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‘Emergency Powers’ of the European Union: An Inquiry on the Supranational Model

*Claudia Cinnirella**

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ABSTRACT: What role do emergency powers play under the EU Treaties, and how might they be further developed? At present, these questions are difficult to answer. Due to the hybrid nature of its legal order, situated between a fully-fledged federation and an international organization of sovereign states, the European Union’s approach to emergencies has drawn on both international and domestic models of emergency powers. Still, when measured against these derivative models, emergency powers in the EU are difficult to assess in terms of their supranational distinctiveness. The emergency paradigm has yet to function as a regulative ideal within the Union. Through a systematic interpretation, supported by institutional practice and judicial interpretation, this paper examines a number of emergency legal bases, namely, Article 42(7) TEU, and Articles 78(3), 122(1) and (2), 143(2), and 222 TFEU, and brings them into a cohesive system. While these provisions coexist with other instruments applicable in emergency contexts, they also exhibit specific differences and, taken together, may be read as establishing a core framework for EU emergency powers that reflects the EU’s distinctive characteristics and functions, with potential for further development. The paper therefore explores key elements of this emerging ‘supranational model’, including who can declare an emergency, under what conditions it can be declared, which actors are vested with special powers during an emergency, and whether emergency measures may restrict fundamental rights. It also considers the European Parliament’s recent proposal to insert an emergency clause into the TFEU and how the EU system of emergency powers might be further developed.

KEYWORDS: emergency powers – crisis – emergency clauses – emergency constitution – treaty revision – safeguard clauses.

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1. Introduction

Over the years, the European Union (EU) has developed considerable expertise in preventing, managing, and mitigating emergencies while simultaneously containing and addressing their effects. Risk regulation, crisis management, and, more recently, emergency powers have progressively evolved as distinct yet interconnected fields, each designed to address emergencies with specific objectives, instruments, and structures.

Risk regulation aims to reduce the likelihood of adverse events, enhancing the EU's capacity to prevent disasters.¹ This domain pertains to day-to-day activities and operates through ordinary procedures governing requirements, inspections, and potential interventions to enhance preparedness and prevent crises. Crisis management ideally begins where risk management ends.² It handles large-scale 'risks come true' through structured frameworks, combining response mechanisms, crisis-coordination centres, and timely decision-making, while coordinating the Union's response with Member States' actions.

When an emergency arises, urgency exists but the existing crisis-management framework proves insufficient, emergency powers should come into play. This domain pertains to 'emergency' governance, involving procedures and measures that are exceptions or derogations from the 'ordinary' ones.³ Emergency powers may grant the EU authority to rapidly act through dedicated decision-making procedures for the adoption of last-resort, time-limited measures that may deviate from the ordinary legal framework.

While risk regulation and crisis management have attracted substantial academic and institutional attention in EU law, the domain of emergency powers remains nebulous. What role do emergency powers play within the EU Treaty framework and

¹ See E Vos, 'Three Decades of EU Risk Regulation Research' (2017) 8 *European Journal of Risk Regulation* 47–51; A Burgess, A Alemanno and J Zinn (eds), *The Routledge Handbook of Risk Studies* (Routledge 2016); HW Micklitz and T Tridimas (eds), *Risk and EU Law* (Edward Elgar 2015); G Majone, *Regulating Europe* (Routledge 1996).

² See A Boin, M Ekengren and M Rhinard, *The European Union as Crisis Manager: Patterns and Prospects* (Cambridge University Press 2013); I Govaere and S Poli, 'Introduction to EU Governance of (Global) Emergencies, Threats and Crises' in I Govaere and S Poli (eds), *EU Management of Global Emergencies* (Brill Nijhoff 2014) 1; M Gestri, 'EU Disaster Response Law: Principles and Instruments' in A de Guttry, M Gestri and G Venturini (eds), *International Disaster Response Law* (Springer 2012) 105; A Antoniadis, R Schütze and E Spaventa (eds), *The European Union and Global Emergencies: A Law and Policy Analysis* (Hart 2011); P Larsson, E Hagström Frisell and S Olsson, 'Understanding the Crisis Management System of the European Union' in S Olsson (ed), *Crisis Management in the European Union: Cooperation in the Face of Emergencies* (Springer 2009) 1.

³ The theme has been famously addressed by C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press 1986) and further developed by G Agamben, *State of Exception* (University of Chicago Press 2011). See also A Green, *Emergency Powers in a Time of Pandemic* (Bristol University Press 2020); K Loewy, *Emergencies in Public Law: The Legal Politics of Containment* (Cambridge University Press 2016).

how might they be further developed? At this stage, these questions are difficult to answer as a matter of EU law.

A scholarly debate is emerging on how the EU should handle emergencies.⁴ A seminal work has already identified a number of provisions in EU primary law, referred to as *emergency competences*, specifically designed to enable the EU to take action in response to emergencies or, more broadly, unforeseen situations.⁵ The analysis includes five clauses, namely Articles 66, 78(3), 107(3), 122(1) and (2) Treaty on the Functioning of the European Union (TFEU) which are considered part of a 'complex and disparate set of rules found in many different parts of primary and secondary law', collectively labelled 'EU Emergency Law'.⁶ Although implicitly, this reading envisions a 'business as usual' approach,⁷ rejecting the idea that emergencies may justify any alteration of the ordinary scheme of EU governance. This implies that, while the EU legal system is perceived as being able to accommodate any situation it faces, EU emergency law is intended as ordinary EU law that specifically deals with emergencies.

From a political science perspective, a much-debated proposal argues that the EU's governance of emergencies is largely unregulated and currently relies on an 'extra-legal approach' to emergencies.⁸ This model acknowledges that, in certain circumstances, addressing extremely grave threats may require acting outside the legal order, sometimes even violating otherwise accepted constitutional principles.⁹ Building on that diagnosis, the author proposes strengthening the EU's emergency

⁴ The concepts of 'emergency' and 'crisis' are characterised by definitional challenges that make any legal distinction inherently complex and sensitive to framing. The definitional issue lies beyond the scope of this paper, which refers to both terms without drawing substantive distinctions. For further insights, see, G Bellenghi, 'Neither Normalcy nor Crisis: The Quest for a Definition of Emergency under EU Constitutional Law' (2025) *European Journal of Risk Regulation* 1; M Riddervold, J Trondal and A Newsome, 'European Union Crisis: An Introduction' in M Riddervold, J Trondal and A Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan 2021) 3, 7; F Schimmelfennig, 'Theorising Crisis in European Integration' in D Dinan, N Nugent and W Paterson (eds), *The European Union in Crisis* (Palgrave Macmillan 2017) 260; I Govaere and S Poli, 'Introduction to EU Governance of (Global) Emergencies, Threats, and Crises' in I Govaere and S Poli (eds), *EU Management of Global Emergencies* (Brill Nijhoff 2014) 1; A Boin, P 't Hart and A McConnell, 'Crisis Exploitation: Political and Policy Impacts of Framing Contests' (2009) 16 *Journal of European Public Policy* 81.

⁵ B De Witte, 'Editorial Comment: EU Emergency Law and Its Impact on the EU Legal Order' (2022) 59 *Common Market Law Review* 3.

⁶ Ibid. 5. De Witte deliberately exclude from his analysis emergency provisions that require Member States to support each other in emergency situations, such as Article 42(7) TEU and Article 222 TFEU. The implicit reason seems to be that their primary function is to ensure mutual support among Member States during emergencies, rather than to primarily address emergency actions at the EU level.

⁷ O Gross and F Ni Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 86 ff.

⁸ C Kreuder-Sonnen, 'Does Europe Need an Emergency Constitution?' (2023) 71 *Political Studies* 133. Kreuder-Sonnen develops this position in C Kreuder-Sonnen, *Emergency Powers of International Organizations: Between Normalization and Containment* (Oxford University Press 2019) 198.

⁹ Gross and Ni Aoláin (n 7) 110 ff.

response by introducing a new emergency regime into EU law. This would take the form of a dedicated emergency clause, an ‘emergency constitution’, to render the exercise of emergency powers at the EU level more structured, less disruptive to the legal framework, and more reversible once conditions permit.

Another perspective, closely aligned with the previous view, advocates ‘constitutional accommodation’ as the optimal model for regulating emergency powers in the EU.¹⁰ According to this approach, because ordinary EU law may be insufficient to address certain emergency scenarios, a constitutional emergency framework should be designed in advance.¹¹ On this model, the author proposes an EU state of emergency to be regulated through an emergency clause inserted in the Treaties, essentially an emergency constitution, which the author also drafted.

The debate over the introduction of the emergency paradigm into the EU Treaties remains ongoing. Against this background, this paper seeks to advance the discussion on the regulation of emergency powers under EU law. Its central claim is that the EU Treaties already incorporate the emergency paradigm. While drawing on both international and national frameworks that constitutionally accommodate emergencies, the EU has progressively elaborated a distinct ‘supranational model’. This model is closely attuned to the Union’s unique characteristics and functions and, as such, holds significant potential for further development. A systematic analysis, supported by institutional practice and judicial interpretation, can help in clarifying this model’s main elements: who can declare an emergency, under what conditions it can be declared, which actors hold special powers during an emergency, and whether emergency measures can restrict fundamental rights.

Supporting this argument, section 2 examines constitutional and international law models that have influenced the evolution of EU emergency powers. Section 3 traces the development of those powers from an approach focused on Member States’ evasion from treaty obligations to one centred on the Union’s institutional responses to crises. It undertakes a systematic reading of a number of emergency legal bases, namely Article 42(7) Treaty on European Union (TEU) and Articles 78(3), 122(1) and (2), 143(2), and 222 TFEU, complemented by institutional practice and judicial interpretation. Section 4 analyses the common features that may bring these legal bases into a coherent system, enabling the EU to navigate the tension between political discretion and constitutional containment in times of crisis. Section 5 reflects on the recent European Parliament’s proposal for an ‘EU state of emergency’. Building on the preceding analysis, it suggests strengthening the current system of EU emergency powers while maintaining continuity with its historical and systematic development. Section 6 presents some conclusions.

¹⁰ J Fernández Arribas, ‘Regulating European Emergency Powers: Towards a State of Emergency of the European Union’ (Notre Europe Policy Paper 2024) institutdelors.eu 295.

¹¹ Gross and Ní Aoláin (n 7) 17 ff.

2. Conceptual framework: ‘models of constitutional accommodation’ in domestic and international law

2.1. Emergency provisions in constitutional documents

‘Models of constitutional accommodation’ offer a conceptual framework for this inquiry.¹² Accordingly, a legal order may accommodate emergencies by explicitly incorporating into constitutional documents provisions that permit temporary departure from normal principles and procedures, while including safeguards to ensure adherence to the rule of law and fundamental democratic values. The proponents of this model argue that existing ‘normal’ rules may not provide adequate responses to emergency scenarios and insist upon the maintenance of an emergency response within the confines of the law. Emergency powers thus serve a conservative function, by governing the emergency and facilitating the restoration of the ‘normal’ legal order once the extraordinary circumstances have ceased.

Many systems across the EU adhere to this model.¹³ Their constitutional documents often include explicit and detailed emergency provisions, usually referred to as an ‘emergency constitution’,¹⁴ which specify conditions, procedures and limits for the exercise of emergency powers. Despite significant divergences, it is possible to identify the main recurrent components.¹⁵

Firstly, emergency powers require a definition of the circumstances under which they can be activated. Most European constitutions distinguish between types of emergencies, describing the factual circumstances under which a declaration of a particular emergency regime may be constitutionally permissible.¹⁶ When different regimes co-exist, emergency powers are tailored and, at the same time, limited in connection with a particular type of emergency.¹⁷ Such classification methods affect the method by which an emergency regime may be declared, its duration, and the extent and scope of emergency powers granted.¹⁸ Other national constitutions, however, recognize only one type of state of emergency, which may be activated through a specific declaration

¹² Gross and Ní Aoláin (n 7) 35 ff; see also J Ferejohn and P Pasquino, ‘The Law of the Exception: A Typology of Emergency Powers’ (2004) 2 *International Journal of Constitutional Law* 210.

¹³ Gross and Ní Aoláin (n 7) 35 ff.

¹⁴ B Ackerman, ‘The Emergency Constitution’ (2005) 113 *Yale Law Journal* 1029.

¹⁵ C Bjornskov and S Voigt, ‘The Architecture of Emergency Constitution’ (2018) 16 *International Journal of Constitutional Law* 101, 106; see also D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006).

¹⁶ For example, Articles 19 and 138 of the Portuguese Constitution distinguish between a ‘state of emergency’ and a ‘state of siege’; Articles 96 and 103 of the Dutch Constitution distinguish between the declaration of a ‘state of war’ and a ‘state of emergency’; Article 116 of the Spanish Constitution identifies three categories of emergencies, namely ‘state of alarm’, ‘state of emergency’ and ‘state of siege’, while leaving to an Organic Law (4/1981) the task to regulate them; Chapter XI of the Polish Constitution distinguishes among ‘martial law’, the ‘state of emergency’ and the ‘state of natural disaster’.

¹⁷ Gross and Ní Aoláin (n 7) 45.

¹⁸ *Ibid.* 41.

with a set of explicitly listed circumstances justifying its activation.¹⁹ This approach bypasses many definitional difficulties while granting the government access to the full range of emergency instruments to govern a crisis scenario.²⁰

Secondly, emergency constitutions include procedures to declare an emergency. In some cases, the state of emergency is triggered or authorized by the Parliament, sometimes initiated, or following consultation with the executive branch.²¹ In other cases, it is the President of the Republic²² or the Government²³ that proclaims a state of emergency after consultation with certain institutional figures. The point of equilibrium depends on the nature of the emergency and the constitutional culture within a particular legal system. The principle of temporal duration usually requires that states of emergency are short-lived, and emergency measures are limited in time. Emergency powers may be granted for a fixed period, extendable only with legislative approval or constitutional amendment,²⁴ may have an indeterminate duration while being subject to regular legislative or judicial review,²⁵ or may be subject to a maximum duration beyond which they cannot be extended.²⁶

Another important component for the exercise of emergency powers is the definition of the authority to legislate during emergencies. Emergency constitutions often regulate horizontal and vertical transfers of powers, leading to the expansion of the executive power and concentrations of such power in its hands.²⁷

The system of checks and balances is also crucial. Granting the executive the power to act in a discretionary realm beyond the ordinary constitutional boundaries poses the risk of both excessive measures and a perpetuation of the emergency regime. Parliamentary and judicial controls over both the declaration and prolongation of the state of emergency, as well as over emergency measures, are thus crucial for the safeguarding of the constitutional architecture. Parliaments may exercise control at different stages (declaration, prolongation, and termination of a state of emergency, application of emergency powers) by reviewing the state of emergency at regular intervals and/or suspending it. Judicial review may be limited to the procedural and/or substantive aspects of the declaration of the state of emergency, or it may also concern emergency measures adopted.

¹⁹ For example, Article 29 of the Mexican Constitution refers to ‘case of invasion, serious breach of the peace or any other event which may place society in severe danger or conflict’. See also Article 37(1)(a) of the South African Constitution. See Gross and Ní Aoláin (n 7) 45.

²⁰ Bjornskov and Voigt (n 15) 106 ff.

²¹ See Article 51, Hungarian Constitution; Article 116(4), Spanish Constitution.

²² See Article 16, French Constitution; Article 229, Polish Constitution; Article 134(d), Portuguese Constitution.

²³ See Articles 116 (2) and 3(3), Spanish Constitution; Article 62, Latvian Constitution.

²⁴ See Article 16, French Constitution.

²⁵ See Article 115I, German Constitution.

²⁶ See Article 19(5), Portuguese Constitution.

²⁷ Gross and Ní Aoláin (n 7) 58 ff; J Petrov, ‘The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?’ (2020) *The Theory and Practice of Legislation* 71.

Lastly, constitutions usually assess whether fundamental rights may be limited or even suspended by the exercise of emergency powers.²⁸ Constitutions may exclude the option to suspend rights in case of emergency,²⁹ may design a regime of limitation of fundamental rights while identifying a list of those that may not be subject to any restriction,³⁰ or may provide for a regime of suspension of certain fundamental rights.³¹

2.2. Emergency provisions in international Treaties

In a different yet complementary fashion, international law accommodates emergencies by primarily relying on the capacities and powers of individual states.³²

Major human rights treaties establish a regime for the derogation of specific rights, allowing state parties to temporarily adjust their treaty obligations during emergencies.³³ Derogation refers to the temporary relaxation of certain individual rights obligations by states, as permitted by law, in exceptional circumstances. Derogation clauses balance the protection of ‘reason of state’ during emergencies with the imperative to safeguard human rights also in times of extreme danger.³⁴ Noteworthy examples include Article 4 of the International Covenant on Civil and Political Rights (ICCPR), Article 15 of the European Convention on Human Rights (ECHR), and Article 27 of the American Convention on Human Rights (ACHR).³⁵

Circumstances justifying a derogation are typically related to the life of the nation-state, such as war or other public emergencies that threaten the life, the independence, or the security of a State. They mostly coincide and tend to overlap with the activation of emergency powers at the national level.³⁶

²⁸ Gross and Ní Aoláin (n 7) 57 ff; V Piergigli, *Diritto costituzionale dell'emergenza* (Giappichelli 2023) 218 ff.

²⁹ See Article 113, Luxembourgish Constitution.

³⁰ See Article 57(3), Bulgarian Constitution; Article 17, Croatian Constitution; Article 103(2), Dutch Constitution; Article 233, Polish Constitution; Article 19(6), Portuguese Constitution.

³¹ See Article 183(2), Cypriot Constitution; Article 48(1), Greek Constitution.

³² For the application of constitutional accommodation models to international law, Gross and Ní Aoláin (n 7) 247.

³³ D Kretzmer, ‘Emergency, State of’ in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law, online edn, 2021); R Higgins, ‘Derogations Under Human Rights Treaties’ in R Higgins, *Themes and Theories* (Oxford University Press 2009) 457; G Cataldi, ‘Le deroghe ai diritti umani in stato di emergenza’ in L Pineschi (ed), *La tutela internazionale dei diritti umani* (Giuffrè 2006) 752; D McGoldrick, ‘The Interface Between Public Emergency Powers and International Law’ (2004) 2 *International Journal of Constitutional Law* 380.

³⁴ G Cataldi, ‘Le deroghe ai diritti umani in stato di emergenza’ in L Pineschi (ed), *La tutela internazionale dei diritti umani* (Giuffrè 2006) 752, 753.

³⁵ Conversely, neither the Genocide Convention nor the Convention Against Torture permits any exceptions to the protections they provide.

³⁶ While Article 4 of the ICCPR requires that a state of emergency be officially proclaimed by a State Party, neither the ECHR nor the ACHR contains an equivalent express provision.

Procedural guarantees enshrined in the treaties, which pertain to the obligation of informing treaty bodies about the measures taken and the reasons behind them,³⁷ do not restrict the action of the international organization itself, but rather the State, pursuing its compliance with the treaty and upholding international jurisdiction over State actions. The obligation to notify a derogation to the necessary treaty body has the function of absolving the State from most of its obligations under the Treaties to the extent strictly required by the exigencies of the situation.³⁸ Furthermore, human rights treaties do not regulate the temporal duration of derogations, as this depends on national provisions regarding the state of emergency, nor do they regulate the system of checks and balances, as this is governed by national constitutions.

Emergencies may also find a place in international economic law, where several safeguard clauses allow a state party experiencing a situation of difficulty to adopt measures that derogate from treaty commitments. As with derogation clauses in human rights Treaties, safeguard clauses in economic law aim to restore, rather than replace, the ordinary legal regime, temporarily relying on national capacities to manage emergency situations. A significant increase in imports, a disequilibrium in the balance of payments, sectoral or regional difficulties, or the protection of essential security interests may allow for the temporary and provisional reintroduction of tariffs or trade barriers.³⁹ An illustrative example is the Security Exceptions of Article XXI of the General Agreement on Tariffs and Trade (GATT), which allows a World Trade Organisation (WTO) Member to maintain a trade barrier measure taken in time of war or another emergency in international relations for the protection of essential security interests.⁴⁰ A notification-and-consultation system is designed to ensure transparency and compliance with international obligations, and to facilitate the restoration of ordinary conditions when the emergency has ended.

Far rarer are international law provisions regulating the activation and control of emergency powers within the International Organisation itself. The most relevant ‘exception’ is Chapter VII of the United Nations Charter, which establishes a system providing for the temporal suspension of ordinary provisions during certain states of exception. Under Articles 41 and 43 of the UN Charter, the Security Council, which has the primary

³⁷ The ECHR requires a State Party to provide full information on the measures taken and their justification to the Secretary General of the Council of Europe and to the other States Parties. The ICCPR mandates that a State Party invoking derogation notify the other States Parties of the provisions of the Covenant from which it derogates and the reasons for the derogation, as well as inform the United Nations Secretary-General. Under the ACHR, notifications must be sent to the Secretary General of the Organization of American States and to the other States Parties to the Convention.

³⁸ The ICCPR, the ECHR and the ACHR specify certain fundamental rights as non-derogable (Articles 4(2), 15(2) and 27(2), respectively).

³⁹ See F Bestagno, *Le clausole di salvaguardia economica nel diritto internazionale* (Giuffrè 1998) 56 ff. The author distinguishes economic safeguard clauses from security exceptions despite the difference may be blurred in practice.

⁴⁰ E Baroncini, ‘UE, Covid-19 e commercio internazionale: una nuova governance sugli healthcare products?’ (2020) 3 *Il Diritto dell’Unione Europea* 539.

responsibility for the maintenance of international peace and security, can issue binding resolutions authorizing the use of military force in specific circumstances.⁴¹

3. From a system of safeguard clauses to a system of emergency clauses: the changing shape of EU emergency powers

3.1. The centrifugal effect of safeguard clauses

Models of constitutional accommodation may also be apt for analysing the EU Treaty framework.⁴² Due to the hybrid nature of its legal system, located between a fully-fledged federation and an international organisation of sovereign states, the European Union's approach to emergencies has drawn on both international and domestic constitutional models.

As primarily economic agreements, the EU Treaties initially addressed emergencies by relying on a system of safeguard clauses, which were widely present in the areas of economic policy, the customs union, the capital market, and trade policy.⁴³ These clauses were intended to protect state sovereignty by allowing Member States, in exceptional circumstances, to temporarily derogate in whole or in part from the Treaties, while simultaneously constraining their actions through a set of procedural rules and controls.⁴⁴ At a time when EU institutions were not yet equipped to handle crisis scenarios, the system of safeguard clauses was essential for protecting the functioning of the emerging Community and ensuring its survival by relying on national emergency interventions.⁴⁵

Many safeguard clauses originally included within the Treaties were linked to the transitional period and gradually disappeared through successive Treaty amendments. This was the case with the general escape clause enshrined in Article 226 Treaty establishing the European Economic Community (EEC Treaty), which allowed a Member State facing serious economic difficulties to take safeguard measures to restore stability in the affected economic sector.⁴⁶ A reduced number of safeguard clauses

⁴¹ C Kreuder-Sonnen, *Emergency Powers of International Organizations: Between Normalization and Containment* (Oxford University Press 2019); J Schott, 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency' (2008) 6 *Northwestern Journal of International Human Rights* 24; K Lane Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11' (2004) 6 *University of Pennsylvania Journal of Constitutional Law* 1001; E de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart 2004).

⁴² Fernández Arribas (n 10) 8 ff.

⁴³ A Accolti-Gil, 'Il sistema normativo del Trattato CEE per la tutela degli interessi nazionali dopo la fine del periodo transitorio' (1977) 17 *Rivista di diritto europeo* 111; MA Lejeune, *Un droit des temps de crises: les clauses de sauvegarde de la CEE* (Bruylant 1975); P Gori, *Les clauses de sauvegarde dans les traités CECA et CEE* (Édition UGA 1967).

⁴⁴ Accolti-Gil (n 43) 128.

⁴⁵ Ibid. 113, 129.

⁴⁶ Other examples can be found in Articles 17(4) and 26(1) of the EEC Treaty on the Customs Union; Articles 44 and 46 of the TEEC on the Common Agricultural Policy; Article 73(2) of the TEEC on the movement of capital; and Article 115 of the TEEC on the common commercial policy.

have persisted to the present day, still providing the EU Treaties with the flexibility typically required by international agreements. Among others,⁴⁷ this is the case of Article 347 TFEU which currently reserves Member States the power to deviate from EU rules to protect public security interests in exceptional circumstances, such as serious internal disturbances, war, or state of international tension.⁴⁸

An important use of safeguard clauses for managing emergencies also appears in the EU Acts of Accession, beginning with the first enlargement. While early Acts of Accession primarily included a general economic safeguard clause, later instruments (from 2003 onward) added specific internal-market and justice-and-home-affairs safeguard clauses.⁴⁹ These clauses have functioned as a safety net in the initial years of membership, facilitating smooth integration when serious problems arise and the acceding state is temporarily unable to fully rely on EU law. They protect both the acceding state and other Member States, which may be endangered by a distorted application of EU law during the transitional period following enlargement. For instance, the general economic safeguard clause has enabled new Member States, as well as the EU itself and other Member States, to adopt necessary protective measures, including limited derogations from EU law and the Act of Accession, where serious and persistent economic difficulties arise or where the economic situation of a particular region risks deteriorating.

3.2. The centripetal effect of EU emergency powers

Along with the surviving safeguard clauses, the EU Treaties have progressively included provisions empowering EU institutions to adopt emergency measures for handling certain crisis scenarios. In the field of economic policy, the Treaty of Rome already included Article 143(2) TFEU and the precursor to the current Article 122(1) TFEU. The Treaty of Maastricht later revised Article 122(1) and added Article 122(2) TFEU. The Treaty of Amsterdam introduced Article 78(3) TFEU in migration policy, while the Treaty of Lisbon further strengthened the framework with Article 222 TFEU, known as ‘the solidarity clause’, and Article 42(7) TEU, known as the ‘mutual defence clause’, in the field of the Common Security and Defence Policy.

⁴⁷ Other illustrative examples include Article 72 TFEU, Article 107(2), third line, TFEU, Article 143(3) TFEU, Article 144 TFEU, Article 346 TFEU.

⁴⁸ See P Koutrakos, ‘Public security exceptions and EU free movement law’ in P Koutrakos, N Nic Shuibhne and P Syrpis (eds), *Exceptions from EU Free Movement Law* (Hart 2016) 190, 208 ff.

⁴⁹ See, for example, Articles 37–39 of the Treaty of Accession of Croatia (2012); Articles 36–38 of the Treaty of Accession of the Republic of Bulgaria and Romania (2005); Article 37 of the Treaty of Accession of Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (2003); Article 152 of the Treaty of Accession of Austria, Finland and Sweden (1994); Article 379 of the Treaty of Accession of Spain and Portugal (1985); Article 130 of the Treaty of Accession of Greece (1979); Article 135 of the Treaty of Accession of Denmark, Ireland and the United Kingdom (1972).

Some of these provisions have already been conceptualised as ‘emergency’ clauses.⁵⁰ Indeed, these legal bases are designed to regulate the *emergency* not *normalcy*, considering emergencies beyond the scope of ordinary EU actions. For this reason, they have begun to be studied together as a part of a unitary framework.⁵¹ These emergency provisions differ from safeguard clauses, such as Article 347 TFEU, as they do not rely on national emergency powers to derogate from EU law in managing a crisis. Instead, they empower EU Institutions to adopt emergency measures rooted in EU law. They also differ from clauses such as Article 352 TFEU or 175(3) TFEU, as they rely on the emergency as a prerequisite for activation. Furthermore, these provisions do not preclude the EU from using other crisis management instruments, such as the recent Crises and Force Majeure Regulation in the field of Migration policy⁵² or the Regulation to secure gas supply in the field of energy policy,⁵³ to address specific crisis scenarios. Rather, they provide an alternative pathway for the rapid adoption of EU emergency measures when other responses to crises are ineffective.

For the purposes of this investigation, it may be of interest to explore these provisions in more detail.

In the field of economic policy, Article 122(1) TFEU allows the Council, on a proposal of the Commission, to adopt by a qualified majority voting far-reaching economic policy measures.

A post-pandemic reading interprets Article 122(1) TFEU as a legal basis for the development of EU economic policy, rather than merely as an emergency clause.⁵⁴ This novel perspective primarily seeks to address constitutional objections raised against the use of Article 122(1) TFEU as the legal basis for the European Recovery Instrument (EURI), one of the legal pillars of Next Generation EU (NGEU), which is considered legally problematic. Nevertheless, the long-accepted interpretation of this provision considers Article 122(1) TFEU of a purely emergency nature,⁵⁵ a position

⁵⁰ See SF Nicolosi, ‘Emergency legislation in European Union law’ in T Van den Brink and V Passalacqua (eds), *Balancing Unity and Diversity in EU Legislation* (Edward Elgar 2024) 61; De Witte (n 5); Bellenghi (n 4).

⁵¹ Nicolosi (n 50).

⁵² See Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, recital 11

⁵³ Consolidated version of Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) 994/2010.

⁵⁴ M Chamon, ‘The non-emergency economic policy competence in Article 122(1) TFEU’ (2024) 61 *Common Market Law Review* 1501, 1510 ff.

⁵⁵ De Witte (n 5); P Leino-Sandberg and M Ruffert, ‘Next Generation EU and its constitutional ramifications: a critical assessment’ (2022) 59 *Common Market Law Review* 433, 445; A Weber and S Pilz, ‘Article 122 [Solidarity]’ in R Böttner and HJ Blanke (eds), *Treaty on the Functioning of the European Union: A Commentary* (Springer 2021) 597, 599; L Flynn, ‘Article 122 TFEU’ in M Kellerbauer (ed), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford

that is supported by the case law on the subject.⁵⁶ Accordingly, Article 122(1) TFEU is regarded as a general emergency provision of the economic policy, whereas Article 122(2) TFEU is interpreted as a *lex specialis*, specifically addressing emergency measures in the form of financial assistance.⁵⁷

Circumstances of emergency textually align with the case of ‘severe difficulties’ in the supply of certain products that could jeopardize the economy of one or more member states.⁵⁸ The Article explicitly refers to a shortage in the area of energy, but its scope is broader, and it can also be invoked for measures of other sectors of economic activity. In *Balkan Import-Export*, the Court has highlighted that Article 122(1) TFEU must be invoked in circumstances of urgency, where no other legal basis would enable the Council to act in a timely manner to address the situation.⁵⁹ Emergency measures might be taken in response to specific, temporary, or situational circumstances, rather than structural or long-term solutions.⁶⁰

Over the years, Article 122(1) TFEU allowed the EU to adopt a wide variety of emergency measures, some of which lie at the intersection between crisis management and emergency powers. Notably, it was first used for the establishment of a stock-holding mechanism of crude oil and petroleum, imposing on Member States the obligation to maintain minimum stocks of these essential energy products to protect the security of energy supply within the Union.⁶¹ Then, the same legal basis served for the adoption of the emergency support instrument allowing the European Union to adopt emergency measures in response to natural or man-made disasters giving rise to severe, wide-ranging humanitarian consequences within the European Union.⁶² During the pandemic, this provision has also ensured the supply of crisis-relevant medical countermeasures at the Union level.⁶³ Furthermore, the recent high risk of a complete halt in Russian gas supplies and the extreme increase in energy prices, which have significantly impacted

University Press 2019) 282; F Sciaudone, ‘Commento all’articolo 122 TFEU’ in A Tizzano (ed), *Trattati dell’Unione Europea* (Giuffrè 2014) 1311, 1312; JV Louis, ‘Guest Editorial: The No-Bailout Clause and Rescue Package’ (2010) 47 *Common Market Law Review* 971, 983.

⁵⁶ Case C-848/19 *Germany v Poland*, EU:C:2021:598, para 62; Case 5/73 *Balkan Import Export GmbH*, EU:C:1973:109, para 15; Case 10/73 *Rewe*, EU:C:1973:111, para 15; Case 9/73 *Schlüter*, EU:C:1973:110, para 15.

⁵⁷ De Witte (n 5) 8; Leino-Sandberg and Ruffert (n 55) 445.

⁵⁸ Sciaudone (n 55) 1312.

⁵⁹ *Balkan Import Export GmbH* (n 56) para 15.

⁶⁰ *Balkan Import Export GmbH* (n 56) para 11.

⁶¹ Council Directive 2006/67/EC of 24 July 2006 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, recitals 11 and 18.

⁶² Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union. More recently, the Council extended the scope of the ESI to the public expenditure needed to address the consequences of the Covid-19 pandemic.

⁶³ Council Regulation (EU) 2022/2372 of 24 October 2022 on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level.

the Union’s economy, have been considered such severe difficulties as to justify recourse to Article 122(1) of the TFEU for an emergency intervention in the field of energy.⁶⁴ Most recently, paragraph 1 of Article 122 TFEU, along with paragraph 2, was the much-debated legal basis of the EURI, which was one of the pillars of NGEU designed to address the economic consequences of the Covid-19 pandemic.⁶⁵

While the Member States remain primarily responsible for their respective economic policies, Article 122(2) TFEU grants the Council, rather than the Member States,⁶⁶ the power to provide non-permanent financial assistance to a Member State in financial distress. Such assistance must be based on a proposal from the Commission and adopted by a qualified majority.⁶⁷

The crisis-oriented nature of Article 122(2) TFEU is widely recognized among legal scholars.⁶⁸ Emergency measures based on Article 122(2) TFEU must be *temporary*, as the Court indirectly highlighted in *Pringle*, given that the provision is not designed to establish a permanent financial assistance mechanism.⁶⁹ Several EU scholars also interpret the provision as a ‘counterweight’ or complement of the ‘no bailout clause’,⁷⁰ namely Article 125 TFEU, which makes certain forms of financial assistance normatively problematic within the Eurozone.⁷¹

⁶⁴ Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas; Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices. See also Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders.

⁶⁵ The choice of the legal basis has raised several concerns, particularly regarding its combination with Article 122(2) TFEU and its use in adopting emergency measures with long-term effects. This, in turn, raises the issue of normalizing emergency measures within the EU legal order. See Leino-Sandberg and Ruffert (n 55).

⁶⁶ Case C-370/12 *Pringle*, EU:C:2012:756, para 41; Case T-450/12 *Anagnostakis*, EU:T:2015:739, para 49.

⁶⁷ *Pringle* (n 66) para 65; see also Case C-589/15 P *Anagnostakis*, EU:C:2017:663, para 75.

⁶⁸ MA Panasci, ‘Unravelling Next Generation EU as a transformative moment: from market integration to redistribution’ (2024) 61 *Common Market Law Review* 13, 26; P Dermine, ‘Article 122 TFEU and the future of the Union’s emergency powers’ (EU Law Live, 23 January 2024) at eulawlive.com; M Chamon, ‘The use of Article 122 TFEU—Institutional implications and impact on democratic accountability’ (European Parliament Study, September 2023) 23, at www.europarl.europa.eu; De Witte (n 5) 8; Leino-Sandberg and Ruffert (n 55) 444; Weber and Pilz (n 55) 599; V Borger, ‘EU financial assistance’ in F Amtenbrink and C Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 963; Louis (n 55) 983; J Pipkorn, ‘Legal arrangements in the Treaty of Maastricht for the effectiveness of the Economic and Monetary Union’ (1994) 31 *Common Market Law Review* 273, 274.

⁶⁹ *Pringle* (n 66) para 65; see also Chamon (n 68) 23.

⁷⁰ Panasci (n 68) 27; De Witte (n 5) 9; Borger (n 68) 974; Weber and Pilz (n 55); 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, 1633; Louis (n 55) 983.

⁷¹ *Pringle* (n 66) para 131.

Article 122(2) TFEU has been mostly employed to grant financial assistance in the form of loans or credit lines to Member States that were experiencing financing difficulties. A noteworthy example is the European Financial Stabilisation Mechanism (EFSM), which provided financial assistance to Ireland, Portugal, and Greece experiencing a severe deterioration of the borrowing conditions during the sovereign debt crisis.⁷² This is also the rationale of the more recent Instrument for Temporary Support to Mitigate Unemployment Risks in an Emergency (SURE), which helped Member States mitigate unemployment and income loss during the COVID-19 lockdowns.⁷³ Breaking from the traditional paradigm, Article 122 TFEU recently served as the legal basis for the European Union Recovery Instrument (EURI), a key pillar of NGEU.⁷⁴ NGEU enabled the EU to borrow €750 billion from financial markets, which was then distributed through the EU budget to Member States in the form of conditional loans and non-reimbursable grants.

Article 143(2) TFEU represents the oldest crisis legal basis in the EU Treaties.⁷⁵ This provision complements Article 122(2) TFEU by allowing the Council, upon recommendation of the Commission, to secure financial commitments in favour of the remaining non-euro-area Member States in difficulties or seriously threatened with difficulties as regards their balance of payments.⁷⁶

Circumstances of emergency, which are outlined in the Article 143(1) TFEU as a prerequisite for activating a three-step procedure, involve actual or potential difficulties in a Member State's balance of payments that reach a certain magnitude, meaning a Member State might be unable to fulfil its obligation under the internal market or to open its markets to products, services or investments from other EU countries.⁷⁷ Emergency measures under Article 143(2) TFEU are designed to avoid the Member State's recourse to national derogation measures under Article 143(3) TFEU, and are temporary, as their sole aim is to restore the economic situation of the beneficiary Member State.

Article 143(2) TFEU has historically been implemented through secondary legislation. The Council first introduced the medium-term financial assistance instrument in 1971, allowing the EU to grant limited credits to Member States experiencing the

⁷² Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism.

⁷³ 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.

⁷⁴ 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.

⁷⁵ Accolti-Gil (n 43) 149 ff; see also Joined Cases 6/69 and 11/69 *Commission v France* EU:C:1969:68, paras 16–17 and 28–29.

⁷⁶ Since the Treaty of Maastricht, the provision lost its original relevance because of the increasingly reduction of Member States with derogations. F. Sciaudone, "Commento all'Articolo 100 TCE" in A. Tizzano (ed.), *Trattati dell'Unione Europea* (Giuffrè, 2004) at 670.

⁷⁷ A Thiele, 'Financial assistance to non-euro area Member States' in F. Amtenbrink and C. Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 1025, 1031.

difficulties described in Article 143(1) TFEU.⁷⁸ This instrument has been modified several times. Since the adoption of the Facility providing medium-term financial assistance for Member States' balances of payments (also known as the 'BoP Regulation' or 'BoP Instrument'), Article 143(2) TFEU disappeared as a legal basis for the instrument, which now relies solely on Article 352 TFEU.⁷⁹ Through the BoP Instrument, the Council entrusted the Commission to grant, on behalf of the EU, financial assistance to Hungary, Latvia, and Romania in the early stages of the sovereign debt crisis. Conversely, Article 143(2) TFEU still appears as the preferred legal basis of the Council's decisions granting mutual assistance under the BoP Instrument.⁸⁰

In the field of migration policy, Article 78(3) TFEU establishes an *extrema ratio* provision that may be invoked only in the event of a sudden inflow of third-country nationals on such an unforeseeable scale that it renders the normal functioning of the EU common asylum system impossible.⁸¹ Under this legal basis, the Council may adopt provisional measures at its discretion, based on a proposal from the Commission and a qualified majority vote. The concept of 'provisional measures' should be interpreted broadly, enabling the Council to adopt any measure necessary to respond effectively and swiftly to an emergency.⁸² These measures may include instruments designed to provide financial, operational, and technical assistance, enabling the Union to respond to migration crises in the short term. Emergency measures must have a clearly defined temporal and material scope,⁸³ and they may neither aim to replace nor permanently amend provisions of legislative acts.⁸⁴

⁷⁸ Council Decision 71/ 143/ EEC of 22 March 1971 setting up machinery for medium- term financial assistance.

⁷⁹ Council Regulation (EC) 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments. The Regulation was last amended during the financial crisis by Council Regulation (EC) 431/2009 of 18 May 2009 amending Regulation (EC) 332/2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments.

⁸⁰ Council Decision 2013/532/EU of 22 October 2013 granting mutual assistance for Romania; Council Decision 2011/289/EU of 12 May 2011 granting mutual assistance for Romania; Council Decision 2009/289/EC of 20 January 2009 granting mutual assistance for Latvia; Council Decision 2009/458/EC of 6 May 2009 granting mutual assistance for Romania; Council Decision 2009/103/EC of 4 November 2008 granting mutual assistance for Hungary.

⁸¹ Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council*, EU:C:2017:631, para 114; SF Nicolosi, 'Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum' (2021) 17 *Utrecht Law Review* 19, 24 ff; V Moreno-Lax, 'Solidarity's reach: meaning, dimensions and implications for EU (external) asylum policy' (2017) 24 *Maastricht Journal of European and Comparative Law* 740, 752.

⁸² *Slovak Republic and Hungary v Council* (n 81) paras 70–77, 99.

⁸³ *Ibid.* para 90.

⁸⁴ *Ibid.* para 79. See also SF Nicolosi, 'Emerging challenges of the temporary relocation measures under European Union asylum law' (2016) 41 *European Law Review* 338.

Article 78(3) TFEU was invoked only once, during the 2015 refugee crisis, to assist Italy and Greece which were confronted with unprecedented arrivals of asylum-seekers. To alleviate the migratory pressure at their borders, the Council adopted two decisions setting up a temporary scheme, aiming for a fairer distribution and a more balanced sharing of responsibility for asylum-seekers who were already present in the EU.⁸⁵

Lastly, the Treaty of Lisbon introduced two complementary mutual assistance provisions: the civilian ‘solidarity clause’ in Article 222 TFEU and the ‘mutual defence clause’ in Article 42(7) TEU, the latter having defence implications. Both provisions are designed to safeguard the political and economic survival of a Member State hit by a natural or man-made disaster, a terrorist attack, or an armed aggression when a national response is insufficient. These mechanisms are aligned with the policies into which they are integrated, resulting in significant differences in their functioning.

Article 222 TFEU places an obligation on the Union (paragraph 1) and its Member States (paragraph 2) to ‘act jointly’ in case of three types of threats, namely terrorist attacks, natural and man-made disasters but its scope may be broader.⁸⁶ In line with other emergency legal bases, Article 222 TFEU is a last-instance mechanism since it may be invoked only if the crisis exceeds the Member State’s response capabilities even after having used all the means at the State’s disposal.⁸⁷ Unlike Articles 122, 143, and 78(3) TFEU, whose activation depends on the Council’s discretion, the invocation of the solidarity clause by a Member State automatically obliges the EU and the Member States to adopt solidarity-based emergency measures. However, while the EU should mobilize all the instruments at its disposal, including military means, Member States remain free to determine the most appropriate means to comply with their solidarity obligations.⁸⁸

Article 222 TFEU provides for both preventive action and ex-post assistance. Given that threats may not develop in a linear or progressive manner, the solidarity clause can be invoked to develop a risk and threat assessment at the Union level, as

⁸⁵ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁸⁶ The Commission has brought ‘hybrid threats’ under the umbrella of Article 222 TFEU. See European Commission, ‘Joint framework on countering hybrid threats: a European Union response’ JOIN(2016) 18 final, 6 April 2016.

⁸⁷ Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, Article 4; See R Sapienza, ‘Commentary on: Article 222 TFEU’ in P Herzog, C Campbell and G Zagel (eds), *Smit and Herzog on the Law of the European Union* (LexisNexis 2019); P Hilpold, ‘Filling a buzzword with life: the implementation of the solidarity clause in Article 222 TFEU’ (2015) 42 *Legal Issues of Economic Integration* 209; S Blockmans, ‘L’Union fait la force: making the most of the solidarity clause (Article 222 TFEU)’ in I Govaere and S Poli (eds), *EU Management of Global Emergencies* (Brill Nijhoff 2014) 111.

⁸⁸ See Declaration No 37 on Article 222 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon [2007] OJ C 306/257.

suggested by Article 222(4) TFEU, to activate a crisis management framework such as the EU Integrated Political Crisis Response, and to adopt new EU emergency measures. As far as it regards the latter function, Article 5(3) of Council Decision 2014/415/EU, which implements the solidarity clause, clarifies that the Commission and the High Representative shall submit proposals to the Council concerning the adoption of exceptional measures not foreseen by existing instruments, requests for military capabilities beyond the existing arrangements on civil protection, or measures in support of a swift response by Member States. This is where emergency powers come into play. Except where a decision has implications for the defence sector, as provided in Article 222(3) TFEU, the Council shall adopt emergency measures by qualified majority. However, since Article 222 TFEU has never been invoked, its potential remains largely unexplored.

In the field of Common Security and Defence Policy (CSDP), the mutual defence clause of Article 42(7) TEU introduces a legally binding obligation of aid and assistance between the Member States 'by all the means in their power' in the event of armed aggression. Unlike the solidarity clause, the mutual defence clause binds only the Member States, while the EU's role is limited to the type of assistance required, as agreed directly between States.⁸⁹ This is because, contrary to NATO, the EU currently lacks the legal capacity to conduct operational military self-defence operations, so its role is confined to facilitating and coordinating the process when needed, for instance by enabling Member States to coordinate their action through the Council or the European Council. The attacked Member State can request such support, for example, with regard to coordinating the overall assistance. Institutional and scholarly critics have pointed out the lack of a procedural framework for both activating and deactivating the clause, while also advocating for the European Council as the appropriate forum for discussing its activation.⁹⁰

The mutual assistance clause was invoked, for the first time, by France on November 17, 2015, in the wake of the terrorist attacks in Paris, during an already scheduled meeting of the European Defence Council. At that time, EU Defence Ministers expressed their 'unanimous and full support to France and their readiness to provide all the necessary aid and assistance'.⁹¹ Since the request for assistance, France held bilateral talks with the Member States to evaluate what kind of aid was available.⁹² At the time, some countries expressed a willingness to join operations

⁸⁹ Federica Mogherini, High Representative of the Union for Foreign Affairs and Security Policy, 'Introductory remarks at the press conference with Jean-Yves Le Drian, French Minister of Defence' European External Action Service, 17 November 2015 www.eeas.europa.eu.

⁹⁰ SE Anghel and C-C Cirlig, *Activation of Article 42(7) TEU: France's request for assistance and Member States' responses*, European Parliamentary Research Service, 2016; European Parliament, Resolution on the Mutual Defence Clause, Article 42(7) TEU, 2015/3034(RSP), 21 January 2016.

⁹¹ Foreign Affairs Council, 16-17 November 2015.

⁹² Anghel and Cirlig (n 90).

against terrorists in Syria and Iraq, whereas others preferred to increase their presence on other international missions.⁹³ Most recently, Sweden and Finland reminded the obligations outlined in Article 42(7) TEU a few weeks after the aggression against Ukraine began through a joint letter to the European Council.⁹⁴

Overall, the increase in emergency clauses within EU primary law, and their subsequent use, has gradually altered the EU's response to crisis scenarios. The reliance on a system of safeguard clauses reflected an early centrifugal tendency in European integration, representing a retreat to national law at a time when the incomplete stage of integration prevented EU Institutions from responding to exceptional circumstances.⁹⁵ In contrast, the increasing recourse to a set of emergency legal bases expresses a centripetal tendency, embodying the idea that the Union, rather than individual Member States, should increasingly be called upon to respond to emergencies.

4. Toward a supranational model of emergency powers

Despite their heterogeneity, these emergency legal bases share several features. This section highlights those commonalities that also parallel the core elements of national emergency constitutions, as discussed in Section 2. Together, these features form the main elements of an emerging system of EU emergency powers, which we refer to as the 'supranational model'.

Firstly, this set of provisions identifies circumstances that may activate EU emergency powers. As in the case with many European constitutions, the emergency provisions examined here rather identify and delimit specific types of emergency and tailor distinct emergency regimes to them. This includes a natural or man-made disaster under Article 222 TFEU, difficulties arising in the supply of certain products affecting the economic policy of the Member States under Article 122(1) TFEU, an economic shock or a severe disequilibrium in the balance of payments of a Member State in the meaning of Articles 122(2) and 143(2) TFEU, a sudden and unforeseeable inflow of a third country national at the EU external borders under Article 78(3) TFEU, threats to the security of a Member State as armed aggression or a terroristic attack in the case of Article 42(7) TEU and Article 222 TFEU. The legal distinction between emergencies and ordinary times should limit and ideally prevent the invocation of these emergency provisions as a pretext to circumvent obligations under EU law in normal periods.

Secondly, this system regulates the conferral of emergency powers on the European Union and their exercise. Even in emergency contexts, the EU may act only

⁹³ NIM Nováky, 'The invocation of the European Union's mutual assistance clause: a call for enforced solidarity' (2017) 22 *European Foreign Affairs Review* 357.

⁹⁴ P Leino-Sandberg and H Ojanen, 'Time for military integration in the EU? Armed aggression and the scope of Article 42 TEU' (Verfassungsblog 3 March 2022) at verfassungsblog.de.

⁹⁵ Nicolosi (n 50) 63.

within the limits of the competences conferred on it by the Member States. The choice of legal basis is crucial to determining the applicable procedures and the types of measures permitted.

EU emergency powers are subsidiary to those of the Member States, meaning that the Union becomes involved only when Member States are unable to address an emergency effectively on their own.⁹⁶ The threshold of threat severity required to activate EU emergency powers seems to be met when an emergency exceeds a Member State's capacity to respond, potentially causing spillover effects in other member states and, more broadly, across the EU. For example, financial assistance delivered under Article 122(2) TFEU may in principle be granted only when a Member State is facing severe difficulties caused by natural disasters or exceptional occurrences which are '*beyond its control*'. Similarly, mutual assistance under 143(2) TFEU may be granted only when, as provided in Article 143(1) TFEU, '*the action taken by a Member State with a derogation and the measures suggested by the Commission do not prove sufficient to overcome the difficulties which have arisen or which threaten*'. Emergency measures under Article 122(1) TFEU may be adopted in cases of '*severe difficulties*', where the urgency of the situation would not allow to act otherwise in a timely manner.⁹⁷ Likewise, provisional measures under Article 78(3) TFEU may be adopted in response to a sudden inflow of third nationals that renders the normal functioning of the EU common asylum system impossible, suggesting that the situation exceeds the capacity of a Member State to control and address it.⁹⁸ Moreover, the prerequisite for activating the solidarity clause under Article 222 TFEU and adopting related emergency measures is that a Member State '*considers that the crisis clearly overwhelms the response capabilities available to it*'.⁹⁹ As far as regards Article 42(7) TEU, the activation threshold is an '*armed aggression*' on the territory of a Member State.¹⁰⁰ In the context of the CSDP, the latter provision serves to deter an attack by signalling a readiness to provide a coordinated and, presumably, more effective response to any potential aggressor.

Thirdly, EU emergency powers impact the EU institutional balance. Articles 78(3), 122 (1) and (2), 143(2) TFEU entrust the Council with the power to adopt emergency measures by qualified majority. The Council thus combines the intelligence of all national executives, which are expected to move faster in the face of a

⁹⁶ For the EU's management of transboundary crises based on subsidiarity and added value, see A Boin, M Rhinard and M Ekengren, 'Managing transboundary crises' (2014) 22 *Journal of Contingencies and Crisis Management* 131, 138 ff.

⁹⁷ *Balkan Import Export GmbH* (n 56) para 15.

⁹⁸ *Slovak Republic and Hungary v Council* (C-643/15 & C-647/15) EU:C:2017:631, at para 114.

⁹⁹ Council Decision 2014/415/EU (n 87) Art 4(1).

¹⁰⁰ D Thym, 'Article 42 [CSDP: goals and objectives; mutual defence]' in H-J Blanke and St Maniameli (eds), *The Treaty on European Union (TEU)* (Springer 2013) 1201, 1224.

crisis scenario, while its representatives are also indirectly linked to domestic electorates.¹⁰¹ Similarly, Article 222(2) TFEU read in conjunction with Article 5 of Council Decision 2014/415/EU TFEU confers on the Council the political and strategic direction of the Union's emergency response by qualified majority. Because of the current design of the Common Security and Defence Policy, Article 42(7) TEU confers the Council only the role of fostering coordination among the Member States in order to reach an intergovernmental agreement, as happened in the wake of the 2015 terrorist attack in Paris.

The European Council has emerged as the *de facto* compass of the EU in emergencies, which calls for a break from 'normalcy' and triggers the 'emergency'. A rational explanation may derive from the fact that choices made during times of emergency are crucial for national sovereignty. During major EU crises, significant decisions were first discussed and largely shaped by the European Council. Notable examples include the sovereign debt crisis, where financial assistance measures were initially coordinated at intense Euro summits.¹⁰² Similarly, during the COVID-19 pandemic, the landmark decision to adopt a recovery plan for Europe through the issuance of common debt was first agreed upon and announced by the European Council.¹⁰³ Likewise, in the 2015 migration crisis, the European Council decided on the 'temporary and exceptional relocation over two years' of 40,000 asylum seekers from Italy and Greece to other EU Member States, urging the Council to swiftly adopt a formal decision to this effect.¹⁰⁴ The European Council has thus become the centre of gravity of the EU's emergency response.¹⁰⁵

The Commission retains the power of initiative while it is also entrusted with the executive management of emergency instruments. This choice derives from its ability to respond speedily and flexibly to immediate challenges and its better access to expertise. In the context of the EFSM, the BoP Instrument, the SURE, and the EURI, the Commission is empowered to carry out borrowing and lending operations. In the context of the 2015 Council Relocation Decisions, the Commission acted as a coordinator, monitor, and enforcer of the emergency measures.

Overall, this system makes *political* the choice to identify and address an emergency at the EU level and *technical* its management.

The current model sacrifices democratic control over EU emergency measures. Inherent constraints of parliamentary deliberation and the co-decision procedure may thus hinder a rapid and flexible emergency action. Under Articles 78(3), 122(2), and 222(3) TFEU read in conjunction with Article 5(3) of the Council Decision 2014/415/EU the European Parliament shall only be informed or consulted whereas

¹⁰¹ C Kreuder-Sonnen, 'Does Europe need an emergency constitution?' (2023) 71 *Political Studies* 125, 133.

¹⁰² European Council, 'Main results of Euro Summit' (26 October 2011).

¹⁰³ Conclusions of the European Council, 17–20 July 2020.

¹⁰⁴ Conclusions of the European Council, 25 and 26 June 2015.

¹⁰⁵ Nicolosi (n 50) 78.

it is completely excluded from the procedure laid down by articles 122 (1) and 143(2) TFEU and, because of the institutional design of the CSDP, by the procedure lays down in Article 42(7) TEU. Democratic oversight is additionally sacrificed at the national level by the non-legislative nature of emergency measures adopted under Articles 78(3), 122(1) and (2), 143(2) and 222 TFEU. Accordingly, the proposal of the Commission does not need to be sent to national parliaments under Protocol No. 1, the national parliaments' subsidiarity scrutiny according to Protocol No. 2 is not applicable, the deliberations in the Council are not public, and the balance between the transparency and confidentiality of the decision-making procedure, when assessing requests for access to documents, will favour the latter.¹⁰⁶ Nevertheless, it must also be considered that the European Parliament's limited involvement does not expose the Union to the risk of centralized or despotic control, such as may arise in the context of emergency powers exercised by national executives. This is because, within the Union, power is shared across multiple centres of authority, and within the Council, among different member states.

Fourthly, these emergency legal bases establish legal limits on the scope and intrusiveness of emergency measures. Emergency measures are exceptional, as they can only be triggered when all other available means prove insufficient to manage a crisis. Additionally, they are time-limited, remaining in effect only until the emergency ceases.

While the institutional practice may not be decisive, it suggests that emergency measures can either be tailored to specific crisis scenarios or implemented through emergency frameworks that operationalize the legal bases when an emergency arises. The institutional practice also suggests that the temporary nature of these measures excludes their permanence but does not preclude the establishment of a related emergency framework. Examples of the former include the SURE program, which was in effect for two years;¹⁰⁷ the 2015 Council Relocation Decisions, which were in force for almost two years;¹⁰⁸ and the gas solidarity measure, initially intended to last one year but later extended for an additional twelve months.¹⁰⁹ In the latter case, examples are provided by the recent framework for ensuring the supply of medical countermeasures, which can be activated during a public health emergency for a maximum period of six months, with a specific procedure governing the potential prolongation of the measure;¹¹⁰ the BoP Instrument, which regulates the granting of mutual assistance to non-euro Member States;¹¹¹ the EFSM follows the same path, as it still exists, although it has been functionally replaced by the ESM.

¹⁰⁶ *Slovak Republic and Hungary v Council* (n 81) paras 193–194; see also Chamon (n 68) 10.

¹⁰⁷ Council Regulation (EU) 2020/672 (n 73) Art 12(3).

¹⁰⁸ Council Decision (EU) 2015/1523 (n 85) Art 13; Council Decision (EU) 2015/1601 (n 85) Art 13.

¹⁰⁹ Council Regulation (EU) 2023/2019 of 21 December 2023, amending Regulation (EU) 2022/2576 with regard to the prolongation of its period of application.

¹¹⁰ Council Regulation (EU) 2022/2372 (n 63) Arts 3(1) and (4), 4

¹¹¹ According to Council Regulation (EC) No 332/2002 (n 79) Art 3, the Council may decide whether to grant a loan or an appropriate financing facility, its amount, and its average duration.

Furthermore, since the scope and reach of these emergency measures are limited to specific emergency scenarios, ordinary rules should resume once these measures cease.¹¹² An example is the no-bail-out rule set out by Article 125 TFEU, which bans financial assistance to Member States under Article 122(2) TFEU in ordinary times, returning to apply once financial assistance measures end. This is also the case of the criteria for determining the Member State responsible for examining an asylum application under the Dublin Regulation, which returned to apply once the 2015 Council Relocation Decisions ended.¹¹³

Fifthly, Articles 78(3), 122(1) and (2), 143(2) and 222 TFEU maintain judicial review over EU emergency measures. When a provision allows the Council to adopt emergency measures to face a crisis scenario, it is a requisite of institutional separation that the Court refrains from substituting its own choice for the Council's broad discretion.¹¹⁴ The Court of Justice may thus be called to question the legality of emergency measures when discretion cloaks arbitrariness, meaning a 'manifest error'. This may be the case of excessive intrusiveness when the policy goals could have been achieved with a less intrusive measure than the one adopted, or excessive duration. By contrast, it seems beyond the Court's scrutiny to evaluate the 'optimal model' of the response to an emergency. An illustrative example is provided by *Slovak Republic and Hungary v. Council*, where the Court dismissed the attempts of two Member States to annul the Council Decision 2015/1601 by rejecting the existence of a 'manifest error of assessment' with regard to both the period of application and the choice of the measure adopted by the Council to address the sharp increase in the inflow of third-country nationals to Italy and Greece in 2015.¹¹⁵ Likewise, in *Balkan Import/Export* the Court recognised to the Council a broad discretion as regards the choice of measures to be adopted under Article 122(1) TFEU.¹¹⁶

A different conclusion may be reached with regard to Article 42(7) TEU, as the Court's scrutiny over measures adopted within the context of CSDP is strongly limited by Article 24(1) TEU and Article 275 TFEU. This limits the mechanisms for monitoring and ensuring the fulfilment of the mutual assistance obligations incumbent on Member States, significantly weakening them.¹¹⁷

¹¹² Nicolosi (n 50) 74 ff.

¹¹³ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

¹¹⁴ On the justiciability of mutual assistance adopted under Article 143(2) TFEU, see Thiele (n 77) 1031–32.

¹¹⁵ *Slovak Republic and Hungary v Council* (n 81) paras 236, 249.

¹¹⁶ *Balkan Import Export GmbH* (n 56) para 18.

¹¹⁷ E Cimiotta, 'Le implicazioni del primo ricorso alla c.d. "clausola di mutua assistenza" del Trattato sull'Unione europea' (2016) 1 *European Papers* 163.

Lastly, the system contains implicit limits on the encroachment of emergency measures upon fundamental rights. In a domestic setting, emergency powers typically target individuals and can potentially rely on the use of force to implement emergency measures. Conversely, at the EU level emergency powers are designed to address interstate relationships and their enforcement eventually relies on the acquiescence of states.¹¹⁸ Nevertheless, an intricate issue at hand pertains to whether, while relying on its emergency powers, the Union's Institutions may limit or suspend the rights safeguarded by the Charter of Fundamental Rights. In this regard, it is worth noting that no derogation clause comparable to Article 15 of the European Convention on Fundamental Rights is enshrined in the Charter. Furthermore, the rights enumerated in the Charter do not contain emergency exceptions. This suggests that by no means can the EU adopt emergency measures that partially or totally suspend its mandate to respect fundamental rights resulting from Article 51(1) of the Charter.

A different argument can be presented for limitations on the exercise of certain fundamental rights as provided under Article 52(1) of the Charter. The Court of Justice has already clarified that the Union, not just the Member States, may in principle impose limitations on fundamental rights if they are adopted in the general interest and do not represent a disproportionate and unreasonable interference undermining the substance of the rights concerned.¹¹⁹ Doubts might arise around the opportunity to consider emergency measures, that are non-legislative in nature, as 'law' in the meaning of Article 52(1) of the Charter.¹²⁰ On this point, the CJEU has already affirmed that the 'provided for by law' requirement can be satisfied by EU non-legislative measures.¹²¹ However, arguments related to the lack of democratic control over emergency measures both at the EU and at the national level, along with factors of urgency and necessity, recommend caution when permitting such measures to directly impact fundamental rights potentially within the whole of the Union. Under the EU model of emergency powers, temporary restrictions on fundamental rights

¹¹⁸ Kreuder-Sonnen (n 41) 9.

¹¹⁹ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications*, EU:C:2014:238, para 69; Case C-292/97 *Karlsson and Others*, EU:C:2000:202, para 45; see also Explanations relating to the Charter of Fundamental Rights, Art 52.

¹²⁰ There are contrasting opinions in legal scholarship. See F Ferraro and N Lazzarini, 'Commento all'articolo 52 della Carta' in S Allegrezza, R Mastroianni, F Pappalardo, O Pollicino and O Razzolini (eds), *Carta dei diritti fondamentali dell'Unione europea* (Giuffrè 2017) 1062, 1065; S Peers and S Prechal, 'Comment to Article 52 of the CFR' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart Publishing 2021) 1611, 1626; R Cisotta, 'Brevi note sulla giurisprudenza sull'articolo 52, par. 1 della Carta dei diritti fondamentali dell'UE in materia di limitazioni ai diritti fondamentali ... con uno sguardo in avanti' (2021) 1 *Osservatorio sulle Fonti* 19, 30; P Mori, 'La "qualità" della legge e la clausola generale di limitazione dell'articolo 52, par. 1, della Carta dei diritti fondamentali dell'UE' (2014) 2 *Il Diritto dell'Unione Europea* 243; T Lock, 'Comment on Article 52 CFR' in M Kellerbauer, M Klamert and J Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) 2248, 2250. See also Opinion of AG Cruz Villalón in Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* EU:C:2013:845, para 109.

¹²¹ Opinion 1/15, EU:C:2016:656, para 190 ff.

may be permissible but, in the light of the above considerations, they should be subject to a strict proportionality assessment.

5. Current challenges and perspectives of reform

EU emergency powers have recently become a topic of institutional concern. In September 2023, a joint group of German and French experts presented an independent report suggesting, among other recommendations, the necessity of improving the ‘EU capacity to act’ by increasing EU competencies and expanding emergency provisions.¹²² One of the main proposals is an amendment to Article 122 TFEU, although the report remains somewhat vague on how this could be implemented.

Shortly after, the Committee on Constitutional Affairs (AFCO) of the European Parliament delivered a more tangible option to reinforce EU powers in times of emergency.¹²³ Along with the strengthening of the European Parliament’s involvement in emergencies, including in the context of Article 78(3) TFEU, the proposal suggests the suppression of the whole Article 122 TFEU and its replacement by a new emergency clause placed in a new first paragraph of Article 222 TFEU. More specifically, under Amendment No. 186, the European Parliament or the Council might grant the Commission ‘*extraordinary powers*’ in the event of an ‘*emergency*’ affecting the European Union or one or more Member States, enabling the recourse to ‘*all necessary instruments*’. It would be the same decision triggering EU emergency powers which would also define their scope, detailed governance arrangements, and duration. While the adoption of emergency powers might be subject to a tailored co-decision procedure with the European Parliament and the Council voting by a qualified majority, the revocation of those powers might be adopted at any time by each institution voting by a simple majority. The same procedure for the declaration of a state of emergency might also be used to review or renew it at any time.

The European Parliament’s proposal would significantly impact the current model of EU emergency powers by explicitly inaugurating the emergency paradigm within the Treaties. The new Article 222(1) TFEU would formally introduce a ‘state of emergency’, the declaration of which should permit and facilitate an EU response that would not otherwise be possible under normal conditions. Under the new Article 222(1) TFEU, the European Parliament and the Council would retain *plein pouvoir*,¹²⁴ in identifying what constitutes an *emergency*, and to design extraordinary

¹²² Franco-German Working Group on EU Institutional Reform, *Sailing on high seas: reforming and enlarging the EU for the 21st century*, 18 September 2023.

¹²³ *Proposals for the Amendment of the Treaties*, annex to European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)).

¹²⁴ G Bellenghi, ‘The European Parliament’s proposal for an EU state of emergency clause: a comparative and constitutional analysis’ (2024) 20 *Croatian Yearbook of European Law and Policy* 1, 11.

powers, including their scope, functions, and duration, as the 'all necessary instruments' formula suggests. This design would create constitutional space for legal solutions that might not otherwise fit with existing rules, thereby avoiding further recourse to the 'liminal practices' that are already highlighted in legal scholarship as the result of the unclear nature of the EU's emergency powers framework.¹²⁵

One example is the practice of *rule-bending*, which involves departing from legal norms during crises or reinterpreting them to extend their boundaries.¹²⁶ Some scholars argue that this practice is evident in the recent use of Article 122 TFEU *tout court* as the legal basis for the EURI, the central pillar of the NGEU, which supports economic recovery by specifying the purposes for which funds borrowed on capital markets are to be used.¹²⁷ This choice has raised several concerns, including an insufficient link between the triggering emergency and the measures adopted, an overextension of the competences outlined in Article 122(1) and (2) TFEU, and a conflict between the temporary nature of the emergency instrument and the goal to address economic disparities within the EU.¹²⁸

Answering current criticisms,¹²⁹ the European Parliament's proposal would increase transparency in EU emergency management, clarifying institutional roles and emergency actions to be adopted. It would also increase the European Parliament's control over emergency management, conferring democratic legitimacy to emergency measures, while maintaining a presumably light EU judicial scrutiny over those measures.¹³⁰ This would also be achieved through greater parliamentary involvement in the procedure outlined in the revised Article 78(3) TFEU (Amendment No 100), where the European Parliament would gain the power of initiative.

Nevertheless, despite its promises, the new emergency framework may also create new problems.

One criticism is that the new clause would not provide any definitional elements to classify an emergency as a legal concept,¹³¹ nor does it delegate this task to another legal act. It also fails to describe the inherent characteristics of a state of emergency,

¹²⁵ See Kreuder-Sonnen (n 101) 128 ff.

¹²⁶ Ibid. 128 ff.

¹²⁷ Leino-Sandberg and Ruffert (n 55).

¹²⁸ Leino-Sandberg and Ruffert (n 55); Panasci (n 68); see also P Dermine and A Bobić, 'Of winners and losers: a commentary of the Bundesverfassungsgericht ORD judgment of 6 December 2022' (2024) 20 *European Constitutional Law Review* 163.

¹²⁹ PM Rodríguez, 'A missing piece of European emergency law: legal certainty and individuals' expectations in the EU response to the crisis' (2016) 12 *European Constitutional Law Review* 265; M Dawson and F De Witte, 'Constitutional balance in the EU after the euro-crisis' (2013) 76 *Modern Law Review* 817.

¹³⁰ Kreuder-Sonnen (n 101) 125; S Auer and N Scicluna, 'The impossibility of constitutionalizing emergency Europe' (2021) 59 *Journal of Common Market Studies* 20; C Kreuder-Sonnen and J White, 'Europe and the transnational politics of emergency' (2021) 29 *Journal of European Public Policy* 953.

¹³¹ M Chamon, 'The EU's dormant economic policy competence: reliance on Article 122 TFEU and Parliament's misguided proposal for treaty revision' (2024) 49 *European Law Review* 166, 185.

such as exceptionality, seriousness, suddenness, or urgency. While this option may broaden the governance of emergencies under EU law, it would also introduce ambiguity, hinder the ability to tailor and, at the same time, limit the powers made available under the new EU emergency regime. Furthermore, natural disasters presumably call for the exercise of emergency powers that are distinct from those that may be necessary to face an economic crisis. Both situations may be distinguishable from armed aggression. While the current emergency system modulates the Union's emergency responses based on the competencies involved, an emergency clause such as the one proposed by the European Parliament would potentially allow EU Institutions to face varying degrees of crisis scenarios with an equal firepower mechanism.

These issues are further compounded by the fact that, in stark contrast with other crisis-related legal bases, the new emergency clause would not require an emergency scenario to be ungovernable by a Member State for its activation. As a result, it could create coordination challenges with Member States' actions in emergencies.¹³² The principles of loyal cooperation and subsidiarity suggest that the EU's action could complement that of Member States in emergencies, allowing coordination between the two.¹³³ While this is a viable approach, it may also be considered that a Member State's response could diverge from the EU's interests, particularly in emergencies, as seen during the initial phase of the COVID-19 pandemic. Urgency may hinder the vertical coordination of emergency actions, which is why an emergency clause should clearly define coordination issues. For this purpose, the new emergency regime could be refined through the introduction of a mechanism similar to those in Articles 42(7) TEU and 222 TFEU, allowing a Member State to activate the emergency provision and thereby making EU emergency action complementary to the Member State's response. Alternatively, if the discretion over activation is to remain with EU institutions, a 'beyond control' option could be incorporated into a new emergency clause, as is currently provided in Article 122(2) TFEU.

Furthermore, the new emergency clause could create coexistence issues with other emergency legal bases. While the new Article 222(1) TFEU will absorb emergencies currently governed by Articles 122(1) and (2) TFEU, which will be repealed, the relationship with Article 42(7) TEU, Articles 78(3) and 143(2) TFEU, and the current Article 222 TFEU would remain undefined. Some scholars have already suggested that the new Article 222(1) TFEU would function as a *lex generalis*, not only in relation to the rest of Article 222 TFEU¹³⁴ but also with regard to other emergency clauses.¹³⁵ However, since the clause emerges from the perceived necessity to expand the scope of current crisis legal bases, including Article 122(1) and (2) TFEU, a historical reading may suggest the new emergency clause has been designed as a

¹³² See also concerns raised by Chamon (n 131) 186; Bellenghi (n 124) 23.

¹³³ A Pau, 'Verso la dichiarazione di uno "stato di emergenza sovranazionale"? Clausola di solidarietà e prospettive di riforma dei Trattati' (2024) *Quaderni AISDUE*, Fascicolo speciale 3/2024, 22.

¹³⁴ Chamon (n 131) 185.

¹³⁵ Bellenghi (n 124) 16.

flexibility clause for emergencies, granting EU Institutions a wider margin of maneuver through a *sui generis* procedure. This flexibility clause for emergencies would represent an alternative to other crisis legal bases, offering another procedure to manage emergencies within the EU legal framework. However, unlike the flexibility clause in Article 352 TFEU, the scope and limitations of the new emergency clause would remain undefined.

Another criticism concerns the limited judicial review over emergency measures. As it has already been said, the clause seeks to reinforce the emergency paradigm, namely constitutional accommodation, into the treaty framework. This paradigm requires to quarantine the emergency as a way to protect the restoration of normalcy.¹³⁶ However, the absence of clear legal boundaries surrounding the exercise of new emergency powers, such as the events that may trigger it, the competences that may be activated (or not), and the types of emergency measures to be adopted, significantly increases the legislator's margin of discretion while correspondingly reducing judicial scrutiny over these discretionary choices.¹³⁷

Lastly, the European Parliament's proposal does not specify the legal nature of new EU emergency measures or their potential impact on the protection of fundamental rights.¹³⁸ While the introduction of *ex-ante* parliamentary control over such measures could increase consideration of their effects on fundamental rights,¹³⁹ this alone is not sufficient to rule out the possibility of violations or disproportionate restrictions. The need to assess these circumstances textually becomes all the more important as the scope and intrusiveness of the Union's emergency powers potentially expand.

Overall, the European Parliament's proposal for an EU emergency clause appears to require some further refinements.

A constructive way forward might be to amend Article 122(2) TFEU while preserving its operational potential.¹⁴⁰ Drawing from past experiences, an expansion of its scope, whether within the context of economic policy or beyond, could be debated. Such an option would require an evaluation of how the EU may or may not act in emergencies within the framework of Article 122(2) TFEU, addressing concerns raised in institutional and academic circles with parliamentary oversight. In doing so, it would avoid the *carte blanche* approach suggested by the reform of Article 222 TFEU, which merely postpones parliamentary debate over these limits in an emergency context, where urgency may hinder careful ponderation of interests at stake.

Another option can be seen in the case of public health, where an emergency legal basis, ideally located in Article 168 TFEU, could grant the EU the authority to

¹³⁶ A Green, 'Separating normalcy from emergency: the jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12(5) *German Law Journal* 981.

¹³⁷ Bellenghi (n 124) 14.

¹³⁸ This concern has also been raised by Bellenghi (n 124) 10 and Chamon (n 131) 184.

¹³⁹ Pau (n 133) 32; Chamon (n 131) 185.

¹⁴⁰ Dermine (n 68).

adopt a broad range of measures in response to an epidemic or pandemic, ensuring the protection of EU citizens against cross-border health threats. This could include binding, risk-based, local, and temporary measures to contain the spread of a virus, particularly when national measures prove insufficient. These emergency powers may supplement the post-pandemic crisis management framework, strengthening EU emergency action through more streamlined procedures and the adoption of time-limited measures that may derogate from ordinary ones.

Still, an option arises in the case of external security and defense, which are proposed to be added to the list of shared competences.¹⁴¹ For instance, Amendment No. 55 of the EP proposal to Article 42(7) TEU suggests that these powers could apply to the Defence Union, where, in the event of armed aggression, the obligation of mutual assistance would extend not only to the Member States but also to the Defence Union itself. This change would also enable a permanent rapid deployment capacity under the Union's operational command.

These proposals would align with the trajectory of the emergency paradigm already suggested by the European Parliament's proposal, while maintaining consistency with the emerging supranational model of emergency powers.

6. Conclusions

Emergency powers are not solely a matter of constitutional provisions. They also encompass the constitutional culture that informs their interpretation. As has already been noted, in the supranational context, the emergency paradigm rarely serves as a regulative ideal.¹⁴² The justification provided relates to the facts that the EU seldom opts for a temporal suspension of the normally valid rules according to legal procedures, preferring instead to resort to extra-legal executive self-empowerment, which extends its power into a grey zone.¹⁴³ This approach might help to explain why, despite the Treaties providing a *de facto* model of emergency powers, it has hardly been recognized as such by actors involved.¹⁴⁴ A comprehensive interpretative practice that actively engages with emergency provisions enshrined in the Treaties as a cohesive system of emergency powers has yet to fully develop. This gap is the space of the present reflection.

By conducting a systemic interpretation of the Treaties, this paper examines the features that unify a set of existing emergency legal bases, namely Article 42(7) TEU, and Articles 78(3), 122 (1), and (2), 143(2) and 222 TFEU, into a cohesive

¹⁴¹ See Proposals for the Amendment of the Treaties (n 123) recitals 14–15.

¹⁴² Kreuder-Sonnen (n 41) 198.

¹⁴³ *Ibid.* 198. This position has been further explained in Kreuder-Sonnen and White (n 130).

¹⁴⁴ Kreuder-Sonnen (n 41) 198. The author provides the example of Chapter VII of the UN Charter, which establishes a system for the temporary suspension of ordinary provisions during certain emergencies. See the considerations and scholarship discussed in section 2 of this work.

system. While these provisions coexist with other instruments applicable in the context of emergencies, they also may be understood as establishing a core framework of emergency powers that shapes the EU’s response to crises. The analysis highlights how these provisions encapsulate the key definitional elements of an emergency constitution, including the conditions for declaring an emergency at the EU level, the authority responsible for such declaration, the actors granted special powers during emergencies, the nature of EU emergency measures, their impact on fundamental rights, and the mechanisms for legal oversight. This legal geography constitutes what has been defined as the supranational model of emergency powers.

Approaching these rules as a system, rather than as isolated legal bases, offers several legal advantages. It provides contextual meaning to each emergency provision within the Treaties, clarifies the often-blurred distinction between *normalcy* and *emergency* in the EU legal order, and helps prevent the persistence of crisis-driven measures and interpretations beyond the emergency period. A systemic approach also enables a clearer definition of the prerequisites for activating and implementing EU emergency powers, as well as the interpretative challenges in selecting the appropriate legal basis for emergency measures.¹⁴⁵ Finally, the supranational model of emergency powers may serve as a critical tool for assessing future Treaty reform aimed at enhancing the EU’s capacity to act while preserving coherence with the existing legal framework.

¹⁴⁵ Several proceedings are pending that challenge, inter alia, reliance on Article 122(1) TFEU as the legal basis for emergency action adopted in response to the curtailment of Russian gas supplies and the resulting surge in energy prices. One such measure is Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices. Pending actions for annulment before the General Court include T-759/22 (*Electrawinds Shabla South v Council*), T-775/22 (*Vermilion Energy Netherlands and Others v Council*), T-795/22 (*Vermilion Exploration and Production Ireland and Vermilion Energy Ireland v Council*), T-802/22 (*ExxonMobil Producing Netherlands and Mobil Erdgas-Erdöl v Council*), and T-803/22 (*Petrogas E&P Netherlands v Council*). Pending preliminary-ruling references on validity include C-358/24 (*Varo Energy Belgium and Others*) and C-533/24 (*Vermilion Energy Ireland and Others*). See also C-153/25 (*Acea Produzione and Others*) and C-467/24 (*2Valorise Ham and Others*).

Navigating Public International Law: ECB Banking Supervision and Cross-border On-site Inspections

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ABSTRACT: Since the establishment of the Single Supervisory Mechanism (SSM), the European Central Bank (ECB) has exercised wide-ranging supervisory and investigatory powers over significant banks in participating Member States. These powers extend, at least textually, to foreign subsidiaries and third-country providers, raising acute tensions with the prohibition of extraterritorial enforcement jurisdiction under public international law. This article examines the legality of such extraterritorial inspections, situating the ECB's mandate within the constraints of customary international law and the sovereignty of third (non-EU) States. We assess the legal basis provided by the international agreements – Memoranda of Understanding (MoUs) – concluded by the ECB with foreign supervisory authorities, and interrogate their sufficiency as instruments of consent. We argue that while MoUs facilitate cooperation in practice, their non-binding nature renders them a fragile legal basis, leaving the ECB and its inspectors exposed to potential international responsibility and diplomatic friction. Next, we evaluate alternative foundations for inspections, including inferred consent, contractual arrangements with third-country banks, countermeasures and indirect enforcement via EU-based affiliates. Moreover, the asymmetrical character of these arrangements underscores the broader political economy of extraterritorial enforcement, in which the ECB's market power enables it to project regulatory authority beyond EU borders. The article concludes that although pragmatic cooperation currently mitigates conflict, the lack of a robust legal framework creates uncertainty for both States and supervised entities, warranting further institutional and doctrinal clarification.

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KEYWORDS: Single Supervisory Mechanism – extraterritorial enforcement – public international law – banking regulation – Memorandum of Understanding – on-site inspections.

1. Introduction

Since the establishment of the Single Supervisory Mechanism (SSM) in 2014, the European Central Bank (ECB), an independent institution of the European Union (EU), is responsible for carrying out banking supervision in the euro area and other participating EU Member States, alongside national supervisors.¹ For the purpose of carrying out its tasks, the ECB is entrusted with supervisory and investigatory powers, including the power to conduct on-site visits (inspections) among others at the business premises of supervised banks.² Relevant banks (credit institutions) subject to direct supervision by the ECB are significant banks established in participating Member States (SSM banks).³ The SSM Regulation however also confers on the ECB supervisory powers regarding third parties to whom these banks have outsourced functions or activities, as well as subsidiaries of SSM banks not (directly) supervised by the ECB.⁴ Such third parties and subsidiaries might be based outside SSM participating States, and thus outside ECB jurisdiction. This implies that the ECB may, at least on the basis of the SSM Regulation, be entitled to conduct on-site visits in relation to foreign subsidiaries of SSM banks, or third-country providers to which SSM banks have outsourced functions and activities.

The exercise of such investigatory powers on the territory of a State which is not a SSM participating State,⁵ is in tension with the prohibition of extraterritorial enforcement jurisdiction in international law. Indeed, international law prohibits the exercise of sovereign powers by a State or regional international organisation on the territory of a third State without the latter's consent.⁶ For EU Member States outside the SSM, this tension might be resolved through the TEU and TFEU, which could be argued to create the relevant consensual basis between EU Member States and

¹ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (SSM Regulation – hereafter SSMR).

² Art 12 SSMR.

³ The SSMR does not as such use the term 'bank', but rather 'credit institution', by referring to the definition contained in Regulation EU/575/2013. The ECB, however, also supervises financial holding companies and mixed financial holding companies, which are technically speaking not banks (Art. 10(1) SSMR). For sake of simplicity, we use the term 'bank' to refer to the supervised credit institutions.

⁴ Art 10(1)(e)-(f) SSMR.

⁵ A third State can also be a non-participating EU Member State. Note, however, as explained below, that the ECB is under an obligation to conclude a Memorandum of Understanding on supervisory cooperation with such States, per Art 3(6) SSMR.

⁶ See further section 3.

their institutions.⁷ This basis however does not exist regarding on-site inspections in non-EU States (referred to hereinafter as ‘third States’), which is what this contribution focuses on. This is where the tension is the strongest, in the absence of a treaty such as TEU and TFEU, and the potential (political) fallout is the greatest. The aim of the contribution is to inquire how this tension could be resolved from the viewpoint of public international law, if at all; as without a proper legal basis, these on-site visits in third States could expose both the ECB and its individual inspectors to diplomatic friction. This contribution discusses both existing policies and practices, as well as possible alternative jurisdictional bases the ECB could rely upon.

The contribution opens with a brief introduction to the system of banking supervision and the specific role played by the ECB (section 2). We then highlight the ECB’s investigatory powers in relation to banks established in third States – i.e. outside the EU –, and address the possible incompatibility between the exercise of such powers and the international law of jurisdiction (section 3). We argue that this incompatibility could, in principle, be resolved by concluding internationally binding agreements with third States.⁸ We then inquire whether the agreements or MoUs (Memoranda of Understanding) which the ECB has concluded thus far could be sufficient to cover extraterritorial inspections (section 4). This section pays specific attention to whether treaty law governs such agreements, and what issues may arise from the current practice of (non-binding) MoUs insofar as they are not covered by international treaty law. We then proceed to examine the circumstances under which the ECB, in the absence of an agreement with a third State, may still lawfully carry out extraterritorial inspections (e.g., by securing the consent of the third-country bank, or via the doctrine of countermeasures - section 5). We also inquire whether, short of inspections, the ECB could exercise enforcement jurisdiction over third-country banks by directing orders to such a bank or a related EU bank to produce information, under threat of a periodic penalty payment (section 6 and section 7). Zooming out in the last section, we draw attention to a broader political-economic context of global power imbalance in which extraterritorial enforcement takes place, and examine how this affects the ECB’s projection of extraterritorial power both regarding its current policies and practices, and regarding the proposed alternatives (section 8). We end our analysis with a brief conclusion (section 9).

2. ECB supervision of banks

The Single Supervisory Mechanism (SSM) is an integrated system of the ECB and national competent (banking supervisory) authorities. The SSM specifically addresses Member States, both inside and outside the euro area. The primary objective

⁷ See further section 6.

⁸ Art 8 SSMR confers the power on the ECB to ‘enter into administrative arrangements with supervisory authorities, international organisations and the administrations of third countries’.

of the SSM is to contribute to the safety and soundness of credit institutions and the stability of the financial system within the EU and each Member, with full regard to the unity and integrity of the internal market based on equal treatment of banks.⁹ The SSM allows exclusive competences given to the ECB to be implemented within a decentralized framework,¹⁰ which comprises the ECB and national competent authorities (NCAs). The competences of the ECB are to serve the internal market for banking services and the stability of the financial system in the euro area and the EU as a whole. For the functioning of the SSM, the primary legal sources are *a*) the SSM Regulation (SSMR), which confers tasks and powers upon the ECB in the area of banking supervision, and *b*) the SSM Framework Regulation (SSM FR),¹¹ establishing the framework for cooperation between the ECB and national authorities.¹² The ECB applies all other relevant Union law,¹³ and is exclusively responsible for the micro-prudential supervision of the euro area's banks.

The ECB is competent to carry out its tasks in relation to banks established in 'participating Member States', meaning Member States whose currency is the euro *and* Member States whose currency is not the euro which have established close cooperation with the ECB.¹⁴ If a Member State is not participating, the ECB and the competent authorities of such States are under a legal duty to conclude a memorandum of understanding (MoU) describing in general terms how they will cooperate with one another in the performance of their supervisory tasks.¹⁵ This memorandum has been concluded in 2022,¹⁶ which provides *inter alia* for cooperation and information exchange.¹⁷

⁹ Art 1 SSMR.

¹⁰ Case T-122/15 *Landeskreditbank Baden Württemberg v ECB*, ECLI:EU:T:2017:337, para 63.

¹¹ Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM FR).

¹² To be mentioned here should also be the Capital Requirements Directive (CRD), Directive 2013/36/EU of 26 June 2013, to be transposed into the national legal systems of Member States using the Capital Requirements Regulation (CRR), Regulation (EU) 575/2013 of 26 June 2013. The CRR lays down uniform rules concerning general prudential requirements that supervised institutions should comply with, and provides powers to competent authorities. We will not delve into this further, as this contribution aims not at the national, but at the international level.

¹³ Art 4(3) SSMR.

¹⁴ Arts 2(1), 4(1) and 7 SSMR. Bulgaria and Croatia have entered into such close cooperation. For a discussion of the challenges which Member States face if they do not belong to the euro area: D Ritleng, 'The ECB's Power over Non-Euro Countries in the Banking Union' (February 2020) SIEPS.

¹⁵ Art 3(6) SSMR.

¹⁶ Memorandum of Understanding Between the European Central Bank and the Competent Authorities of Non-Participating European Union Member States for the Performance of their Supervisory Tasks (2022). The non-participating Member States are Czech Republic, Denmark, Hungary, Poland, Romania and Sweden.

¹⁷ Under Art 3(6) SSMR, the ECB is also under an obligation to 'conclude a memorandum of understanding with the competent authority of each non-participating Member State that is home to at least one global systemically important institution, as defined in Union law'.

The SSM Regulation classifies banks as ‘significant’ and as ‘less significant’, to divide supervising competencies between the ECB and NCAs. This classification is based on a number of criteria, such as size, importance for the economy and the significance of the banks’ cross-border activities.¹⁸ The ECB directly supervises significant banks, while its national counterparts carry out the day-to-day supervision of less significant banks.¹⁹ Daily supervision of significant banks by the ECB is carried out by Joint Supervisory Teams (JSTs), i.e. teams composed of ECB staff and staff from the relevant NCA. The JST must refer under certain conditions suspicions concerning infringements of directly applicable EU law or of ECB decisions or regulations to the independent investigation unit of the ECB (IIU).

For the purpose of carrying out its tasks, the ECB is entrusted with investigatory powers.²⁰ This includes the power to request information from supervised banks based in participating Member States,²¹ to require the submission of documents, to examine books and records of banks, and to interview persons.²² These powers form the ECB toolbox of directly applicable powers to perform ‘effective risk-based supervision’.²³ As part of its investigatory powers, the ECB also has the power to conduct all necessary on-site inspections at the business premises of banks established in the participating Member States, with or without prior announcement.²⁴ On-site inspections must be conducted on the basis of an ECB decision, which shall at a minimum specify the subject matter and the purpose of the on-site inspection. Any obstruction to the on-site inspection by an entity subject to supervision constitutes a breach of the relevant ECB decision.²⁵

In exercising its powers, the ECB works closely together with the national competent authorities (NCAs) designated by the participating Member States. The ECB and NCAs have a duty of cooperation and an obligation to exchange information. In particular, the NCAs provide the ECB with all information necessary for the purpose of carrying out the tasks conferred on it.²⁶ The obligations for national counterparts are

¹⁸ Art 6(4) SSMR.

¹⁹ Although the ECB can decide at any time to assume supervision over a less significant bank: Case T-275/19 *PNB Banka v. ECB*, ECLI:EU:T:2022:78.

²⁰ Art 10 *et seq.* SSMR.

²¹ *Ibid* Art 10.

²² *Ibid* Art 11.

²³ JH Binder, CV Gortsos, K Lackhoff, C Ohler (eds), *Brussels Commentary: European Banking Union* (Bloomsbury Publishing 2023) 159.

²⁴ Art 12 SSMR. More in particular: legal persons referred to in Art 10(1) SSMR, i.e., credit institutions, financial holding companies, mixed financial holding companies, and mixed-activity holding companies established in the participating Member States (and persons belong to such entities, as well as third parties to whom the aforementioned entities have outsourced functions and activities), and any other undertaking included in supervision on a consolidated basis where the ECB is the consolidating supervisor in accordance with point (g) of Art 4(1) SSMR.

²⁵ Case T-275/19 *PNB Banka v ECB*, ECLI:EU:T:2022:781, para 144.

²⁶ Art 6(2) SSMR.

very broad in scope. Subject to a purpose limitation, virtually any type of information can be transferred from NCAs to the ECB. Exchange of information can be at recurring intervals, such as reporting on a regular basis on the performance of their activities, or spontaneously when the NCA receives an application for authorizing a bank in a euro area Member State, or when an authorization must be withdrawn.²⁷ The ECB can always request the NCAs to transmit any information necessary to carry out its tasks. Due to their long experience and their proximity to the credit institutions in question, NCAs can provide the ECB with information that the latter may not have access to. The ECB can instruct the NCAs to use strictly ‘national’ powers if necessary to carry out the tasks conferred on the ECB in the SSMR. Through this stream of information, even though the power to access recorded telecommunications and information on bank accounts are not *per se* provided for in the EU legal framework, the ECB can use this national power indirectly and may eventually receive relevant information if the NCAs *do* have these powers on the basis of their national law.²⁸

As to NCAs’ cooperation specifically with the ECB’s on-site inspections, officials of NCAs of participating Member States have a duty to assist the ECB, including when a person opposes inspection; such officials also have the right to participate in the inspections.²⁹ If required by national law, authorization to conduct inspections or to obtain assistance may have to be sought from a national judicial authority.³⁰ Such an authority may however not review the necessity for the inspection or demand to be provided with the information on the ECB’s file; also, only the Court of Justice of the European Union (CJEU) can review the lawfulness of the ECB’s decision.³¹

In principle, the ECB and the NCAs do not have jurisdiction over third States, or banks established in third States. However, they can exercise supervisory powers over all activities of third-country branches and groups *in the EU* (or at least in the participating Member States), for which purpose a Memorandum of Cooperation (MoC) between the ECB and the NCAs has been concluded in 2024.³² More importantly for the purpose of our analysis, under the SSM Regulation, the ECB may

²⁷ Art 73(1) SSM FR, Art 80(1) SSM FR.

²⁸ In line with Art 9(1) SSMR the ECB has all the powers and obligations which the NCAs have under relevant Union law. It has been questioned whether the ECB needs these additional powers, as its information position is already very strong. M Scholten, M Simonato, ‘EU Report’ in M Luchtman, J Vervaele (eds), *Report Investigatory Powers and Procedural Safeguards: Improving OLAF’s Legislative Framework through a Comparison with other EU Law Enforcement Authorities (ECN/ESMA/ECB)* (April 2017) 16.

²⁹ Art 12(4)-(5) SSMR. See also Art 11(2) SSMR regarding assistance by a NCA in case a person obstructs the conduct of the investigation.

³⁰ Ibid Art 13.

³¹ Ibid Art 13(2).

³² Memorandum of Cooperation between competent authorities for the performance of their supervisory tasks in relation to the supervision of Third-Country Groups and Third-Country Branches, 19 January 2024. A ‘Third-Country Branch’ is defined as a branch established in a participating Member State by an undertaking having its head office in a country outside the Union, whereas a ‘Third-Country

require any entities belonging to banks established in a participating Member State, as well as any third parties to whom these banks have outsourced functions or activities, to provide all information that is necessary in order to carry out its tasks.³³ The ECB may also conduct investigations regarding these persons, and conduct on-site inspections at their business premises.³⁴ The relevant paragraph in the SSM Regulation is not subject to a geographical limitation, which arguably implies that the ECB can exercise investigatory powers, including the power to carry out on-site inspections, in relation to foreign subsidiaries of ‘SSM banks’, or third-country providers to which SSM banks have outsourced functions.

3. On-site visits, extraterritorial enforcement and international law

This next section now qualifies the ECB’s investigatory powers in terms of public international law. First, it should be noted that where the ECB makes use of its investigatory powers in (relation to) third States, it can be seen to be performing a ‘sovereign task’ in another jurisdiction,³⁵ and to exercise extraterritorial enforcement jurisdiction. ‘Enforcement’ in this sense should be understood to cover any coercive State act, also covering investigations, interviews, requisition of documents from inspected parties, et cetera, in addition to issuing sanctions; as such it is distinct from the narrower concept of ‘enforcement’ in European law, which primarily refers to sanctions. It does not cover any action that a foreign actor can freely refuse: for example, asking another national supervisory authority to share information,³⁶ sharing information with that authority, offering or requesting (legal) aid, or asking foreign actors to coordinate activities are all not coercive in this respect and thus are not considered enforcement.

Under customary international law, States are not allowed to exercise their enforcement jurisdiction outside their territory, except, as the Permanent Court of Justice held in the *Lotus* case, ‘by virtue of a permissive rule derived from international custom or from a convention’.³⁷ This means that States cannot enforce their laws extraterritorially, i.e., use physical coercion abroad, by, e.g., arresting a person abroad, seizing property abroad, or conducting inspections,³⁸ unless they can obtain the prior consent of the territorial State. This rule also applies to international institutions, such as the

Group’ is defined as a parent undertaking, and its subsidiaries and branches, of which the ultimate parent undertaking is established outside the Union’. See Art 2(k) and (m) of the Memorandum.

³³ Art 10(1)(e)-(f) SSMR. See: JH Binder, CV Gortsos, K Lackhoff, C Ohler (eds), (n 24) 164.

³⁴ Art 11-12 SSMR.

³⁵ For a closer read on sovereign authorities, jurisdiction and extraterritoriality, see C Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015).

³⁶ This is not necessarily the case when a private entity is mandated to produce documents that are within the regulatory purview of another State, as discussed in section 8 below.

³⁷ *SS Lotus* (Judgment) (PCIJ, 7 September 1927), para. 45.

³⁸ K Meyer, *Grenzen und Entwicklungsmöglichkeiten des Souveränitätsprinzips in transnationalen Handelsbeziehungen* (Tübingen Mohr Siebeck 2018) 199.

ECB, to which States have transferred competences. The CJEU has held in this respect that the EU, ‘when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union’.³⁹ By the same token, when adopting acts and exercising its powers, the ECB, just like a State, is bound to observe customary international law constraints on enforcement jurisdiction.⁴⁰

The prohibition of extraterritorial enforcement jurisdiction thus entails that the ECB cannot carry out inspections of facilities abroad without securing the consent of the territorial State. Such inspections amount to the exercise of sovereign/institutional authority on the territory of another State, and without consent would infringe upon the latter’s sovereign prerogatives to regulate and inspect facilities on its own territory. States can however consent to other States exercising enforcement powers – including investigations – on their territory. This can be done *ad hoc*, but is more regularly done through inter-State agreements. These can constitute an ongoing legal basis for extraterritorial enforcement jurisdiction,⁴¹ and preclude its wrongfulness.⁴² Such agreements can also be concluded by any State agency acting on behalf of the State, and with the necessary competences.

To ensure both parties consent to the same thing, relevant bilateral instruments and follow-up arrangements should outline the precise conditions for inspections, in relation to *who* can inspect and is inspected, *what* can be inspected, and *when* inspections can take place. Inspections cannot lawfully take place outside the four corners of the agreement: from the perspective of international law, exceeding the scope of the agreement (and thus the limits of host State consent) may constitute an internationally wrongful act.

Indeed, the ECB concludes agreements (memoranda of understanding or cooperation) with its counterparts in third States, which can include the possibility of on-site visits. The remainder of this article will thus assess these agreements under public international law. It will examine their legal status, primarily discussing whether or not they create binding obligations, and secondly, what the ensuing consequences of this status are for the specific agreements made by the ECB, and thus the legality of the inspections.

³⁹ Case C-366/10 *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change (ATAA)*, ECLI:EU:C:2011:864, para 101.

⁴⁰ In *ATAA*, the CJEU applied the customary rules of prescriptive jurisdiction. Ibid paras 103-130.

⁴¹ Note that the concept of extraterritoriality is sometimes associated with unlawfulness. In this section, it merely denotes any exercise of power or capacity on another State’s territory, irrespective of the legal justification for that exercise. See generally O Sender, M Wood, ‘Extraterritorial Jurisdiction and the Limits of Customary International Law’ in C. Ryngaert, A Parrish, *Research Handbook on Extraterritoriality in International Law* (Edward Elgar 2023) 31-44; C Ryngaert, J Vervaele, ‘Core Values beyond Territories and Borders: The Internal and External Dimension of EU Regulation and Enforcement’ in T van den Brink, M Luchtman, M Scholten (eds), *Sharing Sovereignty in the European Legal Order?* (Intersentia, 2015) 299-324.

⁴² Draft Articles on State Responsibility for Internationally Wrongful Acts [2001] (ARSIWA), Art 20.

4. International agreements concerning extraterritorial inspections

The European Union enters into various agreements with third countries,⁴³ such as trade agreements, association agreements, or cooperation agreements.⁴⁴ The EU can enter into binding international agreements on all the policy areas in which it has competence, and where it is necessary to reach goals of EU policies.⁴⁵ Also the ECB (the sole EU institution with separate international legal personality)⁴⁶ has the legal capacity to enter into international agreements, albeit of an administrative nature.

Article 8 of the SSM Regulation provides the (internal) legal basis for the ECB to ‘enter into administrative arrangements with supervisory authorities, international organisations and the administrations of third countries’. Based on this provision, since 2021, the ECB has concluded multiple international administrative agreements, usually with foreign financial services authorities.⁴⁷ These agreements are reciprocal in nature, meaning that the stipulated rights and obligations apply to both the ECB and the third-country authority, as is discussed more extensively below. The agreements cover all supervised entities, i.e., ‘entities that fall within the supervisory remit of the [ECB and the third-country authority] ... including their cross-border establishments’.⁴⁸ They govern several forms of cross-border cooperation, including relating to exchange of information, mutual assistance, authorization and assessment, and indeed on-site visits.

Agreements on cross-border cooperation and extraterritorial inspections are increasingly commonplace in other fields too. They vary in nature and scope: they can be inter-state, or inter-agency like the ECB’s agreements with foreign supervisory authorities, and can be on a permanent or *ad hoc* basis. With regard to financial funding by the EU, also awarded to third countries, several EU bodies investigate the alleged fraudulent use of these funds.⁴⁹ For instance the Anti-Fraud Office (OLAF), competent to conduct administrative investigations⁵⁰ based on ‘Administrative Cooperation Arrangements (ACAs), signed between OLAF and competent

⁴³ Concluded in conformity with Art 218 TFEU.

⁴⁴ See: S Keukeleire and T Delreux, *The Foreign Policy of the European Union* (Bloomsbury 2022).

⁴⁵ Art 216 TFEU.

⁴⁶ Art 282(3) TFEU. See also J Kokott and D Eisendle, ‘European Central Bank’ (2020) *Max Planck Encyclopedia of Public International Law* para 17.

⁴⁷ See for an overview: europa.eu.

⁴⁸ E.g., Memorandum of Understanding between the European Central Bank and the Office of the Superintendent of Financial Institutions Canada (2023), ‘Definitions’.

⁴⁹ It should be kept in mind that these funds are awarded on the basis of certain terms and conditions, thus (also) providing a contractual legal basis between the EU Commission and the third country for on-site investigation.

⁵⁰ Art 3(2) of Regulation 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999.

authorities in third countries.⁵¹ According to OLAF officials, these ACAs are not legally binding, but help to overcome practical challenges by setting up contact persons and exchanging information.⁵² In section 4.2., we will further discuss cross-border cooperation between the ECB, the European Securities and Market Authority (ESMA) and the Bank of England regarding the regulation of derivatives and other financial instruments, as a point of comparison. Agreements providing for extraterritorial inspections have also been used for a long time in the area of food and drug regulation, where the import of certain food, medicinal drugs or preparations can be conditional on the existence of cooperation and/or inspection agreements.⁵³ This approach is not exclusive to the EU, for that matter: the US Food and Drug Administration (FDA) has a standing practice of on-site visits authorized by inter-agency agreements, under the US Food and Drug Act.⁵⁴

4.1. Memoranda of Understanding and on-site visits

Zooming in on agreements including the possibility for on-site visits, a typical provision regarding on-site visits is Article 8 of the recent MoU between the ECB and its Canadian counterpart, the Office of the Superintendent of Financial Institutions (2023),⁵⁵ which reads as follows:

1. The Authorities will assist each other, as far as practicable, with the conduct of on-site inspections of cross-border establishments situated in the other Authority's jurisdiction. Where assistance cannot be provided, the Authority requested to provide assistance will notify it to the other Authority as soon as deemed practical.
2. The Authorities will duly notify each other, in advance, of plans to inspect a cross-border establishment or to appoint a third party to conduct an inspection on its behalf. This notification will detail the purposes, scope, expected starting and ending dates of the inspection, the cross-border establishment to be inspected, and the names of the persons leading the inspection. [Before conducting an on-site visit, the Authorities will communicate those plans with each other and reach a common recognition of the terms regarding the on-site visit with full respect to each other's sovereignty and laws. *Cited from the MoC ECB-Japan*⁵⁶ The Authorities reserve the right to accompany each other's inspections team on such an inspection. Following the inspection, an exchange of views

⁵¹ Ibid Art 14.

⁵² C Brière, 'Enforcing PIF Requirements Outside the EU' (Working Paper 9-2024) 8-10.

⁵³ See for an overview, European Medicines Agency, 'Compilation of Union Procedures on Inspections and Exchange of Information' (2024), at www.ema.europa.eu.

⁵⁴ MJ Scheineson, 'FDA's Global Investigation and Enforcement Authority, Partnerships and Priorities' in SF Halabi, *Food and Drug Regulation in an Era of Globalized Markets* (Academic Press; an Elsevier Science Imprint 2015) 18.

⁵⁵ Art 8 of Memorandum of Understanding between the European Central Bank and the Office of the Superintendent of Financial Institutions Canada (2023).

⁵⁶ Section 9(2) of Memorandum of Cooperation between the European Central Bank and the Financial Services Agency of Japan (2023).

will take place between the inspections team and the other Authority within a reasonable timeframe.

A similar provision can also be found in the MoU between the ECB and the competent authorities of non-SSM EU Member States,⁵⁷ but these are not the subject of this contribution.

By way of comparison, it bears notice that other EU agencies also have the authority to conclude MoUs with third States allowing for extraterritorial inspections. Under the revised European Market Infrastructure Regulation (EMIR 2.2),⁵⁸ the European Security and Markets Authority (ESMA) is empowered to conclude MoUs with its regulatory counterparts to arrange monitoring and on-site inspections of Tier 2 (systemically important) central counterparties (CCPs) ‘shall be conducted pursuant to the cooperation arrangements established with the relevant third-country competent authority’.⁵⁹

On this basis, the ESMA concluded an MoU with the Bank of England in 2020 – after Brexit – on arrangements for cooperation on the monitoring and supervision of CCPs in the United Kingdom.⁶⁰ This MoU provides for extraterritorial on-site inspections of Tier 2 CCPs by ESMA officers conducted separately from Bank of England supervisory visits (Tier 1 CCPs being exclusively subjects to visits by the Bank of England),⁶¹ and subject to notification and after clarification of the respective roles and responsibilities of ESMA and the Bank of England.⁶² This arrangement will be discussed in more detail below, in section 5.

As regards the agreements, a few things are notable with respect to the inspections. Article 8 of the MoU with Canada, as well as its counterparts in other MoUs/MOCs,⁶³ allows the ECB to conduct on-site inspections regarding covered entities in third States, and, vice versa, allow third States (foreign authorities) to conduct such inspections in the territory of the ECB participating Member States. This is *quid pro quo* not explicitly covered by this article, nor by any other provisions of the agreement, but could be inferred from the fact that it does set safeguards for *how* these inspections can

⁵⁷ Art 7 of Memorandum of Understanding between the European Central Bank and the Competent Authorities of Non-participating European Union Member States for the performance of their Supervisory Tasks (2022).

⁵⁸ Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

⁵⁹ Ibid Art 25(h).

⁶⁰ Memorandum of Understanding between ESMA and the Bank of England to set out arrangements for cooperation on the monitoring and supervision of CCPs established in the UK, 23 September 2020, (hereinafter ‘ESMA MoU’).

⁶¹ Ibid Art 5(4).

⁶² Ibid Art 5(3).

⁶³ E.g., Section 9 of Memorandum of Cooperation between the European Central Bank and the Financial Services Agency of Japan (2023); Art 9 Memorandum of Understanding between the European Central Bank and the Australian Prudential Regulation Authority (2021).

take place. This would imply that both parties understand there to be mutual consent and certain conditions to the inspections a priori. These safeguards are as follows: a notification requirement, a mandatory exchange of views between the ECB and the foreign authority, and the right of one party to accompany the inspections team of the other party. These safeguards should go a long way to uphold the parties' consent to the exercise of extraterritorial enforcement jurisdiction.

As our contribution primarily takes an 'outbound' perspective, i.e., it focuses on the power of the ECB to conduct inspections in third States under international law, we will not address in-depth the EU law intricacies of 'inbound' inspections, i.e., inspections conducted by third country authorities in ECB participating Member States on the basis of the respective MoUs. We do note, however, that a key question of EU law is whether, under EU external relations law, the ECB can consent to third country inspections on the territory of a Member State, or whether also the consent of the Member State is to be secured. Given our focus on public international law, we will not elaborate on this.⁶⁴

Another thing to note with respect to the MoUs concluded by the ECB is that they explicitly state that they are not intended to confer any enforceable obligations on the parties to the agreement. As Article 10 of the MoU with Canada, for instance, states:

1. This Memorandum of Understanding sets forth a statement of intent and does not modify or supersede any laws, regulations and requirements in force in, or applying to, Canada or the European Union. Nor does this Memorandum of Understanding create any directly or indirectly enforceable rights or legally binding obligations for the Authorities or any third party.
2. This Memorandum of Understanding is without prejudice to other cooperation arrangements that each Authority might conclude and can be supplemented with more specific memoranda of understanding between the same Authorities agreed upon for the purpose of cooperating for the supervision of a specific cross-border establishment.

⁶⁴ Guidance to answer this question can be taken from the EU Court of Justice's 1971 *ERTA* judgment, in which the Court held that 'each time the [EU], with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules', and that '[a]s and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system'. Case 22/70 *Commission v Council (ERTA)*, ECLI:EU:C:1971:32, paras 17-18. The exact scope of this ERTA doctrine of pre-emption and implied external powers remains the subject of debate to this very day. It could be argued, given the fact that the EU (ECB) is given internal powers to conduct sovereign activities in the territory of the SSM participating Member States, that the EU (ECB) can also allow third countries to carry out the same activities in the SSM participating Member States without the latter's additional consent, i.e., it can exercise those powers externally by implication. Given the intrusiveness of third country inspections, and the rather stringent division of competences between the Union and the Member States, it is far from certain, whether the ECB can rely on the ERTA doctrine to allow such inspections to go forward without any Member State consent. See also, M Cremona, C Kilpatrick, J Scott, 'ERTA and Us: Shifting Constitutional Equilibria on the Visions of Europe' (2021) 6 *European Papers* 567-577.

This provision is again fairly typical of MoUs and MoCs concluded by the ECB, that cover on-site inspections, as they are included in at least all publicly available agreements at the time of writing.⁶⁵ This is a consequence of the last section of Article 8 of the SSM Regulation, which holds that any agreements concluded between the ECB and foreign agencies ‘shall not create legal obligations in respect of the Union and its Member States’, and reflects both the division of competences between the Union and the Member States, and the limited powers of the ECB. It affects the legal qualification of MoUs under public international law.⁶⁶ This will be addressed in the next section (4.2).

4.2. Qualifying the ECB MoUs under public international law

This all raises two central issues under international law, which are the focus of this section and form the gateway to the subsequent analysis of this contribution. Firstly, the question is how such agreements should be qualified under international law, especially given their non-binding nature; and second, whether they indeed express consent as required for extraterritorial enforcement actions. From these issues flow a number of specific problems, to be discussed in section 5.

Public international law does not recognize an ‘administrative agreement’, MoU or MoC as a distinct category of sources.⁶⁷ However, if such agreements are concluded between State representatives and intended to create binding obligations, ‘administrative agreements’ can be classified as treaties under the Vienna Convention on the Law of Treaties (VCLT) regardless of how they are formally named.⁶⁸ Whether agencies like the ECB or central banks can represent the State and have a mandate to conclude binding agreements is ultimately a question for the State itself to decide, but is certainly not prohibited under international law, and also not uncommon in practice. In other words, in principle administrative agencies *can* conclude agreements that qualify as treaties under the VCLT, and thus create binding obligations that are governed by public international law.

There are however additional issues with agreements between foreign States or foreign administrative agencies acting on behalf of the state, and the ECB. The ECB is not a State agent in the sense of the VCLT as it acts on behalf of the Union, which is an international organisation under public international law and not a state. While there exists a Convention governing agreements between States and IOs that mirrors *mutatis mutandis* the relevant provisions of the VCLT, this instrument is not in

⁶⁵ E.g.: Section 11 of Memorandum of Cooperation between the European Central Bank and the Financial Services Agency of Japan (2023); Art 12 Memorandum of Understanding between the European Central Bank and the Australian Prudential Regulation Authority (2021).

⁶⁶ For the remainder of this article, we refer to MoUs and MoCs in general as ‘MoUs’.

⁶⁷ Art 38(1) of the Statute of the International Court of Justice.

⁶⁸ Art 2 VCLT.

force.⁶⁹ But even if we were to look at this Convention, or apply the provisions of the VCLT itself analogously, it becomes clear that the specific inter-agency agreements concluded by the ECB cannot be considered treaties at all. That is primarily because they are generally not intended to create international obligations, as noted in the previous section. This appears also to be the case with most agreements concluded by the ECB, which as mentioned, hold that the agreement ‘does not create any directly or indirectly enforceable rights or legally binding obligations for the Authorities or any third party’.⁷⁰ Moreover, as discussed, in some respects, they potentially exceed the agency’s competences under domestic law, meaning they are unlikely to bind the State.⁷¹

In summary, MoUs such as the one cited above have no legal status in international law, and are not governed by the provisions of the VCLT, including the rules on treaty application and interpretation. Nor can breaching these agreements on their own be considered an internationally wrongful act, under the law of international responsibility. At best, these MoUs can be considered to aid in the interpretation of other, primary sources of law. This includes any treaty concluded between the Union and third States, or any rule of customary law applicable between them.

5. The legal status of MoUs and their consequences

From this somewhat indeterminate legal status of agreements as concluded by the ECB follow several more specific issues, as outlined further in this section. First and foremost is the legality of extraterritorial on-site inspections itself. Section 4.1 noted that the MoUs do not explicitly express State consent to on-site visits, but rather assume there is such consent and state the conditions under which such visits should take place. Should the agreement indeed create legal obligations to cooperate with foreign on-site visits, it could be argued that this creates some sort of ‘tacit’ consent on the basis that a State cannot agree to conditions and safeguards for on-site visits, if it does not agree to the visits in the first place. But if an agreement does not create any obligations at all, the basis for even such ‘tacit’ consent becomes thin.

⁶⁹ Art 7 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations could be applied in this respect, insofar as it represents customary international law governing treaty-making involving the ECB, as an international organisation, on the one hand, and a State on the other. Art 7 provides as follows: ‘1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if: (a) that person produces appropriate full powers; or (b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State for such purposes without having to produce full powers’.

⁷⁰ Art 10(1) of MoU ECB-Canada; Section 11(1) of MoC ECB-Japan.

⁷¹ M Chamon, ‘A Constitutional Twilight Zone: EU Decentralized Agencies’ External Relations’ (2019) 56 *Common Market Law Review* 1514.

Therefore, while MoUs provide the general framework for practical cooperation between the ECB and third States, actual consent to extraterritorial on-site visits must be assessed on a case-by-case basis. In practice, such visits will often be preceded by extensive communication between the ECB, their third State counterparts and relevant other State agencies that indicate State consent, but not necessarily. Absent explicit expressions of consent or agreements between the EU and third States which the ECB wishes to visit, consent may be inferred from other actions or decisions by third State authorities, such as allowing ECB personnel to enter the country, and functionally cooperating with the visit in line with the MoU. This would preclude the unlawfulness of the visit in general, from a public international law perspective. Whether the consent then covers all aspects of the visit is however uncertain; that should also be derived from the same State actions signalling implicit consent. These may or may not relate to any of the terms of the MoU on which ECB personnel relies.

Moreover, it is a rather fickle basis for the ECB's work as consent could be easily revoked. As also indicated by Article 1(3) of the aforementioned EU-Canada agreement,⁷² again common to most MoUs studied: cooperation (including on-site) visits can be withdrawn or limited for a wide variety of reasons, including 'national laws, regulations and requirements'. This would be impossible had there been a legal basis in international law, as national law cannot be invoked as a defence against violating an international agreement.⁷³ Similarly, lack of a treaty basis for this inspection means there can be no reliance on good faith or any established rule of treaty interpretation, in case of disagreement on the scope of the planned visit.

The issue of competence on behalf of the parties to the agreement has been raised above.⁷⁴ Per Article 46 VCLT, treaties concluded in excess of the authority of the State agents involved can still bind the State, unless it was 'objectively evident' to any State acting in good faith that the entity was not empowered under internal law to conclude the agreement. This can for example be an issue when a State has multiple regulatory agencies whose competences overlap or compete.⁷⁵ This presump-

⁷² Stating that 'The Authorities recognise that cooperation under this Memorandum of Understanding may be denied on the grounds of laws, regulations and requirements, or public interest, as well as where it would interfere with an ongoing investigation or jeopardise the proper performance of the tasks of the Authorities', Art 1(3) MoU ECB-Canada.

⁷³ Art 27 VCLT.

⁷⁴ A Ott, 'The EU Commission's Administrative Agreements: "Delegated Treaty-making" in between Delegated and Implementing Rule-making' in E Tauschinsky and W Weiß (eds), *The Legislative Choice Between Delegated and Implementing Acts in EU Law: Walking a Labyrinth* (Edward Elgar 2018) 211 and D Bodansky, PJ Spiro, 'Executive Agreements Plus' (2016) 49 *Vanderbilt Journal of Transnational Law* 885–930 on US practice in this regard.

⁷⁵ Note that the ECB sometimes concludes different agreements with supervisory authorities from one single State. See notably the different MoUs between the ECB and US supervisors, namely the New York State Department of Financial Services (concluded 3 September 2021) as well as the US Securities and Exchange Commission (concluded 16 August 2021).

tion is however not applicable to MoUs concluded by the ECB, so if a foreign supervisory authority exceeds its competence under national law when assisting the ECB, ECB inspections can easily be curtailed by other authorities.

Similarly, disputes regarding the scope and content of the MoU should be resolved by negotiations between the parties;⁷⁶ but absent any external governing framework, there is neither an obligation for other party to comply with the agreement in good faith, nor any principles of interpretation that would help interpret the agreement.⁷⁷ Regular methods of interpretation of international law would mean that parties look at the plain meaning, legal context and subsequent practice,⁷⁸ and crucially that internal law cannot be invoked as a defence against non-compliance.⁷⁹ But as these are not necessarily applicable to non-binding agreements like the MoUs, there can be significant legal uncertainty regarding how they should then be interpreted. Should negotiations fail to achieve a mutually satisfactory result, there is also no recourse to a dispute settlement body to resolve the disagreements.

The mirror image of these issues concerns the agreements' reciprocity, also highlighted in section 4. The MoUs studied commit to allowing foreign supervisory authorities to conduct on-site visits in the EU, with ECB cooperation. In spite of the *ERTA* pre-emption doctrine,⁸⁰ cooperation can hardly be guaranteed: since the MoUs are not binding, if a Member State disagrees with a planned inspection, the ECB has little to no authority to induce compliance with the MoU.

The upshot of these issues is that the current practice of concluding non-binding MoUs has significant potential for friction between the ECB and its partner agencies in third States, other agents of that State, and/or the State itself issuing formal protests, and even EU participating Member States. It should be noted here that the authors have thus far not found any case of these risks actually manifesting; as emphasised by the agreements themselves, on-site inspections are always preceded by notifications, negotiations and extensive exchange of information. This diplomatic and practical approach means that in practice, on-site visits in third States do not generate significant controversy yet. That said, should irreconcilable differences arise between the ECB, its inspectors and third States, the agreements themselves offer little (legal) protection. Even if the visits themselves are handled properly and diplomatically, ECB inspectors can potentially be targeted by unscrupulous actors wishing to make a political point – for example, regarding the lack of reciprocity in practice of these agreements. This can especially be a risk if a new government comes into

⁷⁶ Art 3 VCLT and, by analogy, Part II VCLT on the conclusion of treaties.

⁷⁷ Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, Art 8. See also M Lehmann, 'Extraterritoriality in Financial Law' in C Ryngaert, A Parrish, *Research Handbook on Extraterritoriality in International Law* (Edward Elgar 2023).

⁷⁸ Art 31 VCLT. We could apply the VCLT by analogy here, insofar as the relevant agreements may not be meant to have binding legal effects.

⁷⁹ Art 27 VCLT.

⁸⁰ M Chamon (n 71).

power that is less amenable to cooperating with the EU and its institutions; whereas any treaties concluded by previous governments would remain applicable, this is not true for non-binding agreements like MoUs, even if the partner agency and its personnel have not changed. It should also be reiterated here that without proper State consent, extraterritorial on-site inspections constitute an internationally wrongful act. Translated into domestic law and practice, this may expose ECB personnel to arrest, detention or other penalties in third States, without the agreement offering any basis for diplomatic protection or other international recourse. As mentioned, these non-binding agreements do not create obligations under primary sources of international law, breach of which can amount to internationally wrongful acts. It may also lead to diplomatic tensions between the EU and third States, eroding rather than strengthening international banking supervision as intended by the SSM framework.

All this can be contrasted against the MoU concluded between ESMA and Bank of England, mentioned in section 4.1. The legal arrangement upon which this MoU rests differs from that underpinning the previously discussed ECB MoUs, not just from a EU law perspective but also from a public international law perspective. Contrasting the two in fact illustrates the legal twilight zone in which the ECB MoUs exist very well. First, the ESMA-Bank of England MoU is predicated on the European Commission designating the UK framework regulating CCPs as equivalent to the EU framework.⁸¹ CCPs established in an equivalent country can then apply for recognition from ESMA, which once given means they can be used by EU-based parties (and non-EU parties already subject to EMIR) to clear derivatives obligations.⁸² The equivalence decision is what triggers an obligation for ESMA to negotiate an MoU with its regulatory counterpart in that particular state,⁸³ as it did with the Bank of England. The MoU is expected to establish cooperation arrangements to monitor compliance of CCPs, including the aforementioned on-site visits.⁸⁴ It should also ensure continuing equivalence between the EMIR and the third country's legal and supervisory framework, by requiring ESMA to monitor regulatory and supervisory developments in the third country.

