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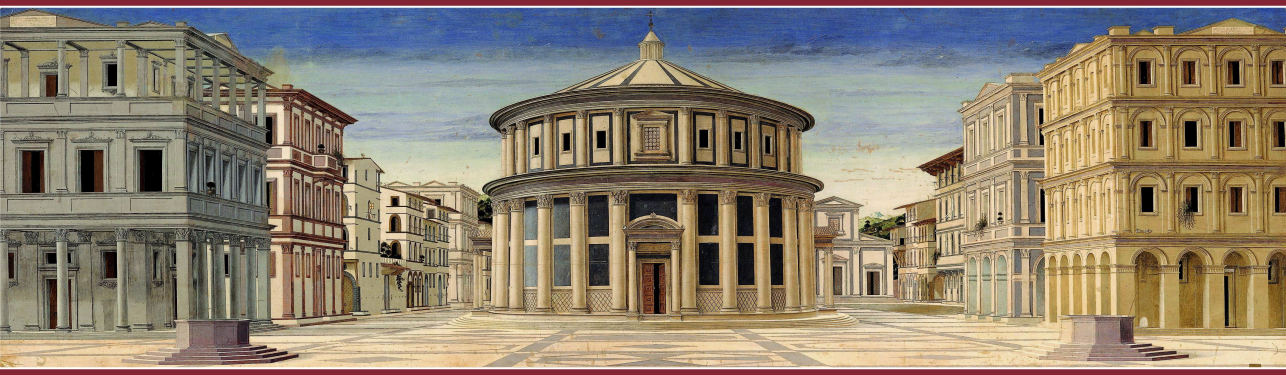

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Articles

Perspectives on the Reformed EU Judicial Architecture – First Part

edited by Lorenzo Grossio *and* Davor Petrić

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CASE NOTES

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The Cultural Dimensions of Legal Certainty: A Study on the Use of Intercultural Knowledge in European Law-Application

Juan J. Garcia Blesa[*]

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ABSTRACT: The need to take cultural differences into account when dealing with transnational legal problems or implementing legal concepts and principles across countries is widely acknowledged by international institutions and the academia. In this sense, there are important initiatives to funnel 'external' cultural expertise into the legal process (e.g. in court proceedings). Yet, the meaningful integration of cultural knowledge into legal work requires lawyers to play an active and guiding role in this exchange so as to shape its modalities, impact and scope. In particular, this involves the identification of professionally intelligible forms of cultural knowledge and the development of potential avenues for their practical integration into legal routines "from within" the legal profession. For this purpose, this article explores the use of the intercultural communication body of knowledge as a means to enrich European human rights adjudication. Focusing on the European Court of Human Rights doctrine on legal certainty and applying intercultural indexes like Uncertainty Avoidance and Individualism to supplement the Court's assessment of the necessary levels of legal predictability, this work examines the potential viability of relying on that particular body of knowledge for a systematic, large-scale interdisciplinary exchange. With certain qualifications, the conclusions support the advisability of this type of exchange and point to further steps in this direction.

KEYWORDS: legal certainty – predictability – European Court of Human Rights – intercultural communication – cultural dimensions – law and culture.

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1. Introduction

The notion that cultural differences have a strong impact on the manner law is understood and applied across countries has long been acknowledged by key international institutions that emphasize the need to take such differences into account when implementing cross-national legal regimes.[1] In Europe, the various layers of the regional legal system (encompassing the Council of Europe [CoE], the European Union [EU] and individual Member States [MS]) provide for general principles, rules and judicial doctrines that allow for cultural differences to be considered in the application of the law.[2] In the same vein, some European institutional initiatives try to deal with the important impact that cultural differences have on the process and outcomes of law-application.[3] Similarly, academic research strives to improve our understanding of the cross-cultural dimension of law-application in Europe.[4] Among the most significant of such contributions, some academic and professional initiatives aim to funnel cross-cultural knowledge into legal work by inserting external experts from culture-related fields (e.g. psychology, cultural studies, anthropology, sociology, etc.) into the legal process.[5] Yet, awareness about the cross-cultural dimensions of law also needs to be improved and developed "from within" the legal profession. In this latter sense, we are still missing practical models and tools for the analysis of law's cultural dimensions that are also intelligible and acceptable for wider European legal professional communities, especially for law-applying institutions and legal education, as the end-users of potential methodological innovations.

[1] See e.g. UN General Assembly, Resolution on the rule of law at the national and international levels (10 December 2014) UN Doc A/RES/69/123, para 9.

[2] For example, Arts 3(3) and 4(2) of the Treaty on the European Union and Article 17 of the Treaty on the Functioning of the European Union require the EU to respect, protect, and promote European cultural diversity. And the European Court of Human Rights' (ECtHR) 'Margin of Appreciation' doctrine gives states room to consider their unique cultural characteristics when interpreting and applying the rights protected by the European Convention on Human Rights (ECHR). See e.g. JA Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) *International and Comparative Law Quarterly* 459.

[3] Some programmes of judicial training offered by national and European institutions aim to explore and deal with European cultural differences in legal matters. See e.g. the European Judicial Training Network's programme for European judges on 'Cultural Diversity in the Courtroom', at catalogue.ejtn.eu (all links in this article were last visited on 19 June 2025). See also trainings offered to judges and police by the Ministries of Justice of some German States, e.g. Nordrhein-Westfalen, at www.jak.nrw.de.

[4] For instance, projects like the CUREDI Database of the Law & Anthropology Department of the Max Planck Institute for Social Anthropology (at www.eth.mpg.de) examine judicial and administrative practices and show how domestic legal orders are gradually adapting to the social demand for the recognition of increasing cultural and religious diversity in Europe. This digital repository of European domestic case-law identifies arguments developed by law-appliers to justify or reject the recognition of different cultural traditions, concepts, practices, beliefs, etc. in legal rulings. The method tracks in particular the use of empirical evidence, anthropological literature, or expert testimony in judicial or administrative decisions.

[5] See e.g. the Cultural Expertise Network, at culturalexpertise.net.

This is by no means an exclusively European problem. In international law, a significant part of the debate over the impact of cultural differences has been so far based on outdated notions about differences between the 'West' and the rest of the World.[6] For example, in relation to international investment law and arbitration the 2018 report of the International Law Association reminds that '[w]hilst there is often presumed to be a universal conception of what is just, fair, or good, there is the need to be more cognizant of specific local, cultural and social factors which may contribute to different notions of the rule of law than that accustomed in Western societies'.[7] That is, as far as the rule of law debate goes, there seems to be at least at the practical level a widespread assumption that "the West" is a more or less homogeneous cultural unit whose internal diversity has little importance and deserves little attention in terms of how law is understood and practiced across countries as diverse as, e.g., Greece, Netherlands, Poland, Finland or Canada.

The lack of a practical approach suitable to capture and process cultural difference in a meaningful manner also surface in European legal integration and cooperation debates. In part a consequence of this methodological deficit, European legal work commonly relies on the more or less implicit assumption that there is one relatively homogeneous European understanding and experience of fundamental legal notions as deeply conditioned by culture as fault, negligence, ownership, participation or 'to be heard'.[8] Even where academic and institutional work acknowledges the diversity of cultural views about fundamental elements of the rule of law in Europe, such insights tend to be effaced by references to different forms of European consensus.[9]

However, as cross-cultural psychology shows, Europe is less culturally homogenous than assumed by a significant part of European jurisprudence, especially as regards cultural dimensions that are fundamental to the practice of the rule of law

[6] This tendency seems to echo the original thrust of legal anthropology and its attempt to demonstrate that "Western" legal systems were more developed than "non-Western" legal cultures, see N Rouland, *L'Anthropologie Juridique* (2nd ed, Presses Universitaires de France 1995) 14-35. Similarly, comparative legal studies have only partially moved away from the reductionist classification of every legal system on earth according to two misleading categories, i.e., civil law and common law, both based on inaccurate images of Roman, French and German law, and English law respectively, see VV Palmer, 'Mixed Legal Systems… and the Myth of Pure Laws' (2007) *Louisiana Law Review* 1205; and T Herzog, 'European Law and the Myths of a Separate English Legal System' (History and Policy 2018), at www.historyandpolicy.org.

[7] See e.g. International Law Association, *Report on the Rule of Law and International Investment Law* (2018), at www.ila-hq.org 24.

[8] See European Commission for Democracy through Law - Venice Commission, 'Report on the Rule of Law' (2011) Study No. 512/2009 - CDL-AD (2011)003rev, paras 41ff.

[9] See e.g. B Grabowska-Moroz, DV Kochenov, 'EU Rule of Law: The State of Play Following the Debates Surrounding the 2019 Commission's Communication' in G Amato, B Barbisan, C Pinelli (eds), *Rule of Law vs Majoritarian Democracy* (Hart Publishing 2021) 63, 64-65. Note that the ECtHR's so-called European consensus doctrine is based on the identification of common legal standards that mostly reflect political power and exclude broader considerations about cultural diversity. See JT Theilen, *European Consensus between Strategy and Principle. The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication* (Nomos 2021).

(e.g., group relations, time perception, communication styles, power distance, etc.).[10] The question becomes even more pressing if we acknowledge that no nation is culturally homogenous due to the existence of different cultural minorities and groups within their borders –especially when the perspectives of migrant citizens and non-citizen residents are taken into consideration.[11]

Against this backdrop, this article explores the potential application of the 'cultural dimensions' tool developed by intercultural research to transnational legal work in Europe. It argues that: *a)* this specific avenue of interdisciplinary cross-pollination can deepen our understanding of key European legal debates and make the operation of cross-European legal regimes more sensitive to issues of cultural diversity –thus enhancing the social legitimacy of those legal regimes across European societies. And *b)*, given the substantive overlapping with some fundamental legal problems and some structural similarities with basic forms of legal argumentation, resort to some cultural dimensions in transnational legal work constitutes an approach that is easily accessible for legal professionals –also European judges.[12] As such, the approach can be learned and applied not only to improve the cross-cultural sensitivity of European law-application, but also to adapt European legal conscience and routines to the growing cultural diversity of European societies. Moreover, this can be done without excluding resort to other forms of cooperation with the field of intercultural research, e.g. through external cultural expertise in judicial proceedings.[13] The article also discusses certain methodological dilemmas that need to be considered in order for legal work to tap into the potential benefits of this particular form of cross-disciplinary dialogue in the future.

In order to illustrate the approach proposed, this work focuses on a distinctly classical legal issue in the case-law of the European Court of Human Rights (ECtHR): the principle of legal certainty and the promises of predictability and normative precision it contains. The ECtHR's formulation and application of this principle are explored from the different cultural expectations that these promises may entail for different peoples in Europe. Given the topic chosen to present the approach, this work may initially appear to link with European institutional and academic initiatives that aim to improve the quality of national laws so as to enhance the democratic basis

[10] See e.g. World Values Survey, '2023 World Values Survey' (17 February 2023), at www.worldvaluessurvey.org; and Globe Project, '2020 GLOBE Study' (2020), at globeproject.com. See also S Kitayama, CE Salvador, 'Cultural psychology: Beyond East and West' (2024) *Annual Review of Psychology* 495.

[11] AB Cohen, MEW Varnum, 'Beyond East vs. West: Social Class, Region, and Religion as Forms of Culture' (2016) *Current Opinion in Psychology* 5.

[12] See generally, JM Balkin, (1986) 'The Crystalline Structure of Legal Thought' (1986) *Rutgers Law Review* 1; JM Balkin, 'Nested Oppositions' (1990) *The Yale Law Journal* 1669; and more specifically in relation to cultural hermeneutic in law, JM Balkin, *Cultural Software: A Theory of Ideology* (Yale University Press 1998).

[13] L Holden, *Cultural Expertise, Law, and Rights* (Routledge 2023).

of the rule of law across Europe (i.e., better laws defined as those that can be better understood by the average citizen).[14] However, the theoretical and methodological premises of this work differ from these initiatives in fundamental respects.

First, although it incidentally features the issue of legal wording or textual precision of legal statutes and regulations as a case-study, this paper looks at legal wording styles from the viewpoint of culture and not the other way around. That is, it does not assume cultural preferences from actual practices of legal wording. Admittedly, there can be positive synergies between these two approaches. For instance, insofar as the study of actual legal wording styles in different countries is also sensitive to background cultural differences across the countries analyzed, the results of such inquiry may be used as a proxy for cultural preferences in relation to the specific issue of legal certainty.

However, it is important to stress from the outset that this article deals not with how laws could or should be drafted in order to be better aligned with the cultural understandings of different European populations. Instead, it deals with law-application and how it can be enriched with intercultural knowledge in order to be more sensitive towards cultural differences in Europe. In this sense, this work is inspired by a critical understanding of legal form and adjudication which posits that *a)* legal materials *per se* do not determine legal decision-making;[15] and *b)* that the actual stability of meaning and the relative predictability of legal decision-making actually stem from the collective values of interpretive communities of law-appliers, especially courts.[16]

Additionally, by focusing on the application of European law by supranational courts, this work takes the judicial rather than the litigant's strategic perspective. That is, it does not aim to help produce more effective cultural defence argumentation by applicants (and respondent states), even if that might be one of its by-products.[17] Rather, this work subscribes to the ethical principles outlined by Holden and others of 'do no harm' (akin to *in dubio pro reo* in criminal law) and procedural

[14] See generally EU Directorate-General for Translation, 'Proceedings of the Conference "Clear Writing throughout Europe"' (Publications Office of the European Union, 2 May 2011), at op.europa.eu; and A Sobota, 'The Plain Language Movement and Modern Legal Drafting' (2014) *Comparative Legilinguistics* 19. See also International Association of Legislation, at ial-online.org.

[15] About the linguistic and (post-)structuralist critique of traditional notions of language, see L Wittgenstein, *Philosophical Investigations* (4th ed. Wiley-Blackwell 2009); J Derrida, 'Structure, Sign and Play in the Discourse of the Human Sciences' in *Writing and Difference* (Routledge 2001) 351. About the semiotic critique of mainstream jurisprudence in Europe, see e.g. P Goodrich, *Legal Discourse. Studies in Linguistics, Rhetoric and Legal Analysis* (MacMillan Press 1987). See also American critical jurisprudence, D Kennedy, 'Legal formality' (1973) *Journal of Legal Studies* 351; D Kennedy, *A Critique of Adjudication: Fin de Siècle* (Harvard University Press 1998).

[16] About this thesis in critical jurisprudence, see e.g. Kennedy (n 15) 228 ff; and R Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press 1996) 104ff, 230ff. See generally Wittgenstein (n 15) paras 241-242. See also in mainstream jurisprudence, e.g., N MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005); and RA Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline' (1988) *University of Toronto Law Journal* 333.

[17] On the notion of cultural defence, see Holden (n 13) 11-19.

neutrality in the use of intercultural knowledge in law so as to support vulnerable groups and correct potential structural imbalances, in particular those potentially caused by judicial ethnocentrism.[18]

Finally, a further methodological clarification is in order.[19] The approach propounded here is not predicated upon the idea of the existence of social/cultural laws that the European judges should simply transcribe –and, thus, should not be read in this way. Instead, this work points at certain cultural belief-structures suggested by intercultural research that, along with other factors, influence and shape social conceptions and expectations about law which, given their socio-political magnitude, deserve being taken into due account.

In other words, this article and the interdisciplinary approach it propounds are based on an interpretivist approach to social knowledge which rejects both traditional legal positivism and scientistic or naturalistic approaches to the social sciences.[20] More specifically, interpretivist social research does not try to mimic the natural sciences and their search for causal laws which would predict people's future behaviour.[21] For interpretivist research, such pursuit is hopeless due to the systemic flaws of scientistic/naturalistic approaches.[22] In contrast, from a social interpretivist epistemological viewpoint, the aim of social inquiry is not to produce causal predictions in order to control human behaviour, but to understand human action and render it intelligible by studying its purpose and meaning.[23]

Interpretivist research acknowledges the reciprocal interrelatedness of social events and, instead of seeking linear causal connections between social phenomena, it tries to explain how and why they interlock with each other without any of them determining the rest.[24] Conceived as the relative correspondence between belief and action, the notion of meaning is applied to explain such interrelation.[25] Beliefs and actions constitute inseparable units of meaning that gather into larger semantic clusters based on collective systems of meaning. Thus, the semantic unity of a social situation is connected to the visions of life shared by its participants; a totality of meaning that derives from its constituent parts and, at the same time, gives meaning to them in a dynamic and changing relation.[26]

[18] *Ibid* 13-14.

[19] The following is based on JJ Garcia Blesa, 'Legal Method in the Context of Social Thought' in JJ Garcia Blesa (ed), *Contemporary Methods in International Legal Research* (Springer 2024) 5-20.

[20] DM Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36(1/2) *Stanford Law Review* 600-605. On the distinction between naturalist and interpretivist research approaches, see A Rosenberg, *Philosophy of Social Science* (5th ed., Routledge 2018) 11-33; M Hollis, *The Philosophy of Social Science. An Introduction* (Cambridge University Press 2002) 8-16.

[21] Rosenberg (n 20) 13.

[22] *Ibid* 41-50.

[23] *Ibid* 43, 56.

[24] RM Unger, *Law in Modern Society. Toward a Criticism of Social Theory* (The Free Press 1977) 14.

[25] *Ibid* 246.

[26] *Ibid* 249.

Insofar as interpretivism rejects causality and determinism,[27] the traditional conundrums of the naturalistic social sciences are not regarded as unsurmountable obstacles, but as the inherent limits of social research. For interpretivists, given such limitations, social inquiry is always sketchy and largely based on guesswork.[28] Therefore, the goal of social research is the interpretation of action in order to understand it, i.e. to establish some coherence between reasons and actions, and possibly transform action by influencing or modifying the reasons that motivate it.

In the same vein, interpretivist research does not solve the dilemmas of individual vs. structural sources of meaning that underlie modern social sciences, nor the problem of combining people's self-understanding (subjective) with the observer's or system's perspective (objective).[29] Neither does it escape the recurring dilemma between abstract vagueness and meaningless precision in scientific explanation that plagues every research approach.[30] In practice, thus, interpretivism, as any other form of social research, is always compelled to seek some sort of reconciliation between concrete perception and abstract knowledge.[31]

Against this backdrop, the cultural beliefs and values on which the approach outlined in this paper is predicated should not be comprehended as causes that determine social action, but as 'reasons' that render action intelligible by highlighting how actors justify it in the empirical studies cited below.[32]

The result is a tool of understanding, a cultural heuristic of law or a 'meta-bricolage' about the 'bricolage' that human culture is itself.[33] Using the hermeneutic power of cultural shared understandings, this approach offers insights into cultural differences in legal interpretation and explores tentatively some potential avenues for European courts to become more responsive towards such differences.

In order to unpack these issues, the article proceeds by analysing the ECtHR's doctrine regarding the principle of legal certainty (section 2). Next, taking this doctrine as a case-study, it introduces the notion of cultural dimensions as the main tool of the proposed intercultural approach to law-application, and outlines some appli-

[27] Defined as the belief in the existence of certain laws of the social world that ultimately determine human action beyond human will, Trubek (n 21) 580.

[28] Rosenberg (n 20) 64-65, 69.

[29] Unger (n 25) 15-17.

[30] *Ibid* 20-22.

[31] *Ibid* 15. Despite these inevitable weaknesses, interpretivism's optimistic view on the potential of anti-naturalist approaches to the study of human behaviour seems to offer the only way out of the pessimism (and cynicism) to which naturalist approaches have led social research throughout the second half of the twentieth century, Rosenberg (n 20) 70.

[32] Thus, the approach is linked to philosophical pragmatism for it skips the fact-value dichotomy and the notion that the purpose of knowledge is the representation of "reality" (e.g. through generalisations), while it still tries to learn something about social *reality* ('what is out there'), to understand better the connection between beliefs/values and action, R Rorty, *Consequences of Pragmatism (Essays: 1972-1980)* (University of Minnesota Press 1982) 160-166.

[33] Balkin (n 12) xi.

cations of the cultural dimensions to the issue of legal certainty (section 3). The following section discusses some limitations and caveats about the use of cultural dimensions in law-application (section 4). This part also clarifies the relation between the approach proposed and the fundamental legal postulates of the generality of laws and equality before the law. Finally, the article reflects on the general advisability and the substantive and geographic scalability of the model (section 5).

2. Making European law-application more culturally sensitive: the ECtHR's application of the legal certainty principle as a case-study

2.1. The uncertainties of legal certainty and the ECtHR's assessment of foreseeability and normative precision

Being one of the core themes of the rule of law debate in the last decades, the principle of legal certainty is connected to a broad cluster of themes that usually includes notions of formal legality, textual clarity, stability and consistency of the law, publicity or accessibility, non-retroactivity, etc.[34] Aside from the specific complexities of each of these themes, the main rationale of legal certainty has traditionally revolved around the idea of predictability or foreseeability in the context of political liberalism and capitalism. That is, the essential purpose of the legal certainty principle is to allow people to know in advance the range of free action they have without the need to fear public sanction, thus, making it possible for them to orient their behaviour and plan for their future.[35]

This is also the basis of the ECtHR's doctrine regarding the principle of legal certainty. According to the European Convention on Human Rights, any allowed interferences with Convention rights must be 'prescribed by law'.[36] But in the Court's case-law this does not only mean that restrictive norms must have some textual basis in domestic or international law; they must also fulfil some criteria as to the *quality of the*

[34] LL Fuller, 'The Morality of Law' (Rev. ed., Yale University Press 1969); J Raz, *The Authority of Law* (Clarendon Press 1979); BZ Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press 2004); A Bedner, 'An Elementary Approach to the Rule of Law' (2010) *Hague Journal on the Rule of Law* 48.

[35] In the context of capitalist economies, the role of this principle has been linked to the facilitation of market exchanges "because predictability and certainty allow merchants to calculate the likely costs and benefits of anticipated transactions", Tamanaha (n 34) 119.

[36] Aside from the rights protected by absolute prohibitions (i.e., the prohibitions of torture in Art 2 and slavery in Art 3), the ECHR contains several explicit references to the principle of legality ("provided by law", "prescribed by law", "according to the national laws", "in accordance with the law") in relation to most of the rights protected (see Arts 5-12).

law in question.[37] Particularly important in this regard is the general principle that the law must be clear and its consequences foreseeable to the persons concerned.[38]

Clarity and foreseeability, however, are flexible standards and are generally understood in relative terms. For instance, the Court has pointed out that 'the mere fact that a legal provision is capable of more than one construction does not mean that it does not meet the requirement implied in the notion "prescribed by law"'.[39] For the court 'it is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise […]'.[40] Thus, the restriction on the enjoyment of fundamental rights must be formulated only with 'sufficient precision' to enable the citizen to regulate their conduct by enabling them to anticipate 'to a degree that is *reasonable in the circumstances*, the consequences which a given action may entail'.[41] And 'those consequences *need not be foreseeable with absolute certainty*: experience shows this to be unattainable'.[42]

In the same vein, the Court has consistently upheld the need to avoid *excessive rigidity* in order to keep pace with changing circumstances, which implies that some laws need to be vague.[43] This applies even to criminal laws, which in theory must live up to more stringent requirements of foreseeability than other norms interfering with the enjoyment of fundamental rights. That is, the requirement of clarity of the law applies in two different contexts in the Convention. First, Article 7 requires clarity in the definition of proscribed criminal behaviour in penal statutes in the sense of the 'void for vagueness' doctrine.[44] And second, clarity is required from any other norm that interferes with the enjoyment of fundamental rights (especially those protected in Articles 8 to 11 ECHR).

In principle, the requirement of foreseeability set forth by the Convention and by the Court's case-law is weaker in the case of non-penal laws (e.g., in disciplinary proceedings against government employees) because, among other reasons, 'it would scarcely be possible to draw up rules describing different types of conduct in detail'.[45]

[37] *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) para 30.

[38] *The Sunday Times v the United Kingdom (no. 1)* App no 13166/87 (ECtHR, 26 April 1979) para 49; *Larissis and Others v Greece* Apps nos 23372/94, 26377/94 and 26378/94 (ECtHR, 24 February 1998) para 40; *Hashman and Harrup v the United Kingdom* [GC] App no 25594/94 (ECtHR, 25 November 1999) para 31.

[39] *Vogt v Germany* App no 17851/91 (ECtHR, 26 September 1995) para 48.

[40] *Gorzelik and Others v Poland* [GC] App no 44158/98 (ECtHR, 17 February 2004) para 64.

[41] *Ibid* (emphasis added).

[42] See *Rekvényi v Hungary* [GC] App no 25390/94 (ECtHR, 20 May 1999) para 34 (emphasis added).

[43] *Gorzelik and Others v Poland* (n 40) para 64.

[44] *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) paras 13-20.

[45] *Vereinigung demokratischer Soldaten Österreichs and Gubi v Austria* App no 15153/89 (ECtHR, 19 December 1994) para 31.

Thus, 'disciplinary law is necessarily drafted in general terms'.[46] However, the same reasoning applies to penal statutes.[47]

In particular, the Court has repeatedly held that in criminal law, like in any other type of law, there is always an inevitable imprecision accompanied by a strong element of judicial interpretation and that, even if certainty is highly desirable, excessive rigidity must also be avoided in criminal law to allow judges to keep up with changing circumstances.[48] Moreover, the Court has stated that 'the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen'.[49]

Of course, the Court has established certain formal criteria to assess the compliance of domestic laws (and case-law) with this standard of foreseeability. More specifically, the level of precision required depends on 'the content of the instrument considered, the field it is designed to cover, and the number and status of those to whom it is addressed'.[50] Yet, these criteria further refer us to other vague standards so that in practice, as far as the Convention rights are concerned, the scope of the concept of foreseeability and the principle of legal certainty depend on the Court's own judicial discretion and interpretation of social context.[51] In other words, the vague standards relative to the content, object and addressees of a norm as well as to the 'changing circumstances' of society and the 'interest of justice' allow for a wide variety of factors to be considered in the Court's evaluation of the legal certainty principle and the foreseeability standard.

This flexibility is fully in accordance with the role of the Court and the diversity of situations and contexts in which issues of legal certainty and foreseeability may arise from Portugal to Sweden to Bulgaria, where the degree of foreseeability expected or required by social actors may vary considerably. Yet, in line with the above de-

[46] *Haseldine v the United Kingdom* App no 18957/91 (ECtHR, 13 May 1992) p 231.

[47] See *Advisory Opinion on the Applicability of Statutes of Limitation to Prosecution, Conviction and Punishment in Respect of an Offence Constituting, In Substance, an Act of Torture* request no P16-2021-001 (EctHR, 26 April 2022) paras 67-69.

[48] See *Del Río Prada v Spain* [GC] App no 42750/09 (ECtHR, 21 October 2013) para 92.

[49] *Bavčar v Slovenia* App no 17053/20 (ECtHR, 7 September 2023) para 144; *S.W. v the United Kingdom* App no 20166/92 (ECtHR, 22 November 1995) para 36; *Streletz, Kessler and Krenz v Germany* [GC] Apps nos 34044/96, 35532/97 and 44801/98 (ECtHR, 22 March 2001) para 50.

[50] *Chorherr v Austria* App no 13308/87 (ECtHR, 25 August 1993) para 25. See also ECtHR (n 47) para 68.

[51] *Advisory Opinion on the Applicability of Statutes of Limitation to Prosecution, Conviction and Punishment in Respect of an Offence Constituting, In Substance, an Act of Torture* (n 47) paras 70-78. As to the central importance of the Court's own discretion with regard to the application of these standards, see e.g. the strong contrast between the opinion of the majority and the Dissenting opinions in *Maestri v Italy* (n 37) joint dissenting opinion of judges Bonello, Strážnická, Bîrsan, Jungwiert and Del Tufo; and dissenting opinion of judge Loucaides joined by judge Bîrsan.

scribed assumption of cultural homogeneity in Europe, the Court has never taken factors of cultural difference into account even if relatively obvious connections to existing research and knowledge from different areas of cross-cultural studies are readily available. However, there are several reasons for the Court to move in this direction.

2.2. Adding shades of social legitimacy to the ECtHR's assessment of foreseeability

There is little doubt today that legal certainty, understood as the requirements of legal formality and the foreseeability of law and its consequences, needs to be defined in close connection to the social circumstances in which they are applied. In this sense, some noted theoreticians of the rule of law have observed that there are several social contexts in which a strict legal certainty standard is problematic –for instance, 'in small-scale communities with a strong communitarian orientation… adherence to formal legality, to rules by rules, might be harmful'.[52]

This insight overlaps with certain proposals geared to improve the application of the principle of legal certainty in cross-national normative contexts. For example, in view of the somewhat erratic case-law of the Court of Justice of the EU regarding legal certainty, some scholars suggest that the analysis and application of the principle in EU law should be approached from the main promise it contains. More specifically, '[l]egal certainty involves the subjective acceptability of a concrete legal decision, which looks at its justification according to the shared values of the legal community (legal reasoning and argumentation)'.[53]

In other words, the assessment of the legal certainty principle requires the acceptability of acts of law-application within the community in which they are performed. Thus, the ultimate test of the principle is the ability of legal justifications (reasoning, argumentation) to reflect the values shared by that community of reference. This insight overlaps with the legal philosophical and epistemological approach of this work. That is, if legal decisions are not determined by legal texts, then the actual stability of meaning and the relative predictability of legal decision-making stem from the collective tendencies and values of specific interpretive communities. These values emerge as a crucial element of legal knowledge and call for special scrutiny to guarantee their legitimacy.

However, if the 'community of reference' whose values must be reflected in judicial practice is not reduced to an elite of legal professionals and is extended to encompass the society at large (or at least to broader groups within it), then intercultural research, which provides a better understanding of cultural differences within the European society, is key to improving the social acceptability and legitimacy of European courts' decisions, bringing them closer to the communities they affect. Adding cultural knowledge about the societies and groups in which norms are to be applied can help

[52] Tamanaha (n 34) 121.

[53] P Martin Rodriguez, 'The Principle of Legal Certainty and the Limits to the Applicability of EU Law' (2016) *Cahiers de Droit Européen* 115, 119.

law-appliers, European courts in particular, to become more sensitive towards the expectations and value-orientations of the communities they deal with in each case, increasing also the legitimacy of law application in different social contexts.[54] As an example of this argument, the next section explores intercultural knowledge about certain cultural dimensions and connects them to the ECtHR's legal certainty doctrine.

3. The cultural dimensions of legal certainty

As explained above, this article argues that the use of cultural dimensions in legal work offers insights about European cultural differences that can improve substantially our understanding and operation of key European legal concepts and regimes. The rest of this section explores which specific insights can be gained from the intercultural analysis of legal certainty and how they can be translated into recommendations for European legal decision-makers, the ECtHR in particular. For this purpose, this section first introduces the general notion of cultural dimensions. The rest of the section delves into the cultural dimensions that are more directly relevant to the cross-cultural study of legal certainty –i.e., uncertainty avoidance and individualism/communalism.

Note that, according to the heuristic nature of the approach proposed, the selection of relevant dimensions begins with the intuitive connection between the issue of legal certainty and the uncertainty avoidance index, from which further connections to other intercultural dimensions are explored (see this section below). Of course, in practical terms, this step requires previous knowledge of the definitions of different intercultural dimensions and practice in their application–which implies previous training and access to the relevant tools (see e.g. the surveys and tools mentioned in the introduction and the observations in section 4). Furthermore, the larger the list of dimensions we know about, the easier it will be to establish such initial intuitive connections from which the argumentation can proceed.[55]

3.1. The study of culture through cultural dimensions

Cultures can be generally defined as systems of values, attitudes, and norms shared by a group of people about how to behave appropriately in a given situation.[56] In this

[54] In other words, insofar as the immediate purpose of this study is to improve law-application processes, the immediate audience of this work are lawyers (especially courts and other law-applying institutions); yet, the ultimate rationale and target of the approach is to connect law-application with the cultural expectations of larger social groups (be these national communities, minorities, groups of migrant persons, etc.). About the prospects and further developments propounded to improve current intercultural knowledge and its combination with law-application in this regard, see sections 4 and 5 below.

[55] On the other hand, the existing dimensions may not suffice or be adequate to some legal questions. In such cases, the development of new dimensions adapted to such legal questions offers new avenues for further research. See sections 4 and 5 below.

[56] See generally S Rathje, 'Der Kulturbegriff – Ein anwendungsorientierter Vorschlag zur Generalüberholung' in A Moosmüller (ed), *Konzepte kultureller Differenz – Münchener Beiträge zur interkulturellen Kommunikation* (Waxmann 2009) 83.

sense, culture informs our beliefs and expectations about social roles and interactions and shapes our feelings and behaviour towards others. It works as a map of meaning shared by a community that is essential for our making sense of the world. From the viewpoint of the individual, the values that make up culture are (conscious or unconscious) abstract guiding principles that regulate relevant aspects of social life. These abstract values and norms help members of a group interpret events and orient their behaviour to achieve individual and collective goals.

Needless to say, different cultural systems give different importance to different values, even when they share some of them. In order to study such differences, cross-cultural researchers have developed the notion of cultural dimensions which can be defined as conceptual categories that help to identify and explain common areas of human life usually addressed by every cultural system –e.g., dealing with time, communicating with each other, relating to power, etc.[57] To help understand and compare the cultural component of human actions, these dimensions –like the categories of grammar– focus on the regularities of culture understood as value systems or 'think models'.[58]

The dimensions create ideal value oppositions, i.e., ideal and extreme poles (e.g., low- vs high-context communication, low vs high power distance, flexible vs linear time perception) between which individuals and groups can be located.[59] Working as broad coordinates, cultural dimensions offer a structured basis to approach cultural systems analytically. They provide a cross-cultural orientation map with information about the general features of these systems. The application of cultural dimensions as a tool enables us to understand in more complex terms the viewpoint of others and facilitate a change of perspective.

Attempts to identify and describe differences in cultural assumptions and values through cultural dimensions include the work by psychologists and organizational theorists on the relation between culture and psychological processes such as independent versus interdependent self-construal, analytic versus holistic systems of thought, and the role of face across cultures.[60] Additional insights into cultural differences come from large-scale, longitudinal projects such as the World Values Survey (WVS) and the European Values Study (EVS).[61]

[57] M Minkov, 'Cultural Dimensions across Modern Nations' in M Minkov, *Cross-cultural Analysis: The Science and Art of Comparing the World's Modern Societies and Their Cultures* (SAGE 2013) 199.

[58] C Tuschinsky, 'Kulturgrammatik' in J Roth, C Köck (eds), *Culture Communication Skills – Interkulturelle Kompetenz* (Bayerischer Volkshochschulverband 2004) 75.

[59] W Dreyer, 'Hofstedes Humbug und die Wissenschaftslogik der Idealtypen' in U Hoessler and W Dreyer (eds), *Perspektiven interkultureller Kompetenz* (Vandenhoek & Ruprecht 2011) 82.

[60] See e.g. Kitayama and Salvador (n 10) 495-526; and C Hampden-Turner, F Trompenaars, *Building Cross-Cultural Competence: How to Create Wealth from Conflicting Values* (Wiley&Sons 2000).

[61] *European Values Study* (1981-2020), at europeanvaluesstudy.eu. About other studies like the WVS see above.

From this vast array of sources, this article strongly relies on Hofstede's work.[62] As one of the pioneers in this field, Hofstede's contribution is still widely recognized and, more importantly, features cultural dimensions that are directly or intuitively applicable to the issue of legal certainty. In addition, the empirical studies that give basis to Hofstede's cultural dimensions have been translated into different virtual tools for country comparison which make interdisciplinary exchange more accessible for experts from other areas of research, including legal studies.[63] While the use of such online tools is not essential to the approach proposed here, it is convenient for explanatory purposes.

3.2. Uncertainty avoidance and legal certainty

By looking at cultural dimension studies in relation to Europe, one can immediately spot cross-European cultural differences which are likely to have a strong impact on the understanding of fundamental legal notions and principles. In particular, the meaning and practical application of the fundamental notion of legal certainty depends to an important extent on how we feel about and deal with uncertainty which, as this intercultural research shows, is a culturally relative matter.

Uncertainty avoidance is one of the cultural dimensions most commonly used in the study of cross-cultural relations and, according the heuristic nature of the approach proposed here, it is explored first as the most directly and intuitively applicable to the issue of legal certainty. Although the term uncertainty avoidance originates in American organizational psychology, it is the social psychologist Geert Hofstede who most famously develops and applies the concept as a broader cultural dimension to measure cultural differences. In the main, Hofstede's Uncertainty Avoidance (UA) dimension expresses different levels of tolerance towards the ambiguous and the unpredictable, i.e., the degree to which the members of a cultural group feel uncomfortable with uncertain situations.[64]

Uncertainty avoidance, thus, refers to a feeling: the subjective experience of anxiety about the unknown future. As Hofstede notes, the future is ambiguous, and uncertainty about it creates unbearable anxiety.[65] These feelings, however, are not just personal; they are widely shared with other members of a cultural group because both the perception of uncertainty as well as the strategies for dealing with the anxiety it produces are socially construed and learned. They belong to the *cultural heritage* of social groups who reproduce these collective values or patterns of behaviour through social institutions.[66]

[62] See generally G Hofstede and GJ Hofstede, *Cultures and Organizations* (McGraw-Hill 2005); and G Hofstede, *Culture's Consequences: Comparing Values, Behaviours, Institutions, and Organizations Across Nations* (SAGE 2001).

[63] This article, e.g., relies on The Culture Factor's, *Country Comparison Tool*, at www.theculturefactor.com.

[64] Hofstede and Hofstede (n 62) 165.

[65] *Ibid* 165.

[66] *Ibid* 165-166.

The degree to which a cultural group tends to feel threatened by ambiguous or unknown situations is related to different levels of anxiety and different needs for predictability. That is, some cultures are more anxious about the future than others and, therefore, prefer types of institutions and relations that render events more predictable.[67] This is expressed in Hofstede's Uncertainty Avoidance index (UAI), which measures the degree to which people try to control the future or just let it happen. The UAI gauges the need for predictability in a specific group of people –and indicates the levels of collective anxiety about the future. Groups scoring higher in the UAI need more predictability and, thus, seek to avoid the uncertain by upholding beliefs, structures and institutions that help them alleviate the collective nervous stress caused by uncertainty.[68]

By assessing and giving values to the attitudes and reactions of different people towards uncertainty, the UAI can be presented as a numerical index that Hofstede and others have expressed in country values from 0 to 100.[69] These values can be compared in order to draw some hypotheses about the differences and similarities of UA cultural orientations in different countries. For the sake of explanation and in order to emphasize cross-European differences, the following compares different selections of countries with more clearly diverging scores.

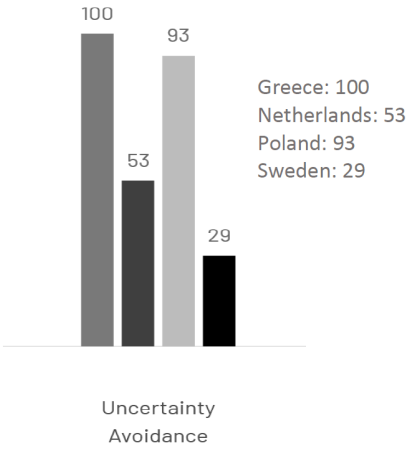

Figure 1. Example of UAI comparison (adapted from The Culture Factor's country comparison tool).[70]

In this example (see fig. 1), Greece and Poland score very high on UA, which indicates a lower tolerance for uncertainty and a greater need for predictability. In

[67] *Ibid* 170-172.
[68] *Ibid* 167.
[69] *Ibid* 18-36. See also WVS, EVS and GLOBE Project indexes.
[70] See reference at n 63.

contrast, the Netherlands and Sweden score low or very low on UA.[71] The latter cultures accept and feel more comfortable in unstructured situations or changeable environments, they tend to be more tolerant of change as the unknown and unpredictable are more openly accepted.[72]

Of course, different cultural groups adopt different strategies to handle uncertainty and mitigate the anxiety it creates. The question then becomes: How does a specific group deal with the fact that the future can never be known? In this context, law can be understood as a social strategy to reduce uncertainty about people's behaviour. The specific link between UA and the legal certainty issues discussed above becomes now more apparent. A higher UA score correlates with a stronger need for predictability and a collective preference for practices and institutions that render future events more clearly interpretable. In particular, this includes a stronger need for more detailed written rules. As Hofstede observes, high UA countries tend to produce more laws and more precise than low UA countries.[73]

For the countries compared in this section (fig.1), for instance, this means that laws will be expected to be more precise in Greece and Poland as a cultural strategy to satisfy a stronger need for security vis-à-vis future events (even when they are not always applied).[74] In Sweden and the Netherlands, on the other hand, the level of precision expected from laws will be comparatively lower and the drive to regulate all possible aspects of life will also be weaker.

In this sense, the UA dimension seems useful to explain and take account of different cultural expectations concerning predictability and legal certainty as one of the central aspects of the ECtHR's standards regarding the quality of laws. But the way the need for predictability is reflected in levels of legislative proliferation and/or textual precision does not depend on one cultural dimension alone. UA interacts with other cultural dimensions some of which deserve special attention in the context of this analysis.

3.3. Individualism and legal certainty

As Hofstede suggests, in order to understand possible cultural expectations about law and legal form, the level of individualism in a cultural group is also an important factor. The dimension of individualism mirrors the universal dilemma about the role of the individual vis-à-vis the role of the group in human societies.[75] According to

[71] The results for the four countries presented here significantly correlate with the results of other studies like GLOBE, at globeproject.com.

[72] Note how the definition of high or low scores is also relative to the different pairings chosen in the comparison. Thus, the Netherlands scores relatively low in relation to Greece, but high in relation to Sweden.

[73] Hofstede and Hofstede (n 62) 190.

[74] *Ibid*.

[75] This dimension is also included in most of the surveys and studies cited above, e.g. Hampden-Turner, Trompenaars (n 60) 68-97.

Hofstede's individualism-vs-collectivism scale or individualism index (IDV), societies where the interests of individuals tend to prevail over those of the group are defined as individualist; and societies where the interests of the group tend to prevail over those of individuals are defined as collectivist.[76]

Collectivism, however, does not refer here to the role of the state in society, but to another type of group relations from which individuals in culturally collectivist societies draw identity and protection as members of an in-group. More specifically, the members of collectivist societies share a strong 'we' identity and normally maintain strong relations of loyalty, dependence and trust with their in-group.[77] Members of individualist societies, on the other hand, believe in their sharp separateness from the group, they have a stronger individuality, base their identity on the idea of an 'I' clearly distinct from the group and, thus, see themselves as independent from the group with which they tend to maintain more limited and looser bonds.[78]

When considered together, UA and the individualism-vs-collectivism dimension can reveal interesting insights about cultural preferences regarding legal predictability and the quality of the law. For instance, societies that score high both in UA and IDV tend to expect more explicit written rules, whereas people from countries that score high in UA and low or very low in IDV (that is, high in collectivism) tend to accept norms that are more rooted in implicit collective understandings.[79]

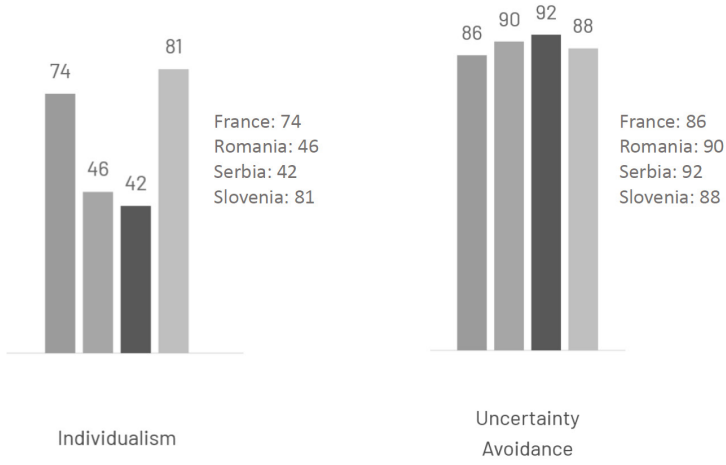

Figure 2. UAI and IDV comparison (adapted from The Culture Factor's country comparison tool).

[76] Hofstede and Hofstede (n 62) 74-75.

[77] *Ibid* 75-76.

[78] *Ibid*. Note that, according to the studies cited here, most societies in the world are collectivist, whereas individualism is an exception, *Ibid* 79.

[79] *Ibid* 190-191.

Despite the high scores in UA of all the countries included in this example (fig. 2), the comparatively more collectivist cultures of Romania and Serbia would tend to temper the requirements of UA in terms of normative precision as the stronger collective bonds in these countries allow individuals to make sense of less explicit rules. In countries like France and Slovenia, in contrast, the high or very high IDV reinforces the effect of high UA scores and indicates a strong preference for more precise and explicit norms. In sum, UA can be modified by the cultural requirements of stronger or weaker relations of mutual reliance, preference for group or individual goals, etc.

Finally, while there are other cultural dimensions that may affect the cultural expectations about legal predictability and the quality of laws, UA and IDV are on closer examination the most relevant ones among the palette of dimensions available from the studies and sources relied upon in this work.[80] The next section explores their applicability to the specific substantive and institutional context of the ECtHR and its legal certainty doctrine.

3.4. UA and IDV in the ECtHR's case-law on legal certainty

As already noted, this article deals not with how laws should be worded in order to be better aligned with the cultural expectations of different European countries. Of course, it is a key aspiration of any democratic rule of law system to produce laws that can be potentially understood by every affected person. The ECtHR's case-law also points in this direction when referring to the need for professional legal advice not as a principle, but as a practical need that must be accepted for want of better solutions ('if need be').[81] That is, even if it is not always a reality that laws can be directly understood by citizens, this is at least the implicit ideal towards which a rule of law system should strive as far as possible.[82]

Moreover, cross-cultural knowledge may play an important role in orienting initiatives that aim to improve the wording of legislation. Yet, this article takes a different approach and focuses on how European cross-national norms can be applied in order to be better aligned with the different cultural understandings of diverse

[80] Although the dimensions of Power Distance and Low-vs-High Context communication are linked to the issue of legality, Hofstede's analysis makes clear that their connection is vague and remote and, thus, can be disregarded when studying legal certainty. In particular, differences in Power Distance are connected rather to how individuals relate generally to laws as expressions of political power and to expectations about law's content than to legislative styles, *Ibid* 58-62. As for differences in communication styles, these overlap with the IDV dimension and, thus, need no separate examination, *Ibid* 92-96, 190.

[81] The disclaimer 'if need be, with appropriate advice' is consistently inserted by the ECtHR in its legality tests since the 1970s, see e.g. *The Sunday Times v the United Kingdom (no. 1)* (n 38) para 49; and *Larissis and Others v Greece* (n 38) para 40.

[82] Even if for practical reasons (administrative, technical, economic, etc.), law is not always expected to be really read and understood directly by citizens, see e.g. Fuller (n 34) 50-51.

cultural groups in Europe. In this sense, several ideas can be advanced regarding the UA and IDV dimensions in relation to the ECtHR's case-law on legal certainty.

First, it is interesting to look at the ECtHR's general doctrine on legal certainty and the cultural preferences it seems to reveal. Broadly speaking, the ECtHR's doctrine is open-ended and flexible. In view of its goal to allow for the adaption of law-application to changing circumstances, the Court's doctrine can support different (cultural) outcomes depending on the context. Thus, the Court may accept solutions better aligned with high UA cultures.[83] But the strong emphasis on the prevention of excessive rigidity and the wide acceptance of textual vagueness, even in criminal law cases, suggest an in-built preference for solutions more compatible with low UA cultures.[84]

Given that the ECtHR does not include cross-cultural knowledge in its reasoning, potential alignments or misalignments between the Court's decisions and a country's or an applicant's broad cultural expectations can be seen as purely coincidental. Yet, in the case of legal predictability, cultural misalignments are more likely to occur, especially because most European countries are high or very high in UA and will probably expect less flexible foreseeability standards.[85] Misalignment with the general UA index of a given country means that the Court's inbuilt preference or tolerance for less detailed and explicit rights-limiting norms may be at odds in some cases with legitimate cultural expectations of the country where the norms have to be applied.[86] Such misalignments may be tempered sometimes by varying degrees of IDV, but this will always represent a coincidental result within the traditional legal methodological framework.[87]

Alternatively, however, the Court could easily rely on interdisciplinary knowledge to produce hypotheses about the optimal levels of foreseeability and legal precision that are better suited to the cultural groups it is dealing with in each case. Technically speaking, this interdisciplinary leap should not be especially complex in view of the Court's own flexible approach. Relying on its own doctrine, the Court is relatively autonomous to estimate what 'sufficient precision' means depending on what is 'reasonable in the circumstances' or, otherwise, by focusing on the needs and expectations of the addressees of the norms in question.

[83] See e.g. *Maestri v Italy* (n 37) paras 37-42.

[84] Although the present analysis is not based on a quantitative analysis, the vast majority of cases reviewed here would support this view.

[85] Low or very low UA is more typical of the North and West of Europe, while high or very high UA is prevalent in the South and East of Europe. Yet, there are exceptions to these geographical groupings. In Hofstede's survey, for example, Slovakia scores relatively low in UA (51) and Belgium very high (94).

[86] See e.g. the critique by Ukrainian scholars in O Shcherbaniuk and T Bohdanevych, 'The Doctrine of Excessive Formalism in the Legal Theory and Practice of the European Court of Human Rights' (2024) *Frontiers in Law* 15.

[87] For instance, Croatia and Bosnia and Herzegovina score high or very high in UA (80 and 87 respectively), but they are low in IDV (42 and 40 respectively). Although their UA scores suggest a preference for more precise/explicit norms and less tolerance towards vagueness, their low levels of individualism (or relatively high levels of collectivism) would be compatible with the ECtHR's flexible solutions.

For instance, in *Maestri v Italy* the Court upheld a rather high standard of legal precision and declared the violation of Article 11 of the Convention by Italy in a case where the applicant, an Italian judge, claimed to be unable to foresee the sanction imposed upon him based on a normative regime contained in the Constitution, a statutory law, a Legislative Decree and two Directives of the National Council of the Judiciary.[88] Because of the professional status of the applicant and the traditional tolerance of the Court towards relatively imprecise laws, among other reasons, this judgment was received with harsh criticism, especially expressed by six judges of the ECtHR in two Dissenting Opinions.[89] The contextualization of this decision in an intercultural setting may have helped the Court's position seem more plausible and understandable as people in Italy tend to be in average relatively high in UA (75) and IDV (53), i.e., they tend in general to expect more precise types of laws –as the Court concluded.

In other words, when considering what is 'reasonable in the circumstances' of the case in order to define what is 'sufficient precision', the Court may easily refer to the role that cultural expectations could play in the event. The purpose of such reference would be to deepen the Court's (and the readers') understanding of the actions of the relevant actors in that situation. To that end, the UA and IDV dimensions can be relied upon as relevant knowledge to formulate hypotheses about the situation, that is, not as causal laws of social interaction that would determine and predict human behaviour. It is important to insist that the heuristic nature of the approach rejects any sort of determinism or stereotyping by excluding the hermeneutic exclusivity of the dimensions. In this sense, cultural considerations in the ECtHR's reasoning could never exclude other contextual and individual factors in the Court's evaluation, particularly in its proportionality assessment.[90]

Following the Court's own doctrine, the reasonable level of precision depends on open-ended criteria like the content of the norm, the field regulated, the number and status of the persons addressed and, more broadly, the circumstances of the case. Therefore, alongside cross-cultural factors, a number of other aspects needs to be weighed and balanced by the Court to reach a conclusion. The cultural dimensions

[88] See *Maestri v Italy* (n 37) paras 17-22, 30-42.

[89] *Maestri v Italy* (n 37) joint dissenting opinion of judges Bonello, Strážnická, Bîrsan, Jungwiert and Del Tufo; and dissenting opinion of judge Loucaides joined by judge Bîrsan.

[90] As to the inherent open-endedness involved in proportionality reasoning, see JJ Garcia Blesa, 'Neoliberal Rationality and the Rhetoric of Sacrifice in the Construction of Proportionality Discourse: A Case-Study from the European Court of Human Rights' (2024) *The International Journal of Human Rights* 969, and JJ Garcia Blesa, 'Proportionality Rhetoric and Neoliberal Rationality in the "Fundamental Social Rights" Adjudication of the Court of Justice of the European Union' (2023) *London Review of International Law* 159.

of law are only one factor in the assessment of such complex issues, never the only or determinant element in the final decision.[91]

As a different example, in *Kokkinakis v Greece* the Court applied an extremely low standard of precision accepting as compatible with the principles of legality and legal certainty a complex constellation of vague legal provisions and a plethora of court cases that referred forth to vague notions and multiple factual situations.[92] According to this regime, the applicant and his wife were arrested and sentenced to four months of imprisonment and a fine of 10 thousand drachmas. The Court dismissed the arguments about legality on the grounds that the case-law was settled, published and accessible.[93] In this case, given Greece's very high UA (100) and high IDV (59) scores, the addition of intercultural knowledge to the ECtHR's assessment could have provided the Court with valuable information about general cultural expectations that point at a strong need for higher precision and clarity of restrictive norms than the relevant state norms allowed for. Being Mr. and Mrs. Kokkinakis's arguments about the vagueness and lack of clarity of the applicable normative regime generally plausible, the information provided by the approach proposed could support a more protective thrust to the Court's judgments vis-à-vis religious freedom in Greece.[94]

A particularly complex type of case is that where restrictive legal norms are contested by foreign citizens or organizations.[95] In such cases, it may happen that both the foreign citizen's and the host country's cultural expectations are consistent with each other –that is, the precision level of the norm under scrutiny may be equally in accordance (or at odds) with the cultural expectations of both. But in other cases, the cultural expectations about normative foreseeability of a foreign citizen and their host country may differ significantly. Should the local culture prevail?[96]

[91] Again, in line with the basic postulates of the approach proposed (see above), the purpose and intended effect of this operation is to improve cross-European judicial decision-making and enhance its social legitimacy by becoming more persuasive vis-à-vis broader audiences, not to achieve intellectual compulsion through demonstration–which is not available with regard to these matters.

[92] *Kokkinakis v Greece* (n 44) paras 13-20.

[93] *Ibid* paras 40-41.

[94] *Ibid* para 38. Note that in this case the Court declared a breach of the Convention but did not condemn Greek law, something that religious minorities in Greece resent still today. See e.g. the complaint of Evangelical communities about how Greek law on proselytism 'is defined in very vague terms', at worldea.org. See also the critique of Greek legal scholars about the insufficient precision of the Greek criminal law on proselytism, in KN Kyriazopoulos, 'Proselytization in Greece (Kokkinakis Judgment): Criminal Statute vs. "Nullum crimen nulla poena sine lege certa"' (2006) *Anuario de Derecho Eclesiástico del Estado* 357. See also Written observations submitted by the European Centre for Law and Justice to the European Court of Human Rights in the case of *Emmanouil Damavolitis v Greece* App no 44913/14 (ECtHR, decision of 22 October 2022) pp. 6 and 12; and the Partly dissenting opinion of Justice Repik in *Larissis and Others v Greece* (n 38) about the "chilling effect" of imprecise laws in this matter.

[95] This point is also crucial in judgments of the European Court of Justice, e.g. case C-341/05 *Laval un Partneri*, ECLI:EU:C:2007:809.

[96] Note that migrant persons are distinguished here from local minorities for illustrative purposes due to the more immediate availability of country scores for foreign nationals and the need for further research

Following again the Court's doctrine, a solution can only be reached on a case-by-case basis. Yet, several criteria may help the Court to articulate a structured (though necessarily flexible) response. First, the above-mentioned ethical principles of neutrality and 'do no harm' must be kept in mind. The use of intercultural knowledge in the context of law-application –particularly in human rights adjudication– should be applied to correct structural imbalances (i.e. power asymmetries between the parties) not to justify them. In the case of persons living in a foreign jurisdiction, it is the power of the majority that might need to be counterbalanced, not reinforced. This may be vehicled by the notion of vulnerable groups in the ECtHR's case-law.[97] Other criteria, like the type of restrictive norm and the rights affected, may provide some guidance.

For instance, in *Dallas v United Kingdom* a Greek citizen living in the UK was called to serve as a juror in a criminal case and was eventually convicted for contempt of court due to an unauthorized internet search to obtain information about the criminal case outside the evidence allowed by the judge.[98] However, there seemed to be legitimate doubts as to whether Mrs Dallas had actually understood not only the textuality of the judge's oral directions about the use of internet, but also the legal status and consequences of such directions.[99] In this case, the comparison of UA scores of both Greece (100 –the highest in Europe) and the UK (35 –one of the lowest) could explain, at least in part, Mrs. Dallas's actions and the way she tried to justify them before the local authorities as related to different cultural expectations about legal form and precision. This could have provided the ECtHR (and perhaps British courts as well) with a more nuanced understanding of the facts of the case.

The questions discussed, however, point at a number of controversial aspects of the approach advanced in this paper. The following canvasses these issues before offering some final thoughts in the last section.

on the specific cultural dimensions of certain minorities (e.g. Roma, Sinti, etc.). The approach to local minorities, however, mirrors the heuristic approach to migrant persons in this case. That is, the cultural preferences of different types of local minorities (religious, ethnic, etc.) may or may not differ from those of the majority of the societies they live in. In the *Kokkinakis* case, for example, the applicants belonged to a religious minority, but their expectations regarding UA and IDV, as expressed in their complaint, seemed to align with those of the religious majority. Thus, the specific features of each case must be carefully assessed. For further discussion on the issue of minorities, see sections 4 and 5 below.

[97] L Peroni and A Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *I•CON* 1056–1085.

[98] *Dallas v United Kingdom* App no 38395/12 (ECtHR, 11 February 2016) paras 7-43.

[99] Especially when even the UK's Law Commission report on Contempt of Court had found that, given that 'there was no specific form of words that judges had to use' and that, '[a]s a consequence, the scope of the criminal contempt depended on the exact wording that each judge adopted in warning the jurors at the start of the trial', the Law Commission 'doubted whether, from the point of view of a layperson, it was obvious what "a contempt" was or what the implications of this were'. *Ibid* para 55.

4. Main theoretical and practical qualifications about the intercultural approach to law

As mentioned in the introduction, this paper does not only aim at formulating an approach to the integration of cultural knowledge into European law-application; it also intends to keep an open and critical mind towards the improvement of this approach by explicitly pointing at avenues for further research.

To this end, the following expands on three questions that have been partially dealt with above. First, the assessment of a country's culture may stiffen assumptions about the uniform and static nature of such culture, thus risking the suppression of the internal cultural diversity and dinamism existing in every country. Second, there are certain limitations to the concept of cultural dimensions that condition their use as a tool for law-application and must therefore be borne in mind. And finally, there is an apparent tension between the resort to cross-cultural knowledge in law-application and the ideals of generality of laws, formal equality before the law and non-discrimination that inform liberal democratic rule of law theory. The following addresses these points in order to clarify the potential and the boundaries of the propounded approach.

4.1. The importance of adopting a nuanced cultural model: the 'fuzziness' of culture and the use of macro-level cultural knowledge

As pointed out above, there are different and even conflicting ways of understanding culture. Thus, the attempt to identify or establish one 'correct', all-encompassing, and definitive notion of culture for all possible intents and purposes is pointless. In this sense, traditional theories of culture tend to assume a relatively high degree of cohesion within cultural systems.[100] Usually focusing on national cultures, they simplify and reduce to nationality the number of cultural systems to which individuals actually belong. Against this, contemporary theories of culture try to accommodate the 'multi-collective' relations of individuals.[101] Especially interesting in this regard is Bolten's notion of 'fuzzy culture'.[102] This view of culture points at how that which we define as one cultural unit actually has rather heterogeneous contours and contains features which are also essential to other (supposedly disparate) cultures. The internal incoherence of cultural units mirrors the diversity of collectives to which individuals belong to and the varying degrees of intensity with which such belonging is experienced by each of them. The resulting model can be represented in visual terms as follows (fig.3).

[100] See generally Rathje (n 56) 83-84; J Bolten, 'Unschärfe und Mehrwertigkeit: "Interkulturelle Kompetenz" vor dem Hintergrund eines offenen Kulturbegriffs' in U Hoessler and W Dreyer (eds), *Perspektiven interkultureller Kompetenz* (Vandenhoek 2011) 55-56.

[101] The question is also addressed as the 'level of analysis issue' or the different layers of culture in intercultural inquiry. See Hofstede and Hofstede (n 62) 5, 10-11, 82.

[102] Bolten (n 100) 57.

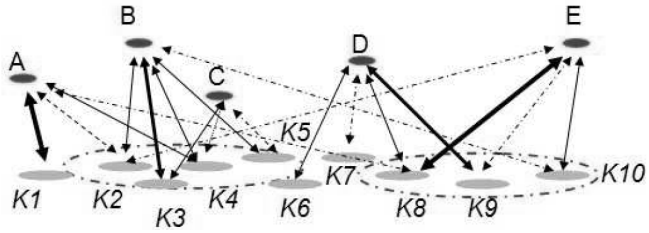

Figure 3. The 'fuzzy' culture model (Bolten (2011), abb.1)

Intercultural actors (A, B, C, …) participate simultaneously in different collectives or communities (K1, K2, …) with diverse degrees of commitment (arrows). Due to the multi-collective relations of the actors, these collectives themselves are interconnected and permeable and so are their cultural dynamics. In Bolten's example, K8 is characterized by a higher degree of involvement of actor E than D. Thus, D probably has a stronger influence on the cultural dynamic of the collective K8 than E, creating also a stronger interconnection between K8 and the other cultures D participates in (K2, K9, K10). Multiplied by the participation of many other actors, such impulses generate new dynamics that can enter in turn the cultural dynamic of other collectives.[103]

This dynamic quality of culture, which can also increase or decrease the cultural homogeneity within or among different collectives, *does not exclude the existence of cultural cohesion; instead, it encompasses it as part of the same model*. For instance, this could be expressed in the experience of two people, A and B, who share a high degree of commitment to the same professional culture, while coming from extremely different religious backgrounds. In a professional context, both might experience a sense of belonging to the same community, sharing the same conventions and frames of plausibility.

If A, however, is invited to participate in a ritual of B's religious community with which A is not acquainted, the initial relation of 'culturality', i.e., of sharing the same professional culture, will move into the realm of 'interculturality'. On the other hand, due to other personal factors and their belonging to other collectives, B's commitment to their religious community is also variable, which causes A and B's relation to be fuzzy vis-à-vis religion without denying the sharp cultural difference between A's and B's religious groups. Thus, cultural collectives' cross-pollination makes the cultural element of human relations appear as *simultaneously homogenous and heterogeneous* to the observer depending on how closely we want to examine relations and collectives.[104] This idea is echoed by the shift in cultural psychology that acknowledges that culture extends beyond nationality and ethnicity, with other forms

[103] *Ibid* 58.
[104] *Ibid* 59-60.

of culture such as social class, religion, and region also having an influence on how we feel, think, and act.[105]

In sum, from the perspective of the fuzzy culture model, both culture and interculturality are relational and relative. They do not allow for totalizing, closed conceptions, but should rather be apprehended as a process where –depending on the context, the issues, and the actors involved– communication can appear as intracultural and intercultural even at the same time (in the example above, B can perceive the professional relation with A as cultural, while A sees it as intercultural) and transform into more or less cohesive relations according to actors' perceptions, objectives and decisions.

The 'fuzzy culture' model, thus, provides a basis both for capturing the complexity of cultural systems and using macro-level knowledge in a nuanced and meaningful manner. This call for caution emphasizes the need for permanent updating and contextualization of the cross-cultural knowledge applied.[106] This model or similar models are, in sum, a necessary component within the heuristic approach proposed as they both offer a broader and flexible analytical framework and help lawyers to keep in mind the intrinsic limitations of the approach.

4.2. Qualifications about the use of cultural dimensions

The notion and the use of cultural dimensions present similar risks that need to be discussed and addressed specifically. First, the underlying assumption that another culture can be grasped like a grammar by just identifying and applying some abstract categories to human interactions has proven to be only partially successful in practice. This is due to a variety of reasons. Especially, as mentioned above, cultural dimensions usually (but not always) reflect national cultures alone and are inspired by an either/or logic (either A or B, but not both) that implies strong and simplified value ascriptions.[107] Therefore, the rigid application of these categories entails a clear risk of generalization, simplification, and stereotyping.

The use of cultural dimensions can be helpful only if we remain critical of their limitations and prevent their rigid learning and application by legal decision-makers and educators. As explained above, for this purpose, the dimensions must be seen and used as heuristic instruments in line with Weber's ideal or pure type constructions whose purpose is not to reduce reality to laws, but to reach a deeper understanding of reality's unique and individual manifestations.[108] In this sense, cultural dimensions are neither empirically derived laws of social reality nor normative goals that intercultural actors should strive to achieve, but simply a necessary and rather imperfect benchmark to appreciate the particular and the idiosyncratic elements of reality.

[105] Cohen and Varnum (n 10) 5-9.

[106] See e.g. HS Park, TR Levine, R Weber, HE Lee, LI Terra, IC Botero, E Bessarabova, X Guan, SM Shearman, MS Wilson, 'Individual and Cultural Variations in Direct Communication Style' (2012) *International Journal of Intercultural Relations* 179.

[107] Tuchinsky (n 58) 75-76.

[108] Dreyer (n 59) 90-91.

So conceived, cultural dimensions are just sketches that try to construe a meaningful image of some aspects of reality. And, precisely due to their being ideal or pure constructions, the dimensions must consist of sharp distinctions because they must function as relatively clear benchmarks against which we can 'measure' and describe real occurrences with a view to getting a better grasp of the particular – always in merely approximate terms.[109] Since cultures are systems of meaning in a permanent process of change and adaption to shifting circumstances, we can say that people are conditioned by culture, but that they also remake culture every day. Therefore, we must also remain aware that, as cultures are in permanent transformation, the map of cultural values that the dimensions provide changes constantly as well.[110]

In addition, to make up for the cultural dimensions' excessive focus on national cultures, their application requires us first to explore and always bear in mind the different and fuzzy layers of culture that intervene in real cultural interactions, and use the dimensions merely as hypotheses that aid us in understanding some cultural grounds of individual behaviour, the meaning of which, however, is only approximately determinable.[111] In some sense, cultural dimensions seem to contradict the 'both/and' fuzzy logic (both A and B are simultaneously possible) underpinning the notion of fuzzy culture described above.[112] Such contradiction, however, is merely apparent as the fuzzy culture model concedes that binary distinctions may be possible in some contexts, i.e., both either/or and both/and logics are simultaneously possible.[113]

In sum, within the approach proposed, cultural dimensions do not replace the necessary observation, curiosity, and respect for the individual case. The purpose of using the dimensions is to assist us in approaching the cultural groups and interactions we are actually dealing with, rather than ignoring or suppressing their specific features by boxing them in abstract categories. Ultimately, the successful application of cultural dimensions as an analytical tool can be measured only by how useful they are to us in understanding and respecting concrete and real persons so as to render transnational legal work more acceptable and legitimate for them.

4.3. The question of the generality of norms and non-discrimination

As is well known, liberal democratic rule of law theory requires respect for the principles of generality of laws, equality before the law and non-discrimination.[114] The question may be raised of whether the approach outlined here could undermine such principles. This possibility, however, should be dismissed for several reasons.

[109] *Ibid* 92-93.
[110] See e.g. the timeline of changes in the Inglehart-Welzel Cultural Map in the WVS.
[111] Tuchinsky (n 58) 76.
[112] Bolten (n 100) 56-57.
[113] *Ibid* 59-60.
[114] E.g. Fuller (n 34) 46-49, 153; Raz (n 34) 215-216; Tamanaha (n 34) 94, 119.

4.3.1. The question of equality before the law and non-discrimination

First, the notions of equality before the law and non-discrimination have multiple and evolving facets and manifestations in the ECtHR's case-law which link with the approach advanced here in different ways. Generally, the very idea of non-discrimination does not preclude non-arbitrary, differentiated treatment.[115] Thus, there is a general acceptance across all European countries and institutions of differentiated treatment on different grounds (also for ethnic minorities).[116] In this sense, the ECtHR has consistently ruled that differences in treatment (even in 'relevantly similar situations') can be lawful if they have a reasonable justification or legitimate aim and the measures adopted are proportionate to that end.[117] Moreover, the Court has repeatedly stated the view that '[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.[118] That is, there is a positive obligation to take action, especially in relation to ethnic minorities.[119]

The above shows that the cultural differentiation that the intercultural approach advanced in this paper would introduce is in no way alien to the European legal system in general and the Court's interpretation of the Convention in particular. And more importantly, as critics show, the Court has neither been able to extricate itself from nor deal successfully with the relevance of cultural differences in the assessment of Convention breaches in the past –in part due to the lack of a clear and structured approach to the issue of cultural differences.[120]

In this context, the intercultural approach proposed would bring relevant information into the Court's assessment of legitimate socio-cultural differences that justify the differentiated application of the Convention, not only due to respect for European

[115] Raz (n 34) 216; Tamanaha (n 34) 94.

[116] C McCrudden and S Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach* (European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities 2009) 13, 30-48.

[117] See e.g. *Burden v the United Kingdom* [GC] App no 13378/05 (ECtHR, 29 April 2008) para 60; and *Guberina v Croatia* App no 23682/13 (ECtHR, 22 March 2016) para 69.

[118] *Thlimmenos v Greece* [GC] App no 34369/97 (ECtHR, 6 April 2000) para 44. See also *Hoogendijk v The Netherlands* App no 58641/00 (ECtHR, 6 January 2005) para 1 (pp 21-22); *Stec v United Kingdom* [GC] Apps nos 65731/01 and 65900/01 (ECtHR, 12 April 2006) para 51.

[119] *Chapman v United Kingdom* App no 27238/95 (ECtHR, 18 January 2001) para 96; *D.H. and Others v the Czech Republic* [GC] App no 57325/00 (ECtHR, 13 November 2007) paras 175, 181.

