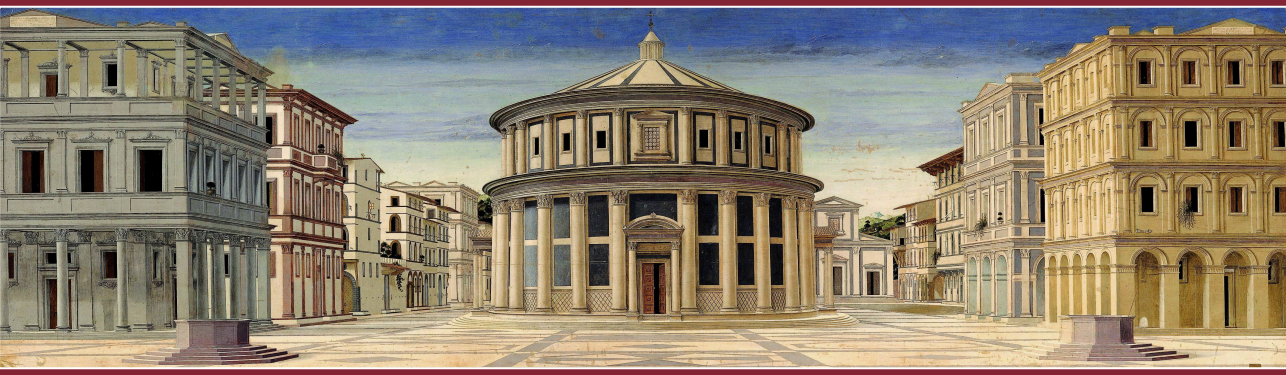
European Papers

A Journal on Law and Integration

Vol. 8, 2023, No 1



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With the support of the Erasmus+ Programme of the European Union

European Papers is a double-blind peer-reviewed journal. This Issue of the *e-Journal* (final on 13 July 2023) may be cited as indicated on the *European Papers* web site at *Official Citation*: *European Papers*, 2023, Vol. 8, No 1, www.europeanpapers.eu.

ISSN 2499-8249 – *European Papers* (Online Journal) doi: 10.15166/2499-8249/0

Registration: Tribunal of Rome (Italy), No 76 of 5 April 2016.

European Papers

A Journal on Law and Integration

Vol. 8, 2023, No 1*

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EUROPEAN FORUM

Editorial

A *Verfassungsbeschwerde* for the European Union?

In contemporary systems of human rights protection the right to an effective remedy is acquiring a prominent place. It is, indeed, the right of the rights, as no right can be qualified as such unless it is assisted by an effective remedy. The effectiveness of the remedy is thus the indispensable instrument which complements every right, regardless of its nature and rank.

Quite surprisingly, however, the right to an effective remedy enters into relational dialectics with the multifarious models of constitutional review (for a classification of these models, see the classic study of M Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill 1971); more recently M Rosenfeld, 'Constitutional adjudication in Europe and the United States: paradoxes and contrasts' (2004) ICON 635 ff.).

Neither the Kelsenian model of abstract review by an *ad hoc* Constitutional Court, requested by institutional organs, nor the Marshallian model of concrete review, carried out by judges in their daily administration of justice, nor even hybrid models, hinging upon a mechanism of preliminary ruling referred to a Constitutional Court by ordinary judges, are immune from criticism. To safeguard the democratic legitimacy of Parliament, and to maintain a sense of deference for the custodian of popular sovereignty, they exclude direct access of individuals to the constitutional review of legislation.

Is that a violation of the right to an effective remedy? Can we consider that this right entails, as a corollary, that individuals must be directly empowered to challenge before a Court a Parliamentary Statute that allegedly undermines their rights? Can we assume that the systems of constitutional review, which were regarded as a revolutionary innovation just a few decades ago, must now be updated in correspondence with the growing relevance acquired by that principle?

The problem of the effectiveness of a constitutional review of legislation also arose in the EU legal order, which, in turn, has idiosyncratic features. The Treaties set up an indirect mechanism of indirect review – the celebrated mechanism of preliminary ruling under art. 267 – and a direct mechanism under art. 263(4) whereby individuals are entitled to bring a complaint against "an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".

European Papers
Vol. 8, 2023, No 1, pp. 239-241
www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/649

In *Inuit* (case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625) the CJEU famously interpreted the notion of "regulatory act" as including non-legislative acts only. In response to the arguments put forward by the complainants that such an interpretation would violate the right to an effective remedy, the Court reasserted that the actual system of remedies enshrined in the Treaties is fully compliant with the requirements of art. 47. In its view, the protection conferred by this provision "does not require that an individual should have an unconditional entitlement to bring an action for annulment of European Union legislative acts directly before the Courts of the European Union" (point 104).

This interpretation is far from obvious with regard to both the method used – a subjective method, hardly consistent with the Constitutional nature of the Treaties –, and its systemic implication. The preliminary ruling mechanism does not fill the gap of the absence of a direct remedy against legislative acts for two reasons. First, it is incomparably more burdensome than a direct challenge, also considering that only last instance national judges have the duty to refer to the Court and that the effectiveness of this duty is rather controversial. Second, and perhaps more importantly, this mechanism is weighed down by a serious flaw. More often than not, it requires individuals to breach the law to be entitled to challenge it: the original sin of the systems of preliminary ruling.

In *Posti and Rahko* (ECtHR *Posti and Rahko v Finland* App n. 27824/95 [24 September 2002] para. 64) the European Court of Human Rights found that "no one can be required to breach the law so as to be able to have a 'civil right' determined in accordance with Article 6 § 1". A somewhat similar principle was raised by the CJEU. In particular, in *Unibet* (case C-432/05 ECLI:EU:C:2007:163), the Court admitted that if an individual "was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law, that would not be sufficient to secure for it such effective judicial protection".

These sparse holdings, quite generic indeed, can hardly amount to a full-fledged judicial doctrine. But they pave the way for a more effective protection of fundamental rights: namely to set up, besides the indirect systems of constitutional review, a mechanism that entitles individuals to lodge a constitutional complaint against the acts of public authorities allegedly violating their fundamental rights, including the right to an effective remedy. Famous examples include the *Verfassungsbeschwerde* initially based on § 90 BVerfGG and later codified in art. 93 (1,4a) of the *Grundgesetz* (see, for a thorough assessment of the role of the *Verfassungsbeschwerde* in the German legal order, C Gusy, *Die Verfassungsbeschwerde*, in RC Van Ooyen and MHW Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System* (2nd ed Springer 2015) 344 ff.).

But how could the old and revered individual action for annulment, established by art. 263(4), be converted into a constitutional or a quasi-constitutional direct remedy?

This transformation would require two re-interpretations of art. 263(4). The first relates to the notion of "regulatory act", which should be construed in accordance with its most obvious sense, namely a measure which, regardless of its denomination and rank, imposes individual conducts and sanctions their violations. The second, relates to the notion of "act [...] which does not entail implementing measures". This notion should include not only the measures which do not need to be implemented, under *T & L Sugars Ltd* (case C-456/13 P ECLI:EU:C:2015:284); but also those which, regardless of their denomination and rank, entail implementation measures, but only in case of a breach.

The first category covers cases in which there is no other remedy, in accordance with the reform of art. 263(4) by the Treaty of Lisbon. An act that does not need implementing measures cannot be challenged if not by means of a direct action. The second includes general measures that direct the conduct of individuals and require them to behave unlawfully in order to assert their allegedly breached rights.

The reinterpretation of art. 263(4) TFEU would set up a mechanism similar to a direct constitutional complaint but quite different in nature and object. In a sense, it even goes beyond it, as it ensures the right to an effective judicial protection irrespectively from the qualification of the underlying substantive rights claimed by the complainant. In so doing, it would bring the system of remedies of the Treaties more in line with the constitutional requirements of the Charter and would lend more credibility and legitimacy to the entire system of judicial protection of the Union.

To do so, the CJEU should repudiate its firm stance stating that nothing in the Charter requires an updating of the system of remedies as enshrined in the Treaties. Once this defensive approach has been abandoned, the CJEU will be on the frontline in the development of the right to an effective remedy. This development will auspiciously dispel the dangerous idea that deference to Parliament justifies a system whereby individuals have to behave unlawfully to assert their rights, in particular their fundamental rights. In these currently difficult times for Europe, this does not seem to be the best way forward.

E.C.

ARTICLES

BALL IN THE COMMISSION'S COURT: ENSURING THE EFFECTIVENESS OF EU LAW THE DAY AFTER THE COURT RULED

MARTINA DI GAETANO*

ABSTRACT: In mid-April 2021, the Hungarian government announced the withdrawal of the 2017 Transparency Law. In its ruling in case C-78/18, in the context of a Commission-led infringement procedure, the Court declared such law in violation of civil society organisations (CSO) and foreign funders' freedom of movement of capital as well as their freedom of association, right to respect for private and family life, and right to protection of personal data. Following intense months of dialogue with the European Commission, in mid-May 2021, the Hungarian Parliament repealed the law. However, at the same time, it adopted a new one on the Transparency of CSOs, which still presents the same shortcomings as the previous one and, consequently, continues to prevent CSOs from exercising their role of democracy watchdogs. This *Article* argues that the new law is the latest manifestation of Hungary's tendency towards autocratic legalism. By relying on a creative compliance-based approach, the Hungarian legislator proposed a law that is only in appearance in line with and based on the ruling of the Court. The *Article* argues that such a strategy, if winning, has the potential to spread its effects beyond the Hungarian border. It claims the Commission finds itself forced to choose between continuing the existing infringement procedure or accepting a merely formalistic implementation of the Court's ruling, in a historical moment where the legitimacy of the Court of Justice to decide on values-related cases is more than ever questioned.

KEYWORDS: rule of law – civil society organisation – *Transparency of Associations* – infringement procedures – creative compliance – autocratic legalism.

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ISSN 2499-8249
doi: 10.15166/2499-8249/650

I. Introduction

Over the last decade, EU institutions and scholars have increasingly focused on 'rule of law backsliding'. Although there is no unanimous definition of this phenomenon, it can be explained as "the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party".[1]

The phenomenon has been addressed under different points of view, particularly concerning the impact on the effectiveness of EU law and the coherence of the system of EU constitutional values and principles. Several suggestions have been proposed to tackle the problem, ranging from overcoming the limits of the "nuclear option" under art. 7 of the Treaty on the European Union (TEU) to making a more consistent use of infringement procedures or leveraging the economic power of EU funds against those Member States that refuse to respect EU values.[2]

However, little has been said on the effectiveness of the use of such instruments. While most scholars call for more action, particularly from the European Commission, few positive changes have occurred so far that may support the argument that such actions are indeed effective in bringing defying Member States back in line. This is an essential aspect that EU institutions and actors should keep in mind when promoting or developing strategies to counter democratic backsliding. In the absence of a proper assessment of the effectiveness of the current tools, one runs the risk to water down any effort to address the phenomenon, by playing the same game that autocratic governments play: limiting oneself to formalistic action, while forsaking the substance.

This contribution addresses this second, and mostly neglected, aspect of the EU's battle for the rule of law. By relying on the case study of the infringement procedure against Hungary's anti-NGO legislation, it argues that, in a context of increasing 'creative compliance' by Hungary, the European Commission should focus more on the enforcement stage of infringement procedures (as provided by art. 260(2) TFEU), verifying to what extent the concerned Member State effectively complies with the Court's instructions. This contribution aims, first, at exposing a strategy (hereafter referred to as "creative compliance"[3] in a context

[1] KL Scheppele and L Pech, 'What is Rule of Law Backsliding?' (2 March 2018) Verfassungsblog verfassungsblog.de.

[2] See, among others, P Bárd, B Grabowska-Moroz and VZ Kazai, 'Rule of Law Backsliding in the European Union Lessons from the Past, Recommendations for the Future' (15 January 2021) RECONNECT www.reconnect-europe.eu; P Bárd and A Śledzińska-Simon, 'Rule of law infringement procedures. A proposal to extend the EU's rule of law toolbox' (2019) CEPS Paper in Liberty and Security www.ceps.eu; and L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 3.

[3] A Batory, 'Defying the Commission: Creative compliance and respect for the rule of law in the EU' (2016) Public Administration 685.

of "authoritarian legalism"[4]), put more and more into practice by autocratic governments, to comply with the ruling of the Court of Justice of the EU (hereafter "CJEU" or "the Court") only formally while, in practice, adopting pieces of legislation that allow them to pursue their illiberal agenda. Second, it provides for possible alternative ways to counter that strategy.

The choice of Hungary as a case study is not a casual one. Over the last decade Hungary has progressively departed from democratic values by increasingly concentrating power in the hands of the government and State officials loyal to the ruling party, *Fidesz*, and its political leader, Orbàn.[5] This phenomenon cannot be easily summarised by reference to selected areas of power or of the society, insofar as the Hungarian government's strategy is more and more based on consolidating its power in a broad range of sectors. Consequently, we are observing the progressive implementation of a scheme based on capturing all different areas of the State, ranging from institutions, such as the Parliament and the judiciary, to telecommunication networks and civic space.[6]

This *Article* does not seek to provide a comprehensive overview of the different reforms and strategies adopted by the Hungarian government to consolidate *Fidesz*' power. Conversely, it will focus on the legislative measures targeting civil society organisations (hereafter "CSOs") in the context of the much-criticised Law No LXXVI of 2017 on the Transparency of Organisations which receive Support from Abroad (hereafter 'Transparency Law').[7]

Following the ruling of the Court of 18 June 2020 in *Transparency of Associations*,[8] in April 2021 the Hungarian government announced the withdrawal of the debated Transparency Law.[9] Following intense months of negotiation and increasing threats by the European Commission to ask the Court to impose financial penalties,[10] in mid-May 2021,

[4] KL Scheppele, 'Autocratic Legalism' (2018) UChiLRev 545.

[5] For an overview of the political and legislative developments that took place in Hungary over the last decade, see P Bárd and L Pech, 'How to build and consolidate a partly free pseudo-democracy by constitutional means in three steps: The 'Hungarian model" (RECONNECT Working Paper October 2019) 4.

[6] See, in this regard, the sections on the judicial system, media freedom and checks and balances of the Commission Staff Working Document SWD (2020) 316 final from the Commission of 30 September 2020 on 2020 Rule of Law Country Chapter – Hungary and Commission Staff Working Document SWD (2021) 714 final from the Commission of 20 July 2021 on 2021 Rule of Law Country Chapter – Hungary.

[7] While the author acknowledges that different definitions and classifications of civil society organisations exist, this *Article* will refer to civil society organisations (CSOs) and non-governmental organisations (NGOs) interchangeably to describe all actors carrying out forms of social action and serving the general interest through a democratic process and independently from State's authorities, playing the role of mediator between public authorities and citizens.

[8] Case C-78/18 *European Commission v Hungary (Transparency of associations)* ECLI:EU:C:2020:476.

[9] Hungarian Parliament, Act LXXVI of 2017 on the transparency of organisations supported from abroad, of 13 June 2017.

[10] On 18 February 2021, the European Commission sent a letter of formal notice to Hungary (available at: ec.europa.eu), asking for clarification as to the implementation of the ruling of the Court in case C-78/18. The letter of formal notice, sent under the procedure provided for in art. 260, para. 2, TFEU, allows the European Commission to ask the Court of Justice for the imposition of financial penalties in the event Hungary does not

the Hungarian Parliament officially repealed the law, while at the same time adopting a new package of legislative measures.[11] While welcoming the withdrawal, the European Commission showed a certain reticence in considering the problem solved. As a matter of fact, the infringement procedure is still open.[12]

In light of Hungary's withdrawal of the 2017 Transparency Law and adoption of the new law in May 2021, it is worth examining the latter with a view to understanding to what extent Hungary took into consideration the issues pointed out by the Court in its ruling. In so doing, the *Article* seeks to expose and analyse the Hungarian illiberal strategy of misusing EU law – and the interpretation provided by the Court – to formally implement the Court's ruling while in practice pursuing its initial goal of progressively closing civic space. To do so, the *Article* will firstly set the scene for the analysis of the Hungarian strategy, addressing the concept of 'autocratic legalism' and the use of a 'creative compliance'-based strategy to legitimise democratic backsliding (section II). Subsequently, it will clarify the context preceding the adoption of the 2021 legislative package (section III), by providing an overview of the 2017 Transparency Law (section III.1) and of the problematic aspects that led the Court of Justice to consider it in violation of EU law (section III.2). It will then analyse the new legislative package in light of the supposed implementation of the Court's ruling (section IV). The *Article* will argue that the new law merely represents a new expression of the Hungarian government's attempt to control civil society and political dissent.

The *Article* will conclude that the new legislative package does not substantially implement the Court's ruling (section V). Nonetheless, it limits itself to a formalistic implementation, thus giving the European Commission a choice between two possible roads to take: accepting the reform, thus avoiding the need to take further action, or acknowledging that the new law poses the same threats to EU law already identified by the Court, while at the same time creating additional legal uncertainty and further hindering CSOs' action, thus requiring action under art. 260 TFEU.

In this light, the *Article* will address the broader impact that a lack of compliance with the Court's rulings may have on the authority of the Commission and the effectiveness of the EU legal system. It will analyse the role of infringement procedures as an enforcement tool, both in their pre-judicial and judicial phase. It will argue that, while in a context of cooperation and mutual respect for commonly shared rules, EU Member States tend to adapt to the Commission's pre-judicial requests and eventually to respect the Court's

comply with the Court's ruling. As a response, first, the Hungarian government informally announced the withdrawal of the Transparency Law and, subsequently, the Hungarian Parliament repealed it.

[11] Such a package comprises the withdrawal of Act LXXVI of 2017 on the Transparency of Foreign-Supported Organisations (Transparency Law), as well as a set of amendments to the cardinal law establishing the State Audit Office (Act LXVI of 2011 on the State Audit Office). The new law was adopted on 17 May 2021, and it entered into force on 1 July 2021.

[12] See infringement procedure no. INFR(2017)2110 against Hungary, Violation of EU Law by the Act on the Transparency of Organisations Supported From Abroad (Act LXXVI/2017) adopted on 13 June 2017, still active at the time of writing, available at ec.europa.eu.

ruling, values-related infringements present their own peculiarities. The *Article* will conclude that, to protect its credibility, the Commission should acknowledge the need to change its approach by (i) constantly and thoroughly analysing new legislation allegedly adopted in order to comply with a Court's ruling and (ii) start making consistent use of the sanctioning phase of the infringement procedures, by systematically relying on art. 260(2) TFEU. Finally, the *Article* will acknowledge some of the limits of the proposed approach and conclude with some remarks on the effectiveness of the existing enforcement tools at the disposal of the Commission (Section VI). While the Commission frequently presents itself as fully equipped to address rule of law backsliding, this *Article* will conclude that the reality does not correspond to this picture, thus making the need of changes evident.

II. Overturning democracy in the name of the law: the use of creative compliance by EU autocratic legalists

The theoretical framework underpinning the concept of autocratic legalism provides a useful starting framework to understand to what extent the Hungarian government and its Prime Minister Orbán selectively make use of EU law to increase electoral support and suppress dissent.

Kim-Lane Scheppele refers to autocratic legalism as the phenomenon where autocratic governments make use of their electoral mandates, coupled with constitutional and legislative procedures to pursue their illiberal agenda.[13]

In her studies on this topic, Scheppele points out the difference between the *old* autocrats and the *new* ones. She stresses that new autocratic governments have developed innovative strategies. They avoid adopting excessively restrictive legislation by opting for a gentler approach which comprises repurposing State's institutions and revising constitutional benchmarks and procedures, while leaving some dissent in play, and relying on a flexible ideology that allows them to meet populistic demands.[14]

Even more importantly, she highlights a specific technique put in place by such autocrats to hinder opponents' actions, namely that of driving them out of the country or forcing them to change the activity they are engaged in through specifically designed economic and political measures.[15] In so doing, autocrats establish a generalised climate of hostility and threat, which eventually leads their opponents to either stop their activities or move into another country to be able to pursue them. An emblematic example is that of the adoption of the 2017 Lex CEU in Hungary,[16] which imposed that foreign universities could continue operating in Hungary only if they were also operating in the country of

[13] KL Scheppele, 'Autocratic Legalism' cit.
[14] *Ibid.* 573-574.
[15] *Ibid*. 575.
[16] Amendments to the Act on National Higher Education in Parliament of 28 March 2017.

origin. In practice, the Lex CEU was aimed at disrupting the activities of the Central European University (CEU), founded by George Soros and accredited to operate under United States (US) law but conducting no activities in the US.[17] While the academic environment immediately reacted against the proposed Lex CEU, it took three years for the Court of Justice of the EU to rule against the law.[18] However, by the time the ruling was adopted and Hungary amended the law, the CEU had been forced to partially relocate to Austria, where its second campus currently seats.[19]

An important aspect that characterises legalistic autocrats is their apparent reliance on the constitution and the formalistic aspects of the law and the legislative process. A recurring element in the analysis of autocratic legalism is the (ab)use of constitutional institutions and procedures to justify the majority's illiberal agenda.[20] In such a context, one can witness laws justified in light of the protection of constitutionally guaranteed rights and freedoms, or with reference to international standards. However, those same laws are at the heart of the deceiving strategy aimed at annihilating the party's political opponents.

Such a phenomenon, particularly the reference to international standards, raises further concerns in the framework of the European Union's legal system. In such a setting, Member States are bound to ensure compliance with EU rules and the judgments of the Court of Justice. Such obligations imply, among others, that domestic laws that have an impact on or are the implementation of EU legislation need to be analysed by national legislators in light of EU law. This is the essence of the relationship between domestic and EU law and can be defined by reference to the judicially developed concept of primacy of EU law over domestic law, which requires, among other things, that national laws must be in compliance with EU law.[21]

Compliance with EU law can be defined as the conformity of a domestic piece of legislation with a prescribed rule or benchmark enshrined in EU law. The establishment of such compliance is, however, difficult to assess, especially in rule of law-related issues, given the broad and undefined reference to EU values provided for in the EU Treaties.[22]

[17] G Halmai, 'Legally sophisticated authoritarians: the Hungarian Lex CEU' (31 March 2017) Verfassungsblog verfassungsblog.de.

[18] Case C-66/18 *Commission v Hungary (Enseignement supérieur)* ECLI:EU:C:2020:792.

[19] E Inotai, 'Legal victory for Central European University is too little, too late' (6 October 2020) Reporting Democracy balkaninsight.com. See also CI Nagy, 'Case C-66/18 Commission v. Hungary (Central European University)' (2021) AJIL 700.

[20] It shall be pointed out that, while illiberal agendas are usually put into action by the government, the main actor behind them can frequently be identified in the majority party. This is particularly true in a captured State, such as Hungary, where the separation of powers (in particular between the legislative and executive powers, but to a certain extent also concerning the judiciary) cannot be ensured anymore. In such contexts, the leader behind the illiberal agenda shall be considered the majoritarian party, rather than the government or the Parliament.

[21] Case 6/64 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66 para. 3.

[22] On the vagueness of art. 2 TEU with regard to the value of the Rule of Law, see W Schroeder, 'The Rule of Law as a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?' in A von Bogdandy and

The challenge of establishing a clear difference between what is compliant and what is not has been correctly described by Zürn, who highlights that a dichotomy does not provide sufficient clarity.[23] This *Article* will distinguish between formalistic and substantive compliance. While the first may imply, for instance, formal transposition of a Directive into national legislation, the second requires the concretisation of such transposition, i.e., ensuring the effectiveness of the Directive.[24]

This is particularly relevant in light of the Hungarian case study. As it will be argued, on the one side, the Hungarian legislator justifies the 2021 legislative package as adopted following the ruling of the Court of Justice and in order to comply with it.[25] On the other side, simultaneously, it creates a new legislative framework which, as the contribution will show, achieves the same result, namely discouraging CSOs from expressing their political dissent.

The conundrum between autocratic tendencies and the need to appear compliant with EU law has given birth to several remarkably creative pieces of legislation. The new 2021 anti-CSO law provides a clear picture of such a contrast and the need, for autocratic governments, to keep up appearances. Agnes Batory clearly examines the phenomenon in her work on the use of creative compliance by autocratic governments.[26] She describes creative compliance as the strategy adopted when "a member state [...] pretends to align its behaviour with the prescribed rule or changes its behaviour in superficial ways that leave [its] original objective intact".[27] This strategy allows the Member State to adopt "measures that in their totality render enforcement action inconsequential".[28] Several scholars in EU studies have described the above concept. For instance, Noutcheva refers

others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 105, and LD Spieker, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision', in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* cit. 237; LD Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) German Law Journal 1182.

[23] M Zürn, 'Introduction: Law and compliance at different levels', in M Zürn and C Joerges, *Law and Governance in Postnational Europe* (Cambridge University Press 2005) 1.

[24] See E Versluis, 'Even Rules, Uneven Practices: Opening the "Black box" of EU Law in Action' (2007) West European Politics 50-67, for an in-depth study of the substantive degree of implementation of Directives in different Member States compared with their formalistic transposition into domestic law.

[25] See the explanatory note attached to Bill no. T/15991, where the government (author of the bill) clarifies that, in view of the findings of the Court of Justice of the EU in case C-78/18, Transparency of Associations, the Bill repeals the 2017 Transparency Law. Furthermore, Bill T/15991 is described as based on the judgment of the Court, which is interpreted as confirming that the need to ensure the transparency of non-governmental organisations with a significant influence on public life can be an overriding reason based on public interest (and thus justify a limitation of EU fundamental freedoms). For this reason, the Bill also creates a new legislative framework regulating CSOs' activities and their accounting and reporting obligations.

[26] A Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU' cit.

[27] *Ibid*. 688.

[28] *Ibid.*

to it as "fake compliance",[29] while Dimitrakopoulos and Richardson define it "tick the boxes implementation", at the same time pointing out that it consists of "conscious attempts by member states to dilute or undermine EU policy".[30] In the following pages, the *Article* shows how creative compliance consists of three stages: first, the Member State announces its willingness to comply with a court's ruling; second, it adopts measures that, formalistically, align with such ruling; third, it adopts a piece of legislation that is announced as in line with EU law and, at first sight, seems to be falling within the limits of EU law. In so doing, the Member State seems *prima facie* to be respectful of their obligations under EU law and the Court's authority. However, at a less superficial level, one will find out how the new piece of legislation is meant to achieve the same unlawful goal already reported by the Court as non-compliant with EU law.

III. Setting the context: the Court's ruling in *Transparency of Associations*

Before diving into the analysis of the new legislative package, it is worth clarifying the general context around the *Transparency of Associations* case. To do so, this section first addresses the content of the 2017 Transparency Law and subsequently points to the problematic aspects as identified by the Commission during the infringement procedure, the justifications provided by Hungary and, finally, the reasoning of the Court.

III.1. The 2017 Transparency Law

The 2017 Transparency Law introduced a set of obligations for CSOs receiving funds from donors which have their legal seats outside Hungary. Given the difficult access to public funding in Hungary and the generalised (and frequently criticised[31]) practice of allocating

[29] G Noutcheva, 'Fake, Partial and Imposed Compliance: The Limits of the EU's Normative Power in the Western Balkans' (2009) Journal of European Public Policy 1065. Although Noutcheva refers to fake compliance in the context of candidate countries' accession to the EU – in particular with regard to institutional reforms, good governance and the rule of law – the notion can also be applied to the context of Member States' compliance with EU law and the Court's ruling.

[30] S Dimitrakopoulos and J Richardson, 'Implementing EU Public Policy', in J Richardson, *European Union: Power and Policy-making* (2nd edition Routledge 2001) 335.

[31] See, among others, Á Vass, 'No Deal Reached on Norway Grants Worth EUR 215 Million' (27 July 2021) HungaryToday hungarytoday.hu, as concerns the reasons underpinning the decision of Norway and other EEA countries to refuse the disbursement to Hungary of €215 million, meant to support CSOs. See also Á Vass, 'Gov't Outsources State Assets and Unis to 'Raise Competitiveness,' Opposition Believes It's Robbery' (28 April 2021) HungaryToday hungarytoday.hu, as concerns the widespread practice of transferring State assets to public interest asset management foundations, in order to remove those funds from public authorities' oversight as to their use. See also Transparency International EU's observations, endorsed by other six NGOs, pointing out that, for years, Hungary's authorities have been overbudgeting and overpricing projects covered by EU funds, thus providing no guarantees as to the independent allocation and control over the disbursement of such funds (L Pearson for Transparency International EU, 'Open letter to the European Commission on Hungarian Resilience and Recovery Facility Plan' (29 September 2021)

funds to CSOs politically close to the majority party, CSOs active in sensitive areas and politically not aligned with the government found in foreign donors their main funding sources.[32] The Transparency Law was adopted and entered into force at a time when CSOs reported increased allegedly State-sponsored "smear campaigns".[33] against organisations funded from abroad and active in migrants and refugees' reception and integration programmes,, as well as against the philanthropist George Soros and its foundation, Open Society.[34]

The Transparency Law was officially aimed at addressing the cases were "support from unknown foreign sources [to civil society organisations] is liable to be used by foreign public interest groups to promote – through the social influence of those organisations – their own interests rather than community objectives in the social and political life of Hungary".[35] Such support "may jeopardise the political and economic interests of the country and the ability of legal institutions to operate free from interference".[36] To address such issue, the law introduced the following obligations:

- Transparency obligations. Every organisation receiving support from abroad was required to submit a declaration to the competent court informing it of the name, place of registration and identification number of the CSO concerned. CSOs should also inform about the amount of support received and the number of donors providing such contributions. If the donor was a natural person, the declaration should also indicate the name, country and city of residence of such a person, while, if a legal person, it should indicate

Transparency International transparency.eu). Finally, see the concerns raised by the European Commission in its 2021 Rule of Law Report – Hungary Country Chapter, where it points out that "the Hungarian authorities frequently withdraw projects from EU funding when OLAF issues a financial recommendation, or sometimes when the authorities become aware that an OLAF investigation has been opened. Furthermore, it appears that amounts due are not systematically recovered from the economic operator who committed the irregularity or fraud. In such cases, the EU subsidy is simply replaced by national funds, with a negative impact on the deterrent effect of an OLAF investigation and higher risks for the national budget" (2021 Rule of Law Country Chapter – Hungary cit.).

[32] P Sárosi, 'Outsourcing Autocracy: The Rise of the Hungarian Deep State' (28 April 2021) Autocracy Analyst autocracyanalyst.net.

[33] International Service for Human Rights, 'The Situation of Human Rights Defenders – Hungary' (September 2015) UPR Briefing Paper ishr.ch. See also M Szuleka, 'First victims or last guardians? The consequences of rule of law backsliding for NGOs: Case studies of Hungary and Poland' (CEPS Paper in Liberty and Security in Europe 06/2018). Finally, see R Csehi, *The Politics of Populism in Hungary* (Routledge 2021), with a specific focus on section "Legislation regulating civil society organizations and non-governmental organizations – the abuse of law".

[34] R Csehi, *The Politics of Populism in Hungary* cit., with a specific focus on Chapter 2, section 'Legislation regulating civil society organizations and non-governmental organizations – the abuse of law'". See also L Bayer, 'Hungary steps up anti-Soros crackdown ahead of election' (17 January 2018) POLITICO www.politico.eu, and Human Rights Watch, *Hungary's Government Strengthens Its Anti-NGO Smear Campaign* (20 January 2018) www.hrw.org.

[35] *European Commission v Hungary (Transparency of associations)* cit. para. 3.

[36] *Ibid.*

the business name and its registered office.[37] Upon receipt of such declaration, the Court was required to register the organisation as an organisation receiving support from abroad and transmit all relevant information concerning the CSO to the Ministry competent for the management of the civil information portal, freely accessible to the public.[38]

- Advertising obligations. CSOs receiving support from abroad were required to indicate on their website and their publications that they have been identified as organisations receiving support from abroad.[39]

The law also provided for specific sanctions should CSOs fail to provide and display information on their revenue source. Such sanctions ranged from a fine to the dissolution of the organisation.[40]

In July 2017, the Commission started the pre-litigation phase, arguing that the law was not in compliance with the free movement of capital and violated arts 7, 8 and 12 of the Charter "by introducing discriminatory, unjustified and unnecessary restrictions on foreign donations to civil society organisations through the provisions of the Transparency Law, which impose obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold, and which provide for the possibility of applying penalties to organisations not complying with these obligations".[41] Following the lack of meaningful replies by Hungary, in December 2017, the Commission brought the action before the Court of Justice.

III.2. The Court is in session!

In the context of the judicial phase, the Commission brought forward its claims.

First, concerning the free movement of capital, the Commission submitted that the Transparency Law introduced a discriminatory measure against donors established outside of Hungary. While the law did not introduce a discrimination based on nationality, it nonetheless treated differently donors within Hungary and those established in other Member States or third countries.

Hungary replied that the law was not discriminatory *per se*, since it did not introduce a nationality criterion, but one merely based on the source of the income. It also held that such distinction was justified on the basis that financial support from Hungary could be more easily monitored, compared to support from abroad, hence requiring a different approach.

[37] Annex I to the Transparency Law.

[38] Art. 2(1), (2) and (4) of the Transparency law.

[39] Art. 2(5) of the Transparency Law.

[40] Art. 71G(2) of Law No CLXXXI of 2011 on the registration of civil society organisations with the courts and on the applicable rules and procedure.

[41] *European Commission v Hungary (Transparency of associations)* cit. para. 18.

With regard to this latter justification, the Commission argued that the place of establishment could not "be used as a parameter to assess the objective comparability of two situations".[42] It also argued that, in any case, the law had a deterrent effect on CSOs established in Hungary and donors established outside of Hungary: the "obligations of declaration and publication would deter the persons granting such aid from continuing to do so and would discourage other persons from doing so".[43]

As to such deterrent effect, Hungary replied that the provisions of the law were drafted in neutral and objective terms.[44] However, in the event the law was found as not compliant with art. 63 TFEU, Hungary argued that it was justified on the basis of an overriding reason in the public interest, namely that of increasing the transparency of the financing of CSOs having an influence on public life.[45] The Commission contended that, even in such a case, the law went beyond what was necessary and proportionate to reach such objectives.[46]

Second, concerning the violation of the Charter, the Commission argued that the law violated freedom of association since it made it more difficult for Hungarian CSOs to operate and stigmatised CSOs receiving funds from abroad while threatening their existence, by providing for the possibility of their dissolution. In addition, by requiring the disclosure of donors' personal data to the general public, the law violated the right to respect for private life and the right to data protection.[47]

Conversely, Hungary claimed that the Transparency Law merely regulated CSOs receiving funds from abroad and did not, as such, limited their freedom of association. It further reiterated that the law was drafted in neutral terms. Furthermore, it argued that the data to be disclosed could not be considered personal data within the meaning of art. 8 of the Charter, inasmuch as donors should be regarded as public persons – given their influence on public life – and thus enjoyed less protection than individuals.[48]

In its ruling of 18 June 2020, the Court endorsed the Commission arguments. It found that, with regard to the free movement of capital,

> "Those various measures, which were introduced together and which pursue a common objective, put in place a set of obligations which, having regard to their content and their combined effects, are such as to restrict the free movement of capital which may be relied upon both by civil society organisations established in Hungary [...] and by the natural and legal persons who grant them such financial support and who are therefore behind those capital movements".[49]

[42] *European Commission v Hungary (Transparency of associations)* cit. para. 41.
[43] *Ibid*. para. 42.
[44] *Ibid.* cit. paras 43 and 44.
[45] *Ibid.* para. 73.
[46] *Ibid*. para. 71.
[47] *Ibid*. paras 105-107.
[48] *Ibid*. paras 108 and 109.
[49] *Ibid*. para. 57.

Such provisions singled out CSOs and their donors, thus stigmatising them and creating a climate of distrust "apt to deter natural or legal persons from other Member States or third countries from providing them with financial support".[50]

The Court also rejected Hungary's attempts to justify the law, holding that the law was not based "on the existence of a genuine threat but on a presumption made on principle and indiscriminately that financial support that is sent from other Member States or third countries and the civil society organisations receiving such financial support are liable to lead to such a threat".[51] Nor could the presumption of such a threat be considered genuine, present and sufficiently serious to justify the restriction.[52]

Moreover, in relation to the Charter, the Court found, firstly, that freedom of association includes the right for CSOs to act freely from unjustified interventions of the State, including as concerns raising funds.[53] Secondly, it held that a piece of legislation which

> "renders significantly more difficult the action or the operation of associations, whether by strengthening the requirements in relation to their registration, by limiting their capacity to receive financial resources, by rendering them subject to obligations of declaration and publication such as to create a negative image of them or by exposing them to the threat of penalties, in particular of dissolution is nevertheless to be classified as interference in the right to freedom of association".[54]

Lastly, it upheld the Commission's argument on the deterrent effect of the law, stressing that the Transparency Law was such as "to create a generalised climate of mistrust vis-à-vis the associations and foundations at issue, in Hungary, and to stigmatise them".[55]

On the protection of private life and personal data, the Court refused Hungary's argument that natural persons providing support to CSOs should be regarded as public figures, holding that granting financial support cannot be considered as exercising a political role. Hence, natural persons providing donations to Hungarian CSOs should benefit from the most extensive right to data protection.

The Court eventually concluded that, by adopting a law

> "which impose[s] obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold and which provide for the possibility of applying penalties to organisations that do not comply with those obligations, Hungary has introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations,

[50] *Ibid*. para. 58.
[51] *Ibid*. para. 93.
[52] *Ibid*. paras 94-95.
[53] *Ibid*. para. 113.
[54] *Ibid.* para. 114.
[55] *Ibid*. para. 118.

in breach of its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union".[56]

In the wake of the ruling, Hungary should have taken the necessary measures to comply, as provided by art. 260(1) TFEU. Following the lack of meaningful measures, on 18 February 2021 the European Commission announced that it was ready to trigger the second stage of the infringement procedure, namely by asking the Court the imposition of financial penalties pursuant to art. 260(2) TFEU.[57]

In its 2021 'February infringement package' press communication, the Commission declared that it sent a letter of formal notice to Hungary for failing to comply with the ruling of the Court in Case C-78/18, on the basis of art. 260(2) TFEU.[58] It held that Hungary had not yet, at the time, taken the necessary measures to comply with the Court's ruling, notably by repealing the law. The Commission gave Hungary a two-months deadline to reply. In the absence of a satisfactory response, the Commission highlighted the possibility of referring the case to the Court for the imposition of financial penalties.[59] Few weeks after, Hungary announced the withdrawal of the Transparency Act and the simultaneous adoption of the 2021 law. As of today, however, the Commission has not closed the infringement against Hungary yet. The following sections analyse the feasibility and interest of pursuing an action under art. 260(2) TFEU in such a case.

IV. (Almost) New actors, same old story: State Audit Office v civil society

This section examines the new law on "Non-Governmental Organisations Carrying Out Activities Suitable for Influencing Public Life" or 2021 anti-NGO law, adopted following the withdrawal of the 2017 Transparency Law.[60] It aims to show how the new law, while formally complying with the ruling of the Court in the *Transparency of Associations* case, leads in practice to the same negative impact on the effectiveness of EU law already identified by the Commission and confirmed by the Court. Even more, it is liable to further restrict civic

[56] *Ibid*. para. 145.

[57] See the European Commission's February 2021 Infringement Package, available at ec.europa.eu and infringement procedure no. INFR(2017)2110 against Hungary, *Violation of EU Law by the Act on the Transparency of Organisations Supported From Abroad (Act LXXVI/2017)*, adopted on 13 June 2017, still active at the time of writing, available at ec.europa.eu.

[58] European Commission's February 2021 Infringement Package cit.

[59] It is worth recalling that, in evaluating whether to trigger this second stage of the infringement procedure, the Commission enjoys the same level of discretion that it has when evaluating whether to launch a procedure under art. 258 TFEU. See E Várnay, 'Discretion in the Articles 258 and 260(2) TFEU procedures' (2015) Maastricht Journal of European and Comparative Law 836.

[60] Act XLIX of 2021 on "Non-Governmental Organisations Carrying Out Activities Suitable for Influencing Public Life". The Hungarian version of the law is available online at www.njt.hu.

space, by contributing to escalating the already established and generalised "climate of distrust"[61] against CSOs and thus having a chilling effect on their ability to conduct their activities freely. It also shows how the Hungarian legislator has, over the years, refined its "creative compliance" approach: while the new law certainly creates several grey areas, it is much more difficult, compared to the Transparency Law, to identify clear violations of EU law.

In addition to withdrawing the 2017 Transparency Law, the new law amends the law establishing the State Audit Office (Act LXVI of 2011 on the State Audit Office – hereafter "SAO Act"), providing for the expansion of its powers.

Art. 43 of Hungary's Fundamental Law designates the SAO as the financial and economic control body of the Parliament, whose primary role is to monitor the implementation of the national budget, the management of public finances, the use of public funds and the management of national assets. The new law expands such powers by providing the SAO with the power to audit all CSOs performing activities influencing public life, regardless of whether they receive public funds.

According to the Hungarian Fundamental Law, the SAO carries out its audits according to the principles of lawfulness, expediency, and effectiveness.[62] Similarly, the new law prescribes that, when auditing CSOs, the SAO should base its work on the principle of lawfulness.

In essence, such a principle relates to the obligation, for national authorities, to act within limits prescribed by the law. The correct implementation of this principle is directly related to the principle of legal certainty, recognised as a general principle of EU law.[63] Respect for such principles is even more critical in cases where judicial proceedings or investigations are ongoing. Indeed, the principle of legal certainty implies that national legislation is drafted sufficiently precisely to allow all individuals to be aware of their rights and obligations under the applicable legal framework.

While a full analysis of the new law is beyond the scope of this *Article*, it is worth mentioning a few points, allowing to clarify the climate of legal uncertainty it establishes.

CSOs' reporting obligations and public authorities' power to control the lawfulness of their activities are laid down in Act CLXXV of 2011 "on the right of association, the public benefit status, and the operation and support of non-governmental organisations".[64] CSOs are required to prepare an annual report on their operations, property, financial and income situation.[65] The report shall include a balance sheet, the income statement, and the bookkeeping information. In addition, CSOs having a public benefit status are required to

[61] *European Commission v Hungary (Transparency of associations)* cit. para. 58.

[62] Art. 43(1) of the Fundamental Law. The English translation of the Fundamental Law is available at www.parlament.hu.

[63] Case C-323/88 *SA Sermes v Directeur des services des douanes de Strasbourg* ECLI:EU:C:1990:299.

[64] The Hungarian version of the law is available at ilo.org.

[65] Arts 28(1) and 30(1) of Act CLXXV of 2011.

submit a public benefit annex, detailing the use made of public funds.[66] Finally, CSOs are required to transmit the report to the body responsible for its publication on the Civil Information Portal. CSOs shall also make the report publicly available on their website.[67]

While Act CLXXV refers to such reporting obligations, neither such law nor the SAO Act explains on which grounds the SAO may start an investigation. For instance, it is not clarified whether the SAO may only challenge the lack of respect of the submission or publication obligation, or whether it is also entitled to question the content of the report. In other instances, for example concerning the SAO's power to audit political parties and political foundations, such elements are clarified in specific methodological guidelines adopted by the SAO itself.[68] Concerning CSOs, no such guidelines have been adopted yet.[69]

Similarly, there is no indication of the threshold that evidence provided by third parties needs to reach for the SAO to launch an investigation. On this basis, the SAO could decide to launch an investigation based on circumstantial evidence, inputs provided by the Government and the Parliament, allegations from anonymous parties or on its own motion.[70]

While the elements of the law mentioned so-far may determine legal uncertainty and fall within the already mentioned grey-area established by the new law, an additional problematic element consists in CSOs' limited possibility to judicially challenge the results of the SAO's investigations.

According to the SAO Act, the findings stemming from the SAO investigations may be commented on by the audited CSO. However, the possibility to provide observations does not make the remedy effective. As the Hungarian Constitutional Court held in its ruling no. 32/2019 (XI. 15),[71] the SAO is to be considered as a non-authority. Therefore, its reports cannot be challenged before a judicial body, as specified in art. 1 of the SAO Act. This is particularly important considering that the reports of the investigation carried out by the SAO are public, as provided for by art. 32(3) of the SAO Act, and frequently advertised. This also applies with regard to the names of the inspected individuals, or the head of the legal persons and personal data related to the audited activities.

All the elements above need to be considered together within the general framework of lack of independence of the SAO from *Fidesz*, the political party holding a strong majority both in the Government coalition and in the Parliament. The lack of clear limits as to the margin of discretion of the SAO when launching and conducting investigations as

[66] Art. 29 of Act CLXXV of 2011.

[67] Art. 30(3) and (4) of Act CLXXV of 2011.

[68] Art. 23(1) of Act LXVI of 2011 on the State Audit Office.

[69] A list of the existing guidelines per sector is available at www.asz.hu.

[70] See, in this regard, art. 3 of the SAO Act, stating that the SAO may carry out inspections at the request of the Government and is obliged to do so on the basis of a decision of the Parliament.

[71] Hungarian Constitutional Court (Cúria) judgment no. 32/2019 (XI. 15) of 15 November 2019 *Establishing a constitutional requirement, on rejection of a constitutional complaint v. Section 1.6 of Act no. LXVI on the State Audit Office and on rejection of a constitutional complaint v. Ruling 2.Kpkf.670.489/2018/3 of the Budapest-Capital Regional Court and Ruling 101.K.31.401/2018/2 of the Budapest-Capital Administrative and Labour Court* paras 47, 48 and 54.

well as the lack of access to an effective legal remedy are even more worrying in light of the numerous accusations by newspapers, opposition parties and CSOs as to the SAO's lack of independence and impartiality.

The independence of the SAO is questioned first and foremost due to the strong political links between its President, László Domokos, and the Hungarian leading party, *Fidesz*. He was a member of the party between 1991 and 2010 and an elected Member of the Parliament for *Fidesz* between 1998 and 2010. His affiliation with the party formally ended in 2010, when he was appointed as President of the SAO. However, in 2010, the former leader of *Fidesz*, János Lázár, proudly announced the goal achieved by *Fidesz* through the appointment of a political party man as the President of the SAO.[72]

The political affiliation between Domokos and *Fidesz* has been highlighted several times by CSOs and opposition political parties. Among others, Transparency International argued that its studies show the SAO's biases in acting on behalf or at least in favour of *Fidesz*, notably by pointing out that the SAO's investigations found irregularities only with regard to opposition parties.[73] This happened despite substantial concerns as to the misuse of public funds by *Fidesz* to financially support its electoral campaign in 2018.[74]

In addition, suspicions have been raised concerning the timing of investigations and adoption of sanctions and the nature of sanctions adopted against opposition political parties. While the SAO acted within its remits, the timing is a source of concern in light of the possibility that it made more substantial use of its powers specifically during election campaigns, to limit the financial resources available to opposition political parties to run their campaigns. The OSCE raised such doubts in its report on the fairness of the 2018 Hungarian Parliamentary Election.[75] Additional allegations concern the disproportionate fines adopted against opposition political parties, leading some of them to consider dismantling the party.[76] The combination of a gentle approach towards *Fidesz* and its ally with the adoption of disproportionate sanctions against opposition parties has been highlighted by several CSOs,[77] stating that

[72] MTI/Hvg.hu, *Szakpolitikus pártembert jelöl az ÁSZ elnökének a Fidesz* (14 June 2010) www.hvg.hu.

[73] See, among others, the interview released in 2017 by Miklos Ligeti of Transparency International Hungary, who argued that, in the light of the studies carried out by Transparency International Hungary, it is evident that the choice of the SAO to investigate political parties' financial expenses is the result of a party political decision, available at www.reuters.com.

[74] See also C Adam, 'The Hungarian State Audit Office's assault on democracy' (9 January 2018) hungarianfreepress.com.

[75] OSCE, Office for Democratic Institutions and Human Rights, Hungary – Parliamentary Elections of 8 April 2018, ODIHR Limited Election Observation Mission – Final Report of 27 June 2018.

[76] See M Dunai, 'Hungary's Jobbik party says might disband after second audit fine' (1 February 2019) Reuters www.reuters.com; The Associated Press, *Fines may force Hungary's nationalistic Jobbik party to fold* (1 February 2019) abcnews.go.com; and Hungary Matters, *Opposition Parties Decry Audit Office Fines* (3 February 2019) hungarymatters.hu.

[77] See the report 'Contributions of Hungarian NGOs to the European Commission's Rule of Law Report', signed by Amnesty International Hungary, Eötvös Károly Institute, Hungarian Civil Liberties, Hungarian

> "The SAO has for decades been underusing its powers and has proven incapable to uncover and sanction questionable spending by political parties, who tend to underreport expenditure. The SAO also denies measuring political parties' declarations on campaign expenses against the reality, and this leaves the systemic overspending unsanctioned.[78] The SAO continues the practice of imposing excessive fines on opposition parties while there is no direct opportunity for legal remedy, which is seen by many as the misuse of power[79]".

The above further uncovers the problematic aspects of the SAO's approach towards transparency and accountability of public funds in Hungary. While transparency in public expenditure is a widespread concern in Hungary,[80] transversally applicable to opposition and majority parties, the SAO's focus on opposition parties further exacerbates the problem. The perceived lack of independence of the SAO is characteristic not only of opposition political parties and CSOs but is widespread among the population, with 44 per cent of Hungarians not believing in the independence and impartiality of the SAO.[81] As it emerges from the concerns reported above, by both CSOs, political parties and international bodies,[82] the generalised perception concerning the SAO's activity is that of expecting investigations particularly against political opponents, whether political parties or, following the new law, CSOs.

In light of the above, this preliminary analysis of the legal framework created by the 2021 anti-CSO law allows considering that the latter is likely to create a climate of general distrust as to the possibility for CSOs to seek redress in case of reputational damages or loss of financial opportunities stemming from the publicity of the SAO's reports. Even though in the subsequent proceedings the CSO may be found not guilty of any irregularity, the mere fact that the SAO may launch and make the public aware of their investigations, coupled with CSOs' impossibility to launch judicial proceedings against abusive investigations and the SAO's lack of independence and impartiality, is liable to intimidate CSOs, thus posing a threat to the free conduct of their activities.

Building on such analysis, some preliminary conclusions can be drawn.

Helsinki Committee, K-Monitor, Mertek Media Monitor, Political Capital and Transparency International Hungary (March 2021) transparency.hu 21.

[78] For details, see: Transparency International, 'Campaign Spending in Hungary: Total Eclipse' (2015) transparency.hu.

[79] See Hungarian Civil Liberties Union, *Our resolution on the sanctions imposed by the State Audit Office on opposition parties* (17 January 2018) tasz.hu, and HVG's comprehensive press report entitled '*4 év alatt 816 millió forintot szedetett be az ellenzéki pártoktól az ÁSZ*' ['The SAO has collected HUF 816 million from opposition parties over four years+'] (31 January 2019) hvg.hu. See also Index, *We have calculated how much money the State Audit Office has collected so far from opposition parties* (31 January 2019) index.hu.

[80] See, among others, Budapest Institute, *Open Budget Tracker Case Study – Hungary* (September 2014) www.budapestinstitute.eu; Gabriela Baczynska, 'Worried by 'systemic irregularities", EU ties recovery funds to Hungary procurement reform' (8 February 2021) Reuters www.reuters.com.

[81] See Daily News Hungary, *Over two-fifths of Hungarians say audit office lacks independence – Survey* (16 September 2020) www.dailynewshungary.com.

[82] See in particular footnotes n. 89 and 93 to 97.

First, as regards the impact on internal market freedoms, it is worth noting the refined strategy adopted by the Hungarian government which is still likely to have a chilling effect on civil society. The Hungarian legislator proved to have learnt from its past mistakes and, in full application of a creative compliance approach, it adopted a piece of legislation that, at least formalistically, does not provide for any discrimination. Indeed, the new law equally applies with regard to all CSOs established in Hungary, regardless of their sources of revenue.

However, it is still likely to deter the action of CSOs and donors. By considering holistically the elements provided above concerning the SAO's action and, in particular, (i) the possible abuse of its discretionary investigative powers, notably concerning which CSOs shall be subject to its controls and in light of the previous auditing practices concerning political parties, (ii) the public character of the results of the SAO's investigations, namely as regards the identities and personal data of the members of the organisations and their donors, and (iii) the SAO's lack of independence and impartiality, the new law is such as to maintain the same climate of distrust created by the previous one.

Although such characteristics only qualify the SAO as operating in a grey area – thus making problematic the same determination of violations of EU internal market law identified by the Court in *Transparency of Associations* – they should nonetheless be considered together with the most important shortcoming of the new law, notably the lack of access to effective legal remedies to seek redress in case of abuse of power or damages stemming from the SAO's action. The latter further impairs civic space, by depriving CSOs of any possibility to judicially react against abusive practices.

In light of the unfair allocation of public funds in Hungary,[83] the new provisions are likely to have an unbalanced effect on CSOs receiving funds from abroad, especially those proposing projects non-aligned with *Fidesz*' political programme, thus further hindering the development of a pluralistic political opposition.

Second, as regards the right to data protection, the explanatory note attached to the law clarifies the extent of the publicity of the SAO's findings. It states that "The report of the State Audit Office is public, but the published report may not contain classified information or other secrets protected by law". However, according to art. 32 of the SAO Act, data such as the "name of the individual or the head of the legal person under investigation and *the personal data related to the activity under investigation, with the exception of sensitive data, are public data in the public interest* and may be made public in the report or otherwise made available" (emphasis added). In other terms, nothing in the new law prevents the SAO from publishing the financial reports of the audited organisations, including the data concerning their donors, both public and private, and the correspond-

[83] P Sárosi, 'Outsourcing Autocracy: The Rise of the Hungarian Deep State' (28 April 2021) autocracyanalyst autocracyanalyst.net.

ence between the SAO and the audited organisations concerning the additional supporting information to be provided by the latter, as long as such data can be considered as public data in the public interest.

Consequently, the new law is likely to amount to a similar restriction of individuals' right to data protection already identified by the Court in *Transparency of Associations*. Finally, given the lack of access to legal remedy against the SAO's report, there is no real and effective possibility to seek rectification of such data and no guarantee of an independent authority verifying compliance with such rules, as required by the Charter.

Similarly, as regards the violation of freedom of association, it is worth reminding that, in *Transparency of Associations*, the Court argued that it considers CSOs' capacity to receive financial resources and operate without being exposed to the threat of penalties as essential elements allowing CSOs to pursue their action and, consequently, exercise their freedom of association.[84]

As already pointed out, the general legal framework of the new anti-CSO law does not introduce a discriminatory element, which could in itself be considered a limitation to the freedom of association. Hungary's refined strategy foresees a deterrent effect equivalent to that identified by the Court in *Transparency of Associations*, which finds its origin in the climate of legal uncertainty and lack of effective judicial remedy. The publicity of the SAO's reports, coupled with the lack of methodological guidelines as to the frequency of the audit controls, the grounds on which an investigation can be started and the minimum threshold of reliability that allegations need to reach to be considered by the SAO, are likely to discourage CSOs from pursuing their activities. In this context of legal uncertainty, CSOs may fear to be targeted by the SAO, thus being subject to onerous and time-consuming investigations and public exposure of their alleged misconduct, while having no possibility to seek redress for the reputational damage. Furthermore, abuses by the SAO of its investigative and publicity powers are likely to lead to a further stigmatisation of the non-profit sector in Hungary, thus contributing to the already existing climate of mistrust described by the Court.

To conclude, as it appears from the Table 1 below, the Transparency Law and the 2021 law impair the effectiveness of the same EU law provisions, thus confirming the initial hypothesis, namely that the new law represents only a formalistic implementation of the Court's ruling.

[84] *European Commission v Hungary (Transparency of associations)* cit. paras 114-115.

Relevant EU law provisions as identified by the Court	Non-compliant domestic provisions of the 2017 Transparency law	Non-compliant domestic provisions of the 2021 anti-CSO law
Freedom of movement of capital	– Registration requirements – Publicity requirements – Sharing of personal data requirements – Excessive penalties (including dissolution)	– Legal uncertainty as to the SAO's powers of investigations and the sanctions connected to them – No access to effective legal remedy – No independent judicial authority to rely upon to challenge the SAO's report or the Prosecutor's decision to sue the CSO
Freedom of association	– Publicity and registration requirements' dissuasive effect on both CSOs and foreign donors	– Legal uncertainty as to the possibility to conduct a project due to uncertainty as to SAO's possibility to launch abusive investigations (onerous procedures and reputational damage)
Right to respect for private life and family life Right to protection of personal data	– Publication of donors' name, liable to deter them from continuing allocating their financial support – No access to venues to ask correction to an independent authority	– Inclusion in CSOs annual reports of personal data of all individuals providing financial support – Publicity of the SAO's reports, including personal data of the inspected individuals, the head of the legal person and any other personal data related to the audited activity – No access to venues to ask correction to an independent authority

TABLE 1. Comparison between the effects on EU law of the 2017 and 2021 Hungarian laws.

It is worth underlining, however, how their similarity in the effects on EU law does not necessarily lead to the possibility to consider the 2021 law as in violation of the same provisions. In fact, any attempt by the Commission to argue that the 2021 law violates the same provisions already identified by the Court in *Transparency of Associations* would need to be based on the SAO's practice and actual implementation measures of the 2021 law. This would not only require a factual assessment of the SAO's daily practice, but also an analysis performed over a certain amount of time, in order to collect sufficient evidence to support such a factual allegation.

V. Beyond the Hungarian case: the impact of creative compliance on the effectiveness of EU law

It stems from the analysis above that the context of mistrust against CSOs and foreign donors translates into the strategic use of legislative practices. Both the withdrawal of the Transparency Law and the simultaneous adoption of the new law represent two logical steps in autocratic legalists' use of creative compliance to pursue their illiberal goals. One can find not only the use of legislative reforms to introduce burdening obligations and to threaten political opponents but also the formal reliance on international standards.

According to the explanatory note attached to the 2021 anti-CSO law, the latter is presented as a form of implementation of the Court's ruling in the *Transparency of Associations* case.[85] However, at the same time, it emerges from the explanatory note how the Hungarian legislator aims to make use of such a ruling to push its illiberal agenda by relying on a creative compliance-based mechanism. As a matter of fact, the explanatory note states that

> "In that case, the Court confirmed that ensuring the transparency of aid granted to organizations capable of exercising significant influence over public life and public debate may constitute an overriding reason in the public interest. *For this reason*, at the same time as the repeal, *the Proposal aims to create new regulations in line with EU law* [...]. *The scope of the proposal is the same as in the Transparency Act, with the difference that the powers conferred on the State Audit Office are a guarantee of professionalism and independence*".[86]

This latest move of the Hungarian legislator is likely to have a widespread impact on the effectiveness of EU law. In this light, the Hungarian case study proves useful to analyse to what extent the reliance on creative compliance-based techniques by autocratic legalists may ultimately negatively impact the credibility and authority of the European Commission as guardian of the Treaties and of the first step of infringement procedures (and thus of the ruling of the Court) as an effective way to induce compliance with EU law.

In rule of law-related cases, the Court of Justice and the Commission are suffering incessant attacks against their authority and power to intervene. Some recent examples can be found in the ruling of the Polish Constitutional Tribunal in case K3/21, where the Polish highest court found the principle of primacy of EU law, the principle of sincere cooperation among EU and Member States' institutions and the principle of judicial cooperation among national courts and the Court of Justice in contrast with the Polish Constitution.[87]

In light of such developments, it is worth rethinking the role that enforcement tools, particularly infringement procedures, can have in inducing Member States to comply with EU law, thus ensuring its effectiveness at the domestic level. Traditionally, in the majority of infringement cases, the mere fact of sending a letter of formal notice in the pre-judicial phase of the infringement procedure is sufficient to ensure Member States' compliance.[88] Even when brought up to the judicial phase, the rulings of the Court under art. 258 TFEU are sufficiently authoritative to push Member States to comply, thus making the use of art. 260(2) TFEU an extremely rare case.[89]

[85] Explanatory note attached to the Bill no. T/15991, amending the SAO Act and repealing the law on the Transparency of NGOs. Hungarian version available at www.parlament.hu.

[86] Explanatory note attached to the Bill no. T/15991 cit. (emphasis added).

[87] Polish Constitutional Tribunal judgment in the name of the Republic of Poland of 7 October 2021 no. K 3/21 *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*.

[88] K Boiret, 'Selective Enforcement of EU Law – Explaining Institutional Choice' (2016 European University Institute – Department of Law) 119-124. See also Table 3 as concerns the data regarding the timeframe 2016-2020.

[89] See Table 3.

Table 2 below refers to the use by the Commission of its informal and formal enforcement tools when dealing with alleged infringements from Member States. It reports on the use of the EU Pilot informal dialogue mechanism and the subsequent use of infringement procedures.[90] The Commission handles several new EU Pilot cases each year, most of which do not reach the stage of the infringement procedure (on average – in the timeframe 2016-2020 – the Commission solved through EU Pilot 72,4 per cent of cases each year). It is worth recalling that the Commission has a wide margin of discretion in evaluating whether to rely on the EU Pilot mechanism or to formally launch an infringement procedure.[91] This is in line with the goal of the EU Pilot mechanism, namely "to quickly resolve potential breaches of EU law at an early stage in appropriate cases".[92] It follows that "the Commission will launch infringement procedures without relying on the EU Pilot problem-solving mechanism, unless recourse to EU Pilot is seen as useful in a given case".[93]

Year	No. cases handled by the Commission	Solved through EU Pilot	Main policy areas
2020	171	108 (63%)	Environment, mobility and transport, energy, taxation and customs union (altogether: 71%)
2019	244	187 (77%)	Energy, maritime affairs, Justice and Home Affairs ("JHA" particularly cybercrime, legal migration and integration, information systems for borders, migration and security), environment (altogether: 71%)
2018	397	290 (73%)	Energy, environment, migration and home affairs (police cooperation, legal migration and integration, cybercrime), taxation and customs (altogether: 83%)
2017	512	393 (77%)	Environment, energy, climate action, taxation and customs (altogether: 77%)
2016	875	630 (72%)	Environment, taxation and customs, internal market, mobility and transport

TABLE 2: Bottom-up regional groups in the European Union.

As shown by the high percentage of cases successfully closed by the Commission in the context of the EU Pilot mechanism, the use of EU Pilot in those cases selected by the

[90] The EU Pilot mechanism consists in an online platform launched by the Commission in to communicate with national legal services and clarify the factual and legal background of national measures which may result in lack of conformity with EU law and undermine the correct application of EU law. Further information on the mechanism can be found at www.single-market-scoreboard.ec.europa.eu.

[91] Communication 2017/C 18/02 from the Commission of 19 January 2017 on EU law: Better results through better application

[92] *Ibid*.

[93] *Ibid.*

Commission effectively achieves its prospected goal, namely reducing the burden of lengthy infringement procedures. However, being a dialogue-based mechanism, its effectiveness stems from the willingness to cooperate from both sides. It follows that it is mostly effective in those fields that are less politicised.

In addition to the EU Pilot dialogue mechanism, the Commission has broad discretion in making use of its enforcement powers by launching a formal infringement procedure.[94] As shown in Table 3, the Commission resolves a high percentage of infringements before the case reaches the Court's stage. Many cases are closed right after the Commission's letter of formal notice, while additional cases are closed after the Commission sends its reasoned opinion. Finally, some residual cases are closed after the Commission informs the Member State of its intention of submitting the case to the Court, but before it does so. This trend can be explained by reference to the dissuasive effect that infringement actions have on Member States, inducing compliance to avoid the reputational and economic costs connected to handling an in-Court proceeding.[95]

Year	No. infringement cases open at the beginning of the year	No. cases solved after the letter of formal notice	No. cases solved after sending reasoned opinions	No. cases closed after deciding to submit application to the Court	No. of financial penalties cases (260(2) TFEU)
2020	1564 (end of 2019)	510	144	27	1
2019	1571 (end of 2018)	604	160	41	2
2018	1559 (end of 2017)	355	219	58	2
2017	716 (new cases)	560	209	43	3
2016	986 (new cases)	520	126	27	-

TABLE 3: Commission's handling of infringement cases under Art. 258 TFEU.

In conclusion, out of the total number of infringement cases the Commission opens each year, only a small minority reaches the judicial phase and comes to a conclusion with a ruling of the Court. Even a smaller minority of cases advances to the next stage of the infringement procedure, namely art. 260(2) TFEU.[96] The data support the conclusion

[94] L Prete, *Infringement Proceedings in EU Law* (Kluwer 2017) 38-41 and 347-350 and L Prete and B Smulders, 'The coming of age of infringement proceedings' (2010) 47 CMLRev 14-16.

[95] A Schrauwen, 'Fishery, Waste Management and Persistent and General Failure to Fulfil Control Obligations: The Role of Lump Sums and Penalty Payments in Enforcement Actions Under Community Law' (2006) JEL 289-299; and E Várnay, 'The Institutionalisation of Infringement Procedures in EC Law – The Birth of a Community Sanction' (2006) European Integration Studies 9-10. See also Joined Cases C-514/07 P, C-528/07 P and C-537/07 PS *Sweden v API* ECLI:EU:C:2010:541 para. 119.

[96] See Table 3.

that the prospective use, by the Commission, of the second stage of infringement procedures induces compliance in Member States, thus reinforcing the overall dissuasive effect of infringement procedures. It is also relevant to note that most cases concerned policy areas such as environment, competition, and internal market.

Differently, as concerns the field of the rule of law, the most relevant case of imposition of financial penalties for lack of compliance with a Court's order can be found in relation to Poland, and it sees the imposition by the Court of a daily penalty of €1'000'000 for lack of compliance with its previous interim order imposing Poland to suspend the functions of the Disciplinary Chamber of the Polish Supreme Court.[97]

Out of the four infringement procedures lodged by the Commission before the Court concerning rule of law backsliding in Poland,[98] the abovementioned interim order is the only case of imposition of a financial penalty in relation to rule of law backsliding and judicial independence.

While such limited use of art. 260(2) TFEU in the field of the rule of law is consistent with the practice of the Commission in other areas of EU law, it is questionable whether the adoption of a similar strategy is able to reach similar results. In fields such as environment and competition, the Commission's monitoring exercises on the implementation of EU law reports high rate of compliance, either voluntary or induced.[99] This is confirmed by the data contained in the tables above concerning the effectiveness of the EU Pilot mechanism and the dissuasive effect that follows the launch of formal infringement actions. However, the same cannot be said as concerns the field of rule of law.

[97] Case C-204/21 R *Commission v Poland* ECLI:EU:C:2021:593. However, it shall be noted that this case does not represent an example of use of art. 260(2) TFEU after lack of compliance by a Member State of a ruling of the Court adopted under art. 258 TFEU. Indeed, in the case at hand, following the Commission's request, the Court adopted first an interim order (on 14 July 2021) ordering Poland to suspend the provisions of national legislation relating to the Disciplinary Chamber of the Supreme Court. Subsequently, following another request from the Commission and due to Poland's lack of compliance with the Court's interim order, the latter adopted a new order imposing Poland the payment of the already mentioned financial penalty.

[98] L Pech, P Wachowiec and D Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (Hague Journal on the Rule of Law 2021) 1. See also Case C-204/21 *Commission v Poland* pending; C-791/19 *Commission v Poland (Régime disciplinaire des juges)* ECLI:EU:C:2021:596; C-619/18 R *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531; C-192/18 *Commission v Poland (Independence of ordinary courts)* ECLI:EU:C:2019:924.