The difference with the MoUs concluded between the ECB and its foreign counterparts is apparent. Whereas under the SSMR, the ECB has the *competence* to conclude MoUs, ESMA has an *obligation* pursuant to the Commission's equivalence decision.⁸⁵ This does not so much change the qualification of the MoU itself under international law, which in this case is still not a treaty for the same reasons the ECB

⁸¹ ESMA MoU (n 60) 2 (preamble), referring to Commission Implementing Decision (EU) 2025/215 of 30 January 2025 determining, for a limited period of time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council.

⁸² Art 25(6) EMIR.

⁸³ Ibid Art 25(7)-(7b).

⁸⁴ Ibid Art 25(6b).

⁸⁵ ESMA MoU (n 60) 2-3.

MoUs are not treaties. Rather, it points to the relevant exercise of authority on behalf of the Union, which is done by the Commission, not ESMA.⁸⁶ Moreover, it reduces the chance of lack of clarity regarding the scope of ESMA's mandate when negotiating the MoU. This creates a much stronger argument for the existence of implicit consent between the EU and third states as to the subject of inspections; first, because the Commission can be expected by third states to have the mandate to speak on behalf of the Union. Second, because ESMA is explicitly required in the EMIR (and by the Commission) to conclude MoUs that also include monitoring and compliance mechanisms, it is much clearer for third states what they are consenting to.

This means the position of ESMA is different from that of the ECB when it comes to negotiating MoUs, as it can point to its relative lack of discretionary power, as well as to the much clearer mandate given by the Commission through the EMIR. It should be noted that the decision to revoke equivalence status is also done by the Commission, thus leaving a much clearer division of authority: the Commission creates the legal grounds for ESMA to exercise its supervisory authority, to which foreign states and/or their representative agencies can consent. ESMA is primarily tasked with negotiating *how* this authority gets exercised, and how the collaboration with third state supervisory agencies is shaped – within the boundaries of the EMIR and the task given to it by the Commission. Similarly, the agreement is clear that continued performance of the agreement is subject to the continuing approval and consent of the respective (national) authorities.⁸⁷

This also translates into how the MoU is phrased. While it does not differ so much in its substance from the previously cited ECB MoUs, it is much clearer in comparison as to its language. For one, the preliminary paragraphs set out the division of competence between the Parliament, Commission and ESMA, how ESMA operates pursuant to Commission mandate and expectations, and the place of the MoU therein.⁸⁸ It also more explicitly outlines the limits of ESMA authority and competence. One notable aspect of this concerns the reciprocity of the agreement. Like the ECB MoUs, the agreement between the ESMA and Bank of England are expected to be reciprocal. Unlike the ECB MoUs however, it explicitly notes that ESMA cannot speak on behalf of other authorities within the Union. Rather, it references an expectation that other Union agencies (including national supervision agencies) may want to engage in similar reciprocal arrangements.⁸⁹ Lastly for the purposes of this contribution, the agreement is more explicit about how on-site visits are conducted. As mentioned, ESMA

⁸⁶ The MoU is also explicitly not intended to create binding obligations, as pointed out in Art 2(4).

⁸⁷ Ibid see i.e. Arts 2(3) and 2(8).

⁸⁸ ESMA MoU (n 60) 2-3, especially in the phrase 'This MoU covers the expectations of the Commission expressed in Recitals 14,15,16 and 17 of Decision (EU) 2025/215 related to exchange of information and cooperation'.

⁸⁹ Ibid Art 3, 'This MoU is an arrangement between the Bank and ESMA and not a collective arrangement with other European Union authorities. As such, it will not impact any arrangements which may be agreed directly between other European Union authorities and the Bank. However, the Bank

can only conduct on-site inspections for Tier 2 CCPs, relying on the supervision of the Bank of England for Tier 1 CCPs only. The conditions and procedure of such visits are outlined in much more detail, especially when such visits are done outside of the Bank of England's own supervisory reviews.⁹⁰

While these more specific provisions still do not create binding obligations, they do matter for how this agreement can function under international law. As mentioned, the MoU is backed by a Commission decision that gives a more robust basis for consent between States, at least on behalf of the Union. The content of the agreement then helps to demonstrate what the foreign State (*in casu* the United Kingdom) is consenting to, and what the scope of its consent is. This is further solidified by the requirement of prior notification, and the elaborate conditions under which such notification needs to be given and to whom. This specificity not only lessens the chance of misunderstandings, but also gives ESMA inspectors a stronger legal basis in case of disputes over whether there was an international legal basis for actions taken pursuant to the visit. Similarly, there can be little misunderstanding about the extent of reciprocity, and thus no complaints in hindsight that ESMA could not consent to reciprocal visits on behalf of the Member States.

6. Extraterritorial on-site visits without State consent

In section 4, it has been discussed that, in principle, the international legal basis for the ECB to carry out extraterritorial inspections ought to be an international agreement, as such an agreement expresses the consent of the host State. We have also concluded that the MoUs currently concluded by the ECB with third State supervisory authorities may not be a sufficient legal basis in that regard. We have pointed out that consent may nevertheless be inferred (*ad hoc*) from other actions or decisions by third State authorities. The question may also arise whether, in the absence of clear third-country consent, the ECB can directly seek the consent of the third-country bank that is to be inspected, thereby bypassing the third State itself. In principle, the answer to this question is negative.⁹¹ The international law of enforcement jurisdiction is inter-State in nature, and is aimed at safeguarding States' sovereign

enters this arrangement with an expectation that other European Union national authorities with responsibility for regulation and supervision of CCPs that wish to gain recognition in the UK will sign reciprocal versions of this MoU, as well as any supplementary arrangements as appropriate'.

⁹⁰ Ibid Arts 3 and 5.

⁹¹ See in respect of extraterritorial inspections by data protection authorities: M Czerniawski, DJB Svantesson, 'Challenges to the Extraterritorial Enforcement of Data Privacy Law - EU Case Study' in M Brinnen, CM Sjöberg, D Törngren, D Westman, S Öman (eds), 'Dataskyddet 50 år – Historia, aktuella problem och framtid' (2023), p. 127-153 ('Challenges to the extraterritorial enforcement of data privacy law – EU case study'), p. 142 (doubting 'whether European data protection authorities are even allowed to send agents abroad to third countries, even with the consent of the controllers/processors established in those countries').

regulatory spheres. Accordingly, private entities cannot waive a sovereign right that accrues to the State, by entering into contractual arrangements with the ECB.⁹² At most, one can countenance the legality of a notification of the territorial State by the inspecting State, inviting the former to accept or object to the inspection within a reasonable time; in case the territorial State does not respond on time, it could be argued that it has implicitly consented to the extraterritorial inspection.

Another issue is whether the ECB can, in the absence of an international agreement, ground the legality of its extraterritorial inspections on the failure of the third State to enter into an agreement. Again, the answer is likely to be negative. Given the principle of voluntarism underlying the international legal system,⁹³ third States are not required to enter into treaty relations. Also, exercising their exclusive enforcement jurisdiction, they have the sovereign right under international law to *refuse* consent to extraterritorial inspections. Accordingly, a failure to consent does not, as such, constitute an internationally wrongful act.

This also implies that the ECB cannot resort to the doctrine of countermeasures to justify its non-consent-based extraterritorial inspections. This doctrine authorises an injured State or international organisation to take countermeasures against a State which is responsible for a prior internationally wrongful act.⁹⁴ Admittedly, it could be argued that third States, by tolerating on their territory banks whose activities cause harm in SSM participating Member States, violate due diligence obligations under international law, which would in turn trigger the right of the injured organisation, *in casu* the ECB, to take countermeasures against the third State, e.g., by carrying out extraterritorial inspections in violation of the prohibition of enforcement jurisdiction. This argument can take its cue from the *dictum* of the International Court of Justice in 1949 *Corfu Channel* case, in which the Court referred to ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’.⁹⁵ It is contested, however, whether this *dictum* grounds general due diligence obligations of States.⁹⁶ And even if one were to agree that it

⁹² It has been reported that national data protection authorities of some EU countries have conducted on-site audits of data processing facilities and equipment in third (non-EU) countries on the basis of a contractual clause, but apparently the concomitant consent of the authorities of these countries had also been obtained. See A Azzi, ‘The Challenges Faced by the Extraterritorial Scope of the General Data Protection Regulation’ (2018) *JIPITEC* 126, 134.

⁹³ See for a discussion: SA Yeini, ‘Whose International Law Is It Anyway? The Battle over the Gatekeepers of Voluntarism’ (2024) 45 *Michigan Journal of International Law* 1.

⁹⁴ Art 49(1) ARSIWA.

⁹⁵ *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v Albania)* (Judgment) (ICJ, 9 April 1949), p. 22.

⁹⁶ J Kenny, ‘A General Obligation of Due Diligence in International Law?’ (10 May 2024) *EJIL:Talk!* (‘Even if the obligation referred to in *Corfu Channel* is understood to constitute a general obligation that is universally applicable to all types of activities, its language does not refer to a duty to prevent territory being used for activity which harms the rights of other States, only an ‘obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States’).

does, it may be questioned whether violations of such obligations can trigger countermeasures, in light of the restrictive conditions governing such measures. In particular, countermeasures can only be taken in order to induce the State to comply with its obligations; in addition, they should be temporary and reversible.⁹⁷ Carrying out inspections as a countermeasure arguably does not meet these requirements, as they may not be aimed at bringing pressure to bear on the third State, and may lead to the ECB obtaining evidence with permanent and irreversible (financial-economic) effects. Also from a practical perspective, one has difficulties imagining how ECB inspectors could, in the absence of any third State cooperation, have unimpeded access to the third State's territory ('sovereignty of the state threshold') and access to the premises of the inspected entity ('premise threshold').⁹⁸

7. Means of obtaining information short of inspections

In case the ECB is barred from conducting inspections of the premises of third-country operators, e.g., because the third State withholds consent, the ECB may have other means at its disposal to obtain relevant information in the possession or under the control of third-country banks. In particular, the ECB could request the third State to provide information on these banks, on the basis of a prior international agreement (even if not legally binding),⁹⁹ or *ad hoc*. If such information is not forthcoming, the ECB, using its investigatory and sanctioning powers, could possibly direct an order to the third-country bank, or a related entity in the EU (e.g., the parent company based in the euro area) to produce information, under threat of a periodic penalty payment.¹⁰⁰ There is no evidence that the ECB has already used these powers, arguably because banks normally provide the requested information, but it is not excluded that, one day, the ECB may direct such 'production orders' at non-cooperating banks.

The international lawfulness of production orders has not fully crystallised yet.¹⁰¹ In one notable case, the Dutch Trade and Industry Appeals Tribunal, the highest tribunal for economic public law in the Netherlands, ruled in 2018 that the Dutch Central Bank (DNB) is allowed to order a foreign financial institution to produce information, under threat of a penalty payment, insofar as such institution carries out activities on

⁹⁷ Art 49 ARSIWA.

⁹⁸ These practical concerns, coupled with sovereignty concerns, may also explain why in the final EMIR Regulation 2.2 (n 58), the Council was not followed in its suggestion to remove the requirement for third country consent to extraterritorial inspections. See for a reconstruction Freshfields Bruckhaus Deringer, 'EMIR 2.2: Third country CCPs', briefing September 2018.

⁹⁹ International agreements between the ECB and third States typically provided for information exchange. E.g.: Section 5 ECB-Japan MoC, Art 4 ECB-Canada MoU.

¹⁰⁰ See Art 132(3) TFEU ('[T]he European Central Bank shall be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions'). See for administrative penalties imposed by the ECB also Art 18 SSMR.

¹⁰¹ Obviously, a mere *request* for information is not problematic, to the extent that no adverse effects are attached to non-compliance with the request.

the Dutch financial market.¹⁰² Unlike the lower court,¹⁰³ the Appeals Tribunal found that a DNB production order and penalty payment do not create effects outside the Dutch legal order, and hence do not violate the sovereignty of a third State.¹⁰⁴ According to the Tribunal, DNB exercises its supervisory powers in the Netherlands, not extraterritorially.¹⁰⁵ This approach is not universally shared, however. For instance, in a 2023 decision, the United Kingdom Competition Appeal Tribunal and High Court of Justice ruled that the UK Competition & Markets Authority does not have the legal power to order German companies to provide information relating to an ongoing investigation.¹⁰⁶ It bears notice that this decision was based on the presumption against extraterritoriality, a canon of statutory construction, rather than on international law proper.¹⁰⁷ Still, it indicates that some courts may consider orders for the production of information held abroad to be in violation of the territoriality principle.¹⁰⁸

Accordingly, for the ECB to order a foreign bank to produce documents under threat of penalty payment is legally risky, in light of the territorial limitations of enforcement jurisdiction. The ECB could try to circumvent these limitations, however, by directing its orders to a euro area-based business partner, parent company, subsidiary, or branch of the foreign bank. These persons are subject to the full territorial jurisdiction of the ECB. Such ‘indirect’ enforcement is in fact part of a larger trend. In the field of law-enforcement in cyberspace, for instance, US and EU legislation allows States to order locally present operators to produce evidence located in a third State – without third State consent being needed *per se*.¹⁰⁹ Similarly, in civil litigation States, notably the US, have allowed courts to order litigants over whom the US has personal jurisdiction, to produce documents held abroad (‘discovery’).¹¹⁰ Importantly, in a case

¹⁰² College van Beroep voor het Bedrijfsleven, DNB v Multi Track Exchange, N.V., Paramaribo (Suriname), ECLI:NL:CBB:2018:2.

¹⁰³ District Court of Rotterdam, Multi Track Exchange, N.V., Paramaribo (Suriname) v DNB, ECLI:NL:RBROT:2016:109, which had ruled that the DNB production order violated the principle of territoriality.

¹⁰⁴ Ibid para 5.2.

¹⁰⁵ Ibid.

¹⁰⁶ *Bayerische Motoren Werke AG, Volkswagen Aktiengesellschaft v Competition & Markets Authority* CAT 7 (Competition Appeal Tribunal and High Court of Justice, 8 February 2023).

¹⁰⁷ Ibid 28-36.

¹⁰⁸ See also some literature, e.g., in Dutch (criticizing DNB’s production orders): R Klein and RE Tak, ‘Rechtsmacht over de grens of rechtsmacht begrensd?’ (2017) 15 *Grensoverschrijdend Bestuursrecht, Jonge VAR-reeks* 37.

¹⁰⁹ See notably Regulation (EU) 2023/1543 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings ; The Clarifying Lawful Overseas Use of Data Act or US CLOUD Act (H.R. 4943). Such production orders are subject to limitations, however, inter alia to safeguard the rights of the third country.

¹¹⁰ SI Strong, ‘Jurisdictional Discovery in Transnational Litigation: Extraterritorial Effects of United States Federal Practice’ (2011) 7 *Journal of Private International Law* 1-31.

pertaining to the European Commission's investigations into foreign subsidies distorting the internal market, the President of the General Court of the EU held in August 2024 that the Commission is legally allowed to order local employees of a Polish and a Dutch company controlled from a third State to hand over digital evidence stored on a non-EU server belonging to the corporate group.¹¹¹ Also the upcoming EU Corporate Sustainability Due Diligence Directive (CSDDD) allows for indirect enforcement jurisdiction.¹¹² The Directive obliges companies within its scope to adopt human rights policies, conduct risk assessments regarding human rights, labour rights, environmental and climate risks in their operations, take measures to prevent or mitigate risks, or to cease or mitigate ongoing impacts, track outcomes and communicate results. The Directive targets parent companies or lead firms, but the intended effect is lower in supply chains where the most salient risks occur – outside Europe. The Directive is backed by administrative enforcement¹¹³ and civil liability.¹¹⁴ The available enforcement measures can only directly affect EU-domiciled companies (or certain companies entering the EU market directly) but could have the indirect effect of forcing foreign subsidiaries or business partners. Their parent companies or contract partners can leverage their own stake or level of control to force their business partners to release certain information or change their way of operating, in conformity with EU standards, to make sure the EU-based company is not exposed to liability. This form of transnational private enforcement then effectively functions as an extended arm of EU-based public agents.

These examples show that States and the EU may be willing to order entities over whom they have personal jurisdiction to produce information held in third countries. Arguably, such enforcement measures eliminate the adverse effects of international non-cooperation,¹¹⁵ and contribute to the effectiveness of the law.¹¹⁶ Because this practice is relatively new, there have not been explicit State protest yet against such measures. This may be explained by the fact that, formally speaking, the relevant

¹¹¹ Order of the President of the General Court, Case T-284/24 R *Nuctech Warsaw Company Limited sp. z o.o., Nuctech Netherlands BV v Commission*, ECLI:EU:T:2024:564 para 86 ('As regards, more precisely, access to data which pass through mailboxes used by employees of [Polish and Dutch] companies controlled from third States in carrying out their business-related tasks within the European Union, it must also be noted that the proper conduct of Commission investigations could be compromised if those companies could evade requests for information by deciding to store their data outside the European Union').

¹¹² For the final negotiated text, see Directive 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 eur-lex.europa.eu. Note that the CSDDD does not envisage foreign site visits and the context is thus different. See also Recital 74 of Preamble CSDDD.

¹¹³ Arts 24 and 25 CSDDD.

¹¹⁴ Ibid Art 29.

¹¹⁵ Compare Saskia Nuijten, 'Notenkraker bij Rb. Rotterdam 1 juni 2017 (ECLI:NL:RBROT:2017:4116) (territorialiteitsbeginsel in het toezicht)', *Tijdschrift voor Toezicht* (2017), nr. 1-2, highlighting that unilateral production orders will make international supervisory co-operation redundant.

¹¹⁶ Compare WW Geursen, *Mapping the Territorial Scope of EU Law* (Eleven, 2024) 287.

measures are not directed at the foreign State or foreign regulatory agency. Indeed, for the ECB, the final objective of requesting or ordering information is not to decide whether to take measure against a third country entity but against the supervised SSM entity in the euro area (i.e. the parent or outsourcing bank). Nevertheless, an intermediate objective is to force the entity in the third country to provide the information. Coercive effects can be felt in the territory of that State, and can undermine the authority of the local agency. In addition, these measures may be seen to circumvent cooperation agreements, insofar as the latter do not explicitly allow this type of enforcement. Even if the measures are separate from the agreement, they work to undermine its purpose and render local enforcement powers less relevant. This explains why not all States support a liberal approach to indirect enforcement jurisdiction.¹¹⁷ Non-supportive third States may then forcefully reassert their sovereignty in the face of foreign enforcement orders considered as extraterritorial in nature. They could refuse to abide by the terms of an existing cooperation agreement. Also, they could adopt blocking legislation to limit the extraterritorial effects of foreign orders. Such legislation may put the objects of inspection in a bind, catching them between the ‘extraterritorial’ obligation to produce documentation, and the territorial prohibition of disclosing documentation to foreign States or agencies.

8. Understanding the power differential between the ECB and third States

In this final section, we reflect on our findings regarding the formal legal basis for on-site inspections and other enforcement measures, and draw attention to the fact that the conclusion of cooperation agreements and the exercise of enforcement jurisdiction do not take place in a political-economic vacuum. Scholars of international law have highlighted that international agreements tend to be skewed in favour of more powerful parties, and that especially powerful States exercise extraterritorial jurisdiction, in ways that further their political and economic interests, to the detriment of weaker parties.¹¹⁸ The ECB may want to keep this in mind when engaging in enforcement cooperation, whether through negotiating agreements on extraterritorial inspections, or when otherwise exercising types of (indirect) enforcement jurisdiction.

¹¹⁷ For an (early) discussion of extraterritorial discovery: DJ Gerber, ‘Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States’ (1986) 34 *American Journal of Comparative Law* 745. For a recent discussion of cyberspace enforcement: C Ryngaert, ‘Extraterritorial Enforcement Jurisdiction in Cyberspace: Normative Shifts’ (2023) 24 *German Law Journal* 537-550.

¹¹⁸ B Ikejiaku, ‘International Law is Western Made Global Law: The Perception of Third-World Category’ (2014) 6 *African Journal of Legal Studies* 337-356; N Krisch, ‘Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance’ (2022) 33 *European Journal of International Law* 481-514; BS Chimni, ‘The International Law of Jurisdiction: a TWAIL Perspective’ (17 November 2021) 35 *Leiden Journal of International Law* 29-54.

The platonic ideal of enforcement cooperation is that States share a common goal and agree on facilitating enforcement actions in pursuance of that common goal. In reality, they are often a product of politically charged negotiations and compromises, to align different parallel and sometimes competing interests. These interests may relate to the Union's single market and economic opportunities for financial service providers in third States. Moreover, the increased integration of global financial markets means it is increasingly difficult to operate without somehow having to deal with the SSM, or impacting the European banking system in other ways. That may expose third State actors to potential sanctions by the ECB in case of non-compliance, and provides another incentive to 'play ball'.

Holding the key to the European financial market is a powerful tool that the Union has, and that it can use to impose its view of banking supervision, its rules and underlying values, and secure relevant concessions by third States. We can witness similar dynamics in other areas where foreign on-site visits are common. For instance, the aforementioned FDA visits to foreign production facilities are possible because the US market for food and especially drugs is exceptionally lucrative and primarily serviced by non-US suppliers – mostly from India and China. Similarly, the EU has relied on its market power to impose obligations regarding air travel, minerals and other raw materials, corporate human rights and sustainability impacts, and of course data protection.¹¹⁹ The ECB's competence to conclude agreements with (bodies similar to) national competent authorities in third States under the SSM has to be seen in this light as well. Nominally, the relevant obligations are imposed through a territorial connection (the presence of certain goods, establishment of a branch or subsidiary, et cetera) and only apply to actors voluntarily entering the EU market. In practice, foreign providers of goods and services have little choice but to submit to the EU's regimes if they want to benefit from the single market. Moreover, the Union is not passive in this regard: integration into various regulatory regimes is often raised when the EU negotiates any form of economic or geopolitical cooperation; while also nominally consensual, this is another way in which the EU projects its power and interests externally.

The net effect is that while the formal basis for the EU's imposition is both territorial and consensual, it can in practice be perceived as unilateral imposition of EU standards on foreign states by virtue of economic power.¹²⁰ While strictly speaking not an exercise of extraterritorial jurisdiction *per se*, or an infringement of foreign sovereignty, it is not hard to see how it can be perceived that way by whomever it affects – individuals, businesses and their home States. The standards applied by the Union moreover reflect the EU's own interests as much as they reflect international

¹¹⁹ See at length: A Bradford, *The Brussels Effect. How the European Union Rules the World* (Oxford University Press 2020).

¹²⁰ See generally J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87-126.

community interests, and the two can be hard to separate. This approach has consequently been controversial, and some measures have been squarely opposed by other States.¹²¹ Some have led to blocking measures and international complaints, prompting retraction of certain measures.¹²²

While the ECB's supervision powers have not been subject to as much controversy yet, this context is an important one to keep in mind when exploring the limits of co-operation agreements and extraterritorial sanctions orders. As to cooperation agreements, while formally speaking, the ECB and States are free to decide on their content, the ECB may well turn out to be the more powerful party depending on which authority the agreement is concluded with, and may have a stronger voice in setting the terms of the agreement. Here we should recall the discussion on reciprocity: while the agreements may provide for reciprocal rights to obtain information and conduct on-site visits, the division of competences within the Union and the non-binding character of MoUs could practically exclude the other party from exercising its rights with respect to the ECB's jurisdiction. Indeed, no visits from third State supervisory agencies to EU Member States have taken place as of yet. This may create the perception that these MoUs, and the broader practice of transnational supervision is yet another part of the EU's asymmetrical projection of regulatory power, not a fully mutual agreement between equals – and a potential encroachment on third State sovereignty. As a point of comparison, a study on EU extraterritorial inspections regarding food safety, climate change, and port state control has warned that, by exerting pressure on third States, the EU may artificially generate third State consent to conduct inspections worldwide, thereby interfering in the internal affairs of third States.¹²³

In terms of legal consequences, at the extreme end, agreements concluded under duress would be null and void. However, appeals to duress in international law are rare and seldom accepted, especially outside threats of use of force, and are thus very unlikely to be relevant to the context of ECB site visits. More likely is that third States may more quickly assert their sovereignty and limit the scope and content of inspections if the agreement itself is perceived not to be in the interest of the territorial State.¹²⁴

¹²¹ See for example case C-366/10 *Air Transport Association of America and Others* (n 40), protesting the original iteration of Directive 2008/101, and KE Ciolino, 'Up in the Air: The Conflict Surrounding the European Union's Aviation Directive and the Implications of a Judicial Resolution' (2013) 38 *Brooklyn Journal of International Law* 1151-1190.

¹²² And vice versa, as the EU has adopted its own blocking statute in Council Regulation 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

¹²³ K Meyer and K Reiling, 'Extraterritoriale Inspektionen der EU. Zu Funktion, Erscheinungsformen und völkerrechtlicher Problematik eines Instruments des internationalen Verwaltungsrechts' (2017) *Archiv des Völkerrechts*, Bd. 55, 414-443.

¹²⁴ It is of note that some agreements explicitly mention "respect for each other's sovereignty and laws" when conducting on-site visits. See Art 9(2) MoC ECB-Japan ('Before conducting an on-site

Finally, attention should not only be drawn to the possible impact of extraterritorial inspections on third States, sovereignty, but also on *individual rights*. Extraterritorial inspections may apply foreign, unfamiliar law to individuals and corporations. In addition, the latter may lack judicial protection *vis-à-vis* foreign inspectors.¹²⁵ Current agreements mainly govern inter-agency cooperation, outlining rights and obligations of the respective authorities. Next generation agreements could possibly pay more attention to individual rights, e.g., by outlining remedies for harm ensuing from wrongful inspections.¹²⁶ In the meantime, in the interest of legal certainty, any existing agreements should be brought to the attention of the potential foreign addressees of inspections, if this has not yet been done. Similar observations apply in respect of indirect enforcement measures short of inspections, in particular orders to produce documents or information backed up penalty payments. Foreign operators may have no choice but to comply with such orders, and may not be in position to easily access equally lucrative non-ECB-supervised financial markets. This puts the ECB in a particularly powerful position, and it may want to use its enforcement powers sparingly.

9. Concluding observations

This contribution has sought to square the ECB's powers to carry out on-site visits in relation to foreign subsidiaries of SSM banks or third-country providers to which SSM banks have outsourced functions and activities, with the prohibition of extraterritorial enforcement jurisdiction in international law. We have argued that the exercise of such jurisdiction by the ECB is unlawful in case it is done unilaterally, i.e., without obtaining the consent of the third State. Third State consent could be secured, however, via an international agreement. We have highlighted that the ECB has concluded a number of such agreements with third-country supervisory authorities, which provide for the reciprocal right to conduct extraterritorial inspections of premises in the parties' respective jurisdictions. While the exact legal status of such agreements may not be fully clear, they evidence the ECB's and the third State's qualified consent to extraterritorial inspections. We have also inquired whether, short of inspections, the ECB could direct an order to a third-country bank or a related EU bank to produce such information under threat of a period penalty payment. We submit that an argument could be made that such orders are territorial in nature and thus that

visit, the Authorities will communicate those plans with each other and reach a common recognition of the terms regarding the on-site visit with full respect to each other's sovereignty and laws').

¹²⁵ K Meyer and K Reiling (n 123) 432-433.

¹²⁶ In the banking sector, arguably, entities may be sufficiently aware of the applicable law governing their transnational activities. Agreements apply to 'laws, regulations and requirements', understood as 'the provisions of the laws, or the regulations and requirements promulgated thereunder, of the European Union and of [the third State], in conjunction with national laws transposing directives or exercising options granted to Member States of the European Union as the case may be, in relation to the prudential supervision of the supervised entities'. See 'Definitions' MoC ECB-Japan.

they are presumptively valid. Nevertheless, we warn that they may bypass the consent of the third State and thus raise international law concerns. Finally, we have observed that the ECB exercises its extraterritorial enforcement jurisdiction against a backdrop of global power imbalances. Even if international agreements provide for reciprocal rights and obligations, actual enforcement practices may still be skewed in favour of the ECB, to the detriment of the interests of the third State or the rights of third-country banks.

Going forward, we suggest that future, more empirically-oriented research ascertain how agreement-based extraterritorial on-site inspections of cross-border establishments by the ECB and their third-country counterparts unfold in practice. Such research may address mutual assistance offered by the parties, the purposes and scope of inspections, the depth of the exchange of views between the parties after inspection, and the actors actually conducting the inspections (the parties themselves, or an independent third party).

A Camouflaged Political Question Doctrine in EU Law?

Luca Pantaleo^{*}

TABLE OF CONTENTS: 1. Introduction. – 2. What is the PQD, and what is left of it in contemporary constitutional systems. – 3. The subtle emergence of a PQD in the case law of the ECJ. – 4. A PQD in EU law. – 5. Concluding remarks.

ABSTRACT: This article examines the emergence of a political question doctrine (PQD) within the European Union legal order. Originating in US constitutional law, the PQD has traditionally operated as a substantive limitation on judicial review, shielding certain inherently political matters from adjudication. While the EU Treaties make no explicit reference to such a doctrine, recent developments in the case law of the European Court of Justice (ECJ) suggest the presence of an embryonic PQD, particularly in the field of the Common Foreign and Security Policy (CFSP). The article maintains that, although still in its formative stage, the PQD is becoming an implicit yet significant tool in the ECJ's evolving jurisprudence. In light of the broader constitutional architecture of the EU, the article argues that judicial abstention in certain domains is not a weakness but rather an inherent feature of a legal system based on the rule of law, such as the EU.

KEYWORDS: political question doctrine – European Court of Justice – Common Foreign and Security Policy – judicial review – rule of law – separation of powers.

1. Introduction

In recent years, questions about the proper boundaries of judicial review have become increasingly pressing across legal systems. Courts are ever more frequently called upon to address matters at the intersection of law and politics, particularly in fields such as foreign relations, security, and lately climate change.¹ In this context, the political question doctrine (PQD) has resurfaced in academic and judicial debates as a conceptual tool to delineate what is justiciable from what must remain within the exclusive remit of political institutions. As will be seen in this article, the doctrine is deeply rooted in the constitutional tradition of the United States, and it is not foreign

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¹ See C Eckes, 'Tackling the Climate Crisis with Counter-majoritarian Instruments: Judges Between Political Paralysis, Science, and International Law' (2021) 6 *European Papers* 1307.

to EU Member States' systems. However, its possible emergence in the European Union legal order raises important normative and practical questions.

This article examines whether a PQD has emerged in the EU legal order, in light of the Union's constitutional framework as interpreted by the European Court of Justice (ECJ). It argues that such a doctrine has indeed surfaced, albeit in a camouflaged form, and that its emergence is consistent with the logic of a legal system based on the rule of law,² such as that of the EU.

The article is structured as follows. Section 2 outlines the notion of the political question beyond the EU legal system and sketches its current status. Section 3 surveys the case law of the ECJ in which the PQD has been explicitly or implicitly discussed, with particular emphasis on the Common Foreign and Security Policy (CFSP), though examples from other areas will also be considered. Section 4 offers broader reflections on the place of the PQD in the Union's constitutional order. Section 5 concludes by drawing together the main findings.

2. What is the PQD, and what is left of it in contemporary constitutional systems

Attempting to pin down a precise definition of the PQD is arguably a futile exercise. While its origins lie clearly in US constitutional law, with the modern formulation typically traced to the landmark ruling of the US Supreme Court in *Baker v Carr*,³ its contours remain elusive. As one scholar has astutely observed, even in the US, where the doctrine was first articulated, 'entire swaths of lawyers are graduating with only a passing and confusing acquaintance with the PQD'.⁴ This article will not dwell excessively on definitional debates. Instead, it adopts a succinct yet effective definition provided by a European scholar: the PQD 'can be understood as placing outside the purview of the [...] judiciary certain constitutional questions, whose final and definitive resolution is entrusted to the political branches of government. [It] operates as a substantive limitation on judicial review',⁵ and 'its applicability is conditioned upon judicial self-restraint'.⁶

² As the Union, back then Community, was declared to be as early as 1986, when the ECJ handed down the landmark *Les Verts* ruling. See Case 294/83 *Les Verts v European Parliament*, EU:C:1986:166, para 23.

³ See *Baker v Carr*, 369 U.S. 186 (1962), in which Justice Brennan, at p. 217, laid down the famous six-prongs catalogue, defining (or attempting to define) the PQD as follows: 'Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question'.

⁴ J Pettinato, 'Executing the Political Question Doctrine' (2006) 33 *Northern Kentucky Law Review* 63.

⁵ JA Gutierrez Fons, 'The Contribution of the United States Supreme Court and the European Court of Justice in the Vertical and Horizontal Allocation of Power' (Queen Mary University of London, 2009), 80, at qmro.qmul.ac.uk.

⁶ *Ibid*

Concise as it is, this definition captures the doctrine's essential features: namely, a) some issues are deemed not amenable to judicial review and reserved for the executive and/or legislative branches; b) the doctrine limits judicial engagements with the merits of such issues; and c) its application rests on judicial self-restraint. On the third element, however, one clarification is needed from the outset. As this article will argue, the PQD is not merely a self-imposed limitation by the judiciary. Rather, it is rooted in the structural features of any constitutional order based on the rule of law. Courts are entrusted with the task of determining whether, in the case before them, the legal system itself imposes restraints on judicial review. The ultimate source of those restraints is not judge-made doctrine but the constitution (and, in the EU context, the Treaties).

In the US constitutional tradition, the emergence of the PQD is often seen as a necessary corollary of the landmark *Marbury v Madison* decision,⁷ in which the US Supreme Court laid the foundations of judicial constitutional review. As Chief Justice Marshall famously stated, '[i]t is emphatically the province and duty of the judicial department to say what the law is [...] If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply'.⁸ From that starting point, US judges 'have tried to define a category of 'political question' outside the scope of that power'.⁹ Over the years, the Supreme Court, as well as lower federal courts, have treated a range of disputes as falling within the PQD, most of them concerning foreign affairs and, in particular, matters of defence. For instance, lower courts have held that the constitutionality of airstrikes over Cambodia without congressional authorisation was non-justiciable under the PQD;¹⁰ similarly, the US Supreme Court considered a political question President Carter's unilateral decision to terminate the 1954 Mutual Defence Treaty with Taiwan with a view to normalising diplomatic relations with China.¹¹ Quantitatively, it has been noted that the US Supreme Court itself has invoked the PQD in only a handful of

⁷ See *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁸ Ibid 177–178.

⁹ JP Mulhern, 'In Defense of the Political Question Doctrine' (1988) 137 *University of Pennsylvania Law Review* 99.

¹⁰ See *Holtzman v Schlesinger*, 484 F.2d 1307, 1309–1312 (2nd Cir. 1973).

¹¹ See *Goldwater v Carter*, 444 U.S. 996 (1979). It is worth noting, as has been rightly pointed out, that US courts tend to show considerable deference to the executive whenever matters of international law are at stake. This applies to issues such as the recognition of States, interpretation of international treaties, the status of customary international law, sovereign immunity, and so forth. For an overview, see CA Bradley, 'The Political Question Doctrine and International Law' (2023) 91 *The George Washington Law Review* 1555, 1570 ff. By contrast, the ECJ is much less hesitant in dealing with international law issues, as demonstrated by the *Front Polisario* saga. See the thoughtful considerations made by E Cannizzaro, 'In Defence of *Front Polisario*: The ECJ as a Global *Jus Cogens* Maker' (2018) 55 *Common Market Law Review* 1, 7 ff.

cases,¹² whereas it has featured far more prominently in the practice of lower courts.¹³

While no serious voices deny the existence of the PQD in US constitutionalism, the most prominent scepticism has been articulated by Louis Henkin on grounds of legitimacy. He famously observed that in a system founded on the rule of law, where judicial review is firmly established, “[a] doctrine that finds some issues exempt from judicial review cries for strict and skeptical scrutiny”.¹⁴ The central difficulty, of course, lies in distinguishing between a genuinely political question reserved to the political branches of government and a non-political question that remains amenable to judicial review. Over time, scholars have proposed different approaches to delineating its scope.¹⁵ Consistent with the earlier commitment not to dwell at length on definitional debates, this article will not attempt to provide a conclusive delimitation of the PQD in US constitutional law. Rather, it will seek to trace the general trends emerging from the work of American scholars who have addressed the doctrine.

To begin with, cases falling under the first criterion of the *Baker v. Carr* formula, namely, ‘where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department’, are regarded as the least problematic. In other words, if the Constitution clearly entrusts a matter to a political branch, there is little reason for the judiciary not to defer. Instances of such questions are admittedly rare, but a classic example is Article IV of the US Constitution, which commits Congress to guaranteeing a republican form of government in every State, a provision traditionally deemed non-justiciable.¹⁶

Apart from these relatively clear-cut cases, there is considerable disagreement among scholars on how to distinguish conclusively between political and non-political questions. With a degree of abstraction, three main trends can be identified. The first is represented by scholars such as Mulhern and Choper, who differentiate between cases in which courts must protect individual rights against government oppression and those in which they do not perform this function. The latter category typically involves questions of vertical separation of powers (conflicts between the federal government and the states) or horizontal separation of powers (between the

¹² The scarcity of Supreme Court precedents may be explained by the Court’s power of certiorari, which allows it to decide, at its discretion, whether to hear a case from the lower courts. A writ of certiorari, granted when at least four of the nine justices agree, is typically issued only for cases of broad constitutional or legal significance. As Mulhern (n 9) 106, observes, the ‘Supreme Court has avoided, with its power to deny certiorari, resolving divisive issues that lower courts avoided by applying the political question doctrine’.

¹³ CA Bradley and EA Posner, ‘The Real Political Question Doctrine’ (2023) 75 *Stanford Law Review* 1034, who have counted hundreds of lower court cases in which the PQD has been applied.

¹⁴ L Henkin, ‘Is There a Political Question Doctrine?’ (1976) 85 *Yale Law Journal* 600.

¹⁵ A comprehensive account of the American scholarly debate is provided by Bradley and Posner (n 12) 1040 ff.

¹⁶ For a thoughtful analogy between this provision and Article 7 TEU, which is also an eminently political instrument, see Gutierrez Fons (n 4) 101 ff.

executive and the legislative branches). According to this view, such disputes fall outside the scope of judicial review.¹⁷ A paradigmatic example, outside the sphere of foreign policy, is the US Supreme Court's refusal to exercise 'supervision over training and command of the Ohio National Guard, explaining that the executive and the legislature were better equipped for this task'.¹⁸ This reasoning finds an interesting parallel in recent case law of the ECJ, which declined to assess the adequacy of equipment for EU missions abroad – a point to which we shall return below. Crucially, the obligation to safeguard fundamental rights means that issues generally regarded as political questions may exceptionally become justiciable if individual rights are at stake. A clear example concerns the use of war powers. While ordinarily reserved to the executive and the legislative branches, the equation changes where the exercise of such powers directly endangers individual rights – for instance, if soldiers were ordered to conduct hostilities in a manner amounting to war crimes under international law.¹⁹ In such circumstances, judicial scrutiny is necessary to shield the individuals from the illegitimate exercise of war powers.

A second perspective is advanced by proponents of so-called populist constitutionalism. This approach draws a distinction between the 'thick' and the 'thin' constitution. Judicial review over the thick constitution is accepted, but the thin constitution is regarded as the preserve of the people acting through political processes rather than the courts. Central to this reasoning is the delimitation of what constitutes the thin constitution. To borrow from Tushnet, 'we can think of the thin Constitution as its fundamental guarantees of equality, freedom of expression, and liberty'.²⁰ From this vantage point, the PQD reflects the idea that 'some constitutional decisions [are left] to Congress and the president with no possibility of judicial review'.²¹ This second trend is in many ways the opposite of the first. Whereas the first view considers individual rights a compelling reason for courts to exercise judicial oversight, the second treats questions relating to fundamental civil liberties, such as racial justice or reproductive rights, as matters to be resolved through political processes, not judicial adjudication.

A third perspective has gained traction in more recent times. Building on the observation that the judiciary has become markedly more influential in contemporary constitutional systems, some authors describe this expansion of the 'province of the judicial department' as the judicialisation of politics.²² This development has progressively eroded the domain of issues traditionally reserved for the political

¹⁷ See Mulhern (n 9) 165–170.

¹⁸ JH Choper, 'The Political Question Doctrine: Suggested Criteria' (2005) 54 *Duke Law Journal* 1468.

¹⁹ See Choper (n 18) 1497–1498.

²⁰ See M Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999) 11.

²¹ *Ibid* 16.

²² See CN Tate and T Vallinder, *The Global Expansion of Judicial Power* (New York University Press 1995); but also M Shapiro and A Stone-Sweet, *On Law, Politics, and Judicialisation* (Oxford University Press 2002).

branches, leading to the gradual demise of the PQD.²³ From this standpoint, while the doctrine may once have served a valid purpose, it has little relevance in the current ‘transition to what I have termed “juristocracy”’.²⁴ This view reflects the increased polarisation of politics, which, it is argued, requires ‘[c]ourts [to] be a “counter-majoritarian force” and stop constitutional excesses within the other branches’.²⁵ According to this view, virtually no issue falls outside the scope of judicial scrutiny.

In conclusion to this assessment of the US constitutional system, where the PQD originated, it appears reasonable to affirm that the doctrine is unanimously acknowledged, yet disagreement persists as to its precise scope, and its current status in constitutional law remains uncertain - particularly how it shapes the contours of judicial scrutiny in light of evolving constitutional dynamics. Before turning to the ECJ’s case law in section 3, it is worth noting that analogous doctrines have developed in several civil law jurisdictions,²⁶ such as the *acte de government* in France or the *atto politico* in Italy. The issue has recently re-emerged in the context of strategic climate litigation, where courts are increasingly called upon to determine whether, and to what extent, national governments’ climate measures (or lack thereof) are open to judicial review.²⁷

3. The subtle emergence of a PQD in the case law of the ECJ

The survey of the relevant ECJ’s case law should begin with a basic clarification. As Luigi Lonardo noted in 2017, ‘the judges of the Court of Justice [...] have never endorsed, nor indeed even discussed, this doctrine’.²⁸ Unlike developments in the US and other national constitutional systems, the PQD *stricto sensu* has not formally entered the EU legal order. That said, there are numerous indications of its subtle emergence.

Let us begin with a hint that is not particularly subtle, as it is explicitly codified in EU primary law. As is well-known, the jurisdiction of the Court of Justice in CFSP matters is generally excluded, subject only to a number of claw-backs expressly provided for in the Treaties,²⁹ and others that the ECJ has inferred as implicit. This general limitation of the Court’s powers in foreign affairs has often been seen as an

²³ See R Hirschl, ‘The Judicialization of Politics’ in GA Caldeira, RD Kelemen and KE Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 119, 123.

²⁴ Ibid 138.

²⁵ C Smith, ‘Suspension of the Rules: Why Federal Courts Should not Fear Adjudicating Cases Involving the Legislative Branch’ (2024) 9 *University of Pennsylvania Journal of Law and Public Affairs* 515.

²⁶ See D Amoroso, ‘Judicial Abdication in Foreign Affairs and the Effectiveness of International Law’ (2015) 14 *Chinese Journal of International Law* 99, 102.

²⁷ See L Pantaleo, ‘The Climate Crisis and the Separation of Powers in the EU. What Role for the Court of Justice?’ (2024) 26 *Diritto pubblico comparato ed europeo* 653, 665 ff.

²⁸ See L Lonardo, ‘The Political Question Doctrine as Applied to Common Foreign and Security Policy’ (2017) 22 *European Foreign Affairs Review* 571, 572.

²⁹ Such as those mentioned in Article 24 TEU.

indirect and implicit codification of the PQD by the Treaty framers,³⁰ consistent with the constitutional traditions of the Member States, ‘with regard to the absence of substantive judicial review of foreign policy decisions’.³¹ We shall return to this question in the analysis of the relevant ECJ’s decisions below.

The first indication that certain political questions in the EU legal order should be reserved for the political institutions can be traced back to *Opinion 1/60*. In that case, the ECJ was asked to assess whether a proposed amendment of the European Coal and Steel Community (ECSC) Treaty was compatible with the conditions laid down in the ECSC Treaty itself. When confronted with the argument that such an amendment might result in higher taxes imposed by the High Authority, the Court observed that ‘the appraisal of any disadvantages of a possible, but not inevitable, increase in the rate of levy is a political and not a legal matter’.³² The Court stopped short of explicitly endorsing the PQD. Yet, its reasoning suggests an awareness that certain issues simply fall outside the scope of judicial determination.

The next relevant ruling is *Commission v Greece (FYROM)*, one of the rare cases in which Article 347 TFEU was invoked by a Member State. Greece had imposed an embargo on products originating in, coming from, or destined for the (then) former Yugoslav Republic of Macedonia. The Commission challenged the measure, arguing that it breached EU law on several grounds. In his Opinion, AG Jacobs formulated what might be described as a ‘lite’ version of the PQD.³³ Addressing Greece’s claim that the embargo was necessary to prevent serious civil disturbances of such magnitude that the maintenance of law and order would become impossible, the Advocate General dismissed the argument as ‘vague and unsubstantiated. No details have been provided about specific disturbances of public order. Greece has not in fact come anywhere near establishing the massive breakdown of public order needed to justify recourse to Article [347] on grounds of serious internal disturbances affecting the maintenance of law and order. I conclude that Greece was not entitled to invoke Article [347] on such grounds’.³⁴ However, AG Jacobs adopted a more cautious stance when considering the second ground for invoking Article 347 TFEU, namely war or serious international tension constituting a threat of war. He acknowledged that this issue ‘is far more complex and raises the fundamental issue of the

³⁰ See P Van Elsuwege, ‘EU External Action after the Collapse of the Pillar Structure: in Search of a New Balance between Delimitation and Consistency’ (2010) 47 *Common Market Law Review* 987, 999.

³¹ See G De Baere, ‘European Integration and the Rule of Law in Foreign Policy’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 210, 216.

³² *Opinion 1/60 Procedure for the amendment of the Treaty pursuant to the third and fourth paragraphs of Art. 95 of the ECSC Treaty*, EU:C:1960:8, p. 51

³³ See G Butler, ‘In Search of the Political Question Doctrine in EU Law’ (2018) 45 *Legal Issues of Economic Integration* 329, 338–339; of the same view is De Baere (n 31) 217.

³⁴ Opinion of AG Jacobs in Case C-120/94 *Commission v. Greece (FYROM)*, EU:C:1995:109, para 49.

scope of the Court's power to exercise judicial review in such situations'.³⁵ While stopping short of endorsing Greece's claim that the ECJ should refrain from scrutiny altogether, he accepted that '[t]he scope and intensity of the review that can be exercised by the Court is [...] severely limited on account of the nature of the issues raised. There is a paucity of judicially applicable criteria that would permit this Court, or any other court, to determine whether serious international tension exists and whether such tension constitutes a threat of war'.³⁶

The dispute was discontinued by the Commission, so the Court did not have the opportunity to rule on the matter. The Advocate General, however, came very close to explicitly endorsing a PQD. In particular, his reasoning indirectly suggested that Article 347 TFEU is, at least in part, insulated from judicial review and therefore encompasses political questions. Yet, as has been convincingly argued, the provision cannot lie entirely beyond the Court's purview; otherwise, Article 348 TFEU, establishing an expedited procedure for reviewing measures adopted under Article 347 TFEU, would serve little purpose.³⁷ The Court itself has never provided a detailed interpretation of Article 347 TFEU, limiting itself to general observations on its exceptional nature.³⁸ Still, it seems reasonable to conclude that certain aspects of the provision are subject to judicial review – for example, whether serious internal disturbances affecting law and order exist – while others, such as the assessment of whether a threat of war arises, are reserved for political institutions. This understanding aligns with the case law of the US Supreme Court, which treats questions such as the existence of war as falling within the prerogatives of the President,³⁹ and it finds indirect support in AG Jacob's Opinion.⁴⁰

The next case in which the PQD was raised is *Kadi I*. The Council, the Commission and the United Kingdom argued that measures implementing Security Council resolutions necessary for the maintenance of international peace and security were, in principle, excluded from judicial review, with the Commission explicitly invoking the PQD.⁴¹ AG Maduro firmly rejected this view, stating that '[t]he implication that the present case concerns a "political question", in respect of which even the most humble degree of judicial interference would be inappropriate, is, in my view, untenable',⁴² and insisting that the Court should review compliance with fundamental

³⁵ Ibid para 50.

³⁶ Ibid

³⁷ See Gutierrez Fons (n 5) 123.

³⁸ See Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206, para 26.

³⁹ See *Martin v Mott*, 25 (12 Wheat.) 19, 30 (1827).

⁴⁰ But see Lonardo (n 28) 580, who sees AG Jacobs' Opinion as a taking 'a stance against the PQD'.

⁴¹ See Opinion of AG Poirares Maduro in Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, EU:C:2008:11, para 33.

⁴² Ibid para 34.

rights. As is well known, the ECJ did not refer to the PQD at all, but nonetheless held that the ‘Community judicature must, in accordance with the powers conferred on it by the EC Treaty, *ensure the review, in principle the full review*, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law’.⁴³

Kadi I can scarcely be read as a general rejection of the PQD. Rather, it is a ruling in which the doctrine was set aside in light of the specific circumstances of the case. In this respect, it is worth noting a parallel development in the US legal order, where the existence of the PQD itself is not in doubt. As has been observed, the US Supreme Court ‘did not apply the political question in any of its “war on terror” decisions concerning the detention and trial of alleged combatants and suspected terrorists, despite the national security context of the cases’,⁴⁴ choosing instead to review the compatibility of the measures adopted by the political branches with fundamental individual rights.

One might therefore be tempted to conclude that, for the ECJ, the protection of fundamental rights is the decisive factor in distinguishing between political and non-political questions. Later case law, however, points in a different direction. In its most recent judgment to reignite the debate on the PQD in EU law, namely *KS and KD*, the Court of Justice explicitly rejected this line of reasoning. The case concerned actions brought by two Kosovar individuals, KS and KD, who claimed to have suffered harm during criminal investigations conducted by the European Union Rule of Law Mission in Kosovo (EULEX Kosovo), a Common Security and Defence Policy (CSDP) mission. They alleged that EULEX and its officials had committed serious failings in handling their cases, resulting in violations of their rights, including the rights to life, to a fair trial, and to an effective remedy.⁴⁵ The General Court dismissed the actions for lack of jurisdiction, holding that CFSP matters generally fall outside the Court’s remit under Articles 24 TEU and 275 TFEU.⁴⁶

AG Ćapeta’s Opinion squarely endorsed the view that judicial scrutiny of CFSP measures must be ensured in order to safeguard fundamental rights. She acknowledged the existence a PQD in EU law, observing that ‘[t]he limitation of jurisdiction of the EU Courts could [...] be understood as a sort of codified ‘political question doctrine’.⁴⁷ She further explained that certain policy choices are, by their very nature, outside the scope of judicial review, and stressed that ‘this is true for any area of EU

⁴³ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, EU:C:2008:461, para 326 (emphasis added).

⁴⁴ Bradley and Posner (n 13) 1040.

⁴⁵ For a summary of the background, see Joined Cases C-29/22 P and C-44/22 P *KS and KD v Council and Others*, EU:C:2024:725, paras 13 ff.

⁴⁶ *Ibid* paras 27 ff.

⁴⁷ See Opinion of AG Ćapeta in Joined Cases C-29/22 P and C-44/22 P *KS and KD v Council and Others*, EU:C:2023:901, para 113.

law, not just for the CFSP'.⁴⁸ At the same time, however, she argued that 'Article 275 TFEU may be construed as ensuring that there is no limitation on judicial review of *all those CFSP measures which restrict the rights of individuals*'.⁴⁹ This interpretation, which she conceded was simplistic but plausible,⁵⁰ was based on a combined reading of Article 24 TEU and 275 TFEU. While the latter explicitly refers only to annulment actions against restrictive measures, the former more generally mentions 'certain decisions'. AG Ćapeta notably omitted to quote the full sentence, which reads 'certain decisions as provided for by the second paragraph of Article 275', thereby expressly limiting the scope to restrictive measures. Be that as it may, she concluded that the limitation on the ECJ's jurisdiction 'cannot go so far as to exclude the review of conformity of CFSP measures with fundamental rights'.⁵¹

We will not dwell further on AG Ćapeta's reasoning regarding the delimitation of the ECJ's jurisdiction in CFSP matters.⁵² It is sufficient to note that her position closely resembles the first trend identified above in American scholarship, which similarly emphasises the need to safeguard individual rights. It also echoes the view advanced by Lonardo, whose proposed test for identifying the PQD in EU law was specifically designed not to 'affect human rights. Any time, and only when, the question genuinely revolves around rights, the Court has jurisdiction'.⁵³ Such a delimitation would apply horizontally across all cases involving alleged infringements of fundamental individual rights.

However, that was not the position taken by the Court of Justice in *KS and KD*. The ECJ made it clear that 'the claim that the acts or omissions which are the subject of an action brought by an individual infringe that individual's fundamental rights *is not in itself sufficient* for the Court of Justice of the European Union to declare that it has jurisdiction to hear and determine that action'.⁵⁴ The Court held that the wording of Article 24 TEU and 275 TFEU constitutes an insurmountable barrier: to rule otherwise would deprive those provisions 'of their effectiveness in part and the principles of conferral and of institutional balance [would be] infringed'.⁵⁵ The Court's reasoning in *KS and KD* will be discussed in greater detail below. For now, it suffices to note that, in

⁴⁸ Ibid para 115.

⁴⁹ Ibid para 132 (emphasis added).

⁵⁰ Ibid

⁵¹ Ibid para 121.

⁵² For a thoughtful yet quite critical assessment see C Contartese, 'Conclusioni dell'AG Ćapeta nelle cause *KS/KD* (C-29/22 P e C-44/22 P) e *Neves* (C-351/22) del 23 novembre 2023, ovvero come la CGUE dovrebbe assicurarsi che "qualsiasi treno che possa arrivare a Strasburgo deve prima fermarsi a Lussemburgo"?' (BlogDUE, 1 February 2024), at www.aisdue.eu.

⁵³ See Lonardo (n 28) 581. It is possible that this author has influenced AG Ćapeta's reasoning, given that he is referenced in the footnotes to the Opinion (but in relation to a different question).

⁵⁴ Joined Cases C-29/22 P and C-44/22 P *KS and KD v Council and Others*, EU:C:2024:725, para 73.

⁵⁵ Ibid

the ECJ's view, there is no overarching fundamental rights safeguard that would automatically render justiciable all disputes concerning their alleged breach.⁵⁶

A similar issue arose in *Opinion 2/13*. Only a few years after suggesting in *Kadi I* that anti-terrorism sanctions might fall outside the Court's jurisdiction on the basis of the PQD, the Commission reversed its position, advancing an expansive interpretation of the notion of 'restrictive measure'. It argued that all '[a]cts that have binding legal effects are, in so far as they are capable of violating fundamental rights, "restrictive measures" within the meaning of the second paragraph of Article 275 TFEU and could, therefore, be the subject of an action for annulment before the EU judiciary'.⁵⁷ A comparable argument was raised again in *KS and KD* by the Commission, this time with the support of all intervening MS except France.⁵⁸ We know, however, how the Court ruled in that case. In *Opinion 2/13*, the ECJ did not endorse the Commission's expansive reading. Instead, it reaffirmed that '*as EU law now stands*, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice'.⁵⁹ The reference to EU law '*as it now stands*', which is absent in *KS and KD*, echoes an earlier pre-Lisbon statement by the Court. In *Segi*, the ECJ noted that while 'a system of legal remedies, in particular a body of rules governing non-contractual liability, other than that established by the treaties can indeed be envisaged, it is for the Member States, should the case arise, to reform the system currently in force in accordance with Article 48 EU'.⁶⁰ As is well known, in *Bank Refah*,⁶¹ the sequel to *Segi*, the ECJ eventually concluded that the innovations introduced by the Lisbon Treaty sufficed to bring actions for damages concerning CFSP measures within its jurisdiction.⁶²

What occurred with regard to actions for damages, together with the Court's reference to EU law '*as it stands*' in *Opinion 2/13*, may be read as suggesting that the

⁵⁶ See L. Lonardo, 'How the Court Tries to Deliver Justice in Common Foreign and Security Policy, Where the Need for Judicial Protection Clashes with the Principles of Conferral and Institutional Balance. Joined Cases C-29/22 P and C-44/22 P *KS and KD*' (2024) 9 *European Papers* 830, 840, who noted 'I read the Court as saying here that the AG went a step too far in her Opinion'.

⁵⁷ *Opinion 2/13 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* EU:C:2014:2454, para 99.

⁵⁸ See Contartese (n 52) 8.

⁵⁹ *Opinion 2/13* (n 57) para 252 (emphasis added).

⁶⁰ Case C-355/04 P *Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council of the European Union*, EU:C:2007:116, para 50.

⁶¹ Case C-134/19 P *Bank Refah Kargaran v Council*, EU:C:2020:793.

⁶² The Court has used a number of grounds in order to assert its jurisdiction in the case, with a special importance given to the 'bridge' between the TEU and the TFEU established by Art. 215 TFEU. See E. Bartoloni, '"Restrictive measures" Under Art. 215 TFEU: Towards a Unitary Legal Regime? Brief Reflections on the *Bank Refah* Judgment' (2020) 5 *European Papers* 1359, 1364 ff. Further on Art. 215 TFEU in the context of sanctions, see E. Cannizzaro, 'The EU Antiterrorist Sanctions' in P. Eeckhout and M. Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart Publishing 2017) 531, 537 ff. But see the critical assessment of the ECJ's approach made by T. Verellen, 'In the Name of the Rule of Law? CJEU Further Extends Jurisdiction in CFSP (*Bank Refah Kargaran*)' (2021) 6 *European Papers* 17, 21 ff.

ECJ refrains from exercising full judicial review over all aspects of EU law, particularly in the CFSP, only because the Treaties impose explicit limitations. Put differently, the Court could be understood as implying that, absent the jurisdictional carve-outs for the CFSP, which can in principle be removed through a Reform Treaty, it would apply the same full review advanced in *Kadi I*, leaving no space for a PQD in the CFSP. In my view, this interpretation is unwarranted. Were the current express limitations on CFSP jurisdiction to be lifted, the Court would undoubtedly expand its review beyond the existing restrictions. It would, for instance, in my opinion, review the compliance of CFSP acts with fundamental rights, since in the absence of explicit carve-outs, disputes concerning individual rights granted by a valid legal source would fall squarely within the scope of judicial review. Yet this does not mean that any matter brought before it would automatically be deemed justiciable. As the case law demonstrates, the position is more nuanced.

To grasp this fully, we must return to *KS and KD*. As noted above, the ECJ rejected the idea that fundamental rights operate as a general claw-back to its jurisdiction in the CFSP. Yet later in the judgment, the Court came strikingly close to articulating a PQD proper. It held that its ‘jurisdiction [...] may be based on the fact that the acts and omissions at issue are not *directly related to the political or strategic choices* made by the institutions, bodies, offices and agencies of the Union in the context of the CFSP, and in particular the CSDP’.⁶³ Put differently, by way of *argumentum a contrario*, the court suggested that CFSP acts (perhaps all CFSP acts) that are directly linked to political or strategic choices made by the competent political institution (or by bodies established by them) lie beyond judicial review. In other words, qualify as political questions reserved for political branches.⁶⁴ The ECJ did not, however, provide general criteria for distinguishing political or strategic questions reserved for the political branches. Instead, it appeared to favour a case-by-case approach.⁶⁵

Unsatisfactory as it may be,⁶⁶ this approach bears a striking resemblance to the case law of the US Supreme Court. The ECJ, for instance, treated the alleged insufficiency of resources made available to the EU mission in Kosovo as an issue directly tied to political or strategic choices. Although the Court did not elaborate further, it is noteworthy that the US Supreme Court reached the very same conclusion when confronted with a comparable question concerning the adequacy of resources allocated to the Ohio National Guard. In that case, the Supreme Court opined that

⁶³ *KS and KD* (n 54), para 116.

⁶⁴ See T Verellen, ‘The CJEU’s Jurisdiction in the *KS and KD* Case’ (Verfassungsblog, 24 September 2024), at verfassungsblog.de, who notes that ‘the Court did embrace the AG’s suggestion of an EU political question doctrine, concluding that “political or strategic” decisions made within the framework of the CFSP fall outside the CJEU’s jurisdiction’.

⁶⁵ *KS and KD* (n 54) para 121.

⁶⁶ See the criticism formulated by Verellen (n 64).

‘It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible - as the Judicial Branch is not - to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system’.⁶⁷

Although the ECJ did not reach anywhere near the level of elaboration developed by its American counterpart on this issue, it is reasonable to assume that similar considerations underpin the statement made in *KS and KD*.

However, the Court indirectly clarified what does not qualify as a political or strategic question beyond judicial scrutiny. It held that: a) ‘the decisions taken by Eulex Kosovo as to the choice of personnel employed by that mission are not directly linked to the political or strategic choices made by it in the context of the CFSP’ as they concern the day-to-day management of the mission;⁶⁸ b) the decision concerning the ‘the absence of provisions for legal aid in proceedings before the review panel’⁶⁹ is not directly linked to the political or strategic choices given its procedural nature; c) ‘the decision whether or not to make the acts and omissions of that mission subject to a review mechanism’⁷⁰ is not directly linked to the political or strategic choices, as they relate to the mission’s administrative management; d) ‘the absence of both [...] remedial action and a legally sound review’⁷¹ does not relate to political or strategic choices;⁷² e) by contrast, ‘the decision to remove the executive mandate of a CFSP mission, and in particular a CSDP mission’⁷³ is instead a political or strategic choice not amenable to judicial review (although the Court gave no reasons for this conclusion).

We can attempt a tentative systematisation of what falls within the PQD in light of *KS and KD*. Matters such as the resources allocated to an EU mission abroad appear to qualify as political questions reserved for political institutions. By contrast, procedural, administrative and managerial aspects of such missions remain fully reviewable. This, however, is only a rough sketch. As has been noted, it will inevitably

⁶⁷ *Gilligan v Morgan*, 413 U.S. 1 (1973) 10.

⁶⁸ *KS and KD* (n 54) para 128.

⁶⁹ *Ibid* para 130.

⁷⁰ *Ibid* para 131.

⁷¹ *Ibid* para 133.

⁷² No clear reason was given for this statement, but later in the judgment the Court qualified it as a ‘misuse or abuse of executive or public power’. See *ibid* para 137.

⁷³ *Ibid* para 136.

be ‘difficult for the CJEU to distinguish “political or strategic” choices from other measures’.⁷⁴ Lonardo’s suggestion to ‘start by looking at the wording of the Treaties’⁷⁵ provides guidance: when decisions are expressly described as strategic, as in Art. 26 or 38 TEU, it is plausible to assume that they will fall outside the Court’s remit. Yet a purely textual interpretation will not suffice. More case law will be required, and it seems likely that the ECJ deliberately left many questions unanswered in order to revisit the issue over time, gradually shaping a PQD through its much-celebrated stone-by-stone approach.

Having concluded the survey of the relevant case law, we can now turn to the next section, which offers some broader and more general reflections on the PQD in EU law.

4. A PQD in EU law

The analysis above reveals the following. The PQD has never been explicitly endorsed by the Court of Justice. Nonetheless, it has surfaced in varying degrees in the Opinions of AGs, has been advanced by the political institutions and several Member States, and has attracted some attention in the literature. In *KS and KD*, the ECJ came close to acknowledging it, though without naming it as such.⁷⁶ The substance of that ruling, however, points to the existence of an (at least) embryonic form of the PQD in EU law.⁷⁷ Many questions remain unresolved and will likely be clarified by the Court in future cases. It is therefore appropriate to make some general reflections.

To begin with, one might be tempted to argue that, if a PQD exists in EU law at all, it applies to the CFSP, and perhaps to the CFSP alone. As noted in Section 3, the Treaties themselves expressly acknowledge the (enhanced) role of political discretion in this domain. Furthermore, no clear counterpart to *KS and KD* can be found in other areas of EU law. It is also worth noting that the Commission, arguably the most proactive advocate of the PQD in the EU context, has defined it as excluding the ECJ’s jurisdiction ‘only with regard to CFSP acts which are an expression of *sovereign foreign policy*’.⁷⁸ As already discussed in section 2, it is undeniable that

⁷⁴ See Verellen (n 64).

⁷⁵ See Lonardo (n 56) 841.

⁷⁶ This is also the opinion of S Vandenbosch, ‘What the European Court of Human Rights and the Court of Justice of the European Union Tell Us About the Changing Contours of Judicial Review in Europe’ (Verfassungsblog, 30 October 2024), at verfassungsblog.de, who notes that ‘the ECJ does not recognize explicitly the existence of a political question doctrine in the EU’s legal order [...] Nevertheless, it seems to refer to the political question doctrine in all but name’.

⁷⁷ This is also the expression used in 2012 by E Fahey, ‘Reviewing High Politics. A Methodology for the Justiciability of EU-US Legal Relations’ (Amsterdam Centre for European Law and Governance Working Paper Series 1-2012), at papers.ssrn.com 4, where she stated that ‘a political question doctrine, is largely embryonic in EU Law’.

⁷⁸ Opinion of AG Wahl in Case C-455/14 P, *H v Council of the European Union and Others*, EU:C:2016:212, para 33 (emphasis added).

certain issues of foreign affairs, particularly defence, may qualify as non-justiciable political questions *par excellence*.⁷⁹ That said, it is one thing to acknowledge that foreign affairs matters are more likely to give rise to non-justiciable political questions than other areas. It is quite another to claim that questions unrelated to foreign relations can never fall within the PQD. *KS and KD* is, after all, a typical CFSP judgment, where debates on the ECJ's jurisdiction are almost routine. By contrast, such jurisdictional issues are less likely to arise in non-CFSP contexts. It is nevertheless submitted that even outside foreign affairs, certain issues may involve discretionary political choices that are not amenable to judicial review, even if such cases are likely to remain quantitatively rare.

This is confirmed not only by the American case law discussed above, for instance, the ruling on the republican form of government, but also by more recent developments. The PQD has been expressly invoked in the context of strategic climate litigation, both by US courts⁸⁰ and by the *Tribunale di Roma*.⁸¹ In both instances, the courts declined jurisdiction, holding that climate-related measures fell within the sphere of political discretion and were therefore not amenable to judicial review. This is not the place to assess whether the judicial self-restraint shown in those cases was justified (it most likely was not).⁸² What matters is that this case law illustrates how certain policy choices, even when entirely domestic in scope, may involve non-reviewable political decisions that fall beyond the reach of judicial scrutiny. Within national systems, one can immediately point to familiar examples: a central bank's decision to raise interest rates; the setting of revenue tax levels; or choices about reallocating expenditure from education to defence, or vice versa. The key question is whether such reasoning can also be transposed to the EU legal order.

It is submitted that it is possible to find indirect confirmation of this in the case law of the ECJ. Not only did the Court explicitly acknowledge the existence of political questions in *Opinion 1/60*. Another line of decisions clearly points in the same direction, namely, those concerning the exercise of discretionary powers by the political institutions. As has been rightly observed, the ECJ has traditionally 'been reluctant to interfere with legislative and administrative acts issued by other institu-

⁷⁹ After all, as noted by Choper (n 18) 1468, even Chief Justice Marshall was convinced that some issues are exclusively for the political organs to decide. He held that the 'power to extradite under a treaty is properly committed to the executive department because only that branch can have a complete view of how this judgment will affect the nation's foreign relations'.

⁸⁰ United States Court of Appeal for the Ninth Circuit, *Juliana et al. v. United States of America et al.*, 17 January 2020, available at [static1.squarespace.com 47 F.3d 1159](https://static1.squarespace.com/47f3d1159/9thCir.2020) (9th Cir. 2020), 1171.

⁸¹ See Tribunale di Roma, Sez. 2 civile, 26 February 2024, no. 35542, available at www.ambien-terdiritto.it.

⁸² For a critical appraisal of the Italian case, see R Mazza, 'Alcune riflessioni sul contenzioso climatico a partire dal *Giudizio Universale* e dal caso *KlimaSeniorinnen*. Quale dimensione assume il principio di separazione dei poteri?' (2024) 8 *Diritti comparati* 237, 251 ff.

tions when these involved the weighing of different interests and Community policies. Underlying this reluctance is the view that courts are primarily concerned with legal rather than political questions'.⁸³ In such cases, the Court 'confines itself to examining whether there are manifest errors or a misuse of power and whether the acting authority clearly exceeded the bounds of its discretion'.⁸⁴ To preserve broad political discretion for the EU institutions, the ECJ typically relies on proportionality, limiting its review to whether the measures adopted are manifestly inappropriate,⁸⁵ or, as the Court put it in *Gauweiler* and subsequent rulings, whether the institution has made a manifest error of assessment.⁸⁶ It is true that in this line of case law, the ECJ does not practise full judicial abstention. Rather, it modulates the intensity of the judicial scrutiny: the broader the discretion, the lighter the review. Yet this case law is inextricably linked to the PQD. The underlying rationale is the need to safeguard the institutional balance of power enshrined in the Treaties. AG Tizzano made the point explicitly, arguing that when sensitive political choices are at stake, especially those requiring complex economic assessments, '[t]he rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not [...] allow the judicature to go further, and particularly [...] to enter into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution'.⁸⁷ From this perspective, the institutional balance ensures that powers are exercised by the body to which the Treaties have conferred them, as exemplified by the classic *Meroni* doctrine.⁸⁸ When the Court defers to political discretion, it is effectively applying *Meroni* to itself: the balance of powers would be breached 'if the courts usurped discretionary powers reserved to other institutions'.⁸⁹ Where broad political discretion is involved, judicial review should therefore be either narrowly limited on grounds of institutional balance or excluded altogether under the PQD. It follows that even within the EU legal order, there are acts of internal governance that escape judicial review. A paradigmatic example is the decision made by the European Central Bank to raise, lower or maintain key interest rates, which reflects discretionary monetary policy choices not amenable to judicial scrutiny as such.⁹⁰

⁸³ See A Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 *Common Market Law Review* 361, 368.

⁸⁴ *Ibid* 370.

⁸⁵ See A Rosas, 'Separation of Powers in the European Union' (2007) 41 *The International Lawyer* 1033, 1039–1040.

⁸⁶ Case C-493/17, *Proceedings brought by Heinrich Weiss and Others*, EU:C:2018:1000, para 24.

⁸⁷ Opinion of AG Tizzano in Case C-12/03 P *Commission of the European Communities v Tetra Laval BV*, EU:C:2004:318, para 89.

⁸⁸ Case 9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, EU:C:1958:7, p. 152.

⁸⁹ See Fritzsche (n 82) 382.

⁹⁰ The picture changes in a *Gauweiler*-type scenario, where the issue is whether the establishment of the outright monetary transactions (OMT) programme fell outside the ECB's mandate, that is,

If one accepts the existence of a PQD in EU law, as this article does, the central challenge becomes how to distinguish between political and non-political questions. In other words, how to define what qualifies as a political question. Here we return to the starting point of our analysis: the difficulty of drawing clear boundaries based on inherently contestable criteria. As we have already seen, even in the jurisdiction where the PQD first developed, lawyers and scholars remain largely in the dark. Beyond acknowledging its existence, there is little consensus in the US as to its precise scope or content.⁹¹ Such uncertainty is, after all, intrinsic to any understanding of the PQD.

As announced, this article does not seek to provide yet another scholarly delimitation of the PQD. Rather than pursuing an ultimate definition, two alternative approaches to the subject can be considered. The first is centred on (evolutive) interpretation. Like any legal doctrine, the PQD is subject to interpretation, and its meaning may shift over time in response to a range of variables. One of the most significant is the constitutional context. As noted above, the constitutional systems of Western democracies grounded in the rule of law are experiencing a marked process of judicialisation. Without necessarily endorsing the view that the PQD has lost all relevance, it is undeniable that the judiciary has steadily expanded its remit, thereby reducing the space traditionally reserved for political discretion.⁹² Questions that were once deemed non-justiciable may no longer be regarded as such today, and may likely not be seen as such in decades to come. As the constitutional landscape evolves, so too does the PQD. As has been observed, judicial attitudes towards review shift periodically,⁹³ in line with broader political and social developments. We are, in all likelihood, living in a period of expanded judicial review in which the PQD is correspondingly contracting.

Beyond evolutive interpretation, the PQD can be linked to the separation of powers. More specifically, it may be seen as a specific manifestation of that theory, or at least as a mechanism, among others, for preserving it. At its core lies a *vexata quaestio*: the supposed distinction between law creation and law application. In Montesquieu's classical conception, itself rooted in Aristotle's understanding of law,⁹⁴ judges were merely *la bouche de la loi*, strictly bound by the law in force and barred from encroaching upon the prerogatives of the legislature. Under this view,

whether it was *ultra vires*. In such cases, judicial scrutiny is required, but it is confined to assessing whether the ECB committed manifest errors of assessment in breach of proportionality. The intensity of review is therefore limited.

⁹¹ See Butler (n 33) 331.

⁹² R Grote, 'Rule of Law, Rechtsstaat and "Etat de droit"' in C Starck (ed.), *Constitutionalism, Universalism and Democracy. A comparative Analysis* (Nomos 1999) 269, 288.

⁹³ See Bradley (n 11) 1557.

⁹⁴ See G Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17 *European Law Journal* 304, 306-307.

the legitimacy of adjudication depends on adherence to existing law.⁹⁵ A different reading shifts the focus from the divide between creation and application of law to the distinction between legislative law-making and judicial law-making. Only a legislature is entitled to create law from scratch, that is, legally unprecedented rules. Judges, by contrast, may develop new norms only to the extent that they build upon valid and existing legal sources, using recognised canons of interpretation.⁹⁶ Seen through this lens, the ECJ's approach to the PQD in *KS and KD* becomes clearer. Had the Court accepted AG Ćapeta's proposal to carve out a general fundamental rights exception, it would have overridden the express wording of Art. 24 TEU and 275 TFEU.⁹⁷ This would have amounted to legislative law-making, effectively re-writing the Treaties. Instead, the Court engaged in judicial law-making. It has resorted to the PQD, a doctrinal resource firmly embedded in the constitutional traditions of the Member States. It was not inventing law from nothing, but rather extrapolating from existing law through interpretation.

What is more, it is submitted that the PQD is inherent in the EU legal order as a system based on the rule of law. As has been observed, 'abstinence with respect to certain constitutional issues is a necessary implication of the rule of law'.⁹⁸ From this perspective, far from undermining the integrity of the system, the PQD forms an integral part of any order based on the rule of law. Put differently, the excessive expansion of judicial power 'may be detrimental to the rule of law itself'.⁹⁹ The PQD is therefore necessary, among other things, to preserve the balance between the different branches of power. The Court of Justice is fully aware of this: its proactive stance in safeguarding the rule of law, particularly in response to recent episodes of democratic backsliding, confirms its pedigree in this regard.¹⁰⁰ As the case law reviewed in this article shows, and as future case law will likely confirm, the PQD is the latest addition to the ECJ's rule of law toolbox.

To conclude this section, it is fair to say that the PQD in the US constitutional system has decades of history behind it. By contrast, in the Union's legal order, despite early signs such as *Opinion 1/60*, it has only begun to take shape in recent years, at a time when constitutional systems worldwide are generally moving towards greater judicial scrutiny of the legislative and (above all) executive branches. This

⁹⁵ See J Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Cambridge University Press 1996), 172-238. See also J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal*, 1346-1406.

⁹⁶ See J Gardner, *Law as a Leap of Faith. Essays on Law in General* (Oxford University Press 2012), 35-41.

⁹⁷ This is also the opinion of SO Johansen, 'The (Im)Possibility of a CSFP "Internal Solution"' (2024) 9 *European Papers* 783, 793.

⁹⁸ See Mulhern (n 9) 176.

⁹⁹ See BZ Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press 2004) 110.

¹⁰⁰ See M Bonelli and M Claes, 'Judicial Politics in the EU Rule of Law Crisis' in M Dawson, B de Witte and E Muir (eds), *Revisiting Judicial Politics in the European Union* (Edward Elgar 2024) 100, 104-106.

broader trend may help explain why the doctrine is emerging in the EU with tentative and uncertain first steps. Its precise contours will ultimately be drawn by the ECJ. Its existence, however, should no longer be seriously doubted.

5. Concluding remarks

This article has examined whether a PQD exists in the EU legal order. The analysis has shown that, while the doctrine has never been formally endorsed by the Court of Justice, there are consistent indications of its emergence, albeit in a camouflaged form. Unlike the US constitutional system, where the PQD has a long pedigree, the EU system has seen the doctrine appear only tentatively and indirectly, with its clearest (yet still camouflaged) manifestation so far in the *KS and KD* ruling.

The comparison with the American experience is illuminating. In the United States, the PQD is both recognised and contested: its existence is ordinarily admitted by a majority of scholars and is corroborated by court practice, especially lower courts. However, its scope and legitimacy remain controversial. US scholarship has oscillated between treating it as a necessary corollary of judicial review, a safeguard of political discretion, or, conversely, as an anachronistic doctrine in an era of ‘juristocracy’. As already mentioned above, the most learnt and eloquent critique of it came from Louis Henkin. Even he did not deny the existence of political questions. This distinguished scholar acknowledged that certain responsibilities are entrusted to the political branches, the exercise of which is ‘ordinarily not subject to review by courts’.¹⁰¹ He did not deny that ‘wisdom might sometimes advise the courts to stay their hand’,¹⁰² yet he maintained that the PQD was ultimately unnecessary. In his view, it is the law itself that enables judges to retreat and to defer to the discretion assigned to the political branches. At first glance, this may appear contradictory. In reality, it is not. Once again, Henkin’s own work helps to resolve this apparent paradox. In a modern constitutional system based on the rule of law, it is natural that certain matters are reserved for the political domain. In some instances, such a reservation is expressly set out in the constitutional text, as is the case with CFSP decisions in the EU legal order. In other cases, it is implicit, as suggested in *Opinion 1/60* and in the rulings concerning the monetary policy measures adopted by the ECB. As Henkin clarified, this is not an ‘extra-ordinary abstention from judicial review’, but rather the ‘ordinary respect by the courts for the political domain’,¹⁰³ which is inherent in the constitutional order itself.

Against this background, the ECJ appears to be moving along such a path, though with great caution. Its case law seems to imply the awareness that some issues are not for judicial resolution. *Opinion 1/60* already hinted at this, while *Commission v. Greece (FYROM)* and the reasoning of AG Jacobs came close to articulating a PQD.

¹⁰¹ See Henkin (n 14) 624.

¹⁰² Ibid 617.

¹⁰³ Ibid 601.

Kadi I rejected the doctrine in favour of safeguarding fundamental rights, but later developments, especially *KS and KD*, signalled that questions directly tied to political or strategic choices in the CFSP fall outside the Court's remit. What emerges is a dual track: within the CFSP, procedural and administrative issues remain justiciable, whereas political ones are not.¹⁰⁴

This embryonic PQD seems not to be confined to foreign affairs. The Court's cautious deference to institutional discretion in cases such as *Gauweiler* shows that domestic decisions involving broad policy trade-offs, with monetary policy being the prime example, also raise issues of non-reviewability. Here, judicial review is modulated to avoid usurping the prerogatives of the political institutions, a move that is consistent with the principle of institutional balance.

Seen through the broader lenses of constitutional theory and separation of powers, the PQD is neither alien nor threatening to the EU legal order. On the contrary, abstaining from adjudication on certain issues is a structural requirement of the rule of law itself. Without it, judicial power risks overreaching and undermining the equilibrium between institutions.

The PQD in the EU remains, for now, somewhat camouflaged: never openly acknowledged, often implicit, and still in its formative stage. Yet its emergence is unmistakable. Its contours will, in all likelihood, be shaped gradually, stone by stone, by the Court of Justice. The CFSP, where the Treaties expressly recognise a broader margin for political discretion, may well prove the natural testing ground for the doctrine's development. In my view, the Court's case law in the field of the CFSP seems to be gradually moving towards the position that the general exclusion of its jurisdiction applies only to those CFSP acts that concern matters of high politics, which are expressly exempted from judicial review by the Treaties themselves. Yet, it is reasonable to assume that a PQD in EU law will extend beyond the CFSP, even if its scope in the CFSP is likely to be wider than in other areas of the Union legal order.

There is one final issue that merits mention. It should not go unnoticed that *KS and KD*, the decision that reignited the debate about a PQD in EU law, was delivered against the backdrop of the EU's second attempt to accede to the European Convention of Human Rights (ECHR). There is little doubt that the 'approach proposed by the Commission [in *KS and KD*] would have rendered the path to ECHR accession clearer'.¹⁰⁵ Had the Court carved out a general human rights exception in the CFSP, one of the main obstacles to accession would have been removed. Yet, as Johansen

¹⁰⁴ As we have seen, the Court referred to them as 'political or strategic choices made by the institutions, bodies, offices and agencies of the Union in the context of the CFSP', it may be assumed that the term 'strategic' is used in *KS and KD* as a synonym for 'issues pertaining to high politics'.

¹⁰⁵ Editorial Comment, 'From Opinion 2/13 to *KS and KD*: Confronting a Legacy of Constitutional Tensions' (2024) 61 *Common Market Law Review* 1455, 1468.

rightly argues, such an outcome would have been at odds with the principle of autonomy.¹⁰⁶ This is not to suggest that the ECJ decided *KS and KD* with the intention of sending a signal to the political institutions on the question of ECHR accession. Rather, there were sound systemic reasons behind its (almost) articulation of a PQD, as this article has attempted to demonstrate. Still, the broader context of *KS and KD* underscores that the Court is acutely aware of its political environment.¹⁰⁷ To borrow from Shapiro's classic characterisation of the US Supreme Court as a political body in the non-derogatory sense,¹⁰⁸ and from Tushnet's observation that 'courts everywhere are parts of the national political system',¹⁰⁹ the same can be said, *mutatis mutandis*, of the Court of Justice. The case law analysed in this article points precisely in that direction.

¹⁰⁶ See Johansen (n 97) 790.

¹⁰⁷ For an analysis of the Court's political awareness in the field of internal market law, see U Šadl and S Hermansen, 'The European Court of Justice, an Able and Unwilling Lawmaker: Evidence from 920 Free Movement of Persons Judgments' in M Dawson, B de Witte and E Muir (eds), *Revisiting Judicial Politics in the European Union* (Edward Elgar 2024) 282, 300, who, after a detailed survey of the relevant case law, demonstrate that 'the Court issued more audacious judgments in times of relative pro-European accord, like in the mid-1970s and mid-1990s'.

¹⁰⁸ See MM Shapiro, *Law and Politics in the Supreme Court. New Approaches to Political Jurisprudence* (Free Press of Glencoe 1964).

¹⁰⁹ See Tushnet (n 20) 134.



Enhancing Access to Justice in European Shared Administration Through the Principles of Good Administration

*Salvatore Fabio Nicolosi** and *Elmin Omičević***

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ABSTRACT: This article offers a synoptical analysis of the challenges to access to justice in European shared administration posed by the expanding mandates of the most operational and fundamental rights-sensitive agencies. These specifically include the European Union Border and Coast Guard Agency (Frontex), the European Union Agency for Asylum (EUAA), and the European Union Agency for Law Enforcement Cooperation (Europol). Created to support the Member States in managing migration, asylum and internal security, these agencies have witnessed a significant expansion of their operational powers and mandates over the years. However, these expanded powers have not been adequately counterbalanced by fundamental rights safeguards. Nor can the current system of legal remedies under EU law guarantee effective access to justice. This article identifies three key obstacles, common to the three agencies, that undermine effective access to justice: lack of transparency, inadequate remedies, and ineffective oversight. Individuals often struggle to secure redress due to secretive agency practices, limited transparency, and inadequate accountability mechanisms. To address these obstacles, this article proposes several pathways to strengthen access to justice by upholding principles of good administration and governance, such as transparency, due process and accountability. Proposed reforms include enhancing transparency, improving complaints mechanisms, and strengthening oversight, all to ensure that the operational expansion of EU agencies does not infringe upon the fundamental rights and values that form part of the EU's constitutional fabric.

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1. Introduction: setting the scene

The European Union (EU) has traditionally been seen as a regulatory authority.¹ According to the theory of executive federalism, the central authority at the European level holds legislative power, while competent entities at the national level hold implementation and enforcement powers.² Nonetheless, over the years, the EU has progressively ‘gained enforcement powers in areas where it previously held only regulatory authority’.³ This shift has prompted the rise of shared administration, the essence of which, as Paul Craig explains, is that ‘Union legislation imposes formal legal obligations on both the Commission and the Member States for the effective implementation of a particular administrative regime’.⁴

The EU shared administration has facilitated the creation of specialised agencies. As decentralised bodies of EU law, they ‘are generally involved by the legislator in (composite) procedures whereby agencies need to co-operate with the Commission and the Member States to deliver policy results’.⁵ In other words, EU agencies have become responsible for implementing relevant policies next to the Member States.⁶ The proliferation of EU agencies in various policy domains, as well as the powers that these bodies have progressively acquired, gave rise to the phenomenon of ‘agencification’, which refers to ‘the process whereby the EU agencies take up an increasingly important role in the EU administration, both in a quantitative as well as in a qualitative sense’.⁷ This process has become a distinct feature of shared administration and has not skipped the Union’s policies on asylum, migration, border control and internal security.

¹ G Majone, ‘The Rise of the Regulatory State in Europe’ (1994) 17 *West European Politics* 77.

² K Lenaerts, ‘Regulating the Regulatory Process: “Delegation of Powers” in the European Community’ (1993) 18 *European Law Review* 23, 27.

³ M Scholten and D Scholten, ‘From Regulation to Enforcement in the EU Policy Cycle: A New Type of Functional Spillover?’ (2017) 55 *Journal of Common Market Studies* 925.

⁴ P Craig, *EU Administrative Law* (Oxford University Press 2018) 56.

⁵ M Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016). See also F Brito Bastos, *Judging Composite Decision-Making. The Transformation of European Administrative Law* (Hart Publishing 2024).

⁶ European Commission, ‘Communication: The Operating Framework for the European Regulatory Agencies’, COM(2002) 718 final. In the literature, see M Everson, C Monda and E Vos (eds), *European Agencies in between Institutions and Member States* (Wolter Kluwer International 2014).

⁷ Chamon (n 5). In other words, ‘agencification’ refers to the progressive transfer of executive powers to new bodies delegated with specialised tasks and various degrees of autonomy, see J Trondal, ‘Agencification’ (2014) 74 *Public Administration Review* 545. For further references to the process of ‘agencification’ in the European Union (EU) law, see, *inter alia*, M Simoncini, *Administrative Regulation beyond the Non-Delegation Doctrine: A Study on EU Agencies* (Hart Publishing 2018).

In these areas, three decentralised agencies, namely the European Union Border and Coast Guard Agency (Frontex),⁸ the European Union Agency for Asylum (EUAA)⁹ – the successor of the European Asylum Support Office (EASO) – and the European Union Agency for Law Enforcement Cooperation (Europol),¹⁰ have been playing an increasingly important role.¹¹ The main rationale for the creation of these agencies lies in their capability to effectively assist the Member States in ensuring adequate levels of enforcement of EU law in an area which has been notably characterised by a ‘protracted implementation deficit’.¹² Scholars have highlighted the tremendous expansion of these EU agencies’ mandates, tasks, and activities over the past decades.¹³ Through frequent modifications of their legal mandates, these agencies have acquired greater prominence and leadership, progressing from a ‘reactive to a proactive’ approach, that is, from a traditional role of coordination to a new one of initiative and decision, thereby asserting their autonomy, both inside and outside Europe.¹⁴

The empowerment of these three agencies undoubtedly boosts their operational efficiency and enables them to further EU policy objectives.¹⁵ However, while officially designed to support Member States in implementing EU policy and legislation,

⁸ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

⁹ Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010.

¹⁰ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, as recently amended by Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022 amending Regulation (EU) 2016/794, as regards Europol’s cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol’s role in research and innovation. Europol is an internal security (police cooperation) agency. However, it performs some tasks related to migration (countering migrant smuggling and trafficking in human beings), leading some scholars to label it as a ‘migration agency’, see D Fernández-Rojo, *EU Migration Agencies: The Operation and Cooperation of FRONTEX, EASO and EUROPOL* (Edward Elgar Publishing 2021) 11–12.

¹¹ S Carrera, L den Hertog and J Parkin, ‘The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?’ (2013) 15 *European Journal of Migration and Law* 337; E Guild, S Carrera, L den Hertog and J Parkin, ‘Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies. Frontex, Europol and the European Asylum Support Office’ (Report requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, LIBE, 2011), at europa.eu.

¹² D Thym, ‘Pitfalls of the Law, Politics and Administrative Practices in the Reform of the Common European Asylum System’ (EU Immigration and Asylum Law and Policy, 9 February 2017), at eumigrationlawblog.eu. See also SF Nicolosi, ‘The Common European Asylum System’ in M Scholten (ed), *The Research Handbook on EU Law Enforcement* (Edward Elgar Publishing 2023) 492.

¹³ See, for example, M Scipioni, ‘De Novo Bodies and EU Integration: What is the Story behind EU Agencies’ Expansion?’ (2018) 56 *Journal of Common Market Studies* 768, 769.

¹⁴ Fernández-Rojo (n 10) 11–12.

¹⁵ See in this regard C Freudlsperger, A Maricut-Akbik and M Migliorati, ‘Opening Pandora’s Box? Joint Sovereignty and the Rise of EU Agencies with Operational Tasks’ (2022) 55 *Comparative Political Studies* 1983.

these agencies are progressively engaging in activities that may infringe upon fundamental rights, especially of third-country nationals. Frontex has, allegedly, been involved in pushing back and returning migrants to third countries, who are, thus, left deprived of access to the European territory and to adequate remedies for harm suffered.¹⁶ Europol has, moreover, attracted the attention of supervisory watchdogs for tensions between its data exchange activities and the respect for data protection rights.¹⁷ Finally, EASO's practice of conducting interviews with asylum seekers in Greece and delivering opinions on the (non-) admissibility of the merits of asylum claims has illustrated issues of coordination with national authorities with regard to legal remedies for migrants.¹⁸

These examples explain why this Article focuses on these three agencies, which exemplify the challenges involved in ensuring access to justice in fundamental-rights-sensitive areas of EU shared administration. European law scholarship has predominantly considered the notion of 'access to justice' as access to a court, thereby including the right to a fair trial or effective remedy before an independent and impartial tribunal.¹⁹ According to this conception of the notion, access to justice gives individuals the opportunity to enforce their individual rights and ensures their continued protection, enabling them to hold executive authorities accountable for their actions. As noted in the literature,²⁰ access to EU judicial remedies is especially challenging in multi-actor operations, such as those conducted by EU agencies in collaboration with Member States, due to the difficulty in attributing wrongful conduct to the responsible actor. What is even more notable is that this traditional notion of access to justice as access to court does not appear well-suited to capture all the problems engendered by the expanding mandates of the three agencies in question.

¹⁶ N Waters, E Freudenthal and L Williams, 'Frontex at Fault: European Border Force Complicit in "Illegal" Pushback' (Bellingcat, 23 October 2020), at bellingcat.com. For a more detailed account of these issues, see Section 3.1.

¹⁷ See, for instance, F Coman-Kund, 'Europol's International Exchanges of Data and Interoperability of AFSJ Databases' (2020) 26 *European Public Law* 181, 202.

¹⁸ SF Nicolosi and D Fernández-Rojo, 'Out of Control? The Case of the European Asylum Support Office' in M Scholten and A Brenninkmeijer (eds), *Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order* (Edward Elgar Publishing 2019) 177.

¹⁹ N Daminova, '"Access To Justice" and the Development of the Van Gend en Loos Doctrine: The Role of Courts and the Individual in EU Law' (2017) 2 *Baltic Journal of Law & Politics* 133; S Carrera and M Stefan, 'Justicing Europe's Frontiers: Effective Access to Remedies and Justice in Bordering and Expulsion Policies' in S Carrera and M Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint Mechanisms and Access to Justice* (Routledge 2020) 1. See also O Balatska and T Lotysh, 'The Right to Effective Access to Justice in the European Union' (2024) 4 *Visegrad Journal of Human Rights* 12; F Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007).

²⁰ SF Nicolosi, 'The European Border and Coast Guard Agency (FRONTEX) and the Limits to Effective Judicial Protection in European Law' (2024) 30 *European Law Journal* 149.

While the potential fundamental rights repercussions have been extensively analysed,²¹ academic analysis from the perspective of access to justice has remained limited and significantly underdeveloped, despite the notion being closely related to core constitutional concepts such as the rule of law.²²

Accordingly, this article devises possible strategies to embed more access to justice safeguards in relation to Frontex, EUAA and Europol by exploring the role of the principles of good administration, connected with transparency, due process and accountability, in the context of the shared governance of migration, asylum, border management and internal security policies. While this approach does not claim to offer a comprehensive solution to the challenges of access to justice inherent in shared administrative frameworks, it seeks to contribute a different perspective to ongoing debates on the governance of the abovementioned policy areas.

From this standpoint, the article advocates for a more transparent and accessible structural and institutional framework in which EU agencies operate, aiming to mitigate the risk of fundamental rights violations and increase individuals' access to justice. To that end, the article first unfolds the access to justice conception in EU law (Section 2). Second, it highlights the concerns that the expansion of the EU migration agencies' operational mandates brings about from the perspective of individuals' access to justice, consecutively reviewing Frontex, EUAA and Europol (Section 3). Third, the article seeks to elucidate how the principles of good administration can contribute to the enhancement of access to justice. This will help devise potential solutions for the problems that are characteristic of the three agencies (Section 4). The last part of the article presents a number of concluding considerations (Section 5).

2. Access to justice in European Union law

The notion of access to justice remains generally undefined in relevant European legal texts.²³ The Treaties contain scant references to the notion of access to justice, failing to define it: for example, Article 67(4) of the Treaty on the Functioning of the EU (TFEU) states that 'the Union shall promote access to justice, particularly by applying the principle of mutual recognition of judicial and extrajudicial decisions in civil matters'.²⁴ A systematic analysis of the notion of access to justice in European law, including in light of the Charter of Fundamental Rights of the EU (Charter

²¹ See, for example, M Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018); C Barnard and S Fraser Butlin, 'The Rule of Law and Access to the Courts for EU Migrants' (2020) 58 *Journal of Common Market Studies* 1621, 1622.

²² A Terlouw, 'Access to Justice for Asylum Seekers' in C Grütters, S Mantu and P Minderhoud (eds), *Migration on the Move. Essay on the Dynamics of Migration* (Brill 2017) 247.

²³ ME Mendez Pinedo, 'Access to Justice as Hope in the Dark. In Search for a New Concept in European Law' (2011) 19 *International Journal of Humanities and Social Science* 9.

²⁴ Consolidated version of the Treaty on the Functioning of the European Union [2012] (TFEU).

or EU Charter),²⁵ suggests situating the scope of the concept in the context of the practices of national and supranational courts, along with the evolving legislation at both the EU and national levels. From this perspective, access to justice is broadly understood as a concept that entails both procedural (access) and substantive (justice) components meant to protect fundamental rights.²⁶ Safeguarding these components requires the establishment of institutions that uphold individuals' rights and, in connection with this, mechanisms that provide access to these institutions for individuals whose rights have been violated.²⁷ Accordingly, the notion of access to justice is inherently linked to the principle of effective judicial protection in that it emphasises the importance of providing individuals and entities with the means to challenge potential violations of their rights and ensures that the legal system is transparent, fair, and capable of addressing such violations effectively.

As part of the overarching obligation to ensure adequate pathways to justice, European law scholarship has predominantly considered the notion rather one-dimensionally, namely as access to a court, thereby including the right to a fair trial or effective remedy before an independent and impartial tribunal.²⁸ According to this conception of the notion, access to justice gives individuals the opportunity to enforce their individual rights, and ensures their continued protection, enabling them to hold executive authorities accountable for their actions (see Section 2.1). However, it is held here that access to justice is more than merely access to courts; it is also an essential rule of law safeguard (see Section 2.2). This twofold dimension of the notion of access to justice – as access to a court and as an element of the rule of law – is further discussed in the following sub-sections.

2.1. Access to justice and the right to an effective remedy

The main aspect through which access to justice traditionally materialises is the right to an effective remedy. In European law, such a right aligns with the principle of effective judicial protection. In its first landmark ruling in the 1986 *Johnston* case, the Court of Justice of the EU ('CJEU' or 'Court') described effective judicial control as 'a principle which underlies the constitutional traditions common to the Member States and which is laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)'.²⁹ This alignment has

²⁵ Charter of Fundamental Rights of the European Union [2000] (EU Charter or Charter).

²⁶ BG Garth and M Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181, 182.

²⁷ K Bovend'Eerd, I Karagianni and M Scholten, 'EU Law Enforcement Authorities and Access to Justice' in M Fink (ed), *Redressing Fundamental Rights Violations by the EU. The Promise of the 'Complete System of Remedies'* (Cambridge University Press 2024) 271, 272.

²⁸ Daminova (n 19) 133. See Bovend'Eerd, Karagianni, Scholten (n 27) 271, for a more nuanced approach to this judicial understanding of access to justice.

²⁹ Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206, para 18.

been consistently reaffirmed through a well-established body of case law, where the Court recognised effective judicial protection as a general principle of EU law.³⁰

This principle was later codified in Article 47 of the Charter.³¹ With the Treaty of Lisbon, it was further incorporated into Article 19(1) of the Treaty on European Union (TEU),³² which the Court has interpreted as requiring Member States to provide remedies sufficient to ensure effective legal protection, particularly as outlined in Article 47 of the Charter, in areas governed by EU law.³³ Additionally, Article 47 of the Charter establishes that any person who suffers an infringement of a right or freedom guaranteed by EU law can claim a judicial remedy that is effective. This essentially means that the remedy must meet two criteria: it must be normatively appropriate and practically accessible. Normative appropriateness requires that the remedy be capable of addressing the violation, whether through compensation, annulment, or other corrective measures. Practical accessibility ensures that legal mechanisms are not prohibitively complex, costly, or time-consuming, so that individuals can effectively exercise their rights.³⁴ The European Court of Human Rights (ECtHR) has greatly contributed to determining the effectiveness of a remedy by requiring that the remedy be accessible, thus not only theoretically available but also concretely viable, be capable of providing redress in respect of the applicant's complaints, and offer reasonable prospects of success.³⁵

Essentially, this understanding of access to justice, which reflects the predominant view in legal doctrine, is not limited to attributing to the individual the right to take legal action but to do so primarily to obtain a useful measure for the protection of one's position. In other words, access to justice provides fundamental procedural safeguards for individuals to enforce other rights before a court. This is why the concept of access to justice also refers to access to the law, in the sense of access to the set of rights that a legal system offers, including the right to be informed about these rights.³⁶ The EU legal framework provides several mechanisms for individuals

³⁰ See e.g. Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, EU:C:2007:163, para 37.

³¹ In Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland GmbH v Commission of the European Communities*, EU:C:2009:456, para 179, the Court of Justice reiterated that Article 47 'relates to the principle of effective judicial protection'. On the principle of effective judicial protection, the literature is vast; for a recent systematisation of the scholarly debate, see M Bonelli, M Eliantonio and G Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection. Volume 1: The Court of Justice's Perspective* (Hart Publishing 2022).

³² Consolidated version of the Treaty on the European Union [2012] (TEU).

³³ Case C-619/18 *European Commission v Republic of Poland*, EU:C:2019:531, para 54.

³⁴ For references see K Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?' (2019) 20 *German Law Journal* 884.

³⁵ See *Vučković and Others v Serbia* App no 17153/11 (ECtHR, 25 March 2014) paras 71 and 74.

³⁶ G Greenleaf and G Peruginelli, 'A Comprehensive Free Access Legal Information System for Europe' (University of New South Wales UNSW Law Research Paper 9-2012), at papers.ssrn.com 1.

to access justice. National courts play a pivotal role as ‘ordinary courts’ of EU law, tasked with applying and enforcing EU rights within Member States.³⁷ Through doctrines such as direct effect and supremacy, the EU legal order empowers individuals to invoke EU rights before national courts, ensuring that these rights are not abstract principles but enforceable guarantees. At the EU level, judicial mechanisms, such as actions for annulment (Article 263 TFEU), actions for failure to act (Article 265 TFEU), and actions for damages (Article 268 and 340(2) TFEU) provide direct access to the Court of Justice for individuals in specific circumstances, strengthening judicial oversight of EU institutions. The preliminary reference procedure under Article 267 TFEU also plays a pivotal role as it offers an avenue for individuals to seek interpretation of EU law when national courts encounter uncertainties. However, as will be demonstrated in greater detail in Section 3, this traditional, one-dimensional view of access to justice is ill-suited to fully capture the problems caused by the expanding mandate of EU operational and fundamental rights-sensitive agencies.

2.2. Access to Justice and the Rule of Law

According to a broader understanding of the concept of access to justice, this notion has evolved from a purely formal right into a more comprehensive principle, inextricably linked to the rule of law. The rule of law is enshrined as a fundamental value of the EU in Article 2 TEU, alongside respect for human dignity, democracy, and human rights.³⁸ The CJEU deserves recognition for initiating the definitional efforts of the rule of law, notably through its landmark ruling in *Les Verts*.³⁹ In this judgment, the Court articulated that the rule of law encompasses the traditional and interrelated legal principles of legality, judicial protection and judicial review. More recently, these principles have been included by the European Commission within the core constitutive elements of the rule of law. The Commission identified, in fact, a number of elements that contribute to the core meaning of the rule of law within the context of the EU legal order. These elements include: (i) legality; (ii) legal certainty; (iii) prohibition of arbitrariness of the executive powers; (iv) independent and impartial courts; (v) effective judicial review, including respect for fundamental rights; and (vi) equality before the law.⁴⁰

³⁷ See more extensively B De Witte, JA Mayoral, U Jaremba, M Wind and K Podstawa (eds), *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar Publishing 2016).

³⁸ See, in this regard, LS Rossi, “‘Concretised’, ‘Flanked’, or ‘Standalone’? Some Reflections on the Application of Article 2 TEU” (2025) 10 *European Papers* 1.

³⁹ Case C-294/83 *Parti écologiste “Les Verts” v European Parliament*, EU:C:1986:166.

⁴⁰ European Commission, ‘Communication: A New EU Framework to Strengthen the Rule of Law’, COM(2014) 158 final/2. For a broader analysis of the definition of the concept of ‘rule of law’ see L Pech, ‘The Rule of Law as a Well-Established and Well-Defined Principle of EU Law’ (2022) 14 *Hague Journal on the Rule of Law* 107.

Accordingly, access to justice operationalises the rule of law by ensuring that individuals can challenge rights violations and hold public authorities accountable within a structured and fair legal process. This interplay between access to justice and the rule of law was reaffirmed by the Court of Justice in *Associação Sindical dos Juizes Portugueses (ASJP)*, where the Court declared that ‘the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law’.⁴¹ The rule of law also requires effective judicial mechanisms that provide remedies for violations of EU law. This is explicitly recognised in Article 19(1) TEU, which mandates Member States to establish remedies sufficient to ensure effective legal protection in fields covered by EU law. This provision strengthens the essential link between the rule of law and access to justice by highlighting the need for robust judicial systems capable of enforcing EU rights at the national level. By requiring all Member States to adhere to the rule of law, the EU ensures the uniform application of its legal order across diverse jurisdictions. This uniformity is crucial in an integrated legal space, as it fosters trust among Member States and between individuals and institutions.⁴²

As a constitutive element of the rule of law in the EU, effective judicial protection ensures that public authorities, including EU institutions and Member States, act within the bounds of the law, respect fundamental rights, and provide avenues for redress when individuals’ rights are infringed. In examining the evolution of the principle of effective judicial protection as a corollary of the rule of law, scholars have observed that these developments have helped address deficiencies in the EU legal framework, enhancing its coherence at both the national and EU judicial levels.⁴³ More recently, in her Opinion in *Commission v Hungary*, Advocate General Tamara Čapeta reiterated that Article 19(1) TEU and Article 47 of the Charter concretise the value of the ‘rule of law’ under Article 2 TEU, which can, therefore, serve as a direct standard for judicial review.⁴⁴ However, such an articulated system established to uphold the rule of law has not yet fully captured situations of composite decision-making or ‘administrative mixity’,⁴⁵ in which the competences of the EU agencies progressively overlap with those of the national authorities. The system of shared administration in the fields of migration, asylum, border control and internal security presents significant challenges that undermine access to justice. These challenges, which relate to the lack of transparency, imperfect remedies, and lack of effective oversight, will be discussed in the following Section.

⁴¹ Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas (ASJP)*, EU:C:2018:117, para 36.

⁴² L Azoulay, ‘Editorial Comments: EU Law between Common Values and Collective Feelings’ (2018) 55 *Common Market Law Review* 1329.

⁴³ See M Bonelli, ‘Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature’ (2019) 12 *Review of European Administrative Law* 35, 61.

⁴⁴ Opinion of AG Čapeta in Case C-769/22 *European Commission v Hungary*, EU:C:2025:408, paras 108 – 112. For a comment see G Athanasiou, ‘Rethinking Article 2 TEU: AG Čapeta’s Opinion in the Context of Recent CJEU Case Law’ (Verfassungsblog, 20 June 2025), at verfassungsblog.de.

⁴⁵ Brito Bastos (n 5).

3. EU operational agencies and the problems of access to justice

This Section will delve into the problems of access to justice underpinning the mandates of the three most operational EU agencies in the fields of migration, asylum, border controls and internal security. The analysis will proceed on an agency-by-agency approach, due to the specific features of each agency, while the core problems, such as lack of transparency, limited individual remedies, and weak oversight, remain the same. To help explain these problems, this Section will briefly outline each agency's mandate, tasks, and activities, including those involving external partners. While most of the problems have been discussed, a synoptic overview can contribute to explaining how these have become structural issues of the EU shared administration related to fundamental-rights sensitive policies.

This Section first explains how access to justice is undermined by the lack of transparency surrounding the operations undertaken by EU agencies.⁴⁶ These agencies do not usually publicly report on the details of their activities. However, to enforce their fundamental rights, third country nationals, such as migrants and asylum seekers, have a great and legitimate interest in obtaining access to documents from these agencies. Transparency is also a precondition for ensuring the accountability of any public body.⁴⁷ Ensuring transparency of the agencies' activities is, therefore, crucial for effective access to justice.

Furthermore, the sub-sections below will illustrate that the mechanisms designed for individuals to obtain redress for harm suffered due to the agencies' activities are largely incomplete and, as a result, impact migrants' safeguards for access to justice. Whereas the expansion of the mandates of the above-mentioned EU agencies has made these bodies more prone to infringing the fundamental rights of individuals, there has been an insufficient increase and improvement in intra-agency complaints mechanisms and remedies. Access to these remedies has been rather limited due to the lack of adequate information. Accordingly, access to remedies should benefit from more transparency, but also requires institutional reforms that can improve the quality of their follow-up and overall operational effectiveness.

Finally, the expanding mandates of the agencies reveals a problem that can be considered of a more structural nature in the emerging EU shared administration. Such a system has not been able to allocate complete avenues for accountability, due to complex multi-actor operations, where, next to the staff of EU agencies, Member States' agents are involved, rendering it difficult to understand who does what.⁴⁸ As

⁴⁶ M Gkiliati and J Kilpatrick, 'Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations' (2021) 17 *Utrecht Law Review* 57.

⁴⁷ Standing Committee of Experts on International Migration, Refugee and Criminal Law, 'Comment on Shortcomings in Frontex's Practice on Public Access to Documents' (Meijers Committee, 5 October 2021), at commissie-meijers.nl.

⁴⁸ Fink (n 21); see also J De Coninck, *The EU's Human Rights Responsibility Gap. Deconstructing Human Rights Impunity of International Organisations* (Hart Publishing 2024).

emphatically stressed by Dennis Thomson, this constitutes an illustration of the problem of many hands: ‘because many different officials contribute in many ways to decisions and policies of government, it is difficult even in principle to identify who is morally responsible for political outcomes’.⁴⁹ This structural problem has been partly addressed by civil society⁵⁰ as well as institutional actors, such as the European Parliament⁵¹ and the European Ombudsman,⁵² although large concerns remain. The following text will proceed by analysing the three problems mentioned concerning Frontex (3.1), EASO and EUAA (3.2) and Europol (3.3).

3.1. The European Union Border and Coast Guard Agency (Frontex)

Established in 2004, Frontex is an important player in supporting the Member States in promoting integrated and efficient border management.⁵³ The agency not only carries out regulatory tasks but also coordinates joint operations among national border guards.⁵⁴ Subsequent revisions of Frontex’s legal framework have expanded the agency’s resources and operational tasks. Most notably, the 2007 amendment enabled the agency to deploy rapid border intervention teams to the Member States,⁵⁵ the 2011 modification strengthened Frontex’s role in joint (return) operations,⁵⁶ and

⁴⁹ DF Thompson, *Restoring Responsibility: Ethics in Government, Business, and Healthcare* (Cambridge University Press 2004) 11.

⁵⁰ Human Rights Watch, ‘Frontex Failing to Protect People at EU Borders. Stronger Safeguards Vital as Border Agency Expands’ (Human Rights Watch, 23 June 2021), at hrw.org.

⁵¹ European Parliament scrutiny of Frontex (European Parliament, 25 November 2021), at euro-parl.europa.eu.

⁵² See, e.g., European Ombudsman, Decision in Case OI/4/2021/MHZ (17 January 2022) on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations and ensures accountability in relation to its enhanced responsibilities.

⁵³ Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Art 1 (1); see J Santos Vara, ‘La Transformación de Frontex en la Agencia Europea de la Guardia de Fronteras y Costas: ¿Hacia una Centralización en la Gestión de las Fronteras?’ (2018) 59 *Revista de Derecho Comunitario Europeo* 143.

⁵⁴ Here, B Schotel’s definition of operational powers is used, namely ‘the physical capacity to intervene directly in tangible reality’, see B Schotel, ‘EU Operational Powers and Legal Protection: A Legal Theory Perspective on the Operational Powers of the European Border and Coast Guard’ (2021) 22 *German Law Journal* 625, 627. For more references, see also JJ Rijpma, ‘Frontex and the European System of Border Guards. The Future of European Border Management’ in M Fletcher, E Herlin-Karnell and C Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2016) 218.

⁵⁵ Regulation (EC) 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

⁵⁶ Regulation (EU) 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

the 2016 reform introduced a ‘rapid reaction pool’ of at least 1500 border guards.⁵⁷ Frontex currently operates under Regulation 2019/1896, which reflects an increased operational role, as it confers executive and coercive powers to Frontex staff and envisages a ‘standing corps’ that should consist of 10,000 operational staff in 2027.⁵⁸

With such revisions, the agency’s external dimension has also experienced great development.⁵⁹ Regulation 2016/1624 and Regulation 2019/1896 introduced and broadened the agency’s power to carry out actions on the territory of a third country by means of a ‘status agreement’ concluded between the EU and the respective third country.⁶⁰ Based on such an agreement, the agency is allowed to ‘carry out actions’ – for instance, joint operations – in the respective third country.⁶¹ Under certain circumstances, team members are, moreover, allowed to exercise executive powers ‘necessary to perform the tasks required for border control and return operations [...] during a joint action’.⁶² Such powers include (i) the possibility to carry service weapons, ammunition and equipment, (ii) the authorisation to use force, ammunition and equipment, and (iii) the authorisation to consult national third country databases and access (personal) data.⁶³

Frontex’s expanding mandate has sparked a great deal of controversy over the years. Scholars, practitioners, civil society organisations, as well as national and supranational political institutions, have brought up Frontex’s potential interference with human rights.⁶⁴ These concerns peaked following a 2022 report by the *Office Européen de la Lutte Antifraud* (OLAF), culminating in the resignation of Frontex’s Executive Director Fabrice Leggeri.⁶⁵ While fundamental rights concerns are already present in the agency’s internal activities, they are amplified in third-country operations, where EU legal safeguards do not apply and local partners may not be bound

⁵⁷ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC; see D Fernández-Rojo, ‘Los Poderes Ejecutivos de la Guardia Europea de Fronteras y Costas: del Reglamento 2016/1624 al Reglamento 2019/1896’ (2020) 60 *Revista Catalana de Dret Públic* 181, 184.

⁵⁸ Regulation (EU) 2019/1896 (n 8).

⁵⁹ Santos Vara (n 53) 173.

⁶⁰ Regulation (EU) 2016/1624 (n 57) Art 54 (5); Regulation (EU) 2019/1896 (n 8) Art 74 (2).

⁶¹ See, e.g., Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania (EU–Albania Agreement) Art 1(1) in combination with Art 2 (1).

⁶² Ibid, Art 4 (1) in combination with Art 2 (12).

⁶³ Ibid, Art 4 (5), (6), and (7); F Coman-Kund, ‘The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond...’ (VerfassungsBlog, 6 February 2020), at verfassungsblog.de.

⁶⁴ For a concise overview, see Nicolosi (n 20) 149.

⁶⁵ See European Border and Coast Guard Agency, ‘Frontex Statement following the Conclusions of the Extraordinary Management Board Meeting’ (2 May 2022), at frontex.europa.eu.

by international human rights treaties like the ECHR.⁶⁶ Despite these human rights concerns, three fundamental obstacles continue to impede full access to justice.

3.1.1. *Lack of transparency*

The first obstacle is the considerable transparency problems that have haunted the agency, with authors having noted a ‘culture of secrecy’ that revolves around Frontex and its activities.⁶⁷ This culture is evident at different levels, concerning not only the nature and development of its operational mandate but also regarding the access to relevant documents.

At the operational level, scholars have pointed out how the engagement of Frontex officers during joint operations was highly non-transparent, for example, concerning the identification and interviewing of migrants (pre-screening).⁶⁸ Another example is offered by joint return operations coordinated by the agency. The European Ombudsman stressed that there is limited public information available with regard to these operations.⁶⁹ The Guide for Joint Return Operations by Air coordinated by Frontex is the only document available and establishes that the competent person ‘explains orally or in writing to the returnee the removal procedure (e.g. reason, phases of travel and procedures, the necessity for body and luggage searches, the possibility of using coercive measures when deemed necessary, etc) and answers their questions’.⁷⁰ However, little information is available about the conduct during specific return operations.

Access to relevant documents has also been very problematic. Generally, EU agencies are required to give EU citizens and residents the right to public access to documents and also have the option to grant this access to individuals outside the Union.⁷¹ When processing requests for access to its documents, Frontex shall, thus, adhere to this obligation and, more concretely, disclose objective, detailed, comprehensive, reliable and easily understandable information regarding its work to ‘the

⁶⁶ E Omičević, ‘Between Security, Secrecy and Scrutiny: Enigmatic External Activities by European Agencies and Bodies in the Fight against Crime’ (European Law Blog, 24 November 2021), at europeanlawblog.eu.

⁶⁷ J Kilpatrick and M Gkliati, ‘Frontex, Secrecy and Security: Control of Information as Strategy for Institutional Preservation’ (EU Open Government, 12 October 2021), at eu-opengovernment.eu.

⁶⁸ See Carrera, den Hertog, Parkin (n 11) 348.

⁶⁹ European Ombudsman, Decision in Case OI/9/2014/MHZ (4 May 2015) closing her own-initiative inquiry concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).

⁷⁰ European Border and Coast Guard Agency, ‘Guide for Joint Return Operations by Air coordinated by Frontex’ (12 May 2016), at frontex.europa.eu. A more recent return-related guidance is European Border and Coast Guard Agency, ‘Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex’ (2018) at frontex.europa.eu.

⁷¹ Regulation (EC) No 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 8, Art 2 (1) and (2).

public and any interested party', save exceptions.⁷² In spite of these legal provisions mandating a rather proactive stance from the agency on transparency matters, Frontex has been increasingly reluctant to share information regarding its activities, with its especially unsettling 'blanket refusal' to provide access to individuals outside the EU.⁷³ In this connection, it is worth stressing that the importance of information is especially salient for third country nationals affected by the agency's external activities. The opacity characteristic of Frontex's legal provisions on external activities and the lack of transparency regarding its external cooperation practice are, thus, a serious impediment to ensuring access to justice concerning Frontex operations.⁷⁴

Over the past years, Frontex has even 'actively and aggressively' dissuaded activists from improving transparency, by demanding they pay large amounts of costs in transparency cases before the CJEU.⁷⁵ While Frontex has finally created a public register of documents in response to a decision by the European Ombudsman,⁷⁶ this register still does not appear to include all the documents it should.⁷⁷ These secretive practices may have important ramifications for individuals' ability to exercise their right to an effective remedy and obtain judicial redress for harm suffered by the agency's activities.⁷⁸ In order to collect evidence on an alleged violation of human rights and argue such a violation before a court, it is, after all, necessary to have sufficient knowledge and information about the exact activities employed by the agency.

3.1.2. *Imperfect remedies*

Another problem has to do with the fact that the judicial and agency-specific remedies for third-country nationals to obtain redress for harm suffered by FRONTEX are incomplete. Looking at the intra-agency mechanisms, it is fair to state that fundamental rights safeguards have improved – at least on paper – with the adoption of Regulation 2019/1896.⁷⁹

⁷² Regulation (EU) 2019/1896 (n 8) Art 114 (1) and (2); see Ibid Art 10 (1) (ad) stating that the agency shall perform the task of 'follow[ing] high standards for border management allowing for transparency and public scrutiny in full respect of the applicable law and ensuring respect for, and protection and promotion of, fundamental rights'.

⁷³ Omičević (n 66).

⁷⁴ Ibid; Carrera, den Hertog, Parkin (n 11) 357. See also J Santos Vara, 'The Activities of Frontex on the Territory of Third Countries: Outsourcing Border Controls Without Human Rights Limits?' (2023) 8 *European Papers* 985.

⁷⁵ J Kilpatrick, 'Frontex, Secrecy and Story-telling: Control of Information as Super-strategy' (Statewatch, 29 July 2021), at statewatch.org, 3.

⁷⁶ European Ombudsman, Decision in Case 2273/2019/MIG (3 February 2021) on how the European Border and Coast Guard Agency (Frontex) complies with its obligations to maintain a public register of documents. The Public Register of Documents is available at prd.frontex.europa.eu.

⁷⁷ 'EU: Disappearing Documents: Frontex's Transparency Efforts Fall Short of Requirements' (Statewatch, 16 May 2022), at statewatch.org.

⁷⁸ Omičević (n 66).

⁷⁹ European Border and Coast Guard Agency, 'Eight Annual Report. Frontex Consultative Forum on Fundamental Rights' (2020), at frontex.europa.eu, 27; See Rijpma (n 54) 233, and Carrera, den Hertog, Parkin (n 11) 355, for initial concerns on the fundamental rights mechanisms of Frontex.

The Regulation not only envisages a Fundamental Rights Officer (FRO) and Fundamental Rights Monitors (FRM) that ‘shall constantly assess the fundamental rights compliance of operational activities, provide advice and assistance in that regard and contribute to the promotion of fundamental rights as part of European integrated border management’.⁸⁰ It also mandates the agency to ‘set up and further develop an independent and effective complaints mechanism’.⁸¹ This mechanism was introduced in 2016 and further expanded by Article 111 of Regulation 2019/1896.

However promising these provisions may seem, significant delays exist in the implementation of the safeguards, causing substantial shortfalls in terms of fundamental rights compliance, monitoring, and correction. Not only did the appointment of the FRO and the recruitment of FRM come very late,⁸² but the individual complaints mechanism also shows deficiencies.⁸³ This mechanism is significant as it enables individuals directly affected by the actions or inactions of agency staff involved in specific operations or activities to file a written complaint if they believe their fundamental rights have been violated. In practice, its impact has been limited due to the lack of requirements for adequate follow-up and its overall inaccessibility.⁸⁴ Moreover, the mechanism lacks genuine independence, as the FRO is only responsible for determining admissibility, while decisions on the merits and follow-up are made by the agency’s Executive Director.⁸⁵ Consequently, the complaints mechanism falls short of being an effective remedy as defined by Article 47 of the EU Charter and Article 13 of the ECHR, in light of the requirements discussed in Section 1.