[120] See e.g. L Peroni, 'Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising' (2014) 10 *International Journal of Law in Context* 195-221 (criticizing the Court's essentialism regarding Roma, Sikhs and Muslims). See also J Ringelheim, 'Chapman Redux: the European Court of Human Rights and Roma Traditional Lifestyle' in E Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press 2012) 426-444; EJ Ruiz Vieytez, 'Minority Marriage and Discrimination: Redrafting Muñoz Díaz v. Spain' in *Ibid* 401-425; and L Peroni, 'Erasing Q, W and X, Erasing Cultural Differences' in *Ibid* 445-469.

cultural diversity and the prevention of (judicial) ethnocentrism, but also to avoid individual injustices in the protection of human rights. This encompasses, for instance, the case of citizens living in their home countries whose cultural orientations are significantly different from those of other countries (or from the Court's) (in *Kokkinakis*, e.g. this would have prevented the application of cultural expectations about legal foreseeability to Greek citizens that are more typical of North-Western Europe); cultural minorities (e.g. Roma, Sinti, etc.); or migrant persons living in a foreign country (e.g., in *Dallas* or, more importantly, for vulnerable migrant persons).[121]

In any of these cases, however, according to the principle of neutrality and 'do no harm' in the use of intercultural knowledge in law-application, the approach could never work against the potential victims of a human rights violation stemming from the poor quality of the applicable law, but function only as a corrector of the negative effects of ethnocentrism in law-application.

4.3.2. The question of the generality of legal norms

Second, insofar as the approach proposed here is limited to the judicial application of legal norms, there can be no conflict between the approach and the traditional understanding of the principle of generality of legal norms. That is, according to current mainstream liberal legal theory in Continental Europe, judicial law-making does not exist and judicial doctrine does not create law.[122] From this perspective, courts only produce discrete decisions that lack generality and, therefore, are mere expressions of the legitimate discretionality that is inherent in any legal decision-making process.[123] Judicial decisions are not expected to be general but specific.

Surely, there is an important jurisprudential strand within mainstream legal scholarship and European institutional practice that concedes a measure of judicial law-making.[124] However, according to the critical indeterminacy thesis that underpins this work, judicial law-making is no more determinate than statutory norms. That is, judicial doctrine may be intended to be general as a complement to statutory law, but, in its application to new contexts through the analogization of cases, both

[121] In this sense, further research on the cultural dimensions of minority groups seems necessary to improve the approach, particularly in the case of certain minorities that display more obvious cultural (not political) differences vis-à-vis the social majority of the states they live in. Although not based on the study of cultural dimensions, other initiatives also point at the need for a better understanding of cultural differences in such cases, see e.g. the European Center for Minority Issues, at www.ecmi.de.

[122] Aside from the self-styled pragmatism of mainstream arguments about the 'unavoidable creative element of adjudication', the denial of judicial law-making–especially by judges themselves–is a defining characteristic of liberal legalism. See e.g. former ECtHR judge Nußberger, in A Nußberger, 'Justiz – die "sensible Gewalt"' (2020) *NJW* 3294, 3296. See also Kennedy (n 14) 192-194.

[123] See e.g. MacCormick (n 16) 170.

[124] This is the case of the ECtHR itself. See e.g. the ECtHR's doctrine on Art 7 ECHR cited above. Within this strand of legal thought, however, the acknowledgement that European courts make law is usually coupled with a call for the blank acceptance of their policies. See e.g. A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2012) 9-11.

the rules it contains and the facts to which it could potentially apply are reconstrued in an open-ended process of argumentation that can yield different outcomes depending on the conceptual and factual frames adopted by the interpreter.[125]

Against this backdrop, this paper's claim that the ECtHR (and other European courts) should consider specific contextual information about European cultural differences is not only in line with the Court's own jurisprudential views, but also with the resulting need for more social legitimacy in supranational adjudication –e.g. through enhanced respect towards European cultural diversity. Moreover, the cross-disciplinary exchange suggested here can add more predictability to the application of the principle in judicial practice for it takes specific and stable social data into account rather than simply reflect the changing cultural preferences of a small judicial community that may or may not coincide with the cultural expectations of the communities to which the ECHR applies from Ireland to Russia.[126]

5. Final remarks

By focusing on the relationship between different cultural expectations about (un)certainty and the ECtHR's standards of normative precision and predictability, the previous sections explore the jurisprudential and practical viability of an interdisciplinary exchange with a specific body of cross-cultural knowledge, i.e., cultural dimensions and the model of 'fuzzy culture'. This final section expands on the advisability (or necessity) as well as the scalability (both substantive and geographic) of this approach and suggests further research steps in this direction.

First, provided that legal work takes notice of and acts upon the limitations discussed in section 4, the constructive potential of the approach proposed seems more likely to enrich the evaluation of the social contexts in which different fundamental legal principles and concepts of European law are applied than to undermine them. Clearly, the adaption of the norms applied by international courts to the different contexts in which they operate is of paramount importance, particularly when vague legal notions need to be applied to more than 500 million people with considerably different cultural expectations.

But more importantly, in view of certain psychological and political aspects of the question, the interdisciplinary approach sketched here seems not merely appropriate, but also indispensable to safeguard the legitimacy of transnational law-application –

[125] The open-endedness of judicial doctrine has been extensively described in American critical jurisprudence, see e.g. J Jaff, 'Frame Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning' (1986) *Journal of Legal Education* 249.

[126] As pointed out above, despite the high UA scores of most European countries, there seems to be a broad tendency towards very low UA in most of the cases analysed here.

and of the international rule of law. As cultural psychology research on culturally embedded biases shows, cultural bias is inbuilt in every human being.[127] That is, there is no culturally 'unbiased' position we (including European courts) can speak from.

Therefore, in the context of law-application, the refusal to consider the intercultural dimension of law simply opens the door to (conscious or unconscious) homespun and potentially dangerous ideas about such a complex and delicate question. At a time when ever more numerous far-right governments in Europe are striving to seize and re-signify the topic of cultural difference for discriminatory, xenophobic and racist purposes, it is of paramount importance that this issue is addressed on the basis of verified socio-cultural research and for the purpose of safeguarding pluralism and human dignity.

Furthermore, in relation to the European integration (through law) process, the question of whether we prefer to apply European law in a culture-specific way or not becomes obsolete. From the methodological perspective advanced in this paper, mutually respectful integration between European peoples and countries can only stem from the awareness of our differences and the conscious negotiation of common strategies to accommodate such differences, never from false assumptions of homogeneity or silent cultural impositions from the economic/political center(s) on the periphery.

Finally, yet importantly, even if this piece concentrates on the study of cultural expectations regarding legal certainty, predictability, normative precision, etc. in European law-application, the approach presented and the general conclusions reached here can be easily extended to other fundamental legal norms and concepts of European and international law. For this purpose, cultural dimensions other than those analyzed above also need to be explored so as to tap into existing intercultural knowledge about other aspects of cultural life. Alternatively, new cultural dimensions need to be developed in collaboration with the relevant cross-cultural research fields in order to tailor new intercultural knowledge to other legal areas. Further research in this sense shall concentrate on more specific ways of dealing with the limitations mentioned above and the development of a basic framework or tool-box of cultural dimensions that touch upon the most vital intersections between European law and cultural diversity across and within national borders.

[127] See e.g. MEW Varnum, I Grossmann, S Kitayama, RE Nisbett, 'The Origin of Cultural Differences in Cognition: The Social Orientation Hypothesis' (2010) *Current Directions in Psychological Science* 9; C Ma-Kellams, 'Cultural Variation and Similarities in Cognitive Thinking Styles Versus Judgment Biases: A Review of Environmental Factors and Evolutionary Forces' (2020) *Review of General Psychology* 238; D Moser, P Steiglechner, A Schlueter, 'Facing Global Environmental Change: The Role of Culturally Embedded Cognitive Biases' (2022) *Environmental Development* 100735.

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The Good, the Bad, or the Ugly? The Choice of Legal Basis in EU Digital Finance

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ABSTRACT: This article analyses the choice of legal basis for measures under the EU's digital finance strategy. In this area, a new regulation has recently been introduced concerning markets in crypto-assets (MiCA). The package for a digital finance strategy also includes a Digital Operational Resilience Act (DORA) as well as a regulation on distributed ledger technology (DLT). All these measures are adopted on Article 114 TFEU as a single legal base, despite having a clear finance-related angle. Potential alternatives to Article 114 TFEU could be found in either the economic or the monetary policy area. Even more so, a digital competence is entirely missing from the treaties, and thus from EU competences. This article analyses the procedural and structural advantages of some provisions over others, which render them more suitable as legal basis in the Digital Single Market. In particular, the quasi-monopolistic role of Article 114 TFEU due to institutional preferences and the resulting pre-emption of other competences has to be criticised. The article suggests a revival of Article 352 TFEU as legal base in order to fill the digital gap in EU competences.

KEYWORDS: EU digital finance – choice of legal basis – Article 114 TFEU – economic policy – monetary policy – Article 352 TFEU.

1. Introduction

The choice of legal basis is of constitutional relevance, indicating institutional preference as well as procedural and structural limitations placed on the EU legislator. In this, both national and European legal frameworks are the same. EU law differs, however, from the national perspective to the extent that there is no 'genuine' or 'inherent' European competence. Rather, according to the principle of conferral

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in Article 5 of the Treaty on European Union (TEU), Member States have given up some of their sovereign powers and have conferred them onto the EU; the Union may act within the limits of these competences in order to attain the objectives set out in the treaties. Any competences not conferred on the Union remain in the hands of national legislators.[1]

This is significant, particularly so with regard to the new regulatory approach in the Digital Single Market.[2] Indeed, the digital era poses new challenges for the EU legislator, particularly concerning the application and enforcement of fundamental rights in digitalisation,[3] having created a legislative gap in urgent need to be addressed.[4] Despite this urgency, however, the quest for the correct choice of legal basis cannot be neglected as it fulfils a vital role in ensuring legitimacy, legal certainty, and the maintenance of the institutional balance via the prescribed legislative procedure.[5] Nevertheless, many of the newly introduced legislative acts are now being adopted on the basis of Article 114 of the Treaty on the Functioning of the European Union (TFEU); prominent examples include the Digital Markets Act (DMA),[6] the Digital Services Act (DSA),[7] the Artificial Intelligence Act,[8] and the

[1] An extensive discussion on the different competences and the courts' legal basis litigation can be found in A Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer International Publishing 2018).

[2] European Commission, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2030 Digital Compass: the European Way for the Digital Decade', COM(2021) 118 final. See also U Šadl, L López Zurita and S Piccolo, 'Route 66: The Mutations of the Internal Market through the Prism of Citation Networks' (2023) 21 *International Journal of Constitutional Law* 826.

[3] Speech by EVP Margrethe Vestager at the Council's High-level Presidency Conference: 'A Europe of Rights and Values in the Digital Decade' (Brussels, 8 December 2020), at ec.europa.eu. See also A Engel and X Groussot, 'The EU's Digital Package: Striking a Balance for Fundamental Rights in the Proposed DSA and DMA Regulations', in M Bergström and V Mitsilegas (eds), *EU Law in the Digital Age* (Hart Publishing 2025) 71.

[4] E.g. T Berg, 'www.wildwest.gov: The Impact of the Internet on State Power to Enforce the Law' (2000) 2000 *Brigham Young University Law Review* 1305; and S Shipchandler, 'The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question' (2000) 33 *Cornell International Law Journal* 435.

[5] See also discussion in M Dougan, 'EU Competences in an Age of Complexity and Crisis: Challenges and Tensions in the System of Attributed Powers' (2024) 61 *Common Market Law Review* 93.

[6] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[7] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[8] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

Markets in Crypto-Assets Regulation (MiCA).[9] The latter is part of the EU's strategy in digital finance,[10] which serves as case study for this article due to its position at the crossroads between economic and monetary policies and the tensions resulting therefrom.

This article will be analysing the recently introduced legislative measures in the area of digital finance and challenge the choice of legal basis for their adoption. As such, Article 114 TFEU features the 'Good', the easy option which is workable and rarely ever seriously contested by the courts. But is it good enough? And should it be used as the default legal basis for legislation in digitalisation, such as the EU package in digital finance? It will be argued that, irrespective of certain practical advantages, Article 114 TFEU should not be considered the default legal basis due to its residual nature in the absence of more special legal bases in the treaties.

Therefore, this article will present alternatives which could help to unlock the constitutional conundrum in the interest of the division of competences as codified by the Treaty of Lisbon. The 'Bad', representing the EU's competences under the economic and monetary policies, caught in constitutional stalemate due to their inherent structural and procedural disadvantages, which unfortunately render them unworkable in conjunction and even harder to delimit in the light of divergent institutional interests.

Last but not least, the article turns to the 'Ugly' in the form of Article 352 TFEU, which might not be everybody's darling, mainly due to its procedural requirements. However, Article 352 TFEU can apply where no other suitable competence is found in the treaties. As will be argued, such a competence is especially needed in order to fill the digital gap in EU law and thus a revival of this provision could be seen as the key to unlock the conundrum caused by the other options.

Hence, this article will first address 'The Good' in section 2, followed by 'The Bad' in section 3, and finally 'The Ugly' in section 4. Some concluding remarks will be provided in section 5.

2. The Good – Article 114 TFEU by default

Article 114 TFEU constitutes one of the horizontal competences in the Treaties – the other one being Article 352 TFEU – which grants a rather broad power to the EU to approximate laws in the area of the internal market. With the internal market being construed widely, the EU has thus been able to adopt a variety of measures

[9] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (E) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937.

[10] European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU', COM(2020) 591 final.

throughout the decades on the basis of Article 114 TFEU, particularly under the new regulatory approach in digitalisation.[11] However, the scope of this provision is delimited by the existence of more special legal bases available in the treaties for a proposed measure, as is evident from the opening sentence of Article 114(1) TFEU starting with 'Save where otherwise provided in the Treaties (…)'. This should constitute the determining factor for the choice of Article 114 TFEU for a proposed measure as well as for judicial review.

2.1. The EU's legislative package in digital finance

The main piece of legislation of the EU's package in digital finance is the new regulation on crypto currencies (MiCA),[12] which entered into force in June 2023 and shall apply in its entirety from 30 December 2024.[13] It applies to 'natural and legal persons and certain other undertakings that are engaged in the issuance, offer to the public and admission to trading of crypto-assets or that provide services related to crypto-assets in the Union'.[14] The regulation is adopted on the single legal basis of Article 114 TFEU. The legislator indicates in recitals 5 and 6 of the regulation the reasons for this choice of legal basis, a creeping fragmentation of rules between Member States, thus hindering growth and innovation in the internal market.

Indeed, analysis of such fragmentation was central to the Impact Assessment during the proposal stage of the MiCA regulation, which also considered Article 53(1) TFEU as an alternative legal basis. However, this provision under the free movement of establishment would have not allowed for the same level of harmonisation across the Union in the form of a regulation.[15] According to Article 1, MiCA provides harmonisation for the following non-exhaustive list

> 'a) transparency and disclosure requirements for the issuance, offer to the public and admission of crypto-assets to trading on a trading platform for crypto-assets ('admission to trading');
> b) requirements for the authorisation and supervision of crypto-asset service providers, issuers of asset-referenced tokens and issuers of e-money tokens, as well as for their operation, organisation and governance;

[11] See e.g. SA de Vries, 'Recent Trends in EU Internal Market Legislation – Bringing back the Old Concept?' in T van den Brink and V Passalacqua (eds), *Balancing Unity and Diversity in EU Legislation* (Edward Elgar Publishing 2024) 17.

[12] Regulation (EU) 2023/1114 (n 9). For a longer evaluation of the MiCA, see N Divissenko, 'Regulation of Crypto-assets in the EU: Future-proofing the Regulation of Innovation in Digital Finance' (2023) 8 *European Papers* 665. See also A Engel, 'The New Regulation on Markets in Crypto-assets (MiCA) – An Analysis of its Supervisory and Sanctioning Framework' (EU Law Live, 24 June 2023), at eulawlive.com.

[13] Art 149 MiCA.

[14] Ibid Art 2(1).

[15] According to Art 53(1) TFEU, the EU may issue directives or coordinate action by Member States, however not issue any regulations at EU level.

c) requirements for the protection of holders of crypto-assets in the issuance, offer to the public and admission to trading of crypto-assets;
d) requirements for the protection of clients of crypto-asset service providers;
e) measures to prevent insider dealing, unlawful disclosure of inside information and market manipulation related to crypto-assets, in order to ensure the integrity of markets in crypto-assets'.

The EU's package in digital finance also includes a Digital Operational Resilience Act (DORA),[16] laying down 'uniform requirements concerning the security of network and information systems supporting the business processes of financial entities',[17] and a regulation on distributed ledger technology (DLT).[18] Both measures are equally adopted on Article 114 TFEU as a single legal base. Similar to MiCA, disparities between the national legal frameworks in the EU and the subsequent creation of obstacles to the proper functioning of the internal market are cited in justification for Article 114 TFEU as a legal base.[19] However, this cannot hide the fact that these regulations have a clear finance-related angle, which, as the *lex specialis* in this case, should in fact derogate from the application of Article 114 TFEU.[20]

So, to which extent can these measures really be said to fall within the objective of 'the establishment and functioning of the internal market' according to Article 114 TFEU rather than any more finance-specific objectives within other policy areas? Evidence may come from the degree of judicial scrutiny in this area.

2.2. (Un-)challenged by the Courts

In *UK v Parliament*,[21] which was brought in relation to Regulation (EU) No 236/2012 on short selling and certain aspects of credit swaps,[22] a measure within the EU's legislative package to address the financial crisis and launch a system of supervision and crisis management within the EU financial system,[23] Article 114

[16] Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011.

[17] Art 1(1) DORA.

[18] Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology and amending Regulations No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU.

[19] See e.g. recital 9 DORA and recital 5 DLT.

[20] "Save where otherwise provided in the Treaties…", Art 114(1) TFEU.

[21] Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, EU:C:2014:18.

[22] Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit swaps.

[23] The European System of Financial Supervision consists of the European Systemic Risk Board, the European Banking Authority, the European Securities and Markets Authority, the European Insurance and Occupational Pensions Authority; see Regulations (EU) No 1092 – 1095/2010 of the Eu-

TFEU was challenged as the sole legal basis for Article 28 of that Regulation. In particular, the applicants questioned the legality of the conferral of some decision-making powers on the European Securities and Markets Authority (ESMA) on this basis and specifically argue that it is '*ultra vires*' Article 114 TFEU in that it 'does not empower the EU legislature to take individual decisions that are not of general application or to delegate to the Commission or a Union agency the power to adopt such decisions'.[24] Instead, the applicants submit that such decisions should be adopted as regulatory rather than harmonising measures.

Opposed to the UK's plea, the three main EU institutions speak with one voice in endorsing the use of Article 114 TFEU as legal basis for the contested regulation. All three are united in their contention of the concept of harmonisation to encompass, if necessary, the adoption of individual measures as the one at hand. As was put by the Council, Article 114 TFEU confers on the Union 'discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features'.[25] The Commission further pointed out that the ESMA Regulation,[26] upon which ESMA was established and which was referred to in the contested regulation in this case, was equally adopted on the basis of Article 114 TFEU and therefore cannot be considered *ultra vires*.

It is worth pointing out that Advocate General Jääskinen in his Opinion provided an opposing view, explicating that 'conferral of decision making powers under that article on ESMA, in substitution for the assessments of the competent national authorities, cannot be considered to be a measure 'for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market' within the meaning of Article 114 TFEU',[27] suggesting that the Court should annul Article 28 of Regulation No 236/2012 due to lack of competence.[28]

In its analysis, the Court largely agreed with the assessment of the scope of Article 114 TFEU as outlined by the EU institutions, thus rejecting the UK's *ultra vires* claim as unsubstantiated. In addition, the Court acknowledged the Union's lack of a common regulatory framework for monitoring short selling due to divergent emergency measures adopted at national level during the financial crisis and thus the need for a more harmonised approach at EU level. With regard to the actu-

ropean Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.

[24] *United Kingdom v Parliament and Council* (n 21) para 89.

[25] Ibid. para 93.

[26] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

[27] Opinion of AG Jääskinen in Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, EU:C:2013:562, para. 37.

[28] Ibid. para 59.

al objectives of the measure, however, the Court merely took account of the wording of the legislation, which was carefully drafted to refer in its recital 2 to the proper functioning of the internal market, including the financial markets, as its main purpose. The Court thus concluded that 'the harmonisation of the rules governing such transactions is intended to prevent the creation of obstacles to the proper functioning of the internal market and the continuing application of divergent measures by Member States'[29] and therefore upheld Article 114 TFEU as the correct choice of legal basis for the contested measure.

As could be argued, this rather light judicial scrutiny of Article 114 TFEU in legal basis litigation does not come as a surprise. Indeed, the court has a long history of accepting such phrasing of the intended purpose in the respective legislation as justification for its adoption on the internal market legal basis. This practice goes as far back as *Tobacco Advertising*[30] and the infamous claim that this outlier of a judgment in delimiting the outer boundaries of Article 114 TFEU as a legal base has provided the legislator with a 'drafting guide' for future legislation to fit within the objectives of the preferred legal base and thus withstand potential judicial scrutiny.[31] When scrutinised against those objectives, rather than the actual effects of a measure, and in applying the 'centre of gravity' theory,[32] the result will inevitably confirm the choice of Article 114 TFEU.

The sheer breadth of applicability of Article 114 TFEU and its harmonising and pre-emptive effects have established it as an effective tool and thus often the preferred choice of legal basis for the adoption of a wide variety of legislative acts to the detriment of other competence areas. The latter in turn have suffered from slow but steady erosion.[33] According to Article 2(2) TFEU, shared competences between the Member States and the Union, such as the case with the internal market,[34] are subject to pre-emption of national powers since priority is given to action at EU level. This development is further exacerbated in the advent of the digital era and the EU's new regulatory rush to harmonise laws for the internet. As a result, Article 114 TFEU is now serving as (sole) legal basis for a large proportion of the

[29] Ibid. para 114.

[30] Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising)* EU:C:2000:544. The case constitutes one of the rare instances of the court's delimitation of Art 114 TFEU and its outer boundaries vis-à-vis other legal bases, in this case that of Art 168 TFEU (public health).

[31] S Weatherill, 'The Limits of Legislative Harmonisation Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 *German Law Journal* 827.

[32] This general principle of legal basis litigation refers to the predominant aim and purpose of a measure rather than any incidental effects and was fist established in Case C-70/88 *European Parliament v Council of the European Communities*, EU:C:1991:373.

[33] See S Weatherill, 'Competence Creep and Competence Control' in P Eeckhout and T Tridimas (eds), *Yearbook of European Law 23* (Oxford University Press 2004) 1.

[34] Art 4(2)(a) TFEU.

newly adopted and proposed legislation in the Digital Single Market, the EU's package in digital finance being just one example.[35]

The question thus arises when exactly the competences available under the economic and monetary policy area have started to be employed less as legal bases by the EU legislator and for what reason, i.e. is there an actual structural or procedural disadvantage inherent in the provisions which renders them less suitable when compared to Article 114 TFEU?

3. The Bad – unfit to regulate

As mentioned above, if other more special legal bases are available in the treaties, which could derogate from the use of Article 114 TFEU as legal base for a proposed measure, the former should be used – either as single legal basis or in combination with Article 114 TFEU, depending on the exact setup of the measure in question. In the area of digital finance, two potential policy areas are available, which could provide the necessary competence.

3.1. The EU's competences under the economic and monetary policy

The EU's competences on finance-related matters are found in several different provisions in the treaties. While they are all under the same Title VIII on economic and monetary policy, only Article 119 TFEU is common to both economic and monetary policies. The EU's economic policy is then regulated under chapter 1, including Articles 120-126 TFEU, before chapter 2 sets out the EU's monetary policy within Articles 127-133 TFEU. This does not constitute a problem *per se*, however, the competences conferred upon the Union under these two policy areas differ significantly in scope. On the one hand, according to Article 3(1)(c) TFEU, the monetary policy area falls within the EU's exclusive competences in relation to those Member States which have adopted the common currency, the Euro.[36] Under the economic policy on the other hand, the Union has coordinating powers only, as provided for by Article 5(1) TFEU.[37]

[35] A Engel, 'Licence to Regulate: Article 114 TFEU as Choice of Legal Basis in the Digital Single Market' in A Engel, X Groussot and GT Petursson (eds), *New Directions in Digitalisation: Perspectives from EU Competition Law and the Charter of Fundamental Rights* (Springer Nature International 2024) 13.

[36] For a discussion on the EU competence in this policy area, see M Waibel, 'Monetary Policy in the EU: An Exclusive Competence Only in Name?' in S Garben and I Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (University of Cambridge Faculty of Law Research Paper 11-2017) at papers.ssrn.com 1.

[37] For a discussion concerning the nature of economic policy of the EU please see R Bieber, 'The Allocation of Economic Policy Competences in the European Union' in L Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 86; P Leino and J Salminen, 'Going "Belt and Braces" – Domestic Effects of Euro-Crisis Law' (EUI Working Papers 15-2015) 3; P Leino and T Saarenheimo, 'Sovereignty and Subordination: On the Limits of EU Economic Policy

Particularly with regard to the rather limited competences the Union thus has for economic policies, any broader harmonising measures cannot be achieved at EU level and would in any case be dependent on Member States' willingness to coordinate their actions. In addition, certain aspects of monetary financing are specifically prohibited under this policy area. According to Article 123 TFEU

> 'Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (…) in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments'.

Article 125 TFEU, or the so-called 'no bailout clause', imposes further limitations on the exercise of the EU competences in this area.

Considering these differences between the EU's exclusive and coordinating competences for the two policy areas concerned, their delimitation becomes even more crucial. Failure to do so would result in an infringement of rights of the respective legislative actors involved, i.e., either the Union or the Member States. However, the treaties offer little guidance only in this regard and to a large extent remain vague in what are supposed to be the delimitating factors on the substance. Article 119 TFEU provides that the maintenance of price stability is the primary objective of the Union's monetary policy, while the purpose of economic policies is based on Member States' close coordination, the internal market, and the definition of common objectives, in accordance with the principle of an open market economy.

During the Great Crisis of 2007–2008 the famous 'Six-Pack' Regulations,[38] consisting of 5 regulations[39] and a directive,[40] and the following 'Two-Pack' Regu-

Coordination' (2017) *European Law Review* 166; J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010) 77; A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015) 73; P Craig and G de Búrca, *EU Law: Text, Cases, and Materials, UK Version* (Oxford University Press 2020) 118; A~~nna~~ Zemskova, *The Rule of Law in Economic Emergency in the European Union* (Lund University, Faculty of Law 2023) 125.

[38] European Commission, 'Six-Pack' legislative proposals, COM(2010) 522–527 final, 29 September 2010.

[39] Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure; Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances.

lations,[41] were adopted on the basis of either Articles 121 or 126 TFEU alone or in combination with Article 136 TFEU, in case the measure in question concerned a regulatory instrument, designed specifically for the Euro Member States. These provisions, however, do not provide plausible legal bases for the regulation of financial services in the Union.

Special attention should be given to Article 122(2) TFEU, allowing the Union to grant financial assistance to the Member States under specific circumstances. During the Eurozone crisis its use was, however, limited to only one instrument, the European Financial Stabilisation Mechanism (EFSM).[42] This provision was later abandoned as an appropriate legal basis for financial assistance measures.[43] The COVID-19 pandemic provided an opportunity to utilise this provision without the previously experienced controversies, related to the presence of 'exceptional occurrences beyond its [Member State's] control'. It thus became a legal base for the creation of the European instrument for temporary support to mitigate unemployment risks (SURE)[44] and the European Union Recovery Instrument.[45]

Article 127 TFEU provided the legal basis for introducing certain monetary policy measures. These included the Security Markets Programme,[46] the Corporate Sector Purchase Programme,[47] the Asset-backed Securities Purchase Programme,[48] the third

[40] Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States.

[41] Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability; Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

[42] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism.

[43] For a discussion regarding the scope of Art 122 (2) TFEU and creation of the EFSM on its basis see P-A Van Malleghem, 'Pringle: A Paradigm Shift in the European Union's Monetary Constitution' (2013) 14 *German Law Journal* 141; B De Witte and T Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle' (2013) 50 *Common Market Law Review* 805; M Ruffert, 'The European Debt Crisis and European Union Law' (2011) 48 *Common Market Law Review* 1777; A de Gregorio Merino, 'Legal Developments in the Economic and Monetary Union during the Debt Crisis: The Mechanisms of Financial Assistance' (2012) 49 *Common Market Law Review* 1613; V Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 *European Constitutional Law Review* 7, 29.

[44] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.

[45] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European union recovery instrument to support the recovery in the aftermath of the COVID-19 crisis.

[46] Decision (EU) 2010/281 of the European Central Bank of 14 May 2010 Establishing a Securities Markets Programme ECB/2010/5.

[47] Decision (EU) 2016/948 of the European Central Bank of 1 June 2016 on the implementation of the corporate sector purchase programme ECB/2016/16.

Covered Bond Purchase Programme[49] and the Public Sector Purchase Programme.[50] These were all adopted on the basis of Article 127(2) TFEU together with Article 12.1, 3.1 and 18.1 of the Statute of the European System of Central Banks (ESCB).

Unfortunately, this inherent material overlap places either policy area – economic or monetary – at a significant disadvantage when compared to, for example, Article 114 TFEU. Aside from the obviously much broader scope for regulation under the internal market, the rather artificial economic-monetary divide constitutes a real risk for legal basis conflicts,[51] which therefore does not render these two policy areas reliable legal bases for the adoption of legislative acts, particularly in times of crisis.

3.2. The *ultra vires* claim

The apparent conflict between the economic and monetary policy area has previously caused judicial uproar, most prominently between the German Federal Constitutional Court and the European Court of Justice in the *Weiss* saga,[52] which may explain – but not justify – the use of Article 114 TFEU as an alternative in order to avoid further conflict and legal basis litigation.

In this case, the German Federal Constitutional Court (FCC) challenged the Public Sector Purchase Programme (PSPP),[53] which was launched by the European Central Bank (ECB) in the aftermath of the financial crisis. The measures adopted under this programme were designed for the recovery of the Eurozone and the previous market neutrality by allowing the ECB to purchase assets on the secondary

[48] Decision (EU) 2015/5 of the European Central Bank of 19 November 2014 on the implementation of the asset-backed securities purchase programme ECB/2014/45.

[49] Decision (EU) 2014/40 of the European Central Bank of 15 October 2014 on the implementation of the third covered bond purchase programme ECB/2014/40.

[50] Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme ECB/2015/10. See discussion below.

[51] See also discussion in A Engel, 'EU Competences in Crisis: Disentangling the Conflict between Monetary and Economic Legal Bases' (2022) 2022 *Europarättslig Tidskrift* 191.

[52] Case C-493/17 *Weiss and Others*, EU:C:2018:1000 and BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR980/16. See also discussion in case note by A Engel, J Nowag, and X Groussot, 'Is This Completely M.A.D.? Three Views on the Ruling of the German FCC on 5th May 2020' (2020) 3 *Nordic Journal of European Law* 128.

[53] Decision of the Governing Council of the European Central Bank of 22 January 2015 and Decision (EU) 2015/774 (n 50), in conjunction with Decision (EU) 2015/2101 of the European Central Bank of 5 November 2015 amending Decision (EU) 105/774 on a secondary markets public sector asset purchase programme ECB/2015/33; Decision (EU) 2015/2464 of the European Central Bank of 16 December 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme ECB/2015/48; Decision (EU) 2016/702 of the European Central Bank of 18 April 2016 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme ECB/2016/8; and Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 amending Decision (E) 2015/774 on a secondary markets public sector asset purchase programme ECB/2017/1.

markets via constituent national central banks in the Euro zone. The applicants criticised the adoption under the EU's exclusive competences within the area of monetary policy, claiming that such measures as under the contested programme could only be adopted within the economic policy area where Member States have retained their competences to take action with the EU's involvement limited to a coordinating function.

The Court's response to the preliminary ruling sent by the German FCC, which upheld the contested decisions as compatible with EU law,[54] was not received favourably at the national court. Instead, the latter described the CJEU's ruling as 'incomprehensible' and '*ultra vires*',[55] thus rejecting the European court's interpretation and going into open confrontation with it.[56] The conflict later culminated in an infringement procedure issued by the European Commission against Germany under the Article 258 TFEU procedure, accusing the German FCC for violation of the principle of primacy of EU law.[57] While the conflict was eventually settled at a political level,[58] the legal conflict re-emerged concerning the more recent Pandemic Emergency Purchase Programme (PEPP),[59] which was launched in order to alleviate the economic effects of the COVID-19 pandemic within the Eurozone. Again, the German FCC set the stage for the recurring *ultra vires* allegations.[60]

With the case still pending before the national court, it is clear that the constitutional conundrum between the economic and monetary policy areas will not cease to provoke competence conflicts between the Union and the Member States until it is resolved by treaty change. So, in the spirit of when two quarrel, the third rejoices, Article 114 TFEU unsurprisingly has evolved as the preferred choice of legal basis for legislation in digitalisation. What can thus be inferred from the above is that Article 114 holds a quasi-monopoly for the choice of legal basis in the Digital Single Market due to the successful pre-emption of other competences, specifically those under the economic and monetary policy areas. As such, the latter are being

[54] *Weiss and Others* (n 52).

[55] BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, paras 141 and 112.

[56] See D Petric, 'Reasoning, Interpretation, Authority, Pluralism, and the *Weiss/PSPP* Saga' (2021) 6 *European Papers* 1123.

[57] INFR(2021)2114 (for further information, see: https://ec.europa.eu/implementing-eu-law/search-infringement-decisions/). See also T Nguyen, 'A Matter of Principle: The Commission's Decision to Bring an Infringement Procedure against Germany' (Verfassungblog, 11 June 2021), at verfassungsblog.de.

[58] European Commission, 'December infringements package: key decisions' (European Commission Press Corner, 2 December 2021) at ec.europa.eu.

[59] Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic purchase programme ECB/2020/17; and Decision (EU) 2021/174 of the European Central Bank of 10 February 2021 amending Decision (E) 2020/440 on a temporary pandemic purchase programme ECB/2021/6.

[60] 2 BvR 420/21 Verfassungsbeschwerde gegen das Pandemie-Notfall-Ankaufprogramm der Europäischen Zentralbank (Pandemic Emergency Purchase Programme – PEPP) und die Beschlüsse der EZB vom 7. und 22. April 2021 zur Absenkung der Kollateralanforderungen.

undermined as valid legal bases with the effect of being immersed within the wider internal market objective. This is justified by the proclaimed fragmentation caused by divergent national legislation in this area; such fragmentation being considered as hindrance to the four freedoms, thus creating obstacles to trade across national borders in the EU internal market.

Despite the lack of a real crisis in the digital era (thus far), measures adopted within this field are equally political and time sensitive. However, it still raises the question to which extent Article 114 TFEU can and should indeed constitute the correct choice of legal basis, aside from its procedural advantages. More specifically asked, is the Digital Single Market a mere extension of the internal market of the EU, or does the digital component render it distinct and therefore meriting a reconsideration of the correct choice of legal basis?

4. The Ugly – mind the *digital* gap

Even if the above line of argumentation for an all-encompassing internal market capable of including finance-related objective is to be accepted, one significant flaw remains in this reasoning for the justification of Article 114 TFEU as legal base. Any legislation introduced in the area of digital law, including the package in digital finance, is missing a digital competence. As such, the only available competence in the treaties – alone or in combination – constitutes Article 352 TFEU in that it can be used as 'gap filler'.

4.1. The missing digital competence in the Treaties

This digital competence gap in the treaties is unsurprising since, at the time of their drafting, the digital era was still in its infancy, when the EU was having a deregulatory as opposed to the more recent regulatory approach. The question which thus arises is to which extent is the Digital Single Market distinct from the 'ordinary' or 'analogue' internal market? In other words, is there a distinguishing factor between the online and offline markets which requires recognition as a separate policy area and thus competence?

The main distinguishing factor between the online and offline markets is tangibility. By virtue, the Digital Single Market and its operations are less tangible than any analogue marketplace. This can be illustrated best with the most common 'product' in the online sphere: data. Should this fall under the free movement of goods or services? Or should it rather be classified as capital? A definite answer to this seems rather complex and highly context-specific,[61] which in turn questions an automatic recognition under Article 26 TFEU and the four freedoms of the internal

[61] With particular reference to the measures in digital finance, they could be classified as both services and capital, but this might not capture the role of the ECB to the full extent.

market. Some commentators have therefore advocated for the creation of a fifth freedom for data flows,[62] while others have rather opposed such an approach.[63] Indeed, a separate legal basis concerning the processing of personal data and the protection thereof already exists in the form of Article 16 TFEU for general application as well as Article 39 for the area of common foreign and security policy.

However, data protection is but one feature of the Digital Single Market and the measures in digitalisation, which tend to be of much broader scope. Thus, while data protection certainly is of concern to the EU legislator when regulating the internet, Article 16 TFEU would be too narrow as legal base alone and would only be suitable in combination with other legal bases, provided their compatibility.[64] As such, it does not provide a generic extension of existing EU competences to the digital sphere, which, as could be argued, would thus be necessary. Based on this, it could be argued that there is a digital gap in the current set of competences under the EU treaties. As mentioned above, according to Article 5 TEU, any competences not conferred on the Union remain with the Member States. However, the treaties have indeed provided for this precise scenario, where Union objectives cannot be achieved by any of the available powers prescribed therein.

4.2. A revival of the forgotten legal basis in Article 352 TFEU

Article 352 TFEU has long been known as the gap filler amongst the EU competences.[65] According to paragraph one, the Union may adopt measures if such action 'should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers'. Despite the clearly residual character of Article 352 TFEU, its scope has long been described as 'potentially unlimited',[66] and thus, if applied to the digital era, could indeed fill the digital gap if Article 114 TFEU is considered insufficient for that purpose. The use of Article 352 TFEU as a legal base would further have the advantage of not having to establish any internal market objective for the proposed measure as is the case with Article 114 TFEU.

[62] SA de Vries, 'The Resilience of the EU Single Market's Building Blocks in the Face of Digitalization' in S de Vries, U Bernitz, X Groussot and J Paju (eds), *General Principles of EU Law and the EU Digital Order* (Wolters Kluwer 2020) 3.

[63] J Adams-Prassl, 'Regulating Algorithms at Work: Lessons for a 'European Approach to Artificial Intelligence' (2022) 12 *European Labour Law Journal* 30.

[64] For example, this was the case with the recently introduced AI Act, which is adopted on a dual legal basis of Arts 16 and 114 TFEU.

[65] On the outer boundaries of Art 352 TFEU, see discussion in T Konstadinides, 'Drawing the Line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause' (2012) 31 *Yearbook of European Law* 227.

[66] R Schütze, 'Organized Change towards an "Ever Closer Union": Article 308 EC and the Limits to the Community's Legislative Competence' (2003) 22 *Yearbook of European Law* 79. See also A Dashwood, 'Article 308 EC as the Outer Limit of Expressly Conferred Community Competence' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009) 35.

However, this gap-filling nature may have worked against the application of Article 352 TFEU for some time. In its *Opinion 2/94*, the Court elaborated on this function with regard to the Union's accession to the Convention of Human Rights and Fundamental Freedoms (ECHR) in that Article 352 TFEU 'cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community'.[67] Such an extension of powers with the effect similar to treaty amendment or the modification of a specific policy area would thus go beyond its scope, entailing 'fundamental institutional implications' of 'constitutional significance' for both Union and Member States.[68] This is not the case here. In fact, as outlined above, Article 352 TFEU as legal base in digital finance would merely be required to be extending existing EU finance-related competence to the digital sphere, perhaps even in the form of a dual legal basis.

In more recent years, however, Article 352 TFEU has lost much of its significance as legal base,[69] since its main disadvantage rests with the procedural requirements the provision entails, most notably the requirement for unanimity in the Council. This confers on each Member State a veto power for any proposed measure, which has Article 352 TFEU as the legal base. In a Union of 27 Member States, this may delay enforcement of new measures, posing a significant challenge for the EU legislator in this rather fast-paced digital environment. As for the role of the European Parliament, Article 352 TFEU only requires consent as opposed to the more democratic co-decision procedure. By contrast, Article 114 TFEU follows the ordinary legislative procedure with qualified majority voting in the Council and the European Parliament as co-legislator, thus more adequately ensuring the maintenance of the institutional balance.

It has to be pointed out that these procedural requirements, while important considerations in the legislative process, cannot be the sole criterion in determining the correct legal basis. The court's establishment of the democracy-maximising rationale in *Titanium Dioxide*[70] has been used only in addition to other principles of legal basis litigation, such as the 'centre of gravity' theory, and mainly with measures pursuing a twofold aim in order to avoid the result of a dual legal base. It is thus the substantive scope of a provision rather than its procedural requirements, which should be the decisive factor in the quest for the correct choice of legal ba-

[67] Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ~~ECLI:~~EU:C:1996:140 para 30.

[68] Ibid. para 35.

[69] See also G Butler, 'The EU Flexibility Clause is Dead, Long Live the EU Flexibility Clause' in A Bakardjieva Engelbrekt and X Groussot (eds), *The Future of Europe: Political and Legal Integration beyond Brexit* (Hart Publishing 2019) 63.

[70] Case C-300/89 *Commission of the European Communities v Council of the European Communities (Titanium Dioxide)*, EU:C:1991:244.

sis. In fact, Article 352 TFEU was also suggested by the Advocate General in the *ESMA* case as the preferred alternative to Article 114 TFEU as a legal base.[71]

In addition, the unanimity requirement in Article 352 TFEU could even be seen as advantageous in the legislative process, adding the necessary legitimacy for the widening of EU competences to the digital sphere. In the words of AG Jääskinen in his Opinion in the *ESMA* case, 'recourse to Article 352 TFEU (…) would have thus opened up an important channel for enhanced democratic input'.[72] Therewith, provided that no Member State makes use of its veto power, it could be argued that Article 352 TFEU would have a more positive effect than Article 114 TFEU as legal basis in the specific area of digital finance and the Digital Single Market as a whole. This positive effect would only be diminished if the veto power was used by Member States to essentially water down the actual effects of the measure, thus resulting in the least common denominator between the Member States. However, if consent can be reached by the 27 members of the Union it would certainly send a strong signal in support of the policy behind the measure in question.

5. Concluding remarks

While digitalisation in the financial field has equipped us with new tools to be employed in this area, the legal regulation of their unconventional nature remains to be thoroughly explored. This includes determining the most suitable legal basis for the adoption of measures in the area of EU digital finance within the wider EU constitutional matrix.

Using the example of the EU's legislative package in Digital Finance, this article has demonstrated that Article 114 TFEU as a legal base represents the default choice by the EU legislator (the 'Good'), that is not fraught with the difficulties associated with other legal bases, such as those in the economic and monetary policy areas. Their structural and procedural limitations render them unsuitable for the regulation of measures in this area (the 'Bad'). However, Article 114 TFEU does not provide the necessary digital competence for legislation in the Digital Single Market. The only suitable legal basis to solve this constitutional conundrum and to fill the digital competence gap in the EU would be Article 352 TFEU, which is often overlooked due to its procedural disadvantages (the 'Ugly'). Suggesting a revival of this forgotten provision, this article has emphasised the potentially positive effect of procedural requirements, such as unanimity, by virtue of its added legitimacy.

[71] AG Opinion in *United Kingdom v Parliament and Council* (n 27) paras 54–58.
[72] Ibid para 58.

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Democracy Manifest? Ensuring the EU Legislature's Democratic Legitimacy in the Face of National-Level Autocratisation

John Cotter[*]

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ABSTRACT: There are numerous means through which EU institutions can seek to enforce the value of democracy under Article 2 TEU. However, each of these mechanisms may contain weaknesses in the face of determined national-level autocrats. The possibility that attempts to address democratic backsliding at national level may fail must be countenanced. The functioning of the EU's representative democracy (Article 10(1) TEU) hinges on the legitimacy of its legislature (the European Parliament and the Council) as set out in Article 10(2) TEU, with EU citizens directly represented in the European Parliament and Member States being represented by their governments, 'themselves democratically accountable either to their national parliaments, or to their citizens'. The EU's representative democracy is therefore dependent on conditions at national level, whether in the context of European Parliament or national elections. This article examines the extent to which EU law allows the presence in the European Parliament and the Council of democratically illegitimate national-level representatives, with a particular focus on the possibility of exclusion of such representatives. After the acknowledging the problem of identifying the meaning of democracy in EU law, the article concludes that orthodox interpretations of existing primary and secondary EU rules, together with existing jurisprudence of the Court of Justice of the EU, leave the EU's legislature open to autocratic trespass by national-level representatives. The article then suggests new interpretative approaches to EU primary and secondary law that would allow the exclusion of such institutional representatives and describes how such exclusion could be operationalised procedurally.

KEYWORDS: democracy – principle of representative democracy – democratic legitimacy of European Parliament and Council – consequences of undemocratic trespass to the EU legislature – new interpretative approaches to institutional protections – risks of action and inaction.

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1. Introduction

How vulnerable are the EU's legislative institutions, the European Parliament and the Council, to trespass by democratically illegitimate national representatives? Two decades ago, such a question might have been deemed to be in the realm of legal science fiction. The EU Treaties assert that democracy is a value of the EU[1] and that the Union is founded on the principle of representative democracy.[2] The Treaties seem to scarcely countenance the possibility of the EU's legislative organs accommodating democratically illegitimate representatives. This observation is underscored by the unwieldiness and weaknesses of the only specific mechanism contained in the Treaties to respond to serious breaches of core Union values occurring at national level.[3] Whether the silences or limitations in the Treaties result from the framers' naivety, or – more likely – their desire to maintain national control over matters of state-level democratic structure, the past twenty years have seen a clearly observable trend of democratic backsliding in several Member States.[4] The multilevel and intertwined nature of the EU's democratic design means that national-level autocratisation is not simply an abstract moral problem to be observed from outside; rather, it poses a profound threat to the EU's representative democracy.[5] Article 10(1) TEU declares that the Union 'shall *be founded* on representative democracy'[6] and Article 10(2) provides the dual-institutional means through which this functioning of the EU's representative democracy is propagated: EU citizens 'are represented directly at Union level in the European Parliament', whereas the Member States 'are represented in the European Council by their Heads of State or Government and in the Council by their governments'. Despite the Member States being represented in a more democratically indirect manner, Article 10(2) TEU nevertheless makes it clear that national representatives in the European Council and the Council derive

[1] Art 2 TEU.

[2] Art 10(1) TEU.

[3] Art 7 TEU.

[4] The most notable being Hungary. On 15 September 2022, the European Parliament voted to adopt a report which acknowledged an 'increasing consensus among experts that Hungary is no longer a democracy'. (*Interim report on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded* (25 July 2022) - (C9-0000/2022 – 2018/0902R(NLE)). The V-Dem Institute in its 2024 Democracy Report classified Hungary as an 'electoral autocracy' in its analysis of the regimes of the world in 2023. Only a bare majority (14) of the EU's Member States were classified as 'liberal democracies': V-Dem Institute, 'Democracy Report 2024: Democracy Winning and Losing at the Ballot' (March 2024) at www.v-dem.net p. 17 . Freedom House in 2024 lists Hungary as 'partly free': Freedom House, 'Freedom in the World 2024: The Mounting Damage of Flawed Elections and Armed Conflict' (2024) at freedomhouse.org p. 23.

[5] J Cotter, 'To Everything there is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council' (2022) 47 *European Law Review* 69, at 70.

[6] Emphasis added.

their legitimacy, within the context of Article 10(1) TEU, from 'themselves [being] democratically accountable either to their national parliaments, or to their citizens'.

EU law provides a number of possible means by which the democratic value and principle of representative democracy can be defended from threats originating from national level beyond Article 7 TEU, whether by means of centralised enforcement via infringement/enforcement proceedings or annulment proceedings, or decentralised enforcement via direct effect and indirect effect of key Treaty and Charter of Fundamental Rights (CFREU) provisions.[7] The EU's institutions have responded to the broader phenomenon of democratic backsliding in various ways, most recently with the Commission's Democracy Action Plan and Defence of Democracy Package.[8] However, the numerous defensive tools available to the EU, at least as means of effecting change at the national level, are undoubtedly hampered by problems when they encounter a determined, recalcitrant authoritarian Member State regime. These problems include the limited competence at EU level to legislate for democratic conditions at national level, as well as EU law's heavy reliance on judicial remedies and enforcement of remedies by national courts that may be weakened or cowed in backsliding States. EU responses to national democratic backsliding may also be undermined by the transactionalist strategies and differing timescales of autocratisers, together with autocratic leveraging of veto powers at EU level.[9] As such, the possibility that EU measures to curb autocratisation – or to in any way alter conditions at national level in an appreciable way – may fail has to be countenanced.[10]

The ultimate consequences of failed attempts to defend the EU's representative democracy or to change inclement democratic conditions at national level are, as alluded to previously, grave: the EU's legislature containing representatives from or of Member States that are not democratic within the meaning of Article 2 TEU, and all citizens of the Union being made subject to laws that have been adopted by such institutions. It is indeed more than arguable that such laws would be invalid and capable of annulment, whether via Article 263 or 267 TFEU procedures.[11] This foreseeable danger poses a number of questions. Firstly, it may be asked to what extent

[7] For a comprehensive analysis, see Y Bouzoraa, 'The Value of Democracy in EU Law and Its Enforcement: A Legal Analysis' (2023) 8 *European Papers* 809. See also, T Theuns, *Protecting Democracy in Europe* (Hurst 2024).

[8] For a summary of the Plan and the Package, European Commission, 'Protecting Democracy' at commission.europa.eu.

[9] For an excellent account of how such regimes operate to mask their processes of autocratisation, see KL Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545.

[10] On the limits of material sanctions against illiberal regimes, see U Sedelmeier, 'Political Safeguards against Democratic Backsliding in the EU: The Limits of Material Sanctions and the Scope of Social Pressure' (2017) 24 *Journal of European Public Policy* 337. See also, KL Scheppele and J Morijn, 'Money for Nothing? EU Institutions' Uneven Record of Freezing EU Funds to Enforce EU Values' (2024) 32 *Journal of European Public Policy* 474.

[11] Cotter (n 5), at 73–75; RD Kelemen, 'The European Union's Failure to Address the Autocracy Crisis: MacGyver, Rube Goldberg, and Europe's Unused Tools' (2022) 45 *Journal of European Integration* 223, at 224.

is the EU legislature empowered to insulate itself against trespass by representatives of autocratic States, in the case of the Council, or representatives elected within the Member States, in the case of European Parliament? Is there any possibility for the Council or the European Parliament, with the possible support/supervision of the CJEU, to exclude representatives from or of an undemocratic national regime? Secondly, if such a possibility does not exist, how should EU primary or secondary law be reformed or re-imagined to better protect the EU's legislative institutions from autocratic intrusion? Thirdly, given that there are no good options when the EU constitutional order is faced with an implacable national autocracy, what are the risks to the EU constitutional order of exclusion and non-exclusion in this context?

This article seeks to address the above questions. After briefly discussing in Section 2 the problems inherent in defining representative democracy or enumerating its minimal requirements, Section 3 first demonstrates that EU primary and secondary law, as currently interpreted by the Court of Justice of the EU,[12] provides extremely limited and highly ineffective, even non-existent, protection to the European Parliament against the risk of autocratic trespass. Potential changes of interpretative approach to existing law or concrete legal reforms, specifically those short of Treaty change or a unified European Parliament electoral process, are then enumerated in the balance of Section 3, along with an account of how existing law could be operationalised to exclude democratically illegitimate legislators from the European Parliament. Section 4 conducts a similar analysis of the rules concerning representation in the Council, again highlighting the Council's vulnerability to autocratic trespass and then emphasising an interpretative approach to EU primary law that could address this issue and describing how that approach could be operationalised procedurally. Thereafter, in Section 5, the risks of action (exclusion) and inaction (non-exclusion) are considered, before the article closes with some concluding remarks (Section 6).

2. The challenge of defining minimal democratic standards

A key purpose of this article is to investigate whether undemocratic representatives may be excluded from the EU's legislative institutions. This question naturally implies a prerequisite enquiry: when will a representative be democratically illegitimate? In more concrete terms, in the context of the European Parliament, one may ask, at what point would a candidate deemed to have been elected at national level in European Parliament elections not have satisfied the requirements of the principle of representative democracy in Article 10 TEU? Likewise, in the case of a national representative taking up a seat at the Council, when would such a representative not be 'democratically accountable' at national level within the meaning of Article 10(2) TEU? These questions are extremely difficult to answer.

[12] Hereinafter, the CJEU when referring to the institution as a whole, which comprises the Court of Justice and General Court.

There is no precise definition of what constitutes democracy or representative democracy in Articles 2 and 10 TEU respectively, though some rough contours could be established via EU law and the jurisprudence of the European Court of Human Rights.[13] While the rule of law is a notoriously contested concept, specific aspects of it, such as judicial independence, are perhaps more readily capable of enumeration.[14] Democracy would appear to be an even more problematic concept around which to draw red lines.[15] A fundamental question arises, for instance, as to whether thick or thin conceptions of democracy should be adopted in establishing the contours of the principle of representative democracy.[16] In particular, it may be queried whether the concept of democratic accountability in Article 10(2) TEU may be understood holistically as intrinsically linked not just to the democratic value in Article 2 TEU but also to other democratic values in that Treaty provision.[17] A finding that a Member State is in breach of these values might support a view that that State's representatives are no longer democratically accountable within the meaning of Article 10(2) TEU.[18] Alternatively, one may argue that democratic accountability should be understood in a minimalistic manner and by reference to electoral rules and practice only.

While one may conceive of circumstances in which it would be readily apparent that a Member State was not a democracy, following a military coup, for instance,

[13] See N Vissers, 'Unveiling Democracy: Will the Court Develop the EU's Core Value?' (Verfassungsblog, 5 February 2024), at verfassungsblog.de; T Verellen, 'Hungary's Lesson for Europe: Democracy is Part of Europe's Constitutional Identity. It Should be Justiciable' (Verfassungsblog, 8 April 2022) at verfassungsblog.de. The work of the Venice Commission or of organisations that compile democracy indices, as well as academic studies, might also be instructive: see K Abazi, N Buscher, and TJ Selck, 'Democratic Backsliding in the European Union: Reassessing Legal Definitions of Democracy' in R Deplano, G Gentile, L Lonardo, and T Nowak (eds), *Interdisciplinary Research Methods in EU Law: A Handbook* (Elgar 2024) 196; P Graziano and M Quaranta, 'Studying Democracy in Europe: Conceptualization, Measurement and Indices' (2024) 59 *Government and Opposition* 605.

[14] There is significant CJEU and European Court of Human Rights jurisprudence on judicial independence. See generally, R Bustos Gisbert, 'Judicial Independence in European Constitutional Law' (2022) 18 *European Constitutional Law Review* 591.

[15] See, for instance, R Dixon and D Landau, 'Competitive Democracy and the Constitutional Minimum Core' in T Ginsburg and A Huq (eds), *Assessing Constitutional Performance* (Cambridge University Press 2016) 268. For an EU specific analysis of how the EU's constitutional core might be worked out, see J Bast and A von Bogdandy, 'The Constitutional Core of the Union: On the CJEU's New, Principled Constitutionalism' (2024) 61 *Common Market Law Review* 1471. See also, LD Spieker, *EU Values Before the Court of Justice Foundations, Potential, Risks* (Oxford University Press 2024).

[16] See Vissers (n 13) and Verellen (n 13).

[17] See, for instance, A Rosas, 'Democracy and Human Rights: Some Conceptual Observations' in A Södersten and E Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (Sieps 2023) 89–93.

[18] At the time of writing, an opinion of the Advocate General and judgment of the Court of Justice is awaited in Case C-769/22 *Commission v Hungary*, in which the Commission has sought to reply on Art 2 TEU values in a free-standing manner in infringement proceedings against Hungary relating to that Member State's anti-LGBTIQ+ law. If the Court is to follow the Commission's lead, a finding that a Member State is in breach of Art 2 TEU values might form the basis of an argument that its representatives are no longer democratically accountable as required by Art 10(2) TEU, especially if a thick conception of democracy is adopted. Again, however, the interplay between Arts 2, 7, and 10 TEU comes into focus.

autocratisation, in Europe at any rate, has become much more subtle and taken the form of democratic backsliding.[19] The greater subtlety involved in democratic backsliding has made the process more difficult to detect, especially for those who do not take a persistent and close interest in developments in the state in question. Moreover, because it is a process consisting of numerous small but interlinked developments, the extent or even the existence of democratic backsliding becomes a matter of contestation and often plausible deniability for the government in question, which makes mobilising and maintaining resistance to the process more difficult. Courts, in particular, and with good reason, may be reluctant to establish and adjudicate upon red lines in the context of democracy.[20] This reticence may be amplified in the case of the EU, which contains Member States with a variety of democratic traditions,[21] and within which respect for national constitutional identity is a constitutional requirement.[22]

This article does not seek to explore where these red lines might be for the purposes of the principle of representative democracy in Articles 10 TEU. Instead, it poses the question as to whether the EU's legislative institutions may exclude representatives from or of a Member State in circumstances in which that State ceases to be a democracy for the purposes of Article 10 TEU. It may assist the reader to picture a set of circumstances in which it is evident to all that a Member State is no longer a democracy, following a miliary coup, for instance, but the EU has been unable to respond to this state of affairs, the use of Article 7 TEU remains out of reach, and national authorities are either captured by the autocratising national regime or are otherwise unwilling or unable to intervene.[23] Such a scenario might also arise without the sudden shock of a coup due to democratic backsliding characterised by one

[19] See Scheppele (n 9) for an account of how autocratic leaders gradually dismantle democracies through 'autocratic legalism'.

[20] M Blauberger and RD Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU' (2017) 24 *Journal of European Public Policy* 321.

[21] To take electoral systems for parliamentary elections alone, most Member States operate proportional representative models, whereas States such as France operate plurality/majoritarian electoral systems and States like Germany operate mixed systems. See Council of Europe, 'Electoral Systems for Parliamentary Elections' at www.coe.int.

[22] While the Court of Justice shows increasingly little patience with Member State defences based on national identity in cases touching on Art 2 TEU values (see, for instance, the judgments of the Grand Chamber in Cases C-808/21 *Commission v Czech Republic*, EU:C:2024:962 and C-814/21 *Commission v Poland*, EU:C:2024:963), Member States nevertheless should be afforded a degree of space within which to design their democratic structures in good faith: see J Scholtes, 'Constitutionalising the end of history? Pitfalls of a Non-Regression Principle for Article 2 TEU' (2023) 19 *European Constitutional Law Review* 59.

[23] For such a scene-setting fictional scenario, see Cotter (n 5) 72. It is important to note that Member States will have a duty under Arts 2, 4(3), and 10 TEU, as well as under the citizenship provisions of the TFEU and Arts 39 and 40 CFREU, certainly in the context of European Parliament and municipal elections, and arguably in national elections (under Art 10 TEU), to ensure the democratic character of elections that impact on the functioning of the Union's representative democracy. The arguments proposed in this article which would allow EU institutions, aided and supervised by the CJEU, to exclude democratically illegitimate national representatives should be understood as being a last-resort measure

or more of the following: unfair electoral rules, electoral fraud or gerrymandering, restrictions on freedom of expression, interference with the independence of the judiciary and other regulatory bodies, etc. However, as suggested above, the watershed moment in the case of more long-term democratic dismantlement may be more difficult to recognise, especially with some consensus.

The sections of this article that follow examine the extent to which the European Parliament and the Council, with the assistance or supervision of the EU's judiciary, could act in such circumstances to exclude democratically illegitimate representatives from those institutions.

3. Ensuring the European Parliament's democratic character

3.1. Existing rules and jurisprudence

As stated above, for the purposes of fulfilment of Article 10(1) TEU's promise that EU is founded on representative democracy, Article 10(2) TEU provides that the Union's citizens are represented directly at Union level in the European Parliament. EU primary law contains some minimal detail as to how elections to the European Parliament are to be conducted. Article 14(3) TEU and Article 39(2) CFREU require that Members of the European Parliament (MEPs) are to be elected by direct universal suffrage in a free and secret ballot. The detailed regulation of European Parliamentary elections is, however, left to EU secondary legislation. Article 223(1) TFEU provides a procedure for the adoption of a uniform suffrage procedure, though no such procedure has thus far been adopted.[24] The requirement that a special legislative procedure involving Council unanimity be utilised to adopt such a uniform procedure means that the adoption of such a procedure may face significant obstacles.

In the absence of a uniform electoral procedure, European Parliament elections are still regulated by the Direct Suffrage Act of 1976.[25] The most striking characteristic of the Direct Suffrage Act is that it establishes a few minimalist requirements

in circumstances in which national authorities have proven unwilling or unable to prevent democratically illegitimate representatives being sent to the EU's legislative institutions.

[24] Although the European Parliament in 2022 proposed a Council Regulation to be adopted under Art 233(1) TFEU which would repeal the 1976 Direct Suffrage Act and replace it with new rules (European Parliament legislative resolution of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision (2020/2220(INL) – 2022/0902(APP)), at www.europarl.europa.eu.

[25] Act concerning the election of the representatives of the Assembly by direct universal suffrage, annexed to 76/787/ECSC, EEC, Euratom Decision of the representatives of the Member States meeting in the Council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage (hereinafter, the 'Direct Suffrage Act').

and leaves almost all aspects of the overseeing and regulation of European Parliament elections to national authorities and national law. In this regard, the key provision of the Act is Article 8, which provides, '[s]ubject to the provisions of this Act, […] the electoral procedure shall be governed in each Member State by its national provisions'. With European Parliament elections being regulated largely at national level and conducted by national authorities, the possibility that there could be breaches of basic EU law or European Convention on Human Rights requirements may easily be foreseen.

EU law does not leave affected citizens or other actors without a remedy, of course. The Commission could commence infringement proceedings against the Member State in question, and interim orders could be sought in an attempt to end infringements urgently.[26] A concerned citizen or political actor could take the matter to a national court, alleging a breach of EU law, perhaps with the hope that the question might be referred to the CJEU, which could provide some clarity on the matter and a solution that the national court could apply to remedy the illegality.[27] However, these remedial processes are not without their weaknesses. First, in both infringement proceedings and preliminary references, the final remedy may be too slow in arriving. Though interim orders may assist in ameliorating this problem, infringement proceedings are nevertheless reactive. Second, the potential utilisation of national courts and the preliminary reference procedure assumes, in the first place, that national courts are sufficiently independent to make references to the Court of Justice and apply resultant rulings or interim orders. This would seem an unsafe assumption in a Member State in which egregious breaches of democratic norms were occurring or in which an autocratic regime had already been consolidated.[28] Moreover, faith in national courts – with or without the preliminary ruling process – to provide a remedy may involve making unsafe assumptions about the extent to which challengers will have access to those courts.[29] Finally, even if these judicial means of redress are successful, there remains a problem where national authorities simply refuse to comply with judgments whether national, supranational, or both.[30]

[26] See, for instance, Case C-441/17 R *Commission v Poland*, EU:C:2017:877.

[27] For the potential use of Art 267 TFEU to protect the fairness of European Parliament elections, see DG Szabó, 'Protecting the Fairness of European Parliament Elections via Preliminary Ruling' (Verfassungsblog, 7 December 2023), at verfassungsblog.de.

[28] This factor also pragmatically undermines any potential argument that the problem can be self-corrected within the national system or that national-level autocratisation is an area of purely national competence.

[29] There is, of course, no pan-European approach to standing before national courts to enforce EU law: see, generally, HK Ellingsen, *Standing to Enforce European Union Law Before National Courts* (Hart 2021).

[30] See Democracy Reporting International (DRI) and the European Implementation Network (EIN), *Justice Delayed and Justice Denied: Non-implementation of European Courts Judgments and the Rule of Law* (2024 Edition) at static1.squarespace.com. See also, A Hofmann, 'Resistance against the Court of Justice of the European Union' (2018) 14 *International Journal of Law in Context* 258.

Therefore, if gross manipulations were to take place at national level in a European Parliament election and Member State authorities were either to block judicial or other means of redress, or simply ignore judicial decisions, the question becomes: would EU law allow for the exclusion of the nationally officially declared winners, or would the European Parliament be obliged to admit them to membership? Currently, it is Article 12 of the Direct Suffrage Act that governs the verification of the credentials of MEPs: 'The European Parliament shall verify the credentials of members of the European Parliament. For this purpose it shall *take note* of the results declared officially by the Member States and shall rule on any disputes which may arise out of the provisions of this Act other than those arising out of the national provisions to which the Act refers'.[31]

The key words in Article 12 are the European Parliament's obligation to 'take note' of national official declarations of electoral results, which must be read together with the exclusion of the European Parliament's jurisdiction over disputes arising out of national legal provisions. It is not immediately clear from the text of Article 12 alone what the power of the European Parliament might be in terms of questioning official results declarations at national level. The exhortation to 'take note' might be taken literally to imply that the European Parliament must simply acknowledge the declaration but would not be bound by it.[32] Such a reading might permit the European Parliament to refuse to verify results if a conclusion were reached that the election breached the requirements of EU law. However, this approach is not the one that has been taken by the Court of Justice. In a series of cases, the Court has ruled that the European Parliament is bound by a national authority's official declaration of results and can, under no circumstances, question the validity of such a declaration.[33] While this line of case law began prior to the emergence of democratic or rule-of-law backsliding, the Court has maintained this line up to the present, despite several opportunities to reverse or at least qualify its approach. In *Le Pen*, a case which involved similar wording in Article 11 of the Direct Suffrage Act, the Court ruled that the

[31] Emphasis added. It should be noted that the European Parliament's proposed Regulation (n 24) does not alter the arrangements provided for by Art 12 of the Direct Suffrage Act as relates to national candidates: Art 23 thereof states that the European Parliament 'shall take note of the results declared officially by the Member States and proclaimed by the European Electoral Authority'.

[32] The requirement for the European Parliament to 'take note' of officially declared results at national level might, for instance, be compared with the requirement in Art 52(7) CFREU that the courts of the Union and the Member States give 'due regard' to the Explanations of the Secretariat to the Convention on the CFREU when interpreting Charter rights. This 'due regard' requirement according to the Court of Justice necessitates no more than taking into consideration the Explanations (see, for instance, Case C-689/19 P, *VodafoneZiggo Group BV v Commission*, EU:C:2021:142, para 136). A similar, ordinary usage approach to 'take note' might lead to a similar conclusion as regards the meaning of that requirement.

[33] Case C-208/03 P *Le Pen v European Parliament*, EU:C:2005:429; Joined Cases C-393/07 and C-9/08 *Donnici v European Parliament*, EU:C:2009:275; Case C-502/19 *Junqueras Vies*, EU:C:2019:1115; Case C-600/22 P *Puigdemont v European Parliament*, EU:C:2024:803.

words 'take note', in that context, prevented the European Parliament from second guessing a national declaration.[34] This judgment was then applied directly to Article 12 in *Donnici*, in which the Court ruled that it was bound by a national declaration in Italy, notwithstanding what was at best an imbroglio at national level.[35] This absolutist reading of Article 12 has since been upheld by the Court of Justice in September 2024 in *Puigdemont*.[36]

Given that the applicable existing EU secondary laws, as interpreted by the Court of Justice, appear to prevent the European Parliament in all circumstances from questioning the credentials of nationally declared electoral winners, three further questions may be asked.

First, it may be asked whether Article 12 of the Direct Suffrage Act, as currently understood, is compatible with the Treaties and the CFREU? The consequences of Article 12 and the Court's interpretation are stark: even if a Member State were to become a military dictatorship and run sham European Parliament elections, the European Parliament would be obliged to verify the credentials of the nationally declared election winners. Consequently, the European Parliament would contain Members lacking any democratic legitimacy, which would certainly be contrary to Article 10 TEU and in contravention also of the democratic rights of EU citizens in that Member State. Moreover, citizens of all EU Member States would be subject to laws created by this European Parliament. When the European Parliament in *Donnici* raised the argument that it must possess the power to ensure a minimum standard regarding the appointment of its members, the Court of Justice responded by maintaining that there were remedies within the EU legal order to deal with breaches of EU law in the conduct of European Parliament elections, namely, utilisation of the preliminary reference procedure.[37] The utility of the preliminary reference procedure has been noted by others in this context.[38] However, as stated above, there is little guarantee that such rulings would result in a change of democratic or electoral conditions on the ground in Member States. In the end, a national declaration of electoral results may be compromised regardless of what previous Court of Justice rulings have stated; consequently, the European Parliament may contain democratically illegitimate members. As such, the EU Treaties would provide no safeguard against autocratic trespass to its most directly democratic institution, turning Article 10 TEU into a mere empty formula. There is, therefore, reason to doubt whether Article 12,

[34] *Le Pen v European Parliament* (n 33) para 51.

[35] *Donnici v European Parliament* (n 33) para 55.

[36] *Puigdemont v European Parliament* (n 33) paras 61–90.

[37] *Donnici v European Parliament* (n 33) para 70. Indeed, the CJEU has assisted in defining democratic requirements in European Parliament elections where compatibility of national rules came into issue before national courts: Case C-145/04 *Spain v United Kingdom*, EU:C:2006:543; Case C-300/04 *Eman and Sevinger*, EU:C:2006:545; Case C-650/13 *Delvigne*, EU:C:2015:648.

[38] Szabó (n 27).

to the extent that it has been interpreted by the Court of Justice to prevent the European Parliament from defending its democratic character is compatible with Article 10 TEU and the democratic rights of citizens in the Treaties and the CRFEU.

