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## EDITORIAL

### SOVEREIGN WITHIN THE UNION? THE POLISH CONSTITUTIONAL TRIBUNAL AND THE STRUGGLE FOR EUROPEAN VALUES

On 6 October 2021, the Polish Constitutional Tribunal (CT) delivered its much-awaited ruling in case K 3/21. The Tribunal declared the unconstitutionality of arts 1, 2 and 19 TEU inasmuch as they require that national judges discard the Polish legislation on the organisation of the judiciary; in particular, those provisions which, in the view of the CJEU, place the Polish magistrature under strict control of the political power.

Although, at the time of writing, the reasons for the ruling have not been stated, the operative part of the decision unveils a line of argument based on the premise that the EU does not possess the power to determine the limits of its own competence and, therefore, cannot acquire substantial autonomy from the will of its founders. On the grounds of this assumption, the consequence was seemingly drawn that the two foundational interpretive doctrines of the CJEU concerning the relations between EU law and national law, namely primacy and perhaps also direct effect, do not apply in Poland.

The supporters of the ruling did not shy away from highlighting the analogies between it and other recent decisions of other MS Constitutional Courts. In particular, the PSPF decision of the BVerfG (judgement of 5 May 2020 2 BvR 859/15) was expressly evoked as a “moral” precedent for the K 3/21 ruling.

This *tu quoque* argument is unfounded, as the two rulings reveal a number of dissimilarities (even though perhaps not all those identified by A Thiele, ‘Wer Karlsruhe mit Warschau gleichsetzt, irrt sich gewaltig’ (10 October 2021) *Verfassungsblog verfassungsblog.de*). In particular, while proclaiming that the conferment of competences in well-determined areas to the Union could not transfer the ultimate power to determine the scope of these competences, the BVerfG carefully conceived of such a power as limited to single acts of the Union. By so doing, the BVerfG was able to reconcile the irreconcilable: establishing and maintaining a strict surveillance on *ultra vires* acts of the Union but not precluding the participation of the German federation in the process of integration.

Conversely, the search for a systemic conflict seems to be the dominant motive in case K 3/21. In order to shield the legislative measures undermining the independence of the judges, and to prevent judges from invoking EU law to set them aside (see case C-791/19 *European Commission v Republic of Poland* ECLI:EU:C:2021:596), the CT did not hesitate to declare unconstitutional the overall principle of the primacy of EU law. In



consequence thereof, Polish legislation conflicting with EU law cannot be discarded by Polish judges and, in practice, the effects of EU law can be made dependent on domestic legislation. The ruling also struck the principle of the “ever closer Union”: a clause which expresses the special nature of the Union and the very essence of the integration project. No doubt, the ruling has heralded the irredeemable rupture between Poland and the Union: a rupture which the most enthusiastic supporter of the PSPP ruling could hardly have imagined.

The difference is conspicuously relevant in an ethical and political perspective. One can wonder, however, whether it is also relevant in a legal perspective.

Modern legal orders are based on the postulate that there must be a supreme authority having the ultimate power to settle conflicting legal claims. In this perspective, it is irrelevant whether the last word pronounced by these supreme authorities accords with standards of morality, justice or even political wisdom, or whether the final settlement of a conflict is right or wrong. In a legal system where there is a supreme authority to have the final say, the only thing that counts is that this last say is the law.

If the authority of the final say depended on its contents, it would be necessary to identify a further procedure to determine the erroneousness of this determination: and the ultimate arbiter would be downgraded to the penultimate. Nor would the issue of the legality of that supreme authority itself be relevant. An authority would not be supreme if its legality could be questioned by another authority (see the ruling by the ECtHR, *Xero Flor w Polsce sp. z o.o. v Poland* App n. 4907/18 [7 May 2021] paras 255-275; a good example of the game of mirrors produced by conflicting claims among judges contesting their respective legality is provided by case C-132/20 *Getin Noble Bank*, pending before the CJEU).

The power to say the last word has been traditionally conceived of as part of the overall power to do or undo the law and the hallmark of legal sovereignty: *(s)ous cette même puissance de donner et casser la loi, sont compris tous les autres droits et marques de souveraineté* (J Bodin, ‘Les Six Livres de la République’, I X 163). For centuries, that power was exercised by the political organs: the prince and, later, the Parliaments. In our complex legal orders, and in particular on issues concerning relations between legal systems, that power seems to have passed on to the ultimate custodian of constitutional legality.

This happened, albeit surreptitiously, also in Europe, where “(t)ucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe” (E Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’ (1981) AJIL 1).

In the struggle for the final say, in this race towards the infinity, the national Constitutional Courts deployed all the theoretical armoury supporting the idea of statehood as the

political organisation of natural communities and of national legal orders as the expression of their self-determination and, ultimately, of their essential identity. The obvious conclusion of this reasoning is that the EU cannot break free from the constitutional restraints imposed on it by its MS through the treaties; that this claim would violate not only the constitutional prohibition to transfer outside the State undetermined competence, but also the principle of democracy whereby only the people can legitimate the exercise of political power; that the people is conceived, now and forever, of as a community sharing a common cultural heritage and a common destiny; that, therefore, there is no European people which could legitimate the decisions of the EU; and, finally, that political decisions of the EU must be blessed by the peoples of the MS through their own procedures of democratic legitimacy. This broad claim is a worm which gnaws at the flesh of the process of integration and that could ultimately corrode its very soul.

This broad claim is grounded on pre-legal ideological views of statehood and community which, as such, can be neither validated nor confuted. But its consequences can be well conceptualised and assessed within a legal perspective and, specifically, within the perspective of the European process of integration. Brought to its ultimate consequences, that claim, *i.e.* to remain fully sovereign within the Union, would not only be inconsistent with the process of European integration; it would also diverge from the principles that inspired the great constitutionalist movement starting in the second half of 20<sup>th</sup> Century: open statehood and *Völker- und Europarechtsfreundlichkeit*. This consideration may have played a role in the decision of the MS Constitutional Court to stop at the cliff's edge and to prevent the claim of absolute sovereignty from producing a systemic inconsistency with the Union's legal order. Yet, this is precisely what is seemingly happening now with the K 3/21.

However, and paradoxically, this ruling does not necessarily prelude to Poland's decision of to withdraw from the European Union. By combining the self-referential legitimacy endorsed by the CT with the unfortunate withdrawal clause of art. 50 TEU, Poland could well retain its claim to be sovereign within the Union without having to comply with its fundamental principles and values.

Two events followed this ruling.

On 27 October 2021, in case C-204/21 R *European Commission v Republic of Poland* (ECLI:EU:C:2021:878), the vice-president of the CJEU fined Poland for its failure to abide by the *interim measures* ordered on 14 July 2021 (ECLI:EU:C:2021:593). The fine, of unprecedented magnitude, was set at one million euros per day.

This decision probably opens a new phase during which the Commission and the CJEU will use monetary leverage to persuade Poland to desist from its course of action and to resume compliance with the European obligations.

However, monetary sanctions can hardly persuade a State to change its overall political course, also due to the multiple instruments at its disposal to minimise or even

nullify their effect. More likely, the two institutions will be bogged down in a prolonged war of position, with sudden escalations and partial retreats. Notoriously, the most efficient instrument of coercion, namely the conditionality clause included in Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, was rendered virtually inoperative by the European Council declaration included in the Conclusions of the meeting of 10-11 December 2020; a decision fiercely criticised in this journal (see the Editorial, 'Neither Representation nor Values? Or, "Europe's Moment" – Part II' (2020) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1101).

The second event, related to the first, is the deafening silence kept by the European Council in its meeting of 21-22 October 2021. Of course, this is not necessarily due to a lack of interest. Behind the scenes, the members of the European Council are likely using diplomatic means to persuade the Polish authorities to reach a compromise. Of course, again, one may think that, instead of compromising on values, the MS should rather back the action of the supranational Institutions, which are on the frontline in the struggle for European values. But how could they react against a violation of the Treaty values apart from by fighting the symbolic battle for the art. 7 TEU procedure?

To answer this question, a short reference should be made to the relation between the Union's values and the obligations which reflect them. While art. 7 TEU provides for a special procedure to assess a systemic breach of the values of the Union, by no means does it prevent the functioning of ordinary remedies against a failure to comply with these specific obligations. Some of these rules are exclusively part of the body of European law. Others are also established by international law.

The correspondence of the content of an obligation of international law with the values protected by art. 2 TEU does not, *per se*, prevent MS from invoking that obligation in their reciprocal relations. More likely, the two obligations – European and international – will coexist and develop along parallel trajectories. It follows that the MS, acting in their capacity of sovereign States, are entitled to invoke *vis-à-vis* another MS a breach of international law obligations corresponding to obligations equally incumbent upon them in force of art. 2 TEU. In particular, MS, acting individually or even collectively, can bring interstate claims before the ECtHR or lodge communications before the Human Rights Committee set up by the International Covenant on Civil and Political Rights of 1966, or avail themselves of other means of redress provided for by international law.

Nor is this option precluded by art. 344 TFEU, which prevents the MS from submitting disputes concerning the interpretation or application of EU law to means of settlement other than those provided for by the Treaties. It is only after the accession of the EU that the ECHR will be part of EU law and, therefore, that MS will be prevented from bringing a claim before the ECtHR against other MS for alleged breach of the Convention (see Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 paras 201-214). But, even then, this preclusion will only apply within the scope *ratione*



*materiae* of EU law. It is common knowledge that art. 2 TEU also requires the MS to respect the values of the Union outside that scope.

An action brought by the MS against Poland in their capacity of sovereign States would produce a number of beneficial effects. It would remedy the weakness of the institutional procedures designed to ensure the implementation of the values of the Union. It would contribute to saving the soul of the Union and the fundamental rights of its citizens. It would make virtuous use of sovereignty: as a historical nemesis for the very ideology of sovereignty.

**E.C.**





## ARTICLES

# REASONING, INTERPRETATION, AUTHORITY, PLURALISM, AND THE *WEISS/PSPP* SAGA

DAVOR PETRIĆ\*

TABLE OF CONTENTS: I. Introduction. – II. National courts interpret EU law. – III. German Constitutional Court interprets EU law. – III.1. Surrendering. – III.2. Forgetting. – III.3. Rejecting. – IV. Interpretation, contestation, pluralism. – IV.1. I hear, but I cannot understand. – IV.2. That's just the way it is. – IV.3. Enter interpretive pluralism. – V. Conclusion.

**ABSTRACT:** This *Article* deals with the question of the quality of legal reasoning of the Court of Justice of the EU. It first introduces the German Constitutional Court's decision in *PSPP* (ECLI:DE:BVerfG:2020:rs20200505.2bvr085915), which brought an unprecedented challenge to the authority of the Court of Justice regarding interpretation of EU law. Then it discusses how national courts, when exercising the constitutionality review domestically, engage in interpretation of EU law. As an example, recent case law of the German Constitutional Court is analysed. Specific focus is placed on the *PSPP* decision, in which the German court took issue with the Court of Justice's interpretive reasoning in *Weiss* (case C-493/17 ECLI:EU:C:2018:1000), thereby contesting the latter's monopoly in saying definitively not only what the EU law is, but also how to determine what the EU law is. One of the key takeaways was that if a judgment of the Court of Justice suffers from gross "methodological" deficiencies, that makes it inapplicable in domestic legal system. However, this suggestion does not change much regarding judicial interpretations and dynamic development of EU law, as will be proposed in this *Article*, and for several reasons. First, what makes interpretive arguments admissible is in general widely shared among the courts in the EU. Second, national courts have already on several occasions provoked the Court of Justice to improve its reasoning. Finally, the concept of interpretive pluralism explains the national courts' ever-greater engagement with the matters of interpretation of EU law.

**KEYWORDS:** German Federal Constitutional Court – Court of Justice of the European Union – legal reasoning and interpretation – institutional authority – interpretive pluralism – *Weiss* and *PSPP*.

## I. INTRODUCTION

In the European Union, many hold these truths to be self-evident: that the Court of Justice of the EU (CJEU) has the final say on both the meaning of provisions of EU law and the

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acceptable ways of interpreting those provisions. That the judgments of the Court have the status of *de facto* precedents with an *erga omnes* effect, binding all courts in all Member States. That the art. 267 TFEU preliminary ruling procedure structures a hierarchical relationship between the courts in Member States and the CJEU, the latter sitting on the top of that hierarchy and enjoying the interpretive monopoly. That national courts that refer preliminary questions to the CJEU in principle accept to abide by the responses they receive. That national courts are in charge of a decentralised application of EU law and have nothing to do with the authoritative interpretation of EU law.

The CJEU's supreme authority in the matters of interpretation of EU law as sketched above for a long time received no serious challenges. Until very recently, that is, when *Weiss met PSPP*.

The story is already well-known:<sup>1</sup> in the *PSPP* decision,<sup>2</sup> the German Federal Constitutional Court (GFCC) refused to accept the CJEU's judgment in *Weiss* that came in response to its own preliminary reference for interpretation of EU law.<sup>3</sup> The Karlsruhe court held the judgment of the Court of Justice to suffer from a flawed interpretive reasoning,<sup>4</sup> which made it *ultra vires* and hence inadmissible not only from the perspective of the German Basic Law but, in the German court's view, from the perspective of EU law as well.

With this, the GFCC openly contested the CJEU's interpretive monopoly and its authority to say definitively not only *what* the EU law is, but also *how to determine* what the EU law is. The German court thus concluded that it intends to accept the Court of Justice's interpretations of EU law only as long as they stay in accordance with "the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States".<sup>5</sup>

The immediate verdict, just short of unanimity (at least in the English-speaking – or better, outside-of-Germany – world), seemed to be: the Karlsruhe court got it "profoundly" wrong. So, the *PSPP* decision was quickly dismissed in those corners of the blogosphere populated by EU constitutional law/judicial politics *aficionados* as

- a "profound threat" to the EU legal order;<sup>6</sup>

<sup>1</sup> See more than a dozen of contributions to the September 2020 issue of German Law Journal, 'Special Section: "The German Federal Constitutional Court's PSPP Judgment"'.

<sup>2</sup> Federal Constitutional Court judgment of the Second Senate of 5 May 2020 2 BvR 859/15 (*PSPP*) ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

<sup>3</sup> Case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000.

<sup>4</sup> The GFCC thus repeatedly treated the Luxembourg court's reasoning with words like "objectively arbitrary", "untenable", "meaningless", and "incomprehensible". See *PSPP* cit. paras 118-119, 127 and 153, respectively.

<sup>5</sup> *Ibid.* para. 112.

<sup>6</sup> DR Kelemen, P Eeckhout, F Fabbrini, L Pech and R Uitz, 'National Courts Cannot Override CJEU Judgments. A Joint Statement in Defense of the EU Legal Order' (26 May 2020) [verfassungsblog.de](https://verfassungsblog.de).

- an “unfortunate decision” that causes “the profound damage to the integrity of the EU’s legal order and its rule of law”;<sup>7</sup>
- “a bad decision, at a bad time, and with worse consequences”;<sup>8</sup>
- “a wrong decision at the wrong moment”;<sup>9</sup>
- “a disproportionate reaction [...] an irresponsible act that only a very vain and arrogant court can afford”.<sup>10</sup>

Some felt – in a manner evocative of Joseph Conrad’s Mr. Kurtz<sup>11</sup> – profound “horror”<sup>12</sup> upon reading this “unprecedented act of legal vandalism” committed by the “Germany’s failing court”.<sup>13</sup> Harsh words, indeed. Then, arguably vindicating some of them, the European Commission in June 2021 decided to initiate the infringement proceedings against Germany, claiming that the *PSPP* decision breaches “fundamental principles of EU law, in particular the principles of autonomy, primacy, effectiveness and uniform application of Union law, as well as the respect of the jurisdiction of the European Court of Justice under Article 267 TFEU”.<sup>14</sup>

The biggest problem for the GFCC seemed to be a mismatch between its stated intentions and the way it went after them in practice. Given that it has arguably failed to deliver on the latter, the former was disregarded as well. Here I will not repeat extensively the well-founded criticism of the German court’s decision.<sup>15</sup> Suffice it to mention several missteps it took while bashing the CJEU’s standard of proportionality review. It was noted that the GFCC’s proportionality assessment was likewise flawed, “simply not comprehensible [...] parochial, misguided and reductive”.<sup>16</sup> The Karlsruhe court, it was added, clumsily and illegitimately “painted in German” the EU’s conception of proportionality, surpris-

<sup>7</sup> D Sarmiento and JHH Weiler, ‘The EU Judiciary After Weiss. Proposing A New Mixed Chamber of the Court of Justice’ (2 June 2020) *Verfassungsblog* [verfassungsblog.de](http://verfassungsblog.de).

<sup>8</sup> F Fabbrini, ‘Eurozone auf Wiedersehen?’ (5 May 2020) *BRIDGE Blog: Brexit Research and Interchange on Differentiated Governance in Europe* [bridgenetwork.eu](http://bridgenetwork.eu).

<sup>9</sup> MP Maduro, ‘Some Preliminary Remarks on the *PSPP* Decision of the German Constitutional Court’ (6 May 2020) *Verfassungsblog* [verfassungsblog.de](http://verfassungsblog.de).

<sup>10</sup> D Sarmiento, ‘Requiem for Judicial Dialogue – The German Federal Constitutional Court’s judgment in the *Weiss* case and its European implications’ (9 May 2020) *EU Law Live* [eulawlive.com](http://eulawlive.com).

<sup>11</sup> J Conrad, *Heart of Darkness* (Coyote Canyon Press 2007).

<sup>12</sup> P Meier-Beck, ‘*Ultra Vires*?’ (11 May 2020) *D’Kart Antitrust Blog* [www.d-kart.de](http://www.d-kart.de).

<sup>13</sup> P Eleftheriadis, ‘Germany’s Failing Court’ (18 May 2020) *Verfassungsblog* [verfassungsblog.de](http://verfassungsblog.de).

<sup>14</sup> European Commission, *June Infringements Package: Key Decisions* (9 June 2021) [ec.europa.eu](http://ec.europa.eu).

<sup>15</sup> For a recent take, see J Basedow, J Dietze, S Griller, M Kellerbauer, M Klamert, L Malferrari, T Scharf, D Schnichels, D Thym and J Tomkin, ‘European integration: Quo Vadis? A Critical Commentary on the *PSPP* Judgment of the German Federal Constitutional Court of May 5, 2020’ (2021) *ICON* 188.

<sup>16</sup> T Marzal, ‘Is the BVerfG *PSPP* Decision “Simply not Comprehensible”? A Critique of the Judgment’s Reasoning on Proportionality’ (9 May 2020) *Verfassungsblog* [verfassungsblog.de](http://verfassungsblog.de). See also, more generally, F 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, 1122-1124.

ingly ignorant about the differences between the two conceptions (national and supra-national) of the same concept.<sup>17</sup> But not only that: its proportionality assessment was not only more expansive than the EU version, but also impossible to perform in practice and contradictory on its own terms.<sup>18</sup>

Interestingly, both courts were defended as just minding their business as usual. On the one hand, the Court of Justice in *Weiss* stayed within the formal boundaries of the text of the Treaties and its earlier jurisprudence on the review of EU acts.<sup>19</sup> Had it done what its German counterpart seemed to suggest in its request for preliminary ruling, it would have gone against the Treaties and the well-established case law. On the other hand, the Karlsruhe court's decision was a similarly unsurprising continuation of its earlier jurisprudence on the matters of economic and monetary union and a "no brainer" application of the consistently articulated criteria.<sup>20</sup> Had it done differently, it would have engaged in "legal acrobatics".<sup>21</sup> For sticking to its guns in this way, the GFCC was accused of "dogmatism".<sup>22</sup> This accusation, however, cuts both ways: for clinging to EU law's own dogmas – on absolute and unconditional supremacy of the Union law and the infallibility of divinations coming out of the Luxembourg benches – does not seem much better.<sup>23</sup>

Now, the question remains whether we should get rid of the spirit together with the body? Whether we should bury the underlying spirit of the *PSPP* decision, whose premises might be sound despite being unorthodox from the perspective of EU legal "dogma", because its body was made of bad material, substantive and argumentative, by the German court?

Few commentators resisted this temptation and instead tried to look for a silver lining. One "more hopeful reading" of the *PSPP* decision thus saw "nothing scandalous about a national court demanding more coherence and accountability" from the EU's institutions, including their Court.<sup>24</sup> Other wondered whether this might be read as just another of

<sup>17</sup> D-U Galetta, 'Karlsruhe Uber alles? The Reasoning on the Principle of Proportionality in the Judgment of 5 May 2020 of the German BVerfG and Its Consequences' (8 May 2020) CERIDAP ceridap.eu.

<sup>18</sup> P Nicolaides, 'An Assessment of the Judgment of the Federal Constitutional Court of Germany On the Public Sector Asset Purchase Programme of the European Central Bank' (2020) LIEI 267.

<sup>19</sup> F Bignami, 'Law or Politics? The BVerfG's PSPP Judgment' (21 May 2020) Verfassungsblog verfassungsblog.de.

<sup>20</sup> U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them: The Relationship Between the Court of Justice of the European Union and the German Federal Constitutional Court' (2021) ICON 208, 212 ff.

<sup>21</sup> A Bobić and M Dawson, 'What Did the German Constitutional Court Get Right in Weiss II?' (12 May 2020) EU Law Live eulawlive.com. Similarly, D Grimm, 'A Long Time Coming' (2020) German Law Journal 944.

<sup>22</sup> J Ziller, 'The Unbearable Heaviness of the German Constitutional Judge. On the Judgment of the Second Chamber of the German Federal Constitutional Court of 5 May 2020 Concerning the European Central Bank's PSPP Programme' (7 May 2020) CERIDAP ceridap.eu.

<sup>23</sup> A Bobić and M Dawson, 'What Did the German Constitutional Court Get Right in Weiss II?' cit.; M Baranski, F Brito Bastos and M van den Brink, 'Unquestioned Supremacy Still Beggars the Question' (29 May 2020) Verfassungsblog verfassungsblog.de.

<sup>24</sup> A Bobić and M Dawson, 'What Did the German Constitutional Court Get Right in Weiss II?' cit.

many national courts “desperate[ly] cry[ing] for more methodological integrity” from the CJEU.<sup>25</sup> In a similar fashion, in this *Article* I deal with the question of the quality of legal reasoning of an apex court operating in the pluralist environment alongside the multiplicity of judicial actors, some of which hold top positions within their respective jurisdictions.

To get there, the discussion will proceed in the following way. After the introduction, I will first discuss how national courts, when exercising the constitutionality review, inevitably engage in interpretation of EU law. When doing so, they adopt as a relevant standard of review not only domestic constitution but also EU law. With this, national courts claim great ownership in the matters of interpretation of EU law. To see how this plays out in practice, I then analyse recent case law of the GFCC. Specific focus will be on the *PSPP* decision, in which the German court took issue with the CJEU’s reasoning in *Weiss*. The suggestion was that if the Court’s judgment suffers from gross “methodological” deficiencies, that makes it inapplicable in domestic legal system. However, as I will argue, this pronouncement does not change a lot the things regarding judicial interpretations as they currently exist in the EU. There are several reasons. First, the admissibility of interpretive arguments is in general widely shared among the courts in the EU. Second, national courts have already on several occasions provoked the Court of Justice to improve its reasoning. And third, the concept of interpretive pluralism explains the national courts’ claim in the matters of interpretation of EU law. Final section then briefly concludes.

## II. NATIONAL COURTS INTERPRET EU LAW

Let us first break down the interpretive steps of the *PSPP* decision in which the GFCC for the first time declared EU law *ultra vires*, hence unconstitutional.

The Karlsruhe court held the ECB’s decision and the CJEU’s judgment endorsing it are violating the German Basic Law. Why? Because both transgressed the limits of EU competences as defined in the Treaties, thus violating EU law itself. Therefore, the GFCC declared EU law unconstitutional under the German constitution because it was unconstitutional under EU primary law.<sup>26</sup> The first part is unproblematic; that is what the German court is supposed to (be able to) do. But what about the second part?

Recall that there is a number of doctrines established by the CJEU that presume the ability of national courts to interpret appropriately and arrive at the “correct” meaning of a provision of EU law on their own.<sup>27</sup> This could be called “no application without interpretation” thesis: to apply EU law, national courts must be able to cognise the meaning

<sup>25</sup> U Šadl, ‘When Is a Court a Court?’ (20 May 2020) [Verfassungsblog verfassungsblog.de](https://verfassungsblog.verfassungsblog.de).

<sup>26</sup> Cf. M Wendel, ‘Paradoxes of Ultra-vires Review: A Critical Review of the *PSPP* Decision and Its Initial Reception’ (2020) *German Law Journal* 979, 984.

<sup>27</sup> For an early recognition, see H Rasmussen, ‘Towards a Normative Theory of Interpretation of Community Law’ (1992) *University of Chicago Legal Forum* 135, 148.

of that law.<sup>28</sup> These familiar situations involve national courts exercising their “European mandate” through giving effect to EU law in their domestic legal systems.<sup>29</sup>

Now, what goes for EU law doctrines that presume such ability on the part of national courts – direct effect, interpretive obligation, and so on – works the same when national courts domestically exercise the review of constitutionality of EU law. To know that an act of EU law violates human rights guaranteed under the national constitution, oversteps the boundaries of competences that have been transferred to the Union via domestic constitutional arrangements, or threatens the national constitutional identity, high national courts must understand what that act means. And to know that, they must interpret it, at least to some extent.

This is what (high) national courts have been doing all the time, no matter how unnoticedly. Discussing the Karlsruhe court’s jurisprudence, Franz Mayer recognises this, yet considers it to be a cunning “trick”:

“[The GFCC] argues that it is just interpreting German constitutional law, the reach of the powers transferred and transferrable to the EU under the German constitution. But this constitutes a legal backdoor, the Court gets to interpret EU law itself through – a task which is reserved to the CJEU in its final sense – and in doing so, it creates a kind of parallel version of EU law, a Karlsruhe version, so to speak”.<sup>30</sup>

For this very reason, the GFCC has been criticised for what it did in the *PSPP* decision. When reaching their decision, the Karlsruhe judges were accused of seriously misreading EU law against which they assessed the ECB’s decision and the Luxembourg court’s judgment reviewing it.<sup>31</sup> Notably, they failed to interpret appropriately arts 5 (on the proportionality principle) and 19 (on the CJEU’s mandate to “ensure that in the interpretation and application of the Treaties the law is observed”) TEU. Several points are worth noting here.

As explained above, there were two distinctive interpretive steps employed in the GFCC’s reasoning. The first step is less controversial: the *ultra vires* review was based in part in the German Basic Law. The second step, however, was much more problematic: the *ultra vires* review was also based in EU law – as *interpreted* by the German court itself. What nonetheless differed from the GFCC’s earlier jurisprudence was that this time there were no “tricks” about it. The Karlsruhe court was frank and open about it interpreting EU law. So, as Gareth Davies noted, this was “less an attempt to keep the EU out, than to shape it in a certain image. That may be why it is so controversial; in a club of many

<sup>28</sup> Cf. case 283/81 *CILFIT v Ministero della Sanità* ECLI:EU:C:1982:267, opinion of AG Capotorti, para. 4.

<sup>29</sup> M Claes, *The National Courts’ Mandate in the European Constitution* (Hart 2006).

<sup>30</sup> F Mayer, ‘To Boldly Go Where No Court Has Gone Before’ cit. 1117.

<sup>31</sup> T Marzal, ‘Is the BVerfG *PSPP* Decision “Simply not Comprehensible”?’ cit.; Editorial, ‘Not Mastering the Treaties: The German Federal Constitutional Court’s *PSPP* Judgment’ (2020) CMLRev 965.



members, it is more offensive for one to tell the others how it should be run, than for that member to simply turn their back".<sup>32</sup>

In other words, what the German court did was lecturing not only its peers but the chairman of the club on how the club rules should be understood and followed. And in doing so, the GFCC abandoned previous constitutional-limits-based approach to the question of relationship between EU and national law, entertained by the CJEU and high national courts alike.<sup>33</sup> So far, this approach has been: our constitution, our business; your Treaties, your business; and vice versa. When conflicts occur, courts simply cancel each other out. If a judgment of the Luxembourg court seems odd to a national judge from the perspective of her domestic constitution, under this approach she will simply disregard and not apply it.<sup>34</sup> The options are: take it or leave it. But, by doing so, national courts

"endorse the view that EU law is whatever the Court of Justice says it is. They take a passive, hand-off, approach to shaping that law, in which their role is not to interpret the Treaty – to participate in its interpretation – but merely to apply the interpretations of the Court, or, in extremis, not apply them. Within the sphere of EU law, the national supreme courts have self-defined themselves not as judges, but as clerks with a conscience".<sup>35</sup>

The GFCC is now changing this course. Now, it is more like: our Treaties, our business. EU law is a shared, common affair, not something foreign. So, when judicial conflicts occur, they occur not because legal texts are by their nature irreconcilable, or because legal orders are inherently incompatible. Rather, they occur because the meanings of those texts conflict – meanings that have been imposed on them by the courts. So, if a judgment of the Luxembourg court seems odd to a national judge – and not only from the perspective of her domestic constitution, but also from the perspective of her understanding of what EU law is – under this approach she will contest it and express her disagreement by

<sup>32</sup> G Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' (21 May 2020) European Law Blog [europeanlawblog.eu](http://europeanlawblog.eu).

<sup>33</sup> G Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation' (2018) *ELJ* 358, 361 ff.

<sup>34</sup> For two recent and widely discussed examples, see Supreme Court of Denmark judgment of 6 December 2016 case 15/2014 *DI, acting on behalf of Ajos A/S v Estate of A (Ajos)*, and commentary by M Rask Madsen, H Palmer Olsen and U Šadl, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation' (2017) *ELJ* 140; and Czech Constitutional Court judgment of 31 January 2012 Pl. ÚS 5/12 *Slovak Pensions*, and commentary by Z Kühn, 'Ultra Vires Review and the Demise of Constitutional Pluralism: The Czecho-Slovak Pension Saga, and the Dangers of State Courts' Defiance of EU Law' (2016) *Maastricht Journal of European and Comparative Law* 185. As this *Article* was finalised, other high national courts delivered judgments with a similar tenor. See Romanian Constitutional Court, Decision 390/2021 of 8 June 2021, discussed in B Selejan-Gutan, 'A Tale of Primacy Part II: The Romanian Constitutional Court on a Slippery Slope' (18 June 2021) *Verfassungsblog* [verfassungsblog.de](http://verfassungsblog.de); Polish Constitutional Tribunal, Decision 7/20 of 14 July 2021 (declaring the CJEU's interim measures on the Polish judicial system to be incompatible with the Polish constitution).

<sup>35</sup> G Davies, 'Does the Court of Justice Own the Treaties?' cit. 361.

putting forward different interpretation. The options now are: take it or make it. And if a national judge can make it right, she may get her way. “And the truth shall set you free” (John 8:32). With things being framed this way, it indeed may turn out that “national supreme courts will emerge as interpreters of EU law, and these are their first steps”.<sup>36</sup>

When a national court rejects a judgment of the CJEU with which it disagrees and adopts a different interpretation of EU law, it contests the CJEU’s final say on matters of interpretation of EU law. However, where the GFCC disagreed with the CJEU was not a substantive meaning of EU law in question, but rather (and more formally) the reasoning employed in interpretation of that law. The CJEU’s judgment was ultimately deemed *ultra vires* due to its “methodological” shortcomings. To this point I will return later. For now, let us turn our attention to the recent case law of the Karlsruhe court that suggests its increased engagement with interpretation of EU law, to see how the *PSPP* decision follows in those footsteps.

### III. GERMAN CONSTITUTIONAL COURT INTERPRETS EU LAW

One of the central parts of the *PSPP* decision opened with the acknowledgment (as did many other GFCC’s landmark decisions before) that the art. 19 TEU mandate – to ensure that in the interpretation and application of EU law *the law* is observed – primarily refers to the Luxembourg court.<sup>37</sup> *Primarily*, but does that mean *exclusively*?

It seems that the GFCC’s Second Senate would respond: “It does not”. This (unexpected) reading of art. 19 TEU would obviously go beyond the text of that provision.<sup>38</sup> And it would also be difficult to reconcile with the CJEU’s established case law, albeit some recent developments might lend more support to it. Consider the Court of Justice’s pronouncement in *ASJP*, which emphasized that the EU court and national courts have a joint duty in carrying out this mandate:

“Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals. [...] Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed”.<sup>39</sup>

Now, pushing this *dictum* to its limit – and arguably against any conceivable intention on the CJEU’s part to allow national courts to go past or against its rulings – the GFCC has

<sup>36</sup> *Ibid.* 371-372.

<sup>37</sup> *PSPP* cit. para. 112.

<sup>38</sup> Art. 19 TEU explicitly uses the subject pronoun “it”, referring to the Court of Justice (“It shall ensure that in the interpretation and application of the Treaties the law is observed”). From where could have national courts possibly borrowed this habit of extra-textual reading of a Treaty provision? (Asking rhetorically).

<sup>39</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117 paras 32-33.

recently made a couple of unguided high-profile excursions into the field of authoritative interpretation of EU law. The following examples are indicative of the Karlsruhe court taking ever-greater ownership in interpretation of EU law (with its application being confined to the territory of Germany, obviously), to the detriment of the Court of Justice's interpretive monopoly and its exclusive institutional position and division of labour with national courts under the art. 267 TFEU preliminary ruling procedure.

### III.1. SURRENDERING

In late 2015, the Karlsruhe court's Second Senate issued an order on the European Arrest Warrant, in which it declared its intention to review the application of EU law in Germany for its compliance with human dignity from art. 1 of the Basic Law.<sup>40</sup> At the same time, however, in the case at hand the Second Senate managed to interpret away the conflict between EU law and human dignity guarantees under the German constitution. In doing so, it tried hard to present the matters of EU law to be, in vocabulary of *CILFIT*,<sup>41</sup> "so obvious as to leave no scope for any reasonable doubt" – in other words, "*acte clair*" – in order to exonerate itself from the obligation to refer preliminary question to Luxembourg.<sup>42</sup>

To support this finding, the GFCC first assessed three language versions (German, English, French) of a relevant provision of the EAW Framework Decision.<sup>43</sup> Then, it confirmed its conclusion arrived at on linguistic terms with the intent of the EU legislator expressed in recitals of the EAW Framework Decision,<sup>44</sup> as well as with the legislative history<sup>45</sup> and "teleological considerations".<sup>46</sup> In the end, it placed everything in a wider regulatory context – a multilevel framework for human rights protection in Europe (comprised of the EU Charter of Fundamental Rights, case law of the CJEU and of the European Court of Human Rights),<sup>47</sup> and the scheme of the Treaties against which all EU secondary law must be constructed.<sup>48</sup> The analysis looked neat and convincing.

<sup>40</sup> Federal Constitutional Court order 2 BvR 2735/14 of the Second Senate of 15 December 2015 ECLI:DE:BVerfG:2015:rs20151215.2bvr273514 (*EAW*). For discussion, see M Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi' (2016) EuConst 549; J Nowag, 'EU Law, Constitutional Identity, and Human Dignity: A Toxic Mix? Bundesverfassungsgericht: Mr R' (2016) CMLRev 1441; F Meyer, "From Solange II to Forever I" the German Federal Constitutional Court and the European Arrest Warrant (and How the CJEU Responded) (2016) New Journal of European Criminal Law 277.

<sup>41</sup> Case 283/81 *CILFIT v Ministero della Sanità* ECLI:EU:C:1982:335 para. 16.

<sup>42</sup> *EAW* cit. para. 125.

<sup>43</sup> *Ibid.* paras 85-88.

<sup>44</sup> *Ibid.* para. 89.

<sup>45</sup> *Ibid.* para. 95.

<sup>46</sup> *Ibid.* para. 90.

<sup>47</sup> *Ibid.* paras 91-92.

<sup>48</sup> *Ibid.* paras 92-93.

Nonetheless, how “*clair*” the things indeed were remained highly doubtful.<sup>49</sup> In any event, subsequently the CJEU itself, in a conciliatory tone, seemed to endorse the German court for getting the right interpretation of EU law that time.<sup>50</sup> (Note how this would presumably fulfil *ex post facto* (one part of) the first *CILFIT* requirement of a national court being “convinced that the matter is equally obvious [...] to the Court of Justice”).<sup>51</sup>

### III.2. FORGETTING

In a more recent case from 2019, the Karlsruhe court’s First Senate dealt with a constitutional complaint by applying, for the first time ever, the EU Charter of Fundamental Rights as the relevant standard of review of domestic application of harmonized EU law.<sup>52</sup> So, here, the matter is somewhat different from what we have seen previously. In the *PSPP* and *EAW* decisions, the German court reviewed EU law for its compliance with the domestic constitution. In the *Right to be forgotten II* decision, on the contrary, the German court reviewed national law for its compliance with EU law. However, to make sense of either review, the GFCC must necessarily purport to understand the meaning of EU law on its own, no matter how the latter is being taken (as the object of review or the benchmark for review).

Asserting a novel jurisdiction in this way, the GFCC promoted itself to a role of “co-curator of the EU Charter, alongside the CJEU”.<sup>53</sup> By doing so, in its own view, the Karlsruhe court is discharging the responsibility the Basic Law lays upon it to develop and give effect to EU integration. In a way, it arrogated the competence to authoritatively interpret the Charter rights in internal situations where the Court of Justice, due to procedural reasons – for example, where lower domestic courts do not refer preliminary questions – remains uninvolved.

Moreover, the GFCC tried to explain how this new competence will be exercised by differentiating between interpretation and application of law.<sup>54</sup> For the CJEU, it acknowledges the final say regarding the matters of interpretation of EU law. For itself, it claims

<sup>49</sup> T Reinbacher and M Wendel, ‘The Bundesverfassungsgericht’s European Arrest Warrant II Decision’ (2016) *Maastricht Journal of European Criminal Law* 702, 712; D Petrić, ‘Dignity, Exceptionality, Trust. EU, Me, Us’ (2019) *European Public Law* 451, 466–467.

<sup>50</sup> See joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198. See also K Lenaerts, ‘La vie après l’avis: Exploring the principle of mutual (yet not blind) trust’ (2017) *CMLRev* 805; N Petersen, ‘Karlsruhe’s *Lochner* Moment? A Rational Choice Perspective on the German Federal Constitutional Court’s Relationship to the CJEU After the *PSPP* Decision’ (2020) *German Law Journal* 995, 1000; U Haltern, ‘Revolutions, Real Contradictions, and the Method of Resolving Them’ cit. 213–214.

<sup>51</sup> *CILFIT* cit. para. 16.

<sup>52</sup> Federal Constitutional Court decision of the First Senate of 6 November 2019 1 BvR 276/17 ECLI:DE:BVerfG:2019:rs20191106.1bvr027617 (*Right to be forgotten II*). For extensive commentary, see the March 2020 special issue of *German Law Journal*, entirely devoted to ‘Right to be forgotten BVerfG judgment’.

<sup>53</sup> J Mathews, ‘Some Kind of Right’ (2020) *German Law Journal* 40, 43.

<sup>54</sup> *Right to be forgotten II* cit. para. 69.

the authority regarding the matters of (correct) application of EU law.<sup>55</sup> However, this purported difference between the two juristic operations – interpretation and application of (EU) law – is hardly tenable. To apply law, court must know what it means. To know what law means, court must interpret that law. To “interpret” means either determining one meaning (of several possible and competing) of a normative text or determining which normative text (of several available) controls given factual situation. So, as Karsten Schneider puts it: “If ‘interpretation of fundamental rights’ was indeed different from ‘application of fundamental rights’, this mode of cooperation [between the GFCC and the CJEU] could be seen as a flash of genius. [...] But the seemingly qualitative difference between (higher courts’) ‘interpretation’ and (lower courts’) ‘application’ is a fallacy”.<sup>56</sup>

Albeit expressing its fidelity to close cooperation with Luxembourg via art. 267 TFEU in such circumstances,<sup>57</sup> the Karlsruhe judges here again dared to conclude that the matter of interpretation of EU law is sufficiently “*clair*”.<sup>58</sup> Or better – “*éclairé*”, since the Court of Justice has through its case law allegedly clarified the matter. Therefore, the GFCC argued that “[i]n the present case, the application of the EU fundamental rights does not raise any questions of interpretation to which the answer is not already clear from the outset nor questions that have not been sufficiently clarified in the case-law of the CJEU (as read in light of the case-law of the European Court of Human Rights, which serves as a supplementary source of interpretation in this regard)”.<sup>59</sup>

Yet again, it remained unclear whether the *CILFIT* criteria on what makes an issue “*clair*” or “*éclairé*” were misinterpreted.<sup>60</sup> On a more general note, commentators have for a long time discussed how difficult it is for a national court to make sense of a vast and intricate (or vastly intricate?) case law of the CJEU, whose pronouncements are often deemed terse and cryptic.<sup>61</sup> So, the bar for concluding that something is reasonably clear from the case law of the Court of Justice is set pretty high.

<sup>55</sup> K Schneider, ‘The Constitutional Status of Karlsruhe’s Novel “Jurisdiction” in EU Fundamental Rights Matters: Self-inflated Institutional Vulnerabilities’ (2020) German Law Journal 19, 23.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Right to be forgotten II* cit. paras 68-70.

<sup>58</sup> *Ibid.* paras 137-141.

<sup>59</sup> *Ibid.* para 137.

<sup>60</sup> A Bobić, ‘Developments in the EU-German Judicial Love Story: The Right to Be Forgotten II’ (2020) German Law Journal 31, 38-39. See also J Mathews, ‘Some Kind of Right’ cit. 43.

<sup>61</sup> Of many notable works, see PJ Wattel, ‘Kobler, Cilfit and Welthgrove: We Can’t Go on Meeting Like This’ (2004) CMLRev 177; A Somek, ‘Inexplicable Law: Legality’s Adventure in Europe’ (2006) University of Iowa Legal Studies Research Paper No 05-41 papers.ssrn.com; A Somek, ‘The Emancipation of Legal Dissonance’ (2010) University of Iowa Legal Studies Research Paper No 09-02 papers.ssrn.com; JHH Weiler, ‘Epilogue: Judging the Judges – Apology and Critique’ in M Adams, H de Waele, J Meeusen and G Straetmans (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 235, 237-238.

For that reason, this judgment was described as “an instance of resistance” and pushback against the expansion of the Luxembourg court’s fundamental rights jurisprudence, through which the Karlsruhe court “seeks to actively influence the fundamental rights jurisprudence of the CJEU in substance”.<sup>62</sup> Although, others have noted that the First Senate’s commitment to cooperation with the Luxembourg court demonstrated in *Right to be forgotten II* still seems more genuine than the Second Senate’s.<sup>63</sup>

### III.3. REJECTING

The Second Senate was quick to confirm this last remark when the opportunity came along with the *PSPP* decision. But it went one step further with grabbing the chunks of authority to interpret EU law. As previously mentioned, the GFCC disagreed not with the substantive meaning of EU law determined by the CJEU in *Weiss*, but rather with the legal reasoning or “methodology” employed in justifying that meaning. How did it get there?

There are four key steps the Second Senate took in the *PSPP* decision.

Step number one was about *judicial authority*. The GFCC is obviously unimpressed with the CJEU’s institutional authority: the latter’s self-asserted position of the final interpreter of EU law.<sup>64</sup> The Karlsruhe judges choose not to be submissive towards the Court of Justice, blindly and at all cost. This is the usual point of discontent for the critics of the *PSPP* decision, the red line not to be crossed: how can anyone dare to disobey the Court of Justice?<sup>65</sup> Although the Karlsruhe judges do acknowledge that the matters of interpretation of EU law are *in principle* for the Court to decide on. And that the art. 19 TEU mandate covers “the methodological standards for the judicial development of the law”.<sup>66</sup> So, they acknowledge that there is an EU “method” of interpretation that is by and large constructed in Luxembourg. In other words, when determining the meaning of a provision of EU law, there are certain interpretive arguments that can be invoked in support of that

<sup>62</sup> D Burchardt, ‘Backlash against the Court of Justice of the EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review’ (2020) German Law Journal 1, 17.

<sup>63</sup> T Violante, ‘Bring Back the Politics: The *PSPP* Ruling in its Institutional Context’ (2020) German Law Journal 1045, 1056; M Wendel, ‘The Two-Faced Guardian – Or How One Half of the German Federal Constitutional Court Became a European Fundamental Rights Court’ (2020) CMLRev 1383.

<sup>64</sup> Cf G Davies, ‘Does the Court of Justice Own the Treaties?’ cit. 360-361 and 364-367, who writes how the mainstream scholarship seems consensual to a high degree in this respect: that both its friends and foes accept without questioning the Court’s claim that it “owns” the interpretation of EU law, albeit the reasoning behind this assertion – relying on the text of the Treaties, effectiveness and uniformity of EU law – is far from bulletproof. Only recently, some stronger objections have been raised against this circular self-assertion: “The CJEU is the ultimate authority on interpretation of EU law. Says who? Says the CJEU”.

<sup>65</sup> JL da Cruz Vilaça, ‘The Judgment of the German Federal Constitutional Court and the Court of Justice of the European Union – Judicial Cooperation or Dialogue of the Deaf?’ (3 August 2020) CERIDAP ceridap.eu. See also case C-824/18 *A.B. and Others (Nomination des juges à la Cour suprême - Recours)* ECLI:EU:C:2020:1053, opinion of AG Tanchev, paras 80-84.

<sup>66</sup> *PSPP* cit. para. 112.

meaning, that are in turn considered admissible. Their admissibility is determined by the CJEU. But the latter determines this with an eye on the common constitutional traditions of the Member States and jurisprudence of the highest European courts.<sup>67</sup> Hence, there is a kind of external check or validation on what makes an interpretive reasoning valid.

Step number two was about *judicial "priors"*. This one is simple. The GFCC cares not about the background political or ideological or any other motivation that made the CJEU decide one way instead of another; to adopt one interpretation of law over the competing one(s). Where the Luxembourg court is coming from is not what they are interested in nor something they want to second guess.<sup>68</sup>

Step number three was about *interpretive outcomes*. The GFCC cares not about the policy or any other substantive outcome that the CJEU arrives at in their decision either, or so it says.<sup>69</sup> They might not like it, but nonetheless will refrain from imposing their own value judgments. The reason is the following: what makes an admissible interpretive argument in EU law does not have to correspond to national jurisprudential traditions in a one-to-one manner. After all, "the particularities of EU law give rise to considerable differences with regard to the importance and weight accorded to the various means of interpretation".<sup>70</sup> For this reason, national courts ought not to substitute the CJEU's interpretations of substantive EU law with their own, when a given interpretation stays within the boundaries of acceptable interpretive arguments. When the law is indeterminate and open for several reasonable interpretations,<sup>71</sup> the Karlsruhe judges do not reject the Luxembourg court's interpretation simply because they favour a different one. Furthermore, they are even willing to accept errors of a smaller magnitude. Because the Luxembourg court surely can make a mistake here and there, and the Karlsruhe court grants it "a certain margin of error".<sup>72</sup> Because judges are humans, and even Luxembourg judges are

<sup>67</sup> The same as the Court does regarding the general principles of EU law; see art. 6(3) TEU.

<sup>68</sup> If, in general, it could ever be possible to read out of the judgment the background motivational reasons, "hunches" or psychological processes that drove the deciding judges. Unlike the justificatory arguments offered in support of a particular decision, which are written down and publicly available as part of the court's reasoning.

<sup>69</sup> Some have suggested otherwise, though, arguing that it is precisely for its dislike of the outcome(s) in the controversy surrounding the EU monetary policy and the ECB's mandate that the GFCC launched the methodology-informed attack on the CJEU. See U Šadl, 'When is a Court a Court?' cit.

<sup>70</sup> *PSPP* cit. para. 112.

<sup>71</sup> To be precise, (EU) law is indeterminate on two levels: the "first order" indeterminacy concerns the multiple possible meanings of a legal text and the judicial choice of one of them, whereas the "second order" indeterminacy concerns the multiple available interpretive arguments and the choice of them by the Court of Justice. See G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012) 6 ff.

<sup>72</sup> *PSPP* cit. para. 112.

humans, and humans make mistakes.<sup>73</sup> And a fair share of ill-reasoned judgments did come out of the Luxembourg benches.<sup>74</sup>

Yet the situation is quite different when the CJEU's interpretation (in the sense of the outcome of the interpretive process) does not square with a reasonable interpretation (in the sense of the interpretive process itself). Granted, what makes an EU law interpretive argument appropriate or reasonable is decided in principle by the Luxembourg court. But – and this is a big “but” – in doing so, it cannot “simply disregard” the national jurisprudential traditions, says the Second Senate. These are arguably themselves a part of the EU primary law.<sup>75</sup> And they bind the CJEU too: the Court stands inside, not outside EU law.<sup>76</sup> The Court of Justice would most certainly accept this proposition. Otherwise, with the Court unbound, what would stand to prevent judicial arbitrariness?

So, the Court of Justice cannot construct the meaning of an EU norm out of thin air or on a whim. It cannot commit “manifest error” in interpretation. That much the German court cannot grant to the CJEU. In that sense, the art. 19 TEU mandate “is exceeded where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded”.<sup>77</sup>

This is, then, the threshold that makes the CJEU's judgments acceptable to the Karlsruhe court in terms of their formal pedigree, that is, quality of legal reasoning. What followed from it was the “Methodological *Solange*”:<sup>78</sup> “as long as the CJEU applies recognized methodological principles and the decision it renders is not objectively arbitrary from an objective perspective, the Federal Constitutional Court must respect the decision of the CJEU even when it adopts a view against which weighty arguments could be made”.<sup>79</sup>

Step number four, hence, was about *interpretive reasoning*. Now there is something the Karlsruhe court seems to care about. The CJEU has to respect and cherish the traditional

<sup>73</sup> D Sarmiento, ‘An Infringement Action against Germany After Its Constitutional Court's Ruling in Weiss? The Long Term and the Short Term’ (12 May 2020) EU Law Live eulawlive.com.

<sup>74</sup> As Daniel Sarmiento said, everyone could probably name their own “Top 5”. See D Sarmiento, ‘Requiem for Judicial Dialogue’ cit.

<sup>75</sup> Think of arts 4-6 TEU (national identity clause, principle of conferral, general principles of EU law).

<sup>76</sup> G Davies, ‘Interpretative Pluralism Within EU Law’ in M Avbelj and G Davies (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018) 323, 325. Cf. K Lenaerts, ‘No Member State Is More Equal than Others: The Primacy of EU Law and the Principle of the Equality of the Member States Before the Treaties’ (8 October 2020) Verfassungsblog verfassungsblog.de (“[T]he EU seeks to establish a government not of men but of laws. Both the Member States and the European institutions must respect the ‘rules of the game’ as interpreted by the [CJEU], since no one is above the law”).

<sup>77</sup> *PSPP* cit. para. 112.

<sup>78</sup> Jacques Ziller similarly noticed this “new [...] extension of the *Solange* reservation to methods of legal interpretation”. See J Ziller, ‘The Unbearable Heaviness of the German Constitutional Judge’ cit.

<sup>79</sup> *PSPP* cit. para. 112.



European way of arguing about law and justifying judicial decisions. No reasoning or exceptionally bad reasoning is from this perspective unacceptable.<sup>80</sup> Therefore, the Luxembourg court has to respect its interlocutors by not treating them with arbitrary and capricious rulings. As long as it respects that, the respect will be reciprocated by high national courts.

What all this means is that what the CJEU got wrong in *Weiss* is not that it failed to honour German constitutional standards of what makes an appropriate interpretive argument. Rather, it failed its own standards. And this is the “manifest error” in reasoning that made it *ultra vires*. It failed the EU standards – as the Karlsruhe court understands them. As if the German court is saying to its EU counterpart: “You are not yourself. I know you better than you”.

With the *PSPP* decision, the Karlsruhe court takes ever greater ownership in the matters of interpretation of EU law; much greater than what appeared to be the case following its earlier decisions discussed above. This time, not only at the level of substantive rules of law. Rather, the German court takes ownership over (in HLA Hart’s parlance) the secondary rules too – “the rules about rules”; here, the rules of interpretation.<sup>81</sup> For this, the challenge in *PSPP* is much greater than, say, in *Right to be forgotten II*. It not only contests the “judicial autonomy” of the Luxembourg court in the EU constitutional realm, that is “the sole power to state the right answer to a specific case”.<sup>82</sup> Now it contests the “methodological autonomy” of the Luxembourg court, which ensures that “the means to arrive to such answer cannot be contested”.<sup>83</sup> As such, the *PSPP* decision seems to cause a more serious shift in the EU constitutional order. Unlike a one-off thing where a national court dismisses a single

<sup>80</sup> S Simon and H Rathke, “‘Simply not Comprehensible.’ Why?” (2020) German Law Journal 950, 954–955: “[I]n a constitutional state an unsubstantiated judgment is not a judgment but an arbitrary statement [...] [T]he way considerations are weighed up can also produce different results. However, the limit has been reached when there is no weighing up at all, when no reasons whatsoever are given. That was what happened – intentionally or unintentionally – with the CJEU judgment [in *Weiss*]”.

<sup>81</sup> HLA Hart, *The Concept of Law* (Oxford University Press 2012), especially chapters V and VI. Although I doubt whether, as a conceptual matter, these rules of interpretation are really “rules” in the sense that they determine ex ante substantive outcomes of the process of legal interpretation. Rather, I understand these “rules” more as ex post justifications of judicial choices, that is, choices of the meaning of a normative text and/or of the normative texts applicable to facts of a dispute. For that reason, I have referred to them throughout this *Article* as “interpretive arguments”. Cf. N McCormick, ‘Argumentation and Interpretation in Law’ (1995) *Argumentation* 467; N McCormick, *Legal Reasoning and Legal Theory* (Oxford University Press 1997); L Burazin and G Ratti, ‘Rule(s) of Recognition and Canons of Interpretation’ in P Chiassoni and B Spaić (eds), *Judges and Judicial Interpretation in Constitutional Democracies: A View from Legal Realism* (Springer 2021) 123.

<sup>82</sup> 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*.

<sup>83</sup> *Ibid.*

judgment of the Court of Justice, here the GFCC is putting a check on the competences and jurisdiction of what is supposed to be the supreme court of the (EU) land.<sup>84</sup>

#### IV. INTERPRETATION, CONTESTATION, PLURALISM

Suppose we accept in principle the GFCC's basic premises in the *PSPP* decision. The questions that immediately follow are: how could the EU "interpretive community" structured along those lines ever function? Could we in that case still consider EU law to have maintained the quality of an organised and meaningful *order*?

I believe yes, and for several reasons that I spell out more concretely below. First, I will show that what makes an admissible interpretive argument as a general matter is widely shared among the courts in the EU. Then, I will describe how in some previous occasions the national courts' concerns regarding the interpretive arguments relied on by the Court of Justice have led the latter to gradually improve its reasoning. Finally, there exists a solid normative foundation for the GFCC's radical claim to interpretation of EU law, that is, for the national courts' ownership in these matters. So, seen in this light, the *PSPP* decision comes out as not so preposterous after all. Rather, it brings no dramatic change. At most, it unearths and recalibrates a bit what we already had in the EU, what was there all along.

##### IV.1. I HEAR, BUT I CANNOT UNDERSTAND

It seems difficult to deny that interpretive arguments employed by the Luxembourg court are essentially the same as those known and used by national courts.<sup>85</sup> Where they might differ, however, is in the way they are used. This only gets exacerbated in pluralist legal contexts, where the kind of law the courts ought to interpret (supranational vs national) differs at face value. In truth, different judges – within a single Member State, or even within a single court – may differ in their preferred approaches to legal interpretation. For instance, the pragmatic, functional interpretation the CJEU champions, with the effectiveness of EU rules at the centre stage,<sup>86</sup> as opposed to doctrinal or "dogmatic" (in a non-

<sup>84</sup> Cf JL da Cruz Vilaça, 'The Judgment of the German Federal Constitutional Court and the Court of Justice of the European Union' cit.: "One thing is sure: an exclusive competence conferred to a court of law does not cease to exist simply because another court of law with territorially limited powers does not agree with a judgment which it asked for. But refusing recognition of such exclusive competence is bound to have a destabilising impact on the integrity and the functioning of the EU legal order".

<sup>85</sup> G Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) *German Law Journal* 537, 538; S Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (Mohr Siebeck Verlag 2001) (providing in-depth comparative overview of the interpretive practices in different European legal systems, including Germany, France, England, and the EU, and highlighting their commonalities). For one general overview of typical interpretive arguments, see A Jakab, 'Constitutional Reasoning. A European Perspective on Judicial Reasoning in Constitutional Courts' (2013) *German Law Journal* 1215.

<sup>86</sup> D Sarmiento, 'Requiem for Judicial Dialogue' cit.

pejorative sense) interpretation often followed by the GFCC.<sup>87</sup> Moreover, it is sometimes noted how a bit more “open-textured” character of EU law favours the systemic and purposive interpretive arguments at the expense of the textualist,<sup>88</sup> although some have pointed out how in practice the CJEU frequently stays with the textualist arguments.<sup>89</sup>

Obviously, these differences may cause serious frictions between the opposing approaches. Because in EU law there are no hard and fast rules that would determine the use of interpretive arguments when interpreting EU law. Granted, different interpretive arguments may have different weight in different circumstances. In part, this is reflected in different values that are usually associated with different arguments. For example, textual arguments tend to reflect the values of legal certainty, democratic legitimacy and deferral to the legislator. Systemic arguments preserve unity and coherence of the legal system. Purposive arguments can be employed with an aim of enforcing the background moral values or adjusting the legal system to the societal and technological developments of time. So, not only do courts have to justify their choice of one of several possible meanings of a normative text with interpretive arguments, which ought to convince and persuade the relevant audience that the judicial choices made are weightier and sounder than the competing ones. But also, the choice of the interpretive arguments themselves sometimes has to be justified by meta-arguments, such as democracy, rule of law, separation of powers, human dignity, and the like.<sup>90</sup>

However, none of this amounts to more than a “rule of thumb” when encountering an interpretive dilemma in EU law. Which is why no court is completely unbiased and impartial when it comes to its preference. And this may lead them to distrust each other. After all, no judicial choice of a particular interpretive approach is ever apolitical,<sup>91</sup> especially when it comes to high courts.

Nevertheless, sharing a basic understanding of what makes an admissible interpretive argument in the first place implies that at least the judicial interlocutors speak the same language. The situation is different when one side engages in whimsical and out-of-nowhere interpretive moves. Then the language is not shared anymore. And for this the CJEU has been long accused, sometimes fairly and at other times not quite. Remember Roman Herzog and Lüder Gerken’s “Stop the European Court of Justice” and their (in)famous criticism of the Luxembourg court’s flawed reasoning in cases like *Mangold*?<sup>92</sup>

<sup>87</sup> J Ziller, ‘The Unbearable Heaviness of the German Constitutional Judge’ cit.

<sup>88</sup> A Arnall, *The European Union and Its Court of Justice* (Oxford University Press 2006) 612.

<sup>89</sup> See, for example, CJW Baaij, ‘Fifty Years of Multilingual Interpretation in the European Union’ in L Solan and P Tiersma, *Oxford Handbook of Language and Law* (Oxford University Press 2012) 217.

<sup>90</sup> Cf. N McCormick and R Summers, ‘Interpretation and Justification’ in N McCormick and R Summers (eds), *Interpreting Statutes: A Comparative Study* (Ashgate 1991) 511.

<sup>91</sup> U Šadl, ‘When is a Court a Court?’ cit.

<sup>92</sup> Case C-144/04 *Mangold* ECLI:EU:C:2005:709.

"[The CJEU] deliberately and systematically ignores fundamental principles of the Western interpretation of law, its decisions are based on sloppy argumentation, it ignores the will of the legislator, or even turns it into its opposite, and invents legal principles serving as grounds for later judgements".<sup>93</sup>

With its *PSPP* decision, the Karlsruhe court can be read as making a similar claim not to understand the Luxembourg court anymore. It expressed concerns already in *Gauweiler*,<sup>94</sup> albeit it stopped short of pulling the trigger. In parallel, the entire strand of the CJEU's case law regarding the euro-crisis, as it developed, has been considered by some as over-stretching the admissible interpretive arguments and being unprincipled on the matters of principle.<sup>95</sup> And after the preliminary reference in *PSPP* showed that the Luxembourg court intends no change, the Karlsruhe court reacted in a "if the mountain will not come to Muhammad, then Muhammad must go to the mountain" manner.<sup>96</sup>

A related and more general point is: if the CJEU depends on national courts in order to uphold a workable and efficient system, and it itself emphasizes this regularly,<sup>97</sup> then national courts accepting its interpretations of what the EU law means is essential. To have them accept those interpretations hinges, in big part, on the quality and persuasiveness of the reasoning behind those interpretations. On this, one may say, depends the very authority of the EU apex court.<sup>98</sup> Unfortunately, a discontent with poor reasoning of the Luxembourg court has been boiling for a while now. Simple, self-referential, and wannabe-authoritative "because I say so" reasoning is not (and probably never was) enough. Similar "Mangold means Mangold"<sup>99</sup> response to the Danish Supreme Court's preliminary question in *Ajos* led the latter to reject the unwritten EU general principle of non-discrimination on the grounds of age, which was in a "fuzzy and questionabl[e] (methodology-wise) [manner] deduced from the spirit of the Treaties".<sup>100</sup>

The Karlsruhe court in the *PSPP* decision suggested further that the judicial "language" is mutually constructed by the courts in the EU.<sup>101</sup> This echoes the classic idea

<sup>93</sup> R Herzog and L Gerken, 'Stop the European Court of Justice' (10 September 2008) EUobserver euobserver.com.

<sup>94</sup> Federal Constitutional Court, judgment of the Second Senate of 21 June 2016 2 BvR 2728/13 ECLI:DE:BVerfG:2016:rs20160621.2bvr272813.

<sup>95</sup> For one critique, see G Beck, 'The Court of Justice of the EU and the Vienna Convention on the Law of Treaties' (2016) Yearbook of European Law 484.

<sup>96</sup> Cf. U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them' cit. 218 and 227.

<sup>97</sup> See, illustratively, *Associação Sindical dos Juizes Portugueses* cit.

<sup>98</sup> V Perju, 'Reason and Authority in the European Court of Justice' (2009) Virginia Journal of International Law 307, especially 322-327.

<sup>99</sup> D Sarmiento, 'An Instruction Manual to Stop a Judicial Rebellion (Before It Is Too Late, of Course)' (2 February 2017) Verfassungsblog verfassungsblog.de.

<sup>100</sup> U Šadl, 'When is a Court a Court?' cit.

<sup>101</sup> Of course, there always remains a question (empirical?) whether any of the GFCC's positions really represent the view of all (or most) national high courts. Perhaps they think the same as their most vocal German representative, as the Karlsruhe court often likes to suggest and as it perhaps might be inferred

expressed already by Alexander Hamilton in his *Federalist No. 78*: “[t]he rules of legal interpretation are *rules of common sense, adopted by the courts* in the construction of the laws”.<sup>102</sup> The same could be inferred from HLA Hart’s account of “rules of adjudication” (under which the rules of interpretation would arguably fall) as being of customary nature, that is a matter of social convention. Therefore, their status would depend on them being accepted by legal officials, most importantly judges. So, if the “rules of interpretation” in the EU indeed reflect the shared constitutional traditions, national courts have their share in constructing them. They make the primary legal audience that has to be convinced and persuaded by the CJEU that its choices of interpretive arguments are weightier and sounder than the possible alternative ones. For these unexpressed “meta-rules”, in this view, the art. 19 TEU mandate is a shared task. A similar idea – that in a discursive development of unexpressed general principles of EU law – both structural, like proportionality, and substantive, like fundamental rights – the task is shared between the EU court and national courts – appeared long ago,<sup>103</sup> but somehow got lost. After *PSPP* decision, it might be picked up again.

#### IV.2. THAT’S JUST THE WAY IT IS

To have national courts contesting interpretive argumentation and reasoning of the Luxembourg judgments is nothing new or unique, I believe. This seems to be the way EU law has always been developing. Textbook examples of classical doctrines on general principles of EU law may illustrate the point.

Recall the (structural) principle of (vertical) direct effect of directives. When introducing it, the CJEU initially offered only a couple of not very convincing arguments. One was the argument from effectiveness (*effet utile*). The other was a mixed textual-contextual argument: on the one hand was the assertion that since art. 267 TFEU empowers national courts to refer questions of interpretation of *all* acts of EU law, without explicitly excluding directives, it is implied that individuals may invoke all those acts, including directives, in

from the undeniable influence of the GFCC on other constitutional adjudicators in the EU when it comes to the spill-over of judicial doctrines; perhaps not. In this respect, see, among many others, discussions in F Mayer, ‘Constitutional Comparativism in Action. The Example of General Principles of EU Law and How They are Made – A German Perspective’ (2013) *ICON* 1003, especially 1010-1014; and M Claes, ‘The Validity and Primacy of EU Law and the “Cooperative Relationship” Between National Constitutional Courts and the Court of Justice of the European Union’ (2016) *Maastricht Journal of European and Comparative Law* 151.

<sup>102</sup> A Hamilton, J Madison and J Jay, *The Federalist, with Letters of ‘Brutus’* (Cambridge University Press 2003) 405 (italics added).

<sup>103</sup> See contributions of Matthias Herdegen and Hjalte Rasmussen to a seminal volume edited by Ulf Bernitz and Joakim Nergelius on general principles of EU law: M Herdegen, ‘The Origins and Development of the General Principles of Community Law’ in U Bernitz and J Nergelius (eds), *General Principles of European Community Law* (Kluwer Law International 2000) 3; and H Rasmussen, ‘On Legal Normative Dynamics and Jurisdictional Dialogue in the Field of Community General Principles of Law’ in U Bernitz and J Nergelius (eds), *General Principles of European Community Law* cit. 35.

disputes before national courts; on the other hand was the assertion that the fact that art. 288 TFEU provides that regulations can have direct effect does not imply that other legal acts, including directives, mentioned in that article cannot have similar effects, provided such effects are not expressly excluded.<sup>104</sup>

However, faced with unimpressed national courts, some of which (in France, for instance) resisted from applying this doctrine, the Court subsequently introduced another argument, which is a combination of consequentialist argument<sup>105</sup> and argument from general principles: the estoppel principle. It held that Member States that failed to implement a directive cannot rely on that failure to defend themselves against individuals who invoke the same directive in their favour.<sup>106</sup> This seemed to solidify the doctrine of vertical direct effect of directives, which to date remains uncontroversial.<sup>107</sup>

Note, however, that this is not to say that a mere development of interpretive argumentation in favour of direct effect of directives carried the day on its own, absent other political or institutional developments. Still, the point is that national courts objected to the Luxembourg court's ambitious doctrine. The Court responded with offering more (and more convincing) arguments when the opportunity came. And the matter eventually got settled.

Another famous example concerns the (substantive) principle of fundamental rights protection as developed originally in the 1970s. In the earliest judgments that marked a turn from the period of "negation" into the period of "revision",<sup>108</sup> the CJEU clung to the "aprioristic" approach of merely "discovering" pre-existing fundamental-rights-as-general-principles-of-law, without a need for much justification.<sup>109</sup> However, soon facing the challenges from national constitutional courts, including the GFCC in *Solange I*,<sup>110</sup> the Court of Justice changed its approach in interpreting EU fundamental rights as general principles to a more "positivist" one, whereby it exercises discretion in "carving" general principles out of

<sup>104</sup> Case 41/74 *van Duyn v Home Office* ECLI:EU:C:1974:133 para. 12.

<sup>105</sup> By this I mean one type of teleological interpretive argument used by the Court of Justice, as discussed notably by Joxerramon Bengoetxea. See J Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press 1993), who differentiated between *i*) functional arguments that aim to ensure the effectiveness (*effet utile*) of law; *ii*) *stricto sensu* teleological arguments that pursue the stated aims and objectives of law; and *iii*) consequentialist arguments that account for the consequences (be it economic, social, policy, legal or the like) of giving a particular meaning to normative text.

<sup>106</sup> Case 148/78 *Ratti* ECLI:EU:C:1979:110 para. 22.

<sup>107</sup> For a full account of this development, see P Craig and G de Búrca, *EU Law. Text, Cases, and Materials* (Oxford University Press 2020) 235-236.

<sup>108</sup> JL da Cruz Vilaça, 'The Judgment of the German Federal Constitutional Court and the Court of Justice of the European Union' cit.

<sup>109</sup> Case 29-69 *Stauder v Stadt Ulm* ECLI:EU:C:1969:57 para. 7.

<sup>110</sup> German Federal Constitutional Court judgment of the Second Senate of 29 May 1974 BvL 52/71 (*Solange I*) para. 56.

sources of EU law and thereby fills the legal gaps.<sup>111</sup> So, the Court gradually introduced and refined the sources out of which EU rights have been constructed: first “the constitutional traditions common to the Member States”,<sup>112</sup> and then “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories”,<sup>113</sup> in particular the European Convention on Human Rights (ECHR).<sup>114</sup>

It was primarily after these developments in the CJEU’s interpretive argumentation that the GFCC stepped back in *Solange II* with a familiar outro:<sup>115</sup> as long as the EU generally retains an effective protection of human rights, substantively similar or comparable to German constitutional standards – “effective” and “similar” as interpreted and understood by the Karlsruhe court itself – we yield.

The same would go under the “Methodological *Solange*” in the *PSPP* decision: as long as the CJEU relies on appropriate interpretive reasoning and argumentation – “appropriate” as interpreted and understood by the GFCC itself – we yield. Perhaps the German court will in the future be celebrated for this, as it deservedly was for its *Solange I & II* push *against* the unbridled supremacy of EU law and *in favour of* an increased standard of fundamental rights protection in the Union. As Ana Bobić and Mark Dawson have remarked, “Sometime in the future we may well yet recognize this decision, from a constitutionalist perspective, as forming part of the jurisprudence of national courts of permanent contestation of the primacy of EU law, that the academic community has often praised as an impetus for the incremental development of EU law”.<sup>116</sup>

So, the GFCC’s objection to the CJEU’s reasoning in the matters of economic and monetary union might lead the latter to solidify and improve its interpretive approach when new opportunities come, similarly to what happened a number of times before. Whether that will settle the whole thing remains to be seen. But importantly, we should be on the watch for the following: whether any change in the CJEU’s interpretive reasoning will be

<sup>111</sup> C Semmelmann, ‘General Principles in EU Law Between a Compensatory Role and an Intrinsic Value’ (2013) *ELJ* 457, 462-463.

<sup>112</sup> Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114 para. 4.

<sup>113</sup> Case 4/73 *Nold KG v Commission* ECLI:EU:C:1974:51 para. 13.

<sup>114</sup> Case 44/79 *Hauer v Land Rheinland-Pfalz* ECLI:EU:C:1979:290 paras 14-15. Note how a similar “switch” in the interpretive approach – from “aprioristic” (discovered as “inherent”) in *Franovich* to “positivist” (initially developed based on comparative legal reasoning and the scheme of the Treaties) in *Brasserie du Pêcheur/Factortame* and afterwards – happened later regarding another general principle: the principle of state liability for breaches of EU law. Cf. case C-6/90 *Franovich and Bonifazi v Italy* ECLI:EU:C:1991:428 paras 31-37 and 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 paras 16-36. See also C Semmelmann ‘General Principles of EU Law: The Ghost in the Platonic Heaven in Need of Conceptual Clarification’ (2013) *Pittsburgh Papers on the European Union* 1, 19; and D Petrić, ‘Game of Courts: A Tale of Principles and Institutions’ (2019) *European Law Journal* 273, 284-295.

<sup>115</sup> German Federal Constitutional Court, judgment of the Second Senate of 22 October 1986, 2 BvR 197/83 (*Solange II*) para. 105.

<sup>116</sup> A Bobić and M Dawson, ‘What Did the German Constitutional Court Get Right in *Weiss II*?’ cit.

followed by a change in the substantive outcomes of adjudication? Because in *Solange I & II*, developments in the CJEU's interpretive approach led to an increased standard of EU fundamental rights protection, in a satisfactory manner judged from the GFCC's perspective. Here, it is possible that any development in the CJEU's interpretive approach would change nothing in practice regarding the judicial review of the ECB's mandate, which might not be a satisfactory outcome for the GFCC. Only in this last situation the Karlsruhe court would not be able to hide behind the alleged flaws in interpretive reasoning of the Luxembourg court. In that situation, the German court would have to come out and openly state its dislike of the substantive outcome(s) of the CJEU's jurisprudence. How convincing would that be is a different ball game, discussion of which exceeds the limits and intentions of the present *Article*.

#### IV.3. ENTER INTERPRETIVE PLURALISM

The idea that the EU legal order is mature enough to allow national courts greater ownership in the matters of interpretation of EU law – to allow them more freedom in interpreting EU law independently in some circumstances – has been entertained for a while now. In different variations, it came from both inside and outside the Luxembourg court's ranks.

Of the former, the prominent examples include several opinions of Advocates General. But they have merely suggested that in the areas of EU law where the existing case law of the Court of Justice is sufficiently well developed and clearly articulated (*"éclairé"*), national courts should have more discretion in the matters of "factual" interpretation; that is, in deciding whether and how that law applies to the specific circumstances of the disputes they are deciding.<sup>117</sup>

Of the latter, some authors similarly criticised the Court's "factual jurisprudence" that tends to intrude into the domain of application of EU law. As Gareth Davies argued, such practice marginalises national courts as EU actors, emasculating and infantilising them.<sup>118</sup> Put differently, the Court's centralisation of the fact-appraisal leaves little (if anything) for the national courts to interpret. With matters being organised this way, "[n]ational courts have no intelligent part to play in [EU] law".<sup>119</sup> The solution, in Davies'

<sup>117</sup> Case C-338/95 *Wiener v Hauptzollamt Emmerich* ECLI:EU:C:1997:352, opinion of AG Jacobs, especially paras 10-21; case C-461/03 *Gaston Schul Douane-expéditeur* ECLI:EU:C:2005:415, opinion of AG Ruiz-Jarabo Colomer, paras 44-59 and 80-90. Cf. case C-561/19 *Consorzio Italian Management and Catania Multiservizi* ECLI:EU:C:2021:291, opinion of AG Bobek. See also M Bobek, 'National Courts and the Enforcement of EU Law – Institutional Report' in M Botman and J Langer (eds), *National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order. The XXIX FIDE Congress in The Hague, Congress Publications Vol. 1* (Eleven International 2020) 61, 87-89.

<sup>118</sup> G Davies, 'The Division of Powers Between the European Court of Justice and National Courts' (2004) *ConWEB – Webpapers on Constitutionalism and Governance beyond the State* 1.

<sup>119</sup> *Ibid.* 26.



view, is to embed the “interpretive pluralism” within the EU judicial architecture.<sup>120</sup> Under this view, national courts would have more involvement in and “part-own” the matters of interpretation of EU law.

Despite the elaborate criticism and some bold proposals for the reform of the art. 267 TFEU preliminary ruling procedure, none of these voices argued in favour of national courts contesting the CJEU’s last say in the matters of interpretation of EU law as strongly as the GFCC did in its *PSPP* decision. Granted, they saw no problem in allowing national courts to issue rulings in certain instances in which they would adopt a particular understanding of EU law that reflects cultural peculiarities and diversity of their municipal legal orders. But in my understanding, none went as far as suggesting that in case possible divergences between the Member States in interpretation and application of EU law would occur and would jeopardise functioning of the internal market or enforcement of EU rights of individuals, the CJEU would not have the *unconditional* authority to step in and resolve the matter once and for all. The Luxembourg courts’ power to decide on general and important questions of interpretation of EU law would remain in its hands. Likewise, the power to decide on the admissibility of interpretive arguments when interpreting EU law. Both tenets of such a power, in this view, would be subject to no limitations – or better, subject to no external challenges.

Another thing indicative of these arguments is that their justification is in essence consequentialist. Here is a rough estimate of the most frequent justifications offered in favour of national courts enjoying more freedom in interpreting EU law on their own, at least on some occasions: enhancing the quality of communication and the level of mutual trust between the EU court and national courts; minimising the opportunities for their jurisdictional conflicts and ensuring proper balance of institutional powers; increasing acceptance and internalisation and ultimately effectiveness of EU law within national legal orders, contributing to quality of its rules in terms of diversity, substantive equality and inclusiveness; enhancing the legitimacy of EU governance in general, and legitimacy and democratic credentials of EU judicial decision-making in particular; putting a check on the CJEU’s tyranny and the EU’s creeping competences; catching up with the achieved level of political developments in the Union; or relieving the CJEU of its caseload, recently skyrocketing concerning the number of preliminary references received.

But the idea of “interpretive pluralism” in the EU can provide a solid non-consequentialist justification for the national courts’ greater intervention in the matters of interpretation of EU law. The normative ground for the proposition that “national courts should get greater ‘ownership’ over interpretation of EU law from the CJEU” would not be that “it will bring many good”. Rather, the normative ground for that proposition would be that that arrangement is simply inherent in the design of the EU legal order. In what follows, I will attempt to briefly sketch how that argument would look like.

<sup>120</sup> G Davies, ‘Does the Court of Justice Own the Treaties?’ cit.; G Davies, ‘Interpretative Pluralism Within EU Law’ cit.

It should be noted first that many who frown upon any notion of “pluralism” share a particular understanding of constitutionalism, and not only of the EU’s version of it. Their “monist” vision is that of a state-centred constitutionalism characterised by oneness, consolidation, closure, hierarchy, and settlement.<sup>121</sup> As Daniel Halberstam points out, these characteristics manifest themselves in two dimensions, normative and institutional. “The first is the primacy of the Constitution’s legal system and legal norms over all other claims of public authority. The second is the primacy within the constitutional system of a single institution, such as a constitutional court, to serve as final arbiter of constitutional meaning”.<sup>122</sup> This neat vision, however, has recently been confronted with an alternative one that conceptualises non-traditional constitutional practices and redefines constitutionalism in a “pluralist” manner.<sup>123</sup> The practice of legal and constitutional pluralism may appear in two variations that differently conceptualise normative and institutional elements of constitutionalism.<sup>124</sup>

The first is “systems pluralism”. Its characteristic is *the plurality of legal systems*, all of which produce their own claim of legal authority. The EU constitutional order is often theorised based on the premises of systems pluralism.

The second is “institutional pluralism”. Its characteristic is the plurality of institutional actors, legal sources, or norms within *a single legal system* that lacks normative hierarchy or division of institutional competences, all of which may produce their own claim of legal authority. In a setting like this, the central feature becomes the act of interpretation of a shared normative framework.<sup>125</sup>

An example of institutional pluralism is the United States. There, institutional actors other than the Supreme Court have a legitimate say in determining what the law of the land means.<sup>126</sup> Through either offering or acting upon competing interpretations, they may try to induce the Supreme Court to change the course and adopt different interpretation. In some instances, the “interpretive stalemates” that arose were resolved in favour of different actors, without the conflict of claims of interpretive authority being resolved for good.

<sup>121</sup> D Halberstam, ‘Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance’ (University of Michigan Law School Working Paper 229-2011) 1, 4-11.

<sup>122</sup> *Ibid.* 8.

<sup>123</sup> *Ibid.* 12.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.* 29-30.

<sup>126</sup> *Ibid.* 32: “The United States Constitution does not grant the Supreme Court exclusive authority to determine constitutional meaning. [...] [T]he basic claim was a rather traditional – if largely forgotten – one: that each department, that is, the Executive, the Legislature, and the Judiciary, can determine the meaning of the Constitution for itself. [...] The claim that each co-ordinate branch of the federal government has the incidental power to interpret the Constitution with ‘coequal status’ goes back to the American Founders. One might even say that this was Madison’s key innovation in the idea of checks and balances over that of Montesquieu’s functional separation of powers”. Cf. Gareth Davies’s take on the US doctrine of “departmentalism” or “co-interpretation of the constitution”, in G Davies, ‘Does the Court of Justice Own the Treaties?’ cit. 362 ff.

Now, this Madisonian institutional-interpretive pluralism is not merely a US peculiarity. It is relevant for other constitutional orders, especially those European subscribed to Kelsenian postulates with one constitutional court absolutely controlling the meaning of the law. Perhaps it will seem counterintuitive, but plurality of claims to final interpretive authority may coexist “even [in] systems following the general Kelsenian mould”.<sup>127</sup> And the reason is simple: “if constitutionalism means limited government” – and it seems uncontroversial to claim that it does – “then the idea of constitutionalism ought to be opposed, in principle, to monopolies of authority – even those held by Kelsenian constitutional courts”.<sup>128</sup>

What about the EU? As mentioned above, in the EU constitutional order elements of systems pluralism have regularly been noticed and discussed. But elements of institutional-interpretive pluralism not so much.<sup>129</sup> However, the elements of the two pluralisms often exist side by side in a given legal system.<sup>130</sup> We can see them ever so clearly in the EU as well.

In other words, the national courts’ concurrent claim of interpretive authority as recently expressed in the *PSPP* decision can be explained in the light of institutional-interpretive pluralism. When constitutional conflicts occur, they are being framed not exclusively as conflicts between different systems – our constitution versus your Treaties. Rather, they are being framed as conflicts between institutional equals over the meaning of one shared constitutional charter – our understanding of the Treaties versus your understanding of the Treaties. National courts put forward their own claims of interpretive authority in EU law while simultaneously accepting the authority of the CJEU, at least until they feel the Luxembourg court’s understanding of the Treaties is manifestly wrong for

<sup>127</sup> D Halberstam, ‘Systems Pluralism and Institutional Pluralism in Constitutional Law’ cit. 39.

<sup>128</sup> *Ibid.*

<sup>129</sup> Some authors differentiate between “interpretive pluralism” and “constitutional pluralism”. But under the latter, if my reading of them is fair, they consider only “system pluralism”, and not “institutional pluralism”. See, for example, G Davies, ‘Does the Court of Justice Own the Treaties?’ cit. 370-371: “Interpretative pluralism is an alternative to constitutional pluralism. Constitutional pluralism seeks to mediate and explain the relationship between EU law and national constitutional orders. However, in seeking to bridge the void, it proclaims the void: constitutional pluralism theories are premised on the separateness of the two legal orders, on their ability to self-define: that degree of autonomy is what makes the theories necessary. Consistent with this perspective, theories of constitutional pluralism contain nothing which questions the Court’s view of EU law as a form of applicable foreign law – to be used and applied nationally, but whose nature and content is, for the national judge, an externally imposed given. Constitutional pluralism focuses on how each court should approach its own legal order in the light of the other – using ideas such as tolerance, openness and constitutionalism – but does not rethink that concept of ‘own’ (references omitted). Note, however, that there is a multitude of notions (not always coherent) ascribed to the term “constitutional pluralism”. So, Gareth Davies might be after a particular one, which is in his view closed for features of interpretive pluralism, contrary to Daniel Halberstam’s account espoused here. For these different understandings of constitutional pluralism – or, indeed, “pluralisms” – see M Avbelj and J Komárek (eds), *Four Visions of Constitutional Pluralism* (EUI Working Paper LAW 2008-21); and K Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014).

<sup>130</sup> D Halberstam, ‘Systems Pluralism and Institutional Pluralism in Constitutional Law’ cit. 44.

failing the shared standards of interpretative argumentation. In those situations, rare and exceptional, national courts compete with the EU apex court.

Moreover, the “structural connections” between different claims of interpretive authority are also visible.<sup>131</sup> National courts are openly engaging in interpretation of the same legal texts as the CJEU. They try to ground their authority within the same legal system as the CJEU through, for instance, references to the EU concept of “common constitutional traditions”. And they are talking to the same audience – the EU institutions, national institutions, courts in all Member States – as the CJEU. In short, national courts are “inhabiting” (or starting to inhabit) the same “interpretive space”<sup>132</sup> as the CJEU. And as members of the EU interpretive community, the way they express their claims of interpretive authority commits them even strongly to the shared project of constitutional governance and demands that their actions further “the basic values of constitutionalism: voice, rights, and expertise”.<sup>133</sup> “Voice” as in furthering the political legitimacy and democratic will; “expertise” as in furthering the knowledge and capacities to conduct common business; “rights” as in safeguarding individual rights.<sup>134</sup> The *PSPP* decision can perhaps be similarly read as furthering “voice” though demanding more legitimacy from the EU economic and monetary governance – often understood to involve depoliticised, crisis-management-oriented hence uncontested decision-making processes – that better reflects democratic will of the EU *demoi*;<sup>135</sup> not contesting “expertise” of the ECB to make complex technical decisions but requiring stricter and more substantive judicial scrutiny of justifications offered in favour of the ECB’s actions, while enjoining national institutions with more expertise (German federal government) and political legitimacy (Bundestag) to decide whether the newly provided proportionality assessment of the *PSPP* package is acceptable;<sup>136</sup> and safeguarding “rights” and interests of individuals against possible illegitimate intrusions from the supranational level.

The bottom line is that adding layers of institutional-interpretive pluralism over the foundations of systems pluralism in the EU, with an increased influence of national courts over the matters of interpretation of EU law, is not something that we should accept because it will bring some distinct good. It may bring no good at all.<sup>137</sup> Nevertheless, we

<sup>131</sup> *Ibid.* 35-36.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.* 37.

<sup>134</sup> D Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’ in J Dunoff and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009) 326.

<sup>135</sup> Cf. U Haltern, ‘Revolutions, Real Contradictions, and the Method of Resolving Them’ cit. 220-221.

<sup>136</sup> See T Violante, ‘Bring Back the Politics’ cit. 1052-1053. For a comment on how this played out in practice, see J Basedow, J Dietze, S Griller, M Kellerbauer, M Klamert, L Malferrari, T Scharf, D Schnichels, D Thym and J Tomkin, ‘European Integration’ cit. 205-206.

<sup>137</sup> Or worse, it could bring a lot of bad. That is why for the many such a view is unthinkable, even blasphemous, having the integrity and uniform application of EU law in mind. See K Lenaerts, ‘No Member

could accept it simply because it is a reflection of the EU's pluralist character. It is an inbuilt feature,<sup>138</sup> not a bug (that will do damage to the system), nor a patch (that will fix of improve the system). It just is.<sup>139</sup>

## V. CONCLUSION

In this *Article*, I followed those rare commentators who tried to look for some positive takeaways from the GFCC's *PSPP* decision. In unearthing the spirit of this decision, I looked whether and how national courts engage in interpretation of EU law in general, using the recent case law of the Karlsruhe court as *Vorspann*. For what this spirit stands, I took the idea that in a pluralist legal environment the quality of legal reasoning of an apex court is essential. Also, that other judicial actors that inhabit the same "interpretive space" necessarily have a say in the matters of interpretation of law. To my mind, this has been always the case in EU law. Through dynamic interactions among the multiplicity of courts developed not only many substantive rules of EU law but also the ways in which those rules ought to be interpreted. The occasional conflicts between the multiplicity of claims of interpretive authority have been resolved differently, usually in favour of the Luxembourg court, but at times in favour of national courts. Importantly, these "interpretive stalemates" always led the actors involved to accommodate the views of the other and to adjust their own interpretive approaches. No side kept doing the same thing repeatedly while expecting different results.

The same goes for the *PSPP* decision. It remains to be seen who will eventually be able to suggest that this time the stalemate worked for them. However, again that will not solve the conflict of claims of interpretive authority for good. So, what will be more interesting is how and at what point, in this case the CJEU and the GFCC, will adjust and accommodate. Before, they always did. Going forward, what could be the alternative?

State Is More Equal than Others' cit. But, for some others, "less uniformity does not necessarily entail complete disintegration". See M Baranski, F Brito Bastos and M van den Brink, 'Unquestioned Supremacy Still Begs the Question' cit. And there are many ways to safeguard the integrity and uniformity of EU law. Some of them involve national courts having more freedom regarding interpretation and application of that law. For discussion, see G Davies, 'Does the Court of Justice Own the Treaties?' cit. 360 and 370-374. So, interpretive pluralism does not automatically exclude the possibility of achieving uniformity of law. Nor do arguments from uniformity conclusively undermine the case for interpretive pluralism in EU law.

<sup>138</sup> G Davies, 'Does the Court of Justice Own the Treaties?' cit. 374-375.

<sup>139</sup> It is also worth noting that some might see more institutional-interpretive pluralism in EU law as a development contingent on the progress of the EU integration. In a slightly different context, Advocate General Ruiz-Jarabo Colomer a while ago similarly predicted that "[o]ne day things will return to normal and the national courts will reclaim the leading role which it is intended that they share with the Court of Justice [...] thereby relinquishing the role of supporting actors to which they have been relegated as a result of the protective zeal of the Court of Justice". See *Gaston Schul Douane-expéditeur*, opinion of AG Ruiz-Jarabo Colomer, cit. para. 81.

For these reasons, we should not seek to quickly dump the spirit of the *PSPP* decision, no matter how great a damage the German constitutional court did to its body. If the reading of that spirit as offered in this *Article* is plausible, then demanding more from those in the position of authority and calling them to order when defaulting should not be so outrageous. Even if many may think otherwise,<sup>140</sup> the rule of law is hardly breached when a check on arbitrary judicial decision-making is introduced by a greater demand for justification.<sup>141</sup> This is what the rule of law – in contrast with the rule of courts or men – means in a pluralist, democratic, constitutional community of values.

<sup>140</sup> D Sarmiento and JHH Weiler, 'The EU Judiciary After Weiss' cit.

<sup>141</sup> Cf N Bačić Selanec and T Čapeta, 'The Rule of Law and Adjudication of the Court of Justice of the EU' in T Čapeta, I Goldner Lang and T Perišin (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart forthcoming).



## ARTICLES

# CREATING EUROPEAN PUBLIC SPHERES: LEGITIMISING EU LAW THROUGH A RECONFIGURATION OF EUROPEAN POLITICAL PARTIES

LENNART LAUDE\*

TABLE OF CONTENTS: I. Introduction. – II. The importance of the public sphere for the democratic legitimacy of law. – III. Conceptualising European public spheres. – III.1. Barriers to European public spheres. – III.2. Adaptations at the EU level. – IV. *Status quo* of European public spheres. – IV.1. Institutions of the EU's sphere of will formation. – IV.2. The European mass media. – IV.3. The European party system. – IV.4. The impact of the non-existent party system. – IV.5. Interim conclusion. – V. A new role for political parties in the EU. – V.1. A model for the European level: political parties as communicative actors. – V.2. Changing the role of European political parties. – VI. Conclusion.

**ABSTRACT:** The European Union's political response – or the lack thereof – to the current Covid-19 pandemic has reinforced doubts about the future viability of the Union. One of the key issues decreasing the acceptance of the EU is the (perceived) lack of democratic legitimacy of EU law. This *Article* attempts to assess the causes for this deficit and to develop suggestions to address it. With the objective of evaluating the institutions in the EU's spheres of will formation and the public spheres, it sets out a discourse-theoretical model of democratic legitimacy as a benchmark. To create European public spheres, inclusive transnational processes of opinion formation and law-making must be institutionalised. Under the changed conditions of modern communication, adaptations to account for a fragmentation of discourse and the importance of digital public spheres are necessary; this requires an institutional focus on internet communication at the EU level. An analysis of the *status quo* reveals that the factual non-existence of a European party system is a decisive factor for the legitimacy deficit of EU law. Without strong European political parties as communicative actors, a void between the EU's procedures of will formation and civil society exists, and European public spheres cannot be created successfully. This structural problem can be addressed, it is argued, by freeing European political parties from the constraints currently imposed by EU law. If they are conceptualised as transnational communicative actors with adequate funding, they can create European public spheres and help to overcome the legitimacy deficit of the EU.

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KEYWORDS: EU law – legitimacy of EU law – European political parties – European public spheres – institutional structure of the EU – digital public spheres.

## I. INTRODUCTION

The public narratives around the European Union have drastically changed over the last decades. After being heralded as a successful peace and economic project and designated to be a model for other countries in every corner of the world,<sup>1</sup> the acceptance of the EU has dropped considerably across different Member States. Its strategy during the European debt crisis since the end of 2009 was – at least – questionable and has resulted in doubts about the future prospects of the whole project.<sup>2</sup> Doubts resurfaced in 2020, when the outbreak of the Covid-19 pandemic saw Member States employing a “me-first response” with export bans on vital medical equipment and the reinstatement of border controls, leading critics to wonder if the latest crisis could be the “final straw” for the EU.<sup>3</sup>

Often linked to this diminishing acceptance is the perceived democratic deficit of the EU and of EU law.<sup>4</sup> The struggle to foster wide acceptance for the Union’s policies is linked to the decision-making and communication structures of the EU. Different reasons can be identified to explain the democratic deficit: the underdeveloped role of the European Parliament due to the dominance of the European Council,<sup>5</sup> the role of the Court of Justice of the European Union (CJEU) in the European integration process,<sup>6</sup> or the lack of spheres for contestation of the Union’s policies.<sup>7</sup> This *Article* attempts to develop a suggestion how the democratic legitimacy of EU law can be increased. It focuses on outlining how changes to the EU’s legal framework can help to achieve that goal. This approach does not call into question the importance of sociocultural changes<sup>8</sup> and the personal attitudes of the responsible politicians in the Member States,<sup>9</sup> but it will be

<sup>1</sup> M Leonard, *Why Europe Will Run the 21<sup>st</sup> Century* (Fourth Estate 2005) 7.

<sup>2</sup> E Balibar, ‘Europe Is a Dead Political Project’ (25 May 2010) *The Guardian* [www.theguardian.com](http://www.theguardian.com).

<sup>3</sup> AK Mangold, ‘How Corona Aggravates the Crisis of the European Union and Threatens its Existence: Call for European Democratic Solidarity’ (6 April 2020) *Verfassungsblog* [verfassungsblog.de](http://verfassungsblog.de); J Rankin, ‘Coronavirus Could be Final Straw for EU, European Experts Warn’ (1 April 2020) *The Guardian* [www.theguardian.com](http://www.theguardian.com).

<sup>4</sup> *Inter alia* EO Eriksen, ‘An Emerging European Public Sphere’ (2005) *European Journal of Social Theory* 343; A Føllesdal and S Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) *JComMarSt* 533; D Grimm, ‘Jetzt war es soweit’ (18 May 2020) *Frankfurter Allgemeine Zeitung* [www.faz.net](http://www.faz.net).

<sup>5</sup> EO Eriksen, ‘An Emerging European Public Sphere’ cit. 343.

<sup>6</sup> D Grimm, ‘Jetzt war es soweit’ cit.

<sup>7</sup> A Føllesdal and S Hix, ‘Why There Is a Democratic Deficit in the EU’ cit. 551 ff.; F de Witte, ‘Interdependence and Contestation in European Integration’ (2018) *European Papers* [www.europeanpapers.eu](http://www.europeanpapers.eu) 488 ff.

<sup>8</sup> D Grimm, ‘Does Europe Need a Constitution?’ (1995) *ELJ* 295 ff.; A Wilkens, ‘Europe Needs Another Cultural Revolution. But Who Would Lead it?’ (13 November 2019) *The Guardian* [www.theguardian.com](http://www.theguardian.com).

<sup>9</sup> J Habermas, *The Lure of Technocracy* (Polity 2015) 73 ff.



argued that the EU's current legal framework prevents crucial institutional developments that could help legitimise EU law.

For this purpose, the *Article* will first provide a normative explanation of the generation of legitimate laws in democratic states (section II). It relies on a discourse-theoretical model that emphasizes the importance of public spheres in the legitimisation of state action. This model will then be applied to the EU to set out how European public spheres can be created (section III). The existing institutions of the EU will be evaluated against this backdrop which shows the particularly weak role of European political parties (section IV). Building on that, this *Article* will propose changes to the legal status of political parties in the EU which would allow them to become communicative actors at the EU level, help to create European public spheres, and legitimise EU law (section V).

## II. THE IMPORTANCE OF THE PUBLIC SPHERE FOR THE DEMOCRATIC LEGITIMACY OF LAW

The normative justification of state institutions and of the laws they enact is a question at the heart of political and legal theory.<sup>10</sup> Scholars have attributed a significant role in the exercise of authority by the people to the existence of a public sphere (*Öffentlichkeit*).<sup>11</sup> It describes, in a simplified way, "a sociological aggregate of readers, viewers or citizens, that excludes no one *a priori* and is endowed with key political and critical powers".<sup>12</sup>

One of the most advanced concepts of the public sphere focusses on the importance of deliberation, an idea that was established in several publications by Jürgen Habermas. His considerations focus on the process of public deliberation that takes place in the public sphere. For a functioning democratic process that produces reasonable results, the power structure of the State must relate to other "discursive arenas".<sup>13</sup> It is the public sphere with its deliberation processes that links civil society to the power structure of the State.<sup>14</sup>

Discourse in the public sphere is of particular importance for legitimising laws enacted by state institutions. The continuous process of deliberation in the public sphere allows for different fragmentations to come into conflict, get coordinated, and resolved.<sup>15</sup> Democratic legitimacy of law then does not stem from the participation of citizens in the law-

<sup>10</sup> EO Eriksen, 'An Emerging European Public Sphere' cit. 342; U Schliesky, *Souveränität und Legitimität von Herrschaftsgewalt* (Mohr Siebeck 2004) 149 ff.

<sup>11</sup> J Durham Peters, 'Distrust of Representation: Habermas on the Public Sphere' (1993) *Media, Culture and Society* 542 ff., with an analysis of the terminology.

<sup>12</sup> *Ibid.* 543 ff.

<sup>13</sup> J Habermas, *Europe: The Faltering Project* (Suhrkamp 2008) 158 ff.

<sup>14</sup> EO Eriksen, 'An Emerging European Public Sphere' cit. 358.

<sup>15</sup> I Spiecker, 'Kontexte der Demokratie: Parteien, Medien und Sozialstrukturen' (2018) *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)* 35.

making processes but rather “from the formation of opinions and wills that can meet the claim of approval in rational free debate”.<sup>16</sup> The democratic procedure draws its legitimizing force from the general accessibility of this deliberative process whose structure provides the basis for an expectation of rationally acceptable results.<sup>17</sup>

Habermas himself understands that his reliance on the discourse-generated reasonableness requires the institutionalisation of different types of discourse, and the democratic process must be organized and conducted.<sup>18</sup> Such an institutionalised public sphere is not an entity existing prior to decision-making bodies or independently of decision-making agencies. Historically, it developed after freedom rights were granted by modern constitutions; the public sphere thus became the vehicle to test the legitimacy of new legal provisions and a counterweight to governmental power.<sup>19</sup> Consequently, the public sphere cannot be conceptualised as an entity simply waiting to be discovered. It rather must be created and emerges in opposition to the power structure of the State.<sup>20</sup> Thus, the creation of the public sphere calls for the existence of certain institutions to allow for and steer the deliberation process.

One necessary institution for the continued processes of deliberation in the public sphere is the existence of a media system. The mass media, as a whole, permit public spheres to emerge by enhancing the context and range of communication.<sup>21</sup>

Political parties are another important feature of the deliberation process in democratic societies. Political competition fosters debate, which subsequently promotes the formation of public opinion on different policy options.<sup>22</sup> An institutional design that allows political parties to compete and provide opportunities to articulate different positions will result in a firmer legitimacy of laws. In consequence, for Habermas, the public sphere “first and foremost [requires] the initiative, the enlightenment and organizational capacity of political parties”.<sup>23</sup>

<sup>16</sup> EO Eriksen, ‘An Emerging European Public Sphere’ cit. 347.

<sup>17</sup> J Habermas, *The Postnational Constellation. Political Essays* (MIT Press 2001) 110; cf. EO Eriksen, ‘An Emerging European Public Sphere’ cit. 347; L Mitsch, ‘Soziale Netzwerke und der Paradigmenwechsel des öffentlichen Meinungsbildungsprozesses’ (2019) Deutsches Verwaltungsblatt 811.

<sup>18</sup> J Habermas, *Between Facts and Norms* (MIT Press 1996) 110.

<sup>19</sup> EO Eriksen, ‘An Emerging European Public Sphere’ cit. 345.

<sup>20</sup> *Ibid.* 344-345; C Lefort, *Democracy and Political Theory* (Polity 1988) 37-38.

<sup>21</sup> J Durham Peters, ‘Distrust of Representation’ cit. 561.

<sup>22</sup> A Føllesdal and S Hix, ‘Why There is a Democratic Deficit in the EU’ cit. 550.

<sup>23</sup> J Habermas, *The Lure of Technocracy* cit. 78.

### III. CONCEPTUALISING EUROPEAN PUBLIC SPHERES

The focus on public discourse as a legitimizing force in democratic systems is a starting point in conceptualising the public sphere beyond the nation state.<sup>24</sup> Solely transferring the discourse-theoretical model to the EU level is, however, impracticable.

#### III.1. BARRIERS TO EUROPEAN PUBLIC SPHERES

The normative concept of democratic legitimacy through public discourse for a nation state is mainly focussed on presenting a model of *the* public sphere, leading to the impression that a singular communication network links society with the power structure of the State. This idea of one unitary communication network no longer seems appropriate, especially when considering the European context. Growing regionalism and nationalism at a sub-state level – to be observed, inter alia, in Catalonia and Scotland – creates distinctive communicate spaces below the state level.<sup>25</sup> Even in nation states presumed to have a collective identity and an interplay between the different discursive spheres, fragmented regional spheres exist and emerge. These observations indicate that an adequate normative model for the EU has to account for a plurality of public spheres; the public sphere has nowadays become “a highly complex network of various public spheres stretching across different levels, rooms, and scales”.<sup>26</sup> With a growing complexity and diversity in contemporary civil societies, “a variety of differentiated processes, forms, and *loci*” is needed to discuss emerging democratic issues.<sup>27</sup> Tendencies towards a fragmentation of public discourse have been highlighted by researchers for various countries.<sup>28</sup> Such tendencies are potentially spurred by the increased importance of digital communication spheres. Whether or not the usage of online services such as social networks does indeed (and already) have polarizing effects is empirically questionable;<sup>29</sup> it is clear that the algorithmic structuring of communication theoretically has the potential to create fragmented discussions and “echo chambers”.<sup>30</sup>

<sup>24</sup> EO Eriksen, ‘An Emerging European Public Sphere’ cit. 348.

<sup>25</sup> *Ibid.* 342, stated this tendency as early as 2005.

<sup>26</sup> *Ibid.* 345; J Habermas, *Between Facts and Norms* cit. 373 ff.

<sup>27</sup> S Benhabib, *Situating the Self* (Polity 1992) 105.

<sup>28</sup> J Bright, ‘Explaining the Emergence of Political Fragmentation on Social Media: The Role of Ideology and Extremism’ (2018) *Journal of Computer-Mediated Communication* 17 ff.; L Mitsch, ‘Soziale Netzwerke und der Paradigmenwechsel des öffentlichen Meinungsbildungsprozesses’ cit. 812 ff.

<sup>29</sup> A Sirbu, D Pedreschi, F Giannotti and J Kertész, ‘Algorithmic Bias Amplifies Opinion Fragmentation and Polarization: A Bounded Confidence Model’ (2019) *PLoS ONE* 1 ff.; JP Rau and S Stier, ‘Die Echo-kammer-Hypothese: Fragmentierung der Öffentlichkeit und politische Polarisierung durch digitale Medien?’ (2019) *Zeitschrift für Vergleichende Politikwissenschaft* 399 ff.

<sup>30</sup> S Flaxman, S Goel and JM Rao, ‘Filter Bubbles, Echo Chambers, and Online News Consumption’ (2016) *Public Opinion Quarterly* 298 ff.; J Müller, V Hösel and A Tellier, ‘Filter Bubbles, Echo Chambers, and Reinforcement: Tracing Populism’ (2020) *Election Data* arxiv.org.