[99] Commission Staff Working Document SWD(2021) 212 final of 23 July 2021 on General Statistic Overview Accompanying the document Report from the Commission Monitoring the application of European Union Law – 2020 Annual Report.

An example of the need for a different strategy can be found in the Polish saga on judicial independence.[100] Following the already mentioned imposition of fines,[101] the government announced the future dismantling of the Disciplinary Chamber of the Supreme Court for the purpose of establishing a new body under the control of the Ministry of Justice.[102] While Poland dismantled the Disciplinary Chamber in July 2022, it also adopted a new law on the Supreme Court. This case may easily represent another example of creative compliance, as pointed out by the Polish opposition, which stressed that it merely represents a cosmetic change, since the old judges of the Disciplinary Chamber may be appointed as new ones and will, at worst, be re-assigned to other chambers of the Supreme Court.[103]

A similar strategy has been followed by the Hungarian government in the context of its plans aimed at curbing civic space and controlling political opponents, particularly in the civil society sector. It is worth recalling that the 2021 law has been announced by the government as aimed at implementing the Court's ruling in *Transparency of Associations.* What one can witness in the present case can be considered as an attempt to misguide EU institutions by entrusting the functioning of a newly created mechanism of control of CSOs' activity to a parliamentary body whose independence from the Government and the majority party is – at best – questionable. The consequences of such a strategy are at least twofold.

First, if not properly identified and addressed by the Commission, this tactic is likely to be reproduced (if it is not already – as the Polish saga seems to indicate) in the context of other infringement procedures, thus giving rise to a growing set of creative compliance-based national measures.

Second, such a strategy, coupled with the Commission's reluctance in making consistent use of the second stage of infringement procedures, is likely to lead to a loss of credibility of the effectiveness of the EU enforcement mechanisms. This is happening in a

[100] For an in-depth overview of the different cases concerning judicial independence in Poland, see L Pech and D Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (SIEPS Stockholm 2021).

[101] See, in particular, the cases of Judges Niklas-Bibik and Gąciarek (see IUSTITIA, 'November 24, 2021 National Board of the Polish Judges` Association "Iustitia" resolution on the suspension of judges Maciej Ferek and Piotr Gąciarek done by the Disciplinary Chamber' (25 November 2021) www.iustitia.pl), suspended for setting aside domestic law to ensure the primacy of EU law and for referring a question for a preliminary ruling to the Court of Justice, and Judge Ferek (Polish News, 'Cracow. Judge Maciej Ferek is facing disciplinary proceedings because he did not want to adjudicate with the judges selected by the new National Council of the Judiciary' (6 November 2021) polishnews.co.uk), for refusing to adjudicate in a panel comprised of members unlawfully appointed by the National Council of the Judiciary. See also M Jałoszewski, 'Judge Niklas-Bibik suspended for applying EU law and for asking preliminary questions to the CJEU' (30 October 2021) Rule of Law ruleoflaw.pl; and M Jałoszewski, 'The illegal disciplinary chamber is working again. And has suspended Judge Ferek for applying EU law' (16 November 2021) THEMIS themis-sedziowie.eu.

[102] Reuters, 'Poland says it will dismantle disciplinary chamber for judges' (17 August 2021) www.reuters.com.

[103] Notes from Poland, 'Poland closes judicial disciplinary chamber at heart of dispute with EU' (15 July 2022) notesfrompoland.com.

historical moment when such reliability is particularly needed, especially in the field of the protection of EU values. In turn, this could lead to other Member States adopting similar tactics to deceive and avoid compliance with EU law, even beyond values-related fields.

The Commission would need to act firmly and avoid accepting any situation of creative compliance. In practical terms, this would imply a careful review of national legislation supposedly adopted in compliance with the Court's ruling under art. 258 TFEU and a quick analysis of the factual situation in those cases where it is apparent that the new legislation only formalistically implements the judgment while in practice reproducing the same shortcomings identified by the Court. This reaction implies a shift in the approach of the Commission *vis-à-vis* Member States. Previously, and especially in non-values-related infringement procedures, the Commission regarded Member States as cooperative partners. In turn Member States, although adopting stalling tactics, avoided reaching the point of infringements actions and Court's rulings. Conversely, values-related cases require a different approach.[104]

The long-lasting struggle between EU institutions and Poland and Hungary over the rule of law has proven that rule of law violations are not a matter of political dialogue and involuntary infringement anymore. Both countries have repeatedly stated that they have a different understanding of EU values and are unwilling to accept the EU institutions' view on such issues.[105] Consequently, the Commission needs to stop relying on dialogue-based mechanism and make consistent use of its enforcement toolbox.[106]

As already experienced in the context of the infringement procedure on freedom of expression and the CEU,[107] the time that elapses between the entry into force of a new law and its effective withdrawal can allow autocratic governments to reach their political goal, thus nullifying the intent of the infringement action and, in essence, the effectiveness of EU law. In the abovementioned case, while Hungary was in the end forced to repeal the so-called *Lex CEU*, it did so only several months after it entered into force. At that point, the law had already irreparably damaged freedom of expression.[108] By the

[104] Different scholars have elaborated on the need for different approaches, suggesting for instance to rely on systemic infringement procedures (KL Scheppele, D Kochenov and B Grawoska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) Yearbook of European Law 3) or to make stronger use of interim orders (L Pech, P Wachowiec and D Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' cit.).

[105] See, among others, Orban's 2014 announcement (full speech available at budapestbeacon.com) of its plan to turn Hungary into an "illiberal state": A Juhász, 'Announcing the "illiberal state"' (21 August 2014) Heinrich Böll Stiftung www.boell.de.

[106] This encompasses not only the second stage of infringement procedures, widely discussed in this contribution, but also additional tools, such as the rule of law conditionality mechanism (see Regulation (EU, Euratom) 2020/2092 cit.), and infringement actions based on the violation of the duty of sincere cooperation ex art. 4(3) TEU.

[107] Case C-66/18 *European Commission v Hungary (Enseignement supérieur)* ECLI:EU:C:2020:792.

[108] E Inotai, 'Legal victory for Central European University is too little, too late' cit.

time it took to condemn Hungary, the goal of its government, namely stigmatising and forcing out of the country a university providing academic programmes not in line with the government's political view, had already been achieved.

In order to prevent a similar strategy being deployed against CSOs in Hungary, thus further hindering freedom of association, the Commission has only one possibility within the general framework of infringement actions: asking the Court the imposition of daily financial penalties against Hungary for failure to implement the ruling of the Court in *Transparency of Associations*. In doing so, the Commission could rely on the argument that the new law, although it repeals the Transparency Law, limits itself to a merely formalistic implementation of the Court's ruling. However, as already stressed, hurdles remain with this approach: it would require a factual analysis of the practical measures put in place by the SAO and their impact on freedom of association.

While an action under art. 260(2) would be a first of its kind situation in a rule of law-related case, it seems necessary in the context of the increasing democratic backsliding. The use of the second stage of the infringement action would remarkably distinguish this case from the Polish one, as penalties would be adopted at the end of a full judicial proceeding, where a court of law has had the opportunity to hear the parties and decide on the matter. Hence, it would benefit from greater consideration than penalties adopted in the context of an interim order. However, when fines are imposed, especially in the form of lump sums, the Commission should immediately enforce their recollection to ensure that the dissuasive character of sanctions does not get neutralised by the unlikelihood of their effective enforcement.

To conclude, the Commission could build on the Court's case law regarding abuses of the procedure by Member States through the adoption of merely formalistic changes during the infringement procedure.[109] It should argue that changes to a law considered by the Court as not in compliance with EU law shall not be limited to solely aesthetic changes but should address the intrinsic issues pointed out by the Court and the factual impact of the measures adopted at the national level. In the absence of the compatibility of such factual impact with the Court's ruling, Member States should not be allowed to argue that they are complying with the Court's judgment.

[109] For a more comprehensive analysis on the case where a Member State amends its domestic law during the infringement procedure without, in the view of the Commission, bringing it in line with EU law, see L Prete, *Infringement Proceedings in EU Law*, cit. 161: "the Court has rejected an overly formalistic reading of the Treaty rules, and has found that: where, after an action against a Member State for failure to fulfil its obligations has been brought, the national legislation which allegedly did not meet the obligations of the Member State in question under [EU] law is replaced by other legislation having the same content, the fact that in the course of the proceedings the Commission imputed its claims concerning the previous legislation to the legislation which replaced it does not mean that it has altered the subject-matter of the dispute", referring to Case C-42/89, *Commission of the European Communities v Kingdom of Belgium* ECLI:EU:C:1990:285 para. 11.

VI. Conclusion

The analysis above provided a practical case study analysing the impact on the effectiveness of EU law that an increased use of legalists' creative compliance strategy may have., particularly in a rule of law backsliding context. To do so, the *Article* focused on the case study of the 2021 Hungarian approach towards civic space and provided a comparative analysis of the 2017 Transparency Law and the new 2021 law. The analysis concluded that the two laws impact the same provisions of EU law, as interpreted by the Court of Justice in the *Transparency of Associations* case. At the same time, it has been noted that it would be problematic to identify comparable violations of EU law, in light of the need to perform a factual analysis of the practices put in place by the SAO over a certain amount of time. Subsequently, the *Article* addressed the impact of a creative compliance-based mechanism on the effectiveness of EU law and the opportunity for the Commission to question such approach through infringement procedures. It concluded that the effectiveness of infringement procedures in values-related cases strongly relies on the Commission's readiness to make use of the second stage of the procedure and ask the Court the imposition of financial penalties.

Given the obstacles and limitations underlined above, doubts remain as to the appropriateness of this enforcement tool *per se*. As the case study has shown, autocratic legalists will reasonably refine their strategy, thus making it more and more difficult for the Commission to identify technical and evident violations of EU law in rule of law-related cases. At the same time, other tools, such as art. 7 TEU, proved their ineffectiveness.[110] The implementation of the recently adopted Rule of Law conditionality mechanism,[111] which had been presented as the completing brick of the set of tools at the disposal of the Commission, is still lagging behind. The first move from the European Commission dates from 18 September 2022, more than one and a half years after the entry into force of the regulation.[112] The long-awaited enforcement of the regulation came however with many limits: Hungary will still remain entitled to around 80% of funds allocated under the EU multi annual financial framework.

The only mechanism that proved able, over the last months, to generate some change, is the conditionality mechanism embodied within the procedure for the disbursement of EU funds connected to the Recovery and Resilience Facility. However, even for such tool, the case of the cosmetic changes introduced by Poland to push the Commission to unfreeze the funds proves that illiberal governments will not easily abide.

[110] T Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7' (2022) Res Publica 693; KL Scheppele and L Pech, 'Is Article 7 Really the EU's "Nuclear Option"?' (6 March 2018) Verfassungsblog verfassungsblog.de.

[111] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

[112] European Commission, Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principle of the Rule of Law in Hungary, COM(2022) 485 final of 18 September 2022.

Ultimately, one could question whether the current system of enforcement is adequate to handle systemic rule of law backsliding. What we are facing is a situation of only apparent abundance of instruments, while neither of them is fully effective in countering rule of law backsliding. How can we expect the Commission to be able to react against the deterioration of EU values, when the reality is that we are asking it to empty the ocean with a soup spoon?

ARTICLES

The Novelty of EU Passenger Name Records (PNR) in EU Trade Agreements: On Shifting Uses of Data Governance in Light of the EU-UK Trade and Cooperation Agreement PNR Provisions

Elaine Fahey*, Elspeth Guild** and Elif Kuskonmaz***

ABSTRACT: The EU-UK Trade and Cooperation Agreement (TCA) offers a new chapter in the treatment of Passenger Name Records (PNR), placing PNR law in an EU trade agreement. The TCA exemplifies acutely pre-existing tensions now in the framework of an EU agreement with a third country. In this *Article*, we examine the evolution of PNR law and look at aspects of the TCA as to PNR relating to the sensitive issue of personal data protection in the context of cross-border data sharing for law enforcement, criminal justice, and border control purposes as an example of the thorny intersection of public law obligations placed on the private sector to provide bulk access to personal data collected for commercial purposes to public sector actors in the framework of counter-terrorism or countering serious crime. First, we provide a brief account of 'repurposing' the use of PNR data at the intersection of criminal justice and border controls in EU law and UK law. Secondly, we examine the question of oversight in EU law and under the TCA. Thirdly, we consider the TCA provisions on PNR data sharing in light of the strict fundamental rights review that the CJEU has adopted. Finally, we look at the incorporation of PNR data sharing into the agreement's law enforcement section and the character of border control and criminal justice. The *Article* argues that PNR law appears vulnerable when seen in the light of the other international data transfers emerging on the question of oversight and accountability.

KEYWORDS: Passenger Name Records – UK-EU relations – trade and cooperation agreement – data adequacy – governance – CJEU.

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EUROPEAN PAPERS
VOL. 8, 2023, NO 1, PP. 273-299
www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/651

I. Introduction

The international transfer of personal data from the European Union (EU) to third countries constitutes a minefield. It engages multiple national constitutional protections, EU data protection rights and international law – and increasingly, now more recently, trade law. Differing approaches and standards of personal data protection in different States and regions have resulted in stalemates between States or groups of States on the transfer of such data. The political struggles thus have emerged over data sharing, resulting in attempts to regulate how and why the data should be made available to various state agencies and commercial actors.[1]

Nowhere is this political struggle more flagrant and sensitive than in the area of air transport, with different actors (e.g., commercial airlines, border authorities, law enforcement authorities, and security agencies) having interests in the production and sharing of data. In the post-9/11/2001 era, the United States (US) demanded advanced access to as much information as possible about people travelling to the US for counter-terrorism purposes. The US insistence on access to personal data triggered a saga of data politics which is far from over.[2] Passenger Name Records (PNR) are the terrain where this data politics is taking place. PNR is made up of numerous elements of personal data provided by passengers when seeking to book travel but unverified by either the private sector to which they are provided by the data subject or the public sector, which requires the private sector to transmit them on request. The inherent relationship of PNR data with the crossing of international border is a complex one already. Brexit, which moved the United Kingdom (UK) from the status of an EU State to a third country (in EU legal parlance) and the treatment of PNR post-Brexit, has put a novel spotlight on this area of law, illuminating the tremendous complexity and political salience of the legal discord.

[1] Y Soda, *The Politics of Data Transfer* (Routledge 2017); C Fanny, 'The Legitimacy of Bulk Transfers of PNR Data to Law Enforcement Authorities under the Strict Scrutiny of AG Mengozzi' (2016) European Data Protection Law Review 596; S Roda, 'Shortcomings of the Passenger Name Record Directive in Light of Opinion 1/15 of the Court of Justice of the European Union' (2020) European Data Protection Law Review 66; P de Hert and B de Schutter, 'International Transfers of Data in the Field of JHA: The Lessons of Europol, PNR and Swift' in B Martenczuk and S van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* (VUB Press 2008); H Carrapico, A Niehuss and C Berthélémy, 'Sectoral Views on Brexit and Future UK-EU Internal Security Relations' in H Carrapico, A Niehuss and C Berthélémy, *Brexit and Internal Security* (Palgrave 2019); N Ni Loideain, 'Brexit, Data Adequacy, and the EU Law Enforcement Directive' in E Kosta and F Boehm (eds), *The Law Enforcement Directive: A Commentary* (OUP 2023); D Korff, 'EU Fundamental Rights Agency: "Thematic Study on Assessment of Data Protection Measures and Relevant Institutions" – Country Report on the United Kingdom' (15 February 2009) SSRN Paper ssrn.com; O Garner, 'Part Three of the EU-UK TCA – From a "Disrupted" Area of Freedom, Security and Justice to "New Old" Intergovernmentalism in Justice and Home Affairs?' (Brexit Institute Working Paper Series 1-2021).

[2] Data politics is coined as the framework to analyse "how data is generative of new forms of power relations and politics at different and interconnected scales". D Bigo, E Isin and E Ruppert, *Data Politics: Worlds, Subjects* (Routledge 2019) 4.

The novelty of the post-Brexit arrangement for the EU-UK PNR data sharing is its placement within a *trade* agreement, the highly esoteric EU-UK Trade and Cooperation Agreement (TCA). This *Article* argues that its provisions require a re-evaluation of this data sharing for they potentially fall short of fundamental rights standards required by EU law. This is not to say that the sharing and processing of PNR data for security purposes have not been contested before Brexit. At the level of the EU, there has long been a mistrust of the capacity of the EU to evolve PNR law in a manner consistent with or compatible with the scope of EU law and the rule of law principles. This mistrust initially materialised in the issues concerning the transfer of PNR data to third countries with an earlier judicial interpretation of the EU competence to legislate that transfer, followed by an exceedingly complex threshold for PNR data transfer arrangements in light of the Charter rights to privacy and personal data protection.[3] The PNR provisions of the TCA must now meet that threshold for the UK to continue to receive PNR data from EU-based commercial airline operators. However, the PNR regulation, including the purposes of the data processing, actors involved in the implementation of regulatory rules as well as the role of the data for law enforcement cooperation, continues to evolve under EU law as the EU PNR Directive, which is the EU secondary legislation on processing PNR data for counter-terrorism and serious crime purposes, is subject of strategic litigation before the Court of Justice of the European Union (CJEU). The first of the series of strategic litigation came to fruition with the CJEU's July 2022 decision of *Ligue des droits humains*.[4] The judicial outcome was a Charter-compliant reading of the EU PNR Directive, with highly significant impacts on the regulation of PNR processing for security purposes in a more institutionalised and rights-based framework. These judicial developments require a constant reconsideration of PNR data sharing arrangements.

The TCA offers a new chapter in this domain, exemplifying the existing tensions in the framework of an EU agreement with a third country, albeit in the context of a trade agreement. It redefines data processing purposes to find mutual ground for the use of PNR data under UK law on the one hand and the outcomes of the judicial review of PNR data transfers and schemes under EU law on the other. The final product, as materialised

[3] Case C-317/04 *Parliament v Council* ECLI:EU:C:2006:346; Opinion 1/15 *Draft agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data* ECLI:EU:C:2016:656.

[4] Case C-817/19 *Ligue des droits humains v Conseil des ministres* ECLI:EU:C:2022:49. There were other preliminary rulings requests which were all terminated following an enquiry by the CJEU asking whether the referring court wishes to maintain the proceedings in the light of the judgement in Case C-817/19. All referring courts responded that they would not wish to continue the proceedings. See, respectively, Case C-486/20 Request for a preliminary ruling from the Ustavno sodišče Republike Slovenije (Slovenia) lodged on 1 October 2020 – *Varuh človekovih pravic Republike Slovenije* ECLI:EU:C:2022:766; Case C-215/20: Request for a preliminary ruling from the Verwaltungsgericht Wiesbaden (Germany) lodged on 19 May 2020 – *JV v Bundesrepublik Deutschland* ECLI:EU:C:2022:773; Case C-222/20 Request for a preliminary ruling from the Verwaltungsgericht Wiesbaden (Germany) lodged on 27 May 2020 – *OC v Bundesrepublik Deutschland* ECLI:EU:C:2022:773; Cases C-148/20, C-149/20 and C-150/20 Requests for a preliminary ruling from the Amtsgericht Köln (Germany) lodged on 17 March 2020 – *BD v Deutsche Lufthansa AG*.

in the PNR provisions of the TCA, raises questions on its compatibility with EU law requirements based on three points: the lack of clarity as regards the authority responsible for the correct implementation of the PNR processing rules, the "adequacy" of the protection afforded to PNR data under the TCA, and the coherence of PNR data transfers as enshrined in the TCA with the criminal law cooperation.

Based on the above issues, in this *Article*, we descriptively examine the evolution of PNR law, with a focus on the TCA. We consider aspects of the TCA which play a critical role in the success or failure of the new relationship on data sharing after Brexit. For this reason, first, we provide a brief account of repurposing the use of PNR data at the intersection of criminal justice and border controls in EU law and UK law to introduce different actors with interests in the production and sharing of data and the attempts to designate an appropriate normative framework to govern these activities. Secondly, we examine the question of oversight in EU law and under the TCA because the agreement is sprinkled generously with provisions for oversight on account of the TCA's efforts to implement Opinion 1/15, where the CJEU struck down the EU-Canada PNR agreement as to its oversight provisions.[5] Yet the robustness of oversight leaves questions as to the capacity of the system to fulfil EU and ECHR requirements of independence and effectiveness. Thirdly, we consider the TCA's two provisions that concern the repurposing of PNR data processing in light of the CJEU's strict fundamental rights. Finally, we look at the incorporation of PNR data sharing into the agreement's law enforcement section and the robustness of that framework in the TCA. Based on these four issues, the *Article* argues that PNR law, even post-Opinion 1/15 and *Ligue des droit humains* appears vulnerable when seen in the light of the other international data transfers emerging in *Schrems I* and *Schrems II* on the question of oversight and accountability. These vulnerabilities are argued to be exemplified well in the EU-UK PNR provisions of the TCA and UK-EU adequacy decision.

All these aspects relate to the sensitive issue of personal data protection in the context of cross-border data sharing for law enforcement, criminal justice, and border control purposes. We take the case of PNR as a paradigmatic of data politics arising under the agreement for several reasons. PNR data sharing is argued here to be a clear example of the intersection of public law obligations placed on the private sector to provide bulk access to personal data collected for commercial purposes to public sector actors in the framework of counter-terrorism or countering serious crime. PNR data collection and sharing regimes uncover complex assemblages of parties interested in the production and mobilisation of data with a knock-on effect on legal regulation. It also raises questions about cross-border data protection not only of aliens (or third-country nationals as regards the EU) but also citizens of the state participating in the data sharing operation. These questions require rethinking who can claim rights for such operations and the position of citizens *vis-à-vis* the State. Our focus in this *Article* is exclusively on the EU dimension of PNR and the implications of the TCA provisions.

[5] Opinion 1/15 cit.

II. From its commercial origin to the acquired purpose: the shifts of PNR data

The story of how public actors have become interested in using Passenger Name Records (PNR) in the border security context reveals not only the repurposing of a type of information used by the private sector but also an effort to find a normative legal base for this repurposing through enacting national laws with extraterritorial effects and brokering international agreements to solve conflicts of laws.[6] In this quest, the actors involved in shaping the legal landscape for regulating the use of PNR data have varied, and the purpose of this use has been reshaped into one of ensuring security. For this reason, to analyse how the provisions of the EU-UK Trade and Cooperation Agreement (TCA)[7] govern the sharing of PNR data and the questions of legitimacy and accountability arising from them, it is important to shed light on this process of recasting the use of PNR data at the juxtaposition of criminal justice and border control tools.

A key point which emerges from the origins of PNR data is that this type of data had been created by the private sector for its use in the commercial air travel sector. As the civil aviation sector has grown, it has become essential to keep track of information relating to air travel. In addition to the main information air carriers were asked to collect about their passengers[8], the sector started to collect different types of information such as ticket payment forms, travel agent, the person making the reservation, and in-flight meals if requested.[9] All this information is contained under a generic term, PNR, collected by or on behalf of air carriers each time a passenger books a flight. Since PNR data was originally introduced in the civil aviation sector, there has not been a unified form according to which the data ought to be collected by private actors such as airline operators, computer reservation systems, global distribution systems, and travel agencies.[10]

The 1990s witnessed the use of PNR data, particularly by the US, in border control action based on voluntary cooperation by air carriers.[11] As the 9/11/2001 attacks led to the revamping of security-led policies, policies relating to border controls were similarly

[6] E Guild and E Brouwer, 'The Political Life of Data: The ECJ Decision on the PNR Agreement between the EU and the US' (26 July 2006) CEPS www.ceps.eu.

[7] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part ST/5198/2021/INIT (EU-UK TCA) [2021].

[8] Art. 29 of the Chicago Convention (Convention on International Civil Aviation, ICAO Doc 7300 (1944)) requires every aircraft engaged in international navigation to carry certain documents, including, a list of passengers' names and places of embarkation and destination.

[9] International Civil Aviation Organisation (ICAO), Guidelines on Passenger Name Record (PNR) Data, Doc 9944 (2010), www.icao.int.

[10] PP Belobaba, C Barnhart and WS Swelbar, 'Information Technology in Airline Operations, Distribution and Passenger Processing' in P Belobaba, A Odoni and C Barnhart (eds), *The Global Airline Industry* (Wiley 2016).

[11] For discussions on the passenger profiling in the US before the 9/11 events see E Baker, 'Flying While Arab – Racial Profiling and Air Travel Security' (2002) Journal of Air Law and Commerce 1375.

affected.[12] The emphasis was placed on the pre-emptive actions that were operationalised through increased data mining and profiling.[13] First, the US enacted legislation with the extraterritorial effect which obliges air carriers to share PNR data with the then-newly established US border control authority, the Department of Homeland Security (DHS), if they operate flights to or over the US to ensure the unhampered access to the data by the DHS.[14] The regulatory differences on data protection in the other jurisdictions where operators are based may have been overlooked because the consequence of this legislation was a conflict of laws with EU data protection law that has resulted in the need for a series of agreements on PNR data sharing, with the US and Canada most notoriously. This US legislation and the consequent negotiations to settle the conflict of laws with the EU have influenced many other jurisdictions, and the requests by public authorities to gain routine access to PNR data have spread like wildfire.[15] Thus efforts to collect and repurpose PNR data are not jurisdiction specific.

In the UK, the use of PNR data followed post-9/11/2001 initiatives of the US. The digitalisation of border controls to "create a joined-up modernised intelligence-led border control and security framework" involved the repurposing of PNR data in UK law to this aim.[16] The Immigration, Asylum and Nationality Act 2006 provides specific powers for immigration authorities and police to obtain PNR data from air carriers and share it with public authorities.[17] Thus, repurposing PNR data had been an inherent part of the UK border control, which involved law enforcement functions as well. Reading the PNR data use within this frame will be significant for our discussion in Section V on whether PNR systems are captured solely by a criminal justice or border control framework.

The EU was not immune from the post-9/11/2001 initiatives of repurposing PNR data. It began working on creating its own PNR scheme in 2004.[18] By the time the EU was progressing towards legislating for harmonised rules governing the use of PNR data for

[12] V Mitsilegas, 'Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Brill 2010).

[13] M de Goede, 'The Politics of Privacy in the Age of Preemptive Security' (2014) International Political Sociology 100.

[14] Aviation and Transportation Security Act of 2001 of United States, 49 USC *§* 44909.

[15] See, for example, Security Council, Resolution 2396 of 21 December 2017, UN Doc S/Res/2396 (2017). See also O Mironenko Enerstvedt, 'Russian PNR System: Data Protection Issues and Global Prospects' (2014) Computer Law & Security Review 25; K Taplin, 'South Africa's PNR Regime: Privacy and Data Protection' (2021) Computer Law & Security Review 105524.

[16] Home Office, *Controlling our Borders: Making Migration Work for Britain – Five Year Strategy for Asylum and Immigration* assets.publishing.service.gov.uk.

[17] Immigration, Asylum and Nationality Act 2006, ss 32-38. The types of information to be shared and the requirements for this sharing were laid out in secondary legislation. See The Immigration and Police (Passenger, Crew and Service Information) Order 2008 (United Kingdom), Schedules 1-4.

[18] E Fahey, 'Of "One Shootters" and "Repeat Hitters": A Retrospective on the Role of the European Parliament in the EU-US PNR Litigation' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (CUP 2017).

counter-terrorism and countering serious crime, the UK had already set up its own PNR system.[19] Yet, in 2011, it still chose to opt-in to the (then draft) EU PNR Directive.[20] Following a tumultuous decade of back-and-forth,[21] the EU PNR Directive was adopted in 2016.[22] The Directive was implemented in UK law,[23] but the UK's participation in the EU PNR scheme was jeopardised by Brexit.

The latest settlement or solution, one which is unique for its location in a trade agreement, to enable PNR data sharing from the EU to the UK is found in the EU-UK TCA. However, the robustness of this solution can be contested, starting from the appropriateness of the checks and balances that it introduces to ensure fundamental rights compliance. To address this legal debate, the next section turns to the question of oversight as a key legal issue of its legality post-Opinion 1/15.

III. The EU-UK TCA and the problem of oversight in EU PNR law

III.1. The EU-UK TCA PNR provisions

Title III of the TCA makes provision in approximately 20 articles for PNR law. The transfer of PNR thus is provided for in Part III, Title 3, TCA. It is unusually detailed and comprehensive in a trade agreement.[24] Oversight is not, however, a separate dedicated article of the TCA. It is mentioned once in one article, art. 554, on the logging and documentation of PNR data processing by the competent authority – which has to "ensure oversight" in para. d) thereof.[25]

Many entities are provided for in the TCA to be involved in governance, supervision, communication, transfer, review, and accountability. They arguably inform its oversight cumulatively. These include in Part III a Competent Authority, Passenger Information Units (PIU), Specialised Committee on Law Enforcement and Judicial Cooperation (Specialised Committee), independent reviews, judicial review and a Partnership Council. This

[19] House of Lords, European Union Committee, *The United Kingdom opt-in to the Passenger Name Record Directive* (HL 2010-11 113) publications.parliament.uk.

[20] Communication COM(2011) 32 final from the Commission of 2 February 2011 on Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record Data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

[21] M Nino, 'The Protection of Personal Data in the Fight Against Terrorism: New Perspectives of PNR European Union Instruments in the Light of the Treaty of Lisbon' (2010) Utrecht Law Review 62.

[22] Directive 2016/681/EU of the European Parliament and of the Council of 27 April 2016 on the use of Passenger Name Record (PNR) Data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

[23] See section III below.

[24] E Cummins, 'The UK-EU Trade and Co-operation Agreement 2020' (18 January 2021) Senior European Experts senioreuropeanexperts.org.

[25] Art. 554 of EU-UK TCA cit.

is in addition to the broader governance structure of the TCA.[26] In total, it appears that there are at least 5 layers of oversight.

The concept of "*competent authority*" is thus defined in art. 543 of the TCA and is pivotal to the operation of PNR here. It refers to the UK authority responsible for receiving and processing PNR data under the TCA. This competent authority is what the PIUs are for the Member States.[27] The TCA and PIUs, in turn must "cooperate" with one another, which provides a rare instance of bilateral institutional cooperation provided for under the TCA.

The main powers to use PNR data of the competent authority are set out in art. 544(2) on the purposes of the use of PNR data.[28] Art. 552(3) on retention of PNR data finally provides for unmasking powers in a limited number of scenarios.

The competent authority entity or concept is to be distinguished from the "*independent administrative body*", as referred to in arts 552(7), 552(11)(d), 552(12)(a) and 553 since this body has explicitly to be independent from the UK competent authority (UK PIU). This independence is necessary to "assess on a yearly basis the approach applied by the [UK] competent authority as regards the need to retain PNR data pursuant to paragraph 4".[29] It is also the only entity expressly mandated to ensure "oversight" in relation to PNR data pursuant to art. 554.[30] It thus, on its face, complies with the CJEU's Opinion 1/15.[31] The independent authority is required to supervise compliance with and enforcement of data protection. Thus, it is a key actor of change in the TCA, marking a shift away from the EU-Canada PNR Agreement, where such oversight was not provided for.[32]

Art. 546(1)-(4) provides that the UK competent authority shall share data "upwards" and "horizontally" with Europol or Eurojust or horizontally with the PIUs of the Member States as soon as possible in specific cases where necessary to prevent, detect, investi-

[26] N Levrat, 'Governance: Managing Bilateral Relations' in F Fabbrini (ed), *The Law & Politics of Brexit* (vol. 3 OUP 2021).

[27] In the UK this is the Home Office (National Border Targeting Centre Independent Compliance Governance Team).

[28] It provides that: "In exceptional cases, the [UK] competent authority may process PNR data where necessary to protect the vital interests of any natural person, such as (a) risk of death or serious injury; or (b) a significant public health risk, in particular as identified under internationally recognised standards."

[29] Art. 552(7) of EU-UK TCA cit.

[30] Art. 554 of EU-UK TCA cit.

[31] Opinion 1/15 cit. paras 228-231.

[32] This follows not only from the TCA but also from art. 36 of the Law Enforcement Directive (LED) as it requires the EU to monitor the compliance of the data protection conditions by third countries, including a periodic review to reassess the adequacy decision (see art. 36 of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (LED)).

gate, or prosecute terrorism or serious crime. However, pursuant to para. 6, the UK competent authority and the PIUs of the Member States are required to ensure that only the minimum amount of PNR data necessary is shared under paras 1 to 4.[33]

Beyond these bodies sits a *Specialised Committee on Law Enforcement and Judicial Cooperation*. Art. 525(3) of the TCA provides that the Specialised Committee will be responsible for overseeing the data protection rules applicable to the cooperation under Part III.[34] It thus establishes a Committee to assist the Parties in their endeavour to reach a consensual solution and to foster their cooperation when allegations of breach of their duties under the TCA arise. However, the dispute settlement mechanism under Part III of the TCA does not refer to a standing judicial body or the establishment of panels.

It has powers to take reports and thus provides for reporting and accountability in art. 552(12) of the TCA, and importantly, the UK must provide a report for the independent administrative body.[35] Thus, art. 549(4) of the TCA develops the next layer of oversight: it provides that "[t]he [UK] competent authority shall promptly inform the Specialised Committee on Law Enforcement and Judicial Cooperation of any significant incident of accidental, unlawful or unauthorised access, processing or loss of PNR data".[36]

Opinion 1/15 found that oversight entailed that PNR titles had to be "subject to prior review either by a court or by an independent administrative body".[37] The terms "*court or independent administrative body*" were mentioned in art. 552(7) refer to and on its face comply with the requirements set out by the CJEU in its Opinion 1/15 on the use and disclosure of PNR. However, courts play a role in only 2 instances – arts 553 and 544 reference the capacity of a court to conduct a prior review or compel oversight. Art. 552(7), in conjunction with art. 552(12) (a) also provides that the [UK] shall ensure that a domestic supervisory authority responsible for data protection will have the power to supervise compliance with and enforcement of data protection. On its face, these operate as a series of multiple governances and accountability checks – cumulatively *layers* of oversight.

In addition to all the above, the TCA establishes the *Partnership Council* – chaired by both the UK and EU – at the apex thereof to oversee the implementation, application, and

[33] Art. 546(6) of EU-UK TCA cit.

[34] Art. 525(3) of EU-UK TCA cit.

[35] The provision further specifies that the report "[…] shall include the opinion of the [UK] supervisory authority referred to in Article 525(3) as to whether the safeguards provided for in paragraph 11 of this Article have been effectively applied"; the UK shall also provide to the Specialised Committee on Law Enforcement and Judicial Cooperation "the assessment of the [UK] of whether the special circumstances referred to in paragraph 10 of [Article 552] persist together with a description of the efforts made to transform the PNR processing systems of the [UK] into systems which would enable PNR data to be deleted in accordance with paragraph 4 of [Article 552]". See art. 552 (12) (a) and (b), respectively, of EU-UK TCA cit.

[36] Art. 549(4) of EU-UK TCA cit. See A Janet, 'Dispute Settlement and Jurisdictional Issues for Law Enforcement and Judicial Cooperation in Criminal Matters under the EU–UK Trade and Cooperation Agreement' (2021) New Journal of European Criminal Law 290.

[37] Opinion 1/15 cit. para. 208.

interpretation of the TCA in Title III, art. 7.[38] The function of the Partnership Council becomes significant directly and indirectly to oversight issues. For instance, the PNR data of most travellers have to be deleted after their stay in the UK has ended, which is an important development in line with Opinion 1/15.[39] However, for example, the UK did not have to apply this provision in 2021 and 2022 because of a derogation – one that could be extended for another year if the Partnership Council agreed to it pursuant to art. 552(13).

III.2. Operation of the TCA oversight provisions in practice

PNR data of travellers that are not suspected of crimes and whose information is not needed for law enforcement purposes could be kept by the UK for another two years before the deletion obligation comes into force because of the operation of a Council decision, and the Partnership Council decision.[40] It has been argued that the EU should not be tied by any arbitrary deadline and consider the overall protection of data being transferred at every opportunity.[41] However, early in the relationship, this decision was taken with swift application. The first meeting of the Specialised Committee on Law Enforcement and Judicial Cooperation took place on 19 October 2021, with minutes published only several months later, where pursuant to art. 552, considered the UK report and assessment of Passenger Name Record Data. They noted that the opinion of the UK supervisory authority included with the report of the independent administrative body (IAB) provided under art. 552(12) of the TCA was based only on the information contained in the report of the IAB. The UK indicated that in view of the unique situation arising as a result of COVID-19 the UK supervisory authority was prepared to provide a note to complement its opinion in November following a review of the operation of the interim period safeguards undertaken directly by the UK supervisory authority.[42] It is difficult to see any legal provision for this "note" or to evaluate its potential legal salience. Then in the second decision of the TCA (Decision 2/2021) Partnership Council, it agreed on a decision on the extension of the interim period on 21 December 2021.[43] The EU

[38] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01 [2019], art. 164.

[39] Art. 552(4) of EU-UK TCA cit.; Opinion 1/15 cit. paras 205-206.

[40] Decision 2021/2293/EU of the Council of 20 December 2021 on the position to be taken on behalf of the Union in the Partnership Council established by the Trade and Cooperation Agreement with the United Kingdom regarding the extension of the derogation from the obligation to delete passenger name record data of passengers after their departure from the United Kingdom.

[41] E Massé, 'Access Now's memo on the data transfers and PNR provisions under the EU-UK Trade Agreement' (2021) Access Now www.accessnow.org.

[42] European Commission, First Specialised Committee on Law Enforcement and Judicial Cooperation under the EU-UK Trade and Cooperation Agreement, 13 January 2022, www.commission.europa.eu.

[43] Decision 2/2021 of the Partnership Council established by the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, of 21 December 2021; Decision 2021/2293/EU cit.; Decision 3/2022 of the Partnership Council established by the Trade and Cooperation

position taken on the Union's behalf in the Partnership Council pursuant to art. 552(13) of the TCA was to agree to extend the interim period during which the United Kingdom may derogate from the obligation to delete the PNR data of passengers after they depart from the United Kingdom by one year, until 31 December 2022. There was scant information available at the time of writing as to how this decision was arrived at nor its implications.

III.3. Analysis

As indicated above, EU PNR agreements with third countries contain variable provisions on oversight, from none to esoteric or non-independent scrutiny.[44] Nor is oversight of PNR law is not also defined explicitly in EU law (or international law), at least until Opinion 1/15. As a result, the *locus* or *place* of PNR, i.e. where it is located as a matter of law, appears worthy of attention as to the place of oversight.[45] Members of the European Parliament individually and *en masse* have for a long time advocated and even litigated for better governance and oversight of PNR.[46] The entire trajectory of EU PNR law has been to add *further* layers of oversight,[47] particular where it is used as alternative to border checks; a point which we will expand on in Section V – arguably warranting more rather than less oversight.[48]

Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, of 21 December 2022 establishing a list of individuals who are willing and able to serve as members of an arbitration tribunal under the Trade and Cooperation Agreement.

[44] E Massé, 'Access Now's Memo on the Data Transfers and PNR Provisions under the EU-UK Trade Agreement' cit.; E Carpanelli and N Lazzerini, 'PNR: Passenger Name Record, Problems Not Resolved? The EU PNR Conundrum After Opinion 1/15 of the CJEU' (2017) Air and Space Law 377. See also European Commission, *Air travel – sharing passenger name data within the EU and beyond (assessment)*, ec.europa.eu.

[45] E Fahey, 'Of "One Shotters" and "Repeat Hitters": A Retrospective on the Role of the European Parliament in the EU-US PNR Litigation' cit.; E Kuşkonmaz, *Privacy and Border Controls in the Fight against Terrorism* (Brill 2021).

[46] Joined Cases C-317/04 and C-318/04 *European Parliament v Council and Commission* (*PNR Cases)* ECLI:EU:C:2006:346 paras 56-59 and 67-69. See C Docksey, 'The European Court of Justice and the Decade of Surveillance' in H Hijmans and H Kranenborg (eds), *Data Protection Anno 2014: How to Restore Trust?* (Intersentia 2014); Case T-529/09 *In 't Veld v Council* EU:T:2012:215; Opinion 1/15 cit.; M de Goede and M Wesseling, 'Secrecy and Security in Transatlantic Terrorism Finance Tracking' (2017) Journal of European Integration 253.

[47] E Fahey, 'Law and Governance as Checks and Balances in Transatlantic Security: Rights, Redress and Remedies in EU-US Passenger Name Records and the Terrorist Finance Tracking Program' (2013) Yearbook of European Law 368.

[48] J Jeandesboz, 'Ceci n'est pas un contrôle: PNR Data Processing and the Reshaping of Borderless Travel in the Schengen Area' (2021) European Journal of Migration and Law 431; L Drechsler, 'Setting the Boundaries between the General Data Protection Regulation, the Law Enforcement Directive and the PNR Directive. The Other Important Question Tackled by Advocate General Pitruzzella in Opinion in Case C-817/19 Ligue des droits humains' (11 February 2022) EU Law Live eulawlive.com.

Notably, EU and ECHR laws increasingly appear to have converged initially then somewhat diverged on oversight as to surveillance, with the ECtHR becoming increasingly less strict.[49]

Some contended early on that the provisions in the TCA on PNR contain much of the same content as all existing EU PNR law.[50] Yet this appears untrue in so far as the EU-UK TCA PNR provisions make considerable effort to learn from the provisions of the EU-Canada PNR agreement.[51] In the landmark Opinion 1/15 the CJEU held that the agreement was problematic as to oversight because the oversight was to be carried out, partly or wholly, by an authority which does not carry out its tasks with complete independence.[52] It was, therefore, not free from any external influence liable to affect its decisions.[53] This requirement of independent oversight emerges also as a key theme in *Schrems* II and the place of an independent *Ombudsman* for the EU-US Privacy Shield.[54]

The TCA is much criticised for its broad powers allowing for the transfer of PNR data to the EU.[55] There is no direct effect of the TCA as provided for explicitly therein, with considerable challenges then faced by those seeking to challenge oversight issues.[56] The term "transfer" or "transferred" is ultimately mentioned 32 times in Title III of the TCA. As a result, it can be said that its governance, specifically its oversight, is highly salient still but underwhelming.

[49] V Mitsilegas and others, 'Data Retention and the Future of Large-Scale Surveillance: The Evolution and Contestation of Judicial Benchmarks' (2022) ELJ 1.

[50] E Massé, 'Access Now's Memo on the Data Transfers and PNR Provisions under the EU-UK Trade Agreement' cit.

[51] Council of the European Union, Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record (Draft Canada PNR Agreement), 12657/5/13 REV 5, 23 June 2014, data.consilium.europa.eu.

[52] Opinion 1/15 cit. para. 230.

[53] C Kuner, 'International Agreements, Data Protection, and EU Fundamental Rights on the International Stage' (2018) CMLRev 857, 868; E Carpanelli and N Lazzerini, 'PNR: Passenger Name Record, Problems Not Resolved?' cit. 386, 388; Zalnieriute, 'Developing a European Standard for International Data Transfers after Snowden' (2018) ModLRev 1046, 1053.

[54] See E Fahey and F Terpan, 'Torn between Institutionalisation and Judicialisation: The Demise of the EU-US Privacy Shield' (2021) IndJGlobalLegalStud 205; and Case C-311/18 *Facebook Ireland and Schrems* ECLI:EU:C:2020:559, para. 68.

[55] T Bunyan and C Jones, 'Brexit: Goodbye and Hello: The New EU-UK Security Architecture, Civil Liberties and Democratic Control' (20 January 2022) Statewatch www.statewatch.org. See Regulation 6A of the Passenger Name Record Data and Miscellaneous Amendments Regulations 2018 of the United Kingdom ("the 2018 Regulations of the UK"). The 2018 Regulations of the UK have been amended by the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 and the European Union (Future Relationship) Act 2020. See also S.7 and Schedule 2, European Union (Future Relationship) Act 2020 of the United Kingdom, www.legislation.gov.uk; European Union (Future Relationship) Act 2020, Explanatory Notes available at www.legislation.gov.uk. See also the Data Protection Act 2018 Schedule 7, Data Protection Act 2018 ("other [competent] authorities" – 52 – ICO).

[56] Art. 5 of EU-UK TCA cit. See European Union (Future Relationship) Act 2020 cit. section 29.

The multitude of actors themselves provides an example of the layers of institutionalised governance emerging, albeit their effectiveness and actual reach of the layers remains to be seen.[57] The main oversight structures of the TCA appear mainly similar to previous PNR Agreements, and it is hard to see the radical change from past practice. Rather, it is an additional later layer of annual reporting that remains the substantive difference, along with the putative layer of courts engaging in judicial review. The extensive range of data transfers taking place unifies academics, civil liberties groups, and NGOs alike.[58] Notably, threats exist on the part of the UK Government post-Brexit to exit the Council of Europe ECHR or overhaul or reform the Human Rights Act operate in the background or "rid" the UK of the GDPR or reform it under the Data Reform Bill as part of the "bonfire" of retained EU law proposed.[59] The effect of such issues remains to be seen for the adequacy decision granted, closely being watched by multiple EU institutions. The opaqueness of the layers of TCA PNR governance will arguably be the most problematic. Ultimately, however, the absence of transparency as to the operation of the oversight provisions overall makes its cumulative impact very difficult to assess. The other problematic aspects of the PNR provisions are the protection of the fundamental rights they offer in terms of the scope of PNR data to be shared with the Home Office.

The next section explores these issues from a more technical perspective, as to "adequacy" explained next.

IV. 'Adequacy' standard for the EU-UK PNR data transfers

IV.1. Overview of 'Adequacy'

Besides being significant in governing the oversight of PNR data transfers, the TCA's PNR provisions set out substantive rules on how data transfers outside the EU should be governed. Because those transfers are carried out seemingly in a law enforcement context, the protection that should be afforded by the TCA to the data bears tremendous significance for the protection of travellers whose data are transferred even though the Agreement is a piece in a patchwork of laws that govern the EU-UK data sharing.

The continuity of PNR data sharing between the EU and the UK after the end of the transition period turned on the observance of international data transfer rules under EU law. At their core, these rules prohibit the transfer of personal data outside the EU unless the recipient country (or the recipient data controller or processor following *Schrems II*)

[57] See N Levrat, 'Governance: Managing Bilateral Relations' cit.

[58] O Garner, 'Part Three of the EU-UK TCA' cit.; T Bunyan and C Jones, 'Brexit: Goodbye and Hello' cit.

[59] UK Government, *The Benefits of Brexit: How the UK is Taking Advantage of Leaving the EU' (January 2022)* www.gov.uk.

affords adequate protection to the data compared to that of EU law.[60] The data sharing arrangements the EU has signed with third countries over the years entails that the recipient country affords an "adequate level of protection" for the transferred data.[61]

Unlike the other PNR data sharing arrangements, the TCA does not declare UK law "adequate" in affording protection to PNR data transferred from the EU. Instead, it sets out certain data protection principles that both parties pledge their allegiances to under art. 522. These principles generally apply to sharing different types of personal data incorporated into the law enforcement section of the TCA. The provisions on PNR data transfers provide rules specific to the sharing of the data by commercial air carrier companies to the UK Home Office (as the "competent authority" described in UK national law and required by the Immigration, Asylum, and Nationality Act 2006), the subsequent processing of the data by the UK Home Office, and the exchanges among the UK Home Office on the one side, and the EU Member States PIUs and the Europol on the other.[62] These rules however must be considered alongside the general data transfer arrangements to the UK.

The answer to retaining data transfers post-Brexit was purely practical. In a separate provision contained outside the law enforcement section, the TCA introduced a bridging period during which data transfers to the UK would not be treated as a transfer to a third country.[63] After the end of this period (which was set to expire on 30 June 2021, including two months extension period), data transfers to the UK would be governed by international data transfer rules under EU law. While this interim solution was provided for the sake of "clarity", especially for the commercial sector, not everyone shared the same optimism for the expected adequacy decisions for commercial data transfers and law enforcement data transfers, not least because the former did not cover the processing for immigration purposes as the question on the legality of UK law that allowed public authorities not to fulfil their obligations concerning data subject rights based on an immigration exemption was still pending.[64]

[60] Ch. V GDPR cit.; ch. V Law Enforcement Directive cit. See also C Kuner, 'Article 44. General Principle for Transfers' in C Kuner, LA Bygrave and C Docksey (eds), *The EU General Data Protection Directive (GDPR): A Commentary* (OUP 2020) 764-765; L Drechsler, 'Wanted: LED Adequacy Decisions. How the Absence of any LED Adequacy Decision is Hurting the Protection of Fundamental Rights in a Law Enforcement Context' (2021) International Data Privacy Law 182.

[61] The PNR data-sharing arrangements contain specific adequacy provisions. See art. 5 Draft Canada PNR Agreement cit.; Agreement of 29 September 2011 between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service (EU-Australia PNR Agreement), art. 5; Agreement of 14 December 2011 between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security (EU-US PNR Agreement), art. 19.

[62] Arts 542-562 of EU-UK TCA cit.

[63] Art. 782 of EU-UK TCA cit.

[64] Open Rights Group, *The UK's Immigration Exemption in the Data Protection Act 2018 and Data Adequacy*, www.openrightsgroup.org; EDPB, Opinion 15/2021 regarding the European Commission Draft Implementing Decision pursuant to Directive (EU) 2016/680 on the adequate protection of personal data

Despite these concerns, the Commission adopted two separate adequacy decisions almost just in time before the end of the bridging period on 28 June 2021; one relating to commercial data transfers under the General Data Protection Regulation (GDPR)[65] and the other relating to data transfers for law enforcement purposes under the Law Enforcement Directive (LED).[66] Data transfers to the UK are not restricted after this date and can take place based on these two decisions. If the answer to retaining data transfers to the UK lies in these two somewhat controversial adequacy decisions, what is the role of the PNR provisions of the TCA in sustaining the sharing of a particular type of information?

In May 2021, the Parliamentary Research Service attempted to clarify the role of the TCA concerning these adequacy decisions.[67] After the bridging period, the adequacy decision on commercial data transfers provides the basis for PNR data transfers by commercial air carriers to the UK Home Office.[68] According to the TCA, the transfer takes place in connection with law enforcement cooperation and situating it within the scope of adequacy decision based on the GDPR might be puzzling to some. Many scholars have raised more general questions on uncertainties in applying the GPDR and the LED where the private-public partnership is involved in the data processing.[69] In *Ligue des droits humains*, the CJEU addressed several of these uncertainties over the sharing of PNR data from commercial companies to the EU Member States PIUs that are deemed "competent authorities" for LED. In view of the Court, a commercial company was not a competent authority, and thus the data sharing would be covered by the GDPR and not the LED.[70] This means that the more exigent standards of GDPR apply and that any drift away from GDPR standards in the UK

in the United Kingdom, 13 April 2021; EDPB, Opinion 14/2021 Regulation (EU) 2016/679 on the adequate protection of personal data in the United Kingdom, 13 April 2021.

[65] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) 1 ff.

[66] Directive (EU) 2016/680 cit. 89–131. For adequacy decisions, see Communication COM(2021) 4801 final from the Commission implementing Decision of 28 June 2021 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom; Communication COM(2021) 4800 final from the Commission implementing Decision of 28 June 2021 pursuant to Directive (EU) 2016/680 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom.

[67] CC Cîrlig, 'Law Enforcement and Judicial Cooperation in Criminal Matters under the EU-UK Trade and Cooperation Agreement' (May 2021) European Parliamentary Research Service www.europarl.europa.eu.

[68] I Hallak and others, 'EU-UK Trade and Cooperation Agreement: An Analytical Overview' (February 2021) European Parliamentary Research Service www.europarl.europa.eu.

[69] MM Caruana, 'The Reform of the EU Data Protection Framework in the Context of the Police and Criminal Justice Sector: Harmonisation, Scope, Oversight and Enforcement' (2019) International Review of Law, Computers & Technology 249; N Purtova, 'Between the GDPR and the Police Directive: Navigating through the Maze of Information in Public-private Partnerships' (2018) International Data Privacy Law 52.

[70] *Ligue des droits humains* cit. paras 67-73.

(as apparent in a bill currently before Parliament)[71] will raise even more questions about the adequacy of the UK data protection system from the perspective of EU law.

The CJEU's above findings seem to confirm that PNR data transfers, at least those by commercial air carrier companies to the UK Home Office, are covered by the UK adequacy decision on commercial data transfers issued under the GDPR.[72] The PNR provisions of the TCA provide additional safeguards to PNR data transfers and the subsequent processing by a "competent public authority", the UK Home Office. As part of an international agreement, these provisions stipulate the transfer and processing of personal data and thus interfere with individuals' right to privacy (art. 7 Charter) and personal data protection (art. 8 Charter). For this reason, the extent to which they successfully provide safeguards to the transferred data and individuals whose data is transferred must be determined based on the EU constitutional framework.[73] The following Sections consider whether the PNR provisions of the TCA are in line with the standard of adequacy based on two issues to highlight the recasting of PNR data use: *i)* the *purpose* for which data may be processed and *ii) procedural* safeguards for access to data.[74]

IV.2. The shifting maze of PNR data processing purposes: from law enforcement to border control

The shift in data transfer purposes is evident in the TCA's PNR data processing provision, which raise questions on the extent to which it satisfies the adequacy standard. Art. 544 of the TCA provided clues in deciphering the oversight mechanism for PNR data sharing in Section III. This article is of significance once again – and this time in determining the

[71] See Data Protection and Digital Information Bill of 2022 bills.parliament.uk.

[72] There is however a question whether PNR data transfers can considered as data transfers for immigration purposes and thus are captured by the exclusion contained in the adequacy decision. The answer lies within how PNR data is used under UK law, which is addressed in Section V.

[73] Opinion 1/15 cit. para. 134.

[74] It is important to note here that the adequacy standard of the PNR provisions of the TCA is one aspect of the complex issues surrounding the continuity of data transfer to the UK. The UK Government has voiced its intention to change UK data protection laws and introduced the Data Protection and Digital Information Bill. Among those areas, the most concerning ones that may indicate a divergence from the current law for which the Commission issued an adequacy decision are the changes relating to the operation of the Information Commissioner's Office, data transfers and the prohibition against automated decision-making. See EDPB, Opinion 14/2021 regarding the European Commission Draft Implementing Decision pursuant to Regulation (EU) 2016/679 on the adequate protection of personal data in the United Kingdom, 13 April 2021, para. 11; Resolution 2021/2594 of the European Parliament of 21 May 2021 on the adequate protection of personal data by the United Kingdom; A Chromidou, 'EU Data Protection under the TCA: The UK Adequacy Decision and the Twin GDPRs' (2021) International Data Privacy Law 388; N Ni Loideain, 'Brexit, Data Adequacy, and the EU Law Enforcement Directive' cit. These changes may open another can of worms for the suspension or termination of Part 3 of the TCA, but there are multiple routes for either option, and none of them requires an automatic suspension or termination; see S Peers, 'So Close, Yet So Far: The EU/UK Trade and Cooperation Agreement' (2022) CMLRev 49.

purpose for which the Home Office may use PNR data. Accordingly, the data received by the UK can be processed *i*) strictly to prevent, detect, investigate or prosecute terrorism or serious crime; *ii*) to oversee the processing of PNR data within the terms of the TCA;[75] and *iii*) in exceptional cases where necessary to protect the vital interests of any natural person, such as a risk of death or serious injury; or *a significant public health risk*, in particular as identified under internationally recognised standards.[76]

To ensure adequacy, the TCA must prescribe the purposes for which PNR data may be used by the Home Office in a clear and precise manner.[77] Based on the mentioned data processing purposes, two issues emerge: first, how the TCA defines serious crime and second, how it provides data processing for non-crime-related purposes concerning the protection of vital interests of individuals.

On the former issue, the TCA incorporates the definition of serious crime found in the EU PNR Directive by prescribing that a crime is deemed serious if it is punishable by a maximum of three years imprisonment.[78] It does not incorporate a list of serious offences as it does for the definition of terrorist offences contained in Annex 45. This point was criticised by the European Data Protection Supervisor (EDPS) who overall welcomed how the TCA incorporated the CJEU's findings in Opinion 1/15.[79] In *Ligue des droits humains*, the CJEU elaborated further on setting the crime threshold. According to the Court, the seriousness threshold should be based on a maximum penalty instead of a minimum penalty because the latter option would allow the PNR data processing to take place for offences that do not reach the threshold of severity and ultimately result in disproportionate interference with the rights of privacy and data protection.[80] Based on this finding, the definition of serious crime under the TCA might be re-evaluated. More importantly, the CJEU required PNR processing to be permitted not for all serious crimes but only for those with an objective link with air travel.[81] This finding of the CJEU might require reassessing the categories of serious crimes for which PNR data can be processed under the TCA.

The issue with non-crime-related purposes is how they capture processing for protecting individuals' vital interests, *including* public health risks. The EU PNR Directive does not provide processing of PNR data for a public-health-related purpose. As a result, some Member States were concerned that the UK would be supplied with PNR data for a purpose not

[75] Art. 544(1) of EU-UK TCA cit.

[76] Art. 544(2) of EU-UK TCA cit.

[77] Opinion 1/15 cit. para. 154.

[78] Art. 543 of EU-UK TCA cit.

[79] EDPS, Opinion 3/2021 on the Conclusion of the EU and UK Trade Agreement and the EU and UK Exchange of Classified Information Agreement, 22 February 2021.

[80] *Ligue des droits humains* cit. paras 151-152.

[81] *Ibidem.* See also Section IV on the cross-border element of serious crimes.

foreseen in national laws implementing the EU PNR Directive.[82] According to the Commission, however, this provision did not contradict the EU PNR Directive and was in line with Opinion 1/15, where the CJEU was satisfied with the processing of PNR data in exceptional circumstances when public health risks are involved.[83] Based on this finding of the Court, a similar type of data processing contained in the TCA might pass the CJEU's scrutiny.

Regarding UK law, the 2018 Regulations do not explicitly mention the processing of PNR data for health-related purposes, as it does for its rules on processing for terrorism and serious crime-related purposes.[84] But this does not mean that processing PNR data for health-related purposes is prohibited. The 2018 Regulations note that processing of PNR data is required under the UK immigration legislation requiring air carriers (or sea carriers) to provide "information" to an immigration officer.[85] With this, the inherent border control purpose of PNR data sharing that we will sketch in Section V shines through.[86]

In addition to these examples of the shifting of PNR data, the next section considers the conditions for data accessing where we exhibit more evidence for such shifting under the TCA.

IV.3. Conditions to access PNR data

The next question on the adequacy of the PNR provisions of the TCA is how they govern PNR data transfers from commercial air companies and their subsequent access by the UK public authorities. In Opinion 1/15, the transfer of PNR data without an objective link between the travellers whose data are transferred and the so-called security purpose was challenged based on the CJEU's case-law on data retention.

[82] Statewatch, 'Brexit: Commission answers to EU member state questions on the Trade and Cooperation Agreement' (25 January 2021) Statewatch www.statewatch.org.

[83] The Commission also mentioned the interests reported by the Member States to process PNR data for public health purposes although the EU PNR Directive does not envisage such processing purpose; see Communication COM(2020) 305 final from the Commission to the European Parliament and the Council on the review of Directive 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

[84] The 2018 Regulations of the UK cit. section 5. Annex 45 of the EU-UK TCA defines terrorism. Serious crime is defined by UK law and covers offences punishable for a maximum period of at least three years. The EU-UK TCA does not list conduct that may fall within these categories of offences as the EU PNR Directive does. Still, the CJEU accepted a similar approach in Opinion 1/15, and the definition of serious crime may not raise any issues in regard to legal clarity.

[85] The 2018 Regulations of the UK cit. section 5.

[86] In fact, the UK's interest in requesting PNR data from air carriers for health-related reasons reportedly goes to the 2014 Ebola virus break to screen incoming passengers from the regions that had been affected the most; see M Holehouse, 'David Cameron Says Europe's Block on Sharing Passenger Data Is "Frankly Ridiculous"' (18 December 2014) Telegraph www.telegraph.co.uk.

As a first step, the Court addressed the scope of the draft Canada PNR Agreement that covers PNR data transfer of all passengers in the absence of objective evidence indicating the contribution of the data to the fight against terrorism.[87] The Court thought that this transfer of data *en masse* was within the limits of the strict necessity test and was permissible because, based on this transfer, the Canadian authorities could carry out automated data processing before the arrival of passengers to facilitate and expedite security checks.[88] The objective of ensuring border security could not be achieved by excluding certain categories of people and areas of origin from the scope of PNR data transfers.[89] The Court further noted that the international civil aviation treaty, the Chicago Convention, to which Canada was a signatory party, recognised states' right to prescribe their own national rules on entry and clearance.[90] Pre-emptive border screening enabled through indiscriminate use of PNR data was part of Canada's entry and clearance rules.[91] In its *Ligue des droits humains* decision, the CJEU stood its ground and held that as far as the extra-EU travels are concerned, the legislation does not have to condition PNR data transfers on the existence of objective evidence that the data transfer would contribute to the fight against terrorism and serious crime.[92]

Based on the CJEU's above findings, the *adequacy* standard of the PNR provisions of the TCA would not be affected by the absence of objective evidence.[93] However, the CJEU notes that once the data is used in pre-screening procedures, its subsequent access by public authorities must be subject to further procedural safeguards because the purpose of the processing ceases to exist once the person is admitted into or departs from the country.[94] For this purpose, systematic access to the retained data is prohibited.[95] The legislation thus must define circumstances and conditions based on objective criteria allowing authorities access to the retained data.[96]

At its face value, the TCA follows the adequacy requirements laid out by the CJEU to an extent. Accordingly, the Home Office may use PNR data for purposes "*other than security and border control checks*", where "new circumstances based on objective grounds indicate

[87] Opinion 1/15 cit. para. 186.

[88] *Ibid.* para. 187.

[89] *Ibid.* para. 187.

[90] *Ibid.* para. 188.

[91] *Ibid*.

[92] *Ligue des droits humains* cit. paras 161-162.

[93] Art. 542 of EU-UK TCA cit.: "2. This Title applies to air carriers operating passenger flights between the Union and the United Kingdom. 3. This Title also applies to air carriers incorporated, or storing data, in the Union and operating passenger flights to or from the United Kingdom". In other words, air carriers that store PNR data outside the EU (as is the case since air carriers may have outsourced data storing capabilities to global distribution systems) will share the data regardless of where it is stored.

[94] Opinion 1/15 cit. para. 200. See also *Ligue des droits humains* cit. para. 218.

[95] *Ligue des droits humains* cit. para. 219.

[96] *Ibid*. The requirement of an independent administrative body as part of the ex-ante review of access requests is discussed in Section III.

that the PNR data of one or more passengers might make an effective contribution to the attainment of the purposes set out in Article 544".[97] Leaving aside the question on the compatibility of processing for "border check" purposes with the CJEU's findings, making the subsequent access to data conditional on new circumstances seems to satisfy access requirements laid out by the CJEU. But the detail is missing here. To justify the subsequent access to data for activities related to terrorist offences, the effective contribution of the data to combat those activities must be considered.[98] The CJEU did not seek this condition for all terrorist offences – only those threatening national security, defence, or public security interest.[99] To justify subsequent access to data for serious crimes, the CJEU gave a different reading of those circumstances, presumably due to the lesser risk that those crimes pose to public security than terrorist offences.[100] Access to combat serious crimes, the Court held, must be granted only to the data of individuals suspected of involving in the relevant crime.[101] To satisfy the latter requirement, the CJEU read the terms "sufficient grounds" and "reasonably" found in the EU PNR Directive jointly and noted that they condition access to data for serious crime based on objective evidence capable of giving rise to a reasonable suspicion that the individual involved in the commission of a serious crime.[102] While the TCA requires the existence of objective grounds, it does not reference the observance of reasonable suspicion in granting access to the retained data for a serious crime.

In relation to the ex-ante review, the TCA subjects access to PNR data to a priori review by a court or an independent administrative body upon request by the Home Office submitted based on "[UK] legal framework of procedures for the prevention, detection, or prosecution of crime".[103] This review requirement is in addition to the power of the Home Office as the PIU to grant access to complete PNR data after the first six months of the five-year retention period.[104] While the text of the TCA seems to incorporate the review requirements noted by the CJEU, the extent to which this review observes the independence requirement is yet to be seen. As mentioned in Section III, there are issues over

[97] Art. 533(1) of EU-UK TCA cit.

[98] *Ligue des droits humains* cit. para. 221.

[99] *Ibid*.

[100] Cf. Case C-203/15 *Tele2 Sverige AB v Post–och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* ECLI:EU:C:2016:970 para. 119; Case C-746/18 *Prokuratuur (Conditions of Access to Data relating to Electronic Communications)* ECLI:EU:C:2021:151 para. 50.

[101] *Ligue des droits humains* cit. para. 221.

[102] *Ibid*.

[103] Art. 533(2) reads that "[u]se of PNR data by the United Kingdom competent authority in accordance with paragraph 1 shall be subject to prior review by a court or by an independent administrative body in the United Kingdom based on a reasoned request by the United Kingdom competent authority submitted within the domestic legal framework of procedures for the prevention, detection or prosecution of crime, except [...] (b) for the purpose of verifying the reliability and currency of the pre-established models and criteria on which the automated processing of PNR data is based, or of defining new models and criteria for such processing".

[104] Art. 552(3) of EU-UK TCA cit.

the oversight of PNR data sharing, and the CJEU case law proves that the adequacy question is not detached from the discussions over oversight mechanisms.

Overall, there is evidence in the TCA of the shifting of PNR data that might ultimately undermine the level of protection afforded to individuals. The next section questions the unchallenged notion that PNR data are processed for *criminal justice* purposes.

V. PNR data processed for criminal justice *or* border control?

V.1. Overview of EU law

As indicated in Section II, PNR is made up of numerous elements of personal data provided by passengers when seeking to book travel but unverified by either the private sector to which they are provided by the data subject or the public sector, which requires the private sector to transmit them on request. The inherent relationship of PNR with the crossing of international borders[105] is obvious from the perspective of the data subject. People do not generally provide their data to travel companies unless they are planning to travel. The obligation to provide personal data to these companies only arises in the process of concluding a contract to travel between the parties. Further, the obligation is primarily one related to travel across international borders, internal border travel does not necessarily require prospective passengers to provide the travel company with PNR data (though this depends on national law). Thus, from the perspective of the individual providing the data and the travel company collecting and processing it, the objective is related to travel which includes border crossing. For the individual providing it, the data is part of the contract with the company, for the company the collection of the data is generally justified based on improving the travel experience of the customer.

As mentioned in Section IV, the CJEU made a very pertinent finding in *Ligue des droits humains* regarding the application of EU data protection standards to this area of rather opaque private-public collaboration.[106] In short, it held that private companies which are required by the state to transfer PNR data to them, do so subject to the high EU standards of the GDPR.[107] When states receive this data for the purposes of fighting serious crime and terrorism, they may use it subject to the less strict rules of the LED.[108] But once the personal data is in the hands of the State authorities, data protection becomes uncertain.

Thus, when the State authorities require companies to transmit PNR data to them, the purpose becomes less clear. It might seem self-evident that there is a border control element central to the objective of the authorities in obtaining PNR data after all the data

[105] A slightly different situation applies to intra-EU PNR where the data relates to the intra-Member State travel and is not limited to Schengen States where border controls on persons have been formally abolished.

[106] *Ligue des droits humains* cit. para. 84.

[107] *Ibid.* para. 81.