Secondly, it may be asked whether there is any scope for Article 7 TEU to be utilised to exclude democratically illegitimate MEPs. Article 7(3) TEU provides that the Council 'may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State [against which a determination of the existence of a serious and persistent breach of Article 2 values has been made]'. One such right is specified, the suspension of voting rights of the representative of the government of that Member State in the Council, which appears to afford the Council some discretion in determining other rights that may be suspended. Whether Article 7 TEU could be utilised to exclude MEPs from a Member State sanctioned under the provision is doubtful. A first doubt arises as to whether the presence of MEPs in that institution constitutes a right deriving from the application of the Treaties to the Member State. On one reading, MEPs are representatives of the citizens, rather than the Member State, something that is evident in the wording of Article 10(2) TEU. On the other hand, Article 14(2) TEU determines the allocation of MEPs to the Member States, providing that, '[n]o Member State shall be allocated more than ninety-six seats'. Moreover, if a Member State were evidently autocratic, it would be perverse to maintain that its MEPs continued to represent EU citizens. In truth, however, one can only speculate as to how far the sanctioning power of the Council under Article 7(3) TEU might extend and it is likely that the answer to this question might only become evident in a concrete case rather than in an abstract thought exercise. In all events, the use of the sanctioning powers in Article 7 TEU appears at present to be a remote prospect. Additional to this second question, the question may be posed whether it might be possible, if Article 2 TEU is to be regarded as a freestanding provision, whether a finding by the CJEU that a Member State is in breach of Article 2 TEU might be potential grounds for exclusionary use of Article 12, given that the Court in its case law has stated that compliance with Article 2 TEU values is a basis for enjoyment of EU rights.[39]

3.2. The case for reinterpretation of the Direct Suffrage Act

The foregoing analysis has demonstrated that the Court of Justice currently appears unwilling to interpret EU primary and secondary law in a manner that would allow for the exclusion of undemocratic representatives from membership of the European Parliament in circumstances in which such representatives have been officially declared at national level. As previously stated, this leaves the European Parliament vulnerable foreseeably to trespass by undemocratic forces from national level. It is therefore nec-

[39] The same logic may be applied to a reading of Art 10(2) TEU as to whether the representatives of such a Member State could be regarded as democratically accountable at national level.

essary to consider how this vulnerability could be addressed. The most readily apparent solution would be by way of an amendment to the Treaties that would allow explicitly for the European Parliament and/or the Court of Justice to exclude democratically illegitimate representatives. However, it is highly unlikely that such amendments would be adopted in the foreseeable future. In the specific case of the European Parliament, the adoption of a uniform electoral law as envisaged in Article 223 TFEU, which might offer more robust assurances against such trespass, would be an obvious improvement. The European Parliament in 2022 proposed a Regulation for this purpose, but this proposed legislation would not make an appreciable change to the existing regime of national results being determined at national level and verified without question by the European Parliament.[40] In any case, the requirement that the Council adopt a uniform procedure makes the realisation of such a solution unlikely. In the absence of utopian solutions, other avenues must be explored.

In the context of the European Parliament, the first approach that may be considered is a change of interpretative tack by the Union's judiciary to Article 12 of the Direct Suffrage Act. As aforementioned, the Court's initial interpretation of Article 12, with which it conferred an absolutist status on national declarations of election results, took place in a different temporal context before the emergence of democratic backsliding on the EU. Moreover, the Court's interpretation was not an inevitable one and it is arguable that the text of Article 12 does not foreclose an alternative reading of the provision that would allow the European Parliament to refuse to accept illegitimately declared election results at national level. In fact, one may even argue that a perfectly literal interpretation of Article 12 would merely require the European Parliament to 'take note' of national declarations rather than be bound by them in cases in which there has been an evident breach of EU democratic and electoral standards that has gone unremedied at national level. Such an interpretation might also be supported by a harmonious reading of Article 12 with Articles 2 and 10 TEU, as well as with citizens' rights under Article 20 TFEU and in the CFREU.

One might counter that any interpretation that would allow the European Parliament to exclude representatives officially declared at national level as election winners would amount to an interference with the autonomy of national constitutional systems and the division of competences between the Union and the States. This argument, however, runs into the problems when one considers the fundamentally intertwined nature of EU and Member State democracies, acknowledged in Article 10 TEU.[41] The EU's democratic network is, of course, not the Union's only intertwined system. Most obviously, the EU has a judicial network, depending on the interrelationship of the CJEU and national courts. So intertwined is that relationship

[40] (n 31).

[41] J Porras Ramirez in HJ Blanke and S Mangiameli (eds), *The Treaty on European Union (TEU)* (Springer 2013) 421–426.

that it relies upon the judicial independence of national courts and the Court of Justice has taken the lead in establishing those standards and providing interim measures to be implemented by national courts when that independence has been threatened at national level.[42] The Court has also refused to recognise national courts as a 'court or tribunal' in the context of Article 267 TFEU where a referring court's independence has been compromised.[43] The Court has, however, stopped short of annulling national measures directly, relying instead on findings of infringement under the Article 258 TFEU procedure or preliminary rulings, both of which must be enforced or applied at national level.

In another of the EU's intertwined networks, the European System of Central Banks (ESCB), however, the Court of Justice has intervened extraordinarily and directly to annul a decision made at national level to protect the independence of a governor of a national central bank and, by extension, the independence of the ESCB.[44] It may arguable that this approach could be extended to protect the functioning of the Union's representative democracy from threats originating at national level.[45] The extraordinary intervention occurred in *Rimšēvičs*,[46] a case in which the Court of Justice, in proceedings brought under Article 14.2 of Protocol (No 4) to the Treaties, annulled a decision of the Latvian state to suspend the Governor of the Latvian Central Bank, who was facing accusations of serious misconduct. The most important aspect of the case revolved around how the Court's jurisdiction under Article 14.2 should be interpreted: was the Court empowered merely to declare the national decision an illegality, in a manner analogous to an infringement proceeding, or could the Court annul the national decision, in a like manner to its powers in an annulment action? The Court ultimately ruled that, in order to adequately safeguard

[42] The Court's approach has been the subject of some criticism: DV Kochenov and P Bárd, 'Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe' (2022) 60 *Journal of Common Market Studies* 150.

[43] See, for instance, Case C-326/23 *Prezes Urzędu Ochrony Konkurencji i Konsumentów*, EU:C:2024:940.

[44] Joined Cases C-202/18 and C-238/18 *Rimšēvičs v Latvia*, EU:C:2019:139. For illuminating commentary on this possibly underappreciated judgment, see: A Hinarejos, 'The Court of Justice Annuls a National Measure Directly to Protect ECB Independence: *Rimšēvičs*' (2019) 56 *Common Market Law Review* 1649; R Smits, 'A National Measure Annulled by the European Court of Justice, or: High-Level Judicial Protection for Independent Central Bankers' (2020) 16 *European Constitutional Law Review* 120; J Bast, 'Autonomy in Decline? A Commentary on *Rimšēvičs and ECB v Latvia*' (Verfassungsblog, 13 May 2019), at Verfassungsblog.

[45] Hinarejos, for instance, speculates whether the judgment might be extended to allow the Court to 'extend its jurisdiction in other situations of comparable "hybridity", *i.e.* where a less marked distinction between EU law and national law prevails' (Hinarejos (n 44) 1658). One might of course object that an intervention in the case of an appointed central bank governor and an elected MEP are appreciably different. This objection, however, would appear to assume that an MEP is legitimately elected by mere dint of a national declaration.

[46] *Rimšēvičs v Latvia* (n 44).

the independence of national central bank governors and by extension the independence of the ESCB, annulment was necessary, notwithstanding Advocate General Kokott's view that such annulment would be 'an extremely serious interference in the sphere of competence and the procedural autonomy of the Member States'.[47]

It is unclear how far, if at all, the *Rimšēvičs* case can be expanded, however.[48] In the first place, the Court's ruling in that case did not involve the Court ruling on whether a national appointee was qualified to sit on the ESCB. Moreover, the Court had a relatively clear and highly plausible textual authority to annul the national decision, given the existence of Article 14.2 of Protocol (No 4) and its similarity to Article 263 TFEU. Indeed, the Court seemed eager to highlight the uniqueness of the situation before it.[49] The academic consensus after *Rimšēvičs* would also be that the principle of the case and its encroachment on national autonomy are exceptional to the specific case of the ESCB.[50]

There are reasons, however, to suggest that the *Rimšēvičs* judgment might have application beyond the ESCB context. First, while the judgment did not constitute a direct ruling on whether a national appointee as central bank governor was qualified to take up their seat on the ESCB, the ruling may imply the existence of the possibility of excluding a national appointee. Suppose for a moment that Latvia had ignored the ruling to annul Mr Rimšēvičs's suspension and instead appointed a temporary replacement. Would it not be the case that as a matter of EU law, that replacement would have no right to sit on the ESCB? Second, the reasoning of the Court, insofar as it relates to the necessity of the independence of the ESCB, may be applied equally and perhaps even more strongly to the imperative of protecting the democratic character of the EU's legislative institutions. Moreover, if we are to accept that *Rimšēvičs* as a precedent of sorts should be limited to the unique circumstances of governorships of national central banks, because of the existence of a specific remedy in the shape of Article 14(2) in Protocol (No 4), it also be asked, why should the independence of the ESCB, which is not a value enumerated in Article 2 TEU, be afforded greater protection than the democratic character of the EU's legislature, democracy being a foundational Article 2 TEU value? While it is a perfectly orthodox interpretation to suggest that the specificity of Article 14(2) is a key distinction, that distinction would leave us with an uncomfortable conclusion: the EU's Treaties are more robust in protecting the independence of the EU's economic and monetary institutions than they are in the protection of its democratic ones. An alternative interpretation, that would allow for the rationale in *Rimšēvičs* to be extended to the EU's democratic network sits more easily with the EU as a Union of values. Indeed,

[47] *Rimšēvičs v Latvia* (n 44) para 60.
[48] For speculation on that question, see Hinarejos (n 44) 1655–1660 and Smits (n 44) 139–142.
[49] *Rimšēvičs v Latvia* (n 44) para 69.
[50] Hinarejos (n 44) 1655–1660 and Smits (n 44) 139–142.

if Article 12 of the Direct Suffrage Act cannot be reinterpreted to exclude undemocratic representatives, the question as to the consistency of that provision with Article 2 TEU in conjunction with Article 10 TEU recurs.

In summary, an interpretation of the existing Article 12 of the Direct Suffrage Act, which would allow the European Parliament to exclude national declared electoral winners on the basis that they were not elected in accordance with EU law requirements is plausible, based on Articles 2 and/or 10 TEU, particularly when viewed through the prism of *Rimšēvičs*, or at least one view of it. The paragraphs that follow describe how such an exclusionary interpretation of Article 12 could be operationalised procedurally.

3.3. Operationalising a reinterpretation of the Direct Suffrage Act

The detailed procedure for the verification of the credentials of MEPs is currently set out in Rule 3 of the European Parliament's Rules of Procedure.[51] The process laid out in Rule 3 would tend to reflect the Court of Justice's interpretation of Article 12 of the Direct Suffrage Act. According to Rule 3(3), the European Parliament, '[o]n the basis of a report by the committee responsible', which in practice is the European Parliament's Committee on Legal Affairs:[52] 'shall verify the credentials without delay and rule on the validity of the mandate of each of its newly elected Members and also on any disputes referred to it pursuant to the provisions of the [Direct Suffrage Act], other than those which, under that Act, fall exclusively under the national provisions to which that Act refers'.

Additionally, Rule 3(3) provides that the Committee on Legal Affairs' report 'shall be based on the official notification by each Member State of the full results of the election […]'. Given that the European Parliament is required to base its verification on the report of the Committee on Legal Affairs and that Committee is required to base its report on the official notifications of the Member States, this would appear accord the final say over the validity of the election of an MEP to the Member State authorities, at least insofar as any dispute relates to compliance with the applicable national rules. If the Committee is tied to basing its report exclusively on the official notifications of the Member States and the European Parliament is then bound by that report, this would seem to go farther than the literal meaning of the requirement to 'take note' of national notifications in Article 12 of the Direct Suffrage Act.

Ideally, to effectuate the exclusionary interpretation of Article 12 suggested above, Rule 3(3) would have to be amended to allow the Committee on Legal Affairs and the European Parliament to extend its considerations, as it is permitted to do

[51] European Parliament, *Rules of Procedure of the European Parliament* (January 2025), at www.europarl.europa.eu.

[52] See the website of the European Parliament at www.europarl.europa.eu.

under Rule 3(2) in relation to the question of whether an MEP holds an office incompatible with that of an MEP.[53] Short of such an amendment, the Committee on Legal Affairs and/or the European Parliament would have two possible options to seek to refuse to verify the credentials of a candidate whose election has been officially notified by a Member State. First, the Committee and/or the Parliament could afford precedence to an interpretation of Article 12 of the Direct Suffrage Act, as advocated for above, that might allow it to look beyond a national notification in circumstances in which there may have been flagrant breaches of democratic standards which have not and are not being remedied at national level. Second, they could interpret Rule 3(3), in an admittedly creative manner, to argue that while the Committee is required to base its report on the notification of the Member States and the Parliament is required to base its verification on that report, Rule 3(3) does not explicitly require either the Committee or the Parliament to base its report or verification on these factors *exclusively*.

It should be acknowledged, however, that any refusal of the European Parliament to verify credentials based on the approaches suggested above would almost inevitably be contested and end up before the Court of Justice in Article 263 TFEU annulment proceedings. The Court could then either reaffirm its existing approach of affording no discretion to the European Parliament *vis-à-vis* the verification of nationally declared results or change its approach as argued for above.

Another means of procedurally operationalising an exclusionary interpretation of Article 12 of the Direct Suffrage Act would be through litigation. In circumstances in which the European Parliament verified the credentials of MEPs based on national notifications, but there was clear evidence that there were either no elections or manifest breaches of democratic standards, there might be grounds to challenge the verification via Article 263 TFEU annulment proceedings.[54] Specifically, it could be argued that the European Parliament is under a duty, deriving from Article 10 TEU, to ensure its compliance with the principle of representative democracy in Article 10(1) and (2) TEU. Moreover, the Court of Justice in the *Commission v Czech Republic* and *Commission v Poland* cases stated that Article 10(2) and (3) TEU confers on EU citizens 'the *right* to be directly represented in the European Parliament and to participate in the democratic life of the [EU]'.[55] Verification of democratically illegitimate representatives might be characterised as a breach of this right. Moreo-

[53] The second paragraph of Rule 3(2) allows the European Parliament to establish a vacancy in the Parliament when 'it is established from facts verifiable from sources available to the public that a Member holds an office that is incompatible with that of [MEP]'. The suggested amendment to Rule 3(3) that would explicitly allow the Committee of Legal Affairs and the European Parliament to look beyond the national notifications would, of course, conflict with the existing case law of the Court of Justice.

[54] The rules on standing under Art 263 TFEU are, of course, notoriously restrictive and unsuccessful candidates would likely be best placed to mount such challenges.

[55] *Commission v Czech Republic* (n 22) para 115 and *Commission v Poland* (n 22) para 113, emphasis added.

ver, challenges could potentially be brought to annul legal acts adopted by the European Parliament, whether by direct actions under Article 263 TFEU or by indirect actions under the Article 267 TFEU preliminary ruling procedure, on the grounds that such legal acts have been adopted with an unlawfully constituted European Parliament within the meaning of Article 10 TEU.

By way of a final observation, it should be noted that the chances of the above arguments prevailing are admittedly slim and would be especially remote save in cases of the most egregious disregard by national authorities of democratic standards, e.g., where no elections were held at all and an autocratic Member State regime simply named its candidates or where the deficiencies of the electoral process were almost undeniably manifest and national authorities, including courts and electoral commissions, were unwilling or unable to remedy the issue. In such circumstances, the European Parliament and the Court of Justice would face a choice of either clinging to an unnecessarily restrictive interpretation of the Direct Suffrage Act or protecting the European Parliament's democratic character within the meaning of Article 10 TEU.

4. Ensuring the Council's democratic character

4.1. Existing rules and jurisprudence

As stated previously, the democratic legitimacy of the Council, in terms of its contribution to the EU's representative democracy, derives from democratic conditions at national level. In the case of the European Council, the national heads of state or government, and in the case of the Council, the governmental representatives, are described in Article 10(2) TEU as themselves being 'themselves democratically accountable either to their national Parliaments, or to their citizens'. There are strong arguments in favour of reading this provision as imposing directly effective obligations on Member States, not least the fact that the Court of Justice has described Article 10 TEU as concretising the democratic value in Article 2 TEU in the same way that Article 19(1) TEU has done for the rule of law value.[56] Accordingly, the Court's reasoning in *Portuguese Judges*,[57] which advanced the view that Article 19(1) TEU gives concrete expression to the Article 2 TEU value of the rule of law and imposes duties on Member States to ensure the independence of national courts which contribute to the Union's judicial network,[58] can be applied by analogy to

[56] Case C-418/18 P, *Puppinck*, EU:C:2019:1113, para 64; Case C-502/19 *Junqueras Vies*, EU:C:2019:1115, para 63; *Commission v Czech Republic* (n 22) para 114 and *Commission v Poland* (n 22) para 112. On the latter two judgments, see M Schuler, 'Paving the Way for an Enforcement of Democracy under Article 10 TEU? The Court's Judgements in Cases C-808/21 *Commission v Czechia* and C-814/21 *Commission v Poland*' (European Law Blog, 20 November 2024), at www.europeanlawblog.eu.

[57] Case C-64/16 *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

[58] *Ibid* paras 29–38.

impose a similar duty on the Member States to ensure the functioning of the EU's intertwined and co-dependent democratic network.[59]

If such duties exist to maintain the democratic accountability of Member State representatives in the Council to ensure the Union's functioning as a representative democracy, then questions arise as to how such duties should be enforced when they are breached by an autocratising Member State that is unresponsive to centralised and decentralised enforcement mechanisms. How, in such a circumstance, can be democratic legitimacy of these institutions be protected against trespass by undemocratic representatives? The problem of such trespass is arguably more significant in the Council than in the European Parliament. Representation will tend to be less diluted in the Council and more deference may be afforded to national positions. Moreover, a single Member State representative can cause significant disruption through the use of, or the explicit or implicit threat to use, a veto in certain matters. Article 7 TEU provides an obvious solution: the Council, acting unanimously, may suspend the voting rights of a Member State in the Council. However, suspension of voting rights does not prevent participation in the activities or deliberations of the Council.

An interpretation that would permit the exclusion of national representatives who fail to fulfil the Article 10(2) TEU qualification of democratic accountability at national level has been advanced in existing literature.[60] According to this interpretation of Article 10 TEU, Article 10(2) TEU should be read as imposing on Member State representatives a necessary qualification for representation in the Council, that of democratic accountability at national level; a failure to fulfil that qualification could allow, indeed require, the Council to refuse to accommodate such a national representative or the Council could possibly be challenged before the Union's judiciary for failing to exclude that representative.[61] There are, of course, strong, indeed more conventional legal arguments, that can be mobilised against this exclusionary and operative interpretation of Article 10 TEU, not least the *lex specialis* nature of the Article 7 TEU sanctioning procedure.[62] Moreover, the jurisprudence of the CJEU might tend to foreclose an exclusionary interpretation of Article 10 TEU. In *Hungary v European Parliament and Council*, the Court of Justice stated that: '[T]he EU legislature cannot establish, without infringing Article 7 TEU, a parallel procedure to that laid down by that provision, having, in essence the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing

[59] See D Krappitz and N Kirst, 'An Infringement of Democracy in the EU Legal Order' (EU Law Live, 29 May 2020), at eulawlive.com; Cotter (n 5) 79.

[60] Cotter (n 5). The operationalisation of such an interpretative approach is discussed below in Section 4.3.

[61] *Ibid* at 73–75.

[62] K Bradley, 'Showdown at the Last Chance Saloon: Why Ostracising the Representatives of a Member State Government is not the Solution to the Article 7 TEU Impasse' (Verfassungsblog, 23 May 2020), at verfassungsblog.de.

for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision'.[63]

However, in the next breath the Court allowed for the possibility of EU legislation establishing other procedures relating to Article 2 TEU values, 'provided that those procedures are different in terms of both their aim and subject matter'.[64] Moreover, in *Wagenknecht*,[65] in which the plaintiff alleged in Article 265 TFEU proceedings that the European Council had acted in breach of EU law in failing to exclude the Prime Minister of the Czech Republic from a meeting of that institution,[66] the General Court ruled that the case was manifestly devoid of any foundation of law owing to, *inter alia*, the fact that: '[F]or the purposes of Article 15(2) TEU, it is for the Member States alone, in accordance with their internal constitutional rules, to determine whether, in the context of the various proceedings of the European Council, they should be represented by their Head of State or Government respectively'.[67]

The above judgments do not close the door entirely to a reading of Article 10 TEU that would allow for or require exclusion of a representative of an undemocratic Member State from the Council outside of the use of Article 7 TEU. In the paragraphs that follow, arguments are advanced as to why these judgments do not foreclose an exclusionary interpretation of Article 10 TEU. However, it must be acknowledged the preponderance of evidence would suggest that anyone making the argument for such an interpretation will face an uphill battle.

4.2. The case for an exclusionary interpretation of Article 10 TEU

An argument for an operative interpretation of Article 10 TEU that would allow for or require the exclusion of national representatives in the Council, without recourse to the close-to-ornamental Article 7 TEU, has been made in previous literature.[68] However, there are many legal and pragmatic objections that may be made and have

[63] Case C-156/21 *Hungary v European Parliament and Council*, EU:C:2022:97, para 167. Although, it should be noted that this passage is directed explicitly at the EU's legislature, rather than at the Council working to exclude democratically illegitimate representatives.

[64] Ibid., para 168.

[65] Case T-715/19 *Wagenknecht v European Council*, EU:T:2020:340. An appeal against the Order of the General Court was rejected by the Court of Justice in Case C-504/20 P *Wagenknecht v European Council*, EU:C:2021:305.

[66] Mr Wagenknecht, a member of the Senate of the Czech Republic argued that the Prime Minister of the Czech Republic, Mr Andrej Babiš, should be excluded from meetings of the European Council owing to alleged conflicts of interest. Wagenknecht argued that the European Council's failure to exclude Mr Babiš amounted to in breach of Art 325(1) TFEU and Art 61(1) of Regulation (EU) 1046/2018 on the financial rules applicable to the general budget of the Union.

[67] Case T-715/19 *Wagenknecht v European Council* (n 65), para 37. The first sentence of Art 15(2) TEU provides: 'The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission'.

[68] Cotter (n 5).

been made to this argument.[69] Moreover, there is, as discussed above, CJEU jurisprudence that might suggest that an exclusionary interpretation of Article 10 TEU is not feasible, in particular, *Wagenknecht*[70] and *Hungary v European Parliament and Council*.[71] It will be recalled that in the former case that the General Court (upheld on appeal) ruled that it is for Member States alone to determine who represents them in the European Council.[72] In the latter case, the Court of Justice rejected the possible creation by the EU legislature of parallel procedures or identical measures that would replicate those which were available under Article 7 TEU.[73] On a *prima facie* basis, the exclusion of national representatives in the Council would appear to replicate or even exceed the specific sanction of suspension of voting rights in Article 7 TEU.

It is undoubtedly the case that the arguments against an exclusionary interpretation of Article 10 TEU are compelling. However, there remain counterarguments, and while the CJEU has closed the door somewhat on the exclusionary understanding of Article 10 TEU, it is submitted it has not shut it completely. The *Wagenknecht* ruling is not necessarily authority for the proposition that Article 10 TEU cannot be a basis for exclusion of a democratically illegitimate national representative from the European Council or the Council. A contrary, narrower reading of that judgment is also possible: while the choice of representative *who* a Member State sends to the European Council is purely a matter for the Member State itself, the question of *whether* the Member State has a right to representation in the institution in the first place is another matter.[74] If this narrower interpretation is adopted, then *Wagenknecht* has nothing to say about whether the Member State has a right to representation in the first place, since it was not argued in that case that the Member State was not entitled to representation at all.[75] Moreover, it could be argued that *Wagenknecht* relates purely to Article 15(2) TEU and the European Council, which is not part of the EU's legislature, and that a different calculation might apply in the context of the Council. Likewise, the full Court's statement in *Hungary v European Parliament and Council* need not be understood as permanently disabling an operative, exclusionary interpretation of Article 10 TEU, given that it is arguable that the exclusionary effect of Article 10 TEU does not replicate a sanction in Article 7 TEU and, moreover, would not be a creature of EU legislation.[76] It has been argued previously that a last-resort exclusionary interpretation and application of Article 10 TEU would not pursue the same objectives as Article 7 TEU, nor would it involve the adoption of identical measures:

[69] See Bradley (n 62).

[70] Case T-715/19 *Wagenknecht v European Council* (n 65).

[71] *Hungary v European Parliament and Council* (n 63).

[72] Case T-715/19 *Wagenknecht v European Council* (n 65) para 37.

[73] *Hungary v European Parliament and Council* (n 63), para 167.

[74] J Cotter, 'Untying the Ties that (don't) Bind: The European Council's Discretion to Exclude Democratically Unaccountable Representatives' (Verfassungsblog, 22 July 2022), at verfassungsblog.de.

[75] *Ibid*.

[76] Bradley (n 62).

> 'Exclusion, owing to failure to meet the requirement of democratic accountability in art.10(2) TEU, is not a sanction [in the sense of the suspension of a Member State's voting rights in Council under Article 7 TEU] and is not discretionary; rather, it arises by automatic operation of law; that is, when a Member State's Head of State/Government or its government ceases to be democratically accountable at national level to parliament or citizens'.[77]

This argument could be raised in response to reliance on the Court's statement about the procedural exclusivity of Article 7 TEU in *Hungary v European Parliament and Council*.

More generally, it may be argued that in many respects orthodox legal thinking has lagged behind the seismic change that the insertion of Article 10 TEU into the Treaties implied: that the EU should no longer be understood as a combination of two separate estates, the Member States and citizenry, but should be understood as an intertwined representative democracy in which all institutions, intergovernmental, supranational, or directly elected would acquire and maintain their legitimacy from their democratic derivation. It may take some time or confrontation with a stark and undeniable democratic crisis for embedded and internalised notions to shift.

As argued above in the context of the European Parliament, an expansive reading of *Rimšēvičs*[78] might also provide a basis for an operative reading of Article 10 TEU that would serve to exclude undemocratic national representatives from the Council for the purposes of maintaining the democratic character of that institution. If the independence of the ESCB is an important enough principle to allow the CJEU to annul a national measure suspending a governor of a central bank, despite not attracting specific mention in Article 2 TEU, it is at least arguable that the democratic nature of the EU's legislature could justify exclusion, notwithstanding the lack of a remedy equating to that contained in Article 14 of Protocol (No 4). If such a reading of Article 10 TEU is not possible, it again raises the awkward question as to why the independence of national central bank governors is placed on a pedestal above that of the EU's functioning as a polity founded on representative democracy.

4.3. Operationalising an exclusionary interpretation of Article 10 TEU

It is one thing to demonstrate that an exclusionary interpretation of Article 10 TEU may be open and another to show how it could be operationalised procedurally. As with operationalising Article 12 of the Direct Suffrage Act, the Treaties and EU secondary law present some potential obstacles. If one is to accept that Article 10(2) TEU presents an opportunity to exclude national representatives who are not democratically accountable from the Council, there are two possible ways in which the operation of such an exclusion can be conceptualised. On one reading, Article 10(2) TEU could be read as a necessary qualification for national representation on the

[77] Cotter (n 5) 79–80.
[78] *Rimšēvičs v Latvia* (n 44).

Council; a failure for national representatives to fulfil this qualification, *i.e.*, democratic accountability, would lead to exclusion of those representatives from the Council by automatic operation of law. Conceived of as such, a failure by the Council or the Council Presidency to exclude such national representatives would constitute a breach of Article 10 TEU, making the Council unlawfully constituted and potentially opening the Council to challenge for a failure to act under Article 10 TEU.[79] Such an understanding of Article 10 TEU would then also, of course, leave any legal act of the unlawfully constituted Council open to challenge, whether by means of direct (Article 263 TFEU) or indirect (Article 267 TFEU) actions. Alternatively, one could read Article 10(2) TEU as not operating automatically to exclude democratically illegitimate national representatives, but as providing the Council with an opportunity to decide on that question. Such an understanding runs into at least two objections, however: first, there is no specific procedure or legal basis provided for in the Treaties to allow the Council to make such a determination; secondly, the wording of Article 10(2) TEU would suggest that the democratic accountability of national representatives is either an assumed state of affairs or a necessary qualification for representation on the Council irrespective of the Council's views on the matter. For these reasons, it is suggested that an interpretation that would require exclusion of democratically illegitimate national representatives from the Council by automatic operation of law is to be preferred. The question remains, however, as to how this exclusion would be realised in practice.

Given the lack of a procedure that would allow the Council to vote to exclude democratically illegitimate national representatives from that institution, the only opportunity to exclude such representatives, or to at least bring the matter to a head, would appear to lie in the convening of the Council. The key procedural provision would appear to be Article 237 TFEU, which is replicated in Article 1(1) of the Rules of Procedure of the Council,[80] and provides: 'The Council shall meet when convened by its President on his or her own initiative or at the request of one of its members or of the Commission'.

Although it would undoubtedly constitute a creative interpretation of Article 237 TFEU, the convenor of the Council, whether its presidency, another member, or the Commission, could in convening the Council specify the membership of the institution for the purpose of its meeting, calling attention to the requirement under Article 10(2) TEU that national representatives be democratically accountable at national level, and excluding the democratically illegitimate national representatives. Such an approach, however, would appear contrary to Article 16(2) TEU, which provides for the composition of the Council: 'The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote'.

[79] See generally, Cotter (n 5) 77–80.

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

This provision read in isolation appears to fix membership of the Council: each Member State is entitled to representation in the Council by mere virtue of being a Member State. One might counter, however, that Article 16(2) TEU must be cross-read with Article 10(2) TEU, which, of course, requires that national representatives be democratically accountable at national level. Another objection to such an approach might be the uncertainty and practical chaos that it would unleash: the impugned Member State and the Council might simply ignore the exclusion, and the potential for abuse of the convening power in this way is readily apparent.[81] However, in an extreme circumstance, in which a Member State were undisputedly no longer a democracy and no other avenue, such as Article 7 TEU, appeared open, this approach would at least serve to bring matters to an apogee in the form of a judicial review before the CJEU: either the Member State would seek to challenge the purported exclusion of it representatives or, if the Council continued as before, the attempt to exclude might lead to proceedings seeking to annul any legal acts adopted by the unlawfully constituted Council. Indeed, an attempt to exclude the democratically illegitimate national representatives would not be a required precursor to the latter type of challenge to the Council's output, whether by way of direct or indirect actions. Such actions could also potentially be instituted by natural persons, as well as other EU institutions, though the hurdle of standing for the former might be considerable.

As with any attempt to operationalise an exclusionary interpretation of Article 12 of the Direct Suffrage Act, it must be emphasised that operationalisation of Article 10 TEU to exclude democratically unaccountable national representatives from the Council would face significant doctrinal and practical resistance. It would, therefore, be suitable only in the most egregious of circumstances and, even then, as a last resort. In every event, as acknowledged above, such an approach would bear significant risks. These risks are discussed in greater detail in the Section that follows, which also considers the risks of inaction in such circumstances.

5. Risks of action versus risks of inaction

It cannot be denied that the reinterpretation of Article 12 of the Direct Suffrage Act and the adoption of an operative interpretation of Article 10 TEU as last-resort responses to autocratic consolidation at national level would bear significant risk.[82] It must be acknowledged that these interpretative solutions involve conferring significant power on the European Parliament, the actor convening the Council, as well as the CJEU, which would allow them to make a determination that representatives from or of a Member State should be excluded from the relevant institution. Moreover, these

[81] See generally, Cotter (n 5) 80–84.

[82] See J Cotter, 'The Last Chance Saloon: Hungarian Representatives may be Excluded from the European Council and the Council' (Verfassungsblog, 19 May 2020), at verfassungsblog.de and Bradley (n 62) for discussions of potential drawbacks of an exclusionary approach. On the risks of exclusionary responses to autocratisation more generally, see Theuns (n 7) 179–198. See also Spieker (n 15) 243–290.

interpretative approaches also place the CJEU in the invidious position of, almost inevitably, having to be the arbiter on when democratic red lines have been crossed and in determining the contours. This, in turn, of course, could lead to intervention by national authorities, especially superior courts, who might charge that the EU's institutions are trespassing on the constitutional autonomy of the Member States.

The potential for abuse of this power is easily imaginable; the European Parliament could, for instance, decide to exclude democratically elected representatives simply because a majority of members wished to do so for purely political reasons. However, the likelihood of such a possibility is – in this author's view – highly remote for a number of reasons. Firstly, any exercise of a power to exclude, whether under the Direct Suffrage Act or Article 10 TEU would have to be performed under the judicial control of the CJEU. The CJEU's involvement would not be limited to just post-review of the decision to exclude either; it is possible that the CJEU would already have delivered rulings on the compliance with EU law of electoral rules and practices at national level, whether in the context of infringement proceedings or the preliminary reference procedure. These rulings, whether interim or final, might also provide a basis for the European Parliament's decision under Article 12, with that decision, as stated above, being subject to review by the Court under Article 263 TFEU. Second, from a pragmatic standpoint, it is unlikely that the European Parliament would abuse a *de facto* power of exclusion. For one thing, use of an exclusionary power for purely self-interested reasons by a faction or factions of parliamentarians would be an unsafe practice beyond a potential short-term advantage, in that such a tactic could subsequently be wielded against those using it. More significant, however, is the diffusion of power within the European Parliament. Owing to the lack of pan-European electoral lists, and the lack of a European demos and a common European media space capable of significant cut-through with citizens at national level, as well as the use of proportional representation in European Parliament elections, the European Parliament has not developed the type of highly partisan and disciplined party system present in many national-level parliaments.[83] As a result of this, it may be difficult for wield a majority in favour of excluding representatives under Article 12, given that to do so will invariably require the support of a plurality of political groupings within the Parliament. Similar dynamics will play out within the Council in terms of both judicial review and of self-interest and diffusion of

[83] In other words, the European Parliament accords better with James Madison's vision for the United States Congress than that body does today. In *Federalist* No.10, Madison argued that the extended sphere of the Federation would operate as a solution to the factionalism that infected government within the individual states and served as a threat to the rights of the minority: 'Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other'. (J Madison, A Hamilton, and J Jay, *The Federalist Papers* (1788)). See N Feldman, *The Three Lives of James Madison: Genius, Partisan, President* (Picador 2017) 180–188.

power. Moreover, calls by the presidency of the Council or of another Council member to exclude national representatives would entail serious political risks for the political figures in question.

The risks of inaction have been indicated previously: autocratic trespass to the EU's legislative institutions; autocratic influence over legislative procedure and legislative output, as well as the subjection of other EU Member States and EU citizens to laws that are made by bodies that do not comply with the requirements of Article 10 TEU. There may, of course, be a school of thought that would counsel against any (perceived) overreactions to such trespass, if it is by one Member State or a small number of minor Member States. Advocates of such an approach may take succour from Kelemen's autocratic equilibrium thesis and the history of federal-style governments hosting and out-surviving (soft) autocratic sub-units.[84] However, there are a number of problems with any such sanguine approach that could be derived from an optimistic reading of the authoritarian equilibrium thesis.[85] First, once again, one cannot simply ignore the constitutional requirements of Article 2 and 10 TEU. Additionally, there is a compelling argument to be made that acts adopted by these institutions when constituted in a manner contrary to the principle of representative democracy are invalid and ought to be annulled, whether directly via Article 263 TFEU or indirectly via Article 267 TFEU.[86] Second, and related to the previous point, the presence of undemocratic representatives in the EU legislature and their involvement in creating and adopting acts that apply across all Member States would be difficult to square with the democratic rights of EU citizens. Third, any argument for a more circumspect approach to some minimal autocratic trespass to the EU's legislature, the power of which might be diluted by the preponderance of democratic representation, and which might – in any case – disappear over time, contains weaknesses both general and specific to the EU. Generally, it should be noted that even minorities of undemocratic representatives in greater federal-style structures can have an outsized influence over legislation and decision-making. This observation is particularly true in the EU context, specifically in the Council, where Member States will enjoy vetoes in some areas, which can also be used as leverage more generally across a number of policy areas.[87] Moreover, the Council is considerably smaller in size than the European Parliament and there tends to be a culture within that institution and within EU governance more generally which is deferential to sovereignty

[84] RD Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) 27 *Journal of European Public Policy* 481.

[85] To be clear, Kelemen does not advocate for such a sanguine attitude.

[86] Cotter (n 5) 73–75.

[87] Kelemen (n 84) 484–485. Responses to autocratisation are also hampered by national vetoes, meaning that there is no guarantee that even a Member State falling into hard authoritarianism would rouse a response under Art 7 TEU.

and seeks consensus.[88] The presence of even a single undemocratic national representative in the Council can, therefore, have deleterious consequences on the EU's functioning as a representative democracy.

The final and most significant problem with inaction is the danger of disintegration of the EU or the loss of the authority of its laws in all Member States. EU institutions may not, in real terms, have the final say over whether the EU's democratic network can tolerate the presence of undemocratic national representatives in the EU's legislature, particularly the Council. A failure to act by EU institutions like the Commission or the CJEU could provoke national constitutional or superior courts to intervene. In other words, inaction could lead to a *Solange III*-type moment in which a national court could annul or refuse to recognise acts adopted by EU institutions which do not fulfil the requirements of Article 10(1) and (2) TEU.[89] The German Federal Constitutional Court in its *Lisbon* judgment may already have laid the groundwork for such a possibility: in its ruling, the Karlsruhe court warned that the German principle of democracy could not be balanced against other legal interests and that the principle of democracy was not amenable to amendment because of its fundamental quality.[90] It is arguable that if a situation arose in which national representatives in the Council and/or the European Parliament lacked democratic legitimacy within the meaning of Article 10 TEU, those institutions and their acts might not comply with German constitutional requirements pertaining to democracy.

6. Concluding comments

This article demonstrates that existing orthodox interpretative approaches to the rules concerning the composition of the European Parliament and the Council leave the EU's legislature vulnerable to trespass by representatives from or of the Member States who do not fulfil basic conditions of democratic legitimacy. This state of affairs would appear to exist, in part, due to an initial interpretative approach taken to the Treaties both in scholarship and by the Court of Justice that prioritised national autonomy and constitutional identity over the protection of the EU's foundational values. It is an approach also which had its seeds prior to the emergence of the rule-of-law crisis in the EU but has persisted, in some contexts, thereafter. Whether the Court would continue with this approach in extremis is doubtful, however. In this author's view, there is a point at which this approach becomes unsustainable. If one is to accept that the EU is a constitutional order of infinite duration with its own values, it is surely a corollary that the same order is entitled to defend itself as a last resort against threats emanating from national orders. While there is a division of competences between the Union and the Member States, with some tasks in the defence of the EU's values being within

[88] *Ibid*.

[89] A point intimated also by Szabó (n 27).

[90] 2 BvE 2/08, *Treaty of Lisbon*, Judgment of the Second Senate of the Federal Constitutional Court [30 June 2009] paras 216–217.

Member State competence, it is also the case that an absolutist approach to respect for national autonomy and constitutional identity may leave the EU defenceless in terms of assuring the democratic legitimacy of its legislature. In other words, while national identity and autonomy must be respected, this respect has its limits. Indeed, the Court of Justice's impatience with national identity claims in the context of the EU's democracy has been evident in the recent judgments.[91]

This article suggests that if textual reforms to the Treaties and secondary law are not possible pragmatically, a change of approach to interpretation of the existing rules may need to take place as an *ultima ratio*. This approach would involve interpreting Article 12 of the Direct Suffrage Act as allowing the European Parliament to refuse to certify representatives that had been declared officially as electoral winners at national level, if the elections in question were not conducted in accordance with minimal EU democratic standards. Moreover, it has been argued that Article 10 TEU should be understood in an operative manner as precluding representatives from national level who are not democratically accountable within the meaning of Article 10(2) TEU. This article has also sought to outline how these exclusionary interpretations could be operationalised procedurally. It is contended in this article that this new interpretative approach is not only plausible, but is more consistent with the Union of values into which the EU has evolved constitutionally. If the EU is to be founded on representative democracy as Article 10(1) TEU claims, then the EU's legislative institutions must be able to defend their democratic status if this claim is to be anything but rhetorical. The ultimate means of defence, when all else fails, must be the ability for these institutions to quarantine themselves against undemocratic representatives. While this ultimate means of defence may conflict with other core principles such as respect for national constitutional identity, these principles should not prevail over the democratic value and the requirement that the EU be founded on the principle of representative democracy. The approach of the Court in Justice in *Rimšēvičs*,[92] in which the Court was prepared to prioritise the independence of the ESCB over national autonomy and annul a national measure directly, also potentially paves the way for more a more direct and muscular approach to the protection of the democratic credentials of EU institutions when threatened by events or conditions at national level. There are of course risks attendant with the suggested interpretative approach. However, the risks of inaction, in terms of the spread of autocratisation to the EU's institutions or the loss of authority of EU law and even disintegration, are equally if not even more profound.

[91] (n 22).
[92] *Rimšēvičs v Latvia* (n 44).

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The Vital Interest to Protect Europe: A Change in the International Regime on the Use of Force to Foster European Defence?

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ABSTRACT: The UK-France joint nuclear statement of 10 July 2025 and the Treaty between the United Kingdom and Germany on friendship and bilateral cooperation of 17 July 2025 refer to an old doctrine of international law: the doctrine of vital interests. The recourse to a legal doctrine that predates not only the European Union but also the prohibition of the use of force and the United Nations could indicate that the most powerful European States are seeking to protect the entire European territory from war by employing all the instruments available under international law. This objective cannot be attained using EU law. This paper argues that these powerful States, among which there are the two nuclear powers in the Western Europe, namely the United Kingdom and France, are using old categories of international law to pursue the supreme objective of the territorial integrity of the European continent: Europe's vital interest, indeed.

KEYWORDS: doctrine of vital interests – European integration – Northwood Declaration – UK-Germany treaty on friendship and bilateral cooperation – prohibition of the use of force – NATO.

1. Introduction

The purpose of protecting European territory from war was at the very root of the entire European integration process.

It inspired the 1950 Schuman Declaration, the manifesto of the ideals underpinning the institution of the European Coal and Steel Community.[1] According to the France foreign minister, European integration was 'indispensable to the maintenance of peaceful relations' and necessary for 'world peace'; i.e. it was a prerequisite for

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[1] See Schuman Declaration (9 May 1950), at european-union.europa.eu.

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preventing further wars that would undermine peace and security on the European continent.[2]

Still today, protecting the European continent from war remains one of the principal objectives of European integration.

It is pursued within the European Union through EU law.[3] In March 2025, the Commission published a White Paper for European Defence – Readiness 2030.[4] After acknowledging that European 'continent is currently being affected by war, aggression and other hostile acts', the Commission stated that the 'only way [the European Union] can ensure peace is to have the readiness to deter those who would do us harm'.[5] This would mean that '[t]he moment has come for Europe to re-arm' and to increase its 'capabilities and military readiness to credibly deter armed aggression'.[6] Furthermore, in May 2025 the Council adopted a regulation establishing the Security Action for Europe, a financial instrument to foster investments by States in the European defence industry.[7]

However, recent practice seems to indicate that some major European States are seeking to protect the European continent from war even beyond the European Union. In this regard, two events would be of great interest. The first one is the Northwood Declaration, i.e. the UK-France joint nuclear statement of 10 July 2025 (hereinafter, the UK-France Declaration).[8] The second one is the Treaty between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany on friendship and bilateral cooperation, signed on 17 July 2025 (hereinafter, the UK-Germany Treaty).[9] What is remarkable about these two acts is that, in some of their passages, both would draw upon a doctrine widely considered to be only part of the history of international law on the use of force.

[2] Ibid.

[3] *Ex multis*, see the recent contributions by SE Anghel and M Damen, *The future European security architecture: Dilemmas for EU strategic autonomy* (European Parliament 2025). See also RA Wessel, 'The Participation of Members and Non-Members in EU Foreign, Security and Defence Policy' in WT Douma, C Eckes, P Van Elsuwege, E Kassoti, A Ott and RA Wessel (eds), *EU External Relations Law: European and Global Challenges* (T.M.C. Asser Press 2021) 177 and P Koutrakos, *The Common Security and Defence Policy* (Oxford University Press 2013).

[4] European Commission, 'White paper for European defence – Readiness 2030' (28 March 2025), at commission.europa.eu.

[5] Ibid., 1.

[6] Ibid., 1–2.

[7] Council Regulation (EU) 2025/1106 of 27 May 2025 establishing the Security Action for Europe (SAFE) through the Reinforcement of the European Defence Industry Instrument. The financement of European Defence is well explained by S Rodrigues, 'Financing European Defence: The End of Budgetary Taboos' (2023) 8 *European Papers* 1155.

[8] Statement by the United Kingdom and the French Republic on Nuclear Policy and Cooperation (10 July 2025), at www.gov.uk and www.elysee.fr.

[9] Treaty between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany on friendship and bilateral cooperation (17 July 2025), at www.gov.uk and www.auswaertiges-amt.de.

2. The UK-France Declaration and the UK-Germany Treaty

The 10 July Declaration excluded the existence of 'situations […] in which the *vital interests* of either France or the United Kingdom could be threatened without the *vital interest* of the other also being threatened'.[10] These words reiterate the 1995 Chequers Declaration, in which the two States had already ruled out 'situation dans laquelle les intérêts vitaux de l'un de nos deux pays […] pourraient être menacés sans que les intérêts vitaux de l'autre ne le soient aussi'.[11] However, the 10 July Declaration added a significant passage to the common understanding of the two States: France and the United Kingdom 'agree that there is *no extreme threat to Europe* that *would not prompt a response by our two nations*'.[12]

In turn, the UK-Germany Treaty was prompted, according to the very terms of the preamble, by the common will of the two States to 'better master' together, 'by deepening their close cooperation as European neighbours and allies', the 'new challenges to Euro-Atlantic security'.[13] Among the new challenges, the preamble mentions 'the Russian Federation's brutal war of aggression on the European continent', significantly described as 'the most significant and direct threat to their security'.[14] To realise the purpose of the Treaty, Article 3(3) establishes a crucial obligation: '[c]onscious of the close alignment of their *vital interests* and convinced that there is no strategic threat to one which would not be a strategic threat to the other', the United Kingdom and Germany 'affirm […] their deep commitment to each other's defence and *shall assist one another, including by military means, in case of an armed attack on the other*'.[15]

Although different in many respects, the UK-France Declaration and the UK-Germany Treaty might be based on the same premises.

[10] Italic added. In the French version: 'nous n'imaginons pas de situation dans laquelle les intérêts vitaux de l'un de nos deux pays, la France et le Royaume-Uni, pourraient être menacés sans que les intérêts vitaux de l'autre ne le soient aussi' (see UK-France Declaration (n 8)).

[11] Déclaration conjointe franco britannique sur la coopération nucléaire entre les deux pays (London, 30 October 1995), at www.vie-publique.fr.

[12] Italic added. In the French version: 'il n'existe pas de menace extrême contre l'Europe qui ne susciterait pas de réponse de nos deux nations' (see UK-France Declaration (n 8)).

[13] In the German version, the intention to 'Herausforderungen besser meistern werden', indem sie ihre enge Zusammenarbeit als europäische Nachbarn und Verbündete', the 'neuen Herausforderungen von großer Tragweite für die euro-atlantische Sicherheit in einem Zeitalter zu stellen' (see *supra* n 9).

[14] In the German version, 'in der Erkenntnis, dass der brutale Angriffskrieg der Russischen Föderation auf dem europäischen Kontinent die bedeutendste und unmittelbarste Bedrohung ihrer Sicherheit darstellt' (see UK-Germany Treaty (n 9)).

[15] Italic added. In the German version, '[i]m Bewusstsein der engen Übereinstimmung ihrer essenziellen Interessen und in der Überzeugung, dass es keine strategische Bedrohung für die eine Vertragspartei gibt, die nicht auch eine strategische Bedrohung für die andere wäre, bekräftigen die Vertragsparteien als enge Verbündete ihr tiefes Bekenntnis zur gegenseitigen Verteidigung und stehen einander im Fall eines bewaffneten Angriffs auf die andere Vertragspartei bei, auch durch militärische Mittel' (see UK-Germany Treaty (n 9)).

According to both acts, States would have a set of fundamental prerogatives, defined as 'vital interests', the defence of which may involve the use of force. The realm of vital interests for a State is not predetermined. Rather, determining which interests can be considered vital to a State requires an act of will on the part of that State: for example, a declaration or a treaty. In this sense, through the declaration of 10 July, France and the United Kingdom would have made it clear that all interests vital to one of the two States are also vital to the other ('we do not see situations arising in which the vital interests of either France or the United Kingdom could be threatened without the vital interest of the other also being threatened'). A similar evaluation would have been carried out by the United Kingdom and Germany by means of the treaty signed on 17 July ('[the Parties are c]onscious of the close alignment of their vital interests and convinced that there is no strategic threat to one which would not be a strategic threat to the other').

Another assumption underlying both the UK-France Declaration and the UK-Germany Treaty would be the power of every State to determine which territories outside its borders, if attacked, would provoke an armed response on its part for the purpose of defending its vital interests. Through the Declaration, France and the United Kingdom announced that their 'response' would be 'prompt[ed]' by any 'extreme threat to [the whole] Europe'. It is not unreasonable to interpret these words as a commitment by both States to repel any attack against any part of European territory. In the same vein, by means of the Treaty, Germany and the United Kingdom, after declaring that their vital interests coincide, have compelled themselves to 'assist one another, including by military means, in case of an armed attack on the other'.

A third premise, implicit in the previous ones, is that both the determination of a State's vital interests and the identification of extra-borders territories which, if attacked, would trigger a military response, may produce some effects on third States.

3. The old doctrine of vital interests

The premises underpinning both the UK-France Declaration and the UK-Germany Treaty seem to situate these acts in a long-gone era, at the dawn of the process which led to the establishment of the international discipline of the use of force as we know it today.[16] An era in which neither the prohibition of the use of force, nor the right to

[16] On the history of the prohibition of the use of force, see I Brownlie, *International Law and the Use of Force by States* (Oxford University Press 1963); H Kelsen, 'The Old and the New League: The Covenant and the Dumbarton Oaks Proposals' (1945) 39 *American Journal of International Law* 45; E Jiménez de Aréchaga, ' International Law in the Past Third of Century' in *Recueil des cours* 1978; Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press 2017); T Ruys, 'The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)? (2014) 108 *American Journal of International Law* 159; C Gray, *International Law and the Use of Force* (Oxford University Press 2018); O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2021).

individual and collective self-defence were yet enshrined in the Charter of the United Nations and, perhaps, not even in customary law. A time when the early forms of renunciations of the use of force by States co-existed with the doctrine of vital interests.

The doctrine of vital interests was invoked by Great Britain during an exchange of letters with the United States, in the context of the negotiations of a draft treaty for renunciation of war as an instrument of national policy, in 1928. As it is well known, according to Article 1 of that treaty, States condemn and renounce war in their mutual relations.[17] In a letter dated 19 May 1928, Sir Chamberlain replied to the United States, specifying the conditions under which Great Britain could accept the commitment set out in Article 1, i.e. the conditions under which it could renounce the use of force.

The 'language' of Article 1 made 'it desirable' for Sir Chamberlain 'to remind […] that there are certain regions of the world the welfare and integrity of which constitute the special and *vital interest* for our peace and safety'.[18] Any 'interference with these regions cannot be suffered', so that '[t]heir protection against attack is to the British Empire a measure of self-defense'.[19]

According to Sir Chamberlain, the renunciation of the use of force would have been acceptable only if it had not been absolute. In particular, such renunciation should not have prevented States from resorting to armed force to defend their vital interests, whatever they might be. In this sense, under to the doctrine developed in the letter of 19 May 1928, the protection of vital interests should have been recognised by all Parties to the Treaty for Renunciation of War as a legitimate basis for the use of force by one State against another, even in a legal regime centred on the ban of the use of force.

One might therefore wonder what implications the 'proximity relationship' between the UK-France Declaration and the UK-Germany Treaty on the one hand, and the old doctrine of vital interests on the other hand, might have for the current regulation of the international use of force.[20] In other words, why did Germany, France and the United Kingdom evoke the doctrine of vital interests in 2025?

[17] See International Treaty for the Renunciation of War as an Instrument of National Policy (Paris, 27 August 1928), Art 1, at treaties.fcdo.gov.uk in a scanned pdf copy: 'The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another'. On the 1928 Treaty, see DH Miller, *The Peace Pact of Paris. A Study of the Briand-Kellogg Treaty* (GP Putnam's Sons 1928).

[18] Italic added. The letter of 19 May 1928 is reproduced in A Lysen, 'Le Pacte Kellogg: documents concernant le traité multilatéral contre la guerre: signé à Paris le 27 août 1928' (A.W. Sijthoff, 1928), 44 ff., and also available at history.state.gov. On the doctrine of vital interests, see P Lamberti Zanardi, *La legittima difesa nel diritto internazionale* (Giuffrè 1972) 79 ff. and DW Bowett, *Self-Defence in International Law* (Frederick A. Praeger 1958) 212 ff.

[19] Letter of 19 May 1928 (n 18).

[20] The expression 'proximate relationship' is used by DW Bowett, 'Collective Self-Defence under the Charter of the United Nations' (1955-1956) 32 *British Yearbook of International Law* 130, 134.

4. The overlap with the 1949 North Atlantic Treaty

The question is even more pressing when one considers that the States Parties to the UK-France Declaration and the UK-Germany Treaty are also Parties to the 1949 North Atlantic Treaty (NATO Treaty) and, therefore, they could avail themselves of the protection provided for by its Article 5, according to which 'an armed attack against one or more of [the Parties] in Europe or North America shall be considered an attack against them all'.

A question thus concerns the legal effects the UK-France Declaration and the UK-Germany Treaty may entail, given that they were adopted by three States already members of the NATO Treaty, which establishes analogous obligations. In other words, are there cases in which the UK-France Declaration and the UK-Germany Treaty can produce legal effects that the NATO Treaty is not able to entail?

Supposedly, this may occur where an armed attack is brought in Europe by another State Party to the NATO Treaty.

In this unprecedented situation, the mechanism referred to in Article 5 may not prove fully adequate. By affirming the duty of every State Party to assist another State Party if it is attacked, without any specification regarding the aggressor State, the plain wording of Article 5 does not prevent its application when the aggressor State is a Party of the NATO Treaty. However, considering the normative context, it could also be argued that the NATO Treaty prohibits its Parties from resorting to the use of force against each other. This interpretation might flow from its Article 1, which obliges the Parties 'to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered'. If a State Party to the NATO Treaty were to attack a European State, and the mechanism provided for in Article 5 failed to work, the Declaration could therefore serve as a 'backup' legal basis for an intervention by France and the United Kingdom. In turn, under Article 3(3) of the UK-Germany Treaty, the involvement of the United Kingdom in the conflict could also prompt Germany to take part in it.

Another hypothesis, non-necessarily alternative to previous one, is that of an armed attack launched against Germany, France, the United Kingdom or another European State, by a permanent member of the UN Security Council.

In this situation, the Security Council would be stalled and, as a result, the entire mechanism of collective security established by the Charter of the United Nations could collapse. If the aggressor State were a permanent member of the UN Security Council but not a member of the NATO Treaty, Article 5 would be applicable. But if the aggressor State were a permanent member of the UN Security Council *and* a member of the NATO Treaty, there would be no conventional rule to rely on until July 2025. The UK-France Declaration and the UK-Germany Treaty would have filled this gap and prevented the European State under attack from facing the aggression alone. Even in this second scenario, then, the UK-France Declaration and the

UK-Germany Treaty would serve as a 'subsidiary' legal basis for the intervention of France, Germany and the United Kingdom.

5. Conclusions

This very brief analysis would suggest that the objective of the UK-France Declaration and the UK-Germany Treaty is to establish a legal framework to be applied in the event of the collapse of the NATO mechanism, the United Nations system, or both. If this hypothesis proved to be correct, it would imply that, in a few days, France, Germany and the United Kingdom have introduced, into the international legal order, a conventional framework that would protect the vital interests of the European continent should the current mechanisms of collective security lose their effectiveness.

This may explain the implicit, yet clear reference to past international law. To identify the legal framework that could best replace 'modern' international law if it were to become ineffective, France, Germany and the United Kingdom turned their attention to what existed before the Charter of the United Nations, before the peremptory prohibition of the use of force, before the right to self-defence, and of course before the foundation of the European Union.

These July 2025 events, i.e. the UK-France Declaration and the UK-Germany Treaty, would not be in violation of EU law. They could strengthen the common European defence that EU member States are struggling to develop with the limited instruments provided by EU law. Furthermore, international law could bring together again, to protect the vital interest of European territorial integrity, EU member States and the United Kingdom.

Of course, the assumption which presumably underlies the UK-France Declaration and the UK-Germany Treaty is that customary law on collective self-defence, guaranteed by Article 51 of the UN Charter, may prove to be insufficient to ensure the security of Europe. Or the Parties to the UK-France Declaration and the UK-Germany Treaty, namely a major European State and the permanent European members of the UN Security Council, suspect that customary law on the use of force will undergo significant changes in the foreseeable future.

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Perspectives on the Reformed EU Judicial Architecture
***edited by* Lorenzo Grossio *and* Davor Petrić**

Advancing a Multi-Perspective Assessment of the Reformed EU Judicial Architecture: An Introduction to the Special Section

Lorenzo Grossio[*] *and Davor Petrić*[**]

'The most relevant overhaul of the Union's judiciary since the creation of the Court of First Instance in 1989'.[1] 'The genie out of the bottle'.[2] 'A milestone in the incremental process of transformation of the EU judicial architecture'.[3] Much has already been said about the 2024 landmark reform of the EU judicial architecture, especially concerning its focal point: the partial transfer of jurisdiction on preliminary references from the Court of Justice to the General Court. Even if comparatively less considered in the literature, the two other key novelties introduced by the reform – the new regime for publication of written pleadings and participation in preliminary reference proceedings, as well as the extension of the scope of the prior admission on appeal mechanism – have not slipped through the scholarly cracks. Hence, editing a Special Section on the 2024 amendments to the Statute of the Court of Justice of the European Union,[4] one year after their adoption and following extensive scholarly contributions previously published,[5] may at first sight appear as a futile or untimely effort.

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[1] D Sarmiento, 'Gaps and "Known Unknowns" in the Transfer of Preliminary References to the General Court' (2024) 3 *Rivista del Contenzioso Europeo* 1, 2.

[2] T Tridimas, 'Sharing Uniformity: A New Era Beckons' (2024) 1 *LCEL Research Paper Series* 2, 7.

[3] S Iglesias Sánchez and D Sarmiento, 'Insight: A New Model for the EU Judiciary: Decentralising Preliminary Rulings as a Paradoxical Move Towards the Constitutionalisation of the Court of Justice' (EU Law Live, 8 April 2024), at eulawlive.com, 1.

[4] Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3 on the Statute of the Court of Justice of the European Union.

[5] Particularly, while not exhaustively, see the various contributions published in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live, 2024), at eulawlive.com; M Condinanzi and

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Upon closer look, the peculiar features and profound implications of the reform under analysis still require further reflection. There are at least two reasons for that. First, most scholarly analyses on the subject have been published before or in the wake of the reform becoming operational in October 2024. The early practice developed over the last eight months, leading the General Court to finally render its first preliminary ruling[6] in the same days as we finalise this Introduction, warrants consideration. On the one hand, it paves the way to provide fresh new insights for addressing interrogatives that have previously emerged – such as the Court's approach to attributing the preliminary references to the General Court under the so-called *guichet unique* mechanism, the role of Advocates General at the General Court, as well as the impact of the dividing line between the Court and General Court's jurisdiction on national judicial authorities' drafting of preliminary questions. On the other hand, the recent practice is liable to raise even new questions on the evolution of the EU judicial architecture.

Secondly, the 2024 reform of the Statute of the Court of Justice of the European Union has previously been assessed from a predominantly procedural standpoint. Assessing the novelties introduced after their full implementation provides a propitious time for expanding the scope of the analysis to a multi-perspective approach. That is the main objective of this Special Section and its key methodological underpinning. Indeed, the recently introduced amendments address sensitive structural features of the EU judicial system and pave the way for a profound rethinking of its architecture in the near future. The implications of the reform extend well beyond

C Amalfitano (eds), *La riforma dello Statuto della CGUE* (2025) 3 *Rivista del contenzioso europeo* 1; B Nascimbene and G Greco (eds), *La riforma dello Statuto della Corte di giustizia* (2024) *Eurojus* I, as well as the following contributions: J Alberti, 'Il trasferimento del rinvio pregiudiziale al Tribunale, all'alba della sua entrata in vigore' in B Cortese (eds), *Il diritto dell'Unione europea nei rapporti tra ordinamenti: tra collaborazione, integrazione e identità* (2024) *Quaderni AISDUE* 511; R Alonso García, 'The Persian Jurist in Luxembourg: On the Decentralisation of the Preliminary Ruling Procedure' (EU Law Live, Weekend Edition No 195, 12 July 2024), at eulawlive.com; C Amalfitano, 'The Future of Preliminary Rulings in the EU Judicial System'(EU Law Live, Weekend Edition No. 133, 4 March 2023), at eulawlive.com; M Bobek, 'Preliminary Rulings Before the General Court: What Judicial Architecture for the European Union?' (2023) 60 *Common Market Law Review* 1515; N Forster, 'Vers un bouleversement de l'architecture juridictionnelle de l'Union européenne ? Étude sur les implications du transfert partiel de la compétence préjudicielle au Tribunal de l'Union européenne' in C Blumann and F Picod (eds), *Annuaire de droit de l'Union européenne 2022* (Éditions Panthéon-Assas 2023); J-P Jacqué, 'Réforme de l'architecture juridictionnelle de l'Union européenne: un dernier pas?' (2023) *Revue trimestrelle de droit européen* 181; J Martín y Pérez de Nanclares, 'La reforma del Tribunal de justicia de la Unión europea: la ruptura de un tabú' (2024) 90 *Revista Española de Derecho Europeo* 21; R Mastroianni, 'Il trasferimento delle questioni pregiudiziali al Tribunale: una riforma epocale o un salto nel buio?' (2024) 1 *Quaderni AISDUE* 41; D Petrić, 'The Preliminary Ruling Procedure 2.0' (2023) 8 *European Papers* 25; E Ros, 'Preliminary Procedures at the General Court: More than Meets the Eye?' (2024) 5 *EC Tax Review* 197; D Sarmiento, 'On the Road to a Constitutional Court of the European Union: The Court of Justice After the Transfer of the Preliminary Reference Jurisdiction to the General Court' (2023) 19 *Croatian Yearbook of European Law and Policy* VII; Tridimas (n 2).

[6] Case T-534/24 *Gotek* EU:T:2025:682.

the procedural dimension, as they involve substantive issues that need to be addressed. In particular, is the reform effectively attaining the objectives featured in the narratives surrounding its early drafting? How is the reform renewing the relationship between the Court of Justice and the General Court? In which way has the role of judges and Advocates General at the General Court evolved? How do the new rules on transparency in preliminary reference proceedings square with the principle of open justice? And, finally, in which direction is the EU judiciary evolving?

To address these issues, while sticking to a legal normative approach, the Special Section develops a multi-perspective assessment that enables a comprehensive picture of the reformed EU judicial architecture and its potential evolution from various angles. To that aim, we have gathered several authors giving voice to the diverse standpoints featured in this publication project. In particular, this publication brings together and puts into dialogue the perspectives of analysis of both insiders and outsiders to the EU judiciary. Given their position and background, the former – including a Judge at the General Court, an Advocate General at the Court of Justice and a *référendaire* – are arguably best placed to address the reform's early impact on the role and tasks of the main actors on the stage of the EU judicial system. Conversely, academic authors complement the analysis by taking broader perspective angles, thus addressing the evolution of the EU judicial architecture as a whole.

To enhance dialogue between the different perspectives of analysis, the Special Section is organised into two parts published in distinct issues of *European Papers*. Each of the two parts features contributions authored by both academics and insiders to the Court of Justice of the European Union. Such a structure enables fruitful exchanges and interrelations with different perspectives within and between the two Issues, thereby contributing to the Special Section's underlying objective.

Against these conceptual and methodological premises, a disclaimer should be made. One perspective that is not covered in our special section – at least not directly – is that of national courts. While some national judges have previously commented on the broader issues raised by the reform of the Statute of the Court of Justice of the EU,[7] such contributions remain limited in the scholarly panorama. To date, the academic literature has only a handful of interventions specifically addressing the position of national courts within the framework of the reformed preliminary ruling procedure.[8] However, it is worth noting that a couple of national judges we invited

[7] See, for instance, S Soldevila Fragoso, 'La triste reforma de la cuestión prejudicial' (2024) 10 *Actualidad Administrativa* 1.

[8] Notable among these is C Wissels and T Boekestein, '"The Proof is in the Pudding": Some Thoughts on the 2024 Reform of the Statute of the Court of Justice from a Highest National Court' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (n 5) 17. Writing in their capacity as members of the Dutch Council of State – which will be only marginally affected by the reform, given that it hears cases in only one area now falling within the General Court's jurisdiction (namely, the EU emissions trading scheme) – they identified as main concerns of national judges the time taken by the General Court (and the Court of Justice) to respond to references, the consistency of their interpretations

to contribute to our special section and reflect on the reform from the perspective of national courts declined to do so, expressing doubts as to whether the position of national judges would be significantly be touched upon by this reform. Of course, we cannot be sure whether this sentiment among national judges is widely shared or merely incidental, or whether this will change – towards a greater or even lesser interest – when the full implications of the reform become known. Still, it is important to mention this caveat in the introduction to our Special Section, with hopes that this 'third wheel' of the EU judicial machinery – the Union ordinary courts which hold general jurisdiction in the application of EU law – will be involved in the formal and informal discussions concerning the future of the EU judiciary. After all, on their willingness to engage with the two EU courts and to implement their rulings in good faith depends the effectiveness of the entire endeavour. The importance of this point explains why, even if not explored from the perspective of national judges, the latter aspect has been incidentally addressed by other contributions to this publication project.

It is now time to introduce the Special Section's layout. The current Issue of *European Papers* features four articles in this respect. The first contribution – authored by us, Lorenzo Grossio and Davor Petrić – provides the introductory groundwork for the analyses developed in the following articles. Indeed, it advances a comprehensive assessment of the amended provisions of Protocol No 3 and the Rules of Procedure of both the Court of Justice and General Court from an institutional and procedural standpoint to pave the way to the perspectives featured in the Special Section.

The successive stream of analysis critically reviews the narratives underpinning the reform and their actual implications. Indeed, the literature and practice consistently framed the amendment of the Statute of the Court of Justice as an answer to three complementary needs. These are, in particular, to reduce the Court of Justice's workload, take stock of the General Court's specialisation in given fields, and enhance the Court of Justice as a supreme or constitutional court, whose access should be limited to questions of the crucial importance for the coherence and unity of the EU legal order. In his article, Jacopo Alberti reviews such narratives *vis-à-vis* the renewed features of the EU judicial architecture to offer an alternative account of the legacy of the 2024 reform.

The second perspective moves the focus of the analysis to the implications of an underexplored – yet profoundly significant – novelty introduced by the reformed Statute: the proactive publication of written submissions in preliminary reference procedures. In particular, Ilaria Fevola and Stefano Montaldo assess the new provisions on transparency through the prism of the principle of open justice, thus unveiling the paradigm shift underpinning the publication of submissions. Moreover,

of EU law, and the overall quality of the judgments delivered by the two courts. Should the reform lead to improvements – or, at the very least, not result in any deterioration – in these aspects, national judges, they suggest, would have little objection.

building upon a comprehensive assessment of the relevant early practice, their article addresses the key issues concerning the limits inherent in the publication arrangements defined by the reformed Statute.

An insider's perspective concludes the first half of the Special Section. Judge Ornella Porchia reflects on the implications and implementation of the organisational set-up defined by the General Court to cope with the new jurisdictional functions assigned. By delving into the practice developed so far, her analysis yields some preliminary findings on some key issues. Among them, Judge Porchia examines whether the domestic courts tend to 'strategically' draft preliminary questions by including references to primary law, thus seeking their reference to be heard and adjudicated by the Court of Justice rather than the General Court. In this respect, the Author advances a negative answer and expresses positive expectations for the functioning of the new procedure before the General Court, which should lead to more areas of EU law being delegated to the General Court's docket in the future.

The second half of the Special Section, published in Issue No 3, is kicked off by further reflections from an institutional perspective. By entering into dialogue with Jacopo Alberti's findings, Tanja Hilpold develops a specific focus on the repositioning of the roles of the Court of Justice and the General Court. Against the prevailing emphasis on the 'constitutionalisation' of the Court of Justice resulting from the reform, this evolution appears to be grounded in a paradox, as empowering the Court of Justice's constitutional nature entails decentralisation within EU courts and the 'de-constitutionalisation' of jurisdiction on preliminary references in certain subject matters. Does the renewed EU judicial architecture entail a strengthened dividing line between the Court of Justice and the General Court's respective roles? Or, conversely, does it ultimately enhance proximity between the two judicial bodies? In her article, the Author provides fresh new insights into these crucial issues.

By relying on her experience as Advocate General at the Court of Justice, Tamara Ćapeta assesses the role of Advocates General at the General Court, providing a comprehensive analysis of the conceptual and practical issues associated with that role in the new field of jurisdiction conferred on the *Bâtiment Thémis*'s judicial body. To that end, the Author juxtaposes the procedural and advice-giving tasks assigned to Advocates General between the Court of Justice and the General Court, thereby particularly emphasising the different ways in which the two figures are called upon to address principled questions arising from preliminary references.

A further insider's perspective on the reform is advanced by Leila Rezki. By complementing the General Court's viewpoint developed by Judge Porchia, her contribution addresses the reform from the angle of the Court of Justice. As *référendaire* in the cabinet of the President of the Court of Justice, the Author's analysis provides further insights into the early practice and, specifically, the Court's approach in assigning references to the General Court within the so-called *guichet unique* procedure.

Finally, Michal Bobek identifies common points and divergences that emerged from the multiple perspectives of analysis, thus drawing conclusions on the direction towards which the EU judicial architecture is currently evolving.

As we conclude this Introduction and wish every reader to enjoy delving into the analysis proposed in the Special Section, let us take this occasion to warmly thank all the authors for accepting to be part of this publication project and their insightful contributions. This Special Section would never have come to life without their effort and cooperation. In the same vein, we would like to thank the *European Papers*' Editorial Board for the opportunity to edit the Special Section and their constant support throughout the whole publication process. We do hope that the articles featured in this Special Section will serve as helpful contributions for future scholarly and institutional discussions about the key questions surrounding the evolution of the EU judicial architecture, especially in relation to the report on the implementation of the recent reform, which the Court of Justice will publish in 2028.

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Perspectives on the Reformed EU Judicial Architecture
***edited by* Lorenzo Grossio *and* Davor Petrić**

EU Procedural Law Revisited: The Reformed EU Judicial Architecture between the Statute of the Court of Justice and the Rules of Procedure

Lorenzo Grossio[*] *and Davor Petrić*[**]

TABLE OF CONTENTS: 1. Introduction: scope and purposes of the analysis. – 2. The partial transfer of preliminary references from the Court to the General Court. – 2.1. The scope of the General Court's jurisdiction on preliminary references. – 2.2. The *guichet unique* mechanism. – 2.3. The procedure for hearing and determining preliminary references at the General Court. – 2.4. The revision of preliminary rulings issued by the General Court. – 3. The new rules on transparency and participation in preliminary reference proceedings. – 4. The extension of the scope of application of the filtering mechanism on appeal. – 5. Not a conclusion but… rather a way forward.