Other crucial factors in this development are personal news curational practices that complement the selection through journalists and algorithms in the newsfeeds of social networks: transnational research shows that users personalize their repertoire of news by following or blocking specific outlets in social networks. This news curation has the potential to stabilize and deepen existing gaps in the opinion formation process between users; those users interested in news tend to boost news content in their newsfeeds while others that say they avoid news are limiting news in their social media feed. For the US specifically, the research shows that such news-limiting practices on social media are also linked to political extremism.<sup>31</sup>

These tendencies towards a fragmentation of the public sphere mean that at the EU level, it cannot be assumed that the creation of European institutions will result in *the* European public sphere. Rather, a network of various, partly digital, public spheres that allows the deliberation of a multitude of issues is required. But how can a diffuse and transnational network of (digital) public spheres generate a set of reasonable public opinions concerning EU policies? "How can a collection of actors be transformed into a group with a distinct collective self-understanding capable of exerting influence unless there is a sense of common mission or vision?"<sup>32</sup> A model for the EU level must be able to explain what makes the European people come together to deliberate and form their opinions in a network of (digital) public spheres while also accounting for an increasing fragmentation of deliberative processes even within nation states.

A further obstacle is connected to the focus of the concept on public discourse: as Dieter Grimm has pointed out, the communication between different people requires a common language. "Communication is bound up with language and linguistically mediated experience and interpretation of the world." In the EU there is a multitude of official languages. Grimm argues that chiefly due to that language diversity, the creation of a European public or a European political discourse is severely hampered, if not impossible.<sup>33</sup> A normative concept for the EU level must consider these communication difficulties.

### III.2. ADAPTATIONS AT THE EU LEVEL

Regarding the conditions under which the European people will come together to deliberate and form their opinions in a network of public spheres, it is important to remember that concepts for the nation state are based on the idea that the people within a state share some basic (sociocultural) characteristics; the concept of the public sphere is thus founded on the assumption that (a state's) democratic legitimation requires a certain ho-

<sup>31</sup> L Merten, 'Block, Hide or Follow – Personal News Curation Practices on Social Media' (2020) *Digital Journalism* 15 ff.

<sup>32</sup> EO Eriksen, 'An Emerging European Public Sphere' cit. 345.

<sup>33</sup> D Grimm, 'Does Europe Need a Constitution?' cit. 295-296.

mogeneity of the state-constituting people.<sup>34</sup> However, Grimm points out that such a homogeneity can have different bases. He argues that society must form “an awareness of belonging together that can support majority decisions and solidarity efforts.”<sup>35</sup> This indicates that such awareness is not connected to a common language or ethnic characteristics, but the political process. At the EU level, this awareness translates to the capacity for transnational political communication and discourse.<sup>36</sup> While this interpretation *prima facie* might appear circular in the sense that communicative processes generate both democratic legitimacy and the necessary homogeneity, it is important to consider that nation states are the result of a historical development as well,<sup>37</sup> and that their national identities did not exist naturally, but were artificially created. This means that the cultural substrate, necessary for an inclusive process of deliberation in public spheres, must not be in place before political institutions exist, but can be created through inclusive processes of opinion formation and law-making. Public spheres are thus conducive to a reflexive identity.<sup>38</sup> The self-understanding of citizens in a democratic community is understood as “the flowing contents of a circulatory process<sup>39</sup> that is generated through the legal institutionalisation of citizens’ communication”.<sup>40</sup> In the model set out in this *Article*, a certain homogeneity, *i.e.* shared (sociocultural) characteristics, can thus be created through deliberative processes, producing reasonable results. For European people to come together in inclusive processes of deliberation, an institutional structure must be in place that allows citizens to be involved in a transnational political discourse. Social integration must be fostered in the legally abstract form of political participation.<sup>41</sup> At the EU level, such a structure for political participation must also be strong enough to integrate citizens from all Member States. The legal framework must allow for an inclusive process of public deliberation that enables citizens to jointly make political decisions.

The identified problems relating to the fragmentation of public discourse are not specific to the EU level. As mentioned above, various nation states within the EU have to deal with growing regionalism and nationalism. This indicates that all democratic states and international organizations must find answers to the question how the deliberation processes in (digital) public spheres can be fostered and function under these changed circumstances. The structural issue is not situated at the EU level but a bigger (global) one,

<sup>34</sup> J Habermas, ‘Remarks on Dieter Grimm’s “Does Europe Need a Constitution?”’ (1995) ELJ 305.

<sup>35</sup> D Grimm, ‘Does Europe Need a Constitution?’ cit. 297.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* 285 ff.

<sup>38</sup> EO Eriksen, ‘An Emerging European Public Sphere’ cit. 346; see LA Friedland, T Hove and H Rojas, ‘The Networked Public Sphere’ (2006) Javnost - The Public 18 ff.: “networked public sphere systematically increases communicative reflexivity”.

<sup>39</sup> Cf. AD Murray, *The Regulation of Cyberspace: Control in the Online Environment* (Routledge-Cavendish 2006) 244 ff., with a depiction of communication as an ongoing process.

<sup>40</sup> J Habermas, ‘Remarks on Dieter Grimm’s “Does Europe Need a Constitution?”’ cit. 306-307.

<sup>41</sup> *Ibid.* 306; cf. A Føllesdal and S Hix, ‘Why There is a Democratic Deficit in the EU’ cit. 550.

with even nation states facing the emergence of a network of (digital) public spheres.<sup>42</sup> Under the changed conditions of modern communication, an institutional focus on internet communication is necessary to address potential fragmentation effects. Just like for “analogue public spheres”, the processes of deliberation in digital public spheres must be shaped in a way so that different fragmentations can come into conflict, get coordinated, and resolved.<sup>43</sup> This will require state regulation for the content review in services such as social networks to ensure a sufficient structure of the discourse. In addition, rules for the content curation in social networks should be considered, e.g. “must-carry-rules” to prevent relevant information from being overlayed by other content.<sup>44</sup> On the European level, a uniform regulatory model should be established to replace the scattered legislation by some Member States – such as the German Network Enforcement Act<sup>45</sup> or the (unconstitutional) French Avia law<sup>46</sup> –, an objective the EU will try to tackle in 2021 with its Digital Services Act.<sup>47</sup> Besides regulation, another crucial factor for shaping digital public spheres will be the presence of institutions within these digital public spheres that take part in and help to shape the discourse. The institutions of the sphere of will formation and political parties in particular need to have a strong presence within services such as social networks to steer the discourse in digital public spheres. Isolated accounts by some political parties, such as the Twitter account of the European People’s Party (EPP) with a little over 100.000 followers, are not sufficient. The (traditional) institutions of the public sphere must actively provide information in new, digital public spheres, so that the people can continue to rely on that information in their opinion formation process.<sup>48</sup>

In the outlined concept, which focusses on the accessibility of a (digital) deliberative process and its communicative context, the significance of different languages is diminished. It is not necessary for the public discourse to take place in one language, if it is institutionalised in a way that can include all European citizens across all Member States. A plurality of public spheres and languages thus does not prevent a public discourse at the European level: “[t]he public sphere comes into existence whenever and wherever all affected by general social and political norms of action engage in a practical discourse, evaluating their validity.” This means as many public spheres can exist as controversial gen-

<sup>42</sup> See *supra*, section III.1.

<sup>43</sup> See *supra*, section II.

<sup>44</sup> L. Mitsch, ‘Soziale Netzwerke und der Paradigmenwechsel des öffentlichen Meinungsbildungsprozesses’ cit. 817 ff.

<sup>45</sup> Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act, NetzDG), BGBl. 2017 I, 3352.

<sup>46</sup> EDRI, ‘French Avia law declared unconstitutional: what does this teach us at EU level?’ (24 June 2020) edri.org.

<sup>47</sup> European Commission, *The Digital Services Act: ensuring a safe and accountable online environment* ec.europa.eu.

<sup>48</sup> Cf. U. Schliesky, ‘Digitalisierung – Herausforderung für den demokratischen Verfassungsstaat’ (2019) *Neue Zeitschrift für Verwaltungsrecht* 700, referring to the State as a “guarantor for information”.

eral debates about the validity of norms are conducted.<sup>49</sup> If a transnational communication between citizens about the validity of EU policies can be legally institutionalised, European public spheres will emerge even if the communication happens in different languages. Digital public spheres can play a vital role for transnational communication if institutions are present to steer the discourse. Additionally, the growing multilingualism of EU citizens works in favour of European public spheres. Research points to an increasing knowledge of foreign languages in the EU: 65 per cent of EU citizens know at least one foreign language,<sup>50</sup> and more than half of EU citizens can speak English.<sup>51</sup> Language diversity does thus not prevent or no longer prevents the creation of European public spheres. European public spheres can be created through the legal institutionalisation of inclusive transnational processes of opinion formation and law-making.

#### IV. *STATUS QUO* OF EUROPEAN PUBLIC SPHERES

Since the creation of European public spheres is generally possible, one has to wonder why scholars – still and more than ever – highlight the legitimacy deficit of EU law.<sup>52</sup> An analysis of the EU's institutions present in the different communicative spheres will show what issues have hindered deliberation processes at the EU level so far.

##### IV.1. INSTITUTIONS OF THE EU'S SPHERE OF WILL FORMATION

The EU's power structure is shaped by the interplay between European Parliament (EP), European Council, and European Commission. While the EP forms a possible key institution for an institutionalized discourse in the sphere of will formation that can receive input from (possible) public spheres,<sup>53</sup> critics have pointed out for a long time that its role is limited due to the dominance of the European executive. As long as the EP was equipped with weak competences and the European Council made key political decisions about the orientation of the Union, it could not be seen as having a strong influence in decision-making processes.<sup>54</sup> However, it must be noted that the competences of the EP were extended substantially with the changes to the European treaties. Its role was transformed from a consultative assembly to a decisive figure among the top EU institutions, equipped with a great proportion of law-making responsibilities.<sup>55</sup> The

<sup>49</sup> S Benhabib, *Situating the Self* cit. 105.

<sup>50</sup> Eurostat, '65% know at least one foreign language in the EU' (26 September 2018) ec.europa.eu.

<sup>51</sup> European Commission, *Europeans and their Languages* op.europa.eu.

<sup>52</sup> See *supra*, section I.

<sup>53</sup> J Habermas, *Europe: The Faltering Project* cit. 159-160.

<sup>54</sup> EO Eriksen, 'An Emerging European Public Sphere' cit. 353; D Grimm, 'Does Europe Need a Constitution?' cit. 283; J Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' cit. 303.

<sup>55</sup> PM Huber, 'Art. 14 EUV' in R Streinz (ed.), *EUV/AEUV* (CH Beck 2020) para. 2 ff.; cf. A Føllesdal and S Hix, 'Why There is a Democratic Deficit in the EU' cit. 535.

EP has progressively developed into a more properly integrated Parliament with increased powers in legislation, the budgetary process and economic governance.<sup>56</sup> It has also become more involved in the process of appointing the European Commission.

The Commission as the EU's executive branch is responsible to the EP pursuant to art. 17(8) TEU. Because the president of the Commission is elected by the EP and the other members of the Commission require its vote of consent (art. 17(7) TEU), the EP has a decisive role in the appointment process for the Commission and thereby mediates democratic legitimacy.<sup>57</sup> Responding to suggestions from scholars that an opportunity for voters to choose between candidates for executive offices at the European level might strengthen the Commission's – and the Parliament's – legitimacy,<sup>58</sup> the election of the president of the Commission was politically linked to the elections to the EP by nominating lead candidates (*Spitzenkandidaten*) for European parties at the 2014 and 2019 parliamentary elections.<sup>59</sup> However, the process was discarded in 2019 when the European Council did not propose the lead candidate of the EP, Manfred Weber, but then German Minister of Defence Ursula von der Leyen as candidate for president. That course of action clearly showed that the European Council remains at the political and legal centre of the EU<sup>60</sup> and potentially disturbed the institutional balance in the long term.<sup>61</sup> Despite increased competences of the EP, its deliberative processes can still be trumped by the decisions of the Council, thus calling into question whether these processes warrant the presumption that its outcomes are reasonable products of a sufficiently inclusive deliberative process in the EU's sphere of will formation. The persistent dominance of the EU Council can thereby weaken the legitimacy of EU law.

This weakness of the EP is, however, not equivalent to illegitimate EU law. The public spheres as the intermediary systems between civil society and the power structure of the state were identified as the key discursive spheres with particular importance for legitimising laws.<sup>62</sup> Even if the sphere of will formation at the EU level only includes weak institutions – as shown for the EP –, the legitimacy of EU law still predominantly depends on an accessible discourse in the public spheres. Well-developed public spheres between the

<sup>56</sup> A Héritier, 'The Increasing Institutional Power of the European Parliament and EU Policy Making' (2017) EIF Working Papers 3 ff.; G De Angelis, 'Political Legitimacy and the European Crisis: Analysis of a Faltering Project' (2017) European Politics and Society 294.

<sup>57</sup> D Kugelman, 'Art. 17 EUV' in R Streinz (ed.), *EUV/AEUV* (CH Beck 2020) para. 119.

<sup>58</sup> A Føllesdal and S Hix, 'Why There Is a Democratic Deficit in the EU' cit. 552; cf. D Kugelman, 'Art. 17 EUV' cit. para. 119.

<sup>59</sup> S Fotopoulos, 'What Sort of Changes Did the *Spitzenkandidat* Process Bring to the Quality of the EU's Democracy?' (2019) European View 194.

<sup>60</sup> A Gray, J Barigazzi and M de La Baume, 'Who Killed the *Spitzenkandidat*?' (5 July 2019) Politico [www.politico.eu](http://www.politico.eu); PM Huber, 'Art. 14 EUV' cit. para. 5.

<sup>61</sup> Editorial, 'The European Parliament at the First Crusade' (2019) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 423 ff.

<sup>62</sup> See *supra*, section II.



EU institutions and the people can thus (partly) compensate for the intrinsic deficits in the sphere of will formation. Although the weakness of the EP hinders its legitimacy, EU law can still draw legitimatizing force from the general accessibility of the deliberative process in public spheres. The structure of these public spheres grounds an expectation of rationally acceptable results. Therefore, the key element of assessing the legitimacy of EU law is the examination of the link between the EU institutions and civil society.

#### IV.2. THE EUROPEAN MASS MEDIA

Looking at the institutions for possible European public spheres, different opinions exist regarding the role of the mass media system. Based on his argument about language diversity,<sup>63</sup> Grimm stated in 1995 that prospects for a European communication system are “non-existent”. An increased reporting on European topics in national media could not establish a European discourse as those remain attached to national communication habits.<sup>64</sup> This argument about national media no longer necessarily holds true today. It was already argued that when the legitimacy of law is largely based on the accessibility of a deliberative process and its communicative context, the significance of different languages is diminished.<sup>65</sup> Therefore, the public discourse does not need to take place in one language and through purely European mass media for it to create transnational public spheres. If the discourse is institutionalised so that it is accessible in different languages but across all Member States, a multitude of public spheres in which discourse about EU policies takes places (in different languages) can be created. National mass media can focus on the same issues in different languages and foster a public discourse. To this effect, research suggests that a greater convergence in journalistic reporting exists, meaning “there is something approaching a common experience for European journalism.” Journalists across the EU are highlighting many of the same problems and share a common understanding of their roles.<sup>66</sup> An example can be seen in the transnational media coverage of the EU's policies following the spread of Covid-19, with mass media across different Member States and language areas striking very similar, critical tones.<sup>67</sup> The fact that the EP picked up on that criticism and demanded additional oversight for the EU recovery

<sup>63</sup> See *supra*, section III.1.

<sup>64</sup> D Grimm, ‘Does Europe Need a Constitution?’ cit. 295.

<sup>65</sup> See *supra*, section III.2.

<sup>66</sup> P Statham, ‘Making European News’ in R Koopmans and P Statham (eds), *The Making of a European Public Sphere* (Cambridge University Press 2010) 148.

<sup>67</sup> T Boucart and L Elliott, ‘The Coronavirus Crisis Has Brought the EU's Failings into Sharp Relief’ (29 March 2020) *The Guardian* [www.theguardian.com](http://www.theguardian.com); Franceinfo, ‘Coronavirus : quatre signes de l'impuissance de l'Union européenne face à l'épidémie de Covid-19’ (9 April 2020) [www.francetvinfo.fr](http://www.francetvinfo.fr); N Schmidt and P Pena, ‘Wie die EU in der Coronakrise versagt’ (23 March 2020) *Der Tagesspiegel* [www.tagesspiegel.de](http://www.tagesspiegel.de).

plan agreed upon by the European Council<sup>68</sup> exemplifies that (convergent) national mass media coverage can impact the deliberations in the EU's sphere of will formation. In light of these developments, it can be argued that the transnational infrastructure on which a European mass media system could be build is no longer totally absent.

Despite some encouraging tendencies, however, the actual acceptance of existing structures by the European population remains low. The market share of Pan-European services such as ARTE and Euronews remains very low.<sup>69</sup> Consequently, the current European media debates are not inclusive and elicit little public interest.<sup>70</sup> The same holds true for online services, with Europeanised communication on the internet being characterized by strong elite biases.<sup>71</sup> Uniform European regulation of digital spheres like social networks remains in the development stage, with national institutions trying to exert their influence on these spheres.<sup>72</sup> A strong presence of the EU institutions as well as European political parties in social networks is necessary to ensure that deliberation processes in digital spheres can link civil society to the power structure of the State.

In determining expectations for European mass media, the commercial character of press companies must be borne in mind. The primary role of mass media as institutions of public spheres is to provide information and to expose potential deficits at the EU level, thereby contributing to Europeanised communication. Their duty is not, however, to bridge the gap between the EU's sphere of will formation and EU citizens, with this task being firmly located within the political system.<sup>73</sup> Drawing a conclusion from an institutional perspective, parts of a European mass media network are there, but their structure is not strong enough to create European public spheres; the primary role in creating European public spheres cannot rest with the mass media.

#### IV.3. THE EUROPEAN PARTY SYSTEM

European political parties are given an important task in the Treaties of the European Union, with art. 10(4) TEU stating that “[p]olitical parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Un-

<sup>68</sup> European Parliament Resolution 2020/2732(RSP) of 23 July 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020.

<sup>69</sup> C Bailey, ‘Democracy as Ideal and Practice: Historicizing the Crisis of the European Union’ in GM Genna, TO Haakenson and IW Wilson (eds), *Jürgen Habermas and the European Economic Crisis* (Routledge 2016) 28-29.

<sup>70</sup> P Statham, ‘What Kind of Europeanized Public Politics?’ in R Koopmans and P Statham (eds), *The Making of a European Public Sphere* (Cambridge University Press 2010) 299 ff.

<sup>71</sup> R Koopmans and A Zimmermann, ‘Transnational Political Communication on the Internet’ in R Koopmans and P Statham (eds), *The Making of a European Public Sphere* (Cambridge University Press 2010) 194.

<sup>72</sup> See *supra*, section III.2.

<sup>73</sup> P Statham, ‘Making European News’ cit. 147 ff., pointing out a shared transnational understanding by journalists to this effect.

ion.” Their capacity to fulfil that function have, however, been scarcely developed. Political parties at the European level are limited to combining the representatives and functionaries of national political parties and bundling up their existing concepts.<sup>74</sup> They are not independent political actors but alliances of national parties. In the past elections to the EP, European voters didn’t have any ideas about the programmes of the main parties on election day.<sup>75</sup>

The current role of European political parties is a consequence of their legal conception: art. 2 of the Regulation (EU, EURATOM) 1141/2014 of the EP and of the Council on the statute and funding of European political parties and European political foundations, based on art. 224 TFEU, defines “political parties” as an association of citizens which pursues political objectives, and which is either recognised by, or established in accordance with the legal order of at least one Member State. It further defines “European political parties” as political alliances between cooperating parties. Art. 3 of that Regulation establishes conditions such alliances must meet to be recognised at the European level: most important, the national member parties must be represented in at least one quarter of Member States by members of the EP, in the national parliaments, regional parliaments, or in the regional assemblies. Alternatively, the European political party or its members must have received in at least one quarter of the Member States at least three percent of the votes cast in each of those Member States at the most recent EP elections. The requirement to be represented in numerous national parliaments or to have received a vote in the European elections in numerous Member States prevents newly founded parties from being recognised at the European level, restricting political competition among the parties.<sup>76</sup>

The legal framework does not only restrict the establishment of European political parties, but also sets out the parameters for their funding. Art. 3(1)(e) of the Regulation 1141/2014 stipulates that European political parties must not pursue profit goals, severely restricting their financial leeway. While the Regulation includes provisions about the funding of European political parties from the general budget of the EU, only parties which are represented in the EP by at least one of its members (*i.e.* a national party) can apply for funds pursuant to art. 17(1) of the Regulation 1141/2014. 90 per cent of EU funding is distributed in proportion to a party’s share of elected members of the EP among the beneficiary European political parties (art. 19 of the Regulation 1141/2014). The combination of these provisions significantly hinders access to funds for smaller parties, especially those not yet represented in the EP. In addition, possible financing from the EU budget is subject to a relative ceiling of 90 per cent of eligible costs according to art. 17(4) of the Regula-

<sup>74</sup> PM Huber, ‘Art. 10 EUV’ in R Streinz (ed), *EUV/AEUV* (CH Beck, 3rd edn 2020) para. 67.

<sup>75</sup> M Nettesheim, ‘Art. 10 EUV’ in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 2020) para. 114; P Statham, ‘What Kind of Europeanized Public Politics?’ cit. 304.

<sup>76</sup> PM Huber, ‘Art. 10 EUV’ cit. para. 64.

tion, meaning that European political parties must, in principle, come up with a share of ten per cent on their own for each grant. Since it is difficult for European political parties conceptualised as alliances between cooperating national parties to generate revenue on their own, this requirement restricts their room for manoeuvre.<sup>77</sup>

Considering the restrictive legal framework, it is unsurprising that the amount of funding available to European political parties is rather low. In 2020, the maximum funding that could be awarded to all European political parties combined pursuant to Regulation 1141/2014 was at approx. 41.8 million euros, with the EPP as the largest party in the EP receiving approx. 11 million euros.<sup>78</sup> Consequently, the campaign expenditure of the European parties is significantly lower than the corresponding campaign expenditure of their national members.<sup>79</sup> In the campaigns before the elections to the EP, European political parties face considerable challenges to spread their political messages: While they are responsible for distributing election materials and organising events,<sup>80</sup> their limited resources and the effort necessary to coordinate the different interests of the national parties makes it difficult for them to become strong communicative actors in the public sphere.<sup>81</sup> In contrast to national political parties, European political parties possess neither the necessary rights nor the funding that would allow them to permanently communicate to civil society. The consequence is that there is no Europeanised party system, just alliances of national parties in the Strasbourg parliament that loosely cooperate.<sup>82</sup> This is reinforced by research analysing the voting behaviour of Members of the European Parliament (MEPs): while their ideology – shown by their party affiliation in the EP – primarily drives their voting, findings show that national interests and country-level economic variables also predict MEPs' votes.<sup>83</sup> With European political parties being defined as political alliances between cooperating national parties, the institutional structure fosters such a high relevance for national interests.

Political parties, as crucial institutions in creating public spheres and maintaining public discourse by steering the opinion exchange, are absent at the EU level, and the legal framework prevents changes to this *status quo*.

<sup>77</sup> J. Schmälter and S. Haußner, 'Die Finanzierung des Europawahlkampfes' (2 May 2019) Bundeszentrale für politische Bildung [www.bpb.de](http://www.bpb.de).

<sup>78</sup> European Parliament, *Funding from the European Parliament to political parties at European level per party and per year* [www.europarl.europa.eu](http://www.europarl.europa.eu).

<sup>79</sup> J. Schmälter and S. Haußner, 'Die Finanzierung des Europawahlkampfes' cit.

<sup>80</sup> S. Fotopoulos, 'What sort of changes did the *Spitzenkandidat* process bring to the quality of the EU's democracy?' cit. 199 ff.

<sup>81</sup> *Ibid.*

<sup>82</sup> D. Grimm, 'Does Europe Need a Constitution?' cit. 294.

<sup>83</sup> E. Cengiz and L. Sabani, 'Voting Behaviour in the European Parliament and Economic Governance Reform: Does Nationality Matter?' (2017) *Open Economies Review* 967 ff.

## IV.4. THE IMPACT OF THE NON-EXISTENT PARTY SYSTEM

Under the outlined normative concept of democratic legitimacy, political parties were identified as key institutions for the creation of public spheres. At the EU level specifically, a shared political culture was highlighted as the foundation for the development of a necessary homogeneity.<sup>84</sup> The absence of a European party system fundamentally impacts the political discourse at the EU level. A link between institutionalized debates – the EU's power structure – and civil society is missing. The topics debated in institutions such as the EP cannot be filtered and transmitted into European public spheres.<sup>85</sup> With the structural attachment of European political parties to national political parties that relegates them to the role of “branch offices”,<sup>86</sup> a void between the sphere of will formation and civil society exists. The lack of interest for European mass media services shows that the missing link cannot be created by the media alone, as a transnational discourse also requires the initiative and capacities of political parties.<sup>87</sup> The intermediate structures necessary for transnational binding debates are lacking at the EU level.<sup>88</sup>

The absence of real European political parties directly affects the legitimacy of decisions taken by the EU's institutions in the sphere of will formation. In elections to the EP, national parties compete on the basis of the performance of their national governments.<sup>89</sup> With only alliances of national parties competing in elections and loosely co-operating in the EP, even the participants in debates within the Parliament are not genuine European actors. Without a link to civil society and opportunities for transnational discourse, European legal acts overwhelmingly derive their legitimacy from the democratic legitimation of the national governments.<sup>90</sup> Consequently, the EU lacks democratic substance even though democratic forms are present.<sup>91</sup>

With the lack of democratic legitimacy of the European Parliament and the European Commission, European integration has been pushed forward not least by the CJEU. Its decisions to declare the primacy of EU law and broadly interpret the free movement provisions have advanced European integration. However, this means that crucial political decisions are taken in an apolitical mode, barring the participation of other EU bodies as well as civil society.<sup>92</sup> EU law operates in isolation from the institutional process

<sup>84</sup> See *supra*, section III.2.

<sup>85</sup> EO Eriksen, ‘An Emerging European Public Sphere’ cit. 355.

<sup>86</sup> P Mair, *Ruling the Void* (Verso 2013) 93.

<sup>87</sup> J Habermas, *The Lure of Technocracy* cit. 78.

<sup>88</sup> EO Eriksen, ‘An Emerging European Public Sphere’ cit. 343.

<sup>89</sup> A Føllesdal and S Hix, ‘Why There is a Democratic Deficit in the EU’ cit. 535 and 552; D Grimm, ‘Jetzt war es soweit’ cit. 9.

<sup>90</sup> D Grimm, ‘Does Europe Need a Constitution?’ cit. 284.

<sup>91</sup> *Ibid.* 293.

<sup>92</sup> D Grimm, ‘Jetzt war es soweit’ cit. 9; F de Witte, ‘Interdependence and Contestation in European Integration’ cit. 484.

that was meant to ensure congruence.<sup>93</sup> People who favour an alternative set of policy outcomes to the current EU policies have no visible “opposition”.<sup>94</sup>

The legitimacy deficit and the lack of possibility to contest EU policies became apparent in the past decade during times of political crisis.<sup>95</sup> During the euro crisis, scholars pointed out that without existing pressure from civil society after an opinion-formation through European public spheres, an unrestrained European executive does not have the power and the interest to regulate markets in a socially responsible way.<sup>96</sup> Strict legality serves as the main resource of legitimacy for EU policies. In responding to the Covid-19 pandemic and its economic fallout, this led to an EU focus on explaining its lack of competence in health matters, without attempting to tap into alternative resources of legitimacy, causing criticism in heavily affected EU countries.<sup>97</sup>

#### IV.5. INTERIM CONCLUSION

The absence of real European political parties is a crucial factor for the legitimacy deficit of the EU. Without them, European public spheres cannot be created successfully, leaving a void between its procedures of will formation and civil society. The lack of a European party system also affects the EU's other institutions, as the will formation in the European Parliament is deficient without real parties as parliamentary actors. Because of the EU's legitimacy deficit, some scholars argue that competences must be transferred back to national parliaments, as only the national political spheres are sufficiently sophisticated to allow for meaningful political expression by the citizens.<sup>98</sup> European integration is seen, in the words of *Wolfgang Streeck*, as a “modernization project that has ceased to be modern, and whose last chance to become democratic has long been missed”.<sup>99</sup> This rollback of EU competences is unnecessary if a modification of the role of political parties in the EU can help to overcome the lack of connection between the EU's power structure and the public.<sup>100</sup> The analysis shows that attempts to address the EU's legitimacy deficit must alter the role of European political parties.

<sup>93</sup> F de Witte, ‘Interdependence and Contestation in European Integration’ cit. 485.

<sup>94</sup> A Føllesdal and S Hix, ‘Why There is a Democratic Deficit in the EU’ cit. 549.

<sup>95</sup> AK Mangold, ‘How Corona Aggravates the Crisis of the European Union and Threatens its Existence’ cit.

<sup>96</sup> J Habermas, ‘Demokratie oder Kapitalismus? Vom Elend der nationalstaatlichen Fragmentierung in einer kapitalistisch integrierten Weltgesellschaft’ (2013) *Blätter für deutsche und internationale Politik* 62.

<sup>97</sup> C Mac Amhlaigh, ‘Legitimacy in the Time of Coronavirus’ (17 April 2020) *Verfassungsblog verfassungsblog.de*.

<sup>98</sup> R Bellamy and D Castiglione, ‘Three Models of Democracy, Political Community and Representation in the EU’ (2013) *Journal of European Public Policy* 218; F de Witte, ‘Interdependence and Contestation in European Integration’ cit. 503.

<sup>99</sup> W Streeck, ‘Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas’ (2014) *Constellations* 218.

<sup>100</sup> Cf. A Føllesdal and S Hix, ‘Why There is a Democratic Deficit in the EU’ cit. 553.

## V. A NEW ROLE FOR POLITICAL PARTIES IN THE EU

Based on the established structural deficits of the European legal framework for political parties, a proposal to free European political parties from their constraints will be developed, aiming to improve the democratic legitimacy of EU law.

### V.1. A MODEL FOR THE EUROPEAN LEVEL: POLITICAL PARTIES AS COMMUNICATIVE ACTORS

To allow political parties to perform a mediatory role and link citizens in the social sphere to the procedures of will formation at the EU level, they must no longer be seen as service providers to the EU's executive. When highlighting the important role of political parties as institutions of the public sphere, Habermas has pointed to the concept of art. 21 of the German Basic Law (*Grundgesetz*, GG): parties are not only given a constitutional mandate to participate in the formation of the political will of the people, but a duty to do so.<sup>101</sup> In contrast to the state institutions, the Basic Law understands political parties (primarily) as communicative actors. They create and shape the public debate that is essential in a democracy.<sup>102</sup> Political parties are given an integrative function: internal discourse within the political parties leads to compromises that can then be passed on into the public discourse. The internal discussion and balancing of political ideas and their subsequent public distribution is thereby interrelated to the process of public opinion formation.<sup>103</sup> The integrative function is not limited to ideas but extends to personnel: parties activate and educate citizens for a participation in political life and recruit them to become party members and (potentially) run for public offices.<sup>104</sup> Art. 21(1)(2) GG protects the right to freely establish political parties. The multitude of political parties resulting from this is desired by the Basic Law, which views competition within a multi-party system (*Mehrparteienstaat*)<sup>105</sup> as a key element of the deliberation process.

This constitutional mandate for political parties to play an active (communicative) role in the opinion formation by the people is further developed in the law on political parties (*Parteiengesetz*, PartG). The key function of political parties in the democratic process requires broad publicity by the parties themselves.<sup>106</sup> Ss. 8, 9 PartG stipulate

<sup>101</sup> J Habermas, *The Lure of Technocracy* cit. 78.

<sup>102</sup> S Augsberg, 'Die politischen Parteien als zentrale Akteure des demokratischen Wettbewerbs' (2018) JURA 1111.

<sup>103</sup> W Kluth, 'Art. 21 – Parteien' in V Epping and C Hillgruber (eds), *Beck'scher Online-Kommentar Grundgesetz* (CH Beck 2019) para. 74 ff.; M Schröder, '§ 119 - Stellung der Parteien' in D Merten and H-J Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa* (CF Müller 2013) 119 para. 21 ff.

<sup>104</sup> M Schröder, '§ 119 - Stellung der Parteien' cit. 119 para. 20.

<sup>105</sup> *Ibid.* para. 14 ff., 48 ff.

<sup>106</sup> HH Klein, 'Art. 21 – Parteien' in T Maunz and G Dürig (eds), *Grundgesetz Kommentar* (CH Beck 2020) para. 316 ff.

that a general meeting (*Parteitag*) of the party members must be held at least every two years; the general meeting forms the supreme body of a political party. S. 6(3) PartG requires the executive board of a party to inform the Federal Election Commissioner about the statute and programme of the party. These specifications can be seen as a direct implementation of the constitutional requirement in art. 21(1)(4) GG according to which the internal organisation must conform to democratic principles: political parties are public actors who must organise their internal deliberation procedures in a corresponding manner. S. 1(2) PartG adds that political parties contribute to the will formation of the people by promoting the active participation of citizens in political life and training citizens capable of assuming public responsibilities, showing a direct link between political parties and civil society. Art. 21 GG thus imposes mandatory (communicative) duties on political parties, and the legal framework is designed to give them the rights and obligations necessary so the parties fulfil this duty<sup>107</sup> – which is of a fundamental importance for a functioning public discourse.

Adequate funding for political parties also plays a decisive role in the fulfilment of their constitutional duty. The financing of German political parties essentially rests on three pillars: membership fees, donations, and contributions from state resources. The total amount of financial resources available to the parties through these three pillars is substantial,<sup>108</sup> especially when compared to European political parties.<sup>109</sup> Considerable state resources are disbursed to allow German parties to fulfil their constitutional duty. In 2018, the governing Christian Democratic Union (CDU) reported revenue of approx. 147 million euros, of which about 56 million euros (38,1 per cent) came from state funding.<sup>110</sup> The party with the smallest parliamentary group in the *Bundestag*, Alliance 90/The Greens (*Bündnis 90/Die Grünen*) still reported revenues of approx. 48 million euros, with 19 million euros (39,7 per cent) stemming from state funding.<sup>111</sup> Pursuant to s. 18(4) PartG, every party that received at least 0.5 per cent of the votes in a nationwide election or 1 per cent of the votes in a state election has a right to receive state funding. Criteria for the amount of state funds disbursed to each party are their success in past elections and the amount of membership fees and donations raised. This means that political parties receive funds *pro rata* for every valid vote cast for them and for every euro raised by them in membership fees and donations.<sup>112</sup> The combination of a (relatively) low threshold to access state funding and the consideration of party success in the calculation ensures that smaller par-

<sup>107</sup> *Ibid.* para. 162.

<sup>108</sup> *Ibid.* para. 408.

<sup>109</sup> See *supra*, section IV.3.

<sup>110</sup> BT-Drs. (*Bundestag* parliamentary material) 19/16760 3.

<sup>111</sup> *Ibid.*

<sup>112</sup> See in detail R Streinz, 'Art. 21 – Parteien' in HV Mangoldt, F Klein and C Starck (eds), *Grundgesetz Kommentar* (CHBeck 2018) para. 197 ff.



ties can receive funds and bigger parties receive the resources which reflect their importance in the political process (and the public discourse).

Under the German Basic Law and the PartG, political parties are not designed as supporters or extensions of the state's power structure, but independent intermediaries in a free and inclusive public discourse.<sup>113</sup> They mediate between the spheres of informal public communication, on the one hand, and the institutionalised deliberation and decision processes, on the other.<sup>114</sup>

## V.2. CHANGING THE ROLE OF EUROPEAN POLITICAL PARTIES

Building upon the model of the German Basic Law, constraints on political parties in EU law must be removed to allow them to act in a similar way. Comprehensive changes to Regulation 1141/2014 of the Statute on European Political Parties<sup>115</sup> are necessary. European political parties must no longer be defined as alliances of (national) political parties. An option to register political parties with European legal personality and independently of a link to existing national parties should be created.<sup>116</sup> The constraints on European political alliances in art. 3 of that Regulation, requiring them to be represented in assemblies in Member States or to have received a vote share in multiple Member States in the last elections to the European Parliament, must be reduced or removed altogether.

An example that illustrates the existing space for European political parties is the initiative of *Volt Europa*. Founded in 2017 as a Pan-European progressive political movement, it aims to strengthen the EU by empowering its citizens.<sup>117</sup> Under the current legal framework, the Pan-European initiative can only compete in elections to the EP by founding separate parties in the different Member States, which resulted in *Volt Europa* winning one seat only in Germany in the 2019 elections.<sup>118</sup> A newly-conceptualised Regulation for European political parties would allow political initiatives such as *Volt Europa* to be recognised as a party and no longer uphold the dominance of established national political parties.<sup>119</sup> European political parties should also be allowed to admit citizens as party members directly without the legal involvement of national political parties.<sup>120</sup> These new-style European political parties – equipped with European legal

<sup>113</sup> Federal Constitutional Court judgment of 19 July 1966 BVerfGE *Parteienfinanzierung I* 20, 56, 101; Federal Constitutional Court judgement of 24 July 1979 BVerfGE 2. *Parteispenden-Urteil* 52, 63, 83.

<sup>114</sup> J Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' cit. 306.

<sup>115</sup> See *supra*, section IV.3.

<sup>116</sup> C Franzius and UK Preuß, *Die Zukunft der Europäischen Demokratie* (Nomos 2012) 124-125; F de Witte, 'Interdependence and Contestation in European Integration' cit. 507.

<sup>117</sup> Volt Europa, 'The Amsterdam Declaration' [www.volteuropa.es](http://www.volteuropa.es).

<sup>118</sup> European Parliament, '2019 European election results – Germany' (24 June 2019) [europarl.europa.eu](http://europarl.europa.eu).

<sup>119</sup> C Franzius and UK Preuß, *Die Zukunft der Europäischen Demokratie* cit. 125.

<sup>120</sup> *Ibid.*

personality – should be allowed to compete in elections to the European Parliament in all Member States. Overall, European political parties would then be conceptualised as transnational actors with a democratic internal structure that could nominate candidates for the European Parliament in all Member States.<sup>121</sup>

Besides legal rights, European political parties must also be given sufficient funding to act as strong (communicative) institutions. At the moment, they are almost entirely dependent on funding from the general budget of the EU. Art. 17(4) of the Regulation 1141/2014 limits the financial contributions or grants from the general budget of the EU to 90 per cent of the annual reimbursable expenditure of a European political party. Since it is difficult for European political parties conceptualised only as alliances of national parties to raise funds independently, this effectively limits the total amount of funds available to a party. To allow for the improved funding of political parties that also places them closer to EU citizens, the process of receiving donations must be simplified. The current limit for donations of 18.000 euros per year and per donor, set out in art. 20(1) of the Regulation 1141/2014, should be increased. While this will give raise to fears about cases of fraud<sup>122</sup> and too much influence by lobbyists, such developments can be prevented through effective and transparent law enforcement; such fears cannot justify an underfunding of political parties by default. Maintaining the current concept that provides for a very limited funding of European political parties and sets a tight cap on donations would uphold the *status quo*. With restricted resources, it will be very difficult for European political parties to emerge as communicative actors. To strengthen new European political parties instead of restricting them, parties not yet represented in the EP should also be given access to funding.<sup>123</sup> The creation of a funding system that is acceptable to the European Council and the European Commission and also improves the financial situation of political parties will require compromises, and the realization of a substantial increase in funds will probably require a long period of time. But for European political parties to be able to create European public spheres, the current funding framework must be changed.

It should be noted that the proposed framework significantly lowers the hurdles for the establishment of European political parties. Such a change to the Regulation would presumably result in more European political parties being registered and competing in the elections to the European Parliament. One could fear that such an increase will lead to a fragmentation of the European Parliament and impair its functionality.<sup>124</sup> The ob-

<sup>121</sup> *Ibid.*

<sup>122</sup> European Council, 'EP Elections: EU Adopts New Rules to Prevent Misuse of Personal Data by European Political Parties' (19 March 2019) [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>123</sup> Cf. C Franzius and UK Preuß, *Die Zukunft der Europäischen Demokratie* cit. 125.

<sup>124</sup> Such fears are often raised in the context of the (national) electoral law for the elections to the European Parliament; see Federal Constitutional Court judgement of 26 February 2014 BVerfGE *Drei-*

jective of protecting the operating conditions of the European Parliament cannot, however, stifle all attempts to achieve a stronger legitimacy of EU law from the start. A lively and legitimate democracy requires party diversity.<sup>125</sup> Further changes to electoral law for the elections to the European Parliament based on art. 223 TFEU, such as transnational electoral lists,<sup>126</sup> could complement the new role for European political parties. The feasibility of such reforms is questionable, as changes to the electoral law require an approval of the Member States' parliaments.<sup>127</sup> In contrast, art. 10(4) TEU, in combination with art. 224 TFEU, allow the EU to change the Regulation governing political parties at the European level. This means that the EU itself has the competence to take a step towards a more vivid European democracy and towards the creation of European public spheres. The EU can amend the legal framework to overcome the piecemeal design of the European political structure and design a coherent framework for European political parties. A functioning European party system is a central component of democracy at EU level. The EU thus has the competence to create a transnational party system without being limited due to already existing national party systems.<sup>128</sup>

The objective of realizing the legitimising potential of political parties beyond the existing structures in the different Member States does not mean that all connections between the national parties and the EU level should be cut. Instead, European political parties should act as a network of parties and – now as legally independent actors – maintain their cooperation with national parties.<sup>129</sup> The legal framework must allow for reciprocal effects and reinforcement between the parties on the two levels. It must therefore allow for European citizens to join both a national and a European political party. The establishment of cooperation structures like joint party conferences could be explicitly provided for in a new Regulation. European political parties can thereby ensure the existence of the necessary link to the Member States. With their focus on the EU level, European political parties can make sure that the electoral lists for the elections to the European Parliament are no longer (predominantly) drawn up based on national interests.<sup>130</sup> They can pick up ideas from the national public spheres while also injecting European ideas into the national discourse.

The amended legal framework for European political parties would allow them to act independently of national parties. They could integrate the opinions of European citizens, discuss them internally and present a European viewpoint on EU policy issues in different

*Prozent-Sperrklausel Europawahl* 135, 259, 293 ff., deciding that the German electoral threshold of 3 per cent for the 2014 European Parliament election was unconstitutional.

<sup>125</sup> C Franzius and UK Preuß, *Die Zukunft der Europäischen Demokratie* cit. 127-128.

<sup>126</sup> *Ibid.* 119 ff.; F de Witte, 'Interdependence and Contestation in European Integration' cit. 507.

<sup>127</sup> PM Huber, 'Art. 223 AEUV' in R Streinz (ed), *EUV/AEUV* (CH Beck 2020) para. 9 ff.

<sup>128</sup> C Franzius and UK Preuß, *Die Zukunft der Europäischen Demokratie* cit. 125.

<sup>129</sup> *Ibid.* 127-128.

<sup>130</sup> *Ibid.* 128.

Member States and in different languages. Issues would no longer be presented to civil society by national political parties through a national lens; EU issues would no longer be falsified into national issues.<sup>131</sup> These new European political parties could present a real European perspective through their members in debates in the European Parliament and outside of it. With their initiative and organizational capacities, European public spheres could be created, and a Pan-European discourse be steered.<sup>132</sup>

## VI. CONCLUSION

Unlike in 1995, when Dieter Grimm identified language as the biggest obstacle to a Europeanisation of the political process,<sup>133</sup> the absence of a European party system has been revealed as the current key obstacle that stands in the way of that objective in 2021. With European political parties being conceptualised as service providers and organizationally tied to national parties, no connection between the EU's sphere of will formation and civil society exists. Without a strengthening of the legal position and the funding of European political parties, it will be difficult to increase the legitimacy of EU policies and law. A change to the EU's legal framework that no longer constrains European political parties is necessary. This allows the parties to become institutions that generate debate and contestation about politics in the EU.<sup>134</sup> Such parties can create European public spheres and help to overcome the legitimacy deficit of the EU; they can be especially helpful as institutions that shape the discourse in digital public spheres. European political parties arguing about the long-term orientation of European policy can help to reduce the dangerous divide that has emerged between the EU's power structure and European civil society.<sup>135</sup> The desirable outcome can be a firmer and stronger legitimacy of EU law.

<sup>131</sup> J Habermas, 'Demokratie oder Kapitalismus?' cit. 70.

<sup>132</sup> J Habermas, *The Lure of Technocracy* cit. 78.

<sup>133</sup> See *supra*, section III.1.

<sup>134</sup> A Føllesdal and S Hix, 'Why There is a Democratic Deficit in the EU' cit. 554.

<sup>135</sup> C Franzius and UK Preuß, *Die Zukunft der Europäischen Demokratie* cit. 126-127.



## ARTICLES

# IN LIMBO: DIVERGENT CONCEPTUALISATIONS OF ILL-TREATMENT BY EUROPEAN COURTS AND THE CREATION OF NON-REMOVABLE MIGRANTS

DIEGO GINÉS MARTÍN\*

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ABSTRACT: Arts 2(f) and 15(b) of the EU Qualification Directive confer subsidiary protection to those third-country nationals in respect of whom there are substantial grounds to believe that, if expelled, would face a real risk of suffering “torture or inhuman or degrading treatment or punishment”. These provisions mirror the wording and risk-assessment criteria of art. 3 of the European Convention on Human Rights. This *Article* explores the possibility that protection from expulsion under art. 3 of the Convention is not followed by the award of subsidiary protection under EU law, leading to limbo-like situations of non-removability. By analysing the text of the Directive and the jurisprudence of both the Court of Justice of the EU and the European Court of Human Rights, and putting a particular emphasis on the case of *MP* (C-353/16 ECLI:EU:C:2018:276), this *Article* shows an asymmetric dialogue between both courts in this field. By ruling that, in medical cases, applicants will need to be intentionally deprived of treatment in the country of origin in order to access subsidiary protection, the Court of Justice attaches a narrower scope to the very same concept and leaves the door open to situations of non-removability. This *Article* contends that the Directive allows for a different interpretation that captures the most recent developments of the principle of *non-refoulement*.

KEYWORDS: expulsion – *non-refoulement* – subsidiary protection – inhuman or degrading treatment – intentional deprivation – non-removability.

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## I. INTRODUCTION

By non-removable migrants, this *Article* refers to those third-country nationals (TCNs) who are in an irregular situation but that, due to the existence of diverse “obstacles”, cannot be removed from the host State. Non-removability thus derives from the simultaneous presence of an “illegal stay”,<sup>1</sup> and an obstacle precluding the removal of the person concerned.

This issue is only marginally dealt with by the Directive 2008/115 (Return Directive), despite the fact that its recital 12 reads that “[t]he situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed”.<sup>2</sup> Whereas the general non-binding clause of art. 6(4) notes that Member States *may* grant a residence permit at any time due to “compassionate, humanitarian or other reasons”, the Directive does not include an obligation to do so if return proves to be impossible in practice.

The impossibility of returning irregular migrants can be due to human rights and humanitarian considerations, practical circumstances and technical reasons, or policy choices not to return.<sup>3</sup> This *Article* examines one of the so-called humanitarian or legal obstacles to removal, namely the legal obligation not to remove a person under European Human Rights Law. In particular, it analyses the situation of those TCNs who hold a human rights-based claim to remain in the host State under art. 3 of the European Convention on Human Rights (ECHR), but who are not recognised as refugees or beneficiaries of subsidiary protection under the Directive 2011/95/EU (hereinafter Qualification Directive or simply QD).<sup>4</sup>

Section II begins with an overview of the European Court of Human Rights’ (ECtHR) case law on art. 3 of the Convention as a *non-refoulement* obligation. It does so by emphasising the inclusion of purely situational cases in applications concerning ill persons, focusing on the Grand Chamber’s ruling of *Paposhvili* in particular.<sup>5</sup>

Section III then compares art. 3 ECHR with the protection afforded under art. 15 of the Qualification Directive, putting a particular emphasis on art. 15(b) (whose wording and risk assessment criteria are based on art. 3 of the Convention), and discusses the arguments against a coordinated interpretation of both provisions. Section IV reflects on

<sup>1</sup> This is defined at the EU level in art. 3(2) of the Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying Third-Country Nationals (TCN), as the presence of a TCN who “does not fulfil, or no longer fulfils the conditions of [...] entry, stay or residence”.

<sup>2</sup> Recital 12 of the Directive 2008/115 cit.

<sup>3</sup> European Agency for Fundamental Rights, Fundamental Rights of Migrants in an Irregular Situation in the European Union, fra.europa.eu.

<sup>4</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

<sup>5</sup> ECtHR *Paposhvili v Belgium* App n. 41738/10 [13 December 2016].

the consequences that the current non-harmonised approach has in terms of non-removability in light of the *MP v Secretary of State for the Home Department* case<sup>6</sup> (hereinafter *MP*) and, more generally, in light of the interaction of the Court of Justice of the EU (CJEU) with the Convention and the jurisprudence of the ECtHR. It is finally argued that the Directive allows for a different interpretation of subsidiary protection that captures the latest developments of the principle of *non-refoulement*.

## II. ART. 3 ECHR AS AN OBSTACLE TO DEPORTATION

### II.1. *SOERING* AND BEYOND: ABSOLUTE PROTECTION UNDER THE ECHR

The principle of *non-refoulement*, first envisaged in the 1951 Convention Relating to the Status of Refugees,<sup>7</sup> has been expanded by different instruments under International Human Rights Law. In the European context, the ECtHR has consistently interpreted art. 3 of the Convention as a non-removal clause since the seminal case of *Soering* in 1989.<sup>8</sup> Despite the fact that art. 3 of the Convention simply states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment” and does not make explicit reference to the prohibition of *refoulement*, the Court ruled that the extradition of the applicant to face the death row in the United States would be “contrary to the spirit and intendment of the Article”. As a result, art. 3 included an obligation not to extradite if there were “substantial grounds” to believe that there was a “real risk” that treatment proscribed by art. 3 would have followed upon the removal of the applicant.<sup>9</sup>

Since *Soering*, the Court has maintained that the principles and reasoning there articulated not only apply to cases of extradition but to any form of expulsion,<sup>10</sup> consistently highlighting the absolute and non-derogable nature of States’ *non-refoulement* obligations. It is because of this, that the Court has offered protection under its non-removal case law to former refugees whose legal residence was withdrawn due to criminal convictions,<sup>11</sup> or international criminals accused of terrorist acts, irrespective of the applicant’s conduct and the nature of the offence committed,<sup>12</sup> among others.

It is also due to the absolute nature of *non-refoulement* that the Court decided to abandon the idea that State actors must be the source of the alleged risk in *H.L.R. v France* and

<sup>6</sup> Case C-353/16 *MP* ECLI:EU:C:2018:276.

<sup>7</sup> General Assembly, Convention Relating to the Status of Refugees [1951] (Refugee Convention).

<sup>8</sup> ECtHR *Soering v the United Kingdom* App n. 14038/88 [7 July 1989].

<sup>9</sup> *Ibid.* para. 91.

<sup>10</sup> ECtHR *Cruz Varas and Others v Sweden* App n. 15576/89 [20 March 1991] paras 69-70.

<sup>11</sup> ECtHR *Ahmed v Austria* App n. 25964/94 [17 December 1996].

<sup>12</sup> ECtHR *Saadi v Italy* App n. 37201/06 [28 February 2008].

subsequent jurisprudence.<sup>13</sup> In these cases, the Court positioned itself with the so-called “protection view” (as opposed to the “accountability view”), according to which the accountability of a State is not a necessary condition to grant international protection.<sup>14</sup>

As regards the substantive conceptualisation of torture or inhuman or degrading treatment or punishment, the Court has extended its scope to the death penalty, situations of indiscriminate violence and medical cases. Concerning the death penalty, the Court made explicit in *Al-Saadoon* that the transfer of the applicants to Iraqi authorities to face a *real risk* of being condemned to death penalty and executed had violated their rights under art. 3 of the Convention.<sup>15</sup> The Court has also observed a violation of art. 3 in the return of TCNs to situations of indiscriminate violence in the country of origin. In *NA v the United Kingdom* (hereinafter *NA*), the Court stressed that it had never excluded the possibility that a situation of generalised violence in a country of destination reached such a level of intensity as to entail that any removal to that country or region would necessarily be in breach of art. 3 of the Convention,<sup>16</sup> but it did not provide any further guidance and it finally decided the case based on a series of individual risk factors. It was in *Sufi and Elmi* that the Court found that the situation of indiscriminate violence in Somalia was of such intensity that any person being returned to Mogadishu would be at risk of suffering inhuman or degrading treatment solely on the basis of their presence there.<sup>17</sup>

## II.2. FROM INFLICTED TO SITUATIONAL RISKS: CASES OF ILLNESS AND *NON-REFOULEMENT*

In addition to the case law described above, the Court has ruled that, exceptionally, art. 3 can prevent removal in cases of illness. Already in 1997, the Court stressed in *D v the United Kingdom* (hereinafter *D*) that it was not precluded from examining a claim under art. 3 in medical cases where the risk stemmed from factors that did not directly or indirectly engage the responsibility of State (or non-State) actors in the country of origin.<sup>18</sup> However, the Court established a very restrictive approach, to the extent that some authors questioned

<sup>13</sup> ECtHR *H.L.R. v France* App n. 24573/94 [29 April 1997]. In the same line, see: ECtHR *Salah Sheekh v the Netherlands* App n. 1948/04 [11 January 2007] para. 163; ECtHR *Sufi and Elmi v the United Kingdom* App n. 8319/07 [28 June 2011] para. 213.

<sup>14</sup> B Vermeulen, T Spijkerboer, K Zwaan and R Fernhout, ‘Persecution by Third Parties’ (1998) Nijmegen University Centre for Migration Law 10-17; C Phuong, ‘Persecution by Third Parties and European Harmonization of Asylum Policies’ (2001) Georgetown Immigration Law Journal 81.

<sup>15</sup> ECtHR *Al-Saadoon and Mufdhi v the United Kingdom* App n. 61498/08 [2 March 2010] para. 144. It must be recalled that in *Soering* it was not the death penalty in itself, but the “death-row phenomenon” that amounted to proscribed ill-treatment.

<sup>16</sup> ECtHR *NA v the United Kingdom* App n. 25904/07 [17 July 2008] para. 115.

<sup>17</sup> *Sufi and Elmi v the United Kingdom* cit.

<sup>18</sup> ECtHR *D v the United Kingdom* App n. 30240/96 [2 May 1997] para. 115.



the absolute nature of the provision in this field.<sup>19</sup> In *N v the United Kingdom* (hereinafter *N*) the Court, arguably concerned about the budgetary burden that an expansive interpretation would place upon States,<sup>20</sup> and probably reluctant to offer generous protection in cases involving purely situational risks with no specific actors involved in the causing of the harm,<sup>21</sup> denied protection to the applicant and reiterated that art. 3 of the Convention only precludes removal in cases of illness under very exceptional circumstances. Although the applicant was suffering from an advanced state of AIDS, which decreased her life expectancy from decades to less than a year if returned, the Court determined that the applicant was “stable” and “fit to travel” and authorised her expulsion to Uganda, where she died a few months later.<sup>22</sup> Despite the Court’s claim that medical cases involving situational risks were included under the umbrella of the Convention due to the absolute nature of *non-refoulement*, these were *de facto* excluded, tacitly concurring with the theory that those risks who do not stem from the acts of States or non-State actors are not worthy of protection.<sup>23</sup> In practice, this meant that every case that had sought to rely on the virtually impossible to reach threshold set in *N* for cases of illness was rejected by the Court.<sup>24</sup>

The case law of the Court changed drastically in 2016 under the Grand Chamber judgment of *Paposhvili*, where the threshold of severity was significantly lowered to a wider array of less exceptional circumstances. Under *Paposhvili*, the removal of a seriously ill person will be contrary to art. 3 if there are substantial grounds to believe that the applicant, “although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy”.<sup>25</sup> As a result, if States find that this lowered (yet still high) standard of ill-treatment would be reached upon removal, they will now be obliged not to remove the TCN concerned even in the absence of an imminent risk of death.

*Paposhvili* can thus be seen as the logical consequence of the Court’s “protection view”, which now finally recognises the absolute nature of *non-refoulement* regardless of the source of ill-treatment. The approach of the Court under *N* in which ill migrants were sent to perhaps not immediate, but certain death, was surely difficult to reconcile with the Court’s commitment to absolute and non-derogable protection from expulsion. The

<sup>19</sup> C Bauloz, ‘Foreigners: Wanted Dead or Alive? Medical Cases Before European Courts and the Need for an Integrated Approach to Non-Refoulement’ (2016) *European Journal of Migration and Law* 409.

<sup>20</sup> ECtHR *N v the United Kingdom* App n. 26565/05 [27 May 2008] para. 44.

<sup>21</sup> C Bauloz, ‘Foreigners’ cit. 414.

<sup>22</sup> *N v the United Kingdom* cit. paras 12, 17, 47.

<sup>23</sup> K Greenman, ‘A Castle Build on Sand? Article 3 ECHR and the Source of Risk in *Non-Refoulement* Obligations in International Law’ (2015) *IJRL* 266.

<sup>24</sup> ECtHR *Yoh-Ekale Mwanje v Belgium* App n. 10486/10 [20 December 2011]; *Paposhvili v Belgium* cit.

<sup>25</sup> *Paposhvili v Belgium* cit. para. 183.

*de facto* non-application of this general principle in cases of illness is thus to be considered as an anomaly which was finally addressed by the Court in *Pasposhvili*.

### II.3. WHAT NEXT? *NON-REFOULEMENT* AND NON-REMOVABILITY

The ECtHR has consistently noted, firstly, that the obligations enshrined in the Convention do not (quite evidently) contain a right to asylum,<sup>26</sup> and secondly, that the protection against expulsion does not provide the necessary legal basis for any type of residence permit. This could be observed in *Ahmed v Austria*, where the Court protected the applicant against expulsion but noted that the applicant's status as a refugee (withdrawn due to criminal convictions) fell beyond its jurisdiction.<sup>27</sup> Moreover, in *SJ* the Court stressed that the fact that a person cannot be expelled does not mean that he or she can claim entitlement to medical, social or other forms of assistance provided by the expelling State.<sup>28</sup> This has also been made clear by the Court in numerous cases concerning so-called "undesirable and unreturnable" migrants, where it has consistently declared their claims to regularisation on the basis of art. 3 and art. 8 of the Convention inadmissible.<sup>29</sup>

There is, in this context, a gap between refugee protection as defined in the Refugee Convention, which is subject to derogations and requires the persecution of the applicant to be based on Convention grounds for refugee law to apply,<sup>30</sup> and the situations covered under art. 3 ECHR, which merely require a *real risk* of torture or inhuman or degrading treatment upon removal as interpreted by the Court. This unbalanced interaction between different supranational systems of norms effectively addresses the human rights concerns in the country of origin while giving rise to a new set of challenges in the host country as a result of migrants' prolonged irregular statuses,<sup>31</sup> to the extent that a mi-

<sup>26</sup> ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011] para. 38. See also *Ahmed v Austria* cit. para. 38.

<sup>27</sup> *Ahmed v Austria* cit. paras 35-38.

<sup>28</sup> ECtHR *SJ v Belgium* App n. 70055/10 [19 March 2015].

<sup>29</sup> By "undesirable and unreturnable" this *Article* refers to those TCNs who have committed, or are suspected of having committed particularly serious crimes (normally in connection with art. 1(f) of the Refugee Convention), but who cannot be removed because their deportation would be contrary to art. 3 ECHR. See: DJ Cantor, JV Wijk, S Singer and MP Bolhuis, 'The Emperor's New Clothing: National Responses to "Undesirable and Unreturnable" Aliens under Asylum and Immigration Law' (2017) *Refugee Survey Quarterly* 1. For an extensive analysis of the Court's jurisprudence in this field, see: MB Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 442-481.

<sup>30</sup> These are race, religion, nationality, membership of a particular social group or political opinion (art. 1(a)(2) of the Refugee Convention).

<sup>31</sup> For further insight on how the vulnerability deriving from irregularity can itself amount to inhuman or degrading treatment, read: D Acosta, 'The Charter, Detention and Possible Regularization of Migrants in an Irregular Situation under the Returns Directive: *Mahdi*' (2015) *CMLRev* 1361.

grant's state of destitution in the host country can in itself amount to inhuman or degrading treatment according to the ECtHR.<sup>32</sup>

It is precisely due to the lack of capacity of the Geneva Convention to provide a comprehensive and up-to-date response to contemporary patterns of forced migration, that this gap was filled (as this *Article* argues, only partially) by EU law through the Qualification Directive. Under this Directive, subsidiary protection aims at complementing the narrow refugee definition by granting asylum not only to refugees, but also to other persons "genuinely in need of international protection".<sup>33</sup>

### III. THE SCOPE OF SUBSIDIARY PROTECTION UNDER THE DIRECTIVE 2011/95

There is, from the EU legislator, a declared intention to complement and add to the Refugee Convention.<sup>34</sup> According to art. 2(f) of the Qualification Directive, a person will be eligible for subsidiary protection if there are *substantial grounds* to believe that, if returned to the country of origin, he or she would face a *real risk* of suffering "serious harm". Art. 15 defines serious harm as consisting of: "(a) the death penalty or execution; or: (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or: (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".<sup>35</sup>

Therefore, in arts 2(f) and 15 the Directive adopts, for subsidiary protection, Strasbourg's risk assessment criteria for non-removal cases, namely the existence of; *substantial grounds* to believe that there is a *real risk* of suffering *serious harm* in the country of origin upon removal. The criteria as to what a serious harm is also correspond, in essence, to the jurisprudence of the ECtHR, which now adopts a wide concept of inhuman or degrading treatment that not only includes art. 15(b) of the Directive, but also the death penalty (*Al-Saadoon*) and situations of generalised violence in the country of origin (*Sufi and Elmi*).

The Qualification Directive was praised by the literature as the first supranational instrument covering international protection beyond the Refugee Convention,<sup>36</sup> as well as a remarkable effort to afford status to many migrants in need of international protection which would otherwise become non-removable.<sup>37</sup> Indeed, the Directive, although less ambitious than the original proposal,<sup>38</sup> still provided a human rights-refugee law nexus. In this

<sup>32</sup> Although the case did not affect an irregular migrant buy an asylum seeker, see reasoning in *M.S.S. v Belgium and Greece* cit.

<sup>33</sup> Recital 12 of the Directive 2011/95 cit.

<sup>34</sup> *Ibid.* recital 33.

<sup>35</sup> *Ibid.* art. 15.

<sup>36</sup> H Storey, 'EU Refugee Qualification Directive: A Brave New World?' (2008) IJRL 1.

<sup>37</sup> C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2005) 139.

<sup>38</sup> G Noll, 'Fixed Definitions or Framework Legislation? The Delimitation of Subsidiary Protection *Ratione Personae*' (2002) UNHCR Working Papers 55.

line, recital 34 enunciates that the criteria to determine an applicant's eligibility for subsidiary protection should be drawn from international obligations under human rights instruments.<sup>39</sup> More specifically, recital 48 suggests that the implementation of the Directive should be evaluated regularly considering the evolution of States' obligations regarding *non-refoulement*. This, together with the fact that the Directive borrowed the notion of *serious harm* and the risk-assessment criteria from the ECHR, suggests that the legislator aimed at a coherent interpretation of both provisions, particularly as to what amounts to a real risk of suffering torture or inhuman or degrading treatment, in order to fill the gap of those potentially left in a legal limbo under Strasbourg's non-removal case law. Nevertheless, the jurisprudence of the Court of Justice shows that it may not always be the case (see *infra* sections III.2 and IV).

Before the adoption of the Directive, non-removal under art. 3 ECHR did not guarantee any legal status, but it would merely classify the person, in the absence of domestic forms of protection,<sup>40</sup> as irregular and non-removable. Under the current framework, non-removability will depend on whether art. 15 of the Directive has a wider, narrower or equivalent scope than that of Strasbourg's jurisprudence on art. 3, as analysed above. Non-removability may thus derive (among other reasons)<sup>41</sup> from the interaction of EU asylum law and European Human Rights if the scope of application of subsidiary protection becomes narrower than that of art. 3 ECHR.

I hereby argue that, even if arts 15(a) and 15(c) can potentially be interpreted differently to art. 3 ECHR due to the principle of autonomy of EU law, it is the difference between Luxembourg's and Strasbourg's understandings as to what amounts to a real risk of suffering torture or inhuman or degrading treatment (art. 15(b)) that endangers a harmonised interpretation of EU asylum law and European Human Rights law the most.

### III.1. SUBSIDIARY PROTECTION UNDER ARTS 15(A) AND 15(C)

The situations covered by art. 15(a) and (c) QD, which provide subsidiary protection in cases of death penalty and situations of indiscriminate violence respectively, are also included under art. 3 ECHR following *Al-Saadoon* and *Sufi and Elmi* (see *supra* section II.1). The inclusion of letters (a) and (c) originally aimed to go beyond ECHR obligations, as they

<sup>39</sup> Recital 34 of the Directive 2011/95 cit.

<sup>40</sup> For an overview of domestic forms of complementary protection, see: European Migration Network, *The Different National Practices Concerning Granting of non-EU Harmonised Protection Statuses* [www.refworld.org](http://www.refworld.org).

<sup>41</sup> This Article analyses the non-removability gap deriving from different interpretations of art. 15(b) QD and art. 3 ECHR, but it leaves aside the gap resulting from the application of the exclusion grounds found in art. 1(f) of the Refugee Convention and art. 17 of the Directive for persons who are non-removable. Neither does it analyse the non-removability gap which may derive from other human rights safeguards against deportation, most notably the right to respect for one's family and private life under art. 8 ECHR (art. 7 of the Charter).

were first introduced by the 2004 Qualification Directive, when Strasbourg's jurisprudence did not cover the death penalty and situations of indiscriminate violence, *per se*, within the scope of art. 3 ECHR. The maintenance of these provisions in the Directive's 2011 recast instead of their subsumption within art. 15(b) denotes the will of the legislator to stress the autonomy of EU law by not making it permeable to the evolutionary interpretation coming from Strasbourg, but casts doubts on their added value today.

In the case of art. 15(a), even if there is no CJEU jurisprudence to date, the fact that States are compelled to grant subsidiary protection to those facing a risk of being subjected to death penalty upon removal does not seem to leave much scope for divergent interpretations stemming from Luxembourg and Strasbourg as to what the death penalty actually means.

As regards art. 15(c), the CJEU ruled on the Qualification Directive for the first time in *Elgafaji*.<sup>42</sup> The Court was asked whether art. 15(c) should be interpreted as offering equal or wider protection than art. 3 ECHR and, if protection went beyond the Convention, what were the criteria determining its specific scope.<sup>43</sup> Firstly, the Court reaffirmed the autonomy of EU law by arguing that the content of the provision in question is different to that of art. 3 ECHR and that its interpretation must be carried out independently. In doing so, the Court did not actively engage with the ECHR to formulate its view, beyond noting that "it is [...] Article 15(b) of the Directive which corresponds, in essence, to Article 3 ECHR".<sup>44</sup> Whether this assertion is coherent with the Court's subsequent jurisprudence is addressed at a later stage of this *Article*.

Secondly, the Court argued that art. 15(c) covers a more general risk of harm than art. 15(a) and (b), and thus that a lesser degree of individualisation needs to be shown by the applicants.<sup>45</sup> Where no individualised risk is shown, the CJEU did not rule out the capacity of a situation of indiscriminate violence *per se* to trigger subsidiary protection, but it argued that the more the applicants are able to show that they are individually affected by the threat, the lower the level of indiscriminate violence it shall be required and vice versa.<sup>46</sup> This approach, known as the "sliding scale" test, sought to reconcile the *prima facie* irreconcilable tension between indiscriminate violence and the existence of an individualised threat which is by definition required in asylum cases.<sup>47</sup>

<sup>42</sup> For an in-depth analysis of the case, see: R Errera, 'The CJEU and Subsidiary Protection: Reflections on *Elgafaji* – and After' (2011) IJRL 93.

<sup>43</sup> Case C-465/07 *Elgafaji* ECLI:EU:C:2009:94 para. 26.

<sup>44</sup> *Ibid.* para. 28.

<sup>45</sup> *Ibid.* para. 33.

<sup>46</sup> *Ibid.* para. 39.

<sup>47</sup> E Tsourdi, 'What Protection for Persons Fleeing Indiscriminate Violence? The Impact of the European Courts on the EU Subsidiary Protection Regime' in D Cantor and J Durrieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014) 277.

It was only after *Elgafaji* that the ECtHR afforded equivalent protection against expulsion in *Sufi and Elmi*. After conducting a thorough analysis of art. 15(c) QD,<sup>48</sup> the Strasbourg Court stated that, even though it was a common assumption that the Directive offered greater protection than the Convention in situations of indiscriminate violence, it was not persuaded that art. 3 of the Convention did not offer comparable protection to that afforded by the Directive.<sup>49</sup>

As it occurred with art. 15(a), we find again a situation in which EU asylum law once envisaged a greater degree of protection, but the ECtHR has willingly caught up, in this case explicitly incorporating references to EU law into its non-removal case law. Although the added value of the art. 15(c) (and art. 15(a)) is now unclear,<sup>50</sup> the emergence of situations of non-removability beyond those resulting from the exclusion grounds of art. 17 of the Directive (which fall beyond the scope of this *Article*) does not seem likely in the near future.

### III.2. SUBSIDIARY PROTECTION UNDER ART. 15(B)

Despite the fact that both the death penalty and situations of indiscriminate violence are now included under art. 3 jurisprudence, it is art. 15(b) that incorporates the clearest expression of Strasbourg's jurisprudence on *non-refoulement*. According to art. 15(b), *serious harm* consists of "torture or inhuman or degrading treatment or punishment of an applicant *in the country of origin*" (emphasis added). However, the text of the Directive becomes ambiguous in at least two of its provisions, namely art. 15(b) itself and art. 6. The wording of these articles arguably endangers the reconciliation between subsidiary protection and *non-refoulement* and can partially shed light on the restrictive understanding of subsidiary protection provided by the Court of Justice in *M'Bodj* and *MP*, according to which the Directive does not necessarily grant subsidiary protection to those protected from expulsion under art. 3 of the Convention.

a) Torture or inhuman or degrading treatment or punishment in the country of origin.

In the Commission's proposal for a Qualification Directive, art. 15(a) (now art. 15(b)), defined *serious harm* as "torture or inhuman or degrading treatment or punishment",<sup>51</sup>

<sup>48</sup> *Sufi and Elmi v the United Kingdom* cit. paras 220-226. There is, in the judgment, a full sub-section of 3 pages entitled "The relationship between Article 3 of the Convention and article 15(c) of the Qualification Directive" where the Strasbourg Court explains in detail the relationship between both provisions.

<sup>49</sup> *Ibid.* para. 226.

<sup>50</sup> E Tsourdi, 'What Protection for Persons Fleeing Indiscriminate Violence?' cit. 279. The author wonders: "Is it still the case that Article 15(b) of the Directive cannot offer this kind of protection that the CJEU in *Elgafaji* has read into Article 15(c)?"

<sup>51</sup> Commission Proposal COM(2001) 510 final for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, art. 15(a).

mirroring the wording of art. 3. The final version slightly departed from it and was reworded in order to include the addition “in the country of origin”, casting doubts upon its scope of application.

According to McAdam, the words “in the country of origin” might indicate the intention of the legislator to obviate claims of asylum seekers which would face ill-treatment in a third country to which return may be considered.<sup>52</sup> Such an interpretation would mean that those TCNs sent back to a third-country in which they would suffer treatment contrary to art. 3 would still be protected from *refoulement* under the ECHR, but would fall outside of the scope of the Directive.

Conversely, Battjes argues that the reference to the country of origin was not added with the intention to restrict the geographical reach of subsidiary protection, but its substantive scope, so as to leave humanitarian cases beyond the reach of art. 15(b). According to him, a twofold distinction should be drawn in *non-refoulement* cases. On the one hand, “classic” asylum cases in which the applicant fears torture or inhuman or degrading treatment in the country of origin. On the other hand, humanitarian cases, where it is the withdrawal of medical treatment and the mere act of expulsion that triggers State liability under art. 3. The latter cases would thus be excluded for lack of serious harm in the country of origin.<sup>53</sup> If one looks at the micro-history of the negotiations of the Directive, the Danish Presidency of the Council seemed to support this approach in a note sent to the Strategic Committee on Immigration, Frontiers and Asylum:

“Sub-paragraph (b), which is generally supported by Member States, is based on the obligations of Member States laid down in Article 3 of the ECHR and the jurisprudence of the ECtHR. However, if sub-paragraph (b) was to fully include the jurisprudence of ECtHR relating to Article 3 of ECHR, cases based purely on compassionate grounds as was the case in *D versus UK* (1997), also known as the *Stt. Kitt's case*, would have to be included. In the *Stt. Kitts case*, although the lack of access to a developed health system as well as lack of a social network in itself was not considered as torture or inhuman or degrading treatment, the expulsion to this situation, which would have been life threatening to the concerned person, was described as such”.<sup>54</sup>

Similarly, recital 15 QD establishes that TCNs who are allowed to remain in the territory of a Member State “for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds” fall beyond the scope of the Directive. Whether this implicit dichotomy between international protection

<sup>52</sup> J McAdam, ‘The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime’ (2005) IJRL 478.

<sup>53</sup> H Battjes, *European Asylum Law and International Law* (Brill Nijhoff 2006) 236.

<sup>54</sup> Council Document 12148/02 of 20 September 2002 on a Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection 5-6.

under EU law and discretionary non-removal (which disregards States' non-removal obligations under arts 3 and 8 ECHR) is an appropriate one will be discussed below.

The Court of Justice has not so far clarified the meaning of the "in the country of origin" addition. However, the fact that it endorsed a narrow interpretation of subsidiary protection in *M'Bodj* on the basis that "its scope does not extend to persons granted leave to reside in the territories of the Member States for other reasons, that is, on a discretionary basis on compassionate or humanitarian grounds",<sup>55</sup> suggests that the Court has aligned itself with this approach. And yet, by not making an explicit reference as to what "in the country of origin" actually means, if anything at all, the Court has kept the ambiguity of the provision. In this regard, it is revealing that by 2016 (two years after *M'Bodj*) 17 out of 27 Member States bound by the Directive had not transposed the "country of origin" limitation into domestic legislation.<sup>56</sup> Moreover, it is my view that the Directive allows for a different interpretation in light of recent developments in European Human Rights Law.

Firstly, a literal interpretation of the words "in the country of origin" does not seem to endorse the above-mentioned interpretation. Even if, in medical cases, ill-treatment is performed in two acts (the withdrawal of treatment in the host country and the conditions faced upon return), this only materialises in the country of origin, as it results from the combination of individual circumstances and country (of origin) conditions. As a result, the removal will merely be the triggering factor of a risk to suffer an art. 3 violation, the effects of which will be felt in the country of origin after removal.<sup>57</sup> This position is further strengthened after *Paposhvili*. Given that now ill migrants no longer have to be facing immediate death to be afforded protection against expulsion, but "only" be in a situation where expulsion would trigger a real risk of "rapid and irreversible decline in his or her state of health resulting in intense suffering or [...] a significant reduction in life expectancy",<sup>58</sup> the prescribed ill-treatment will take place mostly, if not completely, *in* the country of origin and not immediately following the withdrawal of protection in the host State.

Secondly, the distinction between "classic" *non-refoulement* obligations and purely humanitarian cases no longer holds after *Paposhvili*, if it ever did. Indeed, under *D* and *N* the protection against expulsion in cases of illness was rather exceptional and limited to cases of "compelling humanitarian grounds".<sup>59</sup> The medical cases now covered under the jurisprudence of the ECtHR are wider in scope and by no means restricted to people who remain "on a discretionary basis on compassionate or humanitarian grounds" (excluded from the Directive under recital 15), but rather remain owing to a fully-fledged *non-refoulement* obligation under the ECHR. One wonders, however, whether medical cases were ever out of the reach of the Directive on this basis, given that, even before *Paposhvili*,

<sup>55</sup> Case C-542/13 *M'Bodj* ECLI:EU:C:2014:2452 para. 37.

<sup>56</sup> C Bauloz, 'Foreigners' cit. 437.

<sup>57</sup> *Ibid.* 425-426, 431-432.

<sup>58</sup> *Paposhvili v Belgium* cit. para. 183.

<sup>59</sup> *D v the United Kingdom* cit. para. 54.



applicants protected under art. 3 did not remain in the territory of the host State on a discretionary basis, but owing to a legal obligation not to expel them under the ECHR – and therefore fell somewhere in between international protection and discretionary non-removal. In this line, the reasoning followed by the Court in *M'Bodj* that the applicant did not fall under the Directive because he remained in the host country “on a discretionary basis on compassionate or humanitarian grounds” is valid as long as it refers to the granting of a discretionary domestic status of protection (in *M'Bodj*, indefinite leave to remain on medical grounds), but it is invalidated from the moment that the State recognises that the applicant also has protection from expulsion under art. 3 of the Convention.

*b) Serious harm and situational risks.*

The second challenge comes from art. 6 of the Directive, on actors of persecution or serious harm. This provision reads: “Actors of persecution or serious harm include: (a) the State; (b) parties or organisations controlling the State or a substantial part of the territory of the State; (c) non-State actors [...]”.

In *M'Bodj*, the Court noted that art. 6 offers a list of those deemed responsible for inflicting the harm, supporting the view that it must necessarily derive from the conduct of an actor rather than simply resulting from general shortcomings in the health system of the country of origin.<sup>60</sup> According to the Court, it follows that the deterioration of the state of health of an applicant due to the absence of treatment in the country of origin will not be worthy of subsidiary protection unless he or she is “intentionally deprived” of medical care.<sup>61</sup>

The interpretation of this provision can however vary greatly if analysed in view of asylum law and the principle of *non-refoulement*. Firstly, the wording of art. 6 does not preclude the application of subsidiary protection to cases of illness where the risks are situational rather than coming from an identifiable actor. The list provided under this provision is merely indicative as it establishes that actors of persecution or serious harm “include” States, non-State actors, and so on. Art. 7 of the Directive on actors of protection, conversely, clearly mandates that “[p]rotection against persecution or serious harm *can only be provided by* [...] the State; or [...] parties or organisations [...]” (emphasis added). As it was highlighted by the Commission in its proposal for the 2011 recast of the Directive, “[w]here the Directive establishes indicative lists, it uses terms such as ‘include’ or ‘inter alia’; therefore, the absence of such terms in Article 7 is already an indication of the exhaustive character of the list”.<sup>62</sup> Hence, the Directive offers an exhaustive list of actors of protection, but not of actors of persecution or serious harm. Neither does it mention that the risk needs to be posed by an actor at all.

Moreover, if analysed in the context of its adoption, the purpose of art. 6 was precisely to expand the scope of subsidiary protection and avoid that States opt for an “accountability” notion of asylum. As explained above, the Directive was adopted in the context of an

<sup>60</sup> *M'Bodj* cit. para. 35.

<sup>61</sup> *Ibid.* para. 36.

<sup>62</sup> Communication COM(2001) 510 final cit. 7.

intense debate between protective and accountability-based notions of asylum (see *supra* section II.1). Prior to the adoption of the Directive, many civil law jurisdictions, including France and Germany, opted for the “accountability theory”, according to which asylum was only granted when the State of origin was directly responsible for the risk of harm.<sup>63</sup> The inclusion of art. 6 thus signifies the preponderance of the so-called “protection” approach in the Directive, in accordance with the Refugee Convention and art. 3 ECHR, and contrary to other instruments like the UN Convention Against Torture (UNCAT).<sup>64</sup>

By requiring intentionality as an intrinsic feature of *serious harm*, *M'Bodj* is arguably reminiscent of the accountability theory, as it emphasises the unwillingness of States to protect while leaving aside their inability to do so.<sup>65</sup> Conversely, the principle of *non-refoulement* in the context of the ECHR, on which art. 15(b) is based, prohibits expulsion regardless of the source of the risk. Making protection dependent on the subjective element of the intentionality of the State therefore misunderstands the essence of the *non-refoulement* principle, which is based on risk-assessment and absolute protection.<sup>66</sup> More importantly, by claiming that seriously ill applicants who are non-removable under art. 3 of the Convention are not necessarily granted residence by way of subsidiary protection,<sup>67</sup> the CJEU creates a category of people who cannot be returned but who, in the absence of domestic protection, are left status-less.

Lastly, the Court's argument that recital 35 of the Directive supports its *intentional deprivation* threshold rests on poor reasoning.<sup>68</sup> Firstly, because the provision notes that the general risks to which the population is exposed will not “normally” qualify as *serious harm*, evidently allowing for exceptions, as it was already clarified by the CJEU in *Elgafaji*. Secondly, the presence of recital 35 in the Directive arguably responds to the inclusion of situations of generalised violence in the country of origin in line with *Elgafaji* and *Sufi and Elmi* (art. 15(c) QD) and was not included with medical cases in mind. Thirdly and most importantly, the serious harm in medical cases like *M'Bodj* does not respond to general risks to which the population of a country are exposed, but rather to a combination of these and the personal circumstances deriving from the illness of the applicant.

Even though the ECtHR had always left the door open to find a breach of art. 3 in purely situational cases,<sup>69</sup> the fact that it virtually kept these out of its reach meant that the difference in scope between both provisions was of little relevance in practice. It must be borne in mind that *M'Bodj* came about two years before *Paposhvili*, at a time when

<sup>63</sup> JC Hathaway and M Foster, *The Law of Refugee Status* (Cambridge University Press 2014) 303.

<sup>64</sup> General Assembly, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, UN Doc. A/RES/39/46, art. 1.

<sup>65</sup> T Wibault, ‘Is There a Space for Humanitarian Protection within Subsidiary Protection? A Reading of *M'Bodj*’ (5 February 2015) European Database of Asylum Law [www.asylumlawdatabase.eu](http://www.asylumlawdatabase.eu).

<sup>66</sup> C Bauloz, ‘Foreigners’ cit. 427.

<sup>67</sup> *M'Bodj* cit. para. 40.

<sup>68</sup> *Ibid.* para. 36.

<sup>69</sup> *D v the United Kingdom* cit. para. 49.

Strasbourg's protection from expulsion was only available for dying applicants. Nevertheless, by setting a higher standard of protection in *Paposhvili*, Strasbourg's revisiting of its non-removal case law again offers the dual outcome of setting a higher standard of protection against human rights violations in the country of origin while bringing to the surface a new series of challenges for those who might simply become non-removable. This is analysed through the case of *MP* in turn.

#### IV. INTERPRETING SUBSIDIARY PROTECTION AFTER *PAPOSHVILI*: JUDICIAL DIALOGUE AND NON-REMOVABILITY

The above-mentioned limitations of the Court's reasoning were tested in *MP*, where the Court had its first (and so far only) opportunity to revisit its jurisprudence after *Paposhvili*. In *MP*, the applicant, a victim of torture who was no longer at risk of being tortured in his home country, was afforded protection from expulsion by domestic courts, who found that his removal would amount to a violation of art. 3 ECHR considering the lack of available treatment for the applicant's depression, post-traumatic stress, and suicidal tendencies.<sup>70</sup> Nevertheless, British authorities found that subsidiary protection under the Qualification Directive was not meant to cover cases within the scope of art. 3 where the risk was to health or suicide rather than one of persecution, leading to a situation in which the applicant could neither be expelled nor have access to a residence permit by means of subsidiary protection.<sup>71</sup> The Court of Justice first built on *M'Bodj* to affirm that the fact that art. 3 ECHR precludes the removal of a TCN suffering from a serious illness does not mean that the person should be granted subsidiary protection under the Directive.<sup>72</sup> On the contrary, there needs to be a real risk of being "intentionally deprived" of appropriate health care treatment by the country of origin.<sup>73</sup>

Whereas this reasoning might have led to the dismissal of the claims of the applicant, as AG Bot suggested,<sup>74</sup> the Court decided otherwise by making explicit reference to the UN Convention Against Torture. According to the Court, in cases of (previous) torture, the victim is considered to be intentionally deprived of treatment if he or she "is at risk of committing suicide because of the trauma resulting from the torture he was subjected to by the authorities of his country of origin, [and] it is clear that those authorities, notwithstanding their obligation under Article 14 of the Convention against Torture, are not prepared to provide for his rehabilitation".<sup>75</sup> In short, the Court extends subsidiary protection not only to those cases in which the (torturer) State of origin is unwilling to provide for rehabilitation, but also to those where it is unable to do so.

<sup>70</sup> *MP* cit. para. 19.

<sup>71</sup> *Ibid.* paras 20-21.

<sup>72</sup> *Ibid.* para. 101.

<sup>73</sup> *Ibid.* paras 51-52.

<sup>74</sup> Case C-353/16, *MP* ECLI:EU:C:2017:795, opinion of AG Bot.

<sup>75</sup> *MP* cit. para. 57.

*MP* is greatly relevant for the study of non-removability through the lens of EU asylum law. Firstly because, unlike *M'Bodj*, where the applicant had already been granted indefinite leave to remain in Belgium on account of his state of health, *MP* concerned a non-removable migrant, whose non-removability precisely derived from the asymmetric interaction between the ECHR and EU asylum law. It is thus a paradigmatic example of how non-removability may occur. Secondly, because *MP* has been the first judgment adopted by the Court on the scope of subsidiary protection after *Paposhvili*, offering a unique opportunity for the Court of Justice to reassess its approach in light of the evolution of the principle of *non-refoulement*. Thirdly because the CJEU has expanded the scope of subsidiary protection, which must now be granted to torture victims if removal would result in lack of available medical care in the country of origin responsible for the torture. This applies both when the State is unwilling or unable to provide such treatment. Even though the Court has made clear that non-removal under art. 3 does not necessarily lead to subsidiary protection, it has narrowed the gap between the interpretation of both provisions by offering a lower threshold of *intentional deprivation* in cases of victims of torture. It is because of this that the judgment has been celebrated for “ensuring greater protection [...] for the most vulnerable migrants: torture victims and the terminally ill”.<sup>76</sup> Fourthly and most importantly because, far from closing the interpretative gap between both courts, the CJEU the Court upholds the standard of *intentional deprivation* and openly maintains a narrower scope for subsidiary protection than that of art. 3 ECHR.

This outcome can be better understood if analysed in light of the ambivalent approach of the CJEU towards the ECHR, where the specific position and normative value of the Convention remain ambiguous.<sup>77</sup> Indeed, the Court of Justice has long combined judgments which emphasised the relevance of the ECHR as interpreted by the Strasbourg Court,<sup>78</sup> with others that stressed that it is not formally bound by it or simply ignored the role of the Convention.<sup>79</sup> At present, the relationship between both Courts is heavily marked by the legal bindingness of the Charter of Fundamental Rights post-Lisbon and by Opinion 2/13, whereby the Court of Justice held that the draft agreement for the EU's accession to the ECHR was incompatible with art. 6(2) TEU.<sup>80</sup> In this context, and despite the mutual influence of both Courts, it has been argued that the Strasbourg Court might

<sup>76</sup> S Peers, 'Torture Victims and EU Law' (24 April 2018) EU Law Analysis [eulawanalysis.blogspot.com](http://eulawanalysis.blogspot.com).

<sup>77</sup> F Ippolito and S Velluti, 'The Relationship Between the CJEU and the ECtHR: The Case of Asylum' in K Dzehtsiarou, T Konstadinides, T Lock and N O'Meara (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge 2014) 165-166.

<sup>78</sup> See, among others: case C-94/00 *Roquette Frères* ECLI:EU:C:2002:603; case C-400/10 *J McB* ECLI:EU:C:2010:582; joined cases C-404/15 and C-659/15 *Aranyosi and Căldăraru* ECLI:EU:C:2016:198.

<sup>79</sup> Joined cases C-46/87 and C-227/88 *Hoechst v Commission* ECLI:EU:C:1989:337; case C-571/10 *Kamberaj* ECLI:EU:C:2012:233.

<sup>80</sup> Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

have seen the Charter as a way to show consensus and modernise the ECHR, whereas the CJEU has rather used it as a tool to legitimise its status and the autonomy of EU law.<sup>81</sup>

In the asylum field, and particularly after the Charter came into effect, the Court has been eager to stress the autonomy of EU law while seeking to avoid norm conflicts and reflect on the jurisprudence of the Strasbourg Court. In *N.S.*, the CJEU relied on the landmark case of *M.S.S.* in finding that art. 4 of the Charter (equivalent to art. 3 ECHR) precludes the establishment of a conclusive presumption that the responsible Member State in a Dublin transfer observes the fundamental rights of the applicant.<sup>82</sup> And yet, the CJEU's standard of proof was established autonomously and circumscribed to those situations where the requesting State "cannot be unaware" of the systemic deficiencies in the requested State – in contrast with Strasbourg's reference to a "shared burden of proof".<sup>83</sup> In *Puid*, which again scrutinised mutual trust in the context of Dublin, the Court seemed rather concerned about the consequences of a too-wide application of the *N.S.* exception, stressed the need for "systemic deficiencies" in the asylum system of the requested State, and did not include any references to the Strasbourg Court or the Convention.<sup>84</sup> This contrasts with Strasbourg's judgment in *Tarakhel* where the Court broke free from the "systemic deficiencies" approach, and required the requesting State to undertake a thorough and individualised examination of the circumstances the applicants would face upon their transfer to Italy – where the situation could "in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment".<sup>85</sup>

Going back to art. 15 QD, *Elgafaji* (see *supra* section III.1) again represents the tension between the autonomy of EU law and the respect for the Convention. In *Elgafaji*, however, the Court clarified that its interpretation was not only fully compatible with that of the Strasbourg Court at the time, but even went beyond it.<sup>86</sup> Conversely, in *M'Bodj* and (more significantly) in *MP*, the CJEU fails to meet ECHR standards.

Whereas the ECtHR had entered an explicit and thorough dialogue with the CJEU in *Sufi and Elmi*, to the extent that it justified its evolutionary interpretation of art. 3 almost exclusively on the CJEU's interpretation of the QD in *Elgafaji*, no equivalent exercise was

<sup>81</sup> D Spielman, 'The Judicial Dialogue Between the European Court of Justice and the European Court of Human Rights Or How to Remain Good Neighbours After the Opinion 2/13' (27 March 2017) FRAME [www.fp7-frame.eu](http://www.fp7-frame.eu).

<sup>82</sup> Joined cases C-411/10 and C-493/10 *N.S.* and *M.E.* ECLI:EU:C:2011:865 paras 88-92.

<sup>83</sup> S Velluti, 'Who Has the Right to Have Rights? The Judgments of the CJEU and the ECtHR as Building Blocks for a European "Ius commune" in Asylum Law' in S Morano-Foadi and L Vickers (eds), *Fundamental Rights in the EU, A Matter for Two Courts* (Hart 2015).

<sup>84</sup> Case C-4/11 *Kaveh Puid* ECLI:EU:C:2013:740. See further case C-394/12 *Abdullahi* ECLI:EU:C:2013:813. In *Abdullahi*, the Court clarified that the only way in which an asylum applicant can contest a Dublin transfer is by pleading systemic deficiencies in the asylum system of the requested MS, in a judgment with no references to the ECHR.

<sup>85</sup> ECtHR *Tarakhel v Switzerland* App n. 29217/12 [4 November 2014] para. 114.

<sup>86</sup> *Elgafaji* cit. para. 44.

made by the CJEU when it was EU law that fell short of protection *vis-à-vis* ECHR standards. Far from it, the Court made clear in *MP* that art. 15(b) does not go hand in hand with art. 3 of the Convention. Interestingly, when the Court of Justice refers to *Paposhvili* to argue in favour of the need of intentional deprivation for subsidiary protection to apply, it does so arguably misquoting the ECtHR and suggesting that Luxembourg's standards match those of the Strasbourg Court. According to the Court of Justice, "[i]t follows from the case-law of the European Court of Human Rights relating to Article 3 of the ECHR that the suffering caused by a naturally occurring illness, whether physical or mental, may be covered by that article if it is, or risks being, exacerbated by treatment, whether resulting from conditions of detention, removal or other measures, for which the authorities can be held responsible".<sup>87</sup> The Court however omits that, within the very same paragraph quoted by the CJEU, the ECtHR noted that "[the Court] is not prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country".<sup>88</sup>

It is not my contention that the Court has erred in its interpretation of art. 15(b) by ruling *contra legem* (as art. 52(3) of the Charter would in any event bind the Court in its interpretation of art. 4 of the Charter and not of art. 15(b) QD),<sup>89</sup> but rather that the Directive allowed for an interpretation that closed the existing non-removability gap arising from conflicting interpretations of human rights and asylum law provisions. As argued above, the fact that the wording and risk-assessment criteria used by the Directive in arts 15(b) and 2(f) respectively are borrowed from Strasbourg's jurisprudence on art. 3, together with the obligation to derive the scope of subsidiary protection from human rights law under recital 34, indicate a strong nexus between ECHR non-removal case law and subsidiary protection. I have argued that the wording of the Directive in arts 6 and 15(b) does not necessarily put this view into question.

Even if one accepts AG Maduro's reasoning in *Elgafaji* that a completely coherent interpretation of subsidiary protection with art. 3 is not feasible due to the non-linear, dynamic interpretation of art. 3 coming from Strasbourg,<sup>90</sup> the CJEU has unnecessarily departed from Strasbourg's criteria by adopting a threshold (*intentional deprivation*) that was strongly rejected by the ECtHR already in 1997.<sup>91</sup> It must also be borne in mind that recital 48 mandates that the implementation of the Directive be re-assessed at regular intervals taking into consideration Member States' *non-refoulement* obligations.

<sup>87</sup> *MP* cit. para. 38.

<sup>88</sup> *Paposhvili v Belgium* cit. para. 175.

<sup>89</sup> Art. 52(3) of the Charter establishes that the meaning and scope of the Charter rights which are also included in the ECHR must have at least the meaning and scope guaranteed by the Convention.

<sup>90</sup> C-465/07 *Elgafaji* ECLI:EU:C:2008:479, opinion of AG Poiares Maduro, para. 20. On the contrary, AG Trstenjak argued in *N.S.* that the reference to the ECHR in art. 52(3) is to be understood as a dynamic reference which covers the jurisprudence of the European Court.

<sup>91</sup> See *D v the United Kingdom* cit. para. 49.

This discrepancy becomes particularly relevant in the post-*Paposhvili* context, given that States' *non-refoulement* obligations in medical cases are now significantly widened and non-removability is therefore a more tangible reality. The CJEU's attempt to justify the standard of *intentional deprivation* by referring to the ECtHR remains particularly puzzling considering the latter Court's outright rejection of such standard. It is thus my view that the Court of Justice missed an opportunity to extend its "unwilling or unable" criteria used with victims of torture to its wider case law on subsidiary protection. This would have been consistent with the absolute nature of the *non-refoulement* principle (now an integral part of EU law under the EU Charter of Fundamental Rights), upon which art. 15(b) is based. The fact that the Court applied art. 15(b) to a purely situational risk in *MP* also confirms that a different interpretation of art. 6 of the Directive is not a no go.

As noted by Costello, the main significance of art. 15(b) is precisely found in "affording a status, rather than simply rendering non-removable, [to] persons in these circumstances".<sup>92</sup> The threshold of the ECtHR, significantly lowered in *Paposhvili*, requires the applicant to prove a risk of being exposed to a "serious, rapid, and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy",<sup>93</sup> yet no reference can be found as to the unwillingness of the State to provide for treatment. It is thus the potential violation as such, and not the (lack of) intentionality of the State of origin that matters. The CJEU, by adding intentionality as a necessary subjective element, compromises the scope of subsidiary protection, departs from the foundations of the *non-refoulement* principle, and allows non-removability inasmuch as it permits Member States to simultaneously observe that there is a real risk of inhuman or degrading treatment upon removal and that there is no such risk within the very same case.

Interestingly, the Court has so far been able to adopt a legal approach that gives rise to situations of non-removability while avoiding facing before it the practical consequences of its own approach. In *M'Bodj*, the migrant involved already had access to indefinite leave to remain in Belgium on account of his state of health which, although affording a narrower set of rights than subsidiary protection, did not leave him in a situation of irregularity and destitution. In *MP*, the interpretation of the Court seems to grant subsidiary protection to Mr. MP, but only because of his status as a former victim of torture. Nevertheless, torture victims aside, it is now clear that for all those cases where the return of a person would put the applicant under a risk of suffering a deterioration of his or her state of health provoking intense suffering or a significant reduction in life expectancy, protection from expulsion comes with a legal vacuum and, in the absence of a domestic status of protection, with rightlessness and destitution. More generally, this approach can potentially apply to any form of torture or inhuman or degrading treatment beyond medical cases, as the Court notes that arts 3 ECHR and 15(b) QD do not necessarily coincide.<sup>94</sup>

<sup>92</sup> C Costello, *The Human Rights of Migrants and Refugees in European Law* cit. 217.

<sup>93</sup> *Paposhvili v Belgium* cit. para. 183.

<sup>94</sup> C Costello, *The Human Rights of Migrants and Refugees in European Law* cit. 217.

#### IV. CONCLUSIONS

The ECtHR grants protection from expulsion under arts 3 and 8 of the Convention. This *Article* has explored the existing gap between art. 3 non-removal jurisprudence and EU asylum law in order to analyse the extent to which it is legally possible, under EU law, to be protected from expulsion while not being granted international protection.

Through an analysis of medical cases,<sup>95</sup> this *Article* has shown that, in interpreting what torture or inhuman or degrading treatment means, the Court of Justice has departed from ECHR standards by adopting a threshold (*intentional deprivation*) which was discarded by Strasbourg already in the 1990s. This leads to a situation where those TCNs who are non-deportable on account of their state of health, but who would not be intentionally deprived of treatment in the country of origin can be left in a legal limbo, with the exception of those covered under the narrow factual circumstances concurring in *MP*. This is particularly striking considering that art. 15(b) QD borrows its language from art. 3 ECHR, that art. 2(f) adopts the risk assessment tests used by the Strasbourg Court, that recital 34 explicitly mentions the need to draw the eligibility criteria for subsidiary protection from human rights law, and that recital 48 stresses the need to revisit the Directive considering the evolution of States' *non-refoulement* obligations. Both the text of the Directive and the generally ambivalent attitude of the CJEU towards the ECHR and the Strasbourg Court can partially account for the approach of the Court of Justice.

In practice, this gap is substantially widened after *Paposhvili*, where the ECtHR lowered the severity of ill-treatment required to protect seriously ill people from expulsion. The *Paposhvili* criteria therefore offer the dual outcome of granting TCNs greater human rights protection against expulsion while potentially (and involuntarily) leading to further situations of non-removability, generating a whole new set of human rights issues in the host country. This challenge is not necessarily restricted to medical cases, since the Court makes explicit that art. 3 of the ECHR and art. 15(b) QD do not necessarily go hand in hand. This *Article* has argued that, despite the arguments put forward by the CJEU, the Directive allows for a different interpretation in conformity with the basic pillars of *non-refoulement*.

<sup>95</sup> To date, these are the only cases dealt with by the CJEU under art. 15(b).





## ARTICLES

# THE MISLEADING CONSEQUENCES OF COMPARING ALGORITHMIC AND TACIT COLLUSION: TACKLING ALGORITHMIC CONCERTED PRACTICES UNDER ART. 101 TFEU

LUCA CALZOLARI\*

TABLE OF CONTENTS: I. Preliminary remarks. – II. The increasing attractiveness of cartels in the age of big data analytics. – III. Collusion between rational algorithms: the relation between market transparency and artificial intelligence in a world of big data. – IV. Existing vs created market conditions: tacit collusion or algorithmic concerted practices? – V. The limited role played by intent and imputability in the antitrust realm: the case of parent company liability and its applicability by analogy to the relation undertakings *vis-à-vis* algorithms. – VI. Big data analytics does create competitive concerns: should the Commission and national competition authorities *commit* to tackling algorithmic collusion? – VII. Conclusions.

**ABSTRACT:** Due to digital markets' transparency, algorithmic collusion may occur even if algorithms are designed to maximize profits rather than to conspire. The literature suggests that competition rules may not cover algorithmic collusion, being the latter an example of tacit collusion: by monitoring market conditions, each algorithm unilaterally and rationally decides to maintain supra-competitive prices. Data analytics ease the monitoring and reaction to competitors' behaviours, increasing the number of markets subject to tacit collusion. Yet, intention to conspire seems absent. In this *Article*, it is submitted that algorithmic collusion is different from tacit collusion and can be tackled under EU competition law. In the traditional scenario, undertakings base their rational decisions on the existing markets conditions. While designing their algorithms to maximize profits, undertakings are contributing to create the conditions allowing "tacit" collusion to occur. Moreover, a quasi-strict liability regime applies to antitrust offences, so that intention and imputability play limited roles. As a consequence, if algorithms programmed to maximize profits end up colluding, a rebuttable presumption of the existence of a concerted practice should apply. The practice should be prohibited unless undertakings can prove that, in the specific case, a concerted practice did not occur or that art. 101(3) TFEU applies. Moreover, competition rules may be enforced even without ascertaining any antitrust infringement. Competitive concerns are enough to adopt commitment decisions. Here, the Commission (or a National Competition Authority) may negotiate with the concerned undertakings technical remedies to prevent algorithmic collusion by intervening on the way the algorithms work.

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KEYWORDS: competition law – algorithms – algorithmic collusion – imputability – intent – commitment decisions.

## I. PRELIMINARY REMARKS

Collusion between “rational” (*i.e.*, profit maximizer) algorithms may occur even if they are not designed to conspire,<sup>1</sup> as confirmed by the economic literature.<sup>2</sup> Price-fixing could be an automatic consequence of increased market transparency caused by the big data revolution.<sup>3</sup>

<sup>1</sup> Originally described by the seminal work of A Ezrachi and ME Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press 2016), the idea that self-learning algorithms could autonomously learn to coordinate their prices even if they are not designed to collude, became an “instant classic” of the competition law discourse. In addition to being refined by the same authors (see A Ezrachi and ME Stucke, ‘Sustainable and Unchallenged Algorithmic Tacit Collusion’ (2020) *Northwestern Journal of Technology and Intellectual Property* 217; ME Stucke, ‘Pricing algorithms & collusion’ (2019) *Transactions: The Tennessee Journal of Business Law* 1113; A Ezrachi and ME Stucke, ‘Emerging Antitrust Threats and Enforcement Actions in the Online World’ (2017) *Competition Law International* 125; A Ezrachi and ME Stucke, ‘Artificial Intelligence & Collusion: When Computers Inhibit Competition’ (2017) *University of Illinois Law Review* 1775) and discussed by an ever-increasing number of scholars (see *inter alia* F Beneke and MO Mackenrodt, ‘Remedies for Algorithmic Tacit Collusion’ (2020) *Journal of Antitrust Enforcement* 1; MS Gal, ‘Algorithms as Illegal Agreements’ (2019) *Berkeley Technology Law Journal* 67; JE Gata, ‘Controlling Algorithmic Collusion: Short Review of the Literature, Undecidability, and Alternative Approaches’ (REM Lisboa Working Paper 077-2019); B Jedličková, ‘Digital Polyopoly’ (2019) *World Competition* 309; K Noethlich, ‘Artificially Intelligent and Free to Monopolize: A New Threat to Competitive Markets Around the World’ (2019) *AmUIntlLRev* 923; PG Picht and GT Loderer, ‘Framing Algorithms: Competition Law and (Other) Regulatory Tools’ (2019) *World Competition* 391; T Synder, K Fayne and K Silverman, ‘Antitrust Intelligence: Six Tips for Talking to AI Developers about Antitrust’ (2019) *Competition Law & Policy Debate* 35; S Bhadauria and L Vyas, ‘Algorithmic Pricing & Collusion; The Limits of Antitrust Enforcement’ (2019) *Nirma University Law Journal* 87; L Calzolari, ‘La collusione fra algoritmi nell’era dei big data: l’imputabilità alle imprese delle “intese 4.0” ai sensi dell’art. 101 TFUE’ (2018) *Rivista di diritto dei media* 219; JE Harrington, ‘Developing Competition Law for Collusion by Autonomous Artificial Agents’ (2018) *Journal of Competition Law & Economics* 331; U Schwalbe, ‘Algorithms, Machine Learning, and Collusion’ (2018) *Journal of Competition Law & Economics* 568; A Deng, ‘What Do We Know About Algorithmic Tacit Collusion?’ (2018) *Antitrust* 88; A Deng, ‘An Antitrust Lawyer’s Guide to Machine Learning’ (2018) *Antitrust* 82; S Li and C Chunying Xie, ‘Automated Pricing Algorithms and Collusion: A Brave New World or Old Wine in New Bottles?’ (2018) *The Antitrust Source*. Algorithmic collusion has also been the topic of a Policy Roundtable held in 2017 by the Organisation for Economic Co-operation and Development during which the representatives of several competition authorities expressed concerns about this matter.