[108] *Ibid.* para. 80.

was created for this purpose. Perhaps the use of the phrase "an objective link, even if only indirect one, with air travel" largely cited in *Ligue des droits humains* as part of the ground for the legality of untargeted use of PNR data for the purposes of combatting serious crime or terrorism, is an inversion of sorts of this relationship between travel and extensive use of personal data without consent.[109] But there is a great reluctance on the part of European authorities to admit this at least formally. Instead, European authorities insist that the purpose is to prevent, detect, investigate, and prosecute terrorist offences or serious crimes.[110] Indeed, the CJEU found that this use is specifically unlawful.[111] In the agreements the EU has entered into with third countries (Australia, Canada and the USA) regarding PNR data exchange, the same insistence on the objective as one of serious criminal law and counter-terrorism is maintained. So it is no surprise to find the PNR provisions of the TCA in Part III of the agreement, law enforcement and judicial cooperation in criminal matters, art. 542 et seq. Art. 544 states that the UK "shall ensure that PNR data received pursuant to this Title is processed strictly for the purposes of preventing, detecting, investigating or prosecuting terrorism or serious crime and for the purposes of overseeing the processing of PNR data within the terms set out [in the TCA]".

The reason for the insistence of EU institutions and the UK on the criminal justice purpose of PNR data collection and exchange is evident from the legal bases of the TCA and other international PNR agreements. Leaving aside the somewhat vexed question of what the legal basis of the TCA is anyway,[112] its criminal justice provisions refer back to EU competence under art. 82 TFEU judicial cooperation in criminal matters rather than art. 77(1)(a) and (b) TFEU which create competence to develop a policy on the crossing of external border controls and integrated management of external border controls. The EU's power to adopt legislation depends also on the integration of the Schengen *acquis*

[109] *Ibid.* para. 191: "[i]n addition, in order to satisfy the requirement as to the targeted, proportionate and specific nature of the pre-determined criteria, the databases referred to in paragraph 188 above must be used in relation to the fight against terrorist offences and serious crime having an objective link, even if only an indirect one, with the carriage of passengers by air".

[110] Art. 6(b) of EU PNR Directive cit.

[111] *Ligue des droits humains* cit. para. 288: "...national legislation authorising the processing of PNR data collected in accordance with that directive, for purposes other than those provided for therein, namely for the purposes of improving border controls and combating illegal immigration, is contrary to Article 6 of the said directive, read in the light of the Charter".

[112] See P van Elsuwege, 'A New Legal Framework for EU-UK Relations: Some Reflections from the Perspective of EU External Relations Law' (2021) European Papers www.europeanpapers.eu 785. According to the Commission, "[t]he Commission is of the view that the Agreement with the UK can be concluded as an EU-only agreement since it covers only areas under Union competence, be it exclusive or shared with the Member States. The Commission has chosen Article 217 TFEU as the legal basis for the conclusion of the Agreement. This requires the unanimous agreement of the Member States in the Council and the consent of the European Parliament". See European Commission, 'Questions & Answers: EU-UK Trade and Cooperation Agreement (QANDA/20/2532)' (24 December 2020) ec.europa.eu. See art. 217 TFEU.

into EU law and whether a border control-related measure is an extension of that *acquis*.[113] The UK, while still a Member State, spent much effort avoiding participating in measures adopted under art. 77 and kept a very substantial distance from the Schengen *acquis* altogether preferring to retain sovereign control over external borders including those with other (as then was) EU States.[114] As the whole area of border controls and their management is obfuscated by political claims about its role as an inherent part of State sovereignty.[115] Hence, criminal justice cooperation has turned out to be a more palatable choice of the legal basis for PNR data exchanges generally.

But is this position legally sustainable? The first question to resolve is the relationship of border control with law enforcement and in particular criminal justice. In EU law, "[b]order control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations".[116] Illegal immigration and trafficking in human beings are both framed as criminal law and indeed as far as trafficking is engaged, a directive requires the Member States to create criminal offences in relation to trafficking.[117] The value of the criminal offence of trafficking in human beings for the purposes of using PNR data for serious crime purposes in a cross border context (i.e. with an inherent border control element) is acknowledged by the CJEU when it found that within the limited grounds for which PNR data can be used, that of serious crime, trafficking in human beings is legitimate as such a serious crime.[118] The risk of misuse of personal data obtained from PNR ostensibly accessed on the grounds of serious

[113] The legal basis of the Schengen Borders Code (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).

[114] This position was only modified when the UK sought access to the EU Border Agency, Frontex which was rejected by the CJEU on the basis of the UK's rejection of participation in the field of border controls more generally. See Case C-77/05 *UK v Council* ECLI:EU:C:2007:803.

[115] A particularly good example of this is the Statement of the US Mission to the UN of 7 December 2018 on the Global Compact on Migration. See United States Mission to the United Nations, 'National Statement of the United States of America on the Adoption of the Global Compact for Safe, Orderly, and Regular Migration' (7 December 2018) usun.usmission.gov.

[116] Recital 6 of Schengen Borders Code cit.

[117] 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.

[118] *Ligue des droits humains* cit. para. 149: "[i]n that regard, as noted by the Advocate General in point 121 of his Opinion, many of the offences listed in Annex II to the PNR Directive – such as human trafficking, the sexual exploitation of children and child pornography, illicit trafficking in weapons munitions and explosives, money laundering, cybercrime, illicit trade in human organs and tissue, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in nuclear or radioactive materials, unlawful seizure of aircraft/ships, serious crimes within the jurisdiction of the International Criminal Court, murder, rape, kidnapping, illegal restraint and hostage-taking – are inherently and indisputably extremely serious".

crime, that is to say the fight against trafficking in human beings, but actually used for border control, is thus very substantial.[119]

The final section examines the place of border control and criminal justice in EU PNR agreements more specifically.

V.2. The juxtaposition of border control and criminal justice in EU PNR agreements

The same intersection of border control, PNR personal data and serious crime is revealed in the other EU agreements on PNR. In the EU-Australia agreement,[120] the objective is strictly limited to preventing, investigating and prosecuting terrorist offences or serious transnational crime.[121] Yet, the Australian Border Force states: "[a]ccess to Passenger Name Record data by the Department [of Home Affairs] forms an integral component of Australia's intelligence led, risk based approach to border protection"[122] *and* that PNR data facilitates "*undertaking the risk assessment and clearance of all passengers arriving into and departing from Australia*".[123] Thus while the stated objective of the agreement is strictly limited to criminal justice, the agency with access to PNR data states its importance for border and immigration control purposes. In the EU-Canada agreement (expired) the objective is serious crime (see above regarding this agreement). Finally, in the third agreement, EU-US,[124] the objective is to prevent, detect, investigate and prosecute terrorist offences and related crimes but then includes a clear border control element that PNR data may be used "by DHS [Department of Homeland Security] to identify persons who would be subject to closer questioning or examination upon arrival to or departure from the United States or who may require further examination".[125]

For the purpose of EU law, the CJEU has held that the legal basis for a measure (including an agreement such as the TCA) is to be assessed in accordance with objective factors such as the purpose of the measure and its content.[126] Its use is also important – what is the actual use of the agreement. From this perspective, efforts to detach PNR Agreements from border control may not be tenable. If PNR is indeed primarily a border control tool because of its relationship with travel and the crossing of international borders as well as how it is used by States for border control purposes, notwithstanding the link between border control and criminal justice, this has important consequences for the legality of PNR data sharing between the EU and the UK. Personal data protection in

[119] See for instance Information Commissioner's Office, *Mobile Phone Extraction by Police Forces in England and Wales Investigation Report*, ico.org.uk.

[120] EU-Australia PNR Agreement cit.

[121] Art. 3 of EU-Australia PNR Agreement cit.

[122] Australian Border Force, *Collection of Passenger Name Records*, www.abf.gov.au.

[123] *Ibid*. (emphasis added).

[124] EU-US PNR Agreement cit.

[125] Art. 4(3) of EU-US PNR Agreement cit.

[126] Case C-479/21 *SN & SD* ECLI:EU:C:2021:929.

border control contexts in UK law is most noticeable by its absence. The Data Protection Act 2018 specifically exempts all border and immigration control processing of personal data from protection under the act (see below). Thus, all the GDPR rules on personal data do not apply to data collected in this context. While specialist agencies did bring this issue to the attention of Parliament at the time of the passing of the legislation, no correction succeeded. Brexit, however, resulted in this failure to receive judicial consideration. The UK NGOs, the Open Rights Group and the 3 Million, which engaged in protecting the rights of EU nationals in the UK post-Brexit, challenged the exemption.

Accordingly, in 2021 the UK Court of Appeal struck down the immigration exemption in the (UK) Data Protection Act 2018, which allows the UK immigration authorities to bypass and restrict fundamental data rights where compliance would be prejudicial to the maintenance of effective immigration control.[127] The Court suspended the effect of its judgment allowing the Home Office until 31 January 2022 to remedy the unlawfulness through legislation. As a result of the UK court judgment, when the EU issued its adequacy decision on data sharing between the EU and the UK necessary for the exchange of personal data between the two, it carved out immigration-related data from its otherwise favourable decision.[128] The consequence of the carve-out is that immigration-related data sharing can take place only based on arts 45-49 GDPR, relating to data sharing with third countries. If PNR is indeed border control (i.e., immigration-related) data sharing, then it would be caught by these restrictions.

The UK government then presented a statutory instrument which purports to remedy the shortcomings of the immigration exemption in the DPA.[129] The new SI has been described as inadequate by the organisations which brought the claim to the Court of Appeal in the first place.[130] The main complaint is that the revised regulations do not fulfil the necessary criteria of being clear and precise, nor do they provide foreseeability for individuals affected as the CA required in its judgment. They also do not fulfil the requirements of GDPR according to the complainants.

VI. Conclusion

There have been 20 years of difficult evolutions taking place towards the EU's global approach to PNR. This *Article* considered the PNR provisions of the EU-UK TCA based on the ongoing conflicts on international data transfers and the effect of characterising PNR data

[127] See in particular Court of Appeal (England and Wales), *Open Rights Group & Anor, R (On the Application Of) v The Secretary of State for the Home Department & Anor* (2021) EWCA Civ 800.

[128] Communication COM(2021) 4801 final from the Commission implementing Decision of 28 June 2021 pursuant to Regulation (EU) 2016/679 cit.

[129] The Data Protection Act 2018 (Amendment of Schedule 2 Exemptions) Regulations 2022 of United Kingdom.

[130] The 3 Million, *Second Judicial Review Hearing to Challenge Immigration Exemption in Data Protection Act*, the3million.org.uk.

sharing as part of the criminal justice cooperation on future data transfer conflicts. It sketched the multiple layers of PNR governance under the TCA, which eventually raises the question about the transparency and accountability of PNR data sharing carried out accordingly. Moreover, the rules on the scope of PNR data covered by the TCA and the purposes for which the data may be processed call the legality of the PNR provisions of the Agreement into question for their compatibility with EU law. The main issue is the extent to which they afford adequate protection to data subjects compared to the protection afforded under EU law. The starting point in assessing the adequacy standard of the TCA's PNR provisions is the EU constitutional framework ensuring the rights to privacy and data protection. This *Article* argued that in three main areas, the PNR provisions' adequacy to protect data subjects is questionable. The first area is the layers of oversight that the TCA establishes specifically on the processing of PNR data (e.g. PIU as the competent authority and independent administrative body for the ex-ante review of PNR processing) and more generally on the implementation of the TCA's law enforcement section where the PNR provisions are located. On its face, the TCA satisfies the EU requirements of oversight for the former as it largely mirrors the CJEU's findings on the topic in Opinion 1/15. Still, the extent to which the relevant oversight bodies can be deemed independent in practice is yet to be seen. The concerns with the independence and effectiveness of oversight bodies are compounded by the cumulative layers of checks and balances and the absence of transparency (as seen in the initial review of the implementation of the PNR provisions and the decision to extend the interim period).

The second area where the PNR provisions adequacy standard is questioned relates to how the TCA sets out the purposes of data processing and the conditions for the subsequent access to data. The CJEU's findings on these issues in Opinion 1/15 and subsequently in *Ligue des droits humains* suggest that the TCA falls short of satisfying the EU fundamental rights requirements for its failure to condition access to the data for countering serious crimes that have an objective link with the air travel. It also does not require subsequent access to the data based on a reasonable suspicion that the individual in question must involve in the commission of a serious crime. Finally, the legal basis for PNR provisions appears to be vulnerable if PNR data is border control. Its characterisation in criminal justice is through the capacity of the data to be incorporated in border control proceedings to consider the general grounds for refusal of entry into the country.

To ensure the continuity of PNR data transfer in accordance with the EU legal framework, the PNR provisions of the TCA or any future cooperation on the subject must be aligned with the EU fundamental rights framework as interpreted by the CJEU. In this regard, oversight emerges as a major accountability issue. Any future collaboration must disentangle the multiple layers of oversight and ensure they meet the independence requirement put forward by the CJEU and the ECtHR. Serious crime related data processing purposes must be reconsidered in light of the limitations set out in the CJEU's case law. These issues indicate that the PNR provisions of the TCA might not be the end of how EU-

UK PNR data sharing will be governed post-Brexit, and instead, they are the sight of impending discussions. For the continuity of the EU-UK data sharing, including PNR data, the UK must ensure that the UK law is consistent with the EU's adequacy standards, including the CJEU evolving case law. The Data Protection and Digital Information Bill and a sea of uncertainty regarding the "bonfire of retained EU law" indicate that Parliament is willing to take the opposite route to the detriment of maintaining the UK's adequacy standards. This direction might ultimately create uncertainty on the continuity of the free data flow for the public and private sectors.

ARTICLES

ONE HEALTH IN THE EU: THE NEXT FUTURE?

FRANCESCA COLI* AND HANNA SCHEBESTA**

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ABSTRACT: The *Article* investigates how the One Health concept is used in the European Union and what functions are attributed to it in EU laws and policies. To this end we conduct a systematic analysis of EU laws and policy documents, with specific emphasis on the European Green Deal and its actions. The first section outlines the main conceptual features of the evolving One Health approach over time. The second section analyses how European laws and policies have considered One Health over time, showing its erratic use. The third section is dedicated to analysing how One Health is taken into account by the Green Deal's actions. The conclusion recognises that the EU conceptualization and operationalization of One Health is far from being clear, coherent or concrete. However, we argue that a transition may be underway and One Health has the potential to become a new political and legal principle capable of permeating future EU actions towards a new phase of policy integration and sustainability.

KEYWORDS: One Health – European Green Deal – EU law – EU policies – sustainability – integration.

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This *Article* is the joint output of research carried out by Francesca Coli, during her visiting at Wageningen University, Law Group, from February to July 2022, and Dr Hanna Schebesta, her supervisor during the visiting period. While the idea of the *Article*, its structure, section I and concluding discussion (section V) are the result of a joint effort of the authors, sections II, III.1 and IV are attributed to Francesca Coli and section III.2 to Hanna Schebesta.

EUROPEAN PAPERS
VOL. 8, 2023, NO 1, PP. 301-316
www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/652

I. Introduction

The term "One Health", which loosely refers to the interconnectedness of human, animal, and environmental health, originated in the natural sciences in the last century (see section II). It promotes a holistic view to systematically address health threats by valuing the interrelationships between its three dimensions (human, animal, and environmental health). In recent years, the term has gone from being used mainly by medical, veterinary, and epidemiological professionals to being increasingly used also in the language of politics, policy and even law. This rapid evolution raises some questions about the value and meaning of One Health from a policy and legal perspective.

In this context, and with regard to the value of concepts and definitions aimed at creating a common language in the scientific discourse, it has been remarked that "every science tends to create its own particular way of expressing itself, and the introduction of technical terms and expressions is not only *inevitable*, but *beneficial to its precision and rigour*" (emphasis added).[1] One wonders, therefore, whether the introduction of One Health into EU policy and legal discourse is "inevitable" or "beneficial to the precision and rigour" of either of these fields.

As for its "inevitability", certainly we did not need the One Health approach to recognize the link between human, animal, and environmental health. In fact, the history and evolution of One Health shows that what is innovative and effective in this notion is not its content.[2] Rather, it is the methodology required for its implementation, which tends to create mechanisms and procedures for coordination, communication, collaboration, and capacity building.

Then, to be "beneficial to the precision and rigour" of a scientific field – especially that of social sciences – One Health ought to be identified by well-defined features and a clear scope. Yet, it is evident that the One Health approach and its implications continue to appear unclear and vague when referring to it, at least in the legal and socio-political sphere.[3] This has several causes, which are briefly outlined as follows.

[1] AA Martino, *Le definizioni legislative* (Giappichelli 1975), cited in F Cortese and M Tomasi, 'Le definizioni nel diritto. Atti delle giornate di studio, 30-31 ottobre 2015' (2016) Quaderni della Facoltà di Giurisprudenza 8: "Ogni scienza tende a creare il suo particolare modo di esprimersi, e l'introduzione di termini ed espressioni tecniche, non soltanto è inevitabile, ma giova alla sua precisione e rigore" (translated into English by the authors).

[2] M Bresalier, A Cassidy and A Woods, 'One Health in History', in J Zinsstag and others (eds), *One Health: The Theory and Practice of Integrated Health Approaches* (CABI 2021) 1-14; JS Mackenzie and M Jeggo, 'The One Health Approach – Why is it so important?' (2019) Tropical Medicine and Infectious Diseases 88.

[3] By way of example, what does the Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021-2027 mean when it states in art. 3: "(...) It [the Programme] shall pursue the following general objectives in keeping with the One Health approach, where applicable (...)" (emphasis added)? Or, what does the EU Commission intend when establish in the Biodiversity Strategy (Communication COM (2020) 380 final from the Commission of 20 May 2020 on the EU Biodiversity Strategy

To begin with, there is no unequivocal definition of One Health, and existing definitions vary considerably.[4] Moreover, the concept of One Health still seems to be a prerogative of the natural sciences; the latter were certainly primarily responsible for its origin, and it seems clear that as of today they can also be considered the major contributors to its development.[5] One Health is most clearly relevant at the medicine-veterinary nexus, where it continues to be used mainly in relation to the prevention of pandemics, antimicrobial resistance (AMR), zoonosis, and emerging infectious diseases.

In parallel, one can observe a buoyant tendency (from both scholars and inter-governmental organizations) to broaden the scope of One Health, applying it to the fight against climate change and biodiversity loss, the achievement of food security, and the transition towards sustainable food systems, to name a few.[6] This tendency is compounded by the mainstreaming of the term "One Health" in public discourse: indeed, especially after the Covid-19 pandemic, One Health has been used often by public authorities and in official documents, although with little awareness of its implications.[7]

for 2030 Bringing nature back into our lives) that "the EU will enhance its support to global efforts to apply the One Health approach, which recognizes the intrinsic connection between human health, animal health and healthy resilient nature" (emphasis added).

[4] Several definitions are discussed in the following paragraphs of the text. A definition often considered by doctrine is: "One Health is an approach to designing and implementing programmes, policies, legislation and research in which multiple sectors communicate and work together to achieve better public health outcomes" (WHO, 2017, www.who.int).

[5] See S Humboldt-Dachroeden, O Rubin and S Sylvester Frid-Nielsen, 'The state of One Health research across disciplines and sectors – a bibliometric analysis' (2020) One Health 10, 100146: the bibliometric analysis showed an increasing interest for One Health in academic research. However, it revealed some thematic and disciplinary shortcomings, in particular with respect to the inclusion of environmental themes and social science insights pertaining to the implementation of One Health policies. It is worth also mentioning that the One Health European Joint Programme (OHEJP, see www.onehealthejp.eu), launched in 2018 with the aim of creating a European partnership to strengthen transdisciplinary cooperation and integration of activities between institutes, does not include social sciences in its mandate. But even the One Health High Level Expert Panel (see section I) is mostly composed of natural scientists: out of 26 experts only two have a background in social sciences (in the fields of public policy and anthropology) and no legal experts were involved (see www.who.int).

[6] See, among others, IOM (Institute of Medicine), 'Improving food safety through a One Health approach' (The National Academies Press 2012) 15; SN Garcia, BI Osburn and MT Jay-Russell, 'One Health for Food Safety, Food Security, and Sustainable Food Production' (2020) Frontiers in Sustainable Food Systems www.frontiersin.org; Global Hunger Index, 'One Decade to Zero Hunger - Linking Health and Sustainable Food Systems', (2020); G. Parent and L Collette, 'Transforming agri-food systems – Legislative interventions for improved nutrition and sustainability' (FAO Legal Papers 107-2021); J Iain Gordon and others, 'Food security and nutrition', in J. Zinsstag and others (eds), *One Health: the theory and practice of integrated health approaches*, (CABI 2021), 327-343; C Stephen, C Duncan and S Pollock, 'Climate Change: The Ultimate One Health Challenge', in J Zinsstag and others (eds), *One Health: the theory and practice of integrated health approaches* (CABI 2021), 205-216.

[7] These mentions are frequently confined to the declaration of principle of wanting to adopt a One Health approach, without explaining what this means or entails. By way of example only, reference is made to the Communication of the Ministers of Agriculture on the occasion of the G7 Pathways Towards Sustainable Food

These trends are probably at the origin of the mounting interest in One Health that can be observed in social sciences[8], which are expected to develop the role that One Health can play in the context of public policy and law, and to contribute to its implementation.

In other words, a conceptual transformation might be underway, with several drivers (sometimes pushing in opposite directions) determining not only a change in the notion of One Health, but also in its future applications. The European Union seems to be an intriguing testing ground to analyse this transition.

In this regard, the present *Article* seeks to investigate how the European Union conceives the One Health approach and what functions and role (if any) it attributes to it in its law and policy making, specifically in the green transition launched by the European Green Deal.[9] The research emphasises the European Green Deal (and its strategies) for two main reasons: *1*) because it has the ambition to shape the future of the EU, outlining innovative commitments and directing future actions; *2*) because its progressive implementation has been affected by the Covid-19 pandemic, with the result that most of the Green Deal's actions now contain public health considerations and measures alongside environmental ones. Thus, the awareness of the need to jointly address climate change and health threats has never been more intense. In this context, One Health could represent a crucial tool for the achievement of goal setting and profound structural change.

The following section outlines the main features of the One Health approach (section II). The third section provides the general context of the topic in question, illustrating how European laws and policies consider One Health and what role they respectively assign to it (section III). The fourth section is devoted to the analysis of the European Green Deal's actions (section IV). The conclusion presents the main findings, attempting to answer the following research question: how does the Green Deal address the One Health approach?

Systems in Times of Crises (Berlin, 14 May 2022) www.bmel.de; the Declaration of the Ministers of Health on the occasion of the G20 (Rome, 5-6 September 2021), available at www.salute.gov.en; to the Declaration of Rome concluded on the occasion of the Global Health Summit (Rome, 21 May 2021) global-health-summit.europa.eu; to the Speech by the President of the European Commission Ursula Von der Leyen, at the One Planet Summit for Biodiversity (Paris, 11 January 2021) available at ec.europa.eu.

[8] By way of example only, see: M Whittaker, B Obrist and M Berger-Gonzalez. 'The role of Social Sciences in One Health – Reciprocal Benefits', in J Zinsstag and others (eds), *One Health: the theory and practice of integrated health approaches* (CABI 2021), 71-87; L Wettlaufer and others, 'A Legal Framework of One Health: the Human-Animal Relationship', in J Zinsstag and others (eds), *One Health: the theory and practice of integrated health approaches* (CABI 2021), 135-144; MK Lapinski, JA Funk, LT Moccia, 'Recommendations for the role of social science research in One Health' (2015) Social Science & Medicine 51-60; S Humboldt-Dachroeden, 'A governance and coordination perspective – Sweden's and Italy's approaches to implementing One Health' (2022) SSM – Qualitative Research in Health 2, 100198.

[9] Communication COM (2019) 640 final from the Commission of 11 December 2019 on the European Green Deal.

II. The One Health approach: main conceptual features

One Health encapsulates a straightforward, and certainly not cutting-edge, concept which recognises the interconnection between human health, animal health and environmental health.[10] Its main feature is, thus, to embed an integrated and systemic idea of health, the implementation of which is essential not only for scientific progress, but also for the design of effective and coherent policies addressing global challenges. To do this, the three components of One Health are to be considered and managed together by scientists, policy-makers, and possibly stakeholders, through coordination, collaboration, and capacity building.[11]

The meaning of the term can be fully grasped through a quick overview of its history. "One Health" is derived from "One Medicine", whose origin dates to the 20th century and is attributed to the American veterinarian Calvin W. Schwabe.[12] "One Medicine" was used primarily for the development of new treatments and vaccines for animals and humans and was based on the idea that human and veterinary medicine should contribute to each other's development. Therefore, its implementation was meant to address new threats at the animal-human health interface, involving almost exclusively the epidemiological field. The evolution from "One Medicine" to "One Health" takes place "through practical implementation and careful validation of contemporary thinking on health and ecosystems and their relevance for global public and animal health development".[13] Thus, the addition of the third component – ecosystem – has made it possible to go beyond the human-animal health nexus, by also taking into consideration the environment that they share and in which they co-exist.

The spread of the term "One Health" mainly occurred from 2004 onward, when the Wildlife Conservation Society organized the symposium "Building Interdisciplinary Bridges to Health in a Globalized World" in New York. The symposium gave rise to the expression "One Health, One World" and resulted in the "Manhattan Principles", 12 recommendations addressed to governments, policymakers, and scientific institutions, to

[10] For an overview of the One Health approach and its foundations, see F Coli, 'L'Approccio One Health' Rivista di Diritto Agrario 3/2022 (forthcoming). The Author is currently pursuing a PhD in Agri-food law, with a project on the implementation of the One Health approach in the transition to sustainable food systems, focusing mainly on the European context.

[11] See, One Health High-Level Expert Panel (OHHLEP), WB Adisasmito and others, 'One Health: A new definition for a sustainable and healthy future' (2022) PLoS Pathog 2: "Central to this definition is actual implementation (…), taking One Health from theory to practice, as highlighted by the 4 Cs: Communication, Coordination, Collaboration, and Capacity building".

[12] M Bresalier, A Cassidy and A Woods, 'One Health in History' cit.; MC Schneider and others, 'One Health From Concept to Application in the Global World' (2022) Oxford Research Encyclopedia of Global Public Health.

[13] J Zinsstag and others, 'From "one medicine" to "one health" and systemic approaches to health and well-being' (2011) Preventive Veterinary Medicine 149.

holistically approach issues linked to diseases among human, domestic animal, and wildlife populations.[14] In 2019, the "One Planet, One Health, One Future" conference led to replace the "Manhattan Principles" with the so-called "Berlin Principles".[15] The latter aimed at restoring the health and integrity of ecosystems in the logic of One Health, applying it also to the fight against climate change. This update revealed two main interdependent needs, which still exist today: to shed light on the environmental component of One Health, which has traditionally been overshadowed by the others (human and animal); and the attempt to broaden the scope of One Health, which is strongly limited to the epidemiological, medical, and veterinary fields.

A first step towards fulfilling the two requirements mentioned above seems to have been achieved in 2021, with a new and "comprehensive" definition of One Health that has the potential to gain legitimation and be endorsed by the most relevant actors and sources at the international, regional, and national level. The definition was put forward by the One Health High Level Expert Panel (OHHLEP), a group of 26 independent experts on One Health, which was created thanks to the so-called "Quadripartite" (or "Tripartite Plus"), the partnership on One Health involving FAO, WHO, OIE, UNEP. The "Quadripartite", and its previous format the "Tripartite" (FAO, WHO, OIE), has given a fundamental boost to the development of the approach since the early 2000s, achieving several important results,[16] of which the creation of the OHHLEP is certainly one of the most significant. According to the definition:

> "One Health is an integrated, unifying approach that aims to sustainably balance and optimize the health of people, animals and ecosystems. It recognizes that the health of humans, domestic and wild animals, plants, and the wider environment (including ecosystems) are closely linked and inter-dependent. The approach mobilizes multiple sectors, disciplines and communities at varying levels of society to work together to foster well-being and tackle threats to health and ecosystems, while addressing the collective need for clean water, energy and air, safe and nutritious food, taking action on climate change, and contributing to sustainable development".[17]

It thus expresses the intention to make One Health a methodology potentially applicable to some of the key challenges facing humanity in this century (e.g., food and nutrition security and sustainable development), paving the way – at least in theory – for a new phase in the use of the term. This new phase requires One Health to become operational and to come closer to national and regional constituencies, including by finding its own place in the European legal system.

[14] The text of the "Manhattan Principles" is available at www.oneworldonehealth.wcs.org.

[15] The text of the "Berlin Principles" is available at www.oneworldonehealth.wcs.org.

[16] For instance, the *Tripartite Guide to addressing Zoonotic Diseases in Countries* (FAO, OIE, WHO, 2019), which sets forth best practices for countries to implement the One Health approach.

[17] One Health High-Level Expert Panel (OHHLEP), WB Adisasmito and others, 'One Health: A new definition for a sustainable and healthy future' cit.

III. The One Health approach in EU policy and legislation

Given the conceptual developments over time, we examine how the One Health concept is used in the European Union. In this section, we survey the One Health approach in EU policy and legislation by means of a systematic document analysis through EUR-Lex (the EU's official database for searching EU legal acts). From a purely quantitative point of view, the EUR-Lex query shows that the term 'One Health' was referred to a total of almost 450 times in EU documents.[18] It also shows that it has been used increasingly over the years: there is a stark increase from 2018 onwards (41 times in 2018 compared to 11 in 2017), with a peak in 2021 (where 116 citations were counted).[19] As far as the legal acts are concerned, the One Health approach is mentioned[20] in 8 Regulations,[21] 1 Directive (no longer in force)[22], 7 Decisions,[23]

[18] According to EUR-Lex, the word "documents" should include legal acts, legislative acts, case-law, international agreements, preparatory documents, reports, and any type of document deriving from EU institutions, DGs and committees.

[19] As to the authority involved, the institution that has referred to the One Health approach more often is the European Commission (183 times), followed by the Council of the European Union (172 times), the European Parliament (91 times), the Directorate-General for Health and Food Safety (59 times) and the Committee on the Environment, Public Health and Food Safety (36 times). These results are updated to May 2023.

[20] These results are updated to November 2022.

[21] Regulation (EU) 2021/522, cit.; Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC; Regulation (EU) 2022/123 of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices; Regulation (EU) 2019/4 of the European Parliament and of the Council of 11 December 2018 on the manufacture, placing on the market and use of medicated feed; Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013; Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health ('Animal Health Law'); Regulation (EU) of the European Parliament and of the Council of 6 October 2021 amending Regulation (EU) 2017/625 as regards official controls on animals and products of animal origin exported from third countries to the Union in order to ensure compliance with the prohibition of certain uses of antimicrobials and Regulation (EC) No 853/2004 as regards the direct supply of meat from poultry and lagomorphs; Council Regulation (EU) 2021/2085 of 19 November 2021 establishing the Joint Undertakings under Horizon Europe and repealing Regulations (EC) No 219/2007, (EU) No 557/2014, (EU) No 558/2014, (EU) No 559/2014, (EU) No 560/2014, (EU) No 561/2014 and (EU) No 642/2014.

[22] Council Directive 95/68/EC of 22 December 1995 amending Directive 77/99/EEC on health problems affecting the production and marketing of meat products and certain other products of animal origin.

[23] Commission Decision of 24 February 2022 declaring a concentration to be compatible with the common market; Decision (UE) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030; Council Decision (EU) 2021/764 of 10 May 2021 establishing the Specific Programme implementing Horizon Europe – the Framework Programme for Research and Innovation, and repealing Decision 2013/743/EU; Commission Decision of 22 February 2011 concerning the adoption of a financing decision for 2011 in the framework of the second programme of

and as many as 22 Communications.[24] We analyse these in greater depth below.

III.1. The One Health approach in EU policies

We analysed the European Commission communications to understand how EU policies have addressed the One Health approach over the years. Communications represent the vision of the EU executive body, and as such they are useful administrative soft law measures, communication devices and interpretative tools about where the EU intends to go and by what means.

Community action in the field of health (2008-2013); Commission Implementing Decision of 1 July 2011 concerning the financing for the year 2011 of activities in the veterinary field related to the European Union's information policy, support of international organisations, disease notification and computerisation of veterinary procedures; 2009/158/EC: Commission Decision of 23 February 2009 on the adoption of the Work Plan for 2009 for the implementation of the second programme of Community action in the field of health (2008 to 2013), and on the selection, award and other criteria for financial contributions to the actions of this programme; 2006/89/EC: Commission Decision of 10 February 2006 adopting the work plan for 2006 for the implementation of the programme of Community action in the field of public health (2003-2008), including the annual work programme for grants.

[24] Communication COM (2022) 581 final from the Commission of 9 November 2022 on Revision of the EU action plan against wildlife trafficking; Communication COM (2022) 452 final from the Commission of 2 September 2022 on the EU response to COVID-19: preparing for autumn and winter 2023; Communication COM (2022) 404 final from the Commission of 16 June 2022 on the Conference on the Future of Europe; Communication COM (2022) 190 final from the Commission of 27 April 2022 on Covid-19 – Sustaining EU Preparedness and Response: Looking ahead; Communication COM (2021) 764 final from the Commission of 1 December 2021 on Addressing together current and new COVID-19 challenges; Communication COM (2021) 699 final from the Commission of 17 November 2021 on EU Soil Strategy for 2030; Communication COM (2021) 644 final from the Commission of 19 October 2021 on the 2021 Communication on EU Enlargement Policy; Communication COM (2021) 252 final/2 from the Commission of 18 May 2021 on the Global Approach to Research and Innovation; Communication COM (2021) 252 final from the Commission of 18 May 2021 on the Global Approach to Research and Innovation; Communication COM (2021) 400 final from the Commission of; Communication COM (2021) 82 final from the Commission of 24 February 2021 on Forging a climate-resilient Europe - the new EU Strategy on Adaptation to Climate Change; Communication COM (2020) 761 final from the Commission of 25 November 2020 on Pharmaceutical Strategy for Europe; Communication COM (2020) 724 final from the Commission of 11 November 2020 on Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats; Communication COM (2020) 442 final from the Commission of 27 May 2020 on the EU budget powering the recovery plan for Europe; Communication COM (2020) 381 final from the Commission of 20 May 2020 on a Farm to Fork Strategy; Communication COM (2020) 380 cit.; Communication COM (2019) 128 final from the Commission of 11 March 2019 on the European Union Strategic Approach to Pharmaceuticals in the Environment; Communication COM (2017) 0713 final from the Commission of 29 November 2017 on the Future of Food and Farming; Communication COM (2017) 339 final from the Commission of 26 June 2017 on A European One Health Action Plan against Antimicrobial Resistance (AMR); Communication COM (2017) 012 final from the Commission of 10 January 2017 on Safer and Healthier Work for All - Modernisation of the EU Occupational Safety and Health Legislation and Policy; Communication COM (2011) 0748 final from the Commission of 15 November 2011 on the Action plan against the rising threats from Antimicrobial Resistance; Communication COM (2010) 0128 final from the Commission of 31 March 2010 on the EU Role in Global Health.

Our analysis shows a clear and progressive change in the use of the term "One Health" by the European Commission over the period from 2010 to 2022.[25] To illustrate this path, we divided the reference period into three groups: 1) pre-Green Deal period, from 2010 to 2019; 2) transition period, from January 2019 to November 2019; 3) post-Green Deal period, from December 2019 to November 2022. This time partition is useful to assess whether the publication of the Green Deal coincided with a different conceptualization of One Health by the European Commission. Communications related to the Green Deal are not included here, as they are analysed in more detail in the next section.

1) In the pre-Green Deal period, we first encounter the term "One Health" in 2010[26], where reference is made to "the concept of 'one world, one health'". Indeed, at that time, One Health was not perceived as an autonomous concept untethered from the Manhattan Principles (see Sec. II); instead, it appeared at best as an "initiative"[27] of the international arena. Moreover, the European Commission recognized One Health as expressing the unique link between human and animal health, not considering environmental health.[28]

Years later, the 2017 EU One Health Action Plan Against AMR was launched as a cornerstone of the One Health policy framework at the European level.[29] It represented a turning point for at least four reasons:

a) it includes the first ever definition of One Health provided by the EU.[30] The definition is noteworthy because it states that "the One Health approach *also* encompasses the environment" (italics added), which is only acknowledged as a link between humans and animals and as a source of new resistant microorganisms. Thus, the European Commission did not consider the three dimensions of One Health on the same level, instead adopting a rather intensely anthropocentric perspective that does not take into account the environment;

b) despite the narrow and likely inadequate formulation of the One Health definition, the Action Plan contains some remarks worth mentioning since they express the need to

[25] The analysis was conducted by searching the keyword "One Health" with the filter "Communication" on the official EU website "EUR-lex, Access to European Union law". The search returned 22 results from 2010 to 2022. Of these 22 communications, those related to the Green Deal will not be considered in this section, as they will be analysed in more detail in the next section.

[26] Communication COM (2010) 0128 final, cit. 8.

[27] Communication COM (2011) 0748 final, cit. 4 and 14.

[28] Communication COM (2011) 0748 final, cit. 4: "Food and direct contact with animals may serve as a vehicle for the transmission of AMR from animals to humans emphasizing the link between human and veterinary medicine in line with the "One Health" initiative"; Communication COM/2017/0713 final, cit. 24: "In line with an ambitious and encompassing approach with regard to human and animal health - as embodied by the "One Health" concept – it should also promote the use of new technologies, research and innovation to reduce risks to public health".

[29] Communication COM (2017) 339 final, cit.

[30] *Ibid.* 3: "One Health: is a term used to describe a principle which recognizes that human and animal health are interconnected, that diseases are transmitted from humans to animals and vice versa and must therefore be tackled in both. The One Health approach also encompasses the environment, another link between humans and animals and likewise a potential source of new resistant microorganisms".

broaden One Health's scope. The document states, surprisingly, that "initiatives need to be broadened, for example by extending the One Health approach to include the environment"[31] and considers AMR as a "good example of a One Health matter"[32]. Thus, AMR is considered only as one of several issues where the approach is worth applying, paving the way to a wider understanding of One Health;

c) it correlates One Health with policy coherence, introducing the term in the context of policy-making;

d) it refers to One Health both as a "principle" and an "approach", giving it greater legitimacy than in the past, where it was acknowledged as an "initiative" or "concept"[33].

2) In transition period, we only included one communication from March 2019, which was drafted a few months before the election of European Commission President Von der Leyen in July 2019, and thus before the publication of the Green Deal in December of the same year.[34] The communication refers to One Health as an "approach".[35]

3) In the post-Green Deal period, there are two communications that are worth noting. The first one, while returning to the use of the word "principle", puts the health of the planet at the centre, achieving a harmonious dynamic among the three dimensions of One Health: "the 'One Health' principle clearly recognizes that the health of the planet is closely linked with human and animal health. If one group is affected, this influences the health of the rest...".[36] The difference with the definition of the 2017 EU One Health Action Plan Against AMR is clear, in that "environment" is treated as an equal and not accessory dimension. The second communication of 2022, which takes a significant step forward, states that One Health should be emphasized as a "horizontal and fundamental principle encompassing all EU policies".[37]

The use of terms such as "approach" or "principle", rather than "initiative" or "concept", has the direct effect of rooting One Health within the European system. The term "approach" invokes a methodology, a way of doing something, a modus operandi that should be applied by institutions in their procedures. The term "principle" paves the way to a new configuration of One Health as means that should be taken into account by policy-makers in the policy-cycle process, or also by the judicial bodies in their legal interpretation.

III.2. The One Health approach in EU legislation

In our research examining how One Health was incorporated in EU legislation, we identified 8 pieces of EU legislation that refer to it, largely in the recitals.

[31] Communication COM (2017) 339 final cit. 4.
[32] *Ibid.* 16.
[33] For example, Communication COM (2017) 713 final cit. 24 refers to it as a "concept".
[34] Communication COM (2019) 128 final cit.
[35] *Ibid.* 4.
[36] Communication COM (2021) 699 final cit. 12.
[37] Communication COM(2022) 404 final, document 2 cit. 8.

The earliest reference is in the Animal Health Law Amendment[38] (2016, recitals), which, however, simply refers to One Health, although its mention as a "principle" recognises – as said – its wider significance in law making and as a vision.

A number of legal instruments, such as the Mediated Feed Amendment[39] and the Veterinary Medicinal Products[40] regulations (both from 2019) in their recitals refer to the traditional understanding of One Health, i.e. narrowly denoting the intersection of animal and human health in the context of AMR. Other legal instruments through their recitals make an explicit link to the 2017 EU One Health Action Plan Against AMR – this is the case for the Official Controls from Third Countries[41] and the Horizon Europe Regulation.[42] The One Health Action Plan has also influenced the content of legislation. For instance, art. 118 of Veterinary medicinal products[43] 'builds on' the 2017 Communication.[44] Interestingly, the CAP Strategic Plan Regulation[45] enshrines a legal obligation to respect the 2017 EU One Health Action Plan Against AMR in art. 15(4)(c) on Farm Advisory Services, which stipulates that farm advisory services must cover "farm practices preventing the development of antimicrobial resistance as set out in the Commission communication". Based on the overview of legal instruments that do mention the One Health approach to this date, we found that a majority deploys the One Health approach in its *AMR-specific* understanding.

However, even in its narrow iteration (which again, only recognises the interface between animal and human health in the context of AMR), the use of One Health is used to point to the need of engaging novel techniques, for "urgent and coordinated intersectoral action" (the Veterinary Medicinal Products Regulation[46]). The use of One Health in these legal instruments increasingly recognises the wider One Health concept as endorsed by the WHO and the World Organization for Animal Health, based on the understanding that human "health, animal health and ecosystems are interconnected".

By far the most interesting legal development in legally binding instruments is put forward in the EU4Health Regulation, Regulation (EU) 2021/522.[47] It is synchronically adopted post-Green Deal, but ideologically it is not a result of the latter. The recitals refer to the 2017 EU One Health Action Plan Against AMR, but importantly, the document provides the first legal definition of the "One Health Approach" in its art. 2(5):

[38] Recital (9) Regulation (EU) 2016/429 cit.
[39] Recital (30) Regulation (EU) 2019/4 cit.
[40] Recital (41) Regulation (EU) 2019/6 cit.
[41] Recital (4) Regulation (EU) 2021/1756 cit.
[42] Recital (73) Council Regulation (EU) 2021/2085 cit.
[43] Art. 118 Regulation (EU) 2019/6 cit.: "Animals or products of animal origin imported into the Union".
[44] As explicated in Recital (4) of the Official Controls from Third Countries, Regulation (EU) 2021/1756 cit.
[45] Regulation (EU) 2021/2115 cit.
[46] Recital (41) Regulation (EU) 2019/6 cit.
[47] Regulation (EU) 2021/522, cit.

> "One Health approach' means a multisectoral approach which recognises that human health is connected to animal health and to the environment, and that actions to tackle threats to health must take into account those three dimensions".

Furthermore, the One Health approach acts as a binding (!) legal guiding principle in the pursuit of general objectives and specific objectives, that must be "pursue[d] (…) in keeping with the One Health approach" (arts 3 and 4). Within the Programme for the Union's action in the field of health, One Health has therefore been elevated to an organisational principle.

With reference to the core conditions of One Health as applied in the EU4Health Regulation, some considerations can be made. The definition comprises a number of elements: *i*) multisectorial *ii*) human health-centered *iii*) need to recognise three dimensions (human health connected to animal and environment) and *iv*) an imperative for action to consider the three dimensions when taking action on health. The definition leaves a narrow focus of One Health to the context of AMR behind and broadens the scope of application of the One Health concept to all health actions. Added to this, One Health is implied to perform an integrative function across sectors – this notion of "multisectorial" is novel in the EU context, but may be regarded to flow from international policy documents.[48] Human, animal and environmental health are not obviously ranked, although the formulation of the definition presupposes human health as a *primus inter pares* and can therefore be regarded as anthropocentric. To compare, the official definition of OHHELP (or other international definitions) is that One Health recognizes that human health, animal health and environmental health are connected.

Interestingly, the novel wider definition of One Health has already been amplified by references to it in other legislation, namely the Reinforced EMA Regulation[49] (2022), which according to the recitals "reinforces" the EU4Health Regulation.

This view on EU legislation confirms the idea that One Health is an emergent underpinning approach or a principle. It shows an evolution from a narrow topical focus on AMR, and a specific policy (as enshrined in the 2017 Communication) towards a wider approach of integrative force. The definition of One Health in the EU4Health Regulation is specifically noteworthy, as it provides a legally anchored definition of One Health in the broad sense. This foreshadows that One Health can become a veritable approach or principle capable of fulfilling an integrative role in EU law and policy making to tackle health broadly, instead of AMR specifically.

[48] See *Tripartite Guide to addressing Zoonotic Diseases in Countries* cit., where there is the definition of "multisectoral" provided by the Tripartite.

[49] Regulation (EU) 2022/123 cit.

IV. The One Health approach in the European Green Deal

The European Green Deal[50] aims to change European society toward global well-being for present and future generations, with the ultimate goal of achieving climate neutrality by 2050. The communication consists of several instruments (e.g., legislative proposals, action plans, strategies) referring to different sectors, including climate, environment, energy, agriculture, transport, and industry, which are supporting the green transition.

We adopted a qualitative methodology to analyse whether and how the European Green Deal addresses One Health, following defined steps. We based our research on the Annex of the Communication on the European Green Deal, which provides the roadmap and key actions (strategies, action plans, proposed regulations, etc.). We analysed all actions in the Annex available as of July 2022, searching for the keyword 'One Health' within each of them. Out of more than fifty documents stemming from the Annex, just five of them refer to the One Health Approach: the Biodiversity Strategy[51]; the Farm to Fork Strategy[52]; the EU Strategy on Adaptation to climate change[53]; the Zero Pollution Action Plan for Water, Air and Soil[54]; and the Decision on a General Union Environment Action Programme to 2030.[55]

The Biodiversity Strategy, para. 4.2.3, states that the "EU will enhance its support to global efforts to apply the One Health approach, which recognizes the intrinsic connection between human health, animal health and healthy resilient nature". Quite innovatively, "resilient nature" is mentioned, introducing a new nuance to the concept. However, One Health is not presented as a guiding principle embedded in the EU system, but as an approach belonging to the international arena, which the EU can at best support ("support the global context").

The Farm to Fork Strategy, para. 2.1, only mentions One Health in relation to the Regulation on veterinary and medicinal products, which should "promote" it. This illustrates the Farm to Fork Strategy's dedication to a "narrow" or traditional conception of One Health, considering that the reference is made in the context of the fight against AMR.

The EU Strategy on Adaptation to climate change contains, in para. 2.1.3, an interesting reference to the term: "The Commission will pool and connect data, tools and expertise to communicate, monitor, analyse and prevent the effects of climate change on human health, based on a 'One Health' approach". One Health is, thus, considered as an approach (i.e., a tool; a methodology to adopt; a procedure to follow) to communicate, monitor, analyse, prevent and monitor the effects of climate change on human health.

[50] Communication COM (2019) 640 final cit.
[51] Communication COM (2020) 380 final cit.
[52] Communication COM (2020) 381 final cit.
[53] Communication COM (2021) 82 final cit.
[54] Communication COM (2021) 400 final cit.
[55] Decision (EU) 2022/591 cit.

This leads to two considerations. First, applying this step would involve an internal operationalization of One Health within the mechanism of the management of climate change's effects: this would be an intriguing European-level test case on how to use and institutionalize One Health. Second, the view emerging from the Communication reflects an anthropocentric perspective on the role of One Health, considering that not only humans are affected by climate change, but also animals and nature. Indeed, scholars noted that One Health could be pivotal in simultaneously protecting humans, animals and the environment from the impacts of climate change.[56]

The Zero Pollution Action Plan, in contrast, takes up the narrative of the "international arena" supported by the Biodiversity Strategy, establishing, in para. 3.3, that: "the Commission will work with the Tripartite Plus organisations (WHO, FAO, OIE, UNEP) to reach a renewed global and effective One Health consensus on environmental pollution". However, it refers to "environmental pollution", an issue that is not generally associated with One Health: this, on the one hand, confirms the tendency to try to broaden the scope of One Health; on the other, it risks remaining an empty statement, in the absence of any attempt at implementation.

Finally, Decision 2022/591 is noteworthy in that it emphasises, in Recital (27), the "Importance of applying the multi-sectoral One Health approach in policy-making". This is significant, since it expresses the concrete needs to incorporate One Health in the policy-cycle procedure.

Overall, the use of the One Health concept in the Green Deal is highly erratic.

V. Concluding discussion

In our research, we have analysed One Health and its evolution over time by surveying policy documents and legislation. We show that next to the traditional AMR focused definition of One Health, a wider notion that recognizes the interconnection between human health, the environment and animal health is emergent, although very erratically so. The main findings of the research are the following:

a) The Green Deal does not give a specific role to One Health: the various policy initiatives do not systematically consider One Health or give it a defined purpose to enable its operation. As mentioned in the introduction, the link between public health and green and sustainable transition in Europe has never been as close as it is in recent years given the implementation of the Green Deal and its strategies. In this context, an operationalization of One Health as a means to achieve set goals could have been a choice of European

[56] J Zinsstag and others, 'Climate Change and One Health' (2018) FEMS Microbiology Letters 1: "The journal The Lancet recently published a countdown on health and climate change. Attention was focused solely on humans. However, animals, including wildlife, livestock and pets, may also be impacted by climate change. Complementary to the high relevance of awareness rising for protecting humans against climate change, here we present a One Health approach, which aims at the simultaneous protection of humans, animals and the environment from climate change impacts (climate change adaptation)".

policymakers. Instead, what emerged from the research is that the EU Commission certainly referred to One Health in a few strategies, but assigned it different meanings, scopes and functions. In fact, it has been mentioned in relation to climate change, resilient nature, AMR, environmental pollution, and policymaking. Although these references have the undoubted value of linking the term to different issues other than AMR alone, they lack the leverage needed to go further and provide some inputs for its implementation or operationalization. Furthermore, the publication of the Green Deal does not appear to coincide with a different conceptualisation of One Health by the European Commission. Rather, the evolution of how the EU refers to the term seems to be the result of the different trends and pushes described in the introduction;

b) One Health – AMR nexus is still dominating: at the EU level, One Health is still mainly applied in the fight against AMR (and similar issues), despite the new all-encompassing definition of Regulation 2021/522 (as well as that of the OHHELP) and the isolated attempt of some Green Deal strategies to broaden its scope as identified above. Thus, the 2017 EU One Health Action Plan Against AMR is still considered the most relevant document embedding One Health at the EU level. In this context, the role of sustainability should be enhanced. Indeed, it could play a crucial role in overcoming the current limitations of the narrow One Health understanding in the context of the AMR nexus, emphasising the ecological dimension of health, rather than the medical or epidemiological one. Therefore, the new and wider One Health definition provided by the OHHELP, which opens a conceptual bridge between the human-animal-health interface and sustainability discourses, should be leveraged to lay the foundations for a solid, broader and more integrated conceptualisation of One Health;

c) The inception of a future One Health approach or principle: One Health is still mainly a "policy tool", but it is creeping more and more into the legally binding texts. Regulation 2021/522 has the great merit to use, for the first time, One Health as a binding legal guiding principle in the pursuit of said objectives. This paves the way to a new phase in which One Health could be conceived as a tool to foster a paradigm shift not only in the health sector (*stricto sensu*), but also in the food, pharmaceuticals, chemicals, environmental and social ones. So far, the One Health principle is not read in relation to art. 168(1) TFEU that a high level of human health shall be ensured in all Union policies and activities, or in relation to the overarching mandate that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities of art. 11 TFEU and animal welfare of art. 13 TFEU. Although capable of providing constitutional legitimacy for a One Health approach, a One Health principle goes further in that it addresses the interrelationship between these areas. In this regard, it should be emphasised that the Communication on the Conference on the Future of Europe[57] recommends that the term

[57] Communication COM (2022) 404 final, cit.

be conceptualized as a "horizontal and fundamental principle encompassing all EU policies"[58]. This not only implies the definitive adoption of the wide definition of One Health, but also its operationalization, and institutionalization. On this last point, is worth noticing that last October 2022 a new One Health Unit has been created within the DG SANTE (Directorate-General on Health and Food Safety) of the European Commission: the One Health role in the next future will depend also on its mandate and mission. Furthermore, the EU agencies have recognized the value of One Health in enabling transdisciplinary cooperation "with and among" EU agencies and are actively shaping this idea.[59]

The current political cycle represents a "green" and more widely "sustainable" re-orientation of all EU policy areas. However, this process, which formally started with the publication of the Green Deal and is still ongoing, has so far not led to a satisfactory integration of different policy-making arenas. Different sectors continue to develop in idiosyncrasy, and the integration or alignment of veterinary medicine, pharmaceuticals, food, chemical regulation, nature conservation, biodiversity, and other areas still seems to be a legal terrain to be explored. One Health can play an important role in systemic coherency, and it could represent the next generation, post-Green Deal, of political and legal principles, capable of permeating future EU actions, based on a new integrative and sustainable policy on the human-animal-environment health nexus.

[58] *Ibid.* document 2, p. 8.

[59] S Bronzwaer and others, 'One health collaboration with and among EU Agencies–Bridging research and policy' (2022) One Health, 100464.

ARTICLES

THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU: NORMATIVE IMPLICATIONS, IMPLEMENTATION AND POTENTIAL FOR MAINSTREAMING

Edited by Evangelia Psychogiopoulou

THE ENVIRONMENTAL INTEGRATION PRINCIPLE IN EU LAW: NORMATIVE CONTENT AND FUNCTIONS ALSO IN LIGHT OF NEW DEVELOPMENTS, SUCH AS THE EUROPEAN GREEN DEAL

VASILIKI (VICKY) KARAGEORGOU*

ABSTRACT: The environmental integration principle, which aims to incorporate environmental considerations into the regulatory instruments in the fields outside Environmental Law, initially emerged and evolved in International and subsequently in EU Law. Since its emergence, the environmental integration principle has been closely linked to the concept of sustainable development, given that the principle is perceived as a key instrument for its realisation. The main aim of this *Article* is to an-

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This *Article* is dedicated to my beloved father, a practicing lawyer of 47 years who left this world peacefully this November.

www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/645

swer the question of whether the environmental integration principle has not only a procedural, but also a substantive meaning in EU Law and, if this question is answered in the affirmative, the question of how the substantial component of the principle can be determined. Answering this question presupposes not only analysing the legal status, the addressees and the regulative context of the respective provision, but also certain recent critical developments that have taken place since the adoption of the EU Green Deal. The main message underpinning this *Article* is that the principle also has a substantive meaning that has been reinforced since the adoption of the EU Green Deal, but often it cannot be clearly delineated. The implementation of its substantive component through the respective legal instruments can also result in conflicts with the provisions of the EU Economic Constitution.

KEYWORDS: environmental integration principle – sustainable development – EU Green Deal – "do no significant harm" principle – integration clauses – environmental principles.

I. INTRODUCTION

The environmental integration principle has gained significant recognition in International and EU Law. Both at the international and the EU level, the principle, which aims to incorporate environmental considerations in the regulatory instruments and other policy instruments in fields outside Environmental Law, is closely linked to the concept of "sustainable development", the latter considered a key instrument for its realisation. The main aim of this *Article* is to answer the question of whether the environmental integration principle has not only a procedural, but also a substantive meaning and if this question is answered in the affirmative, of how the substantial component of the principle is determined, also in conjunction with the concept of "sustainable development". Answering these questions presupposes the analysis of the recent developments following the adoption of the European Green Deal (EGD) which constitutes a "paradigm shift" with regard to the EU policies aiming to promote sustainability.[1]

To this end, the evolution of the environmental integration principle in International Law will be briefly analysed, as both the principle and the "concept" of "sustainable development"[2] have their origins in International Law and the EU bears the obligation to respect International Law (arts 3(5) and 21 TEU) (Section II). Section III analyses the legal status of the environmental integration clause in EU Primary Law and the reasons for its classification as a legal principle, the addressees and the functions of the principle. The analysis also focuses on its regulatory context, including its relationship with the objec-

[1] Communication COM(2019) 640 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 11 December 2019, 'The European Green Deal'. See also S Schunz, 'The "European Green Deal" – a Paradigm Shift? Transformations in the European Union's Sustainability Meta-Discourse' (2022) Political Research Exchange 19.

[2] The term "concept" is not used at this point in its strict legal meaning, but in a broad sense. This clarification seems necessary, as there is an intense scholarly discussion concerning the legal categorization of "sustainable development", as will be analysed in the next sections.

tive of sustainable development in search of its substantive content. In Section IV, an analysis of how the substantive component of the environmental integration principle has gained new strength in light of the EGD and its accompanying Initiatives will be presented, as without it the green transition cannot be achieved. Finally, specific conclusions are drawn on the new role of the principle and its capacity to promote sustainable development.

II. The origins and the evolution of the environmental integration principle in International Law

At the international level, the principle first emerged in art. 13 of the Stockholm Declaration and was closely linked to the idea of planning.[3] The principle re-appeared in the Brundtland Report and was linked for the first time to the implementation of the concept of sustainable development.[4]

The strong link between the integration principle and sustainable development in the sense that the former constitutes a key instrument for the realisation of the latter was re-affirmed in art. 4 of the Rio Declaration. The key role of the integration principle in achieving sustainable development was reaffirmed in the Johannesburg Plan of Implementation adopted by the 2002 Johannesburg Summit on Sustainable Development and in the Document adopted by the Rio +20 Conference.[5] The integration principle also underpins the UN 2030 Agenda for Sustainable Development, which contains 17 sustainable development goals (SDGs) and 169 targets. The Agenda states that the goals and targets are universal and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental dimension (Declaration, Preamble, para. 5). Moreover, it requires that SDGs are implemented in an integrated manner (art. 13 of the 2030 Agenda).[6]

[3] United Nations, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, UN Doc.A/CONF 48/14/REV.1. See V Barral and P-M Dupuy, 'Principle 4: Sustainable Development through Integration' in JE Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015) 157-158.

[4] World Commission on Environment and Development, Report of the World Commission on Environment and Development: Our Common Future, transmitted to the UN General Assembly as an Annex to document A/47/42, 4 August 1987. See also M Montini, 'The principle of Integration' in L Krämer and E Orlando (eds), *Principles of Environmental Law* (Edward Elgar 2018) 139-140.

[5] United Nations, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002, A/CONF.199/20, New York 2002, p. 8, para. 2; United Nations, "The future we want', Outcome Document of the United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil, 20-22 June 2022, 2012, para. 10, available at: sustainabledevelopment.un.org.

[6] General Assembly, UN Resolution 'Transforming our World: The 2030 Agenda for Sustainable Development' of 21 October 2015, UN Doc A/RES/70/1. See K Bosselmann, 'Sustainable Development Law' in E Techera and others (eds), *Routledge Handbook of International Environmental Law* (Routledge 2020, 2nd edition) 37.

Furthermore, the integration principle has influenced the content of certain Multilateral Environmental Agreements (MEAs) by facilitating an integrated approach to their respective field of regulation and the content of the Trade Agreements that include an environmental or a sustainable development chapter.[7]

The principle of integration has also found its way into the jurisprudence of International Tribunals, as it plays a role in the application and interpretation of the respective legal rules, also by facilitating a balancing exercise between economic and environmental considerations. More specifically, it has been implicitly recognized by the ICJ in the *Gabčikovo Nagymaros* case and in the *Pulp Mill* case.[8] The most explicit application of the principle can be found in the *Iron Rhine* case that was decided by the Permanent Court of Arbitration (PCA), in which the Tribunal ruled that International and European Community law require the integration of appropriate environmental measures in the design and implementation of economic development policies and that the Principle 4 of the Rio Declaration reflected this trend.[9]

In this context, there are two issues that need further attention. The first one concerns the qualification of the integration duty in International Environmental Law as an objective, rule or principle.[10] Although the inclusion of the integration duty in the Rio Declaration is not enough to elevate its status to a legal principle, it is persuasively argued that "it has a relatively high degree of generality and abstraction which indeed suits to the category of the principles" and that "it is however more than a goal or a concept with no legal grounding".[11] Supportive to this approach is that the PCA in the Iron Rhine Case referred to Principle 4 of the Rio Declaration as a principle, although it

[7] The following MEAs include, among others, provisions that reflect the content of the integration principle: *i)* the UN Framework Convention on Climate Change (art. 3(4)); *ii)* the Convention on Biological Diversity (CBD) [1992] (art. 6 (b) and art. 10 (a)); *iii)* the UN Convention to Combat Desertification (UNCCD) [1994] (art. 4 (2)) and *iv)* the Paris Agreement [2015] (Preamble, art.2 and art. 4). The Trade Agreements, which contain an environmental or a sustainable development chapter, are, among others, the United States-Mexico-Canada Agreement (UMSCA) [art. 24] and the EU-Canada Comprehensive Economic and Trade Agreement (CETA) [Chapter 22-Trade and Sustainable Development and Chapter 24-Trade and Environment]. See V Barral and P-M Dupuy, 'Principle 4' cit.169-172.

[8] ICJ *Gabčikovo–Nagymaros Project (Hungary v Slovakia)* (Merits) [25 September 1997] paras 140-141; ICJ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [20 April 2010] paras 76-77.

[9] Permanent Court of Arbitration, Award of 24 May 2005, *Iron Rhine Railway* Case between the Kingdom of Belgium and the Kingdom of Netherlands, para. 59.

[10] According to Dworkin, rules set certain conditions upon the fulfillment of which a legal consequence comes and are thus applied in an "all or nothing fashion". By contrast, principles provide a general direction with regard to justice, fairness and other moral rules to which positive law must comply. See R Dworkin, *Taking Rights Seriously* (Harvard 1977) 22 ff. For the distinction between rules and principles in International Environmental Law, according to the degree of generality see P-M Dupuy and J Viñuales, *International Environmental Law* (2nd edition, Cambridge University Press 2018) 58-59.

[11] V Barral and P-M Dupuy, 'Principle 4' cit. 164.

accepted the distinction between principles and rules in International Law.[12] The second issue concerns whether the integration principle has a mere procedural meaning in the sense of establishing an obligation to take into account the environmental impact of the designed policies, plans or projects, irrespective of the substantive outcome or whether it also has a substantive meaning in the sense that the integrative approach should exert influence on the content of the decisions taken. The decisive factor that has to be considered is that the integration of environmental concerns in the development process is a prerequisite for achieving sustainable development, which cannot be achieved, if the decisions taken fail to achieve an adequate level of environmental protection. Such an approach speaks for the recognition of a substantive element of the integration principle. This namely requires that the decisions taken through a process of integrating economic, environmental and social concerns should mitigate, at least, to some extent, the anticipated environmental damage.[13]

In conclusion, the principle does not have a solid legal foundation and a well-defined legal content,[14] so that it can be a rather vague point of reference for the determination of its regulative contours in EU Law.

III. The evolution, legal status, normative content and functions of the environmental integration provision in EU Law

III.1. The evolution of the environmental integration principle and its legal status in EU Law: towards a legal principle of environmental integration

The environmental integration clause was first introduced in EU Primary Law with the Single European Act (art. 130(r)(2) of the Treaty establishing the European Economic Community (hereafter EEC Treaty), as amended by the Single European Act). The content of the clause was modified in the subsequent Treaty amendments and since the Amsterdam Treaty it has been closely linked with sustainable development.[15]

The most recent changes to the content of the clause were brought by the 2007 Treaty of Lisbon, which re-organized the structure of the Treaties. The clause in its current version is enshrined in art. 11 TFEU and its content remained, to a large extent, unchanged. The current version reads as follows: "Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development".

[12] *Iron Rhine Railway* Case between the Kingdom of Belgium and the Kingdom of Netherlands, cit., para. 58.

[13] V Barral and P-M Dupuy, 'Principle 4' cit. 164.

[14] E Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing 2017) 87.

[15] J Jans, 'Stop the Integration Principle?' (2011) Fordham International Law Journal 1533, 1536-1538; M Montini, 'The Principle of Integration' cit. 143-144.

The environmental integration duty also in connection with the principle of sustainable development is enshrined in art. 37 of the Charter of Fundamental Rights of the EU (EUCFR).[16] Contrary to the integration clause enshrined in art. 11 TFEU, art. 37 EUCFR makes reference to the policy objective of a "high level of environmental protection" and the objective of "the improvement of the quality of the environment". It strengthens, thus, the obligation of EU institutions to pursue these ambitious objectives in the design and implementation of sectoral policies.[17] Art. 194(1) TFEU, which constitutes the legal basis for EU energy policy, also makes reference to the need to protect and preserve the environment within the context of that policy. Furthermore, art. 114(3) TFEU, which is characterised as a "passive integration clause"[18] sets out that EU institutions should pursue a high level of health, safety, environmental and consumer protection when legislation on the internal market is adopted.

In light of the above, the first question that arises concerns the legal status of the environmental integration duty as enshrined in art. 11 TFEU and especially whether it can be classified as a principle or not.[19] A first reason that could speak for its classification as a principle is the "strong" wording of the relevant provision ("must be integrated") also in relation to the other integration clauses. More particularly, the provision sets a clear-cut obligation for the integration of environmental considerations into all EU policies and activities.[20] Supportive to this argument is the fact that the environmental integration clause is the only such clause associated with a fundamental objective (*i.e*. sustainable development), which requires at least equal weight for environmental

[16] E Scotford, 'Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights' in S Bogojević and R Rayfuse (eds), *Environmental Rights in Europe and Beyond: Swedish Studies in European Law* (Hart Publishing 2018) 133 ff.

[17] L Krämer, 'Giving a Voice to the Environment by Challenging the Practice of Integrating Environmental Requirements into other EU Policies' in S Kingston (ed.), *European Perspectives on Environmental Law and Governance* (Taylor and Francis 2013) 88.

[18] B de Witte, 'Conclusions: Integration Clauses: A Comparative Epilogue' in F Ippolito, ME Bartolini and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2019) 181.

[19] For the classification of the environmental integration duty as a legal principle see NML Dhondt, *Integration of Environmental Protection into other EC Policies: Legal Theory and Practice* (Europa Law Publishing 2003) 143; G van Calster and L Reins, *EU Environmental Law* (Edward Elgar 2017) 22; M Montini 'The Principle of Integration' cit. 139 ff.; M Geelhoed, E Morgera and M Ntona, 'European Environmental Law' in E Techera and others (eds), *Routledge Handbook of International Environmental Law* cit. 241; E Scotford, *Environmental Principles and the Evolution of Environmental Law* cit. 87-88; N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (2nd edition, Oxford University Press 2020) 472-483. Other authors take a more cautious approach with regard to its classification as a principle. See J Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2016) 15 ff.; L Krämer, 'Giving a Voice to the Environment by Challenging the Practice of Integrating Environmental Requirements into other EU Policies' cit. 89.

[20] N de Sadeleer, *Environmental Principles* cit. 473. See also case C-379/98 *PreussenElectra* ECLI:EU:C:2000:585, opinion of AG Jacobs, para. 231 with regard to the previous version of the integration clause.

considerations. A second reason is that its content is sufficiently abstract in the sense that it does not provide any direction about the tools and the extent of the "desired" integration. Subsequently, EU organs enjoy a degree of discretion in implementing the enshrined principle and in weighing it against competing principles or interests.[21] This discretion can be, though, limited by the association of the environmental integration clause with the objective of "sustainable development", because legislative instruments or decisions that do not guarantee an adequate level of environmental protection, cannot contribute to the achievement of the afore-mentioned objective. A third reason is that the clause has been used by the EU courts as a standard to review the validity of the EU secondary legislation adopted in a specific sector and its potential impact on the environment, as it will be discussed below in Section III.4.[22] For all the above reasons, the environmental integration duty can be classified as a directing principle of EU Environmental Law[23] that serves several functions also associated with the particularities of EU Environmental Law, as it will be analysed in Section III.4.