ABSTRACT: The article provides a critical assessment of the 2024 reform of the Statute of the Court of Justice of the European Union, combining the analysis of the amended provisions of Protocol No 3 and the Rules of Procedure of both the Court of Justice and General Court. To that aim, the contribution takes a procedural standpoint on the topic, with a view to paving the way to the various perspectives featured in the Special Section. Focusing on the transfer of jurisdiction on preliminary references, the article discusses the rationales behind the selection of 'areas of law' subject to devolution, thereby disclosing that the reform leaves a 'variable geometry' scope to the Court of Justice for being involved in cases in any domain of EU law. That part of the analysis is complemented by assessing the new filing and distributing mechanism for preliminary references (*guichet unique*), the revision mechanism for preliminary rulings issued by the General Court, and the latter's new procedural framework for treating preliminary references. While the procedure has been designed in a way to mirror that already applied by the Court of Justice, the article argues that the General Court's distinctive features may significantly impact the way in which it deals with preliminary references. The analysis then discusses the design and consequences of the new provisions on participation in

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The article constitutes the outcome of the authors' joint reflections. However, Sections 2.1, 2.2, 4 and 5 have been drafted by Lorenzo Grossio, while Sections 1, 2.3, 2.4, and 3 shall be attributed to Davor Petrić.

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preliminary references and publication of parties' written submissions, as well as the rationales and impact of extending the scope of application of the prior admission on appeal mechanism.

KEYWORDS: Court of Justice – Statute of the Court of Justice – Rules of Procedure – transfer of preliminary references – transparency – prior admission on appeal.

1. Introduction: scope and purposes of the analysis

The year 2024 will be remembered as a crucial turning point for the EU judicial architecture. In March, the Parliament and Council adopted Regulation (EU, Euratom) 2024/2019 amending the Statute of the Court of Justice of the European Union, notably – although not exclusively – to partially transfer jurisdiction on preliminary references to the General Court.[1] To implement the reform, the Court of Justice and the General Court amended their respective Rules of Procedure in July, whose modifications became effective from 1 September 2024.[2] After updating the Rules of Procedure's implementing documents – with particular emphasis on the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings[3] and the Practice rules for the implementation of the Rules of Procedure of the General Court[4] – the reform finally became operational on 1 October 2024.

These measures constitute the final step of a procedure initiated in 2022 on the proposal of the Court itself[5] and envisaging a true Copernican revolution. Commonly considered as the Court's 'jewel in the crown', the preliminary reference procedure had previously remained in the exclusive jurisdiction of the Court of Justice, the latter amounting to the only interlocutor in judicial dialogue for national courts. Still, the Treaties did not provide that the jewel shall necessarily remain in the Court's crown exclusively. Indeed, the first mention of the possibility of transferring parts of jurisdiction in the preliminary ruling procedure to the General Court came more than twenty years ago, in the context of the 2001 Nice Treaty amendments. It was formalised in what is now Article 256(3) of the Treaty on the Functioning of the European Union (TFEU), which provides that '[t]he General Court shall have jurisdiction to

[1] Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3 on the Statute of the Court of Justice of the European Union.

[2] Amendments to the Rules of Procedure of the Court of Justice (2024/L/2094); Amendments to the Rules of Procedure of the General Court (2024/L/2094).

[3] Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings (2024/C/6008).

[4] Corrigendum to the Practice Rules for the Implementation of the Rules of Procedure of the General Court of 12 August 2024 (2024/L/90651). For an analysis, see MC Bottino, 'Le nuove norme pratiche di esecuzione del regolamento di procedura del Tribunale' (2024) *Rivista del contenzioso europeo* 1.

[5] Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union, at curia.europa.eu (hereinafter, '2022 Proposal').

hear and determine questions referred for a preliminary ruling under Article 267, in *specific areas* laid down by the Statute (emphasis added)'.[6]

The design of that option was motivated by the necessity for taking some burden off the Court of Justice, which is one of the reasons why the General Court (then, the Court of First Instance) was established in the first place in 1989. The reality was that, decade after decade, the workload of the Court was constantly on the rise, driven in part by the functional and geographical enlargement of the EU. The greatest portion of cases the Court was dealing with came in the framework of the preliminary ruling procedure. The duration of those cases was likewise extending, which at some point meant that on average national courts were waiting for the Court's reply for more than two years. Ironically, the very success of cooperation between the Court and national courts seemed to be damaging the prospects of their continuous cooperation. And although the malaise was obviously coming from this 'input' side, ie through an increased pressure from the national level, the Court's response was always going after the 'output' side only, ie strengthening its processing and production capacities.[7] Over time, possible solutions were sought everywhere except in transferring partial jurisdiction over preliminary rulings to the General Court. The Court was focused on other procedures and institutional aspects, which in a broader perspective form pieces of the same continuous process of rethinking and adjusting 'on the move' the EU judicial architecture. We therefore saw the establishment of the first (and, so far, only) specialised jurisdiction – the Civil Service Tribunal, which operated from 2006 until 2015. This was followed by an increase in the number of judges of the General Court, in the course of which there was some disagreement between two EU courts.[8] Yet another novelty concerned the 'filtering' of appeals to the Court of Justice against rulings of the General Court which reviewed decisions of boards of appeal of some EU agencies.[9] But the 'enabling clause' for

[6] Thus worded, that provision excludes the possibility of conferring general jurisdiction on preliminary references to the General Court (T Tridimas, 'Sharing Uniformity: A New Era Beckons' (2024) 1 *LCEL Research Paper Series* 2, 6; J-P Jacqué, 'Réforme de l'architecture juridictionnelle de l'Union européenne: un dernier pas?' (2023) *Revue trimestrelle de droit européen* 181, 183; D Sarmiento, 'On the Road to a Constitutional Court of the European Union: The Court of Justice After the Transfer of the Preliminary Reference Jurisdiction to the General Court' (2023) 19 *Croatian Yearbook of European Law and Policy* VII, VII; D Petrić, 'The Preliminary Ruling Procedure 2.0' (2023) 8 *European Papers* 25, 26).

[7] M Bobek, 'Preliminary Rulings Before the General Court: What Judicial Architecture for the European Union?' (2023) 60 *Common Market Law Review* 1515, 1541.

[8] See A Alemanno and L Pech, 'Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System' (2017) 54 *Common Market Law Review* 129. Further on the evolution of the 2015 reform of the Statute, see D Sarmiento, 'The Reform of the General Court: An Exercise in Minimalist (but Radical) Institutional Reform' (2017) 19 *Cambridge Yearbook of European Legal Studies* 236; T Ćapeta, 'EU Judiciary in Need of Reform?' in A Lazowski and S Blockmans (eds), *Research Handbook on EU Institutional Law* (Edward Elgar Publishing 2016) 263.

[9] See M-A Gaudissart, 'L'admission préalable des pourvois: une nouvelle procédure pour la Cour de Justice' (2020) 56 *Cahiers de droit européen* 177.

the preliminary ruling procedure in the Treaties remained unused for more than two decades, although good opportunities were presenting themselves along the way.[10]

In the context of the 2015 enlargement of the General Court, the Court of Justice decided not to make any moves in that direction. It considered that the time was not right because the General Court was still going through changes that led to doubling the number of its judges, and the Court thought it had put its own docket under control. But in 2022, the Court of Justice changed its mind. The number of preliminary references was becoming too high, and their complexity ever greater, and the Court felt that it was not handling them in a timely and efficient manner as it used to.[11] At the same time, the reform of the General Court was over, and the enlarged and refreshed version of it appeared capable of taking some extra work.[12] All this led the Court to finally put out a proposal for the reform of the preliminary ruling procedure aimed at ensuring a proper administration of justice by two EU courts. The EU institutions and the Member States were largely positive about the Court's vision of reform, which paved the way for swift negotiations and adoption of the finally agreed Regulation.[13] The latter obliges the Court to update the EU legislators in four years' time about the progress in the implementation of the reform,[14] with a view to exploring further options for change, which shows that the 'transformation [of] the Union courts' will carry on.[15]

As part of the Special Section 'Perspectives on the Reformed EU Judicial Architecture', this article explores the novelties introduced by the 2024 reform of the Statute of the Court of Justice from a procedural viewpoint. In this respect, the transfer of preliminary references to the General Court constitutes the most notable novelty (2). Still, it is not the only one: Regulation (EU, Euratom) 2024/2019 also introduced provisions to enhance transparency and open justice in preliminary references procedures (3) and expanded situations in which appeals on points of law against rulings of the General Court are subjected to the Court's prior admission (4). These three aspects

[10] As argued by Iglesias-Sanchez, the transfer of jurisdiction on preliminary references was previously seen as a last resort means in case the Court was overwhelmed with excessive workload (S Iglesias Sánchez, 'Preliminary References Before the General Court', in *Weekend Edition No 125* (EU Law Live 2022) 1, 3).

[11] Although relevant statistics have not changed dramatically, both in terms of the number of preliminary references received and the time needed to dispose of them; see R Alonso García, 'The Persian Jurist in Luxembourg: On the Decentralisation of the Preliminary Ruling Procedure' in *Weekend Edition No 195* (EU Law Live 2024) 1, 2, 4–6.

[12] The present reform could hence be thought of as 'a last resort attempt of an overburdened Court, after it has run out of other options, to transfer at least something […] and find some additional work for the not so busy [General Court]' (Bobek (n 7) 1517 and 1534).

[13] For an overview of the procedural history, see R Mańko, 'Amending the Statute of the Court of Justice of the EU: Reform of the Preliminary Reference Procedure and Extension of the Leave to Appeal Requirement' in *European Parliamentary Research Service, EU Legislation in Progress* (October 2023).

[14] Ibid, Art 3(2).

[15] D Sarmiento, 'Gaps and "Known Unknowns" in the Transfer of Preliminary References to the General Court' (2024) 3 *Rivista del Contenzioso Europeo* 1, 18.

will be assessed in more detail in the following sections, thus providing a way forward to the various perspectives of analysis developed in the Special Section (5).

2. The partial transfer of preliminary references from the Court to the General Court

2.1. The scope of the General Court's jurisdiction on preliminary references

The core of the transfer of jurisdiction on preliminary references lies in the newly introduced Article 50b of the Statute of the Court of Justice, whose first paragraph details the boundaries of the General Court's competence in that respect. According to that provision,

> 'The General Court shall have jurisdiction to hear and determine requests for a preliminary ruling under Article 267 [TFEU] that come *exclusively* within one or several of the following specific areas: (a) the common system of value added tax; (b) excise duties; (c) the Customs Code; (d) the tariff classification of goods under the Combined Nomenclature; (e) compensation and assistance to passengers in the event of denied boarding or of delay or cancellation of transport services; (f) the system for greenhouse gas emission allowance trading (emphasis added)'.

This provision reveals the willingness of Parliament, the Council, and the Court of Justice itself to clearly define the dividing line between the jurisdiction of the Court and the General Court regarding preliminary references.[16] This element emerges not only from the wording of Article 50b of the Statute, but also from the explanations provided by the Court proposal.[17] Indeed, the choice of these six subject matters follows from their 'clearly identifiable' nature, making them 'sufficiently separable from other areas governed by Union law'.[18] Furthermore, the Court's proposal stressed that the subject matters at issue are characterised by a limited number of acts of secondary law.[19] These two characteristics would make it possible to distinguish preliminary questions falling within these areas 'upon reading the request for a preliminary ruling'[20] at its filing.

[16] As argued by Craig, the need to closely confine the General Court's jurisdiction on preliminary references is not simply a legislative willingness but also a key underpinning of Art 256(3) TFEU (P Craig, '2024 Reform of the Court of Justice: Historical and Normative Underpinnings' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024) 45, 46).

[17] 2022 Proposal (n 5).

[18] Ibid, 4. For a critical account of the precise nature of the dividing line between the Court of Justice and General Court's jurisdiction, among many, see Petrić (n 6) 33.

[19] 2022 Proposal (n 5) 4.

[20] Ibid.

Still, ensuring a clear division of competence between the two judicial bodies is not the only rationale underpinning Article 50b(1) of the Statute. Indeed, three additional criteria have guided the selection of the subject matters transferred. First, the Court's proposal added that the areas of jurisdiction on preliminary references transferred to the General Court shall also be characterised by a consistent and consolidated case-law 'capable of guiding the General Court in the exercise of its new jurisdiction and of preventing the potential risk of inconsistencies or divergences in the case-law'.[21] Second, the areas of law referred to in Article 50b(1) of the Statute shall give rise to 'few issues of principle', which shall conversely be reserved for the Court of Justice's jurisdiction. Finally, those subject matters shall represent a considerable share of the previous ECJ's workload, thus resulting in the transfer of a sufficient number of cases from the latter to the General Court.[22]

These considerations unveil that two additional – and perhaps opposing[23] – rationales underpin the definition of the scope of the General Court's jurisdiction on preliminary references under Article 50b(1) of the Statute. On the one hand, the last criterion points to the effectiveness of the reform. As previously underlined, the reduction of the ever-growing workload of the Court constitutes a crucial objective driving the partial transfer of jurisdiction on preliminary references.[24] Therefore, attaining that goal would have been nullified if the General Court's resulting jurisdiction only comprised an insignificant number of preliminary questions. As outlined in the literature, the areas of law subject to devolution represent a considerable share – about 20 per cent[25] – of the total amount of preliminary rulings, thus potentially

[21] Ibid. This contention has been subject to criticisms in the literature. In particular, Bobek argued that a comprehensive body of case-law can hardly be envisaged in the VAT domain. Moreover, many cases in this respect are rarely 'purely VAT' ones, as they are usually intertwined with profound issues concerning primary law and general principles (Bobek (n 7) 1521–1522). In the same vein, it has been underlined that even the majority of 'purely VAT' cases have not been determined by reasoned order in the recent past, thus suggesting that they may often unveil profound questions for the evolution of EU law (P Carbini, 'Statuto della Corte di giustizia: adottato il regolamento di modifica al Protocollo n. 3' (2024) *Eurojus* 1, 4).

[22] 2022 Proposal (n 5) 4.

[23] As argued by Tridimas, the criteria under analysis ultimately address distinct issues in the identification of the areas of law devolved to the General Court's jurisdiction on preliminary references (T Tridimas, 'Breaking with Tradition: Preliminary Reference Reform and the New Judicial Architecture' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024) 5, 5–6). For a critical account of the narratives surrounding the reform under analysis, see J Alberti, 'O Tell Me the Truth About the Transfer of Preliminary Rulings to the General Court' (2025) 10 *European Papers* (forthcoming).

[24] As preliminary references represent the majority of the workload before the ECJ, delayed timeframes for those proceedings may result in national courts being discouraged from referring (M Condinanzi and C Amalfitano, 'Il Tribunale oltre il pregiudizio: le pregiudiziali al Tribunale' (2024) *Rivista del contenzioso europeo* 1, 2–3).

[25] On this point, see R Mastroianni, 'Il trasferimento delle questioni pregiudiziali al Tribunale: una riforma epocale o un salto nel buio?' (2024) *Rivista Quaderni AISDUE* 41, 49; B Nascimbene and G Greco, 'Presentazione' in B Nascimbene and G Greco (eds), *La riforma dello Statuto della Corte di giustizia* (2024) *Eurojus* I, IV.

paving the way to a reduction of 13-14 per cent of the total workload of the Court of Justice.[26] Still, if individually considered, the six subject matters at issue do not have an equal impact on the Union courts' workload, as VAT cases constitute the vast majority in this respect. This element led some scholars to contend that, without the transfer of VAT preliminary references to the General Court, the reform would have lacked added value from a workload distribution perspective.[27]

On the other hand, the first and second criteria previously considered aim to ensure that the division of competence on preliminary references between the two judicial bodies does not affect the uniform and coherent interpretation of EU law. This rationale entails an imbalanced position between the Court of Justice and the General Court. Indeed, the legislative willingness to keep issues of principle in the hands of the Court of Justice (ECJ) and confer jurisdiction to the General Court only in domains characterised by a consistent case-law unveils a bias underlying the reform's structure, which appears to envisage the General Court as less suited than the Court of Justice to hear and determine preliminary references.[28] Arguably, this bias reflects a genuine concern from the Court of Justice and the EU legislature, particularly in light of the reform's profound implications for the EU's judicial architecture. Still, several critical readings on this point have emerged in the literature. Indeed, scholars pointed out that a potential contradiction lies in the Court's emphasis on the guidance provided by a consistent body of case-law in the six domains transferred. Indeed, whereas the case does not pose a 'serious risk of the unity or consistency of Union law being affected' so as to trigger the extraordinary review by the Court of Justice,[29] nothing would now prevent the General Court from departing from the Court of Justice's case-law when adjudicating over preliminary references.[30] This observation appears convincing from a legal viewpoint. However, such a scenario may hardly be realised. As contended by other authors, the very rationales driving the selection of the areas of law subject to devolution – such as ensuring that previous case-law is 'capable of guiding the General

[26] Among extensive scholarship, see: J Alberti, 'Il trasferimento del rinvio pregiudiziale al Tribunale, all'alba della sua entrata in vigore' in B Cortese (eds), *Il diritto dell'Unione europea nei rapporti tra ordinamenti: tra collaborazione, integrazione e identità* (2024) *Rivista Quaderni AISDUE* 511, 517; Condinanzi and Amalfitano (n 24) 5; Nascimbene and Greco (n 25) IV.

[27] M Angeli, 'Qualche considerazione sulla riforma dello Statuto della Corte di giustizia dell'Unione europea alla luce del suo negoziato. Et quo, hinc?' (2025) *Rivista del contenzioso europeo* 1, 5. However, Iglesias-Sánchez pointed out that also passengers' rights have emerged as a particularly litigious area of law (Iglesias Sánchez (n 10) 7).

[28] C Amalfitano, 'The Future of Preliminary Rulings in the EU Judicial System' in *Weekend Edition No 133* (EU Law Live 2023) 1, 11. On this point, Alberti argued that the Court of Justice appears to have minimised the 'revolutionary' impact of the reform by devolving jurisdiction on areas of law less likely to give rise to delicate questions (Alberti (n 26) 515).

[29] Art 256(3), third period, TFEU. On the Court of Justice's extraordinary review on preliminary rulings rendered by the General Court, see Section 3.4 below.

[30] Sarmiento (n 15) 25.

Court in the exercise of its new jurisdiction'[31] – would probably lead the former to be deferential towards previous ECJ case-law.[32]

Concerning the merits of the areas of law composing the General Court's new jurisdiction, scholarship has emphasised that the reform implies a departure from one of the logics underlying the Treaty of Nice.[33] Indeed, the architecture underpinning Article 256 TFEU would have envisaged the General Court to be competent to hear and determine preliminary references dealing with those specific matters on which it already exercises jurisdiction on appeal.[34] This argument envisioned an inherent parallelism between the General Court's competence in, respectively, appeals against judgments rendered by specialised tribunals and preliminary references. However, such a model was never implemented: the one and only specialised tribunal ever established dealt with an area of EU law – civil service at Union institutions, bodies and agencies – in which domestic courts have no competence and thus preliminary references may hardly be issued. Furthermore, the Nice model was already overcome in 2015, when the Civil Service Tribunal was dissolved. Instead of creating further specialised tribunals, the number of judges at the General Court was doubled.[35] From this perspective, the reform under analysis can be seen as a new step in the direction initiated by the 2015 amendment to the ECJ Statute, which paved the way for a new judicial architecture where the General Court retains its competence in direct actions and acquires an even more enhanced role.[36]

As a further element sparking criticism in literature, it has been noted that the six areas of law under analysis do not align with those sectors that have represented the largest share of litigation before the General Court, such as competition and intellectual property law.[37] Moreover, no transfer of jurisdiction on preliminary references

[31] 2022 Proposal (n 5) 4.

[32] Condinanzi and Amalfitano (n 24) 9.

[33] Bobek (n 7) 1529.

[34] Ibid. At the same time, Jacqué observed that the Treaty of Nice featured a sort of ambivalence between two potential judicial architectures hinged, respectively, on the decentralisation towards specialised tribunals and the transfer of competences on preliminary rulings between the Court of Justice and the General Court (Jacqué (n 6) 181).

[35] Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union.

[36] On this point, Tridimas contended that the reform ultimately strengthens the relationship between the Court of Justice and the General Court (Tridimas (n 23) 7). This contention appears to be shared also by Bobek, who argued that the three-tier structure designed at Nice is now replaced by the logic of a pool, as the General Court and the Court of Justice are now strictly linked into somewhat a unitary structure. In this unitary structure with overlapping jurisdictions and pooled resources, the General Court looks less like 'a body in its own right' and more like an 'appendage' and a 'department of the Court of Justice' (Bobek (n 7) 1535).

[37] Among many, see: Iglesias Sánchez (n 10) 7; N Forster, 'Vers un bouleversement de l'architecture juridictionnelle de l'Union européenne? Étude sur les implications du transfert partiel de la compétence préjudicielle au Tribunal de l'Union européenne' in C Blumann and F Picod, *Annuaire de droit de l'Union européenne 2022* (Éditions Panthéon-Assas 2023) 20; Amalfitano (n 28) 7.

has been envisaged for those areas of law that, in the context of direct actions, are litigated in cases falling within the scope of the 'prior admission on appeal' mechanism pursuant to Article 58a of the Statute.[38] As argued in the literature, such an alternative solution would have been consistent with the underlying rationale of the filtering mechanism itself: limiting access to the Court of Justice in certain domains and empowering the General Court as a *de facto* last resort instance for cases already heard by the boards of appeals of EU agencies.[39]

While these critical remarks are convincing from a systematic viewpoint, the overall architecture of the reform can arguably explain the choices of the EU legislature under analysis. Indeed, the 2024 amendments to the Statute are driven by the willingness to avoid broad exclusions of the Court of Justice from any domain.[40] In the context of direct actions, competition law and intellectual property cases already fall primarily within the General Court's jurisdiction. The same consideration applies to cases governed by the filtering mechanism of Article 58a of the Statute, as the latter significantly limits appeals against judgments issued by the General Court. If these areas of law were subject to the devolution of jurisdiction on preliminary references, such an arrangement would greatly restrict the Court of Justice's ability to shape case-law in these domains. Conversely, the reform of the Statute leaves the Court of Justice with a 'variable geometry' scope for being sufficiently involved in hearing and determining cases in any domain of EU law. On the one hand, the Court of Justice retains its competence to hear and determine preliminary references touching upon issues which already fall primarily under the scope of the General Court's jurisdiction in the context of direct actions. On the other hand, the Court of Justice devolves its jurisdiction on preliminary references in some areas of law which do not constitute the key part of the General Court's workload. As a result of such a 'variable geometry' architecture, the Court of Justice is still endowed with sufficient wiggle room to shape the case-law in any domain of the EU legal order.

The Court of Justice's retained role in driving the evolution of case-law is further reaffirmed by the second paragraph of Article 50b of the Statute. According to this provision, the Court of Justice remains competent to hear and determine preliminary questions that, while falling within the General Court's jurisdiction, 'raise independent questions relating to the interpretation of primary law, public international law, general principles of Union law, or the Charter of Fundamental Rights of the European Union'. This provision was introduced through an amendment to the Court's initial proposal presented by the Commission and aimed at preserving the unity and coherence of the

[38] See Section 4 below.
[39] Amalfitano (n 28) 7.
[40] On this point, see Mastroianni (n 25) 61.

EU legal order.[41] However, preliminary questions regarding the interpretation or validity of secondary law are often intertwined with interpreting primary law and the Charter. Indeed, national courts typically refer to such provisions in their reference, and sometimes this aspect is even more significant than interpreting the relevant secondary law. Looking at recent case-law, that would have been the case in *Taricco*[42] and *Åkerberg Fransson*,[43] which arose from VAT-related litigation but raised independent and profound issues concerning the interpretation of primary law and the Charter.[44] In a hypothetical scenario where the reform has already been in force, one could plausibly assume that such 'constitutional' cases would likely remain within the Court's jurisdiction. Still, in preliminary references where secondary law provisions within the scope of the six areas referenced in Article 50b(1) of the Statute are intertwined with primary law, general principles, international law, or the Charter, a question arises regarding the extent to which hermeneutical issues concerning such sources are independent and separable from those concerning secondary law.[45] This matter may raise uncertainties about the correct allocation of cases between the Court of Justice and the General Court. However, this hurdle has been partially circumvented by the preliminary reference filing mechanism introduced by the reform – the so-called *guichet unique* – which is analysed in the following section.

2.2. The *guichet unique* mechanism

To avoid domestic courts' difficulties in predefining whether a given reference falls within the jurisdiction of the Court of Justice or the General Court, a single filing mechanism – commonly known as *guichet unique* – for all preliminary references

[41] MF Orzan, 'Un'ulteriore applicazione della "legge di Hooke"? Riflessioni a margine dell'entrata in vigore della recente riforma dello Statuto della Corte di giustizia dell'Unione europea' (2024) *Rivista del contenzioso europeo* 30, 37.

[42] Case C-105/14 *Taricco and Others*, EU:C:2015:555.

[43] Case C-617/10 *Åkerberg Fransson*, EU:C:2013:105.

[44] On this point, see Sarmiento (n 6) 10–11; E Ros, 'Preliminary Procedures at the General Court: More than Meets the Eye?' (2024) 5 *EC Tax Review* 197, 203; J Martín y Pérez de Nanclares, 'La reforma del Tribunal de justicia de la Unión europea: la ruptura de un tabú' (2024) 90 *Revista Española de Derecho Europeo* 21, 38. For further potential examples from the previous case-law, see Tridimas (n 6) 12 ff. In this respect, scholars have noted that assigning jurisdiction to the Court of Justice to rule on independent questions of Charter interpretation may encourage strategic recourse to this instrument by national courts. Indeed, the referring judicial authority may either avoid references to Charter provisions to quickly obtain a ruling from the General Court or, conversely, enhance references to fundamental rights in order to have their reference heard and determined by the Court of Justice (M Ceolotto, 'La riforma dello Statuto della Corte di giustizia nel quadro dei diritti fondamentali dell'UE' in *L'evoluzione dell'Unione europea tra prassi innovative e proposte di revision dei Trattati* (2024) *Rivista Quaderni AISDUE* 37, 70).

[45] According to recent scholarship, that could be the case of preliminary references raising questions of jurisdiction or pertaining to the effects or remedies attached to a given primary law provision (Tridimas (n 6) 9).

has been enshrined in the third paragraph of Article 50b of the Statute.[46] As the name suggests, it requires that any preliminary question be presented solely to the Court of Justice. From a procedural perspective, the system is more clearly defined by Article 93a of the reformed Rules of Procedure of the Court of Justice. Once references are filed at the Court's Registry, they are transmitted to the President, the Vice-President, and the First Advocate General of the Court of Justice.[47] After consulting with the Vice-President and the First Advocate General, the President shall direct the Registry to submit the reference to the General Court when the case falls exclusively within the six areas of law on which jurisdiction has been devolved.[48] Conversely, if the reference is outside the scope of those domains, the procedure continues before the Court of Justice. As suggested in the literature, the peculiar features and position of that evaluation within the reformed procedure imply that it should be based on a *prima facie* assessment, relying solely on the information contained in the referral.[49]

The allocation procedure is aggravated in cases where the President of the Court of Justice, after hearing the Vice-President and the First Advocate General, determines that the reference does fall under the scope of the General Court's jurisdiction but also touches upon areas of law excluded from devolution or raises independent questions concerning the interpretation of primary law, public international law, general principles or the Charter. In such a scenario, the allocation cannot be decided by the President alone. Indeed, the latter shall refer the issue to the Court of Justice, which will decide within its General Meeting whether the case shall be transferred to the General Court.[50] The decisions adopted in the context of the *guichet unique* procedure are not subject to publication and, for the moment being, it is unclear whether they would be mentioned in the final judgment rendered by the Court of Justice or General Court.[51]

The *guichet unique* prevents domestic courts from finding themselves in the uneasy position of assessing alone whether their questions fall within the jurisdiction

[46] C Tovo, 'Le nuove regole processuali in materia pregiudiziale e le loro implicazioni istituzionali per la Corte di giustizia: verso un'ulteriore costituzionalizzazione?' in B Nascimbene and G Greco (eds), *La riforma dello Statuto della Corte di giustizia* (2024) *Eurojus* 1, 6–7.

[47] Art 93a(1) of the Rules of Procedure of the Court of Justice.

[48] Art 93a(2) of the Rules of Procedure of the Court of Justice.

[49] Tridimas (n 23) 6. For a deeper analysis of the procedural arrangements defined by the Court in relation to the management of the *guichet unique* system, see O Porchia, 'The Reform for the Transfer of Competence for Preliminary Rulings to the General Court: Issues Concerning Its Implementation' (2025) 20 *European Papers* (forthcoming).

[50] Art 93a(3) of the Rules of Procedure of the Court of Justice. The provision in question does not expressly clarify whether the decision on the transfer falls under the scope of the Court's General Meeting attributions, as it only affirms that 'the Court of Justice' shall decide. However, this profile can be deduced from the broad competence of the General Meeting as provided by Art 25 of the Rules of Procedure of the Court of Justice. This position is also shared in recent literature analysing the reform from a procedural viewpoint: in particular, see Orzan (n 41) 46.

[51] Sarmiento (n 15) 17

of the Court of Justice or the General Court. Such a burden would result in a disincentive to rely on the preliminary reference procedure and enter into dialogue with Union courts. However, both the appropriateness and composition of the *guichet unique* have been subject to criticism in recent literature.

On the one hand, scholars contended that the mechanism under analysis constitutes a sign of distrust towards the General Court, as it empowers the Court of Justice to act as the gatekeeper of the latter's jurisdiction on preliminary references.[52] From a complementary viewpoint, it has been underlined that empowering the Court of Justice as the sole national courts' interlocutor may entail framing the General Court's jurisdiction on preliminary references as derivative rather than original.[53] This conclusion would be at odds with the wording of Article 256(3) TFEU, which states that the General Court '*shall* have jurisdiction (emphasis added)'.[54] Furthermore, recent scholarship questioned whether the *guichet unique* was necessary to enhance the swift allocation of cases between the two judicial bodies. Indeed, Article 256(3) TFEU already provides for the General Court to refer a question back to the Court of Justice if it lacks jurisdiction.[55]

On the other hand, some scholars construed the *guichet unique* as a solely procedural arrangement whose implications do not affect the original nature of the General Court's jurisdiction on preliminary references.[56] That argument appears convincing from a theoretical viewpoint. However, it is undeniable that the procedure under analysis leaves a considerable margin of discretion in the hands of the President of the Court – and, in the cases foreseen by Article 93a(3) of the Rules of Procedure, to the General Meeting of the Court of Justice – in assessing which judicial body shall be competent to hear the case.[57] It is definitely too early to draw conclusions on the practice of the *guichet unique* procedure, as the reform has only been operational for a few months to date. Still, a liberal or more restrictive approach from the Court of Justice in applying this mechanism will have profound implications for the number of cases devolved to the General Court.[58] After all, the effectiveness of the reform largely depends on this element, at least from a workload management viewpoint.[59]

[52] Bobek (n 7) 1524; P Biavati, 'La recente riforma del sistema giudiziario dell'Unione europea: brevi annotazioni sulle sue ricadute processuali' (2024) *Eurojus* 171, 173.

[53] Sarmiento (n 15) 15.

[54] Ibid. On the same point, see also: Amalfitano (n 28) 8; Alberti (n 26) 9.

[55] Sarmiento (n 15) 15.

[56] Orzan (n 41) 47.

[57] Tovo (n 46) 12.

[58] Petrić (n 6) 34.

[59] This profile touches upon the General Court and Court of Justice's respective roles as well, since the reform hinges upon the paradoxical – while logical – rationale of enhancing the 'constitutional' role of the Court of Justice by decentralising jurisdiction on its 'crown jewel', namely, the preliminary reference procedure (on this point, see S Iglesias Sánchez and D Sarmiento, 'Insight: A New Model for the EU Judiciary: Decentralising Preliminary Rulings as a Paradoxical Move Towards the Constitutionalisation of the Court of Justice' (EU Law Live, 8 April 2024), at eulawlive.com; Tovo (n 46) 4).

The second stream of criticisms concerns the *guichet unique*'s composition. Indeed, some scholars contended that the procedure for allocating references should have involved members of both the Court of Justice and General Court.[60] Others, conversely, proposed the *guichet unique* to be established within the General Court rather than the Court of Justice.[61] Both arguments have a common rationale: avoiding the risk of the Court of Justice being too restrictive and keeping for itself the vast majority of cases. However, the choice to involve the Court of Justice exclusively may be justified by the experience gained by the ECJ in treating preliminary questions.[62] This aspect should ensure that a decision on transferring the reference is made swiftly and without delay.[63] Moreover, Member States and EU institutions would hardly have accepted establishing the *guichet unique* at the level of the General Court.[64] This consideration confirms a sense of distrust – or at least cautiousness – towards enhancing the General Court as an interlocutor for national courts. From an opposite perspective, conferring the competence to receive preliminary references and allocate them to the General Court would have been consistent with one of the rationales driving the reform: empowering the Court of Justice as the 'supreme' or 'constitutional' judicial body of the Union, whose jurisdiction is reserved for profound questions of principle. However, the limited areas of law for which jurisdiction has been transferred prevents, at least for the time being, designing a similar judicial architecture.

As anticipated, the allocation of cases by the *guichet unique* does not preclude a subsequent transfer of the reference from the General Court to the Court of Justice and vice-versa. Indeed, the second phrase of Article 256(3) TFEU stipulates that 'where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling'. This provision is complemented by Article 54(2) of the Statute, which provides that the General Court must refer the case to the Court of Justice if it finds that it lacks jurisdiction. On the same grounds, also the Court of Justice may reassign a preliminary reference to the General Court, which cannot declare itself incompetent. As noted in the literature, the two provisions under analysis are worded differently. On the one hand, Article 54(2) of the Statute frames the transfer as a duty upon the Court of Justice and General Court, as they 'shall refer' the case at issue when the pertinent conditions are met. On the other hand, Article 256(3) TFEU states that the General Court 'may' refer the case, thus suggesting it enjoys a

[60] C Amalfitano, 'Il futuro del rinvio pregiudiziale nell'architettura giurisdizionale dell'Unione europea' (2022) *Il Diritto dell'Unione europea* 501, 533; Amalfitano (n 28) 9.

[61] Alberti (n 26) 27.

[62] On this point, see Tovo (n 46) 8.

[63] Orzan (n 41) 47.

[64] Ibid, 47–48.

certain margin of discretion in this respect. Therefore, the question arises: is the General Court faced with a duty or an option to reassign the preliminary reference where it concerns a question of principle pursuant to Article 256(3) TFEU?

Against this issue, two partially divergent positions have emerged. On the one hand, some scholars contended that referral in this context should be construed as an option, thus reflecting 'judicial comity rather than hierarchy'[65] between the Court of Justice and the General Court. On the other hand, it has been argued that the General Court has indeed a margin of discretion to assess the existence of a question of principle 'likely to affect the unity or consistency of Union law' as emerging from the case.[66] However, transferring the case to the Court of Justice amounts to a duty insofar as such a requirement is met. From a systematic viewpoint, this conclusion seems to be supported by the operation of the review mechanism enshrined in the same provision, which allows the Court to exceptionally re-examine preliminary rulings of the General Court when they impact 'the unity or consistency of the Union law'.[67]

From a procedural perspective, it is noteworthy that Article 207 of the Rules of Procedure of the General Court establishes separate arrangements for different types of referrals to the Court of Justice.[68] First, should a preliminary question be erroneously transmitted to the General Court, the Registrar immediately transfers it to the Court's Registry. Second, should the General Court find that the question does not fall under the scope of its jurisdiction in preliminary references, the decision to refer back the question to the Court of Justice is adopted by order of the Chamber after having heard the Advocate General to which the case had been assigned. Finally, the more complex procedure is envisaged if the General Court's competent Chamber finds that the reference entails a 'decision of principle likely to affect the unity or consistency of Union law' pursuant to Article 256(3) TFEU. After hearing the Advocate General, the Chamber may propose to the plenum of the General Court to refer the case to the Court of Justice. This procedural arrangement should be welcomed, as it ensures symmetry between, on the one hand, the assessment made by the General Meeting of the Court of Justice after receiving a preliminary reference raising 'independent questions' pursuant to Article 50b of the Statute and, on the other hand, the evaluation of 'decisions of principle' carried out by the plenum of the General Court under Article 256(3) TFEU. These two assessments entail substantially comparable features; therefore, if the one carried out by the Court of Justice within the *guichet unique* procedure warrants particular caution such as involving its General Meeting, the same procedural arrangement shall apply *mutatis mutandis* to the General Court, thus devolving the decision to its plenum.

[65] Tridimas (n 6) 18.

[66] D Düsterhaus, 'Referring Cases Back to the Court of Justice: Faculty or Duty' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024) 13, 13.

[67] Ibid, 14.

[68] Orzan (n 41) 64.

Finally, it must be underlined that the referral of the case to the Court of Justice pursuant to Article 256(3) TFEU may occur even after the conclusion of the written phase of the procedure before the General Court. In such a scenario, Article 114b of the Rules of Procedure of the Court of Justice requires the President to allow interested parties designated in accordance with Article 23 of the Statute to submit further written observations.[69]

2.3. The procedure for hearing and determining preliminary references at the General Court

To make sure that the General Court will be able to 'mimic' what the Court of Justice does when dealing with preliminary references, several organisational and procedural arrangements were built into the Statute and implemented by the Rules of Procedure of the Court of Justice and General Court respectively.[70]

The first concerns the General Court's specialised chambers which may be assigned to deal with the questions referred by national courts.[71] There is currently one such chamber, which is effectively asked to function as a 'mini-Court of Justice'.[72] It is composed of two formations and comprises the Vice-President of the General Court and two or four judges (from a pool of ten in total), who are assigned to one of these formations on a rotational basis.[73] The idea behind establishing specifically designated chambers is to ensure consistency in the treatment of preliminary references by the General Court. Moreover, specialisation in the areas of law subject to devolution, in the longer run, is meant to capitalise on the expertise of judges of those chambers and their *référendaires*, thus making the proceedings quicker and more efficient and the outputs of better quality.[74] This is something that has already been happening at the General Court in the context of direct actions, given the existing practice of assigning staff and intellectual property cases to specific chambers. While it would purportedly aim at ensuring the quality of output in the preliminary ruling

[69] Ibid, 52. The same possibility is not provided, conversely, for cases where the transfer to the Court of Justice is grounded on Art 54(2) of the Statute. This difference may be explained by the fact that the latter provision features a situation of mere incompetence of the judicial body, which does not require complementing the written observations after transferring the case. Conversely, situations falling under the scope of Art 256(3) TFEU entail a question of principle emerging from the case due to the written phase of the procedure. In such a scenario, the adversarial nature of judicial proceedings before the Court of Justice requires that parties should have the opportunity to address that issue by complementing their written observations.

[70] For a full overview of the new provisions that have been 'transplanted' to the Rules of Procedure of the General Court, most important of which will be discussed in the remainder of this section, see C Amalfitano, 'The Transplant of Procedural Rules from the Court of Justice to the General Court' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024) 29.

[71] Art 50b, para 4 of the Statute.

[72] Bobek (n 7) 1525.

[73] General Court, Formation of Chambers and Assignment of Judges to Chambers (C/2024/6456).

[74] Sarmiento (n 15) 12.

procedure, specialisation of chambers is not a formal requirement at the Court of Justice. Therefore, this procedural guarantee might be seen as an expression of doubt concerning the General Court's capacity to deal with this procedure, at least in this initial phase of operating the reform.[75]

The default formations in which the General Court will deal with preliminary references will number three or five judges. But there is also the possibility of convening an 'intermediate chamber', which is the second arrangement introduced by the reform.[76] The size of this formation was meant to be flexible and was supposed to have between five (as the default formation) and fifteen judges (as the Grand Chamber).[77] The reason why preliminary references should not be heard by the Grand Chamber of the General Court is that this formation is typically convened '[w]henever the legal difficulty or the importance of the case or special circumstances so justify'),[78] and it might be that these cases will raise questions of principle which should be referred back to the Court of Justice in accordance with Article 256(3) TFEU. Moreover, since the Grand Chamber involves fifteen judges, some judges who are not members of the specialised chambers might be involved in dealing with the preliminary references, which could defeat the purpose of establishing specialised chambers in the General Court and giving them the exclusive right to handle these cases. In any event, the Rules of Procedure of the General Court eventually stipulated that this intermediate chamber is composed of nine judges.[79] It will be assigned with more important and difficult cases, where a decision of particular significance in one of the specific areas of law delegated to the General Court will be required, as well as when Member States or EU institutions that are parties to the proceedings so request.

The third and final arrangement concerns Advocates General. It was envisaged that one or more judges sitting in the chambers specialised for preliminary references might be assigned with the role of Advocate General.[80] All judges of the General

[75] Bobek (n 7) 1525.

[76] These formations of flexible size were not unknown to the General Court. Even before the last reform, Art 28 of its Rules of Procedure envisaged that '[w]henever the legal difficulty or the importance of the case or special circumstances' required, a case could be referred to the Grand Chamber or to 'a Chamber sitting with a different number of Judges'.

[77] Art 50(2) of the Statute.

[78] Art 28(1) of the Rules of Procedure of the General Court.

[79] Art 15a of the Rules of Procedure of the General Court. On the composition of this formation, see General Court, Composition of the Grand Chamber and of the Intermediate Chamber (C/2024/6452).

[80] Art 49a of the Statute. The same was already provided by the Rules of Procedure of the General Court for other procedures before that judicial body since its establishment; yet it never took hold in practice. On this point, see *infra*.

Court choose among their ranks those that will perform the tasks of Advocates General. Two of them were initially elected for this duty.[81] Their term is three years and can be renewed once.[82] They will not sit as judges in the preliminary ruling cases during the length of their mandate as Advocates General, nor will they belong to the chamber to which the preliminary reference has been assigned.[83]

Of course, Advocates General will not deliver their opinions in every preliminary reference decided by the General Court, since this does not happen in every case before the Court of Justice either. In particular, it is a general rule that those opinions are not delivered in cases that raise no new points of law.[84] This aspect may question the need of having Advocates General for preliminary references at the General Court in the first place. Indeed, jurisdiction was transferred to the General Court in the areas where there is 'a substantial body of case-law of the Court of Justice which is capable of guiding the General Court' in dealing with preliminary references.[85] Perhaps even in these areas new points of law may emerge now and then. But in practice, this was never the sole criterion that determined whether an opinion of Advocate General will be delivered. Other aspects were often decisive, if only informally, such as clarity of the existing case-law, existence of conflicting lines of rulings (typically delivered by different chambers), complexity of legal questions, prospects for reversing earlier precedents, or political sensitivity of the case.[86] With this in mind, designating Advocates General can be understood as a measure concerned with 'legitimacy and equal treatment', which is there to reassure Member States, their courts, and all parties appearing in this procedure before the General Court that preliminary references will be treated in the same way as those that end up before the Court of Justice.[87] Still, it will be interesting to see how often this will happen. The possibility of having judges of the General Court acting as Advocates General in other procedures was there even before the recent reform,[88] but was used only several times in the first years of the (then) Court of First Instance.[89] Perhaps, also this time we may see more opinions being delivered during first years, as a means for summarising the 'substantial body of case law' developed by the Court of Justice, which judges might find useful and informative when deciding the case.[90] The Court

[81] General Court, Elections of the Advocates General for dealing with requests for a preliminary ruling and of a Judge called upon to replace them in the event that they are prevented from acting (C/2024/6455).

[82] Art 49a of the Statute.

[83] Ibid.

[84] Art 20(5) of the Statute.

[85] Recital 6 to the Regulation amending the Statute of the Court of Justice (n 7).

[86] J Wildemeersch, 'The (New) Role of the Advocate General at the General Court' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024) 21.

[87] Tridimas (n 23).

[88] See Art 49 of the Statute.

[89] Tridimas (n 6) 20.

[90] Wildemeersch (n 86).

of Justice similarly suggested that the 'twofold consideration' of the case – by Advocates General and Judges Rapporteurs (in deliberation with other judges) – could 'contribute to the strength of the analysis carried out by [the General Court]' and 'usefully supplement, qualify or enrich' it.[91]

Besides these pragmatic concerns, a more fundamental question arises: what those few judges of the General Court will make of their second 'hat' of Advocate General that they will occasionally wear? Some scholars have already stressed the 'dual personality' they will be expected to have.[92] But this may be easier said than done. The way of thinking of a judge, who decides collectively and has to negotiate the final content of the ruling with other judges (the ruling they will all sign off) differs from the way of thinking of an Advocate General, who decides and writes for themselves, and can be bolder and take more risk in exploring possible solutions to legal problems that are presented to the Court. It may be difficult or inconvenient to switch from one mode to the other from time to time, and this may be one of the reasons why the judges of the General Court initially did not pick up the practice of assigning the role of Advocate General among themselves.[93]

At the same time, given that many EU judges arrive to Luxembourg from academia – assuming that professors are fairly inclined to critical thinking and do not mind being 'mavericks' – perhaps it will not be so hard to find a couple of them among fifty-four who will be able 'to extricate themselves from their decision-making role in order to take a step back'[94] and gladly propose to adjust or reverse the established case-law. It is reasonable to expect that the degree of involvement and proactiveness of Advocates General may be a crucial factor to determine how much the General Court will be deferential to the Court of Justice's established case-law or, conversely, depart from it. In the long term, this new attempt to revive the image of a judge who acts as Advocate General, if it takes hold in practice, might affect our understanding of the role of Advocates General more generally.[95]

On that same note, judges of the General Court who are used to hearing and deciding certain types of cases might need some time to adjust to the peculiarities of the preliminary ruling procedure. The big question is, then, how the 'culture transition' will work.[96] The General Court mostly decides in direct actions and technical areas of law, which are heavily fact-driven, reliant on expert knowledge, and require

[91] 2022 Proposal (n 5) 7. For a discussion of how much Advocates General in the Court of Justice actually contribute to the comprehension of its rulings and reasoning, see T Ćapeta, 'The Advocate General: Bringing Clarity to CJEU Decisions? A Case-Study of Mangold and Kücükdeveci' (2012) 14 *Cambridge Yearbook of European Legal Studies* 563.

[92] Wildemeersch (n 86).

[93] Ibid.

[94] Ibid.

[95] Sarmiento (n 15) 18.

[96] Tridimas (n 23).

a careful assessment of evidence. This impacts its style of reasoning, makes its rulings lengthy and detailed, and orients it towards finding concrete solutions to individual questions, akin to a first instance court, rather than coming up with abstract solutions that are generalisable and replicable, akin to a supreme court.[97] However, the latter approach is inherent in the preliminary ruling procedure, which the General Court now gets to curate in several areas of law. In the framework of that procedure, national courts are solely responsible for the evaluation of facts. The General Court is going to only interpret EU law, in a more or less abstract manner, which will then fall on the referring courts to apply in solving concrete disputes.[98] So, some 'rewiring of the judicial mind' will have to happen at the General Court when it starts replying to questions of interpretation submitted by national courts.[99] It will be expected to put aside its 'fact-finding mentality' which dominates in direct actions while simultaneously putting trust in the referring court's assessment of facts, and switch to 'statutory interpretation' mode to adopt interpretations of EU law at a proper level of generality which can later on be applied in more factual circumstances.[100]

At the moment, it is uncertain what kind of longer-term impact the various procedural arrangements concerning the preliminary ruling procedure will have, which have been transplanted from the Court of Justice to the General Court. However, this is an open issue that only future practice will shed light on. Among more sceptical voices, Bobek has contended that the existing knowledge tells us that 'while the outer shell (in terms of procedures and institutional appearances) may be changed relatively easily, the inner culture (writing and reasoning style, culture of deliberation and participation) is much more resistant to change'.[101] At the same time, the legal and professional background of individual judges at the General Court – who are experts in EU law and well aware of how the instance above them operates – will also impact their 'inner culture' and influence the way they approach preliminary references.

Beyond these question marks concerning the identity of General Court judges that will deal with preliminary references, the new jurisdiction and procedures in their hands may open a range of new possibilities compared to previous practice.

[97] M Bobek, 'The Future Will Tell. Of Course It Will, But on What Criteria?' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024) 41.

[98] Although the Court of Justice itself crosses the border between abstract interpretation and concrete application of EU law, which is at times determined by the type of questions national courts refer to it. For a critique of the Court's 'factual jurisprudence', see M Bobek, 'National Courts and the Enforcement of EU Law – Institutional Report' in M Botman and J Langer (eds), *National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order. The XXIX FIDE Congress in The Hague, Congress Publications* vol 1 (Eleven International Publishing 2020) 61, 87–89.

[99] Tridimas (n 23).

[100] Ibid, 22.

[101] Bobek (n 7) 1525 fn 32.

Although it should formally remain the same as before the Court of Justice, the General Court may look to adjust the way in which national courts' requests are being handled, experiment with the procedural steps, suggest alternative interpretations of substantive law (or the way of interpreting EU law more generally), and so on.[102] For instance, it could more frequently request additional clarifications from the referring courts,[103] to get better context about the questions the latter have posed. This is something that the Court of Justice has rarely done under Article 101 of the Rules of Procedure, yet it has the potential of improving the dialogue between the judicial interlocutors, and not only concerning points of national law.[104] Or it could make greater use of the possibility of deciding the case by reasoned order whenever the precedent of the Court of Justice (or at certain point, of the General Court itself) already exists or the answer to the question of interpretation of EU law can be inferred from the existing case-law or that answer is obvious beyond reasonable doubt.[105] This is especially so given that the General Court will deal with preliminary references on specific areas of law in which 'a substantial body of case-law of the Court of Justice' has been amassed.[106]

The General Court may also deal with the questions of validity of EU law in the preliminary ruling procedure in a more robust way, similarly to how it addresses same questions in direct actions, which involves more opportunities for the parties to exchange written submissions and greater reliance on external expertise.[107] This would differ from how the Court of Justice deals with references raising questions of validity of EU law, yet may motivate it to sharpen its own scrutiny, if nothing 'to avoid looking like an unwilling or deferent jurisdiction, in contrast with its more incisive lower court'.[108] In the same way, the General Court may adopt bolder and more creative interpretations of EU law, being shielded by the inexistence of a formal appeal against its judgments in the preliminary ruling procedure through which the Court of Justice could discipline the General Court by striking down its overly ambitious holdings, as sometimes it did in the past.[109]

[102] Ibid, 1538.
[103] Art 212 of the Rules of Procedure of the General Court.
[104] Sarmiento (n 15) 17.
[105] Art 226 of the Rules of Procedure of the General Court.
[106] Recital 6 to the Regulation amending the Statute of the Court of Justice (n 7).
[107] Sarmiento (n 15) 11.
[108] Ibid, 18.
[109] For a well-known example concerning standing of individuals in the actions for annulment under Art 263 TFEU, see the General Court's ruling in Case T-177/01 *Jégo-Quéré v Commission*, EU:T:2002:112, and the subsequent reversal on appeal before the Court of Justice in Case C-263/02 P *Commission v Jégo-Qué*ré, EU:C:2004:210.

2.4. The Revision of Preliminary Rulings Issued by the General Court

The need to preserve the uniformity of EU law after the General Court delivers its preliminary ruling is reflected in the procedural *ex post* corrective safeguards the Court of Justice has at its disposal. This complements *ex ante* preventive safeguards also placed under the Court's watch (the *guichet unique* mechanism for allocating jurisdiction, discussed above), and *in tempore* self-control exercised by the General Court itself (remitting the cases that fall outside its jurisdiction or that require a decision of principle that can affect the uniformity of EU law, also discussed above).[110]

As is well known, in the preliminary ruling procedure parties will not have the possibility to bring an appeal before the Court of Justice against the decisions of the General Court. Still, Article 256(3) TFEU gives to the Court the possibility to exceptionally review those decisions. The third sentence of this provision thus says that '[d]ecisions given by the General Court on questions referred for a preliminary ruling may *exceptionally* be subject to review by the Court of Justice […] (emphasis added)'. It follows that, as a general rule, the answer of the General Court given to the referring court will be final. Moreover, the review by the Court of Justice should not only be exercised exceptionally,[111] but also proceed on limited grounds. As the same sentence of Article 256(3) TFEU adds, it should happen only 'where there is a serious risk of the unity or consistency of Union law being affected'.

The mechanism envisaged by Article 256(3) TFEU has been further elaborated in the Statute. From its provisions, we can see that the *réexamen* procedure should be as expedient as possible. It proceeds in the following steps. First, it can be initiated only by the First Advocate General. As provided in Article 62 of the Statute, within one month after the delivery of the ruling of the General Court, the First Advocate General can propose to the Court of Justice to review that ruling if he considers that the condition from the third sentence of Article 256(3) TFEU has been met.[112] Then the Court has another month to decide whether to review the General Court's decision. During this period, the General Court's decision is suspended and is not binding for the referring judge. It means that its decisions in the preliminary ruling procedure will be subject to a certain 'period of ineffectiveness' by default.[113] If the Court of

[110] Tridimas (n 6) 16.

[111] Tridimas suggested that not only the exercise of the review by the Court of Justice should be exceptional, but also referring the case from the General Court back to the Court under second sentence of Art 256(3) TFEU should also be exceptional; see Tridimas (n 6) 18.

[112] Note also that Art 62 of the Statute reproduces the wording of Art 256(3) TFEU and mentions 'a serious risk of the unity or consistency of Union law being affected'.

[113] Sarmiento (n 15) 13. This period can last for one month in case the First Advocate General does not trigger the review procedure, or two months in case he does but the Court of Justice decides not to follow. In the former scenario, the Court's Registrar needs to inform the General Court about that circumstance, which then needs to inform the referring court and the interested parties that the First Advocate General did not propose the review and thus the General Court's ruling has become final; see Art 193a of the Rules of Procedure of the Court of Justice.

Justice does not open the review, the referring court will spend in total two months waiting for the answer to its questions and for the General Court's ruling to take full effect. If the Court decides otherwise, then the referring court will wait for several additional months, until the review is completed in an urgent procedure.[114] Before the Court of Justice, the interested parties that appeared before the General Court will have the opportunity to submit written observations, and the Court may decide to hold oral hearings where necessary.[115] If the review is upheld, the answers to the questions of interpretation of EU law given by the Court of Justice will replace the answers initially given by the General Court.[116]

As we can see, the review procedure is premised upon several considerations, which are not necessarily complementary. Hence, as Iglesias Sánchez wrote, its initiation does not depend on the parties' request, yet the parties take part in the proceedings before the Court of Justice. And although it is triggered only in exceptional situations, which involve hard and principled questions of interpretation that may put the unity and consistency of EU law at serious risk, the review procedure is supposed to be urgent.[117]

How and when the preliminary ruling procedure comes to an end before the General Court will largely depend on how often the Court of Justice will decide to hit the 'review button'.[118] Some insights might be found in the corresponding procedure from Article 256(2) TFEU concerning review of the General Court's rulings on appeal against decisions of the now defunct Civil Service Tribunal,[119] which laid dormant during the last decade. During the times of the Civil Service Tribunal, the review was rarely activated. There were sixteen cases in which the First Advocate General proposed to the Court to review the ruling of the General Court. Given that in the same period the General Court delivered more than 300 rulings on appeal in the civil service cases, the First Advocate General proposed the review approximately once in every twenty instances.[120] The Court eventually granted the review in six cases.[121] So, the Court was willing to follow the proposal for review approximately once in every three instances.

In its review decisions, the Court of Justice adopted certain assessment criteria against which it determined whether the unity or consistency of EU law was seriously affected. Those included whether the ruling of the General Court may set the

[114] Art 62a of the Statute.

[115] Ibid.

[116] Art 62b of the Statute.

[117] S Iglesias, 'Return of the Réexamen' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024) 35.

[118] Bobek (n 97).

[119] For a discussion, see S Hummelbrunner, 'The Unity and Consistency of Union Law: The Core of Review under Article 256(2) and (3) TFEU' (2018) 73 *Zeitschrift für öffentliches Recht* 295.

[120] Iglesias (n 117).

[121] Ibid.

precedent for the future cases, or whether the General Court departed from the established case-law of the Court, or whether the rules or principles of EU law which the General Court misinterpreted have an important position in the EU legal order, or whether those rules and principles have systemic or horizontal application in different areas of EU law.[122] These criteria will arguably have to be refined and adjusted to the reviews that will take place in the future under Article 256(3) TFEU. This is because the logic of the reformed Statute is that the General Court is supposed to set new precedents when exercising jurisdiction in the areas of law that have been delegated to it.[123] It will also be interesting to see if and how the Court of Justice will assess whether the rulings of the General Court in these specific areas of law depart from its established case-law which does not necessarily pertain to those same areas. This will reopen the discussion about the so-called 'horizontal' and 'vertical' precedent in the EU judicial system, as well as the relationship between the two EU courts in shaping the case-law.[124] Moreover, it will be interesting to see whether the Court's finding of the existence of 'a serious risk of the unity or consistency of Union law' will be impacted by developments in its approach to appeals against rulings of the General Court concerning decisions of boards of appeal of EU agencies, where the grant of leave is premised on finding that the questions raised are 'significant with respect to the unity, consistency or development of Union law'.[125]

Scholars have made certain observations about what the future might tell us concerning the exercise and impact of the review procedure.[126] There seems to be no dispute that the rationale of the reform is to have the General Court taking over the interpretive authority in the areas that were placed under its control. So, the state of mind of EU judges should be concerned with 'empowering' instead of 'limiting' the General Court,[127] which would imply self-restraint and modesty on the part of the Court of Justice and courage and creativity on the part of the General Court. If things play out in this way, there may occur more interpretive divergences between the two EU courts that might affect the uniformity of EU law.[128] Consequently, the 'new' review procedure may have to be exercised more frequently than was the 'old' one

[122] View of Advocate General Wathelet in Case C-417/14 RX-II *Missir Mamachi di Lusignano v Commission*, EU:C:2015:593, para 54.

[123] Previously in the review procedure, the Court of Justice was of the view that developments of the case-law of the General Court or the fact that the Court has not yet itself ruled on a specific point of law are not of themselves sufficient to justify a review, since in that area of EU law (civil service) the General Court was designated as the final interpreter; see Case C-17/11 RX *Commission v Petrilli*, EU:C:2011:55, para 4.

[124] Iglesias (n 117). See also K Bradley, 'Vertical Precedent at the Court of Justice of the European Union: When Push Comes to Shove' in K Bradley, N Travers and A Whelan (eds), *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Hart Publishing 2014) 47.

[125] Art 58a of the Statute. For further discussion, see Section 4 below.

[126] Bobek (n 97).

[127] Tridimas (n 6) 13.

[128] Bobek (n 97); Iglesias (n 117).

before. This might be the case especially since the precedential value of the General Court's decisions in the preliminary ruling procedure will affect a significantly larger number of actors – individuals and legal persons, national administrative institutions and courts – than its appellate decisions pursuant to Article 256(2) TFEU, which affected only EU civil servants.[129]

In exercising the review powers, the quest for uniformity will not be the only concern. It will have to be balanced against other concerns that motivated the reform of the Statute, such as efficiency and management of resources.[130] From this perspective, the performance of the review will also depend on how well the Court of Justice manages the *guichet unique* mechanism and whether it properly allocates cases between the two courts, particularly by assessing in the first step whether the case raises questions of principle. However, if the Court eventually starts investing more time and effort in controlling what comes before the General Court and doublechecking what comes out of it, hence ending up with more work than it used to have under the old system, then the entire reform could be futile, and the Court of Justice's cure would come out as worse than the disease.

3. The new rules on transparency and participation in preliminary reference proceedings

Further major novelties introduced by the reform of the Statute concern – once again – the preliminary ruling procedure before the Court of Justice and the General Court. The first thing to mention is the expanded list of EU institutions that can intervene and have their voices heard in the preliminary ruling procedure. Article 23 of the Statute now provides that every reference for a preliminary ruling sent from national courts has to be notified not only to the parties before the referring court, every Member State, the European Commission, and EU institution(s) whose action or omission is the subject matter of the reference, but also to the European Parliament, the Council, and the European Central Bank.[131] These institutions will thus be able to submit

[129] Iglesias (n 117). At the same time, the greater reliance on the review procedure might draw higher requirements concerning the justification that the Court of Justice provides when deciding (not) to follow the proposal of the First Advocate General. Its earlier decisions, in which the Court found that the review could not proceed, were based on scarce reasoning and were not even translated to all EU official languages. It was therefore argued that, when the First Advocate General proposes a review and the Court of Justice does not grant it, the Court will have to carefully justify such a decision since the review proposal might (indirectly) challenge the authority of the General Court's decisions in the preliminary ruling procedure; on this point, see ibid.

[130] Bobek (n 7) 1528; Bobek (n 97). On the consequences in terms of efficiency of potentially combining the transfer of the case between the two EU Courts and the activation of the revision mechanism, see S Soldevila Fragoso, 'La triste reforma de la cuestión prejudicial' (2024) 34 *Actualidad administrativa* 1, 6–7.

[131] See Amendment 52 of the European Parliament's Proposed amendments to the Statute of the Court of Justice (n 86). This follows the established case-law of the Court of Justice in which it already

observations in every case in which they have particular interest,[132] contributing further to the development of EU law through judicial procedure after they have taken part in the enactment of specific legal acts. Since the Parliament will likely use every opportunity to intervene in the preliminary ruling procedure before the Court of Justice and General Court, this might translate to more inclusiveness and democratic input in the decision-making of the two EU courts, and potentially greater perceived legitimacy of their final rulings which may affect many public and private interests.

Further changes are aimed at making the preliminary reference procedure more open and transparent. Such an effort falls in line with other initiatives the Court of Justice has recently made to open itself to the public, from scholars to media and citizens. The Court, for instance, unlocked its historical archives,[133] became active on social media, started publishing national courts' references for preliminary ruling (originals and working translations to all official languages), and agreed to livestream hearings in some important Grand Chamber cases (which should gradually extend to all hearings).[134]

Against this background, with the entry into force of the reformed Statute comes a new regime of publishing written submissions of the parties taking part in the preliminary ruling procedure – private litigants, interveners, national governments, and EU institutions. These documents will now automatically be published on the website of the Court of Justice. Their publication will happen within a reasonable time after the case is closed.[135] Access to these submissions while the case is pending before the Court was excluded for the sake of 'preserv[ing] the quality and serenity of the judicial proceedings'.[136]

However, every party, including EU institutions and national governments, can object to the publication of their submissions.[137] They need to communicate that within three months after the case is closed.[138] When they do so, they do not have to state any reasons. So, the Court of Justice and General Court will have no control

started permitting greater involvement of the Parliament and the ECB in the preliminary ruling procedure.

[132] Tridimas (n 6) 20–21. For a different reading on this point, see A Maffeo, 'Riforma dell'art. 23 dello Statuto: la montagna ha partorito il topolino?' (2024) *Rivista del contenzioso europeo* 1.

[133] Court of Justice, Decision concerning the deposit of the historical archives of the Court of Justice of the European Union at the Historical Archives of the European Union (European University Institute) (2015/C 406/02).

[134] See Art 80a of the Rules of Procedure of the Court of Justice and Art 110a of the Rules of Procedure of the General Court.

[135] Art 23(5) of the Statute.

[136] Letter from Koen Lenaerts, President of the Court of Justice of the European Union, to Ms Hadja Lahbib, President of the Council of the European Union, transmitting draft amendments to the Rules of Procedure of the Court of Justice (Luxembourg, 27 February 2024) 16.

[137] Art 96(3) of the Rules of Procedure of the Court of Justice; Art 202(3) of the Rules of Procedure of the General Court.

[138] Although objections after the submissions have been published are admissible. Also, parties can always decide to withdraw those objections, after which the publication would follow.

over the parties' objections.[139] They will just receive objections, automatically hold back the publication, and indicate on the website that the party in question objected to publication. Besides not having to be justified, those objections will not be challengeable before the EU courts either. The alternative, in which the EU courts would have to examine *ex ante* the merits of the objections to publication or review them *ex post*, would arguably be too costly in terms of time and effort required to perform those tasks. Still, even such a system indeed brings an important change in practice: '[p]roactive disclosure is now the rule, and confidentiality will require a formal objection, which will be announced on the Court's website', so that everyone will know who has 'chosen secrecy over transparency'.[140] And after the case is closed, if private actors or Member States or EU institutions indeed object to the disclosure of their observations, citizens will still be able to request access to them from institutions other than the Court (typically, the Commission) relying on grounds provided in Regulation (EC) No 1049/2001, in line with the Grand Chamber's ruling in *Breyer*.[141]

This novelty is supposed to contribute to good governance and greater transparency of judicial decision-making in the EU. It will provide citizens, national judges, and scholars with important insights into the reasons that might have motivated the Court's judgments.[142] This is warranted especially given the Court's ever greater involvement with constitutional controversies and human rights matters, mostly in the framework of the preliminary ruling procedure. As such, the publication could increase accountability and strengthen trust in the EU judiciary, and consequently in the EU judge-made law.[143] But all this could happen only if the parties' submissions were published systematically. If the parties regularly objected to that[144] – which would not be improbable given that they do not have to provide any justification nor is there any remedy available against their objection – the whole purpose of the new rules would be defeated.[145]

[139] Things work differently when it comes to the parties' objections to livestreaming of the hearings, where justification is always required; see Art 80a(3) of the Rules of Procedure of the Court of Justice and Art 110a(3) of the Rules of Procedure of the General Court, which ask the parties to set out 'in detail the circumstances that justify a decision not to broadcast the hearing'.

[140] P Dermine, 'Transparency and Openness at the Court of Justice – Towards Ex Post Publicity of Parties' Observations' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024) 25.

[141] Case C-213/15 P *Commission v Patrick Breyer*, EU:C:2017:563.

[142] For a discussion of the concept of open justice in the context of judicial decision-making, in general and at the Court of Justice of the EU, see I Fevola and S Montaldo, 'Access to Written Submissions in Preliminary Reference Proceedings: An Evaluation of the CJEU Statute Reform and its Contribution to Open Justice' (2025) 10 *European Papers* 327.

[143] Recital 4 to the Regulation amending the Statute of the Court of Justice (n 1).

[144] Perhaps private parties will be inclined to object to publication of their observations for strategic reasons that relate to the remainder of the proceedings before the referring court.

[145] Dermine (n 140).

It is also indicative that the publication of written submissions was not initially found in the Court's proposal but was pushed for by the European Parliament in the later stages of the legislative procedure, in particular by MEPs René Repasi (S&D) and Patrick Breyer (Greens/EFA). The Court of Justice traditionally had a strict(er) approach to transparency and access to documents it holds, compared to other transnational courts.[146] It never proactively worked on enabling public access to case files,[147] despite calls from within its own ranks.[148] But this time the Parliament was unrelenting about transparency and used the opportunity to have its views integrated in the future setup of the EU judiciary, although not all of its proposals bore fruit.[149] The Court did manage to insert certain details that will make its everyday work easier, such as not having to check the parties' objections to publication or review them.[150] The whole episode showed how the EU legislators are invested in institutional matters of the Court of Justice and that, at the end of the day, the Court (as every court) does not fully control its fate.[151]

Finally, the reformed Statute changes the way in which future amendments will be executed. A new provision was inserted to require that every request or proposal for the amendment of the Statute will be preceded by wide two-month public consultations.[152] These consultations about the developments of the EU judicial system should be open and transparent and 'allow for the widest possible participation'.[153]

[146] Cf Art 40(2) of the European Convention of Human Rights.

[147] On the other hand, access to administrative documents were recently regulated; see Court of Justice, Decision concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (2020/C 45/02).

[148] See Opinion of Advocate General Poiares Maduro in Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission*, EU:C:2009:592, para 37: '[O]nce a final judgment has been delivered, the parties' submissions should be available to the public unless exceptional reasons demand that secrecy be maintained in a particular case. However, such reasons cannot be presumed to exist in all cases. Given the weighty reasons militating in favour of making this information public, such exceptions should be limited'.

[149] For instance, the Parliament sought to impose a duty to state reasons on parties that object to publication of their submissions, and to have an exhaustive list of reasons on which they may rely when raising such objections; see European Parliament, Committee on Legal Affairs, Proposed amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union, 2022/0906(COD) (6 July 2023), Amendment 50. The criticism of unmotivated objections was shared by legal professionals; see Council of Bars and Law Societies of Europe, 'CCBE comments on the draft Rules of Procedure of the Court of Justice and the General Court' (Council of Bars and Law Societies of Europe, 27 February 2024), at ccbe.eu, which argued especially against non-publication of observations made by EU institutions, EU agencies, and Member States, given that 'these observations reflect the legal views of public authorities on matters that are often important and relevant more generally and in more than one EU Member State'.

[150] Dermine (n 140).

[151] Ibid.

[152] Art 62d of the Statute; see also Amendment 68 of the European Parliament's Proposed amendments to the Statute of the Court of Justice (n 149).

[153] Recital 29 to the Regulation amending the Statute of the Court of Justice (n 1).

Among the involved stakeholders should certainly be national judges and EU legal scholars.[154] The outcome of these consultations will be communicated among the EU judiciary and legislators and made publicly available. This is yet another confirmation of the awareness that the institutional fate of the Court of Justice is a matter of common concern for both EU institutions and the public.

Despite all the commendable novelties introduced by the reform of the Statute of the Court of Justice, the strive for more open and transparent judicial proceedings remains a work in progress. Issues with some potentially questionable practices remain, like anonymisation of the case names.[155] There is arguably still room for improvement, such as considering third-party interventions or *amicus curiae* briefs to provide additional inputs that represent diverse points of view and could be relevant to the interpretation of EU law, as seen in one of the unsuccessful amendments proposed by the European Parliament.[156] Another thing that seems to be ripe for reconsideration concerns the expert panel established by Article 255 TFEU and its internal workings in the process of selecting judges of the two EU courts.[157]

But the overall spirit of the recent reform speaks to an increased awareness of the Court's importance in the Union's institutional system in the new (digital) age. There appears to be a conscious effort to improve the way the Court makes its decisions, presents itself, and communicates with the public. The Court's basic organisational and governing structures have remained unchanged since the early days of

[154] Amalfitano (n 70).