<sup>2</sup> The conclusion that even “relatively simple pricing algorithms systematically learn to play collusive strategies” and “typically coordinate on prices that are some-what below the monopoly level but substantially above the static Bertrand equilibrium” has been empirically demonstrated, *inter alia*, by E Calvano, G Calzolari, V Denicolò and S Pastorello, ‘Artificial intelligence, Algorithmic Pricing and Collusion’ (2020) *American Economic Review* 3267, 3268.

<sup>3</sup> VM Schonberger and K Cukier, *Big Data: A Revolution that Will Transform How We Live, Work and Think* (Houghton Mifflin Harcourt 2013). See also F Di Porto, ‘La rivoluzione dei big data’ (2016) *Concorrenza e Mercato* 5.

The literature suggests that competition rules may not cover algorithmic collusion. This concern (or relief, depending on the viewpoint) stems from the observation that algorithmic collusion appears to resemble tacit collusion: by monitoring market conditions, each algorithm unilaterally and rationally decides to maintain supra-competitive prices. Data analytics eases the monitoring and reaction to competitors' behaviours, increasing the number of markets subject to tacit collusion. Yet, since algorithms were not instructed to collude, intention to conspire seems absent.

It cannot be denied that the fact that algorithms may collude simply because they were designed to maximize profits poses very complex challenges. However, it is submitted that comparing algorithmic collusion and tacit collusion may prove to be misleading. As it often happens while dealing with the manifold consequences of the big data revolution, this coupling focuses on the *quantitative* dimension of algorithmic collusion (more markets subject to tacit collusion) but it fails to take into consideration its *qualitative* dimension: while in the analogical scenario undertakings act rationally on the basis of *existing* markets conditions, in the digital scenario undertakings actively and consciously contribute to the *creation* of the conditions allowing their rational algorithms to "tacitly" collude. This difference should be duly considered in the context of the imputability of such conduct and its scrutiny under antitrust rules.

Moreover, other arguments supporting the conclusion that "cartels 4.0" can and should be ascribable to undertakings can be found within the system of EU competition law. Firstly, antitrust offences are subject to an almost strict liability regime. Under this regime there is in principle no need to prove the undertakings' intention to commit a given antitrust infringement. A particularly clear example is represented by the EU legal regime on parent company liabilities for the infringement of arts 101 and 102 TFEU.

Secondly, EU competition rules' enforcement does not always require infringements to be ascertained. For example, commitment decisions can be adopted to tackle simple *competitive concerns*. This threshold is arguably met with regard to algorithmic collusion: accordingly, the Commission and National Competition Authorities (NCAs) have at their disposal an enforcement tool that could be used regardless of the imputability of algorithms' behaviours to the undertakings and regardless of the ascertainment of the anti-competitive nature of said conducts.

After all, the diffusion of algorithmic collusion would make affected markets appear to be competitive (many players, little entry barriers, no search costs, etc.) but the market mechanism would actually be lessened or even "replaced" by big data analytics.<sup>4</sup>

<sup>4</sup> For further reference see L Calzolari, 'International and EU Antitrust Enforcement in the Age of Big Data' (2017) *Diritto del Commercio Internazionale* 855, 874. On the manifold relations between big data and competition law see generally M Maggolino, *I big data e il diritto antitrust* (Egea 2018) and ME Stucke and AP Grunes, *Big Data and Competition Policy* (Oxford University Press 2016). See also A Giannaccari, 'La storia dei Big Data, tra riflessioni teoriche e primi casi applicativi' (2017) *Mercato Concorrenza Regole* 307; DD Sokol and R Comerford, 'Does Antitrust Have a Role to Play in Regulating Big Data?' in RD Blair and DD

## II. THE INCREASING ATTRACTIVENESS OF CARTELS IN THE AGE OF BIG DATA ANALYTICS

Algorithms and data analytics may ease the execution of offences already falling within the scope of competition rules. These are the simpler cases to discuss. The literature identifies various scenarios. For example, undertakings may rely on algorithms to improve the management of a cartel.<sup>5</sup> Pricing algorithms are often quoted as a common example.<sup>6</sup> However, the issue is not new and less sophisticated software may fulfil the same purpose too.<sup>7</sup>

In a significant (and increasing) number of markets, prices are no longer fixed by humans.<sup>8</sup> Although this happens mainly on digital markets, the same may apply also to brick-

Sokol (eds), *The Cambridge Handbook of Antitrust, Intellectual Property, and High Tech* (Cambridge University Press 2017) 271; G Motta, GD Pini and G Tantulli, 'Big Data in the Framework of Antitrust Enforcement' in EA Raffaelli (ed.), *Antitrust Between EU law and National Law: XII Conference* (Larcier 2017) 399; G Colangelo, 'Big data, piattaforme digitali e antitrust' (2016) *Mercato Concorrenza Regole* 425; G Duflos and D Viros, 'The Collection, Storage and Processing of Data and Its Implications for Competition Law: Something Old, Something New' (2016) *Competition Law & Policy Debate* 4; JD Wright and E Dorsey, 'Antitrust Analysis of Big Data' (2016) *Competition Law & Policy Debate* 21; D Sokol and R Comerford, 'Antitrust and Regulating Big Data' (2016) *George Mason Law Review* 1129; A Grunes and ME Stucke, 'No Mistake About It: the Important Role of Antitrust in the Era of Big Data' (2015) *Antitrust source* 4.

<sup>5</sup> Cf. A Ezrachi and ME Stucke, *Virtual Competition* cit. 39-45.

<sup>6</sup> Algorithms may – be deemed to – play a more intensive role in antitrust offences. For example, a lawsuit has been brought against Uber in New York alleging that said platform arranged a hub and spoke cartel by coordinating drivers' prices (cf. J Nowag, 'When Sharing Platforms Fix Sellers' Prices' (2018) *Journal of Antitrust Enforcement* 382; A Ezrachi and ME Stucke, *Virtual competition* cit. 46-55). However, a different view is that online platforms and services providers are a single economic unit for the purposes of competition law (see *infra* section V).

<sup>7</sup> Already in 1994, for example, the US Department of Justice settled a case concerning an online booking system shared by several airlines which "facilitate[d] pervasive coordination of airline fares short of price fixing" (cf. US District Court for the District of Columbia judgment of 1<sup>st</sup> November 1993 836 F. Supp. 9 *United States v Airline Tariff Publishing Co.*).

<sup>8</sup> Indeed, "[t]he increasing power of computers [...] plus the growing ubiquity of the Internet, and increasingly sophisticated data-mining techniques have driven a rapid shift of pricing decisions away from human-decision makers in favor of algorithms-defined as step-by-step procedures for solving problems, especially by a computer", so that "the software programs that apply these algorithms, functioning as 'robot-sellers', can make pricing decisions autonomously" (cf. SK Mehra, 'Antitrust and the Robo-Seller: Competition in the Time of Algorithms' (2016) *Minnesota Law Review* 1323). Although in a different perspective, the issue of automated individual decision-making has been notoriously tackled by art. 22 of the so-called GDPR, according to which "[t]he data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her" (cf. 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). On this topic see, *inter alia*, A Oddenino, 'Decisioni algoritmiche e prospettive internazionali di valorizzazione dell'intervento umano' (2020) *Diritto Pubblico Comparato ed Europeo online* [www.dpceonline.it](http://www.dpceonline.it); MS Gal, 'Algorithmic Challenges to Autonomous Choice' (2018) *Michigan Telecommunication and Technology Law Review* 60; P Hacker,

and-mortar stores:<sup>9</sup> prices showed by shelves' electronic displays are increasingly updated by algorithms just as in the digital world. The aim is precisely to replicate the mechanisms allowing online platforms to dynamically update prices also in brick-and-mortar stores. This means that prices applied by online and physical stores are interconnected too.

Current technological developments blur the distinction between the analogical and the digital world. This is not the place to deal with the manifold issues arising from the development of the so-called internet of things (or internet of everything).<sup>10</sup> It may nonetheless be interesting to recall that having smart sensors inserted in virtually every object may (also) change the modalities by which prices are fixed in contexts which *prima facie* appear quite far from the digital realm.<sup>11</sup>

Algorithms continuously and dynamically update prices, basing their decisions on the incessant examination of real-time data on market conditions.<sup>12</sup> This monitoring process is carried out through specific software (called "spiders", "scrapers" or "crawlers") which are developed by the undertakings themselves or bought from third parties. In the plain-vanilla scenario a group of undertakings may simply programme their pricing algorithms to coordinate prices among themselves.<sup>13</sup>

More complex mechanisms serving the same purpose may be envisaged and, indeed, they have already been put in practice, as shown by the case law. For example,<sup>14</sup> a group of colluding undertakings may use their pricing algorithms to firstly *i*) monitor market conditions in order to spot the lowest price offered by non-colluding competitors in any given

'Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies Against Algorithmic Discrimination Under EU Law' (2018) CMLRev 1143; O Tene and J Polonetsky, 'Taming the Golem: Challenges of Ethical Algorithmic Decision-Making' (2018) North Carolina Journal of Law & Technology 125.

<sup>9</sup> Indeed, "[s]ellers use dynamic-pricing algorithms to gauge supply and demand and set prices not only for books and air tickets online, but increasingly, for consumer electronics, groceries, and other tangible goods in brick-and-mortar stores" (cf. SK Mehra, 'Antitrust and the Robo-Seller' cit. 1327).

<sup>10</sup> Cf. ME Porter, JE Heppelmann, M Iansiti and A Pentland, 'The Internet of Everything: Smart, Connected Products Will Transform your Business' (2014) Harvard Business Review 63.

<sup>11</sup> Although not directly linked with the scope of application of art. 101 TFEU, one common example is represented by vending machines which are increasingly programmed to change the price charged for the products offered (*e.g.*, a cold drink) based, *inter alia*, on weather conditions.

<sup>12</sup> According to an inquiry carried out in 2017 by the EU Commission, "53% of the respondent retailers track the online prices of competitors, out of which 67% use automatic software programmes for that purpose. Larger companies have a tendency to track online prices of competitors more than smaller ones. The majority of those retailers that use software to track prices subsequently adjust their own prices to those of their competitors (78%)" (cf. Commission Staff Working Document accompanying the Final Report on the E-commerce Sector Inquiry of 10 May 2017, document SWD(2017) 154 final para. 149).

<sup>13</sup> It has been noted that "[t]his scenario is similar to the "traditional" situation in which companies rely on an 'outsider' not only to define prices consistent with a collusive outcome but also to monitor and enforce the agreement" (cf. Autorità Garante della Concorrenza e del Mercato in OECD, Algorithms and Collusion – Note from Italy (2017) para. 11).

<sup>14</sup> See US Department of Justice Press Release, Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution (2015) [www.justice.gov](http://www.justice.gov).

moment, and then to *ii*) coordinate their behaviours in order to constantly fix their prices just below the lowest price charged by their non-colluding competitors. This result may be achieved if the colluding undertakings agree that one of them (the “sentry”) programmes its pricing algorithm to monitor market conditions and to dynamically fix its own price just below the lowest price applied by non-colluding competitors, while the other colluding undertakings (the “followers”) programme their algorithm to always match the price set by the sentry. Although somehow disguised and segmented, in this scenario the parties are executing a horizontal price-fixing agreement with the aim to avoid competition among them.

To be sure, monitoring algorithms can also be used in vertical relations as an effective method to achieve (illegal) resale price maintenance: for example, manufacturing undertakings can use algorithms to control the prices applied by their appointed retailers with the aim of keeping resale prices stable at the level that they have “recommended” to such retailers.<sup>15</sup> Such conducts are already covered by provisions on collusive behaviours, such as art. 101 TFEU. From a theoretical perspective, it is not particularly relevant that algorithms facilitate the material execution of a cartel.<sup>16</sup> What matters is the awareness of the collusion, rather than the subsequent implementation of the illicit concertation through an algorithm.<sup>17</sup>

<sup>15</sup> In a recent case, the EU Commission ascertained that “[p]rice monitoring was conducted via various means, in particular through the observation of price comparison websites and, for some product categories, by way of internal software monitoring tools that allowed Asus to identify the retailers that were selling Asus products below the desired price level which typically equalled the [recommended resale prices]. Asus was also informed about low pricing retailers via complaints of other retailers. Retailers that were not complying with the desired price level would typically be contacted by Asus and be asked to increase the price” (see Commission Decision of 24 July 2018 relating to a proceeding under art. 101 TFEU, case AT.40465 – *Asus*, C(2018) 4773 final para. 27). On the position of the French NCA with regard to a similar case concerning the sale of cars spare parts through an algorithm capable of identifying the maximum price consumers would be willing to pay for said cars parts, see D Mandrescu, ‘When Algorithmic Pricing Meets Concerted Practices - the Case of Partneo’ (June 7, 2018) CORE BLOG [www.lexxion.eu](http://www.lexxion.eu).

<sup>16</sup> Indeed, “[f]rom a legal and policy perspective, this scenario is unremarkable” considering that “[t]echnology in this case does not affect the scope and application of the law” (cf. A Ezrachi and ME Stucke, ‘Algorithmic Collusion: Problems and Counter-Measures’ (2017) OECD Roundtable on Algorithms and Collusion 3). After all, “[t]he straightforward rationale behind it is that if price-fixing cartels are illegal when implemented in the bricks-and-mortar world, they *a fortiori* are when implemented online” (cf. N Colombo, ‘Virtual Competition: Human Liability *Vis-a-Vis* Artificial Intelligence’s Anticompetitive Behaviours’ (2018) European Competition & Regulatory Law Review 11, 12).

<sup>17</sup> The need to focus on undertakings awareness of the anticompetitive practice, rather than on its potential implementation through new technologies, has been confirmed by the Court of Justice in a case concerning a common computerised booking system used by several travel agencies (cf. case C-74/14 *Eturas and Others* ECLI:EU:C:2016:42). After all, “[t]he machinery employed by a combination for price-fixing is immaterial” also for the purposes of applying the Sherman Act pursuant to which, “a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se” (cf. US Supreme Court judgment of 6<sup>th</sup> May 1940 *United States v Socony-Vacuum Oil Co.* 310 U.S. 150, 223).

However, it must not be underestimated that the use of pricing algorithms may not only facilitate the execution of cartels<sup>18</sup> but also increase cartels' stability. In principle, and unless specific conditions are met, cartels are inherently unstable:<sup>19</sup> the rational choice of every member of a price-fixing agreement is indeed to cheat on the agreement.<sup>20</sup> All the colluding undertakings are aware that they would be better off should they decide to charge lower prices than those agreed upon with competitors rather than to comply with the terms of the illicit agreement. Since the other undertakings are supposed to charge the concerted prices in faithful execution of the cartel, cheating undertakings have the opportunity to attract customers and to increase their market share at the expense of the "trustworthy cartelists".

The rational incentive to cheat ceases to exist if – *inter alia* – the members of the cartels are able to monitor their competitors' behaviours in order to detect deviation from the cartel arrangement.<sup>21</sup> The cheating party would not benefit from the decision to breach the illicit agreement because the other cartelists would immediately mirror its conduct. The cheating party would not have the time to increase its market share. Together with other characteristics,<sup>22</sup> market transparency is indeed one of the most significant conditions which are likely to lead to the successful implementation of a cartel. As stated above, pricing algorithms may easily detect deviations from the illicit agreement

<sup>18</sup> Indeed, "increased price transparency through price monitoring software may facilitate or strengthen (both tacit and explicit) collusion between retailers by making the detection of deviations from the collusive agreement easier and more immediate" (cf. Commission Staff Working Document accompanying the Final Report on the E-commerce Sector Inquiry cit. para. 608).

<sup>19</sup> See *inter alia* JD Jasper, 'Managing Cartels: How Cartel Participants Create Stability in the Absence of law' (2017) European Journal on Criminal Policy and Research 319. After all, leniency programs (*i.e.*, the most successful enforcement tool against cartels) are also largely based on the idea of taking advantage of the inherent instability of cartels (cf. Notice C 298/11 from the Commission of 8 December 2006 on Immunity from fines and reduction of fines in cartel cases).

<sup>20</sup> Indeed, "così come esiste un comune interesse tra le imprese a giungere ad un coordinamento delle loro condotte nel mercato che eviti la reciproca concorrenza e stimoli profitti di tipo monopolistico, sussiste altresì un forte interesse individuale di ciascuna di esse a deviare dalle condizioni concordate, scontando i prezzi per favorire le proprie vendite", so that "[q]uesti atteggiamenti opportunistici – che qualunque impresa può segretamente tenere – rendono la collusione instabile" (cf. P Manzini, 'Algoritmi collusivi e diritto antitrust europeo' (2019) Mercato Concorrenza Regole 163, 166).

<sup>21</sup> On such topic see A Dilip, D Pearce and E Stacchetti, 'Optimal Cartel Equilibria with Imperfect Monitoring' (1986) Journal of Economic Theory 251.

<sup>22</sup> For example, it has been observed that cartels are more likely to be executed on markets which, in addition to a high level of market transparency, are characterized by a relatively high degree of concentration, significant barriers to entry, homogeneous product and similar costs structures (cf. A Jones and B Sufrin, *EU Competition Law* (Oxford University Press 2016) 654).

on the basis of real-time updated data.<sup>23</sup> By so doing, price algorithms make the cartelization of markets more attractive for undertakings.<sup>24</sup>

It follows that the use of similar pricing algorithms must be considered – not only as the proverbial smoking-gun evidence of the intention of undertakings to collude in order to raise market prices,<sup>25</sup> but also as a relevant factor to be assessed for the purpose of setting fines according to the Commission guidelines.<sup>26</sup> While exercising its largely discretionary power to impose fines pursuant to art. 23 of the Regulation (EC) n. 1/2003,<sup>27</sup> the Commission must take into consideration *inter alia* the gravity of the infringement. The assessment of the gravity of the infringement has to be carried out by the Commission on a case-by-case basis, taking into consideration all the relevant circumstances of the case.<sup>28</sup> These factors include the nature of the infringement, the combined market share of the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been rigorously implemented.<sup>29</sup>

The fact that undertakings use pricing algorithms to immediately detect deviations from a cartel should be considered as a rigorous way to implement a cartel. Indeed, once that pricing algorithms designed to collude are put in place by the undertakings, a cartel is, to a large extent, self-executing.

<sup>23</sup> Indeed, “algorithms could be used by conspirators to detect breaches in a cartel and punish actors for deviations from a price-fixing agreement” (cf. DI Ballard and AS Naik, ‘Algorithms, Artificial Intelligence, and Joint Conduct’ (2017) *Antitrust Chronicle* 29, 32; see also A Ezrachi and ME Stucke, ‘Tacit Collusion on Steroids – The Tale of Online Price Transparency, Advanced Monitoring and Collusion’ (2017) *Competition Law & Policy Debate* 24).

<sup>24</sup> Cf. G Pitruzzella, ‘Big Data and Antitrust Enforcement’ (2017) *Italian Antitrust Review* 77, 83.

<sup>25</sup> Cf. DI Ballard and AS Naik, ‘Algorithms, Artificial Intelligence, and Joint Conduct’ cit. 38.

<sup>26</sup> Cf. Commission guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of the Regulation n. 1/2003. Also for further references, see *inter alia* L Calzolari, ‘Sanctions in EU Competition Law. Ensuring Deterrence Within the Decentralised Enforcement System of Articles 101 and 102 TFEU’, in S Montaldo, F Costamagna and A Miglio (eds), *European Union Law Enforcement: The Evolution of Sanctioning Powers* (Routledge 2020) 241.

<sup>27</sup> Cf. Regulation (EC) n. 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty.

<sup>28</sup> Commission guidelines on the method of setting fines cit. para. 20.

<sup>29</sup> Cf. OECD, *Algorithms and Collusion – Note from the European Union* (2017) para. 23. For example, in the TV and computer monitor tubes cartel decision, the Commission considered appropriate to apply for the purposes of the gravity of the infringement a percentage of 18 per cent the sales concerned, since the cartels were highly organised, rigorously implemented and monitored (cf. Commission decision of 5 December 2012 relating to a proceeding under article 101 TFEU, case COMP/39.437 – *TV and Computer Monitor Tubes*, C(2012) 8839 final, para. 1070).



### III. COLLUSION BETWEEN RATIONAL ALGORITHMS: THE RELATION BETWEEN MARKET TRANSPARENCY AND ARTIFICIAL INTELLIGENCE IN A WORLD OF BIG DATA

Other and more interesting competitive concerns flow directly from the development of such technologies. Collusion between “rational” algorithms may occur even if they are not designed to conspire but rather to maximize profits. Algorithm collusion may be an automatic consequence of increased market transparency caused by the big data revolution. Market transparency facilitates tacit collusion among competitors allowing undertakings to check and react to their competitors’ conducts.

Tacit collusion is also defined as “oligopolistic price coordination” because its effects are similar to those of a cartel.<sup>30</sup> Indeed, both explicit and tacit collusion may result in a reduction of social welfare by means of either higher prices or lower output. Yet, “analogic” tacit collusion does not fall within the scope of antitrust rules because price fixing results from unilateral and rational decisions taken by each of the undertakings active in a market.<sup>31</sup>

If a market presents specific features (e.g., few players, barriers to entry, homogeneous products, high transparency, etc.), every undertaking is likely to reach its own independent decision that it is in its best interest to maintain prices at a supra-competitive level – and to mirror possible price increases by competitors – because other undertakings are likely to reach the same independent and rational decision.<sup>32</sup>

<sup>30</sup> Indeed, “[t]acit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing supra-competitive level by recognizing their shared economic interests and their interdependence with regard to price and output decisions” (cf. US Supreme Court judgment of 21<sup>st</sup> June 1993 *Brooke Group Ltd v Brown & Williamson Tobacco Corp.* 509 US 209, 227).

<sup>31</sup> As is well known, the point has been widely debated, so much that a leading author as Judge Posner changed his approach to the matter over time, firstly supporting the idea that tacit collusion shall be prohibited by the Sherman Act (see RA Posner, ‘Oligopoly and the Antitrust Laws: A Suggested Approach’ (1969) *StanLRev* 1576; RA Posner, *Antitrust Law: An Economic Perspective* (University of Chicago Press 1976)), than concluding that said practice shall be considered as falling outside the scope of application of antitrust rules (see RA Posner, ‘Review of Kaplow, Competition Policy and Price Fixing’ (2014) *Antitrust Law Journal* 761). Among those supporting the (prevailing) view that – especially in the US legal order – tacit collusion is not covered by the current antitrust rules see, *inter alia*, DF Turner, ‘The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusal to Deal’ (1962) *HarvLRev* 655; JB Baker, ‘Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporaneous Economic Theory’ (1993) *Antitrust Bulletin* 143; MS Gal, ‘Algorithms as Illegal Agreements’ cit. 99). The idea that – not being efficient – tacit collusion should fall within the scope of application of antitrust rules is expressed *inter alia* by L Kaplow, *Competition Policy and Price Fixing* (Princeton University Press 2013) 217 ff.

<sup>32</sup> Indeed, “when firms can react by matching price undercutting by rivals in order to retain their customers, monopoly pricing is the only rational course of conduct, as firms lose the incentive to lower prices in the first place” (cf. P Siciliani, ‘Tackling Algorithmic-Facilitated Tacit Collusion in a Proportionate Way’ (2019) *Journal of European Competition Law & Practice* 31, 32).

Undertakings have no incentive to reduce prices for the very same reasons that explain why market transparency increases the stability of a cartel: price reductions would be detected and replicated by competitors before the undertaking that firstly applied rebates can benefit from this choice (e.g., by attracting new customers). Reductions would have the sole effect of reducing the overall earning of the sector, without benefiting the undertaking that first decides to discount.

The supra-competitive level at which prices are “fixed” is actually the result of the rational decision not to be worse off unilaterally taken by each of the undertakings: a smaller cake means that everyone loses out. Newcomers’ (if any) incentives to compete would also be significantly reduced: the best strategy is to take advantage of the supra-competitive equilibrium at which prices are set.<sup>33</sup> From the antitrust viewpoint, in other words, *coordinated* prices are not the same as *interdependent* prices.

In the analogic world, monitoring competitors used to be a timely and costly activity and real-time updates, in principle, simply could not be obtained. Yet in a medium-sized city, a brick-and-mortar store could not be aware of its competitors’ strategies when establishing its pricing policy. As a consequence, tacit collusion could occur only in small and concentrated markets.<sup>34</sup> As is well known, the exemplary textbook case is that of the gas station retail market on a small island.<sup>35</sup> Due to the peculiar market conditions,<sup>36</sup> each gas station would quickly become aware that the more it reduces prices, the less it will earn: other gas stations will likely mirror the decision; while the market share of each of the gas stations will not be affected by the discount, their incomes will.

In a world of big data,<sup>37</sup> business decisions are immediately exposed to competitors. Algorithm-based monitoring mechanisms allow undertakings to instantly discover any

<sup>33</sup> *Contra*, P Siciliani, ‘Tackling Algorithmic-Facilitated Tacit Collusion in a Proportionate Way’ cit. 34, according to whom “the common adoption of this price-matching algorithm would not, in and of itself, deter a new entrant from competing away supracompetitive profits”, as long as “demand is [not] saturated, with customers already attached to an incumbent firm, and possibly facing switching costs” and “the prevailing price-cost mark-up allows firms to earn a profit well above what needed to cover fixed costs”.

<sup>34</sup> Indeed, “[t]ime lags between defection from a cartel and its discovery make that defection more profitable and undermine collusion” (cf. SK Mehra, ‘Antitrust and the Robo-Seller’ cit. 1328). The limited diffusion of tacit collusion in traditional markets is one of the main reasons that reduced the practical relevance of discussing whether or not such scenario was caught by art. 101 TFEU and similar dispositions: “sino ad oggi, la circostanza che la *tacit collusion* sfugga all’applicazione del divieto antitrust non ha rappresentato un problema eccessivo perché, affinché si realizzi, il mercato deve presentare condizioni strutturali non comuni” (cf. P Manzini, ‘Algoritmi collusivi e diritto antitrust europeo’ cit. 169).

<sup>35</sup> Cf. United States Court of Appeals for the First Circuit judgment of 18<sup>th</sup> February 2011 *White v R.M. Packer Co.*, 571 579.

<sup>36</sup> *Inter alia*, no competition on the quality of the gasoline exists. Competitors from mainland cannot enter the market without investments. Each gas station may easily monitor the prices applied by the few competitors located nearby.

<sup>37</sup> On the relation between the availability of (big) data and collusion, see also S Colombo and A Pignataro, ‘Raccolta e condivisione di big data: quali effetti sulla collusione?’ (2019) *Mercato Concorrenza Regole* 315.

change in prices (or other trading conditions) applied by competitors, no matter where the latter are based and operate. Algorithms make it easier and cheaper to monitor and react to competitors' behaviours, thereby lessening the benefit that undertakings would otherwise likely obtain from reducing their selling price.<sup>38</sup> This, in turn, significantly increases the number and type of markets in which tacit collusion may occur.<sup>39</sup>

Moreover, pricing algorithms are usually based on some form of self-learning artificial intelligence: this means that price algorithms are capable to progressively learn not only from data but also from their past decisions. If they are designed to maximize profits, they will assess the results of every single decision that they have taken in order to establish whether it has increased or reduced profits. Just as the managers of the island's gas stations, algorithms will soon note that applying lower prices than those charged by competitors cannot but lead to an undesirable outcome: the same amount of goods are sold but incomes are reduced. Experience will teach pricing algorithms that the best strategy to perform their task (*i.e.*, maximizing profits) is to avoid any alteration of the *status quo*. The capability of self-learning algorithms to learn from data and self-adapt with experience will lessen the struggle to compete even if such forms of artificial intelligence have not been instructed to collude.

#### IV. EXISTING VS CREATED MARKET CONDITIONS: TACIT COLLUSION OR ALGORITHMIC CONCERTED PRACTICES?

The literature suggests that current competition rules may not be adequate to cover algorithmic collusion. For example, it is argued that it may prove difficult to ascribe to undertakings (let alone to hold them liable for) the autonomous decisions of their algorithms to cooperate among themselves if they were not programmed to collude.<sup>40</sup>

According to this view, the autonomous decision taken by the algorithms interrupts the causal link between the conduct of the undertakings (*i.e.*, the decision to use a pricing algorithm designed to maximize profits) and the anticompetitive effects (*i.e.*, the alignment of

<sup>38</sup> Indeed, "[c]onscious parallelism would be facilitated and stabilized by the shift of many industries to online pricing, as sellers can more easily monitor competitors' pricing, key terms of sale and any deviations from current equilibrium. In such an environment, algorithmic pricing provides a stable, predictable tool, which can execute credible and effective retaliation" (cf. A Ezrachi and ME Stucke, 'Algorithmic Collusion' cit. 3).

<sup>39</sup> Of course "the higher the proportion of firms adopting the price-matching algorithm the more sustainable collusion would tend to be, as the pay-off from cheating is lower (*i.e.*, as the cheating pie must be divided up among all the adopting firms)" (cf. P Siciliani, 'Tackling Algorithmic-Facilitated Tacit Collusion in a Proportionate Way' cit. 33).

<sup>40</sup> For example, it has been observed that "[t]he fact that companies unilaterally adopted profit-maximizing pricing algorithms that more accurately reflect present market conditions does not fit the type of conduct meant to be proscribed by Section 1 of the Sherman Act" (cf. DI Ballard and AS Naik, 'Algorithms, Artificial Intelligence, and Joint Conduct' cit. 33).

prices at a supra-competitive level).<sup>41</sup> From a more radical viewpoint, it is suggested that designing an algorithm to rationally implement a given company's pricing policy should be qualified as a unilateral conduct of that undertaking, rather than a collusive one.<sup>42</sup>

According to this view, the fact that the undertakings have not instructed their algorithms to conspire cannot be neglected for the purposes of antitrust analysis: the lack of joint intention precludes the possibility to apply art. 101 TFEU because algorithms that have been programmed only to maximize profit do not collude. In this perspective, however, the fact that more than one undertaking active on the same market use similar pricing algorithms cannot be ignored either. It is therefore suggested that the lack of intent to collude does not prevent the possibility to assess the totality of these unilateral decisions to rely on similar algorithms under art. 102 TFEU: if the relevant conditions of this provision are met, the undertakings could be qualified as a collective entity that may hold and, possibly, abuse a so-called collective dominant position on the market.<sup>43</sup>

It is worth noting that, in this scenario as well, the abusive conduct would consist precisely in the fact that algorithms jointly end up setting supra-competitive prices applied by the undertakings belonging to the collective entity. The difference is that the coordination between the algorithms is not considered to be the consequence of a collusive scenario but rather as the outcome of the different unilateral decisions taken by entities belonging to a single collective entity that, as a consequence, abuses its collective dominant position.

This is actually in line with the origin and the aim of the theory of collective dominance.<sup>44</sup> Indeed, the concept of collective dominance has been elaborated and used mainly in those situations where it was impossible (or considered too difficult) to address a given conduct under art. 101 TFEU, for example because the relevant economic sector

<sup>41</sup> Indeed, "as AI develops further, the links between the agent (the algorithm) and its principal (the human being) become weaker and the ability of algorithms to act and price autonomously puts in question the liability of the individuals or firms who benefit from the algorithm's autonomous decisions" (cf. A Capobianco, P Gonzaga and A Nyeső, 'Algorithms and Collusion: Competition Policy in the Digital Age' (2017) OECD Paper for the Roundtable on Algorithms and Collusion 39). More incisively, it has been held that "punishing companies simply for designing such technology would clearly go too far – in the same way that you wouldn't sentence a gun manufacturer for someone else committing a murder with a gun the manufacturer produced" (cf. M Zdzieborska, 'Brave New World of "Robot" Cartels?' (7 March 2017) Kluwer Competition Law Blog [competitionlawblog.kluwercompetitionlaw.com](http://competitionlawblog.kluwercompetitionlaw.com)). More generally, see Y Bathaee, 'The Artificial Intelligence Black Box and The Failure of Intent and Causation' (2018) Harvard Journal of Law & Technology 890.

<sup>42</sup> According to this view, "the implementation of pricing policies by one firm's employees is unilateral conduct (whether it factors in the prices of competitors or not) and is not actionable under Section 1 of the Sherman Act without evidence establishing an agreement with another firm over the purpose or effect of a pricing algorithm" (cf. OECD, *Algorithms and Collusion* – Note by the United States (2017) para. 6).

<sup>43</sup> On this concept, see *inter alia* A Albors-Llorens, 'Collective Dominance: A Mechanism for the Control of Oligopolistic Markets?' (2000) CLJ 256.

<sup>44</sup> As is well known, the concept of collective dominance was first developed in joined cases T-68/89, T-77/89 and T-78/89 *SIV and Others v Commission* ECLI:EU:T:1992:38.

was subject to some sort of exemption from the application of that provision, as has long been the case for liner shipping.<sup>45</sup> In this vein, already in the past, a turn to art. 102 TFEU occurred precisely in the light of the ambiguities surrounding the applicability of art. 101 TFEU to tacit collusion<sup>46</sup> in order to cover those situations where undertakings, “because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers”.<sup>47</sup>

The reference to the adoption of a common policy (in place of competition) and to specific factors suggests that some similarities may exist between the notion of collective dominance and that of concerted practices under art. 101 TFEU, which will be discussed below. And, unsurprisingly, collective dominance is indeed essentially understood to be an equivalence of oligopolistic coordination,<sup>48</sup> as the two concepts are based on the same conditions.<sup>49</sup> While they may be similar from the theoretical perspective, choosing between collective dominance and oligopolistic coordination has a rather significant

<sup>45</sup> See for example joined cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others v Commission* ECLI:EU:C:2000:132. Also in the EU legal order, liner shipping was exempted from the application of art. 101 TFEU until the entrance into force in 2008 Regulation (EC) 1419/2006 of the Council of 25 September 2006 repealing Regulation (EEC) n. 4056/86 laying down detailed rules for the application of arts 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) n. 1/2003 as regards the extension of its scope to include cabotage and international tramp services. On this topic see *inter alia* F Munari, ‘Competition in Liner Shipping’ in J Basedow, U Magnus and R Wolfrum (eds), *The Hamburg Lectures on Maritime Affairs 2009 & 2010. Hamburg Studies on Maritime Affairs* (Springer 2012) 3; SM Carbone and L Schiano Di Pepe, ‘Gli accordi orizzontali tra imprese nel settore del trasporto marittimo dopo l’abrogazione del regolamento (CEE) n. 4056/86’ in G Berlingieri, A Boglione, SM Carbone and F Siccardi (eds), *Scritti in onore di Francesco Berlingieri* (2010) Special Issue of Diritto Marino 302; P Wareham (ed.), *Competition Law and Shipping: the EMLO Guide to EU Competition Law in the Shipping and Port Industries* (Cameron May 2010); PD Camesasca and AK Schmidt, ‘EC Commission’s Post-conference Maritime Transport Guidelines: True Guidance to Navigate Through Antitrust Compliance’ (2009) European Competition Law Review 143; F Munari, ‘Liner Shipping and Antitrust After the Repeal of the Regulation 4056/86’ (2008) LMCLQ 602; SM Carbone and F Munari, ‘La concorrenza nei traffici marittimi comunitari ritorna al diritto comune: good bye maritime conferences e altre importanti novità a valle dell’entrata in vigore del reg. (CE) n. 1419/2006’ (2007) Diritto dei trasporti 335.

<sup>46</sup> Cf. N Petit, ‘The Oligopoly Problem in EU Competition Law’ in I Lianos and D Geradin (eds), *Handbook on European Competition Law. Substantive Aspects* (Edward Elgar 2013) 259, 297.

<sup>47</sup> Cf. joined cases C-68/94 and C-30/95 *France and Société commerciale des potasses and de l’azote and Entreprise minière and chimique v Commission* ECLI:EU:C:1998:148 para. 221.

<sup>48</sup> Cf. M de la Mano, R Nazzini and H Zenger, ‘Article 102’ in J Faull and A Nikpay (eds), *The EU Law of Competition* (Oxford University Press 2014) 329, 382.

<sup>49</sup> According to the case law, three conditions must be established for a finding of collective dominance and they are essentially the same market conditions under which a concerted practice is likely to occur, *i.e.*, *i)* the market must be transparent and undertakings must be able to become rapidly aware of each other’s conducts; *ii)* coordination must be sustainable over time; and *iii)* the foreseeable reaction of current and future competitors, as well as of consumers, must not be capable of jeopardising the results expected from the common policy (cf. case T-342/99 *Airtours v Commission* ECLI:EU:T:2002:146 para. 62; case T-464/04 *Impala v Commission* ECLI:EU:T:2006:216 para. 243 ff.)

enforcement consequence which concerns the different scope of application of arts 101 TFEU and 102 TFUE (and similar provisions). If the latter is considered to be the correct legal framework to be used against conducts committed by algorithms, then no antitrust liability may arise, unless a (collective) dominant position exists and a specific abuse is demonstrated, in addition to the *per se* legal use of a pricing algorithm.

Looking outside the antitrust realm, it is also observed that in virtually every jurisdiction companies' directors are actually under a statutory obligation to pursue shareholders' value.<sup>50</sup> Directors may even incur liability if they make choices that expose their companies to losses that were reasonably foreseeable when the relevant decision was made.<sup>51</sup> Since algorithms perform many tasks and activities more accurately and with better results than humans (including the task of dynamically updating prices based on the assessment of real-time data on market conditions),<sup>52</sup> it may be considered negligent for companies' directors not to adopt them, because it is clear that this decision will cause a loss (*i.e.*, less profit) to the company.

It cannot be denied that the fact that algorithms may collude simply because they were designed to maximize profits poses very complex challenges. It is indeed unclear how

<sup>50</sup> As is well known, the one exploring the purposes of corporations is one of the most venerable questions in company law and economic theory and dates back at least a century (see US Supreme Court of Michigan judgment of 7th February 1919 170 N.W. 668 *Dodge v Ford Motor Co.*). While many hold that companies' directors should act "only for the ratable benefit of all the shareholders" (cf. AA Berle, 'Corporate Powers as Powers in Trust' (1931) *HarvLRev* 1049), many other believe that companies have "a social service as well as a profit-making function" (cf. EM Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) *HarvLRev* 1145, 1148). On the dilemma between shareholder and stakeholder values the literature is endless. For further references, see RJ Rhee, 'A Legal Theory of Shareholder Primacy' (2018) *Minnesota Law Review* 1951; O Hart and L Zingales, 'Companies Should Maximize Shareholder Welfare Not Market Value' (2017) *Journal of Law, Finance, and Accounting* 247; MC Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' (2001) *Journal of Applied Corporate Finance* 8.

<sup>51</sup> Within the Italian legal order, see for example Italian Court of Cassation judgment of 12 August 2009 n. 18231; Italian Court of Cassation judgment of 22 June 2017 n. 15470; Tribunal of Perugia judgment of 17 July 2020 n. 817; Tribunal of Cosenza judgment of 9 December 2019 n. 2508; Tribunal of Perugia judgment of 4 February 2016 n. 446; Tribunal of Rome judgment of 28 September 2015 n. 19198. The principle is accepted also by Commissione Tributaria Regionale of Rome 22 January 2019 n. 178; Commissione Tributaria Regionale of Brescia 6 June 2016 n. 3329. Although the case law is firm in holding that directors enjoy a quite wide margin of discretion and that management decisions falling within that discretionary power cannot be contested, it is also true that the conduct of directors shall always pursue the interest of the company, a concept which is generally understood as meaning the maximization of profits (see Tribunal of S.Maria Capua judgment of 28 February 2014 n. 693).

<sup>52</sup> Indeed, "[b]ecause of the advent of big data analytics, algorithms can monitor prices more efficiently than human beings and are able to respond to market changes more quickly and accurately" (cf. I Graef, 'Algorithmic Price Fixing Under EU Competition Law: How to Crack Robot Cartels?' (10 May 2016) CITIP Blog [www.law.kuleuven.be](http://www.law.kuleuven.be)).

designing an algorithm to act rationally can be qualified as an antitrust offence.<sup>53</sup> However, it is submitted that the very idea to compare algorithmic collusion and tacit collusion may prove to be misleading. As it often happens when dealing with the many consequences of the big data revolution, this coupling focuses on the *quantitative* dimension of algorithmic collusion but it fails to take into consideration its *qualitative* dimension.<sup>54</sup>

Data analytics most certainly increases the number of markets subject to tacit collusion, since it eases the monitoring and reaction to competitors' behaviours. However, data analytics also changes the nature of the undertakings' behaviours leading to the collusive outcome. When it decides to design its pricing algorithm to maximize profits (by continuously monitoring and dynamically reacting to competitors' behaviours), while at the same time knowing that information on its own strategies is available online to consumers and competitors (and competitor's algorithms), a company is actually contributing to *create* the conditions under which tacit collusion may occur.

There is a significant difference with the traditional scenario where undertakings act rationally on the basis of *existing* markets conditions. This difference should be relevant to the imputability of such conduct and its scrutiny under antitrust rules. Quite regardless of the fact that, in the digital scenario, undertakings actively contribute to the creation of the conditions allowing their rational algorithms to "tacitly" collude, one cannot deny that undertakings, at the very least, do know that tacit collusion may occur even if they do not design their algorithm to breach art. 101 TFEU.<sup>55</sup> The (more than) reasonable awareness on the part of undertakings that anticompetitive harm may occur even if algorithms are not asked to collude is a key factor to address the issue of the imputability of algorithms' behaviours.

On the one hand, such awareness seems capable of reducing the cogency of the line of reasoning concerning the (alleged) interruption of the causal link between the conduct of the undertakings and the anticompetitive effects. Within this perspective, it should be considered that undertakings' attempts to escape their antitrust liability based on the argument concerning the causal link (or the lack thereof) are dismissed more often than not by the CJEU. Although regarding private rather than public enforcement, a particularly clear example is represented by the *Kone* case: the Court of Justice confirmed that cartelists may also be held liable for the losses resulting from the higher prices charged to

<sup>53</sup> In other words, "it would be hard to deny the existence of a plausible legitimate justification for the adoption of the pricing algorithm thereof in that firms would appear to simply trying to preserve conditions of viability" (cf. P Siciliani, 'Tackling Algorithmic-Facilitated Tacit Collusion in a Proportionate Way' cit. 32).

<sup>54</sup> For some observations on the need to consider both the quantitative and the qualitative dimensions of the big data revolution see, *inter alia*, A Oddenino, 'Reflections on Big Data and International Law' (2017) *Diritto del Commercio Internazionale* 777.

<sup>55</sup> In other words, "[b]y simply allowing these bots to go to work, it is easy to imagine an effectively permanent pricing stasis settling over many markets, and not always with procompetitive effects" (cf. DI Ballard and AS Naik, 'Algorithms, Artificial Intelligence, and Joint Conduct' cit. 30).

customers by undertakings that are not part of the illicit agreement because the latter cannot but increase their prices when they intelligently adapt their own conduct to that of their competitors.<sup>56</sup>

On the other hand, the fact that undertakings knowingly contribute to the *creation* of the conditions allowing their rational algorithms to “tacitly” collude seems particularly relevant in order to correctly assess such conduct under antitrust rules. The predictability of the anticompetitive outcome which, under given circumstances, may arise from the decision to design an algorithm to maximize profits arguably entails that algorithmic collusion resembles a concerted practice more than a case of simple tacit collusion.

The term “concerted practice” is designed to catch looser forms of collusion than proper agreements.<sup>57</sup> According to the case law, a proper agreement exists if two or more undertakings “have expressed their joint intention to conduct themselves on the market in a specific way”.<sup>58</sup> The notion, therefore, “centres around the existence of a concurrence of wills between at least two parties”.<sup>59</sup> As long as there is this concurrence of wills, no formal requirements are relevant: oral,<sup>60</sup> non-binding (such as gentlemen’s agreements)<sup>61</sup> and even agreements still under negotiation<sup>62</sup> fall within the notion.

By contrast, according to the CJEU, a concerted practice includes every form of coordination among competitors which, regardless of the concurrence of wills between them, has the effect of altering the conditions of the market by replacing competition with

<sup>56</sup> More specifically, the Court of Justice has established that “[t]he full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets” (cf. case C-557/12 *Kone and Others* ECLI:EU:C:2014:1317 para. 33).

<sup>57</sup> Cf. A Jones and B Sufrin, *EU Competition Law* cit. 153. On the distinction between agreements properly so called and concerted practices see, among the most recent rulings, case C-450/19 *Kilpailu- ja kuluttajavirasto* ECLI:EU:C:2021:10 paras 21-22.

<sup>58</sup> Cf. case T-449/14 *Nexans France and Nexans v Commission* ECLI:EU:T:2018:456 para. 132; joined cases T-117/07 and T-121/07 *Areva and Others v Commission* ECLI:EU:T:2011:69 para. 175.

<sup>59</sup> Cf. case T-216/13 *Telefónica v Commission* ECLI:EU:T:2016:369 para. 98; case T-655/11 *FSL and Others v Commission* ECLI:EU:T:2015:383 para. 413.

<sup>60</sup> Cf. case 28/77 *Tepea BV v Commission* ECLI:EU:C:1978:133 para. 41.

<sup>61</sup> Cf. case C-373/14 P *Toshiba Corporation v Commission* ECLI:EU:C:2016:26; case 41/69 *ACF Chemie-farma v Commission* ECLI:EU:C:1970:71.

<sup>62</sup> See case T-186/06 *Solvay v Commission* ECLI:EU:T:2011:276 paras 85-86.



cooperation.<sup>63</sup> A concerted practice is therefore a very different concept than that of agreement to the extent that the working out of an actual plan is irrelevant.<sup>64</sup>

The underlying rationale is that undertakings must never be free to “cooperate with [their] competitors, in any way whatsoever, in order to determine a co-ordinated course of action” because competition rules aim at preventing undertakings from achieving “success by prior elimination of all uncertainty as to each other’s conduct regarding the essential elements of that action”.<sup>65</sup> The aside “in any way whatsoever” arguably suggests that the notion can (and should) be interpreted extensively and flexibly.

In this vein, according to the case law of the CJEU, “passive modes of participation in [an] infringement”<sup>66</sup> may also be considered as indicative of collusion and, as such, capable of violating art. 101 TFEU; for example, an undertaking that “tacitly approves of an unlawful initiative [...] encourages the continuation of the infringement and compromises its discovery”, thus breaching art. 101 TFEU.<sup>67</sup> In highly transparent markets, the use of pricing algorithms (designed to maximize profits by monitoring and dynamically reacting to competitors’ behaviours, which are likely to follow the same pricing strategy) could arguably be qualified as a conduct falling within the notion of passive modes of participation in an infringement of art. 101 TFEU.<sup>68</sup>

While they do not prevent undertakings from adapting to their competitors’ conducts,<sup>69</sup> it follows that competition rules do strictly preclude any indirect contact between competitors whose effects may be to either influence their conducts on the market or to reciprocally disclose information on their future behaviours.<sup>70</sup> According to the CJEU, an undertaking may be found to be party to a concerted practice simply because it received information on the commercial activities of its competitors.<sup>71</sup>

<sup>63</sup> In other words, a concerted practice occurs when undertakings “knowingly substituted for the risks of competition practical cooperation between them, which culminated in a situation which did not correspond to the normal conditions of the market” (cf. joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Suiker Unie and Others v Commission* ECLI:EU:C:1975:174 para. 191; case C-8/08 *T-Mobile Netherlands and Others* ECLI:EU:C:2009:343 para. 26).

<sup>64</sup> Cf. MM Dabbah, *EC and UK Competition Law: Commentary, Cases and Materials* (Cambridge University Press 2004) 72 ff.

<sup>65</sup> Cf. case 48/69 *ICI v Commission* ECLI:EU:C:1972:70 para. 118.

<sup>66</sup> Cf. joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* ECLI:EU:C:2005:408 para. 143.

<sup>67</sup> Cf. *inter alia* case C-194/14 P *AC-Treuhand v Commission* ECLI:EU:C:2015:717 para. 31.

<sup>68</sup> In this vein, see also P Manzini, ‘Algoritmi collusivi e diritto antitrust europeo’ cit. 172.

<sup>69</sup> Cf. *Suiker Unie and Others v Commission* cit. para. 174.

<sup>70</sup> Indeed, one of the main purposes of a concerted practice is “to influence their conduct on the market and to disclose to each other the course of conduct with each of the producers itself contemplated adopting on the market” (cf. case T-7/89 *Hercules Chemicals v Commission* ECLI:EU:T:1991:75 para. 259).

<sup>71</sup> Cf. joined cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95,

Even leaving aside its role as a constituent element of the notion of concerted practices, it is worth noting that private exchange of information between competitors has been *per se* strictly prohibited ever since EU competition law was devised.<sup>72</sup> Recent case law of the CJEU indeed confirms that private exchanges of sensitive information between competitors are to be qualified and fined as a cartel under art. 101 TFEU.<sup>73</sup>

NCAs generally follow the same approach.<sup>74</sup> Although the case law is more ambiguous on the point,<sup>75</sup> it seems that EU antitrust enforcers also follow a rather strict approach with regard to public exchanges of information (*i.e.*, the disclosure of information to the general public, including competitors and customers),<sup>76</sup> as confirmed by the

T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 e T-104/95 *Cimenteries CBR v Commission* ECLI:EU:T:2000:77 para. 1852.

<sup>72</sup> See for example the Communication from the Commission of 29 July 1968 relativa ad accordi, decisioni e pratiche concordate concernenti la cooperazione tra imprese (not available in English).

<sup>73</sup> Recent case law of the CJEU confirmed that private exchanges of information between competitors may be qualified and fined as a cartel (cf. for example case C-286/13 *P Dole Food and Dole Fresh Fruit Europe v Commission* ECLI:EU:C:2015:184 on which see L Calzolari, 'Il caso Dole: lo scambio di informazioni come restrizione per oggetto ex art. 101 TFUE' (30 May 2015) *Eurojus.it rivista.eurojus.it*; K Hugmark and M Becher, 'Dole v Commission: Exchange of Information, Between Competitors, on Price-Related Parameters' (2015) *Journal of European Competition Law & Practice* 652; L Idot, 'Échanges d'informations et restriction par objet' (2015) *Europe* 22; K Fountoukakos and K Geeurickx, 'Going Bananas – The European Court of Justice Has Confirmed the EU Commission's Approach to Information Exchange Between Competitors' (2015) *Competition Law Insight* 14).

<sup>74</sup> With regard to the practice of the Italian NCA, see for example the Agenzia Garante della Concorrenza e del Mercato (AGCM) decision of 30 September 2004 n. 13622, 1575 *Ras-Generali/Iama Consulting* (on which see F Tirio, 'Fatti e prove nel processo amministrativo antitrust: il caso Iama' (2006) *Foro amministrativo – T.A.R.* 968).

<sup>75</sup> In some instances, the Court of Justice has highlighted the importance of public exchange of information for the purposes of establishing the existence of a concerted practice, noting that "the undertakings [...] announced their intentions of making an increase some time in advance, which allowed the undertakings to observe each other's reactions on the different markets, and to adapt themselves accordingly. By means of these advance announcements the various undertakings eliminated all uncertainty between them as to their future conduct and, in doing so, also eliminated a large part of the risk usually inherent in any independent change of conduct on one or several markets" (see for example *ICI v Commission* cit. paras 100-101). In other cases, the Court of Justice held that price announcements made to users "constitute in themselves market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors", mainly because "[a]t the time when each undertaking engages in such behaviour, it cannot be sure of the future conduct of the others" (cf. joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* ECLI:EU:C:1993:120 para. 64).

<sup>76</sup> Although only "private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities", it is worth noting that also public exchange of information may be "considered as a restriction of competition by object" if it is carried out "with the objective of restricting competition on the market" (cf. Communication from the Commission of 14 January 2011 Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements paras 73-74).

*Container Shipping* case.<sup>77</sup> The underlying rationale is once again that public exchanges of information may have the effect of reducing the level of uncertainty about the current and future pricing behaviours of the market operators, thus decreasing their incentive to compete against each other.

Bearing the above in mind, one should consider that when an undertaking requires its self-learning algorithm to monitor market conditions (*i.e.*, competitors' prices) in order to set and dynamically update prices, the undertaking is basically asking its algorithm to track the information publicly disclosed online by its competitors in order to reduce the former's uncertainty regarding the current and future behaviours of the latter. Since many – if virtually not all the – undertakings are likely to use similar automatic software programmes for the purpose of adjusting their own prices to those of their competitors, it seems tenable to conclude that algorithms indeed engage in some form of contact – if not proper communication – among themselves which result in the replacement of uncertainty with mutual knowledge.<sup>78</sup>

It is worth noting that, for public exchanges of information to fall within the scope of application of art. 101 TFEU, it is not necessary for the information to be exchanged directly between competitors, nor is it necessary for the competitors to communicate among themselves.<sup>79</sup> What matters is only that the information is made available to the general public, so that competitors may have access to them.<sup>80</sup>

To sum up, it is submitted that art. 101 TFEU does capture algorithmic collusion because this practice falls within the traditional EU law concept of a concerted practice or, at the very least, because algorithms' monitoring activities represent a mechanism of (public or private) exchange of information among competitors.

<sup>77</sup> Cf. Decision of the Commission of 7 July 2016 relating to a proceeding under article 101 TFEU, case AT.39850 *Container Shipping*, C(2016) 4215 final (on which see I Rabinovici, 'The Application of EU Competition Rules in the Transport Sector' (2017) *Journal of Competition Law & Practice* 271). The case law of the CJEU, however, is not completely clear on the point.

<sup>78</sup> In other words, "l'uso di una strumentazione di Ai per segnalare prezzi e modificarli in considerazione delle risposte dei concorrenti modifica la natura della decisione commerciale dell'impresa, la quale va ritenuta come concordata, piuttosto che come indipendente", with the – unavoidable – consequence that such conducts "decise mediante algoritmi, apparentemente autonome, costituiscono in realtà una *explicit collusion*, rientrante nel campo di applicazione dell'art. 101, in quanto pratica concertata" (cf. P Manzini, 'Algoritmi collusivi e diritto antitrust europeo' cit. 171-172).

<sup>79</sup> See also O Odudu, 'Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion' (2011) *European Competition Journal* 205.

<sup>80</sup> Such clarification is important because it is held that "in the absence of any communication between competitors, no agreement or concerted practice may be identified as a result of which no violation of Article 101 TFEU can be established either" (cf. I Graef, 'Algorithmic Price Fixing Under EU Competition Law' cit.). Although "it is therefore not obvious that more sophisticated tools through which a firm merely observes another firm's price and draws its own conclusion would qualify as 'communication' for Article 101 purposes", it is also true that "one cannot fully rule out the possibility that more creative and novel types of interactions could in certain situations meet the definition of 'communication'" (cf. OECD, *Algorithms and Collusion* – Note from the European Union cit. para. 33).

In the light of the above, however, it is also submitted that the use of pricing algorithms should be considered as actually capable of establishing a sort of rebuttable presumption of the existence of a concerted practice.<sup>81</sup> In other words, in case pricing algorithms programmed to maximize profits end up colluding, the prohibition enshrined by art. 101(1) TFEU should be deemed to apply without the Commission or NCAs having to prove the undertaking's intention to conspire. It should then be for the undertakings to which said conducts are ascribed to prove that, in the specific case, a concerted practice did not occur or that the efficiency enhancements brought by the algorithms (which, as noted above, perform many tasks better than humans) justify their utilization under art. 101(3) TFEU.<sup>82</sup>

## V. THE LIMITED ROLE PLAYED BY INTENT AND IMPUTABILITY IN THE ANTITRUST REALM: THE CASE OF PARENT COMPANY LIABILITY AND ITS APPLICABILITY BY ANALOGY TO THE RELATION UNDERTAKINGS *VIS-À-VIS* ALGORITHMS

The previous section has tried to show that algorithmic collusion can and should be tackled under current EU competition rules, given that algorithmic collusion is different from traditional tacit collusion and it resembles more a concerted practice falling within the scope of application of art. 101 TFEU. This and the next sections suggest that this conclusion is supported also by other characteristics and principles inherent to the EU competition law system.<sup>83</sup>

First of all, it is well known that a *quasi*-strict liability regime applies to antitrust offences, so that intent and imputability play a very limited role within this context. EU competition rules do not mention intent as a necessary element to ascertain antitrust

<sup>81</sup> In this vein, “l’adesione, decisa da più imprese in modo unilaterale, ad un sistema che impiega tali algoritmi per condizionare il prezzo delle imprese parti di esso comporta una presunzione *iuris tantum* di partecipazione di ciascuna impresa ad una pratica concordata tramite assenso tacito” (cf. P. Manzini, ‘Algoritmi collusivi e diritto antitrust europeo’ cit. 168).

<sup>82</sup> Indeed, ever since the adoption of the Treaty of Rome, art. 101(3) TFEU (then art. 85(3) EEC) can be applied to those cases “where it is in the public interest or in the interest of an industry to permit restraints on competition” (cf. E Steindorff, ‘Article 85 and the Rule of Reason’ (1984) CMLRev 639, 641-642). In other words, art. 101(3) TFEU “allows reconciliation of several EC Treaty objectives by providing a wide margin of discretion” in the application of EU competition rules, and in particular with regard to the application of art. 101 TFEU (cf. CD Ehlermann, ‘Implementation of EC Competition Law by National Anti-Trust Authorities’ (1996) European Competition Law Review 88, 94).

<sup>83</sup> Focusing on traditional legal principles to cope with competitive issues raised by digital innovation, rather than calling for the rethinking of competition law, appears in line with the idea that “the real threat of digital markets is that they may lead to the incorrect conclusion that innovation is also required in relation to legal analysis. The opposite is true. The legal edifice built incrementally over the years, broad and rich in insights, remains not only a useful guide to sound and consistent enforcement, but a valuable safeguard against enforcement errors” (cf. PI Colomo and G De Stefano, ‘The Challenge of Digital Markets: First, Let Us Not Forget the Lessons Learnt Over the Years’ (2018) Journal of European Competition Law and Practice 485, 486).

infringements.<sup>84</sup> The CJEU case law contains virtually no reference to the role of intent for the application of arts 101 and – particularly – 102 TFEU;<sup>85</sup> on the few occasions when it had the chance to deal with the issue, the CJEU established that “the intention of the parties is not an essential factor in determining whether a concerted practice is restrictive”<sup>86</sup> nor “a necessary factor in determining whether an agreement is restrictive”.<sup>87</sup>

The CJEU has thereby confirmed that liability for antitrust violations in fact amounts to strict liability.<sup>88</sup> After all, competition is not about morality but rather about efficiency and the preservation of the market structure: just as dreaming about becoming a monopolist does not represent a competitive issue but rather fuels economic growth,<sup>89</sup> so a collusive scenario achieved without the undertakings having wished for it *does* represent a competitive problem.

The case-law on art. 106(1) TFEU, when applied in combination with arts 101 and 102 TFEU,<sup>90</sup> makes no exception to this principle. Under this legal framework, antitrust liability can be avoided by so-called “privileged undertakings”<sup>91</sup> that are deprived of their autonomy and are *legally* compelled to engage in a conduct that, if autonomously carried out, would be illegitimate under EU competition rules.<sup>92</sup> This sort of antitrust immunity

<sup>84</sup> *Inter alia*, see also N Zingales, ‘Antitrust Intent in an Age of Algorithmic Nudging’ (2019) *Journal of Antitrust Enforcement* 386, 390; P Akman, ‘The Role of Intent in the EU Case Law on Abuse of Dominance’ (2014) *ELJ* 31; ME Stucke, ‘Is Intent Relevant?’ (2012) *Journal of Law, Economics and Policy* 801; PL Parcu, ‘Considerazioni sulla rilevanza del movente nella valutazione delle violazioni antitrust’ in AE Raffaelli (ed.), *Antitrust Between EU and National Law IX* (Bruylant-Giuffrè 2011) 289; A Bavasso, ‘The Role of Intent Under Article 82: From Fishing the Turkeys to Spotting Lioness in Regent’s Park’ (2005) *European Competition Law Review* 616.

<sup>85</sup> In this vein, it is observed that “la violazione degli artt. [101 e 102 TFEU] dà luogo a responsabilità a prescindere dall’esistenza dell’elemento psicologico della colpa”: on the one hand, “né la lettera dell’art. [101 TFEU] né la lettera dell’art. [102 TFEU] fanno riferimento alla colpa mentre, dall’altra parte, più volte la giurisprudenza della Corte di giustizia ha sottolineato la natura oggettiva del concetto di abuso (di posizione dominante)” (cf. S Bastianon, ‘Il risarcimento del danno antitrust tra esigenze di giustizia e problemi di efficienza. Prime riflessioni sul Libro verde della Commissione’ (2006) *Mercato Concorrenza Regole* 321, 336).

<sup>86</sup> Cf. *T-Mobile Netherlands and Others* cit. para. 27.

<sup>87</sup> Cf. case C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160 para. 37.

<sup>88</sup> Indeed, the lack of reference to the concept of intent in the case law of the CJEU “means that liability for violation of competition rules in fact amounts to a strict liability” (M Hazelhorst, ‘Private Enforcement of EU Competition Law: Why Punitive Damages Are a Step Too Far’ (2010) *European Review of Private Law* 757, 763).

<sup>89</sup> Cf. PL Parcu and ML Stasi, ‘The Role of Intent in the Assessment of Conduct Under Article 102 TFEU’ in PL Parcu, G Monti, M Botta (eds), *Abuse of Dominance in EU Competition Law* (Edward Elgar 2017) 12, 14.

<sup>90</sup> As is well known, art. 106(1) TFEU cannot be applied alone, as it is “a reference provision” (cf. A Pappalardo, ‘State Measures and Public Undertakings: Article 90 of the EEC Treaty’ (1991) *European Competition Law Review* 34).

<sup>91</sup> For the use of this term see for example J Temple Lang, ‘Community Antitrust Law and Government Measures Relating to Public and Privileged Enterprises: Article 90 EEC Treaty’ in BE Hawk (ed.), *Fordham Corporate Law Institute Annual Proceedings* (Juris Publishing 1985) 543.

<sup>92</sup> On art. 106(1) TFEU see generally JL Buendia Sierra, ‘Article 106 – Exclusive or Special Rights and other Anti-Competitive State Measures’ in J Faull and A Nikpay (eds), *The EU Law of Competition* cit. 809; G Davies, ‘Article 86 EC, the EC’s Economic Approach to Competition Law, and the General Interest’ (2009)

seems to be based on the fact that, by complying with a national measure, in that scenario the “privileged undertakings” do not act either intentionally or negligently. However, it has to be noted that this doctrine only transfers the liability from the “privileged undertakings” to the Member State whose national measures forced<sup>93</sup> the former to breach arts 101 or 102 TFEU.<sup>94</sup> In other words, the rationale beyond the case law on the joint application of arts 106(1) TFEU and EU competition rules is that, as far as possible, liability should be ascribed to the subject (in this case, the Member State) that caused the antitrust violation rather than to the “coerced” infringer. By contrast, it does not follow from the case law on art. 106 TFEU that the lack of intent or negligence can excuse an antitrust infringement if no other subject can be held liable for such violation of arts 101 or 102 TFEU, as is the case with regard to undertakings using pricing algorithms.

By a different token, it should be considered that, under EU competition law, undertakings may be held jointly and severally liable for antitrust infringements committed by

European Competition Journal 549; JL Buendia Sierra, *Exclusive Rights and State Monopolies Under EC Law* (Oxford University Press 1999); L Hancher, ‘Community, State, and Market’ in P Craig and G De Burca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 721; A Gardner, ‘The Velvet Revolution: Article 90 and the Triumph of the Free Market in Europe’s Regulated Sectors’ (1995) *European Competition Law Review* 78; L Hancher and PJ Slot, ‘Article 90’ (1990) *European Competition Law Review* 35; L Gyselen, ‘State Action and the Effectiveness of the EEC Treaty’s Competition Provisions’ (1989) *CMLRev* 3; P Pescatore, ‘Public and Private Aspects of European Community Competition Law’ (1987) *FordhamIntlJ* 373; P Schindler, ‘Public Enterprises and the EEC Treaty’ (1970) *CMLRev* 57.

<sup>93</sup> The compulsion of the privileged undertakings to abuse their dominant position was considered a necessary requirement in order to apply arts 102 and 106(1) TFEU by the older case law of the CJEU (see for example case C-18/93 *Corsica Ferries v Corpo dei piloti del porto di Genova* ECLI:EU:C:1994:195).

<sup>94</sup> The CJEU’s approach to the application of arts 102 and 106(1) TFEU, however, significantly changed over time. Firstly, the CJEU also began to apply arts 102 and 106(1) TFEU to national measures that merely induce privileged undertakings to abuse their dominant position, simply by exercising their special rights (see for example case C-41/90 *Höfner and Elser v Macrotron* ECLI:EU:C:1991:161; case C-18/88 *RTT v GB-Inno-BM* ECLI:EU:C:1991:474). At a later stage, the CJEU began to hold that the above provisions may apply even in the absence of any abuse of the privileged undertakings: a risk of a potential abuse of a dominant position by the privileged undertakings suffices to trigger the application of arts 102 and 106(1) TFEU (case C-49/07 *MOTOE* ECLI:EU:C:2008:376; case C-553/12 *Commission v DEI* ECLI:EU:C:2014:2083). For further references see L Calzolari, ‘Pari opportunità tra operatori economici e tutela della struttura del mercato: la creazione di mercati concorrenziali come vincolo all’intervento pubblico nella regolazione imposto dagli artt. 106(1) e 102 TFEU’ (2015) *Diritto dell’Unione europea* 637.

their subsidiaries.<sup>95</sup> The legal regime for corporate group liability is rooted in the concept of “undertaking”.<sup>96</sup>

Although undertakings are the addressees of arts 101 and 102 TFEU, the concept is not defined in the Treaties or in secondary legislation. The case law firmly holds that the term undertaking should reflect the economic reality rather than the legal one.<sup>97</sup> Separate legal persons may be considered as a sole “undertaking” for the purposes of EU competition law if they are connected from an economic and managerial perspective.<sup>98</sup>

The theory of the single economic entity<sup>99</sup> has a number of implications for EU competition law.<sup>100</sup> One of the most interesting ones is that it makes it possible to hold (and actually to presume) parent companies liable for competition law infringements committed by their subsidiaries, as long as the former *can* exercise control over the latter and *did* actually exercise such control during the period when the infringement occurred. If the subsidiaries do not determine their own conduct on the market, there is no doubt

<sup>95</sup> See generally C Koenig, ‘An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law’ (2017) *Journal of Competition Law & Economics* 281; B Wardhaugh, ‘Punishing Parents for the Sins of Their Child: Extending EU Competition Liability in Groups and to Subcontractors’ (2017) *Journal of Antitrust Enforcement* 22; M Casoria, ‘L'imputabilità infragruppo delle violazioni antitrust. (Ir)responsabilità e presunzioni’ (2014) *Mercato Concorrenza Regole* 365; F Ghezzi and M Maggolino, ‘L'imputazione delle sanzioni antitrust nei gruppi di imprese, tra “responsabilità personale” e finalità dissuasive’ (2014) *Rivista delle Società* 1060; P Hughes, ‘Competition Law Enforcement and Corporate Group Liability – Adjusting the Veil’ (2014) *European Competition Law Review* 68; NI Pauer, *The Single Economic Entity Doctrine and Corporate Group Responsibility in European Antitrust Law* (Wolters Kluwer 2014); M Bronckers and A Vallery, ‘No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law’ (2011) *World Competition* 535; A Winckler, ‘Parent’s Liability: New Case Extending the Presumption of Liability of a Parent Company for the Conduct of its Wholly Owned Subsidiary’ (2011) *Journal of European Competition Law & Practice* 231; K Hofstetter and M Ludescher, ‘Fines Against Parent Companies in EU Antitrust Law: Setting Incentives for “Best Practice Compliance”’ (2010) *World Competition* 55; A Montesa and A Givaja, ‘When Parents Pay for Their Children’s Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent-Subsidiary Scenarios’ (2006) *World Competition* 555.

<sup>96</sup> See A Jones, ‘The Boundaries of an Undertaking in EU Competition Law’ (2012) *European Competition Journal* 301; O Odudu, ‘The Meaning of Undertaking Within Article 101’ (2005) *CYELS* 209; WPJ Wils, ‘The Undertakings as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Person’ (2000) *ELR* 99.

<sup>97</sup> Cf. *ex pluribus* case 170/83 *Hydrotherm* ECLI:EU:C:1984:271 para. 11.

<sup>98</sup> According to the Court of Justice “[t]he authors of the Treaties chose to use the concept of an ‘undertaking’ to designate the perpetrator of an infringement of competition law, who is liable to be penalised pursuant to articles [101 TFEU and 102 TFEU], and not other concepts such as that of ‘companies or firms’ or ‘legal persons’, used in particular in article [54 TFEU]” (cf. joined cases C-231/11 P to C-233/11 P *Commission v Siemens Österreich and Others et Siemens Transmission & Distribution and Others v Commission* ECLI:EU:C:2014:256 para. 41).

<sup>99</sup> See O Odudu and D Bailey, ‘The Single Economic Entity Doctrine in EU Competition Law’ (2014) *CMLRev* 1721.

<sup>100</sup> For example, it implies that intra-group agreements between different companies cannot breach art. 101 TFEU: although composed by several legal persons, an undertaking is free to choose how to organize itself (cf. case C-73/95 P *Viho v Commission* ECLI:EU:C:1996:405).

that they form a single economic entity together with the holding companies. Just as a given company is the only entity liable for antitrust offences committed by each of its units and departments, so too an “undertaking” is the only entity liable for the antitrust infringements committed by each of the legal persons of which it is possibly composed.

This system of corporate group liability has been devised to ensure that undertakings cannot escape their antitrust liability simply by setting up subsidiaries to which they “assign the task” to breach competition rules in the interest of the whole group (e.g., by formally entrusting the subsidiary with the task of managing the sales of the parent company and letting it enter into a cartel with the parent company’s competitors). For example, the Commission’s ability to recover fines is protected because the Commission is able to require the parent company to pay the fine should the subsidiary become insolvent or be liquidated.

More interestingly, the Commission is able to impose higher fines to increase the deterrent effect of arts 101 and 102 TFEU: the 10 per cent turnover cap enshrined by art. 23 of the Regulation (EC) n. 1/2003 is calculated on the basis of the overall turnover of the whole group rather than on the basis of the single subsidiary.<sup>101</sup> The theory also allows the Commission to broaden the extraterritorial reach of EU competition law.<sup>102</sup> Even when the parent company is based abroad, the circumstance that the subsidiary is established in one of the Member States is enough for the Commission to assert its jurisdiction on the matter as well as for fining the parent company.<sup>103</sup> Since antitrust infringements committed by any entity belonging to a corporate group are ascribed to the parent company, the risk of – indirect – recidivism of, and repeated infringements by, the latter significantly increases too.

<sup>101</sup> Such possibility has been partially limited by the recent case law of the CJEU, according to which “in a situation where the liability of a parent company is purely derivative of that of its subsidiary and in which no other factor individually reflects the conduct for which the parent company is held liable, the liability of that parent company cannot exceed that of its subsidiary” (cf. case C-597/13 P *Total v Commission* ECLI:EU:C:2015:613 para. 38; case C-286/11 P *Commission v Tomkins* ECLI:EU:C:2013:29 para. 43).

<sup>102</sup> See *Imperial Chemical Industries* cit. See F Munari, ‘Sui limiti internazionali all’applicazione extraterritoriale del diritto europeo della concorrenza’ (2016) *RivDirInt* 32; J Scott, ‘The New EU “Extraterritoriality”’ (2014) *CMLRev* 1343; F Wagner Von Papp, ‘Competition Law and Extraterritoriality’ in A Ezrachi (ed.), *Research Handbook on International Competition Law* (Edward Elgar 2012) 21; P De Pasquale, *La tutela della concorrenza oltre i confini comunitari tra applicazione extraterritoriale e cooperazione* (Editoriale Scientifica 2005); EM Fox, ‘Can We Solve the Antitrust Problems of Globalization by Extraterritoriality and Cooperation? Sufficiency and Legitimacy’ (2003) *Antitrust Bulletin* 355.

<sup>103</sup> Moreover, since one of the companies forming part of the single economic entity is established within the EU, the jurisdiction over the whole entity is based on the nationality principle, i.e., on one of the least controversial connecting factors recognized in public international law (see for further references L Calzolari and MG Buonanno, ‘The Relations Between the European Union and the Swiss Confederation in the Antitrust Field: Between Extraterritoriality and the Recent Agreement Concerning Cooperation on the Application of Their Competition Laws’ in V Salvatore (ed.), *The Free Movement of Persons Between Switzerland and the European Union* (Giappichelli 2016) p. 55).



Corporate group liability has raised several controversial and much-debated issues mainly because, according to the case law, it is not necessary for the Commission to prove that parent companies are actually involved or aware of the violations of arts 101 and 102 TFEU planned or committed by their subsidiaries in order to hold them accountable for such infringements. Especially if parent companies hold nearly the entire capital of their subsidiaries,<sup>104</sup> an almost irrebuttable presumption that they exercise decisive influence on the commercial policy of the subsidiaries applies.<sup>105</sup>

In theory, parent companies may rebut such a presumption of control over their wholly owned subsidiaries by submitting evidence that the subsidiaries act autonomously of, and receive no instructions from, the parent companies. In practice, however, such requirement of proof amounts to a so-called *probatio diabolica*: in order to prove the complete autonomy of their subsidiaries, parent companies are essentially requested to submit evidence capable of refuting an abstract possibility, being impossible to adduce direct and irrefutable evidence of the independence of the subsidiaries' conduct on the market.<sup>106</sup>

It is not surprising that there are virtually no cases in which parent companies did succeed in arguing that they did not exercise decisive influence over a wholly owned subsidiary.<sup>107</sup> One of the clearest examples of the rather strict approach applied to the

<sup>104</sup> See for example case T-299/08 *Elf Aquitaine v Commission* ECLI:EU:T:2011:217 and case C-508/11 P *Eni v Commission* ECLI:EU:C:2013:289.

<sup>105</sup> Indeed, "[i]n the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary" (cf. case C-97/08 P *Akzo Nobel and Others v Commission* ECLI:EU:C:2009:536 para. 60).

<sup>106</sup> See F Amato, A Della Negra and F Liberatore, 'La responsabilità della capogruppo per le violazioni al diritto antitrust europeo commesse dalle controllate: presunzione relativa o, di fatto, assoluta?' (2014) *Contratto e Impresa* Europa 334; B Leupold, 'Effective Enforcement of EU Competition Law Gone too Far? Recent Case Law on the Presumption of Parental Liability' (2013) *European Competition Law Review* 570; J Joshua, J Botteman and L Atlee, "'You Can't Beat the Percentage' – The Parental Liability Presumption in EU Cartel Enforcement" (2012) *Global Competition Review* 3; S Thomas, 'Guilty of A Fault One Has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law' (2012) *Journal of European Competition Law & Practice* 11; A Svetlicinii, 'Parental Liability for the Antitrust Infringements of Subsidiaries: A Rebuttable Presumption or *Probatio Diabolica*?' (2011) *European Law Reporter* 288. It is worth noting that this line of criticism has been dismissed by the case law, according to which "il suffit de relever qu'il n'est pas exigé des parties concernées qu'elles rapportent une preuve directe et irréfutable de l'autonomie de comportement de la filiale sur le marché mais uniquement qu'elles produisent des éléments de preuve susceptibles de démontrer cette autonomie [...]". En outre, la circonstance que la requérante n'a pas en l'espèce produit des éléments de preuve de nature à renverser la présomption d'absence d'autonomie ne signifie pas que ladite présomption ne peut en aucun cas être renversée" (cf. case T-168/05 *Arkema v Commission* ECLI:EU:T:2009:367 para. 82).

<sup>107</sup> One of the few exceptions is represented by case T-24/05 *Alliance One International and Others v Commission* ECLI:EU:T:2010:453 on which see L Idot, 'Groupe de sociétés et imputabilité du comportement – Le tribunal rappelle une nouvelle fois que la possibilité d'imputer le comportement d'une filiale à la société mère est fondée sur l'existence d'une entreprise unique' (2010) *Europe* 33; C Hummer, 'Alliance One:

matter is that of purely financial investors: indeed, even private equity firms have been held liable pursuant to the presumption of decisive influence.<sup>108</sup> The fact that the only business activity carried out by an undertaking was that of acquiring distressed companies in order to restructure and sell them to third parties has been considered a circumstance supporting – rather than denying – the exercise of decisive influence by the acquiring company over the target one.<sup>109</sup> The very same approach has also been deemed to apply when a subsidiary disregards express instructions received from its parent company:<sup>110</sup> indeed, the presumption of liability of the parent company cannot be rebutted merely because the participation of the subsidiary in an antitrust infringement is “in blatant contradiction with the explicit instructions” given by the parent company to that subsidiary “not to participate in any anticompetitive practices in a given market”.<sup>111</sup>

Just as the autonomous decision of a subsidiary to blatantly disregard the instruction not to collude received from its parent company does not entail that the latter can avoid liability under art. 101 TFEU, it is submitted that the same conclusion may (and should) hold true also with regard to the autonomous decision to collude taken by algorithms that were not instructed to participate in an anticompetitive infringement but were rather designed to maximize profits.<sup>112</sup> After all, the case law already supports the conclusion that, as a result of their power of supervision, parent companies have “a responsibility to ensure that [their] subsidiary complies with the competition rules”,<sup>113</sup> and not only a responsibility to instruct them to do so.

The CJEU case law on the irrelevance of intent and on parent company liability for antitrust violations committed by subsidiaries arguably makes it possible to interpret the notion of imputability so that undertakings may be held responsible for the autonomous decisions to collude made by their own algorithms,<sup>114</sup> even if the latter were not designed

General Court Overturned Parental Liability of a Pure Financial Holding Company’ (2011) *Journal of European Competition Law & Practice* 126.

<sup>108</sup> See for example Decision of the Commission of 2 April 2014 relating to a proceeding under article 101 TFEU, case AT.39610 – *Power Cables C*(2014) 2139 final.

<sup>109</sup> Cf. case T-395/09 *Gigaset v Commission* ECLI:EU:T:2014:23.

<sup>110</sup> Indeed, “the existence of an express instruction given by a parent company to its subsidiary not to participate in any anticompetitive practices in a given market can be a strong indication of the actual exercise of decisive influence by the parent over the subsidiary” (cf. case C-155/14 P *Evonik Degussa and AlzChem v Commission* ECLI:EU:C:2016:446 para. 40).

<sup>111</sup> *Ibid.* paras 39-40.

<sup>112</sup> The rationale is that “regardless of whether there exists an alternative plausible and legitimate justification for the unilateral adoption of a pricing algorithm, firms should refrain from doing so to the extent that the common adoption may facilitate tacit collusion” (cf. P Siciliani, ‘Tackling Algorithmic-Facilitated Tacit Collusion in a Proportionate Way’ cit. p. 32).

<sup>113</sup> Cf. case T-77/08 *Dow Chemical v Commission* ECLI:EU:T:2012:47 para. 101.

<sup>114</sup> In this vein, it has been observed that it is necessary “not to underestimate the flexibility allowed by the CJEU’s case law in EU antitrust cases”, considered that the CJEU “has identified unlawful collusion as a consequence of the disclosure of sensitive information from one undertaking to another and has also

to conspire. In any case, it seems reasonable that undertakings should ensure that the algorithms that they freely decide to use do not engage in conduct that would be qualified as illicit if committed by humans.

For example, just as undertakings should organize a compliance programme to prevent breaches of EU competition law by their employees,<sup>115</sup> so they should design their algorithms to prevent such infringements.<sup>116</sup> If this occurs (or cannot be avoided from the technical viewpoint), it seems just as much reasonable that undertakings should be the ones that have to bear the negative externalities of their algorithms' behaviours (including harm caused to consumers or to the market structure)<sup>117</sup> even if they did not wish or even expect such externalities to occur:<sup>118</sup> if only because they are the subjects that benefit from the very same – undesired or unexpected – conducts until (if ever) an antitrust authority detects them.<sup>119</sup>

allowed for the establishment of infringements in the absence of anticompetitive intent", so that "even self-learning pricing algorithms could be caught by the prohibition of Article 101 TFEU" (cf. J Blockx, 'Antitrust in Digital Markets in the EU: Policing Price Bots' (Paper for the 2017 Radboud Economic Law Conference) 11).

<sup>115</sup> As is well known, undertakings are liable for the actions of their employees acting within the scope of their employment even if the latter have not been authorised or instructed to collude since "action by a person who is authorised to act on behalf of the undertaking suffices" (cf. case C-68/12 *Slovenská sporiteľňa* ECLI:EU:C:2013:71 para. 25).

<sup>116</sup> Cf. OECD, Algorithms and Collusion – Note from the European Union cit. para. 28, where the Commission notes that "[i]t is up to the firms using algorithms to ensure that their algorithms do not engage in illegal behaviour". Indeed, it has been argued that "undertakings can be liable for the actions of the (self-learning) algorithms they create or use. Undertakings have a positive obligation to ensure compliance with the EU antitrust rules and cannot plead ignorance of what their employees or price bots are doing" (cf. J Blockx, 'Antitrust in Digital Markets in the EU' cit. 11). Indeed, "[i]n a world where employees (*i.e.*, humans) alone made the decisions about pricing, promotions, competition, output, and capacity it makes sense that compliance programs focus on sensitizing the marketing and sales teams to the antitrust laws. But when those same decisions are delegated to or aided by complex and self-evolving algorithms, the approach should broaden. These technologies learn (quickly) and require regular monitoring for compliance with their initial purposes. So, the audience for antitrust compliance discussions has to expand to include AI developers and the dialog must be tailored to this new audience" (cf. T Snyder, K Fayne and K Silverman, 'Antitrust Intelligence: Six Tips for Talking to AI Developers About Antitrust' (2019) Competition Law & Policy Debate 36).

<sup>117</sup> Cf. OECD, Algorithms and Collusion – Note from the European Union cit. para. 2, where the Commission observes that "humans – and, through them, legal entities – must be held accountable for the consequences of the algorithms they choose to use, including in the area of competition policy".

<sup>118</sup> In other words, "[o]nce companies code or implement what may be considered virtual assistants, they must be fully accountable for the anticompetitive outcomes that might derive from their performance on the market", since "[p]rice bots are to be seen as a fully integrated part of a business, implemented by companies to boost pre-existing or future pricing strategies, monitor the market and detect deviation in hypothetical collusive scenarios in the same manner as a particularly skilful employee might do through ordinary means" (cf. N Colombo, 'Human Liability *Vis-A-Vis* Artificial Intelligence's Anticompetitive Behaviours' cit. 16).

<sup>119</sup> Indeed, "since any gains resulting from illegal activities accrue to the shareholders, it is only fair that those who have the power of supervision should assume liability for the illegal business activities of their subsidiaries" (cf. *Dow Chemical v Commission* cit. para. 101).

## VI. BIG DATA ANALYTICS DOES CREATE COMPETITIVE CONCERNS: SHOULD THE COMMISSION AND NATIONAL COMPETITION AUTHORITIES COMMIT TO TACKLING ALGORITHMIC COLLUSION?

Algorithmic collusion may trigger the application of EU competition law, whether or not formally qualified as a concerted practice. Indeed, EU competition rules may be enforced even without ascertaining any actual antitrust infringement.

Formalizing a long-standing practice of informal settlement,<sup>120</sup> art. 9 of the Regulation (EC) n. 1/2003 allows the adoption of commitment decisions if the remedies proposed by undertakings resolve the Commission's *competitive concerns* in a given scenario.<sup>121</sup> Art. 12 of the Directive (EU) n. 1/2019 has recently established that commitment decisions must also be available at the national level.<sup>122</sup>

As is well known, there are no clear procedural rules or specific limits for the use of commitments.<sup>123</sup> The Commission enjoys a broad margin of discretion in relation to the choice, the design and the proportionality of this remedy.<sup>124</sup> In theory, commitments should be offered at their initiative by the undertakings to which the Commission has already sent a Statement of Objections or, more often, a preliminary assessment of the case.<sup>125</sup> Although the preliminary assessment needs to indicate the reasons why the

<sup>120</sup> Cf. H Schweitzer, 'Commitment Decisions under Article 9 of Regulation 1/2003: The Developing EC Practice and Case Law' in CD Ehlermann and M Marquis (eds), *European Competition Law Annual 2008: Antitrust Settlements Under EC Competition Law* (Oxford University Press 2010) 547, 548. In other words, "[a]rticle 9 of Regulation 1/2003 formally introduced the possibility of closing proceedings with a commitment decision, codifying the Commission's previous administrative practice" (cf. S Martínez Lage and R Allendesalazar, 'Commitment Decisions ex Regulation 1/2003: Procedure and Effects' in CD Ehlermann and M Marquis (eds), *European Competition Law Annual 2008* cit. 581).

<sup>121</sup> One could observe that it seems to be a certain degree of inconsistency in asserting that, on the one hand, algorithmic collusion should be treated as a *per se* violation of art. 101 TFEU (if only as a form of exchange of information between competitors) and, on the other hand, suggesting that they should be tackled through the commitment instrument. However, although one may disagree with this policy choice of the Commission which may decrease the deterrent effect of EU competition law, the practice shows that commitment decisions have been indeed used in respects of practices that, if proved, would have represented serious infringements of arts 101 and 102 TFEU (cf. A Jones and B Sufrin, *EU Competition Law* cit. 946).

<sup>122</sup> Cf. Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. On the so-called "ECN+ directive", see *inter alia* L Calzolari, *Il sistema di enforcement delle regole di concorrenza dell'Unione europea* (Giappichelli 2019).

<sup>123</sup> Indeed, a "rather obscured path leading to the issuance of a commitment decision by a competition authority" (cf. P Moullet, 'How should Undertakings Approach Commitment Proposal in Antitrust Proceedings' (2013) *European Competition Law Review* 86).

<sup>124</sup> Cf. D Rat, 'Commitment Decisions and Private Enforcement of EU Competition Law: Friend or Foe?' (2015) *World Competition* 527, 529. On the proportionality issue, see also case C-441/07 P *Commission v Alrosa* ECLI:EU:C:2010:377 and, more recently, case T-76/14 *Morningstar v Commission* ECLI:EU:T:2016:481.

<sup>125</sup> Although "[t]he power to take a commitment decision arises only where the Commission otherwise intends to adopt a termination decision under Article 7", it is observed that "[t]his does not mean that it

investigated practices could violate competition law, thus explaining the competitive concerns of the Commission,<sup>126</sup> the document does not establish an infringement.<sup>127</sup>

The case practice shows that the Commission often contacts the undertakings involved and informally notifies them of its interest in receiving commitment proposals.<sup>128</sup> Although commitments cannot be designed by the Commission and imposed upon the undertakings if the latter are unwilling to propose them,<sup>129</sup> it follows that there is room for considerable negotiation between the Commission and the undertakings with regard to the content of the commitments before the moment in which they are formally “offered” by the latter to the former.<sup>130</sup>

Indeed, the analysis of the Commission’s practice suggests that the preliminary assessment is often issued only when (and if) the actual adoption of a commitment decision

has to have sent a statement of objections (SO) before taking an Article 9 decision”, since the only “requirement is that the Commission has made a ‘preliminary assessment’” of the case (cf. A Jones and B Sufrin, *EU Competition Law* cit. 983). Conversely, “if the Commission has issued an SO, it can opt either for an Article 7 or an Article 9 decision. By contrast, if it has only reached a preliminary assessment but, instead of proceeding under Article 9 it intends to adopt an infringement decision, it would first have to prepare and serve to the defendant a formal [Statement of Objections]” (cf. S Martínez Lage and R Allendesalazar, ‘Commitment Decisions ex Regulation 1/2003’ cit. 590).

<sup>126</sup> Cf. PI Colomo, ‘Three Shifts in EU Competition Policy: Towards Standards, Decentralization, Settlements’ (2013) *Maastricht Journal of European and Comparative Law* 363, 378.

<sup>127</sup> Indeed, “[t]he preliminary legal assessment in Article 9 decisions lacks the evidential depth and rigor of prohibition decisions” (cf. R Subiotto, DR Little and R Lepetska, ‘The Application of Article 102 TFEU by the European Commission and the European Courts’ (2017) *Journal of European Competition Law & Practice*, 263, 264).

<sup>128</sup> Cf. A Gautier and N Petit, ‘Optimal Enforcement of Competition Policy: The Commitments Procedure Under Uncertainty’ (CORE Discussion Papers 63/2014) 1, 2. Indeed, “[t]he chronology of some of the cases decided by the Commission clearly shows that the commitments in these cases were negotiated before the proceedings were formally initiated” (cf. S Martínez Lage and R Allendesalazar, ‘Commitment Decisions ex Regulation 1/2003’ cit. 588), so that “[i]t is thus evident that sometimes the negotiations over the proposed commitments may take place de facto well before the notification of the preliminary assessment” (cf. P Cavicchi, ‘The European Commission’s Discretion as to the Adoption of Article 9 Decisions: Lessons from Alrosa’ (Hamburg Institute for European integration Discussion Paper No. 3/2011) 1, 6).

<sup>129</sup> Conversely, the Commission has “a right and not an obligation to accept commitments” (cf. D Rat, ‘Commitment Decisions and Private Enforcement of EU Competition Law’ cit. 531) and it indeed enjoys “complete discretion as to whether it accepts these commitments, which can be, as in art. 9 commitment decisions, behavioural or structural in nature” (cf. AL Hinds and S Eaton, ‘Commitment Issues: New Developments in EU and Irish Competition Law’ (2014) *European Competition Law Review* 33, 38). Since undertakings are not entitled to a committed decision, even if they offer commitments in order to meet the Commission’s concerns, the latter maintains its right to refuse the proposed (and negotiated) remedies and to revert to the traditional route with a view to adopt an infringement decision ex art. 7 of the Regulation (EC) n. 1/2003 cit. (cf. A Gautier and N Petit, ‘Optimal Enforcement of Competition Policy’ cit. 2).

<sup>130</sup> Cf. N Dunne, ‘Commitment Decisions in EU Competition Law’ (2014) *Journal of Competition Law & Economics* 399, 403.

is not only envisaged but also considered likely as the result of the negotiation already carried out by the Commission and the undertakings involved in the procedure.<sup>131</sup>

In addition to this enhanced role of the undertakings in this procedure,<sup>132</sup> what matters is that the discussions between the Commission and the undertakings do not focus on the past conduct of the latter but rather on the design of the prospective remedies that need to be devised and agreed upon in order to resolve the Commission's competitive concern.<sup>133</sup> Pursuant to recital 13 of the Regulation (CE) n. 1/2003, if it accepts the commitments proposed by the undertakings, the Commission cannot establish, in its art. 9 decision, whether or not there was a violation of arts 101 or 102 TFEU.<sup>134</sup>

On the one hand, the Commission<sup>135</sup> therefore has no incentive to invest its (limited) resources in proving that the investigated practice could actually constitute an antitrust infringement.<sup>136</sup> On the other hand, the parties have no incentive to challenge the validity of the legal arguments advanced by the Commission in the preliminary assessment, as

<sup>131</sup> Cf. E De Smijter and A Sinclair, 'The Enforcement System under Regulation 1/2003' in J Faull and A Nikpay (eds), *The EU Law of Competition* cit. 91, 132. Therefore, the possibility to achieve a "settlement via Article 9 is a mechanism for managing risk", since the undertaking involved "gains control over the remedies implemented, as opposed to the unilateral imposition of remedies (typically, high fines) under an infringement decision" (cf. N Dunne, 'Commitment Decisions in EU Competition Law' cit. 405).

<sup>132</sup> The case law confirms that "the mechanism introduced by Article 9 of Regulation No 1/2003 enables the undertaking concerned to participate fully in the procedure, by putting forward the solutions which appear to it to be the most appropriate for addressing the Commission's concerns and preventing the Commission from making a formal finding of infringement of Article 101 TFEU or Article 102 TFEU" (cf. case T-342/11 *CEEES and Asociación de Gestores de Estaciones de Servicio v Commission* ECLI:EU:T:2014:60 para. 55). Therefore, "[t]he company will have the possibility of proposing to the Commission remedies which it knows can operate in practice; furthermore, it can fine-tune its proposal to meet the Commission's preliminary concerns while disrupting its business practices as little as possible" (cf. S Martínez Lage and R Allendesalazar, 'Commitment Decisions ex Regulation 1/2003' cit. 584).

<sup>133</sup> Indeed, "[o]ne of the major differences between Article 7 (enforcement) decisions and Article 9 (commitment) decisions is that the focus of discussion in Article 7 enforcement decisions is the proof of the (past) violation whereas in Article 9 commitment decisions the focus of discussion is the adequacy of the remedy to meet – in the future – the concerns of the Commission"; in other words, "[t]he issue is no longer what the parties did but what the Commission wants" (cf. F Jenny, 'Worst Decision of the EU Court of Justice: The Alrosa Judgment in context and the Future of Commitment Decisions' (2015) *FordhamIntlJ* 701, 762-763).

<sup>134</sup> Indeed, "the Commission is actually forbidden from discharging its burden of proof in relation to Articles 101 or 102 TFEU in this context, to the extent that doing so results in a formal finding of breach" (cf. N Dunne, 'Commitment Decisions in EU Competition Law' cit. 424).

<sup>135</sup> According to the case law, "the Commission is not required to demonstrate to the requisite legal standard that the conditions of Article 101 TFEU or Article 102 TFEU are satisfied and is therefore able to provide a more rapid solution to the problems which it has identified" (cf. *CEEES and Asociación de Gestores de Estaciones de Servicio v Commission* cit. para. 55).

<sup>136</sup> Therefore, "[t]he depth and the quality of the substantive analysis are in no way comparable to that found in decisions formally establishing a breach of Articles 101 and 102 TFEU" (cf. PI Colomo, 'Three Shifts in EU Competition Policy' cit. 378).

long as they are able to convince the Commission to close the proceeding by accepting commitments that do not affect their core business.<sup>137</sup>

It follows that commitment decisions are essentially “shielded” from judicial review:<sup>138</sup> neither the Commission nor the undertakings have any interest in seeking the annulment of a decision they have agreed upon. Moreover, as far as the viewpoint of the undertakings is concerned, the fact that commitment decisions ascertain no antitrust offences means, on the one hand, that no public fines are attached to them and, on the other hand, that follow-on actions are less likely to be brought by aggrieved individuals.<sup>139</sup>

For these reasons, the diffusion of commitment decisions has been linked with manifold negative consequences for the sound development of EU competition law: for example, commitment decisions are deemed to be capable of harming legal certainty and the evolution of the antitrust legal doctrine (e.g., by reducing the number of

<sup>137</sup> Indeed, “[s]o long as the requested concession does not go too close to the heart of its business model, a negotiated settlement involving a quantifiable sacrifice of business freedom will be more attractive than defending itself robustly” (cf. *inter alia* I Forrester, ‘Creating New Rules? Or Closing Easy Cases? Policy Consequences for Public Enforcement of Settlements under Article 9 of Regulation 1/2003’ in CD Ehlermann and M Marquis (eds), *European Competition Law Annual 2008* cit. 637, 645). For example, it has been observed that “there is too much pressure on the defence to settle, even though the Commission’s case is not correct and goes too far in some way. The idea is straightforward. Proceedings can take ages. Fines can be colossal. The diversion of resources to defend cases may be very significant in time and expense. Companies also want to avoid bad publicity. All of this may lead to considerable incentives on defendants to settle” (cf. J Ratliff, ‘Negotiated Settlements in EC Competition Law: The Perspective of the Legal Profession’ in CD Ehlermann and M Marquis (eds), *European Competition Law Annual 2008* cit. 305, 306). In other words, “[t]he fact that an undertaking voluntarily changes its behaviour or agrees to divest itself of assets as a result of a Commission investigation cannot, in itself, be normative as to the law: undertakings may choose to offer commitments for a range of reasons, and not necessarily because they agree with the Commission’s legal argument against them, and indeed it is sometimes recorded in a commitment decision that the undertaking or undertakings do not agree with its analysis” (cf. R Whish, ‘Motorola and Samsung: An Effective Use of Article 7 and Article 9 of Regulation 1/2003’ (2014) *Journal of European Competition Law & Practice* 603).

<sup>138</sup> Indeed, “[c]ommitment decisions *de facto* withdraw a large part of the Commission’s competition law practice from judicial review” (cf. H. Schweitzer, ‘Commitment Decisions in the EU and in the Member States: Functions and Risks of a New Instrument of Competition Law Enforcement Within a Federal Enforcement Regime’ (2 August 2012) 2 papers.ssrn.com). Although “[a]n Article 9 decision can always be appealed by the addressee, even if the decision is based upon agreements freely entered into”, it is obvious that “this circumstance will undoubtedly make it difficult to appeal such decision successfully” (cf. M Siragusa and E Guerri, ‘Antitrust Settlements Under EC Competition Law: The Point of View of the Defendants’ in CD Ehlermann and M Marquis (eds), *European Competition Law Annual 2008* cit. 192).

<sup>139</sup> Indeed, one of “the main incentive[s] for an undertaking to give a commitment is the avoidance of any admission of liability that might lead to follow-up private enforcement” (cf. MT Richter, ‘The Settlement Procedure in the Context of the Enforcement Tools of European Competition Law – a Comparison and Impact Analysis’ (2012) *European Competition Law Review* 537, 540). Follow-on actions are nevertheless allowed (see case C-547/16 *Gasorba and Others* ECLI:EU:C:2017:891).

binding judicial precedents),<sup>140</sup> as well as to allow the transformation from the traditional adversarial enforcement system of arts 101 and 102 TFEU to a regime of so-called regulatory competition.<sup>141</sup>

The first concern is often raised with regard to the leaning shown by the Commission toward the use of commitment decisions in novel cases where the law is not well-settled,<sup>142</sup> but it is not unanimously shared. Considering that commitment decisions are an enforcement instrument and not an instrument for providing legal certainty to undertakings, nor a substitute for exemption decisions,<sup>143</sup> many believe that so-called art. 9 decisions are particularly useful in novel, technological and fast-moving markets.

On the one hand, by reducing the duration of the administrative (and judicial) procedure through procedural efficiencies, they make it more likely that the decision will be

<sup>140</sup> Cf. H Schweitzer, 'Commitment Decisions under Article 9 of Regulation 1/2003' cit. 577. More specifically, "[t]he potential absence of legal certainty stems from the fact that commitments decisions find solely that there are no grounds for EC's action without concluding whether or not there has been or still is an infringement" (cf. D Rat, 'Commitment Decisions and Private Enforcement of EU Competition Law' cit. 532). Indeed, "the fact that no final decision on liability is reached in commitments decisions robs the competition regime – and businesses – of potentially important legal precedent and clarity about how competition laws apply to particular behaviour" (cf. P Marsden, 'Towards an Approach to Commitments that is "Just Right"' (2015) *Competition Law International* 71, 73). In other words, "the absence of any legal determination regarding the validity of the theory of competition harm advanced or whether the necessary elements are made out on the facts can result in ambiguity as to the legal status of the underlying competition case, thus creating uncertainty as to the parameters of the law" (cfr. N Dunne, 'Commitment Decisions in EU Competition Law' cit. 415-416).

<sup>141</sup> It is widely believed that "the EU law enforcement system has moved from a regime of *ex-post* assessment of competition law violations under the (weak) supervision of the Courts to a regulatory approach whereby the Commission is more concerned by the design of remedies which will improve the competitive situation of a market than by the characterization of a competition law violation and its elimination" (cf. F Jenny, 'Worst Decision of the EU Court of Justice' cit. 763). Indeed, under given circumstances, "commitments have in essence a regulatory flavour, and they may not be easily justified on competition law grounds. They are likely to be disproportionate. Indeed, the Commission could be tempted to use commitment proceedings to deal with unclear cases or regulate markets according to its own vision" (cf. M Siragusa and E Guerri, 'Antitrust Settlements Under EC Competition Law' cit. 191). By the same token, it has been observed that "[c]ommitment decisions may be adopted in sectors where the Commission pursues a specific vision of how markets are to be restructured in order for them to function well, and may then become a substitute for regulation" (cf. H Schweitzer, 'Commitment Decisions in the EU and in the Member States' cit. 3). In other words, "the Commission may seek to attach 'collateral conditions' to a decision, *i.e.*, obligations which are not strictly related to the competition issue, but which are added in pursuit of some broader competitive agenda (such as, classically, to create openings in a context of liberalisation)" (cf. J Ratliff, 'Negotiated Settlements in EC Competition Law' cit. 311).

<sup>142</sup> Many support the idea that "novel cases are poor candidates for Article 9 decisions" (cf. I Forrester, 'Creating New Rules?' cit. 647) mainly because avoiding judicial review in cases based on new (or much debated) theories of harm is clearly not optimal for the sound development of EU competition law (cf. R Whish, 'Motorola and Samsung' cit. 603; C Pesce, *I nuovi strumenti di public enforcement. Commissione europea e «antitrust» nazionale a confronto* (Editoriale Scientifica 2012) 87).

<sup>143</sup> Cf. E De Smijter and A Sinclair, 'The Enforcement System Under Regulation 1/2003' cit. 128).



issued before the new market or new technology has already changed and the initial harm to competition has gone unaddressed. On the other hand, commitments can be modified and, in any case, they expire after a given period of time, thereby enabling the Commission to recalibrate its intervention on the market, without locking in new technologies or new business models.<sup>144</sup> Indeed, the case practice shows that the Commission is particularly willing to accept commitments in cases concerning new markets and new technologies, as seen *inter alia* in the *Samsung*,<sup>145</sup> *IBM*,<sup>146</sup> *Apple*,<sup>147</sup> *Amazon*,<sup>148</sup> and the *Credit default swap*<sup>149</sup> cases, and as was vigorously attempted by the Commission in the *Google Shopping* case.<sup>150</sup>

To conclude, what can be inferred from the above analysis is that the Commission has made large use of the possibility to enforce EU competition rules even without ascertaining any actual antitrust infringement. Commitment decisions have been widely used in order to tackle new legal issues that emerge in new markets, allowing the Commission to play a role that resembles that of a regulatory authority rather than that of an antitrust enforcer. This is possible because, pursuant to art. 9 of the Regulation (EC) n. 1/2003, a competitive concern suffices for the Commission to issue a preliminary assessment and to adopt a binding decision.

