:C:2009:293 para. 52. Voir aussi F Boehm et P De Hert Paul, 'The Rights of Notification After Surveillance is over: Ready for Recognition?' in M Hildebrandte, G Metakides, M Crompton et J Bus (dir), *Digital Enlightenment Yearbook 2012* (IOS Press 2012) 61.

aux personnes visées par une enquête ou touchées par des actes d'enquête portant atteinte à leur droit à la vie privée alors même que les informations collectées ne sont pas utilisées en tant que preuves.⁷⁰

C'est probablement parce que la logique inhérente au droit à la protection des données à caractère personnel, source essentielle des garanties exigées par la Cour de justice, est étrangère à la logique classique de la procédure pénale, que ces garanties sont encore ignorées par le droit pénal européen.

III.2. DES GARANTIES REJETÉES PAR LE DROIT PÉNAL EUROPÉEN

Le droit pénal européen ignore bien souvent la nécessité de prévoir les garanties substantielles aussi bien que procédurales émergentes dans la jurisprudence de la Cour de justice.

Le droit dérivé fait rarement référence, directement ou indirectement, à des garanties substantielles comparables à celles qui sont exigées par la Cour de justice, et il ne les qualifie pas de garanties.⁷¹ Par exemple, les mesures d'enquêtes prévues par le règlement relatif au parquet européen ne peuvent être utilisées "que s'il existe des motifs raisonnables de croire que la mesure spécifique en question pourrait permettre d'obtenir des informations ou des éléments de preuve utiles à l'enquête".⁷² On peut estimer que cette limitation est tellement limitée qu'elle n'apporte rien en matière de garantie⁷³ et en tout cas n'est pas équivalente à ce qui est exigé par la jurisprudence de la Cour de justice en matière de suspicion préalable. Le règlement ajoute toutefois que le recours à ces mesures peut être limité aux cas dans lesquels "l'infraction qui fait l'objet de l'enquête est passible d'une peine maximale d'au moins quatre années d'emprisonnement".⁷⁴ Si cela correspond à une garantie substantielle, cette limitation est la même pour toutes les mesures d'enquête, qu'elles portent atteinte au droit à la vie privée ou pas, et semble surtout limiter l'atteinte aux intérêts des États membres en limitant leurs obligations.

Il y a ainsi un risque que, faute d'harmonisation, les États membres ne respectent pas les exigences de la Charte lorsqu'ils appliquent le droit européen, qu'il s'agisse de demandes de coopération en matière pénale ou de pouvoir des procureurs européens

⁷⁰ Cela suppose aussi une notification aux tiers dont le droit à la vie privée est touché, mais qui ne feront jamais l'objet de poursuites: AH van Hoek et M Luchtman, 'The European Convention on Human Rights and Transnational Cooperation in Criminal Matters' in A van Hoek, A Hol, O Jansen, P Rijkema et R Widdershoven, *Multilevel Governance in Enforcement and Adjudication* (Intersentia 2006) 25. Pour les auteurs "In the end, we are afraid that finding a solution to this problem will require such far reaching adjustments to the current system that it would leave the whole system ineffective".

⁷¹ Puisque le droit dérivé qualifie de garanties les règles protégeant les intérêts des États membres.

⁷² Art. 30(5) du règlement 2017/1939 cit. L'article ajoute "et pour autant qu'il n'existe aucune mesure moins intrusive qui permettrait d'atteindre le même objectif", autrement dit un principe de subsidiarité.

⁷³ J Tricot, 'Lectures analytiques guidées. Quel modèle de procédure?' cit. Pour l'auteur "l'apport de ce prérequis n'apparaît pas clairement sauf à souligner que comme tout ce qui va sans le dire, cela va encore mieux en le disant, surtout lorsqu'il s'agit du respect des garanties procédurales fondamentales".

⁷⁴ Art 30(1) du règlement 2017/1939 cit.

délégués. Les sources de ces garanties substantielles pourraient toutefois venir de l'extérieur du droit strictement pénal. On l'a dit, la jurisprudence de la Cour de justice s'applique au-delà de la procédure pénale, et s'étend à tout traitement de données par les autorités compétentes à des fins de prévention et de détection des infractions pénales, d'enquêtes et de poursuites en la matière. Or la directive relative à la protection des données dans le secteur police/justice exige que les données traitées par les autorités compétentes à des fins de prévention et de détection des infractions pénales, d'enquêtes et de poursuites en la matière soient "adéquates, pertinentes et non excessives au regard des finalités pour lesquelles elles sont traitées".⁷⁵ Cela s'applique aux données personnelles traitées dans le cadre d'une enquête pénale et pourrait compenser les faiblesses du droit pénal européen lui-même.

Le risque de violation des droits fondamentaux dans l'exécution du droit de l'Union apparait avec encore plus d'acuité en ce qui concerne les garanties procédurales qui semblent requises par la Cour de justice. Le risque de constat de la violation du droit à un recours effectif dans le contexte de l'exécution d'actes d'enquête portant atteinte au droit à la vie privée est d'ailleurs avéré au regard tant de la jurisprudence de la Cour de justice,⁷⁶ que de celle de la Cour européenne des droits de l'homme.⁷⁷ Or ce risque est difficile à concilier avec le principe de la reconnaissance mutuelle qui entraîne une évolution vers un contrôle dans le seul État à l'origine de la requête au détriment du contrôle dans l'État d'exécution.⁷⁸ Le droit pénal européen, en renvoyant aux droits nationaux sans prendre en compte l'éventualité que ceux-ci ne soient pas conformes à la Charte, ne répond ainsi pas aux exigences de la Cour de justice.

En matière de coopération judiciaire, la directive concernant la décision d'enquête européenne prévoit par exemple que les voies de recours accessibles dans l'État d'exécution sont "au moins égales" à celles qui sont prévues pour des mesures d'enquête similaires en droit national.⁷⁹ D'aucuns y voient une "obligation générale de fournir des

⁷⁵ Art. 4(1)(c) de la directive 2016/680 du 27 avril 2016 relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel par les autorités compétentes à des fins de prévention et de détection des infractions pénales, d'enquêtes et de poursuites en la matière ou d'exécution de sanctions pénales, et à la libre circulation de ces données, et abrogeant la décision-cadre 2008/977/JAI du Conseil. Voir aussi le considérant 26 de la même directive.

⁷⁶ Voir en particulier, concernant toutefois le cadre particulier de la coopération en matière administrative, les conclusions de l'avocat général Juliane Kokott délivrées le 2 juillet 2020, affaires jointes C-245/19 et C-246/19 *État luxembourgeois (Droit de recours contre une demande d'information en matière fiscale)* ECLI:EU:C:2020:795. Voir aussi, dans le contexte d'enquêtes administratives requises par la Commission européenne et exécutée par un Etat membre: Roquette frères cit. para. 40.

⁷⁷ CourEDH *M.N. et autres c Saint Marin* Req n. 28005/12 [7 juillet 2015].

⁷⁸ A Weyembergh, 'Transverse Report on Judicial Control in Cooperation in Criminal Matters: the Evolution from Traditional Judicial Cooperation to Mutual Recognition' in K Ligeti (dir), *Toward a Prosecutor for the European Union* (Hart publishing 2013) 945.

⁷⁹ Art. 14(1) de la directive 2014/41 cit.

recours".⁸⁰ Cependant, cela semble plutôt être une disposition peu contraignante car elle repose exclusivement sur les droits nationaux et présuppose que ceux-ci prévoient effectivement des garanties procédurales équivalentes à celles qui sont exigées par la Cour de justice. La directive organise aussi le cas dans lequel il y a des recours accessibles dans l'État d'exécution. Cette organisation est toutefois minimale car les recours accessibles ne sauraient en aucun cas être suspensifs⁸¹ et la décision finale sera seulement prise en compte par l'État d'émission.⁸² De plus, la directive est plutôt hostile à la notification de l'exécution de la mesure aux personnes concernées, même si elle ne prohibe pas explicitement une telle notification une fois que l'enquête est terminée dans l'État d'émission.⁸³ La directive se repose ainsi sur un droit national qui n'est pas nécessairement conforme aux exigences de la Cour de justice et tend plutôt à faire en sorte que les voies de recours existantes, considérées comme des obstacles à la coopération, ne nuisent pas à l'efficacité des enquêtes.

Le règlement relatif au parquet européen n'est pas davantage soucieux d'intégrer les garanties procédurales exigées par la Cour de justice en ce qui concerne les pouvoirs des procureurs européens délégués. Ce règlement est fondé sur la même confiance accordée aux droits nationaux et précise ainsi dans son considérant 88, prétendant reprendre la jurisprudence de la Cour de justice, que "les règles de procédure nationales régissant les recours relatifs à la protection des droits individuels octroyés par le droit de l'Union ne doivent pas être moins favorables que les règles régissant des recours similaires au niveau national (principe d'équivalence) et ne doivent pas rendre pratiquement impossible ou excessivement difficile l'exercice des droits conférés par le droit de l'Union (principe d'effectivité)". Le règlement opère donc par renvoi au droit national sans prévoir lui-même des garanties. Il aurait pu en être autrement: le règlement aurait pu exiger, par exemple, le contrôle *a priori* des actes d'enquête par une autorité indépendante.⁸⁴ Ce seul renvoi vers le droit national ne permet en effet pas aux actes d'enquête des procureurs européens délégués d'être conforme à la Charte des droits fondamentaux; le droit national ne l'est pas forcément de lui-même.

⁸⁰ K Ambos, *European Criminal Law* (Cambridge University Press 2018) 460.

⁸¹ Art. 14(6) de la directive 2014/41 cit. Voir aussi art. 13(2) sur la suspension éventuelle du transfert des éléments de preuve.

⁸² Art.14(7) de la directive 2014/41 cit.

⁸³ La décision concernant la décision d'enquête européenne se prononce quant à elle pour la confidentialité des enquête (art. 19(1) à (3)) mais affirme que les États membres devraient veiller à informer en temps utile toute partie intéressée des possibilités de recours qui lui sont ouvertes (considérant 22) tant que cela ne nuit pas à la confidentialité des enquêtes (art. 14(3)). La seule exception s'applique pour les mesures concernant les investigations bancaires pour lesquelles il existe des dispositions spécifiques prévoyant le secret (art. 19(4)).

⁸⁴ S Ruggeri, 'Criminal Investigations, Interference with Fundamental Rights and Fair Trial Safeguards in the Proceedings of the European Public Prosecutor's Office. A Human Rights Law Perspective' in L Bachmaier Winter (dir), *The European Public Prosecutor's Office. The challenges ahead* (Springer 2018) 201.

Ici aussi, seules des sources extérieures au droit pénal européen au sens strict pourraient influencer les législateurs nationaux. La directive 2016/680 semble ainsi prévoir une obligation de notification *a posteriori*, permettant aux personnes concernées d'exercer leurs droits de recours.⁸⁵

En résumé, la question de l'existence de garanties européennes relatives à la protection de la vie privée dans le cadre de l'enquête pénale soulève des questions de sources. Ces garanties existent bien, mais pas dans le droit pénal européen dérivé. Elles tendent à émerger dans la jurisprudence de la Cour de justice, à l'extérieur du domaine du droit pénal au sens strict.

⁸⁵ Art. 13(2) et (3)(a) de la directive 2016/680 cit. L'avocat général Henrik Saugmandsgaard Øe fonde cette obligation sur l'art. 23(2)(h) du règlement du 2016/679 cit.) (conclusions de l'avocat général Henrik Saugmandsgaard Øe, *Data protection commissioner c Facebook Ireland*, cit. para. 204).



ARTICLES

TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – SECOND PART

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LA PROPOSITION *E-EVIDENCE*: RÉVÉLATRICE DES LIMITES DE L'ÉMERGENCE D'UNE PROCÉDURE PÉNALE EUROPÉENNE OU COMPROMIS NÉCESSAIRE?

HÉLÈNE CHRISTODOULOU*, LAETITIA GAURIER** AND ALICE MORNET***

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ABSTRACT: The volatile nature of electronic evidences has compelled the Commission to launch a specific instrument on access to electronic evidence in cross-border investigations. Therefore, the purpose of this study is to comment on the *e-evidence* proposal which is currently being discussed between European institutions. Although the chosen method is classic, the subject matter is entirely new. Despite the existence of numerous European laws on the subject, the need for a new instrument is entirely explained by the unstable nature of electronic data. If this Regulation is adopted, it should have the effect of overcoming the diversity of Member States' criminal procedural laws. In other words, this instrument will be superimposed on heterogeneous internal regulations, to be exclusively applied in a transnational context. This unprecedented adoption could be the beginning of a genuine European Union criminal procedural law, independent of Member States ones.

KEYWORDS: European Union – criminal procedural law – e-evidence proposal – electronic evidence – mutual recognition – extraterritorial enforcement.

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I. D'UNE PROCÉDURE PÉNALE NATIONALE À UNE PROCÉDURE PÉNALE DE L'UNION EUROPÉENNE

"De nos jours, il est devenu banal, dans une grande partie du monde, d'utiliser les médias sociaux, les messageries web et les services et applications de messagerie pour communiquer, travailler, socialiser et obtenir des informations. Ces services permettent à des centaines de millions d'utilisateurs de se connecter entre eux. Ils contribuent considérablement au bien-être économique et social des utilisateurs au sein de l'Union et à l'extérieur. Cependant, ils peuvent aussi être utilisés à mauvais escient pour commettre ou faciliter des actes criminels, y compris des crimes graves tels que des attaques terroristes".¹

En ces quelques phrases, la Commission de l'Union européenne met en exergue la dualité de l'Internet et légitime sa proposition de règlement relatif aux injonctions européennes de production et de conservation de preuves électroniques en matière pénale.² Destinée à faciliter la collecte et l'utilisation transfrontières de ces dernières, elle repose sur la création d'injonctions obligeant un fournisseur situé dans un État membre à conserver ou produire les données qu'il stocke à l'autorité répressive d'un autre État, afin que celles-ci puissent servir de preuve dans le cadre de procédures pénales. Fondée sur le principe de reconnaissance mutuelle,³ la proposition *e-evidence* vient compléter les instruments adoptés par l'Union en matière probatoire en visant les seules données électroniques. Répondant aux vœux de l'ensemble des institutions de l'Union,⁴ le règlement a pour ambition de faciliter la coopération et de renforcer l'efficacité des procédures étatiques. Plus insidieusement, il semble également dévoiler les prémices d'un droit européen de la procédure pénale.

À la lecture de ces différentes questions, la proposition *e-evidence* devrait se révéler novatrice, dans le fond comme dans la forme. Pour autant, en reposant sur la reconnaissance mutuelle, elle se place dans la continuité de la méthode traditionnelle de l'Union. Obligeant "les autorités d'un État à accepter de reconnaître les mêmes effets aux décisions étrangères qu'aux décisions nationales, en dépit des différences qui opposent les ordres juridiques concernés",⁵ elle facilite la coopération tout en respectant les droits nationaux. Consacrée dès le Conseil de Tampere de 1999 comme "pierre angulaire" de la coopération

¹ Proposition de Règlement COM(2018) 225 final du Parlement européen et du Conseil relatif aux injonctions européennes de production et de conservation de preuves électroniques en matière pénale.

² Proposition de Règlement COM(2018) 225 final cit.

³ Art. 82(1) du Traité sur le fonctionnement de l'Union européenne [2016].

⁴ Communiqué de presse du Conseil de l'Union européenne du 9 juin 2016, Lutte contre les activités criminelles dans le cyberspace: le Conseil convient de mesures pratiques et des prochaines étapes.

⁵ F Tulkens, 'La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne (Université de Bruxelles, coll. "Études européennes", 2001) 168.

judiciaire,⁶ la reconnaissance mutuelle demeure, une fois de plus, préconisée par la proposition étudiée. Si, le choix de cette méthode demeure classique, l'innovation se situe en revanche dans son objet: les preuves électroniques. Volatiles, voire insaisissables, elles irradient l'Internet, mais échappent souvent aux autorités répressives en se perdant dans les méandres des réseaux. Pourtant, à l'heure où les principaux services de messagerie — Facebook Messenger et WhatsApp — comptabilisent respectivement 1,3 milliard et 1,5 milliard d'utilisateurs et traitent près de 60 milliards de messages par jour, la nécessité d'appréhender leurs données se justifie au seul regard de la quantité des communications échangées. De surcroît, s'ils représentent des avantages indéniables pour les utilisateurs, ils offrent également aux délinquants un moyen rapide et discret⁷ pour dialoguer avec des complices se trouvant partout dans le monde. Si l'Union européenne, consciente de cet intérêt, a d'ores et déjà adopté certains instruments s'appliquant aux preuves électroniques, aucun n'y est toutefois spécialement consacré, en dépit de leurs spécificités. Au-delà, l'empilement des actes de droit dérivé destinés à faciliter les échanges de preuves s'ajoute à la multiplicité des droits nationaux. Effectivement, la nature éminemment transfrontière de l'Internet apparaît difficilement compatible avec la compétence pénale, marquée par la souveraineté et la territorialité.⁸ Dès lors, si les États ont développé leurs propres mécanismes, ceux-ci se révèlent profondément hétérogènes.

Précisément destinée à corriger ces carences, la proposition *e-evidence* prend le soin de définir son objet, les preuves électroniques: il s'agit de preuves stockées "sous forme électronique par un fournisseur de services ou en son nom" et "consistant en données stockées relatives aux abonnés, à l'accès, aux transactions et au contenu".⁹ Également précisés par la proposition,¹⁰ ces différents types de données présentent un réel intérêt probatoire. Ils permettent, par exemple, de prendre connaissance du contenu des communications tenues entre d'éventuels complices et d'obtenir des métadonnées grâce auxquelles il sera permis de découvrir les déplacements d'un individu, ses relations, ses loisirs et ses centres d'intérêt.¹¹ Si toutes sont nécessaires à la prévention et la lutte contre la criminalité, elles ne sont en revanche pas vectrices de la même atteinte aux droits fondamentaux, ce que le règlement prend en compte.¹² En définitive, la proposition *e-evidence* présente une dualité intéressante en mettant en œuvre une méthode ancienne au service d'un objet résolument moderne.

⁶ Conclusions de la Présidence du Conseil européen de Tampere du 15 et 16 octobre 1999, Vers une Union de liberté, de sécurité et de justice: les jalons posés à Tampere, para. 33.

⁷ Notamment à la faveur des systèmes de cryptage des messages empêchant toute appréhension directe par une autorité répressive.

⁸ M Masse, 'Des figures asymétriques de l'internationalisation du droit pénal' (2006) RSC 755.

⁹ Art. 2(6) Proposition de Règlement COM(2018) 225 final cit.

¹⁰ *Ibid.* art. 2(7-10).

¹¹ M Quemener, 'Le terrorisme face au cyberspace. De l'anticipation des risques à la répression' (2013) AJ Pénal 446.

¹² V. *infra*.

Finalement, la proposition *e-evidence* constitue-t-elle une simple tesselle dans la mosaïque européenne ou une œuvre nouvelle? Une fois encore, la réponse se situe au milieu du gué. Si elle apparaît, comme tous les instruments de reconnaissance mutuelle, venir corriger, tout en les conservant, les divergences des procédures pénales étatiques et faciliter l'échange des preuves, elle traduit également une évolution, voire une métamorphose, de la reconnaissance mutuelle. La rendant plus contraignante et la dotant de ses propres exigences, elle dessine une procédure pénale européenne originale et pensée à partir de ses propres standards: la protection des droits fondamentaux et le souci d'efficacité. Plus exactement, la proposition *e-evidence* reste-t-elle fidèle à la logique classique visant à faire fi des particularités étatiques, pour faciliter, seulement, la coopération et l'efficacité des procédures pénales nationales? Ou alors, traduit-elle, plus insidieusement, l'élaboration d'une procédure pénale européenne suffisamment épanouie pour générer un droit européen de la procédure pénale qui transcenderait et modèlerait les droits nationaux?

À l'analyse, le compromis s'impose. En effet, la proposition *e-evidence*, conformément à la logique traditionnelle, tente de dépasser l'hétérogénéité des procédures pénales au sein de l'Union en matière de preuves électroniques (II). Pour autant, une étude approfondie démontre l'émergence d'une procédure pénale de l'Union européenne pensée à partir de ses propres standards, eux-mêmes influencés par les droits nationaux, mais dont la mise en œuvre reste encore excessivement soumise aux États (III).

II. LA PROPOSITION *E-EVIDENCE*: UN COMPROMIS CLASSIQUE FACE À LA DIVERSITÉ DES PROCÉDURES PÉNALES AU SEIN DE L'UNION EUROPÉENNE

La proposition de règlement s'ajoute à l'amoncellement de textes traitant la question de l'échange des preuves dans le cadre de la coopération judiciaire européenne en détournant les difficultés posées par l'hétérogénéité des législations nationales au moyen traditionnel de la reconnaissance mutuelle. La fragmentation de la procédure pénale de l'Union européenne (II.1) se superpose alors à l'hétérogénéité des procédures pénales nationales (II.2).

II.1. LA FRAGMENTATION DE LA PROCÉDURE PÉNALE DE L'UNION EUROPÉENNE

Alors que l'Europe connaît une multiplication de textes relatifs à l'échange d'informations ou de preuves, aucune de ces très nombreuses dispositions ne présente les caractéristiques adéquates pour répondre aux problèmes spécifiques soulevés par les données numériques.

L'exposé des motifs de la proposition souligne l'enchevêtrement d'instruments en matière d'échange de preuves pénales en visant la convention relative à l'entraide judiciaire,¹³ la décision Eurojust,¹⁴ la décision-cadre relative aux équipes communes d'enquête¹⁵ ou encore le règlement Europol.¹⁶ En vertu de ces textes, les preuves électroniques, obtenues selon les règles nationales en vigueur, peuvent être échangées si la loi d'un État membre concerné par une affaire en autorise la requête. Toutefois, à l'exception de la convention relative à l'entraide judiciaire,¹⁷ aucun de ces textes ne prévoit de disposition spécifique aux preuves électroniques. De surcroît, l'ensemble de ces instruments repose essentiellement sur la bonne volonté des États en envisageant des possibilités plutôt que des obligations.

Au-delà des normes susvisées, la coopération entre les États membres a été remodelée à l'aune du principe de la reconnaissance mutuelle ayant permis d'aborder l'échange de preuves selon un format contraignant. L'amoncellement de textes en la matière démontre, là encore, l'existence d'une large fragmentation du cadre juridique de l'échange de preuves. D'abord, le législateur européen a doté l'Union d'un instrument permettant le gel de biens ou d'éléments de preuves¹⁸ qui en raison de la définition très large de son objet est susceptible de s'appliquer aux données électroniques. En effet, la décision de gel peut porter sur tout bien "qu'il soit, corporel ou incorporel, meuble ou immeuble, ainsi que les actes juridiques ou documents attestant d'un titre ou d'un droit sur ce bien"¹⁹ ou tout élément de preuve c'est-à-dire les "objets, documents ou données susceptibles de servir de pièces à conviction dans le cadre d'une procédure pénale".²⁰ Néanmoins, l'obtention de ces biens ou de ces preuves reste soumise aux dispositions nationales de l'État sur le territoire duquel ils se trouvent et leur transfert ultérieur demeure régi par les procédures d'entraide judiciaire. Ensuite, en raison des faiblesses de la décision gel de biens, le Conseil a adopté, en 2008, le mandat européen d'obtention de preuves.²¹ Son objet apparaît plus large et pré-

¹³ Acte du Conseil du 29 mai 2000 établissant conformément à l'art. 34 du Traité sur le fonctionnement de l'Union européenne, la convention relative à l'entraide judiciaire en matière pénale entre les États Membres de l'Union européenne.

¹⁴ Décision 2002/187/JAI du Conseil du 28 février 2002 instituant Eurojust afin de renforcer la lutte contre les formes graves de criminalité.

¹⁵ Décision-cadre 2002/465/JAI du Conseil du 13 juin 2002 relative aux équipes communes d'enquête.

¹⁶ Règlement (UE) 2016/794 du Parlement européen et du Conseil du 11 mai 2016 relatif à l'agence de l'Union européenne pour la coopération des services répressifs (Europol).

¹⁷ Acte du Conseil du 29 mai 2000 cit.

¹⁸ Décision-cadre 2003/577/JAI du Conseil du 22 juillet 2003 relative à l'exécution dans l'Union européenne des décisions de gel de biens ou d'éléments de preuves.

¹⁹ Art. 2(d) Décision-cadre 2003/577/JAI cit.

²⁰ *Ibid.* art. 2(e).

²¹ Décision-cadre 2008/978/JAI du Conseil du 18 décembre 2008 relative au mandat européen d'obtention de preuves visant à recueillir des objets, des documents et des données en vue de leur utilisation dans le cadre de procédures pénales.

voit spécifiquement “d’obtenir des données de communication conservées par les fournisseurs de services de communications électroniques accessibles au public ou un réseau de communication public”.²² Toutefois, les mesures permettant d’obtenir les preuves restent soumises au respect du droit national de l’État d’exécution.²³ Face au constat selon lequel l’instrument de gel de biens “est rarement utilisé en pratique par les autorités compétentes”²⁴ et du fait que le mandat européen d’obtention de preuve “n’est applicable qu’aux éléments de preuve qui existent déjà”,²⁵ le législateur européen a prévu un instrument plus ambitieux. Il s’agit de la décision d’enquête européenne²⁶ permettant de faire exécuter une ou plusieurs mesures d’enquêtes spécifiques dans un autre État membre ou d’obtenir des preuves déjà en possession des autorités compétentes. Cependant, celle-ci ignore, toujours, la spécificité des preuves électroniques.

Si l’Union n’a pas pris de dispositions propres aux données électroniques, le Conseil de l’Europe a quant à lui adopté la convention de Budapest²⁷ qui a été ratifiée et signée par la quasi-totalité des États membres, à l’exception de l’Irlande et de la Suède.²⁸ Ne prévoyant pas de standardisation européenne des règles de conservation et de production des données électroniques, elle a cependant obligé les États à adopter des mesures permettant d’ordonner ou d’imposer leur conservation²⁹ et la divulgation rapide des données relatives au trafic.³⁰ Elle oblige également les États à se doter du pouvoir d’enjoindre leur détenteur à produire des données informatiques.³¹

Malgré l’existence de ces nombreux instruments, la Commission souligne que “il est préférable de créer un nouvel instrument pour les preuves électroniques plutôt que de modifier la directive concernant la décision d’enquête européenne en raison des difficultés spécifiques inhérentes à l’obtention des preuves électroniques”³² sur l’Internet. “Anonymat, volatilité des preuves, absence de frontière, présence policière très limitée, communication quasiment instantanée à un coup modéré, complexité croissante”,³³ tels sont les traits de cet espace qui pose un véritable défi pour les juristes contemporains. Au-delà des

²² Art. 4(2)(e) Décision-cadre 2008/978/JAI cit.

²³ *Ibid.* art.11(2).

²⁴ Directive 2014/41/UE du Parlement européen et du Conseil du 3 avril 2014 concernant la décision d’enquête européenne en matière pénale, préambule 3.

²⁵ Directive 2014/41/UE cit. préambule 4.

²⁶ *Ibid.* préambule 4.

²⁷ Conseil de l’Europe, Convention STE n. 185 sur la Cybercriminalité du 23 novembre 2001.

²⁸ Il faut par ailleurs noter la coïncidence selon laquelle les *data centers* européens de Facebook se trouvent à Luléal en Suède (2013) et à Clonee en Irlande (2018).

²⁹ Convention STE n. 185 sur la Cybercriminalité cit.

³⁰ *Ibid.* art. 17.

³¹ *Ibid.* art. 18.

³² Proposition de Règlement COM(2018) 225 final cit. 3.

³³ H Matsopoulou, ‘Modalités de la preuve et transformations dans le recueil et l’administration de la preuve’ in G Giudicelli-Delage (dir), *Les transformations de l’administration de la preuve pénale* (Archives de politique criminelle (Pédone 2004) 149.

obstacles posés par le cyberspace, la donnée prend une forme dématérialisée qui la rend “fragile et volatile”.³⁴ La loi, par nature permanente et territoriale, appréhende difficilement cet électron libre. De surcroît, les systèmes de réseaux permettent aujourd’hui de stocker les données, non pas au sein d’un serveur unique, mais directement sur les ordinateurs des utilisateurs du service. Ainsi, “l’infrastructure de stockage des preuves électroniques et le fournisseur de service exploitant ladite infrastructure relèvent d’un cadre juridique national différent, au sein ou en dehors de l’Union, de celui de la victime ou de l’auteur de l’infraction”.³⁵ Dès lors, il peut y avoir jusqu’à cinq États concernés par la donnée ciblée.³⁶

Si la forme facultative de coopération n’est plus le format choisi par l’Union européenne, en raison de son absence d’efficacité, il semble que la reconnaissance mutuelle telle que définie jusqu’alors n’ait pas su, de son côté, répondre au défi posé par le numérique. À l’origine, la reconnaissance mutuelle s’entend comme l’exécution directe par un État membre — dit “État d’exécution” — d’une décision judiciaire prise par un autre État membre — dit “État d’émission”. Elle repose donc sur l’intervention de deux autorités judiciaires compétentes. Dès lors, une application classique du principe en matière de preuve électronique cristallise la difficulté autour de l’identification de l’État d’exécution: s’agit-il de l’État sur lequel se situe l’infrastructure permettant la fourniture du service, de celui où se trouvent le ou les serveurs stockant les données, ou encore celui où est établi le fournisseur de service? Pour surmonter ces difficultés, la proposition fait alors le choix de s’adresser directement au fournisseur de service. Responsable du moyen de communication et du stockage des données ainsi produites, celui-ci apparaît en effet le plus à même d’accéder aux données, quelle que soit leur localisation. Un tel choix permet donc d’agréger à l’instrument une accessibilité à des données stockées hors de l’Union dès lors que les fournisseurs de service proposent leur service en son sein³⁷; ce qui est entendu largement puisque le lien s’évalue selon des indices tels que le nombre d’utilisateurs dans un ou plusieurs États membres ou le ciblage des activités vers un ou plusieurs États membres.³⁸

L’autre reproche pouvant être formulé à l’encontre des textes européens en vigueur en matière de preuve est de laisser aux États membres le soin de déterminer les règles applicables à la requête des données, malgré l’hétérogénéité de leurs législations.

³⁴ M Quémener et F Dalle, ‘L’accès à la preuve numérique, enjeu majeur de toute enquête pénale: pratique et perspectives’ (2018) Dalloz IP/IT 418.

³⁵ Proposition de Règlement COM(2018) 225 final cit. 6.

³⁶ L’État sur lequel se trouve établi le fournisseur de service, l’État sur lequel se trouve établi l’infrastructure permettant le fonctionnement du service, l’État dans lequel se trouve le serveur de stockage des données et l’État de chacun des auteurs de la conversation donc *a minima* deux.

³⁷ Art. 3 Proposition de Règlement COM(2018) 225 final cit.

³⁸ *Ibid.*

I. 2. L'HÉTÉROGÉNÉITÉ DES PROCÉDURES PÉNALES NATIONALES

La nécessité de légiférer en matière de production et de conservation de preuves électroniques doit tenir compte de l'hétérogénéité des législations nationales qui impose le recours à la reconnaissance mutuelle tout en prenant acte des défauts mis en exergue par une vingtaine d'années d'expérience de la méthode.

De nombreux auteurs soulignent la diversité générale des droits procéduraux des États au sein de l'Union européenne.³⁹ Face aux difficultés que représentent ces divergences, et afin de faciliter la coopération judiciaire, le législateur européen a, depuis le traité de Lisbonne, la possibilité d'harmoniser les législations étatiques en matière pénale.⁴⁰ Toutefois, aucune directive de rapprochement ne vise l'obtention de preuves. Ainsi, aucune législation de l'Union n'est venue modifier le droit des États membres relatif à la récolte des preuves électroniques.⁴¹ Seule la grande Europe s'est saisie de ce sujet, obligeant les États à se doter de prérogatives permettant la conservation et la production de données numériques, sans pour autant poser d'exigence quant aux formalités, aux conditions et aux contenus de ces dernières. Alors, "la fragmentation qui en découle engendre une insécurité juridique et des obligations contradictoires, et soulève des questions relatives à la protection des droits fondamentaux et des garanties procédurales pour les personnes concernées par ce type de demandes".⁴² Par exemple, les délais de conservation des données numériques varient grandement d'un État membre à l'autre,⁴³ ce qui avait conduit à l'adoption d'une directive⁴⁴ imposant à six mois le délai, mais cette tentative de convergence a été annulée par la Cour de justice.⁴⁵ Or les chances d'obtenir des données dépendent largement des dispositions relatives à leur conservation et soumettent donc l'efficacité de la coopération européenne à la politique criminelle des États.

³⁹ A Weyembergh, *L'harmonisation des législations: condition de l'espace pénal européen et révélateur de ses tensions*, (Université de Bruxelles 2004) paras 140 ff.

⁴⁰ Art. 82(2), Traité sur le fonctionnement de l'Union européenne cit.

⁴¹ Il faut toutefois noter qu'il existe des accords internationaux conclus par l'UE avec des États tiers: v. not. Décision 2009/820/PESC du Conseil du 23 octobre 2009 concernant la conclusion au nom de l'UE, de l'accord d'extradition entre l'UE et les États-Unis d'Amérique et de l'accord d'entraide judiciaire entre l'UE et les États-Unis d'Amérique; Décision 2010/616/UE du Conseil du 7 octobre 2010 relative à la conclusion de l'accord sur l'entraide judiciaire en matière pénale entre l'Union européenne et le Japon.

⁴² Proposition de Règlement COM(2018) 225 final cit. 1.

⁴³ Ex.: France: délai de conservation d'un an (art. L.34-1, III Code des postes et des communications électroniques); Allemagne: dix semaines pour la date, le début et la fin de la communication, les numéros de téléphone et les adresses IP et un mois pour la localisation des terminaux (arts 100(a) et 100(h) du Code de Procédure Pénale allemand); Royaume-Uni: rétention des données minimale d'un an, mais sanctionné par la Cour de Justice de l'Union européenne: affaires jointes C-203/15 et C-298/15 *Tele2 Sverige* ECLI:EU:C:2016:970.

⁴⁴ Directive 2006/24/CE du Parlement Européen et du Conseil du 15 mars 2006 sur la Conservation de Données Générées ou Traitées dans le Cadre de la Fourniture de Services de Communications Électroniques Accessibles au Public ou de Réseaux Publics de Communications, et Modifiant la Directive 2002/58/CE.

⁴⁵ Affaires jointes C-293/12 et C-594/12 *Digital Rights Ireland Ltd.* ECLI:EU:C:2014:238.

À cette première difficulté s'ajoute l'absence d'harmonisation des dispositions relatives à l'obtention des preuves électroniques. En droit français, par exemple, leur recherche se fait par le biais de réquisitions aux opérateurs de télécommunication ou à des sociétés,⁴⁶ mais le refus d'y répondre n'est sanctionné que d'une amende de 3750 euros pour les personnes physiques, et de 18750 euros pour les personnes morales.⁴⁷ De plus, les fournisseurs de services de communication ne relèvent pas, la plupart du temps, du droit national. Ces données peuvent également être obtenues par le biais du matériel informatique sous le régime de la perquisition judiciaire.⁴⁸ De manière générale, ces réquisitions sont jugées inadaptées⁴⁹ et "dépendantes du bon vouloir des grands opérateurs de l'internet".⁵⁰ Ainsi, aux obstacles posés par la nature numérique des preuves s'ajoute la diversité des droits nationaux dont l'efficacité variable au sein de l'espace de liberté de sécurité et de justice (ELSJ) pourrait mettre à mal la confiance mutuelle dans l'Union européenne.⁵¹

Pour remédier à l'hétérogénéité des législations étatiques, en particulier dans des domaines où l'harmonisation apparaît trop ambitieuse, l'Union européenne recourt au principe de reconnaissance mutuelle dont le mécanisme permet une circulation des décisions de justice, quelles que soient les divergences entre les droits nationaux, mais la méthode présente des limites. En premier lieu, elle n'offre pas à l'Union européenne un droit complet de la procédure pénale. Les instruments laissent alors de nombreuses notions centrales à l'appréciation discrétionnaire des droits nationaux⁵² et mettent corrélativement à mal l'efficacité de la coopération. Le législateur européen, en pensant le dispositif de la proposition *e-evidence*, semble tenir compte de ce défaut en proposant, parallèlement, une directive d'harmonisation de la désignation de représentants légaux devant "permettre l'identification du destinataire des injonctions émanant des autorités des États membres".⁵³ En second lieu, la reconnaissance mutuelle fait classiquement craindre

⁴⁶ Art. 77-1-1 du Code de Procédure Pénale (préliminaire) et 60-1 du Code de Procédure Pénale (flagrance) français.

⁴⁷ Art. 60-2 du Code de Procédure Pénale et art. 131-38 du Code Pénal français.

⁴⁸ Art. 57-1 du Code de Procédure Pénale français cit.

⁴⁹ O Violeau, 'Les techniques d'investigations numériques: entre insécurité juridique et limites pratiques' (2017) AJ Pénal 324.

⁵⁰ M Quémener et F Dalle, 'L'accès à la preuve numérique, enjeu majeur de toute enquête pénale: pratique et perspectives' cit.

⁵¹ D Flore, 'La notion de confiance mutuelle: l' "alpha" ou l' "oméga" d'une justice pénale européenne?' in G de Kerchove et A Weyembergh (dir), *La confiance mutuelle dans l'espace pénal européen* (Université de Bruxelles 2005) 26.

⁵² H Christodoulou, *Le parquet européen: prémices d'une autorité judiciaire de l'union européenne* (Dalloz coll. Nouvelle bibliothèque de Thèses vol. 201 2021) para. 419; A Weyembergh, *L'harmonisation des législations: condition de l'espace pénal européen et révélateur de ses tensions* (Université de Bruxelles 2004) para. 211.

⁵³ Proposition de Directive du Parlement européen et du Conseil établissant des règles harmonisées concernant la désignation de représentants légaux aux fins de la collecte de preuves en matière pénale, COM(2018) 226 final 3.

que l'abolition des procédures intermédiaires et des contrôles aboutisse à une vérification allégée et partant, à une exigence moindre en matière de droits fondamentaux,⁵⁴ mais également que l'hétérogénéité des législations soit en elle-même problématique.⁵⁵ À ce titre, de nombreuses jurisprudences témoignent de la défiance quant à la protection accordée par l'État d'émission.⁵⁶ Les États refusent donc d'exécuter une décision qui serait contraire à la protection des droits fondamentaux. Néanmoins, ce choix est critiquable en opérant qu'une protection négative de ces droits puisqu'il ne fait que faire obstacle à la circulation des décisions de justice. Partant, la proposition *e-evidence* propose un autre mode de protection des droits fondamentaux: le législateur européen ne se contente plus de se placer en retrait, en procédant par référence à des normes existantes, mais il en devient au contraire l'instigateur.

III. LA PROPOSITION *E-EVIDENCE*: UNE PREUVE DE L'ÉMERGENCE D'UNE PROCÉDURE PÉNALE DE L'UNION EUROPÉENNE

La proposition de règlement *e-evidence* illustre le rôle croissant du législateur européen quant à l'émergence d'une procédure pénale de l'Union européenne.⁵⁷ Néanmoins, à y regarder de plus près, au sein de l'Union comprenant plus largement les normes nationales, l'apparition d'un droit européen de la procédure pénale semble plus délicate face aux considérations souverainistes persistantes. Partant, si la proposition de règlement *e-evidence* révèle une procédure pénale de l'Union européenne garante et efficace (III.1); l'existence d'un droit européen de la procédure pénale au sein de l'Union européenne peine à se détacher des normes nationales même si, à terme, ce dernier devrait se révéler (III.2).

III.1. UNE PROCÉDURE PÉNALE DE L'UNION EUROPÉENNE PROTECTRICE ET EFFICACE

Comme le démontre l'étude de la proposition, l'Union crée des normes pénales de forme, s'imposant aux États membres avec plus ou moins de vigueur, sans perdre de vue tant le respect des droits fondamentaux que l'efficacité de la procédure pénale.

La proposition de règlement *e-evidence*, en considération de sa nature intrusive, pourrait remettre en cause certains droits fondamentaux qu'elle prend la peine de lister exhaustivement comme le droit à la protection des données à caractère personnel, le droit au

⁵⁴ A Weyembergh, 'La reconnaissance mutuelle des décisions judiciaires en matière pénale entre les États Membres de l'Union européenne: mise en perspective' in G de Kerchove et A Weyembergh (dir), *La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne* (Éditions de l'Université de Bruxelles 2001) 58.

⁵⁵ N Aloupi, 'La décision d'enquête européenne: un mandat européen pour la recherche des preuves' (2013) *Revue Générale de Droit International Public* 677.

⁵⁶ V. pour un exemple récent relatif au procureur français: affaires jointes C-566/19 et C-626/19 *Parquet général du Grand-Duché de Luxembourg* (Procureurs de Lyon et Tours) ECLI:EU:C:2019:1077.

⁵⁷ Art. 82 Traité sur le Fonctionnement de l'Union européenne cit.

respect de la vie privée et familiale, le droit à la liberté d'expression ou encore le droit à un recours effectif du fournisseur de services.⁵⁸ Ainsi, pour contrebalancer cette nature attentatoire, "de tels outils sont subordonnés à l'existence de solides mécanismes de protection des droits fondamentaux".⁵⁹ À cette fin, le texte s'inscrit dans un contexte général protecteur de ces droits dans l'Union européenne, tout en prévoyant, parallèlement, des règles "garantistes" liées à la spécificité des preuves électroniques.⁶⁰ Partant, la proposition de règlement affirmait ne pas avoir pour finalité d'amoindrir les garanties procédurales existantes au sein de l'Union européenne.⁶¹ Néanmoins, elle ne se contente pas de viser des normes protectrices des droits fondamentaux déjà existantes, mais prévoit, également, des règles spécifiques face aux atteintes liées à la récolte des preuves électroniques, comme l'avait préconisé le Parlement européen.⁶² Concrètement, diverses dispositions "garantistes" retiennent l'attention. D'abord, les injonctions européennes ne peuvent intervenir que dans le cadre de procédures pénales en cours.⁶³ En outre, les caractères de nécessité, supposant qu'il n'y ait pas d'autres moyens moins intrusifs pour atteindre le même résultat, et de proportionnalité, impliquant un rapport entre l'acte d'enquête et la gravité du comportement, doivent être vérifiés voire motivés;⁶⁴ ces deux principes fondamentaux sont d'ailleurs évoqués à plusieurs reprises.⁶⁵ Ensuite, pour les injonctions de production des seules données liées aux transactions et au contenu,⁶⁶ considérées comme des mesures plus intrusives, l'intervention d'une autorité judiciaire indépendante et impartiale est exigée.⁶⁷ Enfin, les personnes concernées par la mise en œuvre de ces injonctions doivent être informées⁶⁸ et pouvoir exercer un recours juridictionnel,⁶⁹ à moins de démontrer l'entrave à la procédure pénale en cours que cette information susciterait. De surcroît, les autorités nationales d'exécution disposent de divers motifs de refus listés exhaustivement, en lien avec la protection des droits fondamentaux, dont la teneur sera étudiée ultérieurement.

De telles dispositions témoignent de l'émergence d'une procédure pénale européenne, dotée de ses propres standards, devant toujours trouver un équilibre entre la sécurité des

⁵⁸ Proposition de Règlement COM(2018) 225 final cit. 10.

⁵⁹ *Ibid.* 2.

⁶⁰ C Vial et R Tiniere (dir), *La protection des droits fondamentaux dans l'Union européenne – entre évolution et permanence* (Bruylant 2015).

⁶¹ Proposition de Règlement COM(2018) 225 final cit. 10-12.

⁶² Proposition de Directive COM(2018) 226 final cit. 3.

⁶³ Art. 3(2) Proposition de Règlement COM(2018) 225 final cit.

⁶⁴ La décision d'enquête européenne allait déjà dans le même sens: v. Directive 2014/41/UE du Parlement Européen et du Conseil concernant la décision d'enquête européenne en matière pénale, art. 6(1)(a).

⁶⁵ Art. 5(1) et 5(l) et art. 6(2) Proposition de Règlement COM(2018) 225 final cit.

⁶⁶ *Ibid.* art. 4(2)(a).

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* art. 17.

citoyens et la protection des droits fondamentaux. Partant, si les droits fondamentaux semblent être pris en compte par la proposition de règlement, qu'en est-il de son efficacité ?

La proposition *e-evidence*, en raison de son originalité, démontre un changement de paradigme s'agissant de l'élaboration des normes de procédure pénale par le législateur de l'Union européenne ; la reconnaissance mutuelle y est alors exigée plus rigoureusement voire y apparaît métamorphosée. Cette force contraignante s'explique par l'instrument de droit dérivé sur lequel repose le texte à savoir, un règlement. Le législateur européen prend la peine de justifier son choix en affirmant qu'un "règlement est directement applicable, est gage de clarté et de sécurité juridique renforcée, et évite les interprétations divergentes par les États membres et d'autres problèmes de transposition rencontrés avec les décisions-cadres relatives à la reconnaissance mutuelle des jugements et décisions judiciaires. En outre, un règlement permet d'imposer une même obligation uniformément au sein de l'Union".⁷⁰ Jusqu'à présent, la directive demeurerait l'instrument privilégié du droit pénal de l'Union européenne en ce qu'elle préservait les souverainetés nationales.⁷¹ Par conséquent, ce nouveau "petit pas" est un signe d'une réelle avancée dans la construction d'une Europe pénale toujours plus intégrée, renforçant corrélativement la confiance et donc la reconnaissance mutuelle. À ce titre, le texte impose aux États membres, dans le cadre des procédures transfrontières, diverses normes procédurales permettant à l'instrument de fonctionner efficacement à deux égards : d'une part, par la rédaction de définitions communes tant fonctionnelles qu'organiques afin de permettre aux États membres d'user du même langage et ainsi de faciliter l'exécution de la mesure d'enquête ; d'autre part, par la prévision d'exigences strictes et uniformisées quant à la récolte des preuves électroniques par les États membres de l'Union européenne.

S'agissant des précisions notionnelles, l'instrument le fait dans un premier temps, d'un point de vue fonctionnel en définissant plusieurs éléments essentiels à son efficacité. Sont d'abord visés les deux types d'injonctions, dont la nature contraignante est précisée, à savoir, aux fins de production⁷² et de conservation⁷³ de la preuve électronique demandée par l'autorité d'émission d'un État membre et s'imposant à un fournisseur "proposant des services dans l'Union et établi ou représenté dans un autre État membre".⁷⁴ Sont ensuite définis les différents fournisseurs de services concernés ;⁷⁵ il s'agit de toute personne physique ou morale qui fournit différents services listés exhaus-

⁷⁰ Proposition de Règlement COM(2018) 225 final cit. 6.

⁷¹ Le règlement vient d'être également privilégié par l'Union européenne dans le règlement (UE) 2018/1805 du Parlement européen et du Conseil du 14 novembre 2018 concernant la reconnaissance mutuelle des décisions de gel et des décisions de confiscation.

⁷² Art. 2(1) Proposition de Règlement COM(2018) 225 final cit.

⁷³ *Ibid.* art. 2(2).

⁷⁴ *Ibid.* art. 2(1) et (2).

⁷⁵ *Ibid.* art. 2(4).

tivement par la proposition de règlement à savoir, en matière de communications électroniques,⁷⁶ de sociétés d'informations "pour lesquels le stockage de données est un élément déterminant du service fourni à l'utilisateur, y compris les réseaux sociaux, les marchés en ligne facilitant les transactions entre leurs utilisateurs et autres fournisseurs de services d'hébergement"⁷⁷ ou encore de services de noms de domaine et de numérotation internet.⁷⁸ Sont enfin décryptées les catégories de données⁷⁹ que les preuves électroniques peuvent renfermer à savoir, celles relatives aux abonnés, à l'accès, aux transactions et au contenu. Dans un second temps, le texte apporte des précisions de nature organique en affinant les caractères dont doit disposer l'organe d'émission ou de contrôle de la mesure. Il prévoit que "toute autre autorité compétente" peut intervenir dès lors que l'injonction est validée par une "autorité judiciaire", laquelle dispose d'un sens variable en fonction du degré d'atteinte de l'acte d'enquête réalisé. S'avérant très disparate au sein de l'Union, cette notion constitutionnelle nécessitait quelques éclaircissements.⁸⁰ À cet égard, la proposition de règlement l'entend largement, en comprenant aux côtés des juges, le procureur, lorsqu'il s'agit d'une injonction aux fins de conservation⁸¹ et de production de données relatives à l'identité de l'individu.⁸² Or concernant la production des données liées aux transactions et au contenu,⁸³ dotées d'un caractère plus sensible, elle évince l'intervention du ministère public national, restreignant corrélativement la notion d'autorité judiciaire. Le degré de l'atteinte détermine donc l'organe de contrôle, "laissant se dessiner une autorité judiciaire à deux visages".⁸⁴

S'agissant des conditions entourant l'exécution de la mesure, plusieurs règles sont, également, posées. À ce titre, la proposition envisage concrètement une solution commune au sein de l'Union européenne afin de remettre uniformément la demande au fournisseur de services par le biais d'un représentant légal.⁸⁵ Sa détermination est strictement encadrée par la proposition de directive relative à l'harmonisation de la désignation du représentant légal aux fins de la collecte des preuves en matière pénale. Ce dernier peut donc exécuter sa demande comme s'il le faisait au sein de son propre territoire.

⁷⁶ *Ibid.* art. 2(3)(a).

⁷⁷ *Ibid.* art. 2(3)(b).

⁷⁸ *Ibid.* art. 2(3)(c).

⁷⁹ *Ibid.* art. 2(7-10), à ce sujet, le Contrôleur européen de la Protection des Données déplore le caractère artificiel de la catégorie des données relatives à l'accès, v. CEPD, Avis 7/2019 concernant les propositions relatives aux injonctions européennes de production et de conservation de preuves électroniques en matière pénale, 9-11.

⁸⁰ H Christodoulou, *Le parquet européen: prémices d'une autorité judiciaire de l'Union européenne* cit. paras 33 et s.; C Lazerges (dir), *Figures du parquet* (PUF 2006).

⁸¹ Art. 4(3)(a) Proposition de Règlement COM(2018) 225 final cit.

⁸² *Ibid.* art. 4(1)(a).

⁸³ *Ibid.* art. 4(2)(a).

⁸⁴ H Christodoulou, *Le parquet européen: prémices d'une autorité judiciaire de l'Union européenne* cit. para. 174.

⁸⁵ Art. 1(3) Proposition de Règlement COM(2018) 225 final cit.

En d'autres termes, l'instrument tend vers une extra-territorialité de l'État membre d'émission qui peut contraindre un fournisseur de service se situant sur le territoire d'un autre État à fournir des informations nécessaires à une enquête judiciaire ; ce n'est qu'à défaut de coopération de l'interlocuteur que la procédure est à nouveau confiée aux autorités compétentes des États membres.⁸⁶ Par ailleurs, la proposition de règlement élabore un certificat commun au sein de l'Union.⁸⁷ La nécessité de créer un tel document standardisé y est alors motivée ; il permettrait de réduire les sources d'erreur, d'identifier facilement les données et d'éviter au maximum les textes libres afin de réduire les coûts de traduction. Il enserme, ensuite, les obligations des fournisseurs de services dans des délais courts et strictement encadrés. À titre d'illustration, dès la réception de la demande d'injonction le prestataire est tenu de répondre dans un délai de dix jours voire,⁸⁸ en cas d'urgences, de six heures,⁸⁹ contre cent vingt jours dans le cadre de la décision d'enquête européenne.⁹⁰ Le texte contraint, enfin, les États à prévoir des sanctions pécuniaires "effectives, dissuasives et proportionnées",⁹¹ pour lesquelles elle ouvre une voie de recours,⁹² afin de donner aux dispositions envisagées leur plein effet.

En somme, l'instrument met en exergue à plusieurs égards ce phénomène tendant à européeniser les mesures procédurales liées à la récolte des preuves électroniques dont l'uniformisation, dans les seules enquêtes purement européennes, pourrait avoir une influence plus large en irriguant les procédures pénales internes. En effet, cette mesure d'enquête respectant le principe de subsidiarité⁹³ en se superposant aux systèmes nationaux sans les modifier pourrait, à terme, inspirer les États dans le cadre de leurs enquêtes purement internes. Avant d'en arriver là, certaines difficultés devraient se dresser face à la proposition de règlement.

III.2. UNE PROCÉDURE PÉNALE INEXORABLEMENT ENTRAVÉE

S'il est indéniable qu'une procédure pénale de l'Union européenne parallèle aux systèmes nationaux se dessine afin de rendre les enquêtes transfrontières toujours plus efficaces, qu'en est-il de l'articulation systémique entre le droit de l'Union européenne et les droits étatiques face à la mise en œuvre de la proposition de règlement *e-evidence* ? Même si le texte est innovant et transcende sur certains points les disparités nationales, les droits internes occupent toujours une place certaine dans la mise en œuvre de la procédure pénale de l'Union européenne. En effet, le texte devrait être rapidement freiné

⁸⁶ *Ibid.* art. 7(2), (3) et (4) et art. 14.

⁸⁷ *Ibid.* art. 8.

⁸⁸ *Ibid.* art. 9(1).

⁸⁹ *Ibid.* art. 9(2).

⁹⁰ Directive 2014/41/UE cit. art. 12.

⁹¹ Affaire C-68/88 *Commission c République hellénique* ECR I-2965.

⁹² Art. 14(10) Proposition de Règlement COM(2018) 225 final cit.

⁹³ Protocole n. 2 sur l'application des principes de subsidiarité et de proportionnalité, annexé au TUE et au TFUE par le Traité de Lisbonne [2007].

par l'existence de limites d'ordre souverainistes comme la dépendance encore trop prégnante tant aux droits des États membres qu'à l'appréciation des autorités nationales.

Au sein de la proposition *e-evidence*, plusieurs limites liées à la dépendance aux droits nationaux se dressent devant l'émergence d'une procédure pénale de l'Union. Le maintien de ces normes se superposant aux règles européennes devrait créer des disparités dans la mise en œuvre de l'instrument et ainsi remettre en cause la légalité pénale, l'égalité entre les justiciables de l'Union et donc plus largement leur sécurité juridique.

La première limite s'explique par la nécessité pour l'État d'émission de l'injonction de disposer dans son arsenal législatif pour "la même infraction pénale dans une situation nationale comparable" d'une mesure similaire.⁹⁴ Or le manque d'harmonisation devrait, dans certains cas, paralyser l'instrument.

La deuxième limite est liée au seuil des peines qui conditionne l'injonction de production, hormis pour une liste exhaustive d'infractions,⁹⁵ et rend corrélativement la mesure inégalement applicable en fonction du *quantum* de la peine variant d'un État membre à l'autre.⁹⁶ En effet, l'infraction pénale doit être punissable dans l'État d'émission d'une peine privative de liberté d'une durée maximale d'au moins trois ans.⁹⁷

La troisième limite s'explique par la possibilité pour les droits nationaux de maintenir d'éventuels privilèges et immunités liés à certaines professions ou encore de faire passer les intérêts fondamentaux de sécurité et de défense au-dessus du texte, tant au moment de l'enquête⁹⁸ que du jugement.⁹⁹ Pour autant, le contenu de ces notions demeure propre à chaque système national en ce qu'elles entretiennent un lien certain avec leur souveraineté. Par conséquent, leurs contours sont difficilement perceptibles d'un État membre à l'autre.

La quatrième limite est liée au maintien de la compétence des juridictions nationales quant aux sanctions et aux recours prévus.¹⁰⁰ Ainsi, qu'en serait-il d'une preuve électronique récoltée en violation des normes procédurales posées par la proposition de règlement? Elle est globalement sanctionnée par la nullité. Or d'un État membre à l'autre, cette dernière ne répond pas aux mêmes règles.¹⁰¹ De surcroît, une difficulté supplémentaire

⁹⁴ Art. 5(2) Proposition de Règlement COM(2018) 225 final cit.

⁹⁵ *Ibid.* art. 5(4)(b).

⁹⁶ *Ibid.* art. 5(4), à l'inverse l'injonction de conservation en ce qu'elle est moins intrusive peut être émise "pour toutes les infraction pénales", art. 5(3) Proposition de Règlement COM(2018) 225 final cit.

⁹⁷ Art. 5(4)(a) Proposition de Règlement COM(2018) 225 final cit.

⁹⁸ *Ibid.* art. 5(7).

⁹⁹ *Ibid.* art. 18.

¹⁰⁰ *Ibid.* art. 17.

¹⁰¹ J. Pradel, *Droit pénal comparé* (Dalloz 3^{ème} éd 2016) 334.

apparaît: dès lors qu'une preuve est annulée, qu'en est-il de celles ultérieurement récoltées?¹⁰² Une nouvelle fois, les droits nationaux ne sont pas harmonisés et plusieurs systèmes se confrontent.¹⁰³ En somme, la question de la légalité de la preuve électronique récoltée uniformément fait en réalité l'objet d'une admissibilité hétérogène, allant corrélativement à l'encontre de l'existence d'un droit européen de la procédure pénale.

La cinquième limite enfin, s'explique par une application matérielle de la proposition de règlement qu'en présence d'enquêtes transfrontières ; *a contrario* si l'enquête est purement interne, l'hétérogénéité des normes nationales sera maintenue.¹⁰⁴

Si les droits nationaux persistent, ils ne sont pas les seuls ; les autorités nationales continuent, également, de jouer un rôle dans la mise en œuvre de l'instrument freinant eux aussi l'émergence d'un droit européen de la procédure pénale. En effet, même si la proposition *e-evidence* dispose d'une force contraignante certaine par rapport aux autres instruments de droit pénal de l'Union européenne, la circulation de la preuve électronique validée en amont par l'État d'exécution suppose concrètement l'intervention des autorités nationales dont l'appréciation demeure maintenue. Son fonctionnement repose sur la reconnaissance mutuelle, permise par la confiance réciproque existant entre les États membres, leur imposant de reconnaître les caractéristiques de leur système judiciaire respectif. Afin de faciliter ce processus, le droit dérivé envisage le rapprochement des législations nationales comme en matière procédurale.¹⁰⁵ Néanmoins, il ne faut pas occulter les défiances mutuelles en matière pénale, parfois justifiées par la protection des droits fondamentaux.¹⁰⁶ À ce sujet, un double contrôle peut être effectué: par le représentant légal désigné, autrement appelé "le destinataire" ou à défaut par tout établissement du fournisseur de service présent au sein de l'Union voire, dans des cas dérogatoires, par l'autorité répressive de l'État chargée de la mise en œuvre de la mesure.¹⁰⁷ Or le contrôle de l'autorité judiciaire d'émission n'était-il pas suffisant ?

En outre, le représentant légal est censé mettre en œuvre "sans autres formalités" l'injonction comme si elle venait de son propre État. Pour autant, le texte relativise son propos en listant exhaustivement différents motifs pour lesquels il pourrait refuser son exécution.¹⁰⁸ En effet, à titre d'illustrations, il le peut si la mesure n'a pas été émise ou

¹⁰² *Ibid.* 340.

¹⁰³ V. par exemple, cass. crim., 26 mai 1999, n. 99-81.764; cass. crim., 21 juin 2016, n. 16-80.126; S Fucini, 'Nullités de procédure: état des lieux de la jurisprudence de la Chambre criminelle' (2018) AJ pénal 359.

¹⁰⁴ Art. 1(1) Proposition de Règlement COM(2018) 225 final cit.

¹⁰⁵ Art. 82(2)(a) Traité sur le Fonctionnement de l'Union européenne cit.

¹⁰⁶ H Haguenu-Moizard, 'Les bienfaits de la défiance mutuelle dans l'espace de liberté, de sécurité et de justice' in C Mestre (dir), *Europe(s) droit(s) européen(s) une passion d'universitaire. Liber Amicorum en l'honneur du professeur Vlad Constantinesco* (Bruylant 2013) 228; LS Rossi, 'Droits fondamentaux, primauté et autonomie: la mise en balance entre les principes "Constitutionnels" de l'Union européenne' (2019) RTD eur 67.

¹⁰⁷ Art. 14 Proposition de Règlement COM(2018) 225 final cit.

¹⁰⁸ *Ibid.*

validée par l'autorité judiciaire telle que définie au sein du texte;¹⁰⁹ si l'injonction "ne concerne pas les données stockées par le fournisseur de services ou pour son compte" au moment de la réception de la demande,¹¹⁰ s'il est évident que le certificat "enfreint manifestement la Charte ou qu'il est manifestement abusif"¹¹¹ ou encore si les données concernées sont protégées par une immunité ou un privilège à la lumière de la législation nationale ou si la divulgation peut porter atteinte à ses intérêts comme la sécurité ou la défense nationale. Ces divers motifs de refus voulant harmoniser la protection des droits fondamentaux pourraient réduire l'efficacité de l'instrument. En effet, certains sont intimement liés à la souveraineté. Ainsi ils dépendront d'une appréciation subjective d'une autorité nationale alors même que le texte avait vocation à dépasser ces considérations.

En somme, il existe bien une procédure pénale de l'Union européenne démontrant qu'il y a un réel mouvement vers un droit européen de la procédure pénale, même si cette avancée sera nécessairement semée d'embûches face aux volontés de préserver les souverainetés nationales.

¹⁰⁹ *Ibid.* art. 14(4)(a) et art. 14(5)(a).

¹¹⁰ *Ibid.* art. 14(4)(d) et 14 (5)(c).

¹¹¹ *Ibid.* art. 14(4)(f) et (5)(e).



ARTICLES

TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – SECOND PART

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PRIVATE LIFE, PERSONAL DATA PROTECTION AND THE ROLE OF SERVICE PROVIDERS: THE EU E-EVIDENCE PROPOSAL

MARINE CORHAY*

TABLE OF CONTENTS: I. A new framework for the collection of electronic evidence in cross-border cases. – II. Preliminary considerations. – III. Privacy at risk? – IV. Towards a re-allocation of protective functions? – V. Conclusion.

ABSTRACT: In April 2018, the Commission adopted a proposal for the collection of electronic evidence in criminal matters (the so-called e-Evidence Proposal). This proposal pursues the ambition to create an EU-wide legal framework for the collection of electronic evidence in the field of criminal procedure and establishes a new criminal justice paradigm at the EU level: direct cooperation between judicial authorities and service providers. This new type of cross-border cooperation raises important issues, two of which will be addressed in this *Article*. The first issue concerns the impact of this new criminal justice paradigm on the right to protection of personal data and the right to respect for private life. This *Article* will provide an assessment of the options presented by the EU institutions (Commission, Council and European Parliament) to safeguard these rights. The second issue relates to the role of private actors, i.e., service providers. This *Article* will discuss the protective functions assigned to service providers in the Commission's proposal and highlight some of the problematic aspects related to it.

KEYWORDS: electronic evidence – cross-border access to electronic evidence – fundamental rights – law enforcement – data protection – private life.

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I. A NEW FRAMEWORK FOR THE COLLECTION OF ELECTRONIC EVIDENCE IN CROSS-BORDER CASES

Online services, information and communication technologies (ICTs) have revolutionised the way we communicate with one another and the way in which we store, access and share information. Collecting data has proven to be a challenge for law enforcement authorities who have to rely on the cooperation of big global technology companies such as Google, Facebook, Microsoft or Amazon. Over the past two decades, law enforcement authorities have tried, with varying degrees of success, to make these service providers cooperate in cross-border situations in order to avoid resorting to mutual legal assistance procedure. The European Union sensed the great need for a supra-national approach and in June 2016 the Council called on the Commission to take concrete actions to improve cooperation with service providers.¹ This call resulted in a proposal for the collection of electronic evidence in criminal matters (the so-called e-Evidence Proposal or Commission's Proposal) which was issued by the Commission in April 2018. This proposal is composed of two intrinsically linked instruments: a Regulation on European production and preservation orders² and a Directive containing harmonised rules on the appointment of legal representatives.³ The e-evidence proposal pursues the ambition to create an EU-wide legal framework for the collection of e-evidence in the field of criminal procedure that will be based on the principle of mutual recognition and establishes a new criminal justice paradigm at the EU level: direct cooperation between judicial authorities and service providers. This new type of cross-border cooperation raises several questions.⁴ It impacts fundamental rights, especially the right to respect for private life and the right to the protection of personal data (part IV). This new criminal justice paradigm also introduces a private actor, the service provider, in the protective framework (part III). Prior to diving into the analysis of these issues, some preliminary considerations on the proposed framework will be exposed (part II).

¹ European Commission Non-paper of 7 December 2016, Progress Report following the Conclusions of the Council of the European Union on Improving Criminal Justice in Cyberspace data.consilium.europa.eu.

² Proposal COM(2018) 225 final of the European Commission of 17 April 2018 for a Regulation of the European Parliament and the Council on European production and preservation orders for electronic evidence in criminal matters (hereafter proposed Regulation).

³ Proposal COM(2018) 226 final of the European Commission of 17 April 2018 for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings (hereafter proposed Directive).

⁴ See, among others, V Franssen, 'The European Commission's e-Evidence Proposal: Toward an EU-wide Obligation for Service Providers to Cooperate with Law Enforcement?' (12 October 2018) European Law Blog europeanlawblog.eu; M Cole and T Quintel, 'Transborder Access to e-Evidence by Law Enforcement Agencies: A First Comparative View on the Commission's Proposal for a Regulation on European Preservation/Production Order and Accompanying Directive' (University of Luxembourg Law Working Paper Series 10-2018); S Tosza, 'The European Commission's Proposal on Cross-Border Access to e-Evidence' (2018) The European Criminal Law Association's Forum 212; G Robinson, 'The European Commission's e-Evidence Proposal' (2018) European Data Protection Law Review 347.

II. PRELIMINARY CONSIDERATIONS

From a law enforcement perspective, data we produce might serve as evidence in a growing number of criminal cases involving all types of crime, not only cybercrime.⁵ The borderless nature of the internet means that online services and ICTs may be provided from anywhere in the world; hence data are often processed, transmitted and/or stored by foreign service providers.⁶ Therefore, in order to have access to data, law enforcement authorities must rely on the cooperation of these private actors. Contrary to telecom operators, big ICTs companies such as Google, Facebook or Microsoft are not covered by the obligations of telecommunications laws and are located outside the territory of the investigating police and judicial authorities.⁷ Law enforcement authorities have resorted to various means to try to make service providers cooperate in cross-border situations in order to avoid resorting to mutual legal assistance procedure, a mechanism that many consider inadequate for the collection of e-evidence.⁸ One way is to rely on the voluntary cooperation of service providers, meaning cooperation that is not based on a legal obligation. Some States went further and enacted legislation containing obligations for service providers to comply with law enforcement authorities' requests.⁹ In that sense, mandatory cooperation is not new. However, the legal grounds for doing so may be questioned¹⁰

⁵ Proposal COM(2018) 225 final 1 of the European Commission of 17 April 2018 for a Regulation of the European Parliament and the Council on European production and preservation orders for electronic evidence in criminal matters, Explanatory Memorandum (hereafter Explanatory Memorandum); V Franssen, A Berrendorf and M Corhay, 'La collecte transfrontière de preuves numériques en matière pénale. Enjeux et perspectives européennes' (2019) *Revue Internationale de Droit Pénal* 1; M Stefan and G González Fuster, 'Cross-Border Access to Electronic Data Through Judicial Cooperation in Criminal Matters – State of the Art and Latest Developments in the EU and the US' (2018) CEPS Paper in Liberty and Security in Europe n. 07.

⁶ V Franssen, 'The European Commission's e-Evidence Proposal: Toward an EU-wide Obligation for Service Providers to Cooperate with Law Enforcement?' cit.

⁷ *Ibid.*

⁸ See, among others, S Tosza, 'Cross-Border Gathering of Electronic Evidence: Mutual Legal Assistance, Its Shotcomings and Remedies' in V Franssen and D Flore (eds), *Société numérique et droit pénal*. Belgique, France, Europe (Larcier-Bruylant 2019) 269; T Christakis, 'E-Evidence in a Nutshell: Developments in 2018, Relations with the CLOUD Act and the Bumpy Road Ahead' (14 January 2019) Cross-border Data Forum www.crossborderdataforum.org; Explanatory Memorandum cit. 7.