[155] In 2018, the Court of Justice decided to replace the names of individuals in all materials related to the preliminary ruling procedure – most importantly, judgments and opinions of Advocates General – with random initials that do not correspond to their actual initials; see Court of Justice, 'Press Release No 96/18 – From 1 July 2018, requests for preliminary rulings involving natural persons will be anonymised' (Luxembourg, 29 June 2018), at curia.europa.eu. The reason was to ensure compliance with provisions of the General Data Protection Regulation (EU) 2016/679 and Regulation (EU) 2018/1725 on the protection of personal data processed by the EU institutions. Then, in 2023 the Court decided to change this practice and start replacing the names of individuals – but only natural and not legal persons – with computer-generated fictional names that are created by 'dividing words into syllables, which are then randomly combined to produce' those names, which do not correspond to the real names of the parties and are not even existing names. Compared to the previous model of using random initials, this change was supposed to make recognition of cases, as well as their referencing in the case-law and scholarship, easier; see Court of Justice, 'Press Release No 1/23 – Anonymised references for preliminary rulings lodged from 1 January 2023 to be allocated a fictional name' (Luxembourg, 9 January 2023), at curia.europa.eu. For critical reflection, see M Bobek, 'Data Protection, Anonymity and Courts' (2019) 26 *Maastricht Journal of European and Comparative Law* 183; and P Oliver, 'Anonymity in CJEU Cases: The Court Changes Its Approach' (*EU Law Analysis*, 23 January 2023), at eulawanalysis.blogspot.com.

[156] European Parliament's Proposed amendments to the Statute of the Court of Justice (n 149), Amendment 48; for a discussion, see A Alemanno, 'Public Participation before the Court of Justice of the EU: Enhancing Outside Party Judicial Participation via Amicus Curiae Briefs' (2025) *Erasmus Law Review* (forthcoming).

[157] See contributions to the EU Law Live Symposium *The Selection of EU Judges and the 255 Committee* (November 2024), at eulawlive.com.

its establishment in the 1950s. While this has helped the Court stand on its feet and become efficient, the environment in which it operates in the 21st century has undergone dramatic changes. Different times need different court – namely, a more open, transparent, and accountable judicial institution.[158] The latest effort aligns the Court of Justice better with an essential (yet often overlooked) part of Article 1 of the Treaty on the European Union (TEU), which talks about 'an ever closer union among the peoples of Europe' in which – importantly – 'decisions are taken as openly as possible […] to the citizen'.

4. The extension of the scope of application of the filtering mechanism on appeal

The last amendment introduced by the 2024 reform addresses litigation concerning direct actions. The revised Article 58b of the Statute makes the mechanism for prior admission of appeals before the Court of Justice applicable to two categories of cases. On the one hand, the reform upholds the previous provision stipulating that the filtering mechanism applies to appeals against judgments of the General Court concerning decisions of independent boards of appeal established after 1 May 2019 within any body, office, or agency of the Union. Regarding those established before that date, the reform of the Statute expands the list of boards enshrined in the same provision to which the mechanism applies. The list previously featured only four boards, namely, those established within the European Union Intellectual Property Office, the Community Plant Variety Office, the European Chemicals Agency and the European Union Aviation Safety Agency. As a result of the 2024 reform, the list now includes the European Union Agency for the Cooperation of Energy Regulators, the Single Resolution Board, the European Banking Authority, the European Securities and Markets Authority, the European Insurance and Occupational Pensions Authority and the European Union Agency for Railways. On the other hand, the reform extends the application of the same filtering mechanism to all appeals against the General Court's judgments rendered on the basis of an arbitration clause within the meaning of Article 272 TFEU.

In both cases, appeals will proceed before the Court of Justice only if they raise 'an issue that is significant with respect to the unity, consistency or development of Union law'.[159] The procedure for the prior admission assessment is detailed by Articles 170a and 170b of the Rules of Procedure of the Court of Justice, which have not been amended after the 2024 reform of the Statute. In essence, they provide that such appeals shall be accompanied by an annexed request for the appeal to proceed, detailing in which way the case touches upon the unity, consistency, or development

[158] Cf C Krenn, *The Procedural and Organisational Law of the European Court of Justice: An Incomplete Transformation* (Cambridge University Press 2022).

[159] Art 58a(3) of the Statute.

of EU law.[160] The decision on the matter is issued through an order by a Chamber presided by the Vice-president of the Court and comprising the Judge-rapporteur and the President of the Chamber of which the Judge-rapporteur forms part.[161]

The two amendments have a common deflationary rationale, as they aim to reduce the Court's workload on appeal. However, the two areas of litigation to which the prior admissibility mechanism now applies deserve distinct considerations.

When adjudicating decisions of independent boards of appeals, the General Court essentially exercises appellate jurisdiction. The opportunity for individual applicants to initiate proceedings on the legality of acts by Union bodies and agencies before these boards is explicitly provided for by the Treaties.[162] When a board of appeals is established within a specific EU body or agency, its acts shall first be contested before that instance. The board's decision may then be challenged through direct action before the General Court in accordance with Article 263 TFEU.

The regulatory framework governing proceedings before the boards of appeals is not uniform, as each has distinct characteristics stemming from the peculiarities of both its area of competence and respective EU body or agency.[163] As a result, boards are different in their design and do not offer identical guarantees of independence and impartiality.[164] Still, some commonalities also emerge. From an administrative perspective, boards of appeals traditionally maintain functional continuity with their respective bodies or agencies. On that basis, their power of review forms

[160] Art 170a of the Rules of Procedure of the Court of Justice. Thus worded, the provision in question poses the burden of proof of the case's impact on the unity or development of EU law on the appellant's shoulder (MF Orzan, 'L'estensione del meccanismo preventivo di ammissione delle impugnazioni a cinque anni dalla sua entrata in vigore nella recente riforma dello statuto della Corte di giustizia dell'Unione europea: bilanci e prospettive' in B Nascimbene and G Greco (eds), *La riforma dello Statuto della Corte di giustizia* (2024) *Eurojus* 94, 102; M Coli, 'La Corte di giustizia si pronuncia sul primo pourvoi ammesso ai sensi dell'articolo 58 *bis* dello Statuto e conferma il carattere restrittivo del "filtro" sulle impugnazioni' (2024) 2 *Rivista del contenzioso europeo* 205, 207; R Torresan, 'Filtering Appeals Over Decisions Originally Taken by the Boards of Appeal: Rationale, Impact and Potential Evolution of Article 58a of the CJEU Statute' in J Alberti (eds), *Quo vadis, Boards of Appeal? The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection* (2024) *Rivista del contenzioso europeo* 129, 140).

[161] Art 170b of the Rules of Procedure of the Court of Justice.

[162] Art 263(5) TFEU.

[163] P Stancanelli and A Menéndez Fernández, 'Role and Perspectives of the Boards of Appeals of EU Agencies in Light of the Reform of the Statute of the Court of Justice' in J Alberti (eds), *Quo vadis, Boards of Appeal? The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection* (2024) *Rivista del contenzioso europeo* 305, 306 ff; Torresan (n 160) 132.

[164] K Bradley, 'The Court of Justice Appeal Filter Mechanism and Effective Judicial Protection: Throwing out the Baby with the Bathwater?' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024) 9, 11; J Alberti, 'The Position of Boards of Appeal: Between Functional Continuity and Independence' in M Chamon, A Volpato and M Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 247.

an integral part of the administrative procedure.[165] Against this background, in recent years, the regulatory framework for boards of appeals has exhibited a general trend towards progressively enhancing their adjudicatory – or quasi-judicial – nature and statutory independence from their respective EU bodies or agencies.[166] There is no opportunity to explore the rich academic discourse on this subject.[167] For the present analysis, it suffices to stress that the filtering mechanism for appeals against the General Court's judgments on boards of appeals' decisions constitutes a key manifestation of that trend.

The filtering mechanism was first introduced by the 2019 reform of the Statute, which followed by only three years the 2016 abolition of the Civil Service Tribunal and the doubling of judges at the General Court. As anticipated, these amendments implied a departure from the judicial architecture previously envisaged by the Treaty of Nice.[168] In turn, the decline of specialised tribunals enhanced the role and position of boards of appeals as specialised fora for administrative review on acts issued by EU bodies and agencies.[169] Together with the strengthening of their guarantees of independence and impartiality, that phenomenon reinforced the position of boards of appeals as quasi-judicial bodies whose review of the legality of administrative acts contributes to safeguarding the right to an effective remedy under Article 47 of the Charter.[170] The Court of Justice's recent case-law has emphasised this feature. In *Aquind*, a case concerning a decision issued by the ACER Board, the Court of Justice upheld the latter's quasi-judicial nature by affirming that it shall exercise a full review of the contested administrative act.[171] The General Court, in turn, operates as an appellate jurisdiction over decisions of boards of appeals which already exercised full review.

As noted by the Court of Justice on occasion of the 2019 reform, many successive appeals in 'cases which have already been considered twice, initially by an independent board of appeal, then by the General Court, […] are dismissed by the Court of Justice because they are patently unfounded or on the ground that they are

[165] This is why some of them are even entitled to replace or amend the act under scrutiny when upholding the action.

[166] Stancanelli and Menéndez Fernández (n 163) 310.

[167] On this topic, among the most recent literature, see the wide-ranging contributions published in M Chamon, A Volpato and M Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022); J Alberti (eds), *Quo vadis, Boards of Appeal? The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection* (2024) *Rivista del contenzioso europeo*; as well as G Greco, *Le commissioni di ricorso nel sistema di giustizia dell'Unione europea* (Giuffrè 2020).

[168] See Section 2.1 above.

[169] Alberti (n 164) 246. On the apparent alternative between specialised tribunals and boards of appeals, see Alonso García (n 11) 8.

[170] Nascimbene and Greco (n 25) V. For a critical account, see Stancanelli and Menéndez Fernández (n 163) 313 ff.

[171] Case C-46/21 P *ACER v Aquind*, EU:C:2023:182, paras 59 and 63.

manifestly inadmissible'.[172] This consideration led the Parliament and Council, acting on the request of the Court, to establish a mechanism of prior admission of similar appeals, 'to enable the Court of Justice to concentrate on the cases that require its full attention'. As underlined by the literature, the mechanism had a profound impact on litigation in those domains.[173] Indeed, only seven cases (all concerning EUIPO acts) adjudicated by the General Court have been reviewed by the Court of Justice since 2019.[174] Still, the 2022 proposal for amending the Statute underlined that other independent boards of appeals were already set up in 2019 while not mentioned in Article 58a of the Statute.[175] Therefore, their exclusion from the prior admissibility procedure appeared inconsistent with the overall rationale of the mechanism.[176] As a result, the 2024 amendment under analysis should be seen as a complement to the 2019 reform, as it broadened the scope of the filtering mechanism to the whole spectrum of the independent boards of appeals. But deflation is not the only rationale of the reform. Indeed, such an amendment consolidates the respective roles of EU Courts in litigation on acts adopted by Union agencies endowed with independent boards of appeals. While the General Court constitutes the appellate jurisdiction, the Court of Justice shall be seen as the last instance court whose access thereto is limited to questions of law touching upon the 'unity, consistency or development of Union law'.[177]

Conversely, partially different considerations apply to extending the same filtering mechanism to appeals on cases brought before the General Court on the grounds of an arbitration clause under Article 272 TFEU.[178] In this domain, the General Court is not an appellate jurisdiction but a first-instance one. According to the Court of Justice's 2022 request, questions concerning the unity of the EU legal order emerge only rarely from that stream of litigation, thus justifying the opportunity to limit access to appeals. It follows that the only rationale for extending the prior admissibility procedure designed for boards of appeals' cases to Article 272 TFEU is to reduce the workload of the Court of Justice on appeals litigation.

[172] Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, recital 4. On this point, see Torresan (n 160) 133.

[173] Angeli (n 27) 10.

[174] Coli (n 160) 2.

[175] 2022 Proposal (n 5) 8.

[176] For a critical reading of the architecture resulting from the 2019 reform, see Torresan (n 160) 136 ff.

[177] Art 58a(3) of the Statute. On this point, see Alonso García (n 11) 7; Orzan (n 160) 107–108.

[178] According to that provisions, the Court of Justice 'shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law'.

5. Not a conclusion but… rather a way forward

This article aimed to provide a critical assessment of the 2024 reform of the Statute of the Court of Justice from a procedural perspective. To that aim, the analysis has been complemented with relevant amendments to the Rules of Procedure of the Court and General Court. When bringing any scientific contribution to an end, concluding remarks are usually appropriate. Still, this article was not intended to conclude but rather to serve as a first step towards further analysis developed in the Special Section 'Perspectives on the Reformed EU Judicial Architecture'. The underlying rationale of that publication project is to bring together different perspectives of analysis on the new EU judicial architecture, thus deepening the novelties introduced and their early application beyond the procedural dimension developed herein. This article thus provided the groundwork for the contributions featured in the Special Section, which address the many open questions stimulated by the reform from a multi-perspective viewpoint. Therefore, rather than concluding remarks, this final section provides a way forward to the subsequent lines of analysis.

Key interrogatives touch upon the implementation of the new EU judicial architecture and its future prospects. Indeed, recent scholarship underlined that the reform gives rise to several 'known unknowns',[179] which only time and further scholarly reflection will clarify. To provide just one example, uncertainties surround the reform's effectiveness in addressing the issues driving the overall amendment of the Statute. On this point, divergent views have emerged. Some scholars argued that the reform would not be a structural solution to the Court's overload but rather a temporary palliative.[180] Should the renewed workload management between the Court of Justice and General Court succeed in reducing the time for defining preliminary references, the reform would risk stimulating referrals from national courts even more, thus exacerbating current issues.[181]

Conversely, other authors raise concerns about the potential fear that national courts may perceive their questions as of lesser importance if examined by the General Court rather than the Court of Justice, thereby discouraging them from referring.[182] In response to such criticism, it has been noted that concerns in the academic and institutional discourse on the Court of First Instance's feasibility to deal with important areas of EU litigation arose even when that judicial body was first established. After 35 years, such fears are now overcome and the General Court is a key

[179] This particularly effective expression has been advanced in Sarmiento (n 15).

[180] Bobek (n 7) 1543.

[181] Ibid, 1540.

[182] Orzan (n 41) 50. On national courts' potential distrust, see the considerations referred to above in Section 3.2, as well as RG Conti, 'C'era una volta il rinvio pregiudiziale. Alla ricerca della fiducia – un po' perduta – fra giudici nazionali ed europei' in B Nascimbene and G Greco (eds), *La riforma dello Statuto della Corte di giustizia* (2024) *Eurojus* 118.

protagonist in the EU's judicial architecture.[183] Therefore, it appears reasonable to expect that successive practice would enable national judicial authorities to become accustomed to preliminary rulings issued by the General Court, thereby getting over potential distrust.[184]

The renewed centrality gained by the General Court in the EU judicial architecture may stimulate further reforms of the Statute of the Court of Justice in the near future. Still, it is quite challenging – at least for the time being – to determine whether the reform marks the first step of an already defined future evolutionary path.[185] Indeed, the 2024 reform can be seen as an experiment[186] which, if successful, may pave the way for further devolution of jurisdiction on preliminary references to the General Court.[187] We will know that in four years after the entry into force of the reformed Statute, when the Court of Justice will present a report to the EU legislative institutions analysing how the reform of the preliminary ruling procedure has progressed. If the system will be firing on all cylinders, the report may be accompanied with a request for amending the Statute, in particular to expand the list of specific areas in which the General Court will be deciding in the preliminary ruling procedure. That would be another indication of the course in which the EU judiciary seems to be heading – with the General Court 'handling the bulk of the docket' in a manner of a supreme court and the Court of Justice 'deciding on points of principle and cases of constitutional relevance' in a manner of a constitutional court.[188] Conversely, if the reform does not produce the desired results, the possibility of a different and even more profound rethinking of the EU judicial system remains open.[189] Against these various questions, only time and future practice will tell. Still, this piece and the other articles featured in the Special Section aim at paving the way – or, given the multiple perspectives developed, the *ways* – for the future assessment of the EU judicial architecture's evolution.

[183] Condinanzi and Amalfitano (n 24) 9.

[184] A Tizzano, 'Il trasferimento di alcune questioni pregiudiziali al Tribunale UE' in *Quaderni AISDUE* (Editoriale Scientifica 2023) 112.

[185] Angeli (n 27) 5.

[186] In this line, see Iglesias Sánchez and Sarmiento (n 59) 5.

[187] Condinanzi and Amalfitano (n 24) 8; Amalfitano (n 28) 13; Angeli (n 27) 11. See also Tridimas (n 6) 22, who argued that 'it is unlikely that the transfer will lead to unhealthy fragmentation' of EU law since '[t]here are good preventive and corrective mechanisms in place and, on a cost benefit analysis, the reform comfortably passes the test'.

[188] Sarmiento (n 15) 4; see also M van der Woude, 'The Place of the General Court in the Institutional Framework of the Union' in *Weekend Edition No 81* (EU Law Live 2021) 1, 20.

[189] Tizzano (n 184) 112.

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Perspectives on the Reformed EU Judicial Architecture
***edited by* Lorenzo Grossio *and* Davor Petrić**

O Tell Me the Truth About the Transfer of Preliminary References to the General Court. Three Narratives to Be Questioned, Two Thorny Issues to Be Introduced and One Scenario to be Addressed as the Main Legacy of the Recent Reform of the CJEU Statute

Jacopo Alberti[*]

ABSTRACT: The article discusses the main narratives surrounding the reform, namely the increasing specialisation of the General Court, the reduction of the workload of the Court of Justice and its progressive constitutionalisation, highlighting the seed of truth that can be found in them as well as the misunderstandings on which they are based. Subsequently, it proposes a further interpretation on the long-term impact of this reform, arguing that its main legacy should more precisely be identified as the verticalisation of the EU judiciary and discussing its benefits and risks. Finally, it presents a couple of thorny issues that have not thus far attracted the attention of the debates, namely the role of the Court of Justice in the legislative process regarding the amendments of its own Statute and the benchmarks for assessing whether the reform reaches its targets.

KEYWORDS: Court of Justice – preliminary reference – EU constitutional law – national courts – accountability – institutional balance.

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1. Introduction

Let us say it bluntly: at least in the short term, the transferral of preliminary rulings will not upset the EU system of judicial protection, nor the settled case-law of the Court of Justice of the European Union (CJEU). This reform has not been extensively debated outside the limited realm of EU scholars and many national judges are not aware of it, also because just a few operate in the policy fields transferred to the General Court (GC) and just a handful of requests are raised in those areas from some Member States.[1]

After all, this should not be surprising. Being unaware of this reform means, to some extent, catching a crucial part of its spirit: to change everything, for some things to remain the same. The Rubicon of the transferral of preliminary rulings has finally been crossed, for the sake of closing the chapter opened in 2015, by doubling the members of the GC.[2] Yet this has been done only under specific conditions, aimed at keeping the role of the Court of Justice (CJ) and of the preliminary ruling procedure as close as possible to the existing one.

However, as taught by the *Gattopardo*, even those who embrace change to keep their role in (r)evolutionary times must accept to undergo some mutations themselves.

Therefore, what transformation will the EU judiciary face after this reform? How will the institution that has probably played the most striking role ever for the process of European integration, at least from a purely legal perspective, evolve in the future?

Standing on the shoulders of the previous literature,[3] this article aims at questioning the foundations of the current debates on the reform and proposing new issues to be discussed as well as a different interpretation on the direction taken by the EU judiciary. The reader should be aware that this article has no truth to tell and no answer to give to many of the issues that it raises. Conversely, it aims to look for

[1] Lacking official statistics, on the basis of the documents publicly available from the CJEU database, after six months of application of the new provisions the judges from 15 Member States were still not involved in the dialogue with the GC. As for Italy, recent studies have assessed that statistically just 3 or 4 cases per year are raised in the policy fields (theoretically) transferred to the GC (see J Alberti, 'Il trasferimento del rinvio pregiudiziale al Tribunale, all'alba della sua entrata in vigore' (2024) 1 *Rivista Quaderni AISDUE* 511).

[2] C Curti Gialdino, 'Il raddoppio dei giudici del Tribunale dell'Unione: valutazioni di merito e di legittimità costituzionale europea' (2015) 8 *Federalismi* 1; F Dehousse, 'The Reform of the EU Courts (II). Abandoning the Management Approach by Doubling the General Court' (2016) 83 *Egmont Papers* 1; A Alemanno and L Pech, 'Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System' (2017) 54 *Common Market Law Review* 129; D Sarmiento, 'The Reform of the General Court: An Exercise in Minimalist (but Radical) Institutional Reform' (2017) 19 *Cambridge Yearbook of European Legal Studies* 236; C Amalfitano and M Condinanzi (eds), *La Corte di giustizia dell'Unione europea oltre i Trattati: la riforma organizzativa e processuale del triennio 2012-2015* (Giuffré 2018); M Derlén and J Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart Publishing 2018).

[3] Individual contributions will be cited below, in the forthcoming footnotes. In general terms, see the Special Issues published by M Condinanzi and C Amalfitano (eds), *La riforma dello Statuto della CGUE* (2024) 2 *Rivista del contenzioso europeo* and by B Nascimbene and G Greco (eds), *La riforma dello Statuto della Corte di giustizia*' (2024) *Eurojus*, as well as the Symposium *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024), at eulawlive.com.

them, deepening the debates on a reform that has certainly marked the beginning of a new era for the EU system of judicial protection.

To this end, the article starts by discussing the main narratives surrounding the reform, namely the increasing specialisation of the GC, the reduction of the workload of the CJ and its progressive constitutionalisation, highlighting the seed of truth that can be found in them as well as the misunderstandings on which they are based (2).

Subsequently, it proposes a further interpretation on the long-term impact of this reform, arguing that its main legacy should more precisely be identified as the verticalisation of the EU judiciary. While this evolution may certainly bring some benefits to the EU system of judicial protection, it clearly also entails some risks (3).

Finally, it presents a couple of thorny issues that have not thus far attracted the attention of the debates, but which deserve to be discussed for the purpose of assessing the future of the EU judiciary: the role of the CJ in the legislative process regarding the amendments of its own Statute and the benchmarks for assessing whether the reform reaches its targets (4).

2. Some narratives to be questioned

2.1. Dealing with oxymoron: the (alleged) specialisation of the General Court

The first narrative that deserves to be questioned in order to understand the reform of the CJEU Statute is the one related to the alleged specialisation of the GC, commonly accepted (albeit more or less strongly debated)[4] in the legal literature as a clear output of the reform. A particularly fervent plea for this argument was also made by President Lenaerts in the hearing of 9 May 2023, before the European Parliament. On that occasion, the President of the CJ reassured MEPs about the 'ordinary' nature of the reform, emphasising that having a specialised jurisdiction in very technical matters is typical of many national judicial systems and that the CJEU's request, therefore, was simply aimed at making the GC a '*spezialisiertes Gericht der Union, im Dialog mit den Vorlagegerichten der Mitgliedstaaten*'.[5]

[4] See T Tridimas, 'Breaking with Tradition: Preliminary Reference Reform and the New Judicial Architecture' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (n 3) 5; S Iglesias Sánchez, 'Shared Jurisdiction of EU Courts Over Preliminary Rulings: One procedure. Two Courts. One Interpretation?' (2024) 3-4 *REALaw* 79; D Sarmiento, 'On the Road to a Constitutional Court of the European Union: The Court of Justice After the Transfer of the Preliminary Reference Jurisdiction to the General Court' (2023) 19 *Croatian Yearbook of European Law and Policy* VII, IX and X. For a more thorough discussion on this trend, see in particular MF Orzan, 'Un'ulteriore applicazione della "legge di Hooke"? Riflessioni a margine dell'entrata in vigore della recente riforma dello Statuto della Corte di giustizia dell'Unione europea' (2024) *Rivista del contenzioso europeo* 30, 57–59 and D Sarmiento, 'Gaps and "Known Unknowns" in the Transfer of Preliminary References to the General Court' (2024) 2 *Rivista del contenzioso europeo* 1, 22.

[5] '[…] a specialised Court of the EU, that dialogues with the national referring Courts' (translated by the Author). See the debates held in the European Parliament on 9 May 2023, on the occasion of the

Certainly, the judges of *Bâtiment Thémis* will now add to their judicial portfolio a new competence to hear and determine preliminary references in some very circumscribed and specialised areas of law – quite a paradox, for an institution called the *General Court*.[6] After having experienced in 2019 the creation of specialised chambers in staff and intellectual property cases (something quite unique, looking from 1989 onwards),[7] the GC will now further increase its competences, becoming – at least in the less relevant cases – the interlocutor of national judges in another six very technical subjects.

However, both for procedural and institutional reasons, the argument of the progressive specialisation of the GC is not fully convincing.

Procedurally speaking, the transfer of preliminary rulings will increase the legal areas and the judicial procedures that the GC is called upon to handle. In fact, the policy fields in which the GC now delivers preliminary rulings were rarely dealt with in the past through direct actions. Moreover, the reform expands the range of judicial procedures that the GC is called upon to apply, as it adds the preliminary ruling procedure to the one established for managing direct actions.

Nor can it be said that this reform leads to a further *internal* specialisation of the GC, i.e. of its chambers. The newly established chamber dedicated to preliminary rulings is actually a *meta-chamber*, i.e.a chamber composed of 10 judges who simultaneously belong to the previous chambers and to the new one.[8] Therefore, the judges dealing with preliminary rulings will become even less specialised than the others. They will be called on to apply a further judicial procedure, and they will be exposed to a much broader range of legal issues. Moreover, if they act as Advocate Generals for preliminary rulings and as judges in direct actions, they will also be required to play a further role.

Even more shadows appear when this narrative is analysed from an institutional perspective.

hearing before the JURI Committee of the President of the Court of Justice, the President of the General Court, representatives of the Legal Service of the European Commission, the CCBE, the Austrian Constitutional Court, the French Council of State and academic experts, available at multimedia.europarl.europa.eu, in particular from minute 09:35:00. It is noteworthy that President Lenaerts, in order to deal with this specific topic, changed language from French to German, probably in order to better catch the attention of those MEPs more concerned about it.

[6] U Öberg, 'A "General" Court in Name Only?' (2024) 3 *Concurrences* 2.

[7] U Öberg, M Ali and P Sabouret, 'On Specialisation of Chambers at the General Court' in Derlén and Lindholm (n 2) 211; MF Orzan, 'La specializzazione del Tribunale dell'Unione europea tra realtà e prospettive: ieri, oggi, domani (?)' in C Amalfitano and M Condinanzi (eds), *Il giudice dell'Unione europea alla ricerca di una assento efficiente e (in)stabile: dall'incremento della composizione alla modifica delle competenze* (Giuffré 2022) 89.

[8] MF Orzan, 'Pronti, partenza, via! Il Tribunale adotta le decisioni necessarie a garantire il funzionamento della recente riforma dello Statuto della Corte di giustizia UE' (2024) 2 *Rivista del contenzioso europeo* 1.

First, even though the concept of 'specialised judicial protection' can certainly not be framed within a single definition or an established set of features,[9] it should be highlighted that both at national level (as in the case of the German *Bundespatentgerichten*, just to mention one example) and at EU level (e.g. the Unified Patent Court and the Boards of Appeal of several EU agencies) far greater examples of specialisation can be found.[10] Creating judicial panels composed of both legal and technical experts, assessing technical knowledge during the selection of new judges, offering ongoing training to keep judges up to date on the most innovative technical aspects of a certain policy field… these are all features that do belong to the European idea of 'specialised judicial body' and clearly cannot (and probably never will) be applied to the GC. This alone should lead to a more cautious application of the concept of 'specialisation' to the GC.

But, most importantly, how can this reform be said to be aimed at specialising the GC, if national courts have no guarantees of being able to dialogue with the 'European specialised judge' of those specific policy fields?

As is well known, the allocation of preliminary references to the GC, even in the areas theoretically transferred to its competence, will depend on the interpretation of Article 50b(1) and (2) of the CJEU Statute made by the CJ (alone, since there is no room for the referring judge, the GC or the parties of the national proceeding to have their voices heard). There is no doubt that the CJ will be measured and prudent in interpreting the concepts of 'independence of the question' and of 'coming exclusively within one or several of the transferred areas' (after all, the reduction of its own workload is at stake!). And it is equally evident that a careful interpretation of the legislation currently in force could already allow a direct dialogue between national courts and the GC.

However, if the reform had really been aimed at pursuing the specialisation of the GC and granting to the latter the 'fan base'[11] of national judges already evoked in the legal debates, it would not have interposed a *guichet unique* – and a *guichet unique* thus composed – between the national judges and the 'EU specialised judge'. National courts should have been left free to consult and send the question to the EU

[9] *Ex multis*, C Ginestet (ed), *La spécialisation des juges* (Presses de l'Université Toulouse 2012); P Farina, *Contributo allo studio della specializzazione del giudice. Profili evolutivi, nodi critici e prospettive future* (Giappichelli 2020); F Montag and F Hoseinian, 'The Forthcoming Reform of the General Court of European Union: Potential Specialization within the General Court' (2012) *International Antitrust Law & Policy* 83. Some decades ago, the issue of specialisation was tackled from the perspective of antitrust law: see, on this point, D Waelbroeck and D Fossellard, 'Should the Decision-making Power in EC Antitrust Procedures Be Left to an Independent Judge? The Impact of the European Convention on Human Rights on EC Antitrust Procedures' (1994) *Yearbook of European Law* 111; House of Lords, EU Committee, 15th Report of Session 2006/2007, *An EU Competition Court*, at publications.parliament.uk.

[10] *Ex multis*, see A Bender, K Schülke and V Winterfeldt, *50 Jahre Bundespatentgericht: Festschrift zum 50-jährigen Bestehen des Bundespatentgerichts am 1. Juli 2011* (Heymann 2011); J Alberti, 'New Developments in the EU System of Judicial Protection: The Creation of the Unified Patent Court and Its Future Relations with the CJEU' (2017) 24 *Maastricht Journal of European and Comparative Law* 6.

[11] Sarmiento (n 4) 26.

court they deemed best qualified to answer their doubts. In order to prevent abuses, beyond the safeguards already provided by Article 256(3) TFEU, an internal reallocation mechanism could have been envisaged, modelled on the one that already exists for direct actions.[12] Alternatively, if the drafters of the reform could not refrain themselves from following the vogue of this era, namely that of offering a one-stop shop (an approach which is usually dearer to the business world than to that of judicial remedies, but so be it), the *guichet unique* could at least be composed equally of members of the CJ and of the GC.[13] If that had been the case, national courts would have felt that they had a specialised, European, counterpart coming to their support in the most technical cases. Conversely, the current legal framework may well give the impression that national courts simply activate a procedure aimed at generating a principle of law that they are subsequently obliged to follow.[14]

All these elements should suggest that greater caution is needed when speaking of a reform aimed at specialising the GC. Certainly, the latter will become, in the future, the manager of a plurality of specialised litigations. But will this make the GC a specialised judge? Or, rather, will it make the latter a 'harmoniser', i.e.a court aimed at avoiding the fragmentation of EU case-law? The second scenario actually seems far more likely. And the idea, shared virtually by all scholars, that this reform will only be the first step towards a delegation of competences to hear preliminary references in even more areas further supports this reading.

2.2. Reducing (or changing) the workload of the Court of Justice?

A further narrative that deserves to be discussed in order to assess the rationale (and the future impact) of the reform is the one related to the workload of the CJ, which this reform is expected to reduce. Intuitively, this argument has a strong self-explanatory basis, given by the sheer fact of the transfer of cases from the CJ to the GC. Moreover, supporters of this argument rightly maintain that it needs to be put into perspective: indeed, even if the decrease in workload were of little significance in the short term, it could still give greater relief in the longer run, when further areas will be transferred to the GC.

[12] Art 54 of CJEU Statute.

[13] C Amalfitano, 'Il futuro del rinvio pregiudiziale nell'architettura giurisdizionale dell'Unione europea' in J Alberti and G De Cristofaro (eds), *Il rinvio pregiudiziale come strumento di sviluppo degli ordinamenti* (Pacini 2023) 55.

[14] Or, in the more inspired words of Bobek, 'then national courts might, at a certain moment, stop feeling like dialogue partners, who are being assisted in solving concrete cases before them, but more like "cannon fodder" for further development of the law and some abstract disputes happening in Luxembourg' (M Bobek, 'The Future Will Tell. Of Course It Will, But on What Criteria?' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (n 3) 41).

However reasonable this teleological key of interpretation may seem, an assessment of the immediate gain of transferring the 'jewel in the crown'[15] should nevertheless be made. Indeed, during the negotiations, the CJ itself associated the need to reduce its workload with what is most delicate and valuable today: the possibility to dedicate more time and energy to dialogue with national supreme courts and thus gain a better understanding of the peculiarity of each national legal order.[16] And given such an important and delicate goal, which must be pursued without delay, the quantitative impact of the reform needs to be carefully assessed.

This issue has already been addressed by scholars[17] who are familiar with the CJ's internal working methods (it is a pity that it has not been addressed by the CJ itself in its request[18] and, above all, by the EU legislators, who should have carried out an impact assessment themselves) and this article does not claim to add much to what has already been said.

As for today, it is not very clear how much work the CJ will really be relieved of. However, what appears absolutely evident is that the issue of workload should be looked at from another perspective: what was needed was not to reduce the CJ's workload, but rather to increase that of the GC, following the doubling of its members.[19]

Be that as it may, the quantitative analysis has to start from what the CJ itself stated in its request for amendment, i.e. that the transferral would hand over 20 per cent of the requests for a preliminary ruling to the GC.[20] Given that, according to official statistics, preliminary rulings account for about 62 per cent of the CJ's workload,[21] this means that the relief should theoretically amount to 12.5 per cent of the overall cases. However, for the reasons discussed above, this share will not be transferred entirely, since some cases will remain within the jurisdiction of the CJ. Though it is early to draw any conclusions, these first 7 months of application of the new Statute show that, out of 32 references for preliminary rulings related (also) to subjects listed in Article 50b, 29 cases were actually assigned to the GC and 3 instead remained within the province of the CJ.[22] This brings the relief to around 11 per cent of the overall caseload.

[15] P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (4th edn, Oxford University Press 2008) 460.

[16] See the debates held in the European Parliament on 9 May 2023 (n 5).

[17] M Bobek, 'Preliminary Rulings Before the General Court: What Judicial Architecture for the European Union?' (2023) *Common Market Law Review* 1515.

[18] The request for amendment of CJEU Statute is available as a document attached to the Council working document of 12 December 2022, No. 15936/22. The data made available therein are very general (not broken down by country, by referring judge, etc) and very few, since issues such as the intervention of national governments, the presence or absence of hearings, etc are not reported.

[19] As also highlighted by Amalfitano (n 13) 39–40; Bobek (n 17) 1517; Sarmiento (n 4) VII.

[20] Request for amendment of CJEU Statute (n 18) 5.

[21] Court of Justice, Annual Report 2024 – Statistics Concerning the Judicial Activity of the Court of Justice (March 2025), at curia.europa.eu 15.

[22] Data referring to the period 1 October 2024 – 30 April 2025 and including only those data publicly available on the Curia website. The cases left to the jurisdiction of the CJ are C-148/25

However, if some cases are indeed handed over to the GC, more tasks will be acquired by the same CJ: the preliminary control of the *guichet unique* of all the references raised by national judges, potentially also involving a *Réunion Général* if the matter is sensitive;[23] the First Advocate General's examination of all the rulings made by the GC to check whether the *réexamen* procedure needs to be activated; and the *réexamen* itself, even though it will hopefully take place just in a few cases. Mathematically speaking, therefore, very little of that 11 per cent of hypothetical relief is likely to remain.

From a quantitative point of view, therefore, the workload of the CJ does not seem about to decrease (at least to any considerable degree). Yet, it will certainly change in its nature, as the CJ will acquire many more tasks of sheer management and supervision of the work of the whole EU judiciary and, in particular, the GC.

2.3. The constitutionalisation of the Court of Justice (and the multiple meanings thereof)

This brings the analysis to the 'repeated mantra'[24] within the current literature, according to which the CJ, thanks to the reform, will make a further step towards constitutionalisation.

Straight after the publication of the request (which, as is well known, was very similar to the legislation eventually adopted), Petrić highlighted that 'the reform […] will likely redefine the roles of the CJ and the GC and push them towards their ideal types: the former towards an EU constitutional court and the latter towards an EU supreme court/council of state'.[25] In the same period, Dermine, arguing on the basis of Krenn's theory,[26] stated that 'the reform would certainly further the metamorphosis of the Court into a constitutional jurisdiction […] confirm[ing] the Court's Luhmannian turn, […] thereby instilling another "dose of Habermas"'.[27] After its entry into force, Iglesias Sánchez pointed out that 'the Reform Regulation is not as innocuous for the EU judicial structure as it may have first appeared. It partially consolidates the role of the CJ as an EU Constitutional Court',[28] given that the reform entails

Emscher Aufbereitung, C-119/25 *Marabu Airlines* and C-909/24 *Investcapital*. The lack of publication of the orders of reference (though for the latter two cases the summary published in the OJ is available) precludes a more accurate analysis on this point, at least for the time being. However, based on the documents currently available, it seems reasonable to assume that the cases remaining under the jurisdiction of the CJ did not fall exclusively within one or more of the areas transferred to the GC.

[23] See Art 93a(3) of the Rules of Procedure of the CJ.

[24] C Amalfitano, 'The Transplant of Procedural Rules from the CJ to the GC' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (n 3) 29.

[25] D Petrić, 'The Preliminary Ruling Procedure 2.0' (2023) 8 *European Papers* 42.

[26] C Krenn, *The Procedural and Organisational Law of the European Court of Justice: An Incomplete Transformation* (Cambridge University Press 2022).

[27] P Dermine, 'What the European Court of Justice Is For – Making Sense of the ECJ's Procedural and Organisational Law' (2023) 19 *European Constitutional Law Review* 768, 784–785.

[28] Iglesias Sànchez (n 4) 84.

'an explicit endorsement of the constitutionalisation of the CJ'.[29] On the same line, Sarmiento noted that the reform puts the Court 'on the road to a constitutional court of the European Union'.[30] Similar views are also echoed by insiders. According to Orzan, 'a process of constitutionalisation of the CJ seems to be increasingly emerging',[31] both in functional and structural terms. In the words of Tovo, this reform further constitutionalises the role of the CJ, despite pursuing this goal without a real 'constitutional moment'.[32]

There is no doubt that the CJ, also thanks to this reform, will be able to focus on the most relevant issues brought to its attention. Moreover, according to recital n 4 of the Regulation amending the CJEU Statute, 'the Court of Justice is increasingly required […] to rule on matters of a *constitutional* nature' (emphasis added). This provision should not be underestimated, being the first time in which the EU legislator has associated the term 'constitutional' with the CJ, albeit only indirectly.

Yet now that the dust is settling and the reform has started being applied, the time may be ripe for a deeper consideration of how the role of the CJ will evolve in the years to come.

On the one hand, this reform does not grant the CJ any new powers or functions, since it simply gives the latter the option of transferring some cases (which were in any case within its competence!) to the GC. Moreover, the CJ does not acquire, with this reform, the powers which are typical of many constitutional courts (such as, just to give some examples, annulling the legislation of the federated entities or ruling on the validity of the election of the members of the parliamentary assembly). They would really be the game changer for the constitutionalisation of the CJ (and of the EU legal order as a whole). Yet, they have absolutely not been touched by this reform.

On the other hand, the richness of meanings of the term 'constitutional' (leaving aside the semantics: the multiple ways in which the role of the constitutional courts has been implemented in temporal and geographic terms) should rather call for a definition of the *type* of constitutionalisation that is taking place. Answering this question would require a study that cannot fit in these pages; besides, another contribution to this Special Section already tackles similar issues.[33] Two points nevertheless need to be made in order to provide a general framework for discussion.

[29] S Iglesias Sànchez and D Sarmiento, 'A New Model for the EU Judiciary: Decentralising Preliminary Rulings as a Paradoxical Move Towards the Constitutionalisation of the Court of Justice' (EU Law Live, 8 April 2024) at eulawlive.com.

[30] Sarmiento (n 4) VII.

[31] Orzan (n 4) 74 (translated by the Author).

[32] C Tovo, 'Le nuove regole processuali in materia pregiudiziale e le loro implicazioni istituzionali per la Corte di giustizia: verso un'ulteriore costituzionalizzazione?' in B Nascimbene and G Greco (eds), *La riforma dello Statuto della Corte di giustizia* (2024) *Eurojus* 1.

[33] See Tanja Hilphold, forthcoming in this Special Section.

First, the type of 'constitutionalisation' (if such a term can be used at all) the CJ is evolving towards would certainly be atypical and (unsurprisingly) different from that of the national experiences.

It is undoubtedly different to that – to varying degrees Kelsenian[34] – which can be found in most EU Member States,[35] where a *constitutional* court is such because its role is to ensure, precisely, that legislative acts are compatible with the principles enshrined in the fundamental law of the State and because it accepts that its *primacy* over the supreme civil, criminal and administrative courts depends only on the degree of importance and abstractness of the rules it is called upon to enforce. Indeed, after the reform the CJ will continue to exercise a role that in the systems of almost all Member States is left up to a Court of Cassation (for instance, in the field of consumer protection)[36] or to a Supreme Administrative Court (as in the interpretation of the public procurement directives, just to mention one example).

At the same time, to speak of a constitutionalisation *à la américaine* would also be inaccurate. The filter system envisaged by the *guichet unique* (and by the filter on appeals, provided for by Article 58a of CJEU Statute, further extended by this reform) and the *certiorari* of the US Supreme Court have certainly brought these two courts closer, as highlighted by several authors.[37] However, the legal systems remain too distant and the type of review that takes place at EU level (certainly not diffused, but evidently atypical and to some extent centralised through the preliminary reference) cannot be compared to the US one.[38]

Second, and probably most importantly, the type of constitutionalisation allegedly activated by this reform does not correspond to the notion set forth by the Treaty of Nice and subsequently confirmed by the Treaty of Lisbon.

[34] It is worth recalling Kelsen's own warning about the impossibility of constituting a single form of constitutional review valid in every context, as it would rather have to be implemented according to the specific characteristics of each (for a discussion on this topic, see L Favoreu, 'Constitutional Review in Europe' in L Henkin and AJ Rosenthal (eds), *Constitutionalism and Rights* (Columbia University Press 1989) 51).

[35] *Ex multis*, M de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing 2014); L Pegoraro, *Sistemi di giustizia costituzionale* (Giappichelli 2019).

[36] In this vein, Petrić (n 25) 42 pointed out that 'in the selected areas of law, at least as a first step, the CJ should lose the final say over questions of factual interpretation, such as in which tariff box to put frozen camel meat, pyjamas, and nightdresses. These questions, again in the selected areas, should become the province of the GC'.

[37] Opinion of Advocate General Ćapeta in Case C-382/21 P *EUIPO v The KaiKai Company*, EU:C:2023:576, paras 36–37. In literature, see R Torresan, 'Filtering Appeals Over Decisions Originally Taken by Boards of Appeal: Rationale, Impact and Potential Evolution of Article 58a of the CJEU Statute' in J Alberti (eds), *Quo vadis, Boards of Appeal? The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection* (2024) *Rivista del contenzioso europeo* 129, 158; Orzan (n 4) 79–82, Dermine (n 27) 784. For a more careful approach, see Tovo (n 32) 42–43.

[38] *Ex multis*, M Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court' (2006) 157 *Cardozo Legal Studies Research Papers* 1; L Garlicki, 'Constitutional Courts versus Supreme Courts' (2007) 5 *International Journal of Constitutional Law* 44.

At that time, the idea, though incompletely expressed, did indeed have a clear direction. The CJ was to progress towards a 'constitutional' dimension, thanks also to the fact that the GC was expected to become, at the same time, a Supreme Administrative Court: a general judge for adjudicating upon the increasingly technical matters that characterised EC and then EU law; a *de facto* judge of last instance for all those policy fields in which specialised courts were to be set up according to Article 220 TEC, in respect of which the GC would hear both appeals and preliminary rulings.[39]

A progressive technicalisation of EU law has certainly taken place. The specialised courts, as we know, have had no luck,[40] but EU agencies' Boards of Appeal have proliferated in their stead.[41] These latter bodies, despite their dubious independence,[42] are in fact the first instance reviewers of many technical policy fields. Their decisions can be appealed before the GC and, also thanks to the extension of the filter mechanism mentioned above, are unlikely to be brought to the attention of the CJ.[43] However, this reform has neither regulated the phenomenon of EU agencies' Boards of Appeal – about which much should be said and even more should be done[44] – nor has it attributed preliminary jurisdiction to the GC in the areas where national courts call for an increase in the quality of judicial law-making,[45] in which the GC already had a consolidated experience (e.g. trademarks and designs, competition, State aid), and in which it already exercises the role of *de facto* last-instance court (i.e.in the policy fields covered by the above-mentioned Boards of Appeal).

[39] Report by the Working Party on the Future of the European Communities' Court System ('The Wise Persons' Report' or 'The Due Report') in A Dashwood and A Johnston (eds), *The Future of the Judicial System of the European Union* (Hart Publishing 2001) 186.

[40] For an assessment of the experience of the Civil Service Tribunal, see P Mahoney, 'The Civil Service Tribunal: The Benefits and Drawbacks of a Specialised Judicial Body' (2011) *Human Rights Law Journal* 11.

[41] See, *ex multis*, J Alberti (ed), *Quo Vadis, Boards of Appeal? The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection* (2024) *Rivista del Contenzioso Europeo*.

[42] J Alberti, 'The Position of Boards of Appeal: Between Functional Continuity and Independence' in M Chamon, A Volpato and M Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 252.

[43] P Iannuccelli, 'L'ammissione preventiva delle impugnazioni contro le decisioni del Tribunale dell'Unione europea ex art. 58-bis dello Statuto: una prima valutazione e le eventuali applicazioni future' in C Amalfitano and M Condinanzi (n 7) 117; MF Orzan, 'Some Remarks on the First Applications of the Filtering of Certain Categories of Appeals Before the Court of Justice' (2020) *European Intellectual Property Review* 426; A Gentile, 'One Year of Filtering Before the Court of Justice of the European Union' (2020) *Journal of Intellectual Property Law and Practice* 4; Torresan (n 37) 129.

[44] J Alberti, 'A Call for a New Approach in the Study (and Management) of EU Agencies' Boards of Appeal' in J Alberti (eds), *Quo vadis, Boards of Appeal? The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection* (2024) *Rivista del contenzioso europeo* 1 and J Alberti, 'EU Agencies' Boards of Appeal: victimes de leur succès?' in J Alberti (eds), *Quo vadis, Boards of Appeal? The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection* (2024) 2 *Rivista del contenzioso europeo* 323.

[45] See, for instance, from the German *Bundesgerichthof*, C Grüneberg, 'Der leise Abschied des BGH von "Heininger" und "Quelle"' (2024) *Neue Juristische Wochenschrift* 993, para 15.

In a nutshell, this reform has made the GC an equerry of the CJ, called on to relieve the latter of less important cases without, however, acquiring its own distinct status.[46] The GC has definitely not become that 'European Council of State' explicitly evoked by GC President Van der Woude at the FIDE Conference in 2021, precisely taking up the approach envisaged since the Treaty of Nice.[47] Of course, this may only be a first step, and the GC – as a rather widespread sub-narrative maintains[48] – may acquire this status in the future. However, those who support this argument should also admit that the *guichet unique* thus composed and the procedural rules discussed above, as well as the areas chosen for the transferral, do not constitute a good training ground for becoming a supreme administrative court in the future.

If the concept of 'constitutionalisation' is thus misleading, how can one read the change that this reform has produced in the role of the CJ?

3. The main legacy of the reform: fostering the verticalisation of the EU judiciary

The different perspective proposed by this article is that of verticalisation. Indeed, this reform ultimately verticalises EU judicial power. While there is no doubt that this latter concept may well fall within that of 'constitutionalisation' (after all, constitutional courts are the supreme courts of the land), speaking of 'verticalisation' seems actually more accurate to capture the ultimate legacy of this reform.

First, it highlights the main innovation brought by this reform. A constitutionalisation could have indeed been pursued also by remaining closer to the paths envisaged at the time of the Treaty of Nice: yet, the result would have been far different. Many could argue that the 'Nice approach' had already faded away many years earlier and, therefore, that the reform has brought no real innovation. To some extent, they would be right, since unmistakable signals thereof had already appeared with the end of the specialised tribunals and the doubling of the members of the GC.[49] However, a different transferral of preliminary rulings (in different areas, under different procedural arrangements) could have changed the current scenario, keeping it closer to the original intentions. Therefore, the reform has brought the considerable innovation of stating that this judicial setting is the final one (or, more precisely, it

[46] Already during the negotiations, Mastroianni warned about that risk: see R Mastroianni, 'Il trasferimento delle questioni pregiudiziali al Tribunale: una riforma epocale o un salto nel buio?' (2024) 3 *Rivista Quaderni AISDUE* 27.

[47] M van der Woude, 'The Place of the General Court in the Institutional Framework of the Union' (EU Law Live, Weekend Edition No 81, 27 November 2021) at eulawlive.com 20, 23–26.

[48] Iglesias Sánchez (n 4) 84.

[49] M Condinanzi, 'Corte di giustizia e Tribunale dell'Unione europea: storia e prospettive di una "tribolata" ripartizione di competenze' (2018) *Federalismi* 1; C Amalfitano and M Condinanzi, 'Dalle modifiche istituzionali del 2012 al raddoppio del numero dei giudici del Tribunale dell'Unione europea: luci e ombre di una riforma (in)compiuta' in C Amalfitano and M Condinanzi (eds) (n 7) 1.

is the one that will shape the future of the EU judiciary) and that the path now taken will no longer cross the one previously envisaged.

Second, the concept of 'verticalisation' captures the deepest implications of the reform, also on the internal allocation of powers within the CJ.

However silently passed over, the *guichet unique* is managed by the 'executive' of the CJ, i.e. the President, the Vice-President and the First Advocate General.[50] The President of the CJ already exercises important prerogatives such as the power to represent both EU courts externally (vis-à-vis Member States, vis-à-vis national courts),[51] the power to appoint the judge-rapporteur[52] (which obviously brings some influence as to how a certain jurisprudence should or should not evolve),[53] the de facto power to sit in any chamber and replace one of the judges formally assigned to it, and the power to initiate the acts of the Committee 255 for the selection of CJEU new members.[54] To those powers, the reform now adds the one to channel preliminary references and thus steer the development of EU case law towards an innovative direction (by assigning cases to the CJ) or a conservative direction (by devolving them to the GC).

Finally, the concept of 'verticalisation' gives the possibility to bring a different perspective into the debates on the impact of the reform of the EU judiciary, currently monopolised by either an explicit or implicit comparison with national experiences. What if the reform of the EU judiciary, rather than being inspired by national legal theories, simply replicates typical approaches of the EU institutional machinery?

Somewhat provokingly, one could argue that, while having very few precedents (if it has any at all) at national level, the relationship between the CJ and the GC is not entirely unknown to other EU institutions.

For instance, seen from the perspective of the *réexamen* procedure, it replicates – with the obvious caveats given by the different contexts, functions and organisation – the relationship between the Council and Coreper. The matters in which the GC considers that a case requires a decision of principle likely to affect the unity or consistency of Union law, and thus refers the case to the CJ under Article 256(3)(2) TFEU, look similar to the issues listed as 'B items' in the agenda of the Council – those on which Coreper could not decide upon and thus brings to the attention of the Council.[55] Conversely, the rulings in which the GC replies to a preliminary reference raised by a national court resemble the issues listed as 'A items'. Indeed, even if those decisions have already been decided by Coreper (the GC), the Council (the CJ) nevertheless has at least a theoretic possibility of checking them one by one[56] and,

[50] Art 93a of the Rules of Procedure of the Court of Justice.
[51] Art 9 of the Rules of Procedure of the Court of Justice.
[52] Art 15 of the Rules of Procedure of the Court of Justice.
[53] For a more comprehensive discussion thereof, see Krenn (n 26) 145.
[54] Art 255 TFEU.
[55] Council Decision 2009/937/EU adopting the Council's Rules of Procedure, Art 3(6).
[56] Ibid Art 3(8).

where deemed necessary, making amendments accordingly through the *réexamen* procedure.

What, then, are the benefits and drawbacks of the vertical approach chosen by this reform?

On the positive side clearly stand everything that can be reconciled with a conservative approach: the smoothness in the transition towards the new system (a GC entitled to deliver preliminary rulings in sensitive areas might well have needed a certain period of apprenticeship); the lower or almost zero risk of conflicting case-law[57] (both because the areas transferred have a consolidated case-law to be applied and, let us be honest, because the main ambition of even more GC judges will become to be promoted to the CJ, in order to do the same job on more interesting cases); the confidence given by having a strong and united judiciary to foster the evolution of a legal order whose primacy – it should never be forgotten – does not rest upon an explicit legal provision of constitutional value, but on the case-law of the same EU Courts.

Drawbacks, however, cannot be underestimated as well.

Many have already been discussed elsewhere and will be mentioned here just very briefly. First and foremost, the *réexamen* procedure: of course, its existence is set forth by the Treaties and thus cannot be challenged as such nor be used as a basis for a critique of the reform. Why, however, was not a single line dedicated, throughout the whole legislative process, to discussing the opportunity to amend the *réexamen* procedure itself? Pros and cons of such an amendment have already been discussed elsewhere[58] and will not be further addressed here. Yet it is quite astonishing that such a delicate provision has never been discussed publicly, considering that amending this procedure could have completely changed the spirit of the reform, by strengthening the role of the GC, or of the referring judge, or of the parties, or reducing the workload of the CJ (and thus increasing the attention given to the most important cases).

A second drawback, as already extensively debated,[59] is a possible mistrust by national judges in their new interlocutor, if the GC is perceived as a second-class judge. As already discussed above, the CJ will have to be very careful in interpreting Article 50b(1) and (2) of its new Statute, so as to give national courts what they actually want: meaningful and timely answers to their questions, with a reasonable degree of predictability (and, possibly, power of influence) as to who will be their interlocutor. The

[57] Contra, Iglesias Sánchez (n 4) 80.

[58] Alberti (n 1) 530–533; S Iglesias Sánchez, 'Return of the Réexamen' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (n 3) 35.

[59] RG Conti, 'C'era una volta il rinvio pregiudiziale. Alla ricerca della fiducia – un po' perduta – fra giudici nazionali ed europei' in B Nascimbene and G Greco (eds), *La riforma dello Statuto della Corte di giustizia* (2024) *Eurojus* 118; Bobek (n 17) 1526–1528, 1536–1543; C Wissels and T Boekestein, '"The Proof Is in the Pudding": Some Thoughts on the 2024 Reform of the Statute of the Court of Justice from a Highest National Court' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (n 3) 17.

issues at stake are indeed of crucial importance: a decrease in referrals and incompliance of the referring judge with the principle stated in the preliminary ruling.

Finally, an important risk tied to the approach chosen by this reform, one which has not been debated so far, is the intertwinement between the verticalisation of the EU judiciary and that of national ones.

National systems are indeed becoming more and more familiar with mechanisms that verticalise the judicial decision-making process, to strengthen legal certainty and/or shorten the length of proceedings. The *saisine pour avis de la Cour de Cassation* of the French judicial system[60] or the possibility set forth by Article 363a of the Italian civil procedural code[61] for a first-instance judge to refer a case to the Court of Cassation for a preliminary ruling are good examples, even if certainly not the only ones. The same also applies, under a different perspective, in the relationship between ordinary judges and national constitutional courts: in many EU Member States, constitutional courts are pushing to take on a role of managing the interplay between the national and the EU legal orders so as to increase their control on the protection of fundamental rights, to the detriment of the direct dialogue between national judges and the CJ. It is worth considering some examples: the recent judgment of the Italian Constitutional Court in case No 181/2024,[62] which encourages national judges to refer matters also related to the interpretation of EU law to the same Constitutional Court, as the latter allegedly finds itself in a better position to protect fundamental rights, and could itself potentially enter into dialogue with the CJ;[63] the German *Bundesverfassungsgericht*'s approach of directly applying the fundamental rights set forth by the EU legal order in cases on the right to be forgotten;[64] the Austrian Constitutional Court's judgment of 14 March 2012,[65] which led to the *A v B* case before the CJ;[66] and of course, going even further back in the past, the French mechanism for reviewing the constitutionality of laws, which led to *Melki and Abdeli*.[67]

[60] Introduced through Law No 91-491 of 15 May 1991 and Decree No. 92-228 of 12 March 1992. See, *ex multis*, A-M Morgan De Riveryguillaud, 'La saisine pour avis de la Cour de cassation' (1992) 15 *La Semaine Juridique* 3576, 173; P Chauvin, 'La saisine pour avis' in *L'image doctrinale de la Cour de cassation* (La documentation française 1994) 109.

[61] *Ex multis*, A Carratta, 'Il rinvio pregiudiziale come modello: l'introduzione di un meccanismo di coinvolgimento pregiudiziale della Corte di Cassazione nel giudizio civile' in J Alberti and G De Cristofaro (eds) (n 13) 103.

[62] Italian Constitutional Court, Judgment No 181/2024. See also, as a further confirmation (albeit with some nuances) of the same approach, Judgments Nos 210/2024, 1/2025, 7/2025, 31/2025 as well as the Order No 21/2025.

[63] *Ex multis*, see C Amalfitano, 'Tanto tuonò che piovve. Abbandonare *Granital*: *cui prodest*?' (2025) *Giurisprudenza costituzionale* (forthcoming).

[64] *Ex multis*, see LS Rossi, 'Il "nuovo corso" del *Bundesverfassungsgericht* nei ricorsi diretti di costituzionalità: bilanciamento fra diritti confliggenti e applicazione del diritto dell'Unione' (2020) 3 *Federalismi* IV.

[65] Austrian Constitutional Court, Judgment of 14 March 2012, U 466/11-18, U 1836/11-13.

[66] Case C-112/13 *A v B and Others*, EU:C:2014:2195.

[67] Joined cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli*, EU:C:2010:363.

Against this backdrop, it seems interesting to evaluate what might arise from the interplay between these two lines of verticalisation. Should the GC not be perceived as a suitable interlocutor, national judges might prefer to dialogue with their own supreme judges. After all, in areas where settled case-law is in place (as it is in those transferred by the reform!), EU law could also be interpreted and applied even without the intervention of the CJ, and the support given by the national Court of Cassation might be perceived as enough. Similarly, in a context where the constitutional court encourages, to say the least, the use of internal mechanisms of review in lieu of preliminary references to the CJ, the perception of dialoguing with a lower tier of the EU judiciary might lead national judges or the parties in national proceedings to take the former route, instead of the EU one. The possibility of avoiding the *réexamen* and the (at least) one-month period in which the losing party could push for a new reference[68] or for different interpretations might also be appealing. Moreover, applying to national supreme courts, whether ordinary or constitutional, does not preclude the possibility of raising the matter at EU level, since a preliminary reference could well be submitted by the same supreme/constitutional court itself. And many might think that such a reference could hardly be transferred to the GC.

A prudent application of the new provisions could certainly reduce those risks – besides, the GC has already received some cases raised by supreme national courts in the areas transferred.[69] However, this issue should not be underestimated. If the verticalisation of the EU judiciary were to foment (and intertwine with) similar trends at national level, the preliminary ruling procedure could change considerably… while remaining the same; and, with it, EU law itself. As observed even in novels,[70] the dialogue raised by supreme courts is inevitably more frictional, being more easily permeated by national interests. Not coincidentally, the CJ erected the pillars of the EU legal order, thanks also to those whom the former Advocate General Tesauro affectionately called the *piccoli giudici*.[71]

4. Two thorny issues to be discussed

By way of conclusion, it is worth turning our gaze to a couple of thorny issues that have been somehow obscured by the debates discussed above and that this reform has either shown in all their relevance or revealed to be questions that need urgently to be addressed: the power of the CJ to initiate and steer the legislative amendments of its own Statute and the benchmarks for assessing the output of this reform.

[68] As intriguingly suggested by Sarmiento (n 4) 23–24.

[69] See Cases T-558/24 *Studieförbundet Vuxenskolan Riksorganisationen*, T-589/24 *A-GmbH*, T-614/24 *AROCO*, T-653/24 *Accorinvest*, T-689/24 *Dyrektor Krajowej Informacji Skarbowej*.

[70] E Carrère, *Lives other than my own* (Picador 2009).

[71] G Tesauro, *Diritto comunitario* (CEDAM 1995) XII.

Clearly enough, dealing with these issues means entering into the realm of the CJ and balancing the opposite needs of protecting its independence and keeping it accountable. Thus, a few caveats are worth making.

Article 281 TFEU expressly grants the CJ the power to request amendments to its own Statute. The EU legal system, autonomous and distinct from the national ones, has its own peculiar balance of powers and any reading of the former on the basis of legal principles or theoretical approaches of the latter can only lead to fallacious results. It is typical of any international court – such as, at least since its genesis, the CJEU has been[72] – to have an important say in the management of cases and of the rules of procedure. The participation of the CJ in the legislative procedure leading to the amendment of its own Statute allows the decision-making process to rely on information and experience-based knowledge which is available exclusively to the CJEU; this asymmetry of information embodies and, at the same time, protects the independence of the CJEU itself.[73] Last but not least, if one praises – as is warranted, looking at the recent and past history of the EU integration process – the fundamental role that the CJ has played in shaping the EU legal order,[74] and if the same CJ needs certain structural changes in order to continue exercising this role, then for the sake of coherence it is inevitable to accept a particularly active role played by the latter in stimulating and shaping these changes.

4.1. The legislative role of the Court of Justice: time for a reconsideration?

Quite apart from all that, this reform brings out a contradiction: does the CJ's power to initiate the amendments of its own Statute still serve its intended purpose or has it spilled over, becoming a power that inhibits the EU political institutions from building their own political view on the future of the EU judiciary?

Of course, the EU political institutions have expressed their position and exercised their prerogatives throughout the many chapters in which the long process of reform of the EU judiciary has unfolded, from 2015 onwards. Yet, they have often been limited visions, aimed at protecting each institution's own interests. The Council has certainly shaped this decade of reforms, but mainly for the purpose of protecting the interests of the Member States to be equally represented in the EU Courts – as demonstrated by the failure of specialised tribunals and, above all, by the doubling of the members of the GC. The Commission did not fail to make its position clear, between 2018 and 2019, when the CJ (who else?) had tried the other viable route to an efficient reallocation of the new resources gained after the doubling of

[72] Krenn (n 26) 26.

[73] C Iannone, 'Articolo 281 TFUE' in A Tizzano (ed), *Trattati dell'Unione europea* (Giuffré 2014) 2210.

[74] *Ex multis*, A Tizzano, 'Le rôle de la Cour de justice et les développements du système communautaire' in N Fenger, K Hagel-Sørensen and B Vesterdorf (eds), *Festskrift til Claus Gulmann*, (Thomson 2006) 461.

the GC, i.e.by proposing the transferral of infringement proceedings.[75] In particular, the Commission immediately stopped the initiative, in order to protect its own secret garden from possibly more lengthy and less efficient procedures.[76] The European Parliament was perhaps the most enterprising institution in this last amendment of the CJEU Statute, as it managed to achieve some changes in the field of participation and transparency.[77] But which EU political institution, in the last decade, has expressed a comprehensive vision of judicial policy? None: each one has intervened to protect its own interests or, as in the case of Parliament, to wage side battles on issues certainly relevant per se (and easy to sell during an electoral campaign) but far from the heart of the debate and in any case incapable of expressing an overall vision.

In this framework, the CJ has emerged as the only institution capable of defining (and implementing) a political strategy, also strengthening its role over time. Leaving aside the quarrels surrounding the doubling of the GC,[78] on that occasion the CJ was the entity that succeeded in finding a compromise solution for solving the existing conflicts. In 2024, it did not limit itself to this role but rather dealt the cards and led the dances from the opening to the closing of the legislative procedure.

Let us put it clearly: here and now, any alternative to this could only produce worse results. But equally bluntly, it needs to be highlighted that this situation reveals a distortion of the system, which should therefore be addressed.

To this end, looking to the future chapters that will be written in the coming years, it seems legitimate to question the degree of intensity of the CJ's participation in the negotiations – at least in those cases where the discussion does not refer to mere procedural rules, but to aspects of the Statute that shape the overall judicial architecture of the Union.[79]

In particular, it is worth assessing to what extent the power to stimulate an amendment of the Statute – for the caveats stated above, of a fundamental value – might give rise to the possibility of participating in trilogues (*rectius*, quadrilogues) on a par with the political institutions, and from there drafting the legislative act.

Such participation may well be justified by the general principle of decision-making efficiency, together with that of loyal cooperation among EU institutions.

[75] Proposed amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union, attached to the Council Working Document No 7586/18 of 28 March 2018.

[76] COM (2018) 534 final. For an analysis thereof, see Condinanzi (n 49) 15.

[77] See Ilaria Fevola and Stefano Montaldo, in this Special Section.

[78] See the hearing of Judges Berardis, Collins, Dehousse and Pelikanova in the European Parliament, at the invitation of the *rapporteur*, during the negotiations on the reform of the Statute of the Court of Justice. For a written record of this hearing, see G Berardis, A Collins, F Dehousse and I Pelikanova, 'Doubling The General Court's Judges: Why Progressive, Reversible and More Economical Solutions Are Far Better', (Politico, 2015) at politico.eu.

[79] Even though the absence of the same GC from the negotiations related to its own competences could also be discussed, as has indeed been done in the past (e.g. by Alemanno and Pech (n 2) as well as by Dehousse (n 2)), the clear hierarchical setting built by this reform makes this point somehow obsolete.

Moreover, as is well known, trialogues are a realm of informality and (perhaps unfortunately) do not have strict provisions on the criteria for participation.

Still, neither the 2007 Joint Declaration on practical arrangements for the codecision procedure[80] nor the 2016 Interinstitutional Agreement on Better Law-making[81] (i.e. the only kind of 'legislative framework' for trilogues)[82] mention the CJ. The same applies for the European Parliament's internal regulation, which regulates the possibility for this latter institution to participate in trialogues with the Council and the Commission, without mentioning the CJ, and without using general clauses referring, in broader terms, to the institution presenting the legislative proposal[83] (as is well known, the internal regulations of the Commission and Council do not even mention trilogues).[84]

And this brings the discussion to a more striking aspect, namely the fact that, for the purpose of amending its own Statute, the CJ does not adopt a legislative *proposal* but rather submits a *request* to amend the Statute. Article 281 TFEU is indeed very clear in providing for two different options for initiating the procedure for an amendment of the CJEU Statute: one is at the *request* of the CJ, after consultation with the Commission; the other is on a *proposal* of the Commission, after consultation with the CJ. This difference clearly reflects the different roles of the two institutions. While there is no doubt that, as discussed above, the CJ has very broad powers to define the rules of procedure governing the disputes pending before it, the Treaties have nevertheless put some limits on these prerogatives, since the Court is an expression of a judicial power, not a legislative or political one. A concrete example of these limits is the difference, which cannot be only semantic, between the 'request for amendment' and the 'proposal for amendment' set forth by Article 281 TFEU. Can, therefore, the rules on trilogues relating to those who make a proposal for amendment also apply, *per relationem*, to those who merely make a *request*?

In this regard, it is interesting to note that such an extensive interpretation is not made in relation to other procedures. For instance, in the procedure under Article 7 TEU, the institution initiating the process is not allowed to participate in discussions in the Council as to whether there exists a clear risk of a serious breach of EU values. After having initiated the procedure against Hungary, the Parliament was not admitted to take part to the negotiations in the Council – even if the act adopted to initiate the procedure was, as Article 7 TEU explicitly states, a 'reasoned proposal' and even

[80] Joint Declaration on Practical Arrangements for the Codecision Procedure (2007/C/145).

[81] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (2016/L/123).

[82] For a more comprehensive discussion on this point, see G Rugge, 'Il ruolo dei triloghi nel processo legislativo dell'UE' (2015) *Il Diritto dell'Unione europea* 809.

[83] Arts 71–75 of the Rules of Procedure of the European Parliament (10th parliamentary term), January 2025, yet to be published in the OJ.

[84] See Council Decision of 1 December 2009 Adopting the Council's Rules of Procedure (2009/L/325) and Commission Decision (EU) 2024/3080 of 4 December 2024 establishing the Rules of Procedure of the Commission.

if, being author of such a reasoned document, the Parliament could well have brought important information into the discussion. It goes without saying that the rationale of this is that the procedure set forth by Article 7 TEU is largely intergovernmental and, therefore, a supranational institution such as the European Parliament does not fit in. It has the power to initiate it, but not the right to participate in the deliberations.

But is the CJ not in the same situation when it comes to the ordinary legislative procedure? It has the power to present a request for amendment, yet not to participate in the deliberations—at least, not on a similar footing with political institutions. The possibility set forth in the internal regulations of both the European Parliament and the Council to organise hearings with other institutions[85] could enable them to bring the expertise and the voice of the CJ into the legislative procedure, while leaving the responsibility for judicial policy choices on the shoulders of the EU political institutions.

4.2. How to assess whether the reform reaches its targets?

The second, equally thorny, issue that deserves to be brought into the discussion, also for the sake of further addressing the 'futurewilltell-ism' that, as already stigmatised, heavily affects the current debates,[86] regards the identification of concrete benchmarks for assessing whether the reform is able to reach its targets.

The fact that (apropos of lack of political vision) no official document clearly defines those targets (and that even scholars struggle to agree upon them)[87] points to the need for a preliminary assessment of the overall objectives of the reform. To those already highlighted in literature, this article adds some new ones, using as a source the already mentioned hearing that took place on 9 May 2023 before the European Parliament.[88] On this occasion, President Lenaerts identified, as the main objectives of the proposed amendment, the need to *i)* rebalance the workload between the two EU courts, *ii)* reduce the length of proceedings, and *iii)* improve the quality of judicial decisions.[89]

Little needs to be said on the first point, at least from a quantitative perspective: there is no doubt that a reallocation will take place and a better balance between the workloads of the CJ and GC will be found accordingly. Of course, the extent of this reallocation will certainly deserve to be measured, but the task is an easy one.

The other two points are far more interesting.