<sup>144</sup> Cf. P Marsden, 'Towards an Approach to Commitments that is "Just Right"' cit. 72. Indeed, commitment decisions not only allow "enforcement authorities to secure the effectiveness of their intervention in highly dynamic markets on the basis of a 'preliminary assessment'", but also permit "to reopen formal proceedings in case of 'material change' in the market context in question", according to art. 9(2) of the Regulation (EC) n. 1/2003 cit. (cf. DMB Gerard, 'Negotiated Remedies in the Modernization Era: The Limits of Effectiveness' in P Lowe, M Marquis and G Monti (eds), *European Competition Law Annual 2013: Effective and Legitimate Enforcement* (Hart 2014).

<sup>145</sup> Cf. Commission decision of 29 April 2014 relating to a proceeding under article 102 TFEU, case AT.39939 – *Samsung* C(2014) 2891 final.

<sup>146</sup> Cf. Commission decision of 13 December 2011 relating to a proceeding under article 102 TFEU, case COMP/39.692 – *IBM Maintenance Services* C(2011) 9245 final.

<sup>147</sup> Cf. Commission decision of 12 December 2012 relating to a proceeding under article 101 TFEU, case COMP/39.847 – *E-books (Apple)* C(2013) 4750 final.

<sup>148</sup> Cf. Commission decision of 4 May 2017 relating to a proceeding under article 102 TFEU, case AT.40153 – *E-book MFNs and related matters (Amazon)* C(2017) 2876 final. More generally see A Giannaccari, 'Apple, Amazon e gli e-book. Una storia illecita, pro-competitiva' (2016) *Mercato Concorrenza Regole* 79; B Kirkwood, 'Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy' (2014) *University of Miami Law Review* 36; I Iglezakis, 'Competition and Antitrust Issues with Regard to E-Books' (2013) *European Competition Law Review* 249.

<sup>149</sup> Cf. Commission decision of 20 July 2016 relating to a proceeding under article 101 TFEU, case AT.39745 – *CDS Information Market (ISDA)* C(2016) 4583 final and Commission decision of 20 July 2016 relating to a proceeding under article 101 TFEU, case AT.39745 – *CDS Information Market (Markit)* C(2016) 4585 final.

<sup>150</sup> Cf. Commission decision of 27 July 2017 relating to a proceeding under article 102 TFEU, case AT.39740 – *Google Search (Shopping)* C(2017) 4444. For further references, see L Calzolari, 'Preliminary Comments on the Google Case: Bridging the Transatlantic Digital Divide by Widening the Antitrust One' (14 July 2017) SIDI blog [www.sidiblog.org](http://www.sidiblog.org).

As already discussed, the diffusion of algorithmic collusion would make affected markets appear to be competitive (many players, low entry barriers, no search costs, etc.) but the market mechanism would actually be lessened or even “replaced” by big data analytics. The replacement of the “invisible hand” with big data and artificial intelligence arguably meets the threshold required by art. 9 of the Regulation (EC) n. 1/2003 allowing the Commission to intervene and somehow begin to regulate data driven markets. Moreover, just as any form of tacit collusion, algorithmic collusion affects the competitive market structure having the same negative effects of a cartel, reducing social welfare by means of either higher prices or lower output.

On the contrary, the relevance of questions such as whether *i)* algorithmic collusion may be considered as a concerted practice rather than an example of tacit collusion and therefore be tackled under art. 101 TFEU as well as whether *ii)* the lack of intent may preclude algorithms’ behaviours from being ascribed to the undertakings involved is significantly lessened. Indeed, even if they do not agree with the theory of harm elaborated by the Commission or with the possibility of being considered liable for the practice under investigation, undertakings have very limited incentives to challenge the preliminary assessment drafted by the Commission and to refuse to discuss with the Commission the possibility to close the proceeding by proposing commitments. Undertakings’ best strategy is indeed that of accepting to engage in the negotiation process with the Commission in order to draft commitments that do not alter their activities too much while allowing them to avoid public fines and to reduce the possibility of civil liabilities.<sup>151</sup>

Moreover, it is worth noting that recital 13 of the Regulation (EC) n. 1/2003 clarifies that commitments meeting the Commission’s concerns can be made binding on the undertakings *concerned*, a notion that does not necessarily refer to the question of imputability and that therefore arguably includes undertakings whose algorithms triggered the Commission’s competitive concerns.

## VII. CONCLUSIONS

Algorithmic collusion can be tackled under current competition rules. Firstly, algorithmic collusion is different from tacit collusion. In the traditional and analogic scenario, when they tacitly collude, undertakings act rationally on the ground of *existing* market conditions. When designing their algorithms to maximize profits, undertakings are *contributing* to the conditions that allow “tacit” collusion to occur. This difference should be considered when dealing with the imputability of algorithms’ behaviours. For this reason, algorithmic collusion should be qualified as a concerted practice falling within the scope of application of current competition rules. On this view, the use of algorithms that

<sup>151</sup> See Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

autonomously decide to conspire is caught by art. 101(1) TFEU unless the undertakings to which the conduct is ascribed succeed in proving that, in the specific case, a concerted practice did not occur or that the conditions listed by art. 101(3) TFEU for so-called “efficiency defences” are met.

Secondly, a *quasi*-strict liability regime applies to antitrust offences, so that intention and imputability already play a limited role. This is clearly shown by the fact that under EU competition law undertakings may be held – and to some extent, presumed – jointly and severally liable for antitrust infringements committed by their subsidiaries. It would be appropriate, we submit, to extend this notion of strict liability to the context of algorithmic collusion.

Thirdly, competition rules may be enforced even without ascertaining any antitrust infringement. *Competitive concerns* are enough to warrant to the Commission the possibility of adopting a commitment decision. Just like any form of tacit collusion, algorithmic collusion affects the competitive market structure, and it has the same negative effects that are caused by a cartel. Regardless of the question concerning the possibility to ascribe algorithms’ behaviours to the undertakings involved, the reduction of social welfare meets the threshold required for the Commission to initiate a proceeding under art. 9 of the Regulation (EC) n. 1/2003. Although not clearly defined, there is no doubt that the concept of “competitive concerns” is wider than that of “infringement”, the latter being the relevant legal standard under art. 7 of the Regulation (EC) n. 1/2003. Moreover, as mentioned, in the context of commitments procedures the focus is on the future (the remedies) rather than on the past (the undertaking’s conduct):<sup>152</sup> the Commission can therefore issue a preliminary assessment even in unclear cases, with regard to which a violation of arts 101 or 102 TFEU could be difficult (or impossible) to establish.<sup>153</sup>

In this perspective, the question of whether or not algorithmic collusion is different from analogic tacit collusion is of little relevance: if it so wishes, the Commission would be free to use the legal framework of art. 9 of the Regulation (EC) n. 1/2003 even in cases of mere oligopolistic interdependence in order to negotiate with the oligopolists a remedy capable of addressing the competitive concerns raised by any form – analogic or algorithmic – of tacit collusion (higher prices and/or lower output). The above of course does not entail that tacit collusion falls *per se* within the scope of application of art. 101 TFEU, but only that the legal standard applicable under art. 9 of the Regulation (EC) n.

<sup>152</sup> In other words, “negotiated procedures are entirely driven by the nature and scope of remedies, rather than by an attempt to apply the law to the facts” (cf. DMB Gerard, ‘Negotiated Remedies in the Modernization Era’ cit.)

<sup>153</sup> Indeed, the Commission “riesce ad ottenere immediatamente un risultato concreto [...], anche nell’ipotesi in cui non è del tutto sicuro che i comportamenti da essa perseguiti siano effettivamente illeciti” or, in other words, “riesce ad ottenere più di quanto potrebbe conseguire se alla fine non fosse in grado di provare l’illecito, e talvolta più di quanto sarebbe in grado di ottenere in assoluto”, moreover “senza alcun rischio di insuccesso istruttorio” (cfr. LG Radicati Di Brozolo and F Russo, ‘Decisioni di accettazione degli impegni e private enforcement del diritto antitrust’ (2011) *Diritto del Commercio Internazionale* 1047, 1055).

1/2003 grants to the Commission a relatively large amount of room for discretionary enforcement and decision making. The ball would then be in the court of the undertakings, which would have to stand up to the high pressure of settling the case which, as mentioned, inherently characterizes commitment procedures. As shown by the case practice, it is likely that in several cases the undertakings do not have sufficient incentives to defend the case and take the risk that the Commission will shift to the ordinary procedure: in the light of the above, algorithmic collusion may be a practice with regard to which the Commission could attempt – and succeed – to adopt a so-called quasi-regulatory approach to EU competition law.<sup>154</sup>

<sup>154</sup> Although in a different perspective, it is worth noting that the use of commitment decisions in order to regulate digital markets is also expressly envisaged under the so-called Digital Market Act (cf. Proposal COM (2020) 842 final for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sectors), art. 23, proposed by the Commission in December 2020 (see P Manzini, 'Il digital market act decodificato' in P Manzini and M Vellano (eds), *Unione europea 2020. I dodici mesi che hanno segnato l'integrazione europea* (Wolters Kluwer and CEDAM 2021) 317).



## ARTICLES

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

edited by Marise Cremona, Claire Kilpatrick and Joanne Scott

## THE GARDEN GROWS LUSHER: COMPLETING THE NARRATIVES ON OPINION 1/75

JAKA KUKAVICA \*

TABLE OF CONTENTS: I. Introduction. – II. Background of the case. – III. A short journey through the *dossier*. – IV. An insight into the atmosphere at the Court: procedural documents. – V. Of incomplete narratives and forks in the road: learning from the submissions. – V.1. Paving the way to admissibility: the affirmation of *kompetenz-kompetenz* and the acceptance of exclusive community competence. – V.2. Towards exclusive competence: what types of arguments interest the Court? – VI. Conclusion.

ABSTRACT: In the European legal tradition, legal researches typically do not have access to court documents to the same extent as in the USA. This has partially changed in 2015, when the Archives of the Court of Justice of the European Union first became available for public consultation. This *Article* inspects the *dossier de procédure* in the Opinion 1/75 case and discusses how our knowledge of the case itself, and the development of EU law more generally, may be enhanced as a result of the availability of the archival material. Through analysing the *dossier*, the *Article* demonstrates, on the basis of internal communication between the members of the Court, that there was an atmosphere of novelty and urgency within the Court at the time and that the entire procedure was considerably micro-managed by President Lecourt. As the Court did not report the arguments the parties made in the Opinion, they are revealed for the first time as the submissions of the actors in the proceedings are made available. Analysing these arguments demonstrates that there was a *kompetenz-kompetenz* dimension to the case which remained hitherto hidden and unnoticed in scholarship as arguments to this effect were ignored by the Court when ruling on admissibility. It also demonstrates that when deciding on merits, the Court routinely responded to some types of arguments (textual, literalistic) and routinely ignored others (factual, practical, policy), while devising some of them (teleological) *proprio motu*. These new findings complete the existing historical narratives about Opinion 1/75.

KEYWORDS: CJEU archives – Opinion 1/75 – *kompetenz-kompetenz* – external relations – methods of interpretation – President Lecourt.

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## I. INTRODUCTION

In December 2015, the archives of the Court of Justice of the European Union (CJEU) were opened at the Historical Archives of the European Union (HAEU) in Florence, Italy. During the ceremony, the President of the Court Lenaerts predicted that the preservation of the archives would add to the knowledge of European law through fostering legal research.<sup>1</sup> However, given the restrictive conditions under which the Court's archives were opened, one could adopt a cynical attitude towards this statement. The Court did not deposit its archive in its entirety but only allowed public access to the *dossier de procédure*. Due to the sacrosanct secrecy of deliberations, this does not include any archival material related to the *délibéré*. Many deposited dossiers are heavily redacted and material is removed from the dossier by the Court for a plurality of reasons, including trade secrets and privacy concerns.<sup>2</sup> The Court refuses to reveal what parts of a dossier are redacted and for what reason, leaving the researcher in the dark as to what documents are missing and why. With such depleted archival material, could the archives really add to our knowledge of EU law?

As the *Articles* in this Special Section demonstrate, the answer varies from dossier to dossier. This *Article* examines the extent to which the release of the Opinion 1/75 dossier enriches our understanding of the case and complements the narratives we have developed describing it. It argues that in the case of Opinion 1/75, a cynical attitude towards Lenaerts' prediction would be uncalled for. The dossier makes a substantial contribution to our knowledge of EU law and its history. It demonstrates this as follows. Section II provides a brief background of Opinion 1/75. Section III offers an overview of the contents of the dossier. Section IV characterises the atmosphere that surrounded the decision-making process at the Court, drawing from the procedure-related documents found in the dossier. Section V demonstrates how the submissions made by the parties enrich the historical narratives surrounding Opinion 1/75 and give insight into the argumentative practices of the Court. Section VI concludes.

## II. BACKGROUND OF THE CASE

Opinion 1/75<sup>3</sup> concerned the competence to regulate the field of export credits. One of the marking points of decade-long attempts of states to harmonise their regimes of export credits was the negotiation of the draft OECD "Understanding on a Local Cost Standard".<sup>4</sup> While the substantive negotiations on the common regime had been successfully

<sup>1</sup> HAEU, *Opening of the historical archives of the European Court of Justice*, [www.eui.eu](http://www.eui.eu).

<sup>2</sup> For redaction practices, see 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); 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* (Oxford University Press 2020).

<sup>3</sup> Opinion 1/75 *Arrangement OCDE – Norme pour les dépenses locales* ECLI:EU:C:1975:145.

<sup>4</sup> Hereafter "OECD Understanding" or simply "Understanding".

concluded by 1974, it remained unclear in what form the European Community and its Member States would participate in the conclusion of the Understanding. There was no agreement on the distribution of competences, neither between the Member States within the Council of the European Communities, nor between the Council and the Commission. The process of concluding the Understanding was stalled.

To cut the Gordian knot, the Commission requested that the Court of Justice deliver an opinion on the compatibility of the OECD agreement with the EEC Treaty, utilising the procedure foreseen by art. 228(1) EEC Treaty (currently art. 218(11) TFEU) for the first time.<sup>5</sup> The Commission asked the Court to decide “whether the Community even has power to negotiate and conclude the proposed agreement and, should the reply to this question be in the affirmative, whether or not such power is exclusive”.<sup>6</sup>

The Court responded to both questions in the affirmative. It reasoned that export credits clearly fell within the meaning of “aids for exports” in art. 112 and “common commercial policy” in art. 113 EEC Treaty (now repealed and currently art. 207 TFEU, respectively), which formed the textual basis for the Court’s conclusion that the Community had the competence to conclude the Understanding. Based on the teleology of arts 113 and 114 EEC Treaty (currently art. 207 TFEU and repealed, respectively), the Court also concluded that the competence of the Community was exclusive in nature. Before doing so, the Court squarely rejected all the arguments advanced in various submissions that the request of the Commission should be declared inadmissible.

### III. A SHORT JOURNEY THROUGH THE *DOSSIER*

At 552 pages and 127 different documents, the Opinion 1/75 dossier features a wealth of diverse archival material available to the public for the first time. Its contents can be divided into four types of documents, as demonstrated in Table 1 below. The most sizeable category (as a percentage of the dossier) is comprised of the submissions made by the Commission, the Council, and four Member States – Ireland, the United Kingdom, the Netherlands, and Italy. This is followed by evidence, which was submitted by the Commission and the UK in the form of annexes to their original submissions. The Opinion of the Court in all language versions constitutes the third category of documents. Last is a plethora of procedure-related documents, including correspondence between the Court and the parties, internal correspondence within the Court, and internal process-related decisions of the Court.

<sup>5</sup> Art. 228(1)(2) EEC Treaty read: “The Council, the Commission or a Member State may obtain beforehand the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty [...]”.

<sup>6</sup> Commission of the European Communities, Request for an Opinion Submitted by the Commission of the European Communities to the Court of Justice Pursuant to art. 228(1)(2) EEC Treaty, JUR/1973/75 (1975) 2-3.

Category of Document	No. of documents (N=127)	% of number of documents	No. of pages (N=551)	% of the dossier
Submissions	16	12.6%	231	41.9%
Evidence	29	22.8%	151	27.4%
Procedure-related documents	76	59.8%	81	14.7%
Opinion of the Court	6	4.72%	88	16.0%
Documents previously not available to public	121	95.3%	464	84.2%
Redacted documents	0	0%	0	0%
Report of the Oral Hearing	0	0%	0	0%
Opinion of the Advocate General	0	0%	0	0%

TABLE 1. Overview of the composition of the Opinion 1/75 dossier.

The bottom part of Table 1 also reflects the specific way in which the opinion procedure was conducted in those early years. There were no oral hearings, and the Advocates General voiced their views collectively *in camera* during the *délibéré*. As a result, the dossier does not contain a report of the oral hearing nor any written record of the Advocates General views. More importantly, the table demonstrates the immense value of the archival material in the Opinion 1/75 dossier, especially compared to the dossiers of other cases; except for the Court's Opinion itself, no other documents had previously been available to the public. Additionally, no material in the dossier has been redacted by the Court and it may be consulted in its entirety. In other words, the Opinion 1/75 dossier is permeated with novelty; it has been released in its entirety and the entirety of its contents is new to the public eye.

#### IV. AN INSIGHT INTO THE ATMOSPHERE AT THE COURT: PROCEDURAL DOCUMENTS

Even though the idea of procedure-related documents might seem dry at first, they provide a fascinating insight into how the case was managed within the Court and more generally depict the atmosphere surrounding Opinion 1/75 at the time. From these documents, three themes emerge and characterise the context in which the case was conducted: *i)* the novelty of the opinion procedure, *ii)* the temporal urgency to deliver the Opinion as soon as possible, and, related to this, *iii)* the micro-management of the case by the President of the Court.

In 1975, the novelty of the opinion procedure under art. 228(1) EEC Treaty was a fact; Opinion 1/75 was the first time the Court was requested to institute the opinion procedure. This pioneering role is reflected by Opinion 1/75 being featured heavily in academic



literature on the nature of the opinion procedure. The Court's reasoning here was foundational for the development of both judicial and academic understanding of the procedure.<sup>7</sup> Given the strong and persuasive teleological exposition of the nature of the procedure, it may seem surprising that the archival material discloses that there was a tangible sense of novelty in the way it was perceived and managed inside the Court. In a letter to the Registrar of the Court, the Attaché of the Court<sup>8</sup> openly spoke of "*la procédure très particulière*".<sup>9</sup> The sense of novelty was at times associated with a lack of certainty. This was clear when the UK sought procedural guidance from the Registrar due to the "absence of precedent for an application of this nature".<sup>10</sup>

Like the novelty of the opinion procedure, the urgency for the OECD to have the opinion delivered as soon as possible was also clear at the time. In part this was due to the prolonged negotiations that had been required for the parties to agree to the draft Understanding. More acutely, with the substantive negotiations concluded, the competence of the Community remained the only outstanding matter preventing the conclusion of the Understanding: "there only remains to be clarified the form of the participation in the Understanding by the European Economic Community, whose decision on the subject is to be made very soon".<sup>11</sup>

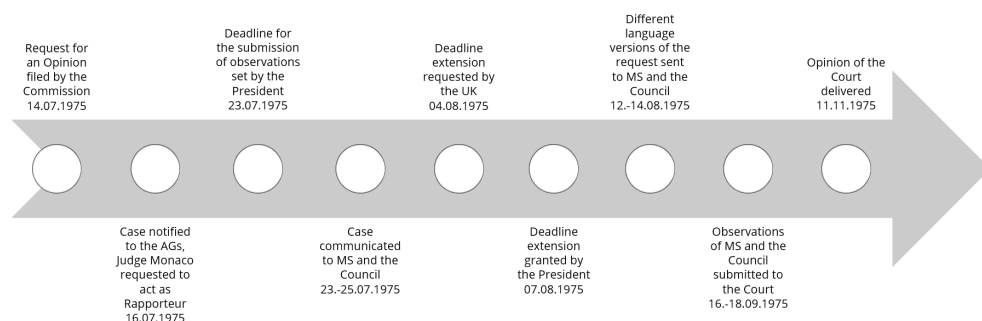


FIGURE 1. Procedural timeline of the Opinion 1/75.

<sup>7</sup> See, for instance, P Pescatore, 'External Relations in the Case-Law of the Court of Justice of the European Communities' (1979) CMLRev 626; P Craig and G De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015) 370.

<sup>8</sup> Please note that *attachés* have later been renamed and are referred to today as *référéndaires*.

<sup>9</sup> "A very peculiar procedure" (translation author's own); *dossier de procédure original* Opinion 1/75 HAEU CJUE-2383, Letter of the Attaché of the Court to the Registrar of the Court of 16 July 1975.

<sup>10</sup> *Dossier de procédure original* Opinion 1/75 HAEU CJUE-2383 cit., Letter of the Assistant Treasury Solicitor of the UK to the Registrar of the Court of 4 August 1975, L75/3950/WHG.

<sup>11</sup> Organization for Economic Cooperation and Development, Note by the Chairman of the group on export credits and credit guarantees of the OECD Trade Committee: draft report to the Council Concerning the understanding on a local cost standard, 11 February 1975. See *dossier de procédure original* Opinion 1/75 HAEU CJUE-2383 cit., Annex I to the Request by the Commission (1975) 3.

The fact that it took the Court less than four months to deliver Opinion 1/75 from the time the Commission had filed its Request, as demonstrated by Figure 1, could give an impression that the Court was aware of the time crunch and was willing to act on the urgency that had surrounded the case. The archival material confirms this impression. It also demonstrates that it was President Lecourt who assumed the role of the expeditor and micromanaged the case considerably to ensure that the Opinion was delivered as soon as possible.

From a letter from the Attaché Mr Chevallier to the Registrar of the Court, we learn in unambiguous terms that the President had made a phone call to the Attaché, giving him specific instructions as to how to handle the case and made it clear that it would be useful not to waste time and proceed with the matter immediately.<sup>12</sup> President Lecourt practised what he preached when he set 1 September 1975 as the deadline for the submission of observations,<sup>13</sup> despite the fact that by 4 August 1975 the UK had still not received the English translation of the Commission's Request for an Opinion.<sup>14</sup> Mr Chevallier, in another letter to the Registrar, suggested to explain this brief deadline with the fact that "*la Cour devra répondre sans tarder à la demande*".<sup>15</sup> He also notified the Registrar that President Lecourt "insisted" that any requests for deadline extensions should be delivered to him personally.<sup>16</sup> The UK was not convinced by the explanation for the brevity of the deadline and proceeded to request a one-month extension.<sup>17</sup> The President rejected the request and only agreed to a shorter 20-day extension.<sup>18</sup>

Whether such urgency and micromanagement by the President was standard at the time is an interesting question, but beyond the scope of this *Article*. Even allowing for the possibility that a smaller case-load in the 1970s might have allowed President Lecourt to micromanage the docket in ways that would be more difficult for future presidents of the Court, it seems likely that his engagement reflects his appreciation of the (historic) nature of the case.<sup>19</sup>

<sup>12</sup> *Dossier de procédure original Opinion 1/75* HAEU CJUE-2383 cit., Letter of the Attaché of the Court to the Registrar of the Court and Mr Eversen of 23 July 1975.

<sup>13</sup> *Dossier de procédure original Opinion 1/75* HAEU CJUE-2383 cit., decision of the President of the CJEU on the extension of the deadline for the submission of observations of 23 July 1975, Avis 1/75 – 64048.

<sup>14</sup> *Dossier de procédure original Opinion 1/75* HAEU CJUE-2383 cit., Letter of the Assistant Treasury Solicitor (1975).

<sup>15</sup> "The Court needs to respond to the request without delay" (translation author's own); *dossier de procédure original Opinion 1/75* HAEU CJUE-2383, Letter of the Attaché of the Court to the Registrar of the Court of 16 July 1975 cit.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Dossier de procédure original Opinion 1/75* HAEU CJUE-2383, Letter of the Assistant Treasury Solicitor (1975) cit.

<sup>18</sup> *Dossier de procédure original Opinion 1/75* HAEU CJUE-2383 cit., decision of the President of the CJEU on the extension of the deadline for the submission of observations of 7 August 1975, Avis 1/75 – 64236.

<sup>19</sup> For further discussion on the role of Judge Lecourt, see W Phelan, 'The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt' (2017) EJIL 935; V Fritz, *Juges et avocats généraux*

## V. OF INCOMPLETE NARRATIVES AND FORKS IN THE ROAD: LEARNING FROM THE SUBMISSIONS

Opinion 1/75 is also remarkable because the Court, in contrast to its later opinions, did not report the arguments made in the submissions in the Opinion itself. As a result, the Opinion reads like an authoritative proclamation of the law. It is impossible to ascertain why the Court discussed a certain point, or made an argument, by just reading the Opinion; the origins of the analysed legal issues are unclear and have hitherto remained unknown.

Having access to the submissions of the Commission, the Council, and the Member States, we can now trace where the arguments discussed by the Court originated and how they were affected by the submissions made by other actors. We can also identify arguments that might have been ignored by the Court in the Opinion but formed an important part of the contention behind the scenes. Likewise, we can discern whether there were any argumentative paths not taken by the Court – whether Opinion 1/75 included some forks in the road of the historical development of EU law and how the turns taken by the Court have impacted EU law as we know it today.

### V.1. PAVING THE WAY TO ADMISSIBILITY: THE AFFIRMATION OF *KOMPETENZ-KOMPETENZ* AND THE ACCEPTANCE OF EXCLUSIVE COMMUNITY COMPETENCE

One such fork in the road that has remained publicly unknown was the Court's decision to declare admissible the Commission's Request to determine if the Community had *exclusive* competence to conclude the OECD Understanding. While this would be impossible to deduce from the text of the Opinion 1/75 itself, the Court's path forked as a result of a strong push made by the Council and the UK against the Court having the competence to decide on the exclusive nature of the Community's competence. But because this argument was ignored by the Court and did not feature in the text of the Opinion, the *kompetenz-kompetenz* dimension of Opinion 1/75, *i.e.*, the means by which the Court affirmed and extended the scope of its own jurisdiction, has remained undiscovered by academic commentary and has not yet become part of the historical narratives.

As noted, this constitutional struggle *par excellence* was initiated by the Council and the UK.<sup>20</sup> Both made lengthy textualistic and teleological arguments that art. 228(1) EEC Treaty only permitted the Court to decide whether the Community had the competence to conclude the Understanding but not to decide whether it had *exclusive* competence to

*de la Cour de Justice de l'Union européenne (1952-1972): une approche biographique de l'histoire d'une révolution juridique* (Vittorio Klostermann 2018); A Vauchez, *Brokering Europe Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015).

<sup>20</sup> *Dossier de procédure original* Opinion 1/75 HAEU CJUE-2383 cit., observations by the Council of the European Communities on the request, submitted by the Commission of 16 September 1975 4; *dossier de procédure original* Opinion 1/75 HAEU CJUE-2383 cit., written observations by the United Kingdom of Great Britain and Northern Ireland of 18 September 1975 12-14.

conclude it. According to them, deciding on the exclusivity of the Community's competence would implicitly mean ruling on the competence of the Member States, which the Court could not do as there was no basis for that in the Treaty; art. 228(1) did not give the Court the competence to decide, as part of the opinion procedure, what competences Member States had or did not have.

This argument is noteworthy for a number of reasons. First, compared to many other arguments made in the submissions in a haphazard and cursory manner, the Council and the UK developed and presented this argument particularly thoroughly and insistently. Second, that two different actors made the same argument is significant in and of itself. Of 31 distinct legal arguments made across all six submissions, only five arguments were advanced by more than one actor. And finally, due to its repercussions for the division of competencies between the Community and the Member States, the argument presented a key and arguably constitutional moment in the development of EU (external relations) law.

And yet, despite this momentous juncture, the Court evaded the challenge and ignored this line of argument, only rejecting it implicitly. In the relevant passage, the Court wrote:

"The question whether the conclusion of a given agreement is within the power of the Community and whether, in a given case, such power has been exercised in conformity with the provisions of the Treaty is, in principle, a question which may be submitted to the Court of Justice, either directly, under Article 169 or Article 173 of the Treaty, or in accordance with the preliminary procedure, and it must therefore be admitted that the matter may be referred to the Court in accordance with the preliminary procedure of Article 228".<sup>21</sup>

In this passage, the Court said nothing expressly about its competence under art. 228 to rule on the *exclusive* competence of the Community and, by implication, on the competence of the Member States to conclude an envisaged international agreement. Instead, it only speaks of the legal basis to rule on the "power of the Community". It was through this passage that the Court declared the Commission's Request admissible and, in so doing, by implication rejected the claim advanced by the UK and the Council. However, given the multifaceted significance of their claim, as demonstrated above, a more direct rebuttal of the argument by the Court could have been expected.

But the point here is not simply that the Court ignored an important argument made by a plurality of actors, while this is interesting in and of itself. Instead, the main claim is that the Court's silence has entirely obscured what was one of the more important issues of Opinion 1/75 in the eyes of some Member States: does the Court have the competence to (indirectly) rule on the competence of Member States to conclude international agreements as part of the opinion procedure? Learning of this contestation behind the scenes, as well as the consequential affirmation of *kompetenz-kompetenz* by the Court, has only been possible by consulting and analysing the archival material found in the Opinion 1/75

<sup>21</sup> Opinion 1/75 cit. 1361. Please note that the equivalent current provisions of arts 169 and 173 EEC Treaty are arts 258 and 263 TFEU, respectively art. 228 EEC can currently be found in art. 218(11) TFEU.

dossier. The submissions by the Council and the UK have made it clear that the competence of the Court to rule on the competencies of Member States was very much an issue for the Member States and that it was not taken for granted as one might have assumed from the text of Opinion 1/75. By implicitly ruling on the competences of Member States, the Court also affirmed its *kompetenz-kompetenz* as part of the opinion procedure. As a result, we should not only expand our understanding of the contestation that was at the heart of Opinion 1/75 as including the issue of whether or not the Court has the competence to (implicitly) decide on the competencies of the Member States. We should also treat Opinion 1/75 as an important case in the development and the affirmation of *kompetenz-kompetenz* of the Court.

## V.2. TOWARDS EXCLUSIVE COMPETENCE: WHAT TYPES OF ARGUMENTS INTEREST THE COURT?

Another consequence of being able to trace the arguments advanced in the submissions and link them to the arguments made by the Court is the ability it gives us to identify patterns in the ways that the Court treats different types of arguments. While no such patterns can be discerned in the Court's approach to arguments pertaining to admissibility, nor the *existence* of the Community competence as it was not contentious, the Court did show a considerable amount of consistency in its approach to different types of argument when deciding on the *exclusiveness* of the Community's competence. Some types of argument were consistently ignored by the Court, while it consistently engaged with others, regardless of whether it agreed with them.

The Court was particularly unwilling to engage with policy arguments and arguments that were practical and consequentialist. For instance, the Court ignored the argument that were the Community to have exclusive competence, the relationship between the Member States of the Community and other OECD member states would be strained because the Community would be an additional, unnecessary intermediary between them. It also ignored the argument that exclusive Community competence would create an imbalance of obligations between Community Member States and other OECD member states because the latter could make exceptions or withdraw from the Understanding unilaterally, while Community Member States could not. Likewise, the Court took no notice of the argument that exclusive Community competence may prejudice potential future changes of the Understanding due to the limited competence of the Community.

On the contrary, the Court was willing to engage with textual arguments. It rejected *ERTA*-style claims and clearly distinguished competence based on the *ERTA* doctrine from competence that is derived from express Treaty provisions.<sup>22</sup> It also rejected the UK's claim that export credits did not fall within "the central core of commercial policy", decid-

<sup>22</sup> For the AETR/ERTA doctrine, see case 22/70 *Commission v Council* ECLI:EU:C:1971:32.

ing that they patently did and thus fell under art. 113 EEC Treaty. The Court even responded to and expressly rejected the most unlikely of arguments that art. 71 of the ECSC Treaty (now expired) precluded the exclusivity of the Community competence under the EEC Treaty.

Finally, the Court also demonstrated a distinct affinity for teleological expositions of the Treaty. Reading Opinion 1/75, where the Court justified the exclusivity of the Community's competence primarily through the teleology of the policy field and the EEC Treaty, one would think that purposive arguments had constituted a significant part of the submissions. However, the archival material shows that this was not the case. There were *no* teleological arguments made regarding exclusive Community competence in any of the submissions. Purposive interpretation, on which the Court so heavily relied, was endemic to Luxembourg and was made by the Court *proprio motu*.

Naturally, on the basis of the Court's approach in Opinion 1/75 one cannot make a more general claim as to how the Court treats different types of arguments. Nonetheless, it does confirm the narratives on the prominence of textual and teleological methods of interpretation that the conventional literature on judicial reasoning of the CJEU has constructed.<sup>23</sup>

## VI. CONCLUSION

That something raises more questions than it answers might be cliché, but there seems to be some credence to it in the context of new discoveries. It is inevitably going to take time to answer all the questions that the newly released dossiers raise, given the wealth of information they hold. For instance, why did Jean Groux, the Agent of the Commission in Opinion 1/75, take a diametrically opposite position on a contentious factual point in his *post hoc* writings compared to the one he advocated for in the Commission's request for an Opinion?<sup>24</sup> Or how did the Council determine its common set of observations, given that the views on the matter inside the Council were very much divided?<sup>25</sup> And perhaps more interestingly, how was it that the submission of the Council seems to be more

<sup>23</sup> See, for instance, K Lenaerts and JA Gutiérrez-Fons, 'To Say What the Law Is: Methods of Interpretation and the European Court of Justice' (2014) *ColumJEurL* 3 ff.; N Fennelly, 'Legal Interpretation at the Court of Justice' (1997) *Fordham Int'l LJ* 656 ff.

<sup>24</sup> Compare the positions regarding the role of the Community in the negotiating process of the Understanding in *dossier de procédure original* Opinion 1/75 HAEU CJUE-2383, Request by the Commission (1975) cit., and in J Groux, 'Mixed Negotiations' in D O'Keeffe and HG Schermers (eds), *Mixed Agreements* (Kluwer Law 1983). This was a relevant contention in the case as the UK argued that the Community had been largely passive in the negotiations and that Member States should not be deprived of the competence they had been exercising throughout the negotiations.

<sup>25</sup> In the Council, six Member States voted in favour of exclusive Community competence, two in favour of shared competence, and one against any Community competence. See *dossier de procédure original* Opinion 1/75 HAEU CJUE-2383, Request by the Commission (1975) cit. 2.

in line with the views held by the minority of the Member States in the Council?<sup>26</sup> Was this the reason that of the three Member States voting against the Community's exclusive competence in the Council, only the UK submitted its observations to the Court? These, and some other questions, remain to be answered by further research.

However, this *Article* has already demonstrated that the dossiers may provide a unique insight into how cases are procedurally managed within the Court. As attested by the archival material, Opinion 1/75 was delivered somewhat hastily, despite the novelty of the procedure, under the close supervision of President Lecourt. Analysing the argumentation of the different actors and comparing it to the decision of the Court, the dossier also provides evidence for claims that the Court has an affinity for textual and teleological methods of interpretation. Most importantly, it sheds light on the fact that Opinion 1/75 should also be discussed as a case in which the competence of the Court to rule (implicitly) on the competencies of Member States was heavily contested. The Court ignored and implicitly rejected the reservations of the UK and the Council, thus affirming its competence to decide whether or not Member States may participate in the conclusion of international agreements. In so doing, not only did the Court affirm its competence to implicitly decide on the competencies of the Member States, but it also firmly established that its *kompetenz-kompetenz* extends also to the opinion procedure.

<sup>26</sup> *Dossier de procédure original* Opinion 1/75 HAEU CJUE-2383, observations by the Council (1975) cit.







## ARTICLES

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

edited by Marise Cremona, Claire Kilpatrick and Joanne Scott

#### *DEFRENNE v SABENA:* A LANDMARK CASE WITH UNTAPPED POTENTIAL

SARAH TAS\*

TABLE OF CONTENTS: I. Introduction. – II. Insights into the *dossier*: towards a contextualisation of the landmark case. – II.1. The actors involved and the “hidden” sources. – II.2. The legal and political context of the case. – III. Behind the famous *Defrenne II*: the debate between horizontal and vertical direct effect and the principle of non-retroactivity. – III.1. Vertical versus horizontal direct effect. – III.2. The non-retroactivity of the judgment. – IV. Conclusion.

ABSTRACT: Case 43/75 *Defrenne v SABENA* (ECLI:EU:C:1976:56) was handed down by the Court of Justice in 1976. It is the second case of the *Defrenne* trilogy, and today is still cited as the landmark ruling establishing a woman’s right to equal treatment in the workplace. However, the recent release of the full *dossier de procédure* shows that the case was about more than that and was influenced by several factors. In this regard, the *dossier* offers valuable insights into the case, including valuable information about the actors involved, the social and political context, and the role of evidence. The opening of the archives also shows that the decision on horizontal direct effect of the provision was not straightforward and that other options were being discussed, notably the vertical direct effect of art. 119 EEC. Finally, the *dossier* offers more clarity regarding the issue of non-retroactivity, which was rapidly concluded in the final decision but takes up a large part of the *dossier*. Using the archives permits us to see that the landmark decision did not come out of the blue but emerged from a series of constituent elements.

KEYWORDS: *Defrenne II* – *dossier de procédure* – art. 119 EEC – preliminary rulings – horizontal direct effect – non-retroactivity.

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## I. INTRODUCTION

The case 43/75 *Defrenne v SABENA* was handed down by the Court of Justice of the European Union (CJEU) in 1976,<sup>1</sup> and is the second and most celebrated case of the *Defrenne* trilogy. It deals with a Belgian air hostess, Miss Gabrielle Defrenne, who was working for SABENA but was being paid less than men doing the exact same job. Miss Defrenne brought a claim before a Belgian court, which referred two questions to the CJEU pursuant to art. 119 EEC (e.g., currently art. 157 TFEU). One involved the direct effect of the provision, and the other concerned its temporal application. The CJEU stated that art. 119 EEC had horizontal direct effect and that individuals could rely on it before national courts to ensure gender equality. Additionally, the CJEU added a temporal limitation to the judgement so as to prohibit retroactive use of the decision.

*Defrenne II* is a landmark case that is still taught in EU law classes and is considered a pivotal case that recognised the horizontal direct effect of the principle of equality of pay.<sup>2</sup> It is part of a broader saga, and whilst *Defrenne I* is considered a defeat, *Defrenne II* can be described as a marvellous decision.<sup>3</sup> *Defrenne II* gave the CJEU the opportunity to be involved in the birth of social movement,<sup>4</sup> and the judgment strongly contributed to the transformation of the EU legal order into a European social model.<sup>5</sup> The case emerged in a particular social context in Europe and particularly in Belgium, which was in the midst of a “second-wave” of feminism and the “Herstal Equal Pay Strike” of the Belgian arms production company.<sup>6</sup> Women decided to strike to demand the implementation of the principle of equal pay. This strike was followed by a strike in the service sector in which air hostesses campaigned about their conditions. It is from the air hostess dispute that the famous *Defrenne* saga arose, on which this *Article* is based.

Today *Defrenne II* is remembered as the case that established gender equality in the workplace as a general principle of Community law.<sup>7</sup> To a lesser extent, it is also known for the temporal limitation that the CJEU applied to it. The recent release of the full *dossier de procédure* provides a new take on this landmark judgment. The archives give insight into the reasoning of the decision as well as on the legal actors involved, the sources used and the overall context. The CJEU’s decision does not appear out of the blue but emerges from a series of constituent elements. The analysis of the *Defrenne II* presented below intends to show precisely this aspect. In this regard, it starts by analysing the insights brought by the *dossier* to the case to contextualise the landmark judgment (see section

<sup>1</sup> Case 43/75 *Defrenne v SABENA* ECLI:EU:C:1976:56.

<sup>2</sup> E Vogel-Polski, ‘Agir pour les droits de femmes’ (2003) *Raisons politiques* 139 ff.

<sup>3</sup> *Ibid.*

<sup>4</sup> R Smith, L Murrell and D Rooks (eds), *Conversion Course Companion for Law: Core Legal Principles and Cases* (Pearson Education 2008) 151-155.

<sup>5</sup> I Ahmed (ed.), *International Labour Review* (International Labour Office 2004).

<sup>6</sup> C Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996) 65.

<sup>7</sup> M Maduro and L Azoulai (eds), *Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 251.

II). This relates specifically to actors' legal representation, the case's context and the prominent role of the observations and evidence in reaching the final judgment. In a second part, the *Article* will go beyond the famous *Defrenne II* judgment and focus on the broader and richer story (see section III). It will do so by highlighting an overlooked issue by the CJEU (horizontal versus direct effect) and by developing further an issue summed up restrictively by the CJEU (non-retroactivity of the decision).

## II. INSIGHTS INTO THE *DOSSIER*: TOWARDS A CONTEXTUALISATION OF THE LANDMARK CASE

A close look into the *dossier* hints at elements that might have influenced the judgment, such as the actors involved and the "hidden" evidence (see section II.1). It also offers insights into its legal, political and social context (see section II.2).

### II.1. THE ACTORS INVOLVED AND THE "HIDDEN" SOURCES

Four legal parties submitted observations in *Defrenne II*: the Commission, the lawyers of the applicant and two Member States. The two Member States involved are the United Kingdom (UK) and Ireland. Surprisingly, the government of Belgium did not submit any observation, even though it was the "home" Member State of the dispute. Additionally, none of the original six Member States brought submissions.<sup>8</sup> Whilst this can be observed in the final decision, the *dossier* shows the involvement of the Member States in the case, notably through the number of observations and evidence they submitted. In this regard, the government of the UK was the only actor that submitted three written observations and two annexes. Ireland submitted two written observations and one annex.<sup>9</sup> Thus, they actively participated in the debates and brought many arguments to the table.

The fact that only the newly acceded Member States submitted observations is noteworthy. *Defrenne II* was decided three years after the accession of Ireland and the UK to the EU.<sup>10</sup> Since they were still new Member States, it is possible that the Court did not want to frustrate or chastise them by imposing the principle of equality of pay retroactively. In fact, the government of the UK and Ireland strongly argued against the retroactivity of the judgment on the ground that it would result in a high economic burden. It is unclear whether the same decision would have been taken if other governments had submitted observations.

The *dossier* shows that the lawyer of Miss Defrenne was Marie Thérèse Cuvelliez (a name that does not appear in the final judgment). In the literature, the name Eliane Vogel-Polski tends to be linked to *Defrenne II*, because of the work she did in collaboration with

<sup>8</sup> Meaning France, Germany, Italy, Luxembourg and the Netherlands.

<sup>9</sup> As a way of comparison, the applicant only submitted two written observations and added zero annexes.

<sup>10</sup> Ireland and the UK accessed the EU in 1973.

Miss Cuvelliez. However, in the *dossier* this name is nowhere to be found. The *dossier*, by giving the name of Marie-Thérèse Cuvelliez, permits us to go further into the research and see the role she played as a lawyer in the case. She was first contacted by air hostesses to form a separate Union and managed later on to convince Miss Defrenne to use her experience as the basis for a case against SABENA.<sup>11</sup> Thus, the *dossier* sheds lights on this somewhat forgotten actor in the literature.<sup>12</sup> The role of Eliane Vogel-Polski in it is also undeniable. However, this is not reflected in the *dossier*.

When it comes to the “hidden” sources of the case, reference is being made to evidence. Evidence forms 69 per cent of the *dossier*<sup>13</sup> and is used by the actors to support their arguments. 14 annexes have been added, among which seven are European sources, four are international sources and three are national sources. It is interesting to note here that evidence came from various levels, which shows that the debate was not centred solely on the EU. The reasoning was influenced as well by national and international sources. Whilst some annexes were mentioned in the final judgment, such as the Convention n. 100 of the International Labour Organization,<sup>14</sup> the majority of them were not referred to by the CJEU. These “hidden sources” that are to be found in the archives allow for more detailed and specific analysis, and consequently place the final decision in a broader context.

Although the Commission attached eight annexes to its observations in the written as well as oral procedure, none of them were analysed in the final decision. The evidence brought by the Commission was essentially official Commission reports,<sup>15</sup> but also included studies created by the International Labour Office.<sup>16</sup> All of them were referenced by the Commission to add information and enrich the debate at stake in the case. The most striking and influential report cited by the Commission was the Cornu Report.<sup>17</sup> This report was also used by the lawyers of Miss Defrenne.<sup>18</sup> It offered an extensive analysis of the state of implementation of the principle of equal pay not only in the UK and Ireland but also in Denmark. Another added value of this report is that it distinguished between the public and private sectors.<sup>19</sup> This approach was also used by the Commission, which strongly encouraged the CJEU to distinguish between the public and the private sectors.<sup>20</sup> This report is in many ways very interesting and was used by two of the four parties in the case to support their arguments. It is likely that the CJEU judges also studied it in their deliberations.

<sup>11</sup> C Hoskyns, *Integrating Gender* cit. 69.

<sup>12</sup> When typing online “lawyer of Defrenne II” the name of Eliane Vogel-Polski appears directly.

<sup>13</sup> Meaning of the 1104 pages accessible to the Reader.

<sup>14</sup> International Labour Organisation, Equal Remuneration Convention n. 100 of 1951.

<sup>15</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, Commission annex III OP.

<sup>16</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., Commission annex VII OP.

<sup>17</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., Commission annex V OP.

<sup>18</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., Applicant, OP 10 second observations.

<sup>19</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, Commission annex V OP cit. part 2.

<sup>20</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., Commission WP 5, observations.

A second example can be found in the national sources used by the government of the UK to support its argument against the retroactivity of the judgment. It was essential for the government to avoid the retroactivity of such a landmark decision to prevent a huge economic burden on the country. To support this argument in figures, the UK used sources such as a national survey from 1969.<sup>21</sup> The survey detailed the types of undertakings that would be most likely affected, the number of workers concerned and the margin between rates and pay. It concluded that the UK would assume an economic burden of over £1,000 million if the judgment were made retroactive.<sup>22</sup> This is an argument of an economic nature, justified with statistical numbers that might influence the reasoning of the CJEU. In fact, the figures on the feasibility of retroactivity may have influenced the CJEU's decision.

Consequently, the actors and the "hidden sources" found in the *dossier* shed light on previously unknown factors that may have influenced *Defrenne II*. Insight into the *dossier* also allows for a contextualisation of the case (see section II.2).

## II.2. THE LEGAL AND POLITICAL CONTEXT OF THE CASE

The *dossier* provides several elements that put the case into context and demonstrate how the principle of equal pay was a topic of interest at the time. *Defrenne II* played a significant role in the evolution of the EU into a European social model, but the story did not start with this case.

Firstly, *Defrenne II* was not the first time an applicant had sought a reference to the CJEU to request the implementation of equal pay. The provision had already been used in two other cases: in the *Sabbatini* case<sup>23</sup> and in *Defrenne I*.<sup>24</sup> Whilst *Sabbatini* was neither mentioned in the final judgment nor in the *dossier*, the final judgment and the conclusion of the Advocate General<sup>25</sup> of *Defrenne I* are found in the *dossier*. In fact, the lawyer of Miss Defrenne and the government of the UK referred to it in their written observations to support their argument. In *Defrenne I*, the CJEU stated that a retirement pension was not included in the concept of "pay" for the purposes of art. 119 EEC.<sup>26</sup> The lawyer of the applicant used the first *Defrenne* case to encourage the CJEU to avoid another instance in which discrimination fell outside the scope of art. 119 EEC and thus to take an innovative stance.<sup>27</sup> It also referred to the conclusions of the Advocate General who at the time was already in favour of the horizontal direct effect of the provision.<sup>28</sup> On the contrary, the government of the UK

<sup>21</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., UK Annex I OP.

<sup>22</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., UK OP 3, answers to questions.

<sup>23</sup> Case 20/71 *Bertoni v Parliament* ECLI:EU:C:1972:48.

<sup>24</sup> Case 80/70 *Defrenne v Belgian State* ECLI:EU:C:1971:55.

<sup>25</sup> Case 80/70 *Defrenne v Belgian State* ECLI:EU:C:1971:43, opinion of AG Dutheillet de Lamothe.

<sup>26</sup> *Defrenne v Belgian State* cit. para 13.

<sup>27</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., applicant WP 6.

<sup>28</sup> *Ibid.*

argued that *Defrenne I* illustrated the lack of clarity of the provision.<sup>29</sup> In any case, these references to the first *Defrenne* judgment place the present one in context and show that the debate was not new but only the continuity of something ongoing. The CJEU in its final decision did not refer to it. With regards to *Defrenne I*, while it is not an added value of the *dossier*, it is interesting to note as well that the composition of the Court was similar in both cases (five of the seven judges were the same). It has been argued that the judges in *Defrenne I* were unhappy with their decision and branded the decision “unfinished business”.<sup>30</sup> *Defrenne II* could in this regard be taken as a second chance to make the right call. It is even more surprising that the CJEU did not refer to *Defrenne I* in its final judgment. Thus, access to the *dossier* permits us to see the broader picture and understand that *Defrenne I* had an influence on the final decision.

Secondly, EU policies were evolving to include more social aspects. Evidence of this evolution is present in the *dossier*. The story starts with the Paris Summit of 1972, which highlighted the new emphasis the EU was putting on social policies.<sup>31</sup> Three EU directives were created regarding equal pay,<sup>32</sup> equal treatment at work<sup>33</sup> and equal treatment in social security.<sup>34</sup> The first directive on equal pay was discussed at length in the *dossier*, notably by Miss Defrenne’s lawyer and the Commission. It also appears in the case’s final judgment. This shows the emphasis the CJEU put on social policies at the time.

Finally, the *dossier* notes the importance of the principle of equality in the Member States. In Miss Defrenne’s written observations, her lawyer argued that the principle of equality was part of an ideological background common to the Member States and that it had constitutional value in Belgium.<sup>35</sup> Thus, according to her, the principle of equality of pay was clear and entrenched in the Member States. Therefore, it should have horizontal direct effect.

The landmark decision was taken in a particular context and has thereby been influenced by different factors at both the EU and national levels. The *dossier* of the case hints at this context and permits a broader understanding of the case and the legal reasoning. With regards to the latter point, *Defrenne II* shows that the final decision was far from obvious and that the story is richer and broader than depicted in the final judgment (see section III).

<sup>29</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., UK WP 7.

<sup>30</sup> C Hoskyns, *Integrating Gender* cit. 74.

<sup>31</sup> Heads of State or Government, Statement from the Paris Summit of 19 to 21 October 1972.

<sup>32</sup> Directive 75/117/EEC of the Council of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

<sup>33</sup> Directive 76/207/EEC of the Council of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

<sup>34</sup> Directive 79/7/EEC of the Council of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

<sup>35</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, applicant WP 6 cit.

### III. BEHIND THE FAMOUS *DEFRENNE II*: THE DEBATE BETWEEN HORIZONTAL AND VERTICAL DIRECT EFFECT AND THE PRINCIPLE OF NON-RETROACTIVITY

In *Defrenne II*, the CJEU ruled in favour of the direct effect of art. 119 EEC. However, the *dossier* shows that this decision was far from obvious, and sheds lights on a big debate, which was essentially absent in the final decision: horizontal versus vertical direct effect (see section III.1). The landmark case is mainly known for this horizontal direct effect but the non-retroactivity of the decision, whilst equally debated in the *dossier*, received less attention in the final decision (see section III.2) and has consequently been less prominent in subsequent analysis in the academic world.

#### III.1. VERTICAL VERSUS HORIZONTAL DIRECT EFFECT

The *dossier* demonstrates that the debate on the horizontal direct effect of art. 119 EEC went further. In fact, three options were essentially considered: *i*) horizontal direct effect of the provision; *ii*) no direct effect of the provision, and *iii*) only vertical direct effect of the provision. It is the last option, first proposed by the European Commission, that was debated at length by every party involved.<sup>36</sup>

The European Commission stated that art. 119 EEC could be directly applicable between individuals and Member States.<sup>37</sup> In this regard, it distinguished between the public and the private sector, affirming that direct effect could apply only to the public sector. The main justification for this point of view was that civil servants were paid and categorised through classification and it would thus be easier to determine the difference in pay and work. The issues of interpretation and comparison of pay that appeared in the private sector did not exist in the public sphere. As such, the argument is somewhat pragmatic. The other parties in the case did not agree with this public/private distinction. The government of Ireland and the applicant pointed out that distinguishing between the public and private sectors would create further discrimination in an already discriminatory situation.<sup>38</sup>

This innovative argument played a significant role in the *dossier* and influenced not only the observations and answers submitted by the various parties, but also the evidence used to support the legal arguments. In this regard, the European Commission notably referred to the Cornu report to support its argumentation, in which a distinction was made between the public and private sectors.<sup>39</sup> The debate between vertical and horizontal direct effect was included in the *dossier* but the CJEU did not refer to any of it in its final judgment. The CJEU simply ruled it out without offering any clear justification

<sup>36</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, Commission WP 5 cit.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, applicant WP 6 cit. and Government of Ireland WP 8.

<sup>39</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, Commission annex V OP cit.

as to why,<sup>40</sup> and concluded in favour of the horizontal direct effect of a provision with an economic and social aim.

### III.2. THE NON-RETROACTIVITY OF THE JUDGMENT

As Hjalte Rasmussen stated, the Court in *Defrenne II* “accepted the responsibility to mould constitutional doctrine in order to make more acceptable the practical effects of judicial decision”.<sup>41</sup> The Court took an innovative stance in interpreting art. 119 EEC as giving horizontal direct effect but limiting its temporal effect. This temporal limitation of the judgment was the second legal issue discussed in *Defrenne II*. Whilst the final judgment devotes only seven paragraphs to it, compared to 65 for the first legal issue, both were equally debated in the *dossier*. Thus, the *dossier* offers precision on an issue rapidly summarised in the final decision.

The Commission and Miss Defrenne argued in favour of the retroactivity of the judgment. Even the Advocate General concluded that the decision should be retroactive since the financial consequences were not expected to be excessively high.<sup>42</sup> However, the government of the UK and Ireland argued strongly against it.<sup>43</sup> The CJEU in its final judgment concluded against the retroactivity of the decision, since the parties concerned continued with practices contrary to art. 119 EEC that were at the time not prohibited under national law.<sup>44</sup> Some arguments of the *dossier* regarding the economic burden were however overlooked by the Court. To understand the intentions of the CJEU regarding the temporal limitation of the judgment one must turn to the *dossier*.

First, the government of the UK provided evidence to support its arguments regarding the economic burden. The UK had added numerous tables and surveys to their submission that demonstrated the specific burden that the State would face in the event the judgement was made retroactive.<sup>45</sup> These tables provided information such as: the status of employees in 1973, the basic rates for men and women for identical jobs, and a comparison of rates of pay for men and women during particular time frames. The UK offered a detailed analysis on the financial implications of retroactivity in the hope of influencing the CJEU to decide against this and prevent the economic burden they would face. Whilst it is normal for the CJEU not to refer to all of the evidence, it could have referred to at least one piece of evidence or concretely shown what it believed the anticipated impact of retroactivity would be.

<sup>40</sup> *Defrenne v SABENA* cit. para. 39.

<sup>41</sup> H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff 1986) 29.

<sup>42</sup> Case C-43/75 *Defrenne v SABENA* ECLI:EU:C:1976:39, opinion of AG Trabucchi, 493.

<sup>43</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, UK OP 3 cit. and Government of Ireland OP 7.

<sup>44</sup> *Defrenne v SABENA* cit. paras 69-75.

<sup>45</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, UK annex I OP cit.



Second, and in a similar strain, the government of Ireland added a report<sup>46</sup> to its observations that supported its argument regarding the economic burden of retroactivity by providing an estimate of the costs that would occur when introducing the principle of equal pay in the private sector.<sup>47</sup> This report and the general use of evidence by the Member States, even if left aside by the CJEU in the final decision, clearly influenced decision-making and concretely illustrated the potential financial implications of retroactivity.

Finally, the government of Ireland also referred to the jurisprudence of the CJEU to support its position. It noted that the Court had previously stated that where a provision is equally open to two interpretations, the Court should favour the one which is consistent with the nature of the subject matter in question, namely, the effective working of the Treaty and the achievement of its objectives.<sup>48</sup> Thus, the Court should have tried to take into account the consequences that retroactivity could cause for the Member States. Whilst it probably influenced the decision of the CJEU, this argument was also left aside in the final decision. The argumentation regarding the temporal limitation has been more important in the *dossier* than in the final decision, which can lead authors to overlook the importance of this statement. In fact, the temporal limitation was not a foregone conclusion but a result of lengthy argumentation.

#### IV. CONCLUSION

The *dossier* highlights how a CJEU decision did not appear out of the blue but rather emerged and developed from a series of constituent elements, such as legal representation, sources and context. Archival research using the dossier is one way to take an innovative and original approach to more broadly understand landmark EU cases. This has been seen with *Defrenne II* in this *Article*. Whilst the majority of the people remember it mainly for its stand on equality of the sexes, and particularly equality of wages between men and women, the archives do the case more justice. *Defrenne II* is about so much more than wage equality and should be commended not only for the horizontal direct effect it gives to art. 119 EEC but also for the reasoning it offers on non-retroactivity of a decision. Additionally, the *dossier* provides insights into the time and effort that goes into a landmark case. The famous *Defrenne II* decision from the CJEU has potentially been influenced by many factors that can only be uncovered by reading the *dossier*. It was also decided within a specific social and political context. As the expression goes, “the key to success is to be in the right place at the right time”. The *dossier* makes the reader even more aware that it is unclear what would have happened if the case had arisen a few years earlier, or if another lawyer had defended Miss Defrenne, or if other Member States

<sup>46</sup> *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, Government of Ireland annex I OP cit.

<sup>47</sup> *Ibid.* OP 7 and OP 11.

<sup>48</sup> *Ibid.*

had submitted observations, or even if other judges had sat in the chamber. This landmark case is a result of coincidences and seized opportunities that allowed it to be the case that it is still known nowadays for being “a heroine of Community law”.<sup>49</sup>

<sup>49</sup> M Maduro and L Azoulai (eds), *Past and Future of EU Law* cit. 251.



## ARTICLES

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

edited by Marise Cremona, Claire Kilpatrick and Joanne Scott

#### *COMMISSION V BELGIUM* AND ITS *DOSSIER DE PROCÉDURE*: A NEW RESOURCE FOR SOCIO-LEGAL RESEARCH

ARUNA MICHIELS\*

TABLE OF CONTENTS: I. Introduction. – II. Case 149/79 *Commission v Belgium*. – III. The context/case dialectic. – IV. Findings on legal reasoning to strengthen doctrinal research. – V. Procedural practice. – VI. Insight into actors and institutions. – VII. Concluding remarks.

**ABSTRACT:** In its final decision of 26 May 1982, the Court of Justice established which of two competing interpretations of the public service exception in art. 48(4) of the EEC Treaty (currently art. 45 TFEU) would define the ambit of free movement of workers to this day. Out of nine Member States, four were actively involved in the proceedings, showing the controversy and importance surrounding the implementation of free movement in the public service of domestic legal orders in this early stage of European integration. Findings from an analysis of the *dossier* for *Commission v Belgium* were gathered in reports drafted as part of a fascinating project on the “Court of Justice in the Archives”. This *Article* showcases the interconnectedness of actors, institutions and procedure that emerges from the *dossier*. The legal reasoning underpinning the case is re-evaluated on the basis of submissions and the evidence contained in the *dossier*. The illustrations selected for this *Article* demonstrate how the *dossier* can be deployed as a new instrument to further socio-legal and legal research on the jurisprudence and practice of the European Community.

**KEYWORDS:** free movement of workers – derogations – employment in the public service – infringement procedure – legal and socio-legal research methods – archival resources.

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## I. INTRODUCTION

Digging up dusty old case files in this digital day and age? What gains could possibly merit sneezing over the Court of Justice's 40 year-old labour? Fortunately, precautions were taken: the archivists at the Historical Archives of the European Union furnished my colleagues and me with high quality digital (even searchable) scans of the *dossiers de procédure*. A number of "landmark cases" for European Community law were selected for this project,<sup>1</sup> which is aimed at exploring these precious paper treasures. Case 149/79 *Commission v Belgium* is one of those cases where the Court of Justice of the European Union (the CJEU) took a decisive step towards an integrated labour market in Europe.<sup>2</sup> This *Article* shares a number of striking highlights that surfaced from the *dossier* for *Commission v Belgium*,<sup>3</sup> and proposes a number of ways in which this newly available resource can be mobilised towards legal, historical and socio-legal research.

The top findings chosen here to illustrate the *dossier's* potential are presented under four headings corresponding to four thematic clusters that structured the reports drawn up for the wider project. For reasons of clarity, these findings are presented separately, whilst they often intertwine and strengthen each other. The first heading gathers findings on the dynamic between the case and its context and how the *dossier* can be used to improve the researcher's understanding of both. The second theme discusses the *dossier's* potential to re-evaluate the legal reasoning underpinning the Court's older case law. The third element highlights the *dossier's* potential to unlock insights into procedural practice associated with enforcement of Community law. The fourth and final thematic cluster gathers findings on the appearance of actors and institutions throughout the *dossier*.

The selection of examples for this *Article* demonstrates a variety of findings: discoveries in the *dossier* itself, findings about what was surprisingly absent from the *dossier*, and elements that inspire further comparative research across different case files. These examples are the result of the analysis of the single *dossier* for *Commission v Belgium* and stem from a very individual experience. Where suggestions are made as to the potential advantage of recourse to *dossiers* for specific types of research, two qualifications should be kept in mind. First, these claims are not in any way exhaustive. Second, these claims are not necessarily generalisable to the *dossiers* related to other case files. That said, this *Article* does aim to give readers an indication of what they *might* find in other *dossiers* stored at the Historical Archives of the European Union in Florence.

<sup>1</sup> The Court of Justice in the Archives, project website: [ejarchives.eu.eu](http://ejarchives.eu.eu).

<sup>2</sup> Case 149/79 *Commission v Belgium* ECLI:EU:C:1980:297.

<sup>3</sup> *Dossier de procédure original Commission v Belgium*, HAEU CJUE-4112/13/14. The *dossier* for *Commission v Belgium* totalled 728 digital pages, covering three separate volumes. The references to documents in the *dossier* refer to the digital page of the pdf-files corresponding to each of the three volumes. Information on its holdings in the Historical Archives of the European Union can be found here: [archives.eu.eu](http://archives.eu.eu).

For starters, however, the following paragraph will briefly outline the facts of the case and the legal question that arose in *Commission v Belgium* to provide readers with the necessary background information.

## II. CASE 149/79 COMMISSION V BELGIUM

In post-war Western Europe, the workload of the State gradually diversified and expanded beyond its traditional public administrative tasks. More and more activities of an industrial or commercial nature were embedded in entities constituted or governed by public law, such as development and management of railways, provision of energy, and services to support the administrative public service in various ways. Art. 48 of the EEC Treaty (currently art. 45 TFEU) instituted the area of free movement for workers within the Community,<sup>4</sup> as a result of which foreign Community workers were more and more engaged in the labour market of different Member States.

Art. 48(4) of the EEC Treaty (art. 45(4) TFEU) provided a derogation to the principle of free movement for workers.<sup>5</sup> Member States had traditionally excluded foreign Community workers from positions organised within the public service, including those positions of an industrial or commercial nature. In the early 1970s in Belgium, various vacancies announced with the National Belgian Railway Company and with decentralised public entities required Belgian nationality for admission, including posts such as electricians, unskilled workers, hospital and children's nurses and night watchmen.<sup>6</sup> Convinced that this practice exceeded the objective of the derogation clause, the European Commission (the Commission) initiated the infringement procedure of art. 169(1) of the EEC Treaty (currently art. 258(1) TFEU) against Belgium.

The report for the hearing in the interim judgment stated the Commission's position that the derogation in art. 48(4) of the EEC Treaty (art. 45(4) TFEU) should not apply to positions organised in the public service that are no different from activities of a commercial or industrial nature organised in the private sector.<sup>7</sup> As such, the Commission proposed a functional interpretation of the derogation clause, according to which it would only apply to those positions involving "traditional" duties and responsibilities of the public service. In this view, only positions related to State interests could justify limiting free movement. Positions would only qualify as public service positions when the duties associated met factual criteria that justified its application. In line with the standard

<sup>4</sup> Art. 48(1)-(3) of the EEC Treaty: "1) The free movement of workers shall be ensured within the Community not later than at the date of the expiry of the transitional period. 2) This shall involve the abolition of any discrimination based on nationality between workers of the Member States, as regards employment, remuneration and other working conditions. 3) It shall include the right, subject to limitations justified by reasons of public order, public safety and public health: a) to accept offers of employment actually made".

<sup>5</sup> Art. 48(4) of the EEC Treaty: "4) The provisions of this Article shall not apply to employment in the public administration".

<sup>6</sup> *Commission v Belgium* ECLI:EU:C:1980:297 cit. 3884.

<sup>7</sup> *Ibid.* 3885.

practice at the time, the four Member States involved (out of nine at the time), advocated for the institutional interpretation, according to which the derogation of art. 48(4) of the EEC Treaty (art. 45(4) TFEU) would apply to any position organised within an entity governed by public law. In its preliminary judgment in *Commission v Belgium* the Court settled the question of whether the concept “employment in the public service” should be construed as a functional or institutional concept in Community law.

Advocate General (AG) Mayras delivered his interim Opinion in line with the Commission’s reasoning. Following the functional concept of public service employment, the Court established factual criteria to assess the scope of the derogation. Ever since, art. 48(4) of the EEC Treaty (art. 45(4) TFEU) applies only to positions “connected with the specific activities of the public service in so far as it is entrusted with the exercise of powers conferred by public law and with responsibility for safeguarding the general interests of the State”.<sup>8</sup> With this decision, the Court took an important step in the consolidation of the area of free movement for workers and the ensuing integration of the labour market in the European Community. Accessing the *dossier* provided an opportunity to engage with the parties’ submissions, yielding other insights about the context of the case, which ties to the following discussion of the first thematic cluster.

### III. THE CONTEXT/CASE DIALECTIC

Understanding the contemporary context of a dispute is crucial to understanding its merits. Analysing the original case files holds tremendous potential in that sense.

From a thorough reading of the *dossier* for *Commission v Belgium*, indications emerged that contributed to a better understanding of the context of the case. Let us take, for instance, the timeline of the case. The examples of postings for job offers for the Belgian National Railway Company dating back to 1973 and 1974 annexed to the petition did not refer to the public nature of the position itself or the duties associated with it.<sup>9</sup> The preliminary judgment also referred to a letter from the Commission addressed to the Belgian government dated 1 April 1977.<sup>10</sup> That letter, annexed to the petition as the first piece of evidence, actually referred to an earlier letter dated 23 January 1974. The same goes for other examples of job offers dating back to 1975 and 1976 with public administrations at the local level, submitted during the oral phase in the first round of proceedings. A further reading of the petition and the letters submitted in evidence provided a rich sketch of how the public service gradually expanded the reach of its activities

<sup>8</sup> Case 149/79 *Commission v Belgium* ECLI:EU:C:1982:195 1851 para. 7.

<sup>9</sup> *Dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 18 cit., Doc 1, Annex I Examples of job offers; *dossier de procédure original Commission v Belgium*, HAEU CJUE-4113 13 cit., Doc 99, Annex I Offre d’emploi de la Société Nationale des Chemins de Fer Vicinaux and Doc 100, Annex I Offres d’emploi auxquelles la Commission fait référence dans sa requête.

<sup>10</sup> *Commission v Belgium* ECLI:EU:C:1982:195 cit. 1885 para. 2.

beyond the traditional duties of the state. The Belgian government explained how the problem was linked to its complex structure of defederalised competences spread over different layers of the public enterprise.<sup>11</sup> These indications illustrate the *dossier's* potential to reconstruct the context preceding formal exchanges linked to the case itself.

Reading additional secondary sources concerning the context of the case also led to a better understanding of how the case unfolded. Secondary sources helped to place this into the Belgian historical context of post-war migration policy. Since the 1950s, Belgium intentionally recruited workers from abroad for heavy labour such as in the extraction industry, often for low wages and against other discriminatory conditions.<sup>12</sup> When the labour market had reached a point of saturation, the Belgian government announced a “migration stop” in 1974.<sup>13</sup> The Belgian policy of attracting migrant workers marks a point where we know workers from different nationalities were contending for positions in industrial and commercial activities. The context of the Belgian labour market at the time helps explain why the question of whether or not to open up jobs in industrial or commercial activities organised by public administrations would become relevant towards the end of the 1970s. This example illustrates how the information contained in the *dossier* allows a reconstruction of the context surrounding the dispute beyond the timeline of its formal proceedings, which can be strengthened with additional (secondary) sources.

The submissions contained other surprises as to its substance, or rather, as to what was missing from it. Even though the eradication of discrimination on the basis of nationality within the Community was central to the objectives of free movement for workers, very little legal reasoning engaged with the consequences of the functional or institutional concept of public service employment for discrimination against foreign workers. The focus of the argumentation was entirely on the inefficiency of applying factual criteria to assess the public nature of employment. In its submission for defence, the Belgian government carefully avoided even using the term “discrimination”;<sup>14</sup> only in its rejoinder did Belgium submit a single counterargument as to how the Commission’s interpretation would expose foreign community nationals to an even “greater” form of discrimination. According to the Belgian government, following a functional criterion, a number of positions traditionally associated with career tracks would be open to foreign workers. They would later on have to

<sup>11</sup> *Dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 29 cit. Doc 1, Annex V Letter by J van der Meulen R/S04/90/300/70.830 of the Permanent Representation of Belgium of 15 January 1979: “[...] en réalité, cette question concerne l'appareil administratif belge au sens le plus large, c'est-à-dire les administrations de l'État, des provinces, des communes et, dans l'avenir, des régions de même que celles des établissements publics en général”.

<sup>12</sup> K Pittomvils, ‘Het ABVV, arbeidsmigraties en “gastarbeiders” in de periode 1960-1974: internationalisme versus nationale verdediging’ (1997) *Belgisch Tijdschrift voor Nieuwste Geschiedenis* 431, 442.

<sup>13</sup> *Ibid.* 431.

<sup>14</sup> *Dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 66 cit., Doc 13 Submission of defence.

be barred from certain promotions to positions involving duties and legitimate State interests, which would fall within the scope of the derogation clause.<sup>15</sup>

Germany and France concurred with this argument, each illustrating the practical difficulties of applying a functional concept of public service employment in their own public legal orders.<sup>16</sup> Germany went even further, arguing that it can hardly be expected not to discriminate against foreign community nationals, when in its own federalised legal order, they would deny admission to public service employment to German nationals originating from a different federal state.<sup>17</sup> The UK did not even raise any arguments in relation to the principle of non-discrimination. It seems as if the Member States preferred an objective criterion that would systematically limit the free movement of workers and discriminate against many potential applicants. They seemed to attach relatively little importance to the eradication of discrimination as an objective underpinning free movement for workers. This example also speaks to the socio-political context of the case which could only be evaluated thanks to analysis of the full written submissions included in the *dossier*.

These two examples neatly showcase the *dossier's* added value for the pursuit of legal research in a historical context (or *vice versa*). Moving on to the second thematic cluster, the *dossier* presented another opportunity, namely, to revisit the legal arguments put forth by the Court and the AG by comparing the contents of the judgment to the submissions of the parties.

#### IV. FINDINGS ON LEGAL REASONING TO STRENGTHEN DOCTRINAL RESEARCH

The *dossier* for *Commission v Belgium* contains all of the full written submissions, in their original language version and French translations, including all the evidence submitted by the parties. The availability of the full written submissions in their original language versions seemed, at first, to hold some promise of revelation. Surely a comparison between the detailed argumentations of the five parties involved and the publicly available materials of the case would yield new insights. In the past, the Court used to publish its decisions together with the report for the hearing, which contained a summary of the arguments raised in the submissions. As long as the case files were closed, one could only guess to what extent the report for the hearing represented a complete and adequate summary of the parties' submissions.

<sup>15</sup> *Dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 143 cit., Doc 33 Submission of rejoinder.

<sup>16</sup> *Commission v Belgium* ECLI:EU:C:1982:195 cit. 1904 para.22; *dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 233 cit., Doc 79 Submission of intervention by Germany and French translation; *dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 272 cit. Doc 80 Submission of intervention by France.

<sup>17</sup> *Dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 244-246 cit., Doc 79 Submission of intervention by Germany and French translation.



Alas, a thorough comparison of the (sometimes lengthy) submissions, however, did not uncover any grand revelations, important details or arguments that were left out of the report. This demonstrates the high quality of the report for the hearing, rather than the novelty of the *dossier*. But that is in fact good news. It is a testament to the Court's work. Only some years ago, the Court published documentation concerning its internal practices that went beyond the scope of the formal Rules of Procedure.<sup>18</sup> With regard to cases before the General Court, the Practice Rules describe the custom to present parties with the opportunity to make observations to the report for the hearing.<sup>19</sup> Whether this practice extends to cases decided by the Court of Justice, and whether the same practice dates back to the Court's early days is, to my knowledge, not documented. If any general inferences can be drawn from this finding, it might be that the report for the hearing is a very useful tool for doctrinal research. Unfortunately, that resource is no longer readily available.

Nonetheless, the *dossier* did prove a valuable resource for comparing the legal reasoning in the written submissions of the different parties. The submissions revealed parallel arguments raised by the Belgian Government on the one hand, and, on the other, the three intervening Member States (the UK, France and Germany).<sup>20</sup> Besides promoting the institutional interpretation of public service employment, the Member States' arguments followed a similar structure. Their submissions all relied on the organisation of their domestic legal orders and resorted to the heterogeneity across Member States to refute the practical applicability of the functional interpretation proposed by the Commission. Their reliance on domestic legal provisions, national law of Community Member States, and, once even of a third State, indicates that a comparative methodology underpinned the legal reasoning. Regardless of their similarities, among the various submissions, only two formal sources were cited by all the parties to substantiate their legal arguments: art. 55 of the EEC Treaty (currently art. 49 TFEU) and the *Sotgiu* case.<sup>21</sup>

To the extent that findings from the *dossier* of *Commission v Belgium* may extend to other cases, one might infer that the original case files can be a valuable resource for

<sup>18</sup> Between 2013 and 2016, the Court adopted two texts documenting its procedural practice, one for each composition. For the Court of Justice, Practice directions to parties concerning cases brought before the Court, 31 January 2014, as amended by Practice Directions to Parties Concerning Cases Brought Before the Court, 14 February 2020; for the General Court: Practice rules for the implementation of the Rules of Procedure of the General Court, 18 June 2015, as amended by Amendments to the Practice Rules for the Implementation of the Rules of Procedure of the General Court, 21 November 2018 (Practice Rules).

<sup>19</sup> Points 187 and 188 of the Practice Rules.

<sup>20</sup> See in particular *dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 66 cit., Doc 13 Submission of defence; *dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 143 cit., Doc 33 Submission of rejoinder; *dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 211 cit., Doc 79 Submission of intervention by Germany and French translation; *dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 263 cit., Doc 80 Submission of intervention by France; *dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 280 cit., Doc 81 Submission of intervention by the United Kingdom and French translation.

<sup>21</sup> Art. 55 of the EEC Treaty; case 152/73 *Sotgiu v Deutsche Bundespost* ECLI:EU:C:1974:13; case 152/73 *Sotgiu v Deutsche Bundespost* ECLI:EU:C:1973:148, opinion of AG Mayras.

comparative doctrinal research. Researchers can gain a refined understanding of the detailed legal arguments raised in the submissions. In other cases, the submissions might still provide useful complements to the report of the hearing. Besides the submissions, the *dossier* contains a rich documentation of the procedural practice of the Court, which constitutes the third thematic cluster of findings.

## V. PROCEDURAL PRACTICE

The third thematic cluster considers the composition of the *dossier*, featuring many documents on procedural practice, both within the Court and throughout the European institutions. With regard to the Court's practice, one thing that can surely be said is that the phases in the procedure are well documented. The category of procedural documents turned out to be the biggest category of documents in absolute terms (see table 1 below). Only rarely were these documents signed by a different registrar than the one appointed to each round of proceedings respectively. On these occasions the interim registrar signed as "administrateur principal" or as "greffier adjoint".<sup>22</sup> The case was appointed to AG Mayras, who had also delivered the Opinion for the *Sotgiu* judgment,<sup>23</sup> which was also on free movement of workers. This suggests that the Court might take into account the pre-existing expertise of AGs for case allocation. Although the Opinion for the final judgment was delivered by AG Rozès, her second Opinion consisted of a very brief confirmation of AG Mayras' detailed reasoning, which she applied to the remaining positions for which the application of the derogation in art. 48(4) of the EEC Treaty (art. 45(4) TFEU) was still contested.<sup>24</sup>

Category of document	Number of documents	% of number of documents (n = 190 inc. annexes)	Number of pages	% of the dossier (728 p)	% of the original file (912 p)
<b>Submissions by the parties</b>	11	5,8	185	25,4	20,3
<b>Evidence</b>	18	8,4	153	21	16,8
<b>Procedure-related documents</b>	148	77,9	203	27,9	22,3
<b>Report of the Oral Hearing</b>	2	1,1	52	7,1	5,7
<b>Opinion of the AG</b>	2	1,1	36	4,9	3,9
<b>Decisions</b>	9	4,7	100	13,7	11

<sup>22</sup> *Dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 204 cit., Docs 74-78 Transmission of date for submission of intervention; *dossier de procédure original Commission v Belgium*, HAEU CJUE-4114 222 cit., Doc 163 Transmission of certified copy of deposition by Defendant to Applicant.

<sup>23</sup> *Sotgiu v Deutsche Bundespost*, opinion of AG Mayras, cit.

<sup>24</sup> Case 149/79 *Commission v Belgium* ECLI:EU:C:1982:153, opinion of AG Rozès.

Category of document	Number of documents	% of number of documents (n = 190 inc. annexes)	Number of pages	% of the dossier (728 p)	% of the original file (912 p)
Final Judgment	1	0,5	14	1,9	1,5
Redacted material	n.a.	n.a.	184	n.a.	20,2

TABLE 1: quantitative overview of the composition of the *dossier*.

To preserve the secrecy of deliberations, the *dossier* is redacted in some places. At least the preliminary report of the *juge-rapporteur* and the *délibéré* itself can be expected to be left out of the *dossier*.<sup>25</sup> For *Commission v Belgium*, the pages omitted from the *dossier* seemed to correspond with these predictable instances. Redaction of pages occurred in the same places for each round of proceedings and for a similar number of pages. Twice at the end of the written proceedings, eight pages were redacted, which should normally correspond with the preliminary report of the *juge-rapporteur*. After the oral hearing in the first round of proceedings, 96 pages were omitted and another 72 after the second round of proceedings, which likely corresponds to the *délibéré*. In this case that is good news on all sides: the secrecy of deliberations remains intact for as long as this is still required without redundantly affecting the resourcefulness of the *dossier*.

To summarise, with regard to procedural practice, this *Article* highlighted some descriptive findings from the *dossier* of *Commission v Belgium*. Comparative research across *dossiers* could potentially reveal interesting trends of the Court's procedural practice in the past, especially considering the Court's recent publications on its current practice.

## VI. INSIGHT INTO ACTORS AND INSTITUTIONS

The fourth and final thematic cluster discusses the *dossier's* potential to offer insights into the role played by specific actors and institutions. Beyond identifying numerous individual actors involved in the pre-contentious phase of the dispute, the evidence submitted in *Commission v Belgium* shed light on the institutional dynamics within the Commission. The letters addressed to the Belgian Ministry of Foreign Affairs that were submitted as evidence demonstrated which services of the Commission were involved in the infringement procedure, including the Vice-President and the Secretary-General of the Commission and the DG for Work and Social Affairs.<sup>26</sup> The diplomatic nature of this enforcement mechanism likely makes obtaining information on its dynamics a challenging feat for outsiders. In this case, the Commission served Belgium with a first notice on 1 April 1977 and delivered its reasoned opinion in accordance with art. 169(1) of the EEC Treaty on 4 April

<sup>25</sup> Arts 32(1) and 59 of the Rules of Procedure of the Court of Justice.

<sup>26</sup> *Dossier de procédure original Commission v Belgium*, HAEU CJUE-4112 4 cit., Annexes II-VII with Doc 1 Petition.

1979 (art. 258(1) TFEU). The whole process of formal correspondence preceding the Commission's petition consisted of three phases: *i*) diplomatic correspondence, *ii*) the Commission's reasoned opinion delivered in accordance with art. 169(1) of the EEC Treaty (art. 258(1) TFEU) and *iii*) Belgium's observations thereto. Subsequently, the Commission lodged its petition with the Court on 27 September 1979.

The diplomatic phase covered the exchange of (only) five letters over a period of two full years. Between the second and the third letters, a year and four months had passed. From the letters, it does not appear that there were more informal exchanges on the topic besides the documented ones. Exchanging only five letters at this pace seems slow for the pursuit of enforcement of Community law. Yet, for the Belgian government to reorganise the whole process of acquisition of human resources in the public sector in the course of two years seems very short. The infringement procedure proved ineffective as a preventive instrument to enforce compliance with art. 48 of the EEC Treaty (art. 45 TFEU).

This example illustrates how the *dossier* can contain information on procedural practice outside of the contentious phase of the dispute. It is possible that for many of the disputes where the Commission had previously initiated the infringement procedure, the case files would contain documents on the pre-contentious phase, because it would constitute an essential element of the facts of the dispute and be central to the development of the Commission's legal position. Comparative research across cases could lead to interesting findings on the dynamics and limitations of this enforcement mechanism, at least in the cases where it was unsuccessful at preventing formal litigation.

With regard to the individual actors involved, the analysis of the *dossier* as such did not reveal any findings as to the special influence or significant role of any one individual. The appointment of judges and AGs can be traced via the publicly available materials, so the *dossier* does not constitute a special asset in that sense. Comparative research across case files would be required to uncover expertise regarding repeat players amongst the other actors involved. This includes actors working for the Court, by comparing procedural decisions made by the President of the Court. Another possibility would be to trace the work of the agents of Member States or of the Commission.

However, pairing the *dossier* with secondary resources enhances the potential to identify important actors. In this case, the reception of the case in the scholarly literature presented an interesting link to one of the actors involved in the litigation phase. Some years after the Court pronounced its final decision in *Commission v Belgium*, the Commission's agent Louis Dubouis published an article in a legal journal, which was telling of the decision's reception in the Member States' legal orders.<sup>27</sup> Consistent with the Member States' frustrations that shone through the written submissions in the first round of proceedings, the decision of the Court was met with fierce resistance.<sup>28</sup> Pairing the *dossier* with extra-

<sup>27</sup> L Dubouis, 'La Notion d'Emplois dans l'Administration Publique (Art. 48(4) Traité C.E.E.) et l'Accès des Ressortissants Communautaires Aux Emplois Publics' (1987) *Revue Française de Droit Administratif* 950.

<sup>28</sup> *Ibid.* 952.

judicial writings or autobiographical sources on specific actors could be another interesting avenue to investigate the role, influence or expertise of individual actors.

## VII. CONCLUDING REMARKS

The examples selected for this *Article* showcased some of the findings gathered in the report drawn up as part of this project on the Court of Justice in the Archives. The separation of these examples into topics was a necessary but somewhat artificial exercise. Every illustration in reality ties to findings in various categories: the relative underrepresentation of non-discrimination in the legal reasoning is also telling of the socio-political context of the case. The Court's practice regarding the report for the hearing came up in relation to the report's capacity to shed light on the arguments in the submissions. The findings on the infringement procedure were filed under the category on institutions but could also qualify as procedural practice in the Community beyond the Court's internal practice. These illustrations, resulting from the analysis of just one case, are just the tip of the iceberg.

This *Article* proposed some ways in which the *dossier de procédure* could be deployed to conduct further research across disciplines, including doctrinal legal research, socio-legal research into procedures and institutions, and historical research focusing on actors or specific developments in Community law and policy. Clearly, more research is necessary to truly understand the value of these *dossiers*. In light of the heterogeneity of cases brought before the Court of Justice, which is reflected in the heterogeneity found across the *dossiers* selected for this project, many *dossiers* will no doubt contain a wide variety of other inspiring materials. Paired with various (comparative) research strategies and with other primary and secondary sources, these archival resources are a worthy new asset to mobilise for reinvigorating socio-legal research. If nothing else, they constitute another good reason to visit Florence for those who prefer the real look and feel of paper trails over the digital *dossiers*.





## ARTICLES

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

edited by Marise Cremona, Claire Kilpatrick and Joanne Scott

## THE COURT OF JUSTICE, GENUINE DISPUTES AND JURISDICTIONAL CONTROL: MAKING SENSE OF *FOGLIA II* IN LIGHT OF ITS *DOSSIER*

DIEGO GINÉS MARTÍN\*

TABLE OF CONTENTS: I. Introduction. – II. The *Foglia* saga: towards jurisdictional control. – II.1. *Foglia I* and the facts leading to *Foglia II*. – II.2. *Foglia II*: main features and reception in the literature. – III. Paths not taken: reflecting on the *dossier* and its value. – III.1. A (lack of) genuine dispute? – III.2. France as the legal entrepreneur in *Foglia II*? – IV. Conclusions.

ABSTRACT: The *Foglia* saga remains key to understanding the relationship between the Court of Justice of the European Union (CJEU) and domestic courts in art. 267 TFEU proceedings. By discussing the *dossier de procédure* of case 244/80 (*Foglia v Novello II* ECLI:EU:C:1981:302), this *Article* adds to the existing debates on the case. In doing so, it gives insights into the legal arguments of the different actors as found in the *dossier*, as well as into the way in which these were handled by the Court. Whereas their overall legal stance on the issue was clear from the outset, the most remarkable findings concern the arguments that were left unsaid in the final version of the judgment. These illustrate that, contrary to what the judgment seems to suggest, the case was as much about demonstrating the existence of a genuine dispute between the two parties in this specific case, as it was about the Court's appraisal powers. The material found is also in line with existing academic commentary which pointed to the influence of France in the judgment. Though these findings are not conclusive and do not purport to reveal the motives behind this enigmatic ruling, they nonetheless give fresh insight into this extensively discussed issue.

KEYWORDS: *Foglia II* – *dossier de procédure* – art. 267 TFEU – preliminary rulings – genuine disputes – jurisdictional control.

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## I. INTRODUCTION

The archives of the CJEU were opened in 2015 in the Historical Archives of the European Union (HAEU). They have made available the *dossiers de procédure* for all cases after a 30-year wait period from the ruling dates. By analysing a selection of key cases, the Court of Justice in the Archives Project seeks to illustrate how and why these archives can be relevant for scholars of various disciplines.<sup>1</sup>

Though greatly polemic and widely criticised at the time, *Foglia v Novello* (hereinafter *Foglia II*)<sup>2</sup> remains key to understanding the relationship between the Court of Justice and national courts in preliminary ruling proceedings, as it was the first case in which the Court claimed jurisdictional control. In essence, art. 177 of the EEC Treaty (now 267 TFEU) was interpreted as permitting the Court of Justice to refuse to give judgment if it believed that the preliminary ruling would not be used to solve a genuine dispute, but rather an artificially constructed one. This meant that the Court of Justice could appraise the substance of the dispute in order to evaluate the need to answer the questions before it.

This *Article* adds to the existing debates on the case by delving into its *dossier*. Section II provides a general overview of the factual and legal antecedents leading to *Foglia II*, as well as a brief analysis of the case and its reception in the literature. Section III analyses its *dossier*, reflecting on the arguments of the various actors involved in the case as found in the raw submissions of the archive. It is contended that, contrary to what the Court suggested, litigation before the Luxembourg Court was largely about proving the existence of genuine litigation at the domestic level in this specific case. The information found is also compatible with existing debates which pointed to the influence of France upon the ruling.

## II. THE *FOGLIA* SAGA: TOWARDS JURISDICTIONAL CONTROL

### II.1. *FOGLIA I* AND THE FACTS LEADING TO *FOGLIA II*

If landmark EU law cases are often summarised in a succinct principle, the *Foglia* cases are commonly associated with the words *genuine dispute*.<sup>3</sup>

*Foglia II* derived from a previous Court of Justice case (hereinafter *Foglia I*),<sup>4</sup> the facts of which unfolded as follows.

<sup>1</sup> This *Article* is published in the framework of the research project “The Court of Justice in the Archives”. For more information on the project, see D Ginés Martín, ‘The Court of Justice in the Archives Project: Analysis of the *Foglia* case (244/80)’ (EUI Working Papers 03/2021).

<sup>2</sup> Case 244/80 *Foglia v Novello* ECLI:EU:C:1981:302 (*Foglia v Novello II*).

<sup>3</sup> See, among others: D Chalmers, G Davies and G Monti, *European Union Law: Cases and Materials* (Cambridge University Press 2010) 164; HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union* (Kluwer Law International 2001) 247; A Kaczorowska-Ireland, *European Union Law* (Routledge 2016) 405.

<sup>4</sup> Case 104/79 *Foglia v Novello* ECLI:EU:C:1980:73 (*Foglia v Novello I*).



In 1979, Mr Foglia, an Italian wine merchant, was asked to deliver a shipment of liqueur wine to a person residing in France. To this end, Mr Foglia signed a contract with Mrs Novello, an Italian national, in which Mrs Novello's liability was restricted to "those taxes authorised by the Community provisions in force guaranteeing the free movement of goods".<sup>5</sup> Mr Foglia had recourse to Danzas S.p.A. for the transportation of goods, similarly stipulating that Foglia's liability would be limited to those charges paid in accordance with Community law. Having paid the bill for the dispatch of goods, Mr Foglia requested that Mrs Novello reimburse him, but the latter held that the bill included an unlawful tax paid at the French border and hence refused payment. The *Pretore di Bra* (Italian judge) considered that the solution to be given to the dispute was determined by the (in)compatibility of French legislation with Community law, and he therefore asked the Court of Justice whether the French tax at issue was in conformity with the free movement of goods, since the levy was based on objective criteria but seemed to favour French products over their foreign competitors.<sup>6</sup>

Interestingly, the Court refused to answer a question on Community law for the first time, claiming that there was not a genuine dispute between the parties, but rather one that was artificially built in order to obtain a ruling invalidating French laws so that neither Foglia nor Novello would be accountable for the charges at issue, despite there being no reference to the need for genuine disputes in the treaties. In the words of the Court, "[a] situation in which the Court was obliged [...] to give rulings would jeopardise the whole system of legal remedies available to private individuals to enable them to protect themselves against tax provisions which are contrary to the Treaty".<sup>7</sup>

In spite of the Court's reluctance to solve the preliminary questions, the *Pretore* again stayed the proceedings, offered clarifications on Italian procedural law to persuade the Court on the need to obtain a ruling (see *infra* section III.1), and raised five questions on the interpretation of arts 177 and 95 of EEC Treaty, inquiring again about the compatibility of French legislation with Community law.

## II.2. *FOGLIA II*: MAIN FEATURES AND RECEPTION IN THE LITERATURE

Yet again, the Court declined jurisdiction to rule on the compatibility of French laws with the free movement of goods. The Court simply made reference to *Foglia I* in claiming that the submission of the *Pretore* did not provide new facts justifying a fresh appraisal of the Court's jurisdiction.<sup>8</sup> In other words, nothing had happened since *Foglia I* that made it necessary for the Court of Justice to have another look at its jurisdiction.

<sup>5</sup> *Ibid.* 747.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.* para. 11.

<sup>8</sup> *Foglia v Novello II* cit. para. 34.

The Court noted that, even if it must place as much reliance as possible on the assessment of domestic courts, “it is nevertheless for the Court of Justice, in order to confirm its own jurisdiction, to examine, where necessary, the conditions in which the case has been referred to it by the national court”.<sup>9</sup> It further noted that it must display special vigilance when preliminary questions are referred to it by a national judge concerning the laws of another Member State.<sup>10</sup>

If the importance of a case is determined as much by its follow-up in the broader political, social and legal context as by the judgment itself,<sup>11</sup> the judgment of the Court of Justice in *Foglia II* was rapidly and widely criticised in the literature,<sup>12</sup> for two main reasons. Firstly, because it was said to trespass on the discretionary powers of domestic judges to evaluate whether a question of Community law was necessary for them to be able to give judgment.<sup>13</sup> Secondly, part of the scholarship seemed puzzled by the fact that such strict examination of the facts of the case took place in one that was, at least at first sight, an ordinary example of genuine litigation between two parties.<sup>14</sup>

Academic critiques were followed by erratic Court of Justice jurisprudence, which led some authors to describe the *Foglia* judgments as “isolated”,<sup>15</sup> or even as a “jurisprudential iceberg”,<sup>16</sup> due to its inconsistency with the very liberal preceding jurisprudence,<sup>17</sup> but also with its own successive rulings. Indeed, neither the “genuine dispute” concept,<sup>18</sup> nor the suggestion that there was something wrong in challenging the laws of a Member

<sup>9</sup> *Ibid.* para. 21.

<sup>10</sup> *Ibid.* para. 30.

<sup>11</sup> MP Maduro and L Azoulai, *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) xiii.

<sup>12</sup> Along these lines read, among others: A Barav, ‘Preliminary Censorship? The Judgment of the European Court in *Foglia v Novello*’ (1980) ELR 443; G Bebr, ‘The Possible Implications of *Foglia v. Novello II*’ (1982) CMLRev 421; TC Hartley, *The Foundations of European Union Law: An Introduction to the Constitutional and Administrative Law of the European Union* (Oxford University Press 2014) 301; D Anderson, ‘The Admissibility of Preliminary References’ (1994) Yearbook of European Law 179, 194.

<sup>13</sup> HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union* cit. 248.

<sup>14</sup> TC Hartley, *The Foundations of European Union Law* cit. 301.

<sup>15</sup> HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union* cit. 248.

<sup>16</sup> G Bebr, ‘The Possible Implications of *Foglia v. Novello II*’ cit. 441.

<sup>17</sup> In *Costa*, the Court went as far as extracting the correct questions from inappropriately framed references (case 6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66 593). In *Rewe-Zentrale*, where the preliminary questions were irrelevant to the litigation, these were answered by the Court solely because it could become a test case for similar cases (case 37/70 *Rewe v Hauptzollamt Emmerich* ECLI:EU:C:1971:15).

<sup>18</sup> The concept was disregarded by the Court in cases in which the genuineness of the dispute was arguably more patent than in *Foglia*. This can be seen in other cases adopted by the Court immediately before *Foglia II* (e.g. case 140/79 *Chemial Farmaceutici* ECLI:EU:C:1981:1; case 46/80 *Vinal v Orbat* ECLI:EU:C:1981:4), as well as in subsequent cases (see: case C-412/93 *Leclerc-Siplec v TF1 and M6* ECLI:EU:C:1995:26; case C-144/04 *Mangold* ECLI:EU:C:2005:709).

State in front of the tribunals of another Member State have aged well.<sup>19</sup> It is noteworthy that, to the author's knowledge, the claim that the Court of Justice "must display special vigilance when [...] a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community Law"<sup>20</sup> has only been used again by the Court of Justice once. The Court however did so in a case where the dispute could be easily solved without British courts interpreting French laws, and therefore the national court had clearly failed to explain why it needed a reply to its questions to give judgment.<sup>21</sup>

And yet, although often recognised for its narrow interpretation of the "genuine dispute" rule, *Foglia's* legacy goes well beyond it. As Craig and de Búrca note, the case is also "about the primacy of control over the Article 267 procedure and the nature of the judicial hierarchy, involving EU and national courts [...] *Foglia* reshaped that conception. The ECJ was not simply to be a passive receptor, forced to adjudicate on whatever was placed before it".<sup>22</sup> In short, *Foglia* was the seminal case for the principle of jurisdictional control by the Court. The reference to "genuine disputes" was merely one such manifestation, and arguably not a very fortunate one. After a lethargic period, it was in the 1990s that the principle came back to life.<sup>23</sup> The current articulation of the principle was summarised by the Court of Justice in *Filipiak*:

"[T]he Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981]) [...] The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it".<sup>24</sup>

*Foglia II* however remains a disconcerting judgment. Decided against the criteria of both parties, the domestic judge, the Advocate General (AG) and the Commission, the

<sup>19</sup> For example, in *Parfümerie-Fabrik*, not long after *Foglia*, the Italian government requested the inadmissibility of the reference based on both the lack of a genuine dispute and the fact that the parties were questioning the rules of a Member State before the courts of another Member State. The Court of Justice however clarified that "the Court may provide the criteria for the interpretation of Community law [...] when it is to be determined whether the provisions of a Member State other than that of the court requesting the ruling are compatible with Community law" (case C-150/88 *Parfümerie-Fabrik* 4711 v *Provide* ECLI:EU:C:1989:594 para. 12).

<sup>20</sup> *Foglia v Novello II* cit. para. 30.

<sup>21</sup> Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* ECLI:EU:C:2003:41 paras 43-44.

<sup>22</sup> PP Craig and G De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015) 490.

<sup>23</sup> See case C-343/90 *Lourenço Dias v Director da Alfândega do Porto* ECLI:EU:C:1992:327 para. 20.

<sup>24</sup> Case C-314/08 *Filipiak* ECLI:EU:C:2009:719 paras 41-42.

case left various questions unanswered. The following section of the paper aims to partially untangle some of these issues by delving into the *dossier* of the case.

### III. PATHS NOT TAKEN: REFLECTING ON THE *DOSSIER* AND ITS VALUE

The *dossier de procédure* of *Foglia II* does not provide valuable information regarding the actors involved in the case or the core interests pursued by them. Yet, by looking at the submissions of the *Pretore*, the parties, the intervening Member States and the Commission in full, and based on what was left unsaid in the final judgment, it is possible to reflect on the way in which the Court handled the submissions and take a fresh look at the possible motives behind this ruling in context.

#### III.1. A (LACK OF) GENUINE DISPUTE?

If one goes back to the Court's ruling in *Foglia I* (see *supra* section II.1), three main conclusions could be extracted from the judgment: firstly, that the Court had the power to rule on its own jurisdiction; secondly, that it would refuse to answer questions arising in the context of artificial and abusive disputes; and thirdly, and most importantly for our purposes, that the dispute in the main proceedings between Mr Foglia and Mrs Novello was indeed an artificially constructed one. Whereas *Foglia II* refined the position of the Court as regards the first two issues (see *supra* section II.2), it did not further clarify its position on the third. Conversely, it declined to rule on the validity of the French tax on the basis that there were no new facts available to justify a fresh appraisal of the Court's jurisdiction.<sup>25</sup> And yet, a close look at the *dossier* reveals that the arguments of the parties and the domestic judge were primarily focused on demonstrating that there was a truly genuine dispute between the parties in this specific case. The magnitude and scope of these arguments were visibly undermined in the final judgment. Some (but not all)<sup>26</sup> of the key arguments put forward by the *Pretore*, Foglia, and Novello along these lines are as follows.

Firstly, the *Pretore* and Foglia noted that, in the domestic proceedings that followed *Foglia I*, Mr Foglia had held that the ruling of the Court of Justice was a tacit recognition of the conformity of the French tax with Community law and thus Mrs Novello should bear the costs attached to the shipment. On the contrary, Mrs Novello insisted on the lack of a ruling on the matter.<sup>27</sup> This factual information, which shows clearly contradictory positions held by both the parties and is hence key to determine the existence of a "genuine dispute", was neither included in the summary of the judge rapporteur nor in the final judgment.

As regards domestic procedural law, the *Pretore* noted that in Italy it was common that, following the plaintiff's claim (in this case, that Mrs Novello should have paid the sum owed),

<sup>25</sup> *Foglia v Novello II* cit. para. 34.

<sup>26</sup> These are dealt with in more depth in a larger report see D Ginés Martín, 'The Court of Justice in the Archives Project Analysis of the *Foglia* case (244/80)' cit.

<sup>27</sup> *Dossier de procédure original affaire 244/80 Pasquale Foglia v Mariella Novello* HAEU CJUE-4421 4-5.

the defendant, in responding to it, submitted an autonomous claim for a declaratory ruling. From the moment that the defendant took this procedural position, she gave rise to a specific type of procedure that put the focus not only on the controversy, but also on certain circumstances of fact and law surrounding it – inasmuch as these were necessary to solve the litigation at hand. In this context, Mrs Novello's claim on the incompatibility of the French tax with Community law was to a certain extent an autonomous one, but it was brought up in the context of a litigation and it was certainly of relevance to solve it. According to the *Pretore*, this did not unveil the artificial nature of the dispute but simply evidenced a type of dispute which was characteristic of Italian law.

In an argument that was central for the *Pretore*, Foglia and Novello, it was contented that the Court should have differentiated between the presence of a dispute at the domestic level, and the fact that both parties agreed on the interpretation of Community law before the Court of Justice. This by no means involved an artificially constructed case, but simply that two parties with conflicting interests held a similar view on the interpretation of Community law in a preliminary ruling proceeding which was purely about law. These arguments, ignored by the Court, seemed to convince the Advocate General, who argued that “[i]t does not, in my view, matter for this purpose that the parties adopt the same position on the point of Community law. The crucial matter is not whether the parties are agreed: it is whether the judge considers that the question has to be determined for the purposes of giving judgment”.<sup>28</sup>

In sum, the *dossier* shows that the arguments of the *Pretore*, Foglia and Novello not only sought to demonstrate that the Court had gone beyond the powers conferred to it by the treaties by evaluating the substance of the facts leading to the case (as the final judgment seems to suggest), but primarily that, even if grounded on the premise that the Court held these powers, *Foglia v Novello* was an example of genuine litigation. These arguments seemed to convince the Advocate General as well as the legal service of the Commission, which stated that “there now appears to be no doubt that [...] there is a conflict of interest between the parties in the main action the scope of which is entirely new”.<sup>29</sup>

The Court however addressed the relationship between domestic courts and the Court of Justice in preliminary ruling proceedings *in abstracto*, but it did not even make an attempt to rebut any of the above-mentioned arguments that dealt with the genuineness of the dispute at issue. These arguments were at best partially accounted for, and sometimes simply eliminated from the summary of the judge rapporteur, and completely ignored in the Court's reasoning in the final judgment. The omission of this entire line of reasoning, now available through the *dossier de procédure*, can be easily explained as it clearly contradicted the Court's narrative that there were no new circumstances justifying the need for a fresh appraisal of its jurisdiction.

<sup>28</sup> *Foglia v Novello* II ECLI:EU:C:1981:175, opinion of AG Slynn 3071.

<sup>29</sup> *Foglia v Novello* II cit. 3051.