⁹ See, for instance, arts 46*bis* (production order for traffic and location data) and 88*bis* (production order for identification data) of the Belgian Code of Criminal Procedure and the UK Investigatory Powers Act 2016.

¹⁰ These legislations or practices have substantial extraterritorial effects, affecting the sovereignty of other States. For an analysis of recent Belgian legislation and case-law see V Franssen, 'The Belgian Internet Investigatory Powers Act – A Model to Pursue at European Level?' (2017) *European Data Protection Law Review* 534; V Franssen and M Corhay, 'La fin de la saga Skype: les fournisseurs de services étrangers obligés de collaborer avec la justice belge en dépit des possibilités techniques et de leurs obligations en droit étranger, Note sous Cass. 19 février 2019' (2019) *Revue de Droit Commercial Belge* 1014; P De Hert, C Parlar and J Thumfart, 'Legal Arguments Used in Courts Regarding Territoriality and Cross-Border Production Orders: From Yahoo Belgium to Microsoft Ireland' (2018) *New Journal of European Criminal Law* 326.

and national law, in practice, is not always effective.¹¹ Besides, the existence of a great variety of national approaches creates fragmentation that generates legal uncertainty for both law enforcement authorities and service providers, as well as conflicting obligations for service providers.¹² The European Union is attempting to remedy that situation with a legal framework for direct cooperation in cross-border situations.¹³

The Commission's proposed Regulation creates binding European Production orders (EPOs) and Preservation orders (EPsOs) for stored data.¹⁴ EPOs enable judicial authorities of the issuing Member State to require a service provider¹⁵ located in another jurisdiction to produce certain data while EPsOs allow for the preservation of data until a subsequent EPO is issued. Both orders are to be addressed to the service provider's legal representative outside the issuing Member State. The proposed Directive obliges European service providers that offer services in more than one Member State, as well as non-European service providers which are active on the EU market, to appoint a legal representative in at least one Member State.¹⁶ The legal representative will function as the EU-wide legal contact person for national competent authorities.¹⁷ The Member State hosting the service provider's legal representative will ensure compliance with orders addressed to the legal representative by the competent authorities of other Member States.¹⁸

Unlike other forms of cooperation in criminal matters regulated by EU law – like the European arrest warrant (EAW) or the European investigation order (EIO) – which involve the cooperation between judicial authorities of different Member States, the e-Evidence Proposal provides for cooperation between the judicial authorities of one Member State

¹¹ *Ibid.*

¹² Explanatory Memorandum cit. 2; European Commission Non-paper of May 2017, Improving Cross-Border Access to Electronic Evidence: Findings From the Expert Process and Suggested Way Forward 2.

¹³ The e-evidence proposal does not apply to purely national service providers which only have customers in one Member State and non-EU service providers which do not offer services in the EU. See art. 3(2) *a contrario* of the proposed Directive.

¹⁴ Explanatory Memorandum cit. 5. Real-time interception of communication is not covered by the e-evidence proposal.

¹⁵ The proposed Regulation targets specific subcategories of service providers that exceed the scope of application of the traditional telecommunication providers and aims at including internet access services, internet-based services enabling inter-personal communications such as Voice over IP, instant messaging and e-mail services. It also covers cloud and other hosting services and digital marketplaces. See art. 2(3) of the proposed Regulation. Services for which the storage of data is not a defining component are not covered by the proposal. However, providers of internet domain names and IP numbering services are relevant because they “can provide traces allowing for the identification of an individual or entity involved in criminal activity”. See Explanatory Memorandum cit. 14.

¹⁶ Art. 3(1) and (2) of the proposed Directive.

¹⁷ V Franssen, ‘The European Commission's e-Evidence Proposal: Toward an EU-wide Obligation for Service Providers to Cooperate with Law Enforcement?’ cit.

¹⁸ Art. 3(5) of the proposed Directive. To that end, the host Member State will have to enact rules on the basis of which the representative can be held liable for non-compliance. See art. 3(8) of the proposed Directive.

with a service provider (i.e. a private actor) in another Member States, without the involvement of the authorities of the latter Member State, except in case of non-compliance of the service provider. In this framework, service providers will be required to undertake tasks that are usually assigned to the executing State, including the responsibility to assess, in some instances, compliance of the orders with the Charter of Fundamental Rights of the EU (EU Charter). Part IV of this contribution will provide a critical analysis of service providers' newly assigned tasks with regard to fundamental rights.

Production and preservation orders would entail limitations on the right to respect for private life and the right to protection of personal data¹⁹ which are guaranteed by the EU Charter.²⁰ In addition, personal data may only be processed in accordance with the General Data Protection Regulation (GDPR)²¹ and the Law Enforcement Directive (LED).²² Despite the Commission's claim that the e-Evidence Proposal creates a framework that takes into account the relevant data protection acquis by including sufficient and important safeguards²³ and meets the conditions laid down in art. 52(1) of the EU Charter,²⁴ the European Parliament and other stakeholders have expressed strong criticisms. The next part (III) of this contribution will analyse the relevant aspects contained in the different versions of the proposed Regulation – the one issued by the Commission in April 2018, the General Approach adopted by the Council of the EU in June 2019²⁵ and the

¹⁹ Explanatory Memorandum cit. 9. For the purpose of this *Article*, the right to protection of personal data and the right to respect for private life will be considered together. For an analysis of how the two rights collide in the jurisprudence of the Court of Justice of the EU see G González Fuster, 'Fighting for Your Right to What Exactly? The Convolutional Case Law of the EU Court of Justice on Privacy and/or Personal Data Protection' (2014) *Birbeck Law Review* 263. For an overview of the differences between the two rights see C Docksey, 'Articles 7 and 8 of the EU Charter: Two Distinct Fundamental Rights' in A Grosjean (ed), *Enjeux européens et mondiaux de la protection des données personnelles* (Larcier 2010) 71.

²⁰ See arts 7 and 8 of the Charter of Fundamental Rights of the European Union [2012] (hereafter EU Charter).

²¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (hereafter General Data Protection Regulation or GDPR).

²² Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (hereafter Law Enforcement Directive).

²³ Explanatory Memorandum cit. 9.

²⁴ Read as follows: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

²⁵ Council of the European Union, General Approach 10206/19 on the Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters (hereafter General Approach).

European Parliament Report issued in December 2020²⁶ – in order determine what options the EU institutions have put forward to safeguard these rights.

III. PRIVACY AT RISK?

The proposed Regulation allows repressive authorities to issue production and preservation orders for stored data which are divided into four categories, namely: subscriber data,²⁷ access data,²⁸ transactional data²⁹ and content data.³⁰ At a glance, we notice that the Commission distances itself from the traditional data categories – subscriber data, traffic and location data, content data – contained in other instruments, for instance the Cyber-crime Convention³¹ and previous EU instruments, such as the ePrivacy Directive and the Data Retention Directive.³² In the proposed Regulation, the category of “traffic and location

²⁶ European Parliament (LIBE Committee), Report A9-0256/2020 on the Proposal for a Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters (hereafter European Parliament Report). Prior to the adoption of the Report, on 24 October 2019 the LIBE Committee presented a Draft Report entailing 267 amendments to the Commission's proposed Regulation. See European Parliament (LIBE Committee), Draft Report PR\1191404 on the Proposal for a Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters (hereafter European Parliament Draft Report). The LIBE Committee's *Rapporteur* is MEP Birgit Sippel.

²⁷ Art. 2(7) of the proposed Regulation: “data pertaining to: (a) the identity of a subscriber or customer such as the provided name, date of birth, postal or geographic address, billing and payment data, telephone, or email; (b) the type of service and its duration including technical data and data identifying related technical measures or interfaces used by or provided to the subscriber or customer, and data related to the validation of the use of service, excluding passwords or other authentication means used in lieu of a password that are provided by a user, or created at the request of a user”.

²⁸ Art. 2(8) of the proposed Regulation: “data related to the commencement and termination of a user access session to a service, which is strictly necessary for the sole purpose of identifying the user of the service, such as the date and time of use, or the log-in to and log-off from the service, together with the IP address allocated by the internet access service provider to the user of a service, data identifying the interface used and the user ID”.

²⁹ Art. 2(9) of the proposed Regulation: “data related to the provision of a service offered by a service provider that serves to provide context or additional information about such service and is generated or processed by an information system of the service provider, such as the source and destination of a message or another type of interaction, data on the location of the device, date, time, duration, size, route, format, the protocol used and the type of compression, unless such data constitutes access data”.

³⁰ Art. 2(10) of the proposed Regulation: “any stored data in a digital format such as text, voice, videos, images, and sound other than subscriber, access or transactional data”.

³¹ The Convention on Cybercrime refers to subscriber information, traffic data and content data. See Council of Europe, Convention on Cybercrime adopted in Budapest on 23 November 2001, ETS n. 185, arts 1(d), 18(3) and 21.

³² See art. 2 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (hereafter ePrivacy Directive); art. 2(2)(a), Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly

data", commonly known as "metadata", is cut up in "access data" and "transactional data".³³ While access to any of these data categories by law enforcement authorities constitutes an interference with the fundamental rights to respect for private life and to the protection of personal data,³⁴ the Commission considers that the intensity of the impact on fundamental rights varies between different categories of data, in particular between subscriber and access data, on the one hand, and transactional and content data on the other hand.³⁵ The proposed Regulation entails different levels of protection based on this distinction. According to the Commission, subscriber and access data are less sensitive in nature than transactional and content data and therefore production orders for such data pertain a lower degree of invasiveness hence justifying less strict legal conditions for their production and a larger scope of application.³⁶ An EPO for subscriber and access data can be issued by a prosecutor or a judge³⁷ for any type of offence, regardless of its seriousness.³⁸ Transactional and content data which are considered to be more sensitive are being subject to a higher threshold. An order to produce these categories of data must be issued or validated by a judge³⁹ in the issuing Member State and is limited to certain categories of offences: criminal offences punishable in the issuing Member State by a maximum custodial sentence of at least three years and a number of harmonised offences "for which evidence will typically be available mostly only in electronic form".⁴⁰

In sum, the Commission's approach is based on the assumption that different levels of protection, based on the sensitive nature of the data and the corresponding degree of invasiveness of the production order, should apply. This approach is meant to respect the principle of proportionality as required by art. 52(1) of the EU Charter and must be assessed with regard to the case-law of the Court of Justice of the EU (Court of Justice). The Court of Justice has issued several landmark decisions regarding the retention of data for law enforcement purposes and its compatibility with arts 7 and 8 of the EU Charter. The analysis of these decisions will be used as guidelines to assess whether the approach adopted by the Commission does indeed comply with the EU Charter. The Court of Justice set the foundations of its jurisprudence in the case of *Digital Rights Ireland*⁴¹ and

available electronic communications services or of public communications networks and amending Directive 2002/58/EC (hereafter Data Retention Directive). This Directive was annulled by the Court of Justice.

³³ V Franssen, 'The European Commission's e-Evidence Proposal: Toward an EU-wide Obligation for Service Providers to Cooperate with Law Enforcement?' cit.

³⁴ See e.g., case C-207/16 *Ministerio Fiscal* ECLI:EU:C:2018:788 para. 51 (hereafter *Ministerio Fiscal*).

³⁵ Explanatory Memorandum cit. 14.

³⁶ *Ibid.* 16; V Franssen, 'The European Commission's e-Evidence Proposal: Toward an EU-wide Obligation for Service Providers to Cooperate with Law Enforcement?' cit.

³⁷ Art. 4(1) of the proposed Regulation.

³⁸ *Ibid.* art. 5(3).

³⁹ *Ibid.* see art. 4(2)(a) and (b).

⁴⁰ *Ibid.* art. 5(4); Explanatory Memorandum cit.18.

⁴¹ Joined cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd and Seitlinger and Others* ECLI:EU:C:2014:238 (hereafter *Digital Rights Ireland*). This judgment annulled the data retention directive.

Tele2 Sverige.⁴² On the basis of these first rulings, one might be tempted to conclude that, contrary to the Commission's approach, subscriber data and access data are not less sensitive than transactional and content data and therefore accessing these data entails a similar level of interference which may only be justified for the objective of fighting serious crimes. However, as it will be demonstrated, such a conclusion would be insufficiently nuanced.

In *Digital Rights Ireland*, the Court of Justice held that subscriber data, traffic and location data,⁴³ when taken as a bulk, "may allow very precise conclusions to be drawn concerning the private lives of the persons [...] such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them".⁴⁴ In *Tele2 Sverige*, the Court of Justice reiterated this conclusion and added that these data provide the means "of establishing a profile of the individuals concerned, information that is *no less sensitive*, having regard to the right to privacy, than the actual content of communications".⁴⁵ Concerning access to traffic and location data, in *Tele2 Sverige* the Court of Justice also specifically underlined that access of the competent authorities to these data shall be restricted solely to fighting serious crime.⁴⁶ However, the concept of "serious crime" is not defined by EU law⁴⁷ and thus it is for national law to determine the conditions under which service providers must produce the requested data.⁴⁸ As a consequence, the definition of what constitutes a serious crime may vary depending on the Member State concerned.⁴⁹ Therefore the question is whether the minimum threshold of a "maximum sentence of at least three years imprisonment" contained in the proposed Regulation for production orders for transactional and content data corresponds to the definition of the concept of "serious crime". It is doubtful. As emphasized by Prof. Martin Böse in his assessment of the e-Evidence Proposal, the penalty levels in the Member States' national criminal justice systems suggest that it will be rather the

For an analysis see O Lynskey, 'The Data Retention Directive Is Incompatible with the Right to Privacy and Data Protection and Is Invalid in Its Entirety: *Digital Rights Ireland*' (2014) CMLRev 1789.

⁴² Joined cases C-203/15 and C-698/15 *Tele2 Sverige AB and Watson and Others* ECLI:EU:C:2016:970 (hereafter *Tele2 Sverige*).

⁴³ *Digital Rights Ireland* cit. para. 26. The Court refers to the "data necessary to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users' communication equipment, and to identify the location of mobile communication equipment, data which consist, inter alia, of the name and address of the subscriber or registered user, the calling telephone number, the number called and an IP address for Internet services".

⁴⁴ *Ibid.* para. 27.

⁴⁵ *Tele2 Sverige* cit. para. 99. Emphasis added.

⁴⁶ *Ibid.* para. 125.

⁴⁷ The Court notes that in the Data Retention Directive, art. 1(1) simply refers to serious crime as defined by each Member State in its national law. See *Digital Rights Ireland* cit. para. 60.

⁴⁸ *Tele2 Sverige* cit. para. 118.

⁴⁹ M Böse, 'An Assessment of the Commission's Proposals on Electronic Evidence' (September 2018) www.europarl.europa.eu 40.

exception than the rule that a criminal offence will not meet the minimum threshold for issuing EPOs for transactional and content data.⁵⁰ Indeed, contrary to the Commission's claim,⁵¹ the threshold of three-year imprisonment covers petty offences such as simple theft, fraud or assault under the criminal codes of some Member States.⁵² For instance, in the Belgian criminal code, a simple theft is punishable by a maximum custodial sentence of five years.⁵³ Some consider that a requirement that will be met by most offences under national law cannot be considered an adequate threshold for particularly intrusive measures.⁵⁴ In a subsequent case, *Ministerio fiscal*, the Provincial Court of Tarragona (Spain) did ask the Court of Justice whether the seriousness of the offence could be determined solely on the basis of the sentence which may be imposed and, if so, what should the minimum threshold be.⁵⁵ Unfortunately, the Court of Justice did not answer that question. Yet, this case provides further clarifications with regard to the sensitive nature of data and the corresponding level of interference with fundamental rights. The Court ruled that some subscriber, i.e., data relating to the identity of the user, data are actually less privacy sensitive than traffic and location data.

The Court of Justice combined the two questions asked by the Provincial Court of Tarragona into one: whether access to subscriber data by law enforcement authorities

⁵⁰ *Ibid.*

⁵¹ Explanatory Memorandum cit. 17.

⁵² European Digital Rights (EDRi), 'Recommendations on Cross-Border Access to Data – Position Paper on the European Commission's Proposal for a Regulation on European Production and Preservations Orders for Electronic Evidence in Criminal Matters' (12 April 2019) edri.org 21, (hereafter EDRi, Position Paper on the European Commission's Proposal for a Regulation on European Production and Preservations Orders for Electronic Evidence in Criminal Matters); M Böse, 'An Assessment of the Commission's Proposals on Electronic Evidence' cit. 40.

⁵³ Art. 463 of the Belgian Criminal Code for a simple theft, without threat nor violence ("vol commis sans violences ni menaces").

⁵⁴ Statement by Judge Marko Bošnjak of the European Court of Human Rights during the European Parliament e-evidence hearing of 27 November 2018 www.europarl.europa.eu (2:08:00–2:19:25) (hereafter EP e-evidence hearing); M Böse, 'An Assessment of the Commission's Proposals on Electronic Evidence' cit. 40. Böse considers that in its core, the threshold as defined in art. 5(4) of the proposed Regulation incorporates the exception from the double criminality requirement contained in art. 11(1)(g) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (hereafter EIO Directive) which read as follows: "Without prejudice to Article 1(4), recognition or execution of an EIO may be refused in the executing State where: the conduct for which the EIO has been issued does not constitute an offence under the law of the executing State, unless it concerns an offence listed within the categories of offences set out in Annex D, as indicated by the issuing authority in the EIO, if it is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years". Emphasis added.

⁵⁵ *Ministerio Fiscal* cit. paras 26(2) and 17. The Spanish Criminal Code provides that "serious offences are those which the law punishes with a serious penalty" (art. 13(1)) and "serious penalties shall be: [...] b) imprisonment for a period of more than five years" (art. 33(2)). Art. 579(1) of the Spanish Code of Criminal Procedure provides that access to telephone and telematic communications data which have been retained by service providers may be provided, *inter alia*, for intentional offences punishable by a maximum penalty of at least three years' imprisonment.

entails an interference that is sufficiently serious to entail that access being limited to the objective of fighting serious crime and, if so, by reference to which criteria the seriousness of the offence must be assessed.⁵⁶ The case before the Provincial Court of Tarragona concerned a robbery during which the victim was injured and his wallet and mobile phone were stolen.⁵⁷ In order to identify the suspects, the law enforcement authorities sought access to the telephone numbers that had been activated with the International Mobile Equipment Identity code (IMEI code) of the stolen mobile phone over a period of 12 days and personal data relating to the identity of the owners or users of the telephone numbers corresponding to the SIM cards activated with the code.⁵⁸ The investigating magistrate refused to grant the request on the ground that the measure concerned was limited to serious offences and the facts at issue in the proceedings did not appear to constitute such an offence.⁵⁹ The public prosecutor's office appealed against that decision before the Provincial Court of Tarragona.⁶⁰ The latter decided to stay the proceedings and to refer two questions to the Court of Justice for a preliminary ruling.⁶¹ The Court of Justice first recalled that access of public authorities to data constitutes an interference with the fundamental rights to respect for private life and to the protection of personal data.⁶² The Court then added that "in accordance with the principle of proportionality, serious interference can be justified, in areas of prevention, investigation, detection and prosecution of criminal offences, only by the objective of fighting crime which must also be defined as 'serious'. By contrast, when the interference that such access entails is not serious, that access is capable of being justified by the objective of preventing, investigating, detecting and prosecuting 'criminal offences' generally".⁶³

Therefore what has to be determined is whether the interference may be regarded as "serious".⁶⁴ In this regard, the Court of Justice noted that "the sole purpose of the request at issue in the main proceedings [...] is to identify the owners of SIM cards activated over a period of 12 days with the IMEI code of the stolen mobile phone".⁶⁵ The Court found the data concerned "only enables the SIM card or cards activated with the stolen mobile telephone to be linked, during a *specific period*, with the identity of the owners of those SIM cards" and that these data do not allow "precise conclusions to be drawn concerning the private lives of the persons whose data is concerned".⁶⁶ Therefore, access to

⁵⁶ *Ministerio Fiscal* cit. para. 48.

⁵⁷ *Ibid.* para. 19.

⁵⁸ *Ibid.* para. 20.

⁵⁹ *Ibid.* para. 21.

⁶⁰ *Ibid.* para. 22.

⁶¹ *Ibid.* para. 26.

⁶² *Ibid.* para. 51.

⁶³ *Ibid.* paras 56-57.

⁶⁴ *Ibid.* para. 58.

⁶⁵ *Ibid.* para. 59.

⁶⁶ *Ibid.* para. 60. Emphasis added.

these data “cannot be defined as ‘serious’ interference with the fundamental rights of the persons whose data is concerned”.⁶⁷ As a consequence, “the interference that access to such data entails is therefore capable of being justified by the objective of preventing, detecting and prosecuting ‘criminal offences’ generally, *without being necessary that those offences be defined as ‘serious’*”.⁶⁸ In sum, the Court concluded that the interference with fundamental rights caused by law enforcement authorities’ access to data relating to the identity of the user – which include data such as surnames, forenames and addresses – is not sufficiently serious to entail that such access must be limited to the objective of fighting serious crimes.⁶⁹

Applying this reasoning to the proposed Regulation would imply that an EPO for subscriber data, at least with regard to those listed in art. 2(7)(a) of the proposed Regulation, because it entails an interference that is not deemed serious, is not restricted to serious crimes.⁷⁰ May the same conclusion be reached for access data? The Commission considers that access data, as defined in the proposed Regulation, pursue the same objective as subscriber data, i.e. to identify the user, and that the level of interference with fundamental rights is similar.⁷¹ Nevertheless, one may question whether access data are really less sensitive than transactional data, especially taking into account the fact that, as stated above, both categories are traditionally included in the sole category of “traffic and location data” or “metadata”.⁷² It should also be noted that the definitions of access data and transactional data partly overlap⁷³ which may create legal uncertainty about the applicable threshold and risk impeding the rightful use of the production orders by law enforcement authorities.⁷⁴ Recalling the aforementioned case-law, subscriber data, traffic

⁶⁷ *Ibid.* para. 61.

⁶⁸ *Ibid.* para. 62. Emphasis added.

⁶⁹ *Ibid.* para. 63.

⁷⁰ The Chair of the European Data Protection Board, Andrea Jelinek, is of the opinion that “the lowest threshold providing for the possibility for law enforcement authorities to request access to subscriber and access data for any criminal offence builds on an ‘a contrario’ reading of the case law of the CJEU”. European Data Protection Board (EDPB), Opinion 23/2018 on Commission proposals on European Production and Preservation Orders for Electronic Evidence in Criminal Matters of 26 September 2018 edpb.europa.eu 14(art. 70.1.b) (hereafter EDPB, Opinion 23/2018).

⁷¹ Explanatory Memorandum cit. 15.

⁷² The European Data Protection Supervisor is of the opinion that “this data category seems artificial and to have as only objective to attach lower requirements to the production of such data, similar to those attached to the production of subscriber data”. See European Data Protection Supervisor (EDPS), Opinion 7/2019 on Proposals regarding European Production and Preservation Orders for Electronic Evidence in Criminal Matters of 6 November 2019 edps.europa.eu para. 21 (hereafter EDPS, Opinion 7/2019).

⁷³ *Ibid.* para. 22.

⁷⁴ M Böse, ‘An Assessment of the Commission’s Proposals on Electronic Evidence’ cit. 20; European Parliament (LIBE Committee), 6th Working Document (B) DT1181408 on the Proposal for a Regulation on European production and preservation orders for electronic evidence in criminal matters – Safeguards and remedies 5 (hereafter EP (LIBE Committee), 6th Working Document (B)).

and location data, taken as a bulk, may allow very precise conclusions to be drawn concerning the private lives of the persons. When these data provide the means of establishing a profile of the individuals concerned, the Court of Justice considers that such data are *no less sensitive*, having regard to the right to privacy, than the actual content of communications.⁷⁵ Therefore, when an EPO for subscriber data and access data allows law enforcement authorities to establish a profile of the individual concerned, it may not be justified by the objective of investigating and prosecuting criminal offences generally.

If we were to resume the reasoning of the Court of Justice in the cases analysed above, it can be stated that the principle of proportionality requires that the seriousness of the interference with fundamental rights matches the level of seriousness of the crime.⁷⁶ Unfortunately, the notion of serious crime is yet to be defined by the Court but regarding the seriousness of the interference the Court has consistently emphasized that an interference may be characterised as serious when access to data is likely to allow precise conclusions to be drawn by national authorities concerning the private life of the person whose data are concerned by the access. May other criteria be taken into account in order to determine the seriousness of an interference, such as the duration of the period in respect of which the investigative authorities had access to the data? This question was submitted to the Court of Justice by the Supreme Court of Estonia in the *Prokuratuur* case. The case concerned a woman convicted for theft and the use of another person's bank card. Her conviction relied, *inter alia*, on evidence consisting of traffic and location data which were obtained by the public prosecutor from a provider of electronic communication services.⁷⁷ Before Estonia's Supreme Court, the woman challenged the admissibility of the evidence arguing that the national rules on data retention and the subsequent use of the retained data were violating art. 15 of ePrivacy Directive.⁷⁸ The Supreme Court of Estonia decided to stay the proceedings and referred three questions to the Court of Justice.

The Court of Justice combined the two first questions asked by the referring Court into one:⁷⁹ whether access by public authorities to a set of traffic or location data must be confined to procedures and proceedings to combat serious crime, regardless of the length of the period in which access to those data is sought and the quantity and the nature of the

⁷⁵ *Digital Rights Ireland* cit. para. 27; *Tele2 Sverige* cit. para. 99.

⁷⁶ AG Saugmandsgaard Øe emphasizes that the establishment of a link between the seriousness of the interference found and the seriousness of the reason that could justify the interference is in line with the principle of proportionality. See case C-207/16 *Ministerio Fiscal* ECLI:EU:C:2018:300, opinion of AG Saugmandsgaard Øe, para. 82.

⁷⁷ Case C-746/18 *Prokuratuur* ECLI:EU:C:2021:152 para. 17.

⁷⁸ *Ibid.* para. 19.

⁷⁹ First, the referring court asked whether access to traffic and location data by State authorities constitutes an interference so serious that it must be restricted to the purpose of fighting serious, regardless of the period to which the retained data to which the State authorities have access relate. Second, the Supreme Court of Estonia asked if, in case the amount of data referred to in its first question is not large (both in terms of the type of data and in terms of its temporal extent), the associated access interference could be justified for any crime.

data available in respect of such a period.⁸⁰ In the Supreme Court of Estonia's view, the temporal extent of the period covered by the access to the data is an essential factor for assessing the seriousness of the interference,⁸¹ a view validated by Advocate General Pitruzzella in his opinion on the case. The Advocate General recalls that in the case of *Ministerio Fiscal* the duration period covered by the access was 12 days and that:

"the seriousness of the interference is determined by taking account of the type of data concerned combined *with the duration of the period covered by the access*. These two considerations make it possible to assess whether the criterion determining the seriousness of the interference has been met, that is to say whether access to the data in question is likely to allow precise conclusions to be drawn by the competent national authorities concerning the private life of the person whose data are concerned by the access. In order to build an accurate profile of someone, it is necessary not only that the access concerns several categories of data, such as identification, traffic and location data, but also that the access covers a period long enough to ascertain with sufficient precision the main features of a person's life".⁸²

On 2 March 2021, the Court of Justice delivered its judgment and provided further clarifications on the conditions of access to data relating to electronic communications.⁸³ The Court noted that the Estonian legislation allows public authorities to seek access to traffic and location retained by service providers in relation to any type of criminal offence.⁸⁴ The Court recalled that only non-serious interferences with right to respect for private life and the right to protection of personal data may be justified by the objective of fighting crime in general, as pursued by the Estonian legislation in the proceedings concerned.⁸⁵ The Court found that public authority's access to a set of traffic or location data is a serious interference with the aforementioned rights "regardless of the length of the period in respect of which access to those data is sought and the quantity or nature of the data available in respect of such period, when, as in the main proceedings, that set of data is liable to allow precise conclusions to be drawn concerning the private life of the persons concerned".⁸⁶ Therefore, when a set of traffic or location data allows precise conclusions to be drawn concerning someone's private, public authority's access to those data must be confined procedures and proceedings to combat serious crime or prevent serious threat to public security.⁸⁷

⁸⁰ *Prokuratuur* cit. para. 23.

⁸¹ *Ibid.* para. 22. Emphasis added.

⁸² Case C-746/18 *Prokuratuur* ECLI:EU:C:2020:18, opinion of AG Pitruzzella, paras 81 and 82.

⁸³ For an analysis of this case see S Rovelli, 'Case *Prokuratuur* : Proportionality and the Independence of Authorities in Data Retention' European Papers (European Forum Insight of 11 June 2021) www.europeanpapers.eu 199.

⁸⁴ *Prokuratuur* cit. para. 28.

⁸⁵ *Ibid.* para. 33.

⁸⁶ *Ibid.* para. 39.

⁸⁷ *Ibid.* para. 45.

The Court of Justice also confirmed that data relating to the civil identity of users, can be retained and accessed for the purpose of combating crime in general given that, as previously ruled, the interference entailed by a measure relating to these data cannot be classified as serious.⁸⁸ In *Prokuratuur* case, the Court makes multiple references to two of its judgment issued in October 2020 – *Privacy International*⁸⁹ and *La Quadrature du Net and Others*⁹⁰ –, two additional landmark cases on data retention. While it is beyond the scope of this *Article* to analyse these rulings, they are worth mentioning, especially *La Quadrature du Net*, as they provide relevant precisions. In *La Quadrature du Net and Others*, the Court of Justice implicitly and most interestingly makes a subtle reference to the new category of access data proposed by the Commission in its Proposal. In its judgement the Court of Justice found that the ePrivacy Directive allows the general and indiscriminate retention of IP addresses of the sources of a communication in relation to email and internet telephony but only “for a period limited to what is strictly necessary, for the objective of fighting serious crime and preventing serious threats to public security”.⁹¹

Finally, it is important to emphasize that the Court of Justice jurisprudence was rendered in the context of the Data Retention Directive and national laws which imposed general and indiscriminate data retention obligations to service providers. By contrast, EPOs and EPsOs would only be issued to access data in the context of specific proceedings and for a specific period of time. Some are of the opinion that the jurisprudence of the Court makes too little distinction between data retention and subsequent access.⁹² Others, such as Advocate General Saugmandsgaard Øe, consider that access to personal data does not present fewer risks for fundamental rights. On the contrary, “danger might even be considered to be greater, in that access to retained data gives concrete form to the potentially harmful use that might be made of the data”.⁹³ In *Prokuratuur* case, the Court stated that access may be justified only by the public interest objective for which service providers were ordered to retain the data.⁹⁴ In other words, if the retention of traffic and location can only be justified by the objective of fighting serious crime so does the access to such data. This finding is not without consequence for EPOs and EPsOs. Concerning preservation orders, the proposed Regulation provides that these orders can be issued for all criminal offences and for all categories of data.⁹⁵ To the extent that EPsOs

⁸⁸ *Ibid.* para. 34.

⁸⁹ Case C-623/17 *Privacy International* ECLI:EU:C:2020:790.

⁹⁰ Joined cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others* ECLI:EU:C:2020:791.

⁹¹ *La Quadrature du Net and Others* cit. para. 168.

⁹² See F Coudert and F Verbruggen, ‘Conservation des données de communications électroniques en Belgique: un juste équilibre?’ in V Franssen and D Flore (eds), *Société numérique et droit pénal – Belgique, France, Europe* (Larcier-Bruylant 2019) 245; F Verbruggen, S Royer and H Severijns, ‘Reconsidering the Blanket Data-Retention-Taboo, for Human Rights’ Sake?’ (1st October 2018) European Law blog europeanlawblog.eu.

⁹³ See *Ministerio fiscal*, opinion of AG Saugmandsgaard Øe, cit. para. 38.

⁹⁴ *Prokuratuur* cit. para. 31.

⁹⁵ Art. 6(2) and (3)(d) of the proposed Regulation.

will allow for the retention of data, a comparison can be drawn with the data retention measures analysed in the jurisprudence of the Court of Justice with the difference being that EPOs will concern specific proceedings and relate to a specific set of data. It can therefore be argued that EPOs qualify as targeted measures.⁹⁶ While the Court consistently stated that “general and indiscriminate” retention of traffic and location data was precluded by the Charter even for the purpose of fighting serious crime,⁹⁷ in its judgments of October 2020, the Court leaves the door open to targeted data retention measures for traffic and location data.⁹⁸

Nevertheless, preservation orders have also raised concerns with regard to the principles for the processing of personal data. Since all four categories of data detailed in the proposed Regulation do contain information related to an identified or identifiable natural person they are considered as personal data and are therefore covered by the safeguards under the EU data protection law.⁹⁹ The General Data Protection Regulation and the Law Enforcement Directive provide that several principles must be respected when personal data are processed by private companies and law enforcement authorities.¹⁰⁰ In the proposed Regulation, the principles of data minimisation and storage limitation are at stake. The proposed Regulation does not guarantee that the preservation of the data will be limited to what is necessary to produce.¹⁰¹ The proposed Regulation stipulates that data must be preserved for a period of sixty days, unless the issuing authority confirms that a request for production has been launched.¹⁰² Once a production order has been issued, data must be preserved as long as necessary in order to be produced once the subsequent request for production is served to the service provider.¹⁰³ In case the preservation would no longer be necessary, the issuing authority shall inform the service provider “without undue delay”.¹⁰⁴

What the Commission’s Proposal does not indicate, nor does the General Approach or the Draft Report, is what instrument – the GDPR or the Law Enforcement Directive – should apply between private companies and law enforcement authorities when the latter seek access to data stored by the former for purposes other than criminal justice. The question

⁹⁶ Besides AG Saugmandsgaard Øe, in his opinion in *Ministerio fiscal*, acknowledged that the requested access did not constitute a serious interference and one of the reasons behind this assertion was that the transmission of the data was sought as a targeted measure, i.e., access by the competent authorities and for the purposes of a criminal investigation. See *Ministerio Fiscal*, opinion of AG Saugmandsgaard Øe cit. para. 37.

⁹⁷ See *Tele2* cit. para. 112; *Prokuratuur* cit. para. 30; *La Quadrature du Net and Others* cit. para. 168.

⁹⁸ See *La Quadrature du Net and Others* cit. para. 168. For an analysis of *La Quadrature du Net and Others* and *Privacy International* see J Saffert ‘Bulk Data Interception/retention Judgments of the CJEU – A Victory and a Defeat for Privacy’ (26 October 2020) European Law Blog europeanlawblog.eu.

⁹⁹ EDPB, Opinion 23/2018 cit. 12; art. 4(1) General Data Protection Regulation.

¹⁰⁰ See art. 5(1) General Data Protection Regulation cit. and art. 4(1) Law Enforcement Directive cit.

¹⁰¹ EDPB, Opinion 23/2018 cit. 6.

¹⁰² Art. 10(1) of the proposed Regulation.

¹⁰³ *Ibid.* art. 10(2).

¹⁰⁴ *Ibid.* art. 10(3).

is not purely theoretical.¹⁰⁵ Even though the GDPR and the Law Enforcement Directive contain similar principles for the processing of personal data those instruments also contain some very distinct features that are not without consequence for data subjects. For instance, the principle of purpose limitation which constitutes a safeguard against the misuse or abuse of personal data is given a different interpretation in a law enforcement context.¹⁰⁶ In *La Quadrature du Net and Others* and *Privacy International*, the Court of Justice found that data processing carried out by individuals (e.g. service providers) for, *inter alia*, law enforcement purposes falls within the scope of the General Data Protection Regulation. While when Member States do not impose processing obligations on private actors the processing is regulated by national law, subject to the application of the Law Enforcement Directive.¹⁰⁷ However, the reasoning of the Court on that matter is debatable.¹⁰⁸

Regarding the issuing authorities, the Court of Justice has ruled that access to retained data “should, as a general rule, except in cases of validly established urgency, be subject to prior review carried out either by a court or by an independent administrative body [...] following a reasoned request of competent national authorities submitted within the framework of procedures of prevention, detection or criminal prosecution”.¹⁰⁹ The proposed Regulation opens the possibility for public prosecutors to issue or authorise the issuance of production orders for subscriber data and access data¹¹⁰ hence what has to be determined is whether a public prosecutor may be considered as an independent administrative body. In recent joined cases, the Court found that French, Swedish and Belgian public prosecutor’s offices were sufficiently independent from the executive hence satisfying the requirements for issuing a European arrest warrant.¹¹¹ Following that decision, one might be tempted to reach the conclusion that a public prosecutor could meet the threshold of independence required in the context of data retention. However, the Court has ruled otherwise. In the aforementioned case of *Prokuratuur*, the third question asked by the Supreme Court of Estonia was whether the public prosecutor’s office of Estonia is an

¹⁰⁵ Regarding information sharing between private actors and public authorities see N Purtova, ‘Between the GDPR and the Police Directive: Navigating Through the Maze of Information Sharing in Public-Private Partnership’(2018) International Data Privacy Law 52.

¹⁰⁶ See C Jasserand, ‘Subsequent Use of GDPR Data for Law Enforcement Purpose – The Forgotten Principle of Purpose Limitation?’(2018) European Data Protection Law Review 152; C Jasserand, ‘Law Enforcement Access to Personal Data Originally Collected by Private Parties: Missing Data Subjects’ Safeguards in Directive 2016/680?’ (2018) Computer Law & Security Review 163.

¹⁰⁷ *La Quadrature du Net and Others* cit. para. 103; *Privacy International* cit. paras. 47-48.

¹⁰⁸ See P Vogiatzoglou and J Bergholm, ‘Privacy International & La Quadrature du Net: The Latest on Data Retention in the Name of National and Public Security – Part 3’ (27 October 2020) CITIP Blog www.law.kuleuven.be.

¹⁰⁹ *Tele2 Sverige* cit. para. 120; *Digital rights Ireland* cit. para. 62.

¹¹⁰ Art. 4(1) and (3) of the proposed Regulation.

¹¹¹ See case C-625/19 *Openbaar Ministerie (Swedish Public Prosecutor’s Office)* ECLI:EU:C:2019:108; joined cases C-566 and C-626/19 *Parquet Général du Grand-Duché du Luxembourg and de Tours* ECLI:EU:C:2019:1077; case C-627/19 *Openbaar Ministerie* (Public Prosecutor, Brussels) ECLI:EU:C:2019:1079.

independent administrative body within the meaning of *Tele2 Sverige*. In other words, the referring court is asking whether the Estonian public prosecutor has the power to authorise access to traffic and location data. In his opinion, Advocate General Pitruzzella recalled that the Court of Justice specific assessment made in that particular context cannot be applied automatically to other areas, such as the protection of personal data.¹¹² After exposing detailed considerations, he reached the conclusion that the public prosecutor's office of Estonia did not qualify as an independent administrative body because national law provides that the public prosecutor's office "is responsible for directing the pre-trial procedure, whilst also being likely to represent the public prosecution in judicial proceedings."¹¹³ In its judgement, the Court of Justice reiterated that a prior review by a court or by an independent administrative body prior to access to the data is an essential safeguard.¹¹⁴ The said court or body must be able to strike a fair balance between the needs of the investigation and the rights to protection of personal data and respect for private life of the persons concerned.¹¹⁵ The Court of Justice declared that the requirement of independence means that the authority must be a third party in relation to the authority which requests access to the data, which is not the case of the Estonian public prosecutor. The Court followed the reasoning of the Advocate General and found that due to its involvement in the conduct of the criminal investigation and its position in the proceedings, the Estonian public prosecutor does not qualify as an independent administrative body.¹¹⁶

While the Commission's Proposal was criticised, the General Approach adopted by the Council triggered even harsher criticisms (*see infra*). The Council kept the new data categories introduced by the Commission¹¹⁷ and extended the scope of application of EPOs and EPsOs. The General Approach provides that orders can be issued in proceedings concerning the execution of a custodial sentence or a detention order of at least four months.¹¹⁸ Furthermore, "in validly established emergency cases", any other competent authority – meaning other than a judge, a court, an investigating judge or a prosecutor – may issue production orders for subscriber and access data and preservation orders "without prior validation" if these authorities could issue orders in a similar domestic case without validation.¹¹⁹ In other words, in case of emergency, production orders for subscriber and access data and preservation orders no longer require prior validation by a

¹¹² *Prokuratuur*, opinion of AG Pitruzzella, cit. para. 104.

¹¹³ *Ibid.* para. 129. His opinion is puzzling. One can legitimately question the reasons justifying that a prosecutor satisfying the requirements for issuing a European arrest warrant, potentially resulting in the deprivation of someone's liberty, would not qualify as an independent administrative body in the area of the protection of personal data.

¹¹⁴ *Prokuratuur* cit. para. 51.

¹¹⁵ *Ibid.* para. 52.

¹¹⁶ *Ibid.* paras 54-55.

¹¹⁷ See art. 2(7) to (10) of the General Approach cit.

¹¹⁸ *Ibid.* see arts 5(3), 5(4)(d) (production orders) and 6(2) (preservation orders).

¹¹⁹ *Ibid.* see art. 4(5) read in conjunction with arts 4(1)(a) and (3)(a).

judge, a court, an investigating judge or a prosecutor when issued by “another competent authority”.¹²⁰ By doing so, the General Approach further weakened the safeguards for subscriber and access data.

The European Parliament, in its Draft Report, rejected the Commission’s data categories¹²¹ and opted to return to the traditional data categories – subscriber data, traffic data and content data – “based on existing EU law and national legislation and in line with Court of Justice case-law”.¹²² In the Report adopted in December 2020, while the European Parliament sticks to the traditional categories of traffic data and content data,¹²³ the definition of subscriber data includes an additional type of data compared to the Draft Report. Subscriber data also covers “the type of service provided and the duration of the contract with the service provider, which is strictly necessary for the sole purpose of identifying the user of service”.¹²⁴ Besides, the Report provides that EPOs may be issued to obtain IP addresses “for the sole purpose of determining the identity of specific persons with a direct link to the specific proceedings” under the same conditions that EPOs for subscriber information.¹²⁵ Allowing the issuance of EPOs for such a category of data strongly echoes the recent jurisprudence of the Court of Justice. In *La Quadrature du Net and Others*, the Court of Justice opened to the door to the general and indiscriminate retention of IP addresses for the purpose of, *inter alia*, fighting serious crime.¹²⁶ The Court recognized that while IP addresses fall within of the category of traffic data, in relation to email and internet telephony IP addresses of the *source of the communication* is a category of data that is less sensitive than other traffic data.¹²⁷ The Court also acknowledged that for criminal offences committed online, IP addresses might be the only means to identify the suspect or perpetrator.¹²⁸ In order words, by allowing the general and indiscriminate retention of such data the Court provides law enforcement authorities with a tool to identify unknown individuals suspected of having committed a criminal offence and so does the European Parliament Report. There is, however, a difference between the jurisprudence of the Court and the Report. In the latter, EPOs for IP addresses can be issued for

¹²⁰ The article stipulates that the validation must be sought ex-post “without undue delay, at the latest within 48 hours”. When such ex-post validation is not granted, the issuing authority must withdraw the order “immediately and shall, in accordance with its national law, either delete any data that was obtained or ensure the data are not used as evidence”.

¹²¹ Amendments 91 and 92 of the European Parliament Draft Report cit.

¹²² *Ibid.* 147.

¹²³ See art. 2(8) and (9) of the European Parliament Report cit.

¹²⁴ *Ibid.* See art. 2(7).

¹²⁵ *Ibid.* See arts 4(1) and 5(3).

¹²⁶ See *La Quadrature du Net and Others* cit. para. 155.

¹²⁷ *Ibid.* para. 152. Emphasis added. The same reasoning cannot be applied to the IP addresses of the recipient of the communication.

¹²⁸ *Ibid.* para. 154.

all criminal offences¹²⁹ while in the aforementioned case the Court allowed for the retention of such data, and *a fortiori* subsequent access by state authorities, only for the purpose of fighting serious crime. Nevertheless, as argued earlier, the jurisprudence of the Court concerns data retention and cannot be completely transposed to EPOs and EPsOs. EPOs for IP addresses will be issued in relation to specific proceedings and for a specific period of time hence constituting a targeted measure.

Regarding EPOs for traffic and content data, while the Draft Report raised by two years the threshold to issue such orders,¹³⁰ in the end the European Parliament maintained the threshold contained in the Commission's Proposal, i.e., criminal offences punishable in the issuing State by a custodial sentence of a maximum of at least three years.¹³¹ Concerning the issuing authorities, the Report limits the competence of public prosecutors. It provides that EPOs for traffic data and content data may only be issued by a judge, a court or an investigating judge.¹³² Public prosecutors may only issue EPsOs and EPOs for subscriber data and IP addresses.¹³³

As exposed throughout this part, the Commission's Proposal intends to establish common standards for direct cooperation with service providers in cross-border cases. Nevertheless, Member States will still be required to combine EU rules with national rules on criminal procedure. The new cooperation regime will be regulated by national laws, especially the national laws of the issuing Member State. Indeed, according to art. 5(2) of the proposed Regulation an EPO can only be issued if a similar measure would be available in a comparable domestic case. In other words, the substantive requirements (e.g., threshold, privileges and immunities) for a domestic production order apply accordingly.¹³⁴ The Commission's Proposal does not refer to the protection provided by formal and substantive requirements for production orders under the law of the Member State where the service provider is addressed. As a consequence, and in accordance with the principle of mutual recognition, the competent authority of the enforcing Member State must enforce the order even if domestic law provides for a higher standard of protection than the law of the issuing Member State.¹³⁵ Therefore, the European Union's ability to maintain the high level of protection granted to the right to respect for private life and to the protection of personal data is crucial in order to overcome the fragmentation of national laws which

¹²⁹ Art. 5(3) of the European Parliament Report cit.

¹³⁰ Art. 5(4) of the European Parliament Draft Report cit. stipulates that EPOs for these categories "may only be issued for criminal offences punishable in the issuing State by a custodial sentence of a maximum sentence of at least five years". One can ask whether this new threshold could have led to a race to more severe penalties at national level in order to fall within this requirement.

¹³¹ Art. 5(4) of the European Parliament Report cit.

¹³² Amendment 106 of the European Parliament Draft Report cit.

¹³³ Art. 4(1)(a) and (3)(a) of the European Parliament Report cit.

¹³⁴ M Böse, 'An Assessment of the Commission's Proposals on Electronic Evidence' cit. 43.

¹³⁵ *Ibid.* 39.

may create variable levels of protection among Member States. That said, in some instances, European law may be less strict than the law of the issuing Member State. As previously explained, several authorities are entitled to issue EPOs and EPOs. In the proposed Regulation while judges, courts and investigating judges may issue both types of orders and for all types of data, public prosecutors may only issue EPOs and EPOs for subscriber data and access data. Given the fact that a Regulation, and not a directive, will be enacted, Member States will not have the option to restrict the circle of authorities entitled to issue EPOs and EPOs, by further limiting the power of the public prosecutor for instance.¹³⁶ As a result, a prosecutor might be in the position to issue a preservation order at the European level while it would not be possible in a purely domestic context. In this scenario, conditions to issue orders may be stricter for national orders than for European orders which would have the potential to influence national law. States might have been tempted to align their national legislation with (lower) EU standards. The Report does suppress that risk by providing that EPOs and EPOs may be issued “if it could have been ordered under the same conditions in a similar domestic case”.¹³⁷

By way of conclusion, it can be asserted that the EU institutions have different visions on the conditions that should apply to the issuance of EPOs and EPOs, which offer different levels of protection to the right to protection of personal data and the right to respect for private life. Another highly, if not the most, controversial aspect of the Commission's proposed Regulation concerns the role assigned to service providers.¹³⁸ In the framework proposed by the Commission, a private actor will have to assess compliance with the EU Charter – a responsibility which, in principle, lies with Member States and the EU institutions. The following part of this contribution will discuss the protective functions allocated to service providers in the e-Evidence Proposal and highlight some of the problematic aspects related to it. Then, it will present the option chosen by the European Parliament to prevent service providers from becoming legal assessors of fundamental rights.

IV. TOWARDS A RE-ALLOCATION OF PROTECTIVE FUNCTIONS?

The approach chosen by the Commission regarding service providers has been described as a re-allocation of protective functions.¹³⁹ In the Commission's proposed Regulation, the legal representative of the service provider is given the role of the “addressee” of

¹³⁶ S Tosza, 'The European Commission's Proposal on Cross-Border Access to e-Evidence' cit. 214.

¹³⁷ Arts 5(2) and 6(2) of the European Parliament Report cit.

¹³⁸ See European Digital Rights (EDRI), 'EU “e-Evidence” Proposals Turn Service Providers into Judicial Authorities' (17 April 2018) edri.org; EuroISPA, 'e-Evidence: EuroISPA Adopts Position Paper' (3 July 2018) www.euroispa.org; Council of Bars and Law Societies of Europe (CCBE), 'Recommendations on the Establishment of International Rules for Cross-Border Access to Electronic Evidence' (28 February 2019) www.ccbe.eu 3, (hereafter CCBE, Recommendations on Cross-Border Access to Electronic Evidence); M Böse, 'An Assessment of the Commission's Proposals on Electronic Evidence' cit. 41.

¹³⁹ Expression used by M Böse, 'An Assessment of the Commission's Proposals on Electronic Evidence' cit. 41.

EPOs and EPsOs.¹⁴⁰ In practice, a competent judicial authority in the EU, the issuing authority, will address an order – to preserve or produce data – through a standardised certificate¹⁴¹ directly to the service provider's legal representative in the EU and the data will be provided directly to the issuing authority.¹⁴² The authorities in the EU Member State where the service provider is addressed will not receive the order and will not be involved in the process except when the service provider refuses to execute an order or does not comply with an order.¹⁴³ This is a completely new paradigm. In the sphere of criminal justice, the enforcement of a judicial decision of one Member State in another Member State has always required the intervention of the competent authorities of the Member State where the decision is executed, notwithstanding the principle of mutual recognition. This is the case even for recent instruments such as the EIO Directive.¹⁴⁴

Because service providers will be the addressee of EPOs and EPsOs, they will bear the responsibility to execute these orders and the Commission's proposed Regulation provides for several grounds of refusal to execute EPOs and grounds to oppose the enforcement of EPOs and EPsOs. Concerning EPOs, art. 9(5), subparagraph 2 of the proposed Regulation stipulates that the addressee, i.e., the service provider's legal representative, may refuse to execute an EPO if it is apparent that it "manifestly violates the Charter" or that it is "manifestly abusive". At that stage, this possibility does not exist for EPsOs. If the service provider does not comply with its obligation, the Member State where it is addressed steps in to enforce the order. During this enforcement process, the service provider may oppose the EPO, but also the EPsO, if it is apparent that it "manifestly violates the Charter" or that it is "manifestly abusive".¹⁴⁵ This is no coincidence that the State where production and preservation orders are executed is called the enforcing State in the proposed Regulation whereas in the EIO Directive the State is called the executing State, different names entail different functions. In the proposed Regulation, the State where the EPO or the EPsO is executed is only assigned a very limited role of review at the enforcing stage¹⁴⁶ which means that this State may only have a say if the service provider refuses to comply with the order.¹⁴⁷ *A contrario*, when the service provider complies with an order, the enforcing State might not even be aware of the existence of the

¹⁴⁰ Art 7(1) of the proposed Regulation. If a designated legal representative does not exist or does not comply with its obligations, the order may be addressed to any establishment of the service provider in the Union. See art. 7(2) to 7(4) of the proposed Regulation.

¹⁴¹ *Ibid.* art. 8(1).

¹⁴² *Ibid.* art. 9(1).

¹⁴³ Explanatory Memorandum cit. 3.

¹⁴⁴ See art. 1(1) EIO Directive cit.

¹⁴⁵ Art. 14(4)(f) and. 14(5)(e) of the proposed Regulation.

¹⁴⁶ See *Ibid.* art. 14(6).

¹⁴⁷ Under art. 14(2) of the proposed Regulation, "the enforcing authority shall without further formalities recognise a European Production Order or European Preservation Order transmitted in accordance with paragraph 1 and shall take the necessary measures for its enforcement, *unless the enforcing authority considers that one of the grounds provided for in paragraphs 4 or 5 apply or that the data concerned is protected*

order, neither will it be able to object. As a consequence, the enforcing State will not be able to exercise its protective functions by refusing to execute orders on human rights' grounds.¹⁴⁸ The protective functions are assigned to the competent authority in the issuing State and the addressee of the order, a private actor.

Several actors have strongly advocated against the curtailing of the role and responsibilities of the Member State where the order is to be executed.¹⁴⁹ Under human rights law, States have the obligation to respect human rights and to ensure these rights to all individuals within its territory.¹⁵⁰ The LIBE Committee's *Rapporteur* stressed that, taking into account the fact that all Member States of the EU are parties to the European Convention on Human Rights (ECHR), they are responsible for the protection of human rights on the territory under their jurisdiction.¹⁵¹ In this regard, an important aspect should not be overlooked. In the digital world, the State where the order is executed is rarely the State where the person concerned by the order resides.¹⁵² In other words, there may not

by an immunity or privilege under its national law or its disclosure may impact its fundamental interests such as national security and defence". Emphasis added. The issuing State transfers the order to the State where the service provider has its representative (the enforcing State) in order for the latter to take measures to enforce the order.

¹⁴⁸ M Böse, 'An Assessment of the Commission's Proposals on Electronic Evidence' cit. 41. In the context of the European arrest warrant, a refusal to execute for violation of fundamental rights has long been a hard bone of contention. The Framework Decision on the European arrest warrant (EAW) does not include a ground for refusal based on fundamental rights. At first, the Court of Justice leaned towards law-enforcement demands despite fundamental rights considerations. However, more recently, the Court seems to have restored the balance between the protection of fundamental rights and the effectiveness of the instrument by allowing States to refuse the execution of an EAW based on human rights grounds. On this topic see L Mancano, 'A New Hope? The Court of Justice Restores the Balance Between Fundamental Rights Protection and Enforcement Demands in the European Arrest Warrant System' in A Weyembergh and C Brière (eds), *The Needed Balances in EU Criminal Law. Past, Present and Future* (Hart Publishing 2018) 285; J Ouwerkerk, 'Balancing Mutual Trust and Fundamental Rights Protection in the Context of the European Arrest Warrant' (2018) *European Journal of Crime, Criminal Law and Criminal Justice* 103.

¹⁴⁹ See, for instance, Opinion 23/2018 cit. 17; Opinion 7/2019 cit. para. 42; Recommendations on Cross-Border Access to Electronic Evidence cit. p. 3; European Parliament (LIBE Committee), 3rd Working Document (A) DT\1176298, Execution of EPOC(-PR)s and the role of service providers 4-5, (hereafter EP (LIBE Committee), 3rd Working Document (A)).

¹⁵⁰ See United Nations, International Covenant on Civil and Political Rights of 23 March 1976, art. 2.

¹⁵¹ EP (LIBE Committee), 3rd Working Document (A) cit. 5; see Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) of the 4 November 1950, art. 1.

¹⁵² See T Christakis, 'Lost in Notification? Protective Logic as Compared to Efficiency in the European Parliament's e-Evidence Draft Report' (7 January 2020) Cross-Border Data Forum www.crossborderdataforum.org. He emphasizes that this is a big difference compared to the physical world where the executing State is often at the same time the affected State. For instance, when State A resorts to mutual legal assistance in order to request from State B an investigative measure that will be executed on its territory (e.g. search and seizure of property), the affected State (State B) is also the executing State. State B can exercise its protective functions and refuse to execute such a request if that State considers that this would violate the human rights of the person present on its territory and targeted by the request.

be a match between the territory of the enforcing State and the territory where the person targeted by the order resides hence some authors¹⁵³ and the European Parliament's *Rapporteur* (see *infra*) plead for a notification to the "affected State", meaning the Member State of permanent residence of the affected person.¹⁵⁴ Two questions therefore arise. First, can a Member State rely on EU law to be discharged of its protective functions?¹⁵⁵ In *Matthews v United Kingdom* the European Court of Human Rights (ECtHR) ruled that even after a contracting State transfers part of its sovereignty to an international organisation such as the EU (European Community at the time), its responsibility to protect human rights continues.¹⁵⁶ Subsequently, the European Court developed the *Bosphorus* doctrine. The ECtHR considers that the EU protects fundamental rights in a manner that is at least equivalent to the ECHR and presumes that "a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership".¹⁵⁷ However, this presumption is rebuttable, if "in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient".¹⁵⁸ During a hearing held by the European Parliament in November 2018, Marko Bošnjak, judge at the ECtHR, recalled that the Court has dealt with mutual recognition in previous cases and "has accepted the presumption of equal protection but if the authorities of the enforcing State are faced with a complaint that the protection of conventional rights has been manifestly deficient and this cannot be remedied by EU law, they cannot refrain from examining the complaint on the ground that they are just applying EU law".¹⁵⁹

The second question concerns the role of private actors. May a service provider exercise protective functions?¹⁶⁰ As of today, neither the jurisprudence of the European Court nor the jurisprudence of the Court of Justice have ventured into this matter. On the political level, the idea of private actors acting as fundamental rights' assessors is highly

¹⁵³ See T Christakis, 'E-Evidence in the EU Parliament: Basic Features of Birgit Sippel's Draft Report' (21 January 2020) European Law Blog europeanlawblog.eu.

¹⁵⁴ Amendment 100 of the Draft Report. However, the affected State will not have the ability to object orders (see *infra*).

¹⁵⁵ This issue was raised by Judge Marko Bošnjak of the European Court of Human Rights during the EP e-evidence hearing.

¹⁵⁶ See ECtHR *Matthews v United Kingdom* App n. 24833/94 [18 February 1999] para. 32.

¹⁵⁷ ECtHR *Bosphorus Hava Yollari v Ireland* App n. 45036/98 [30 June 2005] para. 156.

¹⁵⁸ *Ibid.*

¹⁵⁹ Statement by Judge M Bošnjak, EP e-evidence hearing. It has been stated in *Avotins v Latvia* regarding art. 6 of the Convention and concerned the functioning of the EU system of mutual recognition of judgments in civil and commercial matters. See ECtHR *Avotins v Latvia* App n. 17502/07 [23 May 2016] para. 116. This jurisprudence was confirmed later on in a number of instances. In the context of the EAW, see ECtHR *Pirozzi v Belgium* App n. 21055/11 [17 April 2018].

¹⁶⁰ It is beyond the scope of this *Article* to determine whether service providers should and could play a role in the protection of fundamental rights. This question will be addressed over the next few years by the present author in her thesis.

contentious. The LIBE Committee, has taken a strong stance against the protective functions assigned to service providers and the corresponding loss of protective functions for the State where the order is to be executed (see *infra*). What can be said so far is that, if the EU institutions were to agree that service providers may play a role in the protection of fundamental rights, the way this role has been shaped in the proposed Regulation is problematic in several respects. Legal and practical considerations will allow us to demonstrate that the proposed Regulation has not given service providers proper means to duly fulfil protective functions.

First of all, the service provider's legal representative will not receive the full order, only a standardized certificate which will contain very limited information regarding the specific case to which an order is linked. This certificate will also not contain the necessity and proportionality analysis related to the order.¹⁶¹ These two elements alone demonstrate that a human rights assessment will be hardly possible. Furthermore, the order will refer to a foreign legal system, namely the law of the issuing State. One can argue that the criminal provisions on which an order is based may not be sufficiently accessible to the service provider.¹⁶² Even if foreign national laws were to be accessible, it would be unrealistic to expect service providers to have sufficient knowledge of the functioning of each Member State's criminal justice system. In addition, a closer look at the human rights clause displayed in the proposed Regulation reveals that the protective functions delegated to service providers can only be described as limited, if not weak. The human rights clause contained in arts 9(5), 14(4)(f) and 14(5)(e) is limited to "manifest" violations that are "apparent from the sole information contained in the order". The term "manifest" has not been defined and, as previously noted, the certificate will contain very little information. The Commission itself acknowledged that this ground of refusal will apply to exceptional cases only, for instance to an order requesting the production of content data pertaining to undefined group of people in a geographical area or with no link to concrete criminal proceedings.¹⁶³ Finally, it should be noted that service providers are not obliged to assess this ground for refusal before executing EPOs.¹⁶⁴ By contrast, service providers must execute EPOs and EPsOs¹⁶⁵ and may be sanctioned for failing to do so (see *infra*). At

¹⁶¹ According to art. 8(3) of the proposed Regulation, the certificate for production orders will contain the information listed in art. 5(3)(a) to (h) of the proposed Regulation which does not include the grounds for the necessity and proportionality of the measure. For preservation orders, under art. 8(4) of the proposed Regulation, the certificate will contain the information listed in art. 6(3)(a) to (f) which does not include the grounds for the necessity and proportionality of the measure.

¹⁶² EDRI, 'Position Paper on the European Commission's Proposal for a Regulation on European Production and Preservations Orders for Electronic Evidence in Criminal Matters' cit. 20.

¹⁶³ Explanatory Memorandum cit. 21.

¹⁶⁴ See art. 9(5)(2) of the proposed Regulation.

¹⁶⁵ Art. 9(1) of the proposed Regulation states that service providers "shall ensure that the requested data is transmitted". Art. 10(1) states that the service provider "shall, without undue delay, preserve the data requested".

the enforcement stage, service providers “may oppose” the enforcement of EPOs¹⁶⁶ and EPsOs¹⁶⁷ when “based on the sole information contained in the [order], it is apparent that it manifestly violated the Charter or that it is manifestly abusive”.¹⁶⁸ Then, it will be for the enforcing authority to decide whether or not to enforce the order¹⁶⁹ which means that even if the service provider’s legal representative had opposed the order on fundamental rights’ ground, he may nevertheless be obliged to execute it.

The Council did not address the aforementioned issues, instead it deleted the human rights clause from grounds upon which service providers are permitted to refuse to execute production orders¹⁷⁰ and from the list of grounds upon which service providers may oppose the enforcement of an order.¹⁷¹ As a consequence, in the General Approach the responsibility to protect fundamental rights lies solely with the issuing State. This goes even further than the Commission’s approach and the General Approach gave rise to harsher criticisms than the Commission’s Proposal.¹⁷² The European Parliament intends to reverse the paradigm shift and return to a traditional mutual recognition approach. The Report adopted by the European Parliament prevents service providers from becoming legal assessors of fundamental rights (see *infra*). Prior to the Report being released, the LIBE Committee’s *Rapporteur* had stated that the wording of the human rights clause was very vague and suggested to replace it with the definition from art. 11(1)(f) of the EIO Directive: “there are substantial grounds to believe that the execution of the investigative measure indicated [in the EIO] would be incompatible with the executing State’s obligations in accordance with art. 6 TEU and the Charter”. She considers that a fundamental rights clause has to be sufficiently broad referring to all rights and to art. 6 TEU which covers the three layers of fundamental rights protection, namely: the ECHR, the EU Charter and common constitutional tradition.¹⁷³

¹⁶⁶ *Ibid.* art. 14(4).

¹⁶⁷ *Ibid.* art. 14(5).

¹⁶⁸ *Ibid.* art. 14(4) (f) and (5)(e).

¹⁶⁹ *Ibid.* art. 14(6).

¹⁷⁰ See art. 9(5) of the General Approach cit.

¹⁷¹ *Ibid.* art. 14(4) and (5).

¹⁷² See C Berthélémy, ‘EU Council’s General Approach on “e-Evidence”: From Bad to Worse’ (19 December 2018) edri.org; at least seven EU States, including Germany, opposed the Council’s draft. The Netherlands, for instance, denounced the Council’s text for being adopted “too fast” and stated that it “opened the way for abuse by EU countries that lack sufficient guarantees over the rule of law and fundamental rights”. See T Christakis, ‘Lost in Notification? Protective Logic as Compared to Efficiency in the European Parliament’s e-Evidence Draft Report’ cit.

¹⁷³ EP (LIBE Committee), 6th Working Document (B) cit. 3. The *Rapporteur* noted that “taking over the same wording as the EIO seems to be even more important in order to overcome the current patchwork of clauses from different EU mutual recognition legal instruments and CJEU case-law. Even though it has become clear over time that a clear fundamental rights clause is essential for guaranteeing fundamental rights obligations, the practice has rather been to introduce different clauses for each mutual recognition instrument, with a clear intention by some to limit it or render it inapplicable”.

Secondly, considerations of a more practical nature must be taken into account if EU institutions were to consider giving a role to service providers. First, it can be noted that the time-limit for compliance with EPOs are pretty strict.¹⁷⁴ The mandatory deadline is ten days maximum upon receipt of the certificate and this deadline is reduced to six hours in case of emergency.¹⁷⁵ It has been claimed that these time-limits are too short to allow for a proper assessment of whether there are any grounds not to comply with the order and take appropriate decision.¹⁷⁶ Some consider that it will certainly not allow for an in-depth assessment of human rights issues.¹⁷⁷ EuroISPA, the world's largest association of internet service providers, warned that the timeframes are not feasible for small and medium enterprises (SMEs), especially the six hours deadline. According to the association, this deadline is not practicable for a vast majority of its members.¹⁷⁸ In addition to time constraints, undertaking a human rights assessment requires financial and personal resources. Unfortunately, the proposed Regulation does not harmonise the reimbursement of costs. Art. 12 of the proposed Regulation specifies that service providers may claim reimbursement of their costs by the issuing State if it is provided by the national law of that State. Therefore, depending on the national law of the issuing Member State, service providers may or may not be reimbursed for the costs of their cooperation. It could be argued that big companies such as Facebook and Microsoft, contrary to SMEs, do have the means and resources to comply with strict deadlines and perform human rights assessment. Nevertheless, big companies receive a staggering number of requests.¹⁷⁹ The question of who should bear the cost of cooperation needs to be addressed. While the Council General Approach follows the Commission's approach,¹⁸⁰ the

¹⁷⁴ For EPOs, art. 10(1) of the proposed Regulation provides that upon receipt of the certificate, "the addressee shall, without undue delay, preserve the data requested".

¹⁷⁵ See art. 9(1) and (2) of the proposed Regulation. An emergency case is defined as a situation where there is an imminent threat to life or physical integrity of a person or to a critical infrastructure. See Explanatory Memorandum cit. 19.

¹⁷⁶ Opinion 23/2018 cit. 6; Opinion 7/2019 cit. para. 62; EDRI, 'Position Paper on the European Commission's Proposal for a Regulation on European Production and Preservations Orders for Electronic Evidence in Criminal Matters' cit. 5. The EDPS and EDRI recommended to make the six hours deadline for emergency cases a preferred time-limit rather than a mandatory one. See Opinion 7/2019' cit. para. 65; EDRI, 'Position Paper on the European Commission's Proposal for a Regulation on European Production and Preservations Orders for Electronic Evidence in Criminal Matters' cit. 5.

¹⁷⁷ M Böse, 'An Assessment of the Commission's Proposals on Electronic Evidence' cit. 41.

¹⁷⁸ EuroISPA, 'Position Paper on the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters' (June 2018) www.euroispa.org 2.

¹⁷⁹ For an overview of the number of requests from law enforcement authorities received by Microsoft, for instance, see www.microsoft.com.

¹⁸⁰ See art. 12 of the General Approach cit.

European Parliament Report opens the possibility for service providers to obtain reimbursement of the costs exposed to cooperate with law enforcement authorities.¹⁸¹

Finally, unlike a public authority, service providers will be subject to an obligation to produce or preserve the requested data, and will be confronted with the risk to be subjected to enforcement measures and pecuniary sanctions in case of non-compliance.¹⁸² Indeed, under art. 13 of the proposed Regulation, Member States are required to enact rules on pecuniary sanctions applicable to infringements of the obligations to execute EPOs and EPsOs.¹⁸³ The proposed Regulation does not include specific minimum rules, it refers, as for the reimbursement of costs, to national law and solely requires Member States to provide “effective, proportionate and dissuasive” sanctions. In the Council General Approach sanctions of up to 2 per cent of the total worldwide annual turnover of the service provider’s preceding financial year can be imposed. It is not unreasonable to argue that such a sanction may deter service providers from objecting to EPOs and EPsOs.¹⁸⁴ However, service providers have obligations towards their customers under the GDPR. Service providers may legitimately ask what would be the consequences of not opposing the execution or the enforcement of an order that does actually violate the Charter. Can a service provider be held responsible for such violation? The proposed Regulation¹⁸⁵ does not offer much guarantee to service providers nor does the Council General Approach¹⁸⁶ – a statement is simply included in the Recitals – whereas the European Parliament Report provides that, “without prejudice to data protection obligations”, service providers shall not be held liable in Member States for the consequences resulting from compliance with an EPOC or an EPsO.¹⁸⁷ The European Parliament also abandons the Council General Approach punitive sanction of up to 2 per cent of the total worldwide annual turnover of the service provider’s preceding financial year case in case of non-

¹⁸¹ Art. 12 of the European Parliament Report provides that “where so claimed by the service provider, the issuing State shall reimburse the justified costs borne by the service provider and related to the execution of the European Production order or the European Preservation Order”.