The length of proceedings should be measured, according to what President Lenaerts stated on that occasion, not in average terms, but taking account of the various procedures. Indeed, between 2016 and 2022 the average length of the preliminary

[85] See Art 127 of the Rules of Procedure of the European Parliament (n 83) and Art 12(2)(c) of that of the Council's Rules of Procedure (n 84).

[86] Bobek (n 14).

[87] Ibid, as well as Wissels and Boekestein (n 59).

[88] See above at n 5.

[89] Ibid.

ruling procedure increased by only 2.3 months, from 15 to 17.3 months. However, this figure also includes all the cases decided with expedited procedures, which of course pull down the average. If one looks only at the most important cases, where the protection of fundamental rights is at stake or where the dialogue with national supreme courts is dedicated to issues of a constitutional value, the average stood (as reported by the same President) above 2 years.[90]

This analysis cannot but be fully supported. The experience of preliminary references raised by Italian Courts (the only ones for which such data have been made publicly available by academic research, at least to the author's knowledge) tells us that in 2016 the average length of the preliminary reference procedures concluding with an ordinary judgment was 20.9 months and was up to 23.4 months by 2022. In the same timeframe, the average duration of all the proceedings (ordinary and expedited) was a far more reasonable 17 months (in 2016) and 18.2 months (in 2022), thanks of course to the impact of the cases decided with orders.[91] If one looks at the impact of the composition of the chamber on the length of the procedure, the Italian experience[92] shows that, from the entry into force of the Lisbon Treaty to 31 December 2024, the average length of the cases decided by ordinary chambers (3 or 5 judges) was about 15 months, while that of those decided in the Grand Chambre was about 22 months.[93]

For the time being, the CJ does not publish such data in its yearly official statistics, where only the overall duration of the procedure is given, and only the impact of urgent and expedited procedures is specified.[94] However, it should start to break up the data related to the length of preliminary rulings, also highlighting the differences at least with regard to the composition of the chamber and between cases decided with a judgment and those decided with an order. More precisely, this latter item could be broken down at least between 'Cilfit orders' (i.e.those adopted pursuant to Article 99 or 100 of the CJ Rules of procedure for bringing to the attention of the referring judge that the question referred is identical to a question on which the CJ has already ruled, that the reply to the question raised may be clearly deduced

[90] Ibid.

[91] J Alberti, 'I rinvii pregiudiziali italiani dall'entrata in vigore del Trattato di Lisbona al 31 dicembre 2022: uno studio sulla prassi e sulle prospettive del dialogo tra giudici italiani e giudici dell'Unione' (2023) *Il Diritto dell'Unione europea* 180.

[92] For the sake of precision, it should be noted that Italy may not be the best example for assessing the differences in duration depending on the composition of the chamber, since its preliminary references are decided in the Grand Chambre only rarely (see ibid, 152). Nevertheless, the duration of the time period covered by the research (15 years) and the lack of any other example make this data useful for comparative purposes.

[93] J Alberti, *La meccanica dei rapporti tra ordinamenti. Uno studio sui rinvii pregiudiziali italiani dall'entrata in vigore del trattato di Lisbona a oggi e sulla dimensione processuale del dialogo multilivello* (Jovene 2025, forthcoming).

[94] Annual Report 2024 (n 21) 31.

from existing case-law or that the answer to the question referred admits of no reasonable doubt) and the others. Of course, those data should then also be presented in the report which, according to Article 3 of Regulation (EU) 2024/2019, the CJ has to present to the European Parliament, the Council and the Commission by 2 September 2028 for the purpose of assessing the implementation of the reform. This provision (see Article 3(2)(c)) only requires that the *average* length of the procedures be reported. However, for the reasons stated above, far more precise data are needed to properly assess whether the reform succeeds in reaching the target to reduce the length of the most sensitive cases.

With regard to the need to increase '*la qualité des décision judiciaires*', it should be highlighted that, according to President Lenaerts, this implies '*la capacité d'étudier à fond le dossier, d'étudier la jurisprudence nationale des cours constitutionnelles, suprêmes, qui sont une source de nourriture de notre jurisprudence*'.[95]

In consideration of this target, one cannot but highly appreciate the commitment taken by the CJ to rely more on Article 101 of its Rules of Procedure and, accordingly, to increase the practice of requesting clarification from national judges in order to better understand the questions referred by the latter and the peculiarity of each national legal order. The number of activations of this provision will be stated in the forthcoming 2028 report (or, at least, so it seems reasonable to infer from Article 3(2)(g) of Regulation (EU) 2024/2019, which should have probably been written more clearly). Yet, the CJ should also consider adding this information in the official statistics published yearly.

On the other hand, the legal basis requesting the 2028 Report does not envisage the possibility of analysing national jurisprudence for the sake of evaluating the relationship between national and EU Courts in the fields where preliminary rulings have been transferred to the GC. This may well create a sensitive lacuna in the evaluation of the reform, which should be addressed under two perspectives.

First, by analysing the follow-up decisions adopted by national judges after having received the answer to their question from either of the two EU Courts, so as to assess whether and to what extent they comply with the principles stated by the latter in the fields covered by the reform and to assess the impact of the author of the preliminary ruling. Second, by looking into national case-law to assess whether, when and why national judges refuse to raise a preliminary reference. For the reasons already discussed above, maintaining a sound, productive relationship with national judges, despite the appearance of a third party in the dialogue, is perhaps the main challenge posed by this reform. Enriching the 2028 Report with an analysis of these two issues, either made by the *Recherche et Documentation* of the same CJEU or possibly by creating a pool of national experts, would certainly elevate the debates on the future extension of the GC's competence in preliminary rulings over new policy fields.

[95] See above at n 5.

Along the same line, it is worth considering to disclose more information with regard to hearings. The provision regarding the 2028 Report does not mention this issue and the yearly official statistics offer very scant information on that. However, since the 2012 amendment of the CJ Rules of Procedure,[96] which gave the CJ the option of refusing the request of the parties to be heard if it considered that it had sufficient information to give a ruling,[97] the organisation of hearings has decreased dramatically. Academic research – official statistics, unfortunately, do not cover this subject – reveals that from 1 November 2012 to 31 December 2023, a hearing was held in only 31 per cent of the preliminary references raised by Italian judges, 30 per cent of those coming from Spain, 32 per cent of those from Germany, and 39 per cent of those from Belgium.[98] For some Member States, statistics are slightly better (47 per cent and 56 per cent for French and Dutch cases, respectively).[99] Yet, also considering that Italy and Germany are in the top two positions for number of references,[100] these data clearly reveal that the 2012 amendments of the Rules of Procedure have enabled the CJ to greatly reduce the oral phase of preliminary reference procedures.

However, for EU Courts, hearings are a further moment in which information on the ever-evolving national case-law can be obtained. Moreover, hearings are of crucial relevance for the parties both to defend their interests and to make them feel that they are being heard and are receiving an answer that is useful for solving the litigation.

Therefore, the resources gained through the partial transferral of preliminary rulings call for a reconsideration of such a restrictive approach of the CJ (and, potentially, of the GC) towards the organisation of hearings in preliminary rulings, as well as for having official data thereon. Indeed, academic research shows that, at least with regard to the preliminary references raised by Italian courts in the timeframe mentioned above, the length of proceedings where a hearing took place is lower than that of those where only the opinion of the Advocate General was presented.[101] This means that, at least in cases where the CJ decides to hear the AG's opinion, the organisation of a hearing does not extend the length of the preliminary ruling procedure (paradoxically enough, it even reduces it, by only a few weeks though). Thus, the added value that the latter can bring in terms of awareness of the parties' needs, national case-law, or possible amendments that may have occurred in national legislation or jurisprudence after the closing of the written phase (or possible different

[96] Rules of Procedure of the Court of Justice (2012/L/265).

[97] C Amalfitano, 'Art 20 dello Statuto' in C Amalfitano, M Condinanzi and P Iannuccelli (eds), *Le regole del processo dinanzi al giudice dell'Unione europea – Commento articolo per articolo* (Editoriale Scientifica 2017) 98.

[98] J Alberti, 'Le udienze dibattimentali nei pregiudiziali italiani, da Lisbona ad oggi' (2024) 2 *Rivista del contenzioso europeo* 52.

[99] Ibid.

[100] Annual Report 2024 (n 21) 41.

[101] Alberti (n 98) 63.

interpretations thereof: as is well known, the parties cannot reply to the others' observations, if there is no hearing) can be obtained without resulting in an extension of the overall length of the procedure.

Therefore, the judicial statistics published each year, as well as the forthcoming 2028 Report, should carefully consider the possibility of providing data on hearings and on their impact on the length of proceedings.

Indeed, it is (also) against those practical benchmarks that it will be possible to assess the impact of this reform and, more importantly, take reasoned decisions on the next steps of the EU judiciary.

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Perspectives on the Reformed EU Judicial Architecture
***edited by* Lorenzo Grossio *and* Davor Petrić**

Access to Written Submissions in Preliminary Reference Proceedings: An Evaluation of the CJEU Statute Reform and its Contribution to Open Justice

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ABSTRACT: The article analyses the new provisions of the Statute of the Court of Justice and its Rules of Procedure requiring the proactive publication, on the Court's website, of written observations submitted in preliminary reference proceedings by the parties and other interested persons. This development represents a significant step forward for the Court of Justice, which has historically prioritised confidentiality to protect the serenity of proceedings and the equality of arms between parties. Against this backdrop, the Article delves into this aspect of the reform through the theoretical foundations of open justice alongside the evolution of the rules and case-law on

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access to court documents. It also explores the implications of the reform, with particular attention to the possibility for the parties and interested persons to object to publication. To that end, the Article includes an empirical analysis of the number of objections and published observations during the first six months of the new regime's implementation. A combined reading of the normative and empirical findings suggests that the widespread concerns over an extensive use of objections appear (for now) to be unfounded, and that a real paradigm shift towards greater openness at the Court of Justice may indeed be underway.

KEYWORDS: CJEU Statute – reform – openness – access to documents – court proceedings – preliminary reference proceedings.

1. Introduction

International courts – including the Court of Justice of the European Union (CJEU) – often face criticism for their perceived lack of legitimacy. Just like any other judicial body, they contend with the inherent technicism of their mandate, which can create an impression of elitism and detachment from the general public. This perception is further reinforced by complex and mediated selection procedures.[1] Additionally, international courts can be easily associated with the alleged original sin of imposing legal obligations from outside the domestic arena that influence, where not dictate, national policies and their implementation.[2]

Within this landscape, the CJEU holds a privileged position compared to other international courts. This advantage stems from the unique nature of the EU integration process and the Court's deep-rooted connections with national legal systems. As part of a 'community of law'[3] built on shared values, the CJEU operates within a structured 'constitutional framework' of principles, rights, and remedies, strengthening its legitimacy and role within the legal order.[4]

Yet, over the last decades, some scholars have argued that the CJEU is not immune to concerns about legitimacy. Drawing the Nienke Grossman's tripartite conceptualisation of the level of (whether normative or perceived)[5] legitimacy of an international

[1] M Pollak, 'The Legitimacy of the European Court of Justice. Normative Debates and Empirical Evidence', in N Grossman, HG Cohen, A Follesdal and G Ulfstein (eds), *Legitimacy and International Courts* (Cambridge University Press 2018) 144.

[2] In this regard, it has been contended that the provisions on democratic principle enshrined in the TEU from Art 9 to Art 12 TEU could be regarded as a source of inspiration for developing the democratic legitimacy of international courts: A von Bogdandy and I Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press 2014) 156–206.

[3] W Hallstein, *Europäische Reden* (Deutsche Verlags-Anstalt 1979) 343–344; Case 294/83 *Partie écologiste les Verts v European Parliament*, EU:C:1986:166, para 23.

[4] Case C-234/17 *XC and Others*, EU:C:2018:853, para 46.

[5] Perceived legitimacy refers to the concept of sociological legitimacy, which has to be regarded as the 'diffuse support' that an institution gains among citizens and qualified actors, who concede its authority as a trustworthy decision-maker. See the seminal study conducted by GA Caldeira and JL Gibson, 'The legitimacy of the Court of Justice in the European Union: Models of institutional support' (1995) 89 *American Political Science Review* 356, followed by JL Gibson and GA Caldeira, 'Changes

court,[6] these critiques focus on three key factors: the absence of bias, adherence to the will of the states from which the court originates, and an appropriate level of transparency and openness.[7]

Regarding the first two strands, concerns about the CJEU adopting a pro-integrationist stance date back to 1986, when Hialte Rasmussen was the first one to explicitly accuse the Court of such bias.[8] According to Rasmussen, the CJEU's case law is 'goal-oriented', deliberately extending the meaning and scope of Treaty provisions beyond what the drafters reasonably intended, often at the expense of national sovereignty.[9] Since then, criticism of judicial overreach – fuelled by perceptions of the Court's reasoning as 'cryptic,'[10] or 'uneven and unpredictable'[11] – have periodically resurfaced.[12]

While broader questions concerning the quality of the CJEU's legal reasoning and the legitimacy of its judicial mandate remain central to discussions on the EU legal order, issues of transparency and openness have thus far occupied only a marginal place in both public and specialist discourse. Yet, 'judicial candor'[13] is a cornerstone of any legal community. It underpins democratic values, ensures the fair administration of justice, and enhances judicial accountability to the benefit of individuals and the legal system as a whole.[14]

Needless to say, the EU judicial system adheres to fundamental principles of court transparency. It ensures public access to hearings and judgments and has established internal procedures for accessing administrative documents. The CJEU has

in the legitimacy of the European Court of Justice: A post-Maastricht analysis' (1998) 28 *British Journal of Political Science* 63.

[6] N Grossman, 'Legitimacy and international adjudicative bodies' (2009) 41 *George Washington International Law Review* 115.

[7] At the same time, the relationship between transparency and legitimacy has been questioned by some scholars: see for instance D Curtin and A Meijer, 'Does transparency strengthen legitimacy? (2006) 11 *Information Polity* 109.

[8] H Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff 1986).

[9] Ibid, 3; for a similar critique see also M Bobek, 'The Legal Reasoning of the Court of Justice of the EU' (2014) 39 *European Law Review* 10–11; G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013) 447.

[10] JHH Weiler, 'The judicial après Nice', in G de Búrca and JHH Weiler (eds), *The European Court of Justice* (Oxford University Press 2001) 215, 225.

[11] E Muir, M Dawson and B de Witte, 'Introduction: The European Court of Justice as a Political Actor' in M Dawson, B de Witte and E Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013) 2.

[12] Needless to say, such positions face strong counter arguments, focussing for instance on the key role played by the Court in the evolution of the Union's integration process and in fostering fundamental rights and the general principles of the EU legal order. *Inter alia*, see A Tizzano, 'Qualche riflessione sul contributo della Corte di giustizia allo sviluppo del sistema comunitario' (2009) 13 *Il Diritto dell'Unione europea* 925.

[13] Grossman (n 6) 134.

[14] The principle of open justice started appearing in the works of legal scholars in the 16th century as a 'virtue of the judicial process'. In the 'History of the Common Law of England', holding trials in public ensured judges' impartiality and a way to check on the 'performance of the Judge itself' (G Nettheim, 'The Principle of Open Justice' (1984) 8 *University of Tasmania Law Review* 27).

also demonstrated some responsiveness to technological advancements, such as the livestreaming of selected hearings. However, it has remained consistently cautious when faced with demands for greater openness in areas more directly linked to its judicial functions, such as most notably the denial of third-party access to court submissions and pleadings.

Against this backdrop, the recent reform of the CJEU Statute marks a notable development. For the first time, it has introduced a duty for the Court to proactively publish written pleadings submitted by interested parties in preliminary reference procedures. While this change might appear to be a secondary aspect of the broader reform package discussed in this Special Section, it marks a departure from longstanding practice and may prompt a significant shift in how institutional transparency is integrated into the Court's judicial role, and how litigants and observers engage with its proceedings.

Building on the theoretical elaboration of the principle of open justice and its progressive incorporation into international standards for judicial independence and accountability (Section 2), this Article examines the evolution of the concept of openness in the EU judicial system before outlining the state of play (Section 3). Section 4 then focuses on third-party access to court proceedings, highlighting its inherent limitations – an essential backdrop for understanding the contentious inter-institutional negotiations and the specific content of the reform (Section 5). However, the practical impact of this reform remains uncertain. As argued in Section 6, its success in advancing transparency will largely depend on how parties to the main proceedings and other interested persons navigate their procedural choices before the Court. In this regard, this Article offers valuable insights by analysing the practices of EU institutions and Member States during the first six months of the reform's implementation. Section 6 discusses emerging trends and supports its findings with original data derived from the Court's website. Ultimately, whether this reform leads to a genuine shift toward greater judicial openness or remains a formal gesture with limited practical effect will depend on how the new rules are interpreted, applied, and strategically used in practice (Section 7).

2. Open justice and human rights: ensuring transparency and accountability through public access

2.1. The notion of open justice: scope and constitutive elements

Open justice is a foundational principle of democratic judicial systems, rooted in fairness, public participation, and the rule of law.[15] At its core, it ensures that justice

[15] In the words of Jeremy Bentham, publicity is 'the very soul of justice' by 'keeping the Judge itself under trial' (*Works of Jeremy Bentham* (Bowring 1843) 305, 316–317). This concept has been tellingly illustrated in the UK House of Lords leading case *Scott v Scott* in 1913, describing the 'open

is not only done but is seen to be done, reinforcing the legitimacy of judicial outcomes. More than a procedural norm, open justice encompasses the transparency of court processes, accessibility of legal reasoning, and public engagement with the judiciary. It holds judges accountable by subjecting their work to scrutiny, deters arbitrariness, and affirms the judiciary's role as a guardian of rights.[16] In parallel, studies have shown that public scrutiny enhances honesty in legal proceedings, as parties are more likely to present accurate information when proceedings are accessible.[17]

In addition to its institutional implications, open justice has a profound societal dimension.[18] It builds trust in legal institutions, improves public understanding of the law, and strengthens civic engagement.[19] The media plays a critical role as an intermediary between courts and the public.[20] In recognition of this, courts often

conduct of trials' as a 'sound and very sacred part of the constitution and the administration of justice' (House of Lords, 1913 AC 417, 473 *Scott v Scott*).

[16] S Rodrick, 'Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public' (2014) 19 *Deakin Law Review* 123. The Author defines open justice as 'a means to an end, but not an end itself'. In the United States, the principle of open justice was constitutionalised through the Supreme Court's decision in *Richmond Newspapers Inc v Virginia*. In this case, the Court ruled that the First Amendment guaranteed a presumption of openness in judicial proceedings, affirming that public access to trials was a fundamental aspect of both free expression and democratic governance. The Court further established that any effort to override this presumption required an 'overriding public interest', setting a high bar for limiting transparency (US Supreme Court, *Richmond Newspapers Inc v Virginia* 25 448 US 555 (1980)). See JJ Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006) 29 *The University of New South Wales Law Journal* 152.

[17] L Neuberger, 'Open Justice Unbound?' (2011) 10 *The Judicial Review* 259, 260. Also, the visibility of court proceedings serves not only as a mechanism for holding individuals accountable but also as a means of vindication for those seeking justice (Rodrick (n 16) 125; Nettheim (n 14) 27).

[18] The principle of open justice has undergone significant transformation over the centuries, adapting to the shifting dynamics of legal systems and societal expectations. Initially, justice was delivered in rudimentary public trials, where local communities actively participated in dispute resolution. However, as legal systems became more structured and codified, courts transitioned into formal institutions: there, open justice served as a safeguard against the arbitrary exercise of judicial power. Then, openness became a procedural rather than an informal communal practice. With the rise of print journalism and mass communication in the 19th and 20th centuries, the role of the media in disseminating court information became a crucial factor in enhancing openness, enabling the broader public to stay informed about legal developments even if they could not physically attend proceedings. In the 21st century, the concept of open justice has further expanded to incorporate digital transparency and accessibility. The digitalisation of court documents, the online publication of judgments, and the livestreaming of hearings have revolutionized public access to judicial processes.

[19] G Zdenkowski, 'Magistrates Courts and Public Confidence' (2007) 8 *The Judicial Review* 398; S Rodrick, 'Open Justice, the Media and Avenues of Access to Documents on Court Records' (2006) 29 *The University of South Wales Law Journal* 94. The latter Author contends that open justice bridges the gap between the judiciary and the broader public, reinforcing the legitimacy of judicial decisions and strengthening the relationship between courts and society. Transparency in the judiciary also serves an educational purpose. It empowers citizens to understand their rights and the functioning of the legal system, which is crucial for the continued engagement of individuals in democratic processes.

[20] See *Attorney-General (UK) v Guardian Newspapers Ltd* (No 2) [1990] 1 AC 109, 183; In literature, see PD Cummins, 'The Benthamite Principle of Open Courts' (2007) 142 *Victorian Bar News* 53, 55.

grant journalists privileged access to documents and hearings.[21] At the same time, media coverage shapes public perception of the judiciary, either reinforcing or undermining its legitimacy. In this regard, crucially, the principle of open justice is not absolute and must be balanced against competing interests, such as the need to protect vulnerable parties, maintain confidentiality, or safeguard national security. Exceptions must be narrowly defined and carefully applied to preserve the core function: ensuring fair and accountable justice.

Three key components help define judicial openness. First, public access to hearings. According to Jaconelli, physical (and, we may add today, online) attendance of members of the public as well as the media to the trial as a 'live event' constitutes 'the very core of the idea of open justice'[22] as it enables public oversight. The second component is transparency in the administration of justice, whereby courts must proactively disclose administrative structures, procedural rules, and organisational details.[23] Moreover, transparency in principle extends to judicial proceedings, requiring the proactive publication or accessibility through requests of court documents, decisions, parties' submission, and reasoning behind judgments.[24] The third aspect relates to access to judicial documents and data, namely access to decisions, case files, court agendas and statistics, as well as all documents deposited with the registrar by the parties or by any third party.[25] There is growing recognition of the need for access in all judicial domains.[26] The digital age has expanded access through livestreams and online databases, but this evolution raises new challenges for balancing transparency with privacy and procedural fairness.

2.2. Open justice under international and EU law

From a human rights perspective, open justice intersects directly with international law. Article 14 of the International Covenant on Civil and Political Rights (ICCPR)[27] and Article 6 of the European Convention of Human Rights (ECHR)[28] enshrine the

[21] Rodrick (n 16) 135. Landmark cases, such as *Cox Broadcasting Corporation v Cohn* (1975) in the United States and *R v Waterfield* (1975) in the United Kingdom, have reinforced the media's right to report on court proceedings as an essential aspect of democratic discourse. Moreover, in cases such as *Pennekamp v State of Florida* (1946) and *Attorney General v Leveller Magazine* (1979), courts have emphasised the importance of press freedom in maintaining judicial openness.

[22] J Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002) 2.

[23] Rodrick (n 16) 128.

[24] Jaconelli (n 22) 3.

[25] Ibid, 1. See also UK, House of Lords, R*e S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 607, and *R v Legal Aid Board Ex parte Kaim Todner (A Firm)* [1999] QB 966, 977.

[26] Rodrick (n 19) 90.

[27] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Article 14. UN Human Rights Committee (HRC), General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, p. 3.

[28] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, ETS No 155 (entered into force 1 November 1998).

principle of open justice as an entitlement to a fair and public hearing by an independent and impartial tribunal established by law. These provisions underline that public hearings and the publication of judgments are essential for ensuring judicial transparency and public trust.[29] However, the interaction between open justice and fair trial requires a court 'to compare essentially incommensurable matters'.[30] Public disclosure in sensitive cases can harm the interests of the parties involved, particularly when privacy or reputational concerns are at stake. This tension has led to a cautious approach, with international standards outlining clear exemptions to transparency, including national security and the protection of commercial interests.[31]

The scope of open justice has evolved to include access to court documents as part of the broader right to information. UN Human Rights Committee's General Comment 34 highlights states' obligations to proactively disclose information and facilitate access to all public data, including judiciary-held information. Similarly, the OHCHR affirms that access to information must extend to all branches of government, including courts.[32] The Office of the United Nations High Commissioner for Human Rights (OHCHR) also recalls that 'the obligation to provide access to information applies to the executive, legislative and judicial branches of government, and extends to all organs of the State, including all de facto entities and private entities carrying out elements of governmental functions'.[33]

Thus, access to court proceedings has been gradually and fully embedded into the international normative notion of open justice. The Istanbul Declaration on Transparency in the Judicial Process (endorsed by the UN Economic and Social Council in 2019) states that the justice system should be 'integrated into society', which requires that it 'opens up and learns to make itself known'.[34] In this context, it mandates that '[S]ubject to judicial supervision, the public, the media and court

[29] ECHR, Guide on Article 6: Right to a Fair Trial (Civil Limb), clarifies that 'complete concealment from the public of the entirety of a judicial decision cannot be justified'.

[30] JJ Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (n 16) 150.

[31] See the Global Principles on National Security and the Right to Information lay out some of these limitations (Tshwane Principles). As per public access to judicial proceedings, the principles state that the 'invocation of national security may not be relied upon to undermine the fundamental right of the public to access judicial processes' (Principle 28). The Tshwane Principles lay out the components of judicial processes that should be made available: i) judicial reasoning; ii) information about the existence and progress of cases; iii) written arguments submitted to the court; iv) court hearings and trials; and v) evidence in court proceedings that forms the basis of a conviction. The ECHR has stated that 'the mere presence of classified information in the case file does not automatically imply a need to close a trial to the public, without balancing openness with national-security concerns'. Secrecy should, therefore, be limited to the extent necessary to preserve a compelling governmental interest.

[32] UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, paras 7, 18, 19.

[33] OHCHR, Report of the Office of the UN High Commissioner for Human Rights, A/HRC/49/38, 10 January 2022, para 23.

[34] UN Economic and Social Council, Resolution 2019/22 on Enhancing Transparency in the Judicial Process, Principle 6.

users should have reliable access to all information pertaining to judicial proceedings, both pending and concluded. Such access could be provided on a court website or through appropriate and accessible records. Such information should include reasoned judgments, pleadings, motions and evidence. Affidavits or like evidentiary documents that have not yet been admitted in evidence may be excluded. Access to court documents should not be limited to case-related material, but should also include court-related administrative information such as statistics on the caseload and case clearance rates, as well as budget-related data, e.g. collection of court fees and the use of budgetary allocations'.[35]

The close connection between open justice and access to documents has been gradually acknowledged at the European level. A telling illustration is the Council of Europe Convention on Access to Official Documents (Tromsø Convention),[36] which codifies the right to access documents held by public authorities, including judicial bodies.[37] It defines documents broadly, encompassing written, audio-visual, or digital formats held or created by public institutions.[38]

In the EU legal order, the need for open and transparent judicial activity has its foundations in primary law. Article 15(1) TFEU establishes that 'EU institutions, bodies, offices and agencies shall conduct their work as openly as possible'.[39] This provision highlights that openness is not an end in itself but a means to achieving

[35] The Istanbul Declaration on Transparency in the Judicial Process, Principle 6. Accordingly, the UN Special Rapporteur on the Independence of Judges and Lawyers Gabriela Knaul stressed that 'external institutional accountability, in turn, should encompass activities whereby the public, through the media, civil society, human rights commissions, and parliament, can scrutinize the functioning of the judiciary and prosecution services. Such activities can include institutional dialogues with parliament and other State institutions, such as human rights commissions; all hearings being public; the availability and transparency of information about courts and the judiciary; and the creation of a judiciary website and the use of social media and television programs to explain important judicial decisions and laws. A system of justice that is independent should not retreat behind closed doors'. UN Special Rapporteur on the Independence of Judges and Lawyers Gabriela Knaul, Report to the General Assembly A/HRC/26/32, 50 and 73.

[36] Council of Europe Convention on Access to Official Documents (CETS n 205), 18 June 2019.

[37] The notion of 'public authorities' includes 'government and administration at national, regional and local level' as well as 'legislative and judicial authorities as they perform administrative functions according to national law'. *Ibid.*, Art 1.

[38] Council of Europe Convention on Access to Official Documents, CETS n 205, Preamble. Under the Tromsø Convention, 'official documents' are in principle public and are defined as 'all information recorded in any form, drawn up or received and held by public authorities'. As noted in the Explanatory Memorandum (para 11), this broad definition encompasses 'any information drafted or received and held by public authorities that is recorded on any sort of physical medium whatever be its form or format (written texts, information recorded on a sound or audiovisual tape, photographs, emails, information stored in electronic format such as electronic databases, etc.)'.

[39] For an overview, P Craig, *EU Administrative Law* (Oxford University Press 2018) 390-391; Alemanno and Stefan argue that Art 15 TFEU marks a paradigm shift compared to the pre-Lisbon wording of Article 1 TEU, which was merely declaratory and devoid of tangible legal implications: A Alemanno and O Stefan, 'Openness at the Court of Justice of the European Union: Topping a Taboo' (2014) 51 *Common Market Law Review* 103.

broader objectives such as good governance, democracy, and institutional legitimacy.[40] In addition, Regulation 1049/2001 establishes the right of access to documents held by EU institutions, including the CJEU.[41] According to Article 2(3), this Regulation aims to ensure 'the fullest possible effect to the right of public access to documents'. In particular, such right extends to the Court of Justice of the European Union's activity. The broad personal scope of application of the Regulation reflects the similarly wide substantive reach of the notion of document. Under Article 3(a), the latter encompasses any content, whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording), concerning a matter relating to the policies, activities, and decisions falling within the institution's sphere of responsibility.

The underlying premise of these provisions is the recognition that openness of public institutions 'enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system'.[42]

Yet, in drawing exceptions to request access to documents, Article 4(2) specifically states that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of court proceedings and legal advice'.[43] It follows that access to any document related to court proceedings held by the Court of Justice is in principle debarred from the scope of this transparency regime.

This long-standing exclusion has persisted with only minimal changes.[44] However, the recent reform of the Statute of the Court of Justice marks an interesting turning point. For the first time, it introduces a requirement for the Court to proactively publish written pleadings in preliminary reference cases. The following Sections trace the path leading to this reform and discuss its scope as well as its potential implications for enhancing openness at the Court of Justice.

3. Open justice at the CJEU: evolution, targets achieved and unresolved questions

The scope of the principle of open justice is inherently fluid and flexible depending on the EU institution or body concerned. Accordingly, while transparency and public access must be guaranteed, relevant measures and procedures differ significantly depending on the nature of the function and the specific institutional setting.

[40] Accordingly, openness has been described as an autonomous principle encompassing various important components, including transparency. A Alemanno, 'Unpacking the Principle of Openness under EU law: Transparency, Participation and Democracy' (2014) 39 *European Law Review* 72.

[41] Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

[42] *Ibid*, Preamble (2).

[43] *Ibid*, Art 2.

[44] See *infra*, Section 5.

As for the CJEU, it performs fairly well in the openness ranking, especially if compared to other international courts.[45] This assessment is based on three key factors.

First, Article 15(3) TFEU subjects the Court's administrative activity to the principle of openness.[46] This means that, in the spirit of good administration of justice, the documents related to the Court's internal self-governance, and the multifaceted administrative functions supporting the performance of jurisdictional functions must be as a rule disclosed to the public.[47] The scope of this provision, however, does not extend as such to the Court's core judicial activities.

Second, concerning judicial activities, the CJEU's Statute and the Rules of Procedure are designed to uphold fair trial guarantees. The Court adheres to the fundamental principles of publicity for court proceedings, including publishing notices of new cases, holding public hearings, and making judgments available and accessible in all 24 official EU languages.

Third, over time, the Court of Justice has responded to increasing demands for greater transparency, whether from civil society, legal commentators, or, more simply, offered by technological advancement. A notable example is the live broadcasting of Plenary and Grand Chamber hearings.[48] Originally announced as a 6-month pilot project, this practice has been gradually incorporated into the Court's daily routine. Eventually, following the recent reform discussed in this Special Section, it has been codified in Article 80 *bis* of the Court's Rules of Procedure.[49] Under paragraph 1 of this provision, the delivery of judgments and the reading of opinions of the Advocates General are live streamed, while hearings involving oral pleadings in cases referred to the full Court and the Grand Chamber are broadcast with a delay. Exceptionally, cases assigned to a Chamber of five judges may also be broadcast if deemed important.[50] In any event, a party to the case or, in the context of a preliminary reference procedure, one of the interested persons referred to in Article 23 of the Statute[51] can object to the decision to broadcast a hearing, by setting out the

[45] T Neumann and B Simma, 'Transparency in international adjudication' in A Bianchi and A Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 436.

[46] The provision in question reads as follows: 'The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks'.

[47] For an in-depth analysis, C Krenn, 'Self-Government at the European Court of Justice: A Bedrock for Institutional Success' (2018) 19 *German Law Journal* 2007.

[48] On the initial stages of this practice and the remaining challenges: A Alemanno, 'The Court of Justice of the EU goes (almost) public', 26 April 2022 at verfassungsblog.de.

[49] See the Amendments to the Rules of Procedure of the Court of Justice 2024/2094, in OJ L of 12 August 2024, 1.

[50] Under Art 80 *bis*(5) of the Rules of Procedure, the video recordings remain available on the Court's website for a maximum period of one month after the hearing is closed.

[51] On this notion and its reform see Sections 6 and 7.

detailed circumstances that justify this claim.[52] A similar provision applies to requests for the removal of video recordings from the Court's website.[53] The reform also introduced the possibility of broadcasting hearings before the General Court. *Mutatis mutandis*,[54] Article 110a of the Rules of Procedure of the General Court reiterates the same regime now briefly described.

Overall, the CJEU has proved reasonably responsive to demands for greater openness. Despite these efforts, academic literature and legal commentators have identified several transparency gaps within the CJEU's framework.

For example, previously, the Court published summary reports of its hearings, but this practice has been discontinued, raising concerns about reduced public access to case deliberations.[55] In addition, Article 76 of the CJEU's Rules of Procedure allows the Court to decide cases without oral proceedings, unless a reasoned request for a hearing is submitted.[56] This practice has been criticised for limiting public scrutiny, particularly in cases of significant legal or political importance.[57]

[52] Rules of Procedure, Art 80 *bis*(3).

[53] Ibid, para 6.

[54] Based on the different adjudicating configurations of the General Court, Art 110a(1) covers cases 'referred to the Grand Chamber, to the Intermediate Chamber, or, where this is justified by the importance of the case, to a Chamber sitting with five Judges, or, exceptionally, to a Chamber sitting with three Judges'. On the connections between the Rules of Procedures of the Court of Justice and the General Court see C Amalfitano, 'The Transplant of Procedural Rules from the Court of Justice to the General Court' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024), at eulawlive.com 29.

[55] A reply to this contention could be that the Court's approach to the drafting of its judgments has changed accordingly. As a matter of principle, the Court makes explicit references to the arguments raised by the parties in their written observations or in the oral hearings, both as a means to set the stage for its judgments and as a way to elaborate on its legal arguments. Following the reform, the General Court has amended points 210 and 211 of its Practice Rules for the Implementation of the Rules of Procedure to permit the Judge-Rapporteur to draw up a 'summary report for the hearing'. This report is intended to assist the parties in preparing for the hearing, in line with the principle of sound administration of justice. However, the summary is served exclusively on the parties' legal representatives. See Amendments to the Practice Rules for the Implementation of the Rules of Procedure of the General Court (2025/810). The new provisions entered into force at the beginning of June 2025.

[56] It is important to note that this procedural development is not expressly mirrored in the provisions applicable to the General Court. Pursuant to Art 106 of its Rules of Procedure, the General Court is required to grant parties' requests for an oral hearing. This distinction largely reflects the Court's jurisdictional focus, which is more heavily oriented towards questions of fact than that of the Court of Justice.

[57] M Dahlberg, 'Increasing Openness of Court Proceedings? Comparative Study on Public Access to Court Documents of the European Courts' (2019) 60 *University of Helsinki Legal Studies Research Papers Series* 1, 9. Art 76(2) of the Rules of Procedure also allows the Court to skip the oral phase if it deems to have acquired all the information it needs to adjudicate the case.

Moreover, while the incorporation of hearing broadcasts in the Rules of Procedure represents a positive step, its scope remains limited. Currently, it only applies to select cases, excluding most of the Court's caseload from public view.[58]

Lastly, recent debates have highlighted concerns over the appointment process of the CJEU judges and AGs.[59] The confidentiality of the '255 Committee' deliberations responsible for vetting judicial candidates is regarded as a key guarantee for the serenity of these important evaluations, but critics argue that the lack of transparency in negative assessments undermines public trust in judicial appointments.[60]

[58] This argument is made by Alemanno (n 30). The most recent demonstration of the importance and tangible impact of live streaming of Grand Chamber hearings is the wide journalistic and scholarly debate on the saga concerning the notion of 'third country of origin' for the purpose of EU migration and asylum law. The oral hearing held on 25 February 2025 in the joined cases C-758/24 and C-759/24, *Alace and Canpelli*, has been the subject of various comments, especially in Italy, where most of the various pending preliminary references on this matter have originated. See for instance S Morlotti, 'Mattoncini di Lego in Corte di giustizia: la designazione dei Paesi di origine sicuri. Udienza di Grande Chambre del 25 febbraio 2025, cause riunite C-758/24 Alace e C-759/24 Canpelli' (2025) 3 *Rivista del Contenzioso Europeo* 1; E Colombo 'I grandi assenti: il principio del primato e la disapplicazione della normativa nazionale in contrasto con il diritto UE. Alcune riflessioni a margine dell'udienza del 25 febbraio 2025 sulle cause riunite C-758/24 e C-759/24' (2025) 10 *Eurojus* 1.

[59] Delving into the intricacies of this debate would be out of the scope of the present analysis. A comprehensive overview of the criticisms connected to the selection of EU judges is provided by C Krenn, *The Procedural and Organisational Law of the European Court of Justice. An Incomplete Transformation* (Cambridge University Press 2022) 105-116. See also the contributions to the EU Law Live Symposium *The Selection of EU Judges and the 255 Committee* (November 2024), at eulawlive.com, with a follow-up reaction from J Gardiner, 'The Article 255 Committee's 20-Year Experience Requirement – Contra Legem or Constitutional Convention' (EU Law Live, 26 February 2025), at eulawlive.com. The procedure for selecting EU judges has been at the centre of the recent Case C-119/23 *Valančius*, EU:C:2024:653, on which see ME Bartoloni, 'The "255 Committee" and the Procedure for Appointing EU Judges. The (Perhaps Unintended) Implications of the Valancius Judgment' (2024) 9 *European Papers* 846.

[60] JHH Weiler, 'Judging the Judges Who Judge the Judges. Concluding Reflections' in *The Selection of EU Judges and the 255 Committee* (n 59); M Bobek, *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press 2015). This matter has been brought before the European Ombudsman already. In 2019, Access Europe complained about a refusal of access to the 255 Panel's evaluations, contending that greater transparency would have been beneficial to the Panel itself, as it would have halted the 'speculation, chattering and manipulation' that strict confidentiality elicits. However, the Ombudsman did not uphold the complaint, based on a detailed analysis of various 255 Panel decisions. In particular, she pointed at how 'thorough and frank' the evaluations were on core matters such as appropriate knowledge of EU law. Making unfavourable opinions public could have led the Panel to be less pressing on candidates and to refrain from outlining its assessment clearly and straightforwardly. See European Ombudsman, Decision in case 1955/2017/THH on the Council of the European Union's refusal to grant public access to opinions evaluating the merits of candidates for appointment to the Court of Justice and the General Court of the European Union (23 May 2019), especially paras from 20 to 24. It should also be pointed out that strict confidentiality is the rule also for the appointment of new judges at the European Court of Human Rights. According to the Procedures for the election of judges, a specialised committee consisting of 22 members of the Council of Europe's Parliamentary Assembly conducts interviews in private and issues decisions that are subject to strict confidentiality.

Beyond these broader transparency concerns, one of the most contentious issues in recent reform discussions has been the limited access to written observations submitted by parties and interveners. Unlike other international courts,[61] the CJEU maintained strict confidentiality over these documents. This approach has led to significant debate among legal scholars, civil society, and policymakers. The next Section delves into this debate and examines the current state of access to written observations and the new elements introduced by recent transparency reforms, setting the stage for the analysis of the new elements introduced by the reform of the CJEU's Statute and for a critical assessment of ongoing challenges and future prospects for judicial openness in the EU.

4. The CJEU and access to Court proceedings: the state of play

4.1. The Lack of EU Law Provisions Allowing for Access to Court Proceedings

Before the recent reform of the CJEU Statute, the EU legal regime governing third-party access to court proceedings echoed the overarching choice made by the Member States in the Treaties, with Article 15(3) TFEU delimiting the duty of disclosure only to documents concerning the Court's administrative tasks. Accordingly, as recalled in the previous Section, the general transparency regime excludes the application of Regulation 1049/2001 to the documents held in the context of the exercise of the CJEU's judicial functions.

In line with this framework, the Rules of Procedure of the CJEU did not provide for third-party access to court proceedings. Instead, an indirect understanding of access could be derived from a combined reading of the Statute, the Rules of Procedure, and the Instructions to the Registrar. On the one hand, Article 20(2) of the Statute provided – and still provides – that the written phase includes applications, defences, observations, replies and all documents and papers submitted by 'the parties and […] the institutions of the Union whose decisions are in dispute'. On the other hand, the Rules of Procedure[62] and the Instructions to the Registrar made clear that only the parties to the case enjoyed a right to be served with these documents. *A contrario*, third parties and the general public were not entitled to access the case file.

A slightly different approach was taken by the General Court,[63] where the Instructions to the Registrar made clear that the President could authorise third parties'

[61] See Section 7 with respect to the European Court of Human Rights.

[62] Art 39 of the Rules of Procedure in force until 2021. The current wording of Art 110(2) and (3) provide that, in the context of preliminary reference procedures, the statements of case or written observations which have been lodged shall also be served on the parties and the other interested parties under Art 109(1) of the Rules of Procedure and Art 23 of the Statute.

[63] Art 45 of the Rules of Procedure of the General Court.

access. In cases still pending, this authorisation was entrusted to the President of the relevant formation of the General Court.[64]

This approach reflected the Court's reluctance to consider less stringent regimes on grounds of two main underlying objectives: preserving the serenity of court proceedings and deliberations and ensuring the parties' equality of arms. Regarding the former, in the *API* case, the Grand Chamber made clear that secrecy aims 'to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity'.[65] As per the latter, in the same ruling the Court was concerned that, should the parties' pleadings be open to public debate – especially those of the EU institutions, agencies, and bodies and the Member States – the criticism levelled against them, whatever its actual legal significance, might influence the position defended before the CJEU. Based on such risks, the Grand Chamber recognised and justified 'a general presumption that disclosure of the pleadings lodged […] in court proceedings would undermine the protection of those proceedings'.[66]

Against this position, the CJEU itself has identified two situations in which this 'general presumption of confidentiality' can be rebutted: indirect access to the pleadings in possession of an EU institution through Regulation 1049/2001 once the case is closed, and a party's voluntary decision to disclose its pleadings, even during the pending proceedings.

4.2. Indirect Access to Court Proceedings Through the Transparency Regulation 1049/2001

The first exception to the general presumption of confidentiality concerns the obligations of EU institutions under Regulation 1049/2001. In the *API* case, a journalists' organisation requested access to the Commission's written pleadings submitted before the General Court and the Court of Justice in several pending and closed cases. Tasked with the appeal of a judgment of the General Court concerning the Guardian of the Treaties' partial refusal to grant access to its pleadings, the Court of Justice confirmed that the documents at issue fell under the scope of application of Regulation 1049/2001, since they had to be regarded as 'drawn up' by an EU institution under Article 2(1) and (3). As a result, the obligation to 'give the fullest possible effect' to the right of access, as laid out in Recital 4 and Article 1 of the Regulation, extends to the Commission's written pleadings. Any deviation from this general rule

[64] This clarification is reported by A Alemanno and O Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo' (n 39), 122.

[65] Joined cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v Association de la presse internationale ASBL (API) and European Commission (C-514/07 P), Association de la presse internationale ASBL (API) v European Commission (C-528/07 P) and European Commission v Association de la presse internationale ASBL (API) (C-532/07 P)*, EU:C:2010:541, para 92 (hereinafter, *API*).

[66] Ibid, para 94.

must be strictly limited to the exceptions explicitly listed in Article 4 of the Regulation, which must be interpreted and applied narrowly.[67] Against this background, the Court drew a distinction among three categories of situations: (1) closed cases, (2) pending cases, and (3) closed cases that are substantively connected to pending ones.

As for closed cases, the CJEU found that its core judicial functions are completed once a case is concluded. Accordingly, there is 'no longer ground for presuming' that granting access to written pleadings would undermine the protection of court proceedings or legal advice under Article 4(2). Therefore, this exception cannot be invoked, and EU institutions are, in principle, obliged to disclose such pleadings upon request.

By contrast, in pending cases, the presumption of confidentiality reasserts itself. The burden shifts to the third party to prove that access would not harm protected interests under Article 4(2) – a threshold that can be difficult to meet. Moreover, the Court has extended the same presumption to various ongoing administrative and judicial proceedings.[68] While consistent in its application, the Court's broad interpretation of harm has raised concerns about compatibility with international standards on access to information, which call for a narrower and more precise harm test.[69]

The third scenario is a hybrid one and involves closed cases that are substantively linked to pending ones. Here, the Court ruled that disclosure is not automatically presumed to undermine proceedings.[70] Nonetheless, the Grand Chamber acknowledged that disclosure could prove problematic for the EU institution involved, especially where its position in both sets of proceedings was based on similar legal arguments and the parties to the pending case were not the same as those to the closed one.[71] In such circumstances, access may be refused under Article 4(2), but only if the institution provides a detailed and specific justification subject to judicial scrutiny.[72]

Interestingly, in its initial judgment in the *API* case, the General Court had endorsed a broader interpretation in favour of transparency. Rather than distinguishing between closed and pending cases, it argued that once a hearing has taken place, the arguments have already been presented and debated publicly, weakening the rationale

[67] Ibid, para 73. On the need to interpret the exceptions laid down in Art 4 of the Regulation restrictively see, *inter alia*, Case C-64/05 P *Sweden v Commission*, EU:C:2007:802, para 66.

[68] Case C-612/13 P *ClientEarth v Commission*, EU:C:2015:486, paras 77–78, where the Court recalls that the general presumption of confidentiality of documents extends, for example, to the documents in an administrative file relating to a procedure for reviewing State aid, the documents exchanged between the Commission and notifying parties or third parties in the course of merger control proceedings, the documents concerning an infringement procedure during its pre-litigation stage, and the documents relating to a proceeding under Art 101 TFEU.

[69] UN Human Rights Committee, General Comment n. 34.

[70] *API* (n 65) para 135.

[71] Ibid, para 132. The Commission stressed that disclosure could have affected the full effectiveness of the right to defence.

[72] Ibid, paras 72 and 134.

for a general presumption of confidentiality. The General Court advocated for a case-by-case assessment of whether greater transparency would be justified and harmless.[73]

However, the Court of Justice declined to follow this approach. Instead, in its subsequent case law, it confirmed the tripartite framework and reaffirmed a restrictive reading of Article 4(2) with respect to closed proceedings. A notable development arose in the *Breyer* case, where the Commission refused third-party access to a Member State's written submissions in an infringement procedure. These submissions had originally been received from the Court of Justice. The Commission contended that the document was primarily in the Court's possession and related to its judicial functions, thereby falling outside the scope of Regulation 1049/2001. Furthermore, it argued that the request conflicted with the limits to transparency set out in Article 15(3) TFEU.

The Grand Chamber rejected this argument, clarifying that while Regulation 1049/2001 does not apply to access requests directed at the Court of Justice itself, documents related to judicial activity remain within its scope if they are in the possession of another EU institution. In this case, the decisive factor was that the Commission held the document in question.[74] Thus, the Court found that the latter constituted a 'document held by an institution' under Article 2(3) of the Regulation.[75] Once the Regulation applies, any refusal of access must still be assessed in light of the tripartite framework discussed above.

A similarly generous interpretative stance concerns the use an applicant intends to make of the documents to which they have been granted access, including to support their legal position in other pending court proceedings. Once disclosure of a document drafted or held by an EU institution has been granted, the Regulation contains no provisions that restrict onward use or public dissemination. Then, the applicant is not prohibited from making this information available to other persons or the general public. It follows that applicants who receive access to pleadings or other materials are not limited in how they use this information, including to support their legal arguments in other pending proceedings. As the Court noted, a disclosed document 'could, one day, be referred to in court proceedings, even by other than the person who, after making the request, obtained access'.[76] Any attempt to limit such use would overreach the narrowly defined exceptions under Article 4(2).

[73] Case T-36/04 *Association de la presse internationale ASBL (API) v Commission*, EU:C:2007:258, paras 81–82.

[74] Case C-213/15 P *Commission v Patrick Breyer*, EU:C:2017/536, para 38.

[75] Ibid, para 46.

[76] Case C-576/19 P *Intercept Pharma Ltd and Intercept Pharmaceuticals v European Medicines Agency*, EU:C:2020:873, para 40. In this case, a law firm aimed at being granted access to a series of documents concerning the safety of an orphan medicinal product. The documents were held by EMA and originally drafted by Intercept Pharma Ltd. Invited by EMA to take a stance on the access request, Intercept Pharma Ltd complained that the applicant intended to use the information in question in a dispute with its parent company pending in the US.

4.3. Voluntary disclosure by the parties to a case

A second situation in which the presumption that disclosure would undermine the EU Courts' judicial functions can be rebutted concerns the voluntary release of written submissions by the parties themselves. In the absence of explicit rules governing this practice, both the Court of Justice and the General Court have consistently rejected the claim that proceedings are subject to a general and absolute principle of confidentiality.[77] On the contrary, the limited case-law suggests that parties are generally permitted to disclose their own submissions, even in pending cases, save exceptional circumstances where such disclosure might 'adversely affect the proper administration of justice'.[78] However, this threshold of 'exceptionality' remains vague. The case-law has not clarified the degree of risk required to justify a restriction, the criteria for determining whether a particular disclosure would be harmful, or the procedural safeguards – if any – that could prevent inappropriate publication.

As a result, this legal ambiguity leaves ample room for uncertainty and inconsistent case-by-case application. During the *API* proceedings, Advocate General Poiares Maduro called for a reassessment of this position. In his view, the current approach is problematic because it deprives the Court of the ability to control access to documents in the case file.[79] Just like access requests under Regulation 1049/2001, voluntary disclosures may exert public pressure on the judicial process or unfairly disadvantage one of the parties.

However, unlike requests processed through the transparency framework – which are subject to institutional scrutiny and legal safeguards – voluntary disclosures can occur unilaterally, unnoticed, and without any realistic possibility of redress once a document enters the public domain.[80] To address these risks, Advocate General Poiares Maduro proposed that the Court should act as a central gatekeeper, determining on a case-by-case basis whether a document should be made public. In his words, 'in pending cases it is necessary to avoid imposing a strict rule at the current stage of development of the law and instead adopt a careful, case-by-case approach'.[81] Nevertheless, in its preliminary ruling in the *API* case, the Court of Justice did not take up this recommendation, missing an opportunity to clarify the law.

As the legal framework currently stands, EU law continues to permit the voluntary disclosure of written pleadings by parties without requiring prior judicial authorisation or oversight. This unresolved issue raises broader questions about how to

[77] Order in Case C-376/98 *Germany v European Parliament and Council*, EU:C:2000:181, para 10; see also *API v Commission* (n 55), para 88, and Case T-188/12, *Patrick Breyer v Commission*, EU:T:2015:124, para 93.

[78] *Germany v European Parliament and Council* (n 77), para 10.

[79] Opinion of AG Poiares Maduro in Joined Cases C-514/07 P, C-528/07 and C-532/07 *API*, EU:C:2009:592, para 16.

[80] Ibid, para 16.

[81] Ibid, para 39.

strike an appropriate balance between transparency and the integrity of judicial proceedings, an area that may warrant future reform and clearer guidance.

5. The reform of the CJEU Statute and the paradigm shift concerning access to written submissions in preliminary reference proceedings

5.1. The interinstitutional negotiations

As discussed in the previous Section, access to written pleadings lodged before the CJEU has traditionally followed a bottom-up model rooted in Regulation 1049/2001. Access is not automatic but triggered by a third-party request, and its availability is governed by conditions and limitations developed through judicial interpretation.

Historically, the Court has been reluctant to adopt a more proactive stance on document disclosure, citing concerns about the serenity of deliberations and the equality of arms between parties. Yet, over the past two decades, this restrictive approach has been increasingly questioned, both within the Court and by legal scholars. The *API* case again serves as a key reference point. In his Opinion, Advocate General Poiares Maduro argued that written submissions should be made public once a case is closed, unless 'exceptional circumstances demand that secrecy be maintained'.[82] This view has been endorsed in academic discourse by Alemanno and Stefan, and more recently by Krenn, who sees it as a way to reinforce the democratic legitimacy of the CJEU's decision-making.[83]

Despite these arguments, the Court's initial proposal to reform its Statute showed no inclination toward greater transparency. The formal request to amend Protocol n. 3, submitted under Article 281(2) TFEU,[84] focused solely on the partial transfer of jurisdiction over preliminary references to the General Court and the expansion of mechanisms for determining the admissibility of appeals. Transparency was conspicuously absent.

It was during the European Parliament's deliberations that proposals for increased openness began to surface,[85] along with several other interesting – yet ulti-

[82] AG Maduro based this proposal on three main arguments: the 'justificatory reason' of enabling the public to understand the reasons for the Court's decision and the process through which it was reached (para 32), the need to foster the Court's accountability and public confidence in it (para 33), and assuring those who had a different view on the law that, even if their view did not prevail, it was given due consideration in the deliberative process of the Court (para 34).

[83] Alemanno and Stefan (n 39) 112; Krenn (n 59) 135.

[84] Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union, at curia.europa.eu.

[85] European Parliament, Committee on Legal Affairs, Proposed amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union, at europarl.europa.eu. Critical opinions on the legitimacy of this *addendum* to the original Court's proposal have been voiced by some Member States and commentators. In particular, the amendment could be regarded as departing from the original scope

mately unsuccessful – proposals, such as establishing a conciliation mechanism between the Court of Justice and national supreme courts. More concretely, the Parliament initially proposed a mandatory disclosure regime, requiring the Court of Justice and the General Court to make available to the public 'all documents deposited with the Registrar by the parties or by any third party in connection with an application' in accordance with their Rules of Procedure and in compliance with primary EU law.[86] During the negotiations, the European Parliament held firm in advocating for the inclusion of access rights as a core element of the reform package, despite strong resistance from the European Commission.[87] As a matter of principle – and despite significantly diverging views on the scope of the right in question – the Court itself eventually acknowledged that its constitutional role within the EU legal order necessitated greater transparency and hence more openness.[88]

Following multiple rounds of interinstitutional dialogue, the Parliament's JURI Committee softened its initial stance. The obligation for proactive publication was converted into a general right of access upon request. The revised proposal for a new Article 20a of the Statute provided that 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right to access, upon request, documents of the Court'.[89] Under this framework, access could be refused only by the President of the Court of Justice or the General Court, and solely on grounds such as risks to public interests, privacy, individual integrity, commercial confidentiality, or the sound administration of justice. Significantly, the proposal extended this right to all procedures before the EU Courts, regardless of whether they were pending or concluded, marking a potential development in the transparency of judicial proceedings at the EU level.

and purpose of the proposal. See the declaration made by Austria, Cyprus, France, Greece, Italy and Malta on 8 March 2024, in parallel to the adoption of the reform of the CJEU Statute, 2022/0906(COD), at data.consilium.europa.eu. See also C Tovo, 'Le nuove regole processuali in materia pregiudiziale e le loro implicazioni istituzionali per la Corte di giustizia: verso un'ulteriore costituzionalizzazione?' in B Nascimbene and G Greco (eds), *La riforma dello Statuto della Corte di giustizia* (2024) *Eurojus* 1, 19-20.

[86] European Parliament, Committee on Legal Affairs, Proposed amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union (n 67) Art 20a.

[87] For an overview of the main negotiation phases see the briefing from the European Parliamentary Research Service PE 754.559 of February 2024, Amending the Statute of the Court of Justice of the EU Reform of the preliminary reference procedure, at europarl.europa.eu.

[88] These arguments have been incorporated into the preamble of Regulation 2024/2019, in recital 4, which reads as follows: '[…] as the Court of Justice is increasingly required, in preliminary ruling cases, to rule on matters of a constitutional nature or related to human rights and the Charter of Fundamental Rights of the European Union ('the Charter'), the transparency and openness of the judicial process should be strengthened'.

[89] European Parliament legislative resolution of 27 September 2023 A9-0278/2023, on the draft regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union, at europarl.europa.eu.

5.2. The final text of Article 23(5) of the CJEU Statute

The final compromise between the Parliament and the Council adopts an intermediate solution to openness. Article 1(1)(b) of Regulation 2024/2019 introduces a new paragraph 5 to Article 23 of the Court's Statute, which provides that

> 'Statements of case or written observations submitted by an interested person pursuant to this Article shall be published on the website of the Court of Justice of the European Union within a reasonable time after the closing of the case, unless that person raises objections to the publication of that person's own written submissions'.[90]

This provision marks a partial shift toward a regime of proactive disclosure of court proceedings, instead of solely relying on individual requests to access documents.[91] Overall, the post-reform scenario features two parallel and complementary transparency regimes: written submissions filed in the framework of preliminary reference procedures are now subject to proactive publication, albeit with some limitations; and access to written pleadings submitted in other actions remain subject to Regulation 1049/2001, with strict confidentiality safeguards, as outlined in the previous Section.

Although limited in scope, this reform represents a step forward in enhancing judicial openness. The proactive publication of pleadings is expected to contribute meaningfully to transparency, informed legal debate, and broader judicial accountability. It also aligns well with the nature of preliminary reference proceedings, as a dialogue between national courts and the CJEU. By making written observations publicly accessible, the Court allows the referring national court, the parties to the main proceedings, and other interested persons to better understand the reasoning behind the Court's ruling, the role of divergent legal interpretations, and how those shaped the final judgment.[92] The European Parliament, in a 2023 resolution, further emphasised the value of such access: national judges, it argued, would be better positioned to follow up on preliminary rulings in their domestic proceedings and to determine whether further references to the Court of Justice are necessary – potentially helping to ease the Court's caseload. The importance of this new rule is further underscored by its interaction with Article 23(1) and (2) of the Statute. These provisions define 'interested persons' broadly, extending the right to submit observations in preliminary reference cases beyond the parties to include Member States, the Commission, and – following the reform – the European Parliament, the Council,

[90] This amendment was followed by the re-wording of Art 96 of the Rules of Procedure of the Court of Justice, which lays down provisions concerning participation in preliminary ruling proceedings.

[91] Interestingly, in 2010, in response to a petition, the Legal Service of the European Parliament acknowledged that an amendment to the Statute could allow access to case files, provided that certain provisions of primary law would be observed, such as Arts 16 and 339 TFEU, Arts 7 and 8 of the Charter. See petition 163/2010 by P.B (German).

[92] Krenn contends that this outcome is an effective surrogate for the lack of rules on separate and dissenting opinions at the Court of Justice (Krenn (n 59) 134).

and the European Central Bank.[93] All of these actors are now entitled to receive notification of a reference for a preliminary ruling and may submit written observations within two months. As a result, their submissions also fall within the scope of the Court's new duty to publish.

If one considers that the national courts' references for preliminary rulings are increasingly made available on the Court's website (usually) in most EU official languages, full accessibility of the key procedural documents is a tangible prospect for the jurisdiction of the Court under Article 267 TFEU.

From a broader comparative perspective, this move toward proactive disclosure helps narrow the transparency gap between the CJEU and the European Court of Human Rights (ECtHR). Under Article 40(2) of the ECHR – introduced by Protocol n. 11 – documents deposited with the ECtHR Registrar are publicly accessible unless the President of the Court decides otherwise. In this regard, Article 33 of the ECtHR's Rules of Procedure allows online submission of access requests, and disclosure is generally permitted even while cases are still pending.[94] However, access may be refused on the President's own motion or at the request of a party, based on specific grounds such as public order, national security, privacy, or the interests of justice.[95] While the ECtHR's system offers broader access to documents – including in pending cases – it does not impose a requirement of proactive publication, which the new CJEU regime now does, albeit in limited circumstances.

In conclusion, Article 23(5) represents an important development in the transparency of EU judicial proceedings. Still, both the Statute and the Court's Rules of Procedure impose meaningful constraints. Two key aspects will determine the effectiveness of the reform: (1) the expanded definition of 'interested persons' and its implications for transparency, and (2) the mechanisms that allow parties to object to disclosure, which could potentially limit the reform's reach. These issues will be examined in the following Section.

6. The reform between theory and practice: the limits to proactive publication of court proceedings

6.1. The expanded definition of 'interested person' under Article 23 of the CJEU Statute

As outlined in the previous Section, the reform of Article 23 of the CJEU Statute extends the definition of 'interested parties' to include the European Parliament, the Council, and the European Central Bank (ECB) in preliminary reference procedures.

[93] This reform is in line with a proposal put forward by Krenn (n 59) 118 ff. More specifically, the Author argued in favour of increasing the Parliament's chances to take part in preliminary reference procedures, to democratize the Court and enhance the effectiveness of Art 10 TFEU.

[94] European Court of Human Rights, Rules of Court, 28 April 2025, at echr.coe.int, Art 33(1).

[95] Ibid, Art 33(2).

This expansion enhances opportunities for institutional participation and debate before the CJEU and has undeniable merits. However, bearing in mind the current state of play, its practical significance may be more modest than it appears.

Even prior to the reform, existing legal provisions allowed these institutions to intervene when the validity or interpretation of one of their acts was at issue. The Parliament and Council, for example, were already entitled to submit observations in most preliminary references concerning acts adopted under the ordinary or special legislative procedures. Similarly, the ECB had standing in cases involving its own legal instruments.[96] In practice, however, interventions have been selective. As the number of preliminary references has grown, institutions have increasingly prioritised their involvement based on legal, political, and practical considerations. In addition, bare budgetary and human resource constraints limit the feasibility of systematically intervening in every case.

This selectivity is codified in internal rules. For instance, Article 155 of the European Parliament's Rules of Procedure, supplemented by detailed Guidelines,[97] sets out a complex procedure for deciding whether to intervene. The final decision rests with the President of Parliament, based on a combination of legal analysis by the legal service and political judgment by the committee responsible for legal affairs. The Rules of Procedure are amended periodically, as an updated official version is usually published at the start of a new parliamentary term. However, the design of this procedure has remained largely unchanged over the last years, and the provisions in question have undergone minor adjustments. This entails that, unless the Parliament decides to streamline the decision-making framework in question, systematic and unselective parliamentary participation in preliminary reference proceedings remains unlikely.

The situation for the Council is even more constrained. While it may intervene in cases where its acts or institutional prerogatives are at stake, its participation raises the challenge of balancing its role against those of Member States, which typically contribute to the legal debate before the Court but often advocate for differing interpretations of EU provisions, due to political or legal divergences.[98] Then, this insti-

[96] Art 23(3) adds that 'the decision of the national court or tribunal shall, moreover, be notified by the Registrar of the Court to the States, other than the Member States, which are parties to the Agreement on the European Economic Area and also to the EFTA Surveillance Authority referred to in that Agreement'. Within two months of notification, where one of the fields of application of that Agreement is concerned, these States and the EFTA Surveillance Authority can submit statements of case or written observations to the Court.

[97] European Parliament, Rules of Procedure, Tenth Parliamentary Term 2024–2029, July 2024; European Parliament, Committee on Legal Affairs, Notice to Members 10/2025 of 24 June 2024, Guidelines for the application of Rule 155 of the Rules of Procedure, at europarl.europa.eu.

[98] Empirical research demonstrates that the Member States' participation in the written and oral phases has generally increased over the last decades: M-PF Granger, 'When Governments Go to

tution's participation requires careful preliminary evaluations and may demand appropriate coordination with intervening States. While the Council's Rules of Procedure do not directly regulate this matter, internal litigation guidelines assign the legal service the task of initiating interventions, subject to the Council's formal authorisation, at the COREPER's level. Moreover, any document transmission to the Court of Justice or the General Court – including the appointment of agents – must receive prior approval. Here, the permanent representations of Member States play a prominent role, as the Council's legal service must circulate draft submissions to them. This step can trigger political sensitivities, potentially exposing the Council's legal arguments. In the absence of a clear and consistent policy, these internal checks – combined with political considerations – shape the Council's institutional posture on voluntary interventions before EU Courts.[99]

By contrast, the Parliament is not constrained by such institutional limitations and might increasingly act as *de facto amicus curiae*,[100] especially in cases involving fundamental rights or democratic participation. The reform offers to the Parliament a firmer legal basis to do so. This evolution merits further attention, especially as parliamentary practice adapts to the new framework.[101]

Luxembourg: the Influence of Governments on the Court of Justice' (2004) 29 *European Law Review* 8. See also M Bulterman and C Wissels, 'Strategies Developed by – and between – National Governments to Interact with the CJEU' in B de Witte, E Muir, and M Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013) 269. For insights on the Italian case, G D'Agnone, 'Alcune osservazioni in merito agli interventi dell'Italia in procedimenti in corso davanti alla Corte di giustizia dell'Unione europea' (2017) *Il Diritto dell'Unione europea – Osservatorio*, 31 May 2017, at dirittounioneeuropea.eu. Interestingly, AG Trstenjak compared the submissions by Member States in preliminary reference proceedings to *amicus curiae* participation: see her Opinion in Case C-137/08 *Schneider*, EU:C:2010:401, para 80.

[99] Some legal scholars have pointed out that the Council seldom intervenes before EU Courts voluntarily, except for direct actions. On this point, I conducted three semi-structured interviews with members of the Council legal service and of the CJEU, all of them confirming the same understanding of the current state of play. As reported by Krenn, out of the 509 preliminary rulings delivered by the Grand Chamber between 2004 and 2020, the Council submitted written or oral observations in 44 cases, while the Commission intervened in all of them. See Krenn (n 59) 70–71. On the Commission's practice, see *inter alia* L Romero Requena, 'La Commission devant la Cour de justice: l'exemple de la procédure préjudicielle' in A Rosas, E Levits and Y Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Springer 2012) 155. An empirical research has revealed that in one-third of cases private parties do not submit any oral or written observation: L Boulaziz, S Hermansen and T Pavone, 'Instrument of Power or Weapon of the Weak? Judicial Entrepreneurship and Party Capability at the European Court of Justice', in *European Consortium for Political Research*, 2022, at ecpr.eu.

[100] On the current role of the parties and interested persons in contributing to the Court acquiring insights on the national normative framework, the factual background, and other relevant information see V Passalacqua and F Costamagna, 'The law and facts of the preliminary reference procedure: a critical assessment of the EU Court of Justice's source of knowledge' (2023) 2 *European Law Open* 322.

[101] From a broader perspective, the extension of the set of interested parties could also lead to another development. According to Art 96(2) of the Rules of Procedure of the Court, 'Non-participation in the written part of the procedure does not preclude participation in the oral part of the procedure'.

6.2. Limitations to proactive disclosure: the right to object to publication

Despite the importance of the reform, Article 23(5) of the Statute imposes three core limitations to the proactive disclosure of the parties' and interested persons' written submissions. First, the scope of this provision is limited to preliminary reference procedures. Second, it does not allow publication while the case is pending. Third, publication is contingent on the absence of an objection from the party concerned.

To the purpose of this analysis, the possibility of objecting to publication deserves closer examination, given its potentially significant implications for the day-to-day implementation of the reform. In this regard, the broad wording of Article 23(5) of the Statute must be read in conjunction with Article 96(3) of the Rules of Procedure, laying down more detailed rules on this matter. Three main issues arise from this legal framework: the grounds for filing an objection, the procedural regime, and the timing of an objection.

Concerning the first aspect, the Parliament initially proposed limiting the right to object to specific, predefined grounds to balance transparency with competing and equally compelling protected interests.[102] However, the final version of Article 23(5) of the Statute broadly reads that the interested person can raise 'objections to the publication of that person's own written submissions'. The lack of references to a duty to provide evidence of a qualified interest in confidentiality is confirmed by the Rules of Procedure: according to Article 96(3), the interested persons 'need not to state the reasons on which [the objections] are based'. In principle, when an objection is raised, the Court's website merely records its existence. More specifically, a fixed disclaimer has been added at the end of the InfoCuria online search webpage, reading that 'The statements of case or written observations referred to above will not be accessible if an objection is raised pursuant to Article 96(3) of the Rules of Procedure of the Court of Justice or Article 202(3) of the Rules of Procedure of the General Court.'

In addition, in line with the absence of pre-determined grounds for objecting, the Rules of Procedure expressly exclude the possibility of challenging an opposition to publication before the Court of Justice or the General Court.

Lastly, as a rule, objections are to be communicated to the Registry by a separate document, no later than three months after the delivery of the judgment or service of

Therefore, the Parliament and the Council could consider filing a reasoned request for an oral hearing under Art 76(1) of the Rules of Procedure and taking part in it, to present their arguments before the Court, while skipping the practical hurdles connected to the submission of written pleadings during the preceding phase of the procedure. The same situation applies to the general Court, under Arts 202(2) and 213(3) of its Rules of Procedure. It has been argued, however, that a regular procedural strategy of this kind could represent a way of eluding the rules governing the written and oral phases and could therefore be limited by the President of the Chamber involved. See A Maffeo, 'Riforma dell'art. 23 dello Statuto: la montagna ha partorito il topolino?' (2024) 2 *Rivista del Contenzioso Europeo* 6.

[102] See Section 5.

the order closing the proceedings.[103] This means they can be filed alongside the written submissions or at any time during the proceedings. As the Court made clear in its draft amendments to the Rules of Procedure, this deadline serves two main purposes. On the one hand, it provides the parties and interested persons concerned with 'sufficient time to become aware of the Court's decision and to assess the potential impact on the publication (or non-publication) of the observations'. On the other hand, it allows the Court 'to carry out the technical operations necessary for the observations lodged to be made available online, including any redaction of personal data which might prove necessary'.[104] In line with these purposes, the deadline in question is not mandatory and parties enjoy broad discretion to unilaterally and unconditionally oppose publications, unencumbered by substantive, procedural or time constraints. This is why the possibility to object has been described, in substance, as a right of veto.[105]

On the one hand, this approach can be explained by the need to make this system work in the face of the Court's caseload. Due to the growing volume of preliminary references, judicial scrutiny over the merits of each objection would be resource-intensive. Also, it could lead to additional litigation, mirroring the abundant case-law on the exceptions to the right of access to documents under Regulation 1049/2001.