Besides the issues related to Frontex’s internal mechanisms, judicial redress before the CJEU for harm suffered by Frontex activities is extremely difficult to obtain. The whole system of EU judicial remedies, including bringing an action for annulment (Article 263 TFEU), an action for failure to act (Article 265 TFEU) or an action

⁸⁰ Regulation (EU) 2019/1896 (n 8) Art 110 (1).

⁸¹ Ibid, Arts 109, 110, and 111.

⁸² As of December 2022, the Fundamental Rights Office (FRO) finalised the recruitment of 46 Fundamental Rights Monitors (FRM), see European Border and Coast Guard Agency, ‘The Fundamental Rights Officer. Annual Report 2022’ (2023), at frontex.europa.eu, 4.

⁸³ ‘Frontex: The Ongoing Failure to Implement Human Rights Safeguards’ (Statewatch, 25 January 2022), at statewatch.org.

⁸⁴ In 2021, the European Ombudsman in an own-initiative inquiry in Case OI/5/2020/MHZ (15 June 2021) on the functioning of Frontex’s complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer noted the very low number of complaints submitted, delays and other issues regarding replies by national authorities and inadequate transparency about the mechanism’s activities. Even if the number of complaints has lately increased, the impact of this mechanism is limited, also due to the high inadmissibility rate. As illustrated in European Border and Coast Guard Agency, ‘2024 Annual Report of the Frontex Fundamental Rights Officer’ (2025), at frontex.europa.eu, 30, in 2024, the FRO received 84 complaints. After an admissibility review, only one complaint was declared admissible and forwarded to the relevant Member States’ competent authorities for further handling; of 26 complaints still pending assessment in 2025, six were declared inadmissible in January 2025; 57 complaints were considered inadmissible.

⁸⁵ Regulation (EU) 2019/1896 (n 8) Art 111 (6).

for damages (Article 268 and 340 TFEU, as well as Article 97 of Regulation 2019/1896) has been recently tested in relation to Frontex activities. All three possibilities are essentially flawed. First of all, it is the factual conduct by Frontex that sparks concerns over fundamental rights violations. Such conduct cannot, in principle, be reviewed under an action for annulment. Moreover, an action for annulment places a heavy burden on a person to prove that an act is addressed to them or that it concerns them directly and individually.⁸⁶ Concerning Article 265 TFEU, in the very first legal action against Frontex, the General Court stated that the provision applies when an institution has failed either to take a decision or to define its position, and not when there is disagreement over a decision or position taken by the agency, as purported by the claimants in such action.⁸⁷

Finally, while the action for damages may be a more promising avenue, this too requires the necessary legal creativity and flexibility to apply it to Frontex's activities and alleged violations of fundamental rights. This is a challenge that the CJEU's General Court chose not to address, as evidenced by its dismissal of the first two actions for damages brought against the agency in *WS and Others v Frontex* and *Hamoudi v Frontex*.⁸⁸ Strict cumulative conditions apply to an action for damages, including, as recalled by the General Court, unlawful conduct, actual damage and a causal link between the alleged conduct and the damage pleaded.⁸⁹ The major challenge is to establish that the wrongful conduct is attributable to an EU body and, therefore, to Frontex. This requirement is particularly challenging because Frontex's expanding operational mandate often lacks clarity in defining the agency's specific tasks. This led the General Court to take a rather formalistic approach⁹⁰ and conclude that, since Frontex 'has no competence either as regards the assessment of the merits of return decisions or as regards applications for international protection, the direct causal link alleged by the applicants between the damage allegedly suffered and the conduct of which Frontex is accused cannot be established'.⁹¹

⁸⁶ See Case C-486/01 *Front national v European Parliament*, EU:C:2004:394; and Case C-25/62 *Plaumann & Co. v Commission of the European Economic Community*, EU:C:1963:17.

⁸⁷ See Case T-282/21 *SS and ST v European Border and Coast Guard Agency*, EU:T:2022:235, paras 22, 33. The case lodged by the civil society organisation Front-Lex aimed to compel Frontex to suspend or terminate its activities in the Aegean Sea region in accordance with of Regulation (EU) 2019/1896 (n 8) Art 46(4). Nonetheless, the Executive Director of Frontex informed the applicants that the conditions for the adoption of a decision ex Art 46(4) of Regulation (EU) 2019/1896 (n 8) were not satisfied in the present case.

⁸⁸ Case T-600/21 *WS and Others v Frontex*, EU:T:2023:492; Case T-136/22 *Hamoudi v Frontex*, EU:T:2023:821. Both cases are pending appeal before the Grand Chamber (see Case C-679/23 P *WS and Others v Frontex (Opération de retour conjointe)*, EU:C:2025:427; Case C-136/24 P *Hamoudi v Frontex*, EU:C:2025:257). The hearings in both cases took place in February 2025.

⁸⁹ *WS and Others v Frontex* (n 88), para 52. For a broader analysis, see especially M Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 *German Law Journal* 532, 541-547.

⁹⁰ Nicolosi (n 20) 161.

⁹¹ *WS and Others v Frontex* (n 88), para 66.

More recently, however, Advocate General Ćapeta in her Opinion on the appeal case *WS and Others* asserted that Frontex can be held liable for damages even when Member States bear the primary responsibility in issuing and executing a return decision.⁹² Despite such a promising development, there is currently still a ‘striking lack of mechanisms for individuals affected by Frontex’s activities to hold the agency to account’.⁹³ The situation appears even worse in light of the difficulties in invoking the international responsibility of the EU for violations that occurred concerning the agency’s activities.⁹⁴

3.1.3. *Lack of effective oversight*

Finally, there is also a lack of effective external control by EU institutions and extra-judicial bodies over Frontex’s activities. While internal mechanisms, such as the FRO and FRM are, as stated above, promising in theory, they are currently not so much in practice, as they do not appear to be used to their full potential. As regards the external scrutiny, the 2019 Regulation states that ‘[t]he Agency shall be accountable to the European Parliament and to the Council’.⁹⁵ This role of oversight takes many forms and may, for instance, be exercised by reviewing the agency’s annual report and interrogating the Executive Director based on that report. More importantly, the European Parliament has the power to withhold the discharge of Frontex’s budget.⁹⁶ On 31 March 2022, the Parliament voted to postpone the discharge based on the OLAF report.⁹⁷ Moreover, Frontex’s former Executive Director testified to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) on the allegations of fundamental rights violations.⁹⁸

Apart from scrutiny by the EU institutions and sub-committees, the European Ombudsman has also used its powers in respect of Frontex to address concerns related to transparency, fundamental rights, and accountability. While these control mechanisms seem to function generally well on paper, the transparency problem discussed above has a great impact on the potential for EU institutions and other actors to exercise their

⁹² Opinion of AG Ćapeta in Case C-679/23 P *WS and Others v Frontex (Opération de retour conjointe)*, EU:C:2025:427, for a comment see A Kunst, ‘Advocate General Ćapeta’s Opinion in *WS and Others v Frontex* before the Grand Chamber: The End of Frontex’s Shielding? Joint Liability of Frontex and Member States in Return Operations’ (EU Law Analysis Blog, 17 June 2025), at eulawanalysis.blogspot.com.

⁹³ Fink (n 89) 547.

⁹⁴ *Amplius*, see G Raimondo, *The European Integrated Border Management. Frontex, Human Rights, and International Responsibility* (Hart Publishing 2024).

⁹⁵ Regulation (EU) 2019/1896 (n 8) Art 6.

⁹⁶ For references see M Gigli, ‘The Potential of Budgetary Discharge for Political Accountability: Which Lessons from the Case of Frontex?’ (2024) 30 *European Law Journal* 238.

⁹⁷ N Nielsen, ‘EU Lawmakers Refuse to Sign off Frontex Budget’ (EU Observer, 1 April 2022), at euobserver.com.

⁹⁸ European Border and Coast Guard Agency (n 79) 50. More broadly, see T Strik, ‘Frontex’s Expanding Mandate: Has Democratic Control Caught Up?’ (2024) 30 *European Law Journal* 217.

role of oversight. As the agency dodges requests for access to documents by hiding behind security reasons, and as it has on occasions proved unwilling to fulfil its task of fully informing the European Parliament of its activities, the competent authorities are hampered from performing their oversight functions.⁹⁹ Moreover, the Consultative Forum and the European Ombudsman provide a good opportunity to hold Frontex accountable for its activities, although the role of these actors has remained rather modest. While these oversight bodies may have an authoritative influence on Frontex, their reports and recommendations are non-binding, numerous challenges remain, and their effectiveness is to be improved in particular situations – e.g. the European Ombudsman’s proactive monitoring at external borders.¹⁰⁰

3.2. The European Asylum Support Office (EASO) and the European Union Agency for Asylum (EUAA)

Over more than a decade, the European Asylum Support Office (EASO) witnessed an increasing expansion of its mandate,¹⁰¹ especially after the migratory pressure of 2015 and the adoption of the European Agenda on Migration.¹⁰² This culminated in its transformation into the new EU Agency for Asylum (EUAA), which has been operational since 19 January 2022.¹⁰³ In light of the overall reform of the Common European Asylum System (CEAS) under the New Pact on Asylum and Migration,¹⁰⁴ EUAA responds to Member States’ growing need for operational support and guidance on the implementation of the common asylum rules.

Although significantly less studied than Frontex, concerns have been raised about EUAA’s lack of accountability for mistakes resulting from recommendations to national authorities about asylum applications.¹⁰⁵ This was already evident in EASO’s

⁹⁹ See T Strik, ‘Report on Fact-finding Investigation on Frontex Concerning Alleged Fundamental Rights Violations’ (Working document for LIBE Committee on Civil Liberties, Justice and Home Affairs, 14 July 2021), at www.europarl.europa.eu, 16.

¹⁰⁰ M Jaeger, A Fotiadis, E Guild and L Vidović, ‘Feasibility Study on the Setting up of a Robust and Independent Human Rights Monitoring Mechanism at the External Borders of the European Union’ (Pro Asyl Foundation, 4 May 2022) at proasyl.de; C Loschi and P Slominski, ‘Frontex’s Consultative Forum and Fundamental Rights Protection: Enhancing Accountability through Dialogue?’ (2022) 7 *European Papers* 195.

¹⁰¹ Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

¹⁰² European Commission, ‘Communication: A European Agenda on Migration’, COM(2015) 240 final.

¹⁰³ For an overview of the process of transformation, see Nicolosi (n 12).

¹⁰⁴ European Commission, ‘Communication: On A New Pact on Migration and Asylum’, COM(2020) 609 final. For a critical overview of the adopted legislative instruments, see S Peers, ‘The New Asylum Pact: Brave New World or Dystopian Hellscape?’ (2024) 26 *European Journal of Migration and Law* 381.

¹⁰⁵ European Council on Refugees and Exiles, ‘ECRE Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM(2016) 271’ (July 2016), at ecre.org.

role in the Greek hotspots, where it effectively conducted interviews, assessed the applicability of the safe third country concept, and issued recommendations on the admissibility of international protection applications. While not legally binding, these recommendations often had quasi-binding effects, as Greek officials rarely conducted independent assessments.¹⁰⁶ The European Ombudsman confirmed that there were ‘genuine concerns about the quality of the admissibility interviews as well as about the procedural fairness of how they are conducted’, but did not take any further action since the ‘ultimate legal responsibility for decisions on individual asylum applications rests with the Greek authorities’.¹⁰⁷ The exercise of discretion by the agency may, thus, lead to procedural issues and challenges to fundamental rights.¹⁰⁸

Article 2 of the EUAA Regulation lists an array of tasks that are not entirely different from the mission of EASO, though more emphasis is now placed on practical cooperation through the agency’s restructured operational dimension. As highlighted on its new website, ‘operations now form a core part of the agency’s activities’ and the agency in 2023 deployed over 1540 personnel across 160 locations in 13 EU countries.¹⁰⁹ Annex I to the Regulation also establishes a permanent asylum reserve pool of 500 Member State officials at the disposal of the agency. This expanded operational dimension is reflected in the new competences under Chapter 6 of the EUAA Regulation, which details the operational and technical assistance. Unlike the EASO Regulation, which allowed for the deployment of asylum support teams only when a Member State was subject to a particular pressure,¹¹⁰ the EUAA Regulation makes a more visible connection with enforcement by allowing for deployment also with regard to the implementation of the obligations under the CEAS.¹¹¹ Additionally, in case of disproportionate pressure on the reception system of a Member State, the EUAA can deploy the asylum support teams on its own initiative with the agreement of the Member State.¹¹² Nonetheless, the EUAA Regulation does not fully mirror the agency’s enhanced role on the ground ‘which includes agency staff and agency-deployed experts independently undertaking actions which involve executive discretion’.¹¹³ It is, therefore, legitimate to assume that the same problems of access to justice arise with regard to the operational mandate of EUAA.

¹⁰⁶ Nicolosi and Fernández-Rojo (n 18) 177.

¹⁰⁷ European Ombudsman, Decision in Case 735/2017/MDC (5 July 2018) on EASO’s involvement in the decision-making process concerning admissibility of applications for international protection submitted in the Greek Hotspots, in particular shortcomings in admissibility interviews.

¹⁰⁸ See also E Tsourdi, ‘Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible?’ (2020) 21 *German Law Journal* 506, 508.

¹⁰⁹ See European Union Agency for Asylum, ‘The EU Asylum Agency’s 2023 in numbers’ (EUAA, 8 April 2024), at euaa.europa.eu.

¹¹⁰ Regulation (EU) 439/2010 (n 101) Art 13.

¹¹¹ Regulation (EU) 2021/2303 (n 9) Art 16 (1)(a).

¹¹² Ibid, Art 16 (1)(d).

¹¹³ E Tsourdi, ‘European Union Agency on Asylum: An Agency “Reborn”?’ in *Weekend Edition No 98* (EU Law Live 2022) 6.

EUAA's mandate builds on the functions of EASO, also regarding cooperation with third countries. However, in this regard, the EASO mandate in third countries was rather underdeveloped, while Article 35 of the EUAA Regulation more clearly refers to activities that the agency can develop in third countries, namely capacity-building and resettlement. To this aim, Article 36(1) refers to the deployment of liaison officers to gather information and facilitate access to legal pathways to the EU, including through resettlement. These emergent tasks in third countries may give rise to fundamental rights issues concerning, for example, the coordination with third country authorities regarding the identification of those refugees that can be resettled in the EU.¹¹⁴ Since the practice of EASO has left its imprint on the operational mandate of the new EUAA, it is worth noting how the three major problems that have been analysed concerning Frontex (lack of transparency, imperfect remedies and lack of effective oversight) are also common to EASO and risk being reproduced by the EUAA.

3.2.1. *Lack of transparency*

The practice of EASO has disclosed overlapping competences between the agency and the national asylum authorities. This creates issues of transparency for asylum seekers, who are neither aware of which authority they will be interfacing with nor in a position to express their consent about the possibility of being interviewed by the agency instead of national authorities. This is a practice that is likely to be reiterated by the EUAA. The EUAA Regulation partly formalises the activities that EASO was undertaking in hotspot areas, especially in light of inter-agency cooperation.¹¹⁵ However, the Regulation only pays lip service to the involvement of the agency in the examination and processing of asylum claims along with state authorities. Article 16(2)(c) of the Regulation limits the agency's competence to facilitating 'the examination by the competent national authorities of applications for international protection or provide those authorities with the necessary assistance in the procedure for international protection'. In addition, the same provision confirms a role of assistance, advice, and support to the national authorities as regards the enforcement of the CEAS, including the implementation of asylum procedures, reception facilities and obligations under the Dublin Regulation on the state responsible for an asylum application (Article 16(2)(d), (e), (f) and (g)).¹¹⁶

¹¹⁴ See M Gkliati and SF Nicolosi, 'External Solidarity in Integrated Border Management: The Role of EU Migration Agencies' in E Kassoti and N Idriz (eds), *The Principle of Solidarity. International and EU Law Perspectives* (Springer 2023) 209, 224–229.

¹¹⁵ See more extensively Fernández-Rojo (n 10).

¹¹⁶ In light of the reform under the New Pact on Migration and Asylum, the Dublin Regulation (Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanism for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person) will be replaced by Regulation (EU) 2024/1351 of the European Parliament and of the Council

On the other hand, under Article 11 of the Regulation, the EUAA Management Board adopts Guidance notes for the assessment of applications that Member States ‘shall take into account’ when examining these applications. The language seems to confirm the existence of an obligation for national authorities that in practice are subject to the influence of the EUAA when deciding on an application. This unclear distribution of tasks between the agency and the Member States renders untransparent the execution of the operational mandate of the new agency, especially in the light of the fact that not even the Operational Plans between the agency and the Member States clarify the coordination with national authorities or, more specifically, the formal contribution of the agency to the processing of asylum claims by national authorities.¹¹⁷

3.2.2. *Imperfect remedies*

Debates have emerged about the need to ensure an internal administrative fundamental rights monitoring mechanism for the agency, especially following the European Ombudsman’s investigations into the EASO operational activities. In an inquiry, launched after alleged wrongdoings by the EASO experts during interviews, the European Ombudsman concluded that ‘EASO’s failure to address adequately and in a timely way the serious errors committed’ in a particular interview, constituted misconduct and subsequently advised the agency to undertake several improvements to ensure procedural guarantees during asylum procedures.¹¹⁸ These included, *inter alia*, the recommendation to inform national authorities, ‘immediately and systematically’ once significant errors have occurred during an interview, and the suggestion to set up an internal complaints mechanism accessible for individuals who come into contact with the agency. In its response to the European Ombudsman, a complaints mechanism has been included in the EUAA Regulation, at the request of the European Parliament.¹¹⁹

Article 51(2) of the EUAA Regulation establishes that ‘any person who is directly affected by the actions of an expert participating in an asylum support team, and who considers that his or her fundamental rights have been violated due to those actions, or any party representing such a person, may submit a complaint in writing to the agency.’ The complaints mechanism was set up in May 2024, and it is still too early to evaluate its effectiveness.¹²⁰ Such a mechanism is placed under the responsibility of the EUAA

of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, which will be applicable as of June 2026.

¹¹⁷ *Amplius* see Nicolosi (n 12).

¹¹⁸ European Ombudsman, Decision in Case 1139/2018/MDC (30 September 2019) on the conduct of experts in interviews with asylum seekers organised by the European Asylum Support Office.

¹¹⁹ See European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010’ COM (2016) 271 final.

¹²⁰ European Union Agency for Asylum, Management Board Decision No 159 of 24 May 2024 on the setting up of the complaints mechanism, EUAA/MB/2024/056.

Fundamental Rights Officer and is to be seen in the context of the Fundamental Rights Strategy adopted by the EUAA Management Board.¹²¹

Since this complaints mechanism is not designed for claims against a national authority's decision, it is all the more urgent to clearly define the operational tasks of the agency and the measures that the asylum support teams can adopt, and dispel doubts about the accessibility and effectiveness of the mechanisms. The Fundamental Rights Strategy highlights that 'in view of the implementation of the complaints mechanism, the Agency will ensure that asylum support team experts, including interpreters, are clearly identifiable and differentiable from national authorities or other stakeholders operating in the operational location.'¹²² This approach is welcome also in terms of transparency and coordination with the national authorities. However, its effectiveness remains to be evaluated in practice, particularly in relation to the actual awareness of asylum seekers regarding the authorities or personnel with whom they are interacting. Still, as noted with reference to the Frontex complaints mechanism, despite the emphasis on ensuring adequate follow-up, regrettably, the EUAA Regulation has not established any form of redress for the victims of fundamental rights violations. This is a major lacuna that leaves the system of internal remedies incomplete.

It is worth stressing that the complaints mechanism is complemented by an 'escalation mechanism' – foreseen by the Fundamental Rights Strategy – that will function as a mechanism to report any incident related to potential violations of fundamental rights and international protection obligations committed by Member States' authorities, in the context of an EUAA operation and observed or brought to the knowledge of the Agency's staff or experts of asylum support teams, including interpreters.¹²³ This mechanism, just like Article 46(4) of Regulation 2019/1896 for Frontex, can lead to the suspension or termination, in full or part, of the deployment of asylum support teams, if serious or persistent violations of fundamental rights or international protection obligations by the host Member State are identified (Article 18(6)(c) of the EUAA Regulation).

Finally, with reference to the possibility of undertaking external judicial actions before the CJEU against the agency, the fact that, despite the assistance provided by the agency, the Member States keep the primary administrative responsibility for asylum applications constitutes a relevant obstacle. This means that asylum seekers can only appeal a negative decision before domestic courts, even if the national authorities have acted under the influence of the EU agency. Scholars have already

¹²¹ European Union Agency for Asylum, Management Board Decision No 166 of 25 September 2024 on the Fundamental Rights Strategy 2024-2028, EUAA/MB/2024/130 [hereinafter 'EUAA Fundamental Rights Strategy 2024-2028'].

¹²² *Ibid.*, Annex I, para 11.

¹²³ *Ibid.*

highlighted that contesting the agency's advisory opinions through an action for annulment before the Court of Justice is particularly difficult,¹²⁴ as they would not constitute reviewable acts under the requirements of Article 263 TFEU.¹²⁵

Other direct remedies before the CJEU, like actions for damages against the EUAA, would suffer from the same limits that have been addressed with regard to Frontex. Additionally, apart from complying with the strict conditions of EU liability law, the non-binding nature of the agency's advisory recommendations to the national authorities can stand as an obstacle to claiming the existence of a causal relationship between the unlawful conduct and the victim's damage, due to the interposition of the state's official decision on an asylum claim. Ultimately, as has been argued, the fact that the agency's cooperation with the Member States can take different forms, depending on the national asylum systems and the articulation of the domestic procedures, 'makes EUAA a catalyst in the rule of law crisis because of the lack of viable ways to access justice for asylum seekers' and increases the risk of fragmented judicial protection.¹²⁶

3.2.3. *Lack of effective oversight*

A distinct feature of the EUAA Regulation is the monitoring mechanism on 'the operational and technical application of the CEAS'.¹²⁷ This monitoring system, whose functioning is outlined in a decision by the Management Board,¹²⁸ cannot be regarded as a form of political oversight on the agency, as its goal is to 'prevent or identify possible shortcomings in the asylum and reception systems of Member States and to assess their capacity and preparedness to manage situations of disproportionate pressure so as to enhance the efficiency of those systems'.¹²⁹ On the contrary, there are limited improvements as regards the monitoring of the agency.

The Fundamental Rights Strategy states that 'the Agency is accountable towards the EU institutions and its governing structures'.¹³⁰ Nonetheless, the EUAA Regulation confirms the intergovernmental nature of the Management Board, as for other agencies, which constitutes a challenge to the independence of the agency. This can partly be counterbalanced by the establishment of a Fundamental Rights Officer and an upgraded role for the Consultative Forum. In particular, the Fundamental Rights Officer is responsible for ensuring compliance with fundamental rights in all EUAA

¹²⁴ Tsourdi (n 108) 525.

¹²⁵ See A Pirrello, 'The European Union Agency for Asylum: Legal Remedies and National Articulations in Composite Procedures' (2024) 30 *European Law Journal* 165. See also G Lisi and M Eliantonio, 'The Gaps in Judicial Accountability of EASO in the Processing of Asylum Requests in the Hotspots' (2019) 4 *European Papers* 589, 599.

¹²⁶ Pirrello (n 125) 180.

¹²⁷ Regulation (EU) 2021/2303 (n 9) Art 14.

¹²⁸ European Union Agency for Asylum, Management Board Decision No 161 of 13 March 2024 establishing a common methodology for the monitoring mechanism on the operational and technical application of the Common European Asylum System, EUAA/MB/2024/070.

¹²⁹ Regulation (EU) 2021/2303 (n 9) Art 14.

¹³⁰ EUAA Fundamental Rights Strategy 2024–2028 (n 121) 9.

activities and for promoting the agency's respect for fundamental rights.¹³¹ The Fundamental Rights Officer is also interfaced by the Executive Director who 'shall, after informing the host Member State, suspend or terminate, in whole or in part, the deployment of asylum support teams where it is, *inter alia*, 'consider[ed] that there are violations of fundamental rights or international protection obligations by the host Member State that are of a serious nature or are likely to persist'.¹³²

As noted about EASO,¹³³ the Consultative Forum has the potential to contribute to the social and democratic accountability of the agency, thereby partly remedying the insufficient oversight mechanisms. While having a rather limited role in the former institutional setup of EASO, the EUAA Regulation enhances the role of the Consultative Forum, despite confirming that it is 'a mechanism for the exchange of information and the sharing of knowledge'.¹³⁴ While the Consultative Forum has gained the more specific tasks of advising the Executive Director and the Management Board on asylum issues,¹³⁵ its real impact will primarily come to light in respect of the new operational dimension of the agency.

Significantly, Article 67 of the EUAA Regulation establishes that 'the activities of the agency shall be subject to the inquiries of the European Ombudsman'. This can be read as an attempt to recognise the growing quasi-judicial review provided in the past few years on EASO activities and to add a guarantee of external oversight to a system that still raises doubts about political independence. In contrast to the other two agencies, Frontex and Europol, over which different EU institutions have already exercised more accurate control, EASO has been especially subject to the investigations of the European Ombudsman. While this may constitute a valid accountability channel,¹³⁶ it might not be sufficient in light of the role that the agency is called to play in the future management of the CEAS.

3.3. European Agency for Law Enforcement Cooperation (Europol)

Europol is a key actor not only in police cooperation but also in migration matters.¹³⁷ Established as an international organisation by the Member States of the European Community (EC) in 1995, Europol initially possessed only 'minimal operational au-

¹³¹ Regulation (EU) 2021/2303 (n 9) Art 49.

¹³² *Ibid*, Art 18.

¹³³ Nicolosi and Fernández-Rojo (n 18).

¹³⁴ Regulation (EU) 2021/2303 (n 9) Art 51.

¹³⁵ *Ibid*, Art 51(4).

¹³⁶ For a critical analysis, see D Curtin, T Ehnert, A Morandini, S Tas (eds), *The European Ombudsman Investigated. From Old Battles to New Challenges* (Hart Publishing 2024).

¹³⁷ Fernández-Rojo (n 10) 22, 24; F Coman-Kund, 'Europol's International Cooperation between "Past present" and "Present future": Reshaping the External Dimension of EU Police Cooperation' (2018) 1 *Europe and the World: a Law Review* 3.

tonomy' and was 'fully dependent on the willingness of national authorities' to provide it with information by which it could achieve its aims.¹³⁸ Subsequent modifications to its mandate added to its competences the power to coordinate and carry out operational tasks – for instance, in the framework of Joint Investigation Teams (JITs) – to assist Member States in their national investigations of organised crime.¹³⁹

Through subsequent modifications, it not only acquired new operational capacities but also the potential to request the Member States to initiate, coordinate, or conduct investigative actions, with refusal of national authorities to accede to these requests requiring justifications.¹⁴⁰ In 2016, Europol further enhanced its operational role with the creation of the European Migrants Smuggling Centre (EMSC).¹⁴¹

Already under its 2009 legal framework, the agency was competent to sign operational and strategic cooperation agreements with external partners. Under the current framework, Europol is capable of establishing contact points, seconding liaison officers, and signing working arrangements with competent third country authorities. While these arrangements may not form the basis for international data exchanges, such exchanges are possible on the basis of old cooperation agreements, EU-third country agreements, or a Commission adequacy decision. Concerning Europol's external competences, it is remarkable that the provisions in its legal framework remain succinct and vague – only mentioning the competence to exchange data with third countries – whereas its cooperation practice demonstrates the agency's ability to provide intelligence development and analytical support to third countries with the active-on-the-spot participation of Europol officers in an international anti-smuggling action.¹⁴² A recent reform strengthening Europol's mandate shows that this 'mission creep' is not bound to stop yet.¹⁴³

Fundamental concerns about Europol's compliance with human rights have existed since the nascent stages of the agency's operations, especially concerning its data exchange activities.¹⁴⁴ Europol's collection, storing, and processing of data may directly violate the fundamental rights of data subjects.¹⁴⁵ In his decision of 3 January 2022, the European Data Protection Supervisor (EDPS) ordered Europol to delete the

¹³⁸ Fernández-Rojo (n 10) 4, 24; D Fernández-Rojo, 'El Diseño de una Administración Supranacional e Integrada para el Espacio Europeo de Libertad, Seguridad y Justicia' (2021) 58 *Revista General de Derecho Administrativo* 1, 6.

¹³⁹ Fernández-Rojo (n 138). See more recently S Tas, 'The Dangerous Increasing Support of Europol in National Criminal Investigations: An Additional Layer of Complexity' (2023) 14 *New Journal of European Criminal Law* 534.

¹⁴⁰ Fernández-Rojo (n 10) 78-79.

¹⁴¹ Coman-Kund (n 137) 3-4.

¹⁴² Omičević (n 66).

¹⁴³ Regulation (EU) 2022/991 (n 10).

¹⁴⁴ See, for example, Guild, Carrera, den Hertog and Parkin (n 11) 43.

¹⁴⁵ C Brière, 'Cooperation of Europol and Eurojust with External Partners in the Fight against Crime: What are the Challenges ahead' (DCU Brexit Institute Working Paper 18-2018), at dcubrexitinstitute.eu.

data of individuals with no link to criminal activities.¹⁴⁶ According to the EDPS, Europol had acted in breach of *inter alia* data retention rules, keeping personal data stored for longer than necessary.¹⁴⁷ Such data protection concerns also exist – and are even exacerbated – when the agency exchanges personal data with third countries, as there is a notable difficulty in ensuring that legal safeguards are complied with by partners in third countries.¹⁴⁸ The *Schrems II* judgment by the CJEU illustrates this. In that case, the Court invalidated the legal basis for international data exchanges between the EU and the United States (US), as US law did not ensure a level of protection to citizens that was ‘essentially equivalent’ to that of the Charter.¹⁴⁹

Further risks arise from interoperability regimes, which are designed to enhance the interconnectivity of databases. These regimes grant Europol unprecedented access to various AFSJ databases — including non-law enforcement ones — raising significant privacy concerns.¹⁵⁰ Additionally, Europol’s operational coordination may lead to indirect breaches of other human rights, such as the right to a fair trial or the *ne bis in idem* principle. It is conceivable that Europol-facilitated investigations could result in unlawful arrests, detentions, or ill-treatment by third-country authorities.¹⁵¹ In spite of these human rights concerns, the three problems in relation to access to justice, which were discussed above for the other two agencies, are also apparent in Europol’s activities.

3.3.1. Lack of transparency

A first problem is that Europol’s activities, especially the operational and external ones performed, are insufficiently transparent and bring with them a degree of secrecy, just as witnessed in the case of Frontex.¹⁵² The provisions on external relations in Europol’s constitutive framework are rather broad, vague, and succinct, only referring to the exchange of personal data. Its practice shows, by means of annual reports and press releases on its website, a different story. On the ground, the Agency carries out operational tasks, such as assisting in individual criminal cases, and does not hesitate to showcase the results.¹⁵³ Moreover, in the external dimension, Europol is even indirectly involved in reforming the laws and security systems of third countries by carrying out certain capacity-building tasks, even though these powers are not explicitly reflected in

¹⁴⁶ European Data Protection Supervisor, Decision in Cases 2019-0370 and 2021-0699 (21 December 2021) on the retention by Europol of datasets lacking Data Subject Categorisation.

¹⁴⁷ Ibid, para 4.22.

¹⁴⁸ Omičević (n 66); Coman-Kund (n 17) 182.

¹⁴⁹ C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems (Schrems II)*, EU:C:2020:559.

¹⁵⁰ Coman-Kund (n 17) 203.

¹⁵¹ Omičević (n 66).

¹⁵² D Fernández-Rojo, ‘Transparencia y Control Social de las Actividades Operativas de Europol en la Lucha contra el Tráfico Ilícito de Migrantes’ (2020) 51 *Revista General de Derecho Europeo* 140.

¹⁵³ See the Press Releases on Europol’s website, at europol.europa.eu.

Europol's constitutional framework.¹⁵⁴ What the precise activities of the agency entail, how the cooperation with the Member States and third country authorities is envisaged, and to what extent Europol's own actions lead to investigations, arrests, and prosecutions, is overall unclear. Whereas researchers have made efforts to uncover this veil of secrecy by requesting access to documents, there are notable examples in which Europol has refused partial or complete access, mostly based on public security concerns.¹⁵⁵ For instance, the requests by David Fernández-Rojo to access documents on Europol's operational powers in the context of migrant smuggling were all systematically denied by the agency.¹⁵⁶ While it may be thought that Europol could, through its reports, shed more light on its activities, these reports also 'make no clear effort to provide transparency'; they do not, for instance, specify the 'nature, extent and outcomes of intensive cross-border policing practices at land borders within the EU'.¹⁵⁷

An argument could, of course, be made that at times security concerns or other exceptions justify the refusal of access to documents relating to Europol's activities. Nonetheless, the 2016 Decision by the agency's Management Board on the application of Regulation 1049/2001 states that '[i]n principle, all documents should be accessible to the public'. Only by way of exception should such access be restricted to protect public and private interests.¹⁵⁸ However, the examples mentioned, as well as certain cases before the European Ombudsman, show that refusal based on exception grounds seems to be used more as a rule than an exception. For example, in a decision of 15 July 2024 on the disclosure of documents related to the draft EU legislation on sexual abuse, the European Ombudsman held that 'Europol's application of the exceptions was in the form of short propositions that seem to have been based on assumptions. It did not explain why and in what way the disclosure of the specific documents concerned would actually and specifically harm its relations with third parties, nor did it in any way explain what decision-making processes could be seriously undermined, and how'.¹⁵⁹ Some of the complaints before the European Ombudsman regarding public access to Europol's documents – for instance on its operational tasks in combating illegal migrant smuggling – have made it possible to obtain partial access to some of the agency's documents.

¹⁵⁴ E Omičević, 'Of Simple Doors and Impenetrable Borders: AFSJ Agencies and the Western Balkans' in M Luchtman, F de Jong, K Ligeti, J Lindeman, S Tosza, R Widdershoven and D Zaich (eds), *Of Swords and Shields: Due Process and Crime Control in Times of Globalization - Liber amicorum prof. dr. J.A.E. Vervaele* (Eleven Publishing 2023) 349, 354-356.

¹⁵⁵ Fernández-Rojo (n 152) 168.

¹⁵⁶ *Ibid.*

¹⁵⁷ See JLM McDaniel and A Lavorgna, 'Enhancing the Accountability and Transparency of Transnational Police Cooperation within the European Union' in J McDaniel, KE Stonard and DJ Cox (eds), *The Development of Transnational Policing: Past, Present and Future* (Routledge 2019) 73, 82-87.

¹⁵⁸ Decision of the Europol Management Board of 13 December 2016 laying down the rules for applying Regulation 1049/2001 with regard to Europol documents, Recital 3 of the Preamble.

¹⁵⁹ See, for example, European Ombudsman, Decision in Case 1849/2019/DL (1 July 2020) on the European Union Agency for Law Enforcement Cooperation's refusal to grant public access to documents relating to its operational tasks in combating illegal migrant smuggling, paras 6-11.

This lack of transparency and the secretive practices by Europol undermine access to justice possibilities for alleged violations of fundamental rights. As the EDPS has stated in relation to data protection, '[t]he right to information is also of utmost importance as it allows the exercise of other data protection rights, including the right to remedies'.¹⁶⁰ If data subjects are, for example, unaware of their data having been processed by Europol, they cannot exercise their right of rectification and erasure of the data.¹⁶¹

3.3.2. *Imperfect remedies*

As regards remedies, it is necessary to note that a couple of complaints mechanisms exist to remedy potential fundamental rights violations by Europol, but that these may not always be as effective for persons to obtain redress for harm suffered. When data subjects consider that Europol's processing of their personal data does not comply with the Europol Regulation, apart from the possibilities to rely on national mechanisms, they may lodge a complaint with the EDPS, which shall hear and investigate these complaints before informing the data subject of the outcome.¹⁶²

In the case of damage resulting from an unlawful data processing operation, the person in question shall receive compensation for the damage suffered, either under national law by the Member States or under Article 340 TFEU by Europol.¹⁶³ The action against Europol can be brought before the Court of Justice, and the action against the Member States before a competent national court.¹⁶⁴ Moreover, the general possibility exists for the Court of Justice to rule on disputes concerning the compensation for damages by Europol staff.¹⁶⁵ While these possibilities, in theory, provide data subjects a multitude of opportunities to obtain redress, it appears to be difficult to realise this potential in practice. In order to exercise its rights, the data subject must first have knowledge about the data having been processed, something that is hampered by the above-mentioned opaque legal provisions and secretive practices of the agency. Moreover, human rights violations in the area of shared administration are usually the

¹⁶⁰ European Data Protection Supervisor, EDPS Opinion 02/2018, 14 March 2018, on eight negotiating mandates to conclude international agreements allowing the exchange of data between Europol and third countries.

¹⁶¹ *Ibid.*

¹⁶² Regulation (EU) 2016/794 (n 10) Art 47(1) and Art 43(1). Actions against decisions by the EDPS may be brought before the Court of Justice, see Regulation (EU) 2016/794 (n 10) Art 48; Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, Arts 52-54, provides for the possibility for data subjects to lodge complaints with supervisory authorities at the national level; see the same provisions in Regulation (EU) 2022/991 (n 10).

¹⁶³ Regulation (EU) 2016/794 (n 10) Art 50(1); see the same provisions in Regulation (EU) 2022/991 (n 10).

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*, Art 49(4) in conjunction with Art 49(3).

result of joint conduct between the agency and the Member State. It is in these cases that it is difficult to establish responsibility and obtain judicial redress, given that the Union's liability regime was originally not meant for the adjudication of joint responsibility for harm caused by joint EU and Member State conduct.¹⁶⁶

However, in the 2024 *Kočner* case, the CJEU's Grand Chamber established joint and several liability of Europol and a Member State for damages resulting from the unlawful processing of personal data.¹⁶⁷ The individual is not required to identify whether it was Europol or the Member State that performed the conduct which constituted the unlawful processing. It is sufficient that the individual suffered damage as a result of unlawful data processing in the course of cooperation between Europol and the Member State.¹⁶⁸ This solution of joint and several liability, thus, enhances the possibility of remedy, given that the individual is not required to pinpoint which of the two authorities the wrongful conduct is to be attributed to. While the case sheds much-needed light on the issue of shared responsibility in the EU legal order, an important caveat is that the joint and several liability framework propounded by the Court rests primarily on the particularities of the then-applicable Europol Regulation.¹⁶⁹ Therefore, the broader ramifications of the case beyond privacy and data protection rights, beyond the 2016 Europol Regulation, and beyond Europol, remain highly uncertain at the very least. *Kočner* notwithstanding, the long-expressed difficulties in holding EU agencies responsible for harmful collaborative conduct thus appear to persist.

3.3.3. *Lack of effective oversight*

Challenges have been identified with regard to the control of Europol's actions by institutional and non-institutional actors. Just as was the case with Frontex, Europol must respond to the European Parliament by means of forwarding annual reports and presenting and discussing the activities through the Director, where the Parliament has the competence to approve or withhold the agency's budgetary discharge.¹⁷⁰ Moreover, the Member States' parliaments can also exercise control over the agency's activities, with the possibility to invite Europol's Executive Director to present and discuss the agency's activities.¹⁷¹ Furthermore, the Joint Parliamentary Scrutiny Group (JPSG), established by the national parliaments and a committee of the European Parliament,

¹⁶⁶ J De Coninck, 'Europol's Joint and Several Liability Regime: Revolutionizing EU Fundamental Rights Responsibility?' (EU Law Analysis, 1 November 2023), at eulawanalysis.blogspot.com.

¹⁶⁷ Case C-755/21 P *Marián Kočner v Europol*, EU:C:2024:202.

¹⁶⁸ *Ibid.*, paras 79–80.

¹⁶⁹ J De Coninck and S Tas, 'Investigating Five Dimensions of the EU's Liability Regime: Marián Kocner' (2025) 62 *Common Market Law Review* 195, 205. Interestingly, the mentioned appeal cases pending before the CJEU's Grand Chamber, *WS and Others* and *Hamoudi*, will offer a chance to see if such a judicial approach could be 'exported' to other situations.

¹⁷⁰ Regulation (EU) 2016/794 (n 10) Art 60(10); see the same provision in Regulation (EU) 2022/991 (n 10).

¹⁷¹ *Ibid.*, Recital 58.

politically monitors Europol's activities, including those that may impact the fundamental rights of persons.¹⁷² Whereas much – according to some *too much*¹⁷³ – control is exercised over Europol by these institutions, some challenges remain.

First, the European Parliament cannot have access to classified information, if the originator of that information – with Europol, this is mainly the Member State – refuses disclosure.¹⁷⁴ The agency's secretive ways of working may, then, too become detrimental to parliamentary scrutiny over Europol's activities. Second, as has been highlighted, the effectiveness of the JPSG may be hampered by its large size, several procedural issues, and the complexity of adopting substantial summary conclusions.¹⁷⁵ Nevertheless, interest from the national parliaments and the European Parliament in exercising their oversight role has been strong, as attested by the wide variety of questions posed by them to Europol.¹⁷⁶ Besides the parliamentary control over Europol, the EDPS also exercises scrutiny over Europol's activities. It may, for instance, warn or admonish the agency, order it to carry out rectifications, impose a ban on processing operations by the agency, and refer a matter to the Court of Justice.¹⁷⁷ After the EDPS had made use of these competences, the EU institutions initiated the downsizing of its powers, notably by lowering the situations in which the EDPS must be informed or notified about data transfers by Europol.¹⁷⁸

4. The principles of good administration and their contribution to access to justice

The synoptical analysis of the three EU agencies has contributed to explaining that – although to different degrees – they reproduce similar problems that impair complete access to justice. Together, these factors create substantial barriers that impede individuals' ability to seek and obtain justice, also because they make it overly complicated to identify the appropriate judicial forum for possible victims to exercise their right to an effective remedy.

Accordingly, this Section aims to explain how access to justice could be enhanced by better integrating elements of good administration and governance, such as 'transpar-

¹⁷² Ibid, Art 51(1)-(2). See the same provisions in Regulation (EU) 2022/991 (n 10). It should be noted here that with the 2022 amendment, Europol also has a Fundamental Rights Officer monitoring the agency, see Art 41c.

¹⁷³ M Schininà, 'What Balance between Eurojust and Europol from a Parliamentary Angle?' (2020) 11 *New Journal of European Criminal Law* 123, 131.

¹⁷⁴ Ibid, 132.

¹⁷⁵ Ibid.

¹⁷⁶ See, for example, the questions asked by Members of the European Parliament to Europol, 'Europol Reply to Written Questions from MEP Pagazaurtundúa to the Joint Parliamentary Scrutiny Group (JPSG)' (21 February 2022), at europarl.europa.eu.

¹⁷⁷ Regulation (EU) 2016/794 (n 10) Art 43 (3) (d), (e), (f), and (h).

¹⁷⁸ S Tas, 'Europol's "Big Data Challenge": A Neutralisation of the European Watchdog' (The Digital Constitutionalist, 10 February 2022), at digi-con.org.

ency’ and ‘control’. Along with remedies, these elements are interrelated and inextricably linked as well as functional to the rule of law, of which access to justice is a clear manifestation, as individuals must be able to challenge administrative actions, and institutions must act lawfully, fairly, and transparently. While transparency enhances individuals’ possibilities to obtain redress for the harm they suffered, it also allows judicial and administrative bodies to scrutinise the activities of the agencies better. Moreover, actors that exercise external oversight on the agencies may recommend improvements in terms of judicial pathways, thereby contributing to access to ad hoc ‘remedies.’

A focus on these elements may contribute to fulfilling the requirements for good administration; in other words, it can open new scenarios of legal protection in EU shared administration. It is argued here that the latter should be grounded in the principles of good administration and governance,¹⁷⁹ aligning with the overarching values of transparency, due process, and accountability. Additionally, the EU shared administration must reflect the right to good administration, as enshrined in Article 41 of the EU Charter. Figure 1 below illustrates how access to justice could be strengthened by integrating and improving good administration. In line with John Rawls’ vision,¹⁸⁰ this approach feeds into the understanding of justice not only as judicial fairness but also as a sense of administrative fairness. Such a dimension of fairness beyond the access to remedies will be explored in the following sub-sections, by focusing on transparency (4.1), due process (4.2), and accountability (4.3).

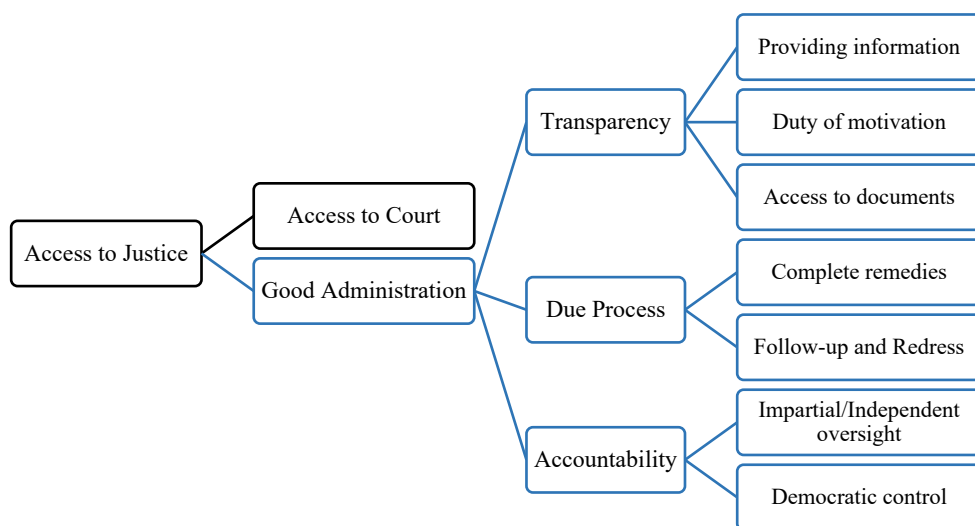


Figure 1. Access to justice through good administration

¹⁷⁹ See L. Azoulai, ‘Le Principe de Bonne Administration’ in J-B Auby, J. Dutheil de la Rochère (eds), *Droit Administratif Européen* (Bruylant 2007) 504. TP Fortsakis, ‘Principles Governing Good Administration’ (2005) 11 *European Public Law* 207; see also V. Mazioti, *The Principle of Good Administration in the Action of EU Institutions* (Nomiki Bibliothiki 2023).

¹⁸⁰ J. Rawls, *A Theory of Justice* (Belknap Press 1971).

4.1. Fostering transparency

A recurring problem for all three agencies analysed is the lack of transparency, owing to secretive ways of working, but also to the unclear allocation of tasks between state authorities and agencies. In this context, transparency serves not only to foster core values that link individuals to a given polity but also functions as a valuable method of ensuring clarity about rights and obligations. Transparency is therefore a fundamental precondition for a well-functioning administration.¹⁸¹ It connects with several principles of good administration, such as the principle of providing relevant information, the principle of access to administrative documents and the principle of justification of relevant decisions. Some of these principles have been spelled out clearly by the CJEU, which has also generally referred to good administration as a general principle of EU law without further elaboration.¹⁸²

The lack of full public transparency in the activities of EU agencies is plausible in certain circumstances, given the areas they operate in. This is further justified by the need to maintain the confidentiality of law enforcement-related documents for security reasons.¹⁸³ These confidentiality considerations are illustrated by a recent judgment of the General Court that partly condoned a decision by which Frontex refused, without appropriately stating the reasons, to disclose documents relating to the pullback to Libya of a boat in distress in the Maltese search and rescue zone, where the agency was present with a drone.¹⁸⁴ This decision was based on the public security exception under Article 4(1)(a) of the Freedom of Information Regulation 1049/2001. Be that as it may, the lack of transparency significantly hampers both individuals' ability to access remedies and the capacity of oversight bodies to conduct effective scrutiny. When relevant information is withheld or access to essential documents is obstructed, individuals are deprived of the tools necessary to challenge decisions or actions that affect them. Similarly, oversight bodies are unable to fulfil their mandate of ensuring accountability and compliance with legal and ethical standards, thereby undermining the rule of law.

In order to foster transparency and decrease the risk of agencies stretching their legal powers, several steps can be taken. The first step entails better circumscribing the legal mandates, tasks, and activities of these bodies. This does not necessarily require an amendment of their statute. Such an amendment would require a cumbersome legislative process, whose feasibility is questionable, for instance, due to the overall positive evaluation of the performance of these EU agencies. More clarity can be provided in the Operational Plans between the agency and the Member States.

¹⁸¹ See more generally, Craig (n 4) 388.

¹⁸² Joined Cases C-141/12 and C-372/12 *YS v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v M and S*, EU:C:2014:2081, para 68; see also Case T-346/02, *Cableuropa and Others v Commission*, EU:T:2003:256.

¹⁸³ Jaeger, Fotiadis, Guild and Vidović (n 100) 18.

¹⁸⁴ Case T-205/22, *Naass and Sea Watch v Frontex*, EU:T:2024:266.

These can include clear instructions to the staff involved in the operations about the duty to inform the migrants about their rights and possible remedies.

Second, the agencies should adopt a proactive stance when it comes to access to information. As emphasised by Paul Craig, ‘access to the relevant documentation is crucial for understanding the reasons behind governmental action’.¹⁸⁵ Early CJEU case law has already established that denying access to administrative documents constitutes a violation of the principles of good administrative practice.¹⁸⁶ This also represents a fundamental preliminary step toward ensuring access to justice. Data subjects, for example, should be informed about their data having been exchanged, so as to be able to effectuate data protection rights (see Section 3.3.1). This is all the more true for international data exchanges, given the augmented fundamental rights risks when cooperating with countries that are not bound by EU data protection law.

Third, and more importantly, the need to ensure more transparency derives from the right to a good administration, enshrined in Article 41 of the EU Charter. This provision establishes that, despite the necessary ‘legitimate interests of confidentiality and of professional and business secrecy’, every person, including third country nationals, should have full access to all documents and files concerning their dossier. While acknowledging the legitimate concerns of confidentiality and the protection of professional and business secrecy, the provision underscores that such limitations should not unduly restrict access to critical information necessary for procedural fairness. Moreover, Article 41 imposes a clear obligation on authorities, including agencies, to provide clear and reasoned justifications for their decisions. This requirement ensures that decisions affecting individuals are not only made in compliance with legal and procedural standards but are also communicated transparently.

4.2. Enhancing due process through complete remedies

Another problem present in all three agencies is that the system of remedies is incomplete and rather asymmetrical, notwithstanding the significant advances that were made over the last years in terms of fundamental rights safeguards and complaints mechanisms for individuals who suffered harm from the agencies’ actions. This is problematic, given that the principle of effective judicial protection lies at the core of the mainstream notion of access to justice, providing procedural safeguards for individuals to enforce other rights.¹⁸⁷ From this perspective, it not only connects with the right to a fair trial but also embodies the administrative principle of due process. In the well-known *Kadi* judgment, the CJEU confirmed that procedural

¹⁸⁵ Craig (n 4) 388.

¹⁸⁶ Case T-76/02 *Mara Messina v Commission of the European Communities*, EU:T:2003:235. See in this regard Fortsakis (n 179) 213.

¹⁸⁷ See S Prechal and R Widdershoven, ‘Principle of Effective Judicial Protection’ in Scholten and Brenninkmeijer (eds) (n 18) 80.

safeguards must be available to ensure a basic level of fairness and procedural rights.¹⁸⁸

The right to a good administration, as enshrined in Article 41 of the EU Charter, highlights the importance of fair and impartial administrative procedures within EU institutions, including agencies, against the risks of arbitrary administrative conduct. As has been argued, this means that failure to comply with the principle of good administration may lead to declaring an act invalid and even result in rights to damages for individuals.¹⁸⁹ This is also reiterated in Article 41(3) of the Charter, stating that ‘every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States’. A similar provision is also included in the constitutive frameworks of the three agencies under study.¹⁹⁰ The operationalisation of such a provision requires the availability of appropriate remedies, within the agencies at the administrative level and externally at the judicial level.

The three EU agencies show substantial differences as to the design of the complaints mechanisms, ranging from a more sophisticated one within Frontex to more rudimentary forms within the EUAA and Europol. Significant improvements are, thus, necessary in terms of the effectiveness of these individual mechanisms. First, while the European Ombudsman has stressed that the mechanism in the case of Frontex – regulated by Article 111 of the Regulation – has partly become more accessible,¹⁹¹ there is a need to raise more awareness about the scope and potential of these complaints mechanisms. The annual reports of the Fundamental Rights Officer indicate that the number of complaints related to Frontex has increased over the years.¹⁹² However, the reports also highlight a high rate of inadmissibility among these complaints.¹⁹³ This illustrates the need for the agency to enhance its awareness campaigns, aimed at clarifying the proper procedures for lodging complaints. In line with this, the Frontex Fundamental Rights Officer has recommended ensuring the correct and accessible display of complaint materials at all relevant border crossing points,

¹⁸⁸ See Joined C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, EU:C:2008:461.

¹⁸⁹ Nicolosi (n 20) 162–163. See also the Court’s case law on EU staff litigation, where breaching the right to good administration was a ground to annul dismissal decisions by some EU agencies, see e.g. Case T-217/21 *SB v European Union Agency for the Operational Management of Large-Scale I System in the Area of Freedom, Security and Justice*, EU:T:2022:524; Case T-614/17 *Laurence Bonnafous v Education, Audiovisual and Culture Executive Agency*, EU:T:2019:381.

¹⁹⁰ Regulation (EU) 2019/1896 (n 8) Art 97; Regulation (EU) 2016/794 (n 10) Art 49; Regulation (EU) 2021/2303 (n 9) Art 66.

¹⁹¹ Decision in OI/4/2021/MHZ (n 52).

¹⁹² See e.g. European Border and Coast Guard Agency, ‘2023 Annual Report of the Fundamental Rights Officer of Frontex’, at prd.frontex.europa.eu, 29.

¹⁹³ See European Border and Coast Guard Agency (n 84) 30.

particularly in Poland, Lithuania, Slovakia, and Romania.¹⁹⁴ This practice could be upscaled and reproduced by other agencies.

Second, more procedural safeguards must be embedded within these complaints mechanisms. These mechanisms cannot be regarded as an effective remedy in the light of Article 47 of the EU Charter and, despite their potential, they procedurally lack adequate and independent follow-up and redress. A proposal could involve allowing individuals who have suffered fundamental rights violations during joint operations led by or involving EU agencies to seek compensation directly from the agency's budget through the existing complaints mechanism. Such a system will provide a tangible form of redress, supporting the right to an effective remedy and a fair trial enshrined in Article 47 of the EU Charter. It additionally serves as a critical step toward ensuring that the complaints mechanism is not merely symbolic but rather an effective tool for enforcing rights. Finally, it is worth stressing that improvements in terms of awareness, accessibility and follow-up in the agencies' complaints mechanisms are crucial in light of the challenges individuals face in pursuing judicial remedies before the Court of Justice. These elements are crucial to enhance access to justice and possibly remedy the inherent limits of the existing EU judicial remedies.

In this connection, it is worth reiterating that there are limited chances for migrants to get their claims past the admissibility stage before the Court of Justice. An illustration of this accountability conundrum can be seen in the General Court's decision in *WS and Others v Frontex*.¹⁹⁵ In this case, the General Court overlooked the agency's *de facto* involvement in executing a return decision, asserting that responsibility rested with the national authorities due to their *de iure* competence in adopting return decisions.

On the other hand, the Court of Justice has also considered other judicial solutions. In *Kočner*, on appeal, the Court ruled that Europol and the Member State involved in unlawful data processing are jointly and severally liable under EU law.¹⁹⁶ To claim this liability, the individual must prove only that the unlawful data processing occurred during their cooperation, without needing to attribute the breach specifically to either entity, contrary to the General Court's earlier position. It is true that in *Kočner*, the Court was facilitated by the relevant provisions of Europol's statute. However, as emphasised by Advocate General Ćapeta in her Opinion on the appeal case in *WS and Others v Frontex*, in *Kočner* the Court did not establish a general principle that joint and several liability must be expressly provided for in EU legislation.¹⁹⁷ Similar possibilities can, therefore, be explored concerning other agencies. For example, in cases involving Frontex, the Court could seize the chance to explore the potential application

¹⁹⁴ European Border and Coast Guard Agency (n 192) 30.

¹⁹⁵ *WS and Others v Frontex* (n 88), para 66. See the critique by, *inter alia*, J De Coninck, 'Shielding Frontex On the EU General Court's "WS and others v Frontex"' (Verfassungsblog, 9 September 2023), at verfassungsblog.de.

¹⁹⁶ *Marián Kočner v Europol* (n 167), para 71.

¹⁹⁷ AG Ćapeta in *WS and Others v Frontex* (*Opération de retour conjointe*) (n 92) para 90.

of Article 7 of Regulation 2019/1896, which addresses the concept of shared responsibility between the agency and Member States.¹⁹⁸

Legal actions before the Court are crucial because they can stimulate the Court's jurisprudence and contribute to adapting the system of EU judicial remedies to the emerging shared administration, in which EU agencies and national authorities become increasingly interconnected. Moreover, courts play a vital role in upholding the rule of law, including safeguarding access to justice and ensuring effective judicial protection. However, they are not always ideally positioned to implement far-reaching changes to the existing system. In any event, their intervention is *ex post*, while a broader and more complete notion of access to justice must consider factors that serve as *ex ante* safeguards preventing the occurrence of grievances and securing a well-functioning administration.

4.3. Embedding accountability

The investigation into the three EU agencies' set-up has illustrated existing problems relating to the lack of fully independent, accessible, and effective monitoring bodies. The lack of effective oversight is a problem that has been more extensively acknowledged in the literature, though especially regarding Frontex.¹⁹⁹ It connects with accountability that, despite being an 'elusive concept', 'is an ingredient of good governance'.²⁰⁰ From this perspective, the concept goes beyond responsibility or liability and refers to a mechanism that legitimises power and decision-making by allowing an entity to be held to account by another entity (forum).²⁰¹

While in traditional constitutional settings, parliaments and courts are the main fora for democratic and legal accountability, respectively, the rise of EU shared administration challenges these traditional patterns of accountability. As illustrated in Section 2, the three EU agencies operate under a mixed regime involving EU and national contingents, which makes the system of control and political oversight difficult.²⁰² This difficulty is a consequence of the opacity typical of composite procedures involving various actors corresponding to different levels of governance (i.e. the EU and the Member States).²⁰³ The resulting 'accountability shortages'²⁰⁴ undermine the rule of law and the realisation of effective access to justice. Migrants face

¹⁹⁸ See in this regard, *ex multis* M Gkliati, 'Shaping the Joint Liability Landscape? The Broader Consequences of *WS v Frontex for EU*' (2024) 9 *European Papers* 69.

¹⁹⁹ See more recently, *ex multis*, Raimondo (n 94).

²⁰⁰ GJ Brandsma and C Moser, 'Accountability in a Multi-Jurisdictional Order' in Scholten and Brenninkmeijer (eds) (n 18) 60.

²⁰¹ *Ibid*, 61. See also M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447.

²⁰² See more extensively, M Busuioc, *European Agencies: Law and Practices of Accountability* (Oxford University Press 2013).

²⁰³ Brito Bastos (n 5).

²⁰⁴ Brandsma and Moser (n 197) 70.

significant challenges not only in identifying and accessing appropriate remedies but also in relying on external and independent oversight mechanisms capable of preventing or addressing misconduct by EU agencies.

Admittedly, the operational and at times ‘factual’ nature of the agencies’ activities does not offer clear avenues for judicial review by the Court of Justice. Until the Court does away with its strict criteria for these matters, it might be best to focus on improving agency-specific complaints mechanisms, external monitoring and correction possibilities, and access to national Member State or third country courts.²⁰⁵ For these alternatives to be effective, information on what, how, and when, agencies have performed a certain activity, and to what extent their action has led to the infringement in question, will be indispensable.

As judicial oversight is challenging, it is worth emphasising that political oversight may have a strong potential to embed accountability. Although EU institutions have at times taken a firm stance on fundamental rights infringements by EU agencies — for instance, the European Parliament’s vote to withhold Frontex’s budget discharge²⁰⁶ — there have also been developments in the opposite direction. Particularly troubling is the decision by the institutions to ignore, and even override, the EDPS’s warnings to Europol, and, more strikingly, to weaken the EDPS’s oversight powers in the new regulation for Europol. Finally, it is evident, perhaps even a truism at this point, that the work of bodies conducting oversight over the agencies’ activities is significantly impeded by the lack of transparency over what the agencies do in practice. It is important that crucial information, such as the findings of the OLAF report on Frontex’s alleged role in pushback operations, be given to democratically elected representatives, to allow them to do the job they were tasked with. On top of this, external actors, such as the European Court of Auditors (ECA), the European Ombudsman and the Consultative Forum, can play a synergic role in ensuring an overall and continual monitoring of EU operational agencies’ activities and their compliance with fundamental rights.²⁰⁷

A concrete realisation of access to justice requires embedding principles of control and accountability internally, within the functioning of the agencies. From this perspective, it is pivotal that those bodies that have been established to exercise oversight on the agencies, such as the Fundamental Rights Officers, be guarded against pressure and influence from the agencies, their Directors and Boards, both *de iure*

²⁰⁵ Scholars have in this connection also proposed ‘systemic accountability’, see M Gkliati, ‘Decoding Frontex’s Fragmented Accountability Mosaic and Introducing Systemic Accountability - System Reset’ (2024) 30 *European Law Journal* 197.

²⁰⁶ European Parliament Press Releases, ‘Frontex: MEPs Refuse to Discharge EU Border Agency over its Management in 2020’ (18 October 2022), at europarl.europa.eu.

²⁰⁷ Jaeger, Fotiadis, Guild and Vidović (n 100) 40.

and *de facto*.²⁰⁸ The full independence of such bodies, which are a part of the agencies' institutional structure, is, therefore, a crucial priority in the future of EU shared administration. The evolution of such a form of administrative setting will also contribute to shaping accountability regimes,²⁰⁹ which could, therefore, offer more possibilities to close the existing accountability gaps.

5. Conclusion

The rise of EU shared administration, based on the cooperation between national authorities and EU bodies, has significantly changed the governance and administrative ecosystems of many policies.²¹⁰ A clear illustration is offered by the Union's policies on asylum, migration, border control and internal security that increasingly rely on the intervention of EU agencies, such as Frontex, EUAA and Europol. In an attempt to provide a detailed overview of the challenges raised by the expanding mandate of these EU agencies, this article focused on the contribution and potential of the principles of good administration to enhancing access to justice.

The traditional and predominant view of access to justice, defined primarily in terms of access to court or judicial remedies, fails to capture the complexities of the EU agencies' operational landscape. Through an extensive review and analysis of relevant documents and reports from civil society organisations and independent bodies, this article has systematised such problems along three major categories related to lack of transparency, availability of effective remedies, and lack of oversight.²¹¹ Taking this set of problems into account, it has explained various ways in which access to justice can be strengthened through the principles of good administration, with transparency, due process and accountability as core elements. Access to justice should be understood as a multidimensional concept, of which access to court constitutes an essential yet only one possible aspect for the complete fulfilment of the notion in the context of EU shared administration. In sum, this article has suggested several steps that may help to improve the overall system of EU shared administration by looking at the contribution that the principle of good administration can offer to strengthen access to justice as a core element of the rule of law.

First, transparency ensures that individuals and oversight bodies have the information necessary to understand and challenge EU agencies' actions. The lack of transparency is particularly acute in the external activities of the agencies, where cooperation with third countries often occurs under a shroud of secrecy. Without

²⁰⁸ Ibid, 14.

²⁰⁹ GJ Brandsma, E Heidbreder and E Mastenbroek, 'Accountability in the Post-Lisbon European Union' (2016) 82 *International Review of Administrative Sciences* 621.

²¹⁰ See for the development of the concept HCH Hofmann and AH Türk (eds), *EU Administrative Governance* (Edward Elgar Publishing 2006).

²¹¹ Other problematic aspects related to EU shared administration from a constitutional perspective have also been addressed in Scholten and Brenninkmeijer (n 19).

adequate access to information or clear operational mandates, individuals cannot effectively seek proper access to justice, and oversight bodies are unable to perform their roles. Transparency, as enshrined in the right to good administration under Article 41 of the EU Charter, must extend beyond formalistic obligations to provide reasons for decisions. It should encompass proactive disclosure of operational details, clear delineation of agency responsibilities, and accessible documentation of actions taken.

Second, the principles of due process and administrative fairness are crucial to making the existing imperfect remedies complete and deliver on the core component of access to justice. In particular, this article has suggested that administrative and quasi-judicial mechanisms must be strengthened to ensure that they provide meaningful redress. The internal complaints mechanisms of agencies such as Frontex and EUAA represent steps in this direction, but their effectiveness is often limited by procedural shortcomings, lack of independence, and inadequate follow-up. They should include provisions for financial compensation, independent adjudication, and greater procedural safeguards to ensure that they function not as symbolic gestures but as robust tools for enforcing rights.

Third, oversight mechanisms are equally vital to embed accountability within the complex structure of the EU shared administration. The opacity of composite procedures and the involvement of multiple actors make traditional accountability frameworks insufficient. Both internal and external oversight must be strengthened. Internal bodies like the Fundamental Rights Officer should operate with full independence, while external actors, such as the European Ombudsman, the European Court of Auditors, and the European Parliament, should assert their roles more effectively. Democratic accountability through parliamentary scrutiny, including measures such as withholding budgetary approvals, provides a crucial counterbalance to the executive powers of fundamental rights-sensitive agencies.

These steps require recognising the preventive role of administrative safeguards. Judicial remedies are often reactive, addressing harms after they have occurred. A more comprehensive approach should integrate *ex ante* measures that mitigate grievances by ensuring that agencies' conduct and operations adhere to legal and procedural standards from the outset. Through this approach, the EU will not only strengthen the architecture of shared administration but also ensure that it aligns with constitutional principles and fundamental rights, appropriate for a 'community based on the rule of law'.²¹²

²¹² *Parti écologiste "Les Verts" v European Parliament* (n 39), para 23.



The Future of Digitalisation in EU Law Enforcement
edited by Niovi Vavoula

The Future of Digitalisation in EU Law Enforcement: Enhanced Exchanges of Personal Data, Privatisation and Algorithmisation

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A central pillar of the development of European Union (EU) Criminal law has been the establishment of legal and technical avenues aiming at facilitating the collection, retention and transfers of personal data, in the context of fighting terrorism and other serious criminal offences. As technological evolution has offered national law enforcement authorities enhanced opportunities to collect, store and exchange personal data seamlessly and in a timely manner, an elaborate EU legal framework regulating different forms of processing personal data has emerged. Legislative initiatives at supranational level have been relied upon Article 87(2)(a) of the Treaty on the Functioning of the European Union (TFEU), which provides for the setting-up of information exchange mechanisms which enable the collection, storage, further processing, analysis and exchange of relevant information.

Initiatives in this respect have been two-pronged.¹

Firstly, emphasis has been placed on the establishment of *EU-wide centralised information systems for law enforcement purposes*. The setting up of the Schengen Information System (SIS) is emblematic in this context. The SIS is perhaps the best-known multinational IT system in the EU that became operational in 1995 as a ‘flanking’ measure assisting the abolition of internal borders in the Schengen area. It aims to ensure a high level of security across the participating states and to enable the exchange of information for the purposes of controls on persons and objects. With a view to facilitating both border control and police investigations and to those ends, national authorities register in SIS so-called ‘alerts’ in relation to specific categories of persons and objects, such as persons wanted for arrest and extradition,

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¹ V Mitsilegas and N Vavoula, ‘Databases’, in V Mitsilegas, *EU Criminal Law* (Hart 2022, 2nd edn) ch 5.



missing persons, or irregular migrants.² Alerts are essentially requests by the state that issued the alert (issuing state) to the other Schengen countries to take a certain action and execute the alert.³ Thus, by default, SIS is designed to operate as a hybrid instrument; on the one hand, as a tool for police and judicial cooperation in criminal matters, and on the other hand, as an instrument for immigration control.

Another EU large-scale system in the field of migration and security is the European Criminal Record Information System for Third-Country Nationals (ECRIS-TCN),⁴ which is currently under development. The ECRIS-TCN will be a centralised system for the exchange of criminal records on convicted third-country nationals and stateless persons and is meant to complement the already existing, decentralised ECRIS system through which information on the criminal records of EU nationals is exchanged among Member States (see below).⁵ This database is also characterised by its hybrid nature; though established under a criminal justice cooperation legal basis (Article 82(1)(d)), the ECRIS-TCN will be consulted for immigration-related objectives e.g. to support the operation of the Visa Information System (VIS) and the European Travel Information and Authorisation System (ETIAS), as well as immigration decision-making.⁶

Furthermore, databases have also been set up in the framework of Europol, the EU's criminal information hub.⁷ Europol's mandate is to support actions by EU Member

² The law enforcement branch of SIS is governed by Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU. For the other branches see 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; Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals.

³ J Dumortier, 'The Protection of Personal Data in the Schengen Convention' (1997) 11 *International Review of Law, Computers & Technology* 93, 93.

⁴ Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726.

⁵ Council Decision 2009/316/JHA on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA; Council Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States.

⁶ See N Vavoula, *Immigration and Privacy in the Law of the European Union – The Case of Information Systems* (Brill Nijhoff 2022).

⁷ Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation, as amended.

States' law enforcement authorities and ensure their cooperation for the purpose of preventing and combating serious crime affecting two or more Member States, terrorism, and forms of crime that affect a common interest covered by an EU policy. To fulfil its objectives, Europol carries out a series of tasks, with its information-related tasks being at the core of its activities, along with providing operational support and expertise to Member States' criminal investigations. Europol's information comes from various sources; Member States; EU bodies, third countries and international organisations as well as private parties and private persons⁸ and is organised in an integrated, overarching, central data repository, following a simplified and controversial approach, whereby instead of specific databases, the rules for information processing relate to the purposes of processing the data.⁹ Importantly, since its setting up, Europol has undergone remarkable changes marked by continuous reforms to its legal basis, which have increased the agency's information processing capacities. For example, Regulation (EU) 2022/991 has increased the agency's role to cooperate with private parties, propose to Member States the registration of alerts in SIS, support criminal investigations, and in research and innovation.¹⁰ In September 2025, the co-legislators agreed on additional reforms in tackling migrant smuggling.¹¹ The increase in information processing capacity has been coupled with institutional and scholarly attention, including the so-called 'big data' challenge concerning the processing of mass amounts of personal data beyond its mandate,¹² or the agency's civil liability for unlawful disclosure of personal data during cross-border cooperation with Member State.¹³

Secondly, a set of legislative initiatives have aimed at eliminating obstacles to the exchange of personal data among national law enforcement authorities. In that regard, legal instruments boosting cooperation through *decentralised mechanisms of information exchange* have been adopted. As mentioned above, the ECRIS facilitates

⁸ Article 17.

⁹ F Coudert, 'The Europol Regulation and Purpose Limitation: From the 'Silo-Based Approach' to ... What Exactly?' (2017) 3 *European Data Protection Law Review* 313.

¹⁰ Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022 amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation. For a critical appraisal of the proposal see N Vavoula and V Mitsilegas, 'Strengthening Europol's mandate: A legal assessment of the Commission's proposal to amend the Europol Regulation' (European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, Study commissioned by the LIBE Committee, May 2021) at www.europarl.europa.eu.

¹¹ Council of the European Union, Doc. 13302/25 (9 October 2025).

¹² European Data Protection Supervisor, 'EDPS Decision on the own initiative inquiry on Europol's big data challenge' (5 October 2020), at https://www.edps.europa.eu/data-protection/our-work/publications/investigations/edps-decision-own-initiative-inquiry-europols_en; European Data Protection Supervisor, 'EDPS Decision on the retention by Europol of datasets lacking Data Subject Categorisation' (Brussels, 21 December 2021), at www.edps.europa.eu.

¹³ 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.

the exchange of criminal records amongst national authorities by interconnecting national criminal records databases.¹⁴ This is sole legal instrument that has not been subject to legislative reform (albeit criminal record information was the subject matter of the ECRIS-TCN). Furthermore, Member States' law enforcement authorities may exchange existing information and intelligence effectively and expeditiously for the purpose of conducting criminal investigations or criminal intelligence operations. Here, the so-called 'Swedish Initiative' – Framework Decision 2006/960/JHA – was replaced by Directive 2023/977,¹⁵ to remedy flaws of the previous legal framework. Framework Decision 2006/960 was scarcely used in practice, in part due to the lack of clarity as its relationship with judicial cooperation instruments, such as the Directive regarding the European Investigation Order (EIO),¹⁶ and the use of the exchanged information as evidence in criminal proceedings. This issue is still unsatisfactorily resolved; whereas the Directive emphasises that it does not affect Union legal acts on cross-border evidence gathering, pure consent to the use of already submitted information as evidence in criminal judicial proceedings suffices, giving the impression that such consent 'is only a rubberstamp by the authorities of the requested state circumventing the rules of the legislation on judicial cooperation'.¹⁷

The Directive constitutes part of the EU Police Cooperation Code package, intended to enhance law enforcement cooperation across Member States and to give EU police officers more modern tools for information exchange. That package also includes a revision of the Prüm regime, first developed outside the EU framework but subsequently incorporated into EU law. The Prüm Decisions regulated the exchange of DNA, fingerprint and vehicle registration data between EU law enforcement authorities.¹⁸ Following a rocky implementation whereby the development of connections in-between the Member States took far longer than expected, Prüm II further automates the cross-border sharing of data for police cooperation. As a novelty, Regulation (EU) the Prüm II Regulation contains two new data categories: facial images and police records (reference numbers of suspects and convicted criminals). It also lays down rules for the exchange of core data after a confirmed biometric data match.¹⁹

¹⁴ Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States.

¹⁵ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union.

¹⁶ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

¹⁷ T Walh, 'Exchange of Information between Law Enforcement Authorities on New Footing' (2023) *eu crim* 36, at *eu crim.eu*.

¹⁸ Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime; Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

¹⁹ Regulation (EU) 2024/982 of the European Parliament and of the Council of 13 March 2024 on the automated search and exchange of data for police cooperation, and amending Council Decisions

Considering that due to late implementation, various Member States could not offer much of first-hand experience, legislative action in this context seems to have been primarily driven by the possibilities offered by the evolution of technology and the emphasis on simplifying and streamlining exchanges of personal data to maximise law enforcement cooperation. This approach has been at the expense of fundamental rights enshrined in the Charter, without fully scrutinising the necessity and proportionality of expanding its scope of the existing legal instruments. In particular, with the expansion of Prüm II to facial images, new large-scale databases containing this category of personal data are in the making,²⁰ which will deepen biometric surveillance, promote further the use of Artificial Intelligence (AI) in the field of police cooperation and criminal justice with significant risks for discriminatory treatment of different groups of people (for example, marginalised or black persons).

Another level of boosting the collection, analysis and exchange of personal data for law enforcement purposes in the EU has been via the *co-option of the private sector*. This aspect of the privatisation of law enforcement consists of calling on private companies or professions to cooperate with state authorities in the fight against crime. The co-option of the private sector has been conceptualised as privatised surveillance or co-production of security,²¹ reconfiguring the relationship between the private and the public and leading to the mass collection and further processing of a wide range of personal data, which can then be repurposed and used by the state for law enforcement purposes. The private-public cooperation takes place in various forms. A major move to involve the private sector in cooperating with the state in the fight against crime has occurred in the field of anti-money laundering (AML) and terrorism financing, whereby dedicated Financial Information Units (FIUs) receive information on suspicious transaction by different entities of the private sector, which is then further processed and exchanged.²² Over time, the EU AML framework has also been subject to continuous reforms and additions, marked by the successive expansion of the obliged entities subject to AML rules (e.g. to include Crypto-Asset Service Providers ('CASPs') or crowdfunding platforms).²³ Thus, financial surveillance has over time

2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, (EU) No 2019/817 and (EU) 2019/818 of the European Parliament and of the Council (the Prüm II Regulation).

²⁰ European Digital Rights (EDRI), 'Respecting fundamental rights in the cross-border investigation of serious crimes' (EDRI position paper, 7 September 2022), at edri.org p. 27.

²¹ V Mitsilegas, 'The Privatisation of Surveillance in the Digital Age' in V Mitsilegas and N Vavoula (eds), *Surveillance and Privacy in the Digital Age: European, Transatlantic and Global Perspectives* (Hart Publishing 2021); R Bellanova and M de Goede, 'Co-Producing Security: Platform Content Moderation and European Security Integration' (2021) *Journal of Common Market Studies* 1.

²² V Mitsilegas, *Money Laundering Counter-measures in the European Union: A New Paradigm of Security Governance versus Fundamental Legal Principles* (Kluwer Law International 2003).

²³ For the applicable legal framework see Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [2024] OJ L2024/1624, 19.6.2024; Directive (EU) 2024/1640 of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be

significantly expanded, as has the cooperation between FIUs under rules, which have traditionally favoured extensive information exchanges without correspondent clarity about the applicable EU data protection regime.²⁴

Other examples of privatised surveillance are the retention of metadata by telecommunications companies;²⁵ the transfer of air travellers' data (passenger name record (PNR) data) already collected for business purposes and their processing by specialised national Passenger Information Units (PIUs), as per the prescriptions of the EU PNR Directive;²⁶ and the preservation and transfer of electronic evidence data, such as emails, text messages, information on IP addresses.²⁷ The proliferation of legislative activity has been coupled with the emergence of an elaborate case law by the Court of Justice of the European Union (EU) on data retention and the processing of PNR data. In a series of judgments, such as *La Quadrature du Net and Others*²⁸ and *La Ligue des Droits Humains* from June 2022,²⁹ the Court has placed limits on state surveillance and has provided extensive guidelines to both the EU and national legislature transposing EU legislation on the necessary safeguards for lawful processing of personal data in the law enforcement context. Whereas the EU PNR Directive was partly re-written by the CJEU,³⁰ in the case of telecommunications metadata, implementing those guidelines into revised legal regime following the invalidation of the Data Retention Directive has proved to be a particularly hard endeavour. A revision of the e-Privacy Directive was withdrawn and the European Commission is aimed at proposing new harmonising on obliging service providers to store such data to address the fragmented and uneven legal landscape that has since prevailed in the Member States,³¹

put in place by Member States to prevent the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive (EU) 2019/1937, and amending and repealing Directive (EU) 2015/849 [2024] OJ L2024/1640, 19.6.2024.

²⁴ T Quintel, 'Follow the Money, If You Can - Possible Solutions for Enhanced FIU Cooperation Under Improved Data Protection Rules' (University of Luxembourg Law Working Paper No.001-2019), at ssm.com.

²⁵ On the data retention saga see among others V Mitsilegas, E Guild, E Kusonmaz and N Vavoula, 'Data Retention and the Future of Large-scale Surveillance: The Evolution and Contestation of Judicial Benchmarks' (2022) *European Law Journal* 176; N Ni Loideain, *EU Data Privacy Law and Serious Crime: Data Retention and Policymaking* (Oxford University Press 2025).

²⁶ Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

²⁷ Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings PE/4/2023/REV/1.

²⁸ Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others v Premier ministre and Others*, ECLI:EU:C:2020:791.

²⁹ Case C-817/19 *Ligue des droits humains v Conseil des Ministres*, ECLI:EU:C:2022:491.

³⁰ C Thönnies, 'A Directive altered beyond recognition : On the Court of Justice of the European Union's PNR decision (C-817/19)' (Verfassungsblog, 23 June 2022) at verfassungsblog.de.

³¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Roadmap for lawful and effective access to data for law enforcement COM/2025/349 final.

One trend in deepening the public-private divide has emerged in the context of online content moderation, whereby several legal instruments have empowered transnational corporations operating in the digital environment as hosting providers to perform quasi-public functions in the transnational context. This trend started in 2021 with the adoption of the Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online (TERREG).³² The Digital Services Act (DSA) is of broader application and imposes due diligence obligations to all digital services, including on the fast removal of illegal online content.³³ Whereas the DSA has been adopted under an internal market legal basis – Article 114 TFEU – it has a distinct law enforcement dimension, in the sense that online intermediaries and platforms such as marketplaces, social networks and content-sharing platforms are entrusted with policing tasks in preventing illegal and harmful activities online and the spread of disinformation. At the heart of fulfilling these tasks, lies a delicate balance between online safety and the protection of users' fundamental rights, particularly freedom of expression. In this context, questions about the degree of interference in the control of public opinion and the role of private companies as gatekeepers at the threshold of fundamental rights are crucial. These questions are heightened when considering the legislative proposal for online content moderation in the content of preventing and combating child sexual abuse online (CSAM) – the so-called Chat Control.³⁴ Under the proposal, the detection of known, or unknown CSAM as well as grooming will entail the scanning even of private communications of all individuals irrespective of suspicion (through the use of – potentially unreliable – AI tools. Chat Control not only goes against the DSA paradigm, which forbids general monitoring, but importantly, if adopted, it will mark the end of privacy and of end-to-end encryption and the prevalence of mass surveillance of online activity.³⁵ At the time of finalising this editorial, the proposal faces significant deadlock within the Council of the EU, with several Member States forming a blocking minority' standing against Chat Control, including Germany, Luxembourg and Netherlands.

Finally, the rise of interest in the *deployment of Artificial Intelligence (AI) systems* in the sphere of criminal law, for example in relation to predictive policing, facial recognition, have sparked debates about the maturity of the current technology and its compatibility with fundamental rights. A key example in this respect is the AI Act, which aims to regulate horizontally the use of AI systems in various contexts

³² Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online.

³³ 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).

³⁴ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse' COM(2022) 209 final.

³⁵ L de Swart and others, 'Complementary Impact Assessment of the proposal for a regulation laying down the rules to prevent and combat child sexual abuse' (commissioned by the European Parliament Research Service, April 2023) at www.europarl.europa.eu.

and *fora* and contains restrictions on law enforcement use of AI technology, whilst also giving them significant leeway as regards the type of technologies that can be deployed.³⁶ At the same time, the automated processing of personal data, which can entail the use of AI, is embedded in a number of EU legal instruments; automated analysis is embedded at the national level in the processing of PNR data transmitted by air carriers and of telecommunications metadata to the PIUs, with the CJEU providing guidance as to the requirements for its lawfulness in *La Quadrature du Net*³⁷ and *Ligue des Droits Humains*.³⁸ A key question arising from the jurisprudence of the CJEU is the applicability of the Court's standards to a multiplicity of contexts, such as money laundering obligations to obliged entities,³⁹ in accordance with the 6th AML Directive. Notwithstanding the different logic under which automated analysis operates, an answer in favour of the transplantability of the CJEU's safeguards would be grounded on the fact that there is clear continuity in the existing case law.⁴⁰ In addition, as mentioned earlier, the upgraded Prüm also fosters the use of AI systems in the provisions to share facial images for the purpose of facial recognition and sharing of police records. Thus, a shift towards algorithmisation is a central aspect of the future of digitalised law enforcement. This is understandable; with the proliferation of information exchange avenues, making sense of huge amounts of data cannot take place without recourse to algorithms, including AI. Nonetheless, the fundamental rights concerns regarding the principle of non-discrimination as well as the existence of meaningful procedural safeguards are acute and the parallel developments in legislation and case law are not always towards the same direction. Although the CJEU has not resolved a series of open questions and there is room for further elaboration (e.g. on how to audit algorithms), its protective scope is contrasted with the significant gaps of the AI Act, particularly as regards classification of AI systems in law enforcement based on the degree of risk of harm to individuals, transparency and accountability.⁴¹

The previous paragraphs aimed to highlight the tremendous transformation of EU law enforcement in the digital era via the significant burst in legislative activity, particularly with a view to reforming pre-existing legal instruments, as well as the

³⁶ 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 Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

³⁷ *La Quadrature du Net and Others v Premier ministre and Others* (n 28) paras 172-182.

³⁸ *Ligue des droits humains v Conseil des Ministres* (n 29) paras 176-213; *La Quadrature du Net and Others v Premier ministre and Others* (n 28) paras 172-182.

³⁹ Z Chen and others, 'Machine Learning Techniques for Anti-money Laundering (AML) Solutions in Suspicious Transaction Detection: A Review' (2018) 57 *Knowledge and Information Systems* 245.

⁴⁰ N Vavoula, 'Data Retention and Automated Processing of Personal Data: Unpacking the CJEU's Approach' in E Kosta and I Kamara (eds), *Data Retention in Europe and Beyond: Law and Policy in the Aftermath of an Invalidated Directive* (Oxford University Press 2025).

⁴¹ A Sachoulidou and N Vavoula, 'Artificial Intelligence and Surveillance' in J Sperling and S Lucarelli (eds), *Handbook of European Union Governance* (Edward Elgar Publishing 2025).

emergence of a significant body of CJEU case law providing significant limits to Member States' discretionary power and the EU legislature. Piecing together the puzzle of these developments shows a clear tendency to streamline law enforcement work and cooperation through automated means and enhanced transfers of personal data in the fight against crime, including by harvesting the full potential of information that EU agencies, such as Europol, have. Against this backdrop, this two-part Special Section explores and critically appraises various aspects of the EU digital law enforcement architecture in terms of challenges posed to fundamental rights, such the rights to protection of personal data, respect for private life, freedom of expression and effective remedies, and the rule of law. In comprehending the present and future outlook of law enforcement in the era of digitalisation, the Special Section revisits fundamental questions on the necessity and proportionality of surveillance through the maximised processing of personal data in light of the legitimate aim of fighting serious crime and terrorism, and provides insights as to whether, why and how the EU legal framework should be amended or interpreted to delimit the negative consequences for the protection of fundamental rights.

Two overarching research questions guide the scientific enquiry:

How is the future of EU police cooperation shaped in view of the burst in legislative activity and the jurisprudence of the CJEU?

What is the impact of the legislative initiatives and practices by law enforcement authorities and agencies on the protection of fundamental rights and the rule of law?

By bringing together scholars both from law, political science and sociology, the Special Section provides a comprehensive critical analysis of the aforementioned developments in the light of the protection of fundamental rights and the rule of law. The underlying aim is to enable the readers to acquire a holistic understanding of the current state of play and future outlook of EU law enforcement in the digital age.

The first section of the Special Section contains articles shedding light into all three underlying themes. Sarah Tas's article brings together the SIS with Europol and explains how Regulation 2022/1190 has changed the traditional *modus operandi* of the former by giving Europol an active role in proposing so-called alerts in the interest of the Union. Europol's data received from third countries concerning third-country nationals' links to terrorism as foreign terrorist fighters will not only feed its own databases, but can be translated into actionable alerts in SIS issued by Member States. Acting as a middleman does not put Europol on an equal footing as Member States, which are ultimately responsible for the issuance of this novel category of alerts, but does constitute a major shift in how the SIS operates. This approach of using Europol as a means through which data from third countries are re-baptised as EU data in a clearly preventive logic whereby data collected outside the EU may be useful to the EU Member States as well, comes with significant risks for data quality privacy and legal certainty with far reaching consequences on third-country nationals, particularly in an interoperable architecture. Tas rightly notes that the process for creating and supervising these alerts is vague and not well monitored and argues that without strong

and clear oversight thought the ‘life cycle’ of the article that is before, after and during an alert is made, there is a real risk of misuse, such as targeting innocent people or political opponents. This is all the more necessary, as opening the door to Europol proposing alerts for now concerns third-country nationals and only in relation to terrorism. However, this could be the gateway for further extension in the future to other areas of criminality and the inclusion of EU nationals too.

The central role of Europol is further highlighted by Tereas Quintel, who provides a bird’s eye view into the magnifying data processing capacities of the agency arising not only from legislative reforms to its own legal basis, but also deriving from reforms to other EU legal instruments that contain Europol-specific provisions. The article highlights how Europol supports Member States in areas such as AML, CSAM, terrorism, and PNR data processing, thus demonstrating the huge amounts of information from many sources and usage of advanced data analytics to identify links between different types of crime. In view of bringing down the silos between Europol databases in lieu of a so-called ‘data lake’, individuals face increasing difficulties in knowing how their personal data are processed or to exercise their individual rights in accordance with EU data protection law. In view of this lack of foreseeability, as a fundamental legality requirement, Quintel also calls for stronger oversight and safeguards since current EU laws on data protection are scattered and sometimes inconsistent with one another. While Europol’s analytical capacity improves cross-border crime prevention, Quintel stresses that it must be matched with clear rules and accountability to ensure that the rights to respect for private life and personal data are respected.

One avenue for decentralised information exchanges, the Prüm regime, as recently reformed is examined by Nina Amelung and Helena Machado. Their article provides important insights into the manners in which public consultation before the reform shaped the outcome, viewing these consultations acting as ‘technologies of democracy’ whereby official processes appear open but actually hide disagreement and make complex, contested policies seem widely accepted. Amelung and Machado focus on two main changes under Prüm II: linking the system with other EU databases through interoperability and expanding the scope of information exchange to cover facial images. In line with earlier remarks in this editorial, the authors rightly warn that sharing facial images could allow massive data processing without strong safeguards, creating risks of abuse, discrimination and bias, especially in areas like policing, border control, and asylum. The article further shows that instead of promoting real debate, the consultation helped legitimise a security-driven logic, while making it harder to question its impact on rights and democracy. This is an inherent danger when EU legal instru-

ments are subjected to reforms without the prior conduct of dedicated impact assessments, which was in fact called for.⁴² Considering that public consultations without the simultaneous conduct of impact assessments constitutes a standardised practice when amending pre-existing legislation, the article serves as a pressing reminder of the need to uphold the Better Regulation Guidelines.⁴³

The privatisation of surveillance, including when infused with algorithms, is examined from various angles in the Special Section. Its first part envisages the contribution by Maria Tzanou and Plixavra Vogiatzoglou, whose article examines the applicability of EU fundamental rights law to surveillance conducted for national security purposes viewed through the lens of data retention of telecommunication metadata and the so-called data retention saga. The authors analyse the case law of the CJEU, which has brought into the realm of EU law national measures that impose obligations upon private sector actors, whose activities are regulated by EU law, thus these national measures are subject to CJEU scrutiny, even if they are pursuing the safeguarding of national security. However, they stress the questionable route to reach that conclusion and the significant legal uncertainties, which necessitate a shift in the focus towards protecting individuals themselves, ensuring that their rights remain central even when the objective of national security is invoked. The authors also call for a clearer and stronger EU legal approach that keeps up with the growing use of algorithms and private-sector technology in surveillance, blending lessons from the relevant CJEU to create a more coherent and rights-focused system. In view of the upcoming legislative proposal on a harmonised regime on data retention coupled with the entry into force of the AI Act, the authors' findings are highly topical to ensure a high level of fundamental rights protection in the digital era.

Stay tuned for the second part of this Special Section where other dimensions of EU digitalised law enforcement are explored.

⁴² N Vavoula, 'Police Information Exchange – The future development regarding Prüm and the API Directive' (European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, Study commissioned by the LIBE Committee of the European Parliament, September 2020) at www.europarl.europa.eu.

⁴³ European Commission, Staff Working Document, 'Better Regulation Guidelines', SWD(2021) 305 final.



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**Europol and the Schengen Information System:
A Dangerous ‘Unsupervised’ Extension of Powers**

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ABSTRACT: Regulation (EU) 2022/1190 amending the Regulation (EU) 2018/1862 on the use of the Schengen Information System (hereafter ‘SIS’) in the field of police and judicial cooperation was adopted on the 6th of July 2022. The Commission stated in the Explanatory Memorandum attached to the proposal that ‘[t]his is an important paradigm change for SIS’. Initially, the idea was to allow Europol to enter information alerts on suspects and criminals and thereby to not only have access but formally update the SIS. Due to the reluctance of some Member States, the reform did not go as far as this. The current legal framework, however, still gives Europol a crucial role, as the Agency can propose Member States to enter information alerts in the SIS. While this is a step down compared to the Commission proposal, this article shows that this remains a paradigm change not only for the SIS, but also for Europol as an agency, and ultimately for the nature of supervision. The article first discusses the new changes of the SIS and their ensuing challenges in relation to data quality, lack of transparency, lack of clarity of the procedure and the extended scope of actions. It then addresses the supervisory challenges that may emerge in this new legal architecture. The issue of supervision shall be addressed *pre-alert*, before the proposal for an alert has been made, *during the alert*, when an alert is proposed, and finally *post alert* after an alert has been entered into the system.

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KEYWORDS: Europol – Schengen Information System – information alert – supervision – data protection – legal certainty.

1. Introduction

The Schengen Information System (SIS) makes Europe safer. This is the redounding key argument that comes up after every change made to the system. The extension of the European Union (EU), the change in political context, the various terrorist attacks, the arrivals of refugees and migrants, and more recently the proliferation of databases and new technologies, has required several changes to the initial system.¹ It became necessary to constantly update it, by introducing new alerts and functionalities for it to be able to remain ‘a vital instrument for enhancing our internal security and strengthening the management of the EU’s external borders’.²

The most recent changes to the SIS were made in July 2022,³ to palliate an existing information gap in the system, with regard to data coming from third countries and international organisations, particularly on foreign terrorist fighters. The proposal emerged in the Commission’s Counter-Terrorism Agenda.⁴ Once again, terrorist attacks were a driver for change in the EU, and notably for the system. The Commission argued that it is essential for Europol to get a stronger role in the system, for third country-information, for instance on foreign terrorist fighters, provided by trusted third countries, to be entered into the system.⁵ The SIS Regulation introduces a new category of alerts, the so-called ‘information alerts’ that will be studied in this article.

The objective of the article is to analyse to what extent Europol’s new role in the SIS, particularly in the issuing of information alerts, escapes any supervision. The supervision of Europol and of the SIS is essential and not a new endeavour. Supervision (or more broadly oversight) ensures compliance with the relevant rules and values, including fundamental rights and freedoms. Within the data protection sector, supervision gained momentum with the adoption of the General Data Protection

¹ Communication COM(2020) 795 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 9 December 2020 on a Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond.

² European Commission, ‘Security Union: Commission welcomes agreement on a reinforced Schengen Information System’ (Brussels, 12 June 2018), at ec.europa.eu.

³ Regulation (EU) 2022/1190 of the European Parliament and of the Council of 6 July 2022 amending Regulation (EU) 2018/1862 as regards the entry of information alerts into the Schengen Information System (SIS) on third-country nationals in the interest of the Union.

⁴ Communication COM(2020) 795 (n 1).

⁵ Ibid.

Regulation in 2016.⁶ The latter states that data protection supervisory authorities ensure the consistent application of the Regulation and the protection of personal data. When it comes to the supervision of Europol, the recent ‘Big Data’ saga put supervision into the spotlight.⁷ The European Data Protection Supervisor (EDPS), the EU’s data protection authority that supervises Europol, opened an own-initiative inquiry on the use of large datasets by Europol. The saga started in 2019, when Europol’s Executive Director asked the EDPS about the compliance of Europol’s data processing activities, as it was receiving increasing amounts of bulk data from Member States and exploiting data of individuals that had no proven link to any criminal activity.⁸ The EDPS first admonished Europol,⁹ and later, published an order for Europol to erase the data concerning individuals that had no clear established link with criminal activity.¹⁰ This saga got significant attention from the media and NGOs,¹¹ which emphasised the importance of efficient supervision of EU Agencies, and their role *vis-à-vis* personal data, including within the SIS.

Personal data are at the heart of the SIS, since the system is composed of alerts containing data on a particular individual or object.¹² By the end of 2023, 91 million alerts were stored in the system, which amounts to an enormous amount of personal data.¹³ Supervision of the system emerged early on, essentially performed by national supervisory authorities on their national system. In addition to national supervision, coordinated supervision also took place. EU Agencies role in the system further complexify the system and its supervision. With the expansion of competences of Europol with regard to the SIS, additional supervisory challenges emerge.

This article deals with the supervision of the system and Europol’s role in it, focusing on the supervisory challenges posed by the newest changes made to the SIS. To do

⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

⁷ S Tas, ‘Europol’s ‘Big Data Challenge’’ (Digi-Con, 10 February 2022), at digi-con.org.

⁸ L Bertuzzi, ‘L’autorité européenne de protection des données porte le mandat renforcé d’Europol devant la justice’ (Euractiv, 22 September 2022), at www.euractiv.fr.

⁹ EDPS Decision of 17 September 2020 relating to EDPS own inquiry on Europol’s big data challenge.

¹⁰ EDPS Decision of 21 December 2021 on the retention by Europol of datasets lacking Data Subject Categorisation (Cases 2019-0370 & 2021-0699).

¹¹ V Manancourt, ‘Europe’s Surveillance Crisis’ (Politico, 11 January 2022) at www.politico.eu; Fair Trials, ‘EU Must Reconsider the Expansion of Europol’s Data Processing Powers’ (Fair Trials, 1 February 2022), at www.fairtrials.org; Statewatch, ‘Europol Unlawfully Processing Personal Data of Vast Numbers of Innocent People, Says Report’ (Statewatch, 8 October 2020), at www.statewatch.org.

¹² European Commission Migration and Home Affairs, ‘Alerts and data in SIS’ (European Commission), at home-affairs.ec.europa.eu.

¹³ Eu-LISA, ‘SIS 2023 Annual Statistics’ (May 2024), at www.eulisa.europa.eu 3.

so, the article starts by retracing the origins of the SIS and Europol's role in it, showing the shift of its role from accessor to a facilitator. It then moves to the new integrated system of alerts introduced by the newest amendments and discussed the attached dangers of it. Finally, the paper argues for the need of enhanced and tailored supervision, dividing the information alert process into three distinct stages. As it stands, the system lacks efficient supervisory mechanisms to palliate the potential dangers of it.

2. New changes to Europol's role in the SIS: *from accessor to facilitator*

The SIS story started in 1990, with the Schengen Convention.¹⁴ Its legal framework got subsequently amended several times, transforming it from an intergovernmental project to the first generation of the system (SIS I), and finally the second generation of the system (SIS II). Europol did not get access to the system since the beginning, but its role was more progressive.

2.1. From SIS I to SIS II: the origins of a widely used system

The Schengen area was initiated in 1985 by five countries, namely Germany, France, Belgium, the Netherlands, and Luxembourg. They signed an agreement dealing with the free circulation of goods and individuals.¹⁵ The abolition of internal borders automatically brings along stronger security risks, and an increase in cross-border criminal activities.¹⁶ Five years later, the Schengen Convention was adopted, which introduced among others the SIS, a joint information system that would enable 'to maintain public policy and public security, including national security, in the territories of the Contracting parties and to apply the provisions of this Convention relating to the movement of persons in those territories [...]'.¹⁷

As noted by this provision, the system from its origins had a dual purpose; an immigration and a law enforcement one. The system allowed Schengen States to get access to reports on individuals and objects to support border controls, police and customs checks, and the issuing of visas and residence permits.¹⁸ The system grew

¹⁴ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

¹⁵ Ibid.

¹⁶ J Parkin, 'The Difficult Road to the Schengen Information System II: The Legacy of "Laboratories" and the Cost for Fundamental Rights and the Rule of Law' (CEPS, 4 April 2011), at www.ceps.eu 3.

¹⁷ Convention implementing the Schengen Agreement (n 14) Art 93.

¹⁸ S Mahmood, 'The Schengen Information System: An Inequitable Data Protection Regime' (1995) 7 *International Journal of Refugee Law* 179, 182.

bigger, including more Member States, and with the Treaty of Amsterdam, the system got integrated into the EU framework alongside the rest of the Schengen *acquis*, through a Protocol attached to the Treaty.¹⁹ In March 2001, the system already counted 17 Contracting Parties.

In a nutshell, the system is currently made up of a central system (C-SIS), and national databases in every participating State (N-SIS). A communication infrastructure provides for an encrypted network between these two types of databases. In addition, Supplementary Information Requests at the National Entry (SIRENE) Bureaux's are set up in each Contracting State, to allow for the exchange of additional information between the members.²⁰ The system works on a 'hit/no-hit basis', meaning that where information on a person or an object already exists in the system, a hit occurs when the system is queried with data of that person or object.

The first generation of the system proved successful but had its limits. From the technical side, as noted above, in 2001, the system was operated in 17 Schengen States. However, it only allowed for the participation of 18 members.²¹ The outdated technology used for the first generation could not live up to the expansion of the EU. The system also faced criticism for potential data protection issues.²² These concerned notably issues of data quality, as well as the risk of breaching the principle of purpose limitation. This is for instance linked to the close intertwinement between law enforcement and immigration information, and the divergent interpretation of what constitutes a risk leading to uneven entry of alerts by Member States. These shortcomings showed that the first generation of the system was insufficient and that a second generation had to be adopted.²³

The existing limits, pushed by the tragic terrorist attacks of 9/11, led to the adoption of two new Decisions in 2006: (1) on the establishment, operation, and use of the SIS II, and (2) on the issuance of vehicle registration.²⁴ In 2007, a Council decision for

¹⁹ Protocol n. 2 integrating the Schengen *acquis* into the framework of the European Union [1997] attached to the Treaty of Amsterdam.

²⁰ Decision 2003/C 38/01 of the Council of 17 February 2003 Sirene Manual.

²¹ House of Lords European Union Committee, Schengen Information System II (9th Report of Session 2006-07) 8.

²² J Parkin (n 16) 6; E Brouwer, *Digital Borders and Real Rights: Effective Remedies for Third-Country Nationals in the Schengen Information System* (Brill Nijhoff 2008) 72.

²³ Ibid.

²⁴ Regulation (EC) No 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Second Generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates; Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the Second Generation Schengen Information System (SIS II).

policing purposes was adopted.²⁵ Originally, the launch was planned for 2007, but the second generation of the system faced several setbacks and delays.²⁶ The second generation SIS (SIS II) thus only entered into operation in 2013. It brought along significant changes. First and foremost, the SIS II had enhanced functionalities, with the possibility of entering alphanumeric data and biometrics (fingerprints and photographs).²⁷ New types of alerts can also be entered, notably on stolen aircraft and boats, and a link can be created between different alerts.²⁸

While Europol's access to the system was already discussed in 1999, the idea was opposed by some Member States.²⁹ Consequently, Europol got access to the SIS only in 2005, when discussions for the second generation of the system were already on the table.³⁰ Europol was able to access, and directly search the data entered into the system that falls under Europol's mandate. In addition, Europol could also, if needed, request supplementary information from the concerned Member States, through the Europol National Units (ENU).³¹ The Agency's access got subsequently extended in 2018 in the legislative package of three Regulations amending the SIS II.³² Europol was given full access to all alerts entered in the system and was to be informed of any hit linked to terrorist offences.³³ The aim of the package was to make the SIS a central tool for

²⁵ Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the Second Generation Schengen information System (SIS II).

²⁶ J Parkin (n 16) 1.

²⁷ R Bellanova and G Glouftisios, 'Controlling the Schengen Information System (SIS II): The Infrastructural Politics of Fragility and Maintenance' (2022) 27 *Geopolitics* 160, 164.

²⁸ Eu-LISA, 'Report on the Technical Functioning of Central SIS II and the Communication Infrastructure, including the security thereof and the bilateral and multilateral exchange of supplementary information between Member States' (2015), at www.eulisa.europa.eu 6.

²⁹ B Hayes, 'From the Schengen Information System to SIS II and the Visa Information (VIS): the proposals explained' (Statewatch, February 2004) at www.statewatch.org 10.

³⁰ Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism, Art 101A.

³¹ Commission Implementing Decision 2013/115/EU of 26 February 2013 on the Sirene Manual and other implementing measures for the second generation Schengen Information System (SIS II).

³² Of particular relevance here is Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU. The other Regulations are Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals; Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006.

³³ Regulation (EU) 2018/1862 (n 32), Art 48.

the fight against terrorism and serious crime, that ensures a high level of security within the EU.³⁴ By then, the system included seven types of alerts on people or objects:³⁵ (1) alerts on persons wanted for arrest or extradition;³⁶ (2) alerts on missing persons, or vulnerable persons who need to be prevented from travelling;³⁷ (3) alerts on persons, such as witnesses, sought to assist with a judicial procedure;³⁸ (4) alerts on persons or objects subject to discreet, inquiry or specific checks;³⁹ (5) objects sought for the purpose of seizure or their use as evidence in criminal proceedings;⁴⁰ (6) alerts on unknown wanted persons;⁴¹ (7) alerts on unwelcome third-country nationals, including irregular migrants subject to a return decision.⁴²

The story of the SIS II does not end here, as a more recent Regulation has been adopted in 2022 to further introduce alerts and extend Europol's role therein.⁴³

2.2. The new information alerts: a paradigm change of the SIS

Regulation 2022/1190 strengthened and extended the system, and brought along significant changes to the database, as well as Europol's role in it. This extension was essentially driven by the information gap identified in the system, according to which personal data from third countries and international organisations only rarely made it into the SIS, as alerts are inserted by Member States authorities.

2.2.1. *Changes brought by the new Regulation*

The key amendment to Regulation 2018/1862 concerns the introduction of a new category of alerts.⁴⁴ In particular, according to its Article 37a an eighth category of alerts is introduced, namely information alerts on third-country nationals in the interest of the EU. The alert targets solely third-country nationals who are suspected of involvement in terrorist offences or other serious crimes and may for example include data on foreign

³⁴ T Wahl, 'New Legal Framework for the Schengen Information System' (Eucrim, 18 February 2019), at eucrim.eu.

³⁵ N Vavoula and V Mitsilegas, 'Strengthening Europol's Mandate: A Legal Assessment of the Commission's Proposal to Amend the Europol Regulation' (European Parliament, May 2021), at www.europarl.europa.eu 44; European Commission Migration and Home Affairs (n 12).

³⁶ Regulation (EU) 2018/1862 (n 32) Arts 26–31.

³⁷ Ibid arts 32–33.

³⁸ Ibid arts 34–35.

³⁹ Ibid arts 36–37.

⁴⁰ Ibid arts 38–39.

⁴¹ Ibid arts 40–41.

⁴² Regulation (EU) 2018/1861 (n 32) and Regulation (EU) 2018/1860 (n 32).

⁴³ Regulation (EU) 2022/1190 (n 3).

⁴⁴ For an analysis see N Vavoula and V Mitsilegas (n 35); European Commission Migration and Home Affairs (n 12).

terrorist fighters.⁴⁵ Counter-terrorism was the primary driving force behind the amendment,⁴⁶ but the scope of application was further extended to also encompass other serious crimes beyond terrorism. According to Article 37a of Regulation 2018/1862, Europol can propose to one or more Member States to enter information alerts in two situations.⁴⁷ Firstly, where there is a factual indication that a person intends to commit or is committing a terrorist offence or a serious crime. Second, where an overall assessment of a person gives reason to believe that the person may commit a terrorist offence or serious crime. Once Europol proposes to enter an alert, Europol's Data Protection Officer (DPO) is notified, and the relevant information is shared with one or more Member States. These proceed to a second verification and analysis and decide whether to enter the information alert in the SIS or not, or whether to use the data to enter another alert. The procedure of the information alert is shown in the figure below.

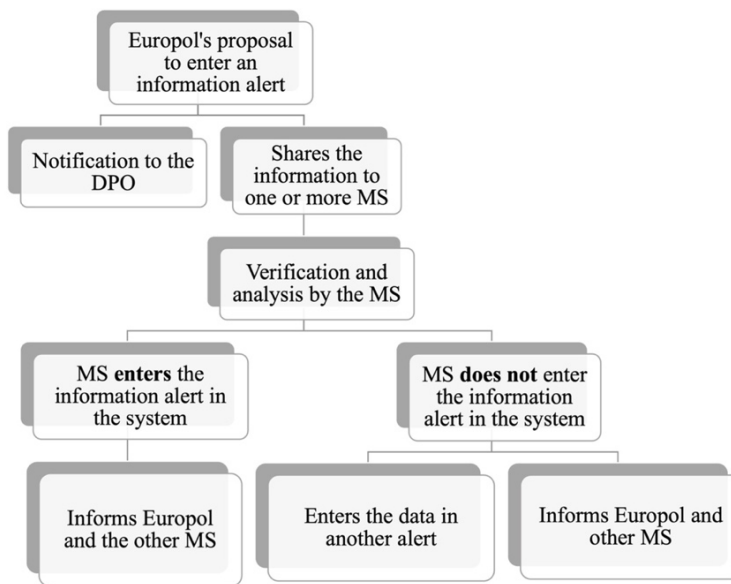


Figure 1: Procedure for information alert in the SIS (Author's compilation based on Regulation (EU) 2022/1190.

Figure 1 describes the process of information alerts and shows how the responsibility shifts from the EU Agency to the Member State, which conducts the last

⁴⁵ N Vavoula, 'Surveillance of Foreign Terrorist Fighters (FTFs) via the Schengen Information System (SIS): Towards Maximum Operationalisation of Alerts and an Enhanced Role for Europol' (2023) 14 *New Journal of European Criminal Law* 206, 220–223.

⁴⁶ Communication COM(2020) 795 (n 1).

⁴⁷ Regulation (EU) 2022/1190 (n 3) Art 37a(3).

verification check, on the basis of Europol's data essentially. Europol must share all the information it holds on the case to one or more Member States and inform them if it receives additional data in relation to the proposal.⁴⁸

The introduction of information alerts constitutes a paradigm shift for the SIS, as for the first time, an EU agency plays a preponderant role within the SIS; indeed, Europol becomes the initiator and evaluator of alerts, and shares all relevant information with the Member States.

2.2.2. *Europol as a crucial middleman*

While the amendments significantly strengthened the role of the Agency in the system, it did not go as far as initially planned. The Commission proposal originally introduced the possibility for Europol to directly enter alerts into the SIS, through information alerts, not only in respect to third-country nationals.⁴⁹ Europol still plays a crucial role in the introduction of information alerts but cannot enter the alert in the system on its own.

As noted above, the amendments were made to fill a perceived information gap. Data from third countries and international organisations on individuals suspected or convicted of terrorist offences or other crimes, only rarely made it into the SIS.⁵⁰ The information is not necessarily shared with Member States, which can thus not enter an alert in the SIS or is being shared but Member State cannot enter the alert under national law.

On the contrary, Europol has long-standing relations with third countries and international organisations, which involve information sharing. It signed, for instance, 17 operational agreements with third countries, and one with Interpol.⁵¹ This means that Europol can get and enter data providing from the latter in its own information system. However, these are not accessible to front-line officers through the SIS. This leads to an information and security gap, since data of approximately 1,000 non-EU foreign terrorist fighters for example is in the hands of Europol, but not inserted in the SIS.⁵² Linked to the fact that the SIS is frequently consulted (12,7 billion searches in 2022),⁵³ this leaves a lacuna, which the Commission tried to fill.⁵⁴

⁴⁸ T Wahl, 'Legislation on Information Alerts in SIS Passed' (Eu crim, 20 July 2022), at eucrim.eu.

⁴⁹ N Vavoula and V Mitsilegas, 'Strengthening Europol's Mandate: An Appraisal of the Commission's Proposal to Amend the Regulation (EU) 2016/784' (EU Law Analysis, 29 July 2021), at eulawanalysis.blogspot.com.

⁵⁰ N Vavoula and V Mitsilegas (n 35) 45.

⁵¹ Europol, 'Operational Agreements' www.europol.europa.eu.

⁵² Recital 5 Regulation (EU) 2022/1190 (n 3).

⁵³ Eu-LISA, 'SIS II 2022 Annual Statistics' (February 2023) at www.eulisa.europa.eu 3.

⁵⁴ Proposal for a Regulation of the European Parliament and of the Council of 9 December 2020 amending Regulation (EU) 2018/1862 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters as regards the entry of alerts by Europol, COM(2020) 791 final – 2020/0350(COD).

Regulation (EU) 2022/1190 gives Europol the role of the middleman between on the one side, third countries and international organisation and on the other side, Member States. Europol can propose Member States to enter information alerts in two situations, mentioned above.⁵⁵ In doing so, Europol shares information with the Member State, that may in big part come from third countries and international organisations. Thus, it plays an intermediate role between the third country data, and the Member State, resulting potentially in an alert within the SIS. This does not mean that Member States do not have bilateral agreements with third countries and all EU Member States are member of Interpol. However, the assessment as to whether an alert is in the interest of the EU may be more difficult to be undertaken by a single national authority in a Member State, when the person in question does not have any links with that Member States. It remains a big role for Europol, who becomes closer to becoming a custodian of the database, by playing a key influencing role within the system. It went from a 'read only' access to all categories of data, to a facilitator for the introduction of alerts. While the role of Europol is supposedly solely limited to information alerts, it goes beyond, as shown in Figure 1. As noted in the Regulation, Member States may decide to enter another type of alert on the same person.⁵⁶ This pushes Europol's influencing role even further.

Finally, Europol also pre-assesses the necessity of the alerts. In doing so, it notably analyses the reliability of the source of information and the accuracy of the information received and shared it with the relevant Member State.⁵⁷ The Agency is therefore not only instrumental at initiating the registration of the alert, but also participates in its assessment, which gives Europol significant indirect power *vis-à-vis* the system compared to its previous status where it only had read-only access to the alerts.

3. A dangerous new integrated system of alerts

The changes made to the SIS do not come without risks. The main challenges of the new integrated system of alerts relate to the quality of the data used to enter the alert, to the essence of the alerts themselves causing a potential misuse of alerts, and to the procedure and responsibility, characterised by legal uncertainty.

3.1. Data quality issues: trusting the source of the information?

As described in Section III of the article, Europol proposes to a Member State to enter information alerts in the system. This information essentially comes from third

⁵⁵ Regulation (EU) 2022/1190 (n 3), Art 37a.

⁵⁶ Ibid Art 37a (8).

⁵⁷ Ibid Art 37a (4).

countries and international organisations, with which Europol maintains relationships.⁵⁸

As mentioned previously, Europol can process personal data provided by third countries and international organisations.⁵⁹ Exchanges of personal data with third countries and international organisations can be made for example, on the basis of an adequacy decision of the Commission, an international agreement concluded between the EU and the third country or international organisations, or an operational agreement concluded by Europol before May 2017.⁶⁰ This means that Europol can process the data received and enter it in its own information system. The operational agreements, were in some cases, adopted more than twenty years ago. The agreements with the United States, and Interpol, date for example from 2001.⁶¹ In principle, the Commission was supposed to assess these cooperation agreements by the 14 June 2021, particularly with regard to data protection provisions with the aim of assessing whether the agreements still fulfil the EU data protection requirements and standards, as developed in legislation and case-law. As of today, this has still not been done. This is surprising, since the Commission admitted that some agreements do not meet anymore the high data protection standards developed in the EU.⁶² This becomes clear when one compares the existing operational agreements with the recent draft agreement for a cooperation agreement between the EU and New Zealand, for the purpose of exchanging personal data with Europol.⁶³ The old cooperation agreements must be replaced. This is even more alarming with the criticism that arose over Interpol's notices. States abuse the Interpol's Notice System to persecute

⁵⁸ For example, Europol's list of operational agreements signed with third countries and international organisations, see Europol (n 51) europol.europa.eu (Albania, Australia, Canada, Bosnia & Herzegovina etc.).

⁵⁹ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, Art. 17(1).

⁶⁰ Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022 amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation, Art. 25(1).

⁶¹ Agreement of 6 December 2001 between the United States of America and the European Police Office (Europol); Agreement of 5 November 2001 between Interpol and Europol.

⁶² Informal conversation with a representative from DG Home, European Commission.

⁶³ Proposal for a Council Decision of 13 May 2022 on the conclusion of the Agreement between the European Union, of the one part, and New Zealand, of the other part, on the exchange of personal data between the European Union Agency for Law Enforcement Cooperation (Europol) and the authorities of New Zealand competent for fighting serious crime and terrorism, COM(2022) 208 final – 2022/0157(NLE).

not only terrorists, but also civil society activists, journalists, human rights defenders, and refugees.⁶⁴ This perverted use may then also be seen within the SIS, as it is unclear how detailed and credible the assessment by Europol may be.⁶⁵

In addition to the formal legal basis, derogations are also provided for in Europol's Regulation, under which either the Management Board, or the Executive Director may authorise the exceptional exchange of personal data.⁶⁶ In light of this, some Working Arrangements (WA), which are agreements that do not in principle provide for exchanges of personal data, still include provisions on personal data exchanges, when the derogations apply. Consequently, the WA either contain a provision on personal data (WA with Israel, Japan, and New Zealand), or a whole chapter on personal data (the other WA).⁶⁷ This is highly problematic as these derogatory regimes may apply with countries with limited data protection standards, and outside of the public's eye. Normally law enforcement operates based on the secrecy of investigations but the secrecy and opacity of Europol's work is significantly different from national law enforcement practices, which in the case of the SIS also require a national decision to base the alert.

Some safeguards are introduced within Regulation 2022/1190; Europol notably establishes whether the information alert is necessary and justified, for instance by analysing and checking the reliability of the source of information, and the accuracy of the information on the person.⁶⁸ This may include subsequent exchanges with the third country or international organisation. However, these do not address the elephant in the room, being that the sharing of information from third countries and international organisation itself is based on outdated legal basis. This may cause data protection issues, as data might have been obtained under lower data protection standards.

Alongside potential issues of data quality and accuracy, that may arise notably in the misuse of data (particularly biometric data), the implications for individuals subject to an alert can be severe and affect other fundamental rights, such as the prohibition of inhumane and degrading treatment under Article 4 of the EU Charter of Fundamental Rights. An alert may lead to the arrest of the individual by the police. When it comes to information alerts, as will be argued in the paragraph iii.3. below, there is a lack of clarity on the action to be taken when an alert is entered into the

⁶⁴ R H Wandall, D Suter and G Ivan-Cucu, 'Misuse of Interpol's Red Notices and impact on human rights – recent developments' (European Parliament, January 2019) at www.europarl.europa.eu 17.

⁶⁵ N Vavoula and V Mitsilegas (n 49).

⁶⁶ Regulation (EU) 2022/991 (n 60), Art 25.

⁶⁷ Europol, 'Agreements and Working Arrangements with countries' www.europol.europa.eu.

⁶⁸ Regulation (EU) 2022/1190 (n 3), Art 37a (4).

system.⁶⁹ In other words, Member States have the discretion to decide which action to perform shall a hit occur on such an alert.

3.2. Pushing the boundaries of the SIS: bypassing constraints and potential misuses

The changes to the system faced criticism, notably by NGOs, who pointed out the dangerous misuse of the system to persecute political opponents.⁷⁰ This is not a new issue. The SIS has already previously been used as a political tool by authoritarian and dictatorial regimes to persecute and arrest their opponents.⁷¹ The story of the Open Dialogue Foundation President Lyudmyla Kozlovskya (Human rights defender from Ukraine living in Poland for years) perfectly illustrates this issue.⁷² She was informed in Belgium that she was subject to an alert in the SIS as a threat to Polish national security, and consequently to the EU. This was probably linked to her NGO and her husbands' criticism on the controversial reforms in Poland, notably with regard to the appointment of judges. She was subsequently deported to Ukraine in 2018. This shows how alerts within the SIS may be misused for an illegal purpose, namely the prosecution of political opponents. This problem also reaches beyond the limits of the SIS and is visible within Interpol. Contracting States similarly misused Interpol's Notice System to persecute civil society activists, journalists, human rights defenders, and refugees.⁷³ While the issue is not new, it might be further exacerbated with the introduction of information alerts. In fact, unscrupulous third countries can then also persecute political opponents through Europol by using the SIS as a motor. It is true that Europol will not notify the third country of a match, but the system could be used as a filter to prevent such individuals to seek refuge in the EU, for example if they apply for a Schengen visa.