III.2. The addressees and scope of the principle

Another preliminary issue that arises concerns the addressees of the duty of environmental integration. In accordance with art. 11 TFEU, this duty is placed mainly on the Commission, the European Parliament and the Council – the three EU institutions, which have the core competences in legislative decision-making procedures and are obliged to integrate environmental concerns when adopting secondary legislation other than environmental policy.[24] Furthermore, the integration duty also applies to cases where the Commission acts as a "Guardian of the Treaties" with respect to the implementation of EU Law both by the other EU institutions, bodies and agencies and by Member States (MS).[25] In addition to this, the EU Courts are bound by the principle when they interpret the respective EU Law provisions.[26]

The material scope of art. 11 TFEU is determined in a broad manner in the sense that the integration duty applies to all policies and activities in the various policy fields outside environmental policy, such as the Common Agricultural Policy, the Fisheries Pol-

[21] N de Sadeleer, *Environmental Principles* cit. 473-474.

[22] *Ibid*. 475; E Scotford, *Environmental Principles and the Evolution of Environmental Law* cit. 144 ff.

[23] N de Sadeleer, *Environmental Principles* cit. 411 ff. and 471 ff.

[24] B Sjåfjell, 'The Environmental Integration Principle: A Necessary Step Towards Policy Coherence for Sustainability' in F Ippolito, M-E Bartolini and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 105, 109.

[25] *Ibid*. 115.

[26] Although art. 11 TFEU does not directly impose obligations on MS, it is persuasively argued that MS have to respect the environmental integration duty, when they implement EU-originated policies and legislation. Such an obligation can be inferred from the duty of loyalty and cooperation enshrined in art. 4(3) TEU. See B Sjåfjell, 'The Environmental Integration Principle' cit. 116 ff.; J Nowag, *Environmental Integration in Competition and Free-Movement Laws* cit. 22 and 24.

icy and the policies associated with the internal market.[27] The wording of the provision and, specifically, the reference to "activities" supports the view that EU institutions are bound by the integration duty not only when they adopt policies or legislation but also when they adopt individual decisions, such as competition and state aid decisions. This thesis is supported by certain judgments of the EU Courts.[28] It is also apparent from the wording of art. 11 TFEU that the incorporation of the environmental requirements must take place in the early planning phase and, specifically, at the definition of the policy objectives and should apply to every stage of the legislative process.[29]

Another central issue concerning the application of the integration principle is the question of "what precisely has to be integrated?" in the policies and legislative measures outside the environmental area, as art. 11 TFEU speaks of "environmental protection requirements", without providing any further specification. It is persuasively argued[30] that the environmental protection requirements, which must be incorporated in the various legislative measures, policies and decisions, include the environmental objectives listed in art. 191(1) TFEU, the environmental principles listed in art. 191(2) TFEU and the environmental policy aspects enshrined in art. 191(3) TFEU. Such a broad interpretation of the "environmental protection requirements" is supported by the holistic character of environmental protection.[31]

Another central question concerns whether the integration duty bears a merely procedural character or also a substantive character. That would be in the sense that it only imposes an obligation on the respective actors to take the environmental considerations into account, yet irrespectively of the substantive content of the final act or decision (weak interpretation), or in the sense that, by contrast, it should exert an influence on the substantive outcome of the final decision and, thus, mainly in the context of a balancing process of the competing interests (stronger interpretation). If the question of the substan-

[27] N de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford University Press 2014) 26; M Geelhoed, E Morgera and M Ntona, 'European Environmental Law' cit. 241-242 who distinguish between external integration which concerns the incorporation of the environmental requirements in EU sectoral policies and internal integration which requires that the environmental legislation itself is interpreted in light of the principles, the objectives and the criteria set in art. 191 TFEU, even when these are not explicitly incorporated in the concrete piece of the legislation at stake. The internal integration is also associated with the adoption of a holistic regulatory approach to environmental law making that relies on various forms of assessment, on permitting instruments which promote the integrated pollution prevention and control and legislative instruments which set the framework for the integrated protection and management of the natural resources and promote the eco-system approach.

[28] J Nowag, *Environmental Integration in Competition and Free-Movement Laws* cit. 24. See case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757 para. 90; case C-594/18 *Austria v Commission* ECLI:EU:C:2020:742 para. 100.

[29] B Sjåfjell, 'The Environmental Integration Principle' cit. 110; M Geelhoed, E Morgera and M Ntona, 'European Environmental Law' cit. 241.

[30] J Jans, 'Stop the Integration Principle?' cit. 1542.

[31] J Nowag, *Environmental Integration in Competition and Free-Movement Laws* cit. 25.

tive character of the environmental integration principle is answered in the affirmative, then the question of the strength of the integration duty arises. This essentially concerns whether it is required that environmental protection is to be given priority over the interests representing the other two pillars of the sustainable development concept (economic and social) in the case of a rather irresolvable conflict (strong interpretation of the environmental integration principle).[32] To answer these interrelated questions and to define the regulative contours of the environmental integration principle, it is necessary to explore its relationship with sustainable development, as the former does not stand alone, but is perceived as a prerequisite for achieving the latter.

III.3. The normative content of the Environmental Integration Principle in EU Law through its association with the "objective" of "sustainable development"

More than any other principle or concept in EU (Environmental) Law, sustainable development is connected to international legal developments, as it was first defined in the 1987 Brundtland Report.[33] There is an intense debate with regard to the legal nature of sustainable development, as a wide array of opinions exists concerning its classification in International Law. These opinions range from its recognition as a principle of Public International Law to an objective, a concept or even a paradigm, with the most common classification being that of a concept or a principle.[34] Furthermore, while it is agreed that sustainable development is structured around the three interrelated and complementary pillars of economic growth, social cohesion and environmental protection, there is a discussion concerning the weight that is given to each of them.[35] Moreover, in the quest to determine the content of sustainable development there have been certain efforts to break the concept (or the multi-faceted principle) into clearly defined princi-

[32] S Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2012) 113 ff.

[33] Report of the World Commission on Environment and Development: Our Common Future (1987), cit., Part I, Chapter II, Point 1.

[34] Ph Sands and J Peel, *Principles of International Environmental Law* (Cambridge University Press 2018, 4th edition) 217 classifying it as a principle; P-M Dupuy and G Viñuales, *International Environmental Law* cit. 91 classifying it as a concept. See also V Barral, 'The Principle of Sustainable Development' in L Krämer and E Orlando (eds), *Principles of Environmental Law* cit. 103 and 106 classifying it as a legal principle in its most abstract formulation.

[35] M-C Cordonier-Segger, 'Sustainable Development in International Law' in H Ch Bugge and Ch Voigt (eds), *Sustainable Development in International and National Law: What did the Brundtland Report do to Legal Thinking and Legal Development, and Where Can we Go From Here?* (Europa Law Publishing 2008) 93, 103 arguing that the three pillars are of equal importance; K Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Routledge 2017, 2nd edition) 104 arguing that the environment is the overriding system which sets the limits for economic and social development.

ples or elements, which include the integration principle, the principle of sustainable use of natural resources and the principle of intergenerational equity.[36]

Although no definition of "sustainable development" is given in EU Primary Law,[37] the term appears in certain provisions. It is first referred to as a principle in recital 9 of the Preamble of TEU. Furthermore, art. 3(3) TEU sets out that "the Union [....] shall work for the sustainable development of Europe" (and that it "shall promote [....] solidarity among the generations"), while art. 3(5) TEU underlines the global role of the EU in promoting sustainable development by stating that "the Union [...] shall contribute to peace, security, the sustainable development of the Earth [...]". Art. 21(2)(d)(f) TEU sets forth the commitment of the EU to promote sustainable development in the context of the EU external relations and the commitment to promote policies aiming at the sustainable use of global natural resources.[38] Moreover, sustainable development is referred to in art. 37 EUCFR as a principle and in art. 11 TFEU without any legal classification.

The systematic and teleological analysis of the afore-mentioned provisions leads to certain conclusions. The first conclusion is that "sustainable development" mainly in the form of a concept that consists of three interrelated and complementary pillars of equal importance is set in rather clear terms in art. 3(3) TEU, while in art. 21(2)(d) TEU it is enshrined as a core component of EU external relations.[39] The second conclusion is that the relevant EU Primary Law provisions do not make any reference to any other procedural or substantive element of this multi-faceted concept, except for the sustainable use of global natural resources (art. 21(2)(f)) and for the intergenerational equity through the reference to the solidarity among generations in art. 3(3) TEU and the association of the enjoyment of the rights enshrined in the EUCFR with responsibilities and duties also with regard to future generations in the Preamble of the Charter. Subsequently, the legal provisions of EU Primary Law, also due to their vague formulation, do not provide significant and clear guidance for determining which economic model or which decisions concerning the authorization of major infrastructure or energy-related projects (*i.e*. decisions for the authorization of hydropower plants or offshore drilling installations) can be classified as compatible with sustainable development.[40] The third conclusion that can be drawn, is that because of the vague wording of the afore-mentioned provisions of EU Primary Law (art. 3(3)

[36] K Bosselmann, 'Sustainable Development Law' cit. 35-37.

[37] A definition of "sustainable development" was included in art. 2 of Regulation (EU) 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries which was repealed by Regulation 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation.

[38] G Bándi, 'Principles of EU Environmental Law Including (the Objective of) Sustainable Development' in M Peeters and M Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar 2020) 38-39.

[39] N de Sadeleer, *EU Environmental Law and the Internal Market* cit. 16 (with regard to art. 3(3) TEU).

[40] *Ibid*. 16.

and (5) TEU, art. 21(2)(d)(f) and art. 37 EUCFR), it can hardly be perceived as a principle or as a legal concept that imposes concrete legally enforceable obligations on EU institutions.[41] It can be regarded merely as a legally binding objective that should guide EU institutions in the internal and external Union action. In addition, EU organs enjoy a rather wide margin of discretion on how to achieve it.[42]

It is also worth noting that the CJEU has not shed sufficient light on the legal nature and the regulative context of the term "sustainable development", which has appeared in certain rulings regarding its enshrinement in the EU Primary and Secondary Legislation. In the few cases in which "sustainable development" played a role in the shaping of legal reasoning, the Court seems to approach the concept in its dominant three pillar version without any further doctrinal elaboration.[43]

The analysis concerning sustainable development as an overarching EU objective that EU institutions should respect and, which even in its weak version, presupposes striking a balance among the three pillars, provides guidance so as to answer the question of whether the environmental integration principle also has a substantive meaning. The linkage of the environmental integration principle with sustainable development gives the former a substantive meaning.[44] The latter is firstly meant in the sense that environmental considerations should be on equal footing with other sectoral policy objectives and be incorporated in the content of the respective legislative instruments or decisions in the various fields of EU policy as a result of a balancing process, in order for the fundamental objective of "sustainable development" to be achieved.[45] Its substantive character also requires that, if various options are possible, the most favourable

[41] J Jans and HB Vedder, *European Environmental Law: After Lisbon* (Europa Law Publishing 2012, 4th edition) 8; J Verschuuren, 'The Growing Significance of the Principle of Sustainable Development as a Legal Norm' in D Fisher (ed.), *Research Handbook on Fundamental Concepts of EU Environmental Law* (Edward Elgar 2016) 276, 285 characterizing it as a mere political idea.

[42] G Bándi, 'Principles of EU Environmental Law Including (the Objective of) Sustainable Development' cit. 39.

[43] Case C-91/05 *Commission v Council* ECLI:EU:C:2008:288 para. 98; case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias and others* ECLI:EU:C:2012:560 para. 139; case C-66/13 *Green Network* ECLI:EU:C:2014:2399 para. 55; case T-370/11 *Poland v Commission* ECLI:EU:T:2013:113 para. 108. In this context, see case C-371/98 *First Corporate Shipping* ECLI:EU:C:2000:108, opinion of AG Léger, para. 54, who adopted the thesis that sustainable development does not mean that environmental protection should prevail necessarily and systematically over other interests protected by EU policies and emphasised the need for a conciliatory approach between the various competing interests. See also case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias and others* ECLI:EU:C:2011:651, opinion of AG Kokott, para. 238 in which she deviates to some extent from the thesis of the equal importance of the three pillars. See also E Scotford, *Environmental Principles and the Evolution of Environmental Law* cit. 193 ff.

[44] If the environmental integration principle is limited to its procedural dimension, it cannot then be ensured that it contributes to the achievement of sustainable development as an overarching EU objective. See J Jans and HB Vedder, *European Environmental Law* cit. 23 who favour a rather procedural approach.

[45] B Sjåfjell, 'The Environmental Integration Principle' cit. 112; S Kingston, *Greening EU Competition Law and Policy* cit. 107, 114.

from an environmental perspective is chosen.[46] Furthermore, the threshold set by the environmental integration principle in substantive terms that cannot be exceeded in the balancing process lies in the avoidance of any significant damage to the environment by the adopted (legislative) measure or decision. The reason for this is that in such a case the environmental pillar of the afore-mentioned objective would be violated.[47] This thesis concerning the avoidance of significant environmental damage as a threshold is not expressly founded in the Treaties.[48] However, it may be argued that it can be founded on the requirement for the integration of a "high level of environmental protection" and of the "improvement of the quality of the environment" into EU policies set in art. 37 EUCFR. Likewise, it may be founded in the obligation to achieve a "high level of environmental protection, as set in art. 191(2) TFEU,[49] in conjunction with art. 3(3) TEU and art. 11 TFEU and the status of environmental protection as an EU fundamental objective.[50] In this respect, the substantive content of the environmental integration principle is identified, to some extent, with that of the "do no significant harm" principle set in certain recent EU legal instruments, as will be analysed in section IV.4.

Furthermore, the wording of the respective provisions (art. 3(3) TEU, art. 11 TFEU) in conjunction with art. 7 TFEU which requires that the EU institutions should take into consideration the objectives of all other policy areas when taking action in a specific policy field,[51] cannot support the view that the environmental integration principle requires that priority should be given to environmental protection requirements vis-à-vis other competing interests (*e.g.* economic growth, social cohesion).[52] This position is further justified by the fact that the Treaties do not set out any kind of hierarchy among the various integration clauses.[53] On the contrary, a thesis for the prioritisation of environmental interests over other competing interests could be only founded, if the fundamental objective of sustainable development is interpreted in light of the concept of

[46] S Kingston, *Greening EU Competition Law and Policy* cit. 114

[47] V Barral and P-M Dupuy, 'Principle 4' cit. 164 adopting the same approach with regard to International Law.

[48] S Kingston, *Greening EU Competition Law and Policy* cit. 106 (and footnote 39 of the same page).

[49] D Misonne, 'The Court of Justice of the European Union and the High Level of Environmental Protection: Transforming a Policy Objective into a Concept Amenable to Judicial Review' in C Voigt, *International Judicial Practice on the Environment* (Cambridge University Press 2019) 219 ff.

[50] Case C-240/83 *Procureur de la République v ADBHU* ECLI:EU:C:1985:59 para. 13; case C-302/86 *Commission v Denmark* ECLI:EU:C:1988:421 para. 8. See also *Nomarchiaki Aftodioikisi Aitoloakarnanias and others*, opinion of AG Kokott, cit. para. 238 with regard to the limits that the sustainability principle may set in the balancing process of competing interests.

[51] N Nic Shuibhne, 'Deconstructing and Reconstructing Article 7 TFEU' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 162.

[52] Case C-161/04 *Austria v Parliament and the Council* ECLI:EU:C:2006:66, opinion of AG Geelhoed, para. 59; joined cases C-204/12 to C-208/12 *Essent Belgium NV* ECLI:EU:C:2013:294, opinion of AG Bot, para. 97.

[53] B de Witte, 'Conclusions' cit. 181.

the planetary boundaries,[54] as is persuasively suggested in the legal theory given the current climate crisis and other pressing environmental problems.[55]

Finally, the specific characteristics of the environmental integration principle (strong wording both in art. 11 TFEU and art. 37 EUCFR) and its association with the fundamental objective of sustainable development can set normative limits to the so-called "reversed" integration. This "situation" can be the consequence of the proliferation of the integration clauses by means of the Lisbon Treaty and the introduction of the "super integration clause" of art. 7 TFEU. The concern here is that it may lead to the dilution of environmental standards, offsetting them against other interests or policy considerations or the lowering of the environmental standards, because everything has to be integrated into everything and the balancing process becomes difficult.[56] The thesis concerning the normative limits set to the "reversed" integration can also be supported by the argument that the lowering of the environmental standards as a result of the balancing process in the context of integrating various interests would also violate the obligation to achieve a high level of environmental protection (art. 191(2) TFEU).

III.4. The functions of the principle

The environmental integration principle plays a critical role in *enabling* the EU institutions in their capacity to propose, adopt or modify legislation to pursue environmental objectives within the framework of other non-environmental policies, such as the internal market and the common agricultural policy. By qualifying the EU institutions to take legal measures for the protection of the environment whenever they exercise their legislative competence in furtherance of the respective EU policies, the principle leads to an extension of the limits of their competence which is governed by the principle of conferral (art. 5(1) and (2) TEU) ("the enabling function").[57] This function is re-affirmed by the CJEU in certain cases in which the Court adopted the view that the environmental integration principle, also in its previous version (art. 6 EC), can justify the pursuit of environmental objectives by measures adopted under a legal basis other than art. 192 TFEU.[58] The provision

[54] The concept of the planetary boundaries attempts to identify certain non-negotiable ecological limits which should determine the space in which economic and social development has to take place, so that the earth system can safely operate. See J Rockström and others, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) Ecology and Society 1-33 www.ecologyandsociety.org.

[55] B Sjåfjell, 'The Environmental Integration Principle' cit. 106 ff.; see also Ch Voigt, 'Article 11 TFEU in light of the Principle of Sustainable Development in International Law' in B Sjåfjell and A Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2015) 31, 32 arguing that the core meaning of sustainable development concerns the conservation of life-sustaining process.

[56] J Jans, 'Stop the Integration Principle?' cit. 1546-1547.

[57] *Ibid*. 1540-1541; E Scotford, *Environmental Principles and the Evolution of Environmental Law* cit. 129; B de Witte, 'Conclusions' cit. 181, 182 with regard to all integration clauses.

[58] Case C-62/88 *Greece v Council* ECLI:EU:C:1990:153 paras 19-20; case C-300/89 *Commission v Council* ECLI:EU:C:1991:244 paras 22-24; case C-336/00 *Huber* ECLI:EU:C:2002:509 para. 36; case C-440/05 *Com-*

has played a role in determining the correct legal basis in the field of EU external action as well.[59] In addition to this, it was applied by the Court, in its previous version, to justify the expansion of the EU environmental competence in the field of criminal law through the adoption of secondary EU Law provisions, provided that their introduction was considered necessary to achieve effective environmental protection.[60]

Furthermore, the environmental integration provision has been applied in the context of the interpretation of EU legal provisions other than those of environmental legislation in a manner that promotes the environmental objectives (the "guidance" function).[61] The use of the principle as a tool for interpreting the various provisions outside the environmental field in an environmentally-friendly manner reflects the Court's view according to which art. 11 TFEU emphasises the fundamental nature of the objective of environmental protection and its extension across EU policies and activities.[62] A notable case in this context is the *Preussen Electra* case in which the Court applied the integration principle in light of the priority objective of promoting the use of renewable energy sources in accordance with international climate change obligations in order to justify a discriminatory measure.[63] Moreover, the Court applied the environmental integration principle in order to justify the application of the precautionary principle, outside the environmental sphere, with the aim to protect public health.[64]

The jurisprudence of the EU Courts has not always been consistent with regard to the application of the integration principle as a tool for the interpretation of key provisions in the field of EU Economic Law, such as State Aid Law. More particularly, the

mission v Council ECLI:EU:C:2007:625 para. 60; case C-411/06 *Commission v Parliament and Council* ECLI:EU:C:2009:518, opinion of AG Maduro, para. 17.

[59] Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* ECLI:EU:C:2017:376 para. 146 in which the Court referred to the integration principle, in order to justify the fact that an International Trade Agreement, which was based on a legal basis other than art. 192 TFEU, pursues the objective of sustainable development; joined cases C-626/15 and C-659/16 *Commission v Council (Antarctic MPAs)* ECLI:EU:C:2018:925 paras 90-101, in which the Court ruled that art. 11 TFEU cannot justify the choice of a non-environmental legal basis for environmental measures, as the measures at stake were considered to be. See Ch Eckes, 'Antarctica: Has the Court of Justice got Cold Feet?' (3 December 2018) European Law Blog europeanlawblog.eu.

[60] Case C-176/03 *Commission v Council* ECLI:EU:C:2005:542 paras 42, 48-51.

[61] J Jans, 'Stop the Integration Principle?' cit. 1541.

[62] *Commission v Council* cit. para. 42; case C-320/03 *Commission v Austria* ECLI:EU:C:2005:684 para. 73; case C-549/15 *E.ON Biofor Sverige AB* ECLI:EU:C:2017:490 para. 48; case C-513/99 *Concordia Bus Finland* ECLI:EU:C:2002:495 para. 57, where the Court applied the integration principle, in order to justify the use of environmental protection requirements in the public procurement procedure.

[63] Case C-379/98 *Preussen Elektra* ECLI:EU:C:2001:160 paras 73-76. In this direction see also case C-573/12, *Ålands Vindkraft AB* ECLI:EU:C:2014:2037 paras 77-80; *E.ON Biofor Sverige AB* cit. paras 64-70.

[64] Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00, T-141/00 *Artegodan* ECLI:EU:T:2002:283 para. 183; T-229/04 *Sweden v Commission* ECLI:EU:T:2007:217 para. 262; case T-817/14 *Zoofachhandel Züpke and others v Commission* ECLI:EU:T:2016:157 para. 51. See E Scotford, *Environmental Principles and the Evolution of Environmental Law* cit. 145-146.

General Court ruled in certain cases with reference to its jurisprudence in the *BUPA* case[65] that the Commission does not have the obligation to assess the compatibility of state aid with EU environmental legislation, because environmental protection does not constitute *per se* an objective of the internal market.[66] This thesis was reversed by the CJEU in its judgment in the case *Commission v Austria*. The Court based its reasoning on the environmental integration principle alongside art. 37 EUCFR, art. 194(1) TFEU and the EU rules on environmental protection. The Court came then to the conclusion that a positive obligation is established for the Commission to check whether the activity for which aid is granted, complies with EU environmental legislation when assessing whether state aid is intended to "facilitate the development of an economic activity", as required by art. 107(3)(c) TFEU. In the case that the Commission finds an infringement of the EU rules on environmental protection, it has to declare the aid incompatible with the internal market without any further examination.[67]

The preceding analysis with regard to the application of the environmental integration principle in the jurisprudence of the EU Courts in the field of State Aid law leads to the conclusion that despite its contribution, the respective jurisprudence cannot ensure the effective implementation of the principle in a consistent manner in various sectoral policies. This "limited" contribution can be attributed not only to the punctual nature of the jurisprudence, but also to the so far insufficient determination of the substantive content of the principle, also in association with the objective of sustainable development, that may pave the way for diverging interpretations. It is also of relevance that the review exercised by the EU Courts is limited to ascertaining whether there is a manifest error of appraisal regarding the application of the principle, as they recognize that the EU organs enjoy a wide margin of discretion in pursuing environmental objectives by balancing different requirements and interests.[68] In this context, it is questionable to which extent it can be subject of review whether the incorporation of environmental parameters into a certain measure is sufficient not only for preventing the occurrence of "significant" environmental harm but also for promoting sustainability.

[65] Case T-289/03 *BUPA and others v Commission* ECLI:EU:T:2008:29 para. 314.

[66] Case T-57/11 *Castelnou Energía v Commission* ECLI:EU:T:2014:1021 paras 187-191; case T-356/15 *Austria v Commission* ECLI:EU:T:2018:439 paras 514-518. It is worth noting that this jurisprudential stance is contrary to the CJEU judgment in the Nuovo Agricast Case. Case C-390/06 *Nuovo Agricast SrL* ECLI:EU:C:2008:224 paras 50-51.

[67] *Austria v Commission* cit. paras 41-47 and 100. See S Kingston, 'State Aid and the European Green Deal: The Implications of Case C-594/18P Austria v European Commission (Hinkley Point C)' (19 March 2021) UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 6/2021 ssrn.com.

[68] Case C-341/95 *Gianni Bettati v Safety Hi-Tech Srl* ECLI:EU:C:1998:353 paras 34-35 and 53; *Austria v Parliament and the Council*, opinion of AG Geelhoed, cit. para. 59; *E.ON Biofor Sverige AB* cit. paras 50, 64-70.

III.5. The insufficient operationalisation of the environmental integration principle before the adoption of the European Green Deal

The legal obligation imposed on the EU institutions to incorporate environmental parameters into the definition and implementation of EU sectoral policies and activities requires that a coherent and systematic strategy and the necessary institutional arrangements for pursuing environmental integration are adopted. As the analysis of the integration of environmental considerations into the sectoral policies is mainly a subject of a monograph, only a few remarks will be made with regard to the operationalization of the environmental integration principle before the adoption of the EU Green Deal. Already in 1993, the Commission announced measures for facilitating environmental integration, which included, *inter alia*, the elaboration of an environmental impact assessment for legislative proposals and the introduction of an explanatory memorandum illustrating the environmental considerations of each proposed measure. The vast majority of the above-mentioned measures was abandoned.[69] The Cardiff process which constituted an institutionalised effort to promote environmental integration on the basis of a decision of the European Council that asked the various Council formations to integrate environmental considerations into their activities, failed to deliver fully its expectations, as was admitted by the Commission.[70]

Furthermore, the promotion and improvement of environmental integration was identified as a central objective in the successive Environment Action Programmes since the adoption of the 4rth Environment Action Programme.[71] Policy integration, which has been recognized as a guiding principle of the EU Sustainable Development Strategies, is, to some extent, promoted by the use of the tool of Impact Assessment, which has to be applied to the Commission Initiatives that have far-reaching consequences. The instrument encompasses the analysis of the potential impacts of the various policy

[69] Communication (COM) 785/5 from the Commission of 3 June 1993 concerning the integration of environmental policy considerations into other policies. See also L Krämer, 'Giving a Voice to the Environment by Challenging the Practice of Integrating Environmental Requirements into other EU Policies' cit. 84-85, 98.

[70] Communication COM(2004) 394 final Commission Working Document of 1 June 2004 on Integrating environmental considerations into other policy areas: a stocktaking of the Cardiff process, p. 31.

[71] Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment (1987-1992), 2.3.1-2.3.38; Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development - A European Community programme of policy and action in relation to the environment and sustainable development, paras. 18-30; Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, arts 3(3) and (7); Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', Annex-Priority Objective 7, paras 85-89.

options in various fields, including their environmental impact.[72] Much depends, though, on the quality of the impact assessments[73] and the role assigned to them in the policy formulation and the legislative process.

Subsequently, while some progress in promoting environmental integration in certain sectors (such as in energy and agriculture) has been achieved, it cannot be regarded as satisfactory, as even in the 6th and 7th Environment Action Programmes respectively the need to pursue further integration was recognized.[74] Moreover, the principle has had so far limited application in the core fields of EU Economic Law, such as Competition Law.[75] This can be attributed not only to the contextual ambiguity accompanying the "sustainable development" as an EU fundamental objective to which the integration duty is inextricably linked, but also to the strong protection of the economic goals provided by the EU Treaties.[76]

IV. Assessing the contribution of the environmental integration principle to the fundamental objective of sustainable development in light of new developments

IV.1. The European Green Deal and the environmental integration principle: Introduction

The EGD is the new EU growth strategy that aims to respond to the urgent, complex and inter-linked environmental and climate realities, which are so significant that they are regarded as "this generation's defining task", by fostering the EU's transformation by 2050 to "a fair and prosperous society, with a modern resource-efficient and competitive economy".[77] Its central goal for the transformation[78] of the EU economy to an economic model decoupled from its ecological footprint can be achieved via a set of transformative policies in eight areas identified critical for enabling this transition.[79] The implementation of this set of wide-ranging transformative policies requires not only new legislative and policy interventions covering the whole political spectrum, but also the effective implementation of the existing legislation relevant to enable the afore-

[72] SRW van Hees, 'Sustainable Development in the EU: Redefining and Operationalizing the Concept' (2014) Utrecht Law Review 66-68.

[73] L Krämer, 'Giving a Voice to the Environment by Challenging the Practice of Integrating Environmental Requirements into other EU Policies' cit. 94.

[74] Arts 3(3) and (7) of Decision No 1600/2002/EC cit.; para. 85 of Decision No 1386/2013/EU cit.

[75] M Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: Where We Are and Where We Could Go' (2021) Journal of European Competition Law and Practice 430 ff.

[76] S Kingston, *Greening EU Competition Law and Policy* cit. 106.

[77] Communication COM(2019) 640 final cit. 2.

[78] There is no broadly accepted definition about the distinction between the terms of "transformation" and "transition" in the academic literature, which seem to be identical.

[79] Communication COM(2019) 640 final cit. Annex.

described fundamental transition. Subsequently, the EGD is a multi-faceted regulatory project with a long-term perspective.[80] The achievement of the objectives of this multi-faceted project requires significant flows of public and private investment.[81]

A central component of the EGD is the goal of climate neutrality, which has to be achieved by 2050 and is a cross-cutting objective, because it requires the adoption of significant legislative initiatives and policy measures in various economic sectors and systems (energy, transport, agriculture). It can also require the adoption of innovative legal instruments, such as the carbon border adjustment mechanism to avoid carbon leakage.[82] Another central component concerns the preservation and restoration of the eco-systems, which sets, at least, in symbolic terms the frame for the re-definition of the human-nature relationship in the sense that it implies the acknowledgement that ecological integrity can place limits to the economic activities.[83]

Moreover, due to the fundamental nature of this transition to sustainability in the medium and long term, the active public involvement in the respective processes is required. In this context, the EU Climate Pact is an innovative mechanism, which aims to support grassroots initiatives on climate change and environmental protection.[84] In addition, the EGD takes into account the social dimension of the transition to sustainability by requiring that the transition should be "just" and inclusive, so that "no one is left behind".[85] In conclusion, the EGD can be viewed not only as a strategy aiming to introduce a new growth model as a response to the pressing environmental realities, but also as an endeavour to re-orientate the mission of the EU integration process towards a sustainable direction by placing environmental and sustainability considerations at the heart of the integration process. It can also be seen as a vision for the EU's future.[86]

The Communication on the EGD does not make any reference to the environmental principles set forth in art. 191(2) TFEU or to the environmental integration principle as such.[87] Despite the lack of an explicit reference to the environmental integration princi-

[80] E Chiti, 'Managing the Ecological Transition of the EU: The European Green Deal as a Regulatory Process' (2022) CMLRev 25 ff.

[81] Communication COM(2019) 640 final cit. 15; A Sikora, 'European Green Deal: Legal and Financial Challenges of the Climate Change' (2021) ERA Forum 681, 690 ff.

[82] J Jendrośka, M Reese and L Squintani, 'Towards a New Legal Framework for Sustainability Under the European Green Deal' (2021) Opolskie Studia Administracyjno-Prawne 87, 102 ff.; E Chiti, 'Managing the Ecological Transition of the EU' cit. 27.

[83] E Chiti, 'Managing the Ecological Transition of the EU' cit. 35; L Krämer, 'Planning for Climate and the Environment: The EU Green Deal' (10 July 2020) Journal for European Environmental & Planning Law 267, 293.

[84] J van Zeben, 'The European Green Deal: The Future of a Polycentric Europe?' (2020) ELJ 300, 308.

[85] Communication COM(2019) 640 final cit. 2.

[86] E Chiti, 'Managing the Ecological Transition of the EU' cit. 26.

[87] A Sikora, 'European Green Deal' cit. 689; M Montini, The European Green Deal from an Environmental Protection Perspective: The Missing Role of the Environmental Integration Principle' in K de Graaf and others (eds), *Grensoverstijgende rechtsbeoefening: Liber Amicorum Jan Jans* (Uitgeverij 2021) 97-98.

ple, the EGD Communication devotes a specific section to the need for "mainstreaming sustainability in all EU policies".[88] In this context, the "green finance and investment" and the "greening of the national budgets" are singled out as areas in which action should be taken. Furthermore, research and innovation and education and training are fields that are identified as critical for the mainstreaming of the sustainability considerations with the aim to achieve the objectives of the EGD.[89] In this section, a new principle is also introduced, namely the "no harm principle", according to which an explanatory memorandum is attached to each legislative proposal or executive act which would demonstrate that they live up to a green oath to "do no harm".[90] The principle is however defined in rather ambiguous and programmatic terms, so that the question is raised whether it can be legally enforceable before the courts and be easily reconciled with the EU constitutional framework and in specific with the EU substantive constitution.[91] It has been further developed in the form of the "do not significant harm" principle in certain EU legal instruments.[92] The relationship between the environmental integration principle and the "do no (significant) harm" principle cannot be easily defined, as while the former sets a positive obligation for the EU institutions to incorporate environmental considerations into other sectoral policies, the latter sets merely a negative test, according to which an activity must not harm any of the set environmental objectives. [93] In any case, there is a common element between the two principles: the avoidance of (significant) environmental harm by the proposed policy or decision through an ex-ante examination at an early stage.

IV.2. The implementation of the environmental integration principle in EU Energy and Climate Policy in alignment with the EGD objectives

Although the environmental integration principle is not mentioned as such in the EGD, it is implemented by it as well as by the legislative and policy initiatives that have been adopted to achieve its objectives. In the fields of EU energy and climate policies, the EGD

[88] Communication COM(2019) 640 final cit. 15.

[89] *Ibid.* 15-18.

[90] *Ibid*. 19(2)(2)(5). See also M Onida, 'The "do not (significantly) harm" Principle' in K de Graaf and others (eds), *Grensoverstijgende rechtsbeoefening* cit. 45; E Chiti, 'Managing the Ecological Transition of the EU' cit. 36-37.

[91] A Sikora, 'European Green Deal' cit. 689.

[92] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation 2019/1088; Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilient Facility; Regulation (EU) 2021/1229 of the European Parliament and of the Council of 14 July 2021 on the public sector loan facility under the Just Transition Mechanism.

[93] M Onida, 'The "do not (significantly) harm" Principle' cit. 45 ff.

further promotes the integrative approach adopted 15 years ago,[94] namely the incorporation of environmental and climate concerns in energy policies and the contextual link between energy and climate policies. In addition to the above, the central objective of climate neutrality to be achieved by 2050 set out in the EU Climate Law[95] is closely associated with the decarbonization of the energy system, while it is also a cross-cutting objective in the sense that it presupposes significant action in the vast majority of economic sectors. The afore-mentioned integrative approach also characterises the draft legislative measures that were proposed in order to achieve the intermediate target that is set in the EU Climate Law, according to which the binding Union 2030 climate target shall be that of a domestic reduction of net greenhouse gas emissions by at least 55 per cent compared to 1990 levels (art. 4(1)).[96] The proposals set in the "Fit for 55" legislative package can be classified in four categories. In the first category, measures that impose obligations to MS and concern mainly the revision of the existing Directives, such as the Energy Efficiency Directive, are included. The second category contains measures that impose obligations on economic operators, such as the Proposal for the Regulation on the use of renewable and low carbon fuels in maritime transport, while in the third category the measures included aim to alleviate the social impacts of the energy transition process (*e.g.* the Social Climate Fund). Finally, the fourth category includes measures that aim to protect EU industry (*e.g.* the carbon border adjustment mechanism).[97]

The new element with regard to the integrative approach of the EU Energy and Climate policies, which was introduced by the EGD and was further strengthened by the "Fit for 55" Package and the Repower EU Action Plan,[98] lies in the enhanced EU interference into the MS' energy mix, with the aim to achieve the EU climate and environmental objectives. As it is persuasively argued in legal scholarship,[99] this interference was facilitated by the CJEU's restrictive determination of the scope of the energy specific competence limita-

[94] Communication COM(2007) 1 final from the Commission to the European Council and the European Parliament of 10 January 2007 'An energy policy for Europe' ~~{SEC(2007) 12~~.

[95] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[96] Communication COM(2021) 550 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 14 July 2021 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality.

[97] Editorial Comments, 'The European Climate Law: Making the social market economy fit for 55?' (2021) CMLRev 1321 ff.

[98] After Russia's invasion of Ukraine, the EU Commission presented the REpower EU Action Plan which aims to promote energy saving, the acceleration of the transition to clean energy and the diversification of energy supplies. See Communication COM(2022) 230 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 18 May 2022 'REPowerEU Plan', p. 6.

[99] J van Zeben, L de Almeida and M Alessandrini, 'Stress Testing the European Green Deal: The "securitization" of Energy, Food and Climate' (July 2022) EU Law Live Weekend Edition 5.

tion, as set in art. 192(2)(c) TFEU.[100] More specifically, the afore-mentioned limitation is mainly procedural in nature in the sense that when the EU exercises its competence on environmental issues and these issues significantly affect the sovereignty of a MS over its choice of mix of energy sources and the general structure of its energy supply, the EU can only legislate by making use of the special legislative procedure that requires unanimity in the Council.[101] The Court interpreted this limitation to the EU environmental competence in light of the EU environmental and climate objectives, so that it arrived at the conclusion that the legal basis of art. 192(2)(c) TFEU can be applied "only if it follows from the aim and content of the measure that the primary outcome sought by that measure is significantly to affect a Member State's choice between different energy sources and the general structure of the energy supply of that Member State".[102]

The Ruling has direct implications for the determination of the scope of MS' sovereignty to choose and exploit their energy sources, because, if it is applied by analogy to art. 194(2) TFEU,[103] the EU' s competence in the energy sector can be limited only if the aim, content and primary outcome of a legal measure directly affects MS' sovereignty over their energy sources in the sense of prohibiting the use of a concrete energy source.[104]

In this context, the Proposal for the revision of the Renewable Energy Directive sets an increased target of 40 per cent of total energy consumption to be generated by renewable energy sources (RES) by 2030,[105] which is further raised to 45 per cent by the the

[100] Art. 192(2)(c) TFEU reads as follows: "By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure [...], shall adopt: a) [...] b) [...] c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply".

[101] K Huhta, 'The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of the EU Competences in the Energy Sector' (2021) ICLQ 991, 998-999; J Jans and HB Vedder, *European Environmental Law* cit. 62-63.

[102] Case C-5/16 *Poland v Parliament and Council* ECLI:EU:C:2018:483 paras 43-44 and 46. See also case C-5/16 *Poland v Parliament and Council* ECLI:EU:C:2017:925, opinion of AG Mengozzi, para. 25: "As a derogation, Article 192(2)(c) TFEU is to be interpreted strictly, especially since an efficient modern environment policy cannot ignore energy questions".

[103] Energy policy is a shared competence (art. 4(2)(i) TFEU). Art. 194(2) TFEU states that measures adopted in the context of the EU Competence on energy policy shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to art. 192(2)(c) TFEU. See K Huhta, 'The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of the EU Competences in the Energy Sector' cit. 1001 ff.

[104] K Huhta, 'The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of the EU Competences in the Energy Sector' cit. 1008.

[105] Communication COM(2021) 557 final Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 of 14 July 2021.

REPower EU plan legislative proposal.[106] Furthermore, the proposed Directive sets specific sub-targets for renewable energy use in transportation, heating and cooling, buildings and industry, introduces an updating of the sustainability criteria for bio-energy and sets out goals for the traceability and certification of renewable fuels, including green hydrogen and its derivatives. A further step in enabling energy transition by further limiting MS' choices with regard to their energy mixes constitutes the Gas Decarbonization Strategy which aims to reform the common rules for the internal market in natural gas in order to facilitate the uptake of renewable and low-carbon gases, including hydrogen.[107]

Finally, another intervention is the proposed revision of the Energy Efficiency Directive, which enshrines the "energy efficiency first" principle which is underpinned by an integrative approach, in the sense that it requires that energy efficiency solutions should be taken into account in planning, policy and investment decisions in all sectors that have an impact on energy demand (art. 3). The proposal also sets the Union's ambitious binding energy efficiency target for final and primary energy consumption, which is further raised by the REPower EU plan legislative proposal and presupposes that MS set national contributions in their National Energy and Climate Plans.[108]

IV.3. The implementation of the environmental integration principle in selective fields of EU Policy in alignment with the EGD objectives

The environmental integration principle is implemented through the modification of the EU Industrial Policy, which aims to align with the objectives of the EGD. In particular, a critical component of the EU "Circular Economy Action Plan"[109] is the Sustainable Product Policy Initiative, which aims to foster resource efficiency, circularity, and climate neutrality in industrial production chains.[110] The objectives of this Initiative are to be achieved through

[106] Communication COM(2022) 222 final Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency of 18 May 2022.

[107] Communication (COM)2021 803 final Proposal for a Directive of the European Parliament and of the Council of 15 December 2021 on common rules for the internal markets in renewable and natural gases and in hydrogen; Communication COM(2021) 804 final Proposal for a Regulation of the European Parliament and of the Council of 15 December 2021 on internal markets for renewable and natural gases and in hydrogen, (recast); see J van Zeben, L de Almeida and M Alessandrini, 'Stress Testing the European Green Deal' cit. 6.

[108] Proposal COM(2021) 558 final for a Directive of the European Parliament and of the Council of 14 July 2021 on energy efficiency (recast); Proposal COM (2022) 222 final cit. 24 (art. 3 amendment to the Directive 2012/27).

[109] Communication COM(2020) 98 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 March 2020 'A new Circular Economy Action Plan, for a cleaner and more competitive Europe'.

[110] Communication COM(2022) 140 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 30 March 2022 on making sustainable products the norm.

certain legislative initiatives that set environmental sustainability standards for products at the EU level. A key Initiative is the Proposal for a Regulation on ecodesign for sustainable products, which establishes the framework for setting ecodesign requirements for specific categories of products with the aim to improve their circularity and other sustainability aspects.[111] The proposed Regulation broadens the scope of the existing eco-design Directive (2009/125/EC) both in terms of products and their sustainability requirements. The product aspects to which eco-design requirements relate concern, among others, the durability, the reusability, the reparability and presence of substances of concern (art. 1). The eco-design requirements will apply either to a specific product group or to more product groups that share sufficient common characteristics (arts 4 and 5). The proposed Regulation will apply along with product specific rules in the cases where specific circumstances justify targeted regulatory intervention, such as the Proposal for the revision of the construction products Regulation and the proposed batteries Regulation.[112]

The proposed regulatory instruments constitute significant regulatory interventions in the sense of incorporating sustainability considerations in the production cycle through mandatory regulatory requirements and can, thus, contribute substantially to the transition towards a sustainable production model.[113] It remains to be seen to what extent the "strong" regulatory intervention foreseen in the respective Proposals will also characterise the final form of the respective legislative instruments, also due to the possible reaction of the industrial sectors that will be affected in financial terms.

The Commission also introduced a Proposal for a Directive for empowering citizens to a green transition, which includes targeted amendments to existing consumer protection Directives in order to enable consumers to make informed choices and to tackle unfair commercial practices that mislead consumers from sustainable consumption choices.[114] This proposal contributes to the implementation of the environmental integration principle in the EU Consumer Law.

Another EU policy field in which the relevant initiatives foreseen in the EGD or associated with the objective of climate neutrality, are underpinned by an integrative approach

[111] Proposal COM(2022) 142 final for a Regulation of the European Parliament and of the Council of 30 March 2022 establishing a framework for setting eco-design requirements for sustainable products and repealing Directive 2009/125/EC.

[112] Proposal COM(2022) 144 final for a Regulation of the European Parliament and the Council of 30 March 2022 laying down harmonized conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011; Proposal COM(2020) 798 final for a Regulation of the European Parliament and of the Council of 10 December 2020 concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/2020.

[113] L Krämer, 'Planning for Climate and the Environment' cit. 280 characterizing rightly the adopted approach as "revolutionary".

[114] Proposal COM(2022) 143 final for a Directive of the European Parliament and the Council of 30 March 2022 amending Directives 2005/29/EC and 2011/83/ EU as regards empowering consumers for the green transition through better protection against unfair practices and better information.

to environmental and climate protection is the transport sector, as their main aim is to facilitate the transition to sustainable transport and to contribute to the reduction of transport emissions. In particular, along with the adoption of the "Sustainable and Smart Mobility Strategy",[115] certain legislative initiatives are introduced in the "Fit for 55" package. These Initiatives include the revision of the Emissions Trading Directive, in order to cover emissions from the shipping sector and to contribute to more ambitious emission reduction targets in the aviation sector, the establishment of a separate emission trading system to include emissions from buildings and road transport fuels, the revision of the Alternative Fuels Infrastructure Directive and the revision of the Regulation setting CO2 emission standards for cars and vans towards stricter standards.[116] Furthermore, a second wave of Initiatives are adopted, which include, among others, the revision of the Regulation for the trans-European Transport Network (TEN-T) to contribute to the objectives of the EGD[117] and the revision of Directive 2010/40/EU on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport.[118] The implementation of the proposed measures, if adopted, will require fundamental changes in the transport system, which will also raise issues concerning universal access to transport services and the capacity of low-income citizens to use their private cars for basic transportation needs.

The Common Agricultural Policy (CAP) is another policy field which must be significantly transformed in order to align with the EGD environmental objectives and the objective of climate neutrality, as the agricultural sector is responsible for a significant percentage of greenhouse gas emissions and also contributes to biodiversity loss. Moreover, despite the incorporation of certain green elements in the 2014-2021 CAP and the spending for climate action, the respective measures have not been effective in achieving concrete results, such as emission reductions.[119]

The "Farm to Fork Strategy", which was adopted as envisaged in the EGD, recognised the need for a fundamental transition in our food system, so that it can reconcile human needs with environmental protection. To this end, the Strategy sets objectives and regulatory and non-regulatory actions, which concern the reduction of the use of

[115] Communication COM(2020) 789 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 9 December 2020 'Sustainable and Smart Mobility Strategy – putting European Transport on Track for the future'.

[116] Communication COM(2021) 550 final cit. 6-9.

[117] Proposal COM(2021) 812 final for a Regulation of the European Parliament and of the Council of 14 December 2021 on Union guidelines for the development of the trans-European transport network, amending Regulation (EU) 2021/1153 and Regulation (EU) No 913/2010 and repealing Regulation (EU) 1315/2013.

[118] Proposal COM(2021) 813 final for a Directive of the European Parliament and of the Council of 14 December 2021 amending Directive 2010/40/EU on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport.

[119] Special Report 16/2021 of the European Court of Auditors of 21 June 2021 'Common Agricultural Policy and climate: Half of EU Climate Spending but farm emissions are not decreasing'.

chemical pesticides, fertilisers and antibiotics, a decrease of nutrient loss, an increase in organic farming and the protection of biodiversity.[120]

To promote a sustainable transition of EU agricultural policy, the CAP was recently reformed for the period 2023-2027 and aims to also achieve environmental, biodiversity and climate objectives. An element that characterises the new CAP is that MS are given substantial flexibility to pursue the CAP objectives in a manner which is most appropriate in their national and regional context through the adoption of the national CAP Strategic Plans.[121] Although, it cannot be extensively analysed in the context of this *Article* whether the new CAP sufficiently integrates environmental and climate concerns, an initial conclusion of the analysis of the reformed CAP is that the integration of environmental considerations is rather weak. More specifically, the provisions of the CAP Regulations do not set any quantitative EU targets or any obligation for the MS to set legally binding targets regarding the use of pesticides, fertilisers and antibiotics as well as the percentage of the organic farming, so that the lack of ambitious targets in the CAP strategic Plans cannot be a reason for their rejection by the Commission.[122]

Furthermore, the conditionality rules laid out in the CAP Strategic Plans Regulation (art. 12 and Annex III), which consist of the statutory requirements for environmental and climate protection and the standards for Good Agricultural and Environmental Condition of land (GAEC) and have to be respected by farmers as a condition to receive direct payments, are also rather weak. This is due to the fact that the conditionality rules do not include requirements of the EU Environmental legislation which are important for promoting sustainability, such as arts 10, 11 and 12 of the 92/43 Habitats Directive and art. 14 of the 2009/128 Directive on Integrated Pesticide Management, while other requirements are "watered down" or diluted compared to the initial Commission Proposal.[123]

Finally, eco-schemes constitute a novel instrument that is introduced by the new CAP with the aim to reward farmers who manage their land in an environmental and climate-friendly manner. MS enjoy, though, a rather wide margin of discretion to their design (art. 31 of the 2021/2115 Regulation), as the Regulation sets a vaguely formulat-

[120] Communication COM(2020) 381 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 May 2020 'A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system'.

[121] Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for Strategic Plans to be drawn up by Member States under the common agricultural policy (CAP strategic plans) and financed by the European Agricultural Guarantee Fund and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013. See also J van Zeben, L de Almeida and M Alessandrini, 'Stress Testing the European Green Deal' cit. 9.

[122] Birdlife International, EEB and Greenpeace, 'Does the new CAP measure up? NGOs assessment against 10 tests for a Green Deal- compatible EU Farming Policy' www.greenpeace.org.

[123] WWF, 'Conditionality: The Cornerstone of a Greener Common Agricultural Policy' wwfeu.awsassets.panda.org; F Bas-Defossez, 'What is Left for Environment and Climate in the New CAP?' (30 June 2021) Institute European Environmental Policy ieep.eu.

ed obligation that the schemes cover at least two "areas of action" for the climate, environment and animal welfare. Therefore, it is worth asking whether the designed schemes are capable of ensuring a transition to sustainable farming and of achieving measurable results in this direction.[124]

In conclusion, the weak environmental requirements of the new CAP in conjunction with the discretion given to MS in the elaboration of the national Strategic Plans cannot create the necessary conditions for achieving the ambitious environmental goals of the Farm to Fork Strategy.[125]

IV.4. EU Financial Instruments and the environmental integration principle

Another field key to the transformation of the EU economy towards climate neutrality is sustainable finance, as significant investments both from the public (EU budget and other funding mechanisms) and the private sector would be required.[126] The notion of "sustainable finance" is a key aspect of the EGD and presupposes the implementation of the environmental integration principle, as it refers to the process of taking due account of climate, environmental and social considerations in the investment decision-making, leading to increased investments in long-term and sustainable activities.[127] In this context, the Europe Sustainable Investment Plan which is the investment pillar of the EGD,[128] lays out the roadmap for the mobilisation of at least one trillion euro of sustainable investments, such as investments to address climate crisis and biodiversity loss over the next decade, by funds provided under the EU 2021-2027 Multiannual Financial Framework (MFF) and other public (Next Generation EU) and private funds.

Furthermore, due account of the fact that the transition to a climate neutral economy will have economic and social justice implications especially for those regions that rely on fossil fuel extraction and treatment and for highly carbon intensive industries is taken. As a result, the Just Transition Mechanism (JTM) was established in order to alleviate the impact of the transition in the regions and on the citizens most affected by it. The first pillar of the Mechanism is the Just Transition Fund (JTF), which is established as a new Struc-

[124] WWF, EEB and Birdlife International, 'Will CAP eco-schemes be worth their name?' (November 2021) www.birdlife.org.

[125] After the war in Ukraine, it is expected that the elements of the CAP Strategic Plans that enable food security will be strengthened probably at the expense of the achievement of the CAP environmental goals. See J van Zeben, L de Almeida and M Alessandrini, 'Stress Testing the European Green Deal' cit. 10.

[126] Communication from the Commission, The European Green Deal, cit. 15-17; A Sikora, 'European Green Deal' cit. 693.

[127] Communication COM(2021) 390 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 6 July 2021 'Strategy for financing the transition to a sustainable economy', p. 1 fn. 4.

[128] Communication COM(2020) 21 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 14 January 2020 'Sustainable Europe Investment Plan, European Green Deal Investment Plan'.

tural Fund and provides financial support in the form of grants to the afore-mentioned regions and citizens.[129] Access to funding is conditional upon the adoption of the climate neutrality objective by the MS (art. 7 of JTF Regulation) and the approval of the Territorial Just Transition Plans (TJTP) which have to be elaborated by the MS and are approved by the Commission (art. 11 of JTF Regulation). The second pillar of the JTM is part of the Invest EU Programme[130] and supports financial investments of the private and public sector entities that serve the just transition purposes and are in line with the eligibility criteria of the InvestEU Programme, by providing an EU budget guarantee in order to partially cover the risk in financing and investment operations. The third pillar of JTM concerns the establishment of a Public Sector Loan Facility which facilitates the financing of public sector investments that address the development needs of the territories included in the TJTPs and do not generate sufficient streams of revenues to cover their investment costs.[131] Except for the possibility of financing projects that promote sustainability *per se*, such as investments in renewable energy and green and sustainable mobility through the respective pillars of the JTM, the environmental integration principle is implemented, to some extent, through the adoption of the "do no significant harm" principle as one of the horizontal principles that has to be respected in the preparation, evaluation, implementation and monitoring of the eligible projects in the Public Loan Sector Facility Regulation (art. 4(3)). It is also implemented through the exclusion from financing of certain unsustainable investments, which are set in art. 9 of JTF Regulation.[132] The JTF Regulation does not enshrine, though, the "do no significant harm" principle as a horizontal principle which should be respected in the elaboration of TJTPs with the aim to avoid unintended effects of the eligible projects to climate.[133]

Another critical instrument that strongly promotes the integration of environmental parameters in the financial sector is the Taxonomy Regulation,[134] as it sets a clearly defined common framework of criteria and standards on the basis of which it can be determined whether an economic activity pursued within the EU can be qualified as environmentally sustainable. The Regulation harmonises, thus, the criteria for

[129] Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund.

[130] Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017.

[131] Regulation (EU) 2021/1229 cit.

[132] The activities that cannot be financed, are the following: *i)* the decommissioning or the construction of nuclear power stations *ii)* the manufacturing, processing and marketing of tobacco and tobacco products *iii)* the undertakings in difficulty and *iv)* the investments related to the production, processing, transport, distribution, storage or combustion of fossil fuels.

[133] Opinion No 5/2020 of the European Court of Auditors of 20 July 2020 on the Commission's 2020/0006 (COD) proposal for a Regulation of the European Parliament and the Council establishing the Just Transition Fund, COM (2020) 22 final and COM (2020) 460 final.

[134] Regulation (EU) 2020/852 cit.

"sustainable investment" at the EU level, which has to be facilitated for the achievement of the EU environmental and climate objectives. The Regulation applies to measures adopted by the MS or by the Union that set out requirements for financial market participants or issuers in terms of financial products or corporate bonds offered as environmentally sustainable, to the financial market participants that make the financial products available and to undertakings subject to the obligation to publish a non-financial statement or a consolidated non-financial statement pursuant to art. 19(a) or art. 29(a) of Directive 2013/34/EU (art. 1 of the Regulation). Furthermore, the framework set out by the Regulation provides a benchmark for the evaluation of any economic activity that can also be used for other purposes (*e.g.* planning, regulatory).[135]

The qualification of an economic activity as environmentally sustainable requires passing a double test. The first test is a positive one in the sense that the activity tested must contribute substantially to one or more of the environmental objectives that are set out in art. 9 of the Regulation and cover climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, the transition to circular economy, pollution prevention and control and the protection and restoration of biodiversity and ecosystems. In addition to the above, the positive test encompasses compliance with certain minimum social safeguards, as required by art. 18 of the Regulation. The negative test concerns respect of the "do no significant harm" principle set out in art. 17 of the Regulation which requires that the activity does not harm any of the environmental objectives set out in art. 9.[136] Compliance with the technical screening criteria that determine how a specific economic activity qualifies as substantially contributing to the environmental objectives of art. 9 and whether it does not cause significant harm to one or more of these objectives is also necessary for the qualification of an activity as environmentally sustainable. These screening criteria are set in delegated acts issued by the Commission.[137] In conclusion, the EU Taxonomy Regulation, as complemented by the Delegated Acts, sets a common classification system of what an environmentally sustainable activity is at the EU level, which will make sustainable investments across EU MS comparable, and contributes to the re-orientation of investments towards a climate friendly economy as well as strengthens investors' trust in sustainable financial products.[138] However, the inclusion of the nuclear energy and natural gas-fired power plants as "green activities"

[135] J Jendrośka, M Reese and L Squintani, 'Towards a New Legal Framework for Sustainability Under the European Green Deal' cit. 98.

[136] M Onida, 'The "do not (significantly) harm" Principle' cit. 47.

[137] European Commission, *EU Taxonomy for Sustainable Activities: What the EU is doing to Create an EU-wide Classification System for Sustainable Activities* finance.ec.europa.eu.

[138] Recital 11, 12, 13 of Regulation (EU) 2020/852 cit.; see also Ch Gortsos, 'The Taxonomy Regulation: More Important than just as an Element of the Capital Markets Union' (16 December 2020) EBI Working Paper Series 2020 ssrn.com.

under strict conditions in the Complementary Delegated Regulation[139] highlighted the ways in which the difficulties associated with the transition to climate neutrality, also due to different national characteristics and the energy choices of MS, can result in legal rules that endanger the consistency and the effectiveness of the legal regime in terms of achieving the respective objectives.[140]

Finally, another financial instrument that promotes the environmental integration principle is the Recovery and Resilience Facility Regulation[141] which aims to provide MS with direct and wide-ranging financial support in the form of loans or grants to deal with the economic and social consequences of the COVID 19 pandemic. Access to funding presupposes that MS submit National Recovery and Resilience Plans (NRRPs) that set out the reforms and investments that have to be completed by 2026 and that are approved by the Commission. The measures included in the NRRPs should cover six areas of European relevance structured in six pillars, one of which is green transition, so that they contribute to the achievement of the Union's 2030 climate targets and to the objective of climate neutrality (arts 3(a) and 4(1)). It is notable that the "do no significant harm" principle is one of the two horizontal principles against which each reform and public policy investment outlined in NRRPs should be examined (art. 5 (2)). Furthermore, the Regulation requires that MS provide an explanation of how each NRRP ensures that no measure included by it causes significant harm to the environmental objectives within the meaning of art. 17 of the Taxonomy Regulation as well as a qualitative explanation on how the respective measures are expected to contribute to green transition, the latter including biodiversity (art. 18(4)(d) and (e)). The Commission also examines compliance with the "do not significant harm" principle and the contribution of the NRRP to the green transition prior to its approval (art. 19(3)(d)).[142]

V. Conclusions

The first conclusion that arises from the analysis above is that the environmental integration principle has not only a procedural, but also a substantive meaning in EU Law. This is due to its linkage with the fundamental objective of sustainable development, as, otherwise, it cannot contribute to the achievement of the afore-mentioned objective.

[139] Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities.

[140] It is worth noting that Austria challenged the Delegated Regulation 2022/1214 before the CJEU claiming, among others, that nuclear energy violates the "do no significant harm" principle, which is a central principle of the EU Taxonomy Regulation, as it is demonstrated by accidents, such as Chernobyl or Fukushima. See M Williams and K Abnett, 'Austria seeks Allies for Legal Challenge to EU Green Investment Rules' (10 October 2022) Reuters www.reuters.com.

[141] Regulation (EU) 2021/241 cit.

[142] M Onida, 'The "do not (significantly) harm" Principle' cit. 58 ff.

Moreover, its substantive component has been reinforced after the adoption of the EGD and the accompanying Initiatives. More specifically, although the principle is not explicitly mentioned in the respective legislative and policy instruments, it is implemented by them, to some extent, in substantive terms (Sections IV.2-IV.4). This is due to the fact that the achievement of the EU Environmental and Climate Objectives presupposses the "greening" of the legislative frameworks regulating various sectors.

The second conclusion that may be drawn is that the regulative context of the environmental integration principle in substantive terms often cannot be clearly delineated. This is meant in the sense that the extent of incorporation of environmental considerations in the respective legislative instruments may depend on compromises in the framework of the legislative procedure or on the specific characteristics of each regulatory field. The concrete and measurable EU environmental and climate objectives can contribute, to a certain extent, to the delineation of the contours of the substantive component of the environmental integration principle in its application in various fields, because such an application is associated with the achievement of the afore-mentioned objectives. In addition to the above, the "do no significant harm" principle which is enshrined in certain financial instruments, also facilitates the determination of the substantive component of the principle, because its content coincides with it to a certain extent. Moreover, the re-orientation of the fundamental objective of "sustainable development" in light of ecological limits can resolve the existing ambiguities associated with its content and can substantially facilitate the determination of the exact contours of the substantive component of the environmental integration principle.

The third conclusion that arises is that the extent of the incorporation of environmental considerations into the respective legal instruments and the safeguards that these include against "significant harm" constitute an important factor for assessing their capacity to contribute to the achievement of the central objective of climate neutrality and the specific objectives set for each sector.[143] Their effectiveness will also be determined by the extent to which the objectives aimed by them can be judicially enforced.[144]

The fourth conclusion is that the level of implementation of the environmental integration principle in various EU law fields shall lay the groundwork for conflicts between the regulatory instruments aiming at achieving the ambitious EU environmental and climate objectives and the provisions of the EU Economic Constitution or those of the secondary legislation.[145] These conflicts cannot be easily resolved, because, as it has been already mentioned, the EU Treaties provide a strong

[143] E Chiti, 'Managing the Ecological Transition of the EU' cit. 42-43 concerning the effectiveness requirement of the regulatory instruments provided for achieving the EGD objectives.

[144] A Sikora, 'European Green Deal' cit. 684.

[145] E Chiti, 'Managing the Ecological Transition of the EU' cit. 37.

protection to economic interests.[146] In this context, the limits of the implementation of the substantive component of the environmental integration principle and of the ambitious objectives of EGD in the current framework are demonstrated.

The fifth and last conclusion is that the greening of all areas of law in substantive terms is a large, if not the largest, normative challenge of our times.[147] Importantly, it also demonstrates the role that the law can and, in fact, should play to reshape behaviours and (production) models in order to achieve fundamental objectives through the necessary transformations. The EU is taking the lead in this process by making concrete efforts at the regulatory and policy level. The question that is left open is whether the envisaged re-orientation of the EU integration process towards sustainability can be achieved within the current regulatory system or whether reforms of EU Primary Law may be deemed necessary.

[146] *Ibid*. 36-37.

[147] LJ Kotzé and D French, 'Staying Within the Planet's "Safe Operating Space"? Law and the Planetary Boundaries' in LJ Kotzé and D French (eds), *Research Handbook on Law, Governance and Planetary Boundaries* (Edward Elgar 2021) 8.

ARTICLES

THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU: NORMATIVE IMPLICATIONS, IMPLEMENTATION AND POTENTIAL FOR MAINSTREAMING

Edited by Evangelia Psychogiopoulou

TAKING STOCK OF ART. 13 TFEU IN EU AGRICULTURE: READING ART. 13 AS A WHOLE

DIANE RYLAND*

ABSTRACT: Minimum standards of welfare for farm animals in harmonised EU norms derive from the Treaty Title on Agriculture in the absence of a conferred competence in animal welfare. Subsequently, a competence "of sorts" in animal welfare has been inserted into the Treaties in art. 13 of the Treaty on the Functioning of the European Union (TFEU). Art. 13 TFEU incorporates an integrative stipulation to pay full regard to the welfare requirements of animals as sentient beings in the formulation and implementation of certain EU policies, inclusive of EU agriculture policy, while respecting the customs of Member States relating in particular to religious rites, cultural traditions and regional heritage. Yet, in the constitutional framework of the Treaties there are limitations, and tensions arise between EU policy in agriculture and the non-market objective of animal welfare. Art. 13 TFEU is not driving evolving EU policy in farm animal welfare or EU legislative revision; the legal force of art. 13 TFEU remains in doubt. Concomitantly, recent CJEU Grand Chamber rulings in EU agriculture/animal welfare law read in the light of art. 13 TFEU have recognised the marked social and cultural momentum to improve the welfare of animals in agriculture, and reinforced the constitutional standing of art. 13 TFEU, with positive implications for animal welfare mainstreaming. This *Article* explores the application of art. 13 TFEU in EU agriculture policy, and reasons that the scope exists for the CJEU further to exploit its potential.

KEYWORDS: animal welfare mainstreaming – EU agriculture policy – art. 13 TFEU – CJEU interpretation – common organisation of the market – societal/cultural concern.

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I thank Evangelia Psychogiopoulou for her very helpful comments on an earlier draft of this *Article*.

www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/646

I. Introduction

The European Union (EU) Member States have not conferred upon the EU a competence with its own Treaty Title in the sphere of animal welfare. Nonetheless, the EU has effectively introduced harmonised welfare provision for animals in agriculture premised on the Agriculture Treaty Title, eradicating poor practices in which farm animals were unable to perform basic natural behaviours. EU legislation derived from the Agriculture Title is concerned with the common organisation of the market in agricultural produce and there is a conflict between animals as products to be traded in agriculture and animals as sentient beings.[1] It is a minimum level of welfare which has been achieved in EU norms for animals farmed in intensive industrial conditions. Yet, during the past few years, there has been an evolving momentum for change in matters of welfare for animals in EU agriculture, from political intent towards a more direct regard for animal welfare, which has coincided with an increasing societal and cultural movement for improved welfare standards.

Section II tracks the momentum towards a Treaty basis for the integration of animal welfare in EU agriculture, with a brief *exposé* of animal welfare minimum legislative standards and their interpretation. These legislative norms were adopted still without a specific Treaty Title from which animal welfare legislation could derive.

A competence "of sorts" in animal welfare then became inserted into the Treaties by means of art. 13 of the Treaty on the Functioning of the EU (TFEU). Art. 13 TFEU incorporates a cross-cutting instruction to the EU and its Member States to pay full regard to the welfare requirements of animals in the formulation and implementation of, *inter alia*, EU agriculture policy, while respecting the customs of Member States relating in particular to religious rites, cultural traditions and regional heritage. Section III considers the legal nature of art. 13 TFEU and its role in driving the contemporary development of animal welfare policy in EU agriculture. It looks at the limitations which exist in the EU Common Agricultural Policy (CAP) and, on closer examination, at the tensions inherent in the support and promotion of quality produce in EU agriculture.

In section IV there will be an analysis of landmark Grand Chamber CJEU rulings which, read in the light of art.13 TFEU, have heeded scientific progress and consumer regard for the welfare of animals sourced for food, acknowledged evolving societal and cultural concern to improve the welfare of animals in agriculture, and consolidated the constitutional standing of art. 13 TFEU. The scope exists to exploit the potential of art.13 read as a whole.

[1] K Sowery, 'Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals under Union Law' (2018) CMLRev 55.

II. Evolution of Animal Welfare Law and policy in EU agriculture

In the absence of a conferred competence in animal welfare,[2] the Agriculture title has provided the legal basis for harmonised measures which reconcile the welfare of certain farm animals with the common organisation of the EU market for agricultural produce,[3] using in particular the concept of minimum harmonisation.[4] For instance, EU legislation derived from arts 43 and 100 of the European Economic Community Treaty (EEC) required farm animals to be stunned by approved methods prior to slaughter, providing that cruelty and unnecessary suffering must be avoided, while not affecting national provisions related to special methods of slaughter which are required for particular religious rites.[5] A further Directive, adopted on the basis of arts 43 and 100 EEC, laid down rules on the protection of animals during international transport.[6] In a Council Decision,[7] the EU approved the Council of Europe Convention on the Protection of Animals kept for Farming Purposes.[8] The joint legal basis for that Decision was that of agriculture in art. 43 EEC, together with art. 100 EEC with the objective of approximating the laws of the Member States to ensure the establishment and functioning of the common market. These developments in the field of animal welfare can be seen to mirror the early extension of Treaty competence in environmental concerns whereby environmental standards were adopted to ensure a competitive level playing field in the EU internal market, in the absence of an environment legal basis in the EEC Treaty.