On the other hand, undeniably, proactive publication enters the courtroom through the main door – the Statute of the Court of Justice – only to exit through the back – the Rules of Procedure. While in principle the Court is bound to publish written submissions, the broad discretion granted to intervening parties can mitigate the 'openness potential' significantly. Moreover, even prior to the entry into force of the reform, the concern that parties, especially Member States, would routinely object to disclosure was reinforced by political signals. In March 2024, Austria, Cyprus, France, Greece, Italy, and Malta issued a joint declaration expressing criticism about the implications of Article 23(5). They emphasised that confidentiality is a cornerstone of many national legal traditions, enabling candid communication with the court. These States made clear that they expected the Rules of Procedure to maximise opportunities to object to disclosure.[106] Also, they were concerned about selective publication and the interaction among interested parties: if one party's submissions are published but others are not, the objector's position may still be inferred, render-

[103] However, under Art 51 of the Court's Rules of Procedure, this time limit is 'extended on account of distance by a single period of 10 days'.

[104] Court of Justice, Draft amendments to the Rules of Procedure – Explanatory Statement, 1 March 2024, n. 7225/24, 17.

[105] MF Orzan, 'Un'ulteriore applicazione della "legge di Hooke"? Riflessioni a margine dell'entrata in vigore della recente riforma dello statuto della corte di giustizia dell'unione europea' (2024) 2 *Rivista del Contenzioso Europeo* 68.

[106] See the declaration made by Austria, Cyprus, France, Greece, Italy, and Malta (n 85).

ing objections *de facto* meaningless. This argument echoed concerns raised by Advocate General Poiares Maduro in the *API* case, where he argued that equality of arms and procedural integrity require balanced access to information.[107] In the end, this concern did not materialise in the final text of the reform. However, interested parties could in practice decide to concert their procedural action to ensure their expectations of full confidentiality are satisfied. In addition, the lack of mandatory deadlines for confidentiality objections could trigger a domino effect, prompting similar initiatives from other parties or interested persons. The concern that – fully or partially – lifting confidentiality might deter parties from presenting their defence if they knew that critical elements of fact or law would be made public is deeply rooted in the case-law of the Court, legal scholarship, and some institutional narratives. Although focused on legal advice and policymaking within EU institutions, Leino-Sandberg's analysis illustrates this underlying fear.[108] She argues that '[i]t is the conviction of the institutions and their legal advisers that legal advice has to remain confidential to remain objective'.[109] In particular, she points to the Council legal service's concern that the public debate and external pressure deriving from greater openness would ultimately influence the position of the Council.[110]

Another concern stems from the structure of preliminary reference procedures and from national legal traditions. In many Member States, the disclosure of parties' submissions is not permitted, reflecting a desire to preserve the confidentiality and

[107] Opinion of AG Poiares Maduro in *API* (n 79) para 17: 'Suppose, for instance, that the Commission – either of its own volition, or because it is compelled to comply with the Regulation – were to allow access to its written pleadings in a particular case: it is reasonable to expect that the same obligation would have to apply to all the other parties as well, since it would be extremely odd for the Court to refuse access to their pleadings on the grounds that such disclosure would affect the integrity of the judicial process. Thus, the Court's own decisions about access would end up being significantly affected (if not determined) by the disclosure policy of the other institutions or by the criteria established by the Regulation – which was not, however, meant to be applicable to the Court'. In its Explanatory Statement to the draft amendments to the Rules of Procedure of March 2024, the Court also referred to the need to 'enable the meaning and scope of the decision given by the Court to be fully understood'. According to some commentaries on the reform, scattered publication of written submissions could instead fuel ambiguities and poor or biased understanding of the Court's reasoning: see Tovo (n 85) 94.

[108] P Leino-Sandberg, 'Enchantment and critical distance in EU legal scholarship: What role for institutional lawyers?' (2022) 1 *European Law Open* 231.

[109] Ibid, 244.

[110] These concerns were raised by the Council before the General Court and in the appeals proceedings before the Court of Justice in the *Pech* case. See Case T-252/19 *Laurent Pech and Kingdom of Sweden v Council of the European Union*, EU:T:2021:203, paras 45, 92; Case C-408/21 P *Council of the European Union v Laurent Pech*, EU:C:2023:461. The appeal was dismissed. Both the General Court and the Court of Justice made clear that 'a lack of information and debate is capable of giving rise to doubts in the minds of citizens, not only as regards the legitimacy of an isolated act, but also as regards the legitimacy of the decision-making process as a whole'.

serenity of judicial deliberations.[111] As the Court of Justice's jurisdiction under Article 267 TFEU is incidental to domestic litigation, national courts remain the ultimate decision-makers. As a result, although deprived of a formal role on this matter, referring courts may not remain neutral on whether the Court of Justice should publish written observations. The Recommendations to national courts permit them to summarise parties' arguments and state their own views. Updated in October 2024, these Recommendations remain silent on disclosure.[112] However, it is plausible that referring courts could incorporate disclosure preferences into their orders, especially if prompted by domestic legal culture or party concerns. Also, national courts could encourage parties to object to disclosure, to anticipate the spillover effects on their own proceedings and preserve confidentiality and the serenity of proceedings at the domestic level.

In this multifaceted context, preliminary interesting insights can be drawn from the early practice regarding the new publication regime. Between the 1st of September and the 31st of May,[113] the CJEU issued 183 preliminary rulings. As of the final submission of this Article,[114] pleadings have already[115] been made publicly available on the Court's website in 85 of these cases.[116]

Within this subset of 85 judgments, full disclosure – meaning the publication of written pleadings from all parties and interested persons – occurred in 38 cases. In the remaining 47 cases, one or more objections were raised:

[111] See for instance European Parliament, Committee for Legal Affairs, National practices with regard to access to court documents, 2013, at europarl.europa.eu.

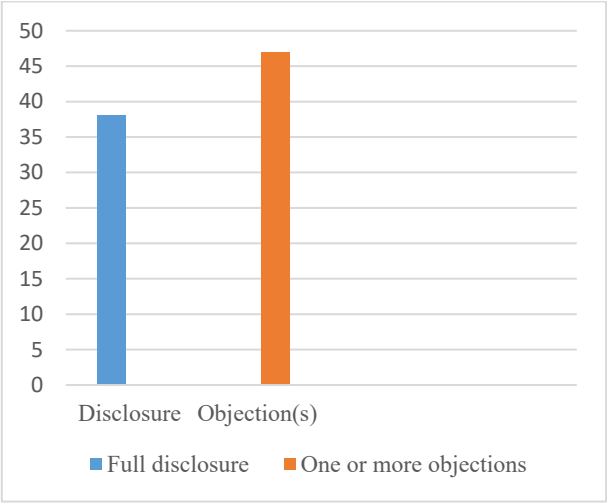
[112] See paras 15–18, concerning the form and the content of requests for preliminary ruling. This section adds that the referring courts must provide a clear explanation of the factual background and of the relevant provisions of national law. In addition, according to paras 20 and 21, the national courts must contribute 'to ensure optimal protection of personal data in the handling of the case by the Court of Justice or the General Court'.

[113] The relevant period was chosen taking into account the 3-month deadline for filing an objection to publication.

[114] The final version of the Article was submitted on 3 June 2025.

[115] Following a request for clarification addressed to the ECJ's Registry, we were informed that, once the deadline for objection expires, the publication process requires careful preparation, resulting in several additional weeks of delay before the written pleadings are made available. Understandably, organisational and technical challenges may cause further delays, especially in the current early phase of implementation of this aspect of the reform. We are particularly grateful to the Court of Justice's Registry – and especially to Mr Cesare Di Bella, Mr Giovanni Chiapponi, and Ms Eleonora Sartori – for their kind and invaluable assistance.

[116] All of these judgments refer to written observations submitted by the parties and, where applicable, other interested persons. In any event, pleadings are not published when a case is removed from the registry.



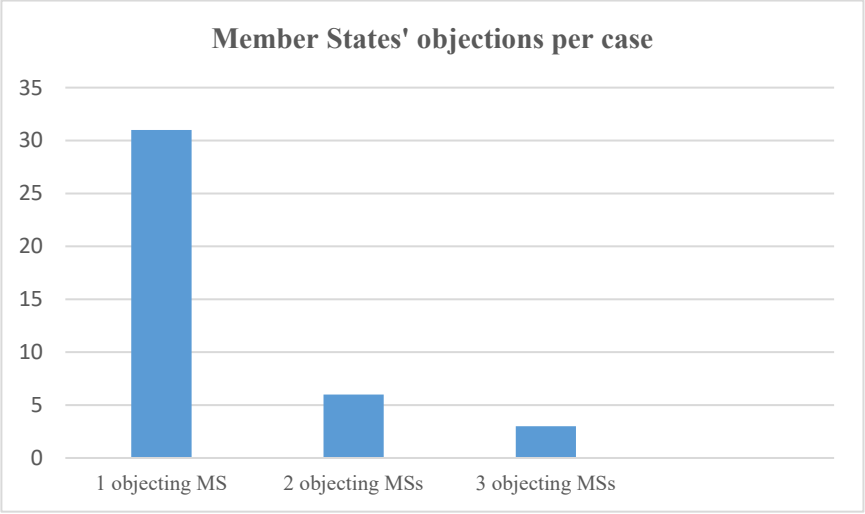
The following table summarises the number of cases in which the parties in the main proceedings, Member States, EU institutions and bodies, and EFTA States and bodies submitted written pleadings before the Court, and indicates how many of those cases involved an objection to publication:

Party or interested person	**Cases (out of 85)**	**Cases with objection(s)**
Parties	85	9
Member States	79	40
Commission	85	1
Parliament	2	2
Council	6	4
Other EU institutions/bodies	1 (ECHA)	-
EFTA States and bodies	6	-

From an institutional perspective, this data shows that the Commission has taken the openness rationale underpinning the reform seriously. As a general rule, it does not object to the disclosure of its written pleadings. Although the sample of relevant cases is smaller, the same cannot be said for the Council and the Parliament. The Council has lodged objections in 4 out of 6 cases, while the Parliament has, to date, opposed publication in every instance where it submitted pleadings.

As for Member States, the first six months of practice appear to confirm the anticipated trend of more frequent use of the objection mechanism. However, a more nuanced understanding of how Member States are utilising this procedural tool re-

quires closer scrutiny. To that end, the following diagram disaggregates the 40 relevant cases into three sub-categories, based on the number of objections submitted by Member States in a single case: one objection (31 cases), two objections (6 cases), and three objections (3 cases):



The following table presents a State-by-State comparison of the number of interventions and the number of objections, using the pool of 85 cases as a benchmark. Member States are ranked in descending order based on the number of objections lodged. For States with an equal number of objections, and for those that intervened without invoking the objection clause, ordering is based on the total number of their interventions:

State	Interventions	Objections	Publication
France	13	13	-
Spain	13	10	3
The Netherlands	13	6	7
Finland	5	5	-
Bulgaria	3	3	-
Hungary	10	2	8
Czech Republic	18	1	17
Austria	13	1	12
Greece	8	1	7
Denmark	4	1	3

State	Interventions	Objections	Publication
Sweden	4	1	3
Latvia	3	1	2
Cyprus	2	1	1
Croatia	1	1	-
Luxembourg	1	1	-
Malta	1	1	-
Germany	19	-	19
Italy	14	-	14
Poland	14	-	14
Romania	9	-	9
Portugal	8	-	8
Belgium	5	-	5
Ireland	4	-	4
Estonia	3	-	3
Lithuania	-	-	-
Slovakia	-	-	-
Slovenia	-	-	-
TOTAL	188	49	139

Although this data relates to the initial 'warming up' phase of the reform's implementation, it nonetheless prompts a number of meaningful reflections that future research may further explore and validate. First, the widespread pre-reform concerns about the risk of an extensive use of the objection appears, for now, to be unfounded. The number of published submissions (139) significantly outweighs objections (49). Most Member States prioritise openness or, at very least, avoid blanket opposition to disclosure, apart from a few 'permanent objectors' such as France, Finland, and Hungary. Notably, Italy and Austria – members of the club of the most active interveners and signatories of the harsh declaration referenced in this section – have generally refrained from raising objections, with only one exception for Austria, in cases involving sensitive legal questions or issues directly affecting their domestic legal orders. Moreover, Member States seem not to be concerned about partial publication. Except for *Neves 77 Solutions*,[117] where all three intervening Member States decided

[117] Case C-351/22 *Neves 77 Solutions*, EU:C:2024:723. The intervening States were the Netherlands, Romania, and Austria.

to object, the other preliminary ruling proceedings involving more than one Member State feature publications of written submissions alongside objections.

Overall, it can be argued that the widespread and deep-rooted concerns about the fairness of proceedings and equality of arms reiterated by the Court and by various commentators have been effectively overcome by practice in a relatively short period.

That said, the practical implementation of the reform could also evolve towards compromise solutions, particularly in scenarios that current data trends are not yet able to capture or predict. While Article 96 of the Rules of Procedure adopts an 'all or nothing' approach to publication, the Court's Explanatory memorandum to the amendments of the Rules of Procedure clarifies that it 'will not publish the observations of an interested person if that person has expressed a wish to that effect, whatever the underlying reasons for it, such as, for example, the desire to await the outcome of the dispute in the main proceedings before the referring court or tribunal, or the outcome in parallel proceedings in another case pending before the Court'.[118] In other words, in the absence of clear normative indications on this point, the Court seems ready to accommodate delayed publication if the interested person concerned requests it to do so. For example, an interested party may wish to delay until parallel national proceedings or related cases before the CJEU are resolved. Though not ideal, this offers a middle ground and may reduce blanket objections.

Another challenge lies in the linguistic regime. Under Article 38 of the Rules of Procedure, the language of the case – typically the language of the referring court – governs written and oral pleadings. It follows that the parties' written submissions are generally drafted in the language of the case. French – the Court's working language – and the party or interested person's language are relevant alternatives. In this context, Article 40 of the Rules of Procedure provides that the 'publications of the Court' must be available in all official EU languages. However, written submissions are not 'publications of the Court', thus falling outside the scope of this obligation. In addition, the Statute and Rules of Procedure do not require translation of written submissions. It follows that publication in the language of the case alone would technically satisfy the new disclosure obligation.

However, such an approach would likely undermine the spirit of the reform. Two arguments support a more inclusive linguistic approach. First, in practice, EU institutions and bodies translate their submissions into French, for the needs of the judges deciding the case, and sometimes also into the languages of the States intervening in a case. The revised text of Article 57(2) of the Court's Rules of Procedure codifies this practice and requires institutions to produce translations of any procedural document into the other official languages.[119] It follows that the cost and administrative

[118] Court of Justice, Draft amendments to the Rules of Procedure – Explanatory Statement (n 104) 17.

[119] Although the wording of this provision seemingly requires translation to all other EU official languages, it is reasonable to interpret it so as to delimit its scope to the sole official languages that are relevant to a given case.

burden of multilingual publication may be manageable, at least for institutional submissions. Second, as per the parties' and interested persons' observations, the absence of an explicit translation requirement does not equate to a prohibition. The Court could voluntarily extend its current approach regarding the publication of preliminary references, wherein the official version in the language of the case is often published online alongside unofficial translations in multiple EU languages. The first semester of the reform's implementation indicates that the Court has sought to balance potential linguistic barriers while also avoiding excessive operational burdens and resource-consuming practices. As a rule, statements of case and written observations – including those of EU institutions – are made available in French and the language of the case. In addition to these versions, the pleadings submitted by intervening States are available in their official language.

7. Concluding remarks

The recent reform of the Statute of the CJEU marks a significant shift in the Court's approach to transparency and access to court documents. By moving from a reactive model grounded on passive transparency – where third-party access to written pleadings was granted only upon request in very limited situations – to a system of active transparency as a way of proactive publication, the reform represents a significant departure from longstanding practices both within the EU and in other regional and international courts. Notably, it diverges from the more restrictive approach of the ECtHR – where individual requests to access documents have to be filed and assessed on a case-by-cases basis – and from the legal traditions of many EU Member States, particularly within the western central bloc, where judicial documents have historically remained confidential and locked away from the general public. This development, therefore, positions the CJEU as a frontrunner in embracing openness as an integral component of judicial accountability and legitimacy.

This shift aligns with broader international standards promoting transparency, including those set out by the Council of Europe, the United Nations and the Open Government Partnership, which emphasise that access to judicial information is fundamental to safeguarding the rule of law and enhancing public trust in the judiciary.

However, while the reform constitutes a step forward in meeting these standards, concerns persist regarding the potential for procedural objections to publication provided for in Article 23 of the Statute to function as a *de facto* veto power. In particular, Member States and other institutional actors – who may have a vested interest in maintaining confidentiality – are provided leeway for invoking the objection clause. If objections become a routine procedural strategy rather than an exception based on genuine concerns about harm to protected interests, the new transparency framework risks being undermined, effectively preserving the *status quo* under a different legal guise.

Crucially, the analysis of the first semester of the reform's implementation gives rise to cautious optimism. The Commission has demonstrated commitment to prioritising the disclosure of its written pleadings, with only one isolated exception. Member states are generally less inclined to accept publication as the default option. However, in most cases, they did not invoke the objection clause. This emerging trend is particularly significant, given that it has taken shape within a few months of the reform's entry into force, following decades of entrenched institutional and academic positions that framed near-absolute confidentiality as necessary to preserve the serenity of proceedings and the equality of arms.

If the CJEU's confidentiality walls have weakened considerably in just a few months, it is reasonable to anticipate a potential spillover effect on similarly confidentiality-oriented domestic legal systems over the longer term.

Looking ahead, the success of the reform will depend on its implementation and the extent to which its underlying rationale – enhancing transparency and openness in the EU judicial system – is upheld in practice in the longer term. It is, therefore, imperative that the evolution of the reform is closely monitored, both by legal scholars and by institutional actors committed to judicial transparency. The role of academia, civil society organisations, journalists and oversight bodies such as the EU Ombudsman, will be critical in assessing the extent to which the reform delivers on its promise of greater openness.

The European Parliament, in particular, which played a crucial role in advocating for increased transparency, could provide a key institutional check by conducting an independent evaluation of the reform's implementation. Such an assessment would not only help determine whether the reform is achieving its intended objectives but could also serve as a basis for further practical or legislative refinements if necessary.

Ultimately, the reform represents an important milestone in advancing openness within the EU judicial system, but its long-term success will depend on the vigilance of institutional actors, legal practitioners, and civil society in ensuring that transparency is not just formally recognised but meaningfully upheld. Moving forward, sustained engagement with the principles of open justice will be essential to reinforcing the legitimacy of the Court and fostering a judicial culture that embraces, rather than resists, transparency as a fundamental pillar of the rule of law in the European Union.

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Perspectives on the Reformed EU Judicial Architecture
***edited by* Lorenzo Grossio *and* Davor Petrić**

A View from the General Court. The Reform for the Transfer of Competence for Preliminary Rulings to the General Court: Issues Concerning Its Implementation

Ornella Porchia[*]

ABSTRACT: This paper offers an insider's preliminary assessment on the first implementation of the reform on transfer of preliminary ruling jurisdiction to the General Court. First of all, the paper reminds the rationale behind the reform and explains the latter's development, legal basis and context. Thereafter, the paper follows the course of the procedure from its inception, underlining the criteria according to which a case is attributed to the Court or to the General Court and offering an insight into the '*guichet unique*' mechanism and its inner workings. Furthermore, the paper casts light on the guarantees that the reform sets in place, such as the introduction of a permanent role for the Advocate General and of *specialised* chambers. Subsequently, attention is brought to the corrective mechanisms aimed at guaranteeing the division of competences between the Court and the General Court, discussing the *ex ante* control of the Court's Registry and possible referrals to the Court of Justice. With regard to the safeguarding of the uniform interpretation of EU Law, the contribution then offers a critical appraisal of the re-examination procedure thereto predisposed. Moving onto the other innovations of the recent reform, the paper briefly presents other measures to enhance transparency, such as the publication of written observations and live broadcasting of certain proceedings. Finally, the paper presents some first conclusions on the future impact of the transfer of competences and the reform in general.

KEYWORDS: EU judicial system – General Court – transfer of jurisdiction – preliminary rulings – procedural measures – implementation.

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1. Introduction

Regulation 2024/2019 of 11 April 2024[1] amending Protocol No 3 on the Statute of the Court of Justice of the European Union, which entered into force on 1 September 2024, introduced an important reform signaling a 'fundamental step in the evolution of the EU judicial system'.[2] More specifically, this piece of legislation provides for certain changes to the distribution of jurisdiction to give preliminary rulings under Article 267 TFEU. This recent reform confers on the General Court jurisdiction to give preliminary rulings in 'certain specific areas' expressly identified by the Regulation.

In this regard, it is important to remember that the Nice Treaty had already provided for the possibility of an involvement of the General Court in preliminary ruling procedures. The provision, which is enshrined now into Article 256(3) TFEU, allows for this possibility in relation to 'specific areas laid down by the Statute'. An intervention by the legislator was therefore necessary in order to identify these areas.

Only in 2022, the Court of Justice referred a proposal in this sense to the Union's legislator. There are some reasons that could explain why it happened at this time. Indeed, it was only at that moment that the reform of the General Court introduced by Regulation 2015/2422,[3] which doubled the number of judges per Member State, was fully implemented. It therefore resulted in an improvement in the efficiency of the jurisdiction and its capacity to deal with an increasing workload. Furthermore, a strong common will to reduce the workload of the Court made it imperative to introduce the reform under analysis.[4] The lightening of this workload as a result of the reform would indeed enable the Court to continue fulfilling its mission of safeguarding and strengthening the unity and consistency of EU law, while guaranteeing the highest quality of its decisions. This is particularly important in our time, when the Court is constantly called upon to address questions arising in areas that, firstly, have not yet been extensively shaped by case-law and, secondly, comprise significant challenges for our society, such as threats to the international order and rule of law.[5]

[1] Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, recital (2).

[2] E Coulon, 'Summer 2024 reforms: A radical Overhaul of the Statute of the Court of Justice of the EU and the Rules of Procedure of the Court of Justice and the General Court' (2024) 4 *Concurrences* 258.

[3] Regulation 2024/2019 (n 1) recital (5).

[4] As for now, the average length of time of dealing with preliminary rulings was about 17 months, and showed an upward trend. It has been estimated that the reform will reduce the workload of the Court of Justice of about 13–14 per cent, thus reducing the time of treatment of the cases as well. See in this regard: PJ Wattel, 'The Transfer of Preliminary Ruling Jurisdiction to the General Court of the EU', in G Kofler, M Lang, P Pistone, A Rust, J Schuch, K Spies, C Staringer, R Szudoczky and I Kuniga (eds), *CJEU – Recent Developments in Value Added Tax 2023* (Linde Verlag 2024) 1.

[5] M Condinanzi and C Amalfitano, 'Il Tribunale oltre il pregiudizio: le pregiudiziali al Tribunale' (2024) *Rivista del contenzioso europeo* 1. See also T Tridimas, 'Breaking with Tradition: Preliminary Reference Reform and the New Judicial Architecture' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024), at eulawlive.com 5.

Consequently, the reform aims to allow the Court to treat the most complex and sensitive cases of a constitutional nature and thus includes the General Court in the dialogue with national courts without changing its role as the first judge of legality.[6]

For a better understanding of the context, it is important to underline that the Regulation provides for other changes, mainly related to the need to strengthen the transparency and openness of the judicial process.

Notwithstanding doubts expressed at the time of the proposal about the acceptance of such a reform by the Member States, especially by some supreme courts, the reform was adopted in a relatively short period of time. It could be said that its adoption expresses an example of good cooperation inside the institution, between the two jurisdictions (Court and General court) in the preparation of the proposal and among the EU institutions (Council, European Parliament, Commission and Court of Justice) throughout the legislative procedure.

The conferral of preliminary competence to the General Court is accompanied by some substantive and procedural guarantees.[7] Indeed, other than identifying the specific areas in which the General Court shall have jurisdiction to hear and determine preliminary questions, the reform sets in place important guarantees such as the introduction of specialised chambers, a permanent role for the Advocate General, and the adoption of procedural rules identical to those in force in the Court. Moreover, the reform defines a number of mechanisms, such as the possibility to refer the question back to the Court and the possibility of reviewing preliminary rulings issues by the General Court, according to Article 256(3) TFEU.

This paper aims to give a preliminary assessment of the implementation of the reform from an insider's perspective. By exploring the structural changes that occurred within the General Court, it highlights the rapid response that the institution needed in order to adapt to the upcoming workload. More specifically, the paper refers to the first cases lodged under this reform and to the early steps taken by the General Court for their handling.

2. The partial transfer of jurisdiction in 'certain specific areas'

As already outlined in other articles in this Special Section, the choice on the basis of the reform launched by the Court and accepted by the EU legislator consists of introducing a partial transfer of jurisdiction on preliminary references, on a limited number of areas.[8] In this regard, the recitals of Regulation 2024/2019 lay out a series of criteria. First, such areas shall be 'clearly defined' upon reading the preliminary

[6] Regulation 2024/2019 (n 1) recitals (2) and (3).

[7] Condinanzi and Amalfitano (n 5).

[8] Wattel (n 4). The author refers to this as a *dormant* competence, because it only exists in certain areas that have to be identified by the legislator.

ruling request and 'sufficiently separable from other areas', in order to avoid uncertainties as to the precise scope of the questions referred.[9] Secondly, there shall be a substantial body of case-law capable of guiding the General Court in the exercise of its power to hear and determine preliminary questions, to prevent the potential risk of inconsistencies or divergences in the case-law. However, the presence of this body of case-law is not sufficient to exclude systematically the obligation for a court of last instance to ask for a preliminary ruling pursuant to Article 267(3) TFEU.[10] Indeed, the presence of consistent case-law does not mean that all provisions, falling under the scope of the areas transferred to the General court are 'clear' in light of the *CILFIT* doctrine.[11] National judges, in particular of last instance, remain under the obligation to verify on a case-by-case approach whether or not they have to make a preliminary reference. Thirdly, these areas shall be related to a certain number of cases in order to make a significant difference in the reduction of the workload of the Court; and, lastly, they shall rarely give rise to issues of principles.[12]

The choice of these areas, accepted and shared by judges of the Court at the time of the proposal, could be intended as a first step towards a future larger reform.

According to these criteria, the reform has identified 'six specific areas' in which the General Court shall enjoy jurisdiction on preliminary rulings. This is the case when the question referred comes exclusively within one or several of the following specific areas:[13]

a) the common system of value added tax;
b) excise duties;
c) the Customs Code;
d) the tariff classification of goods under the Combined Nomenclature;
e) compensation and assistance to passengers in the event of denied boarding or of delay or cancellation of transport services;
f) the system for greenhouse gas emission allowance trading.

[9] Ibid. For a critical discussion on this point, see L Grossio and D Petrić, 'EU Procedural Law Revisited: The Reformed EU Judicial Architecture between the Statute of the Court of Justice and the Rules of Procedure (2025) 10 *European Papers* 293.

[10] For a different reading of these parameters, see M Bobek, 'Preliminary Rulings Before the General Court: What Judicial Architecture for the European Union?' (2023) 60 *Common Market Law Review* 1515. The Author emphasises the ambiguity of the message sent to national courts of last instance about their obligations to make a reference, under the third subparagraph 267 TFEU, when dealing with a case in this area, 'if the Court itself is stating there is nothing unclear or new to be discovered with that area of law and no potential threat to the unity of the EU law…?'.

[11] Case 282/81 *CILFIT and Others*, EU:C:1982:335; Case C-561/19 *Consorzio Italian Management and Catania Multiservizi (CILFIT II)*, EU:C:2021:799. See M Broberg and N Fenger, *Preliminary References to the European Court of Justice* (3rd edn, OUP 2021) 210–211. The Authors underline that, for the *acte éclairé* exception to apply, the question answered in a prior preliminary ruling must be materially identical in light of the circumstances of the case, in such a way as not to potentially prejudice the uniform application of EU law.

[12] Regulation 2024/2019 (n 1) recitals (5) to (7).

[13] Ibid. Art 1.

Whenever the question referred exclusively comes within one or more of these areas, the General Court enjoys jurisdiction to hear and determine it, notwithstanding the national court from which the question arose, even if the latter is a supreme court.

However, the Court of Justice retains jurisdiction when the request for a preliminary ruling raises independent questions of interpretation of primary law, public international law, and general principles of Union law or of the Charter, due to the horizontal nature of these questions. This derogation also applies when the legal framework of the case in the main proceedings comes within one or more of the six specific areas.[14]

Lastly, the Court continues to adjudicate any preliminary references that, even if connected to one of the specific areas referred to in Article 50b of the Statute, also concern other subject matters.[15]

In this regard, the first cases transferred to the General Court do not confirm the concerns expressed by some scholars[16] that national courts may try to include broader horizontal issues in their references only with a view to having their case moved to the Court.[17] Indeed, upon examining current practice, national judges do not tend to include references to provisions that are not relevant in the cases.[18]

3. Procedures to determine which judicial body has jurisdiction

Every request made under Article 267 TFEU shall be submitted to the Court of Justice, as, for reasons of legal certainty and expedition, national courts cannot arbitrarily decide who has jurisdiction to hear the case. The Court has to verify as quickly as possible[19] whether the request exclusively comes within one or more of the specific areas laid down in Article 50b of the Statute. If it is clear that the question does not relate to any of the six specific areas, the case is immediately registered as 'C', as the Court enjoys full jurisdiction. On the contrary, when doubts arise whether the General Court has jurisdiction, the case has to be registered in the so-called '*guichet unique*' system, expressly created for this kind of preliminary request.[20]

In particular, under Article 93a of the Rules of Procedure of the Court of Justice, when the Court receives a request for a preliminary ruling, which raises doubts as to

[14] Ibid. recital (13) and Art 50b(2).

[15] Ibid. recitals (12) and (13).

[16] Bobek (n 10). *Inter alia*, Case T-534/24 *Gotek* EU:T:2025:682 (the very first case transferred to the General Court).

[17] *Inter alia*, A Police, 'La (giurisdizione della) Corte è mobile, qual piuma al vento' (2024) 4 *Eurojus* 11. According to this Author, such a practice would allow national judges to 'pick' their judge, thus breaching the principle of the rule of law and the right to a fair trial, closely connected to the principle of the 'natural judge pre-established by law'.

[18] On 14 March 2025, the Court retained only four cases, one because it refers to one of these other provisions, and the other three because they refer to fields other than those included in specific areas transferred.

[19] One month is the delay internally fixed and generally respected by the Court as of today.

[20] It shall however be observed that at this stage the case does not yet have a specific number.

the possible jurisdiction of the General Court, the Registry shall transmit it to the President, the Vice President and the First Advocate General.

Meanwhile, the question is subject to a preliminary analysis carried out by the Registry of the Court on the one hand, and by the Research and Documentation Directorate, in cooperation with the Directorate-General for Multilingualism, on the other. These assessments aim to determine whether the request for a preliminary ruling received covers one or more of the specific areas identified by Article 50b of the Statute.

More specifically, the Registry of the Court collects all the information and documents relevant to the case and carries out a first assessment to determine, *prima facie*, whether the case raises procedural questions that may allow for a simplified treatment of the case.

The analysis carried out by the Directorates leads to the adoption of a 'pre-examination' sheet. In particular, the latter identifies the essential subject matter of the case and the relevant provisions of national, EU and international law, thus allowing the President or, as the case may be, the General Meeting (*Réunion Générale*) of the Court, to determine whether the question falls within one of the 'specific areas' subject to devolution. Furthermore, the sheet sets out possible doubts or procedural matters arising from the case, relating to the jurisdiction of the Court or of the General Court, to the admissibility of the request or to the possibility of treating the case through the urgent preliminary ruling procedure or the expedited procedure. Lastly, the sheet lays out the relevant case-law, as well as any identical, connected or related case.

Once the 'pre-examination' sheet is drafted, it is transmitted by the Directorate for Research and Documentation to the Registry of the Court, as well as to the cabinets of the President and the Vice President of the Court and to that of the First Advocate General.

Following this preliminary analysis, the President, after hearing the Vice President and the First Advocate General, informs the Registry as to whether the question comes exclusively within one or more of the 'specific areas', or whether it also concerns other matters or raises independent questions of primary law, public international law, general principles of Union law or the Charter. In the first case, the Registry shall transmit the question to the Registry of the General Court and the proceedings continue before this judicial body. As for the second scenario, the question is referred to the General Meeting of the Court (*Réunion Générale*) for further analysis. This composition, consisting of all Judges and Advocates General of the Court, is convened to assess the question within a timeframe that shall not exceed what is strictly necessary, taking into account the nature, length, and complexity of the case.[21] If the General Meeting confirms the President's opinion, the request stays

[21] Regulation 2024/2019 (n 1) recital (14); Statute of the Court, Art 50b. In principle, it shall not take longer than one month.

within the Court of Justice; otherwise, it shall be transmitted to the General Court and the referring national court shall be informed.[22]

4. The Chamber designated to deal with the request for a preliminary ruling

According to the Rules of Procedure of the General Court, the latter had to designate one or more chambers responsible for dealing with requests for preliminary rulings.[23] In this regard, on 9 October 2024, the Plenary Assembly of the General Court adopted its decision on the composition of the chamber for preliminary rulings for a transition period until August 2025, the date of the three-year renewal of the General Court.[24] As from September 2025, two new chambers with five judges each will be set up.

Once the request for a preliminary ruling is transmitted to the General Court, it shall be forwarded to the Chamber expressly designated for the treatment of such questions. In this regard, as soon as possible after the document initiating the proceedings has been lodged, the President of the General Court shall assign a case to one of the Chambers, with five judges sitting. The President of the Chamber proposes the designation of a Judge Rapporteur, which the President of the General Court has to accept.

However, the five-judge chamber may decide to refer the case to a Chamber sitting with a different number of judges, whenever the legal difficulty, the importance of the case or any other specific circumstance justifies it. In particular, the General Court may sit in the intermediate chamber, consisting of nine judges, or as a Grand Chamber, with 15 judges.[25] As the latter is limited to very specific cases, the intermediate chamber is meant to become the common formation of the General Court to deal with preliminary questions [26]. Nonetheless, the five-judge chamber may also refer the question to a smaller panel of judges, composed of only three members, if it considers that the case does not raise specific complex questions.[27]

[22] Rules of Procedure of the Court of Justice, as amended by the Amendments to the Rules of Procedure of the Court of Justice (2024/L/2094), Art 93a.

[23] Ibid, Arts 25(1) and 26(1).

[24] The chamber sits, as a rule, in five judges, appointed in accordance with a rotation system among the 10 designated, under the leading of the Vice-president.

[25] Protocol No 3 on the Statute of the Court of Justice of the European Union, Art 50(2). See, Rules of Procedure of the General Court Art 28 (1). According to this article, the referral to the grand chamber and to the intermediate chamber is based on the same conditions (legal difficulty, importance the case or specific circumstances). As far as it concerns the intermediate chamber, Art 28 (8) states that the latter 'shall rule when a Member State or an institution, that is a party of the proceedings requests so'.

[26] See, MF Orzan, 'Un'ulteriore applicazione della 'legge di Hooke'? Riflessioni a margine dell'entrata in vigore della recente riforma dello Statuto della Corte di giustizia dell'Unione europea' (2024) *Rivista del contenzioso europeo* 30. No referral to the intermediate chamber has yet been proposed so far as regards preliminary rulings. Indeed, as of today, only direct actions have been referred to the intermediate chamber (see the pending joined cases T-435/23 and T-224/24; T-132 and 133/23; T-139 and 140/23, case T-138/23, joined cases T-262 and 265/24, case T-15/24).

[27] Rules of Procedure of the General Court, Art 28(6).

Notwithstanding the composition of the chamber, when dealing with preliminary references, the General Court's judges shall be assisted by an Advocate General.[28] In this regard, the judges shall elect from among themselves those who are to perform the duties of an Advocate General and the members who shall replace them if they are prevented from acting.[29] For each case, the Advocate General shall be selected from among the judges elected to perform that duty,[30] and shall belong to a different chamber than the one seized of that case.[31] The new Articles 31a and 31b of the Rules of Procedure of the General Court govern the procedure for appointing the Advocate General. The involvement in principle of the Advocate General aims to ensure an equivalent treatment as provided for by the Court. It does not mean a presumption *iuris et de iure* that preliminary questions always involve complex issues requiring the assistance of an Advocate General.[32] Indeed, the appointment of the Advocate General in all preliminary rulings does not imply that Opinions are delivered in all cases.

5. Corrective measures to the division of competences

As discussed before, the conferral of jurisdiction upon the General Court appears strictly linked to the Court's assessment of the 'exclusivity' of the questions referred and their connection with the 'specific areas' laid down in Article 50b of the Statute[33]. This approach, which is conditional in nature, does not exclude the risk of conferring upon the 'wrong' court the preliminary question. However, this risk is limited by the possibility given to the General Court to refer the case back to the Court of Justice.

First, under Article 207(1) of the Rules of Procedure of the General Court, when a request for a preliminary ruling is introduced directly to the General Court in breach of Article 50b of the Statute, the Registry of the General Court has to forward it immediately to the Registry of the Court.

Furthermore, according to Article 54(2) of the Statute, when the General Court finds that it has no jurisdiction to hear and determine the case, it has to refer the

[28] Statute of the Court of Justice, Art 49*a*.

[29] On 9 October 2024, the General Court elected two judges called upon to perform the duties of Advocate General for the purpose of dealing with requests for a preliminary ruling for the transition period, as well as one Judge called upon to replace those Advocates General in the event of their being prevented from acting.

[30] These judges are elected for a term of three years, and can be re-elected once. In this transitional phase, the judges, taking on the role of Advocate General, are elected only for one year (renewable for a further three years).

[31] Protocol No 3 on the Statute of the Court of Justice of the European Union, Art 49a. Rules of Procedure of the General Court, as amended by the Amendments to the Rules of Procedure of The General Court (2024/L/2095), Arts 31a and 31b.

[32] Condinanzi and Amalfitano (n 5).

[33] D Sarmiento, 'Gasps and "Know Unknowns" in the Transfer of Preliminary references to the General Court' (2024) 3 *Rivista del contenzioso europeo* 11.

proceedings back to the Court of Justice. In such circumstances, the General Court, acting on a proposal from the Judge Rapporteur and after hearing the Advocate General, issues a reasoned order of referral, which cannot be subject to any appeal.[34]

Finally, at any stage of the proceedings, the Chamber appointed for the case may, after hearing the Advocate General, propose to the *plenum* that the case be brought before the Court of Justice where there is 'a serious risk that the unity or consistency of Union law would be affected'. The procedure before the Court is regulated by Article 114b of the Rules of Procedure of the Court.

6. The review procedure

Subject to some adjustments related to its specificity, the General Court will deal with requests for a preliminary ruling in the same way as the Court of Justice and will apply equivalent rules of procedure.[35]

The preliminary rulings of the General Court will also have the same effects as those of the Court of Justice. However, the judgements of the General Court will not take effect until the two-month period for the Court to make a decision on the review expires, as will be explained below.

According to Article 62 of the Statute, when there is a serious risk that the unity or consistency of EU law be affected, the judgments of the General Court may be exceptionally subject to a review.[36] This mechanism, available to the Court of Justice, is provided for by Article 256(3) TFEU. On a different note, a review mechanism had already been envisaged and put into force for the Civil Service Tribunal's judgements, despite a very limited practice.[37] As for preliminary rulings, the mechanism operates upon proposal of the First Advocate General. If the Court, in the two-month period after the judgement, decides to open the review procedure, this judgement will only take effect when such a procedure has been finalised. Some scholars have expressed their concerns about the effects that such a delay would entail on the

[34] Rules of Procedure of the General Court (n 31) Art 207(2). Rules of Procedure of the Court of Justice (n 22), Art 114a.

[35] Through the reform, 'Title VI – References for a preliminary ruling' was added to the Rules of Procedure of the General Court. This Title reproduces for the most part the respective provisions of the Rules of Procedure of the Court of Justice, with only certain amendments required by the structure of the General Court.

[36] Rules of Procedure of the Court of Justice (n 22) Arts 193a and 194.

[37] Throughout the period of activities of the Civil Service Tribunal, out of more than 400 judgments issued by the General Court as the appeal judge, only six cases were reviewed by the Court, essentially when horizontal issues were in question. See Case C-197/09 RX-II *M v EMEA*, EU:C:2009:804; Case C-334/12 RX-II *Arango Jaramillo v BEI*, EU:C:2012:468; Case C-579/12 RX-II *Commission v Strack*, EU:C:2013:570; Case C-417/14 RX-II *Misir Mamachi di Lusignano v Commission*, EU:C:2015:588; Joined Cases C-542/18 and C-543/18 RX-II *Simpson v Council*, EU:C:2020:232. On the limits of review power exercised by the Court, see C-17/11 RX *Commission v Petrilli*, EU:C:2011:55. On this aspect, in literature, see S Iglesias, 'Return of the Réexamen' in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024) 35.

national procedure and, consequently, on the position of the parties. Indeed, throughout this time, while they do not enjoy any remedy, they should have no say on the matter and just await the final decision.[38] As a possible answer, it has been supposed that the parties, not satisfied with the ruling of the General Court, could try to convince a national court to introduce a new preliminary question with the aim to reach the Court before it has had the opportunity to review the judgement of the General Court itself.[39] Against this background, it is not clear how a further preliminary ruling, assuming it is admissible, could help to speed up the procedure as to put the national judge in a position to close rapidly the pending case. On the contrary, such a practice seems to add a layer of complexity to the overall procedure.

7. Other changes introduced by the reform

The reform introduces a series of other changes which do not all relate to the transfer of jurisdiction in the preliminary ruling procedure.

More specifically, Article 23(4) of the Statute now requires the publication of the written observations submitted by interested parties (ie, parties in national proceedings, Member States and the institutions listed in the second subparagraph of that provision) 'within a reasonable period' after the case has been closed. Exceptionally, when the parties object to the publication of their observations, the latter remain confidential. The initial request advanced by the Parliament in the context of the legislative procedure provided for open access to written observations, even in the course of judicial proceedings. This prerogative has been limited, shifting from an *erga omnes* right to access to an obligation of disclosure addressed to the Court, exclusively in closed cases of preliminary rulings, and only on the condition that the author of the act agrees to disclose it.[40]

The reform also amended Article 23 of the Statute by broadening the list of subjects entitled to receive from the Registry of the Court the notification of the national decision to stay proceedings and refer the case under Article 267 TFEU. This notification enables addresses to submit memoranda and observations. Accordingly, this right is now recognised to the European Parliament, the Council and the European Central Bank.[41] These three new subjects may submit memoranda and observations

[38] In case of preliminary ruling review, the Court does not refer the case to the General Court but it has to adopt a new judgement replacing the reviewed decision.

[39] Sarmiento (n 33).

[40] See in this respect, R Mastroianni, 'Il trasferimento delle questioni pregiudiziali al Tribunale: una riforma epocale o un salto nel buio?' (2024) 3 *Rivista Quaderni AISDUE* 41. For further analysis on this topic, see I Fevola and S Montaldo, 'Access to Written Submissions in Preliminary Reference Proceedings: An Evaluation of the CJEU Statute Reform and its Contribution to Open Justice' (2025) 10 *European Papers* 327.

[41] The European Parliament has already enjoyed this prerogative even if not expressly provided by the rules of procedure (eg Case C-62/14 *Gauweiler v Deutscher Bundestag*, EU:C:2015:400).

within two months from the notification, if they 'consider that they have a particular interest in the questions raised by the request for a preliminary ruling'.

Finally, other changes were introduced to strengthen respect for the principle of transparency and good administration. Since 2022, the Court had already declared that the delivery of its judgements and the reading of the opinions of Advocates General would be broadcast live on its website and that hearings assigned to the Grand Chamber would, in principle, be subject to a later broadcast. After the reform, a live broadcast may take place when it relates to the delivery of judgements or opinions. However, when it relates to oral pleadings, the broadcast is transmitted later. Parties still enjoy the right to submit a request for the hearing not to be broadcast.

8. Further Reflections

The mechanism, which was only recently set up, is still in a running-in phase. Therefore, it is still too early to assess its overall performance and impact.

The reform appears to have struck a balance between the competing interests at stake: on the one hand, the need to reduce the Court's workload in order to ensure more timely and efficient judgments; on the other hand, the necessity of continuing to safeguard the unity and consistency of Union law. Indeed, the reform provides for three control mechanisms, namely an *ex-ante* control with the '*guichet unique*' system, an *in itinere* control, consisting of the possibility to refer the case back to the Court and, lastly, an *ex-post* control, namely the review procedure.

In this scenario, the concern raised by some scholars that national courts may become reluctant to refer preliminary questions does not seem to be justified.[42] Indeed, the carefully calibrated balance provided by the reform should offer reassurance to those sharing this apprehension, as the first cases demonstrate. In the view of the national judges, nothing has changed in the way they raise the questions before the Court. As long as the General Court ensures equivalent procedural rules to the ones applied by the Court of Justice, national judges seem to be reassured about the effective assessment of their preliminary questions. From a different and complementary perspective, they might also desire a different judicial body to adopt a different approach from the Court of Justice's case-law, maybe by revisiting orientations which are not always well accepted.

[42] For the concerns as to the possibility of national courts reducing the number of preliminary questions referred to the EU jurisdictions see: Condinanzi and Amalfitano (n 5); R Conti, 'C'era una volta il rinvio pregiudiziale. Alla ricerca della fiducia – un po' perduta – fra giudici nazionali ed europei' in B Nascimbene and G Greco (eds), *La riforma dello Statuto della Corte di giustizia* (2024) *Eurojus* 118.

It appears clear that much of the success of the reform that has just entered into force will also depend on how the Court of Justice interprets[43] the notions of 'exclusivity' of specific matters[44] and of the 'independent question'[45] for the purposes of assigning cases to the General Court. For a better understanding of these questions, according to Article 3(1) of Regulation 2024/2019, the Court is invited to publish by September 2025 a list of examples where these categories were applied. This arrangement aims to clarify the mechanism under analysis, as it is quite sophisticated and it is difficult to predict all possible outcomes.

For the sake of illustration, some complexities could be foreseen in the field of VAT proceedings, which may give rise to questions of horizontal nature or other independent questions[46]. In this regard, European judges could find themselves in the position to determine whether the preliminary question involves questions regarding general principles (such as proportionality principle) and other treaty provisions immediately linked to this subject matter. This situation may somehow put into question the independent nature of the issue in light of Article 50b.[47] If this element

[43] On the possible interpretations of these criteria D Petrić, 'The Preliminary Ruling Procedure 2.0' (2023) 8 *European Papers* 25, 33.

[44] Looking at the first applications of the reform, one case of no 'exclusivity' of a question on customs has emerged, as the questions referred also involved other provisions such as rules of dumping (Case C-827/24 *Direct Line Inox Impex*).

[45] Among those pending cases which entail the interpretation of general principles – such as equal treatment – and of provisions of the Charter for fundamental rights, see Case C-119/25 *Marabu Airlines*, Case C-910/24 *Calmit Hungária Mészművek*, and Case C-844/24 *Labroix*. In particular, the latter case features an interesting situation in the field of custom duties, concerning the possibility to employ a statistic database to determine the custom value. In this framework, the referring judge asks whether the use of a European statistical database, which gathers data collected within the European Union, to assess the customs value of goods in accordance with the method of 'last resort' or 'reasonable means' provided for in Art 74(3) of the Union Customs Code complies with the guarantees afforded to individuals under Art 53 of the Charter of Fundamental Rights of the European Union. In this respect, the national judge mentions the situation where, on the one hand, in criminal proceedings, those individuals are obliged to defend themselves in the light of statistical data and, on the other hand, the applicable national criminal law provides for a penalty consisting of a fine of between five and ten times the duties evaded, which are themselves determined on the basis of statistical data.

[46] For instance, in the field of the taxation of sharing economy platforms the previous determination of some horizontal elements could be necessary with a view to identify the tax status of the entities concerned. Inter alia, see, Cases C-434/15, *Taxi v Uber*, EU:C:2017:981; C-390/18 *Airbnb Ireland*, EU:C:2019:1112, related to the question whether a digital platform shall be regarded as a service provider. This issue could affect other questions such as those related to the rules on imposition of a VAT obligation on the platform. Other issues, concerning the rules on the sharing platform economy, could be foreseen in relation to the 'VAT in the Digital Age' package, which was recently adopted.

[47] For example, in the field of VAT carousels, the extent of the right to deduct, according to Art 168 of the VAT Directive, implies the previous definition of the extent of the assessment required for the trader. In other words, the interpretation appears strongly intertwined with the notion of participation in a fraud. These questions have to involve the good comprehension of principles such as effectiveness and proportionality (see the Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen*, EU:C:2006:16).

arises during the procedure before the General Court, it is up to the latter to refer the case back to the Court as soon as possible.

The success of this reform relies not only on the ability of the Court to apply the '*guichet unique*' system and the review procedure, but also on the General Court's ability to exercise this new prerogative.[48]

In sum, the results of the first implementation, the strong engagement from the General Court, and the first reactions from national judges allow us to predict positive results. If this is the case, and the 'mechanism' works properly, we can expect a further development of the system towards a devolution of other subject matters to the General Court in line with Article 3(2) of the Regulation.

Finally, from the perspective of the EU judicial architecture, from one side, the reform could have the (unexpected) result of creating two "courts" within the General Court, one dealing with the preliminary rulings and the other with direct actions as first judge of legality. If that were the case, such a scenario would give rise to unforeseen hurdles. On the other side, the reinforcement of the role of the Court of Justice's role in matters of a constitutional nature in preliminary rulings procedures has been perfectly combined with its role as the judge of last resort for direct actions.[49]

[48] MF Orzan, 'Le conseguenze per le giurisdizioni nazionali della recente riforma dello Statuto della Corte di giustizia dell'Unione europea' (Giustizia Insieme, 21 November 2024), at giustiziainsieme.it.

[49] Notwithstanding some changes in favour of an appeal filter mechanism. See Regulation 2024/2019 (n 1) recitals (23) and (24); Protocol No 3 on the Statute of the Court of Justice, Art 58a.

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Inconsistent and Imprecise Explanations: *NYT v Commission*, Transparency, and the Search for Lost Documents

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ABSTRACT: On May 14, 2025 the Grand Chamber of the General Court handed down its judgment in T-36/23 *Stevi and the New York Times Company (NYT)* v *European Commission*. The eagerly-awaited judgment is an unequivocal win for proponents of EU institutional transparency. The Court made short shrift of the Commission's evasive justifications for refusing access to the requested documents and clarified the core concepts that define the scope of the access to documents regime of Regulation 1049/2001. The judgment clarifies the concept of possession, so as to discourage tactical deletion of documents by institutions, and elaborates on their obligation to provide an explanation for why the requested documents could not be found. Both are linked to the duty of the institutions to proactively promote transparency via document retention practices.

KEYWORDS: *NYT v Commission* – Pfizergate – access to documents – Regulation 1049/2001 – EU transparency – possession of documents.

1. Introduction

Transparency is a normative choice made in the Treaties and is closely linked to the democratic values that underpin the EU constitutional system. Its purpose is to *inter alia* foster citizen participation in decision-making, ensure greater legitimacy of those processes, and enable holding the administration to account.[1] In practice, CJEU case law on transparency centres on institutions' refusals to grant access to documents in their possession. The Courts appear at times highly sympathetic to institutional claims

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[1] Regulation (EC) 1049/2001 of the European parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, recital 2.

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to secrecy and at times as stalwart guardians of wider access.[2] In *NYT* v *Commission*,[3] the Grand Chamber of the General Court assumed the latter role.

The case is interesting from a transparency perspective, because refusal was grounded on non-possession of the requested documents. Most cases dealing with the institutions' refusal to disclose documents rather contest their reliance on mandatory and optional grounds for refusal listed in Article 4 of Regulation 1049/2001.[4] As such, the case offered the General Court an opportunity to elaborate on the precepts underlying the Union's access to documents regime, and to counteract the Commission's strategies for evasion at the earliest instance they may arise. This case analysis will focus in particular on the relevance of the judgment for the Commission's document retention practices, including the meaning of 'possession', as well as its duty to provide reasons to an applicant for why the requested document could not be found or is not in its possession. In this sense, the most notable feature of the judgment is the Commission's imprecise and inconsistent explanations as to the existence and location of the documents. It will first however briefly outline the access to documents regime and the background to the case to provide context.

2. Background

The background to the case begins with the NYT's reporting of the EU's bid to acquire enough Covid-19 vaccines for the EU population. The Commission was striving to make up for vaccine doses its supplier AstraZeneca was unable to provide.[5] The shortage was remedied by procuring the missing doses and more from Pfizer.[6] Key to this effort were phone calls and text messages exchanged between Commission President Ursula von der Leyen and Albert Bourla, CEO of Pfizer.[7] The content of the messages garnered wide interest – particularly as the deal was for 1.8 billion

[2] See e.g. M Costa and S Peers, 'Beware of Courts Bearing Gifts: Transparency and the Court of Justice of the European Union' (2019) 25(3) *European Public Law* 403; P Leino, 'Just a Little Sunshine in the Rain: The 2010 Case Law of the European Court of Justice on Access to Documents' (2011) 48 *Common Market Law Review* 1215.

[3] Case T-36/23 *Matina Stevi and the New York Times Company v European Commission*, ECLI:EU:T:2025:483.

[4] Art 4(1) lists the situations where the institution must refuse disclosure, whereas Arts 4(2) and (3) allow it to assess whether to disclose. The decision is a balancing act between interests served by disclosure versus secrecy. See e.g. J Mendes, 'The Principle of Transparency and Access to Documents in the EU: For What, for Whom and of What?' (University of Luxembourg Law Working Paper 004-2020), at dx.doi.org (accessed 24 May 2025); D Wyatt, 'The Anaemic Existence of the Overriding Public Interest in Disclosure in the EU's Access to Documents Regime' (2020) 21(4) *German Law Journal* 686.

[5] M Stevis-Gridneff, 'How Europe Sealed a Pfizer Vaccine Deal With Texts and Calls' (New York Times, 28 April 2021), at www.nytimes.com (accessed 23 May 2025).

[6] European Court of Auditors Special Report 19, *EU COVID-19 vaccine procurement: Sufficient doses secured after initial challenges, but performance of the process not sufficiently assessed* (2022) paras 57-59.

[7] M Stevis-Gridneff (n 5).

vaccine doses, estimated at around 15.5 euros per shot.[8] It is these text messages that Ms. Stevi requested access to, and was subsequently denied by the Commission on the grounds that it was not in possession of the documents.

Quickly dubbed *Pfizergate*, the Commission's handling of the vaccine deal became mired in controversy. It refused to even acknowledge the existence of the reported-on text messages. The matter was first considered by the European Ombudsman following a complaint by another journalist whose access request had been refused. The Ombudsman found the Commission's conduct to constitute maladministration on two occasions.[9] The European Court of Auditors likewise noted the absence of any explanation as to how the early stages of the vaccine procurement negotiations were carried out.[10] The European Public Prosecutor's Office (EPPO) opened an (on-going) investigation into the deal in 2022 after receiving an exceptionally high number of reports.[11]

Pfizergate is a bold example of the Commission's attitude toward its transparency obligations, and indeed, the principle of transparency itself. While the Treaty on the Functioning of the EU (TFEU) (Article 15(3)) and the Charter of Fundamental Rights (Article 42) impress its prime importance for democracy and legitimacy of EU action, its operationalization has long been challenging.[12] Transparency is first and foremost facilitated through access to documents held by the Commission, Council and European Parliament (Regulation 1049/2001). Particularly the Commission and Council tend to interpret grounds for refusing access maximally.[13] Proactive disclosure is likewise lackluster. Attempts to amend the Regulation have long stalled, with the result that the current framework is over 20 years old. In practice this means

[8] *Ibid*.

[9] European Ombudsman, 'Recommendation on the European Commission's refusal of public access to text messages exchanged between the Commission President and the CEO of a pharmaceutical company on the purchase of a COVID 19 vaccine (case 1316/2021/MIG)', at www.ombudsman.europa.eu (accessed 23 May 2025); European Ombudsman, 'Decision on the European Commission's refusal of public access to text messages exchanged between the Commission President and the CEO of a pharmaceutical company on the purchase of a COVID 19 vaccine (case 1316/2021/MIG)', at www.ombudsman.europa.eu (accessed 23 May 2025).

[10] European Court of Auditors Special Report 19 (n 6) para 49.

[11] European Public Prosecutor's Office, 'Investigation Into Acquisition of Covid-19 Vaccines: Clarifications' (17 May 2024), at www.eppo.europa.eu (accessed 23 May 2025).

[12] See e.g. M Hillebrandt, 'EU Transparency as "Documents": Still Fit for Purpose?' (2021) 9(1) *Politics and Governance* 292; J Peters and L Ankersmit, 'Public Access to Documents in EU External Relations' (2024) 31(1) *Maastricht Journal of European and Comparative Law* 53; M Spoerer and R More O'Ferrall, 'The European Ombudsman's Role in Access to Documents' (2022) 23 *ERA Forum* 253; D Curtin and P Leino, 'Openness, Transparency and the Right of Access to Documents in the EU: In-Depth Analysis' (Robert Schuman Centre for Advanced Studies Research paper No. RSCAS 63-2016), at dx.doi.org.

[13] European Ombudsman, 'Decision on how the European Parliament, the Council of the European Union and the European Commission handle requests for public access to legislative documents (OI/4/2023/MIK)', at www.ombudsman.europa.eu, Annex; P Leino-Sandberg, 'Who Can Guard the Guardian?' (European Law Blog, 6 February 2025), at doi.org (accessed 23 May 2025).

that developments in Court case law are not reflected in the text of the Regulation, nor are the more problematic aspects of institutional practice corrected by it.[14] In fact, any attempt to recast the Regulation is in danger of further circumscribing the remit of transparency in the Union, rather than guaranteeing wider access.[15]

The starting point is openness of administration: the presumption is that documents held by the institutions are public.[16] Notably, the Regulation only applies to documents held by the institutions, *not* information. Although documents are defined broadly under Article 3 as 'any content whatever its medium […] concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility',[17] this line of division nevertheless has legal consequence. The right of access pertains only to documents in possession of the institutions, who are not obliged to draw up new ones to communicate information to an applicant.[18]

An applicant who wishes to obtain a document held by an institution may consult its public register for documents or request access directly.[19] Every document held by the institutions may not be available through its registry, which are notoriously difficult to navigate for a non-expert.[20] The institution is to respond within 15 working days, which it may extend once.[21] In practice, the Commission takes much longer on average to respond,[22] as was the case for Ms. Stevi. Upon a total or partial refusal, an applicant is entitled to make a confirmatory application.[23] A (partial) refusal by

[14] A key division stemming from the Court's case law beginning with Turco is the division of documents into legislative and administrative categories. The former are subject to greater transparency requirements due to the strength of public interest in the EU legislative process. See Joined Cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v the Council*, ECLI:EU:C:2008:374, paras 45-46. Likewise the existence of so-called presumptions of non-disclosure are not reflected in the text itself, which arguably leads to the Regulation's near-amendment via practice. On these presumptions see M Costa and S Peers (n 2) 403.

[15] See e.g. European Commission, 'Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents', COM(2008)229 final .

[16] Regulation 1049/2001 (n 1) recital 11.

[17] See also Case T-188/12 *Breyer* v *Commission*, ECLI:EU:T:2015:124, para 42 where the General Court notes 'the only restriction on the content that falls within that definition is the condition that it must relate to the policies, activities or decisions of the institution in question'. Identity of the document's author is irrelevant for whether it is held by an institution, case C-213/15 P *Commission* v *Breyer*, ECLI:EU:C:2017:563, para 36.

[18] Case T-264/04 *WWF European Policy Programme* v *Council*, ECLI:EU:T:2007:114, paras 76 and 78.

[19] Regulation 1049/2001 (n 1) Arts 2(1) and 6(1).

[20] S Heikkonen, 'Transparency Materialised: How Registers Can Regulate Access to Documents?' (2024) 3(1) *European Law Open* 111; M Haller and D Rosani, 'EU Document Registers: Empirical Gaps Limiting the Right of Access to Documents in Europe' (2024) 61 *Common Market Law Review* 449.

[21] Regulation 1049/2001 (n 1), Art 7(3).

[22] European Ombudsman, 'Special Report of the European Ombudsman in her strategic inquiry concerning the time the European Commission takes to deal with requests for public access to documents, (OI/2/2022/OAM)', at www.ombudsman.europa.eu. In the context of legislative documents, see also European Ombudsman (n 13) para 20.

[23] Regulation 1049/2001 (n 1) Art 7(2).

the institution in response to the confirmatory application entitles the applicant to institute court proceedings.[24] Access to Commission documents is furthermore regulated by its Rules of Procedure,[25] and a Commission Decision on records management and archives,[26] which implement the access regime in more detail.

3. Judgment of the General Court

The applicants put forth three pleas, of which the Court only examined the third. First, the applicants alleged infringement of Article 3(a) of the Transparency Regulation *in combi* with article 11 of the Charter (freedom of media); second, infringement of Article 2(3) of the Transparency Regulation; and third, an infringement of the principle of good administration. The two first pleas essentially center around the definition of a document in possession of the institution. As the Commission had in its reply to the confirmatory application stated it was not in possession of the documents in order to deny disclosure,[27] the Court chose to engage with the third plea first.[28] This plea, in contrast to the first and second, is not dependent on the possession of the document and allows review of the administration's conduct in responding to the access request. Having ruled on the third plea, the Court no longer had to consider the two others.

The Court began by stressing the importance of transparency. It reiterated that no matter what the ground for refusal, such refusal must be subject to judicial review[29] – to hold otherwise would be to confer a *carte blanche* for the institutions, who could simply claim inexistence or non-possession of a document so as to escape their obligations. The Court furthermore derives two starting points for the right to access to documents which frame its examination of the plea and the access regime on the whole. First, the right 'necessarily presupposes that the documents requested exist and are held by the institution concerned',[30] and second, a presumption of veracity attaches to an institution's claim that the document does not exist.[31] This presumption may nonetheless be rebutted by relevant and consistent evidence presented by the applicant.[32] The preceding applies by analogy to non-possession.[33]

[24] *Ibid*. Art 8(1).

[25] At the time of the judgment, the old Rules of Procedure were applicable (Rules of Procedure of the Commission, C(2000) 3614, as amended by Commission Decision 2020/555 of 22 April 2020 amending its Rules of Procedure). The Commission recently updated these (Commission Decision (EU) 2024/3080 of 4 December 2024 establishing the Rules of Procedure of the Commission and amending Decision C(2000) 3614), the importance of which is remarked upon below.

[26] Commission Decision (EU) 2021/2121 of 6 July 2020 on records management and archives.

[27] *NYT v Commision* (n 3) para 8.

[28] *Ibid.* para 22.

[29] *Ibid.* para 37.

[30] *Ibid.* para 38.

[31] *Ibid.*

[32] *Ibid*. para 39.

[33] *Ibid*.

The Commission's arguments and refusal to disclose should be seen against this starting point, in light of its wider, rather stingy, practice of granting access to documents. Possession of the document and the presumption of veracity may work together to effectively shield the institution concerned where it does not want to concede a document ever existed or be put in a position where it could be compelled to hand it over. It is no secret that the Commission in particular would rather deny access than grant it if disclosure meant any enhanced scrutiny of its policy choices.[34] This general attitude toward public discussion as hindrance is reflected in how the text messages were discussed both in and out of court. As the judgment illustrates, the messages between President von der Leyen and Mr. Burla oscillate in a no-mans land between inexistence and disappearance. While the 'Commission's replies are based either on assumptions or changing or imprecise information',[35] and make it appear unprepared before the Court, this did not, in the Court's view, affect the presumption of veracity[36] nor the fact that the Commission cannot be compelled to create a document with the information held in the text messages themselves.

3.1. Against a narrow reading of possession

Even if the non-existence of a document is presumed valid, it can be rebutted. The Court clarified what the concept of possession as precondition for access entails. It held that the concept 'cannot be limited to the possession or holding of documents by the institution at the time when it responds to the confirmatory application, since the exercise of the right of access […] would be rendered devoid of purpose if the institution concerned could, in order to escape its obligations, simply claim that the requested documents could not be found'.[37]

Thus, it suffices that an applicant shows with relevant and consistent evidence that the institution was 'at a given time' in possession of the document.[38] It is this teleological reading of possession that grounds the obligation on the institution to explain why it could not locate the requested documents, and how it searched for them, as part of the principle of sound administration.[39] Needless to say, the purpose is also to discourage the institutions from tactically deleting or misplacing documents. It should be noted that periodic deletion of emails is already routine policy for the Commission.[40]

[34] P Leino-Sandberg, 'The EU Commission's Drift towards Authoritarianism' (EU Observer, 13 May 2025), at euobserver.com (accessed 27 May 2025); P Leino-Sandberg, 'In the Dark: How the Commission deals with Access to Documents Requests relating to Europe's Recovery Transformation' (Verfassungsblog, 15 April 2024), at verfassungsblog.de (accessed 26 May 2025).

[35] *NYT v Commission* (n 3) para. 45.

[36] *Ibid.* para 46.

[37] *Ibid*. para 47.

[38] *Ibid*. para 48.

[39] *Ibid*. para 59. See also Case C-337/15 P *Ombudsman v Staelen*, ECLI:EU:C:2017:256, paras 34, 114.

[40] Art 5(3) of Commission Rules of Procedure.

Given that the text messages were mentioned on an interview transcript with the CEO of Pfizer and had been reported on, the applicants were able to provide relevant and consistent evidence that they had at some point existed and, consequently logically, been in the possession of at least President von der Leyen.[41] It would be absurd to argue that this does not constitute possession by the institution, although this is what the Commission attempted at the hearing with no success. Thus, the applicants succeeded in rebutting the presumption. The Commission for its part did not offer a consistent answer as to whether the messages existed, had been lost, or were ever in its possession – instead, it attempted to preclude the introduction into evidence of interview transcripts where the texts were mentioned,[42] and to have the argument rebutting the presumption of verity declared inadmissible.[43] While as a line of defense this is to be expected, it nonetheless does underline the unconvincing nature of the Commission's responses during the proceedings.

3.2. Obligation to provide plausible explanations

The institutions are under the duty to act diligently, and with care and caution in their relations with the public.[44] The rebuttal of the presumption of non-existence (and non-possession) places the ball back in the Commission's court. Essentially, the reversal entails that the institution is presumed to have held the document in its possession, and must now furnish 'plausible explanations enabling the applicant for access – as well as the Court – to understand why the requested documents could not be found'.[45]

The provision of reasons in the confirmatory decision has two functions. For one, from the perspective of the applicant, it is explanatory and so functions to dispel any doubts as to the credibility of the institution's statement that a document is not in its possession. If there are instances in which the institution's claims appear to be contrary to facts about the existence of a document, such as in the case at hand, there is reason to doubt the credibility of its statements. Ultimately, this may call into question its reputation or credibility of its access to document practices beyond one specific instance. It should be clear that this is not in the institutions' favor – trust in the institution increases its legitimacy whereas distrust diminishes it. In this sense, the presumption of veracity has to be 'earned' (anew).

Secondly, from the perspective of the wider public and the Court, the provision of reasons is linked to the accountability of the EU institutions and the judicial reviewability of their actions. It is simply impossible to know whether an institution is in compliance with its obligations if it offers no account of how it has purported to

[41] *NYT v Commission* (n 3) paras 57-58.
[42] *Ibid*. para 15. It did however indirectly concede that the messages had existed at some point.
[43] *Ibid*. para 28.
[44] *Ombudsman v Staelen* (n 39) paras 34 and 114; *NYT v Commission* (n 3) paras 59-60.
[45] *NYT v Commission* (n 3) para 60.

perform them. The Commission fell woefully short of providing such a plausible explanation of how it had searched for the documents, and consequently, why they were no longer in its possession. Despite the fact that it had conducted a renewed search for the requested documents, it did not elaborate on the methodology of that search or which locations it had looked for the messages in.[46] It could not confirm whether the President's Cabinet had attempted to search in von der Leyen's phone for the texts, or where it had looked for them at all. It could offer no conclusive answer as to whether the messages still existed or had been deleted on purpose from the phone.[47] In short, in Court it appeared as though *it had simply not bothered to look* for the documents.

Instead, the Commission attempted to downplay the significance of its search methodology, 'submitting that it has no bearing on the question of whether or not it held those documents'.[48] It is however hard to see how this could be the case. In the context of the Ombudsman complaint, the Commission had limited its search to registered documents,[49] which is perhaps something it did not wish to concede before the Grand Chamber. Registration and explanation of the search methodology are closely linked issues. The Court held that the Commission had not furnished a plausible explanation, as it was impossible to know what had actually become of the requested documents,[50] thus indicating that what is required is a truthful explanation.

Nonetheless, the real reason for the Commission's lackluster performance most likely lies elsewhere. It seems that the decision not to disclose the text messages was made long ago,[51] and the case and its fallout are a matter of damage mitigation. If you do not explain what happened to the documents, then you cannot be criticized for how you handled them – only for how poor the explanation is. For this reason, there is little the Court could say about the document retention practices of the Commission in this particular case.

3.3. Document registration

The final point of interest in the judgment revolves around the duty of the institutions to be proactive in facilitating the right to access, and with it transparency. Thus, they must draw up and retain documentation relating to their activities 'in so far as possible and in a non-arbitrary and predictable manner'.[52] Unlike the obligation to provide reasons, facilitating access to documents via their retention applies outside the ambit

[46] *Ibid*. para 62.
[47] *Ibid*. paras 69-70.
[48] *Ibid*. para 67.
[49] European Ombudsman, Decision (n 9) para 9.
[50] *NYT v Commission* (n 3) para 84.
[51] C Martuscelli, 'Pfizer, the EU, and Disappearing Ink' (Politico, 26 May 2023), at www.politico.eu (accessed 23 May 2025).
[52] *NYT v Commission* (n 3) para 41.

of an individual access to document request. As such, it has a clear link to document retention and registration practices of the Commission.