Furthermore, this new type of alerts might also be a way to bypass previously existing constraints. First, concerning the access to data from third countries. As pointed out earlier, Member States may not get the same amount of information from third countries or cannot enter the alert in the system under national law. Europol, with the new changes, may serve as a data laundering body, allowing to circumvent

⁶⁹ EDPS, Formal comments of 10 March 2021 on the Proposal for amendment of Regulation (EU) 2018/1862 on the use of SIS within the field of police and judicial cooperation as regards entry of alerts by Europol, para 15.

⁷⁰ Statewatch, 'EU: Europol and the Schengen Information System: New Powers to Propose "Information Alerts"' (Statewatch, 14 April 2022), at www.statewatch.org.

⁷¹ Human rights defenders, 'Authoritarian Regimes Cooperate to Persecute Opponents with the Help of the Tools of Democratic Countries' (Center for civil liberties, 20 October 2022), at ccl.org.ua.

⁷² M Mycielski, 'The Netherlands Obstructs EU Law on Crime' (Open Dialogue, 16 January 2019), at en.odfoundation.eu.

⁷³ R H Wandall, D Suter and G Ivan-Cucu, (n 64) 17.

the previously existing limits.⁷⁴ The new alerts can also circumvent another limit, that is the one of national interest. To introduce alerts, Member States must have a national decision and interest. With the category of information alerts, it suffices to establish a threat against collective EU internal security, without having to prove a national interest.⁷⁵ This allows for broader purposes, but also the risk of more alerts added in the system without sufficient justification and purpose.

Finally, Regulation 2022/1190 also pushes the boundaries of the SIS further in terms of data exchanges. Before then the essential part of exchanges occurred through entry of alerts and access to the system, as well as through the SIRENE Network.⁷⁶ With the amendments made to the SIS, new data exchanges appear, outside of the system itself. In fact, as shown in Figure 1, Europol shares all the available information it holds on the case, and the result of their assessment with the Member State to which it proposes to enter an information alert. Notwithstanding the outcome of the proposal, an additional layer of exchanges occurs, that according to the Regulation, escapes any supervision.⁷⁷ Coordinated supervision of SIS applies horizontally, but it is doubtful that it includes the stage prior to the insertion of an alert to the system.

3.3. Legal uncertainty and blurred competences within the integrated system

The issue of legal uncertainty arises on three main levels occurring pre-alert, during the pre-evaluation of Europol and the assessment of the Member State, and post-alert once the information alert entered the system.

The first situation where legal uncertainty is noted is when Europol decides or not to propose to one (or more) Member States to enter an information alert. As stated above, Europol conducts a pre-evaluation according to which it determines whether it is necessary and justified to enter the alert in the SIS.⁷⁸ In the Commission proposal, two additional sub-categories were added under Article 37a(3):

‘(b) a verification confirmed that entering the alert is necessary for achieving Europol’s objectives as laid down in Article 3 of Regulation (EU) 2016/794;

[...]

(d) a consultation, involving the sharing of information on the person concerned with Member States participating in Regulation (EU) 2016/794 in accordance with Article 7 of the Regulation, confirmed that:

⁷⁴ B Goodwin, ‘Europol Gears up to Collect Big Data on European Citizens after MEPs Vote to Expand Policing Power’ (ComputerWeekly, 16 May 2022), at www.computerweekly.com.

⁷⁵ N Vavoula and V Mitsilegas (n 35) 49.

⁷⁶ European Commission Migration and Home Affairs, ‘SIRENE cooperation’ (European Commission), at home-affairs.ec.europa.eu.

⁷⁷ Regulation (EU) 2022/1190 (n 3) Art 37a(5).

⁷⁸ Ibid Art 37a(4).

- (i) no intention was expressed by a Member State to enter an alert in SIS on the person concerned;
- (ii) no reasoned objection was expressed by a Member State regarding the proposed entry of an alert in SIS on the person concerned by Europol'.⁷⁹

The revised SIS rules do not contain these additional sub-provisions, and no other provision replaces them, arguably because the rules do not foresee a role for the agency as one inserting the alerts but rather as their initiator. Within its formal comments, the EDPS mentioned that the proposal gives wide discretion to Europol to decide whether or not to issue an alert.⁸⁰ It deplored the lack of specific criteria that could guide Europol's decision. In the adopted Regulation, no elements are added that could limit the Agency's discretion. Thus, it is impossible to know how Europol interprets the necessity and justification of an information alert. Practice might give indications, but since Europol's work has been criticised for its lack of transparency, access to relevant documents and indications might be very challenging.⁸¹

The discretion of Europol is then limited afterwards when the Member State decides or not to enter the information alert in the system. However, then, the second situation of lack of clarity arises. According to the Regulation and Figure 1 above, Member States can decide to enter the information alert in the system, or to use the data to enter another alert, or to simply dismiss the proposal.⁸² The Member States discretion concerns there not only the issuing or not of the alert, but also the analysis it does of the proposal. No additional elements are given on how the Member States assesses the proposals, and how it decides on it. They solely have to inform the other Member States and Europol of the outcome of the analysis and their decision. No justification is required, Member States remain fully competent on the matter.

The final instance where there is legal uncertainty, is in case of a 'hit' once the information alert is entered in the system. Article 37b of the Regulation precisely touches upon this aspect, but only notes that the executing Member State shall transmit certain information to the issuing Member State, which then informs Europol of a hit.⁸³ The Regulation thus mentions a reporting obligation but does not clarify which other action shall be taken by the frontline officers, which is subject to national law. This creates issues of legal certainty and foreseeability, as it is impossible to predict what could happen. This matters as this will have direct consequences on the individuals subject to a SIS alert. Guidance and clear implementing criteria would help avoiding legal uncertainty.

⁷⁹ COM(2020) 791 (n 54) Art. 37a (3).

⁸⁰ EDPS, (n 69), para 12.

⁸¹ C Berthélémy, 'Europol's Reform: A Future Data Black Hole in European Policing' (EDRi, 20 April 2022), at edri.org.

⁸² Regulation (EU) 2022/1190 (n 3) Art 37a (6).

⁸³ Ibid Arts 37b and 48(8).

Next to the issue of legal uncertainty, the new procedure of information alert also brings along a blurring of competences. This integrated system of information alerts starts with data from third countries or international organisations, moves to Europol who proposes an alert and assesses it, and finally ends at the national level, where a national authority decides after another evaluation whether to enter the alert in the system or not. In the end, Europol plays a key role in the process, but the responsibility lies on the Member States. In this regard, if the information is correct, Europol can wash its hands off and place the responsibility on the Member State to adequately respond. If the information is incorrect, Europol also washes its hand off, and exposes the Member State who recorded the alert unlawfully.⁸⁴ This potential responsibility immunity of the Agency is problematic regarding the fact that they initiate the alert, and pre-evaluate them, playing thus a pivotal role in the introduction of the alert in the system.⁸⁵

4. A need for enhanced and tailored supervision

Section 3 highlighted the various challenges of the changes brought by Regulation (EU) 2022/1190, be it with regard to fundamental rights, impacted or issues of legal certainty. It is essential that these new changes are subject to efficient supervision, to ensure compliance with relevant rules and values (here particularly data protection rules). Supervision must occur of the SIS in general, but also of the actors involved in the issuance of information alerts, namely Member States and Europol. As the Commission stated already in its White Paper of 2001, EU agencies must be subject to an ‘effective system of supervision’⁸⁶ competent on the matter.

The article argues that the supervision of the new integrated system of alerts must be divided into three distinct phases. First, the pre-alert phase, where Europol is essentially involved in receiving the data from third countries, and developing a proposal after evaluation. Second, the issuing of the alert phase, which occurs at the national level, where the Member State decides or not to enter the alert in the SIS. Third, the post-alert phase, once the information alert has been issued, which relates for example to the possibility of an extension of the alert.

4.1. Supervising the pre-alert phase

As described above, the pre-alert phase concerns essentially Europol’s role in the process. It encompasses the supervision of the information provided to the Agency

⁸⁴ Vavoula and Mitsilegas (n 35) 50.

⁸⁵ See Case C-755/21 *P* EU:C:2024:202.

⁸⁶ Communication COM(2001) 0428 final from the Commission of 25 July 2001 on European governance – A white paper.

by third countries or international organisations, but also the supervision of the proposal itself.

According to Europol's Regulation, several supervisory authorities supervise Europol's data related actions. The EDPS is the main central supervisor of Europol, responsible for monitoring and ensuring the application of Europol's Regulation.⁸⁷ It performs external supervision of the Agency and can use various powers to do so, ranging from advisory powers to the use of corrective powers. Alongside, the EDPS, the DPO ensures the internal supervision of the Agency, even though the advice to the controller does not necessarily need to be followed by the controller. This is a member of Europol's staff, that ensures the lawfulness and compliance of the Agency's processing operations.⁸⁸ Coordinated supervision was previously conducted by Europol's Cooperation Board, composed of national supervisory authorities of each Member State and members of the EDPS.⁸⁹ With the entry into force of the new Regulation, the Board ceased to exist and was replaced by the Coordinated Supervision Committee (CSC).⁹⁰ Administrative supervision may also be performed by the European Commission, as stated above, it should for example evaluate the operational agreements to ensure their compliance with data protection rules.⁹¹ The European Ombudsman is not analysed here, as it deals with administrative inquiries and not data protection-related matters.⁹² Politically, oversight takes place within the European Parliament, and more particularly in the Joint Parliamentary Scrutiny Group (JPSG), composed by members of national Parliaments and members of the European Parliament (MEPs).⁹³ Finally, it is worth considering the SIS II Supervision Coordination Group, composed of national supervisory authorities and the EDPS,⁹⁴ now replaced by the Coordinated Supervision Committee (CSC).

When analysing the supervision of the source of information and the proposals to enter an information alert, all these organs must be looked at consecutively, to see whether in theory and in practice efficient supervision is in place.

⁸⁷ Regulation (EU) 2022/991 (n 60), Art 43.

⁸⁸ Ibid Arts 41a and 41b.

⁸⁹ Regulation (EU) 2016/794 (n 59) Art 45.

⁹⁰ European Data Protection Board (EDPB), 'Who we are – Coordinated Supervision Committee' at edpb.europa.eu.

⁹¹ Regulation (EU) 2016/794 (n 59) Art 25(4).

⁹² Memorandum of Understanding of 7 February 2007 between the European Ombudsman and the EDPS.

⁹³ Regulation (EU) 2022/991 (n 60), Art 51.

⁹⁴ EDPS, 'Schengen Information System: About the SIS II SCG', at edps.europa.eu.

4.1.1. The supervision of the source of information

Europol's cooperation with third countries or international organisations is generally based on an adequacy decision of the Commission, an international agreement concluded by the EU, or an operational agreement concluded by Europol before May 2017.⁹⁵ The previous section showed that these agreements were for some signed more than twenty years ago,⁹⁶ and do not meet the current data protection standards within the EU.⁹⁷ The first issue one must look at is whether the information Europol receives is adequately supervised.

The Commission failed its duty to evaluate the existing operational agreement, which was planned for June 2021,⁹⁸ and still has not seen the light. Thus, it is highly likely that data are being shared with Europol, dismissing the European data protection standards. The old operational agreements do not for example include clear references to data protection principles, the need for efficient oversight, the prohibition of automated processing of personal data (subject to exceptions) and clarifications on the right of access for data subjects.⁹⁹ It is urgent, particularly due to the introduction of the category of information alert to deal with these long-standing issues. Since the exchanges of personal data between Europol and third countries or international organisations form the source of the information alerts, their legality must be ensured. Other supervisory authorities did not deal with the supervision of these operational agreements. MEPs simply asked when these evaluations will be performed,¹⁰⁰ and Europol's Cooperation Board pointed out that these agreements are subject of concern and that a swift review of them shall be made by the European Commission.¹⁰¹

Notwithstanding this, Europol's cooperation with third countries and international organisations has only very briefly been dealt with by supervisory authorities. When it comes to the EDPS, he essentially gave two opinions, one on the negotiating

⁹⁵ Regulation (EU) 2016/794 (n 59) Art 17(1).

⁹⁶ Agreement between the United States and Europol (n 61); Agreement between Interpol and Europol (n 61).

⁹⁷ Informal conversation with a representative from DG Home, European Commission.

⁹⁸ Regulation (EU) 2016/794 (n 59) Art 25(4).

⁹⁹ As is the case in Proposal for a Council Decision COM(2022) 208 final – 2022/0157(NLE) (n 63).

¹⁰⁰ For example, MEP Bricmont's question in the 9th JPSG meeting on 25-26 October 2021 at the European Parliament secure.ipex.eu.

¹⁰¹ Europol Cooperation Board, Report of the chair of the Europol Cooperation Board to the Joint Parliamentary Scrutiny Group, 23 September 2019, 3; Europol Cooperation Board, Letter to the European Commission on international agreements for the exchange of information between Europol and third countries, 13 May 2020.

mandate to conclude an international agreement with New Zealand,¹⁰² and another one on eight negotiating mandates to conclude international agreements with third countries from the Middle East and North Africa (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia, and Turkey).¹⁰³ Within them, the EDPS essentially recommends the clarification of certain points and the development of additional safeguards and controls to better protect personal data. Regarding the eight agreements, further impact assessments shall be carried out to evaluate the fundamental rights risks posed by this cooperation. These countries are partly characterised either by their current political instability, by their dictatorships, or by their lack of data protection law.¹⁰⁴ These opinions are, however, nowadays of limited impact, as these agreements have not yet seen the light and will not be the source of the data within the information alert. Alongside these opinions, the EDPS made an inquiry into model WA used by Europol to establish relations with third countries, which it closed in 2019.¹⁰⁵ Within it, the EDPS also inspected specific transfers authorised on a case-by-case basis and pointed out the need to avoid overusing the derogations. He recommended that exceptional transfers shall require advice from the DPO and include an obligation to regularly verify whether the conditions are still met to prevent systematic transfers of personal data.¹⁰⁶ This inquiry is interesting but remains limited in terms of supervision, as it is the only one that has been made so far, on two exceptional transfers.

Turning to the DPO function, it essentially assisted the EDPS in its inspection on the transfers of data to third countries,¹⁰⁷ and participated in the assessment of a potential transfer of personal data to a third country with which Europol does not have an operational agreement.¹⁰⁸

The JPSG's supervision is without impact, as it merely mentioned Europol's cooperation with third countries when discussing the changes brought to Europol's

¹⁰² EDPS, Opinion 1/2020 on the negotiating mandate to conclude an international agreement on the exchange of personal data between Europol and New Zealand law enforcement authorities, 31 January 2020.

¹⁰³ EDPS, Opinion 2/2018 on eight negotiating mandates to conclude international agreements allowing the exchange of data between Europol and third countries, 14 March 2018.

¹⁰⁴ Statewatch, 'EU: Warnings over Proposed new Europol Partners in Middle East and North Africa' (Statewatch, 14 May 2018), at www.statewatch.org.

¹⁰⁵ EDPS, Invitation to exchange of information by electronic means in the framework of the JPSG, 29 May 2020.

¹⁰⁶ Redacted version of the EDPS inspection on the transfers to third countries and EU bodies – obtained through a request for access to documents by the author.

¹⁰⁷ Europol DPO, Annual Report of the Data Protection Officer 2019 of 14 February 2020 – redacted version granted after a request for access to documents by the author.

¹⁰⁸ Europol DPO, Annual Report of the Data Protection Officer 2021 of 12 December 2022 – redacted version granted after a request for access to documents by the author.

Regulation.¹⁰⁹ This limited supervision is surprising since Europol has a long-standing relation with third countries and international organisations and supervisory authorities had sufficient time and material to be able to ensure their supervision. It is insufficient and highly worrying as this data now plays a bigger role, and will be entered within the SIS, which is the most widely used EU databases.¹¹⁰ If the source of the data and the exchanges are not sufficiently supervised, it is difficult to trust the rest of the process. It is not necessary here to analyse the CSC, as the supervision of the sources of information is outside of the system.

4.1.2. The supervision of the proposal to enter an information alert

Before proposing to a Member State its registration into the SIS, Europol pre-evaluates the information alert to determine whether it is necessary and justified by evaluating the reliability of the source of information and the accuracy of the information.¹¹¹ No information whatsoever is provided for on the criteria it may use to do this evaluation.

The Regulation mentions that ‘Europol shall notify its Data Protection Office where it makes such a proposal’.¹¹² This means that the DPO is involved in the procedure. However, it is simply a notification, and the DPO’s opinion is not requested. This is not satisfactory, as a notification does not ensure the protection of personal data. A solution could be to ask for the mandatory advice from the DPO, who can thus assess the information alerts, and the source of the information ensuring high safeguards.

The other supervisory authorities are completely left out of the equation, even the EDPS. A notification and consultation to the EDPS could have ensured a more dynamic supervision of the new procedure. A satisfactory addition could have been to subject the proposals of an information alert to the prior consultation mechanism, which is an important safeguard for new types of processing operations. Article 39 of Europol’s Regulation details the procedure, according to which the EDPS shall carry out a prior consultation of the processing activities.¹¹³ However, it is not supposed to apply to specific individual operational activities, but to the use of new information technology systems for processing personal data. For it to be used, a change must occur. Europol could consult the EDPS for proposal to enter information alerts stemming from a specific third country. This would change a broader

¹⁰⁹ European Parliament, 8th meeting of the Joint Parliamentary Scrutiny Group on Europol – Summary conclusions by the Co-Chairs (2021)

¹¹⁰ Eu-LISA (n 13) 3.

¹¹¹ Regulation (EU) 2022/1190 (n 3) Art 37a (4).

¹¹² Ibid Art 37a (1).

¹¹³ Regulation (EU) 2022/991 (n 60), Art 39.

trend to limit supervisory powers of the EDPS, that has also been seen regarding Europol's processing of Big Data.¹¹⁴ In this context, the EDPS is merely notified by the Data Protection Officer, *if* relevant, about dataset transfers from third countries, and is not involved in the assessment of their proportionality.

Not adding supervisory safeguards does not amount to no supervision. Supervisory authorities are free to conduct supervisory tasks on their own over the proposal to enter information alerts. The practice will show whether this will be the case. What can already be noted though, is that supervisory authorities lack resources to deal with all the matters, and ensure follow-up, and may thus not supervise the procedure daily. Since these activities will occur outside of the public's eye, it is essential that supervisory authorities investigate it to ensure the protection of personal data.

The proposal from Europol to the Member State includes a lot of personal data, emerging from third countries or international organisations and from Europol's analysis of it. This new information sharing will not be supervised whatsoever, as what might be subject to supervision is solely the proposal and not this additional information sharing. This is a lacuna that might never get solved.

4.2. Supervising the issuance of alerts

The second phase of the information alert process takes place at the national level. Once Europol sends the proposal to one (or more) Member State, the latter verifies and analyses it before deciding whether to enter the alert in the system or not.¹¹⁵

Nothing more is added on the criteria the Member States look at to conduct their analysis: is the Member State checking the data quality and accuracy (particularly coming from third countries)? Is it evaluating solely the assessment of Europol? In addition, there is no mention of the role of national supervisory authorities ensuring Member States compliance with relevant data protection rules. Perhaps the application of Directive (EU) 2016/680 – the Law Enforcement Directive (LED)¹¹⁶ as a *lex generalis* regarding the operation of SIS is of interest here. National supervisory authorities are competent to supervise the national competent authorities, and more particularly the SIRENE Bureaux's (the contact points for the system). Thus, their role in the issuing of alerts is also relevant. These authorities can perform audits,

¹¹⁴ Tas (n 7).

¹¹⁵ Regulation (EU) 2022/1190 (n 3) Art 37a (6).

¹¹⁶ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

give opinions and have enforcement power.¹¹⁷ They could give opinions on the possibility to enter (or not) the information alert and supervise the evaluation of the Member State, performing thus *ex ante* supervision.

In a few years, once the procedure of information alert has been in motion for more than two years, an audit could be performed by each national supervisory authority, to check if national competent authorities act in compliance with data protection standards. For now, it is mandatory to conduct an audit and supervise SIRENE Bureaux's at least once every four years.¹¹⁸ The results of this could then be discussed in the CSC, where members of national supervisory authorities sit, alongside members of the EDPS.¹¹⁹ Nowadays, there is a fragmentation in the supervision of the SIRENE Bureaux, depending on the Member States.¹²⁰ Audits must only be made every four years, and national supervisors essentially put their resources at the service of the implementation of the GDPR. Their work on SIS is thus more marginal.

While this adds another layer of protection, it remains outside of Europol's realm. Since Europol plays a pivotal role in the introduction of these alerts, and the provision of the data, the supervision shall occur essentially at the European level. But as the EDPS positively pointed out, this additional safeguard adds a mandatory step before introducing the alert.¹²¹ It is, however, not sufficient.

4.3. Supervising the post-alert phase

The last phase of the process relates to the post-alert phase. In other words, the period starts once the Member State decided to enter the information alert within the system, or to use the data and enter it through another alert.

The Regulation once again does not mention much but notes two aspects. First, Europol should keep records of its proposals to enter information alerts, and report to all Member States every six months whether information alerts were entered into the SIS or not.¹²² This allows for transparency of the role of Europol in the process and can serve as a basis for subsequent supervision. If the EDPS for example, wants to open an inquiry into the Agency's proposal to enter information alerts in the SIS, it will start by analysing the record note of Europol, before diving into the substance

¹¹⁷ Information provided in a conversation with a national supervisory authority sitting in SIS II SCG.

¹¹⁸ Ibid.

¹¹⁹ EDPB (n 90).

¹²⁰ Information (n 117).

¹²¹ EDPS (n 69) 3.

¹²² Regulation (EU) 2022/1190 (n 3) Art 37a (14).

of the matter. The reporting obligation to Member States can also generate subsequent supervision within the CSC. Since all Member States are informed about the information alerts that it made into the system, coordinated supervision can occur. The second aspect relates to the national level. According to the Regulation, Member States must also put in place periodic reporting mechanisms, of whether they entered information alerts in the system, or not.¹²³ This can then be used for national supervisory authorities to perform their supervision (similar to what the EDPS would do over Europol).

Reporting obligations are useful tools to ensure the transparency of a body's actions, and support therefore the supervision of them, as well as their accountability. The latter reports mentioned above, allow to shed light and quantify the number of information alerts proposals from Europol, and the number of alerts introduced in the system or not. Without this, it is difficult to grasp the extent of the process. When it comes to the process of an information alert, joint supervision must be favoured, as it is an integrated system, where Europol's role and national authorities' role are highly intertwined. Joint investigations between the EDPS (as Europol's supervisor) and the national supervisory authority from the issuing Member States might prove useful.

Another important element that should be subject to supervision is the extension of the storage period for information alerts in the system. Article 53 of the Regulation points out that a Member State can enter an alert for a period of one year and reviews it afterwards to decide whether to keep it or not.¹²⁴ To do so, the issuing Member State must follow a comprehensive individual assessment on the necessity and proportionality of the extension, which will be recorded.¹²⁵ The latter might be done with the support of Europol.¹²⁶ There again, no mention is made of a supervisory authority. A simple recording of the assessment and decision must be made. In this situation, with the support of Europol in the individual assessment, a joint supervision may again be recommended. In any case, considering the danger of keeping an information alert in the system, it is essential to ensure the compliance of their extension within the system. Otherwise, there is a risk of having a systemic automatic extension of the storage period, infringing potentially the principle of proportionality, necessity, and oversight. The practice will show how this shall evolve.

However, since neither the pre-alert phase, nor the issuing of the alert might be efficiently supervised, it is key to ensure, at least, the supervision of the post-alert phase. Otherwise, this new paradigm shifts to the SIS, which circumvents previously existing limits, remains unsupervised. This is highly problematic due to the dangers

¹²³ Ibid Art 37a (9).

¹²⁴ Ibid Art 53 (4).

¹²⁵ Ibid Art 53 (6).

¹²⁶ Ibid Art 53 (7).

that this extension of the SIS may cause to individuals' fundamental rights. This is further exacerbated by the challenges linked to the interoperability, namely the connection, of various EU databases, which as Mitsilegas notes challenges a number of fundamental rights, such as non-discrimination, privacy and effective judicial protection.¹²⁷ The interoperability regulations notably incorporate additional security checks for third-country nationals.¹²⁸

5. Concluding remarks

This article offered a detailed analysis of the new changes brought by Regulation 2022/1190 to the operation of the SIS, focusing particularly on Europol's new role in it. The SIS sets an important precedent, within EU databases, showing that EU Agencies are not anymore side-lined, and go beyond a mere read-only access role. Europol does not solely have access to all the alerts entered within the SIS but can also facilitate the introduction of information alerts within it. It plays a crucial role of middleman between third countries or international organisations, and Member States and consequently the SIS. This is only a first steppingstone of this new role the EU intends to give EU Agencies. In the future, it is highly likely that Europol will go beyond proposing to Member States to enter information alerts, to entering them itself, or that alerts will not only concern third-country nationals, but also EU citizens.

The article emphasised how this change to the system brings along dangers regarding individuals' fundamental rights, issues of legal certainty, but also dangers of misusing the system for illegal purposes. The introduction of information alerts bases itself on a data sharing by third countries and international organisation to Europol, which is an issue. The legal basis of Europol's relation with the latter is questionable and has not been sufficiently scrutinized. The new process brings about a paradigm shift but remains vague on a number of aspects: criteria for Europol to decide on the proposals, criteria for Member States to assess the proposals and decide to enter the alert (or not) in the system, and actions to be taken in case of a hit. This legal uncertainty increases the risk of opacity of the procedure and may significantly affect individuals' fundamental rights, by leading for example to restricting their freedom of movement. The risk for alerts to be entered on political opponents, journalists and human rights activists is also further exacerbated with the introduction of this new types of alerts.

¹²⁷ V Mitsilegas, 'Interoperability as a Rule of Law Challenge' (Queen Mary University of London School of Law, 13 February 2020) at www.qmul.ac.uk.

¹²⁸ C Blasi Casagran, 'Fundamental Rights Implications of Interconnecting Migration and Policing Databases in the EU' (2021) 21 *Human Rights Law Review* 433.

The article finishes by looking at the supervision of the new procedure, dividing it into the pre-alert phase, the issuance of alert phase, and the post-alert phase. Overall, there is a lack of supervision mentioned within the Regulation, which does not expressly provide for supervisory safeguards. This does not mean that no supervision will be made. However, in light of the existing lack of supervision over Europol for example, and the focus of national supervisory authorities on the GDPR, practice might show that the process of information alerts essentially escapes any supervision. In light of the big change the Regulation brings, it is essential to enhance supervision and further develop joint supervision for the integrated process to comply with relevant data protection rules and values.

For now, information alerts solely concern third-country nationals, which is probably one of the reasons that led to the adoption of Regulation 2022/1190. It is highly unlikely that Member States would have agreed to enter such alerts based on information by third countries concerning their own EU citizens. However, the fact that this essentially affects third country nationals should not be an excuse for reduced safeguards. First, third country nationals should not be treated in a manner to not respect fundamental rights and freedoms. Second, it is highly likely that in the future, this possibility of information alert might be extended to EU nationals as well. In general, if tailored supervision is not ensured, this would set a worrying precedent for potential amendments to other databases as well.



The Future of Digitalisation in EU Law Enforcement
edited by Niovi Vavoula

Europol's Data Dominance: The Multifaceted Involvement and Impact of Data Analytics Across Sectors

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ABSTRACT: On 1st July 2024, Europol celebrated its 25th anniversary. Evolving from informal police cooperation in the 1970s, the Agency has undergone remarkable changes over the years. Indeed, when the then Europol Drugs Unit commenced its operation in 1999, it seemed difficult to imagine where Europol, as fully-fledged EU Agency, would stand two decades later. Over the years, its capacity to support, coordinate security and even steer cooperation among national authorities through the use of digital technologies transformed Europol into the EU's primary information hub, developing into a crucial pillar of the EU's security architecture. With its processing activities, Europol is involved in all areas covered in this Special Section and beyond, from large-scale IT systems, Information Alerts in the Schengen Information System, the processing of PNR data, Anti-Money Laundering (AML) and cooperation between Financial Intelligence Units, the Prüm framework, and illegal content online such as terrorist propaganda. Europol plays a pivotal role in all legislative texts and proposals. Often these topics are addressed in silos. Therefore, this article seeks to address this gap in the literature by looking at the areas covered in this Special Section and Europol's involvement in all of them.

KEYWORDS: Europol – data analyses – AML – terrorism – police cooperation – PNR.

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1. Introduction

On 1st July 2024, Europol celebrated its 25th anniversary. Evolving from informal police cooperation in the 1970s,¹ the Agency has undergone remarkable changes over the years. Indeed, when the then Europol Drugs Unit (EDU) commenced its operation in 1999, it seemed difficult to imagine where Europol, as fully-fledged EU Agency, would stand two decades later. Whereas in the first years of its existence, Europol was frequently met with scepticism and reluctance by the EU Member States in terms of its evolving role, this picture has arguably changed. Europol's capacity to support, co-ordinate security and even steer cooperation among national authorities through the use of digital technologies transformed Europol into the EU's primary information hub, developing into a crucial pillar of the EU's security architecture.

The Agency's information processing capabilities have become an essential part of information exchanges at multiple levels, not only by providing support on the ground² but also by influencing EU policy-making.³ This may explain the co-legislators' willingness to increase Europol's mandate twice within a relatively short timeframe. Already under the 2016 Europol Regulation,⁴ the Agency was empowered to tackle more than 30 forms of serious crime and related criminal offences, including terrorism, drug trafficking, money laundering, human trafficking, sexual abuse and exploitation, trafficking in arms and ammunition.⁵ The 2022 recast Europol Regulation⁶ further strengthened the Agency's opportunities to cooperate with private parties, its role in research and innovation as well as its cooperation with third countries and the European Public Prosecutor's Office (EPPO).⁷ In addition, Europol's mandate to process information by way of analysis of large and complex datasets was further broadened.⁸ The recast Europol Regulation should be seen as an important step towards making the

¹ The origins of EU cooperation in the area of police and criminal law dates back to the 1976 'Trevi' Group. Established to address the challenge of terrorism in Europe, the group later expanded cooperation to tackle other forms of crime, such as drug trafficking and illegal immigration.

² Europol, 'Newsroom' (3 November 2023), at www.europol.europa.eu.

³ H Carrapiço and F Trauner, 'Europol and its Influence on EU Policy-Making on Organized Crime: Analyzing Governance Dynamics and Opportunities' (2013) *Perspectives on European Politics and Society* 357.

⁴ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

⁵ C Cîrlig (European Parliamentary Research Service), 'Europol: The EU Law Enforcement Cooperation Agency' (September 2019) at www.europarl.europa.eu.

⁶ Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022 amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation.

⁷ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

⁸ Proposal COM(2020) 796 final for a Regulation of the European Parliament and of the Council of 9 December 2020 amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role on research and innovation, 3.

Agency a central information hub in the EU Area of Freedom, Security and Justice (AFSJ) not only for the exchange of data analyses with national authorities for law enforcement purposes, but also as regards cooperation with other EU Agencies, third countries and private parties.⁹ Importantly, Europol strives to being involved in all relevant EU initiatives by leveraging its tailor-made expertise in the specific areas of its competence and utilizing its institutional autonomy and professional expertise.¹⁰

A long time has passed since Europol was dependent on receiving information from its national counterparts.¹¹ From a reliance on its national counterparts to provide it with necessary information to carry out its tasks, Europol developed analytical skills and knowledge to support national authorities.¹² Nowadays, the Agency appears to be inundated by data the national authorities transmit to it¹³ and while it might seem as if Europol cannot make use of all those data it receives, the expertise it developed during the years made it an important partner of many law enforcement authorities in the Member States.¹⁴

Furthermore, certain Member States proactively suggested more involvement of the Agency in technology foresight and innovation¹⁵ and, progressively, these developments led to the inclusion of Europol in areas beyond its initial mandate as the European Drug Unit and arguably even beyond the one under the Agency's previous founding act,¹⁶ eventually leading to the adoption of the 2022 recast Europol Regulation. The above developments may explain why Europol is involved in all areas covered in this Special Section and beyond, from large-scale IT systems¹⁷ and, in

⁹ On this, also see: S Tas, 'The Dangerous Increasing Support of Europol in National Criminal Investigations: An Additional Layer of Complexity' (2023) 14 *New Journal of European Criminal Law* 534.

¹⁰ M Deflem, 'Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective' (2006) 23 *Justice Quarterly* 336; Also see: H Carrapiço and F Trauner (n 3).

¹¹ M Busuioc and M Groenleer, 'Beyond Design: The Evolution of Europol and Eurojust' (Amsterdam Centre for European Law and Governance Working Paper Series 8-2011)

¹² D Hock and J Stigter, 'Europol: An Overwhelming Stream of Big Data' (2022) 92 *Revue Internationale De Droit Pénal* 19, 26.

¹³ E Ilbiz and C Kaunert, *The Sharing Economy for Tackling Cybercrime* (Springer 2023) 37. According to internal documents seen by The Guardian, Europol's cache contains at least 4 petabytes – equivalent to 3m CD-Roms or a fifth of the entire contents of the US Library of Congress. See: A Fotiadis, L Stavinoha, G Zandonini and D Howden, 'A Data "Black Hole": Europol Ordered to Delete Vast Store of Personal Data' (Guardian, 10 January 2022), at www.theguardian.com; also see: L Bertuzzi, 'EU Institutions Bolster Europol's Mandate for Data-Crunching Activities' (EURACTIV, 1 February 2022), at www.euractiv.com.

¹⁴ C Kaunert, S Leonard and I Yakubov, 'An Equal Fight: Strengthening Europol's Counterterrorism Mandate' (2018) *Friedrich-Ebert-Stiftung, International Policy Analysis* 7.

¹⁵ Proposal to establish a High-Level Expert Group on Access to Data (CM 1815/23) – Compilation of replies by delegations (Brussels, 20 March 2023), 3.

¹⁶ Regulation (EU) 2016/794 (n 4).

¹⁷ See the contribution by Napierlaski, forthcoming in the second part of this Special Section.

particular, the proposal of alerts in the Schengen Information System,¹⁸ the processing of PNR data,¹⁹ anti-money laundering (AML)²⁰ and cooperation between Financial Intelligence Units (FIUs), the Prüm II framework,²¹ and the removal of illegal content online such as terrorist propaganda or CSAM.²² Europol plays a pivotal role in all legislative texts and proposals. Often these topics are addressed in silos. This article seeks to address this gap in the literature by looking at the areas covered in this Special Section and Europol's involvement in all of them.

To that end, the article will provide an overview of the Agency's role in the different areas covered in the articles of the Special Section. It will thereby primarily focus on the complexity of Europol's involvement and how the intertwininess of the different areas may easily lead to a situation where information about an individual may be collected in seemingly disconnected fields that nevertheless establish a link in its analyses. The main objective of the assessment in this article is to demonstrate how the interwindiness of these different fields will make it difficult to exercise individual rights and challenge certain decisions being made based on the results of Europol's data analyses. Due to the obscurity in which data analyses are necessarily carried out in the law enforcement context, challenging those decisions remains difficult if not impossible. Therefore, additional avenues to ensure oversight of the operations remain essential.

One of Europol's tasks is the provision of information in form of data analytics to the Member States in order to assist in their criminal investigations. Because in a majority of cases, the analysed information includes personal data, data protection law may arguably one of the most tangible avenue for individuals to exercise their rights in terms of access to data about them, including ancillary rights (such as the right of rectification or the right to restrict processing). Therefore, this article will emphasise on the importance of data protection law as an important means to achieve accountability of EU Agencies such as Europol directly towards individuals.²³

Against this backdrop, Section I will provide a brief overview of the developments the Agency underwent during the past 25 years, and focus on the 2016 and 2022 Europol reforms. Thereafter, Section II will demonstrate, by way of assessing different legislative texts, reports, and strategic documents, Europol's role in the relevant policy areas covered by this Special Section. Section III will provide an insight into the future by taking into consideration the recently adopted legislative proposals

¹⁸ See S Tas, 'Europol and the Schengen Information System: A Dangerous "Unsupervised" Extension of Power' (2025) 10 *European Papers* 637.

¹⁹ See the contribution by Mendos, forthcoming in the second part of this Special Section.

²⁰ See the contribution by Karapatakis, forthcoming in the second part of this Special Section.

²¹ See N Amelung and H Machado, 'Dancing in the Dark: Policy Transformations Through Obfuscating Contestations in the Case of Prüm II' (2025) 10 *European Papers* 695.

²² See the contribution by Dunn, forthcoming in the second part of this Special Section.

²³ It needs to be noted that both political and financial accountability mechanisms exist with regard to the Agency.

that are that regulate Europol as an actor. The conclusion will recapitulate how different areas covered by this Special Section may be interconnected by Europol's way of analysing data from different crime areas to connect the dots between those areas. It will also highlight the pivotal and overarching role Europol plays in police and criminal justice cooperation which, when looking into each legal instrument separately, may not be as prominently visible. In addition, the article will outline some of the practical difficulties that exist in the exercise of individual rights and the supervision of Europol's data analyses.

2. From Member State dependency to EU information hub

2.1. The first steps towards Europol's emergence as an information hub

Prior to the establishment of the European Drug Unit, Europol's predecessor, in June 1993, already during the 1970s, several initiatives paved the way for the Agency's formation. In 1976, the so-called TREVI group that was established to address challenges related to terrorism in Europe comprised representatives of the interior and justice ministries from the 12 Member States of the then European Economic Community as an informal, intergovernmental structure.²⁴ By 1987, the Ministers of Justice and Internal Affairs were discussing a proposal to develop a network of National Drugs Intelligence Units (NDIUs) that was meant to coordinate the intelligence-gathering and dissemination of information on drug trafficking and drug-related crime.²⁵ Together with primarily national discussions on the possibility to establish a European police agency and first references to it in 1991, the Treaty of Maastricht codified these ideas.²⁶

Although the Europol Convention²⁷ was adopted in 1995, it was not until July 1999 that Europol commenced its activities.²⁸ However, during the first years of Europol's operational existence, the policy priorities were not represented in the legislation that followed. While the proposal for a Framework Decision on the principle of availability that was proposed in 2005 already foresaw Europol as an information hub and sought to introduce direct online access to available information for both

²⁴ C Cirlig (n 5) 2.

²⁵ R Woodward, 'Establishing Europol' (1993) 1 *European Journal on Criminal Policy and Research* 7.

²⁶ *Ibid.* 8.

²⁷ Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention).

²⁸ O Bures, 'Europol's Fledgling Counterterrorism Role' (2008) 20 *Terrorism and Political Violence* 498; Council of the European Union, 'Council conclusions on the creation and implementation of an EU policy cycle for organised and serious international crime' 3043rd Justice and Home Affairs Council meeting, Brussels, 8 and 9 November 2010, Brussels, Belgium; C Kaunert, 'Europol and EU Counterterrorism: International Security Actorness in the External Dimension' (2010) 33 *Studies in Conflict & Terrorism* 652.

Member States' law enforcement authorities as well as for Europol officers,²⁹ the Council Framework Decision on the Swedish initiative from 2006 mentioned Europol only marginally.³⁰

Europol was not conceived as an executive police body and hence has no coercive powers, such as the power to make arrests.³¹ This might explain the need for the Agency to develop its expertise in other areas. Europol's first steps towards developing into an EU information hub emerged with the occurrence of new cyber threats that increased after the proposal for a Framework Decision on the principle of availability was silently abolished due to its supposedly excessive information sharing between national and EU actors.³²

Nevertheless, Europol's potential role as central EU policing actor progressively became evident in key policy documents, such as the Hague Programme from 2005³³ and the Stockholm Programme from 2010.³⁴ The 2008 Council Conclusions on measures against cybercrime,³⁵ was the first initiative to establish a European Cyber Crime Centre (EC3). While Europol was merely invited to set up a network of police to improve knowledge sharing, the establishment of a European platform to enable the sharing of cybercrime information was still left to the Member States and the Commission.³⁶ Nevertheless, Europol became increasingly visible in that area and, in 2013, the EC3 was established as a sub-unit within the Agency.³⁷

²⁹ See: Proposal COM(2005) 490 final for a Council Framework Decision of 12 October 2005 on the exchange of information under the principle of availability, 2. Art 9(1) of the proposal states that Member States shall ensure that equivalent competent authorities of other Member States and Europol shall have online access to the information contained in electronic databases to which their corresponding competent authorities have online access.

³⁰ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union. The Swedish Initiative was put forward by the Kingdom of Sweden with a view to adopting a Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, in particular as regards serious offences including terrorist acts.

³¹ C Kaunert, "Without the Power of Purse or Sword": The European Arrest Warrant and the Role of the Commission' (2007) 29 *Journal of European Integration* 387 or C Kaunert (n 28).

³² J Saffert, 'Resolving Legal Conflicts between Data Access Investigative Measures and Data Protection Law in the EU. The Case for Quantitative Data and Balancing' (forthcoming PhD thesis) 89. Also see: V Mitsilegas, *EU Criminal Law* (2nd edition, Bloomsbury 2022).

³³ Council of the European Union, The Hague Programme: strengthening freedom, security and justice in the European Union (2005/C 53/01), 3 March 2005.

³⁴ European Council, The Stockholm Programme — An open and secure Europe serving and protecting citizens (2010/C 115/01), 4 May 2010.

³⁵ Council conclusions on a concerted work strategy and practical measures against cybercrime (2009/C 62/05), 27 November 2008.

³⁶ *Ibid.* point 2.

³⁷ E Ilbiz and C Kaunert (n 13) 272. See also: R Bossong, and B Wagner, 'A Typology of Cybersecurity and Public-private Partnership in the Context of the EU' in O Bure and H Carrapico (eds), *Security Privatization: How Non-Security Private Businesses Shape Security Governance* (Springer 2018).

The EU's activities in police and judicial cooperation in criminal matters were given new impetus with the entry into force of the Lisbon Treaty, which stipulated a high level of security through measures to prevent and combat crime as one of the Union's objectives.³⁸ The Lisbon Treaty not only abolished the pillar structure and granted the EU more competences to legislate in the area of police and criminal justice cooperation. Article 88 of the TFEU provided a legal basis for Europol's mandate under EU primary law.³⁹

The digitalisation of serious crime increasingly being committed online and thereby inevitably having a cross-border dimension also shifted the role and importance of Europol.⁴⁰ The expertise it had built up in a forward thinking way during the years when it was still very much dependent on the willingness of national authorities to share information gathered at domestic level was starting to pay off.⁴¹ Europol became a sought-after stakeholder that was able to leverage its expertise from primarily collaboration and sharing towards becoming the EU's hub for innovation for policing solutions.⁴² The Agency became the central intermediary between public and private stakeholders,⁴³ a development that was certainly propelled through an increasing reliance on private actors in criminal investigations. Over time, a networking concept

³⁸ Art 67(1) of the Treaty on the Functioning of the European Union (TFEU).

³⁹ C Brière, 'Cooperation of Europol and Eurojust with External Partners in the Fight Against Crime: A Legal Appraisal' in HCH Hoffmann, E Vos and M Chamon (eds), *The External Dimension of EU Agencies and Bodies* (Edward Elgar 2019) 59.

⁴⁰ S Gless and T Wahl, 'A Comparison of the Evolution and Pace of Police and Judicial Cooperation in Criminal Matters: A Race Between Europol and Eurojust?' in C Brière and A Weyembergh (eds), *The Needed Balances in EU Criminal Law: Past, Present and Future* (Hart Publishing 2018).

⁴¹ A De Moor and G Vermeulen, 'The Europol Council Decision: Transforming Europol into an Agency of the European Union' (2010) 47 *Common Market Law Review* 1089; K Lingenfelter and S Miettinen, 'Obstacles to Supranational Operational Police Powers in the European Union: Europol Reform and the Construction of Trust between National Police Authorities' (2021) 28 *Maastricht Journal of European and Comparative Law* 182; N Vavoula, '(Covert) Surveillance of Foreign Terrorism Fighters via the Schengen Information System (SIS): Towards Maximum Operationalisation of Alerts and an Enhanced Role for Europol' (2023) 14 *New Journal of European Criminal Law* 206; A Weyembergh and G Theodorakakou, 'The Role of Europol and Eurojust in Countering the Threat of FTFs: An Evolving Mandate' (2023) 14 *New Journal of European Criminal Law* 157; Also see D Drewes and V Miladinova, 'The BIG DATA Challenge: Impact and Opportunity of Large Quantities of Information under the Europol Regulation' (2017) 33 *Computer Law & Security Review* 299.

⁴² Europol, 'EU Innovation Hub for Internal Security' (10 August 2023), at www.europol.europa.eu; C De Bolle, 'The Role of Europol in International Interdisciplinary European Cooperation' (2020) 19 *European Law Enforcement Research Bulletin* 19.

⁴³ R Bossong, and B Wagner (n 37); Also see H Carrapiço and A Barrinha, 'The EU as a Coherent (Cyber) Security Actor?' (2017) 55 *Journal of Common Market Studies* 1254.

that has been described as ‘Uberisation’⁴⁴ developed as a collaboration model that follows an integrated data management approach between public and private actors rather than one that aims at accumulating data received from national authorities only.⁴⁵

At the same time, Europol’s role became more prominent, allowing it to have a presence in many legislative instruments in the field of police and judicial cooperation in criminal matters. Consequently, all areas discussed in this Special Section are, in one way or another, interconnected through the role of Europol. Just like its very own *modus operandi*, collaboration, sharing and networking, the Agency connects the different areas that might otherwise seem separated from each other. And similar to its data environment, in which Europol may connect links between criminal activity, suspicions or otherwise hypothetically associated individuals, the Agency interconnects different areas of EU policy and law making by being involved not only as a crucial intermediary but often as one of the central actors in police cooperation at EU level.

In order to develop into the EU’s criminal intelligence information hub, the Agency established a complex and sophisticated data environment, existing of different systems.⁴⁶ Launched in 2005, the Europol Information System (EIS), Europol’s central criminal information and intelligence database, covers all of its mandated crime areas. The data in the EIS is stored within different online ‘entities’, which can be linked to each other in different ways in order to create a structured picture of criminal cases.⁴⁷

Designated users in the national authorities of the Member States may query the EIS and may use the Secure Information Exchange Network Application (SIENA) for follow-up exchanges via the Europol National Units in case of hits. The entity that inserted the data into the EIS is responsible for data accuracy and reliability, is to ensure the storage limitation of the data and must guarantee that the data inserted into the system are up to date. The inserting authority is the so-called owner of the data and may restrict access to the information provided to the system, so that the designated EIS users in the Member States may not always find the same information when running a query in the system. In those cases, the owner of the data is notified that a search was carried out and may contact the querying user to share the relevant and sought for information.⁴⁸ How far Europol staff members and additional Europol

⁴⁴ R Wainwright and F J Cilluffo, ‘Responding to Cybercrime at Scale: Operation Avalanche – A Case Study’ (2017) *Center for Cyber and Homeland Security* 7.

⁴⁵ F König, ‘Big Data, 5G. and AI: How Europol could Help von der Leyen Achieve her Goals’ (Hertie School Jaques Delors Centre Policy Paper 2020).

⁴⁶ European Court of Auditors Special Report, ‘Europol Support to Fight Migrant Smuggling: A Valued Partner, but Insufficient Use of Data Sources and Result Measurement’ (Luxembourg 2021) 26, point 47.

⁴⁷ Europol, ‘Europol Information System (EIS)’ (2021), at www.europol.europa.eu.

⁴⁸ *Ibid.*

partners have access to restricted data remains unclear. In addition, the responsibilities attached to the data ownership after Europol used the information for its own analyses may be difficult to allocate.

Besides the EIS and SIENA, the Europol Analysis System (EAS) as an operational information system hosts data that Europol received from its stakeholders to manage information centrally and ensures the use of a wide range of analytical tools to apply investigative capabilities as effectively as possible.⁴⁹

Operational 24/7, Europol's Operational Centre is responsible for handling all incoming information⁵⁰ via the constant flow of data between Europol and its operational partners, assesses the data to be included in Europol databases, maintains a centralised cross-checking service against all existing data and produces analytical reports whenever hits are found in crosschecks.⁵¹

2.2. Two decisive changes to Europol's founding acts

Following the Paris terrorist attacks, the 2016 Europol Regulation was adopted and entered into force on 1 May 2017.⁵² The Regulation enabled the Agency to enhance information sharing with its national counterparts as well as with private parties and to pave the way to making Europol the EU's primary information hub. It abandoned the so-called silo-based approach that separated processing operations in accordance with the databases and work files, and replaced it by a list of legitimate purposes for which Europol could process the data collected to allow for the linkage of information from different sources and discover correlations.⁵³ The Regulation introduced a technology-neutral approach to data management and processing that rendered the analyses more flexible than the previous regime regulated by the Europol Council Decision. Instead of references to the different information processing systems in which the processing took place previously, the 2016 Regulation laid down the purpose(s) for which data could be processed.⁵⁴ Thus, while processing of data by Europol had formerly been system-specific (indicating which data could be processed in which system), under the 2016 Europol Regulation, information processing

⁴⁹ Europol, 'Intelligence Analysis' (2017), at www.europol.europa.eu.

⁵⁰ Europol, 'Europol Programming Document 2023-2025' (2022), at www.europol.europa.eu 37.

⁵¹ Europol, 'Operational Centre' (2021), at www.europol.europa.eu.

⁵² E Bernabe, 'A Central Counterterrorism Coalition: An Analysis of Intelligence Sharing and the Challenges it Faces in the European Union' (2023) 32 *Minnesota Journal of International Law* 254. On the Regulation's predecessor, see: E Disley, B Irving, W Hughes and B Patrui, 'Evaluation of the Implementation of the Europol Council Decision and of Europol's Activities' (RAND Europe 2012) *Technical Report* 47.

⁵³ F Coudert, 'The Europol Regulation and Purpose Limitation: From the "Silo-Based Approach" to ...What Exactly? (Part I)' (2017) 3 *European Data Protection Law Review* 313; and F Coudert, 'The Europol Regulation and Purpose Limitation: From the "Silo-Based Approach" to ...What Exactly? (Part II)' (2017). Also see, N Vavoula and V Mitsilegas, 'Strengthening Europol's Mandate. A Legal Assessment of the Commission's Proposal to Amend the Europol Regulation' (Study for the LIBE Committee 2021) 18.

⁵⁴ *Ibid.* 301.

started to depend on the purpose for which data could be processed.⁵⁵ To implement this change, the Agency moved away from its existing separate systems to an integrated, overarching, central data repository and operational environment.⁵⁶

Furthermore, Article 18(2)(a) of the 2016 Europol Regulation allowed the Agency to engage in data mining, by performing ‘cross-checking aimed at identifying connections or other relevant links between information’ regarding persons who are suspected of having committed, who were convicted of, or against whom there are factual indications to believe that they will commit a crime.⁵⁷ Under Article 18(2)(b) and (c), Europol was to process personal data for analyses of strategic and thematic nature and for the purpose of operational analyses.⁵⁸

The 2016 Europol Regulation could thus be viewed as a mandate setting instrument as it introduced a number of substantive and procedural changes for the work of Europol: the systems used by the Agency became interoperable or interconnected, and the modalities of processing carried out by Europol started to be defined by the purposes such as cross-checking, strategic/thematic analysis/operational analysis/facilitating information exchange. There was no longer a need of duplication of datasets in different systems, but only one dataset to be used in an integrated data management concept, so-called data lakes. In addition, the processing of data moved at the centre of Europol’s activities, and allowed it to maintain that its operational needs necessitate a tailor-made data protection regime that would allow sufficient flexibility for the Agency to carry out its tasks.⁵⁹ While arguably, coupled with the restraint of the Agency emerging from the reliance on Member States’ willingness to share data, this tailor-made regime provided for a robust data protection framework, it was not aligned with the rules applicable at national level under Directive 2016/680 (Law Enforcement Directive, (LED)).⁶⁰ In addition, the EU Data Protection Regulation (EUDPR)⁶¹ that applies to the processing of personal data carried out by EU institutions, bodies, offices

⁵⁵ Arts 18 and 19 of Regulation (EU) 2016/794 (n 4).

⁵⁶ European Court of Auditors Special Report, ‘Europol Support to Fight Migrant Smuggling: A Valued Partner, but Insufficient Use of Data Sources and Result Measurement’ (Luxembourg 2021).

⁵⁷ Cf. T Quintel, ‘The Impact of Interoperability on the Processing of (Biometric) Data of Third Country Nationals by Europol’ (2018) 101 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 332.

⁵⁸ Art 18 (2)(b) and (c) of Regulation (EU) 2016/794 (n 4).

⁵⁹ D Drewer and V Miladinova (n 41) 300.

⁶⁰ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016].

⁶¹ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) no 45/2001 and Decision no 1247/2002/EC.

and agencies and entered into force in December 2018, would only apply to the processing of operational personal data by Europol after the 2022 reform.

2.3. The Recast Europol Regulation

On 20 December 2020, the Commission proposed amendments to the Europol Regulation.⁶² The recast Europol Regulation implemented changes to further strengthen the data protection framework applicable to the Agency.⁶³ Most of the novel provisions represent an alignment with the rules at national level and those applicable to other EU Agencies, as they already existed in the data protection instruments that apply to national authorities as well as to EU law enforcement Agencies such as Eurojust and the EPPO.⁶⁴ Those existing rules apply to the remaining EU bodies, offices and agencies that are subject to the *lex generalis* framework under the EUDPR in addition to their standalone data protection provisions, or the legal instruments that have been aligned with the rules under the LED within the revision of data protection rules applicable to former third pillar instruments.⁶⁵

In a nutshell, the recast Europol Regulation introduced new opportunities for the Agency to process large and complex datasets, put forward a strengthened mandate for Europol to cooperate effectively with private parties,⁶⁶ third countries and other EU Agencies, and reinforced Europol's role in research and innovation.⁶⁷ The provisions on research and innovation signify additional possibilities for Europol to engage in broadly defined processing.⁶⁸

⁶² Proposal COM(2020) 796 final (n 8). On an in-depth analysis of the proposal, see N Vavoula and V Mitsilegas (n 53).

⁶³ The proposal emphasized five provisions that (allegedly) contribute to such strengthening of data protection standards, see Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/794 (n 4), as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role on research and innovation, 14.

⁶⁴ Although it needs to be mentioned that the EDPS has no power to impose administrative fines against Europol or the EPPO.

⁶⁵ Communication COM(2020)262 final from the Commission to the European Parliament and the Council of 24 June 2020, Way forward on aligning the former third pillar *acquis* with data protection rules; and regarding the current developments in terms of alignment: European Parliament Legislative Train Schedule, *Alignment of relevant Union law enforcement rules with regard to data protection*, "A New Push for European Democracy" www.europarl.europa.eu.

⁶⁶ C Riehle, 'Study on Data Exchange between Europol and Private Parties' (eucrim, 20 November 2020), at eucrim.eu.

⁶⁷ S Eskens, 'New and Extensive Data Processing Powers Proposed for Europol' (European Law Blog, 30 July 2021), at www.europeanlawblog.eu.

⁶⁸ T Quintel, 'The EDPS on Europol's Big Data Challenge in Light of the Recast Europol Regulation' (2022) *EDPL* 90–102. As the EDPS emphasized in his Opinion on the European Strategy of Data, the provisions are too broadly defined and relevant data protection principles may not be fully taken into account. See European Data Protection Supervisor, Opinion 4/2021 of 8 March 2021 on the Proposal for Amendment of the Europol Regulation 3, para. 33. See also N Vavoula and V Mitsilegas (n 53) 41.

Therefore, the recast Europol Regulation, while introducing data protection rules similar to those applicable to comparable authorities, offers a whole new range of processing capabilities to the Agency, which will be mentioned in the subsequent sections of this contribution.⁶⁹

3. Europol's involvement in different areas of EU police and judicial cooperation in criminal matters

3.1. EU large-scale information systems and interoperability

Since 2016, tremendous developments have taken place in terms of large-scale information systems that were set up for internal security, migration and asylum purposes both at the external borders and within the Schengen Area. From what were initially only three databases – the Schengen Information System, the Visa Information System and Eurodac – the Union established a common European IT architecture with three entirely new databases: the Entry/Exit System, the European Travel Information and Authorization System and the European Criminal Records Information System for Third Country Nationals and stateless persons. Moreover, all of the founding acts of the existing databases were revised in order to accommodate additional objectives, store further categories of personal data, grant access to additional authorities (both at national and at EU level) and to upgrade the systems in terms of general functionalities. In addition, the AFSJ databases are supposed to increasingly employ algorithmic matching techniques and pre-vetting analyses. In a final step, all of the operational and yet -to -be- established systems are supposed to improve their capacities by inter-exchanging the data they store.

While the EU databases were initially established in so-called silos and compartmentalized according to their individual purposes, they are now to become interconnected, or interoperable. Full interoperability was to be established by the end of 2023. That initial date, however, was postponed and the interoperable system might now be operational only after 2025.⁷⁰ Interoperability will connect all EU databases for borders, migration and security and is to ensure that these underlying systems ‘talk’ to each other. Thus, when issuing a query in the centralized system, end users will be able to access information from all connected databases in accordance with their access rights and restrictions in the underlying databases.

One of the objectives of interoperability is to facilitate and streamline access by national and EU (law enforcement) Agencies to information stored in EU large-scale

⁶⁹ Europol, ‘European Migrant Smuggling Centre – EMSC. Tackling the Organised Criminal Groups Profiting from Migrant Smuggling’ (2022), at www.europol.europa.eu.

⁷⁰ In 2023, the system was to be operational by the end of 2024. However, that date seems rather ambitious. See Working Party on Frontiers, ‘Non Paper on EES-ETIAS Decoupling: A High Level Analysis’ (3 May 2023) at data.consilium.europa.eu.

information systems that were not exclusively established for law enforcement purposes. The term ‘streamlining’ is the notion used to describe the ‘aligning’ and ‘simplifying’ of the conditions for providing access across various systems. Ultimately, the interoperable system is also to be connected to certain Europol data, which may be queried through the European Search Portal, one of the interoperable components.⁷¹

Europol’s increasing opportunities for processing Third Country Nationals’ personal data has gone hand in hand with the revision of operational and the establishment of new EU large-scale information systems. Europol has progressively engaged in the processing of Third Country Nationals’ personal data and is inter alia responsible for operational and strategic support in intelligence-led investigations, analysis and forensics related to migrant smuggling.⁷² In 2017, Europol ‘guest officers’ were deployed to designated hot spots for the carrying out of secondary security checks on Third Country Nationals.⁷³ In that regard, the establishment of the European Migrant Smuggling Centre (EMSC) was a further step in deepening the sharing of intelligence between Europol and other authorities involved in border control and migration management.⁷⁴ Within the scope of the EMSC, Europol is to support the tackling of cross-border crime such as migrant smuggling and trafficking in human beings, thereby exchanging personal data with Member State authorities and additional EU bodies. A legislative proposal from November 2023⁷⁵ aims at establishing a European Centre Against Migrant Smuggling which is to reinforce Europol’s support to the prevention and combatting of migrant smuggling and trafficking in human beings.⁷⁶

In addition to the activities of the EMSC, the EU Internet Referral Unit (IRU), which is based at Europol’s European Counter Terrorism Centre (ECTC) and will from part of the discussion in Section 4, monitors online content related to migrant

⁷¹ The European Search Portal will be composed of a central infrastructure that will enable the simultaneous querying of the underlying AFSJ databases as well as of Europol data and potentially INTERPOL databases, see Art 6(2) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818.

⁷² Europol (n 69). The EMSC identified five so-called high-value targets (HVTs) in 2019, all of whom were arrested. With EMSC’s support, Member States arrested 598 people as part of operations on action days. Europol does not specify the classification of the arrested persons (e.g. high-ranking members or other people at an operational level, such as lorry drivers for organized crime groups). In 2021, Europol identified 21 HVTs. See European Court of Auditors Special Report (n 56) and Europol, ‘Europol in Brief’ (2022), at www.europol.europa.eu.

⁷³ Europol, ‘Consolidated Annual Activity Report 2017’ (2018) 51 www.europol.europa.eu

⁷⁴ T Quintel, *Data Protection, Migration and Border Control. The GDPR, the Law Enforcement Directive and Beyond* (Hart 2022). The EMSC was merged with a drugs unit and an organised crime unit into European Serious and Organised Crime Centre when the European Financial and Economic Crime Centre (EFECC) was established. See Europol, ‘Consolidated Annual Activity Report 2019’ (2020) 13 www.europol.europa.eu.

⁷⁵ Proposal COM (2023) 754 final for a Regulation of the European Parliament and of the Council of 28 November 2023 on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol’s support to preventing and combating such crimes and amending Regulation (EU) 2016/794.

⁷⁶ *Ibid.* 4.

smuggling and referring websites that are connected to migrant smuggling criminal networks to the relevant online service providers for removal.⁷⁷

With the Interoperability regulations, the Agency was given a bigger role so as to be able to search, access and retrieve data from both the EU information systems and the interoperable components. Even before the Interoperability Regulations were proposed, Europol's access to the EU information systems had become self-evident, as demonstrated in Napieralski's article in this Special Section. Both the Interoperability Regulations and the recast Europol Regulation contribute to the Agency's new role in the context of migration management and border control. The recast Regulation broadened the Agency's mandate to enable it to analyse large and complex datasets and leaves sufficient flexibility to allow the Agency to perform substantive processing activities that are laid down in sector-specific legislation. The only provision that specifically refers to the EU large-scale information systems in the Europol Regulation itself is the possibility for it to propose the entering of so-called information alerts in the Schengen Information System.⁷⁸ The remaining tasks of Europol relating to EU large scale information systems and interoperability are scattered in the constituting acts of the (highly complex) framework of interoperable EU information systems.

Europol's role regarding the Schengen Information System was progressively strengthened over the years and in 2019, steps were taken to enable Europol's searches in the Schengen Information System⁷⁹ and its access to the Visa Information System.⁸⁰ The data in the Visa Information System will be automatically processed by using the interoperability European Search Portal to query the remaining systems, including Europol data.⁸¹ In addition, Europol will be represented in the Visa Information System Screening Board.⁸²

The European Travel Information Authorisation System allows for the pre-vetting of Third Country Nationals by matching their personal data against screening rules and a watch-list that will be fed with data from Europol's analyses and consist of data relating to people who are suspected of having committed or taken part in a terrorist offence or other serious criminal offence. For purposes of follow-up action with regard

⁷⁷ Europol (n 74) 23. Also see: European Commission, 'Migrant Smuggling' (18 October 2024), at home-affairs.ec.europa.eu.

⁷⁸ Art 4(1)(iv)(t) of Regulation (EU) 2022/991.

⁷⁹ Also see N Vavoula (n 41) or T Wahl, 'New Legal Framework for Schengen Information System' (eucrim, 18 February 2019), at eucrim.eu.

⁸⁰ Europol (n 74) 5.

⁸¹ Regulation (EU) 2021/1134 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EC) No 810/2009, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861, (EU) 2019/817 and (EU) 2019/1896 of the European Parliament and of the Council and repealing Council Decisions 2004/512/EC and 2008/633/JHA, for the purpose of reforming the Visa Information System, arts 9a(3)(f) and 22b(2)(f).

⁸² Art 9(k)(1) of Regulation (EU) 2021/1134.

to hits in the European Travel Information Authorisation System watch list, Europol will issue an opinion where data was entered by its staff into the watch list.⁸³ With the European Travel Information Authorisation System and Visa Information System-recast mechanisms becoming operational in 2024-25, Europol prepares to have in place a 24/7 service that is expected to provide swift follow-up and reasoned opinions on hits of visa or travel authorisation applications against Europol data.⁸⁴

In practical terms, Europol may use the opportunities made available by the interoperability of EU databases in order to occupy a travel intelligence function and to further expand the use of biometrics.⁸⁵ In 2020, the so-called Future Group on Travel Intelligence and Border Management, an informal and independent gathering of experts discussing the future of travel intelligence and (intelligent) border management, was set up.⁸⁶ Europol's role was to share and disseminate the Group's findings and to explain the possibilities and lessons learned to all stakeholders. The Group's final report, dated March 2022, highlighted the new cooperation opportunities that the new architecture of EU information systems for borders, migration and security provides. In the Report, Europol and the European Border and Coast Guard Agency suggest ways to merge the capacity of different authorities at national and EU level in order to maximize operational benefits. In particular, the agencies propose making it easier for law enforcement and border authorities to proactively share strategic information, trends and patterns regarding Third Country Nationals. Although the Group was dissolved before the end of 2022, Europol maintained that the Group establishes comprehensive study material for the next decade, to propose improvements in relation to the future of Travel Intel and external border management.⁸⁷

Europol's future objectives in relation to travel intelligence will be to build-up its capabilities in that area towards a fully-fledged European Travel Intelligence Centre (ETIC)⁸⁸ and to cooperate with the relevant EU agencies and national authorities to implement its roadmaps related to travel intelligence and to EU systems interoperability. In addition, the Agency aims at taking up a more prominent role through an improved information management architecture with fully integrated data management and advanced capabilities.

⁸³ See, for instance art 9(e)(4) of Regulation (EU) 2021/1134 and art 29 of Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226.

⁸⁴ Europol Programming Document 2022–2024, The Hague, 22 December 2021, available at www.europol.europa.eu.

⁸⁵ Europol (n 69) 4.

⁸⁶ Answer provided to Parliamentary question - E-001969/2022(ASW) by Europol (EDOC# 1244976) on 8 August 2022.

⁸⁷ *Ibid.*

⁸⁸ Europol (n 84) 42.

3.2. PNR Data

As explained by Mendos-Kuskonmaz in this Special Section, under the so-called PNR Directive, Passenger Information Units (PIUs) are responsible for conducting an initial assessment of PNR data in form of operational processing. PIUs process PNR data for different purposes, inter alia, to carry out an assessment of passengers to identify persons who represent a security risk and require further examination, to respond to requests from competent law enforcement authorities and to analyse PNR data for the purpose of updating or creating new criteria to be used in the passenger assessment in order to identify any persons who may be involved in a terrorist offence or serious crime.⁸⁹ Such processing could be regarded as proactive preventive policing by means of algorithmic analysis of large datasets received by private actors.⁹⁰ The results of such analyses are forwarded to national law enforcement authorities.⁹¹

Access to the EU PNR data for further use is not only granted to PIUs and national law enforcement authorities, but also to Europol: under the PNR Directive, Member States are to, through their PIUs, exchange the PNR data that they receive amongst each other and with Europol, where this is deemed necessary for the prevention, detection, investigation or prosecution of terrorist offences or serious crime.⁹² In particular, under Article 10(1) of the PNR Directive, Europol is entitled to request both PNR data and the results of the processing carried out by the PIUs. For that purpose, the Agency may submit, on a case-by-case basis, an electronic request to the PIU of any Member State through the Europol National Unit for the transmission of specific PNR data or the result of processing those data. For the information exchanges under Article 10, the Europol SIENA must be used.⁹³ By 2020, a majority of the PIUs in the EU Member States used SIENA for their communications with the PIUs of other Member States.⁹⁴ Different projects were carried out in order to facilitate information exchanges between the national PIUs and Europol. For instance, from February 2016 to June 2017, a pilot programme was implemented

⁸⁹ Art 6(2) of Directive (EU) 2016/681; Also see J Wojnowska-Radzińska, 'Legitimizing Pre-Emptive Data Surveillance under the EU Law: The Case of the PNR Directive' (2021) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 115, 120.

⁹⁰ D Korff, 'Does the EU PNR Directive Pave the Way to Mass Surveillance in the EU? (Soon to be Decided by the CJEU...)' (Fundamental Rights European Experts Group, 10 December 2021), at free-group.eu.

⁹¹ Commission Staff Working Document SWD(2020) 128 final Accompanying the Document Report from the Commission to the European Parliament and the Council of 24 July 2020 On the review of Directive 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

⁹² Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, art. 4(2)(b) and recital 23.

⁹³ Art 10(4) of Directive (EU) 2016/681.

⁹⁴ Commission Staff Working Document SWD(2020) 128 final (n 91) 34.

to explore the possibilities of fostering the exchange of PNR data between the PIUs in the Member States and Europol.⁹⁵ In addition, Europol provides support to the national PIUs to carry out operational processing and analyses of PNR. Europol's role has another dimension; because the use of pre-determined criteria is more demanding from an operational, analytical and technical point of view, it is still at an early stage of implementation in some Member States. Against that background, Since January 2020, Europol provides assistance to the Member States in the development of this processing method. Such assistance is offered through Europol's Travel Intelligence Task Force. The latter centralises, analyses and distributes relevant information and intelligence on patterns, trends and modus operandi, which are then used by the national PIUs to develop targeting rules.⁹⁶

In addition, Europol offers training and advice to national PIUs that include best practices in investigations and intelligence-gathering/sharing and it supports the co-ordination of cross-border operations and investigations. Consequently, Europol acts as a central point of contact for PIUs to exchange information with each other and with law enforcement agencies across the EU and in that role it can be assumed to have a first-class overview of the work that is carried out by the different PIUs in the Member States.⁹⁷

A future objective of Europol foresees hosting the Secretariat for the informal working group on PNR and to provide further support to the connectivity and data exchange among the PIUs in the Member States.⁹⁸ In addition, the Europol Operational Centre will put an increasing emphasis on the implementation of Europol's role in the EU PNR within the framework of its travel intelligence operations⁹⁹ to develop into a fully-fledged European Travel Intelligence Centre (ETIC) and to complement the work of Frontex.¹⁰⁰ Furthermore, the Agency aims at improving the use of PNR data in investigations related to the trafficking of human beings in order to identify victims and suspects and to further develop effective targeting rules related to trafficking situations.¹⁰¹

3.3. AML

Financial information can play a key role in tackling Money Laundering (ML), Terrorist Financing (TF) and combatting serious crime more generally. The latter includes

⁹⁵ *Ibid.* 8.

⁹⁶ *Ibid.* 12.

⁹⁷ S Roda, 'Secondary Access to European Passenger Name Records' (2019) *Jusletter IT*.

⁹⁸ Europol (n 84) 43.

⁹⁹ *Ibid.* 40.

¹⁰⁰ *Ibid.* 42.

¹⁰¹ *Ibid.* 55.

different types of serious crime, for instance, child sexual exploitation,¹⁰² such as online live streaming of child sexual abuse,¹⁰³ but also migrant smuggling,¹⁰⁴ corruption or VAT fraud.¹⁰⁵ Tracing back a financial payment can be essential in investigations to link it to the perpetrators of a serious crime and assist in their prosecution, and cooperation in that regard may be crucial due to the cross-border nature of such crime.

Financial Intelligence Units (FIUs) analyse and exchange information concerning suspicious transactions, serving as intermediaries between the private sector and law enforcement authorities. Similarly to PIUs, FIUs thus present a filtering instance between private actors and law enforcement. However, other than PIUs, which are also involved in the investigation of crime, the mandate of FIUs is limited to financial intelligence. Consequently, the sole purpose of FIUs is to collect evidence where money laundering, associated predicated offences or financing of terrorism is suspected, - before the start of any preliminary proceedings or criminal investigation.¹⁰⁶

As explained in Karapatakis' article of this Special Section, during the past years, the EU's AML framework has progressively been reformed, and the latest legislative initiatives on fighting AML and TF were adopted in April 2024.¹⁰⁷ Preventing and fighting money laundering and the financing of terrorism were top priorities of the

¹⁰² Please note that a difference must be made between child sexual exploitation and child sexual abuse as referred to in Section 4.1 of this contribution. Child sexual abuse means 'the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions. It includes sexual slavery, pornography, child abuse and sexual assault. On the other hand, sexual exploitation is defined as an actual or attempted abuse of someone's position of vulnerability (such as a person depending on you for survival, food rations, school, books, transport or other services), differential power or trust, to obtain sexual favours, including but not only, by offering money or other social, economic or political advantages. It includes trafficking and prostitution. See UNHCR, 'What Is Sexual Exploitation, Abuse and Harassment?', at www.unhcr.org.

¹⁰³ The use of credit cards to purchase child sexual exploitation material (CSEM) online has been virtually eliminated globally and websites offering CSEM have had to find alternative payment schemes for their illicit businesses. Emerging payment methods are, for instance, Cryptocurrency such as Blockchain technology. See, The International Centre for Missing & Exploited Children and Standard Chartered, 'Cryptocurrency and the Trade of Online Child Sexual Abuse Material' (February 2021), at cdn.icmec.org. According to IWF, the last several years have seen the greatest overall rise of darknet markets engaged in the sale of CSEM; See IWF Annual Report 2019, at www.yumpu.com. Please note that this section will focus on livestreams and not include Cryptocurrencies.

¹⁰⁴ 50th Meeting of the EU Financial Units' Platform – Virtual Meeting – 7 December 2021, 10:00 – 17:00, 2, available at ec.europa.eu.

¹⁰⁵ Europol, 'European Financial and Economic Crime Centre – EFECCE' (2023), at www.europol.europa.eu.

¹⁰⁶ European Data Protection Supervisor, EDPS Decision of 19 December 2019 relating to the technical administration of fiu.net by Europol point 3.13 and 3.14. This also has an impact on the data protection framework applicable to FIUs. Other than the author of this contribution has argued in previous articles, FIUs should apply the GDPR to their processing operations and are not subject to the LED.

¹⁰⁷ See, European Parliament Press Release, 'New EU Rules to Combat Money-Laundering Adopted' (24 April 2024), at www.europarl.europa.eu and 'New EU Measures Against Money Laundering and Terrorist Financing' (28 March 2023) at www.europarl.europa.eu.

EU Security Strategy for 2020-2025,¹⁰⁸ which might explain the fast developments regarding legislative measures to further regulate anti-money laundering and counter terrorism financing. As a result, in 2020, the Commission put forward an Action Plan to establish an EU policy on combatting money laundering¹⁰⁹ and shortly afterwards, proposed an AML Package in July 2021, which included the setting-up of a new EU Anti-Money-Laundering Authority (AMLA).¹¹⁰

Europol cooperates with FIUs in a variety of ways to support the prevention and detection of financial crime, but also to detect other serious crime such as terrorist financing and child sexual exploitation.¹¹¹ It works closely with national FIUs to facilitate the exchange of information and intelligence related to such crime and supports FIUs by providing analytical and operational support, to identify patterns and trends. In addition, Europol coordinates joint investigations and operations with national FIUs to target and disrupt criminal networks involved in financial crime. Furthermore, Europol works on the development of common standards and practices for FIUs and provides trainings to FIUs,¹¹² including bilateral meetings with FIUs on how to better cooperate.¹¹³

In 2020, Europol's European Financial and Economic Crime Centre (EFECC) was established to coordinate EU-wide investigations into money laundering and financial crimes more generally. The EFECC is supposed to assist national law enforcement authorities with analytical support, operational coordination, as well as

¹⁰⁸ Communication COM(2020) 605 final from the European Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, and the Committee of the Regions of 24 July 2020 on the EU Security Union Strategy.

¹⁰⁹ Communication (2020/C 164/06) from the Commission of 13 May 2020 on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing.

¹¹⁰ Proposal COM(2021) 420 final for a Regulation of the European Parliament and of the Council of 20 July 2021 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing; Proposal COM(2021) 423 final for a Directive of the European Parliament and of the Council of 20 July 2021 on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849; and Proposal COM(2021) 421 final for a Regulation of the European Parliament and of the Council of 20 July 2021 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010; See European Parliament Press Release, 'New EU Rules to Combat Money Laundering Adopted' (24 April 2024), at www.europarl.europa.eu; Also see T Quintel, 'Data Protection Rules Applicable to Financial Intelligence Units: Still No Clarity in Sight' (2022) 23 *ERA Forum* 23.

¹¹¹ See, for instance, Minutes of the 51st meeting of the EU FIUs' PLATFORM 16 March 2022, 09:30 – 17:30, 7, available at ec.europa.eu.

¹¹² See, for instance, Minutes of the 38th Meeting of the EU FIU PLATFORM 12 December 2018, available at ec.europa.eu.

¹¹³ Minutes of the 51st meeting of the EU FIUs' PLATFORM, see (n 111) 8.

with training and capacity-building programs. In addition, the Centre currently expands the Agency's responsiveness and operational performance in the areas of fraud, money laundering, asset recovery, corruption and counterfeiting.¹¹⁴

Between 2016 and 2021, Europol hosted FIU.net, a decentralised information exchange network designed to support national FIUs.¹¹⁵ The Agency managed the system centrally and had technical access to all servers in the network. In practice, this meant that while some FIUs were not even able to delete certain data, only Europol was technically capable of performing such operations.¹¹⁶ Because not all information processed by FIUs fell within Europol's mandate, but the Agency nevertheless had access to it, the EDPS considered that Europol would not be permitted to carry out the technical administration of FIU.net. In a Decision from December 2019, the EDPS decided that Europol did not have a sufficiently grounded legal basis to administer the network and imposed a ban on the processing.¹¹⁷ By December 2021, FIU.net was migrated to the Commission's Directorate-General for Financial Stability, Financial Services and Capital Markets Union.¹¹⁸ Thus, while exchanges of information between FIUs and Europol take place via FIU.net, exchanges between law enforcement authorities and Europol take place via SIENA.¹¹⁹ Such differentiation indicates the separation of tasks and powers between FIUs and national law enforcement authorities and endorses it in the information exchange channels with Europol: while intelligence is shared in FIU.net and in accordance with the GDPR applicable to FIUs, law enforcement information is exchanged via SIENA by competent law enforcement authorities that are subject to the rules under the LED. The preferred option to use FIU.net instead of SIENA for exchanges of information between FIUs and Europol was also expressed in an agreement and confirmed in a meeting of the FIU platform.¹²⁰

Europol argued that, because its recast Regulation provides new possibilities to process personal data for longer periods following the reform of the rules on data categorisation,¹²¹ this could serve as a justification to interconnect SIENA and

¹¹⁴ Europol, 'Economic Crime, Economic Crime Team, EFECC Operations' (2023), at www.europol.europa.eu.

¹¹⁵ European Data Protection Supervisor, EDPS Annual Report 2021, 87; Also see 49th Meeting of the EU Financial Units' Platform – Virtual meeting – 9 September 2021, 3, available at ec.europa.eu.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* points 4.9 to 5.8. The EDPS suspended the ban for a period of one year, counting from the day of this decision, in order to allow Europol to ensure a smooth transition of the technical administration of FIU.net to another entity.

¹¹⁸ See (n 104).

¹¹⁹ Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA, art 13(1)(a) and (b) - on the exchange of information with Europol, distinguish between FIU.net and SIENA.

¹²⁰ DG FISMA Draft Minutes of the 52nd meeting of the EU FIUs' PLATFORM 03 June 2022, 6.

¹²¹ See (n 111) 7.

FIU.net¹²² so that Europol would regain a strong role regarding the management of the network.¹²³ However, because it is not clear whether hosting FIU.net forms part of Europol's tasks under Article 88 TFEU, such interconnection might be challenged even under its recast Regulation. Nevertheless, Europol aims at improving cooperation with the national FIUs to increase the contributions of financial intelligence to Europol¹²⁴ and to manage platforms on such intelligence.¹²⁵

After the start of operations of AMLA, Europol intends to establish strong operational cooperation mechanisms with the new Authority, in order to mitigate the potential risk of duplicating activities and to enhance the fight against money laundering and terrorism financing.¹²⁶ In addition, Europol's plan for the near future is to further develop as the EU law enforcement hub for collecting, processing, analysing and exchanging information and criminal intelligence related to financial and economic crime. Eventually, cooperation between the EFECC and other centres such as the ESOC, EC3 and ECTC is supposed to be strengthened by supporting their operational work.

Beyond internal cooperation amongst different Europol Centres, the Agency plans to strengthen cooperation with entities from different fields. On the one hand, this includes a multi-agency approach and cooperation with both the European Anti-Fraud Office (Olaf) and the EPPO.¹²⁷ On the other hand, according to Europol, this should also cover the Europol Financial Intelligence Public Private Partnership (EFIPPP),¹²⁸ which tests opportunities for cross-border cooperation and information exchange between Europol, FIUs, national law enforcement authorities and regulated financial service entities such as banks.¹²⁹

Given Europol's strong track record of cooperation with national FIUs and LEAs in the EU, it could eventually play an important role in supporting AMLA's work. However, it remains to be seen in how far Europol will be able to set its intended endeavours into motion.

¹²² As put forward during the 51st meeting of the FIU platform See (n 111) 8.

¹²³ On 20 July 2018, the EDPS issued an Opinion on the compliance of the planned embedding of FIU.net into SIENA with the Europol Regulation. The EDPS considered that Art 18(2)(d) of the Europol Regulation, interpreted together with Annex II.B(I), did not allow Europol to process data related to data subjects who did not class as 'suspects' of money-laundering or terrorist financing activities under the applicable national criminal law, see European Data Protection Supervisor (n 106) point 2.2.

¹²⁴ Europol Programming Document (n 84) 7.

¹²⁵ *Ibid.* 77.

¹²⁶ *Ibid.* 18. It needs to be noted that although Europol intended to ensure that 'the position of the EFECC as the criminal intelligence hub for financial and economic crime in the EU is assured and maintained within the framework of the new legislative proposals and in particular of the prospective EU AML Authority', Europol/the EFECC is not mentioned in the proposal.

¹²⁷ To which Europol intends to respond to requests for information and analytical support; see Europol Programming Document (n 84) 77.

¹²⁸ *Ibid.* 79.

¹²⁹ Europol (n 105).

3.4. Terrorist content online

The risks and problems connected to the spread of terrorist content online have been long acknowledged, not only at national level, but also at the level of the EU.¹³⁰ Particularly the prominent role of online platforms in revolutionising modern communication and as influencers of the public opinion has increasingly come to the attention of policy makers over the past years.¹³¹ However, because privatised removal procedures may be influenced by commercial interests, the regulation of content moderation has become one of the main features to limit the powerful position of platforms and other online service providers, also in relation to different fundamental rights of their users.¹³² In addition, the matter of content moderation became part of the Security Union Strategy¹³³ and the Counter-Terrorism Agenda.¹³⁴

Over the past few years, different sets of rules on disinformation and regulation covering illegal hate speech, IP rights violations and illegal content online, such as terrorist content, were adopted. The latter will be subject of this section and, although content moderation touches upon various areas having an impact on additional fundamental rights, it will focus on Europol's role in removal orders under the so-called Terrorist Content Online Regulation (TCO).¹³⁵

While the Proposal for a Regulation on preventing the dissemination of terrorist content online was issued in September 2018, the Regulation itself entered into force in June 2021 and became applicable one year thereafter, obliging internet companies in the EU to take swift measures to prevent the misuse of their services for the dissemination of terrorist content.¹³⁶ The TCO Regulation sets strict time limits to remove content following the receipt of a removal order, requires mandatory duty of care mechanisms for all platforms, obliges the latter to establish effective complaint

¹³⁰ European Parliamentary Research Service, 'Liability of Online Platforms' (February 2021), at www.europarl.europa.eu 55.

¹³¹ T Quintel and C Ullrich, 'Self-Regulation of Fundamental Rights? The EU Code of Conduct on Hate Speech, Related Initiatives and Beyond' in B Petkova and T Ojanen (eds), *Fundamental Rights Protection Online* (Edward Elgar 2020).

¹³² For instance, the rights to privacy, data protection and freedom of expression, enshrined in Arts 7, 8 and 11 of the EU Charter. Also see R Gorwa, 'What is Platform Governance?' (2019) *Information, Communication & Society* 854.

¹³³ Communication COM(2020) 605 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 24 July 2020 on the EU Security Union Strategy.

¹³⁴ Communication COM(2020) 795 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 9 December 2020, A Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond.

¹³⁵ Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online (TCO Regulation).

¹³⁶ T Wahl, 'Rules on Removing Terrorist Content Online Now Applicable' (eucrim, 7 June 2022), at eucrim.eu.

mechanisms for users of (unjustifiably) removed content, imposes transparency and accountability tools and established a framework for strengthened co-operation between hosting service providers, national authorities and Europol.¹³⁷

Within the context of removal orders, national law enforcement authorities are to share information, coordinate and cooperate with Europol, where appropriate.¹³⁸ In addition, both Member States and service providers can use the relevant tools provided by Europol to address the misuse of their services for the dissemination to the public of terrorist content.¹³⁹ Where terrorist content concerns an imminent threat to life, relevant information concerning that terrorist content is to be transmitted to Europol for follow-up.¹⁴⁰ As a side note, it remains unclear what such follow-up actually entails, as it would be for the Member States to implement appropriate follow-up action. Presumably, Europol will assist national authorities with intelligence analyses and further use the provided information to carry out subsequent data analyses.

Finally, the competent national authorities are encouraged to send copies of removal order to Europol. This is to allow Europol to provide an annual report regarding the types of content that was removed or to which access was disabled.¹⁴¹ Importantly, the provision under the TCO Regulation does not limit the use of the copies for additional use by Europol.

Consequently, Europol will not only play a pivotal role regarding the cooperation with service providers for the purpose of taking down terrorist or extremist content. It will also receive copies of removal orders that were sent by the national authorities to provide dedicated tools that it developed, tailored in accordance with the needs of national authorities.¹⁴² In addition, the unit responsible for these tasks may cooperate with other centres within Europol in order to use online content for additional types of crime and the referral process creates opportunities for the Agency to store the information received in its own data environment.¹⁴³

Already in 2015, the development of an EU Internet Referral Unit (IRU) by Europol was agreed upon by the Justice and Home Affairs Council of the EU,¹⁴⁴ which

¹³⁷ European Parliament Legislative Train Schedule, 'Preventing the Dissemination of Terrorist Content Online In "Promoting our European Way of Life"', at www.europarl.europa.eu/.

¹³⁸ Art 14(1) of TCO Regulation (n 135).

¹³⁹ *Ibid.* Arts 14(2) and 5(1).

¹⁴⁰ *Ibid.* Art 14(5).

¹⁴¹ *Ibid.* Art 14(6).

¹⁴² *Ibid.* Recital 39.

¹⁴³ R Bellanova and M de Goede, 'Co-Producing Security: Platform Content Moderation and European Security Integration' (2022) *JCMS* 1317.

¹⁴⁴ To act in accordance with the Europol Council Decision. See J Ellermann, 'Terror Won't Kill the Privacy Star – Tackling Terrorism Propaganda Online in a Data Protection Compliant Manner' (2016) *ERA Forum* 558.

was later formally embedded within the Europol European Counter-Terrorism Centre (ECTC) under the 2016 Europol Regulation.¹⁴⁵ Since its establishment, the IRU structurally intervenes in the content-moderation workflow of online service providers by identifying and flagging terrorist content.¹⁴⁶

The IRU's core tasks are to provide support to the competent EU authorities by providing strategic and operational analysis, flagging terrorist and violent extremist content online, detecting and requesting removal of internet content used by smuggling networks to attract migrants and refugees¹⁴⁷ and to execute and support referral processes in close cooperation with the industry.¹⁴⁸ For these tasks, Europol is meant to act as a European Centre of Excellence by systematically monitoring social media accounts and searching publicly available sources.¹⁴⁹ Thus, on the one hand, the IRU closely cooperates with online service providers to refer terrorist and violent extremist content. On the other hand, the ECTC provides information for use in criminal investigations such as the ones carried out by the European Migrant Smuggling Centre as part of the European Serious and Organised Crime Centre.¹⁵⁰

Europol is currently developing a technical solution for managing referrals and removal orders to hosting service providers. The so-called PERCI, the European Platform for takedown of illegal content online, is supposed to succeed the Internet Referral Management application, currently used by the Member State IRUs and Europol as a central system to transmit referrals.¹⁵¹

The TCO Regulation thereby endorses the adoption of data-driven analyses and technology by Europol for the purpose of identifying and referring content to private service providers. It thus not only provides a mandate for Europol to engage in such processing operations. It also institutionalises cooperation between private actors and Europol, as further laid down in the recast Europol Regulation.¹⁵² Both the IRU and potentially also the PERCI platform entail configurations of such public-private

¹⁴⁵ D Drewer and J Ellermann, 'May the (Well-Balanced) Force Be with Us! The Launch of the European Counter Terrorism Centre (ECTC)' (2016) 32 *Computer Law & Security Review* 195; Also see R Bellanova and M de Goede (n 143) 1317.

¹⁴⁶ Europol, 'EU Internet Referral Unit. Year One Report' (2016), at www.europol.europa.eu.

¹⁴⁷ Ellermann writes, 'Already before the launch of the EU IRU the special European Council which discussed the migration situation in the Mediterranean Sea on 23 April 2015 called on Europol to expand its open source and internet monitoring activities in order to contribute to the disruption of illegal immigrant smuggling networks, by detecting and requesting the removal of internet content used by traffickers to attract migrants and refugees'. See J Ellermann (n 144) 563.

¹⁴⁸ Europol, 'EU Internet Referral Unit - EU IRU' (2023), at www.europol.europa.eu.

¹⁴⁹ J Ellermann (n 144) 559.

¹⁵⁰ Between 2015 and 2019, Europol's IRU identified and referred 111.355 'pieces of [online] content' to social media companies; See Europol, 'EU Terrorism Situation and Trend Report 2020' (2020) at www.europol.europa.eu 92.

¹⁵¹ Europol, '2021 – EU Internet Referral Unit Transparency Report. Terrorist Propaganda Monitoring and Analysis, Referrals, and Public Private Partnerships' (2022), at www.europol.europa.eu 3.

¹⁵² R Bellanova and M de Goede (n 143) 1317.

security collaboration that remain opaque.¹⁵³ Evidently, the confidentiality of criminal investigations needs to be secured and competent authorities as well as Europol must be able to carry out their investigations without being fully transparent about their processing operations. However, when it comes to public-private collaboration, additional factors need to be taken into consideration, including the obligations that service providers have towards their users under the data protection framework of the General Data Protection Regulation.¹⁵⁴

Finally, of crucial importance to the IRU's referral process is the creation of a mechanism for storing suspect online material within Europol itself. For the IRU to intervene in the platforms' own content moderation workflow, Europol staff needs to first assess whether the content to be flagged falls within its mandate. If that is the case, online content will be referred to the hosting service provider and stored in Europol's system.¹⁵⁵ Hence, it is not the referral that is the primary leverage, but rather the harvesting of information by the IRU in order to subsequently use the data for additional analyses. It therefore satisfies Europol's mission as EU information hub to be able to provide the end-result of its data-driven analyses to the Member States. Thus, these datasets, once inserted into Europol's data environment can, under specific conditions, be processed for subsequent purposes.¹⁵⁶

4. What more is there to come?

4.1. Protection of children online

Content moderation encompasses much more than notice and takedown mechanisms for terrorist content, but it includes also hate-speech, harmful content, copyright infringements, and additional categories of illegal content. Indeed, the removal of Child Sexual Abuse Material (CSAM) preceded the terrorism content debate.¹⁵⁷

Europol's EC3 provides assistance to the competent authorities in the Member States in preventing and detecting all forms of criminality associated with the sexual exploitation of children. This includes preventing and intercepting the distribution of child abuse material, and preempting the further dissemination of such material through peer-to-peer networks and commercial platforms. For that purpose, Europol supports its national counterparts with expertise regarding all types of criminal be-

¹⁵³ *Ibid.*

¹⁵⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

¹⁵⁵ The system is called Check the Web Analysis Project; See R Bellanova and M de Goede (n 143) 1317.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.* 1320.

havior related to the abuse of children in an online environment such as sexual extortion and online live-streaming. Beyond that, Europol's assistance includes additional forms of online behavior that may not always be of criminal nature such as the solicitation of children and self-generated indecent material.¹⁵⁸

Europol collects and analyses data and intelligence related to child sexual abuse and exploitation, which can be used to identify trends and patterns and inform prevention strategies. In addition, Europol closely cooperates with the US-based National Centre for Missing & Exploited Children (NCMEC), which receives reports about potential child sexual exploitation or abuse by internet service providers, social media platforms, and other online companies.¹⁵⁹ Once a report is submitted to the NCMEC, its analysts review the information and work with law enforcement authorities to investigate and respond to the potential threat for a child. Europol receives those NCMEC reports targeting online suspects in various EU Member States.¹⁶⁰ Every NCMEC report is stored and cross-checked against Europol data and eventually disseminated to the respective country.¹⁶¹ Designated law enforcement authorities in the Member States can download the NCMEC reports for their jurisdiction either directly from the NCMEC Web Services via NCMEC's Case Management Tool or via the Europol route.¹⁶² Hence, over the past years, Europol was arguably able to build up a lot of expertise with regard to analyzing CSAM submitted to it by NCMEC. Furthermore, Europol is involved in obtaining information on CSAM from the US Department of Homeland Security Investigations, cross-checking these reports and forwarding them to the different Member States.¹⁶³

On 11 May 2022, the Commission issued a Proposal for a Regulation laying down rules to prevent and combat child sexual abuse.¹⁶⁴ The proposed text aims at setting rules to effectively address the misuse of online services for purposes of child

¹⁵⁸ Europol 'Child Sexual Exploitation – Assistance and Expertise' (2022), at www.europol.europa.eu.

¹⁵⁹ The CyberTipline allows service providers to report any content, activity, or behaviour that they believe may involve the sexual exploitation or abuse of a child. This could include images, videos, or messages that appear to involve child pornography, grooming, or other inappropriate behaviours towards children; See AviaTor Annual Report, 'Save Time, Save Lives' (2021), at aviatorproject.com.

¹⁶⁰ *Ibid.* 40.

¹⁶¹ Europol, '44 Arrested in Poland in a Sting Targeting Online Child Sexual Exploitation' (2022), at www.europol.europa.eu.

¹⁶² AviaTor Annual Report (n 159) 14; NCMEC makes these reports available to 147 national police forces globally, including Europol and INTERPOL.

¹⁶³ European Parliamentary Research Service, 'Proposal for a Regulation Laying Down Rules to Prevent Child Sexual Abuse: Complementary Impact Assessment' (2023) 70.

¹⁶⁴ Proposal COM(2022) 209 final for a Regulation of the European Parliament and of the Council of 11 May 2022 laying down rules to prevent and combat child sexual abuse.

sexual abuse.¹⁶⁵ Aiming at replacing the current system of voluntary measures applied by service providers,¹⁶⁶ the proposal lays down obligations on providers of relevant information society services to assess and minimise the risk that their services may be misused for online child sexual abuse, obligations on providers of hosting services and providers of interpersonal communication services to detect and report online child sexual abuse and to remove or disable access to such material, and obligations on providers of internet access services to disable access to child sexual abuse material (CSAM).¹⁶⁷

In addition to the mandatory risk assessment, service providers would have an obligation to, submit a report to a newly established EU Centre on Child Sexual Abuse when becoming aware of any information indicating potential online child sexual abuse on their services. The EU Centre will substitute the EU law enforcement's reliance on the NCMEC as it would provide a triage role for reports of potential CSAM from providers¹⁶⁸ and act as a hub of expertise to assist Member States regarding best practices on prevention and on assistance to victims.

For that purpose, a close relationship between the EU Centre and Europol is to be established. In order to allow the EU Centre to achieve all of its objectives it is to have its seat at the same location as Europol¹⁶⁹ in order to improve data exchange possibilities between the two Agencies, to create a knowledge hub on combatting CSAM and to rely on the support services of Europol¹⁷⁰ such as information technology, cybersecurity, and communication infrastructure.¹⁷¹

In order to facilitate the detection, reporting and removal of CSAM, the EU Centre would analyse and review reports received from service providers and would forward such reports to national law enforcement authorities and Europol. To achieve this objective, Europol and the EU Centre shall provide each other with the fullest possible access to relevant information and information systems.¹⁷² This includes the

¹⁶⁵ European Commission Press Release, 'Fighting Child Sexual Abuse: Commission Proposes New Rules to Protect Children' (11 May 2022), at ec.europa.eu.

¹⁶⁶ Regulation (EU) 2024/1307 of the European Parliament and of the Council of 29 April 2024 amending Regulation (EU) 2021/1232 on a temporary derogation from certain provisions of Directive 2002/58/EC as regards the use of technologies by providers of number-independent interpersonal communications services for the processing of personal and other data for the purpose of combating online child sexual abuse.

¹⁶⁷ Proposal COM(2022) 209 final (n 164) art 1(1)(a) to (d).

¹⁶⁸ *Ibid.* art 48(1).

¹⁶⁹ *Ibid.* 11.

¹⁷⁰ *Ibid.* 11.

¹⁷¹ *Ibid.* recital 72.

¹⁷² *Ibid.* art 53(2). It needs to be mentioned that the Rapporteur's Draft Report only allows for access to relevant information, where strictly necessary, on a case-by-case basis. The same holds true for subsequent transmissions of personal data by Europol, which may only take place on a case-by-case basis.

creation of a database of reports by the EU Centre that Europol would be granted access to.¹⁷³

It is without any doubt that (online) child sexual abuse is one of the most horrific crimes and the generation and dissemination of CSAM as well as the solicitation of children online needs to be prevented, particularly in view of the drastic increase of such crimes in recent years. In addition, to using data analyses to detect and investigate child (sexual) abuse that already took place, exhausting existing possibilities to prevent child (sexual) abuse happening in the first place while protecting end-to-end encrypted private communications of users, including children, is of utmost importance. Yet, while technology experts argue that end-to-end encryption is one of the only technological safeguards to ensure meaningful private communication,¹⁷⁴ the so-called Virtual Global Taskforce, of which Europol is a member, issued a statement in which it argues that the implementation of end-to-end encryption would degrade safety systems and weaken the ability to keep child users safe.¹⁷⁵ This will be a discussion for the future, as secure end-to-end encrypted communication not only provides protection to users and victims of crime, but also safeguards information transmitted by authorities investigating crime. For the latter purposes, the CJEU permitted the infiltration of terminal devices used by criminal networks and to share those data with additional authorities in other Member States under certain circumstances.¹⁷⁶

4.2. The Police Cooperation Code and Prüm II

Two further legislative initiatives that are to attribute an enhanced role to Europol are worth mentioning in the context of this Special Section, as they are also related with the Interoperability framework. On the one hand, Europol's role under the recently adopted Regulation on automated data exchange for police cooperation (Prüm II),¹⁷⁷ which will be connected via the European Search Portal, one of the interoper-

¹⁷³ European Parliamentary Research Service, 'Complementary Impact Assessment. Proposal for a Regulation Laying Down the Rules to Prevent and Combat Child Sexual Abuse' (April 2023) *EPRS* 20.

¹⁷⁴ M Whittaker, 'Comments (intended for) EDPS Seminar on EU's CSAM refs.' (November 2023), at signal.org.

¹⁷⁵ Virtual Global Taskforce (VGT), 'Statement on End-to-End Encryption' (VDT, 2023), at www.nationalcrimeagency.gov.uk. In 2021, the VGT had issued a position in which it highlighted the devastating impact E2EE can have on law enforcement's ability to identify, pursue and prosecute offenders.

¹⁷⁶ Case C-670/22 *M.N. (Encro Chat)*, ECLI:EU:C:2024:372.

¹⁷⁷ Regulation (EU) 2024/982 of the European Parliament and of the Council of 13 March 2024 on the automated search and exchange of data for police cooperation, and amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, (EU) No 2019/817 and (EU) 2019/818 of the European Parliament and of the Council (the Prüm II Regulation).

ability components mentioned above. On the other hand, a recently adopted Directive,¹⁷⁸ which aims at facilitating information sharing between law enforcement authorities in the Member States, including Europol. Both form part of the so-called Police Cooperation Code,¹⁷⁹ that was proposed in December 2021 and included – besides the two legislative initiatives mentioned above – a Council Recommendation on operational police cooperation,¹⁸⁰ which will not form of this discussion. This section will give a brief overview of the tasks that Europol obtained under the Prüm II Regulation and the Directive.

As illustrated Amelung and Machado in this Special Section, the revision of the Prüm framework aims at reforming the system's technical architecture by adding new categories of data (facial images and police records) strengthening the inter-authority exchange of information in terms of follow-ups, and by including Europol in the process of information sharing. For the prevention, detection and investigation of criminal offences, participating Member States are to allow national contact points of other participating Member States and Europol the searching of vehicle registration data¹⁸¹ facial images and¹⁸² police records¹⁸³ in their national systems subject to certain conditions.¹⁸⁴ With regard to automated searching of national police record indexes, authorities are to use the European Police Records Index System (EPRIS) infrastructure, which connects those national authorities and Europol.

With the inclusion of Europol, national authorities have the possibility to query biometric data provided by third countries held by Europol and may exchange such data with Europol in case of matches.¹⁸⁵ These systematic exchanges of third countries data between Europol and the Member States were to enhance the Agency's role as the EU criminal information hub in support to Member States' operational needs. However, compared to the initial proposal, the co-legislators significantly limited the role of Europol with regard to querying data held by the Member States. Furthermore, numerous conditions and safeguards were added so as to grant Member

¹⁷⁸ 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.

¹⁷⁹ European Commission, 'Police Cooperation Code: Boosting Police Cooperation across Borders for Enhanced Security' (8 December 2021), at ec.europa.eu.

¹⁸⁰ Council Recommendation (EU) 2022/915 of 9 June 2022 on operational law enforcement co-operation; Proposal COM(2021) 780 final for a Council Recommendation of 8 December 2021 on operational police cooperation.

¹⁸¹ Art 16 Prüm II Regulation (n 177).

¹⁸² *Ibid.* Art 20.

¹⁸³ *Ibid.* Art 42(1)(b).

¹⁸⁴ The provisions permitting these automated searches include numerous safeguards and conditions attached to conducting such searches. In addition, Member States are to decide whether or not they allow for access by other authorities and Europol. With regard to facial images and police records, the criminal offences must be punishable by a maximum term of imprisonment of at least one year under the law of the requesting Member State to allow for such searches.

¹⁸⁵ Arts 48 and 49 Prüm II Regulation (n 177); Also see: Europol Programming Document (n 84) 20.

States more discretion on deciding when data will be shared with Europol. It remains to be seen whether Europol will receive sufficient data to establish cross-border links between criminal cases and to launch more complete analyses for the purpose of criminal investigations.¹⁸⁶ It seems as if certain Member States are still reluctant to share data even with their national counterparts, despite the principle of mutual recognitions¹⁸⁷ and they might be even more hesitant to share data with Europol.

Finally, the Prüm II system will be indirectly connected to the interoperable large-scale IT infrastructure, as the router that will enable the Member States and Europol to exchange data will be connected via a secure communication infrastructure to the ESP. Similar to the provisions on exchanges or police indexes, facial images and vehicle registration data, the co-legislators significantly heightened the threshold regarding requirements and limitations with regard to access to and exchanges with other authorities and Europol.

For instance, Article 57 of the Prüm II Regulation on liability refers to both the Member States and Europol, while the proposal only mentioned the penalties for misuse of data by national authorities and not Europol not mentioning in that provision. These limitations, additional safeguards and further details are to be welcomed. At the same time, they might be an indication of the persisting reluctance of Member States to exchange sensitive information with other authorities at national and EU level.

The second initiative included in the Police Cooperation Code, the Directive on information exchange between law enforcement authorities of Member States, is to ensure that law enforcement authorities have equivalent access to information held by other Member States. For that purpose, the Directive aims at formalising the procedures on information exchanges between Member States, and reinforcing the effective functioning of Single Point of Contacts (SPOCs) for such exchanges, in order to remedy the proliferation of communication channels used for law enforcement information exchange between Member States.¹⁸⁸

In addition, the Directive is to strengthen Europol's role as EU criminal information hub by compelling the national authorities to make full use of Europol's information exchange channel SIENA for all information exchanges under the Directive.¹⁸⁹ Initially SIENA was to become the default information exchange channel

¹⁸⁶ Proposal COM(2021) 784 final for a Regulation of the European Parliament and of the Council of 8 December 2021 on automated data exchange for police cooperation ('Prüm II'), amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, 2019/817 and 2019/818 of the European Parliament and of the Council, recital 14.

¹⁸⁷ *M.N. (Encro Chat)* (n 176).

¹⁸⁸ European Data Protection Supervisor, Opinion 5/2022 of 7 March 2022 on the Proposal for a Directive on information exchange between law enforcement authorities of Member States, 2.

¹⁸⁹ Art 12 and Recital 8 of Proposal COM(2021) 784 final (n 186); EDPS Opinion 5/2022 (n 188) 2.

for all police cooperation cases where such exchanges would not take place via existing systems such as the SIS.¹⁹⁰ Here, the EDPS noted that transforming SIENA into a mandatory channel for law enforcement exchanges seems appropriate to provide for enhance data security, address fragmentation and facilitate supervision.¹⁹¹ The adopted Directive allows Member States not to use SIENA to send requests for information, or to provide information.¹⁹² Whether national authorities will make use of this option not to use SIENA and if this will indeed lead to a persistent fragmentation and difficulties in terms of supervision remains to be seen. In addition, the future will show whether the initial intention to reinforce Europol's role as the EU criminal information hub for offences falling within its mandate will materialise.¹⁹³

5. Conclusion and outlook

This contribution has illustrated the role of Europol within the different areas in EU police cooperation. Different types of crime in which the Agency offers criminal intelligence support to the Member States became progressively interconnected. Over time, Europol's mandate expanded into additional areas of criminality, thereby helping the Agency to develop into a powerful EU criminal information hub.

Consequently, it is no longer adequate to analyse the areas of its involvement in isolation. Europol's current data lake environment allows data analytics based on linking and matching the different fields of specialisation of its operational centres. Consequently, any assessment of Europol's processing activities, and the accompanying (data protection) safeguards, must be carried out in an interoperable manner. Similarly, the opportunities for individuals to exercise their (data subject) rights at Europol, as well as the supervision and enforcement model of Europol's processing activities requires a holistic approach. Just like Europol's databases became increasingly interconnected, allowing sophisticated data analytics, the scrutiny of its work should consider the entire network, instead of examining operations of specialised centres, or different criminal justice policy areas. In the words of, its data analytics, enriching information from different fields of criminal activity, can create a 'haystack full of needles'. However, it is necessary to ensure that this 'haystack' only includes relevant 'needles', and all 'needles in the haystack' should be able to exercise their individual rights in accordance with the applicable data protection rules.

¹⁹⁰ EDPS Opinion 5/2022 (n 188) point 3.4 note 30. It needs to be noted that the European Parliament introduced changes to Art 13 of the Proposal, which would allow Member States to permit their Single Point of Contact or their competent law enforcement authorities not to use SIENA to send requests for information; see www.europarl.europa.eu.

¹⁹¹ EDPS Opinion 5/2022 (n 188) point 3.4 note 31.

¹⁹² Art 13(2) of Directive (EU) 2023/977 (n 178).

¹⁹³ Proposal COM(2021) 782 final for a Directive of the European Parliament and of the Council of 8 December 2021 on information exchange between law enforcement authorities of Member States, repealing Council Framework Decision 2006/960/JHA, 5.

As mentioned above, the Agency was able to develop sophisticated processing capabilities. This is evidently welcome and of use for the Member State when cooperation in cross-border cases is required, including those covered in this Special Section. Nevertheless, it is important that Europol's strengthened mandate is always accompanied by adequate safeguards that ensure sufficiently high data protection standards. Often, these safeguards need to be ensured in legislation that is adopted at different times, which makes coherence challenging. From a purely data protection standpoint, concerns could, therefore, arise from the lack of readability of different pieces of EU law that serve as building blocks of Europol's data processing capabilities. When authorities at national and EU level exchange personal data, or data are exchanged indirectly through the EU large-scale information systems, this makes it difficult to ensure the data protection rules stipulated in the both the recast Europol Regulation and the horizontal rules under the EUDPR are followed. In addition, Chapter IX of the EUDPR on operational data needs to be finalised so as to ensure coherence where systematic exchanges of personal data take place at different levels.

It will be challenging for individuals whose information will be stored in Europol's data environment to understand how their data will be analysed and utilized, in particular because the analyses carried out by Europol evidently require a certain level of confidentiality. While there is certainly an added value in making use of Europol's expertise and processing capabilities, attributing it a stronger role must come with adequate safeguards and procedural limitations. In the future, Europol as EU Agency could be exemplary in demonstrating that strong data protection rules can go hand in hand with effective crime prevention, as its enhanced mandate also comes with increased responsibility.



The Future of Digitalisation in EU Law Enforcement
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**Dancing in the Dark:
Policy Transformations Through
Obfuscating Contestations in the Case of Prüm II**

Nina Amelung and Helena Machado***

TABLE OF CONTENTS: 1. Introduction. – 2. From Prüm over Prüm Next Generation to Prüm II. – 3. Orchestrated stakeholders' consultation manifesting asymmetries of power. – 4. Two prospective changes in the Prüm system and still silenced substantial challenges they raise. – 4.1. In the name of 'interoperability': unsettling data sovereignty of Member States and providing access to new law enforcement actors. – 4.2. Matters of inclusion of new biometric data: facial images. – 5. Conclusions.

ABSTRACT: In December 2021, the European Commission proposed amendments to the Prüm system on the exchange of different categories of personal data for stepping up cooperation for combating terrorism and cross-border crime (Prüm II). The proposal aimed to increase automation of the sharing of data, add new categories of data for exchange, namely facial images and police records, and prepares the integration of the Prüm system into the interoperability framework which interconnects the six large-scale IT systems in the European Union Area of Freedom, Security and Justice (AFSJ). In this article we analyse the public consultation process on these planned reforms to the Prüm II system, and we focus on two particular prospective changes: interoperability and

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exchange of facial images. We argue that the public consultation process related to prospect changes to the Prüm system has functioned as ‘technologies of democracy’ by which policy transformations obfuscate tensions and conflicts around complex and contested public problems. Specifically, in the context of Prüm II, we assert that public consultation efforts fall short of addressing the concerns of the affected publics. Instead, they sideline and suppress alternative yet reasonably anticipated concerns, thereby fortifying dominant security frameworks.

KEYWORDS: Prüm II – interoperability – facial images – public consultation – technologies of democracy – stakeholders.

1. Introduction

Council Decision 2008/615/JHA and Council Decision 2008/616/JHA – the Prüm Decisions –¹ require Member States to step up cross-border cooperation by ensuring the availability of DNA, fingerprint and vehicle registration data from their national databases to assist in combating terrorism and cross-border crime. Since 2018, the Prüm Decisions have been subject to technical and political negotiations and reconfigurations, which were channelled into a Commission proposal for a Prüm II system, adopted on 8 December 2021.² On 8 February 2024, the European Parliament approved the rules on Prüm II and the Regulation 2024/982 (Prüm II Regulation) was adopted on 13 March 2024.³

The Prüm II Regulation aims to modernise the legal framework by increasing automation in the personal data exchanges, adding new categories of personal data that can be exchanged, namely facial images, police records, and driving licence data, standardizing the format in which data can be shared, setting new standards on data quality, transfers, and other largely technical elements, and creating a legal basis for searches for missing persons and unidentified human remains, irrespective of whether they have been initially collected for criminal or civil identification purposes.⁴ Another novelty of the Regulation is the integration of Prüm II into the interoperability framework. The latter links the six large-scale IT systems established

¹ Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime; Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

² See, Council of the EU Press Release, ‘Council Adopts Two General Approaches and a Recommendation to Improve Operational Police Cooperation and Information Exchange, Press Release’ (10 June 2022), at www.consilium.europa.eu.

³ Regulation (EU) 2024/982 of the European Parliament and of the Council of 13 March 2024 on the automated search and exchange of data for police cooperation, and amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, (EU) No 2019/817 and (EU) 2019/818 of the European Parliament and of the Council (Prüm II Regulation).

⁴ EDRI, ‘Respecting Fundamental Rights in the Cross-Border Investigation of Serious Crimes’ (7 September 2022), at edri.org.

in the EU Area of Freedom, Security and Justice merging migration and mobility control on the one hand, and crime control on the other hand.⁵

Before the implementation of the Prüm system, literature pointed out important fundamental rights challenges regarding the protection of personal data, respect for private life, and the presumption of innocence.⁶ These critical approaches gained new impetus as the Prüm system was being implemented – a process that lasted no less than 15 years.⁷ Additional concerns were voiced regarding the significant heterogeneity in national legislations and police operations, as well as the accuracy, reliability, and accountability of the technical and operational governance regimes set up to facilitate the Prüm system.⁸ Other studies took a broader approach to societal, cultural and political implications of the Prüm system, reflecting on the role of science and technology in the EU security agendas and policy making and implications on citizenship and democracy.⁹ Democratic deficits were identified as key shortcomings in the process of implementing the Prüm regime, as the European Parliament

⁵ C Blasi Casagran, 'Fundamental Rights Implications of Interconnecting Migration and Policing Databases in the EU' (2021) 21 *Human Rights Law Review* 433.

⁶ T Balzacq, D Bigo, S Carrera, and E Guild, 'Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats' (CEPS Working Document No. 234-2005).

⁷ S Hufnagel and C McCartney, 'Police Cooperation Against Transnational Criminals' in N Boister and R Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2014) 107; S Matos, 'Privacy and Data Protection in the Surveillance Society: The Case of the Prüm System' (2020) 66 *Journal of forensic and legal medicine* 155; C McCartney, 'Opting in and Opting Out: Doing the Hokey Cokey with EU Policing and Judicial Cooperation' (2014) 77 *The Journal of Criminal Law* 543; C McCartney, E Topfer and R Granja, 'Biometric Forensic Identity Databases: Precariously Balanced or Faulty Scales?' in A Roberts, J Purshouse and J Bosland (eds), *Privacy, Technology and the Criminal Process* (Routledge 2023).

⁸ F Santos, H Machado and S Silva, 'Forensic DNA Databases in European Countries: Is Size Linked to Performance?' (2013) 9 *Life Sciences, Society and Policy* 1; F Santos and H Machado, 'Patterns of Exchange of Forensic DNA Data in the European Union through the Prüm System' (2017) 57 *Science & Justice* 307–313; H Machado, and R Granja, 'Police Epistemic Culture and Boundary Work with Judicial Authorities and Forensic Scientists: The Case of Transnational DNA Data Exchange in the EU' (2019) 38 *New genetics and society* 289; V Toom, 'Cross-Border Exchange and Comparison of Forensic DNA Data in the Context of the Prüm Decision' (Study for the LIBE Committee 2018); V Toom, R Granja and A Ludwig, 'The Prüm Decisions as an Aspirational Regime: Reviewing a Decade of Cross-Border Exchange and Comparison of Forensic DNA Data' (2019) *Forensic Science International: Genetics* 41, 50.

⁹ N Amelung, R Granja, H Machado, *Modes of Bio-Bordering: The Hidden (Dis)integration of Europe* (Springer 2021); N Amelung, and H Machado, '"Bordering" Processes in the EU: De-Bordering and Re-Bordering along Transnational Systems of Biometric Database Technologies' (2019) 5 *International Journal of Migration and Border Studies* 392; H Machado, R Granja, N Amelung, 'Constructing Suspicion through Forensic DNA Databases in the EU. The Views of the Prüm Professionals' (2019) 60 *The British Journal of Criminology* 141; H Machado and R Granja, *Genetic Surveillance and Crime Control: Social, Cultural and Political Perspectives* (Taylor & Francis 2022) 212; B Prainsack and V Toom, 'The Prüm Regime: Situated Dis/empowerment in Transnational DNA Profile Exchange' (2010) 50 *The British Journal of Criminology* 1117; B Prainsack and V Toom, 'Performing the Union: The Prüm Decision and the European Dream' (2013) 44 *Studies in History and Philosophy of Science Part C: Studies in History and Philosophy of Biological and Biomedical Sciences* 71.

and the European Court of Justice were for years excluded from exercising democratic and judicial control. After all, the Prüm Decisions fell under the former third pillar or police and judicial cooperation in criminal matters. Thus, issues around the lack of democratic ‘legitimacy and guarantees that all the public interests were equally balanced’ had been problematized from early on.¹⁰

Regarding Prüm II, various stakeholders have raised diverse concerns about the planned restructuring arguing that it may pose challenges to the protection of fundamental rights.¹¹ However, we observe that these diverse concerns relating to the Prüm II proposal have played a limited role in the negotiating procedure. This observation prompts our interest to enquire in this article how public consultation processes as part of the regulatory process of Prüm II prefigure and (dis)enable the enactment of particular political visions for law enforcement cooperation relying on biometric data exchange in the EU.

The current transformations towards an expanded Prüm system require a closer look at the various ‘consultation activities’ or ‘consultation strategy’, set up by the European Council and the Commission assessing the limitations of current Prüm system and preparing for the Prüm II proposal. Public consultations have become a standard tool in the ‘good governance’ repertoire of the Commission over time.¹² We will address the selected public consultation activities with stakeholders and the wider publics that have accompanied the legislative process of the Prüm II proposal as sequences of staged performances of conflict resolution that fail to satisfy concerned publics.¹³ Laurent has referred to such public participation forms as ‘technologies of democracy’, in the sense that they require material and cognitive investments to generate their intended outcomes, publics and collective problems.¹⁴ They ‘allocate public roles for citizens, define rules for legitimate actions of public and private actors, and identify suitable public issues for collective examination’. The objective of analysing organized consultations is ‘to make explicit the political constructions they enact’ and to reveal ‘conflicts, oppositions and potential alternatives

¹⁰ N Vavoula, ‘Police Information Exchange - The Future Developments Regarding Prüm and the API Directive’ (Study for the LIBE Committee 2020), at www.europarl.europa.eu.

¹¹ C McCartney, E Topfer and R Granja (n 7).

¹² AS Binderkrantz, J Blom-Hansen, M Baekgaard and S Serritzlew, ‘Stakeholder Consultations in the EU Commission: Instruments of Involvement or Legitimacy?’ (2023) 30 *Journal of European Public Policy* 1142; C Quittkat and B Kohler-Koch, ‘Involving Civil Society in EU Governance: The Consultation Regime of the European Commission’ in B Kohler-Koch and C Quittkat (eds), *De-Mystification of Participatory Democracy. EU Governance and Civil Society* 41–61 (Oxford University Press 2013); AS Binderkrantz, AS Blom-Hansen and R Senninger, ‘Countering Bias? The EU Commission’s Consultation with Interest Groups’ (2021) 28 *Journal of European Public Policy* 469.

¹³ M Hajer, ‘Setting the Stage: A Dramaturgy of Policy Deliberation’ (2005) 36 *Administration & Society* 624; J Oomen, J Hoffman, and M Hajer, ‘Techniques of Futuring: On How Imagined Futures become Socially Performative’ (2022) 25 *European Journal of Social Theory* 252.

¹⁴ B Laurent, ‘Technologies of Democracy: Experiments and Demonstrations’ (2011) 17 *Science and engineering ethics* 649, 651.

that are in tension with otherwise stable dominant constructions of democratic order'.¹⁵ In light of the above, our aim is to investigate the staged processes and the framing of problems and solutions, and the situated and contingent framings of stakeholders' roles and the values guiding their approaches to Prüm II.

The article is structured as follows: in the next section we briefly outline the incremental regulatory evolution from Prüm to Prüm II. Then, we analyse the consultation process set up prior to the adoption of the Prüm II proposal. Afterwards, we explore the heterogeneous views on the planned reforms to the Prüm system focusing on two aspects: the preparation for its integration into the interoperability framework and the inclusion of facial images for exchange among police forces of the EU Member States. These selected examples serve to illustrate some characteristics and limitations of the process of consultation. We conclude by arguing that consultations activities have functioned as 'technologies of democracy' emphasizing the engineering and technocratic character of these processes oriented to demonstrate deliberation, consensus and agreement, embedded in, and co-constituting the governance of complex and contested public problems in pre-scripted ways.¹⁶

2. From Prüm to Prüm II

In 2018, ten years after the adoption of the Prüm Decisions and while not all Member States had implemented them in full, the European Council began to consider reforming the Prüm system, using the term 'Prüm Next Generation', later referred to as Prüm II.¹⁷ Two driving forces behind the proposed reforms can be identified; on the one hand, legal, technical and operational shortcomings, and, on the other hand, the desire to include additional types of personal data, such as facial images and police records, as well as streamlining the IT architecture of the Prüm system with other existing database systems.