### III.2. FRANCE AS THE LEGAL *ENTREPRENEUR* IN *FOGLIA I*

The *dossier* also adds to the scholarship that highlighted the will to protect France as a hidden cause leading to this ruling, and it might also point at France as the legal entrepreneur in *Foglia II*.<sup>30</sup> This was not only suggested by part of the literature (see *supra* section II.2), but the *dossier* shows that it was also mentioned by the *Pretore* in its submission for a preliminary ruling, and by Foglia and Novello in their submissions. It is worth noting that these arguments go largely unreported in the judgment. In this regard, Foglia's lawyers wondered whether all the "inquisition" into the merits of the case owed to the Court's concerns about having an Italian court ruling on French legislation, rather than to a correct interpretation of art. 177.<sup>31</sup> In the case of Mrs Novello, this very same argument has a residual place in the judge-rapporteur's report despite being the central claim in her observations.<sup>32</sup>

Whereas the overarching legal stance of France was clear from the outset, having access to its submissions in full makes it possible to observe its influence in terms of arguments and legal reasoning in a clearer manner. Indeed, the French government contended that the jurisdiction issue had been solved in *Foglia I* and that there was no new information justifying a fresh appraisal of the facts,<sup>33</sup> and put forward a teleological interpretation of art. 177 according to which the provision was not envisaged to deliver advisory opinions for fictional or hypothetical disputes, but to solve jurisdictional ones.<sup>34</sup> This claim, which is not transcribed in the official reports, is however adopted, almost word for word, by the Court in the judgment.<sup>35</sup> It must be remarked, again, that there were numerous arguments that sought to demonstrate the existence of a dispute between the parties, none of which were challenged by the French government or the Court.

The case of *Foglia* remains a puzzling one, nonetheless. Might it now be prudent to consider France as the unique architect behind the *Foglia* judgments? Given that it was Advocate General Warner in *Foglia I* who contested the jurisdiction of the Court prior to France doing so in *Foglia II*, this seems highly unlikely. Interestingly, however, Jean-Pierre Warner was born and educated in France and, although also trained in common law, was a French-speaking lawyer before joining the Court of Justice as the first British AG.<sup>36</sup> This

<sup>30</sup> On the concept of legal entrepreneurs in EU case law, see A Vauchez, 'The Transnational Politics of Judicialization. *Van Gend En Loos* and the Making of EU Polity' (2010) ELJ 1.

<sup>31</sup> *Dossier de procédure original, affaire 244/80 Pasquale Foglia v Mariella Novello* HAEU CJUE-4421 cit. 79.

<sup>32</sup> *Ibid.* 91-101.

<sup>33</sup> *Ibid.* 52 (in French) and 62 (in Italian).

<sup>34</sup> *Ibid.* 54-55 (in French) and 64-65 (in Italian).

<sup>35</sup> Case *Foglia v Novello II* cit. para. 18. A more comprehensive analysis of the arguments put forward by the French government and their similarities with the reasoning of the Court is provided in a larger report of the *dossier* published as an EUI Working Paper, D Ginés Martín, 'The Court of Justice in the Archives Project Analysis of the *Foglia* case (244/80)' cit.

<sup>36</sup> R Greaves, 'Advocate General Jean-Pierre Warner and EC Competition Law' in N Burrows and R Greaves, *The Advocate General and EC Law* (Oxford University Press 2007) 183-184.

likely made him familiar with the civil law concept of *abuse de droit*, on which the notion of genuine dispute is inspired. Sir Gordon Slynn, who sat as AG in *Foglia II*, was likely more common law oriented than AG Warner, and it is therefore reasonable to assume that he would possibly see the Court's approach in *Foglia I* as a bizarre self-limitation on its power of judicial review.

In any event, whether the intention of the Court was to protect the interests of Member States whose laws were challenged in the tribunals of another Member State, to shield itself from artificial disputes, or simply to show its capacity to rule on its own jurisdiction, the case turned out to be inconsistent with previous and subsequent rulings (see *supra* section II.2), at least until the 1990s when the Court began to claim again jurisdictional control. In addition, the Court already had, and would have, better occasions to make these points. The inconsistency of the case law is however compatible with the idea that the ruling was given with the interests of France in mind, as it seems that whatever historical, political, or other reasons that made it impermissible for an Italian court to decide on French laws, ceased to exist later on. This makes clear the need to separate the (possible) motivations of the Court from what the case became later on. As Vauchez notes, the meaning of a case is not settled by virtue of a judge's decision, but depends on a subsequent process of "meaning-building".<sup>37</sup> This is particularly so in the case of *Foglia*, where the conditions under which the Court can refuse to give judgment are today very different to those it originally envisaged, even if the notion that the Court of Justice is the ultimate decision-maker of its own jurisdiction remains.

#### IV. CONCLUSIONS

Archival research into the Court of Justice seeks to open up a space for research that looks at cases, not for what they may have become after decades, but as a resource that provides a deeper understanding of what they were about at the time, giving additional insights into the micro-history of case dynamics.<sup>38</sup> Though this contribution does not go as far as revealing the motives behind this perplexing ruling, it has nonetheless sought to give fresh insights into it.

By reflecting on the material found in the *dossier* and the Court's way of handling the submissions, this paper has provided some thoughts on what the Court left unsaid and on the possible roots of what the Court did indeed say. These are consistent with the arguments of the *Pretore*, *Foglia* and *Novello* (again overlooked in the final judgment) and part of the early scholarship, which pointed at the Court as siding with the French government. This plausible account of the ruling cannot possibly explain the jurisprudential developments in the decades that followed but can historically and politically make sense

<sup>37</sup> A Vauchez, 'EU Law Classics in the Making' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 30.

<sup>38</sup> *Ibid.* 22.

of a decision that does not flow logically from a legal perspective. And yet, it might be unrealistic to point at the role of France as the unique “legal entrepreneur” behind this EU law story, particularly considering that it was AG Warner in *Foglia I* who urged the Court to abstain from giving judgment. The *dossier de procédure* of *Foglia I* would certainly provide valuable insights on this matter.





## ARTICLES

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

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

## A “EUROPE OF LAWYERS”? THE MAKING OF A DATABASE ON CASES AND LAWYERS OF THE CJEU

LOLA AVRIL\* AND CONSTANTIN BRISSAUD\*\*

TABLE OF CONTENTS: I. Introduction: why a database of lawyers at the Court of Justice is an important new tool for socio-legal inquiry. – II. The construction of the database. – III. The Court as a place of confluence. – IV. How to complement the analysis? – V. Concluding remarks.

**ABSTRACT:** This *Article* presents a database of lawyers being built within the Court of Justice in the Archives project. Recent studies, relying on actor-centred approaches, have fostered a renewed interest in European lawyers. While visits of these lawyers in Luxembourg have fostered the development of transnational legal networks and participated to the acculturation of the Court's informal and formal rules, they remain largely under-studied. We therefore suggest to analyse the Court as a “place of confluence”, where different professional groups meet during the course of the proceedings. The database precisely aims at mapping the networks of lawyers that take shape in Luxembourg. Providing statistical analysis of the structuration and evolutions of the Europe of lawyers (agents of the European institutions or Member States, law professors or private practitioners), we suggest that the database could contribute to a better understanding of transformations in the European legal field.

**KEYWORDS:** quantitative research – database – Court of Justice – lawyers – webscraping – transversal analysis.

### I. INTRODUCTION: WHY A DATABASE OF LAWYERS AT THE COURT OF JUSTICE IS AN IMPORTANT NEW TOOL FOR SOCIO-LEGAL INQUIRY

On 26 November 1996, for the 10th anniversary of the Union of European Lawyers (*Union des avocats européens*, UAE), Bertrand Favreau, President and Founder of the association,

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gave a speech in the courtroom of the Court of Justice of the European Union (CJEU). He justified the creation of the UAE as a response to the need to foster a “Europe of lawyers”.<sup>1</sup> But the very existence of a Europe of lawyers remains largely a subject of academic debate.

Whether in history, law, or political science, the literature on the European legal integration process has identified a European community of lawyers. Vauchez<sup>2</sup> has traced the action of “Euro-lawyers”, “jurisconsults-diplomats, corporate lawyers, EU institutions’ legal advisers, ‘politicians of the law’, institution-builders, academics” outside the Court, acting as “knowledge producers” and “standard bearers” in various arenas. Studying publications in major European law journals, Schepel and Wesseling<sup>3</sup> pointed to the role of a “community of EU lawyers” – law professors, judges, clerks, officials of the European Commission and national governments, private practitioners – in the building and expansion of the CJEU’s authority. Overall, scholars insist on “the variety of parts lawyers actually play in European affairs”,<sup>4</sup> Euro-lawyers being portrayed as spokespersons for the Court in external forums, disseminating and interpreting its judgments,<sup>5</sup> or as activists using court proceedings for political purposes.<sup>6</sup>

This interest for the role of legal actors outside the Court and national referring courts is the product of major disciplinary changes: the socio-historical and empirical turn within European studies since the end of the 1990s,<sup>7</sup> as well as the development of the “law in context” approach in legal academia, which fosters trans-disciplinary approaches.<sup>8</sup> This made it possible to go beyond the legal analysis of the Court’s judgments, to consider its actors and the processes that shape its role. Adopting a sociological point of view on legal matters, scholars insist on the fact that EU legal integration could not have been achieved without external allies, either in the academic world with institutions such as International Federation of European law (FIDE),<sup>9</sup> in the legal service of the European

<sup>1</sup> Speech by Bertrand Favreau, ‘1986-2006: l’Union des Avocats Européens. 20 ans de congrès et d’activités sans frontières au profit de l’Europe des avocats’ UAE (26 November 1996) [www.favreaucivilise.com](http://www.favreaucivilise.com).

<sup>2</sup> A Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015).

<sup>3</sup> H Schepel and R Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe’ (1997) *ELJ* 165.

<sup>4</sup> A Cohen and A Vauchez (eds), ‘Symposium: Law, Lawyers, and Transnational Politics in the Production of Europe’ (2007) *Law and Social Inquiry* 75, 78.

<sup>5</sup> H Schepel and R Wesseling, ‘The Legal Community’ *cit.*

<sup>6</sup> RA Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007).

<sup>7</sup> A Favell and V Guiraudon, *Sociology of the European Union* (Palgrave Macmillan 2011).

<sup>8</sup> B Davies and F Nicola (eds), *EU Law Stories: Contextual and Critical Histories in European Jurisprudence* (Cambridge University Press 2019).

<sup>9</sup> R Byberg, ‘A Miscellaneous Network: The History of FIDE 1961-94’ (2017) *American Journal of Legal History* 142.

Commission<sup>10</sup> or within national legal professions.<sup>11</sup> A growing body of research has thus emphasized the role of interdependent networks – national legal communities, law professors, meetings in and out of the Court – in the elaboration of CJEU decisions.<sup>12</sup> Altogether, throughout these works, a community of jurists forming a "transnational legal field"<sup>13</sup> involved in the preparation, dissemination and interpretation of the Court's judgments is taking shape. However, it is the activity of this transnational community of lawyers outside the Court that has attracted the most attention. These studies indeed reveal a process of mutual legitimation, and co-constitution dynamics between a discipline (European law), an institution (the Court of Justice), and a professional group seeking dominant positions in the European polity. If these works show an interest in the repeat players who plead before the Court, it is mainly for their other activities: those of brokers in Brussels, between the European institutions and companies, those of missionaries of European rules or entrepreneurs of Europe. It is as if there was not much worthy of note happening in the activities taking place inside the Court's premises in Luxembourg.

This heuristic approach to examine the Court as embedded in complex multi-level institutional and professional configurations therefore introduces a bias: what happens inside the Court remains largely outside of the scope of these studies. Researchers have attempted to open up the walls of the Court of Justice. Christoph Krenn<sup>14</sup> for example, studied how procedural and organizational law of the Court was shaped to enhance its legitimacy and authority. More actor-focused studies have shed light on governments' EU litigation strategies<sup>15</sup> and the lawyers who represent parties in preliminary rulings.<sup>16</sup> However, these studies, drawing upon an American literature on the US Supreme Court,<sup>17</sup> mainly aim to identify repeat players/one-shotters and assess their chance of success in court. Hence, to date, there is no systematic or long-term research on lawyers who appear before the CJEU. The black box of decision-making processes for judgments, the actors involved in them, and the rules governing their interactions is still very much

<sup>10</sup> J Bailleux, *Penser l'Europe par le Droit : L'Invention du Droit Communautaire en France* (Dalloz 2014).

<sup>11</sup> T Pavone, *The Ghostwriters: Lawyers and the Politics Behind the Judicial Construction of Europe* (Cambridge University Press forthcoming).

<sup>12</sup> M Rasmussen, 'Revolutionizing European Law: A History of the *Van Gend en Loos* Judgment' (2014) ICON 136.

<sup>13</sup> A Vauchez and B de Witte (eds), *Lawyerling Europe. European Law as a Transnational Social Field* (Hart 2013).

<sup>14</sup> C Krenn, *Legitimacy in the Making. The Procedural and Organization Law of the European Court of Justice*, Ph.D. Dissertation (Goethe University 2017).

<sup>15</sup> MP Granger, 'States as Successful Litigants before the European Court of Justice: Lessons from the "Repeat Players" of European Litigation' (2006) Croatian Yearbook of European Law and Policy 27.

<sup>16</sup> J Hoevenaars, *A People's Court? A Bottom-Up Approach to Litigation Before the Court of Justice of the European Union* (Eleven International 2018).

<sup>17</sup> M Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) Law and Society Review 95; KT McGuire, 'Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success' (1995) The Journal of Politics 187.

sealed off from researchers. Yet these lawyers, whether they are agents of governments or European institutions, law professors or practitioners, have contributed to the development of common practices and perceptions of the CJEU. They have done so in spite of their different national legal professions, administrative cultures and legal traditions. We would like to move the research focus from the decisions to the interactions in the decision-making process. Drawing upon the previous actor-centred studies of the Court's players, we would like to go beyond their involvement outside the Court, and take a closer look at the activities of the members of the European legal community inside the Court.

It is to assess the role of the Court in this "Europe of lawyers" that our database project was born,<sup>18</sup> gathering together all the actors who have appeared before the Court of the Justice of the CJEU since its creation. Agents of the Member States, law professors, lawyers, members of the legal services of the Commission or the Council, judges and advocates general appear in the analysis of the *dossiers* carried out within the framework of the Court of Justice in the Archives project. Although these actors are omnipresent and the actor-centred approaches of the EU have been fruitful, we still lack a comprehensive sociological stance on CJEU actors. It is this gap that our database aims to fill. The choice of this methodology was guided by the results obtained from pioneering research in the field of European studies, which have made it possible to objectivise both the European field of power and the flows crossing it. Following a sociological turning point in European studies at the beginning of the 2000s, studies adopted an actor-centred approach,<sup>19</sup> crossing sociology of institutions and professions. Applied to the Court, this political sociology of the EU tried to go beyond a neo-functionalist analysis focusing on the progressive constitutionalisation of the treaties. In line with this work, an ambitious research group on the role of lawyers in the European polity has been set up in France. In particular, it included a database containing the socio-professional profiles of all the actors of the "European legal field": judges, advocates-general of the European judicial institutions, *référéndaires*, members of the legal services of the European Commission, the European Parliament and the Council, as well as private practitioners, law professors and members of the European parliament from the legal affairs committee. From the outset of the project, its members pointed out the value of such an approach, the aim of which was to "grasp the logic of structuring and interdependence linking together the relatively dispersed populations that make up the European legal field".<sup>20</sup> With our project, we intend to turn the proposition around. The idea is no longer to start from the actors, defined by the knowledge they master, but rather from an institution where they cross paths. By

<sup>18</sup> The database has benefitted from the Court of Justice in the Archives Project, [ecjarchives.eu](http://ecjarchives.eu).

<sup>19</sup> M Mangenot and J Rowell (eds), *A political sociology of the European Union. Reassessing Constructivism* (Manchester University Press 2010); D Georgakakis and J Rowell (eds), *The Field of Eurocracy. Mapping EU Actors and Professionals* (Palgrave Macmillan 2013).

<sup>20</sup> A Mégie and G Sacriste, 'Polillexes: Champ Juridique Européen et Polity Communautaire' (2009) *Politique européenne* 157, 159.

focusing on the Court of Justice and what happens there, we want to show that what is at stake in the Court's courtrooms is precisely the encounter of diverse professional groups that make up the Europe of lawyers. As historians have long shown, a database is never a neutral view of the world, but a point of view. It is a set of hypotheses on the relational structure of the world.<sup>21</sup> This is why this database is understood as a tool for a better sociological understanding of this group. It will provide an original overview of the transformations of the Europe of lawyers throughout the European integration process.

## II. THE CONSTRUCTION OF THE DATABASE

To build this database, we have scraped the CJEU website.<sup>22</sup> Every case from 1954 to 2020 has been coded extracting the following data: the Celex number of the case, its keywords as put in the judgement, the names of the parties (defendant, applicant but also intervening parties) and whether they were a private company, a public authority, such as a government, or a European institution. The names and statuses of the representatives of the parties (agent of a public institution, private practitioner, professor), the functions/positions of these representatives, and the composition of the Court have also been added. It finally must be noted that preliminary ruling cases are missing since they are dealt with by a team from the University of Oslo<sup>23</sup> which shares the same questions and therefore has entered in its database properties that are in line with ours. Staff cases are also not included in the database since we considered them to be “niche” cases, poorly valued within the Court.

Overall, our database includes 2500 cases. It covers mostly actions against Member States for failure to fulfil obligations (infringement cases), actions for annulment/and appeals of Commission decisions. Policy areas covered range from competition to environmental legislation.

<sup>21</sup> P Bourdieu and M De Saint Martin, ‘Le Patronat’ (1978) *Actes de la Recherche en Sciences Sociales* 3.

<sup>22</sup> On the website, each case has a URL that follows a regular pattern that contains the case's Celex number. Since each Celex is also constructed following a regular pattern, we first have constructed an index of all the Celex numbers. Rvest, a package of the R software then allowed us to store in the computer every page that refers to a case, and to take advantage of the nodes that structure the HTML page to extract every case's preamble, where the information of interest is gathered. Then several regular expressions extracted the precise information and pasted it into a spreadsheet. We then cleaned the spreadsheet using Stringr, a set of text management packages in R. The columns that contain names were cleaned a second time using OpenRefine, a free (and now open-source) piece of Google-initiated software for data wrangling. The facet function of OpenRefine applies several detection algorithms to every cell in a given row, providing the user with the nearest neighbours in terms of lexical differences among the various names written in the row. It therefore allows us to “hand clean” the misspelled names.

<sup>23</sup> T Pavone and S Hermansen, ‘Instrument of Power or Weapon of the Weak? Litigation and Legal Representation Before the European Court of Justice’ (paper presented at the American Political Science Association Annual Conference 2020 on file with Authors).

### III. THE COURT AS A PLACE OF CONFLUENCE

This database is designed as a tool for researchers working on the Court of Justice *dossiers de procédure*. The database is intended to foster cross-cases insights. It allows, among other things, for researchers to identify a new judge, a first case for an advocate general, the actors facing each other, the repeat players, or the specialized legal issues involved in the case. These data therefore make it possible to place the case and its actors in a network of other cases and other actors, not through judicial quotations – which have been widely studied<sup>24</sup> – but following an actor-centred approach, through the network of actors involved. The database thus contributes to restoring the visibility of the Court's actors. We hope to stimulate reflection on the way in which the Court's jurisprudence is analysed. In particular, the chronological coverage of the database invites us to think about the transformations of the Court and the actors who intervene in it over the long term.

The CJEU has been largely analysed as embedded in a complex configuration of institutions and networks of actors. But the Court itself, because it gathers members of the Europe of lawyers, is a place of confluence. As such, it can be seen as a place “where interdependencies between public and private actors in the public space are consolidated, where rules for collective action are negotiated, where lasting balances are formed between organized groups”.<sup>25</sup> Our database aims to provide statistical data about *all* the actors that represented parties in the Court: lawyers, professors, but also agents from national governments and EU institutions as well as judges assigned to the cases and advocates general. It is designed to answer a set of questions - in our view in a more exhaustive way than other bodies of work on the Court. We then hope to contribute to answering long-running questions on the CJEU: who are the repeat players of the Court? What are the Member States defence strategies? How do they use law professors and external private practitioners to strengthen their defences? Who meets whom and on what occasions? Furthermore, coding the keywords allows us to track specialization on certain topics: do lawyers specialize in specific matters, for example, on the Common Agricultural Policy or competition policy? Are certain lawyers specialized in the defence of public or private parties? Finally, as we have a preliminary knowledge of the CJEU, the database aims at verifying the evolutionary properties of these variables among time-periods.

We therefore hope to contribute to the stream of work that aims to characterize the European legal field while taking into account both actors and practices. The database can help to provide a better understanding of who the Euro-lawyers are.<sup>26</sup> Drawing upon

<sup>24</sup> See for example JH Fowler, TR Johnson, JF Spriggs II, S Jeon and PJ Wahlbeck, ‘Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court’ (2007) *Political Analysis* 324; F Tarissan and R Nollez-Goldbach, ‘Analysing the First Case of the International Criminal Court from a Network-Science Perspective’ (2016) *Journal of Complex Networks* 616.

<sup>25</sup> O Nay and A Smith, ‘Les Intermédiaires en Politiques Publiques: Médiations et Jeux D’institutions’ in O Nay and A Smith (dir), *Le Gouvernement du compromis. Courtiers et Généralistes dans l’Action Politique* (Economica 2002) 3, 47.

<sup>26</sup> A Vauchez, *Brokering Europe* cit.

the sociology of professional groups, statistical analysis can unveil the shared characteristics of these lawyers. Despite the diversity of their positions and of the organizations to which they are affiliated, our hypothesis is that they meet in the courtrooms of the CJEU where they share and shape common knowledge, practices and representation of their role, despite the variety of titles and professional realities. By grasping this group through its successive evolutions and reconfigurations, we intend to take into account those who revolve around the hard core of repeat players, are excluded from it or are included in it as they evolve.<sup>27</sup> Hence, instead of wondering whether there is a Europe of lawyers, we hope to show the constant process of redefinition of what a European lawyer is. Circulations of individuals from one role to another have long been identified as strong incentives for advocacy coalitions,<sup>28</sup> especially in fields that are so commonly characterized by the weakness of their frontiers.<sup>29</sup> That is why our attention will be focused on the different roles played by these lawyers within the court, the different institutions they have represented and the European policies they have dealt with. Circulation is indeed a key component of the Europe of lawyers. Some authors have resorted to the concept of "weak field"<sup>30</sup>: the "European field of power"<sup>31</sup> would thus have a shifting structure, characterized by an "extraordinary heteronomy" with other social and political spheres. The European legal field, because it is "weak" and heteronomous, is crossed by exchanges, collusive transactions and circulation that our database aims to map. Finally, by looking closer at who is working with whom and when, we intend to contribute to the broad discussion on the constitution of a "European judicial field" or a "Europe of lawyer", whose emergence and reinforcement must be traced through the interactions and relations between individuals that our database precisely aims to map. The reconfigurations of this Europe of lawyers will be studied after identifying relevant time-periods, corresponding to different moments of the institutional history of the CJEU: the early days of the Court (50s-60s), its growing political role in the 1970s/1980s, and finally the expansion of the Europe lawyers with the expansion of the Court (growing numbers of *référéndaires* and judges, of law firms dealing with European law, of Member States within the jurisdiction of the Court with the enlargements) (90s-00s).

<sup>27</sup> L Boltanski, *The Making of a Class: Cadres in French Society* (Cambridge University Press 1987).

<sup>28</sup> A Orsini and D Compagnon, 'Lobbying Industriel et Accords Multilatéraux d'Environnement. Illustration par le Changement Climatique et la Biosécurité' (2011) *Revue Française de Science Politique* 231, 243 ff.; P France and A Vauchez, *The Neoliberal Republic: Corporate Lawyers, Statecraft, and the Making of Public-Private France* (Cornell University Press 2021).

<sup>29</sup> A Vauchez, 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)' (2008) *International Political Sociology* 128.

<sup>30</sup> *Ibid.*

<sup>31</sup> D Georgakakis and J Rowell (eds), *The Field of Eurocracy* cit.

#### IV. HOW TO COMPLEMENT THE ANALYSIS?

Although many paths could be traced for extending and deepening the database,<sup>32</sup> one example is given here to demonstrate how the database can productively be combined with qualitative analysis such as interviews with key actors.<sup>33</sup>

Semi-structured interviews would provide an opportunity to discuss in greater detail the group's representations, practices and values. What does it mean to be a "good lawyer" at the Court? What is a successful pleading? What are the rules regarding the behaviour of each actor involved in the process? This would also allow us to question the development of a homogeneous practice of European law at the CJEU. For example, one of the present authors interviewed a private practitioner (also former *référéndaire*) during her PhD research. He recalled how Jeremy Lever became a model of the "great pleader" in the 1980s:

"I really liked to hear him. It was...it was very amusing. I remember one case where we were all pleading a case of dumping and among our group there was a Belgian [...] his baby [was] in the room. And at one point the baby started to cry. And then Jeremy Lever who was pleading stopped 'my lords, I didn't know that my pleading would cause so much sorrow!' So he was...brilliant...he's a...a great pleader. A barrister".<sup>34</sup>

Interestingly, the same interviewee compared this great pleader with the lawyers less accustomed to the Court's practices: "they pleaded but sometimes it was completely beside the point. Because they had no idea [...] they didn't know what the style of the institution was".<sup>35</sup> It is precisely the "style of the institution" that we would like to uncover by linking social properties and involvements in certain networks to certain styles of pleading. Indeed, such socialisation to the culture of the institution also operates through interpersonal relations. For example, big cases, such as the major cartel cases of the 1970s have brought together lawyers from very different background who found a "community of interest"<sup>36</sup> in the legal and judicial defence against the European Commission's accusations. During these years of investigations, negotiations, and hearings with officials of DG Competition, as well as in the courtrooms of the Court, lawyers met to coordinate their actions, and to develop strategies and legal arguments beyond national differences. In so

<sup>32</sup> Among the options considered, we could perform in-depth descriptive statistics such as Multiple Correspondence Analysis and conduct a network analysis.

<sup>33</sup> Some of the repeat players identified so far are: Dietrich Ehle, Jochim Sedemund, Michel Walbroeck, Jean-François Bellis, Arturo Cottrau, Ivo van Bael, Volker Schiller, Arved Deringer or Jeremy Lever (private practitioners), Luigi Ferrari Bravo, Iva Braguglio, Giuliano Marengo, Oscar Fiumara, Martin Seidel, John Temple Lang or Alberto Prozzillo (agents of governments/EU institutions), Ebehard Grabitz, André de Labaudère, Alberto Trabucchi, Hans Peter Ipsen, Georve van Hecke, Giulio Pasetti-Bombardella or Cesare Grassetti (law professors).

<sup>34</sup> Interview with a partner, law firm, Brussels, 24 August 2015 on file with Authors.

<sup>35</sup> *Ibid.*

<sup>36</sup> Interview with a partner, law firm, Paris, 2 June 2018 on file with Authors.



doing, they drew the contours of the figure of the Euro-lawyer. Here, our database could also serve as a backup, an argument to produce during interviews in order to help actors remember cases or lawyers they had worked with regularly. Combined with interviews and archival work, our database would help to understand the progressive development of “European” pleading strategies, objectivize the links between lawyers and provide an actor-centred approach to the progressive building of this “community of interest”.

## V. CONCLUDING REMARKS

Drawing upon the renewed trans-disciplinary interest on legal actors, our database primary aims to be a tool for archival research on the Court of Justice allowing researchers to place the actors appearing in the *dossiers* in a set of relations while helping to have a glimpse on their historical record of activity in the Court.

In recent years, the Court has opened itself to further research, opening first its archives on the *dossiers* and more recently its administrative documents. This new accessibility opens up rich and fascinating opportunities to do research on this institution. We believe the database could complement the study of these archives by providing a unique perspective of the Court as a place of confluence of various professional actors and an arena of socialisation.

By combining quantitative and qualitative analysis, we would then craft a model of institutionalisation of the very special space of practices that the CJEU is. Since actor-centred approaches of international spaces enjoy a renewal of interest, this database could equally give birth to new collaborations with researchers in International Relations that share the same sociological set of questions.<sup>37</sup>

<sup>37</sup> See for example V Pouliot, *International Pecking Orders: The Politics and Practice of Multilateral Diplomacy* (Cambridge University Press 2016); J Go, ‘Global Fields and Imperial Forms: Field Theory and the British and American Empires’ (2008) *Sociological Theory* 201; M Hadjiisky, LA Pal and C Walker (eds), *The Micro-Dynamics and Macro-Effects of Policy Transfers: Beg, Borrow, Steal or Swallow?* (Edward Elgar 2017).





## ARTICLES

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

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

## TOWARDS A LEGAL HISTORY OF EUROPEAN LAW

MORTEN RASMUSSEN\*

TABLE OF CONTENTS: I. Introduction. – II. The lack of legal history of European law. – III. What kind of legal history for European law? – IV. Towards a legal history of European law.

**ABSTRACT:** European law differs from other fields of law in that it has no well-established tradition for legal history. This places European law at a real disadvantage when it comes to critically reflecting upon its own tradition of great classics as well as understanding the relatively conflictual role European law plays in the EU today. This *Article* first offers a few reflections about why there is no established tradition for legal history in European law and what this means for legal scholars in the field. In a second step, the *Article* explores what kind of legal history could be developed in the field of European law. Ultimately, the *Article* concludes that legal history today generally has adopted mainstream historians' contextual and archival approach to explore the role of law in broader society. This Special Section consequently represents an important first step for legal scholars of European law to venture into the field of legal history using the recently opened historical archives of the Court of Justice of the European Union.

**KEYWORDS:** legal history – European law – history of European integration – law studies – politics studies – international law.

### I. INTRODUCTION

The academic field of European law has existed for more than sixty years.<sup>1</sup> During those years, the field has grown increasingly diverse and European law has become an important

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<sup>1</sup> The academic field of European law has no precise date of origin. Research in European law took place from 1951 when the Treaty of Paris was ratified and onwards. However, in the first decade it was typically scholars from the fields of international law and comparative law, who were interested in European law. It was



part of the curriculum of Law Faculties across Europe. As the European Union has grown in importance, so has the legal order that underpins it and as a result European law has acquired a distinctive international profile, as the most developed regional regime of law in existence.<sup>2</sup> However, in one respect, European law differs from other fields of law: it has no well-established tradition for legal history.<sup>3</sup> This may not be surprising considering the relative youth of the field compared to other parts of the legal discipline, but it places European law at a real disadvantage when it comes to critically reflecting upon its own tradition of great classics as well as understanding why the role of European law in the EU remains conflictual even today. This *Article* begins by offering a few reflections about why there is no established tradition for legal history in European law and what this means for legal scholars in the field. In a second step, the *Article* explores what kind of legal history could be developed in the field of European law. This is done by taking a closer look at recent developments in research on legal history of international law, a particularly fertile field at the moment, as well as the important progress that historians have made in the last decade towards producing a basic history of European law, which remains somewhat overlooked by legal scholars. Ultimately, the *Article* concludes that contemporary legal history has adopted mainstream historians' contextual and archival approach to explore the role of law in society. This Special Section consequently represents an important first step for legal scholars of European law to venture into the field of legal history using the recently opened historical archives of the Court of Justice of the European Union (CJEU).

only in the late 1950s that the first research institutions and law departments dedicated to European law were established at European universities. The first academic journals followed from 1961 onwards. It was arguably first with the breakthrough of a constitutional interpretation of European law in the two seminal judgments of *Van Gend en Loos* and *Costa v E.N.E.L.* that the new field of law acquired a clear identity that separated it from other fields of law. For recent analysis of the transnational academic field of European law: A Boerger and M Rasmussen, 'Transforming European Law. The Establishment of the Constitutional Discourse from 1950 to 1993' (2014) *EuConst* 199; R Byberg, *Academic Allies. The Key Institutional Institutions of the Academic Discipline of European Law and Their Role in the Development of the Constitutional Practice 1961-1993* (PhD dissertation University of Copenhagen 2017). Two national case studies have also been published recently on respectively Germany and France: AK Mangold, *Gemeinschaftsrecht und Deutsches Recht: Die Europäisierung des Deutschen Rechtsordnung in Historisch-empirischer Sicht* (Mohr Siebeck 2011) and J Bailleux, *Penser L'Europe par le Droit: L'invention du Droit Communautaire en France* (Dalloz 2014).

<sup>2</sup> M Goldmann, 'The Significance of the Treaties of Rome in the History of International Law' paper presented at the conference 'Treaties as travaux préparatoires' (22-23 June 2017) Max Planck Institute for European Legal History.

<sup>3</sup> With the term "well-established tradition for legal history", I mean the existence of a legal history of European law researched and taught both at Law Faculties and History Departments across Europe. At the moment, the only research institution working on the legal history of European law is the Max Planck Institute of Legal History and Legal Theory in Frankfurt [www.rg.mpg.de](http://www.rg.mpg.de). I do not argue of course that no contributions have been published on the history of European law. In fact, I have been involved in starting up such research together with a network of younger historians since 2008, and from 2013 to 2016 also directed a collective research project on the topic at the University of Copenhagen [www.europeanlaw.saxo.ku.dk](http://www.europeanlaw.saxo.ku.dk).

## II. THE LACK OF LEGAL HISTORY OF EUROPEAN LAW

The main reason why the field of European law has no tradition for legal history is obviously its relative youth compared to other parts of the legal discipline such as national constitutional law, comparative law or international law. However, a second reason has arguably been the reluctance of both the CJEU and EU law scholars to confront the extent to which the field of European law from the very beginning was permeated by pro-European and even federalist ideology. Legal scholars and practitioners established the field of European law in close cooperation with the supranational institutions of the European Community from the early 1960s onwards. The legal service of the European Commission in particular, but also the CJEU, organised, financed and facilitated the development and the transnational coordination of this new field of law<sup>4</sup> and lawyers working in the European institutions contributed with great effect and quantity to the development of legal scholarship.<sup>5</sup> Legal scholars in turn played a key role in legitimating the case law of the CJEU as the latter gradually established a constitutional legal order to underpin the future European federation that ultimately never appeared.<sup>6</sup> As a result, the field of European law was dominated by a pro-European attitude to the legal questions at stake until at least the early 1990s, and to some extent still remains so today.<sup>7</sup>

The strong ideological element in European law is by no means unique if we look at the broader legal discipline. International law provides another example of how the legal discipline can be intertwined with an ideological project. From the very start of the professionalization of the discipline in the 1870s, legal scholars and practitioners believed international law would help transform or even replace international power politics with an international rule of law.<sup>8</sup> However, as a result of the ideological bias of European law, the reception by legal scholars and practitioners of the first analyses of the history of

<sup>4</sup> M Rasmussen, 'Establishing a Constitutional Practice: The Role of the European Law Associations' in W Kaiser and JH Meyer (eds), *Societal Actors in European Integration: Polity-Building and Policy-Making 1958-1992* (Palgrave Macmillan 2013) 173; R Byberg, 'A Miscellaneous Network: The History of FIDE 1961-94' (2017) *American Journal of Legal History* 142; R Byberg, 'The History of *Common Market Law Review* 1963-1993. Carving out an Academic Space for Europe' (2017) *ELJ* 45.

<sup>5</sup> According to Schepel and Wesseling the proportion of legal writings by institutional actors went significantly beyond that of other fields of law. H Schepel and R Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) *ELJ* 164.

<sup>6</sup> A Boerger and M Rasmussen, 'Transforming European Law. The Establishment of the Constitutional Discourse from 1950 to 1993' (2014) *EuConst* 199; R Byberg, 'The History of *Common Market Law Review* 1963-1993' cit.

<sup>7</sup> For a new historical analysis of the ideological dimension of the seminal book series – *Integration Through Law* – from the European University Institute consult: 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.

<sup>8</sup> M Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2001).

European law, produced by a group of historians over the last decade, has been mixed. Whereas several prominent legal scholars and institutions welcomed this new input from historians,<sup>9</sup> there was also at first resistance both from the CJEU and from legal scholars,<sup>10</sup> who were less keen on any revelations of how ideology and strategies of self-empowerment of the supranational institutions had mixed with legal argument in the first half of the 1960s to produce a constitutional interpretation of European law.<sup>11</sup> As it stands, the publications by historians, despite constituting today a growing body of work with key pieces published in leading legal journals, have still to fully impact legal scholarship.<sup>12</sup>

What are the consequences of the lack of a well-established legal history of European law for legal scholarship? To answer this question, we need to briefly explore what legal scholars typically have put in the place of legal history. The historical development of European law has been the subject of relatively few analyses by legal scholars, but several of these remain major classics today and have cemented a relatively undisputed narrative about how the Treaties of Rome provided the spark for a gradual process of constitutionalisation to which the member states more or less tacitly acquiesced.<sup>13</sup> From the mid-1990s, legal scholars could even cite a new body of work from political scientists that seemingly corroborated the classical narrative of constitutionalisation,<sup>14</sup> even if they also

<sup>9</sup> See the positive responses in the editorial in *EuConst* 2014; PL Lindseth, 'The Critical Promise of the New History of European Law' (2012) *Contemporary European History* 457; F Nicola, 'Introduction: Critical Legal Histories in EU law' (2013) *AmUInt'l LRev* 1173; and F Bignami, 'Rethinking the Legal Foundations of the European Constitutional Order: The Lessons of the New Historical Research' (2013) *AmUInt'l LRev* 1311.

<sup>10</sup> The CJEU at first did not want to make its archives available to historical research. This initial attitude finally changed in December 2015 when the judicial archive was first opened to be followed in December 2020 by the opening of the administrative archive.

<sup>11</sup> This was the key finding related to the early history of European law in the 1950s and 1960s. See M Rasmussen, 'Revolutionizing European Law: A history of the Van Gen den Loos judgment' (2015) *ICON* 136; A Boerger and M Rasmussen, 'The Making of European Law: Exploring the Life and Work of Michel Gaudet' (2017) *AmJLegal Hist* 51.

<sup>12</sup> A good example of this lack of attention to the contributions of the new legal history is the recent evaluation of Joseph Weiler's seminal interpretation of the history of European law from the early 1990s, MP Maduro and M Wind (eds), *The Transformation of Europe. Twenty-Five Years On* (Cambridge University Press 2018).

<sup>13</sup> P Pescatore, *Law of Integration* (AW Sijthoff 1974); E Stein, *Lawyers, Judges and the Making of a Transnational Constitution* (1981) *AJIL* 1; JHH Weiler, 'The Transformation of Europe' (1981) *YaleLJ* 2403 and JHH Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (1994) *Comparative Political Studies* 510. Weiler further argued that member state governments accepted the constitutionalisation of European law, because they had an informal veto right in the legislative process after the Empty Chair Crisis of 1965-1966.

<sup>14</sup> The new generation of political scientists were very much introduced to the field by personalities such as Weiler and consequently started their work from the assumptions of the established historical narrative of European law had developed. For an example of how Weiler and the famous "Integration through Law" project inspired the new, young generation of American political scientists, see K Alter, 'On

nuanced it significantly with increasingly sophisticated theoretical and empirical work.<sup>15</sup> Today, it is fair to say that the classical narrative does not stand up to closer scrutiny; the new empirical work by historians and social scientists has largely debunked its core elements.<sup>16</sup> To the extent legal scholars still use the old classics to understand the history of European law, they draw on an outdated interpretation of the historical development of the European law. And even more problematic, they reproduce the ideological bias that was an intricate part of European law scholarship in the 1970s and 1980s.

Famous authors such as Pierre Pescatore, Eric Stein and Joseph Weiler were all among the most sophisticated and brilliant scholars of the field, but they were also actors in their own right in the broader development of European law. Pescatore was a judge from 1967 to 1985 and a key defender of the constitutional case law of the CJEU. Stein and Weiler's careers were primarily as academics, but they played an important role in advising the European institutions and cementing the constitutional discourse used by the supranational institutions in academia.<sup>17</sup> So, by using their work as a replacement for a genuine legal history, legal scholars today actually rely on key actors of that same history without being fully aware that their interpretations were not only a result of academic reflection, but also deeply shaped by their concrete political, institutional and ideological position and practice at the time.<sup>18</sup>

The continued reproduction of the classical narrative in legal scholarship arguably stands in the way of new critical thinking on the role of European law in the process of European integration. Traditionally, legal scholarship has a great tradition of drawing on other disciplines, such as philosophy for example, when analysing the normative nature

Law and Policy in the European Court of Justice. An American Perspective' in H Koch, K Hagel-Sørensen, U Haltern and JHH Weiler (eds), *Europe. The New Legal Realism* (DJØF 2010) 1.

<sup>15</sup> For key contributions of the new political science literature in the 1990s: AM Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) *International Organization* 41; A Stone Sweet and TL Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) *AmPolSciRev* 63; K Alter, 'Explaining National court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in JHH Weiler, AM Slaughter and A Stone Sweet (eds), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context* (Hart 1998) 227; K Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001).

<sup>16</sup> For a general discussion of this consult: M Rasmussen and DS Martinsen, 'EU Constitutionalisation Revisited: Redressing a Central Assumption in European Studies' (2019) *ELJ* 1, 21-22.

<sup>17</sup> A Boerger, 'At the Cradle of Legal Scholarship on the European Union. The Life and Early Work of Eric Stein' (2014) *AmJCompL* 859; V Fritz, 'Activism on and off the bench: Pierre Pescatore and the law of integration' (2020) *CMLRev* 475; 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; A Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015) 212.

<sup>18</sup> This is a point that Joseph Weiler has recently acknowledged when he reflected on the impact and legacy of the Integration Through Law project at the European University Institute, in which he played such an important role. JHH Weiler, 'Epilogue' in D Augenstein (ed), *'Integration through Law' Revisited The Making of the European Polity* (Ashgate 2012) 175, 178-179.

of law.<sup>19</sup> In order to connect European law to the concrete social, economic and political realities of European integration, the systematic use of the social sciences and history is consequently crucial. The lack of a genuine legal history of European law is thus problematic for legal scholars because it makes an accurate understanding of the contested nature of European law in the EU, both in the past and in the present, difficult to achieve. A good example of this problem is the way many legal scholars today address the problems of popular legitimacy that has haunted the EU since its foundation in the early 1990s. One of several factors behind the problems of legitimacy has arguably been the impression that the EU continuously expands its competences and political power, despite the occasional outburst of popular resistance such as the rejection of the Constitutional Treaty in the French and Dutch referenda in 2005.<sup>20</sup> The drive of the CJEU, supported by the European Commission and the European Parliament, towards the constitutionalisation of European law is a key example of this tendency, and as a result the court became one of the main targets of the Brexit campaign. However, the solutions offered by legal scholars to the problems of legitimacy continue to be more 'integration through law', not less, and identify the consolidation of a European rule of law and the improvement of rights of EU citizens as the best possible solutions.<sup>21</sup>

### III. WHAT KIND OF LEGAL HISTORY FOR EUROPEAN LAW?

Having established why European law needs a legal history, let us now explore the current variety of legal history of international law as well as the emerging historical scholarship on the history of European law to illustrate the different themes treated and the alternative ways legal history are currently being written.

Around 1990, the state of the art of the history of international law since 1870 was very much in a situation similar to European law at the moment. Legal historians were at the time working on much older history, and consequently the few works that dealt with the history of modern international law had been written by legal scholars and practitioners. There is no doubt that many of these scholars produced admirable legal histories.<sup>22</sup> However, they typically had a relatively narrow focus on the doctrinal development

<sup>19</sup> A great example is K Tuori, *European Constitutionalism* (Cambridge University Press 2015).

<sup>20</sup> It is quite telling that legal scholars continued to argue that European law was of a constitutional nature, even when the electorate in the Netherlands and France rejected the Constitutional Treaty in 2005 and the Lisbon Treaty was stripped of constitutional language. See for example: S Griller, 'Is this a Constitution? Remarks on a Contested Concept' in S Griller and J Ziller (eds), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty* (Springer 2008) 21.

<sup>21</sup> See for example the Reconnect project at [www.reconnect-europe.eu](http://www.reconnect-europe.eu), which is a particularly interesting example of this type of research launched on basis of an interdisciplinary approach that includes social scientists and historians.

<sup>22</sup> For example: TA Walker, *A History of the Law of Nations* (Cambridge University Press 1899) and A Nussbaum, *A Concise History of Law of Nations* (MacMillan 1947).



of international law, and since they were also often practitioners of international law, tended to reproduce the biases of the ideological project inherent in modern international law. There were exceptions, such as the famous legal history by German diplomat and scholar, Wilhelm Grewe, who wrote a contextualized legal history in which he argued that international law could be divided in epochs according to which great power dominated the international system.<sup>23</sup> A common trait for this body of scholarship was that the authors typically used public sources, and occasionally also relied on their own experience and contacts, to produce their accounts.

It was only in the 1990s, after the Cold War ended, that a new type of legal history of international law emerged. The former Finnish diplomat and legal scholar, Martti Koskeniemi, spearheaded a movement of legal scholars centred around the *Journal of the History of International Law*, which refined the approach of legal scholars to the history of international law by drawing on sociology and the history of ideas. Koskeniemi and his associates produced a rich and varied intellectual history of international law that among many insights demonstrated how leading jurists and their doctrines had served the material and ideological interests of the Western colonial powers in the 19<sup>th</sup> and early 20<sup>th</sup> century. The peace through law ideology of international law thus had a darker side.<sup>24</sup> This new school of legal history was not without its flaws, however. By focusing on the intellectual history of jurists, it reproduced the narrow focus of former legal scholars on doctrines. An intellectual history of international law remains but a limited slice of a much broader reality that needs to be explored to understand how international law was created and what kind of impact it had. Moreover, although the best work in this new school displayed a sensitivity to context and attempted to place the legal personalities analysed in their own time, it rarely involved archival work and did not more systematically consider relevant social, economic and political contexts. The lack of systematic archival research and proper contextualization makes it impossible to check for bias,<sup>25</sup> and as a result, international jurists risk being portrayed as more important to the development of international law than they probably were.

In the 2000s, historians finally entered the fray and have since produced a large number of rich empirical explorations of core themes of the history of twentieth century international law that have fundamentally changed the field. Here we can mention but a few. A central theme in international law has been the negotiation of the most important treaties and conventions. In two new contextual and archive-based histories of respectively the

<sup>23</sup> WG Grewe, *The Epochs of International Law* (Walter De Gruyter 2000). The book was first published in German in 1984.

<sup>24</sup> Key works: M Koskeniemi, *The Gentle Civilizer of Nations* cit. and A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005). For a general overview of the field with a certain focus on the French language literature consult: JM Guieu and D Kévonian, 'Introduction' (2012) *Relations Internationales* 3.

<sup>25</sup> D Lustig, 'Governance Histories of International Law' in M Dubber and C Tomlins (eds), *Oxford Handbook of Legal History* (Oxford University Press 2018) 859.

Hague Conventions (1899 and 1907) and the Paris Peace Treaties (1919), we now have detailed empirical explorations of how these key treaties were produced and what precise political interests shaped international law.<sup>26</sup> Likewise, the legal dimension of international organisations has also been the subject of archive-based historical analysis in the last decade. These include the first studies on the legal history of the League of Nations,<sup>27</sup> the ILO<sup>28</sup> and GATT/WTO.<sup>29</sup> These studies have laid bare the extent to which the creation of a degree of autonomy of international organisations in relation to state power was based on legal techniques. A third theme explored by historians is the field of Human Rights. This work started with a reassessment of the “triumphalist” accounts of the post-war war crimes tribunals.<sup>30</sup> However, it quickly developed into a complex and still unsettled discussion of when human rights in a modern sense began to have a societal impact. Was it as Samuel Moyn famously claimed in *The Last Utopia* only in the 1970s, as human rights were embraced by the Carter administration, or did it happen earlier in the 1960s as recently argued by Steven Jensen, when former colonies appropriated human rights for their own purposes?<sup>31</sup> The new archive-based and contextual history by historians has fundamentally changed how the history of international law is now perceived and studied. In a field once dominated by a self-congratulatory reproduction of the ideology of international law and a focus on the legal doctrine as expressed in public documents, historians have ensured that international law is now analysed within a much broader social and political context.

By accident, the emerging historical research on the history of European law has followed the trend in international law. Produced by a small group of historians that came from the field of European integration history with no training in law or legal history, the

<sup>26</sup> M Abbenhuis, *The Hague Conferences and International Politics, 1898-1915* (Bloomsbury Academic 2018); M Payk, *Frieden Durch Recht? Der Aufstieg des modernen Völkerrechts und der Friedensschluss nach dem Ersten Weltkrieg* (De Gruyter 2018).

<sup>27</sup> L Lloyd, *Peace Through Law: Britain and the International Court in the 1920s* (The Boydell Press 1997) and O Spiermann, *International Legal Argument in the Permanent Court of International Justice. The Rise of the International Judiciary* (Cambridge University Press 2005); V Genin, *Incarner le droit international. Du mythe juridique au déclassement international de la Belgique (1914-1940)* (Peter Lang 2018); M Donaldson, ‘The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order’ (2018) AJIL 557 and N Wheatley, ‘New Subjects of International Law and Order’ in G Sluga and P Clavin (eds), *Internationalisms. A Twentieth-Century History* (Cambridge University Press 2018) 265.

<sup>28</sup> GF Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017).

<sup>29</sup> G Marceau, *A History of Law and Lawyers in the GATT/WTO* (Cambridge University Press 2015).

<sup>30</sup> See for example A Kramer, ‘The First Wave of International War Crimes Trials: Istanbul and Leipzig’ (2006) *European Review* 441; G Simpson and KJ Heller (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press 2013); KJ Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press 2011). See also the recent and quite remarkable book by KC Priemel, *The Betrayal. The Nuremberg Trials and German Divergence* (Oxford University Press 2016).

<sup>31</sup> S Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010); S Jensen, *The Making of International Human Rights: The 1960s, Decolonization and the Reconstruction of Global Values* (Cambridge University Press 2016).

approach adopted was one of archive-based and contextual history imported from political history. The historical analyses written by this group over the last decade has consequently not been focused on doctrinal history, but instead connected the history of European law to the broader context of the process of European integration. This new historiography has demonstrated that the development of European law was part of a broader political battle inside the EC/EU over institutional reform and the political soul of the Community.<sup>32</sup> Studies have explored the role of key institutional actors such as the CJEU and the European Commission;<sup>33</sup> transnational networks;<sup>34</sup> the role of European law in academia;<sup>35</sup> and the reception of European law by Member States.<sup>36</sup> In contrast to legal scholarship and many studies from political science, this new legal history tends to subsume the importance of European law into the broader process of European integration. Having placed European law in a much broader context, it becomes clear that although European law played an important role in the process of European integration, it was never the core dynamic that has often been claimed by law and politics studies.

To conclude, the new archive-based and contextual legal history by historians demonstrates that production of international and European law never was autonomous from politics and the borderline between legal doctrine and its social context always fluctuating and fuzzy. Most legal developments are intertwined with a broader social and political context marked by constant change and contradictory influences. The prize received for doing the archival work and embracing this complexity is a much deeper understanding of the historical processes related to the creation, codification, expansion and enforcement of international and European law.

The recent developments of the historiographies on international and European law demonstrate that a broad range of themes should be explored, including the more traditional ones of intellectual and doctrinal history. However, at the same time, the archive-based and contextual approach by historians has clearly set a new standard for how to deal with primary sources and reduce bias by the means of proper contextualization. This

<sup>32</sup> M Rasmussen, 'From International Law to a Constitutional Dream? The History of European Law and the European Court of Justice, 1950 to 1993' in I de la Rasilla, Y del Moral and JE Viñuales (eds), *The Dream of International Courts: A History* (Cambridge University Press 2019) 287.

<sup>33</sup> M Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952-1965' (2012) *Contemporary European History* 375.

<sup>34</sup> *Ibid.*; R Byberg, 'A Miscellaneous Network' cit.; R Byberg 'The History of *Common Market Law Review*' cit.

<sup>35</sup> R Byberg, *Academic Allies. The Key Transnational Institutions of the Academic Discipline of European Law and Their Role in the Development of the Constitutional Practice 1961-1993* (PhD dissertation University of Copenhagen 2017).

<sup>36</sup> B Davies, *Resisting the ECJ. West Germany's Confrontation with European Law 1949-1979* (Cambridge University Press 2012); J Pedersen, *Constructive Defiance - Denmark and the Effects of European Law, 1973-1993*, (PhD dissertation Aarhus University 2016) 142-145 and A Bernier, *La France et le droit communautaire 1958-1981: histoire d'une réception et d'une coproduction* (PhD dissertation University of Copenhagen 2018).

challenges legal scholars who are typically trained to systematize, find coherence and explore functionality, instead of placing their analysis in the right temporal context. It will take 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.<sup>37</sup>

#### IV. TOWARDS A LEGAL HISTORY OF EUROPEAN LAW

With the discipline of legal history having been renewed with the methodological toolbox of mainstream historians, the opening of the historical archive of the CJEU in December 2015 is all the more important.<sup>38</sup> While historians had already begun to write the legal history of European integration based on primary sources collected in relevant archives around the CJEU, it is obvious that the opening of the archives of the Court is a game changer. This Special Section is a testimony to this fact. The *Articles* written by young legal scholars are examples of what can be achieved by exploiting the judicial part of the CJEU archives in combination with a contextual analysis of single court cases.

In terms of available archival documentation from the Court, the future looks exceptionally promising. The CJEU has just in December 2019 opened its administrative archive, which holds the promise that it will be possible to write the administrative history of the court. Moreover, the Historical Archive of the European Union in Florence has done a great job in bringing together the institutional archives of the EU relevant for its legal history, including the legal service of European Commission, as well as a rich collection of private papers of key actors.<sup>39</sup>

At the level of research institutions, we have also witnessed important progress. In 2016, The Max Planck Institute for European Legal History in Frankfurt established a new research section that works from an interdisciplinary basis, including both legal scholars and historians, on the legal history of European law.<sup>40</sup> And with the thematic issue published here, the Academy of European Law of the European University Institute has also finally taken the first step towards embracing the legal history of European law as a future research field. With historians and legal scholars working together, it is finally possible to produce the rich and thematically varied legal history that the field of European law needs.

<sup>37</sup> B Davies and F Nicola, 'Introduction to EU Law Stories: Contextual and Critical Histories in European Jurisprudence' in B Davies and F Nicola (eds), *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 1.

<sup>38</sup> The archive is accessible at the Historical Archive of the European Union in Florence.

<sup>39</sup> EUI, *Historical Archives of the European Union*, [www.eui.eu](http://www.eui.eu).

<sup>40</sup> Max Planck Institute for Legal History and Legal Theory, *Legal History of the European Union* [www.rg.mpg.de](http://www.rg.mpg.de).



## ARTICLES

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

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

## THE BENEFITS OF TIME TRAVEL: HARNESSING THE POTENTIAL OF THE HISTORICAL ARCHIVES OF THE COURT OF JUSTICE FOR LEGAL RESEARCH

NIAMH NIC SHUIBHNE\*

TABLE OF CONTENTS: I. Introduction: the added value of the archive for legal researchers. – II. Travelling across time and across cases: transversal Project insights.

**ABSTRACT:** This *Article* engages with a core objective of the Court of Justice in the Archives Project: how best to demonstrate and evaluate the potential of the Historical Archives of the Court of Justice for the purposes of deepening and furthering legal research. It considers two forms of novelty in that light: first, finding out things that are “literally” new; and, second, being alerted to analytical possibilities that arise from looking deeply into a case dossier. To illustrate these instances of research novelty, the *Article* identifies themes – as well as questions – emerging from the individual reports and from the transversal analysis made possible through the Project, highlighting particular strengths or “added value” factors in that context. It also reflects on the limits of the Archives from the perspective that not all Court of Justice mysteries can, or should, be uncovered.

**KEYWORDS:** case dossier – transversal analysis – argumentation – evidence – admissibility – legal methodology.

### I. INTRODUCTION: THE ADDED VALUE OF THE ARCHIVES FOR LEGAL RESEARCHERS

In his *Article* for this Special Section, Morten Rasmussen underlines the promise and the significance of interdisciplinary research on the case law of the Court of Justice of the European Union (CJEU) and articulates, more specifically, the best practices of historical methodology in that light. That growing body of work has enabled EU lawyers to appreciate and understand critical case law steps in the evolution of EU law in a far more

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rounded way; most strikingly through research that animated and, in a positive sense, demystified the judgments in *Van Gend en Loos* and *Costa* through lenses of analysis other than legal ones.<sup>1</sup> Turning the historical lens back on legal researchers, this *Article* considers the ways in which the Historical Archives of the Court of Justice in general and the findings of the Court of Justice in the Archives Project (the Project) more specifically can add value for scholars who examine the Court's case law through primarily doctrinal methods – for the purposes, to steal from the Project's aims, of “deepening and furthering legal research”. It is written, in other words, from the perspective of a researcher who engages with the case law of the Court of Justice more or less every working day.

Around the same time as the Project commenced, I was re-reading all of the Court's judgments on the development of social security law; what the Project compelled me to consider more carefully was: why am I doing this, and what do I think I can actually find (out)? At one level, I was immersing myself in critical foundational case law to try to understand more about the genesis of a field and, more particularly for my own research, to trace the origins of certain principles that emerged to shape a legal framework – and which have endured, in their essentials, almost to this day. What I realised I could not answer, though, was *why* these principles, not others, became the legal framework's compass points.

“Why” certain judicial choices are made – and even, what the choices actually involved – is one of the most difficult questions to answer for a Court that publishes for each case just one collegiate judgment agreed to, publicly, by all of the judges involved in the making of it; who are, in turn, bound by a stringent commitment to the secrecy of their deliberations. If judgments are stripped of any traces of formative debate or disagreement, they produce “a version of the law that is, or can be, strangely bloodless”.<sup>2</sup> Another consequence of the Court's unknowability, pointed to by Antoine Vauchez, is that “cases form a terrain of contention and trigger a collective, and at times conflictual, process of meaning-building that takes place in a variety of arenas from courts to learned societies, law schools, or EU institutions”.<sup>3</sup> Analysis of and debate on the case law must, in that sense, remain speculative to a certain extent; “the Court” can never really confirm or deny. But can the Archives shed more light on “why” questions for legal scholars?

For present purposes, we should perhaps distinguish between, first, “why” questions in a subjective sense, though these are not necessarily or always beyond the reach of deep

<sup>1</sup> E.g. M Rasmussen, ‘From *Costa v ENEL* to the Treaties of Rome: A Brief History of a Legal Revolution’ in M Poiras 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 2010) 4; A Vauchez, ‘The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of EU Polity’ (2009) ELJ 1.

<sup>2</sup> M Pollack, ‘Learning from EU Law Stories: The European Court and Its Interlocutors Revisited’ in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 577.

<sup>3</sup> 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.

archival research, as historical analysis of *Van Gend en Loos* and *Costa* has already shown us; and, second, “why” questions in a more objective sense. What this Project demonstrates is that looking deeply into a case *dossier* can bring true novelty for legal researchers around objective “why” questions, as explained in section II. A note of caution, though, about limiting – or at least, managing – our expectations of what the Archives might reveal is worthwhile. We can never be “in the room” to witness judicial deliberations, historically or otherwise. Moreover, as the fascinating Project reports illustrate, the *dossiers* vary enormously in terms of content as well as in the balance between publicly available content and non-publicly available content.<sup>4</sup> In other words, in the light of structural features (and choices) that constrain deeper external understanding of the Luxembourg way of judging, the Archives can offer “insights” but cannot reveal or confirm “motivations”.<sup>5</sup>

Investigating the Court in historical perspective reminds us too that “the institution” being viewed through the Archives – especially in terms of its size, its workload, and the historical stability of relationships and engagement that coalesced, in effect, around one core judicial grouping – does not actually exist anymore, which might, in turn, condition the transferability of insights gained; particularly on more procedural questions around case management: what can the administrative decisions and practices of “that” Court realistically tell us about the Court that we aim to investigate now? Additionally, the extent of redacted text in some *dossiers*<sup>6</sup> provokes not just frustration but maybe even suspicion: why *that* text; what is the Court “hiding”?

Even with these caveats in mind, though, this Project convinces beyond any doubt that remarkable benefits await legal researchers who might be willing to embark on a little time travel.

## II. TRAVELLING ACROSS TIME AND ACROSS CASES: TRANSVERSAL PROJECT INSIGHTS

Exploring a *dossier* from the Archives enables a “deep reading” of the case in question, and often for the very first time. As a novel source for research, there is then the potential to unearth what might have remained otherwise unknowable. The *dossier* therefore presents opportunities for amplifying dimensions of our understanding of case law stories that are

<sup>4</sup> For example, compare R Munro and R Williams ‘Caught in the (Red)Act: Insights from the *Van Duyn Dossier*’ (2021) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 589, 591 (“the parties’ argumentation was largely reflected by the court”) with M Patrin, ‘*Meroni* Behind the Scenes: Uncovering the Actors and Context of a Landmark Judgment’ (2021) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 539, 543 (“Only a tiny percentage of the arguments of the parties contained in the dossier de procédure are reflected in Meroni’s public documents [...] Therefore, the parties’ submissions reveal many aspects of the dispute that were previously unknown”).

<sup>5</sup> D Ginés Martín, ‘The Court of Justice, Genuine Disputes and Jurisdictional Control: Making Sense of *Foglia II* in Light of Its Dossier’ (2021) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 655.

<sup>6</sup> See e.g. R Munro and R Williams, ‘Caught in the (Red)Act’ cit.; G Bacharis ‘*Consten and Grundig* and the Inception of an EU Competition Law’ (2021) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 533.

seemingly already well told and already well known.<sup>7</sup> Moreover, it is enticingly and entirely possible that *dossiers* will produce novelty in the most literal sense: that we might actually discover aspects of a case that were not previously known to us at all. In that meaning, perhaps one of the most striking discoveries from the Project is that a *dossier* concerning infringement proceedings opens up for the legal researcher access to the papers constituting the pre-litigation phase.<sup>8</sup> This could prove to be an extraordinary resource over time.

But beyond new findings associated with each case investigated through the Project in an individual sense, this *Article* seeks to emphasise that the reports have yielded a research resource greater than the sum of the parts; organised here around the key elements of any historical drama: first, there are the characters or players; second, there is the substantive contribution of each case as an “episode” in the drama; and, third, there is the broader arc of the story, which develops over time.

Looking, first, at the significance of the *characters*, the reports underline above all the multiverse of contributors that participate in and can therefore influence the evolution and/or outcome of a case. It was absolutely striking to me that few Project reports addressed the most “deliberative” publicly available resource on which legal researchers (must) usually rely: the Opinion of the Advocate General; which has acquired even greater salience as an articulated repository of the arguments and perspectives offered by all of the players involved in a case now that reports for the hearing are no longer accessible through any means.<sup>9</sup> Reading across the reports collected for this Project, it is the national judges (and national judgments) as well as the intervening Member States and institutions that come out of the shadows as “legal entrepreneurs”<sup>10</sup> alongside, more expectedly, the parties directly involved in the case itself – though we can also find examples of cases that seemed to acquire legal life independently from what the dispute was actually “about” and/or how the players involved had actually characterised or argued it.<sup>11</sup>

Considering, second, the substantive contribution that each case makes on its own terms, the findings highlight that cases are, in the end, the products of dynamic, collaborative and iterative processes; perhaps precisely because of the interactive, paper-centred procedure practised before the Court, but traceable in action only through reviewing a case *dossier*.<sup>12</sup> Even the now defunct report for the hearing represented, in reality, a summary

<sup>7</sup> For an example of legal research that taps into the Archives to undertake deep reading in this way, see e.g., R Schütze, ‘Re-reading Dassonville: Meaning and understanding in the history of European law’ (2018) ELJ 376.

<sup>8</sup> See e.g., A Michiels, ‘*Commission v Belgium* and its *Dossier de Procédure*: A New Resource for Socio-legal Research’ (2021) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 643.

<sup>9</sup> See further, Editorial, ‘The Court of Justice in the Archives’ (2019) CMLRev 903. In contrast, it is very much welcomed that the Court of Justice now makes the referring court’s request for a preliminary ruling available on its website for proceedings under art. 267 TFEU.

<sup>10</sup> D Ginés, ‘The Court of Justice, Genuine Disputes and Jurisdictional Control’ cit.

<sup>11</sup> See e.g., M Patrin, ‘*Meroni* Behind the Scenes’ cit.

<sup>12</sup> *Ibid.*



of contributions that someone else had already filtered before presenting it to us. In contrast, the *dossier* lays bare the full extent – and co-produced quality – of argumentation before the Court. Without drilling into the Archives, how can we know now or into the future how argumentation evolved and who contributed to it, beyond what an Advocate General or the Court in its judgment selects to digest for us? These gaps in knowledge are not just resonant for legal scholarship; they have significance for the shaping of litigation strategies in practice too;<sup>13</sup> especially when it is remembered that, through the preliminary ruling procedure in particular, most case law actors will find themselves having to make arguments before the Court of Justice only rarely or sporadically.

Five further insights about the nature of “EU case” arguments can be drawn from the Project findings. First, interrogating the full span of a case *dossier* can reveal something about the “atmosphere”<sup>14</sup> at the Court at the time – about the extent to which the argumentation or reasoning that shaped case outcomes connected to the wider economic, political or social dimensions of the case; and producing, in turn, opportunities for meaningful interdisciplinary research.<sup>15</sup> This connects, once again, to the enrichment of litigation strategies, especially on the significance of evidence – revealing more about how it is used, and how lawyers can best prepare and engage with it.<sup>16</sup> However, the research has also suggested that the wider context can, in some cases, seem strangely subdued.<sup>17</sup> Second, the *dossiers* reveal some divergence in terms of the use of (at the time) “non-Community sources” of law as between the parties and interveners, on the one hand, who tended to engage more with national and international law, and the Court itself, on the other, occupied more consciously with the building of “Community law”.<sup>18</sup> It will be interesting to trace this point over time. Did “Community law” become more embedded for case law actors; and does success before the Court of Justice depend at least in part on the extent to which those participating can think and argue in terms of – can speak the language of – EU law? Third, *dossiers* offer tantalising glimpses of different outcomes; illuminating sharp crossroads moments where decisions made by the Court have proven to be so critical because they could very credibly have gone a different way.<sup>19</sup> Again, over time, we might start to see that paths not taken at a particular historical point in time were in fact rediscovered later on. Fourth, a deep reading of the case *dossier* can unearth the significance of procedural

<sup>13</sup> See e.g., G Bacharis, ‘*Consten and Grundig* and the Inception of EU Competition Law’ cit.

<sup>14</sup> J Kukavica, ‘The Garden Grows Lusher: Completing the Narratives on Opinion 1/75’ (2021) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 621.

<sup>15</sup> A Michiels, ‘*Commission v Belgium* and its *Dossier de Procédure*’ cit.

<sup>16</sup> See e.g., S Tas, ‘*Defrenne v SABENA*: A Landmark Case with Untapped Potential’ (2021) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 633.

<sup>17</sup> See e.g., R Munro and R Williams, ‘Caught in the (Red) Act’ cit.

<sup>18</sup> See e.g., G Bacharis, ‘*Consten and Grundig* and the Inception of EU Competition Law’ cit.

<sup>19</sup> *Ibid.*

dimensions; opening up reflections on what we might think of as “substantive proceduralism”.<sup>20</sup> However, limitations about the transferability of historical insights on procedural questions that were noted in section I should be recalled in that respect.

Fifth, while the Archives can disclose how perspectives or concerns – whether those of the parties directly involved in the dispute or, for example, of Member States that intervened in the case – shaped legal outcomes and can explain, far more than the judgment on its own, why certain phrases or formulas came into being (as well as the often quite specific factual matrixes that can end up shaping very general legal tests),<sup>21</sup> a clearly recurring theme across the Project reports is that arguments are often “disregarded” or “ignored” or “overlooked” by the Court.<sup>22</sup> These findings suggest gaps between matters of legal importance for the case law actors and for the Court respectively – or, perhaps more accurately, on the presentation of them.<sup>23</sup> This tactic raises questions about judgment silences that can be both constructive, for the project of law-building (since the narrative is not then confused by alternatives), and destructive, in terms of trying to understand the outcome of a case as an “episode” on its own terms. One striking example is that admissibility is clearly of far greater concern, and in legal as much as tactical terms, for the parties involved in the dispute than for the Court, which often dismisses extensive (as we can see because of the Archives) argumentation on that question with the tersest of statements.<sup>24</sup>

It is entirely logical that the Court has taken a very broad view of admissibility; this approach has certainly extended the reach of EU law into national spheres, but it has also fostered the accessibility and utility of the preliminary ruling procedure from the perspective of national courts and tribunals. Judgments of the Court are often at their most cryptic when “explaining” admissibility choices; yet the Project reports demonstrate that a wealth of argumentation might provide resources for deeper analysis. Admissibility can provoke controversial dilemmas that still, occasionally, come to the fore. For example, one of the recent Orders of the Vice-President of the Court in *Council of the European Union v Sharpston*, proceedings relating to the appointment of a new Advocate General to replace Advocate General Sharpston in the context of Brexit, dismissed an application for interim measures but also included striking – and strikingly substantive – findings about the nature of the

<sup>20</sup> See e.g., J Kukavica, ‘The Garden Grows Lusher’ cit.

<sup>21</sup> See e.g., J Muller, ‘*Procureur du Roi v Dassonville*: the Judicial Dossier Behind the Measure Equivalent to Trade Restriction Formula’ (2021) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 579; demonstrating how “the famous formula” is grounded “in the parties’ reality” and exposing the cross-institutional perspectives at work behind the scenes of this case, bringing to light the contributions of various institutional actors including the European Parliament.

<sup>22</sup> See e.g., S Tas, ‘*Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*’ cit.

<sup>23</sup> Explored through the lens of “judicial restraint” in A Petti, ‘ERTA and Us: Shifting Constitutional *Equilibria* on the Visions of Europe’ (2021) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 567.

<sup>24</sup> More directly on admissibility, see D Ginés, ‘The Court of Justice, Genuine Disputes and Jurisdictional Control’ cit.

“manifestly inadmissible” main action.<sup>25</sup> The pertinence of admissibility will surely be reigned as a result of this case law; but the Project reports show that it is almost always an active concern for case law players even if it is under-appreciated more generally.

Thinking, finally, about case law in terms of wider story arcs, the Project reports connect vividly to scholarship that tracks the migration of ideas across place and time; evoking the contrast between Vauchez’s advocacy of “thick description [of] cases as political, legal, and social ‘events’ that are fully part of the history of the European Union” and passive consolidation of accounts reproducing an “uninterrupted and consistent chain of cases that map out the EU legal landscape”.<sup>26</sup> The Project does present a challenging paradox in this respect, since the *dossiers* – as well as the reports examining them – underline, at one level, and in a very affecting way, that cases are above all else disputes between the parties actually involved in them. In other words, spending time with the *dossier* has the effect of “re-personifying” a case quite powerfully. We are more familiar and perhaps more comfortable, as legal researchers, with doing precisely the opposite; concentrating instead on the more abstract project of fitting case law episodes together. In doing so, we move away from the specifics of each case on its own terms; we lose sight of each case’s own story.

That assertion does not overlook the active mobilisation of legal disputes for the sake of change, even where this happens with the full blessing of the relevant parties. But deeper mining of case materials can, at the same time, illustrate how cases can become problematically detached from the parties involved; or even from the origins or parameters of the concrete dispute – exposing where this occurs because, for example, the eventual legal outcome was clearly under-argued in the pre-judgment process; or even where it seemed to manifest from nowhere, appearing only in the judgment as the very final *dossier* resource. That perspective raises, in turn, far more questions than answers; making the researcher feel upon exiting one *dossier* – or even, as in this Project, exiting from several of them – that the level of work needed to realise a sincerely deep reading of the case law of the Court of Justice is disconcertingly beyond reach.

What the Project therefore convinces of most of all is that the Historical Archives of the Court of Justice deserve analysis *at scale*: which can be realised both through the incremental work of legal explorers who disseminate their “wayfinding”<sup>27</sup> through the “paper trails”<sup>28</sup> laid by individual *dossiers* as well as larger, collaborative work that builds on the route charted so fruitfully by the *Court of Justice in the Archives* Project.

<sup>25</sup> Case C-424/20 *Représentants des Gouvernements des États membres v Sharpston* ECLI:EU:C:2020:705, order of the Vice-President of the Court; and compare the approach taken in the Order with the analysis of how admissibility was differently instrumentalised in A Petti, ‘ERTA and Us’ cit.

<sup>26</sup> A Vauchez, ‘EU Law Classics in the Making’ cit. 21.

<sup>27</sup> M Bond, *Wayfinding: The Art and Science of How We Find and Lose our Way* (Picador 2020).

<sup>28</sup> A Michiels, ‘*Commission v Belgium* and its *Dossier de Procédure*’ cit.

In that vein, inspired directly by the path-breaking work undertaken by all of the Project's researchers, I have now requested a case *dossier* for the first time myself. In my previous research on the building of EU social security law, I could identify one of the fundamental legal principles that clearly shaped the Court's approach – the objective of ensuring the “greatest possible freedom of movement” for EU workers<sup>29</sup> – but I could not, from researching the publicly available case law materials alone, establish the origins of that principle or understand “why” it was chosen as the lodestar of the nascent legal framework for free movement rights. As a novice time traveller, I am curious to see if the *dossier* for *Unger* might hold some clues.<sup>30</sup> I will keep you posted.

<sup>29</sup> See further, N Nic Shuibhne, ‘Reconnecting free movement of workers and equal treatment in an unequal Europe’ (2018) ELR 477.

<sup>30</sup> Case 75/63 *Unger v Bedrijfsvereniging voor Detailhandel en Ambachten* ECLI:EU:C:1964:19.



## ARTICLES

### SHAPING THE FUTURE OF EUROPE – SECOND PART

*edited by Sandra Hummelbrunner, Lando Kirchmair, Benedikt Pirker, Anne-Carlijn Prickartz and Isabel Staudinger*

## THE EU RESPONSE TO TERRORIST CONTENT ONLINE: TOO LITTLE, (MAYBE NOT) TOO LATE?

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TABLE OF CONTENTS: I. Introduction. – II. The fight against the dissemination of terrorist content online: a substantive framework. – III. The Commission's proposal on the extension of the EPPO's competence to terrorist conducts. – IV. The persistent role of Eurojust and Europol as crucial cybersecurity and human rights guardians. – V. Some conclusive remarks.

**ABSTRACT:** The prevention and suppression of terrorist crimes within the European Union are subject of discussion at the European level, currently characterised by a heterogeneous substantive framework that bears the risk of an insufficient response, particularly with regards to the massive spreading of terrorist content online. Indeed, while Directive 2017/541/EU provides a comprehensive discipline on the deterrence and repression of terrorist conducts, the EU is only just starting to address the specific problem of the illicit use of the internet by terrorists. Thus, the Commission's initiative to extend the competences of the European Public Prosecutor's Office (EPPO) to transnational terrorist crimes has timely recognised how the EU lacks a European level of prosecution and any compelling power towards domestic authorities. This creates gaps in investigations and proceedings in one Member State that may result in casualties or risks in the Union as a whole. This *Article* argues that the EPPO should consequently represent the central authority entrusted with the power to directly enforce instructions upon national prosecutors and to coordinate their joint actions in the field. This *Article* also suggests that Eurojust and Europol's capability as specialised agencies in this area should be enhanced on the basis of their well-established expertise on the subject.

**KEYWORDS:** Area of Freedom Security and Justice – Eurojust – European Public Prosecutor's Office – internet – judicial cooperation – terrorism.

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## I. INTRODUCTION

"The quality of judicial cooperation in the fight against terrorism is a big challenge. We cannot work in silos in our countries anymore. We need an overall approach".<sup>1</sup>

This *Article* focuses on the current and foreseeable response to the challenges brought forward by the ever-growing terrorism threat within the EU legal order, particularly for what concerns its online dissemination.

Terrorist crimes perpetrated through or facilitated by the internet are current subject of discussion by EU Institutions and agencies, also in light of the increasing attention on tackling online disinformation.<sup>2</sup> Remarkably, public incitement to terrorism on the internet constitutes a crime under recent Directive 2017/541/EU,<sup>3</sup> which concerns the deterrence and suppression of terrorist conducts and requires Member States to adopt measures in order to ensure a swift removal of terrorist content online. Furthermore, this issue has been addressed both at the political level, during the 2018 European Council held in Salzburg, and at the legislative one, in the 2018 Commission's Proposal for a Regulation on preventing the spreading of such material.<sup>4</sup>

This creates a heterogenous substantive framework that bears the concrete risk of an insufficient response to the massive spreading of terrorist content online. Notably, the EU is considering the necessity of facing unitedly the grave threats posed by those crimes which can be perpetrated quite easily through the internet. Indeed, the Commission has already forwarded to the European institutions an initiative to extend the

<sup>1</sup> F Molins, former District Chief Prosecutor of Paris and leader of the investigation following the Paris terrorist events from 2015 onwards, at the 20 June 2018 Eurojust press conference on counterterrorism.

<sup>2</sup> While the Covid-19 pandemic will most likely contribute to an acceleration in the adoption of new means of protection against the threat of online disinformation, a number of instruments on the subject are already being considered. See, most recently, Communication COM(2020) 456 final of May 2020 from the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Europe's Moment: Repair and Prepare for the Next Generation*; Communication COM(2020) 67 final of February 2020 from the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Shaping Europe's Digital Future*; Joint Communication JOIN(2020) 5 final of March 2020 from the European Parliament and the Council, *EU Action Plan on Human Rights and Democracy 2020-2024*.

<sup>3</sup> 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. For a comprehensive overview on the developments adopted in the Directive compared to the previous Council Decision 2005/671, see J Maliszewska-Nienartowicz, 'A New Chapter in the EU Counterterrorism Policy? The Main Changes Introduced by the Directive 2017/541/EU on Combating Terrorism' (2017) *PolishYIL* 185 ff.

<sup>4</sup> Commission Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online, COM(2018) 640 final. The Proposal was adopted by the European Parliament at its first reading of 17 April 2019 with a number of amendments which do not entail any major revisions of the original text.

competences of the European Public Prosecutor's Office (EPPO)<sup>5</sup> to cross-border terrorist crimes.<sup>6</sup> Several reasons stand in favour of this proposal, as further demonstrated; however, the classical approach to terrorism therein adopted shall be discarded, emphasising instead the internet's role both in the Commission and in the suppression of those criminal conducts, and further analysing its interplay with Eurojust and Europol.

This *Article* is divided in three main parts. First, it focuses on the results that the EU has already achieved on the substantive level in light the adoption of the abovementioned acts, also considering the subsequent legislation on the subject. Second, it addresses the opportunity of an implementation of the recent Communication by the Commission on the initiative to extend the competences of the EPPO to cross-border terrorist crimes. The third part discusses how the EU could further build upon the Commission's proposal, benefitting from the solid structure of Eurojust and Europol in order to increase the suppression of terrorist conducts, particularly within the internet, thus providing a high level of cybersecurity within its territory.

## II. THE FIGHT AGAINST THE DISSEMINATION OF TERRORIST CONTENT ONLINE: A SUBSTANTIVE FRAMEWORK

In the most recent years, the EU has offered both Member States and stakeholders – for instance, online hosting providers – a relevant framework on the prevention and suppression of terrorist conducts, through legislative measures (the already mentioned Directive 2017/541/EU and the Proposal for a Regulation on terrorist content online) and non-binding instruments (the Commission Recommendation (EU) 2018/334<sup>7</sup> and several voluntary agreements entered into by States or stakeholders<sup>8</sup>).

Directive 2017/541/EU<sup>9</sup> considers the appropriateness of harmonising national provisions on terrorism with the purpose of ensuring a high level of security within the EU

<sup>5</sup> Council Regulation (EU) 1939/2017 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO").

<sup>6</sup> Communication COM(2018) 641 final from the Commission to the European Parliament and the European Council of 12 September 2018, A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes. A contribution from the European Commission to the Leader's meeting in Salzburg on 19-20 September 2018 (hereinafter 2018 Communication on the extension of the EPPO's competences).

<sup>7</sup> Commission Recommendation (EU) 2018/334 on measures to effectively tackle illegal content online of 1 March 2018.

<sup>8</sup> See for instance European Commission, *Fighting Terrorism Online: Internet Forum pushes for automatic detection of terrorist propaganda* (6 December 2017) [ec.europa.eu](http://ec.europa.eu); Europol, *Europol's EU Internet referral unit partners with Belgium, France and The Netherlands to tackle online terrorist content* (2 March 2018) [www.europol.europa.eu](http://www.europol.europa.eu).

<sup>9</sup> For a comment on Directive 2017/541/EU see A Garrido Muñoz, 'The Proposal for a New Directive on Countering Terrorism: Two Steps Forward, How Many Steps Back?' (2016) *European Papers* [www.europeanpapers.eu](http://www.europeanpapers.eu) 759.

territory, as well as better complying with the international obligations on the subject. Indeed, art. 3 of the Directive enlists several conducts that shall be deemed as terrorist to the extent that they are committed with the intention of *i)* intimidating a population, *ii)* compelling a government to perform a certain act, or *iii)* destabilising “the fundamental political, constitutional, economic or social structures of a country or an international organization”.<sup>10</sup>

Public incitement to terrorism holds fundamental relevance in the Directive. Indeed, art. 5 requires Member States to “take the necessary measures to ensure that the distribution, or otherwise making available by any means, whether online or offline” of messages amounting to intentional provocation to commit terrorism related acts is considered as a punishable criminal offence by the national legislation.<sup>11</sup> Moreover, according to art. 21 of the Directive, the responsibility of ensuring the swift removal or blockage of “online content constituting a public provocation to commit a terrorist offence” lies with the States in the event that such content is hosted within their territory.

States should also strive to obtain the removal of this content when hosted on online platforms based in servers of other countries: however, it is not clear how national authorities may achieve this objective. The wording on the subject is indeed quite obscure and does not allow a univocal interpretation on whether this part of the provision refers to all States or to EU ones only.

Furthermore, as to Member States more specifically, this may imply an antinomy with art. 3 of the Directive 2000/31/EC (“eCommerce Directive”),<sup>12</sup> which provides a complex procedure regulating the interferences with another State’s free movement of

<sup>10</sup> Pursuant to art. 3(1)(j), a mere threat to commit the acts therein listed is to be considered a terrorist conduct. This may concretely entail that conducts such as the threat of interfering illegally with an informatic system (art. 3(1)(i) reach the intensity of criminal contempt). Accordingly, such crime is punished with no less than a maximum penalty of eight years of imprisonment if the defendant directs a terrorist group, pursuant to art. 15(3) of the Directive.

<sup>11</sup> As provided by Recital 10 of the Directive 2017/541/EU cit.: “[s]uch conduct should be punishable when it causes a danger that terrorist acts may be committed. In each concrete case, when considering whether such a danger is caused, the specific circumstances of the case should be taken into account, such as the author and the addressee of the message, as well as the context in which the act is committed”. See also S De Coensel, ‘Incitement to Terrorism: The Nexus Between Causality and Intent and the Question of Legitimacy – A Case Study of the European Union, Belgium and the United Kingdom’ in C Paulussen and M Scheinin (eds), *Human Dignity and Human Security in Times of Terrorism* (Springer 2020) 277 ff.; N Paunović, ‘New EU Criminal Law Approach to Terrorist Offences’ in D Duić and T Petrašević (eds), *EU and Comparative Law Issues and Challenges Series* (Faculty of Law, Josip Juraj Strossmayer University of Osijek 2018) 534-535.

<sup>12</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”). For a perspective on the need to amend this legislation in order to more adequately face the new technological challenges, see D Calciu, ‘The Commission’s roadmap for digital regulation: updating the EU digital rulebook and regulating the platforms having a gatekeeper position’ (5 June 2020) EU Law Live [eulawlive.com](http://eulawlive.com).



services.<sup>13</sup> While it could be argued that the threat posed by terrorism may entail a derogation, particularly in cases of online public incitement that, as such, require the promptest response, art. 3 of the eCommerce Directive considers that even in cases of urgency the proceeding State has an obligation to notify the Commission and the Member State in which the server is based of any restriction posed to its freedom to provide information services.<sup>14</sup> Moreover, the Commission may even act on this notification by requesting the proceeding Member State to terminate any measure adopted against the services based in another State if they are deemed to be in contrast with European law.

Directive 2017/541/EU sets its main focus on substantive definitions concerning the elements of the crimes therein punished, including the attempt to commit terrorism related acts or the conducts of aiding, abetting or inciting to terrorism (art. 14). The Directive goes as far as imposing Member States a framework of penalties<sup>15</sup> and mitigating circumstances (art. 16) to be handed to those convicted of terrorist crimes, in accordance with the definitions provided by arts 3 and 4.

Moreover, art. 19 provides States with an important procedural disposition concerning the establishment of jurisdiction over terrorist offences. It is to be noted that, along with traditional criteria based on either territorial or personal requirements,<sup>16</sup> this provision allows States to extend their jurisdiction over terrorist crimes committed “in the territory of another Member State”.<sup>17</sup> It should be stressed that the European legislator has already envisaged the possibility of a conflict of jurisdiction between Member States willing to prosecute an individual on the same factual basis for alleged terrorist

<sup>13</sup> Restrictions to the freedom to provide information services from another Member States are generally prohibited by art. 3(2). Any derogating measure shall meet the following requirements (para. 4): *i*) necessity, for reasons of public policy, protection of public health, public security or protection of consumers; *ii*) specificity, targeting only the service which prejudices or constitutes a serious and grave threat to the objects of protection; and *iii*) proportionality. The proceeding State shall first comply with some procedural obligations, before adopting any restrictive measure: *i*) ask the target Member State to remedy to its shortcomings and proceed only if such measures were either inadequate or not implemented; *ii*) consequently, notify the Commission and the target Member State of the intention to adopt restrictive measures.

<sup>14</sup> Art. 3(5) and (6) of the Directive 2000/31 cit.

<sup>15</sup> Art. 15 of the Directive 2017/541/EU cit., while encouraging States to adopt “effective, proportionate and dissuasive criminal penalties” (para. 1), also requires them to adapt their national legislation to grave penalties by stating that the maximum sentences shall not be less than the years of conviction therein provided in relation with the specific conducts of arts 3 and 4(2) and (3).

<sup>16</sup> As established by art. 19(1) of the Directive 2017/541/EU cit., those criteria are: “(a) the offence is committed in whole or in part in its territory; (b) the offence is committed on board a vessel flying its flag or an aircraft registered there; (c) the offender is one of its nationals or residents; (d) the offence is committed for the benefit of a legal person established in its territory; (e) the offence is committed against the institutions or people of the Member State in question or against an institution, body, office or agency of the Union based in that Member State”.

<sup>17</sup> Art. 19(1) and (2) of the Directive 2017/541/EU cit.

crimes. Indeed, in the event of a disagreement among the proceeding States, they may request Eurojust to coordinate the action of all the domestic authorities involved.<sup>18</sup> As it will be further addressed in the following paragraphs, it is clear that such provision entails the national authorities' willingness to cooperate under the guidance offered by Eurojust, in a field where a swift, coordinated response to a grave threat as that posed by terrorism is crucial. Thus, the Commission's proposal to extend the EPPO's competences to transnational terrorist crimes, that would reduce the margin of dependence on the States voluntariness to cooperate in favour of binding obligations, is to be received with interest.<sup>19</sup>

Building on the framework created by Directive 2017/541/EU, the Commission adopted a Proposal for a Regulation concerning specifically the dissemination of terrorist content online,<sup>20</sup> which was first presented at the European Council held in Salzburg in September 2018 and is, at the time of writing, pending before the Council after being approved by the European Parliament in its first reading in April 2019. The Proposal takes notice of the frequent abuses of the internet by terrorists both in facilitating the organisation and perpetration of attacks and in inciting and recruiting supporters. Thus, with a view to encourage platforms to protect the users from access to such content and tackle the arising cybersecurity issues, the future Regulation addresses both States and hosting providers that have a substantial connection to Member States, which may be determined by either the establishment of the hosting provider, a significant number of users within at least one Member State or the targeting of activities towards at least one Member State.<sup>21</sup>

The Commission has indeed regarded the duty to engage in a systematic supervision over potential terrorist content for companies operating in this business as fairly balanced. The Proposal operated a restriction compared to the previous Recommendation 2018/334, which in turn promoted the adoption of general minimum standards of protection against all kinds of online illicit material. The exclusion of a Proposal contain-

<sup>18</sup> Art. 19(3) of the Directive 2017/541/EU cit. The same article also provides both States and Eurojust with a list of criteria that shall be taken into account in determining the authority having jurisdiction: *i)* the State in which the crime was committed; *ii)* the one of nationality or residence of the offender; *iii)* the country of origin of the victim; or *iv)* the State in which the offender is arrested.

<sup>19</sup> See *infra* section III.

<sup>20</sup> Commission Proposal for a Regulation 2018/640 cit. For some critical remarks, see M Scheinin, 'The EU Regulation on Terrorist Content: An Emperor without Clothes' (30 January 2019) *Verfassungsblog verfassungsblog.de*; JH Jeppesen and L Blanco, 'Terrorist Content Regulation: MEPs Should Support IMCO and CULT Committees Proposals' (25 January 2019) Center for Democracy & Technology [www.cdt.org](http://www.cdt.org); K Ramešová, 'Public Provocation to Commit a Terrorist Offence: Balancing Between the Liberties and the Security' (2020) *Masaryk University Journal of Law and Technology* 137 ff. The necessity to prevent and suppress terrorist conducts perpetrated through the Internet, as well as to further cooperate with private entities to reach this objective, was also addressed in the ACP-EU Joint Parliamentary Assembly Resolution 018/C 415/04 of 15 November 2018 on the urgency of new measures to fight international terrorism, para. 12.

<sup>21</sup> Art. 2(1) n. 3 of Proposal for a Regulation 2018/640 cit.

ing a generalised obligation upon hosting providers to prevent the dissemination of any illicit content online (e.g. regarding child pornography or copyright infringements) appears to be a sensible approach, considering that the digital platforms' technological upgrades may lead to unbearable hardships on smaller to medium businesses.<sup>22</sup>

The Proposal for a Regulation, that imposes on hosting providers to remove such illegal material regardless of any order issued by competent authorities, grants them a wide margin of appreciation in the evaluation of which content constitutes terrorist propaganda. While hosting providers should rely on the useful framework of definitions offered by Directive 2017/541/EU, those provisions lack sufficient clarity to be applied directly by private entities. Furthermore, in conformity with the Directive, Member States are entitled to determine autonomously the means by which they can guarantee an immediate elimination of said content: this approach may entail a strong fragmentation as to the measures adopted and frustrates the clear intention of harmonisation of national legislations in this field.<sup>23</sup> Nonetheless, art. 18 of the Proposal requires States to establish a set of effective, proportionate and dissuasive penalties in the event that digital platforms act in violation of the forthcoming Regulation, which may add up to "4 per cent of the hosting service provider's global turnover of the last business year" in case of a systematic lack of compliance with the obligations incumbent upon them.<sup>24</sup>

Moreover, art. 6 requests hosting providers to take proactive measures to prevent the dissemination of terrorist material, both through automated tools and human-based review, insofar as such tools are compatible with the principle of proportionality, in light of "the fundamental importance of the freedom of expression and information in an open and democratic society".

States are however required to monitor if hosting providers comply with this preventive requirement by also respecting art. 15 of the eCommerce Directive, according to which they may not impose on providers any general obligation to monitor information therein stored.<sup>25</sup> While no potentially binding part of the proposed Regulation offers an

<sup>22</sup> It is to be noted however that the Recommendation dedicated a separate section to terrorism, urging States to provide public authorities with "the capability and sufficient resources to effectively detect and identify terrorist content and to submit referrals to the hosting service providers concerned, in particular through national internet referral units and in cooperation with the EU Internet Referral Unit at Europol" (art. 32 of the Commission Recommendation (EU) 2018/334 cit.).

<sup>23</sup> Similarly, this was observed for the case of the implementation of Directive 2017/1371/EU ("PIF Directive", see *infra* section III) in V Mitsilegas and F Giuffrida, 'Raising the bar? Thoughts on the establishment of the European Public Prosecutor's Office' (30 November 2017) Centre for European Policy Studies – Policy Insights [www.ceps.eu](http://www.ceps.eu) 8-9.

<sup>24</sup> Arts 18(2) and (4) of Proposal for a Regulation 2018/640 cit. Factors that shall be taken into account by the competent authorities in handing these sanctions include, *inter alia*: "a) the nature, gravity, and duration of the breach; b) the intentional or negligent character of the breach; c) previous breaches by the legal person held responsible; d) the financial strength of the legal person held liable; e) the level of cooperation of the hosting service provider with the competent authorities" art. 18(3).

<sup>25</sup> Art. 15(1) of the Directive 2000/31/EC cit.

effective coordination among these provisions, Recital 19 admits the possibility of derogating from art. 15 of the eCommerce Directive in cases where the public authority recognises “overriding public security reasons” by adopting “certain specific, targeted measures” for a hosting provider. Consequently, two scenarios may concretely occur: either *i)* public authorities find those risks to be *ex ante* subsistent and impose a general obligation of surveillance upon the digital platforms, violating as an effect art. 15 of the eCommerce Directive; or *ii)* such risks materialise into public terrorist content and frustrate the preventive scope of the proposed Regulation.<sup>26</sup>

### III. THE COMMISSION’S PROPOSAL ON THE EXTENSION OF THE EPPO’S COMPETENCE TO TERRORIST CONDUCTS

With the view of starting a debate on the potential extension of the EPPO’s competences to transnational terrorist crimes, the Commission provided the European Council meeting held in Salzburg in September 2018 with a Communication constituting an initiative on the subject, adopted the same day as the abovementioned Proposal for a Regulation 2018/640.<sup>27</sup>

Indeed, the Commission has recognised that “the Union lacks a European level of prosecution in this area encompassing all steps starting from investigating, prosecuting and ending with bringing to judgement cross-border terrorist crimes” and, as a consequence, “gaps in investigations and prosecutions in one Member State may lead to casualties or risks in another one or in the Union as a whole”.<sup>28</sup> In line with the agenda introduced by Juncker’s Commission, that focused largely on the protection of the European security against threats to be faced unitedly by all Member States, the 2018 Communication builds on the framework created mainly by Directive 2017/541/EU,<sup>29</sup> but al-

<sup>26</sup> Significantly, the CJEU has recently observed, in a preliminary ruling concerning art. 15(1) of the eCommerce Directive, that “[g]iven that a social network facilitates the swift flow of information stored by the host provider between its different users, there is a genuine risk that information which was held to be illegal is subsequently reproduced and shared by another user of that network” (see case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* ECLI:EU:C:2019:821 para. 36).

<sup>27</sup> It shall be noted that during the 2018 Salzburg European Council, as well as in the informal meeting held in Sibiu in May 2019, the Commission’s proposal has not been taken into account, although President Juncker had clearly addressed the issue of strengthening security within the European borders as a priority in the Commission’s agenda, as already stated in the 2017 State of Union – thus before the Regulation on the establishment of the EPPO was even adopted – also with a view of reaching a “more united and more democratic Union by 2025” (Communication on the extension of the EPPO’s competences cit. 1).

<sup>28</sup> 2018 Communication on the extension of the EPPO’s competences cit. 3.

<sup>29</sup> Indeed, as already considered *supra* (section II), Directive 2017/541/EU represents a comprehensive discipline on terrorism: similarly to a national criminal code, it establishes specific definitions of the conducts and all elements of crime, including strict indications on the sanctions that States shall apply to those found guilty.

so reserves attention to the subsequent question of tackling terrorist crimes perpetrated online.

While potentially acting beyond the limits imposed by art. 83(1) TFEU, which allows the EU to “establish *minimum* rules concerning the definition of criminal offences and sanctions”,<sup>30</sup> the Directive certainly paves the way for a procedural regulation on the subject as well. Notably, the very same pattern was followed by Directive 2017/1371/EU (“PIF Directive”),<sup>31</sup> which provides a complete framework for financial crimes (corruption, fraud, misappropriation, money laundering) and constitutes the only substantive basis for the competence of the EPPO.<sup>32</sup>

Preliminarily, it must be stressed that any extension of the EPPO’s competences entails a prior amendment to the Treaty by means of a simplified procedure. Pursuant to art. 86(4) TFEU, the EPPO’s competences may be extended to crimes other than those affecting the financial interests of the Union with a transnational dimension, by a decision adopted unanimously by the European Council,<sup>33</sup> with the prior consent of the European Parliament and following a consultation with the Council.

Nonetheless, as noticed in its 2018 Communication, no element in the wording of art. 86 TFEU precludes the Commission from forwarding an initiative on the subject to the European Council.<sup>34</sup> Indeed, the institution appears to be already in the proper position to submit a proposal on the extension of the EPPO’s competence, given both the 2018 Communication and the abovementioned acts on terrorism previously adopted. Furthermore, this confirms that the prevention and suppression of these crimes constitutes a sensitive matter in the Commission’s agenda.

In any event, following the TFEU amendment, the Commission certainly has to present a “legislative proposal to amend Regulation (EU) 2017/1939 so as to grant the competence to the EPPO and introduce any possible adjustment that might be required for the EPPO’s effective activities in investigating and prosecuting terrorism”.<sup>35</sup> This shall

<sup>30</sup> Art. 83(1) TFEU (emphasis added). An overview on the current debate on the definition of “minimum rules” is provided in M Kettunen, *Legitimizing European Criminal Law: Justifications and Restrictions* (Springer and Giappichelli 2020) 141 ff.

<sup>31</sup> Directive 2017/1371/EU 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; D Vilas Álvarez, ‘The Material Competence of the European Public Prosecutor’s Office’ in L Bachmaier Winter (ed.), *The European Public Prosecutor’s Office: The Challenge Ahead* (Springer 2018) 25 ff.

<sup>32</sup> The potential extension of the EPPO’s competence to terrorist crimes, in addition to those considered by the PIF Directive, has been regarded as “highly welcome, because it will address the concerns voiced over the principle of proportionality”, not least because the EPPO appears to be a far too costly mechanism to protect the EU budget alone in F De Angelis, ‘The European Public Prosecutor’s Office (EPPO): Past, Present and Future’ (2019) EUCrim eucrim.eu 275.

<sup>33</sup> Thus, an extension of competences shall be approved not only by those States participating in the EPPO’s enhanced cooperation, but by all Members of the European Union.

<sup>34</sup> 2018 Communication on the extension of the EPPO’s competences cit. 4-5.

<sup>35</sup> *Ibid.*

include a definition of both the personal and territorial scope of application of the EP-PO's competence, an assessment on whether to restrict its intervention only to cases exceeding a certain threshold of gravity,<sup>36</sup> as well as a clear definition of the investigative powers and tools that may be employed and of the principles of jurisdiction to be applied by the EPPO and Member States.

The justifications that led the Commission to adopt the Communication can be divided into three main arguments.

First, there is a significant fragmentation in investigating terrorism related crimes. Although Eurojust<sup>37</sup> and Europol<sup>38</sup> have successfully led several States' investigations in such field, every result requires the previous voluntary agreement among the interested Member States. Indeed, both Europol and Eurojust lack a specific power to compel the competent national authorities to act by investigating or prosecuting an alleged case of terrorism. This entails two main negative effects: *i)* a risk of conflict of jurisdiction; and *ii)* an insufficient response due to the unawareness of the potential presence of a criminal cell operating over more than one Member State, also through the inter-

<sup>36</sup> See *infra* for a consideration on whether such threshold may be concretely identified and linked to financial damages.

<sup>37</sup> According to art. 85(1) TFEU, "Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol. In this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include: (a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union; (b) the coordination of investigations and prosecutions referred to in point (a); (c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network [...]". See also the recent Regulation (EU) 1727/2018 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust) and replacing and repealing Council Decision 2002/187/JHA, entered into force on 12 December 2019. For an overview on Eurojust's functioning see G De Amicis and RE Kostoris, 'Vertical Cooperation' in RE Kostoris (ed.), *Handbook of European Criminal Procedure* (Springer 2018) 223 ff.

<sup>38</sup> According to art. 88 TFEU, "1. Europol's mission shall be to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy. 2. The European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Europol's structure, operation, field of action and tasks. These tasks may include: a) the collection, storage, processing, analysis and exchange of information, in particular that forwarded by the authorities of the Member States or third countries or bodies; b) the coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust [...]". For an overview on Europol's functioning see G De Amicis and RE Kostoris, 'Vertical Cooperation' cit. 211 ff.

net. As for the first point, it is quite common that victims of terrorist attacks are of two or more different nationalities. Consequently, prosecutions may legitimately be initiated by a plurality of States, thus giving rise to parallel proceedings creating a situation of *bis in idem*. As for the second one, the inadequacy of cooperation may reasonably result in singular prosecutions and convictions, with no perception of more subtle or sophisticated conducts carried out by groups, potentially leaving those persons coordinating or even in charge of criminal cells across Europe unscathed.<sup>39</sup>

Second, the swiftness in the exchange of relevant information among national authorities or between those authorities and EU agencies is insufficient. As already stressed, Member States are under no duty to cooperate within the instruments provided by both Eurojust and Europol. Thus, there is no binding obligation incumbent upon them to share any information pertaining to the commission of terrorism related crimes. While there is, in principle, no reason to believe that national authorities would necessarily withhold data on the matter that may interest another Member State, the absence of a central body which can control such information still inevitably causes a slowdown in sharing findings that could be vital to ensure the prevention of terrorism.

Third, the lack of common admissibility criteria of collecting and sharing evidence entails the concrete risk of an improper use of sensitive information. In the event that information is indeed shared by States with one another, the gathering of proof, particularly for what concerns circumstantial evidence (e.g., surveillance results, witness statements, intercepts), does not necessarily follow similar practices, which in turn carries the risk of evidence that may be deemed as inadmissible in proceedings before national courts of other Member States.

According to the Commission, all these questions cannot find an adequate answer within the existing framework. While the contribution so far provided by European agencies has been meaningful in order to tackle main terrorist threats,<sup>40</sup> it has become increasingly apparent that the abovementioned factors cause a general weakness in the European system of prevention and suppression of terrorist conducts, particularly for

<sup>39</sup> A clear example of how this particularly problematic question may arise is provided by the Commission itself (2018 Communication on the extension of the EPPO's competences cit. 7-8): a terrorist group may employ agents in more Member States, who operate separately within their country and are tasked with different assignments, that individually considered amount to common offences (e.g. forgery of documents, collection of information on targets, purchase of chemical materials and weaponry). As such, the proceeding authorities within one Member State may prosecute those individuals, unaware of the bigger transnational scheme organised by the group leaders, that could easily remain unscathed. However, the scenario therein depicted does not consider the main threat that cannot be contained through a separated approach: terrorism related crimes perpetrated through and facilitated by the internet.

<sup>40</sup> As recognised by the Commission itself: "the added-value of Eurojust and Europol in supporting national authorities and facilitating judicial cooperation on the basis of existing mutual assistance and mutual recognition instruments is crucial" (2018 Communication on the extension of the EPPO's competences cit. 9).

their lack of any power to adopt compulsory measures.<sup>41</sup> Therefore, the extension of the EPPO's competence to such crimes in their transnational dimension can effectively constitute a remedy to the analysed shortcomings,<sup>42</sup> as follows.

First, a comprehensive European effort would bridge the gap among national prosecutions. Through a comprehensive response at the European level and through the work of the European Delegated Prosecutors referring to the central European authority, the EPPO would be empowered with "order[ing] investigations, ensur[ing] the timely collection of further evidence, connect[ing] and prosecut[ing] jointly related cases, and settl[ing] any issues of jurisdiction before bringing a case to court".<sup>43</sup> Indeed, national authorities would be directed by the EPPO, to the point that it may decide that "investigative actions are taken at the time and place where this is most efficient, irrespective of where in the Union these actions must take place".<sup>44</sup> Thus, the risk of incurring in *bis in idem* violations would be reduced to the minimum and, in any event, the European Prosecutor's Office would constitute the best placed authority on dispute resolutions if conflicts of jurisdiction would still persist despite the criteria that shall be established by the amended Regulation on the functioning of the EPPO. Moreover, the EPPO may directly adopt preventative measures, such as the freezing and seizure of assets, and even issue orders of arrest to be executed by national authorities, while also allowing both national and European authorities to detect wider and complex criminal schemes across the Union's territory.