¹⁸² M Böse, ‘An Assessment of the Commission’s Proposals on Electronic Evidence’ cit. 41.

¹⁸³ Pecuniary sanctions shall also be applicable to infringements of the obligations pursuant to art. 11 of the proposed Regulation which relates to the confidentiality of production and preservation orders.

¹⁸⁴ T Christakis, ‘Lost in Notification? Protective Logic as Compared to Efficiency in the European Parliament’s e-Evidence Draft Report’ cit.; EDPS, ‘Opinion 7/2019’, cit., para. 66; EDRI, ‘Position Paper on the European Commission’s Proposal for a Regulation on European Production and Preservations Orders for Electronic Evidence in Criminal Matters’ cit. 17.

¹⁸⁵ Recital 46 of the proposed Regulation: “Notwithstanding their data protection obligations, service providers should not be held liable in Member States for prejudice to their uses or third parties exclusively resulting from good faith compliance with an EPOC or an EPOC-PR”.

¹⁸⁶ Recital 46 of the General Approach: “Service providers should not be held liable in Member States for prejudice to their uses or third parties exclusively resulting from good faith compliance with an EPOC or an EPOC-PR. The responsibility to ensure the legality of the Order, in particular its necessity and proportionality, should lie with the issuing authority”.

¹⁸⁷ Art. 13(1a) of the European Parliament Report cit.

compliance with orders. Art. 13(1) of the Report refers to sanctions that “shall be effective, proportionate and dissuasive”, as did the Commission in its proposed Regulation.

In terms of costs and responsibility, the European Parliament Report puts service providers a much more comfortable situation which is unmistakably linked to the limited role granted to these private actors in the Report. As briefly mentioned earlier, the European Parliament intends to reverse the paradigm shift and to prevent service providers from becoming legal assessors of fundamental rights.¹⁸⁸ The responsibility to protect fundamental rights would remain with the issuing State and the executing State. The change of terminology between the Commission's Proposal – enforcing State – and the Report – executing State – is, again, no coincidence. The Report provides that EPOs and EPsOs shall be addressed to the service provider and to the executing authority (in the State of the service provider) simultaneously.¹⁸⁹ By comparison, the Draft Report provided that, in addition, the EPOs shall be addressed simultaneously to the affected State (i.e. the state of residence of the data subject concerned by the EPO) “where it is clear that the person whose data is sought is residing neither in the issuing State nor the executing State”.¹⁹⁰ This implied that EPOs would potentially have had three different addressees.¹⁹¹ The notification system contained in the Report gives a prominent role to the executing State. This means that countries hosting several service providers, or the one of most important players such as Facebook, will find themselves assailed by EPOs and face a very heavy workload.¹⁹²

For EPOs relating to subscriber data and IP addresses and for EPsOs, while the order is addressed directly and simultaneously to the executing authority, the Report provides that the information of the executing authority “shall not have a suspensive effect on the obligation of the service provider” to transmit or preserve the data.¹⁹³ In case of an EPO for subscriber data and IP addresses, the service provider must ensure that the data is

¹⁸⁸ European Parliament Draft Report cit. 146.

¹⁸⁹ Art. 7(1) of the European Parliament Report cit.

¹⁹⁰ Amendment 130 of the Draft Report cit.

¹⁹¹ However, each addressee would have had different prerogatives. While the executing State could object EPOs on several grounds that include a human rights clause identical to the one contained in the EIO Directive (see Amendment 142 of the European Parliament Draft Report cit.), the affected State did not have such a capacity. The affected State could only inform the executing State if the former considers that one of the grounds for non-recognition or non-execution applies (see Amendment 146 of the European Parliament Draft Report). While this mechanism is certainly an improvement in terms of fundamental rights protection compared to the Commission's proposed Regulation and the Council General Approach one may legitimately question whether it would create negative repercussions on the efficiency of the instrument. As a matter of fact, the Draft Report has provoked a strong reaction from the Commission. The institution claimed that the amendments suggested by the LIBE Committee's *Rapporteur* would have a major impact on the efficiency of the e-Evidence Proposal. See T Christakis, ‘Lost in Notification? Protective Logic as Compared to Efficiency in the European Parliament's e-Evidence Draft Report’ cit.

¹⁹² Théodore Christakis notes that it is not surprising that Ireland was in favor of notifying the Member State where the person whose data are sought is residing. See T Christakis, ‘E-Evidence in a Nutshell: Developments in 2018, Relations with the CLOUD Act and the Bumpy Road Ahead’ cit.

¹⁹³ See arts 8a(1) and 10(1a) of the European Parliament Report cit.

transmitted directly to the competent authority in the issuing state, as soon as possible and at the latest 10 days upon receipt of the EPO¹⁹⁴ or within 16 hours in case of emergency.¹⁹⁵ The executing authority has 10 days to invoke a ground for non-recognition or non-execution.¹⁹⁶ If the executing authority invokes such a ground, the Report provides that if the data have not yet been transmitted to the issuing authority, the service provider shall not transmit the data.¹⁹⁷ However, the Report does not impose the obligation for the issuing authority to erase the data in case it would have been transmitted before the executing authority invoked a ground for non-recognition or non-execution. Regarding EPOs for traffic data and content data, under art. 9(1a) of the Report, the executing authority must decide whether or not to refuse the execution of the EPO based on the grounds for non-execution or non-recognition listed in art. 10a which includes a human rights clause.¹⁹⁸ The deadline for the executing authority to refuse to execute the EPO is identical to the deadline to invoke grounds for non-execution or non-recognition in relation to EPOs for subscriber data and IP addresses.¹⁹⁹ The service provider may transmit the data directly to the issuing authority where the executing authority has not invoked any grounds for non-execution or non-recognition within 10 days upon receipt of the EPPO.²⁰⁰ Furthermore, the Report also conditions the transmission of traffic data and content data to the explicit written approval of the executing authority if the issuing State is subject to a procedure under art. 7(1) or (2) of the Treaty on the European Union. In other words, service providers are not allowed to transmit traffic data and content data to Member States being subject to infringement proceedings for violations of EU law without the approval of the executing State.

Regarding the role of service providers, the Report allows these private actors to flag issues with EPOs and EPsOs and uses a language similar to the Commission's Proposal. Indeed, the Report specifies that service providers may inform the executing authority that an EPO or EPsOs is manifestly abusive or exceeds the purpose of the order.²⁰¹

To conclude, it makes no doubt that putting service providers in the position of protecting European citizens' fundamental rights raises questions. As discussed above, one may ask if these private actors are sufficiently equipped and knowledgeable to assess the impact of an order on the fundamental rights of the person concerned. We should also ask whether these actors are willing to play a part. Telecommunications operators, for

¹⁹⁴ *Ibid.* art. 8a(2). The service provider also has the obligation to simultaneously send a copy of the data transferred for information to the executing authority.

¹⁹⁵ Art. 8a(3) of the European Parliament Report cit.

¹⁹⁶ *Ibid.* art. 8a(4). The executing authority must immediately inform the service provider and the issuing authority of its decision.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.* see art. 10a(1)(c).

¹⁹⁹ *Ibid.* art. 9(1a).

²⁰⁰ *Ibid.* art. 9(2b).

²⁰¹ *Ibid.* arts 8a(7), 9(5)(2) and 10(6).

instance, have clearly shown reluctance and stated they did not want to adjudicate on citizen's fundamental rights and they were not in position to do so.²⁰² Microsoft, however, saw the Commission's Proposal as a "positive step forward".²⁰³ BSA | The Software Alliance, the leading advocate for the global software industry, welcomed the Commission's Proposal while expressing concerns over the timeframes for compliance and emphasized that adequate time is needed for service providers to evaluate all data requests.²⁰⁴ It is now up to the EU institutions to decide whether it is feasible and, more importantly, acceptable for private actors to play a role in the protection of fundamental rights and, if so, to what extent. In this regard, it may be worth noting that even those who are among the most critical towards the Commission's Proposal, such as EDRI, have acknowledged that service provider might play a role in assessing the intrusiveness of law enforcement demands as they are best placed to know about the nature and amount of data requested and the technicalities related to the production and transfer of data.²⁰⁵ Service providers can flag issues that may not be identified or dealt with by the States concerned.²⁰⁶ It is also important to recall that service providers have obligations towards their customers in terms of data protection (see *supra*). Whatever the European institutions will decide, the Commission's Proposal has left room for improvement. The analysis on the limited role of service providers provided above, clearly indicates that the Commission did not intend for service providers to fill the shoes of an executing State.²⁰⁷ This creates a situation where the issuing State would be the sole guardian of fundamental rights and has been considered unacceptable for some of the stakeholders involved, especially the European Parliament.

²⁰² EP (LIBE Committee), 3rd Working Document (A) cit. 4; EuroISPA strongly advocates against service providers becoming actors responsible for checking orders against the local or the Issuing Member State's law as well as to signal non-compliant or abusive orders. See EuroISPA, 'Position Paper on the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters' cit. 1; for the Deutsche Telekom see A Petri, 'No Law Enforcement by Private Corporations' (10 May 2018) www.telekom.com.

²⁰³ J Frank and L Cossette, 'The e-Evidence Proposal – A Positive Step Forward' (18 April 2018) Microsoft EU Policy Blog blogs.microsoft.com.

²⁰⁴ BSA | The Software Alliance, 'BSA Welcomes Draft EU e-Evidence Legislation. Advocates for continued dialogue' (16 April 2018) www.bsa.org.

²⁰⁵ EDRI, 'Position Paper on the European Commission's Proposal for a Regulation on European Production and Preservations Orders for Electronic Evidence in Criminal Matters' cit. 25.

²⁰⁶ See T Christakis, "'Big Divergence of Opinion" on e-Evidence in the EU Council: A Proposal in Order to Disentangle the Notification Knot' (22 October 2018) Cross-Border Data Forum www.crossborderdataforum.org.

²⁰⁷ M Stefan and G Gonzalez Fuster consider that "the very rationale underlying the different provisions on the role of service providers does not, as a matter of fact, appear to be concerned with effectively replacing judicial authorities in terms of rule of law requirements, but rather with facilitating their intervention, and mitigating some possible conflicts". See M Stefan and G González Fuster, 'Cross-Border Access to Electronic Data Through Judicial Cooperation in Criminal Matters – State of the Art and Latest Developments in the EU and the US' cit. 40.

V. CONCLUSIONS

The e-Evidence Proposal has led to an institutional confrontation between the Commission and the Council, on the one hand, and the European Parliament, on the other hand.²⁰⁸ While the former plead for an instrument based on an efficiency logic, the latter is a strong advocate of fundamental rights – and their positions seem hardly reconcilable. Numbers speak louder than words. The Draft Report presented by the LIBE Committee's *Rapporteur* in October 2019 contained 267 amendments to the Commission's proposed Regulation and further amendments were brought forward by different political groups at the end of last year, raising the number of amendments to 841 in total.²⁰⁹ Even though the European Parliament has, in some respects, softened its approach, the Report abandons some of mechanisms and basic principles contained in the Commission's Proposal, including the paradigm of direct cooperation with service providers and may hinder the efficiency of the instrument. The challenge ahead for EU institutions will be to create an instrument that can reconcile both approaches and will strike a right balance between efficiency and fundamental rights' protection. Indeed, on the one hand, a burdensome legal instrument will bring the risk that law enforcement authorities will try to circumvent. On the other hand, an instrument placing efficiency and law enforcement authorities' interest above fundamental rights will weaken the level of protection granted to the fundamental rights to respect for private life and to protection of personal data and may fail to meet the high standards set by the Court of Justice.

One can regret that, so far, the EU institutions have missed the opportunity to adopt a position on some important questions such as the instrument – the GDPR or the LED – that must apply when public authorities access data stored by private actors. Another question that, in our opinion, is crucial and must be addressed concerns service providers. The EU institutions must decide whether service providers may play a part in the protection of fundamental rights and, if so, how and to what extent. The European Parliament's *Rapporteur* is sceptical and so are other actors, including various service providers. Nevertheless, even those who were among the most critical ones towards the role assigned to service providers in the Commission's Proposal did acknowledge that service providers might play a useful role in some circumstances. Only the results of the trilogues will tell what role, if any, service providers will be given in the EU e-evidence framework.

²⁰⁸ For an overview of the basic features of the European Parliament Draft Report see T Christakis, 'E-Evidence in the EU Parliament: Basic Features of Birgit Sippel's Draft Report' cit. For an opinion on whether the European Parliament Draft Report strikes a right balance between necessary protection and efficiency see T Christakis, 'Lost in Notification? Protective Logic as Compared to Efficiency in the European Parliament's e-Evidence Draft Report' cit.

²⁰⁹ See European Parliament (LIBE Committee) Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters, Amendments 268-582 (AM\1193813) and Amendments 583-841 (AM\1194325).



ARTICLES

TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – SECOND PART

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THE CRIMINAL PROCEDURE OUT OF ITSELF: A CASE STUDY OF THE RELATIONSHIP BETWEEN EU LAW AND CRIMINAL PROCEDURE USING THE ETIAS SYSTEM

FRÉDÉRIQUE MICHÉA* AND LAURENT ROUSVOAL**

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ABSTRACT: In order to manage migratory flows, the large-scale information system ETIAS (European Travel Information and Authorisation System) aims to establish whether third- country nationals whose country takes part in visa-waiving agreements could be authorized to travel to the EU. This *Article* intends to shine a light from a legal perspective on the ambivalence of the means and ends of the ETIAS database. ETIAS is not solely an instrument of migratory flow management. It is also, more discretely, a criminal justice instrument. In addition to the administrative function of ETIAS, there is a law-enforcement capability: once data pertaining to candidates seeking travel authorization is collected, it becomes available to ends which are estranged from the administrative function of ETIAS. This *Article* intends to highlight the opaque nature of ETIAS resulting from its cumulating complexities at the crossroads of law and information technology, EU and member states competences, administrative and criminal laws. ETIAS is indicative of a more global model that it is helping to deploy, suggesting the prospect of a data set pertaining to migrants and available for criminal purposes. In conclusion, this *Article* raises the following questions: is ETIAS compatible with fundamental liberties? And in this respect should its hidden criminal dimension raise concerns?

KEYWORDS: databases – large-scale information systems – area of freedom, security and justice – criminal repression – migration management – fundamental rights.

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I. THE CUMULATIVE COMPLEXITIES OF ETIAS

Migration and criminal repression are two issues closely linked to state sovereignty. Moreover, before the Amsterdam Treaty and the Treaty of Lisbon changed the architecture of the Union, they both came under its third pillar. This common point does not exhaust the relationship between these two issues. Thanks to the opportunities offered by information technology, a crossroad is developing, making migration management tools useful for the fight against crime. Adding to other migration-related databases, the large-scale European Travel Information and Authorisation (known as ETIAS) system aims to determine whether third-country nationals who are exempt from visa requirement can be granted travel authorisation to the European Union for stays not exceeding 90 days. The ETIAS Regulation lays down the conditions for issuing travel authorisations and the conditions for rejecting individual applications from third-country nationals.¹

Technical interfaces will make it possible to link data recorded in ETIAS travel application files to multiple other information repositories: data stored in the ETIAS Central System, ETIAS “specific risk indicators”, data stored in other EU information systems, and data provided by Europol and Interpol. A comparison between data recorded in ETIAS travel application files and other European databases will be carried out by means of automated processing. The ETIAS Central System will compare the relevant data in the applicant file to the data registered within nine different information systems:² the ETIAS Central System itself, the Schengen Information System (SIS),³ the Entry-Exit System (EES),⁴ the Visa Information System (VIS),⁵ Euro-

¹ Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) 1077/2011, (EU) 515/2014, (EU) 2016/399, (EU) 2016/1624 and (UE) 2017/2226.

² *Ibid.* art. 20(1).

³ Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals; Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) 1987/2006; Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU.

⁴ Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) 767/2008 and (EU) 1077/2011.

⁵ Regulation (EC) 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).

dac,⁶ the European Criminal Records Information System⁷ (ECRIS), Europol data and Interpol systems. The comparison process may result in “hits”. In this case, the ETIAS Central System will automatically consult the ETIAS Central Unit. The ETIAS Central Unit, having access to the different databases, will manually process the request in order to make a decision.⁸ When the automated processing does not report any “hit”, the ETIAS Central System will automatically issue a travel authorisation.

The history of the ETIAS legislative project demonstrates the Commission's will to make rapid progress on the dauntingly complex large-scale information system architecture of the Area of Freedom, Security and Justice (AFSJ). For example, prior to the publication of its proposal in 2016, the Commission had not carried out a data protection impact assessment of the processing operations envisioned for ETIAS. Such an analysis is now required by Regulation 2018/1725 in cases of systematic and extensive evaluation of persons based on automated processing of data related to criminal convictions and offences.⁹ Secondly, the Commission relied exclusively on two studies carried out in 2011 and 2016, when the institution started to formalize the ETIAS project.¹⁰

As a result of this long process, the technical architecture of ETIAS proves to be very complex.¹¹ ETIAS is a centralised IT system, consisting of an EU information system, an ETIAS Central Unit - established within the European Border and Coast Guard Agency - checking the applications, and a national unit designated in each Member State.¹² The ETIAS case study is of real interest because ETIAS is not just another European database. ETIAS changes the ecosystem of pre-existing European databases, taking a decisive step

⁶ Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

⁷ Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726.

⁸ Art. 22 Regulation 2018/1240 cit.

⁹ Art. 39(3)(a) and (b) Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) 45/2001 and Decision (EC) 1247/2002.

¹⁰ On the history of the formalization of the ETIAS project since the 1990s, see S Alegre, J Jeandesboz and N Vavoula, 'European Travel Information and Authorisation System (ETIAS): Border Management, Fundamental Rights and Data Protection' (2017) Study for the LIBE Committee of the European Parliament 16 ff.

¹¹ Art. 6(2) Regulation 2018/1240 cit.

¹² The ETIAS Regulation applies for Schengen participating States and constitutes a development of the provisions of the Schengen Acquis in which Ireland does not take part.

forward in the logic of integration. The term integration will be understood in our *Article* as meaning “incorporating one or more foreign elements into a constituted whole, assembling various elements to form an organic body”.¹³

The ETIAS information system and the way it is immersed in a more global system is characterised by an opacity of the rules of law pushed to its ultimate limit. The multiplicity of Union legislative acts interacting and complementing each other to organise the linkages between different information systems forms a normative nebula, which is very difficult to grasp, even for an experienced lawyer. Opacity spreads throughout the matter, with different levels of reading, particularly at the level of the legislative sources, because they carry the issues of distribution of powers between competing institutions and bodies. Admittedly, this opacity is the result of material constraints inevitably linked to the creation of ETIAS technological supports. EU law is here confronted with the requirements of information technology. However, the analysis suggests that this lack of transparency is also partly the result of a political decision allowing the discreet development of an enterprise of massive collection and exploitation of third-country nationals’ personal data.¹⁴ The ETIAS system thus illustrates, in an archetypal way, the very complex relationship maintained by two disciplinary fields: law and information technology. Because of the interactions sought by the political authorities between many of EU information systems, ETIAS combines maximum complexity both on a technological and legal level. The law is no longer able to organise its own production autonomously: it is confronted with the otherness of computer technologies. Computer and legal procedures are vertiginously superimposed in the ETIAS normative base, both at the stage of raw data’s collection when persons apply for a travel authorisation and at the subsequent stage of the data’s exploitation. This intermingling raises the question of the distribution of power, and more precisely that of a technocratic conception of it.

This configuration, in itself highly problematic, is all the more worrying in the light of the penal dimension of the ETIAS system. As a tool for managing the crossing of the Union’s external borders, ETIAS seems *a priori* outsider to the repressive sphere. The decisions it records, namely whether or not a travel authorisation is granted, or whether it is revoked, annulled or maintained, are an administrative matter. The data stored in ETIAS is then used to assess the risk that the prospective traveller might present in terms of security, illegal immigration or health. However, ETIAS has another function. Data collected with migration management purpose is made available to the designated authorities and the operating units in Member States for law enforcement purposes, in order to prevent, detect and investigate terrorist or other serious criminal offences. In doing so,

¹³ See the National Textual and Lexical Resource Centre, which defines the word integration as such, www.cnrtl.fr.

¹⁴ S Turgis (ed), *Les données numériques des migrants et des réfugiés sous l'angle du droit européen*, (Presses Universitaires de Rennes 2020); C Chevallier-Govers (ed), *L'échange de données dans l'espace de liberté, de sécurité et de justice de l'Union européenne* (Mare & Martin 2017).

ETIAS also has a criminal dimension. By combining these two functions, ETIAS constitutes a hybrid object that is of direct relevance to both criminal law and procedure. As such, it again raises the crucial issue of fundamental rights as enshrined in the EU Charter of Fundamental Rights [2012]. Indeed, the implementation of the ETIAS system is likely to lead to significant interference in the exercise of fundamental rights.¹⁵ This problem is exacerbated by its hidden criminal dimension.

Thus, the ETIAS Regulation makes the ETIAS information system emerge as an element of a global information system(s) (II) even though it is a remarkable criminal law device (III). A provisional conclusion may be drawn at the end of this exploratory *Article* (IV).

II. ETIAS, ELEMENT OF A GLOBAL INFORMATION SYSTEM

At first glance, ETIAS seems to be a unique information system: its purpose, the management of travel authorisations, does not correspond to any other in positive law. However, this apparent uniqueness is misleading. The analysis reveals that ETIAS is nothing more than a filter added to an increasingly tight net, the result of the widespread integration of different European information systems. This strong trend is occurring on two complementary levels (II.1) starting from concrete integration conditions in accordance with the relevant instruments (II.2).

II.1. INTEGRATION CONDITIONS

The superposition of EU legislative acts relating to the ETIAS system highlights two sets of conditions for the integration of ETIAS into a wider information system: the first being institutional, the second instrumental.

The institutional organisation around ETIAS highlights the activities of three agencies of the European Union directly involved in this system. In addition to the two European agencies responsible for it, the European Border and Coast Guard Agency and the European Union Agency for the Operational Management of Large-scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), a third supporting agency, Europol, also needs to be mentioned. These organisations have already acquired considerable experience in the management of other pre-existing EU information systems, including their own internal systems. In that respect, the institutional model used for ETIAS, although more complex, is hardly original. It is simply an extension of the institutional architecture employed for other information systems, such as the Schengen Information System (SIS) or Eurodac.

The European Border and Coast Guard Agency (Frontex) will manage the ETIAS Central System in the ETIAS Central Unit. ETIAS will be the first EU information system whose

¹⁵ We may mention in particular the respect to private and family life (art. 7 of the Charter), the protection of personal data (art. 8), the principles of legality and proportionality of criminal offences and penalties (art. 49), the presumption of innocence and rights of the defence (art. 48).

central unit shall be hosted and ran by Frontex. It is something of an innovation compared to other pre-existing centralised systems, like the Schengen Information System or the Visa Information System (VIS). For this reason, Frontex will manually process applications for travel authorisations if a positive correspondence (a match or hit) is confirmed by comparing the data provided by applicants with the data stored in other databases. Likewise, an investigation carried out by a human will be conducted if there are doubts arising from the automated processing of an application. This responsibility should be seen in the context of the significant expansion of Frontex's mandate to include cross-border crime prevention missions.¹⁶ Frontex will therefore be tasked with defining, assessing and revising the risk indicators taken into consideration within the framework of an ETIAS watchlist, drawn up by Europol, which will use a computer algorithm. As regards power accountability, Frontex is required to monitor the activities of two bodies central to the functioning of ETIAS, the ETIAS Central Unit and an ETIAS Examination Committee – with an advisory role – dominated by representatives of the Member States.¹⁷

The eu-LISA Agency will be responsible for the development of ETIAS and its technical management, as is already the case for most of existing information systems and those under construction in the context of the AFSJ.¹⁸ On the other hand, each Member State will remain responsible for the maintenance of its national infrastructures and their connection with the elements of interoperability relating to EU law.

Finally, the unique role of the European Agency for Law Enforcement Cooperation (Europol) in the operation of ETIAS and the importance of its databases containing personal data will be a decisive factor in bringing together ETIAS and comparable information systems.¹⁹ In this way, the ETIAS regulation establishes an unprecedented mechanism for communication between the agency and the ETIAS National Units.²⁰

¹⁶ See 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; J Burchett, 'Frontex et l'interopérabilité des systèmes d'information. Réflexions à propos de l'articulation entre les impératifs de sécurité et de liberté' in C Chevallier-Govers and R Tinière (ed), *De Frontex à Frontex-Vers l'émergence d'un service européen des garde-côtes et garde-frontières*, (Bruylant 2019) 99.

¹⁷ Art. 9 Regulation 2018/1240 cit.

¹⁸ Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) 1077/2011.

¹⁹ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA. See P Berthelet, 'Europol face au défi des "méga-données". L'évolution tendancielle d'une coopération policière européenne "guidée par le renseignement"' (2019) *Revue du droit de l'Union européenne* 157, 178 ff.

²⁰ Art. 29 Regulation 2018/1240 cit. Various cross-consultation mechanisms between Europol and the law enforcement authorities of the Member States are also referred to in the ETIAS Regulation.

This extremely complex institutional labyrinth, involving numerous actors who will produce heterogeneous and interwoven standards, evokes the new paradigm of the “network”.²¹ This institutional issue should be viewed in the context of the sociology of those involved. The professional practices of the officials of these agencies will undoubtedly undergo significant changes in the future.²² The practices and actions of the actors are intended to converge significantly once the European regulations have established detailed interfaces and IT procedures that can be employed by all users of European databases. The correlations between digital searches and data accessible to the agents will have a decisive influence on the processing of travel authorisations and will lead to a convergence of agents’ practices before their computer screens.²³ This perspective is supported by the institutional model selected for ETIAS which, as a general rule, only duplicates the model used for pre-existing information systems like the Schengen and Eurodac systems.

The ETIAS regulation does not only cover the institutional conditions for the integration of this database within a broader network of information systems, it also concerns instrumental conditions. In instrumental terms, the immersion of the ETIAS system within the wider integration of multiple large-scale information systems is prepared using the principle of interoperability that will connect this system with others.²⁴ This principle was defined by the Commission as “the ability of IT systems and of the business processes they support to exchange data and to enable the sharing of information and knowledge”.²⁵ The interoperability between the ETIAS system and other IT systems, namely the SIS, the Entry-Exit System (EES), the VIS, Eurodac and the Europol and Interpol databases,²⁶ is not defined in art. 11 of the ETIAS Regulation in very precise terms. The incompleteness of this provision is notable on this point, with art. 11(2) stipulating that “the amendments to the legal acts es-

²¹ M Van de Kerchove and F Ost, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Publications des Facultés Saint-Louis 2002).

²² The practices of other actors (police authorities in the Member States, border guards, immigration officers, etc.) are also required to evolve under the influence of EU law.

²³ For example, in regard to the use of the multiple-identity detector, colour links are planned for agents, to identify the correspondence between data and Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816, arts 30-33.

²⁴ Regulation 2019/818 cit., and Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 and Council Decisions 2004/512/EC and 2008/633/JHA.

²⁵ Communication COM(2005) 597 final from the Commission to the Council and the European Parliament of 24 November 2005 on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs 3.

²⁶ The Interpol databases concerned mainly relate to Stolen and Lost Travel Documents (SLTD) and travel documents associated with notices (the Travel Documents Associated with Justice Database, TDAWN). See the list of Europol databases at the following website: www.interpol.int.

establishing the EU information systems that are necessary for establishing their interoperability with ETIAS as well as the addition of corresponding provisions in this Regulation shall be the subject of a separate legal instrument".²⁷

The specific interoperability elements of the different systems are set out in two later interoperability regulations, which are of an extremely technical nature.²⁸ The technical procedures for the interoperability of databases are also covered together in the areas of police and judicial cooperation in criminal matters, and asylum and immigration, although these areas differ significantly with regard to their legal framework and political issues.

Three interoperability elements have been established to support the operation of ETIAS and its objectives:²⁹ the European Search Portal, the Common Identity Repository and a Multiple-Identity Detector.

The European Search Portal is an interoperability element taking the form of a unique portal or "message broker"³⁰ connected to the ETIAS system. This central infrastructure will include a single search interface available to duly authorised users,³¹ making it possible to search simultaneously a number of systems for data (alphanumeric or biometric) relating to individuals or their travel documents. Users will then obtain results consisting of raw data combined on a single screen without needing to search separately on each relevant system. The reply provided by the European Search Portal to the query launched by a user shall indicate to which EU information system or database the data belongs to.³² The eu-LISA will keep records of all data processing operations carried out in this European Search Portal.³³

The creation of a Common Identity Repository embodies "the most invasive aspect of interoperability".³⁴ The CIR will store the biographical and biometric identity data of third-country nationals, which are recorded in the existing systems and those being created, with the aim of facilitating identification of matches.³⁵ The major part of the query load will be handled through the CIR as a first step in 2021. This central infrastructure will

²⁷ Art. 11(2) Regulation 2018/1240 cit. See IV (conclusion).

²⁸ S Peyrou, 'L'interopérabilité des systèmes d'information au sein de l'Union européenne: l'efficacité au prix d'un fichage de masse' (2019) *Revue du droit de l'Union européenne* 143; N Vavoula, 'Interoperability of Pan-European Centralised Databases: Another Nail in the Coffin of Third-Country Nationals' Privacy?' (8 July 2019) EU Immigration Law Blog eumigrationlawblog.eu.

²⁹ A fourth interoperability element provided for in the interoperability Regulations, namely the Biometric Matching Service will not be referred to, as it is not applicable to ETIAS. A specific search engine devoted only to personal biometric data will be established simultaneously with the Entry-Exit System.

³⁰ Recital 13 Regulation 2019/818 cit.

³¹ The rights of access for users will always be based on the rules set out for each database.

³² Art. 9(4) Regulation 2019/818 cit. and art. 9(4) Regulation 2019/817 cit.

³³ Art. 10 Regulation 2019/818 cit.

³⁴ S Peyrou, 'L'interopérabilité des systèmes d'information au sein de l'Union européenne : l'efficacité au prix d'un fichage de masse' cit. 147.

³⁵ The existing systems are Eurodac and the VIS. The IT systems in the process of being created are ETIAS, the Entry/Exit System (EES) and ECRIS-TCN.

create an individual file for each person recorded in the different systems, including ETIAS. This file will be accessible to duly authorised end users.³⁶ A match indicator will indicate whether data are stored in one of the underlying systems.

A Multiple-Identity Detector will make it possible to check whether the biographical data relating to a searched identity exists in one of the systems in order to detect users of multiple identities. This technical interoperability element will cross-reference the identity data stored in the aforementioned Common Identity Repository³⁷ and in the SIS.

This move towards interoperability and its expansion do not appear to meet any material limits and the intention is for it to continue growing. New centralised systems will thus support further interactions with ETIAS. As an example, the recent creation of the European Criminal Records Information System for Third-Country Nationals (ECRIS-TCN) is interesting from this point of view, because the inter-operability of this new system with ETIAS is foreseen by the legislation.³⁸ The ECRIS-TCN will be a centralised hit / no hit system to supplement the existing EU criminal records database (ECRIS) on non-EU nationals convicted in the European Union.³⁹

The deployment of this sprawling interoperability already has an impact on the operational organisation of new national files relating to travel and migration. In France, a decree dated 16 December 2019 concerned the creation of a national-level service called the "*Service national des données de voyage*" (SNDV – the national travel data service) attached to the director-general of the *Police Nationale*, whose aim is to implement measures for the collection and exploitation of travel data relating to ground, air and maritime transportation.⁴⁰

The community of institutional actors and the technical compatibility of files are merely resources. They serve one purpose: incorporating ETIAS into a huge machine of which it is only a cog due to its close connection to others.

II.2. THE INTEGRATION MECHANISMS

The integration of ETIAS with other EU information systems is visible on two levels. Their degree of completion is inversely proportional to their significance. Already developed, the horizontal links between the different information systems outline a perspective of another dimension: the discreet and gradual introduction of a mega-system, in a vertical relationship with the different files it comprises.

³⁶ Recital 24 Regulation 2019/818 cit.

³⁷ As a reminder, this relates to data from the Eurodac, EES, VIS, ECRIS-TCN and ETIAS systems.

³⁸ In the context of interoperability, the Regulation (EU) 2019/818 cit., applies to ECRIS-TCN.

³⁹ Regulation 2019/816 cit.

⁴⁰ Arrêté du 16 décembre 2019 portant création d'un service à compétence nationale dénommé 'Service national des données de voyage' (SNDV) www.legifrance.gouv.fr. The *Commission nationale de l'informatique et des libertés* (CNIL) was not consulted about the content of this public decree, made without real consultation.

ETIAS supports horizontal, peer-to-peer, relationships with the other EU homologous information systems. In particular, the ETIAS Regulation is mindful of a close connection with the SIS. The links are bilateral: each system feeds the other. ETIAS' support to the SIS is even set out in its objectives. Thus, ETIAS "provides support to the SIS in meeting its objectives" in relation to several types of reports made by ETIAS Member States.⁴¹ Symmetrically, ETIAS makes use of SIS reports. The ETIAS algorithm compares them with the information gathered from applicants for travel authorisations, in order to identify data triggering a "positive hit", including an alert that must lead to a fresh inspection, this time manual, of the file.⁴² This human check may result in the refusal of the travel authorisation in a series of cases in which the SIS again intervenes. For example, the authorisation is refused if the applicant has used a travel document identified in the SIS as lost, stolen, misappropriated or invalidated.⁴³ This connection is not only synchronous, but it has also a diachronic aspect. Thus, if a new report of this type is integrated in the SIS after the issue of a travel authorisation, manual processing by the competent national ETIAS unit would then have to determine whether there are grounds to revoke the authorisation previously granted.⁴⁴

Although privileged, the relations between ETIAS and the SIS are not exclusive. Beyond the SIS, ETIAS is connected to other information systems of the European Union. Applications for travel authorisations are also processed by comparing the data provided by the applicant with those of a number of databases, including EES, VIS and Eurodac.⁴⁵

In this way, direct links are formed between ETIAS and different information systems. The terminology of the Regulation betrays this plural approach, sometimes referring to "the other information systems of the European Union".⁴⁶ Only the intensity of these links changes. Whereas these links are generally unilateral and to the benefit of ETIAS, they can also be bilateral, as in the case with the SIS. These links instituted by the ETIAS Regulation increase the density of a pre-existing canvas: at the same time as the EU is creating these IT systems, it joins them together to form an ever-tighter network.

This horizontal plan is then no longer working alone. In a complementary way, it feeds another structuring: a vertical one.

ETIAS shares common purposes with the other systems to which it is individually connected. They all have two purposes in common. Their first common objective concerns migration control. In regard to, for example, visas (VIS), requests for asylum and international protection (Eurodac) or travel authorisations (ETIAS), it is always related to the control of the movement of people entering and/or leaving the European Union. It is

⁴¹ Art. 4(e) Regulation 2018/1240 cit. For the achievement of this objective, *ibid.* art. 23.

⁴² Art. 20(2) Regulation 2018/1240 cit.

⁴³ *Ibid.* art. 37(1)(a).

⁴⁴ *Ibid.* art. 41(3).

⁴⁵ *Ibid.* art. 20(2).

⁴⁶ E.g., the definition in art. 3(1)(14) Regulation 2018/1240 cit.

important to mention that the fight against identity and document fraud is emerging as an omnipresent political purpose in the Regulations concerning the interoperability of databases. The Court of Justice of the European Union recently sanctioned this purpose as a new and compelling reason of general interest justifying restrictions to the exercise of freedom of movement.⁴⁷ The second common objective consists of the strictly penal purposes attached to these information systems created for the control of the EU's external borders: prediction for prevention purposes or detection for purposes of the prosecution of serious criminal offences, including but not restricted to terrorism. ETIAS shares this extrinsic purpose in common with its counterparts. Like the formers, it is designed to serve this global purpose that goes beyond the distinct objectives of each information system – principally ETIAS, VIS and Eurodac. Furthermore, the assignment to ETIAS of this purpose foreign to border control is the explicit offshoot of a model. At the European legislature's own admission, it is the successful application of this approach to the VIS, that led the EU's institutions duplicating it with ETIAS.⁴⁸ These shared purposes are focal points common to different planned information systems: they converge in that they are all intended to perform the same functions by comparable – and connected – means. As they converge, they form a whole that unites them, without mixing them up.

Each information system is specifically aimed at one segment of the management of crossings of the EU external borders. Each information system, although developed individually, is seen as part of a broader and global approach based on their complementarity. The explanatory statement of the ETIAS Regulation refers to this global approach. The communication of the Commission to which the instrument refers, like a template, from the first sentence of the first recital, is entitled "Stronger and Smarter Information Systems for Borders and Security".⁴⁹ The issue does not concern ETIAS alone. Its establishment is explicitly explained there by the existence of a missing link in the broad network of information systems being patiently formed by the EU.⁵⁰ In other words, ETIAS is a complement to the pre-existing databases and its creation results from a search for completeness. The approach is revealing completeness evokes a plural object whose components are connected to form a system.

It would surely be going too far to maintain that there is already a single EU information system relating to the control of the EU's external borders. It has been said in particular that the chains connecting the different information systems are not all identical: the bilateral links operate alongside lighter connections. However, the prospect of an

⁴⁷ Concerning the use of biometric data in the Member States: case C-70/18 *A and Others* ECLI:EU:C:2019:823, paras 48-49 – the Court even refers to art. 2(2)(b) Regulation 2019/817 cit.

⁴⁸ Recital 40 Regulation 2018/1240 cit.

⁴⁹ Communication COM(2015) 205 final from the Commission to the European Parliament and the Council of 6 April 2016 *Stronger and Smarter Information System for Borders and Security*.

⁵⁰ At the European legislature's own admission, "it sets out possible options for maximising the benefits of existing information systems and, if necessary, developing new and complementary ones to address still existing information gaps" (Explanatory Memorandum of Regulation 2018/1240 cit.).

IT mega-system is becoming more likely with the adoption of each new instrument. For better or worse, the movement in that direction is accelerating. Until recently, the inclusion of information systems in this set-up was done in hindsight: pre-existing files, created in their own right, were then entered into a system that connected them together. For ETIAS, time was running out. From the beginning, ETIAS has been designed to be part of this large network. Accordingly, each new (sub-)system, now ETIAS and, certainly, in the future others, is another building block in the construction of a larger EU system being built before our eyes. If it is difficult to appreciate this ambition, that is because the building site is relatively unobtrusive: unnamed, its purpose is easily lost in the dust raised by the complexity of each independently planned information system. The effort presumed by the study of individual IT systems is such that it tends to exhaust the capacity for analysis even before this reaches the level of the unifying structure. The complexity of ETIAS, surpassing that of some of its predecessors, thus forms an epistemological obstacle. It monopolises the observer's attention, acting as a smoke screen. What is more, the obstacle does not diminish over time, since the faster new information systems are created, the more frequently older ones have to be modified.⁵¹

To summarise, ETIAS is part of a vast integration movement. The links it creates with the other pre-existing information systems form part of a structure that is abandoning horizontal peer-to-peer relationships to develop a three-dimensional plan. The analysis of ETIAS only makes sense in this overall perspective of which it is part. ETIAS certainly has its own reality, which has not been lost in the ensemble of other comparable systems. However, it is not autonomous, and thinking of it in isolation would betray its function and its significance. It is this overall perspective that must be kept in mind for the analysis of one dimension of ETIAS, which it shares with other homologous systems: its penal nature.

III. ETIAS, ELEMENT OF A PENAL MECHANISM

The ETIAS legal regime resembles a kaleidoscope of disparate normative fragments which, using sets of cross-references, are governed by other legislative acts. Compared to other EU information systems, the uniqueness of this legal regime is explained by the duality of the functions that drive the ETIAS system: on the one hand, the administrative function, concerning the management of travel authorisations, and on the other hand, the penal function, consisting in providing law enforcement authorities access to the data

⁵¹ For example, created in 2000, Eurodac is undergoing its second major overhaul, not including interim adjustments, in particular due to the intervention of new files with which it is required to be connected. See Proposal COM(2016) 272 final/2 for a Regulation of the European parliament and of the Council of 4 May 2016 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes.

gathered by ETIAS (III.1). However, this binary structure is so blurred that it must not be exaggerated (III.2).

III.1. DIFFERENTIATING THE CRIMINAL AND ADMINISTRATIVE FUNCTIONS OF ETIAS

The administrative and penal functions of ETIAS sit side by side within its constitutive instrument, whose security dimension is clearly assumed by the EU legislature.

In the first instance, ETIAS is equipped with an administrative function. The primary, existential, function of ETIAS consists of assessing the risk that the applicant's entry into EU territory would represent in terms of "security". Three risks are identified. In addition to the risks of illegal immigration and of spreading an epidemic, the first item on the list is "a security risk", defined as "the risk of a threat to the public order, internal security or international relations of one of the Member States".⁵² The definition of security risks is therefore extremely vague.⁵³

The assessment of such security risk resides in three incursions of ETIAS within the penal sphere. The first concerns the nature of some data gathered from applicants for travel authorisations. They must state whether they have been convicted, during the previous ten years, of a criminal offence listed in the appendix to the Regulation, or of a terrorist offence.⁵⁴ Another contact point is the ETIAS "screening rules" recorded in the ETIAS Central System, under the supervision of Frontex. These rules will allow profiling individuals unknown to national authorities and Europol, who could pose a security or illegal immigration risk, or a high epidemic risk.⁵⁵ The result generated by ETIAS on the basis of a computer algorithm therefore does not relate solely to personal data, but to indicators able to facilitate the detection of those representing a risk, and in particular a security risk. Finally, an ETIAS "watchlist", technically developed by Eu-LISA, will contain a list of data concerning people suspected of having committed a terrorist offence or another serious criminal offence, or having participated in such an offence, or people "for whom there are concrete indications suggesting or reasonable grounds to believe, on the basis of a comprehensive assessment of the individual, that they will commit a terrorist offence or other serious criminal offence".⁵⁶ The "watchlist" will be established on the basis of information - related to terrorist and other serious criminal offences - held by Europol and by Member States.⁵⁷ Accountability for such assessment appears deficient in this regard, as no supervisory body

⁵² See the definition in art. 3(1)(6) Regulation 2018/1240 cit.

⁵³ In the same sense, V Mitsilegas and F Mouzakiti, 'Data-driven Operational Co-operation in Europe's Area of Criminal Justice' in C Billet and A Turmo (eds), *Coopération opérationnelle en droit pénal de l'Union européenne* (Bruylant 2020) 129.

⁵⁴ Art. 17(4)(a) Regulation 2018/124 cit.

⁵⁵ *Ibid.* art. 33.

⁵⁶ *Ibid.* art. 34(1).

⁵⁷ *Ibid.* art. 34(4) for the items of data concerned.

has been provided for in the ETIAS Regulation to oversee the implementation of the watch-list by Europol. By default, the general accountability mechanisms of the agency will apply; a specialised Joint Parliamentary Scrutiny Group – including representatives of the European Parliament and national Parliaments – shall politically monitor Europol's activities in fulfilling its mission.⁵⁸ Under the guise of establishing “technical measures”,⁵⁹ the Commission is required to define these risks, in particular with regard to security, on the basis of delegated acts within the meaning of art. 290 of the TFEU. And yet, the extremely broad material scope of this delegation to the Commission raises the question of the democratic legitimacy of the choices the Commission could make, compared to the legitimacy of choices made instead by the Council and the European Parliament. Furthermore, this time under the closer supervision of the Council, implementing powers will be conferred on the Commission to adopt detailed rules concerning security risks, on which the “specific risk indicators” will rely upon.⁶⁰ This interplay between delegated acts and implementing acts to define the risks, an eminently political subject, shows clearly how close the function of the administrative border police is to the penal sphere. That said, this is mainly present through the second function assigned to ETIAS.

Secondly, the system ETIAS has a penal function. ETIAS must contribute to the prevention and prosecution of terrorist offences and other serious criminal offences,⁶¹ two categories defined by a set of external references.⁶² This strictly penal function is somewhat exogenous: it has little in common with a system dedicated to the management of travel authorisations. It does, however, share the same objective as ETIAS.⁶³ On this point, ETIAS follows the footsteps of the revised Regulations of 2013 concerning Eurodac⁶⁴ and the 2016 Directive on Passenger Name Records.⁶⁵ These two instruments were the first

⁵⁸ Art. 51 Regulation 2016/794 cit.

⁵⁹ Recital 61 Regulation 2018/1240 cit.

⁶⁰ *Ibid.* recital 63.

⁶¹ The ETIAS regulation adds, as a third purpose, the conduct of investigations on the subject. The structure of the listing is surprising: law enforcement operates through a penal procedure includes such investigations. It is therefore difficult to make a completely different purpose from this third term, unless perhaps the pleonasm is being used rhetorically.

⁶² An initial reference concerns the terrorist offences referred to in the Directive 2017/541/EU of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. A second concerns the offences referred to in Framework Decision 2002/584/JHA of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, art. 2(2).

⁶³ Art. 1(2) Regulation 2018/1240 cit.

⁶⁴ Art. 1(2) Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

⁶⁵ Directive 2016/681/EU of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist

legislative acts of the EU to attach an *assumed* penal function to mechanisms for the mass collection of personal data.

Functioning as a huge bank of interconnected data, ETIAS is thus open, to a degree, to the competent national law enforcement authorities and Europol. They can therefore use the data it contains for the performance of their tasks (prevention or investigation of crime). The conditions of access by the designated authorities, in the Member States or Europol, to the central ETIAS law enforcement system, are set out in chapter X of the ETIAS Regulation in simple terms. These conditions are based on the same model, and they vary only depending on the specific nature of the institutions concerned. With regard to the access of national law enforcement authorities, the conditions rely, in terms of guarantees, on the principle of an organic duality between the designated authority, submitting a request to search the stored data, and an authority that is the “central access point” to the ETIAS central system, which will decide whether or not to grant this request. However, the functional duality has a relative scope⁶⁶ and in urgent cases, the “central access point” checks only retrospectively whether the request was valid.⁶⁷ A similar system has been planned so that Europol agents can have access to the same data stored in the ETIAS central system.⁶⁸

Finally, indirectly, but necessarily, ETIAS participates in the same penal functions of the other information systems to which it is connected. For example, it contributes to the penal aspects of the Schengen IT system through the support it provides to the SIS notifications,⁶⁹ and reciprocally, due to the synergy established by the “Interoperability” Regulations between the SIS and the Common Identity Repository (CIR). The extrinsic penal function of ETIAS is all the more powerful as it echoes that of related information systems.

III.2. BLURRING OF THE PENAL AND ADMINISTRATIVE FUNCTIONS OF ETIAS

Although they are undoubtedly separate functions, the penal and administrative functions converge at the point where the dividing line becomes blurred. This is a dual phenomenon, derived from both the coexistence and the crossover of the functions.

An initial blurring of the duality of the functions of ETIAS stems from their coexistence in the same system. As its name implies, ETIAS is first thought of in relation to its administrative function. The information system assists those responsible for the management of movements of persons at the EU's external borders, more specifically for the issuance or

offences and serious crime. These data concerning the travel conditions of air passengers enable the competent authorities to identify those passengers representing a threat to internal security who are involved in a terrorist offence or another serious crime.

⁶⁶ This organic duality must be put into perspective, in as much as art. 50 of Regulation 2018/1240 states that the designated authority and the central access point “can form part of the same organisation”.

⁶⁷ Art. 51(4) Regulation 2018/1240 cit.

⁶⁸ *Ibid.* art. 53. According to art. 53(3) Regulation 2018/1240, the Europol requests for consultation of data “shall be subject to prior verification by a specialised unit of duly empowered Europol officials”.

⁶⁹ *Ibid.* art. 4(e) and art. 23(1), specify the SIS notifications/reports of which the applicant may be the subject, supported by the comparison with ETIAS data made by the ETIAS central system.

refusal of travel authorisations required for applicants willing to enter the Schengen area. It is for this purpose alone that the collection of migrants' personal data is defined, and the information considered relevant, and therefore required, is deemed so in relation to this question.⁷⁰ It is a matter of providing the competent authorities – national (the ETIAS National Units) or European (the ETIAS Central System), depending on the individual case – with the means to assess the possible risks of granting entry to the applicant, in terms of security, immigration and health. However, once the collection of these data has been organised, ETIAS splits into two: the consultation and the exploitation of the data it gathers are not reserved for this administrative function. The data can also be used for the penal function of the prediction / detection of the serious crimes listed in the Regulation.⁷¹ The duality of the functions is impaired by this, as the penal function adds itself to the administrative function. The penal function flows into the slipstream of the administrative function to benefit from the effects the latter produces. In other words, the architecture of ETIAS is not designed on the basis of a parallelism of the two functions it serves. The blueprint is rather one of continuity, however completely artificial. Via a discreet shift, the information gathered under the auspices of the administrative function is made available to a penal function that acts like an extension of it, although they have nothing in common.⁷²

Since collection of data is seen only as an administrative function, while exploitation is designed, concurrently, with both functions in mind, their distinction is blurred – as is the relationship between collection and exploitation. There is a form of instrumentalization of the administrative function which, opportunistically, turns into a Trojan horse of a penal function with which it shares spontaneously nothing. Correlatively, the penal function is linked to the treatment of the migration issue. Thus, the data of applicants for travel authorisations – because that is the reason they are gathered – become, at the exploitation stage, the data of potential perpetrators of, or accomplices to, serious criminal offences. Attached to the immigration question, the law enforcement dimension of ETIAS establishes a relationship between migration and criminality.⁷³ The European leg-

⁷⁰ *Ibid.* art. 17.

⁷¹ *Ibid.* arts 50 ff. Only one datum gathered from the applicant is excluded from the consultation for penal purposes: the studies carried out by the interested party (see art. 52(4) *in fine*, referring to art. 17(2)(h) Regulation 2018/1240 cit.).

⁷² The reasoning would be different if the offences for which the law enforcement authorities are authorised to consult ETIAS were related, at least, to migration in general. And yet, that is not the case. The offences in question are defined by a set of references to two instruments with no relationship to migration: on the one hand, the Directive 2017/541 cit. for terrorist offences; and on the other hand, the offences listed in Framework Decision 2002/584, for “other serious criminal offences”, art. 2(2) cit. Unrelated to border management, these instruments list offences that have no particular link with the migration issue – except, for instance, facilitation of unauthorised entry and residence. The reference made by the ETIAS regulation to these instruments is therefore not based on an analogy between their respective purposes.

⁷³ About “cimmigration”, see in particular J Stumpf, ‘The Cimmigration Crises: Immigrants, Crime, and Sovereign Power’ (2006) *AmULRev* 367.

islature is undoubtedly on a slippery slope, which the European Data Protection Supervisor, referring to the pre-existing information system Eurodac, rightly qualified as the “risk of stigmatisation” of people whose data are stored in such systems.⁷⁴ The link thus suggested between migration and crime could feed harmful prejudices,⁷⁵ together adding to collective fears and discriminations.⁷⁶

Already a threat, this blur resulting from the coexistence of the penal and administrative functions of ETIAS is made worse by the crossover between these two functions. Thus, the administrative function mobilises elements that are undoubtedly penal. Over and above the crime-related data collected from applicants for travel authorisations,⁷⁷ this crossover is due to the creation within the information system of a specific sub-system, already partially addressed, the “ETIAS watchlist”.⁷⁸ Penal authorities, Europol included, are required to provide data to draw up this “list” of specifically flagged individuals.⁷⁹ The purpose refers indeed to the administrative function of ETIAS, which is to decide the response to an application for a travel authorisation. However, this crossover enabling the administrative function to use criminal data could lead to a downward slide.

To feed the “ETIAS watchlist”, penal authorities have to enter some information about two types of people: persons who are suspected of *having committed* serious criminal offences and “persons regarding whom there are factual indications or reasonable grounds, based on an overall assessment of the person, to believe that they will commit a terrorist offence or other serious criminal offence”. In other words, to flag them and

⁷⁴ European Data Protection Supervisor (EDPS) Opinion on the amended proposal for a Regulation of the European Parliament and of the Council concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EC) (establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person), and on the proposal for a Council Decision on requesting comparisons with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes of 7 October 2009, para. 47. The words are evocative, taken from a landmark judgement of the European Court of Human Rights ruling against the United Kingdom for being in breach of art. 8 of the Convention (ECtHR *S and Marper v the United Kingdom* App n. 30562/04 and n. 30566/04 [4 December 2008] para. 122). The petitioners denounced the storage, after they had been cleared, of personal data collected when they were suspects in criminal proceedings. The identical treatment of the innocent and the guilty, underlined the Court when referring to the presumption of innocence, would give rise to “a risk of stigmatisation” due to the former being confused with the latter.

⁷⁵ On the reality of the relationships between immigration and criminality, too often misrepresented by xenophobia: P Morvan, *Criminologie* (LexisNexis 2016) 267; R Gassin, S Cimamonti and Ph Bonfils, *Criminologie* (Dalloz 2011) 473 ff.

⁷⁶ On this reversal of the policy thus pursued which, claiming to combat factors leading to insecurity, could increase a feeling of insecurity, see A Scherrer, ‘Lutte antiterroriste et surveillance du mouvement des personnes’ (2013) *Criminologie* 15, 23 ff.

⁷⁷ Art. 17(4)(a) Regulation 2018/1240 cit.

⁷⁸ *Ibid.* arts 34 and 35. On the watchlist, see III.1.

⁷⁹ Either Europol or the Member State concerned shall be responsible for all the data they enter in the ETIAS watchlist. See art. 35 Regulation 2018/1240 cit., which defines the responsibilities regarding the ETIAS watchlist.

refuse their *administrative* demand of travel authorisation, the Regulation orders *penal* authorities to report individuals where there is reason to believe that they *will* commit offences. This predictive approach is correlated by the instrument to a specific purpose: the issue of travel authorisations, in the context of the administrative, not penal, function of ETIAS.⁸⁰ However, a contamination effect cannot be ruled out. The operating order given, in this formally defined context, to these penal authorities could indeed inspire them to other actions. In other words, the ETIAS Regulation runs the risk of acclimatising penal authorities with crime prediction. The instrument undoubtedly stipulates this operation in a non-penal context, as part of the administrative function of ETIAS. Nevertheless, it cannot be ruled out, from this hypothesis, that this process could broaden to find applications in criminal procedure. Again, it is a matter of considering the consequences of the effective implementation of the Regulation. It will have the effect of instituting or normalising a crime prediction operation by penal authorities. Such an approach is undoubtedly intended only for the management of travel authorisations. However, the legal barrier separating the activity of these law enforcement authorities into two purportedly airtight parts, administrative and penal, could prove to be rather fragile. The practical and human reality of the functional duality can be quite a long way from the dogmatic blueprint that lends it the power of a Great Wall of China. Admittedly, the prediction envisaged is part of a non-repressive legal framework. However, it falls within a professional criminal field, by the actors and the public concerned. Consequently, there is a risk of contagion of this mode of analysis, beyond the formally administrative framework that is its own in strict law. In other words, ETIAS employs profiling of travel applicants that is carried out in a legal framework based on its administrative migratory function, but with resources, particularly human resources, borrowed from the penal field. The administrative and penal functions are so closely intertwined that the possibility of one function contaminating the other must be considered. This hypothesis could be split in two. It could occur in the legal system, inspiring the legislature to extend the framework of profiling, and/or in facts via the confusion of professional practices.

IV. CONCLUSION

The European legislator has designed an information system to better manage the issuance, refusal, revocation or annulment of travel authorisations. However, the enormous amount of data collected for this purpose is then made available to law enforcement authorities. This opportunistic logic makes ETIAS an object of double nature, both administrative and penal. Hybridization is even greater. This is not only due to the presence of these two functions, but also due to the blurring of their distinction by cross-contamination. The pattern is worrying. The duality of ETIAS foreseen functions allows to protect fundamental rights, and their confusion weakens both of them.

⁸⁰ See *supra* III.2.

This acknowledgment is all the gloomier as it does not apply only to ETIAS. The addition of this new database hides a multiplication. ETIAS consists, first of all, in a multiplication of data collection. Envisaged without political recontextualization, the interoperability of ETIAS with other information systems will make it possible to justify an escalation in the collection of personal data.⁸¹ Secondly, this system generates an accumulation of legal rules and standards governed by numerous IT constraints, which outline, step by step, the ecosystem into which ETIAS and other information systems will mature.

This interconnection of various information systems is often presented by the Commission under the innocuous guise of “technical amendments”. It is in these terms that the institution has submitted to the Council and the European Parliament a legislative proposal, which aims to lay down the rules allowing the effective establishment of ETIAS.⁸² The purpose of this proposal is also to amend the legal acts related to the computer systems interrogated by ETIAS. However, this separate proposal deals with highly sensitive subjects from the point of view of the protection of individual freedoms. In particular, it must specify the access rights to the other systems by the ETIAS central system, the ETIAS central unit and the ETIAS national units, and determine which data will be exchanged between the ETIAS central system and the other systems.⁸³

The system ETIAS confirms, amplifies and accelerates the move towards the implementation at EU level of a global information(s) system built on large-scale databases whose respective fields are becoming increasingly overlapping. As a hidden penal object, behind an administrative nature that is only immediately visible, ETIAS raises all the more questions as it probably forms a cornerstone of a much more ambitious construction.

⁸¹ For example, the recast of Eurodac proposed by the Commission in May 2016 would, by the Commission's own admission, better serve the objectives of ETIAS by collecting personal data in addition to the data currently collected by Eurodac, i.e., biometric data and a reference number. See in this sense the explanatory memorandum in the Proposal COM(2019) 3 final for a Regulation of the European Parliament and the Council of 7 January 2019 establishing the conditions for accessing the other information systems and amending regulation (EU) 2018/1862 and Regulation (EU) 2019/816 4.

⁸² Proposal COM(2019) 3 final cit. 4. The adoption of two regulations is made necessary by the variable-geometry application, depending on the Member States, of the provisions of the Schengen *acquis* related to police cooperation and judicial cooperation in criminal matters.

⁸³ The definition of the correspondence of data between ETIAS and other systems will therefore be crucial. Considering the fact that data across different databases are not necessarily recorded in the same manner, it will be necessary to allow for partial, loose, correspondence.



ARTICLES

TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – SECOND PART

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EU CRIMINAL PROCEDURAL LAW ONTO THE GLOBAL STAGE: THE E-EVIDENCE PROPOSALS AND THEIR INTERACTION WITH INTERNATIONAL DEVELOPMENTS

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TABLE OF CONTENTS: I. Access to electronic evidence as a new tool for criminal justice actors. – II. The importance of common procedural standards. – III. The EU's contribution to the clarification of the applicable law. – III.1. EU Standards with a large territorial scope of application. – III.2. Negotiating a bilateral agreement with the United States of America. – III.3. Intervening in international negotiations on global standards. – IV. The limits to the EU's ambitions. – V. Conclusion.

ABSTRACT: The evolution of information and communication technologies has impacted society, including the modus operandi of criminals, who use them in the preparation and commission of their criminal activities. This led to the adaptation in the work of criminal justice actors who increasingly rely on electronic evidence in the course of criminal proceedings. This type of evidence, composed of data, including sensitive personal data, presents certain characteristics, as it is often produced online, easily moved and destroyed. As a consequence, several actors started to develop new standards on direct cooperation with service providers for obtaining the preservation and disclosure of such data. The present *Article*, taking the perspective of the European Union in such matters, aims to analyse the mechanisms through which the EU, relying on both its internal and external competences, participates in the elaboration of common criminal procedural rules. Building on the internal EU proposals on e-evidence, the EU claimed external competences to negotiate a bilateral agreement with the United States of America and to participate in the negotiations of a Second Protocol to the Budapest Convention on Cybercrime. If at the current stage of the negotiations, it is unclear what will result of these parallel processes, the EU has the possibility in the elaboration of these standards to manifest the importance it grants to the protection of fundamental rights, both internally and externally.

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KEYWORDS: electronic evidence – cooperation in criminal matters – criminal procedural law – external relations – USA – Budapest Convention.

I. ACCESS TO ELECTRONIC EVIDENCE AS A NEW TOOL FOR CRIMINAL JUSTICE ACTORS

Social media, webmail, messaging services and applications are nowadays increasingly used to communicate, work, socialize or obtain information. These behavioural changes have also been integrated by criminals, who have adapted their *modus operandi*. Beyond the rise of cybercrimes, such as identity theft or phishing, based on such technologies, criminals also use them to commit “ordinary” crimes. In such circumstances, criminal justice actors, be it law enforcement or judicial authorities, adapt to the evolution of communication and information technologies, following the evolution in the criminals’ *modus operandi*. Such adaptation has been recently focussed on the necessity to be able to collect specific types of data, referred to as electronic evidence, thanks to which investigators can find leads to determine who committed a crime and obtain evidence that can be used in court.¹ This data, which can very easily be destroyed or moved includes for instance information allowing to establish the localisation of a suspect at the moment a crime was committed, or retrieving the content of messages exchanged between suspects proving their collusion. Obtaining such data requires a close and smooth collaboration with private actors, such as online services providers offering access to websites or telecommunication tools.

In the recent years, various initiatives have been launched at national, regional and international levels in order to facilitate the access of criminal justice actors to data held by online service providers and to organize their contribution to security objectives. It is interpreted as another sign of the “responsibilisation strategy” whereby the private sector is co-opted by the State in the fight against crime, something that has already taken place in the field of money laundering and countering terrorism financing.² In EU law, such strategy translates for instance the possibility for Europol to exchange personal data with private parties,³ or the obligation imposed on service providers to take proactive measures to prevent dissemination of terrorist content online.⁴ Of particular interest, and as the focus of this *Article*, can be highlighted the impetus in favour of the adoption

¹ Proposal COM(2018) 225 final of the European Commission of 17 April 2018 for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters.

² V Mitsilegas, ‘Transatlantic Counterterrorism Cooperation and European Values’ in E Fahey and D Curtin (eds), *A Transatlantic Community of Law, Legal Perspectives on the Relationship between the EU and US Legal Orders* (Cambridge University Press 2014) 296.

³ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol), art. 4(1)(m) and art. 26.

⁴ Proposal COM(2018) 640 final of the Commission of 12 September 2018 for a Regulation on preventing the dissemination of terrorist content online.

of norms allowing criminal justice actors to request directly private actors holding relevant data to preserve and disclose it. While the United States of America, the country in which major service providers are head-quartered, has enacted specific legislation on the subject, efforts have also been initiated for the adoption of global standards, potentially taking the form of a Second Additional Protocol to the Budapest Convention on Cybercrime.⁵ Meanwhile, the European Union and its Member States are not sitting still. The EU institutions engaged in an effort to facilitate the access by public authorities to personal data held by service providers, regardless of whether such access involves the crossing of EU jurisdictional borders (internal or external), through the proposal and negotiations of two EU internal instruments, known as the “e-evidence package”.⁶ In addition, the European Commission sought⁷ and obtained mandates to enter into negotiations for the conclusion of a bilateral agreement with the USA,⁸ and to participate in the negotiations of the Second Protocol to the Budapest Convention.⁹

The elaboration of these various norms pursues the objective of facilitating the preservation and disclosure of electronic evidence, yet it must do so without diluting the protection of the fundamental rights of individuals, such as the right to privacy, freedoms of expression and speech, and procedural rights in criminal proceedings. Since at the time of writing, the elaboration of these norms is far from reaching its end, the scope of our analysis is reduced, and cannot for instance include a critical examination of the level of protection guaranteed. The present paper will thus analyse the mechanisms through which the EU, relying on both its internal and external competences, participates in the elaboration of common criminal procedural rules at European and global levels. After highlighting the importance of elaborating common procedural standards at European and global levels (II), our analysis will be devoted to the appraisal of the three different processes in which the EU is currently engaged, in order to identify their synergies and

⁵ Council of Europe Convention on Cybercrime, CETS n. 185, signed in Budapest on 23 November 2001.

⁶ Proposal COM(2018) 640 cit.; and Proposal COM(2018) 226 final of the Commission of 17 April 2018 for a Directive laying down harmonized rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.

⁷ Recommendation COM(2019) 70 final of the Commission of 5 February 2019 for a Council Decision authorising the opening of negotiations in view of an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters; and Recommendation COM(2019) 71 final of the Commission of 5 February 2019 for a Council Decision authorising the participation in negotiations on a second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS n. 185).

⁸ Decision 9114/19 of the Council of the European Union of 24 May 2019 authorizing the opening of negotiations with a view to concluding an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters.

⁹ Decision 9116/19 of the Council of the European Union of 24 May 2019 authorizing the European Commission to participate, on behalf of the European Union, in negotiations on a Second Additional Protocol to the Council of Europe Convention on Cybercrime.

interconnections (III). Last, the potential limits to the EU's ambitions in the elaboration of common standards will be pinpointed (IV).

II. THE IMPORTANCE OF COMMON PROCEDURAL STANDARDS

With criminals' increasing use of information and communication technologies, criminal justice actors, be it law enforcement or judicial authorities, often require obtaining specific types of data, including sensitive personal data, in the course of their investigations and prosecutions. The relevant data is most generally held, stored and managed by private actors, such as online service providers or communication service providers. General instruments of EU law, concerning the provision of such services or the protection of personal data,¹⁰ regulate the procedures and the duration for which they should preserve and store such data. However, when it comes to their cooperation with criminal justice actors, which takes the form of preserving and disclosing data that can later be used in criminal proceedings, the legal regime applicable is more fragmented. Service providers have themselves developed their voluntary cooperation with criminal justice authorities and may under specific procedures collaborate with them. This form of cooperation is far from being satisfactory, as it is to the detriment of legal certainty and accountability since the transparency reports published by service providers do not provide sufficient details regarding the exact extent of their cooperation with criminal justice actors.¹¹ In addition, some States enacted specific legislation allowing competent national authorities to request data from service providers. Yet the jurisdiction of these national authorities is determined by the principle of territoriality. While this national legislation was initially suited to address situations in which all elements are located within the same State (service provider established in State A, individual suspected of having committed an offence residing in State A and data stored in State A), their application is more complex in cases which present a cross-border element. In practice, such cross-border dimension is almost always present when the data is generated online.¹² Due to the borderless and immaterial nature of the Internet, service providers may most likely be based in another jurisdiction, and they often store the data generated by users in various distant data centres.¹³ A strict legal regime would imply that national criminal justice actors do not only have to gain knowledge on the localisation of

¹⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

¹¹ S Carrera and M Stefan, 'Access to Electronic Data for Criminal Investigations Purposes in the EU' (20 February 2020) CEPS Paper www.ceps.eu 22.

¹² C Kuner, 'The Internet and the Global Reach of EU Law' in M Cremona and J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019) 116.

¹³ R Bismuth, 'Le Cloud Act face au projet européen e-evidence : confrontation ou coopération?' (2019) *Revue Critique de Droit International Privé* 683, or T Christakis, 'Données, extraterritorialité et solutions internationales aux problèmes transatlantiques d'accès aux preuves numériques' (2017) CEIS The Chertoff Group 2.

the data and the establishment of the service provider, but also to activate mechanisms for cross-border cooperation between judicial authorities in criminal matters with each State potentially concerned. Among these mechanisms, can be included mutual legal assistance treaties, being bilateral or multilateral treaties,¹⁴ or the European Investigation Order, an instrument only applicable between authorities of EU Member States.¹⁵ Even though these mechanisms are currently relied upon on a daily basis, they have been considered insufficiently efficient, burdensome and time-consuming, especially considering the high volume of electronic evidence to be requested.¹⁶

To remedy such burdensome procedures, some States have enacted legislation allowing public authorities to request such evidence directly from service providers, regardless of the localisation of the data, as long as they offer their services in their territory. Such possibility is expressly foreseen in the Budapest Convention on Cybercrime.¹⁷ Of particular interest, the United States of America, the country in which major global online service providers are headquartered, have enacted in 2018 a specific piece of legislation, known as the Cloud Act, an acronym for *Clarifying Lawful Overseas Use of Data*.¹⁸ This legislation had been adopted in reaction to a particular case, in which Microsoft refused to communicate data about an individual suspected in a drug trafficking case. The company argued that the data stored in Ireland was outside US jurisdiction. Obtaining the data thus required a request for mutual legal assistance addressed to the Irish authorities. The Cloud Act now forces service providers subject to US jurisdiction to preserve and disclose the content of a wire or electronic communication regardless of whether such communication is located within or outside the USA.¹⁹ Yet such unilaterally enacted norms present several disadvantages.