The Commission's arguments illustrate how registration is in practice tied to what is discoverable, and what counts as a document. The Commission Decision on Records Keeping provides in Article 7(1) that '[d]ocuments shall be registered if they contain important information which is not short lived or if they may involve action or follow-up by the Commission or one of its departments'.[53] Notably, its attitude toward whether text messages could be considered documents at all within the meaning of Regulation 1049/2001 has been ambivalent at best.[54] In practice, registration is what makes a document. In Court, the Commission relied on the above Article 7(1) and prior case-law to argue that internal communications and drafts were not of such importance as to warrant registration.[55]

This argument amounts to a denial of the importance of von der Leyen's text messages, without however, an explanation of how and by whom such importance is assessed. Implicit in it is an understanding of the medium as determining the importance of the information it contains, with the result that text messages, 'short-lived and ephemeral' as they are,[56] would not be registered. Nonetheless, this is evidently not how the assessment ought to be taken, especially as decision-making and communication about policy moves increasingly to instant messaging applications.[57] The Court picked up on the Commission's evasion on this point, appearing heavily skeptical of its claim that the texts were not important enough to register.[58] It is hard not to read into the relevant paragraph the Court's understanding that the documents ought to have been registered. And indeed, it is hard to see how discussion of a multi-million procurement deal was not important and did not involve follow up by the Commission, especially as that follow up has been jabbed into the shoulders of Union citizens.

[53] Commission Decision (EU) 2021/2121 (n 26).

[54] '[Text and instant messages] therefore neither qualify as a document subject to the Commission record-keeping policy nor are they falling within the scope of Regulation 1049/2001 on access to documents'. Answer given by Vice-President Jourová on behalf of the European Commission, 18 January 2022, at www.europarl.europa.eu (accessed 26 May 2025).

[55] The Commission relied on case T-110/23 *Kargins* v *Commission*, ECLI:EU:T:2024:644; *NYT v Commission* (n 3) paras 61 and 78.

[56] European Commission, 'Reply of the European Commission to the Recommendation from the European Ombudsman regarding the European Commission's refusal of public access to text messages exchanged between the Commission President and the CEO of a pharmaceutical company on the purchase of a Covid-19 vaccine', at www.ombudsman.europa.eu, 3.

[57] M Eccles, 'Politics by WhatsApp? Even "Pfizergate" won't end That' (Politico, 14 May 2025), at www.politico.eu (accessed 24 May 2025).

[58] *NYT v Commission* (n 3) para 81. See also the questions posed by judges at the hearing, M Eccles and E Braun, 'Von der Leyen's Commission Dodges Public Responsibility over Pfizergate Texts' (Politico, 15 November 2024), at www.politico.eu (accessed 24 May 2025).

In combination with the apparent half-heartedness of its efforts to search for the documents requested, this threatens to lead to a situation where the existence of a document within the meaning of Regulation 1049/2001 is dependent on its registration. As the Ombudsman has already argued, this cannot be the case and is contrary to that Regulation.[59] Hence, according to the Court, 'the Commission cannot rely solely on the absence of registration in its system for managing the requested documents to establish that it did not hold those documents, without any other explanation'.[60] While the Commission may be able to ignore the Ombudsman, as appears to have become its *modus operandi*,[61] one would hope it cannot give the Court the same cold shoulder.

4. *Plus ça* change

In contrast, information is considered to be unimportant and short-lived if not keeping it would have no negative administrative or legal effect for the European Commission.[62]

The Court annulled the contested decision. The Commission will have to adopt a new decision, in which it either explains its non-possession of the document, and hence refusal to disclose, or grants access to the messages. The latter seems highly unlikely. The former would seemingly require it to elaborate on how and where it has searched for the messages so that the reason for their non-possession becomes clear – in short answer the questions the Commission found difficult to answer in the hearing. In this vein, it should also be noted that the scrutiny of the refusal to disclose was only made possible by the applicants' ability to rebut the presumption of veracity. It is not a given that applicants can do so.

The judgment can still be appealed to the European Court of Justice. Given how utterly the Commission lost on all counts, it is doubtful whether it would lodge an appeal with its extra publicity. In a statement released after delivery of the judgment, the Commission indicated that it will 'closely study' the Court judgment, and adopt a "new decision providing a more detailed explanation".[63] In that same statement, it also stated that '[t]he General Court does not put into question the Commission's

[59] European Ombudsman, Recommendation (n 9) para 17.

[60] *NYT v Commission* (n 3) para 83.

[61] 2024 Commission Rules of Procedure (n 25) Annex Art 15(2) 'the Commission may upon assessment of the arguments provided by the European Ombudsman decide to grant further or full access…'; S Wheaton and S Starcevic, '"Powerful consiglieri" run von der Leyen's Commission, EU Transparency Chief Says' (Politico, 20 December 2024), at www.politico.eu (accessed 24 May 2025).

[62] Commission Guidelines on document registration, quoted in Report on the meeting of the European Ombudsman's inquiry team with the European Commission (case 1316/2021/MIG), at www.ombudsman.europa.eu (accessed 26 May 2025).

[63] European Commission, 'Statement by the Commission on the decision by the General Court on an access to documents request' (14 May 2025), at ec.europa.eu (accessed 7 July 2025).

registration policy regarding access to documents'.[64] In other words, the Commission appears intent on minimizing the impact of the judgment.

While in general this is true – the Court did not assess the Commission's registration policy on the whole – it did put into question the Commission's apparent equation of registration with possession and stressed that documents must be kept. The reason it did not say more on registration may have more to do with the Commission's avoidance of explaining how it evaluates what is important enough to retain, as noted above. In this sense the judgment is also frustrating. Its most distinctive feature is the poor quality of the Commission's arguments. While this allows the Court to lambast the Commission's lack of preparedness and provision of reasons, it may ultimately detract from what the Court could have said about the obligations incumbent on the institutions. From the perspective of the wider audience, the evasion by the EU executive is deeply disappointing.

The Commission continues by recommitting itself to open administration: 'Transparency has always been of paramount importance for the Commission and President von der Leyen. We will continue to strictly abide by the solid legal framework in place to enforce our obligations'.[65]

Nonetheless, only half a year prior it adopted new Rules of Procedure that blatantly contradict both Regulation 1049/2001 and its obligations under the Aarhus Convention as implemented by the Aarhus Regulation.[66] These Rules also further regularize the non-retention of instant messages, use of which the Commission now discourages for conducting official business.[67] Likewise, tying registration together with the existence of a document is hardly a new strategy: it was already featured in the Commission 2008 proposal to recast Regulation 1049/2001.[68]

While one might hope that the judgment would lead to renewed vigor in applying Regulation 1049/2001 in line with its purported objective to open up Union administration, the stated commitment to transparency has a hollow ring to it. Absent a change of heart, the Commission's access to documents practices following this judgment should raise more than a few eyebrows – they are a cause for concern.

5. Conclusion

This case analysis has drawn attention to the relevance of the General Court's judgment in *NYT v Commission* for shedding light on the scope of Regulation 1049/2001. It has sought to illustrate how the Court engaged with axiomatic concepts that underlie the Union's access to documents framework and interpreted them so as to preserve its integrity. The Court interpreted the concept of possession of a document

[64] *Ibid*.
[65] *Ibid*. (emphasis omitted).
[66] See P Leino-Sandberg (n 13).
[67] 2024 Commission Rules of Procedure (n 25) Annex Art 5(4).
[68] Proposal COM(2008) 229 final (n 15) Art 3(a).

by the institutions teleologically, so as to discourage loss of documents. This the judgment ties to the duty to proactively retain documentation so as to enable the effective exercise of access rights. Review of how the institutions perform their obligations is by and large based on the reasons they provide for refusing access. On this point the judgment makes clear that, upon rebuttal of the presumption of non-possession, the institution claiming non-possession of a document must provide such plausible explanations as to make clear what has become of the requested documents. This indicates that it must explain what it has done to attempt to retrieve them – and crucially – why it has not retained them.

The decision not to retain documents that *prima facie* appear important enough to keep should be subject to critical public discussion about how the administration conducts itself and its affairs. The Commission has now been held to account for its shortcomings in court, but this is not the be all end all of its responsibility. Given the limits of what it is liable to do following the ruling, public discussion should also lead to *political* responsibility of the Commission, one way or another. This seems to be the only way in which lasting change in opaque practices is achieved and administration made more transparent for Union citizens.

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A Stitch in Time? Mutual Trust as the EU's Fix-All in Case C-183/23 *Commission v Malta*

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ABSTRACT: In Case C-183/23, the Court of Justice of the European Union ruled on the legality of Malta's investor citizenship scheme, holding that national citizenship cannot be acquired on a purely transactional basis. Since Union citizenship is automatically conferred upon the acquisition of national citizenship, the Court anchored the former in the EU value of solidarity, effectively imposing analogous conditions on the latter. The judgment further reinforced this reasoning by invoking the principle of mutual trust, which serves as the constitutional foundation for the cross-border recognition of national citizenship and the derived rights of Union citizenship. This landmark ruling is significant for two key reasons: first, it explicitly links Union citizenship to mutual trust, and second, it frames the free movement of Union citizens as a concrete expression of the values enshrined in Article 2 TEU. However, uncertainties remain regarding the judgment's future implications – particularly whether Member States may refuse to recognise Union citizenship status and its derived rights, or whether more generally the disapplication of a measure based on mutual trust could simultaneously protect an EU value while infringing individual rights. This would be an exceptional, and therefore extremely unlikely, outcome, which raises questions about the reliance on mutual trust (dealing with the effects of citizenship acquisition in other Member States) in an infringement action against a Member State concerning an administrative mechanism for the award of national citizenship in that Member State (dealing with the citizenship status itself).

KEYWORDS: mutual trust – Article 2 TEU – Union citizenship – Malta investor citizenship – enforcing EU values – infringement action.

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1. Introduction

In its judgment on 29 April 2025 in *Commission v Malta*,[1] the Grand Chamber held that Malta's investor citizenship scheme, which in general terms grants Maltese nationality in exchange for predetermined payments or investments, was contrary to EU law. Taking as the starting point the statement from *Micheletti* that Member States must have due regard to EU law when laying down the conditions for the acquisition and loss of nationality,[2] the Court confirmed for the first time that a Member State's naturalisation scheme could be reviewed under EU law and found to be in breach of Article 20 TFEU on Union citizenship and the duty of sincere cooperation in Article 4(3) TEU. Since the case law to date has dealt with the issue of loss of national, and consequently Union, citizenship, it is perhaps unsurprising that the judgment lacked directly relevant jurisprudence concerning citizenship acquisition to ground the decision on. This in turn has resulted in immediate post-judgment criticism of judicial overreach (or, somewhat less diplomatically, judicial gaslighting).[3]

This article contends that the practical impact of the judgment is narrowly confined to the lawfulness of the Maltese investor citizenship scheme in its current form, and with limited scope for affecting current beneficiaries of the scheme, rendering its immediate consequences minimal. It is argued that the judgment does not change the fact that EU law cannot, by itself, take away a person's citizenship, either of a Member State or of the Union, which is subsidiary to it. Even if not directly intentional, the limited impact of this judgment is that it opens the possibility in EU law for another Member State to deny the derived rights that are guaranteed by Union citizenship in the Treaties (namely, free movement and residence rights, as well as equal treatment for EU citizens and their family members), on the basis that the administrative system for granting national citizenship partially breaches EU law. Even then, this would normally have to follow the existing requirement in EU law of a proportionality review.[4]

As Advocate General Ćapeta clearly stated in her Opinion in *Commission v Hungary*, proceedings under Article 258 TFEU are of an objective nature, and it is part

[1] Case C-181/23 *Commission v Malta*, ECLI:EU:C:2025:283.

[2] Ibid 81, citing Case C-260/90 *Micheletti*, EU:C:1992:295, para 10; also, Case C-135/08 *Rottmann*, ECLI:EU:C:2010:104, para 39.

[3] M Van den Brink, 'Why Bother with Legal Reasoning? The CJEU Judgment in Commission v Malta (Citizenship by Investment)' (02 May 2025), at globalcit.eu; S Peers, 'Pirates of the Mediterranean meet Judges of the Kirchberg: the CJEU Rules on Malta's Investor Citizenship Law' (30 April 2025), at eulawanalysis.blogspot.com.

[4] Confirmed recently in Joined Cases C-684/22 to C-686/22 *Stadt Duisburg (Loss of German nationality)*, EU:C:2024:345, para 42 and cited case law. This obligation is limited only in the situation where the loss of Union citizenship is an automatic consequence of a Member State withdrawing from the European Union, see C-673/20 *Préfet du Gers*, ECLI:EU:C:2022:449, para 62.

of the ordinary competence of the Court of Justice to establish only if a legal provision has or has not been infringed.[5] As a preliminary point, therefore, it is important to stress that the judgment cannot deprive Maltese citizens of their nationality, and Malta alone retains authority to revoke the citizenship of a Maltese national. On the other hand, the ruling's true significance lies in its novel constitutional development: the explicit anchoring of EU citizenship – and its associated rights – in the value of solidarity and the principle of mutual trust among Member States.

The analysis proceeds in three parts. First, it demonstrates why this doctrinal shift matters, reframing EU citizenship not merely as a derivative status but as a core element of the EU's constitutional order, contingent on reciprocal confidence between States. Second, it explores the broader implications of this linkage, particularly how it expands the EU's toolbox for enforcing Article 2 TEU values. By tethering free movement rights to mutual trust, the judgment effectively subjects them to potential suspension in cases of systemic breaches of Article 2 TEU values – akin to other privileges Member States 'enjoy' under the Treaties. Finally, the article assesses the institutional and federal balance this move entails. While the immediate fallout for Malta's scheme is marginal, the judgment's deeper legacy is its normalisation of conditionality in EU citizenship rights. This transforms free movement from an unconditional guarantee into a right mediated by mutual trust, with profound consequences for future conflicts between the EU and the Member States.

The conclusion argues that the most consequential effect of this ruling is not its technical application to investor citizenship, but its potential to strategically recalibrate EU leverage in cases of systemic backsliding of EU values: by grounding citizenship rights in mutual trust, the Court has subtly expanded the conditions under which the EU may restrict Member State prerogatives – potentially reshaping the enforcement of EU values in the future.

2. The (limited) substance of the judgment in *Commission v Malta*: what it says about citizenship per se

It is not open to dispute that Member States are and remain competent to make rules governing the acquisition of their nationality,[6] and can decide for themselves who will become a citizen. A citizen of a Member State is automatically a citizen of the Union, without precondition, as confirmed by Article 20(1) TFEU. This is also the internal logic underpinning Declaration No. 2 on nationality of a Member State, annexed to the 1992 Maastricht Treaty.[7] Further, as the Court stated in C-192/99 *Kaur*,

[5] Opinion of AG Ćapeta in Case C-769/22 *Commission v Hungary*, ECLI:EU:C:2025:408, paras 193–194.

[6] Opinion of AG Collins in Case C-181/23 *Commission v Malta*, ECLI:EU:C:2024:849, para 17.

[7] Declaration No 2, attached to the 1992 Maastricht Treaty which established EU citizenship 98. The caveat being that the Declaration has no legal effects, though it is informative. See LJ Wagner,

a person is not deprived of their rights under EU law if they do not satisfy the definition of a national under national law, on the grounds that those rights never arose in the first place.[8] Additionally, since the status of Union citizenship is automatic, it does not as such become effective only once a person has exercised the free movement rights that attach to that status by virtue of Article 21 TFEU. This is evident in C-673/20 *Préfet du Gers*, where the Court stated that exercising free movement rights was not sufficient justification for UK nationals to retain EU citizenship once their country ceased to be a Member State.[9] The judgment in *Commission v Malta* has added to this body of case law concerning the personal scope of Union citizenship through the explicit linkage of citizenship in the EU to the relationship of solidarity and good faith and basing Union citizenship on mutual trust.

The salient legal principles leading to the conclusion in *Commission v Malta* can be found in paras 93-97. Firstly, the Court stated that Union citizenship is one of the principle concrete expressions of solidarity which forms the very basis of the process of integration that is the raison d'être of the European Union itself.[10] The Court then went on to state that national citizenship is based on a relationship of solidarity and faith between each Member State and its nationals, required by Article 20(1) TFEU.[11] Normatively, it then held that Malta's investor citizenship scheme breached Article 20 TFEU and Article 4(3) TEU, stating that:

> 'a Member State manifestly disregards the requirement for such a special relationship of solidarity and good faith, characterised by the reciprocity of rights and duties between the Member State and its nationals, and thus breaks the mutual trust on which Union citizenship is based, in breach of Article 20 TFEU and the principle of sincere cooperation enshrined in Article 4(3) TEU, when it establishes and implements a naturalisation scheme based on a transactional procedure between that Member State and persons submitting an application under that programme, at the end of which the nationality of that Member State and, therefore, the status of Union citizen, is essentially granted in exchange for predetermined payments or investments'.[12]

With this paragraph, the Court has taken its own understanding of the bond between a country and its citizens as being a special relationship of solidarity and good faith,[13] and infused it into Article 20(1) TFEU to form the 'basis of the rights and obligations reserved to Union citizens by the Treaties'.[14] It then proceeded to refer

'Member State Nationality under EU Law – To Be or Not to Be a Union Citizen?' (2021) 28 *Maastricht Journal of European and Comparative Law* 304–331.

[8] Case C-192/99 *Kaur*, ECLI:EU:C:2001:106, para 25.

[9] Case C-673/20 *Préfet du Gers*, ECLI:EU:C:2022:449, para 52.

[10] *Commission v Malta* (n 1), para 93.

[11] Ibid paras 96–97.

[12] Ibid para 99.

[13] Ibid para 96.

[14] Ibid para 97.

to transactional naturalisation within the EU as manifestly disregarding this relationship.

In his Opinion, Advocate General Collins relied on existing case law, specifically *Micheletti* and *Zhu and Chen* to make the point that EU law does not allow Member States to impose additional conditions in their national law on an individual as a prerequisite for recognising their nationality of another Member State.[15] Thus, while a Member State may require a genuine link before granting its own citizenship to an individual, no such requirement exists generally in EU law. Furthermore, in other decisions, the Court has held that the automatic loss of nationality of a Member State would be in breach of the principle of proportionality if the relevant national rules did not allow for an individual assessment of the consequences of that loss for the individuals concerned in light of EU law.[16]

The judgment expressly deviates from the Opinion of Advocate General Collins on the point about the requirement of a genuine link in Article 20 TFEU before granting national citizenship. It also goes further than the Advocate General's Opinion with regards to the relationship between EU citizenship and mutual trust. According to the Advocate General, the agreement of the Member States to abide by decisions of other Member States as to whether an individual has lawfully acquired national citizenship is taken in the 'spirit of mutual trust and respect'.[17] The Court instead held that Union citizenship is based on mutual trust,[18] which is 'called into question' when a Member State is required to recognise the rights of a Union citizen who acquired their EU citizenship under the scheme.[19] It is this divergence between the Advocate General and the Grand Chamber on the scope of EU law regarding acquisition of national citizenship that has led to such a wide range of views on what the judgment says about the nature of Union citizenship.

There are three legal innovations that flow from this reasoning. The first is confirmation that Union citizenship is one of the principle concrete expressions of the value of solidarity that is 'an integral part of the identity of the European Union as a specific legal system'.[20] The second is that EU citizenship is based on mutual trust. The third is, perhaps most obvious, that the Court found that the Maltese investment citizenship scheme breached Article 20 TFEU and Article 4(3) TEU. The first two innovations will be dealt with separately in the following sections and then contextualised as they relate to the third in the remainder of the text.

[15] Opinion of AG Collins in *Commission v Malta* (n 6) para 48.
[16] E.g. C-212/17 *Tjebbes*, ECLI:EU:C:2019:189, para 41; C-689/21 *X*, ECLI:EU:C:2023:626, para 39.
[17] Opinion of AG Collins in *Commission v Malta* (n 6) para 47.
[18] *Commission v Malta* (n 1) para 99.
[19] Ibid para 101.
[20] Ibid para 93.

3. The concrete expression of solidarity

In the judgment, the Court started by stating the formula that Union citizenship constitutes the fundamental status of nationals of the Member States, explaining that this is both because of the rights that attach to Union citizenship and also because the status is derived automatically from the fact of being a national of a Member State.[21] The Court then stated that Union citizenship is one of the concrete expressions of solidarity, in particular the 'solidarity which forms the very basis of the process of integration', which is an integral part of the Union's identity, and which is accepted by the Member States on the basis of reciprocity.[22] It provides justification for this statement by reference to the paragraph from *Eurobox Promotion* that grounded the principle of supremacy in reciprocity, which makes it 'impossible' for Member States to unilaterally adopt acts that risk rights' losing their 'Community character'.[23] Finally, the Court stated that Union citizenship is based on the common values in Article 2 TEU and on mutual trust between the Member States, and as such the granting of national citizenship cannot be exercised in a way that is 'manifestly incompatible' with the very nature of Union citizenship.[24] It is this last paragraph which acts as the hook that now forms the basis of EU interference with the granting of national citizenship, which must be based on solidarity and good faith.[25] Yet in both the abstract and the concrete, it is not at all obvious what it means.

In his Opinion, Advocate General Collins cited existing case law to conflate the 'genuine link' requirement with the special relationship of solidarity and good faith between a Member State and its citizens, which Member States are free to impose as a requirement of their citizenship acquisition schemes.[26] There is no consensus in the literature on whether this a correct reading of the law prior to the judgment. According to Lamprinoudis, this special relationship is a repackaged version of the genuine link.[27] Others have questioned whether this now means that EU law requires national laws on naturalisation to possess a genuine link requirement.[28] Spieker argues that it is already

[21] Ibid para 92, citing Case C-184/99 *Grzelczyk*, EU:C:2001:458, para 31; Case C-118/20 *Wiener Landesregierung*, EU:C:2022:34, paras 38 and 58; Case C-689/21 *Udlændinge- og Integrationsministeriet*, EU:C:2023:626, paras 29 and 38. The status of Union citizenship has seemingly evolved from being 'destined' (*Grzelczyk*) to 'constituting' (*Wiener Landesregierung*) the fundamental status of nationals of the Member States.

[22] *Commission v Malta* (n 1) para 93.

[23] Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, para 246.

[24] *Commission v Malta* (n 1) para 95.

[25] Ibid para 99. While English is the language of the judgment, other language versions describe the relationship as being based on solidarity and loyalty.

[26] Opinion of AG Collins in *Commission v Malta* (n 6) para 55, relying on *Tjebbes* (n 16) para 33.

[27] K Lamprinoudis, 'Money Cannot buy Everything! Catharsis Reached in the Commission v. Republic of Malta Tragedy?' (EU Law Live, 15 May 2025), at eulawlive.com.

[28] J Koudron, 'Op-Ed: "Not Yours to Sell: The Long-Awaited Commission v. Malta Judgment (Case C-181/23)"' (EU Law Live, 12 May 2025), at eulawlive.com.

a general principle of public international law that expresses the prohibition of abuse of rights.[29] Wagner contends that recognition of a nationality under EU law presupposes that it conforms with and is recognised under international law.[30] If the genuine link requirement is indeed a general principle of public international law, then it could be required by EU law through the constitutional norm that requires EU action to be based on the strict observance of international law. The case law of the Court of Justice and General Court concerning the territory of the Western Sahara could be applied by analogy.[31] In *Front Polisario II*, the Court of Justice stated that the EU is bound, when exercising its powers, to observe international law in its entirety, which includes the rules and principles of general and customary international law.[32]

In *Commission v Malta*, the Court confirmed a variation of this obligation through a two-step process. Firstly, it repeated existing case law that requires Member States to have 'due regard' to international law when laying down the conditions for the grant and loss of the nationality of a Member State, and that those powers must be exercised in accordance with EU law.[33] It is this element that potentially limits the material scope of the judgment to EU law review of naturalisation processes, leaving initial attribution of nationality under the principles of *ius sanguinis* and *ius soli* to be determined exclusively by reference to national law, since they are not subject to any further requirements.[34]

Secondly, the Court defined citizenship as a special relationship of solidarity and good faith between a State and its nationals and the reciprocity of rights and duties,[35] which also forms the basis of the rights and duties reserved to Union citizens by the Treaties via Article 20(1) TFEU.[36] The political rights afforded to EU citizens under the Treaties allow them to participate in the democratic life of the Union, whose functioning is founded on representative democracy, which gives concrete expression to democracy as a value in Article 2 TEU.[37] Further, EU citizenship is one of the principal concrete expressions of the solidarity which forms the very basis of the process of integration.[38] Granting nationality, and thereby Union citizenship, without

[29] LD Spieker, 'It's Solidarity, Stupid!: In Defence of Commission v Malta' (VerfBlog, 7 May 2025), at verfassungsblog.de.

[30] LJ Wagner, 'Fury and Surprise Anchored in Dogmas and Myths: Reflections on Commission v. Malta and its Discontents' (VerfBlog, 26 May 2025), at verfassungsblog.de.

[31] This is analogous, since these cases concerned the external acts of the Union, and flow from the objective of the Union in Art 3(5) TEU requiring the strict observance and development of international law through the EU's relations with the wider world.

[32] Case C-779/21 *Commission v Front Polisario*, ECLI:EU:C:2024:835, para 173.

[33] *Commission v Malta* (n 1) para 81, and cases cited therein.

[34] For discussion, see R Bauböck, 'Genuine Links and Useful Passports: Evaluating Strategic Uses of Citizenship' (2019) 45 *Journal of Ethnic and Migration Studies* 1015, 1020.

[35] *Commission v Malta* (n 1) para 96.

[36] Ibid para 97.

[37] Ibid para 89.

[38] Ibid para 93.

the links demonstrating solidarity and belonging to the community,[39] manifestly disregards that requirement in EU law.[40]

According to Spieker and Weber, belonging to European society is a central precondition for solidarity between the Member States and Union citizens, and the genuine link may be an expression of this belonging.[41] Commercialising Union citizenship infringes this mutual solidarity between the Member States, by upsetting the balance between the advantages and obligations of EU membership.[42]

In *Germany v Poland*, the Court referred to the role of solidarity in Article 194 TFEU regarding the EU's energy policy, and also listed other provisions of the Treaties that specifically reference it.[43] It added that the principle is capable of producing binding legal effects, and agreed with the Advocate General in that case that solidarity is the thread that brings together all the objectives of the EU's energy policy and gives them coherence.[44] It creates binding obligations for the EU towards the Member States and between the Member States inter se.[45] The Court stated that the principle of solidarity underpins the entire legal system of the EU and is closely linked with the principle of sincere cooperation in Article 4(3) TEU.[46] In the words of the FIDE 2025 Report, 'solidarity was "present at the creation," as European integration is founded on the idea of solidarity'.[47]

Writing prior to the publication of the judgment in *Commission v Malta*, but after the Advocate General's Opinion was released, Spieker noted that, regarding the vertical relationship with the Union, Member States are obliged to refrain from any measure which could jeopardise the attainment of the Union's objectives or the effectiveness of

[39] See the Opinion of AG Ćapeta in Case C-488/21 *GV*, ECLI:EU:C:2023:115, para 134, where she asserted: 'The second way in which the unreasonable burden argument can be understood is in terms of solidarity, viewed as a readiness to participate in burden sharing. Such solidarity is usually based on belonging to a community, be it national, professional, family or European, which allows for the exclusion of those who are not members of the community, given that burden sharing with them is perceived as unreasonable'.

[40] *Commission v Malta* (n 1) para 99.

[41] L Spieker and F Weber, 'Bonds without Belonging? The Genuine Link in International, Union, and Nationality Law' (2025) 00 *Yearbook of European Law* 1–39, 27.

[42] Ibid citing Case C-132/22 *Commission v Hungary*, ECLI:EU:C:2024:493, para 127.

[43] Case C-848/19 *P Germany v Poland (Baltic Pipeline Connector)*, ECLI:EU:C:2021:598, paras 39–41.

[44] Ibid para 43.

[45] Ibid para 49.

[46] Ibid para 41. See, for discussion, A Bobić, 'Imagining Transnational Solidarity in the EU through Hegel's Idea of Mutual Recognition' (2025) 31 *Maastricht Journal of European and Comparative Law* 676–690.

[47] O Beynet and T Scharf, 'Energy Solidarity and Energy Security – from Green Transition to the EU Crisis Management', (Federation Internationale Pour le Droit Européen, 28–31 May 2025) at www.fide-europe.org, citing K Huta and L Reins, 'Solidarity in European Union Law and its Application in the Energy Sector' (2023) 72 *International and Comparative Law Quarterly*; D Calleja, T Maxian Rusche and T Shipley, 'EU Emergency-call 122? On the Possibilities and Limits of Using Article 122 TFEU to Respond to Situations of Crisis' (2024) 29 *The Columbia Journal of European Law* 27–28.

Union law.[48] Further, the horizontal relationship between the Member States is characterised by the obligations of cooperation, consideration and solidarity.[49]

Convincingly, Bobić reconfigures solidarity, in its transnational sense, as mutual recognition,[50] which could become a 'vehicle for a more serious rethink of redistribution in the EU and the starting point towards a genuine political community of citizens'.[51] Following *Commission v Malta*, this statement accurately reflects the relationship envisaged by the Court of Justice. At the same time though, by grounding Union citizenship in mutual trust and framing it as an expression of the value of solidarity, the most probable short-term effect of this judgment will not in fact be further development toward of a community of citizens (if anyone outside Malta or the legal blogosphere is paying attention), but rather to provide an EU law basis for rejecting the administrative mechanisms that determine individual membership of the current version of that community.

As with any status, rules that influence its acquisition have the necessary side effect of deciding who the 'other' will be. That 'other' now includes wealthy third-country investors looking for a convenient entry into the community of Union citizens. In any event, in *Commission v Malta* the absence of a legal requirement in Maltese law of actual physical residence prior to naturalisation was clearly a major factor in demonstrating the absence of a special relationship of solidarity and mutual trust.

4. EU citizenship is based on mutual trust

In its judgment, the Court explicitly stated that Union citizenship is based on mutual trust.[52] To understand the consequences of linking Union citizenship to mutual trust, and also what role mutual trust plays in the EU legal order generally, it is important to understand why the Court may have chosen to make the connection explicit in the judgment.

In the Commission Press Release announcing the infringement action against Malta, no reference was made to mutual trust,[53] and the grounds for infringement were solely the failure to fulfil obligations under Article 20 TFEU and violation of the principle of sincere cooperation in Article 4(3) TEU.[54] Neither of these Treaty articles make explicit reference to mutual trust. Instead, the Court accepted the arguments of the Commission that when Member States exercise their exclusive competence to grant nationality to an individual – who will automatically become a Union

[48] Spieker and Weber (n 41) 21.
[49] Ibid.
[50] Bobić (n 46) 689.
[51] Ibid.
[52] *Commission v Malta* (n 1) para 99.
[53] European Commission Press Release, 'Investor Citizenship Scheme: Commission Refers Malta to the Court of Justice' (29 September 2022), at ec.europa.eu.
[54] Action brought on 21 March 2023, at curia.europa.eu.

citizen – they are under an 'obligation to ensure that it does so without compromising or undermining the essence, value and integrity of Union citizenship, in order to preserve the mutual trust which underpins that status'.[55] At the same time, the Court could have reached the conclusion that the Maltese scheme breached Article 20 TFEU and Article 4(3) TEU without referring to mutual trust, which rather concerns the cross-border effects of national citizenship, which are infused into EU citizenship status by the common value of solidarity.

The grounds of infringement did not refer to mutual trust. Even if they did, *Latvia v Sweden* is precedent for an infringement action – albeit under Article 259 TFEU – where the explicit allegation was a failure to fulfil obligations under Article 4(3) TEU which undermined mutual trust between the Member States, only for the Court to ignore the mutual trust element in its entirety and instead focus (correctly) on the sincere cooperation component in the operative part.[56]

In addition to not being strictly necessary for the judgment, the Opinion of the Advocate General provided sufficient cover to allow the Court to gloss over this part of the Commission's argumentation. Advocate General Collins does not associate mutual trust with Union citizenship in his Opinion at all. The single reference that comes close can be found in paragraph 47, where he asserts that in 'a spirit of mutual respect and trust, Member States have unconditionally agreed to abide by the decisions of other Member States as to whether an individual possesses the nationality of a Member State and, therefore, EU citizenship, irrespective of the particular relationship between that person and that Member State'.[57] From a purely linguistic point of view, the 'spirit of mutual trust and confidence' is not the same as the Court's own formula for the principle of mutual trust in EU law, but also the action defined by the Advocate General, namely that Member States must unconditionally accept an EU migrant's nationality, more closely resembles the principle of mutual recognition. Support for this understanding can be found in the Opinion of Advocate General Szpunar in *Alchaster*, where he claimed that a high level of mutual trust and confidence 'translates legally to what is known as the principle of "mutual recognition"'.[58]

While the Court and the Advocates General have often expounded the connection between mutual trust and mutual recognition,[59] they are not synonymous concepts. This is the case, even though the Court has stated that mutual recognition is

[55] *Commission v Malta* (n 1), para 42.

[56] Case C-822/21 *Latvia v Sweden*, ECLI:EU:C:2024:373, para 98. Latvia argued that Sweden was in breach of mutual trust under Art 4(3) TEU concerning arrangements for collecting contributions payable by certain banks under the Deposit Guarantee Scheme (DGS), which the Court reinterpreted as referring to the duty of sincere cooperation under Art 4(3) TEU.

[57] AG Collins in *Commission vs Malta* (n 6) para 47.

[58] Opinion of AG Szpunar in Case C-202/24 *Alchaster*, ECLI:EU:C:2024:559, para 35.

[59] E.g. in Case C-359/16 *Criminal proceedings against Ömer Altun and Others*, ECLI:EU:C:2018:63, para 40. In the original language version of the judgment, the Court stated 'Het

based on mutual trust with increasing regularity.[60] Mutual trust requires Member States to presume that all other Member States comply with EU law and the fundamental rights recognised by EU law.[61] According to Advocate General Szpunar in *Real Madrid Club de Fútbol*, mutual trust 'permits the inference' that national legal systems and judicial institutions, together with the Article 267 TFEU procedure, afford a sufficient guarantee of protection to individuals in the event of a misapplication of national or EU law.[62] The Advocate General additionally referred to mutual trust as 'not merely the result of the legislative choice made by the EU institutions. It has its basis in primary law'.[63] Mutual recognition is one of the mechanisms employed to ensure fulfilment of the EU's objectives, by providing for the free movement of, for example, goods, services, court decisions and professional diplomas, without the need for full harmonisation of national laws underpinning them.[64] As such, while the mutual trust reference wasn't necessary for the Court to reach the conclusion it did, the effect of doing so was nevertheless of a declaratory nature. To understand why that is, an overview of the role played by mutual trust specifically in the internal market will be presented, followed by how it may find application in Union citizenship.

beginsel van loyale samenwerking gaat immers gepaard met het beginsel van wederzijds vertrouwen', which roughly translates to English as 'going hand in hand', which may imply that they are the same obligation, but this is not borne out by later case law, so it can be assumed that they are not synonymous.

[60] Case 318/24 *PPU Breian*, ECLI:EU:C:2024:658, para 36; Case 261/22 *GN*, ECLI:EU:C:2023:1017, para 33; Case C-158/21 *Minister of Finance v Puig Gordi*, ECLI:EU:C:2023:57, para 134; Case C-699/12 *E.D.L.*, EU:C:2023:295, para 21; Joined Cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie* ECLI:EU:C:2020:1033, para 35.

[61] Opinion 2/13 *Accession of the European Union to the ECHR*, ECLI:EU:C:2014:2454, para 191.

[62] Opinion of AG Szpunar in Case 633/22 *Real Madrid Club de Fútbol*, ECLI:EU:C:2024:127, para 62.

[63] Ibid para 60. In footnote 36 of the Opinion, the Advocate General listed the primary law bases for mutual trust: 'First, Article 4(3) TEU provides that, pursuant to the principle of sincere cooperation, the European Union and the Member States must, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. Next, under Article 67(4) TFEU, the European Union is to facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters. Furthermore, under Article 81(1) TFEU, the European Union is to develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. For those purposes, on the basis of Article 81(2)(a) TFEU, the European Union is to adopt measures aimed at ensuring the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases'.

[64] See, for example, J Pelkmans, 'Mutual Recognition: Economic and Regulatory Logic in Goods and Services' (2012) 24 *Bruges European Economic Research Papers*; JHH Weiler, 'Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO' in F Kostoris Padoa Schioppa (ed), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave Macmillan 2005); S Prechal, 'Mutual Trust Before the Court of Justice of the European Union' (2017) 2 *European Papers* 75–92, 77.

4.1. How has mutual trust been applied in the internal market already?

Mutual trust assumes that, despite differences in national laws and procedures, Member States share a commitment to common values and principles, such as the rule of law, democracy, and respect for fundamental rights, as enshrined in Article 2 TEU. This trust enables the EU to create frameworks – such as mutual recognition, mutual assistance, and information-sharing mechanisms – that allow national decisions to have extraterritorial effects without requiring full harmonisation of national laws and procedures. For example, in areas like judicial cooperation – part of the Area of Freedom, Security and Justice (AFSJ) – mutual trust allows a court decision in one Member State to be recognised and enforced in another, even if the underlying legal systems differ. Similarly, in competition law, mutual trust underpins the cooperation between national competition authorities and the European Commission within the European Competition Network (ECN).[65]

Mutual trust and mutual recognition make it possible for the AFSJ to be created and maintained.[66] Union citizenship is also based on mutual trust. It is not a mechanism established within the AFSJ, but the right to move and reside freely within that area without internal borders is an 'achievement' of the AFSJ'.[67] Two possible interpretations can be derived from this statement: either the status of Union citizenship is based on mutual trust or the free movement and political rights derived from that status are based on mutual trust.

Since mutual trust requires national authorities to recognise and refrain from questioning national acts and decisions of other Member States, the rights of Union citizens must be guaranteed subject to existing restrictions in EU law, and cannot be refused on the grounds of doubts about the status of an EU citizen. At the same time, it is the status of citizen that guarantees those rights, and other Member States cannot question that status, which is granted solely on the basis of national law. The granting of national citizenship of a Member States is thus comparable in the external effects it produces to the transnational administrative procedures that allow the internal market to function properly. It is on this point that an investor citizenship scheme, which may not be controversial in other polities, is problematic within the EU, since it undermines solidarity between the Member States.

Within the EU regulatory space, it is Member State bodies that are responsible for general administration, unless EU law has expressly delegated or conferred these powers on EU institutions or agencies. According to Hofmann, this approach to the

[65] Case T-791/19 *Sped-Pro v Commission*, ECLI:EU:T:2022:67, para 85.
[66] *Commission v Malta* (n 1) para 85.
[67] Ibid para 86.

implementation of EU law arises from the concepts of subsidiarity, limited attribution of powers and the principle of mutual trust,[68] and that by administering EU policies using existing authorities in the Member States and at EU level, a degree of national autonomy is preserved while representing the 'cheap option' for the Union.[69] The different types of 'composite' procedural cooperation[70] include 'vertical' cooperation as between EU and national bodies, 'horizontal' cooperation involving domestic administrative organs as well as 'diagonal' cooperation between several Member State bodies possibly in cooperation with EU bodies.[71] The various forms this cooperation can take include exchanges of information – which exist in the fields of, for example, competition law,[72] immigration,[73] cooperation on criminal matters,[74] customs,[75] product safety,[76] maritime traffic monitoring,[77] cyber threats[78] and cyber threats involving financial entities[79] – cooperation between organisations and

[68] H Hofmann, 'Multi-Jurisdictional Composite Procedures: The Backbone to the EU's Single Regulatory Space' (2019) 3 *Law Working Paper Series*.

[69] Ibid. F Brito Bastos, 'An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law' (2020) 16 *European Constitutional Law Review* 66 describes this form of cooperation as 'an approach that can secure effective and consistent implementation of EU law across the member states while respecting their reluctance to centralise administrative powers at the EU level'.

[70] H Hofmann (n 68) 18 describes 'composite procedures' on p 2 as 'implementing procedures for EU law involve actors from several jurisdictions, both national and EU, applying law from various levels'. Also, discussed by G Gentile and O Lynskey, 'Deficient by Design? The Transnational Enforcement of the GDPR' (2022) 71 *International & Comparative Law Quarterly* 800.

[71] H Hofmann (n 68) 18.

[72] Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Art 12.

[73] Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, Art 8.

[74] Directive (EU) 2023/977 of the European Parliament and of the Council of 10 May 2023 on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/960/JHA.

[75] Council Regulation (EC) 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, Title V.

[76] Consolidated text: Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (Text with EEA relevance), Chapter V.

[77] The 'Union Maritime Information and Exchange System (SafeSeaNet)', Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, Art 14.

[78] Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) (Text with EEA relevance) Text with EEA relevance.

[79] Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 (Text with EEA relevance), Art 45.

procedural cooperation through the creation of composite procedures in legislative acts.

4.2. How could mutual trust impact upon Union citizenship?

Demonstrating the role of mutual trust in the internal market by focusing on transnational administrative law is more than merely incidental as an example of an EU mechanism that depends on mutual trust. The granting of national citizenship is an administrative act of one national authority that produces cross-border effects that create obligations for another national authority.

The connection between Union citizenship and the AFSJ was explicit in the Court's reasoning, which directly linked the alleged infringement of Article 20 TFEU and Article 4(3) TEU with the objective of the EU offering 'its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured through the existence of appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.[80] The Court then added that the AFSJ is made possible by the principles of mutual trust and mutual recognition,[81] and has achieved an area without internal borders for the benefit of Union citizens and their families to exercise their free movement rights, both as citizens and through the exercise of economic activity.[82]

This is a logical continuation of recent case law, such as *Alchaster*, where the Court of Justice stated that the obligation to consider that all other Member States comply with EU law and fundamental rights applies *particularly* in the AFSJ.[83] This means that, when implementing EU law, a Member State cannot check if another Member State is observing fundamental rights protected by EU law in a particular case.[84]

By basing Union citizenship on mutual trust, it is more possible than ever to reconceptualise the EU as an internal market – and the overlapping AFSJ – for the mutual recognition of administrative and judicial decisions. This means it is not just goods produced in one Member State that are allowed to be marketed and distributed in others, but the regulatory acts permitting their production and distribution in the Member State of production that are recognised as valid. Similarly, it is not just the EU citizen who is permitted to move and reside in another Member State, but the administrative document granting their citizenship in their home country that is accepted, as well as the procedure preceding its production.

This understanding of both Union citizenship and mutual trust demonstrates that the Court was correct as a matter of EU law to link the two institutions. However, doing so explicitly is not without risk. In the Court's case law, mutual trust is only

[80] *Commission v Malta* (n 1) para 84.
[81] Ibid para 85.
[82] Ibid para 87.
[83] Case C-202/24 *Alchaster*, ECLI:EU:C:2024:649, para 57.
[84] Ibid para 58.

contentious in those exceptional circumstances when the effect of mutual recognition of a national act results in a real risk of the concerned person's fundamental rights being violated.[85] The purpose of judicial review to determine if the presumption of mutual trust may be rebutted in a particular case is always about protecting the EU fundamental rights of the affected person at the expense of the near automaticity required by EU law.[86] According to Leloup et al, a manifest breach of any fundamental right, whether procedural or substantive, has the potential to override the presumption of mutual trust, particularly following the Court's judgment in *Real Madrid Club de Fútbol*.[87]

It would be very difficult to imagine a situation where a national refusal of EU citizenship rights (such as the third country national child of a Maltese citizen being charged the international level of course fees for a university programme rather than the fees paid by home students) would be about protecting the fundamental rights of the individual concerned. An alternative reading of the judgment is that the issue is not so much about refusing to recognise the free movement rights afforded to Maltese citizens who are also Union citizens in individual situations at all, but about refusing to recognise that (certain) Maltese citizens have the status of Union citizens in the first place, even if they are still Maltese (i.e. reading the judgment as representing an EU-level version of the *Kaur*[88] ruling). A literal reading of Article 20 TFEU demonstrates that it is only the exercise of rights contained in Article 20(2) TFEU that can be limited by EU law, and not the granting of Union citizen status, thus precluding this possible reading of the judgment.

However, this understanding of the judgment may help to explain why the Court emphasised the effects of EU citizenship status through mutual trust as part of a ruling on the lawfulness of a national citizenship acquisition scheme: the cross-border effects of EU citizenship require a degree of solidarity in a shared community, and since it cannot be inferred into Article 20(1) TFEU that EU citizenship can only be granted in accordance with EU law, the same constitutional value must be inferred into national citizenship. Mutual trust is the amplifier for the normative argument based on Article 2 TEU.

[85] E.g., Case C-261/22 *GN*, EU:C:2023:1017, para 57. AG Ćapeta in *GN* made the claim that the two-stage test for discerning the exceptional circumstances is the "guardian of the principle of mutual trust" (Case C-261/22 *GN*, ECLI:EU:C:2023:582, para 43). The Grand Chamber has also stated, in the context of the Brussels I Regulation (Recast), that a court may refuse to enforce a judgment on mutual trust grounds if enforcement would give rise to a *manifest breach* of a fundamental right in the Charter (Case C-633/22 *Real Madrid Club de Fútbol*, ECLI:EU:C:2024:843, para 44).

[86] For discussion of this point, see for example E Di Franco and M Correia de Carvalho, 'Mutual Trust and EU Accession to the ECHR: Are We Over the Opinion 2/13 Hurdle?' (2023) 8, *European Papers* 1221–1233.

[87] E Sandri, J Meeusen and M Leloup, 'The End does (not) Justify the Means: Mutual Trust and Fundamental Rights Safeguards after the ECJ's Real Madrid Judgment' (2025) *Maastricht Journal of European and Comparative Law* 14.

[88] See *Kaur* (n 8).

In summary, while it would be virtually impossible to do so, if a national authority were to rely on *Commission v Malta* to deny residence and associated rights to a Maltese national – and their family members – who had obtained citizenship through Malta's investor scheme, it would mark an unprecedented scenario. In such a case, the disapplication of a measure grounded in mutual trust (specifically, the recognition of Union citizenship status or the rights guaranteed by it) would, for the first time, cause the actual infringement of individual fundamental rights. These rights include the legitimate expectation that Maltese nationality confers EU residence rights, as well as protections for family life and economic activities. Such a limitation would be imposed in defence of an EU foundational value, solidarity, which underpins the concept of Union citizenship. That the investment citizenship beneficiary could still reside in Malta, as well as perhaps claim non-contractual damages against Malta before Maltese courts for the false representation of EU free movement rights,[89] is cold comfort, even if the judgment is constitutionally correct and appropriate.

5. The practical outcome of the judgment: legal certainty and existing beneficiaries

When the Commission commences an action for infringement against a Member State under Article 258 TFEU, it is fulfilling its role of ensuring that Member States give effect to EU law.[90] The procedure under Article 258 TFEU presupposes an objective finding that a Member State has failed to fulfil its obligations under EU law,[91] and judgments of the Court are declaratory in nature. As discussed by Advocate General Medina in his recent Opinion in *Commission v Hungary (UN Commission on Narcotic Drugs)*, rulings given under Article 258 TFEU do not identify any specific measures a Member State must adopt in order to put an end to an infringement of EU law.[92] The judgment as such does not have automatic legal effects outside the Maltese legal system, and it also cannot have the effect of requiring Malta to change the law in a prescribed manner or even at all.[93] Bringing Malta's naturalisation regime in line with the requirements of the judgment is now a matter for negotiations between the Commission, as guardian of the Treaties under Article 17 TEU, and the Maltese authorities. The Maltese authorities have already taken the first step in this direction. At the time of publication, the Maltese Parliament had held the first reading of an amendment to

[89] Under the normal principles of state liability for sufficiently serious breaches of EU law, see the Opinion of AG Hogan in Case C-497/20 *Randstad Italia*, ECLI:EU:C:2021:725, para 79 and cases cited therein.

[90] Case C-20/09 *Commission v Portugal*, ECLI:EU:C:2011:214, para 41.

[91] Case C-336/16 *Commission v Poland*, EU:C:2018:94, paras 61 and 62; Case C-620/16 *Commission v Germany*, ECLI:EU:C:2019:256, para 40; Opinion of AG Ćapeta in *Commission v Hungary* (n 5) para 33.

[92] Opinion of AG Medina in Case C-271/23 *Commission v Hungary*, ECLI:EU:C:2025:128, para 33, and cited case law.

[93] Ibid.

align the law with the CJEU's judgment.[94] Considering the judgment in the context of its value-laden reasoning, however, allows for two additional observations to be made.

Firstly, while the reasoning of the Court in reaching its decision underscores the centrality of mutual trust and EU values, its primary focus is systemic and constitutional in nature. At its core, mutual trust requires national authorities – whether administrative or judicial – to accept that their counterparts in other Member States are complying with EU law when they make decisions that have extraterritorial, horizontal effects within the EU. Now that EU citizenship is confirmed to be based on mutual trust, a national administrative authority or judicial body that refuses to recognise a migrant's citizenship of a Member State on grounds not already provided for in EU law would not only be in breach of the EU right being exercised but potentially also Article 4(3) TEU.[95] Furthermore, by adopting a naturalisation scheme that goes against the fundamental nature of EU citizenship, Malta has undermined that mutual trust which Member States have in, at a minimum, its naturalisation process, and to the maximum extent, in any personal documentation proving Maltese nationality.

Semantics may play a role in what may happen next. The Court stated that transactional naturalisation is both contrary to sincere cooperation but also is 'liable, by its nature, to call into question the mutual trust which underlies that requirement of recognition'.[96] The last time the Court of Justice determined that Member State authorities may refuse to give effect to an EU law measure based on mutual trust (and its precursor, mutual confidence) as it applied to an individual Member State, on the grounds of systemic deficiencies in an entire administrative scheme of a Member State, was in *N.S.*, which concerned asylum procedures and reception conditions in Greece.[97] In that case, because Greece was structurally incapable of guaranteeing the fundamental rights of asylum seekers, other Member States could not be sure they wouldn't be liable themselves for breaching the same fundamental rights by sending asylum seekers to Greece pursuant to EU law.[98] That is where the similarities in the two judgments ends, since the effects on certain Maltese nationals is potentially the opposite to those for the asylum seekers who may have been transported to Greece

[94] Motion No. 381, First Reading of the Maltese Citizenship (Amendment) Bill.

[95] The judgment of the Court in Case C-158/21 *Puig Gordi*, ECLI:EU:C:2023:57 is an example of a failure of mutual trust resulting in a breach of the duty of sincere cooperation (particularly, see para 134). Further, in Case C-822/21 *Latvia v Sweden*, ECLI:EU:C:2024:373, the Court considered that a failure to fulfil the general obligation of sincere cooperation under Art 4(3) TEU is only possible if it covers conduct that is distinct from conduct amounting to an infringement of distinct obligations (para 98), and it may be considered that the individual expressions of free movement rights represent distinct obligations, thus removing the need to rely on Art 4(3) TEU in any event.

[96] *Commission v Malta* (n 1) para 101.

[97] Case C-411/10 *N.S.*, ECLI:EU:C:2011:865.

[98] Discussed by AG Sharpston in her Opinion in Case C-396/11 *Radu*, ECLI:EU:C:2012:648, para 76. See also, K Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (yet not blind) Trust' (2017) 54 *Common Market Law Review* 808–809.

to have their request for international protection processed. The door has theoretically now been opened for national authorities and courts to refuse to recognise the rights of certain Maltese citizens. This is a real, albeit unlikely, possibility, given that the judgment does not explicitly provide for temporal limitations.

The second point derives from the legal certainty problem with this judgment. Before the ruling, Malta's investor citizenship scheme was, at the very least, not unlawful under EU law, since the presumption was that Member States had exclusive competence to decide how a person becomes a citizen of that country. As articulated by Advocate General Collins in both *Préfet du Gers*[99] and *Commission v Malta*,[100] the Member States could have pooled competences and conferred on the Union the power to decide who may become an EU citizen, but they chose not to do so. Given the force of the constitutional language employed by the Court in the current judgment, it would be unthinkable for Malta to continue to operate its investor citizenship scheme.

At the same time though, should the authorities of a host Member State determine that an existing beneficiary of the Maltese investment citizenship scheme does not have the right to exercise the rights and benefits that come with the status of EU citizenship, it would not necessarily follow that to do so goes against anything the Court stated in *Micheletti*. EU law requires a proportionality assessment of the affected individual's circumstances.[101] What EU law cannot do is deny Maltese citizenship to beneficiaries of the scheme, and this cannot be a consequence assumed from the judgment. Furthermore, even if a Member State authority chooses to exercise its authority to deny residence rights to a Maltese beneficiary of the scheme, as a matter of practicalities it would be difficult to determine initially that a Maltese citizen acquired their citizenship under a scheme that infringes EU law, as a Maltese passport or valid ID should be enough to prove a right of entry and residence in the host Member State.[102] Malta could require that the passports of investment citizenship schemes contain information to that effect, which would make it easier for other Member State authorities to distinguish which Maltese citizens should be investigated prior to granting rights that are reserved for EU citizens and their families.[103] Technically, it would not be prohibited from a policy of reverse discrimination

[99] Opinion of AG Collins in Case C-673/20 *Préfet du Gers*, ECLI:EU:C:2022:129, para 22.

[100] AG Collins in *Commission vs Malta* (n 6) para 44.

[101] E.g. Joined Cases C-684/22 to C-686/22 *Stadt Duisburg (Loss of German nationality)*, EU:C:2024:345, para 42 and cited case law.

[102] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, Art 5(1) (right of entry with a valid passport or ID) and Art 6(1) (right of residence for up to 3 months with a valid passport or ID).

[103] How national authorities would perform the same task as it relates to the third country national family members of the Maltese national is another matter entirely.

against its own citizens in this way.[104] Also, if it chooses not to repeal the investor citizenship scheme, it may be required to do something along these lines in order to comply with the duty of sincere cooperation.

This highlights a clear problem with the judgment. The Court could have concluded that Union citizenship is an expression of the Article 2 TEU value of solidarity and then concluded on that basis that the Maltese scheme infringed Article 20 TFEU and Article 4(3) TEU by reducing the acquisition of citizenship to a transaction. Beneficiaries of the scheme should not thus be entitled to the status of an EU citizen. This argument would have essentially added new text to Article 20 TFEU in order to achieve a particular result. The Court could alternatively have concluded that the Maltese scheme infringed the value of solidarity in Article 2 TEU as expressed in Union citizenship and in doing so undermined the mutual trust necessary for cross-border recognition of that status as it applies to Maltese citizens. An infringement on this basis would apply the same normative grounds, albeit with different effects, since this argument only indirectly targets the national scheme at issue by focussing on its effects on the internal market. Instead, the Court chose to find an infringement of EU law based on both the national status and the cross-border effects of it. Both are arguably correct statements of EU law, but it isn't obvious that both are strictly necessary for the purpose of resolving the problem with Malta's investor citizenship scheme.

6. The wider influence of Article 2 TEU on the EU legal order

The pattern of infusing EU rights with the values in Article 2 TEU is now an established feature of the Court's jurisprudence. Union citizenship is one of the principle concrete expressions of the solidarity which 'is an integral part of the identity of the European Union as a specific legal system'.[105] Additionally, Article 22 TEU, which allows EU migrants to participate in municipal and European Parliamentary elections, gives concrete expression to the principles of democracy and equal treatment of EU citizens, which are also 'an integral part of the identity and common values of the European Union'.[106] This is because the 'functioning of the European Union is to be founded on the principle of representative democracy, which gives concrete form to the value of democracy referred to in Article 2 TEU'.[107] These references to EU values in Article 2 TEU repeatedly confirm the scheme developed in the *Rule of Law Conditionality Mechanism* judgments, namely that actions of the Member

[104] Not unlike Scotland charging university fees only to students from England, Wales and Northern Ireland but not Scotland or the EU, when the UK was a Member State.

[105] *Commission v Malta* (n 1) para 93.

[106] Case C-814/21 *Commission v Poland*, ECLI:EU:C:2024:963, para 159; Case C-808/21 *Commission v Czech Republic*, ECLI:EU:C:2024:962, para 162.

[107] Case C-502/19 *Junqueras Vies*, EU:C:2019:1115, para 63.

States can be challenged in infringement proceedings for a breach of any values in Article 2 TEU, but only when they are given concrete expression in principles containing legally binding obligations for the Member States.[108]

This reading of the normative application of Article 2 TEU values lends further credence to the prediction that the final judgment in the current infringement proceedings against Hungary concerning its LGBTIQ+ laws will be a finding against Hungary and at least partly on the basis of Article 2 TEU. The Commission in that case alleges a breach of numerous EU laws, as well as Article 2 TEU, which the Commission agent on being questioned before the CJEU in the oral proceedings suggested could not be applied autonomously, but rather through other obligations.[109] Since functionally the Hungarian law could be challenged solely on the basis of EU secondary laws, this raises the question about the added value of relying also on Article 2 TEU. In the Opinion of Advocate General Ćapeta in *Commission v Hungary*, it was put forward that Art 2 TEU values are deliberately abstract, on the grounds that their open content 'leaves room for constitutional dialogue between Member States and the parallel existence of different "concretisations" of values'.[110] Going further than the Grand Chamber in the *Rule of Law Conditionality Mechanism* judgments, the Advocate General asserts that 'Article 2 TEU expresses the choice of the founders of the European Union as to the type of society that the Member States have pledged to create together within the framework of the European Union'.[111] The 'vision of what a good society is in the EU constitution' is expressed in Article 2 TEU, and when the values are read together, they paint a picture of *a constitutional democracy that respects human rights*.[112]At the same time, the Advocate General acknowledges that the values in Article 2 TEU are interrelated, and that the 'finding of the breach of one of them is an indication about the negation of the model of a constitutional democracy that is based on the respect of human rights by the Member State at issue', which results in a 'deviation from the model of society as set out in Article 2 TEU'.[113] Further, since in infringement proceedings, the Court is only being asked to determine what cannot be tolerated – whether a Member State has

[108] Case C-156/21 *Hungary v Parliament and Council*, EU:C:2022:97, para 232; Case C-157/21 *Poland v Parliament and Council*, EU:C:2022:98, para 264; Case C-814/21 *Commission v Poland*, ECLI:EU:C:2024:963, para 157; Case C-808/21 *Commission v Czech Republic*, ECLI:EU:C:2024:962, para 160.

[109] Case C-769/22 *Commission v Hungary*, pending; see also, W Bruno, 'Op-Ed: "Three Questions to rule (on) them All: the full Court Hearing in the Case Commission v. Hungary on the Justiciability of EU Values against Member States (C-769/22)' (EU Law Live, 25 November 2024), at eulawlive.com; L Rossi, '"Concretised", "Flanked", or "Standalone"? Some Reflections on the Application of Article 2 TEU' (2025) 10 *European Papers* 1–24, 22.

[110] AG Ćapeta in *Commission v Hungary* (n 5) para 203.

[111] Ibid para 155.

[112] Ibid para 157.

[113] Ibid para 265.

crossed 'red-lines' – and not to determine the content of the values involved,[114] the finding of a breach of Article 2 TEU is the negation of a value which is the 'root cause of other breaches of EU law'.[115]

Bonelli and Claes, for example, have expressed concern that a Court that adjudicates on the basis of 'political' values rather than on clear legal rules may not adequately contribute to the protection of EU values.[116] Rossi takes a view much closer to that provided by Advocate General Ćapeta in her Opinion, asserting that the novelty of the Hungarian legislation at issue is that collectively it appears to violate almost all of the values and principles in Article 2 TEU, challenging the very model of values and common identity of the Union.[117]

Equally, the use of Article 2 TEU may be a necessary addition in infringement proceedings, if the national act under review is both of a systemic/structural nature and is so severe that it undermines core features of the EU legal order as a constitutional order.[118] As Spieker points out, the Charter does not cover threats of a structural or institutional nature detached from individual rights violations, and also, that not every value has a fundamental rights counterpart.[119] The limitation on its use would be, as demonstrated by the Court thus far, in the structural nature of the national measure at issue and the significance of the effect of the measure on the basic tenets of the EU's identity.

At the same time, even if this is warranted, or even necessary, the values in Article 2 TEU are common to the Member States; in situations where the Court applies them negatively to answer the binary question of whether the national measure is or is not in breach of any value, each iteration adds substantive flesh to those values, making them more supranational in character.[120] In any event, both the judgment in *Commission v Malta* and the Opinion of the Advocate General in *Commission v Hungary* represent a new direction for the protection of rights in EU law. During the first phase,

[114] Ibid para 212.

[115] Ibid para 247.

[116] M Bonelli and M Claes, 'Crossing the Rubicon? The Commission's use of Article 2 TEU in the Infringement action on LGBTIQ+ rights in Hungary' (2023) 30 *Maastricht Journal of European and Comparative Law* 3–14, 12.

[117] L Rossi (n 109) 18.

[118] A pertinent example based on severity of harm is the infringement proceedings against Poland following rulings of the constitutional tribunal that Arts 2, 4(3) and 19(1) TEU were unconstitutional. According to AG Spielmann in Case C-448/23 *Commission v Poland*, ECLI:EU:C:2025:165, para 94 this represents a 'manifest infringement' and disregards all the values and obligations which the Treaties impose on the Member States .

[119] L Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 *German Law Journal* 1187.

[120] And therefore coming closer to the homogeneity clause, or a core minimum of constitutionality. See, e.g. A Von Bogdandy and L Spieker, 'Die Verfassungsprinzipien' in J Bast and A von Bogdandy, *Unionsverfassungsrecht. Eine Neubestimmung anhand der Grundlagen im EU-Vertrag* (Nomos 2024) 123–178, 149–150; P Cruz Mantilla de los Ríos, 'European Constitutional Identity as the Unamendable Core of the EU Treaties' (2024) 20 *European Constitutional Law Review* 545–568.

the Court of Justice incorporated human rights into EU law through the general principles of EU law. In the second phase, fundamental rights, which includes the protection of human rights, were given application through the EU Charter, subject to the limitation in Article 51(1) CFR.[121] With the third wave of protection, national laws can be challenged for compliance with EU law when they manifestly disregard (*Commission v Malta*) or, potentially, negate (Advocate General Ćapeta in *Commission v Hungary*) the values in Article 2 TEU, and have the effect of undermining the type of society that the Member States have pledged to create.[122]

Nevertheless, it is difficult to envisage what new role the relationship of solidarity and good faith could play as a normative concept in EU law applicable to Union citizenship. The relationship between a citizen and the State is a deeply personal one that cannot be so readily reduced to a legal test of general application to review Member States' naturalisation or citizenship laws.[123]

There may still be an internal logic that can be deduced from the judgment that necessitates a finding that national citizenship is connected in some way to the value of solidarity in Article 2 TEU, even if it is not exactly a concrete manifestation of it but something more akin to the 'real link'. Firstly, the majority of rights that attach to Union citizenship manifest when a citizen exercises free movement within the Union, and so the solidarity inherent in Union citizenship is undermined when Malta accepts payments from individuals to become citizens and then those individuals move to and reside, with their families, to another Member State, where they then benefit from public services provided for by the State on a non-discriminatory basis. The problem from an internal market perspective therefore stems from the mutual recognition of Maltese citizenship rather than the granting of Maltese citizenship itself. Secondly, if the judgment was normatively framed exclusively around this issue, then the legal solution would be to potentially deprive Maltese citizens of their free movement rights on the grounds that certain Maltese citizens may not possess the necessary bond of solidarity to be Union citizens, resulting from a systemic breach of a value in Article 2 TEU. This normative argument only indirectly concerns the Maltese investor citizenship scheme itself, since it would be the Union citizenship status derived from successfully concluding the national naturalisation scheme that is undermined. Which is why, thirdly, the Court needed to extend the scope of Article 2 TEU also to national citizenship, as being based on solidarity and good faith. This is quite a leap, but perhaps a necessary one: Union citizenship is an expression of a value in Article 2 TEU, and since the EU status is derived from the

[121] When Member States are acting within the scope of EU law, see Case C-617/10 *Åkerberg Fransson*, ECLI:EU:C:2013:105, para 19.

[122] To use the language of AG Ćapeta in *Commission v Hungary* (n 5) para 158.

[123] Even if non-representative, a significant proportion of the people of Northern Ireland would not consider their relationship with the United Kingdom as one of solidarity and good faith, and yet once they 'activate' their Irish citizenship birthright, they must reside within the administrative borders of Ireland in order to exercise most of the rights associated with it.

national citizenship status pursuant to Article 20(1) TFEU, so it too must be based to some extent on the same value in Article 2 TEU. Thus, a transactional citizenship scheme infringes Article 20(1) TFEU by design, because it undermines the EU value on which it is based, thereby undermining the effect of the status, namely cross-border mutual trust in Maltese citizenship generally (resulting in a breach of Article 4(3) TEU), and in doing so undermining the solidarity in the national citizenship status it applies to, on the basis of both Article 20(1) TFEU and Article 4(3) TEU.

7. The continuation of an emerging pattern

Ever since the *Portuguese Judges* case, where the Court of Justice stated that Article 19(1) TEU was an expression of the value of the rule of law in Article 2 TEU, questions have existed about how far Article 2 TEU can be substantively interpreted and procedurally applied.[124] One possible avenue that has opened up with the Maltese judgment is that a national status of constitutional importance such as citizenship may have to be interpreted on the same normative basis as a corresponding status in EU law when the EU status is an expression of a value in Article 2 TEU. To a large extent, something similar has already been done to the administration of justice through a combined reading of Article 19 TEU, Article 2 TEU and Article 47 of the Charter.[125]

Secondly, a maximalist approach to interpreting this judgment, such as the one presented here, has other potential implications. Mutual trust requires Member States to presume that all the other Member States comply with EU law and fundamental rights. It is one thing for the Court of Justice to say that mutual trust is absent from a particular national scheme creating cross-border effects, giving limited license to other Member States to refuse to recognise the measures produced by that scheme. It is quite another thing should the day arrive that a Member State is found to be in breach of the values contained in Article 2 TEU on a more general and systematic basis pursuant to Article 7(2) TEU.

For example, during the rule of law crisis in Poland, it was argued that specific judicial cooperation measures based on mutual trust (such as the European Arrest Warrant) be suspended as they relate to Poland, on the grounds that the national judiciary lacked independence and therefore did not satisfy the requirements inherent in the value of the rule of law in Article 2 TEU and given concrete expression in

[124] R O'Neill, 'Effet Utile and the (Re)organisation of National Judiciaries: A Not so Unique Institutional Response to a Uniquely Important Challenge?' (2021) 27 *European Law Journal* 240–261; LD Spieker, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision' in A von Bogdandy, P Bogdanowicz, I Canor, C Grabenwarter, M Taborowski and M Schmidt (eds), *Defending Checks and Balances in EU Member States*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht (Springer 2021).

[125] And, more formally, to rights contained in the Charter that correspond with equivalent rights in the ECHR, pursuant to Art 52(3) CFR.

Article 19 TEU.[126] Beyond individual cases, Article 7 TEU remains the only currently available mechanism, albeit a political one, for finding that a Member State has seriously and persistently breached the values in Article 2 TEU. The proposition being made here is that, since mutual trust presumes respect for Article 2 TEU values, a confirmed breach of those values should lead to the judicially-sanctioned suspension of mutual trust regarding that Member State, independently of any sanctions established by the Council under Article 7(3) TEU.

There are strong arguments against this nuclear option, of course. In the Opinion in *Commission v Hungary*, for example, Advocate General Ćapeta defines the consequences that flow from Article 7 TEU are leading to the exclusion from decision-making at the EU level.[127] Yet the Advocate General also acknowledges the effect of a deviation from values is not internal to a Member State, but affects the functioning of the EU legal order and reduces that Member State's ability to comply with other obligations under EU law.[128] It is difficult to comprehend how a Member State that is found to have negated those values in infringement proceedings before the Court could still be capable of having its legal and administrative mechanisms immune from review by the courts of other Member States when they create cross-border legal effects, on the basis of mutual trust (once it is added into the mix).

And given that mutual trust is the basis for so much more than the instruments adopted within the AFSJ, and now also includes EU citizenship, any suspension applies not only to specific instruments but to the entirety of the free movement of people from that Member State. This has not hitherto been considered as an obvious consequence of a serious breach of Article 2 TEU.

8. Conclusion

The judgment of the Court in *Commission v Malta* is a landmark decision, and not because it is the first time the Court has ruled that the mechanism for granting national citizenship breaches EU law, though this is undoubtedly a huge milestone – or rubicon, depending on the reader's persuasion.

The big constitutional innovation is the confirmation that Union citizenship is one of the principle concrete expressions of the value of solidarity that is 'an integral part of the identity of the European Union as a specific legal system',[129] and, to a lesser extent, that it is based on mutual trust. With these two developments, the author will dare to predict that the former will directly or indirectly result in a large

[126] For example, P Bárd and A Bodnar, 'The End of an Era. The Polish Constitutional Court's Judgment on the Primacy of EU Law and Its Effects on Mutual Trust' (2021) *CEPS Policy Insights* 1.

[127] Opinion of AG Ćapeta in *Commission v Hungary* (n 5) para 122.

[128] Ibid para 242.

[129] *Commission v Malta* (n 1) para 93.

volume of academic commentary and the latter may potentially result in a novel avenue for future litigation.[130]

The reason for the cynical assessment of the first development is to do with the lack of added value in normatively defining citizenship status in terms of values, even if this is juxtaposed onto all communities generally. Citizenship and its meaning are personal to every individual and their identity and often have little to do with belonging or solidarity and perhaps have more to do with practical convenience.

On the second development, by concluding that the Maltese scheme undermines mutual trust, the status of Union citizenship for Maltese beneficiaries of the scheme may potentially not be recognised abroad. This cannot though affect the existence of citizenship status in Malta itself, which is a matter for the Maltese State and those who it deems to be a citizen. This is a problematic reading of the judgment, however: the authorities of a host Member State would not be refusing to recognise the rights of a Maltese EU citizen migrant so as to protect their fundamental rights, but rather to protect an EU value. Doing so may even cause the rights of the individual to be denied, which would be unprecedented in the mutual trust case law concerning fundamental rights.

The grounding of Union citizenship and associated free movement rights in mutual trust also has a potentially much wider scope of application: as a tool to prevent and punish EU value backsliding. That now includes free movement and residency rights for citizens of a Member State that deviates so far from the common values of the Member States that such an outcome becomes necessary.

Regarding mutual trust more generally, a pattern is emerging: where EU law does not fully harmonise an administrative or judicial procedure which has cross-border effects, mutual trust is the adhesive substance, the glue that holds the inherent legal-systemic diversity together: constitutional Polyfilla.

[130] There will need to be at least one preliminary reference from a national court asking the Court of Justice what test should be applied before denying rights to Maltese citizens in the host Member State.

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