Second, the exchange of information would be appropriate and swift. The EPPO would indeed hold the power to have Member States provide it with data on ongoing investigations, as well as directly order national prosecutors to collect more specific evidence. Furthermore, this would allow domestic authorities to access more easily infor-

<sup>41</sup> However, it has been observed that Member States may prefer to rely on voluntary mechanisms, rather than binding instruments, as counter-terrorism is still considered "a matter of national prerogative, as it very often involves a mix of classical police investigation techniques and surveillance with intelligence, and sometimes counter-insurgency methods, depending on the country", see European Parliamentary Research Service, *Unlocking the potential of the EU Treaties* (May 2020) [www.europarl.europa.eu](http://www.europarl.europa.eu) 39. Indeed, Member States may consider that any concrete transfer of power to the EPPO may result in a – so far – undesired harmonisation of national procedures, see JAE Vervaele, 'The European Public Prosecutor's Office (EPPO): Introductory Remarks' in W Geelhoed, LH Leendert and A Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (Springer 2018) 13.

<sup>42</sup> F Trauner, 'EU Internal Security: Countering Threats and/or Respecting Fundamental Rights' (2019) RSCAS Policy Papers 4; A Nato, 'The European Public Prosecutor's Office between counter-terrorism and strengthening of the European citizens' safety' (2016) *Civitas Europa* 317 ff.

<sup>43</sup> 2018 Communication on the extension of the EPPO's competences cit. 9.

<sup>44</sup> *Ibid.* 10-11.



mation gathered by the European Prosecutor's Office through the creation of new channels interoperable at both levels.<sup>45</sup>

Third, evidence would be shared among Member States on an agreed common standard on the gathering and use of investigative results. In order to request States' cooperation in the exchange of data, the EPPO would necessarily set an acceptable standard of protection of what constitutes sensitive material. This would also facilitate the establishment of best practices under Europol's supervision, particularly in the technological field, thus allowing States to enhance their investigative means and strategies. Therefore, the risk of having evidence collected in other Member States declared inadmissible before national courts would be, once again, minimised.<sup>46</sup>

The delimitation of the area of competence of the EPPO, however, could prove to be a more difficult task for these crimes than for illicit conducts impairing the financial interest of the Union. At the outset, it appears unlikely that a threshold of sufficient gravity could be identified in order to trigger the competence of the EPPO, as opposed to what is already provided by the current Regulation on the establishment of the European Prosecutor's Office, that requires a total damage of not less than 10 million euros in addition to a conduct linked to the territory of at least two Member States. Rather, a more precise definition needs to be found for the element of transnationality, that shall specify whether and to what extent preparatory acts carried out in one State, with the intention to be perpetrated in another Member State, could be deemed as sufficient to entail the EPPO's competence.<sup>47</sup>

The perspective of the implementation of such extension of the EPPO's competence however begs the question of the role that can be envisaged for Europol and Eurojust for the future of the fight against terrorism. As the following section demonstrates, their potential could be adequately employed in countering terrorist content online, in coordination with the EPPO's action.

<sup>45</sup> P Pérez Enciso, 'Exchange and Processing of Information Between the European Public Prosecutor's Office and National Authorities: The Case Management System' in L Bachmaier Winter (ed.), *The European Public Prosecutor's Office: The Challenge Ahead* (Springer 2018) 254 ff.

<sup>46</sup> As already envisaged in European Parliament Resolution P8\_TA(2017)0366 of 3 October 2017 on the fight against cybercrime, para. 62: "a common European approach to criminal justice in cyberspace is a matter of priority, as it will improve the enforcement of the rule of law in cyberspace and facilitate the obtaining of e-evidence in criminal proceedings, as well as contributing to making the settlement of cases much speedier than today".

<sup>47</sup> For a similar consideration, see A Juszczyk and E Sason, 'Fighting Terrorism through the European Public Prosecutor's Office (EPPO)? What future for the EPPO in the EU's Criminal Policy?' (2019) EUCrim eucrim.eu 70. On the element of transnationality, see also F Giuffrida, 'Cross-Border Crimes and the European Public Prosecutor's Office' (2017) EUCrim eucrim.eu 149 ff.

#### IV. THE PERSISTENT ROLE OF EUROJUST AND EUROPOL AS CRUCIAL CYBERSECURITY AND HUMAN RIGHTS GUARDIANS

The answer to the previous question requires more careful considerations as to Eurojust and Europol's role in the field of the prevention and suppression of terrorist conducts.

It appears that the establishment of the EPPO's competence over terrorism related crimes, by admittedly limiting the scope of their action, would conversely enhance their capability as extremely specialised agencies in a more operative-oriented way.<sup>48</sup>

This holds particularly true in light of the recently emended Regulation (EU) 1727/2018 on Eurojust, entered into force in December 2019, that has settled its competence as complementary to that of the EPPO. Indeed, Eurojust must refrain from acting within those fields attributed to the newly established European Prosecutor's Office.<sup>49</sup> Naturally, Eurojust's competence is still in force with regards to those Member States that do not take part in the EPPO's enhanced cooperation or insofar as the European Prosecutor decides not to exercise its competence or directly requests Eurojust to exercise its own.

Three main functions attributed to Eurojust, pursuant to the 2018 Regulation, shall be noticed. Art. 4 tasks the European Agency to "(c) assist in improving cooperation between the competent authorities of Member States, in particular *on the basis of Europol's analyses*; [...] (e) cooperate closely with the EPPO on matters relating to its competence; [...] (g) support and where appropriate participate in the Union *centres of specialised expertise developed by Europol* [...]".<sup>50</sup> Similarly, the 2018 Communication on the extension of the EPPO's competences envisages a close collaboration "with other Union actors, such as Eurojust and Europol, and thus [the EPPO is] strategically placed to enforce the Union's approach to investigating and prosecuting terrorist crimes".<sup>51</sup>

The perspective that can be drawn is that the EPPO shall represent the central authority able to directly enforce instructions upon the domestic prosecutors and to coordinate their joint actions, while Eurojust, with the fundamental support provided by Europol, may continue to tackle illicit conducts relating to terrorism relying on the instruments already created, particularly in the field of online terrorist propaganda.<sup>52</sup> Indeed,

<sup>48</sup> F Spiezia, 'The European Public Prosecutor's Office: How to Implement the Relations with Eurojust?' (2018) EUCrim eucrim.eu 130 ff.

<sup>49</sup> Art. 3(1) of the Regulation (EU) 1727/2018 cit.

<sup>50</sup> Emphasis added.

<sup>51</sup> 2018 Communication on the extension of the EPPO's competences cit. 9.

<sup>52</sup> Notably, computer crimes fall under the competence of Eurojust according to Regulation 1727/2018 cit., Annex I. Furthermore, some scholars have recently argued in favour of the extension of the EPPO's competence to computer crimes, pursuant to art. 83(1) TFEU, considering the opportunity of holding criminally accountable the main internet service providers (e.g. Facebook and Google) in cases of failure to ensure an adequate protection of fundamental rights against illicit content published thereon, see L Picotti, 'Diritto penale e tecnologie informatiche: una visione d'insieme' in A Cadoppi, S Canestrari, A Manna and M Papa (a cura di), *Cybercrime* (UTET Giuridica 2019) 89.

the Agency would still hold operating space within such crimes as the EPPO is deliberately not structured to completely replace national prosecutors' competence and allow Member States to maintain a certain degree of autonomy that may be voluntarily transferred over to Eurojust.<sup>53</sup>

Moreover, Eurojust has already implemented some measures intended to prevent and suppress terrorist threats online. In this regard, the European Agency has recently launched, on 1 September 2019, a centralised record (Counter-Terrorism Register – CTR) to collect information on ongoing investigations and proceedings regarding suspects of terrorist attacks.<sup>54</sup> The initiative is based on the principles set by the 2005 Council Decision on the exchange of information concerning terrorism<sup>55</sup> in order to improve the judicial response against such crimes, and was supported by a number of Member States (France, Germany, Spain, Belgium, Italy, Luxembourg and the Netherlands) and the European Commission.

The creation of the CTR proves both the belief, shared by Member States, that a more substantial form of cooperation is needed within the fight against terrorism, and the acknowledgement of the insufficient – even if fundamental – results that can be achieved through the establishment of the Joint Investigation Teams (JITs). Indeed, JITs were first established by Council Framework Decision 2002/465/JHA<sup>56</sup> and may only be constituted by Member States or their national authorities for a specific, predefined objective and a limited time by means of an *ad hoc* agreement, with the support – legal, practical and financial – and under the supervision of Eurojust and, if necessary, of Europol. Significantly, the last meeting of the JITs Network focused on the challenges and opportunities brought forward by cybercrime cases and recognised the inadequacy of traditional instruments (mutual legal assistance, European Investigation Order<sup>57</sup>) in provid-

<sup>53</sup> Indeed, Eurojust's action still largely relies on Member States' willingness to cooperate. This is proved by art. 5(4) of the Regulation 1727/2018 cit., that envisages the repercussions in cases of systematic resistances opposed by States to cooperation: "[a]t the request of a competent authority, or on its own initiative, Eurojust shall issue a written opinion on recurrent refusals or difficulties concerning the execution of requests for, and decisions on, judicial cooperation, including requests and decisions based on instruments giving effect to the principle of mutual recognition, provided that it is not possible to resolve such cases through mutual agreement between the competent national authorities or through the involvement of the national members concerned". See also A Novokmet and Z Vinković, 'Eurojust and EPPO on the Crossroads of their Future Cooperation' (2019) EU and Comparative Law Issues and Challenges Series hrcak.srce.hr 589-590.

<sup>54</sup> Eurojust, 'Supporting Judicial Authority in the Fight Against Terrorism' [www.eurojust.europa.eu](http://www.eurojust.europa.eu) 1.

<sup>55</sup> Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences.

<sup>56</sup> Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigations teams.

<sup>57</sup> The European Investigation Order (EIO) was established by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. This instrument allows national judicial authorities to issue an order to those of another Member State to carry out specific investigative measures (preservation of evidence, hearings of witnesses or sus-

ing a swift response to cybercrimes, thus proposing a number of conclusions on how to render the JITs more appropriate in order to prevent the perpetration of such crimes.<sup>58</sup>

Thus, Eurojust itself is recognising the opportunity to increase its specialisation in the field of, *inter alia*, cybercrimes. Hence, its interplay with the EPPO on crimes concerning, for instance, online terrorist propaganda, the illicit trade of weaponry on the dark web<sup>59</sup> and the financial exchanges aimed at supporting terrorism, would prove to be fundamental and a most welcomed evolution.

Moreover, by directing its forces towards this sector, rather than being responsible for coordinating national authorities in the fight against terrorism *tout court*, Eurojust could hold a more important role in guiding Europol's efforts and in promoting a stronger cooperation in the operational field. Europol has indeed achieved significant results in the prevention of terrorist conducts through its specialised branch, the European Counter-Terrorism Centre (ECTC), that in turn has created the Internet Referral Units (IRUs), charged with the task of detecting, investigating and referring illicit content of terrorist nature spread through the internet to Member States and hosting providers. IRUs hold a fundamental function not only in the removal of online terrorist content, but also in the identification of the perpetrators of such conducts, which contributes to the attribution of criminal liability within domestic prosecutions.<sup>60</sup> It is worth highlighting that these recent developments targeted against terrorism built on Europol's previous experience with the European Cybercrime Centre (EC3), which has ac-

pects, searches of premises, check of bank and financial data, interception of telecommunications and temporary transfers of persons held in custody) within the jurisdiction of the latter. However, as it has been noticed, the EIO "reflects a one-dimensional approach to cooperation, wherein one party only seeks assistance from another. It does not adequately tackle transnational, interlinked investigations, within the framework of joint teams, networks, EU agencies", see M Luchtman, 'Transnational Law Enforcement Cooperation – Fundamental Rights in European Cooperation in Criminal Matters' (2020) *EurJCrimeCrLCrJ* 40-41. The lack of a correct coordination between the EIO Directive and the EPPO Regulation has also been underlined in V Mitsilegas and F Giuffrida, 'The European Public Prosecutor's Office and Human Rights' in W Geelhoed, LH Erkelens and AWH Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (Springer 2018) 88-89, inasmuch as the ground for refusal of an EIO for non-compliance with fundamental rights is not recalled in the EPPO discipline.

<sup>58</sup> Eurojust, 'Conclusions on the 15<sup>th</sup> Annual Meeting of National Experts on Joint Investigation Teams (JITs)' (5-6 June 2019) [www.eurojust.europa.eu](http://www.eurojust.europa.eu). For an opposite opinion that considers the JITs' intervention in the field of combating terrorism as sufficient, see MA Arva, 'Frictions on Cross Border Cooperation in Criminal Matters Involving Terrorism Threats' (20 August 2019) Research Association for Interdisciplinary Studies [papers.ssrn.com](http://papers.ssrn.com).

<sup>59</sup> Namely, "the encrypted part of the internet accessed using specific software that in themselves are not criminal, such as the Tor browser", see Europol, 'Internet Organised Crime Threat Assessment' (2019) [www.europol.europa.eu](http://www.europol.europa.eu) 44.

<sup>60</sup> See Europol, 'EU Internet Referral Unit Transparency Report of 2018' (20 December 2019) [www.europol.europa.eu](http://www.europol.europa.eu). The IRUs have already achieved significant results: since their establishment in July 2015 and until December 2018, 83871 decisions for referral were forwarded to Member States and service providers, analysing contents across 179 online platforms.

quired a relevant role in fight against online crimes within the EU since 2013, by also providing Member States with operational and analytical support. Thus, the operational capability of Europol could prove to be of paramount importance, particularly in tackling cybercrimes interrelated with terrorism within the dark web.<sup>61</sup>

The extension of the EPPO's competence to terrorist crimes would then bridge the shortcomings of Eurojust and Europol's action, still largely based on voluntary mechanisms, by creating an obligation of cooperation across all Member States part of the enhanced cooperation, while also benefiting from their fundamental contribution and experience the most threatened field: the internet.

At least one more reason stands in favour of the extension of the EPPO's competence to terrorism and the simultaneous specialisation of Eurojust over terrorist crimes perpetrated through the internet: an increased protection of human rights within the European Union.<sup>62</sup>

It is a well-known fact that States have largely justified the use of mass surveillance and illegal techniques of acquiring evidence in order to strengthen their national security against the ever-growing terrorism threat. In this regard, art. 4(2) TEU, establishes that national security, and the responsibility thereby deriving, shall remain within the exclusive competence of States, as it concerns their essential functioning.<sup>63</sup>

As far as this *Article* is concerned, it suffices to consider that the CJEU's case-law has consistently rejected the use of mass indiscriminate surveillance. Indeed, while the Court has confirmed that individual rights may be sacrificed in the event of a grave threat to public security, which undoubtedly includes terrorism related offences,<sup>64</sup> said

<sup>61</sup> "More coordinated investigation and prevention actions targeting the dark web as a whole are required, demonstrating the ability of law enforcement and deterring those who are using it for illicit activity. An improved real-time information position must be maintained to enable law enforcement efforts to tackle the dark web. The capability will enable the identification, categorisation and analysis through advanced techniques including machine learning and artificial intelligence. An EU-wide framework is required to enable judicial authorities to take the first steps to attribute a case to a country where no initial link is apparent due to anonymity issues, thereby preventing any country from assuming jurisdiction initiating an investigation. Improved coordination and standardisation of undercover online investigations are required to deconflict dark web investigations and address the disparity in capabilities across the EU" (Europol, 'Internet Organised Crime Threat Assessment' cit. 46).

<sup>62</sup> The urge for more adequate considerations over the protection of fundamental rights in the fight against terrorism within the EU has been significantly affirmed in W van Ballegooij and P Bakowski, *The Fight Against Terrorism: Cost of Non-Europe Report* (European Parliamentary Research Service 2018) [www.europarl.europa.eu](http://www.europarl.europa.eu) 19 ff.

<sup>63</sup> For a comprehensive reflection on the subject see F Ferraro, 'Brevi note sulla competenza esclusiva degli Stati membri in materia di sicurezza nazionale' in *Tem e questioni di diritto dell'Unione Europea: Scritti offerti a Claudia Morviducci* (Cacucci 2019).

<sup>64</sup> Case C-165/14 *Rendón Marín* ECLI:EU:C:2016:675; case C-304/14 *CS* ECLI:EU:C:2016:674.

notion shall be interpreted restrictively and any derogation must comply with the principle of proportionality.<sup>65</sup>

Thus, the well-established jurisprudence of the CJEU, opened with its leading case *Digital Rights Ireland*,<sup>66</sup> has affirmed that the right to privacy, in its twofold perspective of the respect for private life and the protection of personal data, as enshrined in arts 7 and 8 of the Charter of Fundamental Rights, cannot be restricted to the point of interfering with those rights without a limitation for what is strictly necessary.<sup>67</sup> That is to say that, although the fight against terrorism concerns the general interest of the European population, the use of data surveillance must always meet the requirements of a limited scope of application, and in any case guarantee the right to judicial or administrative review, and provided that the person subjected to such measure is considered to be linked at least indirectly or remotely with the commission of a grave crime.<sup>68</sup>

Moreover, Europol has recently adopted a strong stance against the use of mass surveillance, by defining such measures as “difficult, expensive, not necessarily effective and highly problematic from the perspective of civil liberties and privacy rules”.<sup>69</sup> Thus, it appears that there is a trend, starting at the EU level, in favour of the use of targeted tools of investigations when using surveillance on personal data even within the fight against terrorism. This is also confirmed by Directive 2017/541/EU, that provides that the “use of such tools, in accordance with national law, should be targeted and take into account the principle of proportionality and the nature and seriousness of the offences under investigation and should respect the right to the protection of personal data”.<sup>70</sup>

Lastly, it appears that evidence, particularly in the field of the suppression of conducts amounting to illicit use of the internet for terrorist purposes, could be collected within the EU through more consistent procedures under the coordination of Eurojust and Europol, thus contributing to a progressive harmonisation of the means of gathering proof that could be used by the EPPO, by also facilitating the issuing of European

<sup>65</sup> Case C-82/16 *K.A.* ECLI:EU:C:2018:308 para. 91.

<sup>66</sup> Joined cases C-293/12 and C-594/12 *Seitlinger and Others* ECLI:EU:C:2014:238.

<sup>67</sup> T Lock, ‘Article 8 CFR’ in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 2125: “[t]he question as to whether data retention constitutes a suitable means for fighting serious crime and terrorism remains open. However, in order to be compatible with the requirements of Article 8 CFR, legislation providing for the retention of data cannot be unlimited in its personal scope and must stipulate criteria laying down the circumstances under which data can be retained; furthermore, there must be objective criteria in place determining access and use of that data and clear time limits for its retention. [...] The data subjects concerned must be informed of any access. In addition, the duration of the retention period must be based on objective criteria in order to ensure that it is limited to what is strictly necessary”.

<sup>68</sup> *Seitlinger and Others* cit. para. 52 ff.; see also case C-362/14 *Schrems* ECLI:EU:C:2015:650; case C-203/15 *Tele2 Sverige* ECLI:EU:C:2016:970; and, most recently, case C-311/18 *Facebook Ireland and Schrems* ECLI:EU:C:2020:559 para. 168 ff.

<sup>69</sup> Europol, ‘The Evolution of Online Terrorist Propaganda’ (19 April 2018) [www.europol.europa.eu](http://www.europol.europa.eu).

<sup>70</sup> Recital 21 of the Directive 2017/541/EU cit.

Investigation Orders. As an immediate consequence, this could lead to a reduction of the cases in which national judicial authorities may recognise impeding reasons to the execution of European Arrest Warrants (EAW) issued by another Member State, claiming the violation of fundamental rights, as the right to privacy, during investigations.

Therefore, the extension of the EPPO's competence to terrorist offences, rather than undermining Eurojust and Europol's role in the fight against organised crimes, could lead to the role as specialised within matters pertaining to cybersecurity and the prevention and suppression of online terrorist conducts, while guaranteeing a high standard of protection *vis-à-vis* those human rights that are constantly impaired, *inter alia*, through the use of mass surveillance.

## V. SOME CONCLUSIVE REMARKS

The extension of the European Public Prosecutor's Office competence to terrorism related crimes can be considered as feasible and advisable in the short future for several reasons.

First, the internet is transnational by nature. Thus, the investigation of online terrorist conducts, which concerns the security of the whole EU geopolitical area, requires a common prosecutorial strategy and the issuing of precise guidelines for hosting providers. This could also grant the EU an autonomous and leading stance in the fight against terrorism on the international stage and strengthen its cooperation with the United Nations' effort on the matter, ultimately benefitting the society as a whole.

Second, the empowerment of the EPPO with a competence on terrorist conducts would grant Eurojust and Europol a more penetrating role within the EU, thus further implementing technologies and best practices through the collaboration of all Member States, facilitating the suppression of terrorist conducts in the most fertile ground for radicalization, training and organization of attacks: namely, the dark web.

Third, a euro-centric competence would allow for more adequate considerations on human rights issues. Indeed, both Europol and the CJEU have reckoned that the use of mass surveillance for investigations bears an inherent risk of human rights violations, that cannot ever be deemed proportionate and strictly necessary in a democratic society. Furthermore, independent prosecutions led by individual Member States may expose defendants to *bis in idem*. Recent CJEU case-law on the EAW clearly demonstrates a trend within the Union of questioning those general principles concerning the prosecution of crimes, thus hindering mutual trust among States.<sup>71</sup> In turn, an extension of the EPPO's competence, in a field marked by well-known violations of those principles,

<sup>71</sup> See for instance the recent preliminary rulings concerning questions on the independence of the public prosecution in Court of Justice, joined cases C-508/18 and C-82/19 PPU *Minister for Justice and Equality v OG and PI* ECLI:EU:C:2019:456; case C-509/18 *Minister for Justice and Equality v PF* ECLI:EU:C:2019:457.

would grant a higher standard of human rights protection and remove obstacles to the execution of EAWs.

While a concrete evaluation of the extension of the EPPO's competences would have been appropriate before the beginning of its work, set to happen by the end of 2020, as terrorist-related crimes could also impair the financial interests of the Union, the Commission itself excluded this possibility in the 2018 Communication on the subject.<sup>72</sup>

Thus, the proper moment to move forward with the present proposal appears to be the end of 2021, as by that time the Commission shall submit a report to the European Parliament and to the Council on the added value brought by Directive 2017/541/EU in the fight against terrorism and "decide on appropriate follow-up actions".<sup>73</sup> Remarkably, in that occasion the Commission shall evaluate "the impact of this Directive on fundamental rights and freedoms, including on non-discrimination, on the rule of law, and on the level of protection and assistance provided to victims of terrorism".<sup>74</sup> This may well include the recognition of whether the Directive constitutes an appropriate and sufficiently detailed substantive framework for the EPPO to build on its investigative jurisdiction, with a view to further developing the way to harmonisation paved by the Directive.

It will certainly be interesting to see whether the Commission will keep considering the security of the EU as one of its priorities for action and put the adequate political pressure on the other institutions. In a moment of such disaggregation, the European Union could find renewed strength in setting far-reaching objectives, demonstrating its peculiar and unique potential not least in the matter of common security.

<sup>72</sup> 2018 Communication on the extension of the EPPO's competences cit.: "[w]ork is on-going to ensure that the EPPO becomes fully operational by the end of 2020. This initiative will not affect the setting up of the EPPO under the existing Regulation (EU) 2017/1939" 4.

<sup>73</sup> Art. 29(2) of the Directive 2017/541/EU cit.

<sup>74</sup> *Ibid.*





## ARTICLES

### SHAPING THE FUTURE OF EUROPE – SECOND PART

*edited by Sandra Hummelbrunner, Lando Kirchmair, Benedikt Pirker, Anne-Carlijn Prickartz and Isabel Staudinger*

## THE ECN+ DIRECTIVE: AN EXAMPLE OF DECENTRALISED COOPERATION TO ENFORCE COMPETITION LAW

CORINNA POTOČNIK-MANZOURI\*

TABLE OF CONTENTS: I. Introduction. – II. The road to the ECN+. – II.1. Regulation 1/2003. – II.2. Success and shortcomings of Regulation 1/2003. – II.3. Actions taken to address the shortcomings. – III. The ECN+ Directive. – III.1. Institutional security of NCAs. – III.2. Harmonised power to investigate and sanction. – III.3. Dissuasive fines. – III.4. Leniency programs. – III.5. Mutual assistance. – IV. Decentralised cooperation as a role-model leading to an ever closer union? – IV.1. Is the decentralised enforcement of competition law after the ECN+ to be considered as a well-functioning system? – IV.2. Can a decentralised enforcement system contribute to an ever closer union? – IV.3. Does the system under the ECN+ serve as a role-model for other areas, too? – V. Conclusion.

ABSTRACT: Present *Article* deals with Directive 1/2019 which intends to harmonise public enforcement regimes of EU competition law in the Member States. The Directive does so by harmonising and complementing the existing decentralised system of competition law enforcement and empowering the competition authorities in the Member States to be more effective enforcers. In light of the overall topic “Shaping the Future of Europe”, the Directive will be tested regarding its possibilities to contribute to more effectiveness, acceptance and ultimately deeper integration. It is concluded that the system complemented by Directive 1/2019 can overall be considered a success, multiplying enforcers and thus strengthening enforcement. With the preconditions of uniform – and uniformly interpreted – substantive law, well-equipped expert authorities as well as close cooperation within a network, it could, furthermore, even contribute to an ever closer union and serve as a role-model for other areas, too.

KEYWORDS: EU competition law – ECN+ Directive – competition authorities – networks – public enforcement – ever closer union.

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## I. INTRODUCTION

Present *Article* deals with Directive 1/2019 that intends to empower the Member States' competition authorities to be more effective enforcers and to ensure the proper functioning of the internal market.<sup>1</sup> The Directive had to be transposed by the Member States until February 2021.

Directive 1/2019 is commonly referred to as "ECN+ Directive" or simply "ECN+", whereby ECN stands for "European Competition Network".

This network as such is no novelty but was already established in 2004 (as a complementation of Regulation 1/2003; see *infra*, section II.2). It constitutes a network of cooperation between the EU's Competition Authorities (CAs), *i.e.*, the European Commission (Commission) and the National Competition Authorities (NCAs).<sup>2</sup> In essence, the ECN is designed as a complex forum for exchange of experience on EU competition law.

The ECN+ Directive obviously intends to put a "plus" to this existing network, aiming at achieving a uniform all-European competition culture, the former system could not provide for. The ECN+ keeps up and seeks to improve the decentralised system of EU competition law enforcement. The ECN+ does so by harmonising public enforcement regimes in the Member States and complementing the existing system of decentralised enforcement of competition law in the EU. This is noteworthy, it being the first attempt to harmonise public enforcement of competition law in the EU.

Despite this obvious novelty – the Commission is even deemed to have entered somehow "uncharted territory"<sup>3</sup> – and the fact that Member States are currently dealing with its implementation, one could possibly ask how this Directive can be linked to the general topic "Shaping the Future of Europe".

In the view of the author, the answer to this question can be first of all summarised with the expression "looking back and thinking forward" and is closely linked to the stance competition law has in the overall EU law context: albeit priorities shifted over time,<sup>4</sup>

<sup>1</sup> Directive (EU) 1/2019 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

<sup>2</sup> Notice C 101/43 from the Commission of 27 April 2004 on cooperation within the Network of Competition Authorities.

<sup>3</sup> S Thomas and M Dueñas, 'The Draft Provisions on Antitrust Fines in the Commission's ECN+ Proposal' (2018) *Zeitschrift für Wettbewerbsrecht* 1.

<sup>4</sup> For an overview see *e.g.*, PJ Slot, 'A View from the Mountain: 40 Years of Developments in EC Competition Law' (2004) *CMLRev* 443 ff. With regards to legal theories on EU competition law see also T Jaeger, 'Wirtschaftliche Betrachtungsweise im Wettbewerbsrecht' in *WiR – Studiengesellschaft für Wirtschaft und Recht* (ed.), *Wirtschaftliche Betrachtungsweise im Recht* (Linde Verlag 2020) 69, 76 ff.

competition policy was and is fundamental to the purposes of the EU, described as *conditio sine qua non* for the EU's economy, growth and employment.<sup>5</sup> Once designed as an economic community, the aim of bringing down trade barriers and establishing a common market was linked to strong competition laws from the start. These strong competition laws should eliminate obstacles to trade between Member States, enhance integration and thereby reinforce the unity of the Community. Competition policy was and is even considered as one of the EU's key policies that must remain a priority if the EU wishes to achieve the objectives laid down in the Treaties.<sup>6</sup>

It seems reasonable to include fundamental policies when seeking models for the future. This holds especially true in present times when the EU is called to rely on its fundamentals in order to prepare for upcoming challenges.<sup>7</sup> The internal market lies at the heart of the EU and competition law and policy undoubtedly contribute to its functioning.<sup>8</sup>

But this *Article* seeks to extract even more from the ECN+: the Directive shall ultimately be analysed regarding its ability to shape Europe's future by testing whether the system it introduces can be considered as a contribution to more effectiveness, acceptance and ultimately, deeper integration – under the assumption that integration in a sense of closer cooperation and harmonisation is in principle desirable. Therefore, the system installed by the ECN+ must be examined and followed by a discussion on how this could possibly contribute to an ever closer union and whether it can serve as a role-model beyond competition law.

In order to do so, the present *Article* will start by outlining the road that eventually leads to the ECN+, then presenting the most pertinent provisions introduced by this act of secondary law and finally concluding by a couple of hypotheses analysing whether the system established by this Directive could ultimately be used as an example of cooperation with the outlook of contributing to an ever closer union in the future.

## II. THE ROAD TO THE ECN+

Before talking about the ECN+ Directive, it is inevitable to put the Directive into context by retracing the road that led to its adoption.

<sup>5</sup> P Akman and H Kassim, 'Myth and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy' (2010) *Journal of Common Market Studies* 111, 117 with recourse to former Commission Presidents and Commissioners.

<sup>6</sup> *Ibid.* 116 with further references.

<sup>7</sup> See e.g., White Paper COM(2017) 2025 final from the Commission of 1 March 2017 on the Future of Europe.

<sup>8</sup> B Widmer, 'Wenn der Wandel alleine das Beständige ist: Die EU-Wettbewerbspolitik und ihre Umsetzung' (2015) *Zeitschrift für Europarechtliche Studien* 295, 296.

## II.1. REGULATION 1/2003

Regulation 1/2003 is considered as the starting point on the road to the ECN+.<sup>9</sup>

In 2004, Regulation 1/2003 created a complete shift in the EU's competition law enforcement, calling NCAs competent to apply the TFEU's competition laws in their entirety for the first time. Regulation 1/2003 replaced the former system of centralised application of EU competition law with the Commission as the only authority competent to apply these norms. It introduced the still existing decentralised system where the NCAs are, alongside the Commission, co-enforcers of the EU competition law.

This required *i.a.*, that all Member States set up respective authorities capable of applying the laws. However, Regulation 1/2003 granted full discretion to the Member States on how to install these authorities and how to shape the new national systems.<sup>10</sup> Regulation 1/2003 only provided for detailed competences of the Commission whereas it contained no obligations for NCAs, except for their duties to cooperate with the Commission.<sup>11</sup>

The importance of this shift can hardly be overrated: the Commission accepted to give up on its monopoly on what was considered its "sharpest sword"<sup>12</sup>, namely EU competition law. In light of this consideration, it is noteworthy that the Commission agreed to transfer its duties at least partially onto the Member States and their NCAs.

Regulation 1/2003 was adopted against the backdrop of increasing competition law cases<sup>13</sup> that rendered the former centralised system impossible to perform.<sup>14</sup> With the establishment of the decentralised system, Regulation 1/2003 enabled a much broader application of EU competition law, making more authorities competent to enforce it.<sup>15</sup> At

<sup>9</sup> Regulation (EC) 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty.

<sup>10</sup> N Harsdorf, E Ummenberger-Zierler and A Reidlinger, 'Europäische Vorgaben für Befugnisse und Unabhängigkeit von nationalen Wettbewerbsbehörden: Eine erste Analyse der am 3.2.2019 in Kraft getretenen ECN+-RL' (2019) Österreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht 63, 63.

<sup>11</sup> *E.g.*, Editorial, 'Public Enforcement of EU Competition Law: Why the European Antitrust Family Needs a Therapy' (2015) CMLRev 1191, 1192.

<sup>12</sup> A Von Bogdandy and F Buchhold, 'Die Dezentralisierung der europäischen Wettbewerbskontrolle, Schritt 2 – Der Verordnungsvorschlag zur dezentralen Anwendung von Art. 81 III EG' (2001) Gewerblicher Rechtsschutz und Urheberrecht 798.

<sup>13</sup> See *e.g.*, in the Proposal COM(2000) 582 final from the Commission of 19 December 2000 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty and amending Regulations (EEC) n. 1017/68, (EEC) n. 2988/74, (EEC) n. 4056/86 and (EEC) n. 3975/87.

<sup>14</sup> For the sake of completeness, it has to be added that Regulation 1/2003 also changed the system of prior application (where undertakings had to notify any intended cooperation with the Commission, which would then authorise it or not). With Regulation 1/2003 undertakings were now obliged to self-assess whether their intended behaviour is in compliance with EU competition law. For the purpose of present Article, this part of Regulation 1/2003, however, won't be elaborated further.

<sup>15</sup> O Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' (2019) CMLRev 121, 122.

the same time it allowed the Commission to save resources and use them in areas considered key for the functioning of the internal market.

Nevertheless, in order to ensure uniform application of EU competition law in this new decentralised system with a maximum of discretion left to the Member States, Regulation 1/2003 was complemented by a set of soft-law instruments.<sup>16</sup> One of these instruments was the already mentioned European Competition Network (ECN) aiming at close cooperation and giving the CAs the possibility to align on substantive matters but also avoid disputes on competences.<sup>17</sup> Albeit being an important source of influence – just like the other notices and guidelines published by the EC<sup>18</sup> – alignment of the application of EU competition law depended to the vast extent of the Member States' willingness to implement the soft-law instrument.<sup>19</sup>

## II.2. SUCCESS AND SHORTCOMINGS OF REGULATION 1/2003

The evolution from Regulation 1/2003 to the ECN+ suggests that Regulation 1/2003 left room for improvement. In fact, the general system established by Regulation 1/2003 is considered a success in the effective enforcement of EU competition law. However, the Commission identified a couple of major deficits it seeks to compensate with the ECN+.

A mere look at the statistics on competition law decisions reveals that since the adoption of Regulation 1/2003 not only the overall number of decisions increased dramatically, but also 85 per cent of all decisions that applied EU competition rules were then taken by NCAs.<sup>20</sup> These numbers allow two conclusions: first, enforcement of EU competition law is now taking place on a scale which the Commission could never have achieved on its own<sup>21</sup> and second, NCAs proved to play a decisive role in enforcing EU competition law. Still, it remains unclear if it was the decentralisation that eventually led to these numbers. Some authors state that it is simply not known how many of the reported cases and decisions of the NCAs were “national-turned-into-EU cases and how many of them represent a genuine increase in enforcement activity owed to the advantages of being part of a system of decentralized enforcement”.<sup>22</sup> However, it is beyond doubt that EU competition law enforcement is taking place on a larger scale with NCAs at the heart of it.

<sup>16</sup> For an overview see European Commission, *European Competition Network (ECN)* ec.europa.eu.

<sup>17</sup> Notice C 101/43 cit.

<sup>18</sup> O Brook, 'Struggling with Article 101(3) TFEU' cit. 123.

<sup>19</sup> Editorial, 'Public Enforcement of EU Competition Law' cit. 1195.

<sup>20</sup> European Commission, *European Competition Network (ECN)* ec.europa.eu. In absolute numbers: whereas the Commission dealt with 377 cases in the years 2004 to 2018, the NCAs dealt with 2149 cases in the same period.

<sup>21</sup> A Sinclair, 'Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+)' (2017) *Journal of European Competition Law & Practice* 625.

<sup>22</sup> Editorial, 'Public Enforcement of EU Competition Law' cit. 1196.

Despite the impressive overall increase of competition law decisions, statistics also show that not all Member States contribute equally to the growth of investigations and decisions. Numbers provided on antitrust cases investigated in each Member State between 2004 and 2018<sup>23</sup> show that they are not proportionate to the actual size (in terms of inhabitants) of the respective state. Just to highlight some aspects, whereas large EU countries, such as Germany, France, Italy and Spain are on top of the list, former EU Member State United Kingdom was severely lagging behind.<sup>24</sup> The same holds true for the “new MS” that acceded the EU in 2004 and later (with the exception of Hungary), resulting *i.a.*, from a historically weaker awareness for competition law as such, combined with lacking independence of the NCAs from political influence as well as insufficient human resources and budget.<sup>25</sup> On the other hand, small countries such as Austria or Hungary<sup>26</sup> proved to have investigated a large number of potential competition law infringements compared to their actual size. It cannot be assumed that the numbers actually correspond to the real allocation of competition law infringements in the EU. Similar observations can be found in surveys conducted by the Global Competition Review.<sup>27</sup>

The numbers and statistics left the Commission to conclude that the system, despite being successful by and large, was not flawless. As one explanation already mentioned, the Commission found that (some) NCAs simply lacked guarantees and instruments, preventing them from fulfilling their potential.<sup>28</sup> Additionally, shortcomings resulted from the fact that apart from Regulation 1/2003 itself, all other instruments to ensure the well-functioning of the decentralised system were mere soft law, with no hard law ensuring its compliance.

The system of parallel competences introduced by Regulation 1/2003 hence led to *e.g.*, a mostly free allocation of cases within the ECN combined with differences in national rules of procedure and different national sanction regimes and tensions within the network.<sup>29</sup>

Thus, the discretion granted to the Member States under Regulation 1/2003 that focused on giving the NCAs the general power to co-enforce EU competition rules while not addressing the means and instruments of NCAs to do so, proved to be counterproductive. Although NCAs were obliged to enforce the same substantive rules, their means and instruments depended on national law.<sup>30</sup> The new system of parallel enforcement consequently

<sup>23</sup> Available at European Commission, *European Competition Network (ECN)* ec.europa.eu.

<sup>24</sup> France: 280 cases (rank 1), Germany: 227 cases (rank 2), Italy: 117 cases (rank 3), Spain: 159 cases (rank 4), United Kingdom: 109 cases (rank 8).

<sup>25</sup> A Geiger, ‘Das Weißbuch der EG-Kommission zur Art. 81, 82 EG – eine Reform, besser als ihr Ruf’ (2000) *Europäische Zeitschrift für Wirtschaftsrecht* 165, 168.

<sup>26</sup> Hungary: 140 cases (rank 5), Austria: 121 cases (rank 6).

<sup>27</sup> Global Competition Review, *Rating Enforcement* globalcompetitionreview.com.

<sup>28</sup> A Sinclair, ‘Proposal for a Directive’ cit. 626.

<sup>29</sup> K Ost, ‘Die Richtlinie 1/2019: Ein Meilenstein für die Rechtsdurchsetzung im European Competition Network’ (2019) *Neue Zeitschrift für Kartellrecht* 69.

<sup>30</sup> A Sinclair, ‘Proposal for a Directive’ cit. 626.

posed an inherent risk to uniformity and legal certainty of enforcement. Especially since the application of EU competition law merits a wide margin of discretion, the NCAs' national "economic, and political traditions are prone to lead to a fragmented application".<sup>31</sup>

### II.3. ACTIONS TAKEN TO ADDRESS THE SHORTCOMINGS

In fact, the Commission was not surprised that shortcomings emerged but rather anticipated them when adopting Regulation 1/2003.<sup>32</sup> Mario Monti, Competition Commissioner at the time, even stated during the debates on Regulation 1/2003 in the European Parliament (EP) that it would be "desirable to have common procedures and sanctions"<sup>33</sup> in order to prevent fragmentation and legal uncertainty. However, the Commission took the approach to "introduce a substantial framework first, leaving the possible introduction of common procedures and sanctions to a later stage. Once experience of operating the system has been acquired, it will be easier to identify the areas that give rise to practical problems and draw up rules to deal with them effectively".<sup>34</sup>

Roughly ten years after its adoption, the Commission carried out an assessment on the functioning of Regulation 1/2003, reacting to calls from stakeholders to ensure that NCAs are equipped with the means and instruments to enforce effectively.<sup>35</sup>

Based on the results of this analysis, the Commission issued in 2014 the Communication *Ten Years of Antitrust Enforcement under Regulation 1/2003*<sup>36</sup> and concluded that the new system considerably increased the enforcement of EU competition rules, with the NCAs now being a key pillar of the system. However, the Commission found that there is room for NCAs to become more effective enforcers and identified a number of areas for action to be taken shortly.

Following the 2014 Communication, the Commission thus carried out an extensive data collection in cooperation with all NCAs to gain a detailed picture of the *status quo*. This was completed by a public consultation in 2015 in order to get feedback from interested stakeholders. The aim was to identify the existing system's shortcomings and the measures necessary in order to render enforcement of EU competition law even more effective. The survey revealed that a vast majority was in favour of actions to be taken in order to boost enforcement by the NCAs.<sup>37</sup>

<sup>31</sup> O Brook, 'Struggling with Article 101(3) TFEU' cit. 122.

<sup>32</sup> *Ibid.* 122 ff.

<sup>33</sup> M Monti, speech in European Parliament, *Debate of 5 September 2001* [www.europarl.europa.eu](http://www.europarl.europa.eu).

<sup>34</sup> *Ibid.*

<sup>35</sup> See e.g., A Sinclair, 'Proposal for a Directive' cit. 625.

<sup>36</sup> Communication COM(2014) 453 final from the Commission to the European Parliament and the Council of 9 July 2014: Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives.

<sup>37</sup> The various steps taken as well as their corresponding documents can be found online at European Commission, *Antitrust, Empowering National Competition Authorities* [ec.europa.eu](http://ec.europa.eu).

As a consequence, the Commission presented in 2017 its Proposal for the ECN+ Directive<sup>38</sup> followed by an extensive impact assessment<sup>39</sup> that listed which competences, means and instruments were available in the respective Member States and where improvement is required to truly ensure an effective enforcement of EU competition law.

This time, the Commission chose a different approach that it somehow already announced when adopting Regulation 1/2003: whereas so far the Commission used different sets of soft-law instruments in order to achieve “soft convergence” or “autonomous harmonisation”<sup>40</sup> it now opted for a hard law instrument to harmonise enforcement regimes in the Member States. The Commission thus seems to have given up its hope that soft law instruments would suffice to lead to the emergence of best practice role models and ultimately to uniformity.<sup>41</sup> Apparently hard law is the only way to protect undertakings from “arbitrary differences in the enforcement of arts 101 and 102 TFEU, depending on whether their case is handled by a “weak” or by a “strong” authority, or whether national rules on enforcement offer loopholes or not”.<sup>42</sup>

ECN+ is thus the next milestone on the road to effective enforcement of EU competition law, taking into consideration that Regulation 1/2003 has improved enforcement across the EU while there is still untapped potential for the NCAs to do even more.

### III. THE ECN+ DIRECTIVE

First of all, it has to be emphasised that the ECN+ is not a repealing instrument of Regulation 1/2003 but a mere complementation thereof – somehow aligning the competences of NCAs to the competences of the Commission.<sup>43</sup> Furthermore, the ECN+ does not make any changes regarding substantive law but only tries to cover shortcomings in its enforcement. The aim shall be an effective enforcement of arts 101 and 102 TFEU with NCAs equipped with suitable instruments to reveal and end competition law infringements.<sup>44</sup>

<sup>38</sup> Proposal for a Directive COM(2017) 142 final from the Commission of 22 March 2017 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

<sup>39</sup> Staff Working Document SWD(2017) 114 final from the Commission of 22 March 2017 on an Impact Assessment, accompanying the document “Proposal for a Directive of the European Parliament and the of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market”.

<sup>40</sup> K Ost, ‘Die Richtlinie 1/2019’ cit. 69.

<sup>41</sup> E.g., Austria, where the Federal Competition Authority adopted the ECs leniency programme.

<sup>42</sup> Editorial, ‘Public Enforcement of EU Competition Law’ cit. 1195.

<sup>43</sup> H Achenbach, ‘Die “ECN+“-Richtlinie (EU) 2019/1 und das deutsche Kartellordnungswidrigkeitenrecht’ (2019) *Zeitschrift für Wirtschafts- und Steuerstrafrecht* 257, 258.

<sup>44</sup> N Harsdorf, E Ummenberger-Zierler and A Reidlinger, ‘Europäische Vorgaben für Befugnisse und Unabhängigkeit’ cit. 64.



The ECN+ tried to, however, not touch upon national individual procedural peculiarities wherever possible, *i.a.*, to prevent non-acceptance of the proposal in the Council.<sup>45</sup> This is also one of the reasons the EU legislator opted for a Directive instead of continuing the path of Regulations, complying with the principle of proportionality and ideally enhancing acceptance of the measures in the Member States and among the citizens.

Consequently, the ECN+ Directive does not impose a “one size fits all” approach but allows Member States to take into account their legal traditions and institutional peculiarities.

In light of the second part of present *Article*, only a few aspects of the ECN+ Directive shall be highlighted in the following.<sup>46</sup> Overall, the provisions present a vast set of measures to ensure that NCAs will become even more effective enforcers in the future, equipped with sufficient resources and securities. On the other hand, at the moment it remains questionable whether these provisions are really suited to compensate the criticised non-uniform application of EU competition law.

### III.1. INSTITUTIONAL SECURITY OF NCAS

A cornerstone of the ECN+ is to ensure independence and sufficient resources for all NCAs (Chapter I and III of the Directive) since some NCAs are currently not able to set their priorities autonomously and free from external influence.

Therefore, Member States shall in the future ensure that NCAs perform their duties and exercise their powers impartially in the interest of effective and uniform application of the Directive (art. 4 of the Directive 1/2019). NCAs must be accorded the right to set their own priorities, including the right to decide which cases shall be pursued and which cases shall be closed. Member States shall, as a minimum, ensure that NCA staff is independent of external influence and shall receive no instructions by governments or public or private entities, not precluding general policy rules. Staff shall be protected against dismissal and selected transparently (art. 4 of the Directive 1/2019).

Furthermore, NCAs shall be equipped with a sufficient number of qualified staff as well as sufficient financial and technical resources (art. 5 of the Directive 1/2019).

However, the ECN+ stays very vague at this point. Rather than giving concrete numbers or guidelines, this non-justiciable provision seems more of a programmatic kind – the only guideline being that resources shall be sufficient in order to effectively enforce arts 101 and 102 TFEU (see *infra*, section IV.1).<sup>47</sup>

<sup>45</sup> Including, *e.g.*, that in some Member States (*e.g.*, Germany) NCAs are at the same time investigating and sanctioning authorities whereas in other Member States (*e.g.*, Austria) NCAs are mere investigating bodies whereas sanctions can only be imposed by the courts.

<sup>46</sup> The structure of following paragraphs is inspired by the grouping suggested by K Ost, in its paper ‘Die Richtlinie 1/2019’ cit. 69 ff.

<sup>47</sup> Cf. N Harsdorf and A Koprivnikar, ‘Die Richtlinie zur Stärkung der nationalen Wettbewerbsbehörden – Eine Reform der kleinen Schritte’ (2019) *Ecolex* 919, 920 ff.

### III.2. HARMONISED POWER TO INVESTIGATE AND SANCTION

As a second pillar, the ECN+ provides in its Chapter IV for extensive rules on what powers NCAs shall have which were formerly not granted to all of them.

This includes the known right to inspect business premises (the right to enter the premises, examine books, make copies, seal and interview; art. 6 of the Directive 1/2019), possibly under the condition of prior judicial authorisation. the ECN+ extends this right to inspections of all premises the NCAs deems necessary (art. 7 of the Directive 1/2019). NCAs must be able to access any information accessible to the undertaking concerned, irrespective of the medium in which the information is stored.

This is complemented by the NCAs rights to request information, whereas such requests may be addressed to undertakings as well as associations of undertakings and third parties (art. 8 of the Directive 1/2019).

In regards to the power of sanction, under the ECN+, all NCAs will have the power to impose behavioural as well as structural remedies to end a conduct that is in breach of art. 101 or art. 102 TFEU (art. 10 of the Directive 1/2019). Furthermore, NCAs will have the possibility to issue interim measures (upon request by a complainant and on their own initiative) and to accept commitment decisions (arts 11 and 12 of the Directive 1/2019).

### III.3. DISSUASIVE FINES

The next very important pillar of the ECN+ is its Chapter V on fines imposed by NCAs. This part of the Directive can be considered particularly relevant since not all NCAs were formerly able to impose dissuasive fines, especially to sanction non-compliance with the NCA during investigations. Fines were furthermore often not enforceable, *e.g.*, because the undertaking had no subsidiary or not sufficient assets in the sanctioning Member State.

Therefore, the Directive now provides effective, proportionate and dissuasive fines that shall be determined in proportion to the undertakings total worldwide turnover, either for the competition infringement itself or for non-compliance with NCAs during investigations (art. 13 of the Directive 1/2019). Fines will be calculated on the basis of gravity and duration of the competition law infringement and shall be no less than 10 per cent of the total worldwide turnover of the undertaking or association of undertakings in the business year preceding the decision (arts 14 and 15 of the Directive 1/2019). Recital 46 of the Directive 1/2019 further elaborates that “undertaking” shall designate an economic unit. Therefore, NCAs will be able to fine a parent company liable where this company and its subsidiary form a single economic unit.

These provisions reveal two things: firstly, the Directive acknowledges the CJEU's case-law<sup>48</sup> according to which parent companies can be held liable.<sup>49</sup> Secondly, the wording of art. 15 leaves no doubt that the amount of fines is designed as a minimum harmonisation clause. Therefore, while fines shall in future be dissuasive throughout the EU, national legislator may nonetheless opt for very different maximum amounts and thus maintain the formerly expressed criticism that there will always be "cheap" vs "expensive" Member States when it comes to sanctioning competition law infringements.<sup>50</sup> At least, the ECN+ makes clear that fines will always be calculated on the basis of worldwide turnover which was not uniform in all Member States.

#### III.4. LENIENCY PROGRAMMES

In its Chapter VI, the ECN+ provides for the first time for rules governing leniency programmes that are not only soft law.<sup>51</sup> This was considered particularly important since the Commission is convinced that effective leniency programmes would considerably increase incentives for undertakings to disclose cartels and thereby contribute to their ending.

The Directive differentiates between leniency applications leading to total immunity from fines and applications that will only lead to a reduction of fines (e.g., where the undertaking applying is not the first applicant; arts 17 and 18 of the Directive 1/2019). Member States shall introduce both options.

The ECN+ also provides for conditions for leniency, e.g., the undertaking's obligation to end its cartel involvement and to genuinely cooperate with the competent CA.

Furthermore, the ECN+ will introduce summary applications in all Member States, meaning that undertakings that apply for leniency with the Commission can submit a short version (summary application) of their application to relevant NCAs (art. 22 of the Directive 1/2019).

This being said, it must be noted that the ECN+ does not introduce a one-stop-shop system.<sup>52</sup> This means that undertakings applying for leniency will also in the future have to submit their applications to all CAs that might be competent to investigate the cartel. Another fact is that the ECN+ limits its rules on leniency programmes to horizontal, secret cartels, whereas it does not preclude Member States to provide for leniency programmes

<sup>48</sup> E.g., case C-724/17 *Skanska Industrial Solutions and Others* ECLI:EU:C:2019:204 para. 38; case C-668/11 *Alliance One International v Commission* ECLI:ECU:C:2013:614 para. 36 ff.; case C-97/08P *Akzo Nobel and Others v Commission* ECLI:EU:C:2009:536 para. 58 ff.

<sup>49</sup> Cf. H Achenbach, 'Die "ECN+"-Richtlinie (EU) 2019/1' cit. 258 ff.

<sup>50</sup> *Ibid.* 259 ff.

<sup>51</sup> Formerly, the ECN Model Leniency Programme of 2012 was used as a guideline for the MS; see thereto e.g., N Harsdorf and A Koprivnikar, 'Die Richtlinie zur Stärkung der nationalen Wettbewerbsbehörden' cit. 921 ff.

<sup>52</sup> C Potocnik, 'One-Stop-Shop für Kronzeugen?' (2016) *Ecolex* 599 ff.

e.g., for vertical cartels (which is the case e.g., in Austria),<sup>53</sup> too. This will consequently keep a certain degree of non-uniformity across the EU.<sup>54</sup>

### III.5. MUTUAL ASSISTANCE

As a last pillar presented in this context, Chapter VII of the Directive provides for rules governing mutual assistance amongst the CAs, including close cooperation within the ECN+.

Alongside general principles of cooperation (art. 27 of the Directive 1/2019), the ECN+ provides for a couple of provisions governing the cooperation between NCAs. As such, it will be, e.g., possible for NCAs to take part in investigations in other Member States and receive, upon request, relevant information and documents from other NCAs (arts 24 and 25 of the Directive 1/2019).

Furthermore, NCAs will be able to request that their decisions be imposed in other Member States (art. 26 of the Directive 1/2019), calling upon all Member States to ensure that cross-border enforcement of fines and collection of evidence works well, to compensate the former problem of fines that could not be enforced.

## IV. DECENTRALISED COOPERATION AS A ROLE-MODEL LEADING TO AN EVER CLOSER UNION?

Looking at the road that led to the *status quo*, it must be noted that this was not the only path the Commission and eventually the EU and its Member States could have chosen. Especially the shift from the centralised to the decentralised system must be questioned.

This shift must be seen against the backdrop of not only increasing workload for the Commission preventing it from concentrating on major competition obstacles, but also of overwhelming the Commission with small competition law cases that could be better treated by NCAs that are “on the ground”<sup>55</sup> and have particular knowledge of the markets in the respective Member State. The ECN+ was also adopted in the light of the Member States’ unwillingness to further equip the Commission and especially the Commission’s Directorate-General for Competition (DG Comp) and somehow create a “mammoth”<sup>56</sup> DG dealing with all competition law cases across the EU. This would have entailed a massive increase of the DG’s budget, on which the Member States would not have agreed. Some authors claim that decentralisation was not put on a well thought out idea of optimal

<sup>53</sup> N Harsdorf and A Koprivnikar, ‘Die Richtlinie zur Stärkung der nationalen Wettbewerbsbehörden’ cit. 921 ff.

<sup>54</sup> F Rizzuto, ‘The ECN Plus Directive: Empowering National Competition Authorities to Be More Effective Enforcers of EU Competition Law’ (2019) European Competition and Regulatory Law Review 96 ff.

<sup>55</sup> M Vestager, answer during the Debate in the European Parliament of 13 November 2018 [www.europarl.europa.eu](http://www.europarl.europa.eu); see also A Geiger, ‘Das Weißbuch der EG-Kommission zur Art. 81, 82 EG’ cit. 168.

<sup>56</sup> See European Parliament, *Debate of 5 September 2001* [www.europarl.europa.eu](http://www.europarl.europa.eu).

antitrust enforcement but as the only promising solution at a time where it became obvious that the Commission could not maintain the existing system.<sup>57</sup>

One could assume that under the pretext of relieving the Commission, Member States supported this approach and took the chance to regain power over one of the EU's core policies with major importance for the functioning of the internal market. Accordingly, it was argued that Regulation 1/2003 would not even lead to a decrease of workload for the Commission, when taking the Commission's coordination role within the ECN seriously, which implies dealing with a case initially left to a NCA, dealing with requests on consultation or appearing as *amicus curiae* in front of national courts and the like.<sup>58</sup>

The danger of renationalisation and fragmentation of competition policy including the undermining of the internal market was noticed at the time Regulation 1/2003 was introduced<sup>59</sup> and the Commission was called to have a close look at the NCAs in order to protect not only the undertakings active in this new system but above all, to protect consumer welfare.<sup>60</sup> In that regard it has also been argued that uniform application and interpretation of EU law is of crucial importance for the EU which might be endangered when opting for a decentralised system.<sup>61</sup>

An even heavier argument presented against the shift to a decentralised system is linked to the allocation of competences between the EU and its Member States: competition law is one of the few areas of EU law where primary law empowers the Commission, *i.e.*, an EU organ, to directly enforce the laws – against the general rule of Member States enforcing EU law.<sup>62</sup> In this context, it has been questioned whether the EU was even competent to such a transfer of Union competences. In an area of shared competences between the EU and its Member States, it is undisputed that Member States shall exercise their competences where the EU does not exercise its competences (anymore) (art. 2(2) TFEU). But competition law is an area of exclusive competence (art. 3(1)(b) TFEU) and as the other side of the coin of the principle of conferral (art. 5(2) TFEU) it is questionable whether the EU is entitled to re-transfer competences to Member States. Some authors argue that even in an area of exclusive EU competence, a re-transfer of competences to the Member

<sup>57</sup> Editorial, 'Public Enforcement of EU Competition Law' cit. 1195 ff.

<sup>58</sup> As provided for in Regulation 1/2003 cit. and the Commission Notice on cooperation within the Network of Competition Authorities cit.; see also F Koenigs, 'Die VO Nr. 1/2003: Wende im EG-Kartellrecht' (2003) *Der Betrieb* 755, 758.

<sup>59</sup> *E.g.*, W Durner, 'Die Unabhängigkeit nationaler Richter im Binnenmarkt – Zu den Loyalitätspflichten nationaler Gerichte gegenüber der EG-Kommission, insbesondere auf dem Gebiet des Kartellrechts' (2004) *Zeitschrift Europarecht* 547, 551.

<sup>60</sup> See European Parliament, *Debate of 5 September 2001* [www.europarl.europa.eu](http://www.europarl.europa.eu).

<sup>61</sup> G Hirsch, 'Dezentralisierung des Gerichtssystems der Europäischen Union?' (2000) *Zeitschrift für Rechtspolitik* 57, 59.

<sup>62</sup> HCH Hofmann, 'Negotiated and Non-Negotiated Administrative Rule-Making: The Example of EC Competition Policy' (2006) *CMLRev* 153.

States must be possible, provided that the EU's competence is not totally undermined.<sup>63</sup> This argument is based on art. 2(1) TFEU allowing the EU to empower Member States to legislate and implement EU acts. Other authors claim that art. 2 in conjunction with art. 103 TFEU does not allow the EU to implement laws with which the EU releases itself from an enforcement competence provided for in the treaties.<sup>64</sup> If so, the solution can be found in Regulation 1/2003 allowing the Commission to step in any time, deciding a case and thus remaining the keeper of competition proceedings – thereby creating a somehow “controlled decentralization”.<sup>65</sup> This is complemented by the information exchange between the CAs allowing the Commission to concentrate on major cases.

It is not to be expected at this stage that the Member States or the Commission will take the initiative to reinstall a centralised system to enforce competition law.<sup>66</sup> Nevertheless, this *Article* argues that this is not even necessary, if close cooperation among the CAs proves that the decentralised system can all the same be an important contribution to an eventually ever closer union, overcoming diverging interpretations and application of EU law and maybe even facilitating things in terms of acceptance amongst citizens. This has also been argued in other contexts (e.g., when talking about national courts applying EU law, seeing them as somehow extended arm of the CJEU),<sup>67</sup> highlighting that the principle of subsidiarity is a major principle enhancing acceptance of and in the EU.<sup>68</sup>

The argument of fragmentation of law and endangering uniform application and interpretation is exactly the consideration that drove the Commission to present the new ECN+ Directive: There is awareness that a decentralised system can only function with a maximum degree of uniformity in every respect ensuring a level playing field.<sup>69</sup>

In this context, a couple of hypothesis shall be discussed in the following, starting with the question *i)* whether the decentralised system of enforcing competition law after the ECN+ can be considered as a well-functioning system; continuing by broadening the view and asking *ii)* whether a decentralised system can be considered as a contribution to an ever closer Union at all, and concluding by asking *iii)* whether the system under the ECN+ could serve as a role-model for other areas, too.

<sup>63</sup> R Priebe, ‘Rückverlagerung von Aufgaben – ein Beitrag zu besserer Akzeptanz der Europäischen Union?’ (2015) *Europäische Zeitschrift für Wirtschaftsrecht* 697, 698.

<sup>64</sup> J Brauneck, ‘Europäisches Wettbewerbsnetz 2.0 – Unabhängige nationale Wettbewerbsbehörden mit weitreichenden EU-Befugnissen?’ (2017) *Europäisches Wirtschafts- und Steuerrecht* 199, 202.

<sup>65</sup> *Ibid.*

<sup>66</sup> F Rizzuto, ‘The ECN Plus Directive’ cit. 96.

<sup>67</sup> F Koenigs, ‘Die VO Nr. 1/2003’ cit. 758.

<sup>68</sup> *Ibid.* 758. The ECN+ is based on arts 103 and 114 TFEU.

<sup>69</sup> See European Parliament, *Debate of 5 September 2001* [www.europarl.europa.eu](http://www.europarl.europa.eu).

#### IV.1. IS DECENTRALISED ENFORCEMENT OF COMPETITION LAW AFTER THE ECN+ TO BE CONSIDERED AS A WELL-FUNCTIONING SYSTEM?

As a first step, the system after introducing the ECN+ shall be analysed, before turning to the broader picture.

In this regard, it must be borne in mind that not only the ECN+ Directive itself but also the whole system that was set up starting with Regulation 1/2003 is under scrutiny. This is because the ECN+ Directive forms a mere complementation of the existing system but does not repeal Regulation 1/2003.

Overall, the ECN+ can be considered as a consequential continuation, not only aligning the NCAs competences to the competences of the Commission but also realising the ECs announcement that Regulation 1/2003 might imply further harmonisation in order to ensure uniformity of competition law enforcement in the EU.

When answering the above-mentioned question, one could be tempted to easily refer to the numbers that show that the system is working well: the introduced decentralised system led to an extensive application of EU competition law, with the NCAs at the heart of it. Additionally, the ECN+ will address actual and potential flaws that hindered at least some NCAs to fully apply their potential so that an even more successful system can be expected in the future. Apparently, soft law instruments did not suffice to achieve this goal but with the ECN+, the Commission opted for hard-law to finally ensure more harmonisation.

But this picture might only be true at the outset. It seems indisputable that EU competition law enforcement is now taking place at a large scale with enforcement authorities that are the actual experts on the ground and thereby strengthen effective enforcement.

However, looking closely, it must be put into question whether the ECN+ can actually contribute to more uniformity and legal certainty that is not endangered by national particularities and tendencies to renationalisation. Albeit aiming at harmonisation, the ECN+ pays great attention to the principle of national procedural autonomy<sup>70</sup> and tries to intervene as little as possible in the actual national institutional structures.<sup>71</sup> The legislator took the decision to establish the ECN+ in a Directive, providing for harmonisation instead of uniformity.<sup>72</sup> Some authors even argue that such comprehensive national procedural autonomy comes in exchange for being bound to EU substantive law that must be enforced by the NCAs.<sup>73</sup> In that regard, a parallel can be drawn to federal states taking examples where

<sup>70</sup> To this expression see also case C-201/02 *Wells* ECLI:EU:C:2004:12 paras 65 and 67.

<sup>71</sup> One example therefore is the standing of NCAs within the national institutional structures and their structure of being mere investigating bodies or being able to impose sanctions at the same time.

<sup>72</sup> Cf. E Csatlós, 'The European Competition Network in the European Administrative System: Theoretical Concerns' (2018) *Yearbook of Antitrust and Regulatory Studies* 53, 69.

<sup>73</sup> J Brauneck, 'Europäisches Wettbewerbsnetz 2.0' cit. 203 with further references.

law-making lies within the competences of the federal government whereas the application and enforcement of said laws lies within the competences of the federal states.<sup>74</sup>

However, it seems that three essential prerequisites must be met in order to allow the ECN+ to eventually contribute to a better functioning system. Those are *i)* a common substantive legal framework and its uniform interpretation and application being ensured by a central court; *ii)* well-equipped national expert authorities in the Member States; and *iii)* close cooperation between the authorities and the Commission.

With regards to the first point, it has to be noted that so far the CJEU takes its role seriously in ensuring uniform interpretation and application of EU competition law.<sup>75</sup> In fact, apart from interpreting the substantive laws, the CJEU ensured a certain degree of convergences by even interpreting EU law in a way it requires Member States to reconsider their national competition law enforcement structures by imposing specific institutional requirements:<sup>76</sup> "In doing so, the Court directly envisaged the 'institutional assimilation' of national competition law enforcement structures to a supranationally attuned image".<sup>77</sup>

The second point is exactly what the ECN+ is aiming at, taking into consideration its actual provisions: the NCAs as expert authorities shall be equipped in a way that allows them to fully accomplish their duties.<sup>78</sup> This implies a vast degree of guarantees and securities to allow all NCAs to independently and effectively investigate competition law infringements.

This is a crucial point that turns out to be problematic: How can the Directive guarantee independent and well-functioning authorities? As stated above, the provisions on this point are rather programmatic and certainly non-justiciable. At the same time, there are currently examples of Member States showing tendencies of political influence in the recruiting of personnel for essential positions. Just to mention one example, the CJEU is currently or was recently dealing with proceedings against Poland regarding questionable independence and/or impartiality of judges as well as political involvement in the appointment of judges.<sup>79</sup> These proceedings are but one example of struggles the EU has with Member States who

<sup>74</sup> A Weitbrecht, 'Das neue EG-Kartellverfahrensrecht' (2003) *Europäische Zeitschrift für Wirtschaftsrecht* 69, 72.

<sup>75</sup> See recent examples case C-637/17 *Cogeco Communications* ECLI:EU:C:2019:263 para. 42 ff.; case C-724/17 *Skanska Industrial Solutions and Others* ECLI:EU:C:2019:204 para. 38 ff.; case C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160 para. 43 ff.

<sup>76</sup> E.g., case C-439/08 *VEBIC* ECLI:EU:C:2010:739 para. 61 ff.; case C-74/14 *Eturas and Others* ECLI:EU:C:2016:42 para. 32 ff.; case C-681/11 *Schenker & Co and Others* ECLI:EU:C:2013:404 para. 46.

<sup>77</sup> CP Van Cleynenbreugel, 'Institutional Assimilation in the Wake of EU Competition Law Decentralization' (2012) *The Competition Law Review* 285.

<sup>78</sup> Assessing the importance of independence of national authorities see M Guidi, 'The Impact of Independence on Regulatory Outcomes: The Case of EU Competition Policy' (2015) *JComMarSt* 1195 ff.; JW van de Gronden and SA de Vries, 'Independent Competition Authorities in the EU' (2006) *Utrecht Law Review* 32 ff.

<sup>79</sup> Case C-791/19 *Commission v Poland (Régime disciplinaire des juges)* ECLI:EU:C:2021:596; case C-192/18 *Commission v Poland (Independence of ordinary courts)* ECLI:EU:C:2019:924; case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:615.



challenge fundamental EU values such as the rule of law.<sup>80</sup> Poland's leaders showed that they do not shy away from replacing judges even in the country's highest court and install courts loyal to the current government. It is thus the Commission as guardian of the Treaties and the CJEU that seek to ensure compliance with the EU's values.

It cannot be assumed that Member States will refrain from political intervention in the appointment of NCA staff or its dealing with the cases.<sup>81</sup> This is *per se* nothing new: "long-term political considerations"<sup>82</sup> are commonly linked to the implementation of competition law and structure of competent authorities.<sup>83</sup> However, it is "short-term political influence",<sup>84</sup> including political interventions in pending cases or politically motivated recruitment of staff, that hinders effective and independent enforcement of EU competition law and thus needs to be excluded.<sup>85</sup> Surely, compliance with competition laws and sanctioning of non-compliant undertakings is by far less attractive in political terms than (financial) support of national undertakings and economic branches or political measures in order to intervene in cartel or merger control proceedings.<sup>86</sup>

Even more, it cannot be assumed that all Member States actually want to improve or further deepen integration of the internal market. The opposite might even be true: there are tendencies of renationalisation and protectionism of national undertakings and economy – reinforced in the current situation of multiple crises.<sup>87</sup> Member States show more and more intentions to safeguard their national economy and undertakings and do not see them as part of the broader internal market.<sup>88</sup>

Consequently, the ECN+ is battling against centrifugal tendencies that emerge. Those tendencies also show in competition law.<sup>89</sup> Thus, the Directive hints to an even more dramatic problem the EU is dealing with at the moment: on many occasions we can see that

<sup>80</sup> See e.g., M Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' (2019) *Hague Journal on the Rule of Law* 417 ff.

<sup>81</sup> M Bernatt, 'Rule of Law Crisis, Judiciary and Competition Law' (2019) *Legal Issues of Economic Integration* 345 ff.; C Harding, 'Enforcement Inconsistency in EU Competition Cases as Rule of Law Problem' (2019) *LIEI* 363 ff.

<sup>82</sup> JW van de Gronden and SA de Vries, 'Independent Competition Authorities in the EU' cit. 63.

<sup>83</sup> See I Malobek-Szwast, 'The Appointment and Dismissal Procedure of the Polish NCA in the Light of EU and International Independence Standards' (2018) *Wrocław Review of Law, Administration and Economics* 24, 32 ff. on potential current threats to NCAs' independence in certain Member States.

<sup>84</sup> JW van de Gronden and SA de Vries, 'Independent Competition Authorities in the EU' cit. 63.

<sup>85</sup> A Jasser, 'Independence and Accountability' (2015) *Journal of European Competition Law and Practice* 71; F Rizzuto, 'The ECN Plus Directive' cit. 96 ff.

<sup>86</sup> JW van de Gronden and SA de Vries, 'Independent Competition Authorities in the EU' cit. 64; A Jasser, 'Independence and Accountability' cit. 72; U Aydin and P Thomas, 'The Challenges and Trajectories of EU Competition Policy in the Twenty-first Century' (2012) *Journal of European Integration* 531, 537 ff. and 540.

<sup>87</sup> P Genschel and M Jachtenfuchs, 'From Market Integration to Core State Powers: the Eurozone Crisis, the Refugee Crisis and Integration Theory' (2017) *Journal of Common Market Studies* 178 ff.

<sup>88</sup> R Grzeszczak (ed.), *Renationalisation of the Integration Process in the Internal Market of the European Union* (Nomos Verlag 2018) 15 ff.

<sup>89</sup> *Ibid.*

the Member States are not able to agree on a common strategy for the EU's future.<sup>90</sup> In more concrete terms; whereas the Commission clearly intends to enhance close cooperation and further integration, this is certainly not desirable for all Member States.<sup>91</sup> In that regard, the ECN+ is not a solution but merely a continuation of the struggle.

Again, it will rely on the Commission and ultimately the CJEU to somehow discipline non-compliant Member States and infringement proceedings or even proceedings according to art. 7 TEU seem inevitable.<sup>92</sup> This situation is even more complex since the ECN+ does – as already mentioned – not provide for justiciable norms in that respect. The only benchmark will be whether the national norms or decisions taken might hinder effective enforcement of arts 101 and 102 TFEU.<sup>93</sup> From this point of view, precondition *ii*) is closely linked to precondition *i*): not only the substantive laws but also their enforcement and the NCAs themselves must be under constant scrutiny. This holds especially true in combination with historically weak awareness for competition law and its use. Thus again, the CJEU will probably be called upon to align the NCAs and their actual competences. It will, however, require a courageous interpretation of the Directive's provisions to do so.

In that regard, the ECN+ appears as a step in the right direction, ensuring guarantees and securities that will allow the NCAs to comply with their competences. Still, the Directive leaves broad spaces for national peculiarities and diverging approaches (see *supra*, section II.1 ff.) that will potentially hinder a creation of a real level-playing field.

Concluding, the ECN+ can basically only contribute to more uniformity and legal certainty through alignment of competences and guarantees granted to the NCAs, probably with a vigilant CJEU ensuring the latter. "[T]he more the enforcement powers of all ECN

<sup>90</sup> Most prominently this can be seen in the area of asylum and migration, see thereto *e.g.*, J Prantl, 'Shaping the Future Towards a Solidary Refugee Resettlement in the European Union' (2021) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1027; I Goldner Lang, 'No Solidarity Without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?' (2020) European Journal of Migration and Law 39, 41 ff. It can also be seen recently in the area of EU enlargement, *e.g.*, C Potocnik-Manzouri, 'Keine Beitrittsverhandlungen mit Albanien und Nordmazedonien – Das Ende der bisherigen Erweiterungspolitik?' (2020) Juridikum 45, 50 ff.; A Rexha, 'An analysis of the European Enlargement Policy Through the Years: the Case of Western Balkans' (2019) ILIRIA International Review 234, 249. To rule of law proceedings see *e.g.*, M Blauburger and V Van Hüllen, 'Conditionality of EU Funds: an Instrument to Enforce EU Fundamental Values?' (2020) Journal of European Integration 1, 3; F Gremmelprez, 'The Legal vs Political Route to Rule of Law Enforcement' (29 May 2019) Verfassungsblog [verfassungsblog.de](http://verfassungsblog.de). In more general terms see also P Genschel and M Jachtenfuchs, 'From Market Integration to Core State Powers' cit. 183 ff.

<sup>91</sup> F Schimmelfennig and T Winzen, *Ever Looser Union? Differentiated European Integration* (Oxford University Press 2020) 4 ff.

<sup>92</sup> See *e.g.*, on the persistence of violations of European legislation T Hofmann, 'How Long to Compliance? Escalating Infringement Proceedings and the Diminishing Power of Special Interests' (2018) Journal of European Integration 785, 786 ff.

<sup>93</sup> Art. 5(1) of the Directive 1/2019 cit.

members converge, the less likely are shifts in the allocation of cases to cause violations of fundamental rights or the rule of law".<sup>94</sup>

As to the third prerequisite, it seems inevitable that networks are created in order to ensure and institutionalise real cooperation ultimately allowing an alignment of practices. In fact, the ECN was created expressly for this purpose and is now recognised as a successful and innovative model of governance for the complementary implementation of EU law at both European and national level.<sup>95</sup> The network was established to ensure a constant channel for systematic cooperation and data flow, whereby these activities shall be performed in an automatic way without the possibility of rejecting collaboration or retaining information which differentiates real networks from mutual assistance.<sup>96</sup>

The importance of close cooperation within the network is broadly highlighted, but has not always been received positively: already during the debates for the adoption of Regulation 1/2003, some members of the European Parliament perceived the network as implementation tool for the Commission, being able to use NCAs as its servants where it could supervise the NCAs that were installed and paid for by the Member States. The Commission was supposed to have created a network with the Commission at its heart where NCAs would be equipped by Member States but ultimately work for the Commission and implement EU law.<sup>97</sup> Additionally, the legislator's intention to have all Member States' courts to report cases to the Commission was perceived as the Commission's long-planned attempt to take influence on the Member States jurisprudence.<sup>98</sup>

On the contrary it has also been argued that cooperation within networks is a most promising mechanism in order to respect regional differences or national particularities (that a centralised system would not) and to hinder emergence of competitive differences (that a decentralised system might lead to). Thus, networks can be understood as tools ideally combining advantages of a centralised and a decentralised system.<sup>99</sup>

In the light of questionable adherence to the Directive's provisions on independence and sufficiently equipped authorities, the functioning of effective networks seems even more important, if understood as a tool to ensure the well-functioning or at least detect the non-functioning of coherent application and enforcement of EU competition law.

Irrespective of objections or welcomes, it must be emphasised that successful cooperation within a network requires close cooperation and exchange on experiences made on both sides: the Commission and the NCAs. In that regard, authors took the e-commerce

<sup>94</sup> Editorial, 'Public Enforcement of EU Competition Law' cit. 1192.

<sup>95</sup> A Sinclair, 'Proposal for a Directive' cit. 625.

<sup>96</sup> E Csatlós, 'The European Competition Network' cit. 58 ff.

<sup>97</sup> See European Parliament, *Debate of 5 September 2001* [www.europarl.europa.eu](http://www.europarl.europa.eu).

<sup>98</sup> W Durner, 'Die Unabhängigkeit nationaler Richter im Binnenmarkt' cit. 551 ff.

<sup>99</sup> D Kugelman, 'Kooperation und Betroffenheit im Netzwerk' (2020) *Zeitschrift für Datenschutz* 76.

sector inquiry by the Commission of May 2015 as an example where the Commission entered a field in which several NCAs have already been active.<sup>100</sup> The Commission could thus easily have profited from the knowledge and experiences that were already available within the network. Furthermore, this idea of networks must also include close cooperation between NCAs in cases where more than one authority is getting active.<sup>101</sup>

This leads to two further deficits of the ECN+: first, it does not provide for clear and binding rules on the allocation of cases eventually hindering legal certainty. Furthermore, decisions taken by NCAs are not binding for the whole Union.<sup>102</sup> So far, only the Commission's decisions are binding *erga omnes*, leading to requests that the Commission shall ultimately take the decision even though NCAs might seem better equipped.<sup>103</sup>

What remains open, furthermore, is the question how fit the system is to deal with future challenges. Competition policy is in a constant flow. Currently, especially digitalisation and phenomena linked thereto require new concepts and adaptations.<sup>104</sup> Again, it seems inevitable that those challenges are faced commonly within the network ensuring a real level playing field in the EU. So far, the EU has witnessed close cooperation between some CAs,<sup>105</sup> but lacks a real cooperation of all of them, eventually within the ECN.<sup>106</sup>

#### IV.2. CAN A DECENTRALISED ENFORCEMENT SYSTEM CONTRIBUTE TO AN EVER CLOSER UNION?

When answering this second question, it shall be assumed that shortcomings can be overcome and the decentralised system to enforce competition law is reasonable, since action is multiplied by a multiplicity of enforcers that makes it stronger, more effective and a better deterrent for undertakings to refrain from breaching EU competition law.<sup>107</sup>

The argument is brought forward that an ever closer union is largely influenced by common understanding of and respect for the laws. Whereas such legal communities can be created by common substantive law, it is arguably also possible to create such

<sup>100</sup> Editorial, 'Public Enforcement of EU Competition Law' cit. 1191 ff.

<sup>101</sup> *Ibid.* 1192 and 1197, taking the example of the investigations against Booking.com.

<sup>102</sup> EJ Mestmäcker, 'Versuch einer kartellpolitischen Wende in der EU – Zum Weißbuch der Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 EGV a. F.' (1999) *Europäische Zeitschrift für Wirtschaftsrecht* 523, 529.

<sup>103</sup> Editorial, 'Public Enforcement of EU Competition Law' cit. 1198 ff.

<sup>104</sup> B Widmer, 'Wenn der Wandel alleine das Beständige ist' cit. 314.

<sup>105</sup> See e.g., the cooperation of the French *Autorité de la Concurrence* and the German *Bundeskartellamt* on Algorithms (*Autorité de la concurrence*, Report on Algorithms and Competition, November 2019 [www.autoritedelaconcurrence.fr](http://www.autoritedelaconcurrence.fr)).

<sup>106</sup> C Massa, 'Sincere Cooperation and Antitrust Enforcement: Insights from the Damages and ECN+ Directives' (2020) *European Competition Journal* 126, 140.

<sup>107</sup> A Sinclair, 'Proposal for a Directive' cit. 625.

communities with more integrated enforcement of the laws.<sup>108</sup> Actually, the enforcement level is considered as “crucial element in the implementation of policies”.<sup>109</sup> As such, the level under scrutiny is merely the legislator itself, but the level of enforcement thereby including all competent authorities, may they be EU institutions or national authorities.

The background of this line of arguments is an increasing awareness of the importance of successful enforcement of EU rules, in order to comply with one of the central concepts of EU law, namely effectiveness.<sup>110</sup>

It seems as a logical prerequisite that an ever closer union is only possible where such enforcement is not only effective, but also conducted in uniformity, in order to guarantee legal certainty and thereby acceptance. Following the arguments presented under the first hypothesis, again the importance of networks cannot be neglected when talking about an ever closer union: it seems decisive that a decentralised system is designed in a way that combines its clear advantages while at the same time ensuring uniformity of law in the EU.<sup>111</sup>

Having said this, it seems reasonable to again get back on what an ever closer union actually means. Understood as one of the Treaties’ objectives<sup>112</sup> an ever closer union amongst people would ultimately create real European citizens.<sup>113</sup> In the past, the idea of an ever closer union was inextricably linked to the idea of more integration.<sup>114</sup> From that point of view, the transfer of competences from the EU or its institutions to the Member States seems counterproductive in order to foster integration and ultimately an ever closer union.<sup>115</sup> This is not necessarily the case: authors have concluded that this link between more integration and the ever closer union is somewhat outdated<sup>116</sup> and others presented new concepts that seem more appropriate in the current EU context: “integration” could be replaced by the concept of building a “European legal space”,<sup>117</sup> suggesting that a relation

<sup>108</sup> A Gavala, A Gutermuth and L Gyselen, ‘The New ECN+ Directive: Towards an Even More Integrated Antitrust Enforcement in the EU’ (20 December 2018) Arnold & Porter [www.arnoldporter.com](http://www.arnoldporter.com).

<sup>109</sup> M Scholten, ‘Mind the Trend! Enforcement of EU Law Has Been Moving to “Brussels”’ (2017) *Journal of European Public Policy* 1348.

<sup>110</sup> C Poncibò, ‘Networks to Enforce European Law: The Case of the Consumer Protection Cooperation Network’ (2012) *Journal of Consumer Policy* 179.

<sup>111</sup> G Hirsch, ‘Dezentralisierung des Gerichtssystems’ cit. 60.

<sup>112</sup> On the concept of the ever closer union see e.g., R Bellamy, ‘An Ever Closer Union Among the Peoples of Europe: Union Citizenship, Democracy, Rights and the Enfranchisement of Second Country Nationals’ in R Bauböck (ed.), *Debating European Citizenship* (Springer 2019) 47 ff.

<sup>113</sup> A Gavala, A Gutermuth and L Gyselen, ‘The New ECN+ Directive’ cit. *passim*.

<sup>114</sup> A Von Bogdandy, ‘European Law Beyond “Ever Closer Union”: Repositioning the Concept, Its Thrust and the ECJ’s Comparative Methodology’ (2016) *ELJ* 519, 527.

<sup>115</sup> R Priebe, ‘Rückverlagerung von Aufgaben’ cit. 697.

<sup>116</sup> *Ibid.* 697.

<sup>117</sup> A Von Bogdandy, ‘European Law Beyond “Ever Closer Union”’ cit. 528.

to specific spaces constitutes “a core element for developing political identities”<sup>118</sup> and ultimately European citizens. Such a European legal space would then be characterised by “thick communication, deep interlocking, and mutual dependency of all involved legal regimes”.<sup>119</sup> Thus, this idea again relies on the ideal of close networks in multi-level governance with EU authorities and Member States authorities being competent to act.

In order to create a real closer union it seems not sufficient enough to have certain networks but rather that these networks benefit from a certain climate of trust.<sup>120</sup> The ECN is by far not the only existing network in the EU. It is, however, considered as the most advanced one<sup>121</sup> and a network that is actually based on a certain degree of trust among its members.<sup>122</sup>

The idea of trust or “mutual trust” has been introduced by the CJEU initially in the context of cases dealing with the internal market<sup>123</sup> and is now mostly known from the development of the Area of Freedom, Security and Justice (AFSJ).<sup>124</sup> It provides that, save in exceptional circumstances, Member States shall consider all other Member States to be complying with EU law.<sup>125</sup> By now the CJEU even included mutual trust among the founding principles<sup>126</sup> that characterise EU law as a new kind of legal order and put it alongside classic principles such as the autonomy, primacy and direct effect of EU law.<sup>127</sup>

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.* 530.

<sup>120</sup> V Pereira, J Capiu and A Sinclair, ‘Union de Almacenistas de Hierros de España v Commission: Strengthening a Climate of Trust Within the European Competition Network’ (2016) *JIntL&Prac* 117, 118.

<sup>121</sup> For more examples see e.g., C Poncibò, ‘Networks to Enforce European Law’ cit. 178 ff., who firstly presents different networks (such as the ECC-Net or the EJM) stressing that they all have different actors and also distinguishes between the networks’ functions: whereas there are networks for mere information exchange, there are others for standardisation purposes and lastly genuine enforcement networks such as the ECN.

<sup>122</sup> This climate of trust will also be required in order to implement certain provisions of the ECN+ such as the rules on mutual assistance, e.g., when it comes to cross-border enforcement of fines.

<sup>123</sup> E.g., case 46/76 *Bauhuis* ECLI:EU:C:1977:6 para. 38; case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)* ECLI:EU:C:1996:205 para. 19.

<sup>124</sup> See e.g., joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198 paras 78 and 82; case C-486/14 *Kossowski* ECLI:EU:C:2016:483 para. 50, referring to case C-297/07 *Bourquain* ECLI:EU:C:2008:708 para. 37 and joined cases C-411/10 and C-493/10 *N.S. and Others* ECLI:EU:C:2011:865 para. 83; see also T Von Danwitz and A Arbor, ‘Der Grundsatz des gegenseitigen Vertrauens zwischen den Mitgliedstaaten der EU: Eine wertebasierte Garantie der Einheit und Wirksamkeit des Unionsrechts’ (2020) *Zeitschrift für Europarecht* 61 and N Cambien, ‘Mutual Recognition and Mutual Trust in the Internal Market’ (2017) *European Papers* www.europeanpapers.eu 95 ff.

<sup>125</sup> *Avis 1/17 - Accord ECG UE-Canada* ECLI:EU:C:2019:341 para. 128, see also F Maiani and S. Migliorini, ‘One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice’ (2020) *CMLRev* 7, 8.

<sup>126</sup> *Avis 1/17 - Accord ECG UE-Canada* cit. para. 128.

<sup>127</sup> F Maiani and S Migliorini, ‘One Principle to Rule Them All’ cit. 8 with recourse to *Avis 2/13 - Adhésion de l’Union à la CEDH* ECLI:EU:C:2014:2454 para. 157 ff.

Mutual trust initially related to the legal systems of Member States, where the CJEU concluded that Member States can rely on the fact that other Member States value the fundamental rules upon which the EU is founded. Thus, has evolved and now comprises the implementation of values and ultimately enforcement of values and laws, too.<sup>128</sup>

It is obvious why the CJEU tends to grant such an importance to this principle: mutual trust is a major pillar for uniformity and effectiveness of EU law. The utility of EU law is maximised where it is applied uniformly and effectively<sup>129</sup> and where Member States can trust that other Member States comply with EU law, too.<sup>130</sup> Some authors have argued quite convincingly: no EU law without uniformity of EU law. No uniformity of EU law without uniform application of EU law. No uniform application of EU law without mutual trust in the other MS's uniform application of EU law (which can be stabilised e.g., by close cooperation).<sup>131</sup>

It must be added that this also holds true for the Member States' enforcement of EU law.<sup>132</sup> Enforcement in that regard is nothing but the prevention or response to "the violation of a norm in order to promote the implementation of the set laws and policies".<sup>133</sup> Thus, enforcement is the level that is most present in the daily life of those who are subject to a substantive norm and thus plays a crucial role for acceptance and understanding amongst those subjects.

It seems thus fair to conclude that a decentralised system in which close cooperation is ensured can ultimately lead to an ever closer union.

It should be again emphasised in that regard that the actual success and acceptance of such a system will largely depend on effectiveness and its results.<sup>134</sup> Using the means of a multitude of authorities seems reasonable in order to detect even more competition law infringements and to uphold the system's overall motive that "full cooperation yields more than the sum of the parts".<sup>135</sup> Competition law as such might not seem as a topic capable of creating certain feelings of belonging or identity, but it can considerably contribute to the welfare of economy and especially consumers<sup>136</sup> and thereby enhance its acceptance and relaxation on a level-playing field.

<sup>128</sup> Case C-519/18 *Bevándorlási és Menekültügyi Hivatal (Regroupement familial - sœur de réfugié)* ECLI:EU:C:2019:1070 para. 43.

<sup>129</sup> T Von Danwitz and A Arbor, 'Der Grundsatz des gegenseitigen Vertrauens' cit. 75.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.* 76.

<sup>132</sup> M Hazelhorst, 'Mutual Trust Under Pressure. Civil Justice Cooperation in the EU and the Rule of Law' (2018) NILR 103, 104.

<sup>133</sup> M Scholten, 'Mind the Trend' cit. 1350.

<sup>134</sup> R Priebe, 'Rückverlagerung von Aufgaben' cit. 702.

<sup>135</sup> AW Kist, 'Decentralisation of Enforcement of EC Competition Law: New Cooperation Procedures May Be Necessary' (2002) *Intereconomics* 36, 37

<sup>136</sup> LH Röller, GE Clemenz and M Janssen, 'Challenges in EU Competition Policy' (2011) *Empirica* 287, 288.

#### IV.3. DOES THE SYSTEM UNDER THE ECN+ SERVE AS A ROLE-MODEL FOR OTHER AREAS, TOO?

When answering this last question, it has to be emphasised again that competition law has a quite unique role in the EU context: enforcement of EU competition law does not only initially lie with the Commission, but it is also fundamental for the internal market and the European integration and therefore considered as one of the EU's key policies.<sup>137</sup> Even though this might seem exaggerated, it cannot be denied that competition law was ever since closely linked to the initial idea of creating the EU: an internal market has to be secured by sound competition law rules. Moreover, it must be remembered that in the end, competition law is not protecting competitors but competition and thereby ultimately consumers.<sup>138</sup>

Moreover, competition law is to be considered as a role-model for integration. Competition law was from the beginning on created as a central domain of EU competence<sup>139</sup> and thus against the overall claim of keeping direct enforcement as matter of national sovereignty with the MS,<sup>140</sup> considered as the EU's "first supranational policy"<sup>141</sup>.

Competition law thus enjoys a position within EU law where the general EU competence, supranationality and power of the Commission are not put into question.<sup>142</sup> This is an advantage other areas cannot claim.

Despite these differences, abstract criteria that can be deduced from the current the ECN+ system shall be found that might nevertheless be valuable for other areas, too.

As a first critical comment, one could note that the system established by Regulation 1/2003 and now somehow institutionalised by the ECN+ is a perfect example for the EU's crisis at the moment: it was not possible to uphold a centralised system – for obviously various reasons – so the outcome was that powers shifted to the Member States and their authorities. Thus, Regulation 1/2003 and the ECN+ could be understood as examples for disintegration with the provisions laid down in the ECN nothing but a desperate attempt to regain some control by the Commission. In that regard, also the ECN as a network would serve as a platform for control and observation in order to ensure implementation and enforcement of EU policies in a decentralised system.

However, the decentralised system proved to be successful and – as stated above – can ultimately even enhance deeper integration, including mutual trust and close cooperation between authorities. Thus, even if it were true that the system after Regulation

<sup>137</sup> A Von Bogdandy and F Buchhold, 'Die Dezentralisierung der europäischen Wettbewerbskontrolle' cit. 798.

<sup>138</sup> LH Röller, 'Challenges in EU Competition Policy' cit. 288.

<sup>139</sup> P Akman and H Kassim, 'Myth and Myth-Making' cit. 122.

<sup>140</sup> M Scholten, 'Mind the Trend' cit. 1350.

<sup>141</sup> P Akman and H Kassim, 'Myth and Myth-Making' cit. 128 with further references; see also M Cini and L McGowan, *Competition Policy in the European Union* (Bloomsbury Publishing 2008) 18.

<sup>142</sup> P Akman and H Kassim, 'Myth and Myth-Making' cit. 128.



1/2003 is an example of renationalisation, it does not necessarily harm a future of Europe that aims at an ever closer union. Furthermore, it seems that the decentralisation and therewith somehow renationalisation of competition law is against an observable trend of competences shifting to the EU that are complemented by the creation of networks and agencies to ensure their functioning.<sup>143</sup>

When talking about areas that could profit from similar systems as the one under Regulation 1/2003 and the subsequent the ECN+, it seems firstly reasonable to talk about areas of competition law that have been neglected in the present *Article* so far: whereas the application and enforcement of arts 101 and 102 TFEU has been transferred to the NCAs with Regulation 1/2003, there is nothing similar in the area of merger control.<sup>144</sup> Authors claim that merger control does not know any “substantial law to speak of, no common procedural scheme, and agencies may not even enjoy the same powers”.<sup>145</sup> It appears as a logical consequence to include merger control into a similar system established by Regulation 1/2003 in order to really guarantee a level-playing field for competition across the EU<sup>146</sup> And to develop a “European Merger Area”.<sup>147</sup>

Even apart from other areas of competition law, it seems reasonable to include areas that might be either included in the system after the introduction of the ECN+ or profit from similar considerations. In that regard, Commissioner Margrethe Vestager made clear that “the competition portfolio [is not] a lonely portfolio”.<sup>148</sup> Again, speaking under the prerequisite that a decentralised system per se is not negative and either hindering deeper integration nor somehow hampering the EU’s aims and values.

Classic examples of areas that are closely linked to competition law are consumer protection and data protection. In fact, this close link can even be witnessed when observing the general trend of emerging authorities that are competent for competition law and other areas, such as consumer protection, too.<sup>149</sup> As regards data protection, it is widely acknowledged that there is a close intersection between data protection and competition law, albeit

<sup>143</sup> KF Gärditz, ‘§ 35 Verhältnis des Unionsrechts zum Recht der Mitgliedstaaten’ in HW Rengeling, A Middeke and M Gellermann (eds), *Handbuch des Rechtsschutzes in der Europäischen Union* (C.H. Beck 2014) 35 para. 27; M Scholten, ‘Mind the Trend’ cit. 1349 ff.

<sup>144</sup> JW van de Gronden and SA de Vries, ‘Independent Competition Authorities in the EU’ cit. 65.

<sup>145</sup> B Lasserre, ‘The Future of the European Competition Network’ (2013) *Italian Antitrust* 11 ff.

<sup>146</sup> See e.g., U Von Koppenfels, ‘A Fresh Look at the Merger Regulation? The European Commission’s White Paper “Towards More Effective EU Merger Control”’ (2015) *Liverpool Law Review* 7 ff.

<sup>147</sup> White Paper COM(2014) 449 final from the Commission of 9 July 2014 towards more effective EU merger control, para. 23.

<sup>148</sup> M Vestager, hearing before the European Parliament on 2 October 2014 multimedia.europarl.europa.eu.

<sup>149</sup> T Jaeger, ‘Wirtschaftliche Betrachtungsweise im Wettbewerbsrecht’ cit. 77 ff.; C Hodges, ‘Competition Enforcement, Regulation and Civil Justice: What is the Case?’ (2006) *CMLRev* 1381, 1386.

distinct methods and aims.<sup>150</sup> Again, it seems crucial that cooperation between authorities is maintained and even enhanced to create a coherent framework.<sup>151</sup>

It seems that this close intersection is enhanced by current developments: in a digitalised world, new emerging questions need a coherent, coordinated approach comprising all areas affected. In light of the consideration that competition law is not merely a portfolio, network cooperation should be enhanced in order to enable a harmonised approach.

## V. CONCLUSION

Directive 1/2019 is not only the latest milestone in attempting to harmonise public enforcement of EU competition law, but it also serves as an example of decentralised cooperation between the EU and the Member States. At the same time, it appears as an example for the constant struggle on how to allocate competences and powers.

For the enforcement of EU competition law, the legislator has chosen to implement and strengthen the system of decentralised enforcement where NCAs are competent to enforce EU competition law that seem more competent to deal with the cases on the ground and allowing the Commission to concentrate on major competition issues. The Commission, however, remains competent to step in.

Possibly, this setting can be seen as a compromise of allocation of powers between the EU and the Member States. This must, however, not be negative: testing the new Directive 1/2019 revealed that such a system can actually contribute to more effectiveness, acceptance and an ever closer union, provided that certain conditions are met. At the outset, a decentralised system seems reasonable, since action is multiplied by a multiplicity of enforcers that make enforcement much stronger, more effective and a better deterrent for undertakings to refrain from breaching EU competition law.

It must further be emphasised that the level of enforcement is equally important as the level of law-making. Acceptance of laws is largely influenced by a common understanding and respect for the laws as well as successful, uniform enforcement that fulfils one of the EU's central principles, namely effectiveness.

A precondition seems to be a common substantive law, the uniform interpretation and application of which is secured by a competent court, the CJEU. Furthermore, all authorities that contribute to the enforcement of EU laws must be expert authorities that are well-equipped in order to fulfil their duties. This is where the ECN+ comes in: the former system of soft law aiming at uniformity that depended on the willingness of the Member States did not lead to authorities that could fully expand their potential. It seems inevitable that such authorities are equipped with a minimum of institutional guarantees

<sup>150</sup> F Costa-Cabral and O Lynskey, 'Family Ties: The Intersection Between Data Protection and Competition in EU Law' (2017) CMLRev 11 ff.; see also N Heilberger, F Zuiderveen Borgesius and A Reyna, 'The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law' (2017) CMLRev 1427 ff.

<sup>151</sup> D Kugelman, 'Kooperation und Betroffenheit im Netzwerk' cit. 78 ff.

and securities as well as sufficient resources. At the same time, uniform enforcement requires uniform rules of the game across the EU.

Last, but certainly not least, the system can only work properly when set in an environment of constant exchange of experiences and close cooperation between the competent authorities. This purpose is served by the already existing European Competition Network.

Having said this, it must be borne in mind that this picture is somehow an ideal that the Commission pursues with its new instrument. In theory, this instrument and its complementation by existing Regulations and soft law seems adequate to ameliorate decentralized enforcement. But this conclusion is working under the assumption that all Member States adhere to the ECN+ and share the Commission's understanding of how important a well-functioning competition is for the internal market and consumer welfare. In practice, however, one cannot assume that the Member States agree or even unconditionally support the internal market or its deeper integration. It is thus questionable how the ECN+ may really contribute to more effective enforcement where it does, *e.g.*, not even provide for justiciable rules regarding the NCAs institutional guarantees but on various occasions leaves room for national particularities. Thus, the ECN+ serves as an example of the Commission's ideals and plans differing from at least some Member States whereas the functioning of the internal market largely depends on a common strategy and a common plan for its future. Only if those divergences can be overcome, the ECN+ will be even more able to respond to the EU's actual political situation and fully expand its potential, ultimately leading to an ever closer union.

Thus, decentralised enforcement – such as the system completed by the ECN+ – can work and ultimately contribute to an ever closer union thereby shaping the future of Europe. But only where a couple of preconditions are met and all NCAs are able to work to their full potential. Only then it can serve as a role-model for other areas, too, contributing to more effectiveness and deeper integration while at the same time leaving room for national peculiarities and being well-prepared for future challenges.





## ARTICLES

### SHAPING THE FUTURE OF EUROPE – SECOND PART

edited by Sandra Hummelbrunner, Lando Kirchmair, Benedikt Pirker, Anne-Carlijn Prickartz and Isabel Staudinger

## RESHAPING THE FUTURE OF EUROPE WITH COMPLEMENTARY CURRENCIES

CHRISTIAN GELLERI\*

TABLE OF CONTENTS: I. The phenomenon of complementary currencies. – II. The bigger picture: the eurozone. – III. Legal status of complementary currencies in Germany. – IV. Societal challenges. – V. Collective design of money. – VI. Oligarchical and democratic ways of creating money. – VII. Conclusion.

ABSTRACT: For several decades, the phenomenon of complementary currencies has been emerging without the law having taken much notice. Only with the emergence of the first virtual currencies have there been serious discussions on this topic. The motives of the initiators and groups are very different. Is it about maximising profits or about ecological, social and cultural goals? The author advocates the integration of complementary currencies that have actively contributed to societal problems into the legal framework of the European Union.

KEYWORDS: complementary currencies – money – eurozone – Chiemgauer – Sardex – virtual currencies.

### I. THE PHENOMENON OF COMPLEMENTARY CURRENCIES

People starting complementary currencies think of money as a tool<sup>1</sup> and are concerned with issues such as unemployment, environmental degradation, poverty, inequality, discrimination and so on. There are many theories about money and experts who campaign for the concept of complementary monetary institutions.

Before inventing the Chiemgauer, there was a year-long analysis of many different ideas, not only on local levels but also on proposals for changing money and finance on the national level. Back in the 1990s, there was only scant economic literature on complementary currencies, but some literature about barter systems describe a “special purpose

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<sup>1</sup> M Kennedy, B Lietaer and J Rogers, *People Money: The Promise of Regional Currencies* (Axminster Triarchy Press 2012).



money”.<sup>2</sup> However, the arguments remain purely economic, neglecting the social dimension, e.g., enhancing trade between businesses and being subject to high transaction costs within an unstable economic system, as was the case in Russia and Ukraine in 1997.<sup>3</sup>

A broader perspective on complementary currencies came with the turn of the millennium writings about “complementary currencies”.<sup>4</sup> One of the leading researchers on complementary currencies, Bernard Lietaer, defines complementary currencies as an agreement within a community to use an additional currency as a means of exchange,<sup>5</sup> but it is only complementary because it is not meant to replace the national currency system.

There is a wide range of different types of complementary currencies in Europe.<sup>6</sup> With the help of complementary currencies and their counter-cyclical effect on the relevant regions,<sup>7</sup> inequalities between regions within the eurozone could be harmonized.<sup>8</sup> A significant example can be found in Sardinia with the Sardex initiative. More than 4.000 businesses built a network to assist each other with a mutual-credit currency.<sup>9</sup> The companies pay one another with interest-free credits, which are only valid within the network, and the limits are also set by the network provider representing the companies as an institution. As a result, the more credits in euros are constrained, the more Sardex loans are used for expenses, resulting in every business having an additional turnover of about 10.000 euros on average.

In times of recessions and crisis, the complementary currencies could help to make up extra income by using the existing, not fully utilized infrastructure. Even though the counter-cyclical effects are not the only potential of these kind of monetary tools, there are also convincing arguments to establish complementary currencies in stable times to enhance the economy and transform it into one with greater sustainability, social justice and resilience.<sup>10</sup>

Another example is the Chiemgauer, a currency located between Munich, Germany and Salzburg, Austria. Its aim is to promote local business cycles based on sustainable

<sup>2</sup> K Polanyi, ‘The Economy as Instituted Process’ in K Polanyi, CM Arensberg and HW Pearson (eds), *Trade and Market in the Early Empires. Economies in History and Theory* (Free Press 1957) 243 ff.; C Schneider, *Barter-Clubs – Chancen und Probleme: Eine Theoretische und Empirische Analyse* (Berlin Duncker and Humblot 1995).

<sup>3</sup> D Marini and M Schnitzer, ‘The Economic Institution of International Barter’ (2003) *The Economic Journal* 293.

<sup>4</sup> M Kennedy and BA Lietaer, *Regionalwährungen: Neue Wege zu Nachhaltigem Wohlstand* (Riemann 2004); BA Lietaer, *Das Geld der Zukunft: Über die Destruktive Wirkung des Existierenden Geldsystems und die Entwicklung von Komplementärwährungen* (Riemann 1999).

<sup>5</sup> BA Lietaer, *Regionalwährungen* cit. 282.

<sup>6</sup> C Gelleri, ‘The Phenomenon of Complementary Currencies’ (1 July 2020) *Just Money* [justmoney.org](http://justmoney.org).

<sup>7</sup> J Stodder and BA Lietaer, ‘The Macro-Stability of Swiss WIR-Bank Credits: Balance, Velocity, and Leverage’ (2016) *Comparative Economic Studies* 570 ff.

<sup>8</sup> C Gelleri, ‘Regionalwährungen Parallel zum Euro?’ (2019) *Fairconomy* 12 ff.