The first steps towards preparing a reform of the Prüm system took place (under the label of 'Prüm Next Generation') between 2018 and 2020 and was driven by the Council of the EU. The initial phase included focus groups on the different forensic modalities of fingerprints, DNA, Vehicle Registration Data (VRD) and facial images, discussions with the Working Party on Information Exchange and Data Protection, and from 1 January 2020, the Working Party on Justice and Home Affairs

¹⁵ *Ibid.* 650–651.

¹⁶ *Ibid.*

¹⁷ Proposal COM(2021) 784 final for a Regulation of the European Parliament and of the Council of 8 December 2021 on automated data exchange for police cooperation ('Prüm II'), amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, 2019/817 and 2019/818 of the European Parliament and of the Council.

Information Exchange (IXIM) as well.¹⁸ Additionally, the Commission commissioned a feasibility study from Deloitte a ‘feasibility’ on ‘improving information exchange’ under the Prüm decisions which incorporated a technical report accompanied by a cost-benefit. In response, the LIBE (Committee on Civil Liberties, Justice and Home Affairs) Committee of the European Parliament commissioned its own study to provide background information and to assess fundamental rights implications of the Prüm Next Generation project in-the-making.¹⁹

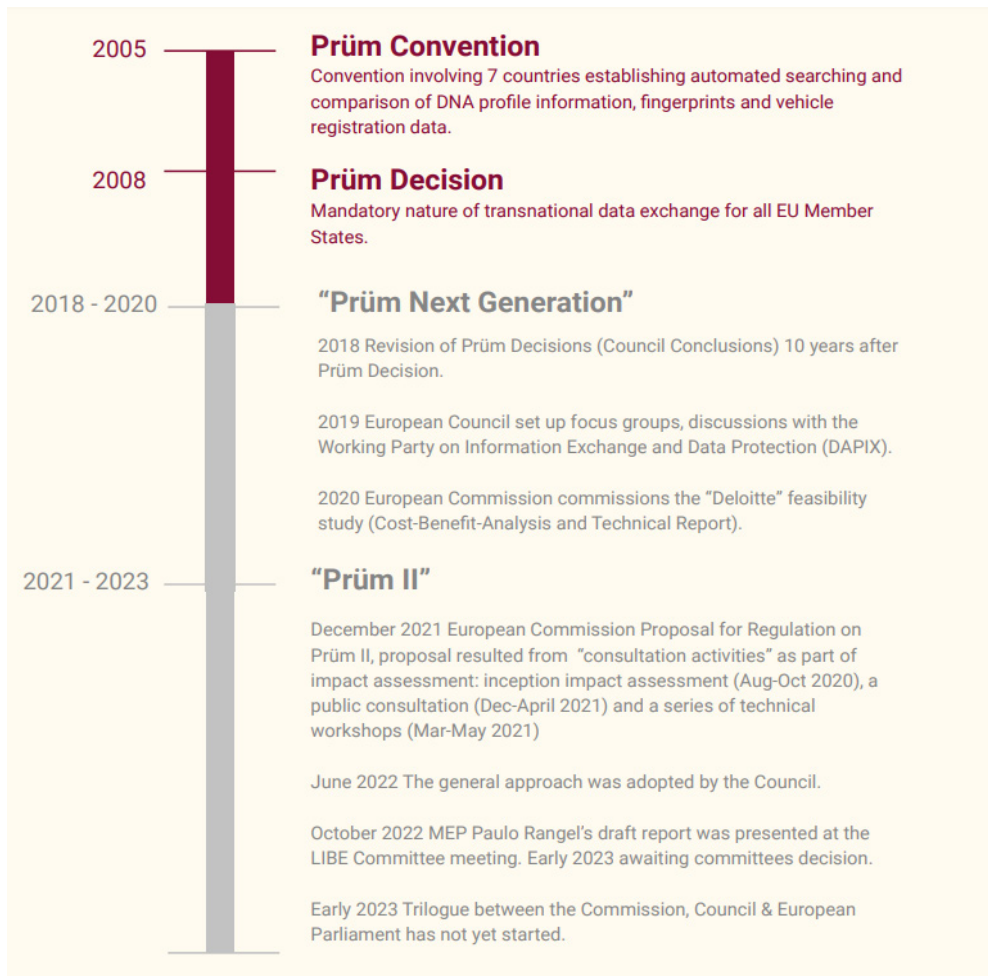


Figure 1: From Prüm to Prüm II (Authors' compilation).

¹⁸ Council of the European Union, Note 13511/19 from the German delegation to the Working Party on Information Exchange and Data Protection (DAPIX) on Next generation Prüm (Prüm.ng) - Reports from focus groups / Report on DNA data exchange.

¹⁹ N Vavoula (n 10).

During the COVID-19 pandemic, the Commission initiated the second phase of preparations for the Prüm II proposal including public consultation activities, with the term ‘Prüm Next Generation’ being dropped. An online public consultation designated as ‘inception impact assessment’ was launched by the Commission for 8 weeks between August and October 2020; in early 2021, a de facto online questionnaire was set up online for 12 weeks, and a series of technical workshops took place between March and May 2021.²⁰ The Commission’s proposal of Prüm II was adopted in December 2021, and the Council adopted the general approach in June 2022.²¹ Additionally, on their own initiative, the European Data Protection Supervisor (EDPS) released two opinions,²² European Digital Rights (EDRi) issued two position papers²³ and the European Economic and Social Committee published its opinion.²⁴ In the European Parliament, the Committee on Budgets which had been designated to give an opinion, opted for not giving one.²⁵ In May 2023, the LIBE Committee adopted its report²⁶ and in June 2023, the European Parliament entered into the interinstitutional trilogue negotiations. In February 2024, an agreement was reached and the Prüm II Regulation was adopted on 13 March 2024.

The Regulation introduces profound changes compared to its precursor. The scope of personal data exchanged includes facial images and police record index numbers of suspects and convicted persons, in case Member States opt in to share the data.²⁷ When permitted by national law, Member States could also exchange data for the search of missing persons, identification of unidentified human remains, and for humanitarian purposes.²⁸ The follow-up procedure to a data match needs to be happening within a deadline of 48 hours, with the exception when national judicial authorisation requires

²⁰ Proposal COM(2021) 206 final for a Regulation of the European Parliament and of the Council of 21 April 2021 laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain union legislative acts.

²¹ Proposal COM(2021) 784 final (n 17).

²² European Data Protection Supervisor, Opinion 4/2022 on the Proposal for a Regulation on automated data exchange for police cooperation (Prüm II); Opinion 5/2022 on the Proposal for a Directive on information exchange between law enforcement authorities of Member States.

²³ EDRi, ‘EDRi Challenges Expansion of Police Surveillance via Prüm’ (24 March 2021), at edri.org; EDRi (n 4); EDRi, ‘Automated Data Exchange in Prüm II: The EU’s Securitisation Mindset Keeps Encroaching on our Fundamental Rights’ (6 February 2024), at edri.org.

²⁴ European Economic and Social Committee, *Opinion on Security Union package/Schengen package* (19 May 2022), at www.eesc.europa.eu.

²⁵ European Parliament, *Legislative Observatory 2024*, at oeil.secure.europarl.europa.eu.

²⁶ European Parliament, ‘REPORT on the Proposal for a Regulation of the European Parliament and of the Council on Automated Data Exchange for Police Cooperation (“Prüm II”), Amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, 2019/817 and 2019/818 of the European Parliament and of the Council’ (2023); European Parliament Press Release, ‘Police co-operation: MEPs Adopt Law on more Efficient Data Exchanges’ (8 February 2024), at www.europarl.europa.eu; European Parliament, *Legislative Observatory 2024*, at oeil.secure.europarl.europa.eu.

²⁷ Prüm II Regulation (n 3) Art 1.

²⁸ *Ibid.* Art 2.

a longer time period.²⁹ The solutions found suggest that Member States may adopt and progress within a range of expansive versus restrictive data exchange possibilities impacting on the type of data exchange, the purposes of data exchanges as well as the conditions to attend to substantive measures of validation procedures.

In the next section we analyse the diverse expert, stakeholder and public consultation activities, which accompanied the legislative process to illustrate how processes and possibilities to raise critical issues and diverse viewpoints were designed.

3. Stakeholders' consultation

As noted by several scholars, open consultations should be designed to elicit the interests, preferences, and pursued policy norms of key stakeholders in the security field, viewed as legitimate and bias-reducing, leading to successful policy outcomes.³⁰ On the surface, public consultations aim to foster the inclusion of citizens' and civil societies' stakeholders feedback. Binderkrantz et al. have pointed to the common use of public consultations as means of governance processes of the European Commission.³¹ They differentiate between three types of instruments used for public consultations of the EU Commission that vary with regards to their openness and access for diverse stakeholders and their ability to facilitate enduring interactions: open online consultations, stakeholder conferences, expert groups.

We find these instruments in the preparation for the Prüm II revision. As mentioned earlier, the Commission organized consultation activities to mobilize experts and invited different stakeholders in two phases. In the first phase, the Commission along with the Council of the EU held expert groups focus group meetings focussing on stakeholders they classified as 'current and potential new end-users or other directly related stakeholders of the Prüm framework', e.g. Member States' authorities, EU agencies, EU institutions.³² In an early version of a published 'consultation strategy' additional approaches are listed as 'consultation activities' that include the research methodologies used for the additionally commissioned feasibility study carried out by Deloitte.³³ The ambiguous use of the label 'consultation activities' to

²⁹ *Ibid.* Art 47.

³⁰ T Baird, 'Who Speaks for the European Border Security Industry? A Network Analysis' (2017) 26 *European Security* 37; A Bunea and R Thomson, 'Consultations with Interest Groups and the Empowerment of Executives: Evidence from the European Union' (2015) 28 *Governance: An International Journal of Policy Administration and Institutions* 517; A Bunea, 'Designing Stakeholder Consultations: Reinforcing or Alleviating Bias in the European Union System of Governance?' (2016) 56 *European Journal of Political Research* 46.

³¹ AS Binderkrantz, A S Blom-Hansen and R Senninger (n 12).

³² Commission Staff Working Document Impact Assessment SWD(2021) 378 final Accompanying the proposal for a regulation of the European Parliament and of the Council on automated exchange for police cooperation ("Prüm II"), amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, 2019/817 and 2019/818 of the European Parliament and of the Council.

³³ *Ibid.*

refer to the nature of these processes becomes visible when this early phase ex-post became renamed as processes which ‘have contributed to establishing a sound knowledge about the benefits and shortcomings of the existing Prüm framework’ and was included into the Annex 2: Stakeholder consultation of the Impact Assessment Report accompanying the Prüm II proposal.³⁴



Figure 2: ‘Consultation activities’ between 2018 to-early 2020 (Authors’ compilation).

In the second phase, the Commission aimed at conducting more structured consultation processes, including selected NGOs, networks and the wider public. The pandemic was used as a justification of different methodologies rather than the organization of in person meetings; in effect, ‘the consultation activities focus on alternatives such as online surveys, semi-structured phone interviews, as well as meetings via video conference’.³⁵ The Commission, as the main driving force and designer of these processes, decided on the formats, the participants, and the agenda of these consultations. Thereby, it defined what expertise and concerns could become included as relevant, as well as which issues would be opened up for more public consultation, and which ones might be reserved for deliberation among expert groups.

³⁴ Council of Europe, ‘Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a regulation of the European Parliament and of the Council on automated data exchange for police cooperation (‘Prüm II’), amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, 2019/817 and 2019/818 of the European Parliament and of the Council’ (2021) 14204/21.

³⁵ European Commission, ‘Consultation Strategy for the Initiative on Strengthening the Automated Data Exchange under the Prüm Framework’ ec.europa.eu 4.

In the course of the consultation activities specific framings of the policy and technical problems at stake and solutions to deal with them were established and manifested, reflecting security industry driven language and rationalities. The feasibility study serves as an excellent example in this respect. Listing a consulting service of a private consulting agency as a ‘consultation’ clearly demonstrates the bias leaning towards private consultation instead of public ones. The feasibility study was outsourced to Deloitte, which provides audit, consulting and financial and risk advisory services. The major changes proposed by the private firm were: *a)* improving the automated data exchange through the inclusion of missing persons and the identification of deceased persons); *b)* improving the follow-up procedure to a hit called ‘step-2’ procedure, which regulates what obligatory personal ‘core data’ is exchanged; *c)* introducing new data categories including facial images, driving licences and biographic data; *d)* introducing a new IT architecture by implementing a new central route, which implied to move from a decentralized data exchange system to a centralized data exchange system; and *e)* exploring the possibility to link Prüm to the EU large-scale IT systems and embedding interoperability solutions, which was entailed the involvement of Europol, Interpol and other third countries.

This outsourced consulting service shows an understanding of reforming Prüm as a business case which was assessed with a framing of a cost-benefit analysis, rather than an emphasis on the possible challenges for fundamental rights. This is also evidenced from the fact that the Commission preferred the conduct of a feasibility study instead of an impact assessment. This does not mean that business actors drive policy development, since the powers of agenda-setting and legislative decision-making still rest with Member States and the EU institutions. However, as suggested by many scholars researching on EU security policy making, industry gains political legitimacy through strategic communication of its preferences and interests in order to co-construct policy norms alongside EU institutions.³⁶ As noted by Baird, this raises the question of ‘how to address alternative frames in the debate on EU border security, frames which bring into account alternative world views and interpretations of social contexts that move beyond the categories, logics, and practices of business actors’.³⁷

³⁶ T Baird (n 30); AW Chalmers, ‘Getting a Seat at the Table: Capital, Capture and Expert Groups in the European Union’ (2014) 37 *West European Politics* 976; D Coen, ‘Empirical and Theoretical Studies in EU Lobbying’ (2007) 14 *Journal of European Public Policy* 333; D Lowery, FR Baumgartner, J Berkhout, JM Berry, D Halpin, M Hojnacki, H Kluver, B Kohler-Koch, J Richardson, and KL Schlozman, ‘Images of an Unbiased Interest System’ (2015) 22 *Journal of European Public Policy* 1212; S Roura, ‘The Role of the Private Sector in EU Internal Security’ (High-Level Conference on a Renewed EU Internal Security Strategy Speech to Be Released 2014).

³⁷ T Baird (n 30).

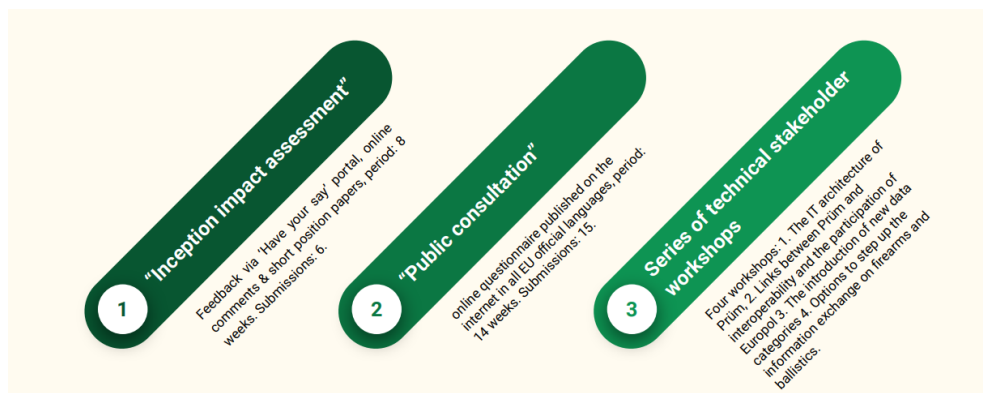


Figure 3: 'Consultation activities' between August 2020 and May 2021 (Authors' compilation)

In explaining the attributed roles to participating actors invited as 'concerned stakeholders' the Prüm II proposal states: 'The preparation of this proposal involved targeted consultations of concerned stakeholders, including end-users of the system, namely Member States' authorities using the Prüm automated data exchange ranging from law enforcement and judicial authorities, national vehicle registration authorities, to national database custodians and forensic laboratories. Europol and eu-LISA were also consulted in view of their respective expertise and their potential role in the new Prüm framework'.³⁸

Other stakeholders were the European Union Agency for Fundamental Rights (FRA), the non-governmental organization European Digital Rights (EDRi) and Eucarlis (European car and driving licence information systems).

The 'inception impact assessment' launched by the European Commission, published on 11 August 2020, serving to inform stakeholders and citizens about the initiative, and the 'public consultation' activities drew very limited number of responses.³⁹ In the Annex attached to the proposal, which documents these consultation activities, the reasons behind the limited number of responses were speculated 'due to the technical nature of the instrument'.⁴⁰ The policy issues at stake were scripted as of 'technical nature', an approach which stresses the necessity and legitimacy of relying on expert expertise. Taking the technicality of the issue at stake as a given also easily serves as a reasonable explanation for not investing in providing wider public access, information and education or further public consultations.

³⁸ European Commission, Strengthening the Automated Data Exchange under the Prüm Framework, Have your Say - Public Consultation and Feedback, at ec.europa.eu; European Commission, 'Combined Evaluation Roadmap/Inception Impact Assessment' (2021), at ec.europa.eu.

³⁹ *Ibid.*; Six for the inception impact assessment, and 15 for the public consultation, with the large majority of them provided by public authorities in the field of security and law enforcement.

⁴⁰ Council of Europe (n 34).

Citizens and stakeholders were invited to provide their views on foresight scenarios and policy options to ‘successfully prevent and investigate serious crimes’. The likely social impacts were described as follows: ‘Improved information exchange between European law enforcement authorities leads to a greater number of successful investigations and convicted criminals, and will consequently lead to a safer society’.⁴¹ With regard to the impact on fundamental rights, first, there was a reference to the expansion of new categories of data, which were anyway ‘already collected’.⁴² Second, the impact on fundamental rights was in fact depicted solely in a positive manner, suggesting that Prüm II will enhance data security and privacy protection. In this regard, it was stated:

‘...one of the aims of this initiative is to update and strengthen the Prüm framework in the light of the new European data protection regime, especially the Law Enforcement Directive. Improving the efficiency of the Prüm framework, and improving the security of the system by modernising the technical requirements, will lead to improved possibilities for the identification of criminals and more efficient criminal investigations that will contribute to the security of the society’.⁴³

Any potential challenges to fundamental rights, for example along the alternative positions expressed by Vavoula and EDRI, raising concerns that fundamental rights are increasingly threatened by the way data is made available and increasingly exchanged, for instance with stakeholders, such as Europol did not feature.⁴⁴

While critical voices have been raised beyond those fora of ‘invited’ consultations, they hardly find their way into any of the assessment reports and considerations of the Prüm II proposal. Even in the limited cases where they are mentioned,⁴⁵ there is no meaningful engagement with the critical issues they raise. Such issues are for example the lack of common shared technical standards about matching rules that lead to hits and follow up validation procedures. Fingerprint comparisons conducted on the basis of as few as six or seven loci are susceptible to false positives and consequently require subsequent validation procedures to definitively exclude such outcomes. Another issue is the lack of meaningful statistical data compiled from the Prüm system to provide evidence for its efficiency and effectiveness. Thus, ‘un-invited’ participation becomes marginalized and certain forms of contestations can get protracted and silenced. Even when ‘invited’, critical voices are also sidelined to give way to the positive effects.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ N Vavoula (n 10); EDRI (n 23); EDRI (n 4); EDRI (n 23).

⁴⁵ V Toom, ‘Cross-border Exchange and Comparison of Forensic DNA Data in the Context of the Prüm Decision’ (Study for the LIBE Committee 2018), at www.europarl.europa.eu.

In sum, the public consultations were non-inclusive and provided a space for shaping the views of the Commission, through the rhetoric of ‘openness’ to policy learning opportunities, using direct channels of communication.⁴⁶ De facto, they functioned as means to diffuse critique or resistance while reinforcing power asymmetries and hegemonic discourses about fighting criminality. These public consultations performed what Laurent has called ‘technologies of democracy’.⁴⁷

The relevance of including diverse views may be best illustrated along issues that remain highly contested, and yet have gained little visibility along the organized consultation processes. The following section portrays two examples of matters of concern which have been marginalized by how the consultations were organized and whose voices get heard throughout these processes. These examples concern two reforms with significant ethical and fundamental rights concerns, namely integrating the Prüm system into the interoperability architecture, making diverse database systems – these of migration control and of law enforcement – interoperable, and second, integrating new types of biometric data such as facial images. Both areas raise substantial ethical and regulatory issues according to the critical views of diverse stakeholders, and have not yet sufficiently found recognition in the governance process towards Prüm II and the legal provisions outlined in the draft regulation.

4. Reforming the Prüm system: matters of concern and underexplored substantial challenges they raise

4.1. In the name of ‘interoperability’: unsettling data sovereignty of Member States and bringing together centralized with decentralized systems of information exchange

At the heart of the transformation of Prüm is its refurbishment from a decentralized system of information exchange to a partially centralized one. The logic of centralized database infrastructures can be found in other existing systems, such as the Visa Information System (VIS) and the Schengen Information System (SIS), set up in the AFSJ (Area of Freedom, Security and Justice) for immigration control, that process personal data primarily of third-country nationals. Centralized databases aggregate personal data collected by Member States’ authorities into one repository and at EU level have been typically created in the context of asylum, migration and border management.⁴⁸ Europol databases store data from multiple sources, including other Agencies and private parties. In turn, in the field of law police cooperation in crimi-

⁴⁶ T Baird (n 30).

⁴⁷ B Laurent (n 14).

⁴⁸ V Mitsilegas and N Vavoula, ‘Databases’ in V Mitsilegas (ed), *EU Criminal Law* (2nd edition, Hart 2022).

nal matters, emphasis has been placed on decentralized avenues of cross-border information exchange of Prüm as the rationale has been to make Member States' law enforcement data from (mostly pre-existing) national databases available across Member States.⁴⁹ Because of its decentralized data exchange and cross-jurisdictional nature, the Prüm system represents an information exchange tool that exemplified Member States' sovereignty, autonomy and ownership of data governance.⁵⁰ The emphasis on decentralized systems is also shaped by the diversity of national legislations, the multitude of practices related to the operation and maintenance of domestic law enforcement databases, as well as the heterogeneous functioning of criminal justice systems and policing practices across EU Member States.

Prüm's decentralized structure has kept data as the 'property' of the Member State where they are collected.⁵¹ The Prüm system contains large amounts of biographical information, as well as biometric – thus sensitive – data of mostly EU citizens, referring to national databases with mostly data of EU nationals. The attempt to introduce more centralizing components comes with the introduction of a central router.

The creation of a central router is presented as a 'hybrid approach between a decentralized and centralized solution without any data storage at central level'.⁵² All national databases in each Member State shall connect to the central router instead of connecting to one another.⁵³ Via the newly installed central router, the Prüm data exchange will be connected to the backbone that holds together the whole interoperability architecture of the meta-database system, the Common Identity Repository (CIR).⁵⁴ The CIR contains individual files created for each person that is registered in one or many of the other existing databases. These files are established for the purpose of facilitating the correct identification of persons registered across different databases. The EU Agency responsible for the management of large-scale IT Systems (eu-LISA) is entrusted with the task of developing the central router, as

⁴⁹ *Ibid.*

⁵⁰ N Amelung, R Granja, H Machado (n 9).

⁵¹ This does not mean that in centralized systems the Member States storing the data do not have any ownership.

⁵² Proposal for a Regulation of the European Parliament and of the Council on automated data exchange for police cooperation ("Prüm II"), amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, 2019/817 and 2019/818 of the European Parliament and of the Council *cit.* 4.

⁵³ Art 35 of the Prüm II Regulation.

⁵⁴ Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA; Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816, Arts 17–21.

it is the hosting and facilitating entity for the interoperability project. The CIR initially aimed at centrally storing basic biographic and biometric information of third-country nationals from VIS, Eurodac, the Entry/Exit System (EES), the European Travel Information and Authorisation System (ETIAS) and the European Criminal Record Information System for Third-country Nationals (ECRIS-TCN) which then is available for search and comparison by the authorities and agencies that are granted access to the system. The inclusion of Prüm entails including data not only from third-country nationals, but from EU citizens who fall under the categories relevant for exchange. The paradigm shift of distributing powers to coordinate data exchange to EU agencies such as the EU agency for Large Scale IT Systems (eu-LISA) in more centralized manners is significant in terms of sharing data sovereignty of Member States.

Interoperability is a term that originates from computer science and constitutes the response to users' needs for shared access across multiple autonomous databases developed and operated in silos. In EU terms, this means that separate, EU-wide IT systems should become interconnected.⁵⁵ Interoperability reinforces the political intentions behind the development of the Prüm system to harmonize and minimize the divergence of Member States' situations. In that respect, the Prüm II proposal states that based on previous evaluations of the Prüm system not all Member States have sufficiently implemented the Prüm Decisions, and that differences in national rules and procedures caused delays and inefficiencies in the information exchange and thus hindering law enforcement measures to identify criminals.⁵⁶

Overall, considering that almost all the large-scale IT systems to which Prüm is interconnected process biometric data, namely dactyloscopic data and facial images, the revised regime aims at the mass exchange of biometric data at the borders and beyond. This in line with attempts to expand biometric data exchange and establish 'borderlessness' for data flows and to overcome the logics of nation state boundaries as part of data governance. The aim of interoperability is to diminish technical, scientific, operational and legal obstacles, resulting in increasingly permeable bio-borders.⁵⁷

This seemingly technical change – imagined as possible to be separated from political dimensions – of IT architecture towards interoperability had been a potential scenario since the beginning, as Vavoula outlined.⁵⁸ The EDPS raised this point

⁵⁵ R Bellanova and G Glouftsiou, 'Formatting European Security Integration through Database Interoperability' (2022) 31 *European Security* 454, 455.

⁵⁶ Proposal for a Regulation of the European Parliament and of the Council on automated data exchange for police cooperation ("Prüm II"), amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, 2019/817 and 2019/818 of the European Parliament and of the Council cit. 5.

⁵⁷ N Amelung, and H Machado (n 9) 396.

⁵⁸ N Vavoula, 'Interoperability of EU Information Systems: The Deathblow to the Rights to Privacy and Personal Data Protection of Third-Country Nationals?' (2020) 26 *European Public Law* 131.

clearly: The EDPS is convinced that interoperability should be viewed first and foremost as a policy choice, not as a technological solution, due to its far-reaching legal and societal consequences. [...] However, the EU legal framework must ensure that any limitations to the fundamental rights of all affected individuals apply only in so far as is strictly necessary'.⁵⁹

The political dimension of these paradigm changes in the case of Prüm is a shift towards vertical integration and re-negotiation of data sovereignty. The centralization and integration of Prüm into a wider set of centralized IT systems clearly shifts the data sovereignty of Member States which had been a core principle in the data management of law enforcement authorities in the AFSJ. While also in centralized systems Member States have national rules and responsibilities to which the use of data exchange needs to correspond to, the bottom up approach building on national databases of the Prüm system so far allowed for a wider range of sovereign procedures which includes for instance different standards of validation processes, also taking different timings for that into consideration.⁶⁰ As the shared Biometric Matching Service (sBMS), another interoperability component, will store fingerprints and facial images, it is here where the EDPS reminds of the multi-layered context of performing biometric data collection and analysis. The EDPS exemplifies the problematic consequences of diverse origins of biometric data collection for different purposes for the case of facial images:

'Furthermore, the EDPS draws the attention to the fact that facial images from the national databases, subject to automated searches in the context of Prüm, may differ from the ones stored in the EU large scale IT systems (e.g. VIS, EES) in terms of format and quality. In this regard, there are questions about the performance of the biometric matching algorithm of sBMS when matching facial images of data of suspects captured under different conditions, e.g. by a security camera, with facial images taken in a controlled environment, e.g. in a booth during visa procedure. Appropriate measures should be developed and implemented to address the risks stemming from low performance of matching algorithms'.⁶¹

The paradigm shift disguising a political transformation as a technology and innovation oriented takes place by also subscribing to the vision of 'digital transformation' which Trautmansdorff and Felt identified already in the context of the interoperability initiative as the driving mission for eu-LISA's attempt to harmonize and incorporate various forms of identity management.⁶² The latter demonstrates the dominant role of IT experts in the transformation towards interoperability of both

⁵⁹ European Data Protection Supervisor, Opinion 4/2018 of 16 April 2018 on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems, 15.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² P Trautmansdorff and U Felt, 'Between Infrastructural Experimentation and Collective Imagination: The Digital Transformation of the EU Border Regime' (2023) 48 *Science, Technology & Human Values* 635.

decentralized and centralized systems which contribute to narratives that frame the project rather as a mere technical and less political matter. The vision of ‘digital transformation’ together with specific technical solutions such as the router also get mainstreamed across different data exchange systems. The regulatory reform of the Advance Passenger Information (API) system also foresees the introduction of a central router coordinated by eu-LISA to introduce centralizing components on a previously existing system which imposes on air carriers to transmit API data prior to flights’ take off. Similarly, the new layer to Prüm is the digital aspect of linking decentralized databases into the interoperability project via the central router and the link to the CIR allowing to verify and cross-validate identity records across various databases. The latter moves identity management into a new and still unknown digital space which lives from its promise to be assumed to be reliable.⁶³ This change facilitates the delegation and relies on accumulated powers of IT expertise.

The additional ‘formatting’ of the system to be ready for interoperability implies the inclusion of additional biometric data such as facial images, and the widened access for additional actors of law enforcement, in particular by Europol.⁶⁴ Furthermore, it is the integration across different databases at the intersection of migration and law enforcement and streamlining processes, such as speeding up the follow up processes to a hit which then includes the exchange of personal data via law enforcement agencies (the so-called ‘step 2 process’) in stricter defined short timelines. The data transactions measured along the central router then will be reported and transformed into technical statistics of the system intended to be published by eu-LISA in the future. Here, the EDPS pointed to the relevance to go beyond pure technical statistics and turn such a tool into meaningful statistics to prove the efficiency and efficacy of the Prüm system for its defined purposes: ‘The EDPS believes that reporting on the accuracy of hits by the requesting Member State / Europol, would be highly valuable to measure the effectiveness of Prüm, particularly where it concerns matches of biometric data, such as facial images. Therefore, he recommends including explicitly this element in the statistics’.⁶⁵

Concerns have also rightly been raised that once there is a central router together with the 72 hours period to share personal core data (step two process) in place that there are no sufficient safeguards for accuracy and veracity in place to prevent false positives which immediately impact on risks for privacy.⁶⁶ Finally, Europol access has also been contested on two grounds; its lack of necessity – notably there has not been a single explanation as to why Europol should have access to that data and

⁶³ L Leese, ‘Fixing State Vision: Interoperability, Biometrics, and Identity Management in the EU’ (2022) 27 *Geopolitics* 113.

⁶⁴ R Bellanova and G Glouftisios (n 55) 456.

⁶⁵ EDPS Opinion 4/2022 (n 22) 16.

⁶⁶ EDRI (n 4) 25.

concerns about the lack of robust safeguards in place to prevent data reaching third countries via their cooperation with Europol.⁶⁷

4.2. Matters of inclusion of new biometric data: facial images

The second reform of interest relates to the introduction of new data categories for exchange across EU Member States, such as the addition of searches for missing people and unidentified remains and new types of data, in particular facial images and police records. The implicit assumption in the Prüm system is that the more data are exchanged, the more useful they are.⁶⁸ The ‘profoundly ideological role of beliefs in the power of data’ is materialised by the fact that data matter more than ever, through their gathering, further processing and sharing, in the control of crime of borders, and migration.⁶⁹ For the purpose of this article, in this section we focus on a particular aspect of expansion of categories of sensitive data, the addition of facial images, understood at the visual representations of a person’s face captured through photographs or video frames.

The Prüm II Regulation foresees in Arts 22(2) and 24 the introduction of automatic search of facial images: The requesting Member State automatically receives a list of matches concerning likely candidates. One matter of concern involves the possibility of using facial recognition technologies that utilize algorithms and computer vision to analyse and identify unique facial features within these images⁷⁰ Facial Recognition Technologies (FRTs) can be applied on videos (e.g. CCTV) or photographs to authenticate or to identify a person, and may be used for various purposes, including to search for persons in police watch lists or to monitor a person’s movements in the public space.

This concern is more than rhetorical or hypothetical. As of December 2020, the TELEFI project, funded by Internal Security Fund – Police of the Commission, has found that facial recognition for law enforcement purposes has been implemented in several EU Members and beyond.⁷¹ A typical use case of facial recognition by law

⁶⁷ *Ibid.*

⁶⁸ H Machado and R Granja, (n 9) 212.

⁶⁹ J Van Dijck ‘Datafication, Dataism and Dataveillance: Big Data between Scientific Paradigm and Ideology’ (2014) 12 *Surveillance & Society* 197, 201; G Glouftsiou and S Scheel, ‘An Inquiry into the Digitisation of Border and Migration Management: Performativity, Contestation and Heterogeneous Engineering’ (2021) 42 *Third World Quarterly* 123; L Leese (n 63).

⁷⁰ FRTs use digital images of faces (i.e. a person’s face that is captured using a device such as a camera or a scanner). The image is then stored in a database, and can be processed and analysed using computer algorithms.

⁷¹ According to the TELEFI study, facial recognition technologies were already implemented in eleven EU Member States (Austria, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, The Netherlands and Slovenia), in the UK and by Europol and Interpol. Seven Member States (Croatia, Cyprus, Czech Republic, Estonia, Romania, Spain and Sweden) have reached the stage of preparing for implementation and expect to start using the technology within one to two years. Nine EU Member States (Belgium, Bulgaria, Denmark, Ireland, Luxembourg, Malta, Poland, Portugal and

enforcement authorities in the Member States, in the United Kingdom (UK), or by Europol and Interpol is to use it as a retrospective tool during an investigation, where the facial image associated with a criminal event is examined after the crime has been committed. The facial image of interest is searched against a database that contains known individuals with an aim to identify the ‘unknown’ person within the image. The search result is a list of suspect candidates. No EU Member State has implemented live facial recognition for routine use, but it is routinely used in the UK.

While calls to ban facial recognition are proliferating at European level,⁷² the technology has been speedily rolled out at EU’s borders and is seen as an essential tool of policing.⁷³ In sum, despite huge controversies raised by FRTs there is a large global scale use of them.

Non-governmental organisations critically engaging with the development of surveillance technologies and expansion of police databases have reported ethical and social concerns with facial recognition, considered to be highly intrusive and human rights violating. Euroactive, Statewatch, EDRi and other civil society organizations have called on the European Commission, the European Parliament, and Member States to ensure that facial recognition technologies are comprehensively banned in both law and practice throughout the EU.⁷⁴ The problematic plans on the table to exchange facial images within the Prüm system raise serious concerns that Prüm II could therefore facilitate automated exchange of sensitive data without putting in place adequate safeguards to ensure that this cannot be done spuriously, arbitrarily or for politically-motivated reasons. During the consultation phase, EDRi strongly opposed the plans for extension of the Prüm framework with facial images in Member States’ criminal investigation databases. EDRi urged for a democratic debate on facial recognition and for refraining to impose the roll out of facial recognition in policing through the Prüm framework potentially leading to ‘biometric mass surveillance’.⁷⁵

Scholars alert that with the evolution of Artificial Intelligence (AI), particularly with the development of machine-learning algorithms, there has been significant progress in the field of image recognition that expands the potential for unscrupulous

Slovakia) did not present solid plans for implementation; TELEFI, ‘Summary Report of the Project “Towards the European Level Exchange of Facial Images”’ (2020), at www.telefi-project.eu.

⁷² The EU Artificial Intelligence Act, unveiled in April 2021, has reached a provisional agreement between the European Parliament and the Council in 8 December 2023, after months of intensive trilogue negotiations. In the AI Act, one banned AI application is untargeted scraping of facial images from the internet or CCTV footage to create facial recognition databases. Recognising the potential threat to citizens’ rights and democracy posed by certain applications of AI, the co-legislators agreed to prohibit its use but agreed on ‘law enforcement exceptions’.

⁷³ C Aradau and T Blanke, ‘Algorithmic Reason: The New Government of Self and Other’ (Oxford University Press 2022) 160; L Urquhart and D Miranda, ‘Policing Faces: The Present and Future of Intelligent Facial Surveillance’ (2022) 31 *Information & Communications Technology Law* 194.

⁷⁴ EDRi (n 4); M Monroy, ‘Facial Recognition and Police Records: European Biometric Systems to be Expanded’ (27 January 2022), at digit.site36.net.

⁷⁵ EDRi (n 23) 4.

use of this technology.⁷⁶ The use of facial images in Prüm II might enable large-scale data processing, and it also opens new paths for racial bias and other discriminatory outcomes in sensitive contexts such as security, border control, or asylum management or enabling very problematic uses such as predicting how likely it is for an individual to commit a future crime.⁷⁷

In the context of AI, the European Parliament has already warned about the risks arising from law enforcement uses of facial recognition, calling to prohibit uses which would constitute biometric mass surveillance (EPRS, 2021). Commission's AI Act prohibited real-time facial recognition in publicly accessible spaces, while permitting narrowly defined exemptions for law enforcement to search for missing children, dangerous criminals, or suspected terrorists.⁷⁸

FRTs are also considered as inducing the risk of discrimination and false results. As one of the most deployed AI applications, the errors of facial recognition appear frequently in public debates. According to a report by the civil liberties organization Big Brother Watch in the UK, facial recognition systems used by the police were wrong nine times out of ten. Errors in facial recognition are systematic rather than accidental, revealing underlying patterns of bias and discrimination (Matzner, 2018: 41). Algorithms can 'automate' racial and class relations, presenting them as natural and objective (Buolamwini and Gebru, 2018).⁷⁹

Vavoula stressed the challenges to the protection to private life and protection of personal data, the potential for discrimination and profiling against certain groups of people, the risks of false positive matches due to problems with data quality and accuracy of the technology, concluding that:

'If this option goes forward, the sources of facial images require clarity and data protection safeguards must be embedded so that the quality of facial images is high enough to

⁷⁶ C Bueno, 'The Face Revisited: Using Deleuze and Guattari to Explore the Politics of Algorithmic Face Recognition' (2020) 37 *Theory, Culture & Society* 73.

⁷⁷ L Introna and D Wood, 'Picturing Algorithmic Surveillance: The Politics of Facial Recognition Systems' (2004) 2 *Surveillance & Society* 177; S Kloppenburg and IVD Ploeg, 'Securing Identities: Biometric Technologies and the Enactment of Human Bodily Differences' (2020) 29 *Science as Culture* 57; J Angwin, J Larson, S Mattu, 'Machine Bias: There's Software used Across the Country to Predict Future Criminals. And it's Biased Against Blacks' (2016) *ProPublica.Org*.

⁷⁸ Final Regulation (EU) 2024/1689, adopted in March–May 2024 (with entry into force July 2024 and full applicability by dates up to August 2026). Under Art 5(1)(d) of Regulation (EU) 2024/1689 (the Artificial Intelligence Act, in force 1 August 2024), 'real-time' remote biometric identification systems (e.g. live facial recognition) in publicly accessible spaces are generally prohibited when used for law enforcement purposes; exceptions may be authorized *only* in specific, serious circumstances—namely, the targeted search for missing persons (including children), prevention of an imminent terrorist threat, or identification and prosecution of serious criminals—only after appropriate court or administrative authorization at national level.

⁷⁹ J Buolamwini and T Gebru, 'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification' (2018) *Proceedings of the 1st Conference on Fairness, Accountability and Transparency* (FAT* 2018), *Proceedings of Machine Learning Research* 81, pp 77–91.

prevent the risk of increased false matches, which may lead to discriminatory practices. The specific purposes for searching facial images should also be circumscribed so as to prevent wide-ranging surveillance practices at the national level. Separation of images on the basis of their sources and their quality (mug-shots v probe images) should be considered as well'.⁸⁰

The European Data Protection Board (EDPB) also alerted on the use of facial recognition technology in the areas of law enforcement to the necessity to consider carefully the challenges of reliability and efficiency of facial recognition, as well as the overall issue of quality and accuracy of data sources, since they entail particular significant or serious risks for data subjects concerned in the area of law enforcement.⁸¹ The EDPB's pronouncement illustrates how public concerns with 'errors' and lack of quality of data sets used to training algorithms have been enacted in regards to controversies of facial recognition in the following statement:

'the EDPB considers it important to recall that FRT [i.e. facial recognition technologies]. facial recognition technologies, the authors], whether used for the purposes of authentication or identification, do not provide for a definitive result but rely on probabilities that two faces, or images of faces, correspond to the same person. [...] Numerous studies have also highlighted that such statistical results from algorithmic processing may also be subject to bias, notably resulting from the source data quality as well as training databases, or other factors, like the choice of location of the deployment'.⁸²

From the perspective of developers of facial recognition, the controversies triggered so far have been the result of a mere lack of technical accuracy and hence these errors can and must be solved by employing better training data sets for machine learning.⁸³ As noted by Bueno, from this perspective, a properly trained algorithm accompanied by adequate technical solutions is presented by AI developers as 'less racist than human-to-human interactions', therefore obliterating historical systemic racism and social logics of power and discrimination.⁸⁴

In the same line of reasoning, Aradau and Blanke propose to unpack the emergence of 'accountability by error' in global scenes of controversy around facial recognition and their respective 'politics of optimization and trust'.⁸⁵ In their view, accountability has been enacted triggered through error detection when different publics have encountered algorithmic malfunctions, misrecognitions, failures, or

⁸⁰ Vavoula (n 10) 51.

⁸¹ European Data Protection Board (EDPB), Guidelines 05/2022 of 12 May 2022 on the use of facial recognition technology in the area of law enforcement 14.

⁸² *Ibid.*

⁸³ F Pasquale, 'The Algorithmic Self' (2015) 17 *The Hedgehog Review* 14.

⁸⁴ Bueno (n 76) 75.

⁸⁵ Aradau and Blanke (n 73) 166–171.

other fallibilities: ‘These forms of accountability through error enact algorithmic systems as fallible but ultimately correctable and therefore always desirable. Errors become temporary malfunctions, while the future of algorithms is that of indefinite optimization’.⁸⁶ In this context, to have ‘better’ facial recognition technologies (‘better algorithms’) might mean to assemble larger and larger data to optimise algorithms, and in this way logics of power are obfuscated and extensive surveillance is normalized.

5. Conclusions

This article focussed on selected components of the policy process leading from Prüm to Prüm II. We emphasized on the preparatory process between 2018 to 2021 which included different consultation activities led by the Commission, and then selected two areas which are subject of contestation to discuss some characteristics and limitations of the process of regulating the follow-up process which expands, modifies and reformats the Prüm system.

The political rationale of public consultation activities set up by the European Commission to reform the Prüm system aimed to provide a regulation in line with fundamental rights and dedicated to the public good of security of EU citizens. However, it was done through particular framings of the procedural democratic (consultations) and technical (technology assessment) steps. We argue that the process suffers from various limitations. It is driven by a monopoly of actors who are involved in the governance of possible futures of the Prüm system which consists of regulators, specific EU agencies such as Europol and eu-LISA which had themselves interests in magnifying their powers, law enforcement authorities, and selected Member States. The hegemonic governance that creates and manifests Prüm builds on specific ascribed meanings of security and underpinning assumptions of security governance, configures what is conceived as risks and threats, who is assumed in need to become protected and by what means, and whose voices and expertise are considered and whose are silenced in the decision making of governing this continuously emerging technological system. Thereby power asymmetries between actors drive the settings for consulting activities, but are also confirmed and manifested by them.

By focussing on the orchestrated policy deliberations and public consultations in the context of the Prüm II preparations this article improves the understanding of why certain governance arrangements claiming to be participatory fail to satisfy institutions and concerned publics.⁸⁷ With such staged and orchestrated forms of consultation, opportunities for alternative anticipatory practices — such as predictions,

⁸⁶ Ibid. 171.

⁸⁷ M Hajer, ‘Setting the Stage: A Dramaturgy of Policy Deliberation’ (2005) 36 *Administration & Society* 624; M Hajer, ‘Rebuilding Ground Zero. The Politics of Performance’ (2005b) *Planning Theory & Practice*, 6:4, 445.

forecasts, and scenarios informed by ‘ecologies of participation’ (i.e., the dynamics of diverse, interrelating collectives and spaces of participation) — are often missed.⁸⁸ The still scarce attention paid to critical issues in the governance towards Prüm II provokes us to ask if there are possibilities for alternative governance forms which suggest being more attentive to ethical and democratic concerns. We suggest to continuing the exploration of the following questions: How can hegemonic security narratives be contested? How may alternative positionings, that are attentive to claims about additional or alternative ethical and human rights issues, be heard and incorporated into the governance of Prüm? What forms of anticipatory governance can and shall accompany incremental technology change policy process leading from Prüm to Prüm II?

With this article, we aim to contribute to scholarship which sensitizes readers to the finding that policy and engagement processes with the objective to arrive at decision making and political choices on security issues are political in themselves and need to be reconsidered and re-opened to define legitimate public problems and acceptable ways to deal with them. In order to be legitimate, they need to seriously consider the various articulations of reasonable public contestations.

⁸⁸ J Chilvers, H Pallett, T Hargreaves, ‘Ecologies of Participation in Socio-Technical Change: The Case of Energy System Transitions’ (2018) 42 *Energy Research & Social Science* 199.

The Future of Digitalisation in EU Law Enforcement

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National Security and New Forms of Surveillance: From the Data Retention Saga to a Data Subject Centred Approach

Maria Tzanou* and Plixavra Vogiatzoglou**

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ABSTRACT: National security is a regulatory complex area that brings together public and private actors performing a variety of functions for the safeguarding of the EU Member States' national interests. The article critically reflects on the applicability of EU law in this area by examining the complexities and controversies surrounding the respective judiciary and legislative approaches as well as the emerging surveillance practices deployed under the veil of national security. It argues that, while it is laudable that some aspects of national security were brought within the scope of application of EU law by the CJEU through its data retention jurisprudence, the grounding of the EU law applicability on the activities of private entities (controllers) is problematic. In particular, it creates significant legal uncertainties as private and public bodies are increasingly intertwined in the field of security and Member States push back against such expansion of EU law, while the case law does not take into account new forms of intrusive surveillance such as Pegasus. To counter these issues, the article proposes a new *data subject-focused* approach for the grounding of the scope of application of EU law -including to national security measures- which shifts the focus

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from the entity carrying out the national security operation (controller) to the individuals being affected (data subject). As such, it aligns better with fundamental rights and the constitutional foundations of EU data protection law and is urgently needed in the rapidly privatised and algorithmised area of national security.

KEYWORDS: national security – data retention – EU data protection law – algorithmic surveillance – digital constitutionalism – Pegasus.

1. Introduction

The increased privatisation and algorithmisation of Member States' national security through the deployment of emerging technologies, such as machine learning, Artificial Intelligence (AI) and modern spyware, pose unprecedented risks to EU fundamental rights. New forms of digital surveillance have been deployed by EU Member States, such as Pegasus, which is considered 'the most powerful hacking tool or spyware'¹ developed to date granting 'complete, unrestricted access' to the targeted mobile phones, and all the information contained on these.² Member States's national governments are increasingly procuring powerful spywares and data mining and predictive tools by private tech companies, such as Palantir considered to be involved in 'serious human rights abuses' worldwide.³

Yet, the scope of application of EU law in this area remains unclear and convoluted. Pursuant to Article 4(2) of the Treaty on European Union (TEU), 'national security remains the sole responsibility of each Member State'. In the now (in)famous *Privacy International* and *La Quadrature du Net* (LQdN) rulings, the Court of Justice of the EU (CJEU) established that activities by electronic communications services providers (ECSPs), carried out for national security purposes, are subject to EU law, while activities by intelligence services alone are exempted.⁴ Nevertheless, there are significant uncertainties about the applicability of such distinctions in practice, due to the blurred boundaries between national and public security and even more so where the involvement of private actors in national security surveillance goes beyond the activities of ECSPs and includes new forms of surveillance, such as Pegasus.⁵

¹ European Data Protection Supervisor, Preliminary Remarks on Modern Spyware, 15 February 2022, at www.edps.europa.eu 3.

² D Pegg and S Cutler, 'What is Pegasus Spyware and How Does it Hack Phones?' (The Guardian, 18 July 2021), at www.theguardian.com.

³ A Bychawski, 'What you need to Know about Palantir, the US Firm in Line for a £480m NHS Deal' (Open Democracy, 23 October 2023) at www.opendemocracy.net.

⁴ Case C-623/17 *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others* EU:C:2020:790; Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others v Premier minister and Others* EU:C:2020:791.

⁵ Pegg and Cutler (n 2).

Furthermore, the EU legislator has increasingly been pursuing a different approach to the regulation of national security activities, as demonstrated for instance by the freshly agreed upon AI Act. Accordingly, the AI Act shall not apply to national security regardless of the actor involved, contrary to the CJEU's jurisprudence.⁶

This article aims to contribute to this debate and advance legal certainty by offering a new way of thinking how the exercise of power in the context of national security ought to be limited and made subject to review in the EU digital ecosystem. This approach considers the applicability of EU fundamental rights to national security measures as a pre-condition for the achievement of the constitutional equilibrium in this area, without which the substantive fundamental rights protection cannot be realised.

The article makes two distinct contributions to the debate of EU regulation of national security: First, it investigates the complexities and controversies surrounding the scope of application of EU law to national security surveillance. In this regard, it argues that, while it is laudable that some aspects of national security were brought within the scope of application of EU law by the Court through its data retention jurisprudence, the grounding of the EU law applicability on the activities of private entities (controllers) is problematic because it creates significant legal uncertainties. To demonstrate this, we first expose the issues raised by this case-law and its legislative aftermath. Then, we employ two case studies of surveillance measures deployed by EU Member States: data mining and analysis software developed by Palantir and the Pegasus spyware surveillance. Second, situating the discussion within the digital constitutionalism framework, the article proposes a new way of thinking about this topic, a *data-subject centric* model for establishing the applicability of EU fundamental rights law to national security which aligns better with the constitutional foundations of EU data protection law.

This is the first time that such an approach is developed and proposed in the academic field. To date, academic literature has mainly focused on discussing national security in relation to the Court's data retention case law.⁷ A discussion on new forms of surveillance, such as Pegasus is emerging and focuses primarily on

⁶ 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 Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), Art 2(3).

⁷ See for example M Rojszczak, 'National Security in a Digital Europe' (2023) 48 *European Law Review* 544. By contrast, see P Vogiatzoglou and S Fantin, 'National and Public Security within and beyond the Police Directive' in A Vedder, J Schroers, C Ducuing and P Valcke (eds), *Security and Law. Legal and Ethical Aspects of Public Security, Cyber Security and Critical Infrastructures* (Intersentia 2019) 27.

demonstrating their unprecedented risks on fundamental rights.⁸ However, this discussion is limited if EU fundamental rights are barred from applying to the use of such surveillance systems in the area of national security. Privacy scholars, such as Korff, have called for national security agencies to be made subject to EU law and the EU Charter of Fundamental Rights (Charter).⁹ Their arguments are normally based on the Court's expansive data retention case law. However, the data subject model, proposed here, differs from these analyses for two reasons. First, we call for a general shift from the focus on controllers to data subjects when establishing the applicability of EU law in the national security context. Second, we argue that there is a principled, theoretically and doctrinally more robust framework to achieve this, inspired by digital constitutionalism, which differs from what has already been proposed in the case law, by regulators and debated in academic legal scholarship.

Legal certainty is urgently needed in the rapidly privatised and algorithmised area of national security.¹⁰ The lack of applicability of EU fundamental rights law on national security measures and on new forms of surveillance procured by Member States is an issue that has significant repercussions for collective and individual level protections in the EU even if the CJEU has expanded the application of EU law in the area. The rethinking of the issue of grounding the application of EU law as proposed in the article is likely to influence academic debates in the area, and more importantly, to produce practical consequences. It aims to demonstrate to the EU legislator and the judiciary that there is a different way to approach this issue, which breaks free from current constraints, uncertainties and shortcomings. If such an approach were to be adopted by the EU legislator or the judiciary, then new surveillance forms (such as Pegasus) would no longer fall outside the scope of EU fundamental rights law.

The article is structured as follows: Section 2 examines the national security activities that fall within the scope of EU law. It critically discusses the distinction between national and public security and the CJEU's development of what can be characterised as a data *controller-focused approach*, which relies primarily on the role of the private sector for expanding the applicability of EU (data protection) law onto national security operations. Section 3 challenges this approach, by demonstrating the fragmented responses by the EU legislator following the CJEU's jurisprudence and on the basis of two case studies of new surveillance forms: Palantir and Pegasus. It argues that the controller-focused approach is subject to conflicting interpretations that neglect the

⁸ See for example G Sartor and A Loreggia, 'The Impact of Pegasus on Fundamental Rights and Democratic Processes' (European Parliament, January 2023) at www.europarl.europa.eu.

⁹ D Korff, 'Opinion on the Implications of the Exclusion from New Binding European Instruments on the Use of AI in Military, National Security and Transnational Law Enforcement Contexts' (European Center for Not-for-Profit Law, October 2022) at ecnl.org.

¹⁰ R Jansen and M Reijneveld, 'Convention 108+, the GDPR, and Data Processing in the National Security Domain' (2022) 8 *European Data Protection Law Review* 423.

working reality of intelligence services and the increasing use of emerging technologies which bring novel risks to fundamental rights and the EU democratic society. Section 4 proposes a novel, *data subject-centric* model, which could yield a higher degree of legal certainty, coherence and protection of individuals rights and freedoms than the one currently followed in the EU. The analysis addresses the potential objections to this model and considers possible ways to overcome these *de lege lata* and *de lege ferenda*. The final section contains concluding remarks.

2. National security

2.1. Definition and scope

Under Article 4(2) of the Treaty on European Union (TEU), ‘national security remains the sole responsibility of each Member State’.¹¹ Conversely, other aspects of security, such as the safeguarding of public security and the fight against crime, fall within the scope of EU law.¹² However, the concept of national security is not delineated in EU law, nor is there a single unilaterally accepted definition.¹³ Moreover, public security has been expanding into a notion overlapping or even being assimilated to national security.¹⁴ Therefore, discerning what constitutes an activity in pursuit of national security becomes an increasingly complex task.

National security, often also referred to as state security in case law and legislation, seems linked to the core sovereignty and democratic nature of the state, relating to both internal and external dimensions of security.¹⁵ In *Privacy International and LQdN*, the CJEU described the national security responsibility incumbent upon Member States under Article 4(2) TEU as corresponding: ‘to the primary interest in protecting the *essential functions of the State and the fundamental interests of society* and [as encompassing] the prevention and punishment of activities capable of seriously destabilising the fundamental constitutional, political, economic or social

¹¹ See also P Vogiatzoglou, ‘The Era of Pre-Crime: How Mass Data Surveillance and Predictive Policing Intersect and Interfere with Privacy, Data Protection and Due Process Rights in the EU’ (KU LEUVEN, 2023), at lirias.kuleuven.be.

¹² Treaty on the European Union [2016], Art 3(2); Title V of the Treaty on the Functioning of the European Union [2016].

¹³ Vogiatzoglou and Fantin (n 7).

¹⁴ Ibid. 42, 47.

¹⁵ See for example Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland*, EU:C:2000:2, para 17; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), Arts 1(3) and 15(1). See also P Kourakos, *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing 2016) 190; Vogiatzoglou and Fantin (n 7).

structures of a country and, in particular, of directly *threatening society, the population or the State* itself, such as *terrorist activities*'.¹⁶

At the Council of Europe (CoE) level, national security is broadly subject to scrutiny and regulation. First, the European Court of Human Rights (ECtHR) is competent to scrutinise state measures pursuing the aim of national security.¹⁷ Although the ECtHR may recognise a wider margin of appreciation to states when examining the proportionality of national security measures, given its powers in this context, it has neither defined national security nor does it always distinguish between national and public security.¹⁸ Ultimately, the Court equally endorses a restrictive interpretation of national security, stating that its limits cannot 'be stretched beyond its natural meaning'.¹⁹ Second, the CoE Convention on data protection (Convention 108+) enables Contracting States to apply the rules therein to all sorts of processing activities, including state security. It further foresees permissible restrictions to its rules for national security purposes, which must, however, abide by certain conditions.²⁰ Finally, the CoE Recommendation on data processing by police explicitly recognises that states may extend the applicability of those international data protection rules and principles also to the field of state security.²¹

At the EU legal order, the national security exception raises more complex issues. In this context, national security (which falls outside the scope of EU law) may be juxtaposed to public security which falls within the scope of EU law. Public security appears to be linked to the internal security of a state, as well as the security of the

¹⁶ *Privacy International* (n 4) para 74; *La Quadrature du Net and Others* (n 4) para 135. However, when discussing the purpose of the fight against terrorism pursued by the PNR Directive, the CJEU was much less willing to accept that it may also include monitoring activities by intelligence and (national) security services. Case C-817/19 *Ligue des droits humains ASBL v Conseil des ministres*, EU:C:2022:491 para. 236, on Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

¹⁷ See for example European Convention on Human Rights [1950], Art 8(2).

¹⁸ See for example *Centrum för Rättvisa v. Sweden* App n. 35252/08 (ECtHR, 19 June 2018) para 112. See also N Ni Loideain, *EU Data Privacy Law and Serious Crime: Data Retention and Policy-making* (Oxford University Press 2023) 61; M Rojszczak (n 7) 549.

¹⁹ *Case of C.G. and Others v. Bulgaria* App n. 1365/07 (ECtHR, 24 April 2008) para 43.

²⁰ Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108+) [1981, 2018] Arts 3(1), 11 and II Commentaries point 47. See also P Vogiatzoglou, 'Article 2: Scope' in E Kosta, F Boehm (eds), *The Law Enforcement Directive (LED): A Commentary* (Oxford University Press 2024) 67.

²¹ Recommendation No. R (87) 15 of the Committee of Ministers to member states regulating the use of personal data in the police sector, Explanatory Memorandum point 29 [1987].

European public, its citizens and the EU territory.²² Furthermore, the definitions given to public security within case law and secondary law start to closely resemble the above description of national security. For instance, the CJEU has stated that public security could be affected by ‘a threat to the *functioning of the institutions and essential public services and the survival of the population*, as well as the risk of a serious *disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests*’.²³ This definition has been further endorsed within secondary (data protection) law, whereby public security is considered to ‘[presuppose] the existence of a *genuine and sufficiently serious threat* affecting one of the *fundamental interests of society*’, such as those described in the above case law.²⁴ Finally, terrorism constitutes a serious crime within the broader realm of security for which the EU is co-responsible.²⁵

The references to fundamental interests of society, essential services, survival of the population, interstate relations and even military interests, traditionally part of national security, now used to also define public security, demonstrate how blurred the boundaries between these two concepts of security have come to be. Adding to that, combatting terrorism expressly falls within the scope of both national and public security.²⁶

In the CJEU’s view, ‘a threat to national security must be *genuine and present, or at the very least foreseeable*’ and is thereby ‘distinguishable by its *nature, its seriousness, and the specific nature of the circumstances* of which it is constituted, from the general and permanent risk of the occurrence of tensions or disturbances, even of a serious nature, that affect public security, or from that of serious offences

²² A Dimitrova and M Brkan, ‘Balancing National Security and Data Protection: The Role of EU and US Policy-Makers and Courts before and after the NSA Affair’ (2018) 56 *Journal of Common Market Studies* 751, 760; Vogiatzoglou and Fantin (n 7).

²³ Case C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis* EU:C:2010:708 para 44 and case law cited therein.

²⁴ The recital continues by repeating the case law as follows: ‘a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or the peaceful coexistence of nations, or a risk to military interests’. Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, recital 19. See also Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, recital 12, according to which a threat to public security may further include ‘a particularly serious threat to one of the fundamental interests of society’.

²⁵ Art 83(1) TFEU. See also Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* EU:C:2016:970 para 103.

²⁶ See for example *Tele2 Sverige* (n 25) para 103; *La Quadrature du Net* (n 4) para 135.

being committed'.²⁷ Nevertheless, the nature and seriousness of threats against national and public security are similarly defined as genuine and as relating to the same fundamental state and society interests, as discussed above. Ultimately, the determining factor may be temporal, as the threat to national security is present or foreseeable, whereas a threat to public security is seen as general and permanent.²⁸ Yet, in such a dynamic and complex environment like security, distinguishing between *foreseeable* and *general* may not be as explicit either.²⁹ Furthermore, the guidance by the CJEU seems to neglect the growing collaboration and institutional blurred lines between intelligence services, competent for national security, and law enforcement authorities, competent for public security, for example, working together to prevent terrorist acts.³⁰ Adding to that complexity, private sector actors are increasingly involved in security activities, with a crucial impact in delineating the scope of EU competences and data protection law.

2.2. Private sector and the expanding application of EU law

As with every exception to EU law, the national security derogation under Article 4(2) TEU must be interpreted strictly. The CJEU has consistently held that Member States are not allowed to unilaterally decide to completely override EU obligations for purposes of national security unless they have sufficiently substantiated their claim.³¹ A derogation from an EU obligation cannot take place in the abstract, but the Member State in question must demonstrate specifically and 'to the requisite legal standard' that the derogation is necessary. In this way, the Court does not

²⁷ *La Quadrature du Net and Others* (n 4) paras 136–137. Case C-140/20 *Commissioner of An Garda Síochána* xEU:C:2022:258 para 62.

²⁸ *Ibid.*

²⁹ M Tzanou and S Karyda, 'Privacy International and Quadrature Du Net: One Step Forward Two Steps Back in the Data Retention Saga?' (2022) 28 *European Public Law* 123, 137–138; V Mitsilegas, E Guild, E Mendos Kuşkonmaz and N Vavoula, 'Data Retention and the Future of Large-Scale Surveillance: The Evolution and Contestation of Judicial Benchmarks' (2022) 29 *European Law Journal* 176, 197; P Vogiatzoglou, 'Case note on the Court of Justice C-140/20 *Commissioner of An Garda Síochána* ruling' (2022) *Computerrecht* 272, 277.

³⁰ See *inter alia* C Cocq and F Galli, 'The Catalysing Effect of Serious Crime on the Use of Surveillance Technologies for Prevention and Investigation Purposes' (2013) 4 *New Journal of European Criminal Law* 256; A Završnik, 'Blurring the Line between Law Enforcement and Intelligence: Sharpening the Gaze of Surveillance?' (2013) 9 *Journal of Contemporary European Research* 181.

³¹ Case C-300/11 *ZZ v Secretary of State for the Home Department* EU:C:2013:363 para 38; Case C-808/18 *European Commission v Hungary* EU:C:2020:1029 para 261; Case C-715/17, C-718/17 and C-719/17 *European Commission v Republic of Poland and Others* EU:C:2020:257 para 143; *La Quadrature du Net and Others* (n 4) para 99. See also M Claes, 'The Primacy of EU Law in European and National Law' in D Chalmers and A Arnall (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 178.

unconditionally accept the invocation of Article 4(2) TEU by Member States, but instead examines whether EU law may still be applicable in the case at hand.

Accordingly, in its now (in)famous *Privacy International* and *LQdN* judgments, the CJEU conditioned the national security derogation upon the lack of private actors. In particular, the rulings clarified that the national security exception is applicable only when it concerns practices that are purely governmental, this means that they do not engage any private entity subject to EU rules.³²

To reach this conclusion, the CJEU built not only on its settled case law that ‘the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable’,³³ but also on its rich data retention jurisprudence. In fact, the activities of private entities have been playing a determinant role in defining the scope of EU law applicability, already since the litigation regarding the legal basis of the now invalidated Data Retention Directive (DRD).³⁴ In turn, a series of cases regarding the e-Privacy Directive (EPD),³⁵ and its Article 15(1), which allows the adoption of national data retention measures for national and public security purposes, helped shape the court’s argumentation. Interestingly enough, its line of reasoning, especially as regards the scope of ECSPs activities, has not been entirely consistent throughout time.

More specifically, when deciding on the fate of the DRD legal basis, the Court held that, since the DRD governed only the *retention* of electronic communications services (ECS) metadata³⁶ by private entities, and *not their subsequent access* and use, it did not concern law enforcement purposes or any state activities.³⁷ In fact, the Court found data retention as such to be of commercial nature, independent of any security activity.³⁸ The role of the private sector served in this case as a means to

³² *Privacy International* (n 4) para 49; *La Quadrature du Net and Others* (n 4) paras 103-104. See also Case C-101/01 *Criminal proceedings against bodil Lindqvist* EU:C:2003:596 para 43 and Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* EU:C:2008:54 para 51.

³³ *Ibid.*

³⁴ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

³⁵ Directive on privacy and electronic communications (n 15).

³⁶ Metadata in the context electronic communications services refer to traffic and location data. Traffic data are defined as ‘data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof’ and location data are defined as ‘data processed in an electronic communications network, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service’. Directive on privacy and electronic communications (n 15) Art 2(b) and (c) respectively.

³⁷ C-301/06 *Ireland v European Parliament and Council of the European Union* EU:C:2009:68 paras 80, 91.

³⁸ *Ibid* paras 82–83.

confirm the DRD legal basis of the EU internal market, rather than the then third pillar where the EU enjoyed less power.³⁹ By contrast, in *Tele2* a few years later, the CJEU held that the data *retention* by ECSPs and the *access* to the retained data by security authorities fall within the scope of the EPD.⁴⁰ This approach seems to have come as a response to Member States and the Commission claiming that only national legislation relating to data *retention* must abide by the EPD;⁴¹ the Court stated clearly that also data access comes within this scope.

To that end, the CJEU took into account the general structure of the EPD, which applies to ECSPs, and its Article 15(1), which foresees the adoption of national data retention schemes derogating from EPD obligations.⁴² Still, Article 15(1) EPD, in the same way as the invalidated DRD, does not refer to *access* to the retained data. Nevertheless, the CJEU stated that data are retained ‘only for the purpose, when necessary, of making that data accessible to the competent authorities’.⁴³ The fact that data are retained for the sole purpose of being accessed to by security authorities had been previously neglected.⁴⁴ Moreover, in a rather conflicting way, the Court admitted that ‘the legislative measures that are referred to in [art. 15(1) EPD] concern *activities characteristic of States or State authorities, and are unrelated to fields in which individuals are active*’.⁴⁵ Without bringing forth any counter-argument, the CJEU posited, however, that Article 15(1) EPD ‘expressly authorises’ such legislative measures, and thus they necessarily fall within its scope.⁴⁶ Any different

³⁹ Ibid para 93 with reference to Treaty of Nice [2001].

⁴⁰ *Tele2 Sverige* (n 25) paras 78 and 82.

⁴¹ Ibid paras 65–66.

⁴² In particular, according to Directive on privacy and electronic communications (n 15), Art 15(1), ‘Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in [...] this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC’. See also *Tele2 Sverige* (n 25) para 73.

⁴³ *Tele2 Sverige* (n 25) para 79.

⁴⁴ The CJEU had in fact been subject to criticism for its DRD ruling, disregarding how retention and access are inextricably connected, see F Boehm, *Information Sharing and Data Protection in the Area of Freedom, Security and Justice: Towards Harmonised Data Protection Principles for Information Exchange at EU-Level* (Springer 2012) 392–393.

⁴⁵ The Court even admitted that the objectives pursued by such measures substantially overlap with the objectives that fall outside the scope of the Directive on privacy and electronic communications (n 15) as per its art 1(3). *Tele2 Sverige* (n 25) para 72.

⁴⁶ *Tele2 Sverige* (n 25) para 73.

conclusion, in the court's debatable view,⁴⁷ would deprive the provision under Article 15(1) EPD of any purpose.⁴⁸

Throughout its argumentation, the Court did not touch upon how different security purposes may be pursued by national data retention measures in line with Article 15(1) EPD. In fact, Advocate General (AG) Øe interpreted the *Tele2* ruling as bringing 'national provisions, based on [art. 15(1) EPD] governing both the retention by [ECSPs of metadata], as well as the access by the public authorities to the data retained for the purposes referred to in that provision – *which include law enforcement and the protection of national security* – [...] *within the scope of that directive*'.⁴⁹ In this way, the outcome in *Privacy International* and *LQdN* extending the EPD scope to national security activities should not come as a surprise.

In the meantime, another building block was added with *Ministerio Fiscal*, whereby the CJEU clarified that the Article 1(2) EPD excludes from its scope activities of the state that 'are unrelated to field in which individuals are active' – the phrase previously used to describe the national measures adopted pursuant to Article 15(1) EPD.⁵⁰ Conversely, national measures imposing retention of data and access to retained data fall within the scope of the EPD, and are governed by Article 15(1) EPD. Through this rather circular argumentation, it was asserted that these national measures regulate activities of ECSPs, and 'cannot be regarded as activities characteristic of States'.⁵¹ In *Tele2* and *Ministerio Fiscal*, the central role of the private sector actors⁵² allowed the extension of EU rules applicability, by shifting the scope of their activities to also encompass the access to retained data. However, it should be noted that these cases concerned processing activities for the purpose of public security, where the EU enjoys clear regulating powers.

Finally, in *Privacy International* and *LQdN*, the scope of ECSPs activities allowed the CJEU to confirm that national data retention legislation at large falls within the scope of the EPD.⁵³ Based on *Tele2* and *Ministerio Fiscal*, the Court affirmed how '[such] legislative measures *necessarily involve the processing, by [ECSPs], of the data and cannot [...] be regarded as activities characteristic of States*'. Therefore, the entire data retention framework, comprised of the processing activities of both the retention by ECSPs and the granting of access to security authorities, for both national

⁴⁷ See *inter alia* I Cameron, 'Metadata Retention and National Security: Privacy International and La Quadrature Du Net' (2021) 58 *Common Market Law Review* 1433, 1458.

⁴⁸ *Ibid.*

⁴⁹ Opinion of AG Øe in Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems* EU:C:2020:559 para 215.

⁵⁰ Case C-207/16 *Proceedings brought by Ministerio Fiscal* EU:C:2018:788 para 32.

⁵¹ *Ibid.* para 37.

⁵² See also Mitsilegas, Guild, Mendos Kuşkonmaz and Vavoula (n 29) 5.

⁵³ *Privacy International* (n 4) paras 34–39; *La Quadrature du Net and Others* (n 4) paras 91–103.

and public security, is subject to and must comply with the EPD.⁵⁴ By consequence, it must also comply with the General Data Protection Regulation (GDPR), which is supplemented and specified by the EPD.⁵⁵ To reinforce its argumentation, the CJEU further claimed that the GDPR, too, foresees exceptions from the application of certain of its provisions for security purposes, and thereby, ‘*it is apparent from Article 23(1)(d) and (h) [GDPR] that the processing of personal data carried out by individuals for those same purposes falls within the scope of that regulation*’.⁵⁶

To sum up, the conclusion that arises from the CJEU’s data retention case law is that EU rules are applicable to national measures which impose obligations upon private sector actors, whose activities are regulated by EU law, such as ECSPs. Therefore, these national measures – even if they are pursuing the safeguarding of national security – are subject to CJEU scrutiny. By extending the applicability of EU law to activities even in pursuit of national security purposes, it brought them under the safeguards of EU data protection law, as well as the Charter.⁵⁷ However, the Court took a questionable route to reach this conclusion, and its reasoning is far from robust or well-substantiated, to say the least.⁵⁸ The incoherent building of argumentation on what constitutes activities of states, the unique understanding of what foreseeing an exception entails and the limited analysis of the Article 4(2) national exclusivity on national security matters have failed to convince Member States of the judicial interpretation of the scope of EU law applicability (see below Section 3). As a result, this case law is liable to result in more fragmentation rather than establishing clear boundaries between national and public security activities. Furthermore, drawing a distinction between ECSPs activities broadly understood, and purely state activities narrowly understood, may not be as easy to operationalise in practice either, as security tasks more often than not rely on the private entities which have taken over critical infrastructures such as ECS.⁵⁹

⁵⁴ *Privacy International* (n 4) paras 46–47; *La Quadrature du Net and Others* (n 4) paras 101–102.

⁵⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation-GDPR), Art 95. See also *ibid*.

⁵⁶ *Privacy International* (n 4) para. 47; *La Quadrature du Net and Others* (n 4) para 102.

⁵⁷ Nevertheless, expanding EU law applicability to national security activities has a sword function as well, since it brought mass surveillance into its scope. More specifically, according to the CJEU, mass, that is, general and indiscriminate surveillance, is permitted for purposes of national security, while the objective of public security may only justify surveillance which is targeted, that is restricted in relation to categories of persons or data concerned. *La Quadrature du Net and Others* (n 4) paras 137 and 147 respectively.

⁵⁸ See also critiques raised by Cameron (n 47); Tzanou and Karyda (n 29); Mitsilegas, Guild, Mendos Kuşkonmaz and Vavoula (n 29).

⁵⁹ Cameron (n 47) 1458–1459.

3. The legal uncertainty arising from the current delineation of the scope of EU data protection law

3.1. Narrowing the scope back down? The draft E-Privacy Regulation and the AI Act Member States in general, and France in particular, were dissatisfied, to say the least, with the expansive approach by the CJEU.⁶⁰ In this vein, the Council position adopted in the context of the negotiations for the draft E-Privacy Regulation (which would replace the EPD),⁶¹ introduced several provisions that essentially seek to circumvent the above jurisprudence.⁶² Specifically in relation to national security, the Council inserted a clause excluding from the scope of the draft E-Privacy Regulation: ‘measures, processing activities and operations concerning national security and defence, *regardless of who is carrying out those activities whether it is a public authority or a private operator acting at the request of a public authority*’.⁶³

Most likely prompted by the CJEU’s expansive interpretation of the scope of the EPD, a similar exclusion clause was introduced to the Proposed AI Act by the Council.⁶⁴ Following fierce negotiations and the unyieldingness of certain Member States led by France, the national security exemption made it to the final text of the AI Act.⁶⁵ Accordingly, the AI Act

⁶⁰ As reported in media, see for example T Christakis and K Propp, ‘How Europe’s Intelligence Services Aim to Avoid the EU’s Highest Court – and What It Means for the United States’ (Lawfare Blog, 8 March 2021), at www.lawfareblog.com.

⁶¹ Proposal for a Regulation of the European Parliament and of the Council of 10 January 2017 concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications – Proposal for E-privacy Regulation) COM(2017) 10 final - 2017/03 (COD). The E-Privacy Regulation was eventually withdrawn in February 2025, under the justification of ‘no unforeseeable agreement’ between the co-legislators. Civil society has raised the concern that the proposal was blocked by not only Big Tech companies, but also member states that seek to ensure broader surveillance powers. Annexes to the Communication from the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission work programme 2025 of 11 February 2025, 27; EDRI, ‘The ePrivacy Regulation Proposal has been withdrawn, but the fight for your privacy is far from over’ (EDRI, 19 February 2025), at edri.org.

⁶² Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council of 10 February 2021 concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) – Mandate for negotiations with EP, 6087/21.

⁶³ Ibid Art 2(a).

⁶⁴ Council of the European Union Presidency, Proposal for a Regulation of the European Parliament and of the Council of 25 November 2022 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts – General approach, 14954/22, Art 2(3).

⁶⁵ Besides, the national security exception phrased in that way was already established in the Data Act. Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023

‘does not apply to areas outside the scope of Union law, and shall not, in any event, affect the competences of the Member States concerning national security, regardless of the type of entity entrusted by the Member States with carrying out tasks in relation to those competences.

This Regulation does not apply to AI systems where and in so far they are placed on the market, put into service, or used with or without modification exclusively for military, defence or national security purposes, regardless of the type of entity carrying out those activities.

This Regulation does not apply to AI systems which are not placed on the market or put into service in the Union, where the output is used in the Union exclusively for military, defence or national security purposes, regardless of the type of entity carrying out those activities’.⁶⁶

As further explained in the recitals, the exclusion is justified by Article 4(2) TEU appointing sole responsibility of national security matters upon Member States.⁶⁷ Where the AI system is placed on the market or put into service for both national and public security purposes, though, it must still abide by the AI Act.

Both these pieces of secondary legislation are crucial in regulating surveillance practices given the strong reliance on ECS data as well as the proliferation of advanced technologies promising to facilitate the fight against crime and the safeguarding of security.

That being said, the legitimacy of the European legislator challenging the European judiciary’s rulings raises significant concerns. Indeed, if the final adopted texts maintain a derogation from the scope of relevant EU secondary laws of any national security activity regardless of the undertaking actor, will that entail a complete abolition of the CJEU red lines?

First, as pointed out by the European Data Protection Board (EDPB), the proposed exclusion in the E-Privacy Regulation risks fragmenting the consistency of the EU data protection framework, while in any case, the GDPR continues to apply.⁶⁸ In other words, this clause only excludes the applicability of the E-Privacy Regulation, which acts as *lex specialis* in relation to the GDPR;⁶⁹ the latter is meant to regulate all data processing activities by entities, including ECSPs, insofar as other specific laws, such as the EPD, do not provide for different rules.⁷⁰ This point was to an

on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828, Art 1(6).

⁶⁶ Art 2(3) AI Act.

⁶⁷ Recital 24 AI Act.

⁶⁸ European Data Protection Board, Statement 03/2021 on the ePrivacy Regulation (9 March 2021).

⁶⁹ Recital 173 GDPR.

⁷⁰ See also M Rojszczak, ‘The Uncertain Future of Data Retention Laws in the EU: Is a Legislative Reset Possible?’ (2021) 41 *Computer Law & Security Review*, 9.

extent implied by the CJEU in *LQdN*;⁷¹ although only referring to the national security derogation within Article 23 GDPR, the statement was put forward by the CJEU to solidify its argumentation on how individuals acting in the scope of these derogations are still subject to the GDPR.

Second, as demonstrated above, the CJEU has in essence defined the ECSPs' operations as activities that are not characteristic of the state. It may therefore be questioned to what extent activities 'concerning national security and defence' can, in fact, be interpreted as encompassing the ECSPs' activities, as the Council suggests.⁷² A study for the European Parliament Committee of Inquiry to investigate the use of Pegasus and equivalent surveillance spyware' (hereinafter 'PEGA Committee') has similarly submitted that the assessment of the nature of state activities necessarily pertains to EU law and is subject to CJEU scrutiny.⁷³ In this way, the last say regarding what constitutes an ECSPs' activity is with the CJEU. If – or, most likely, when – the CJEU is confronted with this exclusion provision, an equally expansive applicability of EU (data protection) law could arguably be adopted.⁷⁴

Finally, it may be claimed that the CJEU jurisprudence is primarily rooted in the Charter and the rights to privacy and to personal data protection enshrined therein,⁷⁵ and as such, must be upheld insofar as the Charter applies. Member States must comply with the Charter both when implementing EU law into their national legal order, and when derogating from EU law as foreseen in the EU Treaties.⁷⁶ The CJEU has even found rights such as the right to an effective remedy under Article 47 and the right to non-discrimination under Article 21 Charter to apply also in horizontal relations between private entities,⁷⁷ while the possible horizontal effect of the right to personal data protection under Article 8 Charter has also been explored.⁷⁸ This brings the issue back to Article 4(2) TEU, as the Charter does not apply when Member

⁷¹ *Privacy International* (n 4) para. 47; *La Quadrature du Net and Others* (n 4) para 102.

⁷² Rojszczak (n 70).

⁷³ Sartor and Loreggia (n 8) 47.

⁷⁴ See also *ibid.*

⁷⁵ Council of the European Union, 'Informal Outcome of Proceedings of the informal VTC of the members of CATS on 8 February 2021' (26 February 2021), WK 2732/2021 INIT, at cdn.netzpolitik.org 4.

⁷⁶ Art 51(1) of the Charter of Fundamental Rights of the European Union [2012]. See *inter alia* Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdelias and others* EU:C:1991:254 para 43; Case C-617/10 *Åkiagaren v Hans Akerberg Fransson* EU:C:2013:105 paras 17–21.

⁷⁷ Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* EU:C:2018:257 paras 59, 82. See also K Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 *German Law Journal* 779, 788.

⁷⁸ See for example M Tzanou, 'The Unexpected Consequences of the EU Right to Be Forgotten: Internet Search Engines as Fundamental Rights Adjudicators' in M Tzanou (ed) *Personal Data Protection and Legal Developments in the European Union* (IGI Global 2020) 279.

States act outside the scope of EU law; however, as aforementioned, the invocation of Article 4(2) TEU to derogate from EU law has been interpreted very restrictively. In that regard, diverse opinions have been expressed; Kosta considers that the lack of reference to the Charter in the discussion on the scope of EU law implies that in cases of national security, the Charter does not apply pursuant to Article 4(2) TEU.⁷⁹ By contrast, Rojszczak puts forth that the judicial interpretation of what constitutes proportionate limitations to the rights to privacy and to data protection on the basis of the Charter remains unaffected.⁸⁰ Building on previous CJEU rulings on Article 4(2) TEU,⁸¹ Hijmans has also argued that general EU standards on fundamental rights, including the data protection regime based on Article 16 TFEU, ‘could, in principle, be applied to national security agencies’.⁸² As a derogation from EU law must be strictly interpreted and sufficiently substantiated, even in cases of national security, it is hereby argued that derogating from respecting the right to personal data protection in line with the Charter cannot be unilaterally decided by Member States.

3.2. National security and new forms of surveillance

There are other crucial forms of private entities’ involvement in national security processing that go beyond data retention by ECSPs and concern automated processing or other forms of surveillance. To illustrate the legal uncertainties surrounding the grounding of the applicability of EU law for national security processing operations on the activities of private entities, such as ECSPs, we make use of two case studies.

The first case study arises from a recent judgment, where the German Federal Constitutional Court found that the use of the Palantir software⁸³ by police in Hesse and Hamburg was unconstitutional.⁸⁴ Palantir was used as a data analysis instrument with the purposes of averting terrorist threats and combatting organised crime.⁸⁵ It undertook automated data analysis aimed at generating new knowledge, by establishing connections between people, groups of people, institutions, organisations, objects and things, excluding insignificant information and findings, assigning

⁷⁹ E Kosta, ‘A Divided European Data Protection Framework: A Critical Reflection on the Choices of the European Legislator Post-Lisbon’ in E Kosta, R Leenes, and I Kamara (eds) *Research Handbook on EU Data Protection Law* (Edward Elgar Publishing 2022) 68, 86. See also Korff (n 9).

⁸⁰ Rojszczak (n 70) 10. See also Sartor and Loreggia (n 8).

⁸¹ ZZ (n 31), reference to which is made in *La Quadrature du Net and Others* (n 4) para 99.

⁸² H Hijmans, *The European Union as a Guardian of Internet Privacy: The Story of Art 16 TFEU* (Springer 2016) 142–143.

⁸³ See *inter alia* D Howden, A Fotiadis, L Stavinoha and B Holst, ‘Seeing Stones: Pandemic Reveals Palantir’s Troubling Reach in Europe’ (The Guardian, 2 April 2021), at www.theguardian.com.

⁸⁴ 1 BvR 1547/19 and 1 BvR 2634/20, judgment of 16 February 2023.

⁸⁵ *Ibid.*

incoming information to known facts and the statistical evaluation of the stored data.⁸⁶ It allowed the public authorities to skim far-reaching knowledge from the available data with practically all possible information technology methods and develop new connections from the evaluation.⁸⁷ This linking of data allowed, among others, multi-stage analyses that first generate new suspicions, as well as further analysis steps or subsequent operational measures.⁸⁸

In this case, Palantir was used by the police for law enforcement purposes and, thus, would come within the scope of the Law Enforcement Directive (LED),⁸⁹ which, surprisingly, the Federal Constitutional Court did not mention in its judgment. However, let us assume for a moment that a similar commercially developed AI software is used by intelligence services for national security purposes. Following the CJEU data retention line of cases, it is unclear whether such processing would fall in or outside the scope of application of EU law, because the involvement of private entities here concerns the *automated processing* of ECS data by state securities through a software developed by a private entity not subject to EU law. In this vein, a narrow reading of the CJEU's data retention cases focusing on ECSPs would exclude such processing from the scope of EU law.

However, a broader reading of these cases, recently proposed by certain scholars would bring such processing within the application of EU law. For instance, Korff has argued that even where AI systems are deployed by national security agencies alone, thereby comprising purely governmental activities, applicability of EU law may still be invoked by virtue of their collaboration with entities subject to EU law.⁹⁰ Indeed, intelligence services rarely function in a vacuum but instead share data with, amongst others, national law enforcement or other specialised security authorities, subject to the LED or EU agencies such as Europol. This is certainly supported by the Palantir example, where in the German State of Hesse, Palantir had access to mainly three databases POLAS (police information system for 'repressive' data), ComVor (case processing system for all procedures) and CRIME-ST (case processing system for storing 'preventive' data for future investigations);⁹¹ but also used further data sources, including – among others – 'traffic data from telecommunications monitoring' provided by telecommunications providers. While a broad reading of the CJEU's data retention jurisprudence is possible here, such approach is to say the least debatable.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Directive (EU) 2016/680 (n 24).

⁹⁰ Korff (n 9).

⁹¹ HessLT Drucks 20/660, 2

Let us now consider a second case study. Imagine that an EU Member State uses against EU citizens for counter-terrorism and national security purposes, a modern spyware tool, such as Pegasus, developed and marketed by a private company (in this case, the Israeli NSO Group).⁹² Pegasus is considered ‘the most powerful hacking tool or spyware’⁹³ to date, because it grants ‘complete, unrestricted access’ to the targeted mobile phone device, its sensors and all the information contained on this (including geolocation).⁹⁴ This means that it can read end-to-end encrypted messages, download stored photos, hear voice/video calls and activate the phone’s microphone and camera to record conversations.⁹⁵ Alarming, all this can be carried out through a so-called ‘zero-click’ attack; this means that even the most tech-savvy users would not be aware of the attack as it does not require any action by the user to be triggered.⁹⁶ Finally, the Pegasus software is ‘very difficult to detect’ and its ‘intrusions are very hard to prove’, making it a ‘game-changer for digital surveillance’.⁹⁷

Pegasus is developed and deployed by a private company but procured and used by national security agencies. It entails targeted surveillance that differs from the bulk data retention model, seen in *Privacy International* and *LQdN*. Such a processing would also fall outside the scope of EU law because the involvement of private operators does not implicate an ECSP or another entity subject to EU law.⁹⁸ Yet, Pegasus’ level of intrusiveness is ‘unprecedented’.⁹⁹ Indeed, as the EDPS rightly noted, the use of Pegasus ‘threatens the *essence of the right to privacy*, as the spyware is able to interfere with the most intimate aspects of our daily lives’.¹⁰⁰ Conversely, the European Parliament ‘Committee of Inquiry to investigate the use of Pegasus and equivalent surveillance spyware’ attempted in its Recommendation to the Council and the Commission to bring within the scope of the EPD the use of spyware, such as Pegasus, arguing that the deployment of such surveillance tools by Member

⁹² This is not just a hypothetical situation as ‘some EU governments admitted to having bought Pegasus’, and it has been reported that the Pegasus spyware has been ‘used in the EU against EU citizens, including opposition politicians, journalists and lawyers’. European Data Protection Supervisor (n 1) 6; ‘Hungary Admits to Using Pegasus Spyware’ (Deutsche Welle, 11 April 2021) at www.dw.com; Z Wanat, ‘Poland’s Watergate: Ruling Party Leader Admits Country has Pegasus Hacking Software’ (Politico, 7 January 2022), at www.politico.eu.

⁹³ European Data Protection Supervisor (n 1) 3.

⁹⁴ Pegg and Cutler (n 2).

⁹⁵ European Data Protection Supervisor (n 1) 3.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ A contrario see Sartor and Loreggia (n 8) noting that ‘We submit that this preliminary issue, pertaining to the qualification of nature of the state activities, necessarily pertains to EU law, and therefore falls within the competence of the ECJ’.

⁹⁹ European Data Protection Supervisor (n 1) 2.

¹⁰⁰ Ibid.

States ‘constitutes a restriction of the right to protection of terminal equipment afforded by the e-Privacy Directive’.¹⁰¹ While it is welcome that the EP PEGA Committee would like to find an interpretation of the EPD which brings the deployment of spyware within the scope of EU fundamental rights law, the mention of ‘a right to protection of terminal equipment’ under the EPD is confusing: what is the content of such right and what obligations does it create? More importantly, it appears to offer another means to circumvent the overall problem of the applicability of EU data protection law to modern surveillance tools; this has to be grounded once again on -uncertain- provisions of the EPD.

3.3. Grounding the EU law applicability on secondary law interpretations

The examined case studies demonstrate that the centring of the applicability of EU law in national security matters on interpretations of the EPD and the role of ECSPs is problematic and short-sighted. First, as discussed in Section 2, it is problematic, because it relies on an artificial distinction of what constitutes private and public functions that is unworkable in practice, where the traditional model of data retention by private actors and access and further processing by public authorities is often blurred. The increasing responsabilisation of the private sector in performing security tasks on behalf of the state will only blend these boundaries more.¹⁰² Additionally, the CJEU has confusingly expanded the scope of what constitutes an ECSP activity, from *retention* to *access* to ‘all operations processing personal data carried out’ by ECSPs,¹⁰³ by interpreting broadly the exclusion and restriction clauses within the EPD and the GDPR, while at the same time interpreting narrowly Article 4(2) TEU. In this way, this approach depends on the interpretation of derogations within primary and secondary law, which, is perpetually found in a tag war, with the CJEU pulling more and more towards the realm of EU law, and the Member States demanding their unrestricted freedom in matters of national security. Consequently, reliance on the actor/controller to determine the applicability of EU (data protection) law in matters of national security results in increased legal uncertainty.

Second, this approach is short-sighted, because, while it relies on a teleological interpretation of existing data protection instruments, such as the EPD, it misses out on two fundamental aspects of EU data protection law: On the one hand, it fails to account for other crucial forms of private entities’ involvement in personal data processing for national security purposes. While it captures communications’ data

¹⁰¹ PEGA Committee, Recital AF.

¹⁰² The responsabilisation strategy was first introduced by D Garland, ‘The Limits of the Sovereign State - Strategies of Crime Control in Contemporary Society’ (1996) 36 *The British Journal of Criminology* 445. See further contributions within this issue.

¹⁰³ *La Quadrature du Net and Others* (n 4) para 101.

retention by ESPs, it leaves untouched potential data processing undertaken by intelligence agencies with different ways of involvement of private entities, which entail for instance, the public procurement of data mining and analysis software, such as the one developed by Palantir, or indeed spyware software, such as Pegasus. On the other hand, by regrettably excluding from the scope of application of EU data protection law surveillance tools that encroach on the very essence of the fundamental rights to privacy and data protection, it falls short from achieving the overarching fundamental goals of EU data privacy law that are to protect both individual data subjects from such invasive (new forms of) surveillance and to ensure ‘the functioning of democracy’¹⁰⁴ and the rule of law, ‘since privacy is a core value inherent to a liberal democratic and pluralist society’.¹⁰⁵

Against this background, we argue that there is an urgent need to *rethink* the current grounding of the scope of applicability of EU data protection law on processing activities in the context of electronic communications. While the CJEU’s data retention jurisprudence is welcome because it clearly demonstrates that the area of national security is not outside the purview of EU fundamental rights, it is no longer fit for purpose to address the ‘corporate and government entanglements’¹⁰⁶ regarding the collection and processing of personal data and new forms of intrusive surveillance. The following Section situates our proposed model in the conceptual framework of digital constitutionalism and draws inspiration from the theoretical debates surrounding this framework to develop a comprehensive theory underpinning the proposed approach.

4. Rethinking the scope of application of EU law in the context of national security: a new approach

4.1. National security through the prism of digital constitutionalism

Digital constitutionalism is a theoretical framework that adapts the values and ideals which permeate, inform and guide the process of constitutionalisation to the digital environment.¹⁰⁷ As a relatively new theoretical (and practical) field of

¹⁰⁴ European Union Agency for Fundamental Rights, ‘Facial Recognition Technology: Fundamental Rights Considerations in the Context of Law Enforcement’ (FRA, 27 November 2019) at fra.europa.eu 4 and 28.

¹⁰⁵ Ibid. 4 and 28. For a detailed analysis, see below.

¹⁰⁶ A Campolo, M Sanfilippo, M Whittaker, K Crawford, ‘AI Now 2017 Report’ ainowinstitute.org

¹⁰⁷ E Celeste, ‘Digital Constitutionalism: A New Systematic Theorisation’ (2019) 33 *International Review of Law, Computers & Technology* 76. See *inter alia* V Karavas, ‘Governance of Virtual Worlds and the Quest for a Digital Constitution’ in C Graber and M Burri-Nenova (eds) *Governance of Digital Game Environments and Cultural Diversity: Transdisciplinary Enquiries* (Edward Elgar Publishing

constitutionalism, digital constitutionalism focuses on how digital technologies affect the evolution of constitutionalism by investigating the dynamic dialectic between the ‘digital’ and ‘constitutionalism’.¹⁰⁸ The ‘digital’ refers to the Internet and automated technologies, while ‘constitutionalism’ denotes the basic idea of constitutional law that power (of governments) should be legally limited and the legitimacy of such power is dependent upon compliance with those limitations.¹⁰⁹ Digital constitutionalism, thus, aims to explore ‘the reaction of constitutional law against the power emerging from digital technologies implemented by public and private actors’¹¹⁰ and to articulate the limits to the exercise of such power in the digital society. The digital constitutionalism literature, despite being fairly recent, has various iterations with certain authors focusing on its ability to constrain private power and private actors in the digital space,¹¹¹ others looking at public power and the role of national governments¹¹² and a further strand proposing the creation of new ‘digital’ bills of rights.¹¹³

Overall, digital constitutionalism offers a framework ‘to rethink how the exercise of power ought to be limited (made legitimate) in the digital age’.¹¹⁴ As Suzor notes eloquently, ‘digital constitutionalism requires us to develop new ways of limiting

2010) 153; K Milewicz, ‘Emerging Patterns of Global Constitutionalisation: Towards a Conceptual Framework’ (2009) 16 *Indiana Journal of Global Legal Studies* 413; C Padovani and M Santaniello, ‘Digital Constitutionalism: Fundamental Rights and Power Limitation in the Internet Eco-System’ (2018) 80 *International Communication Gazette* 295; I Pernice, ‘Global Constitutionalism and the Internet. Taking People Seriously’ in S Kadelbach and R Hofmann (eds), *Law Beyond the State: Pasts and Futures* (Campus Verlag 2016) 151; A Simoncini, ‘The Constitutional Dimension of the Internet: Some Research Paths’ (EUI Working Papers 16-2016); G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012); JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press 2003); KM Yilma, ‘Digital Privacy and Virtues of Multilateral Digital Constitutionalism—Preliminary Thoughts’ (2017) 25 *International Journal of Law and Information Technology* 115.

¹⁰⁸ G De Gregorio, ‘The Rise of Digital Constitutionalism in the European Union’ (2021) 19 *International Journal of Constitutional Law* 41, 58.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ B Fitzgerald, ‘Software as Discourse? A Constitutionalism for Information Society’ (1999) 24 *Alternative Law Journal* 144; N Suzor, ‘The Responsibilities of Platforms: A New Constitutionalism to Promote the Legitimacy of Decentralized Governance’ (Association of Internet Researchers Annual Conference, 2016).

¹¹² Celeste (n 107).

¹¹³ J Zittrain, ‘A Bill of Rights for the Facebook Nation’ (The Chronicle of Higher Education, 20 April 2009) at www.chronicle.com; D Redeker, L Gill and U Gasser, ‘Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights’ (2018) 80 *International Communication Gazette* 302.

¹¹⁴ N Suzor, ‘Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms’ (2018) 4 *Social Media+Society* 1.

abuses of power in a complex system that includes many different governments, businesses, and civil society organizations'.¹¹⁵

We adopt digital constitutionalism as a theoretical framework for the purposes of the present analysis; our aim is to rethink how the exercise of national security surveillance powers ought to be limited in the European digital environment. The ultimate goal of this rethinking is to develop new ways of limiting abuses of power in this context. This rethinking focuses on two basic aspects of digital constitutionalism (and constitutional law in general): *i*) the protection of fundamental rights, and *ii*) the balancing of powers.¹¹⁶ We use digital constitutionalism as a conceptual prism for our discussion because modern surveillance technologies, such as Palantir and Pegasus affect the protection of fundamental rights -and in particular the right to data protection- in the digital space. However, we understand the balancing of powers slightly differently from traditional constitutional law articulations here: these concern the vertical distribution of powers (between the EU and its Member States). Therein, an added layer of complexity derives from national security as a limitation between EU and Member State powers. How does this balancing of powers between the EU and its Member States affect fundamental rights protection in the digital society when national security measures are at stake? In light of the risks that are exacerbated in the digital domain, how could we develop new ways of limiting abuses?

In our view, both these questions should be analysed within the framework of EU digital constitutionalism and with the tools offered by it, as the exercise of national security powers impacts the fundamental rights of EU citizens. Our primary focus is on the protection of fundamental rights, while the involvement of both private entities and national security operations are important parameters to our analytical framework.

For the purposes of this discussion, digital constitutionalism is understood as providing the imperative that underpins the process of constitutionalisation, offering, in this way, the production of different 'normative counteractions that address the challenges of digital technology'.¹¹⁷ We view constitutionalisation as a dynamic process comprising different stages,¹¹⁸ rather than referring only to the final outcome of a process in which norms are institutionalised or constitutionalised.¹¹⁹ We, therefore,

¹¹⁵ N Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge University Press 2019).

¹¹⁶ A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579.

¹¹⁷ Celeste (n 107) 77.

¹¹⁸ Ibid; E Celeste, 'Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?' (2018) 33 *International Review of Law, Computers & Technology* 1.

¹¹⁹ Ibid.

subscribe to an understanding of constitutionalisation, which considers that the development of constitutional principles at the societal level can mark the presence of a process of constitutionalisation in the digital environment, even if norms are not yet institutionalised or positivised in the hierarchy of legal sources.¹²⁰ Lastly, we see this dynamic process of constitutionalisation of the digital environment as not unitary¹²¹ and involving not only formal, institutionalised actors, such as courts or legislators, but also other voices, such as civil society and academia.

The *data subject* model developed and proposed in this article is our new way of limiting abuses of power in the EU legal order when national security practices in the digital domain affect individuals. This model is developed as a normative counteraction to address the challenges of different forms of surveillance used for the purposes of national security and the legal uncertainty of current regulatory and judicial attempts. Its ultimate aim is to achieve ‘constitutional equilibrium’, broadly understood as ‘the ideal condition produced by the application of the norms of constitutional law in a given legal order’.¹²² We consider the applicability of EU fundamental rights to national security measures as a pre-condition for the achievement of the constitutional equilibrium in this area, without which the substantive fundamental rights protection cannot be realised.

We argue that a process of (digital) constitutionalisation has already commenced in the area of data retention, with the CJEU leading this. However, in our view, the Court’s normative counteraction in this context is no longer sufficient or fit for purpose.¹²³ We, therefore, see our new approach as advancing the dynamic process of this constitutionalisation while addressing the limitations of the Court’s data retention jurisprudence.

4.2. A new *data subject-centric* model

A first way of delimiting the scope of application of EU law in the context of national security is based on the *purposes of processing* (we call this the *purposes model*). According to the purposes model, which has been proposed by Member States, if data processing is undertaken for national security purposes, it falls automatically outside the scope of EU law pursuant to Article 4(2) TEU. The purposes model has been rightly rejected¹²⁴ – at least partially – by the CJEU in favour of a different

¹²⁰ Karavas (n 107); Celeste (n 107).

¹²¹ Celeste (n 107); A Peters, ‘Global Constitutionalism’ in M Gibbons (ed), *The Encyclopedia of Political Thought* (John Wiley & Sons 2014).

¹²² Celeste (n 118).

¹²³ See discussion above.

¹²⁴ We consider that this is right, because Member States tend to often invoke the national security exception to escape EU law obligations.

approach, which grounds the scope of applicability of EU law, in the context of national security, on the activities of ECSPs. While the purposes underlying the processing operations are important in order to determine the level of intrusiveness that may be justifiable in terms of bulk or targeted surveillance,¹²⁵ since such activities are regulated by the EPD, data retention falls within the scope of EU law in cases where ECSPs are compelled by national security agencies to carry out processing activities for national security purposes. We call this the *controller model* as the applicability of EU law is based on the regulation of the activities of *data controllers* (here the ECSPs).

Under the framework of digital constitutionalism, this article proposes a novel, third model of establishing the scope of applicability of EU law that should be grounded on the *data subject* instead (we call this the *data subject model*). The data subject model envisions the applicability of EU law to national security measures where these involve the monitoring of the behaviour or the processing of personal data of data subjects within the EU. This would mean that EU law would be applicable in both case studies discussed above as all of them concern the monitoring of the behaviour/ processing of personal data of EU data subjects.

Privacy scholars, such as Korff, have called for national security agencies to be made subject to EU law and the Charter.¹²⁶ Their arguments are normally based on the Court's expansive data retention case law discussed above. However, the data subject model, proposed here, differs from Korff's for two reasons. First, we call for a general shift from the focus on controllers to data subjects when establishing the applicability of EU law in the national security context. Second, we argue that there is a theoretically and doctrinally more robust framework to achieve this, which differs from what has already been proposed. This is, therefore, a novel approach that attempts to move forward from what has been established in the case law and argued in the academic legal scholarship.

Nevertheless, we submit that *data subject model* is not radical or unfeasible from a legal point of view. Indeed, it is inspired by current and proposed legislative frameworks as both the GDPR and the AI Act adopt a data subject approach when considering questions of the territorial application of the relevant law. Article 3(2) GDPR establishes the *ratione loci* of this Regulation: '*to the processing of personal data of data subjects who are in the Union* by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or

¹²⁵ See Section 2.

¹²⁶ Korff has suggested that 'entities that, while established in the EU, are not subject to EU law or the Charter – i.e., to the EU Member States' national security agencies' should be subject to EU law. See Korff (n 9).

services,...to such data subjects in the Union; or (b) *the monitoring of their behaviour as far as their behaviour takes place within the Union*'.¹²⁷

Along the same lines, Recital 22 of the AI Act states: 'To prevent the circumvention of this Regulation and *to ensure an effective protection of natural persons located in the Union*, this Regulation should also apply to providers and deployers of AI systems that are established in a third country, *to the extent the output produced by those systems is intended to be used in the Union*'.

We argue that the same approach should apply to national security issues. These do not concern the territorial application of EU law, but we submit that a similar data-subject centric approach – already in place in the context of territorial matters – should be implemented to other questions of applicability of EU law as well. The next section discusses why this approach is needed by highlighting its underpinning normative foundation and its benefits. We then take a closer look at the potential limits and objections to that interpretation of EU data protection law, which concern national security and the lack of a legal basis. Consequently, it is necessary to consider possible ways of overcoming these limitations both under *de lege lata* and *de lege ferenda* perspectives. This discussion is undertaken drawing inspiration from digital constitutionalism, which constitutes the theoretical framework within which we develop our data-subject model.

4.3. Normative foundation and the benefits of the *data subject* model

The data subject model has a number of benefits. These are based on both descriptive and normative arguments.¹²⁸ Starting from the more descriptive benefits, the data-subject approach provides a clear and straightforward conceptualisation of the applicability of EU data protection law in the context of national security: This would apply where national security measures involve the monitoring of the behaviour or the processing of personal data of data subjects within the EU. In this regard, the data subject model would address the uncertainties – identified above – surrounding the current controller model which is based on blurred distinctions between private and public functions, as well as the uncertainties regarding the nature of the specific national security measure, as interpreted by the CJEU (broadly) or the EU legislator (narrowly). Legal clarity is urgently needed in this area where the case law of the Court – albeit welcome – has, regrettably, confused the current legal situation even further and has often resulted in a clear pushback from national governments and Supreme Courts, as in the case of France.¹²⁹

¹²⁷ Emphasis added.

¹²⁸ These are not (and cannot be) totally separated.

¹²⁹ See above.

Secondly, the data subject model *aligns better* with the underlying aims of EU data protection law as it would bring into its scope of application new forms of intrusive surveillance that threaten fundamental rights and freedom at large yet remain excluded under the current controller model. It would, thus, serve better both the individual and social underpinning values and constitutional objectives of EU data protection law (and EU fundamental rights law more broadly).¹³⁰ This is significant because data protection has been elevated to the status of a fundamental right in the EU legal order (Article 8 Charter)¹³¹ and is recognised in primary EU law (Article 16 TFEU) as an express legal basis for the adoption of data processing-related instruments, such as the GDPR.¹³² The data subject model is, in this way, anchored in EU primary law rather than secondary EU law, where the Court's data controller approach is based.

Article 16 TFEU, in particular, has been relied upon to realise and promote respect for fundamental rights and freedoms in general (beyond data protection). For instance, it is noteworthy that the legal bases of the AI Act are: The internal market harmonisation clause (Article 114 TFEU) and Article 16 TFEU. As explained in Recital 3 of the AI Act, this secondary legal basis is justified insofar as the AI Act contains specific rules on data processing activities, particularly those 'concerning restrictions of the use of AI systems for remote biometric identification for the purpose of law enforcement'. The choice of Article 16 TFEU as a legal basis for the AI Act has not been uncontroversial; for example, Ebers et al, have questioned to what extent this provision can support the bans on certain AI systems whereby the aim is not only to protect the processing of personal data but more broadly fundamental rights and the democratic society.¹³³ However, as explicitly stated in the GDPR, the fundamental right to personal data protection seeks to protect people's fundamental rights and freedoms at large.¹³⁴ It is also commonly argued that the right to personal data protection aims at providing individuals with substantial control over their personal data and empowering them against informational power asymmetries.¹³⁵ It is

¹³⁰ See also below discussion on art 16 TFEU and on digital constitutionalism.

¹³¹ M Tzanou, *The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance* (Hart Publishing 2017); M Tzanou, 'Data Protection as a Fundamental Right Next to Privacy? "Reconstructing" a Not So New Right' (2013) 3 *International Data Privacy Law* 88.

¹³² Art 16 TFEU.

¹³³ M Ebers, VRS Hoch, F Rosenkranz, H Ruschemeier and B Steinrötter, 'The European Commission's Proposal for an Artificial Intelligence Act – A Critical Assessment by Members of the Robotics and AI Law Society (RAILS)' (2021) 4 *J – Multidisciplinary Scientific Journal* 589, 590.

¹³⁴ Art 1(2) GDPR.

¹³⁵ See for example Tzanou (n 131); O Lynskey, 'Deconstructing Data Protection: The "Added Value" Of A Right To Data Protection In The EU Legal Order' (2014) 63 *The International and Comparative Law Quarterly* 569; J Ausloos, *The Right to Erasure in EU Data Protection Law* (Oxford University Press 2020); P Vogiatzoglou and P Valcke, 'Two Decades of Article 8 CFR: A Critical Exploration of the

therefore unsurprising that the European Parliament suggested bans on AI systems to protect individuals' rights not only with regard to personal data protection but also with regard to other fundamental rights, including privacy, non-discrimination, dignity and presumption of innocence.¹³⁶ The Parliament's position to the AI Act, relying on its legal basis being Articles 114 and 16 TFEU, to establish bans on technologies that present risks to human dignity and rights, demonstrates the instrumental role of personal data protection in safeguarding democratic values and rights, which the data-subject model promotes. While Article 16 TFEU is still bound by the EU's existing competence, as argued above, any exceptions to the exercise of the right to personal data protection in line with EU primary law cannot be unilaterally and in general terms decided by Member States, even for national security purposes.

The normative argument that follows from the above is that the grounding of the scope of applicability of EU data protection law should be removed from the data retention context and, indeed, from secondary EU law (the EPD) altogether. Article 15(1) of the EDP has long been relied on by the Court to bring relevant national security measures within the scope of applicability of EU law, but this is neither sufficient nor necessary. It is not sufficient because it would not capture new forms of surveillance, such as Palantir and Pegasus discussed in the case studies above. It is not necessary because within the digital constitutionalism framework discussed above, the applicability of EU data protection law on such important issues, such as national security, should be grounded on primary EU law and not on secondary law instruments, such as Directives, and the judicial or legislative interpretation thereof which is potentially subject to constant change. The grounding of the scope of application of EU data protection law on primary EU law through the data-subject model proposed is, therefore, needed as it would reduce the risk of EU data protection law becoming toothless and, hence, irrelevant in the face of new technological developments and new forms of surveillance.

Third, distinctions in the applicability of EU fundamental rights protections risk undermining the overall internal coherence of EU law¹³⁷ and should be avoided. In

Fundamental Right to Personal Data Protection in EU Law' in E Kosta, R Leenes and I Kamara (eds), *Research Handbook on EU Data Protection Law* (Edward Elgar Publishing 2022) 11.

¹³⁶ Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)), Recitals 26(a) and 26(b).

¹³⁷ See *inter alia* J Raz, 'The relevance of coherence' (1994) 72 *Boston University Law Review* 273; R Dworkin, *Law's Empire* (Harvard University Press 1986) 166; J McGarry, 'The Possibility and Value of Coherence' (2013) 34 *Liverpool Law Review* 17; R Alexy and A Peczenik, 'The Concept of Coherence and Its Significance for Discursive Rationality' (1990) 3 *Ratio Juris* 130; A Schiavello, 'On "Coherence" and "Law": An Analysis of Different Models' (2001) 14 *Ratio Juris* 233; K Kress,

practical implementation terms, this issue has already arisen in the context of international data transfers which concern the question of the (extra-)territorial application of EU fundamental rights law to national security measures of third countries, such as the US. In this context, the EU has been accused – by mainly American commentators – of ‘double standards’.¹³⁸ This is because the CJEU has confirmed the applicability of EU fundamental rights to US national security measures, when it is – to say the least – much less clear when EU fundamental rights apply to its own Member States’ national security surveillance measures,¹³⁹ as the discussion above has demonstrated. There is, therefore, an overarching normative argument that underpins the proposed data subject centric approach: EU data protection law *should* be overall coherent and distinctions and exceptions between different elements of this law that introduce divergent rules for territorial and national security applicability *should* be removed. The *data-subject* model would end any such divergences in the review and scrutiny between Member States’ and third countries’ national security measures and the concomitant accusations of double standards and ‘hypocrisy’ from the EU’s side in this regard.¹⁴⁰

Finally, in practical terms, the adoption of the data-subject centric approach would create disincentives for Member States to ‘baptise’ a growing number of measures as pertaining to national security in order to escape the application of EU fundamental rights law.¹⁴¹ Where such measures involve the monitoring of the behaviour or the processing of personal data of data subjects within the EU, they should come within the scope of application of EU fundamental rights law.

‘Coherence and Formalism’ (1993) 16 *Harvard Journal of Law and Public Policy* 639; K Kress, ‘Coherence’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell 2010) 521; N McCormick, ‘Coherence in Legal Justification’ in A Peczenik, L Lindahl and B van Roermund (eds), *Theory of Legal Science. Proceedings of the Conference on Legal Theory and Philosophy of Science Lund, Sweden, December 11-14, 1983* (Springer 1984) 235; R Grantham and D Jensen, ‘Coherence in the Age of Statutes’ (2016) 42 *Monash University Law Review* 360; B Baum Levenbook, ‘The Role of Coherence in Legal Reasoning’ (1984) 3 *Law and Philosophy* 355.

¹³⁸ S Baker, ‘How Can the U.S. Respond to Schrems II?’ (Lawfare, 21 July 2020), at www.lawfaremedia.org.

¹³⁹ On this point, see M Tzanou, ‘Schrems I and Schrems II: Assessing the Case for the Extraterritoriality of EU Fundamental Rights’ in F Fabbrini, E Celeste and J Quinn (eds), *Data Protection Beyond Borders: Transatlantic Perspectives on Extraterritoriality and Sovereignty* (Hart Publishing 2020) 114; M Tzanou, ‘Who Occupies the Transatlantic Data Privacy Space? Unpacking the Evolving Dynamics, and Assessing the Way Forward’ in E Fahey (ed) *The Routledge Handbook on Transatlantic Relations* (Routledge 2023) 266.

¹⁴⁰ *Ibid.*

¹⁴¹ We thank Niovi Vavoula for her insightful comment on this matter on an earlier draft of this article.

4.4. Addressing the objections to the *data subject* focused model

We acknowledge that while the proposed *data subject* model could resolve the legal uncertainties that arise in the context of national security and ensure that this does not become a law-free area, several objections could be raised against this model. We address the two main potential oppositions to our proposed approach.

A first and obvious objection concerns Article 4(2) TEU, which provides that ‘national security remains the sole responsibility of each Member State’. Critics to the proposed data subject model would be quick to point out that this would be incompatible with the national security exception enshrined in EU primary law. While this is a valid and important objection, we submit, however, that it is not insurmountable. As mentioned above, through its data retention jurisprudence, the CJEU has clearly established that: ‘although it is for the Member States to define their essential security interests and to adopt appropriate measures to ensure their internal and external security, *the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with that law.*’¹⁴²

The data subject model does not depart from this approach.¹⁴³ It is indeed based on exactly the same premise, with the mere difference that it focuses directly on protecting the data subject rather than on unclear definitions of private entities’ involvement. This means that under the model proposed in this article, Member States would still be free to determine their security interests and adopt relevant national security measures they deem appropriate. Whenever such measures monitor the behaviour or more broadly process the personal data of EU data subjects, they would fall within the scope of application of EU law and the review of the Court as to their compatibility with EU fundamental rights- as is the current situation with data retention measures.

The most important objection that might be potentially raised against the proposed data subject approach is that this model is not based on the law. It thus differs from the controller model developed by the CJEU in its data retention case law which is based on Article 15(1) EPD which permits the adoption of national laws that restrict the confidentiality of electronic communications for national (and public) security purposes. The lack of a clear legal basis is a very important issue and we do not pretend to have an easy solution. However, we argue that there are possible ways

¹⁴² *La Quadrature du Net and Others* (n 4) para 99.

¹⁴³ This approach is also confirmed in the law. As the CJEU has explained in *La Quadrature du Net and Others* (n 4), Directive on privacy and electronic communications (n 15) Art 1(3) excludes from its scope ‘activities of the State’ in the areas of public security, defence and State security (the ‘exclusion’ clause); while, Directive on privacy and electronic communications (n 15) Art 15(1) permits the adoption of national laws that restrict the confidentiality of electronic communications appropriate for national and public security purposes (‘limitation’ clause). See Tzanou and Karyda (n 29) 128.

of overcoming this limitation both *de lege lata* and *de lege ferenda*. We start from a *de lege ferenda* perspective and then move to a *de lege lata* discussion, which draws inspiration from the digital constitutionalism framework discussed above.

De lege ferenda, a shift to the data-subject model would require the intervention of the EU legislator. The data-subject model could be clearly enshrined in the law by a legislative amendment to the GDPR and the LED, the two core data protection instruments. We consider this probably the best solution as it would address the underlying problems identified above. First, it would bring legal certainty to an area dominated by conflicting judgments of the CJEU, fraught with unclear boundaries, conceptual confusion and inconsistencies. Second, it would ensure the overall coherence of EU data protection law by putting an end to divergences in its applicability depending on the context: this would apply both territorially and to national security matters, and it would be anchored in robust protections of fundamental rights enshrined in primary EU law. Third, from an internal market perspective, the varied deployment of modern surveillance methods¹⁴⁴ might lead to fragmentation in fundamental rights protection in the EU, which might have an impact on competition in the single market. Thus, from this perspective as well, a harmonised approach adopted by the EU legislature would be more desirable while ensuring an equal level of protection of fundamental rights.

Nevertheless, we acknowledge that a legislative intervention does not seem very realistic at the moment. Indeed, it appears that the intention of the EU legislator (in particular, the Council) is to delimit the impact of the CJEU's data retention judgments and to circumvent their consequences.¹⁴⁵ It should be recalled, however, that even the EU legislator has recognised that national security restrictions fall within the scope of application of EU law under Article 23(1) (a) GDPR and 15(1) EPD. In our view, a legislative amendment would bring clarity and consistency in the area, while acknowledging that even if EU law is applicable to national security, there is still room for restrictions in this area and a significant margin of appreciation of Member States, as foreseen in the GDPR and also recognised by the CJEU.¹⁴⁶ Indeed, restrictions on data subject rights, for instance, are permitted for purposes of national security in line with Article 23 GDPR. As the data retention line of cases has further shown, mass surveillance is, in fact, allowed for national security but

¹⁴⁴ The PEGA Committee notes that these have been adopted by the Polish (Pegasus spyware), Hungarian (Pegasus spyware), Greek (Predator spyware), and Spanish (Pegasus spyware) governments, adding that 'it can be safely assumed that all Member States have purchased or used one or more spyware systems'. PEGA, Recital O

¹⁴⁵ See Section 3.1.

¹⁴⁶ As the CJEU acknowledges, national security is considered the most important objective of general interest and is capable of justifying measures entailing what are considered the more serious interferences with fundamental rights. *La Quadrature du Net and Others* (n 4) para 136.

subject to certain safeguards.¹⁴⁷ It would certainly be more honest for the EU legislator to directly recognise the applicability of EU law to national security measures and ensure that certain safeguards are needed – even in this area – to maintain democratic societies. This also aligns with the national obligations deriving from the ECHR, as discussed above.¹⁴⁸

From a *de lege lata* perspective, we argue that a data subject centric interpretation of EU law would be possible. Going back to the digital constitutionalism framework discussed above, we argue that the adoption of the data subject model would further the constitutionalisation process which has begun by the Court.¹⁴⁹ We consider that there are common foundational values, motivations and aims between our model and the Court's approach when seen through the prism of digital constitutionalism: fundamental rights protection- even if not mentioned explicitly by the Court in its data retention case law as far as the scope of application of EU law is concerned. As mentioned above, constitutionalisation is a dynamic process comprising different stages. The data retention case law has institutionalised the application of EU law to national security. However, we view this as the beginning, rather than the end of the constitutionalisation process in the area.¹⁵⁰ Challenges posed by new forms of surveillance require a rethinking of the developed normative counteractions. Our data-subject model offers a new normative answer that is now explicitly based on primary EU law, more specifically on Article 8 Charter and Article 16 TFEU. A model that is centred on the data subject is an approach required by fundamental rights and constitutional norms. Therefore, in our view, such an interpretation would be possible also from a *de lege lata* perspective. Grounding the application of EU law to national security surveillance technologies – old or new – directly on the fundamental right to data protection (rather than obscure secondary law provisions) is the next step in this dynamic constitutionalisation process. After all, we can already observe 'a new evolving trend in EU policy, characterized by the extension of constitutional values

¹⁴⁷ Ibid.

¹⁴⁸ As the ECtHR in particular notes, '[a] measure of secret surveillance can be found as being in compliance with the Convention only if it is strictly necessary, as a general consideration, for the safeguarding the democratic institutions and, moreover, if it is strictly necessary, as a particular consideration, for the obtaining of vital intelligence in an individual operation. In the Court's view, any measure of secret surveillance which does not correspond to these criteria will be prone to abuse by the authorities with formidable technologies at their disposal.' *Szabó and Vissy v Hungary* App n. 37138/14 (ECtHR, 6 June 2016) para 73.

¹⁴⁹ See also O Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?* (Hart Publishing 2021).

¹⁵⁰ See also M Tzanou, 'The Judicialization of EU Data Retention Law: Epistemic Injustice and the Construction of an Unequal Surveillance Regime' in E. Kosta and I. Kamara (eds) *Data Retention in Europe and beyond: Law and Policy in the aftermath of an invalidated directive* (Oxford University Press 2025) 343.

beyond EU borders'.¹⁵¹ An articulation of a similar human-centric technological model concerning its Member States as well is, hence, both urgently needed and well anchored in primary EU law foundations.