The fragmentation of the applicable laws may lead to conflicting obligations, preventing or slowing down the preservation and disclosure of data. This is for instance the case when a service provider subject to US jurisdiction is compelled under the Cloud Act to disclose data but is also prohibited from disclosing it under the law of the country in which the data is stored. National legislations can indeed also provide certain restrictions to the disclosure of data, making it dependent upon the existence of dual criminality,

¹⁴ See for instance the European Convention on mutual legal assistance of 20 April 1959, CETS n. 30, or the bilateral agreements signed by the EU, such as the Agreement between the European Union and Japan on mutual legal assistance in criminal matters [2010], or the Agreement between the European Union and Japan on mutual legal assistance in criminal matters [2003].

¹⁵ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

¹⁶ Europol, SIRIUS EU Digital Evidence Situation Report 2019, Cross-border access to electronic evidence, 2019.

¹⁷ Budapest Convention, art. 18(1)(b) cit.

¹⁸ U.S. Congress, Cloud Act, 18 U.S.C., para. 2713.

¹⁹ D Callaway and L Determann, 'The New US Cloud Act – History, Rules and Effects' (2018) *The Computer and Internet Lawyer* 1, or R Bismuth, 'Every Cloud Has a Silver Lining, Une analyse contextualisée de l'extraterritorialité du Cloud Act' (2018) *La Semaine Juridique, Entreprises et Affaires* 35.

prohibiting the preservation and disclosure of data relating to its nationals or residents, or due to provisions on privileges or immunities.²⁰

As a result of fragmentation and the deriving conflicts of laws, service providers face the risk of violating one country's law in order to comply with the law of another. The risk is even higher for those providing online services. The pluralistic and fragmented nature of Internet gives rise to even more situations where different norms cover the same actors or conducts without rules to determine which one has priority.²¹ This situation also impacts individuals and the protection of their fundamental rights. There is a lack of legal certainty and clarity for users of online services, who may most certainly have difficulties in grasping what are the laws applicable to the preservation and the disclosure of the data they generate. This is particularly problematic in situations in which service providers are compelled to collaborate with criminal justice authorities. The data collected represents an important intrusion in a person's privacy, and it might end up as evidence used in court to convict an individual and impose criminal sanctions that can amount a deprivation of his/her liberty. The data collected may also be used in proceedings, which could lead to violations of freedom of expression and freedom of speech. In the light of these potential interferences with their rights, individuals shall be able to rely on safeguards. These ultimately include the rights of the defence applicable in the course of criminal proceedings and trials in the country having jurisdiction, but individuals should also be able to benefit from safeguards specific to the preservation and disclosure of personal data by service providers in the context of cross-border proceedings.

The current fragmentation resulting from unilaterally enacted norms is thus highly problematic. From a practitioner's perspective, it may impair the conduct of criminal investigations and prosecutions, especially those with a cross-border dimension. Delays in the execution of MLA requests or EIOs may lead to the disappearance of the evidence, as electronic data may easily be destroyed or hidden. The situation is also problematic from a fundamental rights' perspective. It also endangers the rights of both legal persons, such as service providers, and natural persons, depriving them of legal certainty and enforceable rights. These elements have been considered sufficient to support the elaboration of common standards, which translated into the initiation of various processes aiming at clarifying the law applicable with regard to electronic evidence.

III. THE EU'S CONTRIBUTION TO THE CLARIFICATION OF THE APPLICABLE LAW

In order to remedy the fragmentation of the rules that allow public authorities to directly request that service providers preserve and disclose electronic evidence, a clarification of

²⁰ Budapest Convention, arts 27, 29 and 30; US Cloud Act, '(h) Comity Analysis and Disclosure of Information regarding Legal Process Seeking Contents of Wire or Electronic Communication', '(2) Motions to quash or modify', amending Section 2703 of title 18, United States Code.

²¹ C Kuner, 'The Internet and the Global Reach of EU Law' cit. 121.

the applicable law is required. Such clarification entails not only the elaboration of common or at least compatible standards, but also the adoption of rules addressing conflicts of legislation. If there is a form of consensus on the need for such clarification, complexity increases when turning to the way such clarification is provided. Taking the perspective of the European Union, such clarification results from three intertwined processes. A first process consists in the elaboration of norms applicable to service providers operating within the EU, in order to ensure the application of uniform standards within the Union. A second process lies in the negotiation of multilateral norms, aiming at providing minimum common standards. The EU has an interest in ensuring that those standards are as much as possible compatible with the future EU law on the matter. Finally, a third process resides in the negotiation of a bilateral agreement with the USA. This agreement would complement the international standards by addressing more specifically potentially conflicting obligations between EU and US laws, and providing for more specific rules, for instance on the authorities competent for requesting evidence. The EU institutions are taking part in these three simultaneous processes that interact between each other, and they defend specific interests in each of them.

III.1. EU STANDARDS WITH A LARGE TERRITORIAL SCOPE OF APPLICATION

Within the EU legal order, the process of elaborating norms on services providers' direct cooperation with criminal justice authorities started when the Commission published on 17 April 2018 its 'e-evidence package', a hybrid package composed of two legislative proposals belonging to different fields of EU law. The first instrument proposed consists in a Regulation on European Production and Preservation Orders for Electronic Evidence in Criminal Matters, which is based on art. 82 (1) TFEU, the legal basis at the disposal of the EU legislator for the adoption of EU instruments approximating criminal procedural law.²² The text seeks to introduce two new mechanisms in the EU legal order, namely the European Production Order and the European Preservation Order, both issued or validated by a judicial authority and addressed directly to service providers. The latter are defined broadly and include those who provide electronic communication services, or internet domain name and IP numbering services, and those who provide "information society services", including social networks or online marketplaces.²³ The Production Order aims to request and obtain the production of different categories of data,²⁴ while the Preservation Order aims to prevent the removal, deletion or alteration of data in situations where it may take more time to obtain it, for instance because judicial cooperation

²² Proposal COM(2018) 640 cit.

²³ *Ibid.* art. 2(3).

²⁴ The text foresees a gradation: subscriber data and access data can be requested for any criminal offence, but transactional and content data should only be requested for offences which carry a maximum custodial sentence of at least 3 years or more. The text also foresees an exception for a certain number of offences falling below that threshold but for which evidence will typically be available mostly in electronic form.

channels are used. These orders will be addressed to service providers via specific certificates, whose content is defined in annexes to the Regulation, delivered to their legal representatives. This Proposal for an EU criminal law Regulation indicates the EU's interest in exercising its competences in the matter, in order to put an end to the fragmentation of national legislation. In this field of shared competences, the Member States remain free to act as long as the EU has not decided to exercise its competence. The proposal thus marks a limit to the autonomy of the Member States, which also impacts their capacity to act externally and negotiate with external partners.

The second instrument proposed is a Directive, based on arts 53 and 62 of the TFEU, which lays down harmonized rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.²⁵ The Commission opted for a separate internal market instrument, advancing the necessity to eliminate obstacles to the freedom to provide services, resulting from uncoordinated national solutions and potentially conflicting national obligations.²⁶ In substance, the text provides for measures on the legal representation in the EU of certain service providers for the purpose of gathering evidence in criminal proceedings.²⁷ Service providers will have to designate at least one legal representative in the Union, who shall reside or be established in one of the Member States where the service provider is established or offers services.²⁸

The key feature of these two envisaged EU instruments lies in their scope of application, characterised by a broad territorial extension of the scope of EU law.²⁹ The envisaged texts would apply to a large group of economic operators established well beyond the geographical borders of the EU, namely those “enabling legal and natural persons in one or more Member States to use services and having a substantial connection – based on specific factual criteria - to the Member State in which the service is provided”.³⁰ Such substantial connection shall be considered to exist where the service provider has an establishment in the EU, or in the absence of such establishment, when specific factual criteria, such as a significant number of users, or the targeting of activities in one or more

²⁵ Proposal COM(2018) 226 cit.

²⁶ *Ibid.* 4.

²⁷ A specific provision (art. 3(3)) deals with the consequences of variable geometry in judicial cooperation in criminal matters, and foresees that all Member States should be required to ensure that service providers not established in the Union but offering services in the Union designate a legal representative in the Union, which would be the addressee of direct requests in cross border situations and of requests based on judicial cooperation between judicial authorities.

²⁸ Proposal COM(2018) 226 cit. art. 3.

²⁹ J Scott, ‘The New EU Extraterritoriality’ (2014) CMLRev 1343.

³⁰ Proposal COM(2018) 640 cit. art. 2(4) and Preamble 7 “application should not depend on the actual location of the provider’s establishment or of the data processing or storage facility”. See also Proposal COM(2018) 226 cit. art. 2(3).

Member States,³¹ make it possible to identify the connection with the EU.³² Such a broad scope of application is not unique, especially for texts regulating online services. Similar provisions can be found in the GDPR,³³ or in the proposal for an e-privacy Regulation, which also foresees the appointment of legal representatives in the Union for online service providers.³⁴ The future provisions on the preservation and disclosure of electronic evidence will be contained in instruments addressed only to EU Member States, but the standards they contain will be applied far beyond the EU's territory. This approach, which is not questioned by the Council or the European Parliament,³⁵ mirrors the one taken in the US Cloud Act.³⁶ This is understandable and pragmatic, as a scope of application limited to the EU's territory would fail to achieve the objectives pursued by the e-evidence package.

Yet the envisaged EU standards present shortcomings. The EU is at risk of "regulatory overreaching", i.e., the risk of EU law being applied so broadly that it stands little chance of being enforced.³⁷ In addition, many service providers will prove to have a substantial connection with the EU, and they have greater chances of facing conflicting obligations. To resolve such conflicts, the proposal for a Regulation initially envisaged two possibilities under which a service provider could object to the execution of a European Production Order. Such objections would have applied when the order conflicted with applicable laws of a third country prohibiting the disclosure of the data concerned, either to protect the fundamental rights of the individuals concerned or the fundamental interests of the third country related to national security or defence;³⁸ or any other third country's rules.³⁹ In such circumstances, the competent court in the Member State of the issuing authority would have transmitted all relevant legal and factual information about the case to the third country's central authority. After review, the latter would have had the possibility to object to the disclosure of the data concerned, leading the competent court in the issuing country to lift the Order.⁴⁰

³¹ This entails for instance the availability of an app in the national app store, providing local advertising, advertising or customer service in the language used in that Member State, etc.

³² General Approach 10206/19 of the Council of 11 June 2019 on a Proposal for a Regulation, Preamble 8.

³³ Art. 3(2) Regulation (EU) 2016/679 cit., see C Kuner 'The Internet and the Global Reach of EU Law' cit. 129.

³⁴ Proposal COM(2017) 10 final of the Commission of 10 January 2017 for a Regulation of the European Parliament and the Council concerning the respect for private life and the protection of personal data in electronic communications, art. 3.

³⁵ Draft Report 10206/19 LIBE_PR(2019)642987 of the European Parliament on the proposal for a regulation on European Production and Preservation Orders for electronic evidence in criminal matters, no amendment on this specific point; and General Approach of the Council on a Proposal for a Regulation, art. 2(4) – addition of the requirement of specific factual criteria for establishing a substantial connection with the EU.

³⁶ R Bismuth, 'Le Cloud Act face au projet européen e-evidence' cit. 685.

³⁷ C Kuner, 'The Internet and the Global Reach of EU Law' cit. 138.

³⁸ Proposal COM(2018) 640 cit. art. 15

³⁹ *Ibid.* art. 16. For an analysis of this procedure, see R Bismuth, 'Le Cloud Act face au projet européen e-evidence' cit. 689.

⁴⁰ Proposal COM(2018) 640 cit. art. 15(6).

The Council substantially amended the text, transforming two provisions into one applicable in all cases of conflicting obligations,⁴¹ and introducing a ten-day deadline for the addressee to inform the issuing authority.⁴² These changes were criticised for reducing the influence of third country authorities and deleting the obligation of the competent court in the issuing country to dismiss the order if a conflict of laws is established.⁴³ The sensitivity of the issue is further reinforced with the draft European Parliament amendments. The approach proposed is radically different: as the order would no longer be transmitted to the service provider but to an executing authority, the latter would have to inform the issuing authority of a potential conflict within 10 days from the receipt of the order, via a notice including all relevant details on the law of the third country, its applicability to the case at hand and the nature of the conflicting obligation. As in traditional EU mutual recognition instruments, the executing authority would furthermore have the last word for taking a final decision on the execution of the order.⁴⁴ These elements illustrate the difficulties in determining the adequate procedure to resolve conflicting obligations, and further reinforce the importance of the two other processes in which the EU is engaged to mitigate these shortcomings.

III.2. NEGOTIATING A BILATERAL AGREEMENT WITH THE UNITED STATES OF AMERICA

The negotiations of a bilateral agreement on cross-border access to electronic evidence for judicial cooperation in criminal matters with the US take place in a specific context. The US and the EU have a well-established history of cooperation in criminal matters.⁴⁵ In addition to their agreements on extradition and mutual legal assistance, they concluded in 2016 a specific agreement, known as the Umbrella Agreement on Data Protection and Privacy,⁴⁶ which provides additional standards for the protection of personal data in the course of information exchange in criminal matters.⁴⁷ Furthermore, they already cooperate in relation with the collection of electronic evidence. A direct mechanism provided for in US law allows US-based service providers to cooperate directly with European authorities, but it only covers non-content data, and it is only voluntary.⁴⁸ Lastly,

⁴¹ General Approach 10206/19, cit. 45, deletion of art. 15.

⁴² *Ibid.* 46, art. 16(2).

⁴³ T Christakis, 'E-Evidence in a Nutshell: Developments in 2018, Relations with the Cloud Act and the Bumpy Road Ahead' (14 January 2019) Cross Border Data Forum www.crossborderdataforum.org

⁴⁴ Draft Report of the European Parliament cit. amendment 173, art. 14(a)(5).

⁴⁵ See the Agreement on extradition between the European Union and the United States of America, or the Agreement on mutual legal assistance between the European Union and the United States of America. For a detailed analysis of these agreements, see V Mitsilegas, 'The New EU-USA Cooperation on Extradition, Mutual Legal Assistance and the Exchange of Police Data' (2003) *European Foreign Affairs Review* 515.

⁴⁶ Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences.

⁴⁷ These rules include notably clear limitations on data use, right to access to personal data and to rectification, notification in the case of data security breaches, and judicial redress and enforceability of rights.

⁴⁸ Recommendation COM(2019) 70 final cit. 2.

US authorities collaborate with European authorities desiring to request information held by US-based service providers thanks to the mutual legal assistance treaty (MLAT) process, under which judicial cooperation requests are issued and transmitted. This process is currently applicable to all EU Member States, with whom the US has concluded mutual legal assistance agreements, under the framework of the broader EU-US mutual legal assistance agreement which was signed in 2003 but has not yet entered into force.

In this context, the need for a new agreement on electronic evidence stems from various factors, among which the volume of requests addressed to the USA where the largest service providers have their headquarters, and the alleged difficulties arising from the length of judicial cooperation based on the EU-US mutual legal assistance treaty, under which requested evidence may be obtained in an average of 10 months.⁴⁹ Additionally, a new agreement could allow the EU to benefit from the possibility provided for in the US Cloud Act to conclude executive agreements governing access by a foreign government to electronic data held by communications- service providers in the United States.⁵⁰

From the EU's perspective, a new agreement should pursue three objectives: 1) to address conflicts of law and set common rules for orders on content and non-content data addressed to a service provider that is subject to the law of another contracting party, such as the binding character of such order, the obligation to disclose the request to the data subject, etc.; 2) to allow for a transfer of electronic evidence directly on a reciprocal basis by a service provider to a requesting authority; and 3) to ensure respect for fundamental rights, freedoms and general principles of EU law.⁵¹ These objectives translate in various priorities in the Commission's mandate. The agreement should set out the conditions to be met before a judicial authority can issue an order, thus excluding the issuance of orders by other public authorities. The agreement should also contain procedural right safeguards, such as the fact that data may not be requested for its use in proceedings that may lead to the death penalty, or a life imprisonment without a possibility of review and a prospect of release,⁵² or specific safeguards for data protected by privileges and immunities.⁵³ With regard to the procedure, the negotiating mandate also refers to the importance of complying with the Umbrella Agreement on Data Protection and Privacy, and provides for additional safeguards that take into account the unique requirements of the transfer of electronic evidence directly by service providers rather than between authorities and transfers from competent authorities directly to service

⁴⁹ *Ibid.*

⁵⁰ US Cloud Act cit. Sec. 5. Executive Agreements on Access to Data by Foreign Governments, para. 2523.

⁵¹ Recommendation COM(2019) 70 final cit. 8.

⁵² These safeguards, relating to the risk of the e-evidence requested being used in proceedings leading to death penalty or life imprisonment, are not an exception. See for instance the provisions in the MLA agreements with Japan and the USA.

⁵³ Addendum 9666/19 of the Council to the Council Decision authorising the opening of negotiations with a view to concluding an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters 7.

providers.⁵⁴ The EU also intends to require reciprocity in the rights and obligations of the parties, and in particular reciprocity in terms of the categories of persons whose data must not be sought pursuant to the future agreement. This refers notably to the possibility, foreseen in the Cloud Act, for the service provider to file a motion to modify or quash the legal proceedings if the provider reasonably believes that the customer or subscriber is not a US person and does not reside in the US.⁵⁵ Such restrictions should as a consequence be applicable to EU citizens and residents.⁵⁶

The negotiations on the future EU-US bilateral agreement started on 25 September 2019, and even though two rounds of negotiation have already taken place in September and November 2019, the discussions remain rather general. Nevertheless, it is possible to analyse what could be the content of the future EU-US agreement in the light of the agreement that the US has concluded with the United Kingdom on access to electronic data for the purpose of countering serious crime,⁵⁷ the first agreement concluded under the Cloud Act a few months before the UK's withdrawal from the EU. Of particular interest are the provisions foreseeing that the orders shall be subject to review or oversight under the domestic law of the Issuing Party by a court, judge, magistrate, or other independent authority (art. 5(2)), and the issuing party's designated authority, which shall transmit the order to a service provider, must review and certify the compliance of the order with the agreement (art. 5(6) and (7)). On fundamental rights and freedoms, the agreement refers to the EU-US Umbrella agreement (art. 9), as well as to the compatibility of the agreement with the Parties' respective applicable laws on privacy and data protection (art. 9(2) or art. 10(10)). The agreement also provides for a specific procedure when a service provider wishes to raise objections about the invocation of the agreement for a specific order; including a potential conflict of laws. In such situations, the service provider's objection is to be raised successively to the Designated Authorities of the Issuing and Receiving Parties, which may confer in an effort to resolve any such objections, and meet periodically and as necessary to discuss and address any issues raised (art. 5 (11)). Whereas some provisions of the text can be considered as a precedent compatible with the red lines identified by the EU, there are still unresolved issues, in particular regarding conflicts of law. In addition, the conclusion of an UK-US agreement does not make the negotiations of an EU-US agreement a less delicate process. Whereas the US and the UK negotiated their agreement with a full knowledge of

⁵⁴ *Ibid.* 8.

⁵⁵ US Cloud Act, '(h) Comity Analysis and Disclosure of Information regarding Legal Process Seeking Contents of Wire or Electronic Communication', '(2) Motions to quash or modify', amending Section 2703 of title 18, United States Code.

⁵⁶ R Bismuth 'Le Cloud Act face au projet européen e-evidence' cit. 693.

⁵⁷ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime, presented to the British Parliament on 7 October 2019. For an analysis of that agreement, see T Christakis, '21 Thoughts and Questions about the UK-US CLOUD Act Agreement' (17 October 2019) europeanlawblog.eu.

their respective domestic legislation, the EU is still in the process of elaborating its own domestic standards, making its negotiations with the US a forward-looking exercise. Moreover, even once the EU standards on electronic evidence will be adopted, the exercise will remain complex considering the diversity among the EU Member States. The future EU-US agreement might most likely have to be complemented by bilateral agreements between the US and individual EU Member States, in order to accommodate national variations in the organization of criminal justice systems, or in national standards on privacy, privileges and immunities.⁵⁸

III.3. INTERVENING IN INTERNATIONAL NEGOTIATIONS ON GLOBAL STANDARDS

Reducing fragmentation and incompatibilities between norms enacted at national and/or regional levels finally encompasses the elaboration of global standards on the direct co-operation of service providers with public authorities in the preservation and disclosure of electronic evidence. The participation of the EU and its Member States in such process can be explained by their mutual interest in ensuring that as many countries as possible accept global norms which are at least compatible with the EU's own standards.⁵⁹ In addition of reducing risks of conflicting obligations for service providers, and facilitating reciprocal cooperation, these global standards can also become tools for the EU's bilateral relations with third countries. Finally, should the EU succeed in "uploading" its internal norms into the international level, it would grant them hierarchical authority within the EU's legal order, reinforcing the chances of their correct and uniform implementation.⁶⁰

International negotiations concerning the elaboration of global norms on direct cooperation between repressive authorities and service providers have been ongoing for few years. They intervene under the auspices of the Council of Europe, in which the Budapest Convention, the first multilateral binding international instrument addressing cybercrime, was elaborated. The Convention aims to eliminate or at least reduce the existence of "safe havens", and to facilitate effective cooperation between law enforcement agencies.⁶¹ Since 2017, the Cybercrime Convention Committee, i.e. the Committee in charge of supervising the implementation of the Convention, has decided to conduct negotiations in order to prepare a Second Additional Protocol. The text envisages a series of provisions, including specific provisions allowing for direct cooperation with service providers in other jurisdic-

⁵⁸ This is furthermore the position taken by the US. See Report 13713/19 of the Council and the Commission on the second round of negotiations in view of an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters, 8 November 2019 3.

⁵⁹ M Cremona, 'Extending the Reach of EU Law' in M Cremona and J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019) 101.

⁶⁰ *Ibid.* 107.

⁶¹ J Clough, 'A World of Difference: The Budapest Convention on Cybercrime and the Challenges of Harmonisation' (2014) *Monash University Law Review* 701.

tions with regard to request for subscribers' information, preservation requests and emergency requests.⁶² As of July 2019, the negotiations have progressed well, as there is a provisional agreement on the provisions dealing with this issue. The Committee stressed that several meetings were devoted to the discussion of their compliance with data protection and rule of law requirements, and it underlined the high complexity of drafting such provisions which need to be compatible with the systems of, and be of benefit to, all Parties of the Convention.⁶³

A provisional text was agreed upon on 8 November 2019, establishing a procedure for direct cooperation between the authorities in one Party and a service provider in the territory of another Party to obtain subscriber information. The draft provision allows parties to make a declaration through they accept only orders "issued by, or under the supervision of, a prosecutor or other judicial authority, or otherwise be issued under independent supervision".⁶⁴ The draft text also allows parties to require simultaneous notification of the order, and/or to require the service provider to consult their authorities in identified circumstances prior to disclosure.⁶⁵ Last, it allows the parties to instruct the service provider not to disclose the information if the disclosure may prejudice criminal investigations or proceedings in the receiving Party; or if conditions or grounds for refusal would apply had the subscriber information been sought through mutual assistance.⁶⁶ The role of the EU in the elaboration of this provisional text seems limited considering that the Commission only obtained the authorisation to participate in the negotiations on behalf of the EU in July 2019,⁶⁷ and so far has only participated in the negotiation sessions held in July and September 2019.⁶⁸

Nevertheless, the late participation of the EU in such negotiations is crucial for several reasons. Firstly, it signals the EU's support of the Budapest Convention and its Addi-

⁶² Cybercrime Convention Committee, Terms of reference for the preparation of a draft Second Additional Protocol to the Convention on Cybercrime, 9 June 2017, T-CY (2017)3, 3.

⁶³ Cybercrime Convention Committee, Preparation of the 2nd Additional Protocol to the Budapest Convention on Cybercrime, State of play, 8 July 2019, T-CY (2019)19.

⁶⁴ Cybercrime Convention Committee, Preparation of the 2nd Additional Protocol to the Budapest Convention on Cybercrime, Provisional text of provisions, 8 November 2019, T-CY (2018)23, 15.

⁶⁵ *Ibid.* 15-16.

⁶⁶ This refer to the possibility to refer to the provisions according to which "mutual assistance shall be subject to the conditions provided for by the law of the requested Party or by applicable mutual assistance treaties, including the grounds on which the requested Party may refuse co-operation" (art. 25(4) Budapest Convention) and the possibility to refuse assistance in the absence of applicable international agreements if the request concerns an offence which the requested Party considers a political offence or an offence connected with a political offence, or it considers that execution of the request is likely to prejudice its sovereignty, security, order public or other essential interests (art. 27(4) Budapest Convention).

⁶⁷ Decision 9116/19 of the Council authorizing the opening of negotiations cit.

⁶⁸ Non-paper from the Commission services on the state of play of the negotiations for the second additional protocol to the Budapest Convention and the negotiations for an EU-US agreement on cross-border access to electronic evidence, Council 12318/19, 2 October 2019.

tional Protocols as the instruments of choice for international cooperation on cyber-crime,⁶⁹ a claim shared with the US.⁷⁰ This aspect should not be neglected, as there are currently dissensions regarding the adequate vehicle for agreeing upon global standards. In parallel to the negotiations of the Protocol, the Russian Federation made a proposal taken on in a UN General Assembly Resolution⁷¹ to elaborate a new international treaty negotiated in the United Nations framework. The initiative has been criticized for largely duplicating the Budapest Convention, and for potentially lowering the standards for protecting fundamental rights.

Secondly, the participation of the EU in the negotiations allows it to ensure that the future global standards will contain provisions allowing for flexibility and recognition of separate agreements concluded by Contracting Parties. The EU may seek to obtain the insertion of a disconnection clause, not only allowing its Member States to apply EU standards in “internal EU cross-border cooperation”, but also organising the relationship between the envisaged EU-US bilateral agreement and the future Protocol, the former taking precedence on the latter.⁷² Such disconnection clauses are frequent in Council of Europe Conventions, considering that many Parties are also Member States of the EU, and they allow these States to prevent conflicts of laws.

Thirdly, the EU’s participation in the negotiations allows it to establish its competence *vis-à-vis* its Member States. The EU does not possess express external competences in the field of EU criminal law, and its competence to act externally may be implied where the conclusion of an international agreement is likely to affect common rules or alter their scope (art. 216 TFEU). This may explain why the Commission waited for the publication of the e-evidence package to seek the authorisation to participate in the negotiations. Lastly, and most importantly, this participation allows the European Commission to closely monitor the elaboration of the other parts of the Second Additional Protocol, especially regarding the respect for fundamental rights. The Commission could attempt to “upload” some of the EU’s standards, or at least ensure that the future text will be compatible with them, thus further reducing the risk of conflicting obligations.

These three processes reveal how the EU is taking part not only in the elaboration of EU criminal procedural norms on the direct cooperation with service providers for the collection of electronic evidence, but also in the elaboration of criminal procedural norms with a broader scope of application. At present the content of these EU, bilateral and

⁶⁹ Council of Europe, EU Statement in support of the Council of Europe Convention on Cybercrime of 15 January 2020.

⁷⁰ Press release n. 828/19 on Joint EU-US statement following the EU-US Justice and Home Affairs Ministerial Meeting, 11 December 2019.

⁷¹ UN General Assembly, Resolution A/RES/74/247 of the of 27 December 2019, Countering the use of information and communications technologies for criminal purposes.

⁷² Addendum to the Decision 9666/19 of the Council authorizing the negotiations of an EU-US agreement, 5.

multilateral norms is not finalised, which makes it difficult to evaluate whether these negotiation processes will result in compatible standards, ensuring an adequate balance between security objectives and the protection of individuals' rights. Nevertheless, these three parallel processes constitute another illustration of the interdependence between the internal and external dimensions of the EU area of criminal justice, which is particularly strong when it comes to the collection of evidence generated in a borderless online environment.

IV. THE LIMITS TO THE EU'S AMBITIONS

The development of new norms allowing for the direct cooperation with service providers in the preservation and disclosure of electronic evidence is not exempt of limits and critics. As a preliminary remark, it is worth noting that the need for these new norms is in itself contested. Various actors have denounced the limited evidence brought forward, for instance by the European Commission, to justify the need for new norms on the matter.⁷³ In a similar vein, others have stressed the potentially limited added value of the future new instruments, stressing that the existing instruments, such as the EIO, could be put to better use before considering adopting norms.⁷⁴

The drafting of the EU standards started in April 2018, and since then the two proposals have been discussed and negotiated within the two EU co-legislators, the Council of the EU and the European Parliament. The Council has adopted its general approaches for both proposals.⁷⁵ The work within the European Parliament advanced between April 2018 and April 2019,⁷⁶ but it was interrupted due to the European elections, which took place in May 2019. The newly (re-)elected members of the European Parliament (MEPs) took back office in July 2019, and work on legislative proposals resumed progressively. Discussions are still taking place within the LIBE Committee. Draft reports were submitted in the autumn: on 24 October 2019 for the proposal for a Regulation⁷⁷ and on 11 November 2019 for the proposal for a Directive.⁷⁸ However, even though the Croatian Presidency of the Council placed emphasis on finalizing trilogue negotiations on these texts,⁷⁹ the negotiations are far from being concluded at the time of writing (May 2020), even more so with the disruption in the legislative process caused by Covid-19. Never-

⁷³ G González Fuster and S Vásquez Maymir, 'Cross-border Access to E-Evidence: Framing the Evidence' (2 March 2020) CEPS www.ceps.eu.

⁷⁴ S Carrera and M Stefan, 'Access to Electronic Data for Criminal Investigations Purposes in the EU' cit. 21.

⁷⁵ General Approach 10206/19 of the Council cit. and General Approach 7348/19 of the Council of 11 March 2019 on a Proposal for a Directive.

⁷⁶ European Parliament, Draft Report on the proposal for a regulation cit. Executive summary.

⁷⁷ European Parliament, Legislative Observatory oeil.secure.europarl.europa.eu.

⁷⁸ European Parliament, Legislative Observatory oeil.secure.europarl.europa.eu.

⁷⁹ Croatian Presidency, Programme, eu2020.hr, 22.

theless, the amendments introduced at this stage allow us to identify the points of convergence and divergence between the two co-legislators. Both seem to agree to substantially modify the procedure through which the European Production and Preservation Orders will be enforced. They both propose the insertion of a notification to the competent (judicial) authorities in the enforcing Member State, with a strict deadline to oppose the execution of the order, especially in light of the possible risks of violations of freedom of the press and freedom of expression.⁸⁰ MEPs also suggest the reintroduction of grounds of refusal based on fundamental rights as for the EIO,⁸¹ a position also shared by some Member States in the Council. Both institutions also suggest introducing rules regarding the specialty principle,⁸² i.e. the possibility of using the information/evidence gathered only for the purpose indicated in the order, an element not addressed in the Commission's proposal for a Regulation. These changes would allow for a certain review and examination of the order's compliance with fundamental rights prior to its execution, carried out by competent judicial authorities, rather than by the service providers themselves. However, other elements appear as potential sticking issues in the negotiations, sometimes within each institution. For example, MEPs expressed reservations concerning the choice of art. 82 TFEU for the adoption of the Regulation, considering that it focusses on the execution of law enforcement orders by private providers, and not on cooperation between judicial authorities. MEPs also expressed doubts about the choice to present a package composed of a criminal justice Regulation and an internal market Directive, the latter being considered as overreaching its goal and raising serious issues with its legal basis.⁸³

The absence of a definitive (or at least a provisional) agreement on EU standards represents a difficulty for the external activities initiated by the EU. A hurdle has already appeared in the context of the negotiations of the bilateral agreement with the US. As stressed by Commissioner D. Reynders, the agreement can only be concluded by the EU once there is an agreement on internal EU rules, but the US is more than prepared to seek bilateral negotiations with EU Member States if negotiations at EU level stall or take

⁸⁰ General Approach 10206/19 of the Council cit. art. 7A and European Parliament, Draft report on the proposal for a regulation cit. amendment 141.

⁸¹ European Parliament, Draft report on the proposal for a regulation, amendment 101 and General Approach 10206/19 of the Council cit.

⁸² General Approach 10206/19 of the Council, cit. art. 12(b) and European Parliament, Draft report on the proposal for a regulation cit. amendment 465.

⁸³ Draft report on the proposal for a regulation of the European Parliament cit. Explanatory statement 146.

too long.⁸⁴ This may result in a fragmented patchwork of different agreements, and endanger the consistency of the EU area of criminal justice.⁸⁵ It may nevertheless be restrained by the consequences the duty of sincere cooperation has on EU Member States' external activities, especially when an EU negotiating mandate has already been agreed upon.⁸⁶ In the context of the negotiations on the Second Additional Protocol to the Budapest Convention, the agreement on the Commission's mandate is also a factor that may limit the capacity of EU Member States to act on their own. The Commission further reported working in consultation with the Council's Special Committee for the negotiations and organising on-the-spot coordination meetings for EU Member States.⁸⁷ Nevertheless the risk of disputes between the Commission and the Member States is not completely mitigated, especially in the light of previous tensions and disputes in the field of data protection and online activities that have arisen when the Commission has asserted its right to negotiate on behalf of the EU regarding a matter that was the subject of present or pending EU legislation.⁸⁸

V. CONCLUSION

In response to the evolution of our societies, criminal justice authorities have stressed the importance taken in criminal proceedings by electronic evidence generated online. As it should be in democratic societies complying with the rule of law, the legislator must define the legal framework under which these authorities may request and obtain the preservation and disclosure of data, including sensitive personal data. The European Union chose within the scope of its competences to engage in three simultaneous processes for the elaboration of standards governing the collection of electronic evidence in cross-border criminal proceedings.

The proposals for EU instruments on e-evidence illustrate the challenges inherent to the elaboration of common procedural standards within the European Union, especially for the elaboration of new types of cooperation mechanisms concerning the cross-border collection of evidence. This is particularly vivid when recalling the failure of the Framework Decision on the European Evidence Warrant, never implemented and repealed in

⁸⁴ European Parliament, LIBE Committee meeting of 21 January 2020, Presentation by Didier Reynders, Commissioner for Justice on the EU-US JHA ministerial meeting of 10-11 December 2019, Agenda item LIBE/9/03307.

⁸⁵ S Tosza, 'All evidence is equal, but electronic evidence is more equal than any other: The relationship between the European Investigation Order and the European Production Order' (2020) *New Journal of European Criminal Law* 10.

⁸⁶ M Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in M Cremona and B de Witte (eds), *EU foreign relations law: Constitutional fundamentals* (Hart Publishing 2008) 160 ff.

⁸⁷ Report on the state of play 12318/19, 5.

⁸⁸ C Kuner, 'The Internet and the Global Reach of EU Law' cit. 119 f.

2016,⁸⁹ or when stressing the absence of initiative regarding the elaboration of common standards on the admissibility of evidence despite an explicit legal basis to do so.⁹⁰ The importance of national procedural criminal law in defining the threshold above which an evidence becomes admissible may explain the difficulties encountered in defining these future common standards.⁹¹

In this regard, the guarantees that will be provided for the protection of fundamental rights in the future mechanisms designed at European and international levels are essential. The proposals for EU internal instruments contain specific rules strictly framing the possibilities and modalities under which electronic evidence may be requested, including the issuance of the request by a judicial authority, or under its supervision, and disclosure of data only for offences above a certain threshold of seriousness.⁹² The ongoing negotiations might even further reinforce the guarantees by granting judicial authorities in the executing States the role of reviewing the requests issued and eventually refusing their execution.⁹³ Similarly, the negotiation mandates obtained by the Commission stress the importance of ensuring a sufficient protection of fundamental rights, which might result in the insertion of specific clauses in the future envisaged agreements. Yet the adoption of these procedural safeguards will be a delicate task. The diversity within the EU and beyond will have to be accommodated and be reflected in the procedural rules applicable to the collection of electronic evidence. Preventing conflicts of laws will be essential in order to provide legal certainty and accessibility of the law applicable, which is of core importance, not only for service providers who should avoid being placed in a situation in which they breach either their domestic law, or EU law, but also for the protection of the rights of individuals from which they may benefit under the law of a third country or EU law.

In this context, the discussions around the procedure under which the request to preserve and disclose data will be reviewed and executed are essential to guarantee the long-term implementation of the future standards. There will be little interest in designing mechanisms that lead to decisions of inadmissibility and prevent the use of key data as evidence before courts. This concern applies to EU internal negotiations, but also to the two other processes in which the EU is currently engaged. When negotiating its bilateral agreement with the US and the future global instrument on the matter, the EU must be careful in ensuring that the facilitation of cross-border collection of evidence directly from service providers is not achieved at the expense of the protection of procedural

⁸⁹ Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

⁹⁰ Art. 82(2) TFEU. A Weyembergh and E Sellier (30 August 2018) 'Criminal procedural laws across the European Union' www.europarl.europa.eu 62.

⁹¹ A Weyembergh and E Sellier, *Criminal procedural laws across the European Union* cit. 48-52.

⁹² Proposal COM(2018) 640 cit. arts 3(2), 4 and 5(4), and the amendments suggested by the Council and the Parliament.

⁹³ Draft Report on the proposal for a regulation of the European Parliament cit. 145.

safeguards, which are key to ensure the future admissibility of the data collected as evidence. It will also be a test of its capacity to ensure the consistency between the internal and external dimensions of the EU area of criminal justice, and the promotion of human rights and fundamental freedoms on the international stage.



ARTICLES

TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – SECOND PART

edited by Araceli Turmo

THE IMPACT OF BREXIT ON EU CRIMINAL PROCEDURAL LAW: A NEW DAWN?

ANNEGRET ENGEL*

TABLE OF CONTENTS: I. Introduction: the state of play. – II. Background: a European patchwork. – III. Brexit: replicating the un-replicable. – IV. EU *versus* UK: opposing directions of travel. – V. EU-27: a new dawn for criminal law cooperation? – VI. Concluding remarks.

ABSTRACT: This *Article* provides an analysis of how the UK's withdrawal from the European Union is going to impact on EU criminal procedural laws. From the EU's perspective, the loss of a "critical" partner may lead to more harmonised cooperation between the remaining Member States and thus less intergovernmental features in this area in the long term. More crucially however, the future relationship between the EU and the UK poses certain difficulties as the procedural arrangements to be put in place cannot simply replicate the pre-Brexit status of the UK's membership. According to the Draft Agreement on the New Partnership with the UK, mechanisms such as the European Arrest Warrant are to be replaced by new "streamlined" procedures and other "simplified" arrangements for the exchange of information and cooperation. This raises questions as regards the possibility for monitoring the UK's compliance as well as the enforceability of any procedural guarantees given. In addition, the inherent danger of the UK's departure comes in the shape of a discontinuity of upholding similar values as those applied by the EU (e.g., fundamental rights) and thus a further drifting apart of both sides. Essentially, it is argued in this contribution that this constitutes the opposite of the relationship with other third countries, which is usually characterised with progressive alignment, and should therefore be approached with great caution from an EU perspective for the conclusion of the negotiations on the future relationship.

KEYWORDS: Brexit – draft agreement – criminal procedural law – differential integration – cooperation between Member States – fundamental rights standards.

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I. INTRODUCTION: THE STATE OF PLAY

The withdrawal of a Member State from the EU is unprecedented in its history. For the first time during the Union's existence, the Lisbon Treaty has provided for the possibility of voluntary termination of membership according to art. 50 TEU. The UK's referendum in June 2016 on its future in- or outside of the EU resulted in a marginal win for the Leave side. The process of withdrawal officially started with the triggering of art. 50 TEU in March 2017 after UK-internal quarrels in the quest for the correct constitutional competences and institutional involvement.¹ The negotiations for a withdrawal agreement have since been difficult, characterised by deadlocks, extensions, and even one preliminary ruling before the Court of Justice on the revocability of art. 50 TEU.² Eventually, the UK formally left the EU on 31 January 2020. The current transition period will last until 31 December 2020. Unlike the Withdrawal Agreement which stipulates the terms and conditions of the UK's departure,³ the current negotiations for the future relationship between the EU and the UK now also include matters in criminal law cooperation.

As is clear from the to and fro in the Brexit negotiations, the future EU-UK relationship is a moving target and therefore capturing more than just a snapshot remains difficult. The negotiations between the EU and the UK are currently still on-going – despite various setbacks – with the aim to successfully conclude an agreement on the new partnership before the end of 2020. Basis for these negotiations forms a draft agreement from March 2020, which has however not yet reached consensus from the two sides.⁴ Indeed, it is questionable whether such consensus will be possible in the time remaining for a conclusion of an agreement and before the end of the transition period. Nevertheless, this draft reveals the underlying issues in criminal law matters and the procedural requirements necessary for cooperation across the Channel, irrespective of an eventual adoption of this version, and shall therefore assist as reference point for the following discussion.

The focus of this *Article* will be on EU criminal procedural law and the impact Brexit will have in this area. As will be argued, the UK's withdrawal not only changes its own relationship with the EU, but may also affect the future cooperation between EU Member States themselves. As one of the policy areas characterised by variable geometry,⁵ the area of freedom, security and justice has received much attention in academic literature,

¹ UK Supreme Court judgment of 24 January 2017 *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* (2017) [UKSC] 5. See also discussion in A Engel, 'The European Union and the Brexit Dilemma – A very British Problem?' (2019) *Nordic Journal of European Law* 24.

² Case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999. For a short case analysis, see P Koutrakos, 'The European Court of Justice and the Politics of Brexit – the Wightman Judgment' (2019) *ELR* 1.

³ European Council Agreement of 2019 on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

⁴ Draft text of the Agreement of 18 March 2020 on the New Partnership with the United Kingdom.

⁵ B De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order', in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* (Edward Elgar 2017) 9.

including the role of the UK during its EU membership. As such, the aim of this contribution is not to elaborate in great detail about all the peculiarities of EU criminal procedural law; this is already done elsewhere in this Special Issue. Instead, specific examples will be picked to illustrate the impact of the UK's withdrawal on the relationship with the European Union for criminal procedural law as well as the effect it has on the remaining Member States and on their relationship with each other.

First, a brief background with examples of differentiated integration shall provide an overview of the rather fragmented European landscape in this area. Second, the key differences in criminal procedural law after Brexit will be analysed as proposed by the Draft Agreement for the future relationship with the UK. As will be argued, these are an attempt to replicate the un-replicable due to the common desire for cross-border cooperation in the fight against international crime. However, it is also suggested, that this has to be met with realism about the post-Brexit truth of opposing directions of travel as reflected in the procedural guarantees incorporated in the Draft Agreement, particularly with regards to fundamental rights standards. This will be followed with a discussion on the potential for closer cooperation between the remaining EU Member States after the UK's withdrawal. Some concluding remarks will be provided in the final section.

II. BACKGROUND: A EUROPEAN PATCHWORK

EU cooperation in criminal matters has long been characterised as intergovernmental and despite its integration by the Treaty of Lisbon, the former third pillar preserves some of its previous flexibility for Member States.⁶ Such intergovernmental flexibility requires the additional application of general principles of trust⁷ and mutual recognition,⁸ without which cross-border cooperation in criminal matters would be less than efficient. While the provisions under the area of freedom, security and justice are now governed by shared competences according to art. 4(2)(j) TFEU, differential integration is mainly facilitated by special procedural arrangements in place for some of these legal bases in this area.⁹

Most notably, judicial cooperation in criminal matters allows for emergency brakes by one single Member State, thus suspending the ordinary legislative procedure for a measure it might otherwise have to comply with if adopted, but does not wish to partake in for reasons that it considers to affect fundamental aspects of its own criminal justice

⁶ S Peers, 'Mission Accomplished? EU Justice and Home Affairs Law After the Treaty of Lisbon' (2011) CMLRev 661.

⁷ See e.g. Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 191.

⁸ J Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure' (2020) EuConst 33.

⁹ For an extensive discussion on the different competences under EU law, see A Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer 2018).

system.¹⁰ Enhanced cooperation then enables some (at least nine) of the Member States to proceed with action for such a measure without the participation of the remaining countries if the latter wish to abstain.¹¹ As was claimed by J.C. Piris, enhanced cooperation essentially creates a “two-speed Europe” in those policy areas.¹² However, it could also be argued that the resulting flexibility achieves solidarity amongst Member States and enthusiasm for the European idea: some countries are simply better equipped to invest in certain initiatives at an early stage, while risking failure, and perhaps paving the way for others to join at a later stage.¹³ Thus despite the fact that enhanced cooperation creates somewhat of a patchwork within EU criminal law, it does not in itself prevent further European integration; quite the contrary, it might arguably even support it.¹⁴

Another peculiarity is the option for opt-outs in relation to Title V of Part Three TFEU. For the UK and the Republic of Ireland, a flexible opt-out has been agreed, which allows them to initially abstain from any measures adopted in this area, but with a possibility to opt-in at a later stage.¹⁵ In the case of Denmark, a permanent opt-out provides some more legal certainty, but still allows for the adoption of parallel international agreements in order to substitute any measure at EU level, thus leading to a somewhat similar result.¹⁶ Under these opt-outs, Denmark has also negotiated a special position in relation to the Schengen *acquis*, which the UK and Ireland have not opted-in at all for certain provisions.¹⁷ In contrast, other non-EU countries have been able to join the Schengen area by signing association agreements,¹⁸ while some EU Members are still waiting to join.¹⁹ Similar variable geometry holds true for the Dublin asylum procedure.²⁰ Again, this is evidence of the rather fragmented European landscape in this area.²¹

¹⁰ Arts 82(3) and 83(3) TFEU.

¹¹ *Ibid.* See also S Peers, ‘Enhanced Cooperation: the Cinderella of Differentiated Integration’, in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* cit. 76.

¹² J.C. Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press 2012).

¹³ Art. 328(1) TFEU.

¹⁴ See e.g., evidence provided in the Fourteenth Report of the Select Committee on European Scrutiny, ‘The “emergency brakes”’ publications.parliament.uk.

¹⁵ Protocol n. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice [2016].

¹⁶ Protocol n. 22 on the position of Denmark [2012].

¹⁷ Protocol n. 19 on the Schengen *Acquis* integrated into the Framework of the European Union [2012].

¹⁸ The four EFTA countries: Iceland, Liechtenstein, Norway, and Switzerland. Monaco, San Marino, and the Vatican City are *de facto* participating.

¹⁹ Bulgaria, Croatia, Cyprus, and Romania.

²⁰ Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

²¹ See also A Engel, ‘Opting in or Opting out? The EU’s Variable Geometry in the Area of Freedom, Security and Justice’, in R Pereira, A Engel and S Miettinen (eds), *The Governance of Criminal Justice in the*

As for the cooperation with and participation in European agencies, such as Europol²² and Eurojust,²³ a staggering of possible cooperation with partner countries can be observed, the extent of which depends on the country's membership in the EU and its participation in Schengen as opposed to those with mere strategic or operational agreements in place.²⁴ Such agreements vary depending on their scope with the country in question. In particular, this affects the possibility for direct access to databases under those agencies and the range of information which can be exchanged with the partner country and under which conditions. Similarly, the establishment of the European Public Prosecutor's Office (EPPO) with the help of the enhanced cooperation procedure manifests further divergence within the EU amongst participating and non-participating Member States.²⁵

The above are examples of Member States' variable geometry under the area of freedom, security and justice. The bigger picture seems to draw a European patchwork of measures and initiatives for intergovernmental cooperation which allow for a national portfolio to be tailored towards a Member State's individual interests and needs. Particularly the UK has often been described as "cherry-picking" in this regard, which is evidenced by the various flexible opt-outs mentioned above, as well as for example its continued application of the transitional provisions after Lisbon according to Protocol 36.²⁶ The UK was thus referred to as the "awkward partner",²⁷ but others have also pointed out its contributions to further integration in this area, which is the case for example with the European Arrest Warrant as well as the principle of mutual recognition.²⁸ By making full use of the available flexibility in criminal matters and asserting its own interests at EU level, the UK has been a *critical* partner throughout its EU membership.

III. BREXIT: REPLICATING THE UN-REPLICABLE

With the end of this rather ambiguous relationship between the EU and the UK, the latter not only withdraws from some of those undesirable policy areas which it had to comply with during the time of its membership, but also automatically is being removed from some of the key areas it has actively shaped and which are at the heart of its concerns for national

European Union: Transnationalism, Localism and Public Participation in an Evolving Constitutional Order (Edward Elgar 2020) 39.

²² Decision 2009/371/JHA of the Council of 6 April 2009 establishing the European Police Office (Europol).

²³ Decision 2009/426/JHA of the Council of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

²⁴ An overview of Europol's external partners and agreements can be found at 'Fostering cooperation among law enforcement and other partners around the world' EUROPOL www.europol.europa.eu; agreements concluded with Eurojust are available at www.eurojust.europa.eu.

²⁵ The role of EPPO is discussed in more detail elsewhere in this Special Issue.

²⁶ European Parliament, Committee on Civil Liberties, Justice and Home affairs on Protocol n. 36 to the Treaty of Lisbon on transitional provision: the position of the United Kingdom, www.statwatch.org.

²⁷ S George, *An Awkward Partner: Britain in the European Community* (Oxford University Press 1998).

²⁸ See e.g., V Mitsilegas, 'European Criminal Law After Brexit' (2017) CrimLF 219.

security. As has been argued, this may lead to the paradoxical situation that in order to continue enjoying similar security benefits after its withdrawal, the UK would have to provide more procedural guarantees than previously during its EU membership.²⁹ Of course, from an EU perspective there is a similarly strong interest in continuing cooperation with the UK in the fight against international crime and cross-border terrorism.

In the revised (non-binding) Political Declaration, both the EU and the UK declared their intentions for establishing “a broad, comprehensive and balanced security partnership” with “a view to Europe’s security and safety of their respective citizens”.³⁰ The Draft Agreement on the New Partnership with the UK covers the envisaged Security Partnership in Part Three. Thereunder, Title I on law enforcement and judicial cooperation in criminal matters includes provisions on exchanges of DNA, fingerprints and vehicle registration data (PRUM), transfer and processing of passenger name record data (PNR), cooperation on operational information, cooperation with Europol, cooperation with Eurojust, surrender, mutual assistance, exchange of information extracted from criminal records, and anti-money laundering and counter-terrorism financing. Further thematic cooperation under Title III deals with the fight against irregular migration, health security, and cyber-security.

The most interesting part certainly is the chapter on surrender, which is the post-Brexit equivalent of the European Arrest Warrant. In his speech at the EU Agency for Fundamental Rights on 19 June 2018, Michel Barnier made clear that the UK would not be able to continue participating in the European Arrest Warrant after becoming a non-Schengen third country. Instead, a new extradition scheme with “streamlined” procedures and “facilitated” processes was suggested.³¹ Indeed, the new system proposes direct judicial cooperation between the institutions, bodies offices and agencies of the UK and EU Member States,³² and the introduction of “a mechanism of surrender pursuant to an arrest warrant”,³³ however with significant differences to its equivalent between EU Member States only.

One of the main achievements of the European Arrest Warrant has been the application of the principle of mutual recognition in the enforcement of judicial decisions

²⁹ V Mitsilegas, ‘After Brexit: Reframing EU-UK Cooperation in Criminal Matters’ in R Pereira, A Engel and S Miettinen (eds), *The Governance of Criminal Justice in the European Union: Transnationalism, Localism and Public Participation in an Evolving Constitutional Order* cit. 17.

³⁰ Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators’ level on 17 October 2019, to replace the one published in European Council Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019) cit. para. 78.

³¹ European Commission, ‘Speech by Michel Barnier at the European Union Agency for Fundamental Rights’ (19 June 2018) www.ec.europa.eu.

³² Draft Agreement on the New Partnership with the UK cit., art. LAW.GEN.1.

³³ *Ibid.* art. LAW.SURR.76.

under this mechanism.³⁴ In essence, this largely eliminates the so-called “double-criminality” verification, i.e. whether the alleged offence in the issuing State is also considered an offence in the executing State, in addition to the 32 *per-se* offences listed in art. 2(2) of the Council Framework Decision (2002/584/JHA).³⁵ While the same list can be found in the Draft Agreement on the New Partnership with the UK, the latter does not include a mention of the principle of mutual recognition, which means that any other offences shall be subject to the “double-criminality” verification.³⁶

Furthermore, the proposed surrender mechanism leaves the option for a political offence exception in art. LAW.SURR.81. According to para. 2, a declaration can be made by the UK as well as the EU on behalf of its Member States that the execution of an arrest warrant for political offences may be refused in others than those listed circumstances.³⁷ No such option is available under the European Arrest Warrant. Similarly, art. LAW.SURR.82 provides for a possibility to declare refusal to surrender a State’s own nationals or that such surrender “will be authorised only under certain specified conditions”. In fact, Germany, Austria and Slovenia have made such a declaration of own-national exception according to art. 185(3) of the Withdrawal Agreement for the duration of the transition period already. This was previously prohibited by the concept of EU citizenship which does not permit such exceptions between Member States. With its withdrawal, the UK has evidently stepped outside the protection of this concept of EU citizenship and may therefore face additional hurdles in the operability and efficiency of the new surrender mechanism.³⁸

When it comes to the exchange of information and intelligence of criminal activity, the UK has lost direct access to the data bases of European agencies, such as Europol

³⁴ Framework Decision 584/2002/JHA of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, art. 1(2). For a commentary, see e.g., V Mitsilegas, ‘The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU’ (2006) CMLRev 1277.

³⁵ *Ibid.* They include: participation in a criminal organisation; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in weapons, munitions and explosives; corruption; fraud; laundering proceeds of crime; counterfeiting currency; computer-related crime; environmental crime; facilitation of unauthorized entry and residence; murder and grievous bodily injury; illicit trade in human organs and tissue; kidnapping, illegal restraint and hostage-taking; racism and xenophobia; organised or armed robbery; illicit trafficking in cultural goods; swindling; racketeering and extortion; counterfeiting and piracy of products; forgery of administrative documents and trafficking therein; forgery of means of payment; illicit trafficking in hormonal substances and other growth promoters; illicit trafficking in nuclear or radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircraft/ships; sabotage.

³⁶ Draft Agreement on the New Partnership with the UK cit. art. LAW.SURR.78(2).

³⁷ Offences referred to in Council of Europe, European Convention ETS n. 90 on the Suppression of Terrorism of 27 January 1977, arts 1 and 2; offences of conspiracy or association; and in the Directive 541/2017/EU of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, arts 3-14.

³⁸ See also discussion in S Peers, ‘Extradition to non-EU Countries: The Limits Imposed by EU Citizenship’ (7 September 2016) EU Law Analysis www.eulawanalysis.blogspot.com.

and Eurojust, with its withdrawal. Nevertheless, cooperation with these agencies remains possible according to chapters five and six respectively under the law enforcement title in part three of the Draft Agreement, albeit in more limited form than during the time of the UK's membership within the EU. In particular, specific requests need to be made for the exchange of information, which are subsequently processed for those indicated purposes only and are subject to restrictions with regards to "onward transfer, erasure or destruction after a certain period of time".³⁹

Outside of these agencies, cooperation on operational information between the competent law enforcement authorities of the UK and EU Member States is subject to requests⁴⁰ being made to exchange information and intelligence "for the purpose of conducting criminal investigations or criminal intelligence operations in the context of the detection, prevention or investigation or investigation of criminal offences."⁴¹ Such requests would then be "limited to what is deemed relevant and necessary for the successful detection, prevention or investigation of the crime or criminal activity in question"⁴² and information may even be withheld under certain circumstances, for example in the case of interests of national security.⁴³

The Draft Agreement does not mention the possibility for access to the Schengen Information System. As a non-Schengen country, the UK has already had limited operability with regards to border control cooperation during the time of its EU membership. After Brexit and despite non-EU Member States being able to participate in the Schengen Information System as associate countries,⁴⁴ these are however all part of the Schengen area, which the UK has no intention to join.

The above demonstrates on the one hand, the clear intention from both sides to maintain as much cooperation as possible for the sake of achieving common goals in the fight against cross-border crime and the resulting necessity to ensure efficient law enforcement mechanisms beyond Brexit. On the other hand, it is also clear that a non-Schengen third country cannot be treated the same as an EU Member State.⁴⁵ As can be argued, the proposed "streamlined" procedures and "simplified" arrangements reflect a deep desire for continued future cooperation in an attempt to replicate the un-replicable pre-Brexit state. Realism about the UK's withdrawal however has had to acknowledge the sensitivity of cooperation in criminal matters with a third country and to take into account

³⁹ Draft text of the Agreement of 14 August 2020 on the New Partnership with the United Kingdom, art. LAW.EUROPOL.52(1) and art. LAW.EUROJUST.70(3) respectively.

⁴⁰ *Ibid.* art. LAW.OPIN.41.

⁴¹ *Ibid.* art. LAW.OPIN.38(1).

⁴² *Ibid.* art. LAW.OPIN.43(2).

⁴³ *Ibid.* art. LAW.OPIN.44.

⁴⁴ Switzerland, Norway, Liechtenstein, Iceland.

⁴⁵ Essentially, the UK has become a "rule-taker" with its withdrawal.

the potential for divergences in fundamental rights and other standards over time on both sides of the Channel.

IV. EU VERSUS UK: OPPOSING DIRECTIONS OF TRAVEL

The exchange of certain sensitive information between law enforcement authorities or even surrender of persons can indeed be a very controversial issue. The European Arrest Warrant itself has been challenged on various occasions, one Member State questioning the adequateness of human rights standards in another Member State.⁴⁶ So how can this possibly work with a now third country? Of course, the new arrest warrant is to be considered a “simplified” version of the European equivalent, as discussed above. Of course, the UK has been a Member State until recently and therefore currently still upholds the same very high standards of human rights as under EU law. And, of course, the EU also has agreements in place with other third countries regulating the surrender of criminals overseas under certain conditions.⁴⁷

However, there is a significant difference between other third countries and the UK: the direction of travel. Third countries usually have to raise their standards in order to meet those of the EU, before they may decide for a continued alignment after an agreement is reached with a view to manifesting their relationship not only with EU Member States but also applying those high standards in their relations with other third countries. This concept of extraterritoriality of EU legislation and standards is the so-called “Brussels effect”.⁴⁸ However, the UK’s direction of travel is the opposite, as evidenced by the motives behind the withdrawal itself and, more specifically related to human rights standards, its firm rejection of a possible continuation of applying the Charter of Fundamental Rights under UK law.⁴⁹ As a result, further procedural guarantees are necessary. These can be found in international obligations the UK has entered into as an individual party, which thus remain unaffected by the UK’s withdrawal from the EU, as is the case with the European Convention on Human Rights.

Therefore, according to the Draft Agreement on the New Partnership with the UK, law enforcement and judicial cooperation in criminal matters “shall be conditional upon the United Kingdom’s continued adherence to the European Convention on Human

⁴⁶ See e.g. Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198; and Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586. For a commentary on mutual trust between Member States in relation to the operation of the European Arrest Warrant, see V Mitsilegas, ‘Mutual Recognition, Mutual Trust and Fundamental Rights After Lisbon’ in V Mitsilegas, M Bergström and T Konstadinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar 2016) 148.

⁴⁷ E.g., with the US: Agreement of 19 July 2003 on extradition between the European Union and the United States of America 27 ff.

⁴⁸ A Bradford, ‘The Brussels Effect’ (2015) *Northwestern University Law Review* 1.

⁴⁹ United Kingdom Parliament, European Union (Withdrawal) Act of the of 26 June 2018, section 5(4).

Rights and Protocols 1, 6 and 13 thereto, as well as upon the United Kingdom giving continued effect to these instruments under its domestic law”.⁵⁰ In particular, these instruments provide for essential judicial guarantees, such as the right to a fair trial, access to a lawyer, or the abolishment of the death penalty. An automatic termination of the agreed cooperation will become operative if the UK “abrogates the domestic law giving effect to the instruments in para. 1 or makes amendments thereto to the effect of reducing the extent to which individuals can rely on them before domestic courts”⁵¹ or denounces those instruments in their entirety.⁵²

Regarding the protection of personal data transferred to the UK, art. LAW.GEN.4 of the Draft Agreement on the New Partnership with the UK provides that the European Commission will check the adequacy of the level of protection according to art. 36 of the Directive (EU) 2016/680,⁵³ and according to art. 45 of the General Data Protection Regulation (EU) 2016/679⁵⁴ respectively. Both provisions provide for procedural safeguard mechanisms, in particular in case of violations of human rights or the rule of law in relation to the protection of personal data within the territory of the third country in question. In addition, the UK is required to “ensure that the domestic independent authority responsible for data protection has the power to supervise compliance with and enforcement of the data protection safeguards under this Title”.⁵⁵

From an outside perspective, the difficulty lies with monitoring UK compliance as a third country according to the various procedural guarantees given in the Draft Agreement. As could be argued, the UK’s legal system which admits a more prominent role to case law – as opposed to most European civil law traditions – which can make the state of law hard to establish and could therefore cause problems when trying to monitor continuity in upholding the agreed human rights standards post-Brexit. Such concerns were raised in the case of *RO*, where a person who was subjected to a European Arrest Warrant claimed that he could suffer inhumane and degrading treatment after Brexit if being surrendered to the UK. This reasoning was rejected however by the Court stating that, even

⁵⁰ Draft text of the Agreement of 14 August 2020 on the New Partnership with the United Kingdom cit. art. LAW.OTHER.136(1).

⁵¹ *Ibid.* art. LAW.OTHER.136(2).

⁵² *Ibid.* art. LAW.OTHER.136(3).

⁵³ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

⁵⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

⁵⁵ Draft text of the Agreement of 14 August 2020 on the New Partnership with the United Kingdom cit. art. LAW.GEN.4(3).

with the UK's withdrawal, the suspect would still have recourse to the European Convention of Human Rights and, unless there was concrete evidence to the contrary, such an arrest warrant by a then still EU Member State would therefore have to be executed. The Court thus clarified that one cannot rely on the potential emergence of such circumstances in the future with the aim to avoiding surrender to UK authorities.⁵⁶

With the UK's actual withdrawal however, there is now a greater risk for a slow but steady erosion of certain rights under UK domestic law, which could go unnoticed for a while. Therefore, the procedural guarantees provided for in the Draft Agreement between the EU and the UK are an attempt to adjust for a change in UK standards over time. Nevertheless, the Agreement can largely reflect the *status quo* only. As could be argued, the longer it takes to finally conclude an agreement, the more visible the differences between the two diverging paths – that of the EU and the UK – will become and the better it will reflect the post-Brexit conditions in the longer term. Time constraints, such as the end of the transition period, should therefore not be the guiding factor in the negotiations from an EU perspective.

In fact, there are still many hurdles for a successful conclusion of the negotiations as well as the ratification process. In particular the latter may prove problematic on both sides even if a compromise for a final agreement can be reached before the end of the transition period. On the one hand and despite the Tory's clear majority in the House of Commons after the most recent election in December 2019,⁵⁷ the deal would still face scrutiny in the UK Parliament and could even be rejected, as was the Withdrawal Agreement on several occasions.⁵⁸ On the other hand, the EU's shared competences would require ratification in and approval of all 27 EU Member States for a mixed international agreement,⁵⁹ a process which is rather complex, time-consuming and certainly not without its risks of failure.⁶⁰ Alternatively, separate agreements could be concluded based on the different types of competences, which would allow for a swifter ratification process for those competence areas not requiring the joint approval of all Member States.⁶¹

Finally, with currently no willingness to renew the transition period, particularly from the side of the UK, an "economic" hard Brexit at the end of this year is still very much a

⁵⁶ Case C-327/18 PPU *RO* ECLI:EU:C:2018:733.

⁵⁷ A Busquets Guàrdia and E Casalicchio, 'UK election 2019: How Britain voted. A Breakdown of the UK Election Result in Maps and Charts' (13 December 2019) Politico www.politico.eu.

⁵⁸ A Gürhan Kartal, 'UK Parliament Rejects EU Withdrawal Deal for 3rd Time' (29 March 2019) AA www.aa.com.tr.

⁵⁹ Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore (EUSFTA)* ECLI:EU:C:2017:376. See also case comment by M Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017. ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore' (2018) *EuConst* 231.

⁶⁰ As was the case with the failed Transatlantic Trade and Investment Partnership (TTIP) with the US.

⁶¹ See e.g. Opinion 3/15 *Marrakesh Treaty* ECLI:EU:C:2017:114.

possibility.⁶² Until an agreement is reached, a suggested fall-back option could be the mechanisms provided for by the Council of Europe in this area.⁶³ Nevertheless, the currently “diametrically opposed positions” between the UK and the EU Member States with regards to human rights standards could worsen over time which in turn may even lead to endangering the peace process at the Irish border and the Good Friday Agreement.⁶⁴

V. EU-27: A NEW DAWN FOR CRIMINAL LAW COOPERATION?

Irrespective of the outcome of the current negotiations for an agreement with the UK, it is suggested that Brexit will also have a significant impact on the cooperation between the remaining EU Member States themselves. After the loss of a critical partner, as was suggested above, some reflections will be apt in order to determine what lessons can be learned. Should there be more harmonisation, even in sensitive policy areas, such as criminal law cooperation? Or should there be more flexibility to accommodate the more and more divergent national interests in an ever-enlarged Union, i.e. less harmonisation? And how to uphold enthusiasm for the European idea and to ensure the promotion of its core values across the EU?

For example, when it comes to cooperation for the exchange of information, an updated version of the Schengen Information System has been approved and is currently being implemented step-by-step with the aim to be fully operational by the end of 2021. This includes more extensive cooperation between the relevant law enforcement authorities, in particular in relation to sharing of information, biometrics, counter-terrorism, vulnerable persons, irregular migration, and enhanced access for EU agencies.⁶⁵ As could be argued, countries such as Ireland or even Cyprus could very well be inclined to join the Schengen area for the purpose of being able to participate in the enhanced features

⁶² European Commission, ‘Press Statement by Michel Barnier Following the Second Round of Future Relationship Negotiations with the United Kingdom’ (20 April 2020) www.ec.europa.eu.

⁶³ C Brière, ‘Brexit and its Consequences for Cooperation in Criminal Matters’ (3 February 2020) *European Law Blog* www.europeanlawblog.eu. Further alternative solutions for the European Arrest Warrant can be found in C MacPartholán, ‘Arresting Developments: The Post-Brexit Future of European Arrest Warrants’ (2020) *The Journal of Criminal Law* 124.

⁶⁴ N O’Meara, ‘Extradition Through the Lens of Brexit: The UK, Ireland, and Future Extradition Prospects’ (2020) *Irish Journal of European Law* 47.

⁶⁵ Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals; Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) 1987/2006; and Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU.

the system will have to offer – and without the UK as an ally in keeping them company under a special status outside of the Schengen area.

In his speech calling for a “European renaissance”, the French President Emmanuel Macron advocated for a more united Europe, stronger on the outside and more harmonised internally, suggesting a revised Schengen area with stringent (external) border controls and one common asylum policy under the control of a European asylum office.⁶⁶ Indeed, such criticism and suggestions for reform have already been voiced since the migration crisis in 2015 which was followed by an immediate resurrection of EU internal border controls in some Member States.⁶⁷ However, as can be seen with the most recent Covid-19 crisis, such behaviour appears to be a natural reflex of quite a few national governments in situations of external threats. While this was condemned by even the Commission President Ursula von der Leyen,⁶⁸ most border controls in the heart of Europe remain in operation until the finishing of this *Article*.⁶⁹ This demonstrates a clear lack of solidarity and a failure of intergovernmental cooperation in times of crises.

In fact, some Member States have actively violated the rule of law in recent years, which has rendered mutual trust more challenging as the basis for criminal law cooperation between countries. For example in the case of Poland, which was subject to an infringement procedure according to art. 7 TEU with regards to its amendments on the ordinary courts law,⁷⁰ Irish courts responded by suspending a European Arrest Warrant due to fundamental rights concerns.⁷¹ As has been suggested, it is vital for the European institutions to first acknowledge this trust gap between Member States in order to then be able to adequately reform the current system of criminal law cooperation.⁷² If anything, maybe Brexit could be seen as a wake-up call to solve such internal problems before they escalate and prevent further undermining of fundamental rights standards in the EU.