<sup>9</sup> L Sartori and P Dini, ‘From Complementary Currency to Institution: A Micro-Macro Study of the Sardex Mutual Credit System’ (2016) *Stato e Mercato* 273 ff.

<sup>10</sup> BA Lietaer, C Arnsperger, S Goerner and S Brunnhuber, *Money and Sustainability: The Missing Link* (Triarchy Press 2012).

supply chains. A large share of the exchange costs for businesses is given to non-profit-organizations to invest in education, environment protection and culture. A similar project has also been established in Bayonne, France, where the local authority supports a complementary currency called the Eusko to promote local businesses, resulting in more than 900 businesses accepting the Eusko.

All three currencies work with electronic payment systems and two of them issue paper currencies.

Because of the rise of hundreds of complementary currencies all over Europe, we need to take a closer look at the question if complementary currencies that are useful for society as a whole and their relationship to laws and legal science.

## II. THE BIGGER PICTURE: THE EUROZONE

Complementary currencies are embedded in the legal structure of the European Union. The beginning of the euro started in the confirmation of the aim of an Economic and Monetary Union in 1988 and in the following order for the European Council to plan the steps for a European Monetary Union.<sup>11</sup> The euro started as an electronic currency in 1999, and the European Monetary Institute (EMI) was renamed as the European Central Bank. Eleven countries fulfilled the conditions of the Maastricht Treaty and the related legal documents. A design series of the “euro” was presented in 1996 and officially launched in 2002.

Only one year before the introduction of the euro, Greece was given the green light to take part as well. The decision process for establishing the euro was tested before the courts many times,<sup>12</sup> but the European Court of Justice rejected the objections. National courts followed the decisions in the main.

Art. 128(1) TFEU defines the euro banknote as legal tender. But not all countries of the European Union delegated the sovereignty of money issuance to the European Central Bank. Sweden and Denmark for example, provide their own national currency, while they are not allowed to issue euro notes. That alone is a reference to the pluralism that our official monetary system in Europe is all about. In addition, there is an enormous variety of payment institutions and means of payment. Countries taking part in the euro-zone had to accept additional rules for their country.<sup>13</sup> Germany has accepted the rules and has changed its basic law (“Grundgesetz”) in art. 88 to allow the transfer of their money policy to the European System of Central Banks. The German central bank is part of the system that issues the euro for Germany.<sup>14</sup>

<sup>11</sup> PR Krugman and M Obstfeld, *Internationale Wirtschaft. Theorie und Politik der Aussenwirtschaft* (Pearson 2004) 773.

<sup>12</sup> HJ Hahn and U Häde, *Währungsrecht* (Beck 2010).

<sup>13</sup> *Ibid.* 116 ff.

<sup>14</sup> Para. 14 of the Bundesbank Act.

At first sight, we do not see much room for alternative currencies, but we must remember the fundamental principle of the European Union of striking a balance between harmonisation and subsidiarity. “The potential for more variation is inherent in the current set-up of the euro. It is, as it were, the ‘flip side’ of the Member States’ own responsibility for fiscal discipline and structural reform. Variation in this sense requires different, co-existing arrangements”.<sup>15</sup> After the collapse of Lehman Bank in 2008 and the ensuing financial crisis, there was a committed discussion about whether states particularly affected by strong economic downturns could help themselves with national parallel currencies in the sense of subsidiarity.<sup>16</sup> In the wake of the Covid-19 pandemic, the debate has rekindled.

Some legal scholars go so far as to classify monetary instruments such as the mini-bots discussed in Italy as a possible form of coexistence: “In this perspective, the mini-BOTs could be conceived as a fiscal policy device to implement article 4 of the Directive 2011/7/EU on late payment in commercial transactions”.<sup>17</sup>

Before experiments with dual monetary approaches are tested at the national level, would regional institutional experiments perhaps be a preferred option for money researchers and money practitioners to make friends with?

### III. LEGAL STATUS OF COMPLEMENTARY CURRENCIES IN GERMANY

Every country created its own laws to regulate the conditions of issuing legal tender and for the financial institutions that issue deposit money and e-money in euro as units of account or deal with money in general. But what about currencies with another unit of account? Some laws are an expression of the fights among the national, state and local initiatives that tried to issue local barter systems or local currencies.<sup>18</sup> The relationship between these old laws and modern local and current virtual currencies remains unsettled.<sup>19</sup> Para. 35 of the Bundesbank Act forbids issuing money aside from legal tender:

“Unauthorised uttering and use of monetary tokens

(1) A term of imprisonment not exceeding five years or a fine will be imposed on anybody who

1. utters without authority monetary tokens (stamps, coins, notes or other instruments capable of being used in payments in place of the coins or banknotes authorised by law)

<sup>15</sup> E Hirsch Ballin, E Ćerimović, H Dijkstra and M Segers, *European Variations as a Key to Cooperation* (Springer 2010) 110.

<sup>16</sup> C Gelleri and T Mayer, ‘Express Money – Avoiding the Eurozone Breakup’ (1 February 2012) [www.eurorettung.org](http://www.eurorettung.org).

<sup>17</sup> AJ Menéndez and M Goldoni, ‘Mini-BOTs, Complementary Currencies and the European Monetary Malaise’ (21 June 2019) [verfassungsblog.verfassungsblog.de](http://verfassungsblog.verfassungsblog.de).

<sup>18</sup> K Hardraht and H Godschalk, ‘Komplementärwährungsgutachten: Erstellt im Auftrag der Sparkasse Delitsch-Eilenburg’ (30 March 2004) [monneta.org](http://monneta.org).

<sup>19</sup> M Sademach, *Regionalwährungen in Deutschland: Strategie, Hintergrund und Rechtliche Bewertung* (Nomos Verlag 2012).



or non-interest-bearing bearer debt securities, even if they are not denominated in Deutsche Mark;

2. uses for payments objects of the type specified in number 1 above that have been uttered without authority”.

The roots of the ban go back to the 1930s. But in some cases, barter systems as well as local currencies are tolerated.<sup>20</sup> In one case, a local paper currency – the “Dreyecker” – was examined by a prosecutor. The office of the public prosecutor asked the German Central Bank for valuation of the currency. It answered with a reference to a study of the *Bundesbank* that said that local currencies in Germany are limited in terms of time and geographical extent. As a conclusion, the study assumed that local currencies in Germany are too small to cause inflation and no threat to the euro.<sup>21</sup>

Moreover, the *Bundesbank* gave a guideline for issuing vouchers and did not demand the collection of the issued local currency. The prosecutor argued the issuers of the Dreyecker have not violated law because the local voucher system is not able to replace the euro. It cannot be qualified as “monetary token”. This shows that it depends strongly on the interpretation of the law by authorities and courts, which are embedded in a certain history and social context. In the 1930s, central banks in Germany, Austria and other countries actively pursued attempts to issue local currencies and barter systems. At the same time the central banks were given a monopoly on the issuance of state banknotes. With the beginning of the new millennium, in the euro zone are apparently unwilling to apply the national laws to current projects.

The European Union responded with their directives on the development and emergence of local currencies. It defined exceptions from supervisory law in art. 3 such as paper vouchers.<sup>22</sup> The *Bundesbank* tends to see local currencies as “vouchers”. There are court decisions defining only money as legal tender and clearly distinguishing it from private forms of exchange such as bitcoin, local currencies and others.<sup>23</sup> Conversely, this means that local currencies are currently not under the supervision of banking authorities.

When currencies are dealt with in euros, then laws of money market trading, money laundering and others must be taken into consideration. Recently, the emergence of cryptocurrencies has widened the discussion. The adoption of the laws on virtual currencies proves to be difficult, and there are many discussions about more regulations on

<sup>20</sup> German Federal Court (BGH) judgment of 5 November 1998 III ZR 95/97; M Casper and M Terlau (eds), *Zahlungsdienstenaufsichtsgesetz (ZAG): Das Aufsichtsrecht des Zahlungsverkehrs und des E-Geldes* (Beck 2018).

<sup>21</sup> G Rösl, *Regionalwährungen in Deutschland: Lokale Konkurrenz für den Euro?* (Deutsche Bundesbank 2006).

<sup>22</sup> Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.

<sup>23</sup> Chamber Court Berlin decision of 25 September 2018 *BaFin v Bart van Kersavond*.

alternative currencies.<sup>24</sup> There is an ongoing discussion process to regulate stable coins in the European Union and Germany.<sup>25</sup> It is unclear if and how reserve-backed local currencies such as the Chiemgauer will be affected.

#### IV. SOCIETAL CHALLENGES

Big challenges such as climate change and the deepening social and regional inequalities lead to some openness towards a new culture of communication between the state and civil society to meet the key challenges of the century. The variety of proposals and the practical implementation of complementary currencies suggest that national currencies cannot provide a *one-size-fits-all solution*. This impression has intensified with the beginning of the Covid-19 pandemic. The European Union fosters competition in payment innovations<sup>26</sup> and even promotes complementary currencies in some regions of the eurozone.

In Sardinia, the Sardex increases the liquidity of companies and thus initiates independent regional cycles. In Catalonia as well as in Bayonne, regional currencies link purchasing power to the region. In Chiemgau, the economy is well utilised and more attention is paid to channelling the money into more sustainable cycles and generating gift money for communities. In Ghent, Belgium, ecological problems are tackled with a complementary currency. Money in the eurozone serves as an individual solution in many thousands of places, without compromising official monetary policy. All examples are embedded in the local cultural environment. It is not the economic motives that dominate, but community goals. Through their close links to societal challenges, these types of currencies can be identified as “social innovation”, characterised by an active contribution to society and by a non-profit-orientation.<sup>27</sup>

#### V. COLLECTIVE DESIGN OF MONEY

Time after time, individuals have been inspired by ideals like equality, liberty and fraternity and tried to implement them into a monetary design. In former times, monetary design was seldom a democratic process but a decision by one or some powerful persons, such as a queen or king, or more often a local ruler who organized a local market and a suitable money system. The decisions helped secure the interests of the ruling class. The focus was on securing power. David Graeber describes the issuance of coins as the result

<sup>24</sup> O Read and K Gräslund, ‘EU-Regulierung von Bitcoin und Anderen Virtuellen Währungen: Erste Schritte’ (2018) Wirtschaftsdienst 504 ff.

<sup>25</sup> German Federal Parliament, Drucksache 19/20839 of 6 July 2020, Schaffung eines EU-Rechtsrahmens für Kryptoassets und Stablecoins.

<sup>26</sup> Directive 2015/2366 cit.

<sup>27</sup> C Gelleri, ‘Komplementärwährungen und Monetäre Werkzeuge als Soziale Innovation’ in HW Franz, G Beck, D Compagna, P Dürr, W Gehra and M Wegner (eds), *Nachhaltig Leben und Wirtschaften* (Springer 2020) 157 ff.

of paying soldiers for their services who had no possibility of spending the money at home. With their wages, the soldiers could always shop where they were stationed. Markets emerged at the occupation sites where the soldiers spent their coins. The recipients used the money for the supra-regional exchange and paid their taxes in the currency of the occupying power.<sup>28</sup> The process of creating money was often linked with religious or military motives in medieval and early modern times.<sup>29</sup> Totally different from this tale of the origin of money are local exchange systems that emerged in many local communities all over the world. A common example is the tally-stick that was broken into two pieces, one for the debtor and one for the creditor. When the debtor paid his duty to the creditor, he got back the other part of the tally-stick. It was sufficient for a village to use this accounting system for the exchange of goods and services. It was not possible for one person not to pay the debt without attracting attention. Until the 18<sup>th</sup> century, money was not a separate good but closely linked to the culture of the communities and often the non-commercial motives of the issuers.<sup>30</sup>

At the turn of the first millennium, Chiemgau money was issued by the archbishop of Salzburg<sup>31</sup> and its domination ended only in 1803. The issuance was mostly of divisional coins which represented more than the bullion value and expressed the power of the ruler and the trust of the public in the stability of the coinage system.

With the beginning of the so called “modern time”, banking systems evolved more and more. The money creation by banks is strongly intertwined with the state. It is like a “franchise system” where the state defines the basic rules and the conditions but delegates the issuing of bank money, which is accepted as official currency.<sup>32</sup> This system dominates today with a “market share” of nearly 100 per cent. Christine Desan shows in her studies how this form of collective design of money evolved in a hard-fought political process.<sup>33</sup> This monetary system has been associated with profound crises over the centuries and, above all, in recent decades. This is attributed to the pro-cyclical behaviour of money creation by the banks. Therefore, many people have scrutinized the right of banks to create money out of nothing. It is a question of democratic legitimacy and not just about a value-stable money and the efficient operation of the financial system.<sup>34</sup> It is about the objectives of a society and the contribution of the money system to their fulfilment.

The advantage of small alternative currencies is their limited risk in experimenting with the best design to fulfil the goals. The first step in the process of designing each currency is to activate and engage people in defining common goals. A small currency

<sup>28</sup> D Graeber, *Debt: The First 5,000 years* (Melville House 2011).

<sup>29</sup> BA Liettaer, *Mysterium Geld: Emotionale Bedeutung und Wirkungsweise Eines* (Riemann 2000).

<sup>30</sup> K Polanyi, *The Great Transformation* (Beacon Press 2001).

<sup>31</sup> Archbishop Hartwig obtained the right from the German emperor Otto III in 996.

<sup>32</sup> RC Hockett and ST Omarova, ‘The Finance Franchise’ (2017) Cornell Law Review 1144 ff.

<sup>33</sup> C Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* (Oxford University Press 2014).

<sup>34</sup> K Armingeon, K Guthmann and D Weisstanner, ‘How the Euro Divides the Union: The Effect of Economic Adjustment on Support for Democracy in Europe’ (2015) Socio-Economic Review 506 ff.

can make this process more visible. The assembly of Chiemgauer organization discussed the goals and designs of “their” currency a lot. Members form a public discourse space and decide on the reciprocal rules that ensure their implementation. Dewey already identifies this formation of associative communities and relates them to the ideals of the society (“Great Society”). The joint activities of the group transform the society into a community (“Great Community”). “A community thus presents an order of energies transmuted into one of meanings which are appreciated and mutually referred by each to every other on the part of those engaged in combined action”.<sup>35</sup>

Blanc distinguishes between three types of money: “public”, “business” and “associative” and assigns the Chiemgauer to the last type: “The type ‘associative money’ relates to the construction of schemes by groups of people who voluntarily associate for the purpose of collective utility. The focus is put on the particular way these moneys are designed and implemented: the association is considered here as a general way of assembling people around common projects, distinct from resource-seeking motives of business money or instituted political control of public money”.<sup>36</sup> The democratic quality depends on constitutional aspects; in fact, societies engineer money rather than discover it.<sup>37</sup> It is an unusual perspective to look at money as a common good that has to be democratic. For complementary currencies, the democratic decision process is a key to understanding. This comes before the application of a monetary theory. Of course, it might not always be a conscious process of development, and sometimes only a few people may be involved in the development of the core design; but everybody has the potential to take part in the process if she or he desires. At this point, the types “public” and “associative” are similar. Both come about through democratic procedures but differ in the fact that the official monetary system is created through representative democracy procedures and is decoupled from the democratic rules in a one-off act as an institution.<sup>38</sup> Associative monetary institutions, on the other hand, have a direct relationship with their members. They can experience financial citizenship in small and decentralized networks, which are usually characterized by physical proximity and locality. “The local is the ultimate universal, and as near an absolute as exists. It is easy to point to many signs which indicate that unconscious agencies as well as deliberate planning are making for such an enrichment of the experience of local communities as will conduce to render them genuine centers of the attention, interest and devotion for their constituent members”.<sup>39</sup>

<sup>35</sup> J Dewey, *The Public and Its Problems* (Ohio University Press 2016) 179.

<sup>36</sup> J Blanc, ‘Making Sense of the Plurality of Money: A Polanyian Attempt’ in G Gómez (ed.), *Monetary Plurality in Local, Regional and Global Economies* (Taylor and Francis 2019) 55.

<sup>37</sup> C Desan, ‘Constitutional Approach to Money’ in N Bandelj, FF Wherry and VAR Zelizer (eds), *Money Talks: Explaining How Money Really Works* (Princeton University Press 2017) 112.

<sup>38</sup> P Tucker, *Unelected Power. The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton University Press 2018).

<sup>39</sup> J Dewey, *The Public and Its Problems* cit. 230.

A second common basis for complementary currencies is the equal consideration of common needs and challenges of the involved people. This is the foundation for the formulation of the objectives. The people want to provide themselves with goods and services and avoid a dependence on external financial services and loans.

In history, there was a similar movement initiated by Robert Owen. He understood economics as a part of society and tried to reconcile democracy and the economy by establishing cooperatives. By working for the community without the intention of maximizing profits, the vision of a humane world of work was to become a reality. At that time, a separate working currency was also used, which was based on time.<sup>40</sup> Money should not bear interest and should serve fair exchange. Companies should be owned by both workers and entrepreneurs. It was a mass movement that believed that society could be creative from bottom-up.<sup>41</sup> Many institutions such as cooperative banks and trade unions as well as complementary currencies were inspired by the practical and theoretical work of Owen.

At the beginning of the 21<sup>st</sup> century, there was no depression scenario in the Chiemgau, but there were still perceptions of problems and challenges. At the micro level, a school felt the lack of a sports hall. The students suffered under these circumstances and were delighted to create a system for contributions (solution). They asked businesses and parents to take part in the complementary currency scheme, and so it all started. The students recognized the interdependent play of actors and used their social relationships to institutionalize them in the form of a complementary currency through collaboration and trust. The students faced some issues with businesses and non-profit organizations like their own school. One example was the fear of “printing money” and the potential consequences of maybe getting into greater trouble. It took a long time to turn curiosity into trust. Annelise Riles describes the process as the development of a legitimacy narrative that is not only a task for a central bank<sup>42</sup> but also for the issuer of a complementary currency.

The combination of a problem and a problem-solving democratic process leads to a money design that brings people into a connected network with rules and institutions. The rules, institutions and effects can and should be subject to research.<sup>43</sup> Economists

<sup>40</sup> MS Cato, *Green Economics: An Introduction to Theory, Policy and Practice* (Earthscan 2009) 72.

<sup>41</sup> K Polanyi, *The Great Transformation* cit. 133.

<sup>42</sup> A Riles, *Financial Citizenship: Experts, Publics, and the Politics of Central Banking* (Cornell University Press 2018) 48.

<sup>43</sup> C Thiel, *Das “Bessere” Geld: Eine Ethnographische Studie über Regionalwährungen* (Springer 2011); F Ziegler, *Konzept, Umsetzung und Akzeptanz einer Regionalwährung am Beispiel des “Chiemgauer”: Eine Untersuchung aus Unternehmer- und Verbrauchersicht* (Master thesis, Universität Passau 2009); S Bode, *Potentiale Regionaler Komplementärwährungen zur Förderung einer Endogenen Regionalentwicklung* (Master thesis, Universität Osnabrück 2004).

concentrate on the effects and say that what works for the people is good for democracy.<sup>44</sup> I would add to this: the journey is the reward. When people using community currencies can experience basic democratic principles, not only by using money but also by designing money, it enriches a democracy as a whole.<sup>45</sup> On the contrary, concentrating the money creation processes in oligarchical systems impoverishes a democracy.

## VI. OLIGARCHICAL AND DEMOCRATIC WAYS OF CREATING MONEY

The history of money creation can be seen as an interplay between oligarchical and democratic processes. When we look at the proposals of Facebook and the Libra Association, we find a globalized renewal of an oligarchical type of money.

The idea of the Libra goes back to Hayek's idea of a private currency that is covered by a stable currency basket.<sup>46</sup> It is comparable to the special drawing rights of the International Monetary Fund (IMF) that represents a currency basket of five national currencies (US dollar, euro, yen, Chinese yuan, British pound and Swiss franc). The Libra currency could have a similar basket, but the Libra Association intends to buy government bonds so they can earn additional interest. In that case, the disadvantage would be that a sell-off of the Libra currency could cause a shortage of liquidity at the Libra Foundation, and owners of Libra may risk losing value.<sup>47</sup>

Another issue that arises is that the interest is not given to the owners of the Libra currency but to the shareholders of the Libra Association. However, you can only become a shareholder in the Libra Association when you invest at least 10 million dollars. This hurdle is quite high and excludes more than 99 per cent of humanity from being shareholders. Bofinger calls the idea an "enrichment program".<sup>48</sup> We must see clearly that this has nothing to do with "democracy", "sustainability" or "fairness" and in the long run also with "freedom" and "stability". Democracy is not the power of an oligarchical elite but the power of all people in a community. Even the interim change of mechanisms and the project name of Libra in Diem does not change this.

## VII. CONCLUSION

The main issue is that the existing financial system in Europe, and also in Germany, is being confronted with a deepening inequality in wealth.<sup>49</sup> According to legal experts, the

<sup>44</sup> F Jung and U Sunde, 'Income, Inequality, and the Stability of Democracy: Another Look at the Lipset Hypothesis' (2014) *European Journal of Political Economy* 52 ff.

<sup>45</sup> A Riles, *Financial Citizenship* cit. 52.

<sup>46</sup> FA von Hayek, *Denationalisation of Money: The Argument Refined; An Analysis of the Theory and Practice of Concurrent Currencies* (The Institute of Economic Affairs 1990).

<sup>47</sup> P Bofinger, 'Damit Macht Facebook Sich Keine Freunde' (23 July 2019) IPG [www.ipg-journal.de](http://www.ipg-journal.de).

<sup>48</sup> *Ibid.*

<sup>49</sup> J Beckert, 'Wie viel Erbschaftssteuern?' (MPIfG Working Paper 04-2007) 5.

state is obliged to harmonize inequality,<sup>50</sup> but the micro-practices of capitalism are very often contradictory to the principles as stated, for example, in the basic law of Germany.<sup>51</sup> A complementary currency that is democratically constituted is based on the basic political principles of the society. In this context, complementary currency initiatives can be seen as experiments to find pathways for more congruence among societal, economic and ecological spheres.

In light of the recent judgment on the European Central Bank's bond-buying programme,<sup>52</sup> it is appropriate to widen up the perspective on monetary policy. Different perspectives are needed to harmonise imbalances in the eurozone. In the spirit of Robert Owen, institutional experiments would be possible as public citizenship partnerships, *i.e.*, forms of cooperation whereby citizens work with the state through cooperatives and non-profit associations to overcome social challenges. "The resulting cooperative relationships between central banks and complementary currency experiments would have the potential of opening up space and opportunities, not only for government politics, but for ever more institutional experiments to democratize society".<sup>53</sup>

France was the first country in the eurozone to create a legal framework for social enterprises. Local currencies have been expressly authorised when issued by institutions of the social and solidarity economy (SSE).<sup>54</sup>

The OECD writes about the law: "Indeed, several studies have demonstrated the resilience of social enterprises in the wake of the economic and social crisis of the early 21st century, thanks to their emphasis on social values, as well as their local roots and capacity to seed different fields of activity".<sup>55</sup>

When we think of shaping the future of Europe, we should not only fight against problems such as the concentration of economic power in the hands of a few, but we also have to imagine and implement alternatives. Complementary currencies could contribute as one piece in a diverse and pluralistic network of solutions.

<sup>50</sup> D Suhr, 'Gleiche Freiheit: Allgemeine Grundlagen und Reziprozitätsdefizite in der Geldwirtschaft' (1988) *Fragen der Freiheit* 5.

<sup>51</sup> *Ibid.* 8.

<sup>52</sup> German Federal Constitutional Court judgment of 5 May 2020 2 BvR 859/15; 2 BvR 1651/15; 2 BvR 2006/15; BvR 980/16.

<sup>53</sup> I Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment or Impetus for the Democratization of Europe' (2020) *German Law Journal* 1090.

<sup>54</sup> République Française, *Loi no. 2014-856 du 31 juillet relative à l'économie sociale et solidaire* in *Journal Officiel Lois et Décrets*, 2014/176, 1 August 2014 42.

<sup>55</sup> OECD, 'The Law on the Social and Solidarity Economy (SSE)' (2017) 102.







## ARTICLES

### SHAPING THE FUTURE OF EUROPE – SECOND PART

*edited by Sandra Hummelbrunner, Lando Kirchmair, Benedikt Pirker, Anne-Carlijn Prickartz and Isabel Staudinger*

## SHAPING THE FUTURE TOWARDS A SOLIDARY REFUGEE RESETTLEMENT IN THE EUROPEAN UNION

JANINE PRANTL\*

TABLE OF CONTENTS: I. Introduction. – II. The concept of refugee resettlement. – III. A Union based on solidarity and fair responsibility sharing? – IV. The EU can spur global refugee resettlement. – IV.1. The EU's competence to adopt legislation in the field of refugee resettlement. – IV.2. The EU can support but not replace EUMS' administration. – IV.3. The adoption of procedural rules that apply outside EU territory. – IV.4. The legal basis for a Union Resettlement Framework Regulation. – V. The US centralized and permanent resettlement framework. – VI. Failed attempts of solidarity and responsibility sharing in the EU. – VII. Conclusion.

ABSTRACT: Against the background of divergent resettlement policies of Member States of the European Union, the principle of solidarity and responsibility sharing has not been effectively realized in this field. Despite standardization efforts of the United Nations High Commissioner for Refugees, the resettlement process lacks clear binding rules. So far, the EU has developed a common asylum policy rather than a common refugee policy, whereas resettlement forms part of the latter. One challenge consists of defining and consenting on a common EU resettlement framework, which is based on solidarity and responsibility sharing and adheres to international protection obligations. Looking at the US, the 1980 Refugee Act frames a permanent resettlement program, which is attributed to the federal government. Under this framework, the US has conducted extraterritorial selection of resettlement refugees for decades. This contribution argues that the US resettlement experience provides lessons to be learned for the expansion of EU governance in resettlement and establishment of a future EU resettlement framework.

KEYWORDS: solidarity – responsibility sharing – refugee resettlement – refugee policy – US – federalism.

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## I. INTRODUCTION

When Jean-Claude Juncker ran for the presidency of the former European Commission (Commission) in May 2014, he recalled from his experience “that Europe will need more solidarity”. His vision was “a prosperous continent that will always be open for those in need”.<sup>1</sup> In this light, resettlement constitutes an instrument of international solidarity. By offering resettlement, Member States of the European Union (EUMS) express solidarity towards persons in need and overburdened countries of (first) refuge.<sup>2</sup>

When Ursula von der Leyen, President of the current Commission, expressed aspirations for a Union that strives for more, she stressed the need for a new way of *burden sharing*. Thus, von der Leyen announced to propose a New Pact on Migration and Asylum entailing commitment to resettlement.<sup>3</sup> Consequently, the Commission declared to financially support EUMS’ collective pledge of more than 30.000 resettlement places for 2020 at the first Global Refugee Forum in Geneva.<sup>4</sup> This pledge constituted a significant increase compared to 2017, when the (then) Commission complained that the pledge of 14.000 places offered by eleven EUMS in the course of the eighth resettlement and relocation forum were “not enough to contribute to a common effort to save lives and offer credible alternatives to irregular movements”.<sup>5</sup> Though, the implementation of the 2020 target has faced substantial challenges in the course of the outbreak of the Covid-19 pandemic. Several EUMS, the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) have temporarily suspended resettlement operations.<sup>6</sup> As a reaction, countries of (first) refuge have hampered refugees’ access to their territory. The Commission is alarmed that the impact of Covid-19 on countries of (first) refuge may render resettlement needs even more pressing. Against this background, it released a Communication guiding and encouraging EUMS “to continue showing solidarity with persons in need of international protection and third countries hosting large numbers of refugees”.<sup>7</sup>

So far, common efforts have taken place on a voluntary basis, whereby EUMS’ individual contributions differ. These heterogeneous responses make it difficult to objectively assess the capacity of each EUMS, and to distinguish between *inability* and *unwillingness*

<sup>1</sup> European Commission, *Migration: A Roadmap, The Commission's Contribution to the Leader's Agenda*, 1 May 2014 ec.europa.eu.

<sup>2</sup> Cf. European Commission, *Delivering on Resettlement*, December 2019 2 ec.europa.eu.

<sup>3</sup> Cf. U von der Leyen, *A Union that Strives for More: My Agenda for Europe, Political Guidelines for the Next European Commission 2019-2024* (Publications Office of the European Union 2019) 14 ff.

<sup>4</sup> Cf. European Commission, *Resettlement: EU Member States' Pledges Exceed 30,000 Places for 2020*, 18 December 2019, ec.europa.eu.

<sup>5</sup> European Parliament, *Resettlement of Refugees: EU Framework*, April 2017, www.europarl.europa.eu.

<sup>6</sup> Cf. ECRE, *UNHCR and IOM Temporarily Suspend Resettlement Travel for Refugees*, 19 March 2020, www.ecre.org.

<sup>7</sup> Communication C(2020) 2516 final of 16 April 2020 from the Commission – COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement.

to contribute. This gives rise to the question whether law can render the principle of solidarity more effective. Scholars claim that increased EU governance “would make objective assessment of calls of solidarity possible”.<sup>8</sup> Hence, introducing a legal framework at the EU level could provide avenues to access EUMS’ untapped capacities. As a first step in this direction, the Commission proposed a Union Resettlement Framework Regulation,<sup>9</sup> which is subject to ongoing negotiations.

In light of these considerations, this contribution questions whether and how EU governance can achieve a solidary resettlement Union. In doing so, the United States (US) refugee resettlement experience, which is based on (centralized) federal competence, promises to reveal *lessons to be learned*.

## II. THE CONCEPT OF REFUGEE RESETTLEMENT

Resettlement targets particularly vulnerable refugees, who have already left their home countries, seeking for asylum in a country of (first) refuge. However, in this country, the refugees have no prospect to stay because they are facing difficult conditions and serious (threats of) human rights violations. If a third country, *i.e.*, the reception country, admits some of these refugees, they are transferred to this country with prospect of lasting integration.

Refugee resettlement aims at providing a durable solution,<sup>10</sup> namely a “satisfactory situation which enables the refugee to integrate into a society”.<sup>11</sup> States are, however, not obliged to offer any durable solution to refugees.<sup>12</sup> It is rather left to their discretion whether to engage in resettlement at all. But if states then conduct resettlement, they must comply with their obligations under international law, particularly international refugee law and international and regional human rights law.<sup>13</sup> For example, in terms of international refugee law, the 1951 Convention Relating to the Status of Refugees (Refugee Convention),<sup>14</sup> applies to all refugees, notwithstanding if they arrive in an uncontrolled or, such as by means of resettlement, in a controlled manner.<sup>15</sup> Along with this

<sup>8</sup> P de Bruycker and EL Tsourdi, ‘In Search of Fairness in Responsibility Sharing’ (2016) Forced Migration Review 64.

<sup>9</sup> Commission Proposal COM(2016) 468 final for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) n. 516/2014 of the European Parliament and the Council.

<sup>10</sup> Cf. M Zieck, ‘The Limitations of Voluntary Repatriation and Resettlement of Refugees’ in V Chetail and C Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 577.

<sup>11</sup> KB Sandvik, ‘On the Social Life of International Organizations: Framing Accountability’ in J Wouters, E Brems, S Smith and P Schmitt (eds), *Accountability for Human Rights Violations* (Intersentia 2010) 296.

<sup>12</sup> Cf. M Zieck, ‘The Limitations of Voluntary Repatriation and Resettlement of Refugees’ cit. 562.

<sup>13</sup> Cf. *ibid.* 577.

<sup>14</sup> United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Convention Relating to the Status of Refugees of 28 July 1951, 189 UNTS 137-220.

<sup>15</sup> Cf. M Zieck, ‘The Limitations of Voluntary Repatriation and Resettlement of Refugees’ cit. 578.

comes the question whether the current voluntary nature of resettlement justifies that states may disregard their international protection obligations towards refugees during the resettlement conduct.<sup>16</sup>

Ensuring protection rights of refugees and pursuing durable solutions is part of the mandate of the UNHCR.<sup>17</sup> In its *Resettlement Handbook*,<sup>18</sup> the UNHCR further defined and standardized the concept and conduct of resettlement and provided the following definition:

“Resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status. The status provided ensures protection against refoulement and provides a resettled refugee and his/her family or dependents with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country”.<sup>19</sup>

As of today, differences in the understanding of resettlement have remained and the UNHCR resettlement definition is considered as soft law, which implies that it has not reached the level of binding international customary law. Nonetheless, the EU and its EUMS as well as the US have acknowledged this definition.<sup>20</sup>

The concept underlying the UNHCR definition was taken up by the Commission. Art. 2 of the Proposal for a Union Resettlement Framework Regulation stipulates that “resettlement means the admission of third-country nationals and stateless persons in need of international protection from a third country to which or within which they have been displaced to the territory of the Member States with a view to granting them international protection”.<sup>21</sup>

<sup>16</sup> Cf. T de Boer and M Zieck, ‘The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU’ (2020) *International Journal of Refugee Law* 54, 72.

<sup>17</sup> Cf. M Zieck, ‘The Limitations of Voluntary Repatriation and Resettlement of Refugees’ cit. 562.

<sup>18</sup> In 1997, the first UNHCR *Resettlement Handbook* was published. A revised version followed in 2004 and the most recent version dates to 2004. It has been recognized as a useful information tool; cf. J van Selm, P Erin and T Woroby, *Study on ‘The Feasibility of Setting up Resettlement Schemes in EU Member States or at EU Level, Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure’* (Publications Office of the European Communities 2004) 11; UNHCR, *UNHCR Resettlement Handbook* (2011) [www.unhcr.org](http://www.unhcr.org).

<sup>19</sup> UNHCR *Resettlement Handbook* cit. 3.

<sup>20</sup> Cf. A Garnier, KB Sandvik and LL Jubilut, ‘Refugee Resettlement as Humanitarian Governance: Power Dynamics’ in A Garnier, KB Sandvik and LL Jubilut (eds), *Refugee Resettlement: Power, Politics, and Humanitarian Governance* (Berghahn 2018) 7; cf. D Perrin, ‘Refugee Resettlement in the EU – 2011-2013 Report’ (2013) [EUI cadmus.eui.eu](http://EUI-cadmus.eui.eu).

<sup>21</sup> Commission Proposal COM(2016) 468 final cit.

One aspect particularly stands out when comparing the resettlement definition of the Commission with the UNHCR definition. The Commission extended the scope of beneficiaries to internally displaced persons. Albeit internally displaced persons<sup>22</sup> have not left their home countries, they may seek protection for the same reasons as Convention refugees who are – by definition – outside their home country. This means that cases of internal displacement might equally be relevant for resettlement operations. In fact, agreement on and implementation of an extended scope of resettlement beneficiaries have proven difficult because receiving states would have to offer even more places. In comparison, the US selects on the basis of a priority system, whereas priority two (“groups of special humanitarian concern to the US”) includes persons who are in their home country – but in exceptional cases only.<sup>23</sup>

Another aspect worth mentioning is that the definition proposed by the Commission does not expressly refer to permanent residence and prospect of naturalization as the UNHCR definition does. These differences regarding the time-aspect exemplify Zieck's claim that resettlement has shifted towards a temporary substitution of the country of (first) refuge “that is not capable of providing the requisite protection for another state”<sup>24</sup> rather than a permanent solution.

More recently, in its factsheet of December 2019, the Commission still refrained from indicating the permanent character of resettlement: “Resettlement means the admission of non-EU nationals in need of international protection from a non-EU country to a Member State where they are granted protection. It is a safe and legal alternative to irregular journeys and a demonstration of European solidarity with non-EU countries hosting large numbers of persons fleeing war or persecution”.<sup>25</sup>

It is nonetheless noteworthy that the Commission expressly described resettlement as a demonstration of European solidarity with overburdened countries of (first) refuge. This demonstrates that the Commission has recognized the importance of the interplay between home country, country of (first) refuge and reception country. Unburdening countries of (first) refuge by taking a share can, in turn, stabilize the situation in these countries and spur the integration of refugees there, *i.e.*, a durable solution.

The situation in the country of (first) refuge constitutes the focal point for determining the eligibility for resettlement to the US. The US legislator does not explicitly define

<sup>22</sup> The Guiding Principles on Internal Displacement of 2004 provide the normative framework for protecting and assisting internally displaced persons. Therein, such persons are defined as those “who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border”, UNHCR, OCHA Guiding Principles on International Displacement, September 2004 1, [www.unhcr.org](http://www.unhcr.org).

<sup>23</sup> Cf. G Noll and J van Selm, ‘Rediscovering Resettlement’ (2003) Migration Policy Institute Insight 15.

<sup>24</sup> M Zieck, ‘Refugees and the Right to Freedom of Movement: From Flight to Return’ (2018) Michigan Journal of International Law 105.

<sup>25</sup> European Commission, *Resettlement: EU Member States' Pledges Exceed 30,000 Places for 2020* cit. 18.

resettlement but refers to the situation where an alien is considered to be firmly resettled. Only individuals who are not firmly resettled qualify for resettlement to the US. In order to be firmly resettled, a refugee must enjoy rights and privileges under the conditions ordinarily available to other residents in the country of (first) refuge. This includes housing, employment, permission to hold property, travel documentation alongside with a right to entry or re-entry, education, public relief, or naturalization.<sup>26</sup> The criterion of firm resettlement in any other country of (first) refuge not only supports the idea of offering durable solutions to refugees, but also responds to the need of preventing and improving situations in those regularly overburdened countries, where fundamental rights of refugees are at risk. At the same token, it diminishes the number of persons who qualify for resettlement to those who have not found a durable solution yet, which at least limits the burden for potential reception countries, who, in turn, fear an overwhelming number of refugees.

These considerations show that the definition of resettlement must respond to the following core question: In whose interest is resettlement? In this light, a definition shall account for the interest of those in need, the interest of their home countries, the interest of the countries of (first) refuge and the interest of the third countries who accept the people.

### III. A UNION BASED ON SOLIDARITY AND FAIR RESPONSIBILITY SHARING?

Already in 1979, the Court of Justice characterized solidarity as a general principle of EU law, deriving from the particular nature of the (then) Communities.<sup>27</sup> There are numerous references to solidarity in EU primary law. According to art. 2 TEU, solidarity constitutes one of the common values of EUMS.<sup>28</sup> Specifically, art. 80 TFEU incorporates the principle of solidarity and responsibility sharing. Nevertheless, a precise legal definition of solidarity is missing.<sup>29</sup> The abstract notion of solidarity makes its effective implementation difficult. The issue is mirrored in the multiple facets of solidarity, namely normative (common rules), financial (compensation for overburdened states) and operational (e.g., EU agencies) solidarity.<sup>30</sup>

Notably, in addition to solidarity, art. 80 TFEU refers to “fair sharing of responsibility”, as opposed to “burden sharing”. The term “burden sharing” has been rejected in favour of “responsibility sharing” because of the problematic connotation of “burden”. Despite the sometimes synonymous usage of “burden” and “responsibility sharing”, the meaning

<sup>26</sup> Code of Federal Regulations, 1 January 2012, section 208.15 title 8, [www.govinfo.gov](http://www.govinfo.gov).

<sup>27</sup> Cf. case 128/78 *Commission v United Kingdom* ECLI:EU:C:1979:32.

<sup>28</sup> Cf. joined cases C-715/17, C-718/18 and 719/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* ECLI:EU:C:2019:917, opinion of AG Sharpston, para. 248 (emphasis as in original).

<sup>29</sup> Cf. P de Bruycker and EL Tsourdi, ‘In Search of Fairness in Responsibility Sharing’ cit. 64.

<sup>30</sup> Cf. P de Bruycker, ‘Towards a New European Consensus on Migration and Asylum, EU Immigration and Asylum Law and Policy’ (2 December 2019) [EUmigrationlawblog.eumigrationlawblog.eu](http://EUmigrationlawblog.eumigrationlawblog.eu).

of these terms is not exactly the same. In this context, Hathaway and Neve made the following distinction: while burden sharing refers to *contributions* by states to the protection of refugees *on another state's territory*, responsibility sharing refers to the *overall contributions* by states towards ensuring refugee protection.<sup>31</sup> Other scholars, like Zieck, attached a broader notion to international burden sharing by claiming that its intention goes beyond *ad hoc* compensation and "signifies that states would, in addition to the responsibilities they already have under international (refugee) law, be subject to an apportioning system that does not currently exist".<sup>32</sup> Actually, references to (international) burden sharing have been imprecise.<sup>33</sup> For example, conclusions of the UNHCR Executive Committee<sup>34</sup> mentioned burden sharing in the context of (financial) assistance to cope with mass influxes but they have not pointed to any permanent burden sharing mechanism. Indeed, while asylum is "supported by a relatively strong legal sub-regime", burden sharing mechanisms are hardly governed by "norms, rules or decision-making procedures".<sup>35</sup> In the same vein, Kritzman-Amir observed a lack of a specific, clearly determined mechanism for responsibility sharing in international law.<sup>36</sup> The Refugee Convention does not include burden or responsibility sharing in its operative part. A mere reference in the preamble<sup>37</sup> and a recommendation in the Final Act of the Conference adopting the

<sup>31</sup> Cf. JC Hathaway and A Neve, 'Making International Refugee Law Relevant Again: A Proposal of Collectivized and Solution-Orientated Protection' (1997) *Harvard Human Rights Journal* 144 ff.

<sup>32</sup> M Zieck, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited' (2009) *International Journal of Refugee Law* 399.

<sup>33</sup> Cf. *ibid.* 399.

<sup>34</sup> *E.g.*, UNHCR, Conclusions adopted by the Executive Committee on the International protection of refugees, 1994, n. 74 (XLV) *General lit. h*; 1997, n. 81 (XLVII) *General lit. j*; 1998, n. 85 (XLIX) *International Protection* 1998, *lit. o*; 2000, n. 89 (LI) *General*; 2001 n. 90 (LII) *General lit. f*; 2003, n. 95 (LIV), *General lit. g*; 2003 n. 98 (LIV), *Protection from Sexual Abuse and Exploitation lit. g*; 2004 n. 100 (LV), *International Cooperation and Burden and Responsibility Sharing in Mass-Influx Situations lit. b*; cf. UNHCR, Conclusions on International Protection: Adopted by the Executive Committee of the UNHCR Programme 1975-2017 (Conclusion n. 1 – 114), October 2017, UN Doc HCR/IP/3/Eng/REV. 2017, [www.refworld.org](http://www.refworld.org).

<sup>35</sup> A Betts and JF Durieux, 'Convention Plus as a Norm-Setting Exercise' (2007) *Journal of Refugee Studies* 510.

<sup>36</sup> For example, responsibility sharing is reflected in arts 55 and 56 of the Charter of the United Nations, in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States as well as in the preamble of the Refugee Convention; cf. T Kritzman-Amir, 'Not in My Backyard: on the Morality of Responsibility Sharing in Refugee Law' (2009) *Brooklyn Journal of International Law* 376.

<sup>37</sup> "Considering that the grant of asylum may place unduly heavy burdens on certain countries and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation, [...]" (emphasis as in original).

Refugee Convention<sup>38</sup> prove awareness of uneven burden.<sup>39</sup> Scholars have therefore criticized that the international refugee regime is only partially complete. International refugee law arbitrarily assigns full legal responsibility for protection to whatever state asylum-seekers are able to reach, but there is no parallel international obligation of solidarity, burden or responsibility sharing.<sup>40</sup>

With a view to solidary EU refugee resettlement, the question arises whether normative force can be attributed to the principle of solidarity and responsibility sharing. Even though art. 80 TFEU incorporates this principle in written legislation, the provision's openness leaves doubts about its legislative effectiveness. Scholars have confirmed that, as an attitude of working together, namely an obligation of means, the principle of solidarity compels EUMS to follow a specific course of action and to adopt and implement defined measures.<sup>41</sup> According to Kotzur, art. 80 TFEU includes concrete obligations to act.<sup>42</sup> Also Peers *et al.* confirmed that the principle of solidarity created a series of positive obligations, namely an obligation to adopt legal measures for the management of refugee influx.<sup>43</sup>

But what can EUMS (realistically) expect, and do they have moral obligations?<sup>44</sup> While EUMS are still disputing which number and which kind of refugees to take, already in 2016, the Visegrád group proposed flexible solidarity as an alternative to resettlement and mandatory quotas. Flexible solidarity would enable EUMS to contribute voluntarily based on their experience and potential.<sup>45</sup> In other words, it would allow EUMS to volunteer on the *how* of burden sharing and could thereby be a way out of political deadlock. Nevertheless, a cynical note lingers in flexible solidarity, *i.e.*, a legally non-enforceable scheme. For example, the experience that some EUMS, including Visegrád states, did not comply with *intra* EU relocation obligations in the past (see *infra*, section VI) underpins

<sup>38</sup> "Recommends that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement" (emphasis as in original), General Assembly, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, Recommendation D [www.unhcr.org](http://www.unhcr.org).

<sup>39</sup> Cf. M Zieck, 'Doomed to Fail from the Outset?' cit. 400.

<sup>40</sup> Cf. S Barbou des Places, 'Burden Sharing in the Field of Asylum: Legal Motivations and Implications of a Regional Approach' (EUI Working Papers 2012) 8 ff.

<sup>41</sup> H Rosenfeldt, 'The European Border and Coast Guard in Need of Solidarity: Reflections on The Scope and Limits of Article 80' in V Mitsilegas, V Moreno-Lax, and N Vavoula (eds), *Securitisating Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Brill Nijhoff 2020) 173.

<sup>42</sup> M Kotzur, 'Art. 80 TFEU' in R Geiger, D Erasmus-Khan and M Kotzur (eds), *European Union Treaties: Treaty on the European Union, Treaty on the Functioning of the European Union* (C.H. Beck/Hart 2015).

<sup>43</sup> Cf. S Peers, V Moreno-Lax, M Garlick and E Guild, *EU Immigration and Asylum Law (Text and Commentary)* (Brill Nijhoff 2015) 629.

<sup>44</sup> Cf. M Kotzur, 'Flexible Solidarity' (16 November 2016) [Völkerrechtsblog voelkerrechtsblog.org](http://voelkerrechtsblog.org).

<sup>45</sup> Cf. *ibid.*; M Nič, 'The Visegrád Group in the EU: 2016 as a Turning-Point?' (2016) European View 286 ff.; Heads of Government of the V4 Countries, Joint Statement of the Heads of Governments of the V4 Countries, 16 September 2016, 3 [euractiv.com](http://euractiv.com).



the prediction that for at least some EUMS, “flexible” could be taken to mean that they do not have to show solidarity at all. Ultimately, the interpretation of “flexible” remains a political question that cannot be answered from a legal point of view. In any case, flexible solidarity does not come without legal limits, namely where the conduct of EUMS clashes with international refugee law and human rights.<sup>46</sup>

#### IV. THE EU CAN SPUR GLOBAL REFUGEE RESETTLEMENT

The EU can only spur global refugee resettlement if EUMS have transferred competences allowing the EU to act in this field (see *infra*, section IV.1). These EU competences may, however, face boundaries that cannot be overcome without Treaty amendment (see *infra*, section IV.2). Furthermore, the very nature of resettlement induces that the EU may have to adopt procedural measures that apply outside EU territory. This is where the question of the extraterritorial applicability of the Charter of Fundamental Rights of the European Union (Charter) arises (see *infra*, section IV.3). Finally, the legal basis for a future Resettlement Framework Regulation needs to be clarified by the Commission (see *infra*, section IV.4).

##### IV.1. THE EU’S COMPETENCE TO ADOPT LEGISLATION IN THE FIELD OF REFUGEE RESETTLEMENT

First of all, it is necessary to reconcile the legal ground and extent of EU’s competence to make refugee policy. This, in turn, determines the potential scope of EU governance in refugee resettlement.

So far, the EU has developed a common *asylum policy* rather than a common refugee policy.<sup>47</sup> Asylum policy generally constitutes an internal matter of a state, assigned to the regulatory area of Justice and Home Affairs.<sup>48</sup> Refugee policy, in contrast, “encompasses a broader view of international or foreign affairs”.<sup>49</sup> It comprises extended protection tools, such as resettlement and humanitarian admission.<sup>50</sup>

EU primary law does not discuss a common refugee policy at all. Art. 78 TFEU (only) proclaims the development of a “common policy on asylum, subsidiary protection and temporary protection”. Hence, for systematic reasons, refugee resettlement in the EU law

<sup>46</sup> Cf. M Kotzur, ‘Flexible Solidarity’ cit.

<sup>47</sup> Cf. J van Selm, ‘European Refugee Policy: Is There Such a Thing?’ (UNHCR Working Papers 115-2005) [www.unhcr.org](http://www.unhcr.org).

<sup>48</sup> Cf. *ibid.* 2.

<sup>49</sup> *Ibid.* 2.

<sup>50</sup> Cf. *ibid.* 1.

context has been allocated to the external dimension of the Common EU Asylum System (CEAS).<sup>51</sup>

Since the Treaty of Amsterdam, asylum policy has been communitarized at the EU-level.<sup>52</sup> The EU institutions, including the European Parliament, are called upon to intervene in the asylum policy of EUMS. Still, asylum policy constitutes a *shared competence*.<sup>53</sup> Consequently, the EU legislator must limit its actions to initiatives that cannot be sufficiently achieved at the national level. In terms of regulatory intensity, EU actions must not exceed what is necessary to achieve legitimate policy objectives.<sup>54</sup>

A particularity derives from art. 78(1) TFEU's reference to the Refugee Convention and other relevant treaties. This reference entails that measures adopted by the EU legislator must adhere to the Refugee Convention, although the EU itself is not a contracting party to that Convention.<sup>55</sup> Specifically, the Court of Justice has clarified that art. 78(1) TFEU and art. 18 of the Charter (right to asylum) require the EU to "observe"<sup>56</sup> the rules of the Refugee Convention. The Court has jurisdiction to examine the validity of EU secondary law in light of art. 78(1) TFEU and art. 18 of the Charter. In doing so, the Court is competent to verify whether provisions of secondary law can be interpreted in line with the level of protection guaranteed by the rules of the Refugee Convention.<sup>57</sup> From that follows that a future Union Resettlement Framework Regulation could be subject to examination in light of its compliance with the Refugee Convention.

#### IV.2. THE EU CAN SUPPORT BUT NOT REPLACE EUMS' ADMINISTRATION

Art. 78(2)(d) TFEU states that the EU legislator is competent to adopt measures on common procedures "for the granting and withdrawing of uniform asylum or subsidiary protection status". Being formulated in an open manner,<sup>58</sup> this provision covers procedural rules, governing amongst others "the personal interview, the evaluation by administrative authorities or special rules for vulnerable persons together with guarantees for judicial protection".<sup>59</sup>

<sup>51</sup> Cf. K Pollet, 'A Common European Asylum System under Construction: Remaining Gaps, Challenges and Next Steps' in V Chetail, P de Bruycker and F Maiani (eds), *Reforming the Common European Asylum System: the New European Refugee Law* (Brill Nijhoff 2016) 88 ff.

<sup>52</sup> Cf. TJ Hutton, 'Asylum Policy in the EU: The Case for Deeper Integration' (2015) CESifo Economic Studies 613.

<sup>53</sup> Cf. art. 4(2)(j) TFEU.

<sup>54</sup> Cf. K Hailbronner and D Thym, 'Art. 78 TFEU' in K Hailbronner and D Thym (eds), *EU Immigration and Asylum Law: a Commentary* (C.H. Beck, Hart, Nomos 2016) 1030 para 12.

<sup>55</sup> Cf. case C-175/08 *Salahadin Abdulla and Others* ECLI:EU:C:2010:105 para. 51.

<sup>56</sup> Joined cases C-391/16, C-77/17, C-78/17 *M (Revocation of refugee status)* ECLI:EU:C:2019:403 para. 74.

<sup>57</sup> Cf. *ibid.* para. 75.

<sup>58</sup> "[C]ommon procedures for the granting and withdrawing of uniform asylum or subsidiary protection status".

<sup>59</sup> K Hailbronner and D Thym, 'Art. 78 TFEU' cit. 1036 para. 25.

It clearly derives from the wording of art. 78(2)(d) TFEU that this article serves as a legal basis to establish *common* procedures conducted by EUMS, as opposed to *centralized* EU processing solely conducted by EU institutions or agencies. Centralized EU assessment of claims for international protection requires that this competence – which presently lies with EUMS – is transferred to the EU level.<sup>60</sup> From this follows that for constitutional reasons, EUMS' asylum administration cannot be replaced by EU level administration without Treaty amendment in line with art. 48 TEU.<sup>61</sup>

Still, the EU can “sponsor the effective application of the EU asylum *acquis*”.<sup>62</sup> Art. 78(2)(d) TFEU enables support of transnational cooperation among EUMS, including the expansion of the European Asylum Support Office (EASO),<sup>63</sup> *i.e.*, the EU agency tasked to assist in resettlement matters.<sup>64</sup> In fact, the Commission has already proposed to better equip EASO and extend its mandate to an EU Agency for Asylum with new competences, such as the examination of claims.<sup>65</sup> But are there constitutional boundaries against empowering a future EU Agency for Asylum to take the lead in conducting eligibility interviews, preparing and eventually deciding upon resettlement cases?<sup>66</sup>

Case-law of the Court of Justice provides guidance if the EU legislator can vest competence into EU agencies to take binding executive decisions upon third parties.

The *Meroni* case<sup>67</sup> first dealt with this issue.<sup>68</sup> It concerned a body governed by private law, without any basis in EU law. In contrast, EU agencies are grounded in individual EU Regulations. Nonetheless, they are not explicitly addressed in the EU Treaties. Hence, the

<sup>60</sup> Cf. Medam Assessment Report, Flexible Solidarity: A Comprehensive Strategy for Asylum in the EU (2018) [www.medam-migration.eu](http://www.medam-migration.eu) 31 ff.

<sup>61</sup> Cf. K Pollet, ‘A Common European Asylum System under Construction’ cit. 84 ff.; K Hailbronner and D Thym, ‘Art. 78 TFEU’ cit. 1037 para. 27.

<sup>62</sup> *Ibid.* 1037 para. 27.

<sup>63</sup> Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

<sup>64</sup> TJ Hutton, ‘Asylum Policy in the EU’ cit. 614.

<sup>65</sup> Cf. art. 21(2)(b) of the Commission Proposal COM(2016) 271 final of 4 May 2016 for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) n. 439/2010; cf. also Commission amended Proposal COM/2018/633 final of 12 September 2018 for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) n. 439/2010 A contribution from the European Commission to the Leaders’ meeting in Salzburg on 19-20 September 2018.

<sup>66</sup> Cf. J van Selm, P Erin and T Woroby, *Study on The Feasibility of Setting up Resettlement Schemes in EU Member States or at EU Level* cit. 172.

<sup>67</sup> Cf. joined cases 9/56 and 10/56 *Meroni v High Authority* ECLI:EU:C:1958:7.

<sup>68</sup> Cf. M Scholten and M van Rijsbergen, ‘The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the *Meroni-Romano Remnants*’ (2014) *Legal Issues of Economic Integration* 394; cf. for a detailed discussion on this topic A Orator, *Möglichkeiten und Grenzen der Einrichtung von Unionsagenturen* (Mohr Siebeck 2017).

*Meroni* judgment has been interpreted in such a way that EU agencies lack “discretionary or legally binding powers”.<sup>69</sup>

In the later *Romano* case, the issue arose whether the EU legislator could delegate the power to take legally binding decisions to actors other than the Commission.<sup>70</sup> Then, the Court ruled against the possibility of delegating binding decision-making powers to other actors<sup>71</sup> because the Treaty (before Lisbon) foresaw delegation of such powers only to the Commission.

Eventually, the Court of Justice departed from *Meroni* and *Romano* by adopting a more liberal approach “within the realities of the new treaties”<sup>72</sup> in *ESMA-short selling*.<sup>73</sup> The reasoning of the Court was that the competence of the EU legislator to empower EU agencies to issue acts of general application can implicitly be derived from arts 263<sup>74</sup> and 277 TFEU. These provisions ensure the reviewability of EU agencies’ decisions.<sup>75</sup> The Court further stated that in the case of the European Securities and Markets Authority (ESMA), decision-making power did not undermine the rules governing the delegation of powers, *i.e.*, arts 290 (delegated acts) and 291 TFEU (implementing acts) because the delegation provision in the *ESMA*-case aimed at upholding financial stability and market confidence within the EU, an essential objective of the EU financial system.<sup>76</sup>

Even if definite answers for EU agencies in the specific field of migration and asylum are still missing, essential requirements for a delegation, respectively conferral, of powers to EASO can be deduced from the *Meroni*-doctrine and the subsequent judgements. In essence, any delegation or conferral of powers must be based on an explicit decision of EUMS (although an explicit Treaty base is dispensable). In addition, the margin of discretion conferred by such powers must be limited in light of the principle of institutional balance, prohibiting that policy choices are fundamentally altered by an EU agency.<sup>77</sup> This restriction not to alter policy does, however, not preclude the EU legislator from equipping EASO with

<sup>69</sup> M Fernandez, ‘Multi-stakeholder Operations of Border Control Coordinated at the EU Level and the Allocation of International Responsibilities’ in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration* (Routledge 2016) 241.

<sup>70</sup> Cf. case 98/80 *Romano* ECLI:EU:C:1981:104.

<sup>71</sup> Cf. M Scholten and M van Rijsbergen, ‘The ESMA-Short Selling Case’ cit. 390.

<sup>72</sup> *Ibid.*

<sup>73</sup> Cf. case C-270/12 *United Kingdom v Parliament and Council* ECLI:EU:C:2014:18.

<sup>74</sup> “It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties”.

<sup>75</sup> Cf. *United Kingdom v Parliament and Council* cit. para. 65; M Scholten and M van Rijsbergen, ‘The ESMA-Short Selling Case’ cit. 401.

<sup>76</sup> Cf. *United Kingdom v Parliament and Council* cit. para. 85.

<sup>77</sup> Cf. J Pelkmans and M Simoncini, ‘Mellowing Meroni: How ESMA Can Help Build the Single Market’ (18 February 2014) CEPS core.ac.uk; similarly, Chamon concludes that any form of discretion that allows EU agency to alter policy choices is prohibited, M Chamon, ‘Granting Powers to EU Decentralized Agencies, Three Years Following Short-Selling’ (2018) ERA Forum 603-605.

executive discretion in the sense that EASO's decisions have the capacity to affect an individual's legal position. This was confirmed by Tsourdi who pointed out that "executive discretion to decide, for example, whether an individual fulfils criteria of the legal definition of a refugee, does not amount to the prohibited discretion of formulating policy".<sup>78</sup> Ultimately, the questions remain "what powers (and how much discretion) can be conferred upon an entity, when and how the conferral takes place (within what procedural and substantive limits) and who holds the recipients of the conferred powers to account and how".<sup>79</sup>

#### IV.3. THE ADOPTION OF PROCEDURAL RULES THAT APPLY OUTSIDE EU TERRITORY

Refugee resettlement comprises extraterritorial processing because EUMS regularly select resettlement beneficiaries outside EU territory in the country of (first) refuge. Art. 78(2)(d) TFEU remains silent on whether the rules on procedures established under this article may apply outside the territory of the EUMS. Discussions on this issue took place during the drafting of the European Constitutional Treaty.<sup>80</sup> Accordingly, extraterritorial processing is covered by art. 78(2)(d) TFEU if conducted in compliance with international Refugee and Human Rights law.<sup>81</sup>

When EUMS apply procedural rules outside EU territory, they may (extraterritorially) be bound to the protection standards in the Charter. Art. 51(1) of the Charter obliges EUMS to uphold the Charter rights "when they are implementing Union law", irrespective of the territory. At present, refugee resettlement is not attributed to binding EU law, though. This leads to the question whether soft law and discretionary provisions can trigger the implementation of EU law.

According to the Court of Justice in *Florescu and Others*,<sup>82</sup> implementation of EU law can be assumed when an EUMS adopts measures and thereby exercises discretion conferred upon it by an act of EU law. This is also reflected in former case-law in the context of the CEAS, namely in *N.S. and Others*.<sup>83</sup> To this effect, de Boer and Zieck pointed out that already according to the current legal situation EUMS were implementing EU law when

<sup>78</sup> EL Tsourdi, 'Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible?' (2020) German Law Journal 521.

<sup>79</sup> M Scholten and M van Rijsbergen, 'The ESMA-Short Selling Case' cit. 402.

<sup>80</sup> Earlier formulations were more restrictive, cf. K Hailbronner and D Thym, 'Art 78 TFEU' cit. 1037, para. 26.

<sup>81</sup> Cf. *ibid.* 1037 para. 26; cf. e.g., Commission Recommendation C(2015) 3560 final of 8 June 2015 on a European resettlement scheme.

<sup>82</sup> Cf. case C-258/14 *Florescu and Others* ECLI:EU:C:2017:448 para. 48.

<sup>83</sup> Cf. joined cases C-411/10 and C-493/10 *N.S. and Others* ECLI:EU:C:2011:865 paras 64-69.

conducting resettlement, namely by claiming the lump sum reserved by the Asylum, Migration and Integration Fund (AMIF)<sup>84</sup> – although the AMIF-Regulation does not provide for an obligation to resettle at all.<sup>85</sup>

Still, ECJ case-law has remained blurred; for example, in its order in *Demarchi Gino*,<sup>86</sup> the Court recalled that the application of fundamental EU rights requires that the EU law in the subject area imposes an obligation on EUMS with regards to the situation at issue.

Eventually, strong indications militate in favor of EUMS' obligation to provide Charter rights in the course of the (extraterritorial) resettlement process, namely when exercising discretion conferred upon them by the AMIF-Regulation. This would equally apply to a prospective Resettlement Framework Regulation – even if the Regulation was based on voluntary resettlement commitment of EUMS instead of mandatory *quota*.

#### IV.4. THE LEGAL BASIS FOR A UNION RESETTLEMENT FRAMEWORK REGULATION

The adoption of a future EU resettlement framework implies the challenge of choosing the right legal basis. From a legal policy perspective, it appears plausible to consider the principle of solidarity and responsibility sharing under art. 80 TFEU in the legal basis of a Union Resettlement Framework Regulation. For example, it was disputed in the context of the AMIF-Regulation if art. 80 TFEU (as a reference to the principle of solidarity and responsibility sharing) shall be part of the legal basis. While the European Parliament intended to rely on arts 78(2)(g) and 80 TFEU,<sup>87</sup> the Council opposed any reference to art. 80 TFEU. Therefore, the European Parliament agreed on a compromise, i.e., to include the principle of solidarity and responsibility sharing in Recital 2 AMIF-Regulation. However, this shall (according to a political declaration) not have an impact on future legislation.<sup>88</sup> Hence, the possibility to include art. 80 TFEU in the legal basis of a future solidary EU resettlement framework still exists.

Actually, the Commission based the 2016 Proposal on a future Resettlement Framework Regulation on art. 78(2)(d) (see *supra*, and art. 78(2)(g) TFEU, which refers to partnership and cooperation with third countries). The argument of the Commission is that

<sup>84</sup> Regulation (EU) 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decision n. 573/2007/EC and n. 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC.

<sup>85</sup> Cf. T de Boer and M Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees' cit. 80.

<sup>86</sup> Joined cases C-177/17 and C-178/17 *Demarchi Gino* ECLI:EU:C:2017:656 para. 21 ff.

<sup>87</sup> This was in line with Communication COM(2009) 665 final/2 of 2 December 2009 from the Commission to the European Parliament and the Council – Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures.

<sup>88</sup> P Van de Peer, 'Negotiating the Second Generation of the Common European Asylum System Instruments: A Chronicle' in V Chetail, P de Bruycker and F Maiani (eds), *Reforming the Common European Asylum System* cit. 66 ff.

resettlement concerns international protection, which links it to asylum policy. By contrast, in the decision in *X and X v État belge*,<sup>89</sup> the Court of Justice referred to art. 79(2)(a) TFEU in the context of long-term visas for humanitarian reasons. This article constitutes a legal basis for measures in the field of immigration policy instead of asylum policy. It remains open whether the Commission will follow the Court of Justice in an upcoming proposal or amendment of the 2016 Proposal.

## V. THE US CENTRALIZED AND PERMANENT RESETTLEMENT FRAMEWORK

The US permanent refugee resettlement program is governed by federal law and dates back to the Refugee Act of 1980.<sup>90</sup> This Act stipulates that the President sets the annual admission ceiling after consultation with the Congress.<sup>91</sup>

As regards the implementation of the annual admission ceiling, the so-called *Refugee Corps*, employees of the federal agency *US Citizenship and Immigration Services* (USCIS),<sup>92</sup> conduct interviews overseas to assess whether individuals meet the qualifications for resettlement. Upon acceptance by the USCIS, resettlement refugees are dispersed among the individual US states.

Non-state actors have traditionally played a crucial role in the placement process. The 1980 Refugee Act takes account of this by providing a legal basis for public-private partnerships between the government and voluntary non-profit resettlement agencies.<sup>93</sup> The Office of Refugee Resettlement (ORR), located in the *Department of Health and Human Services*, is authorized to fund cooperative agreements with nine voluntary agencies,<sup>94</sup> known as “Volags”. The responsible Volag determines where the refugee will live.<sup>95</sup> Beyond placement, affiliates of the Volags help refugees to set up new lives, including “housing, job-training, job-finding, healthcare, and English language classes”.<sup>96</sup> They are also in charge of distributing financial assistance to refugees. Since 1981, refugee financial and medical assistance have gradually been truncated down to eight months. If employment

<sup>89</sup> Cf. case C-638/16 PPU *X and X* ECLI:EU:C:2017:173 para. 44.

<sup>90</sup> Refugee Act 1980, Public Law 96-212, 94 stat. 102.

<sup>91</sup> Cf. K Bockley, ‘A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise’ (1995) *North Carolina Journal of International Law and Commercial Regulation* 281 ff.

<sup>92</sup> Cf. JY Xi, ‘Refugee Resettlement Federalism’ (2017) *Stanford Law Review* 1204 ff.

<sup>93</sup> Cf. A Brown and T Scribner, ‘Unfulfilled Promises, Future Possibilities: The Refugee Resettlement System in the United States’ (2014) *Journal on Migration and Human Security* 101.

<sup>94</sup> The nine voluntary agencies are: Church World Service, Ethiopian Community Development Council, Episcopal Migration Ministries, Hebrew Immigrant Aid Society, International Rescue Committee, U.S. Committee for Refugees and Immigrants, Lutheran Immigration and Refugee Services, United States Conference of Catholic Bishops, World Relief Corporation, cf. [www.acf.hhs.gov](http://www.acf.hhs.gov).

<sup>95</sup> JY Xi, ‘Refugee Resettlement Federalism’ cit. 1205.

<sup>96</sup> G Noll and J van Selm, ‘Rediscovering Resettlement’ cit. 22.

is not achieved within this period,<sup>97</sup> regular rules of the welfare system, *i.e.*, limited access to health care and cash assistance, apply.<sup>98</sup> The structure of the US resettlement program pressures rapid labour market entry.<sup>99</sup> In case of resistance, legislation foresees sanctions, namely the termination of cash assistance.<sup>100</sup>

Xi took a critical view on (exclusive) federal government decision-making, including insufficient federal funding support for receiving communities. According to Xi, the US framework has largely failed to consider local communities in resettlement decisions.<sup>101</sup> Specifically, he pointed to the issue of reactive federal funding. Given that the number of refugee arrivals over the last two years determined the amount of the federal funding, receiving communities did not get the necessary additional resources in cases of sudden influx. Besides, pre-resettlement information provided by the federal government to the receiving communities prove insufficient according to Xi.<sup>102</sup> The assistance that communities received from federal funds did not consider the education level, health condition or psychological background of refugees allocated in this community. In order to eliminate financial shortfalls impeding the optimal functioning of the US resettlement system, Xi suggested to give local communities more weight in the refugee placement decision taking. Eventually, he drew the conclusion that even allowing states to refuse the admission of refugees for ideological reasons would serve a useful function because it could prevent that refugees face opposition in the receiving environment.<sup>103</sup>

Noteworthy, in the course of the 2015 attacks in Paris, thirty-one US governors expressed the wish to block resettlement for security reasons.<sup>104</sup> On this basis, the Presidential Executive Order of 26 September 2019 announced that “the State and the locality’s consent to the resettlement of refugees under the Program is taken into account to the maximum extent consistent with law. [...] [I]f either a State or locality has not provided consent to receive refugees under the Program, then refugees should not be resettled within that State or locality [...]”.<sup>105</sup> With this Executive Order, Trump administration eased the exclusive federal competence doctrine in resettlement matters for the first

<sup>97</sup> Cf. J van Selm, ‘Public-Private Partnerships in Refugee Resettlement: Europe and the US’ (2003) *Journal of International Migration and Integration* 169 ff.

<sup>98</sup> Cf. *Ibid.*

<sup>99</sup> Cf. JH Darrow, ‘Working It Out in Practice: Tensions Embedded in the U.S. Refugee Resettlement Program Resolved Through Implementation’ in A Garnier, KB Sandvik and LL Jubilut (eds), *Refugee Resettlement: Power, Politics, and Humanitarian Governance* (Berghahn 2018) 105.

<sup>100</sup> Cf. section 412(e)(2)(C) of the US Refugee Act of 1980; JH Darrow, ‘Working It Out in Practice: Tensions Embedded in the U.S. Refugee Resettlement Program Resolved Through Implementation’ cit. 104.

<sup>101</sup> Cf. JY Xi, ‘Refugee Resettlement Federalism’ cit. 1212.

<sup>102</sup> Cf. *ibid.* 1229.

<sup>103</sup> Cf. *ibid.* 1234.

<sup>104</sup> Cf. *ibid.* 1199.

<sup>105</sup> Section 2 US Homeland Security, Presidential Executive Order 13888 of 26 September 2019, Enhancing State and Local Involvement in Refugee Resettlement [www.hsdl.org](http://www.hsdl.org).



time. Remarkably, the vast majority of US governors sidestepped the opportunity to stop accepting refugees and affirmed their continued resettlement commitment, with Texas as only exception so far.<sup>106</sup> Still, due to the ongoing declining commitment of the federal government to admit resettlement refugees since 2017, resettlement agencies have been forced to shut down offices, which has weakened their network and impact.<sup>107</sup>

## VI. FAILED ATTEMPTS OF SOLIDARITY AND RESPONSIBILITY SHARING IN THE EU

Attempts to render solidarity and responsibility sharing among EUMS more effective date back to the Balkan crisis in the 1990s. The then German Presidency suggested a refugee distribution key based on three criteria of equal weight,<sup>108</sup> i.e., *i)* size of population, *ii)* size of EUMS' territory and *iii)* Gross Domestic Product (GDP). This key was derived from the refugee distribution mechanism between the federal states of Germany as foreseen in the German Asylum Procedure Act.<sup>109</sup> However, the Proposal did not find the necessary support in the Council. Noteworthy, some Council members expressed concerns about possible human rights violations when transferring refugees without their consent.<sup>110</sup> The French Presidency followed up with a softened Resolution on burden sharing<sup>111</sup> in September 1995. This Resolution failed to mention any compulsory distribution mechanism. It rather referred to mass influx situations, which exemplifies that *ad hoc* commitment remained the limit of what was politically feasible.<sup>112</sup> In the end, the burden sharing attempts of the 1990s showed little effects.<sup>113</sup>

Until then, a satisfactory solution on how to distribute refugees among EUMS has not been achieved. The overall issue is mirrored in the failure of the Dublin system. It lies in the nature of the geography of Europe that some states are more exposed to migration flows than others. However, the Dublin system does not take account of the map of Europe.

<sup>106</sup> Cf. M Chishti and S Pierce, 'Despite Trump Invitation to Stop Taking Refugees, Red and Blue States Alike Endorse Resettlement' (29 January 2020) Migration Policy [www.migrationpolicy.org](http://www.migrationpolicy.org).

<sup>107</sup> Cf. K Mena and CE Shoichet, 'Judge Blocks Trump's Executive Order on Refugee Resettlement' (15 January 2020) CCN edition.cnn.com.

<sup>108</sup> Cf. German Presidency, Draft Council Resolution on burden-sharing with regard to the admission and residence of refugees of 1 July 1994, Council document 7773/94 ASIM 124.

<sup>109</sup> *Ibid.* 8 para. 10: "Where the numbers admitted by a Member State exceed its indicative figure [...], other Member States which have not yet reached their indicative figure [...] will accept persons from the first state"; cf. ER Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union' (2003) *Journal of Refugee Studies* 259; the so-called 'Königsteiner Schlüssel' is currently enshrined in art. 45 of the German Asylum Act as of 8 September 2008, BGBl. I 2008, 1798.

<sup>110</sup> Cf. ER Thielemann, 'Between Interests and Norms' cit. 260.

<sup>111</sup> Council Resolution of 25 September 1995 on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis.

<sup>112</sup> Cf. ER Thielemann, 'Between Interests and Norms' cit. 260.

<sup>113</sup> Cf. *ibid.* 261.

Another issue is that human beings seeking protection are to be treated “humanely and with respect for their fundamental rights”.<sup>114</sup> In essence, any distribution mechanism accounting for the shortfalls of the Dublin system – either in the form of *intra*-EU relocation or resettlement – expects the EU “to provide protection standards and access to welfare on a comparative level”.<sup>115</sup> It is the *raison d’être* of an area of freedom, security and justice that EUMS can expect other EUMS to comply with EU law and fundamental rights.<sup>116</sup> Notwithstanding, the ECJ<sup>117</sup> as well as the ECtHR<sup>118</sup> have confirmed that some EUMS fail to provide even basic standards. In its judgement in *Jawo*, the ECJ admitted that the system based on mutual confidence might practically face operational problems in respect of a particular EUMS, *i.e.*, a substantial risk that applicants for international protection may, when being transferred to that EUMS, be treated in a manner incompatible with their fundamental rights.<sup>119</sup>

Another reason hindering political consensus on mandatory (resettlement) quota is the fall-out of the 2015 *intra*-EU relocation scheme. Against the will of Eastern EUMS, a qualified majority in the Council adopted a (short-term) mandatory relocation mechanism to disburden Italy and Greece.<sup>120</sup> The mandatory distribution key was based on a multi-indicator system,<sup>121</sup> including the GDP, the population size, the unemployment rate (capacity to integrate) and the average number of spontaneous asylum applications and

<sup>114</sup> Joined cases C-490/16 and 646/16 A.S. ECLI:EU:C:2017:443, opinion of AG Sharpston, para. 3 ff.

<sup>115</sup> A Niemann and N Zaun, ‘EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives’ (2018) JComMarSt 7.

<sup>116</sup> Cf. A.S., opinion of AG Sharpston cit. para. 123.

<sup>117</sup> Joined cases C-411/10 and C-493/10 N.S. and Others ECLI:EU:C:2011:865.

<sup>118</sup> ECtHR *Tarakhel v Switzerland* App. n. 29217/12 [4 November 2014]; “The requirement in this case of an individual assessment in light of the risk that such transfer may result in inhuman and degrading treatment and the need for the Swiss authorities may result in inhuman and degrading treatment and the need for the Swiss authorities to obtain assurances from the Italian authorities that the applicants will be received in facilities and conditions adapted to the age of the children and that family is kept together makes an automatic application of the Dublin criteria nearly impossible”, K Pollet, ‘A Common European Asylum System Under Construction: Remaining Gaps, Challenges and Next Steps’ in V Chetail, P de Bruycker and F Maiani (eds), *Reforming the Common European Asylum System* cit. 78.

<sup>119</sup> Cf. case C-163/17 *Jawo* ECLI:EU:C:2019:218 para. 83; Advocate General (AG) Wathelet emphasized “the adoption of a genuine policy on international protection within the European Union [...] by ensuring that the principle of solidarity and the fair sharing of responsibilities between Member States enshrined in Article 80 TFEU [...] for the benefit not only of Member States, but above all of the human beings concerned”, case C-163/17 *Jawo* ECLI:EU:C:2018:613, opinion of AG Wathelet, para. 145.

<sup>120</sup> Cf. Council Decision 2015/1601/EU of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece; the decision was adopted on the basis of art. 78(3) TFEU, which provides that “in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament”.

<sup>121</sup> Cf. L Carlsen, ‘An Alternative View on Distribution Keys for the Possible Relocation of Refugees in the European Union’ (2017) Social Indicators Research 1147.

of resettled refugees over a four-year period (absorbed refugees in the recent past).<sup>122</sup> Slovakia and Hungary brought actions for annulment against the Council decision, which were dismissed by the ECJ.<sup>123</sup>

Yet, the implementation of the mandatory quota encountered resistance. In particular, the Czech Republic, Hungary and Poland did not fulfill their relocation obligations. In July 2017,<sup>124</sup> the Commission launched infringement proceedings against these EUMS that were brought before the Court in December 2017.<sup>125</sup> The defendant EUMS invoked their exclusive competence under art. 72 TFEU arguing that they could not comply with the relocation obligations because they had to uphold law and order and safeguard internal security.<sup>126</sup>

AG Sharpston recalled that the relocation mechanism itself preserved EUMS' right to refuse to relocate an applicant if there were reasonable grounds that the applicant's relocation could endanger national security or public order.<sup>127</sup> In addition, AG Sharpston pointed out that EU secondary law within the asylum *acquis* adequately accounted for legitimate national security and public order concerns in relation to the particular applicant.<sup>128</sup> Hence, there were less restrictive means for EUMS than absolute refusal to fulfill their relocation obligations. AG Sharpston stressed that other EUMS, such as Austria and Sweden, also faced difficulties to comply with their relocation obligations but they applied for and obtained temporary suspensions thereof. "If the three defendant Member States were really confronting significant difficulties, that – rather than deciding unilaterally not to comply with the Relocation Decisions was not necessary – was clearly the appropriate course of action to pursue in order to respect the principle of solidarity".<sup>129</sup>

Finally, AG Sharpston highlighted the principle of solidarity in her concluding remarks.<sup>130</sup> "Solidarity is the lifeblood of the European project. Through their participation in that project [...], Member States and their nationals have obligations as well as benefits.

<sup>122</sup> Cf. Communication COM(2015) 240 final of 13 May 2015 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration.

<sup>123</sup> Cf. joined cases C-643/15 and C-647/15 *Slovakia v Council* ECLI:EU:C:2017:631.

<sup>124</sup> Cf. European Commission, *Relocation: Commission launches infringement procedures against Czech Republic, Hungary and Poland*, europa.eu.

<sup>125</sup> Cf. European Commission, *Relocation: Commission refers the Czech Republic, Hungary and Poland to the Court of Justice* europa.eu; S Carrera, 'An Appraisal of the European Commission of Crisis: Has the Juncker Commission Delivered a New Start for EU Justice and Home Affairs?' (2019) CEPS 21.

<sup>126</sup> Cf. *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)*, opinion of AG Sharpston, cit. para. 189 ff.

<sup>127</sup> Cf. *ibid.* para. 205.

<sup>128</sup> Cf. *ibid.* para. 221 ff.

<sup>129</sup> *Ibid.* para. 235.

<sup>130</sup> Cf. *ibid.* para. 238 ff.

[...] Respecting the ‘rules of the club’ and playing one’s proper part in solidarity [...] cannot be based on a penny-pinching cost-benefit analysis [...]”.<sup>131</sup>

In its ruling of 2 April 2020, the ECJ re-emphasized that art. 72 TFEU only allowed derogation to ensure law and order on their territory in exceptional and clearly defined cases. “It cannot be inferred that the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of European Union law and its uniform application”.<sup>132</sup>

Alike AG Sharpston, the ECJ recalled that the Relocation Decisions sufficiently granted EUMS a right to refuse relocation of a specific applicant.<sup>133</sup> In comparison to the grounds of exclusion from refugee or subsidiary protection status,<sup>134</sup> the reasonable grounds for excluding an applicant from relocation on the basis of national security or public order concerns left state authorities an even wider margin of discretion.<sup>135</sup> In terms of exercising such wide discretion, the Court provided guidance on the threshold for the assessment whether an applicant posed a danger to national security or public order under the Relocation Decisions.

Thereby, it reaffirmed previous case-law<sup>136</sup> by distinguishing between the threshold applied in free movement law (art. 27(2) of the Citizenship Directive<sup>137</sup>) and the threshold applied towards third-country nationals. Notably, the free movement of Union citizens and their family members may only be restricted if the personal conduct of the individual concerned represents a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”. The wording of the Relocation Decisions, however, did not impose such strict conditions and had to be interpreted more broadly, also covering potential threats.<sup>138</sup>

<sup>131</sup> *Ibid.* para. 253 ff.

<sup>132</sup> Joined cases C-715/17, C-718/17 and C-719/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* ECLI:EU:C:2020:257 para. 143.

<sup>133</sup> Cf. *ibid.* para.150.

<sup>134</sup> Cf. arts 12(2)(b) and 17(1)(b) of the Directive (EU) 2011/95 of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

<sup>135</sup> Cf. *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* cit. paras 156, 158.

<sup>136</sup> Cf. e.g., case C-380/18 *E.P (Threat to public policy)* ECLI:EU:C:2019:1071.

<sup>137</sup> Directive (EC) 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

<sup>138</sup> Cf. J Bornemann, ‘Coming to Terms With Relocation: the Infringement Case Against Poland, Hungary and the Czech Republic’ (17 April 2020) [eumigrationlawblog.eu](https://eumigrationlawblog.eu/migrationlawblog.eu).

Still, it becomes clear from the judgement that this discretion had to be exercised only in the context of a case-by-case investigation. Invoking art. 72 TFEU for the purpose of general prevention and without relation to a specific case was therefore not justified.<sup>139</sup> Ultimately, the Court confirmed AG Sharpston's view by stating that there "is nothing to indicate that effectively safeguarding the essential State functions [...] such as that of protecting national security, could not be carried out other than disapplying Decisions 2015/1523 and 2915/1601 [the Relocation Decisions]".<sup>140</sup>

## VII. CONCLUSION

Failed past attempts demonstrate that solidary and fair sharing of responsibility towards refugees among EUMS has not been achieved yet.

From a legal policy point of view, the US provides *lessons to be learned* about the involvement of voluntary agencies in the refugee placement process. The staff of recognized voluntary agencies is particularly familiar with refugee profiles and at the same time with the conditions in the receiving communities. They have proven successful to support refugees in becoming self-sufficient. Notwithstanding, US experience exemplifies that even a well-established agency network depends on the willingness of the federal government to admit resettlement refugees.

Furthermore, centralized governing entails the risk to undermine local needs, conditions and concerns. Granting EUMS and/or local communities a right to oppose admission may be justified for several reasons. A right to refuse admission can prevent situations where refugees face opposition in the receiving community. In this regard, the spread of public interest narratives is crucial to overcome present hostility of the receiving environment. Essentially, if EUMS were allowed to absolute refusal of commitment, the action would run counter the principle of solidarity and fair sharing of responsibilities.

The ECJ ruling in the infringement proceedings concerning the 2015 relocation schemes indicates that refusal should be restricted to temporary suspension and/or case-by-case assessment. Yet, the last word has not been spoken since the ECJ has left contemporary issues open. These issues do not only relate to relocation, but also to resettlement. Questions to be tackled include whether and to what extent EUMS are allowed to resort to art. 72 TFEU in order to derogate from Union law in the context of combatting the spread of Covid-19 to the detriment of resettlement commitment or "the disheartening situation of asylum seekers at the Greece-Turkish border".<sup>141</sup>

Moreover, it is noteworthy that national security and public order concerns, as invoked by several EUMS to refuse relocation, do not necessarily contradict an increase in EU governance. As a first step, centralized general assessment of the qualification for

<sup>139</sup> Cf. *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* cit. para. 160.

<sup>140</sup> *Ibid.* para. 170.

<sup>141</sup> J Bornemann, 'Coming to Terms with Relocation' cit.

resettlement, including standardized security checks could be implemented at the EU-level. This involves taking account of the refugee's conditions in the country of (first) refuge, like the US definition of firm resettlement does. Once a refugee has passed the general centralized eligibility assessment, attention to specific national concerns of EUMS could still be afforded in a second step, *i.e.*, in the course of determining the actual placement of the refugee to be resettled.

What is more, as AG Sharpston pointed out in *A.S.*, art. 80 TFEU includes solidarity regarding financial implications between EUMS.<sup>142</sup> Proactive and tailor-sized EU funding is needed to encourage EUMS to look beyond ideology. The EU should draw a lesson from the US experience and avoid deficiencies resulting from a lack and/or misallocation of centralized funding. In particular, reactive funding fails to respond to sudden mass influx.

Lastly, "solidarity [...] cannot be based on a penny-pinching cost-benefit analysis [...]".<sup>143</sup> Times of lacking political will and consensus require a more flexible approach on solidarity. The members of the club need to listen to each other and accept the respective prevailing democratic opinions. If not willing to admit resettlement refugees, what can an EUMS offer in the alternative?

<sup>142</sup> Cf. *A.S.*, opinion of AG Sharpston cit. para. 139.

<sup>143</sup> *Ibid.* para. 253 ff.



## ARTICLES

### SHAPING THE FUTURE OF EUROPE – SECOND PART

*edited by Sandra Hummelbrunner, Lando Kirchmair, Benedikt Pirker, Anne-Carlijn Prickartz and Isabel Staudinger*

## AN ARMY OF PEOPLES? A DEMOCRATIC PERSPECTIVE ON A FUTURE EUROPEAN ARMY

JOSEF WEINZIERL\*

TABLE OF CONTENTS: I. Introduction. – II. The constitutional dimension of armed forces. – II.1. The military as part of State authority. – II.2. International military forces. – II.3. The EU and defence: from failure to incremental integration. – II.4. Interim conclusion. – III. The EU as a democracy. – IV. Taking stock: the combination of political theory and military architecture. – V. An army of peoples: design questions. – V.1. Replacing or reinforcing national troops? – V.2. All in v coalition of the willing. – V.3. Decision-making rules and parliamentary accountability. – V.4. Operational decision-making: the Council(s) and the Commander. – V.5. National constitutional reservations: demos v demoi. – VI. On complexity. – VII. Conclusion.

ABSTRACT: In this *Article*, I combine political theory and defence-related institutional design in order to suggest what a future EU army could look like. I begin by explaining the main differences between national and international armed forces as well as the EU's current defence architecture. As a result, I observe that armed forces necessarily reflect the constitutional identity and theoretical architecture of their home political community. I then explain why, in my view, the idea of *demoicracy* best describes the EU's theoretical nature. On that basis, I discuss various questions of institutional design for a future EU army, for which the democratic nature of the EU both prescribes and constrains the available options. Apart from concrete design proposals, the two key take-aways are *i)* that there is conceptual space for autonomous armed forces beyond the nation-state, and *ii)* that any proposal for an EU army needs to be aware of its reflexive relationship with the nature of the EU as a political community.

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KEYWORDS: European army – EU constitutional theory – democracy – military and constitutional design – Common Security and Defence Policy – EU defence integration.

## I. INTRODUCTION

At the dawn of a new decade, the constitutional discourse on the future of the EU gains momentum from two interrelated phenomena: the challenges unearthed by a cycle of crises, and a new generation of political leaders. Many initiatives, new and old, are on the table. One particularly dynamic field is defence. The current turmoil in Afghanistan in wake of the chaotic departure of international troops in August 2021 only adds to the ever-louder calls on Europe to find its role in the 21st century. Only very recently, High Representative Borrell opined: “Strategic autonomy is a way of framing our choices: we must be able to defend our interests, by ourselves if necessary”.<sup>1</sup> One of the hot potatoes in the discussions about the future of EU defence integration is the old idea of creating a self-standing European army.<sup>2</sup> For example, several European leaders, notably French President Macron, German Chancellor Merkel, and former Commission President Juncker, have openly supported the idea of a European army and thereby revived the debate.<sup>3</sup>

Due to these developments, I agree with Kucera that “the time is ripe for theoretical thinking about the prospect of European defence integration”.<sup>4</sup> In the following reflections, I contribute to the academic debate on how to shape the future of Europe by combining the idea of an EU army with EU constitutional theory.<sup>5</sup> I argue that reflecting on self-standing EU armed forces is impossible without attention to the EU’s theoretical nature, since the design of a polity’s armed forces necessarily touches on its constitutional *ethos*. For example, a state’s use of armed forces is tied to state sovereignty and, ultimately, popular self-determination. That is, the *raison d’être* of a state’s military is to serve and defend a (however defined) territorially-organised people. By contrast, the case of the EU seems more complicated since the EU’s theoretical *Gestalt* itself continues to be controversial. It is far more difficult to capture the nature and design of armed forces in the EU,

<sup>1</sup> J Borrell, *Discussion at the European Council on Foreign Relations Annual Council Meeting 2020* (29 June 2020) [www.eeas.europa.eu](http://www.eeas.europa.eu).

<sup>2</sup> For an analysis of recent initiatives in EU defence integration see S Duke, ‘The Enigmatic Role of Defence in the EU: From EDC to EDU?’ (2018) *European Foreign Affairs Review* 63 ff.; see also G Butler, ‘The European Defence Union and Denmark’s Defence Opt-out: A Legal Appraisal’ (2020) *European Foreign Affairs Review* 146.

<sup>3</sup> E Macron, *Initiative pour l’Europe* (speech of 26 September 2017) [www.elysee.fr](http://www.elysee.fr); A Merkel, *Speech to the European Parliament* (13 November 2018) [www.bundesregierung.de](http://www.bundesregierung.de). Juncker’s remarks are cited in T Kucera, ‘What European Army? Alliance, Security Community or Postnational Federation’ (2019) *International Politics* 331 ff.

<sup>4</sup> T Kucera, ‘What European Army?’ cit. 335.

<sup>5</sup> I use the concept *constitution* in relation to the EU in a weak sense, related to the fundamental laws and institutions ordering the EU as a political community. For but one discussion see R Schütze, *European Constitutional Law* (Cambridge University Press 2016) 1 ff.



which escapes such a clear-cut purpose and description. Put simply, a *people's* army in a sovereign state must look different from a *peoples'* army in a supranational polity.

One of the main advantages of a theoretical lens is that it goes beyond the widespread focus on economic benefits and efficiency in EU integration discourse. As I aim to show below, a purely efficiency-based approach is problematic because it distracts from the underlying constitutional questions. This is especially troublesome in a salient sector like defence.

In a sense, this *Article* is an exercise in hands-on political theory. Not unlike a new recipe, it combines the ingredients of democratic theory and military architecture to explore whether they, if combined, result in a presentable dish. You can see it as an attempt to counter the criticism according to which democratic theory often fails to spell out institutional implications.<sup>6</sup> For that reason, it will be necessary to explore the concrete possibilities and limits EU law and national constitutional law provide for the individual design questions. Thereby, we not only get a clearer understanding of whether the current EU Treaties could accommodate an EU army or whether such a step would require Treaty amendment. More fundamentally, law operates as the main bridge between abstract political theory and the concrete design of armed forces. Consequently, only the comparison of individual legal-institutional design options enables us to evaluate the theoretical upshot of each model.

More broadly, I assess whether it is possible for the EU to have armed forces without becoming a state, without tipping the scales a bit further towards statehood.<sup>7</sup> I conclude that there is indeed conceptual space for autonomous armed forces beyond the nation-state. This realisation comes with the warning that any proposal for an EU army needs to be aware of its reflexive relationship with the nature of the EU as a political community. If we (rightly in my view) understand the EU as a democracy, we can deduce important guidelines for the design and limits of a potential European army. Below, I propose an EU army that complements national armies, leaves options for Member States to opt-out (differentiated integration), accommodates national and supranational accountability, and foresees qualified majority voting with special safeguards for the participation of one's own nationals.

Let me address these matters in turn.

<sup>6</sup> See only M Ronzoni, 'The European Union as a Democracy: Really a Third Way?' (2017) *European Journal of Political Theory* 217.

<sup>7</sup> Fears regarding that development are voiced in M Trybus, 'The Legal Foundations of a European Army' (2016) *Institute of European Law Working Papers* (Birmingham Law School) 1. For hopes, by contrast, see ND White, *Democracy goes to War: British Military Deployments under International Law* (Oxford University Press 2009) 114 ff.

## II. THE CONSTITUTIONAL DIMENSION OF ARMED FORCES

The theoretical nexus between armed forces and the constitutional nature of a polity today emanates from the nation state (II.1). Due to state sovereignty, international military cooperation constitutes but an *ad hoc* aggregation of national military forces (II.2). Despite far-reaching integration in other sectors, even the EU's current relationship to military integration remains faithful to the international model (II.3).

### II.1. THE MILITARY AS PART OF STATE AUTHORITY

Why could the development of an independent EU army (in whatever form) create a constitutional moment? For the reason that a standing army has been at the heart of every epoch-defining political community, long before the emergence of sovereign states.<sup>8</sup> Ever since states have become the dominant form of political community in the world, their (claimed) monopoly of the legitimate use of force seems to necessitate police forces (used internally) and a military (used *primarily* externally). In a sense, it is part of a state's job description to maintain armed forces.<sup>9</sup> As a result, an EU army is associated with a decisive move towards statehood.

Besides, there is a cultural, identity-related aspect to military forces on the national level, namely protecting and defending your compatriots, your fellow citizens. The diverse interpretation of this mission illustrates widespread cultural differences. Think only of the public celebration of the military in some states (USA, Russia) or the constitutional neutrality and non-alignment obligations in others (to varying extents, for example, in Malta, Austria, Ireland, or Switzerland). The point is that a nation's attitude towards its armed forces tells you something about the character of the polity as a whole. Relatedly, conscription and drafting foster a certain allegiance between citizens and an individual state. For example, one reason why many states consider dual nationality problematic is the difficult decision of recruiting dual nationals for armed forces of only one of the involved states.<sup>10</sup>

Admittedly, due to the risk of coups, the interest of the public in armed forces is usually more pronounced in unstable and less democratic states. But the constitutional anchor for the role of the military in a democracy is the army's political accountability to the elected representatives in Parliament.<sup>11</sup> Although the demanding German notion of

<sup>8</sup> Aristotle, *Politics*, book 6, ch. IV contains one of the earliest discussions of the nexus between armed forces and political institutions.

<sup>9</sup> Note, however, that the decision not to have an army also affects and reflects the identity of a state (related to its history, size, geopolitical influence etc.). See C Barbey, 'Non-Militarisation: Countries Without Armies. Identification Criteria and First Findings' (October 2015) Åland Islands Peace Institute Working Paper.

<sup>10</sup> See, for example – among the Members of the Council of Europe – the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality of 6 May 1963, European Treaty Series n. 43.

<sup>11</sup> See only ND White, *Democracy goes to War* cit. ch. 11.

*Parlamentsarmee* (parliamentary army)<sup>12</sup> cannot serve as a blueprint here, it provides a helpful buzzword for the idea of linking a state's armed forces to its democratic representatives, e.g. by requiring parliamentary approval for individual missions, their funding and size. Mirroring the cultural differences discussed above, the role of parliament varies considerably among states, from weak control (for example under the controversial War Powers Resolution in the USA) to parliament taking centre stage (e.g. in Germany). The relationship between military and parliament accordingly illustrates the constitutional dimension of armed forces.

In short, a state's relationship to its armed forces is a unique prism through which to assess its broader constitutional architecture, the relation to its citizens as well as its civic identity.<sup>13</sup> Two conclusions emerge for the EU. First, while there are some voices in the literature that portray the EU's authority claim in terms of sovereignty,<sup>14</sup> the EU does not claim the monopoly of force as one of sovereignty's core elements. As long as that remains the case, EU military forces would have to fulfil different functions than to protect a self-determined *demos*. Second, the various examples given above suggest that if the EU were to have proper armed forces, they would exert a significant influence on the EU's theoretical nature. In that sense, the relationship is reflexive, because theoretical nature and military architecture influence each other. That, in turn, raises the stakes for military design in the first place.

## II.2. INTERNATIONAL MILITARY FORCES

The focus on nation-states thus far seems to suggest that military forces beyond the state are unthinkable. But that would neglect both the military history before the advent of states as well as the various contemporary fora for international military cooperation. What, then, characterises today's international armed forces?

The UN is the traditional *locus* for assembling armed forces in an international setting. While art. 43 of the UN-Charter provides formal means to delegate national military for UN missions, hitherto this provision has never been invoked. Instead, the UN has developed various other mechanisms, such as peacekeeping and *ad hoc* missions.<sup>15</sup> And yet, none of them creates an independent international army. Rather, states *voluntarily* dispatch forces to support a specific mission. Accordingly, in line with the portrayal of sover-

<sup>12</sup> For a concise overview of the German model see RA Miller, 'Germany's Basic Law and the Use of Force' (2010) *IndJ Global Legal Studies* 197.

<sup>13</sup> For an in-depth treatment SE Finer, *The Man on Horseback: The Role of the Military in Politics* (Penguin 1976).

<sup>14</sup> References in M Avbelj, 'Theorizing Sovereignty and European Integration' (2014) *Ratio Juris* 344.

<sup>15</sup> N Krisch, 'Article 43' in B Simma, D-E Khan, G Nolte, A Paulus and N Wessendorf (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press 2012) vol. I 1351 para. 10.

eign states and their exclusive hold over military forces, international missions remain a combination of national troops, lent temporarily to the international body.<sup>16</sup>

Structurally similar (and particularly important in the European context), NATO requires troops from its Member States in order to carry out any mission the Northern Atlantic Council plans. During this “force generation process”, NATO members *voluntarily* offer troops and equipment and might even stipulate caveats for individual missions.<sup>17</sup> In short, NATO forces are a combination of voluntarily dispatched national forces, assembled *ad hoc* for each mission. The states remain responsible for their soldiers.

These reflections complement the above picture: only nation states have independent armies under their full and exclusive control. They sometimes make them available voluntarily to international organisations for mission-specific cooperation. In that case, national (parliamentary and legal) and international (legal) accountability regimes are combined.<sup>18</sup> Crucially, the respective international organisations do not thereby incorporate or become themselves responsible for the armed forces in a theoretically meaningful way. The troops remain politically accountable to their home peoples and states; in turn, national<sup>19</sup> courts increasingly hold states legally liable for international wrongs committed with their troops’ contribution.<sup>20</sup>

Succinctly, there are international troops, but their design stands in stark contrast to national armies. How can one characterise the EU’s role in this national-international dichotomy?

### II.3. THE EU AND DEFENCE: FROM FAILURE TO INCREMENTAL INTEGRATION

The EU’s relationship to military forces is not very subtle. After all, the historic momentum for European integration resulted directly from World War II and the widespread desire to secure the so long so fragile peace among European nations. In 1952, in the wake of the Schuman Declaration, the founding Member States envisaged nothing less than the merging of their national armed forces into a single European military apparatus (European Defence Forces) under exclusively supranational accountability and

<sup>16</sup> *Ibid.* para. 12; A Hofsommer, ‘Die Anfänge der völkerrechtlichen Organleihe’ (2011) Archiv des Völkerrechts 312.

<sup>17</sup> Consult the helpful explanations at NATO, *Troop Contributions* [www.nato.int](http://www.nato.int).

<sup>18</sup> See for a comprehensive survey C Ku and HK Jacobson, ‘Toward a mixed system of democratic accountability’ in C Ku and HK Jacobson (eds), *Democratic Accountability and the Use of Force in International Law* (Cambridge University Press 2003).

<sup>19</sup> See, however, ECtHR *Behrami and Saramati* App n. 71412/01 and 78166/01 [5 May 2007], where the Court held the UN accountable for the Kosovo Force. See also W Cremer, ‘Art. 42 EUV’ in C Calliess and M Ruffert (eds), *EUV/AEUV* (Beck 2016) para. 24.

<sup>20</sup> Insightful H Krieger, ‘Addressing the Accountability Gap in Peacekeeping: Law-Making by Domestic Courts as a Way to Avoid UN Reform?’ (2015) NILR 259.

administration.<sup>21</sup> The proposal was too ambitious at the time and failed in the French Parliament.<sup>22</sup> In that context, the ensuing communitarisation of crucial defence-related industries in the European Coal and Steel Community seems almost modest. Yet, in combination with economic integration from 1957 onwards, it proved to be a more acceptable and viable path among key European nations. Notice, however, how peace and the future of armed forces thereby became part of the constitutional DNA of European integration in the broadest sense of the term.

Since then, the EU has never become a military power itself. And yet, the failure of the European Defence Community did not mark the end of defence integration. After staying clear of it for decades, the frequent Treaty amendments since the late 1980s allowed for a greater role of the EU in, for example, coordinating military personnel provided by Member States. The EU started to contribute to missions and even took over security responsibilities from the international community.<sup>23</sup> Yet, the old pillar structure represented a cautious, non-judiciable and overall purely intergovernmental process in the defence sector, with the Member States wary of the sovereignty-related salience of defence. Indeed, the post-Maastricht Treaty (art. L) outright excluded the Court's jurisdiction in relation to the Common Foreign and Security Policy (CFSP). In addition, the European Parliament (EP) played no part in the decision-making process, which was left to the European Council and the Council of the EU (meeting as General Affairs and External Relations Council).<sup>24</sup>

After the Lisbon reforms, Title V of the TEU lays out the CFSP, including carefully regulated defence cooperation under the Common Security and Defence Policy (CSDP). While these reforms mark the as yet most advanced defence integration as well as an effort to align defence with the broader treaty regime, the CFSP – as the only policy area in the TEU regulated in some detail – remains not only visibly distinct from the rest of the *acquis communautaire*.<sup>25</sup> The largely political process, entrusted to mostly unanimous Council decisions (art. 31 TEU), and the lack of legislative acts prevail as an anom-

<sup>21</sup> M Trybus, 'The Legal Foundations of a European Army' cit. section 2.1. Regarding the historical and political background see D Klemm, 'An Attempt to Establish the European Army: The Pleven Plan' (2016) *Journal on European History of Law* 105 ff.

<sup>22</sup> P Koutrakos, *The EU Common Security and Defence Policy* (Oxford University Press 2013) 5 ff.; M Trybus, 'The Vision of the European Defence Community and a Common Defence for the European Union' in M Trybus and ND White (eds), *European Security Law* (Oxford University Press 2007) 28 ff.

<sup>23</sup> KR McNamara, *The Politics of Everyday Europe: Constructing Authority in the European Union* (Oxford University Press 2015) 8. A short summary of EU defence integration can be found in ND White, *Democracy goes to War* cit. 114 ff.

<sup>24</sup> For a critique see A Stie, 'Decision-making Void of Democratic Qualities? An Evaluation of the EU's Second Pillar Decision-making Procedure' (2010) *European Integration Online Papers* www.eiop.or.at 1.