5. Conclusions

National security is a complex regulatory area that brings together public and private actors performing a variety of functions for the safeguarding of the Member States' national interests. Although this area remains the sole responsibility of Member States, the CJEU's rulings on data retention have extended the applicability of EU data protection law to national security activities when those involve private entities – ECSPs – subject to EU law. Albeit welcome from a fundamental rights' perspective, this interpretation of the scope of EU law raises a number of questions. More specifically, the Court relied on a fluctuating understanding of what constitutes an ECSPs' activity, from data retention, to provision of access to data, to all processing operations undertaken by the providers themselves, be it for public or national security. As all ECSP activities, even for national security purposes, must also abide by EU law standards, national security is no longer an EU (fundamental rights) law free area. However, the applicability of data protection safeguards onto national security activities is far from settled. First, the EU legislator is trying to circumvent the EU Court's jurisprudence altogether. On the basis of the EU Treaties which appoint sole responsibility on matters of national security to Member States, the EU legislator has introduced a new exemption clause to the regulation of artificial intelligence. The clause clarifies that national security activities are exempted from EU law regardless of the (private) actor carrying it out.

Second, the operational reality of electronic communications surveillance paints a much more blurred picture, whereby it is increasingly difficult to discern between purely governmental state activities for national security and private actor activities. New forms of surveillance technologies, such as Palantir and Pegasus have revealed a crucial weakness of the above regulatory approach: while they implicate the involvement of private companies, EU fundamental rights are not applicable at all to such surveillance systems as they do not involve the retention of data by ECSPs. It shows, therefore, that the current regulatory framework in the area of national security as interpreted by the Court is no longer fit for purpose. It relies on shaky grounds as it is bound to be circumvented by the EU legislator and overall falls short from achieving the overarching fundamental goals of EU fundamental rights law that are to protect both individual data subjects from such invasive (new forms of) surveillance and to ensure the overall functioning of the rule of law and a democratic society.

¹⁵¹ De Gregorio (n 108) 67.

An urgent need, thus, arises to rethink the current regulatory framework so that this can deal with new forms of surveillance and address the uncertainties that the CJEU's data retention case law has created. Digital constitutionalism offers an appealing theoretical framework for this endeavour. Constitutional theory, including both its traditional¹⁵² and more innovative articulations,¹⁵³ offers a 'prism',¹⁵⁴ through which scholars can study ongoing phenomena¹⁵⁵, and reflect on future directions.¹⁵⁶ Digital constitutionalism requires us to develop new ways of limiting abuses of power in a complex system that includes many different governments and private actors. We propose a new approach, the *data subject centric model*, as a normative counteraction of constitutional nature – a reaction based on constitutional law against the power emerging from digital technologies. Our approach differs from current EU approaches to the national security problem, which are based on secondary law and in particular the interpretation of the EPD. Its ultimate aim is to achieve 'constitutional equilibrium', thus it is strongly anchored on fundamental rights (Articles 7 and 8 Charter) and other provisions of primary EU law (Article 16 TFEU).¹⁵⁷ Our proposal focuses on two basic aspects of digital constitutionalism (and constitutional law in general): the protection of fundamental rights and the balancing of powers. It sees the applicability of EU fundamental rights to national security measures as a pre-condition for the achievement of the constitutional equilibrium in this area, without which the substantive fundamental rights protection cannot be realised. The data subject model envisages the applicability of EU law to national security measures where these involve the monitoring of the behaviour or the processing of personal data of data subjects within the EU. While this model is innovative, it is not unfeasible from a legal point of view. As explained, it draws inspiration from current approaches of the law, including the rules on the territorial application of the GDPR (Article 3(2) GDPR).

The data subject model has several benefits. First, it provides a clear and straightforward conceptualisation of the applicability of EU data protection law in the context of national security, thus, addressing the uncertainties of the current controller model while advancing better the constitutional foundations of EU data protection law. Second, it is founded, in accordance with digital constitutionalism, on EU primary law. This means that it removes the grounding of the scope of applicability of

¹⁵² M Loughlin, 'What Is Constitutionalisation?' in P Dobner and M Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford University Press 2010) 47.

¹⁵³ A Wiener, AF Lang Jr, J Tully, MP Maduro and M Kumm, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 1.

¹⁵⁴ Celeste (n 107).

¹⁵⁵ Ibid.

¹⁵⁶ Peters (n 121).

¹⁵⁷ Celeste (n 107).

EU data protection law from the data retention context and, indeed, from secondary EU law – the EPD – altogether. It is therefore, able to capture new forms of surveillance, such as Palantir and Pegasus, and to reduce the risk of EU data protection law becoming toothless and, hence, irrelevant in the face of new technological developments. Third, the model would make EU data protection law more coherent, avoiding divergences in the application of fundamental rights depending on context (territorial applicability and national security applicability).

There are different ways through which the data subject model could be taken forward. The best approach would be for the EU legislator to directly recognise the applicability of EU law to national security measures and ensure that certain safeguards are needed – even in this area – to maintain democratic societies. Nevertheless, we acknowledge that such a legislative intervention does not seem very realistic at the moment. The article, therefore, submits from a *de lege lata* perspective, that the adoption of the data subject model would further advance the constitutionalisation process which has already begun by the Court through its data retention jurisprudence.

Overall, we recognise that the shift to the proposed *data subject-focused* approach requires bold and courageous steps from the CJEU or the EU legislator. However, it is urgently needed in face of new forms of surveillance, such as Pegasus, which require, in the words of the EDPS, ‘to rethink the entire existing system of safeguards established to protect our fundamental rights and freedoms, which are endangered by these tools’.¹⁵⁸ This article argued that this rethinking must be undertaken by putting *data subjects* and *their fundamental rights* at the forefront; even in the context of national security.

¹⁵⁸ European Data Protection Supervisor (n 1) 2.



Perspectives on the Reformed EU Judicial Architecture
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The 2024 Reform of the EU Judicial System and the Transformation of the Court of Justice into a Constitutional Court

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ABSTRACT: The 2024 reform of the Statute of the Court of Justice of the European Union does not entail merely technical adjustments but will bring about groundbreaking consequences for the structure of the EU judicial system. This contribution shows how these procedural amendments can significantly affect the constitutional role of the Court of Justice. While there is no unanimous understanding of the term ‘constitutional court’ in the EU legal order, a broad consensus has emerged as to the core elements of this concept. This article analyses several novelties introduced by the 2024 reform that may pave the way for the Court of Justice’s transformation into a fully-fledged constitutional court. It also situates the 2024 reform within the broader trajectory of EU judicial reforms, showing that it forms part of a decades-long trial-and-error process that is far from concluded. Finally, it offers an outlook on the possible future development of the EU judicial system, emphasising the need for a long-term vision of the Union’s judicial architecture and, in particular, of the respective roles of the Court of Justice and the General Court.

KEYWORDS: Court of Justice – constitutional court – preliminary reference procedure – Statute of the Court of Justice of the EU – 2024 reform – future architecture of the EU judicial system.

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1. Introduction

Much praise has been lavished on the 2024 reform of the Statute of the Court of Justice of the European Union (2024 reform).¹ At the same time, however, a number of concerns have been raised regarding the far-reaching changes it has brought about in the EU's judicial architecture. In many respects, the ensuing discussion has reignited the longstanding question of whether, and to what extent, the Court of Justice (CJ) can be qualified as a constitutional court. As will be shown, this is not a fruitless or merely abstract discussion. While at first glance the issue may appear to revolve around terminological classifications of merely technical relevance, in reality, these classifications help to structure the main traits of the 2024 reform and to provide clarity as to the direction in which future reforms may evolve.

Couching the debate in established terminology further helps to contextualise the reform within a longstanding tradition from which valuable suggestions can be drawn to address present-day dogmatic questions. By contrast, ignoring these precedents risks portraying the 2024 reform as haphazard and piecemeal. Adopting a broader perspective, however, allows us to identify the recent reform steps as cornerstones of a well-marked trajectory. Following this line, it becomes evident that many of the challenges we are now facing in assessing the 2024 reform and determining its future direction have a long pedigree reaching deep into the history of EU procedural law.

By engaging in dialogue with the contribution published by Jacopo Alberti² in this Special Section, this article advances a distinct interpretation of the 2024 reform's implications. It shows that the 2024 reform has the potential to significantly shape the development of the CJ's constitutional role. Moreover, it argues that the adoption of a constitutional perspective helps to better grasp the actual scope of the 2024 reform and to discern the possible trajectory of the ongoing reform process of the EU procedural system.

In particular, this contribution is structured as follows. It will, first, discuss the concept of a 'constitutional court' and clarify how this notion can be applied to the CJ (2). It will then analyse the elements of the 2024 reform that strengthen the constitutional role of the CJ and that may set the stage for its transformation into a fully-fledged constitutional court (3). Afterwards, it will turn to problematising the concept of constitutionalisation, engaging with critical perspectives that highlight possible countervailing dynamics of the 2024 reform process (4). Finally, the article will provide an outlook on the broader evolution of the EU judicial system, emphasising the continuing trial-and-error nature of EU judicial reforms and the

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 J Alberti, 'O Tell Me the Truth About the Transfer of Preliminary Rulings to the General Court' (2025) 10 *European Papers* 333.

need for a long-term vision of the respective roles of the CJ and the General Court (GC) (5). While the 2024 reform also introduced measures concerning the transparency and participation in preliminary reference proceedings,³ as well as an extension of the filtering mechanism for appeals,⁴ this contribution focuses on the novelties relating to the partial transfer of preliminary ruling jurisdiction to the GC.

2. Approaching constitutionalisation

One might argue that any analysis of the constitutional role of the CJ must first address the definitional question. Yet, while a deductive approach – starting from a precise definition of a constitutional court and applying this definition to the Court’s activities – might at first glance appear to be the royal road, a closer look reveals that such an approach is hardly feasible. This is, first, because there is no consensus on a precise definition of a ‘constitutional court’.⁵ Second, the long-lasting qualification of the EU legal order as a ‘sui generis’ legal order cannot be overlooked.⁶ This characterisation necessarily implies that the CJ can only be regarded as a ‘sui generis’ constitutional

³ See the new Art 23 of the Statute of the CJEU. Requests for a preliminary ruling shall be now notified also to the European Parliament, the Council and the European Central Bank. Where they consider that they have a particular interest in an issue raised by a request for a preliminary ruling, they are entitled to submit statements of case or written observations to the CJ. Furthermore, the new Art 23(5) of the Statute of the CJEU foresees the publication on the CJEU’s website of statements of case or written observations submitted by an interested person pursuant to Art 23 of the Statute after the closing of the proceedings, unless that person raises objections to the publication of its own written submissions.

⁴ The 2024 reform also provides for an extension of the filtering mechanism for appeals against decisions of the GC which have been already previously heard by an independent board of appeal of a Union body, office or agency. This mechanism was introduced in 2019, with the entry into force of Art 58a of the Statute of the CJEU and was extended in 2024 to six additional independent boards of appeal. Furthermore, this mechanism also applies to independent boards of appeal established after 1 May 2019 within any other body, office or agency of the Union and to disputes relating to the performance of contracts containing an arbitration clause.

⁵ See, for example, JHH Weiler, ‘The Reformation of European Constitutionalism’ (1997) 35 *Journal of Common Market Studies* 97, 99; B Vesterdorf, ‘A constitutional court for the EU?’ (2006) 4 *International Journal of Constitutional Law* 607, 607: ‘There is no single accepted definition of what a “constitutional court” is, but everyone would probably agree that, at a minimum, it requires, first, a “constitution” (or any other “supreme law of the land” or Magna Carta) and, second, a court defending and interpreting this basic charter’. See also A Dashwood and AC Johnston, ‘Synthesis of the Debate’ in A Dashwood and AC Johnston (eds), *The Future of the Judicial System of the European Union* (Hart Publishing 2001) 55, 62. The latter provided a synthesis of the discussions which, in 1999, resulted in the adoption of the Court’s paper entitled ‘The Future of the Judicial System of the European Union (Proposals and Reflections)’.

⁶ See already, at that time with reference to the ECSC, R Schuman, ‘Préface’ in P Reuter (ed), *La Communauté Européenne de Charbon et de l’Acier* (Pichon et Durand-Auzias 1953), 7. Famously, Case 26/62 *Van Gend & Loos*, EU:C:1963:1, p 12 (‘new legal order of international law’). See also G Itzcovich, ‘The European Court of Justice as a Constitutional Court. Legal Reasoning in a Comparative Perspective’ (2014) 4 *STALS Research Paper* 1, 4–11.

court.⁷ Any assessment of the CJ's constitutional functions must be undertaken from the perspective of EU law itself, with its specific aims, goals, and imperfections.⁸

To overcome the definitional conundrum, one might follow the approach devised by Ole Due, who referred to the old saying that 'an elephant may be hard to define, but that it is relatively easy to recognize the animal when you see it.'⁹ Trivial as this picture may appear, it is nonetheless helpful to grasp the rationale underlying the indirect recommendation to abandon overambitious attempts to arrive at a comprehensive definition of an EU constitutional court. Instead, some substantive elements can allow us to 'spot the elephant', that is, to identify the constitutional role of the CJ.¹⁰ These include, in particular, the power to rule on the allocation of competences between the Member States and the EU or between the different EU institutions; the protection of fundamental rights; decisions on the constitutionality of secondary law; and the development of new approaches which are important for the EU legal order as a whole.¹¹

It is therefore advisable to adopt an inductive perspective: there is a broad consensus that the tasks mentioned above can be regarded as constitutional in nature;¹² and by analysing whether the 2024 reform strengthens or weakens these responsibilities, one may ultimately determine whether the reform reinforces the CJ's constitutional role.

In this regard, some preliminary caveats must be noted. First, this article does not engage with the constitutionalisation process of EU law in general, which is inherently linked to the evolution of the constitutional role of the CJ. Nor does it analyse whether the CJ fulfils a constitutional role in substantive terms. Accordingly, issues such as the strengthening of the rule of law, the CJEU's increasing positioning as the Union's fundamental rights court, and the unlocking of the potential of Article 2 TEU are not examined here. While they undoubtedly play an important role in strengthening the

⁷ Dashwood and Johnston (n 5) 62.

⁸ Similarly, already Mertens de Wilmars in 1987: see Centre d'études internationales et européennes, *Le Parlement européen et la Cour de justice des Communautés européenne: table ronde, Strasbourg, 10 avril 1987* (Université R Schuman 1987) 54.

⁹ O Due, 'A Constitutional Court for the European Communities?' in DM Curtin and DO'Keeffe (eds), *Constitutional Adjudication in European Community & National Law: Essays for the Hon. Mr. Justice T. F. O'Higgins* (Butterworths 1992) 3, 4.

¹⁰ Ibid.

¹¹ See, inter alia, GCR Iglesias, 'Der Gerichtshof der Europäischen Gemeinschaften als Verfassungsgericht' (1992) 3 *EuR* 225, 226; Dashwood and Johnston (n 5) 60; K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 *Common Market Law Review* 1625, 1651–1652; MT Kotzur, 'Funktionen und funktionelle Zuständigkeit der europäischen Gerichte' in U Karpenstein, MT Kotzur and JJ Vassel (eds), *Handbuch Rechtsschutz in der Europäischen Union* (Beck 2024) 49, 62; A Arnall, 'A Constitutional Court for Europe?' (2003–2004) 6 *Cambridge Yearbook of European Legal Studies* 1, 2–4; E Sharpston and G de Baere, 'The Court of Justice as a Constitutional Adjudicator' in A Arnall, C Bernard, M Dougan and E Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 123, 124–125.

¹² Ibid.

CJ's constitutional role, the focus of this article lies on the procedural side of the CJ's constitutionalisation process. It should be noted that also present members of the CJEU have explicitly referred to the CJ's constitutional role and, in some instances, even to the CJ as the Union's 'constitutional court'.¹³ The question examined here is whether the 2024 reform further strengthens this role and whether it sets the stage for the transformation of the CJ into a fully-fledged constitutional court.

Second, it is not argued here that the CJ exercises a role fully identical to national constitutional courts. As mentioned above, due to the nature of EU law as an autonomous legal system,¹⁴ a differentiated approach is required. Many areas in which the CJ has a strong interest would never be regarded by national constitutional courts as crucial to their constitutional function.¹⁵ However, areas such as the uniform development of EU law are clearly of pivotal importance for the EU constitutional order.¹⁶ Thus, caution is advisable against a comparative approach relying all too enthusiastically on national constitutional theory, although such references cannot be entirely renounced. The challenge, therefore, is to assess the widely recognised constitutional role of the CJ by making measured reference to qualification elements developed in national constitutional theory and adapting them to the particularities of the EU legal order, which is characterised by a series of elements that cannot be found in any other national order or international organisation.

Third, this contribution does not claim that the CJ exercises exclusively a constitutional role, nor is it contended here that the CJ constitutes a specialised constitutional court.¹⁷ While its constitutional role has become increasingly pronounced, the CJ continues to perform a variety of other judicial functions. The mere fact that the CJ exercises also competences that are not, strictly speaking, constitutional in nature does not, however, preclude its qualification as a constitutional court, or as a court moving in that direction. Similar considerations have been made, *mutatis mutandis*, with regard to the U.S. Supreme Court, which can carry out constitutional review and thus exercise a constitutional role, but also decides as a court of appeal on matters that are not of a constitutional nature.¹⁸

¹³ See, for example, Lenaerts (n 11) 1651–1652; J Kokott, 'Der EuGH auf dem Weg zum Verfassungsgericht' (2025) 80 *JuristenZeitung* 278; Opinion of AG Ćapeta in Joined Cases C-29/22 and C-44/22 *KS and KD*, EU:C:2023:901, paras 117, 133 and 155; Opinion of AG Ćapeta in Case C-769/22 *Commission v Hungary*, EU:C:2025:408, para 215: 'The Court of Justice is a constitutional court [...]'.
¹⁴ As famously referred to in *Van Gend & Loos* (n 6) p 13; Case 6/64 *Costa v ENEL*, EU:C:1964:66, p 593.

¹⁵ See Dashwood and Johnston (n 5) 60.
¹⁶ *Ibid.*

¹⁷ See also, for example, Iglesias (n 11) 226; FG Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in DM Curtin and DO'Keeffe (eds), *Constitutional Adjudication in European Community & National Law: Essays for the Hon. Mr. Justice T. F. O'Higgins* (Butterworths 1992) 25.
¹⁸ *Ibid.*

On a more general note, the dividing line between a supreme court and a constitutional court is porous. While it may be argued that the key task of an EU supreme court is to ensure the uniform interpretation and application of Union law, such a task can also be seen as indicative of the Court's constitutional role, especially if the interpretation of EU constitutional law, in itself often not clearly separable from 'ordinary' EU law, is at stake.¹⁹ Given the enormous dynamics inherent in EU law, guaranteeing unity and consistency of the EU legal order is in itself a condition for the preservation of this legal order, and therefore for its constitutional nature, regardless of the specific content of the norm at issue in a single case.

3. Elements of the 2024 reform strengthening the Court of Justice's constitutional role

3.1. Aims of the reform

At first glance, Regulation (EU, Euratom) 2024/2019 amending Protocol No 3 of the Statute of the CJEU does not seem to place particular emphasis on the strengthening of the CJ's constitutional role. Indeed, the term 'constitutional' is mentioned only in Recital 4 of the Regulation, which justifies the introduction of new transparency measures by noting that the CJ 'is increasingly required, in preliminary ruling cases, to rule on matters of a constitutional nature or related to human rights and the Charter'.²⁰ The Preamble specifically mentions two key objectives that guided the 2024 reform process – aims that are, however, both underpinned by the ambition to enable the CJ to focus on constitutional questions.

First, the reform is presented from an efficiency-enhancing perspective, seeking to reduce the ever-growing workload of the CJ by delegating part of its preliminary ruling jurisdiction to the GC.²¹ In particular, the 2024 reform provides for the transfer of preliminary ruling jurisdiction in six 'specific areas',²² a possibility already foreseen in Article 256(3) TFEU. The Regulation amending Protocol No 3 notes that the number of pending preliminary ruling cases and the time taken to deal with those

¹⁹ M Claes and M de Visser, 'The Court of Justice as a Federal Constitutional Court: A Comparative Perspective', in E Cloots, G de Baere and S Sottiaux (eds), *Federalism in the European Union* (Bloomsbury Publishing 2012) 122.

²⁰ Regulation (EU, Euratom) 2024/2019 (n 1) recital 4.

²¹ According to the statistics presented by the Court, requests for a preliminary ruling account for around 62% of the caseload of the CJ, and the six selected areas transferred to the GC encompass approximately 20% of all preliminary references reaching the CJEU. See Court of Justice of the European Union, 'Annual Report 2024 – Statistics concerning the judicial activity of the Court of Justice', at curia.europa.eu, 5.

²² These are: the standard system of value added tax; excise duties; the Customs Code; the tariff classification of goods under the Combined Nomenclature; compensation and assistance to passengers in the event of denied boarding or of delay or cancellation of transport services; the system for greenhouse gas emission allowance trading.

cases are increasing, also due to the particularly complex and sensitive nature of many questions.²³ While some authors argued that ‘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’,²⁴ and that the reform only solves the problem of ‘finding some additional work for the not so busy GC’,²⁵ this contribution takes a different view. It is precisely the reduction of the CJ’s workload that is essential for a restructuring of the EU judicial system along the lines originally envisaged at its inception, paving the way for the CJ’s transformation into a fully-fledged constitutional court. This necessarily entails relieving the CJ, as far as possible, of cases of secondary importance, in particular those raising less complex and less sensitive questions.²⁶ It is probably true, as pointed out in literature,²⁷ that the 2024 reform will not immediately lead to a significant decrease in the CJ’s workload.²⁸ Nevertheless, some early signs are encouraging: the GC delivered its first preliminary ruling judgment, *Grotek*,²⁹ less than nine months after the CJ had transmitted the case, whereas the average duration of preliminary ruling proceedings in 2024 was 17,2 months.³⁰ The 2024 reform has delineated a testing ground that can pave the way for a more far-reaching delegation of preliminary ruling competences to the GC. Decisive for ensuring that the reform will be efficiency-enhancing in the long run, and that the CJ can concentrate on its constitutional role, will be the resolve to continue along this reform path.

The objective of reducing the CJ’s workload is intrinsically linked to the second aim explicitly articulated in the reform text: to allow the CJ ‘to continue to fulfil its mission of safeguarding and strengthening the unity and consistency of Union law, and to ensure that the decisions of the Court of Justice are of the highest quality’.³¹ As will be explained below, the specific task of safeguarding and strengthening the unity and consistency of Union law, which is clearly assigned to the CJ, further constitutionalises the EU procedural order and, on an institutional level, strengthens the constitutional role of the CJ.

²³ Regulation (EU, Euratom) 2024/2019 (n 1) recital 2.

²⁴ Alberti (n 2) 339.

²⁵ M Bobek, ‘Preliminary rulings before the General Court: What judicial architecture for the European Union?’ (2023) 60 *Common Market Law Review* 1515, 1517.

²⁶ See also the Court’s Paper on ‘The Future of the Judicial System of the European Union (Proposals and Reflections)’ printed in Dashwood and Johnston (eds) (n 5) 133. See also Vesterdorf (n 5) 613; P Craig, *EU Administrative Law* (Oxford University Press 2012) 269; U Öberg, ‘A “General” Court in Name Only?’ (2024) 3 *Concurrences* 1, 4.

²⁷ Alberti (n 2) 338–340; Bobek (n 25) 1527.

²⁸ As of the end of August 2025, 60 preliminary ruling cases have been transmitted to the GC. See the list available on the Court’s website (curia.europa.eu).

²⁹ Case T-534/24 *Grotek*, EU:T:2025:682.

³⁰ Court of Justice of the European Union, ‘Annual Report 2024 – Statistics concerning the judicial activity of the Court of Justice’ (n 21) 31.

³¹ Regulation (EU, Euratom) 2024/2019 (n 1) recital 2.

3.2. Allocation of cases between the EU courts

The criteria used to identify the six areas transferred to the GC's jurisdiction already provide significant insights into the envisaged future role of the CJ. The specific areas are to be devised as follows: they must be clearly identifiable and sufficiently separable from others; they must raise only few issues of principle; there must be a substantial body of case law in these areas to guide the GC and to prevent the risk of inconsistencies or divergences in the case law; and they must give rise to a sufficiently high number of references.³² Accordingly, areas that typically involve questions of principle and are crucial for the further development of EU law as a whole – and thus can be regarded as constitutional in nature – remain within the competence of the CJ. Even though the relevant provisions do not mention the term 'constitutional', it represents the underlying concept that fundamentally inspired the allocation of competences under this reform.

This fact is further confirmed by the exclusion of a series of specific 'horizontal competences' from any transfer to the GC. According to Article 50b(2) Statute, 'the Court of Justice shall retain jurisdiction to hear and determine requests for a preliminary ruling that 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'.³³ As noted at the beginning of this contribution, the qualification of a competence as 'constitutional' will rarely be free from doubt and contestation.³⁴ Nevertheless, it can be noticed that certain fields are broadly acknowledged as falling within such a qualification, and the topics mentioned in Article 50b(2) Statute surely are among them.

As regards the legislative technique applied in Article 50b(2) Statute, the approach adopted may appear striking. While Article 256(3), first sentence, TFEU refers only to 'specific areas' that can be assigned to the GC, it makes no mention of specific competences expressly to be retained by the CJ.³⁵ From a technical perspective, this provision may be understood as an additional safeguard mechanism designed to protect the CJ's prerogatives and to exclude a 'competence overreach' by the GC. Seen more positively and in relation to its material content, this provision

³² 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, 4–5.

³³ In the meantime, the Court has published a list of examples of the application of Art 50b of the Statute, also indicating the cases in which it considered such an 'independent question' to be given: see Court of Justice of the European Union, 'Implementation of Article 50b of the Statute of the Court of Justice of the European Union (1/10/2024 – 30/06/2025)', at curia.europa.eu.

³⁴ 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, 43: '[...] there is simply no dividing line between a "constitutional question" and "mere law" in individual cases'.

³⁵ See also R Mastroianni, 'Il trasferimento delle questioni pregiudiziali al Tribunale: una riforma epocale o un salto nel buio?' (2024) *Rivista Quaderni AISDUE* 23.

is intended to emphasise the overall attempt to strengthen the constitutional role of the CJ and to ensure that it can exercise its function as custodian of the constitutional core of EU law to the utmost end.

The interpretation of the rather vague Article 50b(2) Statute will require a delicate balancing act, the outcome of which will significantly shape the further evolution of the roles of the EU Courts. In particular, the notion of ‘independent questions’ is ambiguous and leaves the CJ a wide margin of discretion.³⁶ This term is of crucial importance, since the mere fact that a case raises a question concerning the interpretation of provisions of primary law, public international law, general principles of Union law or the Charter does not automatically trigger the application of Article 50b(2) Statute.³⁷ Indeed, within the specific areas assigned to its jurisdiction, the GC will act in a way very similar to that of a supreme court and will necessarily be called upon to interpret provisions referred to in Article 50b(2) Statute. Furthermore, it must be borne in mind that references for a preliminary ruling can concern not only the interpretation but also the validity of a provision of EU law, and the latter will in most cases require an interpretation of the provisions mentioned in Article 50b(2) Statute.³⁸

Whether the CJ will retain a case under this provision will thus significantly depend on whether the question raised can be qualified as ‘independent’ – a criterion which, however, has not been further defined. It is suggested here that a qualitative assessment should take place when interpreting this concept: the reach of a question beyond the specific case should be of considerable relevance and operate not only horizontally, in relation to similar cases, but also vertically, *id est* by involving matters of structural consistency of the EU legal order as a whole.³⁹ In particular, questions important for safeguarding and strengthening the unity and consistency of the EU legal order can be regarded as fulfilling the requirements of Article 50b(2)

³⁶ The recitals of the Regulation try to offer some guidelines but, rather than providing clarity, they create further ambiguities. Recital 16 of the Regulation states that questions of jurisdiction or admissibility raised are not to be considered as horizontal and shall thus remain within the competence of the GC. What, however, happens if an issue of jurisdiction or admissibility gives rise to a question of principle, important for ensuring the unity and consistency of EU law? Can this question be considered as falling under Art 50b(2) Statute? See T Tridimas, ‘Sharing Uniformity: A New Era Beckons’ (2024) 1 *LCEL Research Paper Series* 2, 8; S Iglesias Sánchez, ‘The 2024 Reform of the Statute of the Court of Justice of the EU and the Transformation of the EU Judicial System: Preliminary Rulings before the General Court of the EU’ in A Saiz Arnaiz and J Solanes Mullor (eds), *The European Judiciary* (Hart Publishing 2025) 97, 103.

³⁷ See also Tridimas (n 36) 13.

³⁸ *Ibid.*, 12.

³⁹ S Iglesias Sánchez, ‘Return of the Réexamen’ in *The 2024 Reform of the Statute of the Court of Justice of the EU* (EU Law Live 2024) 35, 37: ‘The criteria for “retained jurisdiction” outlined in Article 50b of the Statute [...] may be traced back to the idea of the “important position” that a rule occupies in EU law.’ Takis Tridimas suggested that ‘independent’ should be understood as ‘separate’, meaning that ‘a reference raises an issue of interpretation of one of the higher ranking norms which goes beyond its mere application in the case in issue’, see Tridimas (n 36) 11–12.

Statute. Ultimately, it will be for the CJ to breathe life into this element, to define it – if, indeed, it can be captured in any general formula at all – and thereby to delineate its own jurisdiction and further shape its constitutional role.

Caution, however, is warranted, as an overly broad reading of this element should be avoided. This reflects the very philosophy of the 2024 reform, which arguably does not conceive the GC as a mere ‘equerry’⁴⁰ of the CJ, but as an equal interlocutor within the scope of its specific functions. Indeed, the success of this reform will essentially hinge on fruitful cooperation and increasingly close interaction between the EU courts.⁴¹ If the CJ were to ardently defend its competences by overly relying on Article 50b(2) Statute and the review mechanism under Article 256(3) TFEU, the essential potential gains in terms of workload would be offset. As has been aptly remarked by Michal Bobek: ‘In contrast to works of science fiction, where one can be travelling without moving, there cannot be transferring without letting go.’⁴²

3.3. Safeguard mechanisms

As seen, the competence transfer operated by the 2024 reform is characterised by a series of ‘carve-outs’: even though cases pertaining exclusively to the six specific areas listed in the Statute are in principle allocated to the GC’s jurisdiction, the CJ maintains a particular control and steering power, which can be seen as indicative of the future development of its role.

In particular, under the so-called ‘guichet unique’ mechanism, all requests for a preliminary ruling are submitted to the CJ, which then assesses whether a case shall be referred to the GC.⁴³ The CJ continues to act as the main manager of the preliminary reference procedure, starting from the moment in which a case is lodged by a national court or tribunal before the CJEU.⁴⁴

The President of the CJ assumes a role of paramount importance in this process. After having heard the Vice President and the First Advocate General, he decides whether a question falls exclusively within one or more of the specific areas and, accordingly, whether the Registry of the CJ shall submit a case to the GC. In complex scenarios – where the President considers that a case concerns one or more of the six specific areas but also touches upon other areas of law or raises independent questions relating to the interpretation of the provisions listed in Article 50b(2)

⁴⁰ As has been suggested by Alberti (n 2) 344.

⁴¹ Tridimas (n 36) 13.

⁴² Bobek (n 25) 1550.

⁴³ Art 50b(3) of the Statute of the CJEU; Art 93a of the RoP of the CJ.

⁴⁴ The fact that the ‘guichet unique’ is composed solely of CJ members sparked some controversy: see, inter alia, Alberti (n 2) 338; Mastroianni (n 35) 21–23; 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) 9–10.

Statute – the decision of whether or not to refer a case to the GC is taken by the *Réunion Générale*.⁴⁵ While it is widely acknowledged in literature that this novelty entails a strong verticalisation of judicial control, views differ as to whether it should be interpreted as a confirmation of a further constitutionalisation of the EU judiciary.⁴⁶ According to the position advanced here, the verticalisation taking place within the CJEU system – between the CJ and the GC, and even within the CJ itself – is not only a matter of internal procedural reorganisation. Rather, it constitutes a defining feature of the broader process of constitutionalisation currently unfolding within the CJEU. Constitutionalisation is intrinsically linked to hierarchy: constitutional courts enable a structured form of judicial oversight in which a higher-ranking body reviews legal acts in a top-down manner, thereby defending the superiority of the constitutional law.⁴⁷ This does not, however, detract from the fact that the GC will be, in principle, the final judicial instance in the specific areas delegated to its jurisdiction, with the CJ intervening only exceptionally.

Such intervention will occur, in particular, where the need arises to safeguard the unity and consistency of EU law. To this end, Article 256(3) TFEU embeds two mechanisms enabling the CJ to examine a case even after it has been delegated to the GC. As mentioned above, while at the national level the task of guaranteeing the unity and consistency of law is typically entrusted to a supreme court, within the EU legal order it also assumes a constitutional character.

First, the GC may transfer a case back to the CJ if it holds that a case requires a decision of principle likely to affect the unity or consistency of EU law.⁴⁸ Second, the First Advocate General may propose that the CJ review a GC decision if he considers that there is a serious risk of the unity or consistency of Union law being

⁴⁵ Art 93a of the RoP of the CJ. The decision of the President and the decision of the *Réunion Générale* are both not published. For a more detailed analysis of the ‘guichet unique’ see previous contributions in this Special Section: O Porchia, ‘A View from the General Court. The Reform for the Transfer of Competences for Preliminary Rulings to the General Court: Issues Concerning Its Implementation’ (2025) 10 *European Papers* 391, 395–397; 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, 302–307, as well as L Rezki, ‘A View from the Court of Justice. Some Considerations About the Transfer of Competence for Preliminary Rulings to the General Court: The Functioning of the Guichet Unique and a Brief Review After Nine Months of Implementation of the Reform’ (2025) 10 *European Papers* 877.

⁴⁶ Critical in this regard Alberti (n 2) 345, who acknowledges that this novelty could be interpreted as a sign of constitutionalisation but considers ‘verticalisation’ to be a more accurate description of the reform’s defining element.

⁴⁷ A Stone Sweet, ‘Constitutional Courts’ in M Rosenfeld and A Sajo (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 816, 817.

⁴⁸ Art 256(3), second sentence, TFEU; Art 54(2) of the Statute of the CJEU. For a more detailed analysis, see 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; Grossio and Petrić (n 45) 305–306.

affected.⁴⁹ As regards procedural time limits, the First Advocate General may propose the initiation of the review procedure within one month of the delivery of the GC's decision.⁵⁰ The CJ then has an additional month to decide whether to follow this proposal.⁵¹ Where the CJ accepts to review the GC decision, the 'unity and consistency of Union law' criterion comes again into play. If the CJ concludes that the GC decision affects the unity or consistency of Union law, the preliminary ruling delivered by the CJ will replace the one given by the GC.⁵²

Even though the 'unity and consistency of Union law' criterion appears, explicitly and implicitly, throughout the whole reform text, its exact meaning is still unclear. How and how often the 'unity and consistency of Union law' criterion will be applied will have far-reaching repercussions on the success of the reform as a whole and on the evolution of the respective roles of the EU courts.⁵³ The Court merely stated in its Request to amend the Statute that the recourse to the review procedure should be exceptional and that the GC decision should, in principle, be final.⁵⁴

However, the CJ is not called to develop entirely new criteria for identifying cases falling under Article 256(3), third sentence, TFEU. Rather, it may, to a certain extent, draw on the experience gained under Article 256(2) TFEU, which exceptionally allows the CJ to review GC decisions on appeal from specialised courts where there is a serious risk of the unity or consistency of Union law being affected.⁵⁵ Yet, as this provision has been applied only rarely in EU civil service disputes – which have a much more limited reach than preliminary rulings – it remains to be seen whether the CJ will use the interpretative criteria developed in this context also in preliminary ruling cases. Nonetheless, many similarities are likely to emerge.

Under the review mechanism in Article 256(2) TFEU, the Court found the following four criteria, considered as a whole, to be indicative of the unity and consistency of Union law being affected: whether (1) the judgment of the GC may constitute a precedent for future cases, (2) the GC has departed from established case law of the CJ, (3) the errors of the GC relate to rules that are applicable regardless of the matter at issue and (4) the rules with which the GC failed to comply occupy an important position in the Union legal order.⁵⁶ These criteria have, to a large extent,

⁴⁹ Art 256(3), third sentence TFEU; Arts 62 to 62b of the Statute of the CJEU.

⁵⁰ Art 62(2) of the Statute of the CJEU.

⁵¹ Ibid.

⁵² Art 62b(2) of the Statute of the CJEU.

⁵³ See, inter alia, Grossio and Petrić (n 45) 313–316; Iglesias Sánchez (n 39) 35–38; Bobek (n 25) 1525–1527.

⁵⁴ Request submitted by the Court of Justice (n 32) 6; also Art 256(3), third sentence, TFEU.

⁵⁵ See also Iglesias Sánchez (n 39) 36–37; Grossio and Petrić (n 45) 314–316. As regards the application of the 'unity and consistency of Union law' criterion in the context of Art 256(2) TFEU, 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.

⁵⁶ Opinion of AG Wathelet in Case C-417/14 RX-II *Livio Missir Mamachi di Lusignano v European Commission*, EU:C:2015:593, para 54. See also, for example, Case C-197/09 RX-II *Review*

informed the 2024 reform.⁵⁷ Indeed, the criteria used for identifying the ‘specific areas’ and the mechanism provided for in Article 50b(2) Statute should ensure that most cases fulfilling these criteria can already be caught before being transferred to the GC.⁵⁸ It stands to reason that these four criteria will also inform the CJ’s interpretation of what constitutes a ‘serious risk of the unity or consistency of EU law’ under Article 256(3), third sentence, TFEU. However, they will probably not apply in identical form but will have to be reconstrued in the light of the peculiarities of the preliminary reference procedure.⁵⁹ As regards the first criterion, it must be recalled that preliminary rulings – also the ones issued by the GC – are *ex natura* endowed with general validity and are of precedential value.⁶⁰ Thus, something more will be required in this context. An adapted formula, suited to such situations, could be framed as follows:

‘The following criteria, considered as a whole, are relevant for the determination of whether the unity or consistency of EU law is affected:

- 1) the judgment of the GC may constitute a precedent for future cases *of fundamental relevance for the EU constitutional order*;
- 2) the GC has departed from established case law of the CJ;
- 3) the errors of the GC relate to *fundamental* rules that are applicable regardless of the matter at issue; and
- 4) the rules with which the GC failed to comply occupy a *central* position in the Union legal order’.

Generally, it can be said that the GC should, and will, enjoy considerable leeway in its jurisprudence and act as the final arbiter of questions arising within the ‘specific areas’,⁶¹ provided that they do not fall under Article 50b(2) Statute and do not pose a serious risk to the unity and consistency of EU law. The review procedure must certainly not be used by the CJ as a mechanism to dictate the development of the GC’s case law.⁶² Contrary to what has been argued in literature,⁶³ there is no fundamental

M v EMEA, EU:C:2009:804, paras 60–66; Case C-334/12 RX-II *Review Arango Jaramillo and Others v European Investment Bank*, EU:C:2013:134, paras 50–54.

⁵⁷ More in detail, see Iglesias Sánchez (n 39) 37.

⁵⁸ Ibid.

⁵⁹ Ibid; Grossio and Petrić (n 45) 315.

⁶⁰ See, for example, Case C-689/13 *PFE v Airgest SpA*, EU:C:2016:199, para 38.

⁶¹ D Sarmiento, ‘Gaps and “Known Unknowns” in the Transfer of Preliminary References to the General Court’ (2024) 3 *Rivista del Contenzioso Europeo* 21, 35–36; Grossio and Petrić (n 45) 315; Tridimas (n 36) 13: ‘[...] the frame of mind should be towards empowering rather than limiting the GC’.

⁶² As has also been stated in the context of the review procedure provided for in Art 256(2), second sentence, TFEU. See Case C-17/11 RX *Review of Judgment T-143/09, Commission v Petrilli*, EU:T:2010:531, para 4: ‘[...] the fact that the Court of Justice has not yet ruled on a point of law is, in itself, not sufficient to justify a review pursuant to Article 62 of the Statute of the Court of Justice of the European Union, in so far as it is now solely for the Civil Service Tribunal and the General Court of the European Union to develop the case-law in matters relating to the civil service, since the Court of Justice has jurisdiction only to prevent the decisions of the General Court affecting the unity or consistency of European Union law’.

⁶³ Bobek (n 25) 1527; Bobek (n 34) 43.

contradiction between, on the one hand, the aim of obtaining a meaningful transfer of competences and, on the other hand, the need to preserve the constitutional steering role of the CJ in order to safeguard and strengthen the unity and consistency of EU law. Instead, there appears to be a strong confidence by the CJ that the direction devised by its previous jurisprudence will be more or less continued. Deviations may occur,⁶⁴ yet they have been implicitly accepted by the CJ as an expression of the autonomy vested in the GC, as long as they do not give rise to a serious risk for the unity and consistency of Union law. This whole reform is informed by the conviction that future, also novel, developments of the jurisprudence in the specific areas can be managed by the GC, while the CJ retains the right to intervene only in ‘emergency situations’. That additional ‘safeguard mechanisms’ were inserted by the 2024 reform, and that the CJ maintains the last word in cases raising important constitutional questions, should arguably not be read as a sign of diffidence towards the GC,⁶⁵ but rather as a further attempt to allocate constitutional cases to the CJ.

The GC has been granted something akin to a ‘*carte blanche* authorisation’, subject to certain exceptional clauses: the CJ maintains an overarching control right, but one which is not intended to be exercised in an overly rigorous manner. To a far-reaching extent, the future development of jurisprudence in the six specific areas will be the result of a joint effort by both courts, each exercising its autonomous powers while cooperating towards a common end. Perhaps at first sight paradoxically, the strengthening of the role of the GC, acting as the supreme court in the six specific areas, represents a necessary condition for the transformation of the CJ into a fully-fledged constitutional court.

3.4. Specialisation of the General Court

An important, though often overlooked, element in enabling the CJ to concentrate on its constitutional role is the progressive specialisation of the GC.⁶⁶ Under Article 50b(4) of the Statute,⁶⁷ preliminary references are assigned to specialised chambers within the GC. Since September 2025, two GC chambers have been designated to

⁶⁴ See also Sarmiento (n 61) 15. The GC will, in principle, be free to depart from the case law of the CJ in the ‘specific areas’.

⁶⁵ As has been argued, for example, by Mastroianni (n 35) 27.

⁶⁶ For a more detailed analysis of the GC’s transformation, see Porchia (n 45) 395–397; Öberg (n 26); G Hesse, ‘Die Übertragung von bestimmten Kategorien an Vorabentscheidungsverfahren auf das Gericht der EU’ (2025) *EuR Beiheft* 189, 193–199. That the GC is undergoing a process of specialisation is, however, not undisputed: see Alberti (n 2) 335–338. He argued, *inter alia*, that the transfer of preliminary rulings to the GC broadens the subject areas and increases the judicial procedures dealt with by the GC. Thus, the argument of the progressive specialisation would not be convincing. However, it must be recalled that the GC’s preliminary ruling jurisdiction is limited to six specific, highly technical areas, assigned to two chambers specialised on dealing with preliminary rulings.

⁶⁷ And specified in Arts 25(1) and 26(1) of the RoP of the GC.

hear preliminary ruling cases.⁶⁸ Specialisation enhances the sectoral unity and consistency of EU law in these fields, as all preliminary references assigned to the GC are examined by the same two chambers.⁶⁹ In this way, the GC will develop technical expertise that will enable it to handle a large number of cases in a coherent way. At the same time, concentrating preliminary references in specific technical fields before two specialised chambers enables the GC to familiarise itself more quickly with this new type of cases.⁷⁰ The speed with which the GC delivers preliminary rulings, together with their quality, will be decisive for the success of the 2024 reform and, more broadly, for the transformation of the CJ into a fully-fledged constitutional court. The more efficiently the GC delivers preliminary rulings and the more technical cases can be delegated to it, the greater the breathing space the CJ gains to focus on constitutional questions.

Furthermore, specialisation can provide reassurance to national courts, which must now interact with a different body under Article 267 TFEU, one that is formally lower in the judicial hierarchy than their previous counterpart. While concerns have been voiced in literature regarding the possible reaction of national courts,⁷¹ it can be argued that precisely the specialisation introduced makes the GC a particularly attractive interlocutor for national courts.⁷² In several of the areas transferred to the GC's jurisdiction – notably those relating to tax law and customs law – specialised courts also exist in many Member States, such as the '*Bundesfinanzhof*' in Germany.⁷³ National specialised courts may prefer to engage with a specialised EU court in Luxembourg, which is used to addressing highly complex technical issues, rather than with the CJ, which is increasingly focusing on more abstract, constitutional questions. The progressive specialisation of the GC relieves the CJ of the burden of highly technical cases and can serve as a stepping stone for the CJ's transformation into a fully-fledged constitutional court.

⁶⁸ Court of Justice of the European Union, Formation of Chambers and assignment of Judges to Chambers (C/2024/6456).

⁶⁹ Request submitted by the Court of Justice (n 32) 7; Bobek (n 34) 42.

⁷⁰ Similarly, Request submitted by the Court of Justice (n 32) 7.

⁷¹ 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* 112; Michal Bobek considers the risk of diminished trust in the lower EU court to be far-fetched. However, he argues that national courts may question the sense of submitting preliminary references to the GC, as in these areas a substantial body of case law exists preventing the potential risk of inconsistencies or divergences in the case law (Bobek (n 25) 1536).

⁷² Also D Petrić, 'The Preliminary Ruling Procedure 2.0' (2023) 8 *European Papers* 25, 39; Sarmiento (n 61) 15–16; Hesse (n 66) 197.

⁷³ Hesse (n 66) 197.

4. Problematising constitutionalisation

To interpret the 2024 reform as a further step towards constitutionalising the CJ is a widely,⁷⁴ though not unanimously,⁷⁵ held position. Indeed, some voices in literature, including a contribution to this Special Section,⁷⁶ have problematised the notion of constitutionalisation. This section engages with these arguments by examining the potential countervailing dynamics of the reform. It will be shown that these positions – while not without merit – do not ultimately call into question the evolution of the CJ into a constitutional court; on the contrary, certain arguments may even be regarded as further indications of the strengthening of the CJ's constitutional role.

First, this section examines whether the decentralisation of the preliminary reference procedure also entails, as has been suggested in literature, a de-constitutionalisation of this mechanism. It then turns to the objection that the 2024 reform did not confer any new competences to the CJ, and asks whether such an extension of powers is necessary for its transformation into a fully-fledged constitutional court. The third subsection addresses alternative pathways of strengthening the CJ's constitutional role, focusing in particular on the debate surrounding the recalibration of the *CILFIT* criteria. Finally, the section situates the 2024 reform within the broader trajectory of reforms since the Treaties of Nice and Lisbon and assesses whether the current reform process represents a continuation of or a departure from the logic underpinning the Treaties.

In addressing these issues, some important caveats should be noted. The dividing line between 'constitutional' and 'ordinary' cases is, in practice, often less clear than it might appear in theory. Constitutional questions can well arise also in highly technical areas, as the *Akerberg Fransson*⁷⁷ case paradigmatically shows. Moreover,

⁷⁴ 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–XVII; S Iglesias Sánchez, 'Shared Jurisdiction of EU Courts Over Preliminary Rulings: One procedure. Two Courts. One Interpretation?' (2024) 3–4 *REALaw* 79, 84; Petrić (n 72) 42; 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); 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, 74; 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) (n 71); 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.

⁷⁵ Alberti (n 2) 340–344; Bobek (n 34) 43.

⁷⁶ Alberti (n 2).

⁷⁷ Case C-617/10 *Akerberg Fransson*, EU:C:2013:105. The Court itself referred to the *Akerberg Fransson* case in its 2017 Report, highlighting the risk that requests for a preliminary ruling, although falling within technical areas, may nonetheless raise questions concerning the interpretation of fundamental provisions of EU law. See Court of Justice of the European Union, 'Report submitted pursuant to Article 3(2) of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the

many cases initially appear to be technical in nature and only afterwards reveal their constitutional potential.⁷⁸

That being said, the reform is endowed with several ‘safeguard mechanisms’, analysed above, that shall ensure that the CJ can seize cases raising constitutional questions even when they fall within one of the six specific areas, and also at a later stage of the proceeding if constitutional questions cannot be detected from the outset. Whether the CJ will ultimately succeed in developing into a fully-fledged constitutional court will also depend on how these safeguard mechanisms operate in practice.

4.1. Decentralisation and de-constitutionalisation of the preliminary reference procedure?

As regards the potential consequences attributed to the 2024 reform, a frequently reiterated mantra concerns the decentralisation and de-constitutionalisation of the preliminary reference procedure.⁷⁹ This subsection argues, however, that the decentralisation of the preliminary reference procedure enhances its efficiency and may even contribute to its further constitutionalisation.

That the 2024 reform entails a decentralisation of the preliminary reference procedure in the six specific fields delegated to the GC is self-evident, representing its most significant novelty. Before the 2024 reform, a potential decentralisation of the CJ’s ‘crown jewel’ was viewed with diffidence and even as a threat to the constitutional character of the preliminary reference procedure.⁸⁰ AG Ruiz-Jarabo Colomer, for example, argued in 2001 in *De Coster* that the ‘key to the success of the preliminary ruling procedure has lain in the centralisation of the interpretative function, which promotes uniformity’ and that the death knell would sound for the preliminary reference procedure in the moment in which two different courts would issue two different interpretations in respect of the same precept of Union law.⁸¹

This position was perhaps well-founded at the time of writing. Indeed, the CJEU long opposed any transfer of jurisdiction on preliminary rulings, invoking similar arguments and, in particular, warning against the risk of divergent case law that could undermine the unity and consistency of EU law.⁸² However, as the CJ’s Request to

Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union’, at curia.europa.eu, 6.

⁷⁸ Petrić (n 72) 33; Sarmiento (n 74) X; JJ Vassel, ‘Die Organisationsstruktur der Europäischen Gerichtsbarkeit’ in U Karpenstein, MT Kotzur and JJ Vassel (eds) (n 11) 24, 32; Bobek (n 34) 43.

⁷⁹ See, inter alia, Iglesias Sánchez (n 36) 109; Iglesias Sánchez and Sarmiento (n 74).

⁸⁰ Iglesias Sánchez (n 36) 109.

⁸¹ Opinion of AG Ruiz-Jarabo Colomer in Case C-17/00 *François De Coster v Collège des bourgmestres et échevins de Watermael-Boitsfort*, EU:C:2001:366, para 74.

⁸² Report submitted pursuant to Article 3(2) of Regulation (EU, Euratom) 2015/2422 (n 77) 6–7; Court of Justice of the European Union, ‘Report provided for under Article 3(1) of Regulation (EU, Euratom) 2015/2422’, at curia.europa.eu, 8–9. See also Lenaerts (n 9) 1656.

amend the Statute made clear, the overall context has since evolved.⁸³ As seen above, the 2024 reform tries to address the threat identified by AG Ruiz-Jarabo Colomer through a range of ‘safeguard mechanisms’. One of the leitmotifs of the reform is precisely the ‘safeguarding and strengthening of the unity and consistency’ of EU law, a task explicitly entrusted to the CJ.⁸⁴ The CJ remains the ultimate arbiter of fundamental questions concerning the future development of the EU legal order as a whole. While decentralisation undeniably alters the framework of the preliminary reference procedure, it does not deprive the CJ of the last word in speaking the law when constitutional questions arise. Ironically, in the context of the 2024 reform, it is precisely the decentralisation of the preliminary reference procedure that reinforces, rather than diminishes, the constitutional role of the CJ.

It has been argued in literature that decentralisation gives rise to a transformation of this procedure, depriving it of part of its constitutional coating.⁸⁵ Paradoxically, the strengthening of the constitutional role of the CJ would entail the de-constitutionalisation of at least part of the preliminary reference procedure, the very mechanism that most paradigmatically conferred upon the CJ its constitutional role.⁸⁶ When looking at the individual cases transferred to the GC, the 2024 reform might indeed be seen as conducive to such a process. In fact, a distinction will emerge between preliminary rulings concerning core constitutional questions, delivered by the CJ, and preliminary rulings relating to more technical, less complex, and less sensitive aspects, handed down by the GC. Therefore, the GC has, as mentioned, been qualified as an ‘equerry of the CJ’,⁸⁷ a depiction with which the GC judges may not be particularly satisfied.

The question, however, is whether such a perspective does justice to the reform process as a whole. Indeed, from a systematic perspective, a different, more comprehensive picture emerges. The tasks of the CJ and the GC are intertwined, and their interaction with the broader constitutional framework is undeniable. The transfer of more technical and less complex cases to the GC ensures that the CJ can exercise its core constitutional functions more effectively. Notwithstanding the GC’s autonomy in the six specific fields mentioned above – an autonomy further strengthened by the 2024 reform – this Court also exercises a crucial supporting task, enabling the CJ to concentrate on its core constitutional role. Returning to the picture presented before of the GC as an ‘equerry of the CJ’, it could be suggested to replace it with another image of similar colour but different message: the GC seated next to the CJ on the ‘Union’s judicial carriage’, driving together towards an enhanced constitutionalisation of the CJEU system. In fact, the GC not only fulfils its constitutional task under Article 19(3) TEU in the six specific areas but also plays a

⁸³ Request submitted by the Court of Justice (n 32) 3.

⁸⁴ Regulation (EU, Euratom) 2024/2019 (n 1) recital 2.

⁸⁵ Iglesias Sánchez and Sarmiento (n 74).

⁸⁶ Ibid.

⁸⁷ Alberti (n 2) 344.

pivotal role in paving the way for the CJ's transformation into a fully-fledged constitutional court. In doing so, it will significantly strengthen its own role as something akin to the Union's supreme court and thereby contribute to completing the comprehensive constitutional setting of the EU procedural order in essential respects. The EU judicial system, so famously touted by the CJ as a 'complete system of legal remedies and procedures' in *Les Verts*,⁸⁸ at least implicitly presupposes effectiveness if it pretends to be complete. The 2024 reform must therefore be regarded as an important additional cornerstone in realising this ambition.

It may thus be argued that the continuing transformation of the CJ into a court focusing prevalently on constitutional questions could further reinforce and constitutionalise the preliminary reference procedure. While preliminary rulings on more technical aspects will be delivered by the GC, the CJ will have the opportunity to devote its capacity to requests of constitutional significance. The allocation of preliminary references raising constitutional questions to a judicial instance explicitly and predominantly entrusted with such cases may enhance the effectiveness of the preliminary reference procedure and thereby comprehensively strengthen its constitutional nature.

4.2. New competences for the Court of Justice?

In this Special Section, it has been argued that the 2024 reform should not be regarded as part of a broader process of constitutionalisation, as it did not grant the CJ any new powers or functions but 'merely' delegated cases that previously fell within the competence of the CJ to the GC.⁸⁹ Furthermore, it has been contended that the real 'game changer for the constitutionalisation of the CJ (and of the EU legal order as a whole)' would have been the attribution of powers which are typically vested in many constitutional courts, such as to annul the legislation of the federated entities.⁹⁰

As regards the first point of criticism, it must be noted that the attribution of new competences to the CJ is not necessarily required for the CJ's transformation into a fully-fledged constitutional court. What is crucial, however, is to afford the CJ greater leeway in exercising its core competences. As has been repeatedly emphasised in this contribution, by adjusting the allocation of tasks within the preliminary reference procedure, the 2024 reform has enabled the CJ to concentrate on questions that typically raise constitutional issues.⁹¹ It is precisely this delegation of powers to the GC that will ultimately strengthen the constitutional functions retained by the CJ.

⁸⁸ Case 294/83 *Les Verts*, EU:C:1986:166, para 23.

⁸⁹ Alberti (n 2) 341.

⁹⁰ *Ibid.*

⁹¹ See also Regulation (EU, Euratom) 2024/2019 (n 1) recital 4.

Furthermore, it can be argued that the CJ inherently possesses a constitutional role, which merely needs to be progressively uncovered and brought to the fore. The debates in the Court's early years concerning its qualification already concluded that this constitutional role must be regarded as intrinsic. For example, Maurice Lagrange, who contributed decisively to the shaping of the Court, stated in 1954⁹²: 'Can it not be argued that, to the extent the treaty has a veritable constitutional nature (and it undoubtedly does), the Court of Justice itself has a constitutional role?'⁹³ Similar views were subsequently expressed by many members of the Court in its formative years, among them, to name only a few, Josse Mertens de Wilmars,⁹⁴ Andreas Matthias Donner,⁹⁵ Ole Due,⁹⁶ Gil Carlos Rodríguez Iglesias,⁹⁷ Francis Jacobs,⁹⁸ and Bo Vesterdorf.⁹⁹

Interesting insights into the Court's original perception of its role – and the potential future architecture of the EU judicial system as envisaged at the time – are offered by the Court's Paper of 1999 entitled 'The Future of the Judicial System of the European Union (Proposals and Reflections)'.¹⁰⁰ At the conference that led to its adoption, there was already a broad consensus that the CJ fulfils the role of a constitutional court and that this role should be explicitly recognised.¹⁰¹ It was also stressed that the CJ should be given sufficient breathing space to exercise its role as a constitutional court, without, however, losing jurisdiction over areas crucial to the performance of this role.¹⁰²

Thus, overburdening the CJ with new responsibilities would not only be an unnecessary condition for the constitutionalisation of the CJ but could even prove counterproductive. The Treaty of Nice already introduced the necessary instruments to ensure that the CJ can concentrate on the most important cases steering the further development of EU law.¹⁰³ The most essential challenge is therefore not to invent

⁹² The year in which the Court issued its first ruling: Case 1/54 *France v High Authority* (ECR 1954).

⁹³ M Lagrange, 'La Cour de justice de la Communauté européenne du charbon et de l'acier' (1954) 80 *Revue du droit public et de la science politique en France et à l'étranger* 417, 434–435. See A Cohen, "'Ten Majestic Figures in Long Amaranth Robes": The Formation of the Court of Justice of the European Communities' (2010) 60 *Revue française de science politique* 23, 37.

⁹⁴ Centre d'études internationales et européennes (n 5) 55.

⁹⁵ AM Donner, 'The Constitutional Powers of the Court of Justice of the European Communities' (1974) 11 *Common Market Law Review* 127, who however adopted a more critical approach.

⁹⁶ Due (n 9) 3–10.

⁹⁷ Iglesias (n 11) 225–246.

⁹⁸ Jacobs (n 17) 25–31.

⁹⁹ Vesterdorf (n 5) 607–616. He acknowledged that the CJ already performs the tasks of a constitutional court but emphasised that its competences are broader than those of a pure constitutional court. He therefore argued that the CJ resembles more a supreme court than a specialised constitutional court.

¹⁰⁰ Printed in Dashwood and Johnston (eds) (n 5) 113–143.

¹⁰¹ *Ibid.*, 59.

¹⁰² *Ibid.*, 60.

¹⁰³ Vesterdorf (n 5) 614.

new mechanisms and to attribute new tasks to the CJ, but rather to bring to light the core competences of the CJ already embedded in the EU legal system and to enable them to operate more effectively. By reallocating part of the CJ's jurisdiction on preliminary rulings to the level below, new resources are set free, and the CJ's role as a constitutional court can be gradually unveiled.

As regards the second point of criticism, it must be acknowledged that this argument is impeccable if addressed from the perspective of national constitutional law. However, as already highlighted, the 'sui generis' character of the EU requires a 'sui generis' assessment of the CJ's role. It is well known and uncontested that the CJ cannot annul national legislation. However, this also does not represent an insurmountable obstacle to the qualification of this court as a constitutional one. The CJ has achieved, in this regard, similar results to national constitutional courts, although through different instruments. While this Court has, in principle, no jurisdiction to rule on the conformity of national law with EU law in the context of Article 267(1)(a) TFEU,¹⁰⁴ the Court's interpretation (of EU law), however, has (indirect) repercussions on the validity of national law.¹⁰⁵ The ultimate practical outcome of this judicial review is comparable – albeit narrower in scope – to that of proceedings before national constitutional courts.¹⁰⁶ A similar reasoning applies to infringement proceedings. Here too, the CJ cannot directly annul a national act contrary to EU law. Nevertheless, by determining that a Member State violated EU law under Article 258 TFEU and possibly imposing a pecuniary penalty under Article 260 TFEU, it can very well achieve a result that is similar to that of a national constitutional court endowed with the power to annul national provisions.¹⁰⁷

4.3. Constitutionalisation through an amendment of the *CILFIT* criteria?

There can be no doubt that the approach chosen by the 2024 reform does not represent the only possible means of strengthening the CJ's constitutional role. Instead of adjusting the allocation of competences between the CJ and the GC, it would have been possible, for example, to reduce *ex ante* the number of preliminary references reaching the CJEU.

¹⁰⁴ Most famously *Costa v ENEL* (n 14) p 592–593.

¹⁰⁵ See, for example, Case C-189/18 *Glencore Agriculture Hungary*, EU:C:2019:861, para 31; Case C-448/19 *Subdelegación del Gobierno en Guadalajara*, EU:C:2020:467, para 17; Case C-463/19 *Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle*, EU:C:2020:932, paras 29–30; Case C-817/19 *Ligue des droits humains*, EU:C:2022:491 2022, para 240.

¹⁰⁶ See GF Mancini and DT Keeling, 'From *CILFIT* to *ERT*: the Constitutional Challenge facing the European Court' (1991) 11 *Yearbook of European Law* 1, 9. It must, however, be stressed that the preliminary reference procedure is highly dependent on fruitful cooperation between national courts and the CJEU.

¹⁰⁷ *Ibid.* See also Opinion of AG Ćapeta in Case C-769/22 *European Commission v Hungary*, EU:C:2025:408, para 71.

In recent years, the debate on a possible relaxation of the *CILFIT* criteria has again become heated, and the responses provided by the CJEU can be seen as pieces of a mosaic which, when analysed in the light of the 2024 reform, gradually assemble into a clearer picture. Famously, Advocate General Bobek proposed in his Opinion in *Consorzio Italian Management* to reformulate the *CILFIT* criteria, shifting the CJEU's focus towards the uniform interpretation of EU law rather than its application in a single case.¹⁰⁸ The CJ, however, unequivocally expressed its intent to maintain the *CILFIT* criteria as formulated in 1982. In addition, it strengthened the duty of national courts of last instance to refer questions to the CJEU by introducing an obligation to state reasons when they decide not to refer.¹⁰⁹ In *Kubera*, the CJ upheld the traditional understanding of the *CILFIT* criteria and further reinforced the obligation of national courts of last instance to examine whether they have to submit a question to Luxembourg.¹¹⁰ It thus becomes clear that the CJ's intent was not to curtail the number of preliminary references reaching Luxembourg, but rather to reallocate and open up resources within the CJEU system itself.¹¹¹

There is broad agreement that overburdening the CJ can significantly threaten the effectiveness of the EU judicial system and thereby compromise the CJ's constitutional role. It may be argued that re-transferring competences to the national courts by limiting access to the CJEU could provide new breathing space for the EU judicial system and enable the CJ to concentrate on constitutional questions. However, while this approach might at first sight appear to strengthen the CJ's constitutional role, it risks undermining its core constitutional functions. By loosening the *CILFIT* criteria, many constitutional questions might never reach the CJ, and national courts of last instance could significantly curtail the scope of the preliminary reference procedure.¹¹² The approach adopted by the 2024 reform, by contrast, preserves the full spectrum of 'national court input' while upholding, and

¹⁰⁸ Opinion of AG Bobek in Case C-561/19 *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA*, EU:C:2021:291, paras 134, 149.

¹⁰⁹ Case C-561/19 *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA*, EU:C:2021:799, para 51.

¹¹⁰ Case C-144/23 *Kubera v Republika Slovenija*, ECLI:EU:C:2024:881. The CJ clarified that this obligation also applies within national 'filtering' mechanisms, such as proceedings for granting leave to appeal before national supreme courts. See T Hilpold, 'Op-Ed: Consorzio Italian Management Reloaded: Court of Justice further Strengthens the Preliminary Reference Procedure in the Case Kubera (C-144/23)' (EU Law Live 2024); T Hilpold, 'Op-Ed: Vigilantibus non Dormientibus Iura Succurrunt: Are National Filtering Mechanisms for the Access to the Preliminary Ruling Procedure Admissible? AG Opinion in Case C-144/23 Kubera' (EU Law Live 2024).

¹¹¹ See also Iglesias Sánchez (n 36) 110–111.

¹¹² This could have far-reaching consequences, as in recent years high courts have been those primarily referring cases to the CJEU: see, for example, T Pavone and RD Kelemen, 'The Evolving Judicial Politics of European Integration: The European Court of Justice and national courts revisited' (2019) 25 *European Law Journal* 352; A Dyevre, M Glavina and A Atanasova, 'Who refers most? Institutional incentives and judicial participation in the preliminary ruling system' (2020) 27 *Journal of European Public Policy* 912.

probably expanding, its ‘output capacity’.¹¹³ The only price to be paid was that of an ‘internal decentralisation’, which, however, does not undermine but arguably even strengthens the CJ’s constitutional role, as the GC is operating within the same institution and fully supporting the CJ.¹¹⁴

4.4. Constitutionalisation in line with the Treaty of Nice and Treaty of Lisbon?

It has also been argued in literature that, if one wants to frame the ongoing reform of the CJ in terms of constitutionalisation, it represents a different type from that envisaged by the Treaty of Nice and the Treaty of Lisbon.¹¹⁵ This new groundbreaking restructuring of the EU judiciary would not, according to some, be in line with the EU judicial architecture foreseen by the Treaty of Nice and the Treaty of Lisbon.¹¹⁶ In particular, these authors make reference to the fact that the Treaty of Nice provided for a three-tier judicial structure; and that the GC was envisaged to become the EU’s ‘Council of State’, hearing all direct actions, appeals against decisions of specialised courts and requests for preliminary rulings in specific areas.¹¹⁷ The Court’s original intention would have been to align the GC’s jurisdiction to hear requests for a preliminary ruling with its jurisdiction as an appellate court for civil service disputes.¹¹⁸

However, the Treaties neither define the concept of constitutionalisation nor dictate a single path for the development of the EU judicial system. On the contrary, they grant significant leeway in this regard, ensuring that the EU judicial architecture can be adapted to the challenges the EU faces. It is true that Article 19(1) TEU provides for a three-tier judicial architecture encompassing the CJ, GC and specialised courts. However, Article 257(1) TFEU merely stipulates that specialised courts attached to the GC ‘may’ be established. They can be created and abolished by ordinary legislative acts, without the need for Treaty amendment, thereby offering significant flexibility. Furthermore, Article 256(3) TFEU, which states that the GC ‘shall’ have preliminary ruling jurisdiction in specific areas, remained dormant for over 20 years. These Treaty provisions provide for a constitutional testing ground

¹¹³ Iglesias Sánchez (n 36) 110–111.

¹¹⁴ Similarly, Tridimas (n 36) 23; 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, 6.

¹¹⁵ Alberti (n 2) 342–344.

¹¹⁶ Ibid; Bobek (n 25) 1529; Alonso García (n 44) 8; C Amalfitano, ‘The Future of Preliminary Rulings in the EU Judicial System’ in *Weekend Edition No 133* (EU Law Live 2023) 1, 7.

¹¹⁷ Alberti (n 2) 342–344. For example, Marc van der Woude argued for a conceptual model according to which ‘the Court of Justice would increasingly act as the Union’s constitutional court and transfer lesser tasks and responsibilities to the General Court. This court would become the Union’s Council of State controlling the conduct of its institutions, when they act directly or indirectly in close cooperation with national administrations’. See 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) 20, 26

¹¹⁸ Bobek (n 25) 1529.

aimed at identifying those judicial models that prove most effective in practice. The EU judicial architecture has evolved through a process of trial and error: approaches are tested, their effects evaluated, and, where necessary, alternative paths pursued. The experimental nature of this reform process and the limited scope of the 2024 reform suggest that any unsatisfactory outcome may be readily remedied. This flexibility enables the Court and the legislator to adapt the reform and, should it prove unsuccessful, to reverse it and explore alternative approaches.

Generally, reforms must be seen as products of their time: the conditions must be ripe for their implementation, with the details to be clarified once the dust has settled. Frequently, one development paves the way for approaches that might previously have been rejected. The 2024 reform represents a very good example in this regard. The doubling of the number of GC judges in 2015 and the abolition of the Civil Service Tribunal (CST)¹¹⁹ paved the way for the 2024 reform.¹²⁰ Yet, in the context of the 2015 reform of the EU judicial architecture, a possible transfer of jurisdiction on preliminary rulings to the GC was rejected,¹²¹ as the time was not yet ripe for such a groundbreaking reform of the CJ's 'crown jewel'. Likewise, in two reports issued in December 2017 and in December 2020 assessing the 2015 reform, the CJEU vehemently opposed the idea of transferring jurisdiction on preliminary rulings to the GC. In 2017, the CJEU highlighted, *inter alia*, that the time was not yet ripe for such an amendment, that the reform of the EU Courts of 2015 was not yet concluded, that cases were dealt with expeditiously, and that the risk of divergences in the case law of the EU Courts would only be exacerbated by a transfer of competences.¹²² Similar arguments were repeated in the 2020 Report.¹²³ Nonetheless, in 2022, the CJEU revised its stance and considered that the time had come for a partial transfer of jurisdiction on preliminary rulings to the GC, with two courts now sufficiently prepared for this new step in the EU's trial-and-error process.

It is true that the Due Report ('Report by the Working Party on the Future of the European Communities' Court System'),¹²⁴ which is often invoked to argue that the

¹¹⁹ 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. On the 2015 reform, see, for example, 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; 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.

¹²⁰ Iglesias Sánchez (n 74) 78–79; Bobek (n 25) 1515; Sarmiento (n 74) X, XIII. However, as mentioned above, the possibility of transferring competences on preliminary references to the GC was already provided for in the Treaty of Nice.

¹²¹ Draft amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto of 7 April 2011, Interinstitutional file: 2011/0901 (COD), 10.

¹²² Report submitted pursuant to Article 3(2) of Regulation (EU, Euratom) 2015/2422 (n 77) 4–8.

¹²³ Report provided for under Article 3(1) of Regulation (EU, Euratom) 2015/2422 (n 82) 54.

¹²⁴ Report by the Working Party on the Future of the European Communities' Court System (January 2000), printed in Dashwood and Johnston (n 5) 147.

2024 reform departs from the original vision of the EU judiciary,¹²⁵ advocated a three-tier judicial architecture.¹²⁶ However, it is frequently overlooked that the Due Report itself described this only as ‘a medium-term possibility for the structure of the Community court system’.¹²⁷ Furthermore, it emphasised that its proposals were intended to indicate how the EU judicial system could look ‘some fifteen years hence’, thus in 2015 rather than 2025.¹²⁸ It also underlined that future changes would have to be taken into account,¹²⁹ thereby recognising the necessity of flexibility in the system. The 2024 reform is perfectly in line with the very logic of the reform programme of the EU judiciary, representing one, and certainly not the last, outcome of the EU’s trial-and-error process in shaping its judicial architecture.

5. Outlook

The present article has shown that the 2024 reform must be seen in a broader context – with regard to both the timeline of its adoption and its substantive content – in order to grasp its actual and potential reach, which, as argued here, is considerable. The 2024 reform should be understood as part of a trial-and-error process that lasted for decades and is still far from concluded. Indeed, it may be argued that this process will never reach a definitive end, since EU procedural law is inherently linked to EU substantive law and, as a consequence, as long as EU law evolves, the EU judicial system must evolve as well.

A trial-and-error process is never linear but inherently uneven and adaptive. Yet it is important that judicial reforms do not represent merely ‘*ad hoc* measures’ dictated by the needs of the moment, but instead are part of a broader plan for the evolution of the EU judicial architecture.¹³⁰ As Josse Mertens de Wilmars, one of the first judges of the Court,¹³¹ observed, law is not only experience but rather ‘logic and experience’.¹³² It is therefore essential to develop a coherent structure for the future course of the EU judiciary, together with a clear vision of the respective roles of the EU Courts. The earlier such transparency is achieved, the more effectively future reforms of the EU judiciary can be designed.

As this contribution has shown, by adjusting the allocation of tasks within the preliminary reference procedure, the 2024 reform enables the CJ to focus

¹²⁵ See Bobek (n 25) 1529–1530, in particular fn 41; Alberti (n 2) fn 39.

¹²⁶ And, of course, as mentioned before, the Treaties, see Art 19(1) TEU.

¹²⁷ Report by the Working Party on the Future of the European Communities’ Court System (January 2000), printed in Dashwood and Johnston (n 5) 186.

¹²⁸ *Ibid.*, 161.

¹²⁹ *Ibid.*

¹³⁰ See already Report by the Working Party on the Future of the European Communities’ Court System (January 2000), printed in Dashwood and Johnston (n 5) 186.

¹³¹ Judge at the Court of Justice of the European Communities from 1967 to 1984, and President of the Court from 1980 to 1984.

¹³² Centre d’études internationales et européennes (n 5) 66.

increasingly on constitutional questions. Crucial will be the resolve to continue along the path charted by the 2024 reform. In the long term, the CJ could thereby evolve into a fully-fledged constitutional court, focusing predominantly on constitutional questions. The GC, by contrast, assumes an ever more important role as an adjudicator not only of direct actions but also of preliminary rulings in specific areas. As seen in this article, the strengthening of the role of the GC – fulfilling a function akin to that of a supreme court in the specific areas delegated to its preliminary ruling jurisdiction – constitutes an essential condition for the CJ’s transformation into a fully-fledged constitutional court.

If the statement of Josse Mertens de Wilmars is applied to the 2024 reform, it can be said that the logic of the reform process was directed towards the creation of an EU procedural law system that could satisfy the criteria of a perfect constitutional order, with one court, the CJ, increasingly focusing on constitutional questions. Law is, however, also experience, and in this regard the elements of the 2024 reform mirror the outcome of a decades-long learning process. This learning process is destined to continue, with constitutionalisation – despite its definitional uncertainties – remaining the guiding principle of the whole reform programme.



Perspectives on the Reformed EU Judicial Architecture
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The Advocates General at the General Court

*Tamara Čapeta**

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ABSTRACT: This article examines the introduction of Advocates General at the General Court, following the partial transfer of the preliminary reference jurisdiction under Article 267 TFEU to the General Court. It situates Advocates General within the broader context of two courts operating one unified preliminary reference procedure. It outlines the specific rules on the election, mandate, and dual role of Advocates General at the General Court, contrasting them with their counterparts at the Court of Justice. Particular attention is paid to the Advocates General's procedural and advisory functions, including their involvement in determining the necessity of opinions and their role in identifying cases requiring referral back to the Court of Justice due to questions of principle or constitutional interpretation. The contribution highlights both the similarities and divergences in the functions of Advocates General across the two courts, ultimately raising questions about whether this reform will ensure coherence in EU judicial practice and withstand the test of time.

KEYWORDS: Advocates General – General Court – Court of Justice – preliminary references – procedural role – advisory role.

1. Introduction

A recent reform of the Statute of the Court of Justice¹ has extended the jurisdiction in preliminary ruling procedures – provided for in Article 267 TFEU – to the General

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¹ The reform is based on the 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



Court (GC). With this amendment, the EU legislature aims to reduce the workload of the Court of Justice (CoJ) by empowering the General Court to hear references from national courts in a limited number of ‘specific’ areas enumerated in the Statute of the Court of Justice.²

Although the number of areas transferred to the GC is relatively small, the significance of this reform should not be underestimated. As already highlighted by different scholars, this reform has the potential to not only change the roles of the two courts but to transform the EU’s judicial architecture.³ On the one hand, this reform accentuates the constitutional role of the Court of Justice.⁴ On the other hand, it ends the monopoly of the CoJ on deciding the final meaning of EU law. The task of ensuring uniformity of EU law, by providing authoritative and *erga omnes*-binding interpretations of EU law is now shared between the two courts.

One of the novelties of this reform, which has not been given much attention in the scholarly writing,⁵ is the addition of the Advocates General (AGs) to the decision-making process of the GC. In this short paper, I intend to contribute to the discussions of the reform by focusing on that aspect.

After briefly setting the stage for the new reform (2), I will address two issues; first, I will deal with the procedural and organisational aspects of having AGs at the GC (3), and second, I will elaborate upon the role that AGs will have at that court (4). In relation to both issues, I will compare the role of AGs at the CoJ and the intended function of AGs at the GC.

At the time of finishing this contribution the reform has been in place for less than eight months, therefore it is too soon to fully assess all of its potential implications. Similarly, there are likely questions that I will not have considered here, but

amending Protocol No 3 on the Statute of the Court of Justice of the European Union (hereinafter, ‘the Court’s proposal’). The proposal is available at curia.europa.eu. That proposal, with some amendments, was accepted by the EU legislature by 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 (hereinafter, ‘the Amending Regulation’).

² The transferred areas encompass the common system of value added tax, excise duties, customs code, the classification of goods under the Combined Nomenclature, passenger rights in the event of denied boarding or delay in different modes of transport, and the system of greenhouse gas emission allowance trading scheme. See Art 50b of the Statute of the Court of Justice.

³ M Bobek, ‘Preliminary Ruling Procedure before the General Court: What Judicial Architecture for the European Union?’ (2023) 60 *Common Market Law Review* 1515; D Sarmiento, ‘On the Road to a Constitutional 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; D Petrić, ‘The Preliminary Ruling Procedure 2.0’ (2023) 8 *European Papers* 25; 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.

⁴ In addition to the papers quoted in the previous footnote, see also S Iglesias Sánchez, ‘Preliminary Rulings before the General Court: Crossing the Last Frontier of the Reform of the EU Judicial System?’ in *Weekend Edition No 125* (EU Law Live 2022) 1, 15.

⁵ With that said, see 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.

that will only surface once the two courts have amassed sufficient experience in dealing with the reformed preliminary ruling procedure.

2. Setting the stage: two courts but one procedure

If assessed from the perspective of referring national courts, the reform means that certain interpretive dilemmas of EU law, which arise in cases before them, will no longer be resolved by the Court of Justice but instead by the General Court. Nevertheless, from the very beginning of the process of reform, there was a general consensus that the reform should not have any major impact on the preliminary reference procedure in so far as it concerns national courts.

As explained in Recital 19 of the Amending Regulation, ‘in order to provide the national courts and the interested persons referred to in Article 23 of the Statute with the same guarantees as those provided by the Court of Justice, the General Court should adopt procedural rules equivalent to those applied by the Court of Justice when dealing with requests for a preliminary ruling.’

One important aspect of this procedural guarantee is the participation of AGs in all cases referred to the GC for a preliminary ruling, ensuring that the two courts deal with requests made under Article 267 as similarly as possible.⁶

3. Rules concerning Advocates General before the General Court

3.1. Election of Advocates General at the General Court

The Statute of the Court of Justice provides in Article 49a that the General Court shall be assisted by one or more Advocates General when dealing with references for a preliminary ruling. The wording of that provision is similar that of Article 252 TFEU which provides that ‘the Court of Justice shall be assisted by [11] Advocates General.’ However, there are important differences.

Advocates General at the CoJ, on foot of a nomination from their own Member State, are appointed specifically for that role by the common accord of all Member States, following a positive assessment of the 255 committee. Contrasting this with the GC, only persons who already hold the position of judge at the GC may be selected by their peers to perform the function of an AG for that court. It follows that there are at least three essential differences between AGs at the CoJ and AGs at the GC.

First, AGs at the GC are originally nominated for and appointed to that court to carry out the functions of a judge, not those of an AG. Therefore, the qualities and qualifications that are relevant for their original nomination may have been different from those that are relevant for the nomination of AGs at the CoJ.

⁶ Other procedural guarantees the Court of Justice mentioned in its proposal are the specialised chambers to deal with preliminary references and the composition of those chambers, which, among other things, can sit in intermediary formation. See the Court’s proposal (n 1) 6–7.

Second, the selection pool from which AGs at the General Court are chosen is considerably smaller than that from which AGs at the CoJ are chosen, given that AGs at the GC may be selected from a group of only 54 sitting judges (this number being even smaller in practice, as I will elucidate later).

Finally, the position of an AG at the GC is not in any way linked to the nationality of that person. The eleven positions of AG at the CoJ are filled based on the nomination of Member States; five of those positions are filled by the larger Member States who have permanent AG representation, with the remaining six AG positions being filled on a rotating basis by the rest of the Member States. Conversely, there is no nationality requirement for the election of an AG at the General Court, as they may be of any of the 27 nationalities represented at the GC. At the same time, the larger Member States are not guaranteed to be represented by an AG at the GC.

Judges of the General Court may now be elected to serve as Advocates General for a period of three years, which is renewable once. This represents a departure from the previous rule, according to which a judge of the General Court could be invited to perform the role of an Advocate General *ad hoc*, for a particular case only.⁷ The mandate of AGs responsible for dealing with references for preliminary rulings at the GC is thus more permanent under the reform. However, there is no possibility of having long-term AGs at the GC, whereas this possibility exists at the CoJ, where AGs of the larger Member States can be re-nominated after the expiry of their 6-year mandate.

The rules on the election of Advocates General are regulated in more detail in the Rules of Procedure of the General Court.

All judges at the GC may be elected to perform the role of AG, except the President, the Vice-President and the President of each of the eight Chambers of the General Court.⁸ That is why, in principle, the election of AGs should take place immediately after the election for those other positions.⁹ Given that new elections at the GC are not scheduled until September 2025, and the transfer of competencies for preliminary references became operational in October 2024, it was decided that the first AGs would be elected for an intermediary period ending on 31 August 2025.

⁷ See Art 49 of the Statute of the Court of Justice. That possibility was used only in four cases: Case T-24/90 *Automec v Commission*, EU:T:1992:97; Case T-120/89 *Stahlwerke Peine-Salzgier v Commission*, EU:T:1991:32; Case T-51/89 *Tetra Pak Rausing v Commission*, EU:T:1990:41; and Case T-1/89 *Rhône-Poulenc v Commission*, EU:T:1991:56.

⁸ Art 3(3) of the Rules of Procedure of the General Court.

⁹ Art 31a(2) of the Rules of Procedure of the General Court.

The first two AGs and one alternate AG¹⁰ were thus elected, by secret ballot of their peers,¹¹ at the meeting of the General Court held on 9 October 2024. The decision regarding their nomination was published in the Official Journal.¹²

Although the AGs will have to be re-elected in September 2025, as their renewal will not be automatic, it is expected that the AGs elected in October will continue in their role for another three years. However, the GC has also decided that the intermediary term served by these AGs will count as an entire mandate. That means that the first AGs elected will only be able to serve for a maximum of four years, rather than the maximum of six years which is otherwise available to AGs who have their original three-year mandate renewed.

3.2. The dual role of Advocates General of the General Court and its organisational consequences

As explained, the elected AGs at the GC remain judges despite taking their new role. Thus, their job is not exclusively to serve as Advocates General. Rather, they can, throughout their mandates as AGs, continue to adjudicate in cases that arrive to the General Court as direct actions.

Unlike at the GC, Advocates General at the Court of Justice do not form part of the judge's chambers. They are a separate body of members of the Court and cannot serve as judges while also serving as Advocates General. This makes for an important distinction between the AGs of the two Courts.

As those elected to serve as AGs at the GC continue in their function as judges, they must be assigned to a chamber. They are therefore members of one of the two chambers established to deal with preliminary rulings, which can, however, also decide other types of cases.¹³ Thus, those chambers, even if they are the only chambers competent to deal with preliminary references, are not exclusively 'preliminary rulings chambers'. At the same time, the number of direct actions those chambers will be able to deal with will depend on the number of preliminary references that will be heard by the General Court. That will also influence the number of cases in which new AGs will continue functioning as judges during their AG mandates.

Each preliminary ruling chamber will comprise six judges, one of whom will serve as Advocate General at the same time. It is envisaged that the Advocate General attached to the first preliminary ruling chamber will be allotted cases to be decided by the

¹⁰ Alternate Advocate General is to step in in situations in which the AG who is supposed to be assigned to a case cannot take the particular case. The reason may be his or her nationality, or personal conflict of interest, or similar. As of September 2025, the General Court will elect also the second alternate AG.

¹¹ Art 9 of the Rules of Procedure of the General Court.

¹² 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).

¹³ Currently, during the transitory phase, there are two formations of the same chamber dealing with preliminary rulings. However, as of September 2025, there will be two specialised preliminary rulings chambers.

second preliminary ruling chamber, and vice versa. As explained, those same persons can sit as judges in their own chambers when those chambers decide in direct actions.

4. The Role of Advocates General at the General Court

As I have already expounded, the objective behind the transfer of jurisdiction in some areas to the General Court was not to establish a new preliminary ruling procedure. Rather, the reform aimed at including the General Court in the same procedure that has operated before the Court of Justice since the creation of the European Union (then regulated by Article 177 of the EEC Treaty).

Advocates General at the Court of Justice play an important role in the preliminary ruling procedure in at least two ways.

First, each case initiated by a national court is assigned to an Advocate General, who participates throughout the procedure until that case is decided upon by the designated chamber. That remains so regardless of whether an opinion is warranted in a case. In this task, the AG, together with the reporting judge and the President of the Court, participates in deciding different issues related to the organisation of procedure for that case. I will refer to this task as the ‘procedural role’ of an Advocate General.

The second function of Advocates General, which will be much more known to the public, consists of providing advice to the deciding chamber in the form of a written Opinion, which advises the chamber on how to decide a particular case based on its merits. That opinion is published and thus available to the public. I will mention this role thereunder as the ‘advice-giving role’ of an Advocate General.

At the CoJ, an Advocate General will carry out their procedural role in each case, whereas only in the most important cases – those raising new issues of law – will an AG carry out their advice-giving role.

4.1. The procedural role of Advocates General in preliminary references decided by the General Court

There is no doubt that in their procedural role, AGs of the General Court in the preliminary reference procedure perform the same, or at least very similar, tasks as the AGs of the Court of Justice.

Like at the CoJ, every case transferred to the GC is assigned to an AG. A slight difference exists in the fact that at the Court of Justice the cases are assigned by the First Advocate General, whereas at the GC cases are assigned by the President of that court.¹⁴ However, as the General Court has an automatic system for distributing cases, the choice between the two Advocates General is, in fact, automatic, rather than a discretionary decision of the President. When a reference is registered at the General Court, after being transferred to that Court through a *Guichet unique* procedure at the Court

¹⁴ Art 31b(1) of the Rules of Procedure of the General Court.

of Justice,¹⁵ it is automatically distributed to one of the two chambers. Consequently, that case will be allotted to the Advocate General sitting in the alternative preliminary ruling chamber.¹⁶

Throughout the procedure, the assigned AG participates in deciding different issues related to a particular case. Many decisions, that are adopted either by the President or by the General Court, can be adopted only after hearing the Advocate General. This procedure at the GC is not regulated by parallel provisions in the Rules of Procedure of the Court of Justice, but it is instead found in the Rules of Procedure of the General Court. One potential reason for this might lie in the fact that AGs at the Court of Justice perform their procedural role in direct actions, appeals and in preliminary reference proceedings, whereas AGs at the General Court participate only in preliminary references. Thus, the Rules of Procedure could not simply refer to the Procedural Rules of the CoJ.

AGs at the GC, together with the reporting judge, and on the basis of preliminary report prepared by the latter, advise the preliminary ruling chamber on how each new case should be treated procedurally. That advice entails choosing the appropriate court formation, determining the necessity for a hearing, and deciding whether the case requires an Opinion. In that respect, as the Court of Justice stated in its proposal for the Regulation amending the Statute, ‘the examination of the case file by the Advocate General designated might usefully supplement, qualify or enrich the analysis carried out by the Judge-Rapporteur in his or her preliminary report’.¹⁷

Regardless of whether a case requires an opinion, an AG at the General Court must be heard before the adoption of decisions on:

- whether the participants in the procedure should be allowed to use another language;¹⁸
- whether the case should be joined with another case before the GC;¹⁹

¹⁵ I use the name *guichet unique* procedure to denote the procedure envisaged by Art 93a of the Rules of Procedure of the Court of Justice, in which the Court of Justice decides whether to transfer a request for a preliminary ruling to the General Court or to keep it. All references are addressed by the national courts to the Court of Justice and enter in the unique register (*guichet unique*). The Court of Justice then performs a triage by separating those cases which might be transferred to the General Court. They are labelled with the letters GU, and are attributed their usual signature, C or T, only after it is decided whether they are transferred or not. The decision to transfer a case is made by the President, Vice-President and the First Advocate General of the Court of Justice, unless they consider that there are reasons for the case to be kept at the Court of Justice. In such a case, the general meeting of all Judges and Advocates General at the Court of Justice decides. On the practical functioning of the *guichet unique* procedure, see O Porchia, ‘A View from the General Court. The Reform for the Transfer of Competence for Preliminary Rulings to the General Court: Issues Concerning Its Implementation’ (2025) 10 *European Papers* 391.

¹⁶ If for some incompatibility reason, such as being of the nationality of the referring court, the Advocate General that was supposed to take the case cannot do it, the case will be allotted to the third, alternate Advocate General.

¹⁷ The Court’s Proposal (n 1) 7.

¹⁸ Art 45(4) of the Rules of Procedure of the General Court.

¹⁹ Art 208(2) of the Rules of Procedure of the General Court.

- the stay of proceedings;²⁰
- measures of organisation of procedure,²¹ measures of inquiry,²² or requests for clarification sent to the referring court;²³
- whether there should be a hearing in the case;²⁴
- opening and reopening the oral part of procedure;²⁵
- whether a hearing should be broadcast, or whether a recording of a hearing should be removed from the web;²⁶
- whether the case can be decided by way of a reasoned order;²⁷
- whether the reference can be dismissed by way of a reasoned order for lack of jurisdiction or manifest inadmissibility;²⁸
- whether the case merits expedited procedures;²⁹
- whether legal aid should be granted;³⁰ and
- whether the judgment and order need rectification.³¹

AGs are also consulted before the General Court decides to refer the case back to the Court of Justice, an issue I will come back to.³²

Thus, procedural role of an AG at the General Court is comparable to the same role of the AGs at the Court of Justice. The benefit of having an Advocate General involved in these procedural aspects of a case was not questioned by any of the participants in the legislative procedure leading to the reform,³³ nor has it been contested in the academia.

4.2. Advice-giving role of Advocates General in preliminary references decided by the General Court

4.2.1. *A new question of law*

As with AGs at the Court of Justice, AGs at the General Court are not expected to give an Opinion in every case. Article 20(5) of the Statute of the Court of Justice

²⁰ Art 209(1) of the Rules of Procedure of the General Court.

²¹ Art 210(2) of the Rules of Procedure of the General Court.

²² Art 211 of the Rules of Procedure of the General Court.

²³ Art 212 of the Rules of Procedure of the General Court.

²⁴ Art 213(2) of the Rules of Procedure of the General Court.

²⁵ Art 227 of the Rules of Procedure of the General Court.

²⁶ Art 219(4) and 219(7) of the Rules of Procedure of the General Court.

²⁷ Art 226 of the Rules of Procedure of the General Court.

²⁸ Art 225 of the Rules of Procedure of the General Court.

²⁹ Art 237 of the Rules of Procedure of the General Court.

³⁰ Art 240 of the Rules of Procedure of the General Court.

³¹ Art 235(2) of the Rules of Procedure of the General Court.

³² Art 207 of the Rules of Procedure of the General Court.

³³ For an overview of the legislative procedure and important issues that were raised by different institutions, see M-A Gaudissart, 'Genèse et négociation de la réforme de l'architecture juridictionnelle de l'Union européenne' (2024) 79 *Revista de Derecho Comunitario Europeo* 27.

states that an Opinion is not necessary if the case raises no new questions of law. This provision is also applicable to the transferred preliminary ruling procedure.

At both the CoJ and the GC, where an Opinion has been warranted, the Advocate General announces the date when it is to be publicly read. The date of reading is announced either at the hearing or, if no hearing was scheduled, directly to the interested parties and the referring court through the services of the Registrar.³⁴

Where a hearing has been scheduled in a case, the AG participates and may pose questions to the participants.³⁵

With respect to those aspects, the role of AGs at the two courts is identical. However, some doubts as to the comparability of their roles do arise when one considers the limited jurisdiction transferred to the General Court by the reform.

To recall, one criterion for choosing the areas of law which would be transferred to the jurisdiction of the General Court, for the purposes of the preliminary ruling procedure, was the existence of a substantial body of case-law from the Court of Justice in those areas, which would be capable of guiding the General Court.³⁶

In that respect, Bobek raised the question as to the value of such a transfer.³⁷ Indeed, legislation in such areas of law can be understood as *acte éclairé*, given that the areas are transferred if there is sufficient case-law to guide the interpretation, including in a factually different scenario. In such a situation, the cases do not require the interpretation of a new question of law, but only the application of already interpreted law to novel circumstances. Thus, according to Bobek, the national courts should be able to provide for such interpretation, without the need for the Court of Justice to engage in such ‘factual jurisprudence’;³⁸ the courts of last instance would, in such situations, arguably be relieved of their obligation to refer.

Although Bobek’s criticism calls into question the need for the reform as a whole, it also casts doubt as to the necessity of Advocates General’s participation in cases transferred to the GC. If the AGs are to give Opinions only in cases that raise new questions of law, why then should AGs be necessary if the majority of the cases being transferred are those that do not raise new issues of law?

That question could be addressed by engaging Bobek in a discussion on the difference between interpretation and application, and the respective roles of the EU and national courts. However, I will not do that in this contribution. Rather, I will

³⁴ Art 112 and 221 of the Rules of Procedure of the General Court.

³⁵ Art 110(3) and 218 of the Rules of Procedure of the General Court.

³⁶ See Recital 6 of the Amending Regulation. Other criteria were that the area that is transferred is clearly separable from other areas of EU law, and that there is a sufficiently high number of preliminary ruling cases in that area so that the transfer has a real impact on the workload of the Court of Justice. See also, in that respect, Recital 7 of the Amending Regulation.

³⁷ Bobek (n 3) 1536 ff.

³⁸ See AG Bobek’s discussion about the delimitation between interpretation and application in his opinions in cases: Case C-923/19 *Van Ameyde Espana*, EU:C:2021:125, and Case C-561/19 *Consortio*, EU:C:2021:291.

examine the value of having AG Opinions at the GC by considering the number of cases, which were decided with an Opinion before the reform, but would today be transferred to the General Court. If there is a sufficient number of such cases, that would lead me to the conclusion that the new AGs at the General Court would have a purpose beyond the purely procedural one.

In the two-year period covering judgments pronounced in 2023 and 2024 in the area of VAT law and excise duties, there were in total 40 cases in which an Opinion was provided.³⁹ I estimate that 33 of those cases would satisfy the condition to be transferred to the General Court after the reform. Taking into account the possibility of an error in my assessment,⁴⁰ there still seems to be a sufficient number of cases in the VAT/excise duties area which, once transferred, will require the attention of an Advocate General.

The total number of cases decided in the same period with an Opinion in the area of customs code and classification under the common customs tariff is much lower. Only six cases warranted an opinion, out of which four could today be candidates for transfer.

I do not have relevant data for the area of passengers' rights. However, I would like to point out that all the cases that Bobek offered as an example of 'factual jurisprudence',⁴¹ were decided with an Opinion of an Advocate General.⁴² Following Bobek's logic, those cases, either should be decided by national courts, or, when brought before the EU Courts, should not have warranted an Opinion as they did not raise a new question of interpretation of law. Nevertheless, the Court of Justice treated those references as raising new questions of law, which necessitated an AG Opinion.

Therefore, I can only conclude that, despite the fact that the areas transferred to the jurisdiction of the General Court were chosen on the basis of the existence of a sufficient body of case-law which can guide the General Court, one can expect that some of those cases will raise new questions of interpretation.⁴³ They would therefore necessitate an Opinion of an Advocate General.

³⁹ I am grateful to the Registry of the Court for the initial data, which enabled further research.

⁴⁰ My assessment is made merely on the basis of the key words describing those cases. I did not study the judgments or the references for preliminary ruling in those cases, so it is possible that some of them did raise additional issues to those of VAT or excise duties which was not discoverable from the key words.

⁴¹ See Bobek (n 3) fn 83–87.

⁴² In Case C-315/15 *Marcela Pešková and Jiří Peška v Travel Service a.s.*, EU:C:2016:623, and Case C-12/11 *Denise McDonagh v Ryanair Ltd*, EU:C:2012:161, the opinion was provided by Advocate General Bot. In Case C-74/19 *LE v Transportes Aéreos Portugueses SA*, EU:C:2020:135, Advocate General Pikamäe gave his opinion. In Case C-501/17 *Germanwings GmbH v Wolfgang Pauels*, EU:C:2018:945, it was Advocate general Tanchev and in Joined Cases C-156/22, C-157/22 and C-158/22 *TAP Portugal*, EU:C:2023:91, it was Advocate General Medina.

⁴³ Whether such questions should be classified as questions of interpretation or of application of law is a different discussion. In the current case-law of the Court of Justice, they were understood as questions of interpretation.

4.2.2. *The questions of principle*

The existence of a substantial body of case-law was not the sole criterion relied upon for the purpose of choosing which areas would be transferred to the preliminary ruling jurisdiction of the General Court. There is also the requirement that a reference, which raises the question of interpretation of law relating to one of the specified areas, does not raise a question of interpretation of *any other area of EU law*.⁴⁴ Furthermore, the second sentence of Article 256(3) TFEU provides that cases which need ‘a *decision of principle* likely to affect the unity or consistency of Union law’ may be transferred back to (or kept by) the Court of Justice. Finally, the EU legislature insisted that it be clarified that cases which raise an *independent question* relating to the interpretation of primary law, public international law, general principles of Union law or the Charter *must* remain in the jurisdiction of the Court of Justice.⁴⁵

One important difference between the role of Advocates General at the Court of Justice and those at the General Court lies in those limitations. Whereas the former are always involved precisely in the cases that raise the issues of principle and of interpretation of constitutional EU law, the latter cannot advise the Court on the solution to such issues, as such cases must be referred back to the Court of Justice if they were erroneously transferred in the first place.

What is understood as ‘a decision of principle’ or ‘independent’ question relating to EU constitutional or international law is far from being clear and will have to be clarified through the practice of transfers.

Both the Court of Justice and the General Court will contribute to the development of the understanding of those terms. The Court of Justice will develop its position by deciding whether or not to hear the borderline cases that enter through the *Guichet unique* at the joint meetings of all its members.⁴⁶

Within seven months of the reform's implementation, from October 2024 to the end of April 2025, out of 52 cases registered at the Court of Justice as potentially transferable, eight were not transferred to the General Court.⁴⁷ In those cases, either the questions also concerned other EU acts belonging to areas not transferred to the General Court, or raised independent issues of interpretation of Treaties or the Charter.

The General Court will contribute to the clarification of those limitations of its own jurisdiction through its obligation to refer back those cases which it discovers do not belong to its docket.⁴⁸ The decision to refer back is decided by the plenary

⁴⁴ Art 52b(3) of the Statute of the Court of Justice.

⁴⁵ Art 50b(2) of the Statute of the Court of Justice.

⁴⁶ See the explanation of that procedure above in n 15.

⁴⁷ 37 cases were transferred in that period, while, at the moment in which I have finished this contribution, the Court is still deciding about some additional cases. The cases which the Court has not transferred are the following: Case C-827/24 *Direct Line Inox Impex and Others*, C-844/24 *Labroix*, C-909/24 *Investcapital*, C-910/24 *Calmit Hungária Műszervek*, C-119/25 *Marabu Airline*, C-157/25 *Jas Forwarding Worldwide (Belgium)*, C-167/25 *Swiss International Air Lines*, C-308/25 *Isolanti Group*.

⁴⁸ Art 54 of the Statute of the Court of Justice.

formation of the preliminary ruling chamber, always after hearing an Advocate General.⁴⁹

That means that Advocates General at the General Court might have an important role in the development of the notions of ‘decisions of principle’ and ‘independent’ questions of interpretation of constitutional EU law or international law. Nevertheless, once an Advocate General discovers that a case, which has been transferred to the jurisdiction of the General Court, requires such a decision of principle, he or she must advise the General Court to refer it back to the Court of Justice.

5. Conclusion

The new Advocates General at the Court of Justice were included in the preliminary ruling procedure at the General Court with the purpose of ensuring that even if split among two courts, that procedure will remain the same for the referring national courts and participants in that procedure.

This short overview and comparison between the roles of Advocates General at the Court of Justice and those at the General Court reveals that their roles may differ in certain aspects.

It is without doubt that, in their procedural role, proposing, together with the reporting judge, the procedural treatment of the case, including about whether there is a necessity for an Opinion, new Advocates General will increase the quality of the transferred jurisdiction.

When a reference relating exclusively to a transferred area of EU law will require the General Court to choose between several interpretive options in a novel situation, which are all within the boundaries permitted by the limits imposed by EU constitutional rules, the Advocates General will advise the General Court in the same way as their counterparts at the Court of Justice.

Finally, the AGs at the General Court will be expected to make a detailed examination of each case to discover whether it raises any questions of principle or of constitutional EU law, which may not be obvious at the first analysis of the case. In that respect, their role is also similar to the one of their counterparts at the Court of Justice. Nevertheless, if they discover such an issue of principle, unlike the Advocates General at the Court of Justice they cannot propose a solution. Rather, they will have to propose that such case is referred back to the Court of Justice where it will be decided with the help of its Advocates General. This may incentivise them not to find, and therefore also not to look for the principled questions.

In that sense, there is a crucial difference between the role of Advocates General at the General Court and the role of Advocates General at the Court of Justice. Whereas the latter are most wanted for aiding the judges with principled questions

⁴⁹ Art 207 of the Rules of Procedure of the General Court.

of constitutional nature, the former are excluded from such issues and required only for the situation of ‘ordinary’ legislative interpretation.

Furthermore, given the highly specialised nature of the transferred areas, which are at the same time new for the judges of the General Court,⁵⁰ it is expected that new Advocates General will specialise in those areas.⁵¹ That will add an additional difference between them and the Advocates General at the Court of Justice, who are not specialised, but give advice to the Court of Justice on all questions of EU law that can possibly arise.

It is too early to conclude whether and how these differences will influence the initial intention of keeping the preliminary ruling procedure the same notwithstanding the court that is providing the answer to the referring national court. It is also too early to answer whether the new function of an AG at the GC will withstand the scrutiny of time.

⁵⁰ When choosing the areas for the transfer of jurisdiction, the Court of Justice decided to propose only those areas in which the General Court cannot decide on the basis of direct actions. That means that, prior to the reform, the General Court judges, including those elected to serve as Advocates General, had no expertise in the law belonging to the transferred areas.

⁵¹ Sarmiento (n 3) XI–XII.



Perspectives on the Reformed EU Judicial Architecture
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**A View from the Court of Justice.
Some Considerations About the Transfer of Competence
for Preliminary Rulings to the General Court:
The Functioning of the *Guichet Unique* and a Brief Review
After Nine Months of Implementation of the Reform**

*Leila Rezki**

TABLE OF CONTENTS: 1. Introduction. – 2. The *Guichet Unique* Mechanism: Practical functioning and scope of examination. – 3. Key figures and first review after nine months of implementation of the Reform. – 4. Concluding remarks.

ABSTRACT: The present article offers an insider's preliminary examination on the implementation of the CJEU Statute Reform on transfer of preliminary ruling jurisdiction to the General Court. First of all, the paper aims to provide certain reminders of the relevant provisions of the Statute of the Court of Justice and the Rules of Procedure introduced by the recent Reform. Furthermore, the paper highlights how the '*Guichet Unique*' mechanism works in practice by providing insights into the concrete implementation of the provisions governing the partial transfer of preliminary ruling jurisdiction. Finally, the article includes an empirical assessment of the implementation of the Reform in light of the document published by the Court on September 2025. It reports on the number and nature of cases referred to the General Court or, conversely, retained by the Court for the remainder of the proceedings.

KEYWORDS: EU judicial system – CJEU Statute – reform – transfer of jurisdiction – preliminary rulings – *Guichet Unique* mechanism.

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1. Introduction

The year 2024 clearly marks a turning point in the reform of the judicial architecture of the European Union, materialised by the adoption and entry into force of Regulation (EU, Euratom) 2024/2019.¹ That piece of legislation comprises essentially three components.

The first part consists of two developments provided for in the Regulation amending the Statute of the Court of Justice, which will apply to all requests for preliminary rulings, irrespective of the subject matter concerned. In the first place, the Reform expanded the definition of ‘interested person’ under Article 23 of the Statute. As is already the case for all Member States and the Commission, all references for a preliminary ruling will be notified to the European Parliament, the Council and the European Central Bank so that they can determine whether they have a particular interest in the issues raised and whether they therefore wish to exercise their right to submit statements of case or written observations. In the second place, in order to enhance the transparency and openness of the preliminary ruling procedure and to enable a better understanding of the decisions delivered by the Court of Justice and by the General Court, it is provided that, in all references for a preliminary ruling, the statements or written observations lodged by an interested party referred to in Article 23 of the Statute are to be published on the website of the Court of Justice within a reasonable period after the case has been closed, unless that interested party objects to the publication of its statement in intervention or observations.²

Another aspect of the Reform aims to preserve the effectiveness of the appeal proceedings against decisions of the General Court, given the high number of appeals lodged with the Court of Justice. In order to enable the Court of Justice to focus on cases which raise important questions of law, the mechanism whereby appeals should first be allowed to proceed³ is extended to other decisions delivered by the General Court. That mechanism concerns appeals in cases which have already been examined twice, first by an independent board of appeal of an EU body, office or agency and then by the General Court. With the amendment of the Statute, six independent Boards of Appeal established before 1 May 2019 are added to the previous four to which the mechanism of prior admission applies.⁴

¹ Regulation of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3 on the Statute.

² For a thorough assessment on this aspect of the reform, 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.

³ On the establishment in 2019 of the mechanism for determining whether appeals should be allowed to proceed, see Court of Justice of the European Union, ‘Press Release No 53/19: The Court of Justice adopts new rules on whether or not to allow appeals to proceed in cases which have already been considered twice’ (Luxembourg, 30 April 2019), at curia.europa.eu.

⁴ Until now, that mechanism has concerned decisions issued by four Boards of Appeal and subsequently challenged before the General Court, which are mentioned in Art 58a of the Statute of the

But the most important and emblematic part of the Reform concerns the partial transfer of jurisdiction to give preliminary rulings from the Court of Justice to the General Court.⁵

This reform is indeed intended to reduce the workload of the Court of Justice in preliminary ruling proceedings and to allow it to continue to carry out, within a reasonable time, its mission under Article 19 TEU of ensuring that in the interpretation and application of the Treaties the law is observed.

In 2001, the authors of the Treaty of Nice had provided for the possibility of the General Court being involved in dealing with certain references for a preliminary ruling,⁶ without the Statute of the Court of Justice of the European Union having been adapted for that purpose since then.⁷

Two convergent phenomena have certainly contributed to making effective the partial transfer of jurisdiction to give preliminary rulings to the General Court. On the one hand, over the past five years, there has been a structural and significant increase of the cases brought before the Court of Justice.⁸ This ‘turnover’ development has been accompanied by an increase in the complexity and sensitivity of cases

Court of Justice of the European Union. With the amendment of the Statute, six new independent Boards of Appeal are added, bringing their total number to ten. These are the Boards of Appeal of the European Union Intellectual Property Office (EUIPO), the Community Plant Variety Office (CPVO), the European Chemicals Agency (ECHA), the European Union Aviation Safety Agency (EASA), in addition to the Boards of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER), the Single Resolution Board (SRB), the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), the European Insurance and Occupational Pensions Authority (EIOPA), the European Union Agency for Railways (ERA). Furthermore, the prior admission mechanism also applies to appeals brought against decisions of the General Court concerning a decision of an independent board of appeal established after 1 May 2019 within any other body, office or agency of the European Union, which must be seised before an action can be brought before the General Court. Finally, that mechanism is also extended to disputes relating to the performance of contracts containing an arbitration clause. The extensions of the mechanism for the determination of whether an appeal is allowed to proceed will apply is applicable since 1 September 2024.

⁵ It is this aspect that has been commented on most extensively, sometimes critically, in the legal literature. See, *inter alia*, M Bobek, ‘Preliminary Rulings Before the General Court: What Judicial Architecture for the European Union?’ (2023) 60 *Common Market Law Review* 1515; 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; D Sarmiento, ‘Gaps and “Known Unknowns” in the Transfer of Preliminary References to the General Court’ (2024) 3 *Rivista del contenzioso europeo* 11.

⁶ The first subparagraph of Art 256(3) TFEU provides for the possibility of transferring from the Court of Justice to the General Court jurisdiction to hear and determine questions referred for a preliminary ruling under Art 267 TFEU in specific areas laid down in the Statute of the Court of Justice.

⁷ For a statement of the reasons why such a transfer had not previously been considered appropriate, see the Report submitted pursuant to Article 3(2) of Regulation (EU, Euratom) 2015/2422 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 curia.europa.eu.

⁸ The structural increase in litigation before the Court of Justice has been noted on several occasions (see, *inter alia*, Court of Justice of the European Union, ‘Press Release No 59/24: Judicial

concerning, *inter alia*, constitutional issues.⁹ On the other hand, the General Court, which now has two judges per Member State, is well equipped to absorb that additional workload and, therefore, to deal with the questions referred for a preliminary ruling within a reasonable time in such a way as to provide the national courts and interested parties with the same guarantees as those applied by the Court of Justice.

In such circumstances, the Reform will enable the Court of Justice, as the constitutional and supreme court of the Union, to focus on its task of protecting and strengthening the unity and consistency of European Union law.¹⁰

As clearly explained in other papers in this Special Issue,¹¹ the Reform consists of introducing, from 1 October 2024, a partial transfer of jurisdiction on preliminary references on a limited number of areas ‘clearly defined and sufficiently separable from other areas’¹² and which meet certain criteria.¹³

To that end, Article 50b was added to the Statute by Regulation 2024/2019. That article provides in paragraph 1 that the General Court shall have jurisdiction to hear and determine requests for a preliminary ruling under Article 267 TFEU which fall 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. However, the second paragraph of that article specifies that the Court of Justice shall retain jurisdiction to hear and determine requests for a preliminary ruling raising independent questions of interpretation of primary law, public international law, general principles of EU law or the Charter of Fundamental Rights of the European Union.

statistics 2023: confirmation of the structural increase in litigation before the Court of Justice’ (Luxembourg, 22 March 2024), at curia.europa.eu).

⁹ See, *inter alia*, 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.

¹⁰ For a discussion on the concept of ‘constitutionalisation’ as a driver for the reform under analysis, see the reflections proposed by Alberti (J Alberti, ‘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’ (2025) 10 *European Papers* 333) and Hilpold (T Hilpold, ‘The 2024 Reform of the EU Judicial System and the Transformation of the Court of Justice into a Constitutional Court’ (2025) 10 *European Papers* 837) in this Special Section.

¹¹ 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; O Porchia, ‘The Reform for the Transfer of Competence for Preliminary Rulings to the General Court: Issues Concerning Its Implementation’ (2025) 10 *European Papers* 391. See also D Petrić, ‘The Preliminary Ruling Procedure 2.0’ (2023) 8 *European Papers* 25, 26.

¹² Regulation 2014/2019 (n 1) recital 4.

¹³ *Ibid*, recitals 5 to 7.

In connection with that core provision, Article 93a was added to the Rules of Procedure. That article lays down the detailed rules for the initial processing of requests for a preliminary ruling submitted to the Court under Article 267 TFEU in order to determine which court or tribunal has jurisdiction to deal with them.

It is apparent from those provisions that all requests for a preliminary ruling must be submitted to the Court of Justice in order for the President (after hearing the Vice-President and the First Advocate General) or the Court of Justice (in the General Meeting/*Réunion générale*) to determine whether the proceedings continue before the General Court or the Court of Justice.

For reasons of legal certainty and expedition, all requests for a preliminary ruling will therefore continue to be submitted to the Court of Justice, which will carry out a preliminary analysis of their subject matter.

In order for the transfer of competence to take place as efficiently and harmoniously as possible, the *Guichet Unique* mechanism (also known as the ‘One-stop shop’ mechanism) emerged as the appropriate solution on several grounds. First, the referring courts do not have to consider before which of the two courts they should be seised. Second, it makes it possible to verify that the questions referred do relate *exclusively to one* or more of the matters referred to in the first paragraph of Article 50b of the Statute and do not raise independent questions of interpretation within the meaning of the second paragraph of that article even before the substance of the request for a preliminary ruling is deeply examined. Third, it enables a number of internal players of the Institution to be involved (and to benefit from the synergies offered by cross views) in examining whether references for a preliminary ruling can be transferred to the General Court, while mobilising resources as rationally as possible. Indeed, one should always not lose sight of the fact that the ultimate aim of the Reform is to lighten the burden caused by the increase in the number and difficulty of cases brought before the Court of Justice.¹⁴

Against this backdrop, this contribution aims to provide some insights on the practical functioning of the *Guichet Unique* and to carry out a first review of that mechanism after almost nine months of implementation.

2. The *Guichet Unique* mechanism: practical functioning and scope of examination

As already outlined by Porchia in this Special Section,¹⁵ the Court has to verify as quickly as possible whether the request exclusively comes within one or several of

¹⁴ As has been pointed out, the choices made by the legislator are clear and are the result of a measured and rational approach. In particular, see J Wildemeersch and P Dermine, ‘La compétence préjudicielle de la Cour de justice de l’Union européenne après son transfert partiel au Tribunal de l’Union européenne: défis et perspectives’ (2025) *Journal des Tribunaux* n. 7008, 34.

¹⁵ Porchia (n 11).

the specific areas laid down in Article 50b of the Statute. The salient elements of the *Guichet Unique* may be summarised as follows.

Any request for a preliminary ruling, including those which may be transferred, must be submitted to the Court in accordance with the rules for lodging procedural documents laid down in Article 57 of the Rules of Procedure of the Court of Justice.¹⁶ In practice, for reasons connected, in particular, with the need to ensure expeditious handling of the case and optimal communication with the referring court or tribunal, the Court of Justice recommends that national courts and tribunals use the e-Curia application.¹⁷

As soon as it is filed, the request is analysed by the Registry in order to establish, *inter alia*, whether it is ‘eligible’ for the transfer in the broad sense. At this stage, it is a question of identifying whether the request falls within one or more of the ‘specific matters’ referred to in Article 50b of the Statute. Once a request affects one of the specific subjects, it is examined by the *Guichet Unique*.

Until the decision is taken in this preliminary stage, the request for a preliminary ruling is not registered in the ‘C’ or ‘T’ register of cases. The request is internally identified by a ‘GU’ reference.

The request is then subject to a peculiar and very quick treatment. Indeed, the Cabinets of the President, Vice-President and First Advocate General are immediately informed of that request. A ‘provisional’ translation into the working language (French) is simultaneously distributed after verification by the administrator in charge. At the same time, the Research and Documentation Directorate is also involved in drawing up, as soon as possible, an analysis¹⁸ aimed at clarifying the legal and factual context of the request for a preliminary ruling and, where appropriate, to establish close links with cases already settled or pending.

¹⁶ It should be noted that the content of any request for a preliminary ruling is determined identically in Art 94 of the Rules of Procedure of the Court of Justice and Art 199 of the Rules of Procedure of the General Court. In addition to the questions referred, the request for a preliminary ruling must contain (a) a summary of the subject-matter of the dispute in the main proceedings and the relevant findings of fact as determined by the referring court or tribunal or, at least, an account of the facts on which the questions referred for a preliminary ruling are based; (b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law, and (c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of law (Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (C/2024/6008), at: curia.europa.eu, para 15).

¹⁷ Although situation is unlikely to occur in practice, where an application is lodged before the General Court, the Registry of the General Court shall forthwith transmit it to the Registry of the Court of Justice, as mandated by Art 207(1) of the Rules of Procedure of the General Court.

¹⁸ It should be remembered that the Research and Documentation Directorate generally conducts an early review of all requests for a preliminary ruling made to the Court, in order to identify, at an early stage of the proceedings, any problems relating, for example, to the admissibility of the reference, as well as to assess, where necessary, the need to deal with a case under the urgent preliminary ruling procedure, and a preliminary analysis of the appeals brought before the Court of Justice against the decisions of the General Court in some areas with a view to identifying as rapidly as possible those which could be dealt with by reasoned order. For further information on this aspect, see Court of Justice of the European Union, ‘Research and Documentation Directorate’, at curia.europa.eu.

Once this analysis has been carried out, the Registry sends a form without delay to obtain the opinions of the Vice-President and the First Advocate General, and, taking these opinions into account, the decision is taken by the President.

In accordance with Article 50b of the Statute, two possibilities are available at the end of that examination.

If, after analysing the request for a preliminary ruling, the President of the Court, having heard the Vice-President and the First Advocate General, considers that that request *falls exclusively within one or more of the specific areas* referred to in point (b) of the first paragraph of Article 50b of the Statute, without raising independent questions within the meaning of the second paragraph of that article, the President will inform the Registry accordingly, which will immediately transmit the request to the Registry of the General Court. The latter will formally register the request and the proceedings will continue before the General Court, in accordance with the provisions of its Rules of Procedure.

However, if the preliminary analysis of the request leads the President, having heard the Vice-President and the First Advocate General, to consider that, although it falls within one or more specific areas, the request also covers other areas or raises independent questions of interpretation of primary law, public international law, general principles of EU law or the Charter of Fundamental Rights of the European Union, that request is immediately referred for further analysis to the General Meeting (*Réunion générale*) of the Court, which is held on a weekly basis and in which all the Judges and Advocates General of the Court participate.

Should that analysis ultimately lead the Court to consider that the request for a preliminary ruling falls exclusively within one or more of the specific areas referred to in the first paragraph of Article 50b of the Statute, that request is immediately transmitted by the Registry of the Court of Justice to the Registry of the General Court. The proceedings will then be continued before the General Court in accordance with the provisions of its Rules of Procedure. Otherwise, the proceedings will continue before the Court, in accordance with the provisions of the Rules of Procedure of the Court of Justice. The referring court will, of course, be immediately informed of the outcome of that analysis by the registry of the court concerned, which will then become its sole interlocutor. When the request is included in the General Meeting, it is therefore the Court which decides whether the request for a preliminary ruling must be registered in the register of the Court of Justice or whether it should instead be transferred to the General Court.¹⁹

Finally, it should not be forgotten that the transfer mechanism to the General Court is accompanied by a corrective tool, which has not yet been used. Where the General Court finds that it does not have jurisdiction to hear and determine a request for a preliminary ruling, it shall refer that request to the Court of Justice by order,

¹⁹ See Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (n 16).

pursuant to the second paragraph of Article 54 of the Statute. Under the second subparagraph of Article 256(3) TFEU, the General Court may also, at any stage of the proceedings, decide to refer a request to the Court of Justice where it considers that it requires a decision of principle liable to affect the unity or consistency of EU law. The national court shall be informed immediately of the referral.

As regards the scope of the analysis carried out at the level of the *Guichet Unique*, it is important to clarify that such an examination conducted cannot encroach on the assessment on the merits to be carried out by the court designated as having jurisdiction (General Court or Court of Justice) on the request for a preliminary ruling. At this early stage, the assessment turns on the basis of the wording of the request. That analyses basically involves two steps. First, whether or not the request falls exclusively within one or more of the specific matters referred to in first paragraph of Article 50b of the Statute. Second, if so, whether or not the request raises independent questions of interpretation of the rules or principles referred to in the second paragraph of Article 50b of the Statute of the European Union. It is an objective and *prima facie* examination which does not take account of the referring court, of the possible importance of the case for the matter concerned or even of its specific scope.

3. Key figures and first review after nine months of implementation of the Reform

By addressing potential reservations that could arise with regard to the transparency and consistency of the approach followed in the process of designating the competent court, recital 15 of Regulation 2024/2019 states that ‘in the interests of legal certainty and greater transparency of court proceedings, the Court of Justice or the General Court *should briefly set out in its preliminary ruling the reasons why it has jurisdiction to deal with a question referred for a preliminary ruling*’.