Faced with this multitude of internal and external challenges, it is perhaps unsurprising that further European integration in the form of harmonisation might not seem feasible or even desirable at this point. Of course, this is not to suggest that flexibility itself is necessarily a mere negative side-effect on the one-way road to complete harmonisation of Member States’ laws. Variable geometry is indeed a useful tool for intergovernmental cooperation under more sensitive policy areas, which also reflects the diversity of legal traditions in the EU. As could be argued, Brexit did not happen because of too much

⁶⁶ Speech by Emmanuel Macron, ‘For European Renewal’ (4 March 2019) www.elysee.fr.

⁶⁷ See e.g. T Etzold and R Bossong, ‘The Future of Schengen: Internal Border Controls as a Growing Challenge to the EU and the Nordics’ (2018) Stiftung Wissenschaft und Politik www.swp-berlin.org.

⁶⁸ Speech by President von der Leyen at the European Parliament Plenary on the European coordinated response to the Covid-19 outbreak (26 March 2020) www.ec.europa.eu.

⁶⁹ Beginning of May 2020.

⁷⁰ Case C-192/18 *Commission v Poland (Independence of ordinary courts)* ECLI:EU:C:2019:924.

⁷¹ Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of justice)* cit.

⁷² C Mortera-Martinez, ‘Catch me if you Can: The European Arrest Warrant and the End of Mutual Trust’ (2019) Centre for European Reform www.cer.eu.

flexibility, but rather despite of it. However, considering the importance of cross-border cooperation for tackling the rise in international crime and cross-border terrorism, some core Member States may engage in and promote further European integration in criminal matters, which may in fact lead to a growing gap with those further outside the core,⁷³ for the prophecy of a “two-speed Europe” to become absolute reality.⁷⁴

VI. CONCLUDING REMARKS

As can be concluded from the above discussion, Brexit will have an impact on EU criminal procedural laws, both on the remaining EU-27 as well as on the future relationship between the EU and the UK. The Draft Agreement is evidence of common goals in the fight against international crime and cross-border terrorism, but also exposes the shortcomings of the withdrawal from EU membership in addition to being a non-Schengen country. The previously enjoyed benefits, despite the various concessions and opt-outs, are now no longer available to the UK.

The new “streamlined” procedures are nevertheless an attempt to replicate the pre-Brexit state as much as possible in order to ensure a continuation in the cooperation with the UK. It is also evident however that the UK’s withdrawal could indeed be seen as a literal turning point for the country, resulting in a totally opposite direction of travel for the application of human rights standards for example. As has been suggested, the negotiated agreement can only reflect the *status quo* rather than being able to adjust to the development in the UK over time, despite the inclusion of procedural guarantees in the agreement.

For the remaining EU Member States and 70 years after the Schuman Declaration in 1950, a new vision for Europe is needed more than ever in order to rebuild trust and ensure solidarity in intergovernmental cooperation. This is particularly the case in the area of criminal law cooperation which faces several internal and external challenges at once. In its unique way, the difficulties in the cooperation with the UK have now moved from internal to external, since Brexit happened in January 2020.

It is hoped that the UK’s withdrawal can be seen at least as an opportunity if not a wake-up call to introduce much needed reform in this area. However, as has been argued above, complete harmonisation of Member States’ approaches may not necessarily be the best solution here. Instead, a possible differentiation between core and non-core Member States might prove useful for more effective cooperation mechanisms available in the fight against international crime and cross-border terrorism. While this may add to the current options of differential integration, thus increasing flexibility, it would in turn also guarantee legal certainty and be able to rebuild trust in the long term.

⁷³ See also discussion in B De Witte, ‘An Undivided Union? Differentiated Integration in post-Brexit Times’ (2018) CMLRev 227.

⁷⁴ JC Piris, *The Future of Europe: Towards a Two-Speed EU?* cit.



ARTICLES

SHAPING THE FUTURE OF EUROPE – FIRST PART

edited by Sandra Hummelbrunner, Lando Kirchmair, Benedikt Pirker, Anne-Carlijn Prickartz and Isabel Staudinger

SHAPING THE FUTURE OF EUROPE: INTRODUCTION

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TABLE OF CONTENTS: I. Introduction. – II. Shout out to wonderful commentators & peer reviewers. – III. Overview of the contributions. – III.1. Novel institutional approaches. – III.2. Novel (de-)centralised enforcement. – III.3. Future implications of fundamental rights protection. – III.4. New “solutions” to contemporary challenges. – III.5. The EU’s external action, future EU defence policy and the challenges of the 21st Century. – IV. Conclusion.

ABSTRACT: The present Introduction sets out the context of the following *Articles* to the anthology “Shaping the Future of Europe” to be published in two issues of European Papers. It briefly presents the people who made the anthology possible, in particular the speakers, commentators and other participants at the 2020 Salzburg Young European Law Scholars (YELS) conference and the peer reviewers. Subsequently, it lists the contributions of the anthology which all discuss essential topics related to the future of Europe and tackle a diverse array of issues in EU law, from institutional issues

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such as lobbying via novel approaches and complementary currencies to fundamental rights challenges like terrorist content online and to external action issues such as a future European army.

KEYWORDS: EU institutions – EU law enforcement – fundamental rights protection – EU external action – defence union – hybrid threats.

I. INTRODUCTION

Once again, Europe is at a crossroads: Although there is regular talk of crisis, trust in the European Union (EU) remains surprisingly stable.¹ Nonetheless, Europe faces many internal and external challenges, such as Euroscepticism, the return of nationalism, societal and technological developments, climate change, terrorism, and an ever-changing global political, economic and societal landscape, which may be in need of structural modifications. Most recently, the coronavirus pandemic has been added to this non-exhaustive list of challenges. While novel common European solutions might be prone to teething problems, they might entail solutions which can be allied to other areas of EU law. It is precisely against this backdrop that we pose this question: What could and should be done to put Europe and the EU in the position to properly address its challenges and, more generally, how should we shape the future of Europe?

To answer this question of utmost importance, we invited young scholars to propose ideas and to discuss their views on how to shape the future of Europe. In particular, we asked them to provide a forward-looking conceptual analysis on how to properly address Europe's internal and external challenges and to present bold and visionary approaches. Instead of proposals that focused on current shortcomings, we encouraged submissions that propose new, hands-on approaches to tackling Europe's challenges in an innovative and future-oriented way, or pieces that revisit existing but promising approaches that were never put into practice.

Our call was specifically addressed to Young European Law Scholars, i.e., scholars who had not yet secured a full professorship, but also young scholars from related disciplines such as political science, sociology, economics, and philosophy. The idea was to not only provide a platform for such young scholars to present and discuss their research with their peers, but also to enter into an exchange with already established scholars, who we invited to act as commentators at the conference.

Happily, our call met with an enthusiastic response by many young scholars, which put us in the rather fortunate albeit tough position of having to choose the eleven proposals we deemed most promising in light of the conference theme. The eleven young emerging scholars behind them were invited to join the debate on how to shape the future of Europe at the "3. Tagung junger Europarechtler*innen – 3rd Young European Law Scholars Conference", which took place at the University of Salzburg on Thursday 27th

¹ At least the Standard-Eurobarometer 90 published in March 2019 before the corona crisis had shown a record high: data.europa.eu.

and Friday 28th of February 2020. The conference, which was very well attended despite the waging Corona crisis, was opened with welcome addresses by the Rector of the University of Salzburg, Hendrik Lehnert and by the Dean of the Law Faculty, Michael Rainer. Advocate General of the Court of Justice of the European Union Eleanor Sharpston delivered an inspiring keynote on “The European Project – Past, Present and Future”. In this anthology, which will appear in two separate issues of European Papers, ten of the presentations from the 3rd YELS Conference are collected.

II. SHOUT OUT TO WONDERFUL COMMENTATORS & PEER REVIEWERS

A major goal of YELS is to bring together young and established scholars of European law or from related disciplines. Ideally, this combines fresh ideas from younger scholars with the experience and knowledge from established scholars. We, and surely also all authors of this anthology, are enormously grateful to Catherine Barnard (University of Cambridge), Enzo Cannizzaro (Sapienza Università di Roma), András Jakab (University of Salzburg), Daniel Kaufmann (University of Neuchâtel), Daniel-Erasmus Khan (Bundeswehr University Munich), Dimitry Kochenov (Central European University), Panos Koutrakos (City University of London), Markus Kotzur (University of Hamburg), Kirsten Schmalenbach (University of Salzburg), Ingeborg Zerbès (University of Vienna) and Sonja Puntscher Riekmann (University of Salzburg) for having agreed to come to Salzburg in order to contribute to a wonderful and informed debate on how to shape the future of Europe. The informed comments from these distinguished scholars, together with an additional round of blind peer review, strengthened what we consider to be wonderful sparks to an important debate. We would therefore also like to extend our warmest gratitude to the scholars who have supported the present anthology in the role of peer reviewers.

III. OVERVIEW OF THE CONTRIBUTIONS

III.1. NOVEL INSTITUTIONAL APPROACHES

Institutions matter. This well-known assumption has driven a myriad of researchers from various disciplines, including political scientists, economists and, not least, legal scholars, to investigate whether and how institutions matter. The idea behind this assumption is that how institutions are organised and regulated, what their powers and functions are and how they interact with each other affects (or should affect), *inter alia*, their decision- and policy-making, their (democratic) legitimacy, their effectivity, productivity and consistency as well as the public perception about and the trust in them. What is more, the assumption that institutions matter has actually informed institutional choices in reality. This particularly applies to the EU and, earlier, the European Communities. The Member States, as ‘masters of the Treaties’, have a track record of modifying the institutional set-up of these European organisations in order to achieve certain aims, such as making

them or their institutions more democratically legitimate or their decisions and policies more effective and consistent. A perfect example to this effect is the Treaty of Lisbon, which, for instance, provided the European Parliament with a greater say in the adoption of legal acts and introduced the High Representative of the Union for Foreign Affairs and Security Policy as an institutional link between the Commission and the Council in order to make EU external action more consistent.

Both the contributions of Odile Ammann (University of Zürich) and of Maria Patrin (European University Institute) are implicitly based on the assumption that institutions matter, in that that they both inquire how an EU institution, namely the European Parliament and the European Commission respectively, should be regulated or modified with a view to attaining a certain objective.

Odile Ammann, in her *Article* "Transparency at the Expense of Equality and Integrity? Present and Future Directions of Lobby Regulation in the European Parliament", addresses the problem of weak regulation of lobbying activities vis-à-vis the European Parliament and how this erodes trust in this democratic institution and the law-making processes in the EU more generally. She shows that domestic lobbies have increasingly been targeting the European supranational realm, including the European Parliament, which has become a key lobbying target due to its strengthened position in the EU law-making process. She argues that lobbying in the European Parliament should therefore be further regulated and outlines what should be observed when adopting stricter lobbying regulations. In particular, she points out that today's lobbying regulation neglects issues that transcend transparency, such as equality and integrity, and that it thus defies its ultimate purpose, namely enhancing public trust.

In "The European Commission between institutional unity and functional diversification. The case of economic governance", Maria Patrin analyses the Commission's diverse functions and addresses the significance of the diversification of the Commission's functions in terms of the Commission's institutional functioning. She argues that despite being a collegial institution, the internal decision-making process of the Commission is fragmented and heterogeneous rather than unitary. On the basis of an assessment of the powers and functions newly acquired by the Commission in economic governance, she unveils a paradox inherent in the Commission's multi-functionality. While, due to its independent and impartial status, the Commission is often entrusted with tasks of a political nature, it is not endowed with the legitimacy basis that would support its action in these fields. Ultimately, Maria Patrin argues that more clarity should be provided regarding the functions of the Commission, that is its political and enforcement functions, as they rely on different types of legitimacy, i.e. democratic accountability, on the one hand, and independence and neutrality of judgment, on the other.

III.2. NOVEL (DE-)CENTRALISED ENFORCEMENT

Like in every legal order, improving the administrative and/or judicial enforcement of applicable legal rules also looms large in the EU. The Commission's proposals as well as the academic discourse on public enforcement of EU law somewhat oscillate between increased and reinforced centralised enforcement on the EU level and more decentralised enforcement by the Member States' authorities – depending on the substantive legal framework. In essence, three ways of administrative enforcement are thinkable: i) centralised enforcement by an EU authority or agency, ii) enforcement by Member State authorities, or (iii) enforcement by a combination of both i) and ii).

In her *Article* "The EU Response to Terrorist Content Online: Too Little, (Maybe not) Too Late?", Viviana Sachetti examines the EU's efforts in strengthening the European Public Prosecutor's Office (EPPO). The *Article* provides an extensive overview of the existing substantive framework of countering the dissemination of terrorist content online in order to analyse the Commission's latest Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online (COM(2018) 640 final). After a critical analysis of the proposal, she puts the Commission's effort in the larger context of Eurojust and Europol as "crucial cybersecurity and human rights guardians". In her opinion, the extension of the EPPO's competences would not impinge on Eurojust and Europol's powers but "could lead to their role as specialised within matters pertaining to cybersecurity and the prevention and suppression of online terrorist conducts".

In her *Article* "The ECN+ Directive: An Example of Decentralised Cooperation to Enforce Competition Law", Corinna Potocnik-Manzouri deals with the other side of the same coin: decentralised enforcement of the EU's competition policy in the new European Competition Network (ECN+) Directive (EU) 2019/1. The national competition authorities (NCAs) now form a network of enforcement authorities with the European Commission. She explains the road to the ECN+ Directive by examining the success and shortcomings of the preceding Regulation 1/2003 and the respective actions taken. Then the ECN+ Directive is thoroughly scrutinised, presenting the novel feature of decentralised enforcement also for the rather unexperienced reader of competition law contributions. Having done that, the *Article* does not shy away from asking and answering the important question as to whether decentralised cooperation can contribute to an ever closer Union. In order to answer that question, she focuses on (I) the ECN+ eligibility to be characterised as a well-functioning system, (II) the aspect whether decentralised enforcement could contribute to an ever closer Union and (III) the ECN+ as a potential role model for other areas.

III.3. FUTURE IMPLICATIONS OF FUNDAMENTAL RIGHTS PROTECTION

Many events and publications recently celebrated the ten-year anniversary of the entry into force of the Charter of Fundamental Rights of the EU as a fully binding part of EU primary

law. Ever since, it has often been the Court of Justice that has been at the centre of attention for those studying fundamental rights and human rights in an EU law context. Is the Court doing the right thing? Is it being active enough or already “activist”, however one is to define this term? But fundamental rights law and policy also encompasses the other institutions of the EU and the Member States. The *Articles* in this panel therefore correctly focus not only on future challenges in the area of jurisprudence, but also on potential future legislative developments of EU fundamental rights law in order to shape the future of Europe.

Matteo Manfredi, in his *Article* “Enhancing economic and social rights within the internal market through recognition of the horizontal effects of the European Charter of Fundamental Rights” focuses on the social (justice) dimension of the EU and the European integration process. Examining the horizontal effects of the Charter and the (non-)recognition thereof, he identifies promises for promoting economic and social rights within the internal market, as well as limits and caveats, both in the European Court of Justice’s jurisprudence and on the political (Member State) level. Pointing out the prudence of the Court’s jurisprudence, he nonetheless calls for a more coherent solution and interpretation of the Charter’s horizontal effects, necessary to avoid legal uncertainty and to ensure uniform protection of fundamental rights in the Member States. He concludes that, although first steps have been taken in recognizing the horizontal effects of economic and social rights in the Charter, there is still a need for further (coherent) case law and, where applicable, additional secondary legislation.

In his *Article* “Shaping the Future of Europe in Prisons: Challenges and Opportunities”, Christos Papachristopoulos addresses the problem of the wide disparities in prison conditions across the EU Member States which result in violations of fundamental rights. Not only does this state of affairs constitute a problem for a supposed community of values like the Union, but it also puts the functioning of the Area of Freedom, Security and Justice at risk, as it undermines the functioning of the Area’s foundational principle of mutual trust. Based on literature on the topic of compliance, Papachristopoulos therefore develops a sophisticated typology of possible strategies of intervention of the EU in national prison systems to highlight their potential and shortcomings.

III.4. NEW “SOLUTIONS” TO CONTEMPORARY CHALLENGES

Stating that the EU is currently facing many challenges, some as a direct result of contemporary developments and some as a necessary result of its institutional structure and general character, is an often-repeated truism. In current times, one can think of contemporary challenges such as those presented by Covid-19, tech conglomerates and (online) disinformation campaigns, and the continued plight of people seeking refuge from war, hunger and climate change. It is, of course, important that those challenges are acknowledged, and it is also important to try and change one’s point of view and shift the focus towards possible solutions. Whereas, for example, the Common Market is a fundamental historical building block of the current EU, the Economic and Monetary Union is a more

recent example of European (economic) integration and the EU's (and its Member States') ambitions in this area. It is also a policy area that is still "under construction" and clearly remains in need of further reforms and faces political, legal and economic challenges. Similarly, and perhaps more urgently in light of the current challenges (Covid-19, climate change, political instability, among other problems) facing not just the EU Member States but almost all countries worldwide, the EU still lacks a comprehensive approach towards refugees, leaving many of them stranded in subpar conditions and without future prospects. In this section, therefore, the focus lies on new approaches towards two contemporary challenges that loom large: challenges within the Economic and Monetary Union and the EU's response to the refugee crisis.

Christian Gelleri, in his *Article* 'Reshaping the Future of Europe with Complementary Currencies?', considers a possible role for complementary currencies within the Economic and Monetary Union and the Eurozone, with a particular focus on their potential in harmonizing regional inequalities and strengthening the democratic legitimacy of (local) currencies. To this end, he discusses existing examples of complementary currencies, particularly the Chiemgauer currency in Bavaria, in light of the current legal and economic framework within the EU generally and the Eurozone in particular. The main focus of the *Article* lies on the stronger connection between individuals/regions and currencies that complementary currencies can provide and, as a result, the increase in democratic legitimacy of such a currency. By allowing for the direct involvement of people and decision-makers, regional alternative currencies more closely align with local needs and objectives and provide for a more democratic way of creating and using money, so Gelleri argues.

In her *Article* "Shaping the future towards a solidary refugee resettlement in the EU", Janine Prantl discusses the state of refugee resettlement within the EU and considers its challenges and possible reform. One of the main challenges she identifies in this regard is the creation of a common EU resettlement framework based on solidarity and responsibility sharing – a framework that has yet to materialize in spite of a pressing need and pledges made thereto – to replace the current system of voluntary commitment. She points out the difficulties related to deriving positive obligations from the principle of solidarity, both in EU law and in international law and analyses the issues relating to the EU's competences in the field of refugee policy, arguing that although a common EU processing of refugee resettlement requests would be beyond the EU's competences, the EU and its agencies can coordinate and support common procedures conducted by the Member States. She laments not only that a common framework has failed to materialize, but also the resistance by several Member States to comply with legally binding relocation obligations. One possible solution, she posits, would be the creation of a centralized general assessment of the qualification for resettlement, leaving room for the consideration of a refugee's individual conditions *and* for national concerns at the Member State level.

III.5. THE EU'S EXTERNAL ACTION, FUTURE EU DEFENCE POLICY AND THE CHALLENGES OF THE 21ST CENTURY

The EU has managed to establish itself as a genuine global actor on the international scene. Yet, global problems such as climate change and transnational crime and terrorism have yet to be addressed adequately, not least by the EU. How should the EU position itself in the ever-changing international landscape? Should the EU, when tackling external challenges such as climate change and migration, hold fast to multilateralism, or should it act unilaterally? What could such unilateral action look like? Is it possible to tackle Europe's external challenges without bending/abandoning the EU's values?

Recently, Jürgen Habermas, one of the most renowned European intellectuals, publicly appealed for a European Army. Does the appeal for a European Army point to another truly European constitutional moment? Does the EU need a European Army, or should it focus on its soft power? How could/should a European Army look? Could there be repercussions regarding the EU's most important foundational idea: peace? Could the Europeanization of Member State armies be a promising alternative or complement to a European Army? What are adequate short-term developments of the Common Security and Defence Policy? How should cybersecurity and artificial intelligence be dealt with under the Common Security and Defence Policy?

These are numerous questions which are far from easy to answer. Josef Weinzierl and Luigi Lonardo, however, provide insightful, careful and nevertheless forward-looking and fresh answers to these questions. In his *Article*, Josef Weinzierl provides "A democratic perspective on a future European Army", when posing the question "An Army of peoples?". His analysis is informed by political theory. As the core of his *Article*, he embeds the potential future shape of a European Army with questions of constitutional identity of the European polity, which, in his view, is best characterised as a democracy. He is optimistic in the sense that there is "conceptual space for autonomous armed forces beyond the nation-state". By making concrete proposals on what the institutional design of a European Army could look like in practice, his *Article* adds value to a debate that has mostly concentrated on a discussion about the pros and cons of such an initiative. Importantly, he notes that whatever plans for a future European Army might look like, they must fit the overall political nature of the EU.

Luigi Lonardo delivers "a first assessment" of "EU Law Against Hybrid Threats". In so doing, he elaborates on a topic which recently took centre stage in EU defence policy. Hybrid threats, constituted by diplomatic, military, economic and technological tactics, are high on the security agenda. Even though the responsibility to address such threats remains mainly with the Member States, it is the *Article's* merit that it provides a highly topical analysis of the first steps in EU law to address the challenge of hybrid threats. He argues that despite the diverse nature of hybrid threats, there is a supranational dimension to them and art. 114 TFEU could make for an adequate EU competence in this regard.

IV. CONCLUSION

Even though the European project faces many and quite difficult challenges, that does not mean that the future that lies ahead of Europe is necessarily bleak. On the contrary, we hope that Europe is able to rise to these challenges and to take the necessary steps to tackle them, by finding ways to act in a united, forward-looking and decisive manner. By inviting young scholars to share their ideas on how to shape the future of Europe, we aimed to contribute to this quest and think that this anthology may indeed serve as an inspiration in that regard. Moreover, we hope that the idea of YELS, a non-institutionalized, Europe-wide annual gathering of young and established EU law scholars proves to be a fruitful scholarly event as regards the conferences, which took place already, and hopefully for the many which are scheduled to come. It is a particularly encouraging sign for us that more or less at the time of publication, the next YELS Conference entitled “Back to Beginnings: Revisiting the Preambles of European Treaties” is taking place on 20th and 21st May 2021 at the University of Zürich².

² This *Article* takes into account developments as of beginning of May 2021.



ARTICLES

SHAPING THE FUTURE OF EUROPE – FIRST PART

edited by Sandra Hummelbrunner, Lando Kirchmair, Benedikt Pirker, Anne-Carlijn Prickartz and Isabel Staudinger

TRANSPARENCY AT THE EXPENSE OF EQUALITY AND INTEGRITY: PRESENT AND FUTURE DIRECTIONS OF LOBBY REGULATION IN THE EUROPEAN PARLIAMENT

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ABSTRACT: Citizens' perception that lawmaking is dominated by special interests undermines their trust in democratic institutions and lawmaking processes. This also applies to the EU, where lobby regulation remains weak despite past lobbying scandals. While the European Commission and the European Parliament established a Joint Transparency Register in 2011, registration remains voluntary for lobbyists. Given that domestic lobbies have increasingly been oriented towards the European supranational realm, adopting effective lobby regulation at EU level has become more essential than ever to protect the democratic legitimacy of EU lawmaking. This especially applies to the European Parliament, which has important decision-making powers in the context of the ordinary legislative procedure, and which represents the citizens of the EU, thereby constituting a key lobbying target. My goal, in this *Article*, is to show why and how lobbying should be further regulated in the European Parliament. I first examine the specificities of lobbying in the EU and in its Parliament,

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before looking at the EU's constitutional framework, as well as EU parliamentary law, the Joint Transparency Register established in 2011, and the provisional version of the Agreement on a Mandatory Transparency Register published in December 2020. I then evaluate the European Parliament's current regulation of lobbying from the perspective of EU primary law. I argue that its narrow focus on transparency is misguided and neglects other fundamental democratic values, such as equality. Moreover, the existing framework does not sufficiently focus on MEPs' duties of integrity.

KEYWORDS: equality – European Parliament – integrity – interest groups – lobbying – transparency.

I. INTRODUCTION

"The directly-elected European Parliament is no less than the voice of all the European people, expressing their hopes – and fears – for the future of Europe. The representative nature of the Parliament ensures that the progress towards European unity is public and democratic. The Parliament's active role in European legislation is to ensure that European laws are drawn up and approached according to the democratic process. [...] [A]s Europe moves towards greater unity, the role of our Parliament will be to ensure that the European people participate fully in this process".¹

Trust in domestic democracy and governance has seen better days. In 2020, the Eurobarometer of the European Commission (EC) reported that only 36 per cent of Europeans trusted their national parliament and 40 per cent their national government.² As regards the EU, trust levels are generally higher, but rarely lie above the 50 per cent mark: in 2020, less than half (48 per cent) of Europeans trusted the European Parliament (EP), and 45 per cent the EC.³

Public cynicism extends to domestic lawmaking processes and to the lobbying industry.⁴ Most European countries have witnessed scandals connected to lobbying in recent decades.⁵ Similar affairs also surfaced in the EU: in 2011, the *Sunday Times* revealed that four MEPs had agreed to put forward specific amendments in the EP in exchange for a fee.⁶

¹ Lord Plumb, former President of the European Parliament; see H Plumb, *One Parliament for Twelve: The European Parliament* (European Parliament 1988) 5. The quote appears in S Bowler and DM Farrell, 'Legislator Shirking and Voter Monitoring: Impacts of European Parliament Electoral Systems upon Legislator-Voter Relationships' (1993) JComMarSt 45, 47.

² European Commission, 'Report: Public Opinion in the European Union' (Standard European Barometer 93), July-August 2020, 45.

³ *Ibid.* 109.

⁴ OECD, *Lobbyists, Government and Public Trust, Volume 2: Promoting Integrity through Self-Regulation* (OECD 2012) 21.

⁵ See the scandals reported in the various contributions published in A Bitonti and P Harris (eds), *Lobbying in Europe: Public Affairs and the Lobbying Industry in 28 EU Countries* (Palgrave Macmillan 2017).

⁶ The Insight Team, 'Insight: Fourth MEP Taped in "Cash for Laws" Scandal' (27 March 2011) *Sunday Times* www.thetimes.co.uk. Scandals pertaining to the EC include the so-called Dalligate, the Barrosogate, and the Oettigate.

While bribery cases remain the exception, lobbying efforts can be aggressive at EU level. The General Data Protection Regulation has been called “one of the most lobbied pieces of European legislation in European Union history”.⁷ As regards the EU Copyright Directive, which was adopted in 2019 following intense deliberations, the EP has stated that “MEPs have rarely or never been subject to a similar degree of lobbying before”.⁸ For some time, the Worst EU Lobbying Awards ceremony was even held in Brussels every year.⁹

In the public’s perception, corporations are often deemed the most successful and experienced lobbyists, including at the supranational level. This intuition matches Mancur Olson’s famous theory of collective action according to which “small interest groups with intensely held preferences” are more likely to effectively defend their interests.¹⁰ Accordingly, many political scientists have mapped the power of business lobbyists in the EU.¹¹

Yet grassroots lobbying has scored points in the EU as well, including with regard to issues of high political salience.¹² One example is the Anti-Counterfeiting Trade Agreement, which the EP refused to approve following vigorous citizen lobbying.¹³ Dür, Bernhagen, and Marshall argue that contrary to prevalent views, corporate actors are often less successful than citizen groups when it comes to influencing the EU lawmaking process.¹⁴ Mahoney shows that the scope, level of conflict, and salience of the policy issue at stake are more important determinants of lobbying success than the type of actor who

⁷ W Long, ‘Significant Impact of New EU Data Protection Regulation on Financial Services’ (18 April 2014) Global Banking and Finance Review www.globalbankingandfinance.com.

⁸ European Parliament Press Release of 27 March 2019, Questions and Answers on Issues About the Digital Copyright Directive.

⁹ K Lukas-Eder, ‘EU-Lobbying für Wissenschaft und Forschung: Die Bayerische Forschungsallianz GmbH’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* (Springer 2014) 295, 296.

¹⁰ M Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1971).

¹¹ E.g. M Kluger Rasmussen, ‘The Battle for Influence: The Politics of Business Influence in the European Parliament’ (2015) JComMarSt 365 (finding that the influence of business lobbies depends on their degree of unity, the salience of the issue at stake, and institutional factors); P Bouwen, ‘Corporate Lobbying in the European Union: The Logic of Access’ (2002) Journal of European Public Policy 365 (examining the conditions under which corporate actors can get access to EU decision-makers); D Coen, ‘The Evolution of the Large Firm as a Political Actor in the European Union’ (1997) Journal of European Public Policy 91 (providing an overview of the role played by corporations in the EU lawmaking process across time).

¹² B Farrand, ‘Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement’ (2015) OJLS 487.

¹³ S Breiteneder, ‘Power to the Grassroots! Die Ablehnung des ACTA-Abkommens durch das Europäische Parlament’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 113; B Farrand, ‘Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement’ cit.

¹⁴ A Dür, P Bernhagen and D Marshall, ‘Interest Group Success in the European Union: When (and Why) Does Business Lose?’ (2015) Comparative Political Studies 951. By contrast, Mahoney claims that businesses and citizens have similar chances to be successful. See C Mahoney, ‘Lobbying Success in the United States and the European Union’ (2007) Journal of Public Policy 35, 51 ff.

is lobbying and the tactics he or she is using.¹⁵ It is also worth noting that while grassroots lobbying is usually viewed positively because it involves “ordinary citizens”, it can also be manipulated by special interests (so-called “astroturfing”).¹⁶

The perception that EU lawmaking is substantially shaped by well-organised interest groups (IGs) undermines citizens’ trust in European democracy, also because the EU’s response to the aforementioned “cash for amendments” scandal has been timid. As of today, the EU has almost no binding legislation on lobbying. In 2011, the EC and the EP established their Joint Transparency Register (JTR), yet under this scheme, registration remains voluntary for lobbyists.¹⁷ As of 31 March 2021, 12,457 entities had registered.¹⁸ Only in 2019 did the EP make a further step towards transparency by encouraging or even requiring MEPs, rapporteurs, shadow rapporteurs, and committee chairs to disclose their meetings with interest representatives.¹⁹ In December 2020, after negotiations that lasted roughly four years, the EP, the Council, and the EC reached an Agreement on a Mandatory Transparency Register (AMTR).²⁰ Provided that the AMTR is approved by the institutions, it will replace the JTR.²¹ However, the AMTR has been criticised for failing to deliver on its promise. While the Agreement is “of a binding nature for the signatory institutions”,²² it does not establish mandatory registration requirements for lobbyists. Due to these limitations, Emilia Korkea-aho goes so far as to state that the AMTR is “not a step forward”.²³

¹⁵ C Mahoney, ‘Lobbying Success in the United States and the European Union’ cit. 47 ff.

¹⁶ ET Walker, ‘Astroturf Lobbying’ in P Harris, A Bitonti, CS Fleisher and A Skorkjær Binderkrantz (eds), *The Palgrave Encyclopedia of Interest Groups, Lobbying and Public Affairs* (Palgrave Macmillan 2020); see also (in relation to international lawmaking) M Durkee, ‘Astroturf Activism’ (2017) *StanLRev* 201.

¹⁷ Registration is only necessary for IGs that want to access the EP. See art. 29 of the Interinstitutional Agreement of 19 April 2014 between the EP and the EC on the Transparency Register for Organisations and Self-Employed Engaged in EU Policy-Making and Policy Implementation, 11 ff. (hereinafter: IATR).

¹⁸ Transparency Register 6,665 of them (53.5 per cent) were in-house lobbyists and trade, business, and professional associations, while 3,381 (27.1 per cent) were NGOs ec.europa.eu. According to Dinan, who looks at the former register of the EC, “many trade associations and business associations chose to categorise themselves as NGOs”. See W Dinan, ‘Lobbying Transparency: The Limits of EU Monitory Democracy’ (2021) *Politics and Governance* 237, 240.

¹⁹ European Parliament 2019-2024, Rules of procedure, 9th parliamentary term, January 2021 (hereinafter: EPRoP), art. 11(3). The EPRoP use the word “should” for MEPs, and “shall” for rapporteurs, shadow rapporteurs, and committee chairs.

²⁰ Transparency Register Negotiations, Compromise Package at Technical Level for the Attention of the Political Negotiators, Agreement on a Mandatory Transparency Register, 11 December 2020 (hereinafter: AMTR).

²¹ Art. 15(3) AMTR.

²² Art. 15(1) AMTR.

²³ E Korkea-aho, ‘Op-Ed: New Year, New Transparency Register?’ (12 January 2021) EU Law Live eu-lawlive.com.

In recent years, domestic lobbies have been shifting their attention from State parliaments and governments to the European supranational realm.²⁴ Effective lobby regulation at EU level has thus become more essential than ever.²⁵ This especially applies to the EP, which has important decision-making powers in the context of the ordinary legislative procedure,²⁶ and which represents the citizens of the EU.²⁷ The EP's powers have gradually increased over the past decades, especially with the Lisbon Treaty.²⁸ As a consequence, the EP has turned into a key lobbying venue.²⁹

In this *Article*, I show why and how lobbying should be further regulated in the EP. I first examine the specificities of lobbying in the EU and the EP (II) before looking at the EU's constitutional framework, EU parliamentary law, the JTR established in 2011 and revised in 2014, and the provisional AMTR of December 2020 (III). I then evaluate the EP's regulatory scheme from the perspective of EU primary law (IV). I argue that existing regulation narrowly focuses on transparency, while neglecting other crucial democratic values enshrined in the EU Treaties, as well considerations pertaining to integrity.

Throughout this *Article*, I refer to lobbying as the attempt by natural or legal persons lacking legal authority in a public decision-making process, except for citizens acting on their own behalf, to influence the decisions of those holding such legal authority.³⁰ For reasons of scope, I focus on inside lobbying, which targets public decision-makers directly, and not on outside lobbying, which relies on the media and public opinion to influence political decisions.³¹

²⁴ On this topic, see J Beyers and B Kerremans, 'Critical Resource Dependencies and the Europeanization of Domestic Interest Groups' (2007) *Journal of European Public Policy* 460.

²⁵ E.g. D Plehwe, 'Europäisierung von Interessenvertretung' in A Zimmer and R Speth (eds), *Lobby Work – Interessenvertretung als Politikgestaltung* (Springer 2015) 121.

²⁶ Art. 294 TFEU.

²⁷ Art. 10(2) TEU. See also 'Editorial: The 2019 Elections and the Future Role of the European Parliament: Upsetting the Institutional Balance?' (2019) *European Papers* www.europeanpapers.eu 3, 4. On the two levels of representation embodied by the EP (citizens) and the Council (Member States), see Information COM/2001/428 final from the Commission of 12 October 2001, *European Governance – A White Paper* 1, 7.

²⁸ See also S Hix and B Høyland, 'Empowerment of the European Parliament' (2013) *Annual Review of Political Science* 171. The authors find that the EP "now has a significant impact on policy outcomes in Brussels", *ibid.* 185.

²⁹ It goes without saying that a comprehensive study of EU lobbying should also focus on other institutions, including the Council, which serves the function of a second legislative chamber besides the EP. The EC, which has the right of initiative in the context of the EU lawmaking process, is the EU institution that figures most prominently in EU lobbying scholarship.

³⁰ This definition builds on L Milbrath, *The Washington Lobbyists* (Rand McNally 1963) 8.

³¹ On this distinction, which is commonly drawn in political science, see e.g. F Weiler and M Brändli, 'Inside Versus Outside Lobbying: How the Institutional Framework Shapes the Lobbying Behaviour of Interest Groups' (2015) *EurJPolRes* 745.

This *Article* is exclusively devoted to legislative lobbying, and to EP lobbying in particular. It does not cover attempts to influence the EU institutions in the pre- or post-parliamentary phase, despite the great importance of lobbying at these two stages of the legislative process,³² and even though these forms of (non-parliamentary) lobbying come with their own difficulties, including from the perspective of democratic legitimacy.³³ My narrow focus on the EP means that I do not look at the European Economic and Social Committee and the European Committee of the Regions, which both advise the EC, the EP, and the Council, and which must be consulted prior to the adoption of specific legal acts.³⁴ Finally, the *Article* does not deal with domestic regulatory contexts, although it is worth noting that lobbying law is still rudimentary in EU Member States too. While some of the issues highlighted in this *Article* are specific to the EU, many others can also be identified in domestic legal orders.³⁵

II. THE EUROPEAN PARLIAMENT: A LOBBYING TARGET *SUI GENERIS*?

In order to analyse the legal framework that applies to lobbying in the EP, it seems essential to understand the extent to which lobbying in the EP is a special case compared to other forms of lobbying at the domestic and EU level. Therefore, in this section, I highlight the specificities of lobbying in the EU (II.1) and in the EP (II.2).

II.1. SPECIFICITIES OF LOBBYING IN THE EU

A substantial part of EU legal scholarship is built on the almost axiomatic – though not unchallenged³⁶ – idea that the EU is an entity *sui generis*; Jacques Delors famously called

³² For instance, Harlow writes that consultations occurring at these pre- and post-legislative stages are “perhaps the most effective device for interest-representation and citizen participation in rulemaking”. See C Harlow, ‘The Limping Legitimacy of EU Lawmaking: A Barrier to Integration’ (2016) *European Papers* www.europeanpapers.eu 29, 38.

³³ Bartl, who focuses on European private law, emphasises that the EC “has framed the consultation procedures [in this area] in a way that prevents a democratically relevant discussion about goals from taking place”. See M Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political’ (2015) *ELJ* 572, 592.

³⁴ See art. 13(4) TEU.

³⁵ See S Mulcahy, ‘Lobbying in Europe: Hidden Influence, Privileged Access’ (Transparency International Report 2015) images.transparencycdn.org.

³⁶ For a seminal critique of the *sui generis* attribute as tautological, negative, and unhistorical, see R Schütze, ‘Two-and-a-half Ways of Thinking About the European Union’ (2016) *Politique européenne* 28. Schütze proposes to apply federalist concepts to the EU. See also JE Fossum, ‘Reflections on EU Legitimacy and Governing’ (2016) *European Papers* www.europeanpapers.eu 1033, 1034. See further (although the author acknowledges several “deviations from the model of the federal state”) J Habermas, ‘Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible’ (2015) *ELJ* 546.

the EU an *objet politique non identifié*.³⁷ This deep-seated belief that the EU differs from international organisations,³⁸ on the one hand, and domestic legal orders, on the other hand, has led to an isolation of EU legal scholarship from other fields of public law, especially public international law and domestic constitutional law. This also applies to political science studies pertaining to EU lobbying, which often focus on the idiosyncrasies of the EU instead of comparing it to domestic or international lobbying regimes.³⁹ More generally, EU lobbying is often presented as an activity *sui generis*.⁴⁰ But what exactly is special about it, if at all? As a matter of fact, at least six peculiarities can be identified.

To begin with, EU lobbying operates in the context of what is usually referred to as a *multi-level system of governance*.⁴¹ As Hooghe and Marks highlight, this means that “authority and policy-making influence are shared across multiple levels of government – subnational, national, and supranational”.⁴² This structure has several implications for lobbyists: first, EU lobbying is a multi-level activity,⁴³ as it contains numerous points of entry for lobbyists;⁴⁴ Woll talks about a “complex web of representation”.⁴⁵ Scholars stress that lobbying is even more pervasive in the EU than at the national level.⁴⁶ This is partly due to the gradual increase in EU competences, and to institutional reforms that made some types of lobbying more likely to succeed. For instance, pushing for specific

³⁷ W Phelan, ‘What Is *Sui Generis* About the European Union? Costly International Cooperation in a Self-Contained Regime’ (2012) *International Studies Review* 367.

³⁸ The EU displays “both supranational and intergovernmental characteristics”, see P Bouwen, ‘A Theoretical and Empirical Study of Corporate Lobbying in the European Parliament’ (2 December 2003) *European Integration Online Papers* 1, 4.

³⁹ On this topic, see C Woll, ‘Lobbying in the European Union: From *Sui Generis* to a Comparative Perspective’ (2006) *Journal of European Public Policy* 456. Woll highlights the functional similarities between the EU and domestic legal orders.

⁴⁰ See e.g. G Stahl, ‘Der Ausschuss der Regionen: Politische Vertretung und Lobbyist für Städte und Regionen’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 127.

⁴¹ See e.g. P Bouwen, ‘Corporate Lobbying in the European Union: The Logic of Access’ cit. 365. Some authors highlight similarities between the EU and domestic systems with multiple levels of governance, such as the United States: see e.g., FR Baumgartner, ‘EU Lobbying: A View From the US’ (2007) *Journal of European Public Policy* 482.

⁴² L Hooghe and G Marks, *Multi-Level Governance and European Integration* (Rowman & Littlefield 2001) 2.

⁴³ SS Andersen and KA Eliassen, ‘European Community Lobbying’ (1991) *EurJPolRes* 173, 178.

⁴⁴ W Lehmann, ‘Lobbying in the European Union: Current Rules and Practices’ (European Parliament Directorate-General for Research Working Paper 4-2003) 1, 16.

⁴⁵ C Woll, ‘The Brash and the Soft-Spoken: Lobbying Styles in a Transatlantic Comparison’ (2012) *Interest Groups and Advocacy* 193, 201.

⁴⁶ P Griesser, ‘Lobbying im Mehrebenensystem der EU: Licht und Schatten’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 61. For instance, Eising reports that EC officials “maintain almost as many contacts with interest organizations as with Members of the European Parliament (MEPs) or with officials in the Council of the EU”. See R Eising, ‘The Access of Business Interests to EU Institutions: Towards Élite Pluralism?’ (2007) *Journal of European Public Policy* 384, 384.

changes has arguably become easier since the extension, in the Council, of qualified majority voting to issues that previously required unanimity.⁴⁷ Another consequence of the EU's multi-level architecture is that lobbying can be particularly challenging for groups with modest resources, which are likely to struggle even in relatively simple governance structures.⁴⁸ The complexity of EU lawmaking means that lobbyists must be highly process-oriented in order to succeed; because personal connections matter in this context, some IGs are *de facto* excluded.⁴⁹ Yet another implication of the multi-level system is that EU lobbying techniques are multi-faceted, as IGs need to tailor their strategy to various lobbying targets and lobbying channels; this makes it hard to generate findings about EU lobbying that apply across the board.⁵⁰

A second characteristic of EU lobbying is that unlike most of its member States, the EU has a pluralist system of governance.⁵¹ While neo-corporatist models structure the relationship between the State and IGs by giving specific groups a privileged position to articulate their interests,⁵² pluralist systems let IGs compete freely with each other.⁵³ This likely explains why in the EU, many actors choose to lobby the institutions directly, instead

⁴⁷ Art. 16(3) TEU. According to some scholars, qualified majority voting led to an "explosion of EU lobbying in the final decade of the 20th century", see H Hauser, 'European Union Lobbying Post-Lisbon: An Economic Analysis' (2011) *BerkeleyJIntL* 680, 687. However, unanimity makes it easier for lobbyists to block proposals. On the EU's many veto actors, see M Dawson, 'How Can EU Law Respond to Populism?' (2020) *OJLS* 183, 205.

⁴⁸ P Bouwen, 'Corporate Lobbying in the European Union: The Logic of Access' cit. 374.

⁴⁹ K Joos, 'Erfolg durch Prozesskompetenz. Paradigmenwechsel in der Interessensvertretung nach dem Vertrag von Lissabon' in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 29, 40 ff. According to Hauser, "concerns of unequal access to political institutions and asymmetrical provision of information are magnified when applying general theories of lobbying of [sic] the EU". See H Hauser, 'European Union Lobbying Post-Lisbon: An Economic Analysis' cit. 708.

⁵⁰ P Bouwen, 'Corporate Lobbying in the European Union: The Logic of Access' cit. 365. As Bouwen shows, "the demand for access goods is derived from the specific role of each EU institution in the legislative process", *ibid.* 378.

⁵¹ D Lowery, C Poppelaars and J Berkhout, 'The European Union System in Comparative Perspective: A Bridge Too Far' (2008) *West European Politics* 1231, 1239. Some authors argue that the EU fits neither of these categories, see e.g. TR Burns and M Carson, 'European Union, Neo-Corporatist, and Pluralist Governance Arrangements: Lobbying and Policy-Making Patterns in a Comparative Perspective' (2002) *International Journal of Regulation and Governance* 129. According to other scholars, the EU's way of structuring the interaction with IGs is pluralist but includes some neo-corporatist traits. See N Pérez-Solórzano Borragán and S Smismans, 'Representativeness: A Tool to Structure Intermediation in the European Union?' (2012) *JComMarSt* 403.

⁵² PC Schmitter, 'Neo-Corporatism' in B Badie, D Berg-Schlosser and L Morlino (eds), *International Encyclopedia of Political Science* (SAGE 2011) 1669. Scholars disagree as regards the meaning of the concept of neo-corporatism. See PM Christiansen, 'Corporatism (and Neo-Corporatism)' in P Harris, A Bitonti, CS Fleisher and A Skorkjær Binderkrantz (eds), *The Palgrave Encyclopedia of Interest Groups, Lobbying and Public Affairs* cit.

⁵³ U von Alemann, 'Pluralist Interest Intermediation' in B Badie, D Berg-Schlosser and L Morlino (eds), *International Encyclopedia of Political Science* cit. 1873.

of relying on collective action (e.g. via federations).⁵⁴ Some political scientists argue that the EU system is characterised by elite pluralism, as “businesses are systematically advantaged over citizen groups and non-governmental organizations”.⁵⁵ One plausible reason for this state of affairs pertains to the unequal distribution of resources among IGs.

Third, EU lobbying operates against the backdrop of *numerous and heterogeneous domestic constituencies*, which can make it hard for lobbyists to convince a substantial number of decision-makers of the soundness of their proposals. This diversity is also seen as an obstacle to the adoption of lobby regulation in the EU, where many different domestic political cultures and, therefore, different perceptions of lobbying practices coexist.⁵⁶ Another consequence of this heterogeneity is that domestic actors are more likely to lobby the EU institutions if lobbying is a well-accepted practice in their own State.⁵⁷

Fourth, technocratic considerations – *i.e.*, “functional legitimacy, linked to expertise”⁵⁸ – are often relied on in EU lawmaking, especially in the pre-parliamentary phase.⁵⁹ The EC in particular heavily uses expert knowledge to legitimise its proposals and actions.⁶⁰ Indeed, the EC has a “relatively fragile basis of legitimation”,⁶¹ even if its President⁶² is elected by the EP on the proposal of the European Council.⁶³ More generally, the EU’s democratic credentials are often deemed weak compared to most domestic settings.⁶⁴

⁵⁴ D Coen, ‘The Evolution of the Large Firm as a Political Actor in the European Union’ cit. On this topic, see also RJ Bennett, ‘Business Routes of Influence in Brussels: Exploring the Choice of Direct Representation’ (1999) *Political Studies* 240.

⁵⁵ EÖ Atıkan and AW Chalmers, ‘Choosing Lobbying Sides: The General Data Protection Regulation of the European Union’ (2019) *Journal of Public Policy* 543, 543. For more nuanced views, see R Eising, ‘The Access of Business Interests to EU Institutions: Towards Élite Pluralism?’ cit. 399; D Coen and A Katsaitis, ‘Chameleon Pluralism in the EU: An Empirical Study of the European Commission Interest Group Density and Diversity Across Policy Domains’ (2013) *Journal of European Public Policy* 1104.

⁵⁶ W Lehmann, ‘Lobbying in the European Union: Current Rules and Practices’ cit. 38. Huber also highlights the various conceptions of democracy that exist in the EU Member States: P Huber, ‘Art. 10 EUV’ in R Streinz (ed.), *EUV/AEUV* (3rd edn, CH Beck 2018) para. 3 ff.

⁵⁷ P Bouwen, ‘Corporate Lobbying in the European Union: The Logic of Access’ cit. 375.

⁵⁸ SS Andersen and KA Eliassen, ‘European Community Lobbying’ cit. 178.

⁵⁹ A Føllesdal and S Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) *JComMarSt* 533. See also M Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political’ cit.; C Harlow, ‘The Limping Legitimacy of EU Lawmaking: A Barrier to Integration’ cit. 35; A Jakab, ‘Full Parliamentarisation of the EU Without Changing the Treaties: Why We Should Aim for It and How Easily It Can Be Achieved’ (Jean Monnet Working Papers 03-2012) 14.

⁶⁰ C Boswell, ‘The Political Functions of Expert Knowledge: Knowledge and Legitimation in European Union Immigration Policy’ (2008) *Journal of European Public Policy* 471, 477 ff.

⁶¹ *Ibid.* 477.

⁶² The members of the EC are appointed by the European Council, subject to the consent of the EP: art. 17(7) subpara. 3 TEU.

⁶³ Art. 17(7)(1) TEU.

⁶⁴ See e.g. A Føllesdal and S Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ cit. 534 ff. The authors mention the prevalence of executive authorities, the limited powers of the EP, the absence of truly European elections, the EU’s remoteness from domestic contexts, and the ideological

For instance, the EU is perceived as distant from domestic contexts and civil society.⁶⁵ Scholars also highlight the modest participation of EU citizens in EU elections,⁶⁶ and the fact that citizen engagement is predominantly driven by domestic policy issues.⁶⁷ Some argue that one consequence of this democratic deficit is that “private interest groups do not have to compete with democratic party politics in the EU policy-making process”.⁶⁸

Fifth, the EU exercises a tremendous *normative power*, one reason being the sheer economic weight of its internal market. Besides affecting the legal orders of the EU Member States, EU law also influences third countries and global standards.⁶⁹ This “Brussels effect”,⁷⁰ as Anu Bradford calls it, explains why EU lobbying has become a priority for many domestic, transnational, and international actors, including non-EU Member States facing significant “adaptational pressures” and “adjustment costs”.⁷¹ As of 31 March 2021, the United Kingdom, the United States, and Switzerland were the most well-represented third countries in the JTR.⁷²

One last point pertains to the relatively *scarce resources* that are at the disposal of the EU institutions. For instance, the EC employs 32,000 persons,⁷³ while the Swiss federal administration counts more than 35,000 full-time staff members.⁷⁴ The lack of resources

discrepancy between EU and domestic policies. Some of these concerns are also expressed in the EC’s White Paper on European Governance. See Information COM/2001/428 final cit. See also A Alemanno, ‘Europe’s Democracy Challenge: Citizen Participation in and Beyond Elections’ (2020) German Law Journal 35.

⁶⁵ H Hauser, ‘European Union Lobbying Post-Lisbon: An Economic Analysis’ cit. 680. This criticism also applies to the EP.

⁶⁶ D Curtin and AJ Meijer, ‘Does Transparency Strengthen Legitimacy?’ (2006) Information Polity 109, 110.

⁶⁷ *Ibid.* 115. Hix and Høyland argue that “the electoral connection in the European Parliament is almost nonexistent”, as MEPs’ re-election depends on how well their domestic party is doing. See S Hix and B Høyland, ‘Empowerment of the European Parliament’ cit. 184.

⁶⁸ A Føllesdal and S Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ cit. 537.

⁶⁹ H Hauser, ‘European Union Lobbying Post-Lisbon: An Economic Analysis’ cit.

⁷⁰ A Bradford, ‘The Brussels Effect’ (2012) Northwestern University Law Review 1.

⁷¹ EÖ Atıkan and AW Chalmers, ‘Choosing Lobbying Sides: The General Data Protection Regulation of the European Union’ cit. 547. On this topic, see also E Korkea-aho, “Mr Smith Goes to Brussels”: Third Country Lobbying and the Making of EU Law and Policy’ (2016) CYELS 45.

⁷² See ec.europa.eu. 983 registered entities had their office in the United Kingdom, while 452 were based in the United States, and 281 in Switzerland. See also Joint Transparency Register Secretariat, Annual Report on the Operations of the Transparency Register 2017, presented by the Secretaries-General of the European Parliament and the European Commission to Ms Sylvie Guillaume, Vice-President of the European Parliament and Mr Frans Timmermans, First Vice-President of the European Commission (hereinafter: JTRS Annual Report 2017), 9; Joint Transparency Register Secretariat, Annual Report on the Operations of the Transparency Register 2018, presented by the Secretaries-General of the European Parliament and the European Commission to Ms Sylvie Guillaume, Vice-President of the European Parliament and Mr Frans Timmermans, First Vice-President of the European Commission (hereinafter: JTRS Annual Report 2018), 7.

⁷³ EC, *Commission Staff*, ec.europa.eu.

⁷⁴ Figures retrieved from the publication *The Swiss Confederation – A Brief Guide 2021* (Federal Chancellery 2021) www.bk.admin.ch.

increases the need for EU officials to rely on lobbyists in order to carry out their work.⁷⁵ Pursuant to the exchange theory of lobbying, both officials and IGs benefit from – and even depend on⁷⁶ – lobbying interactions.⁷⁷

II.2. SPECIFICITIES OF LOBBYING IN THE EUROPEAN PARLIAMENT

Zooming in on the EP, what makes this institution special compared to other lobbying venues in the EU, on the one hand, and domestic parliaments, on the other hand? Again, several characteristics can be underlined. These distinctive features show the importance of studying EP lobbying, and of acknowledging that this type of lobbying activity operates within specific constraints.

The EP was long deemed “an institution of secondary importance” from the perspective of EU lobbying, especially before the adoption of the Single European Act (SEA) in 1987.⁷⁸ Thus, unlike domestic parliaments, *the EP has been a neglected lobbying venue*, both in practice and in lobbying scholarship. For many years, the EP “was hardly in the media focus, the Members of the European Parliament (MEPs) too unimportant, even uninteresting to be associated with lobbying or corruption”.⁷⁹ Before the late 1980s, lobbyists mainly targeted the EC and the Council.⁸⁰

The SEA was a turning point for EU lobbying:⁸¹ it led to an increase in lobbying in general, notably due to its aim to establish an internal market by 1992,⁸² and gave more power to the EP through the cooperation procedure.⁸³ A few years later, the Maastricht Treaty

⁷⁵ D Coen, ‘Empirical and Theoretical Studies in EU Lobbying’ (2007) *Journal of European Public Policy* 333, 334.

⁷⁶ A Bunea, ‘Regulating European Union Lobbying: In Whose Interest?’ (2019) *Journal of European Public Policy* 1579, 1582.

⁷⁷ I Michalowitz, ‘Warum die EU-Politik Lobbying braucht? Der Tauschansatz als implizites Forschungsparadigma’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 17.

⁷⁸ R Eising, ‘The Access of Business Interests to EU Institutions: Towards Élite Pluralism?’ cit. 385. Eising refers to a study by Jean Meynaud and Dusan Sidjanski.

⁷⁹ D Dialer and M Richter, ‘“Cash-for-Amendments“-Skandal: Europaabgeordnete unter Generalverdacht’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 235, 236.

⁸⁰ W Lehmann, ‘Lobbying in the European Union: Current Rules and Practices’ cit. 33.

⁸¹ Interestingly, the Act was itself substantially shaped by IGs, most prominently by the European Round Table of Industrialists. On this topic, see M Green Cowles, ‘Setting the Agenda for a New Europe: The ERT and EC 1992’ (1995) *JComMarSt* 501.

⁸² H Hauser, ‘European Union Lobbying Post-Lisbon: An Economic Analysis’ cit. 690. See also (talking about a “well-documented boom in EU business lobbying” after the SEA) D Coen, ‘The Evolution of the Large Firm as a Political Actor in the European Union’ cit. 92.

⁸³ The Lisbon Treaty abolished the cooperation procedure. The SEA also introduced the direct election of MEPs (which, previously, had been delegates of domestic parliaments).

introduced the co-decision procedure,⁸⁴ which further established the EP as a site of power with veto rights.⁸⁵ Today, due to the expansion of the EP's competences, especially after Lisbon, the EP is no longer a "phantom parliament": it has become a crucial lobbying target, just like the EC and the Council.⁸⁶ Still, lobby regulation is, overall, less strict in the EP than in the EC, at least regarding specific aspects such as conflicts of interest and revolving doors⁸⁷ (see *infra*, IV.3), although the Council clearly remains the black sheep as far as lobby regulation is concerned.⁸⁸ Moreover, scholarly literature on EP lobbying remains scant in comparison to analyses of EC lobbying. This is true even if the EP has generally been more open to lobby regulation than the EC in the past, and even if it has been pushing for reforms and for a mandatory transparency register in recent years.⁸⁹

Another feature that distinguishes the EP from other EU institutions is that it is composed of *directly elected representatives*.⁹⁰ As Beate Kohler-Koch highlights, "[t]he EP embodies the principle of democratic representation which is based on the fundamental right of European citizens to partake equally in political rule".⁹¹ While the EC must serve

⁸⁴ Today, the co-decision procedure corresponds to the ordinary legislative procedure (art. 289(1) and art. 294 TFEU). According to Fabbrini, the fact that this procedure now applies to all issues connected to the single market "constitutes a striking success for the EP"; see S Fabbrini, 'The European Union and the Puzzle of Parliamentary Government' (2015) *Journal of European Integration* 571, 576.

⁸⁵ W Lehmann, 'Lobbying in the European Union: Current Rules and Practices' cit. 33; P Bouwen, 'Corporate Lobbying in the European Union: The Logic of Access' cit. 380; S White, 'Footprints in the Sand: Regulating Conflict of Interest at EU Level' in J-B Auby, E Breen and T Perroud (eds), *Corruption and Conflicts of Interest: A Comparative Law Approach* (Edward Elgar 2014) 272, 274.

⁸⁶ H Hauser, 'European Union Lobbying Post-Lisbon: An Economic Analysis' cit. 696. See also D Dialer and M Richter, 'Einleitung: Entmystifizierung von EU-Lobbying' in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 1, 5.

⁸⁷ The expression is commonly used to refer to the seamless transition between the public and the private sector. See e.g. D Freund, 'Access All Areas: When EU Politicians Become Lobbyists' (Transparency International Report 2017).

⁸⁸ This remains true even though the Council joined the AMTR in 2020, as "the most obvious lobbying targets" within the Council, namely the Member States' permanent representations, are likely to remain outside the scope of EU Lobby Regulation: E Korkea-aho, 'Op-Ed: New Year, New Transparency Register' cit. Indeed, art. 12 AMTR provides that Member States may adopt voluntary measures that "make certain activities targeting their permanent representations conditional upon registration in the register".

⁸⁹ R de Caria, 'The Constitutional Right to Lobby on the Two Sides of the Atlantic: Between Freedom and Democracy' (2013) *Cambridge Journal of International and Comparative Law* 452, 466; D Chabanet, 'Les enjeux de la codification des groupes d'intérêt au sein de l'UE' (2009) *Revue française de science politique* 997, 997 ff.

⁹⁰ Art. 14(3) TEU.

⁹¹ B Kohler-Koch, 'Civil Society and EU Democracy: "Astroturf" Representation?' (2010) *Journal of European Public Policy* 100, 108.

the supranational interest,⁹² and while the Council defends domestic interests, the principle of the independent mandate⁹³ requires MEPs to be guided by the interests of their constituents.⁹⁴ Of course, whom and what this constituency encompasses is open to debate.⁹⁵ Answering this question requires developing a normative theory of representation in the EP, and MEPs can be expected to hold different views on the matter.

Third, the EP has *limited resources*, including compared to other EU institutions. In 2016, approximately 32,000 persons were employed by the EC, while approximately 7,500 individuals worked for the EP.⁹⁶ Another constraint is time: for instance, rapporteurs tasked with writing a report on behalf of an EP committee often work under short deadlines, contrary to the EC, which usually has more time to prepare its proposals in the context of the pre-parliamentary phase.⁹⁷ While the plenary has the last word, the EP's committees accomplish the great bulk of the parliamentary work, and are therefore crucial interlocutors for lobbyists.⁹⁸ Due to their dependency on external resources, committees can be expected to be receptive to the inputs of IGs.

Finally, EU democracy is constrained by the fact that the EU is a *purposive project*, and that fundamental goals such as safeguarding the internal market are deemed non-negotiable.⁹⁹ Thus, the legislature tends to consider that its task is to give effect to pre-defined

⁹² Art. 17(3)(3) TEU and art. 245 TFEU. See also Decision 700/20187c of the Commission of 31 January 2018 on a Code of Conduct for the Members of the European Commission, 7 ff. (hereinafter: CoC-EC), art. 2(1).

⁹³ Art. 2 EPRoP.

⁹⁴ According to Bouwen, "MEPs remain firmly rooted in their national political systems" and responsive to domestic constituencies. P Bouwen, 'A Theoretical and Empirical Study of Corporate Lobbying in the European Parliament' cit. 11. However, public scrutiny is usually less stringent as regards MEPs than for domestic representatives. See M Kluger Rasmussen, 'Lobbying the European Parliament: A Necessary Evil' (CEPS Policy Brief 242-2011) 2.

⁹⁵ On this topic, see e.g. A Rehfeld, *The Concept of Constituency: Political Representation, Democratic Legitimacy, and Institutional Design* (Cambridge University Press 2005).

⁹⁶ BBC, 'Reality Check: Who Works for the EU and What Do They Get Paid?' (24 May 2016) www.bbc.com.

⁹⁷ M Kluger Rasmussen, 'Lobbying the European Parliament: A Necessary Evil' cit. 2.

⁹⁸ P Bouwen, 'A Theoretical and Empirical Study of Corporate Lobbying in the European Parliament' cit. 5. As highlighted by Bouwen, it is easier to table amendments in committees than in the plenary. See *ibid.* 6.

⁹⁹ G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) ELJ 2. See also M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' cit.; D Kochenov, 'EU Citizenship: Some Systemic Constitutional Implications' (2018) European Papers www.europeanpapers.eu 1061, 1071.

objectives and assumptions which it does not fundamentally challenge,¹⁰⁰ while “Europeans are denied a meaningful democratic forum for the debating and adoption of laws”.¹⁰¹ This also means that some forms of lobbying – especially those that oppose the rationality of the internal market – are bound to fail. Lobbying deploys itself within a narrow range of options, as the EP does not question the broader underlying purposes of EU law.¹⁰² On the other hand, as Mark Dawson notes, the EU has also begun to intervene in sensitive policy areas, which may give lobbyists a new boost, including in the EP.¹⁰³

III. THE PLACE OF EU LOBBYING IN EU PRIMARY LAW AND EU PARLIAMENTARY LAW

Scholars converge in saying that despite the practical importance of lobbying at EU level, the Union displays a hands-off approach when it comes to regulating this practice.¹⁰⁴ To understand whether this statement is correct as regards EP lobbying, and if so, whether this attitude is justified, it seems important to first recall the place of EP lobbying in EU primary law. Besides examining how the TEU and TFEU deal with lobbies (III.1), I highlight relevant provisions of the Charter of Fundamental Rights of the European Union [2012] (Charter) (III.2).¹⁰⁵ In a second step, in order to understand how the EP implements these provisions, I examine the EP’s Rules of procedure (EPRoP) (III.3), and I briefly discuss the JTR currently in force (III.4), as well as the provisional AMTR (III.5).

III.1. THE TEU AND THE TFEU

The EU Treaties contain several provisions that are relevant from the perspective of lobbying. These provisions highlight the importance of citizen involvement, on the one hand, and of open and transparent lawmaking, on the other hand. These two aspects illustrate the democratic value of lobbying, but also the threats that such practices can create for democratic lawmaking processes, including at the supranational level.

¹⁰⁰ G Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ cit. 3; M Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political’ cit. 592 ff. The EP is even described as “a champion of the integration project”. See ‘Editorial: The 2019 Elections and the Future Role of the European Parliament: Upsetting the Institutional Balance?’ cit. 4.

¹⁰¹ G Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ cit. 14. See, in the same vein, J Habermas, ‘Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible’ cit. 551. Another criticism pertains to “the absence of a clear mandate entrusted by the European constituency as to a political line giving guidance to the Parliament”. See ‘Editorial: The 2019 Elections and the Future Role of the European Parliament: Upsetting the Institutional Balance?’ cit. 3 ff.

¹⁰² G Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ cit. 16.

¹⁰³ M Dawson, ‘Juncker’s Political Commission: Did It Work?’ (Swedish Institute for European Policy Studies 2019) 4.

¹⁰⁴ M Kluger Rasmussen, ‘Lobbying the European Parliament: A Necessary Evil’ cit. 1.

¹⁰⁵ The Charter has the same legal status as the EU Treaties, see art. 6(1) TEU.

As regards *the importance of citizen involvement*, four main categories of norms can be identified, namely norms pertaining to equality, closeness to citizens, representation, and participation.¹⁰⁶ The first aspect, *equality*, is mentioned several times in the Treaties. Together with democracy,¹⁰⁷ equality is one of the values on which the EU is founded.¹⁰⁸ It must also be promoted by the Union's institutional framework.¹⁰⁹ Art. 9 TEU belongs to the title "Provisions on Democratic Principles" and states that "the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies".¹¹⁰ A second requirement is *closeness to the citizen* ("Bürgernähe") in the context of decision-making.¹¹¹ Scholars have linked this concept to the principle of subsidiarity, but also to participatory democracy.¹¹² Third, several provisions refer to *representation*: art. 10 TEU provides that "[t]he functioning of the Union shall be founded on representative democracy" and that "[c]itizens are directly represented at Union level in the European Parliament". Fourth, the Treaties emphasise *participation*. Art. 10(3) TEU gives citizens "the right to participate in the democratic life of the Union". Importantly, art. 11(1) TEU states that "[t]he institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action".¹¹³ Art. 11(2) TEU also underlines the necessity for the institutions to interact "with representative associations and civil society"; it thereby grants EU lobbying constitutional protection.¹¹⁴ Art. 15(1) TFEU mentions the goal of "ensur[ing] the participation of civil society", and art. 227 TFEU pertains to the right of petition.

¹⁰⁶ Alemanno describes representation and participation as two "complementary sources of democratic legitimacy in the Union". A Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' (2014) ELR 72, 81.

¹⁰⁷ Pechstein highlights the importance of representative democracy via periodic elections, and argues that the democratic principle is only moderately developed. See M Pechstein, 'Art. 2 EUV' in R Streinz (ed), *EUV/AEUV* (3rd edn, CH Beck 2018) para. 4.

¹⁰⁸ Art. 2 TEU.

¹⁰⁹ Art. 13(1) TEU.

¹¹⁰ The provision (drafted in the context of the Treaty on a Constitution for Europe) was originally entitled "principle of democratic equality", see S Magiera, 'Art. 9 EUV' in R Streinz (ed), *EUV/AEUV* cit. paras 1 and 7. The article protects the equal participation and representation of citizens in the democratic process, see *ibid.* para. 4. Magiera adds that a finding of infringement seems only likely in the case of arbitrary, i.e. manifest and substantial, disregard of this principle. See *ibid.* para. 11.

¹¹¹ Art. 1 TEU.

¹¹² See M Pechstein, 'Art. 1 EUV' in R Streinz (ed), *EUV/AEUV* cit. para. 23. Pechstein argues that this closeness to the citizen has not been achieved in practice, see *ibid.* para. 24.

¹¹³ According to Huber, the criterion of representativeness should be given a broad interpretation. See P Huber, 'Art. 11 EUV' in R Streinz (ed), *EUV/AEUV* cit. para. 12.

¹¹⁴ *Ibid.* para. 18 ff.

Besides highlighting the value of citizen involvement, the Treaties also stress the importance of *openness and transparency* in EU lawmaking. While both openness and transparency serve democratic ideals because they enable meaningful citizen participation and public accountability, their implications for lobby regulation require discussing them separately from the other democratic principles highlighted above.

Looking at the Treaties, art. 1 TEU states the goal of establishing a union “in which decisions are taken as openly as possible”.¹¹⁵ This aim is reiterated in art. 10(3) TEU.¹¹⁶ Moreover, the work of the institutions must be performed “as openly as possible” to ensure “good governance and [...] the participation of civil society” (art. 15(1) TFEU). As regards transparency, art. 15(2) TFEU pertains to the publicity of the meetings of the EP, and art. 15(3) TFEU establishes “a right of access to documents of the Union’s institutions, bodies, offices and agencies, whatever their medium”.¹¹⁷ Finally, the dialogue between the institutions and civil society must be open and transparent (art. 11(2) TEU), a provision that shows that the two terms are often mentioned jointly.