Legislative minimum welfare standards for certain species of farm animal, adopted on the legal basis for EU agriculture policy, included those for the protection of laying

[2] The limits of Union competence are governed by the principle of conferral. See art. 5(1) of the Treaty on European Union (TEU).

[3] Art. 43 of the European Economic Community Treaty (EEC); Title III art. 43 TFEU: To establish the common organisation of agricultural markets in accordance with art. 40(1) and attain the objectives set out in art. 39 TFEU; case C-68/86 *United Kingdom v Council* ECLI:EU:C:1988:85; JA McMahon, *EU Agricultural Law and Policy* (Edward Elgar 2019); MN Cardwell, *The European Model of Agriculture* (Oxford University Press 2004).

[4] M Dougan, 'Minimum Harmonisation and the Internal Market' (2000) CMLRev 853, 855.

[5] Directive 74/577/EEC of the Council of 18 November 1974 on stunning of animals before slaughter was replaced by Directive 93/119/EEC of the Council of 22 December 1993 on the protection of animals at the time of slaughter or killing, adopted on the basis of art. 43 EC.

[6] Directive 77/489/EEC of the Council of 18 July 1977 on the protection of animals during international transport; Directive 81/389/EEC of the Council of 12 May 1981 established measures for the implementation of Directive 77/489/EEC; Directive 91/628/EEC of the Council of 19 November 1991 on the protection of animals during transport repealed Directives 77/489/EEC and 81/389/EEC; Directive 95/29/EC of the Council of 29 June 1995 amended Directive 91/628/EEC concerning the protection of animals during transport.

[7] Decision 78/923/EEC of the Council of 19 June 1978 concerning the conclusion of the European Convention for the protection of animals kept for farming purposes.

[8] European Treaty Series n. 87 of the Council of 10 March 1976 European Convention for the Protection of Animals kept for Farming Purposes.

hens kept in battery (barren) cages.[9] Provision for the welfare of calves (bovine animals up to six months old) specified ventilation and space requirements for calves kept in groups, and width and height requirements for calves housed in individual boxes or tethered in stalls, with varying dates for compliance between 1994 to 2007.[10] The EU phased out the keeping of calves after the age of eight weeks in individual boxes[11] and by further amendment incorporated enhanced welfare requirements such as stipulated inspection frequency requirements with provision for sick calves, space within which to express normal behaviour, prohibition of tethering, dietary nutrition with iron to ensure minimum blood haemoglobin level, hot weather water supply and the provision of colostrum after birth.[12] The protection of pigs followed concerning space and the phased prohibition of tethering,[13] with tethering prohibited from 1 January 2006.[14] Minimum requirements for floor surfaces applied to the width of openings in slatted flooring and slat widths, for example.[15] Provision ensued for sows (having farrowed) and gilts (before first farrowing) to be kept in groups starting from four weeks after service to one week before farrowing (giving birth to a litter of piglets), with a derogation for holdings with less than ten sows provided they have space to turn around freely.[16] Knowledge of pigs became a requirement for handling staff.[17] Amended rules[18] incorporated enhanced welfare standards in respect of, *inter alia*, noise levels, lighting, access to a sufficient quantity of material to enable proper investigation and manipulation activities, and strengthened requirements for the castration of pigs over the age of seven days to be performed under anaesthetic with additional prolonged analgesia, without tearing tissues and by a veterinarian.

[9] Directive 88/166/EEC of 7 March 1988 complying with the judgment of the Court of Justice in Case 131/86 (annulment of Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages).

[10] Directive 91/629/EEC of the Council of 19 November 1991 laying down minimum standards for the protection of calves, arts 2(1), 3(1) and (4).

[11] Directive 97/2/EC of the Council of 20 January 1997 amending Directive 91/629/EEC laying down minimum standards for the protection of calves.

[12] Decision 97/182/EC of the Commission of 24 February 1997 amending the Annex to Directive 91/629/EEC laying down minimum standards for the protection of calves.

[13] Directive 91/630/EEC of the Council of 19 November 1991 laying down minimum standards for the protection of pigs, art. 3(1) and (2).

[14] Directive 2001/88/EC of the Council of 23 October 2001 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs, art. 3(1) and (3).

[15] *Ibid*. art. 3(2).

[16] *Ibid*. art. 3(4).

[17] *Ibid*. art. 5.

[18] Directive 2001/93/EC of the Commission of 9 November 2001 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs.

The Commission continued to make it clear in relation to the protection of animals that "a uniform basic approach in all Member States" to "rearing conditions" was "imperative" for "the effective functioning of the market organisation".[19] There was, nevertheless, a momentum for change as a result of scientific knowledge, societal interest and political persuasion.[20] With effect from 1993, Declaration n. 24 annexed to the Treaty on European Union signed at Maastricht on 7 February 1992[21] stated: "The Conference calls upon the European Parliament, the Council and the Commission, as well as the Member States, when drafting and implementing Community legislation on the common agricultural policy, transport, the internal market and research, to pay full regard to the welfare requirements of animals". This non-legally binding Declaration was a statement of political intent. In a motion for a resolution, the European Parliament called on the Community "to make provision after Union for further amendment to the Treaties to enable animals to be treated as sentient beings".[22]

The Treaty of Amsterdam, with effect from 1 May 1999, annexed a Protocol on Protection and Welfare of Animals[23] to the European Community Treaty (EC):

> "THE HIGH CONTRACTING PARTIES,
> DESIRING to ensure improved protection and respect for the welfare of animals as sentient beings,
> HAVE AGREED UPON the following provision which shall be annexed to the Treaty establishing the European Community,
> In formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage".

Recognising that the Community did not intend to extend its competence, the UK proposed in the Amsterdam negotiations a Protocol placing a formal legal obligation on the institutions to give full regard to consideration of animal welfare in the exercise of their powers on agriculture, transport, research and the single market.[24] The Presidency

[19] Communication COM(93) 384 final from the Commission to the Council and the European Parliament of 22 July 1993 on the protection of animals, 5.

[20] See J McEldowney, W Grant and G Medley, *The Regulation of Animal Health and Welfare: Science, Law and Policy* (Routledge 2013).

[21] Treaty of Maastricht on European Union [1992].

[22] Resolution of the European Parliament on the Welfare and Status of Animals in the Community [A3-0003/94] 5.

[23] Protocol n. 33 on protection and welfare of animals annexed to the Treaty establishing the European Community [1997].

[24] Conference of the Representatives of the Governments of the Member States 3887/96 (ANNEX) Brussels of 25 July 1996.

then proposed a draft Animal Welfare Protocol,[25] which led to the formal adoption of the Protocol on Animal Welfare. The Amsterdam Protocol, an integral part of the Treaties,[26] imposed an obligation on the EU institutions and on Member States to pay full regard to the welfare requirements of animals when formulating and implementing certain EU policies, inclusive of agriculture. Animals received recognition for the first time as sentient beings deserving of respect and improved protection, albeit in the recital to, and not in the main body of, the Protocol. Such attribution was symbolically a step forward from their classification as products of livestock, or agricultural goods, in EU policy and law.[27] A price to pay for this legal formula would appear to be a "counter" requirement to respect the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.[28]

II.1. Minimum animal welfare standards

Resulting minimum EU standards and their interpretation have negated the substantiation of enhanced animal welfare in EU agriculture. A generic horizontal farm animal welfare Directive[29] was followed by a Directive which updated minimum standards for laying hens kept for the production of eggs not intended for hatching in "establishments" housing at least 350 hens.[30] After a phasing out period, this Directive finally prohibited the keeping of laying hens in barren, i.e. non-enriched unfurnished, cage systems from 1 January 2012.[31] A further Directive newly introduced minimum standards of protection for

[25] Conference of the Representatives of the Governments of the Member States 3876/97 (ANNEX) Brussels of 16 April 1997.

[26] Art. 51 TEU.

[27] Art. 32(1)(2) and (3), Annex I EC. now art. 38(1)(2) and (3), Annex I TFEU.

[28] D Ryland and A Nurse, 'Mainstreaming after Lisbon: Advancing Animal Welfare in the EU Internal Market' (2013) European Environmental Law Review 101, 102; G Van Calster and K Deketelaere, 'Amsterdam, the Intergovernmental Conference and Greening the EU Treaty' (1998) European Environmental Law Review 12, 18.

[29] Directive 98/58/EC of the Council of 20 July 1998 concerning the protection of animals kept for farming purposes.

[30] Directive 1999/74/EC of the Council of 19 July 1999 laying down minimum standards for the protection of laying hens, art. 1(1) and (2).

[31] *Ibid*. ch. II art. 5(1) and (2).

the welfare of chickens produced for meat,[32] known as broilers, housed in intensive farming "systems".[33] Two separate Directives then consolidated the minimum legislative welfare provision for rearing calves[34] and for rearing and finishing pigs,[35] respectively. Triggered by differences in transposition by Member States and experience gained under Directive 91/628/EEC on the transport of animals, further EU rules became established in a Regulation.[36] Welfare concerns and discrepancies between Member States in implementing the former Directive on the protection of animals at the time of killing, also led to the adoption of the current Regulation.[37]

EU animal welfare standards are the outcome of a process in EU agricultural policy in which the primordial legislative objectives are agricultural revenue, rational development of production and the smooth running of the organisation of the market in food producing animals.[38] Consequently, practices endure which impede animals' natural behaviour and result in poor welfare. Concern surrounds the welfare of fast-growing strains of chickens prone to lameness and metabolic problems[39] and facing feed restrictions, for example.[40] The calves Directive recites that calves should benefit from an environment corresponding to their needs as a herd-living species and for this reason they should be

[32] Directive 2007/43/EC of the Council of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production.

[33] *Ibid*. recitals (7) and (8). It does not apply to holdings with fewer than 500 chickens, those only breeding, hatcheries, extensive indoor and free-range chickens and organically reared chickens, *ibid*. art. 2.

[34] Directive 2008/119/EC of the Council of 18 December 2008 laying down minimum standards for the protection of calves (repealing Directive 91/629/EEC as amended), art. 1.

[35] Directive 2008/120/EC of the Council of 18 December 2008 laying down minimum standards for the protection of pigs (repealing Directive 91/630/EEC as amended), arts 1 and 2.

[36] Regulation (EC) 1/2005 of the Council of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) n. 1255/97.

[37] Regulation (EC) 1099/2009 of the Council of 24 September 2009 on the protection of animals at the time of killing.

[38] Recitals (5), (6) and (7) of Directive 2008/120/EC cit.; recitals (4), (5) and (6) Directive 2008/119/EC cit.

[39] Commission Staff Working Paper Impact Assessment Accompanying the document Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015, para. 97; DM Broom, Animal Welfare in the European Union, Study commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs upon request of the Committee on Petitions, European Parliament, PE 583.114 [2017] para. 49.

[40] Report of the EU Scientific Committee on Animal Health and Animal Welfare, 'The Welfare of Chickens Kept for Meat Production' (21 March 2000). EFSA Panel on Animal Health and Welfare, 'Scientific Opinion on the Influence of Genetic Parameters on the Welfare and Resistance to Stress of Commercial Broilers' (2010) EFSA Journal. Report (2016)182 final from the Commission to the European Parliament and the Council of 7 April 2016 on the impact of genetic selection on the welfare of chickens kept for meat production.

reared in groups,[41] yet calves lawfully may be confined in individual boxes up to the age of eight weeks. There are no species-specific competence requirements for animal handlers to keep calves. Pigs raise a number of key welfare issues which continue in the EU, inclusive of confinement.[42] Pigs are social animals and yet individual boxes may be used for the first four weeks of pregnancy[43] in derogation from the general prohibition of use and the requirement otherwise to house sows and gilts in groups.[44] Castration and/or tail-docking of piglets of seven days and under may still be practised without anaesthesia or prolonged analgesia (pain relief) and in the absence of a veterinarian.[45] Tail-biting is prevalent in the EU population,[46] where pigs are raised on floors without straw bedding with a higher proportion of slatted flooring; rearing pigs without enrichment may still be accommodated in EU law.[47] Furthermore, there are no EU minimum animal welfare standards specific to cattle reared for dairy production, for example, although recommendations have been made.[48] Genetic selection for high milk yield and not keeping cows on pasture are major factors causing poor welfare and health in dairy cows.[49] Additionally, at the time of slaughter, EU law allows Member States to derogate from a requirement to stun animals in agriculture prior to killing for reason of religious rites.[50] Live animal transportation journeys are long, and suffering is compounded for pregnant animals and unweaned calves transported for slaughter.[51]

[41] Recital 7, Annex I (11) of Directive 2008/119/EC cit.; EFSA Panel on Animal Health and Welfare, 'Scientific Opinion on the Welfare of Cattle Kept for Beef Production and the Welfare in Intensive Calf Farming Systems' (2012) EFSA Journal Abstract.

[42] Report of the Scientific Veterinary Committee to the European Commission, The Welfare of Intensively Kept Pigs, Doc. XXIV/B3/ScVC/0005 [1997].

[43] Art. 3(4) para. 1 and art. 9 para. 2 of Directive 2008/120/EC cit.

[44] *Ibid*. art. 3(4) para. 2 and art. 9 para. 2.

[45] *Ibid*. Annex 1 ch. 1(8); EFSA Panel on Animal Health and Welfare, 'Scientific Opinion on Welfare Aspects of the Castration of Piglets' (2004) EFSA Journal 1; EFSA Panel on Animal Health and Welfare, 'Scientific Opinion on the Use of Animal-Based Measures to Assess Welfare in Pigs' (2012) EFSA Journal.

[46] EFSA, 'The Risks Associated with Tail Biting in Pigs and Possible Means to Reduce the Need for Tail Docking Considering Different Housing and Husbandry Systems' (2007) EFSA Journal; EFSA, 'Scientific Opinion on A Multifactorial Approach on the Use of Animal and Non-Animal-Based Measures to Assess the Welfare of Pigs' (2014) EFSA Journal.

[47] "or, if no litter is provided" Annex I ch. I (5) of Directive 2008/120/EC cit.

[48] EFSA, 'Scientific Report on the Effects of Farming Systems on Dairy Cow Welfare and Disease' (2009) EFSA Journal 21; DM Broom, Animal Welfare in the European Union, Study commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs upon request of the Committee on Petitions, European Parliament, PE 583.114 cit. para. 54, citing the Petition to the European Parliament on the Welfare of Dairy Cows (PE578.635v01-00 29 February 2016).

[49] EFSA, 'Scientific Report on the Effects of Farming Systems on Dairy Cow Welfare and Disease' cit.

[50] Art. 4(4) of Regulation 1099/2009 cit.

[51] Eurogroup for Animals, 'ANIT Committee Vote: A Missed Opportunity Failing Animals and Citizens' (3 December 2021) www.eurogroupforanimals.org; Eurogroup for Animals, 'No Animal Left Behind: Why no Animal Should be Transported Alive' (10 May 2021) www.eurogroupforanimals.org.

II.2. CJEU INTERPRETATION

The interpretative ruling in the case of *Hedley Lomas* established the impossibility of recourse to the Treaty derogation to the free movement of goods in order to protect the health and life of animals in art. 36 TFEU,[52] where a Directive harmonises the measures which are necessary to pursue that article's objectives.[53] Additionally, the CJEU affirmed that Member States could not take it upon themselves unilaterally to act in the interests of protecting animals' welfare in order to preclude any breach of a harmonised EU norm in the Member State of export.[54]

In the calves Directive, the subject of *Compassion in World Farming* (*CIWF*),[55] there is the higher standards provision[56] and, according to the EU concept of minimum harmonisation, Member States on notifying the Commission may maintain or apply their stricter animal welfare requirements within their territories, but not extra-territorially. The extent of Member States' "freedom" to protect the welfare of species of farm animals is therefore minimal.[57] In *CIWF* the UK prohibited use of the "veal crate", practising higher than EU standards, but could not restrict calf exports to Spain which practised lower standards compliant with EU rules. In its reasoning, the CJEU considered the wording and context of the Directive,[58] attached weight to the objectives of the Directive, namely the rational development of production and the smooth running of organisation of market in food producing animals with no distortions in competition,[59] and noted that the legislature had sought to reconcile the interests of animal protection with the organisation of the common market in calves and calf products.[60] It followed, therefore, that the Directive laid down exhaustively common minimum standards for the protection of calves confined for the purposes of rearing and fattening.[61] A ban on exports imposed on account of conditions prevailing in other Member States, the Court continued, would fall outside the derogation allowed by the higher standards provision and would "strike at the harmonisation achieved by the Directive".[62] In those circumstances, the fact that Member States are authorised to adopt within their own territory protective measures stricter

[52] Art. 36 TFEU.

[53] Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)* ECLI:EU:C:1996:205 para. 21.

[54] *Ibid*. para. 20.

[55] Case C-1/1996 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd. (CIWF)* ECLI:EU:C:1998:113 paras 56-60.

[56] Art. 11 of Directive 2008/119/EC cit.

[57] D Chalmers, G Davies and G Monti, *European Union Law* (Cambridge University Press 2014 third edition) 648.

[58] *Ibid*. paras 50-51.

[59] Recitals (5) and (6) of Directive 2008/119/EC cit.; *CIWF* cit. para. 52.

[60] *CIWF* cit. para. 53.

[61] *Ibid*. paras 54, 56 and 63.

[62] *Ibid*. paras 54, 56, 62 and 63.

than those laid down in a directive does not mean that the Directive has not exhaustively regulated the powers of the Member States in the area of the protection of veal calves. Such harmonisation, furthermore, negated the possibility of relying on the Treaty derogation to the free movement of goods in order to protect the life and health of animals.[63]

The CJEU also ruled out any reliance on art. 36 TFEU for the protection of public "order"[64] or public morality for two reasons. First, public policy and public morality were not being invoked as a separate justification, but as an aspect of the justification relating to the protection of animal health, the subject of the harmonising Directive. The Court further ruled that a Member State could not rely on the views or the behaviour of a section of national public opinion in order unilaterally to challenge a harmonising measure adopted by the EU institutions.[65]

The Court also reasoned on the basis of the Regulation on the common organisation of the market in beef and veal, which expressly limited its scope for action in accordance with the Treaties' fundamental internal market objectives in prohibiting measures restrictive of intra-Community trade.[66] Besides, at the very outset of its ruling, the CJEU asserted that even in the event that a matter had not been exhaustively regulated, rules which interfered with the proper functioning of a common organisation of the market would be deemed incompatible with it.[67]

A broader scope for animal welfare did not emanate from the CJEU's ruling in the case of *Jippes*.[68] Paramount to the Court's reasoning in this case was the fact that ensuring animal welfare was not one of the stated Treaty objectives defined in art. 2 EC. Nor was the protection of animals an explicit objective of the Common Agricultural Policy in the Treaties, as confirmed in the Decision acceding to the Council of Europe Convention for farm animal welfare.[69] The CJEU asserted that it was apparent from the very wording of the Amsterdam Protocol on the protection of animals that it did not lay down any well-defined general principle of EU law which bound the institutions. Although the Protocol provided that "full regard" must be had to the welfare requirements of animals in the formulation and implementation of EU policy, it limited that application to four specific

[63] *Ibid*. paras 63 and 64.

[64] Described as "the framing concept that the Court of Justice chooses (perhaps counter-intuitively for moral and religious questions)" in D Chalmers, G Davies and G Monti, *European Union Law* cit. 935.

[65] *CIWF* cit. para. 67.]

[66] Regulation (EEC) 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal, arts 1 and 22(1); *CIWF* cit. paras 13 and 14.

[67] *CIWF* cit. para. 41 citing case C-218/85 *Cerafel v Le Campion* ECLI:EU:C:1986:440 para. 13 and case C-27/96 *Danisco Sugar v Allmänna Ombudet* ECLI:EU:C:1997:563 para. 24; M Dougan, 'Minimum Harmonisation and the Internal Market' cit. 875-6, 884.

[68] Case C-189/07 *Jippes and Others* ECLI:EU:C:2001:420. The first case to use the accelerated (now expedited) procedure, published without the Advocate General's View, D Ryland, 'The Advocate General; EU Adversarial Procedure; Accession to the ECHR' (2016) EHRLR 169, 176.

[69] Fourth recital of Decision 78/923/EEC cit.; *Jippes and Others* cit. para. 72.

spheres of EU activity (notably animal welfare in agriculture was one such sphere) and provided that the legislative or administrative provisions and customs of the Member States must be respected as regards in particular religious rites, cultural traditions and regional heritage.[70] Neither could such a general principle be inferred from the non-binding Council of Europe Farming Convention, the Treaty derogation to the free movement of goods referring to the life of animals, or from EU animal welfare legislation.[71] The CJEU upheld the protection of animals and their health as a requirement of public interest;[72] and as long as measures taken by the EU legislature in the public interest were not deemed to be manifestly inappropriate, the Court would be reluctant to intervene in the exercise of the EU institutions' wide discretion in matters of agriculture policy.[73]

III. Art. 13 TFEU: mainstreaming animal welfare in EU agriculture policy

The Treaty of Lisbon, with effect from 1 December 2009,[74] incorporated a horizontal mainstreaming clause in art. 13 TFEU to integrate animal welfare into, *inter alia*, EU policy in agriculture, which provides: "In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage".[75]

Accordingly, full regard must be paid to the welfare needs of animals as sentient beings in EU agricultural policy, and legislation adopted thereunder, and in Member States' implementation of the same, while respecting the customs particular to Member States detailed in the second limb of this provision. The expression of animals as sentient beings within the "provisions having general application" in Title II of Part One "Principles" of the TFEU contrasts with its former siting in the recital to the Protocol, with potential significance for the future protection of the welfare of sentient animals in EU agriculture. Donald Broom informs of a sentient being's ability "to evaluate the actions of others in relation to itself and third parties, to remember some of its own actions and their consequences, to assess risk, to have some feelings and to have some degree of awareness".[76]

[70] *Jippes and Others* cit. para. 73.

[71] *Ibid*. paras 74-76.

[72] *Ibid*. paras 77 and 78.

[73] E Spaventa, '*H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren, Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren* v' (2002) CMLRev 1159.

[74] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007].

[75] Consolidated Version of the Treaty on the Functioning of the European Union [2008].

[76] DM Broom, 'The Evolution of Morality' (2006) Applied Animal Behaviour Science 20, 26.

III.1. Legal effect

The TFEU, pursuant to the Lisbon Treaty, obligates the mainstreaming of the "non-market" objectives of social protection (art. 9 TFEU), non-discrimination generally (art. 10 TFEU), and animal welfare (art. 13 TFEU) into certain other EU policies.[77] Consequently, such mainstreaming clauses have spurned academic debate as to their legal nature and the extent to which they direct and achieve obligations of result.[78] Bruno De Witte analyses the "new prominence given, in European constitutional and political discourse, to fundamental rights and non-market values",[79] and contemplates whether the institutions will use their "competence to protect" these rights and values.[80] He argues that the EU has competence to pursue a number of non-market aims through internal market legislation, that there is a "duty" to do so in many cases, although that duty is "not judicially enforceable".[81] He distinguishes, for example, "the mildly worded mainstreaming clause for culture"[82] from the "firm duty" to protect and promote fundamental rights, imposed by art. 51(1) of the EU Charter of Fundamental Rights,[83] and explains that some non-market mainstreaming aims have a legal basis in the Treaties while some do not. The absence of a conferred competence, which would be the case with animal welfare, does not act as a barrier to the pursuit of non-market aims using other policies' derivative Treaty bases.[84] This *Article* draws from De Witte's interpretative understanding of the "legitimacy" of the EU institutions to pursue non-market aims by means of internal market legislation, in application in this instance to the use of the EU legal basis for agriculture in pursuit of the non-market objective of animal welfare.[85] Robert Garner reasons that animal sentience entitles non-human animals to a right not to suffer guaranteed by the State in a non-ideal world where they are used for the production of food.[86] The competence, and not a legally enforceable right, exists to integrate the full welfare needs of animals into the broader range of EU policies specified in art. 13 TFEU, inclusive of agriculture policy.

[77] B De Witte, 'A Competence to Protect: The Pursuit of Non-Market Aims through Internal Market Legislation' in P Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 25-26, 32.

[78] *Ibid*.; see also, for example, D Schiek and others, 'EU Social and Labour Rights and EU Internal Market Law' (2015) Study for the European Parliament's Committee on Employment Affairs; D Ryland and A Nurse, 'Mainstreaming after Lisbon' cit.

[79] B De Witte, 'A Competence to Protect' cit. 38.

[80] *Ibid*. 44.

[81] *Ibid*. 27.

[82] Art. 167(4) TFEU, B De Witte, 'A Competence to Protect' cit. 31-32.

[83] B De Witte, 'A Competence to Protect' cit. 32.

[84] *Ibid*. 32-3.

[85] *Ibid*. 27, 31.

[86] R Garner, *A Theory of Justice for Animals: Animal Rights in a Nonideal World* (Oxford University Press 2013).

Nevertheless, the mainstreaming of the welfare requirements of sentient animals in the EU Treaties' general provisions would appear to signify the advancement of animal welfare as a priority issue in the EU alongside other key integrative objectives such as, for example, environmental protection and promoting sustainable development.[87] EU policy in the sphere of the environment has the reinforcement of a legislative title with the conferred competence to legislate to improve and protect the environment,[88] and EU environmental action programmes, for example, are adopted in legally binding decisions derived from a formally conferred Treaty basis.[89] In the absence of an express competence in animal welfare, the EU has instigated a number of soft law initiatives and policy programmes, "instruments which have not been attributed legally binding force as such".[90] Two EU animal welfare action programmes have been adopted,[91] for example. Although EU action programmes adopted for the protection of the welfare of animals are bereft of the formal level of obligation which underpins EU environmental action programmes, the European Commission (Commission) has been held to account to the European Court of Auditors (ECA) in matters specific to animal welfare in agriculture, which will be discussed in the sub-section below. The second EU Animal Welfare Strategy (2012-2015) is the vehicle from which a number of educative reports and procedural soft law tools have emanated. These include the establishment of EU Animal Welfare Reference Centres[92] and the EU Animal Welfare Platform, which are relevant in contributing to EU policy in animal welfare in agriculture. The EU Platform on Animal Welfare[93] has an extended mandate[94] to assist the Commission and help to hold regular dialogue on EU matters directly related to animal welfare, such as enforcement of the legislation, exchanges of scientific knowledge, innovations and good animal welfare practices, – the Chair of the Platform having the authority to create thematic

[87] Art. 11 TFEU; B Sjåfjell, 'The Environmental Integration Principle: A Necessary Step Towards Policy Coherence for Sustainability' in F Ippolito, ME Bartolino and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2019) ch. 6.

[88] Art. 192 Title XX TFEU cit.

[89] *Ibid*. art. 192(3).

[90] L Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 111-113.

[91] Communication COM(2006) 13 final from the Commission to the European Parliament and the Council of 23 January 2006 on a Community Action Plan on the Protection and Welfare of Animals 2006-2010; Communication COM(2012) 06 final from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 15 February 2012 on the European Union Strategy for the Protection and Welfare of Animals 2012-2015.

[92] Implementing Regulation (EU) 2018/329 of the Commission of 5 March 2018 designating a European Union Reference Centre for Animal Welfare; Implementing Regulation (EU) 2019/1685 of the Commission of 4 October 2019 designating a European Union Reference Centre for Animal Welfare for poultry and other small farmed animals.

[93] Decision 2017/C 31/12 of the Commission of 24 of 24 January 2017 establishing the Commission Expert Group 'Platform on Animal Welfare'.

[94] Decision C/2021/3148 of the Commission of 7 May 2021 amending Decision 2017/C 31/12 establishing the Commission Expert Group 'Platform on Animal Welfare.

sub-groups towards these ends. Six sub-groups focus on: animal transport; the welfare of pigs, poultry, calves and dairy cows, respectively; animal welfare at the time of killing; and labelling.[95] Correspondingly, animal welfare currently features in EU policy for a sustainable agriculture, and animal welfare labelling is a key element of the EU Farm to Fork Strategy for a fair healthy and environmentally-friendly food system.[96] That Strategy operates on the basis that better animal welfare improves animal health and food quality,[97] and is a part of the European Green Deal for sustainable growth.[98]

A "fitness check" accompanying the Farm to Fork Strategy is being undertaken to assess the relevance of existing EU species-specific welfare Directives, the Directive applicable to farm animals generally, and the EU Regulations during transport and at the time of killing.[99] In this process, the Commission has pledged to revise the animal welfare legislation to align it with the latest scientific evidence. Art. 13 TFEU has not been applied in order to revise the minimum legislative standards in animal welfare adopted over 13 years ago. Art. 13 TFEU is not driving these EU policy processes directly or expressly.[100] Consumer interest is strong in the welfare standards in which food-producing animals are raised, and a fundamental factor to countenance for the EU and its Member States in a legislative capacity is that, increasingly, a significant number of EU citizens would prefer a higher regard for animal welfare to be practised generally. The findings of a survey conducted for the Commission[101] established that more than nine in ten EU citizens (94 per cent) believe it is important to protect the welfare of farmed animals, with 82 per cent of Europeans surveyed believing that the welfare of farmed animals should be better protected than it is now. EU citizens are driving EU policy in their ethical concerns to improve animal welfare, evident in the European Citizen's Initiative (ECI) "Ban the Cage Age".[102] This ECI,[103] calls for the end of caged

[95] The minutes of the twice yearly meetings of each sub-group are available at: food.ec.europa.eu.

[96] Communication COM(2020) 381 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 May 2020 'A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system'.

[97] *Ibid*. 8.

[98] Communication COM(2019) 640 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 11 December 2019, 'The European Green Deal'.

[99] European Commission, 'Fitness Check of the EU Legislation on Animal Welfare of Farmed Animals' (May 2020) ec.europa.eu.

[100] A poignant point discussed generally by B De Witte, 'Mainstreaming Clauses in the EU's Decision-Making Process: Legal Duty or Afterthought?' in Helenic Foundation for European and Foreign Policy (ELIAMEP) Online Workshop, *Horizontal Clauses in EU Law: Normative Implications, Implementation and Potential for Policy Mainstreaming* (8 October 2021).

[101] European Commission, 'Special Eurobarometer 442: Attitudes of Europeans towards Animal Welfare' (2016) op.europa.eu.

[102] Communication C(2012) 4747 final from the Commission of 30 June 2021 on the European Citizens' Initiative (ECI) "End the Cage Age".

[103] European Citizens' Initiative, *End the Cage Age* europa.eu.

farming in respect of those species for which EU minimum standards have been adopted, and more broadly in application to additional species of farm animals for which specific welfare standards do not exist. It invites the Commission to propose legislation prohibiting the use of: cages for laying hens, rabbits, pullets, broiler breeders, layer breeders, quail, ducks and geese; farrowing crates for sows; sow stalls, where not already prohibited; and individual calf pens, also where not prohibited.[104] The emphasis of both EU public opinion and EU public policy is focusing more on food quality and animal welfare.[105]

III.2. Limitations and tensions

It is well-documented in the context of the internal market and non-market objectives, that there are "unresolved tensions" in the Treaties' "substantive provisions" between the economic and the social.[106] In a similar vein, limitations to the mainstreaming of animal welfare: *a)* manifest in the EU Common Agricultural Policy (CAP); *b)* remain in the economic/social/ethical balance of pre-policy impact assessments and the quest for a sustainable agriculture; and *c)* result from irreconciled tensions in EU agriculture policy quality.[107]

First, there is no specific mention of animal welfare constituting an objective of the EU CAP in the Treaties. The CAP aims explicitly: *a)* to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour; *b)* thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; *c)* to stabilise markets; *d)* to assure the availability of supplies; and *e)* to ensure that supplies reach consumers at reasonable prices.[108] Member States agree that in working out the CAP and the special methods for its application account must be taken of the particular nature of agricultural policy. This results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions, the need to effect the appropriate adjustments by degrees, and the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.[109] To recall, harmonised EU minimum standards of welfare for farm animals derive from the Agriculture Title,

[104] Communication C(2012) 4747 final cit.

[105] European Commission, 'Special Eurobarometer 473: Europeans, Agriculture and the CAP' (February 2018) europa.eu.

[106] P Syrpis, 'Theorising the Relationship Between the Judiciary and the Legislature in the EU Internal Market' in P Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 13,14.

[107] D Ryland, *Animal Welfare Governance in EU Agriculture and the Agri-Food Chain: Hybrid Standards, Trade, and Values* (Edward Elgar, forthcoming).

[108] Art. 39(1) (a)-(d) TFEU.

[109] Art. 39(2) (a)-(c) TFEU.

which has the objective "to establish the common organisation of agricultural markets".[110] The CAP for the period 2014-20 offered the first opportunity to assess the implementation of art. 13 TFEU in the CAP's support and promotion mechanisms.[111] Animal welfare was not expressed to be an objective of the CAP in the legislative proposals or the adopted instruments for the period 2014-2020. There was no additional budgetary assistance for compulsory good animal welfare practices in the CAP support mechanisms of either Pillar I or II. The CAP (2014-2020) was a "missed opportunity" for animal welfare.[112] Prior to the adoption of the CAP instruments for 2014-20, the Commission set out an agenda to optimise the current mechanisms of the CAP, as part of a socially oriented agricultural approach to animal welfare.[113] In examining whether the Second EU Animal Welfare Strategy had been completed and had delivered its results, the ECA observed that the Commission had not reviewed the legislative framework,[114] and that the Commission reports, undertaken as part of its stated objectives, had identified some outstanding animal welfare issues related to the areas covered by the Strategy. On the farm these related to the tail-docking of pigs,[115] diseases affecting the welfare of dairy cattle,[116] and assessment of technical requirements such as ventilation for chickens kept for meat production.[117] During transport, concerns continued over compliance with the rules on long distance transport of live animals, and over the transport of unfit animals[118] prohibited by the legislation. At slaughter, different practices existed in respect of the derogation from the requirement to stun animals before slaughter.[119] Consequently, the ECA strongly recommended that the Commission conduct an evaluation of its 2012-2015

[110] Art. 3 TFEU, in accordance with art. 40(1), and to attain the objectives set out in art. 39 TFEU.

[111] D Ryland, 'Animal Welfare in the Reformed Common Agricultural Policy: Wherefore art thou?' (2015) Environmental Law Review 22.

[112] Working Document SWD(2021) 76 final of the European Commission of 31 March 2021, 'Evaluation of the European Union Strategy for the Protection and Welfare of Animals 2012-2015', para. 5(3)(8).

[113] *Ibid*. 3, 11; Commission Staff Working Paper Impact Assessment SEC(2012) 55 Accompanying the Communication on the European Union Strategy for the Protection and Welfare of Animals 2012-2015 cit.

[114] European Court of Auditors, Special Report n. 31/2018: Animal Welfare in the EU: closing the gap between ambitious goals and practical implementation (2018) paras 22, 28.

[115] European Commission, Directorate-General Health and Food Safety, Overview Report on Study Visits on Rearing Pigs with Intact Tails, DG (SANTE) 2016-8987.

[116] European Commission Overview Report, 'Welfare of cattle on dairy farms' DG (SANTE) 2017-6241.

[117] Report COM(2018) 181 final from the Commission to the European Parliament and the Council of 13 April 2018 on the application of Directive 2007/43/EC and its influence on the welfare of chickens kept for meat production, as well as the development of welfare indicators; See also European Commission, Directorate-General for Health and Food Safety, *Study on the Application of the Broiler Directive DIR 2007/43/EC and Development of Welfare Indicators: Final Report* (Publications Office 2017) data.europa.eu.

[118] European Commission, Directorate-General for Health and Food Safety, Overview Report on Systems to Prevent the Transport of Unfit Animals in the EU, DG (SANTE) 2015-8721-MR.

[119] European Commission, Directorate-General for Health and Food Safety, Overview Report of FVO Audits to Evaluate the Official Controls of Animal Welfare at Slaughter, Carried Out in member States in 2013-2015, DG (SANTE) 2015-7213-MR; European Court of Auditors, Special Report, n. 31/2018 cit. para. 35.

Strategy to identify to what extent its objectives have been achieved and if its issued guidance is being applied, also that it reflect on how to address the conclusions of that evaluation (for example, through a new strategy or action plan and/or a review of animal welfare legislation) and to publish the results of its assessment.[120] The Commission concluded its evaluation of the second EU animal welfare Strategy saying: "There is a clear need to further optimise synergies with the CAP for the period 2021-27 and to make better use of the instruments offered by it to strengthen CAP beneficiaries' awareness on animal welfare requirements, to improve animal welfare standards in animal husbandry, and to mainstream them into the regulatory framework governing agricultural activities".[121] A key CAP objective in the reformed CAP for the period 2023-2027 is "to improve the response of Union agriculture to societal demands on food and health, including high-quality [...] food produced in a sustainable way, [...] as well as to improve animal welfare [...]".[122] Nonetheless, the ECA has expressed concern that "in the absence of clear, specific and quantified EU objectives uncertainty is created as to how the Commission will assess Member State's strategic plans, that achievement of EU objectives cannot be measured, weak incentives exist for performance, and targets could be missed with little impact on EU financing".[123]

Second, the inclusion of animal welfare within the current EU Farm to Fork Strategy could be seen as a response to the ECA's concerns and recommendations that the Commission evaluate and put in place concrete actions to see the animal welfare Strategy 2012-2015 reach fruition. In the process, regard for animal welfare and a label linking value-added animal welfare to the informed consumer have become the subject of studies and policy discussion in the context of the EU's wider agenda for a sustainable agriculture. Situated within the Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, the Commission proposes to *consider options* for animal welfare labelling to contribute to a sustainable consumption and to transmit the added-value of animal welfare through the food chain.[124] This Strategy advocates *a sustainable food labelling framework* to transmit value through the agri-food chain to empower consumers to make sustainable

[120] *Ibid*. Recommendations 1(a)(c).

[121] Working Document SWD(2021) 76 final cit. para 6.

[122] Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) n. 1305/2013 and (EU) n. 1307/2013, art. 6(1)(i).

[123] European Court of Auditors, 'Opinion n. 7/2018 (pursuant to art. 322(1)(a) TFEU) concerning Commission proposals for regulations relating to the Common Agricultural Policy for the post-2020 period (COM(2018) 392-394 final)', Overall Conclusion 8; see L Ferraris, 'The Role of the Principle of Environmental Integration (Article 11 TFEU) in Maximising the "Greening" of the Common Agricultural Policy' (2018) Environmental Law Review 410-423, 421-2.

[124] COM(2020) 381 final cit. 8.

food choices.[125] Consequently, should the designated label apply additionally and more broadly to other factors relevant to the sustainability of agriculture, the animal welfare labelling sub-group has emphasised in its conclusions that there should not be a watering down of animal welfare requirements nor their visibility.[126] Correspondingly, in response to the ECI, the Commission has undertaken a legal and political assessment of the initiative, and has set out the actions it intends to take, its reasons for doing so and an envisaged timeline.[127] Acting within the Farm to Fork Strategy towards more ethical and sustainable farming systems, the Commission purports to phase out and finally prohibit the use of cage systems for all of the species and categories to which the initiative relates, under conditions (including the length of the transition period) to be determined based on scientific reports and an impact assessment. The fact remains that the impact assessment for the legislative proposal will take account not only of the animal welfare benefits, but also the social and economic needs of the EU farming sector including small farmers, international trade, and the environment, – in the transition to cage-free farming,[128] and in assessing the feasibility of working towards the proposed date of 2027.[129]

Third, in the formulation of EU agriculture quality policy, regional traditions and heritage contribute to the survival of practices which conflict with good agricultural practice in animal welfare. One EU quality scheme regulates and promotes protected Products of Designated Origin (PDO) or Products of Geographical Indication (PGI).[130] This regulatory framework provides the basis for identifying the "value-adding characteristics or attributes" of high quality protected PDOs and/or PGIs[131] and for informing the consumer of the value-adding attributes as a result of the farming or processing methods used in the production of protected products.[132] It works on the premise that the quality and diversity of the Union's agricultural production is one of its important strengths, giving a competitive advantage to the Union's producers and making a major contribution to its living cultural and gastronomic heritage.[133] To qualify for protection, PDOs and PGIs should be registered in

[125] *Ibid*.

[126] DOC.2021.07202, *Conclusions of the animal welfare labelling subgroup of the EU Animal Welfare Platform* ec.europa.eu para. 48.

[127] Communication C(2012) 4747 final cit., acting in accordance with Regulation (EU) 2019/788 of the European Parliament and the Council of 17 April 2019 on the European citizens' initiative, art. 15(2).

[128] Communication C(2012) 4747 final cit. 8-10, 15.

[129] Cf R Geyer and S Lightfoot, 'The Strengths and Limits of New Forms of EU Governance: The Cases of Mainstreaming and Impact Assessment in EU Public Health and Sustainable Development Policy' (2010) Journal of European Integration 339.

[130] Regulation (EU) 1151/2012 of 21 November 2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs.

[131] *Ibid*. art. 1(1) and (2)(a) and (b); Implementing Regulation (EU) 668/2014 of the Commission of 13 June 2014 laying down rules for the application of Regulation 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs.

[132] Art. 1(1) and (2)(b) of Regulation 1151/2012 cit.

[133] *Ibid*. Recital (1).

the publicly accessible EU register[134] and display the relevant EU quality logo.[135] Yet, this quality regime works against the delivery of higher standards of animal welfare in EU agriculture, and two examples, one of a PDO, namely Parma ham, and the second, *fois gras*, an example of a PGI, substantiate the nature and extent of this contradiction. The surgical castration of pigs is scientifically proven to be painful;[136] this EU quality scheme for agricultural produce accommodates such intervention undertaken to avoid the development of boar taint, which is "unavoidable to meet the current quality standards" required in respect of "traditional productions requiring heavier pigs".[137] In Italy male pigs are castrated, some with analgesia: anaesthesia is not used.[138] "Prosciutto di Parma" is registered and protected as a PDO to Italy[139] and heavy pigs are reared for late slaughter to provide this product, which has a delicate, sweet flavour, according to the specificities.[140]

Furthermore, the process of producing *foie gras* through the forced-feeding of ducks and to a lesser degree geese to produce enlarged livers is an extreme animal welfare concern,[141] in respect of which there are no species-specific EU minimum welfare requirements. To the contrary, EU law promotes and protects the gastronomical qualities of such produce to the detriment of the ducks' welfare. "Canard à foie gras du Sud-Ouest (Chalosse, Gascogne, Gers, Landes, Périgord, Quercy)" is registered and protected as a PGI,[142] "reflecting the rural, gastronomic culture of South-West France".[143] Elements of the amended registration include the introduction of a minimum weight for force-fed animals in addition to their average weight, continuous force-feeding *i.e*. of ducks of different ages simultaneously, together with the qualitative aim to achieve a liver weighing 550 grams (minimum size 350 grams).[144]

[134] *Ibid*. arts 11 and 24.

[135] *Ibid*. arts 28 and 64; Regulation 668/2014 cit.

[136] EFSA Panel on Animal Health and Welfare, 'Scientific Opinion on Welfare Aspects of the Castration of Piglets' cit. 1; A Prunier and others, 'A Review of the Welfare Consequences of Surgical Castration in Piglets and the Evaluation of Non-Surgical Methods' (2006) Animal Welfare 277.

[137] *European Declaration on alternatives to surgical castration of pigs* (2010) food.ec.europa.eu.

[138] 97 per cent of male pigs were castrated without analgesia or anaesthesia: Federation of Veterinarians survey (2015) cited in G Backus and others, *Second Progress Report 2015–2017 on the European declaration on alternatives to surgical castration of pigs* (Brussels 2018) 6.

[139] European Commission, *eAmbrosia Database* ec.europa.eu PDO-IT-0067 Registered 21 June 1996.

[140] Implementing Regulation (EU) 1208/2013 of the Commission of 25 November 2013 approving minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indication (Prosciutto di Parma (PDO)), art. 2, Annex II paras 5(2) and 5(3).

[141] I Rochlitz and DM Broom, 'The Welfare of Ducks During Foie Gras Production' (2017) Animal Welfare 135.

[142] European Commission, *eAmbrosia Database* ec.europa.eu PGI-FR-0034 Registered 27 June 2000.

[143] Publication of an amendment application pursuant to art. 50(2)(a) of Regulation 1151/2012 cit. para. 3.

[144] *Ibid*. para. 4.

These protected products are communicated and connected to the consumer via marketable EU logos.[145] In detracting from the requirement to pay full regard to the welfare requirements of animals as sentient beings, such illustrative practices could perhaps continue to be accommodated in the *proviso* to art. 13 TFEU facilitative of the customs of the Member States relating in particular to cultural traditions and regional heritage – in the interests of European consumers to preserve their national gastronomy. Yet such interpretation runs contrary to EU citizens' expectations to improve animal welfare, and such tension fails to recognise, for example, the movement voluntarily to end interventions pursuant to the European Declaration on alternatives to surgical castration of pigs.[146] The United Kingdom, Ireland, Spain and Portugal have a tradition of producing entire males and other countries, for example The Netherlands and Belgium, have started to do so with France and Germany gradually increasing the number of entire male pigs.[147] Previously, a Ministerial Request on welfare grounds for a revision of the pig Directive[148] was signed by Denmark, Germany, the Netherlands and Sweden in 2015.[149] There is a momentum for welfare standards to improve beyond the EU minimum norms adopted years ago.

IV. CJEU reading

Art. 13 TFEU has influenced the CJEU's interpretation of the calves Directive[150] in application to calves confined in dairy farming.[151] National legislation transposing the Directive required the management requirements to apply not only to calves reared for fattening, but also to calves confined for dairy farming. In its reasoning evident in the French translation, the CJEU acknowledged the Directive's objectives of keeping calves as an integral part of agriculture, and guaranteeing the rational development of production. There was no need to refer to the objective of ensuring the smooth running of the common market, freedom of movement not being an issue in this case. The Court accorded an holistic (*manière large*) interpretation to those objectives, as opposed to a restrictive interpretation.[152] To do otherwise, the Court said, would be difficult to reconcile with (*une solution contraire serait, en outre, difficilement conciliable avec*) the sacred principle - the

[145] European Commission, *Geographical Indications and Quality Schemes Explained* ec.europa.eu.

[146] *European Declaration on alternatives to surgical castration of pigs* cit. For a list of the signatories, European Commission, *Alternatives to Pig Castration* ec.europa.eu.

[147] G Backus and others, *Second Progress Report 2015–2017 on the European declaration on alternatives to surgical castration of pigs* cit.

[148] Council Directive 2008/120/EC cit.

[149] Council of the European Union 8596/15 of 5 May 2015, Conference 'Improving pig welfare-what are the ways forward?', Annex, data.consilium.europa.eu.

[150] Directive 91/629/EEC cit.

[151] Case C-355/11 *B Brouwer v Staatssecretaris van Economische Zaken, Landbouw en Innovatie* ECLI:EU:C:2012:353.

[152] *Ibid*. paras 41 and 42.

spirit (*principe consacré* of art. 13 TFEU – under which, in the formulation and implementation of EU policy notably in the domain of agriculture, the EU and the Member States are taking (*tiennent*) fully into account the welfare requirements (*exigences du bien-être*) of animals as sentient beings (*des animaux en tant qu'être sensibles*).[153] Art. 13 TFEU motivated the Court to accept an extension to the material scope of the Directive; the Court interpretated the rearing of calves Directive – with its prohibition on tethering – in application to calves kept confined by a farmer in the context of a dairy farming operation for agricultural purposes.[154]

Thereafter, the CJEU's case law demonstrates that its reasoning in *Jippes* is still followed. In *Schaible*,[155] the CJEU affirmed the welfare of animals to be a "legitimate objective in the public interest".[156] In the area of agriculture, the Court confirmed that the EU legislature enjoys a broad discretion, corresponding to the political responsibilities given to it by arts 40 TFEU to 43 TFEU, with review "limited to verifying whether that legislature has manifestly exceeded the limits of its discretion".[157] There was no reference to art. 13 TFEU by the Court, and in later cases the *dicta* of the CJEU assimilate the Amsterdam Protocol with art. 13 TFEU without elaborating upon the concept of sentience.[158]

IV.1. *Halal* Grand Chamber

In the instance that EU legislation is explicit in its aims of animal welfare, the CJEU is able to pronounce in accordance with the legislature's intentions. In the case of *Oeuvre d'assistance aux bêtes d'abattoirs (OABA*) – *Halal*,[159] – in interpreting the Regulation on organic production and labelling of organic products,[160] read in the light of art. 13 TFEU, – the Grand Chamber relied on the Regulation's expressed objective of establishing a sustainable management system for agriculture which respects high animal welfare standards and in particular meets animals' species-specific behavioural needs.[161] The Court noted in particular the

[153] *Ibid*. para. 43.

[154] *Ibid*. para. 48.

[155] Case C-101/12 *Schaible* ECLI :EU:C:2013:661.

[156] *Ibid*. para. 35 citing joined cases C-37/06 and C-58/06 *Viamex Agrar Handel and ZVK* ECLI:EU:C:2008:18 para. 22; case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel* ECLI:EU:C:2008:353 para. 27.

[157] *Schaible* cit. para. 48 citing case C-221/09 *AJD Tuna* ECLI:EU:C:2011:153 para. 80; case C-545/11 *Agrargenossenschaft Neuzelle* ECLI:EU:C:2013:169 para. 43.

[158] Case C-424/13 *Zuchtvieh-Export* ECLI:EU:C:2015:259 para. 35.

[159] Case C-497/17 *Oeuvre d'assistance aux bêtes d'abattoirs* ECLI:EU:C:2019:137, hereinafter referred to as *Halal*.

[160] Regulation (EC) 834/2007 of the Council of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) 2092/91; Regulation (EC) 889/2008 of the Commission of 5 September 2008 laying down detailed rules for the implementation of Regulation 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control, as amended by Regulation (EU) 271/2010 of the Commission of 24 March 2010.

[161] Art. 3(a)(iv) and (c) and art. 5(h) of Regulation 834/2007 cit.

stated objective of "maintaining and justifying consumer confidence in products labelled as organic",[162] and deemed it important, therefore, "to ensure that consumers are reassured that products bearing the organic logo of the EU have actually been obtained in observance of the highest standards, in particular in the area of animal welfare".[163] The specified obligation to keep animal suffering to a minimum, including at the time of slaughter,[164] "help[ed] to give concrete expression" to that objective.[165] The CJEU, further, underscored the protection of animal welfare to be "the main objective" pursued by Regulation 1099/2009 on the protection of animals at the time of killing, which "protection is as required by art. 13 TFEU".[166] That Regulation's provision that "animals shall only be killed after stunning"[167] was considered to establish an obligation, scientific studies having shown that pre-stunning compromises animal welfare the least at the time of killing.[168] A derogation from the requirement of prior stunning is allowed to Member States in which the practice of ritual slaughter is permitted solely in observance of the freedom of religion.[169] However, the Court deemed slaughter without prior stunning to be "insufficient to remove all of the animal's pain, distress and suffering as effectively as slaughter with pre-stunning" which, in accordance with art. 2(f), read in the light of recital 20, of Regulation 1099/2009 was "necessary to cause a loss of consciousness and sensibility in order significantly to reduce its suffering".[170] Central to the Court's reasoning was that the use of a sharp knife, – in the words of recital 43 of that Regulation, "to minimise" animal suffering, "does not allow the animal's suffering to be kept to a 'minimum' within the meaning of art. 14(1)(b)(viii)" of the organic Regulation.[171] It is, therefore, "not tantamount, *in terms of ensuring a high level of animal welfare at the time of killing*" to slaughter without pre-stunning.[172] Consequent upon the expressed objectives of the organic production and labelling Regulation,[173] in arts 3 and 14((1)(b), read in the light of art. 13 TFEU, the Court maintained that it could not be interpreted to authorise the placing of the EU organic logo on produce derived from animals slaughtered without having been stunned in the practise of religious rites in accordance with Regulation 1099/2009.[174]

[162] *Ibid*. Recital 3.

[163] *Halal* cit. para. 51.

[164] Art. 14(1)(b)(viii) of Regulation 834/2007 cit.

[165] *Halal* cit. paras 37 and 40.

[166] *Ibid*. para. 44.

[167] Art. 4(1), read with recital 20 of Regulation 1099/2009 cit.

[168] *Halal* cit. para. 47, citing case C-479/17 *Oeuvre d'assistance aux bêtes d'abattoirs* ECLI:EU:C:2018:747, opinion of AG Wahl, para. 43.

[169] *Halal* cit. para. 48; art. 4(4) read in the light of recital 18 of Regulation 1099/2009 cit.; case C-426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* EU:C:2018:335 paras 55-57.

[170] *Halal* cit. para. 48.

[171] Regulation 834/2007 cit.; *Halal* cit. para. 49.

[172] *Halal* cit. para. 50, emphasis added.

[173] Regulation 834/2007 cit.

[174] In particular art. 4(4), *Halal* cit. 52.

The *Halal* case is the second in a trilogy of Grand Chamber cases concerned with the balance achieved by the legislature in animal welfare and freedom to practise religious rites. The Court had confirmed in the former case of *Liga van Moskeeën en Islamitsche Organisaties* that ritual slaughter without stunning may take place only in an approved slaughterhouse.[175] The questions referred to the CJEU in *Liga* concerned the validity of art. 4(4) of Regulation 1099/2009, *i.e*. the derogation from pre-stunning solely to practise religious ritual rites, – read with the obligation to slaughter at a defined slaughterhouse,[176] in the light of freedom of religion[177] and the *proviso* in art. 13 TFEU. The Court's examination of the EU legislative framework did not disclose any issues affecting the validity of the Regulation with regard to both the Charter and art. 13 TFEU.[178] The legislature's intention was to organise and manage from a technical point of view, the freedom to carry out slaughter without prior stunning for religious purposes and not in itself of such a nature as to place a restriction on the right to freedom of religion.[179] The EU legislature had reconciled compliance with the specific methods of slaughter prescribed by religious rites with essential rules for animals' well-being and for consumers' health.[180]

IV.2. *Centraal Israëlitisch Consistorie van België* Grand Chamber

The Grand Chamber in the third instance, in *Centraal Israëlitisch Consistorie van België*,[181] reinforced the Court's deference to the expressed balance between religious rites and animal welfare explicit in Regulation 1099/2009. The contested decree of the Flemish Region in this case ended a derogation which exempted ritual slaughter from the obligation to stun prior to killing, requiring instead reversible stunning which cannot result in the animal's death. It was apparent from the Court's examination of the preparatory documents underpinning the decree, that the Flemish legislature sought to promote animal welfare having started from the premise that slaughtering without stunning causes avoidable suffering to animals. Additionally, the documents showed that the Flemish legislature had considered religious precepts that the animal not be dead at the time of slaughter and be completely drained of blood, which would be respected by reversible stunning.[182]

[175] *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* cit.

[176] Art. 2(k) of Regulation 1099/2009.

[177] Art. 10 of EU Charter of Fundamental Rights (Charter) and art. 9 of European Convention on Human Rights and Fundamental Freedoms (ECHR).

[178] *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* cit. paras 80 and 83. There was, thus, no need for the Court to rule concerning the proviso in art. 13 TFEU, see A Peters, 'Religious Slaughter and Animal Welfare Revisited: CJEU, Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen (2018)' (2019) The Canadian Journal of Comparative and Contemporary Law 269.

[179] *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* cit. paras 58, 59, 68.

[180] *Ibid*. paras 62-64.

[181] Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others* ECLI:EU:C:2020:1031.

[182] *Ibid*. paras 26 and 27.

Confirming its rulings in *Liga* and *Halal*, the Grand Chamber examined the validity of the first paragraph of art. 26(2)(c) of Regulation 1099/2009 read in the light of art. 10(1) of the Charter. Art. 26(2)(c) provides that Member States may adopt national rules aimed at ensuring more extensive protection of animals at the time of killing than those contained in the Regulation in relation to "the slaughtering and related operations of animals in accordance with art. 4(4)"; "related operations" are defined within the Regulation to include "stunning".[183] The Court compared Regulation 1099/2009 with art. 13 TFEU in terms of each reflecting the balance to be achieved by the EU and its Member States in paying full regard for animal welfare while respecting religious rites and freedoms. Continuing to locate its ruling within the regulatory framework of Regulation 1099/2009, the Grand Chamber declared that the balance to be attained between those two "values", namely animal welfare and the freedom to manifest religion, is a reconciliation which Member States must achieve themselves.[184] It followed that art. 26(2) of Regulation 1099/2009 did not fail to have regard to the freedom to manifest religion and that Member States are afforded the power to adopt additional national rules to ensure greater protection for animal welfare, such as an obligation to stun before slaughter which applies also to slaughter prescribed by religious rites, subject to respecting those fundamental rights enshrined in art. 10(1) of the Charter.[185] Paying regard to the religious precepts which govern ritual slaughter, the Court found that the decree did entail *"a limitation*" on the right to manifest religion, guaranteed by art. 10(1) of the Charter.[186] This necessitated an examination of whether the decree issued by the Flemish region which obligated reversible pre-stunning not resulting in death during religious slaughter fulfilled the conditions in art. 52 of the Charter, which the Court read in conjunction with art. 13 TFEU.[187] Art. 52(1) provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. The Court found: first, the limitation on the exercise of the right to freedom to manifest religion is provided for by law, namely the decree at issue; and, second, the "interference" resulting from the decree is "limited to one aspect of the specific ritual act of slaughter", does not prohibit and in effect respects the essence of the religious precepts at the time of killing.[188] Third, according to the Court, the limitation of the right guaranteed in art. 10 of the Charter meets an objective of general interest, that of animal welfare, to which the preparatory documents of the Flemish legislature had evidenced the attachment of

[183] Art. 2(b) of Regulation 1099/2009; *Centraal Israëlitisch Consistorie van België and Others* cit. para. 45.
[184] *Centraal Israëlitisch Consistorie van België and Others* cit. para. 47.
[185] *Ibid*. paras 48-50.
[186] *Ibid*. para. 55, emphasis added.
[187] *Ibid*. para. 59.
[188] *Ibid*. paras 54 and 61.

"great importance" with the "objective to eliminate all avoidable animal welfare suffering".[189] The CJEU affirmed what is already clear from the Court's case law[190] and from art. 13 TFEU, that the protection of animal welfare is an objective of general interest recognised by the EU.[191]

Fourth, the Court in its assessment of observance of the principle of proportionality, paid regard to the need to reconcile the requirements of the protection of the various rights and principles at issue, striking a fair balance between them.[192] The Court's choice of words is important, arguably attributing as a principle "*animal welfare enshrined in art. 13 TFEU*".[193] The Court, locating its ruling in the national legislation, declared the Flemish decree laying down the obligation of reversible pre-stunning which must not cause death, in ritual slaughter, to be appropriate for achieving the objective of promoting animal welfare.[194]

An examination followed of the EU legislature's intention precisely to reflect the lack of consensus among the Member States as to how they perceive ritual slaughter in the adoption of arts 4 and 26 of Regulation 1009/2009; this was evident from recitals 18 and 57 of that Regulation.[195] Situated within the Regulation's expressed objectives, on the one hand, to leave a "certain flexibility" to Member States to maintain or adopt higher welfare rules dependent upon "national perceptions" towards animals[196] and/or, on the other, of leaving a "certain level of subsidiarity" to each Member State to pre-stun or to derogate therefrom,[197] – the Grand Chamber underscored the EU legislature's intention to "preserve the specific social context of each Member State" and to give each respective Member State a broad discretion.[198]

As to whether the interference with the freedom to manifest religion resulting from the Flemish decree was *proportionate*, and pivotal to the Court's ruling was, first, the importance attached to the latest scientific evidence by the EU legislature and the Flemish legislative preparatory documents. According to the scientific opinion of the European Food Safety Authority, cited in recital 6 of Regulation 1099/2009, a scientific consensus has emerged that prior stunning is the optimal means of reducing the animal's suffering

[189] *Ibid*. para. 62.

[190] *Viamex Agrar Handel and ZVK* cit. para. 27; case C-424/13 *Zuchtvieh-Export* EU:C:2015:259 para. 35.

[191] *Centraal Israëlitisch Consistorie van België and Others* cit. para. 63.

[192] Citing case C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114 para. 50; *Centraal Israëlitisch Consistorie van België and Others* cit. para. 65.

[193] *Centraal Israëlitisch Consistorie van België and Others* cit. para. 65, emphasis added. Thank you to the anonymous reviewer for his/her valid comment here.

[194] *Ibid*. para. 66.

[195] *Ibid*. para. 68.

[196] Provided that it does not affect the functioning of the internal market, Regulation 1099/2009 cit. recital 57, *Centraal Israëlitisch Consistorie van België and Others* cit. para. 70.

[197] Regulation 1099/2009 cit. recital 18; *Centraal Israëlitisch Consistorie van België and Others* cit. para. 69.

[198] *Centraal Israëlitisch Consistorie van België and Others* cit. para. 71.

at the time of killing.[199] In addition, the Flemish legislature stated that "the gap between eliminating animal suffering, on the one hand, and slaughtering without prior stunning, on the other, will always be very considerable, even if less radical measures were taken to minimise the impairment of animal welfare".[200] The Flemish Region "was entitled", therefore, "without exceeding [its] discretion [...] to consider that the limitation placed by the decree [...] on freedom to manifest religion, by requiring prior stunning which is reversible and cannot result in the animal's death, [met] the condition of necessity".[201] The Court attributed to the Finnish legislature the intention to be guided by the express provision in Regulation 1099/2009, in the interpretation of art. 4(4) of that Regulation, to give preference to the most up-to-date authorised killing method, where significant scientific progress has made it possible to reduce the animal's suffering at the moment of killing, in order to spare animals avoidable pain, distress or suffering.[202]

Second, the Grand Chamber delivered a declaration the significance of which deserves to be underscored in terms of recognising the increasing societal awareness of animal welfare as a value, and in entrenching the constitutional/primary law status of animal welfare to be weighed in the balance in the proportionality assessment:

> "[L]ike the ECHR, the Charter is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today with the result that regard must be had to changes in values and ideas, both in terms of society and legislation, in the Member States. Animal welfare, as a value to which contemporary democratic societies have attached increasing importance for a number of years, may, in the light of changes in society, be taken into account to a greater extent in the context of ritual slaughter and thus help to justify the proportionality of legislation such as that at issue".[203]

Third, in the proportionality assessment, the Court affirmed that the Finish decree did not constitute an interference with the free circulation within its territory of products of animal origin derived from animals which have undergone ritual slaughter without pre-stunning in other EU Member States, according with art. 26(4) of Regulation 1099/2009. Neither was the circulation of such products which originated in third countries prohibited or hindered.[204]

The Grand Chamber's expressed reference to "*the discretion which EU law confers on Member States as regards the need to reconcile art. 10(1) of the Charter with art. 13 TFEU"* is to be exercised, significantly*, "in an evolving societal and legislative context which is characterised by an increasing awareness of the issue of animal welfare*;" a discretion which the

[199] *Ibid*. para. 72.
[200] *Ibid*. paras 73.
[201] *Ibid*. para. 74, emphasis added.
[202] Recital (2) of Regulation 1099/2009 cit.; *Ibid*. paras 75 and 76.
[203] *Ibid*. para. 77.
[204] *Centraal Israëlitisch Consistorie van België and Others* cit. paras 77 and 78.

Finish legislature had not exceeded.[205] The Grand Chamber declared the measures in the Finish decree to be proportionate, having allowed a fair balance to be struck between the importance attached to animal welfare and the freedom to manifest religion.[206] In relation to primary law, the Court endorsed the "constitutional" status of art. 13 TFEU, a point articulated authoritatively by Yumiko Nakanishi,[207] with implications for the direction which this *Article* develops below.

IV.3. An EU market?

The Grand Chamber of the CJEU upheld the growing societal appreciation of animal welfare as a value to the extent of recognising, if not condoning, a future EU market in which animal welfare is prioritised. According to art. 26(4) of Regulation 1099/2009 Member States may not prohibit or impede the free circulation of products derived from animals which have undergone ritual slaughter without pre-stunning in other EU Member States. At the oral hearing in *Centraal Israëlitisch Consistorie van België* the Court posed a question to the Flemish Region, permissive of responses from all intervening parties also, which envisaged a hypothetical situation in which all EU Member States were to adopt a measure prohibitive of the killing of animals without prior stunning at ritual slaughter.[208] This question leaves open, by implication, the instance of an increasing number of Member States adopting higher animal welfare standards legislation, acting within the discretion accorded to them by Regulation 1099/2009 – to the extent that art. 26(4) of that Regulation is rendered redundant. Advocate General Hogan remarked that the file before the Court in *Centraal Israëlitisch Consistorie van België* indicated that increasing numbers of Member States seek to qualify or limit in a variety of ways the scope of the derogation contained in art. 4(4) of Regulation 1099/2009.[209] Noteworthy, the Hellenic Council of State (Supreme Administrative Court of Greece) annulled a 2017 ministerial decision which, in the context of religious slaughter, allowed animals to be killed without prior stunning, ruling that the Greek State had omitted to aim for a balance between its obligations to protect animals and to respect religious freedom.[210] Furthermore, according to Advocate General Hogen, art. 13 TFEU would imply the adoption of a label for the produce of animals killed in accordance with ritual rites: "Specifically, a state of affairs whereby meat produce resulting from the slaughter of animals according to religious rites is simply allowed to enter the general food chain

[205] *Ibid*. para. 79, emphasis added.

[206] *Ibid*. para. 80.

[207] Y Nakanishi, 'Case C-336/19 Centraal Israëlitisch Consistorie van België: Animal Welfare and Freedom of Religion' (2021) Maastricht Journal of European Comparative Law 687.

[208] *Centraal Israëlitisch Consistorie van België and Others* cit. para. 37.

[209] Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others* ECLI:EU:C:2020:695, opinion of AG Hogan, para. 64.

[210] Eurogroup for Animals, 'Religious Slaughter: A Spectacular Win for Animals in Greece' (29 October 2021) www.eurogroupforanimals.org.

to be consumed by customers who are unaware – and who have not been made aware – of the manner in which the animals came to be slaughtered would not comply with either the spirit or the letter of art. 13 TFEU".[211]

An EU market may no longer exist, nor be served, with animals killed in accordance with religious rites without pre-stunning in EU Member States.

Ultimately, EU Member States must not impede the free circulation of "Halal" produce emanating from third countries; this is apparent from the Grand Chamber ruling in *Centraal Israëlitisch Consistorie van België*.[212] Although the Court referred to art. 52(3) of the Charter, which is intended to ensure consistency with the corresponding rights in the European Convention of Human Rights (ECHR), and the need to follow the European Court of Human Rights' (ECtHR) decisions as a minimum standard[213] and, in particular, art. 9 ECHR for the protection of religious freedom, the CJEU did not refer directly to the case law of the ECtHR in this regard.[214] According to the ECtHR, there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable, which would not be the case if such meat can easily be obtained from another country.[215] Could the ruling of the CJEU in *Centraal Israëlitisch Consistorie van België*, therefore, signal even more strongly the constitutional status afforded to the welfare needs of animals for which art. 13 TFEU is the vehicle in EU primary law, read in the light of increasing societal awareness, and *vis à vis* other rights and principles in the Charter?