In addition, again according to that recital, ‘the Court of Justice should publish and regularly update a list of examples illustrating the application of Article 50b of the Statute, as inserted by this amending Regulation’. In that regard, Article 3(1) of Regulation 2024/2019 states that ‘by 2 September 2025, the Court of Justice shall publish and periodically update a list of examples of the application of Article 50b of the Statute’.

The Court followed the latter provision by recently publishing a document entitled ‘Implementation of Article 50b of the Statute of the Court of Justice of the European Union’.²⁰ This short document is highly informative.

First, it should be noted that, while the Court of Justice was (only) invited by the EU legislature to publish a ‘list of examples of the application of Article 50b of the Statute’, the document drawn up by the Court of Justice provides a synoptic table

²⁰ Court of Justice of the European Union, ‘Implementation of Article 50b of the Statute of the Court of Justice of the European Union (1/10/2024 – 30/06/2025)’, at curia.europa.eu.

setting out all the requests for a preliminary ruling falling within one or more of the specific areas referred to in the first paragraph of Article 50b of the Statute which were lodged with the Court of Justice between 1 October 2024 and 30 June 2025 and setting out, in its last column, the reasons why some of those requests were not submitted to the General Court and are dealt with by the Court of Justice. That table therefore provides an exhaustive overview of the outcome of requests for a preliminary ruling in the specific areas covered by the partial transfer of jurisdiction in preliminary ruling proceedings.

Second, that document informs that, during the period from 1 October 2024 to 30 June 2025 ('the reference period') – that is to say, in the first nine months of implementation of the partial transfer of jurisdiction to give preliminary rulings – more than 66 requests for a preliminary ruling were examined within *Guichet Unique* (22 in 2024, 44 in 2025). According to the latest information brought to our attention, almost 80 files were examined within *Guichet Unique* during the first year (from 1 October 2024 to 1 October 2025). That figure corresponds more or less to the estimates which were expected, since the number of references for a preliminary ruling within the six matters listed in Article 50b of Statute introduced in recent years falls between 80 and 90.

Third, it is apparent from the list provided that, of the 66 files examined during the reference period, 57 were transferred to the General Court for the remainder of the proceedings. Only 9 requests for a preliminary ruling were thus 'maintained' at the Court. That shows that approximately 86 per cent of the cases referred to the *Guichet Unique* were transferred to the General Court.

As regards the areas covered by the 57 cases referred to the General Court, they relate, in descending order, to the common system of value added tax (21); excise duties (10); compensation and assistance to air passengers in the event of denied boarding, delay or cancellation of transport services (15); the Customs Code (6) and, finally, the tariff classification of goods in the Combined Nomenclature (5). For the time being, none of the requests for a preliminary ruling transferred to the General Court relate to the scheme for greenhouse gas emission allowance trading.

The files transferred to the General Court will be treated in the same way as the Court of Justice. In that regard, the Rules of Procedure, the practical provisions relating to their implementation and the recommendations addressed to national courts on the initiation of preliminary ruling proceedings were radically revised in 2024 to enable the General Court to exercise its new jurisdiction to give preliminary rulings.²¹

Moreover, it goes without saying that decisions of the General Court in preliminary ruling proceedings will have the same value as those of the Court of Justice. That said, since the third paragraph of Article 256(3) TFEU exceptionally provides for the possibility of a review by the Court, on a proposal from the First Advocate General, of the General Court's preliminary rulings where there is a serious risk of

²¹ Their consolidated versions are available at curia.europa.eu.

the unity or consistency of EU law being affected, it is only in the absence of such a proposal, which must be made within one month of the decision of the General Court,²² that the decision of the General Court will become final. Moreover, where the General Court finds that it does not have jurisdiction to hear and determine a request for a preliminary ruling, it is to make an order to the Court of Justice pursuant to the second paragraph of Article 54 of the Statute. Lastly, the General Court may, pursuant to the second paragraph of Article 256(3) TFEU, decide to refer the case to the Court of Justice if it considers that it raises an issue of principle liable to affect the unity or consistency of EU law. To date, these “corrective” mechanisms have not been implemented.

It is also interesting to note that the requests for a preliminary ruling submitted to the General Court come from courts of 19 Member States, some of which are higher courts.²³ That shows that the *prima facie* and objective examination carried out within *Guichet Unique*, which is based above all on a substantive approach, fails to take account of the author of the request for a preliminary ruling, of the possible importance of the case for the matter in question or of its specific scope.

As regards the requests for a preliminary ruling maintained before the Court, it should be noted that, as is apparent from the logic underlying the application of Article 50b of the Statute, they are of two kinds. These are, first, requests for a preliminary ruling which could be described as ‘mixed’, since they also concern one or more matters other than those referred to in the first paragraph of that article, such as commercial policy (C-827/24), freedom of establishment and freedom to provide services (C-910/24 and C-405/25), consumer protection in the context of package travel (C-119/25) and public health (C-406/25). Second, there are requests raising independent questions of interpretation of primary law (C-308/25), public international law (C-167/25), general principles of EU law or the Charter of Fundamental Rights of the European Union (C-844/24 and C-465/25).

That brief panorama would probably be incomplete unless we devote some words to the decisions already taken by the General Court.

In 2024, the General Court made considerable efforts to finalise and implement the reform of the judicial system of the European Union, initiated with the request for reform of the Statute made by the Court of Justice in November 2022. On 10 July 2024, the General Court adopted, in agreement with the Court of Justice and after

²² As provided for by Art 62(2) of the Statute.

²³ Such as the Augstākā tiesa (Senāts) (Supreme Court, Latvia), the Bundesfinanzhof (Federal Finance Court, Germany), the Conseil d’État (Council of State, France), the Hof van Cassatie (Court of Cassation, Belgium), the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), and the Înalta Curte de Casa, ie i Justiție (High Court of Cassation and Justice, Romania), the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), the Kúria (Supreme Court, Hungary), the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) and the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria).

approval by the Council, fundamental amendments to its Rules of Procedure²⁴, which also entered into force on 1 September 2024 and are intended, *inter alia*, to enable the General Court to exercise its new jurisdiction to give preliminary rulings from October 2024. The Practice Rules for the Implementation of the Rules of Procedure have been recast, while other texts, in particular concerning the use of e-Curia, have been amended.²⁵

In addition, the General Court established a chamber designated to deal with requests for a preliminary ruling and which should remain in place until the General Court is partially replaced in September 2025, to be replaced by two chambers with jurisdiction to give preliminary rulings. It elected three judges (two full members and one alternate) to perform the duties of Advocate-General for the handling of requests for a preliminary ruling. It was decided that the judges involved in the handling of preliminary ruling cases are never appointed as rapporteurs for voluminous cases or groups of cases, the priority given to the rapid management of requests for a preliminary ruling, in accordance with the assurances given by the Court to the legislature at the time of the Reform.²⁶

As to 15 October 2025, and with the exception of the adoption of orders to remove approximately 15 cases from the register following the withdrawal of requests for a preliminary ruling concerning, for the most part, compensation for air passengers, the General Court delivered an initial preliminary ruling on 9 July 2025 in *Gotek*,²⁷ which was also the first case to be examined by the *Guichet Unique* and transferred to the General Court. This case arose from a request for a preliminary ruling filed by the Upravni sud u Osijeku (Administrative Court, Osijek, Croatia) and concerned the interpretation of certain provisions of the Excise Duty Directive.²⁸ In essence, the Croatian court before which the trader brought an action asked whether the national legislation, as interpreted by the national authorities, which provides that excise duty is chargeable on the basis of a fictitious supply of excise goods appearing on falsified invoices, is compatible with EU law. In its judgment, the General Court answered in the negative. In particular, it pointed out that excise duty becomes chargeable when the goods are released for consumption, and the directive lays down an exhaustive list of those grounds. In that case, excise duty was imposed

²⁴ Amendments to the Rules of Procedure of the General Court (2024/L/2094).

²⁵ Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (n 16) 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.

²⁶ See V Di Bucci, 'Statistics concerning the judicial activity of the General Court – 2024' (Luxembourg, March 2025), at curia.europa.eu.

²⁷ Case T-534/24 *Gotek*, EU:T:2025:682.

²⁸ Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).

on account of an abuse of rights, involving the use of falsified invoices even though the petroleum products were not supplied, which does not fall within those situations (paras 28 to 34).

4. Concluding remarks

The fact that a preliminary ruling has been rendered by the General Court only nine months after the case was referred²⁹ is a particularly encouraging evidence about the smooth functioning of the partial transfer of jurisdiction on preliminary rulings to the General Court.

Admittedly, this case concerns a relatively targeted issue, obviously related to a specific area (the ‘excise duties’) within the meaning of Article 50b of the Statute, which is why it was probably not considered appropriate to have the benefit of an opinion from the Advocate General and an oral hearing.³⁰ However, the way it has been handled demonstrates the effectiveness of the mechanisms put in place to deal with the partial transfer of preliminary ruling jurisdiction as quickly as possible.

Such effectiveness is necessary in view of the increasing number of cases brought before the Court (920 cases in 2024), one of the highest numbers of its history, which has automatically led to an increase in the number of cases pending before the Court (1206 to 31 December 2024).³¹ This data demonstrates more than ever the need and the significance of the legislative reform which has been introduced into force in September 2024 and promises to balance the workload between the Court of Justice and the General Court.

The number of files so far transferred to the General Court will certainly not suffice to absorb the increasing flow of cases. The fact remains, however, that the optimal functioning of that ‘new sharing’ between the Court of Justice and the General Court and the prospects it offers are of crucial importance. While only ‘The Future Will Tell’³² and it is certainly too early to measure the overall impact of the changes introduced, which will be reported within three years,³³ the first experiences allow us to be optimistic.

²⁹ In 2024, the average time taken to deal with references for a preliminary ruling was 17,2 months: see Court of Justice of the European Union, ‘Annual Report 2024: Statistics concerning the judicial activity of the Court of Justice’ (Luxembourg, March 2025), at curia.europa.eu.

³⁰ Concerning the written part of the procedure, it appears that only the Croatian Government and the European commission have submitted observations.

³¹ About statistics concerning the judicial activity of the Court of Justice in 2024, see: M-A Gaudissart, ‘Statistics concerning the judicial activity of the Court of Justice – 2024’ (Luxembourg, March 2025), at curia.europa.eu.

³² The reference here is to 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.

³³ The Court will have to submit, by 2 September 2028 at the latest, a report to the European Parliament, the Council and the Commission on the implementation of the reform of the Statute Regulation (see Regulation 2024/2019 (n 1) Art 3(2)).



Perspectives on the Reformed EU Judicial Architecture
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Epilogue: The Ever-Evolving Preliminary Legislative Procedure

*Michal Bobek**

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ABSTRACT: This Epilogue to the Special Section on the 2024 Reform of the Statute of the Court of Justice of the EU brings together the various individual elements of the Reform. It assesses their cumulative impact on the preliminary ruling procedure and the judicial style of the Court. It engages with three elements in particular: what the likelihood that in the future, judicial review of EU legislation before the Union Courts is bound to happen primarily within the preliminary ruling procedure, means for the depth and the scope of that review, in particular in cases where complex, technical or scientific assessment of facts is necessary; what impact removal of all direct and indirect identifiers concerning personal data of all natural persons involved in a case have on the judicial style and level of abstraction embraced in deciding cases; as well as what the now Parliament-ordained generalised anonymous transparency, requiring by default the online publication of all written submission after the delivery of the decision on preliminary ruling, might mean for the judicial process and its outcomes. The overall conclusion is that the institutional and procedural choices made in 2024 confirm that the preliminary ruling procedure, originally conceived as a tool of bilateral judicial cooperation, has increasingly mutated into an essentially vertical legislative process.

KEYWORDS: Court of Justice of the EU – the preliminary ruling procedure – Statute reform – direct actions – access to written pleadings – legitimacy.

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1. Introduction

Academic discussions following the 2024 Reform of the Statute of the Court of Justice of the European Union¹ have focused mainly on the partial transfer of the jurisdiction to hear requests for preliminary rulings from the Court of Justice ('the Court') to the General Court ('the GC').² Rightly so: it was indeed a major development. Additionally, the transfer – or, more accurately, the sharing – of jurisdiction in the six selected areas between the two Union courts can hardly be viewed as the final destination. It is but a testing balloon that will soon determine the direction the future judicial architecture of the EU shall take.

Accounts of the early experience with the new system, captured in this Special Section of the European Papers, are already revealing.³ Nevertheless, it is far too early to draw definite conclusions. The fact that the GC delivered an answer in *Gotek*,⁴ the first case ever heard under Article 267 TFEU by that jurisdiction, within nine months is an excellent result. Yet, that reference was among the first 'selected to shine'.⁵ It raised a question that could scarcely be characterised as complex. It was resolved on the basis of the written observations submitted by two interested parties, namely the Member State from which the question originated and the European Commission, without a hearing and without an Opinion of an Advocate General. For these reasons, it was perhaps not the most representative example of the complex, technical cases intended to fall within the GC's new jurisdiction.

As regards the central feature of this Statute Reform – the sharing of jurisdiction for answering requests for a preliminary ruling between the Court and the GC – I remain doubtful about the suitability of such a procedural arrangement. Sharing jurisdiction between more instances in a procedure the very purpose and legitimacy of which lie in the swift and uniform resolution of a matter of interpretation, which is itself an integral part of other national proceedings, is not an obvious systemic choice. Other means of alleviating the Court's workload were conceivable. This is, however, not the place for rehearsing arguments set out elsewhere.⁶

¹ Carried on by 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 A thorough literature review, to which I cannot but refer, is provided in this Special Section in L Grossio and D Petrić, 'Advancing a Multi-Perspective Assessment of the Reformed EU Judicial Architecture: An Introduction to the Special Section' (2025) 10 *European Papers* 327, in particular fn 5.

³ Cf in particular the contributions by L Rezki and O Porchia on the practice before the GC in the first 9 months after the implementation of the reform, as well as by I Fevola and S Montaldo on the experience with the access to written submissions in the preliminary ruling procedure, both in this Special Section.

⁴ Case T-534/24 *Gotek*, EU:T:2025:682.

⁵ Cf Court of Justice, 'Press Release No 84/25 – Nine months after jurisdiction to rule on references for a preliminary ruling was conferred on it, the General Court of the European Union delivers its first preliminary ruling' (Luxembourg, 9 July 2025), at curia.europa.eu.

⁶ In M Bobek, 'Preliminary Rulings before the General Court: What Judicial Architecture for the European Union?' (2023) 60 *Common Market Law Review* 1515, as well as in M Bobek, 'The Future

Instead, this Epilogue shall examine other elements and consequences of the reform, but above all their cumulative impact. The overall conclusion is that taking the various components of the 2024 Statute Reform together and placing them in the context of the evolution of the preliminary ruling procedure over the past decade confirms the changing nature of that procedure. What was originally conceived as a tool of bilateral judicial cooperation is increasingly becoming an essentially vertical legislative process, with the latest developments quietly acknowledging, or potentially further accelerating, that trend.

It is not something new to observe that, notwithstanding the diplomatic proclamations about ‘assistance’ or ‘dialogue’, the preliminary ruling procedure has, over the decades, evolved from a mechanism of ‘horizontal’ judicial assistance for individual national courts into a channel for ‘diagonal’ or even ‘vertical’ precedent-setting for the Union as a whole.⁷ What is more striking is just how much the 2024 Statute Reform, in terms of procedural and institutional choices it made, acknowledges that evolution.

Three elements contributing to this transformation are outlined in this Epilogue. First, the 2024 Statute Reform is likely to entrench the preference, already voiced some time ago, for cases to come to Luxembourg on preliminary ruling rather than by direct actions. This choice has repercussions for the scope and depth of the judicial review exercised because, absent substantial procedural amendments to the preliminary ruling procedure, that procedure remains ill-suited for in-depth factual and contextual review of EU legislation. Second, while itself not the consequence of the 2024 Statute Reform, the by now generalised anonymisation of all natural persons in judicial proceedings before the Court – including the removal of all direct and indirect identifiers from the case file – nudges the Court towards abstract normative pronouncements unchecked (or even uncheckable) by the truncated (or altogether absent) facts of a case. Third, and rather intriguingly, the 2024 Parliament-ordained default online publication of all written submissions after the preliminary ruling has been delivered moves the system in quite the opposite direction from the anonymity drive. It generates a comparatively novel model of generalised anonymous transparency in judicial proceedings. Such transparency is typically a legitimising factor for democratic legislative processes, but it has not, however, traditionally been a hallmark of judicial proceedings, certainly not in the Continental legal traditions.

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.

⁷ For an overview with further literature references, see, for example, T de la Mare and C Donnelly, ‘Preliminary Rulings and EU Legal Integration: Evolution and Continuity’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021) 228, 247–248.

2. Preliminary ruling instead of direct review: interpretation with(out) (limited) facts

In 2002, in *Unión de Pequeños Agricultores*,⁸ the Court made the choice of not revisiting the ‘*Plaumann* test’⁹ governing who is directly and individually concerned in order to have standing under Article 263(4) TFEU. Subsequently, the Treaty of Lisbon introduced a third category of legal standing into that provision to alleviate some of the concerns regularly voiced about limited access to the Union courts.¹⁰ The essential features of the second scenario – namely, the one requiring direct and individual concern – nonetheless remained the same. Despite repeated invitations over the years from numerous academic commentators and several Advocates General to soften its stance,¹¹ the Court’s position remained essentially the same.¹² If anything, subsequent changes have tended to narrow further the already limited avenues for direct access to the Union courts by obfuscation,¹³ turning the issue of the admissibility of an action into an increasingly arduous obstacle course for individual applicants.

The Court’s case law nonetheless insisted that the EU legal order provides a complete system of remedies.¹⁴ Thus, any limitations on access in direct actions had to be offset by broader, or in fact rather unlimited, access via the preliminary ruling procedure. In the wake of the Court’s judgment in *Unión de Pequeños Agricultores*, the case law increasingly indicated that the appropriate forum for bringing cases questioning this or that element of validity of EU law was the preliminary ruling procedure rather than a direct action.¹⁵ That choice was reinforced by a series of incentives that lowered, or

⁸ Case C-50/00 P *Unión de Pequeños Agricultores v Council*, EU:C:2002:462 (referred to as *UPA*).

⁹ Case 25/62 *Plaumann v Commission*, EU:C:1963:17.

¹⁰ That of a regulatory act not entailing implementing measures and being of direct concern to potential litigants.

¹¹ Most recently by the Opinion of AG Emiliou in Case C-731/23 P *Nicoventures Trading Ltd and Others v European Commission*, EU:C:2025:435, which offers an excellent overview of the often not entirely uniform case law, as well as the academic challenges to it.

¹² Apart from the just cited comprehensive overview provided by AG Emiliou on individual concern, compare similar remarks with regard to the notions of direct concern and a challengeable act by AG Capeta in her Opinion in Case C-97/23 P *WhatsApp Ireland Ltd. v European Data Protection Board*, EU:C:2025:210. Surprisingly, for an area of ‘established’ case law, in the Opinion of the Advocate General, the GC, acting in an extended composition, was not able to correctly distinguish between the notions of a challengeable act and that of direct concern, which one could assume to be the basic categories of the test to be applied.

¹³ By expanding, mixing, or even adding new categories and conditions to the already complex case law, such as, for instance, the indeed rather paternalist ‘interest to act’ category (implicitly assuming that the Court knows better than the applicant whether the latter has any interest in the case already brought) – cf for instance Joined Cases C-596/15 P and C-597/15 P *Bionorica and Diapharm*, EU:C:2017:886, or more recently Case C-121/23 P *Swissgrid v Commission*, EU:C:2025:83.

¹⁴ As emphasised already in *UPA* (n 8) para 40, and then repeated in numerous other decisions, such as in Case C-72/15 *Rosneft*, EU:C:2017:236, paras 66–68 or Case C-384/16 P *European Union Copper Task Force v Commission*, EU:C:2018:176, paras 112–114.

¹⁵ See already in *UPA* (n 8) para 4. Since then, repeated in countless cases, such as in Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625, para 92, or Case C-911/19 *Fédération bancaire française*, EU:C:2021:599, para 60 (referred to as *FBF*).

even removed, barriers to bringing validity challenges when routed through national courts under Article 267 TFEU. For instance, in contrast to the strict two-month time limit applicable for bringing an action under Article 263 TFEU, no such temporal constraint exists under Article 267 TFEU.¹⁶ Nor is there any requirement of direct or individual concern thereunder.¹⁷ The sole filter is the baseline criterion of ‘relevance’ for the referring court, namely that the national court must be able to take the Court’s guidance into account in the continuation of the domestic proceedings.¹⁸ Perhaps most strikingly, there need not even be a challengeable act in order for an EU measure to be referred, and potentially declared invalid, under Article 267 TFEU.¹⁹ The result is a clear preference for one type of procedural avenue over another: strict limits in one type of proceeding, and minimal in the other.²⁰

At the same time, it was not uncommon for questions explicitly referred as questions of validity to be reformulated by the Court as questions of interpretation, either of the same EU law measure, or as questions of interpretation of the ‘parent’ legislation under which the contested measure was adopted.²¹

In consequence, transitive legal issues, which could have been brought before the Union courts as actions for annulment under Article 263 TFEU, were instead channelled through Article 267 TFEU questioning validity, or even ended up (re)formulated as issues of interpretation.²²

¹⁶ Occasionally resulting in rather unique situations such as in Case C-362/14 *Schrems*, EU:C:2015:650, when in 2015, the Court annulled Commission Decision of 26 July 2000 (Commission Decision 2000/520/EC on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce) after 15 years of its operation. While such instances are not common, they cannot be excluded either.

¹⁷ In the sense of the contested EU measure being transposed and applied to the individual situation of the applicant at the national level, thus being of any direct concern to it at the national level. See, in this regard, Case C-62/14 *Gauweiler*, EU:C:2015:400, paras 18–31, which endorsed the previous practice of accepting requests for a preliminary ruling originating in declaratory proceedings at the national level, typically in a common law jurisdiction (see already Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco*, EU:C:2002:741).

¹⁸ In the sense of Joined Cases C-558/18 and C-563/18 *Miasto Łowicz*, EU:C:2020:234, which consolidated the approach of the Court on the admissibility of requests for a preliminary ruling.

¹⁹ *FBF* (n 15).

²⁰ With the ‘counter-limit’ remaining the *TWD* exclusion: if an applicant would clearly have had standing under Art 263(4) TFEU, it cannot later raise the same issue of invalidity under Art 267 TFEU. However, to have ‘clearly’ or ‘undoubtedly’ standing is a relatively high threshold for exclusion, unlikely to be met in cases of doubts (see Case C-188/92 *TWD Textilwerke Deggendorf*, EU:C:1994:90 and more recently Case C-135/16 *Georgsmarienhütte and Others*, EU:C:2018:582).

²¹ From amongst the many cases, see illustratively Case C-526/14 *Kotnik and Others*, EU:C:2016:570 or Case C-62/14 *Gauweiler*, EU:C:2015:400. For a recent example, see eg Case C-460/23 *Kinsa*, EU:C:2025:392.

²² The fact that a question posed by a national court ends up being reformulated does not automatically mean that the Court was avoiding the question posed. Often, the reformulation is the logical consequence of the fact that if certain interpretation of the parent law or the act itself is adopted, the validity issue submitted becomes moot. In this scenario, the examination of validity becomes only necessary if the measure itself cannot not be interpreted in a way compatible with primary law.

The extension of the Commission's authorisation of glyphosate as an active substance, which arose in the parallel cases of *Région de Bruxelles-Capitale*²³ and *Blaise*,²⁴ offers an illustrative example of that preference. In the former, the Région de Bruxelles-Capitale – a federal entity under Belgian law responsible for environment protection – challenged, in an annulment action before the GC under Article 263(4) TFEU, the Commission Implementing Regulation that prolonged glyphosate's market authorisation.²⁵ The 'parent' Regulation No 1107/2009,²⁶ under which the Implementing Regulation for Glyphosate was adopted by the Commission, and in particular the principles and procedure instituted by that Regulation, especially the precautionary principle, featured prominently in the arguments of that applicant region. The subject matter of the action, however, remained the validity of the Implementing Regulation. The GC nonetheless dismissed the action by order on the ground that the applicant lacked direct concern,²⁷ a conclusion which was subsequently endorsed by the Court.

In parallel, however, the Court was seised by a request for a preliminary ruling from the *tribunal correctionnel de Foix* (Criminal Court of Foix, France), which raised questions concerning the validity of Regulation No 1107/2009 in the context of market authorisation for glyphosate. The background of the national proceeding was rather unusual: Mr Blaise and several others entered shops in the department of Ariège (France) and damaged containers of glyphosate-based weed killers, as well as glass display cases. Those individuals were subsequently subjected to criminal prosecution for damaging the property of others. Before the national court, the accused pleaded the defence of necessity and relied on the precautionary principle, claiming that their actions were intended to alert retailers and customers to the dangers associated with selling weed killers containing glyphosate, to prevent such sales, and to protect public health. In the context of that case, the first-instance criminal court submitted a series of questions on the validity of Regulation No 1107/2009, in an order for reference only a few pages long. Before making its reference, the national court had not, quite understandably, conducted any scientific assessment or established any facts in relation to glyphosate or the procedure for its approval.

In a truly complete system of remedies, a direct and more focused action – such as that brought by the Région de Bruxelles-Capitale, which was, with all due respect

²³ Case C-352/19 P *Région de Bruxelles-Capitale v Commission*, EU:C:2020:978.

²⁴ Case C-616/17 *Blaise and Others*, EU:C:2019:800.

²⁵ Commission Implementing Regulation (EU) 2017/2324 of 12 December 2017 renewing the approval of the active substance glyphosate in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011.

²⁶ Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market (OJ 2009 L 309, p. 1).

²⁷ Order in Case T-178/18 *Région de Bruxelles-Capitale v Commission*, EU:T:2019:130. In that order, only the issue of direct concern was discussed since the challenged act was the Implementing Regulation of the Commission, thus the third post-Lisbon scenario, with no individual concern necessary.

to the first-instance court in Foix, far better developed and extensively reasoned – was not permitted to proceed before a Union court vested with full jurisdiction to hear it. At the same time, a case in which the glyphosate authorisation issue was, to put it mildly, underdeveloped in both qualitative and scientific terms (because a first-instance criminal court in Foix is not, for obvious reasons tied to the purpose and scope of the proceedings before it, likely to carry out in-depth fact finding or assess complex scientific evidence) was allowed to proceed directly to the Grand Chamber of the Court through a procedural avenue, the preliminary ruling procedure, where facts and their evaluation lie exclusively with the national court.

There is no shortage of other technical, often scientific, areas of law in which similar patterns have emerged: regulation of tobacco products;²⁸ various elements of environmental protection, particularly climate-change litigation²⁹ or plant protection and eradication of dangerous species;³⁰ air-pollution disputes by car traffic tied to the aftermath of the dieselgate scandal;³¹ various issues of the banking union;³² or data protection³³ to name only a few examples. In such cases, it matters little whether the difficulty lies in parallel (national and European) challenges to secondary or tertiary (typically implementing) legislation or in uncertainty about the stage within

²⁸ Such as the Commission delegated legislation on heated tobacco products and the parallel, but largely identical challenge in the pending direct action in C-731/23 P *Nicoventures Trading Ltd and Others*, and on preliminary ruling, already resolved by judgment in C-759/23 P *J Carroll and Nicoventures Trading Ltd*, EU:C:2025:477.

²⁹ With issues like climate change not being allowed to proceed via direct actions (Case C-565/19 P *Carvalho and Others v Parliament and Council*, EU:C:2021:252), but likely to soon return from the national courts. For example, in climate litigation cases in the Czech Republic before the Supreme Administrative Court, the claimants have repeatedly invited that court to submit the question of the compatibility of EU commitments now transcribed into secondary EU legislation with the Kyoto and Paris Agreements, as well as other international law instruments (cf judgments of the Nejvyšší správní soud of 26 November 2024, Case No 9 As 264/2023–128, as well as of 20 February 2023, Case No 9 As 116/2022–166, both online in Czech at nssoud.cz).

³⁰ If urgency is required in making clear whether or not for instance the bacterium *Xylella fastidiosa* is a genuine threat or whether the Commission committed an error of assessment by including that species into its Implementing Decision, it appears somewhat counterintuitive not to allow a case challenging that act to proceed as direct action brought by the land owners concerned (Case T-439/15 *Amrita arl and Others v Commission*, EU:T:2016:146, confirmed on appeal in Case C-280/16 P *Amrita arl and Others v Commission*, EU:C:2017:9) and instead to wait for the same legal issue to arrive as a request for a preliminary ruling from a national court (Case C-78/16 *Pesce and Others*, EU:C:2016:428).

³¹ Cf, on the one hand, cases like Joined Cases C-177 to 179/19 P *Germany and Others, Ville de Paris and Others v Commission*, EU:C:2022:10, and, on the other, Case C-693/18 *CLCV and Others*, EU:C:2020:1040, or Case C-132/20 *Volkswagen AG*, EU:C:2022:571.

³² *Ex multis*, cf Case C-414/18 *Iccrea Banca*, EU:C:2019:1036, Joined Cases C-551/19 P and C-552/19 P *ABL V Bank and Others v ECB*, EU:C:2021:369, or Case C-551/22 P *Commission v SRB*, EU:C:2024:52.

³³ Recently, see the Opinion of AG Capeta in Case C-97/23 P *WhatsApp Ireland Ltd. v European Data Protection Board*, EU:C:2025:210, disagreeing with the Order of the GC in Case T-709/21 *WhatsApp Ireland Ltd. v European Data Protection Board*, EU:T:2022:783, that a binding decision issued by the EDPB under Art 65(2) of the GDPR, which is binding on the national lead supervisory authority, is not a challengeable act of direct concern to WhatsApp.

various composite EU/national procedures at which a binding and therefore challengeable act of direct concern for a given individual arises. The common thread is that, in those and other cases, there has been a distinct trend towards a restrictive interpretation of what constitutes a challengeable act, direct concern, or individual concern, in direct actions, with the invitation for those legal issues to be submitted later on as requests for preliminary rulings.

Case law concerning challenges to EU soft law has pushed the same trend to its extreme. In *Belgium v Commission*,³⁴ the Court held that true soft law instruments cannot be reviewed through an annulment action under Article 263 TFEU. Absent binding legal effects, there is no challengeable act and thus nothing to review. Yet, subsequently, a true soft law instrument was annulled by the Court, without much further discussion, in a preliminary ruling in *Balgarska Narodna Banka*.³⁵ In *Fédération bancaire française*³⁶ (FBF), the Court clarified that the annulment of a soft law measure is indeed possible under Article 267 TFEU. One of the arguments advanced in FBF in favour of allowing a challenge to validity under Article 267 TFEU of an EU law act which, under Article 263(1) TFEU, is not even considered a challengeable act, was the existence of the Union's 'complete system of remedies' established under the EU Treaties.³⁷ Logically, if the Court wished to keep a say in the judicial review of EU soft law instruments and thereby, indirectly, in the supervision of acts of EU law institutions and bodies, it had to allow for some type of access to it in challenges to such instruments, even at the cost of a coherent system of remedies.³⁸

There are certainly sound arguments in favour of the preference for indirect access to the Union courts via the preliminary ruling procedure in the manner it has been promoted by the Court for the last two decades.³⁹ It enables national judges to act as filters, weeding out repetitive, weak or even spurious challenges to validity. It also allows a case to mature at the national level before proceeding to a review before the Union courts. The EU legislation being challenged is not simply there, freshly adopted and in the abstract, with its impact and real-life consequences still unknown.

³⁴ Case C-16/16 P *Belgium v Commission*, EU:C:2018:79.

³⁵ Case C-501/18 *Balgarska Narodna Banka*, EU:C:2021:249.

³⁶ Case C-911/19 *Fédération bancaire française*, EU:C:2021:599.

³⁷ *Ibid* para 60.

³⁸ Further see M Bobek, 'Legal Protection against EU Soft Law: the Contribution of National Courts' (EU Law Live, Weekend Edition No 244, 20 September 2025), at eulawlive.com.

³⁹ For the sake of completeness: I did not forget the argument that 'this is the system of remedies that the Treaties foresaw and to change anything to it would require a Treaty revision'. I just do not consider it to be a convincing one, which would merit to be put into the main text. 'Direct' and 'individual' concern, as well as the majority of other categories discussed in this section, have always been pure case law constructs. Incidentally, if the (historical) EU constitution maker ever expressed any discernible desire as to the meaning of Art 263 TFEU, it was in the Lisbon Treaty, by inserting the third category of standing, in order to roll back the Court's restrictive case law on standing. So, the only textual and contextual wishes ever expressed by the EU Treaty (makers) appear to be rather to allow for some individual access under Art 263(4) TFEU.

Rather, it has already been applied to individual cases, revealing its effects and visible impact as a legal rule. Ideally, different takes and approaches will have also been tested before the national courts, providing a more developed and contextually grounded basis for the eventual assessment at the European level.⁴⁰

By analogy to the constitutional/judicial review carried out by national (constitutional) courts, the difference is one between an *abstract* (when compatibility of laws is being assessed without those applied first) and *concrete* (when the same exercise is carried out incidentally, after the contested legislation has already been applied to individual cases) review of constitutionality/legality. It is the difference between a legal rule ‘as stated’ in the act, as opposed to ‘as applied’ in subsequent practice.

There are, however, significant costs associated with this mode of case flow. Four merit particular attention. First and foremost, within the preliminary ruling procedure, it is for the national court to ascertain the facts and for the Court to interpret EU law based on those facts and their assessment submitted by the national court in its order for reference. That traditional division of tasks may, however, become problematic in cases of complex technical or scientific assessments. In such circumstances, a national court is unlikely to undertake the scientific assessment itself, certainly not before submitting a request for a preliminary ruling to the Court. Were it to do so, the need, and even the likelihood, of submitting a request to the Court would diminish considerably. Moreover, a referring court is likely to assume, rather reasonably in my view, that it is for the ultimate interpreter of EU law to clarify the technical or scientific dimensions of the issues it requires for the purposes of delivering its ruling. In the context of highly technical, complex legislation, questions of interpretation and the underlying factual or scientific determinations thereafter are often intertwined.⁴¹

However, when it comes to preliminary rulings, the Court never assesses facts and never calls expert witnesses in practice. Naturally, the Court will rely on the information that the (interested) parties, in particular the European Commission, or the Council and Parliament if an issue of validity of legislation which was approved by them is raised, provide to it. But an institution defending its own position which it subsequently transcribed into the legislation it adopted hardly constitutes an independent scientific body. It is defending its own legislation.

⁴⁰ For that effect to materialise, however, the first case reaching the European level on the interpretation of a novel or technical element of new legislation should not immediately proceed to the Grand Chamber of the Court for its presumably final settlement. If it does, such beneficial maturing effects are likely to be lost anyway – in detail, see M Bobek, ‘What are Grand Chambers For?’ (2021) 23 *Cambridge Yearbook of European Legal Studies* 1, 16–17.

⁴¹ Examples may include cases such as Case C-592/14 *European Federation for Cosmetic Ingredients*, EU:C:2016:703, where one of the key issues concerned what are the ‘alternative methods’ to animal testing which exist and are scientifically satisfactory, or a veritable plethora of unclear scientific questions in Case C-528/16 *Confédération paysanne*, EU:C:2018:583, on the definition of a GMO and the status of novel techniques of genome editing, as well as its offspring.

Ultimately, therefore, under such a division of competence in the preliminary ruling procedure, certain cases may devolve into a game of ‘hot potato’, where the Court makes its interpretation conditional on a number of assertions that are left ‘for the national court to verify’. That is the better scenario. Alternatively, an interpretation of EU law may be adopted without any genuine, technical evaluation or assessment ever taking place at any stage, with judicial review resting solely on tacit, or even explicit, deference to the broad discretion enjoyed by the EU bodies or administration.⁴²

Incidentally, the subliminal unease with undertaking factual and scientific assessments in the context of the preliminary ruling procedure may be indirectly reflected in the previously mentioned tendency to reformulate questions of validity as questions of mere interpretation.⁴³ A direct challenge to validity – in particular, again, in technical or scientific areas – requires much deeper discussion of the facts than providing the interpretation of more abstract principle of the parent legislation. Interpretation, particularly when conducted at a high level of abstraction, may be much more selective in what must be articulated for the purposes of a judgment.

Second, there is the factor of time. For cases to filter through the national levels, the transposition of an EU measure, if any is required, must first take place. The measure must then be applied to individual cases, and only thereafter may judicial proceedings arise through which a challenge is conceivable.⁴⁴ This process takes years, during which time the soundness of an EU measure may be contested, potentially even in multiple Member States, with considerable costs to legal certainty and stability. By contrast, in a functioning system of centralised judicial review, the validity of a measure may be determined at a single instance and at a relatively early stage. Such a determination would render most subsequent attempts to raise the issue moot, enabling national courts to rely on the central judgment when dismissing applications for further preliminary rulings on the same point.⁴⁵

⁴² The line there is naturally quite subjective. For a recent example of that discussion, even if in a direct action, see the difference in views between the GC, the AG, and the Court in Joined Cases C-71/23 P and C-82/23 P, *French Republic v European Commission*, on the scope of judicial review of the technical assessment underlying the Commission’s Decision to classify titanium dioxide as a suspected human carcinogen.

⁴³ See above the examples referred to in n 21.

⁴⁴ A case might proceed faster in a Member State which allows for (purely) declaratory adjudication, where the application of EU and/or national law to the individual situation of a claimant, thereby affecting his/her individual (subjective) rights, would not be required.

⁴⁵ This might also be the more pragmatic answer from a number of national courts to the notion that they wish to become or remain the ‘partners’ or ‘first-instance’ courts in a landscape of ‘diffused’ or ‘decentralised’ indirect review, where they would be seised with the burning desire to hear the preliminary cases on the validity of EU legislation and then send the ‘not completely off the point ones’ to Luxembourg for a preliminary ruling. While this sounds all very good in the world of abstract theories (participation, voice, empowerment and so on), there is also no shortage of more down-to-earth national judicial reactions. They might point to the fact that the timely settlement of issues of validity of EU legislation ought to be the job of the Union Courts themselves, not to be offloaded to national courts ill-equipped to carry out that assessment years later in very different proceedings.

Third, there is the issue of participation and voice. In a direct action before a Union court, the author of the contested act, as well as any EU bodies or agencies that participated in its adoption, can present their views. Conversely, in a decentralised and diffuse world of multiple national challenges, EU institutions or agencies are unlikely to be parties to the national proceedings, or even aware that such challenges are taking place.⁴⁶ It is true, however, that this problem will disappear if the silent assumption is dissuading national courts from even starting the discussion on the validity of any EU measure, because if they do, there is often nobody they can discuss that issue with at the national level.⁴⁷ Should a national court nonetheless insist, they ought to refer the matter to the Court, where the EU institution or body which authored the act will be heard. Yet this dynamic may, in turn, exacerbate the trend towards references that are not fully thought through, as that the national court will not have had the benefit of real discussion about the legal problem within in the national proceedings leading to the reference.⁴⁸

Fourth and finally, alongside the just outlined systemic considerations, namely, what is optimal for the EU's system of remedies, lies the issue of individual rights. From both a symbolic and practical perspective, a direct action is in the hands of the individual applicant. By contrast, a request for a preliminary ruling remains solely in the hands of a national court, even where the proceedings are before a court of last instance and despite the recently reaffirmed obligation on such courts to provide reasons when refusing to make a request for a preliminary ruling.⁴⁹ Metaphorically, therefore, the heart of the EU judicial function – full-jurisdiction review of EU law acts, as to both law and fact – appears to be a remarkably cold heart, kicking potential review as far down the road as possible. Passionate abstract discussions about the virtues of a complete system of remedies aside, *in concreto*, for individual applicants, the system may appear neither complementary nor complete.

The doubling of the number of judges at the GC after 2015 could have provided the Court of Justice of the EU with the additional capacity needed to handle technical cases and cases requiring independent scientific assessment, thus alleviating some

⁴⁶ These two points are not new. See already the Opinion of AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores*, EU:C:2002:197.

⁴⁷ It is not uncommon that the national government or the administrative authority responsible for the national transposition of the contested EU law act will not be defending the measure on merits before a national court beyond the rather blunt statements of 'Brussels wills it' and 'we just implemented it'.

⁴⁸ Not to mention that the 'dossier' will seldom be fully prepared with all relevant facts and scientific assessments for ultimate resolution by the Court in a preliminary ruling. Taken together – the passage of considerable time, the fact that the EU legislation would have already been applied in a number of cases, the ensuing legal (un)certainly, the frequent absence of deeper preliminary discussion at the national level, all resulting in significant 'knowledge asymmetry' – all these factors create powerful disincentives for raising issues of validity of EU legislation by national courts in the first place.

⁴⁹ Case C-561/19 *Consorzio Italian Management*, EU:C:2021:799, para 51, or Case C-14/23 *Ku-bera*, EU:C:2024:881, para 62.

of the issues just described. In fact, it was for this reason that, when writing in a judicial capacity, I joined the calls for a moderate and partial opening of the criteria of direct and individual concern, at least for certain kinds of applicants.⁵⁰ Enabling the GC to conduct direct review within the jurisdiction it already possessed, while the Court retained competence to hear any appeal on points of law, could, in my view, lead to deeper and timely judicial review, particularly of implementing EU legislation where technical expertise and scientific evaluation are indispensable.

The key consequence of the 2024 Statute Reform is that the additional judicial resources created at the level of the GC are likely to be gradually redirected towards its handling of requests for preliminary rulings rather than direct actions. The direction charted by that reform implies a willingness on the part of the Court to confer further (technical) areas of jurisdiction on the GC, albeit under the centralised control and allocation of the Court itself.

That is nonetheless likely to mean that cases which could have been brought as direct actions – and assessed on the basis of fully established facts and with proper technical depth, obtained with the help of the parties, witnesses or expert witnesses – will instead arrive as requests for preliminary rulings. In the latter cases, both the national court and the Court/GC may assume that the other will undertake the necessary factual work. Yet, even if the formal position remains that the Court does not make factual findings in preliminary ruling procedures, the reality is that the facts as presented (or rather not presented) by the national court decisively influence the legal interpretation subsequently reached.

Judging without all the necessary facts is problematic, prone to result in hasty decisions which soon require reconsideration. Even if the task is framed as a mere ‘interpretation’ rather than ‘application’, that interpretation still operates on the basis of factual and contextual assumptions generated from the set of initial facts. The facts, or their absence, thus decisively shape the type, scope and depth of the interpretation that will be given to a legal rule. Finally, interpreting, or rather articulating, the law without a sufficiently developed factual context of individual cases moves the exercise away from adjudication and closer to an activity belonging to a different discipline altogether: legislating.

3. Anonymity before the law: direct or indirect (factual) identifiers removed

The Court’s recent push for the anonymisation of all natural persons in preliminary ruling proceedings,⁵¹ together with the instructions to the national courts not to include

⁵⁰ In particular for national law public entities, such as federal units or regions (Opinion of AG Bobek in Case C-352/19 P *Région de Bruxelles-Capitale v European Commission*, EU:C:2020:588) or cities (Opinion of AG Bobek in Joined Cases C-177/19 P to C-179/19 P *Germany v Ville de Paris and Others*, EU:C:2021:476), who can hardly be labelled as some ‘spurious undertakings’ unhappy about the latest EU regulatory framework for their business.

⁵¹ 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.

in their orders for reference any factual information or details that could enable the identification of a natural person concerned by those proceeding,⁵² and with anonymity to be maintained not only in all written communications with the Court, but also in oral hearings,⁵³ has likewise not facilitated the provision of deeper context. Combined with the (already) long-standing instruction to keep the orders for reference as short as possible for the reasons of translation,⁵⁴ national courts are nudged to submit already edited facts in their orders for reference. The contextual understanding of the facts and context remaining is made no easier by the dystopian proliferation of ABs, XZs, or YTs in the narrative part of each case involving natural persons.⁵⁵

The facts of a case involving natural persons tend to be personal data relating to those persons⁵⁶ which may lead to the direct or indirect identification of those persons. The more such facts/data are provided, the easier indirect identification becomes. Conversely, omitting such information forces deliberations onto a higher plane of abstraction. The core mental exercise of judicial subsumption becomes difficult when facts/data are missing. Any interpretation must then proceed on the basis of silent or acknowledged hypotheses. Above all, in adjudication, details matter: a single crucial fact or piece of background information can considerably change the entire course of a case. The metaphorical mental train is put on completely different tracks.

The business of judging has traditionally consisted of subsuming highly detailed and concrete sets of facts under a pre-existing abstract and general legislative framework. First, the facts are a means – indeed, in more realist or critical legal traditions, the *only* means – of controlling the correctness of past judicial assessments and of anticipating future ones. It is no coincidence that the ‘distortion of evidence’ or the ‘incorrect ascertaining of the facts of the case’ is considered a deadly judicial sin, leading to almost automatic annulment of a decision on appeal, or even on second appeal, that is to say, even in proceedings which are not supposed to be concerned with ascertaining or interpreting the facts at all.

Second, and perhaps more importantly, the facts of a case not only define its scope but equally constitute the legitimising foundation for any judicial pronouncement on, and in, a given case. In a modern constitutional system, facts matter also from the perspective of the separation of powers. Certainly, it is impossible to suggest, today,

⁵² Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings (2024/C/6008), point 21.

⁵³ Practice Directions to Parties Concerning Cases Brought before the Court (2020/L 421/01), point 7.

⁵⁴ Recommendation to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01), point 14.

⁵⁵ Not to mention the not so hypothetical danger of mistakes occurring in the (pseudo)anonymisation process and the ensuing judicial confusion of ‘who is who’, which, if undetected, can considerably change the understanding of a case.

⁵⁶ Cf Art 4(1) of the GDPR together with the broad interpretation of the notion of ‘personal data’ carried out by the Court in, for example, Case C-434/16 *Nowak*, EU:C:2017:994 or Case C-25/17 *Jehovan todistajat*, EU:C:2018:551.

that the tenets of say Article 5 of the French *Code civil*⁵⁷ or § 12 of the Austrian *Allgemeines bürgerliches Gesetzbuch*⁵⁸ remain applicable,⁵⁹ if they in fact ever truly were.⁶⁰ But still, even before the highest national courts, and likewise before the Union courts, at some level, the facts of the individual case as presented remain the basis for judicial intervention. The authority that does not need an individual case in order to make a pronouncement on a given issue tends to be the legislature, but not the judiciary.

Third, the facts of a past case matter not only for legitimising the judicial decision in that case, but also, especially for the highest, precedent-setting courts, for future cases. In precedent-based systems, the facts of an earlier case do not themselves form part of a future *ratio*. But they define the reach of the newly established rule. Conversely, the fewer the facts and the less the individual context is known, the broader the normative reach of any new rule judicially created. Indeed, it is no coincidence that in systems attributing binding force to prior judicial decisions, typically the common law systems, the reach of a precedent and the *ratio* it generates is constrained by the facts of the previous case. Only with, often detailed, knowledge of those facts can discussion about the next case unfold: is the next case identical, or at least sufficiently similar on its facts, such that the precedent must be followed (fully or in part), or is the case to be narrowed, distinguished or otherwise treated differently.⁶¹

Intriguingly, civil law systems – which have, on the one hand, dogmatically denied any broader rule-making role to judicial decisions – have, on the other hand, functionally allowed the highest judicial courts to formulate pronouncements of breadth and scope unimaginable to a common-law judge. The trick enabling this is the so-called ‘legal sentence’, ‘legal proposition’, ‘Leitsatz’ or ‘massima’.⁶² That is a condensed rule of behaviour, typically framed (to a common-law lawyer, strikingly) at a high level of abstraction, akin to a legislative proposition, inferred from a

⁵⁷ ‘Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises’.

⁵⁸ ‘Die in einzelnen Fällen ergangenen Verfügungen und die von Richtersthühlen in besonderen Rechtsstreitigkeiten gefällten Urtheile haben nie die Kraft eines Gesetzes, sie können auf andere Fälle oder auf andere Personen nicht ausgedehnet werden’.

⁵⁹ See the disagreement of Portalis on the wording of Art 5 CC in ‘Projet de la Commission du gouvernement, présenté le 24 thermidor an VIII, livre préliminaire’ and ‘Titre préliminaire, De la publication, des effets ed de l’application des lois en général, présentation au Corps législatif, exposé des motifs par le conseiller d’Etat Portalis, 4 ventôse an XI’, reprinted in PA Fenet, *Naissance du Code civil: An VIII – an XII – 1800 – 1804* (Flammarion 1989) 89–133. For a more modern interpretation of § 12 ABGB, see, for example, F Bydlinki, *Juristische Methodenlehre und Rechtsbegriff* (Springer-Verlag 1982) 501 and ff.

⁶⁰ Illustratively, see, for instance, R Ogorek, *Richterkönig oder Subsumtionsautomat?: Zur Justiztheorie im 19. Jahrhundert* (Klostermann 1986) or J Krynen, *L’Etat de justice France, XIII^e-XX^e siècle. Tome II: L’emprise contemporaine des juges* (Gallimard 2012), in particular chapters 1 and 2.

⁶¹ For a classic statement, cf R Cross, JW Harris, *Precedent in English Law* (4th edn, Clarendon Press 1991), in particular chapter VI (186–207).

⁶² See already, for instance, M Taruffo, M La Torre, ‘Precedent in Italy’ in N McCormick, RS Summers (eds), *Interpreting Precedents – A Comparative Study* (Ashgate 1997) 141 and ff, or RA Siltala, *Theory of Precedent. From Analytical Positivism to a Post-Analytical Philosophy of Law* (Hart Publishing 2000) 128–135.

case and formulated either by the reporting judge in a given case or by the editor/research service of a court. In a number of civil legal systems, such legal propositions started operating much like legislation, applied on their own, detached from the original case. Crucially, however, when a legal proposition is detached from the facts and context which gave birth to its creation, its reach grows exponentially. It becomes, in functional terms, legislation, albeit legislation originally crafted by a court.

None of this is really new. Judicial pronouncements of the Court in the preliminary ruling procedure have traditionally been delivered at a comparatively higher level of abstraction, with the resulting generalised ‘legal proposition’ readily detachable from an individual case, whether through formulations in the operative part of the judgment or through individual statements lifted from the reasoning and circulated freely across cases in cluster citations.

The point made here is rather that the robust anonymisation now applied to all natural persons, together with the removal of any direct or indirect identifiers relating to such persons, is bound to further nudge judicial pronouncements in preliminary rulings towards even greater abstraction. However, articulating legal rules in an abstract and anonymous manner, largely detached from the concrete cases that ought to ground them, and leaving their later application to other institutions, namely courts, tends to be the role of the legislature. The (traditional) legitimacy of the judicial function lies in the detail of the individual case.

4. Access to written submissions: default generalised anonymous transparency

The issue of anonymisation seems to pull in the opposite direction from another change introduced by the 2024 Statute Reform: the default online publication of all written submissions received by the Court in preliminary ruling procedures after the closure of the case. The limited academic attention⁶³ paid to this aspect of the Reform may partly be due to the fact that it did not feature in the Court’s original Request. It was introduced in the legislative discussions only at a later stage by the European Parliament. Speculation as to whether the Parliament, or rather certain political factions within it, had grown impatient with the successive failures of the Court to ‘put its own house in order’ by establishing a comprehensive access to pleadings submitted to it, is best left to others. It is, nonetheless, true that the pre-2024 system⁶⁴ was a singular one: a third party interested in access to part of the judicial file, typically the written pleadings of an interested party, could not address the Court itself, which

⁶³ The exceptions being, for example, 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* 357, in this Special Section, or 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.

⁶⁴ See, in particular, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission*, EU:C:2010:541, or Case C-213/15 P *Commission v Breyer*, EU:C:2017:563.

is the natural controller of the judicial file,⁶⁵ but was instead sent off to one of the (interested) parties to the case, namely the Commission.⁶⁶

What is clear, however, is that extremes produce counter-extremes. One singular regime has now been replaced by another equally unique regime, which is, in comparative terms, again an outlier: a system of online *default generalised anonymous transparency*.

First, the publication of all written submissions in a preliminary ruling procedure is to be carried out, *by default*, on the Court's website once the case is closed. Interested parties who submitted written observations in a case may object to the publication of their submissions, but they must do so explicitly and within a time limit. The data available indicate that in the majority of cases, objections to the publication of pleadings have already been made by one or more of the parties.⁶⁷ As far as the objections against the publication of pleadings by the Member States are concerned, it is intriguing to observe that some of those objecting most frequently are the very Member States which, in their earlier submissions in access-to-documents litigation, had consistently advocated for greater openness and transparency on the part of the EU institution or bodies.⁶⁸

Second, the regime is *generalised* in the sense that it appears to apply to all preliminary ruling procedures, irrespective of their subject matter or the identity of the interested party who made the submissions. Yet is there truly the same public interest in accessing the pleadings of, say, an asylum seeker, a VAT fraud suspect, or a consumer defaulting on his or her mortgage payment, as there is in knowing the position of a Member State or an EU institution in a rather abstract dispute over EU competences? Traditionally, the key ingredient in deciding whether to grant access to a judicial file or parts thereof by a court hearing the case tends to be the weighing of the competing interests of transparency and access, on the one hand, and confidentiality, on the other, in each individual case or at least within a given category of cases. Under the new system, however, all this is replaced by a generalised presumption

⁶⁵ Unless the judicial file has been passed on by the virtue of lapse of time to a different (sometimes a non-judicial) body administering the archives, such as the courts' service or national archives. For illustration see Case C-470/19 *Friends of the Irish Environment*, EU:C:2021:271.

⁶⁶ As suggested in my Opinion in Case C-213/15 P *Commission v Breyer*, EU:C:2016:994, paras 68–73.

⁶⁷ Fevola and Montaldo (n 63) 383.

⁶⁸ See the table provided in Fevola and Montaldo (n 63) 385–386. Finland is at the top of the list, having intervened 5 times in the period at issue (1 September 2024 – 31 May 2025) and objected to the publication of *all five* submissions, which were therefore not disclosed. What is also remarkable is the lack of sync between the political convictions of the Members and the Legal Service of the European Parliament: out of 2 interventions made by the Parliament in the same period in question, in both cases, objections to the publication were made by the Parliament. On the other hand, it ought to be acknowledged that the number of samples is still too small.

that, regardless of the case or of the party concerned,⁶⁹ transparency at EU level invariably outweighs all other concerns.⁷⁰

Third, in contrast to the overall direction suggested by the previous two points, what is to be made accessible are *anonymised* submissions, with both the direct and indirect identifiers of the case or natural persons involved required to be removed.⁷¹ This is where the choice made by the European Parliament for the Court becomes particularly intriguing, both at the technical and philosophical levels.

On the one hand, at present, the Court has now publicly committed itself to the pledge of judicial anonymity, thus generating the (legitimate) expectation of natural persons that their cases can proceed to the European level without their identities ever being revealed. However, in order to fulfil that promise, must the Court not only leave out all direct and indirect identifiers *from its own decisions*, but also act as a censor of the parties' submissions? Irrespective of instructions issued, parties will inevitably leave a couple of (in/direct) identifiers in their submissions. Must those be erased, thereby altering submissions actually received by the Court? Or will they be kept intact, at the risk of the Court incurring liability for failing to safeguard the anonymity of a natural person? There is no doubt that the Court is the controller of any personal data published on its own website.⁷²

On the other hand, what is the purpose of disclosing judicial documents apart from or in addition to the final judgments of a court? It is fair to assume that the objective is public control, public scrutiny and the transparency of the judicial process, motivated by an implicit or explicit desire for greater openness and overall transparency. Yet, what meaningful control can be exercised, or what transparency achieved for that matter, if elements of the information, or even significant parts thereof, are withheld?

At this stage, the argument can be taken one level higher in its abstraction. The transparency pursued by such a system becomes a 'second order', or more 'abstract'

⁶⁹ Or whatever the identity of persons seeking the information and their purpose, which would typically form part of the Strasbourg case law in the context of right to information. For illustration, see *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016), or *Társaság a Szabadságjogokért v Hungary* App no 37374/05 (ECtHR, 14 April 2009).

⁷⁰ That is why, even in my proactive and open stance on access to (external) judicial documents in closed cases, my (admittedly quite radical in comparative terms) propositions remained at the level of possible online access to *selected* judicial documents in a *portion of closed* cases, and not an automatic access to all pleadings in all cases. See the AG Opinion in Case C-213/15 P *Commission v Breyer*, EU:C:2016:994, para 137.

⁷¹ With the general rules of the Court on anonymisation given above in fns 51 to 54 applicable equally there.

⁷² Irrespective of the initial author of the document, subsequent online publication constitutes 'processing' within the meaning of Art 4(2) of the GDPR, thereby rendering the authority carrying it out 'controller' within the meaning of Art 4(8) of the GDPR, or formally speaking under the equivalent provisions of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data.

openness: what will be disclosed is the structure of reasoning and the reaction of the Court to the arguments put before it, in the abstract. It is not the disposition of a concrete case that is supposed to be scrutinised. Such oversight can be exercised without knowing all or even any personal information about the individuals concerned, whether they are parties, witnesses, or any other third persons named in the national proceedings. Their generic qualities and characteristics suffice.⁷³

Furthermore, one could equally argue that, unlike a national court, which is there to resolve the individual case of an individual (natural) person, and whose exercise of public power therefore requires close scrutiny, the role of a Union court, in particular in the preliminary ruling procedure, is different:⁷⁴ it is to set a precedent for the entire European Union. That function warrants a greater degree of openness and knowledge of the submissions of each interested party.⁷⁵

All these arguments are possible, and some may even be correct. The point being advanced here is that the new regime of *anonymous transparency* in the publication of written submissions creates a unique *contradictio in adjecto*, for which comparative parallels are not readily available. As far as the practice in Continental Europe is concerned, more emphasis is on fostering the value of open and candid exchanges in court, with parties' submissions disclosed only once the case has concluded and typically only upon an individual request supported by a legitimate interest in the disclosure. Common law systems are generally more open in that regard, allowing access to parties' submissions more broadly, with some, particularly in the United States, even making such submissions available in their legal databases. That said, those systems also take the idea of full disclosure seriously, without the censor's black pen to remove personal information and/or all factual identifiers capable of leading to the direct/indirect identification of a natural person. Even the European

⁷³ There is even a historical or contemporary parallel for that proposition: the past and present publication culture for (higher court) judgments in the German/Austrian legal culture, entailing that in published decisions the parties are only known by their generic function (the appellant, the respondent) or by their initials. However, that publication convention for highest judicial decision has been there for over a century and was in fact born out of (in the second half of 19th century still alive) secrecy of the judicial process. Today, it does not preclude individual requests under the national codes of judicial procedure or the national access to documents legislation to the full and integral version of the judgment, or to the judicial file, if legitimate interest can be demonstrated.

⁷⁴ Incidentally, the idea that the preliminary ruling procedure is 'something other' than a 'normal' adversarial individual judicial decision might be confirmed by the decision of the 2024 Statute Reform to impose the duty of publication only to written submissions *in preliminary rulings*, and not those submitted *in direct actions* before Union Courts.

⁷⁵ The only problem with that argument is that it is also a valid argument against anonymisation: with greater impact comes the need for greater accountability and arguably even a greater need for public control. There would thus be, also by definition, no 'private' litigation in preliminary rulings, since the entire Union will be concerned by the outcome.

Court of Human Rights, arguably at the forefront of this kind of openness, grants access only upon an individual request made in individual cases.⁷⁶

Moreover, such a vision of generalised anonymous transparency is likely to further impact both the process of the preliminary ruling procedure and its outcomes.

As to the process, there are good reasons why the majority of domestic legal systems proceed from the assumption of generalised judicial confidentiality, both during the judicial process and after its closure. The purpose is to allow for candid, thereby open and useful, exchange in both the written pleadings and in the courtroom at the oral hearing. This is not only in order to protect the private sphere of litigants, who will, by necessity, be forced to disclose a lot about their life if they are to argue their case at the appropriate and convincing level of factual detail. Another reasons for the confidentiality in the courtroom is rather utilitarian, pertaining to the judicial (self)interest of typically higher jurisdictions called to (co)shape the law: by providing a ‘free space’ for the parties, a full and open dialogue ensues, which can then assist the court in finding an equitable and reasonable solution.

By contrast, if the parties and their legal representatives are under a constant public supervision of everything they write or say,⁷⁷ knowing that an ‘Online Miranda Warning’⁷⁸ will effectively apply (‘Anything you say in this court might be used against you by the public’), the practical utility of such pleadings or hearings for the court and the judicial process may diminish. That is, again, one reason why most jurisdictions neither grant default, generalised access to the written submissions, nor allow external recording or streaming of the court hearings. From a pragmatic standpoint, what serves a court best is a frank exchange with the parties, where the legal representatives feel able to genuinely engage with the bench, answer all its questions candidly, and thereby assist it in the judicial process. If the legal representative knows that he or she is under constant online supervision, they will stick to the pre-prepared script and refuse to engage further. On a similar note, defending a client and/or assisting the court is a discipline distinct from ‘performing for the cameras’ or using the courtroom exchanges to make a point to quite a different, external audience.

As to the outcome, will the default publication of all written submissions induce greater judicial engagement with the arguments of those parties, resulting in better-reasoned judgments and, ultimately, greater legitimacy for the Union courts? Paradoxically, the opposite might equally occur. First, why should the Court continue reproducing and reacting to the submissions of the parties, however already shortened at

⁷⁶ Cf Art 40(2) of the European Convention in combination with Rule 33(1) of the ECtHR’s Rules of Procedure. However, in my experience, the practice of granting individual access is rather liberal and no particular legitimate interest for access needs to be demonstrated.

⁷⁷ At present, oral hearings before the Grand Chamber of the Court, the full Court, and occasionally a chamber of five judges, are web-streamed either live or with a delay. The video-recordings of those hearings remain available on the website of the Court for a maximum period of one month after end of the hearing. See the dedicated webpage: Court of Justice, ‘Broadcasting of hearings’, at curia.europa.eu.

⁷⁸ *Miranda v Arizona*, 384 US 436 (1966).

present for the reasons of translation, if they will, in any event, be publicly available? Anyone can simply read for themselves what the individual views were, thus saving the Court the time and translation costs spent on reproducing parties' views in decisions. All that is required is for the Court to authoritatively opt for one of the options on the table available before it. Second, if the Court's potential (mis)understanding of the parties' views becomes subject to public scrutiny, the incentives for referring to and engaging closely with those submissions may diminish.⁷⁹ That may not only be due to the fear of later public criticism for misrepresentation of the parties' views, but also simply as a consequence of parties' own (self)censorships: their submissions may cease to contain anything genuinely useful or interesting in the first place.

In summary, the new system of default generalised anonymous transparency may perhaps lead to enhanced quality in the judicial process and its outcomes, and more broadly improve public understanding of, and confidence in, that process. Yet it might equally lead, in some cases, to a (self)imposed censorship in both written submissions and oral hearings, with the parties stating merely the bare minimum necessary and leaving all the rest to the Court ('*Débrouillez-vous!*'). Undoubtedly, the public will see more of the documents presented within the judicial process. Whether that will lead to greater understanding of, and trust in, that process, or (rather) provoke constant scrutiny and renewed challenges – and whether, ultimately, it will end up generating greater legitimacy for the Court and the Union's judicial process – remains to be seen. There is a certain (cynical, but still true) wisdom in the old quip, apparently incorrectly attributed to Otto von Bismark, that laws are like sausages: it is better for the general public not to see how they are made.

To those fears, justified or not, one might always respond⁸⁰ with a value-based override: before the Union courts, nothing shall be kept in the judicial shadows! If parties are unwilling to state their arguments in daylight, they ought to remain silent. That is indeed a clear and principled message. The point made here is simply that 'putting everything online' is not without side effects.

⁷⁹ This proposition may sound cynical, but self-restraint in citation becomes the natural response of any judge whose reliance on, engagement with, or interpretation of non-mandatory sources become publicly contested. If the source referred to is not compulsory, as is likewise the case with engagement with parties' submissions in the Continental legal culture (*iura novit curia*, after all), it may simply be omitted to avoid unnecessary controversy. Incidentally, the (open) use of comparative reasoning or foreign inspiration follows the same logic – in detail, see M Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013) 220–236.

⁸⁰ Alternatively, the more pragmatic counterpoint is likely to be that nobody will have the time to study all the documentation now made available anyway. It will be only in perhaps a handful of (political or sensitive) cases where the background documentation might in fact be studied by the public. While I cannot but concur that, in a number of cases, it might be more exciting to watch wet paint dry than to have to read some party submissions, the argument presented here is not about the effective exercise of a controlling mechanism. It is about what the mere potential for constant control means for the perception of the entire the behaviour of the behaviour of actors involved in it.

Finally, and in any case, for the issue central to this Epilogue, what is equally clear is that the *ex ante* elaboration of relatively abstract and anonymous rules, detached from the concrete specifics of any individual case, made through a transparent and open process, in which individual preferences voiced and the input given are to be fully displayed and publicly accountable, is characteristic of the legislative process, and not necessarily of the judicial one.

5. Connecting the dots: towards requests for additional legislation before the Constitutional Court of the European Union?

First, sharing jurisdiction to give preliminary rulings with the GC signals further verticalisation of the preliminary ruling procedure. Furthermore, in structural terms, the pooling of judicial resources with the GC for that particular type of procedure is likely to eliminate the practical need to nuance or revisit *Plaumann* in order to achieve a more equitable distribution of the docket between the Union courts. Yet, the continued preference for cases to reach Luxembourg under Article 267 TFEU rather than Article 263 TFEU impacts the nature of the judicial review that will be carried out in preliminary rulings. Abstract interpretative statements with limited facts are, however, not always a suitable replacement for a detail-sensitive judicial review of legislation, particularly in cases concerning technical or scientific assessment, which are far from rare in EU law.

Second, the generalised anonymity before the law instituted by the Court for all natural persons further accelerates the trend towards ‘factless’ judging. Names, personal information, direct or indirect identifiers are all to be removed, or in the act of self-censorship by national courts and the parties to the original dispute, not even submitted to the Court in the first place. This pushes the final judicial product – already quite abstract in some cases – to even greater abstraction. Alas, with limited facts only, it might be difficult to foresee the ultimate impact of a legal rule being interpreted or created.

Third, all of this will now be happening within a process in which the external input is to be accessible and accountable: the initial order for reference submitted by the national court; the written submissions of the interested parties; the oral hearing in Grand Chamber cases, which will be web-streamed; and, finally, the publication of the decision of the national court after the preliminary ruling. Even if anonymous, all shall be transparent in the end.

Putting all these elements together yields a rather interesting picture: a body called upon, in a transparent deliberative process in which the value preferences of its participants are to be disclosed to the public to enhance the legitimacy and overall accountability of that process, to establish fairly abstract rules that will later be applied by someone else to individual cases, and with only that subsequent body possessing full knowledge of the facts and circumstance of the individual cases. If only we had a name for such a *sui generis* process. Wait, was it not *legislating*?

The proposition that the Court has long acted as a *de facto* legislator is certainly not a new one. Nevertheless, what is fascinating about the 2024 Statute Reform is, if all its elements are taken together and then combined with the evolution of the preliminary ruling procedure over the last few years, how much the essentially legislative function of the Court is at present being openly acknowledged through the institutional and procedural choices adopted in 2024. But even there, a sceptic might conclude that nothing truly new is happening, save for the form finally being brought into line with an already existing substance.

Perhaps all that is what the discussed ‘constitutionalisation’ of the Court is supposed to mean. After all, are the elements just outlined not characteristic of a constitutional court deciding on *abstract* review of constitutionality, institutionally akin to a (negative or positive) legislator? Is it not what the future is supposed to hold for the Union judiciary, with the Court turning into a Constitutional Court of the Union, and the General Court becoming the Union’s Council of State?⁸¹

Constitutionalisation is no doubt a catchy slogan. But as a notion, it is a jellyfish. In terms of designing a judicial system and attributing jurisdiction within it, nobody has ever been able to define where the borderline between ‘constitutionality’ and ‘mere legality’ lies. With legal issues and cases moving freely between the two sets,⁸² what over half a century of national experience with constitutional adjudication in Europe has taught us is that the notion of ‘constitutionality’ is unable to demarcate any comprehensive division of jurisdiction between a constitutional court and ordinary courts.⁸³

This brings up the issue of very different institutional setups in constitutional review and constitutional justice across Europe: what is a constitutional court, and

⁸¹ Cf the visions echoed, however in a somewhat different way, by J Alberti, ‘O Tell Me the Truth About the Transfer of Preliminary References to the General Court. Three Narratives to be Questions, Two Thorny Issues to be Introduced and One Scenario to be Addressed as the Main Legacy of the Recent Reform of the CJEU Statute’ (2025) 10 *European Papers* 333, on the one hand, and T Hilpold, ‘The 2024 Reform of the EU Judicial System and the Transformation of the Court of Justice into a Constitutional Court’ (2025) 10 *European Papers* 837, on the other, in this Special Section.

⁸² Any case and any legal issue may be eventually put as a matter of one of the following constitutional rights: fair trial (or judicial protection); equality; and/or human dignity. Within or in combination of (by its nature always expansionist) interpretation of these three rights, the real border does not lie in what a constitutional court *cannot* adjudicate upon, but rather what it *does not choose* to adjudicate upon. It was not without reason that the father of (concentrated) constitutional review, Hans Kelsen, excluded the possibility for its contemplated court to adjudicate on such overbroad and unclear notions – H Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit. Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (de Gruyter & Co. 1929) 69–70.

⁸³ In legal systems allowing for individual access to the constitutional court following a constitutional complaint, 60–96% of all cases decided by a constitutional court are challenges to final judicial decisions, typically against the decision of a supreme court (Supreme Court, Supreme Administrative Court etc). Such a constitutional court is in fact the real supreme jurisdiction within such a legal system. For a statistical data and examples with respect to the Czech Republic and Germany, see M Bobek, ‘Quality or Quantity: Re-assessing the Role of Supreme Jurisdictions in Central Europe’ (2009) 57 *American Journal of Comparative Law* 33, 53–55.

what does it do, in particular in contrast to supreme courts? If there is at least one element common to the world of mostly specialised and concentrated constitutional review in Continental Europe, then it is that the task of safeguarding uniform interpretation of the law is the job of national supreme courts within their respective areas of jurisdiction. By contrast, the role of constitutional courts tends to be the protection of constitutionality and above all of human rights, often exactly at the expense of the uniformity of national established case law, because effective protection of constitutional rights in the individual case requires it.

In this regard, intriguingly, the newly-worded Article 62 of the Statute of the Court foresees that the decision of the GC rendered on preliminary ruling can be subject to review by the Court where there is a ‘serious risk to unity or consistency of Union law’. That is, however, at least in national judicial systems, the textbook example for the admissibility of extraordinary remedy to a supreme court, not conditions for access to a constitutional court. The latter ones tend to be construed around the plausible claim of violation of constitutional rights. Or is there now supposed to be two-layered unity and consistency of Union law: the ‘normal’ or ‘merely legal’ unity of EU law, that causes the national court to make a reference to the GC, in order to safeguard uniform interpretation of EU law across the Union, but then (or precisely because of that in fact?) comes the second layer of constitutional ‘super-unity’ of EU law, which makes the case to advance to the Court?

It is correct that such musings are only of limited relevance to the current repartition of competence in the six areas shared on preliminary rulings, where it will be for the Court within the system of ‘guichet unique’ to certify, in each individual case, what is a case of ‘constitutional significance’, by simply not delegating it to the GC in the first place. In comparative terms, again intriguing is that what amounts to a constitutional issue is normally decided ‘positively’: a constitutional court picks up a case or an issue after it was dealt with by (an) ordinary court(s) and it thereby becomes a ‘constitutional’ one. By contrast, in the current EU procedural set-up for areas of shared competence for preliminary rulings, what is an EU constitutional issue shall be defined ‘negatively’, by the ‘constitutional exclusion’ of the GC. Apart from the rather non-flattering implicit message towards the GC inherent in such division of competence,⁸⁴ similar instances of ‘jealous constitutionalism’ are not easily to be found in constitutional court designs.⁸⁵

⁸⁴ See already Bobek, ‘Preliminary Rulings before the General Court: What Judicial Architecture for the European Union?’ (n 6) 1523–1527.

⁸⁵ The tendency in national constitutional review as well as in the system of the European Convention have been exactly the opposite: to involve ordinary/national/own lower courts as much as possible in assessing matters of constitutionality or ‘conventionality’, turning them in genuine constitutional/conventional courts of first instance. Further on post-Brighton visions of diffuse control and subsidiarity within the Strasbourg system, see eg E Brems, ‘Positive subsidiarity and its implications for the margin of appreciation doctrine’ (2019) 37 *Netherlands Quarterly of Human Rights* 210, or J Kratochvíl, ‘Subsidiarity of Human Rights in Practice: The relationship between the Constitutional Court and Lower Courts in Czechia’ (2019) 37 *Netherlands Quarterly of Human Rights* 69.

However, if, at some rudimentary level, the job description of a constitutional court were to be defined as examining the compatibility of lower laws with the higher or basic law or constitutional foundations of that system, would anybody be seriously claiming that the Court have not in fact been doing exactly that job within the European Union and previously the Communities for decades already?

Certainly, the argument advanced is not that the Court is getting a new competence, but that its judicial burden shall be alleviated so that it can become *more* of a constitutional court. But doing *more of what*, exactly? More abstract, general, value-based pronouncements and reasoning, not to be concerned by ‘mere’ or ‘ordinary’ EU law any more? Becoming the guardian of fundamental rights in Europe, entering in a (renewed) human rights dialogue with national constitutional courts and the European Court of Human Rights? Is all that what the EU legal system really needs (today)?

The system of EU law is composed of several constitutional documents (at present essentially the two Treaties and the Charter of Fundamental Rights) and then masses and masses of secondary, often detailed and technical, legislation. Within such a system, the legitimacy for judicial pronouncements has traditionally been based on achieving and maintaining a reasonable degree of *uniform interpretation* of that entire body of law. While, naturally, the protection of fundamental rights acts as a limitation to any and all of those uniformity endeavours today, it has never been the primary aim for cases to come to Luxembourg.⁸⁶

By contrast, human rights protection has been the central job description of national constitutional courts and the European Court of Human Rights. That is, essentially, the foundation for the frequently misunderstood statement that the Court *is not a human rights court*.⁸⁷ That never meant that the Court would not uphold fundamental rights. It just meant that in the structure and logic of the cases coming to Luxembourg, as with the national highest ordinary jurisdictions, fundamental rights have been acting as limits, not as the primary purpose and legitimising element for adjudication.

What work should be entrusted to a ‘constitutional court’ within a system which derives its purpose and legitimacy from securing uniform interpretation of masses and masses of essentially detailed technical secondary legislation? Should the Court gradually delegate (all of) that task to its lower court, the GC, while seeking to wedge

⁸⁶ Ever since the first case came to Luxembourg on preliminary ruling in 1961, that purpose and the stated aim of that procedure has been uniform interpretation of EU law, back then called ‘harmonisation of interpretation – which is the purpose of Article 177’ – cf Case 13/61 *De Geus en Uitdenbogerd v Bosch and Others*, EU:C:1962:11, 51.

⁸⁷ Ex multis, see eg K Lenaerts, ‘The Court of Justice of the European Union and the Protection of Fundamental Rights’ (2011) 31 *Polish Yearbook of International Law* 79, 81: ‘However, from the fact that the Charter is now legally binding does not follow that EU has become a “human rights organization” or that the ECJ has become a “second European Court on Human Rights”’. For a more recent overview of the debates, see A Rosas, ‘The Court of Justice of the European Union: A Human Rights Institution?’ (2022) *Journal of Human Rights Practice* 204.

itself into the already ‘crowded house’⁸⁸ of fundamental rights protection in Europe, where values, emotions, and contestations run higher and higher? Or should the Court be left to focus just on inter-institutional disputes and policing EU competence in abstract terms, making clear the Union is one of values and constitutional principles, but eventually detaching itself from the Member States’ courts and cases?

Such institutional choices are possible, even if, for the reasons just explained, the functional needs of the EU legal system and the ensuing systemic legitimacy for EU Courts lie elsewhere. The question remains whether such institutional choices are equally wise in the Union of today. As to their tone and direction, they are reminiscent of the optimistic, constitutionalising language of the Union of some twenty years ago, but much less so of the present Union covered in self-doubt and facing multiple institutional challenges, including those levied against the Court itself.⁸⁹

Within such an environment, the learned judicial wisdom has been not to underestimate the elegance and strength of seemingly technical solutions to narrowly conceived cases. Their structure is inductive, their logic functional, and the solutions they embrace, even if potentially hiding quite some value choices, are more difficult to contest. The latter statements are bound to be immediately attacked by the (post)critical streams of legal thought, insisting that all of this is just window-dressing hiding the real conflict of values and political convictions, which must be revealed and acknowledged. That is perhaps true and certainly good material for an academic article. But it is quite a different matter for a court to willingly chart a similar path, clamping its legitimising cord to factual and detailed cases that have been providing it with quite some degree of (overall institutional) legitimacy, and instead boldly embarking on the tumultuous sea of abstract values, human rights, general principles, and, in this sense indeed, constitutional adjudication.

⁸⁸ A term first used by Pedro Cruz Villalón when pondering on what new would the EU Charter of Fundamental Rights bring to the (typically already two-layered) protection of human rights in Europe – further on this point, see M Bobek and J Adams-Prassl, *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2021) 3.

⁸⁹ For an overview of the ‘*ultra vires*’ spree and other challenges to the judicial authority of the Court of the last decade coming from various national constitutional and supreme jurisdictions, see M Bobek, ‘Primacy of EU Law in the Age of (Dis)Integration’ (2026) 51 *European Law Review*, forthcoming.

Navigating the Labyrinth of Jurisdiction in Restrictive Measures Cases: *Neves 77 Solutions* (C-351/22)

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ABSTRACT: On 10 September 2024, the ECJ delivered its judgment in Case C-351/22 (*Neves 77 Solutions*). In this case, the Court was confronted with the question whether it has jurisdiction to hear a preliminary reference on the interpretation of a CFSP Decision concerning restrictive measures. While the judgment constitutes an important clarification with regard to the ECJ’s jurisdiction in the area of CFSP matters, it appears that the relevance of the ruling was largely underappreciated when compared to the judgment in Joined Cases C-29/22 P and C-44/22 P (*KS and KD v Council and Others*), which was delivered on the same day. In this annotation, I explore the complex legal questions concerning the Court’s jurisdiction underlying the *Neves 77 Solutions* ruling, discussing both merits and flaws of the judgment. While at first sight *Neves 77 Solutions* might seem relatively unspectacular, I argue that the implications of the judgment are highly significant, particularly in view of the EU’s envisaged accession to the ECHR.

KEYWORDS: CFSP – jurisdiction – carve-out – claw-back – restrictive measures – mutual non-affection clause.

1. Introduction

Does the European Court of Justice (ECJ) have jurisdiction to answer a preliminary reference from a national court asking for an interpretation of a Common Foreign and Security Policy (CFSP) Decision on restrictive measures? As is well-known, the

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jurisdiction of the Union courts in the area of the CFSP is subject to certain limitations. And while studying the text of the Treaties might give the impression to the uninitiated that there is indeed very little role for the Union courts in this policy field, the post-Lisbon case law has significantly narrowed the jurisdictional carve-out for the CFSP and at the same time widened the jurisdictional claw-back in the area of restrictive measures.¹

As far as the latter is concerned, the Court in *Rosneft* ruled that its jurisdiction to rule on restrictive measures against natural or legal persons would not only encompass annulment actions brought in accordance with Article 263(4) TFEU, but also extend to preliminary references on the validity of such restrictive measures.² Only a few years later, the Court in *Bank Refah Kargaran* decided that actions for damages would also be covered by the claw-back provision.³ The question of preliminary rulings on the interpretation of restrictive measures, however, constituted an entirely novel issue that had not arisen until the Regional court of Bucharest issued a preliminary reference of this kind to the ECJ in the case of *Neves 77 Solutions*.⁴

In this case note, I will explore the intricate jurisdictional issues that underlie this seemingly unspectacular and little appreciated case, arguing that there is far more than meets the eye in view of the broader implications of the judgment.

2. Facts of the case and questions referred

In 2019, the Romanian company Neves 77 Solutions acted as an intermediary for a transaction between a Ukrainian and an Indian company involving the delivery of 32 radio sets originally manufactured in Russia.⁵ The Department of Export Control of the Romanian Ministry of Foreign Affairs subsequently informed Neves 77 Solutions that the brokering transaction came within the scope of CFSP Decision 2014/512⁶ concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.⁷ Although Neves 77 Solutions disputed these allegations on

¹ For an overview of the case law see T Giegerich, 'The Rule of Law, Fundamental Rights, the EU's Common Foreign and Security Policy and the ECHR: Quartet of Constant Dissonance?' (2024) 27 *Zeitschrift für Europarechtliche Studien* 590, 607–615. See on the issue of judicial review in the area of the CFSP more generally e.g. P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67 *International & Comparative Law Quarterly* 1; P van Elsuwege, 'Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice' (2021) 58 *Common Market Law Review* 1731.

² Case C-72/15 *Rosneft*, EU:C:2017:236.

³ Case C-134/19 P *Bank Refah Kargaran v Council*, EU:C:2020:793.

⁴ Case C-351/22 *Neves 77 Solutions*, EU:C:2024:723.

⁵ *Ibid* paras 23–24.

⁶ Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

⁷ *Neves 77 Solutions* (n 4) para 25.

legal grounds, the Tax Fraud Department of the Romanian National Tax Administration Agency imposed an administrative fine on Neves 77 Solutions (equal to around 6000 euros) and ordered the full confiscation of the proceeds resulting from the contract with the Ukrainian company (equal to almost three million euros) for infringing Article 2(a) of CFSP Decision 2014/512 (prohibiting the provision of brokering services in relation to military equipment) as well as several provisions of the domestic Decree-Law on the implementation of international sanctions.⁸ Neves 77 Solutions challenged this decision before Romanian courts, arguing that its conduct did not in fact constitute an administrative offence as alleged by the Tax Fraud Department and that, in the alternative, a full confiscation measure would be disproportionate and be in breach of its right to property under Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR).⁹ While the first instance court dismissed the action, the Regional Court of Bucharest decided to refer three questions to the European Court of Justice:

- (1) Can [Decision 2014/512], in particular Articles 5 and 7 thereof, in the light of the [principle] of legal certainty and [the principle that penalties must be defined in law (*nulla poena sine lege*)], be interpreted as permitting (by way of a civil penalty) a national measure authorising the confiscation of the entire proceeds of a transaction, such as the one referred to in Article 2(2)(a) of [Decision 2014/512], in the event that an act categorised by domestic law as a summary offence is found to have been committed?
- (2) Is Article 5 of [Decision 2014/512] to be interpreted as allowing Member States to adopt national measures providing for the automatic confiscation of any proceeds resulting from a breach of the obligation to notify a transaction falling within the scope of Article 2(2)(a) of [Decision 2014/512]?
- (3) Is the prohibition laid down in Article 2(2)(a) of [Decision 2014/512] applicable where goods constituting military equipment, which were the subject of brokering transactions, were never physically imported into the territory of the Member State?¹⁰

3. Opinion of Advocate General Ćapeta

It is worth noting that all post-Lisbon cases concerning the Union courts' jurisdiction in the CFSP so far have been dealt with by different Advocate Generals (AGs). The views expressed in the respective Opinions of the AGs differ greatly, ranging from rather conservative (AG Kokott in *Opinion 2/13*¹¹ and AG Wahl in *H v Council and*

⁸ Ibid paras 26–29.

⁹ Ibid paras 30–32.

¹⁰ Ibid para 33.

¹¹ View of AG Kokott in *Opinion 2/13 ECHR II*, EU:C:2014:2475, paras 185–195.

*Commission*¹²) to fairly nuanced (AG Jääskinen in *Elitaliana v Eulex Kosovo*,¹³ AG Wathelet in *Rosneft*,¹⁴ and AG Bobek in *CSUE v KF*¹⁵) and slightly progressive (AG Hogan in *Bank Refah Kargaran*¹⁶).

AG Ćapeta, who was not only assigned as the AG in *Neves 77 Solutions*, but also in *KS and KD v Council and Others* has advanced the so far most progressive (i.e. least restrictive) interpretation of the carve-out provision enshrined in Article 24 TEU and Article 275(1) TFEU. In her *Opinion in KS and KD v Council and Others* delivered on the same day as in *Neves 77 Solutions*, AG Ćapeta submitted that the carve-out provision could not be interpreted as excluding review of CFSP measures in light of fundamental rights.¹⁷ In her view, only the review of CFSP measures in light of the CFSP provisions enshrined in primary law and the interpretation of CFSP provisions under both primary and secondary law would be excluded from the Union courts' jurisdiction.¹⁸ AG Ćapeta's *Opinion in Neves 77 Solutions* must be read in light of these considerations.

Before taking on the questions referred, the AG thus considered it necessary to reformulate the first and second question as to relate to the interpretation of EU fundamental rights instead of an interpretation of Decision 2014/512. Accordingly, AG Ćapeta reframed the first and second question as asking in essence whether the Romanian confiscation measures were unlawful in light of the principle of legal certainty, the principle of *nulla poena sine lege*, and the right to property.¹⁹ Having found the first two principles not to be relevant to the case, the AG then examined whether Article 17(1) CFR precluded the Romanian confiscation measures in question. She concluded that the confiscation of the proceeds, albeit a limitation of Article 17(1) CFR, was proportionate and thus in accordance with the right to property as enshrined in the Charter.²⁰

Turning to the third question, the AG opined that unlike the first and second question, the third question did not concern an interpretation of the Charter, but was about giving an interpretation to a general provision of a CFSP Decision.²¹ According to the AG, the Court lacks jurisdiction to do so, as the drafters of the Treaties were not willing to give

¹² Opinion of AG Wahl in Case C-455/14 P *H v Council and Commission*, EU:C:2016:212, paras 35–81.

¹³ Opinion of AG Jääskinen in Case C-439/13 P *Elitaliana v Eulex Kosovo*, EU:C:2015:341, paras 16–30.

¹⁴ Opinion of AG Wathelet in Case C-72/15 *Rosneft*, EU:C:2016:381, paras 36–76.

¹⁵ Opinion of AG Bobek in Case C-14/19 P *CSUE v KF*, EU:C:2020:220, paras 51–85.

¹⁶ Opinion of AG Hogan in Case C-134/19 P *Bank Refah Kargaran v Council*, EU:C:2020:396, paras 35–71.

¹⁷ Opinion of AG Ćapeta in Joined Cases C-29/22 P and C-44/22 P *KS and KD v Council and Others*, EU:C:2023:901, paras 111–120.

¹⁸ *Ibid* paras 121–124.

¹⁹ Opinion of AG Ćapeta in Case C-351/22, *Neves 77 Solutions*, EU:C:2023:907, paras 41–51.

²⁰ *Ibid* paras 52–66.

²¹ *Ibid* paras 67–69.

the Court a role in influencing policy decisions in this area.²² While the Court could assess the lawfulness of a CFSP measure as understood by the Council, it was precluded from determining that one of several possible meanings was the correct one. Thus, the notion of ‘brokering services’ pursuant to Article 2(2)(a) of Decision 2014/512 could be given different meanings by different domestic courts.²³

4. Judgment of the Court

In its judgment, the Court recalled that although it did as a general matter not have jurisdiction in the area of the CFSP, pursuant to Article 24(1) TEU and Article 275(2) TFEU there were two exceptions to this limitation: monitoring compliance with Article 40 TEU and reviewing the lawfulness of restrictive measures against natural or legal persons.²⁴ However, given that the latter would only apply in instances of restrictive measures of an individual nature and because Article 2(2)(a) of Decision 2014/512 constituted a general measure, the Court could not rely on the second counter-exception to establish its jurisdiction in this case.²⁵ The Court further recalled that a regulation adopted under Article 215 TFEU giving effect to a CFSP Decision on restrictive measures would come under the full jurisdiction of the Court. In the present case, however, the Council had not implemented the prohibition to provide brokering services laid down in Article 2(2)(a) of Decision 2014/512 by way of a regulation.²⁶

Notwithstanding this fact, the Court stressed that it had full jurisdiction to monitor compliance with Article 40 TEU as the first counter-exception does not require any further conditions to be fulfilled.²⁷ Highlighting the difference in wording between Article 215(1) and (2) TFEU, which requires the adoption of a regulation in cases of general measures, while being optional in the case of individual measures, the Court considered that the Council’s powers under paragraph 1 were ‘circumscribed’. As the Council had failed to implement Article 2(2)(a) of Decision 2014/512 by way of a regulation although it was obligated to do so, the Court considered that in light of Article 40 TEU it would enjoy jurisdiction to give a preliminary ruling for every provision of a CFSP measure that should have been given effect to by a regulation adopted under Article 215(1) TFEU.²⁸

Given that Article 2(2)(a) of Decision 2014/512 constituted a measure aimed at ‘the interruption or reduction, in part or completely, of economic and financial rela-

²² Ibid paras 70–73.

²³ Ibid paras 74–81.

²⁴ *Neves 77 Solutions* (n 4) paras 35–36.

²⁵ Ibid paras 37–38.

²⁶ Ibid paras 39–41.

²⁷ Ibid para 43.

²⁸ Ibid paras 44–54.

tions with a third country’ and that the goods referred to therein fell within the competences of the TFEU, the Court affirmed its jurisdiction to give an answer to the questions referred by the Romanian court.²⁹

Answering the questions referred, starting with the last one, the Court confirmed that the prohibition on providing brokering services pursuant to Article 2(2)(a) of Decision 2014/512 also applied to brokering transactions in which the military equipment concerned did not enter the territory of a Member State.³⁰ Answering the first and second question, the Court found the confiscation of the proceeds not to have violated the right to property pursuant to Article 17(1) CFR nor the principle of legal certainty and the principle that penalties must be defined by law, provided that the provisions under Romanian law were in force at the material time in the main proceedings and that they met the requirements of clarity and foreseeability.³¹

5. Analysis of selected issues concerning the Court’s jurisdiction

5.1. In the shadow: fundamental rights protection as a question of competence

Despite their highly different factual and legal backgrounds, the case of *Neves 77 Solutions* is closely connected to *KS and KD v Council and Others*.³² Both cases were assigned to the Court’s Grand Chamber sitting in the same composition (albeit with different judge rapporteurs) and to the same AG, the oral hearings took place on the same day, and both the AG’s Opinions as well as the Court’s judgments in both cases were delivered on the same day respectively. It is of course not hard to see why the Court chose to deal with these two cases together. With both cases involving questions of EU fundamental rights law and raising novel questions in relation to the jurisdiction in the area of the CFSP, it was virtually impossible to ignore the elephant in the (Court-)room, namely the implications of the two judgments for the EU’s accession to the ECHR.³³

What is striking, however, is that while the judgment in *KS and KD v Council and Others* has attracted much scholarly commentary,³⁴ academic interest in the

²⁹ Ibid paras 55–61.

³⁰ Ibid paras 62–71.

³¹ Ibid paras 72–107.

³² Joined Cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, EU:C:2024:725.

³³ See G Butler, ‘Op-Ed: “Jurisdiction of the EU Courts in the Common Foreign and Security Policy: Reflections on the Opinions of AG Ćapeta in *KS and KD*, and *Neves 77 Solutions*”’ (EU Law Live, 29 November 2023) at eulawlive.com.

³⁴ See e.g. L Lonardo, ‘How the Court Tries to Deliver Justice in Common Foreign and Security Policy, Where the Need for Judicial Protection Clashes with the Principles of Conferral and Institutional Balance. Joined Cases C-29/22 P and C-44/22 P *KS and KD*’ (2024) 9 *European Papers* 830; T Verellen, ‘A Political Question Doctrine for the CFSP: The CJEU’s Jurisdiction in the *KS and KD* Case’ (Verfassungsblog, 24 September 2024) at verfassungsblog.de; A Navasartian Havani, ‘An EU External Relations Political Question Doctrine That Suffers No Human Rights Exception: Joined Cases

Neves 77 Solutions judgment at least so far seems to be largely non-existent.³⁵ Leaving aside the factual aspect that sympathy for a company that has lost its proceeds as a result of having been involved in a forbidden transaction under EU sanctions law is destined to be less pronounced than for individuals who have lost their loved ones to war crimes, I would assume that from a legal perspective the main reason for this relative lack of scholarly interest is that unlike *KS and KD v Council and Others*, *Neves 77 Solutions* only dealt with the interpretation of the claw-back provision, which many scholars presumably regard only as a side issue in the greater scheme of things relating to the Court's jurisdiction in CFSP matters.³⁶

Without a doubt, *KS and KD v Council and Others* is a significant case. The judgment answers some questions and raises a couple of new ones. It does not, however, give a definitive answer to the question whether EU accession to the ECHR will be possible without amending the Treaties, neither in the positive nor in the negative.³⁷ Neither does the judgment in *Neves 77 Solutions*, and yet the outcome of that case – particularly viewed against the Opinion of the AG – is of tremendous importance for keeping the prospects of accession to the ECHR alive.

As summarized above, in her Opinion AG Ćapeta suggested a rather unorthodox solution to the problem of jurisdiction. In her view, the Court would be competent to give a preliminary ruling only in relation to the rights and freedoms enshrined in the Charter of Fundamental Rights, whereas the interpretation of Decision 2014/512 would be off-limits for the Court. What the AG proposed was in essence a decoupling of the interpretation of the Charter rights in question (Questions 1 and 2) from the interpretation of the term 'prohibition on providing brokering services' (Question 3) and only answering the former, while leaving the latter to the domestic courts. AG Ćapeta's Opinion – just like her Opinion in *KS and KD v Council and Others* – appears to be strongly motivated by the intention to pave the way to EU accession to the ECHR.³⁸ Paradoxically, however, it most likely would have done more harm than good had the Court followed her Opinion.

The crucial difference between *KS and KD v Council and Others* and *Neves 77 Solutions* is that in the former case it is the Union institutions which by implementing

C-29/22 P and C-44/22 P *KS and KD* on the Court's Jurisdiction in CFSP Matters' (European Law Blog, 25 September 2024) at www.europeanlawblog.eu; D Genini, 'The Role of the Political Question Doctrine in the EU's CFSP Integration Process' (Preliminary Reference Blog, 20 January 2025) at cjel.law.columbia.edu.

³⁵ But see L Grossio, 'One Step too Far, One Step too Close. The Rocky Road Towards Defining the Scope of Judicial Review in CFSP Matters in Light of *KS and KD v Council and Others* and *Neves 77 Solutions*' (2024) 3 *Rivista del Contenzioso Europeo* 1.

³⁶ I have to admit that this was also my first (erroneous) impression when I first encountered the two cases. See C Breitler, 'Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?' (European Law Blog, 13 October 2022), at www.europeanlawblog.eu.

³⁷ See SØ Johansen, 'The (Im)possibility of a CFSP "Internal Solution"' (2024) 9 *European Papers* 783, 797.

³⁸ AG Ćapeta in *KS and KD v Council and Others* (n 17) para 150.

a CFSP measure were responsible for an alleged infringement of fundamental rights (direct enforcement of EU law), whereas in the latter case the acts in question resulted from actions on the part of a Member State implementing a CFSP measure (indirect enforcement of EU law). While the applicability of the Charter is beyond dispute in a situation like in *KS and KD v Council and Others*, Member States are bound by the Charter only ‘when implementing Union law’ pursuant to Article 51(1) of the Charter. *Lenaerts* and *Gutiérrez-Fons* have popularized the metaphor of the Charter as the ‘shadow’ of EU law to describe this relationship.³⁹

But how do we know whether a Member State is implementing EU law in a given situation? We only know if we interpret the legal act that is supposed to trigger the application of the Charter. And this is precisely the reason why it would have been problematic had the Court followed AG Ćapeta’s proposed solution. In the domestic proceedings before the Romanian courts, which subsequently gave rise to the preliminary ruling, it was called into question whether Neves 77 Solutions’ conduct actually qualified as a violation of the prohibition to provide brokering services enshrined in Article 2(2)(a) of Decision 2014/512. The alleged non-conformity with EU fundamental rights law of the confiscation of the proceeds of that transaction merely constituted an alternative argument. Importantly, however, that alternative argument could only be examined in light of the Charter if Neves 77 Solutions’ conduct was actually covered by the prohibition enshrined in Article 2(2)(a) of Decision 2014/512 as otherwise that conduct and consequently also the sanctioning thereof by the Romanian authorities would not have occurred within the scope of EU law. This is also the reason why the Court considered it ‘appropriate to examine in the first place’⁴⁰ the third question referred before the first and second, as the first and second question were premised on the assumption that the third question was to be answered in the affirmative. Had the Court answered the third question in the negative, then the first and second question would have become obsolete for the simple reason that the transaction in question was outside of Article 2(2)(a) of Decision 2014/512, and the sanctioning of that transaction under domestic law at best would have constituted a form of ‘gold plating’ of Decision 2014/512,⁴¹ which, however, does not trigger Article 51(1) of the Charter.⁴² The only applicable fundamental rights standard in that hypothetical alternative scenario would then have been national constitutional law and the ECHR.

³⁹ K Lenaerts and JA Gutiérrez-Fons, ‘The Place of the Charter in the European Legal Space’ in S Peers, T Herve, J Kenner and A Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2021) 1711, 1713 (para 55.09).

⁴⁰ *Neves 77 Solutions* (n 4) para 62.

⁴¹ Whether such ‘gold plating’ of restrictive measures is actually permissible is in itself a highly controversial question that will not be further examined in this annotation.

⁴² See Joined Cases C-609/17 and C-610/17 *TSN*, EU:C:2019:981, para 53.

Of course, one could argue – in line with what AG Čapeta suggested – that the drafters of the Treaties apparently were willing to accept that one and the same provision of a CFSP measure could be interpreted in different ways by different courts. This is certainly a legitimate way of looking at the ambiguous wording of the carve-out provision enshrined in Article 24(1) TEU and Article 275(1) TFEU. The problem, however, is that this Humpty-Dumpty-approach to the interpretation of a CFSP measure is hard to square with Article 6(1) TEU and Article 51(2) of the Charter, both of which clarify that the Charter must not extend beyond the scope of EU law.⁴³ In other words, Article 51(1) of the Charter requires an *objective* assessment whether a situation falls within or outside the scope of Union law. Thus, while one might accept the argument that the drafters of the Treaties might have been willing to forego a centralized and uniform interpretation of CFSP measures, they clearly did not envisage Article 51(1) of the Charter to serve as an on-and-off switch that domestic courts could trigger as they see fit. A decoupling of the interpretation of the Charter from the interpretation of the underlying provision of a CFSP measure would therefore have created serious tensions with the principle of conferral.⁴⁴

Now what does all of this have to do with the prospects of an EU accession to the ECHR?

Right now, the EU is not (yet) a party to the ECHR. A violation of a Convention right is currently only attributable to the Member States themselves and not to the Union, even in situations in which the Member States are implementing EU law.⁴⁵ After an EU accession to the ECHR, however, the question will arise who incurs responsibility for an alleged violation in situation of indirect enforcement of EU law. To that effect, Article 1(b) of Protocol No. 8 requires that the accession instruments must provide for mechanisms that would guarantee that ‘applications [under the ECHR] are correctly addressed to Member States and/or the Union as appropriate.’ In accordance with this requirement, the Draft Accession Agreement of 2013 (DAA 2013) therefore included two important mechanisms to address the issue of responsibility.

First, there is the co-respondent mechanism, which allows for the EU to join proceedings as a party to the case in applications against one or more Member States before the ECtHR if the compatibility of EU law with the ECHR is called into question, ‘notably where [a violation of the Convention] could have been avoided only by disregarding an obligation under European Union law’.⁴⁶

⁴³ As per usual, there is a lovely German expression for these provisions: *Angstklause* (fear clause). Because the drafters of the Treaties were worried that the Charter might be abused as a potential gateway for competence creep, they chose to insert such clauses into primary law to expressly rule out any such possibility. See H-P Folz, ‘Artikel 51 GR-Charta’ in C Vedder and W Heintschel von Heinegg (eds), *Europäisches Unionsrecht: EUV | AEUV | GRCh | EAGV* (Nomos 2018), 1389, 1392 (para 9).

⁴⁴ As the Court underlined in *KS and KD v Council and Others* (n 32) para 72, the principle of conferral also applies in the context of the CFSP.

⁴⁵ See e.g. *Bivolaru and Moldovan v France*, App nos 40324/16 and 12623/17 (ECtHR, 25 June 2021).

⁴⁶ Article 3(2) DAA 2013/Article 3(2) DAA 2023.

Second, and closely connected to the co-respondent mechanism, there is the prior-involvement mechanism. The prior-involvement mechanism creates a judicial link between Luxembourg and Strasbourg in proceeding to which the EU is a co-respondent in order to allow the ECJ to assess the compatibility of Union law with the Convention in instances where it did not yet have the opportunity to do so.⁴⁷

Both mechanisms still form part of the revised Draft Accession Agreement of 2023 (DAA 2023), albeit with some modifications that were made in order to take account of the incompatibilities with the autonomy of EU law that the Court identified in *Opinion 2/13* with regard to the DAA 2013.⁴⁸ In *Opinion 2/13*, the Court *inter alia* opined that any review with regard to the plausibility of a request to become a co-respondent on the part of the ECtHR as well as the possibility for the ECtHR to depart from the general rule of joint liability for the respondent and the co-respondent would likely affect the division of powers between the EU and its Member States.⁴⁹ Moreover, the Court also opined that the prior involvement mechanism must allow for the interpretation and not just a review of the validity of EU secondary law.⁵⁰ In brief, the way in which these mechanisms were designed in the DAA 2013 would have undermined the Court's jurisdictional and interpretative monopoly over EU law.

Against this backdrop, it is not hard to see why it would have proven rather disastrous for the prospects of EU accession to the ECHR had the Court in *Neves 77 Solutions* declined its jurisdiction for the interpretation of Decision 2014/512. If a restrictive measures case like *Neves 77 Solutions* were to come before the Strasbourg court, it would be necessary to examine whether the conditions for the EU to become a co-respondent to the proceedings are fulfilled. Such a decision, as the ECJ noted in *Opinion 2/13*, 'necessarily presupposes an assessment of EU law.'⁵¹ If the conditions are fulfilled, the EU side will then have to examine whether it is necessary to activate the prior-involvement mechanism, and if that is also the case, then the ECJ will be called upon to rule on the interpretation and/or validity of the provision of EU law that is subject to the proceedings before the ECtHR. Such a ruling allows among other things for the correct interpretation of EU law and as a consequence for a correct attribution of a potential violation of the Convention. If, for example, the ECJ were to find that the EU's decision to join proceedings against a Member State was based on an erroneous interpretation of EU law, it will become necessary to terminate the co-respondent mechanism in light of this finding. If the ECJ was barred

⁴⁷ Article 3(6) DAA 2013/Article 3(7) DAA 2023.

⁴⁸ For comprehensive analyses of the revised DAA 2023 see e.g. P Gragl, 'The New Draft Agreement on the EU Accession to the ECHR: Overcoming Luxembourg's Threshold' (2025) 6 *European Convention on Human Rights Law Review* 39; J Krommendijk, 'EU Accession to the ECHR: Completing the Complete System of EU Remedies?' in M Fink (ed) *Redressing Fundamental Rights Violations by the EU: The Promise of the 'Complete System of Remedies'* (Cambridge University Press 2024) 177.

⁴⁹ *Opinion 2/13 ECHR II*, EU:C:2014:2454, paras 218–225 and 229–234.

⁵⁰ *Ibid* paras 242–247.

⁵¹ *Ibid* para 221.

from making such an interpretation in relation to a CFSP Decision imposing restrictive measures, then it would be exclusively for the ECtHR to interpret such a CFSP measure, which obviously would run counter to the autonomy of EU law.

Some might object that such concerns seem overblown in the context of a case like *Neves 77 Solutions*. After all, while the interpretation of ‘providing brokering services’ indeed requires an interpretation of Article 2(2)(a) of Decision 2014/512, it was undisputed that the policy of confiscating the proceeds of a prohibited transaction did not result from Decision 2014/512, but from the specific implementing measures Romania undertook under its domestic law to give effect to the prohibitions laid down in that Decision.⁵² While I am willing to concede that in *Neves 77 Solutions* it was easy to separate the normative content of the EU legal act in question from the conduct of the Member State acting as a decentralized enforcer of that legal act, this does not alter anything with regard to the analysis made above. First, not all cases will be that clear-cut when it comes to determining whether a potential violation of a Convention right results directly from the CFSP Decision itself or is the consequence of the way the measure is implemented by a Member State. Second, the wording of Article 3(2) of the DAA 2013/DAA 2023 suggests that the EU would become a co-respondent to the proceedings against a Member State ‘*notably* where that violation could have been avoided only by disregarding an obligation under European Union law.’⁵³ Although subject to considerable debate among scholars,⁵⁴ the way I read this provision is that the co-respondent mechanism may also apply outside the narrow situation in which a Member State has virtually no discretion whatsoever when implementing an act of EU secondary law. While unfortunately neither the Draft Accession Agreement itself nor the Explanatory Report enlighten us as to the situations in which it may occur that despite room for discretion recourse to the co-respondent mechanism would be conceivable, it is certainly within the realms of possibility that a case like *Neves 77 Solutions* would raise an issue that could trigger the co-respondent mechanism as well as the prior-involvement mechanism.

By deciding *Neves 77 Solutions* the way the Court did, the gaps in the protection of fundamental rights as far as the issue of restrictive measures is concerned have been drastically reduced, if not closed altogether. Restrictive measures of general application are subject to the full jurisdiction of the Union Courts with regard to the regulation adopted on the basis of Article 215(1) TFEU, or – if the Council has failed to adopt such a regulation – based on Article 275(2) TFEU in conjunction with Article 40 TEU

⁵² See Opinion of AG Ćapeta in *Neves 77 Solutions* (n 19) para 42.

⁵³ Emphasis added.

⁵⁴ While P Gragl, ‘A Giant Leap for European Human Rights? The Final Agreement on the European Union’s accession to the European Convention on Human Rights’ (2014) 51 *Common Market Law Review* 13, 34 considers the non-discretion situation to be the exclusive trigger for the co-respondent mechanism, C Eckes, ‘EU Accession to the ECHR: Between Autonomy and Adaptation’ (2013) 76 *The Modern Law Review* 254, 268 and T Lock, ‘The EU before the European Court of Human Rights after Accession’ in S Douglas-Scott and N Hatzis (eds) *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017) 226, 232, by contrast, interpret the provision more broadly.

with regard to the CFSP Decision itself to the extent that a provision falls within the scope of the TFEU. Restrictive measures of an individual nature are subject to the jurisdiction of the Union Courts where the Council has chosen to implement them by way of a facultative regulation based on Article 215(2) TFEU, or with regard to the CFSP Decision itself in the context of annulment actions, action for damages, and preliminary rulings on the validity of such restrictive measures.

Nonetheless, some questions remain.

For one thing, the Union courts' jurisdiction for restrictive measures of general application only covers those measures that substantively fall within the scope of the TFEU. But what if a measure of general application cannot be transposed by way of a regulation because it contains elements that fall outside of the scope of the TFEU and therefore can only be given effect through measures adopted under the domestic law of the Member States? From a practical point of view, such a scenario is very unlikely to occur. Prior to the judgment in *Neves 77 Solutions*, the prime example of restrictive measures of general application that were not implemented by a regulation were arms embargos. The mistaken assumption that such measures would fall outside the TFEU, however, was corrected by the Court in *Neves 77 Solutions*. It thus seems that as a matter of fact there are no elements left in the context of restrictive measures of general application which would not have to be transposed by way of a regulation.⁵⁵ Nonetheless, a hypothetical risk that such a situation may arise persists.

The other blind spot that is still left is whether the claw-back provision also grants the Court jurisdiction to decide on a preliminary ruling on the interpretation of restrictive measures which are of an individual nature and which are contained in a CFSP Decision itself. I think, however, it is safe to assume that in this case we are dealing with a 'known unknown' and that the Court would also have jurisdiction to hear such a case. Although there is no definitive statement from the Court in this regard, AG Wathelet has already addressed this question in his Opinion in *Rosneft*, arguing that if the Court was competent to decide on the broader question of validity, it must all the more be competent to give a preliminary ruling on the interpretation of a CFSP Decision.⁵⁶ By way of a constitutionally conforming interpretation the annulment or invalidation of a CFSP Decision could thus be avoided if that Decision was given a meaning that was in conformity with the rights enshrined in the Charter. AG Wathelet's argument is persuasive and it is fair to assume that the Court would ultimately follow this line of reasoning.⁵⁷

⁵⁵ Entry bans, which are also typical examples of measures that are not transposed by way of a regulation, are of an individual nature.

⁵⁶ Opinion of AG Wathelet in *Rosneft* (n 14) paras 73–76.

⁵⁷ AG Wathelet's considerations were also endorsed in the Opinion of AG Sharpston in Case C-158/14 *A and Others*, EU:C:2016:734, para 90.

5.2. Categorization of restrictive measures: binary constitutional choices meet complex political realities

The Union's constitutional framework distinguishes between two types of restrictive measures: restrictive measures of general application on the one hand, and restrictive measures of an individual nature on the other hand. That distinction bears legal significance for a number of reasons. First, for restrictive measures of general application, the adoption of a Council regulation is obligatory, whereas in the case of restrictive measures of an individual nature, the adoption of such a regulation is merely optional.⁵⁸ Second, the question whether restrictive measures are of a general or an individual nature affects the standard of judicial review. While the Council is given a larger degree of discretion in cases concerning restrictive measures of general application, the level of scrutiny is stricter when it comes to restrictive measures targeting natural or legal persons.⁵⁹ Third, and most relevantly in the context of *Neves 77 Solutions*, the qualification of restrictive measures as either being of a general or an individual character affects the jurisdiction of the Union courts as far as the application of the carve-out provision pursuant to Article 275(2) TFEU is concerned. While the review of compliance with Article 40 TEU is not subject to any specific conditions, the review of CFSP decisions on restrictive measures is limited to those of an individual nature. Restrictive measures of a general nature are, by contrast, excluded from the jurisdiction of the Union courts.⁶⁰

As the Court found Article 2(2)(a) of Decision 2014/512 to be of general application, its jurisdiction in any event (i.e. regardless of whether preliminary rulings on interpretation are permissible under that provision) could not be based on the second counter-exception to the carve-out provision of Article 275(1) TFEU. Nonetheless, I still consider it worthwhile to reflect on the question whether the conclusion that the prohibition on providing brokering services as laid down in Article 2(2)(a) of Decision 2014/512 constituted restrictive measures of general application was indeed inevitable.

In its judgment, the Court did not spend many words on the issue. It merely stated in a single paragraph that 'the scope of [Article 2(2)(a) of Decision 2014/512] is defined by reference to objective criteria, not to identified natural or legal persons' and that therefore the prohibition on providing brokering services 'is, in any event, a measure of general scope that does not come within the scope of a restrictive measure under the second paragraph of Article 275 TFEU'.⁶¹ It is thus the definition by reference to 'objective criteria' which renders a provision of a CFSP decision on restrictive measures to be of general application and as a consequence outside the jurisdiction of the Court.

⁵⁸ *Neves 77 Solutions* (n 4) para 46. See also Opinion of AG Wathelet in *Rosneft* (n 14) para 72.

⁵⁹ Case T-65/18 *RENV Venezuela v Council*, EU:T:2023:529, para 29.

⁶⁰ *Rosneft* (n 2) para 103 by reference to Joined Cases C-478/11 P to C-482/11 P *Gbagbo and Others v Council*, EU:C:2013:258, para 57.

⁶¹ *Neves 77 Solutions* (n 4) para 38.

The way in which drafters of the Treaties framed the difference between restrictive measures of general application and those of an individual nature is that of a binary logic, a choice of either/or: On the one hand, there are – in the words of Article 215(1) TFEU – CFSP decisions which provide ‘for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries’. On the other hand, there are CFSP decisions imposing restrictive measures ‘against natural or legal persons and groups or non-State entities’ (Article 215(2) TFEU). In practice, however, matters are more complicated than that. The way in which restrictive measures are designed often times fails to reflect the clear-cut differentiation the drafters apparently had in mind.⁶²

Decision 2014/512 illustrates this complexity quite well. Decision 2014/512 is not as such aimed at the interruption or reduction of economic and financial relations with Russia, nor does it exclusively target natural or legal persons. This ambiguity is reflected in the legal basis of Regulation 833/2014⁶³ (giving effect to Decision 2014/512 within the framework of the TFEU), which does not clearly attribute Regulation 833/2014 to either paragraph 1 or 2 of Article 215 TFEU, but instead refers generically to Article 215 TFEU without further distinction.⁶⁴

Even if one looks at each provision of Decision 2014/512 independently, it appears challenging to determine whether a certain measure is of a general or of an individual character. The reason for this lack of clarity is that not only do CFSP Decisions as a whole escape a clear categorization in line with the structure of Article 215 TFEU, but also the measures themselves are not drafted in a way that strictly follows the predefined constitutional dichotomy of embargo measures versus measures against natural or legal persons. Various measures imposed by Decision 2014/512 are of a ‘hybrid’ nature, combining sector-specific restrictive measures relating to goods or services with a particular personal(-ized) element.⁶⁵

The assessment whether a provision is of individual or of general application must therefore always be conducted on a case-by-case basis. But based on what criteria?

Based on an analysis of the case law until 2018, Heliskoski concluded that ‘the notion of restrictive measures against natural or legal persons within the meaning of the second paragraph of Article 275 TFEU is to be understood as covering measures

⁶² L. Lonardo, *EU Common Foreign and Security Policy after Lisbon: Between Law and Geopolitics* (Springer 2023) 112 also observed that ‘this distinction is more blurred in practice.’

⁶³ Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

⁶⁴ See NF Ehlotzky, ‘Die Friedens- und Krisenmanagementpolitik der Europäischen Union unter besonderer Berücksichtigung der restriktiven Maßnahmen angesichts der Lage in der Ukraine’, in H-P Folz, H Isak and AJ Kumin (eds) *Homogenität und/oder Desintegration? Beiträge zum 15. Österreichischen Europarechtstag 2015* (Facultas 2017) 105, 129-131; C Eckes, ‘EU Restrictive Measures against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions’ (2014) 51 *Common Market Law Review* 869, 880.

⁶⁵ Ehlotzky (n 64) 131: ‘Kombination von güter- und personenbezogenen Maßnahmen’.

targeting identified natural or legal persons, in practice, entities individually named in the provisions of the act concerned.⁶⁶ *A contrario* it would follow that all other restrictive measures are of general application. This conception, which in the ECJ's case law finds particular support in the *Rosneft* judgment,⁶⁷ certainly explains why the Court in *Neves 77 Solutions* found Article 2(2)(a) of Decision 2014/512 not to be of an individual character.

The case law of the General Court (EGC) on the differentiation between restrictive measures of an individual and of a general nature is more extensive than the ECJ's case law on that matter. And while the EGC's case law falls mostly in line with the ECJ's approach adopted in *Rosneft*,⁶⁸ there are some notable and also some rather confusing elements in the former's case law.

For one thing, in a number of cases the EGC has ruled that a provision was not of an individual nature despite the fact that it referred to natural or legal persons listed in an annex to a particular CFSP Decision.⁶⁹ The reason for this categorization as measures of general application was that even though certain persons were identifiable through their listing in the annex, the listing itself related to 'a category of persons envisaged in a general and abstract manner'.⁷⁰ Moreover, in two relatively recent cases, the EGC not only made the question of general-versus-individual dependent on the question whether a particular natural or legal person could be identified, but differentiated – within one and the same provision – based on the identity of the applicant in the respective context.⁷¹

I would respectfully submit that the EGC's approach is not particularly convincing and is making matters unnecessarily complicated. In particular, the approach taken in the latter two cases mentioned above seems to be at odds with the wording of Article 275(2) TFEU, which only speaks of 'decisions providing for restrictive measures against natural or legal person'. The fact that Article 275(2) TFEU makes

⁶⁶ See J Heliskoski, 'Made in Luxembourg: The Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy' (2018) 2 *Europe and the World: A Law Review* 1, 13.

⁶⁷ *Rosneft* (n 2) paras 94–107. The ECJ had previously considered the question of the general or individual nature of restrictive measures in *Gbagbo and Others v Council* (n 60) paras 53–59 and Case C-200/13 P *Council v Bank Saderat Iran*, EU:C:2016:284, paras 118–123, albeit not in the specific context of Art 275(2) TFEU.

⁶⁸ See e.g. Cases T-735/14 and T-799/14 *Gazprom Neft v Council*, EU:T:2018:548, paras 53–62; Case T-233/22 *Isentyeva v Council*, EU:T:2023:828, paras 21–30; Case T-258/22 *BSW - management company of "BMC" holding v Council*, EU:T:2024:150, paras 23–27; Case T-259/22 *Mostovdrev v Council*, EU:T:2024:151, paras 22–26.

⁶⁹ Case T-67/12 *Sina Bank v Council*, EU:T:2014:348, paras 38–40; Case T-68/12 *Hemmati v Council*, EU:T:2014:349, paras 31–33; Case T-10/13 *Bank of Industry and Mine v Council*, EU:T:2015:235, paras 27–30; Joined Cases T-14/14 and T-87/14 *Islamic Republic of Iran Shipping Lines and Others v Council*, EU:T:2017:102, paras 37–39.

⁷⁰ *Bank of Industry and Mine v Council* (n 69) para 28.

⁷¹ Case T-235/22 *Russian Direct Investment Fund v Council*, EU:T:2024:311, paras 22–27; Case T-307/22 *A2B Connect and Others v Council*, EU:T:2025:331, paras 25–32.

no reference to the identity of an applicant indicates that the provision does not entail a subjective element, but that the notion of ‘natural or legal persons’ is to be understood in strictly objective terms. That Article 275(2) TFEU requires that proceedings be ‘brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty’ only alludes to the fact that the second counter-exception enshrined in Article 275(2) TFEU serves to protect the rights of individuals. Moreover, in *Rosneft*, the ECJ rejected the argument submitted by the Commission that the Court would only have jurisdiction to give a preliminary ruling on the validity of a CFSP Decision imposing restrictive measures if the applicant in the main proceedings fulfilled the conditions laid down in Article 263(4) TFEU.⁷² If, however, Article 275(2) TFEU were to be interpreted so narrow as to mean that the Court would only have jurisdiction to hear a case where the applicants themselves are identified in the text of a provision or an annex, then this would imply the introduction of the *Plaumann* test through the backdoor of jurisdiction. It appears that the approach adopted by the EGC leads to a problematic conflation of questions relating to the jurisdiction and questions dealing with the admissibility of an action. While questions of direct and individual concern play a role in the context of admissibility for actions for annulment, they should be irrelevant for the issue jurisdiction, irrespective of the type of proceedings.

Yet, even if one accepts the argument that this overly narrow subjective differentiation between measures of individual and general application is incorrect, we should still be critical and ask whether the ‘conventional’ approach endorsed by the ECJ, namely distinguishing between measures of general and individual application based on the identification of a particular natural or legal person, might not be too restrictive either. If one considers the wording of Article 275(2) TFEU, it is not self-explanatory at all that ‘restrictive measures against natural or legal persons’ necessarily would have to be understood in the sense that an individual natural or legal person is identifiable. Instead, one could also read ‘restrictive measures against natural or legal persons’ as restrictive measures being intended to have an adverse legal effect on natural or legal persons, which in the context of *Neves 77 Solutions* arguably would have brought Article 2(2)(a) of Decision 2014/512 within the meaning of a restrictive measure of an individual application.