Noting that openness and transparency are frequently conflated in practice, Alemanno argues that openness requires active efforts on the part of the EU institutions to engage with the broader public, and that openness ultimately aims to strengthen democratic participation. By contrast, transparency is a component of openness that is more passive in character, and that mainly translates into publicity requirements and the right of access to documents.¹¹⁸ As I will argue, the fact that the EP primarily focuses on the passive component (i.e., transparency) in the context of lobby regulation triggers several difficulties (*infra*, IV). One such issue is that the EP does not sufficiently account for the fact that openness and transparency are prerequisites to enabling citizen involvement and, importantly, a type of citizen involvement that is in line with democratic principles like political equality (art. 9 TEU). To achieve this, however, openness and transparency must themselves be interpreted in the light of democratic (and, therefore, egalitarian) considerations.

III.2. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The Charter of Fundamental Rights of the European Union (Charter) also contains provisions pertaining to citizen involvement, on the one hand, and transparency and openness, on the other hand.

For one thing, the Charter shows that various democratic considerations – including participation and representation – justify protecting lobbying activities. Lobbying falls under

¹¹⁵ This requirement was introduced by the Treaty of Amsterdam in 1997. See M Pechstein, ‘Art. 1 EUV’ cit. paras 1 and 21.

¹¹⁶ As Huber notes, openness guarantees effective participation. See P Huber, ‘Art. 10 EUV’ cit. para. 51.

¹¹⁷ See also Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding Public Access to European Parliament, Council and Commission Documents.

¹¹⁸ A Alemanno, ‘Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy’ cit. 73 ff.

the scope¹¹⁹ of freedom of expression and information, which is deemed a prerequisite of democracy.¹²⁰ Moreover, the Charter guarantees “freedom of association at all levels, in particular in political, trade union and civic matters”;¹²¹ in other words, forming IGs is a fundamental right.¹²² Finally, the Charter also protects the right of individuals and groups to petition the EP.¹²³ Thus, in several respects, lobbying practices serve democratic goals.

Still, lobbying must be compatible with the Charter’s commitment to openness, and with transparency in particular. This commitment is expressed in the right to good administration, which requires the institutions to act impartially, fairly, and in a timely manner,¹²⁴ and which includes a duty to give reasons, as well as a duty of equal treatment.¹²⁵ It is also reflected in the right of access to documents,¹²⁶ and in the right to refer cases of maladministration to the European Ombudsperson.¹²⁷

This confirms the ambivalent character of lobbying: on the one hand, it is a democratic practice which the Charter protects; on the other hand, lobbying must conform with the Charter’s requirement of open and transparent lawmaking.

III.3. THE EP’S RULES OF PROCEDURE

To understand how the abstract provisions of EU primary law take shape in practice, we must examine how the EP addresses lobbying in its Rules of procedure (EPRoP).¹²⁸ Complementing the provisions on openness and transparency enshrined in the Treaties and in the Charter (*supra*, III.1-2), the EPRoP address several normative concerns in relation to lobbying activities. These concerns pertain to the independence of MEPs, to the transparency of Members’ activities, and to lobbyists’ access to the EP building.

First, art. 2 EPRoP protects the *independence* of MEPs, stating that “Members shall exercise their mandate freely and independently, shall not be bound by any instructions

¹¹⁹ Krajewski also mentions arts 15 and 16 of the Charter, which guarantee the freedom to choose an occupation and the right to work, as well as the freedom to conduct a business. According to him, these rights are not violated by EU Lobby Regulation. See M Krajewski, ‘Rechtsfragen der Regulierung von Lobbying gegenüber EU-Institutionen’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 269, 280.

¹²⁰ Art. 10 of the Charter. See R Streinz, ‘Art. 10 EU-Grundrechte-Charta’ in R Streinz (ed), *EUV/AEUV* cit. para. 2.

¹²¹ Art. 12(1) of the Charter.

¹²² R Streinz, ‘Art. 12 EU-Grundrechte-Charta’ in R Streinz (ed), *EUV/AEUV* cit. para. 8.

¹²³ Art. 44 of the Charter; see also art. 227 TFEU.

¹²⁴ Art. 41 of the Charter.

¹²⁵ R Streinz, ‘Art. 41 EU-Grundrechte-Charta’ in R Streinz (ed), *EUV/AEUV* cit. paras 5 and 11.

¹²⁶ Art. 42 of the Charter.

¹²⁷ Art. 43 of the Charter.

¹²⁸ Pursuant to art. 232 TFEU, the EP adopts its own Rules of procedure. See also Decision 2005/684/EC, Euratom of the European Parliament of 28 September 2005 adopting the Statute of the European Parliament, 1 ff. (hereinafter: EP Statute), which “lays down the regulations and general conditions governing the performance of the duties of Members of the European Parliament” (art. 1).

and shall not receive a binding mandate".¹²⁹ Similar provisions can be found in the constitutions of the EU Member States.¹³⁰ Second, several norms guarantee the *transparency of MEPs' activities*. The disclosure of MEPs' financial interests – a recent requirement¹³¹ – is regulated in the Code of Conduct (CoC-EP) appended to the EPRoP (Annex I). The Code entered into force in 2012, when the cash-for-amendments scandal was still fresh. Transparency also applies to the meetings between MEPs and lobbyists: art. 11(2) EPRoP provides that Members should endeavour to only interact with registered lobbyists,¹³² and art. 11(3) EPRoP, adopted on 31 January 2019,¹³³ encourages them to publish their meetings with IGs falling under the scope of the JTR ("should"). Rapporteurs, shadow rapporteurs, and committee chairs are even required to do so ("shall").¹³⁴ Finally, art. 121(1) EPRoP states that the EP must act "with the utmost transparency" and in conformity with art. 1 subpara. 2, TEU (openness and closeness), art. 15 TFEU (openness and transparency), and art. 42 of the Charter (transparency). Third, the EPRoP mentions the *access of IGs to the EP*, stating that access badges are granted based on the norms adopted by the Bureau.¹³⁵

III.4. THE JOINT TRANSPARENCY REGISTER

Besides the EPRoP (*supra*, III.3), lobbying activities are mainly regulated via the JTR, which is based on the Interinstitutional Agreement on the Transparency Register (IATR) between the EC and the EP.¹³⁶ Without going into the details of this scheme, it is important to briefly recall its main features.

First, registration is voluntary, and therefore the IATR provides incentives for lobbyists to join the register.¹³⁷ Second, registrants must share information about their organisation, including the number of staff engaged in lobbying activities and holding an access

¹²⁹ See also arts 2(1), 3, and 9(1) EP Statute.

¹³⁰ See e.g. art. 27(1) of the Constitution of the French Republic of 4 October 1958; art. 38(1) of the Basic Law for the Federal Republic of Germany of 23 May 1949; art. 67(2) of the Spanish Constitution of 31 October 1978; art. 67 of the Constitution of the Italian Republic of 22 December 1947; art. 104(1) of the Constitution of the Republic of Poland of 2 April 1997.

¹³¹ As noted by Transparency International, "[t]he 2014-2019 legislative term of the European Parliament is the first where Members had to fill out their declarations of financial interest right from start". See D Freund and R Kergueno, 'Moonlighting in Brussels: Side Jobs and Ethics Concerns at the European Parliament' (Transparency International Report 2018) 6.

¹³² See, by contrast, art. 7(1) CoC-EC.

¹³³ Decision 2018/2170(REG) of the European Parliament of 31 January 2019 on Amendments to Parliament's Rules of procedure affecting Chapters 1 and 4 of Title I; Chapter 3 of Title V; Chapters 4 and 5 of Title VII; Chapter 1 of Title VIII; Title XII; Title XIV and Annex II.

¹³⁴ See, by contrast, art. 7(2) CoC-EC.

¹³⁵ Art. 123(1) EPRoP.

¹³⁶ Art. 295 TFEU. The IATR was reviewed and amended in 2014. Prior to this, the EP (1995) and the EC (2008) each had separate (voluntary) registers.

¹³⁷ Arts 29-30 IATR. The 2018 report of the Joint Transparency Register Secretariat (JTRS) lists the following advantages: long-term access to EP premises, eligibility as a speaker at public hearings, subscription

pass.¹³⁸ They must disclose the pieces of legislation they are working on, their links with EU institutions, and financial information pertaining to their lobbying activities.¹³⁹ Third, the IATR contains a Code of Conduct applicable to all registrants.¹⁴⁰ Fourth and finally, the JTR is operated by the Joint Transparency Register Secretariat (JTRS), which is composed of EC and EP officials.¹⁴¹

III.5. THE AGREEMENT ON A MANDATORY TRANSPARENCY REGISTER

In December 2020, shortly before the present *Article* was published, the EP, the Council, and the EC reached an Agreement on a Mandatory Transparency Register (AMTR). At the time of writing, the AMTR was still pending before the EU institutions, which does not allow for a definitive assessment of its provisions in the present *Article*. Still, providing a brief overview over the text of the provisional AMTR seems appropriate given its importance for the future of EU lobby regulation.

Under the new scheme, and contrary to what the title of the AMTR suggests, registration remains optional for interest representatives. In order to “encourage registration”, the signatory institutions undertake to adopt so-called “conditionality measures”.¹⁴² Like under the JTR, registrants must disclose general information about their organisation, their links to Union institutions, as well as financial data.¹⁴³ Moreover, they are bound to observe a Code of Conduct.¹⁴⁴ The implementation of the AMTR is monitored by a Management Board composed of “the Secretaries-General of the signatory institutions who shall chair it on a rotating basis for a term of one year”.¹⁴⁵ The Secretariat, which is composed of “the heads of unit, or equivalent, responsible for transparency issues in each signatory institution [...] and the respective staff”,¹⁴⁶ is tasked with “manag[ing] the functioning of the register”.¹⁴⁷

to email notifications on the activities of EP committees, ability to organise events on the EP premises, and ability to request patronage by the president of the EP. See JTRS Annual Report 2018, 8.

¹³⁸ Annex II IATR, I.

¹³⁹ I.e., an estimate of the annual costs related to lobbying, EU funding and, for some actors, the annual turnover generated by lobbying activities. See Annex II IATR, II.

¹⁴⁰ Annex III IATR and art. 21 dash 2 IATR.

¹⁴¹ Art. 24 IATR.

¹⁴² Art. 5(1) and (2) AMTR.

¹⁴³ Annex I AMTR.

¹⁴⁴ Annex II AMTR.

¹⁴⁵ Art. 7(1) AMTR.

¹⁴⁶ Art. 8(1) AMTR.

¹⁴⁷ *Ibid.*

IV. EVALUATING LOBBY REGULATION IN THE EP FROM THE PERSPECTIVE OF EU PRIMARY LAW

After having highlighted the specificities of EU and EP lobbying, as well as the place of lobbying in EU primary law and EU parliamentary law (*supra*, II and III), my goal, in this section, is to critically assess selected aspects of the EP's regulatory framework (*supra*, III.3-III.5). As I will show, the EP's almost exclusive focus on transparency (IV.1) – which is however realised in an imperfect and selective way – leads to a problematic neglect of equality (IV.2) and integrity (IV.3) considerations. Examining these two other orientations of lobby regulation is important in order to move beyond the transparency paradigm that characterises much of lobby regulation and research, including with regard to the EP. As the OECD emphasises, a comprehensive lobby regulation strategy that aims to strengthen the democratic legitimacy of lawmaking processes cannot only address transparency. It must also tackle equality and integrity issues.¹⁴⁸

IV.1. TRANSPARENCY AS THE MAIN DRIVER OF EP LOBBY REGULATION

A first critique that can be formulated regarding the EP's scheme of lobby regulation is its narrow focus on transparency as a regulatory objective. As a result, lobbying practices that are deemed transparent and compliant with the CoC-EP are legitimised rather than fundamentally challenged by the applicable regulation. This approach to lobbying neglects other democratic ideals, as well as the principle of openness (*supra*, III.1 and III.2).

According to Smismans, transparency and representativeness (which includes what Smismans calls "system representativeness" and "organisational representativeness"¹⁴⁹) are the two main concerns that originally drove lobby regulation in the EU.¹⁵⁰ These two emphases are reflected in the White Paper on European Governance (WPEG) published by the EC in 2001.¹⁵¹ The WPEG also highlights the importance of openness, equality, closeness to citizens, and participation. Alemanno describes the WPEG as a "turning point" in the emergence of the principle of openness.¹⁵² As already mentioned, the Lisbon

¹⁴⁸ See OECD, *Lobbyists, Government and Public Trust, Volume 1: Increasing Transparency through Legislation* (OECD 2009); OECD, *Lobbyists, Government and Public Trust, Volume 2: Promoting Integrity through Self-Regulation* cit.; OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying* (OECD 2014).

¹⁴⁹ System representativeness pertains to "whether the overall system of interest intermediation is structured as a balanced representation of the interests at stake", while "organisational representativeness" relates to whether a specific interest group is representative. See S Smismans, 'Regulating Interest Group Participation in the European Union: Changing Paradigms Between Transparency and Representation' (2014) ELR 470.

¹⁵⁰ *Ibid.*

¹⁵¹ Information COM/2001/428 final cit.

¹⁵² A Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' cit. 83.

Treaty and the EU Charter have since entrenched the importance of these various principles (*supra*, III.1).

However, this agenda has been shifting in emphasis since the publication of the WPEG, and despite the entry into force of the Lisbon Treaty in 2009. As its title suggests, the EC's Green Paper on a European Transparency Initiative of 2006¹⁵³ – which led to creation of the EC's Register of Interest Representatives in 2008 – mainly addressed issues pertaining to transparency.¹⁵⁴ As highlighted in a 2003 report of the EP's Directorate-General for Research, "[t]he basic purpose of all regulation and codes of conduct is to bring lobbying into the open"¹⁵⁵ – no less, but also no more. Similarly, the current JTR and its Code of Conduct are driven by transparency considerations,¹⁵⁶ and the same applies to the provisional AMTR. Influenced by this approach, the solutions proposed by academics mostly revolve around disclosure and the regulation of individual behaviour, as opposed to structural reforms.¹⁵⁷

Of course, transparency is an important step in the regulation of lobbying. It is a precondition for the realisation of other democratic ideals, as it makes it possible for citizens to hold their representatives accountable.¹⁵⁸ Transparency has been high on the agenda of many NGOs pushing for more robust EU lobby regulation.¹⁵⁹ Yet to solely frame lobbying as a transparency issue is problematic for a range of reasons, one of them being that this narrow approach neglects the other principles pertaining to interest representation that are highlighted in EU primary law (*supra*, III.1 and III.2). Relatedly, transparency alone does not eliminate important democratic concerns pertaining to lobbying, such as well-known imbalances caused by the unequal distribution of political resources¹⁶⁰ and,

¹⁵³ COM/2006/0194 final of 3 May 2006, Green Paper: European Transparency Initiative, 194. On the European Transparency Initiative, see J Greenwood, 'The Lobby Regulation Element of the European Transparency Initiative: Between Liberal and Deliberative Models of Democracy' (2011) *Comparative European Politics* 317.

¹⁵⁴ S Smismans, 'Regulating Interest Group Participation in the European Union: Changing Paradigms Between Transparency and Representation' cit. 39. See also N Pérez-Solórzano Borragán and S Smismans, 'Representativeness: A Tool to Structure Intermediation in the European Union?' cit. 417; J Greenwood, 'The Lobby Regulation Element of the European Transparency Initiative: Between Liberal and Deliberative Models of Democracy' cit. 319.

¹⁵⁵ W Lehmann, 'Lobbying in the European Union: Current Rules and Practices' cit.

¹⁵⁶ S Smismans, 'Regulating Interest Group Participation in the European Union: Changing Paradigms Between Transparency and Representation' cit. 44.

¹⁵⁷ See e.g. D Dialer and M Richter, 'Einleitung: Entmystifizierung von EU-Lobbying' cit. 12 ff.

¹⁵⁸ J Greenwood, 'Organized Civil Society and Democratic Legitimacy in the European Union' (2007) *British Journal of Political Science* 333, 335. For instance, the JTRS expects that the transparency provided by the JTR will lead to "increased public scrutiny, giving citizens, the media and stakeholders the possibility to track the activities and potential influence of interest representatives". See JTRS Annual Report 2017, 3.

¹⁵⁹ Prominent examples include Transparency International and ALTER-EU, the Alliance for Lobbying Transparency and Ethics Regulation.

¹⁶⁰ On this topic, see J Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (Cambridge University Press 2010).

therefore, the unequal ability to participate and to be represented. Transparency serves democratic ideals, but does not suffice from the perspective of democratic legitimacy.¹⁶¹ Curtin and Meijer caution against overestimating the legitimising effect of transparency, which is often viewed as a silver bullet, “a type of holistic medicine designed to remedy many of the ailments the body of the EU is perceived to have”.¹⁶²

A second issue pertains to the *imperfect and selective realisation* of transparency in relation to EP lobbying. Pseudo-transparency is arguably even more problematic than a transparent lack of transparency, as it deceives the broader public. For instance, MEPs are not required to only meet with registered lobbyists,¹⁶³ and most Members are not obliged to publish a legislative footprint.¹⁶⁴ Moreover, because registrants must choose among various categories of IGs and indicate to which category they belong, they are able to influence the reporting requirements by making strategic choices.¹⁶⁵ More generally, problems of non-compliance (e.g., inaccurate data) have been reported.¹⁶⁶ In 2018, the JTRS noted that “[o]f the quality checks performed, 48,52% of the registrations were deemed to be satisfactory (1,923), while the remaining entities were contacted with regard to eligibility or inconsistencies of the data contained in their entries”.¹⁶⁷ Such inaccuracies are encouraged by the lack of systematic checks by the JTRS.¹⁶⁸ In addition, non-compliance results, at most, in an entity being removed from the JTR for one or two years.¹⁶⁹ Similarly, under the AMTR, “where appropriate in the light of the seriousness of the non-observance”, the Secretariat may “prohibit the interest representative from registering again for a period of between 20 working days and two years”.¹⁷⁰ Moreover, few alerts and complaints are lodged regarding alleged ineligibilities, factual mistakes, activities of non-registered entities, and suspected breaches of the Code of Conduct of interest representatives.¹⁷¹

¹⁶¹ A Alemanno, ‘Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy’ cit. 84.

¹⁶² D Curtin and AJ Meijer, ‘Does Transparency Strengthen Legitimacy?’ cit. 110.

¹⁶³ Art. 11(2) EProP.

¹⁶⁴ Art. 11(3) EProP.

¹⁶⁵ J Greenwood and J Dreger, ‘The Transparency Register: A European Vanguard of Strong Lobby Regulation?’ (2013) *Interest Groups and Advocacy* 139, 143. See Annex I IATR regarding the various categories.

¹⁶⁶ D Chabanet, ‘Les enjeux de la codification’ cit. 1003 ff.

¹⁶⁷ JTRS Annual Report 2018, 10-11. In 2017, 53 per cent of the registrations that were subject to a check were deemed satisfactory. See JTRS Annual Report 2017, 12.

¹⁶⁸ J Greenwood and J Dreger, ‘The Transparency Register: A European Vanguard of Strong Lobby Regulation?’ cit. 143. A Member once declared to be the “Master of the Universe” in his financial declaration, which went unnoticed by the JTRS. See J Grad and M Frischhut, ‘Legal and Ethical Rules in EU Decision-Making: “Soft Law” for Targets and Actors of Lobbying’ in D Dialer and M Richter (eds), *Lobbying in the European Union: Strategies, Dynamics and Trends* (Springer 2019) 305, 315.

¹⁶⁹ Art. 34 IATR and Annex IV IATR.

¹⁷⁰ Annex III AMTR, art. 8.1.

¹⁷¹ See arts 31 and 33 IATR; JTRS Annual Report 2018, 11. In 2018, only two out of thirteen complaints were deemed admissible; in both cases, a “satisfactory” solution was reached or expected, see JTRS Annual

Another obvious and often mentioned deficiency is the *voluntary* character of both the JTR and the AMTR.¹⁷² In 2016, the EC presented a proposal for a mandatory Transparency Register.¹⁷³ The negotiations with the EP and the Council first failed in April 2019.¹⁷⁴ Eventually, in 2020, the EP, the Council, and the EC reached a political agreement: the AMTR (*supra*, III.5). Despite being called a “Mandatory Transparency Register”, the new register grants the EU institutions significant leeway in deciding which interactions they wish to allow.¹⁷⁵ Moreover, registration remains optional under this scheme.¹⁷⁶ As already highlighted, at the time of writing, the AMTR still needed to be approved by the institutions in order to enter into force.

It is worth noting that in the past, some scholars argued for the replacement of the IATR by a regulation, as the IATR only binds the institutions and not third parties.¹⁷⁷ One question that needs to be clarified in this regard is whether a Treaty amendment would be necessary in order to make the JTR mandatory through a regulation.¹⁷⁸

Both the IATR and the AMTR contain several problematic *exemptions*,¹⁷⁹ including as regards contacts occurring upon the EP’s or an MEP’s initiative, “such as ad hoc or regular requests for factual information, data or expertise”.¹⁸⁰ As Smismans notes with regard to

Report 2018, 11 ff. In 2017, only three complaints were deemed admissible; one of them was closed, while the two other entries were removed from the Register for lack of eligibility. See JTRS Annual Report 2017, 13.

¹⁷² Alemanno even qualifies the JTR as “legally irrelevant”. See A Alemanno, ‘Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy’ cit. 85.

¹⁷³ Proposal for a Interinstitutional Agreement COM(2016) 627 final from the Commission of 28 September 2016 on a Mandatory Transparency Register.

¹⁷⁴ ALTER-EU, *Mandatory EU Lobby Transparency Sunken by EU Institutions* (5 April 2019) Alter-EU www.alter-eu.org. In December 2019, EC President von der Leyen expressed her intention to resume the negotiations in her mission letter to Commissioner Jourová: Mission Letter of 1 December 2019 to Věra Jourová, Vice-President for Values and Transparency 5.

¹⁷⁵ See recital 7 AMTR.

¹⁷⁶ Art. 5 AMTR. See also E Korkea-aho, ‘Op-Ed: New Year, New Transparency Register?’ cit., noting that the institutions are “stretching the definition of mandatory beyond normal uses of the word”. In its press release, the EC calls the new register “*de facto* mandatory”, which is misleading. See European Commission, *Questions & Answers: Agreement on a Mandatory Transparency Register* (15 December 2020), ec.europa.eu.

¹⁷⁷ See M Krajewski, ‘Rechtsfragen der Regulierung von Lobbying gegenüber EU-Institutionen’ cit. 271.

¹⁷⁸ While scope precludes addressing this issue at length, some scholars argue that the EU has the competence to regulate lobbying based on art. 298 TFEU (for the EU administration) and based on the doctrine of implied powers in relation to art. 298 TFEU (for the EP). See *ibid.* 272 ff. *Contra*: D Dialer and M Richter, “‘Cash-for-Amendments’-Skandal: Europaabgeordnete unter Generalverdacht” cit. 249. Krajewski also mentions a “Kompetenz kraft Natur der Sache”; see M Krajewski, ‘Rechtsfragen der Regulierung von Lobbying gegenüber EU-Institutionen’ cit. 277 ff. The EC views an interinstitutional agreement as “the most pragmatic and promising option to achieve a mandatory scheme in a reasonable timeframe”. See European Commission, *Questions & Answers: Proposal for an Interinstitutional Agreement on a Mandatory Transparency Register* (28 September 2016), ec.europa.eu.

¹⁷⁹ See arts 9-20 IATR (which contain exemptions, and clarify which entities are “expected to register”); art. 4 AMTR (which lists the activities that are “not covered” by the Agreement).

¹⁸⁰ Art. 12 IATR. Art. 4(1)(d) AMTR uses similar wording.

the IATR, “the Register has thus strong limitations since most *formal* consultation mechanisms do not fall in its field of application”.¹⁸¹ Another sweeping exemption – which applies if the conditions set out in the IATR and the AMTR are fulfilled – pertains to law firms and consultancies.¹⁸² Such exclusions undermine transparency, as well as the broad definition of lobbying adopted by the IATR and the AMTR.¹⁸³

These examples show that lobby regulation in the EP, which is mainly driven by transparency concerns, supports “procedural rather than more fundamental change” when it comes to addressing the EU’s democratic deficit.¹⁸⁴ As a result, other democratic values protected by EU primary law, especially equality, closeness to citizens, representation, and participation, are neglected. In the following subsection, I focus on equality, which is arguably the most fundamental democratic value, and which supports the other democratic ideals guaranteed by EU primary law.

IV.2. A TROUBLING NEGLECT OF EQUALITY

Equality is one of the values of the EU,¹⁸⁵ and art. 9 TEU protects equality as a democratic principle. Yet due to the focus on transparency I have highlighted (*supra*, IV.1), equality concerns are largely left out by EP lobby regulation. This neglect of equality is particularly troubling in the case of the EP, which directly represents the citizens of the EU.¹⁸⁶

As previously highlighted, EU lawmaking is characterised by a high level of complexity (*supra*, II.1).¹⁸⁷ Therefore, and perhaps even more than in domestic politics, IGs with superior resources can be expected to navigate EU lawmaking more easily and more effectively than less privileged actors, let alone ordinary citizens; this also corresponds to the findings of several political science studies.¹⁸⁸ More generally, several authors complain that instruments of citizen participation (e.g., the European Citizens’ Initiative and the right to petition the EP) are not as widely used as they should be.¹⁸⁹ Instead of promoting

¹⁸¹ S Smismans, ‘Regulating Interest Group Participation in the European Union: Changing Paradigms Between Transparency and Representation’ cit. 36.

¹⁸² Art. 10 IATR; art. 4(1)(a) AMTR.

¹⁸³ Art. 7 IATR; art. 3 AMTR. On the advantages of a broad definition, see M Kluger Rasmussen, ‘Lobbying the European Parliament: A Necessary Evil’ cit. 4; L Obholzer, ‘A Call to Members of the European Parliament: Take Transparency Seriously and Enact the “Legislative Footprint”’ (CEPS Policy Brief 256-2011) 5.

¹⁸⁴ See, with reference to G Majone, A Føllesdal and S Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ cit. 538.

¹⁸⁵ Art. 2 TEU.

¹⁸⁶ Art. 10(1) TEU.

¹⁸⁷ J Greenwood, ‘Organized Civil Society and Democratic Legitimacy in the European Union’ cit. 335.

¹⁸⁸ See *supra*, footnote 55.

¹⁸⁹ A Alemanno, ‘Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy’ cit. 37 ff. Jakab describes the citizens’ initiative as “a nice jewel with limited practical relevance”. See A Jakab, ‘Full Parliamentarisation of the EU Without Changing the Treaties: Why We Should Aim for it and How Easily It Can Be Achieved’ cit. 17. On this topic, see also A Alemanno, ‘Beyond Consultations:

citizen involvement, the participatory mechanisms available in the EU, such as formal consultation procedures, are geared towards the participation of “functional intermediaries”.¹⁹⁰ The EP’s lobby regulation scheme exacerbates these basic inequalities in several respects. Three main sources of inequality that directly result from the EP’s approach to transparency deserve to be highlighted.

For one thing, and as already mentioned, *contacts that occur upon the initiative of MEPs* (e.g. in the context of official consultations and hearings) are not subject to registration requirements.¹⁹¹ This imperfect transparency (see also *supra*, IV.1) prevents the equal representation and participation of IGs in EU lawmaking processes. As Rasmussen highlights, at present, MEPs consult IGs in an unsystematic fashion, which can lead to imbalances and biases in favour of specific actors and positions.¹⁹² The current regulatory regime hardly makes it possible to scrutinise whether MEPs’ choices are balanced. In other words, there is no requirement of system representativeness in the way the EP deals with IGs (on the concept of system representativeness, see *supra*, IV.1).¹⁹³ Therefore, “not all European interests are pushing at an open door with the same force”.¹⁹⁴ This is partly due to the EU’s pluralist system of interest representation (*supra*, II.1); thus, giving IGs more equal opportunities to be represented and to participate might require moving in the direction of a neo-corporatist system of interest intermediation. Instead of letting IGs compete freely against each other, the EP could consult them in a more structured way. One way of doing so would be to ensure that relevant groups with a large membership (which, as Mancur Olson claims, are at a disadvantage compared with small groups when it comes to organising themselves¹⁹⁵) are directly invited to share their views with regard to a given policy issue.

Second, the EP’s scheme of lobby regulation lacks measures aimed at ensuring that IGs have an *equal opportunity to lobby MEPs* even when the political resources at their disposal are modest. One way of doing so would be to provide funding or strategic advice to IGs that need it, such as IGs that have a large membership. The EC has been granting financial support to specific – and especially less wealthy – IGs since 1976, yet such measures have no equivalent in the EP. The common assumption that funding helps to

Reimagining EU Participatory Politics’ (5 December 2018) Carnegie Europe carnegieeurope.eu; A Alemanno, *Lobbying for Change: Find Your Voice to Create a Better Society* (Icon Books Ltd 2017).

¹⁹⁰ A Alemanno, ‘Beyond Consultations: Reimagining EU Participatory Politics’ cit. 2. The author also highlights a range of measures that could strengthen citizen lobbying, see *ibid.* 3. On this topic, see also A Alemanno, *Lobbying for Change: Find Your Voice to Create a Better Society* cit. 68 ff. and 106 ff.

¹⁹¹ Art. 12 IATR; art. 4(1)(d) AMTR.

¹⁹² M Kluger Rasmussen, ‘Lobbying the European Parliament: A Necessary Evil’ cit. 6.

¹⁹³ N Pérez-Solórzano Borragán and S Smismans, ‘Representativeness: A Tool to Structure Intermediation in the European Union?’ cit.

¹⁹⁴ D Coen, ‘The Evolution of the Large Firm as a Political Actor in the European Union’ cit. 107.

¹⁹⁵ M Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* cit. 127.

balance out inequalities between IGs at EU level is probably overly optimistic.¹⁹⁶ Still, Greenwood reports that for many IGs, this funding ensures their independence in a way that is comparable to the role played by the public funding of political parties in the domestic context.¹⁹⁷ The fact that registered IGs must disclose information pertaining to their financial resources represents a valuable step, as it can raise awareness about resource inequalities. However, this transparency measure does not, as such, level the playing field. Besides financial support, providing policy advice to IGs who are not as well-informed or as well-connected as more established players would help them lobby more effectively. Another measure could be for the EP to provide further guidance on the selection of experts in the context of committee hearings.

Third, *exemptions* from the JTR's and AMTR's registration requirements (*supra*, IV.1) show that some lobbyists are, *de jure*, more equal than others. The JTR and AMTR rely on a broad definition of lobbying,¹⁹⁸ yet as I have noted earlier, they exclude manifold actors from their scope, including law firms and consultancies,¹⁹⁹ trade unions and employers' organisations,²⁰⁰ third countries' governments,²⁰¹ and regional public authorities.²⁰² Again, selective transparency has the effect of putting some IGs at a disadvantage, and sends misleading signals to the public.

To conclude, and as Alemanno highlights, transparency is viewed as a tool to improve the output legitimacy of EU lawmaking.²⁰³ Meanwhile, however, other democratic values enshrined in EU primary law are being overlooked.

IV.3. TRANSPARENCY AS A PROOF OF INTEGRITY?

A third problematic aspect of EP lobbying law pertains to MEPs' duty of integrity.²⁰⁴ In the scholarly literature and relevant policy work, integrity is often identified as another goal of lobby regulation besides transparency.²⁰⁵ The two concepts are frequently mentioned

¹⁹⁶ M Crepez and M Hanegraaff, 'The Funding of Interest Groups in the EU: Are the Rich Getting Richer?' (2020) *Journal of European Public Policy* 102.

¹⁹⁷ J Greenwood, 'Organized Civil Society and Democratic Legitimacy in the European Union' cit. 344.

¹⁹⁸ Art. 7 IATR; art. 3 AMTR.

¹⁹⁹ Art. 10 IATR; art. 4(1)(a) AMTR.

²⁰⁰ Art. 11 IATR; art. 4(1)(c) AMTR.

²⁰¹ Art. 15 IATR; art. 4(2)(d) AMTR.

²⁰² Art. 16 IATR; art. 4(2)(a) AMTR.

²⁰³ A Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' cit. 72.

²⁰⁴ Art. 1 CoC-EP.

²⁰⁵ See e.g. D Dialer and M Richter, "'Cash-for-Amendments"-Skandal: Europaabgeordnete unter Generalverdacht' cit. 255. See also the work of the OECD, *Lobbyists, Government and Public Trust, Volume 1: Increasing Transparency through Legislation* cit.; OECD, *Lobbyists, Government and Public Trust, Volume 2: Promoting Integrity through Self-Regulation* cit.; OECD, *Lobbyists, Government and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying* cit.

jointly in public discourse and in the scholarly literature, due to the widespread assumption that they go hand in hand: the former is viewed as a tool to guarantee and demonstrate the latter and, as a result, to increase public trust.²⁰⁶

Integrity designates “the quality of being honest and having strong moral principles”.²⁰⁷ Like other moral concepts, it has been increasingly referred to in EU law.²⁰⁸ In the legal context, integrity is often used as an umbrella category that includes various principles of good behaviour.

As previously highlighted, the normative principles that must guide the behaviour of MEPs are mentioned in several provisions of EU primary law and in the EPoP and CoC-EP. One fundamental principle that applies to MEPs is that they must exercise their mandate independently.²⁰⁹ Moreover, MEPs must be guided by “disinterest, integrity, openness, diligence, honesty, and accountability and respect for Parliament’s reputation”, “act solely in the public interest”,²¹⁰ and immediately address conflicts of interest.²¹¹ While all these provisions pertain to integrity, significant gaps remain. Several loopholes can be traced back to the problem of imperfect and selective transparency (*supra*, IV.1): they pertain to MEPs’ side jobs, to the problem of revolving doors, and to a lack of enforcement of the CoC-EP.

The first lacuna results from MEPs’ *side jobs*. Indeed, although MEPs are employed full-time by the EP, they are not prohibited from engaging in ancillary activities.²¹² This practice, called “moonlighting”, has raised criticism, especially when the income earned through side jobs is substantial.²¹³ MEPs are prohibited from engaging in “paid professional lobbying directly linked to the Union decision-making process”²¹⁴ while they are in office, yet Transparency International found that three MEPs disclosed paid employment

²⁰⁶ See e.g., Information COM/2001/428 final cit.; U von der Leyen, Mission Letter cit. 3.

²⁰⁷ Cambridge Online Dictionary dictionary.cambridge.org.

²⁰⁸ J Grad and M Frischhut, ‘Legal and Ethical Rules in EU Decision-Making: “Soft Law” for Targets and Actors of Lobbying’ cit. 306. On references to ethics and morality in EU primary and secondary law, see also M Frischhut, “EU”: Short for “Ethical Union”? The Role of Ethics in European Union Law’ (2015) ZaōRV/HJIL 531; M Frischhut, *The Ethical Spirit of EU Law* (Springer 2019).

²⁰⁹ Art. 2 CoC-EP.

²¹⁰ Art. 1 CoC-EP.

²¹¹ Art. 3 CoC-EP.

²¹² See, by contrast, art. 8(1) CoC-EC.

²¹³ See e.g. D Freund and R Kergueno, ‘Moonlighting in Brussels: Side Jobs and Ethics Concerns at the European Parliament’ cit. However, Transparency International acknowledges that even unpaid jobs can be problematic from the perspective of conflicts of interest. See *ibid.* 12. While the incomes generated by side jobs must be disclosed, the exact amount is not revealed; instead, MEPs must match their income with the closest income category. See art. 4(2) CoC-EP.

²¹⁴ Art. 2(c) CoC-EP.

with entities appearing in the JTR.²¹⁵ While these second jobs can jeopardise MEPs' independence, regulatory proposals in this area have failed. The EP has decided to eliminate the potential for conflicts of interest in connection with gifts,²¹⁶ but some important loopholes remain.²¹⁷ Conflicts of interest need to be addressed in a more encompassing and consistent fashion at EU level,²¹⁸ including in the EP, which must be responsive to the citizens of the EU. So far, the EP's efforts to make lobbying more transparent have not made it possible to address these gaps.

Another loophole is that *former MEPs are not prohibited from engaging in lobbying*, although if they do, they must inform the EP and cannot benefit from the facilities granted to former Members.²¹⁹ Contrary to what applies to the EC and its staff and to MEPs' staff, MEPs are not required to observe any cooling-off period upon leaving office.²²⁰ The problem of revolving doors has spilt much ink in relation to the EC²²¹ due to insufficient monitoring of conflicts of interest.²²² In the EP, the lack of regulation can lead to similar – undisclosed – conflicts while MEPs are still in office (so-called “time-shifted *quid pro*

²¹⁵ D Freund and R Kergueno, ‘Moonlighting in Brussels: Side Jobs and Ethics Concerns at the European Parliament’ cit. 2. According to Transparency International, its disclosure of several side jobs of incumbent MEPs “led about 100 MEPs to drop activities”. See *ibid.* 12.

²¹⁶ See art. 5(1) CoC-EP (which only allows MEPs to accept gifts “with an approximate value of less than EUR 150 given in accordance with courtesy usage or those given to them in accordance with courtesy usage when they are representing Parliament in an official capacity”); Bureau of the European Parliament, Decision on Implementing Measures for the Code of Conduct for Members of the European Parliament with Respect to Financial Interests and Conflicts of Interest, Decision of 15 April 2013 (hereinafter: Bureau Decision on Col).

²¹⁷ Another problematic case pertains to events organised by third parties, as art. 5(3) CoC-EP provides that MEPs may accept “the direct payment of [travel, accommodation, and subsistence] expenses by third parties, when Members attend, pursuant to an invitation and in the performance of their duties, at any events organised by third parties”. While such payments must be disclosed (see Bureau Decision on Col, art. 6 ff.), a risk of conflicts of interest remains.

²¹⁸ See S White, ‘Footprints in the Sand: Regulating Conflict of Interest at EU Level’ cit.

²¹⁹ Art. 6 CoC-EP. According to Tansey, this provision is not properly implemented. See R Tansey, ‘The EU’s Revolving Door Problem: How Big Business Gains Privileged Access’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 257, 258.

²²⁰ Senior staff members are bound by a cooling-off period of 12 months. See Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, Title II art. 16. Members of the EC must respect a cooling-off period of 2 years, except for former EC Presidents (3 years). See arts 11(2), 11(4) and 11(5) CoC-EC.

²²¹ Corporate European Observatory, *The Revolving Doors Spin Again: Barroso II Commissioners Join the Corporate Sector* (28 October 2015) corporateeurope.org. See already SS Andersen and KA Eliassen, ‘European Community Lobbying’ cit. 177. In 2017, Transparency International reported that over half of former European Commissioners had gone to work for an entity on the JTR. See D Freund, ‘Access All Areas: When EU Politicians Become Lobbyists’ cit. 6.

²²² I Gräßle, ‘Der Fall Dalli: Die europäische Tabaklobby im Visier’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 231, 232.

quo"²²³).²²⁴ While the CoC-EP states that conflicts of interest must be avoided, *i.e.*, cases where "a personal interest [...] could improperly influence the performance of [an MEP's] duties",²²⁵ the Code does not prohibit obvious causes of interest collisions.

Finally, the *monitoring and enforcement of the CoC-EP*, and therefore of MEPs' duties of integrity, is insufficient.²²⁶ According to Transparency International, none of the 24 MEPs found to have violated the CoC-EP over a five-year period was sanctioned, and only one reprimand was issued.²²⁷ This lack of enforcement also applies to MEPs' duty to disclose their financial interests, as I have already highlighted (*supra*, IV.1).²²⁸

One major issue is that when MEPs face a conflict of interest, they must first address it on their own; only if no solution can be found must they inform the President of the EP.²²⁹ Another severe limitation is that only the President can enforce the CoC-EP.²³⁰ The Advisory Committee on the Conduct of Members can merely provide "guidance on the interpretation and implementation" of the Code.²³¹ In the case of alleged breaches of the Code, it is only tasked with formulating recommendations, as the President enjoys exclusive decisional authority.²³² While the Committee's recommendations to the President are not made available to the public, EU transparency activists have claimed that so far, the President has never observed them.²³³ Be that as it may, the independence of the Advisory Committee is open to doubt, given that the Committee is composed of MEPs.²³⁴ Therefore, several authors and NGOs as well as EC President von der Leyen recommend the creation of an independent interinstitutional ethics body.²³⁵ To sum up, the fact that EP lobby regulation is fixated on transparency means that MEPs' integrity is not sufficiently guaranteed.

²²³ D Freund, 'Access All Areas: When EU Politicians Become Lobbyists' cit. 13.

²²⁴ E.g., S White, 'Footprints in the Sand: Regulating Conflict of Interest at EU Level' cit. 285. On this topic, see R Tansey, 'The EU's Revolving Door Problem: How Big Business Gains Privileged Access' cit.

²²⁵ Art. 3(1) CoC-EP. See also J Grad and M Frischhut, 'Legal and Ethical Rules in EU Decision-Making: "Soft Law" for Targets and Actors of Lobbying' cit. 314.

²²⁶ On the importance of monitoring and enforcement mechanisms, see e.g. M Kluger Rasmussen, 'Lobbying the European Parliament: A Necessary Evil' cit. 5.

²²⁷ D Freund and R Kergueno, 'Moonlighting in Brussels: Side Jobs and Ethics Concerns at the European Parliament' cit. 3.

²²⁸ Art. 4 CoC-EP.

²²⁹ Art. 3 CoC-EP.

²³⁰ D Freund and R Kergueno, 'Moonlighting in Brussels: Side Jobs and Ethics Concerns at the European Parliament' cit. 3. See art. 8 CoC-EP.

²³¹ Art. 7(4) CoC-EP.

²³² Art. 8(2) and (3) CoC-EP.

²³³ J Grad, Transparency and Lobbying: Money Meets Law and Ethics (Management Centre Innsbruck 2016) (on file with author) 110 ff.; J Grad and M Frischhut, 'Legal and Ethical Rules in EU Decision-Making: "Soft Law" for Targets and Actors of Lobbying' cit. 319.

²³⁴ Art. 7(2) CoC-EP.

²³⁵ S White, 'Footprints in the Sand: Regulating Conflict of Interest at EU Level' cit.; D Freund and R Kergueno, 'Moonlighting in Brussels: Side Jobs and Ethics Concerns at the European Parliament' cit. 15; D

V. CONCLUSION

In the early 1990s, Andersen and Eliassen, noting that lobbying was on the rise, argued that “in a representative [European Community] system where the parliamentary chain of command is the core, interest representation will have to be more regularized”.²³⁶ Since then, the EP’s competences have grown significantly, yet the regulation of EP lobbying is still in its infancy.

The EP’s regulatory scheme suffers from significant gaps, and it obtains mediocre scores as far as its robustness is concerned.²³⁷ Especially the narrow focus on transparency risks legitimising lobbying activities without fundamentally questioning them. Another danger created by the transparency approach is that of symbolic legislation:²³⁸ appealing as transparency schemes may be, they often lead to pseudo-transparency which, in the long run, undermines public trust.

Transparency alone is insufficient to address public distrust of the EU institutions. When it comes to regulating lobbying, the EU should not be constrained by its characterisation as a legal order *sui generis*. Just like domestic legal orders, the EU institutions, and the EP in particular, must complement transparency efforts with measures that strengthen the EU’s democratic credentials, including the democratic ideals to which the EU is committed by virtue of EU primary law.

Freund, ‘Access All Areas: When EU Politicians Become Lobbyists’ cit. 8; M Frischhut, ‘Strengthening Transparency and Integrity via the New “Independent Ethics Body”’ (European Parliament, October 2020); Mission Letter cit. 5.

²³⁶ SS Andersen and KA Eliassen, ‘European Community Lobbying’ cit. 173.

²³⁷ In a report published by Transparency International in 2015, the EP obtained 45 out of 100 points for the robustness of its lobby regulation. See S Mulcahy, ‘Lobbying in Europe: Hidden Influence, Privileged Access’ cit. 39. As regards the Centre for Public Integrity (CPI) Index, the EP’s regulatory scheme obtains 32 points, and is therefore characterised as a scheme of “medium-robustness”. See R Chari, J Hogan, G Murphy and M Crepaz, *Regulating Lobbying: A Global Comparison* (2nd edn, Manchester University Press 2019) 183. On the CPI Index, see *ibid.* 160 ff.

²³⁸ Krishnakumar defines symbolic legislation as legislation that aims “to appease the public superficially without effecting any real change in how elected officials conduct business with lobbyists or the interest groups whom lobbyists represent”. See AS Krishnakumar, ‘Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation’ (2007) *Alabama Law Review* 513, 516.



ARTICLES

SHAPING THE FUTURE OF EUROPE – FIRST PART

edited by Sandra Hummelbrunner, Lando Kirchmair, Benedikt Pirker, Anne-Carlijn Prickartz and Isabel Staudinger

THE EUROPEAN COMMISSION BETWEEN INSTITUTIONAL UNITY AND FUNCTIONAL DIVERSIFICATION: THE CASE OF ECONOMIC GOVERNANCE

MARIA PATRIN*

TABLE OF CONTENTS: I. Introduction. – II. The one and the many European Commission(s): institutional coherence and functional fragmentation. – III. Economic governance: a new double-edged function. – III.1. The Commission in the post-crisis reform: a patchwork of functions. – III.2. The super-Olli Procedure: an EMU super Commissioner? – III.3. The European Semester: independent ECFIN or inclusive decision-making? – III.4. Preliminary conclusions: technical assessment and discretionary choices in polyfunctional economic governance. – IV. Functional diversification, democratic legitimacy and the Commission's paradox. – V. Conclusions: the future of the European Commission (or the European Commission of the future).

ABSTRACT: The Commission performs legislative, executive and quasi-judicial functions at the same time. Over time these functions have multiplied, and their nature has become increasingly diverse and fragmented. In the field of economic governance, for instance, the Commission is fulfilling a new multi-faceted function, combining technical assessment with political decisions. Yet, art. 17 of the Treaties require collegial and consistent decision-making processes. Does functional diversification challenge the Commission's internal institutional unity and coherence? And what are the consequences for the Commission's role in the Union's institutional setting? This *Article* addresses these questions, by focusing on the functions in economic governance. The analysis unveils a paradox inherent in the Commission's multi-functionality. The Commission is often entrusted tasks of a political nature in virtue of its independent and impartial status, without however being endowed with the legitimacy basis that would go with it. Therefore, the *Article* warns against the dangers of too extended functional diversity, and contends that clarity as regards the functions fulfilled by the Commission is essential if the institution wants to act legitimately vis-à-vis the other EU institutions, the Member States and the European citizens at large.

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KEYWORDS: European Commission – economic governance – Commission’s functions – democratic legitimacy – politicisation – collegiality.

I. INTRODUCTION

The European Commission has recently been at the core of growing political contestation. It has been the main target of sovereigntists’ accusations pointing to Brussels “Eurocrats” as illegitimate sources of impositions. As misplaced as they may be, these allegations revive the old question of the Commission’s heterogenous nature as a “hybrid” institution, suggesting that the issue deserves further consideration.

Born as an expert-based, technical body, the Commission has evolved towards a semi-politicised institution. Its originally independent and administrative role was slowly eroded by the growing political leadership and quasi-governmental functions that the institution has been assuming. Critically, the Commission initiates legislation, detains extensive executive tasks in the implementation and monitoring of EU legislation, performs quasi-judicial functions in its infringement and supervisory powers, and represents the EU in international organizations and trade relations with third countries. Its functions are often compared to those of a national executive.¹

Yet, despite evolving powers and growing size, the Commission’s institutional architecture has barely changed in over fifty years and the rationale for the different functions originally lies with the Commission’s supranational role as guardian of the Treaties and promoter of the Union’s interest. Eventually, all functions and tasks need to be subsumed under the hat of a collegial body which must decide impartially and independently. Institutional coherence and unity are in this respect crucial imperatives of the Commission’s decision-making. Does functional diversification challenge this internal institutional unity? In this *Article* I will investigate this question and its consequences for the Commission’s role and legitimacy.

Literature on the Commission’s competences, powers and tasks is vast. Many scholars – in the field of both law and political science – have analyzed the Commission’s hybrid nature, pointing to fragmented internal structures, to diverging interests and to numerous intra-institutional conflicts.² However, the overall coherence of the internal Commission’s decision-making has never been the object of in-depth studies. This *Article* fills this gap by examining the heterogenous Commission’s decision-making functions against the background of its unitary institutional nature.

¹ AC Wille, *The Normalization of the European Commission: Politics and Bureaucracy in the EU Executive* (Oxford University Press 2013).

² See e.g. N Nugent and M Rhinard, *The European Commission* (Palgrave Macmillan 2015); T Christiansen, ‘The European Commission. The European Executive between Continuity and Change’ in JJ Richardson (ed), *European Union Power and Policy-Making* (Routledge 2005) 77, 99 ff.

In the *Article* I first briefly introduce the different Commission functions. I address functional diversification and its significance for the Commission's institutional functioning. I argue that, beyond – and underneath – the unitary, collegial output of the institution, fragmentation and heterogeneity permeate the internal decision-making of the Commission at a functional level. In the second part of the *Article* I focus on the powers and functions newly acquired by the Commission in economic governance. The case-study illustrates in practice how the Commission is called to combine the neutrality and rigour of independent economic assessment with political considerations that have enormous impact on the Member States. On this basis I expand the reflection to assess these findings in the light of the overall role of the Commission in the EU institutional setting.

The analysis unveils a paradox inherent in the Commission's multi-functionality. In virtue of its independent and impartial status, the Commission is often entrusted tasks of a political nature, without however being endowed with the legitimacy that would go with it. Therefore, I argue that functional heterogeneity ultimately runs the risk of undermining the Commission's resilience to political contestation, as it does not provide with a clear representation of the legitimacy basis on which the Commission is acting. I contend that clarity as regards the functions fulfilled by the Commission is essential if the institution wants to withstand political contestation in the future and act legitimately vis-à-vis the Member States and the European citizens at large.³

II. THE ONE AND THE MANY EUROPEAN COMMISSION(S): INSTITUTIONAL COHERENCE AND FUNCTIONAL FRAGMENTATION

The Commission is a multi-functional institution. It has the – almost exclusive – right to initiate legislation (legislative function). It has been delegated executive powers by the Member States and therefore adopts non-legislative legal acts as an executive rule-maker (executive rule-making function). It monitors the application of EU law (infringement function) and, in some cases, it directly enforces rules, such as in the field of competition policy (competition function).⁴ Finally, it represents the Union in international fora, be it trade negotiations or international organizations (external representation function). However, the types and categories of the Commission's functions are a matter of contention and scholars often use different classifications and parameters.⁵ Indeed, the traditional separation of powers

³ The empirical part of this *Article* draws on interviews with Commission officials conducted by the author in 2017 and 2018 in the framework of the dissertation: M Patrin, *The Principle of Collegiality in the Commission Decision-making: Legal Substance and Institutional Practice* (European University Institute, Doctoral Dissertation, 2020). The case-study on economic governance is mainly based on the Commission's organisation and functioning at the time of the Juncker Commission.

⁴ J-P Jacqué, *Droit institutionnel de l'Union européenne* (Daloz, 2010) 365.

⁵ A Wonka, 'The European Commission' in JJ Richardson and S. Mazey (eds), *European Union: Power and Policy-making* (Routledge 2015) 83, 84 ff.; T Christiansen, 'The European Commission. The European Executive between Continuity and Change' cit. 100; N Nugent and M Rhinard, *The European Commission* cit. 15 ff.

(Montesquieu's separation between legislative, executive and judicial power) is unfit to account for the distribution of powers and competences between EU institutions, and thus also to draw a clear demarcation line between the Commission's functions.⁶ For instance, the Commission has the right of legislative initiative but the actual legislators are the Council and the European Parliament; in infringement and competition policy it detains enforcement and quasi-judicial powers, although the Court of Justice of the European Union (CJEU) is famously responsible for the judicial oversight of the Union; it is often considered the main executive body of the Union, yet the locus of executive power is typically fragmented, scattered and shared between the Council and the Commission.⁷ These observations alone indicate that it is not easy to navigate between the different Commission's functions. Nevertheless, analysing how the Commission operates under these different functional clusters can reveal a lot about its internal institutional mechanisms and dynamics.

An additional consequence of the absence of a rigid doctrine of power separation in the EU is that the functional categories traditionally adopted to make sense of the Commission's powers are somewhat fluid, so that the Commission could historically acquire new and diverse competences and functions depending on the needs and circumstances. In this *Article*, I will argue that, in addition to the five above-described "traditional" functions in the areas of legislative initiative, executive rule-making, competition policy, infringement proceedings, and external representation, the Commission has recently gained an additional function in the field of economic governance, which constitutes an ever-growing area of Commission's institutional power. I will argue that the post-crisis reform of the Economic and Monetary Union (EMU) framework and the introduction of the European Semester have *de-facto* created a new role for the Commission as a coordinator, supervisor, enforcer and, to a certain extent, legislator in the area of economic governance.

Multiple functions have always coexisted in the Commission's remit of activities. They have traditionally found their justification in the role of the Commission as guardian of the Treaties acting in the interest of the European Union. Be it as an enforcer, legislator, or in representing the Union, the Commission is faithful to the original mission of safeguarding the European interest. In addition, the Commission being a collegial body, these different functions must be performed alongside each other in a coherent and consistent manner. Indeed, according to the principle of collegiality, all decisions must be attributed to the college as a whole and Commissioners are collectively responsible for them. In this sense, collegiality safeguards the independence of the Commission as the Union's impartial and supranational arbiter. Resistance to external pressure through collective endorsement of common decisions remains a key tool for the authoritativeness and respectability of the

⁶ G Majone, 'Delegation of Regulatory Powers in a Mixed Polity' (2002) ELJ 323; See also XA Yataganas, 'Delegation of Regulatory Authority in the European Union. The Relevance of the American Model of Independent Agencies' (Jean Monnet Working Paper 3-2001).

⁷ D Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press 2009).

Commission's output. In addition, collegiality is also a principle of unity of decision-making and it watches over the coherence and homogeneity of the Commission's decisions.

The need for institutional coherence thus informs the internal procedures of coordination within the Commission's political and administrative layers beyond the multi-functional character of the activities performed. Independently from the functions it fulfils, and across all of them, the internal Commission's decision-making procedures must preserve and ensure the cohesion of collegial output. This has significant repercussions for the procedural coordination within the Commission and for the relations between the college of Commissioners and the administrative services. In a complex and multi-tasking institution such as the Commission, decision-making is a continuous process encompassing different levels of activity. To be truly collegial and cohesive, a decision will need to be prepared well before it reaches the college stage through association and consultation of interested actors and departments (Figure 1).

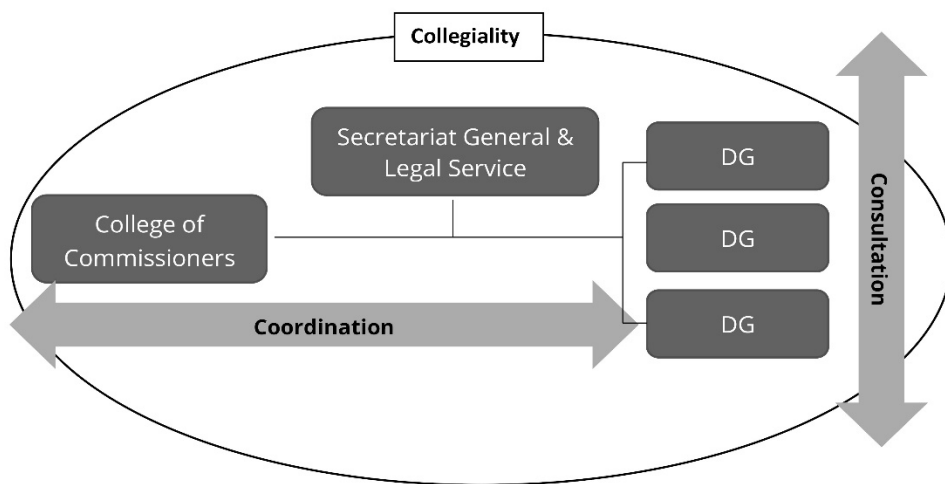


FIGURE 1: The Commission's collegial organization. Source: made by the author.

Yet, at a closer look, the multifaceted nature of the functions performed by the Commission, which require different procedures and respond to different logics, challenges this institutional coherence. It reveals a constitutive fragmentation of decision-making that can prove problematic for the overall role that the Commission plays in the EU. From

a purely formal perspective the college of Commissioners adopts all decisions irrespective of the Commission's area of activity.⁸ However, looking at the micro-level of decision-making, internal coordination and collegial decision-making are far from being uniform and vary greatly according to the types of acts adopted (see *infra* Table 1).

In some cases, the decision-making follows a strict set of procedures allowing for a high level of coordination. Legislative initiatives for instance are very collegial, as regards both the work of the services, where the act is usually drafted, and in the college, where several Commissioners are directly involved at an early stage, especially in the presence of files of high political salience. Interservice consultations, inter-cabinets meetings as well as frequent discussions in the college of Commissioners mark the internal decision-making process for legislation.⁹ Delegated and implementing decisions are equally the result of highly complex coordination procedures, also foreseeing the association of national experts.¹⁰ However, once a measure has been agreed with a broad range of stakeholders and interested parties, the college has none or little discretion to amend the act.

Conversely, where files are deemed to be of a technical nature, the process is highly decentralised with decisions being taken by one Commissioner and one Directorate-General (DG) and only formally rubberstamped by the college. This is particularly problematic when it comes to competition policy. Arguably, competition rules and procedures form an area of separated responsibility, for which the competition Commissioner is exclusively in charge.¹¹ Although final decisions are adopted by the college, the full set of procedures, inquiries and the information needed to work out the cases are exclusive prerogative of one single Commissioner and department.¹² Along similar lines, in infringement proceedings the college has often only a formal role, whereas the main work is done by the services and by the Legal Service in particular. Essentially, decisions on infringements are considered technical and are rooted in the impartial status of the Commission as the watchdog of EU law. This impartiality is embodied by the Legal Service, who has a predominant role in the internal decision-making.¹³

⁸ Exceptions are expressly provided for by the Commission's Rules of Procedure in the empowerment and delegation procedures, Rules of Procedure of the Commission C(2000) 3614, as amended by the Decision 2011/737/EU of the Commission of 9 November 2011 amending its Rules of Procedure.

⁹ M Szapiro, *The European Commission: A Practical Guide* (John Harper Publishing 2013).

¹⁰ N Nugent and M Rhinard, *The European Commission* cit. 323 ff.

¹¹ Significantly, Nugent and Rhinard note that "the centre of the Commission's development and implementation of competition policy is the Directorate-General for Competition", N Nugent and M Rhinard, *The European Commission* cit. 328.

¹² G Monti, 'Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities and the European Competition Network' in D Rittleng (ed), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press 2016) 180 ff; European Commission, Antitrust Manual of Procedures: Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU of March 2012 ec.europa.eu.

¹³ S Andersen, *The Enforcement of EU Law: The Role of the European Commission* (Oxford University Press 2013) 45 ff.

Finally, ensuring internal coherence in external relations is not straightforward either, and this not only for the nature of the policy area, but more importantly for the institutional fragmentation that characterises it. Since the Lisbon Treaty, external affairs are in the hands of the High Representative for Foreign Affairs and Security Policy, who sits in both the Commission and the Council. In performing his duties, the High Representative is administratively supported by the European External Action Service (EEAS), which operates as a separate department independent from the other Commission services.¹⁴ This hybrid institutional arrangement introduces a potentially disruptive element in the internal dynamics of the Commission and in its unitary institutional output. Great part of the external relations' decision-making processes involves another institution and takes place in a separated administrative service.

Based on these considerations, Table 1 summarizes the relations inside the college, within the services as well as between the college and the services for each function performed by the Commission. It shows that collegial procedures and coordination are not uniform across the functional spectrum and that they vary in all three dimensions examined, with significant consequence for the overall institutional coherence of the Commission.

Commission's functions	Collegial procedures	Coordination within the college	Horizontal coordination between departments	Vertical coordination college/ services
Legislative	Many formal and informal procedures inter-service and inter-cabinet at all stages of decision-making	High	High	High
Executive Rule-Making	Extensive consultation at the preparatory stage. Yet limited oversight capacity of the college	High	High	Medium
Competition	Area of separated responsibility in the hands of one DG and one Commissioner	Low	Low	Medium
Infringement	Pre-formal and informal procedures in the hands of legal service and individual DGs	High	Medium	Medium
External action	Hybrid status of High Representative makes coordination complicated	Medium	Low	Medium

TABLE 1: Commission's functions and internal coordination. Source: made by the author.

¹⁴ A-C Marangoni, 'Coordination of External Policies: Feudal Fiefdoms to Coordinate' in A Boening, J-F Kremer and A van Loon (eds), *Theoretical and Institutional Approaches to the EU's External Relations* (Springer 2013) 37 ff.

The varying levels of internal coordination procedures ultimately raise the question of how to safeguard institutional coherence and cohesion despite diversification. Moreover, they highlight a tension between an understanding of the Commission's role as a technical, neutral and impartial arbiter and its political, legislative and executive tasks. The frictions inherent in this functional fragmentation appears clearly if one looks at the Commission's competences and tasks in economic governance. In the rest of the *Article* I will consider economic governance as a test-case showing that functional diversification in the Commission matters and deserves careful examination.

III. ECONOMIC GOVERNANCE: A NEW DOUBLE-EDGED FUNCTION

III.1. THE COMMISSION IN THE POST-CRISIS REFORM: A PATCHWORK OF FUNCTIONS

The 2008 economic and financial crisis spurred a wave of regulatory and institutional reform in the EU. Because of the urgency of the situation, and given the virtual impossibility of revising the Treaties, reforms were adopted either as secondary EU law (e.g. the two- and six-Pack) or outside the EU legal framework by resorting to international agreements (e.g. Fiscal Compact and the European Stability Mechanism (ESM) Treaty).¹⁵ The post-crisis reform undoubtedly brought about the most significant changes in the Commission's functions and tasks in recent years. Many of these tasks were already within the Commission's competences in the EMU before the crisis, but they got enhanced by new provisions. In particular, the Commission today steers the European Semester, a "new governance architecture for socioeconomic policy co-ordination in the European Union".¹⁶ In the framework of the Semester, the Commission is responsible for reinforced surveillance of Member States' macroeconomic and budgetary policy. It monitors national public debts and expenditures under a strengthened Stability and Growth Pact (SGP). In addition, it manages the Macroeconomic Imbalance Procedure (MIP), newly introduced by the Two-Pack and Six-Pack legislation in order to address non-fiscal trade imbalances across European economies. In the assessment of imbalances, the Commission is left with considerable discretion. It can decide to submit the countries to special review (in-depth country reviews) and issues recommendations that can also lead to financial sanctions in case of non-compliance. The introduction of the "reversed qualified majority voting" for sanctions in case of non-compliance for both the SGP and the MIP has strengthened the Commission's position since it is now more difficult for Member States to oppose Commission recommendations. Moreover, the Commission is responsible for preliminary assessment of the conformity of national draft budgets with the SGP. As a result of this monitoring process, the Commission

¹⁵ B De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) *EuConst* 434.

¹⁶ A Verdun and J Zeitlin, 'Introduction: The European Semester as a New Architecture of EU Socioeconomic Governance in Theory and Practice' (2018) *Journal of European Public Policy* 137.

annually drafts country-specific Recommendations (CSRs), which also touch upon policy fields outside of the EU competence, such as pensions, education and healthcare.¹⁷ Finally, the Commission, as part of the Troika, participates in the negotiations over conditionality agreements with countries in financial trouble.

It is important to stress that the Commission does not decide on sanctions nor does it adopt the final country recommendations. This is the responsibility of the Member States in the Council. Yet the Commission conducts the full monitoring and assessment process on which the final decisions are based and is responsible for proposing them.¹⁸ This task has been entrusted to the Commission because of its neutral role as Guardian of the Treaties. The independence and expertise of the Commission is deemed to allow for a neutral assessment of the countries' economic performances. The DG for Economic and Financial Affairs (DG ECFIN) has long represented this neutrality and independence. As stressed by some authors, in the management of the euro-crisis a path-dependent choice was made to endow the supervision of Member States' budgetary performances to the Commission as a technocratic, independent body, that would ensure compliance with the commitments of the reform. "Actors have repeated the choice of the 'technical' profile of the Commission as an independent technical agency with functional authority in order to manage fiscal and economic governance".¹⁹ Mainly based on its neutral and technical nature the Commission has thus acquired new supervising and sanctioning functions in EMU.

Yet, considering these tasks to be purely administrative and technical matters is misleading. In fact, the Commission makes important political decisions on the methodology and on the approach to assess the countries, as well as on the actual advice provided to Member States on the direction and content of the reforms to be undertaken.²⁰ Many authors have pointed to the wide political discretion that the Commission enjoys in its recommendations, which have become increasingly prescriptive and intrusive.²¹ This is especially problematic as recommendations touch upon issues that fall within the competences of the Member States, thus giving the Commission unprecedented capacity to

¹⁷ P Vanheuverzwijn, 'How the Commission Fills in the Blanks of the European Semester: Incomplete Contracts and Supranational Discretion in the EU's Post-Crisis Economic Governance' (2017) *Politique Européenne* 8, 9 ff.

¹⁸ *Ibid.* 9 ff.

¹⁹ C Closa, 'Institutional Change in EU Macroeconomic and Fiscal Governance. The Reinforcement of the Commission' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of European Integration* (Cambridge University Press 2019) 322, 326.

²⁰ MW Bauer and S Becker, 'The Unexpected Winner of the Crisis: The European Commission's Strengthened Role in Economic Governance' (2014) *Journal of European Integration* 213 ff.

²¹ M Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance' (2015) *JComMarSt* 976, 980 ff.

shape and control national economic and social policy.²² Under this perspective, it has been argued that the Union has become a “redistributing political system” whereby the Commission is the “first place of account for the [national] budgetary proposals”.²³ These developments bear significant consequences for the balance between the Commission and the Member States, especially because the budgetary process is at the core of Member States’ parliamentary activity and of their ability to shape policies.²⁴

In conclusion, as a result of the regulatory overhaul of economic governance, the Commission has come to play a new role. The post-crisis setting has endowed the Commission with a new function in EMU, which can hardly be subsumed under any of the traditional ones – but which uses them in novel combinations. The Commission exercises its legislative initiative by proposing corrective measures, it acts as the watchdog of EU law and establishes the medium- to long-term vision for the development of EMU. Moreover, as it will be shown below, the EMU functions come close to resemble the tasks performed by the Commission in the field of competition, albeit with significant differences. As a result, economic governance perhaps represents the culmination of the functional diversification process that was described above. Arguably for this reason, the new Commission’s role in this area poses several problems for the overall institutional identity of the Commission. The patchwork of economic governance’s functions combines neutral, technical and independent assessment with political decisions that will have enormous impact on the Member States. All this within a single, collegial body.

In the following sub-sections, I will examine the main institutional changes both at the level of the college and of the Commission services and I will explain how they affect the institutional coherence of the Commission. I will show that there are significant variations in the functions performed within the EMU area. The polymorphous nature of these functions in turn reflects different perceptions of the role of the Commission in the EU institutional setting.

III.2. THE SUPER-OLLI PROCEDURE: AN EMU SUPER COMMISSIONER?

In 2011, the Commission’s Rules of Procedure (RoP) were amended to introduce a special written procedure for economic and budgetary policies. Art. 12.5 of the RoP states that:

“any Member wishing to suspend a written procedure in the field of the economic and budgetary policies of the Member States, in particular of the euro-area, shall send a reasoned opinion to that effect to the President, explicitly indicating the aspects of the draft

²² F Costamagna, ‘The Impact of Stronger Economic Policy Co-Ordination on the European Social Dimension: Issues of Legitimacy’ in M Adams, F Fabbrini and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014) 359, 376 ff.

²³ D Chalmers, ‘The European Redistributive State and a European Law of Struggle’ (2012) ELJ, 667 and 686.