IV.4. Art. 13 TFEU: read as a whole

The potential implication of the Grand Chamber ruling is not yet apparent, although its declaratory statements would appear to open the gates in a democratic society in which ideas and values change and evolve over time, to the increasingly higher regard for animal welfare being practised by EU Member States in the valid exercise of their discretion to "reconcile art. 10(1) of the Charter with art. 13 TFEU".[216]

Correspondingly, the scope would exist to interpret constructively and optimistically the *proviso* in art. 13 TFEU to affirm this progressive social/cultural consciousness of animal welfare. The Grand Chamber ruling gives credibility to the positive reading of art. 13 TFEU taken

[211] *Centraal Israëlitisch Consistorie van België and Others*, opinion of AG Hogan, cit. paras 63, 80 and 81.

[212] *Centraal Israëlitisch Consistorie van België and Others* cit. para. 78.

[213] *Ibid*. paras 56 and 57.

[214] ECtHR *Cha'are Shalom Ve Tseddek v France* App. n. 27417/95 [27 June 2000]; A Alemano and NM de Sadeleer, 'Humanising Animal Slaughter Need Not Infringe Religious Freedom (Amicus Curiae Brief I C-336/19 Centraal Israëlitisch Consistorie van België and Others)' (21 October 2020) HEC Paris Research Paper No. LAW-2021-1417.

[215] *Cha'are Shalom Ve Tseddek v France* cit. paras 80 and 81.

[216] *Centraal Israëlitisch Consistorie van België and Others* cit. para. 79.

as a whole so as to respect the cultural movement on the part of a growing number of EU Member States to ensure a full regard for the welfare needs of animals in EU agriculture.

V. Comments in conclusion

Art. 13 TFEU places an unenforceable responsibility on the EU legislature to ensure that a full regard for the welfare requirements of animals as sentient beings becomes mainstreamed in EU agriculture policy. At the same time, art. 13 TFEU empowers the EU legislature to integrate a full regard for animal welfare into the legislative provisions establishing the EU Common Agriculture Policy (CAP), while respecting the customs of Member States relating in particular to religious rites, cultural traditions and regional heritage. EU contemporary policy, *prima facie*, is advancing animal welfare for food producing animals and citizenship expectation of EU agriculture policy is driving this political momentum. There is also a fundamental cultural movement amongst EU Member States towards this end.

This contemporary dynamism does not receive its impetus directly from art. 13 TFEU. There are signs that suppliers in the agri-food chain and policy makers are aware of the societal/cultural movement for improved standards of animal welfare and, it is indirectly, *i.e*. aside from art. 13 TFEU, that animal welfare labelling features as a key element of the EU Farm to Fork (F2F) Strategy. Art. 13 TFEU is not the driving force.

The *Halal* case suggests that the CJEU will accommodate full regard for animals' welfare requirements where there is an explicit commitment by the EU legislature to the animal welfare objective to be attained by the norm adopted on the agriculture legal basis.

The Grand Chamber of the CJEU has interpreted animal welfare as a value in the light of societal and cultural evolution in a democratic society and, arguably, a principle in art. 13 TFEU to be weighed in the balance by Member States *vis à vis* fundamental rights. Taking forward this significant *dicta* of the Grand Chamber in *Centraal Israëlitisch Consistorie van België*, respecting cultural traditions and regional diversity, in accordance with the second limb of art. 13, need not then be viewed as a negative *proviso* in order to limit EU animal welfare in agriculture policy. The fact that a number of EU Member States increasingly are taking a stance in order to improve the welfare of animals in agriculture beyond the minimum norms, demonstrates the ascending legitimate public value status of animal welfare in the EU. The scope exists to respect EU Member States' progressive deviation from the minimum norm where animal welfare opinion has proliferated, in an interpretative reading of art. 13 TFEU. Policy mainstreaming in animal welfare which is driven by an ethical and cultural movement for change for animals reared in agriculture, corroborates a positive reading of art. 13 TFEU as a whole.

Articles

The Horizontal Clauses of Arts 8-13 TFEU: Normative Implications, Implementation and Potential for Mainstreaming

Edited by Evangelia Psychogiopoulou

Unravelling the Complexities of the Horizontal Clauses of Arts 8-13 TFEU: An Explanation of the *Special Section*

Certain policy objectives are horizontal by nature, transcending sectoral policy boundaries. Their pursuit requires combined action in various policy fields. For instance, to fight climate change and green our economies, action is needed across a range of policy areas which extend beyond environmental policy in the strict sense. In his keynote speech at the Lustrum Symposium of the Dutch Financial Law Association in December 2022, Frank Elderson, Member of the Executive Board of the European Central Bank (ECB) and Vice-Chair of the Supervisory Board of the ECB, spoke about the ways in which the ECB takes into account the climate neutrality objectives set forth in the European Climate Law,[1] adopted on the basis of art. 192(1) of the Treaty on the Functioning of the European Union (TFEU) (environment), when defining and implementing monetary policy and when exercising its supervisory competences.[2] In doing so, he noted, the ECB is complying with its obligations under art. 11 TFEU, which requires the *integration* of environmental protection requirements into the policies and activities of the Union. Ignoring the European Climate Law, he stated, would be a violation of art. 11 TFEU. Still, art. 11 TFEU does not prescribe *how* the ECB should integrate environmental requirements into the performance of its duties. This, he said, allows the ECB a degree of discretion.

Recital 25 of the European Climate Law states that the transition to climate neutrality does indeed require changes across the entire policy spectrum. It also points to the conclusions of the European Council of 12 December 2019, according to which "[a]ll relevant EU legislation and policies need to be consistent with, and contribute to, the ful-

[1] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[2] Keynote speech by Frank Elderson, Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB, *The European Climate Law and the European Central Bank*, Lustrum Symposium organised by the Dutch Financial Law Association, Amsterdam, 1 December 2022.

European Papers
Vol. 8, 2023, No 1, pp. 221-226
www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/647

filment of the climate neutrality objective".[3] However, the EU Climate Law does not mention art. 11 TFEU in its body. What it does mention is art. 37 of the Charter of Fundamental Rights of the EU (the Charter),[4] a provision similar to art. 11 TFEU. Art. 37 of the Charter states that a high level of environmental protection, plus the improvement of the quality of the environment, must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

On the financial support side, the EU budget makes an important contribution to the fight against climate change through "climate mainstreaming", as the European Commission (Commission) puts it.[5] Over the course of the 2014-2020 multiannual financial framework, EU funding programmes in all policy areas were required to consider climate priorities in their design, implementation and evaluation, with a spending target set at 20%.[6] In the context of the 2021-2027 multiannual financial framework, changes have been made to strengthen the financing of actions relating to climate change, including a spending target of 30%. As a result, a broad range of EU funding programmes support the fight against climate change, ranging from the European Recovery and Resilience Facility to the European Agricultural Guarantee Fund, the European Regional and Development Fund, the Cohesion Fund, Horizon Europe, the Just Transition Fund, InvestEU and others. The Commission explains that climate and environmental policy is at the heart of EU policymaking. This, it underlines, is in line with the Treaties that define environmental protection as a *core task* of the EU by means of art. 11 TFEU and other provisions.[7]

Art. 11 TFEU, which the Commission considers to lay out a core task of the EU, is surrounded by TFEU provisions that can also be seen as setting forth other *core tasks* of the EU. Art. 8 TFEU focuses on gender equality. It provides: "[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women".[8] Art. 10 TFEU is about the fight against discrimination more broadly. It states: "[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".[9] Art. 9 TFEU addresses various elements in the social domain. It declares: "in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guar-

[3] European Council Conclusions of 12 December 2019.

[4] See Recital 6 of the European Climate Law.

[5] European Commission, Financing of Horizontal Policy Priorities in the EU Budget, commission.europa.eu.

[6] *Ibid*.

[7] Commission Staff Working Document of 20 June 2022, Climate Mainstreaming Architecture in the 2021-2027 Multiannual Financial Framework.

[8] See art. 8 TFEU.

[9] See art. 10 TFEU.

antee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health".[10] Art. 12 TFEU pertains to consumer protection. It states: "[c]onsumer protection requirements shall be taken into account in defining and implementing other Union policies and activities".[11] Animal welfare is the focus of art. 13 TFEU. This provides: "[i]n formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage".[12]

Arts 8-13 TFEU, which are sometimes referred to as mainstreaming or integration clauses, have been brought together by the Treaty of Lisbon. They come under Title II "Provisions having general application" of Part One of the TFEU "Principles". Some of them precede the Treaty of Lisbon, others feature among its innovations; but all of them lay down – in the Commission's language – *core tasks* for the EU to integrate into its actions. The integration of *horizontal* tasks of this sort into EU policies and activities is inherent to the idea of efficient and well-designed EU policy-making. Arts 8-13 TFEU encourage the articulation of *integrated* EU policies for gender equality, non-discrimination, social protection, environmental protection, consumer protection and animal welfare. The underlying premise of arts 8-13 TFEU as horizontal clauses is that gender equality, non-discrimination, social protection, environmental protection, consumer protection and animal welfare cannot be attained through single policies; they require concerted efforts. From this perspective, arts 8-13 TFEU take significant steps towards improving the EU's performance in these areas.

However, arts 8-13 TFEU leave a good deal in need of clarification. To begin with, arts 8-13 TFEU do not all use the same wording, although they do all employ vague and abstract formulations. This hampers an easy understanding of their legal nature and effects. Do arts 8-13 TFEU create any legal obligations? If yes, what is the nature of these obligations and on whom are they imposed? If no legal obligations derive from arts 8-13 TFEU, then what is their legal function? Also, what is their relationship to the principle of conferral? In terms of implementation, how should gender equality, non-discrimination, and requirements for social protection, environmental protection, consumer protection and animal welfare be integrated into EU policies and activities? How has such integration been achieved so far? Arts 8-13 TFEU do not elaborate on the ways in which the requirements they lay down are to be incorporated into EU policies and activities. As a matter of fact, they do not even explain what these requirements are. The fact that arts 8-13 TFEU are

[10] See art. 9 TFEU.
[11] See art. 12 TFEU.
[12] See art. 13 TFEU.

not the only horizontal clauses of this sort in EU primary law further compounds the problem. The European Climate Law, as indicated above, does not reference the horizontal environmental protection clause of art. 11 TFEU. Rather, it mentions art. 37 of the Charter, which is a clear proxy. Does it make a difference that the reference made is to art. 37 of the Charter and not art. 11 TFEU? Should art. 11 TFEU be seen as duplicating art. 37 of the Charter (or vice versa)? What does the European Climate Law's failure to reference art. 11 TFEU say about art. 11 TFEU and its implementation? Overall, what is the legal value and concrete contribution of arts 8-13 TFEU to EU law- and policy-making? These are the central questions that this *Special Section* seeks to address.

The *Articles* presented in this *Special Section*, which are based on the contributions discussed in a 2021 workshop entitled "Horizontal Clauses in EU Law: Normative implications, implementation and potential for policy mainstreaming", seek to deepen our understanding of the horizontal clauses of arts 8-13 TFEU. They ask what the horizontal clauses of arts 8-13 TFEU are in legal terms, how they have been interpreted and implemented, and how they may function to bolster the attainment of their objectives. The *Special Section* thus aspires to contribute, with fresh insights, to earlier stock-taking exercises vis-a-vis arts 8-13 TFEU[13] and assess their ability to deliver EU policies that pursue gender equality, non-discrimination, social protection, environmental protection, consumer protection and animal welfare in a coherent and comprehensive manner.

The first *Article*, by Evangelia Psychogiopoulou, sets the scene by examining how the Court of Justice of the EU (CJEU) has approached arts 8-13 TFEU. Psychogiopoulou reflects on the legal nature of arts 8-13 TFEU and their input to judicial review by discussing CJEU cases where arts 8-13 TFEU have formed part of the CJEU's reasoning. The *Article* sheds light on the intepretation of arts 8-13 TFEU by the CJEU and explores the ways in which they have been used by the CJEU in cases concerning limitations on the exercise of fundamental rights, restrictions to free movement, the intepretation of EU secondary law and challenges brought to the validity of EU measures. The analysis shows moderate judicial use of arts 8-13 TFEU, most often in conjuction with various proxies when these exist.

The second *Article*, by Elise Muir, Victor Davio and Lucia van der Meulen, focuses on arts 8 and 10 TFEU on gender equality and non-discrimination. The *Article* looks in particular at the role these two articles play in protecting and enhancing equality, examining their function in – and relevance to – the integration of equality considerations into areas of EU competences other than EU equality law *and* into EU equality law itself. The analysis thus moves beyond a traditional understanding of equality mainstreaming, which is confined to the integration of equality considerations into EU law- and policy-making into areas other than equality. Contradistinguishing them from the various existing equality and non-discrimination provisions in EU law, the authors argue that arts 8 and 10 TFEU are

[13] See F Ippolito, ME Bartoloni, M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge, 2018).

best understood as guidance clauses for the development of EU law and explore their use by the CJEU and the EU institutions in the performance of their activities.

The third *Article*, by Sybe de Vries and Rik de Jager, discusses the horizontal social protection clause of art. 9 TFEU. Taking the view that, despite its limited use by the CJEU and the EU legislator, art. 9 TFEU constitutes a legal tool designed to reinforce the social dimension of EU policies and activities, the authors examine how it could strengthen, in particular, the social prerogatives of the EU single market. The story told is one of hope and fear. On the one hand, the authors argue that art. 9 TFEU can contribute to the EU internal market becoming more socially sensitive, and explore the different ways it could do so. On the other hand, they acknowledge that delivering the social promise of the internal market may not be that straightforward. This relates to legal constraints deriving from – and transcending – art. 9 TFEU.

The fourth *Article*, by Vassiliki (Vicky) Karageorgou, looks at the horizontal environmental protection clause of art. 11 TFEU. Karageorgou elaborates on the legal nature and functions of art. 11 TFEU, paying close attention to its procedural and substantive meanings in EU law, in conjunction with the concept of sustainable development. This is because, pursuant to art. 11 TFEU, the integration of "environmental protection requirements" into the policies and activities of the Union shall aim to promote sustainable development. The analysis then expands on the implementation of art. 11 TFEU, especially following the adoption of the European Green Deal (EGD)[14] and the avalanche of regulatory initiatives the EGD has triggered. The *Article* approaches the EGD as a multidimensional regulatory project and examines the incorporation of environmental and climate objectives in a range of EU policies (e.g. energy, industry, agriculture, transport) and EU funding instruments that target sustainable finance and investment. The evident variation in the extent to which environmental and climate considerations are incorporated in the measures studied reflects the "balancing compromises" that are often struck in law-making.

The firth *Article*, by Federica Casasora, is devoted to the horizontal consumer protection clause of art. 12 TFEU which, despite originating in an earlier provision dating back to the Treaty of Amsterdam, is essentially inactive. As Casarosa explains, art. 12 TFEU is one of the horizontal clauses of the TFEU that is less frequently invoked in EU law- and policy-making. This is due both to the limits set by the wording itself of art. 12 TFEU, and to the availability of other legal channels for mainstreaming consumer protection, especially in internal market legislation. Still, art. 12 TFEU could prove particularly helpful for the development of consumer-friendly EU policies beyond the internal market. Indeed, the dormant horizontal consumer protection clause seems to be awakening in order to link consumer protection to sustainable development and environmental protection policy.

[14] Communication COM(2019) 640 from the Commission of 11 December 2019, The European Green Deal.

The last *Article*, by Diane Ryland, is about the horizontal animal welfare clause of art. 13 TFEU. Ryland examines the legal implications of art. 13 TFEU for EU action on animal welfare against the backdrop of the lack of a proper animal welfare competence entrusted on the EU. Similarly to the other horizontal clauses examined in this *Special Section*, animal welfare can be viewed as an integrative objective to be pursued in a set of EU policies (here specified by the TFEU). Unlike arts 8-12 TFEU, however, animal welfare lacks a legal basis in the TFEU for its protection and enhancement as such. Against this background, the *Article* delves into the animal welfare dimension of the EU policy on agriculture. It explores the nature and breadth of animal welfare considerations in relevant measures and initiatives, assesses the contribution of art. 13 TFEU in this respect and, in the wake of *encouraging* CJEU jurisprudence, advocates a "positive" reading of ar. 13 TFEU that would enhance animal welfare standards in EU law and policy-making.

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Dialogues

Dialogue on the Way the CJEU Uses ECHR Case Law
edited by Victor Davio *and* Elise Muir

Introduction. The ECHR in the ECJ's Case Law Post-Charter: A Dual Perspective

That the law of the European Union ("EU") and that of the European Convention on Human Rights ("ECHR") have a special relationship is beyond doubt. While the two European systems are distinct, they are closely interrelated and interdependent. This intertwining is the result of several overlaps between them. *Ratione loci*, both systems are meant to apply in Europe, in the Smaller and the Greater Europe respectively. *Ratione personae*, the 27 Member States of the Union have acceded to the ECHR, thereby constituting the majority of the States Parties to that Convention. *Ratione materiae*, EU law and the ECHR safeguard to a large extent the same fundamental rights.

That the relationship between EU law and the ECHR is a longstanding one is also evident. As early as 1975, the European Court of Justice ("ECJ") referred to provisions of the ECHR in its case law.[1] In 1989, the ECJ acknowledged the particular significance of the ECHR for the advancement of fundamental rights within the EU.[2] One year later, the European Commission of Human Rights decided that it was not competent to examine decisions from organs of the European Communities, but that it could review the actions of Contracting States which they had taken to give effect to Community law.[3] Since then, the control of EU measures by the European Court of Human Rights ("ECtHR") is governed by well-established principles such as the *Bosphorus* presumption,[4] which have been applied in many recent judgments.[5]

[1] Case C-36/75 *Rutili* ECLI:EU:C:1975:137 para. 32.

[2] Joined Cases 46/87 and 227/88 *Hoescht* ECLI:EU:C:1989:337 para. 13.

[3] European Commission of Human Rights *M. & Co. against the Federal Republic of Germany* App n. 13258/87 [9 February 1990].

[4] ECtHR *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC] App n. 45036/98 [30 June 2005] paras 159-165.

[5] See for recent examples, e.g. ECtHR *Bivolaru and Moldovan v. France* App n. 40324/16 and 12623/17 [25 March 2021] in which the ECtHR concluded that there was a manifest deficiency such as to rebut the presumption of equivalent protection and concluded that there had been a violation of art. 3 ECHR; ECtHR *Willems v. The Netherlands* App n. 57294/16 [9 November 2021] in which the ECtHR considered that both conditions for the application of the presumption of equivalent protection – no margin of manoeuvre on

www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/653

Although, for these reasons, the relationship between the EU and the ECHR has garnered prolonged academic interest and been extensively discussed,[6] it should be noted that the parameters governing this relationship have undergone significant changes during the past two decades. First, the EU has developed its own "Bill of Rights", namely the Charter of Fundamental Rights of the European Union ("Charter"), which was proclaimed in 2001 and which has gained legally binding status with the Treaty of Lisbon. While the Charter provisions, and in particular the political and civil rights, are largely inspired by the ECHR rights, the Charter introduces several changes in relation to the latter rights, either by enriching their content or broadening their scope.[7] The need to articulate the ECHR and the Charter provisions has found expression in art. 52(3) Charter which provides a principle of "homogeneity" or "equivalence" with the ECHR.[8] Second, the EU legislator has been given powers to promote specific fundamental rights, such as the right to equality and non-discrimination and the right to protection of personal data. It has also been given powers in areas of fundamental rights sensitivity, such as those related to asylum and immigration or criminal law. As a result of this increase in powers, numerous EU laws have been adopted on fundamental rights, which, according to the ECJ, give expression to the fundamental rights of the Charter.[9] Third, the Treaty of Lisbon inserted a legal basis and obligation for the accession of the EU to the ECHR, namely art. 6(2) TEU. The ECJ rendered Opinion 2/13, which concluded that the draft accession Treaty was in compatible because it conflicted with the autonomy of EU law. However, negotiations for accession have resumed in 2020 and made considerable progress in recent weeks.[10]

the part of the domestic authorities and deployment of the full potential of the supervisory mechanism provided for by EU law – are met and there is no manifest deficiency.

[6] E.g. R Lawson, 'Confusion and Conflict? Divergent Interpretations of the ECHR in Strasbourg and Luxembourg' in R Lawson and M de Bloijs (eds), *The Dynamics of the Protection of Human Rights in Europe* (Nijhoff 1994) 219; D Spielmann, 'Human Rights Case-Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities', in P Alston, M Butselo and J Heenan (eds), *The EU and Human* Rights (Oxford University Press 1999) 757; D Simon, 'Des influences réciproques entre CJCE et CEDH: 'Je t'aime, moi non plus'?' (2001) Pouvoirs 31; S Scheeck, 'Solving Europe's Binary Human Rights Puzzle: The Interaction between Supranational Courts as a Parameter of European Governance' (2005) Questions de recherche/Research Questions, Centre d'études et de recherches internationales Sciences Po 1; S Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) CMLRev 629; G Harpaz, 'The European Court Of Justice And Its Relations With The European Court Of Human Rights: The Quest For Enhanced Reliance, Coherence And Legitimacy' (2009) CMLRev 105.

[7] Compare, e.g. art. 9 Charter and art. 12 ECHR; art. 47 Charter and arts 6 and 13 ECHR; art. 49(1) Charter and art. 7(1) ECHR.

[8] S O'Leary, 'The EU Charter Ten Years On: A View from Strasbourg', in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020) 42.

[9] E.g. Joined Cases C-924/19 PPU and C-925/19 PPU *FMS* ECLI:EUC:2020:367, para. 192 (Asylum Qualification Directive (2011/95/EU) and the Asylum Procedure Directive (2013/32/EU)); Case C-414/16 ECLI:EUC:2018:257, para. 47 (Equality Framework Directive (2000/78/EC)).

[10] In March 2023, the negotiating group concluded that it had resolved all of the issues that it was currently expected to address. The problem that remains relates to the situation of EU acts in the area of

These evolving parameters strengthen, and are anticipated to continue to strengthen, the interactions and intertwining between the EU and the ECHR. In order to ensure the coherence and harmony of the European architecture of fundamental rights, the ECJ and the ECtHR are required to articulate their legal systems and called upon to display a certain attitude of openness and dialogue by taking into account the law of their counterpart in their case law. Failure to do so could lead to inconsistencies and contradictions for national judges of the EU Member States who are responsible for the simultaneous application of EU and ECHR law, making their task particularly delicate.[11] This raises the question about how each of the two Courts articulate their relationship with one another since the entry into force of the Lisbon Treaty and post-Opinion 2/13. There are two distinct trends that may be observed on either side of the Rhine River.

As far as the ECtHR is concerned, its recent case law shows an increasing openness to EU law in the post-Charter era. On the one hand, the ECtHR has relied significantly on the Charter, EU fundamental rights legislation as well as ECJ case law to shape its case law.[12] On the other hand, several recent judgments show that the ECtHR comforts the effectiveness of the mechanisms provided for in EU law by sanctioning the non-application or incorrect application of EU law in the light of ECHR standards.[13] For instance, in the *Spasov v Romania* judgment of 6 December 2022, the ECtHR considered that any manifest violation of EU law by a national court may be contrary to art. 6 ECHR. In particular, the ECtHR held that the applicant's conviction based on domestic law provisions manifestly contrary to EU regulations constituted a denial of justice in violation of art. 6(1) ECHR.[14] Similarly, the *Moraru v Romania* case, decided on 8 November 2022, involved an applicant who claimed that her exclusion from military medicine studies due to her height and weight violated the prohibition of discrimination enshrined in art. 14 of the

the Common Foreign and Security Policy that are excluded from the jurisdiction of the Court of Justice of the European Union, this has been said to constitute a matter to be resolved internally to the EU. Illustrating contemporary challenges to the limits of the Court of Justice's jurisdiction in this field see: case C-29/22 P *KS and KD v Council and others* (pending) and case C-44/22 P *Commission v KS and others* (pending).

[11] See e.g. J Callewaert, 'Interactions migratoires entre Strasbourg et Luxembourg' (2020) Journal de droit européen 310. See also J Callewaert, 'Convention Control Over the Application of Union Law by National Judges: The Case for a Wholistic Approach to Fundamental Rights' (2023) European Papers www.europeanpapers.eu 331.

[12] See e.g. ECtHR *Vilho Eskelinen and others v. Finland* [GC] App n. 63235/00 [19 April 2007], para. 60; ECtHR *Demir and Baykara v. Turkey* [GC] App n. 34503/97 [12 November 2008], paras 105-107; ECtHR *Bayatyan v. Armenia* App n. 23459/03 [7 July 2011] para. 106; ECtHR *Scoppola v. Italy (no 2)* [GC] App n. 10249/03 [17 September 2009] paras 105-109; ECtHR *Vizgirda v. Slovenia* App n. 59868/08 [28 August 2018], paras 82-83. On the topic, see T Lock, 'The Influence of EU Law on Strasbourg Doctrines' (2016) ELR 804; S O'Leary, 'The EU Charter Ten Years On: A View from Strasbourg' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020) 37.

[13] On this topic see V Davio, 'Le droit de l'Union européenne dans la jurisprudence de la Cour européenne des droits de l'homme' (2023) Journal de droit européen 46.

[14] ECtHR *Spasov v Romania* App n. 27122/14 [6 December 2022], paras 97-98.

ECHR in conjunction with the right to education safeguarded by art. 2 of Protocol No 1 to the ECHR. The applicant relied heavily on EU law and the ECJ *Kalliri* judgment of 2017.[15] The ECtHR found a violation of the ECHR provisions, noting that the domestic courts had failed to engage meaningfully with the ECJ's *Kalliri* judgment and examine its ramifications highlighted by the applicant.[16]

As far as the ECJ is concerned, a different trend seems to be at work. Following the ratification of the Lisbon Treaty, several scholars have remarked upon the waning significance of the ECHR and the ECtHR's case law in the case-law of the ECJ, which contrasts with the amplified role of the Charter in the latter's jurisprudence. In other words, there is a trend towards "Charter centrism" which has emerged within the ECJ.[17] The primary aim of this special *Dialogue* section is to investigate how the ECJ has used the ECHR and the ECtHR case-law in the post-Charter era, and what factors account for the trend towards a "Charter centrism" within the ECJ's case-law. The accompanying publications of this special section each aim to address these questions from two distinct yet complementary perspectives presented by two leading scholars on the subject. The first perspective from Romain Tinière adopts an "internal" approach, focusing on the underlying dynamics of the ECJ's use of the ECHR both prior to and following the Charter's entry into force. The second perspective from Johan Callewaert, on the other hand, adopts an "external" viewpoint anchored in the perspective of national judges. Whereas the former posits that the ECJ's selective use of ECHR law stems from a quest for autonomy and legitimacy, the latter is critical of this selective use as it leads to ambiguity and uncertainty for national judges who are bound to apply both EU and ECHR law.

In his paper, Tinière reminds us that the ECHR played a central role in fundamental rights protection in the EU since the beginning. The ECJ used the ECHR and ECtHR case-law to build EU fundamental rights standards. Historically, the ECJ relied on the ECHR for reasons of both *primacy* and *legitimacy*. However, he observes that, with the Charter becoming binding, the position of the ECHR in the ECJ's case-law changed significantly. The ECJ has progressively replaced references to ECtHR case-law with EU-centered references following three paths. First, it mentions only the Charter, its explanations, and its own case-law, even when the right in question is also protected by the ECtHR. Second, the ECJ substitutes the legal reference to the ECHR invoked by the parties with a reference to the Charter. Third, the Court quotes the ECHR but only after creating some distance between the Charter's right and its ECHR equivalent. Tinière explains that the ECJ's approach to the use of ECHR in the post-Charter era is a quest for *autonomy* and *legitimacy*.

[15] Case C-409/16 *Kalliri* ECLI:EU:C:2017:767.

[16] ECtHR *Moraru v Romania* n. 64480/19 [8 November 2022] para. 54.

[17] See e.g., S O'Leary, 'The EU Charter Ten Years On: A View from Strasbourg' cit. 42; G de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) Maastricht Journal of European and Comparative Law 168.

Callewaert's work addresses the relationship between the ECHR and EU law, as viewed from the perspective of national judges who are tasked with applying both sets of legal rules. Given that national judges hold a dual status as both EU and Convention judges, he emphasizes the need for a wholistic approach to be adopted by both the ECJ and the ECtHR, and to fully account for the reality of interaction and intertwinement between the two legal sources. In his view, it is clear that the ECtHR regularly references EU law sources in its work, doing so explicitly. Turning to an analysis of ECJ's case law, Callewaert is critical of the lack of consistency of reliance by the ECJ on the law of the ECHR. Within the CJEU's case-law, the application of the ECHR falls into three distinct categories: common norms, duality of norms, and duality of methodologies. Common norms refer to the situation where the ECJ makes clear that it "imports" ECtHR case-law into EU law as a common (minimum) norm, i.e. with the same "meaning and scope" and the same – or an increased – level of protection. Duality of norms pertains to instances where there are distinct standards between EU fundamental rights and the ECHR, such as when the ECJ employs essential concepts from the ECHR but with slight modifications. Duality of methodologies concerns cases where there are methodological disparities between the jurisprudence of the ECtHR and the ECJ.

In conclusion, both authors show that the European fundamental rights architecture and the relationship between the ECHR and the EU have become increasingly complex in recent years, particularly in light of developments such as the binding effects of the Charter, the intensification of the fundamental rights implications of EU law-making, for instance in the area of the Area of Freedom, Security and Justice, and the negative opinion of the ECJ on the draft Treaty on accession by the EU to the ECHR. We can only hope that recent progress towards completion of the process of accession by the EU to the ECHR will be fruitful, with solutions being found in matters of judicial review of EU acts in the field of the Common Foreign and Security Policy[18] as well as with the subsequent completion of the procedure set out in Article 218 TFEU. The latter requires unanimity at the Council and consent of the European Parliament. Furthermore the agreement shall only enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements. One can also expect the Court of Justice to be asked for a new opinion. Even in case of accession though, the interaction between the ECJ and the ECtHR would continue to be an important issue for the protection of fundamental rights in Europe. While acknowledging that there may be valid reasons explaining that the ECJ develops its own approach to fundamental rights in specific circumstances,

[18] See *supra* fn. 10.

such as where EU law requirements are particularly dense, there is little doubt that consistency and methodological rigor in articulating the two sources of fundamental rights protection would enhance legal certainty.

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This article was written in the context of a research event hosted by the Institute for European Law of KU Leuven and the RESHUFFLE project (European Union's Horizon 2020 research and innovation programme, grant agreement No 851621).

DIALOGUES

DIALOGUE ON THE WAY THE CJEU USES ECHR CASE LAW
edited by Victor Davio *and* Elise Muir

THE USE OF ECTHR CASE LAW BY THE CJEU: INSTRUMENTALISATION OR QUEST FOR AUTONOMY AND LEGITIMACY?

ROMAIN TINIÈRE*

ABSTRACT: Whilst the ECtHR's case-law has occupied a central position in the CJEU's fundamental rights case-law since the latter's beginning, the entry into force of the EU Charter of Fundamental Rights seems to have opened a new and more chaotic period. Relying on this new fundamental rights instrument, the CJEU tends to cite ECtHR case-law in a far less systematic way, raising questions about the function of this case-law in the CJEU's new and ever-growing fundamental rights jurisprudential corpus. But, beyond this apparent inconsistency, nothing has really changed: ECtHR case-law still helps the CJEU to legitimate its own jurisprudence, being summoned whenever the EU Court needs it, and the ECHR human rights standard is still the CJEU's first (but not only) compass.

KEYWORDS: ECHR – EU Charter – legitimacy – EU law autonomy – CJEU – instrumentalisation.

I. INTRODUCTION

The European Convention on Human Rights (ECHR) is at the heart of fundamental rights protection in the EU almost from the beginning. Whilst the story is well known, it might be worth telling it one more time because some key points as to the use of European Court of Human Rights (ECtHR) case-law by the CJEU today emerged at the very start. After having "discovered" that there were general principles of European Community law

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ISSN 2499-8249
doi: 10.15166/2499-8249/654

protecting fundamental rights, the European Court of Justice (CJEU) identified two inspirations: the constitutional traditions common to the Member States[1] and the international treaties for the protection of human rights signed by the Member States.[2] Soon after France ratified the ECHR – in 1974 – the Court had the opportunity to mention it in *Rutili*[3] and since then, the ECHR has occupied a more and more important place in fundamental rights protection in the European Communities, then the European Union.[4]

To be brief on this well-known subject, the European Convention law (the ECHR itself, its protocols and its interpretation by the Strasbourg Court) has been used by the CJEU to build, right by right, the European Union fundamental rights standard, and to forge most of the tools needed to protect concretely those rights.[5] The space occupied by European Convention law in the CJEU case-law has been so significant that the Court has sometimes forgotten to mention that it was only an inspiration for the general principles, not a binding source of law for the European Communities. There are indeed numerous examples in which the CJEU directly quotes the European Court on Human Rights case-law[6] without any reference to the general principles, mostly between 1990 and 2010.[7]

In a nutshell, the story of fundamental rights protection in the EU is mainly a story of European Convention law.[8] Or at least it was so until the Charter became binding.[9]

But, before speaking about this second chapter of the story, we have to answer an important question: why did the European Convention law have such a central role from the beginning? To put it simply, it is about primacy and legitimacy.

Primacy, first, because we must not forget that fundamental rights protection in the EU was created to protect EU law primacy from threats from national supreme courts. Indeed, the general principles of law have the merit of offering an autonomous source of protection distinct from national constitutional law and safe from national courts' influence. But, relying on the constitutional traditions common to the Member States was still

[1] Since case 11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114 para. 4.

[2] Since case 4/73 *Nold KG v Commission* ECLI:EU:C:1974:51 para. 13.

[3] Case 36/75 *Rutili v Ministre de l'intérieur* ECLI:EU:C:1975:137 para. 32.

[4] "Particular significance" for the CJEU in joined cases 46/87 and 227/88 *Hoechst* ECLI:EU:C:1989:337 para. 13.

[5] See R Tinière, *L'office du juge communautaire des droits fondamentaux* (Bruylant 2007) 79-84 and 119-131.

[6] Hereafter also called "European Convention law" referring to the ECHR interpreted by the ECtHR in its case-law.

[7] Case C-270/99 P *Z v European Parliament* ECLI:EU:C:2001:639 para. 23; case C-245/01 *RTL Television*, ECLI:EU:C:2003:580 para. 68; joined cases C-482 and 493/01 *Georgios Orfanopoulos and others and Raffaele Oliveri v Land Baden-Württemberg* ECLI:EU:C:2004:262 para. 98; case C-499/04 *Werhof* ECLI:EU:C:2006:168 para. 33; and case C-117/01 *K.B.* ECLI:EU:C:2004:7 paras 33-34.

[8] "Mainly", because if the national constitutional traditions have also played a role, it was far more modest – at least in the case-law wording – than the European Convention law's one. See for example J Ziller, 'La constitutionnalisation de la Charte des droits fondamentaux et les traditions constitutionnelles communes aux États' in *Mélanges en l'honneur du professeur J. Molinier* (LGDJ 2012) 677.

[9] Charter of Fundamental Rights of the European Union [2012]

risky for EU law primacy. Indeed, national supreme courts could well have tried to identify their own constitutional principles behind the constitutional traditions and then explain to the CJEU how to interpret them.[10] The ECHR offered, then, a perfect remedy, being out of Member States' reach and genuinely independent from them.

Legitimacy, next, because the CJEU had, at the time, a great need to prove its good will to protect fundamental rights and not only European Community law. Relying on the most important human rights document in Europe, binding since 1974 and its ratification by France for all EU Member States,[11] was therefore the perfect way to convince the Member States of this good will before gradually expanding the standard and the scope of protection.

So, everything was going well – except maybe the legibility of this protection to ordinary people – until the Charter came.

II. Post-Charter situation at first glance

With the Charter having become the principal fundamental rights instrument in the EU according to art. 6 TEU, the position of ECtHR case-law in CJEU case-law has changed drastically. In fact, references to ECtHR case-law have progressively given way to EU-centred references following three main paths.

First, in numerous fundamental rights cases the CJEU mentions only the Charter, its explanations and its own case-law, even if the right in question is also protected by the ECtHR and as a general principle of EU law. The contrast between, for example, *Österreichischer Rundfunk*[12] in 2003 and *Google Spain*[13] in 2014 is striking: omnipresent in the first instance, European Convention law is completely absent in *Google Spain,* although the right to privacy and personal data protection is well-protected in European Convention law.

The second path followed by the CJEU is the substitution of legal reference. When European Convention law is invoked by parties, the CJEU tends to recall that the Charter now implements in EU law the fundamental right at issue and that it is necessary to refer only to the relevant Charter article.[14] Moreover, since Opinion 2/13 on the EU's accession to the ECHR, the Court seems to delight recalling that, "the ECHR does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been

[10] On this topic, see D Simon, 'Y a-t-il des principes généraux du droit communautaire?' (1991) Droits 73 and J Vergès, 'Droits fondamentaux de la personne et principes généraux du droit communautaire' in *Mélanges Jean Boulouis, l'Europe et le Droit* (Dalloz 1991) 513.

[11] Which, by the way, explains that the CJEU waited until 1975 to refer explicitly to the ECHR in its *Rutili* case-law (*Rutili* cit. para. 32).

[12] Joined cases C-465/00, 138 and 139/01 *Österreichischer Rundfunk* ECLI:EU:C:2003:294 paras 71 ff.

[13] Case C-131/12 *Google Spain* ECLI:EU:C:2014:317.

[14] Case C-386/10 P *Chalkor* ECLI:EU:C:2011:815 para. 51 (effective judicial remedy).

formally incorporated into EU law".[15] And as it does not legally bind the EU, there is no obligation to follow the ECtHR's path when interpreting the limits of a fundamental right, like *ne bis in idem* in *Menci*.[16]

By the third, last and perhaps more subtle path, the CJEU can choose to quote European Convention law, but only after having put some distance between the Charter's right and its ECHR equivalent. For example, in *Digital Rights Ireland,*[17] the Court prefaces each ECHR law reference with "see as regards art. 8 of the ECHR". This "as regards" seems to have a clear function: to give some space for the Charter's interpretation. And never mind if the right referred to is a "corresponding right" according to art. 52(3) of the Charter and must therefore be given the same meaning and scope as laid down by the Convention.

Yet, the Charter's drafters took precautions to avoid a split in European fundamental rights' standards, in particular with the "corresponding rights" mechanism enshrined in art. 52(3) of the Charter. It is precisely building on this article that the CJEU decided in some judgments to quote ECtHR case-law like in the good old days, namely without taking any distance from European Convention law. That is what it does, for example, in the *WebMindLicences* judgment concerning the right to respect for private and family life,[18] in *Lanigan* concerning the right to liberty and security,[19] and in *Commission v Hungary (usufruct over agricultural land)*[20] on the right to property.

The CJEU's use of ECtHR case-law thus appears random. That risks undermining its predictability as Johan Callewaert stresses out in his contribution.[21] And it raises old fears about the Court using these sources merely instrumentally.[22] But things can be seen differently for there is an underlying pattern behind that development.

III. Post-Charter situation: second thoughts

Indeed another interpretation of this apparent jurisprudential fluctuation is possible and there is actually a pattern behind it. This time, the duo is slightly different: it is not about primacy and legitimacy, but autonomy and legitimacy. More precisely, it is autonomy first and legitimacy only when needed.

[15] Joined cases C-203 and 698/15 *Tele2 Sverige* ECLI:EU:C:2016:970 para. 167 (respect for private life); case C-601/15 *J. N.* ECLI:EU:C:2016:84 paras 45-46 (right to security).

[16] Case C-524/15 *Menci* ECLI:EU:C:2018:197.

[17] Joined cases C-293 et 594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238 paras 35, 47, 54 and 55.

[18] Case C-419/14 *WebMindLicences* ECLI:EU:C:2015:832 paras 70-72.

[19] Case C-237/15 PPU *Lanigan* ECLI:EU:C:2015:474 paras 56-57.

[20] Case C-235/17 *Commission v Hungary (usufruct over agricultural land)* ECLI:EU:C:2019:432 paras 72 and 85.

[21] J Callewaert, 'Convention Control Over the Application of Union Law by National Judges: The Case for a Wholistic Approach to Fundamental Rights' (2023) European Papers www.europeanpapers.eu 331.

[22] J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously ?' (1992) CMLRev 669.

III.1. Autonomy (first)

Why autonomy? Because the autonomy of the EU legal system, namely its independence and its self-determination,[23] is the key concept, explaining the CJEU's position in its Opinion 2/13 and the main reason why the Charter is preferred to the European Convention whenever possible.

It is probably unnecessary to recall that every legal order, including that of the EU, needs to ensure its autonomy and that it is the CJEU's duty, as enshrined in art. 19 TEU,[24] to protect EU law from the law of the Member States and international law. Moreover, if the CJEU protects fundamental rights, it is not a "human rights court" like the ECtHR, because it has not only one task (protecting human/fundamental rights) but many, including the protection of the EU legal order's autonomy or EU law effectiveness, like a national supreme court.

This obvious reality has been expressed by the Court in its Opinion 2/13 as follows: "[t]he autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU".[25] Fundamental rights protection must take into account the autonomy of EU law. This autonomy can be preserved in various ways but, since the EU now has its own fundamental rights instrument, it is quite logical that the CJEU relies on this instrument rather than on an extraneous one, including even the European Convention itself.

Hence, one may understand that the CJEU's main rule is to use the Charter and other EU possibly existing instruments before referring to European Convention law. And actually it does refer to this law, but only when needed and mostly for legitimacy reasons.

III.2. Legitimacy (when needed)

The CJEU's position has fundamentally changed since the early days of EU fundamental rights protection, and has changed even more with the entry into force of the Charter. Its good will to ensure such protection is no longer seriously debated and it has a legal text to rely on. But as EU fundamental rights protection has gradually built up, expanding to all EU law areas until becoming a part of the EU's constitutional pact itself, expectations about the legitimacy of this protection have dramatically evolved. To put it simply, if the Court wants to give a fundamental rights interpretation that is widely accepted enough

[23] See for example, D Simon, 'Les fondements de l'autonomie du droit communautaire' in *Droit international et droit communautaire. Perspectives actuelles* (Pedone 2000) 207; C Vial and R Tinière, 'Propos introductifs – L'autonomie du système de protection des droits fondamentaux de l'Union européenne en question' in *La protection des droits fondamentaux dans l'Union européenne – entre évolution et permanence* (Bruylant 2015) 9.

[24] Art. 19(1) TEU: "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed".

[25] Opinion 2/13 ECLI:EU:C:2014:2454 para. 170.

to constitute a common ground in Europe[26] and form part of this constitutional pact, it cannot do it alone and needs to rely on the European Convention law which remains "The" European common standard of protection.

It follows that whilst "ordinary EU fundamental rights protection questions" do not need European Convention law, that law may be required for certain hard cases. More precisely, the Convention can help to legitimate the CJEU's statements broadly in three different ways.

First, the European Convention law can help to establish a new or little-used right's interpretation as it is the case, for instance, in *Commission v Hungary (transparency of associations).*[27] In this judgment, the Court had to assess the Hungarian's law on the Transparency of Organisations which receive Support from Abroad (Transparency law), as regards its compatibility with EU law including, among others, freedom of assembly and of association as enshrined in art. 12 of the Charter. It was the first time the Court had the opportunity to interpret this right in depth[28] and it decided to do so in the light of European Convention law by referring to the "corresponding rights" mechanism before relying heavily on ECtHR case-law[29] without any particular precaution for EU law's autonomy. Another example may be found in another *Commission v Hungary*[30] case concerning higher education, where a Hungarian law was adopted to obtain the closure of the Central European University. In this judgment, the Court ruled for the first time on academic freedom (art. 13 of the Charter) and did so again in the light of the European Convention. What is of particular interest here is that this right is not clearly identified by the Charter as having a corresponding right. But, for the Court, even if "it is true that the text of the ECHR makes no reference to academic freedom", it is "apparent from the case-law of the European Court of Human Rights that that freedom is associated, in particular, with the right to freedom of expression enshrined in art. 10 of the ECHR",[31] allowing it to ground its interpretation on this ECtHR case-law so as to define more precisely this new right's meaning.

[26] On this question see E Dubout, *Droit constitutionnel européen* (Bruylant 2021) 386.

[27] Case C-78/18 *Commission v Hungary (transparency of associations)* ECLI:EU:C:2020:476.

[28] Even though already (but scarcely) present in CJEU's jurisprudence, this right has always remained at the periphery of the Court's reasoning. See case C-415/93 *Bosman* ECLI:EU:C:1995:463 paras 79-80 or case *Werhof* cit. Even in *Schmidberger* (case C-112/00 ECLI:EU:C:2003:333) or *Laval* (case C-341/05 ECLI:EU:C:2007:809), the Court did not examine the very substance of this right.

[29] *Commission v Hungary (transparency of associations)* cit. paras 112-114.

[30] Case C-66/18 *Commission v Hungary* ECLI:EU:C:2020:792.

[31] *Ibid*. para. 224. The Court quotes ECtHR *Mustafa Erdoğan and Others v Turkey* App n. 346/04 39779/04 [27 May 2014] and considers in para. 225 that "[f]rom that specific perspective, academic freedom in research and in teaching should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and to distribute knowledge and truth without restriction, although it should be made clear that that freedom is not restricted to academic or scientific research, but that it also extends to academics' freedom to express freely their views and opinions".

European Convention law can also help to introduce a new methodology, opening new ways of interpreting EU fundamental rights. This was the case in *Centraal Israëlitisch Consistorie van België and others.*[32] In this judgment concerning freedom of religion and animal welfare in case of ritual slaughter, the CJEU borrows explicitly two tools that are emblematic of European Convention law – the margin of appreciation and the principle of a Charter as a living instrument which must be interpreted in the light of present-day conditions[33] – to help itself find the correct balance and to accept that the Member State had lawfully restricted freedom of religion in the name of animal welfare. Another example can be found in *Quadrature du net*[34] in which the CJEU borrows the positive obligation technique from European Convention law.[35] If the Court of Justice does it to answer to the Belgian Constitutional Court who tried to use this concept to justify the preventive retention of traffic and location data for the purpose of combating crime, especially prevention and punishment of the sexual abuse of minors, by invoking positive obligations flowing from arts 4 and 7 of the Charter,[36] this new technique is now officially part of EU law.[37]

Finally, the European Convention law can also help to reinforce an already well-established interpretation of a fundamental right when this interpretation is seriously challenged or if the context in which it applies is politically particularly delicate as in Poland or Hungarian affairs for example. This is what the Court of Justice is trying to do in its "rule of law jurisprudence", especially about the situation in Poland, when it refers to ECHR case-law concerning impartiality and tribunal established by law.[38] In this situation, quoting ECHR case-law is a way for CJEU to reinforce its position and recall that this is supported by the ECtHR.

IV. Conclusion: what about the standard of protection?

To conclude, it seems that the CJEU can actually quote and use ECtHR case-law in a proper way – at least when the quest for legitimacy makes it forget about autonomy or, to go a bit further, when the quest for legitimacy reinforces autonomy. "At least" because whilst the framework here proposed tries to offer some explanation for the apparent chaos

[32] Case C-336/19 *Centraal Israëlitisch Consistorie van België and others* ECLI:EU:C:2020:1031.

[33] *Ibid*. respectively paras 67 and 77.

[34] Joined cases C-511, 512 and 520/18 *Quadrature du net* ECLI:EU:C:2020:791.

[35] *Ibid*. paras 126-128.

[36] *Ibid.* para. 85.

[37] Especially since the CJEU uses the corresponding rights mechanism to recognise the existence of positive obligations. Moreover, this recognition suggests that other positive obligations existing under European Convention law may in the future be used by the Court.

[38] Case C-791/19 *Commission v Poland (régime disciplinaire des juges)* ECLI:EU:C:2021:596 paras 165-173 or joined cases C-562 and 563/21 PPU *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)* ECLI:EU:C:2022:100, notably paras 56, 57, 71 and 79.

resulting from the post-Lisbon jurisprudence of the CJEU, it does not pretend to be exhaustive. Other explanations may exist, such as the usual vagaries of judgment-writing, or ECHR reference in secondary law.[39] However, it seems to me that this balance between autonomy and the quest for legitimacy is prominent.

One final thought. One might say: this is all well and good, but is it the most important thing when talking about fundamental rights the standard of protection? Whatever the causes – autonomy or legitimacy –, are all of these jurisprudential fluctuations not affecting the level of protection in the EU compared to the ECHR standard? No, they are not. The standard of protection remains broadly unaffected by the use or non-use of European Convention law in the CJEU's case-law. Surely the EU standard is not always exactly identical to that of European Convention law. It can be, for a while, slightly lower or higher than the ECHR's one.[40] But it does not differ more (or less) than it would if compared to how a national supreme court proceeds in similar settings.[41] Because, whatever the formal place occupied by ECtHR case-law in the CJEU's case-law, the European standard remains the bottom line of EU fundamental rights' protection. And this is the most important point.

[39] For example, case C-348/21 *HYA and others (Impossibilité d'interroger les témoins à charge*) ECLI:EU:C:2022:965 concerning Directive (EU) 2016/343 and the right to a public and adversarial hearing.

[40] For an illustration of an EU standard slightly lower than ECHR's one, see for example the first judgments in mutual trust affairs like joined cases C-411 and 493/10 *N.S. and others* ECLI:EU:C:2011:865. On the opposite, the EU standard in case C-465/07 *Elgafaji* ECLI:EU:C:2009:94 is slightly higher. At least until ECtHR, *Sufi and Elmi v UK* n. 8319 and 11449/07 [28 June 2011]. In some situations, it can also be difficult to determine precisely if a different interpretation leads to a lower or higher standard of protection like, for example, in *Menci* above-mentioned.

[41] Even when the EU Court decides to accept limitations on the exercise of *ne bis in idem*, which is an absolute right in European Convention law (*Menci* cit.), the level of protection remains similar in line to that under the ECtHR.

DIALOGUES

DIALOGUE ON THE WAY THE CJEU USES ECHR CASE LAW
edited by Victor Davio *and* Elise Muir

CONVENTION CONTROL OVER THE APPLICATION OF UNION LAW BY NATIONAL JUDGES: THE CASE FOR A WHOLISTIC APPROACH TO FUNDAMENTAL RIGHTS

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ABSTRACT: Legal acts performed by EU Member States applying Union law come within the scope of the Convention and can give rise to adjudication by the ECtHR. A long series of judgments illustrate the ECtHR's approach regarding the application of Union law by the courts of EU Member States. The Convention and Union law are not two autonomous systems separated by a watertight fence. Both European Courts should therefore adopt a wholistic approach in this area, because only a wholistic view takes full account of the legal reality which is one of interaction and intertwining. The ECtHR makes abundant use of EU law sources, thereby always explicitly referring to them. Three different categories of cases can be identified in how the CJEU goes about the Convention in its case-law.

KEYWORDS: ECHR – EU-Charter – legal clarity – duality of norms – methodology – wholistic approach.

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This contribution was written in the context of a seminar hosted by the Institute for European Law of KU Leuven and the RESHUFFLE project (European Union's Horizon 2020 research and innovation programme).

ISSN 2499-8249
doi: 10.15166/2499-8249/655

I. Convention control over the application of Union law by domestic courts

I.1. The principle

National judges play an essential role in the protection of fundamental rights today, as they are the ones entrusted with the difficult task of combining and translating into viable solutions the multiple sources of such rights which are being produced by today's complex multipolar and multilayer legal world. They are the ones who, at the end of the day, apply these multiple legal sources to the citizens in the most coherent possible way. In other words, the proof of the pudding, i.e. the real interaction between those sources takes place at domestic level, nowhere else. This is why this paper will address the relationship between the European Convention on Human Rights ("the Convention") and Union law from the perspective of the national judges.

The starting point for this consideration will be the simple fact that legal acts performed by EU Member States applying Union law come within the scope of the Convention and can give rise to adjudication by the European Court of Human Rights ("the ECtHR").[1] EU Member States indeed remain liable under the Convention for any acts performed under Union law. This is a direct consequence of the principle according to which the responsibility of the Contracting States to the Convention extends to their entire jurisdiction within the meaning of art. 1 of the Convention.[2] As regards the EU Member States, this jurisdiction also includes Union law as part of their respective domestic legal systems.

Thus, the creation of the EU[3] did not remove the responsibility of the Member States under the Convention for their application of Union law. Rather, since the Member States did not withdraw from the Convention when creating or joining the EU and, consequently, remain bound by it, they also remain under a Convention obligation to apply Union law in a manner which is compatible with the Convention. As the Court stated in *Bosphorus*, EU Member States retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.[4] By contrast, the EU itself, being a separate legal entity with its own legal personality,[5] is not subject to the Convention as long as it does not formally accede to it.

In short, national judges have a double European status, as EU judge and as Convention judge. When applying Union law, they must also apply the Convention. They cannot be EU judges only.

[1] See, among many others, ECtHR *M.S.S. v. Belgium and Greece* App n. 30696/09 [21 January 2011]; ECtHR *Avotiņš v. Latvia*, App n. 17502/07 [23 May 2016].

[2] ECtHR *Matthews v. the United Kingdom* App n. 24833/94 [18 February 1999] para. 29; ECtHR *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* App n. 45036/98 [30 June 2005] para. 153.

[3] The reference to the EU here includes all its predecessor organisations.

[4] *Bosphorus v. Ireland* cit. para. 154.

[5] Art. 47 TEU.

I.2. Applications

A long series of judgments, reaching as far back as 1996, illustrate the ECtHR's approach regarding the application of Union law by the courts of EU Member States.[6]

In *Cantoni*, in which a criminal conviction of the manager of a supermarket for unlawfully selling pharmaceutical products was found not to have violated the principle, laid down in art. 7 of the Convention, that criminal law should be foreseeable in its effects, the ECtHR ruled that the mere fact that a provision of the French Public Health Code was based almost word for word on EU Directive 65/65 did not remove it from the ambit of art. 7 of the Convention.[7]

In *Matthews*, which concerned the exclusion of Gibraltar from European Parliamentary elections, the ECtHR applied to EU primary law a previously established principle according to which art. 1 of the Convention makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States' jurisdiction from scrutiny under the Convention. It also stated that while acts of the former European Community as such could not be challenged before the ECtHR because the European Community was not a Contracting Party, the Convention did not exclude the transfer of competences to international organisations provided that Convention rights continued to be secured. Member States' responsibility under the Convention therefore continued even after such a transfer.[8]

These principles were later confirmed and applied to secondary Union law in *Bosphorus v Ireland*, which examined the compatibility with the Convention of the seizure of an aeroplane which had been carried out in conformity with EU Regulation 990/93. They were complemented by a presumption according to which if an international organisation can be considered to provide a fundamental rights protection at least equivalent to that provided by the Convention, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of that organisation.[9]

Subsequent judgments relying on these principles cover cases concerning the application at domestic level of a variety of different EU legal instruments, including the Dublin

[6] These cases are to be distinguished from the many cases in which Union law or case-law is used as a mere source of inspiration in interpreting the Convention. For an overview of these cases, please turn to www.echr.coe.int.

[7] ECtHR *Cantoni v France* App n. 17862/91 [15 November 1996] para. 30.

[8] ECtHR *Matthews v the United Kingdom* App n. 24833/94 [18 February 1999] paras 29 and 32.

[9] *Bosphorus v Ireland* cit. para. 156.

Regulation (e.g. in *M.S.S.*[10] and *Tarakhel*[11]), the Procedures Directive (e.g. in *Ilias and Ahmed*,[12] *S.H.*[13]), the Brussels I Regulation (e.g. in *Avotiņš*[14]), the Brussels IIbis Regulation (e.g. in *Šneersone and Kampanella*,[15] *Royer*,[16] *OCI and Others*,[17] *Michnea*,[18] *Veres*[19]), the Framework Decision on the European arrest warrant (e.g. in *Stapleton,*[20] *Pirozzi,*[21] *Romeo Castaño,*[22] *Bivolaru and Moldovan*[23]), art. 267 TFEU (e.g. in *Ullens de Schooten,*[24] *Vergauwen,*[25] *Sanofi Pasteur,*[26] *Rutar and Rutar Marketing D.O.O.*[27]), the Common Fisheries Policy (*Spasov*[28]), Directive 76/207 on equal treatment of men and women in matters of employment and occupation (e.g. in *Moraru*[29]). In several of these cases the ECtHR found violations of the Convention, for a variety of different reasons.

The one recently found in *Bivolaru and Moldovan* is certainly one of the most significant of all. It concerned the execution of a European arrest warrant ("EAW") which, in spite of the application of the *Bosphorus* presumption,[30] the ECtHR considered to have given rise to a manifest deficiency in the application of art. 3 of the Convention.[31]

It can be assumed that out of all cases of domestic application of Union law qualifying for scrutiny under the Convention, those which come before the ECtHR are only the tip of the iceberg.[32] In any event, and in response to the concerns expressed by eminent scholars such as Romain Tinière,[33] it should be stressed that the ECtHR's scrutiny in this area is not

[10] ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011].
[11] ECtHR *Tarakhel v Switzerland* App n. 29217/12 [4 November 2014].
[12] ECtHR *Ilias and Ahmed v Hungary* App n. 47287/15 [21 November 2019].
[13] ECtHR *S.H v Malta* App n. 37241/21 [20 December 2022].
[14] *Avotiņš v Latvia* cit.
[15] ECtHR *Šneersone and Kampanella v Italy* App n. 14737/09 [12 July 2011].
[16] ECtHR *Royer v Hungary* App n. 9114/16 [5 March 2018].
[17] ECtHR *O.C.I. and Others v Romania* App n. 49450/17 [21 May 2019].
[18] ECtHR *Michnea v Romania* App n. 10395/19 [7 July 2020].
[19] ECtHR *Veres v Spain* App n. 57906/18 [8 November 2022].
[20] ECtHR *Stapleton v Ireland* App n. 56588/07 [4 May 2010].
[21] ECtHR *Pirozzi v Belgium* App n. 21055/11 [17 April 2018].
[22] ECtHR *Romeo Castaño* App n. 8351/17 [9 July 2019].
[23] ECtHR *Bivolaru and Moldovan* App n. 40324/16 and 12623/17 [25 March 2021].
[24] ECtHR *Ullens de Schooten and Rezabek v Belgium* App n. 3989/07 and 38353/07 [20 September 2011].
[25] ECtHR *Vergauwen and Others v Belgium* App n. 4832/04 [10 April 2012].
[26] ECtHR *Sanofi Pasteur v France* App n. 25137/16 [13 February 2020].
[27] ECtHR *Rutar and Rutar Marketing D.O.O. v Slovenia* App n. 21164/20 [15 December 2022].
[28] ECtHR *Spasov v Romania* App n. 27122/14 [6 December 2022].
[29] ECtHR *Moraru v Romania* App n. 64480/19 [8 November 2022].
[30] *Bosphorus v Ireland* cit.
[31] On this judgment, see J Callewaert, 'The European Arrest Warrant Under the European Convention on Human Rights: A Matter of Cooperation, Trust, Complementarity, Autonomy and Responsibility' (2021) Zeitschrift für Europarechtliche Studien 105.
[32] For more relevant case-law, please go to www.johan-callewaert.eu.
[33] R Tinière, 'The Use of ECtHR Case-law by the CJEU: Instrumentalisation or Quest for Autonomy and Legitimacy?' (2023) European Papers www.europeanpapers.eu 323.

to be understood as challenging the autonomy of Union law. It is simply drawing the consequences of the EU Member States being at the same time Contracting States to the Convention, but doing so according to the *Bosphorus* principles, i.e. with special attention being given to the particularities of Union law, notably through the application of a presumption of conformity with the Convention, combined with a lower threshold.[34] Besides, the very idea that the application of Union law should be the subject of an external control by the ECtHR was since confirmed by the EU legislature himself when enacting art. 6(2) TEU which provides, in its first sentence, that the EU shall accede to the Convention.[35] This is without prejudice to the fact that pending this accession, the Convention does not constitute a legal instrument which has been formally incorporated into EU law.[36]

II. The case for a wholistic approach to fundamental rights: state of the Play

The Convention liability incurred by domestic judges when they apply Union law, as illustrated by the examples described above, amply shows that the Convention and Union law are not two autonomous systems separated by a watertight fence. This is because Union law is to be applied at domestic level by judges who are themselves subject to the Convention and, consequently, must combine these two legal sources.

That being so, the two European Courts have the responsibility to make every effort to help and support domestic judges in fulfilling that difficult task, by providing *legal clarity* as regards the way their respective legal orders interact. In other words, they should not leave it to the national judges to sort this out by themselves. Rather, they should explicitly take into consideration the full picture of the interplay between the Convention and Union law when interpreting their respective provisions. This includes addressing the impact of that interplay at domestic level and indicating how it is meant to play out, notably in terms of whether the respective levels of protection involved are the same or not. In short, both European Courts should adopt a wholistic rather than an autonomistic approach in this area, because only a wholistic view can take full account of the legal reality which is one of interaction and intertwining rather than separate worlds.

Such an approach goes both ways. It requires on the one hand that in cases involving Union law, the Convention be interpreted by the ECtHR having regard to the interests of

[34] On how this scrutiny is being carried out in practice, see V Davio, 'Le droit de l'Union européenne dans la jurisprudence de la Cour européenne des droits de l'homme' (2023) *Journal de droit européen* 46.

[35] According to art. 1 of Protocol No 8 relating to art. 6(2), the modalities of EU accession to the Convention must be such as to preserve the specific characteristics of the Union and Union law.

[36] As repeatedly stated by the CJEU, e.g. in Case C-511/11 P, *Schindler Holding and Others / Commission* ECLI:EU:C:2013:386 para. 32.

European integration and the specificities of Union law, for which the ECtHR has repeatedly expressed support,[37] and that there is communication about how these specificities play out in the application of the Convention. Moreover, it requires adequate communication whenever the ECtHR draws on Union law for the purpose of simply enriching its own case-law and/or achieving convergence between the two.

On the other hand, it means that Union law should be interpreted by the CJEU having regard to the fact that, as suggested notably by art. 52(3) of the EU-Charter and confirmed by numerous rulings of the CJEU,[38] the Convention represents also under Union law a minimum standard, which can however be raised. This requires not only that Union law be interpreted so as to avoid falling below the Convention protection level, but also that there be clear communication about the relationship between both, with a view to enabling domestic judges to correctly evaluate the legal situation. Failure to do so amounts to exposing national judges to being found liable under the Convention.

Indeed, as already suggested by the *Bosphorus* presumption instituted by the ECtHR,[39] domestic judges are entitled to trust that when applying Union law as interpreted by the CJEU, they will automatically comply also with the Convention as interpreted by the ECtHR. Thus, as the main actors in the combined application of Union and Convention law, national judges should, as a matter of decency, be enabled to understand from the relevant judgments whether there are any differences between the standards applied in Strasbourg and Luxembourg.

As Chief Justice Clarke put it:

> "Whatever the influence of international instruments within the national legal order and however those instruments interact with national human rights measures, the net result at the end of the day has to be a single answer. It is in those circumstances that the existence of an increasing range of international instruments which, to a greater or lesser extent, potentially influence the result of individual cases within the national legal order needs to be debated. We may not need to harmonise our human rights laws in the strict sense of that term but can I suggest that we do need a coherent and harmonious human rights order".[40]

The following observations will try and take stock of the extent to which the wholistic approach described above has been followed so far by the two European Courts.

[37] Notably in ECtHR *Waite and Kennedy v Germany* App n. 26083/94 [18 February 1999] para. 72; *Bosphorus v Ireland* cit. para. 150; and ECtHR *Avotiņš v Latvia* cit. para. 113.

[38] See, as illustrations, the rulings mentioned below under the heading "common norms".

[39] *Bosphorus v Ireland* cit.

[40] F Clarke, Chief Justice at the Supreme Court of Ireland, Opening of the Judicial Year of the ECtHR, (31 January 2020) www.echr.coe.int. In the same sense: B Deconinck, 'Le métier de juge' (2019) Journal des tribunaux 847.

II.1. The European Court of Human Rights

In contrast with the double function of the Convention under Union law, where it operates both as toolbox and benchmark (see below), Union law and jurisprudence are only used as toolbox under the Convention, i.e. as source of inspiration when interpreting the latter. This is because, the Convention being itself the minimum protection level open to being raised in the Contracting States,[41] there is no obligation for it to comply with Union law standards.

That said, the ECtHR makes abundant use of Union law, and in particular of the EU-Charter,[42] as source of inspiration, including as an argument in favour of raising its own protection level, as in *Scoppola (No. 2)*[43] or in *Schalk and Kopf*.[44] The wholistic approach thereby adopted is reflected not only in the act of taking on board Luxembourg case-law but also in the fact that the ECtHR as a rule always explicitly refers to Union law sources relied upon on this occasion. This not only has the consequence of giving pan-European effect to such sources but it also, in the interest of coherence in the application of fundamental rights, signals convergence in the area concerned.

At the same time, the ECtHR has shown itself willing to adapt the Convention standards to the needs of European integration and the specificities of Union law flowing from them. This is reflected in such landmark judgments as *Bosphorus*,[45] which sets up a presumption of conformity with the Convention, combined with a lower threshold, and *Avotiņš*,[46] which expressed principled support for the creation of the area of freedom, security and justice and the mechanisms of mutual recognition designed to facilitate its functioning.

II.2. The Court of Justice of the European Union

When considering the use made of the Convention by the CJEU, one should differentiate between the two different functions of the Convention under Union law: as toolbox and as benchmark. Both functions are explicitly addressed by Union law but at different degrees.

The Convention operates as a toolbox when it is relied upon by the CJEU for the sake of filling some gaps in Union law, as was recently the case in *Dorobantu*,[47] on minimum standards as regards conditions of detention, or in *Spetsializirana prokuratura (trial of an absconded suspect)*,[48] on the impact of a waiver of procedural rights. This approach finds

[41] Art. 53 of the Convention.

[42] On the use of the EU-Charter in the Strasbourg case-law, see P Lemmens and M Piret, 'The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, from the Perspective of the European Court of Human Rights' (2021) Cahiers de droit européen 183.

[43] ECtHR *Scoppola v Italy (no. 2)* App n. 10249/03 [17 September 2009] paras 105-109.

[44] ECtHR *Schalk and Kopf v Austria* App n. 30141/04 [24 June 2010] paras 60-61.

[45] *Bosphorus v Ireland* cit.

[46] ECtHR *Avotiņš v Latvia* cit.

[47] Case C-128/18 *Dorobantu* ECLI:EU:C:2019:857 para. 71, in which the CJEU specified that it was relying on *Muršić v Croatia* "in the absence, currently, of minimum standards in that respect under EU law".

[48] Case C-569/20 *Spetsializirana prokuratura (trial of an absconded suspect)* ECLI:EU:C:2022:401 paras 52-53.

support in art. 52(3) of the EU-Charter which provides that as regards the rights which the Convention and the EU-Charter have in common, their "meaning and scope" shall be the same as under the Convention, without prejudice to the possibility for Union law to provide for a more extensive protection. Under these premises, it does indeed make a lot of sense, as a contribution to legal harmony, to draw inspiration from the Convention in interpreting fundamental rights.