One may of course ask why these considerations should matter that much. After all, from the perspective of effective judicial protection it should be irrelevant whether we are dealing with a measure of general application, which comes within the jurisdiction of the Union courts by way of a regulation adopted under Article 215(1) TFEU (or, absent of which, based on Article 40 TEU) or a measure of an individual nature, for which the second counter-exception permits access to the Union courts under certain procedural conditions. However, restrictive measures of general application can only be adopted by way of a regulation and thus will only come within the jurisdiction

⁷² See *Rosneft* (n 2) para 59.

of the Union courts under the condition that they substantively fall within the scope of the TFEU.⁷³ As already elaborated above, although highly unlikely it cannot be categorically ruled out that some restrictive measures of general application contained in a CFSP Decision fall outside the scope the TFEU and thus can only be implemented by the Member States.

I want to make clear that I am not suggesting that the conclusion at which the Court arrived in *Neves 77 Solutions* by categorizing Article 2(2)(a) of Decision 2014/512 as a measure of general application is wrong. Albeit accompanied by relatively little additional reasoning, that conclusion is rooted in precedent from previous case law. But if we take the promise of effective judicial protection against restrictive measures seriously, then perhaps it is warranted to adopt a slightly broader understanding of what may constitute ‘restrictive measures against natural or legal persons’ to prevent any risk of gaps in the system of judicial protection from arising.⁷⁴ In any event, more clarity (i.e. a more refined methodology) when it comes to the criteria for differentiating between measures of general application and measures of an individual nature would be more than welcome, particularly in cases where that distinction may have a decisive impact on the question of jurisdiction.

5.3. The comeback of Article 40 TEU: a missed opportunity?

Article 40 TEU, referred to as the ‘mutual non-affection clause’,⁷⁵ requires a strict separation of Union competences exercised under the TFEU, and the implementation of the CFSP. One could be inclined to assume that Article 40 TEU should play a central role in the EU’s post-Lisbon constitutional edifice. However, the actual track-record of the provision in the Court’s case law looks rather bleak.

In a number of interinstitutional litigations involving questions relating to the correct choice of legal bases and the demarcation of the CFSP and non-CFSP policies, the Court either chose to ignore Article 40 TEU altogether,⁷⁶ or, where it did refer to Article 40 TEU, only did so in a way which ‘gave the impression of being mere lip service’.⁷⁷

⁷³ *Neves 77 Solutions* (n 4) paras 55–57.

⁷⁴ See in this regard ‘Declaration on Articles 75 and 215 of the Treaty on the Functioning of the European Union’ (Declaration No 25).

⁷⁵ See e.g. S Griller, ‘The Court of Justice and the Common Foreign and Security Policy’ in A Rosas, E Levits and Y Bots (eds) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de Justice et la Construction de l’Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (Asser Press/Springer Verlag 2013) 675, 683; C Eckes, ‘The CFSP and Other EU Policies: A Difference in Nature?’ (2015) 20 *European Foreign Affairs Review* 525, 538.

⁷⁶ See Case C-130/10 *Parliament v Council*, EU:C:2012:472; Case C-658/11 *Parliament v Council*, EU:C:2014:2025; Case C-244/17 *Commission v Council*, EU:C:2018:662; Case C-180/20 *Commission v Council*, EU:C:2021:658.

⁷⁷ S Hummelbrunner, ‘From Small Arms and Light Weapons to Pirate Transfer Agreement with Tanzania. The Impact of Articles 21(2) and 40 TEU on the Choice of the Appropriate Legal Basis’

In *Rosneft*, the ECJ was confronted with the question whether the EU position on restrictive measures laid down in Decision 512/2014 was defined ‘in excessive detail’ and thus encroached ‘on the joint power of proposal of the High Representative [...] and the Commission.’⁷⁸ The Court dismissed this argument, reasoning that although a CFSP Decision adopted pursuant to Article 29 TEU and a regulation adopted on the basis of Article 215 TFEU had different functions, a high level of detailedness of the CFSP Decision could not be regarded as an intrusion into to the non-CFSP procedure under Article 215 TFEU ‘when the measures relate to a field where there is a degree of technicality’⁷⁹. The Court also rejected the argument that the measures laid down in Decision 512/2014 would in fact constitute ‘legislative acts’ and therefore infringe upon Article 40 TEU.⁸⁰

In addition to the litigation brought before the ECJ, Article 40 TEU was also invoked in a number cases before the General Court, however, to no avail.⁸¹

Remarkably, *Neves 77 Solutions* is thus the first post-Lisbon case in which the mutual non-affection clause actually proved decisive for the outcome of a case. And yet, the way in which the Court relied on Article 40 TEU – based on a purely formalistic instead of a substantive line of reasoning – is rather disappointing and in my view a missed opportunity for clarifying the boundaries between the CFSP Decision pursuant to Article 29 TEU, and the regulation adopted on the basis of Article 215 TFEU.

To illustrate what I mean by this, it is helpful to reconstruct the reasoning which the ECJ employed to justify its jurisdiction to interpret Article 2(2)(a) of Decision 2014/512. The Court’s reasoning essentially rests on three premises: (1) that unlike in the second alternative of the claw-back provision, there are no specific procedural conditions that need to be fulfilled when reviewing compliance with Article 40 TEU,⁸² (2) that a regulation under Article 215(1) TFEU, whose adoption by the Council is obligatory, is subject to the full jurisdiction of the Court,⁸³ and (3) that the Court’s jurisdiction to conduct judicial review cannot be negatively affected by the classification, nature, or form of a legal act.⁸⁴

Based on these premises, the ECJ developed the following rationalization to justify the interpretation of a restrictive measure of a general nature enshrined in a CFSP decision: The Court is generally barred from giving an interpretation to Article 2(2)(a) of Decision 2014/512 because the provision does not constitute a restrictive measure against natural or legal persons pursuant to Article 275(2) TFEU.

(2019) 74 *Zeitschrift für öffentliches Recht* 267, 285 by reference to Case C-263/14 *Parliament v Council*, EU:C:2016:435.

⁷⁸ *Rosneft* (n 2) para 84.

⁷⁹ *Ibid* para 90.

⁸⁰ *Ibid* paras 91–92.

⁸¹ See e.g. Case T-635/22 *Fridman and Others v Council*, EU:T:2024:620, paras 86–96; Case T-644/22 *Timchenko and Timchenko v Council*, EU:T:2024:621.

⁸² *Neves 77 Solutions* (n 4) paras 43–45.

⁸³ *Ibid* para 46.

⁸⁴ *Ibid* para 47.

By contrast, the Court has full jurisdiction to interpret a regulation adopted on the basis of Article 215(1) TFEU which seeks to give effect to these measures. Because the Council failed to implement the prohibition to provide brokering services enshrined in Article 2(2)(a) of Decision 2014/512 by way of a regulation adopted on the basis of Article 215(1) TFEU even though it would have been required to do so, the Court must treat Article 2(2)(a) of Decision 2014/512 *as if* it was a regulation adopted under Article 215(1) TFEU for which it enjoys full jurisdiction and not as a provision adopted under the CFSP.

The first and the second premise are fairly uncontroversial. Both the lack of procedural conditions for exercising jurisdiction to review compliance with Article 40 TEU as well as the Court's full jurisdiction to review regulations adopted on the basis of Article 215 TFEU have been confirmed by the Court in *Rosneft*.⁸⁵ By contrast, the premise that 'the power of judicial review [...] is not limited by the classification, nature or form'⁸⁶ of an act intended to produce legal effects on third parties requires a more in-depth analysis. Although that premise is also rooted in precedent – the Court cites *ERTA*⁸⁷ and the *Seat of the European Labour Authority*⁸⁸ case in this regard –, I would carefully suggest that reference to these judgments is somewhat misplaced in this particular context. Cases like *ERTA* and *Seat of the European Labour Authority* were concerned with situations in which a decision taken by the Member States should in fact have been taken by the Community/Union institutions. This is clearly different from the situation which gave rise to the judgment in *Neves 77 Solutions*, in which in a two-step procedure on the EU level the final step was simply not completed – intentionally, as we know from the oral hearing.⁸⁹ The real issue here is therefore not so much the correct authorship of Decision 2014/512, which is undisputed, but rather the question about the relationship between a CFSP Decision pursuant to Article 29 TEU and a regulation adopted on the basis of Article 215(1) TFEU and the consequences of a failure to adopt a regulation pursuant to Article 215(1) TFEU.

When considering potential consequences of such failure, the first and most obvious one which comes to my mind is that direct effect would be precluded. While a regulation is – in the words of Article 288 TFEU – 'binding in its entirety and directly applicable in all Member States', a CFSP Decision imposing restrictive measures not directed against natural or legal persons must be implemented by way of a regulation pursuant to Article 215(1) TFEU. As the doctrine of direct effect presupposes that a norm must be unconditional as well as sufficiently precise to be relied upon

⁸⁵ *Rosneft* (n 2) paras 62–63 and 106.

⁸⁶ *Neves 77 Solutions* (n 4) para 47.

⁸⁷ Case 22/70 *Commission v Council*, EU:C:1971:32, paras 40, 42 and 55.

⁸⁸ Case C-743/19 *Parliament v Council*, EU:C:2022:569, para 36.

⁸⁹ See Opinion of AG Ćapeta in *Neves 77 Solutions* (n 19) paras 37–39.

before national courts, failure to transpose restrictive measures of a general nature by way of a regulation would in principle stand in the way of such unconditionality.⁹⁰

While in *Neves 77 Solutions*, the question of direct effect ultimately was not relevant because Romania undertook implementing measures under its domestic law to give effect to Decision 512/2014, it would be misguided to presume that this would make reflections about the relationship between the CFSP Decision based on Article 29 TEU and the regulation adopted under Article 215(1) TFEU obsolete.

One way of looking at the relationship would be to regard it as a two-step composite procedure consisting of a CFSP and a non-CFSP part. The adoption of a regulation under Article 215(1) TFEU, ‘which serves as a bridge between the objectives of the [TEU] in matters of the CFSP and the actions of the Union involving economic measures falling within the scope of the [TFEU]’⁹¹ would thus constitute the second and final step in the procedure for the adoption of restrictive measures of general application at the EU level. As an ‘umbrella competence’ comparable e.g. to Article 217 TFEU,⁹² the regulation would cover every aspect of the CFSP Decision which falls within a competence conferred upon the Union by the TFEU. Importantly, under this conception both steps would constitute essential parts of the law-making procedure at the Union level, while certain implementing measures would still be for the Member States to take. Such a conceptualization, however, raises a number of questions when applied to the context of *Neves 77 Solutions*.

In particular, if the procedure for the adoption of restrictive measures of a general nature is obligatorily to be completed on the Union level, on what basis did Romania transpose the prohibition to provide brokering services into its domestic law? This question is especially relevant given that the Court held that ‘trade in [...] weapons, equipment and services [referred to in Article 2(2)(a) of Decision 2014/512] falls within the remit of the European Union under Articles 114 and 207 TFEU.’⁹³ If, however, the transaction in question at least in part falls within the common commercial policy, how could Romania then adopt legally binding acts in this field without infringing the EU’s exclusive competence pursuant to Article 3(1)(e) TFEU?⁹⁴ If we consider the adoption of a regulation under Article 215(1) TFEU as a form of law-

⁹⁰ Even if one were to take the position that the criterion of unconditionality would be satisfied by way of an unconditional obligation of result (see e.g. Case C-530/23 *Baralo*, EU:C:2025:322, para 83), direct effect would still be precluded in a situation in which the CFSP Decision were to be invoked to the detriment of an individual such as *Neves 77 Solutions*. See by analogy for the direct effect of directives e.g. Case C-630/23 *AxFina Hungary*, EU:C:2025:302, para 84.

⁹¹ *Rosneft* (n 2) para 89; *Neves 77 Solutions* (n 4) para 45.

⁹² In the same way as Article 217 TFEU allows for the EU to enter into ‘commitments towards third countries in all the fields covered by the TFEU’ (Case C-479/21 PPU *Governor of Cloverhill Prison and Others*, EU:C:2021:929, para 57), a regulation adopted on the basis of Art 215 TFEU must (para 1) or may (para 2) cover all aspects of the underlying CFSP Decision which fall within the scope of the TFEU.

⁹³ *Neves 77 Solutions* (n 4) para 57.

⁹⁴ See in this regard e.g. Case C-652/22 *Kolin İnşaat Turizm Sanayi ve Ticaret*, EU:C:2024:910, para 62.

making, then the only possible way in which Romania could do so would be as a trustee of the Union interest.⁹⁵ However, it is highly dubious whether in the post-Lisbon Treaty framework such trusteeship could be assumed on a unilateral basis given that Article 2(1) TFEU requires that the Member States must be ‘empowered by the Union’ if they want to adopt legally binding acts in a field of exclusive Union competences.⁹⁶ But even if one were to accept that under exceptional circumstances this was still a possibility for the Member States also in the absence of an express authorization, it is obvious that in *Neves 77 Solutions* the necessary conditions for such unilateral conduct were not fulfilled.⁹⁷ First, the Council’s inactivity was not caused by an inability to act but was a deliberate choice. Second, Article 215(1) TFEU does not provide for a fixed time limit within which the Council would have to adopt its regulation. Third, there are no indications that Romania would have informed the Commission of its intention to adopt legally binding acts in the field of the common commercial policy.

Another – different – way of looking at the relationship, however, would be to treat the adoption of the regulation pursuant to Article 215(1) TFEU itself as an implementing measure.⁹⁸ While it is as a general rule for the Member States to implement binding acts of EU law in accordance with Article 291(1) TFEU, Article 291(2) TFEU recognizes that ‘[w]here uniform conditions for implementing legally binding Union acts are needed’, such implementing measures could be adopted by the institutions. Thus, one could argue that Article 215 TFEU serves as a *lex specialis* to Article 291(2) and (3) TFEU in the context of restrictive measures of general application. The way in which the Court characterizes Article 215 TFEU seems to lend support to this conceptualization, as it has described the function of Article 215 TFEU as ‘to give effect to restrictive measures where such measures fall within the scope of the [TFEU], and, in particular, to ensure their uniform application in all the Member States.’⁹⁹ But then again, one could ask how a Member State such as Romania could lawfully take implementing measures with regard to restrictive measures where the Council has failed to adopt a regulation which is supposed ‘to ensure their uniform application’. While Article 2(1) TFEU expressly allows for the adoption of legally binding acts by the Member States ‘for the implementation of Union acts’ also in an area of exclusive Union competence, the fact that the constitutional framework mandates the adoption of a regulation pursuant to Article 215(1) TFEU to guarantee uniform conditions for the application of restrictive measures of a general nature puts a huge question mark on the permissibility of any individual implementing measures taken by the Member States in the absence of such a Council regulation precisely because such measures would fail to provide the uniformity that a regulation is supposed to ensure.

⁹⁵ See Case 804/79 *Commission v United Kingdom*, EU:C:1981:93, para 30.

⁹⁶ See Case C-24/20 *Commission v Council*, EU:C:2022:911, paras 100–103.

⁹⁷ See Case 174/84 *Bulk Oil v Sun International*, EU:C:1986:60, para 56.

⁹⁸ See in support of this conception also Case C-440/14 P *National Iranian Oil Company v Council*, EU:C:2016:128, paras 37–41 in relation to restrictive measures of an individual nature.

⁹⁹ *Rosneft* (n 2) para 89.

Against this backdrop, I argue that the approach taken by the Court with regard to the relationship between the CFSP Decision pursuant to Article 29 TEU and the Council regulation to be adopted under Article 215(1) TFEU as well as the role ascribed to Article 40 TEU is not particularly convincing. What would have been more compelling is in my view a clear substantive demarcation between CFSP and non-CFSP policies instead of a purely formalistic argument to justify the ECJ's jurisdiction.

Restrictive measures of an individual nature (i.e. listings of natural or legal persons) are by their very nature of such specificity to be inclined to produce legal effects vis-à-vis the listed individuals, which may also help explain why the adoption of a regulation under Article 215(2) TFEU is a purely facultative measure and why the second counter-exception under Article 275(2) TFEU grants the Union courts jurisdiction only for this particular type of restrictive measures.¹⁰⁰ By contrast, it can be argued that the rationale behind the obligatory adoption of a regulation on the basis of Article 215(1) TFEU for restrictive measures of general application is that the general definition of an 'approach of the Union to a particular matter of a geographical or thematic nature' does not necessarily imply that the specifics under which such restrictive measures may take effect vis-à-vis natural or legal persons are laid down in sufficient detailedness and therefore will most likely require further steps on the Union level by way of a regulation, which then as a result also come under the full jurisdiction of the Union courts. Although the Court in *Rosneft* has accepted a high degree of detailedness of the CFSP Decision adopted on the basis of Article 29 TEU itself, it has also indicated that the CFSP Decision and the Council regulation fulfil two different functions,¹⁰¹ and in *Bank Refah Kargaran* the Court has confirmed that CFSP Decisions and regulations under Article 215 TFEU 'may not be substantively identical'.¹⁰² The Court thus could have built on these arguments and set out in greater detail what the content of the CFSP Decision imposing restrictive measures of general application is supposed to be and what is to be laid down in the regulation to be adopted on the basis of Article 215(1) TFEU instead of rubberstamping the currently prevailing 'copy-and-paste' approach in the field of restrictive measures.¹⁰³ After all, the 'bridge metaphor' that the Court has used to describe the role and function of Article 215 TFEU only makes sense if the two ends that need to be connected are actually located on different sides – not only formally, but also in substance. Failure to respect this functional demarcation should consequently be regarded as a substantive infringement of Article 40 TEU.

¹⁰⁰ See Case T-256/11 *Ezz and Others v Council*, EU:T:2014:93, paras 41–42.

¹⁰¹ *Rosneft* (n 2) para 90.

¹⁰² *Bank Refah Kargaran v Council* (n 3) para 41.

¹⁰³ See F Erlbacher and T Ramopoulos, 'Article 215 TFEU' in M Kellerbauer, M Klamert and J Tomkin (eds) *The EU Treaties and Charter of Fundamental Rights: A Commentary* (Oxford University Press 2024) 2214, 2219 (para 8): 'In practice [...] frequently both decisions are adopted on the same day (with the proposal of the Commission and High Representative therefore submitted prior to the adoption of the decision under Article 29 TEU) and with a nearly identical content, including the listing of persons and goods.'

6. Concluding remarks

Neves 77 Solutions is the type of case which at first sight appears to be rather inconspicuous. The facts of the case seem pretty dull, and the legal questions involved rather technical. Yet, upon closer inspection, *Neves 77 Solutions* is an incredibly complex and fascinating case, full of legal puzzles in relation to the Court's jurisdiction. And although in my view certain elements of the judgment exhibit some flaws, the overall line of reasoning is to be welcomed. And in view of the broader implications of the case, we might perhaps at some point in the future look back at the judgment as the case that saved the EU's accession to the ECHR.

Ordre Public Scores the Winner as Mandatory Arbitration Watches from the Bench: The CJEU’s Decision in Case C-600/23 Royal Seraing Football Club

*Maximilian Henning Boddin**

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ABSTRACT: The case discussed here provides an extensive illustration on the interaction between EU law and arbitration as well as the Court of Justice of the European Union’s approach to it. The judgment concerns a CAS arbitration between a Belgian football club and the world football association, FIFA. The Court was asked, in a preliminary reference, whether the principle of effective judicial protection precludes the *res iudicata* effects of CAS awards. In its judgment, the Court clarified that for an award to have *res iudicata* status, it must have been effectively scrutinised for possible violations of EU *ordre public*. The Court also discussed whether CAS arbitration constitutes ‘mandatory arbitration’ and how this concept affects the principle of effective judicial protection. Another key issue was the special system of enforcement carried out by sports associations. The case note examines this reasoning and evaluates the Court’s findings. It moreover sets out to question how the judgment relates to the position of arbitration in the EU system at large, the effects on the implementation of the New York Convention by member states and the practical implications this judgment has for ongoing and future disputes. Based on this critical assessment of the framework set out by this judgment, the case note aims to give suggestions for its implementation by state courts and point out fallacies to be aware of in future arbitration cases.

KEYWORDS: sports arbitration – mandatory arbitration – effective judicial protection – preliminary ruling – *res iudicata* – *ordre public*.

1. Introduction

It has become a sport for legal scholars to explain sports law cases in sports terminology – this author is no exception. However, in its newest judgment, Case C-

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600/23 of 1 August 2025 (*Seraing*), Court of Justice of the European Union (the Court) showed that legal disputes are not always as clear cut as football games. While some celebrated the judgment as a victory for the European Union (EU) and its legal order, the reception among those that were fearing a defeat of sports arbitration is mixed. The Court was tasked with a preliminary reference in a case where a Belgian football club had appealed against a decision by the world football association (FIFA), first in arbitration, then before the Belgian courts. In the court proceedings, the issue arose whether the earlier arbitral award precluded it with *res iudicata* effect. The Court chose a different path than expected and crafted a judgment that gives insight into the relationship of EU law with the most fundamental principles of international arbitration.

The most important international treaty for international arbitration is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC). With 196 states, including all EU member states, it is one of the most signed treaties in history.¹ Its rules are widely respected and implemented all over the world.² Under Article III of this treaty, states have an obligation to recognise foreign arbitral awards. Article V NYC provides some exceptions under which states can refuse recognition and enforcement. Most of these exceptions deal with violations of procedural rights, such as the right to be heard or lack of consent to arbitration. Only one of these exceptions gives state courts the right to regard the substance of an arbitral award. According to Article V 2(b) NYC, states can refuse recognition or enforcement when doing so would go against their public policy, or *ordre public*.³ To constitute *ordre public* of a state, a rule must be a fundamental principle of the state's legal order.⁴ Thereby, the discretion of state courts to substantially review foreign arbitral awards under the NYC is very limited. The *ordre public* standard, just like the NYC, is widely accepted in international arbitration and respected as a principle by states and arbitral tribunals alike.⁵ The same standard also applies in proceedings regarding the annulment of an arbitral award.⁶

At the heart of the Court's decision lies this very standard. It was speculated that the Court's interpretation of the principle of effective judicial protection derived from Article 19 of the Treaty of the European Union (TEU), Article 47 of the Charter of Fundamental Rights of the European Union (CFREU) and Article 267 of the

¹ Case C-600/23 *Royal Football Club Seraing* EU:C:2025:24, para 116; U Haas, H Kahlert, and A Rigozzi, 'Sports Arbitration Under Threat' (Jusletter, 19 May 2025) at jusletter.weblaw.ch para 13; A J van den Berg, *Contracting States*, at www.newyorkconvention.org.

² GB Born, *International Arbitration: Law and Practice* (Kluwer Law International 2021) 102; N Blackaby, C Partasides and A Redfern, *Redfern and Hunter on International Arbitration* (Oxford University Press 2023) para 1.103.

³ Both terms are used interchangeably, see Born (n 2), 3999. This article will use the term *ordre public*.

⁴ Case C-126/97 *EcoSwiss*, EU:C:1999:269, para 36, 39; Born (n 2), 4008.

⁵ Born (n 2), 400; Blackaby, Partasides and Redfern (n 2), para 11.110 et seq.

⁶ Born (n 2), 3602; Blackaby, Partasides and Redfern (n 2), para 10.78.

Treaty for the Functioning of the European Union (TFEU) might make sports arbitration as currently practiced impossible. The Court has not followed the Opinion of Advocate General Tamara Čapeta (Čapeta Opinion), who demanded full review of sports arbitration based on controversial concepts such as 'mandatory' and 'self-enforcing' arbitration. Instead, it formed its argument around the *ordre public* standard. This way, it has achieved a deeper integration of this principle into EU law while also raising interesting questions regarding the NYC. This case note will illustrate the factual background of the case first (section 2). Afterwards, the Court's judgment will be analysed (section 3). It ends with concluding remarks (section 4).

2. Factual background

The Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, has for decades been the main international forum for the settlement of sports disputes. It is, contrary to what its name may imply, not a court, but an arbitral institution administering arbitral proceedings in front of tribunals named by the parties.⁷ CAS tribunals derive their jurisdiction from arbitration clauses that are usually part of the statutory framework of a sports association or competition.⁸ Therefore, participating in competitions with such statutes requires athletes and sports clubs to submit their disputes to CAS arbitration by agreeing to the competition or association's statutes.⁹ CAS arbitral awards are not subject to revision, they are subject to the limited discretion for annulment by the Swiss Federal Tribunal or enforcement by another state court.

Royal Football Club Seraing (Royal Seraing) is a football club located in Belgium planning to advance to the professional tiers of Belgian football.¹⁰ It is a member of the Royal Belgian Football Association, which is in turn a member of the European Union of Football Associations (UEFA) and FIFA.¹¹ In 2015, Royal Seraing partly sold the transfer rights to 4 players to an investor, Doyen Sports Investment Ltd. (Doyen Sports).¹² Under the FIFA framework, third party investors who are not a club or a player themselves are banned from holding such economic rights to a player.¹³ For this reason, the FIFA disciplinary body imposed a two-year transfer ban and a fine of 150.000 Swiss francs on Royal Seraing.¹⁴ On 9 March 2016, the

⁷ D Mavromati and M Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015) 6.

⁸ Salim S Sleiman and Adrian Winstanley, 'Sports Arbitration – Origins, Developments and the BCDR Rules' (2022) 9 *BCDR International Arbitration Review* 5, 9.

⁹ *Mutu and Pechstein v Switzerland* App nos 40575/10 and 67474/10 (ECtHR, 20 October 2018), para 113.

¹⁰ Opinion of AG Čapeta in *Royal Football Club Seraing* (n 1), para 3ff.

¹¹ FIFA, 'Member Associations' (*FIFA*), at inside.fifa.com.

¹² AG Čapeta in *Royal Football Club Seraing* (n 1), para 14f.

¹³ *Ibid*, para 12.

¹⁴ *Ibid*, para 16.

club requested CAS arbitration based on the arbitration clause in the FIFA statutes claiming this decision was contrary to the FIFA rules. One year later, the CAS tribunal rejected Royal Seraing's claim almost fully, reducing the transfer ban by six months and upholding the fine. The award has been subject to critique from legal scholarship. The CAS tribunal had equated the interests set out in the FIFA statutes to the 'mandatory requirements in the general interest' established by the Court's case law.¹⁵ One commentator saw this as a sign that the CAS tribunal lacked familiarity with the 'subtleties' of the legal doctrine developed by the Court.¹⁶ However, an application by Royal Seraing to annul this award rendered by the CAS tribunal was rejected by the Swiss Federal Tribunal.¹⁷

During the same time, Royal Seraing and Doyen Sports had also started a parallel litigation against FIFA's ban in the Belgian national courts. Based on provisions of civil procedural law enshrining the *res iudicata* principle into Belgian law, the Brussels Court of Appeal declared that it could not decide the case due to the existing CAS award.¹⁸ Royal Seraing and Doyen then brought the case in front of the Belgian cassation court which referred two questions to the Court seeking this preliminary ruling.¹⁹ These two questions, in essence, are: First, whether the application of these national provisions regarding *res iudicata* is barred by the principle of effective judicial protection in the case of an arbitral award that has only been reviewed by a non-EU court. And second, whether such an award can be granted rebuttable probative value vis-à-vis third parties by national law.

3. Analysis

In its preliminary decision, the Court prioritised the need for an effective review of EU *ordre public*. In the *Seraing* judgment, it decided that if an award was not effectively reviewed, state courts shall not apply provisions that grant it *res iudicata* effect. In the following, the reasoning of the Court shall be discussed. First, context is given through the Court's previous case law on arbitration (section 3.1). Second, the Court's findings are analysed (section 3.2). Third, the judgment's practical implications will be explored (section 3.3).

3.1. Previous case law

The Court has commented on the compatibility on arbitral proceedings with European law multiple times in its history. After a few early decisions setting the stage,

¹⁵ Case 120/78 *Cassis de Dijon*, EU:C:1979:42, para 14.

¹⁶ P W Heermann, *Verbandsautonomie im Sport* (Nomos 2022), 216 et seq.

¹⁷ Swiss Federal Tribunal (TF) judgment of 20 February 2018, 4A_260/2017.

¹⁸ AG Čápetá in *Royal Football Club Seraing* (n 1), para 16.

¹⁹ *Ibid*, para 2.

there has been highly relevant recent case law regarding investment arbitration as well as sports arbitration.

The first relevant Court case regarding international arbitration is the 1982 *Nordsee*-Judgment.²⁰ In this judgment, the Court declared that arbitral tribunals are not 'courts of a member state' as per Article 177 EEC (now Article 267 TFEU) and can therefore not refer cases for a preliminary ruling.²¹ It based this decision on the fact that arbitration is voluntary in nature on one hand.²² On the other hand, it argued that private arbitral tribunals lack a link to a member state since state courts have no *ex officio* power to partake in the process of opting for arbitration or the arbitral proceedings themselves, and since the member state itself has not empowered them as decision makers.²³ Finally, the court ruled that the only way for arbitral cases to be referred for a preliminary ruling would be by a state court in court assistance or enforcement proceedings.²⁴

In 1999, the Court expanded on this judgment with its *EcoSwiss* decision. In this judgment, it ruled that Article 81 EC (now Article 101 TFEU) is part of the *ordre public* of the member states.²⁵ It noted that, in consequence, courts can only annul arbitral awards or deny their enforcement in 'exceptional circumstances' – when the rule of EU law violated by the tribunal is part of EU *ordre public*.²⁶ If posed in an arbitration, questions of community law which are not *ordre public* can therefore never be subjected to review by a court and referred to a preliminary ruling. This is accepted under community law because the specific interests of arbitral proceedings justify a limitation of effective judicial protection if favour of efficiency.²⁷

Major developments for international arbitration within the EU came with and after the *Achmea* judgment from 2018. In three judgments, the Court ruled that member states violate their duties under Article 344 TFEU and the autonomy of EU law when they refer investor-state disputes against investors from other EU member states to arbitration.²⁸ Meanwhile, there have been three major decisions regarding sports arbitration: The European Court of Human Rights (ECtHR) had found in its *Mutu and Pechstein* judgment that due to the specific make-up of CAS arbitration in professional sports, the athletes' consent to arbitration was not given freely.²⁹ It held that nevertheless, these 'mandatory' arbitration clauses in question did not violate

²⁰ Case 102/81 *Nordsee*, EU:C:1982:107.

²¹ *Nordsee* (n 20), para 13.

²² *Nordsee* (n 20), para 11.

²³ *Ibid*, para 12.

²⁴ *Ibid*, para 14.

²⁵ *EcoSwiss* (n 5), para 36.

²⁶ *Ibid*, para 35.

²⁷ *Ibid*, para 35.

²⁸ Case C-284/16 *Achmea*, EU:C:2018:158; Case C-741/19 *Komstroy*, EU:C:2021:164; Case C-109/20 *PL Holdings*, EU:C:2021:875.

²⁹ *Mutu and Pechstein v Switzerland* (n 10), para 114.

Article 6(1) of the European Charter of Human Rights.³⁰ However, in the consecutive *Semenya* judgment, it ruled that mandatory arbitration warrants an especially thorough *ordre public* review.³¹ The Court found in its *ISU* judgment that a mandatory arbitration clause, when combined with several other characteristics, could lead to a violation of EU competition law.³² In this case, the violation of EU competition rules did not hinge on the fact that the arbitration clause was unilaterally imposed, but after finding violations in other facts of that case, the Court stated that the mandatory arbitration clause ‘reinforced the infringement’, showing that it considers mandatory arbitration problematic, but not an infringement in itself.³³ Therefore, the European courts have both acknowledged the limited scope of review the Court can exert over arbitral awards and the mandatory nature of sports arbitration clauses.

This line of jurisprudence has been picked up by the Čapeta Opinion. AG Čapeta argued, that limited review of arbitral awards can only be justified by the parties’ voluntary decision to enter into an arbitration agreement.³⁴ She asserted that the CAS arbitration between Royal Seraing and FIFA constitutes mandatory arbitration³⁵ that is moreover difficult to review due to its ‘self-enforcing’ character.³⁶ Therefore, she asserted that in cases like this one, the limited scope of an *ordre public* review does not satisfy the principle of effective judicial protection. She argued that rather, a full review, *de facto* a court revision, of the arbitral award is warranted.³⁷ She urged the Court to rule that CAS awards based on mandatory arbitration clauses should be fully reviewed.³⁸ This way, the Court could address any questions of EU law discussed in these arbitral proceedings in a preliminary ruling.

3.2. The Court’s decision

The Court has largely rejected AG Čapeta’s assessment. Notably, it did not mandate a full review of CAS awards. Rather than hinging its findings on the characterisation of CAS arbitration as ‘mandatory arbitration’, it focused on the need to safeguard EU *ordre public*. In the following, the Court’s findings on the main issues will be discussed: *Res iudicata* and probative value (section 3.2.1), mandatory arbitration (section 3.2.2), the standard of review demanded by the Court (section 3.2.3), the concept of self-enforcing norms (section 3.2.4) as well as proportionality (section 3.2.5).

³⁰ Ibid, para 114.

³¹ *Semenya v Switzerland*, App no 10934/21 (ECtHR, 10 July 2025); para 238.

³² Case C-124/21 *International Skating Union* EU:C:2023:1012, para 228.

³³ Ibid, para. 228.

³⁴ AG Čapeta in *Royal Football Club Seraing* (n 1), para 72.

³⁵ Ibid, para 74.

³⁶ Ibid, para 79.

³⁷ Ibid, para 124.

³⁸ Ibid, operative part.

3.2.1. *Res iudicata and probative value*

The Court was asked whether the principle of effective judicial protection prohibits *res iudicata* status and probative value of arbitral awards. It ruled that the principle of effective judicial protection would exclude the application of any national provision that 'prevent[s] the national court [...] from carrying out, indirectly, an effective review' scrutinising whether an award complies with EU *ordre public*.³⁹ *Res iudicata* however does not fully exclude review by state courts. *Res iudicata* is the basic principle that a decision by an earlier adjudication is final and binding and is barred from being relitigated in new proceedings between the same parties.⁴⁰ As the Belgian government pointed out during the proceedings⁴¹ and as can be derived from the Belgian provisions cited by the Court in its judgment,⁴² the *res iudicata* provisions at hand do not rule out the scrutiny courts give arbitral awards in recognition, enforcement and annulment proceedings. This internationally recognised practice is not specific to Belgian law and is in line with the NYC. The Court did not generally question the compatibility of the *res iudicata* provision with the principle of effective judicial protection.⁴³ Its decision implies: The principle of effective judicial protection stipulates an exception if there was no effective scrutiny of the award regarding EU *ordre public*. This exception is moreover limited to cases regarding 'the pursuit of a sport as an economic activity within the territory of the European Union' only.⁴⁴ Only under these two cumulative circumstances, the principle of effective judicial protection prohibits the *res iudicata* effect of an arbitral award.

Belgian national law gives an award probative value as evidence in court proceedings against third parties when it has *res iudicata* status.⁴⁵ This creates a presumption that the opposing party has to dispel.⁴⁶ The Court correctly assessed the rule as 'intrinsically linked' to the classification as *res iudicata*.⁴⁷ Probative value can be described as a specific consequence of barring an award from *res iudicata* effect.⁴⁸ While probative value is not absolute, it can shift the burden of proof. Such a shift happened in the case at hand: The Belgian Football Association, itself not a party to the CAS arbitration between Royal Seraing and FIFA, used the award in the

³⁹ *Royal Football Club Seraing* (n 1), para 121.

⁴⁰ GB Born, 'Chapter 1: The Law Governing Res Judicata in International Commercial Arbitration' in N Kaplan and M J Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Wolters Kluwer 2018), 1, 2; R Gupta, 'Res Judicata in International Arbitration: Choice of Law, Competence & Jurisdictional Court Decisions' (2020) *Asian International Arbitration Journal* 193, 195.

⁴¹ *Royal Football Club Seraing* (n 1), paras. 62, 63.

⁴² *Ibid*, para 6 et seq.

⁴³ *Ibid*, para 100.

⁴⁴ *Ibid*, operative part.

⁴⁵ *Ibid*, para 113.

⁴⁶ *Ibid*, para 113.

⁴⁷ *Ibid*, para 114.

⁴⁸ *Ibid*, para 112.

Belgian court proceedings as proof that the FIFA statutes in question were not violating EU law. Royal Seraing ‘failed’ to disprove the presumption stipulated by the award.⁴⁹ Ultimately, despite the mere creation of a presumption, an award without *res iudicata* effect also does not have probative value.⁵⁰

3.2.2 Mandatory arbitration

The classification of CAS arbitration as ‘mandatory arbitration’ has been at the heart of many proceedings⁵¹ and discussions.⁵² In the Čapeta Opinion, the AG saw the voluntary character of most arbitrations as a cornerstone of their compliance with the principle of effective judicial protection.⁵³ *E contrario*, she asserted that a mandatory arbitration must be subject to stricter review by state courts.⁵⁴ It was this conclusion that sparked concerns that the Court’s decision might endanger the entire system of sports arbitration.⁵⁵ In the actual *Seraing* judgment, the Court agreed that CAS arbitration is not voluntary. However, notably, the judgment accorded this factor significantly less weight than had been anticipated. In line with its own jurisprudence,⁵⁶ that of the ECtHR in *Pechstein*⁵⁷ and very recently *Semenya*⁵⁸ as well as the Čapeta Opinion,⁵⁹ the Court found CAS arbitration to be mandatory. It conceded that formally, professional sports associations’ statutes are contractual and voluntarily opted into by the athletes and clubs.⁶⁰ Ultimately, it found that these clauses, even if contractual in nature, were ‘unilaterally imposed’ by the associations and therefore mandatory. Further, it explained that this system has to be seen in context with the larger system of sports associations, which act like governance structures with the power to regulate, oversee and impose sanctions.⁶¹ The Court broadly referenced the existing case law, furthering the classification as mandatory arbitration’s development into established European case law.

The Court’s assessment of what consequences the classification as mandatory arbitration has was highly anticipated. AG Čapeta, with reference to the *EcoSwiss*

⁴⁹ Ibid, para 50.

⁵⁰ Ibid, para 121.

⁵¹ *Mutu and Pechstein v Switzerland* (n 10); *International Skating Union* (n 32); *Semenya v Switzerland*, (n 31).

⁵² Haas, Kahlert, and Rigozzi (n 1), para 16 et seq; O Michaelis, ‘Der Schiedszwang im Profisport – Unter Besprechung der aktuellen Rechtsprechung am Fall Claudia Pechstein’ (2019) 23 *German Arbitration Journal* 331, 333.

⁵³ AG Čapeta in *Royal Football Club Seraing* (n 1), para 72.

⁵⁴ Ibid, para 124.

⁵⁵ Haas, Kahlert, and Rigozzi (n 1), para 32; F Dasser, ‘CJEU: Get Off That Slippery Slope, Before It’s Too Late, Please!’ (2025) ASA Website, at www.swissarbitration.org.

⁵⁶ *International Skating Union* (n 32).

⁵⁷ *Mutu and Pechstein v Switzerland* (n 10).

⁵⁸ *Semenya v Switzerland*, (n 31).

⁵⁹ AG Čapeta in *Royal Football Club Seraing* (n 1), para 123.

⁶⁰ *Royal Football Club Seraing* (n 1), para 92.

⁶¹ Ibid, para 93.

case, argued that the limited review of arbitral awards is only justified by the voluntary nature of arbitration.⁶² In consequence, she considered the limited review in mandatory arbitration a violation of the principle of effective judicial protection.⁶³ However, her interpretation of the referenced paragraph from *EcoSwiss* is rather narrow. *EcoSwiss* did not solely base the acceptance of limited review on arbitration's voluntary nature. Instead, the Court asserted a more general legitimate objective to safeguard the 'interest' of arbitration proceedings to be efficient.⁶⁴ In *Seraing*, the Court not only neither followed nor discussed AG Čapeta's interpretation. On the contrary, it reiterated that broader legitimate objectives justify arbitration limiting effective judicial protection, as will be discussed below.⁶⁵

Contrarily to what some feared, the Court did not derive groundbreaking consequences from its finding that CAS arbitration is mandatory. While it contended that 'a distinction must be drawn' between voluntary and mandatory arbitration,⁶⁶ this distinction did not materialise into a match-winning argument. The operative part of the judgment does not even mention this distinction.⁶⁷ In consequence, mandatory arbitration does not constitute a hard criterion for the exclusion of *res iudicata* effect. The Court's actual focus rests on the fact that, in many CAS arbitrations, there will be no EU member state court scrutinising the award in terms of EU *ordre public*.⁶⁸ This phenomenon does not stem from the mandatory nature of CAS arbitration. Rather, it is primarily attributable to the fact that CAS arbitration is seated in Switzerland.⁶⁹ Consequently, annulment proceedings are subject to the jurisdiction of the Swiss Federal Tribunal.⁷⁰ Furthermore, due to FIFA's organizational structure and its headquarters located in Switzerland, a substantial number of arbitrations do not become subject to a traditional court enforcement procedure.⁷¹ Even then, enforcement proceedings against FIFA are also conducted in Switzerland. The mandatory character of arbitration is only an addition to the Court's reasoning in the context of this argument. The above-described deprivation of court review regarding EU *ordre public* constitutes a violation of effective judicial protection – '*a fortiori*' in mandatory arbitration.⁷² Thereby, the Court accounts for the mandatory nature of CAS arbitration in its discussion of effective judicial protection but does not consider it the decisive factor. The expression '*a fortiori*' implies that the deprivation of EU *ordre public* court review limits effective

⁶² AG Čapeta in *Royal Football Club Seraing* (n 1), para 72.

⁶³ Ibid, paras 72, 124.

⁶⁴ *EcoSwiss* (n 5), para 35.

⁶⁵ See 3.2.5.

⁶⁶ *Royal Football Club Seraing* (n 1), para 80.

⁶⁷ Ibid, operative part.

⁶⁸ Ibid, para 95.

⁶⁹ Ibid, para 16.

⁷⁰ Born (n 2) 3422; Blackaby, Partasides and Redfern (n 2), para 10.86.

⁷¹ AG Čapeta in *Royal Football Club Seraing* (n 1), para 78.

⁷² *Royal Football Club Seraing* (n 1), para 95.

judicial protection even without mandatory arbitration. Meanwhile, there is no indication that the court would see a violation where a mandatory arbitration enables review in terms of EU *ordre public*. In conclusion, the Court does see the mandatory nature of CAS arbitration as an aggravating circumstance within its more general issues with CAS arbitration, but not as a violation in itself. This evaluation of mandatory arbitration is consistent with the *ISU* judgment of 2023, where the Court had also taken it into account as part of its larger consideration.⁷³

3.2.3. *Standard of review*

The Court has rejected the Čapeta Opinion's demand of a full review of CAS awards. As with mandatory arbitration, AG Čapeta's bold stance on the standard of review was subject to heavy criticism⁷⁴ and ultimately rejected by the Court. It ruled that a limited review to provisions that constitute EU *ordre public* generally satisfies the requirements of the principle of effective judicial protection.⁷⁵ This review must however be 'effective'.

The Court supported this decision by referencing previous case law and did not discuss alternative standards, including AG Čapeta's proposal of full review.⁷⁶ It did not elaborate on why it understands Article 19 TEU, Article 47 CFREU this way. Yet, a more detailed interpretation of the articles would come to the same conclusion. While the Court itself is not bound by the NYC,⁷⁷ it might take the duties of the member states under international law into account when interpreting treaty provisions.⁷⁸ The NYC does not just bind the member states but is a widely accepted part of the international legal order.⁷⁹ Therefore, the Court's decision to integrate the *ordre public* standard into the principle of effective judicial protection instead of mandating full review is convincing.

The Court has moreover specified which provisions of EU law it considers *ordre public*. It reiterated its previous stance that Article 101 and 102 TFEU constitute EU *ordre public*.⁸⁰ Additionally, named Articles 45, 56 and 63 TFEU as EU *ordre public*, since they are foundational to the single market at the core of EU law.⁸¹ This list does not appear to be exhaustive. Firstly, the Court only designated the principles 'part of' EU *ordre public*.⁸² Secondly, there is no reason given why Articles 45, 56 and 63

⁷³ *International Skating Union* (n 32), para 228.

⁷⁴ Haas, Kahlert, and Rigozzi (n 1), para 31; Dasser (n 54).

⁷⁵ *Royal Football Club Seraing* (n 1), para 95.

⁷⁶ *Ibid*, para 95.

⁷⁷ *Ibid*, para 116.

⁷⁸ Case C-308/06 *Intertanko* EU:C:2008:312, para 52; AG Čapeta in *Royal Football Club Seraing* (n 1), para 116.

⁷⁹ Born (n 2), 102; Blackaby, Partasides and Redfern (n 2), para 1.103.

⁸⁰ *Royal Football Club Seraing* (n 1), para 88.

⁸¹ *Ibid*, para 89.

⁸² *Royal Football Club Seraing* (n 1), para 89.

TFEU would constitute *ordre public*, but not Article 34 TFEU, which is expressly established as a foundational principle of the single market alongside the other three in Article 26(2) TFEU.⁸³ Thirdly, the Court seemingly intended to exclusively list principles of EU *ordre public* relevant in the underlying dispute.⁸⁴ Therefore, the Court listing Articles 45, 56 and 63 TFEU implies it also considers Article 34 TFEU and possible other foundational principles of EU law to be EU *ordre public*.

The Court refrained from specifying whether there is a severity threshold for a violation of these provisions to be considered a violation of EU *ordre public*. It is the author's view that the meaning of *ordre public* regarding these articles should be limited. This is because Articles 34, 45, 56 and 63 TFEU have a very broad scope.⁸⁵ The Court and its integration-friendly interpretation have built a wide protection that makes even small barriers to the foundational freedoms hard to justify.⁸⁶ If this liberal approach were transplanted to enforcement of foreign arbitral awards, the EU might become a hostile region for arbitration parties. Since 'foreign' in this context refers to the state level, such a far-reaching interpretation of *ordre public* would also impair commercial arbitration between EU parties. To prevent this, the Court should set a high standard so that only especially egregious violations of the articles mentioned above constitute a violation of EU *ordre public*.

According to the Court, the CAS arbitration between Royal Seraing and FIFA ultimately did not meet the requirements of the principle of effective judicial protection. The crux lies with the Court's demand for an 'effective' review of EU *ordre public*.⁸⁷ The Court requires awards to be subject to *ordre public* review by an EU court: Only EU courts will consider EU *ordre public* and may submit preliminary references to the Court.⁸⁸ This requirement is met as long as the seat of arbitration is within the EU. In those cases, parties can file for annulment of the award with a court of that EU member state.⁸⁹ It is also met when enforcement is conducted in an EU member state, since the enforcement procedure includes *ordre public* review. To the contrary, many CAS arbitrations, where the seat of arbitration is in Switzerland and enforcement is conducted by or against FIFA. The Court has also made clear that mere declaratory relief by EU courts stating that an awards violates EU *ordre public* outside of enforcement proceedings⁹⁰ does not satisfy its requirement of effective

⁸³ M Klamert, 'Art. 26 TFEU' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford University Press 2024) 868, para 19.

⁸⁴ *Royal Football Club Seraing* (n 1), para 89.

⁸⁵ M Klamert, M Moustakali and J Tomkin, 'Art. 34 TFEU' in Kellerbauer, Klamert and Tomkin (eds) (n 82), 909, para 25.

⁸⁶ Case 46-76 *Bauhuis*, EU:C:1977:6, para 12.

⁸⁷ *Royal Football Club Seraing* (n 1), paras. 108, 111, 121.

⁸⁸ *Ibid*, para 101.

⁸⁹ cf. Born (n 2) 3422; Blackaby, Partasides and Redfern (n 2), para 10.86.

⁹⁰ See 3.3.2.

ordre public review – courts must be able to derive consequences from their finding.⁹¹

The Court has not generally called into question the internationally recognised *ordre public* standard.⁹² Yet, it has qualified this standard to expect ‘effective review’ of arbitral awards as to realise parties’ rights under EU law.

3.2.4. *The self-enforcing nature of CAS arbitration*

AG Čapeta described the FIFA statutes as a ‘self-enforcing’ system.⁹³ She based this on the fact that sports associations have their own governance structure that includes regulatory power and sanctions.⁹⁴ Most claimants in CAS arbitration seek to nullify regulatory decisions by associations or declare sanctions unlawful.⁹⁵ Thereby, the award will often establish that neither party has an obligation to further action such as payment.⁹⁶ Only in rare cases a payment claim or a regulatory action will have to be enforced through courts.⁹⁷ For instance, when a CAS tribunal decides that an athlete must be temporarily banned from professional leagues based on a positive doping test, the network of football associations under FIFA could ‘enforce’ the award by refusing his registration for any competition. Actions like this are more akin to complying with an award than enforcement. In commercial arbitration, neither an award that concludes that there are no claims to be paid between the parties nor an award that the respondent complies with by paying without enforcement proceedings are considered self-enforcing.⁹⁸ Actual enforcement of CAS awards may still be conducted. This includes enforcing FIFA’s obligations to carry out regulatory acts found by the tribunal. However, any enforcement against FIFA would take place in Switzerland, outside the reach of EU courts.

This may explain why the Court refrained from adopting the AG’s description of the FIFA system as ‘self-enforcing’. In any case, the Court did discuss the substance of her argument on the FIFA system to show how many cases involving EU parties can never end up in enforcement procedures within the EU.⁹⁹ However, nothing in the judgment indicates that ‘self-enforcing systems’ are necessary for this situation. For the standard posed by the Court – effective review of EU *ordre public* – it suffices that neither annulment nor enforcement proceedings happen at an EU court, regardless of whether that means enforcement through a third state’s court or through non-court means of realising the award’s contents. The key issue is not the system of enforcement – it is the fact that only EU courts review the compliance with

⁹¹ *Royal Football Club Seraing* (n 1), paras. 102, 103.

⁹² On the *ordre public* standard see Born (n 2), 4008 et seq.; Blackaby, Partasides and Redfern (n 2), para 11.110 et seq.

⁹³ AG Čapeta in *Royal Football Club Seraing* (n 1), para 79.

⁹⁴ *Ibid* para 78.

⁹⁵ Haas, Kahlert, and Rigozzi (n 1), para 7.

⁹⁶ *Ibid*, para 7.

⁹⁷ *Ibid*, para 7.

⁹⁸ *Ibid*, para 9.

⁹⁹ *Royal Football Club Seraing* (n 1), para 93.

EU *ordre public* and can make preliminary references to the Court. In sum, no encroachment of such 'self-enforcing systems' will follow from this judgment. Rather, just like in any other arbitration case, the Court would question whether a cross-border enforcement hinders EU *ordre public* review.

3.2.5 Justification of arbitration as a legitimate objective

Another noteworthy idea contained in the judgment is the Court's consideration of possible legitimate objectives of sports arbitration. The Court had shown as early as its *EcoSwiss* judgment that it will weigh possible obstacles arbitration poses to the principle of effective judicial protection against legitimate interests of arbitral proceedings.¹⁰⁰ Methodologically, it thereby used these objectives of arbitration in the same way it accounts for 'mandatory requirements in the general interest'¹⁰¹ when assessing whether restrictions of single market principles are justified. AG Ćapeta interpreted the *EcoSwiss* judgment narrowly, so that its voluntary nature can be the only justification for diminished judicial protection in arbitration.¹⁰² The Court did not follow this interpretation. Rather, it broadened its scope for legitimate objectives of arbitration that may justify a diminished effectiveness of judicial protection. In the context of sports arbitration, it stated that a diminished effectiveness of judicial protection may be justified by 'legitimate objectives' and named as such the uniform handling of sports disputes and the consistent interpretation of rules applicable to professional sports competitions.¹⁰³ Consequently, even if the Court identifies a conflict between effective judicial protection and arbitration in the future, it will not necessarily take action against it. Instead, it might be convinced by parties showing the value of diversions from the standard EU system of judicial protection.

3.3. Legal and practical implications

The reasoning of the Court posed interesting questions on the relationship between EU law and the NYC (section 3.3.1) and will have deeper implications for arbitral practice (section 3.3.2).

3.3.1. The role of the NYC

As per the Court's decision, CAS arbitration threatens effective judicial protection. In contrast, there is no indication that it inherently threatens the NYC as well. Contrary to all EU member states, the EU itself is not a signatory to the convention.¹⁰⁴ As a consequence, the Court made clear in the *Seraing* judgment that the EU is not

¹⁰⁰ *EcoSwiss* (n 5), para 35.

¹⁰¹ *Cassis de Dijon* (n 16), para 14.

¹⁰² AG Ćapeta in *Royal Football Club Seraing* (n 1), para 72.

¹⁰³ *Royal Football Club Seraing* (n 1), para 94.

¹⁰⁴ *Ibid*, para 116; Haas, Kahlert, and Rigozzi (n 1), para 13; A J van den Berg (n 1).

bound by the NYC.¹⁰⁵ Since the member states have an obligation under the NYC to recognise foreign awards as *res iudicata*, denying recognition violates international law.¹⁰⁶ The provisions on *res iudicata* in Belgian civil procedural law that were in question in the *Seraing* case are constructed in harmony with these duties.¹⁰⁷

The Court has moreover used its monopoly of interpreting EU law to specify which provisions of EU law national courts must consider *ordre public* under the NYC. AG Čapeta's assertion that the NYC is not applicable to mandatory arbitration¹⁰⁸ was not addressed and is unlikely to arise as a prevailing interpretation of the convention.¹⁰⁹ Since the scope of application of the NYC is interpreted autonomously, the Court could not have dictated a new interpretation conforming to perceived necessities of EU law either way.¹¹⁰

The EU and the Court themselves are not bound by the NYC but have the power to influence the way member states implement it. This asymmetrical power over the enforcement of arbitral awards must be wielded responsibly, or other states will themselves question whether they can come up with reasons not to enforce arbitral awards in favour of EU parties. For example, after the Court has damaged the effectiveness of its renowned sports tribunal and ordered EU courts to deny *res iudicata* effect to awards declared lawful by its federal tribunal, Switzerland might be inclined to make the enforcement of claims held by EU parties against Swiss parties more burdensome. The system of enforcement under the NYC should therefore be safeguarded against overreach by the Court. The EU could consider becoming a party to the NYC itself and therefore binding its institutions the same way states are bound. Even without such an accession, the Court interprets the rules of EU law with regard to the member states' duties under international law.¹¹¹

The Court has called into question the international consensus on the NYC. By denying *res iudicata* to awards that have been produced in conformity with the convention, it is undermining the duty to fundamental recognition of foreign awards. It is part and parcel to the NYC's system that not every state court has a say on whether awards should be internationally recognised. Where the Court considers this a deprivation of effective judicial protection, it is not acting in accordance with the spirit of the convention. In this vein, EU law must be read in harmony with the NYC, not in conflict with it.

¹⁰⁵ *Royal Football Club Seraing* (n 1), para 116.

¹⁰⁶ Haas, Kahlert, and Rigozzi (n 1), para 26.

¹⁰⁷ *Royal Football Club Seraing* (n 1), paras. 62, 63.

¹⁰⁸ AG Čapeta in *Royal Football Club Seraing* (n 1), para 118–119; Haas, Kahlert, and Rigozzi (n 1), para 29.

¹⁰⁹ Haas, Kahlert, and Rigozzi (n 1), para 29.

¹¹⁰ *Ibid*, para 29.

¹¹¹ *Intertanko* (n 77), para 52; AG Čapeta in *Royal Football Club Seraing* (n 1), para 116.

3.3.2. Practical outcomes

As laid out above, this judgment will affect all CAS proceedings which do not open the possibility of an enforcement procedure with an EU court. In these cases, an effective review of EU *ordre public* cannot be guaranteed, wherefore the resulting award will not have *res iudicata* effect within the EU. The CAS will supposedly tackle this issue by opening an EU venue.¹¹² When the seat of those EU CAS arbitrations is within the EU, parties can always file for annulment in an EU member state and therefore receive the necessary effective *ordre public* review.

The Court's requirement of 'indirect' *ordre public* review seems to contradict its rejection of declaratory relief.¹¹³ Remedies of declaratory relief empower a state court to declare that it does not recognise the validity of an arbitral award in cases where it can neither annul the award nor play a role in enforcement proceedings.¹¹⁴ The Court has argued that such measures are not sufficient to fit the effective judicial protection standard because courts need to be able to draw legal consequences from their decision.¹¹⁵ However, this is precisely the case in *res iudicata* proceedings: If a court could declare non-recognition of an award and thereby nullify its *res iudicata* effect. Therefore, in these cases, declaratory relief does have a legal consequence the court could draw. Courts have this exact power already, for example in Germany.¹¹⁶ This has led some to conclude that all the Court did was mandate the creation of something that already exists.¹¹⁷ This reading contradicts the Court's express rejection of declaratory relief as a solution.¹¹⁸

To resolve this contradiction, the Court's decision must be interpreted as allowing for indirect declaratory relief within the *res iudicata* proceedings. Without the option of declaratory relief, courts would have no option but to automatically deny *res iudicata* effect to all awards that fit the mould of the Court's judgment. This would mean that all awards of this nature would lose their *res iudicata* status even if they are fully in line with EU *ordre public*. In the opposite case, the courts in every *res iudicata* case could perform a review of whether the award contradicts EU *ordre public*. Thereby, they could recognise awards in line with EU *ordre public* and filter out those that do not comply with it. Such an execution of the Court's judgment would be preferable for parties with an interest in the award's standing while also protecting opposing parties from being deprived of their rights granted by EU *ordre public*. Moreover, it would lead to a more thorough jurisprudence reviewing CAS tribunals' compliance with EU

¹¹² M Frank and J Lowther, 'Red Card for the Court of Arbitration for Sport and a Change of Tactics in International Sports Arbitration' (Daily Jus, 2 June 2025) at dailyjus.com.

¹¹³ *Royal Football Club Seraing* (n 1), para 102.

¹¹⁴ Haas, Kahlert, and Rigozzi (n 1), para 10.

¹¹⁵ *Royal Football Club Seraing* (n 1), para 102.

¹¹⁶ German Federal Court of Justice (BGH) judgment of 9 March 2023, I ZB 33/22, para 93.

¹¹⁷ A Scheuch and J Brandenburg, 'Was bedeutet das Urteil für die Sportgerichtsbarkeit?' (Legal Tribune Online, 8 August 2025), at www.lto.de.

¹¹⁸ *Royal Football Club Seraing* (n 1), para 102.

ordre public which strengthens the general effectiveness of EU law. Where national law does not already expressly provide for such a measure of declaratory relief, courts should derive it directly from Article 19 TEU, Article 47 CFREU and apply it via *effet utile*. With this solution, the Court's doom scenario in which a CAS award is fully exempt from EU *ordre public* review, could not even occur. The denial of *res iudicata* effect on the other hand would remain *ultima ratio*.

The Court has expressly limited its judgment to disputes 'linked to the pursuit of a sport as an economic activity within the territory of the European Union.'¹¹⁹ Therefore, commercial arbitration outside the field of professional sports is not directly affected by the judgment. It appears somewhat intuitive to treat professional sports as an entity that requires to be evaluated separately. It is not common that most actors of an industry fall under EU jurisdiction while the administration and dispute resolution take place outside the EU. This discrepancy in applicable law and jurisdiction might create unique circumstances that the Court may have considered. However, the Court did not expressly discuss this distinction between sports and non-sports disputes in its reasoning. It holds true that the judgment includes reasoning on the specific circumstances of the system of FIFA governance and 'mandatory' CAS arbitration. This specific system may be unique but is not inherent to sports in any way. Ultimately, sports association statutes are multilateral contracts that contain broad arbitration agreements. Commercial disputes might also be considered mandatory arbitration or self-enforcing by the Court on similar grounds. As established above, effective review of EU *ordre public* is mainly hindered not by the system of professional sports, but the fact that both annulment and enforcement regularly occur outside the reach of the EU court system. Therefore, the same reasoning the Court uses for CAS arbitration might apply to commercial arbitration seated outside the EU. And even if there must be a clear distinction between sports arbitration and non-sports arbitration, this raises the question of what does or does not constitute sports arbitration. It might be argued that licensing agreements regarding TV coverage of sports events, sponsoring contracts, or M&A transactions between club owners and their companies are just as 'linked to the pursuit of a sport as an economic activity' as disputes between athletes, clubs and associations. In conclusion, if this qualification in the judgment was the Court's attempt to limit its effects to sports arbitration, this attempt might not prove fully successful.

If the Belgian courts deny the *res iudicata* effect of the arbitral award, the *Seraing* proceedings will continue with a very uncertain outcome. Since the award is recognised and enforceable outside the EU, it might clash with the Belgian court decision which will be treated as definitive within the EU. This might lead to conflicting decisions, with enforcement depending solely on practical feasibility. Royal Seraing might avoid paying fees since its assets are located in Belgium where the CAS award

¹¹⁹ Ibid, operative part.

could not be enforced. The lack of payment might lead to football associations excluding the club from competitions although they might refrain from this drastic choice. The settlement of the dispute between the club and FIFA will therefore boil down to national and association politics, not law.¹²⁰ This is precisely the risk the judiciary takes whenever it hides behind national borders, the same national borders arbitration often excels at overtaking.

4. Conclusions

Legal scholarship's many football metaphors are flawed. In legal disputes, it is not always easy to draw a line between victory and defeat. In its *Seraing* judgment, the Court seems to have managed a remarkable conciliatory success: Those that were demanding a stricter scrutiny of CAS seem satisfied, those who feared the death of sports arbitration relieved. By focusing on the effective enforcement of EU *ordre public*, the Court has affirmed a standard that has been internationally respected for a long time. Aside from this focus, open questions remain. EU courts should only deny *res iudicata* effects after finding a violation of EU *ordre public* in their indirect review. Minimising the cases where *res iudicata* is denied would moreover help controlling the risk of conflicting decisions. Future CAS arbitrations will be in the clear as soon as the EU venue is opened, making annulment proceedings in the EU possible. The UEFA has already taken the first step by creating the option of seating arbitration in Dublin in its statutes.¹²¹

Finally, the Court should act responsibly when affecting the NYC to protect its globally functional system of enforcement. It has already undermined this system with its express rejection of declaratory relief as an effective remedy and the encroachment on states' general duty to recognise awards. A conflict between the Court and the NYC would be a loss for many. And as football and law are not comparable: Just because there are losers, there might not necessarily be winners.

¹²⁰ For an example of how FIFA ensures compliance with EU law see Art. 19 para. 2 (b) of the FIFA Regulations on the Status and Transfer of Players.

¹²¹ Scheuch and Brandenburg (n 115).

The ECtHR's Final Ruling in *Semenya v Switzerland*: A Missed Opportunity to Uphold Human Rights in Sports?

Livia Hinz*

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ABSTRACT: The article discusses the recent Grand Chamber judgement of the European Court of Human Rights in *Semenya v Switzerland*, a landmark decision addressing the protection of fundamental rights in sports governance and arbitration. Ms. Semenya, a South-African intersex athlete, was barred from international competitions following her refusal to comply with World Athletics regulations requiring her to undergo medical treatments in order to lower her natural level of testosterone. Following unsuccessful attempts to challenge the legality of such regulations before the Court of Arbitration for Sports and, in appeal, the Swiss Federal Supreme Court, she turned to the ECHR alleging violations of several substantive Convention guarantees, as well as the right to a fair trial. Reversing the first instance decision, the recent Grand Chamber ruling affirmed that the applicant fell under Switzerland's jurisdiction only in relation to the complaint under Article 6 ECHR. This article criticizes the functional distinction between procedural and substantive rights for the purposes of delineating States' jurisdiction introduced – arguably for the first time – in *Semenya*. At the same time, it shows how the stringent standard of review articulated by the Grand Chamber under Article 6 ECHR for national courts hearing appeals over sports arbitrations demands a close engagement with the protection of fundamental rights involved those arbitrations as well as, potentially, other forms of mandatory arbitral proceedings. Finally, the article offers a comparative analysis of parallel developments concerning sports arbitrations before the Court of Justice of the European Union, drawing upon the recent decisions in *RFC Seraing* and *International Skating Union*.

KEYWORDS: intersex – non-discrimination – sports – private governance – compulsory arbitration – state jurisdiction.

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1. Introduction

The increasing influence of private authority in contemporary global governance is widely acknowledged.¹ International sports is one of the domains where this development has become particularly evident: the control and administration of international sports competitions, indeed, lie entirely with private bodies, most notably the International Olympic Committee (IOC) and the various International Sports Federations (IFs) included in the Olympic Movement.² Sports governing bodies exercise extensive regulatory powers, ranging from determining eligibility criteria for international competitions, to regulating the functioning of those competitions, to administering sanctions. This has given rise to an autonomous body of private norms and regulations commonly referred to as *lex sportiva*.³ The private character of the rule-making function is mirrored by the private nature of the judicial function: dispute resolution is governed by mandatory arbitration clauses designating the Court of Arbitration for Sport (CAS), an arbitral institution established by the International Council of Arbitration for Sport and located in Lausanne.⁴ Given the significant weight exerted by sports governing bodies in the selection of arbitrators, the actual independence and impartiality of the CAS remain subjects of ongoing controversy.⁵

While subjecting international sports to private regulation and adjudication may be justified on grounds of efficiency and effectiveness,⁶ it raises significant concerns about the protection of basic legal safeguards for stakeholders in the system, such as

¹ W Mattli, 'Private Transnational Governance' in JK Cogan, I Hurd and I Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press 2016); RB Hall and TJ Biersteker, *The Emergence of Private Authority in Global Governance* (Cambridge University Press 2002).

² L Freeburn, *Regulating International Sport Power, Authority, and Legitimacy* (Brill/Nijhoff 2018). More detail on the composition of the Olympic Movement is available at The Olympic Committee, 'Factsheet. The Olympic Movement' (20 June 2024), at stillmed.olympics.com.

³ A Duval, 'Transnational Sports Law: The Living Lex Sportiva' in P Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press 2021).

⁴ L Casini, 'The Making of a Lex Sportiva by the Court of Arbitration for Sport' (2011) 12 *German Law Journal* 1317. More generally on the contentious role of arbitration in reinforcing private transnational governance see W Mattli and T Dietz, *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press 2014).

⁵ J Lindholm, 'A Legit Supreme Court of World Sports? The CAS(e) for Reform' (2021) 21 *The International Sports Law Journal* 1. The ECtHR seemingly settled the issue in the positive with the ruling in *Mutu and Pechstein*, which involved two professional athletes, a footballer and a speed skater, subject to sanctions by their respective sports associations. Relying on Art 6(1) of the Convention, the applicants submitted that the CAS could not be regarded as an independent and impartial tribunal. Whereas the Court's Third Section rejected the allegation (*Mutu and Pechstein v Switzerland*, App. 40575/10 and 67474/10, (ECtHR 2 October 2018) paras 138–159) this finding was criticized by two dissenting judges: joint partly dissenting, partly concurring opinion of Judges Keller and Serghides in *Mutu and Pechstein*.

⁶ JAR Nafziger, 'International Sports Law' in JAR Nafziger and R Gauthier (eds), *Handbook on International Sports Law* (Cambridge University Press 2022).

national federations and, above all, individual athletes.⁷ Unsurprisingly, sports regulation and arbitration have come under increased scrutiny both before the European Court of Human Rights⁸ and the Court of Justice of the European Union.⁹

Arguably, the most vivid example of how the regulatory powers of sports governing bodies can affect athletes' fundamental rights consists in the practice to adopt and police sex-based eligibility criteria governing the right of individual athletes to compete in male and female categories.¹⁰ Ostensibly driven by the attempt to protect fair competition for female athletes, these regulations generally turn on genetic or physiological traits and necessarily impact on the basic rights of transgender and intersex female athletes.¹¹ While discussing the rationale and legitimacy of such regulations lies beyond the scope of the present article, it is worth noting that they raise a flurry of interrogatives. First, the scientific basis underpinning sex-based categorization in sports remains contested.¹² Secondly, it appears that these regulations disproportionately affect athletes from the Global South, notably from Africa and Asia.¹³ Thus, the suspect that they reflect and rationalize Western preconceptions as to the appearance of the female body, akin to Judith Butler's notion of 'gender performativity', is hard to dismiss.¹⁴

⁷ B Schwab, 'Protect, Respect and Remedy: Global Sport and Human Rights' (2019) 3 *International Sports Law Review* 52.

⁸ For an overview of the ECtHR cases involving the world of sports see European Convention on Human Rights, 'Factsheet – Sport and the European Convention on Human Rights' (Strasbourg, November 2023), at www.echr.coe.int.

⁹ See the discussion below in section 4.3.

¹⁰ Sex-based categorization is commonly adopted in most sports disciplines, ranging from athletics to boxing to – perhaps more surprisingly – chess: PS Shin, 'Sex and Gender Segregation in Competitive Sport: Internal and External Normative Perspectives' (2017) 80 *Law and Contemporary Problems* 47. For an in-depth critical discussion of sex- and gender-based regulation in athletics: M Krech, 'Gender Equality in World Athletics: Transnational Norm Development by Private International Organizations' (2025) 119 *American Journal of International Law* 1.

¹¹ Intersex individuals are born with sex characteristics – at the genetical, hormonal or anatomical level – that do not fit binary conceptions of male or female bodies. There is a rich literature on the status of transgender and intersex women in sports: see, *inter alia*, T Shinohara, *Paving the Way for the Protection of Human Rights in Sports: The Case of Intersex and Transgender Female Athletes* (Stämpfli éditions 2024); MG De Marcilla Muste, 'You Ain't Woman Enough: Tracing the Policing of Intersexuality in Sports and the Clinic' (2022) 36 *Social and Legal Studies* 847; M Krech, 'To Be a Woman in the World of Sport: Global Regulation of the Gender Binary in Elite Athletics' (2017) 35 *Berkeley Journal of International Law* 262.

¹² Krech (n 10); R Pielke, R Tucker and E Boye, 'Scientific Integrity and the IAAF Testosterone Regulations' (2019) 19 *The International Sports Law Journal* 18.

¹³ OHCHR, 'Intersection of Race and Gender Discrimination in Sport - Report of the United Nations High Commissioner for Human Rights' (United Nations 2020), at www.ohchr.org.

¹⁴ According to Butler, gender identity is a fiction, a social construct 'instituted and inscribed on the surface of bodies': J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 2007) 186. Therefore 'gender proves to be performative – that is, constituting the identity it is purported to be': *ibid* 34.

In this context, the legal battle of Caster Semenya, a South-African intersex runner, against regulations issued by the World Athletics (former International Association of Athletics Federations) forcing her to undergo medical treatments in order to lower her natural level of testosterone, has become rather prominent. Following unsuccessful attempts to challenge such regulations before the CAS, Ms. Semenya filed an application before the ECtHR alleging a violation of several substantive Convention rights as well as the right to fair trial.¹⁵ The recent ruling of the Grand Chamber in July 2025, which is at the center of this article, dismissed jurisdiction over the substantive complaints.¹⁶ As such, it could be seen as a step back from the Third Section's decision, which had been heralded as a 'breakthrough' in human rights.¹⁷ However, as will be discussed in this article, this rollback may be more apparent than real.

The article is structured as follows. Section 2 outlines the factual and legal background of the dispute, from the CAS proceedings to the ruling of the ECtHR's Third Section. Section 3 illustrates the main points of the Grand Chamber ruling. Section 4 provides an analytical commentary on selected aspects of the final judgement, focusing especially on the Court's findings on jurisdiction (4.1) as well as on the standard of review employed in the assessment of the complaint under Article 6 ECHR (4.2). The final sub-section 4.3. provides a brief overview of parallel developments before the Court of Justice of the European Union. Section 5 concludes.

2. Factual and legal background

2.1. The DSD regulations and their impact on Ms. Semenya's career

Caster Semenya is a South African middle-distance runner who achieved outstanding results in international competitions early in her career, including winning two Olympic gold medals.¹⁸

Following the adoption of regulations by the International Association of Athletics Federations (now World Athletics)¹⁹ concerning the eligibility of athletes with hyperandrogenism to compete in the female category, she was required to undergo medical treatment in order to lower her natural testosterone level.²⁰ The stated rationale of the regulations – introduced amid increased public scrutiny regarding the

¹⁵ *Semenya v Switzerland* App. 10934/21 (ECtHR, 11 July 2023).

¹⁶ *Semenya v Switzerland* [GC] App. 10934/21 (ECtHR, 10 July 2025).

¹⁷ A Duval, 'Righting the Lex Sportiva: The Semenya v Switzerland Case and the Human Rights Accountability of Transnational Private Governance' (2025) 6 *The European Convention on Human Rights Law Review* 238.

¹⁸ *Semenya v Switzerland* (n 15) para 4.

¹⁹ World Athletics is the world governing body for the sport of athletics. It is established as a private law association under the laws of Monaco.

²⁰ Hyperandrogenism generally refers to the above-range production of androgens in women, most notably testosterone.

perceived competitive advantages of transgender and intersex athletes²¹ – was to protect fair competition in the female category.²² The underlying assumption was that elevated testosterone levels may be associated with physical characteristics conferring a structural advantage in athletic sports.²³ Although Ms. Semenya is a female athlete – assigned female legal gender at birth, raised as female and always identifying as female – she was born with 5 α -Reductase deficiency, leading to an alteration at the level of chromosomes and testosterone production above the typical female range.²⁴

Ms. Semenya reported suffering significant negative effects due to the medical treatment required to lower her testosterone level below the eligibility threshold. In 2015 the regulations were temporary suspended by the IAAF following an order issued by the CAS in the context of the *Dutee Chand* case,²⁵ and she interrupted the treatment.

In 2018 the IAAF adopted a new set of eligibility regulations for athletes with differences in sex development (hereafter DSD), which further lowered the threshold of admissible testosterone production.²⁶ Concerned athletes were required to submit to a medical test to assess the ‘degree of virilization’, and to undergo medical treatment to reduce their natural level of testosterone below the established limit. Since Ms. Semenya refused to comply with these requirements, she was barred from competing in international races.

2.2. The proceedings before the CAS and the Swiss Federal Supreme Court

In conformity with Article 5.2 of the DSD regulations, which attributes exclusive competence for the resolution of disputes to the CAS, Ms. Semenya lodged a request for arbitration in 2018 challenging the lawfulness of the DSD regulations. Athletics

²¹ Duval (n 17).

²² IAAF was the first international sports federation to adopt regulations restricting the eligibility of females with hyperandrogenism to participate in women's competition: IAAF, ‘IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition’ (1 May 2011), at worldathletics.org.

²³ For a discussion of the scientific evidence presented before the CAS in the proceedings concerning Ms. Semenya see *Semenya v Switzerland* (n 15) para 18. However, as previously noted, the scientific basis of this type of regulations is controversial: Pielke, Tucker and Boye (n 12). For a discussion of the concept of fairness from an ethical perspective see S Camporesi, ‘When Does an Advantage Become Unfair? Empirical and Normative Concerns in Semenya's Case’ (2019) 45 *Journal of Medical Ethics* 700.

²⁴ *Semenya v Switzerland* (n 15) para 18.

²⁵ Dutee Chand, an Indian athlete with hyperandrogenism, successfully challenged the regulations before the CAS: CAS 2014/A/3759, *Dutee Chand v AFI & IAAF*, 24 July 2015.

²⁶ DSD refers to a set of congenital conditions affecting human sex development and maturation due to variations of chromosomal, gonadal and phenotypic sex. The new regulations were published on 1 May 2019 and entered into force on 8 May 2019: see IAAF, ‘Eligibility Regulations for the female Classification (Athletes With Differences of Sex Development)’, at worldathletics.org. Compared to the previous 2011 regulations, they halved the admissible threshold of testosterone from 10 nmol/L a day to 5 nmol/L. The regulations were further amended in 2023: see IAAF, ‘Eligibility Regulations for the female Classification (Athletes With Differences of Sex Development)’ Version 3.0, at worldathletics.org.

South Africa, the national South-African federation, also launched an arbitration supporting her case, and the proceedings were joined.²⁷

To reach its decision, the CAS applied primarily private regulatory sources – namely the IAAF Constitution and the Olympic Charter – while complementing them with Monegasque law.²⁸ It began by acknowledging that the DSD regulations were indeed discriminatory but ultimately found that they were necessary and proportionate in relation to the legitimate aim pursued, namely preserving conditions of fair competition within the female category. According to the CAS, the IAAF had submitted convincing evidence from various sources to demonstrate that testosterone was the ‘primary factor’ associated with certain physical traits conferring performance advantages.²⁹ Interestingly, though, it seemed to be particularly convinced by statistical observations, referring to the ‘striking overrepresentation of 5-ARD athletes on the podium of restricted events at the international level’ compared to the general distribution in the population.³⁰

Even though it dismissed Ms. Semenya’s complaint, the CAS nevertheless expressed serious reservations regarding the practical implementation of the regulations – particularly in view of significant natural fluctuations in testosterone levels³¹ - as well as concerning the selection of the restricted races to which the eligibility criteria applied.³² However, the susceptibility of the regulations to be amended in the course of implementation as ‘living document’ was deemed to represent a sufficient guarantee for athletes.³³

Following the rejection of her complaint by the CAS, Ms. Semenya filed a civil-law appeal with the Swiss Federal Supreme Court (FSC).³⁴ Indeed, in line with a deliberate policy choice aimed at making Switzerland an attractive venue for sports-

²⁷ CAS 2018/O/5794 & 5798 *Mokgadi Caster Semenya and Athletics South Africa v IAAF*, 30 April 2019.

²⁸ *Semenya v Switzerland* (n 15) para 16.

²⁹ *Ibid* para 18.

³⁰ *Ibid* para 18.

³¹ *Ibid* para 25.

³² The CAS noted that the inclusion within the restricted competitions of certain races – specifically the 1,500m and 1 mile races – seemed to be based on a speculative assumption. It suggested that the IAAF could consider postponing the application of the regulations to such events until more evidence was available (*ibid* para 26). Nonetheless, it found that the IAAF had provided ‘a rational overall explanation’ of how the relevant events had been chosen, so that the scope of the restrictions was not disproportionate in toto (*ibid* para 24).

³³ *Ibid* para 25. The award has been subject to sustained criticism: M Krech, ‘The Misplaced Burdens of “Gender Equality” in *Caster Semenya v IAAF*: The Court of Arbitration for Sport Attempts Human Rights Adjudication’ (2019) 3 *International Sports Law Review* 66; L Holzer, ‘What Does It Mean to Be a Woman in Sports? An Analysis of the Jurisprudence of the Court of Arbitration for Sport’ (2020) 20 *Human Rights Law Review* 387.

³⁴ *Semenya v Switzerland* (n 15) para 27.

related disputes,³⁵ CAS awards are subject to appeal before the FSC pursuant to the Federal Act on Private International Law Act (PILA).³⁶

Specifically, the review of international arbitral proceedings such as the ones before the CAS is governed by section 190(2) PILA, according to which the FSC's power of substantive review is confined to assessing the compatibility of the award with Swiss public policy. This provision is not unique to Swiss law but rather reflects the principles of the New York Convention on the recognition and enforcement of foreign arbitral proceedings.³⁷ The FSC, for its part, has consistently interpreted the concept of public policy in a restrictive manner – limiting it to cases where the effects of an arbitral award would undermine essential and broadly recognized values which, according to the understanding prevailing in Switzerland, should underpin every legal system.³⁸ Notably, since the grounds for review established in the PILA are exhaustive, the rights established in the Convention cannot be directly invoked as basis for appeal. Nonetheless, the FSC has acknowledged the indirect relevance of the Convention, as informing its interpretation of public policy.³⁹

Ms. Semenya alleged that she had been subjected to discriminatory treatment based on sex, and that her dignity and personality rights had been violated. On 25 August 2020, the FSC dismissed her appeal.⁴⁰

The Court first noted that, although its consistent case law considers the prohibition of discrimination part of public policy, the case involved discrimination within private relations. In this context, it observed that, under Swiss constitutional law, the duty to protect against discrimination lies primarily with the State and generally does not apply directly to relations between private individuals. Accordingly, it expressed doubts as to whether a private party's discriminatory conduct could breach a fundamental value of the Swiss legal order and thus fall under the concept of public policy – this, despite the fact that the relationship between athletes and sports federations contains elements of verticality due to significant power imbalances.⁴¹ Secondly, while emphasizing that it was bound by the CAS's findings of fact,⁴² the FSC held that the CAS's conclusions regarding the necessity and proportionality of the DSD regulations were reasonable and reflected a careful balancing of the interests at stake. Therefore,

³⁵ A Duval, 'Embedded Lex Sportiva: The Swiss Roots of Transnational Sports Law and Governance' in A Duval, Al Krüger and J Lindholm (eds), *The European Roots of the Lex Sportiva: How Europe Rules Global Sport* (Hart Publishing 2024).

³⁶ Loi fédérale sur le droit international privé (LDIP) du 18 décembre 1987.

³⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1958] Art V.

³⁸ *Semenya v Switzerland* (n 15) paras 45–46. Notably, the same grounds of review apply to all forms of international arbitration, from sports arbitration to commercial arbitration.

³⁹ *Semenya v Switzerland* (n 15) para 49.

⁴⁰ Swiss Federal Supreme Court, *Mokgadi Caster Semenya v IAAF*, 4A_248/2019 and 4A_389/2019, 25 August 2010.

⁴¹ *Semenya v Switzerland* (n 15) para 33.

⁴² *Ibid* para 35.

the effects of the award could not be considered contrary to Swiss public policy.⁴³ The Court further found that these conclusions applied *mutatis mutandis* to Ms. Semenya's claims concerning the violation of her personality rights⁴⁴ and human dignity.⁴⁵

2.3. The ECtHR's Third Section ruling

Having exhausted all available remedies against the contested DSD regulations, Ms. Semenya applied to the ECtHR against Switzerland, alleging the violation of several Convention guarantees in connection to the failure of the FSC to set aside the CAS award upholding the contested regulations. In particular, she invoked the prohibition of inhuman and degrading treatment (Article 3 ECHR), the right to private life (Article 8 ECHR) – alone and in conjunction with the prohibition of discrimination (Article 14 ECHR) – as well as the right to access to justice (Article 6 ECHR) and to an effective remedy (Article 13 ECHR).

The Court's Third Section, tasked with the application, clarified at the outset that its analysis did not address the legitimacy of the DSD regulations themselves, as these could not be attributed to Switzerland. Instead, its review focused solely on whether the review conducted by the CAS and the FSC satisfied the requirements of the Convention.⁴⁶

The first preliminary issue the Court had to address was that of jurisdiction. Specifically, it needed to determine whether the applicant's filing of a civil law appeal with the FSC against the CAS award was sufficient to establish a jurisdictional link with Switzerland. The Court answered in the affirmative, holding that the act of bringing a civil law action before the courts of a State party to the Convention brought the applicant within the jurisdiction of that State for the purposes of Art. 1 ECHR, although the facts underlying the dispute bore no connection to it.⁴⁷ Specifically, it noted that the FSC enforced and validated CAS awards pursuant to Swiss law.⁴⁸ However, the issue of jurisdiction was highly contentious, prompting three judges to issue a joint dissenting opinion.⁴⁹ As will be discussed below, it also marks the primary point of divergence between the decision of the Third Section and the final Grand Chamber's ruling.

⁴³ Ibid para 36.

⁴⁴ Ibid para 37. The Court acknowledged that physical examinations aimed at verifying androgen sensitivity and the degree of virilization, along with unnecessary medical treatments to reduce testosterone levels, affected the bodily integrity of the applicant. However, it stated that such intrusion did not impair the very essence of the right. A similar reasoning applied to the interference with the applicant's economic freedom, as Ms. Semenya was not completely deprived of the means for economic subsistence.

⁴⁵ Ibid para 38. For a critique of the FSC's findings see L Holzer, 'The Decision of the Swiss Federal Supreme Court in the Caster Semenya Case: A Human Rights and Gender Analysis' (*Opinio Juris*, 30 September 2020), at opiniojuris.org.

⁴⁶ *Semenya v Switzerland* (n 15) para 80.

⁴⁷ Ibid para 104.

⁴⁸ Ibid para 105.

⁴⁹ Joint dissenting opinion of Judges Grozev, Roosma and Ktistakis in *Semenya v Switzerland* (n 15).

Having established jurisdiction, the Court proceeded to examine the substantive allegations, beginning with the complaint of discriminatory treatment under Article 14 ECHR in conjunction with the right to respect for private life set out in Article 8 ECHR. It stated that the key question was whether the respondent State had put in place sufficient institutional and procedural safeguards to protect the applicant from discrimination.⁵⁰ Ultimately, the Court found that the oversight of the CAS award by the FSC was deficient in several respects – including inadequate scrutiny of the scientific basis underpinning the DSD regulations and failure to address the various questions left unresolved by the CAS⁵¹ – due to the overly restrictive standard of review which did not adequately take into account the particular sensitivity of sports arbitration.⁵² Accordingly, the Court concluded that Switzerland had failed in its duty to protect the applicant from discrimination.⁵³ For similar reasons, it also found a violation of Ms. Semenya's right to an effective remedy.⁵⁴

Having found a violation of Article 14 ECHR in conjunction with Article 8 ECHR, as well as a violation of Article 13 ECHR⁵⁵, the Court determined that there was no need to issue a separate ruling on the complaints under Article 8 ECHR and Article 6 ECHR.⁵⁶ It also dismissed the complaint under Article 3 ECHR as manifestly ill-founded.⁵⁷

3. The final ruling of the Grand Chamber

Upon request of the Swiss government, the case was referred to the Grand Chamber on 6 November 2023. In its final judgement, delivered on 10 July 2025,⁵⁸ the Grand Chamber reversed the key innovation introduced by the Third Section's ruling, namely the recognition of Switzerland's responsibility to secure the substantive rights enshrined in the Convention in the context of sports disputes before the CAS and the FSC. However, as the discussion in section 4.3 will explore, this reversal may be more formal than substantive.

Heeding the arguments presented in the government's submissions, the Grand Chamber determined that certain procedural circumstances of the case – specifically,

⁵⁰ *Semenya v Switzerland* (n 15) para 166.

⁵¹ *Ibid* paras 183–185.

⁵² *Ibid* para 77.

⁵³ *Ibid* paras 192–193 and paras 200–202.

⁵⁴ *Ibid* para 239.

⁵⁵ *Ibid* paras 200–202 and para 239.

⁵⁶ *Ibid* para 205 and para 244.

⁵⁷ *Ibid* para 217. However, Judge Serghides issued a partly concurring, partly dissenting opinion arguing that the applicant had been confronted with a forced choice between a violation of her right under Art 8 ECHR and under Art 3 ECHR. Therefore, he contended that both provisions had been violated. Furthermore, he issued a bare statement of dissent regarding the choice not to issue a separate ruling regarding the complaint under Art 6 ECHR.

⁵⁸ *Semenya v Switzerland* [GC] (n 16).

the applicant's lodging of a civil law appeal with the FSC – justified establishing jurisdiction for the sole purposes of the procedural right under Article 6 ECHR,⁵⁹ by way of exception to the principle of territoriality that otherwise governs the determination of jurisdiction under art. 1 ECHR.⁶⁰ However, it found that no similar exception to territorial jurisdiction applied to Ms. Semenya's substantive allegations under Articles 8 and 14 of the Convention.⁶¹ Thus, the Court ultimately ruled that only the complaint under Article 6 ECHR was admissible. Notably, this finding was subject to forceful criticism in the separate partly dissenting joined opinion of four Judges.⁶²

Regarding the analysis on the merits of the complaint under Article 6 ECHR, the Court first circumscribed the scope of its examination, clarifying that it would be limited to evaluating the quality of the review of Ms. Semenya's case conducted by the CAS and the FSC. In contrast, it would not extend to the assessment of the independence and impartiality of the CAS.⁶³ It then went on to examine the peculiar nature of the sports dispute resolution system, emphasizing the compulsory nature of arbitration and the relevant power imbalance in favor of sports governing bodies. According to the Court, these features required a particularly rigorous examination of CAS arbitrations in appeal,⁶⁴ a standard which the FSC had failed to meet.⁶⁵

4. Comment

4.1. The Grand Chamber's analysis on jurisdiction

Despite involving different elements of extraterritoriality – the applicant's nationality and place of residence as well as the legal nature, the place of incorporation and the governing law of the IAAF – the case did not truly raise questions of extraterritorial jurisdiction in the traditional sense.⁶⁶ The crux of the matter, rather, was

⁵⁹ Ibid paras 122–124 and 128–133.

⁶⁰ Ibid paras 122–124 and 118–121.

⁶¹ Ibid paras 122–124 and 136.

⁶² Partly dissenting joint opinion of Judges Bošnjak, Zünd, Šimáčková and Derenčinović in *Semenya v Switzerland* [GC] (n 16).

⁶³ The Grand Chamber noted that the applicant had not raised a complaint in this sense, and that it had no power to formulate new complaints: *Semenya v Switzerland* [GC] (n 16) para 89. This finding was criticized in the separate concurring opinion of Šimáčková. See also F Shahlaci, 'Why the ECtHR's Grand Chamber Should Rule on the Independence and Impartiality of the Court of Arbitration for Sport in Its Semenya Judgment' (EJIL: Talk!, 28 October 2024), at www.ejiltalk.org.

⁶⁴ *Semenya v Switzerland* [GC] (n 16) para 209.

⁶⁵ Ibid paras 211–238.

⁶⁶ In this sense, see S Thin, 'The Questionable "Extraterritoriality" of Switzerland's Jurisdiction in the Semenya Case (ECtHR)' (EJIL: Talk!, 13 June 2024), at www.ejiltalk.org. The conditions for the exercise of extraterritorial jurisdiction under the ECHR and other human rights treaties have been the subject of extensive scholarly commentary: see, *inter alia*, P De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo* (Giappichelli 2003); and more recently M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011).

whether the Federal Supreme Court's review of the CAS award concerning the legality of the DSD regulations was sufficient to engage Switzerland's jurisdiction under Article 1 ECHR, despite the fact that the issuance of those regulations had no connection to it. It is worth emphasizing that the FSC's appellate review of arbitral proceedings indisputably constitutes an act of state, carried out by the highest judicial authority within Swiss territory, and involves the application of Swiss law. Clearly, with respect to the substantive rights protected by Articles 8 and 14 of the Convention, jurisdiction would be triggered in relation to the positive obligations inherent in those provisions⁶⁷.

Nonetheless, the Grand Chamber still insisted on characterizing the case in terms of extraterritoriality.⁶⁸ On such basis, noting that the classic exceptions justifying extraterritorial jurisdiction did not apply in the case at hand, it affirmed that the applicant fell within Switzerland's jurisdiction solely for the purposes of Article 6 ECHR, but not with regard to the substantive rights enshrined in Articles 8 and 14 ECHR.⁶⁹ As will be discussed in further detail below, in so doing the Court appeared to introduce a functional distinction between procedural and substantive rights in the context of delineating the scope of states' jurisdiction under Article 1 ECHR.⁷⁰ This represents a striking development, marking the first time such a distinction has been explicitly articulated.

A differentiation along these lines surfaced only in one previous case, *Markovic*,⁷¹ to which the Court indeed referred.⁷² It concerned the same set of facts that gave rise to the seminal – and much criticized – *Banković* ruling, in which the Grand Chamber clarified its interpretation of the notion of jurisdiction in Article 1 of the Convention, stressing the centrality of the territoriality principle and setting out the exceptional criteria for establishing extraterritorial jurisdiction.⁷³ Specifically, the case involved nationals of the former Serbia and Montenegro and arose out of killings occurred in the context of the bombing by NATO forces of a television station in Belgrade in 1999 during the conflict in Kosovo. Contrary to what had happened

⁶⁷ On the emergence of positive obligations in the framework of the ECHR see AR Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004); and, more recently V Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and beyond Boundaries* (Oxford University Press 2023).

⁶⁸ *Semenya v Switzerland* [GC] (n 16) para 127.

⁶⁹ *Ibid* paras 133, 136 and 145–146.

⁷⁰ S Bastianon and M Colucci, 'The *Semenya v Switzerland* ECtHR Grand Chamber Judgement: Jurisdiction, Procedural Rights, and Sports Arbitration' (2025) 21 *Rivista di diritto ed economia dello sport* 1, 9.

⁷¹ *Markovic and Others v Italy* App. 1398/03 (ECtHR, 12 June 2003).

⁷² *Semenya v Switzerland* [GC] (n 16) paras 123–124.

⁷³ *Banković and Others v Belgium and Others* [GC] App. 52207/99 (ECtHR, 12 December 2011). For a critical analysis of the judgement see De Sena (n 66) 91 ff.; M Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights Law Review* 411.

in *Banković*, the applicants in *Markovic* had launched civil proceedings for tort damages in Italy, albeit unsuccessfully as the Italian courts had declined jurisdiction.⁷⁴ In its decision on admissibility, the Court's First Section declared the substantive complaints under Article 2 and Article 10 ECHR inadmissible, whereas the complaint under Article 6 ECHR was referred to the Grand Chamber.⁷⁵ The latter found that Italy's jurisdiction was engaged but dismissed the complaint on the merits.

However, the motivation of the First Section's decision in *Markovic* on the inadmissibility of the substantive complaints merely stated that there were insufficient grounds to depart from the Grand Chamber's findings in *Banković*.⁷⁶ It did not articulate a theoretical distinction between substantive and procedural rights for the purposes of states' jurisdiction such as the one that emerges in *Semenya*. Furthermore, *Markovic* and *Semenya* involve completely different sets of issues, casting doubt as to whether the same legal principles should apply. In *Markovic*, the substantive complaints under Articles 2 and 10 ECHR concerned Italy's participation in the NATO military operations and would have required a finding of Italy's jurisdiction under Article 1 ECHR in relation to those acts, whereas the complaint under Article 6 ECHR concerned the dismissal of the civil lawsuits by the Italian judicial authorities. In *Semenya*, by contrast, the complaints under Articles 8 and 14 ECHR, and the complaint under Article 6 ECHR all arose in relation to the same state conduct, namely the review of the CAS award by the FSC.

The differentiation drawn by the Grand Chamber in *Semenya* might appear logical at first glance: since the only point of contact between the applicant's circumstances and the respondent State were the proceedings before the Federal Supreme Court, it may seem justified to confine Switzerland's accountability to the protection of the procedural safeguards of fair trial under Article 6 ECHR. However, upon closer examination, the Grand Chamber's legal reasoning appears less compelling.

The first striking aspect of the judgment is that the Court bases its conclusions on jurisdiction primarily on a form of *a contrario* reasoning, relying on the absence of relevant precedent.⁷⁷ This is even more notable as the question with which the Court is confronted – to what extent the review of international arbitration proceedings by domestic courts engages the jurisdiction of the state under Article 1 ECHR in relation to procedural and substantive Convention rights – is a novel one.⁷⁸

It should be recalled that the Third Section had advanced a plausible and legally defensible line of argument in affirming jurisdiction over all the complaints raised

⁷⁴ The Italian Court of Cassation held that the decision to participate in NATO military operations constituted a political choice and fell, as such, beyond judicial scrutiny.

⁷⁵ *Markovic and Others v Italy* [first section] App. 1398/03 (ECtHR, 12 June 2003).

⁷⁶ Ibid.

⁷⁷ *Semenya v Switzerland* [GC] (n 16) para 140.

⁷⁸ The novelty of the issues at stake in the case was repeatedly in the proceedings before the Third Section, both in support of the majority views and by the dissenting judges: *Semenya v Switzerland* (n 15) para 77 and Joint dissenting opinion of Judges Grozev, Roosma and Ktistakis.

by Ms. Semenya.⁷⁹ In keeping with a broader trend towards the recognition of the positive dimension of human rights,⁸⁰ the ECtHR has long recognized that the Convention imposes also positive obligations on the contracting parties.⁸¹ Among these, the duty to establish an effective regulatory framework to prevent and remedy violations of Convention rights – including in the context of private, interpersonal relationships – features most prominently.⁸² Such duty has been repeatedly affirmed by the Court, particularly in relation to the right to respect for private life protected under Article 8 ECHR.⁸³ The existence of this obligation, indeed, is acknowledged by the Grand Chamber itself.⁸⁴ Crucially for present purposes, this obligation covers also the implementation of the regulatory framework by state authorities, including the interpretation and application of the law by the judiciary.⁸⁵

It is uncontested that Swiss law provides for the substantive review of international arbitral awards on grounds which – though limited – encompass the consideration of human rights.⁸⁶ However, the restrictive reading of the notion of public policy adopted by the FSC casts doubts as to whether the Court's interpretation of the Swiss legal framework allows for meaningful engagement with concerns regarding the protection of fundamental rights, and specifically Convention rights, in international arbitration proceedings. The FSC's special deference when reviewing CAS awards, in particular, is well documented.⁸⁷ In this sense, the FSC's reading of the notion of public policy is difficult to reconcile with its obligation to apply relevant

⁷⁹ See *infra* section 2.3.

⁸⁰ JW Nickel, 'How Human Rights Generate Duties to Protect and Provide' (1993) 15 Human Rights Quarterly 77; S Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution?' (2015) 32 *Social Philosophy and Policy* 244.

⁸¹ Mowbray (n 67); Stoyanova (n 67).

⁸² For a detailed analysis see Stoyanova (n 67) 171.

⁸³ For instance, *Bărbulescu v Romania* [GC] App. 61496/08 (ECtHR 5 September 2017) para 115. For further discussion see WA Schabas, 'Right to Respect for Private and Family Life/Droit Au Respect de La Vie Privée et Familiale' in WA Schabas (ed), *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 367.

⁸⁴ *Semenya v Switzerland* [GC] (n 16) para 138.

⁸⁵ Stoyanova (n 67) 179; OO Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?' (2006) 13 *Maastricht Journal of European and Comparative Law* 195.

⁸⁶ The FSC itself recognized that the principles underlying the Convention or the Swiss Constitution could be taken into account under the head of public policy. It further recognized that, pursuant to its constant caselaw, prohibition of discrimination was a matter of public policy, even though it expressed doubts as to whether the same was true for discrimination among private parties. Moreover, it acknowledged that an infringement of the personality rights of an athlete – encompassing the right to health, bodily integrity respect for one's profession and right to personal development – could be in breach of substantive public policy. See *Semenya v Switzerland* [GC] (n 16) paras 37–40.

⁸⁷ Duval (n 17). This was implicitly acknowledged also by the Grand Chamber in *Semenya*, which noted that according to the material at its disposal, the FSC had only ever set aside one CAS award on grounds of public policy: *Semenya v Switzerland* [GC] (n 16) para 227.

international law norms, including those enshrined in the Convention⁸⁸ – regardless of the fact that breaches of Convention rights do not constitute an autonomous ground of appeal under Swiss law. Furthermore, by preventing individuals from seeking redress for breaches of their fundamental rights in arbitral proceedings, this interpretive approach conflicts with the right to an effective remedy guaranteed under Article 13 of the Convention.⁸⁹ Finally, it bears emphasizing that the FSC’s interpretive stance seems to be at odds also with the subsidiarity principle, which imposes a ‘shared responsibility between the States Parties and the Court’ as regards human rights protection and requires national judicial authorities to apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention.⁹⁰

Notwithstanding the above considerations, the Grand Chamber shied away from substantively engaging with the arguments articulated by the Third Section. First, it merely stated the obvious – namely, that the usual exceptions to territorial jurisdiction did not apply to the case at hand.⁹¹ Secondly, it confined itself to noting that the Third Section’s approach lacked grounding in precedent, asserting that ‘a general exception to territoriality’ for the obligations arising under Articles 8 and 14 ECHR could not be inferred from existing case law.⁹² However, for the reasons outlined above, the transposition of the legal principles developed with regard to traditional cases of extraterritorial jurisdiction to the circumstances in *Semenya* is far from straightforward.⁹³

The Court’s logic is difficult to follow also when approached from a different angle. In fact, the Grand Chamber’s findings imply a differentiation between, on the one hand, the prerogatives of state authorities under domestic law and, on the other, the state’s accountability on the international level. As has been pointed out before, Swiss law empowers the Federal Supreme Court to review international arbitral awards. This power unquestionably extends to substantive review and, through the public policy clause, comprises the protection of fundamental rights as enshrined in the Swiss Constitution and in the human rights instruments to which Switzerland is a party, including

⁸⁸ See, in this sense, the submission of the UN High Commissioner on Human Rights: *Semenya v Switzerland* [GC] (n 16) para 176.

⁸⁹ In order to be effective, the remedy provided under domestic law must be capable of remedying the impugned situation: Council of Europe, ‘Guide to good practice in respect of domestic remedies’ (2013), at www.echr.coe.int. In this sense, see G Fedele, ‘Efficacia orizzontale della Convenzione europea e previo esaurimento dei rimedi interni: in margine alla decisione di inammissibilità nel caso *Lee c. Regno Unito*’ (2022) *Rivista di diritto internazionale* 1141, 1145.

⁹⁰ The principle of subsidiarity has been recently inserted by Protocol No. 15 into the Preamble to the Convention. See *Grzęda v Poland* [GC] App. 43572/18 (ECtHR, 15 March 2022) para 324.

⁹¹ *Semenya v Switzerland* [GC] (n 16) para 136.

⁹² *Ibid* paras 140–148.

⁹³ Interestingly, the Court did not even bother to support its findings by referring to the arguments raised in the joint dissenting opinion issued by Judges Grozev, Roosma and Ktistakis in connection to the Third Section’s ruling, such as the distinction between derogable and non-derogable rights.

the Convention. However, according to the Court's reasoning, the state's accountability on the international plane for the protection of Convention rights does not match the scope of domestic authority; rather, it is limited to procedural rights. While acknowledging the autonomous nature of the concept of jurisdiction within the Convention system,⁹⁴ this separation between the state's jurisdiction and international responsibility is difficult to justify – except of course as a matter of judicial restraint. Moreover, splitting the jurisdictional competence of the Court between procedural and substantive rights is difficult to square with Article 32 ECHR, according to which the Court's jurisdiction extends to 'all matters' concerning the interpretation and application of the Convention and the Protocols duly referred to it.

Finally, a notable shortcoming in the Grand Chamber's reasoning lies in its failure to appreciate the extent to which the system for adjudicating international sports disputes is integrated within the Swiss legal framework. The possibility of appeal before the Swiss Federal Supreme Court is not merely incidental – as could be said of any proceeding for the recognition or enforcement of arbitral awards before domestic courts. Rather, it is a structural element of the international sports justice system. What is more, FSC review represents the sole avenue of legal redress available to athletes challenging awards issued within a framework of mandatory privatized justice. While, in theory, athletes may attempt to bring actions before domestic courts in other jurisdictions to have CAS awards set aside, this option is residual and, due to practical limitations, cannot be considered an effective remedy.⁹⁵ By contrast, FSC oversight constitutes an essential component of the architecture of sports adjudication. Its central role has been explicitly acknowledged by the Court in various precedents, where it recognized that the appeal before the FSC grants legal force to CAS awards.⁹⁶ This degree of embeddedness of the sports justice system within the Swiss legal order provides further grounds for arguing that appeal proceedings before the FSC engage Switzerland's jurisdiction as regards the safeguard of Convention rights in CAS arbitrations.⁹⁷

In sum, the flaws identified above point to an underlying concern with avoiding perceptions of judicial overreach, which appears to have significantly influenced the Court's approach. On the one hand, the Court probably sought to shun the impression that it would obstruct efforts of states parties to position themselves as attractive arbitration hubs, by formally excluding state responsibility for the safeguard of substantive Convention rights. This concern is particularly evident in the submissions

⁹⁴ Milanović (n 73).

⁹⁵ Duval (n 17).

⁹⁶ *Mutu and Pechstein* (n 5) and *Platini v Switzerland* App 526/18 (ECtHR 5 March 2020).

⁹⁷ From a practical perspective, FSC proceedings sanction and enact CAS awards under Swiss law. In this context, it bears emphasizing that the ECtHR's case law recognizes that the responsibility of the State is engaged whenever the domestic law in force at the relevant time validates the contested treatment, regardless of whether the original violation has been committed by a private actor. See, *mutatis mutandis*, *VgT Verein Gegen Tierfabriken v Switzerland*, App. 24699/94 (ECtHR 28 June 2001) para 47.

of the UK – another prominent arbitration center – as intervening party. The UK urged the Court to limit any potential affirmation of state jurisdiction over substantive rights to the peculiar context of sports arbitration, leaving commercial arbitration unaffected.⁹⁸ On the other hand, the Court also seemed intent on avoiding the perception that it was encroaching on the domain of international sports governing bodies.⁹⁹ Nonetheless, as will be discussed in greater detail below, the Court's apparent restraint seems more formal than substantive.

4.2. The Court's assessment as to the violation of Article 6 ECHR

In examining the complaint under Article 6 ECHR, the Court applied a high level of scrutiny, delving into the merits of the Federal Supreme Court's assessment of the compatibility of the CAS award with fundamental rights attracted within the notion of public policy. As discussed below, it went so far as to articulate a specific – and notably stringent – standard for national courts reviewing sports arbitrations, justified by the distinctive features of the system for the resolution of international sports disputes.

The Grand Chamber began its analysis by restating – consistently with its usual approach under Article 6 ECHR¹⁰⁰ – that it was not competent to act as court of fourth instance, and that it would refrain from questioning national courts' assessment of facts and law unless their findings were manifestly arbitrary or unreasonable.¹⁰¹ It then proceeded, though, to examine the specific issues arising in relation to the resolution of sports disputes before the CAS, emphasizing not only that it constitutes a form of compulsory arbitration imposed by a private entity, but also that it is marked by the dominance of sports governing bodies – both in their relationship with athletes and within the sports arbitration system itself.¹⁰² In line with its established case law,¹⁰³ the Court observed that a similar system of private arbitration followed by limited judicial review by state courts is not *per se* incompatible with the Convention. It held however that, particularly where fundamental rights are at stake – as was the case in *Semenya* – the unique vulnerability of athletes requires that respect for their right to a fair hearing be ensured through a 'particularly rigorous examination' of their case.¹⁰⁴

In the Court's assessment, the review conducted by the FSC was deficient in several respects, as it failed to properly examine key issues left unresolved by the

⁹⁸ *Semenya v Switzerland* [GC] (n 16) para 175.

⁹⁹ Bastianon and Colucci (n 70).

¹⁰⁰ WA Schabas, 'Right to a Fair Trial/Droit à Un Procès Équitable' in William A Schabas (ed), *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015).

¹⁰¹ *Semenya v Switzerland* [GC] (n 16) para 193.

¹⁰² *Ibid* paras 199–210.

¹⁰³ See the rulings in *Mutu and Pechstein* and *Platini* (n 5).

¹⁰⁴ *Semenya v Switzerland* [GC] (n 16) para 209.

CAS. The FSC largely endorsed the CAS's findings without subjecting them to meaningful scrutiny and neglected to adequately engage with the applicant's submissions, thus violating Ms. Semenya's right to a fair trial.¹⁰⁵ Firstly, the Court noted that the FSC did not sufficiently consider the CAS's own concerns about the practical implementation of the DSD regulations, particularly in light of natural fluctuations in testosterone levels – an issue directly relevant to assessing the proportionality of the measures.¹⁰⁶ Second, it omitted to address the fact that the CAS had acknowledged a limited evidentiary basis for the selection of certain restricted competitions, raising doubts about the rationale behind this choice. This was especially problematic given Ms. Semenya's claim that the selection was specifically aimed at targeting her.¹⁰⁷ Third – and most significantly – the Grand Chamber directly criticized the merits of the FSC's evaluation regarding the compatibility of the regulations with fundamental rights and, thus, Swiss public policy. Indeed, it aptly pointed out that the FSC's analysis of whether the regulations were compatible with human dignity and personality rights under Swiss law relied primarily on their stated objectives, rather than on their actual impact on the athletes concerned.¹⁰⁸

The preceding analysis reveals that, through the prism of a procedural right, the Grand Chamber really challenged the FSC's substantive assessment regarding the conformity of the DSD Regulations with fundamental human rights safeguards. Moreover, the Court critically noted that both the provisions of the Swiss private international law framework and the Federal Supreme Court's interpretation of the concept of public policy applied the same standard of review to arbitral proceedings involving purely contractual relationships – typically characterized by equality of arms – and to sports disputes, despite the latter being marked by significant asymmetries between the parties.¹⁰⁹ This is especially significant, because – even if the Court does not say so explicitly – it is tantamount to implying that the Swiss legal framework and its implementation by the judiciary do not adequately safeguard athletes' fundamental rights. Ultimately, this resonates with the reasoning employed by the Third Section in establishing a violation of the positive obligations entailed in Articles 8 and 14 of the Convention.

Finally, the reasoning employed by the Grand Chamber in assessing the complaint under Article 6 ECHR is interesting also for reasons that transcend the peculiarities of the case at hand. Much attention has been devoted over the past years to

¹⁰⁵ Ibid paras 238–239.

¹⁰⁶ Ibid para 229.

¹⁰⁷ Ibid para 233.

¹⁰⁸ Ibid paras 236–237. The Court also noted that the FSC did not sufficiently engage with the applicant's submissions regarding the damage deriving from the publicity of confidential medical information, or regarding the comparability of her case with the challenge previously brought by the footballer Francelino da Silva Matuzalem, which had resulted in the only instance of a CAS award being set aside by the FSC.

¹⁰⁹ *Semenya v Switzerland* [GC] (n 16) para 237.

the ‘procedural turn’ of the ECtHR, referring to the tendency to focus on the adequacy of domestic procedures when assessing complaints regarding breaches of substantive Convention rights.¹¹⁰ Such tendency does not necessarily prevent the Court from engaging in its own normative assessment of the merits of the case, but it involves at least partial deference following the positive verification of procedural due diligence.¹¹¹ In *Semenya*, in turn, the Grand Chamber attracts substantive Convention safeguards in its review of a complaint regarding a procedural right. What is more, it employs quite overtly the protection of such substantive rights as benchmark for the assessment of the adequacy of the national judicial procedures. Once again, this should be probably read as a function of the thin line that the Court has been walking in *Semenya*: on the one hand, displaying judicial restraint to assuage concerns by states and other stakeholders while, at the same time, upholding effective human rights protection.

4.3. Parallel developments regarding sports arbitration before the CJEU

Before concluding, it is worth zooming out from *Semenya* to locate the ECtHR’s approach against the broader context of judicial scrutiny over the activity of sport governing bodies and the sports justice system. Indeed, sports arbitration has come under increased scrutiny also by the Court of Justice of the European Union regarding its compatibility with EU law – most notably, the requirement of effective legal remedies enshrined in Article 19 TEU, read in conjunction with Article 267 TFEU and Article 47 of the EU Charter of Fundamental Rights. The CJEU has recently addressed this issue in two landmark rulings: *International Skating Union*¹¹² and, lastly, in *RFC Seraing*,¹¹³ delivered just a few weeks after the Grand Chamber’s judgement in *Semenya*.

These cases involved very different issues from the ones at stake in *Semenya*. *International Skating Union* concerned the compatibility of regulations adopted by the International Skating Union (ISU) with EU competition law, as well as the role of the sports arbitration system in reinforcing potential infringements by insulating ISU decisions from review on the basis of EU law.¹¹⁴ The ruling in *RFC Seraing*, by contrast,

¹¹⁰ See, inter alia, T Kleinlein, ‘The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution’ (2019) 68 *International & Comparative Law Quarterly* 91; R Spano, ‘The Future of the European Court of Human Rights-Subsidiarity, Process-Based Review and the Rule of Law’ (2018) 18 *Human Rights Law Review* 473.

¹¹¹ OM Arnardóttir, ‘The ‘Procedural Turn’ under the European Convention on Human Rights and Presumptions of Convention Compliance’ (2017) 15 *International Journal of Constitutional Law* 9.

¹¹² Case C-124/21 P *International Skating Union v European Commission*, EU:C:2023:1012.

¹¹³ Case C-600/23 *Royal Football Club Seraing* EU:C:2025:617.

¹¹⁴ For a detailed analysis of the issues involved in the ruling, see S Van den Bogaert and B Van Rompuy, ‘The New Testament for Sports and EU Competition Law in *European Super League*, ISU, and *Royal Antwerp*’ (2025) 62 *Common Market Law Review* 577; H Vedder, ‘On Thin Ice: The Court’s Judgment in Case C-124/21 P, *International Skating Union v Commission*’ (2024) 9 *European Papers*

was issued in the context of a preliminary reference procedure and dealt with the issue of whether national courts should treat CAS award, following appeal before the Swiss Federal Supreme Court, as *res judicata*, and the extent to which the factual findings of the CAS carry probatory value in national proceedings.¹¹⁵ Regardless of the specificities of these cases, what matters for present purposes are the findings of the CJEU regarding the compatibility of the sports justice system with the right to effective judicial review, which are substantially similar across the two cases.

In both instances, the CJEU acknowledged that the establishment by private sports governing bodies of a mechanism of compulsory arbitration before the CAS is, in principle, admissible, in view of the particular needs of expediency, effectiveness and specialization involved in the resolution of sports disputes.¹¹⁶ In *RFC Seraing*, it drew an explicit distinction with other forms of international arbitration which are deemed to be incompatible with EU law, notably treaty-based investor-state dispute settlement.¹¹⁷ However, the CJEU also emphasized that the legal autonomy enjoyed by sports governing bodies cannot go so far as to limit the ability of individuals to invoke rights recognized under EU law.¹¹⁸ Therefore, Member States are required to ensure a minimum degree of judicial supervision by allowing individuals to obtain effective judicial review over CAS awards.¹¹⁹ Whereas the Advocate General in *RFC Seraing* contended that the right to effective judicial protection could only be ensured through full review of arbitral awards via direct judicial appeal before domestic courts in EU Member States,¹²⁰ the CJEU ultimately held that indirect review by national courts limited to assessing the compatibility with EU public policy would suffice, provided that those courts are entitled to refer questions of EU law interpretation under the preliminary

87; A Duval, 'The *International Skating Union* Ruling of the CJEU and the Future of CAS Arbitration in Transnational Sports Governance' (2023) 23 *The International Sports Law Journal* 467.

¹¹⁵ For a more extensive analysis, see S Bastianon and M Colucci, 'Sports Arbitration and Effective Judicial Protection Under EU Law: The RFC Seraing Case' (2025) 21 *Rivista di diritto ed economia dello sport*; DP de Lamo, 'Overruling the Referees: RFC Seraing and the EU Court's Supremacy Over CAS Arbitration' (EU Law Live, Weekend Edition No. 243, 13 September 2025), at eulawlive.com; N Andreotti, 'Game, Set, Review' (Verfassungsblog, 7 August 2025), at verfassungsblog.de.

¹¹⁶ The opinion of the Advocate General Rantos in *International Skating Union* contained a clear endorsement of CAS arbitration for these reasons: Opinion of AG Rantos in Case C-124/21 P *International Skating Union v Commission*, EU:C:2022:988 para 157. The Grand Chamber in the same case was less explicit, but it refused to rule on the independence and impartiality of the CAS and pointed to the fact that the main problem, from its point of view, consisted in the appellate mechanism before the FSC, a court of a non-EU country: *International Skating Union* (n 112) paras 188–191. Similarly, the Court in *RFC Seraing* recognized that imposed recourse to arbitration may be warranted in principle, in the light of the legal autonomy enjoyed by international sports associations and having regard to their responsibilities: *Royal Football Club Seraing* (n 113) para 94.

¹¹⁷ *Royal Football Club Seraing* (n 113) para 79.

¹¹⁸ *Ibid* para 95.

¹¹⁹ *Ibid* paras 100–108. The conclusions reached by the Court on this point in the *International Skating Union* case were very similar: *International Skating Union v Commission* (n 112) paras 188–203.

¹²⁰ Opinion of AG Čapeta in Case C-600/23, *Royal Football Club Seraing*, EU:C:2025:24 paras 104–105.

reference procedure (Article 267 TFEU).¹²¹ It further specified that EU public policy encompasses core provisions of EU law, including key EU competition rules and the freedom of movement safeguards. In short, in the eyes of the CJEU the problems of the sports justice system do not lie within the arbitration mechanism before the CAS, but rather in the review of the FSC.

In sum, the approaches of the ECtHR and the CJEU are, to some extent, aligned. Both courts rely on procedural safeguards – the right to effective judicial review under EU law and the right to a fair trial under the Convention – as a means of striking a balance between two competing objectives: preserving the viability of private sports arbitration, and upholding core elements of EU public policy as well as Convention safeguards. At the same time, though, the rulings of the two courts seem bound to have rather different implications for the sports justice system going forward. In fact, at least from a theoretical point of view it is conceivable that the FSC might attempt to comply with the standard of review of a ‘particularly rigorous examination’ delineated by the ECtHR under Article 6 ECHR by strengthening its oversight over CAS awards. It could, for instance, differentiate the intensity of its review over arbitral awards based on the nature of the arbitration and taking into account the particular sensitivity of sports arbitration, as implicitly suggested by the Grand Chamber.¹²² By contrast, the FSC is structurally incapable of satisfying the requirements outlined by the CJEU, as it does not apply EU law and is not entitled to activate the preliminary reference procedure. This opens up the possibility to challenge CAS awards, regardless of their confirmation by the FSC, before EU domestic courts and might, ultimately, lead to a relocation of CAS proceedings.¹²³

5. Concluding remarks

The journey of Ms. Semenya before the ECtHR could be described, at a first look, as a trajectory marked by a human rights breakthrough, later tempered by judicial conservatism. However, for the reasons discussed in this article, this is only partially true. The Grand Chamber did confine the responsibility of the state whose courts are tasked with the appellate review of CAS awards to securing the right to a fair trial under Article 6 ECHR, thus formally excluding accountability for the violation of substantive Convention rights involved in the proceedings. At the same time, though, it established a high standard of review, which will arguably lead to a closer engagement by the Swiss Federal Supreme Court – or, for that matter, other appellate courts should the seat of the CAS be moved in the future – with human rights issues at stake in the arbitrations.

¹²¹ *Royal Football Club Seraing* (n 113) paras 98–106.

¹²² *Semenya v Switzerland* [GC] (n 16) para 237.

¹²³ In this sense, see Duval (n 114).

The implications of the Grand Chamber's approach are difficult to fully assess. One might argue that, from a practical point of view, the consequences for Ms. Semenya and, in future perspective, for other athletes may not differ significantly from those that would have followed had the Court reached a different conclusion on jurisdiction, as suggested by the Third Section's ruling. Even in that hypothetical scenario, the Court would not have been in a position to directly challenge the legitimacy of the contested regulations. At most, it could have found that the restrictive review carried out by the Federal Supreme Court prevented a proper assessment of whether those regulations violated the prohibition of discrimination and the right to private life under Articles 14 and 8 of the ECHR. However, the Court's attempt to balance judicial restraint and human rights protection came at the price of establishing - for the first time and on rather shaky legal grounds - a distinction between procedural and substantive rights for the purposes of jurisdiction under Article 1 ECHR. It remains unclear how this distinction will influence the future development of the Court's case law, both in relation to the review of international arbitral awards and more broadly. It is conceivable that the Court could have attempted to achieve the same result through a different, perhaps preferable, interpretative path. Specifically, rather than excluding jurisdiction over substantive complaints, it could have leveraged the flexibility of the relevant substantive provisions to limit the responsibility of the respondent state to instances where the national judicial oversight over arbitral awards manifestly fails to safeguard the substantive rights involved in the dispute.

Finally, it is worth pointing out that the implications of the judicial saga of *Semenya* for the broader world of international arbitration beyond sports are likely to remain rather limited. Indeed, the Court expressly stated that its findings on the intensity of the judicial oversight required for the appellate review of CAS awards were motivated by the peculiarities of sports arbitration, and the particular vulnerability of athletes within the sports justice system. In this sense, it appeared to heed the concerns raised by the Swiss government as well as by the UK as to a possible detrimental impact of its ruling on the attractiveness of states party to the Convention as commercial arbitration fora.



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