<sup>25</sup> See P Koutrakos, 'Foreign Policy Between Opt-outs and Closer Cooperation' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Elgar 2017) 411. For an argument against CFSP-exceptionalism see RA Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy' in R Schütze (ed.), *Globalisation and Governance: International Problems, European Solutions* (Cambridge University Press 2018).

ally in the Treaties.<sup>26</sup> The current system is couched in terms of cooperation among the Member States and the main emphasis is on gaining economic advantages by pooling resources and harmonizing equipment.<sup>27</sup>

As a result, *de lege lata* the EU has no self-standing army and no way of unilaterally requesting troops from its Member States. Instead, the EU's current defence architecture maintains the Member States' grip on armed forces and relies on voluntary national contributions for any mission (art. 42(1) and (3) TEU).<sup>28</sup> That holds true even in relation to the most advanced elements of defence integration, such as the enhanced-coordination-based Permanent Structural Cooperation (PESCO) among 25 Member States (arts 42(6) and 46 TEU),<sup>29</sup> or the EU Battlegroups, not yet deployed 1500-soldier strong units for rapid reaction under the command of a lead-Member State.<sup>30</sup> Admittedly, art. 42(2) TEU leaves room for further integration and eases the conditions for Treaty amendment. But due to its ambiguity (for example regarding the precise difference between "the progressive framing of a common Union defence policy" and the "common defence" to which it leads) it is up to debate just how much change it could legitimately cover.<sup>31</sup>

Departing from this *status quo*, one of the goals of this *Article* is to urge the discourse in EU defence integration away from the familiar narrative of economic benefits and efficiency. For example, former Commission President Juncker complained that the current "scattergun approach" is "inefficient and costly".<sup>32</sup> In a similar tone, the EP wants to "create synergies" and commends the EU for beginning to "stimulate efficiency" in defence integration.<sup>33</sup> This understandable argumentative strategy of efficiency that builds on the current model and favours incremental steps over bold visions is risky, however. It deliberately clouds the constitutional salience of the defence sector for all the participants. Perhaps the current reluctance to use the various EU tools described above results, in part, from the relatively weak constitutional foundation and legitimacy of the current defence architecture, as well as from the ambiguous role of the Union

<sup>26</sup> However, Lisbon opened a small window for judicial review (arts 40 TEU and 275 TFEU), which the Court of Justice pushed open a little wider in case C-72/15 *Rosneft* ECLI:EU:C:2017:236. More generally C Hillion, 'A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law* (Hart 2014).

<sup>27</sup> For a summary of current initiatives see European Parliament, 'Defence: is the EU creating a European army?' (24 June 2019) [www.europarl.europa.eu](http://www.europarl.europa.eu). See also M Trybus, 'The Legal Foundations of a European Army' cit. section 4.

<sup>28</sup> For the underlying principles of recourse and voluntarism see generally S Graf von Kielmansegg, *Die Verteidigungspolitik der Europäischen Union: eine rechtliche Analyse* (Boorberg 2005).

<sup>29</sup> Decision 2017/2315/CFSP of the Council of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.

<sup>30</sup> For details see EEAS, 'EU Battlegroups' [eeas.europa.eu](http://eeas.europa.eu).

<sup>31</sup> W Cremer, 'Art. 42 EUV' cit. para. 9 ff.

<sup>32</sup> J-C Juncker, 'Speech by President Jean-Claude Juncker at the Defence and Security Conference Prague: In defence of Europe' (9 June 2017) [ec.europa.eu](http://ec.europa.eu).

<sup>33</sup> European Parliament, 'Defence: is the EU creating a European army?' cit.

interest in primary law. While art. 32(1) TEU obliges the Member States to ensure that “the Union is able to assert its interests [...] on the international scene”, it remains unclear how to articulate and reconcile these interests with those of its Member States. As I mentioned earlier, the EU has to do a lot of soul-searching to define its strategic interests and, as yet, has not succeeded in escaping its characterisation as a “soft power”.<sup>34</sup> In essence, efficiency may be a useful side-effect of an EU army, but it should not constitute its main justification. Instead, constitutional cohesion in the sense discussed below adds a necessary and enriching perspective to the familiar, purely efficiency-driven discourse.

#### II.4. INTERIM CONCLUSION

This *tour d'horizon* highlighted the intrinsic relationship between constitutional nature and military architecture in today's states as well as the comparatively loose cooperation-based forms of international troops. In a political community, armed forces and constitutional identity stand in a reflexive relationship and impact each other.

Despite (or because of?) an early failed attempt to supranationalise armed forces, the EU's model of defence integration remains faithful to this duality with its markedly international design. Despite the existence of CSDP-missions, the EU's military power (so far) does not determine its global influence. Nevertheless, defence integration already affects the very identity of the EU and will continue to do so in the future.<sup>35</sup>

Next, I want to briefly outline the idea of democracy and endorse it as the correct theoretical description of the EU's nature and normative ambition. This will allow me in the remainder of the paper to judge military design proposals against democratic ideals for institutional architecture and appropriate accountability regimes.

### III. THE EU AS A DEMOCRACY

Instead of providing a comprehensive account of the analytical and normative advantages of democracy here, my brief defence of democracy as appropriate theoretical framework for the EU is instrumental for this *Article*. It serves to develop design guidelines for a potential EU army.

<sup>34</sup> See only SB Anderson, ‘The EU defence debate: What kind of power is it?’ in KE Jørgensen, ÅK Aarstad, E Drieskens, K Laatikainen and B Tonra (eds), *The SAGE Handbook of European Foreign Policy* (SAGE Publications 2015) 935 ff.

<sup>35</sup> RA Wessel, ‘Integration and Constitutionalisation in EU Foreign and Security Policy’ cit. 343. For decades, the discussion of the EU's relationship to armed forces has been conducted in relation to Duchêne's concept of “Civilian Power Europe”. See only F Duchêne, ‘The European Community and the Uncertainties of Interdependence’ in M Kohnstamm and W Hager (eds), *A Nation Writ Large? Foreign-Policy Problems before the European Community* (Palgrave Macmillan 1973).

Demoicracy describes a specific model of democratic rule beyond the state. It applies democratic ideals, such as popular authorisation and accountability, to supra-state political communities. The main difference to other discussions of democracy beyond the state stems from conceiving a plurality of *demos* as ultimate subjects of democratic rule. In short, a demoicracy is a polity in which several peoples “govern together but not as one”.<sup>36</sup> Demoicracy thus shifts from *demos* to *demos*, from people to peoples as constituent entities of a political community. This focus expresses the theoretical nexus between each people’s independence as well as their reciprocal interdependence.<sup>37</sup> The constitutional (not ethnic) peoples of the EU Member States underwrite the EU’s theoretical architecture without, however, constituting a single (theoretically meaningful) *demos*. Upon reviewing the way in which the EU Treaties operationalise democratic ideals, Lenaerts rightly concludes that the “idea of demoicracy is incorporated into the constitutional fabric of the EU”.<sup>38</sup> Through the EU, the EU peoples exercise their popular self-determination jointly in a sophisticated institutional framework in order to address issues transcending state boundaries.<sup>39</sup> While remaining constituted in statist political communities, these distinct peoples erect, author and legitimise a supranational governance architecture that is accountable to them separately but jointly.

While there is considerable disagreement about how to operationalise demoicracy institutionally, there are several core features all demoicrats support. They all commit to the idea that the EU neither is nor should be an international union of sovereign states or a state in the making.<sup>40</sup> Rather, the EU is a union of peoples where the individual peoples retain their competence-competence (e.g. right to exit) and the immunity against having essential power-structures altered without their consent (principle of conferral).<sup>41</sup> The EU is ultimately accountable to the EU peoples. In this framework, (national) democracy and EU demoicracy are compatible with each other. Indeed, they complement each other. On the one hand, the political institutions of a demo(s)cracy are accountable to their independent people; on the other, the political institutions of a demoicracy are accountable to the interdependent peoples jointly. Both levels of political communities realise the self-determination of their peoples in separate ways. A demoicratic framework allows us to

<sup>36</sup> K Nicolaïdis, ‘European Demoicracy and Its Crisis’ (2013) JComMarSt 351 ff.

<sup>37</sup> F Cheneval and K Nicolaïdis, ‘The social construction of demoicracy in the European Union’ (2017) European Journal of Political Theory 244.

<sup>38</sup> K Lenaerts, ‘Demoicracy, Constitutional Pluralism and the Court of Justice of the European Union’ in L Van Middelbaar and P Van Parijs (eds), *After the Storm: How to Save Democracy in Europe* (Lannoo 2015) 129.

<sup>39</sup> See F Cheneval, *The Government of the Peoples: On the Idea and Principles of Multilateral Democracy* (Palgrave Macmillan 2011), for a theoretical model of a demoicracy based on Rawlsian methodology.

<sup>40</sup> K Nicolaïdis, ‘The Idea of European Demoicracy’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 254.

<sup>41</sup> F Cheneval ‘Demoicratic Self-Government in the European Union’s Polycentric System: Theoretical Remarks’ in J van Zeben and A Bobić (eds), *Polycentricity in the European Union* (Cambridge University Press 2019) 66 ff.



inject the normative benefits of democratic rule to a political community beyond the state. We should, accordingly, judge the EU against democratic standards.

To test the accuracy of democratic theory applied to the EU, think of Brexit. From a *legal-constitutional* perspective, Brexit reminds the Member States that membership in the EU is ultimately about the choices the peoples of Europe make about how to govern themselves.<sup>42</sup> Furthermore, *public discourse* reflects the EU's democratic constitutional arithmetic, where the individual citizen as such is not the main duty-bearer of the European project. Brexit was not argued based on the autonomy of the individual. Instead, it was about the autonomy of the British people to determine their fate as a collective "freed from" supranational authority. Conceptualising the EU as a democracy allows us then to assess the EU's actions according to theoretical standards that fit its current theoretical identity.

#### IV. TAKING STOCK: THE COMBINATION OF POLITICAL THEORY AND MILITARY ARCHITECTURE

So far, I have argued that any proposal for an independent EU army should not be severed from deliberations about the EU's nature as a political community. In a first step, I explained the duality between national and international armed forces and explored the many ways in which the existence and design of armed forces sheds light on and is simultaneously informed by the underlying constitutional arrangement of the polity/organisation in question. Armed forces, in short, stand in a reflexive relationship to the constitutional DNA of their home polity. In a second step, I advocated for a democratic perspective on the EU's accountability regime and normative architecture. In a nutshell, that means to allow the individual peoples of Europe – in both their manifestations as state institutions and citizens – to play a significant role in the constitutional arithmetic of the EU, while leaving enough room for them to maintain their separate existence, constituted in states.

A word of caution before I move on. Firstly, there is already a variety of different democratic models available on the theoretical level.<sup>43</sup> Concrete institutional implications will inevitably differ among them (based on the individual theory's position on the spectrum between more intergovernmental and more federal features). Accordingly, some *democrats* may legitimately disagree with my conclusions below. Secondly, today's EU is a far from perfect democracy by any standard whenever we encounter executive dominance, lack of accountability and disrespect for popular self-determination.<sup>44</sup> Compliance

<sup>42</sup> Case C-621/18 *Wightman* ECLI:EU:C2018:999 para. 61 ff.; UK Supreme Court judgment of 24 January 2017 *Miller I* [UKSC] 5 para. 78 ff.

<sup>43</sup> See the helpful categorisation in R Schütze, 'Models of Democracy: Some Preliminary Thoughts' (2020) EUI Working Papers table 5.

<sup>44</sup> F Cheneval, 'Democratic Self-Government in the European Union's Polycentric System' cit. 74.

with democratic ideals is gradual. This is why the discussion of design-options for potential EU armed forces below sometimes allows for various models with different degrees of congruence with democratic ideals.

Crucially, the following reflections are hypothetical. They are conditional on the political will to follow the call of prominent European leaders (like the ones mentioned in the introduction) to build an EU army. That is the *if*-question which I will not discuss further.<sup>45</sup> Instead, I examine individual design questions related to the creation of an army for a democratic polity. That is the *how*-question. How can an army of peoples, which govern “together but not as one”, look like? Put differently, how should one design a democratic army that is accountable to the peoples of Europe?

## V. AN ARMY OF PEOPLES: DESIGN QUESTIONS

In what follows, I attempt to reconcile the EU’s current constitutional architecture as a democracy with the development of a European army by looking at important questions of legal-institutional design for armed forces.

### V.1. REPLACING OR REINFORCING NATIONAL TROOPS?

Due to its repercussion for national military forces, a pivotal design question relates to the future of Member State armies. Should a potential EU military replace national forces and thereby remove a central element of state sovereignty from the Member States?<sup>46</sup> Or should a European army merely complement national forces and either contribute to missions alongside them or take over some of their responsibilities, such as the humanitarian and peace-keeping “Petersberg-tasks”?

Habermas’ proposal illustrates the significance of this question for the EU’s constitutional nature. It is no accident that Habermas – who has repeatedly called for the development of a European *demos* and a truly European democracy –<sup>47</sup> proposes a European army that *replaces* national armies.<sup>48</sup> Removing a core element of statehood (armed forces) from Member States and replacing it at the EU level necessarily moves the EU towards a more federal entity and – one could argue – towards federal statehood. Habermas thus uses military integration as a means to serve his ultimate end of an EU demo(s)cracy.

<sup>45</sup> On the current political climate in relation to this question see AT Nguyen, ‘Macron’s Call for a European Army: Still Echoing or Forgotten?’ (22 June 2020) European Law Blog [europeanlawblog.eu](http://europeanlawblog.eu).

<sup>46</sup> O Dupuis, ‘It’s Time for a Common EU Army’ (4 February 2017) Voxeurop [voxeurop.eu](http://voxeurop.eu), calls that model a “single, joint European army”. See the matrix in Annex I.

<sup>47</sup> J Habermas, ‘Why Europe Needs a Constitution’ (2011) New Left Review 5.

<sup>48</sup> J Habermas, B Rürup, R Koch, F Merz, H Eichel and B Zypries, ‘Time to wake up’ (25 October 2018) Handelsblatt [www.handelsblatt.com](http://www.handelsblatt.com). For a discussion of Habermas’ *Postnational Federation* as template for an EU army see T Kucera, ‘What European Army?’ cit. 328 ff.

The answer from a democratic perspective is clear, and it is a different one: a European army must be complementary to national armies. The very point of a democratic polity is that – while binding the participating peoples together in an elaborate institutional framework – its source of authority remains the autonomy of national *demos* and their continuing capacity to self-determine crucial affairs. Not unlike national authority theory's concern for the autonomy of the individual citizen, the exercise of authority by a democracy puts its legitimacy at risk if it curtails the breathing space for its member-peoples too much.

These considerations are ever more salient in a sensitive sector like defence, which – for the reasons given (*supra*, II.1) – is linked to the constitutional identity of a state. Art. 4(2) TEU (fleshed out for defence in art. 42(2) TEU) acknowledges this sensitivity by mandating that the Union shall respect the Member States' "essential state functions, including [...] safeguarding national security". Replacing national armies with a single European army would not only push the EU far away from traditional international military cooperation. It would also dilute the democratic character identified as appropriate theoretical framework. To mention one particularly striking example, consider that, after Brexit, France is the EU's only remaining nuclear power. A replacing EU army could thus make the EU a nuclear power. This scenario is not only at odds with the French vision of an EU army. It also seems a most unrealistic proposal in light of the cautions steps EU integration has hitherto taken.

Admittedly, the actual tasks of a hypothetical EU army contribute to its effect on the EU's constitutional architecture. There is a significant difference between a mandate to defend EU citizens or, alternatively, to merely build on the current support practice (related to, for example, the Petersberg tasks). For present purposes, however, the precise configuration of the mandate is secondary to the institutional design questions, since the latter predetermine and shape the compliance with democratic ideals. In other words, a far-reaching mandate like the defence of EU citizens presupposes an appropriate institutional design, especially an accountability framework. Discussing the constitutional implications of the design of EU armed forces is crucial for the very reason that soldiers might be involved in missions that involve risking their life for the defence of the European peoples.

To sum up, for both theoretical and pragmatic reasons, an EU army should complement rather than replace national armies. This remains true independently of its concrete mandate and tasks.

## V.2. ALL IN VCOALITION OF THE WILLING

Even if there were an EU army that merely complemented national military forces, an equally delicate question would arise in the debate about participation. This field, known as differentiated integration, has yielded many fruits, ranging from opt-outs to enhanced coordination. As a rule of thumb, the more salient the area of integration, the more likely there will be some built-in leeway for the Member States. This is usually

done through granting opt-outs (common currency, Charter of Fundamental Rights), or by allowing for discretion in implementing certain measures (the provision of non-military aid to fulfil solidarity obligations, art. 42(7) TEU, provides an example in the defence sector). Due to the sovereignty-related significance of defence for the Member States, the current CFSP architecture already serves as playground for a variety of differentiated integration-related instruments.<sup>49</sup> The question is, should every Member State have an obligation to join a European army?

Naturally, democratic theory seems to militate against such an obligation and for the possibility of opt-outs. This would leave far-reaching military integration to a “coalition of the willing”. That is due to democracy’s emphasis on the autonomy of the national people and the in-built capacity to accommodate identity-related concerns (such as some Member States’ emphasis on neutrality/non-alignment) as well as practical obstacles (e.g. financial difficulties).<sup>50</sup> The EU army would, consequently, constitute an organic development of today’s PESCO (art. 42(6) TEU). Depending on the concrete proposal, it could, in principle, also be realised using enhanced cooperation under art. 20 TEU and art. 329(2) TFEU.<sup>51</sup> Since the Council of the EU would have to decide unanimously in that case (art. 329(2) TFEU), an EU army based on enhanced cooperation would nevertheless profit from support and legitimation by every Member State.

And yet, to my mind, it is compatible with democracy to impose the obligation to supranationalise *part of* the national military on every Member State. Note that a mandatory EU army excludes the use of enhanced cooperation, which logically requires the option not to participate. Consequently, the Treaty amendment required to create a mandatory EU army would allow each Member State and their people(s) to veto the proposal if deemed unacceptable. That holds true independently of whether such a step towards defence integration could be based on the simplified procedure of art. 42(2) TEU or requires recourse to art. 48 TEU.<sup>52</sup> In any case, having argued that only a complementary army is compatible with pure democratic theory, the question of mandatory or voluntary participation is secondary, given that neither would necessitate to give up national forces entirely.

Whereas democratic theory is thus open to both, voluntary or mandatory participation, the benefits of a differentiated integration-model in my view outweigh the problematic fragmentation and complexity that necessarily result from differentiated integration.<sup>53</sup> Essentially, the sovereignty-related salience and weight of defence integration, the

<sup>49</sup> See P Koutrakos, ‘Foreign Policy Between Opt-outs and Closer Cooperation’ cit. 418 ff.

<sup>50</sup> M Trybus, ‘The Legal Foundations of a European Army’ cit. section 5.

<sup>51</sup> See also O Dupuis, ‘Advocating for a European Army: The alternative to new Maginot lines’ (28 March 2019) Voxeurop voxeurop.eu.

<sup>52</sup> For the related discussion see W Cremer, ‘Art. 42 EUV’ cit. para. 9 ff.

<sup>53</sup> Even if such opt-outs are difficult to manage in practice, especially if non-participating states are NATO members. For the current Danish example see G Butler, ‘The European Defence Union and Denmark’s Defence Opt-out’ cit. 134.

exclusion of enhanced cooperation in case of a mandatory army, and the lack of political will for further defence integration in some Member States tip the scales in favour of a voluntary army. In short, participation in an EU army should not be compulsory.

### V.3. DECISION-MAKING RULES AND PARLIAMENTARY ACCOUNTABILITY

Suppose there is the political will to create a European army. How should the decision-making rules be fleshed out if the underlying ideal remains a democracy? In other words, who should decide according to which majority requirement about the deployment, mandate, size and financing of EU missions? The next two sections address these questions in relation to parliamentary involvement (V.3) as well as the role of the (European) Council and possible command structures (V.4).

The current European Defence Framework in art. 42 ff. TEU is overtly political and intergovernmental (which, paradoxically, is secured via ever more complex and detailed legal rules). That is, it is characterised by informal negotiations and non-legislative decision making in the two Councils. However, this architecture and the ensuing loose accountability structure would be theoretically unacceptable if we created a self-standing European army. Not only the functional comparison to armed forces in national western democracies, where the salience of military matters makes parliamentary involvement mostly mandatory,<sup>54</sup> militates for parliamentary participation of some sort. What is more, a developed supranational army would constitute such a delicate step in European integration that a tighter reconnection to the peoples seems a plausible legitimacy concern. It would therefore be appropriate to establish a decision-making mechanism involving parliament.

In the EU, the coexistence of the EP and national parliaments makes the question of parliamentary decision-making and accountability more complex. Is there a distinct role for national parliaments – representing the separate individual peoples – in the design of a potential European army? The question is theoretically significant, since parliamentary accountability provides a direct link between those who fight, defend and help, and those in whose name and to whose benefit these actions are taken.<sup>55</sup> If a European army defends European citizens who are simultaneously citizens of a state, what constitutes the appropriate parliamentary accountability framework?

I argue for a separation between the initial deployment of national troops to a potential EU army and the adoption of decisions for individual missions. With regard to the first (the actual supranationalisation of some national troops) the accountability re-

<sup>54</sup> Ranging from prior authorisation requirements in some states to mere budgetary questions in others. See L Damrosch, 'The interface of national constitutional systems with international law and institutions on using military forces: changing trends in executive and legislative powers' in C Ku and HK Jacobson (eds), *Democratic Accountability and the Use of Force in International Law* cit. 51 ff. Also C Ku and HK Jacobson, 'Toward a mixed system of democratic accountability' cit. table 15.6.

<sup>55</sup> Space constraints prevent me from elaborating on the various manifestations of accountability as a fundamental notion of constitutional theory. See ND White, *Democracy goes to War* cit. ch. 11.

gime should be modelled according to the recently very prominent art. 50 TEU, which requires the notification to leave the EU to be in accordance with national “constitutional requirements”. In our case, that means that national troops entering into the service of an EU military unit would be accountable to their national institutions in the moment they cease to be controlled by purely national means. In other words, the supranationalising act itself should be underwritten by the institutions and procedures foreseen in national constitutions. This will involve parliamentary decisions in most Member States, but not necessarily in all. In turn, no troops could be requested (additionally) by the EU without the approval of the respective national institutions. That would go a long way towards mitigating what one could call the “Lincoln risk”, namely the situation where the federal level could somehow arbitrarily claim troops from its lower entities. Remember that US President Lincoln summoned and federalised state forces in 1861 to prevent and combat the secession attempts of the southern Confederates.<sup>56</sup> Admittedly, the repetition of such a scenario in Europe must sound highly unlikely and even surreal to most readers. Surely, were there an EU army, no one would suggest sending troops in to prevent a Member State from leaving. And yet, the inability of a potential EU army to request unlimited troops from its Member States would send a signal of constitutional design towards those afraid of a European superpower.

However, once the troops will have been supranationalised with the blessing of the national institutions, their approval, especially the involvement of national parliaments, should not be required for every mission EU troops intend to engage in. Instead, the second decision, *i.e.* the mandate for individual missions, their size, equipment and funding, ought to be in the hands of the EP.<sup>57</sup> For the directly elected EP represents the plurality of European peoples, that is, the EU citizens as individually constituted in their respective statist polities, rather than as a single collective *demos* of roughly 500 million citizens.<sup>58</sup> The EP provides palpable input-legitimacy as decision-making forum for the representatives of the EU *demoi*. Obviously, this architecture would entail a radical departure from the current system with no role for the EP in the CSDP and a very limited

<sup>56</sup> M Les Benedict, ‘Abraham Lincoln and Federalism’ (1988) *Journal of the Abraham Lincoln Association* 36 ff. The important question whether the secession attempts at the time were unconstitutional is complex and controversial. See only P Radan, ‘Lincoln, the Constitution, and Secession’ in DH Doyle (ed.), *Secession as an International Phenomenon: From America’s Civil War to Contemporary Separatist Movements* (University of Georgia Press 2010) 56. The *Continental Army* created in 1775 in the USA marks an even earlier example of requesting troops from US-states for a common cause. For a concise overview see C Cox, ‘The Continental Army’ in J Kamensky and EG Gray (eds), *The Oxford Handbook of the American Revolution* (Oxford University Press 2012) 161.

<sup>57</sup> Which, *inter alia*, distinguishes my proposal from O Dupuis, ‘It’s Time for a Common EU Army’ cit., and his option of a “single, intergovernmental army”. See Annex I.

<sup>58</sup> Case C-138/79 *Roquette v Council* ECLI:EU:C:1980:249 para. 33 (emphasis added). Later also case C-300/89 *Commission v Council* ECLI:EU:C:1991:244 para. 20; case C-263/14 *Parliament v Council* ECLI:EU:C:2016:435 para. 70.

role in the other CFSP areas.<sup>59</sup> And yet, the EP is a democratic parliament and therefore an appropriate forum for holding potential European troops accountable and for authorising their missions.<sup>60</sup>

Such a division of accountability at individual stages of constructing an EU army would not only reflect the constitutional *ethos* of the EU. It would also take into account practical considerations. Imagine every EU mission needed the approval of each national parliament from which soldiers are deployed. Military missions are intrinsically characterised by a certain urgency, independently of whether they are a reaction to war, humanitarian catastrophes or a project of peacekeeping. Hence, timely reaction and operational readiness is vital. Since the EP's approval is theoretically sufficient in my view, these are then additional sector-specific and pragmatic reasons for not involving national parliaments.

This perspective on parliamentary decision-making and accountability excludes the creation of an EU army outside the institutional framework of the EU Treaties. By contrast, Nguyen has recently discussed the use of the Aachen-Treaty between Germany and France, which contains several elements of closer defence cooperation between the two Member States, as international starting point for an EU army outside the EU Treaties.<sup>61</sup> Yet, as I explained, such a step in defence integration has enormous impact on the constitutional configuration of the EU as a polity. Building an EU army outside the EU Treaty framework would not only transpose the various normative problems of the international solutions to the 2008 financial crisis to another salient area of integration. Such problems are, for example, executive dominance, the lack of democratic institutions or procedures, and diminished transparency and accountability.<sup>62</sup> What is more, it would undermine the democratic character of the EU as a polity with sophisticated accountability framework and decision-making institutions that involve the peoples both directly and indirectly.

#### V.4. OPERATIONAL DECISION-MAKING: THE COUNCIL(S) AND THE COMMANDER

Not least because it currently controls the EU Battlegroups, it is very likely that the Council of the EU (assembling national defence ministers) will play a decisive role in any decision-making regarding a potential EU army. Alternatively, the European Council, *i.e.*

<sup>59</sup> P Koutrakos, *The EU Common Security and Defence Policy* cit. 51 ff. And yet, Framework Agreement of 20 November 2010 on Relations between the European Parliament and the European Commission, para. 10 already foresees the EP's involvement.

<sup>60</sup> Nonetheless, even scholars of democracy focus predominantly on national parliaments for providing input-legitimacy to the EU's actions. See only R Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge University Press 2019) ch. 4. For criticism see R Schütze, 'Models of Democracy' cit. 33 ff.

<sup>61</sup> AT Nguyen, 'Macron's Call for a European Army Still Echoing or Forgotten?' cit.

<sup>62</sup> See only EO Eriksen, *The Normativity of the European Union* (Palgrave Macmillan 2014) 118 ff.; S Garben, 'The Constitutional (Im)balance Between "the Market" and "the Social" in the European Union' (2017) *EuConst* 55 ff.; S Weatherill, *Law and Values in the European Union* (Oxford University Press 2016) 411 with further references.

the Heads of State/Government themselves, could act as a “European High Security Council”.<sup>63</sup> The following reflections are suitable for either. The crucial question is whether either Council’s operational decisions should require unanimity or (qualified) majority voting among representatives of the participating Member States. Currently, most of the CFSP (art. 31 TEU) and the entire CSDP (art. 42(4) TEU) are subject to unanimity rules, underlining yet again the salience of the area for the Member States. But would that still be appropriate in case of independent EU forces?

From a theoretical perspective, there is a lot to say against unanimity rules in the Council. Many have emphasised the immorality of veto-powers for a single player in national democracies, enabling them to block even overwhelming majorities.<sup>64</sup> As Waldron explained, the normative difference between majority voting and tossing a coin is the respect which the former encapsulates for the participating stakeholders.<sup>65</sup> The theoretical value of such procedures thus stems from the equal participation in the process, instead of the guarantee of an outcome in one’s favour. Therefore, majority voting is preferable to unanimity in democracies. Whereas democratic decision-making urges to respect the voices and views of each people as equal participant in the debate in the Council of the EU, for example in the current qualified majority system,<sup>66</sup> unanimity requirements grant each people more, namely immunity against being outvoted. Furthermore, efficient and prompt decision making – especially in light of the urgency built into military deployments – pulls towards majority voting.

It should be recalled, however, that the underlying value of a democracy is the self-determination of its constituent peoples. Hence, the forceful arguments against unanimity in a national democracy, where parliaments represent a *demos*, cannot all too easily be extrapolated to the EU context. In the EU, outvoting one people automatically means to deprive it from having its own democratically formed will implemented.<sup>67</sup> Consider only changes in primary law. They require the consent of all the Member States and their peoples (art. 48 TEU). That procedure – *pace* more federalist voices –<sup>68</sup> does not violate de-

<sup>63</sup> O Dupuis, ‘It’s time for a common EU Army’ cit.

<sup>64</sup> D Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008) p. 17 and 172; T Christiano, ‘A Democratic Theory of Territory and Some Puzzles about Global Democracy’ (2006) *Journal of Social Philosophy* 103. On how this stopped the early European Defence Community see F De Witte, ‘Interdependence and Contestation in European Integration’ (2018) *European Papers* [www.europeanpapers.eu](http://www.europeanpapers.eu) 482.

<sup>65</sup> J Waldron, *Law and Disagreement* (Oxford University Press 1999) 107 ff.

<sup>66</sup> Art. 16(3)(4) TEU. One Member State has one vote. The double majority requirement under the qualified majority system (55 per cent of the Member States representing at least 65 per cent of the EU population) is a sophisticated system to ensure that a majority decision is also supported by a majority of the EU citizens.

<sup>67</sup> J Von Achenbach, *Demokratische Gesetzgebung in der Europäischen Union* (Springer 2013) 444 ff.

<sup>68</sup> K Lenaerts and M Desomer, ‘New Models of Constitution-Making in Europe: The Quest for Legitimacy’ (2002) *CMLRev* 1232.



mocracy. Instead, it institutionalises the respect for the individual peoples and their national democracy.<sup>69</sup> In short, majority voting has the potential to force Member States and their troops to participate in defence measures that they reject.

As desiderata from these reflections, I want to propose the following design regime for a future EU army: decision-making in the Council (whichever Council is chosen) with regard to the deployment, funding and size of a potential free-standing EU army should be subject to majority voting among the participating Member States. However, such majority voting should be qualified in order to allow national peoples a veto in relation to the participation of *their* nationals. Whereas reluctant Member States would be unable to stop the deployment of EU troops as such, they could veto the participation of their own nationals.<sup>70</sup> Notice that such a scheme works independently of whether an EU army will be compulsory for all Member States or open to differentiated integration. These limited veto-options would constitute a compromise which respects the self-determination of a national people and its constitutional identity on the one hand, while not allowing the veto to obstruct entire missions (or use the threat of a veto for other political means) on the other. The options of qualified abstention (art. 31(1) TEU, also applicable to the CSDP) and qualified majority voting (art. 31(2) TEU), as well as the handling of the Danish opt-out show that the Treaty already knows how to accommodate such concerns in the defence sector.<sup>71</sup> This balance between functioning supranational institutions and respect for the underlying architecture of the polity in question is, in my opinion, one of the success criteria for any democracy.

A related issue of first and foremost practical importance is the command structure. Who will ultimately call the shots?<sup>72</sup> In that regard, however, democratic theory cannot offer specific guidelines but merely tentative suggestions. Especially in relation to military command structures below the political level. In my view, the chief military commander should be an official position at the top of the then to be created institutional structure of the EU army, not unlike NATO's Supreme Allied Commander Europe. On the political level, the first question is whether there should be a distinct commander in chief at all. It follows from the above that an EU army requires an EU commander in chief, precisely to underline the qualitative difference to international collaborations (like NATO). The second question is who should occupy the role of commander in chief. The intuitive choice for many would be the Commission President as office closest to a Head of the EU executive. In my view, however, the European Council President ought to be the first choice for democrats. Simply because they head the EU institution that

<sup>69</sup> F Cheneval, *The Government of the Peoples* cit. 138 ff.

<sup>70</sup> This nuanced veto option puts my proposal in the theoretical space between the "common-intergovernmental" and "joint-common" European army in O Dupuis, 'It's time for a common EU army' cit. annex I.

<sup>71</sup> G Butler, 'The European Defence Union and Denmark's Defence Opt-out' cit. 148.

<sup>72</sup> I am grateful to an anonymous reviewer for pressing me on this point.

assembles the Heads of State/Government of the EU Member States and thus the elected leaders of the participating peoples. As commander in chief, the European Council President would not only represent the heads of the national executive as traditionally core decision-makers in military affairs. Moreover, tying the role of commander in chief to the European Council presidency instead of the rotating presidency of the Council of the EU (art. 16(9) TEU) guarantees stability and avoids the awkward situation of a (national) commander in chief holding office in a non-participating Member State (assuming the possibility to opt-out). Finally, this choice for the role of commander in chief would maintain the nexus to the plurality of the EU peoples via the collegiate European Council. Instead of the European Council President, one could always create a new position in the EU's political leadership for a commander in chief. For example, if there were to exist a body along the lines of Dupuis' High Security Council (see *supra*, section V.4), one could create a separate presidency with the role of EU Commander in Chief. Rather than agreeing on who should occupy the position, it is more important – for present purposes – to emphasise that the choice of command structures itself ought to reflect the EU's theoretical nature and is, accordingly, not merely organisational.

#### V.5. NATIONAL CONSTITUTIONAL RESERVATIONS: DEMOS V DEMOI?

In addition to abstract theorising about a demoicratic army, national constitutional law has already specified some red lines, especially in Member States with defence-related neutrality/non-alignment obligations or constitutional courts wary of too much EU integration.

Here, we can leave out Denmark, which already opted-out of any EU measures with defence implications and is thus unlikely to join an EU army.<sup>73</sup> But there are other Member States for the peoples of which military neutrality/non-alignment is a precious good. For them, the introduction of the obligation of aid and assistance in art. 42(7) TEU (solidarity clause) already caused a headache.<sup>74</sup> In various Member States, neutrality – although not part of their national identity as understood in art. 4(2) TEU – plays a prominent role in public discourse and constitutional debates.<sup>75</sup> Whereas the Treaty of Lisbon tried to alleviate any concerns by installing various protective mechanisms, it is clear that further defence integration would be hard to stomach for these Member States and their peoples, not only politically, but constitutionally. This provides a compelling argument for differentiated integration (see *supra*, section V.2).

<sup>73</sup> Comprehensively G Butler, 'The European Defence Union and Denmark's Defence Opt-out' cit.

<sup>74</sup> See S Duke, 'The Enigmatic Role of Defence in the EU' cit. 75.

<sup>75</sup> Explicitly for Austria G Lienbacher and M Lukan, 'Constitutional Identity in Austria' in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 51. On the identity-debate more generally K Devine, 'Neutrality and the development of the European Union's common security and defence policy: Compatible or competing?' (2011) *Coop&Conflict* 334.

In contrast to the German voices discussed above, who support an independent EU army (especially Chancellor Merkel, Jürgen Habermas and the politicians supporting his proposal), the German Constitutional Court (*BVerfG*) is more cautious. The Court's reservations are motivated by a concern for the preservation of Germany as a sovereign, democratic state. In its seminal Lisbon-decision, the *BVerfG* scrutinised whether the Treaty of Lisbon violates the fundamental conception of the German military as a parliamentary army.<sup>76</sup> According to the *BVerfG*'s (highly peculiar)<sup>77</sup> doctrine of necessary state functions (*Staatsaufgabenlehre*), the current German Constitution prohibits the replacement of the German military with an EU-only military as well as the erosion of the parliamentary reservation (*Parlamentsvorbehalt*).<sup>78</sup> This demanding doctrine goes well beyond the general consensus, according to which guaranteeing national security is a necessary state function.<sup>79</sup> Since my democratic angle argues for a complementary rather than replacing EU army, however, that particular hurdle *per se* constitutes no obstacle for my design proposals.

Yet, the *BVerfG* went on to emphasise that the deployment of German troops needs to remain voluntary and must not bypass the parliamentary reservation of the *Bundestag*, which is *integrationsfest* and can, consequently, never be abandoned through EU integration.<sup>80</sup> Under the proposals discussed here, the German *Bundestag* will be involved. Once as part of the necessary treaty amendment (under art. 42(2) TEU or art. 48 TEU) in order to establish an EU army of any kind.<sup>81</sup> Moreover, it will be involved in the decision about the supranationalisation of specific troops, which relinquishes them from the grip of the German Parliament and transfers them to EP control (*supra*, V.3). Whereas the Lisbon judgment allows for further voluntary supranationalisation in the defence sector,<sup>82</sup> it seems indeed questionable whether a *Bundestag* decision to supranationalise part of the German army that – not unlike Framework Decisions – entails a general permission to engage in military operations would satisfy the *BVerfG*'s yardsticks. Put differently, would the exclusive responsibility of the EP for the concrete mission-specific deployment of future EU troops be compatible with the *BVerfG*'s reservations?

<sup>76</sup> German Federal Constitutional Court judgment of 30 June 2009 2 BvE 2/08 paras 381-382.

<sup>77</sup> See only C Möllers and D Halberstam, 'The German Constitutional Court says "Ja zu Deutschland!"' (2009) German Law Journal 1241.

<sup>78</sup> German Federal Constitutional Court judgment of 30 June 2009 cit. paras 249, 252-255.

<sup>79</sup> See only J Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016) ch. 1. Notice how this mirrors the discussion *supra*, section II.1, regarding the nexus between state sovereignty and armed forces.

<sup>80</sup> See German Federal Constitutional Court order of 17 September 2019 2 BvE 2/16 para. 52. Rightly critical of the status elevation D Thym, 'Integrationsziel Europäische Armee? Verfassungsrechtliche Grundlagen der Deutschen Beteiligung an der Gemeinsamen Sicherheits- und Verteidigungspolitik (GSVP)' (2010) *Europarecht Beiheft* 175.

<sup>81</sup> Admittedly, this will not necessarily be the case if an EU army is realised via enhanced cooperation.

<sup>82</sup> See D Thym, 'Integrationsziel Europäische Armee?' cit. 187 ff.

So far, the *BVerfG* doesn't consider the EP a Parliament (capital P) capable of providing any viable input-legitimacy.<sup>83</sup> The court evaluates the EP based on the standards of a national majoritarian democracy (defined by an equal vote for each citizen, its role as main forum for legislative decisions, holding a government accountable etc.). Obviously, the EP doesn't satisfy these standards. The *BVerfG* fails to see the distinct qualities of the EP as parliament for a political community beyond the state. It is not based on an *equal* vote by each EU citizen (art. 14(3) TEU) precisely because it assembles multiple peoples rather than a single *demos*. The fate of my proposal depends on whether the *BVerfG* continues to view the EU theoretically in the same terms as any other international organisation, or whether it accepts the independent legitimising force of its democratic elements, especially of the EP.

## VI. ON COMPLEXITY

Before I conclude, I want to pause after this survey of individual military design questions and reflect on the notion of complexity. A broad-brush summary of my proposals results in the following picture: EU armed forces, which complement national armies, leave options for Member States to opt-out (differentiated integration), involve the participation of both national institutions/parliaments as well as the EP, and foresee qualified majority voting in the Council with an in-built veto for the participation of one's own nationals. All of that serves to balance the independence and interdependence of the peoples in the EU as a democracy.

Is it worth it? Does it help to provide a complex web of decision-making and accountability structures that require another layer of meticulous legal rules, seeing that the current CSDP-regime seems overcomplex and underused? I admit that the law can only take us so far, while what we need most is confidence in the EU's role in defence as well as in the operability of its tools. The option to pursue security and defence policy through the EU needs to be a credible one. For this reason, the following reflections necessarily blur the line between the if-question (if there should be an EU army) and the how-question (how to design it).

Despite the ensuing complexity, several reasons indicate that the development of an independent EU army along the lines of the present proposal helps rather than hinders progress in the EU's security and defence policy. Firstly, as I suggested above (*supra*, II.3), increasing the legitimacy of the EU's defence policy by establishing an accountable and operational EU army might end the current state of limbo and contribute to its more frequent use. Secondly, the development of an EU army reduces complexity elsewhere. Instruments like the battlegroups and even PESCO are not needed anymore, because they

<sup>83</sup> See only German Federal Constitutional Court judgment of 9 November 2011 2 BvC 4/10; German Federal Constitutional Court judgment of 26 February 2014 2 BvE 2/13.

should be merged with the EU army. Thus, the focus on the army with reduced overall complexity provides a clear and operational tool for EU involvement in defence missions. Thirdly, the establishment of a transparent and clearly defined EU army takes away some of the fears regarding a creeping loss of sovereignty in the defence sector. This transparency might make the stakeholders less reluctant to envisage and integrate an EU response to security and defence issues. Whereas one could argue that it would be preferable to keep the *status quo*, given that Member States are happy with it, the question is: are they? I have mentioned national and European leaders, who openly call for a significant step forward in defence integration. Furthermore, in practice, we see overwhelming reluctance to use the fragmented groups, mechanisms and tools of the current EU defence architecture. Thus, a transparent and clearly defined framework for EU armed forces plus consolidation of the CSDP elsewhere could contribute to an increased activity of the EU in defence policy. Finally, fourthly, there is the current geopolitical climate.<sup>84</sup> It asks for a more independent and active role of the EU in defence that allows the EU leaders to join forces with their Member States and make a demonstrable contribution in the international security and defence arena, for example through stronger ties with NATO.

Consequently, complexity as such is not problematic. Remember that the necessity for complex rules stems from the fact that the EU is a non-state political community that is best understood as a democracy. Those rules are there to safeguard and reflect the nature of the EU as a democratic political community.

## VII. CONCLUSION

In 1991, then Belgian Foreign Secretary (and later Prime Minister) Mark Eyskens famously remarked that “Europe is an economic giant, a political dwarf, and, even worse, a military worm until it concerns itself with elaborating a defence capability”.<sup>85</sup> Few would doubt that the three parameters have shifted considerably in the decades since. Think only of the underlying constitutional shifts (major Treaty revisions and judicial developments), tectonic changes in membership (enlargement from 12 to 28, then 27 Member States) and existential crises (financial crisis, eurozone crisis, refugee “crisis”, rule-of-law crisis, COVID-19-crisis). Even if we disagree with Eyskens’ position, however, in 2020 the key take-away should be that major political, economic and defence-related changes are closely intertwined and affect the constitutional DNA of a polity, even if that polity defies statist characteristics. But if today’s EU Treaties and policies tell us something about the EU’s nature as a polity, I argue that we should inverse this perspective and suggest that future reforms should in turn be aware of and continue to

<sup>84</sup> For but one discussion from an Eastern-European perspective see D Duna and R-C Dancuta, ‘The Common European Army Project between the National Defence Preferences of the Member States and the Geostrategic Challenges at the Eastern Borders’ (2014) Eurolimes 55 ff.

<sup>85</sup> Cited in M Trybus, ‘The Legal Foundations of a European Army’ cit. 14.

reflect the EU's constitutional identity. Doing so takes this reflexive relationship seriously and grants us more control of constitutional moments. You do not necessarily have to agree with me on democracy as the appropriate theoretical lens. But it is vital to bear in mind the links between theoretical nature and military architecture when designing an EU army. In other words, the recipe only works if it includes both ingredients.

In this *Article*, I proposed design-features for a hypothetical future European army, based on the concept of the EU as a democracy. It is important, to my mind, that the "best system is the most efficient system as chosen by the constituent parts, not simply the most efficient system".<sup>86</sup> Designing a European army is about more than the current focus on economic gains through avoiding inefficient parallel structures in all the Member States. It is about the identity of the EU as a political community. Not only the *if*-question, *i.e.* the political will to advance the project of a European army, represents a cardinal constitutional choice for the peoples of the EU. The *how*-question, in my view, does so likewise.

According to my argument, there is conceptual space for military forces beyond the state, which have the capacity to operate effectively while reflecting their accountability to the peoples of Europe in the plural. In the matrix following Dupuis,<sup>87</sup> my proposal is closest to the "joint-common" European army, though with nuanced attention for democratic concerns. Consequently, there is no need to fear that the creation of a European army necessarily stumbles into a constitutional moment, that it pushes the EU towards statehood. A true *Union of Peoples* has to prevent this by constitutional design, not by historical accident.

More dramatically, democracy helps to explain why the question "Who will die for Europe?"<sup>88</sup> is misleading. The soldiers of a potential EU army along the above lines do not sever the ties to their own people completely. Instead, they continue to serve their own people as one element of the combined peoples that participate in and theoretically underpin the EU. A democratic perspective replaces vague and identity-loaden references to Europe with the idea that EU soldiers bring sacrifices not only for their own people, but also for the other EU peoples, "not because those others have always been part of us but because we understand that interests of those people [...] have in fact become part of us".<sup>89</sup> Only time will tell whether this suffices for the European leaders and the public to undertake this significant step of defence integration.

Finally, I am aware that defence integration in the EU so far has been incremental and cautious. In light of that, my proposals may appear radical. However, I am not arguing that an EU army is necessary for the survival of the EU or that the current defence architecture

<sup>86</sup> F Cheneval, 'Democratic Self-Government in the European Union's Polycentric System' cit. 70.

<sup>87</sup> O Dupuis, 'It's time for a common EU army' cit.

<sup>88</sup> AD Smith, *Nations and Nationalism in a Global Era* (Polity Press 1995) 139.

<sup>89</sup> D Innerarity, *Democracy in Europe: A Political Philosophy of the EU* (Palgrave Macmillan 2018) 107. Innerarity himself does not (explicitly) endorse democracy.

is entirely inadequate. My small *Article* should rather be seen in an argument according to which any EU army ought to reflect the constitutional identity of the EU, and in an exercise in hands-on political theory how to realise that. As a consequence, this principled argument provides a basis for discussing other questions that are either related to or follow from the points discussed here (among others: what tasks should an EU army perform? Should EU citizens be able to enlist directly in an EU army?).

My proposal embraces the EU as a democracy and treats the defence sector as the constitutional laboratory for European integration it has been since the 1950s. Realising the prospect of an EU army with due regard to its nature and *ethos* would, in short, be an important contribution to the overarching idea of the 3<sup>rd</sup> *Young European Law Scholars Conference*, which sparked this *Article: Shaping the Future of Europe*.

## ANNEX I: MATRIX OF OLIVER DUPUIS' MODELS FOR AN EU ARMY

Dupuis helpfully discusses four different models of a future EU army.<sup>90</sup> He calls these single-intergovernmental, single-joint, common-intergovernmental, and joint-common. The main characteristics are the following:

	Joint	Intergovernmental
Single	National armies would be replaced and incorporated into a larger EU-only army	National armies would nominally be incorporated into a larger EU-only army
	Full decision-making authority lies with EU institutions	Intergovernmental EU umbrella, full practical Member State control
	Role model: national armies	Role model: European Defence Community
Common	Newly erected EU army, complementary to national armies	Made up of segments of national armies
	Full Decision-making authority lies with EU institutions	Member States can withdraw their troops without problem
		Role model: EU Battlegroups

<sup>90</sup> Drawn from O Dupuis, 'It's time for a common EU army' cit. The Scientific Service of the German Bundestag discusses these models in Wissenschaftlicher Dienst des Deutschen Bundestages, 'Die Europäische Armee 1948–2018, Konzepte und Ideen zur Vertiefung der Gemeinsamen Europäischen Sicherheits- und Verteidigungspolitik und zur Erhöhung des Grades der Streitkräfteintegration' (18 October 2018) [www.bundestag.de](http://www.bundestag.de).







## ARTICLES

### SHAPING THE FUTURE OF EUROPE – SECOND PART

*edited by Sandra Hummelbrunner, Lando Kirchmair, Benedikt Pirker, Anne-Carlijn Prickartz and Isabel Staudinger*

## EU LAW AGAINST HYBRID THREATS: A FIRST ASSESSMENT

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ABSTRACT: The European Union defined hybrid threats as measures using diplomatic, military, economic and technological tactics to destabilise a political adversary. These threats are one of the emerging security challenges in Europe and have the potential to shape the future of the continent. It is EU policy that the primary responsibility for countering them lies with the Member States; and that NATO's mandate for the security of Europe makes it an important partner for the military and conventional deterrence aspects to tackle hybrid threats. This *Article* describes and discusses the legal tools available to the EU for deterring, mitigating or neutralising hybrid threats. The focus is on disinformation, hostile foreign subsidies and investment, cyber threats, border pressure, and lawfare. The EU seems, overall, legally well-equipped to counter the threats, thus positioning itself as the complementary and to a great extent autonomous ally of NATO in this domain. There is a distinctively supra-national dimension to virtually all of these threats, and this justifies that an EU competence arises. Hybrid threats cover such a broad array of issues that a single piece of legislation is neither feasible nor, probably, desirable; but if there were to be one, it would probably be based on art. 114 TFEU rather than on emergency clauses or on wholesale constitutional reforms. In any case, EU law will need to take into account that a close cooperation between the public and private sector is vital for countering hybrid threats.

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KEYWORDS: EU law – external relations – security and defence – hybrid threats – disinformation – competence.

## I. INTRODUCTION

The notion of hybrid threats refers to compound techniques used to destabilise a political opponent. The European Union defines them as “multidimensional, combining coercive and subversive measures, using both conventional and unconventional tools and tactics (diplomatic, military, economic, and technological) to destabilise the adversary. They are designed to be difficult to detect or attribute, and can be used by both state and non-state actors”.<sup>1</sup>

This *Article* starts from one assumption: that hybrid threats to the EU have a degree of seriousness which makes them worthy of an effort to tackle them.<sup>2</sup> The assumption is widely shared by policymakers (EU institutions, and to a lesser and varied extent, national political leaders<sup>3</sup>), military commanders, and by researchers in this field. It appears to be justified in light of a precise Russian military doctrine<sup>4</sup> and of the long-standing Chinese political and military strategy of “three warfares” (public opinion warfare, media warfare, law warfare).<sup>5</sup> Moreover, the assumption is at the basis of the establishment of the European Centre of Excellence for Countering Hybrid Threats, inaugurated in 2017 with the support of both NATO and EU. The Covid-19 crisis has further fuelled the belief that hybrid threats pose a real danger.<sup>6</sup> Even if correct, the assump-

<sup>1</sup> Communication JOIN(2018) from the European Commission and the High Representative of the Union Foreign Affairs and Security Policy of 13 June 2018 on increasing resilience and bolstering capabilities to address hybrid threats. Other significant players give slightly different, but substantially equivalent definitions. They are recalled in D Fiott and R Parkes, ‘Protecting Europe: The EU’s Response to Hybrid Threats’ (2019) EUISS Chailot Papers 4; scholarly debates over the definition and a new proposal are in M Wigell, ‘Hybrid Interference as a Wedge Strategy: a Theory of External Interference in Liberal Democracy’ (2019) *International Affairs* 255.

<sup>2</sup> The potential impact of each threat is best evaluated by relevant military, security, or political actors and falls outside the scope of this *Article*.

<sup>3</sup> See, for a useful overview, D Fiott, ‘Uncharted Territory? Towards a Common Threat Analysis and a Strategic Compass for EU Security and Defence’ (2020) EUISS Policy Brief 3.

<sup>4</sup> H Foy, ‘Valery Gerasimov, the General with a Doctrine for Russia’ (15 September 2017) *Financial Times*; and prior to that, the *maskirovka* (camouflage) was a doctrine integral to the Russian army.

<sup>5</sup> D Livermore, ‘China’s “Three Warfares” In Theory and Practice in the South China Sea’ (25 March 2018) *Georgetown Security Studies Review* [georgetownsecuritystudiesreview.org](http://georgetownsecuritystudiesreview.org).

<sup>6</sup> Communication COM(2020) 605 final from the Commission to the European Parliament the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 24 July 2020 on the EU Security Union Strategy.

tion (and ensuing urgency in responding) does not imply that the EU's reaction is correct. Some of the measures taken to tackle the threats may prove counterproductive.<sup>7</sup>

Since the *Article* focusses on the EU, it is necessary to place its activity in perspective. Politically, the primary responsibility for countering hybrid threats lies with the Member States, and EU efforts are complementary in nature.<sup>8</sup> At international level, the security and defence of the European continent against such threats is largely ensured by the cooperation between the EU and NATO. Two joint declarations to this effect, of 2016<sup>9</sup> and 2018,<sup>10</sup> appear to divide the tasks pursuant to the respective mandates and capabilities of the organisations. While NATO is entrusted with conventional deterrence (military aspects), the EU is better equipped to deal with the civilian aspects. Given this political division of tasks, this *Article* is dedicated to answering the question of what legal tools the EU has for countering – deter, mitigate, or neutralise – hybrid threats.<sup>11</sup>

While the EU is now suggesting a single policy framework to face hybrid threats<sup>12</sup> (also with a view to adopt a Strategic Compass by 2022)<sup>13</sup> the legal framework is very fragmentary:<sup>14</sup> the label of hybrid threats is recent, it entered military strategy discus-

<sup>7</sup> See the example of actions against fake news, in section II.1. More generally, it is one of Tocqueville's lessons that half measures tend to work against their purposes, see A De Tocqueville, *The Ancien Régime and the French Revolution* (Cambridge University Press 2011) 139, and *ibid.*, J Elster, 'Introduction' xxii.

<sup>8</sup> Council Conclusions of 10 December 2019 on complementary efforts to enhance resilience and counter hybrid threats.

<sup>9</sup> Joint Declaration by the President of the European Council, the President of the European Commission and the Secretary General of the North Atlantic Treaty Organization of 8 July 2016 "The development of coordinated procedures through our respective playbooks will substantially contribute to implementing our efforts".

<sup>10</sup> Joint Declaration by the President of the European Council, the President of the European Commission and the Secretary General of the North Atlantic Treaty Organization, Brussels 2018 ("our partnership will continue to take place in the spirit of full mutual openness and in compliance with the decision-making autonomy and procedures of our respective organisations and without prejudice to the specific character of the security and defence policy of any of our members").

<sup>11</sup> It ought to be remembered nonetheless that the threats are hybrid also in the sense that they may couple civilian and military operations.

<sup>12</sup> See the Commission joint communications of 2016 and 2018. There is also a plethora of subject-specific policy documents, some of which are discussed in this *Article*.

<sup>13</sup> That is, an instrument contributing to forming a common strategic culture, see Council Conclusions of 17 June 2020, Security and Defence 3.

<sup>14</sup> There is no single piece of legislation containing EU tools to counter hybrid threats. EU competence may only arise when there is a cross-border element either to the threat or to the target thereof: but this is a sufficiently vast array of situations to warrant analysis. EU competence would be, most likely, to be based on one of the categories of the shared competences listed in art. 3(2) TFEU, or the Common Foreign and Security Policy and the Common Commercial Policy. Many measures have been or may be adopted in the context of harmonisation of the internal market, as discussed below for the cases of disinformation, IP theft, and privacy.

sion and political discourse,<sup>15</sup> and has not been “translated” into law yet. The EU policy framework and the institutional architecture have been object of excellent analyses.<sup>16</sup> Similarly, many legal profiles of hybrid threats have been dealt with in literature, but a comprehensive approach to EU regulatory response is still lacking.

This *Article* is structured around five hybrid threats: disinformation, hostile foreign subsidies and investment, cyberattacks, border pressure, and lawfare. In principle, the analysis could be structured by focussing on the target of the threat (infrastructures, borders, etc.); or the field to which the threat pertains (energy, internet, etc.); or on the EU competence engaged (energy law, migration law, Common Foreign and Security Policy, etc.). All these classifications, including the one this *Article* adopts, shed light to broadly overlapping aspects of the same phenomenon. The choice of structure of this *Article* is therefore justified in light of the definitionally hybrid nature of the threat, which is probably best captured by anchoring the analysis not to possible responses but to the threats themselves.

Each of the four sections of this *Article* is further divided into two parts. The first presents the threat; the second paints, with very broad strokes, the legal tools available to the EU to either deter, mitigate, or neutralise the threat.<sup>17</sup> In conclusion, in line with the theme of this special issue, the *Article* speculates on possible future developments of EU hybrid threats law and assesses possible constitutional implications.

## II. DISINFORMATION

### II.1. FAKE NEWS

Disinformation is defined by the Commission as “verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm”.<sup>18</sup> It is relatively cheap, can be carried out anonymously, and it may have far reaching-repercussions.<sup>19</sup> Disinformation has been especially linked to its potential to undermine the credibility of institutions, to “al-

<sup>15</sup> See A Missiroli, ‘From Hybrid Warfare to “Cybrid” Campaigns: The New Normal?’ NATO Defence College Policy Brief 19/19 1.

<sup>16</sup> E.g. D Fiott and R Parkes, ‘Protecting Europe’ cit. 4.

<sup>17</sup> The three actions structuring the final part of each section are taken verbatim from Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection, art. 2(e), defining “protection”.

<sup>18</sup> Communication COM(2018) 236 from the European Commission of 26 April 2018 on Tackling online disinformation: a European approach. This is the hybrid threat with the highest potential for philosophical speculation: what is false? And what counts as verification of falsehood? Why this almost metaphysical attachment to truth?

<sup>19</sup> The HR Borrell stated that disinformation in relation to Covid-19 can cost lives (Press conference by High Representative Josep Borrell Fontelles and Vice-President Věra Jourová on stepping up the response to disinformation around the coronavirus pandemic 10 June 2020).

ter political debate”,<sup>20</sup> and has been perceived to have a distinctive target: liberal democracies,<sup>21</sup> attacked through undue influence over their key processes, such as elections, or at time of emergencies or acute uncertainty.<sup>22</sup> Since it is shared especially on social networks, it appears to affect prevalently younger generations. The threat has been identified by the EU (and NATO) as coming especially from Russia and ISIS – both of which had a dedicated apparatus for and a deliberate strategy of “disinformation” campaigns – and, in the context of Covid-19, also from China.<sup>23</sup> Its scale and effects might not be felt until it’s too late: indeed, paradoxically, action taken to mitigate or neutralise a certain message identified as disinformation can produce the opposite effect, for example by lending it visibility.<sup>24</sup> The EU’s strategic objective is to nullify the impact of disinformation coming from third countries, and its action has been based almost exclusively on non-legally binding instruments. The policy response has been to counter this threat with a strategic communication task force, established within the European External Action Service (EEAS).<sup>25</sup> This was followed by a Communication on tackling online disinformation (2018),<sup>26</sup> inspired by the principles of improving transparency, diversity, and credibility of information; and an Action Plan to step up efforts to counter disinformation (2018),<sup>27</sup> establishing a rapid alert system and urging private actors (online platforms) to implement the self-regulatory Code of Practice on Disinformation – applying to disinformation coming from third countries and from the EU itself.

## II.2. ART. 114 TFEU: COMMON FOREIGN AND SECURITY POLICY RESTRICTIVE MEASURES

The EU disposes of regulatory tools for the mitigation or neutralisation of disinformation (art. 114 TFEU), and “punishment” tools that may act as deterrent (restrictive measures adopted under the Common Foreign and Security Policy). This section considers them in turn. Legislative acts may be adopted by the EU to prohibit “fake news”

<sup>20</sup> D Fiott and R Parkes, ‘Protecting Europe’ cit. 34.

<sup>21</sup> M Wigell, ‘Hybrid Interference as a Wedge Strategy’ cit. 268.

<sup>22</sup> To describe the process in relation to Covid-19, the WHO and the EU have used the term “infodemic”.

<sup>23</sup> See [euvsdisinfo.eu](https://euvsdisinfo.eu).

<sup>24</sup> J Elster, *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge University Press 2016) 46 discusses similar cases of “willing what cannot be willed”.

<sup>25</sup> It was established following the European Council conclusions of March 2015 and an action plan submitted later that year by the High Representative for the Union’s Foreign and Security Policy, in agreement with all the Member States. Two more task forces were established in 2017 for the Southern Neighbourhood and the Western Balkans.

<sup>26</sup> Communication COM(2018) 236 final cit.

<sup>27</sup> Communication JOIN(2018) 36 final of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 5 December 2018 on Action Plan against Disinformation.

and disinformation campaigns, arguably on the legal basis of art. 114 TFEU. That article provides a residual competence for the EU to approximate “provisions [...] in Member States which have as their object the establishment and functioning of the internal market”. As such, it is “the central Treaty provision for harmonizing the laws of EU MS”,<sup>28</sup> and as mentioned below other important instruments for the regulation of online content have been adopted on the same legal basis.

Such an EU measure to tackle disinformation would be enacted for the purposes of avoiding that illegal content be in circulation on platforms such as Facebook, Twitter, Instagram, who are hosting providers;<sup>29</sup> and avoiding that the disinformation creates undue distortions in the internal market. This is perhaps not the most appropriate option, in policy terms (for disinformation may do much more than simply causing trouble to a sector of the market), but it appears to be the most solid legal basis. The specificity of the damage which may arise in connection with information society services is characterised both by its rapidity and by its geographical extension. In addition, there exists the need to ensure that national authorities do not lose the mutual confidence which they should have in one another: this led the legislature of the EU to adopt the e-commerce directive<sup>30</sup> on the basis of art. 114,<sup>31</sup> or legislation on the IT society,<sup>32</sup> the proposed regulation against terrorist content online,<sup>33</sup> and the same rationale would apply for the legislation against fake news. Even though each Member State may seek the annulment of the act, legislation adopted pursuant to art. 114 TFEU tends to be confirmed by the Court of Justice of the European Union, which has been generally deferential to the choice of EU institutions when judicial challenges have risen. This measure would have the significant disadvantage of not being able to tackle effectively disinformation coming directly from third countries: EU law adopted on the basis of art. 114 TFEU would most likely apply to *external* threats if and only if there is an *internal* cross-border element, *i.e.* if at least two Member States are involved. So in *Baltic Media Alliance*, content produced in Russia and broadcasted in Lithuania was subject to EU law because the Court was satisfied that there was a

<sup>28</sup> M Kellerbauer, ‘Article 114 TFEU’ in M Kellerbauer, M Klamer and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1236.

<sup>29</sup> The main social media platforms provide a service for the purposes of art. 1(1)(b) of the Directive 2015/1535/EU of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services. They are service providers even when they are not liable for the content, as detailed in case C-18/18 *Eva Glawischnig-Piesczek v Facebook* ECLI:EU:C:2019:821 para. 22 discussed below.

<sup>30</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

<sup>31</sup> Art. 95 of the Treaty on the European Community, as it then was. We know this from recital 52 of the Directive.

<sup>32</sup> Directive 2015/1535/EU cit.

<sup>33</sup> Proposal COM(2018) 640 of 20 September 2018 of the Commission for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online.

cross-border element: namely, the content was provided by a company established in the UK (at that time, an EU Member State) and this triggered the application of the audiovisual services directive.<sup>34</sup> If EU law were binding outside EU territory, it would give rise to the kind of conceptual legal difficulty that other instruments such as the e-commerce directive (see discussion below) are encountering – namely, making EU law binding in third countries. Another challenge would lie in the centralised determination of the content to be considered illegal. As of now, not all disinformation consists of statements that are unlawful (an example of “fake news” which is already unlawful is the one amounting to consumer fraud or constituting hate speech). The Commission would need to show that EU legislation defining what counts as illegal content respects the principle of subsidiarity, but admittedly leaving the choice to Member States would not meaningfully improve the current legislation (for under the e-commerce directive, Member States courts are already empowered to order the removal of illegal content). As any restriction to freedom of speech, whatever definition the EU legislature might adopt, must be proportionate, respect the essence of that right, and meet objectives of general interests (art. 52(1) of the EU Charter of Fundamental Rights).<sup>35</sup>

Another possible legal basis is the chapter of the TEU concerning Common Foreign and Security Policy (CFSP). Punitive measures cannot concern criminal law, for lack of EU competence, but may result in the imposition of restrictive measures under CFSP. The procedural requirements are stricter than the previous option, their scope narrower, and they would risk an uncertain outcome. Restrictive measures thus conceived would involve third-country natural or legal persons (either by targeting them directly or by prohibiting EU nationals from contracting with them). A case in point is that of Ms Bamba,<sup>36</sup> an Ivorian entrepreneur subject to restrictive measures because of her responsibility for publishing a newspaper that incited to hatred, violence, and disinformation campaigns on the 2010 presidential election in Ivory Coast. It is one of the few cases of restrictive measures adopted to tackle disinformation, but the campaign was only indirectly related to EU’s security and defence. On that occasion, the Council targeted disinformation in order to safeguard democracy in a third country – but it is not to be excluded that it might do the same to shield the EU itself from this external threat.

<sup>34</sup> Case C-622/17 *Baltic Media Alliance* ECLI:EU:C:2019:566 para. 56.

<sup>35</sup> A Renda, ‘The Legal Framework to Address “fake news”: Possible Policy Actions at the EU level’ (2018 European Parliament – Policy Department for Economic, Scientific and Quality of Life Policies).

<sup>36</sup> Case C-417/11 *Council v Bamba* ECLI:EU:C:2012:718.

### III. FOREIGN SUBSIDIES AND INVESTMENT

#### III.1. "HOSTILE" SUBSIDIES AND INVESTMENT

The EU is committed to being open to foreign investment,<sup>37</sup> but measures adopted by third countries "appear to have an increasingly negative effect on competition in the internal market".<sup>38</sup> In a nutshell, the problem arises because, as the Commission's White Paper on foreign subsidies puts it, "EU State aid rules help to preserve a level playing field in the internal market among undertakings with regard to subsidies provided by EU Member States. However, there are no such rules for subsidies that non-EU authorities grant to undertakings operating in the internal market. This situation may include circumstances where the benefitting undertakings are owned or ultimately controlled by a non-EU company or a foreign government".<sup>39</sup> The grant of foreign subsidies may be driven, in some cases, "by a third country's strategic objective to establish a strong presence in the EU, or to promote an acquisition and later to transfer technologies to other production sites possibly outside the EU".<sup>40</sup> In addition, analysts have proposed to consider foreign investment in critical infrastructures as part of hybrid threats,<sup>41</sup> because of their potential to influence heavily the political behaviour of the host country's population.

In particular, China's ventures in Central, Eastern and Southern Europe have recently assumed proportions that aroused worry in Western Europe's political circles.<sup>42</sup> The same happened for China's investments in the EU's immediate neighbourhood. China's Belt and Road initiative has manifested itself in EU territory through bilateral international agreements (memoranda of understanding) signed between China and European countries (the so-called 16+1 initiative, which includes 12 EU Member States). As the 2019 EU strategy toward China states, those Chinese investments have "frequently neglect socioeconomic and financial sustainability and may result in high-level indebtedness and transfer of control over strategic assets and resources".<sup>43</sup> The competitiveness of European companies is further undermined by the fact that foreign companies may have access to subsidies, state-backed loans, export credits at preferential terms, and,

<sup>37</sup> It is, arguably, a constitutional commitment: art. 21(2)(e) TEU.

<sup>38</sup> Editorial, 'Protecting the EU's Internal Market in Times of Pandemic and Growing Trade Disputes: Some Reflections about the Challenges Posed by Foreign Subsidies' (2020) CMLRev 1366.

<sup>39</sup> European Commission, 'White Paper on levelling the playing field as regards foreign subsidies' Communication COM(2020) 253 final 6.

<sup>40</sup> Editorial, 'Protecting the EU's Internal Market in Times of Pandemic and Growing Trade Disputes' cit. 1366.

<sup>41</sup> M Demertzis and GB Wolff, 'Hybrid and Cybersecurity Threats and the European Union's Financial System' (2019) Bruegel Policy Contribution.

<sup>42</sup> J de Kok, 'Towards a European Framework for Foreign Investment Reviews' (2019) ELR 24.

<sup>43</sup> Communication COM(2019) 5 final from the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament, the European Council and the Council of 12 March 2019 on EU-China – A strategic outlook.



outside the EU, to different labour market conditions. This is especially concerning for strategic industries (in the energy, transport, and, in the context of Covid-19, healthcare sector).<sup>44</sup> In this domain, deterrence may not be feasible, whereas a mitigation, if not complete neutralisation of whatever threat investment may pose, ought to be possible. The EU rules on investment, albeit not aimed specifically at tackling this situation, might ensure that the final choices over China's policy in central and eastern Europe belong to the EU legislature. This evinces perhaps an optimistic vision of the international order as based on rules and compliance with international agreements, an optimism on which there is bound to be political disagreement.

### III.2. ART. 207 TFEU: THE COMMON COMMERCIAL POLICY, THE FOREIGN DIRECT INVESTMENT SCREENING REGULATION, TRADE DEFENCE INSTRUMENTS

Under EU law, investment is only partially caught by the Common Commercial Policy. The Court held that foreign direct investment falls within EU exclusive competence, regulated in the Common Commercial Policy (art. 207 TFEU),<sup>45</sup> whereas it is shared competence between the Member States and the EU in its non-direct forms such as portfolio investment, and in matters concerning investor-states dispute settlements.<sup>46</sup> EU investment policy is not only contained in EU agreements – sometimes split in separate agreements covering trade (exclusive competence) and investment protection agreements (shared competence)<sup>47</sup> – but also in a Regulation<sup>48</sup> detailing rules for the application of the hundreds of agreements between individual Member States and third countries. The above shows that the regulation of investment is a complex mosaic in which the EU and Member States' competence is intertwined. However, this does not mean that a Member State can unilaterally contract with a third country on this matter: rules on pre-emption (art. 3(2) TEU) apply so that, for example, Greece or Latvia are pre-empted from concluding a bilateral agreement with China or Russia if the subject mat-

<sup>44</sup> Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (2020/C 99 I/01).

<sup>45</sup> Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, for example, was adopted on the basis of this article.

<sup>46</sup> Opinion 2/15, *Free Trade Agreement with Singapore* ECLI:EU:C:2016:992.

<sup>47</sup> Such is the case of the Agreement with Singapore and with Vietnam. Council Decision (EU) 2018/1599 of 15 October 2018 on the signing, on behalf of the European Union, of the Free Trade Agreement between the European Union and the Republic of Singapore and Council Decision (EU) 2019/1121 of 25 June 2019 on the signing, on behalf of the EU, of the Free Trade Agreement between the EU and the Socialist Republic of Viet Nam.

<sup>48</sup> Regulation (EU) 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

ter of that agreement falls in a field already occupied by EU law (it would be a case of so-called supervening exclusivity of EU competence).<sup>49</sup> At the same time, EU free trade agreements usually contain national security clauses, which allow each party to derogate from rules or chapters of the agreement if it is to protect essential state interests.<sup>50</sup> These clauses may be activated, in mixed agreements, by Member States or by the EU to protect key sectors, such as essential industries, from hostile investments that might otherwise be allowed by the agreement in question. While the EU itself could rely on these clauses,<sup>51</sup> it is likely that Member States – who have competence in matters of national security – will be the first to invoke such exceptions.

The main legal instrument adopted by the EU in relation to hostile investments is the Foreign Direct Investment (FDI) screening regulation,<sup>52</sup> which has as legal basis art. 207(2) TFEU. The FDI screening regulation leaves the responsibility for screening FDI to Member States, who can review it on the grounds of security or public order and take measures to address specific risks. Similarly, under art. 65 TFEU, Member States may restrict the free movement of capital from third countries on the ground of public policy or public security. Crucially, the FDI screening regulation ultimately empowers Member States: it leaves them discretion on whether to screen FDI, but if they choose to do so, the regulation provides for a mechanism of co-ordination and provides for partial harmonisation.<sup>53</sup> In the light of Covid-19, the Commission has urged all Member States to set up a screening mechanism.<sup>54</sup> In addition, the EU can tackle foreign subsidies through so called “trade defence instruments”. Part of these, countervailing measures are essentially anti-subsidies proceedings. The World Trade Organisation allows the adoption of countervailing measures in the “Agreement on Subsidies and Countervailing Measures” contained in Annex 1A of the WTO Agreement, to which EU international agreements usually refer.<sup>55</sup> The legal basis under EU law, adopted on the basis of art. 207(2) TFEU, is the Regulation on protection against subsidised imports.<sup>56</sup> Measures on

<sup>49</sup> On which see e.g. M Chamon, ‘Implied Exclusive Powers in the ECJ’S Post-Lisbon Jurisprudence: The Continued Development of the ERTA Doctrine’ (2018) CMLRev 1101.

<sup>50</sup> By way of example, the Free Trade Agreement with Singapore contains such a clause allowing derogations from rules on public procurement (art. 9(3)(1)); the Free Trade Agreement with Canada has the same for public procurement (art. 19(3)(1)(b)) and an additional all-encompassing clause related to essential security interests (art. 28(6)).

<sup>51</sup> Albeit not in the context of investment, in 2014 the EU took action as allowed under art. 99(1) of the Partnership and Cooperation agreement with Russia in light of the tension in Ukraine.

<sup>52</sup> Regulation 2019/452 cit.

<sup>53</sup> J Snell, ‘Editorial: EU Foreign Direct Investment Screening: Europe Qui Protège?’ (2019) ELR 138.

<sup>54</sup> Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) (2020/C 99 I/01).

<sup>55</sup> E.g. arts 5-11 EU-Japan FTA; art. 3(1) EU-Vietnam FTA.

<sup>56</sup> Regulation (EU) 1037/2016 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union.

anti-dumping and anti-subsidy matters applicable following a WTO Dispute settlement body report are contained in a further Regulation.<sup>57</sup> There are, nonetheless, important differences between the regime for foreign subsidies under WTO and EU law, with the important consequence that “it cannot be excluded that under one regime something is found to be a subsidy or aid whilst under the other it is not”.<sup>58</sup>

#### IV. CYBERSECURITY: “THE DARK SIDE OF THE WEB”

##### IV.1. CYBER-ATTACKS TO PUBLIC TARGETS

Usually, the use of the term cybersecurity “relates to four major societal threats – crime, cyberwar, cyber terrorism and espionage”.<sup>59</sup>

Even a cursory mention of the potential *public* targets of criminal, terrorist, or war-like cyber-attacks renders the idea of the complexity of the issues involved, for which the treatment is here bound to be purely schematic:<sup>60</sup> critical infrastructures such as harbours, airports, or pipelines; industrial or civilian complexes (such as powerplants or hospitals); not to mention banks, military headquarters, and ministries. The digitalisation of human activities lends strong support to the fear of those who imagine apocalyptic scenarios in which the enemy gets possession, through a cyber-attack, of the adversary’s military capabilities. Intellectual property theft was listed by the High Representative as a form of hybrid threat in a 2019 declaration. When it assumes the form of espionage through hacking, trade secret theft, or file sharing, it is considered a national security threat in the United States.<sup>61</sup> What these attacks have in common is the potential damage, if not downright paralysis, of core state functions. In that case, if state functions are affected, *ius ad bellum* profiles become relevant, in so far as it is NATO policy that a cyber-attack against a member might open the door to the alliance’s response pursuant to art. 5 of the NATO Charter.

<sup>57</sup> Regulation (EU) 476/2015 of the European Parliament and of the Council of 11 March 2015 on the measures that the Union may take following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters.

<sup>58</sup> Editorial, ‘Protecting the EU’s Internal Market in Times of Pandemic and Growing Trade Disputes: Some Reflections About the Challenges Posed by Foreign Subsidies’ (2020) CMLRev 1377 for a discussion of these differences.

<sup>59</sup> E Fahey, ‘The EU’s Cybercrime and Cyber-Security Rulemaking: Mapping the Internal and External Dimensions of EU Security’ (2014) European Journal of Risk Regulation 47.

<sup>60</sup> See the special issue of the European Foreign Affairs Review, 2019, whence the Pink Floyd-sounding phrase is borrowed: A Missiroli, ‘The Dark Side of the Web: Cyber as a Threat’ (2019) European Foreign Affairs Review 135.

<sup>61</sup> D Halbert, ‘Intellectual Property Theft and National Security: Agendas and Assumptions’ (2016) The Information Society 256.

#### IV.2. ARTS 114, 215 AND 352 TFEU: THE EU CYBERSECURITY ACT AND THE CRITICAL INFRASTRUCTURE DIRECTIVE

EU law countering cyber-attacks is predicated on three main instruments: the EU Cybersecurity Act (adopted on a legal basis of art. 114 TFEU),<sup>62</sup> the cyber-attacks sanctions framework regulation (based on art. 215 TFEU),<sup>63</sup> – both were adopted as part of the “Cyberdiplomacy toolbox”<sup>64</sup> – and the Critical Infrastructures Directive (“CID”, based on art. 352 TFEU). This section considers them in turn, before considering other instruments relevant to cybersecurity. Overall, these EU measures aim to “build resilience, fight cybercrime, build cyberdefence, develop industrial and technical resources and elaborate a diplomatic strategy for cyberspace”.<sup>65</sup>

The Cybersecurity Act defines cyber threat as “any potential circumstance, event or action that could damage, disrupt or otherwise adversely impact network and information systems, the users of such systems and other persons”.<sup>66</sup> In extreme synthesis, that Act increases significantly the mandate, the powers, and the resources of the European Union Agency for Cybersecurity (ENISA). It allows for the opportunity to develop a common response system between EU institutions, and entrusts ENISA with coordinating and supporting it as well as the Member States, both in terms of prevention and of response. The sanctions framework regulation applies to cyber-attack (including potential ones) provided that they meet a minimum threshold of having “significant” effect (by reasons of the criteria set out therein),<sup>67</sup> against the EU and/or its Member States.<sup>68</sup> The framework regulation allowed for the adoption, in July 2020, of the EU’s first sanctions against cyber-attacks. The individuals and entities targeted were allegedly involved in an attempted cyber-attack against the Organisation for the Prohibition of Chemical Weapons, in Cloud Hopper, in WannaCry and NotPetya. The last three are among the most devastating cyber-attacks in history: they affected public services and critical infrastructures, had a far-reaching geographical spread, and the estimated damages amount to

<sup>62</sup> Regulation (EU) 881/2019 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) 526/2013 (Cybersecurity Act).

<sup>63</sup> Council Regulation (EU) 796/2019 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States.

<sup>64</sup> Communication JOIN (2017) 450 of the European Commission and the High Representative of 13 September 2017 on Resilience, Deterrence and Defence: Building strong cybersecurity for the EU.

<sup>65</sup> RA Wessel, ‘European Law and Cyber Space’ in N Tsagourias and R Buchan (eds), *Research Handbook on International Law and Cyberspace* (Edward Elgar 2021) (on file with this author).

<sup>66</sup> Art. 2(8) of the Cybersecurity Act cit.

<sup>67</sup> In art. 2: scope, scale and impact or severity of the disruption, number of Member States or people affected, the economic benefit gained by the perpetrator etc.

<sup>68</sup> Art. 1 of the Council Regulation (EU) 796/2019 cit.

several billions of dollars.<sup>69</sup> The restrictive measures present an important issue bound to result in litigation before (EU) courts: the grounds for being targeted are contained in a short statement (the statement of reasons), but in light of the difficulty in attributing the cyber-attacks a court will face a very delicate choice, between deferring to the Council's choice (as it usually happens for restrictive measures)<sup>70</sup> or scrutinising it in light of the complex technical assessment needed.

When it comes to the CID, EU law identifies critical infrastructures as *physical* assets or systems located in Member States which are essential for the maintenance of vital societal functions (art. 2(a) CID).<sup>71</sup> It imposes on Member States obligations to conduct threat assessments (art. 7 CID), and most importantly lays down a common approach for the security of European critical infrastructures (those whose disruption would affect at least two Member States). The "common approach", as opposed to a centralised procedure, leaves discretion to Member States on the extent to which they wish to involve the Commission. It also sets common standards for infrastructures protection. *Digital* networks are, of course, possible targets of cyber-attacks. The EU adopted, in 2013, its first Cybersecurity strategy, and later a directive on network security.<sup>72</sup> The current discussion on 5G technology, with its risks and potentials, has an EU dimension: the Commission recommendation of March 2019 on cybersecurity 5G networks<sup>73</sup> follows the European Council's call for a concerted approach to this technology.

Intellectual property theft is particularly disruptive of competition – and cannot be confirmed until it is too late (that is, when a similar or identical product has appeared on another market). The target of this threat are most commonly private companies, and this elevates the need to private-public dialogue to an existential requirement, if the threat may be to public security. Under EU law, intellectual property crime may target industrial property and copyrighted material. As part of the digital single market strategy, the Commission adopted a series of recommendations to sustain small and medium enterprises in their fight against IP theft, in the context of the IP rights directive.<sup>74</sup> Within Europol, the Intellectual Property Crime Coordinated Coalition fights these crimes by giving operational and technical support to competent authorities, as well as harmonising and standardising legal instruments to counter IP crime. The latter function is particularly relevant for the purposes of this discussion.

<sup>69</sup> See e.g. KS Nash, S Castellanos and A Janofsky, 'One Year After NotPetya Cyberattack, Firms Wrestle With Recovery Costs' (27 June 2018) Wall Street Journal [www.wsj.com](http://www.wsj.com).

<sup>70</sup> See e.g. case C-72/15 *Rosneft* ECLI:EU:C:2017:236 para. 113.

<sup>71</sup> Directive 2008/114/EC of 8 December 2008 of the European Critical Infrastructures and the Assessment of the Need to Improve their Protection ('CID') on the Identification and Designation.

<sup>72</sup> Directive 2016/1148/EU of 6 July 2018 Concerning Measures for a High Common Level of Security of Network and Information Systems Across the Union.

<sup>73</sup> Commission Recommendation COM(2019) 2335 on Cybersecurity of 5G networks of 26 March 2019.

<sup>74</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

The EU has in place a robust legal framework for the protection of personal data.<sup>75</sup> EU law on data protection and online services is a muscular tool that allows prevention against data breaches and protects EU citizens even outside the territory of the EU. This extra-territorial application of EU law, as mentioned, has raised important legal issues that prove divisive among EU lawyers. In the case of the e-commerce directive, the Court has recently had occasion to pronounce over the reach of the protection granted by such legislative instrument. In *Glawischnig-Piesczek v Facebook*,<sup>76</sup> an Austrian politician was object of a Facebook comment which, under Austrian law, was considered illegal content. Austrian courts asked the ECJ whether EU law allows them to order Facebook to remove worldwide statements with identical wording and/or having equivalent content to the illegal one. The Court held that Facebook is a host provider for the purposes of the e-commerce directive even if it is not liable for the content. This is a very important point, as it entails the application of EU internal market rules to content hosted<sup>77</sup> by social media platforms (regardless of the author), provided that there is a link with EU law (*i.e.* the service provider is established in the EU, the recipient is an EU citizen, or the service is offered across Member States).<sup>78</sup> The Court also found that the host provider may be ordered to remove not only the illegal content, but also “information with an equivalent meaning” – provided that the order specifies with sufficient clarity what ought to be removed, so that it does not result in the host having to carry out an independent assessment.<sup>79</sup> Even though the Court is keen on stating that the host will exclusively have recourse to automated tools for locating and removing the content, some have expressed scepticism as to the technological feasibility of this task.<sup>80</sup> Finally, the Court found that the Courts of Member States may issue injunctions which produce worldwide effects, because there is no relevant limitation in the e-commerce directive. The finding of the Court strengthens the power and the scope of application of EU’s legal response to hybrid threats targeting individuals (in the case under discussion, a politician), in so far as it expanded the substantive and geographical reach of the protection afforded.

<sup>75</sup> On this as well as on criminal measures adopted by the EU to combat cyber-crime see RA Wessel, ‘European Law and Cyber Space’ cit.

<sup>76</sup> *Eva Glawischnig-Piesczek v Facebook* cit.

<sup>77</sup> It will be recalled that hosting is a service pursuant to the definitions of the e-commerce directive and of Directive 2015/1535.

<sup>78</sup> *Eva Glawischnig-Piesczek v Facebook* cit. para. 22.

<sup>79</sup> *Ibid.* para. 46.

<sup>80</sup> P Cavaliere, ‘AG Opinion on C-18/18: Towards Private Regulation of Speech Worldwide’ (28 June 2019) European Law Blog [europeanlawblog.eu](http://europeanlawblog.eu).

## V. BORDER PRESSURE

### V.1. DIVERSE THREATS FOR DIVERSE BORDERS

Borders are traditionally the place where skirmishes and confrontation first happens. Fiott and Parkes provided an excellent overview of the situations faced alongside the thousands of kilometres the EU shares with third countries, by sea or land.<sup>81</sup> The issues range from smuggling of people, drugs, and even garbage, to military provocation. It ought to be recalled that by their very nature, hybrid threats tend to be combined, so that border pressure can be exercised jointly with disinformation campaigns etc.

A necessary if artificial distinction ought to be drawn between the Eastern border and the Southern one. Some of the pressure from Russia is exercised directly by that State, hence the cause of the threat originates in the EU's neighbourhood. Some of the pressure against the Southern borders (Spain, Italy, Greece and the Balkans) does not originate directly from the neighbouring countries, but so to speak further away. The migratory flows from Syria and South-Saharan Africa and routed, respectively, through the Maghreb or Turkey are examples of a pressure whose genesis is not in the EU's immediate neighbourhood but which may be used, for example by Turkey, as leverage in negotiations with the EU.

### V.2. ART. 77(2) TFEU: AREA OF FREEDOM, SECURITY AND JUSTICE, AND THE SCHENGEN BORDERS CODE. ART. 82(2) AND 83: EU CRIMINAL LAW, THE COMMON SECURITY AND DEFENCE POLICY

In addition to a general migration and asylum policy, EU competence consists of rules for the management of Schengen borders (which is also most of EU external borders), now set out in the Schengen Borders Code,<sup>82</sup> through the independent agency Frontex and an integrated information system.<sup>83</sup> Frontex cooperates with national authorities for the purposes of border control and surveillance.

The EU has also adopted criminal law instruments for tackling border issues, based on the broad powers conferred to it under arts 82 and 83 TFEU. Reference shall be made to the directive on human trafficking,<sup>84</sup> and drug trafficking.<sup>85</sup> The legal basis of art. 83(1) TFEU in particular appears to be bestow quite a broad power to the EU, in so

<sup>81</sup> D Fiott and R Parkes, 'Protecting Europe' cit.

<sup>82</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>83</sup> So-called SIS II, Regulation 1987/2006.

<sup>84</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

<sup>85</sup> Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.

far as it allows the adoption of measures to criminalise offences “in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis” (among which the article lists “border threats” such as human or drug trafficking, money laundering). The powers are broad because, on a literal reading of art. 83(1) TFEU, the EU may criminalise offences without a cross-border dimension, as long as they fall in one of the “areas of particularly serious crime” foreseen by said article.<sup>86</sup> Similarly broad powers are invested by art. 83(2) TFEU, under which the EU may adopt directives “if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures”. As mentioned later, these provisions lend themselves to a functional interpretation and are likely to result in an expansion of EU activity.

Complementarily to that, the EU has used instruments adopted pursuant to the Common Security and Defence Policy (CSDP) for patrolling the Mediterranean Sea,<sup>87</sup> such as the launch of the military operation EUNAVFOR MED in 2015.<sup>88</sup> The complementarity between the AFSJ and the CSDP derives from the fact that the latter is meant to be deployed outside the EU, at least if one heeds to the letter of art. 42(1) TEU.<sup>89</sup> CSDP military operations could also be helpful for border surveillance and processing of irregular migrants, in support of Frontex.<sup>90</sup> What happens at the border, however, is only part of the story: as it is well-known, there are remote causes for migratory flows. These can be tackled and perhaps mitigated by the EU development policy and perhaps CSDP. In addition, civilian missions and military operations have been deployed for the purposes of contributing, directly or indirectly through capacity building of local forces, to a decrease in the amount of people who reach EU borders. An example of the former is EUCAP Sahel Niger, of the latter EUTM Mali.<sup>91</sup>

<sup>86</sup> But see, *contra*, I Wieczorek, *The Legitimacy of EU Criminal Law: Hart Studies in European Criminal Law* (Hart 2020) 114.

<sup>87</sup> On which see G Butler, ‘EU Foreign Policy and Other EU External Relations in Times of Crisis: Forcing the Law to Overlap?’ in E Kuzelewska, A Weatherburn and D Kloza (eds), *Irregular Migration as a Challenge for Democracy* (Intersentia 2018).

<sup>88</sup> Council Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the southern Central Mediterranean.

<sup>89</sup> “The Common Security and Defence Policy shall be an integral part of the CFSP [...] the Union may use them on missions outside the Union [...]”. In this sense, see also S Biscop and J Rehrl, *Migration – How CSDP can support* (Publication of the Federal Ministry of Defence and Sports of the Republic of Austria 2016) 11.

<sup>90</sup> *Ibid.* 12.

<sup>91</sup> First approved through Council Decision (CFSP) 2013/34 of 17 January 2013 on a European Union military mission to contribute to the training of the Malian Armed Forces.



If the link between the eradication of poverty or security on one hand, and on the other hand reduction of migration is accepted, then the EU has tools to mitigate the remote causes of migratory flows which result in pressure on borders.

## VI. LAWFARE

### VI.1. USES OF LAW, ABUSES OF LAW, AND LAWFARE

There is, finally, a sense in which law itself can be used by adversaries to exert pressure: law can be, in and of itself, a hybrid threat (not simply a tool or vehicle thereof). The proposition that law may be used for political aims is trivially true, but about what some analysts in the Euro-Atlantic area worry is, more or less explicitly, that the EU has too many rules, and that, paradoxically, the legal system becomes a cumbersome apparatus from which opponents can benefit.<sup>92</sup> The comparison is, once more, with China and Russia. These countries appear less encumbered by legal constraints,<sup>93</sup> or are perceived to engage in obstructionist, unprejudiced, or downright cynical use of law.<sup>94</sup> NATO's standpoint on confrontational "legal operations" concerns explicitly the latter. Authors have identified, for example, that "Russia's activities in the Arctic provide several good examples of manipulating the Rules Based International Order".<sup>95</sup> For instance, in 2015 Russia appealed to the UN for the recognition of a large portion of the Arctic Sea as part of Russia's Exclusive Economic Zone, thus purporting to act in compliance with public international law.<sup>96</sup> Those authors speculate that this claim was not made in good faith.

In addition to that, there is lawfare, can be defined as the "use [of] communication and informational media to propel certain legal concepts and interpretations into the public mindset that will help achieve strategic objectives".<sup>97</sup>

<sup>92</sup> On which see in general A Sari, 'The Mutual Assistance Clauses of the North Atlantic and EU Treaties: The Challenge of Hybrid Threats' (2019) *Harvard National Security Journal* 442-443.

<sup>93</sup> For the difficulties that this give rise to for the rule-of-law based EU, see the reflections in S Blockmans, 'Why Europe Should Harden Its Soft Power To Lawfare' (2020) CEPS in Brief [www.ceps.eu](http://www.ceps.eu).

<sup>94</sup> For example, using law for the purposes of achieving aims other than those for which the rules were originally conceived. Concrete cases are discussed in M Voyger, 'Russian Lawfare – Russia's Weaponisation of International and Domestic Law: Implications for the Region and Policy Recommendations' (2018) *Journal of Baltic Security* 38.

<sup>95</sup> B Seguin, 'The Use of Legal Operations in a Context of Hybrid Threats and Strategic Competition' (13 March 2020) Lawfire sites.duke.edu.

<sup>96</sup> *Ibid.*

<sup>97</sup> AB Munoz Mosquera and SDOV Bachmann, 'Lawfare in Hybrid Wars, The 21st Century Warfare' (2016) *Journal of International Humanitarian Legal Studies* 63.

## VI.2. ARTS 2 AND 3(5) TEU: CAN THE EU ENGAGE IN LAWFARE... IN ORDER TO TACKLE LAWFARE?

Since the rule of law is one of the fundamental values of the EU (art. 2 TEU), and, in its relations with the rest of the world, the EU shall contribute to “the strict observance and the development of international law, including respect for the principles of the United Nations Charter” (art. 3(5) TEU), it is inconceivable to envisage that the EU would develop an express policy commending cynical uses of law.<sup>98</sup> Paradoxically, the requirement to adhere to pre-established and democratically decided rules may be perceived as a vulnerability. Adversaries might exploit the difficulty in reaching consensus and the need to stick to procedures. From this perspective, the mutual defence clauses may invite opponents to act below their threshold,<sup>99</sup> or slightly above just to “test” if there is a reaction. However, the rule of law is a fundamental value common to the organisation of power, both public and private, in the Euro-Atlantic area. Its constitutional importance for the EU can hardly be set aside, perhaps not even in highly exceptional and most unusual circumstances requiring urgent action, lest the EU lose its nature and a new legal order be created. There are nonetheless areas in which the EU may have recourse to “lawful, though unfriendly, measures of international intercourse”.<sup>100</sup> For once, the EU has engaged in what may be construed as lawfare, according to NATO’s definition recalled above, in so far as it has set up the Strategic Communications task forces to counter disinformation, as recalled in section II.1 above. In addition, the EU has the power to adopt restrictive measures whose design is political in nature, *i.e.* subtracted from judicial control, even though it has to comply with human rights and procedural requirements. Finally, the EU has autonomous defence clauses which may be used as deterrent, and those are object of extensive analysis elsewhere.<sup>101</sup>

In any case, the uses of law for international relations are not limited to external competences. As Mills has correctly noted, “internal action by the EU has external effects, which should be viewed not merely as incidental but also as potentially instruments of external policy”.<sup>102</sup> Mills referred to the developments of private international law, regulated “internally” at EU level and with repercussions for EU’s external position:

<sup>98</sup> International law (e.g. art. 17 of the European Convention of Human Rights, art. 300 of the United Nations Convention on the Law of the Sea States), as well as the EU Charter of Fundamental Rights (art. 54), prohibit abuse of right.

<sup>99</sup> A Sari, ‘The Mutual Assistance Clauses of the North Atlantic and EU Treaties’ cit. 444, referring to the classic TC Schelling, *Arms and Influence* (Yale University Press 2008) 35 ff.

<sup>100</sup> The citation is from A Sari, ‘The Mutual Assistance Clauses of the North Atlantic and EU Treaties’ cit. 442.

<sup>101</sup> *Ibid.*

<sup>102</sup> A Mills, ‘Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local?’ (2016) ICLQ 541. Similarly, PG Andrade, ‘EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally’ (2016) CMLRev 157.

for example, when the EU uses private international law “as a means of projecting policies extraterritorially by limiting access to EU recognition unless a foreign law or judgment complies with certain standards”.<sup>103</sup> The same logic ought apply to EU law countering hybrid threats.

## VII. THE FUTURE OF SECURITY AND DEFENCE LAW: EMERGING POWERS OF THE EU?

A single legal instrument or a coherent legal framework is, at this stage, inexistent. This is because of the very nature of the danger, which is meant, by design, to escape detection and clear categorisation. There are two ways in which the EU might nonetheless conceive and implement a unitary legal response: through “horizontal” emergency provisions or through more or less explicit constitutional amendments.

Regardless of the specific policy area of Union action, recourse might be had to “horizontal” emergency provisions. The fundamental Treaties empower the EU (arts 66, 78(3) and 122 TFEU), its Member States (art. 42(7) TEU<sup>104</sup> and art. 65 TFEU), or a mixture of both (art. 222 TFEU)<sup>105</sup> to take action in emergency situations. For their breadth of scope, arts 222 TFEU and 42(7) TEU might seem appropriate for the task – whereas art. 78(3) TFEU, which refers to “an emergency situation characterised by a sudden inflow of nationals of third countries”, is apt in the case of this border pressure. There are, however, two interrelated issues. The first is the very scope of those clauses. Do hybrid threats fall, by virtue of their subject matter, under the definition of either art. 222 TFEU or 42(7) TEU? Arguably, none of the threats identified above constitute, in and of themselves, an “armed aggression” for the purposes of art. 42(7) TEU; whereas damages to infrastructure may amount to “natural or man-made disaster” under art. 222 TFEU, or, if they affect product supply, art. 122 TFEU. The second is a policy argument concerning those definitions: an explicit indication of the threshold which would trigger the clauses under EU law may constitute an invitation to the adversaries. As it is often the case with “redlines”, it may amount to an invitation for opponents to either act below that threshold (ie, causing disturbance without necessarily triggering a response), or to provoke the EU by carrying out an attack precisely to test the Union’s response.

Alternatively, one might observe how recent event-driven developments of EU law have resulted in implicit constitutional amendments, later endorsed by the Court. The EU’s response to the economic and financial crisis of the past decade displayed constitutional ingenuity that at times, if not systematically, stretched the letter of the Treaties

<sup>103</sup> A Mills, ‘Private International Law and EU External Relations’ cit. 543.

<sup>104</sup> P Koutrakos, ‘The Role of Law in Common Security and Defence Policy: Functions, Limitations and Perceptions’ (2011) *European Foreign Policy: Legal And Political Perspectives* 237 ff.

<sup>105</sup> C Hillion and S Blockmans, ‘Europe’s Self-defence: Tous Pour Un et Un Pour Tous?’ (2015) CEPS Commentary.

and of EU's attributed competence. The pervasive reform of "constitutional redesign" that took place through the setup of Banking Union,<sup>106</sup> and especially the management of public finances outside the Treaties (e.g. with the European Stability Mechanism), may be considered to be *de facto* constitutional amendments. In that context, an economic and political rationale guided the reforms. In the name of effectiveness and expediency, the functions of the EU have expanded. It is interesting to speculate whether something similar could happen for hybrid threats. The security rationale might lead the EU to exercise, in practice, powers which go beyond what the Treaties appear to provide, at least if taken literally.<sup>107</sup> There are three reasons why certain EU actions in this domain might amount to an implicit constitutional amendment. The first is the express dictum of art. 4(2) TEU, according to which, as recalled, internal security is the sole responsibility of the Member States. The second is that it might encroach on NATO commitments for part of EU Member States, or on traditional neutrality for others,<sup>108</sup> something which (art. 42(2) TEU) appears to forbid. Additionally, the security threat might be tackled by EU Member States outside the framework of EU Treaties, for example through bilateral agreements. Examples of these, in the domain of defence, are the European intervention initiative (an agreement between eight Member States and the UK creating the pre-conditions for coordination of military operations<sup>109</sup>) or the Aachen Treaty (an international treaty between France and Germany on military cooperation).<sup>110</sup> The third is that if art. 83(2) TFEU were to be interpreted broadly, the recognition of implied powers in the area of criminal law may amount to a recognition of an EU (exclusive) competence in (part of) this field. Yet, it is not unconceivable that EU political institutions – backed by the Court – will find emerging powers or envisage some form of constitutional engineering to justify comprehensive EU action, if the threats reached a sufficient degree of seriousness. There is a distinctively EU dimension – and thus an EU interest – to virtually all of the threats discussed in this *Article*. There is shared awareness of this, at national and Union level. The 2016 Global Strategy makes this clear: "[n]one of our countries has the strength nor the resources to address these threats and seize the opportunities of our time alone".<sup>111</sup> Further, as mentioned, at least in the case of the areas of crimes of art. 83(1) TFEU a cross-border dimension needs not be established, as it is presumed in the list drawn by that article. With few exceptions,

<sup>106</sup> T Tridimas, 'General Report' (2016) Processes of the XXVII FIDE Report 87.

<sup>107</sup> See, for a similar argument in the field of cybersecurity, RA Wessel, 'European Law and Cyber Space' cit.

<sup>108</sup> As discussed in A Sari, 'The Mutual Assistance Clauses of the North Atlantic and EU Treaties' cit.

<sup>109</sup> Letter of intent of 25 June 2018 between the Defence ministers of Belgium, Denmark, Estonia, France, Germany, the Netherlands, Portugal, Spain, and the UK.

<sup>110</sup> Treaty on Franco-German Cooperation and Integration of 22 January 2019.

<sup>111</sup> High Representative, 'Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy' (June 2016) 3.

Member States have little capabilities and overall an underdeveloped legal framework, at national level, for tackling hybrid threats.<sup>112</sup> As far as intelligence and counter-intelligence is concerned, it is worth restating here that many EU Member States are heavily reliant on cooperation within NATO.

In a sense, there was a meta-rationale of security<sup>113</sup> in the case of economic reforms as much as there would be if the response to hybrid threats led to constitutional changes: the underlying idea in both cases is the elevation of a threat to EU's activity to an existential issue, whereby EU inaction is considered tantamount to a complete failure of the integration project. Similar to this, if not precisely this, seems to be the understanding of the CJEU, which Takis Tridimas has called "the existentialist conception of EU competence".<sup>114</sup> Such existential understanding has manifested itself also at times not of emergency: in the interpretation of the internal market harmonisation clause (art. 114 TFEU),<sup>115</sup> or in the protection of the "essence of rights" in the context of EU citizenship.<sup>116</sup> The CJEU has been actively involved in approving an expansive understanding of EU competence, and this might not change in the context of hybrid threats.

## VIII. CONCLUSIONS

Legal and regulatory tools equip the EU to counter the hybrid threats mentioned in this *Article*, thus positioning the Union as the complementary and to a great extent autonomous allied of NATO in this domain. While the threats themselves are very broad, so are EU competences. The three understandings of the word "countering" – deterring, mitigating, and neutralising – are helpful to paint a picture of the potential of the EU's legal framework, even though it should be clear that there will always be "unknown unknowns",<sup>117</sup> so that complete neutralisation is chimerical.

To tackle disinformation, the EU may avail itself of the general clause of art. 114 TFEU to pass legislation regulating news that might adversely affect the internal market. However, it would be more difficult to find EU competence to regulate disinformation coming directly from third countries and targeting individual Member States. On investment, art. 207 TFEU on the Common Commercial Policy affords the EU with competence to regulate to a capillary extent trade and investment with China. Even in the absence of a Free Trade Agreement, EU law often pre-empts bilateral agreements between third countries and EU

<sup>112</sup> G Gressel, 'Protecting Europe Against Hybrid Threats' (2019) European Council for Foreign Relations.

<sup>113</sup> To borrow the expression from M Fichera, *The Foundations of the EU as a Polity* (Edward Elgar 2018) 1.

<sup>114</sup> T Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability' in D Chalmers and A Arnall (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015).

<sup>115</sup> *Ibid.*

<sup>116</sup> Case C-34/09 *Zambrano* ECLI:EU:C:2011:124.

<sup>117</sup> To borrow the concept from Donald Rumsfeld's speech at the US Department of Defence News Briefing of 12 February 2002: there will always be facts or threats that are ignored until... they materialise.

Member States on this subject. EU has capabilities to increase the resilience of Member States against cyber-attacks to critical infrastructures, to individuals, or to intellectual property, as the instruments adopted on the basis of arts 114, 215 and 352 TFEU show. This is done not by deterring third countries with threats of retaliation, but by strengthening EU-level networks of cooperation. The EU has a special interest in the contribution to border management, as witnessed by the emphasis in policy documents of the Commission. It is also competent to establish rules for both Schengen and non-Schengen borders (within the Area of Freedom Security and Justice, or through criminal law, arts 82 and 83 TFEU). Finally, as far as lawfare is concerned, the EU can adopt perfectly lawful yet unfriendly measures (such as sanctions) to deter or mitigate other threats (such as disinformation). The EU has proved successful in mitigating many threats. It could be particularly strong in the deterrence dimension, in its non-military aspects: earlier detection and prevention of the threats is, probably, the best deterrence.

Hybrid threats cover such a broad array of issues that a single legal instrument is neither feasible nor, probably, desirable. If it were to be developed, it would most likely be built on a set of legal bases, spanning from art. 114 TFEU on the approximation of the internal market, to the Common Commercial Policy,<sup>118</sup> rather than on emergency clauses or on wholesale constitutional reforms.

In any case, close cooperation with the private sector is vital, and this is the most likely long-term impact of any legal framework that may be developed to challenge hybrid threats. The threats are not only tackled, but also put by companies or individuals whose affiliation with a sovereign state is always more or less plausibly deniable.<sup>119</sup> The European Commission is aware of this necessary development. If the notion of hybrid threats is destined to be fashionable in the next decades, it might inaugurate an era, if not of privatization of security and defence, at least of diffusion into the private sector of the core public function.

<sup>118</sup> The Common Security and Defence Policy does not seem to offer legal instruments material to this discussion, but rather policy tools.

<sup>119</sup> G Gressel, 'Protecting Europe Against Hybrid Threats' cit.



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