But the Convention is also designed to operate as a benchmark under Union law. This is explicitly stated in the Explanations to art. 52(3) of the EU-Charter, according to which "In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR". This benchmark function of the Convention, which is also underpinning art. 6(2) TEU and the standstill clauses included in several pieces of secondary law enshrining fundamental rights,[49] is obviously designed not only to acknowledge the pan-European relevance of the Convention minimum level, including under Union law, but also to protect domestic judges from incurring Convention liability when applying Union law.

In simple terms, the toolbox function is about the *content* of fundamental rights and helps ensure *substantive harmony* between the Convention and Union law, whereas the benchmark function is about the respective *levels of protection* between the two and their *compatibility*. Both are needed but the benchmark function is more essential to national judges applying Union law, as it is their safety net against breaching the Convention. That said, the two functions can easily be combined, as the CJEU did e.g. in *Orde van Vlaamse Balies and Others*, by indicating that in applying rights of the EU-Charter, the corresponding rights of the Convention, as interpreted by the ECtHR, must be taken into account, as the minimum threshold of protection.[50]

Against this background, three different categories of cases can be identified in how the CJEU goes about the Convention in its case-law. Depending on how the CJEU handles the toolbox and the benchmark functions, these cases will generate, with different consequences as regards the resulting legal clarity, either common norms (a), or a duality of norms (b) or indeed a duality of methodologies (c). Examples of cases belonging to each of these categories are described below.[51]

Generally speaking, while it would appear that the use of the Convention's benchmark function is on the rise when compared with the CJEU's practice following the entry into force of the EU-Charter, it is still far from sufficient to reach in all relevant areas the requisite level of legal clarity.

[49] E.g. in the directives on procedural rights in criminal proceedings (see footnote 62 below).

[50] Case C-694/20 *Orde van Vlaamse Balies and Others* ECLI:EU:C:2022:963 para. 26.

[51] For an overview of recent case-law of the ECtHR and CJEU considered in terms of their interplay, please turn to www.johan-callewaert.eu.

a) Common norms

There will be sufficient legal clarity whenever the CJEU makes clear that it "imports" Strasbourg case-law into Union law as a common (minimum) norm, i.e. with the same "meaning and scope" and the same – or an increased – level of protection, as it did for instance in *Aranyosi and Căldăraru*, where it stated:

> "That the right guaranteed by Art. 4 of the Charter is absolute is confirmed by Art. 3 ECHR, to which Art. 4 of the Charter corresponds. As is stated in Art. 15(2) ECHR, no derogation is possible from Art. 3 ECHR. Articles 1 and 4 of the Charter and Art. 3 ECHR enshrine one of the fundamental values of the Union and its Member States. That is why, in any circumstances, including those of the fight against terrorism and organised crime, the ECHR prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see judgment of the ECtHR in Bouyid v. Belgium, No 23380/09 of 28 September 2015, § 81 and the case-law cited)".[52]

Another way for the CJEU to achieve legal clarity vis-à-vis the Convention is by explicitly referring to the Convention as benchmark under Union law, as was recently done in *Orde van Vlaamse Balies and Others*:

> "In accordance with Art. 52(3) of the Charter, which is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR, without adversely affecting the autonomy of EU law, the Court must therefore take into account, when interpreting the rights guaranteed by Articles 7 and 47 of the Charter, the corresponding rights guaranteed by Art. 8(1) and Art. 6(1) ECHR, as interpreted by the European Court of Human Rights ("the ECtHR"), as the minimum threshold of protection [...]".[53]

Similar indications are to be found e.g. in *Al-Chodor and Others*,[54] *Lanigan*,[55] *HN*,[56] *DD*[57] and *Politsei- ja Piirivalveamet.*[58] Such language is very helpful as it provides assurance that the Convention's minimum threshold has been taken on board by the CJEU in its interpretation, thus allowing national judges to be satisfied that by applying the CJEU ruling at issue they will not encroach on the Convention[59].

[52] Joined Cases C 404/15 and C 659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198 paras 86-87.

[53] *Orde van Vlaamse Balies and Others* cit. para. 26.

[54] Case C-528/15 *Al-Chodor and Others* ECLI:EU:C:2017:213.

[55] Case C-237/15 PPU *Lanigan* ECLI:EU:C:2015:474.

[56] Case C-420/20 *H.N (Procès d'un accusé éloigné du territoire)* ECLI:EU:C:2022:679.

[57] Case C-347/21 *D.D (Réitération de l'audition d'un témoin)* ECLI:EU:C:2022:692.

[58] Case C-241/21 *Politsei- ja Piirivalveamet (Placement en rétention - Risque de commettre une infraction pénale)* ECLI:EU:C:2022:753.

[59] On this approach, see J Callewaert, 'The Recent Luxembourg Case-Law on Procedural Rights in Criminal Proceedings: Towards Greater Convergence with Strasbourg?' (4 May 2023) EU Law Live www.eulawlive.com.

b) Duality of norms

However, things are not always as clear as described above. There are indeed quite a few cases which confront the reader with an apparent *duality of norms*, thereby raising the question whether it also entails a *duality of protection*. The result is a lack of legal clarity about the implications of the interplay between Union law and the Convention.

A first category of cases of that kind are those where key notions are being borrowed from the Convention but slightly modified, for no apparent reason, creating some confusion as to whether they are meant to say the same or not.

An example of such modifications is to be found in *Staatssecretaris van Justitie en Veiligheid (Éloignement - Cannabis thérapeutique)* where the CJEU, referring to the *Paposhvili* jurisprudence of the ECtHR, describes the test to be applied to the expulsion of seriously ill people as being "a real risk of a significant reduction in his or her life expectancy or a rapid, significant and permanent deterioration in his or her state of health, resulting in intense pain".[60] The ECtHR, however, in *Paposhvili* used a slightly different formulation: "a real 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".[61] Why such differences? If the intention is to say the same, why use different formulations? If not, why not be explicit about it?

Of course, any intended substantive differences between these two versions would not appear to be dramatic. But the result is nonetheless some ambiguity instead of legal clarity, leaving national judges guessing whether this apparent duality of norms also entails a duality of protection. For why should lawyers use different words and rebuild phrases if not for referring to a different legal proposition?

Similar questions arise about the wording of some Directives on procedural rights in criminal proceedings when compared with the Strasbourg case-law.[62] Fortunately, the CJEU here seems willing to interpret them in light of the EU-Charter and the Convention, considering the latter as "a minimum threshold of protection".[63]

[60] Case C-69/21 *Staatssecretaris van Justitie en Veiligheid (Éloignement - Cannabis thérapeutique)* ECLI:EU:C:2022:913 para. 66.

[61] ECtHR *Paposhvili v Belgium* App n. 41738/10 [13 December 2016] para. 183.

[62] Such as Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

[63] As in Case C-377/18 *AH and Others* ECLI:EU:C:2019:670 para. 41.

The limitations which can be applied to fundamental rights are another area where an apparent duality of norms can be noted. Whereas under the EU-Charter they are regulated by its art. 52(1), under the Convention they are the subject of specific provisions relating to each of the Convention's articles. They are not entirely identical to art. 52(1), but not entirely different either. The implications of this duality of norms are rarely addressed in the Luxembourg jurisprudence, thus allowing legal ambiguities on this score to persist.

One of the very few exceptions in this respect is *Centraal Israëlitisch Consistorie van België and Others*, in which the CJEU indicated that for the purposes of this case, the limitations provided for by art. 52(1) were "to the same effect" as those allowed under art. 9(2) of the Convention. The CJEU usefully added that the national legislation at stake had to fulfil the conditions of both paras 1 and 3 of art. 52 of the EU-Charter, thus underscoring the relevance of the Convention as benchmark in its examination.[64] This case shows that a more pedagogical approach to this issue is possible.

Another obstacle to legal clarity is created when the CJEU refers to relevant Strasbourg case-law only once, i.e. the first time it is relied on, all subsequent references being made by the CJEU only to its own case-law which has incorporated that piece of Strasbourg case-law. Examples to that effect concern the Strasbourg jurisprudence about the so-called Engel criteria,[65] about the absolute nature of the prohibition of ill-treatment[66] or indeed the right of an accused to be present at the trial.[67] As a result, readers of the Luxembourg follow-up judgments who do not know about the very first reference to that Strasbourg case-law are left in the dark as to its impact in the follow-up cases and the resulting substantive convergence between Strasbourg and Luxembourg on this score. This approach blurs the picture and creates a false appearance of autonomy. In short, it generates missed opportunities to highlight existing convergence and reassure national judges about it.

Similarly, quite a few Luxembourg rulings simply ignore relevant and pre-existing Strasbourg case-law, including on such essential issues as the rule of law and judicial independence, an area where the importance of convergence of European jurisprudence could hardly be over-estimated.[68] However, more recent judgments seem to indicate a different approach in this respect.[69]

[64] Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others* ECLI:EU:C:2020:1031 paras 58-59.

[65] Compare Case C-489/10 *Bonda* ECLI:EU:C:2012:319 paras 36-37 with Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:280 para. 35 and Case C-117/20 *bpost* ECLI:EU:C:2022:202 para. 25.

[66] Compare *Aranyosi and Căldăraru* cit. para. 85 with *Dorobantu* cit. para. 62 and *Staatssecretaris van Justitie en Veiligheid (Éloignement - Cannabis thérapeutique)* cit. para. 57.

[67] Compare Case C-420/20 *H.N (Procès d'un accusé éloigné du territoire)* ECLI:EU:C:2022:679 paras 54-57 with Case C-492/22 PPU *CJ (Décision de remise différée en raison de poursuites pénales)* ECLI:EU:C:2022:964 para. 88.

[68] E.g. in Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117; Case C-619/18 *Commission v. Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:615.

[69] As in Case C-487/19 *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* ECLI:EU:C:2021:798.

c) Duality of methodologies

Since the entry into force of the EU-Charter in 2009, it has become clear that if the consistency required by its art. 52(3) is also designed to protect national judges applying Union law from breaching the Convention, it should cover not only the *substance* but also the *methodology* of fundamental rights.

This is because there can also be significant methodological differences between the Strasbourg and Luxembourg case-law, with consequences which cannot just be ignored. Identical rights applied according to different methodologies can indeed produce very different levels of protection from the point of view of the individual. The assessment of whether a fundamental right has been given the same "meaning and scope" under Union law as under the Convention should therefore extend to these methodological aspects.[70]

However, it seems that we are not there yet, since methodological differences can still complicate the task of all those confronted with having to combine the Convention and Union law standards at domestic level, as the following examples illustrate.

i) Ne bis in idem. A first example to that effect is the Luxembourg case-law on *ne bis in idem*. Only a few months after the ECtHR, in *A and B*,[71] had revised its own case-law on the application of *ne bis in idem* on dual proceedings by opening the door to the possibility of considering criminal and administrative proceedings relating to the same criminal conduct as building a "coherent whole", the CJEU too in *Menci* revisited its case-law with the same intention but through a different methodology, based on art. 52(1) of the EU-Charter, and with partly similar and partly different criteria for the assessment of the "proximity" between the two sets of proceedings. In a rare move, though, the CJEU, explicitly referring to the Convention as benchmark, indicated that its approach ensured "a level of protection of the *ne bis in idem* principle which is not in conflict with that guaranteed by art. 4 of Protocol No 7 to the [Convention], as interpreted by the European Court of Human Rights".[72]

Then came on the same topic, in 2022, *bpost* in which the CJEU seemed to try and fill the gap between *A and B* and *Menci*, by relying on both these judgments and taking on board much of the Strasbourg criteria, including its emphasis on the "coherent whole" which the two sets of proceedings had to build in order for them to be considered as one.[73] This ruling, however, was followed only a few months later by *Direction départementale des finances publiques de la Haute-Savoie*[74] which seems to have taken a step back in this respect, by no longer referring to either *A and B* or *bpost*, but rather to *Menci*. The result of this back and forth seems a far cry from legal clarity. The ECtHR, for its part, has been sticking to *A and B.*

[70] On this, see J Callewaert, 'Do We Still Need Art. 6(2) TEU? Considerations on the Absence of EU Accession to the ECHR and Its Consequences' (2018) CMLRev 1685, 1699.

[71] ECtHR *A and B v Norway* App n. 24130/11 and 29758/11 [15 November 2016].

[72] Case C-524/15 *Menci* ECLI:EU:C:2018:197 para. 62.

[73] *Bpost* cit. para. 49.

[74] Case C-570/20 *Direction départementale des finances publiques de la Haute-Savoie* ECLI:EU:C:2022:348.

Similar methodological issues arise when *ne bis in idem* is being applied in the context of the Convention implementing the Schengen Agreement (CISA). In *Generalstaatsanwaltschaft Bamberg (Exception to the ne bis in idem principle)*, the CJEU recently validated an exception to the *ne bis in idem* principle which is not included in the list of exceptions allowed under art. 4 para. 2 of Protocol No. 7 to the Convention, i.e. an exception for "offences against national security or other equally essential interests" (art. 55(1)(b) CISA). Moreover, it ruled that the essence of *ne bis in idem* remained preserved in the case at hand, even though the effect of that exception – presented as "limitation" – was to deprive the accused person concerned of the benefit of *ne bis in idem* altogether. According to the CJEU, this was because that exception allowed the Member State relying on it to conduct its own prosecutions against the accused, even though the latter had already been convicted for the same criminal conduct in another Member State.[75]

Thus, according to this reasoning, the preservation of the essence of *ne bis in idem* can be for the benefit of the State concerned rather than for that of the accused. By contrast, when the ECtHR examines whether the essence of a fundamental right has been preserved by an interference with that right, it does so from the perspective of the applicant only, thereby inquiring whether the latter enjoyed at least part of his or her fundamental right in the circumstances.[76] For if a fundamental right is to be enjoyed by an individual, the preservation of its essence by definition must be in the interest of that same individual, not in that of the State interfering with his or her right. To hold otherwise amounts to suggesting that States can be the beneficiaries of fundamental rights, which is at odds with the very nature of such rights.[77]

ii) The right to property. Another illustration of different methodologies confronting each other at domestic level are two judgments: *BPC Lux 2 Sàrl and Others*,[78] by the CJEU, and *Freire Lopes*,[79] by the ECtHR, both dealing with the same issue, i.e. the Portuguese legislation which organised the rescue of credit institutions by allowing their resolution and the transfer of part of their assets and liabilities to a bridge bank. One of these credit institutions was the Banco Espirito Santo ("BES"). Its resolution was examined in two different proceedings, first by the CJEU and subsequently by the ECtHR, following different legal challenges before the domestic courts by shareholders, account holders and creditors who had suffered heavy losses as a consequence of that measure and complained notably about a breach of their property rights.

In *BPC Lux*, the CJEU found that the national legislation under which the BES had been resolved was compatible with art. 17(1) of the EU-Charter, which protects the right to

[75] Case C-365/21 *Generalstaatsanwaltschaft Bamberg (Exception to the ne bis in idem principle)* ECLI:EU:C:2023:236 para. 57.

[76] See, e.g. ECtHR *Regner v. Czech Republic* n. 35289/11 [19 September 2017] para. 148.

[77] On this ruling, see J Callewaert, 'A different "ne bis in idem" in Luxembourg? Judgment of the CJEU in Generalstaatsanwaltschaft Bamberg' (22 May 2023) www.johan-callewaert.eu.

[78] Case C-83/20 *BPC Lux 2 Sàrl and Others* ECLI:EU:C:2022:346.

[79] ECtHR *Freire Lopes v Portugal* App n. 58598/21 [31 January 2023].

property and, according to the Explanations to that provision, corresponds to art. 1 of Protocol No. 1 to the Convention. Interestingly, the CJEU did so after following step by step the Strasbourg methodology applied under art. 1 of Protocol No. 1, except for the assessment of the limitations, which it examined under art. 52(1) of the EU-Charter. It concluded in essence that the national law at stake was compatible with art. 17(1).

Yet, the test provided for by art. 52(1) is slightly different from the one applied in Strasbourg under art. 1 of Protocol No. 1, which is based on the "fair balance to be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". Thus, it was the latter test which the ECtHR applied in *Freire Lopes* and which led to the finding that, having regard to all the general and individual circumstances of the case, the complaint about a violation of art. 1 of Protocol No. 1 was manifestly ill-founded, because a fair balance had been struck between the competing interests.

While the European Courts came to similar conclusions on the substance, some lessons can nonetheless be drawn from these parallel cases. First, the same fundamental rights can have to be applied to similar cases by each of the European Courts acting at different stages of the respective proceedings involved and from a different perspective: Luxembourg will examine *in abstracto*, Strasbourg *in concreto*. Secondly, the final *ex post* assessment of compliance with fundamental rights in such cases only takes place in Strasbourg, on the basis of the sole Convention. Thus, the liability which may be incurred by domestic judges in Strasbourg is only with respect to their compliance with the Convention, even when the domestic law at stake, as in the present case, is based on Union law. Thirdly, in *Freire Lopes* the ECtHR repeatedly relied on the assessments made by the CJEU on the basis of the criteria which it borrowed from the Convention case-law on property rights. This not only demonstrates the impact on the outcome of a case in Strasbourg of the use by the CJEU of harmonised criteria, it also considerably facilitates the task of national judges.

The fact remains, though, that here again, national judges are (partly) confronted with a duality of norms raising the question of a possible duality of protection.[80]

iii) The "two step" methodology in the implementation of a European arrest warrant. Last but not least, a further methodological issue of increasing importance is the "two step" approach adopted by the CJEU for the assessment of any obstacles to the execution of a EAW flowing from the risk of a serious breach of the fundamental rights of the person concerned if surrendered to the issuing State. This methodology basically comes down to applying a double test, first a general and then an individual one, for the assessment of any such risks.[81]

[80] Another recent example of slightly different methodologies being applied in Strasbourg and Luxembourg on the same issue is Case C-203/21 *Delta Stroy 2003* ECLI:EU:C:2022:865 compared with ECtHR *GIEM S.R.L and Others v Italy* App n. 1828/06, 34163/07 and 19029/11 [28 August 2018].

[81] See, among others, Joined Cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie* ECLI:EU:C:2020:1033 paras 53-55.

In combining a general with an individual test, this "two-step" methodology seems the result of some commendable efforts by the CJEU in trying to reconcile the Luxembourg system-oriented approach, flowing from the mutual recognition logic, with the Strasbourg person-oriented approach, flowing from an individual justice logic. While it differs from the methodology applied by the ECtHR when assessing the execution of a EAW, which is more focussed on the individual risks, it is not problematic as such, as confirmed by *Bivolaru and Moldovan v France*.

In this case, the ECtHR took note of the Luxembourg "two-step" methodology but focussed straight away on the individual risks incurred by the two applicants, thereby sticking to its own one-step approach.[82] While the latter does not prevent the ECtHR from having regard to the general situation prevailing in a country, it does not make evidence on this score a pre-condition to any findings regarding the individual circumstances of the person concerned and the risks incurred in the event of his/her surrender.

In respect of Mr Moldovan the ECtHR found a "manifest deficiency" resulting in a violation of art. 3 of the Convention because the French courts had surrendered him, even though they had before them sufficient factual elements indicating that he would be exposed to a serious risk of ill-treatment by reason of the detention conditions in the prison in which he would be detained after his transfer. These factual elements only concerned the personal situation of Mr Moldovan, as opposed to any systemic or generalised deficiencies. Thus, regardless of the methodology which the French courts had applied in assessing the lawfulness of the execution of the EAWs concerned, what mattered for the ECtHR was whether their final judgment was compatible with the Convention.

This approach would appear to be more protective for the person concerned, for at least two reasons. First, from a substantive point of view, it does not limit the scope of relevant risks potentially incurred by a person to those which flow from systemic or generalised circumstances. Secondly, from a procedural perspective, because adducing evidence of systemic or generalised deficiencies can represent a heavy and complex burden of proof for an individual, especially in the absence of clear definitions of these notions.

However, in *Puig Gordi and Others* the CJEU recently went one step further in developing its "two-step" methodology, by denying the possibility to examine individualised risks in the event of a surrender if, prior to that, no systemic or generalised deficiencies have been found to exist. The case concerned the refusal by Belgian courts to surrender a Catalan separatist to Spain on account of concerns about the lack of jurisdiction of the court called upon to try that person. In substance, the CJEU ruled *inter alia* that in the absence of systemic or generalised deficiencies in the issuing State to the effect that persons in that State would be generally deprived of an effective legal remedy enabling a review of the jurisdiction of the criminal court called upon to try them, a court of the executing State may not refuse to execute a EAW.[83]

[82] ECtHR, *Bivolaru and Moldovan* App n. 40324/16 and 12623/17 [25 March 2021] para. 114.
[83] Case C-158/21 *Puig Gordi and Others* ECLI:EU:C:2023:57 para. 111.

This comes down to autonomising the general test, to the effect that the application of the individual test is precluded if the result of the prior general test is negative. In that logic, the scale which deficiencies must reach to become relevant under the general test would appear to be of a magnitude which may be seldom reached in practice and which, in the rare cases where it could still be reached, may be difficult to evaluate by domestic judges and even more difficult to prove by the persons concerned by the EAW. It can therefore be assumed that under this methodology, in most cases the assessment by the executing judicial authority will stop, out of convenience, after the first general step, leaving out the second individual step altogether. This would bring us back, *de facto*, to the much-criticised single collective test used in *N.S. and Others*,[84] which would appear to be difficult to reconcile with the individual test being systematically and exclusively applied by the ECtHR, not least because one of the cornerstones of the Convention system is the right of individual petition.

Fortunately, in *Puig Gordi and Others* the CJEU did not go as far as suggested by its Advocate General, who wanted this new version of the "two-step" examination potentially precluding the application of an individual test to be applied to all aspects of the right to a fair trial before a tribunal previously established by law under art. 47(2) of the EU-Charter. The CJEU indeed limited the scope of its ruling to issues relating to the sole lack of jurisdiction of the courts in the issuing State, thereby placing some emphasis on the existence of efficient legal remedies which should avoid "the very occurrence" of the infringement at issue or avoid irreparable damage arising from that infringement.[85]

The fact remains, though, that in this way, a door has again been opened, for the sake of the efficiency of the EAW mechanism,[86] to a general rather than an individual assessment of respect for fundamental rights. One may wonder whether it will be further widened in the future.[87] In this context, it might be useful to recall the following finding by the ECtHR:

> "The Court has repeatedly asserted its commitment to international and European cooperation.... Hence, it considers the creation of an area of freedom, security and justice in

[84] Joined Cases C 411/10 and C 493/10 *N.S. and Others* ECLI:EU:C:2011:865.

[85] *Puig Gordi and Others* cit. para. 113. This consideration, however, seems in contrast with Case C-220/18 PPU *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* ECLI:EU:C:2018:589 para. 74, in which the CJEU ruled that the availability of judicial review in the issuing Member State "is not, as such, capable of averting the risk that that person will, following his surrender, be subjected to treatment that is incompatible with Art. 4 of the Charter on account of the conditions of his detention". To the same effect: *Dorobantu* cit. para. 80. Should *Puig Gordi* need to be distinguished from those cases in this respect, an indication to that effect would have been welcome.

[86] *Puig Gordi and Others* cit. para.116.

[87] In its recent ruling in *C.D.L.* (Case C-699/21 ECLI:EU:C:2023:295), the CJEU adopted a "single step approach" as regards the specific issue of the execution of a EAW concerning a person suffering from a serious disease unrelated to any systemic or generalised deficiencies in the issuing Member State. The future will tell whether this case is to be seen as an exception or a new trend. See also L van der Meulen, 'Leaving the two-step behind? The Court of Justice expands fundamental rights protection for the seriously ill under the EAW in C-699/21' (26 April 2023) EU Law Live www.eulawlive.com.

> Europe, and the adoption of the means necessary to achieve it, to be wholly legitimate in principle from the standpoint of the Convention. Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms, as indeed confirmed by Art. 67(1) of the TFEU. However, it is apparent that the aim of effectiveness pursued by some of the methods used results in the review of the observance of fundamental rights being tightly regulated or even limited".[88]

III. Conclusion

The multipolar and multilayer context in which legal systems must operate today makes the correct application of the law an increasingly complex exercise, especially for national judges. The relationship between the Convention and Union law is no exception to that reality.

The only reasonable way to deal with this complexity is not to ignore it but to try and steer it so as to prevent it from turning into confusion and triggering a fragmentation of European fundamental rights. This requires from all concerned a wholistic approach, as a basis for an ever more fruitful legal and judicial dialogue seeking legal clarity and cross-system coherence.

[88] ECtHR *Avotiņš v Latvia* cit. paras 113-114.

What... Should Have Said

Rewriting Landmark Judgments of the Court of Justice
edited by Justin Lindeboom

Preface: Rewriting Landmark Judgments of the European Court of Justice: A New Project for *European Papers* and a New Way of 'Doing EU Law'

Justin Lindeboom*

One of the key tasks of legal scholars, in my view at least, is to critically analyse court judgments so as to, firstly, provide a "soft power based" check on judicial reasoning and, secondly, provide doctrinal and normative guidance for courts in future cases. These are important tasks. Although legal scholars usually lack hard power, critical analysis of case law nonetheless offers a check on the judicial process because it exposes – moving beyond the veil of the magisterial style of judicial reasoning – the virtues and vices of adjudication. Furthermore, legal scholars can guide courts in future cases precisely by reflecting on the reasoning and outcome of individual judgments in light of the broader context of the legal subdomains in which they are experts.

This role of the scholar, however, poses a problem. This problem may be summarised by a Dutch proverb that translates into "the best helmsmen stand on the shore".[1] It is in general easier to criticise others than to provide for a better solution oneself. In this regard, there are two challenges to scholarly critique of court judgments which in my view merit specific attention.

First, there is a perennial tension between the generality of legal rules and the requirements of justice in the individual case. This tension, which may be regarded as the essential hermeneutic problem,[2] confronts judges more directly and more pertinently

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[1] "De beste stuurlui staan aan wal".

[2] The *experience* of this tension between law and justice is aptly expressed by Derrida: "I think that there is no justice without this experience, however impossible it may be, of aporia. Justice is an experi-

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ISSN 2499-8249
doi: 10.15166/2499-8249/656

than scholars. Their responsibility encompasses both the outcome of the case at hand, as well as the foreseeable and unforeseeable consequences of their judgment in future cases.[3] This tension confronts the legal scholar only indirectly – in terms of the persuasiveness of their writings – but hardly ever in terms of real-life consequences.

Second, the *form* of legal scholarship both liberates and limits. The key dicta and holdings of court judgments are usually more concise and of a different style than doctrinal analyses in annotations or journal articles.[4] By pointing at all the inconsistencies, tensions and sources of injustice of a judgment, the legal scholar is usually able to evade the question how *they* – concretely – would have decided the judgment. This evasion is also incentivised by the expected form of legal scholarship. Law journals are primarily – and legitimately – interested in scholarship, not mock judgments.

By no means I want to criticise either law journals or legal scholars. As I mentioned at the start, the importance of legal-doctrinal scholarship for me is beyond doubt. Having said that, I also think it is important to recognise the limitations and tensions inherent in the way we "do law". Accordingly, this contribution offers another way of "doing law" – "doing EU law" more specifically – which in my view has great potential in complementing the usual form of legal scholarship. The basic modality is to have EU legal scholars *rewrite* – in full, and in judicial style – landmark judgments of the European Court of Justice.

I cannot claim any originality here. This project is inspired by a similar one across the Atlantic. For a series of fascinating books, constitutional law professor Jack Balkin asked leading US constitutional law scholars to rewrite landmark judgments of the US Supreme Court: *Brown v Board of Education*,[5] *Roe v Wade*[6] and *Obergefell v Hodges*.[7] In EU

ence of the impossible. A will, a desire, a demand for justice whose structure wouldn't be an experience of aporia would have no chance to be what it is, namely, a call for justice. Every time that something comes to pass or turns out well, every time that we placidly apply a good rule to a particular case, to a correctly subsumed example, according to a determinant judgment, we can be sure that law {droit) may find itself accounted for, but certainly not justice. Law (droit) is not justice. Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable; and aporetic experiences are the experiences, as improbable as they are necessary, of justice, that is to say of moments in which the decision between just and unjust is never insured by a rule". J Derrida, 'Force of Law: The "Mystical Foundation of Authority"', in D Cornell, M Rosenfeld and D Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992), 3, 16.

[3] For completeness, I may add that this tension applies equally to the European Court of Justice in the context of the preliminary reference procedure, even though the Court does not apply the law to the concrete case at hand: the Court's judges surely are aware of the constraints which their interpretation of the law impose on the referring national court's application of the law in the case at hand, and the implications of these constraints for individual justice. Moreover, there are of course numerous cases – including *Keck and Mithouard* – in which the preliminary ruling leaves open only one solution to the case at hand, at least in terms of its EU law dimensions, such that the distinction between "interpretation" and "application" of the law is but a formality.

[4] Notable examples include some judgments of the American federal courts.

[5] J Balkin (ed), *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (NYU Press 2002), rewriting the US Supreme Court's judg-

law, I am aware of one similar example, namely Joseph Weiler's integral rewriting of *Van Gend en Loos*.[8]

Two important differences with Balkin's series *What … Should Have Said* should be noted. Balkin's project follows the structure of US Supreme Court decision-making, combining a majority opinion with separate concurring and dissenting opinions. This is, of course, not relevant to EU jurisprudence (for better or for worse), and this contribution only includes full-fledged court judgments as if written by a chamber of judges, although most of them they are single-authored.

Secondly, US Supreme Court Opinions, in the classic common law style, are more similar in style to scholarship than the judgments of the ECJ. In line with the ECJ's judicial style, I asked the participating scholars to strictly follow the ECJ's style of adjudication: no fluffiness or academic elaborations. As a result, the rewrites are as straightforward and "dry" as actual ECJ judgments – I presume few would disagree that the ECJ's case law is typically less *enjoyable* to plough through than the average US Supreme Court opinion. In my view, however, they are exciting for precisely that reason: there is nowhere to 'hide' behind scholarly disquisitions. The participating scholars did, however, all write an accompanying note explaining how their judgment differs from the ECJ's judgment and why they made their respective choices.

The project of rewriting the ECJ case law offers a virtually unlimited pool of landmark judgments. The ambition is to publish a steady flow of issues, alternating between older classics and more recent landmark cases in a variety of sub-fields of EU law. Among many candidates for the first issue, I selected – quite unoriginally – the Court's judgment in *Keck and Mithouard* for three reasons. Firstly, it stands out as one of the most contested judgments of the ECJ's jurisprudence. Secondly, in infamously "clarifying" its earlier case law, the Court indirectly philosophised the nature of the internal market and the vertical divi-

ment in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), which held that state laws segregating schools based on race violate the Equal Protection Clause of the Fourteenth Amendment.

[6] J Balkin (ed), *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision* (NYU Press 2007), rewriting the US Supreme Court's judgment in Roe v. Wade, 410 U.S. 113 (1973), which held that the fundamental right to privacy read into the Due Process Clause of the Fourteenth Amendment also implies a right to have an abortion.

[7] J Balkin (ed.), *What Obergefell v. Hodges Should Have Said: The Nation's Top Legal Experts Rewrite America's Same-Sex Marriage Decision* (Yale University Press 2020), rewriting the US Supreme Court's judgment in Obergefell v. Hodges, 576 U.S. 644 (2015), which held that the Equal Protection Clause and the Due Process Clause contain a federal right to same-sex marriage.

[8] JHH Weiler, 'Rewriting *Van Gend en Loos*: Towards a Normative Theory of ECJ Hermeneutics' in O Wiklund (ed), *Judicial Discretion in European Perspective* (Kluwer Law International 2003). While they are not rewrites of ECJ judgments, one may also point at former AG Sharpston's "shadow opinions": E Sharpston, 'Shadow Opinion of Advocate-General Eleanor Sharpston QC – Case C-194/19 HA, on appeal rights of asylum seekers in the Dublin system' (12 February 2021) EU Law Analysis www.eulawanalysis.blogspot.com; and E Sharpston, 'Shadow Opinion of former Advocate-General Sharpston: headscarves at work (Cases C-804/18 and C-341/19)' (23 March 2021) EU Law Analysis, www.eulawanalysis.blogspot.com.

sion of powers, making *Keck* crucial to the constitutional architecture of the Union. And thirdly, several alternative reasonings could be imagined which may have resulted in the same outcome, but nonetheless would have communicated a different vision of the EU internal market. Indeed, as the four contributions to *What Keck and Mithouard Should Have Said* demonstrate, it is not so much the outcome of the case at hand but the vision of the market that characterises *Keck* – and its rewrites.

After this general introduction to *What … Should Have Said*, this issue consists of a specific introduction to *Keck and Mithouard* and its legacy, and four contributions each focusing on an integral rewrite of the Court's judgment. In contrast to Balkin's series, which includes contributions by senior constitutional law scholars only, this issue combines contributions by junior and senior colleagues: two professors of law specialised in European (internal market) law, one doctoral researcher, and – uniquely – a team of undergraduate students supervised by their professor and advised among others by a judge of the chamber of the ECJ which had decided *Keck* and a former Advocate General at the ECJ.

I leave it up to the reader to decide which of these four rewritings is the better one, and whether any, some or all of them are better than the ECJ's actual judgment in *Keck*. Clearly, the four contributions have all provided distinct and thought-provoking alternatives to the Court's actual judgment. I could not have wished for a better start of this series, and I am sincerely thankful to all contributors for their willingness to stick our their necks, and engage in this common project. I hope that the contributions to his issue provide food for thought, and inspiration for rethinking the way in which we do EU law.

WHAT... SHOULD HAVE SAID

REWRITING THE COURT OF JUSTICE'S LANDMARK JUDGMENT IN THE FREE MOVEMENT OF GOODS: *KECK AND MITHOUARD*

edited by Justin Lindeboom

INTRODUCTION: WHAT *KECK AND MITHOUARD* ACTUALLY SAID – AND ITS LEGACY

JUSTIN LINDEBOOM*

The European Court of Justice's judgment in *Keck and Mithouard*[1] is – for better or for worse – one of the crucial judgments in the development of the free movement of goods, and EU internal market law more generally. It has, to quote Catherine Barnard, "received brickbats and bouquets in almost equal measure".[2] *Keck* generated a vast number of scholarly commentaries. Its legacy has continued to be widely debated following more recent judgments including *Commission v Italy (trailers)*[3] and *Deutsche Parkinson Vereinigung*.[4] This is not the appropriate place to provide a comprehensive overview of these debates.[5] This introduction aims to briefly revisit the developments leading to the *Keck* judgment, the central parts of the Court's reasoning, and its legacy in subsequent case law. It will conclude with a brief introduction to the four rewritings in this issue.

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[1] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard*, ECLI:EU:C:1993:905.

[2] C Barnard, *The Substantive Law of the EU: The Four Freedoms* (7th edn, Oxford University Press 2022) 120.

[3] Case C-110/05 *Commission v Italy*, ECLI:EU:C:2009:66. See e.g. E Spaventa, 'Leaving *Keck* Behind? The Free Movement of Goods after the Rulings in *Commission v Italy* and *Mickelsson and Roos*' (2009) ELR 914; P Wennerås and K Boe Moen, 'Selling Arrangements, Keeping Keck' (2010) ELR 387; L Gormley, 'Free Movement of Goods and Their Use – What Is the Use of It?' (2011) FordhamIntlLJ 1589; I Lianos, 'Updating the EU Internal Market Concept' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of the European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019) 495.

[4] Case C-148/15 *Deutsche Parkinson Vereinigung*, ECLI:EU:C:2016:776. See e.g. S López Artetxe, 'Is Health Really the First Thing in Life?' (2017) 44 LIEI 211; B van Leeuwen, 'Vaste verkoopprijzen voor medicijnen beoordeeld onder artikel 34 VWEU' (2017) Nederlands tijdschrift voor Europees recht 62.

[5] For a useful overview of the reception and development of the *Keck* judgment, see e.g. C Barnard, *The Substantive Law of the EU* cit. 120-135.

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ISSN 2499-8249
doi: 10.15166/2499-8249/657

As is well known, the prelude to *Keck and Mithouard* involved a series of judgments in which the Court applied the *Dassonville* rule[6] defining the term "measure having equivalent effect" to a range of indistinctly applicable national laws, and found them to hinder trade within the sense of *Dassonville*.[7] These laws, consequently, required justification on the basis of either (what is now) art. 36 TFEU or "mandatory requirements" related to the public interest.

This need for justification forced the Court to "decide in an increasing number of cases on the reasonableness of policy decisions of Member States taken in the innumerable spheres where there is no question of direct or indirect, factual or legal discrimination against, or detriment to, imported products", as Advocate General Walter van Gerven noted in his Opinion in *Torfaen*.[8] On this view, the breadth of the *Dassonville* rule, which had fulfilled a crucial function as an "an all-out rallying cry against the ethos of protectionism" in the 1970s,[9] had become a burden for judicial decision-making.[10]

Apart from whether (now) art. 34 TFEU really should be construed so as to cover any indistinctly applicable national law which "although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products",[11] a second problem with the case law was its sheer inconsistency. Thus, in *Oosthoek*[12] and *Buet*[13] the Court interpreted the *Dassonville* rule literally and held that the indistinctly applicable nationals laws on advertising and marketing respectively required justification. By contrast, in other cases including *Blesgen*[14] and *Oebel*[15] the Court appeared to take a different approach by focusing on the purpose and lack of discriminatory effects of the national laws in question, concluding that they fell outside the scope of art. 34 TFEU all together. The confusion among commentators and national courts was amplified by the "Sunday trading" judgments including *Torfa-*

[6] Case C-8/74 *Dassonville* ECLI:EU:C:1974:82, para. 5.

[7] See e.g. Case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42; Case 286/81 *Oosthoek* ECLI:EU:C:1982:438; Case C-302/86 *Commission v Denmark* ECLI:EU:C:1988:421; Case C-145/88 *Torfaen Borough Council v B & Q plc* ECLI:EU:C:1989:593; Case C-312/89 *Union départementale des syndicats CGT de l'Aisne v SIDEF Conforama and Others* ECLI:EU:C:1991:93.

[8] Case C-145/88 *Torfaen Borough Council v B & Q plc.*, Opinion of AG Van Gerven, ECLI:EU:C:1989:279, para. 26.

[9] JHH Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' in P Craig and G de Búrca (eds), *The Evolution of EU Law*, (1st edn, Oxford University Press 1999) 362.

[10] See on this point also J Lindeboom, 'Interpreting the EU Internal Market' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market* cit. 88-90.

[11] *Oosthoek* cit. para. 15.

[12] *Ibid.*

[13] Case C-382/87 *R. Buet and Others v Ministère public* ECLI:EU:C:1989:198, paras 7-9.

[14] Case C-75/81 *Blesgen* ECLI:EU:C:1982:117, paras 9-10.

[15] Case C-155/80 *Oebel* ECLI:EU:C:1981:177, paras 16, 20.

en[16] and *Conforama*,[17] which left obscure whether the Court considered Sunday trading rules as measures having equivalent effect that could be justified or as measures which need not be justified in the first place.[18]

The difficulties of applying art. 34 TFEU "reasonably" increasingly came to the attention of national courts and academics. Two proposals by Eric White and Kamiel Mortelmans specifically focused on excluding from the scope of art. 34 TFEU certain rules related to the circumstances under which goods were sold.[19] White suggested to distinguish between (1) rules on the characteristics of products, which would fall within the scope of art. 34 TFEU, and (2) rules on the circumstances in which products may be sold (by whom, where, when, how and at what price), which would fall outside the scope of art. 34 TFEU insofar as they were general and neutral.[20] Mortelmans offered a more specific proposal which distinguished between two types of this latter "market circumstances" category: *1*) rules on market circumstances with a territorial element (including the national measures at stake in *Oosthoek* and *Buet*), which would fall within the scope of art. 34 TFEU, and *2*) rules on market circumstances related to a fixed location (including the situations in *Torfaen* and *Oebel*), which would fall outside its scope.[21] Eric White's article in particular has been recognised as an important influence of the Court's judgment in *Keck*.[22]

In this context, the Court's judgment in *Keck* purported to provide clarity as to the limits of art. 34 TFEU, while disincentivising traders to challenge all sorts of national laws which may be captured by literal reading of the *Dassonville* rule, but had no plausible relationship to interstate trade. After the first ten introductory paragraphs, the Court famously held:

> "11. By virtue of Article 30, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. The Court has consistently held that any measure which is capable of directly or indirectly, actually or potentially,

[16] *Torfaen Borough Council* cit., paras 11-17.

[17] Case C-312/89 *Conforama* cit., paras 9-14.

[18] On the inconsistencies of the case law leading up to *Keck*, see e.g. E Sharpston, 'About that Sunday Trading Mess…' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market* cit. 150. These inconsistencies may be explained by the fact that the Court did not, or at least not consistently, distinguish between the question of whether a national law constituted a 'measure having equivalent effect' and whether it could be justified. See in this regard J Lindeboom, 'One-Stage Internal Market Law: Restriction and Justification in the Early Case Law on Free Movement' (2022) *Jean Monnet Working Papers* NYU School of Law (forthcoming).

[19] E White, 'In Search of the Limits to Article 30 of the EEC Treaty' (1989) 26 CMLRev 235; K Mortelmans, 'Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?' (1991) CMLRev 115.

[20] E White, 'In Search of the Limits' cit. 259.

[21] K Mortelmans, 'Article 30 of the EEC Treaty' cit. 30.

[22] L Gormley, 'Silver Threads Among the Gold… 50 Years of the Free Movement of Goods' (2007) FordhamIntlLJ 1637, 1654; D Edward, 'What Was *Keck* Really About?' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market* cit. 166.

hindering intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction.

12. National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States.

13. Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.

14. In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.

15. It is established by the case-law beginning with "Cassis de Dijon" (Case 120/78 Rewe-Zentral v Bundesmonopolverwaltung fuer Branntwein [1979] ECR 649) that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

16. By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

17. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.

18. Accordingly, the reply to be given to the national court is that Article 30 of the EEC Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss".[23]

The key analytical move occurs in paras 16 and 17, where the Court introduced a legal presumption that national measures restricting or prohibiting certain selling arrange-

[23] *Keck and Mithouard* cit. paras 11-18.

ments are not measures having equivalent effect if they meet the two conditions in the same paragraph (and according to some scholars, provided also that they do not involve universal bans[24]). Among the numerous complexities and quarrels surrounding these two paragraphs, I want to highlight two: whether paras 16 and 17 introduced a rebuttable or irrebuttable presumption of legality, and to what types of national measures it applies.

Whether para. 16 introduces a rebuttable or an irrebuttable presumption still seems unclear, especially after the Court's judgment in *Italian Trailers*.[25] In that case, the Court elevated the market access criterion from para. 17 of *Keck* to an overarching legal principle delineating the general scope of art. 34 TFEU.[26] According to some scholars, this may imply that a national law on certain selling arrangements, even if it meets the two para. 16 conditions, can still be a measure having equivalent effect if it turns out to hinder market access.[27] In that case the *Keck* exception would be a rebuttable presumption, which raises the subsequent question of *how* the presumption can be rebutted. Recent case law suggests that rebuttal would require either a universal ban or a substantial restriction of certain selling arrangements.[28]

On an alternative reading of *Keck* and *Italian Trailers*, the general market access test does not pre-empt the para. 16 conditions for national measures relating to certain selling arrangements. A national measure restricting or prohibiting certain selling arrangements which meets those conditions is irrebuttably presumed *not* to hinder market access.[29] This may have been the initial purpose of *Keck*, although the Court in later case law increasingly seemed to substitute this categorical approach with a "unitary doctrinal framework".[30]

A second, persistent question has been to what types of rules the *Keck* exception applies in the first place. The term "selling arrangements" has led to widespread confusion, since the Court's judgment provides no definition or even an explanation. In sub-

[24] See S Enchelmaier, 'What *Keck and Mithouard* Should Have Said: It Could Have Been so Simple' (2023) European Papers www.europeanpapers.eu 385; and also S Enchelmaier, 'Free Movement of Goods: Evolution and Intelligent Design in the Foundations of the European Union', in P Craig and G de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021).

[25] *Commission v Italy* cit.

[26] *Ibid.* para. 37.

[27] See e.g. I Lianos, '*In Memoriam Keck*: The Reformation of the EU Law on the Free Movement of Goods' (2015) ELR 225, 238; E Spaventa, 'Leaving *Keck* Behind?' cit. 921-923.

[28] For discussion, see C Barnard, *The Substantive Law of the EU* cit. 135-138. Support for a 'substantial restriction' threshold can be derived from Case C-518/06 *Commission of the European Communities v Italian Republic*, EU:C:2009:270, para. 66-70, concerning the compatibility of a legal obligation to provide coverage for third-party motor vehicle liability insurance with the freedom of establishment and the free movement of services.

[29] On this reading, Case C-110/05 *Italian Trailers* cit., para. 37 does not extend to the situation described in para. 36 (recalling the *Keck* exception).

[30] See R Schütze, 'Of Types and Tests: Towards a Unitary Doctrinal Framework for Article 34 TFEU?' (2016) ELR 826.

sequent case law, the Court limited the scope of the *Keck* exception either by distinguishing certain borderline cases from the factual situation in *Keck*,[31] or by qualifying certain national measures as relating to selling arrangements but finding them to discriminate against imports.[32]

In *Italian Trailers* and *Mickelsson and Roos*,[33] the Court held – contrary to the Opinion of Advocate General Kokott in the latter case[34] – that restrictions on the use of products are not equivalent to rules on certain selling arrangements, and should be assessed under the market access test.[35]

Recent case law, including *Colruyt*[36] and *DocMorris NV v Apothekerkammer Nordrhein*,[37] confirms that the *Keck* exception is still good law. At the same time, other judgments such as *Scotch Whisky Association*[38] and *Deutsche Parkinson Vereinigung*[39] suggest that the Court is eager not to emphasise categorisation and might prefer to ignore the *Keck* case law where possible. Advocate General Szpunar's Opinion in *Deutsche Parkinson Vereinigung* expressly assessed the German law fixing prices of prescription-only medicines under the *Keck* standard. He concluded that the law indirectly discriminated against internet pharmacies – which were typically foreign – selling such medicines to German customers. The law therefore did not meet the second condition in para. 16.[40] While the Court followed the Opinion in substance, it did so without even mentioning *Keck* or the two para. 16 conditions.[41] Similarly, in *Scotch Whisky Association* the Court was quick to conclude that the minimum price per unit for alcoholic beverages was a measure having equivalent effect in the sense of the *Dassonville* rule, without any elaboration on the technical categorisation of the measure.[42]

[31] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, ECLI:EU:C:1997:325; Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars* ECLI:EU:C:1995:224; Joined Case C-158/04 and C-159/04 *Carrefour – Marinopoulos* ECLI:EU:C:2006:562; Case C-244/06 *Dynamic Medien* ECLI:EU:C:2008:85.

[32] Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*, ECLI:EU:C:1997:344; Case C-254/98 *TK-Heimdienst* ECLI:EU:C:2000:12; Case C-405/98 *Gourmet International Products* ECLI:EU:C:2001:135; Case C-416/00 *Morellato* ECLI:EU:C:2003:475; Case C-322/01 *Deutscher Apothekerverband* ECLI:EU:C:2003:664; Case C-531/07 *Fachverband der Buch- und Medienwirtschaft* ECLI:EU:C:2009:276.

[33] Case C-142/05 *Mickelsson and Roos*, ECLI:EU:C:2009:336.

[34] Case C-142/05 *Mickelsson and Roos* ECLI:EU:C:2006:782, Opinion of AG Kokott, paras 42-69.

[35] *Commission v Italy* cit., paras 49-58; *Mickelsson and Roos* cit., paras 25-28.

[36] Case C-221/15 *Etablissements Fr. Colruyt* ECLI:EU:C:2016:704, para. 35.

[37] Case C-190/20 *DocMorris* ECLI:EU:C:2021:609, para. 35.

[38] Case C-333/14 *The Scotch Whisky Association* ECLI:EU:C:2015:845.

[39] Case C-148/15 *Deutsche Parkinson Vereinigung* ECLI:EU:C:2016:776.

[40] Case C-148/15 *Deutsche Parkinson Vereinigung* ECLI:EU:C:2016:394, Opinion of AG Szpunar, paras 32-37.

[41] *Deutsche Parkinson Vereinigung* cit. paras 23-27.

[42] *Scotch Whisky Association* cit., paras 31-32. In this sense the Court's approach was similar to the one in Case C-82/77 *van Tiggele* ECLI:EU:C:1978:10.

Regardless of the merits of limiting the scope of art. 34 TFEU, it is fair to say that *Keck* created ample confusion, which forced the Court to further elaborate what is and what is not covered by the *Keck* exception.

Today, the living legacy of *Keck* is hard to distinguish from the remoteness test.[43] The Court has not been willing to extend the *Keck* philosophy to a more general "disparate market access test".[44] At the same time, the Court has remained committed to exclude from the scope of art. 34 TFEU national measures which do not plausibly affect imports more than domestic products, and which also do not unreasonably hinder trade in general. Non-discriminatory national measures relating to certain selling arrangements do not hinder trade in the sense of *Dassonville*, unless they involve universal bans or otherwise clearly restrict trade, for instance because they substantially affect consumer behaviour.[45]

The fact that the number of preliminary references on art. 34 TFEU has steadily declined may suggest that the law is clear enough for national courts.[46] It is also important to note that for many non-discriminatory national measures reflecting sensible policy choices it does not matter much whether they fall outside the scope of art. 34 TFEU or will survive scrutiny under art. 34 TFEU at the justification stage. The Court indeed seems to have become more deferential to Member States in this regard.[47]

Even though *Keck* may be less relevant in day-to-day legal practice, its reasoning, outcome, and overall role in the development of free movement principles still remain salient. For two decades, it defined judicial development and academic debates pertaining to art. 34 TFEU. Its lasting legacy is that it provided a crucial watershed in how the Court imagined the EU internal market – and the vertical distribution of powers more generally.

For that reason, *Keck* remains worthy of legal and legal-historical study, and whether the Court could have done a better job remains a salient question. Before turning to the real substance of this issue – the four integral rewritings of *Keck* – this introduction will conclude with a brief overview of the different roads that the contributors have taken.

The first rewriting is by Niklas Nachtnebel, Antoine Langrée and Fraser Rodger, students at Edinburgh Law School, supervised by Niamh Nic Shuibhne. Their judgment is based on three categories of measures having equivalent effect: *1*) national measures which disadvantage imported goods, *2*) product requirements and *3*) indistinctly appli-

[43] Case C-69/88 *Krantz v Ontvanger der Directe Belastingen* ECLI:EU:C:1990:97, para. 11; Case C-190/98 *Graf* ECLI:EU:C:2000:49, para. 25.

[44] For such proposals, see e.g. G Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International 2003); I Lianos, 'In Memoriam *Keck*' cit.

[45] *Commission v Italy* cit., para. 56.

[46] See J Zglinski, 'The End of Negative Market Integration: 60 Years of Free Movement of Goods Litigation in the EU (1961–2020)' (2023) Journal of European Public Policy.

[47] *Ibid.*; see generally J Zglinski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020).

cable measures capable of substantially impeding the access of goods to a Member State market. Thus, instead of the category of national measures relating to certain selling arrangements, their judgment emphasises that national measures which do not discriminate directly or indirectly, and which do not qualify as 'product requirements' in the sense of *Cassis de Dijon*, must substantially impede market access in order to qualify as measures having equivalent effect.

Their proposal roughly follows the approach of Advocate General Jacobs in *Leclerc-Siplec*.[48] Interestingly, the judgment explains when a national measure "substantially impedes market access", namely if "in hindering the flow and the effective marketing of goods, it undermines the flourishing of a competitive and dynamic Community market".[49] Also noteworthy in my view is the judgment's deference to the national referring court as to whether the French prohibition of sale at a loss "substantially impedes market access" and, if it does, whether it is proportionate. In this regard, the judgment contrasts particularly to Laurence Gormley's rewriting.

The second rewriting is by Elisabeth Schøyen, and essentially aims to retain the "spirit" of *Keck* without resorting to categorising national measures into "product requirements" and "certain selling arrangements". In her explanatory note, Schøyen explains how her judgment is informed by Senn and Nussbaum's capability approach and a social justice perspective on the free movement of goods.

To this effect, Schøyen's judgment construes the previous case law as a "narrow market access approach": only national measures which either negatively impact the competitive position of goods from other Member States or prevent their market access altogether require justification. Thus, the judgment clarifies that product requirements in the sense of *Cassis de Dijon* are measures having equivalent effect because they impose a double burden on foreign producers. The Sunday trading case law, by contrast, is overturned, like in *Keck* itself.

Schøyen's judgment also clarifies that whether a national measure disadvantages imported goods must be ascertained in view of its effects on "both the producers, importers and traders of products from other Member States, as well as on the behaviour of consumers in the domestic market", leaving considerable flexibility in the application of art. 34 TFEU. Indeed, the final verdict is left to the national court.

The third rewriting by Stefan Enchelmaier also keeps the basic underlying philosophy of the *Keck* judgment and dispenses with the terminology of 'certain selling arrangements'. While his judgment takes a similar approach to Schøyen's, there are nonetheless interesting and important differences in reasoning and phrasing. Enchelmaier's

[48] C-412/93 *Leclerc-Siplec v TF1 and M6* ECLI:EU:C:1994:393, Opinion of AG Jacobs.

[49] N Nachtnebel, A Langrée and F Rodger with N Nic Shuibhne, 'What *Keck and Mithouard* Should Have Said: Preventing Substantial Barriers to Market Access' (2023) European Papers www.europeanpapers.eu para. 22.

judgment squarely overturns the Sunday trading case law by stating that Member States 'need not justify rules that apply equally in law, and do not entail greater factual burdens for imported than for domestic goods'.[50] Enchelmaier allows for only one exception to this rule, namely that "universal bans" – i.e. national measures prohibiting the marketing of a type or types of product altogether – must be justified because they raise a legislative frontier to trade contrary to art. 26(2) TFEU (then art. 8a of the EEC Treaty, introduced by the Single European Act).

Enchelmaier's judgment is closest to the actual judgment in *Keck* in style and substance, and perhaps reflects what the judges of the Court *had wanted to say*.

The final rewriting is Laurence Gormley's, perhaps *Keck and Mithouard*'s most longstanding critic. Gormley's judgment is the only one which unequivocally asserts that the French prohibition on sale at a loss is a measure having equivalent effect, and relies to this effect on the *Oosthoek* line of case law, also briefly recalled above. A particularly interesting aspect of this rewriting is how it aims to closely follow the logic of earlier case law, including the Sunday trading case law. At the same time, it also aims to clarify this jurisprudence, albeit with a radically different result than the other rewritings.

In Gormley's rewriting, the judgment also concludes that a *general* prohibition of sale at a loss is contrary to art. 34 TFEU. Insofar as such a general prohibition takes no account of the reason why the products are offered at a loss, it goes beyond what is necessary and proportionate to ensure fair trading and the protection of consumers.[51] Also in regard to proportionality, the judgment aims to strictly follow the 1980s case law, starting with *Cassis de Dijon*.

A few final words on what a combined reading of these four rewritings of *Keck and Mithouard* may teach us. The reasoning of all four contributions is distinct and extremely interesting, both compared to the original judgment of the Court and to each other. I would prefer to compare the rewritings in three different ways.

First, there is the sheer *outcome* of the case. Enchelmaier, Schøyen and "Team Edinburgh" mostly follow the outcome of the actual judgment, though the latter two leave the national court more room for flexibility. By contrast, Gormley's judgment reaches an outcome very different from both the other rewritings and *Keck* itself.

Second, there are important differences in legal reasoning. Here, Enchelmaier and Schøyen take roughly similar approaches focusing on disparate market access effects and universal bans. Nachtnebel, Langrée and Rodger, instead, choose to focus on the notion of a "substantial impediment to trade". Gormley sticks to the reasoning of *Cassis de Dijon* and *Oosthoek*.

[50] S Enchelmaier, 'What *Keck and Mithouard* Should Have Said' cit. para. 16.

[51] L Gormley, 'What *Keck and Mithouard* Should Have Said: 'Steady as She Goes, Left Hand down a Bit?' (2023) European Papers www.europeanpapers.eu para. 21.

Third, there is an interesting divergence, as I see it, between judgments emphasising the *continuity* of the case law and those emphasising a *change* in the Court's approach. In this regard, Nachtnebel, Langrée and Rodger's judgment is similar to Gormley's, to the extent that they both aim to really *clarify*, rather than amend, the Court's previous case law. In contrast, Schøyen and Enchelmaier emphasise the change in the Court's approach which was also inherent to the actual judgment in *Keck* (notwithstanding its suggestion that it merely "clarified" the case law[52]).

The wealth of literature on *Keck and Mithouard* had already demonstrated the many ways to think about the judgment. These four rewritings demonstrate the many alternative roads not taken.

[52] *Keck and Mithouard* cit. para. 14.

WHAT... SHOULD HAVE SAID

REWRITING THE COURT OF JUSTICE'S LANDMARK JUDGMENT IN THE FREE MOVEMENT OF GOODS: *KECK AND MITHOUARD*

edited by Justin Lindeboom

WHAT *KECK AND MITHOUARD* SHOULD HAVE SAID: PREVENTING SUBSTANTIAL BARRIERS TO MARKET ACCESS

NIKLAS NACHTNEBEL*, ANTOINE LANGRÉE** AND FRASER RODGER***, WITH NIAMH NIC SHUIBHNE****

JUDGMENT OF THE COURT OF 24 NOVEMBER 1993 IN JOINED CASES C-267/91 AND C-268/91, CRIMINAL PROCEEDINGS AGAINST BERNARD KECK AND DANIEL MITHOUARD

In Joined Cases C-267/91 and C-268/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Grande Instance (Regional Court), Strasbourg (France), for a preliminary ruling in the criminal proceedings pending before that court against

Bernard Keck and Daniel Mithouard,

on the interpretation of the rules of the EEC Treaty relating to competition and freedom of movement within the Community,

THE COURT,

[...]

gives the following

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ISSN 2499-8249
doi: 10.15166/2499-8249/658

Judgment

1. By two judgments of 27 June 1991, received at the Court on 16 October 1991, the Tribunal de Grande Instance, Strasbourg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the rules of the Treaty concerning competition and freedom of movement within the Community.
2. Those questions were raised in connection with criminal proceedings brought against Mr Keck and Mr Mithouard, who are being prosecuted for reselling products in an unaltered state at prices lower than their actual purchase price ('resale at a loss'), contrary to Article 1 of French Law No 63-628 of 2 July 1963, as amended by Article 32 of Order No 86-1243 of 1 December 1986.
3. In their defence Mr Keck and Mr Mithouard contended that a general prohibition on resale at a loss, as laid down by those provisions, is incompatible with Article 30 of the Treaty and with the principles of the free movement of persons, services, capital and free competition within the Community.
4. The Tribunal de Grande Instance, taking the view that it required an interpretation of certain provisions of Community law, stayed both sets of proceedings and referred the following question to the Court for a preliminary ruling:

   "Is the prohibition in France of resale at a loss under Article 32 of Order No 86-1243 of 1 December 1986 compatible with the principles of the free movement of goods, services and capital, free competition in the Common Market and non-discrimination on grounds of nationality laid down in the Treaty of 25 March 1957 establishing the EEC, and more particularly in Articles 3 and 7 thereof, since the French legislation is liable to distort competition:

   (a) firstly, because it makes only resale at a loss an offence and exempts from the scope of the prohibition the manufacturer, who is free to sell on the market the product which he manufactures, processes or improves, even very slightly, at a price lower than his cost price;

   (b) secondly, in that it distorts competition, especially in frontier zones, between the various traders on the basis of their nationality and place of establishment?"
5. Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
6. It should be noted at the outset that the provisions of the Treaty relating to free movement of persons, services and capital within the Community have no bearing on a general prohibition of resale at a loss, which is concerned with the marketing

of goods. Those provisions are therefore of no relevance to the issue in the main proceedings.

7. Next, as regards the principle of non-discrimination laid down in Article 7 of the Treaty, it appears from the orders for reference that the national court questions the compatibility with that provision of the prohibition of resale at a loss, in that undertakings subject to it may be placed at a disadvantage vis-à-vis competitors in Member States where resale at a loss is permitted.

8. However, the fact that undertakings selling in different Member States are subject to different legislative provisions, some prohibiting and some permitting resale at a loss, does not constitute discrimination for the purposes of Article 7 of the Treaty. The national legislation at issue in the main proceedings applies to any sales activity carried out within the national territory, regardless of the nationality of those engaged in it (see Case 308/86 *Ministère Public v Lambert* [1988] ECR 4369).

9. Finally, it appears from the question submitted for a preliminary ruling that the national court seeks guidance as to the possible anti-competitive effects of the rules in question by reference exclusively to the foundations of the Community set out in Article 3 of the Treaty, without however making specific reference to any of the implementing rules of the Treaty in the field of competition.

10. In these circumstances, having regard to the written and oral argument presented to the Court, and with a view to giving a useful reply to the referring court, the appropriate course is to look at the prohibition of resale at a loss from the perspective of the free movement of goods.

11. By virtue of Article 30, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. It is settled case-law that any measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade is to be considered a measure having equivalent effect to a quantitative restriction (see Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5).

12. The Court has consistently held that, within or outside the scope of Article 7, Article 30 aims to prohibit all measures which, like quantitative restrictions on imports, disadvantage imported goods in relation to domestic goods, whether they apply distinctly to imported goods (see, for example, Case 181/82 *Roussel Laboratoria BV and Others v Netherlands* [1983] ECR 3849, paragraph 19) or indistinctly to imported and domestic goods alike (see, for example, Case 82/77 *Openbaar Ministerie of the Netherlands v van Tiggele* [1978] ECR 25, paragraph 18).

13. Furthermore, it is established by the case-law commencing with "Cassis de Dijon" (Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) that, in the absence of harmonization of legislation, Article 30 prohibits indistinctly applicable measures which impose a special burden on the importer by regu-

lating goods imported from other Member States where they were lawfully manufactured and marketed. This prohibition concerns measures which lay down physical requirements to be met by such products, such as those relating to designation, form, size, weight, composition, presentation, labelling or packaging.

14. The prohibition of resale at a loss in question in the present proceedings does not disadvantage imported goods; nor does it establish a product requirement within the meaning of the 'Cassis de Dijon' ruling. However, the claimant may nevertheless show that it is a measure having equivalent effect to a quantitative restriction by showing that the restrictive effects of the prohibition of resale at a loss amount to a substantial barrier to market access between Member States.
15. Any indistinctly applicable measure which is capable of substantially impeding the access of goods to a Member State market, *inter alia* by regulating the circumstances of marketing, must be considered to be capable of hindering intra-Community trade within the meaning of the ruling in *Dassonville*.
16. In assessing whether the restrictive effects amount to a substantial barrier to market access, the national court must first have regard to the nature of the measure in question. A national provision which does not regulate trade in goods and whose restrictive effects are remote and merely speculative is both too uncertain and indirect to have an effect equivalent to that of a quantitative restriction (see, to that effect, Case C-69/88 *Krantz v Ontvanger der Directe Belastingen* [1990] ECR I-583, paragraphs 10 and 11).
17. Where a measure does not fall outside the scope of Article 30 for those reasons, it can only be considered to amount to a substantial barrier if, in hindering the flow and the effective marketing of goods, it undermines the flourishing of a competitive and dynamic Community market.
18. A measure may do so, *inter alia*, by, directly or indirectly, actually or potentially, frustrating the market viability of business models on which economic actors rely to enter and compete within Member State markets.
19. The Court observes that the prohibition of resale at a loss does not, in principle, preclude business from entering a new market and competing effectively with established market participants in the way that a prohibition on advertising might. Yet, the prohibition at hand is capable of frustrating the viability of business models which rely on resale at a loss to introduce new categories of products to markets or new alternatives to established products within markets.
20. Within these parameters, it is for the national court to determine whether the prohibition of resale at a loss amounts to a substantial barrier to market access between Member States. It should be noted in this regard that proof of a reduction in the volume of sales cannot be sufficient for this purpose, since a sales reduction does not automatically frustrate the market viability of the underlying business

model. Inversely, the flourishing of a competitive and dynamic Community market may well be undermined by provisions hindering the growth and development of trade across borders without reducing the revenue of economic operators.

21. Should the measure in question be found by the national court to amount to a substantial barrier to market access between Member States, the measure must nevertheless be accepted insofar as it may be necessary in order to satisfy mandatory requirements relating to the public interest, and it is also proportionate to the aim in view (see, to that effect, Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 14; Case 382/87 *Buet* [1989] ECR 1235, paragraph 10; and Case C-269/89 *Bonfait* [1990] ECR I-4169, paragraph 11).

22. In assessing the proportionality of a restriction on trade, the national court may additionally consider whether the restrictive effects intrinsic to the nature of such national provisions whose legitimate aim is in accordance with Community law are not excessive in relation to the aim pursued by the regulatory authority (see, to that effect, Case C-312/89 *Union Départementale des Syndicats CGT de l'Aisne v Conforama* [1991] ECR I-997, paragraphs 11 and 12; Case C-332/89 *Marchandise* [1991] ECR I-1027, paragraphs 12 and 13; and Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B&Q* [1992] ECR I-6635, paragraph 15).

23. Accordingly, the reply to be given to the national court is that Article 30 of the Treaty is to be interpreted as meaning that the prohibition which it lays down applies to national rules prohibiting the resale of products at a loss where the restrictive effects on trade amount to a substantial barrier to market access between Member States. Nevertheless, those national rules must be accepted insofar as they may be necessary in order to satisfy mandatory requirements relating to the public interest, and they are proportionate to the aim in view.

Costs

24. The costs incurred by the French and Greek Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal de Grande Instance, Strasbourg, by two judgments of 27 June 1991, hereby rules:

Article 30 of the Treaty is to be interpreted as meaning that the prohibition which it lays down applies to national rules prohibiting the resale of products at a loss where

the restrictive effects on trade amount to a substantial barrier to market access between Member States. Nevertheless, those national rules must be accepted insofar as they may be necessary in order to satisfy mandatory requirements relating to the public interest, and they are proportionate to the aim in view.

Explanatory note*

It became clear early on that there was a fundamental problem with the *Keck* ruling. While it partially signalled the right path forward by excluding sales modalities from the scope of art. 34 TFEU, *Keck* also engaged in unwarranted formalism which obscured rather than clarified the actual, practical process of how and why the Court strikes down a measure under that provision.

Our task, therefore, was to spell out that process in an intelligible and workable test. We entertained multiple possible approaches such as a presumption of legality for residual measures, or a relaxed balancing exercise in a dynamic system of evaluating substantiality, remoteness, and potentiality etc. After thorough deliberation, we roughly followed Advocate General Jacobs' Opinion in *Leclerc-Siplec*,[1] while at the same time stressing the utility of a flexible and wide scope for the free movement rules.

In our chosen approach to identify a measure of equivalent effect within the meaning of art. 34, the *Dassonville* formula (para. 11) functions as the general rule and as the guiding principle for developing our approach, namely by providing the basic framework the new *Keck* rule must work within: (1) When identifying a measure having equivalent effect, *Dassonville* tells us to examine the measure's effect, i.e. *any* impediment to trade between Member States, whether this is so intended by a regulatory authority or completely coincidental. (2) Although this establishes objective review – instead of subjective review in which the Court would examine legislative intentions –, it suffices if a measure is capable of having that effect – crucially, both difficult as well as time-consuming data analysis is not needed. Instead, national courts must evaluate a measure's inherent potential, its abstract suitability to effect unwanted trade impediments. (3) Lastly, the location of the measure in the causal chain of trade restriction is irrelevant, i.e. it does not matter whether the measure hinders trade directly or indirectly (if not in combination with other factors, like in the *Krantz* jurisprudence; para.16).