²⁴ F Fabbrini, ‘The Euro-Crisis, EMU and the Perils of Centralisation’ in L Daniele, P Simone and R Cisotta (eds), *Democracy in the EMU in the Aftermath of the Crisis* (Springer 2017) 121, 130 ff.

decision to which it relates, based on an impartial and objective assessment of the timing, structure, reasoning or result of the proposed decision".²⁵

The President can refuse the suspension if he or she believes that the request is not well founded. In fact, art. 12.5 RoP introduces an exception to the normal rules on written procedure laid out in art. 12.3 RoP. Whereas the principle of collegiality requires that any member can under normal circumstances request the oral discussion of a draft proposal, certain decisions in the field of economic and budgetary surveillance (such as proposing sanctions) undergo an accelerated written procedure that limits the possibility of oral discussion. The art. 12.5 procedure is known within the Commission as the Super-Olli procedure, in honour of Olli Rehn, former Commissioner for Economic and Monetary Affairs in the Barroso II Commission. The procedure is worth closer consideration as it offsets the balance of the College by *de facto* granting special powers to only one Commissioner.

The idea of strengthening the powers of the EMU Commissioner is not new. During the financial crisis, it was proposed to create a Super Commissioner in charge of fiscal policies, endowed with exclusive powers to veto national budgets.²⁶ The Super-Olli procedure is a lighter version of this proposal, which strengthens the autonomy of the Euro-Commissioner within the collegial institutional setting. The new special function of the EMU Commissioner was pushed through by those countries, such as Germany and the Netherlands, that were keen on ensuring strict compliance with fiscal discipline. It relied on the expectation that assessment of national fiscal and macroeconomic performance was essentially a technical matter, that would be decided upon by the EMU Commissioner in an independent and neutral manner – similar to competition policy.²⁷ In the words of the Commission, the objective of the special written procedure was to allow "for a more objective and effective decision-making".²⁸ Remarkably, however, there is no special decision-making procedure that applies to competition policy. The competition Commissioner and DG Competition (DG COMP) in practice act independently, but formally they need to respect normal collegial procedures. On paper, therefore, the EMU Commissioner under the Super-Olli procedure has even wider scope for independent assessment than the Competition Commissioner.

²⁵ Rules of Procedure of the Commission cit. art. 12.

²⁶ Y Karagiannis and M Guidi, 'Institutional Change and Continuity in the European Union: The Super-Commissioner Saga' (2014) *Acta Politica* 174.

²⁷ C Closa notes that "The German government already suggested the possibility of granting this Commissioner the power to veto national budgets, and Angela Merkel proposed that this position enjoy a status similar to that of the competition commissioner, whose decisions do not require the agreement of the rest of the members of the College of Commissioners", C Closa, 'Institutional Change in EU Macroeconomic and Fiscal Governance. The Reinforcement of the Commission' cit. 335.

²⁸ Communication COM(2012) 777 final from the Commission of 28 November 2012 on a Blueprint for a Deep and Genuine Economic and Monetary Union. Launching a European Debate, Footnote 24.

The procedure is arguably illegal because it infringes the equal rights of Commissioners to put an item on the college agenda. The Treaties give the Commission President the power to determine the working guidelines of the Commission and to decide on its internal organization. As a consequence, the President has extensive agenda-setting powers.²⁹ Nonetheless the right of college members to request that an issue be discussed by the full college remains one of the few prerogatives of the collegial architecture of the Commission. The very concept of collegial responsibility implies a right to participate in decision-making from the beginning and a *droit de regard* on the activities of the fellow Commissioners.³⁰ Therefore the cabinet structure is particularly important in the Commission and is built around horizontal policy fields, so that virtually every area of Commission activity is covered by each cabinet, beyond and in addition to their special portfolios.³¹ Secondly, collegial responsibility is a consequence of collective adoption. For this reason, the normal adoption procedure in the Commission is the oral procedure, where all Commissioners sit around the table and express their preferences. For obvious efficiency concerns related to the high number of files treated by the Commission, lighter procedures were established, such as the written procedure. Yet, they all foresee the possibility for any member of the college to request a decision to be discussed orally in the presence of specific concerns or sensitivities. The limits established by the Super-Olli to this rule seem therefore to violate the basic principle of equality between Commissioners and their right to contribute to agenda-setting. This case is implicitly also recognised by the Commission, who in its 2012 "Blueprint for a deep and genuine EMU" notes that "within the Commission, any steps designed to reinforce even further than today the position of the Vice President for Economic and Monetary Affairs and the euro, would require adaptations to the collegiality principle and, hence, treaty changes".³² The legality of the Super-Olli was never challenged in court, but it would not be surprising if the CJEU would rule against the procedure if ever referred with the matter. After all, since the 1980s jurisprudence of the CJEU has recognised substantial consequences to the violation of the principle of collegiality, as constituting a procedural flaw leading to the annulment of the adopted decision.³³

The controversial nature of the procedure is reflected in the fact that the Super-Olli procedure was barely used in the Juncker Commission, or at least it was used in a significantly weakened form. The prerogatives of the Super-Olli were shared between the Vice-President in charge of the Euro, Dombrovskis, and the Economic and Financial Affairs Commissioner Moscovici. If they agreed on the measures to be taken, the provisions could go

²⁹ Art. 17(6) TEU.

³⁰ J Brauneck, 'EU-Kommission: Ist die neue Macht der Vizepräsidenten unionsrechtswidrig?' (2015) DÖV 904 ff.

³¹ N Nugent and M Rhinard, *The European Commission* cit. 144.

³² Communication COM(2012) 777 cit. 38.

³³ Case C-5/85 *AKZO Chemie v Commission* ECLI:EU:C:1986:328; Case C-137/92 P *Commission v BASF and Others* ECLI:EU:C:1994:247; Case T-33/01 *Infront WM v Commission* ECLI:EU:T:2005:461.

through the accelerated written procedure, otherwise they needed to be adopted by oral procedure. Testimonies converge in observing that in practice, decisions on fiscal surveillance are always discussed in the college and are often very lively.³⁴ Although it may be too early to say, this state of affair seems to be replicated in the Von der Leyen Commission. The collective and cohesive nature of the Commission's decision-making is reiterated throughout the new *Working Methods* and in the *Mission Letters* addressed to members of the college.³⁵ In particular, the mission letter to Commissioner Gentiloni, in charge of economic affairs, assigns him important tasks in the supervision of the Semester and in ensuring macroeconomic stability, yet these tasks have to be fulfilled "under the guidance of the Executive Vice-President for an Economy that Works for People".³⁶ There is no mention of the super-Olli procedure or of any special status of the Economy Commissioner.

Ultimately, divergent views on the super-Olli procedure mirror two different ideas for the role that the Commission should play in economic governance: the technical and independent arbiter and/or the political decision-maker. The super-Olli was introduced during the first phase of the post-crisis EU reaction, which was mainly centred on fiscal discipline. A second, more flexible approach followed, championed by Juncker, which aimed to integrate economic considerations with the specific conditions of each country as well as with the macro-economic impact on the Euro-area.³⁷ Juncker's and Von der Leyen's preference for collegial discussions thus reflects a choice for a political approach to economic governance. In fact, it can be argued that precisely a policy area such as economic governance requires an even higher level of collegiality and political guidance, as it may be very difficult to "sell" – and get the Council to adopt – controversial decisions on sensitive matters such as the economic performance of Member States if they are not widely discussed and shared.³⁸

This political approach to economic governance has made the super-Olli procedure less suitable to deal with Member States' economic and budgetary surveillance. Interestingly, more recent Commission's reform proposals for EMU point in the direction of a more "political" role of the Commissioner in charge of economic governance. In its 2017 reform package on EMU the Commission proposed the creation of a European Minister of Economy and Finance, that would also be the Chair of the Euro Group and would rep-

³⁴ Interview with Member of Commission Cabinet, Brussels (28 September 2017); Interview with Member of Commission Cabinet, Brussels (29 August 2018).

³⁵ Communication P(2019) 2 from the President to the Commission of 1 December 2012 on the Working Methods of the European Commission.

³⁶ U Von der Leyen, Mission Letter to Paolo Gentiloni, Commissioner-Designate for Economy of 10 September 2019, 4.

³⁷ P Vanheuverzwijn, 'How the Commission Fills in the Blanks of the European Semester: Incomplete Contracts and Supranational Discretion in the EU's Post-Crisis Economic Governance' cit. 17.

³⁸ Interview with Member of Commission Cabinet, Brussels (22 June 2018).

resent a new central economic policy actor with wide executive powers for the coordination of European fiscal and economic policies.³⁹ Although the proposal does not stand many chances of being adopted in its current form, it vouches for the shift towards a political approach to economic governance initiated by the Juncker Commission.

III.3. THE EUROPEAN SEMESTER: INDEPENDENT ECFIN OR INCLUSIVE DECISION-MAKING?

The diversity of the tasks performed by the Commission in EMU is reflected in its internal work organisation when it comes to the European Semester. The Commission has progressively developed a holistic approach to economic governance with one single package that looks simultaneously at the country-specific and at the EU-wide dimension, at the fiscal and at the structural side. However, substantial differences remain between the hard-law fiscal and macro-economic surveillance side (SGP and MIP) and the softer structural surveillance side (the Semester's CSRs) of the Commission's work. Whereas the fiscal side is dominated by an independent DG ECFIN, the structural side is steered by the Secretariat-General (SG) and features a more collaborative approach. The two surveillance dimensions are both part of the Semester, but they foresee different decision-making processes.

a) Fiscal and MIP surveillance.

With the strengthening of the economic governance system after the crisis, DG ECFIN acquired new responsibilities.⁴⁰ The DG now oversees EMU budgetary surveillance. In this role DG ECFIN traditionally enjoys wide independence as the repository of economic and technical expertise. For instance, DG ECFIN prepares the Autumn and Spring economic forecasts for each country. Based on the forecasts and on Eurostat data, DG ECFIN steers the whole preparatory work for SGP and MIP budgetary surveillance.⁴¹

As shown in Figure 2, DG ECFIN prepares for each country the initial technical analysis as well as a strategic document outlining the preferred way forward. Based on these documents, the EMU Commissioner, in coordination with the responsible Vice-President and the President, issues a college document, in which he either agrees with DG ECFIN's position or proposes a new strategic way forward. Only at this stage, the documents are sent to all services with an interest for interservice consultation – generally the SG, the Legal Service and Eurostat. After the interservice consultation, the documents reach the college level, where they are discussed by the Heads of Cabinets and then usually adopted by oral procedure or, in some cases, by written procedure.

³⁹ See further M Patrin and P Schlosser, 'The European Finance Minister and the EMU Reform Conundrum', (2019) *Capital Markets Law Journal* 274; N Xanthoulis, 'The Commission's Proposal for a European Minister of Economy and Finance: Institutional Empowerment, Constitutional Tensions and the Ministerial Taboo' (CERiM Online Paper Series 7- 2018).

⁴⁰ A Verdun and J Savage, 'Strengthening the European Commission's Budgetary and Economic Surveillance Capacity since Greece and the Euro Area Crisis: A Study of Five Directorates-General' (2016) *Journal of European Public Policy* 101, 110.

⁴¹ Interview with Commission Official of DG ECFIN, Brussels (22 June 2018).

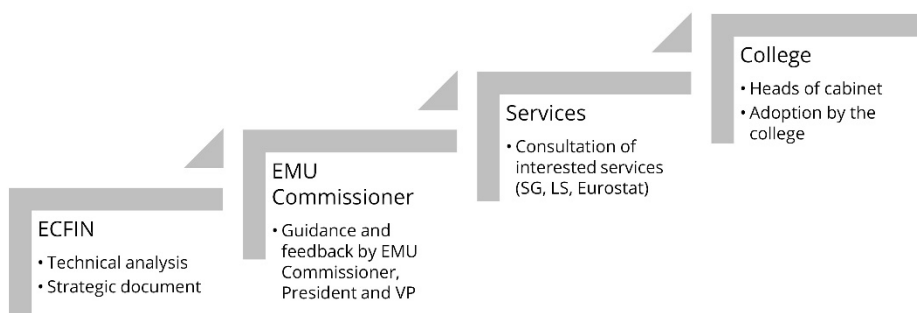


FIGURE 2: Internal decision-making for fiscal and MIP surveillance. Source: made by the author.

Whereas vertical coordination between the services and the college is well integrated into the decision-making process of MIP and SGP surveillance, horizontal coordination between the services is less so. Overall, ECFIN's technical knowledge and assessment are central and inform the final decisions of the college. There are frequent bidirectional exchanges between DG ECFIN and the cabinets, with the EMU Commissioner providing strategic guidance and oversight. However, involvement of departments at the horizontal level is limited. DG ECFIN works autonomously in the development of the technical analysis and of the economic assessment, with only a few services associated through the interservice consultation.

b) Structural surveillance.

The preparation of the CSRs in the framework of the European Semester follows a different logic. The process is more collegial, engaging the horizontal involvement of different actors at an early stage, and it is centrally steered by the Secretariat General. It involves the adoption of country reports in February and of the CSRs in May.

At the beginning of the process several DGs meet to discuss the country reports in Country Teams under the direction of the SG.⁴² On this basis – and considered also the position of the concerned countries – services draft the recommendations. CSRs and country reports are submitted to a Core Directors Group, composed of the SG and the DGs ECFIN, Employment (EMPL) and Growth (GROW), which heads the Semester at the services level. Above the Core Directors Groups is the Core Group, a joint strategic committee of DGs and cabinets in charge of Economic and Financial Affairs, of Internal Market and of Employment and Social Affairs. Once endorsed by the Core Group, the final CSRs and country reports are then passed on to the college for final adoption. Figure 3 summarises this decision-making process.

⁴² A Verdun and J Savage, 'Strengthening the European Commission's Budgetary and Economic Surveillance Capacity since Greece and the Euro Area Crisis: A Study of Five Directorates-General' cit. 111.

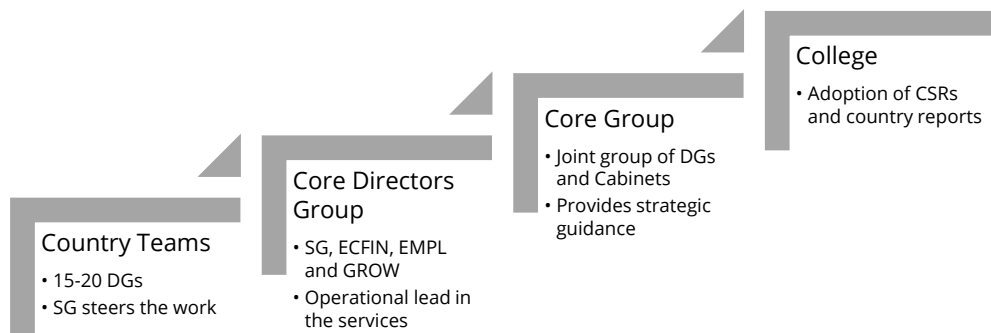


FIGURE 3: Internal decision-making for the European Semester. Source: made by the author.

The procedure for the adoption of CSRs is certainly more inclusive than the SGP/MIP procedure. It is built upon a bottom-up cooperative work between departments with close top-down oversight and guidance. Scholars note that the process has become increasingly collaborative. Political scientists such as Zeitlin and Vanhercke show that the involvement of sectoral DGs, such as DG EMPL and DG SANTE, at an early stage of the process has resulted in a “socialisation of the semester”: “The progressive opening up of the CSRs to social issues reflects the fact that the process of drafting them became increasingly collaborative within the Commission itself”.⁴³

The need for a more inclusive and collegial approach is mainly due to the nature of the recommendations that the Commission handles. As noted above, CSRs are not only about public debt and deficit, but they touch upon fields of limited EU competence, such as education and health. In particular, through the recommendations economic policy has penetrated into the realm of social policy, with significant consequences for the role that the Commission – and more generally the EU – plays in national distributive policies.⁴⁴ To provide just one example, 2019 country-specific recommendations to France addressed issues such as pension reform, labour market integration, investment-related economic policy on

⁴³ J Zeitlin and B Vanhercke, ‘Socializing the European Semester: EU Social and Economic Policy Co-ordination in Crisis and Beyond’ (2018) *Journal of European Public Policy* 149, 159.

⁴⁴ M Dawson and A Durana, ‘Modes of Flexibility: Framework Legislation v “soft” Law’, in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 92, 114 ff.

research and innovation, renewable energies and digital infrastructure, as well as the simplification of the tax system.⁴⁵ Although the technical assessment is at the basis of the recommendations, political leadership is needed to balance the different priorities in areas ranging from macro-economic imbalances, to social matters and investments. There, ECFIN's independent judgment is often replaced by the political guidance of the college.⁴⁶

CSRs are certainly only "recommendations": they are not binding, and they belong to the sphere of soft-law. However, several authors point to the fact that the margin of manoeuvre of Member States to reject or to oppose the Commission's recommendations is often limited.⁴⁷ CSRs are embedded in the overall Semester process that carries "hard" elements because of the link with MIP and Excessive Deficit Procedure (EDP) procedures.⁴⁸ Member States not complying with the recommendations could eventually be subject to penalties and sanctions – the hard law instrument par excellence – under the MIP and the SGP. In this respect the Semester creates a framework "that reaches across the entire spectrum of Member States' economic and social policies, by putting them under supranational control".⁴⁹ On the one hand, a more collaborative approach both inside the Commission and in the relation with the supervised Member States fits well the fluid character of soft law. On the other hand, it is also necessary because the Commission is arguably here stepping outside the remit of its formal competences. It is venturing in the risky arena of prescriptive indications on matters close to the heart of Member States sovereignty. Inclusive and collegial decision-making represents a guarantee that a broader representation of views and positions is integrated in the Commission's approach. However, this hybridization of soft and hard law, of recommendations and prescriptions, is problematic because it masks hard law prescription with soft guidance. It thus creates a short circuit in the Commission's function of economic governance, whereby the role of the hard-law technical enforcer of budgetary discipline overlaps with the soft-law coordination of national economic and social policies.

⁴⁵ Recommendation COM(2019) 510 final from the Commission for a Council Recommendation of 5 June 2019 on the 2019 National Reform Programme of France and delivering a Council opinion on the 2019 Stability Programme of France.

⁴⁶ A Verdun and J Savage, 'Strengthening the European Commission's Budgetary and Economic Surveillance Capacity since Greece and the Euro Area Crisis: A Study of Five Directorates-General' cit. 110.

⁴⁷ F Costamagna, 'The Impact of Stronger Economic Policy Co-Ordination on the European Social Dimension: Issues of Legitimacy' cit.; M Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance' cit.; C Closa, 'Institutional Change in EU Macroeconomic and Fiscal Governance. The Reinforcement of the Commission' cit.

⁴⁸ See further on the "de-flexibilization" of soft-law under the Semester: M Dawson and A Durana, 'Modes of Flexibility: Framework Legislation v "soft" Law' cit.; M Dawson and F De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) *ModLRev* 817.

⁴⁹ F Costamagna, 'The Impact of Stronger Economic Policy Co-Ordination on the European Social Dimension: Issues of Legitimacy' cit. 370.

III.4. PRELIMINARY CONCLUSIONS: TECHNICAL ASSESSMENT AND DISCRETIONARY CHOICES IN POLYFUNCTIONAL ECONOMIC GOVERNANCE

Surely, the introduction of the European Semester has changed substantially the internal Commission's decision-making process and has affected the role of DG ECFIN. Whereas prior to the crisis budgetary surveillance under the TFEU and the SGP was fully centred on DG ECFIN, the Semester brought new DGs into the decision-making process.⁵⁰ I have shown just above that, as a result, the European Semester system has become more collegial, involving DGs and cabinets that were previously not associated to economic governance decisions. Ultimately the case study on economic governance shows that there is a tension over the role to be attributed to DG ECFIN. In the Semester, this tension was resolved by diversifying the procedures, and thus the role that DG ECFIN plays within them. On the fiscal side of the Semester the technical level is in the lead, and on the structural side, it is the political level that provides guidance and manages the process through the SG. However, given the increasing involvement of the EU in the economic policies of the Member states at large, the issue remains topical.

At the beginning of this *Article* I argued that economic governance represents a new function for the Commission. I can now qualify this statement by saying that this new function is in some ways multi-functional in itself. It brings together the tasks of a technical entity (DG ECFIN) in providing neutral and independent assessment of the Member States fiscal performance and those of a political executive with large discretionary powers in directing the reforms that the different countries must implement. As observed by A. De Streel, however, there is confusion inside the Commission about these tasks and the current framework does not sufficiently distinguish between technical assessment (performed by DG ECFIN) and the discretionary choices of the college.⁵¹ The fact that technical assessment and discretion are ultimately responsibility of the same collegial body adds to this confusion. The distinction between technical (DG ECFIN) and discretionary (college) may somehow be drawn in the internal decision-making process. Yet the imperatives of institutional coherence – that were shown to be so important for an independent supranational body such as the Commission – require that both sides must eventually be attributed to and endorsed by a single body. Ultimately, all decisions – be it the result of the technical or of the discretionary functions of the Semester – must be reconducted to the only college of Commissioners who is politically and legally responsible for them. Therefore, the ambition to perform several functions of very different nature at once puts the cohesion of the Commission's decision-making under strong pressure and cannot but become dysfunctional if pushed too far.

⁵⁰ A Verdun and J Savage, 'Strengthening the European Commission's Budgetary and Economic Surveillance Capacity since Greece and the Euro Area Crisis: A Study of Five Directorates-General' cit. 108.

⁵¹ A De Streel, 'The Confusion of Tasks in the Decision-Making Process of the European Economic Governance', in F Fabbrini, E Hirsch Ballin and H Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart 2015) 79, 88.

In the next section I will illustrate in more detail that at the basis of this functional heterogeneity lie different rationales of the Commission's role and I will explore their consequences for the institutional legitimacy of the Commission's output at large.

IV. FUNCTIONAL DIVERSIFICATION, DEMOCRATIC LEGITIMACY AND THE COMMISSION'S PARADOX

In addition to challenging the institutional coherence of the Commission, functional confusion as identified above also risks blurring the picture about the role that the Commission should play within the field of economic governance. Juggling between the different functions can be dangerous for the Commission and raises significant concerns about the legitimacy basis and the democratic mandate of its action. These concerns are two-fold. They relate first to the Commission's lack of legitimacy as unelected body (the legitimacy that the Commission does not have); and secondly to the risk of losing the legitimacy that the Commission actually enjoys as an independent, impartial and technocratic authority (the legitimacy that the Commission in fact has).

First, scholars have stressed the democratic and accountability shortcomings of the current economic governance framework. The political discretion enjoyed by the Commission in policy areas that touch upon the distributive competences of the Member States raises the questions of the lack of electoral accountability of the Commission. This is even more the case if one considers that the Commission is shielding *de-facto* hard powers behind soft-law recommendations. It has been noted that there is an obvious disjunction between where the power is exercised (the supranational – EU – Commission level) and the electoral accountability that mainly resides at the national level – considering the very weak powers of control and decision of the European Parliament.⁵² As summarised by Dawson and De Witte the problem in a nutshell is that “the institutional actor that is deliberately insulated from any direct democratic link – the Commission – has been offered the main role in deciding on national budgets, expenditure, and specific cuts, at the expense of the most directly legitimate one”.⁵³ It was also pointed out that in this patchwork of functions and legal instruments judicial review becomes difficult, in particular when it comes to addressing abuses of power by the supranational executive.⁵⁴

The second concern emerging from the shifting role of the Commission has to do with its increasing political discretion. The legitimacy of the Commission has historically

⁵² P Craig, 'The Financial Crisis, the EU Institutional Order and Constitutional Responsibility' in F Fabbrini, E Hirsch Ballin and H Somsen (eds), *What Form of Government for the European Union and the Eurozone?* cit. 19; M Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance' cit.; D Chalmers, 'The European Redistributive State and a European Law of Struggle' cit.

⁵³ M Dawson and F De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' cit. 833.

⁵⁴ M Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance' cit. 988.

lied with its independent and technical nature, that is with the capacity to enforce and propose law in an impartial manner, thus upholding the interest of the Union. Now, the increasing intrusion of the Commission in policy fields and decision-making processes that are at the core of the political sovereignty of the Member States can undermine this legitimacy, as the Commission cannot be at the same time a credible technocratic authority and a legitimate political decision-maker.⁵⁵ The tensions between the twofold roles of the Commission due to its increasing politicisation have been extensively addressed by the literature and remain a major controversial issue for the institutional reform of the Commission (and of the EU in general).⁵⁶ In its report for the European Parliament on a “New Governance for the European Union and the Euro”, M.P. Maduro observes that the increasing politicisation of the Commission is an inevitable development of the current stage of the EU integration project:

“The politicization of the Commission is bound to affect its perceived neutrality and the authority it derives from being conceived as a semitechnocratic body. But the reality is that the latter authority is already under attack. The expansion of EU and Commission powers into the core of social and economic policy issues is bound to immerse the Commission in politics. The only question is the nature of this politics. As what is happening in some Member States is already making clear, the Commission will not succeed in preserving an appearance of technocratic neutrality in the face of deeply contested political issues. It will simply come across as a limit on democracy and politics.”⁵⁷

Although these observations are certainly accurate, the issue of the Commission's politicisation is trickier than one might think at first sight and demands some counterintuitive reflections. The problem is that, as I have shown in section III, the Commission has been entrusted extensive tasks and functions in economic governance – tasks that often imply a great amount of political discretion in its choices and assessments – precisely because of its technocratic, independent character. Only because of its neutrality, the Commission was in the first place allowed to get involved into politics. As was pointed out above, the Commission was the obvious candidate for the supervision and enforcement of the European Semester, because those tasks were seen as technical in nature, and because the Member States in the Council were formally and politically responsible for

⁵⁵ RD Keleman, ‘Towards a New Constitutional Architecture in the EU?’ in F Fabbrini, E Hirsch Ballin and H Somsen (eds), *What Form of Government for the European Union and the Eurozone?* cit. 214.

⁵⁶ Just to mention few contributions: J Ege, MW Bauer and S Becker (eds), *The European Commission in Turbulent Times: Assessing Organizational Change and Policy Impact* (Nomos 2018); N Nugent and M Rhinard, ‘Is the European Commission Really in Decline?’ (2016) JComMarSt 1199; AC Wille, *The Normalization of the European Commission: Politics and Bureaucracy in the EU Executive* cit.; H Kassim, J Peterson, MW Bauer, S Connolly, R Dehousse, L Hooghe and A Thompson, *The European Commission of the Twenty-First Century* (Oxford University Press 2013).

⁵⁷ LM Póiares Maduro, ‘A New Governance for the European Union and the Euro: Democracy and Justice’ (RSCAS Policy Paper 11-2012) 19.

them. In sum, the Commission was entrusted these tasks precisely for the same reasons why it was created as an independent, supranational authority in the first place – to guarantee impartial assessment and fair involvement of all the Member States.⁵⁸

From this point of view, despite widespread criticism and divergent views about the Commission's role, little has changed over fifty years in the relation between the Member States and the Commission. And yet there is a clear paradox in this path-dependent development at the present stage of European integration, especially in economic and social policies. These policy-fields are indeed of national competence essentially because there lies electoral accountability. Redistributive choices must be made by national politicians accountable to their electorate. At the European level, to the contrary, the logic seems to be inversed: coordination and surveillance of national economic and social policies must not be a political matter but mainly be based on the technical assessment and the recommendations of the impartial and independent Commission (of course endorsed and adopted by the Council). In practice, however, these assessments and recommendations cannot be apolitical, and the Commission would therefore need a solid democratic mandate to intervene in these fields. From there stems the paradox for the Commission. It will never have the political legitimacy to act, because it was chosen on the basis of the absence of this political legitimacy, and yet it is called to act and get involved in fields which are of high political relevance to the Member States and that often imply redistributive choices. In short, the reason why it is getting involved is that same neutrality and apolitical nature that prevents it to be legitimate.

This is obviously a very serious dilemma, that extends well beyond the realm of economic governance to embrace the institutional identity of the Commission. In the first part of this *Article* I have in fact shown that there is a sort of schizophrenia in how the Commission is supposed (and lends itself) to perform several – often opposing – duties at the same time and within the same collegial body. What emerges blatantly in the case of economic governance is in fact an underlying issue affecting the multifunctionality of the Commission in general. This institutional shifting of the Commission has repercussions at many levels. First, it can alter the institutional balance of the Union, as the Commission is positioned differently, depending on the functions and tasks it is fulfilling. Second, it is at the core of the difficulties to reform the Union. Going forward, the role of the Commission will have to be rethought, its institutional scope and remit determined, its nature clarified. And this is not only an internal institutional matter, but it touches upon the very legal and institutional concerns that the EU is facing today. Clarity in this regard would provide increasing democratic legitimacy and thus also better equip the Union to face contestation at the national level.

⁵⁸ C Closa, 'Institutional Change in EU Macroeconomic and Fiscal Governance. The Reinforcement of the Commission' cit. 335.

V. CONCLUSIONS: THE FUTURE OF THE EUROPEAN COMMISSION (OR THE EUROPEAN COMMISSION OF THE FUTURE)

This *Article* has addressed the phenomenon of functional diversification in the Commission through the lens of its institutional coherence. It has shown that the Commission is performing a multitude of tasks often following diverging decision-making paths, despite the need to ensure unitary and cohesive output. To explore the consequences of functional diversification, I have delved into the Commission's role in economic governance, which I argue constitutes a newly acquired function of the Commission, that hardly resemble any other. I have shown that decision-making processes differ within the same policy area (economic governance) and in the framework of the same package of measures (the European Semester). Partially, this patchwork of functions and tasks is due to the chaotic way in which the current EU regulatory framework for economic governance came into existence. The urgency of the crisis and disagreement on the legal instruments led to provisions being adopted at different stages and under different legal bases, as hard and soft law – sometimes incorporated into EU law, sometimes as international agreements. Assuredly, the role of the Commission reflects this heterogeneity.

However, the *Article* puts forward a second, less obvious argument for the multifunctional role of the Commission in economic governance – and more broadly for the diversification of the Commission's functions – that lies with the very institutional nature of the Commission. It originates in the fact that the Commission, because of its independent and neutral status, is entrusted tasks that are of an essentially political nature, without however being equipped with the democratic legitimacy normally needed to fulfil these tasks. This goes back to the widely debated problem of the Union's democratic legitimacy but considers it under a slightly different perspective: the issue is that the Commission as it is today cannot possibly legitimately absolve all the functions it is entrusted precisely because these functions have been endowed to the Commission in virtue of its essentially apolitical nature. The question then becomes: was the Commission a real executive responsible in front of a parliamentary majority, would Member States have relied on it to supervise their financial and economic conditions?

This raises the issue of what the overarching role of the Commission in the EU should be. Eventually, the question is not whether the Commission is technical or political, but rather that it should be clear about the role it is playing. Functional diversification is a reality that one cannot deny. The Commission is now embedded into a political system, whether one likes it or not. At the same time, its independent and impartial regulatory functions are still very needed in the EU. Yet, functional confusion ultimately damages the Commission because it does not provide with a clear representation of what the institution should be doing, thus enhancing legitimacy and democratic concerns and weakening the Commission's resistance to political contestation. More clarity should be provided on the functions that the Commission is playing, whether it is acting in its political cloak or as an enforcer. The two functions in fact rely on different types of legitimacy:

democratic accountability in the former and independence and neutrality of judgment in the latter. Shifting from one legitimacy channel to the other can be detrimental, as it is now the case in the field of economic governance, where the rationale for the Commission's intervention is not always clear.

There is some irony in writing about the future of the EU amidst possibly the worst crisis that Europe (and the world) is facing since World War II. While I am writing this *Article* in my Covid 19 confinement in Florence, everything seems to be highly uncertain, but one thing: the crisis that the pandemic is spreading around will have many serious repercussions for our political systems, not least the EU. The painful and controversial negotiations over the EU response to the crisis showed that the eurozone once again is very vulnerable to external shocks. That it requires new emergency mechanisms and tools, because the old ones, although just recently adopted, are not sufficient to cope with the urgency and intensity of the turmoil. This time again *ad hoc*, temporary instruments were adopted. After four days and four nights of negotiations, EU leaders agreed in July on a three-year recovery fund of €750 billion, composed of €390 billion in grants and €360 billion in loans, and attached to a 1,074.3 billion Multiannual Financial Framework (MFF).⁵⁹ The deal was greeted as ground-breaking not only for the unprecedented size of the fund, but more importantly for the fact that the Commission will borrow funds on behalf of the Union on the capital markets.⁶⁰ Indeed, this may be a huge step forward towards increasing EU fiscal integration. This approach, however, also adds to the EU legal and institutional creativity, thus aggravating the inconsistency, complexity and multi-functionality of a system that is struggling to find its stability and resilience.

It certainly also exacerbates the multi-functional hysteria of the Commission, which is becoming the centre of the financial architecture that will help countries out of the crisis. The new instrument will add new tasks and functions to the already polymorphous Commission. The newly created Recovery and Resilience Facility, will be financed, managed, and supervised by the Commission itself, thus enhancing the already extended Commission's powers in the area of economic governance. Even more intriguingly, spending supervision will be linked to the European Semester. Member States will submit a national recovery and resilience plan explaining how they will use the financing in conformity with the priorities of the Semester: "The criteria of consistency with the country-specific recommendations, as well as strengthening the growth potential, job creation and economic and social resilience of the Member State shall need the highest score of the assessment".⁶¹ Similar to the CSRs, the Commission's proposal for the assessment of the plans will need to be approved by the Council by qualified majority. However, the deal

⁵⁹ European Council Conclusions of 21 July 2020, Special meeting of the European Council.

⁶⁰ J-P Vidal, 'The EU Recovery Package and What's Next' (Online Seminar, Florence School of Banking and Finance, 28 July 2020).

⁶¹ European Council Conclusions of 21 July 2020 cit., A19.

also provides for an emergency mechanism whereby one or several Member States can hold up funds if they believe that relevant milestones and targets have not been fulfilled and refer the matter to the European Council.⁶²

It is too early to assess the consequences of these new developments. It remains to be seen how the plan will be implemented in practice, as well as where the institutional balance between Commission and Council will lean.⁶³ However, it is likely that the management of an emergency mechanism of such magnitude, although temporary, will empower the Commission beyond the soft-low Semester's recommendations, and it will also increase its capacity to penetrate and have a say on the Member States internal economic and social policies. As noted by Costamagna and Goldmann in a *Verfassungsblog* post: "Much will depend on how the Commission will define [...] objectives and how it will manage conflicts and tradeoffs between them".⁶⁴ In other words, the discretion of the Commission in deciding on the reform agendas of Member States will grow, albeit under the veil of – certainly needed and legitimate – soft conditionality about the use of funds. Once again, the neutral, technical and independent nature of the Commissions will provide the basis for interference in sensitive political fields, with the related concerns for the legitimacy and democratic basis on which this interference is based.

Yet this temporary instrument might also be the first step towards a more permanent legal reform of the institutional balance of the EU, which would address some general inconsistencies of the system, including the issues raised by this *Article* about the Commission's role. For decades we have gone forward with ad hoc reforms, driven by the imperative to avoid Treaty revision. The time may be ripe for at least attempting to put again on the table the option of a serious Treaty reform. Among the many tasks, such a revision may for once provide some clarity about the several idiosyncrasies that characterise the current institutional profile of the one and only European Commission.

⁶²*Ibid.* This mechanism, introduced upon request of the so-called Frugal Four (Austria, Denmark, the Netherlands and Sweden) to increase control on spending, is one of the major question marks of the deal. It is unclear what would happen in effect if the Member States refer the matter to the European Council as the mechanism, as it is formulated by the Council Conclusions, does not amount to a real veto.

⁶³ In addition, also the Parliament has a say, since the deal is linked to the MFF. See M De La Baume and DM Herszenhorn, 'Sidelined on Recovery, Parliament Plans Battle over EU Budget' (22 July 2020) Politico www.politico.eu.

⁶⁴ F Costamagna and M Goldmann, 'Constitutional Innovation, Democratic Stagnation?' (30 May 2020) *Verfassungsblog* verfassungsblog.de.



ARTICLES

SHAPING THE FUTURE OF EUROPE – FIRST PART

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ENHANCING ECONOMIC AND SOCIAL RIGHTS WITHIN THE INTERNAL MARKET THROUGH RECOGNITION OF THE HORIZONTAL EFFECTS OF THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS

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TABLE OF CONTENTS: I. Economic and social rights and the European integration process. – II. Promoting economic and social rights within the internal market through the recognition of horizontal effects of the Charter: limits and caveats. – III. New challenges in the promotion of economic and social rights through the Charter's effects in horizontal disputes. – IV. Shaping the future of the European Union through enforceability of the Charter's economic and social rights.

ABSTRACT: This *Article* aims to ascertain the role of the Charter of Fundamental Rights in promoting economic and social rights within the internal market through an analysis of its applicability in horizontal disputes. Recognition of the horizontal effects of fundamental rights can ensure a minimum level of social justice in relations between individuals, help overturn the division between political and social rights in the Charter and promote an appropriate balance between the market and the social. In a series of rulings in 2018 on paid annual leave, the Court of Justice of the European Union attempted to clarify the legal relationship between the rights enshrined in the Charter and the directives on which those rights are based, and admitted the possibility of relying on certain rights conferred by the Charter in disputes between private parties. In particular, in *Bauer and Max-Planck*, the Court argued that art. 31(2) of the Charter, is of a mandatory and unconditional character and sufficient in itself to confer on workers a right to be invoked in horizontal disputes in a field covered by EU law. Recent CJEU case law has recognised horizontal direct effects to a Charter's right outside the scope of the principle of non-discrimination, thus opening a new path to enforcement of the economic and social rights in the internal market and to shaping the future of the European Union through reiteration of its social values and objectives.

KEYWORDS: economic and social rights – internal market – Charter of Fundamental Rights – solidarity chapter – rights and principles – horizontal effects.

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I. ECONOMIC AND SOCIAL RIGHTS AND THE EUROPEAN INTEGRATION PROCESS

The promotion and protection of economic and social rights have always been contentious issues in the European integration process.

It is well known that the Treaty of Rome of 1957 did not confer any legislative competence in the social field on the newly created European Economic Community, giving the European Commission the task of promoting close collaboration between the Member States. A generic reference to the resolve of the founding States to ensure economic and social progress of their countries was in the preamble, where the improvement of the living and employment conditions of their citizens was also identified as a fundamental purpose.¹

In the early years, the Treaty aimed primarily at creating the European Single Market, and there were no Treaty provisions granting the Community explicit competence to take action to protect employees or their organisations. The social deficit was gradually overcome with the adoption of the Single European Act of 1986 and the Community Charter of the Fundamental Social Rights of Workers of 1989 which included several social rights of workers and obligations for member States to realise objectives related to social policy and labour law. However, the real breakthrough came with the Treaty of Maastricht and the Treaty of Amsterdam which favoured the adoption of directives on some economic and social matters, such as, the directives on employers' obligation to inform employees of their working conditions (Directive 91/533/EEC), parental leave (Directive 96/34/EC) and equal treatment (Directive 2000/43/EC).²

The Lisbon Treaty gave a boost to the social dimension within the integration process. Art. 3 TEU provides that the EU strives for the establishment of "a highly competitive social market economy, aiming at full employment and social progress" and a mainstreaming social clause was included in art. 9 TFEU, according to which "in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health".

Despite the innovations introduced by the Lisbon Treaty which grant a significant measure of law making and other competences to pursue these objectives, the most relevant part of the EU's social dimension deals with the effects of other policies, particularly

¹ According to art. 118 of the Treaty establishing the European Community (TEC), the Commission shall have the task of promoting close co-operation between Member States in the social field. On this point see C Barnard, *EU Employment Law* (Oxford University Press 2012) 4 ff.

² For further details on this point see J Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility' in TK Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart 2003) 1, 15 ff.

economic and fiscal policies.³ Indeed, in the years after the Lisbon Treaty came into force, economic and social rights have been negatively affected by the austerity measures imposed by the EU institutions and adopted by the Member States. The European financial assistance mechanisms, are well known, to be based on the use of strict conditionality: all loans awarded are dependent on the recipient State's compliance with economic policy conditions, leading to the dismantling of national labour and social protections in these countries.⁴

The Court of Justice of the European Union (CJEU) was asked to solve the question of the applicability of the EU Charter of Fundamental Rights (henceforth referred to as the Charter) in the context of the European Stability Mechanism (ESM), since austerity measures have affected social benefits (e.g. salary reductions and raising of the retirement age) and the Member States' welfare systems (e.g. cutting spending on public health and public services). However, the Court has consistently adopted a non-interventionist stance with regard to judicial actions challenging the compatibility of austerity measures with the Charter, because the establishment of the ESM outside the EU legal order has the consequence that it is removed from the scope of the Charter as are the Member States on the basis of art. 51 of the Charter.⁵

During the same period, the Court limited its earlier jurisprudence on the social rights accorded to mobile EU citizens, and interpreted some elements of the EU social legislation through, for instance, an invocation of the freedom to conduct a business as a fundamental right protected by the Charter prevailing over the social rights contained in the Charter.⁶

Due to the failed attempts to engage the Court in debates on the incompatibility of the Memoranda of Understanding with the Charter, and in order to respond to the weakening of social and labour rights during the financial crisis, the European Commission officially launched the European Pillar of Social Rights (EPSR) on 26 April 2017.⁷

From a legal perspective, the Pillar is a soft law instrument that could be adopted as a source of inspiration by the CJEU in its case law and as a reference point for the institution for relaunching the use of the Treaty's Social Title through pre-existing legislative proposal and the new initiatives. For example, the Pillar has to be read together with the revision of the Posting of Workers Directive to ensure the principle of "equal pay for equal

³ S Garben, 'The Constitutional (Im)balance between "the Market" and "the Social" in the European Union' (2017) *EuConst* 23, 24.

⁴ F Costamagna, 'Saving Europe "Under Strict Conditionality": A Threat for EU Social Dimension?' (LPF Working Paper 7-2012).

⁵ F Munari, 'Da Pringle a Gauweiler: i tormentati anni dell'unione monetaria e i loro effetti sull'ordinamento giuridico europeo' (2015) *Il Diritto dell'Unione europea* 723 ff.

⁶ Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972. See C Kilpatrick, 'The Displacement of Social Europe: A Productive lens of Inquiry' (2018) *EuConst* 62 ff.

⁷ Communication COM (2017) 250 final from the Commission of 26 April 2017 on establishing a European Pillar of Social Rights.

work". The revision may be seen as a first small step in transforming the principles 5 ("secure and adaptable employment") and 6 ("wages") of the EPSR into concrete measures.⁸ Moreover, principles 2 ("gender equality") and principle 9 ("work-life balance") have been implemented by the revised directive on work-life balance, entered into force on 1 August 2019, which encourages more gender-equalising leave policies.⁹

However, the question arises whether the European Pillar of Social Rights adds to the EU law, considering the existence of the EU Charter of Fundamental Rights. On the one hand, the Pillar goes further than the Charter, since it contains more specific references to economic and social rights and a number of measures that would be legally binding when adopted.¹⁰ On the other, limits still remain: the implementation of the Pillar is subject to the initiative of the EU institutions and the political will of the Member States and the Commission's communication does not indicate appropriate means for addressing the issue of imbalances between economic and social policy and the Economic Monetary Union.¹¹

For these reasons, unlocking the potential of the Charter could be one of the ways, from a legal perspective, to respond to the weakening of the social and economic rights within the internal market. One of the potential effects deals with the horizontality of the economic and social rights enshrined in the Charter. Bearing in mind that parts of social law are horizontal by nature, the next paragraphs will determine some relevant economic and social rights through an analysis of the Charter's applicability in horizontal disputes.

II. PROMOTING ECONOMIC AND SOCIAL RIGHTS WITHIN THE INTERNAL MARKET THROUGH RECOGNITION OF THE HORIZONTAL EFFECTS OF THE CHARTER: LIMITS AND CAVEATS

The overall guarantee of the Charter is reflected in six chapters headed: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights and Justice. The Solidarity chapter (arts 27-38) mainly covers labour rights and some welfare rights (social security and assistance, healthcare, education and housing); discrimination and gender equality are in the Equality chapter.

The incorporation of economic and social rights in the Charter was one of the most controversial issues during the Charter's negotiation, that was overcome by introducing

⁸ S Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) *EuConst* 210 ff.

⁹ S Garben, C Kilpatrick and E Muir, 'Towards a European Pillar of Social Rights: Upgrading the EU Social Acquis' (2017) *College of Europe Policy Brief* 1.

¹⁰ C De La Porte, 'The European Pillar of Social Rights Meets the Nordic Model' (2019) *Swedish Institute for European Policy Studies, European Policy Analysis* 2.

¹¹ S Deakin, 'What Follows the Austerity? From Social Pillar to New Deal' in F Vandenbroucke, C Barnard and G De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 160, 200 ff.

the distinction between rights and principles.¹² As some authors suggest,¹³ the distinction seems to demarcate the difference between civil and political rights on the one hand, and social and economic rights on the other, while ignoring the principle of indivisibility of fundamental rights.¹⁴

To understand how the Charter may promote economic and social rights within the internal market, it is necessary to consider its scope of application. Art. 6 TEU recognises that the Charter has the status of primary law and “the same legal value as the Treaties”. It is well known that provisions of primary law, whereas they are clear, precise and unconditional, may produce direct effects. But the Charter has its own mainstreaming clause in art. 51(1), which states that “the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”.

Despite the wording of art. 51(1), the Court of Justice has interpreted it broadly, stating that “since the fundamental rights guaranteed by the Charter must [...] be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter”.¹⁵

The provisions of art. 52(5) of the Charter must also be considered. The paragraph stipulates that “the provisions of this Charter which contain principles may be implemented by legislative and executive acts [...] of the Union, and by acts of Member States when they are implementing Union law. They shall be judicially cognisable only in the interpretation of such acts and in the ruling of their legality”.

The article stresses the distinction between rights and principles, by clarifying that the latter cannot be given direct effect, but can be used by the CJEU in the interpretation of such acts and in the ruling of their legality.¹⁶ Because the drafters of the Charter could not achieve consensus on the nature of each of its provisions, they decided to leave this matter to the Court’s decision.

¹² J Krommendijk, ‘Principled Silence or Mere Silence on Principles? The Role of the EU Charter’s Principles in the Case Law of the Court of Justice’ (2015) *EuConst* 321, 321-322.

¹³ J Kenner, ‘Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility’ cit.; F Costamagna, ‘The Internal Market and the Welfare State: Anything New after Lisbon’ in M Trybus and L Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar 2012) 381 ff.

¹⁴ R Pisillo Mazzeschi, ‘Sulla natura degli obblighi internazionali di tutela e promozione dei diritti economici, sociali e culturali’ in F Bestagno (a cura di), *I diritti economici, sociali e culturali. Promozione e tutela nella comunità internazionale* (Vita e Pensiero 2009) 3 ff.

¹⁵ Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 para. 21.

¹⁶ S Peers and S Prechal, ‘Art. 52 – Scope and Interpretation of Rights and Principles’ in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (C.H. Beck, Hart, Nomos 2014) 1455 ff.

Some authors argue that social rights enshrined in the Solidarity chapter have to be deemed principles for different reasons. One reason, for instance, deals with art. 1(2) of Protocol n. 30 which states that “nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law”. Another takes into consideration the Explanations to the Charter asserting that art. 52(5) is consistent “with the approach of the Member States’ constitutional systems to ‘principles’, particularly in the field of social rights”.¹⁷

It is true that some social rights have the character of principles in the sense of art. 52(5), but this does not mean that principles have to be equated with social rights. According to the Explanations, arts 25 (elderly people), 26 (people with disabilities) and 37 (environment protection) contain a principle, while arts 33 (family and professional life) and 34 (social security and social assistance) contain “both elements of a right and a principle”.¹⁸ In any case, the Court has determined that other provisions of the Solidarity Title are individually enforceable, for instance, art. 28 on the right of collective bargaining and action and art. 30 on the right to protection against unfair dismissal in the landmark case *Viking*.¹⁹

The CJEU has already clarified that some provisions of the Charter that contain rights may have direct effect in vertical situations.²⁰ However, the question of whether the Charter’s rights could also have horizontal direct effects is still controversial.

An argument in favour of such effects could be drawn from the preamble of the Charter, which states that the enjoyment of the rights enshrined in it “entails responsibilities and duties with regard to other persons, to the human community and to future generations”.²¹ Furthermore, the Court has recognized horizontal direct effects of some general principles contained in the EU Treaties, then incorporated in the EU Charter, as fundamental rights. It would therefore be reasonable that Charter’s rights could also apply and be invoked in horizontal disputes.²²

¹⁷ S Peers and S Prechal, ‘Art. 52– Scope and Interpretation of Rights and Principles’ cit.; A Kornezov, ‘Social Rights, the Charter, and the ECHR: Caveats, Austerity, and other Disasters’ in F Vandenbroucke, C Barnard and G De Baere (eds), *A European Social Union after the Crisis* cit. 385, 407 ff.

¹⁸ Explanations on Art. 52(2) to the Charter of Fundamental Rights of the European Union [2012].

¹⁹ Case C-438/05 *The International Transport Workers’ Federation and The Finnish Seamen’s Union* ECLI:EU:C:2007:772 para. 44, where the CJEU said that the “right to take collective action, including the right to strike, must therefore be recognised as a fundamental right”. See also C Barnard, ‘So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights’ (2019) *ModLRev* 350, 352.

²⁰ Joined cases C-411/10 and C-493/10 *N.S. and Others* ECLI:EU:C:2011:865.

²¹ LS Rossi, ‘The Relationship between the EU Charter of Fundamental Rights and Directives in Horizontal Situations’ (25 February 2019) European Forum eulawanalysis.blogspot.com.

²² D Gallo, *L’efficacia diretta del diritto dell’Unione negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa* (Giuffrè editore 2018) 187.

This is highly important, since the horizontal effect of fundamental rights pursues social goals in the sense that it guarantees fairness in relationships between individuals.²³ In particular, its role is to overcome asymmetries in contractual relations between individuals, e.g. in an employment contract, where the intervention of law is required in order to protect one individual from another.²⁴ Therefore, the horizontal effect is expected to ensure a minimum level of social justice in relations between individuals in order to guarantee equality and social justice to the weaker party.²⁵

The horizontal effect of fundamental rights, and specifically of social rights, has been developed by the Court of Justice in rulings on the fundamental right to equal treatment protected as a general principle of EU law, then developing into a new line of cases on the corresponding right, as enshrined in art. 21 of the Charter.

In the *Mangold*²⁶ and *Kücükdeveci*²⁷ cases, the CJEU recognised, for the first time, the horizontal direct effect of the principle of non-discrimination mediated by the directives which give the principle concrete effect.²⁸ In these two cases the judges affirmed that the general principle as given expression in Directive 2000/78 (on equal treatment in employment and occupation), applies in proceedings between private parties since it meets two conditions: the principle is mandatory in nature and it is sufficient in itself to confer on individuals a right which they may invoke before national judges.²⁹

This case law has been considered by some scholars as an isolated exception to the lack of horizontal direct effect of general principles and fundamental rights, because they are normally the means to protect private individuals *vis-à-vis* public authorities and they are abstract and need to be expressed in legislation before they can be applied to private individuals.³⁰

Some years after the Lisbon Treaty entered into force, the Court ruled on the unclear legal relationship between the rights contained in the Charter and the directives on which

²³ F Fontanelli, 'The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights' (2014) *ColumJ EurL* 194 ff.

²⁴ S Sever, 'Horizontal Effect and the Charter' (2014) *Croatian Yearbook of European Law and Policy* 39, 41-42.

²⁵ F Ferraro, 'Vecchi e nuovi problemi in tema di efficacia diretta orizzontale della Carta' (22 May 2019) *Federalismi.it* www.federalismi.it 6.

²⁶ Case C-144/04 *Mangold* ECLI:EU:C:2005:709.

²⁷ Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21.

²⁸ *Kücükdeveci* cit. para. 50. See G Di Federico, 'Le discriminazioni in base all'età nella più recente giurisprudenza della Corte di giustizia: da Mangold a Georgiev [...] e oltre' (2011) *Studi sull'integrazione europea* 585 ff.

²⁹ *Mangold* cit. para. 77; *Kücükdeveci* cit. para. 53.

³⁰ M De Mol, 'Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law' (2010) *EuConst* 293 ff.; E Spaventa, 'The Horizontal Application of Fundamental Rights as General Principles of Union Law' in A Arnulf, C Barnard, M Dougan, E Spaventa (eds), *A Constitutional Order of States?: Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) 199, 208 ff.

those rights are based in the *Association de médiation sociale (AMS)* judgement.³¹ The case dealt with a French non-profit association, the majority of whose working staff were hired on the basis of “accompanied-employment contracts”. According to the French Labour Code, this category of workers should not be considered when calculating staff numbers in the undertaking. Applying this rule, *AMS* did not recognise the appointment of a union representative, since the association did not reach the minimum threshold of employees required in French law.³²

On the one hand, the Court emphasised that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law.³³ On the other, it did not recognise a horizontal effect of art. 27 of the Charter on the workers’ right to information and consultation (and specified in art. 3 of Directive 2002/14) which provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by EU law and national laws and practices. For this article to be fully effective, “it must be given more specific expression in EU or national law”.³⁴

While in the *Kücükdeveci* judgment the principle of non-discrimination, as general principle of EU law, then enshrined in art. 21 of the Charter, is sufficient in itself to confer on individuals a right to invoke it *vis-à-vis* other individuals, the wording of art. 27 of the Charter cannot have horizontal effect.

Despite the Opinion of AG Cruz Villalon who proposed that “art. 27 of the Charter, given specific substantive and direct expression in art. 3 para. 1 of Directive 2002/14, may be relied on a dispute between individuals, with the potential consequences which this may have concerning non-application of the national legislation”,³⁵ the Court seemed to suggest that the *caveat* in art. 27, which subordinates the right to information and consultation to the cases and the conditions provided for by Union law and national law and practices, would likely indicate that the right is not self-sufficient.

Moreover, the CJEU did not give any answer on the nature of art. 27, since it did not establish whether it is a right or a principle³⁶ but did not exclude the possibility that Title IV of the Charter may contain provisions capable of being invoked as such in horizontal disputes. Rather, the Court suggested that an assessment must be made entitlement by

³¹ Case C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2.

³² N. Lazzerini, ‘(Some of) the Fundamental Rights Granted by the Charter May Be a Source of Obligations for Private Parties: *AMS*’ (2014) CMLRev 907 ff.

³³ *Association de médiation sociale* cit. para. 42, in line with *Åkerberg Fransson* cit. para. 42.

³⁴ *Association de médiation sociale* cit. para. 45.

³⁵ Case C-176/12 *Association de médiation sociale* ECLI:EU:C:2013:491, opinion of AG Cruz Villalon, para. 80.

³⁶ On this point see, also, the opinion of C. Barnard, ‘So Long, Farewell, Auf Wiedersehen, Adieu: So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights’ cit. 354, who affirms: “In the rather opaque judgment of the Court of Justice in *AMS* the Court seemed to confirm that social rights were in fact principles”.

entitlement, having regard to the wording of the relevant provision of the Charter and the related explanation.³⁷

It is evident that the approach of the CJEU is prudent and, for some authors,³⁸ it lacks coherence if one considers the *Mangold* and *Kücükdeveci* judgements. Others point out that arts 21 and 27 of the Charter have different effects, since the principle of non-discrimination on the grounds of age is directly applicable and it may have horizontal direct effect without affecting the prerogative of the EU or the national legislator.³⁹

In any case, *AMS* confirms the complexity of the questions relating to the horizontal application of the economic and social rights enshrined in the Charter, especially from a political point of view, since the Member States fear that EU and national judges could interfere with policies that have significant budgetary implications.⁴⁰ Furthermore, if one considers the vagueness and the incompleteness of fundamental rights in the social field, recognizing horizontal direct effect could lead to self-empowerment of the judiciary in determining what conduct complies with the EU law to the detriment of the national legislators.⁴¹

The Court has tried to go further the wording of art. 51(1), by using Charter's rights in horizontal dispute as expressions of a general principle of law and implemented by directives. The application of fundamental rights in combination with directives is surely a mechanism which restrict the power of judges. Directives can concretise fundamental rights, but without national implementation they cannot be properly used against individuals.⁴² For that reason, AG Trstenjak in *Dominguez* stressed on the importance of a fundamental right providing a precise and unambiguous standard in order to be applied in horizontal disputes.⁴³

The questions left unresolved in the aforementioned cases may be partially answered by the recent judgements of the CJEU on paid leave. However, before continuing with the analysis it is necessary to understand if horizontal protection of the Charter rights may promote better protection of the economic and social rights within the market.

³⁷ N Lazzerini, '(Some of) the Fundamental Rights Granted by the Charter May Be a Source of Obligations for Private Parties: *AMS*' cit. 931-932.

³⁸ E Frantziou, 'Case C-176/12 Association de médiation sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union' (2014) EuConst 332 ff.; ME Gennusa and A Rovagnati, 'Implementation and Protection of Workers' Fundamental Rights. Innovations in the Post-Lisbon Treaty landscape' in G Palmisano (ed.), *Making the Charter of Fundamental Rights a living instrument* (Martinus Nijhoff 2015) 106, 137-142.

³⁹ K Lenaerts and JA Gutiérrez-Fons, 'The European Court of Justice as the Guardian of the Rule of EU Social Law' in F Vandenbroucke, C Barnard and G De Baere (eds), *A European Social Union after the Crisis* cit. 433, 453-454.

⁴⁰ *Association de médiation sociale*, opinion of AG Cruz Villalon, cit. para. 49.

⁴¹ D Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) ELR 479, 489.

⁴² *Ibid.* 486.

⁴³ Case C-282/10 *Dominguez* ECLI:EU:C:2011:559, opinion of AG Trstenjak, paras 137-138.

The concept of the horizontal effect of fundamental rights, as explained before, can prevent asymmetries in private contractual relationships, such as those between employer and employee or between trader and consumer. The imbalance of power between the parties (i.e. a worker or a consumer and a large multinational corporation or an Internet search engine) may lead to imposition by one party onto the other specific contractual condition utilised to lower standards of fundamental rights.⁴⁴ Therefore, the possibility of invoking fundamental rights horizontally can protect claimants in precarious situations by recognising them “not just as deserving claimants whose employment conditions and dismissal had been unfair, but also as equal holders of rights – a civic status from which they had been alienated, through their employment”.⁴⁵

Moreover, the CJEU is called to find a coherent solution and to avoid different interpretations across the EU, since national courts are faced with cases concerning the horizontal effects of the Social Title of the Charter and there could be the risk of legal uncertainty about when exactly citizens can invoke the Charter.⁴⁶ Applying the Charter in horizontal situation is a delicate issue, particularly when national judges are called on balancing competing individual rights, since they could end up in threatening the uniform protection of fundamental rights within the internal market.

III. NEW CHALLENGES IN THE PROMOTION OF ECONOMIC AND SOCIAL RIGHTS THROUGH THE CHARTER’S EFFECTS IN HORIZONTAL DISPUTES

In a series of judgments given in 2018, the CJEU attempted to clarify the legal relationship between the rights enshrined in the Charter and the directives on which those rights are based, and admitted the possibility of relying on certain rights conferred by the Charter in dispute between private parties.

The first two cases were *Egenberger*⁴⁷ and *IR v JQ*,⁴⁸ which dealt with religious discrimination in church-based employment in Germany, and enhanced the previous case law on the direct effect of the general principle of non-discrimination begun with *Mangold* and *Kücükdeveci*.

The cases addressed the prohibition of all discrimination on the grounds of religion or belief based on art. 21(1) of the Charter and art. 4(2) of Directive 2000/78 which allows difference of treatment based on religion or belief within churches and other religious organizations, under specific and objective conditions. The central question submitted

⁴⁴ A Seifert, ‘L’effet horizontal des droits fondamentaux, Quelques réflexions de droit européen et de droit compare’ (2012) RTDE 801 ff.

⁴⁵ E Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 182.

⁴⁶ E Frantziou, ‘*The Horizontal Effect of the Charter of Fundamental Rights in the European Union* cit. 678-679.

⁴⁷ Case C-414/16 *Egenberger* ECLI:EU:C:2018:257.

⁴⁸ Case C-68/17 *IR* ECLI:EU:C:2018:696.

for preliminary ruling was the following: if art. 4(2) of the Directive could not be interpreted in conformity with the EU law (since there is a contrast between the norm of the directive and German law), may a national court disapply a provision of national law incompatible with art. 21 of the Charter?⁴⁹

The Court considered art. 21(1) “sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by the EU law”⁵⁰ and it explained that “(as) regards its mandatory effect, art. 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals”.⁵¹ The CJEU had the opportunity again to address the issue and clarify the full meaning of *Egenberger* and *IR* in *Cresco* of January 2019,⁵² where the Court held that the Austrian legislation was contrary to art. 21 of the Charter, since it considers Good Friday a paid public holiday for members of four churches only. Until measures reinstating equal treatment have been adopted by the Member States, employers are under an obligation to ensure equal treatment for their employees and to recognise paid leave to those employees who are not members of any church.⁵³

The cases mentioned above go further than *Mangold* and *Kücükdeveci* in clarifying the compatibility of the direct horizontal effect of the principle of non-discrimination with the obligation of national courts to balance competing fundamental rights.⁵⁴ Particularly, in *Egenberger* the CJEU stated that, due the vagueness of the clashing provisions at stake (art. 17 TFEU on the autonomy of religious organisation, and arts 21 and 47 of the Charter), the national judges have to make reference to the available EU norms (which concretise the fundamental rights) and to the general principle of proportionality as sources of inspiration for the balancing. In this way, the exercise of one or more fundamental rights will be only diminished rather than completely excluded.⁵⁵

⁴⁹ L Lourenço, ‘Religion, Discrimination and the EU General Principle’s Gospel: Egenberger’ (2019) CMLRev 193 ff.

⁵⁰ *Egenberger* cit. para. 76 and *IR* cit. para. 69.

⁵¹ *Egenberger* cit. para. 77.

⁵² Case C-193/17 *Cresco Investigations* ECLI:EU:C:2019:43.

⁵³ See LS Rossi, ‘The Relationship between the EU Charter of Fundamental Rights and Directives in Horizontal Situations’ cit.; M Pearson, ‘Religious Holidays for the Non-religious? Cresco Investigations v. Achatzi’ (2019) ILJ 468 ff.

⁵⁴ A Colombi Ciacchi, ‘The Direct Horizontal Effect of EU Fundamental Rights: ECJ 17 April 2018, Case C-414/16, Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V. and ECJ 11 September 2018, Case C-68/17, IR v. JQ’ (2019) EuConst 294, 305.

⁵⁵ L Lourenço, ‘Religion, Discrimination and the EU General Principle’s Gospel: Egenberger’ cit. 204.

A decisive step forward in direct application of the social rights enshrined in the Charter in relationships between individuals was taken by the *Bauer*⁵⁶ and *Max-Planck*⁵⁷ rulings of November 2018 on the right to a period of paid annual leave affirmed by article 31(2) of the Charter.

The first ruling was based on two facts: the Stadt Wuppertal and Volker Willmeroth (the owner of a private company) did not want to pay the claimants an allowance in lieu of annual leave not taken by the husbands of Mrs Bauer and Mrs Broßann before their death, according to a German law which restricts the worker's ability to claim compensation for leave not taken prior to the termination of the contract. The Court recognised that German legislation does not comply with Directive 2003/88, but the main proceedings concerned a horizontal situation and, as it is well known, the Directive could not be invoked directly between private parties.⁵⁸

The CJEU overturned its approach and argued, for the first time that art. 31(2) of the Charter has horizontal direct effects. The innovative element of this decision lies in the fact that the proceedings concerned litigation between a worker and his employer, since in *Egenberger*, the right of paid annual leave is not used in horizontal relations, but in vertical situations between an individual and a court.⁵⁹

Moreover, it clarified the *KHS*⁶⁰ and *Dominguez*⁶¹ cases, in which it held that the entitlement of every worker to paid annual leave was a "particularly important principle of European Union social law", by emphasising that paid leave is not only a provision enshrined in the Charter, but also an "essential principle of EU social law".⁶²

The CJEU stated that the worker should be made aware of how to use the right to leave. This right can be derived exclusively from the provision of the Charter, from the meaning it assumes, and which has been attributed by jurisprudence.⁶³ It is clearly evident that the direct effect can be ascribed to the norm of the Charter by attributing to the provisions of primary law all the processing elaborated by the jurisprudence of the Court of Justice on the basis of the more detailed provisions of secondary law (in *Bauer*,

⁵⁶ Joined cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871.

⁵⁷ Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* ECLI:EU:C:2018:874.

⁵⁸ E Frantziou, '(Most of) the Charter of Fundamental Rights is Horizontally Applicable: ECJ 6 November 2018, Joined cases C-569/16 and C-570/16, *Bauer et al.*' (2019) *EuConst* 306 ff.

⁵⁹ D Sarmiento, 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on *Bauer*' (8 November 2019) *Despite our differences despiteourdifferencesblog.wordpress.com*.

⁶⁰ Case C-214/10 *KHS* ECLI:EU:C:2011:761.

⁶¹ Case C-282/10 *Dominguez* ECLI:EU:C:2012:33.

⁶² *Bauer* cit. para. 58.

⁶³ M Condinanzi, 'Le direttive in materia sociale e la Carta dei diritti fondamentale dell'Unione europea: un dialogo tra fonti per dilatare e razionalizzare (?) gli orizzonti dell'effetto diretto. Il caso della giurisprudenza "sulle ferie" (22 May 2019) *Federalismi.it* www.federalismi.it 8.

art. 7 of Directive 2003/88), which however has the limit, according to traditional teaching, of not being able to be invoked directly in horizontal disputes.⁶⁴

The Court held that the right to annual leave was not established by the Directive 2003/88 but, rather, is based on earlier instruments drawn up by the Member States, such as the Community Charter of Fundamental Social Rights of Workers, the European Social Charter and ILO Convention n. 132.⁶⁵ The right of annual paid leave is, first of all, an essential principle of EU social law, then reflected, affirmed and strengthened by art. 31 of the Charter.⁶⁶

In particular, the Court affirmed that

“by providing in mandatory terms that ‘every worker’ has ‘the right’ ‘to an annual period of paid leave’ without referring in particular in that regard — like, for example, Article 27 of the Charter [...] — to the ‘cases’ and ‘conditions provided for by Union law and national laws and practices’, Article 31(2) of the Charter, reflects the essential principle of EU social law from which there may be derogations only in compliance with the strict conditions laid down in Article 52(1) of the Charter and, in particular, the fundamental right to paid annual leave”.⁶⁷

This right “is thus, as regards its very existence, both mandatory and unconditional in nature [...]. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter”.⁶⁸

The other relevant case is the *Max Planck* ruling which deals with an employee that had accumulated 51 days of annual leave over a two-years period and requested to be paid for the leave not taken when his employment ended. The German Courts referred the issue to the CJEU and asked the question whether an employee who fails to take annual leave is entitled to be paid in *lieu* of that leave.⁶⁹

The worker could not rely on the Directive 2003/88 alone, since “Max Planck had to be considered an individual”,⁷⁰ and directives do not have horizontal direct effect. The Court thus turned to Article 31(2) of the Charter and affirmed again that the right to a

⁶⁴ *Ibid.*

⁶⁵ *Bauer* cit. para. 81. The ruling recalls the opinion of AG Tizzano in *BECTU*, who attributed the source of art. 7 of Directive 2003/88 to different human rights instruments, including the Universal Declaration of Human Rights, the European Social Charter, and the UN Charter of 1966 on economic, social and cultural rights. See Case C-173/99 *BECTU* ECLI:EU:C:2001:81, opinion of AG Tizzano, paras 23-28.

⁶⁶ R Palladino, ‘Diritti, principi ed effetto orizzontale delle disposizioni (in materia sociale) della Carta dei diritti fondamentali dell’Unione europea’ (2019) *Il Diritto dell’Unione europea* 175, 190.

⁶⁷ *Bauer* cit. para. 84.

⁶⁸ *Ibid.* para. 85.

⁶⁹ SA de Vries, ‘The Bauer et al. and Max-Planck Judgments and EU Citizens’ Fundamental Rights: An Outlook for Harmony’ (2019) *European Equality Law Review* 16, 17-20.

⁷⁰ *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* cit. para. 65.

period of paid annual leave is mandatory and unconditional in nature and the provision “is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter”.⁷¹ The Court also stressed again that the right to paid annual leave constitutes an essential principle of EU social law, derived both from instruments drawn up by the Member States at EU level and from international instruments on which the Member States have cooperated or to which they are party.⁷² For those reasons the national court must disapply national legislation contrary to that principle.