After mentioning the anti-discrimination (para. 12) and the *Cassis de Dijon* approaches (para. 13), which we regard as *lex specialis* tests in relation to the *lex generalis* test of *Dassonville* – if those tests are triggered, their own idiosyncratic rules apply –, we introduce the proposed new test, in lieu of the *modalités de vente* approach, for residual

* This section is authored by Niklas Nachtnebel, Antoine Langrée and Fraser Rodger. The authors acknowledge the support of Ella Freeman, Pierre Valette and Aimee West.

[1] Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA*, opinion of AG Jacobs, EU:C:1994:393.

measures not caught by the two prior limbs: Art. 34 is triggered by a substantial barrier to market access (para. 15). This seems to delimit the breadth of *Dassonville* in a twofold way. First, it does in fact introduce a *de minimis* principle of sorts which was (very possibly deliberately) left out of the adoption of the competition law test the original formula was borrowed from; and secondly, it seems to target not any trade restriction whatsoever but only impediments to market access.

It is true that the substantiality criterion we introduce in para. 15 limits *which* trade restrictions are caught by art. 34. Contrary to the *de minimis* rule in competition law that *Dassonville* did not adopt, however, this is not to be understood in the mostly quantitative sense in which art. 101 TFEU is applied in practice. This means that art. 34, in contrast to art. 101, does not ignore measures which have only a small impact on competition and the internal market's structures. For instance, while it might be true that the provisions in question in the original *Dassonville* case did not matter much in the great scheme of (Community-market-related) things, it is a rule that inherently limits the individual trader in engaging in dynamic and competitive behaviour. It is in this sense that we ought to picture the proposed substantiality criterion. As for the difference between the broader seeming "trade" and the narrower "market access", it suffices to say that this narrower conception aims at more precisely pinning down what actually constitutes an unwanted trade impediment within the meaning of *Dassonville* and art. 34 – since it is mostly agreed upon that art. 34 does not preclude rules affecting trade per se. We therefore understand "substantial barrier to market access between Member States" as a synonymous but clarified description of measures of equivalent effect to "hindrance to intra-[Union] trade".

Like earlier case-law, our rule aims at breaking up red-tape barriers erected by the Member States which, though possibly somehow justifiable, endanger the efficacy of an internal market. This is what we mean by "market access". To better communicate the qualitative nature of substantiality in conjunction with market access, we introduce the regulative idea of the "dynamic and competitive [internal] market" (para. 17). It is the flourishing of this market structure which is at stake when Member States implement trade restrictions that amount to substantial access barriers. Specifically, in our understanding, access is substantially impeded when a measure renders business models on which traders rely to access and penetrate markets – and which potentially could be engaged to market goods across the internal market as a whole – unviable from an economic perspective (para. 18). While we entertained the idea of excluding substantiality in the event of an accessible alternative to the business model whose market viability has been frustrated by the provision in question, we abandoned that idea, first because this might weaken the protection of new and dynamic business models in favour of established market practice, and secondly because the balancing effect of available equal-utility business models may, at any rate, be factored into the proportionality review of the national court.

Finally, importing the *Cassis de Dijon* case-law and some proportionality considerations from the Sunday trading saga, we leave open the possibility of justifying measures falling within the scope of the new test (paras 21–22).

We believe that a flexible test of this sort is a more honest formulation of the jurisprudence the Court has engaged in already; and that it is, in a cosmos of complex economic phenomena and a wide variety of regulatory activity, more appropriate to the resolution of conflicts within the realm of free movement rules than a possibly more precise but equally more rigid test.

The opportunity to rewrite *Keck* represented a chance to participate in an ongoing academic discussion, and in a way, to become peers with the authors we had been citing in our university papers. However, it also represented a significant challenge, as our writing group is composed of undergraduate students having taken EU law courses mostly as electives. Taking on the role of the Court felt like walking a tightrope: finding a balance between creating a clearer test and doctrine, while avoiding an overly academic or analytical tone. Matching the Court's style took some practice. Nevertheless, we approached the *Keck* conundrum with an inquisitive attitude toward the case-law, deliberated on our solutions as a judicial chamber, and, hopefully, settled on a nuanced solution – like the Court would.

Note on observing the rewriting of *Keck* from a supervisory distance*

One of the joys of teaching in the Scottish university system is the Honours programme structure, where students in their third and fourth years of undergraduate studies take courses that build on foundational learning, in smaller seminar-style groups. Niklas, Antoine, and Fraser, supported by Ella, Pierre, and Amy (in effect, the *référendaires* for this project) illustrate the curiosity, commitment, and calibre of the EU Law Honours II: Substantive students that I am fortunate to be able to teach. That is why I suggested a student-led contribution, I knew that any students who volunteered to take part could, and would, do it brilliantly.

First, and most importantly, all credit goes to the students: I have stayed relatively "hands off" overall in this project, encouraging the "chamber" to reach their own conclusions about *Keck* and about how they might do it differently, and sending more editorial than substantive comments. Students are the thinkers of now and the practitioners of the future, and they therefore deserve their say on a judgment and topic with which we teachers drive them to distraction every year.

Second, what these students produced has impressed me in several respects. They managed to create their "substantial barrier to market access" test by using case law already "available" to the Court at the time of *Keck*; they start with yet build on *Dassonville*,

* This section is authored by Niamh Nic Shuibhne.

managing to put some limits around the scope of that ruling and therefore around the scope of art. 34 TFEU itself; they avoid the formalism for which *Keck* has been criticised, focusing on a rule's effects rather than on its type; and they align their thinking about markets with the competition law origins of the *Dassonville* test while finding a way, at the same time, to avoid the quantitative approach to restrictions that competition law demands.

Third, the process of rewriting was interesting to "watch" from the sidelines. I had the sense, overall, that reaching the agreed ideas was the relatively "easy" part; expressing those ideas in the style of a judgment of the Court was much more difficult. One of the points that I kept coming back to on reading earlier drafts was "flow" – how the paragraphs worked together, how each idea led to the next. The students were also extremely lucky to have input from former Court members David Edward and Eleanor Sharpston, who so enthusiastically and generously sent their comments to the students on an earlier draft. Independently, their shared emphasis was on the national judge: how would the proposed test be applied, what criteria should the judge use? The students worked hard on sharpening these paragraphs of their ruling in particular. They never complained, but I did wonder what the reactions actually were when they received yet *another* "yes, great, but could you just…" email from me with comments and suggestions for tweaking things, yet again, or how they felt when they learned who the other two readers of one of their drafts were (not daunting at all for an undergraduate student to have a former judge and advocate general critiquing their ideas…). On the other hand, the process that they have now been through marks a transition from submitting work for assessment and only getting comments afterwards as feedback, with no opportunity for revision, to the reality of intensive to-and-fro exchanges: welcome to the world of academic writing, (former) students!

Finally, has the rewritten *Keck* judgment "solved" the criticisms of the art. 34 case law? I can sense the *Scotch Whisky* case being resolved more easily on the basis of the students' judgment, for example – and certainly more rigorously than ignoring *Keck* altogether and suggesting a proportionality approach that was simply impossible for the Scottish Parliament to adopt in terms of its competence (eloquently discussed by Niamh Dunne in her *Modern Law Review* annotation of that ruling). I paused more on the implications for the use of goods case law. For example, in para. 17, the students write about "hindering the flow and the effective marketing of goods", and I wondered if "or" rather than "and" might loosen rules from an apparently required impact on "effective marketing". But then, and perhaps also under the surface of both *Scotch Whisky* and the use of goods rulings, "flow" and "marketing" are arguably inherently tied when the focus overall is placed on the idea of a "competitive and dynamic internal market" (also para. 17).

While the students have emphasised that they were alert to enabling more objective than subjective assessment through the test and criteria they have suggested, I am not sure that we can ever fully avoid some subjectivity around concepts like "dynamic" and "competitive" markets and even "substantial" hindrances to market "access". At the

same time, with the art. 34 TFEU starting point of “all measures having equivalent effect”, I am not sure we can ever avoid either some divergence in national decision-making – and thus, that these exceptional students should feel compelled to have “fixed” something that neither the Court nor the Treaty writers ever have.

WHAT... SHOULD HAVE SAID

REWRITING THE COURT OF JUSTICE'S LANDMARK JUDGMENT IN THE FREE MOVEMENT OF GOODS: *KECK AND MITHOUARD*

edited by Justin Lindeboom

WHAT *KECK AND MITHOUARD* SHOULD HAVE SAID: SAME SAME, BUT DIFFERENT

ELISABETH SCHÖYEN*

JUDGMENT OF THE COURT OF 24 NOVEMBER 1993 IN JOINED CASES C-267/91 AND C-268/91, CRIMINAL PROCEEDINGS AGAINST BERNARD KECK AND DANIEL MITHOUARD

In Joined Cases C-267/91 and C-268/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Grande Instance (Regional Court), Strasbourg (France), for a preliminary ruling in the criminal proceedings pending before that court against

Bernard Keck and Daniel Mithouard,

on the interpretation of the rules of the EEC Treaty relating to competition and freedom of movement within the Community,

THE COURT,

[...]

gives the following

Judgment

1. By two judgments of 27 June 1991, received at the Court on 16 October 1991, the Tribunal de Grande Instance, Strasbourg, referred to the Court for a preliminary ruling

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EUROPEAN PAPERS
VOL. 8, 2023, NO 1, PP. 373-383
www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/659

under Article 177 of the EEC Treaty two questions on the interpretation of the rules of the Treaty concerning competition and freedom of movement within the Community.

2. Those questions were raised in connection with criminal proceedings brought against Mr Keck and Mr Mithouard, who are being prosecuted for reselling products in an unaltered state at prices lower than their actual purchase price ("resale at a loss"), contrary to Article 1 of French Law No 63-628 of 2 July 1963, as amended by Article 32 of Order No 86-1243 of 1 December 1986.

3. In their defence Mr Keck and Mr Mithouard contended that a general prohibition on resale at a loss, as laid down by those provisions, is incompatible with Article 30 of the Treaty and with the principles of the free movement of persons, services, capital and free competition within the Community.

4. The Tribunal de Grande Instance, taking the view that it required an interpretation of certain provisions of Community law, stayed both sets of proceedings and referred the following question to the Court for a preliminary ruling:

   Is the prohibition in France of resale at a loss under Article 32 of Order No 86-1243 of 1 December 1986 compatible with the principles of the free movement of goods, services and capital, free competition in the Common Market and non-discrimination on grounds of nationality laid down in the Treaty of 25 March 1957 establishing the EEC, and more particularly in Articles 3 and 7 thereof, since the French legislation is liable to distort competition:

   (a) firstly, because it makes only resale at a loss an offence and exempts from the scope of the prohibition the manufacturer, who is free to sell on the market the product which he manufactures, processes or improves, even very slightly, at a price lower than his cost price;

   (b) secondly, in that it distorts competition, especially in frontier zones, between the various traders on the basis of their nationality and place of establishment?

5. Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6. It should be noted at the outset that the provisions of the Treaty relating to free movement of persons, services and capital within the Community have no bearing on a general prohibition of resale at a loss, which is concerned with the marketing of goods. Those provisions are therefore of no relevance to the issue in the main proceedings.

7. Next, as regards the principle of non-discrimination laid down in Article 7 of the Treaty, it appears from the orders for reference that the national court questions the compatibility with that provision of the prohibition of resale at a loss, in that

undertakings subject to it may be placed at a disadvantage vis-à-vis competitors in Member States where resale at a loss is permitted.

8. However, the fact that undertakings selling in different Member States are subject to different legislative provisions, some prohibiting and some permitting resale at a loss, does not constitute discrimination for the purposes of Article 7 of the Treaty. The national legislation at issue in the main proceedings applies to any sales activity carried out within the national territory, regardless of the nationality of those engaged in it (see the judgment in Case 308/86 *Ministère Public v Lambert* [1988] ECR 4369).

9. Finally, it appears from the question submitted for a preliminary ruling that the national court seeks guidance as to the possible anti-competitive effects of the rules in question by reference exclusively to the foundations of the Community set out in Article 3 of the Treaty, without however making specific reference to any of the implementing rules of the Treaty in the field of competition.

10. In these circumstances, having regard to the written and oral argument presented to the Court, and with a view to giving a useful reply to the referring court, the appropriate course is to look at the prohibition of resale at a loss from the perspective of the free movement of goods.

11. By virtue of Article 30, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. The Court has consistently held that any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction.

12. National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States.

13. Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.

14. In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.

15. It is established by the case-law beginning with 'Cassis de Dijon' (Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down require-

ments to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

16. However, contrary to what has previously been decided, national provisions are not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), where those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing and sale of domestic products and of those from other Member States, that is to say, so long as the application of the national provision in question does not distort the competitive position of products from other Member States vis-a-vis that of domestic products, and does not prevent access to the market entirely.
17. Provided that those conditions are fulfilled, the application of such rules is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.
18. In order to determine whether a national provision affects in the same manner, in law and in fact, the marketing of domestic products and those of other member states, the effects of the provision on both the producers, importers and traders of products from other Member States, as well as on the behaviour of consumers in the domestic market are factors to be considered.
19. It follows that national rules that lay down requirements to be met by goods coming from other Member States where they are lawfully manufactured and marketed (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) are such as to hinder trade between Member States because, while they usually apply to all relevant traders operating within the national territory, they do not affect in the same manner in law and in fact the sale of domestic products and of those from other Member States. This is due to the fact that domestic producers will usually already comply with such national rules, whereas producers from other Member States will likely have to alter their products so as to comply with the rules of their state of origin, as well as with the rules in the state of import. This double burden is thus liable to significantly distort the competitive position of products from other Member States vis-a-vis that of domestic products. Thus, national rules that lay down requirements to be met by goods coming from other Member States where they are lawfully manufactured and marketed constitute measures of equivalent effect and are prohibited by Article 30 unless justified by a public-interest objective taking precedence over the free movement of goods.

20. In the case at hand, however, the national provision does not lay down requirements to be met by goods coming from other Member States, but rather regulates the conditions of sale, namely, it prohibits resale at a loss. In order to determine whether such a rule is such as to hinder, directly or indirectly, actually or potentially, trade between Member States, it must be established whether the national provision applies to all relevant traders in the territory, and affects, in the same manner, in law and in fact, the marketing and sale of domestic products and of those from other Member States, or whether it distorts the competitive position of goods from other Member States.
21. The national legislation at issue in the main proceedings applies to any sales activity carried out within the national territory, regardless of the nationality of those engaged in it. While the national court has noted that the prohibition exempts from its scope manufacturers, such categorical distinction is not in itself such as to render the national provision incompatible with Article 30. What is decisive is whether the provision applies to all *relevant* traders in the territory. Where the national legislator has decided to regulate the activity of a specific class of traders (such as, in the provision at issue, retail traders), a provision that applies to all traders belonging to this class applies to all relevant traders in the territory.
22. It remains to be established whether national legislation prohibiting resale at a loss by retail traders affects in the same manner, in law and in fact, the marketing and sale of domestic products and of those from other Member States, or whether it is liable to distort the competitive position of products from other Member States, or to prevent market access entirely. As noted above, to determine this, the effects on both the producers, importers and traders of products from other Member States, as well as on the behaviour of consumers in the domestic market are factors to be considered.
23. A general prohibition of resale at a loss, even if applicable to all relevant traders in the territory, may be liable to distort the competitive position of products from other Member States, in so far as it deprives traders of an effective marketing technique used to introduce domestic consumers to products which they may not yet be familiar with. It thus cannot be ruled out that an outright prohibition of resale at a loss may lead to traders of products from other Member States incurring cost they would not have absent the prohibition, since they may have to resort to other, potentially more costly methods of advertising in order to gain access to the market.
24. In that regard, however, it should be noted that the prohibition of resale at a loss merely forecloses one of several available strategies for the advertisement of products from other Member States, leaving open other avenues of promotion. Moreover, producers from other Member States wishing to promote their products by selling them at a loss are able to do so. Retailers buying these goods could thus

pass on that differential, enabling them to promote products from other Member States with low prices.

25. Therefore, a prohibition of resale at a loss cannot be considered to prevent market access. It follows that only where a prohibition of resale at a loss has the effect of distorting the competitive position of goods from other Member States, which is for the national court to ascertain, such a regulation is a measure having equivalent effect to quantitative restrictions on imports prohibited by Article 30 of the EEC Treaty.

26. Consequently, a prohibition of resale at a loss is not covered by Article 30 of the Treaty, unless it is shown that the prohibition does not affect in the same way, in law and in fact, the marketing and sale of national products and products from other Member States, thus distorting the competitive position of goods from other Member States.

Costs

27. The costs incurred by the French and Greek Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal de Grande Instance, Strasbourg, by two judgments of 27 June 1991, hereby rules:

Article 30 of the EEC Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss, unless it is shown that the prohibition does not affect in the same way, in law and in fact, the marketing and sale of national products and products from other Member States, thus distorting the competitive position of goods from other Member States.

Explanatory note

What is at stake in the infamous *Keck* decision? Initially, *Keck* appears to be about what constitutes a restriction of the free movement of goods, that is to say, what national measures are subject to supranational judicial review. Of course, beneath the question of defining restrictions, fundamental choices concerning the aim of integration as well as the division of competence loom large. As I am primarily concerned with normative approaches to free movement and the Internal Market more generally, my contribution

focusses on the normative questions underlying *Keck*. More specifically, I will consider them from the vantage point of (social) justice.

I argue that from the perspective of justice, *Keck* was a sound decision, correcting earlier momentum towards an interpretation of the concept of a restriction which would have had decidedly unjust ramifications. My main improvement thus relates to the widely criticised categorisation approach adopted in the judgment, as well as to the nebulous quality of the Court's reasoning. I will explain below how I consider my version to improve upon the original in this respect. Firstly, however, I want to argue why the results of Keck were indeed good news from the vantage point of social justice.

Given the essentially contested nature of (social) justice,[1] one's characterisation of anything as (un)just depends decisively on the understanding of justice one subscribes to. My personal allegiance in this regard lies with the Capabilities Approach (CA) as pioneered by Sen and Nussbaum,[2] and my solution to the restriction-definition-dilemma is informed by this view.[3] I attempt to argue why it is preferable over purely procedural approaches to these normative questions, as well as to highlight where the capabilitiarian demands overlap with other substantive approaches to justice.

I highlight two normative question at stake in the *Keck* decision. The first concerns the division of competences between Member States and the EU (as well as between legislature and judiciary), the second the aim of the internal market, or of economic integration more broadly.[4]

Let us consider first the question of competence. In defining a restriction, the CJEU also defines the regulatory space remaining with Member States: a broad definition tends to reduce it, whereas a narrow one will usually afford national legislators greater discretion.[5] This affects two concerns relevant to justice: Democratic legitimacy, and the question of which level is better placed to deliver just results.

[1] WB Gallie, 'Essentially Contested Concepts' (1955-1956) 56 *Proceedings of the Aristotelian Society New Series* 167.

[2] See e.g. M Nussbaum, *Creating Capabilities* (Harvard University Press 2012); A Sen, 'Equality of What?' in *Tanner Lectures on Human Values* (Cambridge University Press 1982).

[3] I would argue, however, that it has much in common in its prescriptions for this specific case with human-rights based approaches and democratic constitutional approaches to the Internal Market.

[4] Pedro Caro de Sousa identifies three normative dimension inherent in the definition of a restriction of free movement rights, namely the axes between (1) centralisation and decentralisation, between (2) deregulation and economic agnosticism, and between (3) harmonisation and regulatory pluralism. My normative questions are those underlying axes (1) and (2). While the third dimension concerning the desirable degree of regulatory competition is certainly of great importance as well, considering it would go beyond the scope of this contribution, as it depends on several contingent factors such as the effectiveness of the Union legislature and the assumed equal mobility of all factors of production. See P Caro de Sousa, *The European Fundamental Freedoms* (Oxford University Press 2015) 129–135.

[5] See on this point S Weatherill, 'Surrendering the Right to Regulate' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of European Integration* (Cambridge University Press 2019). Of course, the interpretation of justificatory requirements is also at play in defin-

With regard to democratic legitimacy, we must ask in how far it is in the interest of justice to substitute the judgment of the CJEU for that of national (and presumably democratically legitimate) legislatures.

According to some procedural approaches, it is democracy-enhancing to allow judicial review of a broad spectre of national measures.[6] They argue that the operation of the market freedoms remedies an inherent defect of national democracies, namely that they are inherently limited to the pursuit of their own interest, and thus liable to exclude the legitimate interests of affected others (non-nationals) in their democratic processes. Supranational review of national measures thus serves as a tool for correcting this parochial bias by granting those outsiders "virtual representation" when considering their interests in the review of national measures.[7]

Substantive theories will usually include a commitment to democracy within the spectre of justice as well.[8] Thus, in so far as democratic representation is lacking at the national level, it will further justice to remedy this at the supranational level. However, in contrast to the virtual representation approach, substantive theories of justice suggest the EU legislature as better placed to remedy the national democratic defects,[9] or would in any case caution against the unfettered judicial review that could follow from a broad market access or obstacles to trade definition. This is due to their concern for outcomes: For example, following a CA would entail considering which institutional arrangement is best placed to ensure the provision of all relevant capabilities (at least) at a threshold. In the context of defining a restriction, this entails that the definition may only be so broad as to ensure the functioning of the Internal Market without curtailing Member States' right to regulate to such an extent as to diminish their capacity to effectively guarantee the protection of other social goods (and the capabilities affected thereby).

The second normative question concerns the purpose of economic integration itself. In deciding what is considered a restriction on the free movement of goods, the Court shapes the direction of economic integration. Whether any measure liable to

ing the Member States' remaining regulatory space, however, if that is presumed to remain the same, the definition of a restriction will have the impacts described above.

[6] Most notably M Poiares Maduro, *We the Court* (Hart Publishing 1998), drawing on C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Processes: The Constitutionalisation of Comitology '(1997) 3 ELJ 273, and arguably inspired by Ely's theory of judicial review: JH Ely, *Democracy and Distrust* (Harvard University Press 1980).

[7] Poiares Maduro, *We the Court*, cit.167 ff.

[8] Consider the capability to control one's material environment in the context of the CA, but see also e.g. Schiek or Garben's commitment to democracy in their normative approaches to the internal market: see e.g. See e.g. D Schiek, *Economic and Social Integration* (Edward Elgar 2012); S Garben, 'The "Fundamental Freedoms" and (Other) Fundamental Rights: Towards an Integrated Democratic Interpretation Framework' in S Garben and I Govaere (eds), *The Internal Market 2.0* (Hart Publishing 2020).

[9] As indeed, critics of the virtual representation argument have previously noted, see e.g. A Somek, 'The Argument from Transnational Effects I '16 ELJ 315; R Schütze, 'Judicial Majoritarianism Revisited ' (2018) 43 ELJ 269; S Garben, 'The "Fundamental Freedoms" and (Other) Fundamental Rights' cit.

render commercial activity more onerous is caught, or only those which distort competition or partition the market influences the nature of the Internal Market. A very broad definition is prone to instating a deregulatory bias unless the Union legislature is extremely effective as well as competent to re-regulate. Conversely, an overly narrow conception may prove ineffective in identifying covertly protectionist measures and thus impede the development of an efficient Internal Market.

Procedural theories will not provide explicit guidance with regard to this second question, as they are concerned with a just procedure, rather than just outcomes. While some may regard this 'neutrality' as the greatest strength of procedural theories, one may wonder about the usefulness of a theory of justice that is unconcerned with outcomes. To use Nussbaum's analogy, proceduralists resemble a cook with 'a fancy, sophisticated pasta-maker' who 'assures her guests that the pasta made in this machine will be by definition good, since it is the best machine on the market. But surely, the outcome theorist says, the guests want to taste the pasta and see for themselves'.[10]

However, also with a view to just outcomes, there are good reasons to allow oversight by the CJEU over the national legislative process. For once, the establishment of a functioning Internal Market requires the abolition of such restrictions, certainly where they are protectionist in nature or effect, and the Internal Market, by allowing greater economies of scale and efficient trade has the potential of significantly improving the economic position of the individual. For substantive theories of justice, such material outcomes are far from irrelevant. Indeed, the capabilities approach has in common with many other theories that it requires a minimum level of material well-being,[11] and insofar as the establishment of an internal market can and place these capabilities above the required threshold level, its operation is not only tolerated but required by capabilitarian justice. Seeing as it is uncontroversial that some level of judicial review is necessary to achieve the establishment of the Internal Market, it follows that the definition of a restriction adopted to determine when judicial intervention is permissible cannot be so narrow as to render this process ineffective.

On the other hand, many substantive theories of justice, and in particular the Capabilities Approach, are committed to a plurality of valuable goods. The result is that not only one good (such as an efficient internal market) can be taken into account in evaluating whether a given definition of a restriction is just. Rather, the effects of such a definition on all relevant goods (or capabilities) must be taken into account. Thus, if we consider the deregulatory bias that is likely to arise from an overly broad definition of restrictions, it becomes clear that justice requires some room for legitimate legislative action which aims to protect other values. Given the Union's weak ability (certainly at the time of *Keck*) to legislate on, for example, social and environmental protection, ca-

[10] M Nussbaum, *Frontiers of Justice* (Harvard University Press 2006), 83.

[11] As reflected in the capabilities for life and bodily integrity, see M Nussbaum, *Creating Capabilities* cit.

pabilitarian justice requires some regulatory space to remain with the Member States, as they were (and perhaps still are) better placed to protect these other goods.

Therefore, following my rendition of the *Keck* judgment, only those measures which do in fact alter the competitive position of foreign goods, or which prevent their access to national markets altogether are subject to judicial review.

My version thus does not go so far as to allow for review of openly discriminatory measures only,[12] as this might undermine the establishment of the internal market (also) through negative integration. However, my version, like the original, does not permit the review of any measure liable to render more costly the pursuit of economic activities either. In doing so, it (re)opens regulatory space for Member States to legislate without the need to justify their action in terms of EU law.

Thus far, I have explained why I consider the result of the *Keck* judgment (that is, the taming of the overly broad definition of a restriction, thereby correcting potential deregulatory bias and reinstating a degree of Member States' legislative discretion) to have been fortuitous as a matter of social justice.

My main changes relate to the form by which the Court has arrived at this result. By classifying the measure at hand as a 'certain selling arrangement' (CSA), the Court introduced a new legal category, similar to that of product requirements established in *Cassis*, with the difference that whereas product requirements are presumed to be restrictions contravening Article 30, CSA's benefit from the inverse presumption, and are considered to fall outside the scope of the free movement of goods. While producing the results outlined above, this categorisation approach also engendered much confusion in subsequent case law. For the distinction between product requirements and CSA's, or CSA's and other measures (such as regulations on use) is far from clear, necessitating constant clarification and refinement. Moreover, due to the extremely sparse reasoning of the Court, it remained unclear after *Keck* what (if any) vision informed this choice of categories. Indeed, some argue that the later (re)turn to a broad market access approach (which, for the reasons explained above I consider less than ideal) is at least partially a result of the unworkable *Keck* categorisation.

Instead, my version introduces what Lianos terms a 'narrow market access approach',[13] under which only those national measures which either negatively impact on the competitive position of goods from other member states or prevent their market access altogether are in need of justification.

This approach does not change the *Cassis* presumption, as product requirements will normally alter the competitive position of goods from other Member States. Conversely,

[12] As Garben argues the argument from transnational effects, if properly construed, would prescribe: S Garben, 'The Fundamental Freedoms' cit. 350.

[13] I Lianos, 'Shifting Narratives in the Internal Market: Efficient Restrictions of Trade and the Nature of "Economic" Integration' (2010) 21 European Business Law Review 705; I Lianos, 'In Memoriam *Keck*' (2015) 40 ELR 225.

rules such as those at issue in the Sunday Trading saga fall outside of the scope of Article 30, as will the measure in *Keck*, since it seems implausible that the prohibition of resale at a loss deprives traders of a promotion strategy that is of such central importance to their ability to enter the market that it will alter the competitive position of imported goods.

A complete ban of all advertising, however, would certainly be caught, given the reliance of traders of imported goods on advertising to gain recognition in domestic markets. Similarly, bans or complete prohibitions of use would be suspect under this approach, because, while there will usually not be a domestic production to serve as a comparator of competitive position, such bans prevent market access entirely.

Rules merely restricting use or certain forms of advertising would have to be evaluated in their effects on producers, traders and consumers to ascertain whether they have the effect of altering the competitive position of goods from other Member States.

There is an obvious drawback to this, more principled, approach compared to one which employs categories: It necessitates courts (and ultimately, national legislatures intending to legislate in conformity with EU law) to assess for each measure its impact on the competitive position of goods from other Member States. This is likely to entail greater procedural cost, and requires at least some economic expertise. Legal categories, by contrast, allow for relatively uncomplicated *prima facie* assessment of rules. However, as the CSA category has demonstrated, this is not necessarily the case in practice. More importantly, the approach put forward here is not inimical to categorisation per se. As shown by the product requirement example, it allows for a typology, or categories of measures to be integrated within it. Thus, following my *Keck* judgment, the Court could still have introduced further categories of rules, such as those discussed above, and in this way guided national courts and legislators in applying the narrow market access approach in practice. The upside of my approach is that it allows for such categories to form part of a coherent guiding rule which can be relied upon where a national measure does not neatly fit any existing category, and which moreover provides a clear vision as to the form of the Internal Market and the purpose of economic integration at large.

Besides achieving the result required by the demands of capabilitarian social justice, my version thus avoids, or at least reduces, the legal uncertainty that followed the original, which further contributes to justice.

WHAT... SHOULD HAVE SAID

REWRITING THE COURT OF JUSTICE'S LANDMARK JUDGMENT IN THE FREE MOVEMENT OF GOODS: *KECK AND MITHOUARD*

edited by Justin Lindeboom

WHAT *KECK AND MITHOUARD* SHOULD HAVE SAID: IT COULD HAVE BEEN SO SIMPLE

STEFAN ENCHELMAIER*

INTRODUCTION: *KECK* IN CONTEXT

The backdrop to the judgment in *Keck and Mithouard*[1] is the case law commonly referred to as the 'Sunday trading' cases. These were about the legality under European law of fines imposed on traders who had breached the prohibition in England and Wales of sales on a Sunday. The traders contended that the rules under which the fines were imposed were contrary to art. 34 TFEU, and hence unenforceable. They argued that during the remaining permissible opening hours, they could not make up for the sales that they lost on Sundays. As a consequence, they would also sell fewer products imported from other Member States.[2]

The Court dealt with this argument in accordance with the principles set out in *Cassis de Dijon.*[3] This is unconvincing in many respects.[4] Most importantly, the difference between the paradigm in *Cassis de Dijon* and in *Sunday trading,* respectively, is that in

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[1] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* ECLI:EU:C:1993:905.

[2] Case C-145/88 *Torfaen Borough Council v B & Q PLC* ECLI:EU:C:1989:593 paras 13-16. A similar argument was proferred in Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía v Departamento de Sanidad y Seguridad Social de Cataluña* ECLI:EU:C:1991:327 para. 10: "legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect trade, be such as to restrict the volume of trade because it affects marketing opportunities".

[3] Case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42.

[4] This, and the subsequent case law, is discussed in more detail in S Enchelmaier, 'Free Movement of Goods: Evolution and Intelligent Design in the Foundations of the European Union' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 546, 561-566.

ISSN 2499-8249
doi: 10.15166/2499-8249/660

Cassis, the rules on minimum alcohol content and on trade designations, although applicable in law to all beverages of a particular type irrespective of the origin of the products, entailed adaptation costs for imported drinks that their domestic counterparts did not have to incur. By contrast, imports and domestic goods suffered in equal measure under the Sunday trading legislation in England and Wales.

In *Keck,* the Court revisited the question. In issue in that case were rules in France which forbade retail at a loss. Two managers of supermarkets were prosecuted under that legislation for having sold goods during sales promotion campaigns at prices lower than those at which they had procured them. The Court's clarification (para. 14 of the judgment) in paras 15-17 has divided opinions ever since. Especially unclear is the meaning and significance of "product requirements" (para. 15) and (rules relating to) "certain selling arrangements" (para. 16). Equally puzzling is the role of "market access" (para. 17). The rewrite seeks to avoid these difficulties.

Judgment of the Court of 24 November 1993 in Joined Cases C-267/91 and C-268/91, Criminal proceedings against Bernard Keck and Daniel Mithouard

In Joined Cases C-267/91 and C-268/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Grande Instance (Regional Court), Strasbourg (France), for a preliminary ruling in the criminal proceedings pending before that court against

Bernard Keck and Daniel Mithouard,

on the interpretation of the rules of the EEC Treaty relating to competition and freedom of movement within the Community,

THE COURT,

[...]

gives the following

Judgment

1 By two judgments of 27 June 1991, received at the Court on 16 October 1991, the Tribunal de Grande Instance, Strasbourg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the rules of the Treaty concerning competition and freedom of movement within the Community.

2 Those questions were raised in connection with criminal proceedings brought against Mr Keck and Mr Mithouard, who are being prosecuted for reselling products in an unaltered state at prices lower than their actual purchase price ("resale at a

loss"), contrary to Article 1 of French Law No 63-628 of 2 July 1963, as amended by Article 32 of Order No 86-1243 of 1 December 1986.

3 In their defence Mr Keck and Mr Mithouard contended that a general prohibition on resale at a loss, as laid down by those provisions, is incompatible with Article 30 of the Treaty and with the principles of the free movement of persons, services, capital and free competition within the Community.

4 The Tribunal de Grande Instance, taking the view that it required an interpretation of certain provisions of Community law, stayed both sets of proceedings and referred the following question to the Court for a preliminary ruling:

"Is the prohibition in France of resale at a loss under Article 32 of Order No 86-1243 of 1 December 1986 compatible with the principles of the free movement of goods, services and capital, free competition in the Common Market and non-discrimination on grounds of nationality laid down in the Treaty of 25 March 1957 establishing the EEC, and more particularly in Articles 3 and 7 thereof, since the French legislation is liable to distort competition:

(a) firstly, because it makes only resale at a loss an offence and exempts from the scope of the prohibition the manufacturer, who is free to sell on the market the product which he manufactures, processes or improves, even very slightly, at a price lower than his cost price;

(b) secondly, in that it distorts competition, especially in frontier zones, between the various traders on the basis of their nationality and place of establishment?"

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 It should be noted at the outset that the provisions of the Treaty relating to free movement of persons, services and capital within the Community have no bearing on a general prohibition of resale at a loss, which is concerned with the marketing of goods. Those provisions are therefore of no relevance to the issue in the main proceedings.

7. Next, as regards the principle of non-discrimination laid down in Article 7 of the Treaty, it appears from the orders for reference that the national court questions the compatibility with that provision of the prohibition of resale at a loss, in that undertakings subject to it may be placed at a disadvantage vis-à-vis competitors in Member States where resale at a loss is permitted.

8. However, the fact that undertakings selling in different Member States are subject to different legislative provisions, some prohibiting and some permitting resale at a loss, does not constitute discrimination for the purposes of Article 7 of the Treaty. The na-

tional legislation at issue in the main proceedings applies to any sales activity carried out within the national territory, regardless of the nationality of those engaged in it (see the judgment in Case 308/86 *Ministère Public v Lambert* [1988] ECR 4369).

9. Finally, it appears from the question submitted for a preliminary ruling that the national court seeks guidance as to the possible anti-competitive effects of the rules in question by reference exclusively to the foundations of the Community set out in Article 3 of the Treaty, without however making specific reference to any of the implementing rules of the Treaty in the field of competition.

10. In these circumstances, having regard to the written and oral argument presented to the Court, and with a view to giving a useful reply to the referring court, the appropriate course is to look at the prohibition of resale at a loss from the perspective of the free movement of goods.

11. By virtue of Article 30*,* quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. The Court has consistently held that any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction.

12. National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States. That alone, however, does not mean that the legislation is exempt from scrutiny under Article 30.

13. Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether the possibility that sales of domestic and imported products decrease to the same extent is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.

14. In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules have the same effect on all goods, regardless of their origin, the Court considers it necessary to re-examine and clarify its case-law on this matter.

15. It is established by the case-law beginning with 'Cassis de Dijon' (Case C-120/78 *Rewe-Zentral-AG v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42) that even rules that apply to domestic and imported products alike can create obstacles to free movement of goods, and thus amount to measures having equivalent effect to quantitative restrictions. This will be the case where despite the equal treatment in law, goods imported from other Member States in fact find it more difficult than domestic goods to comply with these rules. If imported goods, lawfully made or marketed in another Member State, must undergo adaptations to the rules in the Member State of importation regarding, for example, the goods' designation, form, size, weight,

composition, presentation, labelling, or packaging, such factual inequality is also caught by Article 30. Nevertheless, provided the rules apply equally in law to domestic and imported goods, unequal treatment in fact is not prohibited where the rules pursue a ground of justification from among those enumerated in Article 36. Beyond these grounds, Member States may also invoke any other public interest of their choice except the reservation of markets for the national competitors, administrative expedience, and the mere desire to raise revenue. Moreover, the Member States must prove that the rules are suitable and necessary for realising their aim. Recourse to such interests is precluded, however, to the extent that they have been the subject of Directives or Regulations pursuant to Article 189 of the Treaty.

16. By contrast, Member States need not justify rules that apply equally in law, and do not entail greater factual burdens for imported than for domestic goods. Such rules are not, safe as discussed in the next paragraph, prohibited by Article 30. This is contrary to what has previously been decided regarding, for instance, rules restricting or prohibiting shop opening hours and other arrangements for the promotion, distribution, display, or sale of goods. This case law no longer applies to any rule, of whatever content, that encompasses all goods, regardless of origin, and that merely reduces, to the same extent, turnover in domestic and imported products.

17. Member States must, however, justify even rules that apply equally in law to goods of any origin and that do not entail any factual inequality if they prohibit the marketing of a type or types of product altogether. The prohibition may be definitive, or pertain unless and until some condition is fulfilled. By doing so, a Member State raises a legislative 'frontier' to trade between itself and the other Member States. This is contrary to Article 8(a) of the Treaty which demands that the internal market be free from regulatory obstacles against access to the markets in the various Member States. Member States may justify such prohibitions in the way described in paragraph 15 of this judgment.

18. Accordingly, the reply to be given to the national court is that Article 30 of the EEC Treaty is to be interpreted as not prohibiting legislation of a Member State imposing a general prohibition on resale at a loss.

Costs

19. The costs incurred by the French and Greek Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal de Grande Instance, Strasbourg, by two judgments of 27 June 1991, hereby rules:

Article 30 of the EEC Treaty is to be interpreted as not prohibiting legislation of a Member State that applies in law to all goods regardless of their origin in one Member State or another, that is not in fact more difficult for imports to comply with than for domestic goods, and that does not prohibit the marketing of a type or types of products altogether, such as national legislation imposing a general prohibition on resale at a loss.

Explanatory note

The re-write keeps the substance of the judgment but dispenses with the Court's confusing terminology and generally somewhat cryptic formulations. This is possible because a closer reading of paras 15 and 16 reveals that the Court asks the same two questions twice.

These regard, firstly, the applicability of the rules in issue, i.e. whether there is one set of rules for all goods regardless of their origin in one Member State or another (so-called indistinctly applicable measures), or a separate and more burdensome set specifically for imports (distinctly applicable measures). The latter can only be justified on the grounds exhaustively listed in art. 36 TFEU. Such rules were not in issue in *Keck* but, for instance, in *Dassonville.*[5]

The second question arises only if the answer to the first is that the rules are indistinctly applicable. In that case, the Court goes on to ask what their factual repercussions are. In the *Cassis* paradigm, these were not the same for domestic goods and imports. The rules entailed burdens (adaptation costs) for imports which domestic goods were spared. In situations such as those in *Sunday trading* and in *Keck,* by contrast, the resulting burden was the same for all goods, irrespective of their origin. If unequal burdens to the detriment of imports are found, the Member State can justify their legislation on the grounds found in art. 36. They may also invoke any other public interest except mere protectionism (the reservation of markets to the national incumbents), administrative expedience, and the desire to raise revenue. Whichever interest they invoke, the Member States must also pursue it by proportionate means.

[5] Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* ECLI:EU:C:1974:82.

These two questions together constitute an assessment whether discrimination is present, that is, unequal treatment in law or in fact without justification.[6] That leaves one issue, which the Court tackles in para. 17. If a Member State prohibits a type of product altogether, wherever it is made, products of this type will not come onto its markets. Those made in other Member States will be kept out, and any made domestically may not be marketed there, either. There is no unequal treatment here: the prohibition applies across the board, and no one suffers more from it than anybody else.

Nevertheless, art. 26(2) TFEU describes the internal market as an "area without internal frontiers" in which free movement of goods, persons, services, and capital is ensured. This means movement specifically between Member States, in other words, free access to the markets in each and all of them. Universal bans amount to legislative frontiers between Member States. For the given product, the Member State that bans it opts out of the internal market, so to say, even if it is the last Member State in which the product can lawfully be produced or marketed. For this reason, universal bans too require a justification. By definition, they are indistinctly applicable. The same possibilities of justification are therefore open to the Member States as for other indistinctly applicable measures.

The most conspicuous difference between the re-write and the original is the absence of the terms "product requirements" and "(rules relating to certain) selling arrangements". From the above discussion, it will be seen that the two terms are not part of the one, uniform test, but merely stand for two different results. Even if they were part of the test, after the initial categorisation the salient questions would be identical. The first step, identifying a national rule as one or the other, would therefore not add anything. There is no indication in *Keck,* and there is also no reason in principle to think that presumptions of legality or illegality attach to either category: it is the inequality in law or in fact (or the erection of a frontier in the internal market) that calls for a justification, no matter what sort of rule caused the obstacle. After all, art. 34 prohibits measures having "equivalent effect", not "equivalent cause/form/category" or whatever else.[7]

One might consider retaining the terms as shorthand, or convenient labels, for rules that neither stipulate (in law) or entail (in fact) unequal treatment between domestic and imported products ("selling arrangements"), and for rules that create factual inequality despite their even-handedness in law ("product requirements"). This might still be understood to mean they are test criteria. To put this controversy to rest, the rewrite dispenses with the Court's original phrasing on this point.

[6] On the centrality of the concept of discrimination in the Treaty, see S Enchelmaier, 'Free Movement of Goods' cit. 547-550.

[7] More details in S Enchelmaier, 'Free Movement of Goods' cit. 568-572, and in S Enchelmaier, 'The Development of the Free Movement Principles over Time' in S Garben and I Govaere (eds), *Internal Market 2.0* (Hart Publishing 2020) 25, 49.

WHAT... SHOULD HAVE SAID

REWRITING THE COURT OF JUSTICE'S LANDMARK JUDGMENT IN THE FREE MOVEMENT OF GOODS: *KECK AND MITHOUARD*

edited by Justin Lindeboom

WHAT *KECK AND MITHOUARD* SHOULD HAVE SAID: 'STEADY AS SHE GOES, LEFT HAND DOWN A BIT?'

LAURENCE GORMLEY*

JUDGMENT OF THE COURT OF 24 NOVEMBER 1993 IN JOINED CASES C-267/91 AND C-268/91, CRIMINAL PROCEEDINGS AGAINST BERNARD KECK AND DANIEL MITHOUARD

In Joined Cases C-267/91 and C-268/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Grande Instance (Regional Court), Strasbourg (France), for a preliminary ruling in the criminal proceedings pending before that court against

Bernard Keck and Daniel Mithouard,

on the interpretation of the rules of the EEC Treaty relating to competition and freedom of movement within the Community,

THE COURT,

[...]

gives the following

Judgment

1. By two judgments of 27 June 1991, received at the Court on 16 October 1991, the Tribunal de Grande Instance, Strasbourg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/661

rules of the Treaty concerning competition and freedom of movement within the Community.

2. Those questions were raised in connection with criminal proceedings brought against Mr Keck and Mr Mithouard, who are being prosecuted for reselling products in an unaltered state at prices lower than their actual purchase price ("resale at a loss"), contrary to Article 1 of French Law No 63-628 of 2 July 1963, as amended by Article 32 of Order No 86-1243 of 1 December 1986.

3. In their defence Mr Keck and Mr Mithouard contended that a general prohibition on resale at a loss, as laid down by those provisions, is incompatible with Article 30 of the Treaty and with the principles of the free movement of persons, services, capital and free competition within the Community.

4. The Tribunal de Grande Instance, taking the view that it required an interpretation of certain provisions of Community law, stayed both sets of proceedings and referred the following question to the Court for a preliminary ruling:

   "Is the prohibition in France of resale at a loss under Article 32 of Order No 86-1243 of 1 December 1986 compatible with the principles of the free movement of goods, services and capital, free competition in the Common Market and non-discrimination on grounds of nationality laid down in the Treaty of 25 March 1957 establishing the EEC, and more particularly in Articles 3 and 7 thereof, since the French legislation is liable to distort competition:

   (a) firstly, because it makes only resale at a loss an offence and exempts from the scope of the prohibition the manufacturer, who is free to sell on the market the product which he manufactures, processes or improves, even very slightly, at a price lower than his cost price;

   (b) secondly, in that it distorts competition, especially in frontier zones, between the various traders on the basis of their nationality and place of establishment?"

5. Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6. It should be noted at the outset that the provisions of the Treaty relating to free movement of persons, services and capital within the Community have no bearing on a general prohibition of resale at a loss, which is concerned with the marketing of goods. Those provisions are therefore of no relevance to the issue in the main proceedings.

7. Next, as regards the principle of non-discrimination laid down in Article 7 of the Treaty, it appears from the orders for reference that the national court questions the compatibility with that provision of the prohibition of resale at a loss, in that

undertakings subject to it may be placed at a disadvantage vis-à-vis competitors in Member States where resale at a loss is permitted.

8. However, the fact that undertakings selling in different Member States are subject to different legislative provisions, some prohibiting and some permitting resale at a loss, does not constitute discrimination for the purposes of Article 7 of the Treaty.

   The national legislation at issue in the main proceedings applies to any sales activity carried out within the national territory, regardless of the nationality of those engaged in it (see the judgment in Case C-308/86 *Ministère Public v Lambert* [1988] ECR 4369).

9. Finally, it appears from the question submitted for a preliminary ruling that the national court seeks guidance as to the possible anti-competitive effects of the rules in question by reference exclusively to the foundations of the Community set out in Article 3 of the Treaty, without however making specific reference to any of the implementing rules of the Treaty in the field of competition.

10. In these circumstances, having regard to the written and oral argument presented to the Court, and with a view to giving a useful reply to the referring court, the appropriate course is to look at the prohibition of resale at a loss from the perspective of the free movement of goods.

11. Under Article 30 of the Treaty, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. It is settled law that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitute measures having an effect equivalent to quantitative restrictions (judgment in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).

12. Even though the national legislation concerned in this case imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States, if such legislation has the effect of directly or indirectly, actually or potentially, hindering intra-Community trade, it will constitute a measure having equivalent effect under Article 30.

13. The Court has held that national legislation which restricts or prohibits certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. To compel an economic operator either to adopt sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction (see the judgments in Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 15; Case 382/87 *Buet* [1989] ECR 1235, paragraph 7; Case C-362/88 *GB-INNO-BM* [1990] ECR I-667, paragraph 7; and

Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151, paragraph 10).

14. A prohibition of the kind at issue in the main proceedings is thus capable of restricting imports of products from one Member State into another and therefore constitutes, in that respect, a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty.

15. However, the Court has consistently held that in the absence of common rules relating to marketing, obstacles to the free movement of goods within the Community resulting from disparities between national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be justified as being necessary in order to satisfy mandatory requirements relating inter alia to consumer protection or fair trading (see, in particular, *GB-INNO-BM*, cited above, paragraph 10).

16. It is undisputed that a prohibition of the kind at issue in the main proceedings applies both to domestic products and to imported products.

17. Since the protection of consumers and fair trading are legitimate objectives from the point of view of Community law, the Court must examine, in accordance with the settled case-law, whether the national provisions are suitable for attaining the aim pursued and do not go beyond what is necessary for that purpose.

18. The French government has stated that it views resale at a loss as primarily a strategy for eliminating competition at the retail level, so that higher prices can be charged once the aim of resale at a loss has been achieved. From the point of view of consumer protection, the prohibition of resale at a loss also prevents the use of "loss leaders" to entice customers into a store in the hope of them also purchasing other goods which have been marked at higher prices in order to compensate for the losses suffered on the "loss leaders". The national provisions concerned are suitable for attaining the aims of fair trading and consumer protection, and their application to these strategies is proportionate to those aims.

19. However, as the Advocate General observed in his Opinions, the prohibition of resale at a loss also prevents a resale at a loss from being used to promote the introduction of a new product, which is a market strategy which may be particularly attractive to importers, producers, wholesalers and retailers, and indeed consumers. Resale at a loss may also be used to dispose of excessive stocks or for other purposes, including the grounds permitted under para. II of Article 1 of the Law of 2 July 1963, such as sales of perishable products, sales relating to the change or cessation of a business, and sales of products which are out of season, out of fashion, or technically obsolete. Moreover, offering some products for resale at a loss does not necessarily involve the retailer increasing prices of some other products to compensate.

20. Thus to the extent that the general prohibition at the retail level of resale at a loss takes no account of why the product is offered for sale at a loss, it goes beyond what is necessary and proportionate to ensure fair trading and the protection of consumers. While it is for the national court to establish the circumstances in which the products concerned were offered for sale at a loss, it appears, as the Advocate General observed in point 12 of his second Opinion, that the resale at a loss of Picon Bière and Sati Rouge coffee in this case has nothing to do with the launch of a new product. If the national court concludes that the resale at a loss was for one of the purposes set out in paragraph 18 of this judgment, the prohibition would be necessary and proportionate to ensure fair trading and the protection of consumers; it would therefore not be precluded by Article 30 of the Treaty, there being no evidence of the measure being a means of arbitrary discrimination or a disguised restriction on trade between Member States.
21. Accordingly, the reply to the national court's question must be that Article 30 of the Treaty is to be interpreted as precluding the application of a rule of law imposing a general prohibition of resale at a loss which takes no account of the circumstances in which the product concerned is offered for retail sale at a loss.

Costs

22. The costs incurred by the French and Greek Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal de Grande Instance, Strasbourg, by two judgments of 27 June 1991, hereby rules:

Article 30 of the EEC Treaty is to be interpreted as precluding the application of a rule of law imposing a general prohibition of resale at a loss which takes no account of the circumstances in which the product concerned is offered for sale at a loss.

Explanatory note

My view of the judgment in *Keck* as an immaculate misconception (which, when I stated this in a lecture at Leuven shortly after *Keck* was handed down, had Walter van Gerven, who was the Advocate General in *Keck* and was in the audience, in a fit of giggles) is

well-known,[1] so I shall refrain from further rhetorical flourishes. In redrafting *Keck*, I decided to start with a fresh sheet of paper. I also decided to see just what the products concerned were. Two quick internet searches revealed products with quite a provenance. Sati Rouge Coffee is a brand of coffee, produced by an independent family company based in Strasbourg since 1926, and marketed particularly in the East of France.[2] Picon bière is not actually beer, but a type of bitters, nowadays frequently drunk with beer, although previously with Selz water; its present name dates from 1967.[3]

The Court could have decided that a prohibition of retail resale at a loss (save in the specific circumstances envisaged in the law) was too remote from inter-Member State trade (as happened, not uncontroversially, in, for example, *Blesgen* in relation to a Belgian law prohibiting the sale of strong alcoholic liquor in cafés).[4] That approach seems to have been inspired by a certain reluctance to categorise the relevant law as capable of hindering trade between Member States, even though it could have been justified on health grounds and/or on grounds of public policy (*ordre public*): restricting the opportunities for people to have access to strong alcoholic drinks in cafés, so as to combat at least to an extent, extreme drunkenness.[5] In *Prohibiting Restrictions on Trade within the EEC*,[6] I suggested that in *Blesgen* the Court was inspired by the American approach to non-discriminatory liquor licensing laws. However, while the result of the US Supreme Court's case-law, discussed by Tribe,[7] was to accept such measures as being a legitimate expression of the States' police powers, the starting point of the reasoning (if one reads the judgments themselves) was to accept that the State measures were capable of hindering intra-State commerce, not that retail prohibition or restrictions were too remote to have an impact on intra-State commerce. Admittedly, the "Integration merit" of the facts in *Blesgen* was thin, just as it is in *Keck*. While the *Blesgen* approach of remoteness, or viewing the link with free movement of goods too indirect or uncertain, has been followed in a very few cases, they remain exceptional instances, and are really confined to wholly misconceived and unmeritorious attempts to rely on free movement

[1] See LW Gormley, 'Reasoning Renounced – The Remarkable Judgment in *Keck & Mithouard*' (1994) European Business Law Review 63; LW Gormley, 'Two Years After *Keck*' (1996) FordhamIntlLJ 866; LW Gormley, 'Silver Threads among the Gold: 50 Years of the Free Movement of Goods' (2008) FordhamIntlLJ 1637.

[2] Cafés Sati, *Notre histoire* www.cafesati.com.

[3] Échappée Bière, *Picon, 200 ans d'histoire* www.echappee-biere.com.

[4] Case C-75/81 *Blesgen* ECLI:EU:C:1982:117.

[5] The *Loi Vandervelde*, as the relevant legislation was called, was adopted for the protection of the health of, in particular, young people; restricting the places where hard liquor could be sold. There were worries about how the press would present a judgment which found that there was a barrier to inter-State trade, even if it was a justified barrier.

[6] LW Gormley, *Prohibiting Restrictions on Trade within the EEC* (North Holland 1985) 56, 252.

[7] LH Tribe, *American Constitutional Law* (Foundation Press 1978) ch. 6.

law when it is manifestly irrelevant.[8] In view of Advocate General van Gerven's Opinions, which demonstrate that a prohibition on resale at a loss at retail level can act as a deterrent to an importer or foreign producer seeking to introduce a new product onto the market, it was certainly not a convincing route to take.

The Court could have also disposed of the case by saying that as the products were French products, and there was no element of intra-Community trade, no issue of Article 30 EEC arose. However, that would not be as simple as it might seem. It is true that already in *Oosthoek*,[9] the Court had noted that the application of Dutch legislation to the sale in the Netherlands of encyclopedias produced there was not linked to the importation or exportation of goods and therefore did not fall within the scope of Articles 30 and 34 of the EEC Treaty. Later (after *Keck*), in *Guimont*,[10] the Court observed that it was clear from its case law that a rule that applied without distinction to national and imported products and was designed to impose certain production conditions on producers in order to permit them to market their products under a certain designation, fell under Article 30 of the Treaty only in so far as it applied to situations that were linked to the importation of goods in intra-Community trade. Earlier (before *Keck*), in *Mathot*,[11] the Court recalled that "[w]ith regard to Article 30 of the EEC Treaty, it must be emphasized that the purpose of that provision is to eliminate obstacles to the importation of goods and not to ensure that goods of national origin always enjoy the same treatment as imported goods".[12] However, even though this was not the aim of Article 30, the French national legal system views equality before the law as a jewel in its constitutional crown.

Thus, even though, in *Keck*, all the facts were purely domestic, French lawyers well understood the possibilities inherent in this doctrine of national law. If a national court were to find that the French law could not be enforced against imports of goods from other Member States, it could not be enforced against traders dealing in French goods either. In *Guimont*, the Court finally made it clear that it too understood this.[13] This approach is not a misuse of Community law, but a pure recognition of how French domestic law operated. This compares interestingly with the situation in Germany, where, after the *Reinheitsgebot*

[8] Case C-69/88 *Krantz v Ontvanger der Directe Belastingen* ECLI:EU:C:1990:97; Case C-93/92 *CMC Motorradcenter v Baskiciogullari* ECLI:EU:C:1993:838. Post *Keck*, see e.g. Case C-379/92 *Peralta* ECLI:EU:C:1994:296; Case C-96/94 *Centro Servizi Spediporto v Spedizioni Marittima del Golfo* ECLI:EU:C:1995:308; Joined Cases C-140/94, C-141/94 and C-142/94 *DIP and others v Comune di Bassano del Grappa and others* ECLI:EU:C:1995:330; and Case C-266/96 *Corsica Ferries France v Gruppo Antichi Ormeggiatori del porto di Genova and others* ECLI:EU:C:1998:306.

[9] Case C-286/81 *Oosthoek* ECLI:EU:C:1982:438 para. 9.

[10] Case C-448/98 *Guimont* ECLI:EU:C:2000:663 paras 3, 7-9.

[11] Case C-98/86 *Ministère public v Mathot* ECLI:EU:C:1987:89 para. 7.

[12] The Court correctly added that "a difference in treatment as between goods which is not capable of restricting imports or of prejudicing the marketing of imported goods does not fall within the prohibition contained in that article" (ibid. paras 7-8); see also *Guimont* cit. para. 15.

[13] See *Guimont* cit. paras 22-23.

judgment,[14] while the German government had to change the law to permit non-*Reinheitsgebot*-conform beers from other Member States to be sold in Germany, it was perfectly entitled to maintain the existing law for beer produced in Germany for consumption there (beer brewed there for export was not subject to the *Reinheitsgebot* conditions).

I also looked to see whether one could simply say that the arguments of prevention of unfair trading practices and consumer protection had been made out; it was necessary to protect such interests; they were appropriate and proportionate, and thus conclude that the French measures were not prohibited by Article 30. Relatively easy and straightforward, it might be thought. Unfortunately for that approach, that great jurist, Advocate General Walter van Gerven, had demonstrated that this was not possible. He pointed out two difficulties with such an easy approach. First, people might want to sell at a loss for entirely reasonable reasons, such as to launch a new product. Indeed, French law recognized certain exceptions under para. II of art. 1 of the Law of 2 July 1963, such as sales of perishable products, sales relating to the change or cessation of a business, and sales of products which are out of season, out of fashion, or technically obsolete. Van Gerven noted, however, that it was unclear whether the sale of Sati rouge coffee and Picon Bière fell within them.[15] Secondly, the French legislation was too generally drafted. He argued that if the French legislation were drafted sufficiently precisely, so as specifically to target resale at a loss being used for purposes which were unfair towards competitors or detrimental to consumers, it could be justified as necessary to ensure fair trading and, also, maintaining undistorted competition and/or protecting consumers. These grounds were recognized in Community law. Banning the use of resale at a loss as a method of sales promotion in trading situations which could not be regarded as unfair, anti-competitive, or detrimental to the consumer, went too far. Van Gerven was manifestly correct to observe that an argument that the measure was only actually applied to the resale at a loss designed to eliminate competitors or to draw in consumers while quietly raising other prices to compensate was unsatisfactory from the point of view of legal certainty; the French measure was far too broadly drawn, and should have enabled the reseller to adduce evidence that it had not acted in an anti-competitive manner or to the detriment of consumers.

Following van Gerven's approach, I felt it appropriate to indicate to the national court how it should proceed depending on the factual information that it is best placed to ascertain; I have sought to assist the national court, without usurping its function as sole judge of the facts of the case. I prefer the formulation of advice in the first Opinion, even though the formulation in the second was more direct, as I felt that the national court should be encouraged to consider the motivation: the French authorities clearly

[14] Case C-178/84 *Commission v Germany* ECLI:EU:C:1987:126.

[15] See Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* ECLI:EU:C:1992:448, opinion of AG Van Gerven of 18 November 1992, para. 9 and fn. 13.

thought that the supermarket managers involved had acted either to shaft the competition or to entice consumers into the supermarkets while quietly raising prices of other products. But had they done this? Clearly, the products were not new products being launched, but was there another innocent explanation?

I found van Gerven's Opinions a more convincing line to follow than the line advanced by Advocate General Tesauro in Case C-292/92 *Hünermund v Landesapothekerkammer Baden-Württemberg*[16] which seems to have inspired the Court's approach in *Keck*. In Hünermund, I would have followed the alternative analysis suggested by Tesauro in paras 30-31 of his Opinion, finding the prohibition unjustified: the arguments of the Landesapothekerkammer that the prohibition of advertising of parapharmaceutical products was essential to ensure a proper supply of medicinal products and to avoid the image of pharmacists no longer reflecting their traditional activity were manifestly rubbish and, as he observed, disproportionate.

One of the great functions of *Festschriften* is that they should also provoke the honoree into thinking and rethinking. David Edward's discussion[17] of the expression in para. 16 of *Keck* "contrary to what has previously been decided" is very illuminating. He observed that this phrase, for a common lawyer, implies that previous judgments are being overruled because they were wrongly decided – the wrong result was reached. In *Keck*, he explains, the Court's change of direction was not overruling the previous cases because the result was erroneous; "the departure was from the approach, irrespective of whether the end result was correct or not".[18]

Edward also eloquently argued that

> *[e]ssentially,* the purpose of *Keck* was to emphasise that Article 30 is not about free trade. It is about fair trade. In the absence of harmonizing measures, Member States are at liberty to make such rules as they think appropriate to their own conditions. These rules may be thought to be inept, even ridiculous. But the Treaty has nothing to say about them on condition that everyone has equal and fair access to the market. In a sense, to use the jargon of later years, *Keck* was really about subsidiarity.[19]

These observations induce some more general reflections. The concept of fair trade is the result of the Court developing already in *Dassonville* the justification of the prevention

[16] Case C-292/92 *Hünermund and others v Landesapothekerkammer Baden-Württemberg* ECLI:EU:C:1993:863, opinion of AG Tesauro.

[17] See D Edward, 'What Was *Keck* really About?' in F Amtenbrink and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019) 173-174. All the authors wrote such wonderful contributions that I have learned a great deal from reading this book.

[18] *Ibid.* 174.

[19] *Ibid.* 175.

of unfair commercial practices.[20] The case-law-based justifications can only be invoked in respect of measures which apply equally, in law and in fact to domestic and imported products; if there is a difference, only justification under the heads recognized in the Treaty will be available. This is still true, and indeed was specifically reaffirmed in the *Walloon waste* judgment[21] in which the Court notoriously claimed (or to put it expressively and deservedly devastatingly in french: "*La Cour croyait conclure que*...") that a manifestly discriminatory measure was not discriminatory because of the nature of the product concerned. I suggest, therefore that the basic right is to free trade, the basic duty on the Member States to facilitate trade, the power is to retain obstacles which can be justified,[22] having taken into account the necessity to protect the recognized interest or value concerned, appropriateness / suitability for purpose, and the proportionality of the measure. Art. 30 EEC was about free trade; *Dassonville* was about free trade, and about recognizing legitimate justifications in the absence of Community measures occupying the field: free trade should indeed be fair trade. *Keck* too can be firmly placed in that line.

The dangers with the approach in which the Court took in *Keck* are twofold. First, claiming that equally-applicable selling arrangements are not hindrances to trade within the meaning of *Dassonville* misunderstands the nature of justifications: a hindrance does not cease to be a hindrance because it is justified, it is a hindrance which is acceptable in the absence of EU-level measures protecting the interest or value concerned.[23] Secondly, stating that certain selling arrangements fall outside the scope of art. 30 EEC, effectively removes the jurisdiction of the Court to look at them at all; the Court loses its controlling function, its ability to look behind the face of measures, and its ability to see what is really going on. A measure may provide for equal misery for all, but that is not reason for concluding that it is not caught by art. 30 EEC (now, of course, art. 34 TFEU). Equally-applicable measures can be justified on wider grounds than those specified in art. 36, as was first made clear in *Dassonville*. The great merit of the wide application of the basic principle in *Dassonville*, accompanied by Treaty-based and case-law-based justifications, is that it permits the Court to take a view on national measures. This is not a mechanical application of *Dassonville*, but an opening up to ensure the protection of legitimate interests not envisaged in the late 1950's, pending action at, now, Union level. The *Dassonville* approach

[20] "In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals" (Case C-8/74 *Dassonville* ECLI:EU:C:1974:82 para. 6). Very quickly the reference to "all Community nationals" was dropped (as the benefit of the free movement of goods is not restricted to Community nationals).

[21] Case C-2/90 *Commission v Belgium* ECLI:EU:C:1992:310 para. 34.

[22] Like a trust for sale: the duty is to sell, the power to postpone.

[23] See LW Gormley, *Prohibiting Restrictions on Trade within the EEC* cit. 51-58, 71; LW Gormley, 'Inconsistencies and Misconceptions in the Free Movement of Goods' (2008) ELR 925, 927.

actually helps Member States, economic operators, and consumers, and promotes rational market measures, as opposed to irrational ones.

Edward's further observation that "[i]n the absence of harmonizing measures, Member States are at liberty to make such rules as they think appropriate to their own conditions" is a point often raised by the Member States, but it is well-parried by the Court with expressions such as "within the limits imposed by the Treaty".[24] In other words the justifications recognized by EU law (whether Treaty-based or case-law-based) are not simply a *carte blanche* for the Member States to do whatever they want, no matter how inept or even ridiculous the measures may seem, as long as it is equal misery for all. Access to the market on equal terms gets us a long way, but it insufficient to cope with measures which, even though equally applicable, in practice hinder the exercise of fundamental freedoms without a justification known to EU law.

Finally, Edward's challenging observation that in a sense *Keck* was about subsidiarity. The judgment in *Keck* was handed down on 24 November 1993, some three weeks after the entry into force of the Treaty on European Union; the notion of subsidiarity had been in the air for some time (the final negotiations on the Treaty on European Union were concluded at the Maastricht European Council on 9-11 December 1991 and the Treaty been signed at Maastricht on 7 February, 1992; the Edinburgh European Council in December 1992[25] started to flesh out how the principle would work in practice; the *spirit of Edinburgh* was in vogue). But the principle of subsidiarity is clearly intended to be taken into account in the work of the political institutions in proposing or adopting legislation in areas where the Union does not enjoy sole competence to act, and in the control of that work by the Court; it is not an instruction to the centralized or decentralized judiciary of the Union to be taken into account when deciding cases involving action by the Member State, and indeed Timmermans has rightly observed that the Court itself is not obliged to respect the principle, as its jurisdiction is always exclusive in nature.[26] Subsidiarity, I submit, is irrelevant in deciding on the compatibility of *national* action with EU law.

I have very much enjoyed this exercise, and congratulate and thank Justin Lindeboom for initiating it!

[24] E.g. Case C-104/75 *De Peijper* ECLI:EU:C:1976:67 para. 15; Case C-40/82 *Commission v United Kingdom* ECLI:EU:C:1984:33 paras 33-34; Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía v Departamento de Sanidad y Seguridad Social de Cataluña* ECLI:EU:C:1991:327 para. 16. This is also true post *Keck*, see e.g. Case C-170/04 *Rosengren and others* ECLI:EU:C:2007:313 para. 39; Case C-421/09 *Humanplasma* ECLI:EU:C:2010:760 para. 32; Case C-333/14 *The Scotch Whisky Association* ECLI:EU:C:2015:845 para. 35.

[25] European Council Conclusions of 12 December 1992, Overall approach to the application by the Council of the subsidiarity principle and article 3b of the Treaty of European Union, points I.4 and 1.15.

[26] CWA Timmermans, 'The Genesis and Historical Development of the European Communities and the European Union' in PJ Kuijper and others (eds), *The Law of the European Union* (Wolters Kluwer 2018) 83.

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edited by Lando Kirchmair *and* Benedikt Pirker

* The page numbering follows the chronological order of publication on the *European Papers* website.

ISSN 2499-8249
doi: 10.15166/2499-8249/...

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