As far as direct applicability of art. 31(2) of the Charter in disputes between private parties is concerned, the Court refers to *Egenberger* by affirming that art. 51(1) of the Charter does not address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.⁷³ Moreover, as regards, Art. 31(2) more specifically, the Court emphasised that “the right of every worker to paid annual leave entails, by its very nature, a corresponding obligation on the employer”.⁷⁴

The *Bauer* and *Max-Planck* judgements identify three conditions that have to be satisfied in order to recognise horizontal effects of the Charter’s articles, thereby making different qualification of rights and principles almost irrelevant: they must be mandatory in nature, they must be unconditional and they must fall within the scope of the EU law.

Art. 31(2) can be considered mandatory. First, as to the origins of that right, the CJEU stressed the fact that the right to annual leave is now expressly conceived as a fundamental social right grounded in international human rights instruments. They include the European Social Charter which AG Bot saw as an important factor supporting the direct effect of art. 31(2).⁷⁵ Second, as an essential principle of EU social law, the right to paid leave is mandatory in nature and the adoption of an act of secondary law “is not necessary in order for that provision directly to produce its effects in disputes which must be resolved by national courts”.⁷⁶

The right to paid leave is also unconditional, so that it does not need “to be given concrete expression by the provisions of EU or national law, which are only required to

⁷¹ *Ibid.* para. 74.

⁷² *Ibid.* para. 70.

⁷³ *Ibid.* para. 76.

⁷⁴ *Ibid.* para. 79; *Bauer* cit. para. 90.

⁷⁵ Joined cases C-569/16 and C-570/16, *Bauer et al.* ECLI:EU:C:2018:337, opinion of AG Bot, para. 94. See M Ford, ‘The EU Charter of Fundamental Rights and Working Time: Bauer, Kreuziger and Shimizu before the Grand Chamber’ (2019) *International Labor Rights Case Law* 242 ff.

⁷⁶ *Bauer* cit. para. 83; *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* cit. para. 72. See K Lenaerts, *Limits on Limitations: The Essence of Fundamental Rights in the EU* (2019) *German Law Journal* 779, 791-792.

specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right".⁷⁷

In relation to the third requirement, the recent CJEU case-law shows that when certain rights contained in the Charter are based on and materialised by directives, it is by means of the same directives that the specific legal situation falls within the scope of application of EU law. As it is known, the Charter cannot confer horizontal direct effects to directives, but a directive can draw on the horizontality of legal situations within the scope of the Charter.⁷⁸

The analysed cases could raise the question of whether the Court altered the division of competences in limiting the discretion of the national legislator by creating a new competence of the European Union in the social field. But *Bauer* and *Max Planck* did not recognize the Charter as an independent source of private's rights to be activated in horizontal disputes when private conduct falls within the scope of EU law.⁷⁹ The Court declared that only Charter provisions which are unconditional and have a mandatory nature are horizontal applicable as such and can create duties for private parties.

It is possible to say that the Court has finally extended the approach followed for the principle of non-discrimination to another economic and social right, the right to paid leave, thus opening a new arena in the enforcement of economic and social rights in the internal market.⁸⁰

IV. SHAPING THE FUTURE OF THE EUROPEAN UNION THROUGH ENFORCEABILITY OF THE CHARTER'S ECONOMIC AND SOCIAL RIGHTS

The aim of this *Article* has been to ascertain the role of the Charter of Fundamental Rights in promoting economic and social rights within the internal market through an analysis of its applicability in horizontal disputes.

As mentioned above, the European Pillar of Social Rights could lead to some strengthening of the EU social dimension, but it mostly depends on good will of governments and public authorities. For this reason, it was decided to scrutinise the potential of the economic and social rights enshrined in the Charter and how the Court of Justice uses and interprets these rights by developing the applicability of horizontal direct.

⁷⁷ *Bauer* cit. para. 85; *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* cit. para. 74.

⁷⁸ LS Rossi, 'The Relationship between the EU Charter of Fundamental Rights and Directives in Horizontal Situations' cit.

⁷⁹ D Leczykiewicz, 'The Judgment in *Bauer* and the Effect of the EU Charter of Fundamental Rights in Horizontal Situations' (2020) *European Review of Contract Law* 323 ff.

⁸⁰ E Frantziou, '(Most of) the Charter of Fundamental Rights is Horizontally Applicable: ECJ 6 November 2018, Joined cases C-569/16 and C-570/16, *Bauer et al*' cit. 323.

The importance of the judgments on annual leave is that the Court has taken a first and important step in recognising that fundamental social rights differently to non-discrimination produce horizontal direct effect.⁸¹

Bauer and *Max-Planck* were delivered in the context of employment litigation. It thus seemed possible for individual, to rely in a horizontal dispute, on the Charter's social rights, as given expression by the relevant EU directives. In both cases the CJEU considered the Charter a legal basis of EU fundamental social rights capable of independent legal effects within national systems. A new path is now opened up and other Charter's social rights, if materialised and specified by secondary law, would have direct effects in horizontal relations.⁸²

The case law on paid annual leave hints that the distinction between rights and principles is no longer determinative, since the decisive question under EU law is not whether a provision confers a right on an individual, but whether it has a direct effect. Therefore, the justiciability of a social right would only depend on whether the provision is sufficiently clear, precise and unconditional. If a right is too generic, then the Court cannot apply it without further legislative instruments. Instead, if a principle has been implemented (through for instance directives) it becomes justiciable.⁸³

However, limitations still remain. The analysis of CJEU case law shows that a certain lack of coherence of direct effects of EU fundamental rights beyond the Solidarity chapter. The Court distinguishes art. 27 of the Charter on workers' consultation (at issue in *AMS*) from art. 31(2) on annual leave, because art. 27 refers to "the cases and conditions provided for by Union law and national laws and practices", whereas art. 31 mandates that "every worker" has "the right" "to an annual period of paid leave".⁸⁴

Some authors have suggested that the reference to the conditions laid down by EU and national law could be a decisive criterion for determining which provisions of the Charter contain principles within the meaning of art. 52(5).⁸⁵ However, it is worth noting that if references to national laws and practices were taken to be the determining criterion for whether Charter provisions can have horizontal direct effect, some fundamental rights could be rendered ineffective in horizontal disputes with the consequence of a different protection in cases related to a number of provisions across different parts of the Charter. Most of them, e.g. arts 16 (the freedom to conduct a business) and 9 (the right to marry and found a family) would, therefore, be unsuited to supporting a direct claim for positive action by the European Union or by the Member States.⁸⁶

⁸¹ D Sarmiento, 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on *Bauer*' cit.

⁸² *Ibid.*

⁸³ T Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) CMLRev 1202, 1224.

⁸⁴ C Barnard, 'Are Social 'Rights' Rights?' (2020) European Labour Law Journal 351 ff.

⁸⁵ S Peers and S Prechal, 'Article 52– Scope and Interpretation of Rights and Principles' cit.; A Kornezov, 'Social Rights, the Charter, and the ECHR: Caveats, Austerity, and other Disasters' cit. 424.

⁸⁶ E Frantziou, '(Most of) the Charter of Fundamental Rights is Horizontally Applicable: ECJ 6 November 2018, Joined cases C-569/16 and C-570/16, *Bauer et al*' cit. 321.

Even if *Bauer* and *Max Planck* rulings has not provided a general test of horizontal enforceability of Charter provisions, they can be considered relevant for enhancing the protection of economic and social rights different from non-discrimination and to assure the full effectiveness of EU law.

Moreover, the two cases do not give any solution related to national judges called on to strike a balance between different fundamental rights. The lack of clarity regarding the application of the EU Charter and its horizontal direct effects leads to legal uncertainty about when exactly citizens can invoke it.⁸⁷ To overcome this obstacle, some authors⁸⁸ suggest a hierarchy for the Charter's articles, to guarantee uniform protection of fundamental rights by the national courts. But if one recognizes fundamental rights as inter-related, indivisible and having equal status, a hierarchy among fundamental rights shall not be seen as an adequate option. Therefore, the method of balancing competing rights is currently a proper solution to be followed by national judges.⁸⁹ The balance of Charter articles may be referred to the general principle of proportionality and reinforced through the adoption of secondary legislation in areas where the EU legislator has competence. Once the EU has adopted legislation that materialises certain fundamental rights, the EU Charter can be easily used in disputes between citizens and domestic public or private actors.⁹⁰

As I have highlighted above, in recent case law, the Court has recognised the relevant role of the economic and social rights enshrined in the EU Charter and has aligned the right of annual paid leave with other rights, such as the right to equal treatment and non-discrimination, opening a new path to the recognition of horizontal effects of other Charter's provisions. These improvements can contribute to shaping the future of the European Union through reiteration of its social values and objectives, particularly of solidarity, which according to art. 2 TEU is one of the EU's foundational values.⁹¹ This approach may favour the achievement of a social market economy formulated in the objectives of the Treaty (art. 3(3) TEU) and to the enhancement of the economic and social rights within the internal market.

⁸⁷ See B Pirker, 'Mapping the Scope of Application of EU Fundamental Rights: A Typology' (2018) European Papers www.europeanpapers.eu 133 ff., where the author elaborates a particularly comprehensive typology of situations in which the Member States are bound by EU fundamental rights.

⁸⁸ J Ziller, 'Hierarchy of Norms, Hierarchy of Sources and General Principles in European Union Law' in U Becker, A Hatje, M Potacs and N Wunderlich (eds), *Verfassung und Verwaltung in Europa. Festschrift für Jürgen Schwarze zum 70. Geburtstag* (Nomos 2014) 334 ff.; SA De Vries, 'The Bauer et al. and Max-Planck Judgments and EU Citizens' Fundamental Rights: An Outlook for Harmony' cit. 28-29.

⁸⁹ E Gualco and L Lourenço, "'Clash of Titans". General Principles of EU Law: Balancing and Horizontal Direct Effect' European Papers (European Forum Insight of 8 August 2016) www.europeanpapers.eu 643 ff.

⁹⁰ SA de Vries, 'The Bauer et al. and Max-Planck Judgments and EU Citizens' Fundamental Rights: An Outlook for Harmony' cit. 28.

⁹¹ *Ibid.* 29.



ARTICLES

SHAPING THE FUTURE OF EUROPE – FIRST PART

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SHAPING THE FUTURE OF EUROPE IN PRISONS: CHALLENGES AND OPPORTUNITIES

CHRISTOS PAPACHRISTOPOULOS*

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ABSTRACT: Traditionally, the governance of detention has belonged to the sovereign state. Prisons across Europe present considerable disparities; in some states, penal systems are struggling with structural deficiencies, which result in systemic human rights violations. This reality directly undermines the notion of the EU as a community of values; in turn, the functioning of the Union as an Area of Freedom, Security and Justice, based on mutual trust between peers, is at risk. Departing from the negative consequences of the *status quo* of prisons in Europe, this contribution assesses the potential of Europe in prisons. The overarching premise revolves around the thesis that, to ensure the effective enforcement of Union values and policies, EU intervention in national prison systems proves necessary. Towards this purpose, the *Article* describes potential pathways, upon which EU authorities could potentially tread upon, in order to mitigate existing disparities, and enforce a common standard on detention. Consequently, the *Article* moves on to consider the potential impact and pitfalls that the future of Europe in prisons may hold.

KEYWORDS: mutual trust and recognition – detention conditions – fundamental rights – Area of Freedom, Security and Justice – integration – governance.

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I. INTRODUCTION

"If we now consider Europe in its diversity, it is indispensable that we have a keen realisation of the problem which confronts us: where is the point beyond which this diversity ceases to be simply the individual expression of general truths and begins to call into question the very existence of a community?"¹

Posed by W. Hallstein as early as 1958, this question retains its relevance decades later. The European project has long escaped its internal market constraints; today's Union pursues a number of non-economic policies, at the centre of which lies the goal of establishing an Area of Freedom, Security and Justice (AFSJ) without internal borders.² The overwhelming majority of EU Member States (MS), "resolved to facilitate the free movement of persons, while ensuring the safety and security of their peoples",³ has assumed responsibility towards pursuing this common good.

Yet, at the same time, any effort towards convergence has to respect and account for "the different legal systems and traditions of the Member States".⁴ Thus, unity at EU level is to be pursued within the limits of national diversity. As analysed here, this diversity manifests itself quintessentially within prisons, institutions traditionally regarded as the *sanctum sanctorum* of the Westphalian state; and divergence between national penal systems has proved considerable enough to hinder the integration progress, calling into question the very functioning of the AFSJ.

Case-law at EU level, alongside a considerable bulk of relevant literature, have acknowledged this age-old clash between pursued unity (in our case, towards an AFSJ) and existent diversity (across prisons), and called for a restructuring of the former, so as to resolve the issue. The argument is straightforward: the development of the AFSJ invoked too much, too soon. While appreciating its merits, the contribution at hand departs from this approach, seeking instead to assess whether the desired balance may be better achieved through mitigating national diversities, by shaping a future of Europe in prisons.

Towards this purpose, the rest of the *Article* is structured as follows. Section II presents the current state of penitentiary facilities in Europe. Utilising findings from the Council of Europe (CoE), the disparity between national prisons is disclosed and analysed. The focus lies on post-trial criminal law deprivation of liberty; pre-trial and administrative detention, while highly relevant to the discussion, retain their own distinctiveness, and fall beyond the scope of the present *Article*. Departing from the *status quo*, Section III places national prisons in the context of EU law. The interplay between diverse detention standards and the

¹ W Hallstein, 'The Unity of European Culture and Policy of Uniting Europe' (13 December 1958) University of Pittsburgh aei.pitt.edu 5.

² Art. 3(2) TEU. The importance of this objective is underlined by the fact that its mention precedes that of establishing an internal market.

³ TEU Preamble.

⁴ Art. 67(1) TFEU.

functioning of an integration-oriented AFSJ based on mutual trust is presented. Furthermore, the perceived balance established by the Court of Justice of the European Union (CJEU) through its *Aranyosi/Căldăraru* judgment is scrutinised as untenable. Against this background, Section IV assesses whether EU influence on national prisons could be utilised as a viable alternative of achieving *Unity in Diversity*. Potential options, as deriving from relevant *compliance* literature, are considered in view of the principles of conferral, subsidiarity and proportionality, alongside legal and political considerations that arise.

In light of the foregoing, it is maintained that the potential of EU intervention in national prisons should assume an integral role in outlining the future development of the European idea.

II. PRISON SYSTEMS IN THE EU

At the outset, it should be clarified that no European common policy on prisons exists. Traditionally, and in accordance with the doctrine of Westphalian sovereignty,⁵ prison-related matters have fallen under the sole rule of the state. National authorities have the power to decide on relevant goals, set the desired outcomes, regulate, implement and monitor policies, and evaluate the outcomes according to their own needs and interests; no outside interference has been allowed within this domestic jurisdiction. Furthermore, the European project has historically focused on its role as an architect of the internal market, and has thus been largely absent from the prison narrative. To this day, the Treaties make no specific mention to detention matters.⁶

Additionally, penitentiaries are not formed *in vitro*; they are rather shaped within a specific legal, financial, political, societal, cultural, and historical context.⁷ Today's EU is comprised of 27 countries, each with its own unique identity; this translates to an equal number of different contexts.

The absence of a regulatory monophony on the matter, combined with the individuality of each state, have resulted in considerable variations manifesting within national prison systems.

Evidence for this disparity is to be found in the works of the CoE, and, more specifically, its European Court of Human Rights, and Committee for the Prevention of Torture and Inhuman Treatment (CPT). In brief, it may be said that the Court judges on detention standards *reactively*, in specific cases brought before it by individual claimants. On the other hand, the CPT adopts a more preventive role, by *proactively* monitoring detention

⁵ For an analysis on the history and meaning of this international law principle, see indicatively G Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004); H Kissinger, *World Order* (Penguin Press 2014).

⁶ P Craig and G de Búrca, *The Evolution of EU Law* (Oxford University Press 2011).

⁷ EA Tiryakian, 'Durkheim's "Two Laws of Penal Evolution" (1964) *Journal for the Scientific Study of Religion* 261, 262; S Snacken, K Beyens and H Tubex, 'Changing Prison Populations in Western Countries: Fate or Policy?' (1995) *EurJCrimeCrLcrJ* 1, 40.

conditions through a series of periodic or *ad hoc* visits in national penitentiaries. By merging the findings of the Council's entities, the divergence between living standards in EU prisons becomes apparent.

Before advancing any further, a clarification proves necessary. As already noted, prison institutions are governed at state level. On the basis of what competence, then, and towards which purpose, does the CoE, an intergovernmental (and certainly not national) entity, monitor national penitentiaries? The answer lies in one key element serving as common denominator among all European prison systems: human rights.

II.1. HUMAN RIGHTS IN DETENTION

In accordance with international law, every individual has human rights. As suggested by the term itself, such rights are taken to derive from the very actuality of being human, and are inherent to all. This is the so-called universal quality of human rights. Consequently, individual prerogatives are merely expressed through – rather than based on – law. Therefore, no statute, provision, court judgment or judicial sentence may nullify them.⁸

The trait of inherent universality is endorsed by the CoE. Historically serving as a pan-European entity with a human rights mandate, the Council's first task was to produce the European Convention on Human Rights (ECHR).⁹ The Convention's scope of application includes everyone, as made clear from the very wording of its provisions. The corresponding European Court, responsible for safeguarding the Convention's guarantees, has repeatedly endorsed this approach in several judgments. In *Khodorkovskiy and Lebedev v Russia*, the Court clarifies that "the Convention cannot stop at the prison gate [...] and there is no question that a prisoner forfeits all of his [...] rights merely because of his status as a person detained following conviction",¹⁰ whereas in *Hirst v the United Kingdom (No. 2)*, it declares:

"(P)risoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right of liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention [...], they continue to enjoy the right to respect for family life [...] the right to freedom of expression".¹¹

In principle, therefore, all inmates maintain their freedoms, as guaranteed under international human rights law. This is mirrored in the domestic legal order of many European states. Indicatively, art. 2 of the Greek Penitentiary Code proclaims that "no other individual right of prisoners except the right to liberty is restricted. Measures taken to

⁸ J Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013).

⁹ European Convention on the Protection of Human Rights and Fundamental Freedoms [1950].

¹⁰ ECtHR *Khodorkovskiy and Lebedev v Russia* App n. 11082/06 and 13772/05 [25 October 2013] para. 836.

¹¹ ECtHR *Hirst v the United Kingdom (no. 2)* App n. 74025/01 [6 October 2005] para. 69.

ensure the secure functioning of detention centres do not hinder the enjoyment of constitutionally individual and political rights of detainees [...] in any case, all necessary measures are taken to ensure negative consequences of loss of liberty are minimised”;¹² while the Dutch *Penitenciaire beginselenwet* affirms in art. 3 that “persons subject to the execution of a custodial sentence or detention order shall not be subject to restrictions other than those necessary for the purpose of the detention or for the sake of maintaining order or security in the establishment”.¹³

Ultimately, human rights delimit incarceration in two ways. At the outset, any curb on the inmates’ freedoms must be justified and proportionate, and abstain from violating the core of the right: restriction does not equal nullification. Furthermore, there are certain prerogatives that may not be interfered with under any circumstances. These are the so-called absolute or formally unqualified rights,¹⁴ and consist of the prohibition of torture, inhuman or degrading treatment or punishment (art. 3 ECHR), the prohibition of slavery or servitude (art. 4(1) ECHR), and the *nulla poena sine lege* principle (art. 7 ECHR).¹⁵

To keep watch over the prison environment, and ensure no undue violations take place, a counterweight to the authority of the state is necessary. Within Europe, this role is assumed by the CoE; by establishing monitoring mechanisms, the Council has strived towards equivalent protection of human rights for all inmates, and according to the European Convention.

Nonetheless, existing evidence reveals that the goal of equivalent rights protection is not easily achieved.

II.2. INCONSISTENT AND UNSATISFACTORY DETENTION CONDITIONS

By merging the findings of the CPT and the European Court, one may identify a considerable divergence between living standards in European prisons, which manifests itself in both material and immaterial conditions of detention.

Material conditions refer to tangible aspects of the detention environment, including, *inter alia*, prison infrastructure; sanitary, ventilation, and healthcare facilities; accommodation provided; access to light, clean water, clothing, bedding, and nutrition; and so on.¹⁶

¹² Greek Ministry of Justice, Penal code www.opengov.gr.

¹³ Dutch Ministry of Justice, *Penitenciaire beginselenwet*, wetten.overheid.nl.

¹⁴ S Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really “Absolute” in International Human Rights Law?’ (2015) HRLRev 1, 9.

¹⁵ See also art. 15 ECHR.

¹⁶ Definitions and categorisation between material and immaterial conditions as drawn by the Committee of Ministers of the Council of Europe, Recommendation Rec(2006)2 to Member States on the European Prison Rules of 11 January 2006.

Within this context, the most common issue proves that of prison overcrowding, which occurs when the number of inmates eclipses official capacity. Latest estimates¹⁷ by the Council's Annual Penal Statistics reveal there are nine EU prison systems over their design capacity, where inmates housed exceed the number of detention places available to them. There are five more that are dangerously close to full capacity.¹⁸ These findings are mirrored in European Court case-law, which has identified overcrowding as a structural problem in a number of pilot judgment procedures.¹⁹

High prison density leads to a general deterioration of the prison environment. In *Longin v Croatia*, the Court found that, due to extreme prison density, a large number of inmates was forced to live, sleep and dine in an area "only one metre away from the open sanitary facilities", while the CPT, in its latest inspection of the Greek prison system, reported that 30 inmates were crammed in a dormitory measuring 57 square-metres (less than two per person), and had to share three toilets and three showers "in a state of disrepair" between them – while others had to sleep "on mattresses on the floor with their heads next to the toilet area".²⁰

In addition, individuals in European prisons are often provided with a single meal per day, or with nutrition that fails to account for personal or religious beliefs; other times, they have to carry out their sentence in filthy, humid, poorly ventilated cells, or share their personal space with fleas, bedbugs, cockroaches and rats, often to be found "*en quantité*".²¹

Issues expand to immaterial detention conditions as well. These revolve around two focal points: i) the relationship of the inmate with the outside world, prison personnel, or fellow inmates; and ii) vocational, education, training, and recreational activities provided.

¹⁷ It is worth noting that official statistics often fail to capture the full picture. This is because the SPACE Report statistics refer to the total number of prisoners against the total number of places. Such a calculation overlooks cases where the overall prison density may fall below the threshold, yet overcrowding remains a real problem within specific penitentiaries.

¹⁸ See figure 7 in MF Aebi and MM Tiago, 'Prisons and Prisoners in Europe 2018: Key Findings of the SPACE I report' (15 February 2019) Council of Europe Annual Penal Statistics wp.unil.ch 7.

¹⁹ ECtHR *Orchowski v Poland* App n. 17885/04 [22 October 2009] para. 123; ECtHR *Norbert Sikorski v Poland* App n. 17599/05 [22 October 2009] para. 148; ECtHR *Torreggiani and Others v Italy* App n. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10 [8 January 2013] para. 54; ECtHR *Neshkov and Others v Bulgaria* App n. 6925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13 [27 January 2015] para. 231; ECtHR *Varga and Others v Hungary* App n. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 [10 March 2015] para. 92; ECtHR *Rezmiveş and Others v Romania* App n. 61467/12, 39516/13, 48213/13 and 68191/13 [25 April 2017] para. 102 ff.

²⁰ ECtHR *Longin v Croatia* App n. 49268/10 [6 November 2012] para. 60; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report on the visit to Greece from 14 to 23 April 2015 of 1 March 2016, CPT/Inf (2016) 4, para. 74.

²¹ ECtHR *Kadiķis v Latvia* (no. 2) App n. 62393/00 [4 May 2006] para. 55; ECtHR *Jakóbski v Poland* App n. 18429/06 [7 December 2010] paras 48-55; Report on CTP visit to Greece (2016) cit. paras 59-87; CPT, Report on the visit to France from 15 to 26 November 2015 of 7 April 2017, CPT/Inf (2017) 7 para. 43.

Regarding outside communication, inmates in many MS have to buy their own calling card, if they wish to make use of the phone – individuals with reduced economic capacity are thus indirectly excluded. Available phone devices are limited in number, forcing prisoners to a long wait; when they finally use them, calls do not exceed a few minutes. Internet, e-mail, or fax services are often unavailable. Visitors may be subjected to extensive screening procedures, which, in practice, greatly reduces the (already narrow) time frame of the visit. Conjugal visits are often granted not as a right, but as a reward reserved for those deemed as exhibiting good behaviour, while authorities have been reported eavesdropping on conversations held behind closed doors, also in cases when the inmate was consulting with a lawyer.²²

Corrections personnel in many states display violent and abusive behaviour. The European Court has acknowledged guards have the authority to use force to ensure penitentiaries remain a secure, orderly, crime-free environment; nonetheless, in many cases, the usage of such force has been found to be excessive, without proper justification or provocation. Solitary confinement is regularly utilised as a tool of intimidation and control, instead of a last-resort measure. Internal complaint systems are often lacking or entirely non-existent, leaving inmates without an effective recourse; when official investigations are initiated, they are often conducted only superficially. Consequently, inmates place no trust on prison officials to protect them.²³

Such behaviour is escalated by the fact that wardens may hold no command over their inmates – therefore, they employ violence and intimidation as tactics of regaining control. Staff-inmate ratios are often considerably low – in some instances, amounting to a single officer per 40 inmates. Simply put, there are not enough watchers on the walls. Staff shortages effectively invite organised groups to take over, establishing their own quasi-fiefdom through coercion and violence. Eventually, inmates have to rely on such groups for protection. As has been infamously remarked by Greek criminologist and former Deputy Minister of Justice, Panousis, “tough guys govern the cells, officers only the corridors”.²⁴

Finally, inmates often find themselves with little to do, other than wander around aimlessly. When some form of activity is offered, it comes as an isolated incident. Prison authorities provide for no long-term educational, recreational, or training plans, and inmates have to rely on the goodwill of external volunteers. Opportunities to participate

²² Report on CTP visit to Greece (2016) cit. para. 94; CPT, Report on the visit to Austria from 22 September to 1 October 2014 of 6 November 2015, CPT/Inf (2015) 34, paras 87-89; ECtHR *Kučera v Slovakia* App n. 48666/99 [17 October 2007] paras 127-134.

²³ Report on CTP visit to Greece (2016) cit. para. 68; Report on CTP visit to France (2017) cit. para. 93; ECtHR *Bouyid v Belgium* App n. 23380/09 [28 September 2015] para. 101.

²⁴ C Papachristopoulos ‘Policing Prison’ (1 August 2019) Leiden Law Blog leidenlawblog.nl; Report on CTP visit to Greece (2016), para. 92; ECtHR *Gladović v Croatia* App n. 28847/08 [10 May 2011]; *Bouyid v Belgium* cit. para. 101.

are limited, and a high number of prisoners is inevitably excluded. In some cases, wardens have been found to purposefully sabotage such initiatives, so as to punish insubordinates, or avoid additional workload.²⁵

Overall, empirical and judicial findings point towards deficiencies, which burden penitentiaries in a number of national prison systems across Europe; furthermore, the issues identified seem to be structural, and manifest themselves repeatedly.

The regime and environment within which inmates carry out their sentence is inextricably intertwined with human rights. Consequently, poor conditions of detention constitute violations of the European Convention. This link has been exemplified by the European Court, which has found harsh prison standards as violating prerogatives safeguarded under art. 2 (right to life), art. 3 (prohibition of inhuman and degrading treatment), art. 8 (right to respect for private life), art. 13 (right to an effective remedy), and art. 14 (prohibition of discrimination) ECHR.²⁶

Not all EU Members fit this profile. On the contrary, the same sources that uncover flaws in many national systems, serve to illustrate the fine points of others. Examples include the decreasing trend regarding the total number of incarcerated individuals in Sweden,²⁷ alongside the low prison density in Latvia, Spain, Bulgaria, Croatia, and Lithuania.²⁸ Furthermore, in its most recent visit to the Netherlands, the CPT delegation “did not receive a single allegation of physical ill-treatment. On the contrary, relations between prisoners and staff appeared to be generally good, and staff displayed professionalism and engagement in their interaction with prisoners [...] Inter-prisoner violence appeared to be limited. The delegation observed that the prison buildings were well maintained [...] all inmates were held in individual cells of at least 10 m²”.²⁹

To conclude, detention conditions in EU states differ considerably. In practical terms, such a divergence results on different fates for inmates of different nationalities. For example, should a Dutch citizen be found guilty of crime warranting imprisonment, they will likely carry out their sentence in a well-maintained, clean, and secure setting. Should a Greek national wind up in prison for the same deviant behaviour, they will likely be forced to live in an environment close to “reaching breaking point”.³⁰ Due to different standards across national penitentiaries, the rights of the former shall be respected, while the rights of the latter are likely to be violated.

Yet, the question remains: how does this disparity affect the EU?

²⁵ ECtHR *Tunis v Estonia* App n. 429/12 [19 March 2014] para. 46.

²⁶ ECtHR *Clasens v Belgium* App n. 26564/16 [28 May 2019]; *Rezmiveš and Others v Romania*, cit.; *Bouyid v Belgium* cit.; *Jakóbski v Poland*, cit.

²⁷ CPT, Report on its visit to Sweden from 18 to 28 May 2015 of 17 February 2016, CPT/Inf (2016) 1.

²⁸ MF Aebi and MM Tiago, ‘Prisons and Prisoners in Europe 2018: Key Findings of the SPACE I Report’ cit. 7.

²⁹ CPT, Report on its visit to the Netherlands from 2 to 13 May 2016 of 19 January 2017, CPT/Inf (2017) 1, paras 34-36.

³⁰ Report on CTP visit to Greece (2016) cit. para. 61.

III. THE NEED FOR EU ACTION

As already noted, the EU has no competence on prison-related matters. Furthermore, the Union is not a human rights entity; historically, it has been the CoE that serves as the continent's conscience, while the European Communities (forerunner of today's Union) were meant to revolve around the more practical objectives of regulating economic resources, and, later, the establishment of the internal market.³¹

Nonetheless, human rights are not to be ignored. On the contrary, art. 6 TEU provides the Union with its own *bill of rights* in the form of the Charter of Fundamental Rights of the EU (CFREU), which, since the coming into force of the Treaty of Lisbon, has acquired legally binding status, and equal to that of the EU Treaties. The same provision recognises human rights "as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States" as constituting general principles of EU law.³²

Thus, the Union acknowledges the theoretical existence of a common fundamental³³ rights thread in its MS, as deriving from internal (CFREU) and external (ECtHR and constitutional traditions) influence. The EU community may be comprised of 27 different members, yet they all belong to the CoE, have ratified the Union Treaties, the CFREU, and the European Convention on Human Rights; and they all fall under the jurisdiction of the CJEU, the European Court of Human Rights, and the CPT. Hence, all members share a common normative and monitoring human rights influence, and are therefore supposed to provide for effective and equivalent rights protection.

This assertion serves as the basis on which the AFSJ has been built.

III.1. THE CENTRALITY OF FUNDAMENTAL RIGHTS IN THE AFSJ

Freedom of movement constitutes one of the greatest achievements, and, indeed, one of the defining traits of the Union. A key milestone towards this purpose has been the

³¹ Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 paras 155-176; A von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) CMLRev 1307, 1308; S Smismans, 'The European Union's Fundamental Rights Myth' (2010) JComMarSt 45, 46.

³² Art. 6(3), TEU; S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) HRLRev 645, 648; R Schütze, 'Three "Bills of Rights" for the European Union' (2011) Yearbook of European Law 131, 132.

³³ For the purposes of the paper, the terms "fundamental rights" and "human rights" are used interchangeably. The EU uses the former term to refer to rights as applied internally, within its own jurisdiction, while the latter refers to rights as regulated externally. The difference is a matter of context, instead of substance.

conclusion of the Schengen agreement, and its incorporation in the *acquis communautaire*. With Schengen, the vast majority of EU Members have agreed on the abolition of systematic identity controls and checks at their common borders.³⁴

Notwithstanding its economic and social benefits, this reality comes with a considerable downside, as it simultaneously facilitates the movement of criminals, the cooperation of criminal organisations, and the commitment of cross-border crime. Furthermore, and due to the Union comprising of many different legal orders, wrongdoers may resolve in so-called forum shopping behaviours, manipulating jurisdiction variety so as to escape justice. Overall, criminals in the EU found, within Schengen, an opportune area that allowed them to advance their goals.³⁵

European and national authorities realised that, for the functioning of the EU as a borderless area to prove viable, freedom of movement needs to be accompanied with a safety net against criminal activity and impunity; to put it simply, the Area of Freedom must also become an Area of Security and an Area of Justice. This objective was first achieved with the Treaty of Amsterdam, and remains of primary importance within the Lisbon Treaty.³⁶

The establishment of a borderless, secure, and just EU, could only become possible on the basis of cooperation between national judicial authorities, to counter criminal cooperation. To this end, MS chose the mutual recognition principle, which became the central pillar for the development of the AFSJ as early as 1999, with the Tampere programme. Section VI of this programme falls under the title of “Mutual recognition of judicial decisions”, and includes, inter alia, the following provision:

“Enhanced mutual recognition of judicial decisions and judgements [...] would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in [...] criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities”.³⁷

Mutual recognition has been imported to the AFSJ from another branch of EU law, that of internal market. There, the principle requires that a product lawfully produced,

³⁴ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 22 September 2000.

³⁵ V Mitsilegas, J Monar and W Rees, *The European Union and Internal Security: Guardian of the People?* (Palgrave Macmillan 2003).

³⁶ Art. 3(2) TEU; also art. 67 TFEU.

³⁷ Council of the European Union Presidency Conclusions of 15-16 October 1999, Towards a Union of Freedom, Security and Justice: the Tampere milestones, para. 33.

marketed and sold in one EU state may generally be sold in another MS, even if the product does not fully comply with the technical rules of the second country.³⁸ In the context of criminal law, mutual recognition dictates that a judicial order or judgment issued by the authorities of one MS is to, in principle, be recognised and enforced by the authorities of another MS. In both instances, mutual recognition serves freedom of movement: in the first case, freedom of movement refers to goods, as products of the market; in the second, to judgments, as products of the judiciary.³⁹ The underlying justification remains identical: facilitate the creation and maintenance of a Union without internal frontiers.⁴⁰

Mutual recognition does not call for substantive changes in national legislation; it was exactly this non-interfering nature that made its adoption welcome by MS, as an attractive venue towards balancing unity and diversity. Nonetheless, the principle is not entirely innocent of non-interference, since it obliges national authorities to enforce a decision issued by another MS, by granting it the same legal effect, as if it was issued within their own legal order.

To an outside observer, it may seem peculiar, if not outright precarious, that the European legislator calls upon MS to so readily allow foreign judicial products, originating under a different system, with different rules, traditions and philosophies, to hold an effect within the host legal system – and that MS have voluntarily assumed this obligation. This peculiarity may be explained by the second component of the Union's AFSJ: mutual trust.

Mutual trust requires “States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law”.⁴¹ In practice, mutual trust dictates that, when implementing EU law, each State has a series of legal obligations.⁴² Firstly, MS have a positive (*must*) obligation to presume that their peers adhere to a common fundamental rights framework. Secondly, MS have two negative (*must not*) obligations: they may “not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law”, and, “save in exceptional cases”, MS are not allowed to “check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU”.⁴³

³⁸ Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42; M Ortino, ‘The Role and Functioning of Mutual Recognition in the European Market of Financial Services’ (2007) ICLQ 309, 312.

³⁹ In this sense, freedom of movement of judicial acts may be regarded as a fifth fundamental freedom within the Union. C Barnard, *The Four Freedoms* (Oxford University Press 2013).

⁴⁰ N Cambien, ‘Mutual Recognition and Mutual Trust in the Internal Market’ (2017) European Papers www.europeanpapers.eu 93, 98.

⁴¹ Opinion 2/13 cit. para. 191.

⁴² S Prechal, ‘Mutual Trust before the Court of Justice of the European Union’ (2017) European Papers www.europeanpapers.eu 75, 77.

⁴³ Opinion 2/13 cit. para. 192.

Mutual trust reaffirms the common thread deriving from the participation of EU Members in the same community of values.⁴⁴ Within this community, any decision taken by the judicial authorities of one MS does, in theory, respect the same values, adhere to the same principles, and offer equivalent rights protection, as a decision taken in any other MS. The foreignness of judicial decisions is largely mitigated, and mutual recognition becomes feasible: in the Union we trust.

Thus, a chain is formed: a common thread of rights gives birth to the mutual trust principle – the assumption that, indeed, MS respect and uphold this framework. In turn, this principle allows for mutual recognition of judicial decisions and judgements across the Union, and facilitates anti-crime cooperation between national authorities. Ultimately, this leads to increased levels of security, allows for unconditional freedom of movement, removes potential safe havens for criminal activity, and enhances the protection of common values and individual prerogatives within the European community.

As the above showcases, fundamental rights have become, indeed, *fundamental*, not only for individuals, but for the functioning of the AFSJ as well.

III.2. *ARANYOSI/CĂLDĂRARU*: BALANCING BETWEEN TRUST AND RIGHTS?

Yet, as previously analysed, conditions of detention across MS differ considerably, which results in various levels of protection regarding prisoner rights. It itself, some level of disparity is not problematic; nonetheless, when national prison systems are plagued with structural issues, which repeatedly violate the rights of inmates, the common thread shatters, and mutual trust proves a “legal fiction”.⁴⁵

In the joined *Aranyosi/Căldăraru* cases, the CJEU was forced to address the disparity between national prisons, and its consequent threat to the integration process.⁴⁶ The final judgment has been the subject of extensive analysis, and considered a landmark in the development of the EU legal order. This did not happen by accident; in *Aranyosi*, the CJEU departed from its previous doctrine of primacy and effectiveness of EU law,⁴⁷ as expressed,

⁴⁴ L Bay Larsen, ‘Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice’ in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012).

⁴⁵ T Marguery, ‘Towards the End of Mutual Trust? Prison Conditions in the Context of the European Arrest Warrant and the Transfer of Prisoners Framework Decisions’ (2018) *Maastricht Journal of European and Comparative Law* 704, 705.

⁴⁶ Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru* ECLI:EU:C:2016:198.

⁴⁷ A position that has long been criticised as disregarding for fundamental rights, utilising them as mere means to the end of advancing the autonomy, supremacy, and effectiveness of EU law. J Coppel and A O'Neill, ‘The European Court of Justice: Taking Rights Seriously?’ cit. 227.

inter alia, with *Melloni*⁴⁸ and Opinion 2/13.⁴⁹ Instead, the Court allowed for (some) precedence of fundamental rights.⁵⁰ Towards the purpose, it engaged in a balancing exercise, attempting to reconcile the enforcement of AFSJ principles with human rights protection; nonetheless, as this section argues, the ensued balance proves a precarious one.

The case unfolded as follows. Germany received two European Arrest Warrants (henceforth, EAW)⁵¹ from Romania and Hungary. The EAW serves as the flagship of mutual recognition instruments, and its purpose is to make the forced transfer of criminal suspects and convicts a quasi-automated procedure. To this end, the EAW abolished the old extradition framework, and introduced a novel surrender one. The new regulatory framework established the judiciary as the state branch bearing responsibility for surrender, abolished the dual criminality principle,⁵² and largely reverted the previous prohibition for a state to extradite its own nationals⁵³ – the so-called nationality exception, traditionally recognised as a sovereign right.⁵⁴ These novelties strived towards making surrender a simple, easy, and speedy process, to be realised through judicial cooperation. By bringing a high level of automaticity to surrender proceedings, the EAW ultimately strives to combat criminality, by prohibiting suspects and convicts from utilising national borders as a means of escaping justice.

Upon reception, the German court was bound by EU law to execute the surrender request. This obligation stemmed from the mutual recognition principle, encompassed in the EAW. Yet, the German judiciary was aware of European Court case-law and CPT reports pointing towards structural deficiencies in the prison systems of both issuing states.⁵⁵ This information strongly suggested that, in case of surrender, transferred individuals could wind up in poor detention conditions, and consequently suffer from de-

⁴⁸ Case C-399/11 *Melloni* ECLI:EU:C:2013:107.

⁴⁹ Opinion 2/13 cit.

⁵⁰ A Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) German Law Journal 468, 490.

⁵¹ Framework Decision 2002/584/JHA of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

⁵² *Ibid.* art. 2.

⁵³ *Ibid.* art. 4.

⁵⁴ M Plachta, '(Non-) Extradition of Nationals: A Neverending Story' (1999) *EmoryIntlLRev* 77, 80 ff.; Z Deen-Racsmány and Judge R Blekxtoon, 'The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-) Surrender of Nationals and Dual Criminality under the European Arrest Warrant' (2005) *EurJCrimeCrLCrJ* 317, 318.

⁵⁵ See, indicatively, ECtHR *Varga and Others v Hungary* App n. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 [10 March 2015]; CPT, Report on its visit to Romania from 5 to 17 June 2014 of 24 September 2015, CPT/Inf (2015) 31.

grading and inhuman treatment, as prohibited under arts 3 ECHR and 4 CFREU. Yet, fundamental rights concerns do not constitute ground for refusal of an EAW, as they are not included in the relevant provisions of arts 3 and 4 of the Framework Decision.⁵⁶

Torn between its obligation to surrender, as deriving from mutual recognition, and its obligation to respect fundamental rights, as deriving (also) from the CFREU, the German court was thus reluctant on how to proceed, and referred to the CJEU.

Faced with this Gordian knot, the CJEU introduced a two-step approach, to be applied under similar circumstances. Thus, when evidence reveals the existence of a real risk of degrading and inhuman treatment of inmates in the prison system of the issuing MS, executing authorities must proceed as follows. First, they must assess whether, in general, detention conditions in the issuing MS constitute a risk of violating art. 4 CFREU. For this assessment, executing authorities may use "objective, reliable, specific and properly updated" information, such as relevant CoE case-law, and CPT reports.⁵⁷ The result of this assessment remains, in itself, insufficient. Instead, the executing authority must then proceed to determine whether the risk for violation extends to the specific case, *i.e.* to the particular person whose surrender is requested. To make this decision, the executing court must request additional information by the issuing MS, which must reply promptly.⁵⁸

Subsequently, and in case the executing court identifies both a systemic and a specific risk, it must then postpone – but not abandon – surrender proceedings, until it receives additional information by the issuing MS, which discounts this risk. If this does not occur within a reasonable time, the executing MS may then, ultimately, terminate surrender proceedings.⁵⁹

The judgment proves an attempt to reconcile rights and trust. On the one hand, the principles of mutual trust and recognition retain their centrality within the AFSJ, and fundamental rights concerns do not constitute ground for non-execution. On the other, art.

⁵⁶ In light of the assumed equivalent rights protection in all MS, this omission proves of minor importance – at least in theory. It should also be noted that, in line with the Court's spirit, more recent mutual recognition instruments have included a fundamental rights provision; see, for instance, Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

⁵⁷ *Aranyosi and Căldăraru* cit. para. 89.

⁵⁸ *Ibid.* para. 95.

⁵⁹ It is interesting to identify emerging parallels with preceding ECHR and Court of Justice of the European Union (CJEU) case-law in the sphere of migration law; see ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011]; cases C-411/10 and C-493/10, *N.S. and Others* ECLI:EU:C:2011:865. For an analysis, see indicatively S Peers, 'Court of Justice: The NS and ME Opinions - The Death of "Mutual Trust"' (2011) *Statewatch Analysis* 1; V Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) *Yearbook of European Law* 319, 324.

4 CFREU – and its corresponding art. 3 ECHR – is recognised to “enshrine one of the fundamental values of the Union and its Member States”,⁶⁰ and is allowed to lead to postponement of the proceedings. The Court’s approach ultimately allows for fundamental rights to delimit AFSJ principles. In this regard, the judgment falls in line with the voices raised in favour of revisiting mutual recognition instruments, so as to ensure individual prerogatives are accounted for.⁶¹

Nonetheless, the two-tier approach holds a series of negative consequences. As observed by AG Bot, allowing for national authorities to assess the prison systems of their peers undermines mutual trust, while potentially promoting national biases.⁶² Furthermore, and even accounting for time extensions granted through postponement, an overnight improvement of detention conditions seems unlikely, especially in MS struggling with systemic deficiencies.⁶³ A postponement decision may thus amount to a *de facto* refusal to enforce mutual recognition in disguise.⁶⁴

Consequently, this weakens forced transfer mechanisms operating under the EAW; a risk that expands to the operation of similar instruments, especially the Framework Decision on transfer of prisoners.⁶⁵ A declined effectiveness of these instruments would have reverse effects on the justifications and aims of mutual recognition, undermine the struggle against criminality and impunity, encourage prison shopping behaviour,⁶⁶ weaken the Union as an AFSJ, and ultimately harm the common interests of EU states and citizens – essentially rendering decades of effort null.

At the same time, the judgment offers no redress on the root cause of the issue: poor detention conditions. Inequivalent, ineffective protection of prisoner rights presents a direct challenge for mutual trust and recognition. This proves a current, considerable issue for the EU, threatening its anti-crime policies and common human rights values; and the CJEU two-tier approach does not provide for an answer.

⁶⁰ *Aranyosi and Căldăraru* cit. para. 87.

⁶¹ V Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual’ cit. 319, 363 ff.

⁶² *Aranyosi and Căldăraru* cit. Opinion of AG Bot paras 78-93 and 106-22.

⁶³ A Willems, ‘The Court of Justice of the European Union’s Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal’ cit. 491.

⁶⁴ S Gáspár-Szilágyi, ‘Joined Cases *Aranyosi and Căldăraru*: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant’ (2016) *EurJCrimeCrLCrJ* 197, 216.

⁶⁵ Framework Decision 2008/909/JHA of the Council of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

⁶⁶ Especially since there is no unanimity on how the executing state should conduct its assessment; hence, each MS has developed their own criteria. Thus, convicts may opt to pursue to serve their sentence in what they deem a favourable environment, calling on deficiencies of the issuing State’s prisons to justify their preference. See Council of the EU, Outcome Report of the College of 16 May 2017 on the EAW and Prison Conditions, 2.

There exists hence a both functional (rescue mutual recognition and trust) and principled (ensure equivalent rights protection) need for the Union to intervene, so as to ensure the creation and maintenance of detention conditions that actually safeguard prisoner rights in the penal systems of its MS. To ensure its functioning as an AFSJ, the EU needs to first achieve state compliance with fundamental rights; and to do so, it must pursue convergence of detention condition standards.

IV. IMPROVING DETENTION STANDARDS AT EU LEVEL

As already noted, prison systems are not formed *in vitro*; they are instead the outcome of many variables, which differ among MS. Consequently, this reality calls for the device not of a single generic intervention plan, but rather a series of individualised ones. In other words, different factors result in the same unwanted consequence of poor detention conditions in different contexts; to cultivate change, the EU needs to adopt different actions, adapting for the peculiarities of each State.

Due to practical constraints, the focus on any specific system escapes the scope of this *Article*. Instead, the analysis adopts a holistic approach, seeking to identify policy options that may potentially provide for a positive influence *in abstracto*: how could the EU ensure the creation and maintenance of adequate detention standards in its MS?

Fundamentally, this is a question of governance, and one that EU law in itself may not answer. To this end, this part of the analysis adopts an interdisciplinary approach, seeking to utilise findings from relevant compliance literature.⁶⁷

In brief, compliance theories identify four main clusters of options, which may be used to influence state behaviour: litigation, management, persuasion, and enforcement.⁶⁸ This section analyses and expands on each option in turn. Three points are identified, comprising of: i) the competence of the EU to act and utilise each option, so as to cause changes in national prisons; ii) the potential, specific measures that may be adopted, stemming through this competence; and iii) relevant legal, political, and pragmatic limitations that arise.

⁶⁷ The terms “governance” and “compliance” have been used in a variety of ways. For the purposes of this analysis, I refer here to compliance as a process, or “the whole of ongoing negotiations, political and legal processes, and institutional change that are involved in the execution of EU law and policies and are functionally orientated to give EU law and policies full effectiveness”; see E Chiti, ‘The Governance of Compliance’ in M Cremona (ed.), *Compliance and Enforcement of EU Law* (Oxford University Press 2012) 31, 31-32.

⁶⁸ This categorisation occurs as follows. First, compliance theorists seek to examine whether non-compliance happens on a voluntary or involuntary basis. Having identified the source of non-compliance, they subsequently distinguish between rationalist (changing actors’ pay-off matrices) and constructivist (changing actors’ preferences) approaches. See TA Börzel, T Hofmann and C Sprungk, ‘Why Do States not Obey the Law? Lessons From the European Union’ (1 April 2003) userpage.fu-berlin.de 15.

IV.1. LITIGATION

The failure of state actors to respect their obligation towards ensuring equivalent rights protection may amount to an incapability, on their part, to comply. Such incapability, compliance theory suggests, may be caused by an absence of clear, applicable regulation on detention conditions and prisoner rights. In this case, the Union should seek to internalise specific regulatory norms into the domestic legal orders of its MS.⁶⁹

As noted under section II, no common framework exists, regarding post-trial conditions of detention. Instead, the management of prisons is regulated by the state. Furthermore, while European human rights provisions delimit national discretion, such provisions do not include set criteria, as to when detention conditions may end up violating this framework. Thus, it remains for national authorities to interpret and translate the general human rights rule into specific measures.

This diversification holds the potential to prove troublesome for mutual trust. Since no consensus exists on how prisons should look like, standards regarded poor in one MS, may be deemed adequate in another. In addition, what constitutes a violation in one state may not necessarily be interpreted analogously in another. The structural ambiguity of human rights norms becomes the subject of contesting interpretations at national level, and the absence of precise prison standards allows for various levels of internalisation, according to local peculiarities and interests.⁷⁰

To counter this divergence, and in light of previously presented CJEU case-law, the approximation of detention rules appears a necessary precondition for mutual trust, by achieving equivalent levels of internalisation.⁷¹ This has been recognised by the European Parliament (EP), which has formally invited MS to adopt, by means of a Directive, a European Prisons Charter.⁷² Such a document could introduce clear, concise, legally-binding standards, thus establishing a common minimum framework to be respected by all MS.

In matters of context, the Parliament's proposal submits the adoption of the Charter to be in accordance with a previous CoE Recommendation calling for the same measure.⁷³ This Recommendation suggests a broad scope, covering all aspects of life in prison; reference is made to detention conditions both *stricto sensu* (i.e. material aspects of the prison

⁶⁹ HH Koh, 'Why Do Nations Obey International Law?' (1997) YaleLJ 2599, 2602.

⁷⁰ TA Börzel, T Hofmann and C Sprungk, 'Why Do States not Obey the Law? Lessons From the European Union' cit.

⁷¹ V Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) CMLRev 1277, 1304; L Conant, 'Compliance and What EU Member States Make of It' in M Cremona (ed.), *Compliance and Enforcement of EU Law* (Oxford University Press 2012) 1; D Beach, 'Why Governments Comply: An Integrative Compliance Model that Bridges the Gap between Instrumental and Normative Models of Compliance' (2005) Journal of European Public Policy 113, 126. Provision for approximation was also included in the Tampere conclusions themselves, see Council of the European Union, Presidency Conclusions cit.

⁷² Resolution P8_TA(2017) 385 of the European Parliament of 5 October 2017 on prison systems and conditions.

⁷³ Resolution P8_TA(2017) 385 cit. para 59.

environment), as well as to the regulation of detainee rights, activities provided, and prison security regime.⁷⁴ Furthermore, it has been suggested that the already existing European Prison Rules could serve as blueprint for the drafting of the European Prisons Charter.⁷⁵

To this end, art. 82(2)(b) TFEU has been proposed as legal basis.⁷⁶ This provision allows for the approximation of the rights of individuals in criminal procedure. The process takes place by means of directives adopted in accordance with the ordinary legislative procedure (as defined under art. 294 TFEU), and its purpose is “to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension”.⁷⁷ Approximation entails “the convergence of the legal practice of the various legal systems based upon a common standard”.⁷⁸ The objective is to dismiss obstacles to mutual trust, as they arise from regulatory polyphony.

However, art. 82 TFEU is not without limitations. More specifically, and from the wording of the art. itself, approximation concerns “individual rights”; yet, both the Parliament’s Resolution, and the Council’s Recommendation, make reference to detention conditions in general, thus envisioning a seemingly broader scope than the one provided by the legal basis. Furthermore, these rights shall concern individuals “in criminal procedure”. This term poses two problems. Firstly, detention conditions – and penitentiary law in general – may fall under the umbrella of substantive (rather than procedural) criminal law in the legal systems of some MS. Secondly, detention conditions affect individuals in the post-trial phase, hence, arguably, escaping the scope of the Union’s competence, since they are not part and parcel of criminal procedure.

It has been argued that these considerations may be overcome as follows. At the outset, the prison environment should not be regarded as comprising of a set of impersonal standards, which may result to violations of prisoner rights only incidentally. Instead, detention conditions should be considered as belonging to the very core of art. 6 CFREU on the right to liberty, as corresponding to art. 5 ECHR. In this sense, inmates have an individual entitlement towards adequate living standards, and poor conditions constitute a violation of prisoner rights *in themselves*.⁷⁹ Furthermore, and as regards the latter concern, the concept of criminal procedures differs from that of criminal proceedings. A systematic interpretation of relevant Directives on the rights of individuals in criminal

⁷⁴ Committee of Ministers of the Council of Europe, Recommendation Rec(2004)1656 on the situation of European prisons and pre-trial detention centres of 27 April 2004.

⁷⁵ Recommendation Rec(2006)2 cit.; L Mancano, ‘Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law’ (2019) CMLRev 61, 87.

⁷⁶ According to the principle of conferral, see art. 5(2) TEU; see also R Schütze, *European Constitutional Law* (Cambridge University Press 2012) 152 ff.

⁷⁷ See G Vermeulen and W De Bondt, *Justice, Home Affairs and Security: European and International Institutional and Policy Development* (Maklu 2015).

⁷⁸ A Klip, *European Criminal Law: An Integrative Approach* (Intersentia 2016) 25.

⁷⁹ For a detailed argument in favour of the proceduralisation of detention conditions, see L Mancano, ‘Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law’ cit.

proceedings reveals how their scope “is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal”.⁸⁰ Therefore, one may identify criminal proceedings as covering legal processes up until the final judgment, while criminal procedure has a broader scope, extending to the post-trial phase and including the execution of the sentence – hence, detention standards as well.⁸¹

Nonetheless, the application of art. 82 remains, in practice, problematic. Legal considerations aside, it remains doubtful whether MS would welcome the exercise of EU competence on the matter. At a political level, Euroscepticism has been steadily rising across the Union, with national authorities and citizens alike subscribing to a narrative of *too much Europe*,⁸² as reaffirmed by the latest judgment of the German Constitutional Court.⁸³ In times of growing tension, it remains imperative for the EU to avoid allegations of competence creep practices, so as to retain its legitimacy.⁸⁴ Overall, current circumstances may force EU authorities to opt for a rather narrow reading of art. 82 TFEU, and refrain from legislating on such a contested and sensitive area.⁸⁵

IV.2. MANAGEMENT

Even with a coherent, clear, consistent, and legally-binding framework, dictating the manner in which MS must regulate detention standards and prisoner rights, States may prove unable to follow through to its enforcement. In this case, non-compliance may amount to a lack of resources. This holds especially true for MS still suffering from the results of the recent European debt crisis; in the aftermath of the pandemic outbreak, the upcoming global economic slowdown is bound to exacerbate matters.

To ensure detention conditions match the required standards, national authorities may have to repair and refurbish old facilities, or construct new ones; hire the personnel

⁸⁰ See Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, art. 1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, art. 2; and Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, art. 2.

⁸¹ L Mancano, ‘Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law’ cit.

⁸² On the aftermath of Brexit, support for membership in the Union has increased; nonetheless, things are not seen as going to the right direction. See European Parliament, ‘Closer to the citizens, closer to the ballot’ (Eurobarometer Survey – A Public Opinion Monitoring Study 2019).

⁸³ BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15.

⁸⁴ S Weatherill, ‘Competence Creep and Competence Control’ (2004) Yearbook of European Law 1, 7.

⁸⁵ J Öberg, ‘Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure’ (2020) EuConst 1, 29.

necessary to operate these facilities; ensure the technological equipment is adequately updated; provide for all the required materials and supplies; arrange for training, educational, and vocational activities, and so on. Such initiatives come at a cost, and may have a considerable impact on the public budget – especially if the reforms necessary prove extensive, in order to deal with recurring, structural issues.

This has once more been acknowledged by the EP, which has called for the EU to provide technical and economic support towards this purpose, especially in MS facing financial difficulties.⁸⁶ Regarding competence, it is currently impossible to direct funding specifically to national prisons, since no relevant legal basis exists in the Treaties. Nonetheless, the EU Commission (EC) has suggested that the Union budget could still be used towards this purpose in an ancillary manner. Specifically, the Commission has indicated that the European Regional Development Fund, alongside the European Social Fund, could both be directed towards supporting national initiatives in a number of relevant areas.⁸⁷ For instance, the former could be utilised to establish training facilities in prisons, while the latter could promote vocational activities for inmates.⁸⁸

Financial assistance of this form could enable and incentivise national authorities to adopt measures towards improving conditions of detention; however, and due to the absence of a general competence of the Union to funnel resources specifically towards penitentiaries, such an approach may fail to provide for a comprehensive response.⁸⁹ A more pragmatic consideration revolves around the potential effectiveness of this measure. A considerable number of European countries with poor prison systems tends to demonstrate relatively elevated levels of corruption as well.⁹⁰ Within this context, the risk of fund misappropriation is considerable – especially since prisons do not generally constitute a high-priority target in the political agenda.

IV.3. PERSUASION

The failure to provide for adequate detention conditions that safeguard fundamental rights may also amount to a conscious choice. Under this scenario, MS prove fully aware of their statutory responsibilities and respective measures to be implemented, while also

⁸⁶ Resolution P8 TA(2017) 385 cit. para. 67.

⁸⁷ Green Paper COM(2011) 327 final from the Commission on the application of EU criminal justice legislation in the field of detention.

⁸⁸ Green Paper COM(2011) 327 final cit. See also GL Gatta and E Dolcini, 'Final Proposals on Possible Guidelines of the EU-Policy in Order to Implement the Best Practices in the Fields of Detention Conditions and Alternatives to Detention' in A Benardi (ed.) and A Martufi (coord.), *Prison Overcrowding and Alternatives to Detention – European Sources and National Legal Systems* (Jovene Editore 2016) 515.

⁸⁹ E Sellier and A Wyembergh, 'Criminal Procedural Laws across the European Union – A Comparative Analysis of Selected Main Differences and the Impact they Have over the Development of EU Legislation' (30 August 2018) European Parliament Think Tank www.europarl.europa.eu 120.

⁹⁰ 'Corruption Index 2019: Western Europe and European Union' (23 January 2020) Transparency International www.transparency.org.

possessing the capability to act. Nonetheless, they remain unwilling, deliberately opting for non-compliance instead.

Non-compliance may seem preferable, if state actors are not persuaded by the regulative goal, and, consequently, do not appreciate the need to allocate resources, pursue enforcement, or implement changes in the domestic legal framework. This holds especially true regarding the management of prisons, which have often been deployed by political authorities as a means to manage their electorate, following a *politics of control* approach; thus, from a domestic political perspective, compliance may actually hold counterproductive effects.⁹¹

In this case, the EU should commit towards persuading defiant authorities that they should comply, because it is within their best interests to do so. Towards this purpose, the EU needs to demonstrate the risks of non-compliance, alongside (and contrasted to) the benefits of compliance. The overarching goal consists of redefining MS interests and priorities, until the desired behaviour is adequately internalised and accepted as the new standard.⁹²

To this end, the Union may rely on soft-law and declaratory measures, such as recommendations. These initiatives are not binding, yet hold political significance, and aim towards the convergence of (implicit) social standards – in the same manner Directives aim towards the convergence of (explicit) legal norms. Regarding competence, both art. 7 TEU and art. 352 TFEU may serve as legal basis. These provisions allow for the issuing of recommendations by the Council, the former towards MS demonstrating a “clear risk of a serious breach [...] of the values referred to in art. 2 [TEU]”, while the latter aimed towards the general protection of Treaty objectives – one of which is the establishment of an AFSJ.

Furthermore, the Union should seek to enhance dialogue and the exchange of information, experience, and best practices across national prison systems. This could be achieved by advancing the operative powers and scope of existing networks (such as the European Organisation of Prison and Correctional Services) and online databases (such as the Criminal Detention Database of the EU Agency for Fundamental Rights) that provide consultation to national stakeholders. Other options include the provision of training to prison officers and legal professionals, and the reinforcement of existing judicial cooperation instruments with special mention to the importance of detention conditions.⁹³

⁹¹ D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2001). For a case study on how national authorities utilise poor detention conditions to accommodate domestic socio-economic policies, see S Xenakis and LK Cheliotis, ‘Carceral Moderation and the Janus Face of International Pressure: A Long View of Greece’s Engagement with the European Convention of Human Rights’ (2018) *Crime, Law and Social Change* 1, 13.

⁹² T Risse and K Sikkink, ‘The Socialization of International Human Rights Norms Into Domestic Practices: Introduction’ in T Risse, SC Ropp and K Sikkink (eds), *The Power of Human Rights – International Norms and Domestic Change* (Cambridge University Press 1999) 1.

⁹³ E Sellier and A Wyembergh, ‘Criminal Procedural Laws across the European Union – A Comparative Analysis of Selected Main Differences and the Impact they Have over the Development of EU Legislation’ cit.

IV.4. ENFORCEMENT

Finally, should national authorities retain a non-compliant behaviour, the EU could adopt a harsher approach, aimed towards increasing the costs of nonconformity. To this end, the Union could monitor prisons, so as to identify deviance; and subsequently impose sanctions on MS failing to provide for adequate standards, thus making non-compliance a less attractive option.⁹⁴

Regarding monitoring, the EP Resolution has called for the Commission to collect information on detention conditions in all MS.⁹⁵ While the Commission has no direct competence on prisons, art. 17 TEU has established it as Guardian of the Treaties.⁹⁶ The Commission is thus entrusted with overseeing the application of EU law, which includes art. 2 TEU, and the CFREU.⁹⁷ It should also be noted that, in case the Union utilises its harmonisation potential, as arising from art. 82 TFEU, detention standards would become part and parcel of the EU legal order, and thus subject to the Commission's overseeing.

Another alternative would revolve around utilising art. 259 TFEU as an enforcement mechanism.⁹⁸ This provision allows individual MS to bring fellow MS before the CJEU, to judge on potential Treaty violations. Such an initiative would further establish states as watchers of EU law, thus constituting a step towards the *Aranyosi/Căldăraru* peer-review logic already discussed.

Fundamental rights violations would in turn trigger art. 7 TEU, which provides for a formal legal mechanism that may ultimately lead to the suspension of membership rights for the defiant MS (art. 7(3) TEU). The logic of sanctioning is thus similar to the one applied within the rule of law context.⁹⁹ In the same sense, it has been proposed that EU law obligations should be tied to the Union budget. In case MS are found violating the EU fundamental rights framework, monetary allocations would be reduced as a consequence.¹⁰⁰

⁹⁴ A Boyle, 'Saving the World? Implementation and Enforcement of International Law through International Institutions' (1991) JEL 229; PA Weitsmann and G Schneider, 'Risky States: Implications for Theory and Policy Making' in G Schneider and PA Weitsmann (eds), *Enforcing Cooperation – Risky States and Intergovernmental Management of Conflict* (Palgrave Macmillan 1997) 283.

⁹⁵ Resolution P8 TA(2017) 385 cit. para. 58.

⁹⁶ Communication COM(2014) 158 final from the Commission to the European Parliament and the Council: A New EU Framework to strengthen the Rule of Law.

⁹⁷ For the Charter to apply, there must a clear link of MS action with EU law; see art. 51 of the Charter; and Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105. Within the specific context, the link manifests clearly, since it is the EU policy framework regulating forced transfer across MS that demands individuals to be moved to establishments providing for poor detention conditions.

⁹⁸ D Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) Hague Journal on the Rule of Law 153.

⁹⁹ Resolution 2020/2513(RSP) of the European Parliament of 16 January 2020 on ongoing hearings under art. 7(1) of the TEU regarding Poland and Hungary.

¹⁰⁰ 'An EU Internal Strategic Framework for Fundamental Rights: Joining Forces to Achieve Better Results' (06 February 2015) FRA (European Union Agency for Fundamental Rights) fra.europa.eu.

Overall, this fourth option revolves around the EU undertaking responsibilities that have traditionally fallen within the authority of the CoE, and, more specifically, its CPT (regarding monitoring) and European Court (regarding monitoring and sanctions). This has been used by MS as an argument against the exercise of EU competence in the area; essentially, some states have declared the duplication of monitoring and sanctions mechanisms as an unnecessary and potentially counterproductive measure, leading to fragmentation and inconsistencies.¹⁰¹ Counterarguments to this position simply point at the failure of CoE entities to bring forth substantial change, and the subsequent need for the elevated legal force and enforcement potential that accompanies EU action; indeed, the procedure of art. 7 TEU carries considerable political and symbolic weight.¹⁰² Nonetheless, national authorities may regard EU scrutiny as unduly punitive, exclusionary, and unfair finger-pointing behaviour, leading to MS hardening their stance, ultimately undermining any potential for change.¹⁰³

V. CONCLUSIONS

Based on compliance literature, a series of possibilities arise, addressing the incapability (through litigation and management) and unwillingness (through persuasion and enforcement) of national actors to act. Such initiatives remain, as of yet, under discussion, and have yet to be tested in action. On this basis, a few remarks prove useful.

The Union needs to march forward. The logic of Westphalian states holding exclusive authority over a clearly defined geographic territory or policy area may have worked during the early days of the European community. Nonetheless, the Union has long evolved, and so must its mode of governance. With Schengen, internal borders have largely abolished their significance; with the AFSJ, policy areas have become intertwined. The Area of Freedom does not exist without the Areas of Security and Justice, and unrestricted movement has to account for cross-border criminality and criminal impunity. To address these issues, the MS chose, with Tampere, to rely on mutual recognition instruments. These instruments have served their purpose well, and their importance should not be disregarded, nor their functioning delimited. Yet, integration based purely on trust cannot advance any further, as the implications regarding individual prerogatives would prove detrimental. To this end, the EU has to reinforce mutual trust with compliance safeguards, to ensure the equivalent protection of rights becomes reality, not legal fiction.

Traversing from the abstract to the factual will likely prove a challenging process. By building on assumptions and theoretical common threads, the Union has painted itself into

¹⁰¹ Green Paper COM(2011) 327 final cit. para. 29.

¹⁰² W van Ballegooij, 'Procedural Rights and Detention Conditions' (07 December 2017) European Parliament Think Tank www.europarl.europa.eu 144.

¹⁰³ Overall, a "sunshine policy" may prove more promising; see GN Toggenburg and J Grimheden, 'The Rule of Law and the Role of Fundamental Rights' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 147.

the proverbial corner. European authorities should not repeat this mistake, by assuming that intervention of any form would readily resolve the situation. Compliance mechanisms, either through persuasion, monitoring, and enforcement, or through litigation and capacity building, have the potential to prove consequential – yet, they should not be regarded as panacea. Before committing to a course of action, the Union should conduct a thorough *ex-ante* evaluation, to assess the anticipated impact of any action, and plan accordingly. Towards this purpose, initiatives seeking to identify the root causes of the problematic situation, alongside local needs and peculiarities, should be supported and developed further.¹⁰⁴ The criminal justice principle of *one size does not fit all* holds true in this context, and intervention close to the ground demonstrates the greatest promise, while being in line with the principle of subsidiarity and the current political landscape.

In the (recent) past, contemplating the potential of Europe in prisons would likely be dismissed as another rather extreme view of pro-European federalists, incompatible and far detached from the perceivable. Today, such notions prove a necessity. Embarking on a quest to rescue the AFSJ may be in line with the European idea; more importantly, though, it serves the common interests, security, and individual prerogatives of the European citizen. Advocating for a (*lato sensu*) approximation of detention standards at EU level is no pretext for erasing national diversities; instead, it constitutes a call for addressing burning human rights issues that burden a considerable number of penitentiaries across the continent. While cognizant of the legal, political, and pragmatic considerations concerned, this contribution is meant to advance the debate on how best to ensure unity of values in a diverse setting, thus shaping the future of Europe.

¹⁰⁴ In this sense, calls for the establishment of communication links between prison authorities and the local community are to be celebrated; see Resolution P8_TA(2017) 385 final cit. para. 18.



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